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National Company Law Appellate Tribunal

NCLAT upholds CCI order dismissing case against PVR and Inox

The National Company Law Appellate Tribunal (“**NCLAT**”) dismissed the appeal filed by Consumer Unity & Trust Society (“**CUTS**”), against the order passed by the Competition Commission of India (“**CCI**”), dismissing a case against PVR Limited (“**PVR**”) and INOX Leisure Limited (“**Inox**”) for indulging in alleged anti-competitive practices.

Brief Background

CUTS filed a complaint against PVR and Inox primarily contending that the merger agreement through which Inox would merge with and into PVR (“**Merger Agreement**”) is likely to cause an appreciable adverse effect on competition (“**AAEC**”) in the market for exhibition of films in theatres in different cities in India, in violation of Section 3(1) of the Competition Act, 2002 (“**Competition Act**”).

On September 13, 2022, the CCI passed an order (“**CCI Order**”) wherein it *inter alia* held that Section 3 of the Competition Act provides for examination of the likelihood of an AAEC arising out of conduct in terms of an agreement, not a likelihood of conduct itself. The conduct is missing in the present case and hence, the information was dismissed by the CCI. For a detailed summary of the CCI Order, refer to the [JSA Newsletter of September 2022](#).

Aggrieved, CUTS challenged the CCI Order before the NCLAT and *inter alia* contended that there is no requirement to show actual conduct for invoking Section 3(1) of the Competition Act as the term used therein is “*likely to cause*” which signifies something that is probable or something which might well happen.

NCLAT Judgment

The NCLAT dismissed the appeal and *inter alia* held that:

- a) the Merger Agreement is governed under Sections 5 and 6 of the Competition Act and hence falls outside the scope of Section 3(1) of the Competition Act;
- b) the Merger Agreement has been approved by the National Company Law Tribunal, pursuant to which, PVR and Inox have now become a single entity. Therefore, the said arrangement falls outside the scope of Section 3(1) of the Competition Act, where the entities retain their separate identities even after entering into any agreement;
- c) the interpretation of the term “*likely*” is inconsequential in the present matter because the contravention of Section 3(1) of the Competition Act has not been established in the first place; and
- d) even if the Merger Agreement is concluded, dominance *per-se* is not bad and only the conduct is, which is missing in the present case.

(Source: NCLAT judgment dated August 10, 2023)

Competition Commission of India

Enforcement

CCI finds 2 (two) chemist and druggist associations guilty of indulging in anti-competitive practices

The CCI found 2 (two) chemist and druggist associations of Gujarat (collectively referred to as the “**Chemist Associations**”)¹, including their office bearers guilty of indulging in anti-competitive practices in relation to

¹ The complaint was filed against: (a) Chemist Association, Raisingh Nagar; and (b) Sri Ganganagar Chemists Association.

collectively boycotting and refusing to procure the pharmaceutical products of Solar Life Sciences Medicare Private Limited ("**Complainant**")², in violation of Section 3(3) of the Competition Act.

The Complainant *inter alia* alleged that the Chemist Associations collectively decided to boycott and refused to procure the pharmaceutical products of the Complainant. The Chemist Associations also collectively decided and suggested the margins and incentive schemes for the manufacturers/suppliers of the pharmaceutical products and in case of non-compliance, the pharmaceutical products of the manufacturers/ suppliers were boycotted. The CCI, after forming a *prima facie* view directed the Director General ("**DG**") to investigate the alleged conduct.

The DG found the Chemist Associations guilty of indulging in anti-competitive practices and noted that the Chemist Associations served as a platform whereby the chemists collectively: (a) decided not to procure the pharmaceutical products of the Complainant when he refused to accept their demand to pay exorbitant margins to the members of the Chemist Associations; and (b) fixed the margins to be paid by the manufacturers/ suppliers to the members of the Chemist Associations.

CCI Findings

The CCI agreed with the findings of the DG and directed the Chemist Associations, including their office bearers to cease and desist from engaging in anti-competitive practices. The CCI refrained from imposing any monetary penalty as it considered mitigating factors such as the Chemist Associations: (a) being first-time offenders; and (b) do not have any funds nor receive any fees from its members.

(Source: CCI Order dated August 23, 2023)

CCI closes case against Tata Motors for indulging in alleged anti-competitive practices

The CCI closed a case against Tata Motors Limited ("**Tata Motors**"), for indulging in alleged anti-competitive practices, in contravention of Sections 3(4) and 4 of the Competition Act.

The complainants were the dealers of Tata Motors and *inter alia* alleged that Tata Motors: (a) forced the dealers to order vehicles as per its own preference rather than actual market demand; (b) restricted the ability of dealers to venture into any new line of business; and (c) restricted the dealers from selling vehicles outside their allocated territories. The CCI, after forming a *prima facie* view directed the DG to investigate the alleged conduct.

The DG defined the relevant market as the market for the manufacture and sale of commercial vehicles in India ("**Relevant Market**") and *inter alia* noted that Tata Motors: (a) is dominant in the Relevant Market with a market share of around 45% and (b) abused its dominant position by forcing the dealers to order vehicles as per its own preference. For the allegation regarding restricting the ability of the dealers to venture into the new line of business, the DG noted that Tata Motors did not impose a blanket restriction on the dealers but only required them to seek a no objection certificate ("**NOC**") from it, which was never denied. Thus, the said practice does not amount to abuse of dominant position.

The DG also noted that Tata Motors imposed vertical restraints on its dealers including imposition on territorial restriction in violation of Section 3(4) of the Competition Act.

² It is a supplier of the pharmaceutical products.

CCI Findings

While the CCI agreed with the findings of the DG on the definition of the Relevant Market and Tata Motor's dominance in the said market, it disagreed with the DG's findings on the violation of the Competition Act and *inter alia* noted that: (a) there is no evidence which shows that Tata Motors forced its dealers to order vehicles as per its own preference. Tata Motors only recommends the vehicles that can be ordered by the dealers based on the demand in a particular area to enable a dealer to maintain adequate inventory; and (b) Tata Motors has not imposed a blanket restriction on the dealers who wish to venture into new line of business. It only required an NOC from the dealers, which it has never withheld unnecessarily.

On vertical restraints, the CCI *inter alia* noted that Tata Motors has only imposed territorial restrictions on the dealers in relation to active sales³ of vehicles and not on passive sales⁴. Thus, Tata Motors allows customers from anywhere in India to purchase vehicles from any dealer. In fact, the dealership agreements executed after 2016 have an amended clause on the territorial sales which allows dealers to sell outside their designated territories with consent from Tata Motors. Accordingly, the CCI dismissed the case.

(Source: CCI Order dated August 23, 2023)

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

The CCI received a complaint against Boeringer Ingelheim Pharma GmbH & Co. KG ("**Boeringer Germany**")⁵ and Boeringer Ingelheim India Private Limited ("**Boeringer India**")⁶ for indulging in alleged abuse of dominant position, in violation of Section 4 of the Competition Act. Boeringer Germany and Boeringer India are together referred to as '**Boeringer**'.

Boeringer Germany holds 2 (two) patents which are valid for 20 (twenty) years in relation to 'Linagliptin', a drug used in the treatment of diabetes. In 2022, the first patent expired. Upon its expiry, the complainant began manufacturing drugs based on 'Linagliptin' under the brand names 'Linamac' and 'Linaone'.

The complainant *inter alia* alleged that Boeringer: (a) filed multiple patent applications to extend the period of protection beyond 20 (twenty) years which is causing AAEC by resulting in higher prices of drugs and denial of market access as no other competitor can enter the market; and (b) engaged in frivolous and vexatious litigations against the complainant and other competitors, as well as communications with doctors asking them not to deal with Boeringer's competitors who sell 'Linagliptin'.

The CCI *inter alia* noted that: (a) it will refrain from assessing the validity of the patent as it falls outside its domain; and (b) frivolous and vexatious litigation may amount to market abuse when it is initiated by a dominant company to cause anti-competitive harm, *via*, the inappropriate use of adjudicatory/government processes or legal rights. Usually, the objective of such litigations is to subdue a competitor by increasing operational costs or delay the entry of a competitor in the market. In the instant case, *prima facie*, the said litigations, do not lack *bona fide*, and must be decided by the courts before which the litigations lie. Accordingly, the CCI dismissed the case.

(Source: CCI Order dated August 22, 2023)

³ It means the seller actively approaching the customer beyond the allocated territory for selling products or services.

⁴ It means the customers reaching out to the sellers inquiring about sales in the first instance.

⁵ It is incorporated in Germany and is among the world's largest pharmaceutical companies.

⁶ It is incorporated in India and a subsidiary of Boeringer Germany. It has the permission of the Drugs Controller General of India to import and market certain Linagliptin based drugs.

CCI finds Chandigarh Housing Board guilty of abusing dominant position

The CCI found Chandigarh Housing Board (“**CHB**”) guilty of abusing its dominant position by imposing unfair, arbitrary, and unreasonable conditions in the allotment-cum-demand letter (“**Letter**”) in relation to the allotment of flats in Chandigarh, in contravention of Section 4 of the Competition Act.

The complainant *inter alia* alleged that CHB abused its dominant position by: (a) stipulating the timeline for payment of instalment of flats by the allottees. However, the timeline for handing over the possession of flats to the allottees by CHB was not specified; and (b) levying penal interest for a full month instead of the actual period of delay, even if the delay in payment of instalments was for one day. The CCI, after forming a prima facie view directed the DG to investigate the alleged conduct.

The DG defined the relevant market as the market for the provision of services for development and sale of residential flats in the Union Territory of Chandigarh (“**Relevant Market**”) and *inter alia* noted that CHB : (a) is dominant in the Relevant Market after considering several factors such as market share, dependence of consumers on CHB, regulatory landscape etc.; and (b) has abused its dominant position by imposing unfair/ discriminatory conditions in the Letter for allotment of flats.

The CCI agreed with the Relevant Market definition and the findings of the DG and *inter alia* noted that CHB abused its dominant position by: (a) failing to disclose the date of handing over the possession of flats to the allottees in the Letter.; and (b) levying penal interest for full month instead of the actual period of delay, even when there is no provision in the Letter authorising CHB to levy the aforesaid penal interest. Thus, even if an allottee delays in making installment by a day, he will have to pay interest for the entire month which is patently unfair.

Accordingly, the CCI directed CHB to desist from engaging in any abusive conduct. The CCI refrained from imposing monetary penalty on CHB after considering several mitigating factors such as CHB: (a) has already ceased to engage in the said abusive conduct; (b) gets the project registered with the Real Estate Regulatory Authority.

(Source: CCI Order dated August 22, 2023)

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

The CCI received a complaint⁷ against Curefit Services Private Limited (“**Curefit**”)⁸ for indulging in alleged anti-competitive practices, in violation of Sections 3 and 4 of the Competition Act.

The complainant is engaged in the business of fitness and wellness and runs a gym under the name, ‘Creed Gym’ in Hyderabad. Curefit and the complainant executed a collaboration agreement whereby the complainant would be listed on Curefit’s online platform as one of the gyms where Curefit would provide subscription/membership services to its customers.

The complainant *inter alia* alleged that Curefit: (a) is in violation of clause 9 of the collaboration agreement which obligates Curefit not to onboard any other gym within a distance of 2 kms (two kilometers) from the complainant’s gym; (b) shared confidential information of the complainant with other gyms and exploited the same to endorse and sell its own products such as sportswear, footwear, nutrition products; and (c) insisted that the complainant provide services to its customers only *via* the Curefit platform, disabling the complainant’s access to its own database, delaying payments to the complainant etc.

⁷ The complaint was filed by Creed Gym.

⁸ It is engaged in offering subscription or membership services under the name Cult-Pass to individuals who are already members of established gyms/fitness centres. Curefit ties up with gyms/fitness centres to offer its users/members, the benefits of using multiple gyms under one subscription as per their convenience.

The CCI *inter alia* noted that: (a) clause 9 of the collaboration agreement provided exclusivity to Curefit to some extent which may have a business justification, however the said clause was removed which indicates that more gyms in the locality could associate with Curefit, thereby enhancing competition; (b) the allegation regarding sharing of confidential information of the complainant is not supported by any evidence; (c) there are several players operating gyms and fitness centres especially online and there is no evidence to indicate existence of barriers for new players. Accordingly, bereft dominance of Curefit, the question of Curefit abusing its dominant position does not arise.

Accordingly, the CCI dismissed the case.

(Source: Order dated August 10, 2023)

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

The CCI received a complaint⁹ against Hero FinCorp Ltd. (“**HFC**”) for indulging in alleged abuse of dominant position, in violation of Section 4 of the Competition Act.

The complainant availed a loan against property of INR 5,00,00,000 (Indian Rupees five crore) from HFC at an effective rate of 10.5%. The complainant primarily alleged that although the repo rate of the Reserve Bank of India reduced from 6.5% to 4%, HFC did not decrease the interest rate charged on the loan from the complainant, thereby abusing its dominant position.

The CCI *inter alia* noted that: (a) the loan against property is distinct from other kinds of loan such as housing loan, personal loan etc. and accordingly, defined the relevant market as “market for provision for loan against property in India” (“**Relevant Market**”); (b) HFC is not dominant in the Relevant Market due to the presence of several significant players such as non- banking financial companies, public sector banks, private sector banks, regional rural banks etc.; and (c) bereft dominance of HFC, the question of HFC abusing its dominant position in the Relevant Market does not arise. Accordingly, the CCI dismissed the case.

(Source: CCI Order dated August 10, 2023)

Merger Control

CCI penalises Bharti Airtel for gun jumping

The CCI imposed a penalty of INR 1,00,00,000 (Indian Rupees one crore) on Bharti Airtel Limited (“**BAL**”) ¹⁰ for closing the acquisition of 20% shareholding in Bharti Telemedia Limited (“**BTL**”) ¹¹ by BAL (“**Step I**”). As consideration for Step I, Lion Meadow Investment Limited (“**LMIL**”) ¹², an entity belonging to Warburg Pincus LLC ¹³ acquired 0.664% shareholding in BAL (“**Step II**”). Steps I and II (collectively referred to as “**Transaction**”) were consummated without obtaining the approval of the CCI.

⁹ The complaint was filed by Synco Industries Limited.

¹⁰ It is engaged in the business of providing telecommunication services.

¹¹ It is a subsidiary of BAL and is primarily engaged in the business of distributing multi-channel television programs directly to subscriber premises by using satellite systems in India.

¹² It is primarily engaged in investment holding activities.

¹³ Warburg Pincus is a member-owned private equity firm and acts as a manager to certain private equity funds.

Brief Background

Prior to the Transaction, BAL and LMIL held 80% and 20% shareholding, respectively, in BTL. The parties executed the definitive documents for the Transaction on February 17, 2021 and the same was closed on March 22, 2021, without obtaining the approval of the CCI.

On March 3, 2022, the CCI issued a show cause notice (“SCN”) to BAL and LMIL asking them to explain why the Transaction was closed prior to its approval.

BAL and LMIL *inter alia* contended that: (a) Step I of the Transaction benefitted from item 2 exemption (“**Item 2 Exemption**”) under Schedule I of the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (as amended) (“**Combination Regulations**”) as prior to the acquisition, BAL held more than 50% (i.e., 80%) in a target and the additional acquisition of 20% did not result in a change in control of BTL as BAL already exercised sole control over it; and (b) Step II of the Transaction benefitted from item 1 exemption under Schedule I of the Combination Regulations¹⁴.

CCI Order

The CCI *inter alia* noted that: (a) control includes the ability to exercise material influence over the affairs, management, or operations of an entity. LMIL held 20% shareholding in BTL prior to the Transaction and held several key rights including the right to appoint a director on the board of BTL along with certain veto rights. Thus, LMIL exercised material influence over BTL and hence, it was jointly controlled by both BAL and LMIL. Post the Transaction, LMIL’s material influence ceased to exist over BTL and BAL gained sole control over BTL. Accordingly, Item 2 Exemption will not be available since the Transaction resulted in transfer from joint to sole control; and (b) Step II of the Transaction is inter-connected to Step I, being consideration for Step I, therefore, a composite notice should have been filed by BAL and LMIL prior to the closing of the Transaction covering both steps.

Accordingly, the CCI imposed a penalty of INR 1,00,00,000 (Indian Rupees one crore) on BAL for failure to notify the Transaction and directed BAL and LMIL to notify the Transaction within 60 (sixty) days of receiving the directions of the CCI.

(Source: CCI Order dated August 23, 2023)

CCI penalises NTPC for gun jumping

The CCI imposed a penalty of INR 40,00,000 (Indian Rupees forty lakh) on NTPC Limited (“**NTPC**”)¹⁵ for closing its acquisition of additional 35.47% shareholding in Ratnagiri Gas & Power Private Limited (“**RGPPL**”)¹⁶ without obtaining the approval of the CCI (“**Transaction**”)¹⁷.

¹⁴ 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’.

¹⁵ It is a primarily engaged in power generation.

¹⁶ It is a special purpose vehicle incorporated by NTPC, GAIL (India) Limited (“**GAIL**”) and institutional financial investors. RGPPL acquired the assets of Dabhol Power Company Limited including an integrated gas-based combined cycle power project and a re-gasified Liquid Natural Gas (**R-LNG**) terminal.

¹⁷ NTPC submitted that the Transaction also included: (a) demerger of the R-LNG terminal of RGPPL with and into Konkan LNG Limited (**KLL**); (b) acquisition of 14.82% shareholding in KLL by GAIL from NTPC; and (c) acquisition of 25.51% shareholding in RGPPL by NTPC from GAIL. These transactions were also disclosed by NTPC in the notice jointly given by NTPC Limited & Secured Financial Creditors; (Combination Registration No. C-2021/12/884)

Brief Background

Prior to the Transaction, NTPC held 25.51% shareholding in RGPPL. On December 31, 2020, NTPC acquired additional 35.47% shareholding in RGPPL without seeking the CCI's approval. Post the Transaction, NTPC's aggregated shareholding in RGPPL increased to 60.98%.

On October 27, 2022, the CCI issued an SCN to NTPC asking it to explain why the Transaction was closed prior to its approval. NTPC *inter alia* contended that: (a) NTPC acquired 35.47% shareholding in RGPPL from RGPPL's lenders as part of the resolution plan to settle the outstanding debt of RGPPL. The intent of the Transaction was to repay the debt of RGPPL, thereby reviving it, and not to acquire additional shareholding and/or governance rights; and (b) post the Transaction, the rights of NTPC in RGPPL remained unchanged and RGPPL remained under joint control of NTPC, GAIL (India) Limited, and Maharashtra State Electricity Distribution Company Limited; and (c) the Transaction did not result in AAEC.

CCI Order

The CCI *inter alia* noted that: (a) a combination requires CCI's approval unless it can claim the benefit of any exemption available under the Combination Regulations. In this case, the Transaction could not avail the benefit of Item 1A Exemption¹⁸, since the aggregate shareholding of NTPC exceeded 50% in RGPPL (i.e., 60.98%) post the Transaction; and (b) Indian merger control regime is a mandatory regime irrespective of whether a Transaction causes AAEC or not.

Accordingly, the CCI imposed a penalty of INR 40,00,000 (Indian Rupees forty lakh) on NTPC for failure to notify the Transaction.

(Source: CCI Order August 22, 2023)

CCI penalises ADIA and TPG for gun jumping and submitting false information

The CCI imposed a penalty of INR 5,00,000 (Indian Rupees five lakh) on Platinum Jasmine A 2018 Trust¹⁹ ("**ADIA Platinum**")²⁰ and TPG Upswing Limited ("**TPG**")²¹, for wrongly notifying the acquisition of 5% shareholding in UPL Sustainable Agri Solutions Limited ("**UPL SAS**") by ADIA Platinum and TPG ("**Transaction**") under the green channel route ("**GCR**"). The CCI also imposed a separate penalty of INR 50,00,000 (Indian Rupees fifty lakh) on AIDA Platinum and TPG for submitting false/ incorrect information in the GCR notification form. ADIA Platinum and TPG are collectively referred to as the 'Acquirers'.

Prior to the acquisition, UPL Limited ("**UPL**") would undertake an internal restructuring of its group companies such that amongst other steps: (a) UPL SAS will become a direct wholly owned subsidiary ("**WOS**") of UPL; and (b) SWAL Corporation Limited ("**SWAL**") and Nurture Agtech Private Limited ("**Nurture**"), presently direct WOSs of UPL, will become the WOSs of UPL SAS.

¹⁸ The benefit of Item 1A exemption is provided where prior to the transaction, the acquirer held 25% or more shares or voting rights in a target and does not hold more than 50% shareholding or voting rights after the Transaction, provided that the transaction does not result in sole or joint control by the acquirer or its group.

¹⁹ Acting through its trustee, Platinum Owl C 2018 RSC Limited

²⁰ Abu Dhabi Investment Authority ("**ADIA**") is the sole beneficiary and settlor of the Platinum Jasmine A 2018 Trust. ADIA is a public institution established as an independent investment institution by the government of the Emirate of Abu Dhabi.

²¹ Part of the TPG group whose ultimate holding company is TPG Inc. The TPG group has investments in various sectors such as financial services, technology, consumer, travel, media, real estate and healthcare.

Brief Background

On December 20, 2022, the Acquirers notified the Transaction under the GCR route i.e., under a fast track deemed approval process and disclosed to the CCI that there are no overlaps between the activities of the parties in India.

On May 18, 2023, the CCI issued an SCN wherein it was observed that the TPG through Upswing Trust holds 22.5% in UPL Corporation Limited (“**UPLC**”). UPLC (through its subsidiary Arysta LifeScience India Limited (“**Arysta India**”) is engaged in the manufacture and distribution of crop protection products to third parties as well as SWAL and UPL SAS.

SWAL and UPL SAS are also engaged in the manufacture and distribution of crop protection products to third parties in India. Accordingly, the CCI noted that there exists a horizontal overlap between the activities of TPG i.e., Upswing Trust (through Arysta India) on one hand, and the target i.e., UPL SAS (including its subsidiary i.e., SWAL) on the other hand. In view of this, the Transaction could not have qualified for a GCR route.

The Acquirers contended that: (a) Arysta India and UPL SAS/SWAL belonged to the same group i.e., UPL group, and overlaps need not be mapped between entities of the same group; (b) sale of crop protection products by Arysta India to UPL SAS/SWAL is captive, accordingly, there is no change in the competitive landscape of the market of crop protection products; (c) placing reliance on the Godrej decision²², the Acquirers contended that the test to determine whether 2 (two) entities are competitors is whether the end consumers of such products and services perceive the 2 (two) entities/brands as competitors. Arysta India and UPL SAS/SWAL are treated as the same brand/entity by the end consumers, thus, they are not competitors; (d) third-party sales of Arysta India were minuscule which subsequently, discontinued. Thus, any concerns regarding the overlaps are only academic; and (e) they should not be directed to file a separate notice in Form I.

CCI Order

The CCI inter alia noted as follows:

- a) GCR notice can only be filed in the absence of overlaps between the parties. In the instant case, TPG (through Arysta India) and the target i.e., UPL SAS, and its subsidiary, SWAL are engaged in the manufacture and distribution of crop protection products in India i.e, there was a horizontal overlap between the parties.
- b) Factors such as overlapping entities belonging to the same group, a combination not resulting in change in the competition landscape and no likely effect of a combination, perception about overlapping entities/products being considered as the same, and sales to third parties not being significant and declining etc. at most can be considered in the detailed assessment of the likely effect of a combination on competition but not in the determination of eligibility for a GCR route.
- c) The CCI noted that the combined market shares of the parties are low and will not raise any competition concerns. Accordingly, the CCI did not direct the Acquirers to file a separate notice for the Transaction under Form I.

Accordingly, the CCI invalidated the GCR Notice, imposed a nominal penalty of INR 5,00,000 (Indian Rupees five lakh) on the Acquirers for gun-jumping, and imposed a separate penalty of INR 50,00,000 (Indian Rupees fifty lakh) for submitting false statements in the GCR Notice.

(Source: CCI Order dated August 18, 2023)

²² Suo Moto Case No. 03 of 2017.

CCI penalises Cummins Inc for gun jumping

The CCI imposed a penalty of INR 10,00,000 (Indian Rupees ten lakh) on Cummins Inc. (“**Cummins**”) for closing its acquisition of sole control of Meritor Inc. (“**Meritor**”) without obtaining the approval of the CCI (“**Transaction**”).

Brief Background

On August 3, 2022, the Transaction was closed. On November 2, 2022, Cummins notified the Transaction to the CCI, and the same was approved. Subsequently, on May 18, 2023, the CCI issued an SCN to Cummins asking it to explain why the Transaction was closed prior to its approval.

Cummins *inter alia* contended that to assess the *de minimis* exemption²³, it had limited visibility on the financial information of Meritor i.e., the target enterprise. Basis the information provided by Meritor, Cummins was under a *bona fide* belief that the Transaction availed the *de minimis* exemption. It is only when Cummins analysed the detailed financial information of Meritor in relation to other regulatory compliances, it discovered that the financial information of Meritor breached the *de-minimis* threshold. As soon as Cummins became aware of the inadvertent error on its part, Cummins notified the Transaction to the CCI.

CCI Order

The CCI *inter alia* noted that once it is established that the parties failed to notify the transaction prior to its closing, the provision of Section 43A of the Competition Act will be attracted irrespective of whether the failure to notify the transaction was inadvertent or intentional. Therefore, Cummins cannot be absolved from the liability merely because it was under a bona-fide belief that the Transaction availed the *de minimis* exemption.

Accordingly, the CCI imposed a nominal penalty of INR 10,00,000 (Indian Rupees ten lakh) on Cummins for failure to notify the Transaction.

(Source: [CCI Order dated August 11, 2023](#))

CCI penalises Axis Bank for gun jumping

The CCI imposed a penalty of INR 40,00,000 (Indian Rupees forty lakh) on Axis Bank Limited (“**Axis Bank**”)²⁴ for closing its acquisition of 9.91% shareholding in CSC e-Governance Services India Limited (“**CSC e-Governance**”)²⁵ without obtaining the approval of the CCI (“**Transaction**”).

Brief Background

On November 4, 2020, Axis Bank and CSC e-Governance executed the share subscription agreement (“**SSA**”) in relation to the Transaction, and the same was closed in November 2020 without obtaining the CCI’s approval. On December 28, 2020, a person nominated by Axis Bank was appointed as a director in CSC e-Governance.

On September 19, 2022, the CCI issued an SCN to Axis Bank asking it to explain why the Transaction was closed prior to its approval. Axis Bank *inter alia* contended that: (a) it inadvertently failed to consider the financials of CSC e-

²³ The *de minimis* exemption is available to a transaction if the target’s consolidated asset value in India does not exceed INR 350 crore (Indian Rupees three hundred and fifty crore) or its consolidated turnover generated in India does not exceed INR 1000 crore (Indian Rupees one thousand crore).

²⁴ It is a banking company.

²⁵ CSC e-Governance is a special purpose vehicle, established to oversee implementation of the Common Service Centres (**CSC**) Scheme, a project under the Digital India Programme of the Ministry of Electronics and Information Technology to provide access points for the delivery of essential public utility services, social welfare schemes, healthcare, financial, education and agriculture services, and a host of business-to-consumer services to the people in rural and remote areas.

Governance for the FY 2019-2020, i.e., the relevant year, basis which *de minimis* exemption was not available; and (b) in any case, the Transaction will benefit from item 1 exemption under Schedule I of the Combination Regulations (“**Item 1 Exemption**”)²⁶.

CCI Order

The CCI *inter alia* noted that: (a) the aggregated value of assets and turnover of Axis Bank and CSC e-Governance exceeded the financial thresholds prescribed under Section 5 of the Competition Act; and (b) the Transaction could not benefit from Item 1 Exemption given that Axis Bank had nominated a director who was appointed on the board of CSC e-Governance and therefore, participated in the affairs and management of CSC e-Governance. Accordingly, the CCI imposed a penalty of INR 40,00,000 (Indian Rupees forty lakh) on Axis Bank for failure to notify the Transaction.

(Source: [CCI Order dated August 9, 2023](#))

CCI penalises Massachusetts Mutual Life Insurance Company for *gun jumping*

The CCI imposed a penalty of INR 5,00,000 (Indian Rupees five lakh) on Massachusetts Mutual Life Insurance Company (“**MassMutual**”)²⁷ for closing its acquisition of approximately 16% shareholding of Invesco Limited (“**Invesco**”)²⁸ without obtaining the approval of the CCI (“**Transaction**”).

Brief Background

The Transaction was closed in May 2019 without obtaining the CCI’s approval. Subsequently, on January 17, 2022, the CCI issued an SCN to MassMutual asking it to explain why the Transaction was closed prior to its approval. In the SCN the CCI also noted that MassMutual acquired the right to nominate: (a) a director on the board of Invesco; and (b) a representative on the board of Invesco’s substituent committees. MassMutual primarily contended that based on the turnover of Invesco and its subsidiaries as reflected in their financial statements for the relevant year, the Transaction could avail benefit of the *de minimis* exemption. Further, it would be incorrect to consider the turnover of the Invesco mutual fund as the turnover generated is on account of the buying / selling of the securities which are held in the trust for the benefit of the unitholders.

CCI Order

The CCI noted that for combinations pertaining to mutual funds, for calculating the jurisdictional thresholds provided under the Competition Act, the: (a) asset value/ turnover generated by an asset management company of a mutual fund; (b) asset value and turnover generated by a trustee of a mutual fund (if it is also subject to an acquisition); and (c) asset under management (“**AUM**”) and turnover generated by a mutual fund, need to be considered. The turnover of a mutual fund is aggregate of: (a) gross value of sale and redemption of securities; and (b) income such as dividend, interests, etc. Further, if a fund has any controlled portfolio companies, then the asset value and turnover of such entities also need to be considered.

In the instant case, the AUM of the Invesco mutual fund for the relevant year was approximately INR 20,000 crore (Indian Rupees twenty-thousand crore) which not only exceeds the jurisdictional asset threshold of INR 2,000 crore

²⁶ 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.

²⁷ It belongs to the MassMutual Financial Group and operates as an insurance firm and offers individual and group life insurance, disability insurance, individual and group annuities and guaranteed interest contracts to individual and institutional customers in USA and Puerto Rico.

²⁸ It is incorporated in Bermuda. It is present in more than 26 countries and manages approximately USD 1.5 trillion in assets for investors globally.

(Indian Rupees two thousand crore)²⁹ in India but also the *de minimis* asset threshold of INR 350 crore (Indian Rupees three hundred and fifty crore) in India. With respect to the turnover, the gross value of sale of securities of the Invesco mutual fund exceeds the *de minimis* turnover threshold of INR 1,000 crore (Indian Rupees one thousand crore) for the relevant year. Accordingly, the Transaction qualified as a ‘combination’ under the Competition Act and ought to have been notified to the CCI for its approval.

The CCI imposed a nominal penalty of INR 5,00,000 (Indian Rupees five lakh) on MassMutual for failure to notify the Transaction.

(Source: CCI Order dated August 7, 2023)

CCI approves acquisition of majority shareholding of HDFC Credila by BPEA EQT and others

The CCI approved the acquisition of approximately 90% shareholding of HDFC Credila Financial Services Limited (“**HDFC Credila**”)³⁰ by Kopvoorn B.V. (“**BPEA EQT**”)³¹ belonging to the EQT group³², and Moss Investments Limited³³, Infinity Partners³⁴ and Defati Investments Holding B.V.³⁵ belonging to ChrysCapital group (“**Proposed Transaction**”).

The CCI examined the horizontal overlaps between the activities of the parties³⁶ in the market for the: (a) provision of education loans; and (b) market for distribution/referral of life insurance products and services, in India. On competition assessment, the CCI noted that: (a) the combined market shares of the parties are low; and (b) there are several significant players present in the relevant markets which will pose competitive constraints on the parties. In view of the same, the Proposed Transaction is not likely to raise competition concerns.

Further, the CCI noted that both EQT group and ChrysCapital group (through their respective affiliates) are engaged in information technology and information technology-enabled services (“**IT & ITeS**”) in India. However, these affiliates provided sector-agnostic IT & ITeS and not specifically to the banking and financial services sector.

The CCI approved the Proposed Transaction in 42 (forty two) calendar days.

JSA represented BPEA EQT in obtaining the approval of the CCI.

(Source: CCI Order dated August 8, 2023)

²⁹ As per the parties’ test, if the asset value or turnover of the parties to the transaction in India exceeds INR 2000 or INR 6000 respectively, the transaction qualifies as a ‘combination’ under section 5 of the Competition Act.

³⁰ It is a non-banking financial company registered with the Reserve Bank of India and is a wholly owned subsidiary of HDFC Bank. It is primarily engaged in the business of providing education loans to Indians.

³¹ It is a private limited liability company and forms part of the EQT group of investment funds.

³² EQT group makes investments in various sectors, both in India and overseas.

³³ It is a special purpose vehicle belonging to the ChrysCapital group.

³⁴ It is a partnership firm set up under the laws of India and is an investment vehicle belonging to the ChrysCapital group.

³⁵ It is an investment vehicle belonging to the ChrysCapital group.

³⁶ Through ChrsCapital group (including its affiliates) and HDFC Credila (including its affiliates).

CCI approves acquisition of Marnix Lux by Concentrix

The CCI approved the acquisition of: (a) 100% shareholding of Marnix Lux³⁷ by Concentrix Corporation (“**Concentrix**”)³⁸; and (b) up to 23% shareholding of Concentrix by the sellers of Marnix Lux, subject to certain conditions³⁹ (“**Proposed Transaction**”).

The CCI examined the horizontal overlaps between the activities of the parties⁴⁰, in the broad market for the provision of information technology and information technology-enabled services, and in the: (a) narrow market for the provision of business process outsourcing (“**BPO**”) services, and (b) narrowest market for the provision of customer experience management BPO services, in India. On competition assessment, the CCI noted that: (a) the combined market shares of the parties are low; and (b) there are several significant players present in each of the relevant markets which will pose competitive constraints on the parties. In view of the same, the Proposed Transaction is not likely to raise competition concerns.

The CCI approved the Proposed Transaction in 40 (forty) calendar days.

(Source: CCI Order dated July 4, 2023)

CCI approves combination between TCNS Clothing and Aditya Birla Fashion

The CCI approved the acquisition of 51% shareholding of TCNS Clothing Company Limited (“**TCNS**”)⁴¹ by Aditya Birla Fashion and Retail Limited (“**ABFRL**”)⁴², belonging to the Aditya Birla group. Pursuant to such acquisition, TCNS will merge with and into ABFRL (“**Proposed Transaction**”).

The CCI examined the horizontal overlaps between the activities of the parties⁴³ in the broad market for the sale of retail products in India, and in the: (a) narrow market for sale of apparel, footwear and accessories (“**AFA**”) products; and (b) narrowest market for organised sale of AFA products in India. On the competition assessment, the CCI noted that: (a) the combined market shares of the parties are low; and (b) there are several significant players present in each of the relevant markets which will pose competitive constraints on the parties. In view of the same, the Proposed Transaction is not likely to raise competition concerns.

Further, the CCI examined the: (a) vertical relationship between the parties wherein TCNS supplied apparels to the retail stores of ABFRL; and (b) potential vertical links between the parties in the upstream market for the manufacture and sale of viscose⁴⁴ and the downstream market of sale of women’s apparels manufactured using viscose⁴⁵. However, given the low combined market shares of the parties with the presence of several significant players, the Proposed Transaction is not likely to raise foreclosure concerns.

The CCI approved the Proposed Transaction in 40 (forty) calendar days.

(Source: CCI Order dated June 27, 2023)

³⁷ Marnix Lux does not have operations of its own other than indirectly holding shares in Webhelp S.A.S. (**Webhelp**). Webhelp is primarily engaged in the provision of BPO services and specialised services.

³⁸ Concentrix, a USA based publicly listed customer experience services company is primarily engaged in information technology services, with a focus on BPO services.

³⁹ If Concentrix’s share price reaches above a certain price within 7 (seven) years from the closing of the Proposed Transaction, the sellers have the right to acquire additional shares aggregating to approximately 23% shareholding of Concentrix.

⁴⁰ Concentrix (through its affiliates) and Marnix Lux (through its affiliates).

⁴¹ It is engaged in manufacturing, distribution and sale of women’s apparel, jewellery, footwear and beauty products.

⁴² It is engaged in B2B and B2C sales of branded products within the apparel, footwear and accessories segment through its retail stores, online retail platforms and e-commerce marketplaces.

⁴³ ABFRL (through its affiliates) and TCNS (through its affiliates).

⁴⁴ Through ABFRL (including its affiliates).

⁴⁵ Through TCNS (including its affiliates).

CCI approves acquisition of certain shareholding of Biocon Biologics by Kotak under Green Channel

The CCI approved the acquisition of certain shareholding of Biocon Biologics Limited (“**Biocon Biologics**”)⁴⁶ by Kotak Special Situations Fund (“**Kotak**”)⁴⁷ (referred to as the “**Proposed Transaction**”). The parties notified the Proposed Transaction under green channel as there were no horizontal, vertical, or complementary overlaps between the activities of the parties in India.

(Source: [Summary](#))

CCI approves acquisition of Toshiba by Japan Industrial Partners under Green Channel

The CCI approved the acquisition of Toshiba Corporation⁴⁸ by TBJH, Inc, an indirect subsidiary of Japan Industrial Partners, Inc. (“**Proposed Transaction**”). The parties notified the Proposed Transaction under green channel as there were no horizontal, vertical, or complementary overlaps between the activities of the parties in India.

(Source: [Summary](#))

Miscellaneous

CCI publishes draft regulations for commitment and settlement for public comments

On August 23, 2023, the CCI released the draft CCI (Commitment) Regulations, 2023 (“**Commitment Regulations**”) and the CCI (Settlement) Regulations, 2023 (“**Settlement Regulations**”) inviting public comments.

The draft regulations were published pursuant to the amendment to the Competition Act to allow parties to apply to the CCI to make commitments in, or settle, cases relating to anti-competitive agreements (excluding cartels) and abuse of dominance. This will enable the CCI to achieve efficiency in the regulatory process, including quicker market corrections while maintaining the quality of adjudication and investigation. For a detailed summary of the Competition Amendment Act, refer to the [JSA Competition Law Prism of April 2023](#).

Commitments can be offered between the commencement of the DG’s investigation and before the submission of its investigation report to the CCI, whereas settlements can be offered after the DG report is issued, but before a final order is issued by the CCI. The key features proposed in the draft regulations for mentioned below:

1. Filing:

- a) **Commitment:** A commitment application must be filed within 45 (forty five) days from the receipt of the *prima facie* order passed by the CCI. The CCI has power to grant an extension of 30 (thirty) days if sufficient cause is shown for the delay in filing the application. The CCI’s inquiry into the alleged contravention by the applicant will be in abeyance till the CCI reaches a final decision in relation to the commitment application.
- b) **Settlement:** A settlement application must be filed within 45 (forty five) days from the receipt of the investigation report (“**DG Report**”) of the DG. The CCI has power to grant an extension of 30 (thirty) days if

⁴⁶ It is a biosimilars company which is engaged in the manufacture and commercialization of pharmaceutical formulations such as biosimilars, insulins and drug substances in India.

⁴⁷ It is an alternative investment fund registered with the Securities and Exchange Board of India. It is engaged in investing in companies with a sector agnostic approach. It invests in portfolio vehicles to obtain primarily long-term capital appreciation and returns in the nature of interest, dividend, capital gains or share of profits on its investments through a combination of appropriate instruments.

⁴⁸ It is a multinational conglomerate which is engaged in the business of energy systems & solutions, infrastructure systems & solutions, building solutions, retail & printing solutions, electronic devices & storage solutions, digital solutions, and others (including battery and other products).

sufficient cause is shown for the delay in filing the application. The CCI's inquiry into the alleged contravention by the applicant will be in abeyance till the CCI reaches a final decision in relation to the settlement application.

2. Contents of the Applications:

Both commitment and settlement applications must include details regarding: (a) corporate information of the applicant; (b) proof of payment of fees along with the application; (c) full and true disclosure of the alleged contravention; (d) the proposal and how it addresses the alleged contraventions, competition concerns and the manner of implementation and monitoring; (e) previous contraventions and details of the same; (f) nature, gravity and impact of the alleged contraventions and the duration of involvement of the applicant in the alleged contravention; (g) summary of the *prima facie* order, and details of competition concerns, alleged contraventions, proposal offered by the applicant and how they address the competition concerns; and (h) any other information. Additionally, a settlement application must include the details of the findings in the DG Report and how it proposes to address the concerns identified.

3. Fees:

The fees for both commitment and settlement applications are the same and depend on the applicant's turnover, as set out in the table below:

Turnover of Applicant	Fees
Up to INR 50 crore (Indian Rupees fifty crore)	INR 5 lakh (Indian Rupees five lakh)
Between INR 50 crore (Indian Rupees fifty crore) and INR 500 crore (Indian Rupees five hundred crore)	INR 15 lakh (Indian Rupees fifteen lakh)
Exceeding INR 500 crore (Indian Rupees five hundred crore)	INR 50 lakh (Indian Rupees fifty lakh)

4. Comments, Objections and Suggestions to the Applications:

The CCI can provide an opportunity to the party concerned, the DG, and any other party to submit their comments, objections and suggestions to the public version of the summary of the commitment and settlement applications which the CCI will share. In relation to commitment applications, the CCI can additionally also invite public comments, objections and suggestions by publishing the summary on its website.

5. Factors to be Considered by the CCI:

The CCI while assessing the effectiveness of the settlements and commitments will consider the nature, type and duration of the alleged contravention, proposal offered by the applicant addresses the concern identified amongst other factors.

6. Settlement Amount:

A settlement application will be accepted by the CCI only upon payment of the settlement amount. This amount may extend up to the maximum amount of penalty that would have otherwise been leviable under the Competition Act. In identifying the settlement amount, the CCI may consider factors such as level of cooperation extended by the applicant, nature of disclosure made, settlement proposal and will be guided by the penalty guidelines. The CCI may apply a settlement discount and reduce the settlement amount by up to 15%.

7. Nature of the CCI's Acceptance of the Application:

The CCI's order accepting settlements and commitments, will not be construed as a finding of contravention against the applicant. Further, the CCI can proceed against the parties that are not part of the commitment / settlement proceedings. If the commitment and settlement applications pertain to only some of the alleged contraventions as noted in the CCI's prima facie order and the DG Report respectively, the CCI can continue its investigation in relation to the remaining contraventions. The CCI is also free to use the information submitted in the commitment and settlement applications against the applicant and other parties. Orders passed by the CCI rejecting or accepting commitment/ settlement applications are not appealable.

8. Conclusion of Proceedings:

The CCI must conclude the commitment proceedings within 90 (ninety) days from the receipt of the commitment application and settlement proceedings within 120 (one hundred and twenty) days from the receipt of the settlement application, subject to extensions granted by the CCI, if deemed appropriate.

9. Implementation and Monitoring:

The CCI can appoint agencies to oversee implementation of the commitments and settlements on terms and conditions as specified by the CCI. The cost of appointment of the agency will be borne by the parties.

10. Revocation of the CCI's order:

The CCI can revoke its orders in relation to both, commitment and settlement applications if: (a) the commitment/ settlement applicant fail to comply with the CCI order; (b) the CCI discovers that the applicant did not make full and true disclosure; (c) there is a material change in the facts. Further, the applicant will be liable to pay legal costs incurred by the CCI which may extend to INR 1,00,00,000 (Indian Rupees one crore) and the CCI may restore or initiate an inquiry in relation to the matter for which the settlement or commitment order was passed, after providing an opportunity to the applicant for hearing.

(Source: [Draft Commitment Regulations](#) and [Draft Settlement Regulations](#))

CCI publishes draft combination regulations for public comments

On September 5, 2023, the CCI published CCI (Combinations) Regulations, 2023 ("**Draft Combination Regulations**") to invite public comments until 25 September 2023. The Draft Combination Regulations will replace the existing Combination Regulations and incorporate the changes brought by the Competition Amendment Act including 'deal value' thresholds and waiver from standstill obligation in case of open offer and open market purchase etc.

For a detailed summary of the Draft Combination Regulations, refer to the [JSA Competition Law Prism of September 2023](#).

(Source: [Draft Combination Regulations](#))

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. As such, 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.

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Global Competition Review (GCR)
has recognized JSA's Competition
Law Practice in its latest 2023
edition of 'GCR 100'



17 Practices and
24 Ranked Lawyers



16 Practices and
11 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



11 Practices and
39 Ranked Partners
IFLR1000 APAC Rankings 2022

Banking & Finance Team
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Fintech Team of the Year

Restructuring & Insolvency
Team of the Year



Among Top 7 Best Overall
Law Firms in India and
10 Ranked Practices

13 winning Deals in
IBLJ Deals of the Year

10 A List Lawyers in
IBLJ Top 100 Lawyer List



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Dispute Resolution Law
Firm of the Year 2022

Equity Market Deal of the
Year (Premium) 2022

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