



JSA Newsletter Competition Law



March 2022

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High Court

Bombay High Court stays CCI's investigation against debenture trustees and their Association

The High Court of Bombay (**BHC**) granted interim relief to IDBI Trusteeship Services Limited, Axis Trustee Services Limited, SBICAP Trustee Company Limited (collectively referred to as '**DTs**'), and their association, Trustees' Association of India (**TAI**) (collectively referred to as the '**Petitioners**'), thereby staying the Competition Commission of India's (**CCI**) investigation initiated against them for alleged cartelization.

Brief Background

Muthoot Finance Limited (**MFL**), filed the information with the CCI wherein it *inter alia* contended that the DTs under the aegis of TAI have allegedly fixed, and exorbitantly increased the trusteeship fee charged by the DTs for providing trusteeship services to bond issuers.

Based on such information, the CCI directed Director General (**DG**) to investigate the matter (hereinafter referred to as the '**CCI Order**'). Before filing the information with the CCI, MFL approached the Securities Exchange Board of India (**SEBI**) raising the same/ similar issues against the Petitioners.

In the meanwhile, SEBI informed the CCI and the DG that it is examining the issue raised by MFL and requested the CCI/ DG to hold off its investigation against the Petitioners. Despite the same, the CCI continued with the investigation,

Aggrieved, the Petitioners approached the BHC contended that they are governed by SEBI, being the sectoral regulator, under the SEBI Act, 1992 and the relevant regulations. Further, in terms of the judgment of the Supreme Court in *CCI v Bharti Airtel*¹ (**Bharti Airtel Judgment**), it is only after a sectoral regulator return findings which lead to the *prima facie* conclusion that any anti-competitive conduct has occurred, can CCI's jurisdiction be activated.

On April 11, 2022, the BHC granted interim relief to the Petitioners thereby staying the CCI's investigation. Further, it directed SEBI to complete its inquiry and form its *prima facie* view within two months.

This is the first case where a high court will examine the interplay of jurisdiction between the CCI and SEBI.

JSA represented the Petitioner before the BHC.

(Source: BHC Order dated 8 April 2022 and 11 April 2022)

Competition Commission of India

Enforcement

CCI dismisses case against automobile manufacturers for indulging in alleged anti-competitive practices

The CCI received a complaint² against Maruti Suzuki India Limited, Tata Motors Limited, Hyundai Motor India Limited, Hero MotoCorp Limited, Mahindra and Mahindra Limited, and Toyota Kirloskar Motor Private Limited (collectively referred to as '**Automobile Manufacturers**') for indulging in alleged anti- competitive practices.

The complainant *inter alia* alleged that the Automobile Manufacturers discriminated among consumers/policyholders wherein they denied cashless insurance claims to consumers/ policyholders if they purchase insurance policies from third parties and not from their insurance partners/brokers.

The CCI noted that there is no requirement of defining the relevant market and ascertaining dominance of the Automobile Manufactures as there is presence of significant players who manufacture different categories of passenger vehicles. Further, there are various insurance broking companies who compete for selling insurance policies and consumers have an option of buying insurance policy from alternative sources. Accordingly, the CCI dismissed the case.

(Source: CCI Order dated March 22, 2022)

¹ (2019) 2 SCC 521

² From Manav Shiva Dham, a non-government organisation.

CCI closes suo motu inquiry against Amazon for allegedly manipulating search results

In October 2021, the CCI *suo motu* initiated an inquiry against Amazon Seller Services Private Limited (**Amazon**) based on a [news report dated October 13, 2021](#) published by Reuters alleging that Amazon is running a systematic campaign of creating counterfeit products and manipulating search results to boost its own product lines in India.

Basis the news report, the CCI directed Amazon to submit certain documents and file its response to the news report. Based on the response received from Amazon, the CCI noted that: (i) Amazon, which operates an online marketplace 'Amazon', neither owns nor sells any product, including products of Amazon brands, and it is the sellers that offer all products including Amazon brands, to customers; (ii) Amazon's gross sales from sale of Amazon branded products is insignificant i.e., 1.26 per cent of the total sales and hence, it does not have any incentive to give preferential treatment to Amazon branded products; and (iii) search listing/ranking criteria is applied uniformly to all products listed on the Amazon platform based on various factors. The process is completely automated and is seller agnostic. Accordingly, the CCI decided to not proceed with the inquiry.

(Source: CCI Order dated March 11, 2022)

CCI dismisses case against the online platform, Shopee for indulging in alleged abuse of dominant position

The CCI received a complaint against Sppin India Private Limited (**Shopee**) alleging abuse of dominant position. Shopee, which was launched in November 2021 and is engaged in facilitating third-party sellers to sell their goods on its online marketplace, which are available to consumers throughout India.

The complainant *inter alia* alleged that Shopee is offering deep discounts on its e-commerce platform on various products and indulging in predatory pricing.

The CCI noted that: (i) Shopee is a new entrant in the market of online platforms in India and does not have market power; and (ii) there are various established players in the said market such as Amazon, Flipkart, Myntra, Nykaa etc. Accordingly, Shopee cannot be said to be having a dominant position. Accordingly, the CCI dismissed the case.

(Source: CCI Order dated March 3, 2022)

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

The CCI received a complaint from Cryogas Equipment Private Limited (**Complainant**)³ against Inox India Private Limited (**Inox**)⁴ alleging abuse of dominant position.

In 2019, the Complainant began manufacturing liquified natural gas (**LNG**) semi-trailers⁵ and devised a design specific to its clients' requirements. Inox had been manufacturing semi-trailers, for twelve years.

The Complainant *inter alia* alleged that Inox being a dominant player with 60 per cent market share: (i) maliciously instituted a civil suit against the Complainant claiming infringement of Inox's copyright over drawings of LNG semi-trailers, which was sham litigation to oust the Complainant from the market; and (ii) issued threatening communications to the customers of the Complainant which led the customers cancelling their agreements with the Complainant thereby causing it losses.

The CCI noted that litigation by a dominant enterprise against a competitor to cause anti-competitive harm by the inappropriate use of adjudicatory processes or legal rights may be termed as sham litigation. To determine whether litigation or legal recourse is an abusive strategy by a dominant player (i.e., sham litigation), a complainant needs to establish that: (i) a case filed against an enterprise on an objective view is baseless and appears to be an instrument to harass the enterprise; and (ii) the legal action appears to be conceived with an anti-competitive intent to eliminate competition in the market needs to be examined.

³ The Complainant is *inter alia*, engaged in the manufacture, supply and export as well as engaged in providing solutions with regard to air, gas and LNG. It is also engaged in gas distribution.

⁴ It is a business conglomerate. The Inox group is *inter alia* engaged in activities pertaining to industrial gases, manufacturing refrigerants, fluorochemicals, polytetrafluoroethylene, cryogenic equipment, LNG storage and distribution equipment, wind turbine renewable energy and building multiplexes in India.

⁵ They are trailers that are designed for large volume transportation of LNG over long distances.

In the instant case, the CCI noted that, the litigation initiated by Inox against the Complainant does not appear to be sham litigation but only a competent court can decide the same. Further, there is no requirement of defining a relevant market and assessing the dominance of Inox, as this may not be a fit case warranting an investigation at this stage. Accordingly, the CCI dismissed the case.

(Source: CCI Order dated March 3, 2022)

CCI orders investigation against Star, Disney, and Asianet for indulging in the alleged abuse of dominant position

The CCI received a complaint from a multi-system operator⁶, against Star India Private Limited (**Star**) (including its subsidiaries namely Disney Broadcasting (India) Limited (**Disney**) and Asianet Star Communications Private Limited (**Asianet**) for indulging in the alleged abuse of dominant position. Star, Disney and Asianet are collectively referred to as the '**Broadcasting Companies**'⁷.

The complainant *inter alia* alleged that Star: (i) offered additional discounts to its competitors including Kerala Communicators Cable Limited (**KCCL**) in the form of promotion and advertisement payments, thereby, giving them an unfair advantage in the market; (ii) breached the maximum permissible discounts prescribed under several regulations, issued by the Telecom and Regulatory Authority of India, by offering additional discounts to KCCL; and (iii) provided a bouquet of channels to its competitors at lesser prices resulting into denial of market access.

The CCI defined the relevant market as '*market for the provision of broadcasting services in Kerala*' (**Relevant Market**) and noted that: (i) Star appears to be dominant in the Relevant Market based on factors such as the number of channels offered, popularity, exclusivity of content, size and resources, and countervailing power; and (ii) Star appears to have abused its dominant position by indulging in price discrimination between Star and its competitors. Accordingly, the CCI directed the DG to investigate the conduct of Broadcasting Companies for alleged abuse of dominant position.

The Broadcasting Companies challenged the CCI's inquiry before the BHC on the ground that the issue needs to be first examined by the Telecom Disputes Settlement and Appellate Tribunal in terms of the Bharti Airtel Judgment. The BHC has granted interim relief to the Broadcasting Companies by directing the CCI not to take any coercive steps or adjudication or pass any orders till the next date of hearing (i.e., 8 June 2022).

(Source: CCI Order dated February 28, 2022 and BHC Order dated 6 April 2022)

Merger Control

CCI imposes a penalty of INR 15 lakh on Tata Power for gun jumping

The CCI imposed a total penalty of INR 15 lakh (USD 20,100)⁸ on Tata Power Company Limited (**TPCL**)⁹ for consummating the acquisition of 51 per cent of the equity share capital of each of: (i) Western Electricity Supply Company of Odisha Limited (**WESCO**); (ii) Southern Electricity Supply Company of Odisha Limited (**SOUTHCO**); and (iii) Central Electricity Supply Company of Odisha Limited (**CESU**) prior to receiving CCI approval (together referred to as the '**Transactions**').

Brief Background

In 2016 and 2020, the Orissa Electricity Regulatory Commission (**OERC**) initiated the competitive bidding processes for the sale of 51 per cent of the equity share capital of each of: (i) WESCO; (ii) SOUTHCO; and (iii) CESU and issued requests for proposals for the same. TPCL submitted its bids and the OERC appointed TPCL as the successful bidder for each of the Transactions.

As part of the bidding process, TPCL was required to fulfil certain conditions including: (i) payment of guarantee; (ii) depositing the consideration amount; and (iii) executing transaction documents within 30 days from the issuance of the letter of intent. TPCL fulfilled these conditions and closed the Transactions on January 1, 2021 (WESCO and SOUTHCO), and June 1, 2020 (CESU), without seeking CCI approval.

⁶ Multi-system operators receive broadcasting signals from the broadcaster for a monetary consideration for the purposes of supplying the channels of broadcaster to the end customers.

⁷ Broadcasting Companies are the broadcasters of satellite-based TV channels

⁸ USD 1= INR 74.63.

⁹ It is a public listed company engaged in power generation, transmission and distribution in India, directly and through its subsidiaries.

Subsequently, on March 30, 2021, TPCL filed three separate notices seeking approval of the CCI for the Transactions which was approved on June 7, 2021. During the review of the notices, the CCI noted that TPCL has consummated the Transactions prior to seeking its approval and accordingly issued show cause notices to TPCL seeking its responses.

TPCL *inter alia* submitted that: (i) the Transactions are different from typical commercial transactions as they are entirely regulated by the OERC under the relevant provisions of the Electricity Act, 2003 (**Electricity Act**); (ii) the OERC had exclusive jurisdiction to assess the Transactions; and (iii) in case of an apparent conflict between a general law (i.e., the Competition Act, 2002 (**Competition Act**)) and a special law (i.e., the Electricity Act), the special law will prevail.

After considering the responses, the CCI *inter alia* noted that: (i) even though OERC is a sector regulator, it does not have exclusive jurisdiction under the Electricity Act. The CCI noted that the CCI has jurisdiction to regulate combinations in the electricity sector; and (ii) in January 2021, the OERC, *vide* a letter expressly recognised the CCI's jurisdiction and directed TPCL to comply with the provisions of the Competition Act in relation to TPCL's acquisition of 51 per cent of the equity share capital of North-Eastern Electricity Supply Company of Odisha Limited.

Considering the mitigating factors such as: (i) TPCL had voluntarily filed the notices for the Transactions, and fully cooperated during the inquiry; and (ii) OERC imposed strict timelines on TPCL to comply is tender conditions, the CCI took a lenient approach and imposed a nominal penalty of INR 5 lakh (USD 6,700) on TPCL for each Transaction.

JSA represented TPCL in the Transactions before the CCI.

(Source: Orders dated March 17, 2022(Order 1, Order 2, Order 3))

CCI imposes a penalty of INR 5 lakh on Adani Green for gun jumping

The CCI imposed a penalty of INR 5 lakh (USD 6,700) on Adani Green Energy Limited (**Adani Green**) for violating the standstill obligation in relation to its acquisition of 100 per cent equity share capital of S.B. Energy Holding Limited (**Target**) (hereinafter referred to as the "**Transaction**").

Brief Background

The **Transaction** was notified to the CCI on May 20, 2021, pursuant to the execution of share purchase agreements between Adani Green and Softbank Group Capital Limited (**Softbank SPA**) and between Adani Green and Bharti Global Limited. The CCI approved the Transaction on June 30, 2021.

A clause of the Softbank SPA allowed: (i) the parties to have discussions regarding the ongoing business and operations of the Target; and (ii) Adani Green to provide its inputs on the business of the Target (**Clause**). The CCI was of the *prima facie* view that the Clause may have led to the partial consummation of the Transaction, thereby violating the standstill obligations as contained in Section 6(2A) of the Competition Act (**Standstill Obligations**).¹⁰ Accordingly, on August 14, 2021, the CCI issued a show cause notice to Adani Green seeking its response.

After considering the response, the CCI *inter alia* noted that:

1. **Inherence-Proportionality Test:** An acquirer can impose customary standstill obligations and interim arrangements on the target to ensure certainty in valuation. However, such arrangements must be consistent with the Standstill Obligations. In this case, the Clause could potentially lead to coordinated outcomes and could not be considered proportionate to the objective of preserving the economic valuation of Target.
2. **Clean Teams acting as safeguards:** Clean teams have the potential to safeguard the exchange of competitively sensitive information. For the clean teams to be effective, it is imperative for various aspects of it such as the constitution and rules to be laid down clearly and complied with. In this case, Adani Green provided no details of the clean team formed. Additionally, the Clause required Adani Green to provide inputs in the best interest of Target, which could not have been done without sharing the information with the management of Adani Green.

Accordingly, the CCI imposed a penalty of INR 5 lakh (USD 6,700) on Adani Green.

(Source: CCI Order dated March 9, 2022)

CCI approves acquisition of GSK Asia by GSK- Pfizer JV

¹⁰ A transaction will not come into effect until the CCI has approved the said transaction or 210 days have passed since the date of notification of the said transaction.

The CCI approved the acquisition of: (i) GSK consumer brands¹¹ by GlaxoSmithKline Asia Private Limited (**GSK Asia**)¹²; and (ii) 100 per cent equity share capital of GSK Asia by GSK CH HoldCo¹³, a joint venture (**JV**) between GlaxoSmithKline plc. (**GSK**) and Pfizer Inc. (**Pfizer**) (hereinafter collectively referred to as the '**Proposed Transaction**').¹⁴

The CCI noted that there are horizontal overlaps between GSK consumer brands and GSK Asia on one hand and Pfizer on the other hand, in the markets of: (i) antacids and anti-flatulent products; (ii) topical anti-rheumatic products; and (iii) calcium preparation products. However, given the low market shares of the parties with the presence of several significant players in each market, the CCI noted that Proposed Transaction is not likely to raise competition concerns.

(Source: CCI Order dated January 20, 2022)

CCI approves acquisition of majority shareholding of Eveready by Puran Associates and others under Green Channel

The CCI approved the acquisition of 51.1 per cent equity share capital of Eveready Industries India¹⁵ by Puran Associates Private Limited, MB Finmart Private Limited, VIC Enterprises Private Limited, Gyan Enterprises Private Limited and Chowdry Associates (referred to as the '**Proposed Transaction**'). The parties notified the Proposed Transaction under the Green Channel Route as there were no horizontal, vertical, or complementary overlaps between the activities of the parties in India.

(Source: Summary)

Miscellaneous

CCI amends confidentiality provisions in the General Regulations

By way of [notification dated April 8, 2022](#), the CCI has amended the confidentiality provisions in the CCI (General) Regulations, 2009 (**General Regulations**).

The key amendments to the General Regulations are as follows:

1. **Complainant's identity only to be revealed in certain cases:** The complainant's identity shall be kept confidential; however, it can be disclosed if necessary and expedient after providing a reasonable opportunity to the complainant to make its case before the CCI.
2. **Furnishing of undertaking:** Parties seeking confidentiality on any information will have to submit an undertaking certifying that the confidentiality claims are in terms of the parameters of seeking confidentiality under the General Regulations.¹⁶ Any party submitting a false undertaking will be liable to be proceeded against as per the provisions of the Competition Act.
3. **Segregation of documents/information:** All confidential documents/information including those gathered through search and seizure operations, e-mail dumps, call detail records etc. shall be marked '*confidential (search and seizure/ e-mail dumps/ call detail records etc.)*' and kept separate from the public records.
4. **Incorporation of Confidentiality Ring:**
 - a) A confidentiality ring may be set up by the CCI which will comprise the authorised representatives of the parties who will be able to access the confidential information. The CCI while setting up the confidentiality

¹¹ trademarks pertaining to 'Iodex' and 'Ostocalcium' in India along with the legal, economic, commercial and marketing rights of such brands and other associated assets housed in GlaxoSmithKline Pharmaceuticals Limited.

¹² GSK Asia, a wholly owned subsidiary (**WOS**) of GSK Pte is engaged in the marketing and distribution of over the counter (**OTC**) oral consumer healthcare products under various brand names such as 'Parodontax', 'Polident' and 'Sensodyne' and OTC medicine products under brand names such as 'Crocin' and 'ENO'. GSK Pte. is a WOS of GSK.

¹³ GSK and Pfizer hold 68 per cent and 32 per cent equity share capital in GSK CH HoldCo, respectively.

¹⁴ Effectively, by way of the Proposed Transaction, GSK Asia (which belonged to GSK group) will be transferred to GSK CH HoldCo i.e., the JV between GSK and Pfizer.

¹⁵ It is engaged in the business of marketing of batteries and flashlights and also distributes a wide range of electrical products and small home appliances.

¹⁶ The requirements are that: (i) the information is not available in the public domain; (ii) the information is known to only limited employees, suppliers, distributors and others involved in the party's business; (iii) adequate measures have been taken by the party to guard the secrecy of the information; and (iv) the information cannot be acquired or duplicated by others.

ring may decide the extent of information to be made accessible and the parties to be included in the confidentiality ring.

- b) The information will be made accessible to the members of the confidentiality ring provided they furnish an undertaking to the CCI against disclosure of such information other than for the purpose of the proceedings under the Competition Act, they shall keep the information within their sole custody and destroy the information/ once the proceedings conclude. Any party breaching the undertaking will be liable to be proceeded against as per the provisions of the Competition Act.
- c) The undertaking will also be required to be provided to other parties, whose confidential information will be accessed.
- d) The complainant will not be a part of the confidentiality ring unless considered necessary or expedient by the CCI, for effective inquiry.

CCI simplifies long-form notification for Combinations

By way of notification dated March 31, 2022, the CCI has introduced the revised format of the long form notification (**Form II**) to notify combinations, which will come into effect from May 1, 2022. The Combination Regulations prescribe two forms for filing a merger notification. All merger notifications are ordinarily required to be filed in Form I (i.e., the short form). The parties, however, remain free to file the merger notification in Form II (i.e., the long form) based on their self-assessment of the competitive overlaps and are recommended to file merger notification for Combination in Form II where:

1. the parties to the Combination are competitors and have a combined market share in the same market of more than 15 per cent; or
2. the parties to the Combination are active in vertically linked markets and the combined or individual market share in any of these markets is greater than 25 per cent.

As per the new additions made to Form II, parties will be required to provide the following additional information:

1. market shares of parties and their top 5 competitors, details of their top 5 suppliers and customers for horizontal overlaps as well as for newly introduced vertical and complementary links, for 5 years. Earlier, Form II did not seek information regarding vertical and complementary links and the details of customers and suppliers were also required to be provided only for horizontal overlaps.
2. details of potential disruptions in the relevant market(s) specifically technological disruptions, change in business models, supply arrangements etc.
3. level of concentration basis 4-firm concentration index i.e., the concentration ratio for the top four companies in a relevant market.
4. information regarding pipeline products/services, acquisitions, and expansion (in terms of capacity/geographies), of the parties.

The CCI has also eased the information gathering process and removed the requirement of seeking the following information from the parties:

1. obligations to comply with language requirements in respect of the products of the parties and user's manual of the parties.
2. pricing policies and price lists of the parties and their competitors.
3. in-house consumption in terms of quantity and value for each relevant product/service.
4. details of the parties' distribution channels and service networks.
5. documents to show shipping or transportation costs incurred in the distribution of the products or services.

(Source: CCI notification dated March 31, 2022 and press release dated April 4, 2022)

Central Government extends Small Target Exemption

In a significant development to the merger control regime in India, the Government of India, by way of notification published on March 16, 2022, has extended the *de minimis* or the 'small target' exemption for another 5 years i.e., until March 29, 2027 (**Small Target Exemption**).

The Small Target Exemption exempts a transaction from mandatory notification to, and approval from, the CCI where the enterprise (i.e., the enterprise whose shares, voting rights, assets, or control are being acquired or are being merged or amalgamated) either has assets of not more than INR 350 crores (USD 47 million) in India or turnover of not more than INR 1,000 crores (USD 134 million)¹⁷ in India. The asset and turnover thresholds prescribed under the Small Target Exemption remain unchanged since they were last revised in March 2017.

(Source: Notification for Small Target Exemption)

For more details, please contact km@jsalaw.com



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¹⁷ USD 1= INR 74.63.