



COMPETITION LAW & POLICY NEWSLETTER

Quarter 3 of 2022

SECTORS COVERED IN THIS ISSUE



Lottery



Technology



Broadcasting



Chemicals



Entertainment



F&B



Alco-bev

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- Delhi HC dismisses appeals by WhatsApp and Facebook against the Single Judge's order, refusing to set aside CCI's order
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- Delhi HC reiterates jurisdiction of the CCI in cases relating to the Patents Act
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KEY M&A MATTERS

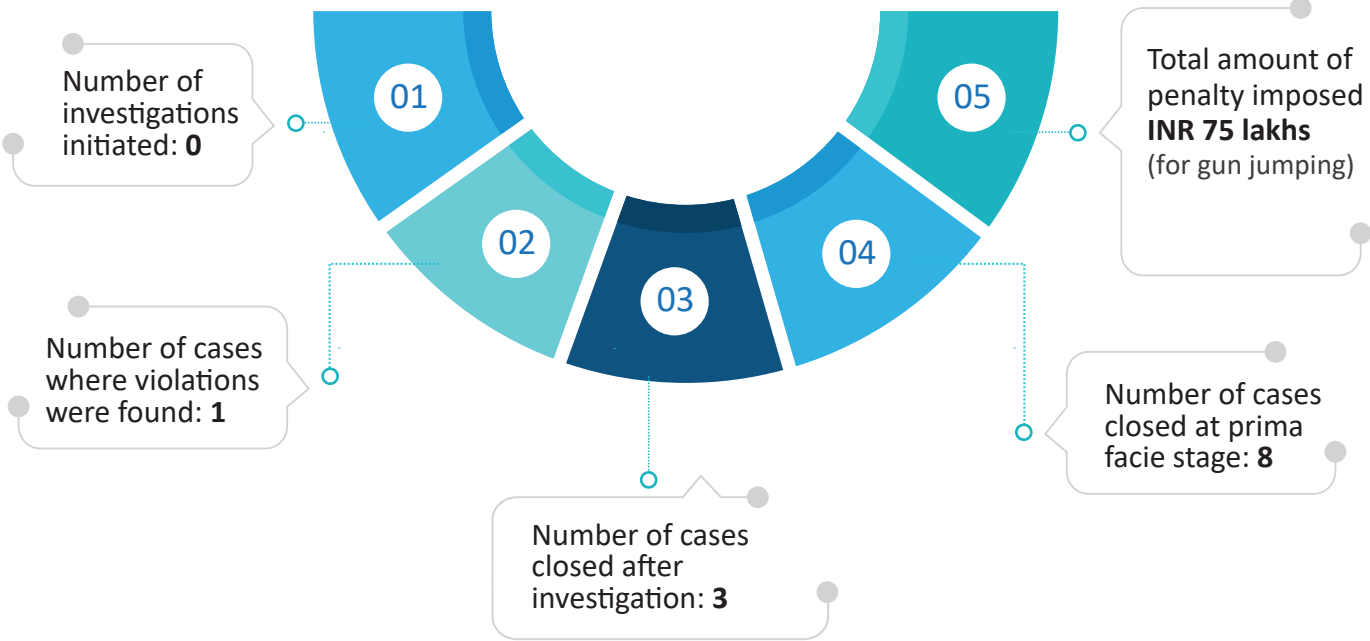
- CCI imposes penalties on SABIC for gun-jumping

OTHER KEY DEVELOPMENTS

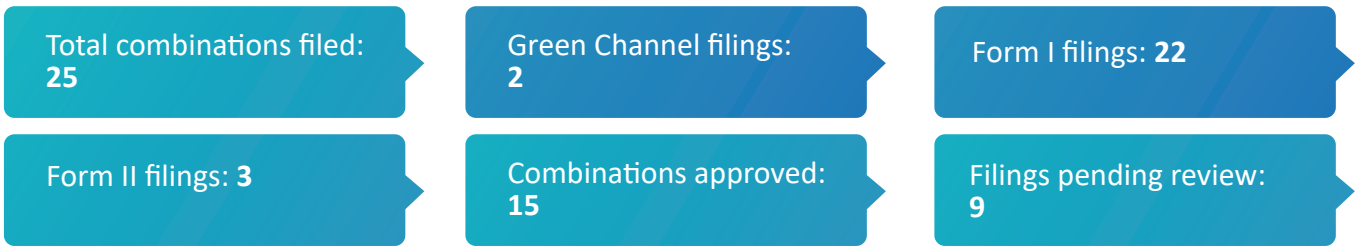
- The Competition (Amendment) Bill, 2022, proposing significant amendments to the Competition Act, 2002, was introduced in the Lok Sabha (Parliament) in August 2022.
- The CCI published a market study on competition and regulatory issues in the taxi and cab aggregator industry with a focus on surge pricing.

A QUICK SNAPSHOT

Enforcement Matters



Mergers & Acquisitions



ENFORCEMENT ACTION

#1 CCI closes case alleging bid-rigging in the appointment of lottery agents by the State of Mizoram



- On September 15, 2022, the Competition Commission of India (**CCI**) closed an investigation into allegations of bid-rigging in the appointment of lottery agents by the Government of Mizoram (**GoM**).
- The information, filed by Tamarai Technologies Private Limited, alleged that the four opposite parties had colluded in responding to an expression of interest issued by the GoM by quoting an identical rate of INR 10,000 per draw. The CCI while directing the DG to investigate did note that the GoM was discharging functions relating to regulation of lotteries and was not an ‘enterprise’ under the Competition Act, 2002 (**Act**).
- The Director General (**DG**) found a contravention of Section 3(3) of the Act, noting that the opposite parties had renegotiated prices of the bids to be submitted and had engaged in prior consultations. At this stage, two of the opposite parties and the GoM filed writ petitions before the Gauhati High Court (**Gauhati HC**) challenging the order directing investigation, the DG report as well as the CCI’s order forwarding the DG report to the parties. The Gauhati HC noted that the lottery business falls under the doctrine of *res extra commercium* and would not be covered under the Act and proceeded to quash the DG report and set aside the CCI orders. On appeal, the Hon’ble Supreme Court (**SC**) noted that anti-competitive aspects, even in the tendering process with respect to State managed lotteries, can be inquired into under the Act and proceeded to set aside the judgment of the Gauhati HC.
- The CCI then considered the DG report along with the arguments of the parties and noted that the prices quoted by the opposite parties were identical since they were in line with the applicable rules. The CCI also did not find any evidence of restriction of competition in the bidding process. In the absence of sufficient evidence, the CCI disagreed with the DG’s findings and closed the case.

The CCI’s order can be accessed [here](#).

#2 Delhi High Court dismisses appeals filed by WhatsApp and Facebook challenging the CCI's order of investigation into WhatsApp's 2021 Policy update

On August 25, 2022, the Delhi High Court (**Delhi HC**) dismissed two appeals filed against an order passed by a Single Judge of the same court, which had refused to set aside CCI's order directing an investigation into WhatsApp's 2021 terms of service and privacy policy update (**2021 Update**). The writs challenging the CCI's order were filed by WhatsApp and Facebook (**Appellants**).

The CCI, in its order directing investigation, had observed that WhatsApp being a dominant player in the relevant market for OTT messaging apps through smartphones in India may have abused its dominant position by formulating overarching terms and conditions in the new policy and only giving a 'take-it-or-leave-it' option to the users.

The Appellants argued that the 2021 Update has already been challenged before the Hon'ble SC and is under adjudication. Therefore, it was argued that the CCI cannot initiate a separate investigation as it may lead to conflicting outcomes from different forums. It was also alleged that the CCI has not recorded sufficient reasons to form a *prima facie* opinion.

The Delhi HC observed that:

The CCI would not be divested of its jurisdiction merely because an issue may be pending before the Hon'ble SC or a different High Court.

The CCI's *prima facie* order is purely administrative in nature and does not entail any consequence on the civil rights of the Appellants.

No other court was analyzing the 2021 Update through the prism of competition law and that also it was common to have parallel inquiries by two different authorities in their respective spheres.

The opinion recorded by CCI in its order contains sufficient reasoning to arrive at the conclusion that a *prima facie* case of violation of Section 4 of the Act was made.

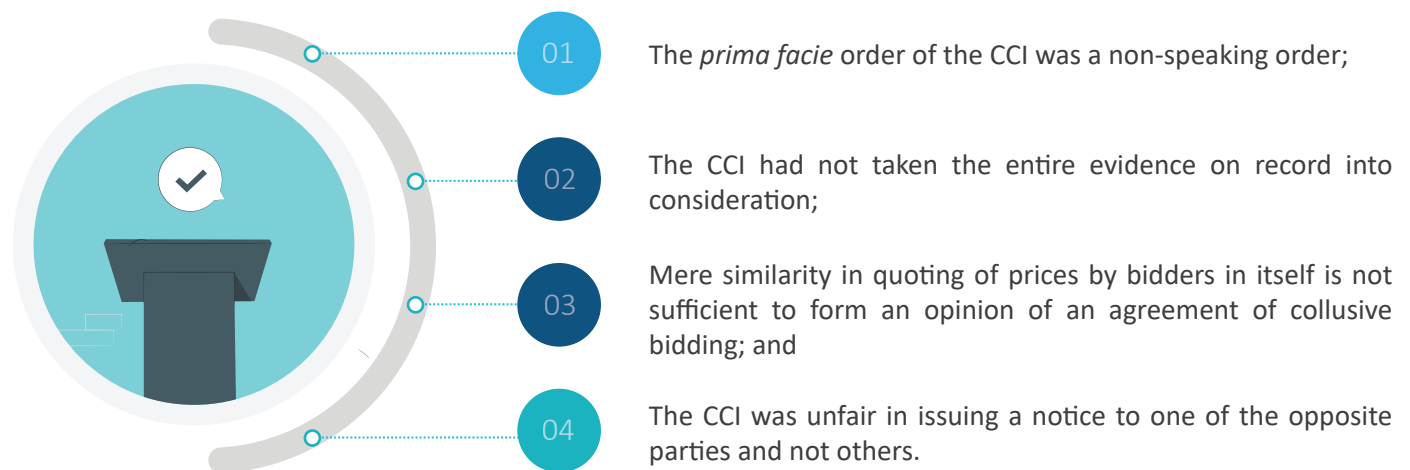
The appeals were accordingly dismissed, and the order passed by the single judge of the Delhi HC were upheld. This implies that the CCI can continue its investigation against WhatsApp.

The decision of the Delhi HC can be accessed [here](#).

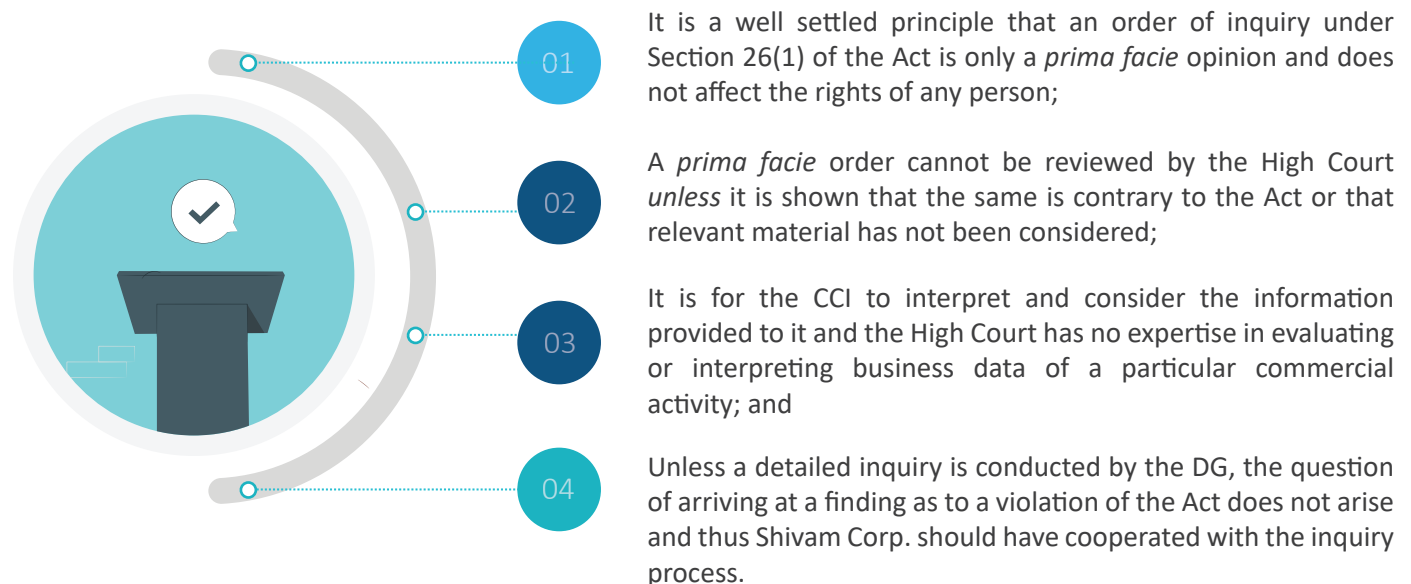
#3 Gujarat High Court dismisses writ filed against CCI's order initiating an investigation; relies on SC's judgement in SAIL

On September 9, 2022, the Gujarat High Court (**Gujarat HC**) dismissed a writ petition filed by Shivam Corporation, a private company (**Shivam Corp.**) primarily involved in the printing and binding of schoolbooks. The writ petition challenged the *prima facie* order of the CCI ordering an investigation into allegations of bid rigging against Shivam Corp. and other bidders with respect to a tender floated by the Gujarat State Board of School Textbooks.

Shivam Corp. argued that:



The Gujarat HC dismissed the writ petition, and observed that:



The Gujarat HC granted Shivam Corp. four weeks to respond to the DG's notices and stayed the penalty proceedings that were initiated against it by the CCI under Section 43 of the Act for not responding to the DG's notices.

The decision of the Gujarat HC can be accessed [here](#) with case details as C/SCA/11152/2020.

#4 Karnataka High Court dismisses writ filed against CCI's order initiating an investigation; reprimands Intel

On August 23, 2022, the Karnataka High Court (**Karnataka HC**) dismissed a writ petition filed by Intel Technology India Pvt. Ltd. (**Intel**) against the *prima facie* order of the CCI directing an investigation into the warranty policy of Intel which allegedly resulted in denial of market access.

Intel submitted that its renewed warranty policy was consistent with the observations of the Delhi HC's judgement in *Kapil Wadhwa v. Samsung Electronics Co. Ltd.* and the CCI's decision in *Ashish Ahuja v. Snapdeal* which dealt with similar issues. Intel argued that modification of policies to make them consistent with observations in similar cases was part of normal business and therefore cannot be termed as anti-competitive.

Relying on the Hon'ble SC's judgement in *CCI v. State of Mizoram*, the Karnataka HC observed that:



The CCI had not issued the order arbitrarily or unreasonably and thus Intel could not invoke the High Court's writ jurisdiction.



Petitions that would warrant the indulgence of the High Court would ordinarily involve *manifest arbitrariness*.

The Karnataka HC reprimanded Intel for "hastily" rushing to Court and noted that besides being premature and devoid of merits, the petition was an **"abortive attempt by the petitioners to scuttle the innocuous statutory proceedings of the Commission"**.

The Karnataka HC dismissed the petition and imposed a cost of INR 10 lakhs on Intel.

The decision of the Karnataka HC can be accessed [here](#) with case details as W.P. No 50727of 2019 (GM-RES)

#5 Bombay High Court dismisses writs filed by Asianet Star, Star India Pvt. Ltd., and Disney Broadcasting (I) Pvt. Ltd., against CCI's order initiating an investigation

On September 16, 2022, the High Court of Bombay (**Bombay HC**) dismissed three separate writ petitions filed by Asianet Star Communications Pvt. Ltd. (**Asianet**), Star India Pvt. Ltd. (**SIPL**), and Disney Broadcasting (I) Pvt. Ltd. (**Disney**) (**Petitioners**), challenging the *prima facie* order passed by CCI dated February 28, 2022. The information filed before the CCI alleged that the Petitioners were abusing their dominant position by engaging in discriminatory practices in the *"relevant market for provision of broadcasting services in the State of Kerala"*.

The Bombay HC while dismissing the writ petitions at the threshold observed that, though the jurisdiction of the CCI spans to the whole of India, the same cannot be a ground for invoking the jurisdiction of any High Court. It further observed that –

The alleged infringement of the provisions of the Act had taken place in the state of Kerala;

The CCI itself is geographically located in Delhi; and

No part of the alleged contravention or the action of the CCI has taken place within the geographical limits of the State of Maharashtra, over which the Bombay HC exercises territorial jurisdiction.

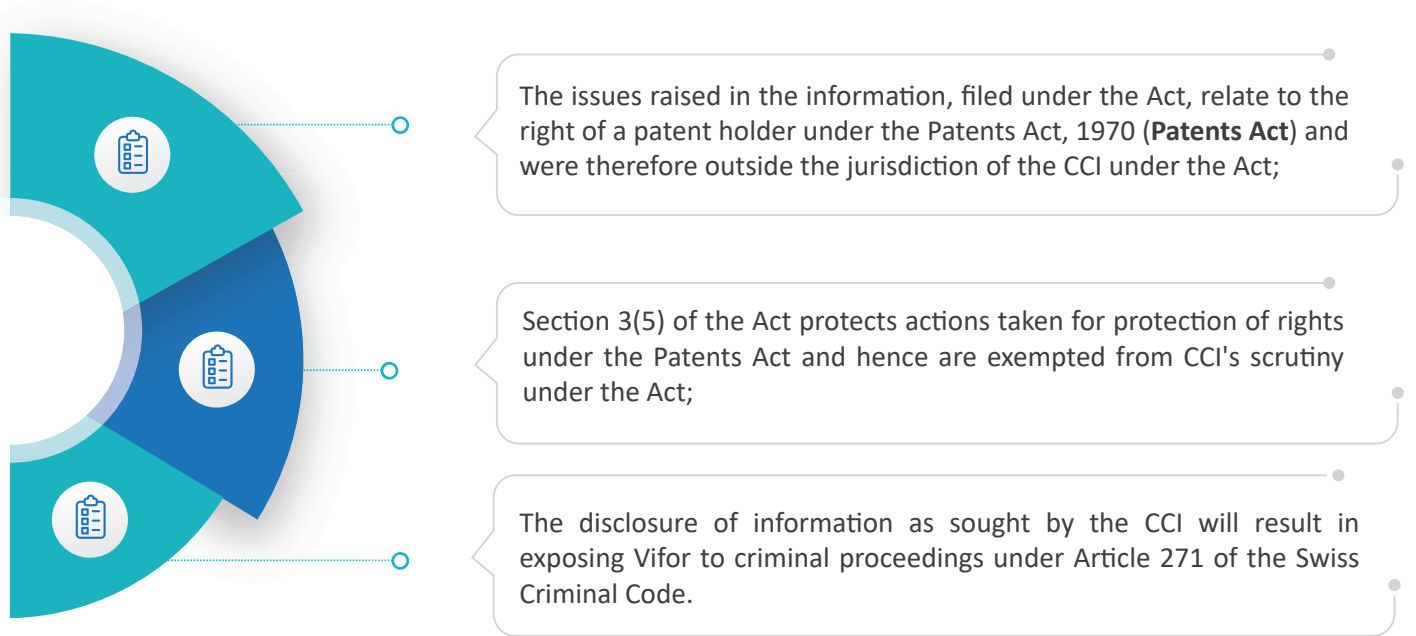
The Bombay HC, in light of the above observations, declined to entertain the writ petitions on the ground of absence of territorial jurisdiction.

The decision of the Bombay HC can be accessed [here](#) with case details as W.P. No. 3755 of 2022.

#6 Delhi High Court reiterates jurisdiction of the CCI even in cases relating to the Patents Act, 1970

On July 28, 2022, the Delhi HC dismissed a writ petition filed by Vifor International Limited (**Vifor**), challenging three orders passed by the CCI directing it to submit certain information in respect of its operations.

In its writ petition, Vifor argued that:



The Delhi HC observed that:

Following the decisions of the Hon'ble SC in *CCI v. Bharti Airtel & Ors.* and the Delhi HC in *Monsanto Holdings Private Ltd. & Ors. v. CCI & Ors.*, it can be inferred that the jurisdiction of the CCI is not ousted merely because a complaint pertains to patents.

On disclosure of information, the relevant regulations under the Act provide for a robust structure and adequate safeguards to maintain confidentiality of the information provided.

An initiation of an inquiry by the CCI on the basis of information received cannot be considered to be a coercive step. Entities having multi-jurisdictional operations can neither assume nor claim immunity or exemption from laws or compliance with statutes unless such laws and compliances fall foul of international or treaty obligations of nations.

The CCI would not have jurisdiction **only** in those cases which relate exclusively to issues of right and liabilities under the Patents Act.



The CCI is legally bound and will consider all objections raised before proceeding further under Section 26 of the Act.

The Delhi HC held the writ petition to be premature and unsubstantiated.

The decision of the Delhi HC can be accessed [here](#).

Quick bites on CCI's Closure Orders under Section 26(2) of the Act

Title	Brief
<p><u>CUTS v. PVR Ltd. and INOX Leisure Ltd.</u></p>	<ul style="list-style-type: none">■ In March 2022, PVR Limited and INOX Leisure Ltd. (INOX) (OPs) announced their merger to create a combined entity called PVR INOX Ltd.■ An information was filed against them alleging that the agreement to merge was likely to cause an appreciable adverse effect on competition (AAEC) in the market for '<i>exhibition of films in multiplex theatres and high-end single screen theatres in different cities in India</i>'.■ Interestingly, the proposed merger fell under the <i>de minimis</i> exemption as INOX reported low turnover in FY 2020-21 due to the pandemic.■ The CCI closed the matter noting that a mere <i>apprehension</i> of likelihood of AAEC by an entity which is yet to take form cannot be a subject matter of investigation.<ul style="list-style-type: none">- The CCI did however clarify that <i>post-facto</i>, if any matter of abusive conduct becomes known, the CCI may examine it at that stage in terms of the provisions of the Act.
<p><u>Hiveloop Technology Pvt. Ltd. v. Parle Products Pvt. Ltd.</u></p>	<ul style="list-style-type: none">■ The informant, a Business-to-Business (B2B) trade platform, filed a complaint against Parle Products Pvt. Ltd. (Parle) for not supplying its products, primarily its glucose (Parle-G) biscuit, to the informant.■ The informant delineated the market as "<i>the market for glucose biscuits in India</i>".■ Relying on its <u>previous order</u>, the CCI noted that a narrow market definition was not warranted when, at the distributors' and retailers' level, all kinds of biscuits are available in a price/ quality continuum. As per the CCI, the market could be stated as the "<i>market for biscuits in India</i>".■ The CCI closed the matter noting that:<ul style="list-style-type: none">- competitive restraints existed due to the presence of other big competitors like Britannia, ITC, Cremica, Patanjali; and- the allegations were based on unsubstantiated apprehensions and Parle was under no obligation to deal with the informant.
<p><u>Pankaj Rai. v. NIIT Ltd</u></p>	<ul style="list-style-type: none">■ The informant, Maj. Pankaj Rai, filed an information against NIIT Ltd. (NIIT), a talent/ skills development corporation, alleging that its right to offer services as a franchise owner had been revoked.■ The CCI, back in 2017, had previously closed a similar matter where it did not find NIIT to be dominant in the '<i>market for the provision of computer education and training services in India</i>' nor found any contravention of the Act.

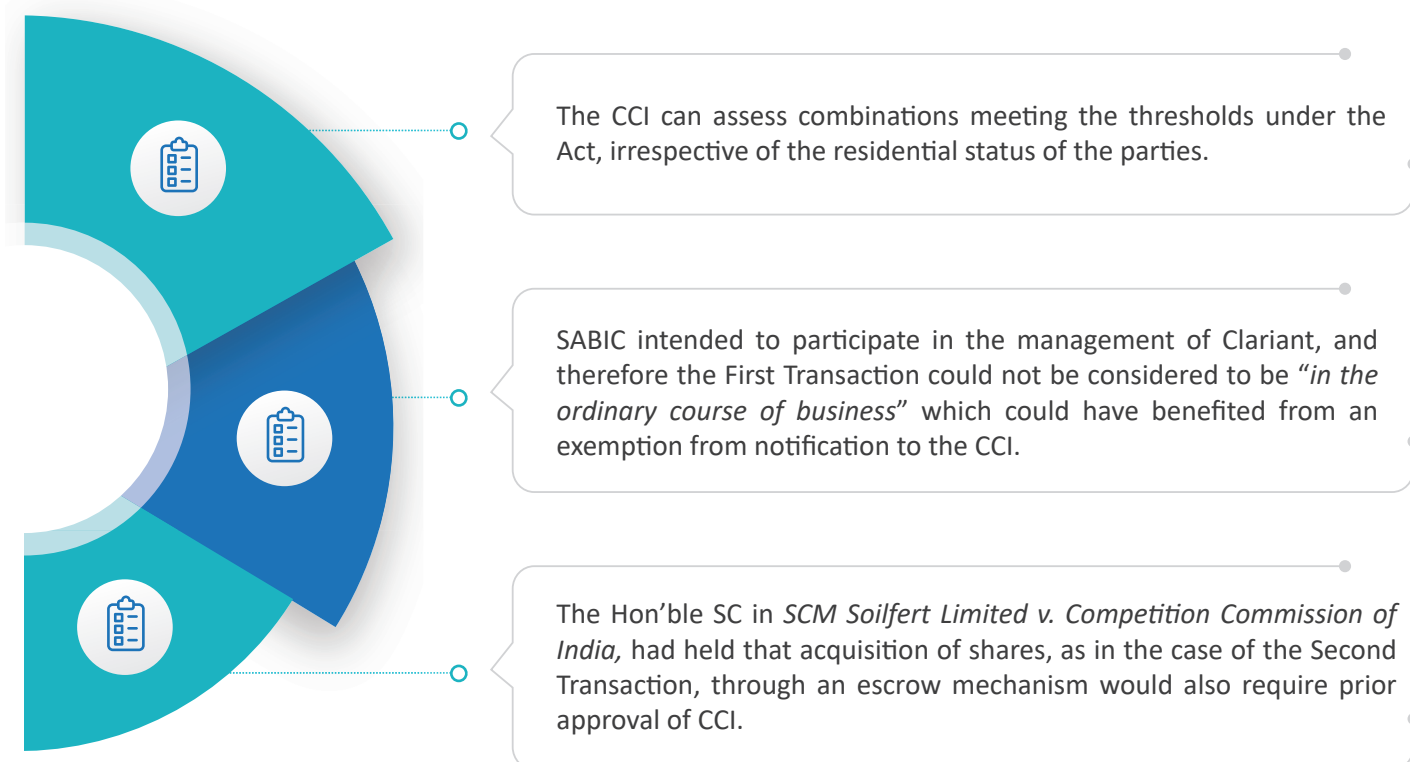
Title	Brief
	<ul style="list-style-type: none"> ■ The informant approached the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh and the Hon'ble SC seeking to reopen issues decided by the CCI in 2017. ■ The CCI noted that the informant was culpably wasting public time and resources. By approaching the CCI again and claiming confidentiality over their identity, the informant had resorted to a <i>gross abuse of the regulatory process</i>.
<p><u>ISWAI Vs. Prohibition & Excise Department, Government of Andhra Pradesh & Anr.</u></p>	<ul style="list-style-type: none"> ■ The informant, an association of the international spirits and wines companies operating in India, approached the CCI alleging the abuse of dominant position by Prohibition and Excise Department, Government of Andhra Pradesh (Excise Department, AP) and Andhra Pradesh State Beverages Corporation Ltd. (APSBCL). ■ The informant was aggrieved by the imposition of unfair commercial terms on manufacturers/suppliers, non-objective manner of procuring branded alcoholic beverages, and discriminatory practices. ■ The CCI observed that APSBCL is a statutory monopsonist in the market based on the State excise policy and both APSBCL and the Excise Department, AP were found to be dominant in the “<i>market for wholesale procurement, distribution and retail sale of branded alcoholic beverages</i>”. ■ While the CCI closed the matter, it noted that it is the responsibility of a dominant procurer to allay concerns of the suppliers surrounding procurement contract clauses. The CCI left it up to the Excise Department, AP and APSBCL to make suitable adjustments in the contracts with suppliers to dispel the notion of these being in the nature of ‘take it or leave it’ contracts.

MERGER CONTROL

CCI imposes penalties on SABIC International Holdings B.V. for gun-jumping

Through two separate orders dated July 15, 2022, and July 19, 2022, the CCI penalized SABIC International Holdings B.V. (**SABIC**) for failing to notify its acquisitions of 24.99% shareholding (**First Transaction**) and 6.51% shareholding (**Second Transaction**), in Clariant AG (**Clariant**).

SABIC had filed a notice dated May 29, 2020, notifying the Second Transaction before the CCI while failing to notify the First Transaction. The CCI approved the Second Transaction by its order dated September 2, 2020. Subsequently, it was brought to the CCI's attention that SABIC had failed to notify the First Transaction. As such, the CCI issued two show cause notices to SABIC and after duly considering the submissions submitted by SABIC, the CCI observed that:



While the CCI found SABIC to have failed to notify the combinations under Section 6(2) of the Act, it took into account certain mitigating factors including: (a) the absence of any *mala fide* intention to evade compliance under the Act; (b) no previous instances of SABIC having been found to be in contravention of the Act; (c) for extending its co-operation with the CCI. Based on these factors, the CCI imposed penalties of INR 40 lakhs and INR 5 lakhs on SABIC.

The orders of the CCI can be accessed [here](#) and [here](#).

OTHER KEY DEVELOPMENTS

Competition (Amendment) Bill, 2022 introduced in the Parliament

The Competition (Amendment) Bill, 2022 (**Bill**) was introduced in the Lok Sabha (**Parliament**) on August 5, 2022. However, the Parliament was adjourned on August 8, 2022, even before the Bill could be considered. While the Parliament will now reconvene in December 2022, in the interim, the Bill has been referred to the Parliamentary Standing Committee on Finance, tasked with examining the Bill and submitting a report within three months.

The Bill proposes to bring about significant amendments to the Act, including introduction of deal value threshold, expedited merger review, flexibility to offer commitments or enter into a settlement with the CCI, and expanding the scope of cartels.

CCI recommends adoption of self-regulatory measures by cab aggregators based on its market study into the sector

On September 9, 2022, the CCI published its market study undertaken in collaboration with Shri Ram College of Commerce (**SRCC**), University of Delhi, on competition and regulatory issues in the taxi and cab aggregator industry with a focus on surge pricing (**Study**).

The Study sought to obtain information on factors affecting pricing and perceptions of stakeholders with respect to pricing structure. The key issues identified in the Study pertained to personalized pricing, surge pricing, and lack of transparency and information asymmetry among stakeholders. The findings of the Study noted a lack of transparency regarding base fare, total fare, and surge pricing, as well as the business practices of the cab aggregators (**CAs**).

The CCI has recommended certain self-regulatory measures to be adopted by the CAs in order to address information asymmetry and transparency concerns. These measures include:

- Setting out the components of the fare;
- Transparent policies for surge pricing, including sharing of additional revenue between drivers and CAs;
- Non-discriminatory ride allocation; and
- Transparency in collection, usage and sharing of information collected on the platform.

A more detailed update published by our team in September 2022, assessing the key findings and issues from the Study, can be accessed [here](#).

Links to Recent Publications by Competition Law Team

- [CCI's market study on Competition and Regulatory issues in the Taxi and Cab Aggregator Industry](#)
- [CCI has ordered a probe into Zomato and Swiggy on a complaint from NRAI](#)
- [CCI updates its Confidentiality Regime](#)
- [Competition Update: CCI amends the Combination Regulations, 2011 to update and replace Form II for a combination filing](#)
- [ELP Quarterly Update - Competition law & policy Q4 of 2021](#)
- [ELP Quarterly Update - Competition law & policy Q3 of 2021](#)
- [CCI's Market Study on the Pharmaceutical Sector](#)
- [How Should the CCI Market Its 'Market Studies'? A Case for Incentivizing Industry Participation'](#)
- [Importance of Disclosures Before the CCI And Key Takeaways](#)
- [ELP Knowledge Series – Part 2 of 2021](#)
- [ELP Quarterly Update - Competition Law & Policy Q2 of 2021](#)

Awards





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