



The Quarterly Newsletter of Competition Commission of India (CCI)

# Fair Play

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**ENGAGEMENTS, COOPERATION  
& KNOWLEDGE SHARING**

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## FROM THE DESK OF THE CHAIRPERSON



The Competition Act, 2002 promotes and sustains competition in markets in India and prevents practices having adverse effect on competition. In the process it protects interests of consumers and ensures freedom of trade in markets in India. The enforcement is complimented by advocacy which is mandated by the Act. Post 1991, when India departed from a command & control economy, and brought in the competition Act a decade later, competition Advocacy assumed great importance. In the early years while the Commission was still to get its enforcement functions, the foundation of competition was laid through advocacy. Post 2009, the Commission has been effectively pursuing its enforcement functions.

The enforcement architecture provides for the Commission to take a *prima facie* view which is followed by investigation by Director General (DG) in cases where there is an apparent violation of the provisions of the Competition Act. The DG's investigation is shared with the parties, and the case is heard thereafter by the Commission based on principles of natural justice. The Commission is equipped with the power to impose sanctions under the Act which include levy of monetary penalties.

Increasingly the markets are becoming global. The digital economy underscores the effects doctrine as markets in India are not only affected by behavior of participants in India but by those abroad also. The Competition Act had conceived of the need to address such a behavior through the extra territorial jurisdiction laid down in Section 32 of the Act. Section 18 of the Act empowers the CCI to enter into Memorandum of Understanding (MOU) with any agency of a foreign country in order to carry out the functions mandated by the Act. The Commission has actively engaged with international agencies and entered into bilateral MOUs with 6 agencies. These are Federal Trade commission (FTC) & Department of Justice (DOJ) of the United States; Federal Antimonopoly Service of Russia (FAS), Australian Competition and Consumer Commission (ACCC), Directorate-General for Competition, European Union (EU), and Competition Bureau, Canada (CCB). A multilateral MOU for promoting cooperation among competition authorities of BRICS nations was signed in May, 2016.

The primary objective of MOUs is that they provide a platform for exchange of ideas and information. The first stage of cooperation besides the MOUs is aimed at capacity building and sharing of best practices. The second stage would move to enforcement cooperation. This would specially be relevant in cases of international cartels.

On the merger review it is seen that review of global mergers which have multi-jurisdictional filings is greatly facilitated by information sharing. Cooperation under the MOU helps improve understanding on delineation of the relevant market and its assessment thereafter. Early contact is the essence of cooperation in merger review, this being a time bound exercise. In some cases of global mergers, we attained better understanding of the transaction through exchange of information. Parties to the merger have equally cooperated, by giving up confidentiality in some of the matters. In others, fruitful exchanges on the basis of the public version of the merger notification were very useful.

In times to come, we foresee international cooperation as major facilitator in the enforcement and merger review functions. We are expanding international cooperation by appointing non-governmental advisors (NGAs) to the International Competition Network (ICN) from 2017 onwards. ICN is a network of over 130 competition authorities. Together with the NGAs, CCI will increase the pace of cooperation, reinforce relationships with various competition agencies and imbibe the best international practices.

(Devender K. Sikri)



# Engagements, Cooperation and Knowledge Sharing

Competition Commission of India (the CCI/the Commission) is a relatively new entrant among the competition regulatory agencies across the world. Developed economies like the EU, the USA and Canada etc. have been regulating the market competition in their economies since long. They have developed a robust institutional framework and jurisprudence. Since its inception, Indian competition law and the Commission have benefitted from the experience of these jurisdictions. Competition Act 2002 (the Act) and regulations thereunder, are confluence and adaption of the best practices and provisions from such jurisdictions. The Commission has, since its early days, recognized the benefits of active engagement with the other competition authorities, international multi-lateral organizations and also with institutions & organizations within the country.

Since its humble beginning in India in 2003 with only advocacy functions and beginning of enforcement only in 2009, competition law jurisprudence in the country has evolved significantly. The Commission has handled cases across several sectors of the economy either on receipt of an information or on *suo-moto* basis as per section 19 (1). Some of these cases involved issues that are being dealt with by other competition agencies also. In such cases, the information and the facts noticed by those agencies are not only relevant, they also help in avoiding the duplication of work by the Commission.

There is a growing realization that the cornerstone of a successful market economy is the existence of a 'competition culture'. To inculcate this, enforcement and advocacy are vital. Both entail continuous engagement with stakeholders at the national and the international levels. Recognising this, CCI has, since its inception adopted a strategy that focusses on engagement, cooperation and knowledge sharing with public institutions, private institutions, multi-lateral institutions and competition authorities in other jurisdictions.

### Engagements with Other Jurisdictions

Given the diminishing trade barriers and fading political boundaries, the Competition law has become an important element of public policy for active oversight on market and its participants. An anti-competitive action by a trans-national or multi-national corporation can cause ripples in markets across multiple jurisdictions. The expansion of cross border commerce, presence of global supply chain and the increasing presence of multinational corporations necessitate cross country oversight by competition agencies.

Globalisation has also brought with itself, instances of foreign firms affecting competition in the local markets. This has necessitated the development of 'effects doctrine'. The doctrine empowers domestic competition regulator to make an enterprise liable, even if it is not located in the country; provided its

conduct is causing appreciable adverse effect on competition in domestic market.

Indian law also includes the 'effects doctrine' under Section 32 of the Act. It empowers the Commission to examine conduct of an enterprise beyond the territorial border of India. Thus, if a company engages in international trade, then it is subjected to multiplicity of competition laws and extraterritorial application of competition agencies. In other words, it is not just accountable for its behaviour to laws and regulation of one country but to competition statute of any country where its operations or sales exists. A firm seeking merger has to notify in a number of jurisdiction wherever it has a market. Similarly, a business indulging in anti-competitive behaviour like cartelisation or abuse of dominance has to face the scrutiny of a number of jurisdictions wherever competition is adversely affected.

Often, the same behaviour is evaluated under divergent standards. This possibility became apparent in the different outcomes in the European Union (EU) and the United States, respectively, in the Boeing/McDonnell Douglas and General Electric/Honeywell mergers. In both these cases, the Federal Trade Commission (FTC) cleared the merger whereas the EU competition authority withheld the same. Such disparate decisions though rare, present a scenario where the businesses are put in a difficult situation. The management or the consultants can't predict whether the proposed merger or market-conduct

can pass the muster in antitrust/anti-competitive scrutiny. Cooperation among competition authorities via bilateral or multilateral agreements, may provide a window for use of collated analysis and result in analogous decision. Working closely, the two competition agencies may be in a better position to appreciate each other's concerns and ensure predictable outcomes.

The presence of international cartels is another scenario where cooperation among competition authorities is quite beneficial. The international cartels, especially the export cartels are treated differently in a few jurisdictions. In some jurisdictions, export cartels are exempt from the applicability of competition law as the government considers these as means to increase the country's international trade. Indian law also provides exemption to such export cartels under Section 3(5) (ii) of the Act. As the export cartels have little or no impact on the domestic markets, the competition authorities, in general, do not regulate them. Trade economists advocate for export cartels highlighting their efficiency gains in the national economy by way of boosting international trade. This is based on the premise that foreign markets are characterised by tariff and non-tariff barriers and a coordinated behaviour helps in overcoming such barriers. Hence, export cartels are peculiar in nature. If they are put into effect domestically, they are considered illegal but if they are implemented externally, they are legally permissible. Such conflicting interest and regulation engender a case for mutual cooperation among competition authorities.

Since 1970s, multilateral and bilateral instruments for cooperation in

notification and information regarding competition law enforcement are being practiced. OECD's recommendation concerning 'Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade 1979' (duly revised in 1995) proposes the utilization of a notification and consultation system. In March 1998, 'OECD Council Recommendation concerning Effective Action against Hard Core Cartels' was issued. This document suggests convergence of national laws to prohibit hard core cartels as an egregious violation of competition law. It stipulates for a framework to promote international cooperation and comity with regard to enforcement against such cartels.

Due to increasing cross-border trade, competition authorities have to pursue fact-finding of anti-competitive behaviour by foreign companies. To avoid the challenge arising in such inquiries, the competition authorities rely on cooperation with their counterparts to provide support for such investigations. Bilateral MoUs help in creating a framework to deal with cases that have international footprint. Such cooperation is useful for both the sides as the anti-competitive conduct by such companies can be harmful for markets in both the countries.

To resolve the conflict of territoriality, the jurisdictions have used the concept of 'International Comity'. It means that the courts of one country, in consideration of international relations, treat the decisions of foreign governments with a degree of respect and deference. Comity requires that courts restrain their judgment in certain cases even though they may technically have jurisdiction, a concept also referred to

as 'negative comity'. This common law notion was traditionally used to prevent international disputes arising through a conflict of jurisdiction caused by the extraterritorial application of domestic laws. In spite of the recognition of the international comity principle and the mutual assistance provisions in international treaties, international law imposes no obligation with regard to either positive or negative comity. In practice following the principle of comity remains a matter of national policy. However, bilateral/multilateral cooperation agreements help in creating a mechanism and procedural framework to apply this doctrine with certainty. Therefore, there is a strong case for bilateral and multi-lateral agreements for enabling effective agency cooperation. A number of cooperation agreements need to be entered into by the competition authorities around the world to effectively deal with the issues arising out of the anti-competitive behaviour of transnational corporations/cartels.

Section 18 of the Act, empowers the Commission to enter into bilateral and multilateral agreements with different countries to seek information and learn from mature competition jurisdictions. The Commission has actively engaged with international agencies and entered into MoU's with Federal Trade Commission and Department of Justice, United States of America; Federal Antimonopoly Service of Russia; Australian Competition and Consumer Commission; Directorate-General for Competition, European Union; and Competition Bureau Canada. A multilateral MoU for promoting cooperation among competition authorities of BRICS<sup>1</sup> nations was signed in May 2016. These MoUs provide for cooperation

<sup>1</sup>BRICS refers to multi-lateral group comprising of Brazil, Russia, India, China and South Africa



framework to achieve two primary objectives viz.: (a) Technical cooperation; and (b) Enforcement cooperation.

Technical cooperation aims towards capacity building for a well-functioning institution. A number of seminars and workshops have been organized to understand and learn from the experiences of other agencies. Experts from agencies that have long experience of handling anti-trust cases have conducted trainings of the professionals in specific areas of case handling like case analysis, investigation and market analysis. The international experts also share good practices and analytical tools developed over a long time of active enforcement.

On the other hand, enforcement and cooperation is required in specific instances where information, investigation etc. are required from other jurisdictions against the companies operating in that (foreign) jurisdiction.

### **Engagements at the National Level**

At the national level, the Commission has engaged itself with a wide range of stakeholders including judiciary, government officials, lawyers, economists, finance professionals, industry, academia and consumers to create awareness of competition law. The Commission engages with stakeholders on continuous basis to organize workshops, conferences and seminars etc.

To establish a structure for its advocacy initiatives within the country, the Commission decided to enter into Memorandums of Understanding (MoUs) and arrangements with professional and academic institutions. It has signed MOUs with Institute of Company Secretaries of India (ICSI) and

Institute of Cost Accountants of India (ICMAI). MoUs with Institute of Chartered Accountants of India (ICAI) and National Law University<sup>2</sup>, Odisha (NLU-O) are also expected to be signed soon.

The Commission is pro-actively reaching out to training institutions of civil servants and judicial academies. Given the benefit of competition for enabling economic growth, the training of Judiciary and bureaucracy in Competition Law is quite beneficial. The Commission sends its professional officers as resource persons to various state, central and judicial academies to conduct short modules/lectures. This year Commission has partnered with National Institute of Financial Management (NIFM) and conducted 'Competition Law Awareness' workshop for Telecom Officers in August 2016. Similar sector specific workshops have been proposed for other key departments like Railways and Defence. NIFM has also included a lecture on 'Competition Law and Procurement' in its ongoing Management Development Program (MDP) for mid-career bureaucrat from central and state government. This year 40 MDPs are being held that will cover more than 1000 officers.

Also, the Commission has engaged itself with trade association/chambers or trade councils like Confederation of Indian Industry (CII), Federation of Indian Chambers of Commerce & Industry (FICCI) and the Associated Chambers of Commerce of India (ASSOCHAM), Competition Law Bar Association (CLBA) etc. for working together to create awareness and promote compliance of competition law. To ensure cooperation with other sectoral regulators, the commission is engaged with the Federation of Indian Regulators (FOIR) as one of its founding members.

Recently, the Commission has adopted 'Resource Person Scheme' to create a pool of speakers/ trainers. Resource Persons can be an individual or a non-Governmental Organization (NGO). Initially 24 resource persons will be empanelled with each of them covering one state. Under this scheme, the Resource Persons will engage at the local level with industry chambers, consumer associations and other stakeholder to promote competition advocacy highlighting the benefits of competition law, competition culture, competition compliance and competition neutrality among the stakeholders and general public in India. Under the scheme, the Commission will undertake capacity building for the select resource persons. A comprehensive set of study material with six modules has been developed with each module specific for a specific set of stakeholders.

In another initiative for enhanced engagement with academia, the Commission has issued the Competition Assessment of Legislations Guidelines 2016. To support the competition assessment, the Commission has empanelled seven institutions that have research capacity to carry out policy assessment. The seven institutions are: 1. CUTS International, Jaipur; 2. Indian Institute of Management, Ahmedabad; 3. Indian Institute of Management, Lucknow; 4. Indira Gandhi Institute of Development Research, Mumbai; 5. National Law University, Delhi; 6. National Law University, Bhopal; and 7. National Institute of Public Finance and Policy. The objective of competition assessment is to assess legislations and policies from a competition perspective. The dynamics of market keep changing. The legislations and policies may inadvertently carry

<sup>2</sup>MoU with NLU Odisha has since been signed on October 18, 2016

certain provision(s) or clause(s) that potentially restrict the ability of economic agents to effectively compete at the market place. Based on the assessment, the Commission would suggest, appropriate modifications in the policy, legislation or the bill, as the case may be, along with the reasons for the same, to the relevant authority(ies). At present the Commission has undertaken the capacity building exercise with the support of experts from Organization for Economic Cooperation and Development (OECD).

Business enterprise and corporates continue to be the main stakeholders. There is a growing need to provide a comprehensive 'Compliance Manual for Enterprise' that brings together the requirements entailed upon the corporates under the Act. The Commission in partnership with the Competition Law Bar Association (CLBA) is developing a 'Competition Compliance Manual'. The manual would include guidance on

preventive compliance, compliance during inquiry & investigation and compliance after final order. Within preventive compliance, the manual would focus on: behaviour of an enterprise in dealing with its competitor, trade associations, agents, third parties, suppliers, distributors etc; behaviour of a dominant enterprise, compliance with regulatory provisions (i.e. combinations) and consequences of non-compliance. It is well known that the penalty(ies) under the Act are quite severe, therefore it is imperative for enterprises to comply with competition law. The compliance manual will help the enterprise to prepare an active charter whereby it can avoid the possibility of inadvertent transgression of the provisions of the Act. This will serve not only in avoiding penalty (ies) and damage to reputation, but will also inculcate good corporate governance.

### Conclusion

Cooperation with other agencies and

competition advocacy are mutually complimentary. The cooperation and continuous engagement between agencies is not a matter of choice but a necessity, as the issues arising out of anti-competitive behaviour cut across the sectors and national boundaries. Therefore, in order to build an active competition community and to enhance the spread of competition culture, it becomes vital to bring together different stakeholders by applying a multi-pronged approach for various stakeholders. Moreover, interactions and cooperation with mature jurisdictions and the multilateral agencies helps in adapting the best practices and case analysis tools. The fast paced economic growth coupled with multi-fold increase in international trade (both in imports and exports) presents newer challenges to a market regulator. The Commission, in a short span of 8 years of active enforcement<sup>3</sup> has made a notable progress in creating 'Competition Culture' using bilateral, multi-lateral and domestic engagements to create awareness in markets in India.

## Forthcoming Events

- i) National Level Seminar on "Best Practices in Tendering, Contracts Management and Disputes Resolution" organised by NLC India Limited formerly Neyveli Lignite Corporation Limited at Neyveli Complex, Tamil Nadu, during 16 – 17 December 2016
- ii) Two days Training Programmes on Nuances of Principles of Competition for newly recruited Judicial Officers at Orissa Judicial Academy at Cuttack, Orissa on 6-7<sup>th</sup> January, 2016.
- iii) One day Competition Law Conference at Bangalore on 16 January, 2016.
- iv) 4<sup>th</sup> International Conference on Competitions Regulation on 10<sup>th</sup> February, 2017 organised by IIM Kashipur
- v) Two days conference on Competition Law with Indian Law Institute (ILI), New Delhi on 25-26 February, 2017.
- vi) 2nd National Conference on Economics of Competition Law, 2017 on 2-3 March, 2017.
- vii) CCI will be organising 1st Economist Conclave with a view to build capacity in the country with expert economists from foreign jurisdictions and national economists on 4-5 March, 2017.

<sup>3</sup>The substantive provisions related to enforcement of Anti-Competitive Agreements (S 3) and Abuse of Dominance came into effect in May 2009.



# SECTION 3 & 4 ORDERS

## CCI Imposes Penalties upon ten Cement Companies and the Cement Manufacturers' Association for Cartelisation

The CCI has imposed penalties upon ten cement companies and their trade association i.e. Cement Manufacturers' Association (CMA) for cartelisation in the cement industry in Case Nos. 29 of 2010 and RTPE 52 of 2016. The final order has been passed by the Commission pursuant to the directions issued by Competition Appellate Tribunal (COMPAT) remanding the matter back while setting aside the original order of CCI.

The information in this case was filed by Builders Association of India ("BAI") under Section 19(1)(a) of the Act against the cement companies and CMA alleging contravention of the provisions of the Act.

The Commission held that cement companies used CMA as a platform for sharing details relating to prices, capacity utilisation, production and dispatch and thereby restricted production and supplies in the

market. This was contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act. Further, CCI also found the cement companies were acting in concert in fixing prices of cement in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

Accordingly, penalties of Rs. 1147.59 crores on ACC Ltd., Rs. 1163.91 crores on Ambuja Company Ltd, Rs. 167.32 crores on Binani Cement Ltd., Rs. 274.02 crores on Century Textiles and Industries Ltd., Rs. 187.48 crores on The India Cements Ltd., Rs. 128.54 crores on J K Cement Ltd., Rs. 490.01 crores on Lafarge India Pvt. Ltd., Rs. 258.63 crores on The Ramco Cements Ltd., Rs. 1175.49 crores on UltraTech Cement Ltd. and Rs. 1323.60 crores on Jaiprakash Associates Limited was imposed by CCI. In addition, a penalty of Rs. 73 lakh was also imposed on the CMA. Cement is a critical input for infrastructure

industry it is a vital commodity for the economic development. The cartelisation by cement companies not only causes consumers to suffer, it is also detrimental economic growth.

The cement companies and the CMA have been directed to cease and desist from indulging in any activity relating to agreement, understanding or arrangement on prices, production and supply of cement in the market. The CMA has been further directed to disengage and disassociate itself from collecting wholesale and retail prices from member cement companies or otherwise. The CMA has also been restrained from collecting and circulating the details relating to production and dispatch by cement companies.

Vide a separate order; the CCI has also imposed a penalty of Rs. 397.51 crore upon Shree Cement Limited in RTPE No. 52 of 2006.

## CCI Imposes Penalty on Karnataka Chemists & Druggist Association and pharmaceutical company Lupin Ltd.

The CCI has found the Karnataka Chemists and Druggist Association (KCDA) and Lupin Ltd. (Lupin) to be in contravention of the provisions of the Act. In an information filed by Maruti & Co., it was brought to the notice of the Commission that KCDA restrains pharmaceutical companies from appointing new stockists in the State of Karnataka unless a No Objection Certificate

(NOC) is obtained from it. It was alleged that Lupin refused to supply drugs to Maruti & Co. on account of not having obtained NOC from KCDA.

On the basis of a detailed investigation by the Director General (DG), and subsequent analysis the Commission has found that KCDA did indulge in the anti-

competitive practice. The KCDA enforces that no pharmaceutical company should appoint a stockist in Karnataka without seeking a NOC issued by the association. This case highlights the obstinacy of Chemists & Druggist Associations who, despite various orders by the Commission in similar cases in other parts of the country, have not abstained from indulging in such



anti-competitive conduct of enforcing a mandatory NOC. Instead of desisting from such activity, these associations are developing new mechanisms to enforce mandatory seeking of NOC. The new mechanisms include issuance of NOC through verbal instructions by association's office bearers (in order to avoid any documentary evidence/proof) or camouflage the same as congratulatory/intimation letters, with a view to hide their apparent anti-competitive behaviour under the garb of benign nomenclatures. Through this order, the Commission has made it explicit that the associations will not escape the legal consequences of their anti-competitive conduct by using alternate nomenclatures or methods.

Based on the evidence, the Commission concluded that KCDA has been indulging in the practice of seeking an NOC prior to the appointment of stockists by pharmaceutical companies, thereby limiting and controlling the supply of drugs in the market, in violation of the provisions of Section 3(1) read

with 3(3) (b) of the Act.

The Commission also observed that the cooperation by the pharmaceutical companies, without any resistance, to implement anti-competitive practice of the associations makes them equally complicit. Instead of approaching the Commission, these pharmaceutical companies continue to cooperate with the NOC requirement of the associations, thus themselves become perpetrators of such anti-competitive practice.

The Commission has therefore held the pharmaceutical company, Lupin, to be in contravention of the provisions of Section 3(1) of the Act for its anti-competitive arrangement/understanding with KCDA.

Further, the Commission has also found three office bearers of KCDA, namely Mr. K. E. Prakash, Mr. D. S. Guddodgi and Mr. A. K. Jeevan, responsible under Section 48 of the Act, for their active involvement in the anti-competitive practice of KCDA and also on account of the positions of responsibility held by them in KCDA during the period of

contravention. Two of the officials of Lupin, namely Mr. Amit Kumar Dhiman and Mr. Nishant Ajmera, were also found to be actively involved in the anti-competitive arrangement/understanding of Lupin with KCDA during the relevant period.

Accordingly, KCDA, Lupin and their office bearers/officials have been directed to cease and desist from indulging in the practice of mandating NOC prior to stockist appointment. The Commission imposed a monetary penalty of Rs. 8,60,321/- under the provisions of Section 27 of the Act. While imposing penalty on Lupin, the Commission observed that the refusal to supply by it was for a brief period, after which Lupin resumed supplies to M/s Maruti & Co. Considering this as a mitigating factor, the Commission imposed a penalty at the rate of 1 per cent of Lupin's average turnover, amounting to Rs. 72.96 crores. In addition, monetary penalties were imposed on the office bearers of KCDA and officials of Lupin at the rate of 10 per cent and 1 per cent of their incomes, respectively.

## HR CORNER

- i) Applications were invited to fill up 04 posts of Advisers and 32 posts of professional and support officials in CCI on deputation basis.
- ii) Applications were invited to fill up 24 posts (20 Professional Staff and 04 Support Staff) in O/o. DG, CCI on deputation basis.
- iii) During the quarter, 06 Office Managers joined CCI on deputation basis and 02 Office Managers on direct recruitment basis. During this period two

- Officers were also permanently absorbed in the Commission. Deputation tenures of 18 officers were extended.
- iv) During the quarter, association of the three officers with the Commission came to an end on completion of their deputation tenures and one officer resigned from the service of the Commission.
- v) 14 Research Associates (including one Expert, Level-IV) joined the Commission.

- vi) A meeting of the Official Language Implementation Committee was held in the Commission on 31 August 2016. Hindi Workshop was organized in the Commission on 8 September 2016. Hindi Pakhwada was also organized in the Commission during 14-28 September 2016 in which Hindi Essay Competition, Hindi Noting & Drafting Competition and Hindi Quiz were held.



# SECTION 5 & 6 ORDERS

## Commission approves the combination between Computer Sciences Corporation and Hewlett Packard Enterprise Company

The Commission has approved the combination between Computer Sciences Corporation (CSC) and Hewlett Packard Enterprise Company (HPE) under sub-section (1) of Section 31 of the Act. The combination envisaged the following steps: (a) Demerger of the Enterprise Services Business (Everett Business) of HPE to Everett Spinco Inc. (Everett), a wholly-owned subsidiary of HPE; and (b) Merger of Everett Merger Sub Inc. (Everett Merger Sub), a wholly owned subsidiary of CSC with and into Everett, with Everett being the surviving entity. Post consummation, Everett would become a wholly owned subsidiary of CSC, which will be held by the existing shareholders of CSC and HPE. The Commission received the notice pursuant to execution of Board Resolution by the respective companies.

CSC is a company incorporated in Nevada, USA and listed on the New York Stock Exchange (NYSE). It is engaged in providing IT services to a range of industries (such as chemical, energy and natural resources, financial services etc.) and to a variety of customers, including multinational companies, governments and public agencies.

HPE, the other party to the combination, is a company incorporated in Delaware, USA and listed on the NYSE. It is engaged in IT services, software, storage, server etc. Its Enterprise Services Business / Everett Business comprises of infrastructure technology outsourcing, applications and business services, including BPO.

The Commission noted that at a broader level, activities of the parties' overlap in IT and ITeS in India. The Commission also

observed that the provision of services relating to IT and ITeS can be sub-segmented into consulting, implementation services, ITO services etc.

The Commission further noted that the combined market share of the parties, post-combination, would be insignificant regardless of how the market is delineated. Further, players such as Tata Consultancy Services, Wipro, IBM etc., with sizeable market share, are present in each of the sub-segments of the IT and ITeS in India.

On the basis of the submissions of the parties, the Commission noted that there exists vertical relationship between the parties. CSC and its subsidiaries were an indirect sales alliance and resale partners of HPE. However, the vertical relationship between the parties was not likely to raise competition concern in India.

## Commission approves the joint venture between Gerdau S.A., Sumitomo Corporation and The Japan Steel Works Ltd

The Commission has approved a joint venture between Gerdau S.A. (Gerdau), Sumitomo Corporation (SC) and Japan Steel Works Limited (JSW) (collectively referred to as the Parties) under sub-section (1) of section 31 of the Act. This joint venture company will primarily be engaged in the business of manufacturing and sale of rolling mill rolls (RMRs), main shafts for

wind turbines and rings for wind turbines. The Parties jointly filed a notice regarding formation of a joint venture on 30 June 2016, pursuant to the Investment Agreement dated 06 June 2016, entered into by and between the Parties.

Gerdau, a company organized and existing under the laws of Brazil, is engaged in production and commercialization of steel products

and has industrial operations in 14 countries throughout America, Europe and Asia. It is also involved in production of flat steel and iron ore and recycling of scrap metal into steel. SC, a company organized under the laws of Japan, is a full-service trading company, which conducts its business through five business segments viz., Metal Products, Transportation and



Construction Systems, Environment and Infrastructure, Media, Network, Lifestyle Related Goods and Services and Mineral Resources, Energy, Chemical and Electronics. JSW, a company organized and existing under the laws of Japan, operates in three segments; viz., Steel and Energy products, Industrial Machinery Products, and Real Estate and other businesses. The Steel and Energy products segment includes

steel castings and forgings, steel plates, pressure vessels and steel structures.

The Commission noted that Gerdau and SC have insignificant presence in India and that JSW does not have any presence either in RMRs or in business of main shafts for wind turbines. The Commission observed that none of the Parties i.e. Gerdau, SC or JSW are engaged in the business of rings for bearings of

wind turbines globally and in India.

The Commission also observed that there are no significant vertical relationships between Gerdau, SC and JSW. Thus, considering the current and potential state of operations, Commission decided that this combination is not likely to cause any appreciable adverse effect on competition in any of the possible relevant market(s).

## **Combination between HCL Technologies Limited, Geometric Limited and 3DPLM Software Solutions Limited**

The Commission received a notice from HCL Technologies Limited (HCL), Geometric Limited (Geometric) and 3DPLM Software Solutions Ltd. (3DPLM) (jointly referred to as the "Parties"). Combination involved two steps (a) acquisition of certain undertakings of Geometric by HCL; and (b) subsequent merger of remaining undertaking of Geometric with 3DPLM.

The HCL is a listed multinational Information Technology ("IT") Services Company. It is primarily engaged in the business of mechanical engineering services, software product engineering, IT services, IT infrastructure services, application services, IT hardware, systems integration and distribution of information & communications technology products. Geometric is engaged in the business of: (i) IT

enabled engineering services; (ii) software services and solutions including Product Life cycle Management (PLM) software services and solutions; and (iii) engineering design productivity software tools/products. 3DPLM, a joint-venture of Geometric and France-based Dassault Systèmes (DS), provides software development / solutions / services and professional consulting / development services to the DS group. It does not provide any product/service independently in any market.

The proposed combination relates to IT and ITES market and the parties are engaged in the business of providing IT services and PLM software services. HCL and Geometric have overlaps in IT services and Engineering, Research & Development' (ER&D) market in

India (Overlapping Segments).

HCL and Geometric are stated to have small market shares in the business of IT and ITES as well as in the Overlapping Segments, and there are several large entities, like Tata Consultancy Services, Infosys and Wipro, operating in the business of IT and ITES, as also in the Overlapping Segments.

As these competing companies will continue to pose competitive constraint to HCL and Geometric, and as there are no vertical relationships between the businesses of the parties, the likelihood of appreciable adverse effect on competition is ruled out.

Accordingly, the Commission approved the combination under sub-section (1) of Section 31 of the Act.

# INVESTIGATIONS INITIATED

## Case No. 2 of 2016 In Re: International Spirits and Wines Association of India and Uttarakhand Agricultural Produce Marketing Board & Ors.

The Commission vide its order dated 19 July, 2016, directed investigation against Uttarakhand Agricultural Produce Marketing Board ('OP-1'), Garhwal Mandal Vikas Nigam Ltd. ('OP-2') and Kumaun Mandal Vikas Nigam Ltd. ('OP-3') [collectively referred to as the 'Opposite Parties'] in an information received from International Spirits and Wines Association of India ('Informant') alleging abuse of dominant position by the Opposite Parties.

OP-1 is a body corporate, established under Section 47 of the Uttarakhand Agriculture Produce Marketing (Development and Regulation) Act, 2011. Vide Liquor Wholesale Order dated 27 April 2015, the Government of Uttarakhand appointed OP-1 as the exclusive wholesale licensee of foreign liquor/beer/wine ('alcoholic beverages'), including the India Made Foreign Liquor ('IMFL') in the State of Uttarakhand. In addition to the appointment of OP-1 as the wholesale licensee of alcoholic beverages, the Liquor Wholesale Order appointed OP-2 and OP-3 as the exclusive sub-wholesalers of foreign liquor for seven and six districts, respectively, in the State of Uttarakhand.

The Informant alleged that OPs are not procuring IMFL brands in accordance with the true consumer demand and OP-1 imposed onerous conditions in its agreements with IMFL manufacturers, in contravention of the provisions of Section 4(2)(a)(i) of the Act.

The Commission observed that the case appears to involve the following relevant markets: (a) market for wholesale procurement of branded alcoholic beverages in the State of Uttarakhand; (b) market for distribution of branded alcoholic beverages in the licensed area of OP-2 in the State of Uttarakhand; and (c) market for distribution of branded alcoholic beverages in the licensed area of OP-3 in the State of Uttarakhand. The Commission also noted that precise definition of the relevant market was not necessary as the Commission was prima facie convinced that the Opposite Parties will remain dominant in any of the plausible relevant markets as each of them have been granted exclusivity in its respective business and area of operation; and no other person can procure, supply or distribute alcoholic beverages in the State of Uttarakhand on account of the restrictions envisaged pursuant to

the Excise Policy and the Liquor Wholesale Order.

As regards the abuse, the Commission, inter alia, noted that two factors: 1. Sudden decline in the procurement of IMFL brands of selected manufacturers, between August and October 2015; 2. Retailers have raised concerns about the non-availability of IMFL brands. These factors suggest that the Opposite Parties have not made procurement of IMFL in accordance with the actual consumer demand. The Opposite Parties being the only source of procurement and distribution of alcoholic beverages in the State of Uttarakhand, the Commission held that the discriminatory and arbitrary procurement/distribution by the Opposite Parties from IMFL manufacturers distort competition. Thus, the Commission was prima facie convinced that such conduct of the Opposite Parties has limited and restricted distribution and sale of IMFL that can be considered as denial of market access, in contravention of the provisions of Section 4(2)(b)(i) and Section 4(2)(c) of the Act. Accordingly, the Director General was directed to cause investigation into the matter.



# DEVELOPMENTS IN OTHER JURISDICTIONS

## MoU between European Union and South Africa

The Directorate General for Competition of the European Commission (DG Competition) and the Competition Commission of South Africa (CCSA) signed a Memorandum of Understanding (MoU) on cooperation in the field of competition law and enforcement. The MoU provides for voluntary information exchange; sharing of developments relating to competition policy and enforcement; technical cooperation in the nature of exchange of staff, organisation of seminars, and training workshops etc. The MoU also provides for coordination in enforcement activities.

### United States of America

The Department of Justice (US DoJ) has till date imposed criminal fines totalling more than \$2.8 billion on 45 companies and 64 executives. The latest among those fines being on Nishikawa Rubber Co. Ltd. (Nishikawa) who has pleaded guilty and agreed to pay \$130 million criminal fine. The cartel related to the fixing of prices and bid rigging in the market for automotive body sealing products installed in cars.

Nishikawa had participated in the conspiracy from January, 2000 to at least September, 2012, to fix the prices and bids of automotive body sealing products, sold to Honda Motor Company Ltd., Toyota Motor Corporation, Fuji Heavy Industries Ltd. (Subaru) and their subsidiaries and affiliates in the United States and elsewhere.

US DoJ had worked closely with the Competition Bureau of Canada under the 'Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws, 1995'. The matter was taken up by the DoJ, as the target for the anti-competitive practices were primarily US consumers.

The investigations in the matter are currently underway, and have so far unearthed anti-competitive practices in relation to the supply of electric power steering gears, anti vibration components, body electronic control units, certain types of switches and sensors, automotive wheel hub unit bearings, wire harnesses, and electrical boxes.

### United Kingdom

On 12 August 2016, the Competition and Markets Authority fined Trod Limited, after it admitted to entering into an agreement with its competitor GB eye Limited, to not undercut prices on sales made on the Amazon UK website. The conspiracy covered the period from March, 2011 to July, 2015. The cartel pertained to the sale of licensed sports and entertainment posters and frames on the Amazon UK website.

The Authority's investigation was limited to posters and frames for reasons of administrative priority, and the same does not exclude the

possibility of a similar cartel in other sports and entertainment merchandise sole, such as badges, stickers, mugs and transfer tattoos.

A total fine of £163,371 was levied on Trod Limited. No fine has been levied on GB eye Limited as it had reported the matter to the authorities, made an application for leniency, and cooperated with CMA during the investigation.

### European Union

In an important decision, the European Court of Justice held that a company may be held liable for conduct undertaken by third parties, if:

- 1) The service provider was in fact acting under the direction or control of the company concerned;
- 2) The company was aware of the anti-competitive objectives pursued
- 3) The company could reasonably have foreseen the anti-competitive acts of its competitors and the service provider.

This decision reiterates that companies have to ensure that third parties comply with the competition regime, that suitable contractual clauses, compliance training and audits are undertaken.

In this case a sub-contractor had participated in a tender, after coordinating with the competitors.

# ENGAGING WITH THE WORLD

- Five officials from the CCI attended a week long program w.e.f. July 31, 2016, organized by the Anti-trust Institute, George Mason University, Washington DC, USA on competition economics.
- Justice G.P. Mittal, Member attended the Russia Competition Week program that commenced on September 26, 2016 at Moscow, Russia. He chaired the first meeting under the MoU signed amongst BRICS Competition Authorities.
- Mr. Augustine Peter, Member attended the CRESSE 2016 -11<sup>th</sup> International Conference on Competition and Regulation. The conference was organised around the theme 'Advances in the Analysis of Competition Policy and Regulation'. He participated in the session on 'Issues of Competition Law Enforcement in the BRICS and Developing Countries'



*Shri Augustine Peter (third from the right), Member, CCI participated in the CREESE Conference 2016 on "Advances in the Analysis of Competition Policy and Regulation" during 1-3 July, 2016 at Rhodes Island, Greece.*

- Two officers from CCI attended the regional seminar on 'The Competition Analysis of Vertical Restraints' organized by the Commission for the Supervision of Business Competition, held on 28-29 September 2016 at Jakarta, Indonesia.
- Two officers attended the two days 'Competition Law Workshop on Merger Control' organized by the OECD-KPC held on 5-7 September 2016 at Seoul, Korea.
- An officer attended the 'ICN Chief Economist Workshop' at Vancouver, Canada on 12-13 September 2016.
- An officer from CCI participated in the RCEP Inter-session Meeting held at Ho Chi Minh City, Vietnam from 15-19 August 2016, organised under the aegis of the ongoing RCEP negotiations.

## ADVOCACY INITIATIVES

### Advocacy Initiatives with Central Government/State Governments/PSUs

- A Conference on "Curbing Deficit through Effective Competition in Public Procurement" was held at India Habitat Centre on 22 July 2016. Mr. Anil Kumar Bhardwaj, Adviser, participated and delivered a lecture on Competition Law and Economic Growth
- One day Advocacy seminar at Hindustan Aeronautical Limited, Bengaluru on Competition Law and Procurement Policy on 29 July 2016. Mr. S. L. Bunker, Member, inaugurated the seminar. Mr. Anil Kumar Bhardwaj, Adviser and Mr. Sukesh Mishra, Director (Law) made Presentations on Competition Law & Policy and Bid Rigging & Public Procurement.
- A meeting with Mr. Solomon Arokiaraj, Secretary & CIP, Govt of Andhra Pradesh, on 8 August 2016, in his chambers at North H Block, 3rd Floor, AP Secretariat, Hyderabad was attended by Mr.



Augustine Peter, Member, who was accompanied by Mr. Sukesh Mishra, Director (Law).

- A meeting was held with the Chief Secretary of Govt. of Himachal Pradesh at Shimla on 16 August 2016. Mr. Sudhir Mital, Member, accompanied by Mr. VP Mishra, Director (Law) participated in the meeting. Subsequent to the meeting Member also held a brief discussion with Sh. Virbhadr Singh Hon'ble Chief Minister of Himachal Pradesh.
- Interactive session with the Chief Secretary of Govt. of Punjab at Chandigarh on 17 August 2016. Mr. Sudhir Mital, Member, accompanied by Mr. V. P. Mishra, Director (Law) participated in the meeting.

- CCI organized a programme on Competition Law and Policy for senior government officers:

CCI organized a programme on 'Competition Law and Policy' for the Joint Secretaries and other senior level officers of central government on 24th August 2016 at India Habitat Centre, New Delhi. The objective of the programme was to sensitize the policy decision makers within the Government with the provisions of the Act in order to promote competition culture, neutrality, compliance and to improve efficiency in the process of public procurement. The programme was quite well attended by more than 60 senior officers from various Ministries/ Departments. It was inaugurated by Mr. D. K. Sikri, Chairperson, CCI who emphasized the changing role of Government in the market; from



Shri Augustine Peter (second from the left), Member, CCI at 4<sup>th</sup> International Conference on Competition Law organised by ASSOCHAM – “Opportunities and Challenges in India”

a participant before economic reforms to an enabler for promoting competition and growth. Mr. Augustine Peter, Member, CCI in his opening remarks stressed the need to review all the policies and legislations, keeping in view the Competition aspects and remove any unintended barriers that it may create. The other distinguished speakers were Ms. Smita Jhingran, Secretary who sensitized the participants with various provisions of the Act; Professor Ajay Shah from National Institute of Public Finance and Policy shared his views on 'Why promoting Competition should be at the Core of Public Policy and Planning'; Dr. Geeta Gauri (ex-Member, CCI) who shared her experience in Competition Regulation citing various Anti-trust cases of Public Procurement; and Mr. Dhanendra Kumar (ex-Chairperson, CCI), Dr. M.S. Sahoo (ex-Member, CCI) and Ms. Pallavi Shroff, Partner and Head, Shardul Amarch and Mangal Das participated in the panel

discussion on 'Competition and Regulation'. There were also discussions with the participants on social objectives of Government policy vis-à-vis Competition, overall situation in various sectors of the economy, challenges arising out of predatory pricing and bid-cartels. The program design and deliberations were appreciated by the participants.

- In a programme at IRITM, Lucknow, on 24 August 2016, Dr. Bidyadhar Majhi, Director (Eco.) made a presentation on the topic 'Curbing Anti-competitive practices in public procurement: A case of Indian Railways'.
- Mr. Anil Kumar Bhardwaj, Advisor and Mr. Sukesh Mishra, Director (Law) delivered lectures on 'Public Procurement and Anti-Competitive Conduct' and 'Public Procurement and Transparency' respectively at a workshop on "Public Procurement" organised by Bharat Petroleum Corporation Limited at Mumbai on 29 September 2016.

# Advocacy Initiatives with Trade Associations and Institutions

- A seminar on 'Payments Banks in India: Competition and Regulatory Bottlenecks' organized by CUTS Institute for Regulation & Competition, Jaipur on 7 July, 2016 at New Delhi. Dr. M. S. Sahoo, Member addressed the opening session of the seminar.



*" Mr. D.K. Sikri, Chairperson delivering keynote address in a Workshop on 'Competition Issues on Telecom Sector' on 22nd July, 2016 at New Delhi"*

- CCI in collaboration with National Institute of Financial Management (NIFM) organised a workshop on Competition Issues in Telecom Sector at India Habitat Center on 22 July, 2016. Ms. Annie Moraes, Member (Finance), Telecom Commission, Department of Telecom inaugurated the workshop. Mr. D.K. Sikri, Chairperson, CCI delivered keynote address on competition law.

Mr. Kaushal Kishore and Mr. Anil Kumar Bhardwaj, Advisers, CCI were the panelists in a discussion on "Competition Law, Economics Evidence in Regulation and Economics Growth". The other panelist were Mr. Manas Chaudhary, Advocate and Mr. Navneet Sharma, Associate Professor, IICA. The second panel discussion was on "Importance and relevance of Competition Law for Telecom Sector". The

expert panellist were Mr. Anil Kumar Bhardwaj, Adviser, CCI, Mr. N. K. Yadav, Member (Services), Telecom Commission, Mr. Ravi Gandhi, Head, Regulation, Bharti Airtel Ltd. and Mr. P. Balaji, Regulatory Head, Vodafone India.

Two lecturers were given on the topics – "Competition Laws- Introduction, Substantive Provisions, Anti-Competitive Agreements and Abuse of Dominance" by Ms. Jyoti Jindgar, Adviser, CCI and on "Public Procurement and Bid Cartels" by Mr. Santhanam Krishnan, Procurement Division, World Bank.

- A half day workshop on Competition Law was jointly organised by CCI and Chemical & Allied Export Promotion Council of India (CAPEXIL) on 09th August, 2016 in New Delhi. Considering that members of CAPEXIL operate in various countries entailing competition issues in overseas markets, the workshop specially focussed on Competition Law and its foreign jurisdiction. The event was inaugurated by Ms. Rita Teotia, Secretary Commerce and Industry Government of India. Dr. M.S. Sahoo, Member, CCI Chaired an interactive session with office bearers and members of CAPEXIL wherein issues pertaining to extra-territorial jurisdiction of CCI were also discussed. Mr. Anil Kumar Bhardwaj, Adviser, CCI delivered keynote address during the inaugural session. Mr. Kaushal Kishore, Adviser, CCI made a Presentation on 'Basics of Competition Law and Necessary Statutory Compliance'. Mr. Samir Gandhi, Partner, M/s AZB & Partners also made a presentations during the event.



*Mr. Augustine Peter (second from the right) and Dr. M.S.Sahoo (fourth from the right), Members, CCI participated in the Panel Discussion on "Economics in Competition Law" by CLBA at New Delhi*

- Dr. M. S. Sahoo, Member delivered Valedictory Address at the Workshop on 'Corporate Laws and Regulations, 2016' organised by PHD Chamber of Commerce



and Industry on 10 August 2016 at PHD House, New Delhi.

- Dr. M. S. Sahoo, Member participated in the panel discussions on 'Economics in Competition Law' held on 24 August 2016 organised by Competition Law Bar Association at New Delhi.
- Mr. D.K. Sikri, Chairperson CCI participated in book release function and high level panel discussion on 'The Political Economy of Regulation in India: Impact on Investments and Economic Growth' on 1



Ms. Rita Teotia, Commerce Secretary addressing the gathering at "Workshop on Competition Law and its Foreign Jurisdiction" organized by CAPEXIL on 9<sup>th</sup> August, 2016 at New Delhi.

September 2016 organised by CUTS – CIRC at New Delhi.

attended by Mr. S.L. Bunker, Mr. Sudhir Mital and Mr. Augustine Peter, Members, CCI.



Shri D.K. Sikri, Chairperson (in centre) CCI at 4th International Conference on 'Competition law - Opportunities and Challenges in India', New Delhi

- Mr. D. K. Sikri, Chairperson, CCI delivered Chief Guest Address at 4th International Conference on Competition Law- Opportunities and Challenges in India' organised by ASSOCHAM on 9th September 2016. The conference was also

Besides, by Mr. Tapan Ray, Secretary, Ministry of Corporate Affairs, Mr. Rajeev Kher, Hon'ble Member, Competition Appellate Tribunal, Mr. Rajkumar Dhoot, Past President, ASSOCHAM, Mr. Manas Kumar Chaudhari, Chairman, ASSOCHAM, Mr. D. Daniel Sokol, Professor, University of Florida were also present in the conference.

## Advocacy Initiatives with Universities/Institutes

- Every week a session on 'Competition Law & Public Procurement' in MDP on Public Procurement at NIFM, Faridabad. Ms Bhawna Gulati, DD (Law), Ms.Sunaina Dutta, DD (Law), Mr.Mukul Sharma, DD (Eco.), Mr. Sachin Goyal, DD (FA), Ms. Jyotsna Yadav, DD (FA), Mr.Ashutosh Kumar, DD (Eco.), Mr. Kamal Sultanpuri, DD (Law) , Mr. Saurabh, DD (Eco.), Mr. Pranav Satyam, DD (Eco.), Mr. Arun Dhall, DD (Eco.), and Ms. Neha Raj, JD (Law) conducted the sessions.
- A National Seminar on 'Laws & Economics of Competition' jointly organised by ICSI and CCI at Bhubaneswar, on 15 July 2016. Mr. S.L. Bunker, Member delivered the key-note address in the inaugural session highlighting the role of CCI in a developing economy. Dr. M.S. Sahoo, Member



Mr. Augustine Peter (first from left), Member, CCI at the National University of Advanced Legal Studies (NUALS), Kochi on 29<sup>th</sup> July, 2016

delivered an address on 'Need of Competition to promote growth' in the technical session on 'Agreements, Abuse of Dominance and Combinations'. Mr. Anil Kumar Bhardwaj, Adviser delivered a lecture on 'Role of professionals in furthering the cause of Competition' in the technical session on 'Developing Competition Culture'.

- Dr. M. S. Sahoo, Member addressed faculty and post graduate students of Commerce and Financial Management of Utkal University 'Emerging Trends in Laws and Governance' at Bhubaneswar on 15 July 2016.
- A half day National Conference of Practising Company Secretaries organised by the ICSI on "PCS@Startup - Accelerate -

Outspace” during 12–13 August 2016, at Kasauli, Himachal Pradesh. Mr. Anil Kumar Bhardwaj, Adviser (Advocacy) participated and delivered a lecture on Competition Law on 12 August 2016.

- Dr. M. S. Sahoo, Member delivered an online Valedictory Address on 13 August 2016 at the end of Six-month Advanced Professional Course in Competition Law and Market Regulations, organised by Indian institute of Corporate Affairs.
- Third Focused Group Discussions held at Institute of Company Secretaries of India - Hyderabad Chapter, Hyderabad on 13 August 2016; Mr. Yogesh Kumar Dubey, DD (Eco.) represented CCI.
- Mr. Kaushal Kishore, Advisor (Eco.) gave a lecture/presentation on “Strategic Dimensions of the Competition Law” to Top/Senior Executives of PSEs during 5th Advanced Global Leadership

- A Capacity Building Workshop on Competition Assessment of Legislation/Policies from 4 – 6 August 2016 was held at IICA, Manesar, Haryana. 15 participants from seven Institutes/Universities participated. Mr. D.K. Sikri,

Programme organised by Standing Conference of Public Enterprises(SCOPE) in collaboration with IIM, Calcutta held at New Delhi on 26 August 2016.

- A workshop on Responsible Business Practices at Hotel Park, Lucknow organised by CCI in collaboration with IIM, Lucknow on 29 August 2016. Mr. Anil Kumar Bhardwaj, Adviser (Eco.) delivered a lecture on ‘Competition, Procurement and Compliance’.
- Dr. M. S. Sahoo, Members, CCI addressed Indian Economic Service officers at Indian Institute of Corporate Affairs, Manesar on 1 September 2016 in a training programme on Competition Assessment. Mr. Anil Kumar Bhardwaj, Advisor and Mr. Rakesh Kumar Director (Eco.) CCI also delivered a lecture in the programme.
- Ms. Smita Jhingran, Secretary, CCI delivered Key Note Address at

Chairperson, CCI inaugurated the event. Mr. S.L. Bunker, Mr. Sudhir Mittal, Mr. Augustine Peter, Mr. U.C. Nahta, Dr. M.S. Sahoo, Members of CCI chaired different sessions in the workshop. Concluding remarks were provided by Mr. Anil

International Conference on Law & Economics at IIT Kanpur during 3-4 September 2016.

- Mr. Rakesh Bhanot, Director (FA) and Mr. Nandan Kumar, Joint Director (Eco.) conducted a workshop on Competition Law at ICAI workshop in Thane on 18 September 2016.
- Ms. Prachi Mishra, Deputy Director (Law), CCI delivered a lecture on ‘Competition Law’ at TERI University on 21 September 2016.
- Mr. Rakesh Kumar, Director (Eco.) delivered a lecture on Competition Law at National Judicial Academy Bhopal on 23 September 2016.
- Dr. M.S. Sahoo, Member, CCI headed a panel discussion on ‘Regulating Professions’ at 1st Law Economics Policy Conference held during 28-30 September 2016 organised by NIPFP and INET at New Delhi.

Kumar Bhardwaj, Adviser, CCI.

- 27 students from various universities/Law Colleges pursuing study in disciplines of Law, Economics, Management and Professional courses i.e. CA, CS undergone internship with CCI.

## Others

## New Advocacy Initiatives Resource Person Scheme

In order to disseminate the message of “competition” and create a culture of competition in society, the Commission has initiated the process of appointing a panel of twenty four “Competition Resource Persons”, one each for the State or group of states and Union

Territories. These Resource Persons would organise competition advocacy programmes for various stakeholders. In this regard, the Commission has framed the Resource Person Guidelines which is available on the CCI website. The selected Resource Persons

candidates will get an initial training on various aspects of competition law and economics that will help them in disseminating the message of “competition” among stakeholders. Specific study material has also been prepared for the use of resource persons.



## Competition Assessment of Legislation and Policies

In sync with the mandate of the Competition Act, the Commission wishes to assess select legislation and policies (Acts, Bills, Rules, Regulations and Policies) from competition perspective and share the assessment with the associated competition stakeholders. The Commission has framed the competition assessment guidelines (under section 49 (1) and (3) of the Act) and has empanelled seven academic institutions i.e. CUTS International, IIM Ahmedabad, IIM Lucknow, NLU Delhi, NLU Bhopal, NIPFP Delhi & IGIDR Mumbai in pursuit of this novel endeavour.

In this context, the Commission organised a capacity building exercise for competition assessment of seven select legislations/policies



Workshop on Competition Assessment, IICA IMT Manesar Gurgaon 4-6 August, 2016

with seven empanelled institutions and CCI officers. For every legislation, an expert in respective domain was also invited to spearhead and guide the discussions. The workshop proved

to be insightful and a successful knowledge sharing experience. The second phase of the said exercise will be held during 8 – 9 December 2016 in collaboration with OECD.

## ECO WATCH

### India 39th Most Competitive Economy in the World

The World Economic Forum (WEF) has placed India at the 39th position in terms of the latest Global Competitiveness Index. India's ranking improved 16 notches from the 55th place attained in the last round, making it the fastest riser among the 138 countries surveyed. The Index is calculated based on 12

parameters that include Institutions, Infrastructure, Macroeconomic Environment, Health and Primary Education, Higher Education and Training, Goods Market Efficiency, Labour Market Efficiency, Financial Market Development, Technological Readiness, Market Size, Business Sophistication and Innovation. As per the WEF Report, India's

competitiveness has improved across the board; particularly in goods market efficiency, business sophistication, and innovation. The improved performance of the country can be attributed to the economic reforms agenda pursued over the past quarter-century as also the increased level of competition in markets post liberalisation.

### Payments Banks: Potential Game Changer in the Competition Landscape in Banking

Payment Banks are institutions which are permitted by the Reserve Bank of India (RBI) to accept deposits, make payments and remittances on behalf of customers. Payments banks can give interest on deposits however, they are not allowed to loan funds to customers. In-Principle approval was given by

the RBI to eleven entities to start Payment Banks in August 2015. However, three of the eleven companies -- Tech Mahindra, Cholamandalam Finance and Dilip Shanghvi-IDFC Bank-Telenor JV have dropped out. This leaves only eight applicants in the fray -- India Post, Airtel Money, Reliance

Industries, Vijay Shekhar Sharma, Aditya Birla Nuvo, Vodafone MPesa, FinoPayTech and NSDL. The backtracking of some of the entrants in the market indicates the unique challenges that the segment faces.

The first challenge in the segment is that the payment banks will have to

compete against the commercial banks in the payment segment, which are big and established players. These commercial banks are now aggressively pushing their own mobile application-based offerings. Payments banks are expected to leverage technology to increase reach of banking in India. However, payments segment of financial sector is subjected to fast changing

and new technology. Therefore, payments banks would have to survive competition from new innovations like Unified Payment Interface (UPI). UPI is a payment system that allows transfer of money between any two parties and enables direct payment from bank account to different merchants without the hassle of typing card details or net banking /wallet

password.

The payment banks have the potential to change the competition landscape of the financial sector in India. It will be in the interest of economy and particularly consumers of financial services that these payment banks develop and provide competitive constraint to the existing players in the market.

## JUDICIAL PRONOUNCEMENTS

### No Requirement to Establish *Mens Rea* under Section 43A

The COMPAT vide its order dated 30th August 2016, in Appeal no. 59/2015 (SCM Soilfert Limited V. CCI) upholding the decision of the Commission, held that Section 43A has no requirement of establishment of mens rea as the legislature has not used the phrase “wilful failure” and failure simpliciter has penal consequences. The imposition of penalty under Section 43A is on account of breach of a civil obligation and once it is established that there was a failure to notify the proposed combination as required under Section 6(2) of the Act, penalty has to follow.

This appeal was filed against the order of the Commission wherein it was held that SCM Soilfert Limited (SCM) had failed to file notice under Section 6(2) for its acquisition of shares of Mangalore Chemicals and Fertilizers Limited (MCFL). The said acquisition was done by means of three transactions; (a) on 03 July 2013, SCM purchased 2,89,91,150 shares (constituting 24.46% of the paid up capital) of MCFL on Bombay Stock Exchange. 19.9% of these shares were acquired through

block deals and the rest through bulk deals; (b) on 23 April 2014, SCM placed a purchase order in the open market for the purchase of equity shares representing 1.7% of the shares of MCFL pursuant to which it acquired equity shares representing 0.8% and (c) an open offer under Regulation 3(1) of the Takeover Code for acquiring upto 26% of paid up equity shares of MCFL. SCM filed a notice disclosing details of the combination under Section 6(2) of the Act with the Commission on 22 May 2014 i.e. within 29 days of the acquisition of shares beyond 25% of the shares of MCFL. The Commission, vide its order dated 30 July 2014 under S.31(1) of the Act, approved the proposed combination, but initiated penalty proceedings under Section 43A of the Act for failure to give notice under Section 6(2) of the Act for the market purchase consummated on 23 April 2014 as well as the acquisition made in 2013.

The parties alleged that the acquisition was “solely as an investment” and hence not a notifiable transaction under

Regulation 4 read with Schedule 1 of the Combination Regulations. The COMPAT considered that in so far as the intention at the time of acquiring the shares of MCFL is concerned, the contemporaneous press release issued by the acquirer was found to be a good evidence to support the view that the objective was not solely to make an investment in a competitor company. The various factors relating to the acquisition, seen not in isolation, but through an economic and commercial perspective, namely, the acquirer and MCFL being competitor enterprises, the timing of the acquisition i.e. bulk / block deals following the rival acquiring shares in MCFL, size of equity stake acquired, the public announcement made through press release, the likely low return on price paid for the shares, conclusively established that shares were not acquired “solely as an investment”. Thus, COMPAT held that there was a failure to comply with Section 6(2) of the Act.



## Finding Against ITPO Set Aside

The COMPAT in Appeal No 36 of 2014 through its order dated 01st July 2016 set aside the order of the Commission wherein it had penalised Indian Trade Promotion Organisation (ITPO) with a sum of INR 67.5 lakh for abusing its dominant position in the market for event and exhibition services. ITPO is a Government agency to promote external trade and it accords approvals for holding of international trade fairs in India and abroad. CCI held that ITPO imposed time gap restrictions for trade shows and gave preferential treatment to

its 4 own fairs over competing fairs by third party at Pragati Maidan. Further, ITPO by stipulating favourable time gap restrictions for its own events as compared to third-party organised events has abused its dominant position. It incorporated unfair conditions in agreements entered with other organizers in case of cancellation or re-scheduling of events.

COMPAT held that DG had not conducted proper investigation with reference to the relevant factors for the purpose of determination of the

relevant market and the Commission had erred in deciding the relevant market. The Commission had not compared Pragati Maidan with other venues across the country. DG also did not investigate the nature of transport facilities available for the 4 venues at Mumbai, 2 venues at Hyderabad, 2 venues at Bangalore, 3 venues at Chennai/Coimbatore, Gurgaon and 2 venues in NCR. COMPAT observed that the Commission did not consider the economic rationale of the time gap policy supplied by the ITPO.

## No Cartelisation by Jute Manufacturers Association and Gunny Trade Association

The Commission had, on the basis of information filed by the Informants, Indian Sugar Mills Association, National Federation of Co-operative Sugar Factories Ltd. and All India Flat Tape Manufacturers Association, investigated into the alleged anti-competitive agreement by the members of Indian Jute Manufacturers Association (IJMA) and Gunny Trade Association (GTA) in fixation of sale price of jute packaging material by issuing of daily price bulletin by GTA for jute bags for the members of the IJMA and the GTA to follow. The Commission had found after

following the due process under the Act, that IJMA and GTA were guilty of violating Section 3(1) read with Section 3(3)(a) and 3(3)(b). Consequently, it had passed an order imposing cease and desist order, penalty, and also order under Section 48 against its office bearers.

On appeal, the COMPAT, vide its order dated 01<sup>st</sup> July 2016, relied on orders passed by the Commission in Neeraj Malhotra and Deutsche Post Bank Home Finance and 15 others (Case No 5/2009), In Re: Domestic Airlines (*Suo Moto* Case No 02/2010), In Re: Sugar Mills (*Suo Moto* Case

No 01/2010) In Re Alleged cartelization by Steel Manufacturers (RTPE 09/2008) and held that it was not possible to draw an inference that GTA and IJMA had entered into an agreement or understanding for fixation of price of jute bags. The COMPAT also held that the penalty should be imposed on relevant turnover and that based on its previous orders in Alkem Laboratories and Bengal Chemist and Druggist Association. Section 48 can only be invoked after it is found that the company has contravened the provisions of the Act or any rule, regulation, order made, and direction thereunder.

## Proceedings against Office Bearers and the Enterprise is a Composite One

Proceedings against Office Bearers and the Enterprise is a Composite One

A writ petition (WP(C). No. 22534 of 2016 (N)) was filed in the Kerala High Court against orders passed by the Commission asking the office

bearers of the association to file their income tax returns and file reply to the investigation report filed by the DG failing which the proceedings will be continued against them and order was passed to initiate proceedings under Section 43A of the Act. The main allegation in the

information was that a ban was imposed against informant by the Film Employees Federation of Kerala and its affiliated trade unions.

The Court held that the materials on record indicated that a final decision

on the issue will be rendered by the Commission only when it disposes of the complaint. If only the Commission finds that the opposite parties in the complaint have contravened the provisions of the Act and that the petitioners were in charge of, and were responsible for

the conduct of the business of the association at the relevant time, they are liable to be proceeded and punished under the Act. There is, therefore, absolutely no reason for the petitioners to be aggrieved by the orders of the Commission at this point of time. The scheme of the Act

does not contemplate two separate proceedings against the opposite parties as also against the office bearers of the opposite parties who are liable to be proceeded under Section 48 of the Act. The proceedings under the Act, going by its scheme, are a composite one.

## TRAINING PROGRAMMES

1. Two days training program on 'Company Law' in collaboration with ICSI was organized for officers of CCI at ICSI campus, Lodhi Road during 7 – 8 July 2016.
2. 16th lecture under Distinguished Visitor Knowledge Sharing Series (DVKS) by Dr. Pratap Bhanu Mehta, President, Centre for Policy Research, New Delhi on the topic 'Crisis of the Professions' was organized at CCI on 21 July 2016.
3. An officer attended a training program on 'Organizational Behaviour' conducted by Institute of Secretarial Training and Management (ISTM) at its campus during 1– 5 August 2016.
4. An officer participated in one week residential Management



*Dr. Pratap Bhanu Mehta, President Centre for Policy Research delivering Lecture on 'Crisis of the Professions' as a part of DVKS Lecture Series.*

- Development Program on 'Public Procurement' during 1– 6 August 2016 conducted by National Institute of Financial Management (NIFM) at its Faridabad campus.
5. Four CCI Professional Officers attended an International Conference on 'Innovation,

- Intellectual Property Rights, Competition and Standard Setting in ICT Industry' organized by O. P. Jindal Global University during 20– 21 August 2016 at The Taj Mahal Hotel, New Delhi.
6. A presentation on 'Competition Law and Economics' by Prof. Yannis Katosoulacos, Athens University was organized on 22 August 2016 at CCI.
7. An attachment programme for newly recruited Indian Corporate Law Services (ICLS) Probationary Officers on 16, 22 & 23 August 2016 at CCI and on 17 August 2016 at O/o DG-CCI.
8. An officer participated in a workshop on "Gender Budgeting" conducted by Institute of Secretarial Training and Management (ISTM) at its



*Prof. Yannis delivering lecture on 'Legal Standards and Role of Economics in Competition Law Enforcement'*



New Delhi campus during 22 – 24 August 2016.

10. One day in-house Induction Training Programme was conducted on 26 September 2016 for newly recruited officers and RAs of CCI.

11. Three officers & two RAs of CCI attended the 1st Law Economics Policy Conference (LEPC) organized by National Institute of Public Finance & Policy (NIPFP), New Delhi and

Institute of New Economic Thinking (INET), New York during 28 – 30 September 2016 at India Habitat Centre, New Delhi.

## KNOW YOUR COMPETITION LAW

### *Enterprise under the Competition Act, 2002*

'Enterprise' is a term used in the commercial world to describe a project or venture undertaken for gain. It is often used with the word "business" as in "business enterprise". Enterprise has been defined in Section 2(h) of the Act as "a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."

A wide inclusive definition of the term 'person' has been given in S. 2(l) of the Act. "Person" includes— (i) an individual; (ii) a Hindu undivided family; (iii) a company;

(iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956; (vii) anybody corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to cooperative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses. The definition assumes importance because when anti competitive conduct is alleged against an entity, and the section applies only to an enterprise, for example, abuse of dominant position under Section 4, it has to be examined whether such entity falls within the definition of enterprise or not.

To be an enterprise, the entity should be engaged in an activity which relates to production/distribution of goods or provision of services or investment or acquiring/holding shares or debentures or other securities of any other body corporate. The exclusion is available only if (a) it is any Government activity relating to the sovereign functions of the Government or (b) all activities

carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. The COMPAT, through its orders, have elucidated the concept and included certain government agencies within the definition of 'enterprise'.

In *Malwa Industrial & Marketing Ferti-Chem Cooperative Society Ltd. v. CCI & Ors*, Registrar of Co-operative Societies was held to fall within the purview of the term 'enterprise' by the COMPAT. The matter which came up before the Commission was that even though there is no provision in the Punjab Cooperative Societies Act, 1961 for restraining any co-operative society to make purchases from the open market or from a particular cooperative society, the Registrar, Co-operative Societies and other officers of the department were not allowing different co-operative agricultural societies to purchase micro-nutrients and agro-chemicals from the informant. Instructions were issued making it mandatory for such societies to make purchases from Punjab State Co-operative Supply and Marketing Federation only. The COMPAT analyzed the definition of 'enterprise' and 'goods' in the Act and observed that though the Registrar, Cooperative Societies, Punjab had issued circulars in the purported exercise of his powers



under the Punjab Cooperative Societies Act, 1961 and the Rules and Regulations framed thereunder, the fact remains that the same were definitely relating to the goods which could be purchased by primarily agricultural societies from Punjab State Co-operative Supply and Marketing Federation only. Therefore, the Registrar would fall within the ambit of term 'enterprise' as defined in Section 2(h) for the purpose of the Act and will be amenable to the jurisdiction of the Commission.

In *Rajat Verma v. Haryana Public Works (B&R) Department* Public Works Department was held to be an 'enterprise' by the COMPAT, as it is a provider of service to the public.

Whether the activity of procuring construction services is with a view to make profit is not the concern of the Act. In the similar case of *Prem Prakash v. Principal Secretary and others* also the COMPAT relied on its order in *Rajat Verma* case and held that Madhya Pradesh Public Works Department ('MPPWD') is an 'enterprise'.

In *Wing Cdr. (Retd.) Dr. Biswanath Prasad Singh v. Director General of Health Services and Ors.*, COMPAT was of the view that Director General of Health Services ('DGHS') is an 'enterprise' under the Act because Central Government Health Scheme (CGHS) is not just a facilitative mechanism but it also provides healthcare facilities by

itself in the out-patient departments. DGHS does not perform a function which can be termed as inalienable and it cannot be said to be performing a sovereign function. The case related to the allegation before the Commission that DGHS notified fresh empanelment of private hospitals and revision of package rates applicable under CGHS in Delhi wherein it prescribed different rates of reimbursement to the private hospitals based on their accreditation with National Accreditation Board for Hospitals and Healthcare Providers ('NABH') and did not spell out any rationale or logic behind the different rates of payment.

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