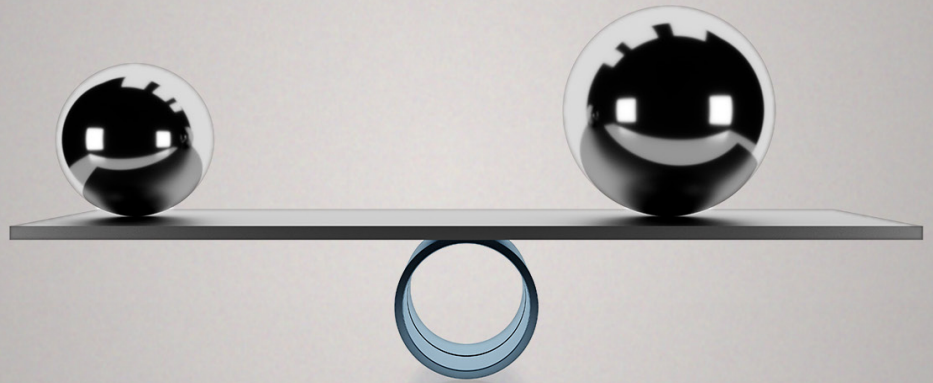


June 2024



Indian Competition Law Roundup February to May 2024

In this Roundup, we highlight some important developments in Indian competition law and policy from February to May 2024. In summary:

- The National Company Law Appellate Tribunal (NCLAT) upheld the Competition Commission of India's (CCI) order finding that *Delicasy* had participated in bid rigging and directing it to cease and desist in such activities. However, it reduced the penalty – exceptionally based on total rather than relevant turnover - as *Delicasy* had only a supporting role in the cartel.
- The CCI directed an investigation into *Google's* billing policies for in-app purchases and paid apps, finding *prima facie* that *Google* had abused its dominant position in the markets for licensable operating systems (OS) for smart mobile devices in India and for apps stores for Android smart mobile OS in India. It rejected the informant's applications for interim relief.
- The CCI issued regulations for commitments and settlements, applying to new cases involving vertical agreements and a residual class of anticompetitive agreements as well as abuses of dominant position. The new regime does not cover cartels, which are subject to a lesser penalty regime.
- The CCI amended its General Regulations, requiring confidentiality claims to be provided in the form of an affidavit and changing the timelines for the confidentiality ring process, general inspections, and the grant of certified copies. Fees for inspection of records have been increased.
- The High Court of Delhi set aside a CCI order directing payment of interest on outstanding penalties as the CCI had failed to use the procedure prescribed in its own regulations.
- The CCI published long-awaited guidelines on the methodologies for determining penalties under various sections of the Competition Act, 2002 (*Competition Act*). It also issued regulations on determining turnover and income for the purpose of imposing penalties.
- The CCI also issued new regulations on lesser penalties, including the introduction of provisions on 'lesser penalty plus' and the ability of applicants to withdraw lesser penalty/lesser penalty plus applications.
- The Government of India increased thresholds for the *de minimis* exemption and increased the assets and turnover notification thresholds under Section 5 of the Competition Act.
- The Ministry of Corporate Affairs published draft rules in relation to Green Channel filings, the *de minimis* exemption and exemptions from filing (to replace the current Schedule 1 exemptions).
- The CCI cleared the acquisition by *Minda* of an additional stake in *Pricol* after it had disposed of its original stake.
- In clearing another transaction, the CCI sounded a warning bell on identifying overlaps. Parties could not limit the identification of overlaps by restricting them to affiliates of parties based on sectors/industries, size, revenue contributions and other limiting factors.
- The Report of the Committee on Digital Competition Law was published, together with a draft Digital Competition Bill providing for a separate *ex ante* law for digital markets.
- The CCI published a request for proposals to undertake a market study on 'Artificial Intelligence and Competition'.



Competition Matters

Cartels

NCLAT Upholds CCI Bid Rigging Order but Reduces Penalty

The NCLAT¹ upheld the CCI's order finding that *Delicasy Continental Private Limited (Delicasy)* was involved in market sharing and bid rigging under Section 3(3) read with section 3(1) of the Competition Act and directing it to cease and desist from its anti-competitive activities. The NCLAT held that, as Delicasy and other cartel participants had no income from the services in question (i.e., soil testing), the CCI had correctly based the penalty on total turnover rather than relevant turnover. The NCLAT noted that Delicasy was, in providing cover bids, only in a supporting role in the cartel and that the penalty in such cases should be less than for those in the main role. The penalty was therefore reduced from 5% to 3% of Delicasy's average annual turnover for the last 3 years.

Abuse of Dominant Position

CCI Directs Investigation into Google's Billing Policies

On 15 March, the CCI issued an order directing an investigation into Google's billing policies for in-app purchases and paid apps.² A number of informants argued that Google's payment policies in relation to its proprietary app store, Google Play Store, were in violation of Section 4 of the Competition Act amounting to an abuse of a dominant position. Following its approach in the 2022 *Google Android*³ and *Google Play Orders*⁴, the CCI *prima facie* found that Google was dominant in the markets for licensable operating systems (OS) for smart mobile devices in India and for apps stores for Android smart mobile OS in India. It was of the *prima facie* view that Google had breached various provisions of Section 4 of the Competition Act, by imposing an unfair and excessive commission, constraining the growth of the app market, denying market access to app developers and implementing its policies in a discriminatory manner. The CCI rejected Google's submissions that the informants were reagitating issues already decided/being decided in the *Google Play* case and later proceedings.

In a separate order,⁵ the CCI rejected applications by the informants for interim relief. It found that there was no clear link between the relief sought and the issues under investigation and that Google could not be required to offer the Google Play Store for free. The order further stated that the high standards for making a *prima facie* case for interim relief had not been met, and that it had not been shown that there would be irreparable harm that could not be addressed by monetary compensation or that the balance of convenience lay in favour of the informants.

Competition Procedures

Commitment and Settlements Regime Enters into Force

On 6 March, the CCI issued regulations for commitments and settlements.⁶ The new provisions apply to vertical agreements and a residual class of anticompetitive agreements under Section 3(4), and abuses of dominant position under Section 4 of the Competition Act. They do not apply to cartels. The Competition Commission of India (Commitment) Regulations, 2024⁷ provide the mechanism through which an entity, against whom an investigation for anticompetitive agreements or abuse of dominant position has been initiated, can apply to the CCI and offer commitments to address the competition concerns identified in the CCI's *prima facie* order. The Competition Commission of India (Settlement) Regulations, 2024⁸ provide the mechanism through which an entity, against whom an investigation for anticompetitive agreements or abuse of dominant position has been concluded, can apply to the CCI and offer a settlement to address the competition concerns identified by the Director General in the investigation report.

Enterprises being investigated can avoid lengthy and costly litigation by offering commitments or settlements. The new provisions cover only 'new' cases; parties in ongoing cases at the time of the regulations' entry into force will unfortunately not be able to avail of the new regime.

1 *M/s Delicasy Continental Private Limited v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 32 of 2022 (31 May 2024).

2 *People Interactive India Private Limited v. Alphabet Inc. and Others, etc.*, CCI, Case No. 37 of 2022, etc. (Section 26 (1) Order, 15 March 2024).

3 *Umar Javeed and Others v. Google LLC and Others*, CCI, Case No. 39 of 2018 (20 October 2022).

4 *XYZ (confidential) and Others v. Alphabet Inc. and Others*, CCI, Case No. 07 of 2020 and Cases No. 14 and 35 of 2021 (25 October 2022).

5 *People Interactive India Private Limited v. Alphabet Inc. and Others, etc.*, CCI, Case No. 37 of 2022, etc. (Section 33 Order, 20 March 2024).

6 See, for further detail, our March 2024 briefing on the new regulations: <https://www.amsshardul.com/wp-content/uploads/2024/03/Competition-Law-Update-March-2024.pdf>

7 <https://cci.gov.in/images/whatsnew/en/gazette-notification-published-on-06-march-2024-regarding-the-competition-commission-of-india-co1709739461.pdf>

8 <https://cci.gov.in/images/whatsnew/en/gazette-notification-published-on-06-march-2024-regarding-the-competition-commission-of-india-se1709738701.pdf>



CCI Amends General Regulations

On 10 May, the CCI amended⁹ its General Regulations,¹⁰ introducing a number of changes in relation to making confidentiality claims, the timelines for setting up and operating confidentiality rings, the timelines for general inspections and grant of certified copies, and fees for inspecting records.

In relation to confidentiality claims, the requirement to provide a simple undertaking has been replaced by a requirement to provide an undertaking in the form of an affidavit.

Owing to delays by parties in completing the requirements for setting up and operating confidentiality rings, the CCI has tightened the timelines. Requests made after receipt of the non-confidential version of the investigation report must be submitted within 10 days (extendable for cause by 7 days). Undertakings relating to inclusion in the confidentiality ring must be submitted in the form of an affidavit within 10 days of receipt of the order setting up the confidentiality ring (extendable by 5 days). Applications for inspections must be made within 7 days of these undertakings, with inspections to be conducted within 21 days of allowing the request (extendable by 7 days). Applications for certified copies must be made within 7 days of inspection. The CCI must supply certified copies within 14 days of receiving the application.

Timelines for general inspections and grant of certified copies of confidential documents shall be the same as those stipulated for inspections and certified copies in confidentiality ring proceedings.

Fees for inspection of records have increased from INR 1,000 to INR 2,500 per day per case. In a small but significant concession, the CCI has increased the time allotted for each inspection from one hour to two hours.

Penalties

High Court of Delhi Sets Aside CCI Order for Failure to Follow Procedural Requirements

On 26 April, the High Court of Delhi (*High Court*) held that, in making an order directing Geep Industries (India) Private Limited and others to deposit interest on an outstanding

penalty amount for a nearly five-year period, the CCI had failed to follow the procedure set out in the Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations 2011¹¹. Regulation 3(1) required the CCI to issue a demand notice in a particular form and the High Court held that its failure to do so meant that interest was not leviable. The case demonstrates the importance of the CCI following to the letter the procedures set out in its own regulations.

CCI Publishes Guidance on Determination of Penalties

On 6 March, the CCI published guidelines on the determination of monetary penalties to be levied on enterprises or persons for contravention of the Competition Act.¹² These have been made in pursuance of Section 64B(1) read with Section 64B(3) of the Competition Act, provisions introduced by the Competition (Amendment) Act, 2023. These set out the methodology for determining penalties under various sections of the Competition Act. It should be noted that, for the purposes of determining penalties for enterprises under Section 27(b) of the Competition Act, the CCI will generally have regard to *relevant* and not total turnover or income. Where this is not feasible, the CCI may consider *global* turnover for determining the amount of penalty. The CCI may divert from the guidelines considering the particularities of a given case and in exceptional circumstances; in certain cases, including penalties under Section 27(b) of the Competition Act, it must record in writing the reasons for such divergence.

CCI Issues Regulation on Determining Turnover and Income for Purpose of Imposing Penalties

At the same time, the CCI issued regulations for the determination of turnover and income of enterprises for the purposes of Section 27(b) of the Competition Act and of income of individuals for the purposes of Sections 27 and 48 of the Competition Act.¹³

New Lesser Penalty Regulations

The CCI also issued new regulations on lesser penalties. The Competition Commission of India (Lesser Penalty) Regulations, 2024¹⁴ repeal and replace the 2019 regulations. Key changes, introduced by the Competition (Amendment) Act, include the introduction of 'lesser penalty plus', enabling lesser penalty applicants in respect of one cartel to get an additional

⁹ The Competition Commission of India (General) Amendment Regulations, 2024 (No. 06 of 2024).

¹⁰ Competition Commission of India (General Regulations), 2009.

¹¹ *Geep Industries (India) Private Limited and Others v Competition Commission of India*, High Court of Delhi, W.P.(C) 10332/2023 & CM APPL. 40030/2023 (26 April 2024).

¹² <https://www.cci.gov.in/images/whatsnew/en/the-competition-commission-of-india-determination-of-monetary-penalty-guidelines-20241709736785.pdf>. See, for further detail, our March 2024 briefing on the new regulations: <https://www.amsshardul.com/wp-content/uploads/2024/03/Competition-Law-Update-March-2024.pdf>.

¹³ <https://www.cci.gov.in/images/whatsnew/en/the-competition-commission-of-india-determination-of-turnover-or-income-regulations-20241709737056.pdf>.

¹⁴ <https://www.cci.gov.in/images/whatsnew/en/gazette1708451685.pdf>. For the CCI's General Statement, see <https://www.cci.gov.in/images/whatsnew/en/general-statement-cci-lesser-penalty-regulations-20241708451478.pdf>, and, for revised FAQs, see <https://www.cci.gov.in/images/whatsnew/en/faqs-on-cci-lp-regime1708500979.pdf>.



reduction in penalty for that cartel where they provide evidence about another cartel, and the ability to withdraw lesser penalty/lesser penalty plus applications.

Merger Control

Increase of Thresholds for The De Minimis Exemption

On 7 March, the Government of India by way of a notification upwardly revised the thresholds for the *de minimis* target based exemption (*Target Exemption*).¹⁵ These thresholds will apply until 7 March 2026. Combinations where the target enterprise has *either* (a) assets of not more than INR 450 crores (approx. USD 54.4 million, up from INR 350 crores or approx. USD 42.3 million) in India *or* (b) turnover of not more than INR 1,250 crores (approx. USD 151.1 million, up from INR 1,000 crores or approx. USD 120.9 million) in India are exempt from the requirement to notify to the CCI. These conditions are in the alternative, so the exemption from notification will apply if *either* the assets in India *or* the turnover in India are below these thresholds.

Assets and Turnover Notification Thresholds Increased

The Government of India also increased the assets and turnover notification thresholds under Section 5 of the Competition Act by 150%.¹⁶

Draft Rules Published by The Ministry of Corporate Affairs

In March, the Ministry of Corporate Affairs published draft rules in relation to Green Channel filings, the *de minimis* target based exemption and exemptions from filing.¹⁷ The draft Green Channel rules largely replicate the current rules, though it is proposed to change the ‘affiliate’ test to cover the right or ability to access commercially sensitive information of the enterprise. The draft *de minimis* rules mirror the revised target exemption (see above) and are designed to codify the notification into rules. The draft rules on exemptions from filing will replace the exemptions currently listed in Schedule 1 to the Combination Regulations. Amongst other matters, it is proposed to revamp the minority share acquisition exemption, covering acquisitions ‘in the ordinary course of business’ and to introduce an exemption for the acquisition of an incremental shareholding by an existing shareholder where the shareholding will be less than 25% before and after the transaction.

Minda/Pricol Transaction Cleared After Sale of Existing Stake

In February, the CCI cleared the acquisition by *Minda Corporation Limited (Minda)* of an additional 8.79% equity shareholding in *Pricol Limited (Pricol)*.¹⁸ Minda had earlier acquired a 15.70% shareholding in Pricol. Both parties manufactured auto-components and exhibited horizontal overlaps. The CCI formed a *prima facie* view that the proposed acquisition was likely to have an appreciable adverse effect on competition (AAEC) in India and issued a show-cause notice (SCN) to the parties. In its response to the SCN, Minda stated that it had sold its existing 15.70% stake in Pricol and that approval was sought only for the acquisition of the 8.79% shareholding with the acquisition of such rights that were exercisable by ordinary shareholders to the extent of their respective shareholdings. The CCI decided not to commence a Phase II investigation as the *prima facie* concerns of a likely AAEC had become infructuous. It therefore approved the combination.

CCI Sounds Warning Bell on Identifying Overlaps

In March, the CCI cleared the acquisition by investment firms *TPG Growth V SF Markets PTE. Ltd.* and *Waverly PTE. Ltd. (Waverly)* of shares in *Asia Healthcare Holdings PTE. Ltd (AHH)* and the subsequent acquisition by AHH of a majority shareholding in the *Asian Institute of Nephrology and Urology Private Limited*.¹⁹ Waverly is part of the GIC Group. In relation to overlaps, the parties had submitted, based on the scope of services and limited nexus to India, that the GIC Group had not considered investee companies that: (a) had Indian revenues below 2 crores; (b) were not engaged in healthcare services or operating healthcare facilities including hospitals; (c) had small/incidental revenues from specified services including those pertaining to urology and nephrology; and (d) were purely debt investments. The CCI noted that it had not specified any of these criteria for identifying overlaps. The presence of overlaps was determined by the scope of the activities undertaken by the parties and was not influenced by categorising the enterprise into a specific sector or industry, its size, revenue contribution from a particular activity, etc. Such factors might be relevant in assessing the effect on competition but could not negate the need to identify overlaps. The CCI found that, though there were horizontal overlaps and vertical linkages, there was no likelihood of an AAEC in India. However, parties to notifiable transactions have been warned to make full disclosure of all overlaps.

¹⁵ <https://www.cci.gov.in/images/whatsnew/en/1131e1710307257.pdf>

¹⁶ <https://www.cci.gov.in/images/whatsnew/en/1130e1710307182.pdf>

¹⁷ See our briefing on the draft rules: <https://www.amsshardul.com/wp-content/uploads/2024/03/Draft-Rules-relating-to-Combinations-released-for-Public-Comments-V1.pdf>

¹⁸ *Minda Corporation Limited*, CCI, Combination Registration No. C-2023/05/1025 (20 February 2024).

¹⁹ *TPG Growth V SF Markets PTE. Ltd., Waverly PTE. Ltd., Asia Healthcare Holdings PTE. Ltd.*, CCI, Combination Registration No. C-2025/01/1102 (12 March 2024).



Digital Competition Law and Policy

Report of the Committee on Digital Competition Law and the Draft Competition Bill

On 12 March, the Ministry of Corporate Affairs published the Report of the Committee on Digital Competition Law (Committee) together with a draft of the Digital Competition Bill, 2024.²⁰ After considering a number of anticompetitive practices undertaken by large digital enterprises and the limitations of *ex post* enforcement under Sections 3 and 4 of the Competition Act, the Committee recommended a separate *ex ante* law for digital markets. To this end, the Committee proposed that the draft Digital Competition Bill should apply to a pre-identified list of Core Digital Services (CDS) susceptible to concentration, covering online search engines, online social networking services, video-sharing platform services, interpersonal communication services, operating systems, web browsers, cloud services, advertising services and online intermediation services. An enterprise crossing specified quantitative thresholds or meeting qualitative criteria will be designated as a Systemically Significant Digital Enterprise (SSDE). Provision is also made for the designation of Associate Digital Enterprises (ADEs) belonging to the same group as a SSDE.

²⁰ <https://www.mca.gov.in/bin/dms/getdocument?mids=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>. A detailed summary of the Report and draft Bill is available at: <https://www.amsshardul.com/wp-content/uploads/2024/03/Competition-Law-Update-Summary-of-the-Report-of-the-Committee-on-Digital.pdf>

²¹ <https://cci.gov.in/images/whatsnew/en/tendernotice-1-11713759672.pdf>

The draft Bill envisages a number of general obligations of the SSCE and ADE in all CDS, covering self-preferencing, data usage, restricting third party applications, anti-steering and tying/bundling. These broad obligations will be addressed by CCI regulations taking into account pro-competitive effects. The CCI may also specify different conduct requirements for enterprises following various business models. Provisions on the inquiry and appeal process, compensation actions, remedies and penalties are modelled on those in the Competition Act.

The consultation process ended in mid-May. It remains to be seen how the MCA will adapt the draft Bill to take account of comments from large digital players and other stakeholders in the digital space.

Market Study on AI and Competition

On 22 April, the CCI published a request for proposals to undertake a market study on 'Artificial Intelligence and Competition'.²¹ The study is intended to gather insights from all relevant stakeholders and to develop a comprehensive understanding of the evolving landscape of AI and the application of AI in markets in India.

COMPETITION LAW TEAM

Pallavi Shroff

Managing Partner
pallavi.shroff@AMSShardul.com

John Handoll

Senior Advisor – European
& Competition Law
john.handoll@AMSShardul.com

Naval Satarawala Chopra

Partner
naval.chopra@AMSShardul.com

Shweta Shroff Chopra

Partner
shweta.shroff@AMSShardul.com

Harman Singh Sandhu

Partner
harman.sandhu@AMSShardul.com

Manika Brar

Partner
manika.brar@AMSShardul.com

Aparna Mehra

Partner
aparna.mehra@AMSShardul.com

Gauri Chhabra

Partner
gauri.chhabra@AMSShardul.com

Yaman Verma

Partner
yaman.verma@AMSShardul.com

Rohan Arora

Partner
rohan.arora@AMSShardul.com

Aman Singh Sethi

Partner
aman.sethi@AMSShardul.com

Nitika Dwivedi

Partner
nitika.dwivedi@AMSShardul.com

Ritwik Bhattacharya

Partner
ritwik.bhattacharya@AMSShardul.com

Disclaimer

This is intended for general information purposes only. It is not a substitute for legal advice and is not the final opinion of the Firm. Readers should consult lawyers at the Firm for any specific legal or factual questions.