



Indian Competition Law Roundup: August 2023

In this Roundup, we highlight some important developments in Indian competition law and policy in August 2023. In summary:

- The Competition Commission of India (CCI) published draft regulations on the new commitments and settlements proceedings, inviting comments by 13 September 2023. Additionally, in early September, the CCI published draft combination regulations, inviting comments by 25 September 2023.
- The National Company Law Appellate Tribunal (NCLAT) upheld a finding by the CCI that a non-notifiable merger could not be challenged under Sections 3 or 4 of the Competition Act, 2002 (*Competition Act*).
- The CCI found that Tata Motors had not abused its dominant position in the commercial vehicles market in relation to its dealers.
- The CCI rejected allegations that a drug company had abused its dominant position by engaging in frivolous and vexatious litigation.
- The Madras High Court dismissed civil suits brought by several app developers against Google challenging its payments policy, holding, amongst other matters, that the jurisdiction of civil courts was ousted under Section 61 of the Competition Act.
- The Madras High Court also dismissed writ petitions by cement companies challenging a CCI order allowing a

builders' association as a party in cement cartel proceedings. Applying the doctrines of comity of courts and *forum conveniens*, it considered that the matter should be decided by the Delhi High Court.

- The CCI cleared a pharmaceutical merger subject to a voluntary undertaking that the target would not re-enter the Indian formulations market for 36 months from the date of closing.
- The CCI imposed penalties under Section 43A of the Competition Act on a number of parties who had failed to notify transactions in the mistaken belief that the Target Exemption applied or that they were covered by other exemptions.
- The CCI also imposed penalties under Sections 43A and 44 of the Competition Act on an acquirer who sought to avail of the Green Channel route even though the parties, through portfolio companies, overlapped in the marketing and distribution of formulated crop protection products.

Competition (Amendment) Act

CCI Publishes Draft Commitment and Settlement Regulations for Public Comment

The Competition (Amendment) Act, 2023 (*Amendment Act*) has amended the Competition Act to allow parties to apply to the CCI to make commitments in, or settle, cases of vertical restraints and abuse of

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dominance. These provisions have yet to enter into force. On 23 August 2023, the CCI published draft regulations for commitments and settlements proceedings inviting public comments, through the CCI's website, by 13 September 2023. These draft regulations are the first step towards the implementation and operation of the new regime.¹

CCI Publishes Draft (Revised) Combination Regulations for Public Comment

On 5 September 2023, the CCI published the draft Competition Commission of India (Combinations) Regulations, 2023 (*Draft Combination Regulations*) inviting public comments, through the CCI's website, by 25 September 2023. In addition to implementing new provisions in the Amendment Act that substantially revised the existing merger control regime, the Draft Combination Regulations propose to amend and update various aspects of the existing Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (*Combination Regulations*). Once they come into force, these Draft Combination Regulations will replace the existing Combination Regulations.²

Horizontal Agreements

NCLAT Confirms that Merger not Caught by Sections 3 and 4 of the Competition Act

The NCLAT upheld a CCI order dismissing arguments by consumer body *CUTS* that a merger between film exhibitors *PVR Limited* and *INOX Leisure Limited* which was not notifiable under the merger control provisions of the Competition Act was prohibited under Sections 3(1) and 4 of the Act.³ The NCLAT affirmed that Section 3 could not address the case of a merger under which two entities became one and lost their separate identities. It also agreed with the CCI that Section 4 could not apply in the absence of allegations of abuse.

Abuse of Dominant Position

No Abuse by Tata Motors in Dealer Arrangements

The CCI, after investigation, closed a case against *Tata Motors (Tata)* finding that Tata had not abused its dominant position under Section 4 of the Competition Act.⁴ The Informants had alleged that Tata had coerced dealers in its commercial vehicles to order vehicles "according to its whims and fancies" and that Tata's dealership agreement provided that the dealer could not engage in any new business even if it was not related to the automobile industry. The CCI found that Tata was dominant in the relevant market for the manufacture and sale of commercial vehicles in India from FY 2017 to FY 2022. It noted that Tata's market share ranged from 42% to 45% during this period and that Tata had itself claimed that it was the market leader. However, the CCI found that Tata had not abused its dominant position. There was no evidence that it had coerced its dealers. In relation to engaging in a new business, the CCI found there was no blanket restriction on dealers; though a no objection certificate from Tata was required, there was no evidence to show that the certificate had been withheld and several dealers had made it clear that Tata had never stopped them from carrying out other businesses.

The CCI also rejected arguments that the dealership agreement was in breach of Section 3(4) of the Competition Act as dealers were prevented from selling vehicles outside the territory allocated to them. The CCI found that Tata had only prohibited active sales outside the territory and that there was no restriction on passive sales. In relation to active sales, there was no evidence that Tata had imposed penalties, though it had condemned dealers for active selling. There had also been no assessment of the factors set out in Section 19(3) of the Competition Act to determine whether the restriction was likely to result in an appreciable adverse effect on competition (AAEC).

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¹ See our more detailed briefing of 23 August (<https://www.amsshardul.com/insight/competition-act-draft-regulations-on-commitments-and-settlements-published-for-comments/>).

² See our more detailed briefing of 5 September (<https://www.amsshardul.com/insight/draft-competition-commission-of-india-combinations-regulations-2023-published-for-comments/>).

³ *Consumer Unity & Trust Society (CUTS) v. CCI and Others*, NCLAT, Competition Appeal (AT) No. 61 of 2022 (10 August 2023) upholding the CCI's decision in *Consumer Unity & Trust Society v. PVR Limited and Another*, CCI, Case No. 29 of 2022 (13 September 2022).

⁴ *Neha Gupta v. Tata Motors and Another*, CCI, Case No. 21 of 2019, etc. (23 August 2023).



Competition Matters

CCI Rejects Complaint of Frivolous and Vexatious Litigation by Drug Company

In a *prima facie* order,⁵ the CCI rejected a complaint by *Macleods Pharmaceuticals Limited* that *Boehringer Ingelheim Pharma GmbH (Boehringer)* had abused its dominant position in respect of *Linagliptin*, a drug used for the treatment of diabetes, by engaging in frivolous and vexatious litigation against it for using *Linagliptin* in its drugs. The CCI confirmed its position that such litigation might be termed as frivolous and vexatious from a competition perspective where it was initiated by a dominant undertaking to cause competitive harm. Two conditions had to be satisfied. First, it needed to be established that the litigation was on an objective view baseless and appeared to be an instrument to harass the enterprise. Second, it needed to be examined whether the litigation appeared to be conceived with an anti-competitive plan to eliminate competition in the market. The CCI stressed that it could not look into the validity of a patent. It was required to consider objectively whether the litigation was on its face baseless, such that no reasonable litigant could reasonably expect success on the merits and that it was filed with the intent of preventing competition. Considering the various legal proceedings initiated by *Boehringer*, the CCI was of the *prima facie* view that they could not be said to be fraught with any lack of good faith and therefore closed the matter.

Competition Proceedings before High Courts

Madras High Court Holds that Civil Court's Jurisdiction was Ousted by Competition Act

The Madras High Court dismissed civil suits brought by several app developers against Google challenging its payments policy.⁶ Amongst other findings, the Madras High Court held that the jurisdiction of civil courts was ousted under Section 61 of the Competition Act. The issues raised pertained to Google's abuse of dominance and non-compliance with the CCI's order in the *Google*

Payments case.⁷ This fell within the scope of the Competition Act, with the special law in the Competition Act prevailing over the general law.

Madras High Court Declines to Exercise Jurisdiction on Account of Existing Proceedings before Delhi High Court

The Madras High Court dismissed writ petitions by two cement companies challenging a CCI order allowing a builders' association as a party in cartel proceedings against cement manufacturers.⁸ The Madras High Court noted that a cement manufacturer operating within the territorial jurisdiction of the Delhi High Court had challenged the CCI order before the Delhi High Court which had heard the matter and reserved judgment. Applying the doctrine of comity of courts, the Madras High Court held that, where one High Court had examined the case on merits, another High Court should decline to do the same in order to avoid the possibility of conflicting judgments. It also held that the cause of action had not arisen within its territorial jurisdiction and that, applying the principle of *forum conveniens*, the more convenient and natural forum for the parties was the Delhi High Court.

Merger Control

Pharmaceutical Merger Cleared Subject to Voluntary Modification

The CCI cleared the acquisition by *Ipsa Laboratories Limited* of *Unichem Laboratories (Unichem)* subject to compliance with a voluntary undertaking submitted by the parties.⁹ Both parties were pharmaceutical companies involved in the manufacture and sale of active pharmaceutical ingredients (API) in India. Existing horizontal overlaps in relevant API markets posed no competition concerns in light of the low incremental market shares and the presence of other players. Certain vertical relationships also posed no concerns as market shares in the relevant upstream and downstream markets were low and other players were present.

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5 *Macleods Pharmaceuticals Limited v. Boehringer Ingelheim Pharma GmbH & Co KG D*, CCI, Case No. 25 of 2022 (22 August 2023).

6 *Google India Private Limited and Another v. Matrimony.com Ltd and Others*, Madras High Court. A. No. 3098 of 2023, etc. (3 August 2023). Several app developers have preferred an appeal against this decision which is pending before a Division Bench of the Madras High Court.

7 *XYZ (Confidential) v. Alphabet Inc. and Others*, CCI, Case No. 07 of 2020, etc. (25 October 2022).

8 *Dalmia Cement (Bharat) Limited v. CCI and Others*, Madras High Court, W.P. Nos. 22263 & 22045 of 2023 (14 August 2023).

9 *Ipsa Laboratories Limited*, CCI, Combination Registration No. C-2023/05/1028 (26 July 2023).



Competition Matters

Possible concerns about potential overlaps in the manufacture of formulations in India were addressed by a voluntary undertaking by the parties that Unichem would not re-enter the Indian formulations market for at 36 months from the date of closing of the proposed combination.

Section 43A and 44 Orders

Several Section 43A orders, one of them together with a Section 44 order, were issued in August 2023.

In three cases, parties to transactions had mistakenly believed that the Target Exemption applied. The CCI held that *Massachusetts Mutual Life Insurance Company (MassMutual)* in its acquisition of *Invesco Limited* had failed to account for turnover generated by Invesco Mutual Fund in India, which would have brought the turnover above the *de minimis* threshold.¹⁰ The CCI made it clear that any income generated from the securities held by a mutual fund company was considered as turnover, irrespective of whether or not the holding of these securities conferred control on the mutual fund company. The CCI imposed a penalty of INR 5 lakhs (approx. USD 6,000).

In proceedings against *Cummins Inc.*, it was argued that the failure to notify resulted from a *bona fide* error by the target, *Meritor Inc.*, in computing its Indian turnover.¹¹ The CCI made it clear that Section 43A applied irrespective of whether the breach was inadvertent or intentional. Considering the case as a whole and the mitigating factors submitted by Cummins, the CCI imposed a penalty of INR 10 Lakhs (approx. USD 12,000).

The CCI also found that that *Axis Bank Limited (Axis Bank)* had wrongly availed of the Target Exemption in deciding not to notify its acquisition of a 9.91% stake in *CSC e-Governance Services India Limited (CSC)*.¹² The CCI stressed that Axis Bank was not absolved from the duty to notify merely on the ground of an error. It also held that Axis

bank could not benefit from the exemption for minority investments under Item 1 of Schedule I to the Combination Regulations, which covers investments of less than 25% where made “solely as an investment” or “in the ordinary course of business” and do not lead to acquisition of control. The acquisition could not be regarded as “solely as an investment” since Axis Bank was represented on the board of directors of CSC and participated in its affairs. It could also not be regarded as “in the ordinary course of business” because, in view of the CCI’s interpretation of the term, the transaction was not undertaken to solely benefit from the short-term price movement of securities. This was not the case here as the investment was a longer-term one and was intended to help Axis Bank gain knowledge and expertise in the financial inclusion sector. In light of the facts, the circumstances of the case as a whole and the mitigating factors submitted by Axis Bank the CCI imposed a penalty of INR 40 Lakhs (approx. USD 48,200).

In proceedings against *Bharti Airtel Limited (Bharti)* and Warburg Pincus affiliate *Lion Meadow Investment Limited (Lion Meadow)*,¹³ the CCI held that Bharti’s acquisition of Lion Meadow’s 20% shareholding in Bharti Telemedia Limited (*BTL*) and Lion Meadows’ subsequent acquisition of a 0.664% shareholding in Bharti should have been notified to the CCI. The parties asserted that Item 2 of Schedule I to the Combination Regulations – which exempts acquisitions of shares or voting rights where the acquirer already has 50% of more of the shares/ voting rights in the target, *except where the transaction results in a transfer from joint control to sole control* – applied. They argued that Lion Meadow did not have control of BTL before the transaction. The CCI held that the relevant test for control was “material influence” and that control was “the possibility of exercising material influence rather than its actual exercise”. Furthermore, a “constraining presence” on the decision-making process or affairs or management of

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¹⁰ Proceedings under Section 43A of the Competition Act, 2002 against *Massachusetts Mutual Life Insurance Company*, CCI, Ref. No. M&A – 2021/01/810 (7 August 2023).

¹¹ Proceedings against *Cummins Inc.* under Section 43A of the Competition Act, 2002, CCI (11 August 2023).

¹² Proceedings against *Axis Bank* under Section 43A of the Competition Act, 2002, CCI (9 August 2023).

¹³ Proceedings against *Bharti Airtel Limited* and *Lion Meadow Investment Limited* under Section 43A of the Competition Act, 2002, CCI, Ref. No. M&A/03/2021/03/CD (23 August 2023).



an enterprise sufficed for control. Considering the package of rights enjoyed by Lion Meadow in relation to BTL before the transaction – including board representation, veto rights, quorum requirements and consultation rights – it had the ability to exercise material influence over the management or affairs or strategic commercial decisions of BTL. In light of the move from joint control to sole control by Bharti, the exemption did not apply. The CCI added that the second transaction was interconnected with the first, as it involved part payment for the first, so one composite notice ought to have been filed.

Given the facts and circumstances of the case, the conduct of the parties during the proceedings and the past violations of the Competition Act by Bharti, the CCI imposed a penalty of INR 1 Crore (approx. USD 120,450) on Bharti and directed the parties to notify the transaction.

The CCI held that *Platinum Jasmine A 2018 Trust (Platinum)* had wrongly availed of the Green Channel route, which provides for the deemed approval on notification for transactions where the parties have no horizontal overlap and no vertical or

complementary relationships.¹⁴ It found that the parties, through portfolio companies, overlapped in the manufacturing and distribution of formulated crop protection products, that the transaction was not eligible for the Green Channel and that the parties had made false statements in the notice. The notice and deemed approval were found to be void *ab initio*. Platinum was liable for penalty under Section 43A of the Competition Act for consummating the transaction without CCI approval and under Section 44 for making statements which were false in material particulars. The CCI imposed a small penalty of INR 5 lakhs (approx. USD 6,000) under Section 43A and INR 50 lakhs (approx. USD 60,000) under Section 44 (the minimum amount under that Section). Stating that the Green Channel was based on trust and the utmost good faith of notifying parties, it made it clear that future cases would be dealt with seriously.

Rather than requiring a fresh notification, the CCI considered Platinum's submissions and, finding that the transaction was not likely to have an AAEC in India, approved the transaction.

¹⁴ Proceedings against *Platinum Jasmine A 2018 Trust* under Sections 43A and 44 of the Competition Act, CCI, Combination Registration No. C-2022/12/995 (18 August 2023).

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