



CRITICAL COMPETITION
COMPETITION LAW NEWSLETTER
DECEMBER, 2022 (PART-II)

ENFORCEMENT ORDERS

1. NCLAT REMANDED BACK A MATTER IN RELATION TO CARTERLISATION IN THE TENDER FLOATED BY PUNE MUNICIPAL CORPORATION TO THE COMPETITION COMMISSION OF INDIA (CCI)

The National Company Law Appellate Tribunal (NCLAT) by way of its order dated 23 December 2022 remitted back an appeal to the CCI for reconsideration of the penalty imposed on opposite parties, i.e., M/s Sanjay Enterprise, and M/s Mahalaxmi Steels, for indulging in cartelization in the tender floated by the Pune Municipal Corporation pertaining to the design, supply, installation, commissioning, operation, and maintenance of municipal organic and inorganic solid waste processing plants. The CCI in its order dated 1 May 2018 passed under Section 27 of the Competition Act (Act) in Case No. 50 of 2015 (CCI Order) had held that there existed an agreement amongst the bidders and imposed a penalty at the rate of 10% of the average turnover of 3 financial years of the opposite parties.

The NCLAT in its order held that CCI did not exercise its discretionary jurisdiction in considering the turnover on the higher level, i.e., 10% which is the maximum percentage prescribed under the Competition Act, 2002 (Competition Act) in a reasonable manner and was required to elaborately assign reason for coming to conclusion for maximum penalty or afford full opportunity to the concerned party before the imposition of the maximum penalty of 10%. The matter was remanded back to the

CCI to examine whether the appellants are entitled to get the penalty reduced or not.

2. NCLAT REMANDED BACK A MATTER IN RELATION TO ALLEGED ABUSE OF DOMINANCE BY THE DLF GROUP TO THE CCI

The NCLAT by way of an order dated 21 December 2022 remitted an appeal in relation to the order of the CCI wherein the CCI dismissed a case regarding the violation of Section 4 (abuse of dominance) of the Competition Act.

The CCI on 31 August 2018 passed an order in Case 73/2014 wherein the DLF Group was held in contravention of Section 4 (abuse of dominance) of the Competition Act (CCI Order). It was alleged that DLF group was abusing their dominant position by incorporating discriminatory and unfair clauses in the agreements in relation to a new residential project in Gurgaon. The Director General (DG) (the investigative wing of the CCI) submitted a report with its findings of anti-competitive conduct and subsequently was directed by the CCI to conduct a supplementary investigation.

Accordingly, the CCI Order was passed based the findings of the DG in the supplementary investigation report. The NCLAT set aside the CCI Order since the same was passed basis the CCI's direction to the DG to conduct a supplementary investigation, which is not authorized under the Competition Act. The NCLAT remitted the matter back to the CCI and directed the CCI to pass a fresh order based on the first investigation report of the DG.



3. NCLAT UPHELD INR 873 CRORE PENALTY IMPOSED BY THE CCI ON UNITED BREWERIES LIMITED (UBL) AND CALRSBERG INDIA

The NCLAT by way of its order dated 23 December 2022 upheld the INR 873-crore penalty imposed by the CCI on UBL, Carlsberg India and All India Breweries Association (AIBA) which were found to be guilty of engaging in cartelization in the sale and supply of beers in various states in India. United Breweries and Carlberg India, as well as AIBA and Anheuser Busch India (Ab InBev) were colluding by aligning beer prices and implementing price increases in several states in India. The CCI also held that UBL and AB InBev were coordinating on purchase of second-hand bottles.

The NCLAT dismissed the submissions made regarding the CCI order being liable to being set aside in the absence of a judicial member and held that that the Competition Act does not mandate the presence of a judicial member to pass an order. It was submitted by the beer makers that the CCI cannot form a prima facie opinion on the basis of leniency applications, which was also rejected by the NCLAT and it was held that the CCI has rightly considered the leniency application filed by one of the respondents as a suo -motu case under Section 19 of the Competition Act and passed a prima facie order directing investigation exercising its jurisdiction under Section 26(1) of the Competition Act.

4. NCLAT SETS ASIDE THE INR 1788 CRORE PENALTY IMPOSED BY THE CCI ON FIVE TYRE COMPANIES

The NCLAT by way of its order dated 1 December 2022 set aside the INR 1788 crore penalty imposed by the CCI on five tyre companies indulging in cartelization by acting in concert to increases prices of cross ply/bias tyres variants sold by each of them in the replacement market and to limit and control production.

The NCLAT noted that there were arithmetic and inadvertent errors in the order of the CCI which may have led to wrong conclusions in imposition of penalty in addition to other discrepancies in the order. The NCLAT remanded the matter to the CCI to re-examine the calculation error and to consider reviewing the penalty to save the domestic industry which is under immense pressure from global tyre manufacturing companies. Further, the NCLAT reiterated the object of the Competition Act, which aims at ensuring the economic development of the country and therefore the promotion of the domestic industry is to be kept in mind by the CCI.

5. DELHI HIGH COURT STAYS THE CCI'S ORDER FOR RECOVERY OF INR 223 CRORE PENALTY FROM MAKE MY TRIP (MMT)

The Delhi High Court passed an order staying the recovery of an INR 223 crore penalty imposed by the CCI on MMT for abusing its position of dominance. The CCI vides its order dated 19 October 2022 had held MMT in contravention of Section 4 (abuse of dominance) of the Competition Act for giving preferential treatment and



restricting access to other competitors. On appeal to the NCLAT, MMT was directed to deposit 10% of the penalty as a condition for admission of the appeal.

MMT challenged this order before the Delhi High Court wherein the High Court held that a pre-deposit of the 10% of the penalty amount could not have been made for mere admission of the appeal and the intention, which may not be explicitly made clear in the order passed by the NCLAT, is against the recovery of the remaining 90% of the penalty amount. However, the High Court by way of order specifically directed that subject to the deposit of 10% of the total penalty amount as directed by the NCLAT, no recovery shall be affected in respect of the remaining 90% of the amount and that MMT is free to approach the NCLAT for any other interim relief.

COMBINATION ORDERS

1. CCI APPROVED THE PROPOSED ACQUISITION OF SHAREHOLDING OF UPL SUSTAINABLE AGRI SOLUTIONS LIMITED (UPL SAS) BY PLATINUM JASMINE A 2018 TRUST AND TPG UPSWING LTD. (TPG)

The CCI approved the proposed acquisition of certain shareholding of UPL SAS by Platinum Jasmine A 2018 Trust (acting through its trustee, Platinum Owl C 2018 RSC Limited) (Platinum) and TPG. Platinum Owl C 2018 RSC Limited is a private company incorporated in Abu Dhabi Global Market. TPG is controlled by the TPG Group which is involved in multiple investment strategies across various sectors

such a financial service, technology, consumers, travel, media etc. UPL SAS is an Indian agro-chemical company.

2. CCI APPROVED WOODHALL HOLDINGS (DIFC) LIMITED'S (WHL) ACQUISITION OF EQUITY SHAREHOLDING OF UPL SAS

The CCI approved the minority acquisition of equity shareholding in UPL SAS by WHL. WHL is a newly incorporated special purpose vehicle which is part of the Brookfield Global Transition Fund. UPL SAS is an Indian agro-chemical company engaged in the manufacture, marketing, and sales of various agro-chemicals and also will provide farm mechanization services, insurance and credit solutions to farmers etc.

3. CCI APPROVED THE ACQUISITION OF CERTAIN SHAREHOLDING AND BENEFICIAL INTEREST BY TANWEER INFRASTRUCTURE SAOC (TANWEER) IN SEMBCORP ENERGY INDIA LIMITED (SEIL)

The CCI approved the acquisition of 99.99% shareholding in SEIL by Tanweer, and the acquisition of beneficial interest in 90% shares of SEIL by Tanweer which would represent 0.000001% shareholding of SEIL. Tanweer is newly incorporated entity set up in Oman held by various holding entities and individuals, while SEIL is a power producer in India which owns and operates power plants in Mandal, Nellore District of Andhra Pradesh, India.



4. CCI APPROVED THE ACQUISITION OF SHARES OF EASTMAN EXPORTS GLOBAL CLOTHING PRIVATE LIMITED (EEGCL) BY BHARAT BIOTECH INTERNATIONAL LIMITED (BHARAT BIOTECH)

The CCI approved the acquisition of shares of EEGCL by Bharat Biotech being implemented by way of the share subscription agreement, share purchase agreement. Bharat Biotech is engaged in the activity of manufacturing of human vaccines and bio-therapeutics, while EEGCL, through its affiliates is engaged in the business of sourcing and buying (including from India and abroad), designing, manufacturing, marketing, distribution, sales and retailing of yarn, fabric and apparels in the domestic and international markets.

OTHER MAJOR DEVELOPMENTS

I. **STANDING COMMITTEE REPORT RECOMMENDS CHANGES TO THE COMPETITION (AMENDMENT) BILL, 2022**

On 13 December 2022, the Joint Parliamentary Standing Committee on Finance (**Committee**) presented its report on the Competition (Amendment) Bill, 2022 (**Bill**) before the Lok Sabha and the Rajya Sabha. The report captured the recommendations of the Committee on the Bill and highlighted the main issues pertaining to the Bill. Some of the key changes proposed in the report are set out below.

- 1) Deal Value Threshold (DVT): the Bill proposes to include an additional threshold wherein

the Competition Commission of India (CCI) can review any transaction whose valuation (directly or indirectly) is more than INR 2000 crores and where either party to the proposed transaction has substantial business operations in India. The Committee recommended that the Bill may explicitly specify that the manner of computation of the deal value would be set out in the CCI's regulations. The Committee also recommended that the Bill may clarify that 'enterprise' refers to the party being acquired, i.e., the Target, to remove any ambiguity. Further, the Committee also recommended that the Central Government reviews the threshold on a yearly basis instead of every two years.

- 2) Definition of 'Control': the Committee noted that the CCI has been following the 'material influence' test to determine the standard of control and recommended that the CCI should pass regulations to define the scope of what would amount to exercise of 'material influence' under competition laws.
- 3) Procedural Timelines: The Bill proposes that the timeline for the CCI to pass an order on the application for approval of combinations be reduced from 210 days to 150 days, and timeline to form a prima facie opinion be reduced from 30 days to 20 days. The Committee, however, was of the view the current timelines of the passing the order for



- approval of combinations should remain unchanged.
- 4) Ability of Director General (DG) to depose legal advisors: the Committee was aligned on the suggestions of the stakeholders involved, that allowing the DG to examine legal advisors would violate the attorney-client privilege and is in contravention of the Indian Evidence Act, 1872 and the Bar Council of India Rules. The Committee has recommended that the Bill expressly clarifies that such provision would not be in violation of the Indian Evidence Act or any other law which protects attorney-client privilege.
 - 5) Settlement and Commitment (S&C): The Committee recommended, (i) that cartels be included within the purview of settlements, (ii) that it is not mandatory for the CCI to seek objections of a third party before passing an S&C order, (iii) that parties be allowed to withdraw their applications before the CCI passes an S&C order, (iv) that prima facie admission of guilt should not be admitted, (v) that no appeals to lie before the NCLAT from a S&C order, (v) that regulations allow for compensation proceedings for affected consumers.
 - 6) Hub and Spoke Cartels: the Bill expanded the scope of cartels to include hub and spoke arrangements implemented by entities involved at different levels of the value chain, without any clarifications on what the meaning of 'active participation' in the agreement entails. The Committee recommended that establishment of intention of a platform would be essential to establish liability of cartelization.
 - 7) Requirement of a Judicial Member: The Committee noted the order of the Delhi High Court in *Mahindra v. CCI* wherein it was held that it is imperative for the CCI to have a judicial member when issuing a final order. The Committee suggested that this suggestion may await the final order which is sub-judice in the Supreme Court.
 - 8) IPR as Defense of Abuse of Dominant Position: there is an exception for reasonable exercise of intellectual property rights (IPR) under Section 3 of the Competition Act, 2002. However, no such explicit defense exists under Section 4. In light of this, the Committee has recommended that such an IPR related exemption under Section 4 (abuse of dominance) may be carved out.
 - 9) Effects Based Test: The Committee has recommended the addition of an effects-based test for Section 4 of the Act wherein the CCI would look at various factors such as impact on consumers, innovation and competition before adjudicating a conduct as violative of competition law which is in alignment with the decisional practice of the CCI.



II. REPORT ON 'ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES' BY THE STANDING COMMITTEE ON FINANCE

The Standing Committee on Finance (**Standing Committee**) submitted its report on 'Anti-Competitive Practices by Big Tech Companies' in the Lok Sabha and Rajya Sabha on December 22, 2022. The report noted that digital markets have the advantage of 'economies of scale' and are driven by learning and network effects which allows them to grow exponentially in a short period of time and there is a need to address the potential anti-competitive concerns in the same.

The Standing Committee identified 10 significant activities by leading players which could have a negative impact on the competition in the digital markets which should be designated as Systemically Important Digital Intermediaries (**SIDI**) and be subject to several mandatory obligations. The 10 anti-competitive practices by SIDIs

along with the corresponding obligations are (i) anti-steering provisions preventing users from moving to other platforms; (ii) self-preferencing; (iii) bundling and tying; (iv) data usage; (v) mergers and acquisitions, including "killer acquisitions"; (vi) dynamic pricing and deep discounting; (vii) exclusive tie-ups; (viii) search and ranking preferencing; (ix) restricting third-party applications; and (x) advertising policies.

The Committee recommended that the SIDIs should annually submit a report to the CCI detailing the measures taken by them to comply with the mandatory obligations. The Committee also recommended that a 'Digital Competition Act' may be introduced to ensure fair competition in the digital markets. Other recommendations included revamping the CCI by introducing a designated and specialized digital markets unit which would exclusively address the needs of competition in the digital markets.



KEY CONTACTS



Mohit Saraf

Founder & Managing Partner

Mohit.Saraf@sarafpartners.com



Akshay S Nanda

Partner, Competition & Data Protection Law

Akshayys.Nanda@sarafpartners.com



Neha Mishra

Partner Designate, Competition Law

Neha.Mishra@sarafpartners.com



Delhi NCR

FC – 10 & 11,
Sector 16 A, Filmcity
Noida – 201 301
+91 (11) 4405 0600
Delhi@sarafpartners.com

Mumbai

One International Centre
Tower 2, Unit No 2402, 24th floor
Senapati Bapat Marg
Lower Parel - 400013
+ 91 (22) 4405 0600
Mumbai@sarafpartners.com

Bengaluru

6 Awfis Residency Square,
Richmond Rd, Shanthala Nagar,
Richmond Town,
Bengaluru – 560025
+91 (80) 4405 0600
bengaluru@sarafpartners.com

***Disclaimer:** The contents of this document are provided for informational purposes only and should not be construed as legal advice on any subject matter. You should not act or refrain from acting on the basis of any content included in this newsletter without seeking legal or other professional advice.*