



Competition Law

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The month of March saw a riot of notifications being brought in by the Ministry of Corporate Affairs (MCA) aiming to revamp the pending provisions of the Competition Act, 2002 (Act), and Regulations. We cover such latest upgraded reforms and some of the most relevant combination orders, along with one enforcement order passed by the Competition Commission of India (CCI).

CCI INITIATES YET ANOTHER PROBE INTO GOOGLE BUT REJECTS INTERIM RELIEF

On 15.03.2024, CCI finally released its first *prima facie* order in over two years, and it was directed against antitrust's favourite whipping boy yet again – Google – this time for imposing exorbitant commissions and that too discriminatorily on a select few app developers.

The CCI noted that the percentage of service fee being charged by Google is dependent on whether the user choose Google Payment Billing System (GPBS) or alternative billing system (ABS) under User Choice Billing (UCB) for making payment for in-app purchases. When a user makes a purchase through a developer's ABS under UCB, the service fee for such transactions is either 11% or 26%.

The CCI observed that analysis of exploitative pricing invariably includes computing difference between the cost and the price of the product/service. It found that *the service fee @ 30% under GPBS (or 26% under ABS) being charged by Google substantially exceeds its cost of providing the services and thus, excessive. Based on this 6% break-even revenue share, Google is charging 4 to 5 times of its cost to the app developers which on a prima facie level appears to be disproportionate to the economic value of services being rendered to the app developers and appears to be an abuse of dominant position by Google.*

In the present case, Google appeared to be using its virtual monopoly to reap trading benefits which it would not have reaped if there had been effective competition. Given the complete dependence of app developers on the Google Play Store, the price charged by Google seemed unfair and discriminatory. Furthermore, such imposition of such excessive charges left app developers with relatively fewer resources to enhance their R&D, thereby completely foreclosing the market, and hindering market access.

Almost simultaneously, *vide* order dated 20.03.2024, CCI refused to grant any interim relief to the informants, which had sought to restrain Google from a slew of activities, in relation to which no *prima facie* case for investigation had been ordered.

The Commission was of the view that the informants were unable to qualify three-fold test laid down by the Supreme Court in *CCI vs. SAIL* for granting interim relief. This test requires that (a) the contravention continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint, and (c) it is apparent that the party would suffer irreparable and irretrievable damage, if relief is not granted.

With respect to Google's fee structure, the CCI held that it requires a detailed investigation, and the informants had been unable to demonstrate how the conduct would result in irreparable harm. Consequently, a case which warranted interim relief was not made out and the interim relief application was disposed of.

CCI APPROVES ACQUISITION OF WISTRON MANUFACTURING ELECTRONICS BY TATA INFOCOMM

Vide order dated 23.01.2024, CCI approved acquisition of 100% equity share capital of Wistron Infocomm by Tata Electronics.

The CCI noted that contract manufacturing by third party electronic manufacturing service (EMS) providers seems to be quite constrained as they *“do not have the discretion to decide which component suppliers it will procure required components from, since this decision lies with the smartphone brand for whom the EMS provider manufactures the phones”* and *“the addressable market for EMS providers is limited to the extent the smartphone brands decide to outsource their manufacturing requirement, which also can be multi-sourced through available EMS service providers.”*

The CCI analysed a potential vertical linkage. Tata is present in the upstream market for manufacture and supply of smartphone enclosures in India and Winston is present in the broad downstream market for manufacturing of smartphones and in the narrow downstream market for provision of electronic manufacturing services for smartphones in India.

However, the market shares of the parties (less than 1% for Tata and less than 15% for Winston in their respective markets) would not give them the ability or incentive to foreclose competition in the relevant markets.

CCI APPROVES ACQUISITION OF STAKE IN MG MOTOR INDIA BY JSW VENTURES

Vide order dated [23.01.2024](#), CCI approved acquisition of 38% equity share capital of MG Motor India by JSW Ventures Singapore, while excluding from the scope of the approval the possible subsequent increase to 46%, which was contingent on the 'occurrence of certain futuristic events'.

The CCI analysed potential vertical linkages between the two, through JSW Steel, which is engaged in the manufacture and sale of cold rolled closed annealed steel and surface coated products (upstream markets) and MG Motor, which is engaged in the manufacture and sale of passenger vehicles (downstream market). While the market share of JSW in surface coated products was in the range of 45 – 50%, the market share of MG was less than 5% in the sale passenger vehicles. Thus, it was concluded that there was no ability or incentive to engage in any foreclosure strategies.

CCI APPROVES ACQUISITION OF STAKE IN RELIGARE ENTERPRISES BY THE BURMAN FAMILY

Vide order dated [23.01.2024](#), CCI approved the hostile acquisition of 5.27% of Religare Enterprises from the open market by the Burman Family, triggering an open offer under the provisions of the Takeover Regulations, for the acquisition of an additional 26% of the target.

After requisitioning information from Religare, the CCI noted that certain subsidiaries and portfolio companies of the Burman family exhibited horizontal overlaps with the business of the target in relation to the provision of general insurance products in India, specifically, in the sub-segments of provision of (a) health insurance, (b) personal accident insurance and (c) travel insurance product. Moreover, the CCI also analysed certain vertical and complimentary interferences between the activity of (i) provision of general insurance and life insurance products and (ii) distribution of insurance products.

However, the CCI approved the combination since the overlaps were not likely to cause any appreciable adverse effect on competition because of the presence of other players and relatively low market shares and/or incremental increases in the market shares.

CCI APPROVES INVESTMENTS IN API HOLDINGS BY GOLDMAN SACHS, CDPQ, AND NASPERS

The CCI *vide* three separate orders dated [30.01.2024](#), ([here](#), [here](#) and [here](#)), approved (a) the subscription of convertible preference shares equating to 3.7% by the Goldman Sachs group, (b) acquisition of additional shareholding of 1.5% (i.e. from 3.5% to 5%) by CDPQ, and (c) acquisition of additional shareholding by Naspers.

Across the three transactions, the CCI noted that the parties/portfolio companies exhibited overlaps in the provision of (a) wholesale and retail sale and distribution of medical services, (b) diagnostic services, (c) tele-medical consultations services, and lastly, facilitation of retail sale of pharmaceuticals products and over-the-counter products. However, given the low market share of the parties, CCI unconditionally approved the transactions.

REGULATORY UPDATES

1. DIGITAL COMPETITION LAW

After a long delay, the MCA, on 12.03.2024, released the highly anticipated [Report of the Committee on Digital Competition Law](#) along

with the Draft Competition Law Bill, 2024 (**Draft Bill**) for stakeholder comments.

To keep the digital institutions in check, the need for a more tech savvy law was envisioned. Hence, the Committee constituted on Digital Competition Law (**Committee**) recommended the introduction of *ex-ante* legislation specifically applicable to Systemically Significant Digital Enterprises (**SSDEs**), to supplement the Act.

Draft Digital Competition Bill, 2024

Since a SSDE forms the centre of the Draft Bill, it is crucial to understand how to identify them.

i. Quantitative Thresholds

a. Significant Financial Strength: comprises of either of the following financial thresholds that serve as proxies for economic power, in each of the immediately preceding three financial years:

No.	Parameters of Significant Financial Strength	Recommended Base Value
1.	Entity’s Indian Turnover ¹	INR 4000 crore OR
2.	Global Turnover ²	USD 30 billion OR
3.	Gross Merchandise Value ³	INR 16000 crore (~ USD 1.95 billion) OR
4.	Global Market Capitalisation	USD 75 billion

AND

b. Significant Spread Test: comprises of the widespread number of active end users that an SSDE might be able to engage. The Committee recommended base values of at least one crore end users **OR** at least ten thousand business users in India for the purposes of the significant spread test.

ii. Qualitative Thresholds: Even if an enterprise did not meet the quantitative

thresholds set out above, it has been recommended that a set of qualitative criteria be used for SSDE designation. These encompass metrics such as resources of the enterprise, volumes of commerce, network effects and data driven advantages, the entity’s bargaining position *vis-a-vis* its business users etc. The Committee was of the view that such factors are indicative of the manner and extent of the enterprise’s ability to set the rules of the ecosystem and influence the market.

The Draft Bill places significant obligations on SSDE including –

- i. Self-Reporting Obligation and Designation: SSDE to notify the CCI within 90 days of meeting the thresholds thereby stating that it fulfils the criteria of being an SSDE in respect of one of more of its Core Digital Services⁴.
- ii. Self-Preferencing: SSDE shall not, directly or indirectly, favour its own products, services, or lines of business, or those of – related parties, or third parties with whom SSDEs have arrangements for the manufacture or sale of products or provision of services over those offered by third party business users on the Core Digital Service.
- iii. Data Usage: SSDEs to not directly or indirectly use or rely on non-public data⁵ of business users operating on its Core Digital Service to complete with such business users on the identified Core Digital Service.
- iv. Restricting third-party applications: SSDE shall (a) not restrict or impede the ability of end users and business users to download, install, operate, or use third-party applications or other software on its Core Digital Services; and (b) allow end users and business users to choose, set and change default settings.
- v. Anti-Steering: SSDEs shall not restrict business users from, directly or indirectly, communicating with or promoting offers to their end users, or directing their end users

¹ Includes revenue derived in India from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprises.
² Includes revenue derived from the sale of goods and provision of all services, whether digital or otherwise, by the enterprise.
³ Means total value of goods or services, or both, sold by, or through the intermediation of, the enterprise through all the Core Digital Services it provides.

⁴ Core Digital Service includes online search engines, online social networking services, video-sharing platform services, interpersonal communication services, operating systems, web browsers, cloud services, advertising services and online intermediation services.
⁵ To include any aggregated and non-aggregated data generated by business users that can be collected through the commercial activities of business users or their end users on the identified Core Digital Service of the SSDE.

to their own or third-party services, unless such restrictions are integral to the provision of the Core Digital Service of the SSDEs.

- vi. Tying and Bundling: A SSDE shall not require or incentivise business users or end users of the identified Core Digital Service to use one or more of the SSDE's other products or services, or those of (a) related parties, or (b) third parties with whom the SSDE has arrangements for the manufacture and sale of products or provision of services, alongside the use of the identified Core Digital Service, unless the use of such products or services is integral to the provision of the Core Digital Service.

The enforcement of the rules are proposed to be overseen by the CCI. Expectedly, there have been strong reactions to introducing an *ex-ante* law to govern tech companies, but the writing seems to be on the wall. What remains to be seen is when, and in what form, the final statue will take.

2. RULES RELEASED BY MCA

a. *Draft Competition Commission of India (Exempted Combination) Rules 2024*

The current Schedule I to the CCI's Combination Regulations exempting certain transactions from notification are set to be replaced by MCA Rules to accomplish the same result. Some of the significant exemptions are:

- i. An acquisition of shares or voting rights *solely as an investment* of less than 25% of the voting rights not leading to acquisition of control, and without any right or ability to (a) appoint a representative on the board, or (b) access to commercially sensitive information, and (c) without any horizontal or vertical overlaps. The exemption would still be available if there are complementary overlaps provided the acquisition is less than 10%.
- ii. An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group entities, where the acquirer already less than 25% of the shares or voting rights and does not cross that threshold post-acquisition, except

where the transaction results in acquisition of control of such enterprise by the acquirer or its group, and provided that in case of horizontal or vertical overlaps between acquirer (or its group entities) and the target, the exemption shall not be available if (a) the incremental shareholding exceeds 5%, or (b) where a shareholding prior to such acquisition is less than 10% and the incremental acquisition results in a shareholding of more than 10%.

- iii. An acquisition of additional shares between 25% and 50% of the voting rights, and 50% to 100% except where the transaction results in change in control of such enterprise.
- iv. An acquisition of shares pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to a change in control.
- v. An acquisition of assets by one person or enterprise of another person or enterprise within the same group, or an intra-group merger or amalgamation, except in cases where there is change in control over assets being acquired.
- vi. Demerger of a company and issue of shares by resulting company, in proportion of the shareholding in the demerged company prior to the demerger.

b. *Draft Competition Commission of India (De Minimis) Rules 2024*

The increased target de minimis thresholds set out in the Notification dated [07.03.2024](#) (covered [here](#)) are set to be replaced by these proposed Rules.

c. *Draft Competition Commission of India (Green Channel) Rules 2024*

Similarly, the current green channel notifications process contained in Regulation 5A of the Combination Regulations, 2011, are set to be replaced by the MCA Rules. As before, parties may avail of this route where there are no actual or potential horizontal, vertical, or complimentary overlaps.

Key Contacts



Abdullah Hussain

Partner

abdullah.hussain@dsklegal.com



Kunal Mehra

Partner

kunal.mehra@dsklegal.com



Kanika Chaudhary Nayar

Partner

kanika.nayar@dsklegal.com




Abhishek Singh Baghel

Partner

abhisheksingh.baghel@dsklegal.com

DSK Legal 

True Value, True Values 

DSK Legal Knowledge Center

Contact Details for any queries: knowledge.management@dsklegal.com

Mumbai

1701, One World Centre,
Floor 17, Tower 2B,
841, Senapati Bapat Marg,
Mumbai - 400013.
Tel +91 22 6658 8000

Mumbai

C-16, Dhanraj Mahal,
3rd Floor,
Apollo Bunder, Colaba,
Mumbai - 400001.
Tel +91 22 6152 6000

Bengaluru


201, 2nd floor, Prestige Loka,
7/1 & 7/7, Brunton Road,
Craig Park Layout, Ashok Nagar,
Bengaluru - 560025.
Tel +91 80 6954 8770

New Delhi

Max House, Level 5,
Okhla Industrial Area, Phase 3,
New Delhi - 110020.
Tel +91 11 4661 6666

Pune

Ground Floor, 1 Modibaug,
Ganesh Khind Road, Shivajinagar,
Pune - 411016.
Tel +91 20 6684 7600

 contactus@dsklegal.com

 DSK Legal

 www.dsklegal.com

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