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In the October Edition of the Luthra and Luthra Law Offices India – ‘Competition Law Newsletter’, we cover some of the most pertinent developments in the competition law space over the last month.

CCI appoints three new members

Two Competition Commission of India (CCI) members demitted office in August and September 2023, respectively. The Ministry of Corporate Affairs, Government of India has appointed three new members to the CCI, who have all assumed office. The newly appointed members are Mr. Anil Agrawal, former Director General of Police and former Additional Secretary in the Department for Promotion of Industry and Internal Trade; Mr. Deepak Anurag, former Additional Deputy Comptroller and Auditor General of India; and Ms. Sweta Kakkad, an independent lawyer who previously served as the Interim Chief Compliance Officer at WhatsApp.

CCI dismisses allegations against Hero Moto Corp and its wholesalers

The CCI vide its order dated [14.09.2023](#) dismissed allegations of contravention of Sections 3 and 4 of the Competition Act, 2002 (**the Act**) against Hero Moto Corp. Limited (**Hero Moto Corp**), its super stockist for supply of genuine parts and

various wholesalers engaged in after-sale distribution of spare parts and services (**collectively, Opposite Parties**).

It was alleged that the operational guidelines and the trade discount policy issued by Hero Moto Corp for the year 2019-20 are unfair to Hero Genuine Part Distributors (**HGPDs**) such as the Informant. It was submitted by the Informant that according to the policy, they must operate on advance payments with super stockist who have power to withhold billing and levy heavy interest.

Further, it was alleged that unlike some of the Opposite Parties who were wholesalers, lower incentives were provided to HGPDs and a cap on purchase of stock was imposed on them beyond which discounts/schemes would become inapplicable, showing clear support of Hero Moto Corp towards the wholesalers allowing them to maintain a dominant position over the Informant in the market.

The CCI noted that the appointment of the Informant by Hero Moto Corp was on a non-exclusive basis whereas, the Opposite Parties appear to be in the vertical chain of business with Hero Moto Corp. Further, the CCI noted that the discounts provided to the wholesalers were in the range of minimum discounts and did not contravene provisions of Section 3 of the Act.

The CCI also dismissed the allegations regarding the dominance of the wholesalers observing that the concept of collective dominance is not envisaged under Section 4 of the Act.



Thus, the CCI held that there existed no *prima facie* case of contravention of the provisions of Sections 3 and 4 of the Act and directed the matter to be closed forthwith under Section 26(2) of the Act.

CCI dismisses allegations against DEN Networks

The CCI vide its order dated [14.09.2023](#) dismissed allegations of contravention of Sections 3 and 4 of the Act against DEN Networks Limited (**DEN**).

It was alleged that the amount charged by DEN from other media companies running numerous channels like News Nation Network Private Limited, Information TV Private Limited, Zee Media Corporation Limited, ABP News etc. was much lower compared to the exorbitant fee being charged from the Informant's media company. The fee charged was not in consonance with the consultation paper issued by Telecom Regulatory Authority of India (**TRAI**) and the excess amount so charged was not refunded despite various representations made to DEN, thereby resulting in violation of Section 4 of the Act.

Further, it was also alleged that the conduct of DEN resulted in constructive refusal to deal as discounts are offered to other channels on certain parameters and the Informant's channel is treated differently and excluded, thereby resulting in violation of Section 3(4)(d) of the Act.

DEN, on the other hand, contended that

the Informant is indulging in forum shopping during pendency of the Broadcasting Petition filed by it against the Informant before the Telecom Disputes Settlement Appellate Tribunal (**TDSAT**) in respect of default in payment of outstanding amounts towards channel placement fees arising out of the same agreement.

Further, DEN submitted that it was not dominant due to presence of several competitors and the channel placement fee depended on various factors. A comparison cannot be drawn between the fee charged for Pay Channels and the Informant's free to air channel and that the TRAI notification is not applicable in the present case.

The CCI observed that DEN is not dominant in the market for cable TV service in the State of Uttar Pradesh based on the presence of multiple players, thereby negating any case of contravention of the provisions of Section 4 of the Act. On the issue of charging excessive carriage fee with differential treatment of the Informant by DEN, the CCI noted that no evidence was placed on record to substantiate the allegations and therefore, no case of contravention of provisions of Section 3(4) or 4 of the Act is made out.

Thus, the CCI held that there existed no *prima facie* case of contravention of the provisions of Sections 3 and 4 of the Act and directed the matter to be closed forthwith under Section 26(2) of the Act.



CCI approves acquisition of shareholding of Brillio Holdings by Orogen-Brunson

The CCI vide its order dated [29.08.2023](#) has approved the acquisition of 30% shareholding of Brillio Holdings, Inc. (**Brillio/Target**) on a fully diluted basis by Orogen-Brunson L.P. (**Orogen/Acquirer**) (**Proposed Combination**).

The CCI observed that the activities of the Acquirer group and Target overlap in the area of data analytics. Accordingly, the CCI assessed that both the Acquirer and Target have a limited presence in the Indian data analytics market as reflected in their turnover.

Further, a substantial majority of Target's revenue is from its intra-group provision of services to its group companies located outside India. Resultantly, the overall position of the combined entity in the data analytics market and the increment in terms of market shares resulting from the Proposed Combination was found to be insignificant to cause any change in competition dynamics.

Thus, the CCI held that the Proposed Combination is not likely to have any appreciable adverse effect on competition in India and approved the Proposed Combination under Section 31(1) of the Act.

Delhi High Court sets aside anti-profiteering order passed by the

CCI against E-Homes Infrastructure

The Delhi High Court (**DHC**) vide its order dated 12.09.2023 in the petition filed by M/s E-Homes Infrastructure Pvt. Ltd. (**E-Homes Infrastructure/Petitioner**) set aside the order dated [17.08.2023](#) (**Impugned Order**) passed by the CCI under Section 171 of the Central Goods & Services Tax Act, 2017.

E-Homes Infrastructure alleged that the Impugned Order was passed in violation of the principles of natural justice as the petitioner was not provided with the copies of the reports submitted by the Director General of Anti-Profiteering (**DGAP**), which were the subject matter of consideration by the CCI. Further, it was submitted that the Impugned Order relates to another project in respect of which no complaint was made. According to the Petitioner, the CCI had no jurisdiction to entertain any proceeding in relation to a project which is not the subject matter of a complaint.

The CCI submitted that the principles of natural justice were not violated as the Impugned Order was in favor of the Petitioner and the CCI had accepted most of the contentions advanced by the Petitioner and had remanded the matter to the DGAP for verification. Further, as on date there was no order fixing any liability on the Petitioner and therefore, the Petitioner cannot be aggrieved as the principles of natural justice are required to be followed only in case an adverse order is contemplated.



Furthermore, the CCI submitted that it was empowered to direct the DGAP to investigate any other project, even if it was not the subject matter of the complaint.

The DHC held that since the reports of the DGAP that formed the basis of the Impugned Order were never provided to the Petitioner, the Petitioner was never afforded the opportunity to address the issues raised in such reports. Further, the contention that the Impugned Order is in favor of the Petitioner is erroneous as in that case, proceedings would have been terminated. The CCI held that the Impugned Order was vitiated as it was passed without following the principles of natural justice.

Accordingly, the DHC set aside the Impugned Order and remanded the matter back to the CCI for considering it afresh in accordance with law. The DHC also directed the CCI to consider all the contentions advanced and pass a speaking order.

Madras High Court dismisses appeals filed by cement manufacturers against impleadment of BAI in CCI proceedings

The Madras High Court (**MHC**) vide its order dated [29.09.2023](#) dismissed the Letters Patent Appeals (**Appeals**) filed by Dalmia Cement (Bharat) Ltd. and India Cements Limited (**collectively, Appellants**) challenging the

impleadment of the Builders' Association of India (**BAI**) by the CCI in its proceedings against cement manufacturers.

The proceedings before the CCI pertained to the *suo motu* cartelization investigation against cement manufacturers. The CCI had previously dismissed BAI's application for impleadment in the proceedings and the BAI had moved the DHC challenging the same, whereby the DHC had granted liberty to the BAI to move the CCI again. Subsequently, the CCI allowed the application for impleadment filed by the BAI.

BAI's impleadment was challenged by the Appellants before the learned Single Judge of the MHC who declined to exercise its jurisdiction on the grounds of forum convenience and comity of Courts, as the same was assailed by another cement manufacturer before the DHC. Accordingly, the Appellants filed the instant Letters Patent Appeals before the MHC.

The Appellants submitted that the CCI has allowed BAI's application for impleadment without issuing notice to the Appellants in violation of the principles of natural justice. Further, they contended that the BAI is not a consumer within the meaning of Section 2(f) of the Act and it can at most be a witness, however, not a necessary or appropriate party. It was also argued that the impleadment of BAI, will prejudice the confidentiality of the sensitive pricing information shared by the Appellants.

The respondents, i.e. the CCI, BAI and the Office of the Director General, CCI, contended that the information shared by



the Appellants should have been segregated as non-confidential and confidential as any member of the public could also undertake inspection by showing sufficient cause. They highlighted that no grievance has been raised by the Appellants over the sharing of the documents with their own competitors from the cement industry. Further, they submitted that the CCI was not required to provide the Appellants an opportunity of hearing while impleading the BAI or allowing its applications for inspection and in any case, the inspection had already been undertaken by BAI.

The MHC held that before passing the order of impleadment, the CCI ought to have given notice to the Appellants as a minimum requirement of the principles of natural justice. However, prior to the filing of the Appeals, the BAI has already been provided with the inspection of the documents. In light of this, the entire premise of arguments of the Appellants pertaining to BAI accessing the documents, would be futile as the matter has proceeded further.

Thus, the MHC dismissed the Appeals challenging the order of the CCI impleading BAI.

CCI releases Draft Combination Regulations, 2023 for public consultation

CCI released a draft of the CCI (Combinations) Regulations, 2023 (**Draft Combination Regulations, 2023**) for

comments which will repeal the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

The Draft Combination Regulations, 2023 include *inter alia* provisions on deal value threshold (**DVT**) of transactions and criteria for substantial business operations in India; form of notice for the proposed combination; exercise of rights in case of open offer and acquisitions on stock exchanges; increase in amount of fee and mode of payment; procedure for filing notice and scrutiny of notice; and procedure for modification to the proposed combination. The key changes are as follows:

- (i) **Deal Value Threshold:** In line with the Competition Amendment Act, 2023, the Draft Combination Regulations, 2023 discuss DVT to cover transactions which are currently not notifiable under the existing asset/turnover based thresholds, along with providing the criteria for determination of "substantial business operations in India".
- (ii) **Increase in amount of filing fee:** The filing fees is proposed to be increased from INR 20 Lakhs to INR 30 Lakhs for Form I and from INR 65 Lakhs to INR 90 Lakhs for Form II.
- (iii) **Procedure for modifications:** A format to offer modifications / remedies to the CCI including



summary of the modifications offered; details on how the modifications address the identified concerns; various details on the divestment products, if any; and monitoring arrangements has been introduced with timelines for various steps in the modification process.

- (iv) **No express regulation for Green Channel route:** The erstwhile regulation outlining the Green Channel route has been deleted. However, a reference to the same has been retained under the draft Form I.
- (v) **Deletion of schedule of exemptions:** The Draft Combination Regulations, 2023 do not contain the schedule of exemptions embodied in the erstwhile Schedule I.
- (vi) **Codification of Pre-filing consultation mechanism:** The pre-filing consultation mechanism has been codified reiterating that the advice will be non-binding in nature.
- (vii) **Relaxations for open-market purchases:** It is proposed that open-market purchases must be notified to the CCI within 30 days from the completion of such transactions. Further, the Draft Combination

Regulations, 2023 permit the exercise of certain rights prior to receipt of the CCI approval including benefiting from economic benefits such as dividends; disposing of shares; or exercising voting rights in matters relating to liquidation or insolvency proceedings. However, the acquirer must not directly or indirectly influence the target enterprise in any way.

CCI to soon commence non-binding guidance initiative

According to [news reports](#), the CCI is set to implement a new mechanism providing 'advanced guidance' to enterprises on competition law provisions and regulations to help undertake commercial decisions and address anti-competitive concerns.

By way of its non-binding nature, the guidance so rendered would not constitute definitive rulings on factual or legal matters by the CCI or its staff. This is a vital step to bring clarity in the interpretation of the provisions of the Act, especially Sections 3 and 4.

This newsletter is only for general informational purposes, and nothing in this edition of the 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 G.R. Bhatia/ Arjun Nihal Singh, at the below mentioned coordinates. © Luthra & Luthra Law Offices India 2023. All rights reserved.

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