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## Supreme Court to hear appeal filed by Google in January 2024

The Supreme Court of India has scheduled the final disposal of the appeal filed by Google in January 2024. This hearing was originally scheduled for October 11, 2023, but has been postponed due to constitution bench hearings. Assurance has been given by the Chief Justice of India that no other cases shall be listed around that time and that this matter shall be over in a couple of days. This appeal challenges the penalty imposed by the Competition Commission of India (“**CCI**”) on Google for abusing its dominant position in multiple markets in the Android mobile device ecosystem. While this matter was pending before the NCLAT, the Apex Court refused to grant Google interim relief.

The National Company Law Appellate Tribunal (“**NCLAT**”) in March 2023 upheld the CCI's decision, which was initially given in October 2022, to impose a penalty of Rs. 1337.76 Crores on Google along with a cease-and-desist order from participating in anti-competitive practices along with directions in order to modify its conduct within a defined timeline. In addition, the NCLAT also found that Google's requirement for original equipment manufacturers to pre-install the entire Google Suite of 11 applications were unjust. However, the entire decision was only partially upheld with the NCLAT overturning four of the directives by CCI, including restrictions on the denial of the access of the Google Pay Services APIs, uninstalling pre-installed applications, distribution of the app store through Play Store. Thus, ruling by the NCLAT has also been challenged in the Supreme Court. The NCLAT dismissed the appeal filed by Google upholding the penalty imposed by the CCI.

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## Supreme Court to hear Amazon's appeal in December 2023

The Supreme Court granted a brief respite to Amazon, scheduling the final hearing on the appeal filed by Amazon for December 2023. The Supreme Court held that the interim order will continue till the next hearing.

The CCI had imposed a Rs. 202-crore penalty on Amazon over its deal with Future Coupons in 2019, entailing acquisition of 49% shares of Future Coupons Pvt. Ltd. by Amazon.com NV Investment Holdings LLC, followed by suspension of the Amazon-Future Group deal in 2021, due to Amazon's failure in announcing the shareholder agreement involving Future Retail. The CCI was of the opinion that Amazon's interest in Future Retail was merely a red herring to disguise its bid to enter India's retail business. According to

the CCI, Amazon had failed to notify its strategic interest at the time of the deal.

The NCLAT had previously dismissed an appeal filed by Amazon challenging the penalty imposed by the CCI. It had, however, decreased the Rs. 2 crore penalty imposed on Amazon under sections 44 and 45 to Rs. 1 crore, finding it to be excessive. The Appellate Tribunal had also remarked that Amazon, being responsible and accountable for its failure to provide the relevant information on the Combinations, made the penalty 'a fair and sensible one'. The NCLAT had noted that since Amazon had, in its opinion, intentionally subjugated the real ambit and purpose of the combination, thus, it was in complete agreement with the order of the CCI.

## NCLAT gives nod to PVR-INOX merger, while dismissing the appeal against CCI's order

NCLAT dismissed the appeal filed by Consumer Unity and Trust Society (CUTS/The Appellant), *inter alia* requesting CCI to investigate the PVR-INOX merger under section 19(1)(a) of the Competition Act, 2002 ("**Act**"). A complaint was filed against PVR Ltd. And Inox Ltd. (collectively, The Respondents), and alleged that the Respondents were entering into an anti-competitive agreement, with significant potential to cause appreciable adverse effect on competition ("**AAEC**") within the territory of India, in contravention of section 3(1) of the Act.

The CCI, while making its decision, had determined that the concerns regarding potential adverse effect on competition from an entity that has not yet been established cannot serve as grounds for inquiry under the Act. The CCI had also noted that, for section 3(1) to be attracted, an agreement has to be established between two or more entities, the nature of which agreement should cause AAEC in the market. The CCI further noted that while the Informant had not specifically alleged contravention of section 4, yet the information contained averments that once PVR and Inox become a single entity, they would become a dominant entity in the future.

The CCI once again observed that the entity against whom allegations were being made had not come into existence yet, and also reinforced the fact that dominance by itself is not per se anti-competitive, and only anti-competitive conduct would fall under the ambit of section 4.

The NCLAT, while considering the appeal, observed that,

- (i) At the time of submission of the complaint, the Appellant was aware of the impending merger of PVR and Inox, forming a consolidated entity referred to as “PVR INOX Ltd.”
- (ii) While this appeal was ongoing, the Respondents communicated to the NCLAT that PVR and Inox had indeed merged, as

confirmed by an order from the National Company Law Tribunal (NCLT) in Mumbai.

In light of these observations, the NCLAT declared that the Appellant’s application is not in accordance with the law for the purpose of initiating legal action under section 19(1)(a) of the Act. The NCLAT substantiated its decision with the reasoning that since PVR and Inox have now become a single entity via combination as defined under section 5 of the Act, thus, section 3(1) in this case is not applicable, since it deals with anti-competitive agreements where the contravening parties retain their individual identities even after the agreement is entered into.

## InGovern flagged the hiring of a former CCI member, Anku Sharma, by Flipkart and raised questions on the CCI’s earlier investigation of Flipkart

The firm InGovern Research Services had raised concerns and doubts on the impartial investigations by CCI with the Government on Mr. Anku Sharma’s professional move to Flipkart. InGovern, which functions as a proxy advisory firm, has sent submissions in writing to the Ministry of Finance and the Competition Commission of India, calling for a fresh investigation into the alleged anti-competitive conduct of e-commerce giants Flipkart and Amazon. The firm has also called for ‘appropriate measures’ to be taken so as to address any lapse of due process at the CCI. These submissions come in light of the hiring of Mr. Anku Sharma to Flipkart as an antitrust subject matter expert in March 2023.

Mr. Sharma was a key member of the former CCI

team responsible for conducting investigations into Flipkart’s alleged anti-competitive conduct, and according to InGovern, his joining Flipkart raises grave and substantial doubts regarding whether the erstwhile investigations done by the CCI during his tenure with the Competition Watchdog were impartial or not. As per InGovern, the entire chain of events is ‘highly suspicious’ and cast a ‘cloud of doubt’ over the impartiality of the investigation. Accordingly, InGovern contends that the entire findings of the CCI during Mr. Sharma’s tenure, regarding the conduct of Flipkart, should be deemed as compromised.

Flipkart has been investigated by CCI on allegations put forth on monopolization and anti-competitive business practices.

## CCI finds no violation of competition law by DEN Networks

Sobhagaya Media Private Limited, the Informant alleged that DEN Networks was indulging in anti-competitive conduct and contravening section 3(4) and section 4 of the Act. The allegations were as follows:

- i. The Informant. engaged in an agreement with Den Networks in which they included Informant's channel in its Digital Addressable Networks.
- ii. Informant, believing that Den Networks' carriage fee was in line with fees charged for other Hindi TV channels, made several payments to them.
- iii. However, Informant later discovered that Den Networks charged significantly lower amounts from other media companies operating multiple channels, such as News Nation Network Pvt. Ltd., Zee Media Corporation Ltd., ABP News, etc.

- iv. Informant communicated various concerns to Den Networks, including requests for a refund of the excess funds, non-fulfillment of the agreement, and poor signal quality for APN (a free-to-air channel). However, Den Networks did not respond to any of these reminders.

For the purpose of market delineation, the CCI considered that cable and DTH services as substitutes for each other and thus may fall in the same relevant market. However, in such a broad relevant market, the market concentration of Den Networks is greatly reduced, and according to the CCI, in the absence of dominance in the relevant market, no case of contravention of section 4 can be made out against Den Networks.

The CCI further highlighted that the Informant had produced no evidence of record to substantiate its claims and had also refrained from filing a rejoinder to the reply filed by Den Networks, negating the Informants contentions.

## NCLAT issues notice to Uber Technologies Inc. and CCI

The NCLAT issued a notice to ride-hailing platform Uber Technologies Inc. and the CCI in response to an appeal filed by radio taxi company Meru. Meru approached the CCI in 2015, alleging that Uber was engaged in anti-competitive practices between 2014 and 2017. Meru had originally appealed against Uber in 2021, submitting before the Appellate Tribunal that Uber had been offering hefty discounts to its customers during the period 2014-2017, that

caused a negative impact on its competitors. Meru also alleged that Uber's competitors have gone out of business or are on the verge of shutdown because of such practices.

The Appellate Tribunals took cognizance of the fact that Uber was a fresh entrant in the Indian market from 2014-2017, and the established legal framework allows such new companies to offer discounts to establish themselves. In response,

Meru has argued that Uber's actions during that time period have caused a significant negative impact on the ride-hailing industry as a whole.

As a result, this notice from the NCLAT comes two years after Meru's original appeal and schedules the case for hearing in January 2024.

## NCLAT sets aside CCI order imposing penalty on Ethanol producers

**N**CLAT has set aside CCI's order imposing penalty on Ethanol Producers for alleged cartelization. The order has been set aside on grounds of violation of principles of natural justice as the matter had been heard by a five-member bench of the CCI, but the final order had been signed only by three members.

The Appellants argued that while five members of the CCI had heard the arguments, only three members had signed the impugned order. Appellants further submitted that there is a distinct possibility that if all the five members who heard the case had deliberated on the issues of the case, the outcome of the case may

have been different. The Appellants also raised the issue of adherence to the principle of natural justice in the hearing of the matter by the CCI and argued that the CCI should have provided an opportunity of oral hearing to the parties while considering the Supplementary Investigation Report of the DG,

NCLAT concluded that CCI order was invalid as all the members who had heard the matter had not signed the final order thus violating the basic principle of natural justice that 'one who hears, must decide'. NCLAT also questioned the inordinate delay in pronouncing the order which resulted in a serious infirmity.

## Combination orders

**T**he CCI had passed the necessary order for approval of:

- i)** The acquisition of 1.74% equity share capital of Lenskart Solutions Private Limited by Kedaara Capital Fund III LLP.
- ii)** The acquisition of a majority stake in Indira IVF by Zonnebaars, owned by BPEA Private Equity Fund VIII.

- iii)** The approval for the acquisition of 100% shareholding of Lanco Amarkantak Power by PFC Projects, REC, SJVN and Damodar Valley Corporation.
- iv)** The proposed acquisition of certain shareholding in TVS Credit Services Limited by PI Opportunities Fund-I Scheme-II along with certain individuals.



The 8th BRICS International Competition Conference (ICC) will be hosted by the CCI at New Delhi during October 11–13, offers a platform to discuss, analyse, and address significant competition-related issues and fosters collaboration among the BRICS nations to ensure that markets remain open, competitive, and innovative.

Three new members have been appointed to the CCI - Anil Agrawal, former Director General of Police and former Additional Secretary, Department for Promotion of Industry and Internal Trade; Deepak Anurag, former Additional Deputy Comptroller and Auditor General of India; and independent lawyer Sweta Kakkad who was previously the Interim Chief Compliance Officer at WhatsApp.



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