



# COMPETITION LAW NEWSLETTER

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## Inside

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Division Bench of Karnataka HC and Supreme Court dismiss appeals filed by Amazon, Flipkart against CCI probe

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CCI dismisses allegations of abuse of dominance and anti-competitive conduct made against Uber

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CCI approves acquisition of shareholding in NAM Estates, Embassy Property and Indiabulls Real Estate by Blackstone

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And more...

In this edition of the L&L Competition Law Newsletter, we cover one judgment of the Karnataka High Court and its appeal to the Supreme Court, two enforcement orders and one significant merger notification by the Competition Commission of India (CCI), along with an overview of the CCI's interactions with other sectoral regulators in the last few years.

## Division Bench of Karnataka High Court and the Supreme Court dismiss petitions filed by Amazon and Flipkart against the CCI probe

*Vide* judgement dated 23.07.2021, a Division Bench of the Karnataka High Court dismissed the writ appeals filed by Flipkart and Amazon against the decision of a single judge, who had dismissed the writs filed by the two e-commerce giants against the probe ordered by the CCI ([covered in our June 2021 newsletter](#)).

The Division Bench held that:

- (i) The CCI cannot foresee and predict whether any violation of the Act would be found upon investigation by the DG;
- (ii) An order passed under Section 26(1) of the Competition Act (**Act**) is purely administrative in nature and is passed at a preliminary stage. It is neither adjudicative, nor determinative, but is merely an inquisitorial, departmental proceedings directing the DG to investigate (relying on the Supreme Court's 2010 decision in [CCI v. SAIL](#));
- (iii) Section 26 of the Act read as a whole, discloses a comprehensive and thoughtfully construed, stepwise scheme which contemplates not only a fair hearing to the concerned parties at the appropriate stage, but it is characterized by an inherent robustness by which the proceedings may culminate in closure;

- (iv) Unless and until a detailed enquiry is conducted by the CCI, the question of giving a finding in respect of the violation of the statutory provisions, does not arise;
- (v) The CCI's 2018 order in the case of [All India Online Vendors Association v. Flipkart](#) does not bar the impugned order by virtue of *res judicata*. The impugned order has been passed by the CCI after a lapse of considerable time. In a competitive market various agreements are executed and new practices are adopted every day;
- (vi) An expert body cannot be crippled or hamstrung in their efforts by application of technical rules of procedure;
- (vii) The investigation ordered will not cause any harm to the business reputation of the appellants (relying upon the Delhi HC decision in [Cadila Healthcare v. CCI](#)<sup>1</sup>).

Taking a strong view while dismissing the writ appeals, the Court opined that the petitions were nothing but an attempt to ensure that the action initiated by the CCI did not attain finality, and asked the companies not to “*feel shy in participating in the enquiry*”.

Along expected lines, both Flipkart and Amazon had appealed before the Supreme Court against the Karnataka HC decision. However, acting swiftly, the Supreme Court [dismissed](#) the appeals on 09.08.2021 and observed that it saw no reason to interfere with the impugned order.

Belatedly, at last, the CCI probe against the e-commerce giants can now begin. A swift investigation is expected in light of the [observation](#) made by the CCI Chairman wherein he has expressed concerns regarding unchecked dominance in digital markets and stressed upon early invocation of anti-trust remedies to counter the same.

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<sup>1</sup> (2018) 252 DLT 647.

## CCI approves acquisition of shareholding in NAM Estates, Embassy Property and Indiabulls Real Estate by Blackstone

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The CCI *vide* [order dated 24.02.2021](#) (published last month) has approved the acquisition of shareholding in NAM Estates, Embassy One Commercial Property Developments, and Indiabulls Real Estate Limited by a consortium of investors including the Blackstone group. The combination entails the merger of the real estate portfolios of NAM Estates and Embassy Property into Indiabulls Real Estate.

The CCI rejected the parties' submissions regarding excluding the Blackstone group and the Embassy Office Parks REIT from the overall competition assessment. The Commission noted that Blackstone group would have over 10% as well as board representation with affirmative rights in the resultant entity. The CCI also rightly brushed aside the argument that a pending Blackstone-Prestige deal should not be taken into account since it had not been consummated. Finally, the CCI noted that Manager of the REIT would have significant influence over the policies and practices relating to lease of assets of a REIT, and the Manager was an Embassy group entity. The assessment was therefore done holistically aggregating the Embassy group, Blackstone group and EOP REIT together.

On merits, the CCI observed that the combination had horizontal overlaps in the commercial real estate (**CRE**) and residential real estate (**RRE**) segments in Bengaluru, the Mumbai Metropolitan Region, and the National Capital Region. The CCI noted that CRE may be further sub-segmented into office spaces in SEZ and non-SEZ markets, warehouse space and retail space, amongst others. With

respect to present combination, the CCI observed that the volume proposed to be developed by the parties in the medium term is not significant and it is unlikely that any competition concerns will arise considering the overall presence of the parties and the incremental market shares resulting from the combination. Further, the CCI observed that RRE may be further sub-segmented into apartments, villas and plots, amongst others. The CCI again found that the combination would not raise any competition concerns, and unconditionally cleared the transaction.

## CCI dismisses allegations of abuse of dominance made against the Quality Council of India

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The CCI *vide* [order dated 5.07.2021](#) dismissed allegations of abuse of dominance made against the Quality Council of India (**QCI**). The informant alleged that the National Accreditation Board for Testing and Calibration Laboratory (**NABL**), of which QCI is the parent body, abused its dominant position in the laboratory accreditation services market in India.

After finding the QCI be an '*enterprise*' within the meaning of Section 2(h) of the Act, the CCI concluded that NABL appears to enjoy market power in the market for '*service of granting accreditation certification to the laboratories after verifying the standards followed by them in India*', but stopped short of an actual *prima facie* finding on dominance.

On abusive conduct however, the CCI found no violation. With respect to NABL compelling the laboratories to participate in proficiency testing, the CCI noted that, internationally, the standard relating to the same had been amended by way of ISO 17025:2017 which made proficiency testing

mandatory. Further, the CCI noted that there was no obligation to get the proficiency testing services solely from NABL and such services could also be availed from other bodies.

As part of its assessment of proficiency testing requirements, the CCI also examined allegations of excessive pricing in respect of the proficiency testing assessment. It was noted that previously a nominal fee would be charged from the participating laboratory by the NABL funded institutions which would conduct such proficiency testing assessments. However, in view of changes in the ISO 17011:2017 standard, NABL does not conduct any proficiency testing program itself and the proficiency testing providers have their own system for charging fees from participants.

Similar to proficiency testing, with respect to equipment calibration, it was noted that the same has been made an essential requirement of the revised standard ISO-17025 and the same service can be availed from any of the five foreign accreditation bodies in India.

With respect to specifying the minimum standard for eligibility and qualification criteria for laboratory staff, the CCI noted that such minimum standards prescribed by the NABL are in the interest of public health, safety, environment & welfare.

Lastly, with respect to the 4-day training, the CCI noted QCI's submissions that NABL had observed in the past that there was a lack of knowledge on the part of laboratory personnel. Accordingly, the training was mandated to comply with latest ISO standards which require laboratories to ensure that their personnel are competent to perform their functions. Therefore, the CCI concluded there is no revelation of any anti-competitive conduct on behalf of NABL.

## CCI dismisses allegations of abuse of dominance and anti-competitive conduct made against Uber

Vide [order dated 14.07.2021](#) the CCI dismissed allegations of abuse of dominance anti-competitive conduct levelled against Uber by Meru Travel Solutions, which is also engaged in the provision of radio taxi services in India.

The matter has a long and chequered history dating back to 2015, having been [dismissed by the CCI in 2016](#), only for it to be reversed in appeal by the Appellate Tribunal,<sup>2</sup> which was [affirmed by the Supreme Court in 2019](#), with a direction to the DG to complete the investigation in 6 months. After dealing with various confidentiality issues, the matter was finally argued in March 2021.

Meru had alleged that Uber by virtue of being a dominant enterprise in the “*market for radio taxi services in Delhi-NCR*”, has abused its position by resorting to predatory pricing, including offering unreasonable discounts to the customers and employing an incentive policy aimed at exclusively engaging drivers and preventing them from working with other radio taxi operators, with an intention to drive its competitors out of the market.

In line with precedent, the CCI delineated the relevant market as the “*market for radio taxi services in Delhi NCR*”. The CCI observed that competitive constraints are generally not unidirectional in nature and while there can be markets wherein the competitive constraints faced by players *inter-se* were not reciprocal and resulted in asymmetry. In view of the close competition between another player who had entered the market and gained a

<sup>2</sup> Appeal No. 31 of 2016, Competition Appellate Tribunal order dated 07.12.2016.

significant foothold – Ola, and Uber in the relevant market identified, neither of them held a market position which would allow them to act independently of each other or of their consumers.

Thus, the CCI concluded that Uber was not dominant in the relevant market given the highly competitive nature of the market and the fluctuating market shares of Uber and Ola over the years.

The CCI touched upon the allegations that Uber had indulged in predatory pricing, even though no further analysis was required in the absence of dominance of Uber. Relying on its decision in [Fast Track Call Cab Pvt. Ltd. and Anr. v. ANI Technologies Pvt. Ltd.](#), the CCI observed that the platform's heavy reliance on network effects requires continuous investment to get both sides of the platform to interact in order to build a robust network. The DG's investigation revealed Uber's below cost pricing, which is evident from its negative margin earned during 2014-2018, but a similar trend was observed in case of Ola and Meru as well. Therefore, Uber's below cost pricing was accepted as a strategy adopted to compete aggressively in the market to develop its network. The CCI also noted that the discounts and incentives had gradually declined over time with a positive per trip margin recorded by Uber since October 2017.

Lastly, addressing the issue of exclusive agreements with driver partners, the CCI found that driver partners routinely multi-home depending on ride availability and short-term incentive schemes offered and faced no restrictions in terms of association with a competitor network, and since no exclusivity clause was present in their agreement with Uber, no allegation under Section 3 could be made out against them.

## CCI's outreach to sectoral regulators

Section 21 and 21A of the Act of the Act provide for references to be made by statutory authorities to the CCI and vice versa, in the event that any such issue is raised by parties which falls outside, or overlaps with, the purview of the relevant regulator's domain. The opinions furnished by both sectoral regulators and the CCI under these provisions are not binding but provide valuable inputs and seek to avoid conflict of opinions.

The CCI and the Telecom Regulatory Authority of India (**TRAI**) had a famous turf war over the dispute relating to points of interconnection between Reliance Jio and the incumbent telecom operators – Airtel and Vodafone. In the 2018 landmark judgment, [CCI v. Bharti Airtel](#), where the lack of inter-regulatory consultation resulted in protracted litigation<sup>3</sup>, the Supreme Court acknowledged the fact that the TRAI was better equipped to handle the issues that arose in that case *at the first stage*, and depending on the outcome of its investigation the CCI *may* exercise jurisdiction thereafter. Since then, the CCI has proactively made attempts to seek inputs from the relevant sectoral regulators whenever faced with such issues.

After years of operating in individual silos, since 2019, the CCI has made several references to sectoral regulators, including to: (i) the [Securities and Exchange Board of India](#) – in a case concerning abuse of dominance by the National Stock Exchange of India Ltd. in relation to provision of co-location facilities; (ii) the [Insurance Regulatory and Development Authority of](#)

<sup>3</sup> For further reading: G.R. Bhatia, *Inter Regulatory Consultation between Competition and Sectoral Regulator*, published by the Forum of Indian Regulators Centre, Indian Institute of Corporate Affairs, available at <https://iica.nic.in/images/foirnews/G.R-Bhatia-COMPETITION-REGULATOR.pdf>



[India](#) – pertaining to introduction of revised parameters for calculation of insurance premium by the General Insurance Corporation of India within the fire insurance segment; (iii) [TRAI](#) – pertaining to a complaint filed against high rates for inbound calls charged by telecom operators in excess of the ceiling fixed by TRAI; (iv) the [Joint Secretary \(Cooperative\) & Central Registrar, Department of Agriculture](#) – in relation to a ban imposed by officials of the Registrar Cooperative, Uttar Pradesh on provision of fertilisers to an independent

distributor; and most recently (v) the [Reserve Bank of India](#) – pertaining to certain allegedly abusive practices adopted by a Non-Banking Finance Company while disbursing loans to borrowers. This is an extremely welcome trend, but unfortunately, the sentiment has not been reciprocated so far, if one goes by the data available in the CCI's [Annual Reports](#) which shows no references received by it in the last four financial years. One hopes that this will change in the near future.

*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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