Competition Matters

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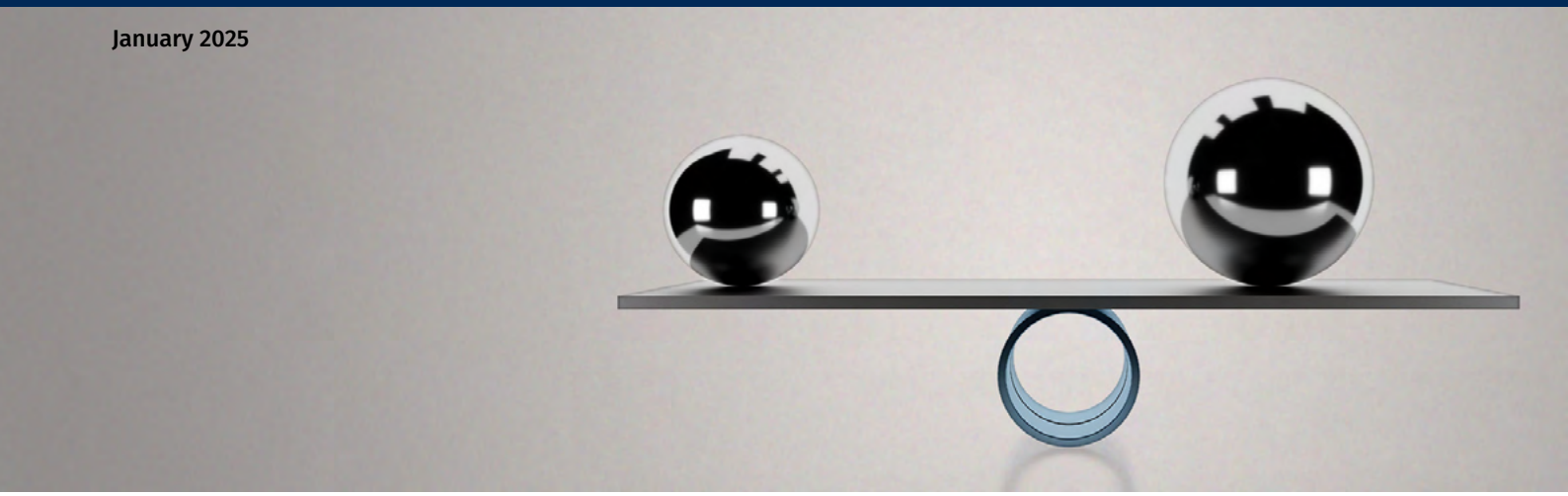

Indian Competition Law Roundup: January 2025

In this Roundup, we highlight some important developments in Indian competition law and policy in January 2025. In summary:

- The National Company Law Appellate Tribunal (*NCLAT*) granted *WhatsApp* and *Meta* a partial stay on an order of the Competition Commission of India (*CCI*) directing remedies, including a prohibition on the sharing of data for advertising purposes, and requiring deposit of 100% of the penalty amount.
- The Supreme Court of India quashed a decision of the committee of creditors in a corporate insolvency resolution process to approve the acquisition of a company on the grounds that CCI approval of the transaction had not been obtained before the decision. The Supreme Court also found that the CCI had committed several procedural errors in reviewing the transaction.
- The CCI cleared the first transaction under the new open offers/on-market purchases provisions.
- The CCI held that it had jurisdiction to review mergers in the electricity sector but decided not to impose any penalty for failure to notify and consummating an acquisition before approval.
- The CCI cleared an acquisition in the data colocation services space. Potential concerns in relation to horizontal overlaps in certain metros were addressed by detailed commitments on confidentiality.

Abuse of Dominant Position

NCLAT grants a Partial Stay in Favour of WhatsApp and Meta

On 23 January, the NCLAT granted a partial stay in favour of *WhatsApp* and *Meta* against the November 2024 order of the CCI,[1] with respect to a remedy requiring WhatsApp not to share any user data with Meta for advertising purposes for five years and requiring deposit of the full penalty amount.[2]

The CCI Order found that WhatsApp 'imposed' its 2021 Terms of Service and Privacy Policy on users. Further, sharing of user data by WhatsApp with Meta gave Meta a competitive edge over its rivals in the online display advertising market, resulting in denial of market access and leveraging of WhatsApp's dominant position in the OTT messaging apps market to protect its position in the online display advertising market. Accordingly, the CCI held that there had been an abuse of a dominant position under Section 4 of the Competition Act, 2002.

The CCI directed WhatsApp and Meta to comply with certain remedies within three months. These included: (a) a complete prohibition on WhatsApp from sharing user data with Meta for advertising purposes for five years; and (b) limitations on sharing of user data for non-advertising purposes. The CCI also directed that any future updates to WhatsApp's privacy policy should comply with these directions.

The NCLAT noted that the sharing of user data for advertising purposes had been in operation since 2016, when WhatsApp's 2016 privacy policy was rolled out. The NCLAT observed that a five-year ban might lead to collapse of WhatsApp's business model. The NCLAT also emphasised that the WhatsApp service was provided free of cost to users. The NCLAT also observed that the Supreme Court had refused to grant a stay on the 2021 Update by way of an order dated 1 February 2023, and noted that the Digital Personal Data Protection Act, 2023 might also come into force soon, which might cover issues pertaining

1 *In Re: Updated Terms of Service and Privacy Policy for WhatsApp users*, CCI, *Suo Motu* Case No. 01 of 2021 (18 November 2024).

2 *WhatsApp LLC v. Competition Commission of India and Others*, NCLAT, I.A. No. 280 of 2025 in Competition App. (AT) No. 1 of 2025, etc. (23 January 2025).

to data protection and data sharing. Accordingly, the NCLAT was of the *prima facie* view that the remedy in relation to the prohibition on data sharing with Meta for advertising purposes for five years ought to be stayed.

The NCLAT also granted relief in relation to the penalty amount, directing that only 50% of the penalty amount be deposited.

Merger Control

The Supreme Court Quashes Approval of Resolution Plan by Committee of Creditors in Absence of CCI Approval and Finds Defects in CCI Approval Process

The Supreme Court of India allowed appeals by *Independent Sugar Corporation Limited* (*INSCO*) and others (*Appellants*) against orders of the National Company Law Tribunal (NCLAT) relating to the Corporate Insolvency Resolution Process of *Hindustan National Glass and Industries Limited* (*HNGIL*) and the approval by the CCI of the combination between HNGIL and *AGI Greenpac Limited* (*AGI Greenpac*).

A number of companies, including INSCO and AGI Greenpac, submitted Resolution Plans for HNGIL under the Corporate Insolvency Resolution Process. Under Section 31(4) of the Insolvency and Bankruptcy Code, 2016, applicants are required to obtain necessary legal approvals within one year of the date of approval or within such period as provided for in the relevant law, whichever is later. However, where the Resolution Plan contains provision for a combination, as referred to in section 5 of the Competition Act, 2002 (*Competition Act*), the applicant must obtain CCI approval *before* the approval of the Plan by the committee of creditors. Despite this, AGI Greenpac's Plan was approved by the committee of creditors before CCI approval had been obtained. INSCO challenged this before the NCLAT, which held that, although the requirement of CCI approval was mandatory, *prior* approval was only directory. The NCLAT also dismissed various challenges to the process followed by the CCI.

The majority of the Supreme Court held that the requirement for the CCI's approval of a combination before approval by the committee of creditors was mandatory. A literal, rather than purposive, reading of the provision was to be adopted. It also held that the CCI had failed to follow procedural requirements. The CCI had issued a show cause notice (*SCN*) only to AGI Greenpac. The Supreme Court held that the SCN should also have been issued to the target, HNGIL. It also found that the CCI had, in conducting its investigation, failed to solicit inputs from the public, affected stakeholders and those likely to be affected by the combination. It also held that a voluntary modification submitted to the CCI by AGI Greenpac should have borne the imprimatur of both the acquirer and the target.

The Supreme Court therefore quashed the approval of the committee of creditors and any action taken under the Resolution Plan and restored the rights of all stakeholders to the position prior to the approval. The committee was to consider INSCO's Resolution Plan and any other Plans possessing CCI approval as on the date it voted on the submitted Resolution Plans.

The Supreme Court made no order in relation to the CCI approval order; this was presumably unnecessary as the committee would not have been able to progress AGI Greenpac's Resolution Plan. However, the CCI will doubtless have regard to the Supreme Court's strictures and review its procedures in their light.

CCI Clears First Transaction under Open Offers and On-Market Purchases Provisions

Under recent changes to the Competition Act, acquirers enjoy a derogation from standstill obligations for open offers and other on-market purchases provided a notification form is filed within 30 days of the acquisition. Although the acquirer can avail of economic benefits such as dividends and exercise voting rights in matters relating to liquidation and insolvency proceedings, the acquirer may not directly or indirectly influence the target enterprise in any way until the CCI has given its approval. In December, the CCI approved the first transaction filed under the new provisions.[3]

CCI Asserts Jurisdiction over Electricity Mergers

The CCI found that *Torrent Power Limited* (*TPL*) had failed to notify its acquisition of a 51% shareholding of a power distribution company in a Union Territory of India.[4] It rejected arguments that the relevant electricity regulation commission had exclusive jurisdiction to regulate combinations in the electricity sector. Since the CCI had jurisdiction to review mergers in the electricity sector, it concluded that TPL had breached Sections 6(2) and 6(2)(A) of the Competition Act by failing to notify the acquisition and by consummating it.

In cases of such breach, a maximum penalty of 1% of the combined value of the turnover or the assets or the value of the transaction can be imposed by the CCI. However, in this case the CCI decided not to impose a penalty given structural

3 *Abu Dhabi National Oil Company P.J.S.C. and Others*, CCI, Combination Registration No. C-2024/11/1204 (10 December 2024).

4 *Proceedings against Torrent Power Limited under Section 43A of the Competition Act, 2002*, CCI (14 January 2025).

issues inherent in the bidding process, the ambiguity arising from overlapping provisions in the Competition Act and the Electricity Act, the absence of an Appreciable Adverse Effect on Competition, and the cooperation extended by TPL.

CCI Clears Acquisition in Data Colocation Services Area subject to Confidentiality Safeguards

The CCI cleared the acquisition by *Ruby Asia Holdings II Private Limited* (*Ruby*) and *Singtel Interactive Private Limited* (*Singtel*) of up to 26% of the shareholding in *STT GDC Private Limited* (*STT GDC*).[5] The CCI found that STT GDC indirectly overlapped with Singtel in the area of data colocation services in India; Singtel's holding company held shares in Bharti Telecom Limited which had investments in its group company Bharti Airtel Limited (*Airtel*) which in turn offered data colocation services in India through its subsidiary Nxtra Data Limited. There were also potential vertical linkages as STT GDC's data colocation services could be availed of by Airtel.

The CCI found data colocation services provided an appropriate frame of reference for assessment of the combination. It also considered that the metros of Mumbai, Delhi NCR, Chennai, Bengaluru and Pune should be considered as distinct narrow relevant geographic markets. On this basis, and taking account of limiting switching by customers, it found a significant impact on the level of concentration in the Delhi NCR, Chennai, Bengaluru and Pune markets.

The CCI considered that, since Singtel would acquire only 4.2% of the shareholding in STT GDC, these concerns could be addressed by means of detailed voluntary commitments to prevent the exchange of confidential information and to set up firewalls between STT GDC and the investors/competing companies. These commitments provide a useful idea of what safeguards will be required by the CCI in similar cases.

5 *Ruby Asia Holdings II Private Limited and Singtel Interactive Private Limited*, CCI, Combination Registration No. C-2024/07/1168 (5 November 2024).

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