



# COMPETITION LAW NEWSLETTER

MAY 2021

---

## Inside

---

Delhi High Court dismisses challenge to CCI order directing investigation into WhatsApp's privacy policy change

---

CCI dismisses allegations of abuse of dominance against Chettinad International Coal Terminal

---

Proposed review of confidentiality provisions

---

And more...

As India grapples with the challenges posed by the second wave of the COVID-19 pandemic, the Competition Commission of India (**CCI**) continues to trudge ahead amidst strict restrictions/lockdowns imposed in various parts of the country. In this edition of the L&L Competition Law Newsletter, we cover one judgment of the Delhi High Court, two enforcement orders of the CCI and one merger approval published in the past month, along with a proposed amendment to the extant confidentiality regime.

## Delhi High Court dismisses challenge to CCI order directing investigation into WhatsApp's privacy policy change

The Delhi High Court *vide* [judgment dated 22.04.2021](#) dismissed WhatsApp and Facebook's challenge to the CCI's [order dated 24.03.2021](#), (covered in our [April 2021 newsletter](#)), wherein the CCI took *suo motu* cognizance of a change to WhatsApp's Privacy Policy and Terms of Service and found the same to be *prima facie* in contravention of Section 4 of the Competition Act, 2002 (**Act**), ordering an investigation into the same by the Director General (**DG**).

WhatsApp's primary argument was that the CCI had exceeded its jurisdiction by taking cognizance of a case when the subject matter was already pending adjudication in proceedings before the Delhi High Court and the Supreme Court, and relied heavily on the Supreme Court's 2018 decision in [CCI v. Bharti Airtel](#).

The Delhi High Court observed that though some of the issues may substantively be the same before the two *fora*, there cannot be an inviolable rule that merely because an issue is pending before a superior court, the CCI would get divested of the jurisdiction that it would otherwise possess under the Act. It was observed that findings by the CCI would

always be subject to the findings of the superior court, which would be binding upon the CCI.

The Delhi High Court further noted the submissions of the CCI that the scope of the inquiry before it is not confined to the issues raised before the other courts. An investigation by the DG, and subsequent assessment by the CCI, would relate to the anti-competitive effects, if any, of the impugned conduct.

The Court also summarily dismissed Facebook's contention that it should not be a party to the proceedings, noting that the allegations centred around the sharing of data with Facebook, and its group companies.

## CCI clears CDPQ's acquisition of additional shareholding in API Holdings

The CCI *vide* [order dated 22.02.2021](#) approved an acquisition of additional shareholding of approximately 2% by CDPQ Private Equity Asia Pte. Ltd. (**CDPQ**) in API Holdings Pvt. Ltd. (**API Holdings**), the parent of PharmEasy, an online pharmacy. Although not mentioned in the order, from publicly available information it appears that that post acquisition, CDPQ's shareholding in API would be approximately 6%.

In line with the CCI's efforts to reduce regulatory burdens in respect of combinations which are unlikely to have an appreciable adverse effect on competition, the CCI ought to exempt such acquisitions of small additional shareholding, as was also suggested in our [February 2020](#) and [May 2020](#) newsletters.

Such an exemption for acquisitions which do not breach any shareholding thresholds or alter the nature of control over the target enterprise, would complement the CCI's recent efforts to reduce regulatory burdens

such as introducing a self-assessment based 'Green Channel' for combination notifications and other changes such as removing the non-compete covenant disclosure requirements from combination filings.

## CCI dismisses allegations of abuse of dominance against exclusive licensees for wholesale trade in country liquor

Vide order dated 15.04.2021, the CCI dismissed allegations of abuse of dominance against four exclusive licensees for wholesale trade in country liquor and their common holding company (collectively **OPs**) in the state of Uttar Pradesh.

The informant, a public company engaged in the business of manufacturing and trading liquor, alleged that the OPs followed a non-transparent policy of procurement, as distillers cannot directly sell liquor to retailers/ end-consumers in the state.

The CCI agreed with the DG's delineation of the relevant market that country liquor is different from spirit, beer and wine, due to the ingredients used, alcoholic content, manufacturing process, class of consumers and regulatory requirements. Thus, the relevant market was the '*market for purchase of country liquor from licensed manufacturers within the State of Uttar Pradesh*'.

On dominance, owing to its exclusive monopoly status, the DG and CCI found one of the OPs, Flora and Fauna (**F&F**), to be dominant. However, the CCI disagreed with the conclusions of the DG on the issue of abuse. It observed that various distilleries, including the one owned by the informant, had closed not due to any conduct of F&F, but due to pollution control norms and closure orders issued by the National Green

Tribunal. Moreover, F&F continued to make liquor purchases from all entities in the open market and had procured 81.14% of the entire liquor procured from distilleries other than its own. Thus, the CCI observed that no case of contravention was established.

The CCI also dismissed allegations against the Government of Uttar Pradesh for formulating the liquor procurement policy and observed that policy formulation is in the realm of sovereign activities and cannot be a subject matter of examination under the enforcement mandate of the CCI.

## CCI dismisses allegations of abuse of dominance against Chettinad International Coal Terminal

After a lengthy investigation involving a supplementary report, the CCI dismissed allegations of abuse of dominance against Chettinad International Coal Terminal (**CICT**) and Kamarajar Port vide order dated 09.04.2021.

The informant, an association of power producers, had filed a case against the CICT and Kamarajar Port alleging abuse of dominance. As per the informant, its members commission their power plants near ports in order to minimise land logistics, as transportation of coal by sea is significantly cheaper compared to other modes of transportation. CICT is one of the terminal operators at Kamarajar Port situated on the Coromandel coast and the sole provider of the common user coal facility at that port. It was alleged that CICT obtained a dominant position in the market post a Madras HC order prohibiting import of coal from its competitor port. Thereafter, CICT abused its dominant position by drastically increasing its common user coal terminal charges. It further forced importers to pay a part of the abovementioned charges as charges for '*coordination and liasoning services*' (**C&L charges**) to third party

service providers as a condition precedent for availing coal terminal services.

The DG in its report observed that the scope of geographic market depends on the extent to which a consumer can choose between different ports based on various factors such as geographical location of the port, proximity to the port, transportation cost from plant to the port, etc. The geographic area of a port is limited by its hinterland, determined by the geographical location, road and rail networks in the area, the connection of the port to these networks, the geographic conditions, etc. The entire region where one port has a substantial competitive advantage because of lower transport costs to these regions belong to the 'captive hinterland'. Contestable hinterland is the geographic area of a port where the port faces effective competition from other ports due to similar or comparable transportation cost.

The CCI disagreed with the delineation of relevant geographic market by the DG based on captive hinterland only. The CCI observed that 15 of the 30 respondents to the survey sent by the DG used both the Kamarajar Port and Krishnapatnam Port. The CCI further observed that imports by fixed-plant owners falling within the captive hinterland of CICT constituted less than 50% of the total imports at CICT. No evidence was placed on record to suggest that fixed-plant owners were constrained from importing all their demand from CICT. Moreover, if such users fall in the contestable hinterland where CICT competes with other ports, it was unlikely that CICT will decide its policies and conduct independent of the potential loss of such users to other competitors.

In the said relevant market, the CCI determined that the presence of Krishnapatnam Port poses significant competitive constraints on CICT, so much so that the latter cannot be held as dominant.

Although the CCI could have stopped here, it went further to note that on the issue of C&L charges, CICT acted in a manner so as to force the users of its ports, at least those

of whom it perceived as being captive, to mandatorily use these services, to ensure advantages to third-party service providers, who were indirectly related to it. However, given the scheme of the Act, this conduct could not be considered abusive as CICT was not in a dominant position. Accordingly, the case was dismissed.

## CCI releases discussion paper on blockchain technology and competition

In a proactive move, the CCI recently undertook a study of blockchain technology and released a [discussion paper](#) on its intersection with competition law.

Noting the potential uses of blockchain technology as it undergoes further development and innovation, the discussion paper identified certain key concerns that may arise in the context of regulation of blockchains. Although the issue of participating on the blockchain anonymously thereby leading to difficulties in ascertaining liable entities was highlighted, the discussion paper did not proffer solutions for the same.

However, very importantly, the discussion paper noted that merely because certain participants may be anonymous, blockchain applications would not stand precluded from the regulatory purview of the CCI. It noted the potential ways that blockchain technology may be employed to give effect to anti-competitive ends not only amongst competitors, such as sensitive information exchanges, but also by dominant entities using a position of strength to prejudice others.

In such context, it is important to note that privacy has been recognized as an important non-price factor of competition, as stated in the recent [market study on the telecommunications sector](#) and the [order directing an investigation into WhatsApp's changes to its Privacy Policy](#). It is pertinent

to note that blockchain records are immutable, but the current understanding of privacy standards includes the ‘right to be forgotten’ as contained in the draft Personal Data Protection Bill, 2018, as is the case in foreign jurisdictions as well.

Thus, a nascent technology throwing up various pertinent questions of law, which are also under development, can be seen in the context of blockchain. Accordingly, the CCI stated that blockchain applications should be developed such that they comply with rules of competition, in addition to being sufficiently flexible to incorporate changes that may be required in light of any future findings of the regulator.

## Proposed review of confidentiality provisions

On [13.04.2021](#), the CCI came out with a notice inviting public comments on a draft amendment to Regulation 35 of the Competition Commission of India (General) Regulations, 2009, which govern confidentiality claims made by parties to proceedings before the CCI.

The proposed amendments seek to reduce multiplicity of filings and ease the DG’s burden of determination of each individual claim made by parties by introducing a provision for parties to file confidential and non-confidential versions of submissions along with an undertaking filed by a company secretary, compliance officer or any other senior officer authorised by the concerned party to the effect that the confidentiality claims, if rejected, would result in serious injury, and were being made in accordance with the parameters specified under the

amended Regulation 35. These include details of the extent to which such information is in the public domain, whether known to employees and other stakeholders, measures taken to ensure secrecy of the same and ease with which such information could be acquired or duplicated by others.

Most importantly, the amended Regulation 35 empowers the CCI to set up confidentiality rings comprising of authorised representatives of opposite parties to proceedings, both internal (from commercially non-operational streams) and external, who would be granted access to unredacted case records and other material used in the course of investigation, thereby addressing concerns of parties who expressed inability to prepare a suitable defence with access to only redacted versions of filings made by opposite parties and eliminating the need for additional litigation in this regard. A similar confidentiality ring set up may also be formed at the level of the Office of the DG, if required. Once adopted, it would formalize the practice the CCI had begun to use on a regular basis to avoid arguments over individual claims and the right to a full defence.

Another issue examined is that of confidentiality granted on the identity of the informant, the CCI endeavours to do away with the existing provision for informants to seek confidentiality over their identity through a request made to the CCI in writing, but will however consider such requests in exceptional cases.

Comments may be submitted to the CCI on the proposed amendment at [atdregistry@cci.gov.in](mailto:atdregistry@cci.gov.in) by 12.05.2021.

*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](mailto:competitionlaw@luthra.com) or any of the contacts listed below. © L&L Partners 2021. All rights reserved.*

## Contacts

---



**Gurdev Raj Bhatia**  
Partner - Head Competition  
Law  
[gghatia@luthra.com](mailto:gghatia@luthra.com)  
+91 98181 96048



**Abdullah Hussain**  
Partner  
[ahussain@luthra.com](mailto:ahussain@luthra.com)  
+91 96660 12499



**Kanika Chaudhary Nayar**  
Partner  
[kchaudhary@luthra.com](mailto:kchaudhary@luthra.com)  
+91 98105 18558



**Rudresh Singh**  
Partner  
[rudreshs@luthra.com](mailto:rudreshs@luthra.com)  
+91 85271 87344