



# CRITICAL COMPETITION

## COMPETITION LAW NEWSLETTER

JULY, 2023

## ENFORCEMENT ORDER

### A. THE SUPREME COURT OF INDIA HELD THAT THE COMPETITION ACT, 2002 APPLIES TO PUBLIC SECTOR UNDERTAKINGS (PSUs) SUCH AS COAL INDIA LTD. (CIL)

The Supreme Court of India by way of its order dated 15.06.2023 held that the Competition Act, 2002 (**Competition Act**) is applicable to CIL and that PSUs are not exempted from the provisions of the Competition Act. The appeal in the instant matter before the Supreme Court arose out of the order of the erstwhile Competition Appellate Tribunal (**COMPAT**) which affirmed the conclusions and findings of the Competition Commission of India (**CCI**) on various facets of abuse of dominant position against CIL in contravention of Section 4 of the Competition Act. The CCI in its order dated 23.04.2017 held that CIL had abused its dominant position by imposing unfair/discriminatory conditions in Fuel Supply Agreements (FSAs) with the power producers for supply of non-coking coal and had imposed a penalty of INR 591.01 Crores on CIL.

In the appeal before the Supreme Court, it was contended by CIL that it was a monopoly created by a statute and its subsidiary, Western Coalfields Limited, ought to be exempted from the purview of the Competition Act since they are governed by the Coal Mines (Nationalisation) Act, 1973.

The Supreme Court held that CIL is an 'enterprise' under Section 2(h) of the Competition Act as the term 'enterprise' has been defined to expressly include within its ambit a 'person' or a 'Department of the Government' and only excludes from the definition of the expression

'enterprise' a government department carrying on sovereign functions of the Government. The Court held that carrying on a business of mining cannot be a 'sovereign function' which would not exempt a 'state monopoly' like CIL from being governed by the provisions of the Competition Act. It also held that existence of other Forums such as the Controller of Coal whereunder redressal may be sought against the actions of CIL, cannot result in denial of access to a party complaining of contravention of the provisions of Competition Law. The order was passed on the application filed by CIL challenging the applicability of Competition Act on CIL and its subsidiary Western Coalfields Limited for the reason that they are governed by the Nationalisation Act and that the Nationalisation Act cannot be reconciled with the Competition Act. Accordingly, the matter is yet to be decided on merits by the Supreme Court.

### B. DELHI HIGH COURT SETS ASIDE CCI'S ORDER OF INVESTIGATION INTO THE ALLEGED ABUSE OF DOMINANCE BY INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

The Delhi High Court in its order dated 02.06.2023 has set aside the order of the CCI directing the Director General (**DG**) to investigate into the alleged abuse of dominance by ICAI under Section 4 of the Competition Act. The CCI in its order dated 28.02.2014 had *prima facie* found ICAI to have abused its dominant position in the relevant market of 'the market for organizing recognized CPE seminars/workshops/conferences' in contravention of Section 4 of the Competition Act.

The present dispute concerns the fact that only ICAI, and its organs are



conducting the structured learning activities and ICAI has not affiliated or recognized any other body to conduct such learning activities. By way of the present writ petition, ICAI contended that it is a non-profit organization and therefore, the CCI does not have any jurisdiction over its activities. ICAI also claimed that its CPE program had been structured in exercise of its powers granted to it under the Chartered Accountants Act, 1949 (**CA Act**) and therefore, the CCI would have no jurisdiction to review its decisions, policies or the manner in which it discharges its functions.

The first question that arose for consideration before the Court was whether ICAI would be covered under the definition of an 'enterprise'. The Court held that the functions performed by ICAI cannot be termed as sovereign in nature. It held that even if ICAI carries on regulatory functions, it is not excluded from the wide definition of the term 'enterprise' as defined under Clause (h) of Section 2 of the Competition Act.

The second question that arose for the consideration of the Court was whether ICAI was *prima facie* abusing its dominant position. Disagreeing with the CCI's findings, the Delhi High Court held there is no other body or institution, which is engaged in the activity of providing professional training to acquire the classification of a chartered accountant or for the continuing education program and therefore, allowed the writ petition setting aside the order of the CCI.

### C. CCI DISMISSED ALLEGATIONS PERTAINING TO ABUSE OF DOMINANCE AGAINST LG ELECTRONICS

The CCI by way of its order dated 26.06.2023 passed under Section 26(2)

of the Competition Act dismissed an information filed by Perfect Infraengineers Limited (**PIL / Informant**) against LG Electronics Limited (**LG**). PIL had approached the CCI alleging abuse of dominance by LG in the market for manufacture and sale of Variable Refrigerant Flow (VRF) Heating, Ventilation, and Air Conditioning (HVAC) air conditioners in India, in contravention of Sections 3 and 4 of the Competition Act.

PIL had made a proposal to the Delhi Metro Rail Corporation (**DMRC**) to supply its Hybrid Thermal Solar (**HTS**) for integration with LG's VRF ACs installed at the DMRC premises. It was alleged that LG's refusal to install PIL's HTS panels on its ACs was in contravention of Section 4 of the Competition Act (abuse of dominance). While assessing LG's dominance in the relevant market, the CCI held the presence of a large number of players in the market for manufacture and sale of VRF HVAC ACs, makes the market contestable and provides several options for the consumers and acts as a competitive constraint on LG. The CCI also noted that the market leader in the relevant market has been Daikin for the last three years. Accordingly, in the absence of establishing dominance of LG, the CCI dismissed the allegations of any abuse of dominance.

Further, the CCI noted that even though the Informant has alleged a contravention of Section 3 of the Competition Act, it had failed to provide any information as to how the said conduct of LG falls under the purview of Section 3 of the Competition Act and accordingly dismissed the case.



#### D. THE CCI DISMISSED AN INFORMATION FILED AGAINST SHUBHAM CONSUMER DURABLES RAISING ALLEGATIONS OF CHEATING, DEFRAUDING AND MISREPRESENTATION

An information was filed by Mr. N. Rajesh Kumar (**Informant**) against Shubham Consumer Durables (**OP**), a consumer durables company, for the alleged contravention of the provisions of Section 3 and Section 4 of the Competition Act. The parties had entered into a franchise agreement, after which the Informant became aggrieved by the OP's conduct which included *inter alia* withholding profit from the Informant, unilaterally deciding the location of the premises, and unilaterally changing the amount of refundable security deposit.

Upon a perusal of the contentions raised by the Informant, the CCI by way of its order dated 27.06.2023 passed under Section 26(2) of the Competition Act dismissed the information filed on the ground that the allegations did not raise any competition concerns and were purely in the realm of a commercial dispute.

### GUN JUMPING

#### A. CCI LEVIED PENALTY ON BANK OF BARODA FOR GUN JUMPING

The CCI by way of its order dated 20.06.2023 levied a penalty on Bank of Baroda (**BOB**) under Section 43A of the Competition Act for its acquisition of 21% shareholding in IndiaFirst Life Insurance Company (**IFLIC**) from Union Bank of India (**UBI**) prior to seeking the approval of the CCI. BOB had notified the transaction to the CCI in Form III, after consummation of the transaction, under Section 6(5) of the

Competition Act (which exempts certain enterprises from prior notification to CCI regarding '*acquisitions undertaken by a bank pursuant to any covenant of an investment agreement*'). However, on being informed by the CCI that such exemption would not be applicable to BOB's transaction, notice under Form III was withdrawn and a fresh notice under Form I was duly filed with the CCI under Section 6(2) of the Competition Act. For the purpose of levying penalty for gun jumping, the CCI took into consideration various mitigating factors and levied a nominal penalty of INR 5,00,000 on BOB for jumping the gun.

### COMBINATION ORDERS

#### A. CCI APPROVED THE PROPOSED ACQUISITION OF 4.04% SHAREHOLDING IN ACKO TECHNOLOGY & SERVICES PVT LTD. BY GENERAL ATLANTIC SINGAPORE ACK PTE. LTD.

The CCI approved the proposed acquisition of 4.04% shareholding of Acko Technology & Services Pvt. Ltd. (**Acko Tech**) through subscription of additional compulsorily convertible preference shares by General Atlantic Singapore ACK Pte. Ltd (**General Atlantic**), which already held 15.54% equity in Acko Tech along with some voting rights, information rights and representation on the board of Acko Tech. General Atlantic is an investment holding company incorporated in Singapore. Acko Tech is an insurance-tech company engaged in general and life insurance business in India.



**B. CCI APPROVED THE ACQUISITION OF SHAREHOLDING OF AMBIT PRIVATE LIMITED BY DAIWA INTERNATIONAL HOLDING INC.**

The CCI approved the proposed acquisition of around 16% of equity shares in Ambit Private Limited (APL) by Daiwa International Holdings Inc. (DAIWA) through a combination of primary subscription of shares and secondary share purchases from existing shareholders. Subsequent to the same, APL will also acquire 100% of the shareholding of Daiwa Capital Market from Daiwa. Daiwa is an intermediary management holding company, incorporated in Japan, engaged in investment/financial business. Daiwa Group is present in India through its subsidiaries engaged in institutional equities services, which comprises of stock broking along with value added services like corporate access and preparing research reports in India as well as investment banking services in the form of M&A advisory services. APL is registered with SEBI as a merchant banker and provides a range of financial services in India.

**C. CCI APPROVED THE ACQUISITION OF TCNS CLOTHING COMPANY LTD (TCNS) BY ADITYA BIRLA FASHION AND RETAIL LIMITED (ADITYA BIRLA FASHION)**

The CCI approved the proposed acquisition of 51% of the expanded share Capital of TCNS by Aditya Birla Fashion. Subsequent to the same, TCNS and Aditya Birla Fashion would merge with Aditya Birla as the surviving entity. Aditya Birla Fashion is a listed company and is part of the Aditya Birla conglomerate engaged in retailing of branded products in the apparel, footwear and accessories segment. TCNS is engaged in the business of manufacture, distribution and sale of women's apparel, jewellery,

footwear and beauty products of several brands. It is also engaged in the business of wholesale cash and carry trading (including sale through franchisee outlets) of products in the above-mentioned categories.

**D. CCI APPROVED HDFC LIMITED'S ACQUISITION OF SHAREHOLDING OF HDFC LIFE INSURANCE AND HDFC ERGO GENERAL INSURANCE**

The CCI approved the proposed combination involving Housing Development Finance Corporation Limited (HDFC Limited) acquiring additional shares of HDFC Life Insurance Company Limited (HDFC Life) and HDFC ERGO General Insurance Company Limited (HDFC ERGO). By the virtue of the proposed combination, HDFC Limited will acquire additional shares of HDFC Life and HDFC ERGO and the surviving entity, i.e., HDFC Bank Limited will hold over 50% of shareholding in HDFC ERGO and in HDFC Life.

**E. THE CCI APPROVED THE PROPOSED ACQUISITION OF MANIPAL HOSPITALS AND OPTIONALLY CONVERTIBLE DEBENTURES OF MEMG INDIA**

The proposed acquisition of equity share capital of Manipal Health Enterprises Private Limited (Target) by Kangto Investments Pte. Ltd. – Kangto (Kangto), Kabru Investments Pte. Ltd. – Kabru (Kabru), Manipal Global Health Services – MGHS (MGHS), TPG SG Magazine Pte. Ltd. - TPG SG (TPG SG), and Manipal Research & Management Services International – MRMS (MRMSI); and acquisition of optionally convertible debentures of Manipal Education and Medical Group India Private Limited - MEMG India (MEMG) by MEMG International India Private Limited – MEMGIPL (MEMGIPL) from National Investment and



Infrastructure Fund – II (collectively, referred to as 'Acquirers').

Kangto, Kabru and MGHS and are investment holding companies incorporated in Singapore and are engaged in making investments across several industries such as real estate, healthcare etc. MRMSI is incorporated in Mauritius and its principal activity is to hold investments in companies engaged in property acquisition, development of tech park business etc. MEMGIPL is incorporated in India and is engaged in providing services in healthcare, education and research sectors. TPG SG belongs to the TPG Group which operates in India through its various investments with a primary focus on sectors such as technology, healthcare, consumer, and financial services. The Target Group is engaged in the business of providing services relating to healthcare / diagnostic services and sale of medical devices.

#### F. THE CCI APPROVED THE INTERNATIONAL FINANCE CORPORATION'S ACQUISITION OF SHARES OF A WHOLLY OWNED SUBSIDIARY OF MAHINDRA & MAHINDRA LIMITED UNDER THE GREEN CHANNEL ROUTE

The proposed transaction involves subscription of certain compulsorily convertible preference shares (CCPS) of a wholly owned subsidiary (Target) of Mahindra & Mahindra Limited (M&M) by International Finance Corporation (IFC), such that IFC will hold 9.97% to 13.64% shareholding in the Target (on a fully diluted basis). IFC is a multilateral financial institution, which provides financial assistance and makes investments in private enterprises. The Target is incorporated as a subsidiary of M&M to undertake commercial operations pertaining to three-wheelers and small commercial

vehicles and is the flagship company of the Mahindra group.

#### G. THE CCI APPROVED DOVE, DEFATI AND INFINITY'S MINORITY ACQUISITION OF EQUITY SHAREHOLDING OF LENSKART UNDER THE GREEN CHANNEL ROUTE

The proposed transaction involves the acquisition of certain equity shareholding in Lenskart Solutions Private Limited (Lenskart) by Dove Investments Limited (Dove), Defati Investments Holding B.V. (Defati) and Infinity Partners (Infinity) (together, the Acquirers). The Acquirers are private equity investors. Lenskart is engaged primarily in the business of manufacture and sale of eyewear products, including eyeglasses, sunglasses and eyewear accessories as well as wholesale trading of eyewear products.

#### H. THE CCI APPROVED CARRIER GLOBAL CORPORATION'S ACQUISITION OF 100% SHARE CAPITAL OF VIESSMAN CLIMATE SOLUTIONS UNDER THE GREEN CHANNEL ROUTE

The proposed transaction involves acquisition of 100% shareholding of Viessmann Climate Solutions SE (Target) from Viessmann Group GmbH & Co. KG (Viessmann HoldCo / Seller) by Carrier Global Corporation (Carrier / Acquirer). The transaction also involves the Seller acquiring a minority shareholding in Carrier along with certain special rights, including the right to appoint a director on the board of Carrier.

Carrier is a global manufacturer and distributor of heating, ventilation, air conditioning & refrigeration and fire and security solutions. The Seller is present in four businesses globally: (i)



Climate Solutions (i.e., the Target Group); (ii) Refrigeration Solutions; (iii) Industrial Solutions; and (iv) Investment activities. The Target is active in the development and production of products, systems and components for heating, cooling and climate control of all kinds of buildings.

#### **I. ISSUANCE OF SHOW CAUSE NOTICE TO THE PARTIES IN THE AIR INDIA – VISTARA MERGER**

Based on media sources, we understand that the CCI has issued a

show cause notice to the parties in the Air India – Vistara merger under Section 29(1) of the Competition Act seeking reasons as to why a detailed investigation should not be conducted pursuant to forming a prima facie view that the proposed merger may cause or is likely to cause an appreciable adverse effect on competition in India. The notifying parties are required to respond within a period of 30 days as to why an in-depth Phase II investigation should not be initiated in the present matter.

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