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Competition Law

Newsletter - July 2024

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The current edition of the DSK Legal Competition Law Newsletter covers the most relevant enforcement orders and combinations orders published by the Competition Commission of India (**CCI/Commission**), order of the Madras and Karnataka High Courts, and a couple of Regulatory Updates.

KARNATAKA HIGH COURT HAS DIRECTED CCI TO TAKE A FRESH CALL ON SWIGGY'S OBJECTIONS TO CONFIDENTIAL DATA SHARING

The Karnataka High Court (**KHC**), *vide* order dated 26.06.2024, has asked CCI to expeditiously take a fresh call on Swiggy's objection to the sharing of its confidential data with the Informant, even within the confines of a confidentiality ring.

By way of a brief background, CCI *vide* order dated 04.04.2022 had directed the DG to probe into alleged anti-competitive business practices of Swiggy and Zomato, India's two major food delivery app services, based on the complaint of the National Restaurant Association of India (**NRAI**).

Post the completion of the investigation, the CCI, *vide* order dated 24 April 2024 allowed the creation of a confidentiality ring, and also allowed the NRAI to include its authorised representatives in the ring. Swiggy took exception to this and challenged it before the Karnataka High Court.

Without getting into the merits of the matter, and based on the counsel's own suggestion, the matter was remitted back to the CCI for reconsideration afresh on both Swiggy and NRAI's applications.

MADRAS HIGH COURT ISSUES IMPORTANT RULING ON THE DIFFERENCE BETWEEN OPPOSITE PARTIES AND THIRD PARTIES

Vide judgment dated 30.04.2024, the Madras High Court held that where 'third parties' to a proceeding are to be made opposite parties charged with a contravention of the statute they must first be put on notice and heard prior to such an order being passed.

By way of background, the Commission had passed its prima facie order in the case on 01.11.2019 directing the Director General, CCI (**DG**) to initiate an investigation into the suspected cartelization and bid-rigging by the top tyre manufacturers of State of Haryana tenders. Upon the commencement of the investigation, in April and August 2020, MRF was approached by the DG for certain information, as a "third-party" to the investigation. MRF sought for a copy of the order initiating the investigation but was denied the same on the ground of it being a 'third-party'.

A few months later, on the request of the DG to the CCI, MRF was impleaded as an opposite party to the case presumably since the investigation found evidence of its involvement in the bid-rigging. No hearing preceded this change nor subsequent intimation given to MRF of its changed status. In March 2024, MRF was made aware of the change.

The Madras High Court held that there was a lack of transparency and "*considerable opaqueness in the manner of conduct of the proceedings*" by the CCI, which ought to have solicited the response of the petitioner prior to changing its status.

When confronted with the decision of the Supreme Court in *Excel Crop Care*, and the decisions of the Delhi High Court in *Cadila* and *Grasim*, the Madras High Court distinguished the situations by referring to the 2023 amendments which inserted a specific definition for the word 'party', and the impact of such 'upgradation'. It also pointed to the relevant provisions of the Act to highlight the difference between the rights of a party and a third-party, and consequently allowed the petition. The decision re-opens a procedural aspect, which was considered closed by the landmark decision of the Supreme Court in *Competition Commission of India Vs. Steel Authority of India and Anr*. (***SAIL decision***) While ruling on the requirement to give mandatory notice/hearing to the parties before initiating investigation(s), the Supreme Court held as follows:

"… mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person."

"The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the

Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature."

The High Court's decision opens an interesting discussion as to whether the initiation of an investigation against a third party in an ongoing investigation would also be covered in the above ratio of the *SAIL decision*. The CCI is expected to appeal the High Court's decision.

CCI DISMISSES PLEA AGAINST GOOGLE FOR PREFERENTIAL TREATMENT TO TRUECALLER

Vide order dated 24.06.2024, the CCI dismissed a complaint filed against Google alleging that preferential treatment was being given to Truecaller and not to other similar services.

The informant alleged that Google was giving Truecaller special access to Android users' contact book details and was limiting other caller ID and spam protection applications by exclusively promoting Truecaller which was in violation of Google's own policies.

Called upon by the CCI to provide its comments, Google stated that Android APIs are open-source and available to all app developers. Google also stated that none of the arrangements with Truecaller contained any exclusivity provisions or any contingency clauses pertaining to sharing of non-public contacts and that there were several other caller ID and spam protection applications available on the Play Store indicating that Google did not prohibit other applications from providing the same function and service as Truecaller.

The Commission agreed with Google's arguments and stated that mere commercial relationship between two entities cannot be assumed to be a basis for favourable / preferential treatment. Consequently, the CCI dismissed the informant's allegations since they remained unsubstantiated.

CCI DISMISSES ALLEGATIONS OF 2015 ORDER DEFIANCE

The CCI, *vide* order dated 11.06.2024 dismissed the allegations levied against the Karnataka Television Association and Karnataka Film Producers Association for allegedly acting in violation of the order of the Commission passed under Section 27 in Case No. 58 of 2012 dated 27.07.2015, relating to the boycott and banning the release and broadcast of any content dubbed into the Kannada language. As per the allegations, the associations had yet again started instigating its members to ban the release and broadcast of dubbed content. The CCI sought certain specific information from the informant on the issue but surprisingly the informant chose not to do so. The CCI concluded that the material on record did not substantiate the claims and hence the complaint was dismissed.

CCI APPROVES ACQUISITION OF STAKE IN MG MOTOR BY INDOEDGE

Vide order dated 02.04.2024, the CCI approved the acquisition of 8% of MG Motor India Private Limited (**MG Motor**) by IndoEdge India Fund, along with the right to appoint a director to the board, reserved matter rights and information rights.

This marks the second investment into MG Motor post JSW Ventures Singapore Pte. Limited's acquisition of 38% of the company, which was approved *vide* CCI order dated 23 January 2024 (prior acquisition covered here).

The CCI determined that the Acquirer Group comprised of IndoEdge, Everstone Capital, and shareholders of Everstone – Mr. Dhanpal Jhaveri, Mr. Ashutosh Lavakare, and Axia Enterprises Private Limited.

The Commission noted that the activities of the Acquirer Group and the Target exhibited certain vertical linkages in full fleet leasing and ER&D services as well as a complementary relating to the operating EV charging stations but concluded that they were minimal and not likely to confer any ability/incentive to the parties for potentially engaging in any foreclosure strategies in any of the vertically affected or complementary segments.

CCI APPROVES ACQUISITION OF MINORITY STAKE IN ANNAPURNA FINANCE BY PIRAMAL

Vide order dated 02.04.2024, the CCI approved the acquisition of 10.39% of Annapurna Finance Private Limited by Piramal Alternatives Trust from existing shareholders of Annapurna. It was also envisaged that Piramal Alternatives would subscribe to certain debentures of Annapurna.

Curiously, while stating that the share acquisition and the debenture acquisition were connected in terms of

Regulation 9(4) of the Combination Regulations and the parties had rightly covered both in a single notice, the debentures were not convertible to shares without the 'mutual consent' of Annapurna, and thus did not amount to an acquisition of shares at this stage. The Commission therefore held that acquisition of such shares would be judged as and when they were converted.

On merits, the Commission found no competitive concerns and unconditionally approved the transaction.

INVESTMENT SPREE IN API CONTINUES

Vide order dated 26.03.2024, the CCI approved the subscription of class B compulsorily convertible preference shares in API Holdings (**Target**) by (a) the Dr Ranjan Pai Family Group, and (b) 360 ONE Private Equity Fund.

This marks the seventh investment into API following those approved *vide* six separate orders of the CCI, four of them dated 30.01.2024 (here, here, here, and here) and two dated 22.02.2021 (here) and 30.12.2020 respectively (here).

The CCI found horizontal overlaps in the market for (a) diagnostics – segmented into pathology and radiology, (b) tele-medical consultation, and (c) wholesale distribution of pharmaceutical products, medical devices, and OTC Products in India. However, the combined market shares of the entities were less than 10% with increments of less than 5%,

Certain additional minor vertical overlaps were also identified in the markets for Logistics and Software Services (upstream), and Healthcare Services Market and Diagnostics Market (downstream), but again with market shares of less than 5% in each case.

REGULATORY UPDATE

The CCI, on 06 June 2024, published the proposed amendments to the General Regulations, 2009 (**Amendments**) for stakeholders' comments. The Amendments are mostly procedural stemming from those made in 2023 to the statute and other adopted practices that have now been formalized.

Some of the key proposed changes are highlighted below:

i. **Notice of difference in opinion with the DG**: The amendments propose that where the CCI disagrees with the DG's finding that no contravention has been committed, it must put the parties on notice regarding the same via show cause notice and provide a specific hearing.

ii. **Opportunity for cross-examination:** A salutary introduction is the proposal to ensure that cross-examinations are allowed by the DG in all cases where it relies on any oral evidence given by a party.

iii. **Marginal change in the timelines:** The time period for the Director General to submit its investigation report is proposed to be increased from 60 to 90 days, although this is likely to do little except reduce the number of extensions sought by the DG considering investigations tend to a minimum of one year and in most cases much longer.

iv. **Increase in the filing fees**: The CCI proposed to increase the fees for filing an Information, the second time since it was revised in November 2019.

v. **Filling of Miscellaneous Application**: The Amendment proposed for filing of Miscellaneous Applications, which intends to cover any application, other than an Interlocutory Application. The fees for filing a Miscellaneous Application have been set at a staggering INR 60,000 for companies with a turnover of between 2-50 crores and INR 3,00,000 for companies with a turnover above 50 crores.

vi. **Monitoring Agencies for Settlements and Commitments**: While the provisions concerning Settlement and Commitments have been institutionalised by the CCI, by way of the proposed Amendments, the CCI seeks to appoint monitoring agencies to oversee proper implementation of the same and report back to the CCI on the regular basis.

GST ANTI-PROFITEERING MATTERS TO BE TRANSFERRED TO GST APPELLATE TRIBUNAL

As reported *vide* our Newsletter in December 2022, on 01.12.2022 the mandate of the National Anti-Profiteering Authority (**NAA**) came to an end and its functions were all set to be brought under the umbrella of the CCI. The Ministry of Finance, through its Department of Revenue on 23.11.2022, had released a notification entrusting CCI with the responsibility of examining the effects (if at all) of reduction in tax rate or any input tax credits availed by a registered person, on the price of the goods or services supplied by it.

Reportedly, the CCI has had a tough time dealing with the additional responsibility with several GST matters pending adjudication for over two years. Finally, it appears that Commission expressed its inability to handle such matters, emphasising that it was not their core function. Consequently, the pending matters are now set to be transferred to the GST Appellate Tribunal (GSTAT) for adjudication.

One hopes the Commission will have more time to devote to its core function now, given that since October 2022 it has only issued one public *prima facie* order opening an investigation and one order imposing a penalty. There are several cases filed in 2023 which still await adjudication.

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