



## Indian Competition Law Roundup: April 2022

In this Roundup, we highlight important developments in Indian competition law in April 2022. In summary:

- The Competition Commission of India (CCI) found that several suppliers of bushes used in railway rolling stock had cartelised while participating in tenders floated by Indian Railways. Four of the eleven suppliers involved made leniency applications and received lesser penalties.
- The CCI directed an investigation into allegations of anti-competitive vertical agreements involving online food delivery platforms.
- The CCI dismissed at *prima facie* stage allegations that online food platform Zomato had abused a dominant position in relation to its cancellation policy and terms on exclusion of liability.
- The CCI amended its confidentiality regime, introducing self-certification of confidentiality claims, treating certain material as confidential by default and introducing confidentiality rings.
- The Bombay High Court addressed the question of parallel investigations by the CCI and sectoral regulators.
- In clearing a transaction in the IT and ITES sector, the CCI made it clear that notifying parties could not apply limiting criteria in determining overlaps involving investee companies and had to provide details of other pipeline acquisitions where these were not too speculative.
- The CCI amended, revamped and simplified the long form notification,

i.e. Form II, which is used for notifying combinations under the Competition Act, 2002 (*Competition Act*), where the parties have more than 15% combined market shares in horizontally overlapping markets or more than 25% (individual or combined) market shares in vertically related markets.

### Horizontal Agreements

#### *CCI Finds Cartel in Supply of Bushes to Indian Railways*

The CCI found that a number of suppliers of bushes used in bogie mounted brake cylinder rail coaches had cartelised while participating in tenders floated by Indian Railways.<sup>1</sup> The CCI found that the suppliers had engaged in price-fixing, in controlling supply, in market sharing through allocation of tenders and in bid rigging. It noted that the cartel conduct was presumed to have an appreciable adverse effect on competition (AAEC) and rejected arguments that the parties had been forced to engage in such activity due to the market structure, in order to avoid losses and get a fair share of business from Indian Railways.

The CCI imposed penalties on the suppliers based on 5% of their average turnover generated from the sale of the bushes concerned for the last three preceding financial years. Several complicit individuals were also penalised on the basis of 5% of

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<sup>1</sup> Chief Materials Manager, North Western Railway v. Moulded Fibreglass Products and Others, CCI, Reference Case No. 03 of 2018 (4 April 2022).





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their average income over the same period. Four of the eleven suppliers involved had applied for leniency and, taking into account the stages at which they had applied for leniency and the added value provided, they and relevant individuals respectively received reductions of 80%, 40%, 30% and 20% of the penalties payable. It should be noted that one applicant had disclosed the existence of another cartel (Leniency Plus) and this factor was considered in setting the level of reduction.

## Vertical Agreements

### CCI Directs Investigation of Online Food Delivery Platforms

Further to a complaint by the *National Restaurant Association of India (NRAI)*, the CCI considered a number of allegations against online food delivery platforms *Zomato Limited (Zomato)* and *Bundl Technologies Private Limited (Swiggy)*.<sup>2</sup> Observing that the two operated as online intermediaries for food ordering and delivery, the CCI found that allegations in relation to preferential treatment of their own cloud kitchen brands and restaurant partners and exclusivity for certain partners merited investigation under Section 3(4) read with Section 3(1) of the Competition Act (dealing with anti-competitive vertical agreements). It also considered that the price parity clauses of the platforms merited further investigation. However, the CCI rejected allegations of bundling and of unfair and one-sided contracts. Finding a *prima facie* case with respect to some of the conduct of Zomato and Swiggy, the CCI directed the Director General (DG) to investigate the matter.

## Abuse of Dominance

### CCI Finds No Abuse of Dominant Position by Zomato

Separately, the CCI dismissed at *prima facie* stage allegations that Zomato had abused its dominant position in relation to its cancellation policy and the exclusion of liability in its terms of service.<sup>3</sup> Without explicitly defining the relevant market, the CCI noted observations in another case (discussed above) that Zomato and another platform operator, Swiggy, were “online food delivery platforms operating as *online intermediaries for food ordering and delivery*” and that the two intermediaries were competing with each other in the same segment in various ways.<sup>4</sup> The CCI also found that the Informant had failed to refute evidence furnished by Zomato showing that there was no abuse.

## Procedures

### CCI Overhauls Confidentiality Regime

The CCI made significant changes to the confidentiality regime to reduce delays in treating confidentiality claims and securing the rights of the defence.<sup>5</sup> The key changes were: (i) the introduction of self-certification of confidentiality claims, replacing the earlier regime of assessment by the CCI/DG and shifting the burden onto parties claiming confidentiality; (ii) the treatment of certain documents/materials as confidential by default; and (iii) the introduction of confidentiality rings, balancing the need to preserve confidentiality whilst providing an effective right of defence.

## Competition Law and Sectoral Regulation

### Bombay High Court Addresses Parallel Investigations

In passing orders in two sets of cases, the Bombay High Court (*High Court*) addressed the question of parallel investigation of matters by the CCI and sectoral regulators.

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<sup>2</sup> *NRAI v. Zomato and Swiggy*, CCI, Case No. 16 of 2021 (4 April 2022) (*NRAI case*).

<sup>3</sup> *Rohit Arora v. Zomato*, CCI, Case No. 54 of 2020 (4 April 2022).

<sup>4</sup> *NRAI case* (n. 2).

<sup>5</sup> The Competition Commission of India (General) Amendment Regulations, 2022 (No. 2 of 2022) (8 April 2022). Please see our April 2022 special client alert for a more detailed analysis.



In the first case,<sup>6</sup> the High Court considered challenges by *Asianet Star Communications Private Limited (Asianet)* and others to a CCI order finding a *prima facie* violation of Section 4 of the Competition Act and directing an investigation by the DG.<sup>7</sup> Asianet argued that, following the 2019 judgment of the Supreme Court in the *Bharti Airtel* case,<sup>8</sup> the complaint had first to be heard by the sectoral tribunal, the Telecom Disputes Settlement and Appellate Tribunal. This was contested by the CCI. On 6 April, the High Court passed an interim order listing the matter for hearing on 8 June 2022. It left the jurisdictional question entirely open for a later decision and did not express a *prima facie* view. In the interim, it prohibited the CCI from passing further orders or to adjudicate further on the complaint or to permit or direct coercive actions against Asianet. It also required the information collected by the DG to be kept confidential. However, the petitioners were to provide the DG with the documents and information called for, on a without prejudice and no-equities basis.

In the second case,<sup>9</sup> the High Court considered challenges to a CCI order finding *prima facie* that a number of trusteeship companies had cartelised and ordering an investigation by the DG. It was argued that, as the sectoral regulator, the Securities & Exchange Board of India (SEBI), was investigating the matter and that, on the basis of the *Bharti Airtel* case, the CCI should hold the CCI action in abeyance. In its 8 April order, the High Court considered that a risk of conflicting orders was a distinct possibility if parallel investigations were to proceed. It would be preferable, and in keeping with the decision of the Supreme court, if SEBI were given a reasonable chance to arrive at a *prima facie* view within a reasonable time period. The High Court also noted that, if SEBI

concluded it did not need to make a final order or that the matter should proceed to the CCI, the material it had obtained would then be transmitted to the CCI to save time in its investigation. On 11 April, the High Court issued a further order allowing SEBI until 30 June 2022 to complete its enquiries and to form its *prima facie* opinion. The High Court also requested the CCI and DG to refrain from taking any coercive action, adjudicating further or taking any further steps on the matter.

## Merger Control

### *CCI Clears Coral Blue Transaction but Identifies Shortcomings in Notification*

The CCI cleared the proposed acquisition by *Coral Blue Investment Pte. Ltd. (Acquirer)* of 13.75% of the preferred stock of *Sutherland Global Holdings Inc.*<sup>10</sup> In considering the transaction, which largely concerned business process outsourcing in the IT and ITES sector, the CCI flagged two issues in the notification. First, in identifying overlaps, the Acquirer group had excluded investee companies which did not identify as IT companies, had small incidental/incidental IT services revenue, or had minimal amounts of Indian revenue. The CCI stated that it did not accept such limiting criteria. The factors identified might be relevant for the competition assessment but did not dispense with the (detailed) overlap identification requirement. Second, affiliates of the Acquirer group had entered into a binding agreement to acquire a shareholding in another company operating in the IT and ITES sector, but details of this were not furnished for the assessment of the transaction under review. The CCI stated that, in accordance with its practice on pipeline acquisitions, the notifying party had to furnish details of the activity of the target in the other transaction unless it was too speculative.

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<sup>6</sup> *Asianet v. CCI and Others*, Bombay High Court, Writ Petition No. 3755 of 2002, etc. (6 April 2022).

<sup>7</sup> *Asianet Digital Network (P) Ltd. v. Star India Private Limited and Others*, CCI, Case No. 09 of 2022 (28 February 2022).

<sup>8</sup> *CCI v. Bharti Airtel Limited and Others*, Supreme Court of India, 2019 (2) SCC 521.

<sup>9</sup> *Trustees Association of India v. CCI and Others*, Bombay High Court, Writ Petition No. 3781 of 2022, etc. (8 & 11 April 2022).

<sup>10</sup> *Coral Blue Investment Pte. Ltd.*, CCI, Combination Registration No. C-2021/11/882 (10 January 2022).



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## CCI Makes Changes to Form II

The CCI introduced changes to Form II, the long-form notification form recommended to be filed for combinations where the parties have more than 15% combined market shares in horizontally overlapping markets or more than 25% (individual or combined) market shares in vertically related markets.<sup>11</sup> The CCI did away with several information / data requests that were not very relevant for its review of the

market dynamics in relation to a transaction. However, it increased the duration of market-facing data from three to five years. It also required a detailed analysis of vertical / complementary activities and details of shareholdings/rights held in any other entity in the overlapping, vertical or complementary markets. The new rules were to apply to any Form II filed on or after 1 May 2022.

<sup>11</sup> Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2022 (31 March 2022). See, further, our April 2022 special client alert on the changes.

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