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

CCI Suspends Approval for Amazon-Future Deal and penalises Amazon

In a first of its kind decision, the CCI, *vide* [order dated 17.12.2021](#) stayed the approval granted on [28.11.2019](#) to Amazon's acquisition of 49% shares in Future Coupons Private Limited (FCPL).

The proceedings in this case were initiated when FCPL filed an application in the CCI against Amazon in March 2021 (due to Amazon's opposition to transfer Future Retail Limited (FRL), a company in which FCPL holds 9.82% shareholding to Reliance Industries). It was alleged that Amazon had taken a completely contradictory stance during proceedings before arbitration and constitutional courts, with regards to the nature of its investment in FCPL, in contrast to the representations it had made before the CCI during the approval process in 2019. It was further alleged that such contradictions amounted to false representation and suppression of material facts before the CCI.

The CCI analysed internal documents of Amazon to understand its focus during negotiation with Future Group and the objectives it sought to achieve by entering into the Future Coupons acquisition. It was observed that Amazon had initially planned to partner with Future Group, by acquiring 9.99% stake in FRL. The rationale for such an investment was Amazon's desire to partner with Future Group, a key player in the offline retail market and to become the single largest shareholder of FRL. Further, it wanted to preclude/block competitive interest in FRL and utilise FRL's pan-India store infrastructure to bolster its ultra-fast delivery program.

However, due to certain developments in the law relating to foreign investment, Amazon instead utilised a twin-entity investment structure to invest in FRL i.e., Amazon would acquire 49% shares in FCPL which, in turn would acquire 8-10% shareholding in FRL. Nevertheless, on account of rights and commercial arrangements between Amazon, FCPL and FRL, the CCI determined that the combination approved on 28.11.2019 was for establishing a strategic alignment/

partnership between Amazon and Future groups, in the Indian retail sector.

The CCI then analysed the nature of disclosures made by Amazon during the approval process. It was noted that Amazon in the section on 'Economic and Strategic Purpose' of the transaction focused on FCPL's business and did not refer to FRL. Amazon had cited FCPL's unique business model, potential growth and strong futuristic outlook as the factors driving its investment. This was in stark contrast to Amazon's internal documents which considered the investment as a 'foot-in-door' in the Indian retail sector, in order to acquire strategic rights over FRL.

As per the CCI, such differences in representation are significant in establishing a proper understanding of the combination and its purpose, and impacts the line of inquiry to assess the effects of the combination on competition. Accordingly, the CCI held that Amazon's conduct was a clear, conscious and wilful case of omission to state the actual purpose of the combination despite the disclosure requirements to suppress material facts. Therefore, the CCI found Amazon in contravention of Section 44(a) and (b) and Section 45(1)(a) of the Act.

On the issue of inter-connected nature of transactions which were not reported, the CCI noted that that the rights of Amazon over FRL were at the heart of the negotiations and the need to enter into a shareholder's agreement (SHA) was to achieve the said objective of the Combination. However, this SHA in its actual context (namely, share subscription agreement between Amazon, FCPL and the rights and obligations of shareholders of FCPL) was not disclosed to the CCI.

Accordingly, the CCI concluded that Amazon had failed to disclose the fact that the SHA was negotiated as a part of the Combination and was an intrinsic element thereof to confer Amazon's rights over FRL. The CCI also held that the mere mentioning of the SHA in a footnote during the 2019 approval process could not be construed as a notification in substance or form. Such conduct of Amazon was found to be in contravention Section 45(1)(b) of the Act.

The CCI concluded by noting that the effect of commercial contracts entered into between FRL and Amazon Group entities, in their normal course of business, would be considerably different from parties contemplating strategic alignments between their

business through strategic investments. Therefore, omissions, false statements and misrepresentations have the effect of influencing the line of inquiry in assessing the Combination. Such actions of Amazon also have the effect of denial of opportunity to the CCI to assess the effects of the actual Combination, with specific focus to the actual intended objectives.

In light of these facts, the CCI considered it necessary to examine the combination afresh based on a notice to be given in Form II. Accordingly, exercising powers under Section 45(2), the CCI directed Amazon to give a fresh notice in Form II, within 60 days. The CCI further ordered that till the decision of the fresh notice, the approval granted in November 2019 would remain in abeyance. A penalty of INR 202 crores was also imposed on Amazon.

CCI dismisses allegations of abuse of dominance by Intel after investigation

The CCI vide [order dated 03.12.2021](#) dismissed allegations of abuse of dominance against Intel Corporation (**Intel**). The Informant, a manufacturer and designer of server systems, alleged that Intel precluded it from designing/ manufacturing server boards by refusing to provide it (i) complete reference design files; and (ii) simulation files, although they are provided to other Original Equipment Manufacturers such as Dell, HP, Lenovo, etc., despite the Informant's requests for access. This led to their server-boards being incompatible with the micro-processors designed and manufactured by Intel.

The CCI examined the conduct of Intel in the '*market for processors for servers in India*', in which Intel was dominant due to (i) Intel's substantially large resources as compared to its competitors; (ii) entry barriers into the market in terms of research and development cost and technology; and (iii) multiple government tenders mentioning Intel's processors as eligibility conditions. Further, the CCI noted that there has been no change in the market structure since its 2014 order in [ESYS Information Technologies v. Intel](#) wherein it found Intel to be dominant in the market for micro-processors for servers in India.

With respect to the alleged denial of access to reference design files, the CCI observed that Intel had in fact provided access to the existing relevant reference files. The CCI further examined if there had

been denial of access to files capable of performing the desired simulation function. The Informant had alleged that it had not received access to 82 out of 700 such files with the number of such files going down to 48 subsequently.

The CCI noted that Intel had established the number of such files was, in fact, 22 and Intel had offered the Informant to provide technical help in order to remedy issues arising in simulation by reviewing the details of the deviation and help the Informant simulate the deviating aspects of the design. However, the Informant did not provide any design files to Intel and never requested any such support. The Informant also objected to the format in which the files were provided to it by Intel on account of them purportedly not being sufficient. However, the CCI concluded that the files had been provided to the Informant in a sufficient manner. Accordingly, the CCI concluded that the impugned conduct did not amount to denial of market access in violation of Section 4 of the Act.

Further, with respect to the allegation of leveraging pertaining to the use of dominant position in the delineated market to enter into the '*market for servers*', the CCI observed that since Intel did not deny access to any files, a case for leveraging did not exist. The CCI observed that, instead, access to information via Intel's portals had increased thus enabling Intel's competitors in the market for servers. Accordingly, the CCI dismissed all allegations against Intel.

CCI grants interim injunction against table tennis association

A rare order granting interim relief was passed by the CCI [on 21.12.2021](#) to the TT Friendly Super League Association against the Suburban Table Tennis Association. As covered in our [December 2021 newsletter](#), the CCI had ordered an investigation into table tennis associations on account of a *prima facie* case of abuse of dominance.

Adjudicating upon the application for an interim injunction under Section 33 of the Act, the CCI noted that the ingredients for grant of interim injunction were present in the instant case. It was observed that a *prima facie* case of contravention existed, as laid out in the order directing investigation. Further, WhatsApp messages from the General Secretary of the

association which sought to restrict the tournaments players can participate in, were held to be anti-competitive and frustrating the cause of promoting the sports of table tennis. It was also noted that players had also objected to such restrictions.

Thus, the CCI directed that the Suburban Table Tennis Association is restrained from issuing any communication which would restrict or dissuade persons from joining or participating in tournaments which are not 'recognized' by the Association. However, the CCI clarified that this does not amount to a final expression of opinion on the merits of the case and the investigation ought not be swayed by the order of the CCI granting interim injunction.

CCI approves acquisition of shareholding in Clariant's pigments business by Heubach and SK Capital Partners

The CCI *vide* [order dated 04.10.2021](#) approved the acquisition of shareholding in Clariant AG's pigments businesses in various countries including India, by Heubach GmbH and investment vehicles of SK Capital Partners.

The CCI observed that horizontal overlaps in the activities of the parties in the markets for organic pigments and inorganic pigments were not significant and/ or the increment in market share as a result of the combination was low. The CCI noted that only in the market for manufacture/ sale of Benzimidazolone Pigments in India was the combined market share more than 25 percent and the incremental market share between 5-10 percent. However, the market has several other significant players posing competitive constraints on the combined Heubach and Clariant business.

With respect to the market for sale of pigment preparations in India, the CCI took into account SKCP's portfolio companies as well while carrying out its assessment of horizontal overlaps. However, CCI noted that the combined business would continue to operate in a fragmented market where they face competition from a number of established players. Similarly, in the market for sale of dyes in India, the CCI took into account SKCP's portfolio companies as well while carrying out an assessment of horizontal

overlaps and noted that there are other market players who shall continue to pose competitive constraints on the combined Clariant and Heubach business.

The CCI also examined the existing and potential vertical relationships between the parties and held that they are not significant to raise any competition foreclosure concerns in addition to the presence of other players posing competitive constraints. Accordingly, the CCI approved the acquisition of shareholding in Clariant's pigment business by Heubach and SK Capital Partners.

CCI launches probe against Apple for alleged abusive conduct in relation to its App store policies

The CCI continued its crackdown on 'Big Tech' with its first investigation into Apple, to join the pending investigations against Amazon, Facebook, and three against Google. *Vide* [order dated 31.12.2021](#), it ordered a probe against Apple for abusing its dominant position in relation to its App store policies.

As per the informant, Apple abused its dominant position in the markets for distribution of apps and processing of consumers' payments for digital content used within iOS. It was alleged that Apple imposed unlawful restraints on app developers which prevented them from reaching out to users of its mobile devices unless they go through the 'App Store' which is controlled by Apple. This was evidenced by various policies adopted by Apple including mandating the use of its proprietary In-App Purchase (IAP) system, which carried a 30% commission.

In its analysis, while determining the relevant market, the CCI noted that the ecosystem of Apple (based on iOS) and Google (based on Android OS) have emerged as the two major mobile ecosystems. App stores are a crucial component of these ecosystems, as consumer downloads apps on their smart devices from app stores to access content.

Consumers generally do not multi-home between ecosystems and can prefer any of the two ecosystems based on their features. In contrast to consumers, App developers, in order to maximise their reach to maximum set of consumers, multi-home and offer

apps on both the platforms. Accordingly, the relevant market for the examination of app store policies of Apple was determined as ‘market for app stores for iOS in India’.

On Apple’s dominance in the relevant market, the CCI noted that Apple acts as a gateway and the iOS app store is the only means for developers to distribute their apps to consumers using Apple’s smart mobile devices. Accordingly, the CCI formed a prima facie opinion that Apple was in a monopoly position in the relevant market for app stores for iOS in India.

While delineating the relevant market, the CCI also observed that digital ecosystems including app stores operate as a platform connecting two or multiple different sets of market participants. Resultantly, the traditional approach to aftermarkets cannot be simply juxtaposed on the digital markets and the multisided nature of this market must be considered to address the intricacies, complexities and interdependencies of such markets.

On the issue of alleged abuse, the CCI noted that:

- (i) Apple’s policy of mandating the use of its proprietary IAP system and charging up to 30% commission on subscriptions purchased via the use of such IAP was *prima facie* abusive, and restricted the choice available to app developers to select a payment processing system of their choice.
- (ii) The tying of two distinct products (i.e., distribution service and payment processing service for in-app purchases) did not allow app developers to take the advantage of a competitive payment gateways market.

- (iii) In many cases Apple’s proprietary apps were in direct competition with third party apps on the IOS platform. In such cases, the high fees charged by Apple would increase the cost of Apple’s competitors and thus might affect their competitiveness vis-à-vis Apple’s own apps.
- (iv) Apple may have access to data collected from the users of its downstream competitors enabling it to improve its own services. In contrast, competitors may not have access to this data for improvisation/innovation of their own app. Such a condition would give Apple competitive advantage over its competitors, which warranted further investigation.
- (v) The tying of Apple’s IAP processing service with App Store forces app developers to accept conditions which have no connection with the subject of the contract for provision of distribution services and appeared to be case of leveraging by Apple of its dominant position in App Store market to enter/protect its market for IAP payment processing market.
- (vi) As third-party app stores are not allowed to be listed on Apple’s App Store, such restrictions foreclosed the market for app stores for iOS for potential app distributors and resulted in denial of market access.

Accordingly, the CCI found Apple’s conduct to be in *prima facie* abusive and directed the DG to investigate the matter.

This newsletter is only for general informational purposes, and nothing in this newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or competition law in general), please feel free to contact the Competition Law Team at competitionlaw@luthra.com or any of the contacts listed below. © L&L Partners 2021. All rights reserved.

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