NOVEMBER 2024

CRITICAL COMPETITION

Competition Law Newsletter

Saraf and Partners is delighted to share with you the latest edition of the Firm's Competition Law Newsletter, titled '*Critical Competition*' (November 2024).

This edition offers a comprehensive update on the recent developments in the field of Competition Law in India. We invite all our valued readers to peruse this newsletter and gain valuable insights into the current state of the law.

SARAF AND PARTNERS
LAW OFFICES

In This Issue

- The CCI directs an investigation against Google for allegedly abusing its dominant position in listing of real money games on the Google Play Store.
- The CCI imposes a penalty of INR 213.14 crore on Meta for anti-competitive practices in relation to WhatsApp's 2021 Privacy Policy update.

...and more

ENFORCEMENT ORDERS

1. THE COMPETITION COMMISSION OF INDIA (CCI) DISMISSED A COMPLAINT AGAINST BAREILLY NAGAR NIGAM ALLEGING VIOLATION OF SECTION 3 OF THE COMPETITION ACT, 2002.

The CCI dismissed an information filed by Harish Kumar (**Informant**) alleging contravention of Sections 3(3)(d) read with Section 3(1) of the Competition Act, 2002 (**Competition Act**) by S B Telecommunication (**OP1**), Indulge Sign & Graphics (**OP2**), Adtek Print & Media Pvt. Ltd. (**OP3**) and Bareilly Nagar Nigam (**OP4**) in relation to a tender issued by OP4 for allotment of advertisement space at different places under its jurisdiction.

The Informant, an advertisement agency, alleged that in the tender notice published by OP4, only the agencies registered with OP4 and having turnover exceeding INR 20 crores could participate. Based on such restrictive criteria, only OP3 was eligible out of all the interested advertisement agencies. Further, without any prior notice, OP4 reduced the turnover criteria from INR 20 crores to INR 9.5 crores which constituted a change in tender conditions and favoured OP1 and OP2 to participate in the tender process. It was also alleged that OP1 and OP2 were associated firms of OP3 as there was commonality of directors. Further, OP4 gave numerous opportunities to the other OPs to submit their tenders beyond the timelines prescribed by OP4 and based on these allegations, the Informant claimed that all OPs have indulged in bid rigging and thereby violated Section 3(3)(d) read with Section 3(1) of the Competition Act.

The CCI observed that the allegations are misconceived and found no *prima facie* case under Section 3(3) read with Section 3(1) of the Competition Act. It further observed that OP1, OP2, OP3 were eligible to participate in the tender process and had given their registrations within time and prior to the closing date of the e-tender. Additionally, OP4 allotted the tender to OP3 only after going through the eligibility criteria as well as considering the highest bid made by OP3 in the entire e-tender process making the tender process transparent as well as in consonance with the bye laws and terms and conditions of the tender. Further, the CCI noted that setting tender terms and conditions is largely within the domain of the procurer and generally does not call for any interference within the provisions of the Competition Act and dismissed the complaint by passing an order under Section 26(2) of the Competition Act.

2. THE CCI DIRECTS AN INVESTIGATION AGAINST GOOGLE FOR ALLEGED ABUSE OF DOMINANT POSITION IN LISTING OF REAL MONEY GAMES ON THE GOOGLE PLAY STORE.

The CCI directed an investigation against Google LLC, Alphabet Inc., Google India Private Limited and Google India Digital Services Private Limited (collectively, **Google**) for alleged violation of Section 4 of the Competition Act (abuse of dominance). The information was filed by Winzo Games Private Limited (**Winzo**), which operates an online digital gaming

platform and hosts its app on Google's Play Store.

Winzo contended that Google required app developers to agree with its one-sided policies and agreements which contained unreasonable and unfair conditions. It was averred that Google's Play Store policy restricts the hosting of gaming apps offering real money games (RMGs) in India, forcing such apps to be downloaded only via sideloading from their websites. The CCI noted that the ambiguities in the legal and regulatory framework in offering RMGs in India has influenced Google's decision to not list RMGs in India, and in the absence of a regulatory framework, did not intervene on this issue.

Selective Listing of certain RMGs on the Play Store: Winzo alleged that Google's RMG pilot program selectively lists only certain RMGs (Daily Fantasy Sports ((DFS) and Rummy) excluding other competitors. The CCI noted that Google's selective onboarding of certain categories of RMG apps while preventing others, like Winzo, limits the access to a crucial distribution platform thereby creating a significant barrier to entry for developers and is likely to results in an appreciable adverse effect on competition (AAEC), especially considering Google's dominant position in the mobile operating system and the app distribution markets in India. These concerns are further exacerbated in the absence of an objective, transparent and unambiguous justification. Accordingly, the CCI noted that the selective listing of certain RMGs on the Play Store prima facie appears to be in violation of Section 4(2)(a)(i) (discriminatory conduct), Section 4(2)(b) (limiting or restricting competition), and Section 4(2)(c) (denial of market access) of the Competition Act.

Unfair Advertising Policies: Winzo also alleged that Google has discriminatory advertising policies which only allows DFS and Rummy app advertisers to host ads using Google Ads. The CCI observed that the Google Play Store is a two-sided market with the ability to attract a large number of Android users (due to presence of numerous apps) and app developers (due to ability to reach numerous users). The CCI noted prima facie concerns that Google's restrictions on ads for non-DFS and non-Rummy apps amount to discriminatory conduct and limits the technical of such apps, in violation of Section 4(2)(b) of the Competition Act.

Sideloading and Malware Warnings: Winzo also contended that a misleading warning is displayed on Android devices when users attempt to download their app from the website, making users wary of installing the app. It was averred that this creates entry barriers by discouraging users from downloading. The CCI did not delve into this allegation since the NCLAT has previously ruled that sideloading does not constitute an anti-competitive conduct as long as sideloading remains an option. Further, the matter is currently sub-judice before the Supreme Court.

Payment Warnings on Google Pay: Winzo also alleged that when users attempt to use Google Pay to make

payments for skill-based games such as Winzo, baseless warnings are displayed, which are not shown when using other payment aggregators or for apps like Rummy and DFS on the Play Store. The CCI noted that these warnings may create discriminatory conditions for Winzo, especially since similar warnings are not issued for other RMG apps (DFS and Rummy) on the Play Store.

Accordingly, the CCI directed the office of the Director General (the investigative wing of the CCI) to conduct a detailed investigation in relation to Google's policies which prima facie appear to be in violation of Section 4 of the Competition Act.

3. THE CCI IMPOSED A PENALTY OF INR 213.14 CRORE ON META FOR ANTI-COMPETITIVE PRACTICES IN RELATION TO WHATSAPP'S 2021 PRIVACY POLICY UPDATE.

The CCI imposed a penalty of INR 213.14 crores on Meta Platforms, Inc. (**Meta**) for violation of Section 4 of the Competition Act (abuse of dominance) in relation to the implementation of WhatsApp's 2021 Privacy Policy.

Previously in 2016, in *Vinod Kumar Gupta and WhatsApp Inc,* the CCI had previously examined WhatsApp's Privacy Policy which allowed WhatsApp to share user account information with Facebook. The CCI assessed whether WhatsApp was abusing its dominant position in the market for instant messaging services using consumer communication apps through smartphones in India'. The CCI assessed whether WhatsApp is abusing its dominant position by introducing its privacy policy which compels users to share their account details and other information with Facebook in order to improve the online advertisements and product experiences available on a user's Facebook page. However, the CCI did not hold WhatsApp liable to be abusing its dominant position since the previous policy allowed the users to 'opt out' of sharing such information with Facebook within 30 days of agreeing to the updated terms of service and privacy policy (**2016 Privacy Policy**)

However, in 2021, WhatsApp updated its privacy policy which mandated that user data can be shared with other companies owned by Meta such as Facebook and Instagram, without an option to 'opt out' in order to continue using the services of WhatsApp. The CCI noted that the 2021 Privacy Policy is different from the 2016 Privacy Policy to the extent that users no longer have an 'opt out' provision available. Therefore, the CCI in its prima facie order noted that (i) the 'take it or leave it' terms by WhatsApp appear to be unfair and unreasonable and (iii) data sharing across Meta platforms may raise competition concerns, and accordingly directed the Director General to conduct a detailed investigation.

Post the investigation, the CCI concluded that WhatsApp holds a dominant position in the market for over-the-top (**OTT**) messaging apps through smartphones in India owing to large number of daily and monthly active users; strong network effects resulting in significant user 'lock-in' and

absence of effective competition due to high barriers to entry. The CCI also assessed the conduct of WhatsApp in the market for online display advertising in India.

On the issue of jurisdiction, the CCI addressed the contentions of the parties regarding whether data-related practices fall solely under data protection laws or also constitute competition law violations. It noted that data is critical to the functioning of digital platforms, enabling them to refine services, predict trends, and gain competitive advantages. However, it also noted that dominant firms could misuse data to exclude competitors, create entry barriers, or exploit consumers, thus harming competition. The CCI emphasized that both data protection and competition laws have distinct roles: the former protects individual privacy, while the latter addresses the impact of data on market power and ensures fair competition. While overlapping concerns exist, such as excessive data collection or exclusionary practices, the CCI and Courts held that competition law jurisdiction remains valid and concurrent with other laws. The Supreme Court and Delhi High Court affirmed the CCI's authority to investigate market dominance abuses even amid parallel legal proceedings.

The CCI noted that the data sharing terms would give Meta access to unique metadata which is not proportionate to what is required to provide its services. The access to this data allows Meta to gain a competitive advantage and strengthen their position in other markets i.e., display advertising. By leveraging the user data from WhatsApp, Meta can better its targeted advertising capabilities, which other competitors cannot match, thereby leading to a denial in market access in the display advertising market, in contravention of Section 4(2)(c) of the Competition Act. The CCI also held that Meta leveraged its dominance in the OTT messaging market via WhatsApp to protect its position in online display advertising by sharing user data, which is in violation of Section 4(2)(e) of the Competition Act.

The CCI observed that WhatsApp's large user base and network effects created a significant "lock-in," as users depended on the platform to stay connected with their users. Switching to alternatives was impractical unless all contacts migrated, reinforcing WhatsApp's dominance. This dependency was exploited to enforce the 2021 Privacy Policy, compelling users to share data with Meta. The lock-in effect also allowed Meta to unfairly strengthen its position in the online advertising market, distorting competition.

Accordingly, in addition to imposition of penalty, the CCI has also issued the following behavioural remedies which includes the following,

(i) *Data Sharing Restrictions for Advertising*: WhatsApp cannot share user data with other Meta companies or products for advertising purposes for five years from the date of the order. From 2029, WhatsApp users in India must be given an option to opt

out of such data sharing through an in-app notification.

(ii) *Transparency for Other Purposes*: WhatsApp must provide a detailed policy explaining *what* user data is shared with Meta companies or products, specifying the purpose for each type of data shared.

(iii) *Voluntary Data Sharing*: Sharing WhatsApp user data for purposes other than *providing WhatsApp* services cannot be a mandatory condition for accessing the platform in India.

(iv) *Opt-Out for Data Sharing*: WhatsApp users in India, including those who accepted the 2021 *update*, must have a clear opt-out *option* via in-app notifications and the ability to review and *modify* their data-sharing preferences through a prominent settings tab.

(v) *Compliance for Future Updates*: All future policy updates must adhere to these *requirements*.

4. THE CCI DISMISSED A COMPLAINT AGAINST GREENBAY INFRASTRUCTURE PVT. LTD. ALLEGING VIOLATION OF SECTION 3 AND 4 OF THE COMPETITION ACT.

The CCI dismissed a complaint filed by Mr. Anurag Gupta and Mrs. Rashmi Gupta (**Informants**) under Section 19(1)(a) of the Competition Act alleging contravention of Sections 3 (Anti-competitive agreements) and 4 (Abuse of dominance) of the Competition Act by Greenbay Infrastructure Pvt. Ltd. (**Greenbay/OP**).

The Informants alleged that they were initially allotted a plot by the OP, but later it was found that the project was abandoned, and the allotted plot was sold. Consequently, the informants were given another plot for which further payment was made by them. The informants further alleged that the newly allotted project was not ready as per the Real Estate Regulatory Authority (**RERA**) standards, and that the price demanded by the OP was exorbitant and the OP neither renewed the RERA registration for the project nor completed the project within the timeline given to RERA.

The CCI closed the complaint under Section 26(2) of the Competition Act on the grounds that the allegations did not raise any competition concerns in terms of Sections 3 and 4 of the Competition Act, and the informants are at liberty to raise these issues before an appropriate forum.

COMBINATION ORDERS

5. THE CCI APPROVED THE PROPOSED ACQUISITION OF INTERSIE TRUST AND INVESTMENT MANAGERS LIMITED.

The CCI approved the proposed acquisition of additional unitholding and shareholding in Interise Trust (**INTERISE**) and Interise Investment Managers Limited (**IIML**) by Ontario Inc. (**Ontario**) and OMERS Infrastructure Asia Holdings Pte. Ltd. (**OMERS**).

Ontario and OMERS are investment entities of OMERS Administration Corporation that is the administrator of

the Ontario Municipal Employees Retirement System Primary Pension Plan and the trustee of the pension funds. It manages a diversified portfolio of investments in public markets, private equity, infrastructure, and real estate. IIML is the investment manager of Interise and is entrusted with the responsibility of managing the assets and investments of Interise.

6. THE CCI APPROVED THE PROPOSED ACQUISITION OF STANDARD CHARTERED BANK'S PORTFOLIO OF UNSECURED PERSONAL LOANS.

The CCI approved the proposed transaction involving the acquisition of Standard Chartered Bank's portfolio of unsecured personal loans (**Target**) by Kotak Mahindra Bank (**Kotak**).

Kotak is a public limited company registered with the Reserve Bank of India as a banking company engaged in the business of providing a range of banking and financial services including retail banking, wholesale banking and treasury operations through various branches in India. The Target provides unsecured personal loans to individual borrowers in India.

7. THE CCI APPROVED THE PROPOSED ACQUISITION OF REBEL FOODS PRIVATE LIMITED.

The CCI approved the proposed acquisition of Rebel Foods Private Limited (**Rebel**) through the subscription of certain compulsorily convertible preference shares and the equity share capital by Jongsong Investments Pte. Ltd. (**JI**)

JI is engaged in the business of holding investments and is an indirect subsidiary of Temasek Holdings Private Limited (**Temasek**). Temasek is an investment company headquartered in Singapore and covers a broad spectrum of industries including transportation & industrials; financial services; telecommunications, media & technology; consumer & real estate; life sciences & agri-food; and multi-sector funds. Rebel is engaged in the organised food services market in India and, *inter alia*, operates cloud kitchens, restaurants, food-courts, and cafes etc.

8. THE CCI APPROVED THE PROPOSED ACQUISITION OF DMI FINANCE PRIVATE LIMITED.

The CCI approved the proposed acquisition of additional securities of DMI Finance Pvt Ltd. (**DMI**) by MUFG Bank, Ltd. (**MUFG**). Post the proposed transaction, MUFG's shareholding in DMI will increase to 20%.

MUFG is a prominent banking institution wholly owned and controlled by Mitsubishi UFJ Financial Group, Inc., which is a financial service and holding company incorporated in Tokyo, Japan. In India, MUFG provides: (i) corporate banking loans; (ii) deposit accounts; (iii) remittances; (iv) trade finance; and (v) bank guarantees. DMI is a private limited company engaged in the provision of loans and lending services in India including the provision of personal loans, loans to micro, small and medium enterprises and consumption loans.

9. THE CCI APPROVED THE PROPOSED ACQUISITION OF SCHENKER AKTIENGESELLSCHAFT.

The CCI approved the proposed transaction which pertains to the acquisition of 100% shareholding of Schenker Aktiengesellschaft (**Schenker**) by DSV Holding Germany GmbH (**DSV Germany**) from Deutsche Bahn Aktiengesellschaft.

DSV Germany is a company incorporated under the laws of Germany. It is an acquisition vehicle and does not carry on any operating activities, whether in India or anywhere else in the world. It is owned and solely controlled by DSV A/S, which is a global asset-light freight forwarding and logistics company active internationally in road / land, air and sea freight forwarding services as well as contract logistics services. Schenker is a company incorporated under the laws of Germany. It is also a global freight forwarding and logistics company active in road / land, air and sea freight forwarding services as well as contract logistics services.

10. THE CCI APPROVED THE PROPOSED ACQUISITION OF SHARES OF FLIPKART PRIVATE LIMITED.

The CCI approved the proposed acquisition of Flipkart Private Limited (**Flipkart**) by Shoreline International Holdings LLC (**Shoreline**). The proposed transaction is a two-step transaction, firstly, through a minority, non-controlling investment by Shoreline in Flipkart and secondly, through an arrangement for additional cloud services between an affiliate of Shoreline and a subsidiary of Flipkart.

Shoreline is a wholly owned subsidiary of Alphabet Inc. Flipkart is a subsidiary of Walmart Inc. primarily engaged in the business of wholesale cash and carry of goods, and providing marketplace-based e-commerce platforms to facilitate trade between customers and sellers in India.

11. THE CCI APPROVED THE PROPOSED ACQUISITION OF THREE SUBSIDARIES OF FOSROC GROUP HOLDING LTD.

The CCI approved the proposed acquisition of 100% shareholding of wholly owned subsidiaries of Fosroc Group Holdings Limited (**Fosroc**) by Starcin Holding France SAD (**Starcin**).

Starcin is an indirect subsidiary of Saint-Gobain (parent company of Starcin) which provides an array of services, including strategy and commercial development, legal, financial, accounting, information technology, and management services, for the benefit of its subsidiary companies or any other companies in which it holds a direct or indirect stake. Additionally, Starcin is involved in acquiring, subscribing, holding, managing, and disposing of shares and securities of any kind in any French or foreign companies.

Fosroc is an international manufacturer and supplier of high-performance, low volume chemicals for the construction industry, with a focus on certain building materials and chemical-based admixtures. Fosroc Top One and Fosroc Top Two are

holding companies incorporated in the United Kingdom and Fosroc Supply is a trading company incorporated in the United Arab Emirates.

12. THE CCI APPROVED THE PROPOSED ACQUISITION OF STT GDC PTE. LTD.

The CCI approved proposed acquisition of certain shareholding in STT GDC Pte. Ltd. (**STT GDC**) by Ruby Asia Holdings II Pte. Ltd. (**Ruby**) and Singtel Interactive Pte. Ltd. (**Singtel**).

Ruby is a special purpose vehicle indirectly wholly owned by investment funds, vehicles, and/or accounts advised and managed by various subsidiaries of KKR & Co. Inc.

Singtel is a wholly owned subsidiary of Singtel Telecommunications Limited, a public listed company incorporated in Singapore. The Singtel group is an Asian communications technology group, operating connectivity, digital infrastructure and digital businesses, and has presence in Asia, Australia and Africa.

STT GDC is a wholly owned subsidiary of Singapore Technologies Telemedia Pte Ltd, a Singapore-headquartered group active in communications and media, data centres and infrastructure technologies businesses globally. STT GDC is a data centre provider with a global platform, operating across Singapore, the UK, Germany, India, Thailand, South Korea, Indonesia, Japan, the Philippines, Malaysia and Vietnam. STT GDC is present in India through its indirect subsidiary i.e. STT Global Data Centres India Private Limited that provides data centre colocations services across several metropolitan areas in India.

KEY CONTACTS

Founder & Managing Partner
Mohit.Saraf@sarafpartners.com

Partner, Competition &
Personal Data Protection Law
Akshayys.Nanda@sarafpartners.com

DELHI (NCR)
Bhaskar House, Sector 16 A,
Filmcity, Noida – 201301
+91 (120) 463 0600

NEW DELHI
D-145, Defence Colony,
Opp. South Delhi Public School
New Delhi – 110024
+91 (11) 4405 0600

MUMBAI
2402, Tower 2, One International Center
Senapati Bapat Marg, Prabhadevi West
Mumbai – 400013
+91 (22) 4405 0600

BENGALURU
201, Embassy Square, 148 Infantry Road
Opp. Police Commissioner's Residence
Vasanth Nagar, Bengaluru – 560001
+91 (80) 4405 0600

HYDERABAD
8-2-619/ 1, 3rd Floor
Saha Complex, Road No.11
Banjara Hills, Hyderabad – 500034
+91 (40) 3551 2050