



## Indian Competition Law in 2020

In this overview, we outline some of the main developments in Indian competition law and policy in 2020 and indicate what may lie “around the corner” in 2021.

### The Response to COVID-19

Shortly after the start of the pandemic, India was placed under a tight lockdown. This impacted the ability of the Competition Commission of India (CCI) to conduct its business and by the end of March it suspended its enforcement work and declined to accept new combination notifications. In this context, it swiftly introduced measures for the electronic filing of combination notifications in the Green Channel (see under **Merger Control**, below) and stated that it would endeavour to process existing merger cases. In mid-April, the CCI stated that it would “endeavour to process new and pending cases subject to the availability of necessary information and material” and complaints of anti-competitive agreements and abuse of dominance could be filed electronically. Merger notifications could also be filed electronically and pre-filing consultations could take place by videoconference. The CCI also issued an important Advisory on competitor coordination addressing the effects of COVID-19 (see under **Anti-Competitive Agreements**, below).

Hearings before the CCI were effectively suspended until early October, when it introduced a Standard Operating Procedure for Virtual Hearings with a set of General Instructions designed to protect confidentiality and the integrity of the hearings process.<sup>1</sup>

The National Company Law Appellate Tribunal (NCLAT) and the Courts also initially suspended hearings but were, over time, able to hear cases by means of virtual hearings.

By the end of the year, the CCI, the NCLAT and the Courts had thus been able to return to full functioning, with an increased reliance on virtual filings and hearings.

### Institutional Developments

*Proposals to Change the Constitution and Operation of the CCI*

Taking on board recommendations by the Competition Law Review Committee in its August 2019 Report,<sup>2</sup> the Draft Competition (Amendment) Bill, 2020 (*Draft Bill*), published by the Ministry of Corporate Affairs in February,<sup>3</sup> included provisions on the constitution and operation of the CCI.

The Draft Bill provided for the constitution of a Governing Board of the CCI to exercise

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<sup>1</sup> CCI, *Standard Operating Procedure (SOP) for Virtual Hearings* (6 October 2020).

<sup>2</sup> The Report is available at [http://www.mca.gov.in/Ministry/pdf/ReportCLRC\\_14082019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf).

<sup>3</sup> [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/bill.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/bill.pdf).



general superintendence, direction and management of the CCI. Taking over some of the existing functions of the CCI, the Governing Board would be responsible for making regulations, engaging with statutory bodies and government departments, competition advocacy and assisting the Central Government in developing a National Competition Policy. The CCI itself would focus on the adjudication of competition cases. The Draft Bill also provided for the appointment of the investigating Director General (DG) by the CCI itself, rather than by the Central Government, thereby merging the office of DG within the CCI as Investigation Division. At the time of writing, the Bill had not been introduced in the Parliament of India.

## Anti-Competitive Agreements

### *CCI's First Leniency Order Upheld*

In February, the NCLAT dismissed<sup>4</sup> an appeal against the first CCI order grounded on leniency.<sup>5</sup> Relying on evidence in the form of call records, e-mails and statements of the opposite parties, the CCI had established the existence of a bid-rigging cartel but granted a 75% reduction to one of the three opposite parties under the Leniency Regulations. Rejecting the appeal by the other two, the NCLAT held that the e-mail records, call records and identical bidding rates established the sequence of events. It rejected an argument raised by one of the appellants that the penalty imposed on it should be reduced as it was more than its net profit for the entire year.

### *Competitor Coordination in the Time of COVID-19*

In April, the CCI issued an *Advisory to Businesses in Time of COVID-19*<sup>6</sup> where it outlined the framework for dealing with coordination between competitors designed to cope with significant changes

in supply and demand patterns resulting from the disruption caused by COVID-19. Recognising the need for such coordination to ensure the continued supply and fair distribution of healthcare and other essential products and services, the CCI pointed out that there were two safeguards in the Competition Act, 2002 (*Competition Act*) protecting businesses from sanctions for coordinated conduct where it resulted in increasing efficiencies. First, under the proviso to Section 3(3) of the Competition Act, the presumption of an appreciable adverse effect on competition (AAEC) did not apply to efficiency-enhancing joint ventures. Second, the existence in Section 19(3) of the Competition Act of a number of positive factors (such as, the accrual of benefits to consumers and promotion of technical, scientific and economic development) showing that there was no AAEC. The CCI limited such protection to cases where the coordination was necessary and proportionate to the aim of increasing efficiencies. It signalled that it would act firmly where, outside the area of legitimate coordination, competitors colluded.

### *No Penalty at the Time of COVID-19*

In July, the CCI found that a number of suppliers of composite brake blocks to railway companies had engaged in cartelisation for a period before the COVID-19 pandemic.<sup>7</sup> The CCI decided not to impose penalties on the suppliers and officials given their cooperation and admissions of guilt. In addition, some of the parties were Micro Small and Medium Enterprises (MSMEs) with small annual turnover for the product. The CCI also noted the prevailing economic situation due to COVID-19 and the measures taken by the Government to support the financial needs of viable MSMEs to withstand the impact of the shock. It directed the suppliers and officials to “cease and desist” and

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<sup>4</sup> *Western Electric and Trading Company and Another v CCI*, NCLAT, Competition Appeal No. 37 of 2017 (17 February 2020).

<sup>5</sup> *Brushless DC Fans*, CCI, *Suo Moto* Case No. 3 of 2014 (18 January 2017).

<sup>6</sup> CCI, *Advisory to Businesses in Time of COVID-19* (19 April 2020) (<https://www.cci.gov.in/node/5088>).

<sup>7</sup> *Chief Material Manager, South Eastern Railway v Hindustan Composites Limited and Others*, CCI, Ref. Case No. 03 of 2016, etc. (10 July 2020).



cautioned them to ensure that their future conduct was strictly in accordance with the Competition Act.

## *Common Directors/Ownership Not Evidence of Collusion*

In a number of cases throughout the year, the CCI declined to order an investigation into alleged cartel activity in the absence of *prima facie* evidence of collusion. In May, rejecting a complaint made against the *Director General of the Armed Forces Medical Services* and some pharmaceutical companies, the CCI dismissed arguments that commonality of directors or ownership in participating firms in itself suggested collusion.<sup>8</sup> In a later case, the CCI *prima facie* held that the fact that three licensees for the supply of imported foreign liquor in the state of Haryana accused of bid-rigging shared a common address, had common shareholders, had financial transactions between themselves and had acted in a collective way towards a common purchaser was, in the absence of evidence of collusion, insufficient to establish a *prima facie* case of breach of Section 3 of the Competition Act.<sup>9</sup>

## *Parties Fail to Rebut Presumption of an AAEC in the Ball Bearing Case*

In June, the CCI found that manufacturers of ball bearings had discussed price increases to automotive and industrial original equipment manufacturers (OEMs) and had engaged in cartelisation.<sup>10</sup> It rejected arguments that there was no AAEC since the prices quoted to the OEMs differed from what had been agreed. The CCI pointed out that an actual AAEC did not have to be established; it was enough to show that the agreement was *likely* to cause an AAEC. The parties failed to rebut the presumption of an AAEC in

Section 3(3) of the Competition Act. The very fact that the parties had met to decide price changes compromised their independence, allowing them to quote different prices than they would have quoted independently. The CCI ordered the parties and a number of officials to “cease and desist”. In light of “the peculiar facts and circumstances” of the case, the CCI decided that no penalty was necessary.

## *Supreme Court Finds No Cartelisation in Taxi Aggregators Case*

In May, the NCLAT dismissed an appeal challenging the closure by the CCI at *prima facie* stage of a case against taxi aggregators *Uber* and *Ola* on grounds, among others, that the aggregators had organised hub and spoke cartels.<sup>11</sup> The NCLAT found no evidence to support allegations that drivers had agreed between themselves to participate in hub and spoke cartels where the aggregators fixed prices. In December, the Supreme Court dismissed an appeal brought by the Informant,<sup>12</sup> affirming findings by the CCI and the NCLAT that *Ola* and *Uber* did not facilitate cartelisation or anti-competitive practices between drivers, who were independent individuals acting independently of each other.

## *“Hub and Spoke” Cartels*

The Draft Bill addressed the question of “hub and spoke” cartels, involving players at different levels of the supply chain. It was proposed to cover non-competitors in such a scenario (including suppliers and dealers) who would be liable where they actively participated in the furtherance of an anti-competitive agreement between competitors.

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8 *Ved Prakash Tripathi v Director General Armed Forces Medical Services and Others*, CCI, Case No. 44 of 2019 (14 May 2020).

9 *XYZ v Lakeforest Wines Private Limited and Others*, CCI, Case No. 36 of 2020 (17 November 2020). See also, *Arddy Engineering Innovations Pvt. Ltd. v Heraeus Technologies Pvt. Ltd. and Others*, CCI, Case No. 47 of 2020 (11 December 2020).

10 *Industrial and Automotive Bearings*, CCI, *Suo Moto* Case No. 05 of 2017 (5 June 2020).

11 *Samir Agrawal v CCI and Others*, NCLAT, Appeal No. 11 of 2019 (29 May 2020).

12 *Samir Agrawal v CCI and Others*, Supreme Court, Civil Appeal No. 3100 of 2020 (15 December 2020).



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## Vertical Agreements

In January, the CCI directed an investigation into allegations by a Delhi-based traders' body of an anti-competitive agreements between e-commerce marketplaces *Amazon* and *Flipkart*, on the one hand, and sellers on these marketplaces, on the other.<sup>13</sup> It was alleged that Amazon and Flipkart offered deep discounts through selected preferred sellers who also benefited from preferential listings and exclusive tie-ups, resulting in competing sellers being excluded from the market. Amazon and Flipkart challenged the CCI order before the Karnataka High Court on the grounds, amongst others, that: (i) the CCI could not direct an investigation where the Central Government was already investigating the manner under the Foreign Exchange Management Act, 1999; (ii) the CCI had failed to adequately form a *prima facie* view that agreements between the marketplaces and the sellers existed or that they caused an AAEC; and (iii) the CCI failed to note that the traders' body had been "set up" by the *Confederation of All India Traders*, which had made earlier complaints about the same business practices to the Central Government and various High Courts. The High Court considered that the matter required deeper consideration and, in the interim, stayed the CCI order.<sup>14</sup>

## Abuse of Dominance

### Abuse in the Supply of Viscose Staple Fibre

In March, the CCI found that *Grasim Industries (GIL)* had abused its dominant position in the market for "supply of viscose staple fibre to spinners in India".<sup>15</sup> It held that GIL had charged discriminatory prices and, in seeking details of production and exports from the spinners, had imposed supplementary obligations which had no

connection with the subject of supply contracts. In addition to imposing a "cease and desist" obligation, the CCI directed GIL to establish a transparent and non-discriminatory price discount policy and not to place any end-use restriction on spinners. It also imposed a penalty of 5% of the relevant average turnover over three years, amounting to INR 301.61 crores (approx. USD 40 million). The order is now being appealed to the NCLAT.

### Asserting Trademark Rights Not Abusive

The CCI rejected at *prima facie* stage a complaint that *SPS Steels Rolling Mills* and related entities/individuals (SPS) had abused their dominant position by making an announcement threatening prosecution of any person using the "Elegant" trademark or associated trademarks.<sup>16</sup> The informant had previously been permitted to use these trademarks but, as a result of insolvency proceedings, was at the time of the announcement no longer able to do so. The CCI held that the informant had not shown it had any legal right in the trademarks, so no legal right could have been infringed. The announcement was a mere reflection of the rights claimed to be vested in SPS. A public announcement by a party of the existence of a legal right that it validly possessed could not amount to an abuse.

### No Abuse by Food Platform where Restaurant Fixed Prices

The CCI rejected at *prima facie* stage a complaint that the app-based food ordering and delivery platform, *Swiggy*, had abused its dominant position by charging higher prices than listed restaurants charged in their own outlets, in addition to delivery charges.<sup>17</sup> The CCI found there was no *prima facie* case of abuse as the restaurants themselves

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<sup>13</sup> *Delhi Vyapar Mahasangh v Flipkart Internet Private Limited and Amazon Seller Services Private Limited*, CCI, Case No. 40 of 2019 (13 January 2020).

<sup>14</sup> *Amazon Seller Services Private Limited v CCI*, Karnataka High Court, Writ Petition No. 3363 of 2020 (14 February 2020) and *Flipkart Internet Private Limited v CCI*, Writ Petition No. 4334 of 2020 (27 February 2020).

<sup>15</sup> *XYZ v Association of Man-Made Fibre of India, Grasim Industries and Others*, CCI, Case No. 62 of 2016 (16 March 2020).

<sup>16</sup> *Prashant Properties Private Limited v SPS Rolling Mills Limited and Others*, CCI, Case No. 17 of 2020 (8 July 2020).

<sup>17</sup> *Ms. Prachi Agarwal and Another v Swiggy*, CCI, Case No. 39 of 2019 (19 June 2020).



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set the prices that appeared on Swiggy's platform. An intermediary like Swiggy was not liable for pricing decisions made by third parties where it did not determine, select or modify the pricing information transmitted through its platform. However, the CCI suggested that Swiggy could, to allay any misgiving in the mind of stakeholders, state on its platform that it was not involved in fixing prices.

## *No Abuse by WhatsApp*

In August, the CCI dismissed at *prima facie* stage a complaint that *WhatsApp* had abused its dominant position in the market for "internet-based messaging applications through smartphones" to manipulate the market for "UPI enabled digital payment applications".<sup>18</sup> The CCI *prima facie* found *WhatsApp* to be dominant in a narrowly defined market for "Over-The-Top messaging apps through smartphones". However, it considered that there was no abuse by *WhatsApp*. The automatic inclusion of the *WhatsApp* Pay feature with the *WhatsApp* application was not abusive as the user was free to use other payment features/apps. There was no unlawful tying, as there was no requirement for users to use *WhatsApp* Pay and that, given its recent entry into the market, it was too early to judge whether competition would be affected. The CCI also rejected allegations of a leveraging abuse, as there was vigorous competition in the UPI payments market and it was implausible that *WhatsApp* would garner market share simply because it had preinstalled the feature. The CCI finally rejected allegations of misuse of data and non-compliance with data localisation/storage norms, finding that no competition concerns were raised.

## *Amazon Not Dominant – For Now*

The CCI dismissed at *prima stage* allegations by fashion companies selling

under the *Beverly Hills Polo Club* brand that *Amazon* had abused its dominance in the market for "online fashion retail in India" by selling counterfeit, unlicensed and unauthorised products at unfair, discriminatory and/or predatory prices.<sup>19</sup> The CCI defined the relevant market as that for "services provided by online platforms for selling fashion merchandise in India"; since there were many players providing these services, no one platform could be seen as dominant. The CCI stressed that this assessment was specific to the relevant market delineation due to the product-focused allegations. Defining markets and making competition assessments depended on market realities at the time of assessment. In rapidly changing markets, there could not be a static approach to market assessment.

## *New Investigation of Google*

The CCI directed a new investigation into *Google*, finding *prima facie* that it had abused its dominant position by requiring the use of *Google* Play's payment system for downloading paid apps and for in-app purchases in the *Play Store*, by *Google* methodology as opposed to a "collect flow" methodology that other payment apps were required to use, and by pre-installing and giving prominence to *Google* Pay on *Android* smartphones. Considering that *Google*'s conduct warranted a detailed investigation, it directed an investigation by the Director General.

## *Flipkart Investigation Stayed*

In November 2018, the CCI had at *prima facie* stage rejected a complaint made by the *All India Vendors Association* that e-tailer *Flipkart* had abused its dominance, including by predatory pricing.<sup>20</sup> In March 2020, the NCLAT set this order aside and directed the CCI to direct an investigation

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<sup>18</sup> *Harshita Chawla v WhatsApp Inc. and Facebook Inc.*, CCI, Case No. 15 of 2020 (18 August 2020).

<sup>19</sup> *Lifestyle Equities C.V. and Lifestyle Licensing B.V v Amazon Seller Services Private Limited and Others*, CCI, Case No. 9 of 2020 (11 September 2020).

<sup>20</sup> *All India Online Vendors Association v Flipkart India Private Limited and Another*, CCI, Case No. 20 of 2018 (6 November 2018).



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into the allegations of dominance.<sup>21</sup> In December, on hearing an appeal filed by Flipkart, the Supreme Court stayed the operation of the NCLAT's order.<sup>22</sup>

## Damages Actions

### [NCLAT Admits Application for Compensation](#)

The NCLAT admitted an application for compensation made by the *Food Corporation of India* for losses alleged to be suffered as a result of bid-rigging in the supply of aluminium phosphide tables.<sup>23</sup> The 2012 Order of the CCI establishing breach was appealed to the COMPAT (the predecessor of the NCLAT), which upheld the order in October 2013, and from there to the Supreme Court which upheld the findings of breach in May 2017. An application for compensation was filed with the NCLAT in July 2017, just over two months after the Supreme Court judgment. The NCLAT rejected arguments that a compensation application could only lie pursuant to a CCI or COMPAT order and not pursuant to a Supreme Court judgment. It held, in the absence of a statutory limitation period, that applications for compensation had to be made within a "reasonable" period of three years. Time thus ran from the Supreme Court judgment and the application had been made well within the three-year period.

## Procedures

### [A Question of Standing](#)

In May, the NCLAT dismissed an appeal<sup>24</sup> challenging the CCI closing, at the threshold stage, a case against taxi aggregators *Uber* and *Ola*.<sup>25</sup> The NCLAT found that the informant in the case, an independent legal practitioner, had no standing (*locus standi*) to complain to the CCI as he had

not "suffered any invasion of his legal rights as a consumer or beneficiary of healthy competitive practices" and there was nothing to show that he had suffered a legal injury at the hands of the opposite parties. The informant appealed to the Supreme Court which, in December, held that the NCLAT's position on standing was wrong.<sup>26</sup> There was no need for a person providing information to the CCI to show that he or she was personally affected by the alleged infringement. Furthermore, where the CCI refused to act on the basis of the information supplied, the informant could be regarded as a "person aggrieved" in appealing to the NCLAT. Since the CCI acted in the public interest, a "person aggrieved" had, in the context of the Competition Act, to be understood widely and not constructed narrowly. Referring to the 2010 *SAIL* judgment of the Supreme Court,<sup>27</sup> the Bench concluded that, "where the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act".

## Settlements

The Draft Bill included the introduction of a procedure allowing the settlement of investigations. This would apply only to cases of restrictive agreements under Section 3(4) of the Competition Act (covering vertical agreements and a new "residual" category of agreements with an AAEC) and abuses of dominant position under Section 4. It would not apply to horizontal agreements between competitors, including cartels, covered by Section 3(3).

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21 *All India Online Vendors Association v CCI and Another*, NCLAT, Appeal No. 16 of 2019 (4 March 2020).

22 *Flipkart India Private Limited and Another v CCI and Another*, Supreme Court, Civil Appeal No. 2770 of 2020 (2 December 2020).

23 *Food Corporation of India v Excel Crop Care and Others*, NCLAT, Compensation Application (AT) No. 1 of 2019 (3 June 2020).

24 *Samir Agrawal v CCI and Others*, NCLAT, Appeal No. 11 of 2019 (29 May 2020).

25 *Samir Agrawal v ANI Technologies and Others*, CCI, Case No. 37 of 2018 (6 November 2020)

26 *Samir Agrawal v CCI and Others*, Supreme Court, Civil Appeal No. 3100 of 2020 (15 December 2020).

27 *CCI v SAIL* (2010) 10 SCC 744.



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## Due Process

### *Amendment of the General Regulations*

In February, the CCI amended the *General Regulations* to make it clear that the investigating Director General's report no longer had to contain findings "on each of the allegations made in the information or reference".<sup>28</sup> This reflected the judgments of the Supreme Court<sup>29</sup> and the Delhi High Court<sup>30</sup> that investigations were not limited to matters raised in an information (complaint) or in the CCI's *prima facie* order directing an investigation. The Director General's report was thus to contain findings on all the matters considered during the investigation.

### *Investigations only where there is a Prima Facie Case*

The Delhi High Court affirmed that enterprises may be proceeded against under the Competition Act only where a *prima facie* case had been made out.<sup>31</sup> In a case involved alleged cartelisation in the supply of bearings, the CCI, basing itself on a report from the Director General, had issued a show-cause notice to the petitioner. In a challenge before the Delhi High Court, the CCI found that the Director General had merely recorded that the petitioner had a relationship with a company involved in the investigation. There was nothing in the report to show that the petitioner was in breach of the Competition Act and the High Court therefore set aside the CCI orders.

### *CCI Order Quashed where No Reasons Given*

In August, the Gujarat High Court quashed a *prima facie* order of the CCI directing the Director General to investigate alleged bid-rigging in a tender for the printing

of school textbooks.<sup>32</sup> The High Court found that the *prima facie* order did not provide even minimal reasons for the CCI reaching its view that there was a breach of Section 3 of the Competition Act. It was not sufficient for the CCI to say that it was "apparent" that the bidder's action was caught by Section 3. The CCI quashed the order, leaving it open to the CCI to record such reasons and to pass a fresh order within four weeks of receiving the High Court's order.

## Merger Control

### *Amendment of Form I Guidance Notes*

In March, the CCI published revised guidance notes for the completion of the short Form I.<sup>33</sup> These reflected earlier changes to the Form itself and the introduction of the Green Channel in August 2019. The revised guidance notes provided guidance on "complementary activities" for the purposes of the Green Channel (which allows for the clearance of a combination at the time of filing where there is no horizontal overlap, vertical relationship or complementary businesses). The requirement to provide market information for the past three years was relaxed where the parties had less than a 10% market share in any plausible market where there was a horizontal overlap or a vertical or complementary relationship. The CCI also provided guidance on the various entities which had to be taken into account in considering overlaps and other relationships. Information was now to be provided in respect of any entity where a party had a direct/indirect shareholding of 10% or more, the right or ability to exercise any right not available to an ordinary shareholder, or the right or ability to nominate a director or observer.

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<sup>28</sup> The Competition Commission of India (General) Amendment Regulations, 2020 (6 February 2020).

<sup>29</sup> *Excel Crop Care v CCI* (2017) 8 SCC 47.

<sup>30</sup> *Cadila Healthcare Limited v CCI*, Delhi High Court, L.P.A. No. 160 of 2018 (12 September 2018) and *CCI v Grasim Industries*, Delhi High Court, L.P.A. No. 137 of 2014 (12 September 2019).

<sup>31</sup> *National Engineering Industries Limited v CCI and Another*, Delhi High Court, W.P. (C) 1714 of 2020 (25 February 2020).

<sup>32</sup> *Vardayani Offset v CCI and Others*, High Court of Gujarat, Special C.A. No. 8101 of 2020 (18 August 2020).

<sup>33</sup> Notes to Form I (27 March 2020).



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## *Self-Assessment of Non-Compete Obligations*

In November, the CCI removed the requirement to provide information on non-compete obligations in the short Form I (used for notifying the bulk of notifiable combinations).<sup>34</sup> In its May proposals,<sup>35</sup> it noted that omitting the requirement would give parties greater flexibility in determining non-compete restrictions and reduce the information burden. However, parties would need to ensure that such restrictions complied with Sections 3 and 4 of the Competition Act (respectively addressing anti-competitive agreements and abuse of dominant position). Parties would thus need to self-assess any non-compete obligations to make sure that they would not raise any competition concerns later on. On 31 December, the CCI stated that it had further withdrawn its Guidance Note on Non-Compete Restrictions, arguably making the process of self-assessment more problematic.<sup>36</sup>

## *Penalty for Non-Notification of Inter-Connected Transaction / Failing to Provide Information*

In January, the CCI published an order finding that the *Canadian Pension Plan Investment Board (CPPIB)* had, in its notification of an acquisition of an energy company (*target*), failed to notify a subsequent acquisition to be made by the target.<sup>37</sup> The CCI held that the later acquisition was an “inter-connected” transaction, which should have been notified as part of the first transaction, even it was not in itself notifiable. The CCI imposed a significant penalty of INR 50 lakhs (approx. USD 70,000) for the failure to notify (under Section 43A of the Competition Act) and for omitting to furnish material information (under Section 44

of the Competition Act). This was the first time that the CCI imposed a penalty under both provisions and highlighted the need for parties to a notifiable transaction to identify past, current and future inter-connected transactions and to ensure that there was full disclosure in the notification.

## *Facebook/Jio Acquisition Cleared*

In June, the CCI cleared the acquisition by *Facebook* subsidiary *Jaadhu Holdings LLC (Jaadhu)* of an approximately 9.9% shareholding in *Jio Platforms Limited (Jio Platforms)*, a subsidiary of *Reliance Industries Limited (RIL)*.<sup>38</sup> The CCI considered this as involving an active investment by Jaadhu in Jio Platforms as well as a strategic tie-up between Facebook and RIL, given that *JioMart*, a new e-commerce marketplace in the RIL Group would use *WhatsApp*, part of the Facebook Group, as one of its communications channels for its retail business.

The CCI found that overlaps between the parties in the segments for consumer communications applications and advertising services were unlikely to cause an AAEC. The business collaboration between JioMart and WhatsApp was also unlikely to cause an AAEC. The CCI dismissed concerns that preferential treatment might be given to Facebook applications/content on the telecoms network of *Reliance Jio Infocomm Limited*, a subsidiary of Jio Platforms. Finally, the CCI considered the consequences of data sharing between the parties and group companies. Considering that the parties might have incentives to engage in mutually beneficial data sharing, it signalled that that any anti-competitive conduct resulting from any future data sharing could be taken up under Section 3 or 4 of the Competition Act.

<sup>34</sup> Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2020 (27 November 2020).

<sup>35</sup> CCI, *Inviting public comments regarding examination of non-compete restrictions under regulation of combinations* (May 2020).

<sup>36</sup> CCI, Press Release No. 49/2020-21 (31 December 2020).

<sup>37</sup> *Proceedings against Canada Pension Plan Investment Board and ReNew Power Limited under Chapter VI of the Competition Act, 2002* (21 November 2019).

<sup>38</sup> *Jaadhu Holdings LLC*, CCI, Combination Reg, No. C-2020/06/747 (24 June 2020).

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## CCI Approves Alstom/Bombardier Transaction

In September, the CCI cleared the acquisition by Alstom S.A. (Alstom) of sole control over Bombardier Transportation (Investment) UK Limited (Bombardier), the acquisition by Caisse de Dépôt et Placement du Québec (CDPQ) of an approximately 18% shareholding in Alstom and the acquisition by Bombardier of a 3% shareholding in Alstom.<sup>39</sup> The CCI found that Alstom and Bombardier overlapped in certain segments of signalling and rolling stock but that these overlaps were unlikely to cause an AAEC. In arriving at this conclusion, the CCI carried out a robust bidding analysis, finding that Bombardier was not a credible competitor to Alstom in the signalling segment and that the parties were not close competitors in the rolling stock segment. The CCI also noted that other international suppliers were present in the market and that the customers/end-users possessed significant countervailing power as they were capable of designing tenders and structuring the bid contest in such a way that fostered competition and maximised their incentives. The CCI also identified a number of vertical relationships between Alstom and a portfolio company of CDPQ but concluded that they were not significant in terms of value or share.

## Remedies

In two cases, the CCI approved combinations on the basis of remedies designed to address competition concerns.

In February, the CCI approved ZF Friedrichshafen AG's (ZF) indirect acquisition of a 100% shareholding in WABCO Holdings Inc. (WABCO) subject to structural modifications.<sup>40</sup> Both parties manufactured commercial vehicle components in India, with ZF

operating through a joint venture, Brakes India Private Limited (Brakes India). The parties overlapped in a number of areas, particularly in the manufacture and sale of components for brakes and clutches systems in the light and heavy commercial vehicle segments. The CCI's *prima facie* competition concerns were addressed by voluntary modifications offered by ZF after the issuance of a show cause notice. These included the divestment of its shareholding in Brakes India, an undertaking that ZF would have no influence on Brakes India in the future, and provisions on ring-fencing in the interim. Unusually, the CCI did not appoint a monitoring trustee to oversee the implementation of the remedies, leaving the parties responsible for this exercise.

In considering the proposed acquisition by Outotec OYJ of the minerals' equipment business of fellow-Finnish company Metso OYJ, the CCI raised competition concerns in relation to the market for "Iron Ore Pelletisation Equipment" in India.<sup>41</sup> These concerns were addressed by voluntary remedies under which Metso India would effectively transfer its business through an exclusive and irrevocable licence of the technology in India. This was the first time that the CCI accepted the transfer of rights for a technology (for a specified duration) as a remedy to address competition concerns.

## Draft Competition Amendment Bill

In relation to merger control, the Draft Bill proposed a number of amendments which would result in more transactions being subject to CCI review. In addition to the current prescribed turnover/asset thresholds, it was proposed to allow the Central Government to introduce deal value, market share or other notifiability criteria. This would result in strategic high value transactions, especially in digital markets, becoming subject to merger review.

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<sup>39</sup> Alstom S.A., Bombardier Inc. and Caisse de Dépôt et Placement du Québec, CCI, Combination Reg. No. C-2020/07/759 (18 September 2020).

<sup>40</sup> ZF Friedrichshafen AG, CCI, Combination Reg. No. C-2019/11/703 (14 February 2020).

<sup>41</sup> Outotec OYJ and Metso OYJ, CCI, Combination Reg. No. C-2020/03/735 (18 June 2020).



# Competition Matters

The Draft Bill also affirmed the CCI's shifting stance on the issue of control, seeking to codify the test of "material influence", which had come to replace that of "decisive influence".

Other amendments reflected the desire to reduce the burden of doing business in India. It was proposed to allow the Central Government to specify combinations that would be deemed to be approved on the submission of a notice in a given format (in effect entrenching the Green Channel introduced by the CCI in August 2019 to cover combinations where the parties had no horizontal overlap, no vertical relationships and no complementary businesses). Another amendment diluted the obligation not to implement a merger before CCI clearance in the case of open offers or acquisitions through series of transactions on a regulated stock exchange. It also proposed that the current overall 210-day review period be cut to 150 calendar days.

## Market Studies

### *E-Commerce Market Study*

In January, the CCI published a report on its *Market Study in on E-Commerce in India*,<sup>42</sup> focusing on three broad categories of e-commerce in consumer goods, accommodation services and food services. The CCI identified and discussed a number of competition issues relating to platform neutrality, platform-to-business contract terms, platform price parity clauses, exclusive agreements and deep discounting. It then set out its enforcement and advocacy priorities: (a) to ensure competition on the merits to harness efficiencies for consumers; (b) to promote transparency to incentivise competition and reduce information asymmetry; and (c) to foster sustainable business relationships between stakeholders. It also pointed to

the importance of improving transparency in the functioning of platforms, including by way of self-regulatory measures.

### *The Pharmaceutical Sector*

In October, the CCI launched a study into the pharmaceutical sector to assess whether there were distortions to competition.<sup>43</sup> The study would examine discounts and margin policies at wholesale and retail levels, the role of trade associations, regulatory rationalisation of trade margins and the impact of e-commerce on price and competition. The study would also look at the extent of proliferation of branded generic drugs in India and to assess whether there were any hurdles in the entry of bio-equivalent/bio-similar drugs. The CCI Chairperson, Mr. Ashok Kumar Gupta, stressed that identifying and addressing mechanisms that locked competition in the pharmaceutical sector was all the more important during a pandemic.

### *Private Equity Investment in India*

In December, the CCI Chairperson announced that the CCI would conduct a market study on private equity investment in India.<sup>44</sup> The study would focus on cases where investors held minority interests in several firms in the same sector. It would look at the shareholding rights given to investors and consider the extent to which they would amount to "passive" shareholder protection rights or would give investors the ability to influence the decisions of the firms and impact competition.

## Looking Forward to 2021

Predicting the future is a risky business, especially at the end of year which has seen enormous change as a result of the pandemic, which was hardly foreseeable at the end of 2019!

However, we think it is quite likely that this

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<sup>42</sup> CCI, *Market Study on E-Commerce in India: Key Findings and Observations* (8 January 2020).

<sup>43</sup> "After e-commerce, CCI looks at pharma sector to unlock competition", *Business Standard* (3 December 2020).

<sup>44</sup> Address by Mr. Ashok Kumar Gupta to CII Annual Conference on Competition Law and Practice (4-5 December 2020).



# Competition Matters

year will see the passing of the Competition (Amendment) Bill, which will introduce a raft of changes to the Competition Act, some of which have been identified above. The constitution and governance of the CCI will change and this may take a little time to bed down.

Although the activity of the CCI, the NCLAT and the Indian courts has clearly picked up during the year, there is a backlog of cases and new cases will have to be taken up. We expect to see a spurt in hearing and deciding cases in 2021.

In relation to enforcement, we may see the CCI address cartel and abuse of dominance cases arising out of the situation caused by COVID-19. It is possible we will see the introduction of a settlement procedures for cases involving vertical agreements and abuse of dominant position, but not for cartels. With key issues decided by NCLAT, we may also see the beginning of damages actions, some in relation to cases which were decided by the CCI nearly ten years ago.

In relation to mergers, private equity deals are likely to proliferate, with the CCI focusing on those where the acquirer already has shareholdings in businesses in the same sector. There may also be an increase in mergers and consolidations. If the legislation is changed, strategic acquisitions in the digital space may also become subject to review.

On the advocacy front, we anticipate continued work on competition in the digital economy and the appearance of reports into the pharmaceutical and private equity sectors.

Finally, we expect that the CCI will continue to work with competition agencies throughout the world to address competition issues arising across the globe – such as those stemming from the digital economy. This will help the CCI become an exemplar of global best practice, contributing to the development of a robust and fairly applied competition regime in a rapidly changing India and world.

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