The Quarterly Newsletter of Competition Commission of India (CCI)

Fair competition
for greater good

Fair Play

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IN FOCUS
Competition Law in the times of Coronavirus

Shri Ashok Kumar Gupta, Chairperson, CCI, signing the BRICS Memorandum of Understanding on cooperation in the field of competition law and policy.

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FROM THE DESK OF THE CHAIRPERSON

The world today is reeling under a formidable crisis caused by the Novel Covid-19 pandemic. Recognising the potential of the pandemic to impede economic growth, Hon'ble Prime Minister Shri Narendra Modi, announced an unprecedented Rs. 20 lakh Crores stimulus package to provide relief to various sectors of the Indian economy affected by the Novel Covid-19 pandemic. The stimulus package also included measures to boost growth and encourage investment in such sectors. Keeping in line with the overall principle emanating from such measures, the CCI has taken immediate steps to bring clarity to enterprises that are grappling with the aftermath of the pandemic. In these testing times, I share with you, this 33rd Volume of 'Fair Play'. This volume showcases the steps taken by competition authorities around the world to combat Covid-19 situations and the developments in the area of competition law that have taken place during the quarter of April-June 2020.

The onslaught of the pandemic has compelled enterprises to modify their business strategies and come up with cost-cutting measures to respond to the sudden fluctuation in the supply chain as well the overall consumer demand. Cognizant of the measures that may be adopted by certain enterprises to adapt to the pandemic, be it to shore-up their revenues or to meet consumer demand for certain essential items, various competition authorities across the world have initiated measures to provide guidance to enterprises on how to devise such business strategies as well as provide any ancillary advisory on matters that are incidental to the pandemic and affect competition. The CCI, on 19.04.2020 issued an advisory to businesses on the enforcement of the legislative scheme of the Competition Act, 2002 and how the same would be applicable during the pandemic.

Also, in this quarter, the Commission undertook some important enforcement measures. After an in-depth inquiry conducted by the Director General (DG), the Commission directed four Bearing manufacturers who were found indulging in price fixing, to cease and desist from such practices in future. The Commission also directed investigation into allegations of abuse of dominance by a Dumper Truck Union that has allegedly sought to prevent certain parties from carrying out

operations with their own vehicles. In another case, CCI held that a bank acting under the provisions of the SARFAESI Act and attempting to recover the outstanding amount in the event of default by the borrower/guarantor cannot be termed as a dominant entity.

On the combinations side, the Commission approved an acquisition by Hitachi Limited of the entire power grid business of ABB Management Holding AG, since the combination was not likely to cause any appreciable adverse effect on competition, owing to minimal overlap and an incremental increase in market share, post-combination.

In the last quarter, a landmark judicial pronouncement was given by the Delhi High Court. The judicial pronouncement pertained to a pending investigation against Monsanto Inc., Mahyco Monsanto Biotech Limited, Maharashtra Hybrid Seeds Company, and Monsanto Holding Pvt. Ltd. The Delhi High Court cleared the air on jurisdictional issues when it came to intellectual property rights matters. The Delhi High Court held that there was no irreconcilable repugnancy between the Patents Act, 1970 and the Competition Act, 2002 and furthermore, the nature of remedies provided by both statutes were materially different from each other. Also, in a significant judicial pronouncement rendered by the National Company Law Appellate Tribunal, it was held that there can be no condonation of any delay in approaching the appellate authority within the prescribed statutory period when the delay is on account of time consumed in litigation before other Courts.

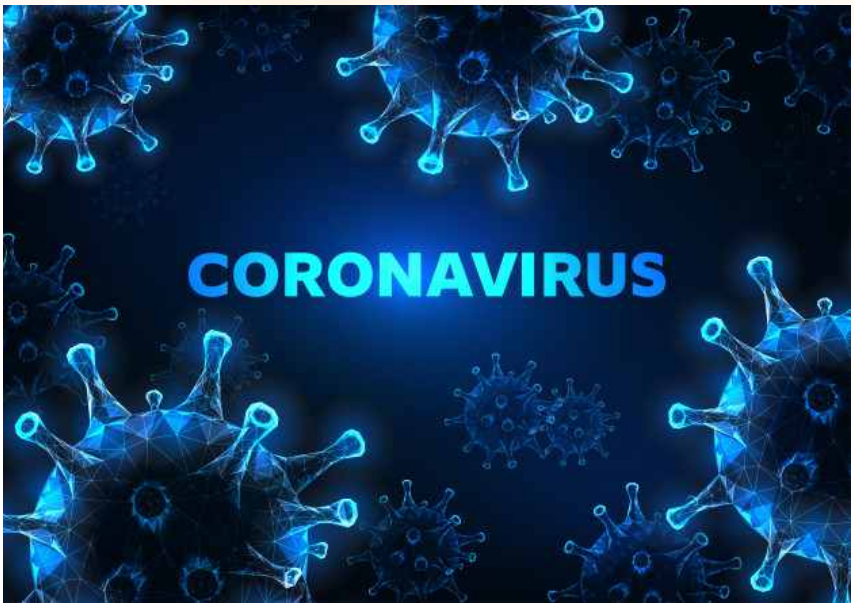
In this quarter, the BRICS Memorandum of Understanding on cooperation in the field of competition law and policy was extended. The BRICS grouping has been a very effective mechanism to gauge best practices in other jurisdictions. It has also provided CCI with a platform to share its views on an assortment of issues related to antitrust. This quarter also witnessed liaison with BRICS competition authorities regarding potential responses that could be undertaken regarding the COVID-19 pandemic. The engagements were fruitful and led to a wide-ranging and timely discussion on the measures that may be adopted by the competition authorities.

In this edition of 'Fair Play', we have also discussed the role of industry self-regulation with a specific focus on the e-commerce sector and how the same can often result in enduring benefits to all stakeholders. A snippet on International Day of Yoga celebrated on June 21, 2020 is also included in this volume. Lastly, this volume of 'Fair Play' includes competition law developments in other jurisdictions, engagement with the global antitrust community, advocacy events and capacity building initiatives undertaken and forthcoming events.

The Commission has always been committed to foster a healthy competition culture in India. We will continue to embark on this journey with zeal while keeping our stakeholders abreast of the latest developments in the competition ecosystem in India and abroad.

(Ashok Kumar Gupta)

Competition Law in Times of Coronavirus



The novel COVID-19 pandemic has emerged as the foremost challenge for countries around the world in 2020. While the pandemic has obvious health implications, it has given rise to serious economic consequences to deal with. Lockdowns of various degrees have been in place in order to flatten the curve of rising COVID -19 infections. This has brought unprecedented disruptions in the normal course of economic activities. Further, the response to COVID-19 pandemic has brought about a sudden surge in the demand for certain healthcare and pharma products. While, there is an increasing demand, production of goods was insufficient as factories remained closed due to ensuing lockdowns. Such demand surges are prone to exploitation through excessive pricing and collusion. However, in such special circumstances, there is a thin line demarcating the coordination between business enterprises to exploit market for their own benefit and coordination to bring about efficiencies in the market. At the same time, some other sectors of the economy have seen a sudden drop in demand as well.

Accordingly, the enterprises are devising new strategies to overcome the volatility in demand and supply and resultant price fluctuations of goods and services. In this background, the role played by a competition authority in preserving market stability assumes significance. Essentially, since the onset of the COVID-19 pandemic, competition authorities have been performing two key functions: (a) facilitating economic recovery by issuing certain guidelines in relation to sectors worst affected by the pandemic, and (b) targeting certain anti-competitive conduct by enterprises that may seek to opportunistically exploit the COVID-19 crisis. This article attempts to bring together the various measures taken by competition authorities in this regard.

Guidelines

In India, the CCI has responded to key twin challenges brought forth by the pandemic. These challenges are: (i) restrictions on the movement of stakeholders; and (ii) the issue of coordination by the competing firms.

Considering restrictions placed on the movement of people, CCI has allowed flexibility within its procedures - including email filing and the deferment of non-urgent cases. The CCI has also made the Pre-Filing Consultation (PFC) facility available through video conference.

Further CCI has brought clarity on the certain regulatory aspects through its 'Advisory to Businesses in time of COVID-19' dated 19.04.2020. The Advisory pointed out that COVID-19 had disrupted supply chains relating to healthcare and essential products. It clarified that legislative scheme of the Competition Act, 2002 enables businesses to coordinate certain activities, by sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, R&D, production etc. since agreements that increase

efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services are not subject to the prohibition under Section 3(3) of the Competition Act, 2002.

Similar measures have been announced the world over as well. In the United States, the Federal Trade Commission (FTC) and the Department of Justice (DoJ) came out with a "Joint Antitrust Statement Regarding COVID-19" on 24.03.2020. Through this Joint Antitrust Statement, both the FTC and DoJ have acknowledged that in the wake of the COVID-19 crisis, certain activities relating to improving the health and safety response to the pandemic may need joint collaboration between companies.

They have given examples of such joint collaboration:

i) Firms collaborating on research and development (R&D);

ii) Collaboration regarding common standards for patient management developed to assist healthcare providers in clinical decision-making;

iii) Joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs.

However, the agencies have counselled businesses that they should still refer to the agencies' previous statements on how they analyze cooperation and collaboration between competitors in the form of Antitrust Guidelines for Collaborations Among Competitors (2000) and Statement of Antitrust Enforcement Policy in Health Care (1996).

The United Kingdom, immediately following the 'Joint Antitrust Statement' released by the FTC and DoJ, released through its Competition and Markets Authority (CMA) a guidance note on 25.03.2020 detailing the "CMA approach to business cooperation in response to COVID-19". The CMA stated that COVID-19 may necessitate coordination between competing businesses. The CMA issued this guidance note to provide the assurance that, if any such coordination is undertaken solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary, the CMA will not take action against it.

These measures, however, should satisfy the following criteria:

i) must be appropriate and necessary in order to avoid a shortage, or ensure security of supply;

ii) must be clearly in the public interest;

iii) must contribute to the benefit or wellbeing of consumers;

iv) must deal with critical issues that arise as a result of the COVID-19 pandemic; and

v) should last no longer than is necessary to deal with these critical issues.

The guidance note also provides an "exemption criteria" to businesses. Under section 9 of the UK Competition Act, 1998, an agreement that restricts competition is exempted from the prohibition on agreements and arrangements restricting competition if it meets all of the following criteria:

i) it contributes to improving production or distribution, or promoting technical or economic progress;

ii) it allows consumers a fair share of the resulting benefit;

iii) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and

iv) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

The CMA did clarify that it could not however offer protection against private litigation brought by third party litigants for perceived breaches of the UK competition law during the pandemic.

Further, on 22.04.2020, the CMA also brought out a guidance note on merger assessment during the COVID-19 pandemic. As per this guidance note, while the timelines under which the CMA is required to operate were not altered, the CMA did make adjustments to its own working arrangements, in particular through increased remote

working and the internal reallocation of staff, to ensure that it was able to continue progressing cases in as close to the usual way as possible. Also, the CMA's overall approach to assessing whether a merger gives rise to competition concerns would remain unchanged. Regarding 'information requests', the CMA acknowledged that businesses may encounter difficulties in responding to statutory information requests and therefore delay in responding to information requests caused due to the COVID-19 will generally constitute a reasonable excuse for not providing certain information by a specified deadline. Lastly, regarding the substantive assessment of mergers, the usual standards would apply and there would be no relaxation. This is because even short-term economic shocks are not sufficient to override long-term competition concerns that may arise due to a merger.

In the adjacent European Union, the European Commission (EC) too came out with a Communication on "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak" ('Communication') on 08.04.2020. This Communication differed from the 'Joint Antitrust Statement' released jointly by the FTC and DoJ since it (i) covered all sectors and was therefore, more wide-ranging in its scope and (ii) provided granular level instructions on how to share information with competitors.

The purpose of the Communication was to explain:

(i) the criteria that the EC will take into account when assessing possible cooperation aimed at addressing shortage of essential items; and

(ii) The process put in place to provide *ad-hoc* guidance to businesses regarding cooperation with each other regarding the provision of essential products.

The EC recognised that such cooperation might be of the following kinds:

i) Coordinate joint transport for input materials;

ii) Contribute to identifying those essential medicines for which, in view of forecasted production, there are risks of shortages;

iii) Aggregate production and capacity information, without exchanging individual company information;

iv) Work on a model to predict demand on a Member State level, and identifying supply gaps; and

v) Share aggregate supply gap information, and request participating undertakings, on an individual basis and without sharing that information with competitors, to indicate whether they can fill the supply gap to meet demand (either through existing stocks or increase of production).

The EC goes on to say that "such activities do not raise antitrust concerns, provided that they are subject to sufficient safeguards (such as no flow of individualised company information back to competitors)". However, at the same time, the EC acknowledges that more far-reaching measures may be needed that could involve measures to adapt production, stock management and, potentially, distribution in the industry which may require exchange of commercially sensitive information and a certain coordination. For instance, sharing the information that which site produces which medicines, so that not all undertakings focus on one or a few medicines, while others remain in under-production.

The EC has said that these activities typically would be considered as problematic, but in the present exigent circumstances, the EC would not designate these as enforcement priorities provided that such measures are:

(i) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients;

(ii) temporary in nature (i.e. to be applied only as long as there is a risk of shortage or in any event during the COVID-19 outbreak); and

(iii) not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.

Regarding the *ad-hoc* guidance, the EC, through its Directorate General for Competition has committed that it would, exceptionally and at its own discretion, provide such legal certainty, wherever needed, by means of an *ad-hoc* "comfort" letter.

The Canadian Competition Bureau has, till date, released two statements concerning measures regarding COVID-19 and antitrust enforcement.

The first statement was issued by the Commissioner on 20.03.2020 regarding remaining vigilant against potentially harmful anti-competitive conduct carried out during the onset of COVID-19. The Commissioner said that the Bureau will scrutinize any evidence that companies or individuals have violated Canada's competition laws, including:

- Deceptive marketing practices, such as false or misleading claims about a product's ability to prevent, treat or cure the virus; and

- Collusion by competing businesses, such as illegal agreements about what price to charge for products or services.

The second statement was issued on 08.04.2020 regarding collaborative activities carried out between competitors. The Canadian Competition Bureau noted that these were exceptional circumstances surrounding the COVID-19 pandemic and may call for the rapid establishment of business collaborations of limited duration and scope.

Notwithstanding the above clarification, the Canadian Competition Bureau issued an advisory for those firms that wish to obtain even greater certainty and more specific guidance related to proposed business collaborations.

In such a case, the following information should be provided by the parties seeking collaboration:

i) The firms involved and the parameters of the collaboration including its proposed scope and duration;

ii) A detailed description of how the collaboration is intended to achieve a clearly identified COVID-19 related objective in the public interest;

iii) An explanation of why the collaboration is necessary to meet this objective; and

iv) A description of any guidance sought from relevant authorities on whether the collaboration contemplated will actually further Canada's response to COVID-19.

China, through its State Administration for Market Regulation ('SAMR') on 04.04.2020, also announced various measures to combat the pandemic as well as spur economic growth. Among the variety of measures that were introduced by the SAMR (which included: (i) continued adoption of online merger filings; (ii) exemption of certain cooperative agreements; and (iii) stepped up enforcement against antitrust violations relating to the pandemic) the most notable was the introduction of a 'Green Channel' mechanism for fast track clearance of mergers. This is notable as the CCI had pioneered the concept of a 'Green Channel' mechanism in 2019 which was hailed by stakeholders as a path-breaking measure to expedite clearance of mergers which would not likely cause any appreciable adverse effect on competition.

Targeting opportunistic anti-competitive conduct

Regardless of the efforts made by various businesses to tackle the COVID-19 pandemic, certain businesses may seek to subvert competition by indulging in anti-competitive practices. These may include: (i) exploitative pricing, (ii) crisis cartels, (iii) seeking 'rescue mergers' not founded on any valid ground.

Exploitative Pricing

As mentioned earlier, the volatility in demand and supply may lead to price increases for certain goods and services. This may even include public procurement cases where the government's urgent demand for certain products (e.g. face masks, protective gloves,

ventilators, beds, medicines, intensive care material, COVID-19 tests, lab equipment etc.) would increase exponentially when compared to the supply.

However, sometimes, increased price can also reflect exploitative business practices that are carried out without objective justification. This conduct would necessitate an investigation by competition authorities. At this juncture, a question that should be considered by competition authorities is - whether competition laws are the best measure for addressing such excessive pricing issues. Other alternatives in the form of price gouging rules or price control may be better and a more effective mechanism. Even if competition laws were to be used to curb excessive pricing, a key challenge may arise: the relevant company must have a sufficient amount of market power in the relevant market to trigger the regulator's jurisdiction over such abusive conduct. Only if the relevant company is seen as dominant will the regulator be able to target such excessive pricing practices. Therefore, as stated earlier, consumer protection and price gouging rules may be more effective since they do not apply only to dominant firms. Nonetheless, certain jurisdictions such as Brazil and Russia have taken note of excessive pricing issues arising after COVID-19. For instance, Brazil's Administrative Council for Economic Defence 'CADE' launched a preliminary probe into excessive pricing of medical-pharmaceutical products. CADE reportedly received a complaint from the Brazilian Association of Dialysis and Transplant Treatment Centres which submitted that suppliers of face masks and 70% alcohol hand gel had increased the price of hand sanitiser by more than 500%, and were imposing limitations on the supply of face masks. Similarly, Russia's Federal Antimonopoly Service 'FAS' has also launched three cartel probes related to medical protective equipment.

Crisis cartels

Certain jurisdictions, such as the EU, permit the operation of 'crisis cartels' during certain exigencies wherein businesses in a sector would cooperate to tackle a common problem that may arise out of a crisis. However, OECD has said in its literature that issues such as “cyclical and structural overcapacity” arising during a crisis are better dealt with by other means available to governments. As per the OECD, other options, such as joint ventures may be explored.

Rescue mergers / Failing Firm Defence

During such a crisis, it is not uncommon to see various businesses seeking to exit the market due to circumstances brought about by rapid change in the market. Firms may therefore seek an expeditious merger review regarding transactions that may otherwise be prohibited or may take sufficient time to approve/modify. This is called the Failing Firm Defence (FFD). The rationale of the FFD is that, if an asset would inevitably exit the market, the merger may be more pro-competitive than just letting the target firm go bankrupt, despite the increased market power of the resulting entity, since no less anti-competitive alternative is available. It should be noted that competition authorities have previously argued that the FFD should be heavily scrutinised and be inapplicable to businesses that were generally and already in a downward economic spiral.

Summing up: Extraordinary situations warrant extraordinary response. Covid-19 is such an event where the entire world is grappling with difficulties while responding to unprecedented situations. Competition authorities around the world have also appropriately responded to the present and emergent economic situations within the framework of competition law. Notwithstanding the clarifications issued by various competition authorities, it is always advisable to seek informed legal counsel prior to engaging in any conduct that may fall foul of the competition legislation. Since competition authorities are monitoring any anti-competitive conduct, a contravention of the competition legislation regarding proscribed conduct would not only result in penalties, but also may be seen as an aggravating factor considering the crisis that has been brought about by the COVID-19 pandemic.

CHAIRPERSON'S INTERVIEW WITH PTI

1. In the wake of the coronavirus pandemic and lockdown that have impacted economic activities, what are the proactive steps being taken by the Competition Commission of India (CCI) to ensure fair competition in the market place?

CCI has been extremely proactive in responding to the challenges arising out of outbreak of COVID-19 pandemic both on the administrative side as well as on the regulatory front.

On the administrative side, CCI took a series of steps in the midst of ongoing pandemic to ensure continuity of work as also to facilitate interface with parties. In this regard, I may mention that arrangements were made to enable the parties to file electronically anti-trust cases as well as combination notices including Green Channel notifications. Further, matters for internal consideration were dealt with through video conferencing. A dedicated helpline was set up to attend to the queries of stakeholders during the pandemic. The website of CCI was regularly updated to put relevant Public Notices for information of the relevant stakeholders. All urgent receipts from Government/Statutory bodies as also representations were processed electronically and relevant inputs were provided expeditiously.

On regulatory side, CCI issued advisory for guidance of businesses during COVID times (see response to Q. No. 2 below).

2. The regulator had also issued an advisory to enterprises to ensure that their collaborations during this time of coronavirus pandemic do not violate competition norms. How is the CCI keeping a tab on enterprises to make sure there are no violations?

Well, outbreak of COVID-19 resulted in widespread disruptions in supply chains including those of critical healthcare products and other essential commodities/ services. In such a fast paced unfolding situation, to cope with significant changes in supply and demand patterns arising out of this extraordinary situation, CCI issued an advisory for guidance of businesses during the pandemic. It was noted in the advisory that businesses may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, R & D, production etc. to ensure continued supply and fair distribution of products (e.g. medical and healthcare products such as ventilators, face masks, gloves, vaccines etc. and essential commodities) & services (e.g. logistics, testing etc.).

It was highlighted that the Competition Act, 2002 ("the Act") prohibits conduct that causes or is likely to cause an appreciable adverse effect on competition and further Section 3(3) of the Act presumes certain concerted actions between competitors to cause an appreciable adverse effect on competition. This presumption is not applicable to joint ventures, if such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Also, while conducting competition assessment, Section 19(3) of the Act enables the Commission to have due regard, amongst others, to the accrual of benefits to consumers; improvement in production or distribution of goods or provision of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Thus, the in-built safeguards of the Act to protect businesses from sanctions for certain coordinated conduct were highlighted, provided such arrangements, as mentioned above, result in increasing efficiencies. However, it was cautioned that only such conduct of businesses which is necessary and proportionate to address concerns arising from COVID-19 will be considered.

Businesses were, however, warned not to take advantage of COVID-19 to contravene any of the provisions of the Act.

Let me also mention that such measures were also taken by several competition authorities in other jurisdictions and they all have endeavoured to address the unprecedented supply shocks arising out of the global pandemic.

Coming to your question as to how CCI is keeping tab on enterprises to ensure that there are no violations of law, let me point out that CCI is adopting multi-pronged approach to ensure that the law is not infringed. Apart from responding to formal filings, CCI, through scanning of media reports, keeps a watch on the anti-competitive conduct and behaviour of the market players. Once a prima facie case gets established, the same is taken up suo-motu to initiate inquiries. Needless to mention, CCI also supplements and complements such enforcement actions through advocacy initiatives by nudging the parties to desist from adopting and following anti-competitive practices and policies.

3. Has the CCI come across or received complaints regarding anti-competitive practices during the lockdown period?

This is an ongoing process and CCI continues to receive formal Informations as also various representations/complaints from aggrieved parties. As pointed out earlier, CCI enabled the parties to file cases through electronic mode during COVID-19 and accordingly, the parties have been filing cases before CCI during the lockdown period.

> ***No doubt, COVID-19 has thrown new challenges for competition regulators. Fortunately, our law is quite flexible and forward looking and it equips the Commission to address the challenges arising out of COVID-19 like situations.***

4. Do you think the coronavirus pandemic has resulted in a paradigm shift that will require competition regulators worldwide to recalibrate the way markets and business practices are assessed?

No doubt, COVID-19 has thrown new challenges for competition regulators. Fortunately, our law is quite flexible and forward looking and it equips the Commission to address the challenges arising out of COVID-19 like situations. I have already mentioned about the Advisory issued by CCI during the pandemic for guidance of businesses which would go a long way in assessing the behaviour of the parties in a holistic manner.

5. The CCI has proposed changes in combination regulations regarding non-compete restrictions to provide flexibility and reduce information burden on parties. What steps are on the anvil to make competition norms less burdensome in the current business environment?

CCI has been looking at non-compete restrictions stipulated in mergers and acquisitions as a part of combination assessment. It was observed that having a general set of standards for assessment of non-compete restrictions may not be appropriate in modern business environments as the same varies from sector to sector. The Commission has, therefore, proposed to omit paragraph 5.7 of Form I in the Combination Regulations that seeks information regarding non-compete restrictions agreed between the parties to combination and justification for

the same. Such change is expected to allow the parties flexibility in determining non-compete restrictions, while also reducing the information burden on them. The proposal has been made available on our website and we are seeking public comments.

In the merger regime, introduction of green channel is one of the most important steps taken by CCI to facilitate ease of doing business. In those combinations where there are no horizontal, vertical or complementary overlaps, parties can avail green channel, wherein they get automatic approval on filing of notices. India has the unique distinction of being the first country to have such a scheme for notifiable combinations. The Commission has received positive feedback from national & international stakeholders and the business community has expressed their confidence towards this initiative. Out of a total of 33 filings received, since 1st January, 2020, Eight (8) filings are under green channel. We have also taken out guidance notes to Form I that will guide notifying parties to understand the nature and scope of information to be provided at the time of submitting the Forms.

6. The regulator had come out with a detailed study on e-commerce sector that covered various aspects, including search ranking and discount policy. What is the CCI's broad assessment about the sector and measures taken or being taken to address possible anti-competitive behaviours?

The Commission undertook a market study on e-commerce in India to understand market trends, distribution methods and strategies. The objective of the study was to comprehend the business practices and contractual provisions in e-commerce and their underlying rationale and implications for competition. The study was a combination of secondary research, questionnaire survey, focused group discussions, one-on-one meetings and a multi-stakeholder workshop and covered three verticals in the e-commerce space namely online retail shopping, online hotel booking and online food delivery. The details of the study can be found on CCI's website (https://www.cci.gov.in/).

The competition concerns that emerged from the study include the following:

Lack of Platform neutrality: Business users have raised concerns about the neutrality of the platform in cases where the platform also acts as a competitor on the marketplace and when the platforms engage in manipulation of search results, sellers'/service providers' data and user review/rating mechanisms.

Unfair Platform- Business Contract Terms: Bargaining power imbalance and information asymmetry between platforms and their business users would lead to unilateral revision in contract terms and imposition of 'unfair' terms by major platforms.

Existence of platform parity clauses and exclusive agreements between platform and certain business users.

Deep discounting: Deep discounting by platforms is found to be a concern when discounts are discriminatory and when they push prices to below-cost levels in certain product categories and affect both offline and online retailer's ability to compete.

While many of these issues merit case by case assessment under the relevant provisions of Competition Act, 2002, what seems to lie at the core is an imbalance in bargaining power between platforms and businesses. Thus, without a formal determination of violation of competition law, the Commission is of the view that improving transparency over certain areas of the platforms' functioning can reduce information asymmetry and can have a positive influence on competition outcomes.

In view of the foregoing, the CCI enumerated certain areas for self-regulation by the e-commerce marketplace platforms with the aim to reduce information asymmetry, promote competition on the merits and to foster a sustainable e-commerce ecosystem in India. These include:

(a) The platform may improve transparency over certain areas of the platforms' functioning, such as search ranking, collection, use and sharing of data and user review and rating mechanism. This would help

in reducing information asymmetry, which in turn can positively influence competition not only on the platform but also between platforms.

(b) The platforms may devise ways to govern inter alia the following aspects to protect the interests of all contracting parties –i) negotiating framework for basic contract terms ii) discount policy iii) penalties and iv) conflict resolution.

(c) The platform may devise ways to improve transparency on discount policies including inter alia the basis of discount rates funded by platforms for different products/suppliers and the implications of participation/non-participation in discount schemes

7. Which are the sectors being closely looked at by the CCI to prevent anti-competitive practices?

As a market regulator, CCI has an overarching jurisdiction across sectors. However, in recent times, digital markets and e-commerce have been the areas where CCI has been building its expertise through market studies, etc. to address the competition issues arising out of digital economy.

8. During our last interaction in October 2019, the CCI was in the process of starting a study on telecom sector. What is the update and are there concerns of anti-competitive practices in the sector, including on pricing front?

The CCI has commissioned Indian Council for Research on International Economic Relations ("ICRIER") to undertake the Market Study on the Telecom Sector in India. The market study will be purely a fact-finding exercise to develop a clear understanding of the Telecom sector in India, and its prevailing landscape. It will be designed to answer broad issues of inquiry like change in competition strategies with the adoption of new technology, analysis of the market/s and assessment of level of concentration and competition, vertical integration between access and content services, impact on competition of regulatory and policy developments etc.

At present, the stakeholder consultation is complete and an Interim Report has been submitted by ICRIER, which is currently being perused by the Commission. The stakeholders consulted include TSPs/ISPs including Industry Associations, Internet Companies including Associations, Academic Researchers/Sector Experts, Tower Companies and Industry Association TAIPA, Device and Equipment Manufacturers, MVNOs, DOT and TRAI.

9. Are there plans to study any other sectors?

Yes, the Commission is planning to undertake market studies in other sectors as well. At present, apart from market study on telecom sector, a study on merger and acquisition in digital market is going on. CCI is also planning to initiate market study in pharmaceutical sector.

10. Air ticket pricing has always been an area where there have been complaints of unfair business practices. The CCI was also looking into such complaints. What is their status? Also, the Civil Aviation Ministry has put floors and caps for airfares till August 24 in the wake of the coronavirus pandemic. Does regulation of prices go against the principles of fair competition?

As I have mentioned earlier, it may not be fair to provide details of such probes except those which are already in the public domain.

As far pricing caps put in place by Civil Aviation Ministry, I can only say that these are not normal times and it would be inappropriate to expect and to apply general and normal principles of free market during the crisis situation. All regulators are addressing the situation arising of COVID-19 appropriately through suitable actions.

CCI Finds Cartelisation in the Bearings Manufacturing Industry

The case was initiated on the basis of a lesser penalty application received by the CCI under the provisions of Section 46 of the Act from Schaeffler. In the said application, it was disclosed that Schaeffler, along with four other companies, namely ABC Bearings Limited ('ABC Bearings'), National Engineering Industries Ltd. ('NEIL'), SKF India Ltd. ('SKF') and Tata Steel Ltd., Bearing Division ('Tata Bearing'), was involved in cartelisation in the domestic industrial and automotive bearings market from 2009 to 2014.

The Commission passed an order dated 17.08.2017 under Section 26(1) of the Act, forming a *prima facie* view of contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act by the abovementioned companies and hence, referred the matter to the DG for investigation. During pendency of investigation, NEIL approached CCI by filing a lesser penalty application.

The DG found cartelisation amongst the four companies namely NEIL, Schaeffler, SKF and Tata Bearing in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. No evidence of cartelisation was found by the DG against ABC Bearings. As per the DG, the period of cartelisation was from 03.11.2009 till at least 31.03.2011.

On 05.06.2020, after taking cognizance of the evidence collected by the DG, and of the lesser penalty applications filed by Schaeffler and NEIL, the CCI concluded that the four Bearings manufacturers namely NEI, Schaeffler, SKF and Tata Bearing, had indulged in cartelisation, in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. Considering all relevant factors, in terms of Section 27(a) of the Act, the CCI directed NEIL, Schaeffler, SKF and Tata Bearing, and their respective officials who were found liable in terms of Section 48 of the Act, to cease and desist in future from indulging into practices which have been found to be in contravention of the provisions of the Act.

IN A NUTSHELL

The CCI directed 4 manufacturers of bearings to cease and desist from cartelisation after they were found guilty of contravening the provisions of the Act.

CCI Finds No *Prima Facie* Contravention in Exclusive Rights Granted by Government Departments to Travel Agencies

An Information was filed by Travel Agents Association of India 'TAAI', under Section 19(1)(a) of the Act against Department of Expenditure, Government of India 'DOE', Balmer Lawrie & Co. Ltd. 'Balmer Lawrie' and Ashok Travels and Tours 'Ashok Travels' alleging contravention of the provisions of Sections 3(4) and 3(1) of the Act. It was alleged that by granting exclusive rights to Balmer Lawrie and Ashok Travels through Office Memorandums and subsequent circulars, the DOE had foreclosed competition in the market for travel agent services for booking air tickets in India and has restricted choice of Government and public sector employees to only Balmer Lawrie and Ashok Travels.

The Commission observed that DOE's principal activities appeared to be in realm of policy making and interface with various ministries and not commercial in nature. Accordingly, DOE cannot be regarded as an 'enterprise' in terms of Section 2(h) of the Act especially in relation to circulars which are impugned, which is nothing but manifestation of a government policy in relation to its availing of particular services as a consumer. The Commission also noted that there does not seem to be any vertical relationship between DOE and Balmer Lawrie and Ashok Travels as DOE does not fall in any level of production chain in a market. Lastly, the Commission also observed that Office Memorandums and subsequent circulars are not in the nature of agreement pertaining to an economic activity but are internal administrative decision of the Government to deal with a particular agency in the matter of securing air tickets. Such policy decisions of the Government emanating through circulars cannot be termed as an 'agreement' under the provisions of the Act and consequently, are not the kind of 'agreement' envisaged under Section 3(1) of the Act.

Accordingly, the Commission held that as there was no vertical agreement between DOE, Balmer Lawrie and Ashok Travels under Section 3(4) of the Act and no case of contravention of provisions of the Act is made out under Section 3(4) of the Act, the matter may be closed.

IN A NUTSHELL

The CCI held that the engagement of a travel agency by a Government department is not in the nature of an agreement which relates to any economic activity. Accordingly, there was no 'agreement' under the Act.

ABUSE OF DOMINANCE

Investigation ordered against Dumper and Dumper Truck Union

An Information was filed by CJ Darcl Logistics Ltd. 'CJD Logistics' under section 19(1)(a) of the Competition Act, 2002 against Dumper and Dumper Truck Union Lime Stone 'Dumper Truck Union' and all the members of Dumper and Dumper Truck Union Lime Stone. It was alleged that the unlawful and anti-competitive acts by Dumper Truck Union in not allowing CJD Logistics to carry out its contractual obligations through its own vehicles at a rate lesser than those offered by union are in contravention of Section 3 of the Act. It was also alleged that the fixation of arbitrary rate for transportation of goods by the Dumper Truck Union as well as arbitrary condition imposed by them to only transfer limestone through their own trucks and drivers was capricious and in violation of provisions of Section 4 of the Act.

The Commission was of the view that Dumper Truck Union enjoyed dominant position in the relevant market of provision of services of transport of goods by trucks in the Sanu mines area. The Commission *prima facie* found contravention of provisions of Sections 3 and 4 of the Act by Dumper Truck Union and ordered an investigation by the Director General under Section 26(1) of the Act *vide* order dated 08.05.2020.

IN A NUTSHELL

The Commission observed, inter alia, that the fixation of arbitrary rates by The Dumper Truck Union was capricious and deserved to be examined by the DG.

The Commission finds that actions taken by SBI under the SARFAESI Act do not make SBI a dominant entity

An Information was filed alleging that the State Bank of India ('SBI'), M/s Patanjali Ayurveda Group and International Traders had entered into a collusive arrangement under Section 3 of the Act, in respect of the e-auction conducted by SBI, to recover the outstanding dues from the Informant. An allegation was also made that SBI and its officials were abusing their dominant position under Section 4 of the Act.

As regards allegations under Section 3 of the Act, any agreement/ understanding/practice between businesses is scrutinized in respect of entities 'engaged in identical or similar trade of goods or provision of services'. In this case, SBI, together with Patanjali Ayurveda (bidder) & M/s International Traders (bidder) could not be said to be similarly placed or involved in the same line of business or horizontally placed so as to fall within Section 3(3) of the Act. Even otherwise, the conduct of a secured creditor in effecting sale of an asset secured to it, through an auction process could not be examined under the provision of Section 3(3)(d) of the Act.

IN A NUTSHELL

In a case relating to recovery of dues from the Informant, the CCI held that, inter alia, resorting to the SARFAESI Act did not amount to abuse of dominance by one of the Opposite Parties.

Regarding the allegation of violation of Section 4 of the Competition Act, 2002, the CCI observed that a bank acting under the provisions of the SARFAESI Act ('Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002') attempting to recover the outstanding amount in the event of default by the borrower/guarantor could not be termed as a dominant entity. The Commission observed further that a bank acting as per the remedies available under the SARFAESI Act for recovery could not be termed as a dominant entity when it acts in accordance with provision thereof as it is acting in recovery of its funds/money in order to mitigate losses in such transaction (where account has been declared NPA).

Accordingly, on 14.05.2020, the Commission found no *prima facie* case as an auction/transaction initiated by a bank/ financial institutions as a secured creditor for the purpose of recovery in terms of provisions of the SARFAESI Act would not amount to violation of the provisions of the Competition Act, 2002.

CCI clears ZF acquisition of WABCO with modifications

On 14.02.2020, CCI cleared the proposed acquisition of 100% shareholding of WABCO Holdings Inc. 'WABCO' by ZF Friedrichshafen AG (ZF/ Acquirer)(both WABCO and ZF referred to as 'Parties') subject to carrying out of certain modifications proposed by the Parties.

ZF is a Germany based global technology company, active in developing, manufacturing and distributing automotive components such as gearboxes, steering, axles, clutches, dampers, chassis components & systems, active & passive safety technology systems for passenger vehicles (PVs), commercial vehicles (CVs), off-highway vehicles (OHVs).

WABCO, having its registered office in Delaware, USA and headquarters in Berne, Switzerland, is a global supplier of products and service including integrated braking systems and stability control, air suspension systems, transmission automation controls as well as aerodynamics and telematics. It also provides services that improve safety, efficiency and connectivity of commercial vehicles including trucks, buses and trailers. WABCO also supplies fleet operators with fleet management solutions, diagnostic tools, training and other expert services.

IN A NUTSHELL

ZF and WABCO are significant players in the automotive component sector supplying various components to OEMs.

WABCO has strong presence in HCV segment, while ZF, through its JV Brakes India, has strong presence in PV and LCV segment. Each of them has been competing through innovation and trying to make inroads into the domain of the other, in the markets of brake and clutch components.

The proposed combination appeared to prima facie result in the loss of a strong player which has aspirations and ability to become a systems player in the brake and clutch segment for LCVs and HCVs.

To alleviate the potential concerns, ZF offered to divest its shares in Brake India, subject to carrying out of which, the Commission approved the proposed combination.

Both ZF & WABCO were present in India through subsidiaries and joint ventures. The business activities of ZF are conducted through various subsidiaries and joint ventures including Brakes India, which is a JV between ZF (49%) and TVS (51%). WABCO and its subsidiaries are also engaged in the sphere of auto components/ systems relating to brake, clutch, steering and certain embedded software products used in PVs, CVs and OHVs.

The proposed combination was notified to the Commission on 07.11.2019, pursuant to a Business Transfer Agreement (BTA).

The preliminary assessment *prima facie* suggested that post-combination, the combined entity would constitute the substantial supply of brake and clutch components/ system for CVs in India. Accordingly, the proposed combination, *prima facie*, appeared to reduce/ eliminate the incentives of WABCO and Brakes India (JV of ZF) to compete in terms of price, products, innovation in the market of foundation brakes and clutch systems for commercial vehicles in India.

The Commission observed that in the product segments mentioned above, there were limited number of players, and as a result of the proposed combination, incentives for Brakes India to innovate, offer complete portfolio of products in brake system for CVs and turn as a full systems player, was likely to be reduced.

ZF offered behavioural remedies of the nature of firewall at the board of Brakes India and boards of WABCO, for a period of five years, so that they work independently. However, the Commission felt that the nature and extent of such behavioural remedies offered by ZF were not sufficient to address the competition concerns. Accordingly, show cause notice (SCN) was issued in terms of Section 29 (1) of the Act asking

as to why detailed investigation should not be conducted.

In response to the SCN, the Acquirer submitted voluntary modifications *vide* submission dated 13.02.2020 under Regulation 25 (1A) of the Combination Regulations, wherein it proposed to divest its 49% shareholding, and all rights and arrangements thereof, in Brakes India. This would ensure the presence of two separate and competing entities in the brake / clutch systems in the Indian market. Further, ZF also clarified that the scope of remedy offered to the Department of Justice in the US, in relation to the Proposed Combination, had included the divestment of the steering business of WABCO in India.

The Commission accepted the voluntary modifications proposed by Parties and approved the proposed combination.

Commission approved acquisition of certain equity share capital of Teesta Urja Limited 'TUL' by Greenko Mauritius 'Greenko'

On 11.03.2020, the CCI cleared the acquisition by Greenko of approximately 35% equity stake in the paid-up equity share capital of TUL.

TUL, an enterprise in which the Government of Sikkim held 60% of share capital through its company Sikkim Power Investment Corporation Limited, was a special purpose vehicle incorporated for the purpose of the implementation of 1200 Mega Watt MW hydro power project in Sikkim. The principal activity of TUL was the generation and sale of bulk power. TUL had only one subsidiary company i.e. Teesta Valley Power Transmission Limited ('TPTL'), which was a joint venture with Power Grid Corporation of India Ltd ('PGCIL'), who is also involved in transmission of power.

IN A NUTSHELL

The proposed combination between Greenko and Teesta Urja Limited relates to power generation. Combined market shares of parties were insignificant to raise any competition concern.

As a result of the proposed combination, Greenko (directly or indirectly) would acquire approximately 35% of the issued and paid-up equity share capital of TUL by way of secondary purchase of shares held by existing shareholders of TUL.

Greenko, incorporated in Mauritius, was a wholly owned subsidiary of Greenko Energy Holdings ('GEH'). Greenko had investments in a portfolio of companies engaged in power generation that operate solar, hydropower, wind, biomass, and gas plants in India. It operated various projects under the names, i.e. Greenko, Orange, Skeiron and SunEdison in India.

It was observed by the CCI that the parties exhibited horizontal overlaps at the broader level of total power generation in India and at a narrow level based on certain sources for power generation.

The Commission noted that the incremental market share in each of the segment/sub-segment is [0-5%], in terms of both installed capacity and actual generation, and the combined market shares were not such to cause any competition concerns.

Further, the existing vertical overlap between an entity belonging to GEH (engaged in generation of power) and subsidiary of TUL (engaged in transmission of power) was only regarding interim connectivity and the arrangement was temporary in nature.

In view of the above, the Commission approved the proposed combination.

CCI approves proposed acquisition of 80.1% stake by Hitachi in the power grid business of ABB Limited

On 07.04.2020, CCI approved the acquisition by Hitachi Limited 'Hitachi' of 80.1% of the

IN A NUTSHELL

The combination related to Hitachi acquiring the power grid business of ABB. The combination was approved as the combined as well as the incremental market shares of parties were insignificant to raise any competition concern.

share capital of ABB Management Holding AG 'ABB Management', which would hold the entire power grid business of ABB Limited 'ABB Limited'. Under the transaction documents, Hitachi was also provided an option to acquire the remaining 19.9% of the share capital of ABB Management within three years of closing of the main acquisition.

Hitachi, headquartered in Japan, is the parent company of the Hitachi group of companies. ABB Limited operated in the development, engineering, manufacturing and sale of products, systems and projects in power grids sector. In India, the activities of Hitachi and ABB Limited were similar in respect of: (a) power semiconductors; and (b) low voltage (LV) reactive power compensation (RPC) products, more specifically LV capacitors. Hitachi sold LV capacitors in India though one of its wholly owned subsidiary *viz*. Hitachi Chemical Company Limited 'Hitachi Chemical'. Recently, Hitachi had entered into an agreement to sell its entire shareholding in Hitachi Chemical to a third party. Following such transfer, the overlap between the parties in relation to LV RPC products would come to an end. Further, the combined market share of the parties and the incremental market share as a result of the proposed combination, in both the overlapping business segments was not significant.

Some of the activities of ABB Limited and Hitachi exhibited vertical relationship. However, the market position of parties either in the upstream or downstream market and the structure of the concerned businesses was such that the proposed combination did not raise any foreclosure concern. Accordingly, the Commission approved the combination under Section 31(1) of the Act.

NOTES TO FORM - I

As a part of ongoing and regular efforts of the CCI to streamline mergers and acquisitions ('Combination') filings, the Commission had introduced, in August 2019, an automatic system of approval for combinations under Green Channel. The objective of introducing the system was to make the combination review process simpler and faster. The Commission also revised Form – I to file the notice under Section 6(2) of the Competition Act, 2002, with a view to incorporate green channel procedure and make it more robust.

The Commission, in the month of March 2020, revised its guidance note for filing notices ('Notes to Form-I') to help the notifying parties to understand the nature, type and scope of information required. The guidance notes are helpful to the parties inasmuch as they are able to file standardised information and get clarity on interpretative issues, including issues such as eligibility criterion for green channel.

Some of the major changes are mentioned below:

a) Presence of officer / manager at senior level of each party having knowledge about the business, during the meetings with officers of the Commission.

b) Data for the period of three years is required to be submitted only for plausible alternative market(s) where combined market share is 10% and above.

c) Only following entities are to be considered by the parties (I) as affiliates, for the purpose of this note; and (II) for the purpose of phrase “any entity in which they, directly or indirectly, hold shares and/or control” where a party has:

   i. direct or indirect shareholding of 10% or more; or

   ii. a right or ability to exercise any right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder; or

   iii. a right or ability to nominate a director or observer in another enterprise(s).

The Commission also defined the Complementary products in Notes to Form-I and provided a guidance framework for information required for products / services considered as complementary.

JUDICIAL PRONOUNCEMENTS

Delhi High Court reaffirms the jurisdiction of CCI in matters regarding Abuse of Dominance in respect to Patent Rights

Information and Reference were filed with the Commission by various seed companies and the Department of Agriculture, Cooperation and Farmers Welfare, Ministry of Agriculture and Farmers Welfare, Govt. of India, respectively, against Mahyco Monsanto Biotech India Ltd. 'MMBL', Monsanto Inc, U.S.A. 'Monsanto', Maharashtra Hybrid Seeds Company Private Ltd. 'MaHyCo' and Monsanto Holdings Pvt. Ltd 'MHPL' (hereinafter called the 'Petitioners'). The seed companies and the Department of Agriculture alleged contravention of the provisions of Sections 3 and 4 of the Competition Act, 2002. It was alleged that MMBL was abusing its position as the dominant player in the market of Bt cotton seeds by charging unreasonably high trait fees from the seed companies and by imposing unfair, discriminatory conditions in sub-license agreements.

CCI found *prima facie* that MMBL's conduct violated Section 4 of the Act and that the conditions imposed in the sub-license agreements were harsh and not reasonable for protecting the Intellectual Property Rights (IPR). Accordingly, the CCI *vide* Order passed under Section 26(1) of the Act directed the DG to conduct an investigation in the matter. The said order of investigation was challenged by the Petitioners before the Hon'ble Delhi High Court on the ground of jurisdiction.

The Hon'ble Delhi High Court *vide* judgment dated 20.05.2020, while reaffirming the earlier judgment passed in Telefonaktiebolaget L.M. Ericsson vs. CCI & Anr.(W.P.(C) 464/2014 decided on 30.03.2016), dismissed the petitions filed by the Petitioners. It was held that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. Therefore, the jurisdiction of the CCI to entertain complaints regarding abuse of dominance in respect to patent rights could not be excluded. The Court reaffirmed the decision in

Telefonaktiebolaget L.M. Ericsson to hold that: (i) the orders passed by the CCI under Section 27 of the Competition Act in respect of abuse of dominant position by any enterprise are materially different from the remedies that are available under Section 84 of the Patents Act; (ii) Section 3(5) of the Competition Act did not mean that a patentee was "free to include onerous conditions under the guise of protecting its rights"; and (iii) the order passed by CCI under Section 26(1) of the Competition Act is an administrative Order and, therefore, unless it is arbitrary, unreasonable and failed the Wednesbury test, no interference was warranted. The Hon'ble Delhi High Court distinguished the application of case law laid down by Hon'ble Supreme Court in CCI vs. Bharti Airtel Ltd.(Civil Appeal No. 11843/2018, decided on 05.12.2018) and inter alia, pointed out following things: (i) In Bharti Airtel Ltd. - which was relied upon by the Petitioners - the Supreme Court did not accept the contention that the jurisdiction of the CCI was ousted by virtue of the telecom industry being regulated by a statutory body 'TRAI'. The expertise of Telecom Regulatory Authority of India 'TRAI' in the field of telecommunications is materially different than the expertise that a Controller bears in regard to grant of patents and exercise of patent rights; and ii) The decision of the Supreme Court in Bharti Airtel Ltd. is certainly not an authority for the proposition that wherever there is a statutory regulator, the complaint must be first brought before the statutory regulator and examination of a complaint by the CCI is contingent on the findings of the statutory regulator.

Condoning of any delay on account of time consumed in litigation before High Court will not be a 'sufficient cause' preventing from preferring the appeal within the prescribed statutory period

Three separate Information(s) were filed before the CCI and they alleged, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act by NIIT Limited. All the Information(s) were disposed of by CCI *vide* a common order as they were substantially similar and were filed against the same Opposite Party. NIIT Ltd. was engaged in the business of computer education and the Informants were its franchisees in the city of Hyderabad.

CCI defined the relevant market as the "market for the provision of computer education and training services in India" and concluded that NIIT Ltd. was not dominant in this relevant market. Regarding Section 3, it was concluded by the CCI that imparting classes through online portals by NIIT Ltd. was not contrary to the dynamics of the competition in the relevant market and that NIIT Ltd. was also providing sufficient training and course material to the members of its franchisees. Thus, finding no case of contravention of the provisions of Sections 3 and 4 of the Act against NIIT Ltd., CCI closed the matter under Section 26(2) of the Act.

Aggrieved by this Order, the Informants preferred writ petitions (W.P No. 42223 and 43744 of 2017) against the same before Hon'ble High Court of Telangana at Hyderabad which was rejected. It was held by the Learned Single Judge that the impugned Order of closure could be challenged in appeal before the Appellate Tribunal under the Competition Act, 2002 which provided an alternative remedy. Against the said decision, writ appeals (Writ Appeals 456 and 457/2018) were filed before the Division Bench of Hon'ble Telangana High Court wherein *vide* a common judgment it was held that the Court did not find any reason to interfere with the order of the Single Judge and that they did not view the discretion exercised by the Single Judge by relegating the appellants to the statutory appellate jurisdiction as being unfounded on fundamental principles of law. A review was then filed against the judgment passed by the Division Bench, however, the same was dismissed as the petition was withdrawn later. Thereafter, the Informants preferred an appeal before Hon'ble NCLAT against the Section 26(2) order passed by CCI along with an application seeking condonation of delay on account of time spent by them

seeking remedy before the Hon'ble Telangana High Court against the order of closure passed by the CCI.

The Hon'ble NCLAT *vide* order dated 29.05.2020 in Competition Appeal (AT) 01/2020 considered the sole issue that whether the delay of a period of 730 days, including 693 days spent by the Informants before the Telangana High Court, in filing the present appeal could be condoned. Hon'ble NCLAT while dismissing the appeal being barred by limitation and without going into the merits of the case held that: (i) competition concerns raised with regard to all anti-competitive activities in whatever form or manifestation are effectively dealt with under the Act which provides an efficacious remedy in the form of a statutory appeal under Section 53B of the Act. Since it is the admitted legal position that an efficacious legal remedy in the form of appeal is available within the adjudicatory mechanism under the Act, an unscrupulous litigant aggrieved of any Order, direction and decision of the CCI under the Act cannot be allowed to choose the remedies under law and invoke the writ jurisdiction of the Hon'ble High Court under the pretext of the impugned order being *non est* and emanating out of an inquiry, investigation or trial held in breach of the principles of natural justice. Such course, if permitted, would provide leverage to unscrupulous litigants to indulge in forum shopping. Such practice has to be deprecated; (ii) having regard to the legislative intent behind the enactment of Act, the provisions of Limitation Act, 1963 stand excluded by necessary implication. Thus, it was not open to take recourse to Section 5 of the Limitation Act, 1963 (which provided for extension of period of limitation prescribed under the Limitation Act, 1963) as it has no application to the appeal in question; iii) no reason much less a cogent lawful reason/ excuse was assigned for a delay of around two years in preferring the statutory appeal under Section 53B of the Act; and lastly (iv) the Informant's conduct/stubborn attitude in pursuing a remedy before the Constitutional Courts and not filing appeal before the Appellate Tribunal, cannot constitute a 'sufficient cause' for not exercising the statutory right of appeal. Therefore, the appellant could not be permitted to say that he was prevented by 'sufficient cause' from filing an appeal within the statutory period of limitation.

Self-Regulation: An Ex-Ante Antitrust Remedy

Self-regulation refers to controlling one's behavior - and in an industrial setting, it concerns firms in a particular industry that agree to act in prescribed ways, according to a set of rules or principles. Industry self-regulation is not a new phenomenon and has been existent for quite some time. In competition law parlance, self-regulation can be used to develop and maintain common standards, providing a level playing field to facilitate the entry of newcomers and promote competition. Thus, it can help in improving efficiency and increasing innovation. Market correction through self-regulation by industry is not only quicker and flexible but also less adversarial. It also reduces regulatory burden and is less likely to impede innovation. Studies on self-regulation also indicate that it can often be less costly and less burdensome for businesses than comparable government regulation.

Lately, the Indian smartphone handset market has seen many exclusive launches and exclusive selling of smartphones on the online platforms. The exclusive selling had agitated other players which included both offline and online sellers of smartphones in India. The brick and mortar players protested their inability to get access to the newly launched smartphones for selling them offline. The online sellers on the other hand were aggrieved that the sale of the exclusively launched smartphones happened only through the 'preferred sellers' of the online platform.

The issue of exclusive launch and selling of smartphones online was also identified in the market study on e-commerce ('market study') released by the Competition Commission of India in January, 2020. In the market study, it was noted that smartphone brands were launching their newest products exclusively on one of the two major goods' marketplace platforms, only through the

'preferred sellers' of the platform concerned. These 'preferred sellers' operated exclusively on a platform and did not multi-home (were not present on the other platforms). Thus, during the initial period after launch, these products were available exclusively on a single online platform and are eventually made available to the offline/brick and mortar retailers later on. As a result of this exclusive arrangement, there may be foreclosure of competition which may also result in creation of entry barriers. Thus, the benefits of competitive markets such as lower prices, better products or more choices may not accrue to consumers. It was also observed in the market study that e-commerce platforms indulge in below-cost pricing in certain product categories, such as smartphones and electronic/electrical appliances on online platforms, impairing the ability of brick and mortar players to compete in the market. The Commission also underlined the likely competition harm emanating from such exclusive launches in its *prima facie* Order in Delhi Vyapar Mahasangh vs. Flipkart and others and accordingly an investigation was ordered by the CCI under Section 3(4) of the Act in January, 2020.

The period after release of the market study and initiation of the antitrust investigation, saw the smartphone manufacturers self-regulating themselves by stopping exclusive online launches of smartphones. In addition, Samsung India withdrew its promotion scheme with Amazon Pay Digital Service. As per this scheme, the consumers were given cash back offers when the payment was done through Amazon Pay. The cash back scheme may have been detrimental to the businesses of offline retailers.

The above example has highlighted the importance of industry self-regulation as it can be used as a tool towards achieving competitive and efficient markets. It is important to note that failures of industry to self-regulate leads to more interventionist policy by way of regulations. For instance, the EU Platform to Business (P2B) Regulation (which would be applicable from 12.07.2020) is aimed at creating a fair, transparent and more predictable environment for businesses and traders, when using online intermediation services and online search engines. Some key elements of the P2B Regulation include: a ban on certain practices deemed to be unfair such as suspending a seller's account without clear reasons; greater transparency; and mandatory dispute resolution system for sellers. Therefore, given the benefits of self-regulation, it could become an important means of improving the functioning of the Indian markets.

KNOW YOUR COMPETITION LAW

The "Green Channel" mechanism was introduced to deal with notifiable combinations that were unlikely to result in any appreciable adverse effect on competition. To start with, combinations with no horizontal, vertical and complementary overlap between the parties were made eligible for Green Channel clearance. Parties could self-assess to determine if their combination would qualify for the Green Channel mechanism.

As an enabling provision, Regulation 5A of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019 provides that parties availing Green Channel shall give notice in the relevant form with the declaration in prescribed format. Such combinations notified are deemed to have been approved under sub-section (1) of Section 31 of the Act upon filing notice and acknowledgement thereof.

Further, as per the proviso to Regulation 5A, where the Commission finds that the combination does not qualify for Green Channel and/or the declaration filed under Regulation 5A is incorrect, the notice given and the approval granted under this regulation shall be *void ab initio* and the Commission shall deal with the combination in accordance with the provisions contained in the Act. Also, the Commission shall give to the parties to the combination an opportunity of being heard before arriving at a finding that the combination does not fall under Schedule III and/or the declaration filed pursuant to Regulation 5A is incorrect.

Pursuant to the introduction of the Green Channel route, the first Combination approved under the green channel was acquisition by BAC Acquisitions Pvt. Limited (BACQ) of Essel Mutual Fund. Since then, there has been a rise in the number of applications filed through the Green Channel mechanism.

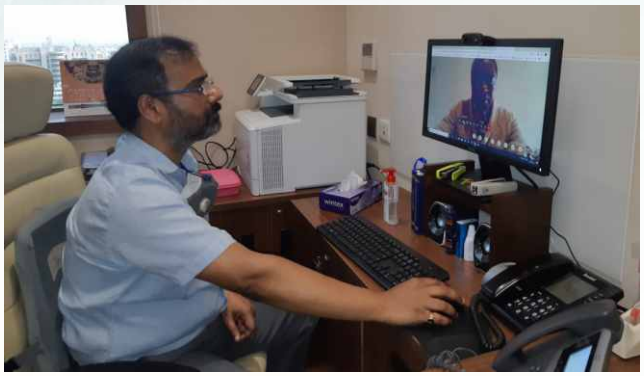
ENGAGING WITH THE WORLD

Participation of CCI in Various Workshops / Seminars / Meetings:

1 Five officers from CCI attended a webinar organised by Organisation for Economic Co-operation and Development (OECD) on '***Merger Control in Times of Crisis***' on 26.05.2020.

2 Ms. Jyoti Jindgar, Secretary (I/C), Dr. Sanjay Kumar Pandey, Adviser (Law) and Shri Kamal Sultanpuri, Deputy Director (Law) participated in the online meeting on '***BRICS response to COVID-19***' with officials from Competition Authorities of Brazil, South Africa, China and Russia on 27.05.2020.

Ms. Jyoti Jindgar, Secretary (I/C), attending the webinar on BRICS response to COVID-19



Dr. Sanjay Kumar Pandey, Adviser (Law), participating in the webinar on the BRICS response to COVID-19

3 Five officers from CCI attended webinar organised by OECD on '***Antitrust in Times of Crisis***' on 28.05.2020.

4 Shri Ashok Kumar Gupta, Chairperson, CCI signed on the ***extension of the BRICS*** Memorandum of Understanding on cooperation in the field of competition law and policy.

5 International Cooperation Division participated in the webinar on the ***ICN Steering Group's project*** on competition law enforcement at the intersection of competition, consumer protection, and privacy on 22.06.2020.

DEVELOPMENT IN OTHER JURISDICTIONS

I. UNITED STATES OF AMERICA

Federal Trade Commission (FTC) and Federal Communications Commission (FCC) send joint letters to VoIP Service Providers Warning against 'Routing and Transmitting' Illegal Coronavirus-related Robocalls

The FTC sent joint letters together with the FCC to three companies providing Voice over Internet Protocol ('VoIP') services. The letters to the three companies (gateway providers SIPJoin; Connexum; and VoIP Terminator/BL Marketing) were in regard to warning them that routing and transmitting illegal robocalls, including Coronavirus-related scam calls, was illegal and may lead to federal law enforcement against them. The joint letter also notified the recipients that the FTC and FCC obtained information about their conduct working in conjunction with the US Telecom Industry Traceback Group.

The two agencies simultaneously sent a separate letter to a broadband association 'US Telecom', a trade association that represents U.S.-based telecommunications-related businesses. The letter conveyed gratitude to US Telecom for identifying and mitigating fraudulent robocalls that were taking advantage of the Coronavirus health crisis, and further noted that the US Telecom Industry Traceback Group had helped identify various entities that appeared to be responsible for originating or transmitting Coronavirus-related scam robocalls.

The letter further notified US Telecom that if, after 48 hours of the receipt of the letter, any of the specified gateway or originating providers continued to route or transmit the specified originators' robocalls on its network, the FCC would: 1) authorize other U.S. providers to block all calls coming from that gateway or originating provider; and 2) authorize other U.S. providers to take any other steps as needed to prevent further transmission of unlawful calls originating from the originator.

Facilitating such calls, the letters stated, “has the potential to inflict severe harm on consumers” and “prey on consumer fear and anxiety” related to the Coronavirus pandemic.

II. RUSSIA

Roadmaps to support Competition Development are mainstreamed in all subjects

The President of the Russian Federation gave instructions to mainstream all regional 'Action Plans' towards Competition Developments that were approved in April 2018 due to adopting of a new edition of the 'Competition Development Standard' in the subjects of the Russian Federation.

The first stage of this instruction included a direction to compile a list of markets classified on the basis of regions and also involved simultaneous determination of the key indicators of developing competition on the selected markets that regions approved at the end of 2018.

The next step was devising a new strategy for 2019-2022 regional roadmaps which are aimed towards Competition Development by regional authorities in collaboration with Federal Antimonopoly Service ('FAS') and its regional Offices.

So far, all 85 subjects of the Russian Federation had approved their 'Action Plans'.

The 'Action Plans' comprise of systemic measures for improving competitive environment in regions, in particular, support to small business, refinement of procurement, public property management, simplifying access to financial resources as well as measures aimed at achieving the key targets in order to increase the share of private companies on the markets selected by regions. All regional roadmaps were analyzed by FAS and its regional offices in terms of whether they conformed to the 'Competition Development Standard' and their impact upon competition development in the subjects of the Russian Federation. The approved regional roadmaps will be executed by regions throughout the next two years, in which all key sectoral bodies will be engaged.

FAS agreed to the fact that as a result of the pandemic in force, there was a high possibility of new economic challenges that may be faced by Russia. As a result of adverse effects of the pandemic consequences, executing the measures specified in the 'Action Plans' will form the basis for expanding market entry for business and developing fair competition. It will seek to stabilize the Russian economy, support national security and increase consumer satisfaction through expanded assortment of goods, works, services, improvement of their quality and price reduction.

III.SOUTH AFRICA

Major Suppliers of Face Masks prosecuted for exorbitant price increases

The Competition Commission of South Africa ('CCSA') referred two major suppliers i.e. Sicuro Safety CC ('Sicuro') and Hennox 638 CC t/a Hennox Supplies ('Hennox') to the Competition Tribunal for allegedly charging excessive prices for face masks during the time of the Coronavirus pandemic. They have been charged with the contravention of Section 8(1)(a) of the Competition Act of South Africa read with Regulation 4 of the Consumer Protection Regulations of South Africa.

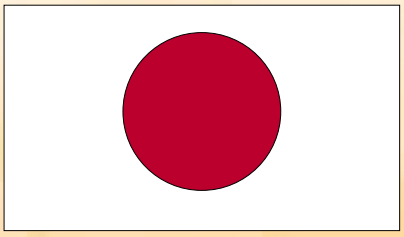
After an in-depth investigation by the CCSA, it was found that the two firms' prices for the Filtering Face Piece 1 'FFP1' mask increased exponentially by more than 969.07% and 956%, as charged by Sicuro and Hennox, respectively. Further, the firms had not furnished the Commission with any reasonable explanation for such excessive and aggressive price increases.

The two cases follow the Competition Commission of South Africa's earlier prosecutions in respect of excessive prices charged for face masks against Babelegi Workwear and Industrial Supplies CC ('Babelegi') and Dis-Chem Pharmacies Ltd ('Dis-Chem'). Babelegia was alleged to have caused a price increase of 1241%, while Dis-Chem had allegedly increased their price for face masks increased by as much as 317%.

The CCSA thus observed that Sicuro's and Hennox's pricing was due to the COVID-19 pandemic and its unprecedented impact on the world in general and South Africa in particular. In order to address this concern, the CCSA asked the Competition Tribunal to issue an interdict prohibiting the two firms from continuing with any excessive pricing conduct, together with any pricing order as may be necessary to remedy this conduct. The CCSA also asked the Competition Tribunal to impose a maximum penalty.

IV. JAPAN

Japan Fair Trade Commission (JFTC) closes an investigation relating to the suspected violation of the Antimonopoly Act by Osaka Gas Co. Ltd.



The JFTC had investigated Osaka Gas Co. Ltd. ('Osaka Gas'), in accordance with the

provisions of the Antimonopoly Act of Japan. Osaka Gas was suspected of violation of private monopolisation and carrying out unfair trade practices in the market. Osaka Gas was also accused of unjustly excluding competitors in the relevant market, wherein it supplied gas to LCPs (being Large Consumption Points subject to an annual gas contract of not less than a hundred thousand cubic meters) in the area of distribution network and did the following acts:

(i) unjustly supplied gas for a low price;

(ii) concluded a contract to discount gas prices under the condition of supplying gas to two or more LCPs (also known as 'multipoint contract') with the stipulation that the total amount of the discounts given by Osaka Gas should be reimbursed back to it, if any of the individual gas contracts on the LCPs subject to the multipoint contract would be cancelled during the contracted period, and

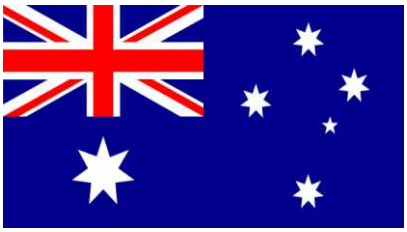
(iii) concluded a gas supply contract with the stipulation that the customer should pay a cancellation charge to Osaka Gas if the customer would cancel the contract during the contracted period.

The JFTC in its order decided to close the investigation in light of the facts that:

- JFTC had not found a violation against the Antimonopoly Act on issue (i); and
- Osaka Gas voluntarily offered the JFTC revision of the stipulations of the multipoint contract and gas supply contract mentioned in (ii) and (iii) above to reduce customers' payment accompanying a change of a gas supplier from Osaka Gas to a competitor.

V. AUSTRALIA

The Australian Competition and Consumer Commission (ACCC) to monitor competition in the domestic airline market



The ACCC recently welcomed the direction received from the Australian government to actively monitor and regularly report on the domestic air travel market, particularly in relation to its competitiveness. On 19.06.2020, the ACCC was directed to monitor the prices, costs and profits of Australia's domestic airline industry and provide quarterly reports to inform government policy. This direction was under Part VIIA of the Competition and Consumer Act and will require that the ACCC seek information from the relevant companies. The direction issued has a time frame of three years.

The aviation industry globally has been severely impacted by the COVID-19 pandemic, and is a critical industry for Australia. It was opined by the Chair of ACCC, Mr. Rod Sims that a strong aviation industry was vital for Australian consumers and the economy. He further added that this direction by the Australian government was very timely and the need of the hour.

The ACCC will seek to look out for any signs of damage to competition in the domestic airline industry that may harm the long-term interests of consumers. This information would then be acted upon by the ACCC and/or provided to the Government.

The monitoring regime that will be put in place will inform the ACCC and the government about the rate at which each airline was increasing capacity on each route. This would help provide insight into whether an airline could be adding additional flights to a route in an attempt to damage a competitor or drive them off the route.

The ACCC is currently investigating whether the acquisition of a 19.9 per cent ownership stake in Alliance Airlines by Qantas represents a breach of competition law.

ADVOCACY INITIATIVES

1. A webinar organized by ASSOCHAM (Associated Chambers of Commerce and Industry of India) on "Safe Harbours Under Competition Law - Competition Compliance during Covid-19" was inaugurated and addressed by Ms. Jyoti Jindgar, Adviser and Secretary(I/C) on 22.04.2020.

2. A Research Associate, attended a webinar on “Industrial Policy and Competition Policy in the Post-COVID Context” organised by Concurrences (Antitrust Publications and Events) on 15.05.2020.

3. Ms. Jyoti Jindgar, Adviser and Secretary (I/C), delivered a lecture through a video conference at the ASSOCHAM (Associated Chambers of Commerce and Industry of India) Regulators Web Confluence on 23.05.2020 on the topic of 'Corporate Restructuring, M&A and Joint Venture Present Challenges, Growth Opportunities and Way Forward'.

4. Considering the peculiar situation of Covid-19, CCI introduced and implemented “Online Internship Programme” from May 2020. The programme details were made available at the CCI webpage (https://www.cci.gov.in/) as well as on CCI's social media accounts for dissemination amongst students. In the Month of May, 2020, a total of 7 students successfully underwent online internship at CCI.

5. Ms. Payal Malik, Adviser (Economics) was a guest speaker in podcast series titled “Platforms for digital markets and disruption” co-hosted by Mr. Vishwanath Pingali (Faculty, Economics Area), Indian Institute of Management, Ahmedabad and Prof. Daniel Sokol, Professor of Law at University of Florida on 30.05.2020.

6. Ms. Payal Malik, Adviser (Economics) was a Panellist in the ABA spring meeting on "Economic Tools for Antitrust in Emerging Markets" on 02.06.2020.

7. Dr. Sanjay Pandey, Adviser (Law) and Shri Arun Dhall, Deputy Director (Economics) attended a webinar on "Competition Law and Blockchain" conducted by Indian Institute of Corporate Affairs (IICA) on 03.06.2020.

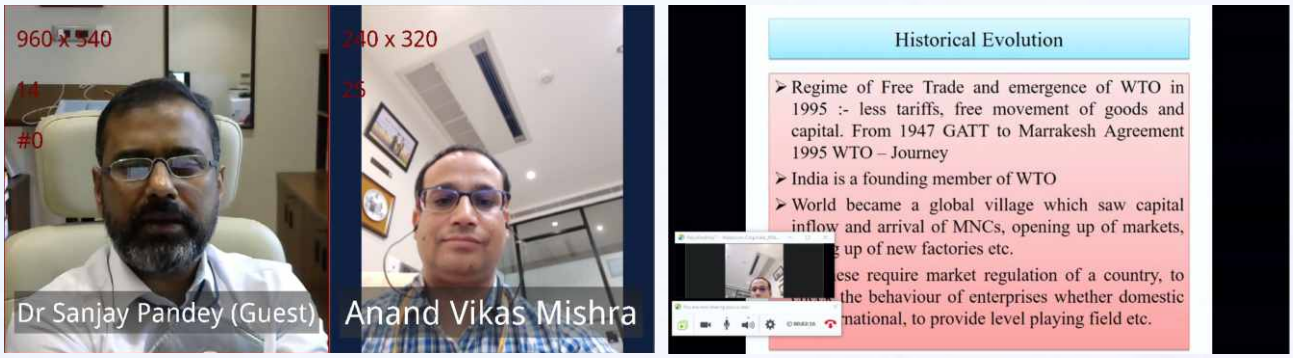
8. Dr. Sanjay Pandey, Adviser (Law), Ms. Payal Malik, Adviser (Economics) and Shri Arun Dhall, Deputy Director (Economics) attended a webinar on "Digital Markets and Competition Law" conducted by IICA on 10.06.2020.

9. Shri Anand Vikas Mishra, Joint Director (Law) delivered a lecture through webinar on 19.06.2020 to the Faculty of Law, Aligarh Muslim University (AMU) providing an overview on the 'Working of the Competition Commission of India'.

10. An Advocacy Programme was conducted in the Office of Chief Electoral Officer (CEO), Odisha for Election Officials by Resource Person of Odisha - Shri P. K. Biswal, Retired IAS on 29.06.2020. This programme was conducted under the 'State Resource Person Scheme' of Competition Commission of India. Additional CEO and senior officers were also present during the Advocacy Programme.

11. Shri Mukul Sharma, Joint Director (Economics) delivered a lecture to the officials of Oil India Limited at Assam on 'Competition Law and Public Procurement' on 29.06.2020. The programme was conducted under the 'State Resource Person Scheme'.

12. In the month of June, a total of 35 Students underwent online internship in CCI, their orientation was conducted online by Dr Sanjay Pandey, Adviser (Law). Keeping in view the Covid-19 situation, practice of award of electronic certificate for internship was adopted by Advocacy Division from May 2020.



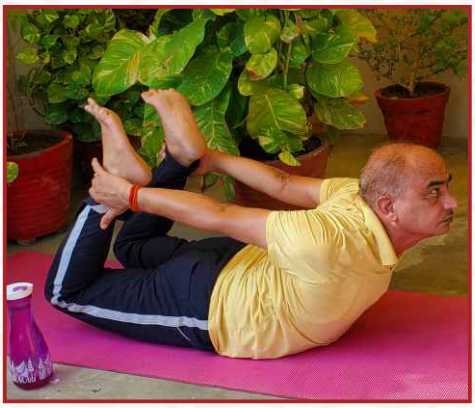
INTERNATIONAL YOGA DAY

On 11.12.2014, the United Nations declared 21st June as the International Yoga Day, endorsed by a record 175 nation states due to the universal appeal of yoga as a healthy lifestyle choice. Yoga is an ancient spiritual practice that originated in India and is practiced across the world in various forms and has continued to grow in popularity. Since 2015, the CCI has celebrated the International Yoga Day by conducting a special yoga session at the CCI. This year, CCI officers and staff took active part by practising yoga. Below are a few snippets.

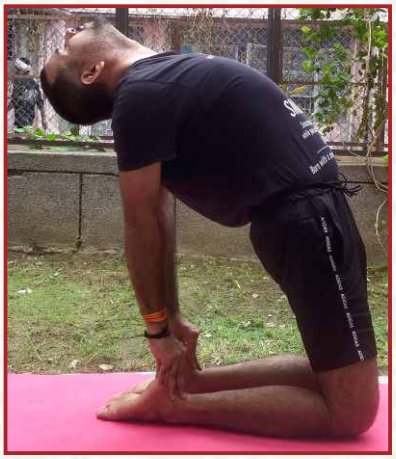
Ms. Bhawna Gulati, Joint Director (Law) - Shirshasana

Shri Ashok Kumar Gupta, Chairperson - Padangusthasana

Shri Kuldeep Kumar, Joint Director (Law) - Shirshasana



Shri Anil Vashishth, Assistant Director (CS) - Dhanurasana



Shri Shailendra Pathak, Assistant Director (CS) - Ustrasana

CAPACITY BUILDING EVENTS

1. Two officers from CCI attended a webinar with Mr. Stephen Gibson, Board Member and Interim Chair of the UK Government's Regulatory Policy Committee on '*Better Regulation Framework in UK and the Role of Regulatory Policy Committee*' which was organized jointly by School of Competition Law & Market Regulation and Forum of Indian Regulators (FOIR) Centre at Indian Institute of Corporate Affairs (IICA) 20.05.2020.
2. Four officers from CCI attended a webinar on the topic – '*A Manufacturing Strategy for India*' organized by Indian Council for Research on International Economic Relations (ICRIER) on 21.05.2020.
3. 10th lecture under CCI's Special Lecture Series (SLS) was delivered online by Prof. Rahul Singh, Associate Professor, National Law School of India University (NLSIU), Bangalore on the topic '*Revisiting Goal(s) of the Competition Act, 2002: A law-and-economics perspective*' on 29.05.2020.
4. 02 officers attended an online workshop on '*GST with focus on TDS, ITC & compliances*' organized by National Academy of Human Resource Development (NAHRD) on 03.06.2020.
5. 12 officers from CCI attended a Webinar with Mr. Thibault Schrepel, Faculty Associate, Berkman Center, Harvard University & Assistant Professor, European Economic Law, Utrecht University School of Law, Netherlands on '*Competition Law and Blockchain*' on 03.06.2020 organized jointly by School of Competition Law & Market Regulation and Forum of Indian Regulators (FOIR) Center at Indian Institute of Corporate Affairs (IICA).
6. 03 officers from CCI attended a Webinar with Mr. Ariel Ezrachi, Slaughter and May Professor of Competition Law and Director, Centre for Competition Law and Policy at University of Oxford on the topic '*Digital Markets and Competition Law*' on 10.06.2020 organized jointly by School of Competition Law & Market Regulation and Forum of Indian Regulators (FOIR) Center at Indian Institute of Corporate Affairs (IICA).
7. 05 officers/ RAs from CCI attended a Webinar with Mr. Eric Thomson, Founder, Envelope Economics (a firm specializing in the socio-economic impact of regulations and government policy) & ex-OECD Regulatory expert on the topic '*Cost-Benefit Analysis of the Socio-economic and Financial Impact of Regulations*' on 17.06.2020 organized jointly by School of Competition Law & Market Regulation at Indian Institute of Corporate Affairs (IICA).
8. 33rd lecture under CCI's Distinguished Visitors Knowledge Sharing Series (DVKS) was delivered online by Shri Arindam Bhattacharya, Managing Director & Senior Partner, Boston Consulting Group (BCG) on the topic '*Globalization is not Dead; It is Different*' on 19.06.2020.

9. An officer from CCI attended a Webinar on the topic '*The Role of Wi-fi in Broadband Proliferation*' on 19.06.2020 organized jointly by Broadband India Forum (BIF) and Bharat Exhibitions in celebration of the World Wi-Fi Day.

HR CORNER

Joining on Deputation:

i) Dr. Atul Verma, IPS joined as Director General, CCI on deputation basis w.e.f. 01.06.2020.

ii) Smt. Savitri Baburao Kore, DD (Eco.) joined as Jt. Director General in the O/o. DG, CCI on deputation basis w.e.f. 29.04.2020 (A/N).

Promotion:

iii) Shri Sukesh Mishra, Director (Law) was promoted as Adviser (Law) on ad-hoc-basis w.e.f. 08.05.2020 (A/N).

Relieving:

iv) Shri Apurv Agarwal, Director (Law) was repatriated to his parent cadre w.e.f. 16.06.2020 (F/N) on his own request.

Selection on deputation made:

v) Selection to the following posts in CCI on deputation basis was made and offer of appointment orders issued to the candidates selected:-

a) Joint Director (CS) -01

b) Asstt. Director (CS) -02

c) Asstt. Director (IT) -01

d) Office Manager (CS) -03

e) Officer Manager (F&A) -01

Shri Ashok Kumar Gupta, Chairperson, CCI felicitating Shri Justice Sudhanshu Jyoti Mukhopadhyaya, Chairperson, National Company Law Appellate Tribunal, on the occasion of his farewell ceremony.

Competition Commission of India
9th Floor, Office Block-1, Kidwai Nagar (East),
New Delhi- 110023, India

Please visit www.cci.gov.in for more information about the Commission.
For any query/comment/suggestion, please write to advocacy@cci.gov.in

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