TRILEGAL

UPDATES

Competition – Legal Milestones Financial Year 2020-21 and a Look Ahead

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This update covers:

1 The Year that Was

The financial year 2020-2021 witnessed significant competition law-related developments, including the advisory for businesses in wake of the COVID-19 pandemic and the market study report on the telecom sector in India. The digital sector faced increased scrutiny, with several technology companies being investigated for alleged anti-competitive and abusive practices in India, as the rapidly evolving digital landscape posed unique challenges.

The Competition Commission of India (CCI) has previously indicated that while assessing new-age markets, it will adopt a nuanced and minimalist approach, to avoid stifling innovation incentives which are offered by such digital companies. Google is facing an investigation for alleged abusive conduct by unfairly mandating the use of its payment's app, Google Pay, *inter alia* to purchase apps in the Play Store.

The competition law regime in India is undergoing significant transformation and the Competition Commission of India is playing a pivotal role in shaping its implementation. This update covers the key highlights of the financial year 2020-2021 and provides a brief overview of the likely trends in the new financial year.

The CCI has also directed an investigation against WhatsApp in respect of its updated privacy policy. The CCI has held that the alleged 'take-it-or-leave-it' nature and the data-sharing provisions of WhatsApp's updated privacy policy is *prima facie* abusive and may have an exclusionary effect in other related market(s) (display advertising), thereby creating barriers to entry and undermining the competitive process.

With respect to mergers, the CCI has continued to adopt a hybrid approach in granting approvals in complex M&A deals, by accepting structural and behavioural remedies, requiring parties to either make a permanent change in the structure of the market (e.g., divestment of assets) or to commit to not act in a certain manner in future (e.g., firewall provisions).

2 Major Developments in the Financial Year 2020-2021

2.1 COVID-19 related advisory and other measures

To manage the significant changes in supply and demand patterns arising out of the COVID-19 pandemic, the CCI, similar to its counterparts in other jurisdictions, issued an advisory for guidance to businesses in April 2020. While acknowledging the need for businesses to co-ordinate certain activities to ensure continued supply and distribution of essential products and services, the CCI highlighted that there are in-built safeguards in the Competition Act, 2002 (Act) intended to protect businesses from sanctions, provided such arrangements were necessary and would result in increased efficiencies.

The CCI in the advisory specifically noted that only such conduct of businesses, which is necessary and proportionate to address concerns arising from COVID-19, will be considered. Businesses are, however, cautioned not to take advantage of COVID-19 to contravene any of the provisions of the Act. The CCI is also closely coordinating with regulators worldwide to combat the negative economic consequences arising from the pandemic and has signed the 'Statement of the BRICS Competition Authorities on COVID-19'.

The CCI has adopted an accommodative approach towards small and medium-sized enterprises due to the economic hardships faced on account of the pandemic. In two cartel contravention cases, the CCI did not impose any penalties in either case, despite there being evidence (and admission) of cartelisation and ordered the enterprises to cease and desist from anti-competitive practices. This lenient approach is unlikely to carry forward post-economic recovery once the effects of the pandemic subside.

To facilitate smooth functioning and to ensure continuity of work, the CCI enabled parties to submit electronic filings, conducted virtual pre-filing consultations and hearings for merger control and enforcement matters.

2.2 CCI grants interim relief directing MakeMyTrip and Go-Ibibo to relist FabHotels and Treebo

The CCI issued an interim order dated 9 March 2021 under Section 33 of the Act, granting relief to FabHotels and Treebo by directing MakeMyTrip and Go-Ibibo (collectively, MMT-Go) to re-list the properties of FabHotels and Treebo on their online platforms. This interim order has been challenged and is currently pending final adjudication.

The CCI observed that the recent upsurge in digital marketplace platforms has changed the digital distribution architecture for sellers and service providers. The change in digital distribution has made these digital platforms the key access routes for sellers/service providers to reach end-customers. The CCI held that denial of access to a dominant online platform can be lethal to the functioning of businesses relying on such intermediaries to reach their end-customer. As such, the CCI in the interim directed MMT-Go to relist the hotels under FabHotels and Treebo on its platform.

In 2019, the CCI had directed an investigation into the alleged anti-competitive/abusive conduct of MMT-Go for charging excessive commissions, indulging in deep discounting, imposing unfair conditions on the hotels including price parity clauses, giving preferential treatment to Oravel Stays Private Limited under its commercial agreement with MMT-Go etc.

2.3 Procedural Developments

To ease the burden on enterprises while notifying combinations, the CCI did away with the requirement of an explanation and justification of non-compete restrictions.

Separately, in a welcome development, the CCI updated its guidance notes to Form I (short form) to provide the scope of information and documents to be submitted to the CCI, and also clarified the eligibility criterion for a green channel filing by explaining the meaning of complementary products/ services. The 'green channel route' introduced by the CCI proved to be a success in improving ease of doing business in India, and 27 combinations (until March 2021) have benefitted from the speedy approval under the 'green channel route'.

In a move to extend co-operation among government agencies and ensure better regulatory oversight, the Central Board of Direct Taxes authorised the income tax authorities to share relevant information with the CCI. This arrangement to share information will enable the CCI to evaluate the financial profile of the infringing enterprise/individual and be better equipped with imposing financial penalties under the Act.

In line with the directions issued by the High Court of Delhi in the constitutional challenge by several automobile manufacturers, the CCI (Meeting for Transaction of Business) Regulations, 2009 were amended through a notification dated 2 March 2021. The amendment provides that the quorum of CCI members for final hearings should remain constant, and the same quorum alone should hear and decide upon the case. In the event the same quorum is unable to continue with the hearings, the case would then be heard afresh by a new quorum.

2.4 Market Studies

In 2020, the CCI initiated or undertook market studies to assess competition law issues in the digital markets, pharmaceutical sector and telecom sector respectively.

a. Digital Markets – The CCI is conducting a study on merger and acquisitions in the digital market. 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.

b. Pharmaceutical – The pharmaceutical sector plays a pivotal role in the public health agenda of any nation. Some of the areas that the CCI is looking into in its study of this sector include, (i) understanding the role of trade associations, (ii) extent of proliferation of branded generic drugs in India, and (iii) the potential hurdles in the entry of bio-equivalent drugs in India. The CCI has started its consultation process to gather information from the stakeholders including, pharmaceutical companies, stockists, chemists, trade associations, doctors, sector experts and regulators.

c. Telecom - The CCI published its report on 'Market Study on Telecom Sector in India' in January 2021. The market study indicated the emergence of new business models in the telecom sector, based on vertical convergence and made key findings in relation to the shift in focus from price-based competition to non-price competition parameters (consumer privacy); adherence to net neutrality principles; maintaining transparency in peering arrangements; and data privacy as a non-price parameter of competition. A harmonised approach in relation to the overlapping regulatory jurisdictions of the Telecom Regulatory Authority of India, Department of Telecommunications, CCI and the envisaged Data Protection Authority, has also been recommended.

3 Looking Ahead

In 2021, the CCI expanded its presence with a regional office in Chennai that will specifically cater to states in Southern India, i.e, Tamil Nadu, Kerala, Karnataka, Andhra Pradesh, Telangana and Union Territories, i.e., Puducherry and Lakshadweep. This will enable the CCI to actively focus on curbing anti-competitive conduct and increase its enforcement, investigation, and advocacy functions, in close coordination with its existing office in New Delhi.

The CCI is currently also undertaking a detailed market study with respect to private equity investments in India. This market study aims to understand the trends and patterns of common ownership by private equity investors across sectors in India, and to gauge underlying incentives and motivations behind such investments. The study will specifically focus on minority investments, identify the kind of shareholding rights available to common shareholders, the type of influence these rights provide, and the available safeguards in companies' policies for mitigating competition concerns, if any. This market study will inform the merger control decisions in the years to come.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed here.