

CRITICAL COMPETITION

COMPETITION LAW NEWSLETTER

MAY, 2022

ENFORCEMENT

I. COMPETITION COMMISSION OF INDIA (CCI) DIRECTED AN INVESTIGATION AGAINST ZOMATO AND SWIGGY FOR ALLEGED ANTI-COMPETITIVE PRACTICES

The CCI directed an investigation against Zomato Limited (**Zomato**) and Bundl Technologies Private Limited (**Swiggy**) for alleged anti-competitive practices based on an information (complaint) filed by National Restaurant Association of India (**NRAI**). Zomato and Swiggy are logistics-enabled restaurant marketplaces and have features of a platform with 'search compare booking' and delivering option, providing their services to distinct but inter-dependent consumer groups, being restaurant partners (**RPs**) on one side, and the end-consumers ordering food on the other side. In the complaint filed before the CCI, NRAI alleged that both Zomato and Swiggy have violated the provisions of the Competition Act, 2002 (**Competition Act**) through the following conduct:

- Bundling of food delivery services with the food ordering services on their platforms.
- Data Masking, i.e., practice of Swiggy and Zomato to mask the consumer data shared with the RPs.
- Creation of an inherent conflict of interest as Zomato and Swiggy are engaging in a dual role on their platform where they list their own cloud kitchen brands exclusively on their platform, akin to private labels and alleged preferential treatment granted to such cloud kitchens on the platform.
- Imposition of unfair terms and conditions by Zomato and Swiggy in the contracts entered with the RPs.
- Exclusive arrangements with RPs through incentives, lower commissions etc.
- Imposition of price parity terms on the RPs, i.e., restricting the restaurants from charging lower prices or providing better terms on their websites or offline shops, as well as through any other sales channel, including other online food aggregator platforms.
- Charging of excessive commission from RPs.
- Deep discounting through schemes and incentives offered by them to customers.

Out of the numerous allegations made against Zomato and Swiggy, the CCI has directed an investigation against these platforms for alleged lack of platform neutrality, i.e., preferential treatment to customers in the downstream market in which the platforms have a commercial interest; exclusive arrangement with RPs through low commission and minimum guarantee; and imposition of price parity restrictions on the RP's listed on their platforms.

II. CCI DISMISSED A COMPLAINT AGAINST DEPARTMENT OF FOOD AND CIVIL SUPPLIES, GOVERNMENT OF PUNJAB, FOR ALLEGED ABUSE OF DOMINANCE

The CCI dismissed an information (complaint) filed against the Department of Food and Civil Supplies Consumer Affairs, Government of Punjab, for allegedly abusing its dominance by inserting clauses in the 'Transportation Policy for Food grains', which prohibits new entrants and bidders with insufficient experience from participating in the tender process. It was alleged that such clauses create a monopoly in favor of the big/old contractors in Punjab, and curbs healthy competition. The impugned clauses required the bidders to have a minimum of one year work experience in transportation of food grains, as well as a minimum turnover in any one of the previous three financial years.



The CCI dismissed the complaint and noted that a procurer, as a consumer can stipulate certain technical specifications/ conditions/ clauses in the tender document as per its requirements which by themselves cannot be deemed to be anti-competitive.

III. CCI LEVIED PENALTY FOR CARTELISATION RELATED TO THE INDIAN RAILWAYS' TENDER FOR MOULDED FIBREGLASS PRODUCTS

The CCI levied a penalty on eleven entities for cartelization in relation to Indian Railways' bidding process for the procurement of High-Performance Polyamide (HPPA) Bushes and Self-Lubricating Polyester Resin (SLPR) Bushes.

The CCI noted that the opposite parties entered into agreements to directly or indirectly determine prices, manipulate the bidding prices, control and limit the supply of HHPA/SLPR bushes and share the market by way of allocating geographical areas, in contravention of Section 3(3) of the Competition Act (which prohibits horizontal agreements).

Further, during the course of investigation, evidence was found in the form of price parallelism in various tenders across different railways; commonality of IP addresses; common login time/date of some of the opposite parties; common directorship/ partnership of some groups of parties; and e-mails as well as WhatsApp communications between representatives of various opposite parties.

The CCI considered the submissions made by the opposite parties, of which some were MSMEs and imposed a penalty @ 5% of their average turnover generated from the sale of HPPA/ SLPR bushes for the last three preceding financial years. A penalty was also imposed on the individuals involved @ 5% of the average income for the last three preceding financial years. The CCI also considered the lesser penalty applications of four of the opposite parties and the individuals involved and granted reductions on penalty ranging from 80% to 20%.

IV. CCI DISMISSED ALLEGATIONS PERTAINING TO ABUSE OF DOMINANCE BY ZOMATO

An information was filed before the CCI alleging that Zomato abused its dominant position by raising food delivery charges/delivery prices above the competitive level and by charging unfair, discriminatory (by altering algorithm) and exorbitant delivery charges from its users/consumers. It was further alleged that, by restricting food delivery services, Zomato is vertically restraining the restaurants from delivering food themselves and is restricting food delivery from unfavored restaurants by not assigning delivery executives. Moreover, Zomato used its dominance in the online food ordering market to enter into market for food delivery services by imposing its delivery services upon the restaurants.

The CCI noted that the grievance of the Informant primarily stemmed from three incidents cited in the Information pertaining to non-delivery of food, non-refund for food spillage and partial refund on cancellation, which the Informant averred to amount to abuse of dominance. The CCI noted that Zomato negated each of the incidents with evidence which was not refuted by the Informant. Further, the CCI held that Zomato does not *prima facie* appear to hold a dominant position.

V. CCI DISMISSED A COMPLAINT AGAINST MALTED MILK SUPPLIERS FOR BID RIGGING

An information (complaint) was filed against Continental Milkose India Limited (**Milkose**) alleging contravention of the provisions of the Competition Act for allegedly indulging in bid rigging. It was alleged that Milkose, M/s. KAG Industries (**KAG**) and Imperial Malts Limited (**Imperial**) cartelized in respect of tenders invited by the Army Purchase Organization, Quarter Master General Branch, Integrated Head Quarters, Indian Army for procurement of "Dry Food Rations/ Malted Milk Foods" over the past many years. The Informant averred before the CCI that Milkose and KAG are related entities, as both have the same set of



promoters and have common Director(s)/ Partner(s). Further, it was contended that Imperial participated in the said tenders as a cover bidder and has been regularly supplying malt to Milkose and KAG Industries.

The CCI dismissed the complaint on noting that several other players had also participated in these tenders and had secured contracts in the last ten years. Further, the CCI noted that in the absence of other material evidence, merely having common linkages between the bidders cannot itself be the sole basis to suggest meeting of minds between the bidders in the bidding process.

VI. CCI DISMISSED A COMPLAINT OF ANTI-COMPETITIVE CONDUCT AGAINST MERCEDES BENZ, RAJASREE MOTORS AND BRIDGEWAY MOTORS

The CCI dismissed an information (complaint) filed against Mercedes Benz - India (**Mercedes**), Rajasree Motors Private Limited (**Rajasree**) and Bridgeway Motors LLP (**Bridgeway**) for contravening provisions of Section 3 (anti-competitive agreements) of the Competition Act. Rajasree and Bridgeway are authorized dealers of Mercedes in the State of Kerala.

It was alleged that in 2017, based on the instructions of Mercedes, Rajasree and Bridgeway entered into an agreement with each other dividing the Kerala market into two on the basis of geographical segments. It had been alleged that the aim and purpose of such an agreement was to eliminate competition between each other and to maximize profits. As per the alleged agreement, either of the parties were restrained from marketing and selling their products in the other entities' territory. It was also submitted that Mercedes introduced a new Retail of the Future (**ROTF**) model whereby Mercedes would own the entire stock of its cars and sell them directly to customers through its showrooms and online sales portal. This differed from their current sales model, wherein dealers purchase stock from Mercedes and then sell it to the

customers. It was averred that this model disabled the dealerships from offering any discounts to the customers and also divided the Indian market wherein the dealerships of Mercedes are restrained from sale of cars in territories other than their relevant territories.

The CCI dismissed the information noting that the information was based on media reports and the Informant had not substantiated the allegations. In fact, even a copy of the dealership agreement had not been placed on record by the Informant. Further, the CCI noted that ROTF policy of Mercedes does not appear to be anti-competitive as it is for the Original Equipment Manufacturers (**OEMs**) to devise their distribution channels or sales mechanism. There is no obligation upon OEMs to sell their products only through dealers and the OEMs, if so desired, may sell their products through any innovative channel.

VII. CCI LEVIED A PENALTY FOR BID RIGGING IN TENDERS FOR SOIL SAMPLE TESTING

The CCI levied a penalty on nine entities for big rigging in the e-tenders invited by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing. Soil sample testing is the analysis of a soil sample to determine its nutrient content, composition, and other characteristics such as acidity and pH level.

The CCI observed that the evidence on record coupled with the statements of the individuals of the opposite parties pointed to their complicity in manipulating the tenders issued by the Department of Agriculture, Government of Uttar Pradesh. Further, even acts of forgery were resorted to in such processes, which spoke about the conduct of such opposite parties. The CCI also noted that certain opposite parties and their individuals had also resorted to the production and submission of fake invoices and grant of false certificates for making some of the opposite parties eligible for participating in the bid process so as to effectively act as cover bidders in respect of the winning



bidders. Some of the opposite parties did not even have prior experience and were later blacklisted.

The CCI imposed a penalty on the nine entities calculated @ 5% of the average of their turnover for three financial years, i.e., 2017-18, 2018-19 and 2019-20, and a penalty on the individuals involved calculated @ 5% of the average income of the three financial years i.e., 2017-18, 2018-19 and 2019-20.

COMBINATION ORDERS

I. CCI APPROVED THE ACQUISITION OF 9.99% SHAREHOLDING BY TANGENT ASIA HOLDINGS II PTE. LTD. IN SHRIRAM GENERAL INSURANCE COMPANY LIMITED

The CCI approved the acquisition of 9.99% shareholding of Shriram General Insurance Company Limited (SGIC) by Tangent Asia Holdings II Pte. Ltd. (Tangent) submitted under the Green Channel Route. Tangent is an investment holding company incorporated under the laws of Singapore, while SGIC is an Indian insurance provider.

II. CCI APPROVED THE ACQUISITION OF MINORITY STAKE IN BDR PHARMACEUTICALS BY MULTIPLES PRIVATE EQUITY FUND III

The CCI approved the acquisition of minority stake in BDR Pharmaceuticals Internationals Private Limited (BDR Pharmaceuticals) by Multiples Private Equity Fund III (Multiples Fund III), SRF Transnational Holdings Limited (SRF), Balkrishna Industries Limited (BIL), Dharmayug Investments Limited (DIL), QRG Investments and Holdings Limited (QRG) and 2 independent financial investors.

Multiples Fund III belongs to the Multiples group which is directly or indirectly engaged in sectors including film exhibition, financial services, banking, etc. in India. BIL, DIL, QRG and SRF are non-banking financial companies registered with the RBI. BDR Pharmaceuticals is a pharmaceutical company.

III. CCI APPROVED THE ACQUISITION OF MINORITY SHAREHOLDING IN HERO FINCORP LIMITED BY AHVF II HOLDINGS SINGAPORE II PTE. LTD

The CCI approved the acquisition of certain compulsorily convertible preference shares by AHVF II Holdings Singapore II Pte. Ltd (AVHF) in Hero FinCorp Limited (Hero), which upon conversion would represent a minority shareholding in Hero.

AVHF is a private limited company incorporated in Singapore which is owned by investment funds managed by affiliates of Apollo Management, L.P and its affiliates. Hero is an Indian entity engaged in the business of financing and related financial services.

DAWN RAID

As per media reports, on 28th April 2022, the office of the Director General (the investigative arm of the CCI), raided the offices of two top sellers of Amazon: Cloudtail and Appario, and top sellers of Walmart's Flipkart for alleged violations of domestic competition laws. These investigations are reportedly in furtherance of CCI's probe ordered in January 2020 pertaining to allegations of anti-competitive practices by Amazon and Flipkart such as deep discounting, preferential ranking, and exclusive partnerships with certain vendors.

OTHER MAJOR DEVELOPMENTS

I. CCI REVISES ITS CONFIDENTIALITY REGIME

The CCI has revised its confidentiality regime by amending Regulation 35 of the Competition Commission of India (General) Regulations, 2009. The key features of the revised confidentiality regime are set out below:

Self-Certification: Parties are now required to self-certify documents and/or information on which confidentiality is being sought and are required to set out cogent reasons for seeking such confidential treatment. The self-



certification undertaking is to be made by an authorized officer of the party confirming that: (i) such information is not available in the public domain; (ii) such information is known only to limited employees, suppliers, distributors, and others involved in the party's business, (iii) that adequate measures have been taken by the party to guard the secrecy of the information; (iv) that the information cannot be acquired or duplicated by others. Further, any party which furnishes a false undertaking is liable to be penalized in accordance with the provisions of the Competition Act.

Personal Information: All 'Personal Information' has been granted automatic protection under the revised confidentiality regime. Under the amended Regulation 35, any 'personal information' such as (i) documents/material obtained through search and seizure operations, (ii) e-mail dumps; (iii) call details records, or (iv) other material in the nature of personal information, would be marked as 'confidential' and kept separately by the CCI.

Confidentiality Ring: Under the revised confidentiality regime, the CCI may, if considered necessary or expedient, set up a 'Confidentiality Ring' which will comprise of authorized representatives of the parties, who would be able to access all confidential information, including the confidential version of the Director General's (DG) report, including documents/material obtained through the search and seizure, which have been relied upon in the confidential version of the DG report. The purpose of setting up the confidentiality ring is to allow parties, access to confidential information /documents of other parties, in order to defend themselves effectively. The members of the confidentiality ring will be required to submit an undertaking that information made accessible to them shall not be disclosed to any member outside of the confidentiality ring. Furthermore, the informant would not be included in the confidentiality ring unless deemed necessary by the CCI.

II. BOMBAY HIGH COURT RESTRAINS CCI FROM TAKING ANY COERCIVE ACTION AGAINST DISNEY STAR

The Bombay High Court has directed the CCI not to pass any further orders or direct any coercive actions against Star India (**Star**), Asianet Star Communications (**Asianet**) and Disney Broadcasting - India (**Disney**) until the hearing in June. The Bombay High Court in its order also stated that any information and documents supplied to the DG are not to be shared with or used by the CCI in any manner until the hearing in June.

Star, Asianet and Disney approached the Bombay High Court against an order of the CCI passed in February 2022, which directed an investigation under Section 26(1) of the Competition Act by the DG.

The CCI passed the order of investigation based on an information (complaint) filed by Asianet Digital Network Private Limited (**ADNPL**) alleging that Star, Asianet and Disney are providing a bouquet of channels to the Informant's competitors in the market at discriminatory discounted prices resulting in denial of market access, and in violation of TRAI's New Regulatory Framework, under which a broadcaster cannot offer discounts to distributors above a certain percentage and such discounts must be offered to all distributors in a fair, transparent and non-discriminatory manner.

III. BOMBAY HIGH COURT PUTS CCI'S INVESTIGATION INTO DEBT TRUSTEES ON HOLD

The Bombay High Court has also put on hold the CCI's investigation into suspected collusion on fees by trustee units of State Bank of India, Axis Bank and IDBI Bank. The CCI, in its order, noted that the Trustees Association of India (**TAI**), a body whose founding members are SBICAP Trustee Company, Axis Trustee and IDBI Trusteeship, had 'substantially' increased the fee for assisting companies in raising debt and prevented members for charging below a floor price, thereby affecting competition.



The Bombay High Court has directed the sectoral regulator, Securities and Exchange Board of India (SEBI) to

complete its probe by June 2022, until which the CCI investigation will remain on hold.

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