



Luthra and Luthra
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In the May 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.

NCLAT sets aside penalty on ITC for gun jumping

The National Company Law Appellate Tribunal (**NCLAT**) on 27.04.2023 set aside the order dated [11.12.2017](#) passed by the Competition Commission of India (**CCI**) whereby a penalty of INR 5 Lakhs was imposed on ITC Limited (**ITC**) for contravening the provisions of Section 43A of the Competition Act, 2002 (**Act**).

On 12.02.2015, ITC entered into a brand purchase agreement with Johnson & Johnson Pvt. Limited (**Johnson**) for the purchase of trademark “Savlon” along with certain inventories, technical know-how and other promotional material (**Savlon Agreement/ Transaction 1**). On the same date, ITC entered into another brand purchase agreement with Johnson for the purchase of the trademark ‘Shower to Shower’ along with attendant know-how and their promotional material (**Shower to Shower Agreement/ Transaction 2**).

The said transactions were initially not notified to the CCI by ITC. However, the CCI initiated an enquiry and after having opined that the transactions were notifiable, directed ITC to file a notice in Form I. Consequently, the transactions were notified and approved. Proceedings under Section 43A were simultaneously initiated and vide order dated 11.12.2017, a penalty of INR 5 Lakhs was imposed on ITC.

Against this order under Section 43A, ITC preferred an appeal before the NCLAT and argued that both the transactions did not contemplate and result in the acquisition of an enterprise as contemplated in Section 5 of the Act. It was further argued that the de minimis exemption was applicable to the transactions, as the notification dated 27.03.2017 clearly specified that “value of assets and turnover relating to the portion or division of an enterprise being acquired or merged” was to be considered. Since the value of assets/turnover attributable to the two trademarks being transferred was less than the thresholds prescribed within the de minimis exemption, it was argued that the transactions were not notifiable and the penalty under Section 43A should be set aside.

On the other hand, CCI argued that de minimis notification dated 27.03.2017 would not be applicable to the transactions since they were consummated in 2015. Accordingly, CCI argued that de minimis notification dated 02.03.2011 (extended by notification dated 04.03.2016) would be applicable, and instead of considering the value of business being acquired, the value of the entire target will have to be considered. Thus, as per the CCI, the transactions were notifiable and penalty under Section 43A was rightly imposed.

However, the NCLAT observed that the notification dated 27.03.2017 was clarificatory in nature and gave a purposive construction to the earlier de minimis notifications dated 4.3.2011 and 4.3.2016. Thus, the NCLAT held that transactions were exempt from being notified and set aside the order under Section 43A against ITC.



DHC directs CCI to continue adjudicatory proceedings in the writ petition filed by Alliance

The Delhi High Court (**DHC**) vide judgement dated 24.04.2023 directed the CCI to decide an interim application filed by Alliance of Digital India Foundation (**ADIF**) in relation to restraining Google from implementing its payments policy which was in contravention of the provisions of Section 42 of the Act. ADIF had alleged in the interim application before the CCI that Google did not comply with the directions passed by the CCI vide order dated 25.10.2022 wherein CCI had directed Google to not create and launch an alternative billing system in addition to the existing billing system. After noting that the CCI was currently not performing adjudicatory functions due to a perceived lack of quorum, the DHC observed that any vacancy or defect in the constitution of the CCI, would not invalidate any proceedings before the CCI. Furthermore, the DHC observed that Section 22 of the Act appeared to be purely in respect of administrative action to be undertaken by the CCI and has no nexus with the adjudicatory process. Thus, the DHC concluded that despite there being less than three members, the CCI would be within its jurisdiction to perform adjudicatory functions.

Google pays penalty of INR 1337 Crores in Android Case

The NCLAT vide order dated 29.03.2023 had upheld the penalty of INR 1337.76 crores imposed by the CCI on Google for abusing its dominant position in the Android mobile device market and directed Google to deposit the same within 30 days from the receipt of the NCLAT's order. The CCI had concluded in its order of 20.10.2022 that

various practices of Google in relation to its Android Operating System amounted to abusive conduct in violation of Section 4 of the Act.

Despite upholding the conclusions of the CCI on various counts including penalty of INR 1337 Crores, the NCLAT modified the order and set aside four out of ten directions passed by the CCI.

[Media reports](#) now suggest that Google has since deposited the entire penalty amount with the Government of India under the "Consolidated Fund of India" within the timelines as directed by the NCLAT.

Google withdraws Supreme Court Appeal against NCLAT order for refusing to grant stay on INR 936 Crore penalty imposed by CCI

Google has [reportedly](#) withdrawn its appeal filed before the Supreme Court of India (**SCI**) against the order passed by the NCLAT whereby NCLAT had refused to grant interim stay to Google in relation to the penalty of INR 936 Crores imposed by the CCI on Google for abusing its dominant position in relation to the play store policies implemented by Google. The CCI, vide order dated 25.10.2022 had directed Google not to restrict app developers from using any third party billing or payment processing services to purchase apps for in-app billing on Google Play Store. In addition to the directions of "cease and desist", the CCI also imposed a penalty of INR 936 Crores on erring Google. The CCI had also prescribed eight corrective measures that Google Play needs to implement to correct the anti-competitive practices.



CCI approves SALIC International Investment Corporation's investment in LT Foods

The CCI on [14.02.2023](#) passed an order under Section 31(1) of the Act, approving the purchase of certain equity shares of LT Foods Ltd. (**LT Foods**), a rice-based foods business, by SALIC International Investment Corporation (**SIIC**). Along with a stake in LT Foods, SIIC also acquired the right to appoint one nominee and one observer on the board of LT Foods along with certain affirmative rights. Furthermore, LT Foods also acquired certain equity share capital of Daawat Foods Limited (**DFL**), a subsidiary of LT Foods. CCI concluded that the proposed restructuring does not have nor likely to have anti-competitive effect in the relevant market.

CCI approves acquisition of up to 76.10% of the voting share capital of Suen Pharmaceuticals Limited by Berhyanda Limited

The CCI on [20.04.2023](#) approved the acquisition of up to 76.10% share capital of Suen Pharmaceuticals Limited (**Target**) by Berhyanda Limited (**Acquirer**) by way of a share purchase agreement of 26.12.2022 and pursuant to the mandatory open offer in compliance with the Securities and Exchange Board of India (**SEBI**) (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Committee on Digital Competition Law seeks additional time to submit its report

The Parliamentary Standing Committee on Finance submitted its 53rd Report on 'Anti-competitive Practices adopted by Big Tech Companies'. The Committee recommended that there is a need of enactment of a separate legislation i.e. Digital Competition Act (**DCA**) to deal with the competition

issues prevailing in the digital markets. The Ministry of Corporate Affairs (**MCA**) appointed a 16-member Committee on Digital Competition Law to *inter alia* suggest a draft DCA within 3 months. However, the committee has sought additional time to provide its suggestions and provide a draft DCA to the MCA for its consideration.

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 and Luthra Law Offices India 2023. All rights reserved.

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