

# CRITICAL COMPETITION

## COMPETITION LAW NEWSLETTER

JULY, 2022

## **ENFORCEMENT ORDERS**

### **I. NATIONAL APPELLATE UPHOLDS SUSPENDING INVESTMENT IN FUTURE COUPONS COMPANY TRIBUNAL (NCLAT) CCI'S ORDER AMAZON'S**

*{Competition Appeal (AT) No 01 of 2022, Amazon NV Investment Holdings LLC vs. Competition Commission of India & Ors.}*

The NCLAT dismissed the appeal filed by Amazon upholding the CCI's suspension of the approval given by it in 2019 to Amazon.com NV Investment Holdings LLC Inc (Amazon), a subsidiary of Amazon.com Inc, in relation to Amazon's acquisition of 49% shareholding in Future Coupons Private Limited (Future Coupons). The CCI in its order had held that Amazon made false representations and suppressed facts regarding its investment in Future Coupons. The CCI held that the approval of the deal shall remain in abeyance and imposed a penalty of INR 202 crores on Amazon. The NCLAT also upheld that Amazon failed to provide relevant information regarding the combination. The NCLAT observed that Amazon made only limited disclosures regarding Future Retail Limited (FRL) and did not spell out the real combination of Amazon acquiring strategic rights and interests over FRL, as well as executing certain commercial contracts between it and FRL. The NCLAT observed that Amazon also made incorrect disclosures before the CCI that the FRL Shareholders' Agreement was independent of the acquisition of 49% shareholding in Future Coupons.

The NCLAT opined that an authority who imposes a penalty performs a 'duty', and any exercise of discretion must be done according to the rules of reason and justice. The NCLAT held that imposition of maximum penalty

of INR 1 Crore each by the CCI under Section 44 and 45 of the Competition Act was an excessive penalty. To prevent an aberration of justice, the NCLAT exercised its prudence and reduced the penalty to INR 50 lakhs each, as per Section 44 and 45 of the Competition Act.

### **II. THE COMPETITION COMMISSION OF INDIA (CCI) HOLDS AMATEUR BASEBALL FEDERATION OF INDIA GUILTY FOR ABUSE OF DOMINANCE**

*{Case No 03 of 2021, Confederation of Professional Baseball Softball Clubs vs. Amateur Baseball Federation of India}*

An information (complaint) was filed by Confederation of Professional Baseball Softball Clubs (CPBSC), which was organizing a baseball championship, before the CCI alleging that Amateur Baseball Federation of India (ABFI) had sent letters to its affiliated State Baseball Associations whereunder they were requested not to entertain unrecognized bodies and to not allow state level players to participate in any of the tournaments organized by them. ABFI, through its letters also threatened strict action against players who would participate in such events). On receiving such letters from ABFI, all registered players withdrew from the CPBSC's championship. It was alleged that ABFI subsequently organized an event which would clash with the rescheduled event of CPBSC's to sabotage the latter's event.

The CCI in its final order noted that ABFI is an apex institution for baseball in India which is engaged in coaching, supervising, and assisting state units. These powers as well as other regulatory powers puts ABFI in a dominant position in the relevant market. The CCI held that ABFI's letters resulted in denial of market



access to other associations from conducting such tournaments and limited/ restricted the provision of services in the market. Such conduct was held by the CCI to amount to abuse of dominant position. Accordingly, ABFI was directed to cease and desist from indulging in such conduct in the future. Since the necessary market correction took place when ABFI withdrew the letters, the CCI did not impose any monetary penalty on ABFI.

### III. CCI HELD SEVEN ENTITIES GUILTY FOR BID RIGGING IN A TENDER ISSUED BY THE INDIAN RAILWAYS

*{Suo Moto Case No. of 2020 In Re: Cartelisation in the supply of Protective Tubes to Indian Railways}*

The CCI held seven vendors of 'polyacetal protective tubes' for axle box guide in Integral Coach Factory guilty for rigging the tenders issued by the Indian Railways for procurement of protective tubes. The investigation was directed based on a leniency application filed by one of the vendors, i.e., Jai Polypan Private Limited.

It was averred by the bidders that the alleged bid rigging did not cause any appreciable adverse effect on competition (AAEC) in the market as there were neither any entry barriers for new entrants nor were competitors driven out of the market. It was further contended that no AAEC had been caused since the prices of the products did not increase. However, the CCI, whilst holding the bidders in contravention of the Competition Act, held that the provisions of Section 3(1) of the Competition Act also forbid agreements which are *likely* to cause an AAEC in the market and the same is presumed to have an AAEC within India. The CCI levied a penalty calculated @ 5% of the average of the bidder's turnover generated from the

sale of protective tubes for the last three preceding financial years. The leniency applicant was granted 100% reduction on penalty.

### IV. CCI DISMISSED A COMPLAINT AGAINST NEUROLOGICA CORPORATION AND SCHILLER HEALTHCARE INDIA PRIVATE LIMITED ALLEGING ANTI-COMPETITIVE CONDUCT

*{Case No 06 of 2022, M/s House of Diagnostics LLP vs. Neurologica Corporation & Ors.}*

M/s. House of Diagnostics LLP (Informant) had filed an information (complaint) against Neurologica Corporation (Neurologica), Samsung Electronics Co. Limited, Samsung India Electronics Private Limited, and Schiller Healthcare India Private Limited (Schiller) alleging contravention of the provisions of the Competition Act. Neurologica is a subsidiary of Samsung Electronics Co. Limited and Schiller is the exclusive authorized service provider for Neurologica. It was alleged in the information that Neurologica abused its dominant position by imposing unfair conditions and discriminatory prices on the Informant (who was a customer of Neurologica), for the supply of Portable CT Scan machines.

The CCI whilst noting that the opposite parties are not in a position of dominance as they have sold only thirty-six machines since 2013 and that the purchasers of the machines are free to import similar/identical machines from other manufacturers, held that no *prima facie* case of abuse of dominance was made out.

The Informant also averred that they were not able to get the Portable CT Scan machines serviced from any third party, since the machines were encrypted, and the passwords were



known only to Neurologica and Schiller. It was alleged that such an agreement between Neurologica and Schiller was in contravention of Section 3(4) of the Competition Act (which prohibits vertical agreements). The CCI dismissed the allegations and noted that there were no restrictions on the Informant from availing aftersales services from third parties and the password related to the operations of the machines was provided in the user manual.

#### V. CCI DISMISSED COMPLAINT AGAINST PUNJAB WAREHOUSING CORPORATION ALLEGING ANTI-COMPETITIVE CONDUCT

*{Case No 42 of 2021, Private Entrepreneurs Godowns Association vs. Punjab State Warehousing Corporation & Anr.}*

Private Entrepreneurs Godowns Association (PEGA) had filed an information (complaint) before the CCI against Punjab State Warehousing Corporation (PSWC) and the State of Punjab's Department of Food, Civil Supplies & Consumer Affairs (**Department of Food**) alleging contravention of Section 3(3) and Section 4 of the Competition Act. The Informant alleged that PSWC was abusing its dominant position by imposing unfair conditions in the purchase (pricing in availing) of godown storage space for food grains and that such resulted in limiting/restricting the provision of services in the relevant market of "market for availing godown services for storage of food grains in the state of Punjab". The CCI in its order noted that PSWC did not hold a position of dominance in the relevant market and considering the same, the allegations of any abuse need not be examined.

With respect to allegations of anti-competitive agreement between PSWC and Department of Food regarding not increasing the rent payable to private godown owners, the CCI held that such allegation was not based on any material evidence which *prima facie* hinted at there being an anti-competitive agreement and dismissed the information filed.

#### VI. CCI DISMISSED ALLEGATIONS OF ANTI-COMPETITIVE CONDUCT BY ATOS INDIA PRIVATE LIMITED

*{Case No 07 of 2022, Hexa Communications Private Limited vs. Atos India Private Limited}*

An information (complaint) was filed by Hexa Communications Private Limited (**Hexa**) against Atos India Private Limited (**Atos**) for alleged anti-competitive conduct. Atos is an original equipment manufacturer (OEM) engaged in providing hi-tech transactional services, unified communications, cloud, big data, and cyber security services. Atos, on its own and/or through its authorized channel partners also provides complementary products and after sale services.

It was alleged that Atos precluded Hexa from providing any support services in respect of its 'Unify' products (manufactured by Atos) by circulating communications to Hexa's customers that any services offered by Hexa regarding Atos' products was not warranted by Atos. Such conduct was alleged by Hexa to amount to abuse of dominant position. The CCI noted that a manufacturer has no legal obligation to warrant genuineness of products/services offered outside its distribution channel, and any insistence that the same be bought from its authorized distributors/partners cannot *prima facie* be considered to be abusive/exclusionary. Other allegations made



by Hexa regarding restrictions of inter-brand operability, restriction on sales in open markets for Atos' products and exploitative warranty policies were also dismissed by the CCI.

#### VII. CCI DISMISSED ALLEGATIONS OF ABUSE OF DOMINANCE BY SUN PHARMACEUTICALS INDUSTRIES LIMITED

*{Case No 17 of 2022, Mr. Ashwani Kumar Singla vs. M/s Sun Pharmaceutical Industries Limited & Anr.}*

An information (complaint) was filed by Mr. Ashwani Kumar Singla before the CCI alleging abuse of dominance by Sun Pharmaceutical Industries Limited (**Sun Pharma**) and M/s Sialkot Medicos. It was alleged that during the peak of the COVID-19 pandemic wave in April 2021, Sun Pharma hiked the MRP of FluGuard 400mg by pasting a sticker on the existing medicine strips and that such conduct amounted to abuse of dominant position.

The CCI noted that owing to the presence of several other competitors selling substitutes of FluGuard 400 mg, Sun Pharma does not hold a dominant position and ascertainment of abuse is not necessary. However, the CCI noted that the informant could raise his grievance, if any, regarding violations of the Drugs and Cosmetics Act, 1940 or any other relevant law with the appropriate forum/authority.

#### VIII. CCI DISMISSED A COMPLAINT AGAINST BRITANNIA ALLEGING ANTI-COMPETITIVE CONDUCT

*{Case No 18 of 2021, Hiveloop Technology Private Limited vs. Britannia Industries Limited}*

Hiveloop Technology Private Limited (**Hiveloop**) filed an information (complaint) against Britannia Industries Limited (**Britannia**) alleging contravention of Section 3(4) (which

prohibits vertical agreements) read with Section 3(1) of the Competition Act in the "*market for mid-premium segment biscuits in India*". Hiveloop is one of the distributors of Britannia, who alleged that Britannia's conduct of not supplying them with requisite quantities of certain products was highly restrictive and discriminatory. It was alleged that such conduct was an agreement in the nature of 'refusal to deal' on part of Britannia which is prohibited under Section 3(4)(d) of the Competition Act. The CCI noted that the allegations regarding the existence of an agreement between Britannia and its distributors not to deal with the Informant *qua* products of Britannia was a mere averment and is not supported by any evidence.

The CCI also noted that there must be some autonomy available to manufacturers to deal with their goods in alignment with their business requirements. The CCI also noted that a business entity has the freedom to refuse to conclude contracts based on objective justifications. The CCI further clarified that selective distribution is an industry practice and non-engagement to the extent required by the informant did not cause or was not likely to cause an AAEC in India.

#### IX. CCI DISMISSED A COMPLAINT AGAINST SHRIRAM CITY UNION FINANCE LIMITED ALLEGING ABUSE OF DOMINANCE

*{Case No 18 of 2022, Mr. Tallada Dilip Kumar vs. Shriram City Union Finance Limited}*

An information was filed by Mr. Tallada Dilip Kumar (**Informant**) against Shriram City Union Finance Limited (**Shriram Finance**) for alleged abuse of dominant position. It was alleged that Shriram Finance had abused its dominant position by not providing



the Informant with information regarding the account statements for his closed loans. The Informant required this information to cross check the rate of interest/EMI charged by Shriram Finance and was not provided with the same despite several requests.

The CCI in its order noted that neither did the Informant specify any provision of the Competition Act which had allegedly been violated by Shriram Finance nor did he provide the CCI with any information in support of the dominant position of Shriram Finance.

#### X. CCI DISMISSED A COMPLAINT ALLEGING ABUSE OF DOMINANCE BY SUBSIDIARIES OF COAL INDIA LIMITED

*{Case No 02 of 2022, Tamil Nadu Generation and Distribution Corporation Limited vs. Eastern Coalfields Limited and Others}*

An information was filed against Eastern Coalfields Limited (ECL) and Mahanadi Coalfields Limited (MCL), both of which are wholly owned subsidiaries of Coal India Limited (CIL), by Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO). TANGEDCO is a state Public Sector Undertaking engaged in power generation for which it enters into coal procurement agreements with CIL.

It was averred in the information that the sampling policy of CIL, whereunder the referee samples are to be kept in the premises of ECL or other subsidiaries of CIL, has made the sampling and testing system of CIL vulnerable to tampering of samples which can lead to grade slippage. Owing to this, the declared grade of coal being supplied to TANGEDCO by ECL was of a lower grade than it ought to have been. Eventually, the coal linkages of TANGEDCO were

transferred to MCL, which would take effect only after MCL obtains a no-objection certificate (NOC) from ECL. However, ECL would provide this NOC only upon receiving payment from TANGEDCO for the pending undisputed dues for the coal supplied. It was alleged that such conduct was in contravention of Section 4 of the Competition Act (which prohibits abuse of dominance).

The CCI in its order noted that the mechanism for sampling and testing of coals supplied to TANGEDCO is governed by a Third-Party Sampling Agreement between ECL, TANGEDCO and Central Institute of Mining and Fuel Research (CIMFR). The CCI noted that while the samples are stored in ECL's premises, the same are under CIMFR's control and any suspicions of potential tampering of seals will not be under the CCI's purview. Regarding MCL's refusal to supply coal to TANGEDCO in the absence of receiving an NOC from ECL, the CCI held that this is to protect its commercial interests and does not amount to any abusive conduct.

#### **NEW INVESTIGATIONS**

##### CCI DIRECTED AN INVESTIGATION AGAINST BOOK MY SHOW FOR ANTI-COMPETITIVE CONDUCT

*{Case No 46 of 2021, Vijay Gopal vs. Big Tree Entertainment Private Limited & Ors.}*

The CCI directed an investigation against Big Tree Entertainment Private Limited (BookMyShow) for alleged contravention of Section 3 and Section 4 of the Competition Act. It was alleged in the information (complaint) filed by Mr. Vijay Gopal, founder of an e-ticketing platform called Showtyme, that BookMyShow had exclusive agreements with certain cinemas in Hyderabad whereby cinemas were not allowed to avail



services from other e-ticketing platforms like Showtyme. It was further alleged that BookMyShow offered cash loans/ monetary deposits on 'zero interest' to such cinemas in lieu of the exclusivity.

The CCI noted that BookMyShow held a market share of 78% in online booking of movie tickets in 2018. The CCI *prima facie* held that BookMyShow's high market share in conjunction with its reach, scale and network effects leads to huge customer footfalls for BookMyShow. This makes it a critical platform for the visibility and competitive ability of theatres. It was noted that the provisions in the agreements between cinemas and BookMyShow indicate its superior bargaining power in deciding contractual terms and also indicates its dominant position.

The CCI also noted that BookMyShow has exclusive agreements with certain single screen cinemas under which these cinemas are not allowed to engage in business with any entity which provides services like BookMyShow or facilitate booking/sales of tickets through any other online medium. The CCI noted that such exclusive agreements have the potential to foreclose competition in the relevant market, as they may make rival intermediary platforms or new entrants incur significant additional cost to induce the cinemas to give up their exclusive contracts with the leading platform with market power. Further, agreements with such cinemas also indicated that BookMyShow reserved the right of data collection, ownership and storage and the theatres did not have any right, title, interest to such data. The CCI noted that exclusivity relating to data ownership can increase the bargaining power of the platform and

could also result in BookMyShow earning monopoly rents in the future.

The CCI formed the *prima facie* view that an investigation was warranted into the matter as exclusivity relating to data ownership can increase the bargaining power of the platform over time and that data further strengthens and entrenches the network effects limiting inter platform competition. On the allegation regarding charging of high convenience fee from consumers by BookMyShow, the CCI held that it cannot act as a price regulator to determine the correct fee. The CCI however, noted that the exclusivity arrangements may result in softening of competition and bolster the market power of BookMyShow without any incentive for it to lower such fees in future.

## **MERGER CONTROL**

### **I. CCI APPROVED THE SALE OF THE GLOBAL BIOSIMILARS PORTFOLIO OF VIATRIS INC. TO BIOCON BIOLOGICS LIMITED AND ITS SUBSIDIARY**

The CCI approved the sale of the global biosimilars portfolio of Viatris Inc. (**Viatris**) to Biocon Biologics Limited (**BBL**) and its subsidiary for cash and stock consideration and the acquisition of 1 (one) common equity share and compulsory convertible preference shares convertible into common equity shares, representing at least 12.9% of the fully diluted equity of BBL by Mylan Inc (**Mylan**), as part consideration for the acquisition of the global biosimilars portfolio of Viatris. The transaction also envisaged an equity infusion by Serum Institute Life Sciences Private Limited (**Serum**) and Biocon Limited in BBL will be carried out



for the purpose of funding the acquisition of the global biosimilars portfolio of Viatriis. Mylan is a global pharmaceutical company and an indirect wholly owned subsidiary of Viatriis. BBL is a pharmaceutical company primarily engaged in carrying out the biosimilars business of Biocon Limited. Serum is a subsidiary of Serum Institute of India Private Limited.

## II. CCI APPROVED THE APPOINTMENT OF TRIAN FUND MANAGEMENT LP'S REPRESENTATIVES ON THE BOARD OF UNILEVER PLC.

The CCI approved the appointment of Mr. Nelson Peltz, CEO of Trian Fund Management, L.P (Trian) on the board of directors of Unilever PLC (Unilever) under the Green Channel Route. Trian is a global investment management firm founded based out of the US. Unilever is engaged in the business of selling fast moving consumer goods.

## III. CCI APPROVED THE ACQUISITION OF JPFL FILMS PRIVATE LIMITED BY PROJECT HOLDINGS FOURTEEN (DIFC) LIMITED.

The CCI approved the acquisition by Project Holdings Fourteen (DIFC) Limited ('Brookfield SPV') in JPFL Films Private Limited ('JPFL Films') under the Green Channel Route. The proposed transaction entails the transfer of the packaging business of Jindal Poly Films Limited and Jindal Films India Limited, together with Jindal Poly Films Limited's wholly owned subsidiary, i.e., JPFL Films and the acquisition of equity stake in JPFL films by Brookfield SPV through issuance of compulsory convertible preference shares and the purchase of equity shares of JPFL Films.

## IV. CCI APPROVED THE ACQUISITION OF ENTIRE SHAREHOLDING OF TENNECO INC BY PEGASUS HOLDINGS III LLC.

The CCI approved the acquisition of the entire shareholding of Tenneco Inc ('Tenneco') by Pegasus Holdings III LLC ('Pegasus') under the Green Channel Route. This combination would result in the indirect acquisition by Pegasus of Federal-Mogul Goetze (India) Limited which is an indirect subsidiary of Tenneco. Pegasus is an investment vehicle and a controlled affiliate of Apollo Funds affiliated with Apollo Global Management. Tenneco is a global supplier of components of motor vehicles.

## V. CCI APPROVED THE ACQUISITION OF GLAXOSMITHKLINE CONSUMER HEALTHCARE HOLDINGS (NO. 2) LIMITED BY GSK PLC, PFIZER INC AND HALEON PLC

The CCI approved the transaction entailing corporate restructuring of GlaxoSmithKline Consumer Healthcare Holdings (No. 2) Limited (JVCO), including through acquisition by Haleon plc (Haleon) via demerger and share exchange steps involving the shareholders of JVCO. Immediately following completion of the demerger and share exchange steps, the shareholding of Haleon will be held by a combination of GSK plc, its affiliates, and shareholders (together representing 68% of Haleon's voting rights) and Pfizer Inc (representing 32% of Haleon's voting rights). GSK and Pfizer are pharmaceutical companies. Haleon is a new incorporated entity that presently does not have any business activities. JVCO is engaged in the manufacture and distribution of consumer healthcare products.





**VI. CCI APPROVED THE ACQUISITION OF ENTIRE EQUITY SHARE CAPITAL OF AIR ASIA (INDIA) PRIVATE LIMITED BY AIR INDIA LIMITED.**

The CCI approved the acquisition of the entire equity share capital of AirAsia (India) Private Limited (**Air Asia**), by Air India Limited (**AIL**), an indirect wholly owned subsidiary of Tata Sons Private Limited (**TSPL**). Air Asia along with its subsidiary is engaged in domestic scheduled air passenger transport service, air cargo transport services and charter flight services in India. AIL is engaged in domestic scheduled air passenger transport service, international scheduled air passenger transport service, air cargo transport services in India and charter flight services in India..

**VII. CCI APPROVED THE ACQUISITION OF 24.98% SHAREHOLDING OF IIFL WEALTH MANAGEMENT LIMITED BY BC ASIA INVESTMENTS X LIMITED**

The CCI approved the acquisition of up to 24.98% shareholding of IIFL Wealth Management Limited (**IIFLWM**) by BC Asia Investments X Limited (**BC Asia**). BC Asia is an investment holding company based in Mauritius. IIFLWM is a private wealth management firm in India.

**VIII. CCI APPROVED THE ACQUISITION BY FUNDS MANAGED BY VISTA EQUITY PARTNERS MANAGEMENT, LLC AND ELLIOTT INVESTMENT MANAGEMENT LP OF JOINT CONTROL OF CITRIX SYSTEMS INC**

The CCI approved the acquisition by funds managed by Vista Equity Partners Management, LLC (**Vista**) and funds and investment vehicles managed by Elliott Investment Management L.P (**Elliott**) of indirect joint control of Citrix Systems Inc (**Citrix**). Pursuant to an agreement and plan of merger entered into and among TIBCO Software Inc (**TIBCO**), Citrix, Picard Parent, Inc and its subsidiary, TIBCO will combine with Citrix, and Vista and Elliott will acquire joint control of the combined Citrix/TIBCO business. Vista and Elliott are US-based investment firms. Citrix is a multinational software company which delivers digital workspace solutions.

**IX. CCI APPROVED GOOGLE INTERNATIONAL LLC'S ACQUISITION OF 1.28% STAKE IN BHARTI AIRTEL**

The CCI approved the acquisition of a minority and non-controlling stake of 1.28% of equity share capital by Google International LLC (**'Google'**) in Bharti Airtel Limited (**'Airtel'**) with certain modifications. Google and Airtel have also entered into certain commercial agreements.



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