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Competition Law Newsletter

– July 2024

Index

Recent Case Laws

Delhi High Court

1. *Delhi High Court dismisses petition alleging cartelization and bid rigging in Tata SIA Airlines Limited and Air India*

A Single Bench of the Delhi High Court in the case of *Captain Deepak Kumar* v. *Competition Commission of India*[1], dismissed a petition alleging cartelization and bid rigging in the approved merger between Tata SIA Airlines Limited (Vistara) and Air India Limited.

Please find a **copy** of the judgement, here.

National Company Law Appellate Tribunal

2. *NCLAT, Delhi analyses the applicability of the principle of 'relevant turnover' v. 'total turnover' in computation of penalty.*

The National Company Law Appellate Tribunal, ("**NCLAT**"), New Delhi in the case of, *Messrs. Delicacy Continental Private Limited* v. *Competition Commission of India*[2], *inter-alia*, adjudicated upon the issue whether penalty can be imposed basis the principle of 'relevant turnover' as formulated by the Supreme Court in the case of, *Excel Crop Care Limited* v. *Competition Commission of India and others*[3], ("**Excel Corp**") while deciding on allegations pertaining to cover/ collusive bidding, sharing of market and bid rigging.

The NCLAT, Delhi while distinguishing the Excel Corp case from the facts and circumstances involved in the instant matter, noted that in Excel Corp, the companies were all involved in the same business since 2002, and their balance sheets also had segment wise reporting, which made it possible to segregate the turnover from the business for each year of operation and hence, in such a scenario, '*relevant turnover*' is a very logical and correct way of calculating the penalty, as it brings in the doctrine of proportionality to the penalty for the offences under the Competition Act, 2002 ("**the Act**"). However, in the instant case, where almost all bidders were the first-time bidders and the turnovers from such business was NIL, '*total turnover*' for computation of penalty would be the correct approach as otherwise, the penalty would be become NIL.[4]

Please find a **copy** of the order, here.

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[1] *Captain Deepak Kumar* v. *Competition Commission of India*, W.P.(C) 9044/2024).

[2] *Messrs. Delicacy Continental Private Limited* v. *Competition Commission of India,* Competition Appeal (AT) No. 32 of 2022.

[3] *Excel Corp Limited* v. *Competition Commission of India and others*, [(2017) 8 SCC 47].

[4] The law for determination of penalty under the Act has been amended with effect from March 3, 2024, *vide* Section 20 of the Competition (Amendment) Act, 2023. Further, the Competition Commission of India (Determination of Turnover or Income) Regulations, 2024 have been introduced for determining turnover or income for the purposes of Section 27 of the Act.

3. ***NCLAT, Delhi dismisses abuse of dominance plea against Kerala state road transport corporation ("KSRTC")***

The New Delhi Bench of NCLAT in the case of *Shine P Sasidhar* v. *Kerala State Road Transport Corporation*[5], held that KSRTC is not liable for abuse of dominant position for charging fares as per rates fixed as per the notification issued by the Government of Kerala in accordance with the powers conferred on it under the provisions of the Motor Vehicle Act, 1988 with the object of providing adequate, economical and properly coordinated passenger road transport service in public interest. The NCLAT also, reiterated the reasoning of the Competition Commission of India ("**CCI/ the Commission**") that the issue involved in the instant case is a matter of public policy wherein the fares on per kilometre basis were being charged uniformly in compliance with the notification issued by the government by both public and private operators. Hence, the NCLAT opined that there is no discernible competition concern in the instant matter.

Please find a **copy** of the order, here.

Competition Commission of India

Anti-Trust

1. ***CCI dismisses allegations of abuse of dominance and unfair trade practices against Indiabulls Housing Finance Limited ("Indiabulls")***

The CCI has recently dismissed allegations of abuse of dominant position in the Delhi NCR region by Indiabulls Housing Finance Limited. The allegations entailed that imposition of high rate of interest, frequent increase of rate of interest and not allowing pre-payment of Loans (imposition of pre-payment penalty) resulted in the creation of barriers for new entrants in the market, as consumers are disinclined to switch to a new entrant due to the apprehension of incurring losses. It is also alleged that the competition gets adversely affected as consumers face hindrance in the form of penalties when they switch to another bank and hence, the same should be considered as anti-competitive and void under Section 3(1) and 3(2) of the Act. Additionally, the Informant also alleged that, Indiabulls is in violation of Section 4 of the Act by engaging in unfair trade practices, abusing its dominant position to impose unjust and excessively high interest rates that are both unfair and discriminatory.

For the purpose of analysis of conduct of IndiaBulls under the ambit of Section 4 of the Act, the Commission deemed appropriate to delineate the relevant market as '*provision of loan against property in India*'. The Commission while rejecting the presence of a *prima facie* case against the Informant under Section 4 of the Act noted that, as per the information available in the public domain, the relevant market appears to be competitive with the presence of large number of banks and Non-Bank Financial Companies ("**NBFCs**") and housing finance companies and thus, dominance of Indiabulls is not established in the aforesaid relevant market. Further, the CCI also enumerated that the allegation of aftermarket abuse is misplaced since the loan services of the nature involved in the instant case, do not involve any aftermarket as alleged by the Informant.

Further, with respect to the allegations under Section 3 of the Act, the Commission held that, the agreement with an end-consumer like in the instant case is not envisaged as an

[5] *Shine P Sasidhar* v. *Kerala State Road Transport Corporation,* COMPETITION APPEAL (AT) NO.03/2024.

anti-competitive agreement under Section 3 of the Act and therefore, no case is made out under the provisions of Section 3 of the Act.

Please find a **copy** of the order, here.

2. ***CCI exonerates Paytm from allegations of abuse of dominance in the digital payments market***

The allegations in the instant case against One97 Communications Ltd. ("**Paytm**") and other opposite parties consisted of, *inter-alia*, imposition of post-paid loan facility on the Informant despite sufficient balance in mobile wallet and saving bank account linked with Paytm. The Informant alleged that holding a dominant position in the market for 'digital payment', Paytm has indulged in conduct in violation of Sections 3 and 4 of the Act.

Analysing the facts and circumstances of the instant case, the Commission noted that the concerns of Informant regarding deficiency in service/ misrepresentation/ mis-selling appeared to be more of contractual/ individual dispute rather than an issue that falls within the four corners of the Act. Therefore, the Commission found no *prima facie* case of violations of anti-competitive provisions of the Act and directed for closure of matter in terms of relevant provision of law.

Please find a **copy** of the order, here.

3. ***CCI dismisses allegations of exclusive supply obligation, forced co-branding, resale price maintenance, refusal to deal and abuse of dominance against Saint Gobain India Private Limited***

The allegations in instant case revolved around: (i) exclusive supply obligation, (ii) force co-branding (iii) refusal to deal, and (iv) Resale Price Maintenance ("**RPM**") in case of bulk orders by Saint Gobain India Private Limited, which as per the Informant, are in violation of the provisions of Section 3(4) and 4 of the Act.

The Commission noted that the Informant has primarily relied upon an undated and unsigned document titled 'Propel Agreement' to allege points (i) 'exclusive supply obligation' and, (ii) 'forced co-branding' mentioned above.

With respect to 'exclusive supply obligations', the Commission noted that the same applies only to specific high-performance glass and tempered clear glass, not to clear float glass, allowing processors the option to source from other manufacturers. The Commission also noted that the exclusivity imposed by Saint Gobain is limited to specialized glass products and is justified by the technical and marketing training provided to processors, which enhances product quality and customization. The Commission thus, stated that such *quid pro quo* arrangement benefits both parties, which leads to the conclusion that that the exclusivity does not appear to be *prima facie* anti-competitive. Further, with respect to the allegation of 'forced co-branding', the Commission noted that the clauses under the 'Propel Agreement' which permitted the processer to use its own trademark/ brand name alongside trademark/ brand name of Saint Gobain under certain terms and conditions, does not raise a competition issue.

In respect of allegations of refusal to deal, the Informant alleged that processors and distributors receive significant discounts from Saint Gobain if they purchased exclusively from Saint Gobain, and that those dealing with Saint Gobain's competitors are denied access to Saint Gobain's products. However, the Commission found these claims to be

unsubstantiated, lacking evidence, and noted that offering discounts based on purchase volume is not inherently anti-competitive. Further, in terms of other allegations pertaining to RPM and refusal to deal, the Commission noted that, Saint Gobain does not control the prices charged by processors to end consumers for services provided, as processors are free to set their own prices for the value-added enhancements, they perform on the glass received from Saint Gobain. Additionally, the Commission also noted that the allegations of 'refusal to deal' and 'RPM' are based on unsubstantiated oral directions and lack of evidence. Therefore, the Commission concluded that, there was no case of RPM or refusal to deal under Section 3(4) of the Act.

While adjudicating upon the allegations of abuse of dominance, the Commission noted that, the Informant identified two relevant markets, i.e., *'production and sale of clear float glass'*, and *'coated glass in India'*, where Saint Gobain allegedly holds significant market power, 44% and 19% (forty four percent and nineteen percent) respectively. However, the Commission emphasized that, simply holding significant market power does not violate Section 4 of the Act; only abusive conduct by a dominant player in a relevant market would do so. As per the Commission, the conditions imposed on processors by Saint Gobain, as per the Propel Agreement, were deemed to have objective justifications. Consequently, the Commission refrained from assessing Saint Gobain's dominance and concluded that there is no *prima facie* case under Sections 3(4) or 4 of the Act, leading to the closure of the Information filed under Section 26(2) of the Act.

Please find a **copy** of the order, here.

4. ***CCI dismisses allegations against Vishakapatnam Port Logistics Park Limited for indulging in unfair monopolistic trade practice***

Aggrieved by the conduct of the Vishakapatnam Port Logistics Park Limited, Kolkata and Visakhapatnam ("**OPs**") concerning (i) lease agreement being camouflaged as 'Leave and License Agreement' for avoidance of stamp duty and registration charges; (ii) a refusal for adjustment of rental arrears against security deposit; (iii) restricting staff of Informant from accessing cold storage plant; and (iv) enforcing 'lock in period' clause in the said agreement, the Informant alleged abuse of dominance by the OPs contravening Section 3 and Section 4 of the Act.

Post brief analysis of the circumstances of the case, the Commission concluded that the primary allegation that the OPs have indulged in unfair monopolistic trade practice remains unsubstantiated by the Informant. The Commission noted that the concerns regarding lease agreement camouflaged as 'Leave and License Agreement' appears to be a dispute between the Informant and the Vishakapatnam Port Logistics Park Limited rather than an issue that can be dealt under the provisions of the Act. Thus, observing that the present matter did not give rise to any competition issue, the Commission held that there was no *prime facie* case of violations of the provisions of the Act and no grounds for ensuing directions for investigations against the OPs.

Please find a **copy** of the order, here.

5. ***CCI dismisses allegations of bid rigging/ cartelization and abuse of dominant position against PCMM, Integral Coach Factory, Super Steels and Alvind Industries***

With respect to the allegations of bid rigging, the Commission noted that, apart from the bid quotations made by Super Steels and Alvind Industries in the two tenders with minor difference in their prices, there is no other evidence on record, which may support the allegations of the Informant regarding cartelisation between them. Further, the

Commission also reiterated that, it is no longer *res integra* that mere price parallelism is not sufficient to arrive at a finding of cartelisation without there being evidence of any plus factors in support of such parallel pricing. Thus, after analysing the facts and circumstances of the instant case, the Commission held that there are no plus factors averred by the Informant indicating meeting of minds or collusion between Super Steels and Alvind Industries and accordingly, in view of the Commission, neither case of cartelisation in contravention of the provisions of Section 3 of the Act was made out in the present matter against Super Steels and Alvind Industries nor there arises any question of violation of the provisions of Section 3 of the Act by PCMM, Integral Coach Factory.

Regarding the allegations of abuse of dominance under Section 4 of the Act by PCMM, Integral Coach Factory, the Commission found that the Informant's claim about only two active vendors participating in Railway tenders is inaccurate, as additional vendors, including Nanda Engineering Works and EC Blade and Tools Private Limited, have been actively bidding. The Informant also failed to define the relevant market where PCMM, Integral Coach Factory is allegedly abusing its dominant position. The Commission further noted that, PCMM, Integral Coach Factory, as a procurer, has the freedom to specify its requirements, and these specifications cannot be deemed anti-competitive. Therefore, the Commission held that there no violation of Section 4 of the Act by PCMM, Integral Coach Factory.

Please find a **copy** of the order, here.

6. *CCI absolves Toyota Kirloskar Motors Private Limited and Uttam Toyota of allegations abuse of dominant position and RPM*

The allegations in the instant case against Toyota Kirloskar Motors Private Limited and Uttam Toyota consisted of: (i) an arbitrary extension of the car delivery time from 2 (two) months to 8 (eight) months; (ii) a selective delivery policy; (iii) unlawful demands for premiums by Direct Sales Agents; (iv) imposition of RPM; and (v) forcing customers to purchase accessories. The Informant alleged that Toyota Kirloskar Motors Private Limited, holds a dominant position in the market for *'strong hybrid passenger vehicles in India'*, and has violated Sections 4(2)(a)(ii) and 4(2)(c) of the Act.

Analysing the facts and circumstances of the instant case, the Commission concluded that the primary issues in the case revolve around the extended waiting period for car delivery and the prices of accessories. The Commission noted that these concerns appear to be a dispute between the Informant and Toyota Kirloskar Motors Private Limited/ Uttam Toyota rather than issues with broader market-wide anti-competitive implications. The Commission observed that the long waiting period is typically influenced by various factors and is not usually subject to antitrust scrutiny. Further, according to the Commission, the pricing issues, driven by demand and supply dynamics, are not unfair or discriminatory as per the provisions of the Act. Therefore, the Commission found no anti-competitive concerns and no grounds to investigate abuse of dominant position by Toyota Kirloskar Motors Private Limited and Uttam Toyota.

Further, with respect to the allegation of RPM under Section 3(4) of the Act, the Commission noted that the same requires proof of an agreement between enterprises at different stages of the production or supply chain that causes or is likely to cause an Appreciable Adverse Effect on Competition ("**AAEC**") in India. However, the Commission noted that the Informant has failed to provide any such evidence to substantiate this allegation. Consequently, the Commission found no *prima facie* case of contravention under Sections 3 or 4 of the Act and ordered the case to be closed under Section 26(2) of the Act.

Please find a **copy** of the order, here.

Merger Control

7. ***CCI publishes detailed approval order approving realignment of interests and legal ownership within the Godrej Group***

The CCI received a joint notice on May 15, 2024 by the entities (family branches of Godrej Group) proposing a combination pursuant to the family settlement dated April 30, 2024 among the parties which involved multiple steps resulting in the Adi Godrej and Family ("**ABG Family**") and Nadir Godrej and Family ("**NBG Family**") to continue controlling and managing the GILAC Group Entities and Jamshyd Godrej and Family ("**JNG Family**") and the Samita Godrej and Family ("**SVC Family**") to continue holding control and management of the G&B Group Entities. Recognizing the nature of combination as internal reorganization among the parties, the Commission was of the view that the same would substantially not affect the existing market dynamics. Thus, considering the extent and nature of the potential horizontal and vertical linkages, the Commission observed that the combination would not be likely to cause AAEC in the market.

Please find a **copy** of the order, here.

8. **CCI approves 8 (eight) new combinations in July 2024. The same are as follows:**

a. ***Amazon Asia Pacific Holdings Private Limited, Haverl LLC. and Clicktech Retail Private Limited***

CCI, *inter-alia*, approves acquisition of 76% (seventy six percent) of equity shares in Frontizo Business Services Private Limited, and acquisition of entire business of Appario Retail Private Limited by Clicktech Retail Private Limited as going concern.

Read more, here.

b. ***Sanlam Emerging Markets (Mauritius) Limited***

Acquisition of 16.12% (six-point one two percent) of SGIH by Sanlam Emerging Markets (Mauritius) Limited from TPG which held 9.44% (nine point four four percent) in SGIH and SOT which held 6.68% (six point six eight percent) stake in SGIH. SEMM already holds a 40.25% (forty-point two five percent) stake in SGIC, the parent company of SGIH which will increase to 50.99% (fifty point nine nine percent) post-acquisition.

Read more, here.

c. ***Manipal Health Systems Private Limited and MEMG Family Office LLP***

Acquisition Combination relating to acquisition of Aakash Educational Services Limited by Manipal Health Systems Private Limited and MEMG Family Office LLP through allotment of equity stake and transfer of equity shares has been approved by the CCI.

Read more, here.

d. ***Dixon Technologies (India) Limited***

Combination relating to acquisition of Ismartu India Private Limited by Dixon Technologies (India) Limited through acquisition of shareholding approved by CCI. The transaction will result in the acquirer holding a total of 56% (fifty six percent) of the target company.

Read more, here.

e. ***The Sandur Manganese & Iron Ores Limited and BAG Holdings Private Limited***

CCI approves the combination relating to the acquisition of control of Arjas Steel Private Limited and Arjas Modern Steel Private Limited by the Sandur Manganese & Iron Ores Limited and BAG Holdings Private Limited.

Read more, here.

f. ***Platinum Poppy C 2024 RSC Limited***

Combination relating to acquisition of ordinary shares by Platinum Poppy C 2024 RSC Limited in, and extension of shareholder debt to Berhyanda Limited and Berhyanda Midco Limited securing indirect non-voting economic interest in Suven Pharmaceutical Limited. approved by CCI.

Read more, here.

g. ***Coforge Limited and Cigniti Technologies Limited***

CCI approves the merger of Cigniti with and into Coforge and acquisition of at least 50.21% (fifty point two one percent) and up to 54% (fifty four percent) shareholding of Cigniti by Coforge in pursuance of share purchase agreements and mandatory open offer.

Read more, here.

h. ***Mitsui & Co., Limited***

CCI approves acquisition of private company Sneha Farms Private Limited by the general trading company Mitsui & Co. Limited by way of acquisition of equity shares of primary subscription and secondary purchase.

Read more, here.

News Snapshots

International

1. ***Apples' App Store in crosshairs of Spain's antitrust for indulging in anticompetitive practices***

Spain's antitrust regulator National Markets and Competition Commission ("**CNMC**") recently levelled allegations of anticompetitive practices of Apply by indulging in unequal treatment of mobile applications developers. While Apple was recently fined by Brussels

for thwarting competition and faced opening of investigation by European Commission ("**EC**") for breach of European Union ("**EU**") Tech laws, it would be challenging for the tech giant to face another backlash as result of the probe initiated by CNMC.

Read more, here.

2. ***EU flags Meta's 'pay or consent' model violating EU's Tech Laws***

The EU has issued preliminary findings against Meta, stating that the company's policy of requiring users to pay for ad-free experiences on Instagram and Facebook on not consenting to data collection for personalized ads possibly infringes on users' rights to freely consent to data usage. This investigation is part of broader EU and global efforts to regulate Big Tech companies under the Digital Markets Act, which came into full effect in March 2024.

Read more, here.

3. ***Microsoft under Fire: EC finds breach of EU Antitrust Rules for abusive practices regarding Teams***

The raising concerns about potentially abusive practices related to its Teams communication platform, the EC has recently issued a statement of objections to Microsoft. EC's preliminary view states a possibility of Microsoft tying Teams to other Microsoft products, its pre-installation in software packages and potential interoperability issues with competing products. If confirmed, these practices would amount to infringement of Article 102 of the Treaty on the Functioning of the European Union.

Read more, here.

4. ***EC opens investigation into alleged collusion and cartel activity of Delivery Hero***

The EC announced that it will conduct an investigation into the relationship between the two online food delivery companies to determine violation of competition and antitrust laws. The investigation was instigated owing to Delivery Hero purchasing a minority stake in Glovo in 2018 that may have divided up geographic markets and shared sensitive information before Delivery Hero substantially acquired Glovo in 2018.

Read more, here.

5. ***Surprise exit of Microsoft from the OpenAI board in wake of scrutiny by EC***

Under investigation for its partnership with OpenAI, Microsoft relinquishes its seat on the board of the leading AI company, saying its participation in board is no longer required due to the supposed fact that the ChatGPT maker has improved its governance since the boardroom chaos last year. In wake of a fresh look at the partnership under its antitrust rules, the British competition watchdog ensued investigation after the power struggle between the OpenAI board and the founder Sam Altman led to the temporary ousting of Altman.

Read more, here.

6. ***US Department of Justice clears Mylan from Antitrust Probe***

Initiated an investigation seeking information relating to price fixing and sale of generic medicines in the drug industry, the U.S. Department of Justice's ("**DOJ**") has exempted Viatris unit Mylan from antitrust probe. Several global drugmakers including India's Sun Pharmaceutical Industries have been under the DOJ's radar for more than 8 (eight) years over alleged anticompetitive practices price fixing activities of certain generic drugs.

Read more, here.

National

7. ***CCI's investigation unit finds Apple in abuse of dominance in the market for App Store***

Holding that Apple's App Store is an 'unavoidable trading partner' for developers, forcing them to adhere to unfair terms including mandatory use of Apple's proprietary payment system, the investigation report by CCI's investigation unit (which is not public but was seen by Reuters), criticizes Apple's practices in the iOS app store market. Ongoing since 2021, this investigation aligns with increased antitrust scrutiny Apple faces globally, including in the EU. The investigation report's findings will advance to the subsequent stage of scrutiny before CCI, and Apple will have an opportunity to respond before a final decision is made.

Read more, here.

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