Competition Law

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With the Chairperson assuming office, the Competition Commission of India (**CCI**) resumed its enforcement duties and started disposing of the backlog of matters that had built up over the last six months. The Supreme Court also delivered a significant judgment reinforcing the CCI's jurisdiction when dealing with government owned entities.

In the July edition of the DSK Legal Competition Law Newsletter we cover all this and more.

SUPREME COURT AFFIRMS THE JURISDICTION OF CCI OVER COAL INDIA LIMITED

Expectedly, the Supreme Court, vide judgment dated 15.06.2023, held that the conduct of government owned undertakings would fall within the purview of the Competition Act, 2002 (**Act**) irrespective of whether they were covered by a special enactment.

By way of brief background, the appeal had been filed against the order of the erstwhile Competition Law Appellate Tribunal dated 09.12.2016, which sided with the findings of the CCI dated 09.12.2013 regarding abuse of dominant position by Coal India Ltd. (**Coal India**) for imposing unfair and discriminatory conditions in the supply of the non-coking coal to the thermal power producers.

The primary consideration before the Apex Court was whether the conduct of Coal India, which was formed with the objective to achieve public good as provided for under Article 39(b) of the Constitution of India and achieved a statutory monopoly due to the Coal Mines (Nationalisation) Act in 1973, can be scrutinized under the lens of the Act.

The Apex Court noted that Coal India clearly fell within the meaning of an 'enterprise' as defined in the Act as it was conducting an economic activity relating to the production, and distribution of goods and services.

The Court noted that the Act is a measure which is intended to achieve faster economic growth for the country, and the role which was envisaged for the public sector companies should not permit them to outlive their utility or abuse their unique position. "*The novel idea, which permeates the Act, would stand frustrated, in fact, if State monopolies, Government Companies and Public Sector Units are left free to contravene the Act.*"

The Court also rejected the contention that the Controller of Coal would have the proper jurisdiction to deal with the issue noting "*that by itself, cannot result in denial of access to a party complaining of contravention of a law which is otherwise applicable. It must also be remembered that action can also be taken by the CCI suo motu. Such is the width of the power vouchsafed for the authority under the Act.*"

GAUHATI HIGH COURT GIVES A GREEN FLAG TO THE DG'S INVESTIGATION ON THE ALLEGED COLLUSION IN THE TENDERS AMONGST CEMENT COMPANIES

The Gauhati High Court, vide order dated 28.06.2023, has affirmed the *prima facie* findings of the CCI in relation to a November 2020 order starting an investigation into alleged cartelisation in tenders floated by ONGC in the years

2013, 2015, 2017 & 2018 to fix the prices of Oil Well Cement.

Dalmia Cement sought to challenge the *prima facie* findings of the CCI as well as a notice issued by the DG and prayed for an interim stay on the investigation. Further, it was contended that the two impugned tender processes i.e., 2013 and 2014 are time-barred, as per the latest amendment to Section 19 of the Act and the information has to be filed within 3 years from the cause of action.

The High Court relied on the Steel Authority of India decision of the Supreme Court and observed that the *prima facie* order is only administrative and there was sufficient material based on which it could be passed having looked at the complaint filed by ONGC.

The Court also relied on the Supreme Court decision in Excel Corp Care, and held that the Director General does not have to restrict itself to only the tenders complained of, but may also find other tenders being rigged based on evidence collected during the course of the investigation.

Additionally, the Court negated the reliance placed by Dalmia Cement on the judgment of the Apex court in *Rajasthan Cylinders and Containers Limited vs. Union of India*, and noted that the same related to a final order by the CCI and not a prima facie decision and thus would have no application to this matter.

Finally, the Court after the perusal of the details of the impugned tender processes, affirmed the prima facie findings of the CCI and directed the DG to carry forward with the investigation.

CCI DISMISSES ALLEGATIONS OF ABUSE OF DOMINANCE LEVELLED AGAINST LG

Vide order dated 20.06.2023, the CCI closed enforcement proceedings against LG Electronics, marking the first enforcement ruling published with the new chairperson at the helm.

The information was filed by Perfect Infraengineers Limited which in collaboration with Suntrac, USA introduced Hybrid Thermal Solar Panels, which when used with Air Conditioners resulted in savings of around 30-40% in electricity consumption.

According to the complaint, both, Envirocare Labs Pvt. Ltd. as well as Delhi Metro Rail Corporation wanted to integrate these HTS Panels with LG's AC's but LG refused to do so despite the informant's guarantee to indemnify or repair if any of the parts of the AC's were to deteriorate.

The Commission held that there were several companies engaged in the manufacturing of air conditioners such as the market leader, Daikin, Panasonic, Samsung and thus LG was only one of the companies in the concerned market. Thus, LG was not in a dominant position and the accusations of abuse of dominance under Section 4 could not have been made. Moreover, the allegations of Section 3 were also not established due to the relevant market's construct.

CCI DISMISSES CASE AGAINST SHUBHAM CONSUMER DURABLES PVT LTD.

Vide order dated 27.06.2023, the CCI disposed of an Information filed against Shubham Consumer Durables Pvt. Ltd. for allegedly contravening the provisions of Sections 3 and 4 of the Act rising as a result of cheating, fraud and misrepresentation faced by the Informant.

The matter pertained to a failed business arrangement. Shubham Consumer Durables Pvt. Ltd. was accused of cheating, misappropriation, and fraud by various ways such as changing the amount of refundable security deposit, ignoring the purchase orders of the Informant, not fulfilling the assurances given at the time of execution of the Franchise Agreement and so on.

While disposing of the complaint, the CCI said that since the allegations arose purely from a commercial dispute which raised no competition concerns, the provisions of the Act were not attracted. Moreover, multiple players were present including multinational companies which offered similar services and the accused company did not have sufficient market power to raise any competition concerns.

CCI IMPOSES A GUN JUMPING PENALTY ON BANK OF BARODA

Vide order dated 20.06.2023, the CCI imposed a gun jumping penalty on Bank of Baroda for failing to notify its completed acquisition of 21% shares of India First Life Insurance Company Limited from Union Bank of India.

The Bank had initially filed a notice of the transaction incorrectly in Form III, which related to acquisitions pursuant to loan covenants post the transaction having taken place. When the CCI informed that Form III was not applicable in this case, the Bank filed Form I, which was approved by the CCI on 29.09.2022. But this approval had no effect on any proceeding which would take place against the bank under Section 43A for gun jumping.

Taking into consideration the mistaken belief that the form could be filed subsequently, the CCI imposed a nominal penalty of INR 5,00,000.

CCI APPROVES THE ACQUISITION OF VIACOM18 BY NBC UNIVERSAL

The CCI, vide an order dated 12.04.2023, approved of an acquisition of a significant (indirect) minority stake by NBC Universal in Viacom18 Media Private Limited (**Viacom18**). NBC also intends on partnering with Viacom18 to license its digital content hosted on Peacock OTT to Jio Cinema OTT platform.
Viacom18 is a 51:49 JV between RIL Group and Paramount Global. It is *inter alia*, involved in the broadcasting business, OTT streaming, production and distribution of feature films.

Four horizontal overlaps in India, were identified, namely (a) retail supply of audio visual (**AV**) content through OTT platforms, (b) licensing of AV content, (c) supply of films to third-party distributors and exhibitors for theatrical release, and (d) merchandise licensing.

Vertical overlaps in India were identified for licensing of AV content in the upstream market by Comcast Group (through NBC) and operation and wholesale supply of TV channels, and retail supply of AV content on OTT platforms in the downstream markets by Viacom18.

The CCI observed that the combined market shares of the parties in the four markets were not significant, save in the narrower sub-segment of English films distribution for theatrical release, which was in the range of 25-30 per cent based on the number of films. However, again, the incremental increase was not significant for NBC and it did not enjoy much of a presence in the market for retail supply of AV through OTTs in India.

Regarding vertical overlaps, with Comcast Group in the upstream market of licensing of AV content in India and the market share of Viacom18 in the downstream market for (a) operation and wholesale supply of TV in India is between 10–15% on the basis of Gross Rating Point of Broadcast Audience Research Council, and (b) retail supply of AV content through OTT platform being 0–5% based on revenue, accompanied with several competitors, likelihood of potential adverse effect was unlikely.

CCI APPROVES THE COMBINATION OF DSM, FIRMENICH, AND DANUBE

Vide its order dated 03.04.2023, the CCI approved a merger of Koninklije DMS (**DMS**), Firmenich International (**Firmenich**), and Danube A.G. (**Danube**) after invalidating the first Notice.

Nine relevant markets were identified by the CCI – (a) aroma chemicals, (b) flavours, (c) fragrances (d) savoury ingredients, (e) systems for food applications, (f) vitamins A, B5, and B6, (g) enzymes, (h) cultures, and (i) beta-carotene, with the geographic market being pan-India.

The CCI noted that horizontally the combining parties, in India, overlapped in the (a) broad markets for sale of aroma chemicals, and flavours, and (b) narrow sub-segment of sale of natural, savoury, and dairy flavours.

The estimated combined market share of Parties in (a) aroma chemicals ranged between 15-20% in terms of value and volumes, while in synthetic aroma chemicals it was 20-25% in volume. Despite the combined entity becoming the market leaders, the CCI concluded that the presence of various global and Indian players is likely to exert competitive restraints on the combining entities.

Similarly, estimated combined market shares for the relevant markets of (a) flavours ranged between 5-10% in terms of value, and 10-15% in terms of volume, (b) natural and dairy flavours, it ranged between 0-5% in value and volume, and (c) savoury flavours ranged between 10-15% in value and 15-20% in volume. However, the CCI concluded that since the market is fragmented, no adverse impact is likely. Several vertical overlaps were also identified including a pre-existing vertical overlap between DMS and Firmenich in the upstream market for supply of aroma chemicals by DMS to Firmenich for manufacture/ sale of flavours and fragrance in the downstream market. Additionally, three potential vertical overlaps were also identified. However, the Commission determined that the market shares at their respective levels would not pose any risks of foreclosure.

Finally, one *complementary* overlap was also identified, due to DSM's presence in the markets for sale of enzymes, cultures, beta-carotene, vitamin A, vitamin B5 and vitamin B6 and Firmenich's presence in the flavours market in India. However, given the market position of the parties, and additionally that DSM's largest customers of beta-carotene, vitamins A, B5 and B6 were not competitors of Firmenich and appear to be manufacturers/sellers of fast-moving consumer goods, pharmaceuticals and other industries, the CCI concluded that there was no competition concerns likely to result from the proposed combination and unconditionally approved it.

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

Hyderabad

3rd floor, SAHA complex,
8-2-619/1, Road No.11,
Banjara Hills,
Hyderabad-500034.

contactus@dsklegal.com
DSK Legal
www.dsklegal.com

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