



COMPETITION LAW NEWSLETTER

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Inside

CCI orders investigation into Tata Motors for alleged abuse of dominance and anti-competitive conduct

CCI dismisses allegations of abuse of dominance against GNIDA and NOIDA

Tata Power and Adani Ports obtain merger approvals

And more...

It has been a relatively quiet May for the Competition Commission of India (CCI), with only two significant orders passed, but it was followed by a quick-fire first few days of June, with several merger approvals published. We cover all the notable orders in this edition of the L&L Competition Law Newsletter.

CCI orders investigation into Tata Motors for alleged abuse of dominance and anti-competitive conduct

The CCI *vide* [order dated 04.05.2021](#) directed the initiation of an investigation against Tata Motors upon finding the latter's conduct to be *prima facie* abusive of its dominance and anti-competitive conduct, pursuant to complaints made against the terms and conditions in their dealership agreements for commercial vehicles.

Noting that commercial vehicles are separate from other category of vehicles such as passenger or utility vehicles on issues such as speed, mileage, appearance, engine capacity, usage, amongst other things, and an accompanying homogeneity in the market for commercial vehicles across India, the relevant market was delineated as the 'market for manufacture and sale of commercial vehicles in India'. In light of the high market share as compared to the competing manufacturers, the CCI found Tata Motors to be *prima facie* dominant in the delineated market.

Upon examining the allegations, the CCI took note of emails which were cited to *ex facie* suggest that Tata Motors indulged in practice of coercing dealerships to bill vehicles as per its own needs and requirements. The CCI was of the view that such a practice may result in swarming dealers with a stock of slow-moving vehicles and have the effect of impairing the

financial health of dealerships. Accordingly, such conduct was found to be *prima facie* in abusive.

With respect to impugned clauses of the dealership agreement prohibiting dealers from starting or indulging in any new business, even if unrelated to the automobile industry, the CCI was of the view that such an overarching restriction and the implementation thereof was unduly restrictive and expansive in its coverage and interferes with the freedom of trade. Accordingly, the CCI found such restrictions to be in *prima facie* contravention of the prohibition on abuse of dominance.

With respect to restrictions on geographical operations and confining a dealership to an allotted territory, the CCI was of the view that no tangible benefits or improvements in distribution have been shown in the present case. Accordingly, the CCI found such a restriction to be *prima facie* in contravention of Section 3(4)(c) of the Act prohibiting anti-competitive refusal to deal. However, with respect to alleged restrictions placed upon dealerships in respect of sources of financing facilities, the CCI observed that an Informant had availed of such facilities from multiple sources and, accordingly, such alleged restrictions are unfounded in fact.

CCI dismisses allegations of abuse of dominance against GNIDA and NOIDA

The CCI *vide* [common order dated 04.05.2021](#) dismissed allegations of abuse of dominance against the New Okhla Industrial Development Authority (NOIDA) and Greater Noida Industrial Development Authority (GNIDA) made *vide* 3 separate informations filed with the CCI, 2 in respect of GNIDA and another in respect of NOIDA. The Informants had individually alleged that NOIDA and GNIDA (collectively **OPs**) had abused their dominance in the market for allotment of land for development of group

housing projects in the Noida and Greater Noida regions, respectively.

In a highly unusual manner, the CCI did not detail the allegations made against NOIDA or findings in respect thereof. Instead, it simply stated that the “*issues are substantially similar and analogous*” and the analysis carried out in respect of GNIDA would also operate in respect of NOIDA. In respect of GNIDA, the Informants alleged that the conduct of GNIDA had been arbitrary and abusive on account of, *inter alia*, non-disclosure and allotment of encumbered land, charging premium as well as lease rent for such encumbered land, passing on the burden of clearing certain encumbrances on to the developers, imposing penalties and penal interest in spite of not providing peaceful possession of land and non-grant of ‘zero period’.

Further, clauses of the lease deed entered into between GNIDA and the Informants were alleged to be arbitrary and abusive on account of being one sided and, *inter alia*, not imposing any liability on GNIDA to provide clear land to developers even when developers are required to adhere to strict project completion timelines, and not providing a provision to opt for cancellation and refund of deposited monies even in the event of any deviation or breach on the part of GNIDA.

While assessing the dominance of GNIDA in the market for allotment of land for development of group housing projects in Greater Noida, the CCI noted the powers conferred upon GNIDA by way of statute and resultant accompanying constraints placed upon developers to accede to the decisions of GNIDA, in order to find it be a dominant entity in the defined market.

With respect to the transfer of cost of removing encumbrances in the form of additional farmer compensation payable to the farmers who previously owned the allotted land, the CCI stated that the matter had been decided by the Allahabad High Court in litigation under other civil laws,

wherein, it was held that the Authority would determine the manner in which the extra compensation would be paid and the proportion in which it would be paid. Based upon such discretion conferred, a decision was taken to transfer the burden of additional compensation payment to the allottees in a Board Meeting of GNIDA.

The CCI stated that in such light, it is of the opinion that the issue is not a competition law issue and it is not inclined to interfere on this count. However, the CCI failed to assess whether GNIDA had complied with the provisions of the Competition Act, 2002 in its move to transfer the burden of additional farmer compensation and the manner of exercise of discretion conferred upon GNIDA.

The CCI also examined allegations of abuse on account of non-grant of ‘zero period’ *i.e.* waiver of penalty, penal interest and time extension charges on account of delays in completion timeline not attributable to the developer. It held that if, after accounting for unforeseen difficulties faced by the developers or difficulties which are beyond their control, a policy is brought out as a remedial measure, such policy cannot be held against the Authority. However, such Authority cannot deviate from the same or otherwise discriminate or act in an arbitrary manner implementing such policy.

The CCI concluded that, in light of the facts and the communications between GNIDA and the Informants, it is not persuaded to interfere with the administrative decisions flowing out of a policy which is not part of contractual obligations. However, the CCI failed to analyse and demonstrate how the impugned conduct was not a deviation from the zero-period policy or was not discriminatory or arbitrary.

The CCI demonstrated a surprising degree of acceptance of arguments put forth by GNIDA without elaborating upon how such decisions were in conformity with the provisions of the Act. In such a manner, the

CCI dismissed other allegations pertaining to the imposition of penalties and penal interest, and the transfer of encumbered land. Such an approach was also seen in respect of some of the impugned lease deed clauses alleged to be anti-competitive and abusive, while the CCI did not even analyse the other allegations against GNIDA pertaining to the impugned lease clauses, in its order.

The CCI also made some very peculiar observations not within the scope of the Act. It observed that the informations had been filed after significant delay and no justifiable reasons for approaching the CCI at such a belated stage were provided. However, most curiously, in the [Tata Motors order](#) passed on the same date, the CCI rejected the arguments put forth by the Opposite Party therein regarding “delays” in filing of the information. In the said order, the CCI observed that *“It also needs no emphasis that dynamic nature of markets makes application of plea of limitation to anti-trust inquiries as wholly irrelevant and ill-suited.”*

It further went on to cite the decision of the Supreme Court in [Samir Agrawal v. CCI](#) wherein the Supreme Court had emphasized on the need to ensure that access to antitrust enforcement ought to be kept *“wide open”*. The only limitation on the same highlighted in the Tata Motors order were *“if the issues have become stale due to lapse of time or otherwise inconsequential due to change in market dynamics and scenario”*. However, no such limiting factors were highlighted in the instant order in favour of the two government authorities.

Such observations contained in the order against the OPs can be expected to have an adverse impact on enforcement of behavioural matters in the event such observations are sustained and relied upon subsequently in other cases. It is important to ensure that the same does not happen as, in certain markets, governmental bodies such as the OPs enjoy a special position of dominance arising from statute. Imposing

such restrictions upon the filing of information may lead to potential informants aggrieved by the conduct of such dominant governmental bodies to have no recourse to seek antitrust enforcement.

Since November 2018, the CCI’s record against government bodies / companies / departments has been particularly poor –
Number of complaints dismissed: **30**
Number of investigations initiated: **2**
Number of final decisions holding a contravention had occurred: **0**

In contrast, during the period 2014 – 2018, 15 investigations were initiated against government bodies/companies, and 6 final orders issued finding a violation had occurred.

CCI approves Adani Ports’ acquisition of Gangavaram Port

Vide [order dated 12.04.2021](#), the CCI approved Adani Port’s acquisition of 89.6% equity shareholding in Gangavaram Port Limited (**GPL**).

Analysing the operations of the parties, the CCI noted that Adani Ports operated in six maritime States of India and provided the following services through its ports: (i) full marine services including pilotage & towage of vessels, berthing and de-berthing; (ii) cargo handling services including storage, loading, unloading and movement of cargo; and (iii) value added services such as bagging and packaging. Further, via its subsidiary Adani Logistics Limited, Adani Ports also provided end-to-end logistics service across container, bulk, breakbulk, and liquid industries.

GPL operated a green-field, all-weather, deep water, multi-purpose port at Gangavaram, Andhra Pradesh. It provided cargo handling and marine services such as pilotage, berth hire, wharfage, stevedoring,

railway rake loading, transporting by rail and road, storing and other activities within its port premises.

Following the jurisprudence laid down in its recently released order in the case of [In Re: Tamil Nadu Power Producer Association v Chettinad International Coal Terminal & Anr.](#) (covered in our [May 2021 Newsletter](#)), the CCI analysed horizontal overlaps between ports based on contestable hinterland i.e., geographic area of a port where the port faces effective competition from other ports due to similar or comparable transportation cost. The CCI observed that exhaustive determination of contestable hinterland may not be required if it is shown that proposed combination is unlikely to cause appreciable adverse effect on competition in the said areas.

Based on these factors, the CCI noted that there was a distance of over six-hundred kilometres between the ports owned by the parties. Therefore, they did not appear to be close competitors. However, based on road and rail connectivity data, the parties did compete in the contiguous districts/regions of North-Odisha, North-Chhattisgarh and South-Jharkhand. Further, GPL's business in coal and dry bulk overlapped with the business of Adani Ports in certain regions. However, the CCI opined that due to the insignificant volume of cargo handled by the parties, the proposed combination did not cause any competition concern.

On vertical overlaps, the CCI noted that there existed vertical overlaps between the parties in the fields of coal trading activities, logistics and the dredging and reclamation services of Adani Ports and port related activities of GPL. However, the extent of the overlap did not appear to cause any appreciable adverse effect on competition. Moreover, there was sufficient presence of other players in the relevant upstream businesses which had considerable operations. Accordingly, the CCI approved the proposed combination.

CCI approves Tata Power's acquisition of North Eastern Electricity Supply Company of Odisha

The CCI *vide* [order dated 19.03.2021](#), approved Tata Power's acquisition of 51% equity shareholding in North Eastern Electricity Supply Company of Odisha Limited (**NESCO**).

The CCI analyzed both horizontal and vertical overlaps (including potential overlaps) and the transaction received routine approval, along expected lines. In India, electricity is a concurrent subject shared between the Central and State Governments. Currently, the power sector is highly fragmented with presence of multiple players across all verticals. While power generation was deregulated in 2003, power supply to consumers is generally carried out by State Government-owned power distribution companies. Further, in many States multiple power distribution companies operate at the same time.

Despite various attempted reforms, the power sector is plagued by inefficiencies. To increase investment in the sector and promote modernisation, the Indian Government in 2012 allowed 100% Foreign Direct Investment under the automatic route in the power sector (except atomic energy). With various government initiatives to boost accessibility and production, the power sector in India is currently seeing a spurt of activity. This is also reflected in number of notices with the CCI – during FY 2018–19, the CCI received four (4) notices while in FY 2019–20 this figure increased to nine (9), and in FY 2020–21, twelve (12) notices were filed.

This trend has continued in the current financial as well, focusing particularly on the renewable energy sector. Considering the fragmented nature of the sector, growing electricity consumption and increasing focus

on investment, heavy activity in this sector is expected in the coming years.

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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