



CRITICAL COMPETITION

COMPETITION LAW NEWSLETTER

JUNE, 2023

ENFORCEMENT ORDER

1. THE HON'BLE SUPREME COURT OF INDIA STAYS THE ORDER OF THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT) IMPOSING PENALTY OF INR 201 CRORES ON AMAZON.COM NV INVESTMENT HOLDINGS LLC (AMAZON)

The Hon'ble Supreme Court, in an appeal filed by Amazon against the order of the NCLAT, held that no coercive steps shall be taken by the CCI against Amazon until the date of next hearing, i.e., 17 July 2023.

The appeal arises out of the CCI's order dated 17 December 2021 passed under Sections 43 A, 44 and 45 of the Competition Act, 2002 (**Competition Act**) against Amazon, through which it directed Amazon to file a fresh Form II with correct and complete information and kept the approval given earlier to Amazon for its combination proposing acquisition of a 49% stake in Future Coupons Private Ltd. (**FCPL**) in abeyance. The CCI had levied a penalty of INR 1 Crore each on Amazon for contravention of Sections 44 and 45 of the Competition Act for suppression/omission to furnish material information and documents pertaining to the transaction, while a penalty of INR 200 Crores was imposed on Amazon under Section 43A of the Competition Act for failure to notify the combination in terms of the obligation cast under Section 6(2) of the Competition Act.

Subsequently, in an appeal filed before the NCLAT by Amazon, the NCLAT had upheld the order of the CCI, however, the penalty imposed on Amazon under Section 44 and 45 of the Competition Act was reduced to INR 50 lakhs each. The NCLAT held that Amazon had obtained the earlier approval by misrepresenting before the CCI that its decision to pursue the combination was based on the unique business model of FCPL, and that Future Retail Limited (**FRL**), a company with strong financials and futuristic outlook, is relevant to the combination only from the perspective of financial strength to FCPL. However, as noted by the CCI, the real reason for envisaging the combination was to get a 'foot-in-door' in the Indian retail sector and secure rights over FRL that are considered as strategic by Amazon.

On the aspect of concealment of material information, it further held that Amazon was required to reveal the 'economic and strategic' purpose of the combination, including business objectives and rationale for the combination and the manner in which they are intended to be achieved. Finding that Amazon had failed to make the required disclosures related to the concerned deal, Amazon was held to be in contravention of the provisions of the Competition Act. The NCLAT also noted that under Section 45(2) of the Competition Act, the CCI has been conferred with wide powers, and the inherent implied powers as a statutory regulator includes the power to



keep its approval orders in abeyance.

2. CALCUTTA HIGH COURT REFUSES TO STAY SUMMONS ISSUED BY THE CCI IN AN ONGOING INVESTIGATION CONCERNING CARTELISATION IN THE STEEL MANUFACTURING INDUSTRY

The Calcutta High Court dismissed a writ petition filed by Shyam Steel Industries Limited challenging the summons issued to the company's director, shareholder and an officer by the Director General, CCI (DG). The single judge bench observed that the petitioners do not have any right to obstruct the investigation and interfere with the investigation process. It further held that the jurisdiction of the CCI under Section 26(1) of the Competition Act does not contemplate any adjudicatory function and would not cause any particular prejudice to the petitioners at the stage of investigation. It also emphasized that the investigation conducted by the DG is nothing but an administrative proceeding and internal handing over of charge.

It further held that in the absence of any adjudication at the stage of the DG investigation, the petitioners would not be met with any civil consequences and the petitioners will have every opportunity to challenge the investigation process or the decision arising from it at a later stage before the CCI. Further, it was observed that since the allegations pertain to cartelization

and manipulation of supply and price of steel which would affect the public at large, including end-users, consumers and home buyers, the petitioners have a duty to assist in the process of investigation.

3. THE NCLAT REFUSES TO INTERFERE IN THE CCI'S DECISION TO NOT IMPOSE A MONETARY PENALTY UNDER SECTION 27 OF THE COMPETITION ACT IN THE RAILWAY CARTELISATION CASE

The NCLAT by way of its order dated 16 May 2023 upheld the CCI's decision in passing a cease-and-desist order under Section 27 of the Competition Act and not levying a monetary penalty despite the parties being found in contravention of Section 3 of the Competition Act. It further held that under Section 27 of the Competition Act, the CCI has the jurisdiction to either pass all or any of the orders mentioned under Section 27 of the Competition Act. The appeal was filed before NCLAT by the Chief Materials Manager, Eastern Railway with the grievance that the CCI has not imposed a suitable penalty upon the opposite parties in terms of the provisions of the Competition Act.

The appeal arises out of the CCI's order dated 10 July 2020 wherein the CCI found ten enterprises and some of their officials in contravention of the provisions of Section 3(3)(a), 3(3)(c) and 3(3)(d) for indulging in anti-competitive practices during the period 2009 to 2017.



In the present case, 5 references were filed before the CCI by the Chief Materials Manager, South Eastern Railway; the Controller of Stores, Central Railway; the Chief Materials Manager, Eastern Railway; the Chief Materials Manager-I, North Western Railway and the Chief Materials Manager-Sales, North Western Railway, under Section 19(1)(b) of the Competition Act, alleging contravention of Section 3 of the Competition Act in various tenders issued by different zones of the Indian Railways.

The CCI only passed an order of cease-and-desist but did not impose any penalty on the enterprises held to be indulging bid rigging. The reasons provided by the CCI for not levying a penalty included cooperation of the parties in aiding the investigation whereby some of the parties had even admitted their respective role in the tender as well as some of the enterprises being MSMEs having a miniscule turnover. Taking a complete and holistic view of the prevailing economic conditions brought in light of the outbreak of global pandemic, the CCI did not impose any monetary penalty in this matter. Reiterating the reasoning behind the CCI's decision of not levying a monetary penalty, the NCLAT upheld the order of the CCI and dismissed the present appeal.

4. THE NCLAT DISMISSED THE APPEAL FILED AGAINST THE ORDER OF THE CCI IN THE BID RIGGING OF THE TENDER FLOATED BY SBI INFRA MANAGEMENT SOLUTIONS PVT. LTD. (SBIIMS)

The NCLAT by way of its order dated 23 May 2023 dismissed an appeal filed against the final order passed of the CCI on 03 February 2022 whereby the CCI had held the Appellant, i.e., Hith Impex Pvt. Ltd. along with six other enterprises to be in contravention of Section 3(3)(c) and Section 3(3)(d) of the Competition Act for bid rigging.

The CCI had taken suo moto cognizance of the matter in response to a complaint filed regarding bid-rigging and cartelisation in a tender floated by SBIIMS for the supply and installation of new signages / replacement of existing signages for branches / offices / ATMs of SBI located at specified metro centres of various circles of SBI across India.

The CCI in the present matter held that actual participation in the tender is not a sine qua non for a finding of bid rigging in terms of Section 3(3)(d) of the Competition Act. Similarly, financial gains resulting from the collusive activities is also not required to be demonstrated as accepting such arguments would defeat the purposes of the Competition Act forbidding anti-competitive agreements including cartels. The CCI held that any collusive or concerted conduct amongst



competitors which vitiates the competitive process of bidding or manipulates the bidding process in any manner, stands squarely covered within the prohibition imposed by virtue of provisions of Section 3(1) of the Competition Act read with Section 3(3) thereof. Thus, every person who was involved in the manipulation of the bidding process can be held liable in terms of the provisions of Section 3 of the Competition Act.

On the issue of evidentiary standard in the case of cartels, the CCI had held that in respect of cases concerning cartels which are hidden or secret, there is little or no documentary evidence, and evidence may be quite fragmentary and that the evidence may also be wholly circumstantial. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences, which taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

COMBINATION ORDERS

1. THE CCI APPROVED THE PROPOSED ACQUISITION OF CREDIT SUISSE BY UBS GROUP AG

The CCI approved the proposed acquisition of Credit Suisse Group AG (Credit Suisse) by UBC Group AG (UBS) by way of an absorption merger wherein UBS would be the surviving legal entity. For the purposes of the transaction, all of

Credit Suisse's assets, liabilities, and contracts are to be transferred to UBS. The Acquirer is a multinational investment bank and financial services company, founded and based in Switzerland with a focus on brokerage services in India. The Target's business relates to wealth management, asset management, investment banking and retail/corporate banking.

2. THE CCI APPROVED THE ACQUISITION OF 2.96% OF THE SHAREHOLDING OF ZETWERK MANUFACTURING PVT. LTD. BY AZK4 LLC

The CCI approved the proposed acquisition of Zetwerk Manufacturing Businesses Pvt. Ltd. (Zetwerk / Target) by AZK4 LLC (Acquirer). The transaction is an acquisition of a 2.96% stake in Zetwerk's shareholding through a combination of primary and secondary transactions and was approved under the Green Channel Route. The Acquirer is an investment vehicle managed by Avenir Management Company LLC, which is a private equity investment firm operating under the brand name 'Avenir Growth Capital'. The Target is a manufacturing services provider catering to businesses related to precision parts, capital goods, and consumer goods categories. It is also in the business of provision of contract manufacturing services under a B2B model.



3. THE CCI APPROVED THE PROPOSED ACQUISITION OF 51.11% OF JAGUAR ADVISORY'S EQUITY SHARES LEADING TO AN INDIRECT ACQUISITION OF 5.44% OF THE EQUITY CAPITAL OF MAGMA HDI BY SANJAY CHAMRIA

The proposed combination involves the acquisition of 11,500 equity shares of Jaguar Advisory Services Private Ltd. (Jaguar / Target) held by Poonawalla Fincorp Ltd. (PFL) and HDI Global SE (HDI) amounting to 51.11% of the total equity share capital of Jaguar, resulting in an indirect acquisition by Mr. Sanjay Chamria (Acquirer) of approximately 5.44% of the equity share capital of Magma HDI General Insurance Company Ltd. (Magma HDI). The Acquirer is engaged in the business of investing directly and through entities owned by him in various listed and unlisted enterprises. The Target is in the business of provision of manpower supply services. Magma HDI is engaged in the business of general/non-life insurance and associated products in India.

4. THE CCI APPROVED THE ACQUISITION OF 100% OF THE ISSUED AND FULLY PAID-UP ORDINARY EQUITY SHARES OF TOWER VISION INDIA PVT. LTD. BY ASCEND TELECOM AND GIP EM ASCEND 2

The proposed combination involves the acquisition of 100% of the issued and fully paid-up ordinary equity shares of Tower Vision India Pvt. Ltd. (Target) by

Ascend Telecom Infrastructure Pvt. Ltd. (Ascend) and GIP EM Ascend 2 Pte. Ltd. (GIP EM). Ascend is engaged in providing passive telecommunication infrastructure services through towers in India and GIP EM currently does not have any business operations. The Target is in the business of provision of passive telecommunication infrastructure services through towers in India.

5. THE CCI APPROVED THE TRANSACTION INVOLVING SUBSCRIPTION OF COMPULSORY CONVERTIBLE DEBENTURES OF BIOCON BIOLOGICS BY EDELWEISS AND ESOF III INVESTMENT FUND

The proposed combination involves the subscription of compulsorily convertible debentures issued by Biocon Biologics Limited (Biocon) by Edelweiss Alternative Asset Advisors Ltd. (Acquirer 1) and ESOF III Investment Fund (Acquirer 2). The proposed combination was notified to the CCI under the green channel route. The Acquirer 1 is an alternative asset advisory registered with the Securities and Exchange Board of India (SEBI) and provides investment management services to alternative investment funds, and advisory services with respect to certain offshore funds. The Acquirer 2 is a Category II AIF registered with SEBI and is engaged in making structured investments through suitable instruments. The Target is a global biosimilars company engaged in the manufacture and



commercialization of pharmaceutical formulations such as insulins and drug substances in India.

6. THE CCI APPROVED THE PROPOSED ACQUISITION OF ACKO TECHNOLOGY & SERVICES PVT. LTD. BY MULTIPLES PRIVATE EQUITY FUND III AND CPP INVESTMENT BOARD PRIVATE HOLDINGS (4) INC.

The proposed combination involves the acquisition of Acko Technology & Services Pvt. Ltd. (Target) through subscription of additional Compulsorily Convertible Preference Shares by Multiples Fund III and CPHI-4. The Target is engaged in the business of providing technology and outsourced services, setting up and managing data processing centres, and related activities. Additionally, the Target is also engaged in the provision of general insurance (non-life) services in India. Multiples Fund III is a Category II Alternative Investment Fund and is managed by Multiples Alternate Asset Management Pvt Ltd. CPHI-4, a wholly owned subsidiary of Canada Pension Plan Investment Board, invests in several sectors such as public / private equities, real estate and infrastructure.

OTHER DEVELOPMENTS

1. APPOINTMENT OF A FULL TIME CHAIRPERSON AT THE CCI

On 15 May 2023, the Appointments Committee of the Cabinet (ACC) approved the appointment of Ms. Ravneet Kaur as the Chairperson of the CCI, becoming the first woman to hold the post on a full-time basis. Ms. Ravneet Kaur, a 1988 Punjab cadre IAS officer, will be the fifth full-time Chairperson of the CCI. With over two decades of experience in the Government, Ms. Kaur has held several key positions including that of chairman of India Tourism Development Corporation (2017-2019), joint secretary in the Department of Industrial Policy and Promotion (2015-2017). Before her appointment as the CCI chairperson, Ms. Kaur was serving as special chief secretary (apex scale) in the Punjab Government's agriculture and cooperation departments in Chandigarh.

Ms. Kaur has a master's degree in economics and public economic management from Panjab University, and is a recipient of the 1991 Census Silver Medal, awarded to her for her government service. In 2019, she was also felicitated by the Institute of South Asian Women (ISAW) with its Women Achievers Award.

2. PROVISIONS OF THE COMPETITION (AMENDMENT) ACT, 2023 (AMENDMENT ACT) NOTIFIED BY THE MINISTRY OF CORPORATE AFFAIRS (MCA) WITH EFFECT FROM 18 MAY 2023.



The key amendments to the Competition Act that were notified are set out below:

Enforcement

Express Prohibition on Hub and Spoke Cartels:

The scope and ambit of Section 3(3) of the Competition Act has been expanded to expressly include the prohibition of Hub and Spoke Cartel. Accordingly, a proviso has been added to Section 3(3) of the Competition Act which provides that an enterprise or association of enterprises though not engaged in identical or similar trade of goods or services shall also be presumed to be part of the agreement under this sub-section, if it participates or intends to participate in the furtherance of the anti-competitive agreement.

'Meeting the Competition' Defence in Abuse of Dominance:

The defence of 'meeting the competition' was previously available to a dominant enterprise only in case of imposition of discriminatory conditions or prices. The Amendment Act now extends the defence of 'meeting the competition' to imposition of 'unfair prices and conditions' as well.

Facts and Issues already decided by the CCI:

The CCI will not inquire into an anti-competitive conduct under Section 3 or Section 4 of the

Competition Act if the same or substantial facts raised in the information received have already been decided by the CCI in a previous order.

Merger Control

Enhanced Penalties:

The CCI may now levy a penalty of up to INR 5 crores on any enterprise to a combination which makes a statement before the CCI which is false in any material particular; or omits to state any material particular knowing it to be material before the CCI. The maximum penalty has now been increased from INR 1 Crore to INR 5 Crores.

Other Procedural and Substantive Changes

Three-year limitation in the filing of Information:

The CCI shall no longer entertain an information or a reference under Section 19 of the Competition Act against anti-competitive conduct unless it is filed within three years from the date on which the cause of action first arose. The CCI may, however, choose to condone a delay if it is satisfied about the existence of sufficient cause for not filing the information within the prescribed period.

Pre-Deposit on penalty for appeals:

The NCLAT would only entertain an appeal by a person on whom the penalty has been levied by the CCI by depositing twenty-five percent



of the penalty amount with the NCLAT.

Delineation of Relevant Market:

The amendment has expressly acknowledged supply-side substitutability as an addition to demand-side substitutability for the purpose of delineation of the relevant product market. Supply-side substitutability means the ability of suppliers to switch production from one product to another and marketing them in the short term without incurring significant additional costs or risks in response to a small and permanent changes in relative prices.

Powers of the Director General:

The Amendment Act has empowered the DG to examine agents of the party under investigation along with its officers and employees. The amendment also imposes a positive obligation on the party under investigation to preserve and produce all relevant documents and offer all assistance to the DG.

Casting Vote of the Chairperson:

In compliance with the Delhi High Court's decision in *Mahindra Electric Mobility Ltd. v CCI*, the Amendment Act has amended Section 22(3) of the Competition Act to revoke the right of a casting vote to the chairperson of the CCI after it was held to be unconstitutional by the Delhi High Court.

Transparency in the regulation-making process:

The Amendment Act has also inserted Section 64A of the Competition Act that requires the CCI to publish draft regulations for public comments and issue a general statement in response to the public comments, latest by the date of the notification of the regulations.

Compounding of Offences:

The Amendment Act also inserts Section 59A of the Competition, allowing the NCLAT or a court before which the proceeding is pending, to compound any offence under the Competition Act.

3. MEMORANDUM OF UNDERSTANDING (MOU) ENTERED INTO BETWEEN CCI AND EGYPTIAN COMPETITION COMMISSION.

The Union Cabinet on 17 May 2023 approved the signing of a MOU between the CCI and the Egyptian Competition Authority (ECA). The MOU between the two regulators is aimed at promoting and strengthening of co-operation in competition law and policy through exchange of information, sharing of best practices as well as through various capacity building initiatives. The MOU also aims to develop and strengthen linkages between CCI and ECA and promote learning between the two regulators through experience sharing and technical cooperation.



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