



# COMPETITION LAW NEWSLETTER

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## Inside

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WhatsApp faces the Commission's ire for change to privacy policy

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CCI clears Google's acquisition of 7.73% in Jio Platforms

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CCI passes interim order directing MakeMyTrip to relist FabHotels and Treebo on its platform

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And more...

In this edition of the L&L Competition Law Newsletter, we cover four enforcement orders of the Competition Commission of India (CCI) and one significant merger approval published in the past month.

## WhatsApp faces the Commission's ire for change to privacy policy

The storm created by WhatsApp's proposed changes to its privacy policy announced in January 2021, resulting in [objections raised by the Ministry of Electronics and Information Technology, Government of India](#) and proceedings being initiated before the Delhi High Court<sup>1</sup>, has also resulted in a formal investigation being launched by the CCI, which took *suo motu* cognizance and passed a *prima facie* [order dated 24.03.2021](#) for abuse of dominance. The change to the privacy policy and terms of service make it mandatory for users to accept the terms and conditions in order to retain their WhatsApp account information and provides the manner in which it will share personalised user information with Facebook and its subsidiaries.

Dealing with preliminary procedural issues prior to coming to merits, the CCI observed that according to Regulation 11 of the CCI (General) Regulations, 2009, all pleadings are required to be signed by the party themselves, and although the regulation permits authorization of a third party and specifically of a counsel, in the CCI's opinion, the counsel could *also* append his/her signature, but it would not absolve an authorized party representative of signing it as well. The CCI brushed aside the contention that it was standard practice for counsels to sign the pleadings once the authorization from the company in their behalf had been placed on record.

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<sup>1</sup> *Chaitanya Rohilla v. Union of India and Ors.*, W.P.(C) 677 of 2021, *Seema Singh and Anr. v. Union of India and Anr.*, W.P.(C) 1355 of 2021.

Similarly, the CCI brushed aside Facebook's contention that it is not a necessary or proper party to the proceedings, terming both companies' initial responses as 'egregious'.

After passing such scathing remarks, the order proceeded to deal with the jurisdictional contentions before moving on to the substantive issue of whether and how a proposed change to a company's privacy policy amounted to an abuse of dominance.

On jurisdiction, WhatsApp contended that the subject of the policy change was within the field of the information technology law and not competition law. It was also urged that the matter is presently under consideration before various authorities and *sub-judice* in other fora, and proceedings before the CCI are not warranted in line with the decision of the Supreme Court in [CCI v. Bharti Airtel](#).

The CCI shot this down, observing that the decision in *Airtel* pertained to maintaining comity between sectoral regulators and market regulators, an issue which did not arise in the present case. It was observed that while contraventions of the Information Technology Act, 2000 do not fall within the purview of the CCI, in the context of digital markets, unreasonable data collection and sharing may grant a competitive advantage to the dominant player and may result in exploitative as well as exclusionary effects, which is a subject matter of examination under competition law.

The CCI quickly found WhatsApp to be dominant in the market for 'Over-the-Top (OTT) messaging apps through smartphones in India' referring to its [order of August 2020 in Harshita Chawla v. WhatsApp](#). Citing network effects, the CCI observed switching from WhatsApp to another platform becomes difficult and meaningless until all or most of their contacts also switch to the same other platform.

Consequently, WhatsApp's OTT messaging services were held to be non-substitutable. In such context, it is relevant to note that WhatsApp has over 2 billion users globally who can avail of its services, including messaging and calling services, without paying any monetary fee.

It was noted that, in the past, privacy policies provided users with an option to not have their WhatsApp account information shared with Facebook, which is why an earlier 2016 complaint against WhatsApp was [dismissed](#). However, in the present update, such an 'opt out' was not possible. Further, the scope of the data collection envisaged was stated to be '*unduly expansive and disproportionate*' and at the same time '*vague and unintelligible*' to users.

With respect to the interplay of data, privacy and competition law, the CCI observed that nowadays consumers value non-price parameters of service such as quality, customer service, innovation, etc. as equally, if not more important, as price. Therefore, reduction in consumer data protection and loss of control over personalised data by users can be taken as a reduction in quality under anti-trust law.

The CCI also developed a theory of harm in relation to exclusionary effects as WhatsApp/ Facebook would be able to further entrench/ reinforce their position and leverage themselves in markets such as display advertising, resulting in barriers to entry.

Indications of the CCI's thought process in including privacy issues within the scope of competition law, was first found in its [January 2021 Report on the telecom sector in India](#), where the CCI noted that "*in the era of data aggregation, competition analysis must also focus on the extent to which a consumer can 'freely consent' to (an) action by a dominant player*". The Report stated that abuse of dominance can take the form of lowering privacy protection and, therefore, falls within the ambit of antitrust as a form of non-price competition since the lowering of privacy

standards implies a lack of consumer welfare. This was followed by the comments made by the Chairman in his [address](#) at a workshop on competition issues in the telecom sector in India held on 05.02.2021.

In initiating the investigation, the CCI has joined ranks with the likes of Germany, where the Bundeskartellamt had, in 2019, [held](#) that Facebook can collect data from Facebook-owned services like WhatsApp and Instagram, however, the same will only be possible subject to the users' voluntary consent; and Turkey, where the current changes to WhatsApp's privacy policy and terms of service are also being [investigated](#) by the competition regulator, which has also passed interim orders against implementation of the change.

The case throws up interesting questions about the interplay between privacy and competition law, particularly given that the [Central Government is looking at setting up a separate regulator to protect data privacy](#). The said regulator would be set up upon the Personal Data Protection Bill, 2019, which is currently being examined by a Joint Parliamentary Committee, being passed in Parliament. Rather unsurprisingly, the CCI's order has already been challenged before the Delhi High Court. Presently, the implementation of the privacy policy has voluntarily been [deferred](#) by WhatsApp until 15.05.2021.

## CCI clears Google's acquisition of 7.73% in Jio Platforms

Vide [order dated 11.11.2020](#), the CCI approved Google's acquisition of approximately 7.73% of the equity share capital in Jio Platforms Limited. In addition to the investment, Google and Jio Platforms have agreed to collaborate and develop new low-cost smartphones and operating system for such devices pursuant to a business collaboration agreement.

It was noted that an assessment of the competitive effects of the combination would require an examination of (i) any potential effect on competition in the markets where the products of the parties are similarly placed; (ii) whether the parties coming together to launch a range of smartphones is likely to raise competition concerns in the markets for supply of mobile operating systems; and (iii) the ability and incentives of both Google and Jio Platforms, including Reliance Jio, to discriminate between competitors in their respective businesses.

While assessing the horizontal overlaps to the combination, it was observed that, with respect to **online advertisement services**, the presence of Jio Platforms in the market is minimal and revenues from the same are less than 1%. With respect to mobile operating systems, the CCI noted Reliance Retail's confirmation that it would continue to sell phones with alternate operating systems thereby raising no competition concerns.

Lastly, with respect to horizontal overlaps relating to apps and mobile services, it was observed that there is similarity in multiple domains such as mobile browsers, payment services, news services, amongst others. However, these activities are of typical new age dynamic markets and market share (of 30% in the present instance) may not be the only guiding parameter for competition assessment. It was noted that the parties do not seem to have incentives to coordinate in the respective businesses, more particularly owing to the features such as multi-homing, services being available for free and technical ease of shifting.

While assessing the business collaboration agreement, it was noted that the new **smartphones** were yet to enter the market, which is competitive with the presence of several known players such as Samsung, Xiaomi, amongst others. The parties do not have considerable market share in supply of smartphones in India, outside of the business collaboration agreement either. Lastly, it was ascertained that there are no incentives for Google to foreclose

competition or increase rivals cost by denying Android to third party OEMs. The same is on account of the fact that Google's primary stream of revenue is from search advertisement and the business model of Google has been to increase audience for its online services. Accordingly, no competition concerns were noted to arise from the business collaboration agreement.

In line with its increased focus on the use of data, the combination was also assessed from the point of view of **data integration** and **net neutrality**. With respect to potential data sharing between the parties, it was noted that combinations between entities having access to user data can be analysed from the perspective of data backed market power. The assessment of such combinations needs to focus on the incentives of the parties to pool or share their databank and monetise such data in possible means.

It was noted that the acquisition of 7.73% shareholding may not result in unrestricted access to each other's resources including user data thereby not warranting an assumption of full integration. However, it was clarified that any anticompetitive conduct resulting from any data sharing otherwise, in any manner, in the future does not preclude proceedings for alleged contraventions of Section 3 and / or 4 of the Act.

With respect to an assessment from a net neutrality perspective, it was noted that the product lines of the Google group and telecommunications services such as those offered by Reliance Jio are complementary to each other and may have vertical linkages. It was observed that the potential for a TSP to give preference to a particular content has to be seen in light of the consequences of non-compliance of net neutrality obligations as well as the incentives for making the same more accessible only in a particular telecom network. It was noted the acquisition in the present instance is a partial acquisition and non-observance of net neutrality obligations

may be prejudicial not only to Reliance Jio but also to the investment made by Google.

Accordingly, the combination was unconditionally approved by the CCI.

## CCI finds Uttarakhand Agricultural Produce Marketing Board guilty of abuse of dominance

*Vide [order dated 30.03.2021](#)*, the CCI found the Uttarakhand Agricultural Produce Marketing Board, the exclusive wholesale licensee for distribution of alcoholic beverages in the State, guilty of abuse of dominance.

The informant, a representative body of the International spirits and wines companies, had filed a case against the Board (and two other distributors) for: (a) placing orders with alcoholic beverage manufacturers in an arbitrary and discriminatory manner with no relation to the consumer demand; (b) not procuring alcoholic beverages of certain brands, despite demonstrably high consumer demand and thereby discriminating against manufacturers of these beverages; and (c) not maintaining minimum stock levels in accordance with the retailers' demand, despite express stipulation in the states' 2015 policy. Various contractual clauses between the manufacturers and the Board were also to be abusive.

Post investigation, the DG agreed with the contentions of the informant, however, opined that the two sub-distributors were not to be blamed as they were wholly dependent on the Board for supply and had no independent authority to procure alcoholic beverages on their own.

Before the CCI, the Board argued that it was not an 'enterprise' and accordingly outside the ambit of the Act. However, the CCI held that the defining feature for an entity to be

termed as an 'enterprise' is that the entity must be engaged in some economic or commercial activity. Presently, the grant of license for the trade of liquor is a statutory function but the Licensees, despite being wholly-owned Government entities, were engaged in the economic activity of 'procurement and distribution/supply of IMFL' and are therefore enterprises under Section 2(h) of the Act.

On the issue of abuse of dominance, the CCI noted that despite demands raised by the retailers, the brands demanded were not supplied. The Board did not place orders for brands of Pernod Ricard and United Spirits during the policy period. The Board was the only route to access the market for alcohol manufacturers and its conduct resulted in denial of market access as per Section 4(2)(b)(i) and Section 4(2)(c) of the Act. Accordingly, the CCI held that the Board carried out procurement in a manner which adversely affected competition in the market and discriminated between different manufacturers and suppliers of IMFL.

## CCI dismisses allegations of anti-competitive conduct by airlines trade associations

*Vide [order dated 31.03.2021](#)*, the CCI closed, for the second time, a decade old case pertaining to allegations of contravention of Sections 3 and 4 of the Act by the International Air Transport Association (IATA) and International Air Transport Association (India) Private Limited, filed by the Air Cargo Agents Association of India.

The cargo agent's primary grievance was against the Cargo Accounts Settlement System (CASS) operated by IATA and IATA India and various Resolutions of IATA pertaining to payment of commissions to cargo agents. In 2013, the CCI ordered an investigation, which however came back negative after the DG's investigation.

The cargo agents appealed to the Appellate Tribunal, which ordered the DG to cause a fresh investigation into the allegations, which was duly done but with the same result. This time, the CCI found that the DG's investigation was short on certain points and asked for a supplementary investigation to be conducted. Again, the DG found no case against IATA.

The CCI noted that the relevant product market would comprise of all services available to air cargo agents for settling their bills or invoices by the airlines for air cargo. Further, there is uniformity in such services offered across the country. Accordingly, the relevant market was defined to be '*market for account settlement services in respect of air cargo segment in India*'. It noted that all airlines are eligible to participate in CASS whether they are members or non-members of IATA subject to the payment of a fee. The investigation also established that in 2013-14, only 7 out of 76 airlines had adopted CASS. Out of the 7, some of them still continued to use their own internal systems for account settlement services in respect of the air cargo segment in addition to CASS. This meant CASS was not mandatory but an option for cargo agents, thus, there existed substitutability in the relevant market. IATA thus did not enjoy a position of strength in the relevant market so as to enable them to operate independently of competitive forces prevailing the relevant market. Consequently, in the absence of dominance, the question of abuse of dominance would not arise.

With respect to allegations of contravention of prohibition of anti-competitive horizontal agreements, the CCI held that no fresh material had been placed before the DG since the date of the order set aside by the appellate tribunal. Accordingly, a fresh investigation into the allegations of anti-competitive horizontal agreements was not merited and the case against the OPs was directed to be closed forthwith.

## CCI passes interim order directing MakeMyTrip to relist FabHotels and Treebo on its platform

In a rare development, the CCI on 09.03.2021 passed [interim directions](#) against online travel agency MakeMyTrip and Golbibo (**MMT-Go**) to relist FabHotels and Treebo on its platform during the pendency of the ongoing investigations initiated into its alleged conduct in violation of Section 3(4) and 4 of the Act.

The investigations had been launched in [October 2019](#) and [February 2020](#), on the basis of complaints received from the Federation of Hotels and Restaurants Association of India (in re exclusion of FabHotels, Treebo) and Rubtub Solutions Pvt. Ltd (operating hotels under the **Treebo** brand), wherein the CCI found MMT to be prima facie dominant in the "*market for online intermediation services for booking of hotels in India*". The impugned conduct stemmed from its exclusive agreement with OYO, which was a significant player in the "*market for franchising services for budget hotels in India*". MMT-Go had abruptly terminated their contracts with FabHotels and Treebo following MMT's agreement with OYO.

Surprisingly, it was only after several months that both FabHotels and Treebo approached the CCI in November 2020 asking for a direction that MMT-Go relist their properties on the website.

The CCI decided to grant interim relief, observing as follows:

- (i) Section 33 requires '*definite expression of satisfaction*' after due application of mind whereas Section 26(1) only contemplates a '*tentative view*'. Facts in the present case were more compelling than at the *prima facie* stage, meeting the higher threshold in *CCI v. SAIL*.

- (ii) The harm caused to the claimant was to be examined along with the harm caused/likely to be caused to competition in the market if the impugned conduct was not restrained at the interim stage;
- (iii) Other distribution channels (direct bookings through hotel website, offline travel agents, etc.) were not found to be posing constraint on MMT-Go in the relevant market;
- (iv) MMT-Go's contention that FabHotels and Treebo were not OYO's competitors does not hold good as OYO would not have imposed a condition restraining MMT-Go from listing them on its portal if it didn't consider them as competitors;
- (v) Section 3(4) and 4 of the Act are not mutually exclusive, there may be instances where the same conduct contravenes both provisions;
- (vi) MMT-Go will not be put to great inconvenience by listing FabHotels and Treebo's inventory alongside the 72,000 others on its platform;
- (vii) Relevance of online marketplaces has increased post-pandemic, denial of access to a dominant marketplace such as MMT can be detrimental to FabHotels and Treebo;
- (viii) Harm to competition in the downstream market for franchisee service providers will be irrevocable if MMT-Go continues to engage in such exclusionary behaviour.

The CCI unfortunately failed to hear OYO on the applications for interim relief, which resulted in the order being stayed by the Gujarat High Court on 23.03.2021.

*This newsletter is only for general informational purposes, and nothing in this newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or competition law in general), please feel free to contact the Competition Law Team at [competitionlaw@luthra.com](mailto:competitionlaw@luthra.com) or any of the contacts listed below. © L&L Partners 2021. All rights reserved.*

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