LKS NEWSLETTER

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Competition & Antitrust

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Enforcement Trends

COMPETITION COMMISSION OF INDIA ("CCI")

1. CCI exonerates IREL from abuse allegations in mining and supply of Ilmenite

CCI has dismissed allegations of abuse against IREL (India) Ltd ("**IREL**") in the mining and supply of beach sand Ilmenite after investigation by the Director General ("**DG**"). Ilmenite is a natural sand based product generated during the extraction of rare-earth compounds from beach sand and is used in the manufacturing of white titanium dioxide pigment/ synthetic rutile. Synthetic rutile is used in the manufacture of white and pastel shades of paints, white-walled tyres, glazed papers, plastics, printed fabrics, pharmaceuticals, toothpastes, soaps, face powders and other cosmetic products. Post 2018, IREL, a Mini Ratna Category 1 Central Public Sector Undertaking ("**PSU**"), is the sole miner of beach sand Ilmenite in India by virtue of a Notification by the Ministry of Mines in early 2019 which prohibited private companies from mining Ilmenite and a subsequent Notification by the Department of Atomic Energy which prohibited the grant of operating rights in respect of atomic minerals in any offshore areas in the country to any person except the government or a government company or a corporation owned or controlled by the government.

Information before the CCI was filed by Beach Mineral Producers Association alleging *inter alia* that IREL imposes unfair and discriminatory conditions in the sale of Ilmenite; engages in discriminatory treatment by providing adequate supply to foreign companies and inadequate supply to domestic consumers; makes arbitrary and exorbitant increase in the price of Ilmenite being the sole miner in India etc. CCI, being *prima facie* convinced that the allegations had merit, directed investigation in October 2022. The DG, in his investigation, had found IREL to be engaging in discriminatory treatment in the supply of Ilmenite and charging unfair prices in the market of beach sand Ilmenite in India.

Considering that IREL functions on behalf of the Department of Atomic Energy, there was a challenge to CCI's jurisdiction as atomic energy is an exempted sector under the Competition Act, 2002 being in the nature of a sovereign function of the government. CCI, however, differentiated between IREL's sovereign and economic activities. It observed that the activity carried out by IREL in mining, extracting and handling of 'Monazite' containing radioactive material which is used for strategic and atomic purposes are sovereign functions and exempted. However, mining and sale of Ilmenite, being devoid of any radioactive content and non-strategic in nature is available for downstream value addition, and therefore, is an economic activity which does not qualify for any exemption.

CCI, after finding IREL to be in a dominant position in the market for mining and supply of beach sand Ilmenite in India, held that it has not abused its dominant position as sufficient evidence of discrimination or refusal to supply of Ilmenite by IREL was not found. The allegations pertaining to supply of more quantity to foreign companies than what is supplied to domestic consumers was also not found to be substantiated on consideration of the Annual Report of IREL for FY 2021-22 and from Memorandum of Understandings ("**MOUs**") furnished to the DG. Further, based on a price comparison of IREL's domestic price *vis-à-vis* its export price and import price of Ilmenite, the price charged by IREL did not appear to be excessive to CCI.

2. CCI expands the scope of investigation against Google in relation to its ad-tech intermediation services

CCI has clubbed an information filed by the co-founder of M/s Capset Infotech to its ongoing investigation relating to Google's ad tech intermediation services. Capset Infotech, specialising in web, mobile applications and software development, is stated to have several of its applications ("**apps**") listed on the Google Play Store, delivering in-app advertisements on its apps by using Google Ad Manager. Google provides a suite of ad-tech intermediation services, acting as an intermediary between advertisers and publishers, to facilitate the display of ads on websites and mobile applications. Advertisers and publishers depend on such ad-tech intermediation tools for the placement of real-time advertisements. The ad tech tools can be broadly categorized into a) publisher ad servers; b) ad buying tools; and (c) ad exchanges. Publisher ad servers are used by publishers to manage the advertising space on their websites and mobile applications. Ad buying tools are employed by advertisers to automate the management of their advertising campaigns through features such as automated bidding. Ad exchanges are platforms where publishers and advertisers engage in real-time, typically via auctions, to buy and sell display ad inventory. Publishers use ad exchanges to auction their ad inventory, while advertisers access these inventories through ad buying tools

It was *inter alia* alleged that Google has foreclosed competition by tying DoubleClick for Publishers (DFP) with Google's Ad Exchange ("**AdX**") into Google Ad Manager[1]; favoured its own properties over those of Google Network[2] members; plays a dual role of hosting the auction and participating in it as a bidder through AdX allowing it to impose unfair and discriminatory conditions on the publishers and third-party exchanges; imposed price parity through Google's Unified Pricing Rule[3]; imposed exorbitant fee of 30% on publishers for providing its services etc., in relation to its ad tech intermediation services.

Noting that the subject matter of the allegations contained in the Information are relating to various ad-tech intermediation services provided by Google, which are already under investigation, the CCI clubbed the present information to its ongoing investigation[4].

3. CCI dismisses allegations of abuse against Honda Motorcycle & Scooter India Pvt Ltd

CCI dismissed allegations of abuse against Honda Motorcycle & Scooter India Pvt Ltd ("**Honda**") levelled by one of its authorized dealers- Classic Omega Auto Private Limited ("**Classic Omega**").

1. Google Ad manager is an ad management platform introduced by Google in June 2018 which combines two of its former services (i) DoubleClick for Publishers and ii) DoubleClick Ad Exchange (AdX). Google's Doubliclick for Publishers was an ad management tool that allowed publishers to sell, schedule, deliver, and manage their ad inventory. Whereas ADX was a real time marketplace to buy and sell display advertising space.
2. Places where ads can appear, including Google sites, websites that partner with Google and other placements like mobile phone apps.
3. Enables publishers to set floor prices determining the minimum amount advertisers are willing to pay for the ad inventories.
4. *Digital News Publishers Association Vs. Alphabet Inc. and Ors.* (Case No. 41 of 2021), *The Indian Newspaper Society Vs. Alphabet Inc. and Ors* (Case No. 10 of 2022), and *News Broadcasters & Digital Association Vs Alphabet, Inc. and Ors.* (Case No. 36 of 2022).

Honda, a wholly owned subsidiary of Honda Motor Company, Japan, is stated to be engaged in the manufacture and distribution of two wheelers. Classic Omega alleged that Honda coerced it to terminate its dealership with Suzuki Motorcycle India Private Limited ("**Suzuki**") as a pre-condition for appointment as a Honda dealer; dumped unpopular models of two-wheelers on Classic Omega for sale; and unilaterally terminated the dealership in January 2024.

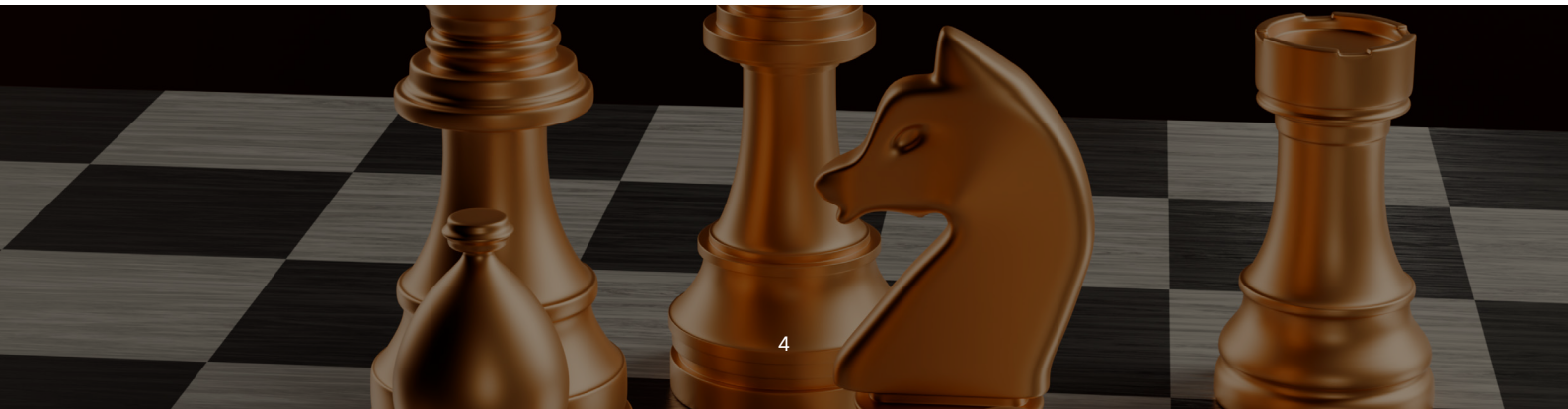
At the outset, CCI noted that there was considerable delay in filing the information as the cause of action appeared to arise in 2018 when Honda is alleged to have coerced Classic Omega to terminate its Suzuki dealership. Nevertheless, CCI analyzed the allegations levelled and found that the allegation of dumping unpopular models is related to commercial transactions between the parties which was governed by the dealership agreement which, in fact, authorized Honda to decide the products to be sold by the dealer. Further, it was found that the termination of the dealership by Honda was based on poor performance in overall sales by the dealer, which was preceded by several warning letters, improvement letters, letters of caution etc. As regards the allegation that Honda coerced the dealer to terminate its Suzuki dealership, it was observed that Classic Omega entered into the dealership agreement with Honda by exercising its choice on acceptable terms and conditions and by mutual consent of both the parties. Consequently, CCI dismissed the allegations noting it to be relating to commercial transactions arising out of the dealership agreement and not leading to any competition law violation.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL ("NCLAT")

NCLAT grants partial stay on CCI order against Meta

NCLAT has stayed the direction issued by the CCI to WhatsApp LLC ("**WhatsApp**") which prohibited it from sharing user data collected on its Over-the-Top messaging app on the smartphone (the WhatsApp application) with other Meta companies for advertising purposes ("**Stay Order**"). Meta operates a multi-sided ecosystem encompassing platforms like Facebook, Instagram, WhatsApp, and Messenger, connecting billions of users with advertisers, businesses and developers.

CCI had found WhatsApp (a wholly owned subsidiary of Meta) to be abusing its dominant position by introducing a Privacy Policy Update in 2021 ("**Policy Update**") which coerced users to accept its terms or leave the messaging app. The data sharing clause in the Policy Update was found to be (i) ambiguous, not giving any clarity on what kind and what quantity of user data will be collected by WhatsApp and; (ii) allowed WhatsApp to share this collected data with other Meta companies. Sharing of WhatsApp users' data between Meta companies, for



purposes other than providing WhatsApp Services, was found to be an entry barrier for the rivals of Meta in the display advertisement market thereby consolidating its leading position. The CCI, based on these findings, had imposed a monetary penalty of INR 213.14 crores (USD 25 million) on Meta and directed course correction by WhatsApp. *Inter alia*, WhatsApp was directed to not share any user data collected on its platform with other Meta companies or Meta company products for advertising purposes for a period of 5 years.

NCLAT observed that the ban of 5 years may lead to the collapse of business model followed by WhatsApp which provides services to its users free of cost. A pertinent observation of the NCLAT was that the Digital Personal Data Protection Act, 2023 ("**DPDP Act**") has been passed which is likely to be enforced within 6 months and may cover all issues pertaining to data protection and data sharing. Pertinently, the NCLAT observed that the directions of the CCI are twofold: (i) directions with respect to sharing of user data for advertising purposes; and (ii) directions with respect to sharing of user data for purposes other than advertising. Further, it was noted that the 5-year ban has been imposed only with respect to sharing of user data for advertising purposes. It is important to note that NCLAT has only partially stayed the order passed by the CCI and the other directions pertaining to data sharing for purposes other than advertising has not been stayed.

Both CCI and Meta have been granted leave to pray for modification of the Stay Order in the event the DPDP Act is enforced, or any other statutory provisions are enforced relating to data protection and sharing of data.

Merger Control

COMPETITION COMMISSION OF INDIA ("CCI")

Goldman Sachs' investment manager penalized for not notifying subscription to optionally convertible debentures in Biocon

CCI penalised Goldman Sachs (India) Alternative Investment Management Private Limited, the investment manager of Goldman Sachs AIF Scheme-1 (collectively "**Goldman Sachs**") INR 4 million (~USD 46,000) for failing to notify its subscription of optionally convertible debentures ("**OCDs**") in Biocon Biologics Limited ("**Biocon**"), a biopharmaceutical company. As on date of the transaction, the OCDs when converted would amount to not more than 3.81% of Biocon's total shareholding. In addition to the OCDs, Goldman Sachs also acquired a rights package which included reserved matter rights, right to access premises and personnel of Biocon and right to access certified true copies of minutes of board/committee/shareholder meetings with related records, latest capitalization table of Biocon, etc.

Goldman Sachs argued that the subscription of OCDs was done solely as an investment and in the ordinary course of business and therefore should benefit from one of the exempted categories of transactions ("**Minority Acquisition Exemption**") of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulation, 2011 ("**erstwhile Combination Regulations**"). The Minority Acquisition Exemption

exempts acquisition of less than 25% shareholding when such acquisition does not amount to control and is done either solely as an investment or in the ordinary course of business without conferment of any special rights.

The CCI rejected Goldman Sachs's argument that it could avail the Minority Acquisition Exemption. It dismissed the claim that subscription to convertible securities should receive differential treatment from acquisition of shares. The CCI was also not persuaded by Goldman Sach's argument that the rights package was available to all investors of Biocon, and should therefore, be considered ordinary shareholder rights. It was found that the true essence of the impugned transaction was not limited to a passive minority investment. The rights available to Goldman Sachs entitled it to access information that could include strategic plans, financial data, proprietary technology, business forecasts, and other confidential matters crucial to the competitive advantage and market position of the entities involved. Such access was found to be indicative of the strategic relevance of the transaction to Goldman Sachs. Additionally, the CCI also noted that while applying the Minority Acquisition Exemption test to determine whether the investment was in ordinary course of business the intended time period of investment was relevant. It was observed that ordinary course of business transactions are short-term investments where the investor enjoys ordinary shareholder rights. CCI concluded that Goldman Sachs's long-term investment with strategic rights required prior notification to and approval from the CCI.

Torrent Power Limited found gun-jumping; no penalty imposed

Torrent Power Limited ("**Torrent**"), engaged in the business of power generation, transmission and distribution, had acquired 51% of shareholding in Dadra and Nagar Haveli and Daman and Diu Power Distribution Corporation Limited ("**Target**") in March 2022. The Target, a 100% subsidiary of the Union Territory of Dadra and Nagar Haveli and Daman and Diu, was set up to undertake the business of power distribution and retail supply of electricity in the Union Territory. It was incorporated in March 2022 by consolidating the Electricity Department of Daman and Diu and DNH Power Distribution Corporation Ltd ("**DNH PDCL**") by way of the Dadra and Nagar Haveli and Daman and Diu Electricity (Reorganization and Reforms) Transfer Scheme, 2022 ("**Transfer Scheme**").

Torrent had acquired the Target pursuant to a bidding process which contemplated consolidation of the Electricity Department of Daman and Diu and DNH PDCL to form the Target, and subsequently, sale of 51% shareholding to a third party. In February 2022, the Letter of Intent ("**LOI**") was issued in favour of Torrent. The LOI was to be executed within 7 days and payment of consideration was to be made within 30 days which was duly executed by Torrent. Post execution of LOI, the Target was created on 6 March 2022 by way of the Transfer Scheme and on 15 March 2022 Torrent entered into the Shareholders Agreement and Share Purchase Agreement with the Union Territory Administration. Torrent claimed that the acquisition was part of a larger structural reform contemplated by the Government of India in the power sector to privatize the distribution of power. The transaction was not notified to the CCI.

The transaction was found to be notifiable before the CCI as the combined assets and turnover of Torrent and the Target exceeded the prescribed limits under the Competition Act, 2022 ("**Competition Act**"). However, Torrent challenged the CCI's jurisdiction arguing that Joint Electricity Regulatory Commission ("**JERC**") under the Electricity Act, 2003

("**Electricity Act**") has exclusive jurisdiction to regulate combinations in the electricity sector. CCI observed that the provisions relating to combinations under the Competition Act are far more comprehensive than those of the Electricity Act. It was noted that the Electricity Act does not contain any provision defining combinations, providing for procedure to assess combinations, stating factors for ascertaining adverse effect on competition etc. and therefore the Competition Act is a special statute and complete code for assessing a combination. It was held that the Competition Act empowers the Commission with necessary powers and jurisdiction to deal with the regulation of combinations for their overall effects on competition including in the electricity sector; except tariff related issues for which provisions are specifically contained in the Electricity Act.

CCI observed that Torrent should have filed the notice of acquisition immediately after the issue of LOI and before payment of consideration and has failed to notify the transaction before consummation. However, having regard to the structural issues inherent to the bidding process, obligation to comply with the strict bid timelines, ambiguity due to overlapping provisions in the two special acts, i.e., Competition Act and Electricity Act, the transaction not resulting in Appreciable Adverse Effect on Competition ("**AAEC**") and Torrent's cooperation in the proceedings, CCI decided not to impose any penalty.

SUPREME COURT

Resolution plans involving combinations need prior approval of CCI before being considered by the Committee of Creditors

The Supreme Court, by a 2:1 majority in a split verdict, has held that CCI's approval for a resolution plan containing a combination must be obtained prior to the examination and approval of the same by the Committee of Creditors ("**CoC**")[5] in a Corporate Insolvency Resolution Process ("**CIRP**")[6] initiated under the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). The Supreme Court was adjudicating an appeal against a combination under which AGI Greenpac Ltd ("**AGI/Acquirer**"), the successful resolution applicant, had acquired the corporate debtor- Hindustan National Glass and Industries Ltd ("**HNGIL/Target**"). The acquisition led to the combination of two of the largest companies in the glass packaging industry with a potential market share of 80-85% and 45-50% within the subsegments of Food and Beverage ("**F&B**") and alco-beverage respectively. The appeal was filed by Independent Sugar Corporation Ltd ("**INSCO**"), which had also submitted their resolution plan for HNGIL, on the primary ground that AGI's resolution plan was approved by the CoC without procuring CCI's approval to the proposed combination. AGI had filed a complete notice of the acquisition before the CCI after obtaining the CoC's approval and the CCI, after accepting voluntary modifications including divestment of one of HNGIL's plant, approved the combination.

The Supreme Court, by adopting a literal interpretation to the proviso to Section 31(4) of IBC, held that the proviso was inserted by way of an amendment in 2018 to specifically address resolution plans with provisions for combinations and the use of the word 'prior' in the proviso requires that necessary CCI approval must be obtained before such plan is granted CoC's

5. CoC is a committee consisting of financial creditors of the corporate debtor.
6. CIRP is a process under IBC where market participants (as resolution applicants) can propose solutions for the revival of the corporate debtor.

approval. It was noted that IBC provided a different threshold for CCI's approval as compared to approvals to be received from other statutory bodies. In case of other statutory bodies, a timeline of 1 year subsequent to CoC's approval of the resolution plan has been contemplated, however, the introduction of the proviso made it clear that the intent of the legislature was to create an exception. The Supreme Court further noted that a resolution plan containing a provision for combination that leads to AAEC and placed before the CoC is incapable of being implemented and approval of CoC to such a resolution plan can have no legal implications. In other words, if prior approval of CCI is not obtained, it may lead to a situation where the CoC approves a resolution plan which may cause AAEC and is subsequently rejected by the CCI thereby rendering the entire exercise futile. Having regard to CCI's power to direct modifications to a combination proposal, it was observed that if CoC's approval is sought prior to seeking approval of CCI, it may give rise to a situation where any such modifications directed by the CCI would be kept out of the examination by the CoC which will have to exercise its commercial wisdom without complete information. Consequently, AGI's resolution plan was found to be unsustainable as it failed to secure prior approval from the CCI.

Additionally, the Supreme Court also highlighted a procedural lapse on the part of the CCI in not issuing the Show Cause Notice ("**SCN**") to the Target on being *prima facie* convinced that the combination is likely to cause AAEC under Section 29(1) of the Competition Act. CCI had only issued the SCN to the Acquirer. The Supreme Court noted that modifications proposed by the Acquirer and accepted by CCI sought divestment of one of the plants of the Target, and therefore, active participation and explicit approval of the Target were indispensable pre-requisites. Further, the term 'parties' in Section 29(1) of the Competition Act signified a clear legislative intent to address not just one entity but multiple parties directly involved in the combination process. The Court held that lack of participation by the Target in the voluntary modification process vitiated the approval granted by the CCI.

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