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National Company Law Appellate Tribunal

NCLAT upholds CCI order against soil testing companies for indulging in bid rigging; remands matter to CCI to reconsider penalty

The National Company Law Appellate Tribunal (“**NCLAT**”) dismissed an appeal filed by Saraswati Sales Corporation (“**Appellant**”) against the order passed by the Competition Commission of India (“**CCI**”) finding the 9 (nine) companies (collectively referred to as the ‘**Soil Testing Companies**’) and their office bearers guilty of indulging in a bid rigging in contravention of Section 3(3)(d) of the Competition Act, 2002 (“**Competition Act**”).

Brief Background

On [April 4, 2022](#), the CCI passed an order (“**CCI Order**”) against the Soil Testing Companies for indulging in bid-rigging in relation to the e-tenders floated by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing (“**Tenders**”).

The CCI *inter alia* noted that the Soil Testing Companies indulged in bid-rigging by: (a) providing fake and fabricated documents to ensure their technical eligibility and submitted cover bids in favour of M/s Yash Solutions, one of the bidders; (b) submitting bids from the same login id and IP address, submitting demand drafts prepared by competing Soil Testing Companies without any justification; (c) having common registered addresses, and some having common shareholding (including family members); and (d) acknowledging their respective conduct during depositions before the Director General (“**DG**”).

Accordingly, the CCI imposed a penalty on the Soil Testing Companies and their office bearers at the rate of 5% of their turnover and incomes, respectively.

NCLAT Observations

Aggrieved, the Appellant, one of the Soil Testing Companies, challenged the CCI Order before the NCLAT. The NCLAT agreed with the findings of the CCI and upheld the CCI Order. On the penalty, the NCLAT noted that the Appellant was a sole proprietorship firm and the CCI should reconsider the penalty on the Appellant and accordingly, remanded the matter to the CCI.

(Source: NCLAT Order dated November 14, 2022)

NCLAT upholds CCI order against LPG cylinder manufacturers for indulging in bid rigging; remands matter to CCI to reconsider penalties

The NCLAT dismissed an appeal filed by 47 (forty seven) liquified petroleum gas (“**LPG**”) cylinder manufacturers (collectively referred to as the ‘**Bidders**’) and 26 (twenty six) office bearers against the order passed by the CCI finding the Bidders and their office bearers guilty of indulging in a bid rigging cartel in contravention of Section 3(3)(d) of the Competition Act.

Brief Background

On [August 9, 2019](#), the CCI passed an order (“**CCI Order**”) against the Bidders for indulging in bid rigging in relation to the e-tender floated by Hindustan Petroleum Corporation Limited in January 2013 for the supply of 14.2 kg capacity LPG cylinders (“**Tender**”).

The CCI *inter alia* noted that the Bidders engaged in bid-rigging by: (a) using common IP addresses for bid submission; (b) quoting similar reasons for withdrawing from the respective bids in their withdrawal letters; (c) exchanging format of the withdrawal letter through e-mails; (d) employing common agents; and (e) sharing sensitive and confidential

information in relation to the Tender. The CCI noted that such conduct is presumed to cause an appreciable adverse effect on competition (“AAEC”) and the Bidders were unsuccessful in rebutting the claim.

Accordingly, the CCI imposed a total penalty of INR 39,74,00,000 (Indian Rupees thirty-nine crore and seventy-four lakh)¹ on the Bidders and INR 45,26,00,000 lakhs (Indian Rupees forty-five lakh and twenty-six thousand)² on their office bearers.

NCLAT Observations

Aggrieved, the Bidders challenged the CCI Order before the NCLAT including that the CCI bench which passed the CCI Order did not have a judicial member. The NCLAT agreed with the findings of the CCI and upheld the CCI Order. On the issue of judicial member, the NCLAT abstained from making any observations, as the said issue is *sub judice* before the Supreme Court of India. However, on the penalty, the NCLAT noted that the Bidders are micro, small and medium enterprises and the CCI should reconsider the penalty for each individual bidder taking this fact into consideration and accordingly, remanded the matter to the CCI.

(Source: NCLAT Order dated November 10, 2022)

Competition Commission of India

Merger Control

CCI approves acquisition of minority shareholding of Yes Bank by Carlyle

The CCI approved the acquisition of up to 10% shareholding of Yes Bank Limited (“**Yes Bank**”) by Carlyle Group Inc. (“**Carlyle Group**”) (referred to as the ‘**Proposed Transaction**’).

The CCI noted that there are horizontal overlaps between the activities of the parties³ in the broad markets for the deposit-taking services, and the provision of loans in India including the narrow markets for the provision of:

- a) retail loans and the narrower markets for: (i) home loans; and (ii) loans against property; and
- b) wholesale loans and the narrower market for: (i) commercial real estate loans (construction finance); and (ii) lease rental discounting.

However, given the low combined market shares of the parties and the presence of several significant market players in each of the relevant markets, the CCI noted that the Proposed Transaction is not likely to raise competition law concerns.

The CCI also examined the existing vertical relationship between the activities of the parties⁴ in the upstream market for operating satellites and the downstream market for providing satellite services. However, given the market for providing satellite services is heavily regulated by the Department of Space and Department of Telecommunications, Government of India (“**GOI**”), the CCI noted that the Proposed Transaction is not likely to raise foreclosure concerns.

(Source: CCI Order dated October 20, 2022)

¹ Approximately USD 4,980,000 million (US Dollars four million and ninety-eight thousand).

² Approximately USD 56,703 (US Dollars fifty-six thousand seven hundred and three).

³ Yes Bank (including its affiliates) and Carlyle Group (including its affiliates).

⁴ Through Yes Bank (including its affiliates) and Carlyle Group (including its affiliates).

CCI conditionally approves amalgamation of Zee with and into Sony group

The CCI conditionally approved: (a) amalgamation of Zee Entertainment Enterprise Limited (“**Zee**”)⁵ and Bangla Entertainment Private Limited (“**BEPL**”)⁶, with and into Cluver Max Entertainment Private Limited (“**CME**”) (resultant entity), a wholly owned subsidiary of Sony Group Corporation group (“**Sony Group**”); and (b) preferential allotment of certain shares of CME by Sunbright International Holdings Limited and Sunbright Mauritius Investments Limited (referred to as the ‘**Proposed Transaction**’).⁷

The CCI noted that there are horizontal overlaps between the activities of the parties in the markets for:

- a) operation and wholesale supply of television (“**TV**”) channels in India, and in the narrower markets of operation and wholesale supply of: (i) Hindi general entertainment channels (“**GEC**”) in India; (ii) regional GEC in India (i.e., Bengali and Marathi); (iii) film channels in India; and (iv) infotainment and lifestyle channels in India (hereinafter referred to as the ‘**Channels Market**’).
- b) retail supply of over-the-top (“**OTT**”) audio visual (“**AV**”) content in India.
- c) supply of advertising airtime on TV channels in India (referred to as the ‘**Advertising Market**’).
- d) licensing of AV content in India, and in the narrower markets of licensing of: (i) AV film content in India; and (ii) AV ‘non-film and non-sports’ content in India.
- e) production and supply of films to third-party distributors and exhibitors for theatrical release in India
- f) licensing of music rights in India.

Except for the Channels Market and Advertising Market, the CCI noted that given the low combined market shares of the parties along with the presence of several significant players in the other markets, the Proposed Transaction is not likely to raise competition law concerns.

With respect to the Channels Market, the CCI noted that the combined market share of parties would exceed 30%.⁸ With respect to the Advertising Market, the CCI noted that post the Proposed Transaction, CME’s market power will increase vis-à-vis the advertisers, and it may increase the prices of advertisements slots for the advertisers. Accordingly, the CCI observed that the same would raise competition law concerns.

The CCI also examined the vertical links between the parties in the: (a) upstream market of licensing of AV content rights, and downstream market of retail supply of OTT AV content and operation and wholesale supply of TV channels; (b) upstream market of advertising on TV channels, and downstream market of sale of advertising airtime on TV channels in India; and (c) upstream market of licensing of music rights, and downstream market of sub-licensing of music.

The CCI noted that CME will become the largest broadcaster of TV channels in India and an indispensable partner for distribution platform operator (“**DPOs**”)⁹, having the incentive to increase the price of channels offered to DPOs, which would ultimately be recovered from viewers at large. Accordingly, the CCI observed that the same would raise competition concerns.

Basis this, the CCI issued a show cause notice (“**SCN**”) to the parties after forming a *prima facie* view that the Proposed Transaction would cause an AAEC and sought a response from the parties in this regard. To alleviate the AAEC

⁵ It is engaged in the business of TV content development, broadcasting of regional and international entertainment satellite television channels, movies, music, and digital business.

⁶ It is an indirect wholly owned subsidiary of Sony group and is engaged in the business of: (a) acquisition of rights for motion pictures, events, and other TV content; and (b) generating advertising revenue from the telecast of TV content.

⁷ Post the Proposed Transaction, the majority shareholding of 50.86% in CME will be indirectly held by Sony Group, 3.99% of the shareholding will be held by the promoters (founders) of Zee, and 45.15% of the shareholding will be held by other public shareholders of Zee.

⁸ From FY 2019 until FY 2022.

⁹ The broadcasters supply TV channels to DPOs, which in- turn distribute the TV channels to end consumers through direct to home services, internet protocol television services, and headend-in-the-sky services.

concerns, the parties offered the following modifications: (a) divestment by Zee and/or CME of Big Magic¹⁰, Zee Action and Zee Classic¹¹ (collectively referred to as the '**Divestment Business**'); and (b) the parties and/or CME shall not, for a period of 5 (five) years from the sale of the Divestment Business, acquire direct or indirect stake or influence over the Divestment Business.

The CCI approved the Proposed Transaction subject to the parties fulfilling the aforesaid conditions.

(Source: CCI order dated October 4, 2022)

CCI imposes a penalty on Premji Invest for gun jumping

The CCI imposed a penalty of INR 20,00,000 (**Indian Rupees twenty lakhs**)¹² on funds of Premji Invest ("**PI Funds**")¹³ for failing to notify the acquisition of 6.03% shareholding and right to appoint a director on the board of Future Retail Limited ("**FRL**") (referred to as the '**x**').

Brief Background

On June 7, 2018, PI Funds acquired 6.03% shareholding in FRL¹⁴ through on-market purchases as a block deal. On June 11, 2018, FRL invited the PI Funds to nominate a director on its board and the same was appointed by the PI Funds.

On February 8, 2019, the CCI issued an SCN to the PI Funds asking it to explain why the Transaction was not notified for its approval. The PI Funds *inter alia* contended that the Transaction could avail the benefit of Item I exemption for the following reasons:

- a) Ordinary course of business: The Transaction was in the '*ordinary course of business*'¹⁵ as it did not result in the acquisition of control of FRL by the PI Funds since it did not have the ability to influence the strategic matters of FRL.
- b) Solely as an investment: The share purchase agreement between the PI Funds and FRL did not commit or confer upon the PI Funds any right to appoint a director on the board of FRL. FRL on its own accord invited the PI Funds to appoint a director on its board and the PI Funds were not aware at the time of acquiring the minority shareholding in FRL, that they would be bestowed with the said right. Additionally, the right to appoint one director on the board of FRL comprising 7 (seven) directors could not be construed as control under the Competition Act since the PI Funds did not enjoy any quorum, veto rights or the ability to influence the management and affairs of FRL.

CCI Order

The CCI rejected the PI Funds' contentions and noted that Item I Exemption is not available for *inter alia* the following reasons:

- (a) Ordinary course of business: The test for examining whether a transaction is in the '*ordinary course of business*' is

¹⁰ It is a Hindi general entertainment channel.

¹¹ Zee Action and Zee Classic are Hindi films channels.

¹² Approximately USD 25,056 (US Dollars twenty-five thousand fifty-six).

¹³ PI Opportunities Fund – I and Pioneer Investment Fund.

¹⁴ From Cedar Support Services Limited.

¹⁵ The benefit of Item 1 exemption is provided to the acquisition of shareholding or voting rights of less than 25% and which are in the '*ordinary course of business*' or '*solely as an investment*'. The objective of this provision is to distinguish between instances of ordinary shareholding and strategic shareholding, falling short of position of acquisition of control.

to ascertain whether the same is a revenue transaction¹⁶ or a capital transaction¹⁷. Since the Transaction qualifies as a 'capital transaction' it cannot qualify in the '*ordinary course of business*'.

- (b) **Solely as an investment:** When evaluating whether Item 1 exemption can be claimed, the substance of a transaction over its form must be considered. It does not matter whether the proposal to appoint a director on the board of target was moved by the target or whether the parties first acquired only shares and subsequently negotiated/agreed for board seat. The intent and purpose of the Competition Act is to ensure that the competitive dynamics are not influenced, as the same can be influenced not only by active decisions but also by way of broad understanding or awareness of competitively sensitive information. Given that the PI Funds appointed the director on the board of FRL pursuant to an invitation by FRL, the Transaction cannot be construed as '*solely as an investment*'.

The CCI while computing the penalty took into consideration mitigating and aggravating factors and imposed a penalty of INR 20,00,000 (Indian Rupees twenty lakhs)¹⁸ on the PI Funds for *gun jumping*.

(Source: CCI Order dated September 30, 2022)

CCI imposes a penalty on Trian for gun jumping

The CCI imposed a penalty of INR 20,00,000 (Indian Rupees twenty lakhs)¹⁹ on funds of Trian group ("**Trian**")²⁰ for failing to notify the acquisition of 9.09% shareholding in Invesco Limited ("**Invesco**")²¹ (referred to as the '**Transaction**')²².

Brief Background

In September 2020, Trian closed the Transaction and on November 4, 2020, Invesco invited 2 (two) founding members of Trian to be appointed as directors on the board of Invesco (collectively referred to as '**Trian Directors**').

On December 8, 2020, Trian passed a board resolution for acquisition of additional shareholding of Invesco post which it will hold more than 10% shareholding in Trian (referred to as the '**Combination**').

On January 20, 2021, Trian notified the Combination under the green channel route to the CCI and the same was deemed approved on the same day.

On April 12, 2021, the CCI issued an SCN to Trian asking it to explain why the Transaction was not notified for its approval. Trian *inter alia* contended as follows:

- a) **Item I Exemption:** The Transaction can claim benefit of Item I exemption as it was '*solely as an investment*' and/or in the '*ordinary course of business*'. Trian's business model is to operate as an engaged shareholder, and it typically engages with the management teams and boards of its investee companies. This is to protect its minority investments and provide suggestions (similar to the right enjoyed by all other shareholders) to the company to

¹⁶ Revenue transactions are those transactions that are short-term and constitute income and expenditure and are accordingly reflected in the profit and loss account or income statement of the enterprise.

¹⁷ Capital transactions are those transactions that affect non-current items such as fixed assets, long-term debt etc., and affect the position statement of an enterprise.

¹⁸ Approximately USD 25,056 (US Dollars twenty-five thousand fifty-six).

¹⁹ Approximately USD 25,056 (US Dollars twenty-five thousand fifty-six).

²⁰ Trian Partners AM Holdco. Ltd. and Trian Fund Management L.P.

²¹ It is a public listed company managing approximately USD 1.35 trillion in assets for investors and having presence in more than 20 countries including India.

²² The Transaction comprised of the following steps:

(a) Acquisition of 4.8% shareholding of Invesco by way of open-market purchases, in June 2020; and

(b) Acquisition of an additional 5.1% shareholding of Invesco through open-market purchases and derivative transactions entered with a third-party financial institution during 22 – 30 September 2020.

improve their operations to earn higher return on investment. Further, Trian has no veto rights in Invesco nor is it a party to any shareholders' agreement relating to Invesco. The Trian Directors were invited to be on the board of Invesco temporarily and did not exercise material influence on Invesco and the said appointment took place outside India and had no nexus to India.

- b) Inter-connected transactions: The Transaction and subsequent appointment of the Trian Directors are not inter-connected. The Transaction was undertaken through open-market purchases and derivative transactions, without the knowledge of Invesco. Accordingly, the Transaction was not dependent on Invesco providing board seats to Trian. The discussions with Invesco regarding board seat only took place only after the Transaction was closed.

CCI Order

The CCI *inter alia* noted as follows:

- (a) Item I Exemption: The Transaction cannot be viewed as '*solely as an investment*' as Trian intended to participate in the affairs and management of Invesco. This is clear from the fact that Trian closed the Transaction and acquired the 2 (two) board seats in less than 2 (two) months after the closing of the Transaction. Further, the Transaction is also not in the ordinary course of business as it qualifies as a 'capital transaction'.
- (b) Inter-connected transactions: The Transaction was a condition precedent to the appointment of Trian Directors because if the Transaction had not been closed, the Trian Directors would have not been appointed.

The CCI while computing the penalty took into consideration mitigating and aggravating factors. Accordingly, the CCI imposed a penalty of INR 20,00,000 (Indian Rupees twenty lakhs)²³ on Trian for *gun jumping*.

(Source: CCI Order dated September 30, 2022)

CCI approves acquisition of Mahindra Susten by Ontario Teachers' Pension Plan Board under Green Channel

The CCI approved the acquisition of 30% shareholding with a right to acquire additional shareholding of 9.99% of Mahindra Susten Private Limited ("**Mahindra Susten**")²⁴ by Ontario Teachers' Pension Plan Board ("**OTPPB**")²⁵ through 2452991 Ontario Limited (referred to as the '**Proposed Transaction**').

The parties notified the Proposed Transaction under the GCR as there were no horizontal, vertical, or complementary overlaps between the activities of the parties (including their respective *affiliates*) in India.

(Source: Summary)

CCI approves acquisition of additional shareholding of Trustroot by M&G under Green Channel

The CCI approved the acquisition of additional optionally convertible bonds and warrants of Trustroot Internet Private Limited²⁶ by funds²⁷ belonging to M&G Plc. (referred to as the '**Proposed Transaction**').

²³ Approximately USD 25,056 (US Dollars twenty-five thousand fifty-six).

²⁴ It is engaged in setting up, acquiring or owning and operating renewable energy generation projects.

²⁵ It is engaged in administration of pension benefits and the investment of pension plan assets of active and retired teachers in the Canadian province of Ontario.

²⁶ The Target, through its *affiliates* in India, is primarily engaged in providing an online Business-to-Business e-commerce marketplace platform by the name of '*Udaan*', for the facilitation of sale and purchase of goods between sellers and purchasers.

²⁷ Luxembourg Specialist Investment Fund FCP-RAIF – M&G Catalyst Capital Fund, M&G Funds (1) Asia Pacific (Ex Japan) Equity Fund, and The Prudential Assurance Company Limited

The parties notified the Proposed Transaction under the GCR as there were no horizontal, vertical, or complementary overlaps between the activities of the parties (including their respective *affiliates*) in India.

(Source: Summary)

CCI approves internal restructuring of Scintia and Trivium under Green Channel

The CCI approved the internal restructuring of Scintia Vermögensverwaltungs GmbH (“**Scintia**”) and Trivium Vermögensverwaltungs GmbH (“**Trivium**”) (referred to as the ‘**Proposed Transaction**’).²⁸

The parties notified the Proposed Transaction under the GCR as there were no horizontal, vertical, or complementary overlaps between the activities of the parties (including their respective *affiliates*) in India.

(Source: Summary)

Miscellaneous

GOI issues notification empowering CCI to deal with goods and services tax anti-profiteering complaints

By way of a notification dated 23 November 2022 (“**Notification**”), the GOI, has empowered the CCI to take charge of matters relating to the anti-profiteering provisions of the Central Goods and Services Tax Act, 2017. Thus, all goods and services tax anti-profiteering complaints will now be dealt with by the CCI with effect from December 1, 2022 on which day the Notification shall come into effect.

(Source: Notification dated November 23, 2022)

Competition Practice

Since the inception of the Indian competition regime, JSA has been a one-stop shop for all types of competition and anti-trust-related matters with its dedicated competition law practice group. The team’s in-depth understanding of the competition law, coupled with its commercially focused litigation skills has been the cornerstone on which it deals with matters relating to cartelisation (including leniency), abuse of dominance, vertical agreements, and dawn raid before the Competition Commission of India and appellate courts. The team regularly advises clients on general competition law issues arising from day-to-day business strategies and conducts competition compliance training for clients. Given the team’s continued involvement with the regulator, coupled with its balanced and practical approach to competition law, it has been instrumental in shaping the competition law jurisprudence in India.

Over the years, the team has developed a reputation of not only being well regarded by its peers but also for having developed a good working relationship with the regulatory authorities. As such our lawyers have been involved in drafting statutory regulations and have represented the Indian competition law fraternity at various competition law seminars, workshops, and advocacy & public awareness programs across the world. The team’s expertise (including team members) has been widely recognised by various leading international rankings and publications including Chambers and Partners, Who’s Who Legal, Global Competition Review, Benchmark Litigation, Asialaw, and the Legal 500.

²⁸ The Proposed Transaction entailed the restructuring which would result in a change from joint control over Beiersdorf AG (“**Beiersdorf**”) and the TCHIBO group by Scintia and Trivium, to sole control by: (a) Scintia over Beiersdorf; and (b) sole control by Trivium over TCHIBO group, respectively. Scintia and Trivium are investment companies ultimately controlled by natural persons of the Herz family.

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14 Practices and
23 Ranked Lawyers



15 Practices and
18 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



11 Practices and
39 Ranked Partners
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IBLJ Top 100 Lawyer List



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Equity Market Deal of the
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