# Competition Law

*Newsletter - September 2023*

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August saw a flurry of activity with 30 orders being handed down/published by the Competition Commission of India (**CCI / Commission**), and the much-awaited draft regulations on Settlements & Commitments, and Combination being put out for comments, due to the retirement of Mr. Bhagwant Singh Bishnoi as a member on 23rd August.

In the latest edition of the monthly DSK Legal Competition Law Newsletter we cover the implication of this and also the significant orders published.

## CCI INQUORATE ONCE AGAIN

Unfortunately, with Mr. Bishnoi leaving office, it has once again left the CCI inquorate, with only two members currently. The CCI was largely dysfunctional for almost four months between October 2022 to February 2023, when the CCI decided to go ahead with merger approvals. Enforcement only commenced in May with the current chairperson joining the CCI (notwithstanding the highly questionable judgment of the Delhi High Court dated 24.04.2023). One hopes the Central Government will act quickly to appoint at least two members, given the impending retirement of Ms. Sangeeta Verma as well.

## MADRAS HIGH COURT DISMISSED APPEAL AGAINST GOOGLE BY APP DEVELOPERS

The single judge bench of the Madras High Court vide a common order dated 03.08.2023, dismissed the applications filed by 14 App developers against the Alternative Billing System/User Choice Billing introduced by Google.

While dismissing the suit filed by the App developers, court noted that Competition Act, 2002 (**Act**) is a special legislation that deals with the anti-competitive concerns in the market in India. The Court further noted that the Act provides for a specialised adjudicatory mechanism i.e., CCI, and further Section 61 bars the jurisdiction of the civil courts to adjudicate upon the disputes falling under the ambit of the CCI.

## NCLAT DISMISSES APPEAL TO INVESTIGATE PVR-INOX MERGER

Vide its order dated 10.08.2023, the Appellate Tribunal dismissed an appeal filed by Consumer Unity and Trust Society (**CUTS**) challenging the CCI's dismissal of its complaint against the merger of India's two largest multiplex chains – PVR and INOX.

CUTS argued that despite the transactions falling below the prescribed thresholds, the CCI ought to exercise its jurisdiction under Section 4 of the Act relating to abuse of dominance and block the transaction because it would be the largest entity in the Film Exhibition Industry with 1500+screens and this would lead to (i) a reduction in consumer choice, (ii) high bargaining power, (iii) restriction on other cinema theatres to access movies fromdistributors, and (iv) adverse impact on consumers in terms of high prices and deterioration in food and service quality.

The Tribunal dismissed the appeal holding that (i) the merger did not fall within the thresholds, (ii) the combination could not be examined under Section 3 of the Act, which dealt with anti-competitive agreements, as this section deals with an agreement between two entities which retain their separate identities, and (iii) as far as Section 4 of the Act was concerned, the NCLAT reiterated that dominance per se is not anti-competitive and if any abusive conduct of the merged entity comes to the notice of the Commission then it would be examined at that stage.

## CCI DIRECTS THE CHANDIGARH HOUSING BOARD TO DESIST FROM ITS ABUSIVE CONDUCT

After a hiatus of ten months, CCI on 22.08.2023 passed an order under Section 27 of the Act finding the Chandigarh Housing Board (**CHB**) guilty of abusing its dominant position in the market for the provision of services for development and sale of residential flats in the UnionTerritory of Chandigarh.

The CCI concurred with the findings of the Director General, that the CHB had no direct competitors in the relevant market, since there existed no policy / law to permit private builders to develop flats in Chandigarh.

Further, the CCI found that the CHB had abused its dominant position by (a) not disclosing the possession date in the brochure to the homebuyers, (b) the exact method of charging interest fee delays in payments, and (c) levying an unnecessarily high and disproportionate penalty on homebuyer on account of any minor delay in payment.

However, the CCI let the CHB off with a stern warning and refrained from imposing a monetary penalty.

## CCI PASSED CEASE AND DESIST ORDER AGAINST CHEMIST ASSOCIATIONS FOR COLLUSIVE BEHAVIOUR

Vide order dated 23.08.2023, the CCI found that the chemist associations at the district level engaged in collusive behaviour and violated section3 (3) of the Act.

The case was initiated pursuant to the information filed by Solar Life Sciences Medicare Private Limited, which alleged that the chemists associations had indulged in collectively deciding the margins and incentive schemes for the manufacturers/suppliers of pharmaceutical products, and any failure to comply with such directions, would lead to the products of that particular supplier being boycotted.

The existence of public notices, and the depositions of various association presidents, led the CCI to conclude that the relevant associations had engaged in a cartel by issuing diktas of non-cooperation and boycott, on the issue of margins in violation of Section 3(3)(a) and Section 3(3)(b) of the Act. Two presidents were also found liable under Section 48 of the Act.

The Commission, however once again, let off the associations (and their presidents) with a warning and decided not to impose any monetary penalty.

## SIX GUN-JUMPING ORDERS PASSED BY THE CCI

It's raining gun-jumping penalties! The CCI has clearly signalled its intention to come down heavily on gun-jumping, by levying a combined total penalty of INR 25 million.

### 1. Mass Mutual

The CCI, vide order dated 07.08.2023, imposed a penalty of INR 0.5 million on MassMutual for failing to notify the 2019 acquisition of approximately 16% shareholding in Invesco Limited along with the right to nominate a board member.

The CCI clarified that with respect to mutual funds, the assets of the AMC, Trustee, and assets under managementwould all need to be taken into account, while turnover would include revenue of theAMC, Trustee, and the gross value of sale and redemptions of the fund and income such as dividend, interest etc. On the computation of the relevant assets and turnover of the parties, CCI noted that it exceeds the thresholds prescribed and ought to have been notified.

### 2. Cummins Inc.

Vide order dated 11.08.2023, CCI imposed a penalty of INR 1 million on Cummins Inc. for failing to give a notice to the Commission prior to acquiring sole control of Meritor in August 2022.

Cummins did not contest the matter except to state that it was a *bona fide* error that led to the situation and voluntarily approached the Commission once the error had been identified. The Commission, while sympathetic, noted that intention did not play a role in Section 43A violations.

### 3. ADIA & TPG

The CCI vide order dated 18.08.2023, imposed a penalty of INR 5.5 million on Platinum Trust (ADIA) and TPG for violating not only Section 43A but also Section 44 for a false declaration relating to a Green Channel Notification – the first case of its kind.

The proposed combination related to the acquisition of a 5% shareholding of UPL Sustainable Agri Solutions Limited in December 2022, pursuant to the internal reorganisation by the UPL group companies of the crop protection and agri-tech solutions businesses.

While the notification was filed under the Green Channel route, which provides for speedier deemed approval of a transaction, it is accompanied by a declaration thatthere are no actual or potential horizontal, vertical, or complimentary overlaps between the parties. This was duly done. However, the CCI noted that the Upswing Trust (of TPG) holds 22.2% stake in UPL Corporation (UPLC) and a subsidiary of UPLC i.e., Arysta LifeScience India Limited was also engaged in a similar business of manufacturing and distribution, and marketing and sale of formulated crop protection products to third parties in India.

The CCI held that the criteria prescribed for eligibility for the Green Channel factors "*such as the overlapping entities belonging to the same group; the transaction not resulting in change in competition landscape; no likely effect of acombination; perception about overlapping entities/products being considered as the same; and sales to third parties not being significant and declining etc. are inconsequential. These factors may, at most, warrant their consideration in* *detailed assessment of likely effect of a combination on competition based on the facts of the case but not in determination of eligibility for Green Channel approval facility."*

Thus, the CCI concluded that the declaration was false. However, and somewhat curiously, instead of requiring a fresh notification to be filed, assessed the transaction on merits in the same order, and approved it unconditionally under Section 31(1).

**4. National Thermal Power Corporation**

Vide order dated 22.08.2023, CCI imposed a penalty of INR 4 million on the National Thermal Power Corporation (**NTPC**) for its acquisition of additional stake in Ratnagiri Gas and Power Limited (**RGPPL**) in December 2020 without a prior notification.

The Commission took cognizance of the transaction from the public domain and subsequently sent a notice to NTPC. The CCI negated the argument made by NTPC of being eligible for the benefit under Item 1A of Schedule I of Combination Regulation, as its shareholding in RGPPL increased from 25.51 % to 60.98% and imposed a penalty.

**5. Bharti Airtel and Warburg Pincus**

The CCI, vide an order dated 23.08.2023, imposed a penalty of INR 10 million on Bharti Airtel (**Airtel**) in relation to a March 2021 transaction whereby Airtel acquired 20% of and Lion Meadow Investment Limited's (**LMIL**) (a Warburg Pincus affiliate) shareholding in Bharti Telemedia Limited (**BTL**) (Tranche I) becoming its sole shareholder, and LMIL acquired 0.664% shareholding in Airtel (Tranche II).

Airtel attempted to avail of the Item 2 exemption arguing that it already had sole control since it had the right to appoint 5 out of 6 directors; the ability to pass ordinary and special resolutions; enjoyed affirmative voting rights; could pass resolutions relating to day-to-day operations and management of the business of BTL, even without the participation of, and irrespective of any dissent from, the LMIL appointed director. The rights conferred on LMIL, it argued, were mere investor protection rights, and did not confer material influence amounting to control as interpreted by the CCI.

The CCI disagreed. According to the CCI, the right to appoint a non-executive director; access the books and accounts; affirmative veto rights over certain reserved matters such as amendment to the charter documents, amalgamation or merger or demerger or spin-off; change in capital structure; fulfilling quorum requirements; access to management informationreports, quarterly audited financial statements etc. amounted to having the ability to influence the decision-making process. The 'sum total' of the rights, the CCI held "*appear to be related to affairs ormanagement of BTL and hence confer material influence of LMIL over BTL*."

The fact that such rights were available only so long as LMIL held a minimum of 7.5% of the shareholding also weighed with the CCI while negating the contention that these were investor protection rights only.

The CCI considered a prior gun-jumping violation as an aggravating factor while imposing the INR 10 million fine, and in addition the CCI also directed both parties to file a notice for approval of the transaction.

### 6. Axis Bank

Vide its order dated 09.09.2023, the CCI imposed a penalty of INR 4 million on Axis Bank for not notifying its November 2020 acquisition of a 9.91% stake in CSC e-Governance Services India Limited.

Axis Bank is one of the biggest banks in India whereas CSC e-Governance is a special purpose vehicle established to oversee implementation of the Common Service Centres scheme, which provides access points for the delivery of essential public utility services, social welfare schemes, healthcare, agricultural services, education and so on to people in rural and remote areas.

Axis Bank contended that the transaction involved a minority investment of 9.91 % which fell below the 10% threshold specified in Item 1 of the Schedule, and therefore the transaction was exempt from notification.

The CCI held that the Bank was not eligible for the Item 1 exemption since it had right to appoint a director on the board of directors of CSC e-Governance and participate in its management and affairs. The benefit of Item 1 of Schedule I is only applicable when the acquisition is solely an investment or in the ordinary course of business, and "*it is immaterial whether the transaction led to acquisition of control or not*."

## TATA MOTORS CLEARED OF ABUSE ALLEGATIONS

Vide an order dated 23.08.2023, the CCI found that Tata Motors Limited (**TML**) had not contravened provisions of Section 3and 4 of the Act by including restrictive clauses in the dealership agreement.

While the CCI agreed with the DG's conclusions on relevant market and dominance of TML noting that its market share in the manufacture and sale of commercial vehicles ranged between 42-45% over the 5-year period (which was significantly higher than its next closest competitor), it disagreed with the DG when it came to the abusive clauses.

With regard to the allegation that dealers were 'coerced' into placing arbitrary orders for vehicles, the CCI found that the DG had relied on communications with only one dealer in order to reach its conclusion whereas several other dealers had indicated contrary experiences.

With regard to the allegation that a dealer is not permitted to start a new business, even if unrelated to automobiles, the CCI again found that several dealers (including one of the informants) had confirmed having multiple other businesses along with the dealership arrangement with TML.

Finally, with respect to territorial restrictions, the CCI found that the evidence available only pointed to a restriction on *active* sales outside the designated territory and customers were free to contact and purchase vehicles from any dealer in the country.

Consequently, the Commission closed the proceedings.

## CCI APPROVES THE ACQUISITION OF UNICHEM BY IPCA LABS

Vide order dated 26.07.2023, the CCI approved the acquisition of approximately 33.38% stake in Unichem Laboratories Limited (**Unichem**) by Ipca Laboratories Limited (**Ipca**) with a follow on open offer in accordance with SEBI (SAST) Regulations, 2011.

Ipca and Unichem are two publicly listed pharmaceutical companies, involved in the manufacture and sale of APIs in India.

The CCI assessed eight horizontally overlapping API markets, and five upstream markets for manufacture and sale of APIs, and corresponding downstream markets for manufacture and sale of formulations which use such APIs.

The CCI noted that horizontally, except in markets for Hydrochlorothiazide (**HChl**) and Phenylephrine Hydrochloride (**PHyd**), the combined market share of the Parties was in the range of 0-5%, in terms of value and volume, and the combined market share of the parties was in the range of 5-10%and 20-25%, for HChl and PHyd respectively, in terms of value and volume. However, the incremental market shares were less than 5%.

Similarly, in relation to vertical overlaps, the CCI noted that the individual market shares of the Unichem in each of the upstream markets and that of Ipca in the downstream markets was merely in the range of 0-5%, except in the upstream market for Lamotrigine, where share ranged between 5-10%, in terms of value. Further, the upstream and downstream markets had enough competing players.

Additionally, to facilitate a smooth approval, the parties voluntarily submitted an undertaking confirming that Unichem would not re-enter the Indian formulations' market for at least 36 months from the date of closing.

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