



ECONOMIC
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COMPETITION LAW & POLICY NEWSLETTER

Quarter 1 of 2023

SECTORS COVERED IN THIS ISSUE



Technology



Alco-bev

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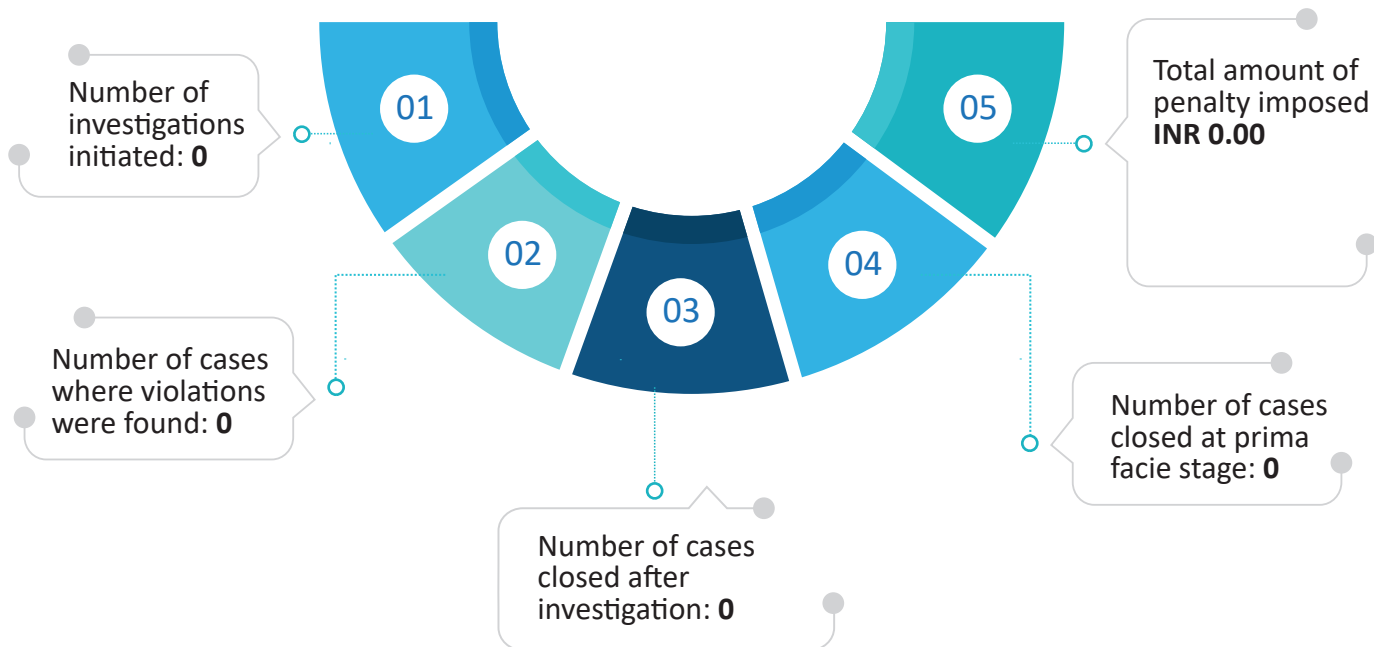
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A QUICK SNAPSHOT

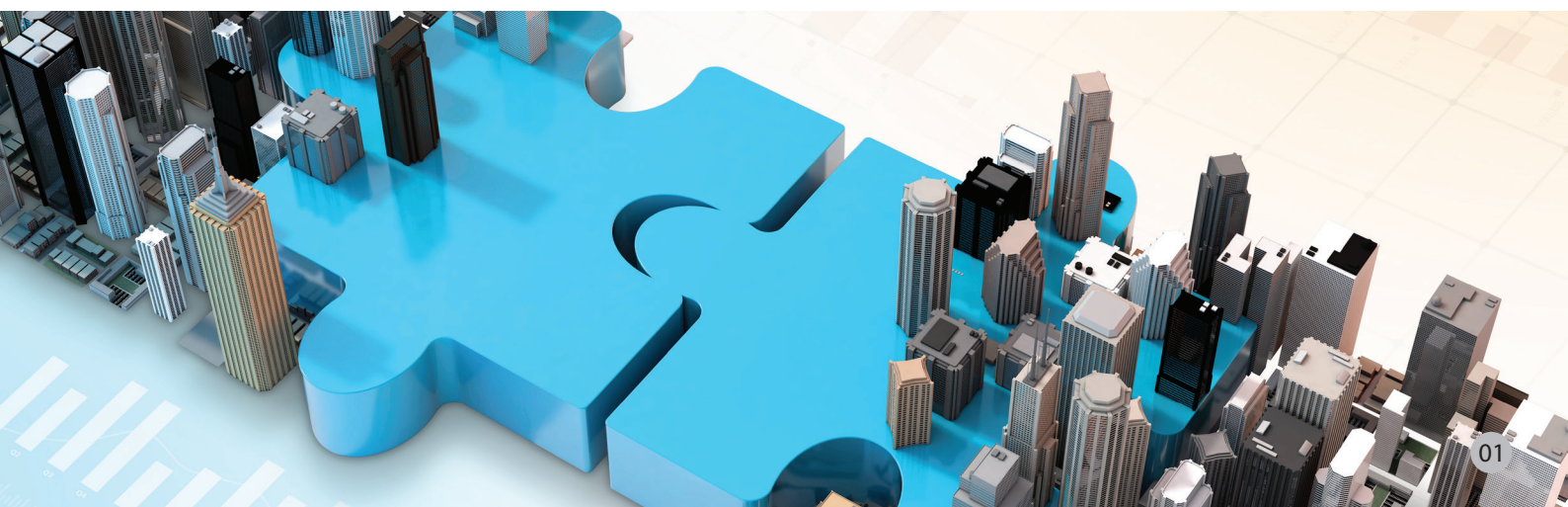
Enforcement Matters



Mergers & Acquisitions



**Due to the absence of a quorum at CCI to approve merger notices, it invoked the doctrine of necessity to approve these transactions in a timely manner. These notices have therefore been approved by a quorum of only 2 members.*



ENFORCEMENT

#1 Bombay High Court clarifies CCI's determination of its jurisdiction

On February 21, 2023, the Bombay High Court (**HC**) disposed of writs filed by Trustees' Association of India and others, challenging a direction of the Competition Commission of India (**CCI**) to investigate allegations of cartelization amongst debenture trustees to fix prices or rates of fees. The Bombay HC directed the CCI to decide on the issue of its jurisdiction before hearing the parties on other aspects.

Previously, following the judgment of the Supreme Court (**SC**) in *Bharti Airtel*, the Bombay HC noted that since Securities and Exchange Board of India (**SEBI**) was examining the same issue, it should first complete its enquiry and provide a report of its *prima facie* opinion on the matter to the CCI, before CCI can proceed with the matter.

The order of the Bombay HC can be accessed [here](#).

#2 Supreme Court admits appeals by United Breweries, others; stays recovery of penalties by the CCI

On February 17, 2023, the SC admitted appeals filed by United Breweries Limited (**UBL**), All India Brewers Association (**AIBA**), and certain other individuals from other beer companies (**Appellants**). The Appellants had challenged the order of the National Company Law Appellate Tribunal (**NCLAT**), which upheld the CCI's order finding UBL, AIBA, Carlsberg India Pvt. Limited, and SAB Miller India Ltd. to have cartelized in the beer markets in India and imposed a cumulative penalty of ~INR 870 crores (~USD 106.35 million). (See our [previous newsletter summary titled "#8 NCLAT holds that a leniency applicant cannot appeal the CCI's order on merits"](#))

The SC granted a stay on the recovery of the penalty imposed by the CCI, subject to a deposit of an additional 10% of the penalty amount by UBL, over and above the 10% already deposited with the NCLAT. With respect to the individuals, no further deposit of penalty was directed by the SC.

The order of the SC can be accessed [here](#).



#3 The Supreme Court refuses to stay CCI's remedies imposed on Google

On January 19, 2023, the SC rejected an appeal filed by Google LLC and Google India Private Limited (collectively, **Google**) against the order of NCLAT dated January 4, 2023 whereby the NCLAT had refused to grant an interim stay on the directions and the penalty levied on it by CCI in its order dated October 20, 2022. (See our [previous newsletter summary titled “#4 CCI imposes penalty and passes remedies on Google for abusing its dominant position”](#))

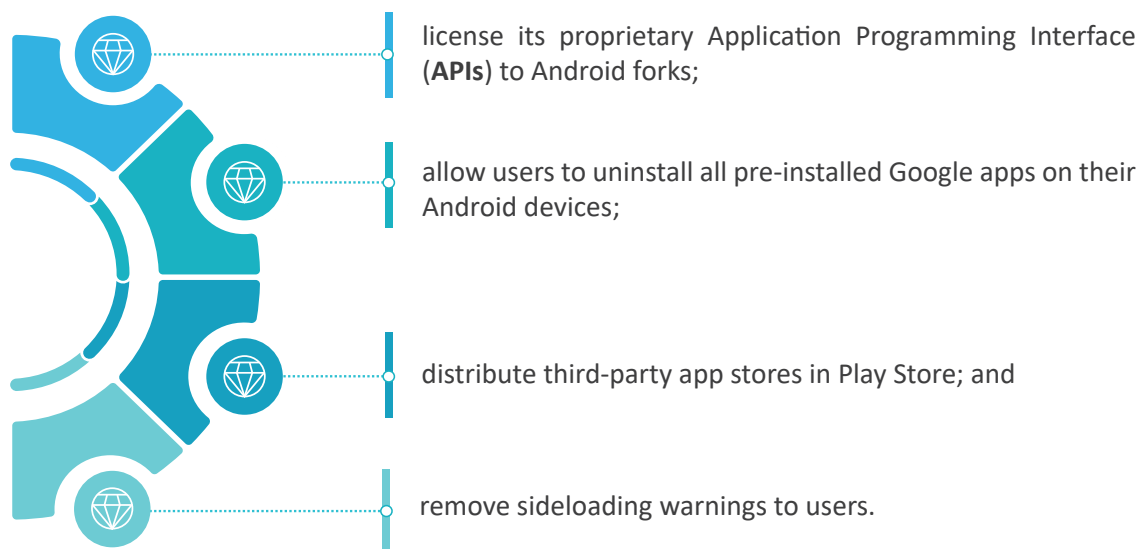
While Google had already deposited 10% of the total penalty (INR ~1337 crore) with the NCLAT for admission of its appeal, the SC directed Google to comply with the other directions of CCI within 7 days of its order. It also directed NCLAT to dispose of Google’s appeal by March 31, 2023. In light of this order, the NCLAT began hearing the appeal on merits on February 15, 2023 and reserved its judgment on March 20, 2023.

The order of the SC can be accessed [here](#).

#4 NCLAT partially upholds CCI’s order against Google setting aside certain remedial directions

On March 29, 2023, the NCLAT partially upheld CCI’s order of October 20, 2022, finding Google’s business practices concerning licensing of its apps to original equipment manufacturers (**OEMs**) and the operation of Android operating system (**OS**) for smartphones/ tablets to be an abuse of dominant position in contravention of Section 4 of the Competition Act, 2002 (**Act**). (See our [previous newsletter summary titled “#4 CCI imposes penalty and passes remedies on Google for abusing its dominant position”](#))

Notably, the NCLAT set aside four of the ten remedies that were directed by the CCI on the grounds that they were unlawful, unnecessary and/or unjustified. The remedies which have been set aside by the NCLAT would have required Google to-



The NCLAT, agreeing with Google’s submissions, also held that the CCI could not impose a ‘provisional’ penalty under the Act, and therefore determined the penalty so imposed by the CCI as the final penalty.

The NCLAT’s judgment is also notable because it clearly holds that in order to establish an abuse under Section 4 of the Act, the CCI must undertake an *effects analysis*.

The NCLAT upheld the remaining remedies relating to unbundling of Google’s suite of apps, providing a choice screen to users to set a default search engine, removing anti-fragmentation obligations, and removing search exclusivity deals.

The order of the NCLAT can be accessed [here](#) with case details as Competition Appeal (AT) No. 01 of 2023.

#5 NCLAT reduces the penalty imposed by the CCI on Geep Industries

On March 31, 2023, the NCLAT reduced the penalty imposed by the CCI on Geep Industries (India) Pvt. Ltd. (**Geep**) from 4% to 1% of its turnover for the period of contravention, *i.e.*, 2010-2016.

In February, 2017 the CCI had directed an investigation by the Director General (**DG**), based on a leniency application filed by Panasonic Corporation, Japan (**Panasonic**), on behalf of itself and Panasonic Energy India Co. Ltd. (**PECIN**). The leniency application alleged the existence of a 'bilateral ancillary' cartel for price coordination between Geep and PECIN in the dry cell battery market. The CCI eventually agreed with the DG's findings and found a clause pertaining to price implication under the Product Supply Agreement (**PSA**) between Geep and PECIN to be anti-competitive and in contravention of Section 3(3) of the Act.

The CCI granted a 100% reduction in penalty to PECIN and imposed a penalty of INR 9.64 crore on Geep which was calculated at 4% of the turnover for each year of the contravention. The CCI also imposed penalties on certain executives of Geep at 10% of their average incomes. Geep and its executives filed appeals before the NCLAT in 2018 against the CCI's final order.

The CCI should have given appropriate reasons and basis for exercising discretion for imposing a 4% penalty on Geep; and

The NCLAT, in its judgment, observed that:

Geep's market share was only 1% during the period of contravention and it did not have a bargaining position with respect to PECIN. As such, an exorbitant penalty can result in its exit from the market.

Since Geep did not have market share to influence the market and incurred losses for the first 3 years of the period of contravention, the NCLAT reduced the penalty to 1% of Geep's turnover for each year of the cartel.

The decision of the NCLAT can be accessed [here](#) with case details as Competition Appeal (AT) No. 90 of 2018.



OTHER DEVELOPMENTS

#1 The Competition (Amendment) Act, 2023 officially notified by the Ministry of Law and Justice

On April 3, Parliament passed the Competition (Amendment) Bill, 2023 (**Bill**) and the President of India granted her assent to the Bill on April 12. (See our [previous newsletter summary titled “Competition \(Amendment\) Bill, 2022 introduced in the Parliament”](#)). The Competition (Amendment) Act, 2023 (**Amendment Act**) has been notified in the Official Gazette by the Ministry of Law and Justice. However, the provisions of the Amendment Act will come into force on such dates as notified by the Central Government.

Some of the key provisions of the Amendment Act are as follows:



Introduction of ‘deal value threshold’: In addition to asset/turnover-based thresholds set out under the Act, the Amendment Act introduces a ‘deal value’ threshold of INR 2000 crores (**DVT**). A transaction that exceeds the DVT will require prior mandatory notification to the CCI for review and approval. However, such a notification would only be required when the target company has “substantial business operations” in India.



Definition of ‘control’: The definition of ‘control’ under the Act has been broadened to include the ability to exercise “material influence over the management affairs, or strategic commercial decisions of an enterprise”.



‘Settlements’ and ‘Commitments’: The Amendment Act has introduced a settlement and commitment regime in cases pertaining to anti-competitive vertical agreements and abuse of dominant position. Under the newly introduced regime, commitments can only be offered after an investigation has been directed but before the DG report is received by a party. On the other hand, a settlement application can be filed after receiving the DG Report but before CCI passes a final order. Based on the recommendation of the Parliamentary Standing Committee (**PSC**), the Amendment Act provides that compensation claims will lie in cases of settlement orders by the CCI.



Penalty based on ‘global turnover’: While imposing penalties, the Amendment Act provides that the CCI can consider an entity’s “global turnover” accruing from all products/services, instead of “turnover” in India.



Withdrawal of leniency applications: As an update to the leniency regime under the Act, the Amendment Act provides that a party would be able to withdraw its application for lesser penalty in cartel cases. However, it has been clarified in the Amendment Act that the DG/CCI will be empowered to use the evidence submitted by such party during the process except for any admission made by the party.



Leniency ‘plus’: Another update to the leniency regime introduced by the Amendment Act is that a lesser penalty applicant can now submit another application, containing disclosures with respect to another cartel, during the investigation pertaining to the first application. Submitting such an application would make the applicant eligible for reduction of penalties in respect of both such cartels.



'Hub and spoke' cartels: The Amendment Act has introduced a provision which would penalize 'hub and spoke' arrangements and is based on the presumption that an enterprise that participates in a cartel is part of it, even though it may not be engaged in an identical or similar trade.



Expedited timelines: The Amendment Act has reduced timelines for clearance of combinations by the CCI, from 210 days to 150 days.



Power to issue Guidelines: The Amendment Act now requires the CCI to publish draft regulations on its website for public comments prior to issuing the regulations. The Amendment Act has also introduced a mechanism for CCI to publish guidelines on various provisions under the Act, including penalty guidelines, which will have to be framed and considered by the CCI while imposing penalties.



Limitation period: The Amendment Act has introduced a period of limitation of three years for filing of information or for making a reference to the CCI on the basis of which the CCI can direct investigations. This period of limitation, according to the Amendment Act, would start from the time the cause of action arises except when 'sufficient cause' can be shown.

(Please see our article titled ["Competition Act Amendment: CCI gets more enforcement tools to address emerging challenges"](#).)

The Amendment Act can be accessed [here](#).



#2 Ministry of Corporate Affairs constitutes Committee on Digital Competition Law

On February 6, 2023, the Ministry of Corporate Affairs (**MCA**) directed the constitution of a Committee on Digital Competition Law (**Committee**), to assess the need for a separate legislation for regulating competition in digital markets. The Committee is directed to submit its report along with a draft Digital Competition Act within 3 months. The Committee will review/examine the following, *inter alia*:



(Parliamentary Standing Committee on Finance’s Report on the ‘*Anti-Competitive Practices by Big Tech Companies*’ recommended identification of a small number of leading players that can negatively influence the competitive conduct in the digital ecosystem, as SIDIs, based on their (a) revenues; (b) market capitalization; and (c) number of active business and end users. See our [previous newsletter summary titled “#2 Parliamentary Standing Committee on Finance presents Report on ‘Anti-Competitive Practices by Big Tech Companies’](#)’)

The Committee comprises members from the MCA, CCI and law firms and has, reportedly, concluded consultations with relevant stakeholders.

The order of the MCA can be accessed [here](#).

#3 CCI to issue notices in ‘anti-profiteering’ matters under the Central Goods and Services Tax Act

On November 23, 2022, the Central Board of Indirect Taxes and Customs (**CBIC**) issued a notification (**GST Notification**) empowering the CCI to examine ‘anti-profiteering’ matters pertaining to Central Goods and Services Tax Act, 2017. Pursuant to the GST Notification, the National Anti-Profiteering Authority (**NAA**) ceased to exist and all pending cases have been transferred from NAA to the CCI.

The CCI will examine whether input tax credits availed or reduction in the tax rate has resulted in a reduction in the prices of goods or services provided to the consumers by such a person. Reportedly, the Directorate General of Anti-Profiteering has completed its investigation into several matters although the CCI will be able to pass further orders only once a chairperson is appointed, and the quorum is complete.

The notification issued by the CBIC can be accessed [here](#).



**ECONOMIC
LAWS
PRACTICE**
ADVOCATES & SOLICITORS

MUMBAI

9th Floor, Mafatlal Centre
Vidhan Bhavan Marg Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

NEW DELHI

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400

AHMEDABAD

801, 8th Floor, Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8

PUNE

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

GIFT CITY

Unit No. 605, Signature, 6th Floor
Block 13B, Zone - I
GIFT SEZ, Gandhinagar 382355
E: elplaw@elp-in.com



elplaw.in



insights@elp-in.com



[/elplaw.in](https://www.facebook.com/elplaw.in)



[/ELPIndia](https://twitter.com/ELPIndia)



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