



Luthra and Luthra
LAW OFFICES INDIA

COMPETITION LAW ALERT

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In the October edition of the Luthra and Luthra Law Offices India - Competition Law Newsletter, we discuss some pertinent developments in the Indian Competition regime.

CCI dismisses allegations of abusive conduct by Asian Paints

The Competition Commission of India (CCI), vide order dated [08.09.2022](#) passed under Section 26(6) of the Competition Act ("**Act**"), dismissed allegations of imposition of vertical restraint on dealers and abuse of dominance in the distribution market by Asian Paints, a market leader in Indian Paint industry.

In 2019, an information was filed by JSW Paints ("**JSW**") (a new entrant in the paints market) against Asian Paints wherein it was alleged that Asian Paints was abusing its dominance in the downstream distribution market by compelling its dealers not to deal in products of JSW and pressurizing godown owners not to provide warehousing services to JSW, thereby denying market access to JSW. It was also alleged that such conduct amounted to "exclusive supply arrangement" and "refusal to deal" and violated Section 3(4) of the Act. Based on JSWs' averments and evidences submitted, the CCI directed the Director General ("**DG**") to investigate after forming a *prima facie* opinion that Asian Paints was dominant due to its consistently high market shares and that its conduct was anti-competitive/abusive. In 2021, another information was filed by "Balaji Traders", wherein similar allegations of pressurizing dealers to not deal with JSW Paints were made against Asian Paints.

Both the cases were clubbed by the CCI and a common investigation report was submitted by the DG.

During the investigation, the DG found that in FYs 2019-20 and 2020-21, JSW had been able to appoint more dealers to its distribution network as compared to Asian Paints. The DG also noted that 86.6% of JSWs' dealer network were common with Asian Paints. Further, the DG noted that in a few instances wherein Asian Paints penalized the dealers, the action was necessitated due to reduction in offtake or unpaid accumulated dues over a period. Thus, the DG found that Asian Paints' action was based on objective criteria to protect its legitimate business interests and not to oust any competitor. Based on these evidences, the DG did not find any denial of market access much less a case of exclusive dealings. The DG also could not find any evidence that paint storage facilities were denied to JSW as a result of exercise of dominance. The CCI agreed with the findings of the DG and dismissed the case due to lack of evidence.

"No ex-ante assessment under Section 3 or 4" - CCI dismisses information against PVR – INOX merger

On [13.09.2022](#), the CCI dismissed an information filed by Consumer Unity & Trust Society ("**CUTS**"), a consumer organization against PVR Limited ("**PVR**") and Inox Leisure Limited ("**Inox**") for entering into an anti-competitive merger agreement.

As per the information, the merger involved the amalgamation of the largest



and the second largest players in the film exhibition industry, and hence there was a likelihood of an Appreciable Adverse Effect on Competition (“**AAEC**”) arising out of the said business structure transaction. It was alleged that the merger would result in reduction of consumer choices, higher prices for consumers, deterioration of services, high bargaining power of the combined entity leading to onerous terms for distributors and real estate developers etc. The said agreement to merge, therefore, was alleged to be anti-competitive and violative of Section 3(1) of the Act. CUTS also advocated that ordinarily the merger would have been notified and undergone a competition law scrutiny by the CCI in terms of Section 5 and 6 of the Act but for the Covid-19 pandemic due to which the turnover of the target (Inox) fell below the INR 1000 crore threshold in the relevant financial year and the parties were able avail of the benefit of the *de minimis* exemption.

The CCI observed that the allegations were based on apprehensions of future conduct of the combined entity, and therefore cannot be assessed under Section 3 or 4 of the Act, which does not envisage an ex-ante assessment. Further, the CCI noted that the proposed transaction was yet to be consummated and even if it was consummated, the Act did not consider dominance to be *per se* abusive. Based on these observations, the CCI dismissed the information but warned that in case any abusive conduct on part of the combined entity is brought to its notice, then it would take appropriate action.

“Advisable to make amendments in the clause” - CCI dismisses allegations against Andhra Pradesh State Beverages Corporation but advises it to review certain clauses in Rate Contract Agreements

The CCI vide order dated [19.09.2022](#), dismissed allegations of abuse of dominance against the Prohibition & Excise Department, Government of Andhra Pradesh (“**the Department**”) and Andhra Pradesh State Beverages Corporation Limited (“**AP Corporation**”). The information was filed by International Spirits and Wines Association of India (“**ISWAI**”) which comprises of eight international companies engaged in the market for branded alcoholic beverages.

It was alleged that the Department and AP Corporation were exclusively responsible for procuring and distributing liquor at the wholesale level and enter into Rate Contract Agreements (“**RCA**”) with manufacturers for supply to AP Corporation. It was therefore alleged that the Department and AP Corporation were dominant in the market for “*wholesale trade and retail distribution of Branded Alcoholic Beverages in the State of Andhra Pradesh*”. It was further alleged that the Department and AP Corporation were abusing their dominance by *inter alia* discriminating between ISWAI members and other manufacturers and imposing on them certain onerous/exploitative terms in the RCAs. It was alleged that there was a drastic drop in market shares of some ISWAI members after the retail operations were taken over by the AP Corporation,



pursuant to the 2019 amendment in the Andhra Pradesh (Regulation of Trade in Indian Made Foreign Liquor, Foreign Liquor) Act, 1993 ("**AP IMFL Act**").

The CCI, after noting that the Department has transferred the function of liquor procurement to AP Corporation in 2021, held that the AP Corporation was dominant in the market for "*wholesale procurement, distribution, and retail sale of branded alcoholic beverages in Andhra Pradesh*". On a perusal of monthwise data pertaining to the "quantity offered for supply" by certain members compared with the supply requested by the AP Corporation, the CCI found that it was the ISWAI members who drastically reduced the quantity of supplies offered to the AP Corporation. The CCI found no evidence to support the claim that the acts of AP Corporation led to reduction in sales and it could have been due to other factors such as Covid-19 pandemic, changes in State policies, change in consumer preference, entry of new brands etc.

With regard to the onerous terms in the RCAs, such as "unilateral termination clauses" or "clause allowing imposition of penalty upon slow moving goods" the CCI observed that "it may be advisable" for the AP Corporation to make suitable amendments/ issue clarifications to allay any concerns. However, after noting that these terms have not been enforced against any party and that the RCAs were entered into for a limited period of one year, the CCI did not find AP Corporation's conduct to be "abusive". Therefore, the CCI dismissed the information by passing an order under Section 26(2) of the Act.

CCI disposes of gun jumping proceedings against Global Infrastructure Partners India Pvt. Ltd.

The CCI disposed of gun-jumping proceedings against Global Infrastructure Partners India Pvt. Ltd. ("**GIP**") under Section 43A for consummating the acquisition of infrastructure asset management business of IDFC Alternatives Limited ("**IDFC Alternatives**") without notifying the CCI. As per GIP, it was under a *bona fide* belief that the transaction was eligible for benefit under the *de-minimis* exemption, based on the financials of IDFC Alternatives - IIF 1 and IIF 2. GIP admitted that it had not considered the financials of the managed portfolio entities while assessing the applicability of the *de-minimis exemption* since the CCI's observations in the *Investcorp* case ([C-2022/02/909](#)) were not available at that time. In the *Investcorp* case, the CCI, for the first time held that even financials of portfolio entities must be included while assessing applicability of *de-minimis exemption*. The transaction, therefore, was notifiable and CCI after duly noting the cooperation extended by GIP, imposed a nominal penalty of INR. 3 million.

CCI dismisses allegations against four national insurance companies

The CCI vide order dated [09.09.2022](#) held that there was no contravention of Section 3 or 4 of the Act by four public insurance companies, namely - National Insurance Company Limited, the New



India Assurance Company Limited, United India Insurance Company Limited, Oriental Insurance Company Limited (collectively, “**OPs**”) as alleged by Dr. Supratik Sanatani and Dr. Paromita Sanatani (**Informants**)

The Informants alleged that OPs have entered into an anti-competitive agreement by forming a Preferred Partner Network (“**PPN**”), where the cost of hospitalization is paid by OPs to PPN hospitals as per the agreed packages and not according to the terms and conditions of health insurance policies. It was alleged that the amount of hospital bill in excess to the PPN package was payable by the policy holder. It was also alleged that the cashless service was only offered to the hospitals which agree to forcefully collect the PPN declaration form from the policy holder, and other hospitals failing to get this form signed were kept out of the PPN, thus resulting in denial of market access for the hospitals. It was further alleged that the OPs have combined market share 46.75% in the group health insurance business and by indulging in the said conduct they violated Section 4 of the Act.

The CCI noted that the purpose of PPN tariff rates was to have standard packages and charges for certain medical procedures to save the policy holder from being overcharged and for better utilization of the insured amount. Further, the CCI observed that fixation of PPN tariff rates would also lead to lower costs payable to the hospitals, the benefit of which was ultimately passed on to the policy holders in the form of lower premium. The CCI held that provision of cashless facility to policy holders only through those network hospitals which

are empaneled under PPN does not cause any competition concern as any hospital was free to join after completing the empanelment formalities. Regarding violation under Section 4 of the Act by the OPs, the CCI held that collective dominance is not recognized under the Act. Accordingly, no violation was made out against OPs and the CCI dismissed the case under Section 26(2) of the Act.

Other significant developments

i. CCI publishes market study on competition issues related to Taxi and Cab Aggregator Industry

The CCI, on [09.09.2022](#), published a “Market Study on Competition and Regulatory issues related to the Taxi & Cab Aggregator Industry: with special reference to surge pricing in the Indian context” (“**Study**”). The Study was aimed at understanding concepts of personalized pricing, surge pricing and algorithmic pricing prevalent in the industry, and assessing the competition/regulatory issues arising therein. For the purpose of the study, controlled real time experiments were conducted and data was collected by surveying both drivers and consumers from two tier 1 cities and two tier 2 cities. Some of the key findings/recommendations of the study include –

- that the Cab Aggregators did engage in personalized pricing and while it was noted that such pricing does not always raise competition concerns, the CCI recommended some self-regulatory measures such as transparency in total fare by providing breakup of the total fare.



- that there was ambiguity with regard to surge pricing and it was unclear whether a portion of the “surge” was being passed to the drivers. It was recommended that the Aggregators come up with a clear and transparent surge pricing policy to allay any concerns.
- that technology experts must be trained about competition law violations to avoid inadvertent algorithmic collusions.

ii. CCI proceedings against private hospitals for alleged unfair pricing challenged before the Delhi HC

Various hospitals which were under the CCI’s scanner for allegedly charging exorbitant prices for their services have challenged these proceedings before the Hon’ble Delhi High Court (**DHC**).

The CCI proceedings began in 2015 after an information was filed against Max Super Specialty Hospital, Patparganj and Becton Dickinson India (P) Ltd., for imposing an unfair price for disposable syringes when purchased from in-house pharmacy of the hospital. The CCI prima facie found that the price of a syringe sold in hospitals was much higher than the syringe sold in medical stores/ pharmacies outside the hospital, despite same brand name, quality, quantity, standard, manufacturer etc.

After considering an initial investigation report, the CCI ordered the DG to broaden the scope of investigation to cover other super specialty hospitals and other products/services, as well. For this purpose, an order of further investigation was passed by the CCI on [31.08.2018](#).

As per media reports, the DG has recently submitted the final investigation report and found 12 super specialty hospitals guilty of charging higher prices for renting rooms, medicines, tests, medical devices, and consumables. The writ challenging the proceedings before the CCI is scheduled to be heard by the Delhi High Court on [14.10.2022](#).

iii. “Much ado about nothing?” – CCI approves PayU’s \$4.7 Billion acquisition of Billdesk only for the deal to be terminated later on

The CCI on 05.09.2022 approved the acquisition of Indialdeas.com Limited (BillDesk) by PayU India (owned by Prosus N. V.) for a consideration of \$4.7 Billion. Since both PayU and BillDesk provide Payment Aggregation Services and there were significant horizontal overlaps, a Form-II was filed before the CCI on 20.04.2022. Reportedly, the CCI had some initial concerns and had sent the parties a show cause notice for initiation of a Phase-II inquiry. However, after hearing, the transaction was approved without any modifications.

Just before the dispatch of this newsletter, media reports suggest that the deal stands terminated due to non-compliance of certain conditions within the agreed time.

This newsletter is only for general informational purposes, and nothing in this edition of 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 Mr. Rajiv K. Luthra/ Mr. G.R. Bhatia/ Mr. Arjun Nihal Singh, at the below mentioned coordinates. © Luthra & Luthra Law Offices India 2022. All rights reserved.

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