



Luthra and Luthra
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In the July 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. These are as under:

Supreme Court clarifies that “Coal India” falls under the purview of Competition Act, 2002

The Supreme Court of India (**SCI**) vide order dated [15.06.2023](#) has clarified that Coal India Limited (**CIL**) will come under the purview of the Competition Act, 2002 (**Act**). The SCI was hearing an appeal filed by CIL against the order passed by the Competition Appellate Tribunal (**COMPAT**) which had affirmed the order of the Competition Commission of India (**CCI**) wherein it found CIL guilty of abusing its dominant position by imposing unfair/ discriminatory conditions in Fuel Supply Agreements for non-coking coal to thermal power producers.

Before the SCI, CIL argued that the coal mines operated by CIL under the Coal Mines (Nationalization) Act, 1973 (**Nationalization Act**) are outside the purview of the Act. It was argued that CIL is a monopoly created under the Nationalization Act and is protected by Article 31B of the Indian Constitution. It was claimed that by virtue of the Ninth Schedule of the Indian Constitution and Article 39(b), CIL is exempt from being

considered as an ordinary monopolist. It was also argued that, according to Section 28 of the Nationalization Act, the provisions of the Nationalization Act prevail over any conflicting laws, including the Act.

In response to CIL’s arguments, the Counsel appearing on behalf of the CCI proffered that the Act will be applicable, despite the non-obstante clause in Section 28 of the Nationalization Act, as there is no conflict between the two statutes. It was argued that the Nationalization Act, which CIL relies on, was removed from the Ninth Schedule in 2017 and subsequently repealed.

It was also argued that the acts and omissions of CIL affect both private players and public sector units who supply power to the consumers. Respondents also pointed out that Section 54 of the Act allows the Central Government to exempt certain entities from the scope of the Act, and since such an exemption has not been provided to CIL, it cannot claim immunity from the applicability of the Act.

The SCI in its judgement observed that:

- (i) The company as a government entity, remains subject to laws and policies and are not immune from them.
- (ii) The Act defines an “enterprise” to include a government company engaged in activities



relating to goods or services. Further, although the Act specifically excludes sovereign functions of the Government from its scope, since CIL is not carrying out sovereign functions, but rather engaging in mining business, it falls within the definition of an “enterprise” under the Act.

- (iii) The SCI has considered the concept of “common good” as stated in Article 39(b) of the Indian Constitution and its interpretation in relation to the economic and competition laws. The said concept is not static in nature but rather dynamic, which evolves from time to time.
- (iv) The inclusion of State monopolies, Government companies, and public sector units within the purview of the Act is for the purpose of regulating their activities to ensure fair competition. The SCI held that the Nationalization Act aimed to subserve the common good by distributing coal resources, and that state monopolies, even if operated through government companies, fall under the purview of the Act.
- (v) As per the provisions of

Section 54 of the Act, the Central Government has not exempted CIL from the purview of the Act.

Thus, the case was disposed of, and the matter was remanded back to the CCI to be dealt on merits and other pending matters to be addressed in the future.

CCI dismisses allegations against LG Electronics

The CCI vide its order dated [20.06.2023](#) under Section 26(2) of the Act disposed off a case against LG Electronics India Pvt. Ltd (**LG Electronics**).

The allegation against LG Electronics was in relation to its refusal to allow the Informant, the installation and integration of Hybrid Thermal Solar (**HTS**) panels into LG Electronics’ Variable Refrigerant Flow (**VRF**) ACs. The Informant claimed that Intertek, an international certifying body, had given certification for their HTS panels’ energy-saving capabilities and the same was communicated to LG Electronics.

In response to the allegations, LG Electronics submitted that its refusal was based on *bonafide* technical reasons to protect themselves from potential claims and liabilities. The test reports provided by the informant were not reliable and lacked third party verification. LG Electronics also accused the informant of being a defaulter and filing petitions at different forums to settle personal grudges and involve LG Electronics in

unnecessary litigations.

The CCI held that LG Electronics does not enjoy a dominant position in the relevant market which was defined by the CCI as “market for manufacture and sale of VRF HVAC ACs in India” due to presence of multiple competitors in the given relevant market. Furthermore, with respect to violation of Section 3 of the Act, the CCI held that the PIL failed to provide sufficient information against LG Electronics and thus, no case under Section 3 was made out.

Thus, the CCI held that LG Electronics did not contravene the provisions of the Act and the case was closed under Section 26(2) of the Act. Consequently, interim relief sought by the informant under Section 33 of the Act was also dismissed.

CCI dismisses allegations against Shubham Consumer Durables

The CCI vide its order dated [27.06.2023](#) under Section 26(2) of the Act dismissed the allegations against Shubham Consumer Durables Pvt. Ltd. (**OP-1**), Shri Sampat Lai Kothari (**OP-2**), and Shri Anil Kumar N (**OP-3**) for contravening the provisions of Sections 3 and 4 of the Act. An information was filed by Mr. N. Rajesh Kumar (**Informant**), the proprietor of Shree Padmavathi Enterprises, against the OPs.

The Informant had entered into a

franchise agreement with OP-1 for the supply of consumer durable goods, and several issues arose during their business arrangement. The Informant alleged that OP-1 changed the amount of refundable security deposit unilaterally and decided the location of the premises against the Informant's wishes, causing delay in procurement of the necessary licenses. OP-1 also failed to transfer the profits from sales to the Informant's account and did not fulfil assurances made regarding sales promotion and incentives. Furthermore, the Informant alleged that the above conduct of OPs amounts to cheating, fraud and misrepresentation and has caused loss in terms of reputation and future earnings to the Informant which has also forced the Informant to shut down its business.

The CCI held that the provisions of Section 3(3) of the Act are not attracted in this case as OP-1, OP-2 and OP-3 are not engaged in identical or similar trade of goods or provisions of services. With regards to Section 3(4) of the Act, the CCI held that since the allegations primarily concerned commercial disputes arising from a failed business arrangement and did not raise competition concerns, the Informant's remedies lay elsewhere. Furthermore, the CCI did not delve into the abusive conduct of the OPs, as they were not found to be dominant in the relevant market.



CCI and Google move Supreme Court against Google's Android NCLAT order

[News Reports](#) suggest that CCI has filed an appeal before the SCI challenging the order dated 29.03.2023 passed by the National Company Law Appellate Tribunal (**NCLAT**) wherein it 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. The CCI had concluded in its order dated 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. The NCLAT in its judgement despite setting aside four out of ten directions by the CCI, upheld the penalty of INR 1337 crores on Google.

Furthermore, the NCLAT in its order had directed the CCI to adopt effects-based approach in abuse of dominance cases.

After the NCLAT's order, Google had deposited the entire penalty amount in the "Consolidated Fund of India" within the timelines as directed by the NCLAT. Recent [news reports](#) suggest that the Google has also filed an appeal before the SCI, challenging the NCLAT's decision to uphold the penalty imposed by CCI.

NCLAT dismisses Railways' Appeal in Bid Rigging Case

The NCLAT vide order dated 16.05.2023 dismissed the appeal filed by the Chief Materials Manager, Eastern Railway against the order dated 10.07.2020 passed by the CCI, whereby the CCI passed a 'cease and desist' order against the opposite parties (**OPs**) but refrained from imposing any monetary penalties. The CCI concluded that the OPs quoted identical prices in the tender floated by Indian Railways for procurement of Composite Brake Blocks (**CBB**) and thus contravened the provisions of Section 3 of the Act.

The CCI refrained from imposing monetary penalty on the OPs as some of the OPs were Micro Small and Medium Enterprises (**MSMEs**) and the relevant turnover arising out of CBB was considerably small. Furthermore, the CCI also took other factors into account such as the economic situation due to the outbreak of global pandemic (COVID-19) and the various measures undertaken by the Government of India to support the liquidity and credit needs of viable MSMEs to help them withstand the impact of the current shock. Further, the CCI also observed that the OPs had fully cooperated during investigation.

The NCLAT was convinced with the reasoning of the CCI and thus upheld the order.

CCI imposes penalty on Bank of Baroda for failure to notify acquisition of IFLIC

The CCI vide its order dated [20.06.2023](#)



imposed a penalty on Bank of Baroda (**BOB**) for failing to notify the acquisition of 21% shares of India First Life Insurance Company Limited (**IFLIC**) from Union Bank of India. BOB initially filed a notice under Form III, however the CCI informed BOB that Form III is not applicable and a notice under Form- I ought to have been filed. Thereafter, BOB withdrew the Form-III and filed a Form I with the CCI. On the basis of the information provided by BOB, the CCI observed that the combination had been consummated even before it was notified to the CCI.

The CCI, looking into mitigating factors such as cooperation extended by BOB and there being no mala fide intention, imposed a nominal penalty of INR 5,00,000/- on BOB under Section 43A of the Act.

CCI issues Show Cause Notice to the parties on Air India-Vistara Merger Plan

[News Reports](#) suggest that CCI has issued a Show Cause Notice (**SCN**) to the parties in relation to the proposed merger of Air India and Vistara. In November 2022, the Tata Group had announced the proposed merger of Air India and Vistara and a Form – II was filed before the CCI on 18.04.2023.

The CCI has raised concerns about the merged entity's market shares on certain routes and the parties have been given 30 days to respond to the SCN issued by

the CCI and in case the responses provided by the parties fail to satisfy the CCI, the CCI will conduct a Phase II investigation wherein it will seek comments from public and various stakeholders while it is important to note that the CCI has not blocked any mergers in the past. However, there have been few instances where mergers have been approved subject to behavioral/ structural remedies.

Chairperson, CCI is keen to expedite implementation of Amendments

News reports suggest that the new Chairperson of the CCI will prioritize completing pending cases and expedite the implementation of amendments in the Act. Furthermore, it appears that the Chairperson is also taking effective measures to collaborate with international jurisdictions to promote global antitrust principles and strengthen cooperation in cross-border cases.

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 G.R. Bhatia/ Arjun Nihal Singh, at the below mentioned coordinates. © Luthra & Luthra Law Offices India 2023. All rights reserved.

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