Shardul Amarchand Mangaldas

CENTURY *of* EXCELLENCE

Towards New HORIZONS

DEVELOPMENTS IN INDIAN COMPETITION LAW 2018-19

Preface

Dear Friend,

We are delighted to present our review of developments in Indian competition law in 2018-19.

Since the enforcement provisions of the Competition Act, 2002 came into effect ten years ago, a large body of case law has developed and, of course, institutional understanding of competition law and policy has evolved. More than ever, enterprises must comply with competition laws.

The CCI continues its fight against cartels. The year has been an important one for leniency applicants. First-in-line applicants coming early have benefited from a 100% reduction in fines, but latecomers have received less than the maximum discount. The NCLAT upheld the CCI order in the *Cement* case. However, in the *LPG Cylinder* case, it found that the CCI and the Competition Appellate Tribunal had erred in finding that similarity in pricing by competitors was evidence that they had colluded in setting the price. They should have considered whether such pricing resulted from the fact that the market was controlled by a small number of powerful buyers.

In relation to vertical agreements, the NCLAT allowed Hyundai's appeal against CCI findings of resale price maintenance and unlawful tying, finding that it had relied on the Director General's findings and had failed to carry out its own analysis. In an important case involving supply of kitchen appliances by Kaff, the CCI found that there was no appreciable adverse effect on competition.

The CCI has decided a number of abuse of dominance cases, some of these involving new technology companies. In a landmark order against Google, it held that the search giant had abused its dominant position in web search and web search advertising markets in India and imposed a significant penalty of INR 135.85 crores (approximately USD 21.15 million). It dismissed abuse of dominance cases against taxi aggregators *OLA* and *Uber*, and against the on-line portal *Flipkart*, as dominance had not been established.

In relation to the scope of investigative powers by the CCI/ Director General, the Supreme Court has made it clear that the power to conduct dawn raids necessarily involves the rights of search and of seizure of documents. The Delhi High Court has confirmed that the Director General can investigate a party not specifically named in the order directing an investigation, that the CCI can proceed against officers of a company and the company at the same time, and that the powers of the CCI in reviewing or recalling an order are limited. The Delhi High Court has also affirmed that persons being investigated by the Director General are entitled to be accompanied by an advocate, but that this could be at a distance in order not to obstruct the investigation. Changes to the CCI's General Regulations provide that advocates guilty of misconduct can be prevented from appearing before the CCI or Director General; this been challenged before the Madras High Court which has granted an interim stay.

The CCI continues to be active in the field of merger control. The CCI has required remedies in a number of cases, showing a flexible and innovative approach. In clearing *Walmart's* acquisition of *Flipkart*, it limited itself to considering the competition aspects of the transaction, declining to take account of criticisms of Flipkart's business practices. The CCI has taken a tough approach to gun jumping, effectively banning the payment of any advance payment or any mechanism reducing the ability of the target to compete.

On a personal level, I have been honoured to be asked to serve on the Competition Law Review Committee which has been asked to carry out a review of the Competition Act. This is an opportunity to update the legislation, to remove anomalies and to adapt to the changing environment.

We have more than 30 competition lawyers based in our Delhi and Mumbai offices. With our bench strength – seven partners, a Senior Adviser and dedicated associates at all levels - we handle the entire range of cutting-edge competition work.

These are fascinating times for competition lawyers. As we continue to advise on complex, and sometimes tricky, cases, we recognise the need for a longer-term view, putting developments in competition law into perspective. We hope that this review will give you a flavour of key developments and what may come.

I do hope that you enjoy it.

Yours sincerely,

Pallavi Shroff
Managing Partner
Shardul Amarchand Mangaldas & Co

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Competition Law & Policy in India 2018-19
An Outline

By **John Handoll** *and* **Aman Singh Sethi**

In this article, we outline the main developments in Indian competition law and policy from January 2018 to March 2019. We look first at policy and institutional changes and then focus on developments in relation to horizontal and vertical agreements, abuse of dominant position, jurisdictional issues, due process, merger control, as well as major advocacy and outreach measures.

Reviewing the Competition Act

The Competition Law Review Committee

In September 2018, the Indian Government set up the Competition Law Review Committee to review the Competition Act, 2002 (*Competition Act*) "in view of changing business environment and to bring necessary changes if required". The Committee is expected to study international best practices with a focus on antitrust law, merger guidelines and handling cross-border competition issues.

The nine-member Committee is headed by the Secretary of the Ministry of Corporate Affairs and includes the Chairpersons of the Competition Commission of India (*CCI*) and of the Insolvency and Bankruptcy Board of India (*IBBI*). Our Managing Partner, Pallavi Shroff, is also a member. The Committee is expected to make its report in early 2019 and this may result in significant changes being made to the legislation in the future.

Institutional Developments

New CCI Chairperson and Members

There have been significant changes at the CCI which has been revamped from a seven-member to a leaner four-member bench. Mr. Ashok Kumar Gupta was appointed as Chairperson in November 2018 and will remain in office until October 2022. In December 2018. Ms. Sangeeta Verma, a retired Indian Economic Service Officer, was appointed as a Member. Mr. P.K. Singh has replaced Mrs. Smita Jhingran as Secretary.

Cartels

Supreme Court Allows LPG Cylinder Appeal

The Supreme Court allowed an appeal by 45 LPG cylinder manufacturers found guilty of bid-rigging by the CCI and the COMPAT.[1] It found that the CCI should not have inferred collusion from parallel pricing, trade association meetings and general market conditions; it should rather have considered whether parallel pricing resulted from the fact that the market was controlled by a small number of powerful buyers.

NCLAT Decides on the Cement Cartel Case

The National Company Law Appellate Tribunal (*NCLAT*) upheld the CCI's 2016 order in the *Cement Cartel Case*,[2] finding that a number of cement producers and the Cement Manufacturers Association had colluded to hike cement prices and create an artificial scarcity of cement. The NCLAT maintained the INR 6,300 crore (approx. USD 915 m) penalty imposed by the CCI stating it was the "mere minimum penalty".

Leniency

The CCI decided a number of cases involving leniency applications, awarding reductions in penalties to applicant enterprises and individuals involved in the cartel. In the *Dry Cell Batteries*[3] and the *Essel Shyam/Globecast* cases,[4] the CCI awarded 100% reductions in penalty to first-in-line leniency applicants who had approached the CCI at the outset and whose evidence enabled the CCI to form a *prima facie* opinion on the existence of the cartel. Applicants who applied later, during the investigation by the Director General (*DG*), received less than the maximum possible reduction.

In the *Flashlights* case,[5] in spite of two leniency applications,

1 Civil Appeal No. 3546 of 2014 *Rajasthan Cylinders and Containers Limited v Union of India* (1 October 2018).

2 TA(AT) (Compt) No. 22 of 2017 *Ambuja Cements Limited v CCI* (25 July 2018).

3 *Suo Motu* Case No. 2 of 2016 *Zinc Carbon Dry-Cell Batteries* (19 April 2018), *Suo Motu* Case No. 2 of 2017 *Dry-Cell Batteries* (30 August 2018) and *Suo Motu* Case No. 3 of 2017 *Dry Cell Batteries* (15 January 2019).

4 *Suo Moto* Case No. 2 of 2013 *Essel Shyam Communication Limited (now Planetcast Media Services Limited) and Globecast* (11 July 2018).

5 *Suo Motu* Case 1 of 2017 *Eveready Industries India* (8 November 2018).

the CCI found no evidence of actual price-fixing. It also held that information exchanges were not prohibited in the absence of collusion.

Bid-Rigging by Ethanol Suppliers

In the *Sugar Mills* case,[6] the CCI found that a number of suppliers of ethanol and two trade associations had quoted the same or similar prices in tenders to public sector oil companies and were guilty of bid-rigging The CCI rejected allegations that the oil companies had, in floating a joint tender, themselves breached Section 3 of the Competition Act, 2002; this could not be regarded as anti-competitive, particularly where there were evident efficiency benefits.

Vertical Agreements

NCLAT Allows Hyundai Appeal

The NCLAT allowed an appeal by *Hyundai Motor India* against a CCI order finding it guilty of resale price maintenance and requiring dealers to use particular oils and lubricants.[7] The NCLAT found that the CCI had relied on the findings of the DG and had failed to conduct its own independent analysis of the matter; it had also failed properly to determine the relevant product and geographic markets and to consider whether there was an appreciable adverse effect on competition (*AAEC*). The CCI has appealed to the Supreme Court.

Resale Price Maintenance

In an important and long-standing case against *KAFF Appliances* (*Kaff*), a manufacturer and supplier of kitchen appliances, the CCI considered the applicability of Section 3(4) of the Competition Act, dealing with vertical agreements, to agreements with providers of online market platform services.[8] *Snapdeal*, the complainant, had alleged that Kaff had attempted to impose a minimum operating price (*MOP*) on its website and that this amounted to resale price maintenance (*RPM*). The CCI roundly rejected a finding by the investigating DG that, as Snapdeal was only a market platform, it was not part of the vertical chain and could not be subject to a vertical restraint.

Though holding that Section 3(4) of the Competition Act *could* apply, the CCI held that there was no RPM in this case. The right of manufacturers to choose the most efficient distribution channel should not be interfered with unless this led to anti-competitive effects. The CCI found no evidence of price restrictions imposed on dealers by Kaff. Attempts by Kaff to secure that products sold on Snapdeal's portal were sold at the MOP had no AAEC as sales of KAFF's product on the portal increased, there was evidence of continued discounting and there was significant intra-brand competition. The CCI therefore ordered that the case be closed.

6 Case No. 21 of 2013 *Indian Glycols Limited v Indian Sugar Mills Association* (18 September 2018).

7 Competition Appeal (AT) No. 6 of 2017 *Hyundai Motor India v CCI* (19 September 2018). On the issue of the CCI blindly accepting the findings of the DG, the Supreme Court, in the *Andhra Pradesh Film Chambers of Commerce* case, dismissed an appeal by the CCI against an order of the COMPAT which set aside the CCI's decision largely on the basis that CCI had failed independently and objectively to assess the facts and evidence gathered by the DG (Civil Appeal No. 272 of 2016 *CCI v Andhra Pradesh Film Chambers of Commerce* (26 February 2019)).

8 Case No. 61 of 2014 *Jasper Infotech (Snapdeal) v KAFF Appliances* (15 January 2019).

In India, a vertical restriction will be prohibited only if the CCI finds an AAEC. In the *Fangs Technology* case,[9] the CCI dismissed a complaint of resale price maintenance at a *prima facie* stage, stating that *Fangs* did not seem to possess significant market power enabling it to impose anti-competitive vertical restraints.

Territorial Restrictions

In *prima facie* proceedings against the "*super-distributor*" of OPPO mobile phones in India,[10] the CCI accepted a restriction on sub-distributors from selling outside their designated sales region where there was no bar on passive sales to customers from outside that region and no restriction on the sub-distributor selling other brands.

Abuse of Dominance

The Supreme Court Addresses Dominance

The Supreme Court addressed dominance for the first time in the *Fast Way Transmission* case.[11] It was alleged that *Fast Way* had unfairly terminated agreements with a broadcaster whose channel it carried to cable TV viewers. The Supreme Court rejected the findings of the COMPAT that a denial of access under Section 4 of the Competition Act could only be by one competitor against another; this meant that a customer could also be denied access. The conduct was found to be abusive since the agreement had been terminated without giving reasons.

Google and other New Technology Cases

The CCI considered a number of cases against new technology companies. In a landmark order in February 2018,[12] the majority of the CCI found that *Google* had abused its dominant position in the online general web search and web search advertising services markets in India and imposed a penalty on Google of INR 135.85 crore (approx. USD 21.15 million). In the later *Adwords* case,[13] the CCI affirmed that Google was dominant in the market for online search advertising services but held that there was no abuse in relation to its terms and conditions, and termination, of Adwords accounts of certain users.

The CCI closed a case against taxi aggregators *Ola* and *Uber*,[14] holding that neither company was dominant in a number of taxi markets in various cities, despite market shares above 50%. The CCI rejected arguments of collective dominance, as this concept is not recognised under the Competition Act, and of dominance of a group (raised as certain investors had interests in both companies). The CCI later dismissed at *prima facie* stage a case against *Flipkart*,[15] finding that it was not dominant in the online marketplace platforms services market.

Establishing Abuse of Dominance

In a case involving *South Asia LPG Company*,[16] a provider of terminal services at Visakhapatnam Port, the CCI found that the refusal to allow a storage facility to be by-passed, and to tap-in/out of a pipeline, amounted to denial of market access. In the *All India Chess Federation* (*AICF*) case,[17] the CCI found that the AICF was dominant in the Indian markets for the organisation of professional chess tournaments and for the services of chess players, and that it had abused its dominance by preventing chess players from participating in unauthorised tournaments.

Moving from Dominance – a Mature Approach

In a welcome development, in fresh cases involving property developer *DLF*,[18] the CCI *prima facie* held that DLF was not dominant. Seven years earlier, the CCI had found that DLF was dominant; however, since then, new players had entered the market, so no individual player was able to influence the conditions of competition in the relevant market.

CCI Launches New Investigations

A number of investigations were launched by the CCI following *prima facie* findings of abuse. It found that *Intel* had abused its dominant position in the market of processors for servers in India by refusing to provide access to files and other information necessary to design server-boards compatible with its processors.[19] It also decided to investigate allegations that the *Oil and Natural Gas Corporation* had abused its dominant position by imposing unfair terms in hiring

9 Case No. 15 of 2018 *Tamil Nadu Consumer Distributors Association v Fangs Technology* (10 October 2018).
10 Case No. 34 of 2018 *KC Marketing v OPPO Mobiles* (8 November 2018).
11 Civil Appeal No. 7215 of 2014 *CCI v Fast Way Transmission* (24 January 2018).
12 Cases Nos. 7 and 30 of 2012 *Matrimony.com and CUTS v Google* (8 February 2018).
13 Case Nos. 6 and 46 of 2014 *Vishal Gupta and Albion InfoTel v Google* (12 July 2018).
14 Cases Nos. 25-28 of 2017 *Ola and Uber* (20 June 2018).
15 Case No. 20 of 2018 *All India Online Vendors Association v Flipkart India and Flipkart Internet* (6 November 2018).
16 Case No. 76 of 2011 *East India Petroleum v South Asia LPG Company* (11 July 2018).
17 Case No. 79 of 2011 *Hemant Sharma v All India Chess Federation* (12 July 2018).
18 Case No. 73 of 2014 *Amit Mittal v DLF* and Case No. 84 of 2014 *Vijay Kapoor v DLF* (31 August 2018).
19 Case No. 16 of 2018 *Velankani Electronics v Intel Corporation* (9 November 2018).

offshore support vessels[20] and that viscose fibre producer *Grasim Industries* had, before granting discounts, required its customers to disclose confidential information and had discriminated in giving discounts.[21]

Overlapping Jurisdictions

The CCI and the Telecommunications Sector

The Supreme Court considered the jurisdiction of the *CCI* when another regulator, the *Telecom Regulatory Authority of India* (*TRAI*) was adjudicating on a matter.[22] It held that, where the issues raised in a matter are within the CCI's jurisdiction, the TRAI, as the expert body created to govern the telecommunications sector, is to decide in the first instance. The CCI cannot exercise its concurrent jurisdiction under the Competition Act until TRAI has come to a conclusion. The CCI seems to have applied the spirit of the Supreme Court's observations in a case involving the *National Stock Exchange*, closing a case at the *prima facie* stage, for want of established facts, which were pending adjudication by the stock market regulator. [23]

Due Process

Dawn Raid Powers

In an appeal brought by the CCI, the Supreme Court clarified the powers of the DG in relation to the search and seizure of documents during dawn raids.[24] In June 2016, the Delhi High Court had made an order restraining the CCI/DG from using the material seized during a dawn raid on JCB India on the grounds that the search warrant issued by the Chief Metropolitan Magistrate, New Delhi, authorised only the entry into and search of premises, and not the seizure of documents.[25] The Supreme Court allowed the appeal, holding that the relevant provisions of the Companies Act, 1956 which applied to searches under the Competition Act extended beyond authorisation for a *search* to authorisation of a *seizure*: unless seizure was authorised, a search by itself would not be sufficient. The High Court had blocked the investigation on the basis of an erroneous construction of the powers of the DG. The Supreme Court therefore vacated the High Court's injunction.

The Delhi High Court Strengthens the CCI's Powers

In the *Cadila Healthcare* case,[26] a Division Bench of the Delhi High Court followed the Supreme Court in the *Excel Crop Care* case,[27] in holding that the DG could investigate a party not specifically named by the CCI as an opposite party in the *prima facie* order directing an investigation. It also stated that the power to review or recall an order could be exercised in very limited circumstances; only if there had been an egregious fraud or a self-evident mistake, and not where the recall application raised complex questions of law that required detailed examination.

The Division Bench finally held that the CCI could proceed against directors and other individual officials of a company at the same time as it proceeded against the company, and it was not necessary first to establish breach by the company. This was followed by a Division Bench of the Delhi High Court in the *Mahyco Monsanto* case,[28] where the Division Bench rejected arguments that individuals could be punished only where a company had contravened orders of the CCI. Breach of Section 3 or 4 of the Competition Act by a company was sufficient for individual liability to arise.

The Right to Legal Representation

In the *Oriental Rubber* case,[29] a Division Bench of the Delhi High Court held that persons were entitled to be accompanied by an advocate during investigations by the DG when the latter was recording or collecting evidence. However, alive to concerns that the (active) presence of advocates might hamper an investigation, the Division Bench stated that the DG could prescribe appropriate procedures; the DG could ensure that counsel sat some distance away and that the witness should not be able to confer or consult with counsel.

A recent amendment to the General Regulations[30] provides that an advocate may accompany a person summoned by the DG provided that there is a prior request in writing, the

20 Case No. 1 of 2018 *Oil and Natural Gas Corporation* (12 June 2018).

21 Cases Nos. 51, 54 and 56 of 2017 *Grasim Industries* (16 May 2018).

22 Civil Appeal No 11843 of 2018 *CCI v Bharti Airtel Limited* (5 December 2018.

23 Case No. 47 of 2018 *Jitesh Maheshwari v National Stock Exchange of India Limited* (7 January 2019).

24 Criminal Appeal Nos. 76-77 of 2019 *CCI v JCB India* (15 January 2019).

25 W. P. (CRL) 183 of 2016 *JCB India v CCI* (2 June 2016).

26 LPA 160 of 2018 *Cadila Healthcare Limited v CCI (12 September 2018).*

27 Civil Appeal No. 2480 of 2014 *Excel Crop Care v CCI* (8 May 2017).

28 LPA 637 of 2018 *Mayco Monsanto Biotech (India) Private Limited v CCI* (18 December 2018).

29 LPA 607 of 2016 *CCI v Oriental Rubber Industries* (24 May 2018).

30 The Competition Commission of India (General) Amendment Regulations, 2018.

advocate does not sit in front of the person, and the advocate is not at hearing distance and does not interact, consult, confer or in any way communicate with the person concerned during his examination on oath. In addition, no "*misconduct*" by the advocate is to be permitted and an advocate guilty of misconduct may be debarred from appearing in proceedings before the DG and the CCI. The Madras High Court has recently granted a stay on the new provisions in a case brought by the *Tamil Nadu Advocates Association*.[31]

Madras High Court Stays CCI Audio Recordings Order

The Madras High Court ordered a four-week stay[32] on an order of the CCI requiring the *Board of Control for Cricket in India* (*BCCI*) to provide audio recordings of meetings held by it for the purposes of an investigation. The High Court *prima facie* considered that this requirement made no sense or showed any link with the object of concluding the investigation when the relevant minutes of the meetings had already been placed before the CCI.

Merger Control

Walmart/Flipkart Clearance

The CCI cleared *Walmart's* acquisition of a majority stake in *Flipkart*.[33] The CCI found that the relevant B2B market in which the parties were active was very competitive, given the presence of large players and the very low market shares of the parties. The CCI declined to consider a number of criticisms of Flipkart's business practices, finding that these were not specific to the notified transaction.

Siemens/Alstom

The CCI also cleared *Siemens*' acquisition of *Alstom*.[34] The parties overlapped in the mobility business (products and services for rail and road transport) but there was no likelihood of an AAEC given the low combined market shares, limited bidding overlaps and the presence of other credible and big competitors.

Remedies

Remedies were required in three cases. In *Bayer/Monsanto*,[35] the CCI cleared the major agrochemicals merger on the basis of divestment of certain businesses and of behavioural commitments, including requirements to license on fair, reasonable and non-discriminatory (*FRAND*) terms and to give Government of India institutions free access to Indian agro-climatic data. In *Linde/Praxair*,[36] a merger between the two industrial gas giants was cleared on the basis of commitments to divest certain plants and filling stations as well as Linde's shareholding in a joint venture. In *Northern TK Ventures/Fortis Hospitals*,[37] a member of the acquirer's group had an interest in a joint venture operating a competing hospital. Concerns that the JV might be used as a platform for coordination by competing companies were addressed by a "*rule of information control*", ensuring that the JV and the combined entity would operate as separate, independent and competitive businesses; this included the removal of interlocking directorates.

The Insolvency and Bankruptcy Code

The CCI reviewed a number of transactions under the Insolvency and Bankruptcy Code.[38] Most of these involved the steel and cement industries. In view of the tight timelines prescribed by the Code, all of these proposed combinations, none of which raised AAEC concerns, were speedily reviewed and cleared.

Gun Jumping

The CCI has continued its hard-line stance in relation to failures to notify notifiable transactions and implementation before clearance ("gun jumping"). The CCI penalised a number of telecommunications companies for failing to notify acquisitions of spectrum;[39] such spectrum constituted assets and the exemption for the acquisition of assets made solely as an investment or in the ordinary course of business did not apply. In the *Telenor* case,[40] the CCI found that Telenor had failed to notify a transaction involving a move from joint to sole control; it had incorrectly argued that it was in control of the target throughout.

31 W.P.No.34313 of 2018 and W.M.P.Nos.39886 & 39888 of 2018 (4 January 2019).

32 WP. No. 4648 of 2019 and WMP. No. 5264 of 2019 (19 February 2019).

33 C-2018/05/571 *Walmart International Holdings* (8 August 2018).

34 C-2018/07/588 *Siemens/Alstom* (29 October 2018).

35 C-2017/08/523 *Bayer/Monsanto* (14 June 2018).

36 C-2018/01/545 *Linde/Praxair* (6 September 2018).

37 C-2018/09/601 *Northern TK Venture* (29 October 2018).

38 See, for examples, C-2018/02/557 *Rajputana Properties* (7 March 2018) and C-2018/08/593 *ArcelorMittal/Essar* (18 September 2018).

39 C-2017/05/509 *Bharti Airtel*, C-2017/05/510 *Bharti Airtel & Bharti Hexagon*, C-2017/06/516 *Reliance Jio Infocomm* (all 11 May 2018).

40 *Proceedings against Section 43A of the Competition Act, 2002, against Telenor* (3 July 2018).

In *LT Foods*,[41] it made it clear that any coordination between parties before approval – such as handing over inventories, making introductions to suppliers and restrictions on promotional selling – were prohibited. The payment of any advance consideration, even if made in escrow or refundable, could distort competition and was also prohibited.[42] In *Adani Transmission*,[43] the CCI found that a requirement on part of the seller to make a loan to the buyer before CCI approval, which could be offset against the purchase price, constituted gun jumping. The CCI also found that contractual arrangements – including on price - which disincentivise the target from competing with the acquirer will also amount to gun jumping.[44]

Amendments to the Combination Regulations

The CCI made a number of amendments to the Combination Regulations,[45] in particular allowing parties to "pull and refile" a merger notification and enabling the parties to offer modifications (remedies) in response to a show cause notice, before the start of a detailed Phase II investigation.

Advocacy and Outreach Measures

Sectoral Focus – Pharmaceuticals, Taxis and Automotive Industry.

The CCI continued to keep an eye on the pharmaceutical sector where it looked into high prices for in-patient consumables and issued a policy note calling for loosening up of the market.[46]

The CCI has announced a study on the app-based taxi and auto booking sector to understand the general working of the industry and surge pricing, and to advise on the need for any sector specific regulations.

In March 2019, the CCI held a workshop on competition issues in the automotive industry. It recently issued a questionnaire on the working on the automotive industry in order to gather information on practices and market conditions for a BRICS Working Group.

Advocacy on a War Footing

The CCI organized several major and well-attended roadshows across the country to create awareness of competition law and its impact on business. This was a major push from an already active advocate.

Looking Forward:

The forthcoming report of the Competition Law Review Committee is likely to contain a number of major recommendations that, if implemented, will result in major changes to the Indian competition law regime. Since this is an election year in India, it is too early to say if, and when, there will be changes.

More generally, there are a significant number of cases before the NCLAT and the Supreme Court, as well as challenges before the High Courts, that may have a significant impact on the development of Indian competition. These bodies could provide important clarifications on the substantive provisions of the Competition Act as well as procedural aspects.

41 C-2016/04/387 *LT Foods* (11 May 2018).

42 C-2015/02/246 *UltraTech Cement* (12 March 2018) and *Chhatwal Group Trust* (8 August 2018).

43 C-2018/01/547 *Adani Transmission* (30 July 2018).

44 C-2017/10/531 *Bharti Airtel* (27 August 2018).

45 Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (as amended).

46 *Policy Note: Making Markets Work for Affordable Healthcare* (October 2018).

Ten Years of the Cartel Leniency Regime in India

By **Harman Singh Sandhu**, **Gauri Mehta** *and* **Raveena Sethia**

Introduction

Cartel leniency regimes in various jurisdictions have been designed to aid the detection of cartels striking a balance between the needs of an effective cartel regime and the rights of the various parties involved.

This article aims to outline the main elements of the leniency regime in India taking account of the decisional practice of the Competition Commission of India (*CCI*). The article also highlights the shortcomings of the current regime and makes recommendations in relation to some of them.

Leniency

Cartels formed by competitors indulging in anti-competitive behaviour such as bid rigging, price fixing, limiting supply or production, or market sharing are unarguably the worst forms of anti-competitive agreements. Cartels result in higher prices, poorer quality, and reduced choice for customers. One of the most important tasks of competition authorities is to detect cartels. However, given the secretive manner in which cartels are implemented, there is hardly ever any smoking gun evidence of cartel activity, making it extremely difficult to detect.

In order to make the detection of cartels easier, many jurisdictions across the globe, including mature jurisdictions such as the United States and the European Union, have adopted leniency regimes to allow cartel participants to disclose vital information about a cartel in exchange for immunity or reduced penalties. The availability of leniency is considered one of the best ways to combat cartels, easing the burden of detection on the competition authority by incentivizing cartel-members to come forward and provide clinching information, which may otherwise have been unavailable to it.[1]

The Leniency Regime in India

Background

Section 46 of the Indian Competition Act, 2002 (*Competition Act*) read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (as amended) (*Lesser Penalty Regulations*) provide for the imposition of "lesser penalties" on enterprises and individuals who provide information which helps to establish a cartel.. The CCI can reduce the penalty to be imposed on any applicant member of a cartel, if the CCI is satisfied that it has made a full, true, and vital disclosure in respect of the cartel activities.

2019 marks 10 years since the Lesser Penalty Regulations entered into force. Until February 2019, there have been nine reported cases involving leniency applications. The first reported order under the leniency regime was issued by the CCI in January 2017, in a case involving bid-rigging for tenders relating to the supply of fans to the Indian Railways.[2] In 2018, the CCI issued seven orders stemming from leniency applications,[3] and in 2019 it has issued one order so far.[4] The industries examined in these orders cover railway, batteries and flashlights, television broadcasting, and waste management.

In 2017, the CCI introduced important amendments to the

1 Competition Commission of India (*CCI*), '*Advocacy Series 8: Leniency Programme*', 6-8.

2 Suo Moto Case No. 3 of 2014 *In Re: Cartelisation in respect of tenders floated by Indian Railways for supply of Brushless DC Fans* (18 January 2017).

3 Suo Moto Case No. 2 of 2016 *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India* (19 April 2018); Suo Moto Case No. 4 of 2016 *In re: Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing* (31 May 2018); Suo Moto Case No. 3 of 2016 *In Re: Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing* (31 May 2018); Suo Moto Case No. 2 of 2013 *In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters* (11 July 2018); Case No. 50 of 2015 *In Re: Nagrik Chetna Manch and Others* (1 May 2018); Suo Moto Case No. 2 of 2017 *In re: Anticompetitive conduct in the Dry-Cell Batteries Market in India* (30 August 2018); and Suo Moto Case No. 1 of 2017 *In Re: Alleged Cartelisation in Flashlights Market in India* (6 November 2018).

4 Suo Moto Case No. 3 of 2017 *In Re: Anticompetitive conduct in the dry-cell batteries Market in India* (15 January 2019).

Lesser Penalty Regulations. These amendments focused on codifying and clarifying the provisions with respect to treatment of individuals, confidentiality, and the number of leniency applications that may be entertained in any given case.

Key Elements of the Indian Leniency Regime

What leniency means: The leniency regime in India provides for a sliding scale of reduction in penalties. The amount of reduction is capped, depending upon the applicant's position in the queue, based on the time the leniency application is filed.

- ***First Applicant***: The first party to make a vital disclosure to the CCI may benefit from a reduction in penalty of *up to or equal to 100%*, if the disclosure enables the CCI either: (a) to form a *prima facie* opinion regarding the existence of a cartel, where the CCI did not have sufficient evidence at the time of the application to form such an opinion; or (b) to establish the contravention of the Competition Act by providing evidence which the Director General (*DG*) – the investigative arm of the CCI - or the CCI did not have in its possession in a matter under investigation.
- ***Second Applicant***: The second party to make a disclosure to the CCI may benefit from a reduction in penalty *up to or equal to 50%*, upon making a disclosure of evidence that provides significant added value to the evidence already in possession of the CCI or the DG.
- ***Third and Subsequent Applicants***: Third and subsequent applicants may get a reduction in penalty of *up to or equal to 30%*, upon making a disclosure of evidence that provides significant added value to the evidence already in possession of the CCI or the DG.

It is important to note that if an applicant has been granted immunity under the leniency provisions, such immunity will not extend to any compensation claims by third parties.

Given the limited number of published orders, it is unclear whether the second and subsequent applicants can move up in the priority order, if an applicant is disqualified due to a breach of any essential condition.

Conditions to be fulfilled to be eligible for leniency: Broadly, in order to secure a lesser penalty, the applicant is required to make full, true and vital disclosure and also must continue to co-operate with the CCI throughout the period of investigation and until the completion of the proceedings before the CCI.

A party seeking lesser penalty must fulfill the essential conditions set out under the Lesser Penalty Regulations in order to obtain a reduction in penalty. The conditions require the applicant to: cease further participation in the cartel, unless otherwise directed by the CCI; provide vital evidence to the CCI; extend genuine, full, continuous and expeditious cooperation with the CCI throughout its investigation and other proceedings; and not conceal, destroy, manipulate or remove any relevant documents which may establish the existence of a cartel.

Where the applicant fails to comply with the above conditions, it will not benefit from leniency. However, if this happens the CCI shall be free to use the information and the evidence submitted by the applicant in the proceedings before it.

When to file: A leniency application can be filed at any time before the DG submits its investigation report to the CCI. The application may be filed at the very beginning, leading to the initiation of investigation by the CCI, or after the investigation has started. It is not uncommon for applications to be made after the applicant has receive a notice requiring production of documents or dawn raids have been conducted.

Marker Position: Prior to submitting a complete application seeking the benefit of the Lesser Penalty Regulations, the applicant may place a marker to preserve its priority status either orally or by writing a simple letter to the CCI. Following the receipt of a marker by the CCI, the CCI is to consider it and communicate its acceptance of the marker along with the priority status of the applicant. The Lesser Penalty Regulations provide that the leniency applicant has a period of 15 days from the acceptance of the marker to submit the leniency application in the requisite format.

Discretionary powers of the CCI: Under the Indian Leniency Regime, the CCI has a very wide discretionary power while deciding the amount of reduction in penalty. As per the Lesser Penalty Regulations, the CCI is to exercise this discretion having due regard to:

- the stage at which the applicant comes forward with its disclosure;
- the evidence already in possession of the CCI;
- the quality of the information provided by the applicant; and
- the entire facts and circumstances of the case.

The CCI has in practice granted a 100% reduction in penalty only where the first-in-line application has been made to the CCI at the very beginning, that is, where it has disclosed the existence of a cartel, enabling an investigation to be launched. Even if the first application is received after the initiation of an investigation, the applicant is under the Lesser Penalty Regulations eligible for a 100% reduction, subject to the fulfillment of the necessary conditions. However, in its decisional practice, the CCI has not granted full reduction to first-in-line applicants who file for leniency after an investigation has been initiated, since the DG has already been in possession of relevant evidence at that stage. In one such case, the CCI granted only a 75% reduction in penalty to the first applicant.[5]

In relation to second and subsequent applicants who apply after the investigation has been launched, the CCI will consider the information already available with it or the DG and any added value. In exercising its discretionary powers, the CCI has taken divergent views in different cases. By way of illustration, in a case concerning a batteries cartel[6] the CCI granted a 30% reduction in penalty to the second applicant who had merely admitted to participation in the cartel and had co-operated in the investigation process, without providing any added value over and above the evidence already in possession of the CCI. In contrast, in a case involving solid waste management services,[7] the CCI granted only a 25% reduction to the second applicant where, in addition to admitting to the cartel and cooperating in the investigation, the applicant also added minimal value by providing additional evidence, and no reduction at all to the third applicant, despite acknowledging that the applicant extended full cooperation during the investigation.

While exercising its discretion in relation to the addition of

5 Suo Moto Case No. 3 of 2014 *Brushless DC Fans* (see n. 2, above).

6 Suo Moto Case No. 2 of 2016 *Zinc Carbon Dry Cell Batteries* (n. 3, above).

7 Case No. 50 of 2015 *Nagrik Chetna Manch* (n. 3, above).

value, the CCI has also considered that submissions on the *modus operandi* of the cartel and the role of individuals involved in the cartel, as well as documentary and physical evidence such as emails, bank statements, affidavits, letters, pen-drives and digital keys, have added value to the investigation process.[8] The CCI has also considered the role played by the applicant while denying the grant of lesser penalty to the ringleader and beneficiary of the cartel.[9]

Confidentiality and the identity of the applicant: The Lesser Penalty Regulations permit access to the non-confidential version of the information, documents and evidence furnished as part of the leniency application, but only after the investigation is complete and the CCI has provided a copy of the DG's report to the opposite parties. The CCI is also required to keep confidential the identity of the applicant and the information/evidence provided by it. However, there may be disclosure where it is required by law, the applicant agrees or where the applicant has made a public disclosure. In addition, following the 2017 amendment of the Lesser Penalty Regulations, the DG may, where the applicant has not agreed to disclosure, disclose information, documents and evidence to any party for the purposes of the investigation, provided that reasons are recorded in writing and the CCI has given prior approval. In its orders, the CCI has taken the view that confidentiality granted under the Lesser Penalty Regulations does not cover statements of the employees of the opposite parties, which constitute a separate set of evidence.[10]

Shortcomings: Suggestions for a More Effective Regime

There are certain shortcomings in the procedure and practice of the Indian leniency regime, which, if addressed, may result in a more effective, predictable and transparent regime. Many of these shortcomings arise from the level of discretion exercised by the CCI.

Lack of Certainty in Reductions

The leniency regime provides for reductions *up to* 100%, 50% and 30%, instead of providing a fixed amount of reduction conditional upon the satisfaction of conditions. The CCI has not yet granted 100% reduction to an applicant who approached it after the initiation of proceedings, despite there being a specific provision in the statute which allows a full reduction in penalty even at that stage. Different levels of reduction have been granted to companies in similarly placed situations in respect of evidence adduced and added value. Such uncertainty may discourage the making of applications, reducing the effectiveness of the regime.

8 Case No. 50 of 2015 *Nagrik Chetna Manch*; Suo Moto Case No. 3 *of 2016 Solid Waste Processing* (both at n. 3, above.

9 Suo Moto Case No. 3 *of 2016 Solid Waste Processing* (n. 3, above).

10 Case No. 50 of 2015 *Nagrik Chetna Manch* (n. 3, above).

To remedy this situation, the legislation could provide for a guaranteed reduction of a fixed amount subject to all conditions being met by the applicant. A similar approach of full leniency/immunity is followed in jurisdictions like the European Union and the US.

Insufficient Information in CCI Orders and Delayed Access to Case Files

While the CCI provides a confidential version of the *prima facie* order to opposite parties in an investigation, in many cases the details contained in this order are insufficient. The alleged cartelist should be informed of the nature of the contravention, scope of the investigation (including duration) and general nature of the evidence relied upon by the CCI in coming to a *prima facie* opinion when notice is first served to provide information. Further, while the CCI has acknowledged the importance of providing access by opposite parties to case files, the timing of sharing this information (i.e., after the investigation report is submitted) makes this effectively redundant as the opposite parties are unable properly to avail of their defence rights.

To avoid unfairness in the process and litigation arising out of potential natural justice violations, the CCI should aim to strike a balance between the rights of the applicants, the opposite parties and the efficacy of the enforcement regime. Providing access to the case files earlier should be considered by the CCI on a case-to-case basis. However, this should be done with the consent of and in consultation with the applicant, similar to the process followed in the European Union, the United Kingdom, and the US.

Intimation of Market Position

While the Leniency Regulations require the CCI to convey the marker position to the applicant at the very beginning, in practice the CCI has recently stopped providing this information to the applicants. This leads to a situation in which the applicant has no certainty as to its marker position until the CCI arrives at its final decision. This uncertainty, combined with the obligation of continuous cooperation with the investigation, puts the applicant in a disadvantageous position. This is a deterrent and companies and individuals may be reluctant to apply for leniency. To address this shortcoming, the CCI should follow the provisions of the Lesser Penalty Regulations and inform the applicant of their marker position up front. In addition to this, there could also be a provision enabling the applicant to withdraw its application in the event that it feels that its position in the queue is not favourable enough to obtain an appropriate reduction in penalty.

Lack of Consultation Process

It is often extremely difficult for companies and individuals to ascertain whether the information or evidence available with them will be sufficient for a leniency application and obtain a significant reduction in fines. This puts potential applicants in the difficult position of deciding whether to file for leniency or instead to prepare a defensive strategy. To assist potential applicants in arriving at a decision which would also help uncover more cartels, the CCI should consider adopting a consultation process for potential leniency applicants on a hypothetical no-names basis. A similar option is available under the EU regime where potential applicants can test the waters to ascertain whether the information available with them will be sufficient to obtain a reduction in fines.

No Provision for Oral Applications

Presently, the Indian regime does not allow oral leniency applications. The submission of a written application exposes the applicant to a risk of being forced to produce self-incriminating evidence under discovery procedures for civil cases (as is often the case in the US). To avoid this risk and ensure that applicants are not deterred, the Indian regime should be revised to allow for oral applications. The European Commission allows oral applications to avoid

the risk that the applications may be subject to discovery procedures; oral statements are recorded and transcribed in European Commission premises and are given the status of internal Commission documents. A similar provision in India, with necessary safeguards, would perhaps lead to a higher number of leniency applications.

Leniency Plus

An additional provision may be added to the Lesser Penalty Regulations, providing for an additional reduction in penalty to second and subsequent applicants in case they provide information about a second cartel, enabling the Commission to form a *prima facie* opinion regarding the existence of a second cartel. In addition, such an applicant may be guaranteed a reduction in penalty in relation to the second cartel in which it is a participant. It could also be provided that non-reporting of a second cartel may be considered as an aggravating factor when computing the penalty. Such provisions would be in line with the Amnesty Plus and Penalty Plus provisions of the US regime which have proven to be quite successful.

Information Exchanges under the (Indian) Competition Act, 2002

By **Manika Brar** *and* **Akkriti Bhaat**

Introduction

Information exchanges that take place between competing enterprises may fall under three different categories: (i) as a part of a broader anti-competitive horizontal agreement (including a cartel) to, for example, fix prices or share/allocate markets/customers; (ii) in the context of a larger efficiency enhancing collaboration, such as joint ventures or research and development agreements; or (iii) as a stand-alone practice, where the competitors exchange certain information, including information that may be commercially sensitive.

Where the competitors exchange information as a part of an overall anti-competitive agreement, such as a cartel, there is a rebuttable presumption under the Competition Act, 2002 (*Competition Act*) that the overall agreement and associated exchange causes an appreciable adverse effect on competition *(AAEC),* and is therefore in violation of the competition rules. There is however no presumption of an AAEC where it is shown that the exchange of information is in the context of an efficiency enhancing joint venture.

This article primarily focuses on the third type of information exchanges, i.e., stand-alone information exchange. This is a "pure" or "stand-alone" information exchange, where the primary function is in the exchange itself.

Many competition authorities around the world consider that a stand-alone agreement between competitors to exchange commercially sensitive/confidential information, which has as its object or effect to distort competition, can be a violation of the competition rules. This is the position taken in the European Union, for example. The Competition Commission of India (CCI) seems to have taken a different position on this issue in the recent *Flashlights* Case,[1] where it confirmed that mere information exchange will not constitute a violation of the Competition Act. However, if there is other circumstantial evidence indicating the existence of a cartel, information exchange may be considered as a "plus factor" (that is, falling under the first category of information exchange). Therefore, under the Competition Act, information exchange is not considered as a stand-alone violation.

Though this case provides welcome guidance on the approach the CCI intends to take in relation to information exchanges, it is questionable whether this can be taken as a green signal to all kinds of information exchanges in any given market scenario. In this article we seek to analyse the *Flashlights Case* in the framework of the Competition Act and to understand the key takeaways from this case and other decisions of the CCI which relate to information exchanges. We also assess if there continue to remain risks associated with information exchanges between competing enterprises.

The CCI Decisions

The Flashlights Case

The *Flashlights Case* commenced on the basis of a lesser penalty application filed in September 2016 by Eveready Industries India Ltd. (*Eveready*), followed shortly afterwards by another lesser penalty application by Panasonic Energy India Co. Ltd. *(Panasonic*). The leniency applicants produced evidence of exchanges of information on sales and production of flashlights through the Association of Indian Dry Cell Manufacturers (the *Association*) and other information exchanges between Eveready, Panasonic and Indo National Ltd. (*Indo National*).

After investigating the matter, the Director General (*DG*) found that the Association had regularly collected, compiled and shared data with its members on the sales and production of flashlights over a number of years. According to the DG, this enabled Eveready, Panasonic and Indo National to monitor each other's market shares in India, facilitating collusion in the flashlights market. The

1 *Suo Motu* Case No. 1 of 2017 *In Re: Alleged Cartelisation in Flashlights Market in India* (6 November 2018) (*Flashlights Case*). Shardul Amarchand Mangaldas acted for Indo National Ltd. in this case.

DG also found that the opposite parties had agreed to increase prices, and had planned to announce this in an Association press release. Even though the press release was not implemented, in order to "avoid attention" of the CCI, the DG found that there was an agreement for the concerted price increase of flashlights. Finally, the DG found that there were direct exchanges of commercially sensitive information between some of the opposite parties in relation to pricing, margins, promotional schemes, launching new products, etc. The DG concluded that Eveready, Panasonic, Indo National and the Association had indulged in anti-competitive behaviour in breach of Section 3(3)(a) read with Section 3(1) of the Competition Act which prohibits agreements between competitors which directly or indirectly determine purchase or sale prices.

The CCI stated that all but one of the opposite parties had admitted to the practice of monthly exchanges of sales and production data through the Association. It considered arguments that these exchanges were made in order to monitor the zinc carbon dry cell batteries market (in relation to which Eveready, Panasonic and Indo National had all admitted to breach and were found to have violated the Competition Act), rather than the flashlights market. The CCI rejected this argument and held that the information exchange enabled monitoring of the flashlights market and that it could have facilitated collusion. However, it held that the practice of collecting data indicated only the possibility of collusion and could at best be considered as a "plus factor". The CCI found that, in the absence of other corroborating evidence, the mere fact that certain information had been exchanged was insufficient to prove that parties were acting in a coordinated manner.

In relation to the proposed issue of the draft press release on increasing prices, the CCI found that, although it was indicative of an agreement between the opposite parties to increase prices of flashlights, the evidence showed that such an agreement was not implemented. Further, in order to verify this, the CCI examined the direct exchanges of information between some of the opposite parties. Although it found that this raised a possibility of collusion, on the facts the CCI concluded that these exchanges did not conclusively determine that the opposite parties: (a) agreed on actual terms of the price changes of flashlights; and/or (b) ever acted on any such agreement. The CCI held that, in the absence of sufficient cogent evidence, it could not be concluded that Eveready, Panasonic, Indo National and the Association had formed a cartel and acted in a concerted manner directly or indirectly to determine the price of flashlights, in violation of Section 3(3)(a) of the Competition Act. It reached this conclusion in spite of the leniency applications filed by Eveready and Panasonic.

Precedents – The Sugar Mills and MIA Cases

The CCI reasoning and analysis in the earlier *Sugar Mills Case*[2] and the *MIA Case*[3] shows its consistent thinking that, where the agreement in question has not been implemented or where there is only a stand-alone information exchange, there cannot be a contravention of the provisions of the Competition Act.

The *Sugar Mills Case* was one of the very early decisions of the CCI. In this case, it was alleged that certain sugar mill manufacturers met and discussed the minimum floor price of sugar. The CCI carried out an extensive analysis to examine whether: (a) the minimum floor price was implemented; and (b) the discussion on minimum floor price resulted in any AAEC in the market. The CCI finally held that, in the absence of evidence of implementation of a minimum floor price and evidence of any AAEC, the discussion on price in itself was insufficient to violate the provisions of the Competition Act.

The CCI later dealt with the issue of information exchange in the *MIA Case*, where it was alleged that the cinema multiplexes used the platform of their trade association to exchange information that assisted them in aligning their behaviour towards film producers/distributors. As there was insufficient evidence demonstrating coordinated behaviour among the multiplexes, the CCI found no contravention of the Competition Act. It, accordingly, held that competitors meeting and exchanging information could provide circumstantial evidence to prove the existence of a conspiracy only when such meetings are followed by parallel conduct of the conspirators (as where competing enterprises increased prices at the same time, or offered the same discounts and/or terms and conditions to their customers).

2 *Suo Motu* Case No. 1 of 2010 *In Re: Sugar Mills* (30 November 2011) (*Sugar Mills Case).*

3 Case No. 37 of 2011 *Film & Television Producers Guild of India v. Multiplex Association of India (MIA), Mumbai and Others* (3 January 2013) (*MIA Case*).

Takeaways

The guidance that can be drawn from the decisions above is that information exchange alone cannot be a violation of the provisions of the Competition Act, and it can only be used as circumstantial evidence or a "plus factor" showing collusion by competing enterprises. Further, even in cases where there is an agreement to fix prices, etc., but such an agreement is not implemented, there cannot be a violation of the Competition Act.

Information Exchanges – Continuing Areas of Risk

While the Competition Act does not have specific rules/provisions dealing with information exchange and the cases so far do not consider stand-alone information exchanges to be a violation of the Competition Act, there is no denying that information exchanges between competitors can result in increased transparency in the market which can present risks under the competition rules.[4]

There are some critical factors which make it more likely that a competition authority will view apparently stand-alone information exchanges with suspicion, such as: (i) the structure of the market; (ii) the products involved; (iii) the nature of the information exchanged; and (iv) the modalities through which such exchanges take place. These are dealt with in the paragraphs below.

Structure of the Market

The degree of transparency in markets which are concentrated (oligopolistic markets) is usually high, making them more susceptible to competition law violations.

An oligopolistic market structure falls between the two extreme market types - monopoly and perfect competition. In a monopoly market structure the prices and outputs are set by a monopolist independently as there is absence of any competitive pressure from rivals. On the other hand, in a competitive market place, the firms are price-takers and are unable to influence prices given the large number of competitors in the market. In case of an oligopoly, price and output decisions determined by an oligopolist affect the decisions of its rivals. Thus, the actions of market participants in an oligopolistic market are mutually interdependent and enterprises are reasonably able to predict the outcome of their decisions on the market as well as reactions from their competitors[5]. Accordingly, estimations of the market and rival actions are taken into consideration by an enterprise in an oligopolistic market before any decisions are taken in the marketplace.

Economic literature recognizes this interdependence among players in an oligopoly - decisions taken by firms are based on decisions taken by their rivals[6]. Therefore, in an oligopolistic market, a similar trend in pricing is a natural and inevitable outcome.

While the similarity of pricing or behaviour in an oligopolistic market could be a natural consequence of the market being concentrated, one has to be extremely cautious with any interactions and exchange of information with rivals in a concentrated market. This is because, where similar conduct is observed in the market, the exchange of information between enterprises can be viewed as "circumstantial evidence" or a "plus factor" which in fact facilitated the coordinated behaviour and can go to show collusion.

Nature of the Products Involved

It is likely that the more homogeneous the products, the easier it is to monitor and predict the operations of the competitors, because there is no need to take into evaluation competitive elements like quality differences between products of different enterprises. Therefore, exchange of information in homogeneous product markets is more likely to facilitate collusion. The European Commission has also drawn a distinction between exchanges of information in homogeneous product markets and exchanges of information in differentiated product markets[7]. It is easier for companies to coordinate on the price for a single, homogeneous product than for many differentiated products. In differentiated product markets, access to detailed sensitive information about competitors may not be useful to predict future behaviour of competitors and therefore may not lead to an increase of coordination between them. The difficulties in comparing

4 European Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (OJ C11, 14.1.2011, at p. 20).

5 Sagi Guy *The Oligopolistic Pricing Problem – A Suggested Price Freeze Remedy*, (10 June 2007), at p.3.

6 *The Oligopolistic Pricing Problem – A Suggested Price Freeze Remedy* (see n. 5, above).

7 Horizontal Guidelines, at p.23 (para. 80) (see n. 4, above).

differentiated products make the information difficult to interpret and to individualize.[8]

Therefore, where coordinated behaviour is observed in respect of homogeneous products and there is evidence of information exchange, information exchange could be considered as a "plus factor" to arrive at a finding of collusion.

Nature of Information Exchanged

The more recent and future-looking the information being exchanged, the more likely it is to raise a concern under the competition rules. Exchanges of information may adversely influence competition among undertakings in two basic ways. First, information exchanged may be forward-looking, revealing future behaviour in the market, e.g., pricing strategies, and thus making it easier to agree on a common, cooperative strategy, at the expense of trading partners. Second, the exchange may concern information on actual behaviour, such as prices offered and quantities sold, making it easier to monitor actions of competitors and discipline those who deviate from a collusive strategy[9]. Generally, historical information is not as harmful as it may not affect future conduct and strategy of the competing enterprises, and it may not be helpful in policing a cartel.

Therefore, as a general rule, the exchange of (i) confidential, (ii) individual and (iii) future or current data is risky from the perspective of competition law, as opposed to the exchange of (i) public, (ii) aggregated or statistical and (iii) historical data.

Modalities of Information Exchange

There are various ways in which information exchanges take place, such as in a clandestine manner, during the meeting of trade associations or through so-called 'hub-and-spoke' arrangements, for example indirect exchanges between retailers through their supplier.

Trade associations provide a valuable platform to discuss industry wide issues, such as the impact of taxes, the impact of proposed legislation and enhancing quality standards. While the competition authorities recognize that trade association activities can be procompetitive or at least competitively neutral, they remain vigilant as the sharing of competitively sensitive information through the trade association platform can facilitate agreements among competitors on prices, output, and/or other terms.[10]

Direct competitor meetings are most suspect in the eyes

8 OECD *Information Exchanges Between Competitors under Competitors under Competition Law 2010 (DAF/COMP(2010)37)*, (11 July 2011), at p. 47.

9 *OECD Information Exchanges,* at p. 245 (see n. 8, above).

10 *OECD Information Exchanges*, p. 305 (see note 8, above).

of the competition authorities and are likely to be viewed with caution.

Competition agencies around the world have investigated cases of vertical information flows (so-called "hub-and-spoke" arrangements). Vertical exchanges of information between manufacturers and retailers are normally not objectionable if the information transferred concerns only the retail sales of the manufacturer in question. However, they may amount to a competition infringement if they allow for the identification of sales of other competitors, and if such information allows interference with the retail activity of the dealers or of the parallel importers. In these cases, while the flow of information is vertical in nature, as it involves firms at different levels of trade, the effect of the exchange can be horizontal if it affects competition between retailers or between suppliers.[11]

Conclusion

While the CCI has held that stand-alone information exchanges will not be considered as a violation of the provisions of the Competition Act dealing with anti-competitive horizontal agreements; information exchanges between competing enterprises remain a high risk area, especially in a case where: (i) the market is concentrated; (ii) the parties are competing in homogenous product segments; (iii) the nature of information being exchanged is current or future looking; and/or (iv) the competitors have direct contact with each other, whether through personal meetings/calls or through the medium of an association, or even indirect contacts through persons at different levels of the production/distribution chain.

Information exchanges between competing enterprises could bring one under the scrutiny of the CCI with a high probability that it will direct an investigation by the DG. Where an enterprise is found to have entered into an anti-competitive agreement in violation of Section 3 of the Competition Act, the CCI can pass orders as specified under Section 27 of the Competition Act, which includes orders on cease and desist and imposition of penalty. The penalties can be up to 10% of the average turnover for the three preceding financial years. Alternatively, in case of a cartel, the CCI can impose a penalty which is the higher of (i) three times the profit for each year of continuance of the cartel, and (ii) up to 10% of the turnover for the each year of the continuance of the cartel. Further, individual, directors and managers can also be investigated and penalized for cartel infringements.

11 *OECD Information Exchanges*, p. 31 (see note 8, above).

Resale Price Maintenance: The Indian Approach

By **John Handoll** and **Vivek Agarwal**

Introduction

Resale price maintenance (*RPM*) arises "where an upstream firm – usually the manufacturer, producer or importer of a good or service – limits or restricts the ability of a downstream firm - usually a distributor or retailer – to set the prices at which it on-sells the product of the upstream firm".[1]

In this paper, we outline the position taken in India with regard to RPM. We first consider the phenomenon of RPM and its treatment under competition law. Like the US, and in contrast to the EU, a "rule of reason" approach applies in India. We then set out the framework under the Competition Act, 2002 (*Competition Act*) for addressing RPM and discuss the approach taken by the Competition Commission of India (*CCI*).

Approaches to Resale Price Maintenance[2]

What is Resale Price Maintenance?

RPM can be in the form of "maximum RPM", setting the maximum resale price, "fixed RPM", specifying the resale price, and "minimum RPM", setting the price below which the product may not be resold. It also covers measures which *indirectly* fix prices, such as fixing distribution margins or maximum levels of discount, or threatening to terminate a contract where a price is not adhered to.

The term more loosely covers mechanisms for maintaining a prescribed level of pricing, including imposing penalties for failure to price at required levels, where such failure is identified by other resellers or by means of "mystery shopping", or printing the recommended price on the product packaging.

RPM usually involves an element of compulsion. Merely *recommending* that a product be resold at a particular price does not generally involve RPM, though it may do where in fact it is taken by resellers as the required selling price.

The Two Approaches to Resale Price Maintenance

The effects of RPM on competition are addressed in a large number of jurisdictions. They fall into two main groups.

First, many jurisdictions treat RPM as a *per se* or "object" breach; of its nature, RPM is treated as a hard-core restriction of competition not requiring any evidence of anti-competitive effects, though it may be open to the parties to argue that it should be permitted on efficiency grounds. This is the approach taken in the European Union, where RPM continues to be treated as an object breach of Article 101(1) TFEU.[3] Furthermore, RPM is a hard-core restriction which removes the benefit of the 2010 Block Exemption Regulation for vertical agreements.[4] Up to the 2003 *Yamaha* decision,[5] there were a relatively small number of cases where RPM was condemned by the European Commission. A long absence of enforcement activity by the European Commission in relation to RPM ended in July 2018 when it fined four consumer electronics manufacturers for imposing fixed or minimum resale prices on their online retailers.[6]

In other jurisdictions, RPM is subject to a "rule of reason" approach, where the pro-competitive effects of RPM will be balanced with any anti-competitive effects. In the United States, for example, RPM has at *federal* level[7] been subject to the rule of reason since 2007 when the US Supreme Court

1 OECD *Roundtable on Resale Price Maintenance* (10 September 2009), at p. 9.

2 See, generally, OECD *Roundtable on Resale Price Maintenance* (n. 1, above). For RPM in relation to on-line sales, see OECD *Roundtable on Vertical Restraints for On-Line Sales* (12 September 2013) and a Background Note on *Implications of E-Commerce for Competition Policy* (21 February 2019).

3 See, for example, Case 243/83 *Binon v AMP* [1985] ECR 284 § 45.

4 Commission Regulation (EU) No 330/2010 of 2 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L102, 23.4.2010, p. 1.

5 Case COMP/37.975 *PO/Yamaha* (16 July 2003).

6 Cases AT.40465 *Asus* §§ 105-107, AT. 40469 *Denon & Marantz* §§ 90-92, AT.40181 *Philips* §§ 59-61 and AT.40182 *Pioneer* §§ 150-152 (all 24 July 2018).

7 Some individual US antitrust laws continue to take a *per se* approach, so the actual use of RPM in the US appears to be rare.

in the *Leegin* case[8] overruled the rule established in the *Dr. Miles* case[9] that an agreement between a manufacturer and a distributor setting the minimum resale price for the former's product was *per se* illegal. Vertical price restraints were to be judged by the rule of reason, under which the courts would consider the pro-competitive and anti-competitive effects of the restraint.

In India, RPM is covered by the rule of reason; restrictions in vertical agreements, including RPM, will be prohibited only where an appreciable adverse effect on competition (*AAEC*) within India is established.

Adverse Effects on Competition

RPM can *adversely* affect competition in a number of ways. The *Vertical Guidelines* issued by the European Commission in May 2010[10] address in some detail no less than seven possible effects on competition. RPM may facilitate collusion between suppliers of competing products (*inter-brand* competition) and between suppliers of the specific brand subject to RPM (*intra-brand* competition). It may soften competition between suppliers or between retailers. It can prevent resellers from reducing prices. It may lower pressures on supplier margins. Where the supplier has market power, it may enable the foreclosure of smaller rivals. Finally, it may reduce dynamism and innovation at reseller level. In the US, the Supreme Court in the *Leegin* case has recognised that RPM can facilitate supplier or retailer cartels. It can also be abused by powerful manufacturers or retailers.

Efficiencies

RPM can also lead to efficiencies. In *Leegin*, the US Supreme Court recognised that minimum RPM could, by reducing intra-brand competition, stimulate inter-brand competition. It could encourage retailers to invest in services or promotional efforts. It could increase consumer choice. It could also ensure the adequate provision of retail services without the risk of free-riding by discounting retailers. Finally, it could facilitate market entry for new firms and encourage the provision of retailer services. According to the European Commission *Vertical*

8 *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, 551 U.S. 877 (2007).

9 *Dr. Miles Medical Co. v John D. Park & Sons Co.*, 220 U.S. 373 (1911).

10 European Commission *Guidelines on Vertical Restraints* (OJ C130, 19.5.2010, p. 1). At the time of writing, the EU's vertical restraint regime is the subject of a wide-ranging review.

Guidelines, RPM can help new brands get a foothold in the market. It may help in organising short-term low price campaigns in franchise-type situations. It may also allow resellers to offer pre-sale value-add services and prevent free-riding by other resellers.

India: The Competition Act

Section 3 of the Competition Act prohibits anti-competitive agreements. Section 3(1) provides that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of goods and services, which causes or is likely to cause an AAEC in India. Section 3(2) provides that such agreements are to be void.

Section 3(4) covers vertical agreements, i.e., agreements amongst enterprises or persons at different stages or levels of the production chain in different markets. Such an agreement, which includes RPM, shall be an agreement contravening Section 3(1) if it causes or is likely to cause an AAEC in India.

Under Explanation (e) to Section 3(4), "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. This definition of resale price maintenance is not comprehensive, which suggests that the CCI may identify other cases subject to the prohibition where an agreement causes or is likely to cause an AAEC.

In common with other vertical restraints, RPM will be prohibited under Section 3(4) read with Section 3(1) of the Competition Act only if it causes or is likely to cause an AAEC in India.

Section 19(3) of the Competition Act sets out six factors to which the CCI is to have due regard while determining whether an agreement – including RPM – has an AAEC.

Three of these are negative factors which tend to show there is an AAEC: (a) the creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; and (c) foreclosure of competition by hindering entry into the market.

The other three are positive factors which tend to show that there is no AAEC: (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; and (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Defining the relevant market in product and geographic terms is clearly key to determining whether or not an agreement causes an AAEC. Section 19(5) and (6) of the Competition Act sets out the factors to which the CCI is to have "due regard" while determining the relevant geographic and product markets.

The CCI's Approach

What is Resale Price Maintenance?

In the *Hyundai* order,[11] the CCI observed that an agreement which had the direct or indirect object of establishing a fixed or minimum resale price level might restrict competition. This would include "*fixing the distribution margin or the maximum level of discount, making the grant of rebates or the sharing of promotional costs conditional on adhering to a given price level, linking a resale price to the resale prices of competitors, or using threats, intimidation, warning, penalties, delay or suspension of deliveries as a means of fixing the prices charged by the buyer (i.e., retailer).*"

Additional explanations were given in the *Kaff* case,[12] where RPM was stated to be "*a vertical imposition whereby a manufacturer/seller dictates the price at which the product can be resold by the downstream distributor/ wholesaler/retailer (hereinafter, the 'reseller').*" RPM could be in various forms, but the Competition Act "*generally proscribes a price prescription/ agreement when the agreement imposes a restriction on a resale at a price below the price stipulated in the agreement between manufacturer and downstream distributor*". The purpose of such a stipulation was "*to set a floor price so as to avoid price competition between retailers beyond a certain price*".

In a case against taxi aggregators *Ola* and *Uber*,[13] it had been alleged that Ola and Uber had, in setting the prices to be charged by drivers, engaged in RPM. In closing the case at the *prima stage*, the CCI held that *resale* was fundamental to RPM. Here the drivers did not resell services; rather they acted as extensions or agents of the aggregators who had sole control of the prices of transportation services. The CCI added that RPM was essentially a setting of a floor price on resale and that there did not appear to be any fixed floor price in this case.

Recommended Prices

In the *Bajaj* case,[14] the CCI first found that there was no AAEC as Bajaj faced extensive competition from other brands. Then, almost as an afterthought in relation to RPM, it noted the submission that the price was merely recommendatory in nature and that a purchaser was free to sell the product at a lower price. This is consistent with practice elsewhere.

Maximum Resale Price Maintenance

In dismissing a case against *Hindustan Sanitarywares and Industries* (*HSIL*) at the *prima facie* stage,[15] the CCI noted that a clause requiring resellers not to sell at above a maximum resale price did not raise any competition concerns. It considered that the definition of "resale price maintenance" in Explanation (e) to Section 3(4) of the Competition Act clearly stated that prescribing/setting maximum prices was not prohibited under the Act.

No Evidence of Resale Price Maintenance

In a number of cases, the CCI has dismissed allegations of RPM at least partly on grounds of lack[16] of or insufficiency[17] of evidence. This reflects the fact that, in considering a complaint of infringement (referred to as an "information" in the Competition Act), the CCI generally requires the complainant to produce clear evidence of breach.

In the *Kaff* case, the CCI agreed with the finding of the investigating Director General that there was no evidence that KAFF had imposed minimum RPM on its dealers. Even though there was a "smoking gun" e-mail from Kaff to Snapdeal stating that it would not allow its products to be sold if the minimum operating price (*MOP*) was not maintained, the CCI found that it had not been conclusively established that this and subsequent notices had been used as instruments for imposing a minimum RPM on Snapdeal.

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11 Case No. 36 of 2014 *Fx Enterprise Solutions India Pvt. Ltd. v Hyundai Motor India Ltd.* and Case No. 82 of 2014 *St. Antony's Cars Pvt Ltd. v Hyundai Motor Ltd.* (14 June 2017). See, also, *Saturn Vehicles Pvt. Ltd. v Hyundai Motor India Ltd.* (3 October 2017).

12 Case No. 61 of 2014 *Jasper Infotech Pvt. Ltd. v KAFF Appliances (India) Pvt. Ltd.* (15 January 2019).

13 Case No. 37 of 2018 *Samir Agrawal v ANI Technologies and Ors.* (6 November 2018).

14 Case No. 68 of 2013 *Shri Ganshyam v Bajaj Corp. Ltd. and Ors (12 October 2015).*

15 Case No. 09 of 2015 *Shubham Sanitarywares v HSIL Limited* (9 September 2015).

16 See Case 15 of 2018 *Tamil Nadu Consumer Distributors Association v Fangs Technology & Or.* (10 October 2018), Case 17 of 2018 *Khemsons Agencies v Mondalez India Foods* (27 August 2018),

17 Case 55 of 2017 *Counfreedise v Timex Group India* (14 August 2018).

In the earlier *Intel* case,[18] the CCI found that Intel had not set the resale prices for distributors of microprocessors. It also rejected arguments that Intel's monitoring of resale prices constituted RPM; such monitoring of the downstream price of its own products was not in itself anti-competitive.

It appears that RPM may not arise where the supplier requires dealers/distributors wishing to give more than a stipulated level of discount to route such proposals through it. In the *HSIL* case,[19] the CCI found that there was no absolute restriction or prohibition imposed on the dealer. Such practices could not be *per se* anti-competitive unless they led to an AAEC.

Findings of Resale Price Maintenance

In a case brought against publishers *Wiley India* and *John Wiley and Sons* (*Wiley*),[20] the CCI considered, at *prima facie* stage, that Wiley had issued a directive to all its subscription agents that they could offer a maximum discount of 3% to customers. Reciting Explanation (e) to Section 3(4) of the Competition Act, the CCI took the view that the restriction on maximum discount appeared to be in the nature of RPM as the directive fixed the lower limit of the price of journals. However, as seen below, there was unlikely to be an AAEC.

In the *Hyundai* cases, the CCI found that Hyundai had sought to impose on dealers an arrangement that resulted in RPM, which included monitoring the maximum permitted discount level through a "Discount Control Mechanism" and a penalty punishment mechanism for non-compliance.[21] The level of discount was determined by Hyundai for each model and variant of passenger cars. Hyundai had also appointed a Mystery Shopping Agency to collect data from dealers for such monitoring and reporting to Hyundai.

The CCI relied heavily on detailed findings by the investigating Director General (*DG*). In September 2018, the National Company Law Appellate Tribunal set aside the CCI's order,[22] finding that the CCI had relied on the findings of the DG and had failed to make its own analysis based on the DG's report and other evidence brought on record. The NCLAT made no comment on the substantive approach taken by the CCI to RPM. The CCI has appealed the order to the Supreme Court.[23]

Appreciable Adverse Effect on Competition

General

Even if RPM can be established, it will be in breach of the Competition Act only if there is an AAEC applying the six factors set out in Section 19(3) of the Competition Act.

In most of the cases involving RPM, the CCI concluded that there was no AAEC. In some of these, this was a "fail safe" finding, made in case CCI's main finding that there was no evidence of RPM was incorrect.[24]

In the *HSIL* case, the CCI stated that, unless the regulation of discounts led to an AAEC, such practices did not become anti-competitive *per se*.

18 Case No. 48 of 2011 *ESYS Information Technologies Pvt. Ltd. V Intel Corporation and Ors.* (16 January 2014).

19 See 15, above.

20 Case No. 7 of 2016 *Prime Mag. Subscription Services Pvt. Ltd v Wiley India Pvt. Ltd. and John Wiley & Sons Ltd.* (28 June 2016).

21 A similar observation was made by the CCI in its prima facie order in Case No. 17 of 2017 *Vishal Pande v Honda Motorcycle and Scooter India Pvt. Ltd* (14 March 2018).

22 Competition Appeal (AT) No. 6 of 2017 *Hyundai Motor India v CCI and Ors.* (19 September 2018).

23 Civil Appeal No. 11250/ 2018.

24 Case 17 of 2018 *Khemsons Agencies v Mondalez India Foods* (27 August 2018).

The CCI has held that RPM will not arise where the enterprise concerned has low market shares or does not enjoy a position of strength in the market. In the *Wiley* case, for example, the CCI had found evidence of RPM, but found that, in view of the negligible share in the relevant journals market, the impact of such RPM would be limited and not likely to have an AAEC. In the *Bajaj* case, the CCI found that Bajaj did not have a position of strength in the market and that, given the presence of other brands, AAEC was unlikely. In the later *Fangs Technology* and *Timex* cases, the CCI pointed to the need to show significant market power and found that that it was lacking.

The CCI set out more detailed frameworks for considering AAEC in relation to RPM in the *Hyundai* and *Kaff* cases. These are considered below.

The Hyundai Cases

In the *Hyundai* cases, the CCI found that Hyundai had set the maximum level of discount of prices to be charged by its dealers, monitoring this through a discount control mechanism (including a mystery shopping agency) and imposing penalties for non-compliance. In relation to an AAEC, the CCI generally noted that RPM could prevent effective competition at *intra-brand* and *inter-brand* levels.

At *intra-brand* level, RPM prevented distributors from decreasing the sales price, in other words, from competing on price. This would result in higher prices for consumers. Imposing upper limits on discounts through the discount control mechanism led to loss of intra-brand competition. RPM was particularly problematic where it was enforced at the instance of distributors/dealers as it helped them to maintain their collective interest in maintaining higher resale prices and caused consumer harm. The discount control policy was "an instrument to maintain a collusive outcome at the level of the distributors".

At *inter-brand* level, the CCI stated that RPM could decrease the pricing pressure on competing manufacturers when a significant player such as Hyundai imposed minimum selling price restrictions in the form of maximum discount that could be offered by multi-brand dealers.

The CCI identified three situations where there might be an effect at inter-brand level. First, RPM by multiple manufacturers was conducive to the effective monitoring of a cartel. Second, higher prices could arise even where a single manufacturer imposed minimum RPM; this was more likely in the case of multi-brand retailers who had significant bargaining power. Third, even in the absence of a conspiracy, preventing price competition for a popular brand could result in higher prices of competing brands as well, including those where there was no RPM. Although the possibility of an effect on inter-brand competition was

raised, the CCI reached no conclusion in relation to such effects in this case.

The CCI finally noted that the Director General had conducted an analysis of the AAEC arising out of the arrangements which resulted in RPM in light of the Section 19(3) factors, concluding that the RPM foreclosed intra-brand price-competition for its dealers. The CCI did not comment on this analysis but concluded that, "based on the above", Hyundai had contravened Section 3(4), read with Section 3(1), of the Competition Act.

As seen above, the CCI's order was overturned by the National Company Law Appellate Tribunal in September 2018. In considering the CCI's approach to AAEC, the NCLAT, referring to a 2017 Supreme Court judgment,[25] found that the CCI had failed to determine the relevant product and geographic markets having regard to the factors set out in Section 19(6) and (7) of the Competition Act. It had also failed to analyse the distribution agreement applying the Section 19(3) factors to determine whether there was an AAEC. The CCI's appeal is now pending at the Supreme Court.

The Kaff Case

In the *Kaff* case, the CCI found that there was no evidence of RPM in relation to its dealers. To the extent that there was RPM in relation to the on-line portal Snapdeal, the CCI held that there was no AAEC.

In setting out the framework for considering the question of AAEC in RPM cases. The CCI distinguished between *inter-brand* and *intra-brand* competition, noting that the latter could be on price and non-price factors. RPM agreements could destroy intra-brand price competition because the manufacturer fixed the minimum price below which the product could not be sold. This led various competition authorities to prohibit and penalise RPM as it might not result in consumer welfare.

In India, the rule of reason approach was followed for RPM. Vertical agreements were not necessarily anti-competitive but could be efficiency enhancing with sound economic justifications. Since the parties were not competitors, their incentives were generally aligned to those of the end customer. Competition authorities should not end up restraining pro-competitive behaviour. Furthermore, the CCI recognised that

25 Civil Appeal No. 6691 of 2014 *CCI v Coordination Committee of Artists and Technicians of W.B. Film and Television and Ors.* (7 March 2017).

RPM could be justified to avoid intra-brand competition resulting in free-riding in the short term and, in the longer term, the under-provision or eradication of services.

However, vertical agreements could have anti-competitive outcomes where the vertical restraints could restrict competition at the horizontal level, either upstream (that is, inter-brand) or downstream (that is intra-brand).

Section 19(3) of the Competition Act laid down the analytical framework to examine whether an agreement had or was likely to have an AAEC. It would be prohibited only where the net effect was anti-competitive – that was, where anti-competitive effects exceeded the pro-competitive effects.

In relation to Snapdeal, there had been a significant increase of sales of Kaff's and its competitors' products. Kaff's products continued to be sold on the portal at discounted prices. Its actions thus had no deterrent effect. The actual impact of Its conduct did not demonstrate any adverse effect on competition. The CCI added that the existence of strong intra-brand competition among Kaff's dealers/distributors negated any anti-competitive impact of its alleged conduct.

Conclusion

In considering RPM, the CCI is required by the Competition Act to apply a "rule of reason" approach. In the leading *Hyundai* and *Kaff* cases, it has set out the framework for considering AAEC in RPM cases. It has, not surprisingly, taken inspiration from the approach taken by the US Supreme Court in the *Leegin* case, but it also seems to have drawn from the *Vertical Guidelines* of the European Commission.

Even where RPM has been established, the CCI has frequently concluded that there was no AAEC. Where the supplier does not possess market power, it seems to have taken the broad view that inter-brand competition protects against any restriction on intra-brand competition. It has also found no AAEC where the alleged RPM seems to have no deterrent effect, where sales of a product have in fact increased, or discounting continues, or indeed strong intra-brand competition prevails. The CCI has signalled that efficiencies will be considered in appropriate cases, but this has not arisen to date.

The CCI has been prepared to take issue with the conclusions of its investigating Director General that there has been RPM and an AAEC. In *Hyundai*, however, it was criticised by the NCLAT for its failure to carry out its own independent investigation of the matter, to define the relevant market and to apply properly the factors for determining whether there was an AAEC.

That aside, at first sight the CCI appeared to have identified a "text book" case of RPM, with clear indications of an effect on intra-brand competition. However, this reflects a *per se* approach and a more rigorous application of the "rule of reason" suggests that the CCI could have also looked more critically at the state of inter-brand competition before finding an AAEC in that case.

RPM is permitted in India. However, suppliers with significant market power need to be careful in imposing vertical restrictions such as RPM, and, if they do so, need to be sure that the pro-competitive effects outweigh the anti-competitive effects.

The Competition Commission of India: A Fair Antitrust Referee?

By **Naval Satarawala Chopra**, **Rohan Arora** *and* **Anjali Kumar**

The progress of the Competition Commission of India (*CCI*) in applying competition rules to sports authorities has been bookended by its proceedings against the Board for Control of Cricket in India (*BCCI*) starting in 2010[1] and continuing with an investigation commenced in 2018.[2] This is perhaps unsurprising given the popularity and commercial importance of cricket in India. In its almost 10 year journey so far, the CCI has also considered the competition implications of the conflict between the regulatory and commercial roles of sports authorities in athletics,[3] hockey[4] and chess.[5]

This article uses the decision of the European Commission (*EC*) in the *International Skating Union (ISU)* case[6] as a benchmark to trace and assess the development of the CCI's case law in this sector.

Application of Competition Law to Sports Authorities

The EC's approach to the application of European Union (*EU*) competition law to the conduct of sports organizations has been settled since the decision in *Meca-Medina*[7] in 2006. The EC recognizes the specific nature of sport – the characteristics that make sport special, such as the pyramid structure of regulation and the interdependence between competing adversaries. However, the EC has also observed that, while it respects the specific nature of sport, sporting rules remain subject to the law of the European Union, including competition law.

From its earliest decision in *BCCI*, the CCI has recognised the need to take account of the specific nature of organized sport when assessing the conduct of sports authorities. The CCI has also recognized that, while sports bodies do have the autonomy to frame rules and regulations, the classification of such rules and regulations as "purely sporting" (and therefore, exempt from the application of competition law) is not appropriate.

The CCI has consistently held that, merely because a sports organization earns revenue with a not-for-profit motive and invests it back into the development of the sport itself, it would not fall outside the scope of the Competition Act, 2002 (*Competition Act*). Sports organizations carry out 'economic activity', *i.e.,* they operate in a market with buyers and sellers, and the CCI has therefore held that they are squarely covered by the definition of an 'enterprise' under the Competition Act.

Once it has been established that sports authorities are enterprises under the Competition Act, the CCI has considered whether the restrictions imposed are in the nature of proportionate regulatory actions (and therefore outside the scope of the Competition Act) or of commercial activities.

As the CCI has considered sports authorities to be enterprises in their own right, it has conducted its assessment under both Section 4 of Competition Act, which deals with abuse of a dominant position, as well as Section 3(4) of the Competition Act, which prohibits vertical agreements which cause an appreciable adverse effect on competition (*AAEC*) in India. In the *ISU* case, the EC considered the ISU to be an association of undertakings

1 Case No. 61 of 2010 *Surinder Singh Barmi v. Board of Control for Cricket in India* (8 February 2013) (*the BCCI case*). The BCCI case was first decided by the CCI by way of its order dated 8 February 2013. However, the case was remanded to the CCI by the erstwhile Competition Appellate Tribunal on 23 February 2015 on grounds of violation of principles of natural justice. (Appeal No. 17 of 2013 *The Board of Control for Cricket in India v The Competition Commission of India and Another* (23 February 2015). The CCI passed its final decision in the matter on 29 November 2017. (Case No. 61 of 2010 *Surinder Singh Barmi v. Board of Control for Cricket in India* (29 November 2017)).

2 Case No. 91 of 2013 *Pan India Infraprojects Private Limited v. Board of Control for Cricket in India* (1 June 2018).

3 Reference Case No. 1 of 2015 *Department of Sports v. Athletics Federation of India* (12 July 2018).

4 Case No. 73 of 2011 *Dhanraj Pillay and others v. Hockey India and another* (31 May 2013) (*the Hockey India case*).

5 Case No. 79 of 2011 *Hemant Sharma and others v. All India Chess Federation* (12 July 2018).

6 Case AT.40208 *International Skating Union's Eligibility Rules* (8 December 2017).

7 Case C-519/04 P *David Meca-Medina and Igor Majcen v. Commission of the European Communities* [2006] ECR 1-6991 (18 July 2006).

(and not an undertaking itself) and therefore subject to review under Article 101 of the TFEU.

Defining the Relevant Market

In order to define the relevant product market in the *ISU* case, the EC assessed the competitive constraints exercised in terms of demand side substitutability, supply side substitutability and potential competition. The EC assessed demand side substitutability by considering whether consumers/ viewers of speed skating considered it substitutable with other sports or forms of skating. On the supply side, the EC noted that there was limited substitutability between the organization of speed skating events and other sports, as well as in terms of the athletes who can perform in speed skating and other sporting events. The EC also took into account the secondary demand for speed skating by broadcasters/sponsors; however, it ultimately held that the organisation and commercial exploitation of speed skating is a different relevant market from other sports. To define the relevant geographic market, the EC relied on the standard principle of defining the area in which conditions of competition are sufficiently homogenous.

The CCI has shown an appreciation of the multi-sided markets in which sports authorities operate. However, it has not taken yet established a consistent or structured approach to the definition of the relevant market. In the *BCCI* case, where the CCI was examining the grant of broadcasting rights for the Indian Premier League (*IPL*) by BCCI, the CCI considered the distinction between other forms of entertainment and IPL from the perspective of the consumers/viewers. However, when it came to assessing whether IPL could be distinguished from other formats of cricket, the CCI notably did not take into account either demand side substitutability (views of the consumers/ viewers), or supply side substitutability (the athletes who can participate in the various events or the organization of the events).

It is unlikely that the CCI would have arrived at a finding that the BCCI was not dominant, even if the relevant market had been defined differently. However, inconsistencies in its approach have meant that the CCI has arrived at widely disparate definitions of the relevant market in different cases. While in the *BCCI* case, the CCI looked at a particular format of cricket in India, in the *Athletics Federation of India* case the CCI defined the relevant market to include more than 55 different events/ activities in India. The defendents argued that the relevant market had been incorrectly delineated; however, the CCI dismissed this on the ground that no alternative market definition had

been proposed by them. In the *All India Chess Federation* case, the CCI, in addition to defining a market for the organization of professional chess tournaments in India, defined a market for the services of chess players. The CCI held that, as the All India Chess Federation requires the services of chess players to organize chess tournaments, it is a consumer of chess players, who are not substitutable for any other service.

The CCI's current approach to defining the relevant markets in the sports sector thus seems to be coloured by perceptions, rather than guided by an objective examination of the prevailing market conditions.

Establishing Anti-Competitive Conduct

Inherence and Proportionality Test

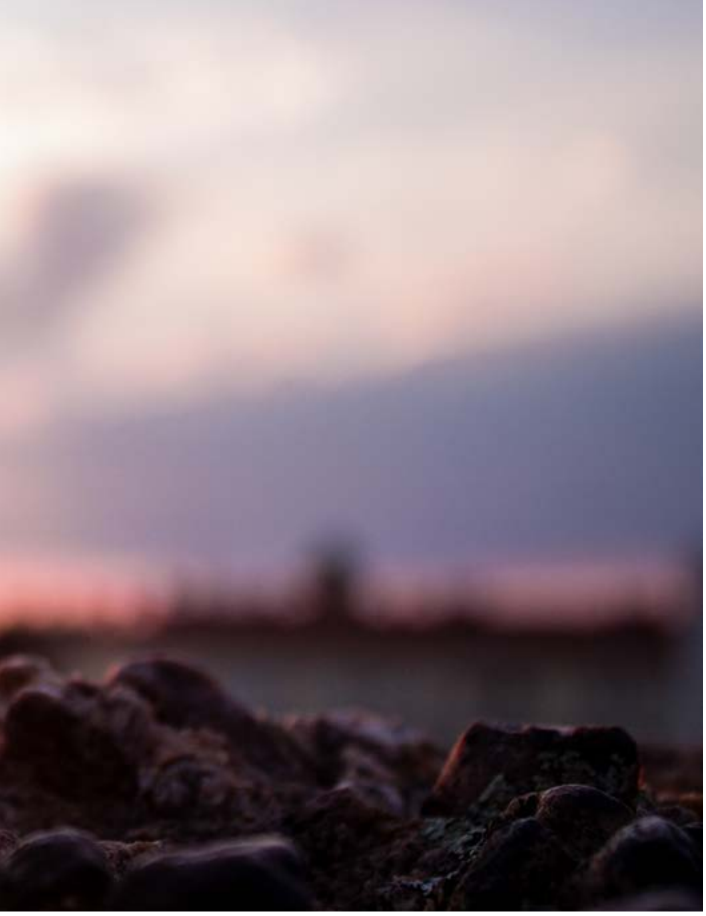
A majority of the CCI's decisions relating to anti-competitive conduct have proceeded under Section 4 of the Competition Act which governs abuse of dominance.[8] However, in the *ISU* case, which is the only case where the EC found a breach of the TFEU, the EC examined the alleged conduct under Article 101 of the TFEU, which deals with anti-competitive agreements. However, regardless of the nature of the breach, both the CCI and the EC have adopted the position that all rules – whether organizational, structural or regulatory – are to be judged on the basis of their *inherence* and *proportionality* to the legitimate sporting interest being pursued.

In the *ISU* case, the EC determined that, in the relevant market for the organization and commercial exploitation of speed skating worldwide, where the ISU had a strong position, its decisions were within the scope of Article 101 of the TFEU. The EC further determined that the ISU's decisions had an anti-competitive purpose and amounted to restrictions by object, and that these could not be justified as being inherent and proportionate to legitimate objectives.

The CCI has used the inherence and proportionality framework in a different manner. In order to establish abuse of dominance in breach of Section 4 of the Competition Act, it must be shown that the enterprise has a dominant position in the relevant market and that it has abused its dominance by engaging in types of conduct specified in Section 4. The CCI has also considered objective justifications in limited circumstances, and this has been affirmed by the Supreme Court of India which has recognised that there may be objective justifications for a dominant enterprise's conduct in certain cases.[9]

8 The CCI has also examined allegations under Section 3(4) of the Competition Act, which addresses anti-competitive vertical agreements. However, the orders of the CCI do not provide detailed reasons/analysis in relation to these.

9 Civil Appeal No. 7215 of 2014 *Competition Commission of India v. Fast Way Transmission* (24 January 2018).



Establishing the dominance of sports authorities in their respective relevant markets has proven to be an easy threshold to meet, given the pyramid structure of the regulation of sports, recognition by the international bodies and the regulatory role played by the sports organisations being examined. The CCI uses the inherence and proportionality test to examine whether the conduct in question amounts to an abuse of the dominance of the sports organization, or whether it can be objectively justified. In order to assess inherence and proportionality, the CCI considers the intention and rationale of the conduct, and the *manner* in which requirements of the sports organization are applied. In practice, the CCI has taken a holistic approach towards inherence and proportionality, examining both these aspects in the same breath.

Availability of Less Restrictive Options

In testing the inherence and proportionality of conditions, both the EC and the CCI also consider whether there is a less restrictive way of pursuing the objectives. In the *ISU* case, it had been argued that one of the objectives of ISU's policy was to protect the integrity of sport by preventing betting related match-fixing. However, the EC noted that, in revisions made by ISU to its own Code of Ethics, it put the responsibility of preventing such match-fixing by obliging skaters not to bet on events in which they participate. The EC observed that this was a less restrictive method of pursuing the objective than prohibiting the participation of skaters in events.

In the *All India Chess Federation* case, in addition to noting that the manner of application of the restrictive conditions was absolute and did not offer the players an opportunity to be heard, the CCI also distinguished the complete prohibition on players participating in any international events from the less restrictive measure of not awarding specific ratings to players participating in unsanctioned events. Similar to the *ISU case,* the CCI held that lifetime bans on athletes by the dominant sports authority foreclosed the entry of rival chess organisations which was covered by the denial of market access provisions under Section 4 of the Competition Act.

On the same day as the CCI found a violation in the *All India Chess Federation* case, it held that restrictions imposed by the Athletics Federation of India (*AFI*) did not amount to an abuse. The CCI held that despite the draft minutes of the Annual General Meeting (*AGM*) of the AFI recording that they would take action against officials and athletes that encouraged unauthorized marathons, in fact, 96% of the marathons in that year took place without authorization and AFI did not initiate any proceedings against officials/ athletes involved. In addition, the final minutes of the AFI AGM only recommended that the AFI and state associations should be mindful of the health of athletes who participate in marathons and was, therefore, not found to be abusive. Contrasting this with the *ISU case*, the CCI clearly felt that the diluted AFI resolution did not foreclose competition, whereas the EC held that the change in eligibility criteria still resulted in potential bans of up to half the average skating career, in effect continued to foreclose the market.

Finally, the timing of the conduct has also played a part in the EC and CCI's assessment of conduct. The CCI held that the decisions of the AFI regarding authorization of events were too far in the past to be specifically connected to the AGM where the draft minutes recorded the severe restrictions, whereas in the *ISU case* the restrictions were formalized by the ISU pursuant to being contacted by a rival organization.

Legitimate Sporting Objectives

The EC and the CCI have also taken similar stances on the requirement that the 'legitimate objective' cited by the sports organisation be with respect to the sport itself.

In the *BCCI* case, the CCI considered the impact of long term exclusivity granted to a broadcaster and the foreclosure effect on rival broadcasters. The BCCI argued before the CCI that the impugned restrictions in the media rights agreement were necessary because of the need to protect the rights of the broadcasters who had made significant investments in the launch of the IPL. However, the CCI did not accept this argument. The recoupment of investments was, in the CCI's view, in pursuance of the commercial interest which was distinct from the legitimate interest of cricket. The EC has similarly distinguished the protection of economic and/ or financial interests from other legitimate sporting objectives, and held that the former cannot justify a restriction of competition. It has gone so far as to hold that justifications for limited restrictions of competition can only be of a non-economic nature such as the protection of the integrity of the sport.

The Imposition of Appropriate Remedies

The CCI has taken a far stricter approach to contraventions of the Competition Act than the EC in the *ISU* case. In its very first decision in BCCI, the CCI imposed a hefty penalty of over INR 520 million (approximately USD 7.4 million) (6% of average turnover). In contrast, the EC was lenient in the *ISU* case, and decided not to impose any penalties on ISU, only directing it to bring the infringement to an end.

In addition to imposing penalties, the CCI has also in certain cases directed modification of the conduct of sports organisations. In the *Hockey India* case, despite the fact that the majority of the CCI decided that no case of contravention of the Competition Act had been made out, the CCI observed that there existed a lack of parameters that defined and demarcated the scope of the term 'organization of events'. The CCI emphasized the need to establish systems in good faith that would allow Hockey India to separate its role as a regulator and its commercial efforts. In the *All India Chess Federation* case, the CCI imposed a penalty of INR 34 million (approximately USD 485,000) (2% of average turnover), as well as directions for the modification of conduct.

The CCI's Role in Sports and Competition

By taking an active role in regulating the conduct of sports authorities in India, the CCI has emerged as an important authority demanding the accountability of these bodies. A testament to its role has been the manner in which its most recent decisions against the All India Chess Federation and the Athletics Federation of India were initiated.

The *All India Chess Federation* case was initiated by writ petitioners who had originally approached the High Court of Delhi, praying for a writ of mandamus[10] to be issued against the All India Chess Federation, and the governing body, the Ministry of Sports, Government of India, on account of the recommendation made by the All India Chess Federation to the FIDE for the removal of ratings of certain players. The High Court noted that the WRIT of mandamus could not be granted in the case, as the Ministry of Sports did not play any supervisory role vis-à-vis the All India Chess Federation. It further recorded its *prima facie* satisfaction that the All India Chess Federation was an enterprise under the Competition Act, and that its monopolistic conduct fell within the scope of the Competition Act. Consequently, it directed the petitioners to approach the CCI and seek appropriate relief. The *Athletics Federation of India* case was brought before the CCI by way of a reference from the Department of Sports, Ministry of Youth Affairs and Sports itself.

While these have lent the CCI added legitimacy in its regulation of sports organization bodies, there remain certain issues which undermine the quality of its decisions.

Procedural Justice and Due Process

First, the CCI continues to run into natural justice issues.

10 A writ issued by a court to compel performance of a particular act by a lower court or government body, to correct a prior action or failure to act.

The *BCCI* case, which was the first decision passed by the CCI in the field, was plagued by a disregard for due process. The erstwhile Competition Appellate Tribunal (*COMPAT*) remanded the case back to the CCI, observing that the CCI had not granted the BCCI with a fair hearing and the opportunity to meet the allegations against it, and had relied upon information available in the public domain without any verification. It cost the CCI almost 7 years to close the investigation in the case. However, the CCI and the investigating Director General remain prone to high-handedness in the manner in which investigations are conducted.

This high-handedness was demonstrated recently with the CCI requesting BCCI to provide audio recordings of all BCCI meetings for a 7 year period, as part of its investigation pursuant to the complaint by Pan India Infraprojects against BCCI. The High Court of Madras issued a stay on the CCI's investigation until the next date of hearing, noting that such a wide ranging request *prima facie* had no nexus to the objectives of the investigation especially as the CCI already had minutes of the meetings available.[11]

Effective Remedies for Contraventions of The Competition Act

The CCI has not held back from imposing heavy penalties and making strong observations on the anti-competitive conduct by sports organisations in its decisions. However, it remains to be seen how effective the CCI's decisions are in correcting the anti-competitive conduct. With respect to the order of the CCI in the *All India Chess Federation* case, reports have surfaced which allege that the All India Chess Federation has not complied with the directions of the CCI to modify its conduct, and is under investigation for non-compliance with the CCI's directions.[12] Reports have also surfaced on the filing of compensation claims before the appellate body, the National Company Law Appellate Tribunal. These cases ought to go a long way in utilising the full enforcement apparatus of the Competition Act and securing its effectiveness.

11 W.P. No. 4648 of 2019 (19 February 2019).

12 See: The News Minute, '*Why should punitive action not be taken for violation of orders: CCI to chess body*', December 2018, available at https://www.thenewsminute.com/article/why-should-punitive-action-not-be-taken-violation-orders-cci-chess-body-93334.

Gun Jumping in India

By **Shweta Shroff Chopra** *and* **Vivek Agarwal**

Introduction

Although the Competition Act, 2002 (*Competition Act*) came into force in India in 2009, the merger control (also called regulation of combinations) provisions only came into force in 2011 due to resistance from the industry on introducing another set of regulations for mergers and acquisitions. Like any other nascent jurisdiction, the Competition Commission of India (*CCI*) initially had teething issues and had to ensure compliance by imposing high penalties for not notifying a combination (a merger/ amalgamation/ acquisition which requires a pre-notification to the CCI) or delayed notification.[1]

Recently, there have been fewer gross gun-jumping violations where a combination has not been notified to the CCI at all. Both the CCI and parties to a transaction have become more sophisticated in their approaches towards merger control and any violations have now become more nuanced and generally focussed on premature implementation of all or part of a transaction. This may have the effect of softening the competitive intensity between the parties, before completion of the CCI's review.

In this article, we explore the scope of gun jumping and share practical insights to bear in mind when contemplating transactions that may be notifiable in India.

Meaning of Gun Jumping

"*Gun jumping*" is a term used by competition authorities across the world to describe cases where the parties to a notifiable merger or acquisition:

- fail to notify the transaction and give effect to it without the prior approval of the competition authority; or
- give effect to all or part of a notified transaction before the approval of the competition authority is received or before the waiting period has expired; or
- perform actions (including information exchanges) that effectively reduce the incentives to compete with each other, prior to the receipt of approval of the competition authority or the expiry of the waiting period.

The Competition Act provides that a combination cannot come into effect before the earlier of (i) the CCI granting approval or (ii) the expiry of 210 days following the notification to the CCI. The regulatory framework therefore envisages an *ex ante* regulation of combinations with an opportunity given to the CCI to evaluate the likely effects of the proposed combination on competition and regulate it appropriately. In essence, the standstill obligation prohibits actions aimed at implementation of a transaction, which give complete or partial effect to a proposed combination. Any action which has the effect of premature integration between the transacting parties prior to the CCI's approval would be viewed as a violation of the standstill obligation and would amount to gun jumping.

The Competition Act does not contain a specific provision laying down the consequences for implementing a combination before either (i) or (ii) above has occurred. Although, from a plain reading of the Competition Act, it would appear that it does not contemplate imposition of penalties for gun jumping (and only covers a "failure to file"), the CCI has levied penalties on parties under Section 43A for gun jumping, as constituting a breach of the standstill obligation under Section 6(2) of the Competition Act. Moreover, in penalising gun jumping, the CCI appears to ignore the fact that there has been no actual transfer of ownership or control, or the transaction was subsequently abandoned or, indeed, the period of enquiry has expired.[2] As of November 2018, the CCI had found gun jumping in 38 out of 599 combinations reviewed by it. Of these, no fewer than 13 cases were decided in 2018 itself.

The main purpose of the standstill obligation is to ensure the independence and autonomy of a target during the period between signing and the receipt of approval from a competition authority, or even closing. This has to be reconciled with the parties' need to evaluate the transaction, protect value and plan for the future. However, the parties need to maintain a fine distinction between planning activities, which are permissible, and direct or

1 The requirement to file the notification within 30 days was removed in June 2017.

2 The proviso to Section 20(1) says that the CCI shall not initiate any inquiry into whether a combination has caused or is likely to cause an AAEC in India, after the expiry of one year from the date on which such combination has taken effect. In the *Intellect Design Arena* case (C-2015/12/348), the CCI noted that the one year limitation for undertaking a competitive assessment of a transaction under Section 20(1) of the Competition Act is not applicable to proceedings under Section 43A.

oblique integration activities, which could be considered as a step towards consummation. To determine whether there has been a violation of the standstill obligation, the activities must be considered in the context of all the facts and circumstances. No one act or criterion can conclusively determine that there has been a violation of the standstill obligation. In weighing whether any interim activity amounts to gun jumping, a balance must be struck between preservation of value and preparation for the future, on the one hand, and compromising competitive independence or control by the seller, on the other. Moreover, transactions between actual or potential competitors may require further care, given the possible additional risk of information exchanges which may facilitate collusion between competitors.

Whereas internationally, the test for determining gun jumping is whether there has been an *actual* premature exercise of control by the acquirer, the CCI's standard appears to be lower - *whether any interim activity or arrangement would reduce the incentive of the seller to operate the target in the ordinary course or to act in the best interest of the target business*. The concept of incentive has been referred to by the CCI in two of its orders, *Bharti/ Tata*[3] and *Hindustan Colas*[4]. In *Bharti/Tata*, the CCI noted that "*such a clause [...] may have the effect of the parties ceasing to act independently as the target would have no incentive to continue to compete as before*". Similarly, in *Hindustan Colas*, the CCI considered the impact on the '*will of the Target to compete*'. Both cases related to horizontally overlapping transactions and it appears that, in such cases, the CCI considers that whether an act during the suspensory period would reduce the incentive for the target to operate independently is the relevant standard for determining gun jumping. It is unclear whether the possible independent breach of the prohibition on horizontal anti-competitive agreements under Section 3 of the Competition Act may also have weighed with the CCI, despite it not being articulated clearly.

Guidance from CCI Practice

The CCI has considered various types of conduct and provisions in transactional documents to determine whether there has been gun jumping. A snapshot of several key CCI decisions on gun jumping is provided below.

Failure to Notify Due to Interpretation of Jurisdictional Thresholds

Incorrect Computation of Assets and Turnover

In the *Intellect Design Arena* case,[5] the parties argued that the turnover attributable to India fell below the target

3 C-2017/10/531 *Airtel/ Tata Teleservices Limited and Tata Teleservices (Maharashtra) Limited* (16 November, 2017)

4 C-2015/08/299 *Hindustan Colas Private Limited/ Shell India Markets Private Limited* (14 September, 2016)

5 C-2015/12/348 *Intellect Design Arena Limited/ Polaris Financial Technology Limited* (7 May, 2018)

exemption threshold and therefore the transaction was exempt from notification. The CCI, in the instant case, discussed the interpretation of 'turnover' in India as it appears in Section 5 of the Competition Act, and held that the CCI would examine the books of account for the enterprise concerned and not allow for any special geographical segmentation. The CCI further noted that the one year limitation for undertaking a competitive assessment of a transaction under Section 20(1) of the Competition Act is not applicable to proceedings under Section 43A of the Competition Act. The CCI imposed a penalty of INR 1,000,000 (approximately USD 14,500).

Expansive Definition of 'Asset' and 'Acquisition'

In transactions[6] involving spectrum trading among telecom service providers (TSPs), the TSPs had argued that the transactions were not notifiable as spectrum trading did not amount to an 'acquisition' or a change of 'control' because: (a) the transfer of the right to use spectrum did not involve the transfer of an ongoing business concern; and (b) the transaction did not amount to transfer of ownership (which rested with the government) or the underlying licence, but involved a mere right to use the spectrum. It was further argued that spectrum trading was exempted under Item 3 of Schedule I to the Combination Regulations as spectrum trading was an 'activity' which was in the 'ordinary course of business' for a TSP.

However, the CCI rejected these arguments and held: (a) acquisition of 'control' represents the right to economic benefits flowing from a resource and not its perpetual ownership; (b) while auction of spectrum licences by the government leads to organic growth, its trading resulted in inorganic growth which was covered by the merger review process; (c) use of spectrum had the ability to generate turnover for a TSP and was of competitive significance and would therefore qualify as an asset acquisition under the Competition Act; and (d) the concerned transaction was in the nature of a 'capital transaction' and not a 'revenue transaction' exempted under Item 3 of Schedule 1. Accordingly, the CCI imposed a penalty of INR 500,000 (approximately USD 7,250) in all these cases.

Actual Implementation of Parts of the Transaction Prior to CCI Approval

In the *Jet/ Etihad* case,[7] Etihad had notified the CCI of its proposed acquisition of a 24% stake in Jet Airways. While approving the transaction, the CCI observed that certain provisions in relation to the commercial agreement between the parties (the sale of certain landing/take-off slots of Jet Airways at London Heathrow Airport) had already been implemented but had not been notified to the CCI before consummation. In view of the above, the CCI imposed a penalty of INR 10,000,000 (approximately USD 145,000) on parties for not subjecting all aspects of the transaction to the standstill obligation and closing one part of the transaction prior to obtaining CCI approval.

Closing the Overarching Global Transaction Before Approval

The standstill obligation applies to local and global deals alike. In the *Baxter/ Baxalta* case,[8] the CCI imposed a penalty of INR 10,000,000 (approximately USD 145,000) on the parties for closing the global leg of the transaction before receiving CCI approval, in spite of the fact that the local leg of the transaction had not been implemented. The CCI made it clear that it was not possible to carve out the India related part of a global transaction, and to implement global closing prior to obtaining CCI approval for the transaction as a whole. The global change in ownership was sufficient to constitute a breach of the standstill obligations, as it was that which triggered the requirement to notify.

Interconnected Steps

- In the *Telenor* case,[9] the transaction involved four steps for which a combined notice was filed. Despite different parties being involved in the transaction, only Telenor filed a notification before the CCI. The CCI was of the view that the fact that all the four steps were disclosed did not absolve the parties of their respective obligations to file separate notices or to file a composite notice jointly by the each of the relevant parties and such disclosure could at best only be considered as a mitigating factor. The CCI imposed a penalty of INR 500,000 (approximately USD 7,250).
- In the *Thomas Cook* case,[10] the CCI imposed a penalty of INR 10,000,000 (approximately USD 145,000) for failure

6 C-2017/06/516 *Reliance Jio Infocomm Limited/Reliance Communications Limited* (11 May, 2018) and C-2017/05/509 *Bharti Airtel Limited/Videocon* (11 May, 2018).

7 C-2013/05/122 *Etihad Airways PJSC/Jet Airways (India) Limited* (19 December, 2013).

8 C-2015/07/297 *Baxalta Incorporated/ Baxter International Inc.* (8 March, 2016).

9 C-2012/10/87 *Lakshdeep Investments and Finance Private Limited/Telewings Communication Services Private Limited* (03 July, 2012).

10 C-2014/02/153 *Thomas Cook Insurance Services/ Sterling Holiday Resorts (India) Limited* (21 May, 2014).

to notify the acquisition of shares in Sterling Holiday Resorts (India) Limited. The erstwhile Competition Appellate Tribunal allowed the appeal against the decision of the CCI, holding that the mere fact that several transactions were entered into around the same time and were approved by the board of directors of the concerned companies on the same date was not enough to establish that these transactions were interconnected. In April 2018, however, the Supreme Court set aside the Tribunal's decision, and upheld the CCI's reasoning and the penalty imposed.

- In the *SCM Soilfert* case,[11] SCM Soilfert acquired the share capital of Mangalore Chemicals through two seemingly separate transactions. The first one involved share purchase of 24.6% of the paid-up share capital of Mangalore Chemicals on the Bombay Stock Exchange through bulk and block deals. The second step included open market purchase of 1.7%. While notifying the second step to the CCI, a disclosure was made about the first step. The CCI imposed a penalty on SCM Soilfert holding that the two steps were interconnected and should have been notified to the CCI before consummating the first step. The Competition Appellate Tribunal and subsequently the Supreme Court of India upheld the penalty of INR 20,000,000 (approximately USD 300,000) imposed by the CCI.

Escrow Arrangements

It is commonplace in public market transactions for there to be escrow arrangements for shares tendered by the public, where the acquirer is not entitled to exercise control over such shares pending completion of the open offer. However, in the *SCM Soilfert* case[12], *"the Act and Combination Regulations do not exempt a situation wherein a buyer acquires shares but decides not to exercise legal/beneficial rights in them from the purview of the provisions of the Act in general, and Section 43A of the Act in particular."* Therefore, the CCI rejected the acquirer's contention that, by putting the shares into an escrow account conditional upon the receipt of the CCI approval, the acquisition was not consummated. Moreover, the Competition Appellate Tribunal affirmed the decision of the CCI on appeal and noted that the creation of an escrow account and the covenant by the acquirers of their own volition to abstain from exercising voting rights, did not eliminate the requirement to notify.

Since this approach is likely to have a limiting approach in public sector deals, especially in the on-market building of stakes prior to the launch of an open offer, there is a need to re-consider this position and it perhaps necessitates a change in the law, to permit the parties to seek a derogation from the standstill obligation.

Gun Jumping Owing to Provisions in Transactional Documentation

Interim Conditions Between Signing and Closing

In the *LT Foods* case,[13] the CCI penalized LT Foods Limited for imposing a condition precedent under which HUL (the seller) was required to deliver all packaging and promotional inventory for the business being transferred to LT Foods and to introduce to it the designer and printer supplying this inventory. The agreement also required HUL to transfer all relevant IP related documents to LT Foods and placed restrictions on promotional spending and, entry/exits in markets, in the interim period. The CCI rejected the argument that these arrangements were necessary to allow LT Foods to commence production on closing without further delay. Instead, the CCI held that such arrangements led to '*pre-approval co-ordination between parties*' which violated the standstill obligation. In view of this, the CCI imposed a penalty of INR 500,000 (approximately USD 7,250).

Pre-Payment and Advance Consideration:

In the *Hindustan Colas* case,[14] the acquirer, Hindustan Colas, had paid INR 40,000,000 (approximately USD 575,000) to the target as part consideration on the date of signing of the sale and purchase agreement. The CCI held that the prepayment of consideration alone (without other contributing provisions or circumstances) prior to approval, had a variety of competition-distorting effects, by virtue of creating a strategic advantage for the acquirer, reducing the incentive and will of the target to compete and granting the acquirer access to the target's confidential information prior to approval of the transaction. The CCI also observed that this might result in tacit collusion, which could cause an adverse effect on competition (*AAEC*) before consummation of the combination. The CCI found Hindustan Colas guilty of gun jumping and imposed a penalty of INR 500,000 (approximately USD 7,250) on it.

11 C-2014/05/175 *SCM Soilfert Limited/ Deepak Fertilizers and Petrochemicals Corporation Limited* (10 February, 2015).

12 C-2014/05/175 *SCM Soilfert Limited/ Deepak Fertilizers and Petrochemicals Corporation Limited* (10 February, 2015).

13 C- 2016/04/387 *LT Foods Limited/Hindustan Unilever limited (HUL)* (11 May, 2018).

14 C-2015/08/299 *Hindustan Colas Private Limited/ Shell India Markets Private Limited* (14 September, 2016).

Later, in the *UltraTech/JAL* case,[15] the acquirer, UltraTech Cement, had extended a corporate guarantee in favour of the target, Jaiprakash Associates (*JAL*), for disbursement of a loan to JAL, prior to filing a notification with the CCI. The CCI also rejected the parties' contention that the corporate guarantee was provided before the transaction was approved and therefore could not be seen as implementation of the transaction. The CCI stated that this argument was fallacious as it was the conduct which was important and not its timing, especially since the corporate guarantee was interconnected to the overall acquisition. The CCI held the corporate guarantee in support of a loan taken by JAL was in the nature of part payment of consideration and reiterated that the key concern was that such an arrangement could result in the parties to the combination not acting independently as they were required to do until the combination was approved. They concluded that the mere possibility of tacit collusion was sufficient and the need to show actual acquisition of control or influence by way of pre-payment did not have to be established. Ultratech was fined INR 1,000,000 (approximately USD 14,500) for gun jumping.

The position was endorsed in the *Adani* case,[16] where the acquirer, Adani Transmission Limited (*ATL*), had, prior to filing the notice, advanced three loans to one of the targets, which loans could be adjusted against the consideration payable for the proposed transaction. ATL submitted that the loans: (a) were advanced for the limited purpose of maintaining the financial viability of the target in the interim period; (b) were only optionally adjustable against the consideration for the proposed acquisition; (c) were a mere safeguard mechanism for ATL; and (d) did not result in any acquisition or change in control in the target. The CCI held the loans to be in the nature of advance consideration, particularly given that ATL was not ordinarily engaged in the business of advancing loans, and held that it amounted to gun jumping. Further, the CCI also reiterated that actual acquisition or change of control in the target was not a pre-requisite for gun jumping, and imposed a penalty of INR 1,000,000 (approximately USD 14,500) on ATL.

Finally, in the *Chhatwal/ Shrem* case,[17] the CCI rejected similar arguments made by the acquirers that pre-payment of part consideration was refundable and was merely a gesture to demonstrate the acquirer's earnestness. The CCI took the view that pre-payment of consideration was '*potentially likely to facilitate tacit collusion*' and therefore amounted to gun jumping, imposing a penalty of INR 1,000,000 (approximately USD 14,500).

In assessing each of these cases, the CCI considered both the provisions of the transactional documents but also the other circumstances surrounding the transaction in evaluating if there was indeed gun jumping. In addition, the argument regarding the possibility of tacit collusion assumed centre stage since most of these cases were either horizontal or otherwise strategic transactions for the parties. Nevertheless, the possibility of change in the independence of the target by virtue of part-payment of consideration (whether through cash, supporting guarantees or loans) could not be ruled out even in non-horizontal/ strategic transactions.

Notional Date or Locked Box – A New Frontier of Gun Jumping Enforcement?

The CCI examined the concept of a 'notional date' for the first time when it received a notice from Bharti Airtel (*Airtel*) for its proposed acquisition of 100% of the consumer mobile business of Tata Teleservices Limited and Tata Teleservices (Maharashtra) Limited (*Tata*).[18]

The CCI noted that the acquisition agreement contained a particular clause (*ER Clause*), which might have the effect of the parties ceasing to act independently during the period until the CCI approval. This could lead to a situation which would be similar to tacit collusion and have the effect of consummating a part of the proposed combination. Airtel submitted that the ER Clause was only a notional date, in the nature of a contractual obligation meant to preserve its business valuation, which would be effective only after the CCI had approved the combination, and therefore it did not amount to consummation. The CCI rejected this argument and held that the ER Clause was not a notional date and, in fact, granted Airtel a potential mechanism to exercise operational control of the target prior to the approval of the combination. The CCI observed that the basis of examination of a gun jumping contravention was whether the parties had ceased to compete as they were competing earlier, or whether they had ceased to act independently. The substantive issue in gun jumping was the effect on competition dynamics.

15 C-2015/02/246 *UltraTech Cement Limited/ Jaiprakash Associates Limited* (12 March, 2018).

16 C-2018/01/547 *Adani Transmission Limited/ Reliance Electric Generation and Supply Limited* (30 July, 2018).

17 C-2018/01/544 *Shrem Infraventure Private Limited /Dilip Buildcon Limited* (08 August, 2018).

18 C-2017/10/531 *Airtel/ Tata Teleservices Limited and Tata Teleservices (Maharashtra) Limited* (16 November, 2017).

This case also highlighted the CCI's position on the issue of a "notional date" in agreements, akin to a "locked box mechanism". A locked box mechanism fixes the purchase price/consideration for a target by reference to the historical balance sheet of the target on a date before the transaction documents are signed. The locked box concept works on the basis that no value has 'leaked' from the target business back to the seller, and the buyer is therefore indifferent to the fact that the closing balance sheet will be different to the locked box balance sheet. Essentially, the locked box mechanism operates as an interim arrangement to ensure that the seller does not inappropriately extract value from the target business after the locked box date.

In this case, the CCI held that notional dates were permitted and customary standstill and interim arrangements might be imposed on the target, in order to ensure and preserve the valuation of a business. It laid down three tests to determine if a clause imposing a notional date amounted to gun jumping:

- *Proportionality:* The form and scope of the customary arrangements imposed by the notional date on the target must be inherent and proportionate to the objective of ensuring certainty in business valuation and preservation and must not violate standstill obligations as envisaged in the Competition Act.
- *Operational control:* The notional date clause must not grant the acquirer any operational control on the target, including access to the target's confidential and commercially sensitive information, as that could result in a situation of tacit collusion and could also affect competition dynamics.
- *Incentive to operate as an effective competitor:* Any clause which disincentivises the target from competing effectively with the acquirer in the interim period before the combination is approved by the CCI will amount to gun jumping. The effect of such a clause on the target's ability to compete with the acquirer must be seen in the context of its effect on competition dynamics, given that the resulting adverse effect on competition in the interim period cannot be restored if the CCI decides not to approve the transaction on account of its potential to cause an AAEC.

The CCI held that the ER clause was a violation of the standstill obligation as such an agreement by itself was bound to dis-incentivise the target from competing and could not be considered as inherent and proportionate to the objective of preserving business valuation. Accordingly, the CCI levied a penalty of INR 1,000,000 (approximately USD 14,500).

This is a new frontier of examining possible gun jumping owing to the valuation mechanism of transactions, increasingly being adopted in private equity transactions across the world, in place of the routine completion accounts methodology. Such clauses have not been held to be in violation of the standstill obligations by other competition regulators so far and, in fact, these should not be viewed restrictively, as it would have a crippling effect on deal making. It is imperative in such cases to evaluate the actual conduct on the ground and not merely proceed on the assumption of a potential change in incentives to compete.

Conclusion

While the practice on gun jumping is still developing in India, the CCI definitely seems to be scrutinising transactions and related documents very closely to ascertain whether there have been any cases of gun jumping. The CCI has sent a clear message to the business community that it is likely to consider very seriously any infringement of the notification and standstill obligations. However, in due course, some of the contours and parameters for ascertaining gun jumping are likely to get more settled and clear.

In today's environment where global transactions are becoming increasingly common and coordinated, the potential adverse consequences of violating merger control provisions in the relevant jurisdictions can have significant implications, including disruption of the timing of a transaction, imposition of fines and other penalties, and, in some jurisdictions, the unwinding or nullity of the transaction itself. Therefore, parties need to be very careful not only to notify the relevant transactions but also to assess the implications of any interim arrangements drafted into the transaction documents.

The Indian Merger Control Regime
Trends and Challenges

By **Aparna Mehra**, **Neetu Ahlawat** *and* **Abhiruchi Jhawar**

Introduction

This past year in the Indian merger control regime has seen an interesting mix of some new trends and challenges. The Competition Commission of India (*CCI*) approved over 60 proposed combinations. As before, there were no prohibitions but three cases raised concerns of an appreciable adverse effect on competition (*AAEC*) in India and resulted in remedies. The CCI has continued to demonstrate that it is a constructive yet watchful regulator, and that it is open to consider extensive and flexible remedies that allay its concerns in relation to an AAEC in India, rather than blocking a transaction.

2018 witnessed generally swift and speedy approvals by the CCI. Yet again the CCI showed its maturity whether it was dealing with cases under the new Insolvency and Bankruptcy Code 2016 (*Insolvency Code*) or with high profile mergers such as *Walmart/Flipkart*[1] and *Linde/Praxair*[2] and *Bayer/Monsanto*.[3]

In 2018, the CCI cracked down, as never before, on procedural violations of merger control rules, with a number of investigations being launched and fines being imposed, including on *UltraTech* for the non-furnishing of information[4] (in the first ever penalty of its kind) and on *Bharti Airtel* for entering into certain contractual clauses in relation to consideration paid.[5]

In relation to remedies, the CCI was innovative in: (i) imposing hybrid and hitherto untested remedies in the *Bayer/Monsanto* merger;[6] and (ii) accepting voluntary commitments which removed structural links between the parties in the acquisition of *Fortis Hospitals* by *Northern TK Ventures*.[7]

Insolvency and Merger Control

In light of the introduction of the time-bound insolvency resolution process under the Insolvency and Bankruptcy Code (*IBC*) in India, the CCI was very closely involved in the review of several insolvency cases. Initially, there were apprehensions as to how both laws could work harmoniously.

The CCI reviewed about ten transactions under the IBC such as *Tata/Bhushan Steel,*[8] *AION and JSW/Monnet*[9] and *ArcelorMittal /Essar*.[10] Of these, six pertained to the steel industry. Given the tight timelines prescribed by the IBC, each of these combinations (which the CCI found had no AAEC in India) were expeditiously reviewed and cleared.

Third Party Outreach and Multi-Jurisdictional Coordination

The CCI has focused on gaining, during the merger review process, a complete picture of the market and the proposed combination in order to assess its competitive effects. To this end, the CCI regularly reaches out to third parties (such as competitors, customers and industry bodies) during the review of a combination better to understand the potential challenges that a combination may cause.

More recently, in global transactions which involve filings to be made in several jurisdictions, the CCI has proactively engaged with other competition authorities across the globe. In certain cases, this has helped with its engagement with the parties on the competitive concerns as well as remedies. Based on our experience, the CCI usually reaches out to the parties to provide waivers for exchange of information with other competition authorities and on occasion has also discussed cases without such waivers.

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1 C-2018/05/571 *Walmart/Flipkart* (8 August 2018).

2 C-2018/01/545 *Linde/Praxair* (6 September 2018).

3 C-2017/08/523 *Bayer/Monsanto* (14 June 2018).

4 C-2015/02/246 *UltraTech* (12 March 2018).

5 C-2017/10/531 *Tata Tele Services/Bharti Airtel* (27 August 2018).

6 C-2017/08/523 *Bayer/Monsanto* (14 June 2018).

7 C- 2018/09/601 *Fortis Hospital/Northern TK* (29 October 2018).

8 C- 2018/03/562 *Tata/Bhushan Steel* (25 April 2018).

9 C- 2018/03/561 *AION* (11 May 2018).

10 C- 2018/08/593 *JSW/Monnet* (18 September 2018).

Remedies/Modifications

Remedies are playing an increasingly important role in the merger review process of the CCI. There has been active use by the CCI of its power to require remedies to address competition concerns before clearance. In the past year, the CCI has accepted a broad range of structural and non-structural remedies. It must be added that, in cases of significant horizontal overlaps, the CCI continues to prefer structural remedies over behavioural remedies.

By now, the CCI has considerable experience with more complex transactions which have required effective engagement on remedies to address competition concerns. In its decisional practice, the CCI has adopted a balanced approach vis-à-vis global remedies. Where the transaction has involved a global remedies package, it has sought to be consistent with remedies elsewhere and aligned its own decisions with those of competition agencies in other jurisdictions. At the same time it has not shied away from awarding India-specific remedies if global remedies have not been appropriate for the Indian market.

2018 stands out, not only in terms of the number of remedies it witnessed, but also in terms of the complexity and variety of these remedies. One of the key cases on remedies in 2018 was the well-known *Bayer/Monsanto* merger.[11] It was the fourth and last transaction in the recent consolidation in the agrochemical and seeds industry worldwide. In 2017, the CCI had analysed *Dow/Dupont*[12], *Agrium/Potash*[13] and *ChemChina/Syngenta*,[14] requiring significant remedies in approving those transactions.

Bayer/Monsanto went through a lengthy phase II review conditional on Bayer offering India-specific remedies. These remedies included both structural and behavioural remedies, including a set of remedies requiring Bayer to license on fair, reasonable and non-discriminatory (*FRAND*) terms. In reviewing the transaction, the CCI closely coordinated with competition law authorities in other jurisdictions.

In another case involving the proposed combination of industrial gas companies *Linde/Praxair*,[15] the CCI approved the combination after accepting modifications involving divestments of Linde India's shareholding in a joint venture and divestiture of some of the parties' plants and cylinder filling stations.

Towards the end of 2018, in *Northern TK Ventures'* acquisition of *Fortis Healthcare*,[16] the focus of the CCI was on removing any common structural links between two competitors and not on imposing any structural remedies by way of divestment. This was also the first case in which a life-long ring-fencing obligation was imposed by the CCI. It was noted that the acquirer's group, IHH Healthcare had an existing joint venture (*JV*) with Apollo Hospitals for operating another hospital. Thus the acquirer (along with its group entities), the JV partner (Apollo), the JV and the target were all present in similar businesses. In order to avoid the JV being used as a common platform for coordinated behaviour by the competing companies, the CCI accepted a number of voluntary commitments made by the acquirer ensuring that the JV and the combined entity would operate as separate, independent and competitive businesses.

Procedural Changes

In a welcome move, to ease doing business in India, the CCI made a number of amendments to the *Combination Regulations*,[17] particularly allowing parties to 'pull and refile' a merger notification and enabling parties to offer modifications (remedies) in response to a show cause notice, before the commencement of a detailed Phase II investigation.

The CCI has provided some important clarifications for parties in recent times, helping them in the process of filing and accurately to assess the competitive concerns with proposed combinations. This has also allowed interactions with the CCI to be more streamlined and effective. Key guidance provided by the CCI includes:

- *Publishing the Introductory Notes to Forms and Frequently Asked Questions*: the CCI has published guidance notes on the process of filing and the content that has to be included in a notification form. The publication of these guidance notes has greatly increased awareness of the modalities of the notification processes.

11 C-2017/08/523 *Bayer/Monsanto* (14 June 2018).
12 C-2017/06/519 *Dow/DuPont* (18 September 2017).
13 C-2016/10/443 *Agrium/Potash* (27 October 2017).
14 C- 2016/08/424 *ChemChina/Syngenta* (16 May 2017).
15 C- 2018/01/545 *Linde/Praxair* (6 September 2018).
16 C- 2018/09/601 *Fortis Hospital/Northern TK* (29 October 2018).
17 Competition Commission of India (Procedure in regard to the transaction of business relating to combinations Regulations), 2011 (as amended).

- *Guidance on Non-Compete Restrictions:* another welcome move by the CCI has been the issuance of guidance on its assessment of non-compete restrictions, which was published last year. The guidance note highlights the CCI's general approach towards non-compete clauses in transactions, and has gone a long way to improve predictability in decision making.
- *Do It Yourself*: in July 2018 the CCI also introduced an online 'do-it yourself' tool kit to help stakeholders assess the notifiability of a transaction.
- *CCI's decisional practice:* the recent decisional practice of the CCI has also contributed to increasing transparency and predictability in the merger review procedures. For instance, in *Bharti Airtel*[18] the CCI extensively dealt with the definition of the "acquisition of assets". The CCI has also been increasingly relying on economic tests during its review in order to delineate the relevant market and measure the effects of the proposed combination.

Gun Jumping

The merger control regime in India is suspensory in nature. Simply put, parties cannot take any steps towards closing a transaction before receipt of the CCI's approval in relation to the combination. Under Section 43A of the Competition Act, 2002 (*Competition Act*), the CCI has the power to impose penalties for a failure to notify the CCI and/or gun-jumping. In 2018, the CCI imposed penalties in approximately 13 such cases.

For the first time, the CCI provided guidance and clarity on the scope of the '*standstill*' obligations. In *LT Foods,*[19] the CCI found that the acquirer had agreed to certain measures contrary to the standstill obligation, such as handing over inventories, making introductions to the supplier's sellers, restrictions on promotional selling and restrictions on the seller entering existing territories. The CCI pointed out that the Act prohibited not only completion of the transaction but also any coordination between the parties, pending receipt of the CCI approval.

In 2018, the CCI also penalized various companies on grounds such as: (i) the advance payment of cash consideration;[20] (ii) acquisitions of the right to use spectrum without seeking prior approval of the CCI[21] and (iii) providing bank guarantees/loans to the target prior to CCI approval.[22]

Notably, the CCI also came heavily down on arrangements akin to a "locked-box" mechanism which have become popular in M&A transactions in recent years. In August 2018, *Bharti Airtel's* acquisition of *Tata Teleservices*[23] was penalized by the CCI for having a valuation mechanism which, according to the CCI, allowed the acquirer potentially to have operational control on the target from the 'notional date' set in the agreement and reduced the target's incentives to compete with the acquirer before consummating the transaction. Although, due to confidentiality of the privately agreed terms, the specific mechanism objected to by the CCI was not been disclosed in the public order, it appears that the CCI was concerned about the valuation mechanism where the methodology of computing leakages in the value of the target made the target susceptible to the acquirer's commercial influence pending receipt of the CCI approval.

Based on the CCI's decisional practice, the critical test for gun jumping, to which parties should adhere, is that between signing and closing, and in particular before the receipt of the CCI approval, the acquirer *must not*: (a) actually or effectively obtain or exercise control over the ordinary course of business activities of the target; *or* (b) reduce the target's incentives to operate independently and compete vigorously in the market (whether through contractual provisions or actual conduct).

Key Issues to be addressed in the Merger Review Process

Some of the aspects of the merger review process which would benefit from the CCI's attention are:

Rigid Remedies Process

Under current practice, the process of negotiating remedies (both in Phase I and Phase II) is fairly rigid and overly prescriptive, and neither the CCI nor the parties have the ability / flexibility to propose amendments/revisions to the remedy package offered by the other. Therefore, there is very little room for effective 'negotiations' in the process, and it is more in the nature of 'take it or leave it' from

18 C-2017/05/509 *Bharti Airtel* (11 May 2018).

19 C- 2016/04/387 *LT Foods* (11 May 2018).

20 C- 2018/01/547 *Adani Transmission Limited/ Reliance Electric Generation* (30 July 2018).

21 C-2017/05/509 *Bharti Airtel* (11 May 2018); C-2017/06/516 *Reliance Jio Infocomm* (11 May 2018); C-2017/05/510 *Bharti Airtel/Bharti Hexacom* (11 May 2018).

22 C-2015/02/246 *UltraTech* (12 March 2018).

23 C-2017/10/531 *Bharti Airtel/Tata Tele Services* (27 August 2018).

the parties' perspective. Accordingly, it is desirable that the process be amended to allow for more flexibility by; (i) allowing the parties to submit a remedy proposal first; and (ii) providing room for negotiation between the CCI and the parties resulting in a remedies package with the CCI having the last say. This will ensure a fair balance between the interests of the parties and the CCI, and will facilitate an effective dialogue between the two.

Timelines for Review

Parties looking to notify combinations to the CCI would benefit from greater clarity on the timelines for approval by the CCI. Under the current practice, if the CCI requests information or requires the parties to remove defects, it "stops the clock" which only restarts once the parties have filed the information sought. Further, if the CCI is not satisfied with the response to the information request, it sends another information request and does not start the clock until such time that the CCI is satisfied with the response. This has led to the review clock being stopped for a much longer time than provided for in the law, i.e., 210 calendar days, and this affects the expected timelines of the transaction as a whole. Additionally, the review periods are also subject to various 'exclusions' (some of which are specifically provided under the Act, and others which have emerged from CCI practice). The CCI heavily relies on these 'exclusions' in most of its detailed investigations, to extend the review period to 9-10 months or even longer (for example, the review of *Bayer/Monsanto* in India was completed in more than 500 days). Most of these time exclusions that are relied upon by the CCI are not provided for under the Act, and are susceptible to challenge as it goes beyond the exclusions permitted under the Competition Act.

It is the need of the hour that all permissible time exclusions be codified within the Act itself. This will reduce the discretion of CCI introducing the arbitrary exclusions and provide more certainty and transparency.

Open Market Purchases/Advance Cash Consideration

Presently, the Act does not permit parties to acquire any shares (or pay any consideration) pending clearance. This effectively rules out any open market acquisition of shares listed on the stock exchange, including potential hostile acquisitions in India, where the execution and completion of share acquisition is nearly instantaneous. Owing to this complete embargo on the purchase of any shares prior to receipt of the CCI's approval, the CCI has not allowed the purchaser to surrender voting rights/place the purchased shares in an escrow account pending approval. Therefore, in order to provide an avenue for public market purchase of shares, including where such purchases are

non-negotiated/hostile acquisitions, it is desirable that the CCI considers allowing parties to purchase shares on the market (provided they surrender all beneficial rights, for example, dividend and voting rights, on such shares and place them in escrow pending CCI approval). Such a change will be consistent with the more flexible position taken in various other jurisdictions, for example, Brazil and the EU.[24]

Confidentiality Concerns

The CCI grants confidentiality over information submitted with the notification which is not publicly available, and the disclosure of which may cause an irreparable injury to the parties or results in a disclosure of trade secrets. However, the CCI requires parties to submit an affidavit from the authorised person, setting out detailed reasons and justifications in support of their confidentiality claims, which tends to be onerous. Further, the CCI has also shown a reluctance to grant confidentiality for a period of more than three years.

Moreover, the notifying parties are required to submit a summary of the proposed transaction, containing the names of the parties, the nature of the transaction, the area of activity of the parties and the relevant market(s) to which the transaction relates, in less than 500 words. This summary is then published on the CCI website, generally on the date the notification form is filed. Especially in market purchases, this has the potential of distorting the purchase price for the acquirers as the public can undertake additional purchases/ sales while the transaction is pending, which would affect/ alter share prices for the acquirer.

Filing and information requirements for private equity deals

Due to the over-arching nature of the merger control regime in India, private equity deals often have to be notified to the CCI. Typically, private equity investments are notified as short-form merger notifications (i.e. Form I). However, even Form I requires detailed information, including details of investments by portfolio companies. Such requirements tend to be onerous for large private equity funds which generally have numerous investments across multiple sectors. It may also raise confidentiality concerns due to the detailed level of information required to be submitted. Of late, the CCI is paying closer attention to: (i) "common ownership" in simultaneous ownership of non-controlling stakes in competing companies; and (ii) board presentations and documentation prepared for the transaction.

For non-problematic and no overlap deals, the CCI should consider introducing a simple short form with limited information. This would aid the parties in providing specific information. The CCI itself will benefit from such a focussed approach with a reduced strain on its resources and enabling it to adopt a more pragmatic approach to transactions where concerns do not exist.

The Competition Law Review Committee

The Competition Law Review Committee (*CLRC*) was set up by the Indian government in September 2018 to review the Act "*in view of the changing business environment and to bring necessary changes if required*". The study of merger guidelines is specifically mentioned in the terms of reference. It will be interesting to see whether there will be any changes in the Indian merger control regime in 2019 given the interplay of various factors, including the impending elections in India.

Conclusion

There have been a number of important developments in relation to merger control in India in 2018. The CCI has now gained enough experience in handling cases involving complex fact patterns and markets. It has shown that it is well able to design remedies taking account of the specific characteristics of Indian markets. It has taken steps towards adopting best practices and applied lessons learned from more mature merger control jurisdictions. It has taken a more stringent approach to any form of procedural violations committed by the parties. In particular, the CCI has clamped down on gun jumping in India. It has also paid heed to stakeholder concerns, providing more clarity on the need to notify and the process of filing, as well as providing more guidance on substantive issues.

There continue to be concerns, for example in relation to remedies, timelines for review, the payment of advance cash consideration, confidentiality and the often onerous filing requirements for straightforward transactions. Some of these may be addressed by the Competition Law Review Committee and future legislative changes. In any case, it is hoped that the CCI will maintain a steady course in balancing the desire of notifying parties for a speedy and proportionate review of their transactions with the CCI's requirement of a robust and effective merger control system.

24 Article 7(1) of the EUMR.

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Ms. Pallavi S. Shroff is the Managing Partner of Shardul Amarchand Mangaldas with about 36 years of experience. She mentors the Competition Law practice at the Firm and is also the Head of the Litigation practice. She was a key member of the high-powered SVS Raghavan Committee, which formulated the legal framework for the competition law and helped draft the Competition Act. She has also represented several companies in competition law cases before the Competition Commission of India and the Competition Appellate Tribunal/National Company Law Appellate Tribunal).

She is ranked 'Band 1' for Competition Law & Dispute Resolution by Chambers and Partners 2019 which describes her as *"a stalwart in the field of competition law."* She featured in the Global Competition Review's International Who's Who Legal of Competition Lawyers and Economists, 2014 and has been acclaimed as *"a doyenne of Indian competition law"* and *"a legal luminary with the brilliant acumen necessary to crack the most complex legal cases."* Ms. Shroff has recently been awarded the 'Outstanding Lifetime Achievement Award' by at the Chambers Forum 2019. She has also been conferred 'Lifetime Achievement Award' at the Legal Era Awards, 2017-18 and also awarded 'India Managing Partner of the Year' by Asian Legal Business Asia Law Awards 2017. Ms. Shroff has been recognised as the 'Market Leading Lawyer' by Asialaw Profiles 2018 and 'Leading Lawyer' for Dispute Resolution by Legal 500, 2018 among others. Ms. Shroff has been recognised as one of the Most Powerful Women in Indian Business by Business Today, six years in succession (2013-18). Recently Fortune India also recognised Ms. Shroff as one of 'The Most Powerful Women in Business, 2018'.

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John Handoll is the National Practice Head, Competition Law with the Firm. He is a specialist competition and regulatory lawyer with extensive experience of 40 years and has worked in a number of European jurisdictions – notably the UK, Belgium and Ireland. Bringing his European and international experience to bear, he has worked with Indian lawyer members of the New Delhi competition team in a number of matters before the Competition Commission of India, Appellate Tribunal and the Indian courts. This has included working on merger notifications (including multi-jurisdictional filings), antitrust (including cartel investigations and leniency applications), and alleged abuse of dominance. John has also advised a number of Indian and multinational companies on compliance programmes and on preparing for dawn raids. He has also acted as non-governmental adviser in the International Competition Network, working in the areas of mergers, cartels and unilateral behaviour. Widely acclaimed as a top practitioner of European and Competition Law by a number of international media and legal publications, John is also the author of two full length volumes: Capital, Payments and Money Laundering in the European Union (Richmond Law & Tax, 2006) and Free Movement of Persons in the EU (Wiley Chancery, 1995). John lectures widely to professional and student audiences in India.

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Naval Satarawala Chopra is an Equity Partner in the Firm's Competition Law Practice, focusing on both contentious and non-contentious competition matters. He is the first and only Indian lawyer in GCR's top "40 under 40" competition lawyers in the world; and has been listed as a global *"Thought Leader"* (Who's Who Legal, 2017). Naval is acknowledged as a *"master strategist"* who is known for his *"very sound handle on Indian law"* and his *"ability to think out of the box and find solutions by balancing the law and commercial considerations"*. Naval is ranked 'Band 2' for Competition law in Chambers & Partners, 2019. According to interviewees, Naval is a *"very practical, commercially sound and solution-oriented business partner"* who serves, not only as a *"go-to person for any kind of dispute resolution issue"*, but also as someone with whom to *"discuss strategies in the competition space"* more generally.

Naval has advised clients such as *Monsanto Company,* the *National Stock Exchange, HT Media, Verifone Corporation* and *DLF* in prominent abuse of dominance cases on predatory and excessive pricing, unfair terms and conditions and leveraging. Naval is particularly skilled in advising on antitrust aspects of technology-related matters and has successfully defended companies such as *Uber, WhatsApp* and *Microsoft*. He has recently successfully prosecuted *Google* in an abuse of dominance case in India. Naval has successfully obtained merger clearances in several prominent cases including *Avago's* acquisition of *Broadcom*, *HP's* acquisition of *Samsung's* printer business, the failed merger of *Publicis* and *Omnicom* as well as the conditional approval for *Bayer AG's* acquisition of *Monsanto Company*, and the acquisition by *PVR* of *DT Cinemas*. Naval has also successfully defended various companies against price fixing allegations and is presently advising auto components manufacturers in ongoing cartel investigations. He is also championing due process and natural justice issues against the CCI before the Delhi High Court.

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Shweta Shroff Chopra has over 14 years' experience and has been involved in several high profile cases relating to cartels, abuse of dominance and merger control. She worked closely with the Government of India and the Competition Commission of India in finalising the draft Combination Regulations and associated exemption notifications. She also contributed to the drafting of the national competition policy of India. Shweta is also a Non-Governmental Advisor to the International Competition Network from India. In Chambers and Partners Rankings 2019, Shweta has been ranked in 'Band 2' (being the youngest Indian competition practitioner in this band for the third year running) which quotes, *"Shweta Shroff Chopra attracts praise for her expertise in handling competition law matters, in particular enforcement and merger control mandates"*. The clients have recommended her highly for her *"to-the-point, easy-to-understand advice"*.

She was awarded 'Emerging Corporate Lawyer of the Year' at the Legal Era Awards, 2017-18. She has also been recognised for her professional achievements in the International Who's Who of Competition Lawyers and Economists every year since 2013. She has won the "Young Lawyer of the Year (Female)" Award at the Legal Counsel Congress & Awards 2014 and selected by the international in-house counsel community as an outstanding practitioner in the Euromoney Guide to the World's Leading Competition and Antitrust Lawyers/ Economists. In 2016, Shweta was featured by Legal Era in its list of "Under 40 Rising Stars" and has also been listed as a foremost practitioner under 45 in "Who's Who Legal: Competition – Future Leaders". She recently secured unconditional approval for the USD 16 billion acquisition of *Walmart* of India's leading e-commerce marketplace as well as *Vodafone* in its landmark USD23 billion merger with *Idea*.

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Harman Singh Sandhu is a Partner in the Firm's Competition Law Practice. Harman has considerable experience in advising Indian and foreign companies in relation to a whole range of competition issues (both on the advisory side and in proceedings before the Competition Commission of India) in a variety of sectors including telecoms, railways, steel, aviation, banking, natural resources (oil, coal, iron ore, etc.), pharmaceuticals, agro-chemicals, paper, construction, cement, tyres and fibres.

Harman has been acknowledged as a leading lawyer in Global Competition Review's Who's Who Legal of Competition Lawyers since 2011. Harman has also been ranked in 'Band 2' in the competition practice by Chambers and Partners 2019, which quotes *"Harman Sandhu commands increasing respect in this space, market sources"* declaring themselves *"very impressed with his capabilities"* and identifying him as a *"central pillar of the team"*. Others prize his combination of industry-specific with multi-jurisdictional expertise to "come up with the best advice." He stands out for his assured handling of the competition aspects of large, cross-border transactions. Recently, Harman has advised on *Agrium's* merger with *Potash Corporation*, the merger between *Praxair* and *Linde* and the transaction between *Alstom* and *Siemens* in relation to their mobility business.

Before joining the firm, Harman worked with the Office of Communications (UK) and the Directorate General of Competition in the European Commission - Cartels Division (Belgium), focusing on competition law issues.

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Manika Brar is a Partner in the Firm's Competition Law Practice. She has more than 8 years of experience in Indian competition law and has considerable expertise in advising on cartel investigations, dominance cases and merger control issues.

Manika has many firsts to her credit. She was involved in, the first case in India on predatory pricing – the National Stock Exchange case, the first compensation claim before the Competition Appellate Tribunal, and the first case where the Director General Office of the Competition Commission of India successfully conducted a "dawn raid". Over the years, Manika has represented many multinational and domestic companies, including *Transitions Optical*, *Hiranandani Hospital*, and *DLF* on allegations of abuse of dominance. Manika is also advising clients on complex cartel cases. Additionally, she regularly conducts competition law compliance trainings for several Indian and multinational companies. On the merger control side, Manika has many notable successes including obtaining clearances for *Konecranes Plc, CMA CGM SA, Nestle SA, H. J. Heinz,* and *Berkshire Hathaway*. Manika has also made valuable contributions to the market intelligence chapters on cartels for Getting the Deal through (GTDT). Manika has also been listed as a foremost practitioner under 45 in *"Who's Who Legal: Competition – Future Leaders"*.

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Aparna Mehra, is a Partner in the Firm's Competition Law Practice and has over 9 years of extensive experience especially in the Indian merger control regime. She is a merger control specialist and has been involved in a number of high profile merger control matters.

According to Chambers & Partners 2019, Aparna has been praised as a partner who is *"able to sift through a lot of information without having to ask for instructions on every piece"* and who can maintain *"great transparency in an area with lot of confidentiality, making the business teams very comfortable"*. Recently, she has been involved in several complex transactions for *Videocon d2H/ DishTV*, *HP/Samsung* and *Monsanto/Bayer*.

She also played an important role in the finalisation of the Indian merger control regime, working closely with the Government of India and the Competition Commission of India in relation to the draft Combination Regulations and associated exemption measures. She also co-authored *"Navigating through Indian Merger Control, Trends and Challenges"* published in USIBC Legal and the India Chapter of the Antitrust Chronicle – Antitrust Developments in Asia Pacific which is published by Competition Policy International. Aparna has been listed as a foremost practitioner under 45 in *"Who's Who Legal: Competition – Future Leaders"*. She has co-authored the India chapter of the upcoming Private Equity Antitrust Handbook which will be published by the American Bar Association. Prior to venturing into competition law, she was involved in a number of M&A transactions and practised general corporate commercial law, advising clients on regulatory and compliance issues in various sectors.

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Gauri Chhabra is a Partner in the Firm's competition law practice and has over 10 years of experience in advising on competition and corporate law. She specialises in competition law and has worked on a full range of competition law matters, including cartel enforcement, abuse of dominance, merger control and competition compliance. She has represented Indian and multinational clients before the Competition Commission of India across various sectors. Her clients include *Singapore Airlines, Microsoft, Blackstone, Warburg, Brookfield* and *UltraTech Cements*. She has worked closely with the Competition Commission of India on drafting the merger regulations, as part of the "Law Firm Working Group" constituted by the Ministry of Corporate Affairs.

Gauri has been recognised for her professional achievements in the International Who's Who of Competition Lawyers and Economists in 2017 and 2018, where she was described as a *"merger specialist with an international profile"*. She has also been recognised in Asialaw Leading Lawyers 2018 Edition as a leading lawyer in competition law. Before joining the Firm, she interned in the State Attorney General's office, Antitrust Division, New York and was a research assistant to Prof. Eleanor Fox.

Glossary

Abbreviation	Terms
AAEC	Appreciable Adverse Effect on Competition
CCI	Competition Commission of India
Combination Regulations	Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011
COMPAT	Competition Appellate Tribunal
Competition Act	Competition Act, 2002
DG	Director General
EC	European Commission
EU	European Union
FRAND	Fair, reasonable and non-discriminatory
IBC	Insolvency and Bankruptcy Code, 2016
ICN	International Competition Network
Lesser Penalty Regulations	Competition Commission of India (Lesser Penalty) Regulations 2009
NCLAT	National Company Law Appellate Tribunal
RPM	Resale Price Maintenance
US	United States of America

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