

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – India

Avaantika Kakkar, Kirthi Srinivas, Ruchi Verma (Cyril Amarchand Mangaldas) · Friday, February 10th, 2023

Introduction

2022 was an eventful year for competition law in India. The Competition Commission of India (CCI) operated optimally approving combinations notified before it in reasonable timelines, conducting significant dawn raids, passing notable orders that made international headlines, and conducting market studies. The anticipated amendments to the Competition Act, 2002 (**Act**) were discussed ad nauseum in conference rooms and across coffee tables. Notable also is that the CCI has not had a quorum for the formal conduct of business since Chairperson, Mr Ashok Gupta demitted office on 24 October 2022, which has resulted in deals worth billions stuck without clearance.

The Competition Amendment Bill, 2022 & Report of the Parliamentary Standing Committee on Finance

The most notable development this year was the introduction of the Competition (Amendment) Bill, 2022 (**Bill**), proposing significant changes to the Act. The Bill has been adopted by the Parliamentary Standing Committee on Finance (**SCF**), which suggested certain amendments to it. The Bill may be tabled in Parliament in its next session (February 2023).

Deal Value Threshold

The Bill proposes a global deal value threshold of INR 20 billion (approx. USD 251 million / EUR 247 million) if the parties also have ‘substantial business operations in India’. The SCF has suggested that the Bill should specify the manner of calculation of the value of a proposed transaction. It has also been suggested that for a proposed transaction, the presence of ‘*substantial business operations in India*’ should be assessed only with respect to the target entity, as opposed to the presence of the parties.

Shorter merger review

The Bill provides for a shorter period for merger review from the existing outer limit of 210 days to 150 days and a deemed approval at a *prima facie* stage if the CCI does not form an opinion within 20 days. Currently, the regulations allow the Commission 30 working days at the *prima facie* stage and there is no provision for a deemed approval at this stage. The SCF has observed, based on comments by practitioners as well as the CCI, that such a reduction in timelines would be burdensome to the CCI. It has recommended that no change be made to the current timelines for merger approvals.

Settlement and commitment

The Bill proposes a mechanism for ‘settlement’ and ‘commitment’, allowing parties under investigation (for contraventions relating to vertical agreements and/or abuse of dominance) to offer commitments in respect of the alleged contravention, or settle the matter with the CCI. Parties can offer commitments before the office of the Director General (**DG**) submits its investigation report to the CCI. Settlements can be entered into, after the CCI has received the DG’s investigation report but before the CCI’s final order is passed. The Bill requires the mandatory participation of the DG, concerned parties, and third parties to submit objections and suggestions to the commitment and settlement proposals.

The SCF has recommended the inclusion of cartels in settlement proposals. It has also suggested that where the CCI rejects a settlement proposal, parties should be allowed to file an appeal before the appellate tribunal and that no appeal should lie to the appellate tribunal where the party accepts the commitment proposal.

The SCF has also observed that allowing third parties to interfere with commitment and settlement proposals will impact the secrecy of the matter; and has recommended that third parties may participate in the process at the discretion of the CCI, as opposed to their present, mandatory inclusion.

Hub & spoke cartels

The Bill specifically defines “*hub and spoke*” cartels and lays the foundation for the inclusion of third parties (who facilitate cartels without being competitors themselves). The Bill’s language suggesting that a presumption of illegality would lie against third parties who “*actively participated*” in cartel conduct, was considered by the SCF as being too harsh and it recommended that an element of intention be included in the definition to account for third parties that may unknowingly have facilitated anti-competitive conduct amongst competitors.

DG’s power to depose legal advisors

The Bill empowers the DG to also examine on oath, the legal advisors of any of the officers/employees/agents of the party being investigated. The SCF has opined that the scope of the

proposed amendment is very wide and the DG or any investigative authority such as the CCI cannot be authorised to depose legal professionals or other similarly placed privileged advisers as this goes against the concept of ‘*attorney-client privilege*’. It also noted that it is highly probable that such a provision if inserted, may be struck down by the constitutional courts as being unconstitutional.

Gun Jumping and Green Channel

The ‘*Green Channel*’ (a coinage borrowed from Indian customs laws) was introduced in August 2019 under which mergers where parties to the transaction exhibit no horizontal overlaps, vertical, or complementary linkages are granted deemed approval upon filing. In 2022, the CCI approved a total of 80 proposed combinations, of which 25 were approved via the green channel route.

This year, the Commission penalised Trian Partners AM Holdco, Ltd. and Trian Fund Management, L.P. (collectively, **Trian**) for gun jumping in a green channel notification (Case No. C-2021/01/810). The CCI had approved a green channel notification filed by Trian for the acquisition of shareholding in Invesco Limited since there were no overlaps between the activities of Trian and Invesco Limited. The CCI later discovered that the proposed combination had been given effect before its deemed approval since two of Trian’s founding partners were appointed directors on the board of Invesco Limited before filing the green channel notification. The penalty amount was INR 2 million (approx. USD 0.02 million/EUR 0.02 million).

The CCI also imposed a penalty worth INR 500,000 (approx. USD 0.06 million/EUR 0.05 million) on Adani Green Energy Limited for gun-jumping in its acquisition of S.B. Energy Holding Limited. The CCI found that a contractual clause of a transaction document was disproportionate to the stated objective of preserving the economic value of the target entity, and the clause lacked safeguards to prevent the exchange of competitively sensitive information prior to the approval of the transaction by the CCI. The case is significant as the CCI has clearly stated that standstill covenants are acceptable provided that they are proportionate to the objective of ensuring certainty in business valuation, and that such conditions do not amount to interference in the ordinary course activities of the target entity. Post this case, in several other transactions, the CCI has conducted an in-depth review of standstill covenants. In some of these cases, the CCI has asked the parties to justify the rationale for such a clause and even going to the extent of asking the parties to submit e-mails or other records in relation to the objective and for such a clause.

In-Depth Review of Certain Mergers

If the CCI believes that a combination is likely to cause an appreciable adverse effect on competition (AAEC) in India, it can issue a Show-Cause Notice (SCN) to the parties, for determining whether a Phase-II investigation should be initiated. This year, 2 combinations were scrutinised in detail by the CCI.

Digital Payments

The CCI issued an SCN to PayU India (an indirect subsidiary of a global consumer internet company ‘Naspers’) for its proposed acquisition of IndiaIdeas.com Limited (an Indian digital payments platform operating under the brand name ‘BillDesk’) (Case No. C-2022/04/920).

The CCI disagreed with the definition of the broad relevant market proposed by PayU India – which submitted that all online payment services (made in-store on an app/website) as part of the same relevant market. The CCI delineated two relevant markets i.e., (i) market for online payment aggregation services (recurring/standalone); and (ii) market for ‘*Bharat Bill Payment Services*’ (an interoperable and accessible bill payment ecosystem operating via digital infrastructure as well as a network of agents and bank branches).

The CCI eventually concluded that the combination did not raise any competitive concerns in either of the relevant markets and did not initiate a Phase II investigation nor require any remedies. The transaction was however called off due to non-fulfilment of certain conditions precedent. The order of the CCI is notable for being the first instance where no remedies (behavioural or structural) were required by the CCI after the issuance of an SCN.

Media and Entertainment

This notice was filed by Culver Max Entertainment Private Limited (**Sony**), Bangla Entertainment Private Limited (a wholly-owned subsidiary of Sony) (**BEEPL**) and Zee Entertainment Enterprises Limited (**ZEE**) (a competitor of Sony), which are leading operators of television channels and OTT video services in India (Case No C-2022/04/923). The combination involved the amalgamation of ZEE and BEEPL into Sony.

The CCI noted that television advertising has the highest market penetration in India and that the amalgamated entity would become the largest broadcasting house in India, owning approximately 92 television channels with high market shares in four market segments, i.e. Hindi general entertainment channels (**GEC**), Marathi GEC, Bengali GEC and Hindi films. The amalgamated entity would have the ability and incentive to increase prices for advertisers and viewers in the identified segments. It would also be able to charge high prices and/or engage in differential pricing and behaviour with ‘*Distribution Platform Operators*’ (operating through cable, DTH, etc).

In response to the SCN from the CCI, the parties voluntarily offered to divest ZEE’s ownership in three Hindi-language channels and undertook not to divest the channels to the next two largest competitors operating in the market segments i.e., Star India or Viacom 18 Media. The CCI accepted this remedy and approved the amalgamation without conducting a Phase II investigation, subject to these voluntary structural commitments.

Wide Platform Parity Clauses are a No-Go

In 2020, the CCI had initiated investigations into allegations of abuse of dominance against MakeMyTrip India Private Limited and Go-Ibibo (India’s leading online travel companies) (collectively, **MMT-Go**). The allegations referred to confidential exclusivity agreements between MMT-Go and Oravel Stays Private Limited (**OYO**) (an Indian multinational hospitality chain of leased and franchised hotels, homes and living spaces) wherein MMT-Go agreed to provide

preferential treatment to OYO on its platform. Additionally, it was alleged that MMT-Go had entered price parity arrangements with hotel partners, barring them from selling rooms on other platforms at lower prices. The investigations were initiated on complaints filed by the Federation of Hotel & Restaurant Associations of India and Treebo (a budget hotel brand).

The CCI concluded that wide parity obligations and exclusivity conditions imposed by MMT-Go were abuses of dominance for being unfair and discriminatory (Case No. 14 of 2019 and .01 of 2020). It observed that narrow parity may be justified in light of free riding concerns since free riding of hotels on the investment made by the online platforms would be detrimental to the business of MMT-Go and other online travel agencies. The penalty on MMT-Go was INR 2.23 billion (approx. USD 27 million/EUR 25.6 million). The CCI also passed directions which included the removal of the price and room availability parity obligations, eliminating exclusivity conditions, and provision of access of the MMT-Go platforms to hotels in a non-discriminatory manner.

Separately, the CCI found that the commercial arrangement between MMT-Go and OYO which was in the nature of ‘*refusal to deal*’ led to the delisting of FabHotels, Treebo, and other independent hotels. OYO was also penalised INR 1.68 billion (approx. USD 20 million / EUR 18.96 million) for the exclusive arrangements between MMT-Go and OYO.

A similar investigation has also been directed in 2022 against the online ticketing platform, BookMyShow, to investigate the allegations of abuse of dominance by the platform and exclusivity and refusal to deal with arrangements between BookMyShow and certain theatres/multiplexes (Case No.46 of 2021).

Google penalized by CCI

The monetary penalties and directions imposed by the CCI on Google in two major orders also made headlines in 2022. The CCI imposed a provisional penalty of INR 9.36 billion (approx. USD 113 million / EUR 116 million) on Google for allegedly abusing its dominant position with respect to its Play Store billing system, policies, and UPI application (i.e., GPay) (Case No. 14 of 2021). This is the first time any antitrust regulator has passed a formal order in relation to Google’s exclusive imposition of its billing system and Google’s service fee. The service fee was not found to be abusive. The CCI appears to have exceeded its mandate by passing sweeping ex-ante directions (not necessarily on topics that were the subject matter of the investigation).

In another investigation against Google around its Android ecosystem, the CCI imposed a provisional penalty of INR 13.37 billion (approx. USD 162 million / EUR 153 million) on Google for abusing its dominance in multiple markets relating to the Android mobile device ecosystem (Case No. 39 of 2018). Interestingly, the CCI has identified almost identical issues as the European Commission (EC) did in the 2018 [Google Android decision](#). However, the CCI’s directions are more intrusive than the EC’s Google Android decision.

More Developments in the Digital Sector

Google is facing another investigation for the alleged imposition of unfair and opaque revenue

generation terms in online digital advertising intermediation services (Cases No. 41 of 2021, No. 10 of 2022 and No. 36 of 2022). Food delivery giants Zomato Limited and Bundl Technologies Private Limited (i.e., Swiggy) are being investigated by the CCI for allegations of price parity arrangements, data masking, and platform neutrality (Case No. 16 of 2021). The CCI conducted raids on the premises of various sellers of online platforms, Amazon and Flipkart, investigating exclusive vertical agreements with certain sellers operating on their platforms.

Dawn Raids

In addition to the raid on Amazon and Flipkart, the CCI conducted four other raids on entities operating in different sectors in 2022:

- In March, simultaneous raids were conducted on the premises of at least four tyre manufacturers, for allegations of cartelization.
- In April, raids were conducted on the premises of different mining companies based in West Bengal and Jharkhand, following allegations of bid-rigging in relation to coal mining tenders floated by Bharat Coking Coal Limited, a public sector undertaking.
- In December, various small-scale steel companies in West Bengal, Punjab, Tamil Nadu, and New Delhi were raided following allegations of price collusion with respect to construction-related steel products.
- Another raid was conducted in December at the premises of prominent cement companies in Southern India to investigate possible competition law irregularities.

Market studies and Updated FAQ's

In September 2022, the CCI released a market study on the '*Taxi and Cab-Aggregator Industry*' (**Report**) which focused on major cab aggregators operating in India such as Ola and Uber (**Cab Aggregators**). A controlled experiment was conducted to understand the dynamic pricing of the Cab Aggregators. The Report found that surge pricing was based on demand and supply and possibly, individual rider attributes. As per the Report, there is a need for transparency in the algorithms and the nature of data processed by the Cab Aggregators, to fix the information asymmetry between Cab Aggregators and their drivers.

In October 2022, the CCI published another market study on the '*Film Distribution Chain in India*'. It identified bargaining power imbalance, lack of transparency in box office revenue collections, and the virtual print fee acting as a barrier to entry for producers wishing to exhibit their movies theatrically, as the major competition law issues relating to multiplexes, film producers, and distributors. The CCI made notable recommendations such as tailor-made agreements between producers and exhibitors to accommodate the type of content being showcased, negotiable deal-making by multiplexes, fair and reasonable terms to producers for promotions, no restraint on trade in the exhibition by multiplexes, adoption of a standardized and audited box office monitoring systems, etc.

The '*Market study on e-commerce in India*' conducted in 2020, prompted the inquiry into the e-commerce platforms, Amazon and Flipkart.

The CCI is expected to publish its market study on the common ownership of shares by private equity funds in different portfolio companies. The CCI's findings are awaited and are expected to clarify the issues arising out of common ownership in portfolio companies operating in the same sector. India is one of the few jurisdictions that require the notification of minority acquisitions including the acquisition of control (rather broadly defined) in the target.

The CCI publishes 'Frequently Asked Questions' (**FAQs**) on its website, clarifying various procedural and legal aspects of Indian competition law. In 2022, it revised the FAQs for the first time in five years, with a few notable additions to the existing regime.

Updated Confidentiality Regime

In April 2022, the CCI notified amendments to the Competition Commission of India (General) Regulations, 2009. Post the amendment, parties to an enforcement proceeding are required to submit undertakings certifying that disclosure of confidential information/documents would cause commercial or competitive harm. A false undertaking will invite a penalty of up to INR 10 million (approx. USD 0.12 million / EUR 0.11 million) and the CCI may also revoke the confidential treatment of the documents/information.

Previously, there was no provision for the levy of fines, and confidentiality claims were taken at face value.

In line with global practice, the CCI has issued guidelines for setting up '*confidentiality rings*', for access to confidential information/documents by authorized representatives of the opposite parties in ongoing proceedings. Informants (unless the CCI directs otherwise) and third parties are not members of such confidentiality rings.

Conclusion

The CCI is committed to proactively reigning in anti-competitive conduct and continues to demonstrate a facilitative approach to merger review (balancing that with increased scrutiny of transaction documents and merger enforcement). Its decisions, particularly in the technology/digital sector have outlined novel jurisprudence, which is expected to mature in the future.

The enactment of the Bill into law (hopefully, paying heed to the recommendations of the SCF) will be a step towards greater sophistication in the process of competition law enforcement in India.

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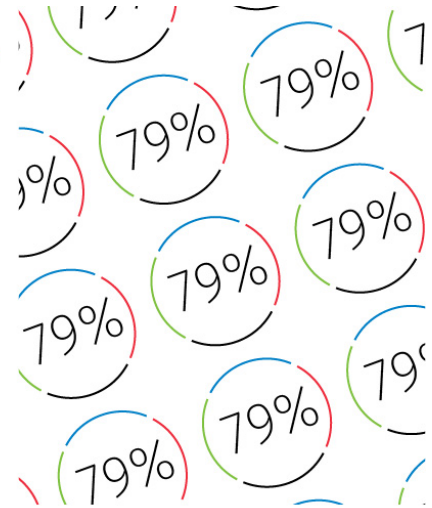
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