



The Quarterly Newsletter of Competition Commission of India (CCI)

# Fair Play

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**Annual Day Lecture 2017  
Competition Commission of India**

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## **FROM THE DESK OF THE CHAIRPERSON**



Competition law is designed to protect the interest of consumers and businesses from harm arising out of anti-competitive behaviour. It ensures effective competition by fostering productive, allocative and dynamic efficiencies in the economy. Competition Act, 2002 follows the principle of competition neutrality i.e. it is an ownership and sector neutral law and all enterprises operating in India whether state owned or private are required to comply with competition law.

There exist a number of factors which determine whether a business complies with competition law or not. Factors that encourage compliance are mainly fear of monetary penalty, damage to reputation, morality and a strong competition compliance culture. Drivers of non-compliance include uncertainty of law, market conditions, mixed signals regarding compliance from top management and a culture of non-compliance (OECD, 2011). It is in the interest of the competition authorities to assess these factors and understand what efforts are needed from their part. If it is observed that there is lack of sufficient awareness among enterprises, then antitrust authorities should commit more of its resources towards training and advocacy. However, if it is found that the firms are aware of the law and still mandate it, then antitrust authorities should increase their investigatory efforts and make the legal consequences of violation more severe. Antitrust authorities should aim to promote the idea that antitrust violations are not only illegal but immoral as well.

We, at Competition Commission of India (the Commission / CCI), aim to promote a culture of competition compliance by creating awareness about the benefits of complying with competition law. We believe that imposition of fines and penalties alone would not help in achieving effective compliance. In order to achieve it, the dynamics of competition needs to be understood and fostered at the unit level of an enterprise. To help the enterprise in developing a competition culture at their premises, we have developed a “Compliance Manual for Enterprises” which was launched on the occasion of 8<sup>th</sup> Annual Day function of CCI on 20<sup>th</sup> May, 2017. The manual acts as a guidance material for the enterprise and lists out the various provisions of competition law and the do’s and don’t’s list. It guides the enterprise on preventive compliance, compliance during investigation and compliance post sanctions. With the help of the manual, we hope that enterprises would be able to adhere with the nuances of competition law and would strengthen and foster a strong culture of compliance at their premises. This would in turn increase the competitiveness of the economy.

We at CCI, would continue to promote awareness about competition law and would always be within reach of the enterprises for inspiring them to be fair and competitive.

(Devender K. Sikri)

# IN FOCUS

## Fostering Competition Compliance

Compliance with competition law in many jurisdictions is primarily enforced through imposition of penalties. Courts and enforcement agencies have imposed high monetary fines and, in some jurisdictions, even decreed imprisonment. However, the goal of the antitrust authorities is not merely to impose fines but rather avoiding imposition of such fines in the first place by ensuring compliance among enterprises. Also, deterrence through fines and penalties are not simply enough to ensure compliance as it doesn't address morality of the conduct and hence doesn't foster an ethical business culture<sup>1</sup>. So, while the old era competition compliance function relied on deterrence of fines, the new era compliance function's focus is to engender the culture of compliance rather than merely creating a fear of non-compliance by putting a heavy price on it.

Being a relatively young agency, promoting and spreading competition culture is a priority for the Commission and at the same time, its other priority is to help businesses comply with the Act. In eight years, a fair degree of awareness has been created amongst stakeholders, with respect to the provisions of the Competition Act, 2002 (the Act) its scope and application, and the sanction/penalties that the statute can provide. A weak competition culture and inadequate awareness of law come in the way of implementation of competition law. Thus, organizing advocacy and compliance programmes with enterprises and other stakeholders is always needed.

<sup>1</sup> Zambia Competition and Consumer Commission

The purposes of these programmes are to ensure that enterprise takes the necessary steps to be in compliance with the provisions of the Act. CCI in order to achieve its compliance objectives employs the following strategies:

### 1. Advocacy Interventions

Since the crux of the compliance function are well informed firms, CCI makes use of its advocacy interventions to spread awareness about the competition law. It informs the businesses about their rights and responsibilities under the Act. It makes them aware about the importance of compliance and the harmful effects of non-compliance with the competition law. It basically follows an *ex-ante* approach which plays a key role in reducing the potential of non-compliance. It conducts advocacy programmes to ingrain competition principles in the minds of the stakeholders in the market, strengthen the awareness of competition law, inculcate competition culture, and thereby encourage self-compliance and reduce the need for action against erring enterprises. The advocacy complements enforcement of competition law to bring desired changes in conduct of enterprises. CCI's advocacy initiatives concentrate on providing expertise to the enterprises on how to ensure compliance culture at their premises even in cases when there is no contravention of the law.

CCI's advocacy interventions are in the form of lectures, discussions, seminars and workshops with a range of stakeholders which includes

trade associations, company secretary, cost accountants, legal practitioners, business heads, professionals and other representatives of the businesses. It also interacts with sectoral regulators for promoting competition within their respective sectors. CCI also publishes a wide array of advocacy materials for guidance of various stakeholders. It acts as a guiding material for the stakeholders and informs them in simple language about the different provisions of the Competition Act and the approach adopted by CCI in their investigation. The Commission has also entered into MoUs with professional bodies to inculcate competition culture and spreading the message of competition in the society.

### 2. Competition Compliance Programme

CCI focuses on encouraging enterprises to invest on robust and credible Competition Compliance Programmes (CCP). From the enterprise's point of view, because of the severe penalties prescribed in the Act, huge cost involved in litigation and the loss of reputation of enterprises if found on the wrong side of the law; it would be useful to generate awareness within its organization to adopt CCPs. This will serve not only to avoid penalties and damage to reputation, but also to inculcate good corporate governance in their organisation. It would also prove useful in situations when an enterprise itself becomes a victim of anti-competitive practices carried out by other market participants. Thus,



having a good CCP may help the enterprises in identifying the boundaries of permissible conduct and may have inbuilt alarm systems which would raise red flags in the event of possible transgression.

In some countries like Italy, United Kingdom etc. an active CCP acts as a mitigating factor while evaluating the penalty or the punishment, if there is any transgression of the law. The Brazilian Competition Commission through their guidelines on competition compliance programme emphasized that only a robust compliance programme could result in a reduction of fine levels imposed by it (OECD, 2016). The CCI has also been strongly advocating for enterprises to inculcate a compliance culture in their organizations. In the recent bid rigging case against cement companies, CCI also considered the existence of CCP as a mitigating factor.

## Objectives and Features of CCP

The CCP needs to have the following three main objectives:

- (i) Prevent violation of law, i.e. the Act and all Rules, Regulations & Orders made there-under.
- (ii) Promote a culture of compliance, and
- (iii) Encourage good corporate citizenship

When it comes to compliance programmes, there is no such thing as one size fits all approach. The CCP needs to be tailor made depending on the size, nature of activities and as per the requirement of the enterprise. However, the compliance

programme needs to have the following essential features:

- Explicit statement of the commitment to the CCP from senior management
- Enterprise's Compliance Policy in simple and plain language
- Training and education of employees
- Development of a Compliance Manual
- Undertaking from employees to conduct business dealings within the compliance framework
- Relevant procedures to enable the employees to seek advice on whether a particular transaction complies with competition law and
- Mechanism of reporting of suspicious anti-competitive activities.

In India, compliance is also encouraged through leniency programmes and lesser penalty provisions under the Act. This led to an increase in leniency applications in the recent past. CCI issued its first order in a case where 75 per cent reduction in penalty was granted to an applicant under the lesser penalty provisions. The criteria used for determining reduction in penalty are timing of the disclosure, the value that the applicant adds to the evidence already available with CCI and continued cooperation during investigation. While it is anticipated that leniency application will gather momentum and more and more enterprises will come forward to uncover cartels, the priority is and will remain to ensure that violations

of the Act do not happen in the first place.

To facilitate compliance culture, the CCI released a Compliance Manual for Enterprises. The manual includes guidance on preventive compliance, compliance during inquiry and investigation and compliance after final order. It provides the basic principles of competition law that impact an enterprise's relationship with competitors, agents, suppliers, distributors, customers and other third parties. It also contains guidelines that are designed to help executives and employees of the enterprise to distinguish between permissible business conduct and illegal anti-competitive behavior.

### Conclusion

Having a culture of competition compliance not only benefits enterprises irrespective of their size and nature of operation but also benefits the economy as a whole. Ensuring compliance is essential feature of a competition policy. It helps in reducing harm by anti-competitive activities following the approach of "prevention is better than cure". The new age compliance function ensures that the competition benefits and harm due to inhibition of competition are understood by all. Thus it leads to sharing of the burden of strengthening and fostering competition between the competition regulator and the beneficiaries/stakeholders of competition. Adaptation of a sound CCP would help in inculcating competition culture more readily.

# SECTION 3 & 4 ORDERS

## Case Nos. 36 & 82 of 2014

In Case Nos. 36 & 82 of 2014, CCI has found Hyundai Motor India Limited (HMIL) to be in contravention of the provisions of Section 3(4) (e) read with Section 3(1) of the Act for imposing arrangements upon its dealers which resulted into Resale Price Maintenance in sale of passenger cars manufactured by it. Such arrangements also included monitoring of the maximum permissible discount levels through a Discount Control Mechanism.

Further, HMIL was found to have contravened the provisions of Section 3(4) (a) read with Section 3(1) of the Act for mandating its dealers to use recommended lubricants/ oils and penalising them for use of non-recommended lubricants and oils.

The final order has been passed 14.06.2017 on information filed by the dealers of HMIL viz. Fx Enterprise Solutions India Pvt. Ltd. and St. Antony's Cars Pvt. Ltd.

Apart from issuing a cease and desist order against HMIL, CCI has imposed a penalty of Rs. 87 crore upon HMIL for the anti-competitive conduct. The penalty has been levied @ 0.3 per cent of the average relevant turnover of HMIL of preceding three years. In its order, CCI noted that for the purposes of determining the relevant turnover for the impugned infringement, revenue from sale of motor vehicles alone have been taken into account.

## Suo Moto Case No. 01 of 2013

1. This case was taken up *suo moto* by the Commission under Section 19 of the Act, based on the finding in the 'Performance Audit Report of the Comptroller and Auditor General of India on Sale of Sugar Mills of Uttar Pradesh State Sugar Corporation Limited for the year ended 31 March 2011' (hereinafter, the 'CAG report') which indicated cartelization / concerted bid by a group of related companies in the sale of ten operational sugar mills by the Uttar Pradesh State Sugar Corporation Limited (hereinafter, 'UPSSCL') and eleven closed sugar mills by its subsidiary M/s Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited (hereinafter, 'UPRCGVNL') during July 2010 - October 2010 and January 2011 - March 2011, respectively. Finding *prima facie* contravention of the provisions of the Act, the Commission referred the matter

to the Director General ('DG') for investigation.

2. On investigation, DG found that there was an understanding among the bidders to not bid against each other for the sugar mills put for sale by UPSSCL and UPRCGVNL and that they had acted in a collusive manner and also directly/indirectly decided the bid prices in violation of Section 3(3)(a) and 3(3)(d) of the Act.
3. However, the Commission observed that rather than collusion the lack of competition amongst bidders appeared to be an outcome of onerous and litigious nature of the property, which acted as deterrent for prospective purchasers and also resulted in reluctance amongst participating bidders to place bids at or above the expected price declared by the

Government of Uttar Pradesh. Further, on examination of the bidding pattern for operational and closed mills, the Commission observed that the matter was not one involving identical or similar pricing by the participating bidders. Furthermore, it was noted that unless there was evidence of collusion amongst participating bidders with non-participating companies or prior knowledge with participating bidders regarding non-participation of other companies, the allegation of cover bidding or arrangement amongst participating bidders to share the mills was also not sustainable. Observing that no such evidence of collusion or prior knowledge had been found by the DG during investigation, the Commission decided to close the matter.

# SECTION 5 & 6 ORDERS

## Chennai Network Infrastructure Limited into GTL Infrastructure Limited

The Commission received a notice jointly given by GTL Infrastructure Limited (“GIL”) and Chennai Network Infrastructure Limited (“CNIL”) on May 22, 2017. The then proposed combination regarding merger of CNIL into GIL and was notified pursuant to board resolutions of each of the company.

GIL, listed on BSE and NSE, is engaged in the business of providing passive infrastructure services to various telecom operators across India. CNIL, a public company incorporated in India and an associate company of GIL, is also engaged in the business of providing passive infrastructure

services to various telecom operators in seventeen telecom circles in India. They are both registered with the DOT as an IP-I service provider.

The Commission observed that both GIL and CNIL are engaged in the business of providing passive infrastructure services to various telecom operators in India and that their operations overlap in many telecom circles. The Commission also noted that there is no vertical relationship between the activities of the Parties.

The Commission took into account that there are more than 600 IP-I service providers registered with the

DOT indicating that there is no significant legal or regulatory barriers to enter into the business of providing passive infrastructure services. In circles where operations of both GTL and CNIL overlapped, there are a number of other players such as Indus Towers Limited, Bharti Infratel Limited, ATC Viom, Reliance Infratel Limited, Bharat Sanchar Nigam Ltd., Vodafone and Idea, which are engaged in business of providing passive infrastructure services.

Accordingly, the Commission approved the combination under sub-section (1) of Section 31 of the Competition Act, 2002.

## Commission approves the acquisition of global printer business of Samsung Electronics Co. Ltd. by HP Inc.

The Commission received a notice, under sub-section (2) of Section 6 of the Act on October 13, 2016, filed by HP Inc. (“HP”), for proposed acquisition of global printer business (“Target Business”) of Samsung Electronics Co. Ltd (“Samsung”), (collectively, HP and Samsung are referred to as the “Parties”).

HP, incorporated in Delaware, is a global provider of products, technologies, software, solutions and services. In India, HP, is engaged in: (i) manufacture, distribution and sale of computing products and associated services and solutions; and (ii) distribution and sale of printing products and associated services and solutions. Samsung, incorporated under the laws of the

Republic of Korea, is *inter alia*, engaged in selling mobile devices, memory/storage devices and televisions/home entertainment systems. The Parties don’t have any manufacturing facilities for printers in India.

The Commission noted that printers can be broadly categorised as: (a) Regular Format Printers (“RFPs”) and (b) Large Format Printers (“LFPs”). The Commission observed that there is no overlap between the activities of the Parties in respect of LFPs. The Commission, however, observed that there is horizontal overlap among the Parties in respect of RFPs, which can be segmented on the basis of: (i) functionality of the printer as Single Function Printers

(“SFPs”) and Multi-Function Printers (“MFPs”) (ii) ink colour as Black & White (“Mono”) printers and colour printers; and (c) speed of printing.

In relation to RFPs, the Commission noted that the market share of the HP and Samsung in India for year 2015 is in the range of [35-40] percent and [0-5] percent, respectively thereby resulting in a combined market share of [40-45] percent. The Commission examined the presence of the Parties in the various sub-segments of RFPs based on the criteria of functionality, speed and ink colour of printers. Based on submissions of Parties and other third parties, the Commission observed that there is convergence



between SFPs and MFPs, the absolute price differential between SFPs and MFPs is narrowing over time and colour printers are gradually replacing mono printers.

On the supply side, the Commission observed that the printer manufacturers are able to switch production across various segments

of RFPs in the short term and without incurring significant incremental cost. Further, the Commission noted that the RFPs segment is characterised by the presence of other major players in India, namely, Canon, Epson, Ricoh and Konica Minolta, having significant market shares.

In view of the foregoing, the Commission did not find the proposed combination to raise any appreciable adverse effect on competition in RFPs business in India. Accordingly, the Commission approved the proposed acquisition under Section 31(1) of the Act.

## Commission approves the combination among Tata Sons Limited, Tata Steel Limited, Tata Industries Limited, Tata Communications Limited and the Tata Power Company Limited



Tata Sons Limited (“Tata Sons”), Tata Steel Limited (“Tata Steel”), Tata Industries Limited (“Tata Industries”), Tata Communications Limited (“Tata Communications”) and Tata Power Company Limited (“Tata Power”) (Hereinafter collectively “Tata Companies”/ “Acquirers”) jointly filed a notice on 27.03.2017 under Section 6(2) of the Competition Act, 2002.

The combination relates to acquisition of 21.63% shareholding in Tata Teleservices Limited (“TTSL”/ “Target”) by the Acquirers from NTT Docomo Inc, Japan (“Docomo”), pursuant to the execution of Consent Terms entered into between Tata Sons and Docomo signed by Docomo on 20.02.2017 and by Tata Sons on 23.02.2017.

Tata Sons is the promoter and

principal investment holding company of various Tata companies engaged in diverse industry sectors like information systems and communications, engineering, materials, services, energy, consumer products and chemicals etc.

TTSL is a public listed company incorporated in India. Its shareholding is majorly held by Tata companies 47.91 and Docomo 21.63. TTSL is engaged in the business of wired telephone service, wireless telephone service and Internet and broadband services in seventeen telecom circles in India.

Docomo is a subsidiary of Nippon Telegraph and Telephone Corporation. It is a telecommunication company providing mobile services. It also

offers a wide range of resources and knowhow for development and growth of mobile businesses.

The Commission noted that the combination envisaged exit of Docomo from TTSL and resultantly shareholding of Tata Companies would increase from existing 66.79% to 88.42%. The Commission also noted that Docomo did not have any independent presence in telecom sector. Thus, the change in control over TTSL consequent upon the combination is not likely to result in a change in competition dynamics in any market in India.

Considering the facts on record and the details provided in the notice, the Commission approved the combination under sub-section (1) of Section 31 of the Competition Act, 2002.



## GUIDANCE NOTE ON NON-COMPETE CLAUSES / RESTRICTIONS

Non-compete clauses/restrictions are frequently used and form an important part of merger or acquisition transactions including acquisition of a business or an enterprise, formation of a joint venture etc. They provide purchasers protection against competition from sellers so that they may benefit by obtaining the full value of the transferred assets. Hence, in order to ensure that the value of the asset acquired is fully transferred to the buyer, the seller might be obligated not to compete with the buyer for a certain period in a certain geography.

While such clauses may be necessary as they provide Acquirers protection against competition from sellers, these clause, as they are essentially agreements not to compete, may also adversely impact competition landscape. Accordingly, the Commission has issued Guidance Note on non-compete restriction (s)/clause (s) ("**Guidance Note**"). This is also in accordance

with international best practices. According to the Guidance Note, a non-compete restriction should be "*directly related and necessary to the combination*" in order to be considered "*ancillary*" to the combination. Non-compete clauses/restrictions which cannot be regarded as directly related and necessary to the implementation of the combination, are considered 'not ancillary' to the combination. The Guidance Note specifies that in order to be directly related, the non-compete restriction must be connected and closely linked to the combination in terms of its duration, subject matter, geographic field of application and scope of application with due to the nature of the business concerned.

In cases where a non-compete restriction is found to follow the principles set out in the Guidance Note, the Commission's order approving the combination will be deemed to cover the non-compete restriction. In contrast, non-compete

restrictions that do not comply with the principles set out in the Guidance Note, will not be regarded as directly related and necessary to the implementation of the combination and the Commission's approval of the combination will not therefore include the non-compete restriction. In such cases, the Commission's order would state that the non-compete restriction is not "*ancillary*" to the combination. However, the finding that a non-compete restriction is not ancillary to a combination, as such, will not be prejudicial to the legal status of the combination.

Although, the Guidance Note is not binding on the parties to a combination but it is intended to serve as an important tool in drafting non-compete clauses. Additionally, the standards set forth in the Guidance Note would not be applied mechanically and the specific circumstances of each case would also be taken into consideration.



# DEVELOPMENTS IN OTHER JURISDICTIONS

## EUROPEAN UNION (EU)

### 1. European Commission (EC) fines Google for abusing dominance

The EC has imposed fine of €2.42 billion on Google for abusing its dominant position by giving illegal advantage to another Google product, its comparison shopping service.

Google is one of the major global players with regard to the internet and the world's largest, and most popular, search engine. In recent years, Google has been confronted with antitrust allegations in various jurisdictions, including United States and the European Union. Allegations against Google in both Europe and America focuses on confusing advertising (e.g. the mix of general and specialised search results and the high position given to paid search results), and abuse of its dominant market position.

The EC has found that Google's search engine has held very high market shares in all European Economic Area (EEA) with a market share of about 90 percent. Google has abused its dominance by giving its own comparison shopping service an illegal advantage. It gave prominent placement in its search results only to its own comparison shopping service, whilst demoting rival services. Thereby, Google has stifled competition on the merits in comparison shopping markets. The said Decision also requires Google to stop the conduct within 90 days or face penalty payments of up to 5 percent of the average daily worldwide turnover of Alphabet, Google's parent company.

### 2. EC fined Facebook for providing misleading information

The EC has imposed fine of €110 million on Facebook for providing misleading and incorrect information regarding merger regulation of Facebook's acquisition of WhatsApp.

The EU Merger Regulations obliges companies in a merger investigation to provide correct information that is not misleading as the same is essential for the Commission to review mergers and takeovers in a timely and effective manner.

In 2014, Facebook notified the Commission about its acquisition of WhatsApp. It informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, in 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. On 20<sup>th</sup> December 2016, the Commission addressed a Statement of Objections to Facebook detailing its concerns. The Commission found that the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014 and that Facebook was aware of the same and has *malafidely* given wrong information to the Commission.

## GERMANY

### 3. Germany settles automobile heat shields cartel

Germany's competition authority has ordered companies that had colluded to pass on the prices of a component part for automobile engine heat shields to car manufacturer Volkswagen to pay €9.6 million in

finances. The Federal Cartel Office agreed settlements with Elring Klinger, Estamp and Lydall Gerhardt, which the enforcer had accused of exchanging sensitive information to strengthen their bargaining position with Volkswagen in 2011.

Leniency applicant Carcoustics received full immunity for blowing the whistle on the cartel.

## CANADA

### 4. Competition Bureau, Canada imposed penalty on Mitsubishi Electric Corporation for involvement in bid rigging

The Ontario Superior Court of Justice fined Mitsubishi Electric Corp. \$13.4 million after it pleaded guilty to three counts of charges of bid-rigging for participating in an international conspiracy, brought by the Competition Bureau, Canada. Through investigation, the Competition Bureau determined that Mitsubishi Electric entered into illegal agreements with a competing Japanese car parts manufacturer. The companies conspired to determine who would win certain calls for bids issued by Honda and Ford for the supply of alternators, and by General Motors for the supply of ignition coils. The calls for bids occurred between 2003 and 2006.

The cartel in the auto parts industry came to light through the Competition Bureau's Immunity Program. The investigation also benefitted from the cooperation of many companies under the Leniency Program.

## UNITED STATES OF AMERICA

### 5. Federal Trade Commission (FTC) approved mergers between Emerson Electric and Pentair



FTC approved a final order settling charges that Emerson Electric Co.'s acquisition of Pentair Plc. would be anticompetitive. Emerson and Pentair are manufacturers of industrial valves and control products, including switchboxes, which are widely used in the oil and gas, chemical, petrochemical, power and other industries.

The complaint had alleged that the proposed acquisition would likely to harm competition in the United States market for industrial switchboxes, which are devices used to monitor and control valves that regulate the flow of liquids and gases in industrial facilities such as oil refineries. Emerson's TopWorx and Pentair's Westlock brands account for about 60 percent of the market and are the two leading brands of switchboxes in the United States. Switchboxes perform a critical safety function; hence, brand reputation and product reliability are very important to customers. The complaint alleged that because of the time and investment required to develop switchboxes along with the time required to build a sufficient reputation with customers for quality and reliability, future and current competitors in the switchbox market are unlikely to restore the loss of competition caused by the acquisition.

The FTC order requires Emerson to divest Crane (another competitor) all of Westlock's production facilities, intellectual property, confidential business information, and the opportunity to hire Westlock employees.

#### **6. FTC approved merger between Chem China and Syngenta AG**

FTC conditionally approved the the

proposed \$43 billion merger of China National Chemical Corporation (ChemChina) and Swiss global agricultural company Syngenta AG.

According to a complaint filed by the FTC, the merger as originally proposed is likely to cause significant competitive harm in the U.S. markets for three pesticides:

- the herbicide paraquat, which is used to clear fields prior to the growing season;
- the insecticide abamectin, which protects primarily citrus and tree nut crops by killing mites, psyllid, and leafminers; and
- the fungicide chlorothalonil, which is used mainly to protect peanuts and potatoes.

Chem China, won FTC approval to buy Switzerland's Syngenta AG on condition that it divest the said three products. The FTC complaint alleged that without the proposed divestiture, the merger would eliminate the direct competition that exists between Chem China generics subsidiary ADAMA and Syngenta's branded products. The merger would also increase the likelihood that U.S. customers buying paraquat, abamectin and chlorothalonil would be forced to pay higher prices or accept reduced service for these products, the complaint states.

Syngenta owns the branded version of the mentioned three products at issue, giving it significant market shares in the United States. ChemChina focuses on generics pesticides and is either the first or the second largest generic supplier in the United States for the mentioned three products.

The proposed merger between the two would eliminate the direct

competition that exists today between ChemChina generics subsidiary ADAMA and Syngenta's branded products. The merger would also increase the likelihood that US customers buying paraquat, abamectin, and chlorothalonil would be forced to pay higher prices or accept reduced services for these products.

## **JAPAN**

### **7. The JFTC closed the investigation on the suspected violation by Amazon Japan GK**

The Japan Fair Trade Commission (JFTC) has investigated Amazon Japan G. K. in accordance with Article 19 (Trading on Restrictive Terms) of the Antimonopoly Act (AMA). Amazon Japan G.K. has been suspected to restrict business activities of the sellers in Amazon Marketplace by including the price parity clauses and the selection parity clauses in the seller contracts.

Responding to the JFTC's investigation, Amazon Japan G.K. proposed to take voluntary measures promptly. As a result of the JFTC's review on this proposal, the JFTC recognized these measures would eliminate the suspected violation mentioned above and decided to close the investigation on this case. The measures proposed by Amazon Japan G.K. include contents, such as;

- Amazon Japan G.K. will delete the above parity clauses from the seller contracts. Also, it will not exercise the rights under the above parity clauses.
- Amazon Japan G.K. will annually report the implementation status of the proposed measures to the JFTC in writing.

# ADVOCACY INITIATIVES

## CCI Annual Day, 2017

• CCI Annual Day 2017 was celebrated on May 20, 2017 at The Ashok, New Delhi. This year Annual Day Lecture was delivered by Hon'ble Mr. Justice Jagdish Singh Khehar, Chief Justice of India, on "Emerging jurisdiction on Competition Law – How will it serve, the business community in India, and India's trade policy". He addressed the gathering comprising of members of judiciary, legal fraternity, regulatory authorities, bureaucracy, chambers of commerce, industry leaders, academics and experts. Hon'ble Justice Khehar emphasised that economic policy and management must enable achievement of constitutional social order and every government is bound to ensure the twin fundamental principles of competition i.e. ownership and control of resources and an economic system that does not work towards



*Justice Mr. Jagdish Singh Khehar, Hon'ble CJI, lighting the lamp on the occasion of CCI Annual Day 2017*

detriment of common good. He talked about the evolution of competition law reflecting replacement of an administered economy with the globalised and liberalised markets. He further stated that the Competition Act, 2002 replaced the control regime of MRTP Act, 1969 by encouraging competition, not on any dogmatic basis or the per se rule, but based on rule of reason.

Hon'ble Justice Khehar cited an earlier judgement of Supreme Court, wherein it was held that the Commission is vested with "inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction". He further stated that fair relationship between the manufacturer-supplier on one hand and the consumer on the other is possible only if the stream of supply and



*Justice Mr. Jagdish Singh Khehar, Hon'ble CJI, delivering the CCI Annual Day Lecture, 2017*



demand remains unpolluted. The Commission is a necessity to prevent, control and abate such pollution. Hon'ble Justice Khehar concluded by saying that the young Competition Commission of India is on a noble national mission in terms of its vision and mission.

In his welcome address, Shri Devender Kumar Sikri, Chairperson, Competition Commission of India, highlighted various achievements of the Commission in its journey so far. He emphasised that effective implementation of any legislation requires legal certainty and predictability for which the Commission is looking up to the Supreme Court of India. Highlighting some of the recent judgements of the Supreme Court,



*Justice Mr. Jagdish Singh Khehar, Hon'ble CJI, releasing the Competition Compliance Manual for Enterprises on the occasion of CCI Annual Day 2017*

Mr. Sikri stated that the Apex Court has provided much sought clarity on some of the jurisdictional and interpretational issues.

A manual titled "Competition Compliance Manual for Enterprises" brought out by CCI was also released by the Hon'ble

Mr. Justice Jagdish Singh Khehar, Chief Justice of India, on this occasion.

The event concluded with a vote of thanks by Ms. SmitaJhingran, Secretary, CCI.



## Advocacy Initiatives with Central Government, State Governments and PSUs

- Mr Yogesh Kumar Dubey, Dy. Director (Eco.) made a Presentation on Overview of Competition Law including Competition Assessment in an Interactive session with officers of state governments under CCI's state advocacy programme held on May 22, 2017 at CCI office, New Delhi. The programme was chaired by Ms Sibani Swain, Adviser (Eco.).
- A Round Table conference on Predatory Pricing in the Telecom Sector was organised by National Institute of Public Finance and Policy (NIPFP), New Delhi on

May 23, 2017. Mr Rakesh Bhanot, Adviser (FA), CCI attended the conference.

- Mr. Augustine Peter, Member, CCI inaugurated "Workshop on Integrity and Governance aspects in Public Procurement" jointly organised by CCI and World Bank in New Delhi on June 7, 2017. Ms. Payal Mallik, Adviser (Eco.) and Mr. K.D. Singh, Joint Director (Law) gave presentations on the topics – "Competition Law: General Overview" and "Public Procurement and Competition Concerns" respectively. Ms. Sibani

Swain, Adviser, Mr Nandan Kumar, Joint Director, Mr Yogesh Dubey, Deputy Director, Mr Anil, Deputy Director, and Mr Anand Vikas Mishra, Deputy Director, also attended the workshop.

- Mr D.K. Sikri, Chairperson, Mr Sudhir Mital, Member, and Mr. Nandan Kumar, Joint Director (Eco), had a meeting on competition law and related issues with Chief Secretary, Himachal Pradesh and senior officers of the state on June 23, 2017 and with Chief Minister, Himachal Pradesh on June 24, 2017.



*Mr. Augustine Peter, Member, CCI delivering the inaugural address at the Workshop on Integrity and Governance Aspects in Public Procurement*

## Advocacy Initiatives with Trade Associations and Institutions

- Mr Shekhar, Joint Director (FA) attended the Economic Times Merger and Acquisition Summit 2017 in Mumbai during June 28-29, 2017.



## Advocacy Initiatives with Universities/Institutes

- Mr Kuldeep Kumar, JD (Law) and Mr. B. Naveen Kumar, DD (Law) delivered lectures on Competition Law in Jaya Deva Institute of Management at Noida on April 1, 2017.
- Mr P.K. Singh, Advisor (Law) was a Judge in the final round on April 9, 2017 and Mr Ved Prakash Mishra, Director (Law) was a Judge in the Semi-final round on April 8, 2017 of the Moot Court Competition at the National University for Advanced Legal Studies (NUALS), Kochi.



*Mr. P. K. Singh, Adviser, CCI judging the final round of 1<sup>st</sup> NUALS Antitrust Moot 2017*



*Justice Mr. G P Mittal addressing the Workshop on Competition Law and Policy in India on April 10, 2017 at Faculty of Law, Delhi University*

- Justice G.P. Mittal, Member, CCI, inaugurated the Workshop on Competition Law and Policy in India on April 10, 2017 at Faculty of Law, University of Delhi. Mr Rakesh Kumar, Director (Eco), Mr Nandan Kumar, JD (Eco), Mr K.D. Singh, JD (Law), and Mr Kamal Sultanpuri, DD (Law)

were panellists at the workshop.

- Mr Nandan Kumar, Joint Director, was a panellist in the IGIDR-PayPal Round Table on payment systems organised by Indira Gandhi Institute of Development Research (IGIDR) on June 14, 2017 in Mumbai.

- Mr. Manish Mohan Govind, Adviser was nominated by CCI as a resource person for a workshop on 'Social Media' organised by National Academy of Customs Excise & Narcotics (NACEN) on June 16<sup>th</sup>, 2017 at NACEN's Faridabad campus.

# ENGAGING WITH THE WORLD

- CCI delegation consisting of Mr. Devender Kumar Sikri, Chairperson, CCI, Mr. Sudhir Mital, Member, CCI, Ms. Smita Jhingran, Secretary, CCI, Mr. K.V.R Murthy, Joint Secretary, MCA and Mr. V. Sriraj, Deputy Director (Law), CCI participated in 2017 ICN Annual Conference during May 10 -12, 2017 in Porto, Portugal. Apart from the CCI delegation, eight Non-Governmental Advisors (NGAs) from India also participated in the conference.

During the ICN conference Mr. Devender Kumar Sikri, Chairperson was panel speaker for plenary session of Unilateral Conduct Working Group on “The Analytical Framework for Evaluating Unilateral Conduct”. Ms. Smita Jhingran, Secretary moderated breakout session of



*Mr. Devender K. Sikri, Chairperson, CCI addressing the gathering at the ICN Conference, 2017 at Porto, Portugal*



*Mr. Devender K. Sikri, Chairperson, CCI participating in the ICN Conference, 2017 at Porto, Portugal*





*Ms. Smita Jhingran, Secretary, CCI participating in the ICN Conference, 2017 at Porto, Portugal*

Agency Effectiveness Working Group on “Staff Training”. Mr. V. Sriraj, Deputy Director (Law) was panellist in side session on “State Restraints”. In ICN 2017, The Indian Delegation held one multilateral and five bi-lateral meetings. The meetings were held with delegations from BRICS Competition Authorities, Federal Anti-monopoly Services (FAS), United States Federal Trade Commission (USFTC), United States Department Of Justice (USDoJ), DG

Competition, European Commission and Competition Bureau (CB), Canada.

- Mr. U.C. Nahta, Member, CCI participated in the 7<sup>th</sup> St. Petersburg International Legal Forum during May 16 -20, 2017 in St. Petersburg, Russia.
- CCI officials participated in various workshops/seminars/ meetings :
  - a. One officer participated workshop on Competition Law

in Pharmaceutical Sector during May 23 -25, 2017 in Sydney, Australia.

- b. One officer participated in a seminar by the Economic Institute for Competition Enforcement Officials during June 18 -23, 2017 in Melbourne, Australia.
- c. Two officers participated in the OECD Competition Committee meeting during June 19 -23, 2017 in Paris, France.



# TRAINING PROGRAMMES

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1. CCI organized 3<sup>rd</sup>, to 7<sup>th</sup> (last) sessions of its 20-hrs introductory training in 'R Software' by Dr. Moonis Shakeel, Associate Professor, Jaypee Business School on 7<sup>th</sup>, 21<sup>st</sup>, 28<sup>th</sup> April, 5<sup>th</sup>& 12<sup>th</sup> May 2017 respectively for professional officers of CCI.
2. A short 2-days In-house training programme on 'HR Matters & Conduct Rules' was organized by CCI on May 26 and June 2, 2017 for DR officers of CCI.



## FORTHCOMING EVENTS

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- Ms. Smita Jhingran, Secretary CCI will give Keynote address in the 14<sup>th</sup> Capital Markets Summit (CAPAM) Conference to be organised by FICCI in Mumbai on September 6, 2017.
- A half day workshop on Competition Advocacy with Industry/Trade Associations and Chamber of Commerce on August 22<sup>nd</sup>, 2017 at Patna.
- A Train the Trainer Workshop for members of the Institute of Cost Accountants of India (ICoAI) on August 31<sup>st</sup>, 2017 at Kolkata.
- A half day workshop on competition law for the members of the Indian Drug Manufacturers' Association (IDMA) on September 22<sup>nd</sup>, 2017 at Mumbai.



## Wave of Consolidation in Banking Sector and Competition

Buoyed by the smooth merger of the State Bank of India (SBI) with its associate banks, the Government has expressed its intention of further consolidation in the public sector banking space-what could be the second wave of consolidation in the banking sector. Merger of five associate banks of the SBI and the Bhartiya Mahila Bank with the country's largest lender SBI took place in April, 2017.

The recent fervour for consolidation in banking being displayed by the Government is based on two assumptions. First, there are too many banks in India and second, if the banking sector has to be assessed in the international context, size is the most important factor. It is argued that the size of a bank enhances its risk-bearing capacity, for which consolidation through orderly Mergers & Acquisitions (M&As) may be necessary.<sup>2</sup>

The major gains perceived from bank consolidation are the ability to withstand the pressures of emerging global competition, to strengthen the performance of the banks, to effectively absorb the new technologies and demand for sophisticated products and services, to arrange funding for major development products in the realm of infrastructure, telecommunication, etc. which require huge financial outlays and to streamline human resources functions and skills in tune with the emerging competitive environment.

Merger of banks are governed under

Section 44A of the Banking Regulation Act, 1949 and the Merger Guidelines issued by RBI which lays down the process of merger / amalgamation and the factors which are to be considered by the board of directors before approving the scheme.

RBI will need to examine the proposal for these mergers from a prudential perspective to gauge the impact on the stability and the financial well-being of the merger applicants, their customers and on the financial systems. In addition to the assessment of the proposed merger on the competitiveness and stability of the financial systems, RBI will also need to examine the implications on regional development, impact on society etc. as a result of merger since banks in India also have to fulfil various social obligations.

However, a distinction should be made between prudential regulation of banks by RBI and competition regulation of the whole economy, including financial sector, by CCI. Prudential regulation is largely centred on laying and enforcing rules that limit risk-taking of banks, ensuring safety of depositors' funds and stability of the financial sector. Thus, regulation of M&As by the RBI would be determined by such benchmarks. Competition regulation of M&As in the banking sector on the other hand is a different matter. This is aimed at ensuring that banks compete among themselves in fighting for customers by offering the best terms, lower interest rates on

loans and higher interest rates on deposits and securities.

The impact of consolidation on competition depends, *inter alia*, on the market structure or degree of concentration in the relevant market, the nature of competition, the extent of entry barriers, the heterogeneity of products/services and price differentiation. The adverse effects of merger/amalgamation/acquisition on competition in the banking sector, like in any other sector, may in certain instances, outweigh the efficiency gains that it gives rise to, thereby leading to loss of welfare. The role of the CCI in regulation of M&As of banks therefore assumes importance. Application of competition law in the banking sector is desirable, and in no way incompatible with an effective regulatory framework.

In almost all jurisdictions Ministries of Finance or Central Banks have the duty to regulate bank mergers for stability reasons and for ensuring the safety and soundness of the institution and its' managerial competency, while competition authorities regulate them on competition grounds. Only in very few jurisdictions competition and stability concerns are pursued by the same institution. In most jurisdictions there has been a movement (in those countries which had partially or totally exempted their banking systems) to extend the jurisdiction of national competition laws to include banks.

<sup>2</sup> Competition and Consolidation, Reserve Bank of India, 2008

# JUDICIAL PRONOUNCEMENTS

## 1. WHETHER PENALTY UNDER SECTION 27 OF THE ACT IS TO BE CALCULATED ON TOTAL TURNOVER OR RELEVANT TURNOVER

Hon'ble Supreme Court vide its judgment dated 07.03.2017 has upheld the final order passed by the CCI in *Suo-moto* Case No. 02/2011. However, it did not agree with the CCI that 'turnover' mentioned in Section 27 would be 'total turnover' of the enterprise. The proceedings, on which the judgement is based, find their origin in the letter dated February 04, 2011 written by the Chairman and Managing Director of Food Corporation of India ('FCI') to the Commission, informing about an anti-competitive agreement among M/s. Excel Crop Care Limited, M/s. United Phosphorous Limited, M/s. Sandhya Organics Chemicals (P) Ltd. and Agrosynth Chemicals Limited, in relation to tenders issued by the FCI for supply of Aluminium

Phosphide Tablets ('APT') of 3 gms. It was alleged that four manufactures of APT had formed a cartel by entering into an anti-competitive agreement amongst themselves and on that basis they had been submitting their bids for last eight years by quoting identical rates in the tenders invited by the FCI for the procurement of APT.

The Commission in its majority order found the acts and conduct of the parties in contravention of section 3(3) (b) and section 3(3) (d) of the Act. In his minority Order, Shri R. Prasad held that the provisions of section 3(3) (a) have been contravened in as much as there was certainly an activity of determining the sale price of ALP tablets.

However, Shri Prasad also held that

there was no violation of section 3(3) (b) of the Act. Penalty of 9 per cent on the total turnover of the parties was imposed on the contravening parties. Since M/s. Agrosynth Chemicals Limited had stopped participating in the tender of FCI since 2007 and did not participate in the tender of 2009, it was exonerated.

An appeal against the order of the Commission was filed before the Competition Appelaate Tribunal (COMPAT). The COMPAT upheld the Order of the majority and the minority both on merits. However, it reduced the penalty on the basis that penalty should have been imposed on the 'relevant' and not the 'total' turnover.





COMPAT's order confirming the findings of the Commission on merits was challenged by all the three parties before Hon'ble Supreme Court. Appeal was also preferred by the Commission on the legal issue of whether penalty under section 27 has to be imposed on the turnover of the enterprise (i.e. total turnover) or only the relevant turnover of the enterprise.

Vide its judgement, Hon'ble

Supreme Court affirmed the finding of the Commission on merits. In its judgement, Supreme Court held that Section 27(b) of the Act while prescribing the penalty on the 'turnover', neither uses the prefix 'total' nor 'relevant'. In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, it would be appropriate to adopt the criteria of

'relevant turnover' for the purpose of imposition of penalty. The Supreme Court also laid down the definition of the term "Relevant Turnover" as the entity's turnover pertaining to products and services that have been affected by such contravention. The Supreme Court also suggested CCI to draft its own penalty guidelines for better clarity.

## **2. REGULATION 35 AND REGULATION 37 OF THE CCI (GENERAL) REGULATIONS, 2009 AS WELL AS REGULATION 6 OF THE CCI (LESSER PENALTY) REGULATIONS, 2009 ARE LEGAL AND CONSTITUTIONAL.**

A prima facie order was passed by the Commission recording that exchange of price sensitive information among the companies has resulted in a bid-rigging cartel. Subsequently an application was filed before the Commission seeking permission to inspect the record/documents available in Commission's record in the said matter. Commission denied the access to documents, evidence, information etc. since the said information was confidential in terms of the provisions of the Act read with the relevant Regulations.

Being aggrieved by rejection of application to inspect the records, two writ petitions challenging the constitutional validity of Regulation 35 and the proviso to Regulation

37(1) of the CCI (General) Regulations, 2009 as well as Regulation 6 of the CCI (Lesser Penalty) Regulations, 2009 were filed.

Delhi High Court vide its order dated 11.04.2017 held that the entitlement of a party to the proceedings to inspect the documents or to obtain copies of the same is not absolute and it is always open to CCI to reject permission for inspection or furnishing copies if it is of the view that the documents/information require confidential treatment.

Regarding the validity of the subordinate legislation, it was laid down that the above challenged regulations are neither arbitrary nor unreasonable. It was also held that

though delegated legislation can also be challenged as being unreasonable, the unreasonableness is not to be judged in the same standard as unreasonableness of administrative action. The delegated legislation can be struck down unreasonable only if it is manifestly arbitrary or if so unreasonable that Parliament never intended to confer such power on the Regulator. Since the power to make subordinate legislation is derived from the enabling Act, it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Hon'ble High Court held that rules cannot be made to supplant the provisions of the enabling Act but to supplement it.

# KNOW YOUR COMPETITION LAW

## TOTAL TURNOVER vs. RELEVANT TURNOVER

Section 27 (b) of the Act, empowers the Commission to impose penalty, which shall be not more than ten percent of the average of the turnover for the last three preceding financial years. Section 2(y) of the Act states that 'turnover' includes value of sale of goods or services. However whether turnover here refers to 'total turnover' or 'relevant turnover' has not been given anywhere in the Act.

In other jurisdictions such as European Union, United Kingdom, Australia, etc. the overall cap on the penalty imposed is 10 per cent of 'worldwide turnover'. This implies that the turnover on which penalty is imposed is neither limited to the market affected by the infringement nor to turnover within the country. Few other jurisdictions such as the United States and Canada do not impose fines based on the turnover, rather they have criminal sanctions and upper limits of monetary fines that may be imposed.

In *Suo Moto Case No. 02/2011*<sup>3</sup>, information was received by the Commission by the Food Corporation of India (FCI) alleging

cartel formation in the production and supply of Aluminium Phosphide tablets (APT) by four manufacturing companies. CCI found that three parties had indeed formed a cartel and violated the provisions of Section 3 of the Act. Penalty amounting to 9 per cent of the turnover of the three enterprises was imposed under Section 27(b) of the Act. This penalty was levied on the entire turnover.

An appeal against the order of the Commission was preferred before COMPAT by all the three parties. COMPAT upheld the order of the Commission on merits. However, it did not agree with the CCI that 'turnover' mentioned in Section 27 would be 'total turnover' of the enterprise. In its opinion, it has to be 'relevant turnover' i.e. turnover of the product in question. According to COMPAT in cases where the enterprise is a multi-product company, only turnover of the product/ service in question is to be considered for the purposes of imposing the penalty.

Against this interpretation of the term "turnover" given by COMPAT,

appeal was preferred by the Commission before Hon'ble Supreme Court of India. The Apex Court in its judgement<sup>4</sup> held that Section 27(b) of the Act while prescribing the penalty on the 'turnover', neither uses the prefix 'total' nor 'relevant'. In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, it would be appropriate to adopt the criteria of 'relevant turnover' for the purpose of imposition of penalty. It was elucidated that there may be a situation that some of such enterprises may be multi-product companies and some may be single product in respect of which the agreement is arrived at. If the concept of 'total turnover' is introduced it may bring out very inequitable results.

Hon'ble Supreme Court applied the doctrine of 'proportionality' and laid down the definition of the term **"relevant turnover" as the entity's turnover pertaining to products and services that have been affected by such contravention.**



<sup>3</sup> In Re:- Aluminium Phosphide Tablets Manufacturers

<sup>4</sup> CA Nos.2480, 53-55, 2874 and 2922 of 2014; Excel Crop Care Limited vs CCI and Another.

# HR CORNER

- i) 3<sup>rd</sup> International Day of Yoga was celebrated in CCI and DG's office on 21.06.2017 by organizing an interactive yoga session, through Experts from Bhartiya Yog Sansthan.
- ii) The sixth round of Direct Recruitment process in CCI was started by issuing a vacancy circular on 30.06.2017 for filling up of 31 posts (17 Professional staff and 14 Support staff).
- iii) Posts of officers on deputation



- basis was advertised during May, 2017.
- iv) Shri Rakesh Bhanot, Director (FA) was promoted as Adviser (FA) w.e.f. 02.05.2017.
- v) Four officers including two

- Advisers and one Director joined CCI on deputation basis.
- vi) Nine officers were selected for appointment in DG's office on deputation basis. Four of them assumed the charge of the post offered to them.
- vii) One officer in support-staff category retired on attaining the age of superannuation on 30.06.2017 and two officers were relieved at their own request/on completion of their deputation term.







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