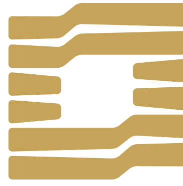

Luthra and Luthra
LAW OFFICES INDIA

COMPETITION LAW NEWSLETTER

AUGUST EDITION

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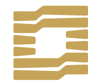

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In the August edition of the Luthra & Luthra Law Offices India (**L&L**) Competition Law Newsletter, we encapsulate several significant enforcement and combination orders passed by the Competition Commission of India **(CCI)**. Along with it, the much-awaited upcoming regulatory reforms are also discussed.

The Competition (Amendment) Bill, 2022 introduced by the Government

The Minister of State for Corporate Affairs introduced the Competition (Amendment) Bill, 2022 (**Bill**) in the Lok Sabha on August 5, 2022.

This development finds its footing from the report prepared by the high-level Competition Law Review Committee (**CLRC**) in 2019.

Some of the proposed amendments in the Bill include introduction of deal value thresholds, expedited merger review timelines; settlements and commitments; leniency plus, etc.

Currently, the Competition Act, 2002 (**Act**) only prescribes asset and turnover based thresholds and if either test is met and no exemption is available, a notification is required to be filed before the CCI. The Bill proposes the introduction of a "deal value" threshold, so that transactions: (a) with a deal value of more than **INR 2,000 crore** (approx. **USD 252 million**); and (b) where either party has "substantial business operations in India", will require to be notified in India.

The Bill also seeks to reduce the merger review timelines. Currently, the CCI has 30 working days to arrive at its prima facie view on whether a transaction causes Appreciable Adverse Effect on Competition (**AAEC**) or not – this has now been reduced to 20 calendar days. It is also proposed to reduce the overall period of 210 calendar days for the CCI to arrive at a decision on a transaction to 150 calendar days.

The Bill also introduced the much-awaited concept of 'Settlements and Commitments', which will allow parties to apply to the CCI to settle the matter or make commitments in cases of anti-competitive vertical agreements and abuse of dominance cases. However, the concept will not be available in cartel cases.

Specifically for cartel matters, the Bill seeks to strengthen the regulations by increasing the burden on parties for failing to cooperate till the completion of proceedings. The CCI may consider these factors to reject a marker. The Bill seeks to allow a party to withdraw a marker as well. The Bill also seeks to introduce "leniency plus" mechanism, allowing a party to disclose another cartel basis which the party will receive a reduction in penalty for both cartels.

The Bill also provides that parties who have been slapped with a penalty for contravening the Act will have to make a pre- deposit of 25% before their appeal can be entertained by the National Company Law Appellate Tribunal (**NCLAT**).

CCI dismisses allegations of anti-competitive practices against NIIT Limited

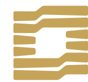
The CCI vide its order dated 01.07.2022, held that there was no contravention of the provisions of the Act by NIIT Limited (**OP**) as alleged by Mr. Pankaj Rai (**Informant**).

The Informant submitted that the OP misled the Informant to sign an exclusive supply agreement by claiming to be an honest business entity. The Informant also relied upon various orders issued by different courts/tribunals against the OP to establish its alleged bad credentials as a dishonest business entity. Based on the same, the Informant prayed that the CCI should inquire into the conduct of OP for contravening the provisions of Section 3 and Section 4 of the Act. However, the CCI noted that orders of different courts/tribunals against the OP, furnished by the Informant were completely irrelevant to the present matter. Further, the Informant contended that the principle of *res judicata* cannot be applied in the present matter, since it was based on a "fresh cause of action and on points that were not adjudicated earlier on merits." The CCI held that the Information presented by the Informant was a gross abuse of the regulatory process, whereby the Informant was seeking to reopen the case which has already been decided against it by the CCI. Further, it was also held that the present matter was not based on any new information, cause of action, or evidence. Lastly, the CCI held that the Informant is a chronic, compulsive, and habitual litigant in the habit of filing frivolous and vexatious proceedings before various judicial forums, wasting public time and resources, and that the OP has not contravened the Act.

CCI dismissed the allegations of anti-competitive behavior against Chhattisgarh Chemist & Druggist Association

The CCI vide its order dated 05.07.2022 dismissed the complaint against the Chhattisgarh Chemist & Druggist Association (**CCDA**) which alleged that its members collectively ensured that no new medicines could be launched by pharmaceutical companies in the markets of Chhattisgarh unless a sum of **INR 5000/-** per medicine was given to the said association, which then issues receipts against these charges collected towards Product Information Services (**PIS**) and Letter of Consent/No Objection Certificate (**LOC/NOC**). It was alleged that the CCDA illegally collected crores in this manner.

The CCI was of the prima facie view that the act of collecting PIS charges by the CCDA seemed to be directly or indirectly limiting or restricting the supply of medicines/pharmaceutical drugs in the market. The CCI further noted that there is no justification for the conduct of CCDA and its members, which has caused and has the potential to cause appreciable adverse effect on competition (**AAEC**) in the market. Hence, the CCI directed the Director General (**DG**) to investigate into this matter, and also on the role of



persons/officers who were responsible for the conduct of such activities.

The DG went through the emails of CCDA and was of the view that it is mandatorily charging payments in the form of PIS/NOC/LOC charges for the launch of new products by pharmaceutical companies, and hence was acting in a way to limit or control the supply of goods and services.

The CCI took notice of the DG Report, contentions of the informant and CCDA. The CCI noted that the DG stated that the payment of PIS is mandatory, however, CCDA contended that it is voluntary. The CCI then took note of some leading pharmaceutical companies operating in Chhattisgarh and a company named Macleods Pharmaceuticals Limited stated that PIS is mandatory and not voluntary; however, it was also stated that CCDA has not thwarted the launch of any product for want of PIS. The CCI, hence, was not in agreement with the findings of DG. Thereby, the CCI concluded that the benefit of doubt would be extended to CCDA for two reasons - firstly, the distribution of pharmaceutical products has not adversely affected any market and, secondly, there is no cogent evidence on record which suggests that the collection of PIS charges by CCDA from pharmaceutical companies was mandatory.

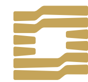
Lastly, CCI opined that since there was no contravention of any provision of the Competition Act by the CCDA, no question of liability arises on the office bearers of CCDA in the facts of the present case.

CCI dismisses allegations against Parle Products Private Limited

The CCI vide its order dated 06.07.2022 found that there existed no prima facie case in the allegations made by Hiveloop Technology Pvt. Ltd. (**Hiveloop /Informant**) against Parle Products Private Limited (**Parle**) regarding anti-competitive practices committed by Parle. The Informant (popularly known as Udaan) contended that they were being forced to buy from the open market rather than getting their supply from Parle itself, and that Parle was abusing its dominant position in the market for glucose biscuits in India, by refusing to enter into a contract with Hiveloop.

Parle is a manufacturer of one of the world's largest selling biscuits, 'Parle-G' and is India's leading manufacturer of biscuit and confectionary. Hiveloop alleged that all of Stock Keeping Units (**SKUs**) of Parle have a high consumer demand in the market, and therefore, Parle-G, in general, is part of a 'must-have' stock for distributors and retailers. Retailers were using Udaan's platform to demand for more such products, which Parle refused to supply making it a clear case of refusal to deal under Section 3(4)(d) of the Act and also abuse of dominance as under Section 4(2) of the Act. The Informant also stated that 115 of 235 vendors from whom the retailers of Udaan could purchase on Udaan's platform are Parle's distributors. Therefore, Udaan is forced to procure Parle's product from the open market.

The CCI took note that as per the information available in the public



domain, Parle has a market share of approximately 27% in the overall category of biscuits and it cannot be said that it does not have market power. In relation to the contravention of Section 3(4) of the Act, as alleged by the Informant, the CCI opined that the Informant is free to obtain its products from the open market and that Parle does not place any embargo on its distributors from dealing with the Informant. The CCI also stated that even if it were to be assumed that Parle had placed active vertical restraint on one of its distributors not to deal with the Informant, no retailer or end consumer appears to have been affected.

Lastly, with regard to the allegations under Section 4 of the Act, the CCI did not find any abuse, as the Informant failed to establish any contravention. Further, the CCI held that scrutinizing the narrow market based on the segmentation provided by the Informant may not be justified in the facts and circumstances of the case, and hence it did not warrant any further assessment of dominance.

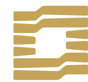
Thus, the CCI was of the prima facie view that the Informant has not been able to demonstrate any exclusionary practice on behalf of Parle which might have hindered the development of a competing supply chain for the products of Parle, and hence there existed no case of contravention of Sections 3(4) and 4 of the Act.

CCI approved the acquisition of shares in Prione by Amazon Asia-Pacific

The CCI, vide order dated 09.03.2022, approved Amazon's combination proposal under Section 31(1) of the Act.

The proposed combination envisaged the acquisition of 76% of the share capital of Prione by Amazon Asia-Pacific. Pursuant to the proposed combination, Amazon Asia-Pacific and Amazon Eurasia would have 100% stake in Prione and Cloudtail India Pvt. Ltd. (**Cloudtail**), a wholly owned subsidiary of Prione. The notifying party had submitted that in order for Amazon Asia Pacific and Amazon Eurasia to acquire 100% shareholding in Prione, and indirectly 100% stake in Cloudtail, Cloudtail will cease its B2C business in India. However, this would happen after the date of receipt of the CCI's approval. Cloudtail would also cease B2B business operations after the closing date, and post that it will undertake limited B2B sales for not more than six months from the closing date in order to dispose of any balance inventory lying in the books of Cloudtail. Further, Couldtail would cease all online B2B and B2C operations within 45 days from the date of receipt of the CCI's approval.

The CCI examined whether the proposed combination would increase the overall market power of Amazon group – and eventually cause AAEC in India. The CCI observed that during FY 2020-21, about one-fifth of the total GMS of Amazon Marketplace was generated through Cloudtail sales. However, the CCI noted that because the volume of sales made by Cloudtail in the B2B space was not significant, the proposed combination is not likely to raise competition concerns in the B2B sales space. The CCI further



noted that activities of Amazon.com's subsidiaries and Cloudtail exhibit vertical interfaces. However, because Cloudtail would cease its operations, foreclosure concerns in the market would not arise. Similarly, Amazon's subsidiaries and Prione also exhibit vertical interfaces. However, based on the value and nature of services provided by Prione to entities other than such subsidiaries, the CCI noted that this vertical interface is not likely to cause foreclosure to third parties. The CCI also considered the application filed by the Confederation of All India Traders (**CAIT**), under Section 33 of the Act, in which it was contended that the complete acquisition of Cloudtail by Amazon will compromise the neutrality of the platform. Cloudtail will get further support of Amazon in terms of subsidized/ no commission, along with other resources such as access to data and funds of Amazon. In furtherance, the CCI talked about the blatant misrepresentations made by Amazon in the past with respect to ensuring a non-preferential treatment to sellers, and therefore, it was stated that Amazon's stance regarding Couldtail ceasing operations cannot be taken at face value.

The CCI warned that if any person conceals/suppresses and/or misrepresents information, it is empowered to take action under Sections 44 and 45 of the Act. Owing to the submissions made by Amazon Asia-Pacific, the CCI decided that the issue of preference is not relevant for the assessment of the proposed combination.

CCI passed a cease-and-desist order against Chennai based Trailers' Association

The CCI, vide its order dated 20.07.2022, passed a cease-and-desist order against Chennai based Trailers' association **(OP)** that represents the trailer owners and drivers. The CCI observed that OP's act of putting an upper limit on the number of containers to be moved and increasing the price of the same resulted in price fixing and halting the provision of services by the virtue of them constituting a trade association.

Trailer Owners Association **(OP1)** in the instant case submitted that the allegations and the findings of the DG were purely based on conjecture. It was also submitted that the National Association of Container Freight Stations **(NACFS)** act as container freight stations **(CFSs)** and transporters at the same time. Further, the allocation of work is provided to NACFS on a priority basis. Moreover, the members of OP operate solely as transporters, and rely on it for their livelihood. On the issue of price fixing, members of NACFS were present in the meeting dated 09.08.2014, whereby, it was mutually decided that all the concerns would be decided through a joint meeting of all the stakeholders. Upon the failure of NACFS to uphold its promise, the associations had requested that the members comply with the 2014 agreement/MoU and further requested the operators of CFSs to make payment of the transport charges within 15 days of raising the invoice. Furthermore, the OP submitted a comparative chart of increase in the prices of diesel, insurance,

tyres, spare parts, driver/cleaner charges, etc. between 2009 and 2018 before the DG, to justify the increase in price, which was not considered by the Commission.

Pursuant to taking note of all the material evidence on record, the CCI found that the existence of the agreement violated provisions of Section 3(3)(a) and Section 3(3)(b) of the Act. The question before the CCI was whether the actions of the trade associations contravened the provisions of the Act. The commission placed its reliance on *Advertising Agencies Guild* v. *IBF & its Members* and reiterated that the trade associations colluded to limit or control production which amounted to a violation under Section 3(3)(a) and Section 3(3)(b) read with Section 3(1) of the Act.

Competition law updates from around the world

i. EU proposes DMA Act

The European Commission (**EU**) has broadcasted newfangled regulations and instructions against big-tech companies such as Facebook, Google, Amazon for their unfair business conduct and the data practices in the market. The EU has framed its regulations by introducing new legislation i.e., The Digital Markets Act (**DMA**) which is yet to be executed by the European lawmakers. The main goal of DMA is to target the Gatekeeper companies for ensuring that they do not use the competitor's data for their own commercial activities. The gatekeeper companies not complying with the rules as enshrined under DMA would be held liable for the penalty which is 10% of the global turnover, and repetitive offenders would be fined up to three times within five years.

ii. Govt. planning to amend IT rules to mandate sharing of revenue with publication companies

The new rules are expected to be formulated under the Information Technology Act, 2000 to target the big-tech companies such as Google, Amazon, Facebook to pay the share of revenue to the digital publishers for the content churned on their platform.

This newsletter is only for general informational purposes, and nothing in this edition of newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to *anything contained in this newsletter (or competition law in general), please feel free to contact Mr. G.R. Bhatia/ Mr. Arjun Nihal Singh, at the below mentioned coordinates.* *© Luthra & Luthra Law Offices India 2022. All rights reserved.*

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