



JSA Newsletter Competition Law



December 2021

Contents

High Court

Madras High Court upholds CCI's investigation against Tamil Nadu Discom

National Company Law Appellate Tribunal

NCLAT stays CCI order imposing penalty of INR 751.8 crores on United Breweries

Competition Commission of India

Enforcement

- CCI orders investigation against Apple for indulging in abuse of dominant position
- CCI dismisses case against Yamaha for indulging in alleged abuse of dominant position
- CCI dismisses case against Intel Corporation for indulging in alleged abuse of dominant position

Merger Control

- CCI imposes a penalty of INR 202 crores on Amazon for gun-jumping and suppressing material information; suspends Amazon/ Future Coupon deal
- CCI approves acquisition of majority shareholding of ASK Investment Managers by Blackstone group
- CCI approves acquisition of sole control of Parexel by EQT Fund and Goldman Sachs
- CCI approves acquisition of sole control of Exide Life Insurance by HDFC Life Insurance
- CCI approves acquisition of sole control of worldwide healthcare BPO business of Hinduja Global Solutions by Baring
- CCI approves internal restructuring of the TVS group

Media Updates

- MoU signed between CCI and Competition Commission of Mauritius

High Courts

Madras High Court upholds CCI's investigation against Tamil Nadu Discom

The Madras High Court (MHC) dismissed the writ petition filed by Tamil Nadu Generation and Distribution Corporation Limited (**Tamil Nadu Discom**) *inter alia* challenging the order passed by the Competition Commission of India (CCI), ordering investigation against it for alleged abusing its dominant position.

Brief Background

Southern India Engineering Manufacturers' Association filed a complaint before the CCI alleging that Tamil Nadu Discom *inter alia* abused its dominant position by imposing discriminatory conditions in the sale of electricity as it charged the industries located in Chennai at a significantly reduced rate of INR 5.5 per unit as compared to the industries located outside Chennai from which it charged INR 15 per unit thereby resulting in escalated operational cost for industries located outside Chennai. On October 8, 2013, the CCI passed a *prima facie* ordering investigation against the conduct of Tamil Nadu Discom.

Aggrieved by the *prima facie* order, Tamil Nadu Discom filed a writ petition before the MHC on the grounds that: (i) the CCI lacks jurisdiction to adjudicate the matter as the allegations squarely fall within the domain of Electricity Act, 2003 (**Electricity Act**), and therefore, Tamil Nadu Electricity Regulatory Commission (**TNERC**) has the sole power to adjudicate the matter; and (ii) effective redressal mechanism is prescribed under the Electricity Act, which is a special law and therefore, it will have an overriding effect over the Competition Act, which is a general law.

MHC Observations

The MHC dismissed the writ petition and *inter alia* held that the Electricity Act do not confer powers to the TNERC to investigate allegations related to abuse of dominant position which are specifically enshrined under the Competition Act and therefore, there are no overlaps between the provisions of the Electricity Act and Competition Act. In the absence of any overlap, the jurisdiction of the CCI cannot be ousted.

(Source: *MHC Order dated December 22, 2021*)

National Company Law Appellate Tribunal

NCLAT stays CCI order imposing penalty of INR 751.8 crores on United Breweries

On [September 24, 2021](#), the CCI passed an order holding United Breweries Limited (**United Breweries**), Carlsberg India Private Limited, SABMiller India Private Limited / Anheuser Busch InBev SA/NV, All India Brewers' Association (including their office bearers) guilty of indulging in cartelisation in relation to the sale and supply of beer in various states and union territories of India, in contravention of Section 3(3) of the Competition Act and, *inter alia*, imposed a penalty of INR 751.8 crore (USD 101 million) on United Breweries (**Impugned Order**).

Aggrieved, United Breweries filed an appeal challenging the Impugned Order before the National Company Law Appellate Tribunal (**NCLAT**). On December 22, 2021, the NCLAT passed an interim order staying the operation of the Impugned Order until adjudication of the appeal by the NCLAT subject to deposit of 10 per cent of the penalty amount imposed on United Breweries.

(Source: *NCLAT Order dated December 22, 2021*)

Competition Commission of India

Enforcement

CCI orders investigation against Apple for indulging in abuse of dominant position

The CCI received a complaint from Together We Fight Society¹ against Apple Inc., Apple India Private Limited² and Apple Distribution International Limited³ (collectively referred to as '**Apple**') for imposing unfair conditions in accessing its app store.

The complainant *inter alia* alleged that Apple: (i) forced app developers to sign one-sided contracts; (ii) mandated app developers to use Apple's in-app payment solution for distributing their apps on the Apple app store and charged app developers a commission of up to 30 per cent commission as processing fee; and (iii) did not allow third party app store to be listed on the Apple devices.

On the issue of relevant market, the CCI noted that app developers are dependent on the app stores to reach the app users. The app stores are developed to work on a particular OS (i.e., iOS or Android) and the consumer i.e., app developer or the device user, cannot use app store developed for another OS to offer the app or download the app, as the case may be. Accordingly, the CCI delineated the relevant market as the '*market for app stores for iOS in India*' (**Relevant Market**). This Relevant Market will include all app stores developed for iOS ecosystem.

On the issue of dominant position, the CCI noted that Apple held a monopoly position in the Relevant Market as Apple's app store is the only means for: (i) developers to distribute their apps to consumers using Apple devices; and (ii) Apple device users to download apps for their devices, with no alternative app store options.

On abuse of dominant position, the CCI *inter alia* noted that Apple's conduct resulted in: (i) potentially higher prices of in-app purchases to the users; (ii) restriction of choice to app developers to select a payment processing system of their choice and from using alternate payment gateways at a competitive rate; (iii) foreclosure of the market for app stores for iOS users for potential app distributors; and (iv) limiting and restricting technical or scientific development of the services related to app store for iOS. Accordingly, the CCI referred the matter to the Director General (**DG**) for investigation.

(Source: CCI Order dated December 31, 2021)

CCI dismisses case against Yamaha for indulging in alleged abuse of dominant position

The CCI received a complaint against Yamaha Motors Company Limited and India Yamaha Motors Private Limited (**Yamaha**) alleging abuse of dominant position.

The complainant, a dealer of Yamaha for sale of motorcycles in the State of Tamil Nadu, *inter alia* alleged that certain clauses of the dealership agreement are anti-competitive/ abusive as: (i) it restrains complainant to sell motorcycles other than those manufactured by Yamaha, thereby making the complainant solely dependent on Yamaha; (ii) Yamaha has the sole discretion to terminate the dealership without assigning any reasons; and (iii) Yamaha has the power to appoint another dealer within the same geographical area where a dealer is already operating.

The CCI defined the relevant market as '*market for manufacture and sale of motorcycles in the territory of India*' (**Relevant Market**) and noted that the market share of Yamaha in the Relevant Market is less than 10 per cent with presence of several other significant players like Hero, Bajaj, TVS, Honda etc. Therefore, Yamana cannot be said to be

¹ It is a non-governmental organisation.

² It is in charge of sales, marketing and support of Apple branded products in India.

³ It makes available, Apple-owned apps, content and services in its own name and on its own account to consumers and is responsible for the app store.

having a dominant position in the Relevant Market. Ergo, there arises no case for assessing the alleged abuse of dominant position by Yamaha. Accordingly, the CCI dismissed the case.

(Source: *CCI Order dated December 31, 2021*)

CCI dismisses case against Intel Corporation for indulging in alleged abuse of dominant position

In 2018, the CCI received a complaint from Velankani Electronics Private Ltd. (**Complainant**)⁴ against Intel Corporation (**Intel Corporation**)⁵ alleging abuse of dominant position.

The Complainant intended to design its server for which it sought to manufacture a server board compatible with the processor of Intel. For this purpose, the Complainant approached Intel Corporation to get access to its reference design files, information and simulation files of server-boards (collectively referred to as '**Files**'). However, the same was allegedly denied by Intel Corporation.

Aggrieved, the Complainant approached the CCI *inter alia* alleging that Intel Corporation is dominant in the market for processors, and it has abused its dominant position by: (i) refusing access to the Files which has led to denial of market access to the Complainant; (ii) restricting the production of servers and limiting its technical/scientific development; and (iii) leveraging its dominant position in the market for processors for servers to protect the market of servers. The CCI referred the matter to the DG for investigation.

The DG observed that Intel Corporation is dominant in the '*market for processors for servers in India*' and but noted that there was no denial of market access or restriction of production of servers given that the complete set of Files were provided by Intel Corporation to the Complainant and the same were sufficient to develop the server boards as per Complainant's own experts.

The CCI agreed with the findings of the DG and concluded that, the requisite Files were provided to the Complainant. Therefore, there is no denial of market access by Intel Corporation. Accordingly, the CCI dismissed the case.

(Source: *CCI order dated December 3, 2021*)

Merger Control

CCI imposes a penalty of INR 202 crores on Amazon for gun-jumping and suppressing material information; suspends Amazon/ Future Coupon deal

On December 17, 2021, in an unprecedented move, the CCI suspended the approval granted to Amazon's acquisition of 49 per cent equity share capital of Future Coupons Private Limited (**Future Coupons**) and imposed a penalty of INR 202 crores (USD 27.19 million) for gun-jumping and suppressing material information.

Brief Background

On September 23, 2019, Amazon filed a notice for acquisition of 49 per cent equity share capital of Future Coupons which was approved by the CCI on November 28, 2019 (hereinafter referred to as '**Transaction**'). For the Transaction, the parties entered into a share subscription agreement and shareholders agreement dated August 22, 2019.

⁴ It is engaged in the business of designing and manufacturing electronic products in India, including servers. It was also engaged in assembly of server by putting together various subassemblies and sold the server in the market for which it entered into a Manufacturing Enablement and Licensing Agreement with Intel.

⁵ It is a leading multi-national corporation and technology company manufacturing a wide range of information technology components, semiconductors, peripherals, computer systems and electronic devices relating to communication and computing.

Prior to execution of the Transaction, Future Coupons acquired equity warrants of Future Retail Limited (**FRL**), convertible into equity shares representing 7.30 per cent equity share capital of FRL (**Warrants Transaction**), and (ii) pursuant to the Warrants Transaction, Future Coupons, FRL and certain promoters belonging to the Future Group entered into a shareholders' agreement dated August 12, 2019, with respect to FRL (**FRL SHA**).

Commercial Arrangements

Amazon and Future group companies had certain existing and potential business arrangements (Collectively referred to as '**Commercial Arrangements**')⁶.

In the notice to the CCI, Amazon submitted that the Commercial Arrangements and the FRL SHA were not connected with the Transaction. Further, Amazon has limited investor protection rights in Future Coupons to protect its investment. While all decisions with respect to Future Coupon's investment in FRL will be taken by the board of directors of Future Coupons, however, with a view to protect Amazon's investment in Future Coupon, certain rights have been granted to Amazon with respect to Future Coupon's investment in FRL. However, these rights can be exercised only through Future Coupon, and not directly by Amazon. Importantly, these rights have been derived from the rights granted to Future Coupon in terms of the FRL SHA which was negotiated by the Promoters, Future Coupons and FRL, independent of the Transaction, and with a view to unlock value for Future Coupons.

Future Coupon's Complaint to the CCI

On March 25, 2021, Future Coupons filed an application before the CCI stating that Amazon had initiated arbitration and court proceedings in relation to transfer of assets of FRL to Reliance Retail Ventures Limited and Reliance Retail and Fashion Lifestyle where Amazon took contradictory stand than the one taken before the CCI in relation to the FRL SHA. Before the arbitrator, Amazon submitted that the FRL SHA is linked to the Transaction whereas before the CCI, it said it was not. Further, Future Amazon concealed certain material information from the CCI. Accordingly, on June 4, 2021, the CCI issued a show cause notice to Amazon asking it to explain its conduct.

CCI's Decision

The CCI relied on the internal correspondence within the Amazon group including e-mail dated July 18, 2019, sent to Mr. Jeff Bezos for the Transaction, to understand the intent behind the Transaction and noted that:

- 1) **Strategic Interest Over FRL:** Amazon had earlier intended to acquire approx. 10 per cent in FRL directly as well as enter into a business commercial framework to establish a strategic partnership with Future group. However, the said acquisition could not be implemented. Therefore, through the Transaction, Amazon indirectly (through Future Coupon) sought to acquire equity share capital of FRL. The CCI noted that when a strategic acquisition is contemplated to achieve synergies amongst the business activities of acquirer and target enterprise through acquisition of shareholding or integration of whole/part of their business or commercial contracts/arrangements or a combination of these, any right accruing to acquirer pursuant to such acquisition would be beyond, mere investor protection.

⁶ (i) Business arrangement between FRL and Amazon Seller Services Private Limited that govern the listing of the products of FRL, on the Amazon India marketplace; (ii) agreement dated August, 21, 2019 between Amazon Retail India Private Limited (**ARIPL**) and Future Consumer Limited for supply of, *inter alia*, food category to ARIPL; and (iii) memorandum of understanding dated August 21, 2019, between Amazon Pay (India) Private Limited and FRL to offer the option of making payments through Amazon Pay.

2) **Inter-connected Transactions:** FRL SHA and Commercial Agreements were negotiated as part of the Transaction and were inter-connected to the Transaction but were not disclosed as such in the notice to the CCI.

Accordingly, the CCI imposed a penalty of INR 2 crores for suppressing the actual scope and purpose of the Transaction and INR 200 crores for failure to notify the acquisition of strategic interest over FRL and Commercial Arrangements as an inter-connected step to the Transaction. Further, the CCI has directed Amazon to file the notice for the Transaction in a long form format and until the CCI has taken a decision on the said notice, the approval granted to Amazon for the Transaction has been suspended.

Till date, the highest fine imposed by the CCI in respect of combinations including for false representations and gun-jumping, i.e., closing transactions (in part or full) without seeking CCI approval was INR 5 crore. With this order, the CCI has substantially raised the bar for penalties for gun-jumping and suppression of material information.

(Source: [*CCI Order dated December 17, 2021*](#))

CCI approves acquisition of majority shareholding of ASK Investment Managers by Blackstone Group

The CCI approved the acquisition of up to 71.25 per cent equity share capital along with certain rights in ASK Investment Managers Limited (**ASK**)⁷ by the Blackstone group⁸ (referred to as the '**Proposed Transaction**').

The CCI noted that there are horizontal overlaps between the activities of the portfolio companies of Blackstone group and ASK in the: (i) market for the provision of loans and lending services and the narrow segment for the provision of retail loans, in India and (ii) market for the distribution of insurance products in India. However, given the low market shares of the parties in the markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

Further, the CCI noted that there is a potential complementary link between the activities of the parties as ASK is engaged in the activity of investment advisory services and can offer guidance for investing in real estate projects to the relevant portfolio companies of Blackstone group⁹, that are engaged in the provision of housing finance and can provide the necessary financing for acquiring such real estate projects. However, given that the parties provide services to different categories of customers, the complementary link between the parties is insignificant. Accordingly, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

(Source: [*CCI Order dated 15 November 2021*](#))

CCI approves acquisition of sole control of Exide Life Insurance by HDFC Life Insurance

The CCI approved the acquisition of 100 per cent equity share capital and sole control of Exide Life Insurance Company Limited (**Exide**)¹⁰ by HDFC Life Insurance Company Limited¹¹ (referred to as the '**Proposed Transaction**')¹².

⁷ It is an asset and wealth management company incorporated in India.

⁸ It made the acquisition in ASK through its portfolio company, BCP TopCo XII Pte Ltd. (**BCP TopCo**). BCP TopCo. is a newly created entity incorporated in Singapore.

⁹ Aadhar Housing Finance Limited and Fino Paytech Limited

¹⁰ It is a wholly owned subsidiary of Exide Industries and a life insurance company registered with the Insurance Regulatory Development Authority of India (**IRDAI**). It offers various individual and group life insurance products.

¹¹ It is a life insurance company registered with the IRDAI. It is a joint venture between n HDFC Limited and Standard Life Aberdeen. It provides a range of individual and group life insurance solutions.

¹² In consideration, Exide would receive 4.1 per cent equity share capital of HDFC Life Insurance Company Limited. Subsequently, Exide will merge with and into HDFC Life Insurance Company Limited such that HDFC Life Insurance Company Limited would be the only surviving entity.

The CCI noted that there are horizontal overlaps between the activities of the parties in the market for: (i) life insurance products and services in India; and (ii) health-related products constituting of riders and defined fixed benefits in India. However, given the low market shares of the parties in the markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

(Source: *CCI Order dated 2 November 2021*)

CCI approves acquisition of minority shareholding of HDFC ERGO by HDFC Bank

The CCI approved the acquisition of 4.99 per cent equity share capital of HDFC ERGO General Insurance Company Limited¹³ by HDFC Bank Limited (referred to as the '**Proposed Transaction**').

The CCI noted that there are no horizontal overlaps or existing vertical relationships between the activities of the parties. However, there are potential vertical links between the activities of parties in the upstream market for general/ non-life insurance products in India and the downstream market for the distribution of such products in India. However, given the insignificant presence of parties in the markets with presence of several key competitors, the Proposed Transaction is not likely to raise foreclosure concerns.

(Source: *Order dated October 25, 2021*)

CCI approves acquisition of sole control of Parexel by EQT Fund and Goldman Sachs

The CCI approved the acquisition of 100 per cent equity share capital and sole control of Parexel International Corporation (**Parexel**)¹⁴ by Phoenix Parentco, Inc., a special purpose vehicle jointly owned and controlled by EQT Fund Management S.à r.l.¹⁵ and the Goldman Sachs¹⁶ (referred to as '**Proposed Transaction**').

The parties submitted that Parexel is mostly engaged in providing services to its group companies. If turnover generated from providing services to its group companies is excluded, the Proposed Transaction is not notifiable to the CCI. For the first time, the CCI has provided guidance with respect to treatment of intra-group turnover for the purposes of examining financial thresholds for analysing filing requirement of a transaction with the CCI. In this regard, the CCI clarified that:

- 1) Import Turnover:** Turnover originating from outside India and terminating in India i.e., import turnover is to be taken into account since it represents the value of business relatable to India.
- 2) Intra Group Export Turnover:** If a company sells goods or provides services to its group company, and that group company makes further/ onward sale of such goods or services to a third party, the revenue of such further/ onward sales is required to be included for calculating the Indian turnover.

The CCI noted that there are horizontal overlaps between the activities of Goldman Sachs (through its portfolio companies) and Parexel in the market for provision of clinical research services in India. However, given the low market shares of the parties in the market, the CCI noted that Proposed Transaction is not likely to raise competition concerns.

(Source: *CCI Order dated October 25, 2021*)

¹³ It is a joint venture between HDFC and ERGO International AG and is engaged in general' non- life insurance business.

¹⁴ It is headquartered in Durham, USA and provides biopharmaceutical outsourcing services to biopharmaceutical companies globally. Biopharmaceutical outsourcing services provided by Parexel in India include: (i) clinical research organization services; (ii) real world evidence services; and (iii) healthcare consulting services.

¹⁵ Acting as fund manager for and on behalf of the entities forming the investment fund EQT IX.

¹⁶ Through funds managed by Goldman Sachs & Co. LLC, a wholly owned subsidiary of The Goldman Sachs Group, Inc.

CCI approves acquisition of sole control of worldwide healthcare BPO business of Hinduja Global Solutions by Baring

The CCI approved the acquisition of 100 per cent equity share capital of the worldwide healthcare business process outsourcing (**BPO**) services of Hinduja Global Solutions Limited¹⁷, along with certain assets, contracts, and employees (**Target Business**) by Baring Private Equity Asia Pte. Ltd. (**Baring**)¹⁸ (referred to as '**Proposed Transaction**').

The parties submitted that the Target Business does not offer any services to customers located in India and therefore, there is no question of mapping horizontal overlaps between the activities of Target Business and portfolio companies of Baring, in India. To this, the CCI noted that the Target Business located in India but supplying to customers outside India, can exert competition constraints to suppliers that offer services in the domestic market.

Further, the CCI noted that Baring is proposing to acquire equity share capital of Global Content Alpha Partners Holdco Pte. Ltd (**GCAPH**)¹⁹ which also provides Information Technology (**IT**) and IT- enabled services (**ITeS**) services and more specifically BPO services. Accordingly, while doing competition assessment of the Proposed Transaction, the CCI also took the said acquisition into consideration.

The CCI noted that there are horizontal overlaps between the activities of Baring Group (including its portfolio companies and GCAPH) and Target Business in the: (i) market of provision of IT and ITeS services; (ii) provision of BPO services; and (iii) provision of BPO services in the healthcare segment. However, given the low market share of the parties in the markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

(Source: Order dated October 18, 2021)

CCI approves internal restructuring of the TVS group

The CCI approved the internal restructuring of TV Sundaram Iyengar & Sons Private Limited (**TVSS**) group pursuant to a Memorandum of Family Arrangement entered between various families of TVS group (referred to as the '**Proposed Transaction**').

TVSS is the ultimate holding company of the TVS group which is jointly owned and controlled by four family groups²⁰ with each holding 25 per cent equity share capital in TVSS. The various businesses housed in and operated by TVSS (directly or indirectly) have been traditionally managed and operated by a particular family group notwithstanding the shareholding of the other family groups in such business.

Pursuant to the Proposed Transaction, a particular family group which is presently managing and operating the business (through TVSS) will acquire sole control over such business, with non-managing family group holding only ordinary shareholder rights in such business.

Given that the Proposed Transaction involved a change in control, the CCI mapped overlaps between the affiliates of the: (i) family holding companies; and (ii) shareholders of the families' holding companies on one hand, and the respective target business/entities that each family group was acquiring, on the other hand. Accordingly, the CCI noted that there are horizontal overlaps between the activities of the parties in the: (i) broad market for manufacture and sale of yarn and the narrow market of manufacture and sale of cotton yarn; and (ii) market for the manufacture and sale of injection moulded/automotive plastic components. However, given the low market share of the parties in the markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

¹⁷ It is engaged *inter alia* engaged in the business of providing: (i) healthcare member lifecycle management services; (ii) healthcare provider lifecycle management services; (iii) healthcare claims benefits management services; (iv) healthcare medical cost management services; and (v) healthcare revenue cycle management services.

¹⁸ Through Betaine B. V. which is an entity owned and controlled by Baring Asia Private Equity Fund VIII, a fund affiliated with Baring.

¹⁹ A separate notice for this transaction was filed by the parties before the CCI.

²⁰ Krishna Family Group, Santhanam Family Group, Srinivasan Family Group, Balaji Family Group.

JSA represented the TVS group before the CCI.

(Source: CCI Order dated 11 October 2021)

Media Updates

MoU signed between CCI and Competition Commission of Mauritius

The Government of India approved the memorandum of understanding (**MoU**) between the CCI and the Competition Commission of Mauritius to promote and strengthen cooperation in competition law and policy, through exchange of information, technical cooperation, experience sharing and enforcement cooperation. The MoU is expected to: (i) address anti-competitive restraints affecting international trade; (ii) improve enforcement of the Competition Act; (iii) promote understanding of competition policy; and (iv) enhance capacity building and bring diplomatic benefits.

(Source: PMINDIA)

For more details, please contact km@jsalaw.com



Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi

This update is not an advertisement or any form of solicitation and should not be construed as such. This update has been prepared for general information purposes only. Nothing in this update constitutes professional advice or a legal opinion. You should obtain appropriate professional advice before making any business, legal or other decisions. JSA and the authors of this update disclaim all and any liability to any person who takes any decision based on this publication.