



CRITICAL COMPETITION  
COMPETITION LAW NEWSLETTER  
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## **ENFORCEMENT ORDERS**

### **1. THE DELHI HIGH COURT HAS HELD THAT THE PATENTS ACT MUST PREVAIL OVER THE COMPETITION ACT IN RESPECT OF ISSUES ARISING FROM LICENSING OF PATENTS [Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India & Anr.]**

The Division Bench of the Delhi High Court in its order dated 13.07.2023 held that, on the issue regarding the exercise of rights by a patentee, the Patents Act, 1970 (**Patents Act**) must prevail over the Competition Act, 2002 (**Competition Act**). The judgement arose from four appeals and a writ petition raising a common question regarding whether the Competition Commission of India (**CCI**) has the jurisdiction to inquire into the actions of a patentee exercising its powers, under the Competition Act.

Two appeals were filed by Telefonaktiebolaget LM Ericsson (PUBL) (**Ericsson**) against the judgement which previously dismissed writ petitions filed by Ericsson challenging the investigation directed by the CCI on allegations that the conditions imposed by Ericsson in the licensing of Standard Essential Patents (**SEP**) were not fair, reasonable, or non-discriminatory (**FRAND**) (**2016 Judgement**). One appeal was filed by the CCI challenging a previous writ petition filed by Ericsson against CCI and Best IT World (India) Pvt. Ltd. (**iBall**) (**2015 Judgement**). The 2015 judgement noted that since Ericsson and iBall had arrived at a settlement, and iBall wished to withdraw its information, the Court disposed of the petition and quashed the proceedings initiated by the CCI under Section 26(1) of the Competition Act against Ericsson. However, the CCI was allowed to take

any *suo moto* action basis the information received from iBall. The fourth appeal was filed by Monsanto Holdings Pvt. Ltd (**Monsanto**) challenging the order which relied on the 2016 Judgement and held that there is no bar in law for the CCI to proceed against Monsanto for allegedly abusing its dominance by charging excessive royalties and not making its patents available on reasonable terms and conditions (**2020 Judgement**).

The division bench made the following observations,

- (i) The court noted that Section 81(1) read with Section 84(4) of the Patents Act empowers the Controller of Patents (**Controller**) to grant compulsory licenses if the reasonable requirements of the public are not satisfied or the patented invention is not available to the public at a reasonable price, or that the patented invention is not worked in India. In exercising this power, Section 84(5) empowers the Controller to exercise powers under Section 88 (Powers of controller in granting compulsory license) as well. The Court noted that the applicant must make efforts to obtain a license from the patentee 'on reasonable terms and conditions.' The Court also considered powers of Civil Courts under the Patents Act pertaining to restrictive covenants in sale, lease, or license of a patent.
- (ii) The Court has held that the question of whether an agreement under which a patent is licensed will cause an appreciable adverse effect on competition within India or will



amount to an abuse of dominant position is not reserved for only the CCI. Further, it was noted that the factors required to be considered by the CCI under Section 19(3) and 19(4) of the Competition Act while assessing any anti-competitive conduct is not very different from the factors considered by the Controller in exercise of its power to grant a compulsory license, under Section 84(6) and 84(7) read with Section 83 and 89 of the Patents Act.

- (iii) The bench observed that Chapter XVI of the Patents Act, was introduced specifically, in 2003 by way of an amendment after the enactment of the Competition Act and the inclusion of Section 84(6)(iv) (which deals with compulsory licensing of patents) in the Patents Act by way of an amendment after the Competition Act was passed with Section 3(5)(i)(b) (which exempts reasonable conditions in the licensing of a patent to be exempted from Section 3) is particularly instructive of the above legislative intent as regards anti-competitive agreements and therefore, overrides the Competition Act.
- (iv) The Court noted that Chapter XVI of the Patents Act is a complete code in itself on all issues pertaining to unreasonable conditions in agreements of licensing of patents, abuse of status as a patentee, inquiry in respect thereof and relief that is to be granted. The Court further noted the Patents Act is a special statute equipped to deal with anti-competitive

conduct vis-a-vis patents, while the Competition Act is a general legislation pertaining to anti-competitive agreements and abuse of dominant position generally.

Accordingly, the Delhi High Court set aside the 2016 Judgement and the 2020 Judgement and quashed the proceedings initiated by the CCI. Further, the Delhi High Court also upheld the 2015 Judgement and noted that once a settlement has been reached between the informant and person against whom an information is filed, the very substratum of the proceedings by CCI is lost.

## 2. THE NCLAT DISMISSED ALL FOUR APPEALS FILED AGAINST THE ORDER OF THE CCI GRANTING APPROVAL FOR THE ACQUISITION OF HINDUSTHAN NATIONAL GLASS & INDUSTRIES LIMITED BY AGI GREENPAC LIMITED

The National Company Law Appellate Tribunal (NCLAT) by way of order dated 28.07.2023 (NCLAT Order) upheld the order of the CCI approving the acquisition of up to 100% of the shareholding in Hindusthan National Glass & Industries Limited (HNG), by AGI Greenpac Limited (AGI Greenpac) dated 15.03.2023 (CCI Order). HNG is undergoing the Corporate Insolvency Resolution Process (CIRP). The CCI Order was passed on the basis of the voluntary modifications offered by AGI Greenpac which entails the divestiture of the Rishikesh plant of HNG. (Modification).

Four appeals were filed under Section 53B of the Competition Act by: (i) Independent Sugar Corporation Limited (INSCO) which is the unsuccessful resolution applicant in the CIRP of HNG; (ii) U.P. Glass



Manufacturers Syndicate (**UP Glass**) which is an industry body of micro, small and medium scale manufacturers of glass based out of Uttar Pradesh representing the interests of small MSME glass manufacturers in Uttar Pradesh; (iii) Geeta & Company (**Geeta & Co**) which represents the interests of contract workers engaged at the Rishikesh plant of HNG; and (iv) HNG Industries Thozilalar Nala Sangam (**HNG Industries**) which is a workers unions representing the interest of the workers at the Puducherry plant of HNG.

The NCLAT dismissed all four appeals challenging the CCI Order and noted that there are no merits in the grounds raised by the appellants. The NCLAT Order examined the distinction between the Phase I and Phase II investigation of a combination by the CCI. It was held that the CCI is required to form a second prima facie view under Section 29(2) of the Competition Act (after considering the response to the show cause notice (**SCN**) issued Section 29(1) of the Competition Act) prior to initiating a Phase II investigation into a combination including directing the parties to a combination to publish details of the combination to invite public comments.

Further, the legislative intent stipulates that if the CCI is satisfied with the response to the SCN (including any voluntary modifications) that the proposed combination will not cause an appreciable adverse effect on competition, it may decide not to proceed further and grant its approval to the combination. Therefore, it is not mandatory for a Phase II investigation under Section 29(2) to be initiated where no second prima facie opinion is formed by the CCI. The NCLAT also

dismissed submissions regarding non-application of mind by the CCI and held that the CCI Order has been passed after due assessment of the impact of the combination and the modifications offered. Further, it was held that the the decision of an expert body does not warrant interference when it has followed due procedure under the Competition Act and the Combination Regulations. The NCLAT also dismissed the submissions by UP Glass stating that the objections submitted by them to the CCI regarding the proposed combination were not addressed or taken into consideration and held that the right of public participation only arises *after* the Phase II investigation under Section 29(2) has been initiated by the CCI and not prior to it.

### 3. THE CCI HELD THAT IT NEED NOT INTERVENE IN CASES WHERE REGULATORS ARE CARRYING OUT REGULATORY FUNCTIONS

The CCI dismissed a complaint filed against the Insurance Regulatory and Development Authority of India (**IRDAI**) and Indian Institute of Insurance Surveyors and Loss Assessors (**IIISLA**) (collectively, OPs), filed by Shrikant Ishwar Mendke (**Informant**), who is a holder of a license to act as surveyor and loss assessor for alleged violation of Section 3 and 4 of the Competition Act.

The Informant alleged that his application for renewal of his license was withheld by IRDAI for the sole reason that the Informant was not a member of IIISLA, and also alleged that IIISLA abused its dominant position by resorting to unfair and restrictive trade practices which were in contravention of Sections 4(2)(a)(ii), 4(2)(b)(i), 4(2)(b)(ii) and 4(2)(c) of the Competition Act. Moreover, the Informant submitted that IRDAI



mandated membership of IISLA as an eligibility criterion for grant of a valid license to act as a surveyor, which was an action being in concert, thereby violating Sections 3(2) and Section 3(3(b) of the Competition Act.

The CCI held that IRDAI has been set up under the IRDAI Act, 1999 (**IRDAI Act**) which provides for the establishment of an authority to regulate, promote, and protect the interests of holders of insurance policies. The CCI observed that IISLA has been established and promoted by IRDAI under Section 14(2)(f) of IRDAI Act, which empowers it to promote and regulate professional organisations connected with the insurance and re-insurance business.

After perusing IRDAI's Notification that mandated membership with IISLA for grant/ renewal of license, the CCI held that IISLA is a body promoted by IRDAI in the discharge of its functions under Section 14(2) (k) of the IRDAI Act. Further, membership of IISLA has been made mandatory by IRDAI for grant and renewal of licences for surveyors and loss assessors, emphasizing that such functions, being regulatory in nature, are not per se amenable within the jurisdiction of the CCI as held by the Delhi High Court in the matter of Institute of Chartered Accountants of India v. Competition Commission of India & Ors<sup>1</sup>. On the basis of the aforesaid, the CCI passed an order under Section 26(2) of the Competition Act and held that no case of contravention of the provisions of the Competition Act is made out.

#### 4. THE CCI DISMISSED ALLEGATIONS PERTAINING TO ABUSE OF DOMINANCE BY M/S. KARAGIRI STUDIO

The CCI vide its order dated 06.07.2023 passed under Section 26(2) of the Competition Act dismissed a complaint filed by Shri Sanjay Kumar (**Informant**) against M/s. Karagiri Studio (**Karagiri**). The Informant had approached the CCI alleging abuse of dominant position by Karagiri in the market for silk sarees bearing GI tags. The Informant alleged that Karagiri has indulged in predatory pricing and abused its dominant position in contravention of Section 4 of the Competition Act.

The Informant further alleged that Karigiri defrauded him and sent polyester sarees, in place of GI tagged Kancheepuram and Paithani silk sarees. The Informant referred to Section 3(5) of the Competition Act and Section 40 of the Geographical Indication of Goods (Registration and Protection) Act, 1999, which provide for imposition of penalty for selling goods to which false GI is applied and has sought compensation amounting to INR 67,000.

The CCI observed that the Informant has failed to ascertain any relevant market and has not mentioned any specific conduct which would amount to abuse of dominant position. The allegations pertaining to predatory pricing have not been substantiated and this matter is merely a dispute between a consumer and a seller. The CCI also observed that the reference made by the Informant to Section 3(5)(d) of the Act and provisions of GI Act is misplaced and the same does not warrant interference. Therefore,

<sup>1</sup> W.P.(C) 2815/2014 and CM Nos. 5836/2014 & 15032/2014



the CCI held that there are no competition concerns arising out of the present information and accordingly, the matter was closed by way of an order Section 26(2) of the Competition Act.

#### 5. THE CCI DISMISSED A COMPLAINT ALLEGING ABUSE OF DOMINANCE BY DLF GAYATRI DEVELOPERS

The CCI vide its order dated 13.07.2023 dismissed an information filed against M/s. DLF Gayatri Developers (DGD) under Section 26(2) of the Competition Act. In this case, Jitendra Bathla (Informant) alleged that unfair and discriminatory conditions have been imposed in the Club Agreement (CA) relating to a residential plot project by DGD. The Informant further alleged that the CA binds the plot owners and contains certain one-sided, unfair, and discriminatory conditions pertaining to membership, annual charges etc., which are in contravention of provisions of Section 4 of the Competition Act.

In order to assess DGD's dominance, the CCI determined the relevant market as the "*provision of services for development and sale of residential plots in Mahabubnagar district in the State of Telangana*". The CCI observed that there exist many real estate developers in the relevant market and the Informant has failed to establish DGD's dominant position in the defined relevant market. It held that since the DGD does not enjoy a dominant position in the relevant market, the question of abuse of a dominant position within the meaning of the provisions of Section 4 of the Competition Act does not arise.

#### 6. THE CCI HELD THAT SELECTION OF ONE BID AND REJECTION OF ANOTHER BID CANNOT BE TERMED AS ABUSE OF DOMINANCE

The CCI vide its order dated 17.07.2023 passed under Section 26(2) of the Competition Act dismissed an information filed by Ravinder Singh, owner of Ratan Medical Store, Dehradun (Informant) against the Additional Director, Central Government Health Scheme (CGHS). The Informant had participated in an e-tender for the supply of allopathic medicines/drugs to CGHS and alleged that the successful bidder i.e., M/s. Goel Medicos did not fulfill the eligibility criteria as outlined in the tender document such as: **a)** the bidder did not qualify the 3 years drug license criteria; **b)** it submitted ITR of Urmila Goel instead of Mr. Manish Goel, the proprietor; and, **c)** requirement of furnishing audited balance sheet was not fulfilled. The Informant further alleged that some other bids were rejected on vague grounds and CGHS ignored the irregularities in the bid, which is in contravention of Sections 3 and 4 of the Competition Act.

The CCI held that since there is no anti-competitive agreement entered into between the parties therefore, Section 3 does not apply in this case. Furthermore, it observed that there is no allegation of bid rigging, nor do the facts and circumstances of the present matter reveal any meeting of minds by the bidders in response to the e-tender of CGHS, for the matter to be covered under the provisions of Section 3(3) of the Competition Act. The Informant also failed to establish that the tender conditions are one-sided/ unfair or abusive, therefore, the CCI held that the act of selecting one bid and rejecting another is not in violation of Section 4 of the Competition Act. Accordingly, an





order for closure of the complaint was passed under Section 26(2) of the Competition Act.

#### 7. THE CCI DISMISSED A COMPLAINT AGAINST M3M INDIA PVT. LTD. FOR ALLEGED ABUSE OF DOMINANCE

The CCI vide its order dated 19.07.2023 dismissed an information filed against M3M India Pvt. Ltd. [M3M] by Devendra Nath [Informant]. The Informant alleged that M3M constructed the 11<sup>th</sup> tower in the M3M Merlin society without the prior consent of residents when the occupation certificate provided for 10 towers to be constructed with world-class amenities. It has been alleged that M3M did not take consent of the residents before taking the approval of the Directorate of Town and Country Planning (DTCP) for changing the layout and construction of a new tower. The Informant contended that M3M held a dominant position in the relevant market for 'provision of services of development and sale of residential flats in Sector 67, Gurgaon'.

The CCI in its analysis delineated the relevant market as 'market for provision of services of development and sale of residential flats in Gurgaon' and observed that M3M does not enjoy a dominant position in the market because of presence of other big players like DLF, Emaar India, Godrej properties, etc. and thus, Section 4 of the Competition Act does not apply in this case. Furthermore, the Informant did not substantiate the allegations regarding the contravention of Section 3(4) of the Competition Act. Therefore, CCI dismissed the complaint and passed an order under Section 26(2) of the Competition Act.

#### 8. THE SUPREME COURT REJECTED CCI'S PLEA TO TRANSFER WRIT PETITIONS FILED IN THE HIGH COURTS IN RESPECT OF THE STEEL CARTEL CASES [Competition Commission of India v. Agni Steels Pvt. Ltd. & Ors.]

The Supreme Court in its order dated 18.07.2023 turned down the CCI's plea to transfer writ petitions filed in respect of the steel cartelization cases from the Calcutta and Madras High Courts. The CCI submitted that the Supreme Court should transfer the writ petitions before itself and hear the cases since they pertain to a question of law best answered by the apex court.

The Supreme Court noted that the High Court's power to hear a writ petition cannot be taken away, especially when the courts were already engaged in the matter, and the jurisdiction of the apex court cannot be invoked like this.

### **COMBINATION ORDERS**

#### 9. THE CCI APPROVED MARNIX LUX'S INDIRECT ACQUISITION BY CONCENTRIX CORPORATION

The proposed combination pertains to the indirect acquisition of Marnix Lux SA (Marnix) by Concentrix Corporation (Concentrix). The proposed combination is a two-step transaction, which are set out below:

- 1) Concentrix will acquire, directly and indirectly through its wholly owned subsidiary OSYRIS S.a.r.l. (OSYRIS), the entire share capital of Webhelp S.A.S. (Webhelp), which is a subsidiary of Marnix; and,
- 2) Marnix will hold 22% shareholding in Concentrix and will receive approximately 14.9 million shares, with the right to earn an additional 0.75 million shares of Concentrix, if the share price of Concentrix



reaches USD 170 per share within seven years from the closing of the Proposed Combination.

Concentrix is a USAbased publicly listed company engaged in providing customer experience services, a segment of Information Technology and Information Technology enabled Services. Marnix is the parent company of **Webhelp** and it does not have operations of its own other than indirectly holding shares in Webhelp. Webhelp is active in the provision of BPO services and specialised services. It is active in India through two of its subsidiaries that provide BPO services such as interactive communication support services, call centre services as well as back-office processing and other BPO services.

#### 10. THE CCI APPROVED ACQUISITION OF UP TO 59.38% SHARHOLDING IN UNICHEM LABS BY IPCA LABORATORIES LIMITED

The proposed combination pertains to the acquisition of 33.38% of the issued and paid-up equity voting share

capital (on a fully diluted basis) of Unichem Laboratories Limited (**Unichem**) pursuant to a share purchase agreement by Ipca Laboratories Limited (**Ipca**). Furthermore, Ipca is acquiring an additional 26% shareholding in Unichem and since it is a listed company (acquiring >25% shareholding in the Unichem), Ipca is required to make an open offer for the purchase of equity shares up to 26% of the Unichem's equity share capital in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Therefore, the Ipca will acquire up to 59.38% shareholding of Unichem.

Ipca is a pharmaceutical company that manufactures formulations and active pharmaceutical ingredients for various therapeutic segments. Unichem is active in the sale of formulations, active pharmaceutical ingredients, intermediates, and contract manufactured finished formulation dosages.

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