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# CRITICAL COMPETITION

## Competition Law Newsletter

Saraf and Partners is delighted to share with you the latest edition of the Firm's Competition Law Newsletter, titled '*Critical Competition*' (August 2024).

This edition offers a comprehensive update on the recent developments in the field of Competition Law in India. We invite all our valued readers to peruse this newsletter and gain valuable insights into the current state of the law.

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- NCLAT reduces penalty imposed on M/S. Toyfort by the CCI.
- CCI approves Amazon seller, Appario's sale to Clicktech - another major seller on the Amazon platform.

*...and more*



## **ENFORCEMENT ORDERS**

### **1. THE DELHI HIGH COURT UPHELD THE ORDER OF THE COMPETITION COMMISSION OF INDIA DISMISSING AN INFORMATION FILED IN RELATION TO THE VISTARA-AIR INDIA MERGER**

On 5 July 2024, the Delhi High Court dismissed a writ petition filed by Captain Deepak Kumar (**Petitioner**) against the order of the Competition Commission of India (**CCI**) rejecting an information filed by him. The Petitioner alleged cartelization and bid rigging in the approved merger between Tata SIA Airlines Ltd. (**Vistara**) and Air India Ltd. By way of order dated 15 December 2023, the CCI dismissed the information filed under Section 26(2) of the Competition Act, 2002 (**Competition Act**) due to the absence of any substantive evidence to back these allegations (**Impugned Order**).

The Delhi High Court noted that the Petitioner's plea contained numerous unsubstantiated and reckless allegations not supported by evidence but driven by malice. A similar petition challenging the Impugned Order was filed by the Petitioner which was dismissed as withdrawn with liberty to approach the appropriate authority despite which the present petition had now been filed before the Delhi High Court. The Court noted that this approach of the Petitioner not only discredits his credibility but also burdens the legal system. Therefore, in the absence of any substantiated claims and the apparent malicious intent behind the allegations, the Impugned Order was upheld.

### **2. THE NCLAT DECREASES PENALTY IMPOSED ON M/S. TOYFORT BY THE CCI**

The National Company Law Appellate Tribunal (**NCLAT**) disposed an appeal filed by M/s. Toyfort (**Toyfort**) challenging the CCI's order which held that Toyfort had acted in contravention of Sections 3(3)(c) and Section 3(3)(d) read with Section 3(1) of the Competition Act for collusive practices such as bid rigging, cover bidding, and submission of false documents to manipulate the tender process in relation to soil sample testing by the Department of Agriculture, Government of Uttar Pradesh.

Toyfort challenged the findings of the CCI arguing that its involvement was not intentional bid rigging but rather a commercial misstep. However, the NCLAT's examination revealed collusion between Toyfort, M/s. Austere System Pvt. Ltd., and M/s. Fimo Info Solutions Pvt. Ltd. in the tender issued by the Department of Agriculture, Govt. of Uttar Pradesh for soil testing tenders in Meerut and Jhansi. Toyfort's conduct involved cover bids to bolster Austere Systems's bid and to prevent tender failures due to inadequate participation. Despite lacking experience in soil testing, Toyfort engaged in the bidding process to create a facade of competition, with evident business and familial ties among the involved entities.

The NCLAT thus affirmed the CCI's decision on Toyfort's violation of provisions of the Competition Act, upholding the cease-and-desist order under Section 27(a) of the Competition Act. However, the

penalty imposed by the CCI was reduced to 3% of the average annual turnover for the last three years, down from the initial 5% imposed by the CCI. The NCLAT also observed that in the present case, where almost all bidders for soil testing are first time bidders and relevant turnover of firms from the aforesaid business is NIL, the concept of relevant turnover in such cases would not be correct, as it would lead to NIL penalty and allow the parties involved to go scot-free. Therefore, the NCLAT rejected the Appellant's narrow turnover interpretation, emphasizing a broader consideration of total turnover in cartel cases would be appropriate to deter anti-competitive practices effectively.

### 3. THE CCI DISMISSED A COMPLAINT ALLEGING ANTI-COMPETITIVE CONDUCT BY INDIABULLS HOUSING FINANCE LIMITED

The CCI dismissed an information (complaint) filed by Mr. Anil Bansal, director of M/s. Karmyogi Hotels & Buildcon Ltd (**Informant**) alleging contravention of the provisions of Section 3 and 4 of the Competition Act by Indiabulls Housing Finance Limited (**Indiabulls**) and its officers (**OPs**). The Informant alleged that Indiabulls and other OPs engaged in deceptive practices related to loans against property including misleading the Informant with false advertising about favourable interest rates. It was alleged that Indiabulls was consistently raising the benchmark rate / Floating Reference Rate without justification, imposing unfair penalties, and hindering consumer mobility by discouraging transfers to other institutions, in violation of Sections 3(1) and 3(2) of the

Competition Act. Moreover, the Informant highlighted discrepancies between RBI repo rates and the interest rates charged by Indiabulls, alleging that unjust and excessively high rates of interest contravene the provisions of Section 4 of the Competition Act (abuse of dominance).

The CCI analysed the conduct of Indiabulls in the relevant market of '*provision of loan against property in India*' and noted that the dominance of Indiabulls is not established in the relevant market due to the presence of a large number of banks, non-banking financial companies and housing finance companies. Further, the allegation of aftermarket abuse is misplaced since the loan services of the nature impugned do not involve any aftermarket as alleged by the Informant. Further, with regards to Section 3 of the Competition Act, the CCI noted that an agreement with an end-consumer like in the present case is not envisaged as an anti-competitive agreement and therefore, no case is made out. Thus, the CCI concluded that prima facie, there is no competition concern and therefore dismissed the information.

### 4. THE CCI DISMISSED ALLEGATIONS AND CLOSED THE CASE AGAINST SUGAR MILLS MANUFACTURERS AND ASSOCIATIONS

The CCI dismissed the information filed against Sugar Mill Manufacturers and Associations. This development follows from the separate set of information that were filed in 2013 against sugar mills' associations, PSUs, and sugar mills, alleging price fixing and bid-rigging in an ethanol procurement

tender. The investigation by the office of the Director General's (DG), which is the investigative wing of the CCI, found violations, leading to penalties. However, after appeal, the NCLAT, in October 2023, remanded the case to the CCI on account of certain procedural irregularities.

The CCI noted that the DG suggested potential cartelization among the Indian Sugar Mills Association (ISMA) and various sugar mills across Uttar Pradesh, Gujarat, and Andhra Pradesh during a tender process. Key pieces of evidence relied on were firstly, the meetings convened by ISMA in December 2012 with sugar mills, including key representatives of non-members, leading to allegations of collusion on prices and quantities. Secondly, mobile conversations providing evidence of communications between competing mills during the tender period. Thirdly, many bidders quoted identical prices (net delivered cost and basic price) within narrow ranges across depots, which the DG interpreted as being indicative of collusion. Fourthly, the history of parallel pricing in earlier tenders by ISMA and its members.

While the investigation identified a few instances of identical pricing, the parties rebutted that the competition and operational nuances of the sugar and ethanol markets would naturally lead to similar pricing without collusion. They also highlighted that the OMCs (Oil Marketing Companies), the purchasers in the tender, did not allege any wrongdoing despite having provisions in the tender for addressing competition concerns.

The CCI ultimately concluded that evidence was insufficient to support claims of anti-competitive behaviour under Section 3(3)(a) of the Competition Act. For bidders from Gujarat and Andhra Pradesh, only isolated instances of identical bids were noted, but these were not deemed sufficient for a finding of cartelization. The CCI found no anti-competitive conduct on the part of the OMCs or other associations involved, citing that the joint tender process had operational benefits aligned with government policies. Therefore, no violations were established against ISMA, the implicated sugar mills, or the OMCs.

#### 5. THE CCI DISMISSED A COMPLAINT ALLEGING ANTI-COMPETITIVE PRACTICES BY SAINT GOBAIN INDIA PVT. LTD. AND COMPAGNIE DE SAINT-GOBAIN

The CCI dismissed a complaint filed against Saint Gobain India Pvt. Ltd. (**SG India**) and Compagnie De Saint-Gobain (**CDSC**) for alleged anti-competitive practices under Sections 3(4) (anti-competitive vertical agreements) and 4 (abuse of dominance) of the Competition Act. SG India is part of the Saint Gobain Group, which is engaged in the business of designing, manufacturing and distributing materials and services for construction and industrial markets.

The Informant accused the Saint Gobain Group of imposing anti-competitive conditions on glass processors, fabricators, and distributors. As per the Informant, the 'Propel Project Participation Agreement' (**Propel Agreement**) imposed exclusive supply obligations, forced co-branding,



refusal to deal with competitors, and resale price maintenance, violating Sections 3(4) and 4 of the Competition Act. It was alleged that SG India is dominant in the relevant markets of production and sale of clear float glass and has significant market power in the coated glass market. It was alleged that SG India was leveraging its dominant position in clear float glass market to enter and influence the coated glass market and further abusing its dominance by forcing downstream players to deal exclusively with them.

The CCI noted that the allegations made by the Informant regarding the alleged 'exclusive supply obligations' and 'forced obligations' were basis the Propel Agreement which was an unsigned and undated document whose authenticity could not be established. Further, the allegations regarding 'refusal to deal' and 'resale price maintenance' were stated to be imposed basis oral directions.

Nonetheless, CCI noted that there was no exclusive supply obligation since the processor could procure from other manufacturers, and the exclusivity imposed was limited to the training provided to make specialized glass products and processing techniques suitable for the use of the end consumers. As such, the terms of the agreement had a rationale of quid pro quo which aimed at benefiting both the parties. Further, the forced co-branding was seen as facilitating the processor's brand use alongside SG India's, not posing a competition issue. Regarding the refusal to deal allegation, CCI noted that offering discounts based on purchase volume may not be anti-

competitive, per se. Regarding resale price maintenance, CCI found no evidence of SG India controlling the end product price, as it only charged for its products it sells to the processor. Hence, no violation of Section 3(4) of the Competition Act was made out. Further, given the terms of the relationship between the processor and manufacturer as provided in the Propel Agreement, the CCI concluded that the agreement's conditions had objective justifications, refraining from market delineation and assessing SG India's dominance. Accordingly, the CCI concluded that no prima facie case was made out and dismissed the information filed by an order under Section 26(2) of the Competition Act.

#### 6. THE CCI DISMISSED ALLEGATIONS OF CARTELISATION AGAINST PCMM, INTEGRAL COACH FACTORY, SUPER STEELS AND ALVIND INDUSTRIES

The CCI dismissed a complaint filed against the PCMM - Integral Coach Factory (PCMM), Super Steels (Super Steels) and Alvind Industries (Alvind) alleging contravention of the provisions of Sections 3 and 4 of the Competition Act.

It was alleged that the eligibility criteria in a tender issued by PCMM for procurement of 'lower Spring Beam with vertical brackets' favoured specific vendors, limiting competition. Further concerns regarding bid-rigging, cartelization, and purported abuse of dominant market positions were raised highlighting PCMM's continued ignorance of cartelization between Super Steels and Alvind in previous tendering

processes. It was also alleged that PCMM was imposing restrictive eligibility criteria that allegedly supported cartel formation by Super Steel and Alvind, in violation of Section 4(2)(a)(i) of the Competition Act (imposition of unfair and discriminatory conditions).

The CCI noted that apart from the bid quotations made by Super Steel and Alvind in two tenders with minor difference in their prices, there is no evidence on record which supported the allegations regarding cartelization. The CCI also observed that parallel pricing is not per se violative of the Competition Act and there have to be plus factors in support of parallel pricing, which are absent in the instant matter. Therefore, the CCI rejected the allegations of cartelization by Super Steel and Alvind, as well as allegations regarding violation of Section 3 of the Competition Act by PMCC. The CCI dismissed allegations regarding abuse of dominance and noted that PMCC being a consumer/ procurer of the impugned item has freedom to specify its requirements and the said requirements themselves cannot be deemed to be anti-competitive. Accordingly, the CCI concluded that no prima facie case was made out and dismissed the information filed.

#### 7. THE CCI DISMISSED A COMPLAINT ALLEGING VIOLATIONS BY TOYOTA KIRLOSKAR MOTORS PVT. LTD

The CCI dismissed an information (complaint) filed by Shri Balbir Singh Nagpal (**Informant**) alleging contravention of provisions of Sections 3 and 4 of the Act by

Toyota Kirloskar Motors Pvt. Ltd. (**Toyota Motors India**) and Uttam Toyota (**Uttam Toyota**).

It was alleged that Toyota Motors India, the Indian arm of Toyota Motor Corporation, and OP-2, an authorized dealer, engaged in unfair practices by arbitrarily extending the delivery timeline of Informant's booked car, with some customers receiving their cars ahead of schedule. Additionally, it was alleged that the Direct Sales Agents offered expedited delivery for a premium, creating artificial scarcity and imposing Resale Price Maintenance (**RPM**), charging excess prices, and imposing additional costs and conditions on buyers to purchase accessories, potentially violating Sections 4(2)(a), 4(2)(c), and 3(4) of the Competition Act. The Informant sought various reliefs, including an investigation by the Director General, a cease-and-desist order against abuse of dominant position, disclosure of booking and delivery data, penalties for violations, and other appropriate orders.

The CCI noted that such allegations are an inter se dispute between the Informant, Toyota Motors and Uttam Toyota and do not have market-wide anti-competitive ramifications. The CCI noted that the long waiting period cannot be the subject matter of antitrust scrutiny as they are dependent upon various factors. Further, price is an outcome of demand and supply forces in the market and consumer preferences and the Informant failed to highlight whether such prices have overtone of being 'unfair' or 'discriminatory' in terms of the provisions of the Competition Act.

Moreover, regarding allegations of RPM, the CCI noted that the Informant did not substantiate his allegation by way of any evidence to show the existence of any agreement as required under Section 3(4) of the Competition Act (anti-competitive agreements) and accordingly, dismissed the information.

### **COMBINATION ORDERS**

#### **1. THE CCI APPROVED AMAZON ASIA'S ACQUISITION OF 76% SHAREHOLDING IN FRONTIZO AND SALE OF APPARIO TO CLICKTECH**

The CCI approved acquisition of 76% of the equity shareholding in Frontizo by Amazon Asia-Pacific from Zodiac Wealth Advisors LLP (**Zodiac**), followed by acquisition of Appario Retail Private Limited's (**Appario**) entire business, as a going concern, by Clicktech Retail Private Limited (**CRPL**). The combination also comprises of an acquisition of a minority, non-controlling shareholding of 1% by Haverl LLC (**Haverl**) in New Trends Commerce Private Limited (**NTCPL**) and intra group transactions among Clicktech Enterprise Private Limited (**CEPL**), NTCPL and CRPL.

Amazon Asia-Pacific acts as the seller of record for distribution of digital kindle content to end-customers in India and some of the Amazon Affiliates are engaged in the Indian retail market and wholesale (B2B) sales in India. Frontizo is engaged in the business of providing customer support services through email, chat and telephone on the online marketplace operated by the

Amazon Affiliates. Frontizo's wholly owned subsidiary, Appario, is engaged in retail (B2C) business and wholesale (B2B) sales in India, and currently offers for sale products to customers on the Amazon India Marketplace. Haverl is engaged in the business of making and holding investments. CEPL is the parent/holding entity of NTCPL which is the parent entity of CRPL. CRPL is engaged in B2C and B2B sale of products to customers on the Amazon India Marketplace.

#### **2. THE CCI APPROVED ALLOTMENT OF EQUITY STAKE IN AAKASH EDUCATIONAL SERVICES LIMITED TO MANIPAL HEALTH SYSTEMS PRIVATE LIMITED**

The CCI approved the allotment of identified equity stake in Aakash Educational Services Limited (**Aakash/Target**) to Manipal Health Systems Private Limited (**Manipal/Acquirer-1**) and the right to seek transfer of certain equity shares to MEMG Family Office LLP (**MEMG/Acquirer-2**). Manipal is engaged in the business of running / managing hospitals and providing healthcare services. MEMG belongs to the Pai Family Group and is engaged in the provision of consultancy services in India. Aakash is a public unlisted limited company incorporated in India and is engaged in providing various coaching services through multiple modes such as classroom-based coaching, online learning, distance learning and hybrid learning programmes.

3. THE CCI APPROVED THE ACQUISITION OF 16.12% SHAREHOLDING OF SHRIRAM GI HOLDINGS PRIVATE LIMITED BY SANLAM EMERGING MARKETS (MAURITIUS) LIMITED

The CCI approved the acquisition of 16.12% shareholding of Shriram GI Holdings Private Limited (SGIH) by Sanlam Emerging Markets (Mauritius) Limited (SEMM) from TPG India Investments II, Inc, Mauritius which holds 9.44% shareholding and Shriram Ownership Trust which holds 6.68% shareholding. SGIH is the promoter and holding company of Shriram General Insurance Company Limited (SGIC) and holds 66.64% shareholding. SEMM is the strategic partner of the Shriram Group which already holds a 40.70% shareholding in Shriram Capital Private Limited (the holding company of SGIH) and 22.92% shareholding directly in Shriram General Insurance Co. Ltd. The proposed acquisition will result in increase of shareholding held by SEMM above 50% in SGIC.

4. THE CCI APPROVED THE ACQUISITION OF CONTROL OF ARJAS STEEL PRIVATE LIMITED AND ARJAS MODERN STEEL PRIVATE LIMITED

The CCI approved the proposed acquisition of an indirect controlling acquisition of Arjas Steel Private Limited (ASPL) and its wholly owned subsidiary, Arjas Modern Steel Private Limited (AMSPL), by Sandur Manganese & Iron Ores Limited (SMIORE) and BAG Holdings Private Limited (BHPL). SMIORE is a publicly listed firm which primarily operates in the mining of iron and manganese ores, along with the production

and sale of ferroalloys and coke in India. BHPL, an affiliate of SMIORE, is a newly formed entity without any revenue activities globally. ASPL and AMSPL are involved in manufacturing steel products and intermediate goods like billets.

5. THE CCI APPROVED PLATINUM POPPY C 2024 RSC LIMITED'S ACQUISITION OF SHARES IN BERHYANDA LIMITED AND BERHYANDA MIDCO LIMITED

The CCI approved Platinum Poppy C 2024 RSC Limited's (Platinum Poppy) acquisition of ordinary shares in, and extension of shareholder debt to Berhyanda Limited and Berhyanda MidCo Limited, in furtherance of which an indirect non-voting economic interest in Suven Pharmaceuticals (Suven), as Berhyanda holds a 50.1 percent stake in Suven. Platinum Poppy, a restricted scope company incorporated in the Abu Dhabi Global Market, was established solely for investing in Berhyanda entities. Berhyanda Limited and Berhyanda MidCo Limited, managed by Advent International, serve as investment holding companies. Suven Pharmaceuticals, a publicly traded Indian company, specializes in the manufacture and sale of active pharmaceutical ingredients and intermediates and offers contract development and manufacturing services.



6. THE CCI APPROVED DIXON TECHNOLOGIES' ACQUISITION IN SMARTU INDIA PRIVATE LTD.

The CCI approved the acquisition of 56% shareholding along with certain control rights by Dixon Technologies (India) Limited's (Dixon) in Ismartu India Pvt. Ltd. (Target). Dixon (through various subsidiaries and joint ventures in India) is involved in the business of providing Engineering and

Manufacturing Services (EMS) including EMS for communication devices, lighting solutions, washing machines etc. The Target is the Indian subsidiary of Ismartu Ind. Pte. Limited and is involved in the business of providing EMS, in relation to the manufacturing mobile phones, Printed Circuit Board Assembly, LCD Module display and other ancillary services for mobile phones.

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