



COMPETITION LAW NEWSLETTER

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In this edition of the L&L Competition Law Newsletter, we cover two significant decisions of the Delhi High Court, one enforcement order and two combination notifications by the Competition Commission of India (**CCI**) in the past month.

Delhi HC rules against review/recall power of the CCI

The Delhi High Court was faced with an unusual set of facts relating to the implementation of certain remedies imposed by the CCI as part of its [approval issued in April 2019](#) of L&T's acquisition of Schneider's Electrical and Automation (**E&A**) business.

The transaction was approved pursuant to acceptance of certain modifications suggested by the CCI in order to mitigate the appreciable adverse effect on competition caused due to the consolidation of two major players in the E&A industry, which included Schneider putting in place white labelling arrangements (where five L&T products manufactured by the combined entity are passed on to another manufacturer /distributor without a brand or logo affixed for sale by them) for a period of five years, followed by the grant of a non-exclusive technology transfer licence to a third party for a period of five years from the expiry of the white labelling period. The intent behind the white labelling arrangement was to facilitate availability of products of the same quality from different sources.

The petitioner, Eaton Power, also engaged in the low-voltage switchgear business, had submitted its Expression of Interest (**EOI**) for availing of white labelling services by Schneider. However, Eaton was disqualified as it had not submitted the requisite documents within the stipulated time.

Eaton approached the CCI seeking its inclusion in Schneider's white labelling arrangements. Without hearing Schneider

on this application, the CCI passed an order permitting Eaton's inclusion. Schneider sought a recall of the aforementioned order stating that: (i) it was not granted an opportunity of hearing; and (ii) it was at an advanced stage in its negotiations with other eligible participants in and allowing Eaton to participate would further delay implementation of the white labelling arrangement.

The CCI reconsidered the issue at this stage and recalled its earlier order permitting Eaton to participate (**Impugned Order**). Eaton then challenged this Order before the Delhi High Court primarily contending that the CCI did not have the statutory power of review/recall in light of the repeal of Section 37 of the Act. Further, Eaton argued that it ought to have been given an opportunity of hearing before the Impugned Order was passed.

Vide [judgment dated 10.09.2021](#), a Single Judge Bench of the Delhi High Court ruled against the CCI's power to review and recall an earlier order passed by it. Placing reliance on the [Mahindra](#) judgment, the Bench observed that the inclusion of Eaton in the white labelling process was an exercise of the CCI's adjudicatory/quasi-judicial powers, and Schneider should have been afforded an opportunity to make submissions before any such order was passed. It was this lapse in judgment by the CCI which led to the review/recall application being filed and the Impugned Order being passed. However, noting that the CCI's power of review has expressly been taken away by the Legislature by way of an amendment in 2007, the Bench concluded that both the order allowing Eaton's inclusion and the Impugned Order were bad in law.

Faced with these peculiar facts, the Court attempted to fashion a suitable relief that would balance the rights of all the parties. Prioritising the implementation of the white labelling arrangement while granting relief, the Bench directed Schneider to conclude negotiations with eligible parties on or before 30.09.2021 and execute agreements in terms of the approval order, and commence

a second round of issuance of EOIs where Eaton would be free to participate. In the event that negotiations could not be concluded before the stipulated date, Eaton would be allowed to participate in the first round of the said negotiations to be concluded latest by 31.12.2021.

CCI finds three leading beer manufacturers guilty of cartelisation

The CCI *vide* [order dated 24.09.2021](#), found United Breweries Limited (UBL), SABMiller India Ltd. (now Anheuser Busch InBev India Ltd.) and Carlsberg India Private Limited (Carlsberg) to have cartelised in the sale and supply of beer in various States and Union Territories (UTs) in India, including through the platform of the All India Brewers' Association (AIBA) (collectively OPs), thereby contravening Section 3(3)(a), 3(3)(b) and 3(3)(c) read with 3(1) of the Act.

A *suo moto* investigation was initiated *vide* order dated 31.10.2017, pursuant to receipt of a lesser penalty application by Crown Beers India Pvt. Ltd. and SABMiller India Ltd. (collectively held by Anheuser Busch InBev SA/NV / Ab InBev) disclosing coordinated activities with UBL and Carlsberg under the aegis of AIBA to align prices of beer and implement price adjustments across the country. During the course of the investigation, the DG carried out search and seizure operations on the premises of the OPs, following which leniency applications were filed by UBL and Carlsberg as well.

In its investigation report, the DG noted that in India, control over production, distribution, transportation and taxation on alcohol falls under the purview of the States/UTs. The DG observed that different States/UTs follow one of the following major route-to-market models for the distribution and sale of beer:

(i) **Corporation Model:** Operating as a monopoly, the State Government runs

the business of pricing, distribution and retail of alcohol (including beer) through a separate public sector company/corporation.

- (ii) **Auction Market Model:** The State Government auctions the right to sell liquor (including beer) in a particular geographical territory to an individual/company on an annual basis.
- (iii) **Open/Free Market Model:** Beer manufacturers are free to engage private distributors, who then sell to private retailers. However, the manufacturers are required to declare Maximum Retail Price (MRP) and get the same approved by the relevant Government department.
- (iv) **Hybrid Model:** Operation of both Corporation and Open Market models at the same time.

As per the DG, given the regulated nature of beer industry, any change in the price of beer has to be approved by the State Government. Further, in certain states, the wholesaler and retailer profit margins are also fixed by Government Authorities.

While analysing anti-competitive conduct during the period of the cartel (identified as 2007 – October 2018), the DG noted that beer manufacturers were in regular contact with one another while submitting their bids to corporations. Further, they often co-ordinated amongst themselves to fix prices of the beer sold, discussed pricing strategies to get favourable price revisions from the State Governments. Moreover, the top management of these companies were found to have shared periodical sales and sales data with each other as a monitoring mechanism to check that each has adhered to the 'understanding/agreement'. The DG also recorded that they collectively decided upon the strategy to oppose unfavourable policies, by way of ceasing production and supply in states where State Governments hiked the excise duty payable or reduced the Ex-Brewery Price / MRP of beer. AIBA's involvement in the cartel was found by the DG to be through proposal of quantum of price hikes as well as facilitation of

discussions with excise authorities as well as amongst the senior management of the OPs in relation to pricing.

Agreeing with the findings of the DG, the CCI noted that anti-competitive conduct by the OPs had been established in the form of: (i) price coordination in the States of Andhra Pradesh, Delhi, Karnataka, Maharashtra, Odisha, Puducherry, Rajasthan, West Bengal; (ii) restriction in supply of beer in Maharashtra, Odisha and West Bengal, and; (iii) market sharing in Maharashtra and in the city of Bengaluru. Certain evidences pointing towards similar conduct in respect of supply in Bihar, Madhya Pradesh and Telangana were also found.

The CCI also observed that UBL and Carlsberg had also indulged in a cartel with respect to the purchase of second-hand beer bottles from 2009 – 2012, thereby limiting and controlling the supply of second-hand bottles in the market in contravention of Section 3(3)(b) read with 3(1) of the Act.

As regards the role of AIBA in the cartel, the CCI relied on several e-mail communications submitted by UBL and deposition statements of various officials of the OPs to conclude that AIBA and the other OPs were aware that joint representations made by them to Government authorities and discussions amongst themselves in relation to restraint of trade, increase in prices, etc. were in violation of the Act. Four officials each of UBL and Ab InBev, six Carlsberg officials and the Director General of AIBA were found liable for the anti-competitive conduct of their respective companies/association in terms of Section 48 of the Act.

Pursuant to directions made to cease and desist from such conduct in the future, Ab InBev and its officials received the benefit of 100% reduction in penalty, by virtue of being the first lesser penalty applicant. UBL and Carlsberg (and their officials) received a reduction of 40% and 20% respectively, resulting in a penalty of approximately INR 750 crores and INR 120 crores respectively payable by the two companies, whereas a

penalty of approximately INR 6.25 lakhs was imposed on AIBA. It remains to be seen if the OPs will appeal the CCI's order including the quantum of penalty imposed, for which a 60-day timeframe from the date of communication of the order has been envisaged under the Act.

Consequently, a rectification order under Section 38 of the Act was passed by the CCI recalculating an error in calculation of penalty imposed on Carlsberg, which has now been reduced to INR 111 crores.

CCI initiates investigation into anti-competitive agreement between three players in the film production and distribution business

Vide [order dated 17.09.2021](#), the CCI directed an investigation into digital cinema equipment supplier UFO Moviez India Ltd., its wholly owned subsidiary engaged in post-production processing of cinematograph films, Scrabble Digital Ltd., and Qube Cinema Technologies Pvt. Ltd., also engaged in supply of digital cinema equipment, for alleged violation of Section 3(4) read with 3(1) of the Act.

The complainant was a company engaged in post-production processing of films and alleged that UFO Moviez was leveraging its dominant position in the market for supply of digital cinema equipment to cinema theatre owners (CTOs) in order to promote its subsidiary Scrabble by disabling all equipment leased by them from being able to accept/play any content which was post-production processed by companies other than Scrabble. Similar allegations were levelled against Qube for restraints imposed in its agreements with CTOs.

While assessing the allegations made in respect of the Section 4 violation, the CCI delineated the relevant market as that for

“provision of services of supply of digital cinema equipment by a digital cinema service provider on lease/rent to CTOs in India” and the “market for provision of post-production processing services in India”, noting that even though there was a mismatch between the market share data provided by the informant and the opposite parties in respect of the first relevant market, both UFO Moviez and Qube appeared to be significant players therein and it was not apposite to assume that UFO Moviez held a dominant position therein. In light of the same, the CCI held that assessment of dominance of Scrabble in the second relevant market was not relevant.

Notwithstanding UFO Moviez’ contention that production processing services and provision of digital content equipment to CTOs by way of lease/rent formed part of a composite service offered by them in order to recover huge investments made, the CCI noted that the clauses in their equipment lease agreements were *prima facie* in contravention of Section 3(4) of the Act. The agreement resulted in the exclusive supply between UFO Moviez and the CTOs and refusal to deal with other providers of post-production processing services, and could potentially have the effect of stifling innovation in the post-production processing market and making exhibitors/producers captive consumers of Scrabble even when others offered similar services at more competitive rates.

Lastly, observing that Qube’s agreements with CTOs permitted procurement of post-production processing services from other providers only if they were unable to provide the same, and an additional charge was levied on availing services from such third party providers, the CCI also directed the DG to examine Qube’s conduct in light of a possible infringement of Section 3(4) read with 3(1) of the Act.

¹ Other examples of similar transactions notified to the CCI are [Carlyle / Delhivery](#), [CDPQ / Piramal](#)

CCI clears Lighthouse Fund’s acquisition of additional shareholding in Bikaji Foods

The CCI *vide* [order dated 09.08.2021](#) approved the acquisition of 2.7% shareholding by Lighthouse Funds in Bikaji Foods International Limited (**Bikaji Foods**).

Prior to the instant acquisition, Lighthouse Funds held 7.472% shareholding in Bikaji Foods, in addition to certain affirmative rights and the right to nominate one director to the board of directors. By way of the current transaction the shareholding increased to 9.995% on a fully diluted basis.

It was noted that certain horizontal overlaps existed in the Quick Service Restaurant segment with Lighthouse present in the segment through Wow Momos and Bikaji Food present through Bikaji Food Junxon. However, the limited presence of Bikaji Foods and differences in the nature of outlets was noted. Accordingly, the CCI concluded that the acquisition was unlikely to cause an appreciable adverse effect on competition in any of the plausible relevant markets in the segment.

As discussed previously in our [May 2021](#) newsletter, this is yet another example of a transaction which ought to be exempt from scrutiny by the CCI, in light of the marginal increase in minority shareholding of an existing investor¹ with no change in the nature of control held.

CCI clears Zomato’s acquisition of shareholding in Grofers

The CCI *vide* [order dated 09.08.2021](#) approved Zomato’s acquisition of

[Enterprises](#), [ChrysCapital / Hero Fincorp](#) and [CDPQ Private Equity Asia / API Holdings](#).

approximately 9.3% shareholding Grofers India Private Limited, one of India's largest online grocery delivery services.

Although the exact market delineation was left open after the CCI's preliminary view that the acquisition was unlikely to cause an appreciable adverse effect on competition, it examined four relevant markets for its assessment:

- (i) The market for supply of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India; (**Broad Relevant Market**)
- (ii) Narrower segment of B2B supply of aforementioned products; (**Narrower Relevant Segment**)
- (iii) Further narrower categories, *i.e.*, market supply of groceries, fruits and vegetables in India; (**Narrowest Relevant Segment**) and
- (iv) Market for sale of services provided by online platforms for the sale of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India. (**Online Marketplace Market**)

With respect to the Online Marketplace Market, the CCI observed that the combined market share of the parties is in the range of 10-15%, however, the incremental market share is less than 1%. Further, market participants such as BigBazaar, BigBasket, Amazon and Flipkart will continue to pose competitive constraints on the parties to the acquisition.

With respect to the Broad Relevant Market, Narrower Relevant Segment and Narrowest Relevant segment, the combined market shares of the parties are less than 1%. Further, in the Narrower Relevant Segment, market players such as Walmart, Indiamart and Metro will continue to pose competitive constraints on the parties to the acquisition.

Since no appreciable adverse effect on competition could be observed in the present case, the CCI cleared the shareholding and acquisition of affirmative voting rights and board rights.

Delhi HC faced with 'leaked' DG Report in Google's case

In an unusual turn of events stemming from media coverage regarding the conclusion of the investigation against Google in the [Android Case](#) (Case No. 39 of 2018), allegations regarding leaking of commercially sensitive and confidential information were seen to be made. It is relevant to note that the investigation process, material submitted therein and the investigation report are confidential in nature in light of Section 57 of the Act.

Google filed a Writ Petition before the Delhi High Court requesting that directions be issued to maintain confidentiality of the commercially sensitive data submitted by it during the investigation. Further, a challenge was raised to an order of the CCI dated 08.09.2021 which had decided against Google's representation submitted against the DG's order in respect of the confidentiality request over its commercially sensitive data.

The whole affair put the Commission in quite a pickle, and although the CCI strongly affirmed that no leaks of any sort had taken place, it also stated that it would internally investigate the matter and accept Google's request for maintaining confidentiality in respect of all its claims. Accordingly, the Delhi High Court held that nothing further survived for adjudication in the petition filed by Google.

This newsletter is only for general informational purposes, and nothing in this 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 the Competition Law Team at competitionlaw@luthra.com or any of the contacts listed below. © L&L Partners 2021. All rights reserved.

Contacts



Gurdev Raj Bhatia

Partner - Head Competition
Law

gbhatia@luthra.com

+91 98181 96048



Abdullah Hussain

Partner

ahussain@luthra.com

+91 96660 12499



Kanika Chaudhary Nayar

Partner

kchaudhary@luthra.com

+91 98105 18558



Rudresh Singh

Partner

rudreshs@luthra.com

+91 85271 87344



Kunal Mehra

Partner

kmehra@luthra.com

+91 96500 40741