

CRITICAL COMPETITION

COMPETITION LAW NEWSLETTER

APRIL, 2022

ENFORCEMENT

I. COMPETITION COMMISSION OF INDIA (CCI) DISMISSED A COMPLAINT AGAINST SEVERAL AUTOMOBILE COMPANIES IN INDIA

The CCI dismissed an information (complaint) filed against several automobile companies in India including Maruti Suzuki, Tata Motors, Hyundai Motors, Hero MotoCorp, Mahindra & Mahindra and Toyota Kirloskar alleging contravention of Section 3 (anti-competitive agreements) and Section 4 (abuse of dominance).

It was alleged by the informant that the aforesaid automobile manufacturers had contravened the competition laws by disallowing/denial of the cashless claim to consumers if the insurance policy had not been obtained through them, their dealers, or their insurance broking companies. The CCI held that no *prima facie* case of contravention was made out by the informant to warrant an investigation as consumers have a choice to purchase their vehicle from various manufacturers and the same also is true in respect of availing insurance facility for vehicles. The CCI also noted that the customer is neither bound to obtain insurance for the vehicle from the manufacturer or its broking arm nor that of any particular insurance company. It was also noted that the informant has made bald allegations without providing any concrete evidence.

II. CCI DISMISSED A COMPLAINT FILED AGAINST AMAZON BY ALL INDIA ONLINE VENDORS ASSOCIATION

The CCI dismissed an information (complaint) filed against Amazon alleging contravention of Section 3(4) of the Competition Act, 2002 (which prohibits vertical ant-competitive agreements) for alleged 'deep discounting' and 'lack of platform neutrality'. It was alleged that during COVID-19, Amazon facilitated the sales of essential commodities sold by its own sellers rather than accommodating more sales to independent sellers. Further, massive discounts were offered on various product categories such as groceries, snacks, beverages, household supplies, personal care, beauty products and baby products.

It was also alleged that Amazon uses the data of successful manufacturers/sellers on

its marketplace to float private labels and sells them at massive discounts to underpin competition. The informant contended that Amazon through its related companies exploits 'competitors' data to build its products, without having to invest the time and resources in testing the products, unlike their 'competitors', and these products get a better placement on the marketplace of Amazon, which is a paid service for the 'competitors'. Further, Amazon allegedly charges higher platform fees from independent sellers as compared to the fees charged to Amazon's related vendors.

The CCI dismissed the information noting that the information contains allegations that are devoid of admissible/requisite evidence and lacks actionable material for further examination.

III. CCI DISMISSED A COMPLAINT AGAINST SAMSUNG, LG ELECTRONICS AND SEVERAL PARTICIPANTS IN TENDERS FLOATED BY CERTAIN GOVERNMENT DEPARTMENTS FOR PROCUREMENT OF SMARTPHONES/TABLETS

The CCI dismissed an information (complaint) of bid rigging and abuse of dominance against Samsung, LG Electronics and several entities which participated in tenders floated by various Government Departments for the procurement of smartphones/tablets. It was alleged that all the opposite parties acted in concert and indulged in bid rigging and that Samsung abused its dominant position by participating in tenders through its numerous representative bidders and thereby, allegedly denied access to other players in the market.

The CCI observed that the crux of the allegations in the instant matter was that all the opposite parties indulged in cover bidding with a view to ensure that one party emerged successful in tenders invited by various State/ Central Government Departments particularly, Women and Child Department (State Nutrition Mission), Government of Uttar Pradesh; Medical Health and Family Welfare Department (National Health Mission), Government of Uttar Pradesh and, Department of Post, Government of India for procurement of smartphones and tablets.



The CCI dismissed the information on the ground that the prices quoted by the bidders did not indicate any price parallelism or prices being placed in any close or narrow ranges.

IV. CCI DISMISSED TWO COMPLAINTS FILED AGAINST SHOPEE

The CCI dismissed two complaints filed against Sppin India Pvt. Ltd. which operates the marketplace 'Shopee', alleging contravention of Section 3 and 4 of the Competition Act, 2002. It was alleged that Shopee had abused its dominant position by offering 'deep discounts' on its e-commerce platform on various products by selling them at extremely low prices, thus, hampering competitors in the Indian market. According to the Informant, this was allegedly being done with a view to kill traditional and small-scale businesses in the country which amounted to an abuse of dominant position which had an adverse effect on competition.

In the other complaint, it was alleged that Shopee was abusing its dominant position by indulging in predatory pricing. It was contended that Shopee poses a threat by the methods adopted by it in the Indian marketplace since small competitors and traditional brick and mortar sellers have significant fixed costs, lack the ability to burn cash, and are devoid of pan-India reach which such online marketplaces provide.

The CCI dismissed both the complaints noting that Shopee has had a very recent launch in the market of online platforms in India, which already has the presence of several e-commerce companies like Amazon, Flipkart, Myntra, Nykaa etc. Further, the CCI observed that it does not appear that Shopee possesses significant market power, much less dominance, at this stage because of the fact that it is a new entrant in a market with established players.

V. CCI DISMISSED A COMPLAINT OF ANTI-COMPETITIVE CONDUCT AGAINST DAIRY SUPPLIERS IN KERALA

The CCI dismissed an information (complaint) alleging anti-competitive conduct by dairy suppliers in Kerala, i.e., Kerala Co-operative Milk Marketing Federation Ltd (KCMF) and Thiruvananthapuram Regional Co-operative

Milk Producers Union Ltd (TRCMPU). It was alleged that KCMF and TRCMPU created entry barriers through agreements with various distributors / retailers / agents expressly preventing them from dealing with products supplied by the competitors of KCMF and TRCMPU, including the informant. Further, it has been alleged that in the event such distributors/retailers/agents, were found to be dealing in goods other than those of KCMF and TRCMPU, the agreement was liable to be terminated, and such entities would be liable for punitive action, including penalty.

The CCI noted the restrictions were placed only upon the retailers/ dealers etc. who took the agency of opposite parties and only such retailers/dealers were restricted from dealing with any other brands of milk and milk products. The CCI dismissed the complaint on observing that except for a limited number of exclusive agents, the parties did not have such agreements with other distributors. The CCI also noted that an exclusive arrangement in a vertical chain is not an anathema under competition law, when supported by circumstances warranting such exclusivity when looked at objectively.

VI. CCI DISMISSED A COMPLAINT AGAINST INOX FOR ABUSING ITS DOMINANCE BY INSTITUTING FRIVOLOUS LITIGATIONS

The CCI dismissed a complaint filed against Inox India Pvt Ltd (Inox) for alleged abuse of dominance by instituting frivolous litigations filed by Cryogas Equipment Private Limited (CEPL). Both Inox and CEPL are engaged in the business of LNG semi-trailers.

CEPL alleged that Inox abused its dominant position and maliciously instituted a suit of copyright infringement of Inox's engineering drawings against CEPL to exclude them from the market.

The CCI noted that to determine whether a litigation or legal recourse is an abusive strategy of a dominant player, firstly, it needs to establish that a case filed against an enterprise on an objective view is baseless and appears to be an instrument to harass the enterprise. Secondly, what needs to be examined is whether the legal action appears to be conceived with an anti-competitive intent/plan to eliminate/thwart competition in the market. The lawsuit must



be objectively baseless that no reasonable litigant could realistically expect success on the merits and be filed and prosecuted, not with a view to protect a legitimate right but to prevent a competitor from effectively competing or thwarting a potential entrant into the market.

The CCI dismissed the complaint and noted the suit filed by Inox against CEPL cannot be, at this stage, said to be fraught with any lack of bona fide.

GUN-JUMPING

I. CCI LEVIED PENALTY ON TATA POWER FOR GUN-JUMPING

The CCI imposed a penalty on Tata Power Company Limited (Tata Power) for gun-jumping in relation to its acquisitions of 51% of equity share capital of Western Electricity Supply Company of Orissa Limited (WESCO), Southern Electricity Supply Utility of Odisha Limited (SOUTHCO) and Central Electricity Supply Utility of Orissa Limited (CESU), from Grid Corporation of Odisha Limited (GRIDCO).

In FY 2020-21, Odisha Electricity Regulatory Commission (OERC) initiated a process of sale of 51% equity of share capital of WESCO, SOUTHCO and CESU through a bidding process. Tata Power submitted the bid and was selected as a successful bidder by OREC. Subsequently, a Letter of Intent (LOI) was issued to Tata Power, and the combination was consummated subsequently.

The CCI noted that Tata Power ought to have notified this acquisition to the CCI before consummation of the transaction. It was contended by Tata Power that this combination is different from a typical commercial transaction as it is end-to-end regulated by OERC. It was submitted that the entire process of sale was regulated and governed by the provisions of Section 20 of the Electricity Act 2003, which empowered the Appropriate Electricity Regulatory Commission (in this case, OERC) to select the bidder and vest the entities in terms of Section 21 of the Electricity Act, 2003. Tata Power further contended that it believed that OERC had the exclusive jurisdiction to regulate 'combinations' in the electricity sector. In this regard, Tata Power referred to Section 60 of Electricity Act, 2003, which

empowers OERC to issue appropriate directions if in its opinion such acquisition / combination will cause an adverse effect on competition in the electricity market in India.

The CCI, based on several precedents, held that OERC cannot be said to have exclusive jurisdiction in relation to the aforesaid combinations, and that it was incumbent upon Tata Power to notify the transactions to the CCI. The CCI imposed a nominal penalty of INR 5,00,000/- each for the three acquisitions not notified to the CCI.

II. CCI LEVIED PENALTY ON ADANI GREEN ENERGY LIMITED FOR GUN-JUMPING

The CCI levied a penalty of INR 5,00,000 on Adani Green Energy Limited (Adani) in relation to its acquisition of the entire shareholding of S.B. Energy Holding Limited (SB Energy). During the review of the combination, the CCI noted a Clause in the Share Purchase Agreement which, (i) allowed the parties to discuss the ongoing business and operations of SB Energy and its subsidiaries; (ii) allowed Adani to provide inputs on the business of SB Energy; and (iii) provided for SB Energy to take such inputs into account in the best interests of SB Energy and its subsidiaries. The CCI *prima facie* found the scope of the Clause to be broader than what had been stated by Adani, as it envisaged discussions on the "ongoing business and operations of the target".

The CCI was of the view that such discussions and consequent inputs which may be provided by Adani may result in the parties ceasing to act independently or ceasing to compete as the parties were competing before the combination resulting in coordinated outcomes before the expiry of timelines contained in Section 6(2A) of the Competition Act, 2002. The CCI was of the view that the safeguards contained in the Share Purchase Agreement in the form of clean team protocols and the inputs being non-binding did not appear to be commensurate with the scope and likely effect of the Clause considering that exchange of information and provision of inputs is per se sufficient to lead to a situation similar to tacit collusion, even if the inputs were non-binding or clean team protocols were followed. The CCI noted that the issue of concern in such cases is access to information and the decisions being



based on a wider pool of information, including the inputs of a competitor who is in the process of acquiring the business.

The CCI noted that while on one hand the agreement states that the information will be disclosed only to duly constituted clean teams which will be ring fenced from the management, on the other hand, as per the Clause, the inputs are to be taken into account in the best interests of SB Energy.

The CCI observed that the aspect of "taking into account" necessarily implies that information is shared with the management, as in the absence of such a construct, the clean teams by themselves cannot act on the inputs on their own.

The CCI imposed a nominal penalty of INR 5,00,000 on Adani for the gun jumping arrangement.

MERGER CONTROL

I. CCI APPROVED ACQUISITION OF SHAREHOLDING AND COLLECTIVE EXERCISE OF JOINT CONTROL OVER EVEREADY INDUSTRIES INDIA LIMITED UNDER THE GREEN CHANNEL ROUTE

The CCI approved the acquisition by Puran Associates Private Limited, VIC Enterprises Private Limited, MB Finmart Private Limited, Chowdry Associates and Gyan Enterprises Private Limited to increase their collective shareholding in Eveready Industries India Limited to 51.11% of the total share capital (assuming full acceptance in the open offer process by the public shareholders) and collective exercise joint control over Eveready.

II. CCI APPROVED ACQUISITION OF 100% SHARE CAPITAL OF L&T INVESTMENT MANAGEMENT LIMITED BY HSBC ASSET MANAGEMENT INDIA PVT. LTD.

The CCI approved acquisition by HSBC Asset Management India Pvt. Ltd. (HSBC) and its nominees of 100% share capital of L&T Investment Management Limited (L&T), from L&T Finance Holdings Limited and its nominees. HSBC is an asset management entity which operates the day-to-day functioning of HSBC Mutual Fund Schemes. L&T is the asset management entity which operates the day-to-day functioning of L&T Mutual Fund Schemes.

III. CCI APPROVED ACQUISITION OF CERTAIN EQUITY STAKE IN FUTURE GENERALI INDIA INSURANCE COMPANY LIMITED BY GENERALI PARTICIPATIONS NETHERLANDS N.V.

The CCI approved the acquisition of 25% of equity share capital of Future Generali India Insurance Company Limited (FGIIC) (held by Future Enterprises Limited) by Generali Participations Netherlands N.V. (GPN). Pursuant to this, GPN's aggregate shareholding in FGIIC will increase from 49% to 74%. GPN is a wholly owned subsidiary of Assicurazioni Generali S.p.A which is a global insurance provider and is present in the general insurance industry in India through FGIIC.

IV. CCI APPROVED ACQUISITION OF MICRO LIFE SCIENCES BY SOUTH ELM INVESTMENTS B.V.

The CCI approved the acquisition of minority stake representing 11.64% or 13.09% (depending on conversion of compulsory convertible preference shares) of the equity share capital of Micro Life Sciences by South Elm Investments B.V. (South Elm). Additionally, South Elm will have the right to nominate a director on the board of Micro Life Sciences, representation in shareholding meetings and certain veto rights. South Elm is a Dutch investment holding company, while Micro Life Sciences is an Indian company engaged in the manufacturing and sale of medical devices and other over the counter medical kits.

V. CCI APPROVED ACQUISITION OF SHAREHOLDING IN BUSYBEES LOGISTICS BY BXG XENON HOLDCO LTD.

The CCI approved the acquisition of shareholding by BXG Xenon Holdco Ltd., in BusyBees Logistics Solutions Private Limited. BXG Xenon Holdco is newly incorporated entity controlled and managed by affiliates of Blackstone Inc. BusyBees Logistics provides logistics and delivery solution services in India.

VI. CCI APPROVED ACQUISITION OF STAKE IN BUSYBEES LOGISTICS BY TPG GROWTH V SF MARKETS PTE. LTD.

The CCI approved the acquisition of 7% of total shareholding (on a fully diluted basis) of BusyBees Logistics by TPG Growth V SF Markets Pte. Ltd (TPG). TPG is majority owned and controlled by TPG group, a global



investment firm. BusyBees Logistics provides logistics and delivery solution services in India.

VII. CCI APPROVED THE ACQUISITION OF SHARES OF PRIONE BUSINESS SERVICES PRIVATE LIMITED BY AMAZON ASIA-PACIFIC RESOURCES PRIVATE LIMITED

The CCI approved the acquisition of 76% equity shares of Prione Business Services Private Limited (Prione) by Amazon Asia-Pacific Resources Private Limited (Amazon). Post this acquisition, Amazon's shareholding in Prione will increase from 23% to 99%. Prione (a wholly owned subsidiary of Cloudtail India Private Limited) provides services to small and medium online businesses. Amazon is a foreign subsidiary of Amazon.com (which has indirect subsidiaries registered in India or having business operations in India).

DAWN RAIDS

As per media reports, on 30th March 2022, the office of the Director General (the investigative arm of the CCI), raided the offices of tyre companies including Continental AG, Apollo Tyres and CEAT for suspected competition law violations. The raid is reportedly in relation to the anti-trust investigation into the use of unfair trade practices and big rigging in supply of tyres for public transport vehicles in the state of Haryana.

OTHER MAJOR DEVELOPMENTS

I. CCI INTRODUCES CHANGES TO THE FORM II MERGER NOTIFICATION FORM

In a much-awaited development, the CCI has revised the long form (Form-II) merger notification form. The requirement to comply with the revamped form will come into effect from 1 May 2022. A long form notification, i.e., Form II is typically required to be filed with the CCI where parties to a notifiable transaction have a combined market share of over 15% (in case of horizontal overlaps) or over 25% (in case of vertical overlaps).

This is a welcome move by the CCI to revamp and standardize the long form which removes repetitive queries including information not required for an assessment of whether an acquisition or merger causes or may cause an appreciable adverse effect

on competition in India. This is an addition to a series of business-friendly initiatives taken by the CCI to simplify the merger notification process from an 'ease of doing business' perspective.

II. EXTENSION OF DE-MINIMIS TARGET EXEMPTION AND NOTIFICATION TIMELINES OF TRANSACTIONS BEFORE THE CCI

In a welcome move, the Government of India issued a notification dated March 16, 2022, which has extended the applicability of the de-minimis target exemption by five years, i.e., till March 29, 2027. Under the de-minimis target exemption, acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets not more than Rs. 350 Cores in India or turnover of not more than Rs 1000 crores in India are exempt from notifying the transactions to the CCI.

The Government has also extended the time period for the exemption from mandatorily notifying transactions before the CCI, within a period of 30 days of a 'trigger' event, within the meaning of Section 6(2) of the Competition Act, 2002. Any acquisitions, mergers and amalgamations that meet the prescribed thresholds of assets or turnover under the Competition Act, 2002 had to be mandatorily notified to the CCI within a period of 30 days of the 'trigger' event. The suspension of this requirement has been extended for a period of five years, i.e., till 28 June 2027.



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