



# Competition Law

Newsletter - May 2024

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In the May edition of the DSK Legal Competition Law Newsletter, we bring to our readers orders from across fora, and significant orders of the Competition Commission of India (CCI) and the Delhi High Court.

## **DELHI HIGH COURT CLARIFIES THAT INTEREST ON PENALTY SHALL BE CALCULATED ONLY ON ISSUANCE OF DEMAND NOTICE**

The Delhi High Court *vide* judgment dated [26.04.2024](#) observed that the interest on the penalties imposed by the CCI shall be calculated only after issuance of a demand notice for recovery in terms of the CCI (Manner of recovery of Monetary Penalty) Regulations, 2011 (**Regulations**) and not from the date the final order of the CCI.

The matter arose from a penalty of INR 9,64,06,682/- levied on Geep Industries in [2018](#). On appeal, the NCLAT (in 2023) noted that Geep neither had a significant market share nor could influence the price in the market, reduced the penalty amount.

The primary grievance of Geep arose from the demand notice issued by the CCI after the NCLAT order directing it to pay the penalty amount *along with a simple interest of 1.5% for every month from date of the original 2018 order* – a significant additional amount.

The Delhi High Court on perusal of relevant provisions of the Regulations and judicial precedents clarified that the interest can only be calculated from the date of issuance of the demand notice and not from the order of the CCI under Section 27 of the Act.

## **SUNDARAM BRAKE'S APPEAL DISMISSED**

The NCLAT, *vide* order dated 02.04.2024, dismissed the appeal filed by Sundaram Brakes against the order of the CCI dated [10.07.2020](#), holding it guilty of cartelisation in the Composite Brake Blocks market in India. Although no monetary penalty was levied by the CCI given the economic hardships due to the onset of the

Covid-19 pandemic, the company nevertheless chose to appeal the decision.

What makes the case peculiar is that Sundaram's employees admitted to the collusive conduct, but the company took the plea that the employees were not authorised to speak on behalf of the company. The company also argued that though it had received commercially sensitive emails for over five years it never sent any or acted on in.

The NCLAT summarily dismissed the arguments noting that there was more than sufficient evidence on record pointing to the company's involvement in the cartel even leaving aside the employee's statements. With regard to the e-mails, the NCLAT held that "*in bid rigging cases mere exchange of information is sufficient to attract the provisions of the Act. The Appellant argued it had never sent any such email and only 'received' such emails and mere 'receipt' of the emails does not amount to 'exchange' of emails, is not acceptable. The appellant continuously 'received' emails for over five years without any protest and never requested the cartel to stop sending such emails to it. This itself indicates a meeting of mind.*"

## **CCI APPROVES NIRMA'S ACQUISITION OF GLENMARK LIFE SCIENCES**

*Vide* order dated [19.12.2023](#), CCI approved Nirma Limited's (**Nirma**) acquisition of 92.17% shareholding of Glenmark Life Sciences Limited (**GLS**) through a direct purchase and a follow on open offer.

GLS is engaged in the business of: (a) development, manufacture and sale of Active Pharmaceutical Ingredients (**APIs**) and intermediaries and (b) Contract Development and Manufacture Organisation services for APIs. APIs are the essential chemical

compounds used in the manufacturing of any finished formulation drug product.

The CCI noted that two portfolio companies of Nirma's Promoter Group – Aculife Healthcare and Stericon Pharma, were engaged in the manufacturing of formulations. GLS did not produce any APIs suitable for Stericon's formulations. Out of 16 APIs for pipeline products of Aculife, 9 APIs were not sold by GLS during FY 2022 – 23. For the remaining APIs, the market share of GLS was not significant, and several other competitors / players such as Cipla, Ralington Pharma, and Jigs Chemical were also present in the market. As the combination would not lead to any significant change in the competition dynamics of the concerned markets, the transaction was unconditionally approved.

### **CCI APPROVES TPG-GIC INVESTMENT IN ASIAN INSTITUTE OF NEPHROLOGY AND UROLOGY PRIVATE LIMITED**

The CCI, *vide* Order dated [12.03.2024](#), approved the proposed combination involving acquisition of majority shareholding in Asian Institute of Nephrology and Urology Private Limited (**AINU**) by Asia Healthcare Holdings Pte Ltd, a company jointly controlled by TPG Inc. and GIC Special Investments Private Limited (GIC).

With regard to overlaps, GIC submitted that portfolio companies without a sufficient India nexus based on a turnover threshold, incidental revenues, or debt investments, had not been considered. However, the CCI noted that it had not specified any of the criteria used for identifying overlaps, and *"instead, it has been observed that the presence of overlaps, whether horizontal or vertical or complementarity between the activities of two or more enterprises, is determined by the scope of activities undertaken by these enterprises. This determination is not influenced by categorizing the enterprise into a specific sector or industry, its size, revenue contribution from a particular activity, etc. and while these factors may be relevant for assessing the potential*

*impact of the Proposed Combination on competition, they do not negate the need for identifying overlaps."*

The CCI noted that there were horizontal and vertical overlaps with portfolio entities of TPG but considering that the combined market share of the parties, and the incremental market share on account of the proposed combination, was low, the CCI concluded that the transaction was not likely to cause any competition concerns. The proposed combination was therefore approved.

### **CCI APPROVES MINORITY INVESTMENT IN SHADOWFAX BY TPG**

Serial investor TPG received yet another approval for its acquisition of ~13.24% shareholding in Shadowfax Technologies Private Limited (**SFX**), *vide* order dated [06.02.2024](#).

On a preliminary scrutiny of the initial notice filed, the CCI noted that the combined market share in one of the relevant markets could breach the 15% threshold, and thus directed the parties to refile the notice in Form II.

On refiling, the CCI noted that there were horizontal overlaps in (i) the overall third-party logistics services in India, (ii) third-party logistics services for e-commerce in India, and (iii) third-party logistics services in metros, tier 1, and tier 2 cities.

Although the CCI noted that the combined market shares were in the range of 25-30% for third-party e-commerce logistics in India it was between 30-35% when metros were considered. However, given the presence of other strong service providers and the incremental share being low, the CCI concluded that it was unlikely to affect competition adversely. Moreover, the CCI noted that the providers face significant countervailing buyer power and hence the ability to raise prices was constrained.

Similarly, with respect to vertical overlaps identified, the CCI concluded that the market shares in the upstream and downstream markets would not affect competition, and unconditionally approved the transaction.

### **MINDA – PRICOL SAGA CONTINUES**

*Vide* an order dated [20.02.2024](#), the CCI appeared to put an end to Minda Corporation's (**Minda**) troubles by allowing it to acquire 8.79% equity share capital in Pricol Limited (**Pricol**).

It started in February 2023, when Minda launched what many felt was an attempt at a hostile takeover, by purchasing a 15.70% stake in Pricol from the open market, and subsequently approached CCI for approval for acquiring upto 24%.

Both companies manufacture auto-component parts for major OEMs. As reported in our [June](#) and [August 2023](#) Newsletters, Pricol put up a fight by approaching the Madras High Court and temporarily delayed the approval process.

The CCI directed the parties to file responses to a plethora of queries and finally sent a show cause notice in December 2023 on arriving at the *prima facie* conclusion that the transaction would adversely affect competition in the relevant markets.

Minda relented and sold the entire 15.7% in January 2024. But its heart was still set on Pricol and soon after passed a board resolution to purchase 8.79% in Pricol. This time, it approached the CCI before the purchase.

Without going into any detail, the CCI approved the proposed acquisition, although it had materially altered the initial proposed transaction merely noting that the show cause notice issued earlier had now become infructuous (again without giving any reasons). Even more curiously perhaps, there is no mention of possible 43A proceedings to follow for gun-jumping due to the initial 15.7% acquired without CCI approval.

### **CCI APPROVES THE ACQUISITION OF TIANISH LABS BY MATRIX PHARMA AND KOTAK**

*Vide* an order dated [13.02.2024](#), the CCI approved the 100% acquisition Tianish Laboratories (a subsidiary of Mylan India) by Matrix Pharma, to be funded in part by optionally convertible debentures of the Acquirer acquired by two Kotak investment funds.

The CCI noted that while there were no overlaps between Tanish and Matrix, a portfolio company of another Kotak fund – Biocon – exhibited certain overlaps with business activities of the Target.

Of the 13 overlaps identified in manufacturing APIs in India, the CCI focused on 8 formulations of Biocon (which it manufactures and sells) that use APIs manufactured by the Target. It noted that since the Target's API business is export based, its domestic market share was nil while that of Biocon's was negligible.

Hence the CCI unconditionally approved the transaction.

### **CCI DISMISSES ALLEGATIONS OF ABUSE AGAINST SENIOR CITIZENS' APARTMENT DEVELOPER IN BANGALORE**

*Vide* its order dated [05.04.2024](#), the CCI dismissed allegations of abuse of dominance levelled against the developer of a residential apartment for allegedly forcing the informant (a resident of the apartment developed by the developer) to accept catering and housekeeping services of one Covai Services, unilateral changes in allotment of housekeeping staff and increase in monthly maintenance charges.

The CCI noted that apartments for senior citizens required certain specific features such as grab rails, sensor lights, 24x7 catering and emergency services, etc. and consequently defined the market as '*the market for provision of services for development and sale of apartment to cater to the needs of senior citizens in Bangalore Metropolitan Region.*'

The CCI noted that there appeared to be many players in the relevant market and the opposite party could not operate independently of market forces. Hence, no dominance could be established; and since there was no dominance, the question of abuse would not arise.

The CCI also examined the complaint from a vertical restraint perspective, and noted that since this was an agreement between a service provider and a final consumer it would not fall within the purview of Section 3(4) of the Act.

### **CCI DIMSISSES ALLEGATION OF AN ABUSIVE CONDUCT LEVIED AGAINST WORDPRESS**

CCI, *vide* an order dated [29.04.2024](#) dismissed allegations of abusive conduct despite finding Wordpress.org to be dominant in the relevant market.

According to the CCI, the first relevant product market is the market for the *provision of Content*

*Management Software (CMS) in India*. It found that WordPress had the largest market share with ~ 62.5%.

Every CMS has a plugin directory which limits interchangeability or substitutability with websites built on another CMS platform. Due to this the CCI defined that second relevant market as '*WordPress-Specific Plugin Directories Market in India*', and again found WordPress dominant in this market as well.

The CCI found that all plugin developers are subject to a set of guidelines and a code of conduct to ensure a simple and transparent process. They dictate that any violation of the guidelines may result in all the developers' plugins being removed from the WordPress Plugin Directory and the developer being banned from hosting any plugins on WordPress.org. The CCI found the guidelines to be fair and reasonable. Moreover, the informant appeared to be a repeat offender of the guidelines despite of multiple warnings, hence the delisting seemed appropriate.

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