



# Luthra and Luthra

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## COMPETITION LAW ALERT

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August was an action-packed month with one of the members demitting office. Yet again, the CCI is down to two members, in-case there is no new appointment. Another member is also to demit office later this month. In the September 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 imposes penalty on Massachusetts Mutual Life Insurance under Section 43A of the Competition Act, 2002**

The Competition Commission of India (**CCI**) vide its order dated [07.08.2023](#) imposed a penalty on Massachusetts Mutual Life Insurance Company (**MMLI/Acquirer**) under Section 43A of the Competition Act, 2002 (**the Act**) for failing to notify the acquisition of approximately 16% shareholding in Invesco Limited (**Invesco/Target**) (**Transaction**).

MMLI submitted that the Transaction was not notifiable, since the Target's turnover in India did not exceed 1000 crores and thus falls within the ambit of the *de minimis* exemption. It submitted that it would be incorrect to consider revenue/turnover generated on account of buying/ selling of securities through mutual funds, that are held in trust for the unitholders. Thus, the turnover of the

mutual fund will be excluded while calculating turnover of Invesco in India.

Considering MMLI's submissions, the CCI observed that in combinations pertaining to mutual fund businesses, the value of turnover, as per Section 5 of the Act, is the aggregate of (i) turnover/revenue from operations of the Asset Management Company (**AMC**) of the mutual fund, (ii) turnover/revenue from operations of the trustee of the mutual fund, if it is also subject to the acquisition, and (iii) turnover of the mutual funds. Further, turnover of mutual funds are aggregate of: (i) gross value of sale and redemption of securities; and (ii) income such as dividend, interests, etc.

Further, the CCI also held that any income generated from the securities held by a mutual fund company is considered as turnover, irrespective of whether holding of those securities confer control to mutual fund company or not.

Accordingly, the CCI rejected MMLI's argument of *de minimis* exemption and imposed a penalty of INR 5 Lakhs for failing to notify the Transaction.

### **CCI imposes penalty on Bharti Airtel and Lion Meadow under Section 43A of the Act**

The CCI vide its order dated [23.08.2023](#) imposed a penalty on Bharti Airtel Limited (**BAL**) and Lion Meadow Investment Limited (**LMIL**) under Section 43A of the Act for failing to notify BAL's acquisition of 20% shareholding in Bharti Telemedia



Limited (**BTL/Target**) from LMIL (**Step 1**) and LMIL's acquisition of 0.664% shares in BAL (**Step 2**) (collectively, **Transaction**).

BAL held 80% shareholding of BTL and LMIL held the remaining 20% shareholding in BTL along with various rights in BTL, prior to the Transaction.

BAL submitted that it could avail the benefit of Item 2 of Schedule I of the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (**Combination Regulations**) as it held a majority stake in BTL prior to the Transaction and there was no transfer from joint to sole control. LMIL's rights in BTL were merely investor protection rights and did not confer any degree of material influence.

LMIL submitted that Step 2 was exempt from scrutiny under Item 1 of Schedule I of the Combination Regulations as LMIL acquired less than 25% shares in BAL and did not secure any rights above those conferred upon ordinary shareholders. Further, considering both steps were exempted from notification, a composite merger filing of the Transaction was not required.

The CCI considered the various rights available to LMIL in BTL prior to the Transaction and held that it constituted the ability to exert material influence over management or affairs or strategic commercial decisions, making Step 1 ineligible for availing benefit of Item 2 exemption. Further, Step 2 being part payment for Step 1 renders the two

tranches interconnected and one composite notice ought to have been filed prior to the consummation.

Thus, the CCI considering the past contraventions by BAL, imposed a penalty of INR 1 Crore on BAL, being the acquirer in Step 1 and directed both the parties to file a notice in relation to the Transaction.

## CCI imposes penalty on NTPC under Section 43A of the Act

The CCI vide its order dated [22.08.2023](#) imposed a penalty on NTPC Limited (**NTPC/Acquirer**) under Section 43A of the Act for failing to notify the acquisition of shareholding in Ratnagiri Gas & Power Private Limited (**RGPPL/Target**) from lenders of RGPPL (**Transaction**). RGPPL is a joint venture wherein NTPC and GAIL (India) Limited (**GAIL**) held 25.51% equity stake each, prior to the Transaction. Post NTPC's acquisition of 35.47% equity stake in RGPPL, its total shareholding increased to 60.98%.

NTPC submitted that the Transaction was undertaken to repay the debt of RGPPL in national interest and NTPC did not acquire any additional rights in the Target. NTPC continues to exercise joint control in RGPPL along with GAIL and Maharashtra State Electricity Distribution Company Limited (**MSEB**), and the Transaction caused no Appreciable Adverse effect on Competition in India (**AAEC**). It was proffered that the CCI has already analysed the power sector in past transactions, including in a notice by NTPC. The Transaction could avail the benefit of the exemption available to



Central Public Sector Enterprises (**CPSEs**) operating in the Oil and Gas sector.

The CCI observed that where an enterprise prior to acquisition has more than 25% shares in the other enterprise, the exemption under Item 1A of Schedule I of the Combination Regulations is available to the transaction only if the shareholding does not exceed 50% after the transaction. Since the Transaction exceeded 50%, upon unavailability of any exemption, the Transaction was notifiable irrespective of whether it has caused AAEC or not.

Thus, the CCI imposed a penalty of INR 40 Lakhs on NTPC.

### **CCI imposes penalty on Axis Bank under Section 43A of the Act**

The CCI vide its order dated [09.08.2023](#) imposed a penalty on Axis Bank Limited (**Axis/Acquirer**) under Section 43A of the Act for failing to notify the acquisition of 9.91% stake in CSC e-Governance Services India Limited (**CSC/Target**) (**Transaction**).

Axis submitted that it made a *bona fide* error in considering the Target's financials for the Financial Year (**FY**) 2019 instead of FY 2020 whereby it failed to consider that the value of turnover breached the *de minimis* exemption threshold. In any case, benefit of exemption under Item 1 of Schedule I of the Combination Regulations is available as the acquisition of less than 10%

threshold has been made solely as an investment and Axis, like any ordinary shareholder, merely has the right to nominate a director subject to the approval of Board of Directors of CSC at their sole discretion.

The CCI considered these submissions and observed that it is immaterial whether failure to give notice is inadvertent or intentional. Further, Item 1 benefit was not available to the Transaction as Axis has representation on the Board of Directors of CSC and participates in its affairs.

Thus, the CCI imposed a penalty of INR 40 Lakhs on Axis.

### **Green Channel violation - CCI imposes penalty on Platinum Trust and TPG under Sections 43A and 44 of the Act**

The CCI vide its order dated [18.08.2023](#) imposed a penalty on Platinum Jasmine A 2018 Trust (**Platinum Trust**) acting through its trustee Platinum Owl C 2018 RSC Limited (**Platinum Trustee**), and TPG Upswing Ltd. (**TPG Upswing**) (collectively, **Acquirers**) under Section 43A of the Act. The transaction was in relation to the acquisition of stake in UPL Sustainable Agri Solutions Limited (**UPL SAS/Target**) by the Acquirers through the Upswing Trust (**Transaction**). The notice was filed by the Acquirers under the Green Channel mechanism.

The CCI initiated proceedings based on overlaps between activities of Arysta India,



an indirect subsidiary of Upswing Trust's portfolio company and the activities of the Target.

The Acquirers submitted that the overlapping entities belonged to the same group and the Transaction did not result in a change in the competition landscape with no likely AAEC in India. Further, the consumer perception was that the overlapping entities/products are the same and sales to third parties were insignificant and declining.

The CCI while rejecting the Acquirer's submissions, held that the deemed approval facility under the Green Channel route does not envisage detailed assessment of AAEC that is otherwise undertaken for all other combinations and the test for the same is to check that the parties to the transaction, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control, must not exhibit horizontal overlap, vertical interface or complementarity, considering all plausible alternative market definitions. The Green Channel facility is a trust-based mechanism which is based on self-assessment by the parties to the combination.

The CCI further observed that as the Acquirers made statements in the notice, including declarations which were false in material particulars, the Acquirers are liable for penalty under Section 44 of the Act.

Thus, the CCI, while approving the

acquisition, imposed a penalty of INR 5 Lakhs under Section 43A and of INR 50 Lakhs under Section 44 of the Act on the Acquirers.

The CCI also observed that going forward, any disregard to the conditions for availing Green Channel would be dealt with seriously with attendant consequences based on the specificities of the case.

### **CCI approves acquisition of TCNS by Aditya Birla Fashion**

The CCI vide its order dated [27.06.2023](#) approved the proposed combination pertaining to the acquisition of 51% shareholding in TCNS Clothing Co. Limited (**TCNS/Target**) by Aditya Birla Fashion and Retail Limited (**Aditya Birla Fashion/Acquirer**).

The CCI noted that the activities of the parties display horizontal and vertical interfaces. However, the proposed combination is not likely to have any AAEC in India due to insignificant market share of the Parties.

Thus, the CCI approved the proposed combination under Section 31(1) of the Act.

### **CCI passes order against CHB for contravention of Section 4 of the Act**

The CCI passed an order dated [22.08.2023](#) under Section 27 of the Act against Chandigarh Housing Board (**CHB**) for



contravention of the provisions of Section 4(2)(a)(i) read with Section 4(1) of the Act.

It was alleged that clauses as stipulated under the CHB Self-Financing Housing Scheme 2010 (**Scheme**) were unfair and exploitative. The Scheme did not disclose the date of possession and CHB imposed heavy interest including levying interest for delay of one day in credit of the required instalment.

CHB submitted that it is not the dominant/single agency which has allotted residential flats in Chandigarh to general public and there are other options such as Estate Office, Chandigarh Administration, Municipal Corporation etc. It was also argued that allotments are being made by CHB under the Chandigarh Housing Board (Allotment, Management and Sale of Tenements) Regulations, 1979. Further, CHB has now made provisions computing interest for the actual delay period and CHB has not launched any scheme without getting it registered with the Real Estate Regulatory Authority.

The CCI observed that CHB enjoys exclusive powers and is dominant in the market for the provision of services for development and sale of residential flats in the Union Territory of Chandigarh. Further, the CCI held that non-disclosure of date of delivery of possession to consumers and levying penal interest for full month, on account of delay of one day in credit of instalment, amounts to abuse of dominance under Section 4(2)(a)(i) of the Act. The CCI also

considered that CHB has ceased from these acts and refrained from imposing penalty.

## CCI dismisses allegations against Tata Motors

The CCI vide its order dated [23.08.2023](#) dismissed the allegations against Tata Motors Limited (**Tata Motors**) for contravention of Sections 3 and 4 of the Act.

It was alleged that Tata Motors imposed onerous conditions on its authorised dealers pertaining to order quantities and imposed restrictions on indulging in any new business and indulged in territory allocation.

It was also alleged that Tata Capital Financial Services Limited (**TCFSL**) and Tata Motors Finance Limited (**TMFL**) sanctioned finance facility in a discretionary manner depending upon the number and model of vehicles that Tata Motors wished the authorised dealer to off-take rather than considering the financial credibility of the dealer.

Tata Motors submitted that the allegations are only being raised on termination/ non-renewal of the dealership agreements of the informants due to consistent non-performance and financial indiscipline. It is an attempt to invoke contractual issues that the informants have against the termination of its dealership. Further, declining market share of Tata Motors, as against increase in the market share of its competitors, demonstrates that Tata



Motors is not a dominant player in the market for manufacture and sale of commercial vehicles in India. It also submitted that it only prevents active sales outside the allocated territory, not passive sales. This restriction was due to commercial needs as it incentivizes dealers to make investments in developing the dealership business in the allocated territory and prevents other dealers from free-riding on such investments.

The CCI did not examine the conduct of TCFSL and TMFL as they do not command any significant market power.

Further, the CCI observed that Tata Motors held dominant position in the market for manufacture and sale of commercial vehicles in India from FY 2017 to FY 2022. However, Tata Motors did not coerce its dealers to off-take vehicles as per its demands. Mere mentioning of a clause requiring dealers to seek a NOC from Tata Motors with no instance of the same being withheld is not a contravention under Section 4. Furthermore, Tata Motors did not enforce territory allocation.

Thus, the CCI found no contravention of the provisions of Sections 3(4) and 4 of the Act by Tata Motors and closed the matter under Section 26(6) of the Act.

### **CCI passes order against Chemists, Druggists and their associations for contravention of Section 3(3) of the Act**

The CCI passed an order dated [23.08.2023](#) under Section 27 of the Act against various chemists and druggists of Rajasthan and their associations (collectively, **OPs**) for contravention of Section 3(3) of the Act.

It was alleged by the informant– Solar Life Sciences Medicare Private Limited (**Solar**), a supplier of pharmaceutical products- that the OPs collectively decide and impose margins and incentive schemes on the manufacturers/ suppliers of pharmaceutical products under the threat of boycott using the aegis of the impugned trade associations, based on which other associations also passed similar resolutions.

The OPs submitted that the information at hand had been filed to harass one of the OPs who had filed a letter with RoC- Mumbai to ensure that Solar was not misleading public with a fake company operating out of multiple addresses. Further, there was no evidence to show that any decision/agreement by/amongst the OPs resulted in restricting/limiting of supply of Solar's products.

Rejecting the submissions made by the OPs, the CCI held that the letters/notices issued/abided by the OPs were in the form of decisions/diktats for boycott and non-cooperation in dealing with the products of Solar, contravening Section 3(3) of the Act.

Thus, the CCI directed the OPs to cease and desist such behaviour without imposing any penalty.



## CCI continues adjudication of Anti-profiteering cases

The CCI continued adjudication of antiprofitteering cases and passed 9 final orders and 9 interim orders in the month of August 2023. Importantly, no instance of “profiteering” was found by the CCI in any of the 9 final orders. However, the CCI directed further investigation and inquiry in several cases by passing various interim orders. Most notably, an interim order was passed against Jaiprakash Associates Limited, after the CCI noted that the amount of “profiteering” was not calculated for 46 units (out of 1107 units) due to insufficiency of data. Thus, the CCI directed the Director General of Anti-Profiteering (**DGAP**) to conduct further investigation and furnish a fresh and complete investigation report pertaining to alleged profiteering in “Jaypee Greens Kalypso Court”.

## Madras HC dismisses 14 complaints challenging Google’s billing policy

The Madras High Court (**MHC**) dismissed 14 out of 16 complaints filed by Indian mobile application developers (**Plaintiffs**) against Google’s new user choice billing system. The two complaints filed by Disney+ Hotstar and Testbook remain pending.

The Petitioners had filed the suits before the MHC seeking a declaration that Google’s payment policy relating to implementation of Google Play Billing

System (**GPBS**) and User Choice Billing System (**UCBS**) vis-a-vis the Mobile Applications (**apps**) owned and operated by the Plaintiffs in Google Play Store, along with the charges levied thereunder, is illegal and unenforceable. The Plaintiffs also sought for a permanent injunction restraining Google from delisting their apps in the Google Play Store for their failure to subscribe to Google’s terms and conditions relating to implementation of the GPBS and UCBS.

The Plaintiffs alleged that Google Play Store is indispensable for app developers and taking advantage of the dominant position, Google imposed non-negotiable service fee and implemented one-sided and arbitrary payment policies and terms.

The CCI vide order dated 25.10.2022 had directed Google to not restrict the app developers from using any third-party billing/payment processing services. The Petitioners submitted that Google tried to evade the CCI order by permitting the app developers to use Alternative Billing System/UCBS alongside and in addition to the GPBS. However, in effect integration of GPBS by app developers is still mandatory in addition to UCBS.

Google challenged the jurisdiction of the MHC to adjudicate on the issues arising from the Act and submitted that the same cannot be invoked before a civil court. Accepting Google’s submissions, the MHC held that the matter pertains to allegations of abuse of dominance by Google and falls within the jurisdiction of CCI. The remedy available under the Act is much more





comprehensive than that available before a civil court. Further, the subject matter of the suit is barred by Section 61 of the Act which expressly forbids civil courts from hearing any lawsuit or action that the CCI is authorised to decide.

Thus, the MHC dismissed the complaints against Google's billing policy.

### **NCLAT dismisses the appeal challenging the CCI's order against PVR and Inox**

The National Company Law Appellate Tribunal (**NCLAT**) vide its order dated 10.08.2023 dismissed the Appeal filed by the Consumer Unity and Trust Society (**CUTS/Appellant**) challenging the CCI order dated 13.09.2022 which dismissed the Appellant's allegations against PVR Limited (**PVR**) and INOX Leisure Limited (**Inox**) (collectively, **Respondents**) for the alleged contravention of Section 3(1) of the Act.

The Appellant alleged that the Respondents entered into an anti-competitive agreement through their merger which is likely to cause AAEC in the relevant market for the exhibition of films in multiplex theatres and high-end single screen theatres in different cities in India. The merger is otherwise exempted from the notification requirement under Section 5 of the Act as it qualifies for the *de minimis* exemption, by virtue of low turnover of Inox due to Covid pandemic. However, it is likely to cause AAEC and CCI erred in dismissing the allegations on

the ground that no actual anti-competitive conduct was prevailing at present.

The Respondents submitted that their merger would not fall within the definition of an agreement under Section 3 of the Act as mergers are separately inquired into under Sections 6 and 29 of the Act.

The NCLAT held that both the entities have become one and do not fall within the definition of Section 3(1) of the Act. Further, if any abusive conduct emanates from the merged entity *post-facto*, the same can be subsequently examined under Section 4 of the Act.

Thus, the NCLAT upheld the CCI's order and dismissed the Appeal.

### **CCI releases Draft Settlement and Commitment Regulations, 2023**

The CCI released a draft each of the Competition Commission of India (Settlement) Regulations, 2023 (**Settlement Regulations**) and the Competition Commission of India (Commitment) Regulations, 2023 (**Commitment Regulations**) in line with the objective of reducing litigation and ensuring quicker market correction.

The Competition (Amendment) Act, 2023 introduced Section 48A Section 48B of the Act to create a settlement and commitment mechanism respectively, to enable enterprises against whom an inquiry is initiated for an alleged contravention of Section 3(4) or 4 of the Act.



The Settlement Regulations, as well as the Commitment Regulations, detail the procedure to be followed during settlement/commitment proceedings and include *inter alia* form of the application, fee payable, process, manner in which the CCI will invite objections/suggestions to the proposed terms, effect of the order and implementation of the terms. The Settlement Regulations also describe the Settlement Amount payable along with reduction by means of Settlement discount.

The CCI has invited stakeholders to submit comments on the draft Regulations.

*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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