



# COMPETITION LAW NEWSLETTER

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And more...

It's been a busy November in the competition law space despite the Diwali festivities and the foul air in the national capital. In this edition of the L&L Competition Law Newsletter, we cover one judgment of the National Company Law Appellate Tribunal (**NCLAT**), four enforcement orders and one significant combination cleared by the Competition Commission of India (**CCI**) in the past month, along with the highlights of the recently published market study on the pharmaceutical sector in India.

## CCI initiates investigation against table tennis sports associations for alleged anti-competitive conduct

Sports associations are once again in the firing line, with table tennis joining the ignominious group of [baseball](#) and [cricket](#) that are currently under investigation, and [volleyball](#), [athletics](#), [chess](#) and [hockey](#) that have previously undergone investigation by the CCI. The CCI, *vide* [order dated 17.11.2021](#), directed the initiation of an investigation against the (i) Suburban Table Tennis Association; (ii) Maharashtra State Table Tennis Association; and (iii) Table Tennis Federation of India, (collectively **OPs**). While the first two are responsible for conducting district ranking tournaments state ranking tournaments for the selection of players to represent Maharashtra, the Federation is the apex table tennis body responsible for the regulation of table tennis in India.

The informant, TT Friendly Super League Association, alleged that a notice was issued that players should not join any unaffiliated organization and should not play any matches organized by unaffiliated organizations, or they would face suspension / non-acceptance of their entries in official district and state table tennis tournaments. The informant also alleged that the Memorandum of Association (**MoA**) of the Federation contained clauses that

restricted players from taking part in unrecognized tournaments and threatened to disbar/suspend them for violating the same.

Rejecting arguments on the CCI's lack of jurisdiction the CCI observed that it is immaterial whether the economic activity required for exercising jurisdiction under the Competition Act, 2002 (**Act**), is commercial or non-commercial in nature. The CCI observed that a '*functional rather than a formal approach*' is to be adopted for examining whether an entity qualifies as an 'enterprise'. In view of the fact that the Associations provided prizes and rewards for the players and also received donations, royalty and sponsorship for conducting tournaments, they performed an economic activity.

The CCI delineated the relevant market as the '*market for organization of table tennis leagues/events/ tournaments in India*'. The CCI observed that the OPs are engaged in a hierarchical structure regulating table-tennis from the district to the national level. Moreover, the OPs are all collectively responsible for representing, coordinating, administering, marketing and developing the sport of table-tennis in the country. The CCI concluded that, "*prima facie it appears that [the] OPs hold a dominant position in the relevant market*".

Upon examining the conduct of the OPs in the delineated market, the CCI observed that the notice restricting the players from participating in tournaments organized by unaffiliated organizations and sanctioning them with suspension *prima facie* appears to result in denial of market access to unaffiliated organizations thus amounting to a *prima facie* contravention of Section 4(2)(c) of the Act. Further, the CCI observed that the restrictions contained in the clauses of the MoA were unfair being restrictive in nature and, thus, violative of Section 4(2)(a)(i) of the Act.

The CCI also opined that the conduct may contravene Section 3(3) read with Section

3(1) of the Act. Accordingly, the DG was directed to undertake an investigation.

## CCI dismisses allegations of bid rigging in bids submitted to CP Cell, Directorate General Ordnance Service

The CCI *vide* [order dated 03.11.2021](#) dismissed allegations regarding bid rigging in contravention of Section 3(3)(a) and Section 3(3)(d) read with Section 3(1) of the Act, against the UP State Handloom Corporation (**OP-1**), the J&K State Handloom Development Corporation (**OP-2**), Women Development Organisation (**OP-3**) and Manmohan Commercial Limited (**OP-4**) (collectively, **OPs**).

The DG concluded that the quantity was trifurcated between OP-1, OP-2 and OP-3 and the bids were not only similar but were also made within a span of six hours. Moreover, it was also observed that there was an exchange of information between OP-3 and Mr. Vinay (an individual associated with the informant) and OP-4 and Mr. Vinay. It was also noted that OP-1 was not an original manufacturer of durries and procured durries from OP-4 by way of a Memorandum of Understanding (**MoU**) between them. The DG further noted that OP-4 prepared and processed bids on behalf of OP-1 for which OP-1 received 2.5% of the total consideration amount.

Therefore, in view of the abovementioned evidence, the DG found that there was ‘meeting of minds’ among the OPs and their conduct was in contravention of Section 3(3) read with Section 3(1) of the Act. However, upon conducting its assessment of the investigation report, the CCI concluded that the OPs had not contravened Section 3(3) of the Act.

The CCI noted the establishment of an agreement between the parties is a *sine qua*

*non* for proving the existence of an anti-competitive horizontal agreement under Section 3(3) of the Act. The CCI observed that the evidence did not provide any communication among the OPs in order to establish the existence of an agreement among them. The only communication relied upon by the DG related to two separate exchanges between Mr. Vinay and OP-3 / OP-4.

Although the CCI found such conduct to be unfair in public procurement where a member of the procuring entity is in communication with the bidders, it observed that the evidence was not sufficient to prove existence of an ‘agreement’ for the purpose of Section 3(3) of the Act.

## CCI approves acquisition of Indiabulls entities by Nextbillion

The CCI *vide* [order dated 09.09.2021](#) approved the acquisition of 100% shareholding of Indiabulls Asset Management Company and Indiabulls Trustee Company (**Targets**) by Nextbillion Technology Private Limited (**Nextbillion**), a subsidiary of Groww Inc. (**Groww**).

While analysing overlaps, the CCI considered the portfolio companies of the private equity shareholders of the acquirer’s parent company Groww, and took the same into account in its assessment of the combination even though the PE shareholder(s) were not a party to the combination.

The CCI observed that Tiger Global held less than 5% in Groww but was entitled to exercise certain rights that are not available to an ordinary shareholder. Accordingly, the CCI was of the view that the assessment of the combination required mapping overlapping activities of the target and portfolio entities of Tiger Global.

Further, it was observed that neither the assets under management of the Targets nor the market shares of the portfolio companies of the private equity shareholders are significant. Furthermore, the segments in which the target entities and portfolio companies of the private equity shareholders operate have several other market participants. Thus, the CCI concluded that the combination is not likely to have an appreciable adverse effect on competition and approved the combination.

## CCI finds two suppliers of carbon brushes guilty of cartelisation

*Vide* [order dated 01.11.2021](#), the CCI found Mersen (India) Pvt. Ltd. and Assam Carbon Products Ltd. (collectively **OPs**) guilty of contravening Section 3(3) of the Act, based on a reference filed by the Deputy Controller of Stores, Southern Railways alleging that the OPs had colluded while quoting bids in response to tenders floated by Indian Railways for the procurement of carbon brushes used in industrial electric motors, resulting in a steady hike in the rate of such brushes from 2010-2015 without any justification for the same.

During the pendency of the investigation, Mersen and Assam Carbon Products approached the CCI by way of leniency applications. The DG concluded that while no evidence to substantiate collusion in the Indian Railways tenders was found for the period 2010-2014, the OPs had engaged in anti-competitive practices from November 2014 - 2019.

The CCI rejected the contention that the DG had exceeded its authority by investigating the conduct of the OPs beyond the scope of that ordered *vide* the order under Section 26(1), relying on [Excel Crop](#) and [Cadila](#) to hold that the DG need not be restricted by the specific facts or time period outlined at

the time of issuance of *prima facie* directions by the CCI.

On merits, the CCI held that the WhatsApp messages and email exchanges between the OPs indicated a clear meeting of minds to the extent of entering into an understanding regarding the prices to be quoted and discussion regarding an increase in price before filing of bids across different tenders floated by the various Divisions of Indian Railways, thereby establishing a violation of Section 3(3)(d) read with Section 3(1) of the Act. The Managing Directors of the OPs were also found liable under Section 48 of the Act.

With regard to the imposition of penalty, the CCI noted that both the OPs were medium enterprises who were incurring losses from the sale of carbon brushes. In light of the cooperation extended during the course of the investigation and stress on the Micro, Small and Medium Enterprises sector due to the pandemic, the CCI noted that penalising the OPs may render them economically unviable and let them off the hook with a direction to refrain from such conduct in the future.

## CCI penalises paper manufacturers for cartelisation

The CCI *vide* [order dated 17.11.2021](#) arrived at a finding of cartelization against ten paper manufacturers and the Indian Agro and Recycled Paper Mills Association, in contravention of Section 3(3)(a) read with Section 3(1) of the Act. The case was initiated *suo motu* by the CCI against 21 paper manufacturers and the association, basis material uncovered by the DG during two other ongoing investigations, pointing towards concerted action using the association's platform to manipulate prices in the market for writing and printing paper made out of agricultural waste and recycled waste paper from September 2012 to March 2013.

While the investigation was ongoing, one of the opposite parties, Trident Limited, filed a leniency application admitting to having participated in meetings where commercially sensitive information was exchanged.

On the basis of the e-mails found during the investigation and deposition statements given by several officials of the manufacturers under investigation, the CCI concluded that meetings were convened under the aegis of the association in order to discuss prices and chart a roadmap for future increases by the member manufacturers as well as monitor implementation of decisions taken in earlier meetings. The CCI went on to observe that mere attendance in such meetings where commercially sensitive information was discussed takes away from the independent decision-making ability of participants, which when coupled with the other direct evidence on record was a clear indicator of cartelisation by the parties under investigation.

Taking into account the shift to virtual operations of most businesses since the coronavirus outbreak and its effect on the paper industry, the CCI imposed a nominal penalty of INR 5 lakh on each of the defaulting manufacturers and INR 2.5 lakh on the association. The lesser penalty applicant Trident Limited received a full penalty waiver, in light of the vital disclosures made and cooperation extended during the investigation. Interestingly, there was no finding of contravention against 6 parties even though they had attended meetings and were aware of the discussions. However, there was no evidence that they were part of the cartel agreement. The CCI let them off with a warning that *“if they find themselves in such meetings, it would be obligatory for them to recuse themselves from such meetings and, as responsible corporate citizens, immediately bring such meetings and discussions to the attention of the Commission without any delay.”*

## NCLAT dismisses appeal for CCI probe into Bar Council of India

The NCLAT *vide* [order dated 08.11.2021](#) dismissed an appeal against a CCI [order](#) that had held that the Bar Council of India (BCI) was not an enterprise within the meaning of Section 2(h) of the Act.

It was alleged by the informant that the BCI enjoys a dominant position in controlling the legal education in India, and it had abused its dominant position *vide* Clause 28 of the Schedule III, Rule 11 to Part IV of Rules of Legal Education, 2008 (**Clause 28**) that barred candidates (in the general category) who have attained the age of 30 years from pursuing legal education. It was argued that *vide* clause 28, the BCI conspired to reduce the competition faced by its electors and created indirect barriers in the profession of legal service.

In appeal against the order before the NCLAT, it was alleged that the CCI had erred in holding that the BCI did not meet the definition of an ‘enterprise’ by failing to realise that it regulates professionals in its field (similar to previous decisional practise of the CCI in the case of the [Board of Control for Cricket in India](#), [All India Chess Federation etc.](#)). Therefore, the informant/Appellant prayed for the same reliefs before the NCLAT.

The NCLAT observed that for any entity to come within the meaning of the word ‘enterprise’, the activities performed by an entity must be ‘economic’ and commercial in character. In the current case, the BCI was concerned with maintaining the standards of the legal profession and equipping those who seek entry into the profession with the relevant knowledge and skills.

Subsequently, the NCLAT arrived at the same conclusion as the CCI and held that the BCI is a statutory body performing a regulatory role devoid of any economic/

commercial activity and was therefore, not an enterprise within the meaning of Section 2(h) of the Act. Consequently, the CCI's order under Section 26(2) of the Act dismissing allegations of abuse of dominance against the BCI was upheld.

## CCI publishes findings pursuant to market study on the pharmaceutical sector

On 18.11.2021, the CCI published its [Report on the pharmaceutical sector in India](#), the second in the space, following its study on affordable healthcare in 2018 which resulted in the publication of the Policy Note on [making markets work for affordable healthcare](#). The overarching aim of the study was to understand the factors which influence price competition in the pharmaceutical sector. The study further analysed issues in pharmaceutical distribution, prevalence of branded generic drugs in India and online pharmacies.

It was noted that pharmaceuticals contribute 43.2% to the total out-of-pocket expenditure on health in India. Therefore, the prices of pharmaceuticals have a significant and direct link with access to healthcare. Some of the key findings from the Report are:

- (i) Despite generics being substitutable with one another, 87% of the generics sold in India are branded i.e., they are sold with their brand names.
- (ii) Considerable price differences were observed between brands of a particular generic formulation marketed by different firms. Furthermore, there were significant variations between brands marketed by the same company.
- (iii) Consumers in India pay a premium for brands because of factors such as information asymmetry, unobservable quality of drugs, lack of public trust and prescription of drugs by brand names

rather than by their generic names. Consequently, brand competition overrides price competition in the domestic market for generic drugs.

- (iv) Trade Margin is calculated as the difference between the retail price of medicines and cost price of manufacturers. Due to the presence of several branded generics for each formulation, manufacturers set high retail margins to lure chemists to stock and dispense their brands. Moreover, high retail margins can simply be ensured by raising the MRP for pharmaceuticals that are not subject to price regulation. Therefore, it was observed that competition between manufacturers does not yield lower prices to consumers on account of pitching high retail margins to the retailers.
- (v) Online pharmacies in India are based on two major models – inventory and marketplace platforms. A significant part of online pharmacy business is conducted under the marketplace-model, wherein online pharmacies play the role of an intermediary, connecting buyers and sellers. However, there are concerns regarding the discount policies of these platforms and concentration of personal health data in the hands of select few entities.

Based on an analysis of the issues discussed in the Report, the CCI made certain recommendations to address the concerns highlighted. These include:

- (i) Higher price branded generics are able to sustain their market share due to (a) brand differentiation underpinned by purported heterogeneous quality of drugs and (b) financial incentives (in the form of higher trade margins) to chemists that influence retail sale of drugs. Such a situation can be addressed by (a) uniform and effective implementation of quality standards across states; (b) transparency during

drug regulation; (c) scaling up and routine testing of drugs; (d) a national digital drugs bank consolidating real-time data on therapeutic class-wise/formulation-wise approved branded/ unbranded products along with their manufacturing and marketing entities; and (e) introduction of a quality signalling mechanism akin to a standard compliance mark.

- (ii) On online pharmacies, the CCI acknowledged the role of introductory

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offers offered by a new entrant to overcome the incumbency advantage. For e-commerce platforms, network externalities may need to be stimulated in the early stages of business development such that scale and demand efficiencies can be promoted. However, the CCI refrained from making any observation of the discounts offered by these pharmacies and noted that any such analysis has to be on a case by case basis.

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