



# COMPETITION LAW NEWSLETTER

## SEPTEMBER 2021

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And more...

In this edition of the L&L Competition Law Newsletter, we cover four enforcement orders and three significant combination notifications by the Competition Commission of India (CCI) in the past month.

## Grasim abusing its dominant position in the market for supply of Viscose Staple Fibre, again

The CCI *vide* [order dated 06.08.2021](#) held that Grasim Industries had abused its dominant position by imposing a discriminatory discounting structure and pricing policies.

This is the second time in two years that Grasim has been held in contravention for practically the same conduct, the earlier one being the March 2020 decision in [XYZ v. Association of Man-Made Fibre Industry of India](#). As on the previous occasion, CCI delineated the relevant market as the “market for supply of Viscose Staple Fibre (VSF) to spinners in India”.

On the issue of dominance, the CCI noted that Grasim had a consistent market share of 84-86% during the period under investigation while the only other source of VSF for domestic spinners was through imports, which was not a commercially viable alternative.

While the earlier matter involved discriminatory pricing and discount practices being followed, the instant case involved the complete withdrawal of discounts/credit note facilities provided to one of the informants. The CCI held that the denial of VSF, which is an indispensable input for producing both 100% VSF yarn and blended yarn, to a spinner by a dominant entity amounts to an exclusionary abuse which results in such buyer being

denied access to the market, driven out of such market or marginalised.

Finally, requisition of production and export details from domestic spinners was found to be in the nature of supplemental obligations unconnected to the primary sale, and therefore a violation of Section 4(2)(d) of the Act. However, in light of the INR 301.61 crore penalty imposed in the previous case,<sup>1</sup> the CCI directed Grasim to cease and desist from engaging in the impugned conduct but refrained from imposing any further monetary penalty.

## CCI approves acquisition of feeder and regional trade operators by Unifeeder

The CCI *vide* [order dated 02.06.2021](#) approved U.A.E-based Unifeeder’s acquisition of 100% stake in Avana Logistek and Transworld Feeders Private Limited (TFPL) and 99.99% stake in Transworld Feeders FZCO (TWF), resulting in indirect acquisition of Transworld Shipping Agencies (TSAPL) (Avana, TFPL and TSAPL collectively referred to as **Targets**).

In line with past precedent ([Adani Ports / Gangavaram Port](#), covered in our [June 2021](#) newsletter), while delineating the relevant geographical market within which the parties operate, the CCI noted that gross aggregation of all ports in India or the Gulf as a single market would not be reflective of true market dynamics. Where two or more ports have common contestable hinterland (determined based on factors such as distance between ports, proximity of target customer from such ports, transport infrastructure and inland transport costs), a cluster of such ports may form part of the same relevant market

<sup>1</sup> The recovery of penalty (for contravention of Section 4 of the Act) has been stayed by the National Company Law Appellate Tribunal (NCLAT) *vide* [order dated 04.11.2020](#), pursuant to Grasim depositing 10% of the amount.

subject to homogeneity across other factors such as density of service providers which influence pricing, etc.

The CCI noted that both the acquirer group and Targets exhibited horizontal overlaps in (i) short-sea EXIM service provision; (ii) short-sea EXIM cargo flow consolidation and (iii) short-sea EXIM vessel operation. However, based on their market position, volume handled and presence of other competitors, concluded that the proposed acquisition(s) were not likely to cause an appreciable adverse effect on competition in India.

In relation to vertical overlaps, the CCI observed that while there existed vertical overlaps between the activities of the parties in the operation of container terminal services, container freight station, inland container depot/ private freight station, free trade warehouse zones, cold chain facilities, non-container contract logistics and container rail transport services, the same did not give rise to any competition concerns and cleared the transaction.

## CCI finds Maruti Suzuki India Limited guilty of Resale Price Maintenance

The CCI *vide* [order dated 24.03.2021](#) found Maruti Suzuki India Limited (**MSIL**) guilty of Resale Price Maintenance (**RPM**) under Section 3(4)(e) of the Act.

Previously, the CCI had taken *suo moto* cognisance of this matter on receipt of an email from an anonymous MSIL dealer. It was alleged that MSIL's sales policies did not allow dealers to give discounts to their customers beyond the prescribed limit announced by MSIL. Further, MSIL implemented a Mystery Shopping Audit by posing as customers. If any extra discount was offered, MSIL would send a 'Mystery Shopping Audit Report' to the errant dealership asking for a clarification. If a

satisfactory clarification was not provided, a penalty would be levied, not only on the dealership, but also on the Sales Executive and the Team Leader making the sale, and copy of the said penalty e-mail would be marked to all dealerships.

The DG while investigating noted that MSIL was operating in the upstream market of the manufacturing of passenger vehicles and its dealerships were operating in the downstream market of distribution and sale of passenger vehicles, across India. Therefore, an agreement entered between them could be analysed under Section 3(4) of the Act. Further, MSIL had the highest market share in FY 2018-19, of 51.22% in the passenger vehicle segment.

Referring to an avalanche of incriminatory email communications from different regions, the CCI concluded that MSIL had clearly imposed a maximum discount policy on its dealers and imposed penalties if the limits were exceeded. This fell within the scope of RPM within the meaning of the Act and did not allow the distributors to compete effectively on price, effectively stifling *intra-brand* competition and resulting in higher prices for consumers.

Further, by controlling the dealers' margin, *inter-brand* competition also softened due to ease of monitoring the retail prices by the competitors. This provided the manufacturer more liberty to regulate its own margin freely. Thus, RPM lowered the pressure on the margin of the manufacturer.

While the penalty could have been quite significant given Maruti's revenue figures, the CCI considered the post-pandemic phase of recovery of the automobile sector, and imposed a penalty of INR 200 crores.

This is not the first time that the CCI has dealt with the issue of RPM in the automobile industry. Previously, similar investigations have been launched against Hyundai and Honda. While the investigation against [Honda](#) is currently ongoing, the CCI

had imposed a [penalty on Hyundai](#) in 2017 for *inter alia* indulging in RPM. However, the decision of the CCI was overruled by the [NCLAT](#) and the matter is currently pending in appeal before the Supreme Court.

## CCI approves the acquisition of Aakash Educational Services Limited

The CCI *vide* [order dated 07.06.2021](#) approved the acquisition of 70% equity shareholding in Aakash Educational Services Limited (**Aakash**) by Think & Learn Private Limited (**Byju's**), India's most valuable startup.

Byju's is a technology based (online) education platform which provides coaching for primary and secondary school subjects, overseas and domestic tests for entrance examinations of various courses including engineering, medical, etc.

Aakash provides curriculum-based coaching for K-12 students and test preparatory services for various competitive examinations (such as, engineering examinations, medical examinations, Olympiads, National Talent Search Examination, etc.). Aakash offers its services through multiple modes such as classroom-based coaching, online learning, distance learning and hybrid learning programmes.

The CCI noted that the education sector in India can be segmented into formal and informal segments. The formal segment comprises K-12 school education and higher education (including graduation and post-graduation courses). On the other hand, informal segment includes pre-school; coaching classes for school courses and competitive examinations, test preparatory coaching services for entrance examinations, vocational training and publishing.

The parties had also submitted that in the informal segment, classroom-based coaching services are easily substitutable with online-based coaching services. However, the CCI decided to leave the delineation of relevant market open as the combined market share of the parties was less than 10% across all segments/sub-segments. Moreover, the non-formal education sector in India is characterised by the presence of several players which will continue to pose significant competitive constraints on the parties. Accordingly, the CCI approved the proposed combination.

Backed by a string of marquee investors including General Atlantic and the Chan-Zuckerberg Initiative, Byju's has raised over \$2 billion dollars in various rounds of funding. The said funds have been utilised to not only bolster its own business but also acquire numerous other educational companies.

In 2017, Byju's acquired US-based online tutoring companies TutorVista and Edurite, while in 2019, it acquired US-based Osmo known for its play-based learning games for \$120 million. In July 2020, it acquired India-based WhiteHat Jr which teaches online coding to students for \$300 million. In July 2021, it acquired US-based Epic! which is a digital reading platform for kids in a \$500 million deal and Great Learning, a leading global player in the professional and higher education segment for \$600 million. More recently, it has acquired Gradeup, a test preparatory platform, to be rebranded as Byju's Exam Prep.

In recent times, Byju's like various other technology-based companies has made a number of acquisitions. Most of these acquisitions derive their value not from the asset base of the target enterprise, but from the userbase, data or some other business innovation held by the target. In such a case, the target's revenue/sales usually fall below the notifiability thresholds.

This was highlighted as a potential 'enforcement gap' by the Competition Law

Review Committee in 2019, resulting in a proposal reflected in the Competition Amendment Bill of 2020 to introduce a deal-value threshold to enable the CCI to scrutinise such transactions.

## CCI approves acquisition of stake in Swiggy by Softbank

The CCI *vide* [order dated 12.07.2021](#) approved the minority acquisition of 8.37% shareholding in Bundl Technologies Pvt. Ltd. (**Swiggy**) by an entity of the Softbank Group Corp. (**Softbank**).

The CCI noted that there were certain overlaps between Softbank portfolio companies and Swiggy. With respect to horizontal overlaps, the CCI observed that these overlaps existed in:

- (i) Retail sale of groceries and daily essentials, where Softbank has an indirect presence through PayTM Mall, Grofers and Snapdeal and Swiggy through Swiggy Stores and Instamart;
- (ii) Organized food services where Softbank has an indirect presence through OlaFoods and Swiggy through The Bowl Company and Homely; and
- (iii) Food packaging material where Softbank has an indirect presence in the market for B2B sales through Zume and Swiggy through Swiggy StaplesPlus.

However, the CCI observed that the horizontal overlaps are not significant and the parties' presence in such markets is not substantial in comparison to the overall size of the market seen in conjunction with presence of other market players.

With respect to vertical relationships, the CCI observed that there were both actual and potential vertical relationships in the digital payment services and mobile wallet markets between Swiggy Softbank portfolio companies such as PayTM and OlaMoney.

Again, the CCI noted that the market shares were not significant in the relevant markets, and further the total value of transactions undertaken by Swiggy in FY 2020-2021 was less than 5% of the total value of transactions being facilitated in FY 2020-2021. Accordingly, the CCI observed that no competition concerns arose in the instant vertical relationship.

The CCI also observed that there was an existing vertical relationship in the online advertising services market. Softbank is present in the market through InMobi, which is engaged in the provision of online advertising services to advertisers and app publishers. Swiggy, to effectively advertise its application and services, avails the services of online advertising services providers. However, the CCI observed that InMobi has a market share of less than 5% in the upstream market for provision of online advertising services and a market share of 10-15% in the narrower market for provision of mobile advertising services.

## CCI finds Odisha State Civil Supplies Corporation to be abusing its dominance

In a rare order against a public sector enterprise, the CCI found the Odisha State Civil Supplies Corporation Ltd. to be abusing its dominance *vide* [order dated 05.08.2021](#).

The CCI observed that on account of the market share coupled with its unparalleled size, vast resources and its disposal and dependence of millers on the Corporation, it was dominant in the '*market for procurement of custom milling service for rice in the State of Odisha*'.

The CCI noted that a letter had been issued to millers stating that differential custody and maintenance charges arising out of the Kharif Marketing Season (**KMS**) 2017-18 would not be paid unless they executed an

agreement for KMS 2018-19 to participate in the procurement process. The CCI observed that the letter effectively conditioned the payment of the legitimate dues of millers on them entering into future agreements. The CCI stated that the OP-2 cannot introduce new terms and conditions upon millers without valid and cogent reasons. Moreover, withholding legitimate dues without a justifiable reason is onerous on the millers and deprives them of timely financial consideration owed in respect of work undertaken. Therefore, the CCI found such conduct to be imposing unfair terms and conditions in contravention of Section 4.

However, the CCI did agree with the certain contentions of the Corporation and did not find any contravention of the Act on other accounts such as modification of criteria for Rabi KMS 2017–18. It also refrained from entering into a discussion regarding non-settlement of insurance claims involving the informant and the Corporation as the issue was pending adjudication before other relevant fora.

Despite a contravention however, the CCI refrained from imposing a monetary penalty on the Corporation.

## CCI dismisses allegations of abuse of dominance against Siemens

The CCI *vide* [order dated 13.08.2021](#) dismissed allegations made by diagnostics labs relating to abuse of dominance by Siemens entities with respect to conduct in the sale of MRI and CT scans machines.

The informants alleged that the Siemens entities had abused their dominant position on account of imposing unfair and discriminatory conditions on the diagnostic lab by exploiting the locked-in consumer status of the Informants. These allegedly unfair and discriminatory conditions took the

form of encrypted protection of the machinery which restricts the choice of after-sales provider groups and the OP group imposing excessive charges for spare parts, in addition to exorbitant prices charged in case the machines and equipment are upgraded.

The informants contended that there were two distinct markets in the instant case – (i) market for manufacturing and supply of CT Scan machines and MRI machines in India (primary market); and (ii) market for sale of spare parts and repair services of CT Scan machines and MRI machines in India (secondary market). The informants contended that the secondary market derived its existence from the primary market. On the other hand, Siemens contended that the informants were made aware of maintenance charges at the time of purchase, which is indicative of whole life costing of the product.

The CCI observed that, in its decisional practice, it has clearly laid down factors such as the ability of a consumer to undertake a whole-life cost analysis of the product/service and availability of independent aftersales service providers to be crucial in determining the bifurcation of relevant market into primary (manufacture and sale) and secondary (spare parts and after-sales services) markets. Agreeing with Siemens, the CCI observed that the informants were aware of the maintenance charges which would enable them to estimate life-cycle costs of the original equipment thereby putting them in a position to make an informed choice.

Further, the CCI observed that since the informants purchased the machines for commercial use they were in a position to estimate the life cycle cost in order to generate returns from the investment made while charging from patients who avail their diagnostic services. Accordingly, the CCI observed that there is no basis for concluding that any separate market for aftersales existed, as contended by the informants.

Furthermore, the CCI observed that the kinds of diagnostic machines involved in the present case appear to be substitutable with other machines of similar types manufactured by other manufacturers. It was also observed that there are other significant players in the market such as GE and Philips in addition to new market entrants such as the Tata Group. Therefore, the CCI concluded that Siemens could not be said to be dominant.

The CCI found no substance in any of the other grievances as well, such as the alleged overcharging for optic fibre cables required for the machines. The CCI observed that in case the informants wished to, they could have purchased such cables from local markets as well and such replacement did not require any password or any other impediment. Therefore, all allegations made by the informants were rejected.

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