



Luthra and Luthra
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INSIDE

- Delhi High Court refuses to interfere with CCI's investigation into WhatsApp's 2021 privacy policy.
- Delhi High Court upholds CCI jurisdiction to seek information relating to patented drugs.
- Karnataka High Court dismisses Intel's petition to halt CCI probe and imposes costs.
- *"Actual participation in the tender not a sine qua non for a finding of bid rigging"* – NCLAT upholds CCI order.
- CCI approves the "mega merger" between HDFC Ltd. and HDFC Bank.

And Many More....



In the September edition of the Luthra and Luthra Law Offices India - Competition Law Newsletter, we encapsulate some significant developments in the Indian Competition regime.

Delhi High Court refuses to interfere with CCI's investigation into WhatsApp's 2021 privacy policy

A division bench of the Delhi High Court (DHC) vide its order dated [25.08.2022](#), dismissed the appeal filed by WhatsApp against the order of a single judge passed last year, and thereby refused to interfere with the Competition Commission of India's (CCI) order directing an investigation against WhatsApp and Facebook for alleged abuse of dominance in relation to its updated privacy policy (**2021 policy**).

As opposed to the earlier policies (2012 policy and 2016 policy), the 2021 policy made it mandatory for the users to accept the updated terms and conditions, including terms relating to sharing of personalized user information/data with other Facebook companies. This attracted concerns from various quarters, including the Ministry of Electronics and Information Technology (which termed the policy as discriminatory and harmful for Indian consumers and warned WhatsApp not to implement it). The CCI taking *suo-moto* cognizance of the issue vide its order dated [24.03.2021](#), noted that data collection envisaged under the 2021 policy appears to be unduly expansive/ disproportionate and considering the

“take-it or leave it” nature of the policy, it warranted an in-depth antitrust scrutiny. WhatsApp's dominant position being undisputed, the CCI formed a *prima facie* opinion that the conduct of WhatsApp amounted to an imposition of unfair condition upon the user and violated Section 4(2)(a)(i) of the Competition Act, 2002 (**the Act**). In addition to causing direct consumer harm, the CCI opined that such conduct may also lead to exclusionary effects, as WhatsApp/Facebook will be able to further use the data collected to reinforce their position and leverage themselves in related or even non-related markets (such as display advertising market), resulting in “insurmountable entry barriers” for new entrants. Based on this observation the CCI formed a *prima facie* opinion that a potential contravention of Section 4(2)(c) and 4(2)(e) also required an investigation. This order of the CCI was challenged by WhatsApp before a single judge of the DHC who, vide his order dated [22.04.2021](#), dismissed the petition.

On an appeal before the division bench, WhatsApp challenged the jurisdiction of the CCI to initiate investigation and adjudicate upon privacy related issues, by relying upon the National Company Law Appellate Tribunal's (NCLAT) order in *Vinod Kumar Gupta v. Whatsapp*, 2022 (this was a challenge to the 2016 privacy policy which the CCI dismissed) and the fact that similar issues were *sub judice* before the Hon'ble Supreme Court in the case of *Karmanya Singh Sareen v. Union of India* [SLP (C) 804/2017]. WhatsApp and Facebook also raised concerns regarding confidentiality and contended that disclosure of information might be detrimental for its business.



The division bench did not agree with the arguments made by WhatsApp/Facebook and upheld the order of the single judge and the order passed by the CCI after noting that there were anti-competitive/abusive concerns pertaining to the updated policy and the issue warranted a scrutiny from a “competition lens”. The division bench clarified that CCI’s jurisdiction was not ousted due to the mere fact that privacy related issues pertaining to the 2021 policy were still under consideration by the Supreme Court. Therefore, the division bench refused to interfere with the investigation.

“Actual participation in the tender not a *sine qua non* for a finding of bid rigging” – NCLAT upholds CCI order

The NCLAT, *vide* its order dated [27.07.2022](#), dismissed the appeals filed by Macro Media Diamond Display Pvt Ltd. (**Appellant Company**) and its Managing director Mr. Naresh Kumar Dasari against the CCI order dated [03.02.2022](#). In the said order, the CCI had found 7 companies and 9 individuals, guilty of bid rigging and penalized them for violation of section 3(3)(d) of the Act.

The Appellant Company and Mr. Naresh Kumar both assailed the CCI’s order on the ground that Mr. Naresh Kumar, while facilitating and helping other companies in bid rigging, acted in his individual capacity and did not conduct himself as if he was acting on behalf of the Appellant Company. Since the appellant company had no apparent involvement

in the impugned bids, it was argued that the appellant company could not be found guilty of “bid rigging”. Further, Mr. Naresh also contended that section 48 of the Act allows CCI to penalize individuals in charge of a guilty company, and since the Appellant Company was not guilty, he should not be penalized under Section 48 of the Act.

The NCLAT rejected these contentions after it noted that the Appellant Company had executed some work in relation to the impugned tender and was directly or indirectly a beneficiary of the bids in question. It agreed with the CCI’s conclusion that actual participation in the tender by the opposite party was not required to be proved in every case and as per the explanation to section 3(3) it is sufficient if it is proved that the agreement resulted in a manipulation of the bidding process. Therefore, the NCLAT refused to exonerate the appellants and upheld the CCI’s order. Though not mentioned explicitly in the order, it becomes abundantly clear on a plain reading of Section 3(3)(d) that it casts a wide net by using the phrase “directly and indirectly results in bid rigging”. It appears that the NCLAT order is along expected lines and correctly clarifies the scope of bid rigging as explained in the Act.

Karnataka High Court dismisses Intel’s petition to halt CCI probe with costs

The Karnataka High Court (**KHC**), *vide* its order dated [23.08.2022](#), dismissed the petition filed by Intel Technology Pvt. Ltd. (**Intel**) against CCI’s order dated



[09.08.2019](#), whereby the CCI had ordered an investigation into Intel's new warranty policy.

Before the CCI, Matrix Info Systems Pvt. Ltd. (**Matrix**) had filed an information alleging that the revised 'warranty policy' of Intel was anti-competitive and contravened section 3 and 4 of the Act. The new policy stated that warranty for "Boxed Micro-processors for Desktop and Laptop PCs" (Processors) in India was to be provided only when they are purchased from an authorized Indian distributor of Intel and that too within India. This meant that Indian customers who bought from resellers or parallel importers (or bought from abroad on their own) would no longer be able to avail after-sales warranty and thereby will be less inclined to purchase from them. The CCI noting that this differentiated policy was specifically implemented only in India, formed a *prima facie* opinion that it was discriminatory and thereby contravened Section 4(2)(a)(i) of the Act. Further, the CCI also held that this policy *prima facie* resulted in limiting/restricting the market for Processors in India in contravention of section 4(2)(b)(i) and denied market access to parallel importers in contravention of section 4(2)(c).

Intel challenged the said order by the CCI before the KHC, by way of a writ petition and contended that the terms in the new warranty policy were normal business practices followed across the industry and is in consonance with the landmark decision on "warranty policies relating to parallel importation" by the DHC in *Kapil Wadhwa v. Samsung Electronics* [2013 (53) PTC 112 (Del.) (DB)]. Accordingly, Intel submitted that the new policy could

not be termed as an abuse under section 4 and requested the court to grant a stay upon the investigation since it may have a 'detrimental effect' on its business reputation.

The KHC noted that the CCI's power to order investigation is an essential tool in the hands of the regulator to fulfil the central objectives of the Act and an aggrieved party can only invoke the writ jurisdiction if the CCI directs investigation in an arbitrary and unreasonable manner. As per the KHC, in the present petition, no such case was made out and the present petition was not only premature and devoid of merits, but also "an abortive attempt by the petitioners to scuttle the innocuous statutory proceedings of the CCI". Considering this, the KHC also imposed costs of Rs. 10 lacs on Intel for resorting to delaying tactics. The decision of the KHC to refrain from interfering with CCI's investigation seems to be consistent with its past decisional practice. For instance, last year, a single judge bench and consequently a division bench of the KHC had dismissed petitions filed by Amazon and Flipkart to stop the CCI probe against them (although an interim stay on CCI's investigation was initially granted by the single judge). On appeal, the apex court had upheld the KHC's decision and asked Amazon and Flipkart to cooperate with CCI's investigation.

Delhi High Court upholds CCI's jurisdiction to seek information relating to patented drugs

The DHC, *vide* its order dated [28.07.2022](#),



dismissed a writ petition filed by Vifor International Ltd. (**Vifor**), wherein Vifor had challenged the CCI's jurisdiction, and its demand for the disclosure of information pertaining to a drug named - Ferric Carboxymaltose (**FCM**).

Vifor contended that as per Section 3(5) (i) of the Act, CCI lacked jurisdiction to entertain the information against Vifor. Furthermore, Vifor also expressed its concerns pertaining to the confidentiality of the information sought by the CCI. Vifor contended that the information sought was commercially sensitive, and the disclosure of such information would be immensely detrimental for Vifor as it would be exposed to criminal proceedings under Article 271 of the Swiss Criminal Code.

Pursuant to hearing the rival submissions, the DHC held that Vifor's contentions were misplaced, and as per DHC's decision in *Monsanto holdings v. CCI* [2020 SCC Del 598], CCI's jurisdiction would not be ousted merely because the information being sought was related to a patent. Furthermore, the DHC also dismissed Vifor's concerns with respect to exposure of confidential and sensitive commercial information. The DHC opined that the CCI had robust safeguards, such as Regulation 35 of the CCI (General) Regulations 2009, to protect the information of the parties. In furtherance of this, the DHC dismissed the writ petition.

CCI dismisses allegations of anti-competitive practices against Maharashtra State

Road Development Corporation Limited

The CCI *vide* its order dated [24.08.2022](#) dismissed the allegations of contravention of Section 3 and 4 of the Act against Maharashtra State Road Development Corporation Limited (**MSRDCL**), and other parties.

Apaar Infratech Private Limited (**Informant**) stated that its product Xypex has been a quality leader in the field of Crystalline Durability Admixture (**CDA**) and therefore, it intended to be included in the Identified Vendors List (**IVL**) to supply the CDA for the Nagpur–Mumbai Super Communication Expressway (**MSM Project**). However, the Informant alleged that MSRDCL mandatorily required accreditation by the Indian Road Congress (**IRC**) which violated the provisions of Section 4(2)(a)(i) and Section 4(2)(c) of the Act. Further, the Informant also contended that the MSRDCL entered into an agreement with the objective of directly or indirectly determining the sale price of the CDA, and controlling the production and supply of CDA, thus, causing an appreciable adverse effect on competition and violating Section 3(3)(a) and 3(3)(b) of the Act.

Nonetheless, the CCI dismissed these allegations on the basis of lack of any evidence to demonstrate the existence of any agreement. Further, the CCI opined that MSRDCL could not be said to be dominant in the "relevant market for procurement of CDA in HIPs in India" given the fact that there are many major market players. Accordingly, no violation under the provisions of Section 3 or 4 of



the Act was made out, and the CCI dismissed the case under Section 26(2) of the Act.

for banking services. In terms of market share, the merged entity will only be behind the Government owned State Bank of India. A detailed order under Section 31 is awaited.

Other significant developments

i. **Parliamentary Standing Committee on Finance summons and questions executives of “Big-Tech” firms**

The Parliamentary Standing Committee on Finance, to whom the Competition (Amendment) Bill, 2022 has been referred for examination and preparation of a detailed report thereon, earlier summoned and questioned representatives of big tech companies including Apple, Microsoft, Google, Amazon, Twitter and others on the subject of “anti-competitive practices in the digital markets”. Prior to this, the Committee had also summoned the executives of Zomato, Swiggy, Flipkart, Oyo, Ola and others and had a presentation session with the CCI’s team on competition issues with respect to the tech/digital markets.

ii. **CCI approves “mega merger” between HDFC Ltd. And HDFC Bank**

On 12.08.2022 the CCI approved the merger between HDFC Ltd., HDFC Bank, HDFC Holdings and HDFC Investments. The said merger has been touted as India’s biggest Merger transaction till date and the deal has been valued at over \$40 Billion. The merger is likely to consolidate HDFC’s already strong market position in the broader loans and lending services market and the market

This newsletter is only for general informational purposes, and nothing in this edition of 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 Mr. G.R. Bhatia/ Mr. Arjun Nihal Singh, at the below mentioned coordinates. © Luthra & Luthra Law Offices India 2022. All rights reserved.

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