



## Indian Competition Law in 2022

In this overview, we outline some of the main developments in Indian competition law and policy in 2022 and indicate what may lie ahead in 2023.

### Competition (Amendment) Bill

In August, the Government of India introduced the Competition (Amendment) Bill, 2022 (*Bill*) in the Parliament.<sup>1</sup> The Bill, which draws on the 2019 Report of the Competition Law Review Committee, proposes several significant amendments to the Competition Act, 2002 (*Competition Act*). These include:

- In relation to *merger control*, the introduction of deal value thresholds, expedited merger review timelines, the codification of “*material influence*” as the standard of control and a derogation from standstill provisions for open market purchases.
- In relation to *enforcement*, the introduction of a framework for making settlements and commitments, fixing liability for facilitators of cartels and participation in “*hub and spoke*” cartels, introducing “*leniency plus*”, expanding the powers of the Director General (DG) (to be appointed by the Competition Commission of India (CCI) rather than, as presently, the Government of India), and

limiting the period for filing a case before the CCI.

The Bill was referred to the Parliamentary Standing Committee on Finance (*Standing Committee on Finance*), which issued its report in early December and made several comments and recommendations for further amendments.<sup>2</sup> The Bill was not considered in the Winter Session of the Parliament. It may be considered in the Budget Session in Spring 2023. In the meantime, the Ministry of Corporate Affairs will decide if recommendations made by the Standing Committee on Finance in its report on the Bill and its later report on Anti-Competitive Practices by Big-Tech Companies (see below) should be reflected in the Bill.

Specific proposed amendments to the Competition Act are outlined in the following sections.

### Institutional Developments

#### CCI Chairperson Retires: Hunt for Successor

The CCI Chairperson, Ashok Kumar Gupta, retired in October. Pending the appointment of a new Chairperson, CCI Member Sangeeta Verma was appointed as Acting Chairperson.

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<sup>1</sup> The Competition (Amendment) Bill, 2022 ([http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185\\_2022\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf)). See our detailed briefing on the Competition (Amendment) Bill, 2022 – A Modern Law for Modern Markets (<https://www.amsshardul.com/insight/competition-amendment-bill-a-modern-law-for-modern-markets/>).

<sup>2</sup> Standing Committee on Finance (2022-2023), 52nd Report, “The Competition (Amendment) Bill, 2022” ([http://164.100.47.193/lssccommittee/Finance/17\\_Finance\\_52.pdf](http://164.100.47.193/lssccommittee/Finance/17_Finance_52.pdf)). See our briefing on the Parliamentary Standing Committee Report (<https://www.amsshardul.com/insight/standing-committee-on-finance-presents-report-on-competition-amendment-bill/>).



The search for a replacement was continuing at year end. Section 22 of the Competition Act requires a quorum of three Members at meetings. As there are currently only two Members (including the Acting Chairperson), the CCI has not been quorate and has been unable to exercise its adjudicatory role or make orders in relation to combinations.<sup>3</sup>

## CCI Regional Offices Opened

In May, the Union Minister of Finance and Corporate Affairs, Smt. Nirmala Sitharaman, inaugurated the CCI's Regional Office (East) in Kolkata.<sup>4</sup> This was followed in October by her inauguration of the CCI's Regional Office (West) near Mumbai.<sup>5</sup> The opening of these offices will facilitate access by/ to stakeholders, enhance enforcement and enable more effective competition advocacy.

## Anti-Competitive Agreements

### Horizontal Agreements

#### Supreme Court Upholds Bid Rigging Order

In July, the Supreme Court of India (Supreme Court) disposed of an appeal by PES Installation Private Limited (PES)<sup>6</sup> against a 2013 judgment of the COMPAT (the predecessor of the National Company Law Appellate Tribunal (NCLAT)) upholding a CCI order finding that PES and others had rigged bids in a tender for the supply of medical equipment.<sup>7</sup> The Supreme Court stated that any concerns that PES might be blacklisted or debarred by any authority

could be addressed in independent proceedings before an appropriate forum.

#### NCLAT Rejects Beer Cartel Appeals

The NCLAT dismissed appeals made by participants in the Beer Cartel.<sup>8</sup> It rejected the argument that the CCI order<sup>9</sup> was liable to be set aside in the absence of a judicial member, simply pointing out that the Competition Act did not expressly provide for the inclusion of a judicial member. It held that, since the appellants had already admitted their involvement in a cartel in their (successful) leniency applications, they were not able to challenge the CCI order. It also found that a lenient approach had been taken in imposing penalties.

#### NCLAT Upholds CCI Findings in Cylinder Cartel Case but Remits for Reconsideration of Penalty

In November, the NCLAT disposed of 73 appeals against the CCI's 2019 order<sup>10</sup> finding bid rigging in the supply of LPG cylinders.<sup>11</sup> The NCLAT affirmed that the cylinder manufacturers had engaged in cartelisation. However, as several of the manufacturers were micro, small or medium-sized enterprises (MSMEs), it called on the CCI to take a lenient view on penalties. It also held that the penalty should have been calculated based on the three financial years preceding the year in which the violation occurred. It remanded the cases back to the CCI for re-computation/review of the penalty. The NCLAT considered that, as a general practice, it was improper to proceed on the basis of

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<sup>3</sup> The combinations notified under the "Green Channel" route are being "deemed approved" upon filing, since such transactions are not put up for approval at CCI meetings.

<sup>4</sup> Union Finance & Corporate Affairs Minister Smt. Nirmala Sitharaman participates in the 13th Annual Day commemoration of the Competition Commission of India, CCI, Press Release (20 May 2022).

<sup>5</sup> Regional Office (West) of CCI in Mumbai inaugurated by Smt. Nirmala Sitharman, Hon'ble Union Minister of Finance & Corporate Affairs, CCI, Press Release (6 October 2022).

<sup>6</sup> PES Installation Private Limited v. MDD Medical Systems Private Limited & Others, Supreme Court of India, Civil Appeal No. 4040 of 2014 (29 July 2022).

<sup>7</sup> MDD Medical Systems India Private Limited v. Foundation for Common Cause & People Awareness and Others, Competition Appellate Tribunal, Appeal No. 93 of 2012 (25 February 2013).

<sup>8</sup> Pawan Jagetia v. Competition Commission of India and Others, NCLAT, Competition Appeal (AT) No. 16 of 2021, etc. (23 December 2022).

<sup>9</sup> Alleged Anti-Competitive Conduct in the Beer Market in India, CCI, Suo Motu Case No. 06 of 2017 (24 September 2021).

<sup>10</sup> Alleged cartelisation in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Limited (HPCL), CCI, Suo Motu Case No. 01 of 2014 (9 August 2019).

<sup>11</sup> Sahuwala Cylinders Private Limited and Another v. Competition Commission of India, NCLAT, Competition Appeal (AT) No. 38 of 2019, etc. (10 November 2022).



anonymous complaints. Entertaining such complaints would promote rivalry and make it difficult for the business sector to grow. Although it did not set aside the CCI order on this ground, it asked the CCI to take appropriate care in the future.

### **CCI Finds that Maritime Transport Companies Engaged in Cartelisation**

In January, the CCI found that four maritime transport companies had cartelised in providing motor vehicle transport services to automobile manufacturers on various routes.<sup>12</sup> It found evidence of an agreement which followed a “*respect rule*”, implying the avoidance of competition between the four and protecting the business of incumbents. They shared commercially sensitive information including freight rates. As well as seeking to preserve the *status quo*, the companies aimed to preserve their position in the market and to maintain or increase prices. The CCI calculated penalties on the basis of 1.5 times the profit or 5% of turnover for each year of continuance of the cartel, whichever was higher. Complicit individuals were penalised on the basis of 5% of the average of their income over three years. Three of the companies applied for leniency and their individuals respectively received the maximum available reductions of 100%, 50% and 30%. The CCI rejected arguments that, as the second and third applicants for leniency were in the same group, both should enjoy a 50% reduction.

### **Tyre Cartel Order Remitted to the CCI for Re-Examination**

In February, the CCI published its August 2018 order finding that five Indian tyre manufacturers and the Automotive Tyre Manufacturers Association had acted in concert to increase the prices of cross ply/

bias tyre variants sold in the replacement market for the truck/bus segment and to limit and control production and supply of these tyres.<sup>13</sup> It found that the Association had acted as a platform for the exchange of sensitive information which facilitated coordination by the manufacturers. The CCI imposed penalties on the manufacturers of 5% of their average turnover over three years and on the Association of 5% of its average income over the same period. Certain complicit individuals were also liable to pay penalties on the same basis.

The CCI order was appealed to the NCLAT which allowed the appeals in its judgment of 1 December 2022.<sup>14</sup> The NCLAT found that arithmetical errors had been made by the DG and the corrected data showed there was no price parallelism. It remitted the matter to the CCI to re-examine the calculations. It also asked the CCI to consider reviewing the penalty as the domestic tyre industry was under a lot of pressure from global manufacturers where a lot of unutilized capacity was available.

### **Bid Rigging in Soil Sample Testing Tenders**

In April, the CCI found that several companies had manipulated bids in respect of tenders floated by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing.<sup>15</sup> It found that some of the opposite parties and their individuals had resorted to the production and submission of fake invoices and grant of false certificates allowing participation in the bid process, effectively acting as cover bidders. In addition to requiring the parties and complicit proprietors to “*cease and desist*”, the CCI imposed penalties on the parties of 5% of their average turnover, and on certain individuals of 5%

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<sup>12</sup> *In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original Equipment Manufacturers*, CCI, *Suo Motu* Case No. 10 of 2014 (20 January 2022).

<sup>13</sup> *Ministry of Corporate Affairs v. Apollo Tyres Limited & Others*, CCI, Reference Case No. 08 of 2013 (31 August 2018). Publication was delayed by the fact that one of the manufacturers had challenged the CCI proceedings – this challenge was finally dismissed by the Supreme Court in January 2022.

<sup>14</sup> *Ceat Limited v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 05 of 2022, etc. (1 December 2022).

<sup>15</sup> *Alleged bid-rigging in E-Tenders invited by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing*, CCI, *Suo Motu* Case No. 01 of 2020 (4 April 2022).



of their average income, for three financial years. One of the parties appealed to the NCLAT which, in November, approved the CCI's finding of breach but remitted the matter back to the CCI to reconsider the imposition of penalty, expecting the CCI to take a lenient view.<sup>16</sup>

## **Kraft Paper Cartel**

In October, the CCI found that associations of corrugated box manufacturers had been involved in increasing and deciding the price of kraft paper and in deciding on the collective shut-down of mills from at least 2011 to 2017/18, and that many mills implemented the associations' directives.<sup>17</sup> There was ample evidence of such conduct, including WhatsApp messages and admissions on oath made by representatives of the mills during the course of the investigation. 31 lesser penalty applicants had admitted to the conduct. The CCI refrained from imposing financial penalties given financial pressures on the mills, especially resulting from the COVID-19 pandemic, and admissions of wrongdoing. It also noted arguments that the cartel was formed as a result of prevailing market circumstances due to rising input costs and lack of individual bargaining power.

## **Other Bid-Rigging/Collusive Tendering Cases**

In February, the CCI found that seven signage suppliers had engaged in bid rigging and market allocation in relation to a tender floated by the State Bank of India for the supply and installation of signage across India.<sup>18</sup> In July, the CCI's order was upheld

by the NCLAT,<sup>19</sup> as it was well-reasoned and addressed each aspect in detail.

In successive orders, the CCI found that suppliers had cartelised in tenders for bushes,<sup>20</sup> protective tubes<sup>21</sup> and axle bearings<sup>22</sup> to the Indian Railways. In relation to bushes, the CCI imposed penalties on the suppliers of 5% of their average turnover for the last three preceding financial years and corresponding penalties on complicit individuals. Four of the suppliers had applied for leniency and received reductions ranging from 20% to 80%. One of the applicants had disclosed the existence of another cartel and this was taken into account in setting the reduced penalty ("*leniency plus*"). Similar levels of penalty were imposed in the protective tubes order, though some escaped penalty given their status as MSMEs and the fact they had already been penalised in an earlier matter. One of the suppliers had sought leniency up front and was granted a 100% reduction in penalty. In the axle bearings case, the suppliers were MSMEs under financial stress following the COVID-19 pandemic. They had stopped the conduct after an investigation in another case had started and some had admitted their involvement and sought leniency. The CCI decided not to impose penalties and limited itself to a "*cease and desist*" order.

In September, the CCI rejected a complaint that several lottery operators had engaged in bid rigging in relation to an expression of interest for the appointment of lottery distributors and selling agents in the

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16 *Saraswati Sales Corporation v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 31 of 2022 (14 November 2022).

17 *Federation of Corrugated Box Manufacturers of India and Others v. Gujarat Paper Mills Association and Others*, CCI, Case No. 24 of 2017 (12 October 2022).

18 *Alleged anti-competitive conduct by various bidders in supply and installation of signages at specific locations of State Bank of India across India*, CCI, *Suo Motu* Case No. 02 of 2020 (3 February 2022).

19 *Naresh Kumar Dasari v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 24 of 2022 (27 July 2022).

20 *Chief Materials Manager, North Western Railway v. Moulded Fibreglass Products and Others*, CCI, Reference Case No. 03 of 2018 (4 April 2022).

21 *Cartelisation in the supply of Protective Tubes to Indian Railways*, CCI, *Suo Motu* Case No. 06 of 2020 (9 June 2022).

22 *Chief Materials Manager (Stores), Eastern Railway v. Krishna Engineering Works and Others*, CCI, Reference Case No. 02 of 2020 (11 October 2022). The CCI had earlier found bid rigging in the supply of axle-bearings to Eastern Railways in *Eastern Railway, Kolkata v. Chandra Brothers and Others*, CCI, Reference Case No. 02 of 2018 (12 October 2021).



state of Mizoram.<sup>23</sup> The CCI found that the operators had quoted at the same statutorily prescribed minimum base price. This was known to all potential bidders and there was nothing to show that they had agreed amongst themselves to quote at this price. The CCI's investigation had been delayed by nearly nine years whilst the issue of whether lotteries were within the scope of the Competition Act was being decided by the courts. In January, the Supreme Court held that, even if lotteries were a regulated activity and fell "*outside the scope of commerce*", it did not prevent the CCI from investigating anti-competitive conduct in the context of lotteries.<sup>24</sup>

### **CCI Finds that Proposed (Non-Notifiable) Merger Not Caught by Section 3 of the Competition Act**

The CCI rejected at *prima facie* stage arguments by consumer body CUTS that a proposed merger between film exhibitors *PVR Limited* and *INOX Leisure Limited*, which was not notifiable to the CCI under the merger control provisions of the Competition Act, was prohibited under Section 3(1) as it was likely to cause an appreciable adverse effect on competition (AAEC) in India.<sup>25</sup> The CCI pointed to the need to show an agreement of a nature which might result in an AAEC or in the likelihood of an AAEC. In looking at such a likelihood, there had to be "*conduct in terms of an agreement, not a likelihood of conduct itself*". As there was no actual conduct by the parties (save entering into the merger agreement), Section 3 was not attracted. It added that Section 4 of the Competition Act, prohibiting abuse of a dominant position, could not apply where the proposed combined entity had not taken form. In this case there was no combined entity, let alone a dominant one, in existence.

### **Competition (Amendment) Bill**

The Bill contains a number of proposed amendments in relation to cartels:

- Anti-competitive horizontal agreements involving entities which are not engaged in identical or similar trade will be caught under the Competition Act. This will fix liability on those who "*actively participate*" in such agreements (such as trade associations or consultants) as well as participants in "*hub and spoke*" cartels.
- The leniency regime will be strengthened by increasing the disincentives for failing to cooperate. Applicants will be able to withdraw markers. It is also proposed to introduce "*leniency plus*", enabling an applicant seeking leniency for one cartel to expose a separate cartel and receive a reduction in penalty for both.

### **Vertical Agreements**

#### **CCI Dismisses Cases Against Amazon**

In March, the CCI dismissed, at *prima facie* stage, allegations by the *All-India Online Vendors Association (AIOVA)* that *Amazon Seller Services Private Limited (Amazon)* and a number of related companies had acted in breach of Section 3(4) of the Competition Act by engaging in "*deep discounting*" and failing to ensure "*platform neutrality*".<sup>26</sup> It observed that AIOVA had failed to provide sufficient evidence for it to form a *prima facie* view and closed the matter. In another case, the CCI decided not to proceed with a case on private label brands related to Amazon sold on the Amazon India marketplace.<sup>27</sup>

#### **CCI Orders Investigation into Online Food Delivery Platforms**

Following a complaint by the *National Restaurant Association of India (NRAI)*, the CCI in April ordered an investigation against

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<sup>23</sup> *Tamari Technologies Private Limited v. Teesta Distributors*, CCI, Case No. 24 of 2012 (15 September 2022).

<sup>24</sup> *Competition Commission of India v. State of Mizoram and Others*, Supreme Court of India, Civil Appeal Nos. 10820-10822 of 2014, etc. (19 January 2022).

<sup>25</sup> *Consumer Unity & Trust Society v. PVR Limited and Another*, CCI, Case No. 29 of 2022 (13 September 2022).

<sup>26</sup> *AIOVA v. Amazon Seller Services Private Limited and Others*, CCI, Case No. 29 of 2020 (3 March 2022).

<sup>27</sup> *In Re: Allegations pertaining to private label brands related to Amazon sold on Amazon India marketplace*, CCI, *Suo Motu* Case No. 04 of 2021 (7 and 11 March 2022).



online food delivery platforms *Zomato Limited (Zomato)* and *Bundl Technologies Private Limited (Swiggy)*.<sup>28</sup> Observing that the two operated as online intermediaries for food ordering and delivery, the CCI found that allegations of preferential treatment of their own cloud kitchen brands and restaurant partners, exclusivity for certain partners and price parity clauses of the platforms merited further investigation. It rejected allegations of bundling and of unfair and one-sided contracts.

### **Delisting of Hotels on Online Travel Agency's Portal in Breach of Section 3(4)**

In October, the CCI held that online travel agency (OTA) *MMT-Go* and franchisee provider *Oravel Stays Private Limited (OYO)* had agreed to the delisting of certain franchisee hotels on *MMT-Go's* portal in breach of Section 3(4) of the Competition Act.<sup>29</sup> The CCI imposed penalties on the parties of 5% of the average of their turnover over three years.<sup>30</sup>

### **Abuse of Dominant Position**

#### **NCLAT Finds Ola Not Dominant**

In January, the NCLAT dismissed an appeal against the 2017 CCI order<sup>31</sup> finding that *ANI Technologies Private Limited (Ola)* had not abused its dominant position in the radio-taxi services market in Bengaluru.<sup>32</sup> On the question of dominance, the NCLAT found that Ola's high market share was not consistent or lasting as it faced competition from Uber. It was not dominant since it could not operate independently of competitive forces in the market. Although the question of abuse did not arise, the NCLAT considered that Ola's below-cost

strategy could be justified as a response to Uber's low prices. Offering consumer discounts and incentives could not be seen as predatory pricing but was rather justified as a strategy to meet market conditions and grow Ola's business.

#### **August: WhatsApp Privacy Policy**

In August, the NCLAT dismissed an appeal against a 2017 CCI decision<sup>33</sup> rejecting, at the threshold stage, allegations that *WhatsApp LLC (WhatsApp)* had abused its dominant position in relation to its 2016 Update to its Terms of Service and Privacy Policy.<sup>34</sup> It held that, although WhatsApp was dominant in the market for consumer communication apps, simply updating terms and conditions, with consumers consenting or not consenting, did not amount to an abuse. This was a common practice in the digital age.

#### **CCI Google Orders**

In October, the CCI passed orders finding that *Google* had abused its dominant position in markets in the Android Mobile Device Ecosystem and in the Google Play Store Billing System. In the *Android* order,<sup>35</sup> the CCI noted that Google had abused its dominance in multiple markets by requiring smartphone and tablet manufacturers to pre-install, give prominent placing to and make as default its bundle of apps. This led to limiting choice and foreclosure for competing service and app providers. In addition to imposing a provisional penalty on Google of nearly INR 1340 crores (approx. USD 164 million), the CCI issued immediate cease and desist orders and directed Google to modify its conduct within a prescribed timeline.

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28 *NRAI v. Zomato and Swiggy*, CCI, Case No. 16 of 2021 (4 April 2022).

29 *Federation of Hotel & Restaurant Associations of India and Another v. MakeMyTrip India and Others*, CCI, Case No. 14 of 2019, etc. (19 October 2022).

30 For OYO, this penalty was in respect of the Section 3(4) breach. *MMT-Go's* penalty was also in respect of its abuses of its dominant position (see below).

31 *Fast Track Call Cab Private Limited and Another v. ANI Technologies Private Limited*, CCI, Cases No. 6 & 74 of 2015 (19 July 2017).

32 *Meru Travel Solutions Private Limited v. Competition Commission of India and Another*, NCLAT, Competition Appeal (AT) No. 19 of 2017, etc. (7 January 2022).

33 *Vinod Kumar Gupta v. WhatsApp Inc.*, CCI, Case No. 99 of 2016 (1 June 2017).

34 *Vinod Kumar Gupta v. Competition Commission of India and WhatsApp LLC*, NCLAT, Competition Appeal (AT) No. 13 of 2017 (2 August 2022).

35 *Umar Javeed and Others v. Google LLC and Another*, CCI, Case No. 39 of 2018 (20 October 2022).



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In the *Play Store Billing System* order,<sup>36</sup> the CCI found Google liable for anti-competitive practices relating to its Play Store billing and payment policies. It found that Google had abused its dominant position in multiple markets by requiring the use of its Billing System for paid-app downloads and in-app purchases. It also preferred use of its own UPI payment app, Google Pay. The CCI imposed a provisional penalty of nearly INR 937 crores (approx. USD 114 million). It also directed Google to allow app developers/users to process payments through third party payment processors and to cease discriminatory practices.

Earlier, in January, the CCI directed an investigation against Google in respect of complaints by the *Digital News Publishers Association* of alleged abuse of dominance in the digital advertising space.<sup>37</sup> In October, a complaint by the *News Broadcasters & Digital Association* addressing these issues was joined to the investigation.<sup>38</sup>

## Online Travel Agency: CCI Targets Wide Price Parity Clauses

In October, the CCI found that MMT-Go had abused its dominant position in the market for online intermediation services provided by OTAs.<sup>39</sup> The CCI considered allegations of abuse including price and room parity obligations, predation, misrepresentation and exclusivity. Distinguishing between *wide* parity (applying to all other platforms including the provider's own website) and *narrow* parity (applying only to the provider's website), with wide parity being more restrictive of competition, the CCI found that MMT-Go had imposed wide room rate parity on its hotel partners. It looked at this together with room volume parity obligations, deep discounting strategies and exclusivity conditions. It concluded

that the parity obligations coupled with the deep discounts created an ecosystem that reinforced MMT-Go's dominant position and amounted to an abuse.

The CCI imposed a penalty on MMT-Go of 5% of the average of its *total* turnover over three years, amounting to INR 223.48 crores (approx. USD 27.4 million). In addition, it prescribed broad behavioural remedies on MMT-Go in order to return to an environment that supported fair competition.

## CCI Closes Cases Against Asian Paints

In September, the CCI rejected, after investigation, allegations by *JSW Paints Private Limited (JSW Paints)* that *Asian Paints Limited (Asian Paints)* had abused its dominant position by denying JSW Paints access to distribution channels in the decorative paint segment.<sup>40</sup> Although the CCI held that Asian Paints was dominant in the Indian markets for the manufacture and sale of decorative paint by the organised sector, it found that it had not denied access to JSW Paints; the appointment of a significant number of dealers by JSW Paints showed that its entry into the market had not been impeded. The CCI also rejected allegations of coercion of dealers by Asian Paints and of denial of access by JSW Paints to infrastructural facilities.

## CCI Orders Investigations at Prima Facie Stage

In February, the CCI considered allegations by *Asianet Digital Network Private Limited (Asianet)*, a Multi System Operator providing digital TV services mainly in Kerala, that *Star India Private Limited* and several of its subsidiaries (*Star*), which broadcasted satellite-based TV channels in India, had abused its dominant position by not giving Asianet discounts offered to Asianet's

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<sup>36</sup> *XYZ (Confidential) v. Alphabet Inc. and Others*, CCI, Case No. 07 of 2020, etc. (25 October 2022).

<sup>37</sup> *Digital News Publishers Association v. Alphabet Inc. and Others*, CCI, Case No. 41 of 2021, etc. (7 January 2022).

<sup>38</sup> *News Broadcasters & Digital Association v. Alphabet Inc. and Others*, CCI, Case No 36 of 2022 (6 October 2022).

<sup>39</sup> *Federation of Hotel & Restaurant Associations of India and Another v. MakeMyTrip India and Others*, CCI, Case No. 14 of 2019, etc. (19 October 2022).

<sup>40</sup> *JSW Paints Private Limited v. Asian Paints Limited*, CCI, Case No. 36 of 2019 etc. (8 September 2022).



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competitors.<sup>41</sup> The CCI *prima facie* found that Star (a part of Disney) was dominant in the market for the provision of broadcasting services in the state of Kerala and that it had abused its dominant position by discriminatory pricing and denial of market access. It therefore directed the DG to investigate the matter.

In June, the CCI ordered an investigation against movie ticket portal/website *BookMyShow* after finding *prima facie* that it had abused its dominant position in the market for online intermediation services for the booking of movie tickets in India by entering into exclusive and restrictive agreements with certain cinemas, thereby limiting access by other portals.<sup>42</sup>

## Dismissal of Allegations of Abuse at Prima Facie Stage

In March, the CCI summarily dismissed, at *prima facie* stage, allegations that *Spinn India Private Limited*, which operated the e-commerce platform *Shopee*, had, in offering “deep discounts” for various products on its platform, abused its dominant position.<sup>43</sup> The CCI noted that *Shopee* was a new entrant in a market that already included established e-commerce companies. It did not appear that it possessed significant market power, let alone dominance.

The CCI also closed at *prima facie* stage a complaint that a number of automobile manufacturers who provided motor insurance to buyers of their vehicles had abused their dominant position by disallowing cashless claims if the policy had not been obtained through them, their dealers or specific insurance brokers.<sup>44</sup> The CCI noted that the

allegation was not substantiated and seemed to be one of collective dominance which was not provided for in the Competition Act.

The CCI also rejected a claim that bringing a copyright infringement claim was abusive.<sup>45</sup> It stated that, to be termed a sham, such litigation had to be initiated by a dominant undertaking to cause anti-competitive harm. Two conditions had to be satisfied. First, the legal action had to be shown on an objective view to be baseless and to be an instrument to harass the other party. Second, it had to be shown that the action was conceived with an intent or plan to eliminate/thwart competition in the market. The CCI was of the *prima facie* view that the litigation was brought in good faith.

In April, the CCI dismissed at *prima facie* stage allegations that *Zomato* had abused its dominant position in relation to its cancellation policy and exclusion of liability in its terms of service.<sup>46</sup> The CCI noted its findings in an earlier case<sup>47</sup> that *Zomato* and another food delivery platform operator operated as “online intermediaries for food ordering and delivery” and competed with each other in the same segment in various ways.

In June, the CCI rejected allegations by *Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)* that *Coal India* had abused its dominant position by failing to supply the required grade of coal, tampering with samples and insisting on a no-objection certificate (NOC) for resuming supply.<sup>48</sup> It held that the Office of the Coal Controller was a suitable independent mechanism to redress grievances on grade

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41 *Asianet Digital Network Private Limited v. Star India Private Limited and Others*, CCI, Case No. 09 of 2022 (28 February 2022). (Separate orders were made under Section 26(1) and Section 33 of the Competition Act.)

42 *Vijay Gopal v. Big Tree Entertainment Private Limited (BookMyShow) and Others*, CCI, Case No. 46 of 2021 (16 June 2022).

43 *Vaibhav Mishra v. Spinn India Private Limited (Shopee)*, CCI, Case No. 01 of 2022 and *Praveen Khandelwal v. Spinn India Private Limited*, CCI, Case No. 8 of 2022 (3 March 2022).

44 *Manav Seva Dham v. Maruti Suzuki India Limited and Others*, CCI, Case No. 03 of 2022 (22 March 2022).

45 *Cryogas Equipment Private Limited v. Inox India Private Limited*, CCI, Case No. 08 of 2021 (8 March 2022).

46 *Rohit Arora v. Zomato*, CCI, Case No. 54 of 2020 (4 April 2022).

47 See n. 28, above.

48 *Tamil Nadu Generation and Distribution Corporation Limited v. Eastern Coalfields Limited and Others*, CCI, Case No. 02 of 2022 (30 June 2022).





slippage. New sampling procedures replacing sampling by Coal India were in place, with remedies for tampering lying elsewhere. Requiring a NOC was commercially prudent in view of the alleged non-payment of dues by TANGEDCO.

The CCI also rejected at *prima facie* stage a complaint that *Sun Pharmaceutical Industries Limited (Sun)* had abused its dominant position by hiking the price of FluGuard 400, an anti-viral medicine used in the treatment of COVID-19, by attaching an adhesive sticker to the medicine strip.<sup>49</sup> The CCI found that the market for this medicine was competitive: there were more than 40 substitutes available in the market and several manufacturers manufactured and supplied these. Sun did not therefore have market power.

## Competition (Amendment) Bill

It is proposed to extend the “*meeting competition*” defence to cover not only discriminatory prices but also unfair conditions or prices.

The Standing Committee on Finance has recommended extending the intellectual property rights defence in Section 3(5) of the Competition Act to Section 4. It has also recommended the introduction of a general effects-based test for Section 4, thus requiring the CCI to analyse the actual effects of conduct in determining whether there is an abuse.

## Procedures

### CCI Overhauls Confidentiality Regime

In April, the CCI made significant changes to the confidentiality regime in order to reduce

delays in treating confidentiality claims and to secure the rights of the defence.<sup>50</sup> The key changes were: (a) the introduction of self-certification of confidentiality claims, replacing the earlier regime of assessment by the CCI/DG and shifting the burden onto parties claiming confidentiality; (b) the treatment of certain documents/materials as confidential by default; and (c) the formal introduction of “*confidentiality rings*”, balancing the need to preserve confidentiality whilst providing an effective right of defence.

### Courts Show Reluctance to Interfere in CCI Decisions to Investigate

In August, the Division Bench of the Delhi High Court<sup>51</sup> rejected *WhatsApp/Meta’s* appeal against the April 2021 order of a single judge dismissing writ petitions challenging the CCI’s jurisdiction to investigate WhatsApp’s 2021 Update.<sup>52</sup> A petition for leave to appeal was rejected by the Supreme Court in October.<sup>53</sup> The CCI investigation could thus continue despite a number of challenges to the 2021 Update pending before the Supreme Court and the Delhi High Court.

In September, the Karnataka High Court dismissed a writ petition filed by *Intel Technology India Private Limited* and *Intel Corporation* (together *Intel*) challenging the CCI’s jurisdiction to investigate its product warranty policy in India.<sup>54</sup> Stating that it was loath to interfere in such cases “*subject to just exceptions*”, it rejected arguments that the CCI had departed from earlier positions on warranties taken by it and the Delhi High Court and that the investigation was “*draconian*”. It found that Intel had failed to make out a case of “*manifest arbitrariness*”. Seeing the writ petition as an abortive

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<sup>49</sup> *Mr. Ashwani Kumar Singla v. Sun Pharmaceutical Industries Limited and Another*, CCI, Case No. 17 of 2022 (10 June 2022).

<sup>50</sup> The Competition Commission of India (General) Amendment Regulations, 2022 (No. 2 of 2022) (8 April 2022). Please see our April 2022 special client alert for a more detailed analysis.

<sup>51</sup> *WhatsApp LLC v. Competition Commission of India and Another*, Delhi High Court, LPA No. 163 of 2021, etc. (25 August 2022).

<sup>52</sup> *WhatsApp LLC v. Competition Commission of India*, Delhi High Court, W.P.(C) No. 4378 of 2021, etc. (22 April 2021).

<sup>53</sup> *Meta Platforms Inc. v. Competition Commission of India and Another*, Supreme Court, Petition for Special Leave to Appeal (C) No. 17121.2022 (14 October 2022).

<sup>54</sup> *Intel Technology India Private Limited and Intel Corporation v. Competition Commission of India and Another*, High Court of Karnataka, Writ Petition No. 50727 of 2019 (23 August 2022).



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attempt to delay CCI proceedings, it imposed costs on Intel of INR 10 lakh (approx. USD 12,000) and directed that the CCI investigation should be concluded at the earliest.

In October, the Telangana High Court dismissed a writ petition filed by *GMR Hyderabad International Airport* challenging the jurisdiction of the CCI to order an investigation into alleged abuse of dominance.<sup>55</sup> It noted that CCI proceedings should be interfered with only in rare cases, where *prima facie* it was evident that the investigation would lead to an abuse of process or it appeared that the investigation was ordered in bad faith.

## NCLAT Limits Power of CCI to Direct Further Investigation by DG

In December, the NCLAT allowed an appeal against a CCI order closing a case against real estate developer *DLF*.<sup>56</sup> In that case, the DG had found in its investigation report that DLF had abused its dominant position. The CCI directed further investigation by the DG under Regulation 20(6) of the General Regulations, 2009 and, in its supplementary report, the DG concluded that DLF was not dominant. The NCLAT held that the CCI could direct a further investigation only where the DG had found that there was no breach of the Competition Act. This was not the case here. The NCLAT found that the CCI order was void as it was based on the supplementary report which had been conducted on a void order of the CCI. It therefore remitted the matter back to the CCI to pass an order based on the first DG Report.

## Competition (Amendment) Bill

The Bill contains a number of proposed amendments in relation to procedures:

- The introduction of a settlements and commitments mechanism, allowing parties to settle/make commitments in cases of anti-competitive vertical

agreements and abuses of dominant position. The mechanism will not apply to cartel cases, on the basis that these are already addressed by the leniency regime. The Standing Committee on Finance however recommends that cartels should be included within the scope of settlements.

- It is proposed that the CCI, rather than the Central Government, will appoint the DG, who up to now has been acting “*at arms’ length*” from the CCI.
- The DG will have greater powers for seeking information, including from third parties, about entities under investigation. The DG may examine on oath “*officers and other employees and agents*” of the party being investigated. The Standing Committee on Finance has expressed concerns that this could cover external lawyers and prejudice attorney-client privilege and recommends that they not be covered.
- The Bill details the powers of the DG to conduct investigations (including dawn raids) which are currently contained in the Companies Acts. Parties under investigation will be required to preserve and protect relevant documents and offer all assistance required.
- The CCI will be unable to entertain any information or reference which has been filed beyond three years from the date the cause of action first arose (though a delay may be condoned in certain cases). The CCI will also be barred from entertaining cases involving substantially the same facts and issues that it has already decided upon.

## CCI and Sectoral Regulation

### CCI Affirms that Electricity Act Does Not Oust CCI’s Merger Control Powers

In March, the CCI found that *Tata Power Company Limited (TPCL)* had failed to notify

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<sup>55</sup> *GMR Hyderabad International Airport Limited and Others v. Competition Commission of India and Another*, Telangana High Court, Writ Petition No. 22467 of 2019 (12 October 2022).

<sup>56</sup> *Amit Mittal v. DLF Limited and Others*, NCLAT, Competition Appeal (AT) No. 82 of 2018 (21 December 2022).



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three acquisitions in the electricity distribution sector.<sup>57</sup> TPCL stated that it believed that the electricity regulator in the Indian state of Odisha (OERC) had the exclusive jurisdiction to regulate combinations in the electricity sector. The CCI rejected arguments that provisions in the Electricity Act, 2003 overrode those in the Competition Act which was enacted earlier (in 2002). It also found that the OERC had recognised the CCI's jurisdiction and had directed TPCL to notify to the CCI. Taking account of mitigating factors, including the ambiguity arising from overlapping provisions in the two Acts, the CCI imposed a nominal penalty of INR 5 lakh (approx. USD 6,000) for each case of non-notification.

## Bombay High Court Addresses Parallel Investigations

In April, the Bombay High Court considered challenges to a CCI order finding *prima facie* that a number of trusteeship companies had cartelised and ordering investigation by the DG.<sup>58</sup> The sectoral regulator, the Securities and Exchange Board of India (SEBI), was investigating the matter and the High Court considered that there was a risk of conflicting orders if parallel investigations were to proceed. SEBI should therefore be given a reasonable chance to arrive at a *prima facie* view within a reasonable period. If SEBI did not need to make a final order or it considered the matter should go to the CCI, relevant material could be sent to the CCI to save time in its investigation. In a further order, the High Court allowed SEBI until 30 June 2022 to complete its enquiries and to form its *prima facie* opinion. It requested that, in the meantime, the CCI and the DG refrain from taking any coercive action, adjudicating further or taking any further steps on the matter.

## CCI Jurisdiction in Cases Involving Patents

In July, the Delhi High Court disposed of a writ petition by *Vifor International Limited* (*Vifor*) challenging a CCI order seeking information on *Vifor's* patents on the ground that the CCI had no jurisdiction to consider a case involving the rights of a patent holder under the Patents Act, 1970.<sup>59</sup> It held that this would be the case only if the case dealt exclusively with rights and liabilities under the Patents Act and did not pertain to an issue falling within the scope of the Competition Act. Following the approach of the Delhi High Court in a previous case,<sup>60</sup> it affirmed that the jurisdiction of the CCI was not ousted just because the complaint related to patents. It also affirmed that Section 3(5) of the Competition Act (which provides that nothing in Section 3 shall restrict the right of persons to restrain any infringement of, or impose reasonable restrictions necessary to protect, rights under specified Indian legislation including the Patents Act) could not be read to completely exclude the CCI's jurisdiction.

The Delhi High Court also dismissed arguments that disclosure of the information sought would expose it to criminal penalties under Swiss law. It held that entities operating in multiple jurisdictions could not claim immunity or exemptions from laws not shown to be in breach of the international treaty obligations of nations.

In October, the CCI dismissed at *prima facie* stage allegations that *Vifor* had, in refusing to give a licence of its patented medicines, acted in breach of Sections 3(4) and 4 of the Competition Act.<sup>61</sup> It adopted a similar approach to jurisdictional challenges as that taken by the High Court in July.

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57 *Proceedings against Tata Power Company Limited under Section 43A of the Competition Act*, CCI, Combination Registration Nos. C-2021/03/824, C-2021/02/825 and C-2021/03/826 (17 March 2022).

58 *Trustees Association of India v. CCI and Others*, Bombay High Court, Writ Petition No. 3781 of 2022, etc. (8 & 11 April 2022).

59 *Vifor International Limited v. Competition Commission of India*, Delhi High Court, W.P.(C) No. 11263 of 2022 (28 July 2022).

60 *Monsanto Holdings Private Limited and Others v. Competition Commission of India and Others*, Delhi High Court, W.P.(C) No. 1776 of 2016 (20 May 2020).

61 *Swapan Dey v. Vifor International (AG) and Another*, CCI, Case No. 05 of 2022 (25 October 2022).



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## Merger Control

### Target Exemption Extended to 28 March 2027

In March, the Government of India extended the 2017 Target Exemption until 28 March 2027.<sup>62</sup> This exempts from notification combinations where: (a) the value of the assets being acquired, taken over, merged or amalgamated is not more than INR 350 crores (approx. USD 42.3 million) in India; or (b) turnover of the target is not more than INR 1,000 crores (approx. USD 121 million) in India. It should be noted that these conditions are alternative, so the exemption will apply if either the assets or the turnover of the target are below these thresholds.

### NCLAT Rejects Amazon Appeal

In June, the NCLAT rejected<sup>63</sup> a number of appeals against the CCI's December 2021 order imposing penalties on *Amazon.com NV Investment Holdings LLC (Amazon)* in relation to its 2019 notification of the acquisition of a 46% shareholding in *Future Coupons Private Limited (FCPL)*.<sup>64</sup> The CCI had found that FCPL was a vehicle for Amazon to acquire an interest in Indian retail giant *Future Retail Limited* and that Amazon had failed to notify a relevant agreement and other commercial arrangements. The NCLAT agreed with the CCI that Amazon had intentionally not made clear the "real ambit and purpose" of the transaction. It maintained the INR 200 crores (approx. USD 24 million) penalty imposed by the CCI for failure to notify but halved the penalty of INR 2 crores (approx. USD 240,000) for suppressing the scope and purpose of the transaction.

### Veolia/SUEZ Merger

In January, the CCI published its November 2021 order clearing the merger of *Veolia Environnement S.A. (Veolia)* and *Suez S.A. (Suez)*, and the sale of *New Suez* to a

consortium of primarily French investors.<sup>65</sup> In clearing the arrangements, the CCI considered the competition implications of the New Suez acquisition. The consortium members applied "materiality thresholds", taking into account only entities in which they held a direct or indirect shareholding of 10% or more, a right or ability to exercise a right not available to ordinary shareholders, or a right or ability to nominate a director or observer. Two (linked) consortium members had a current shareholding in *Veolia* and a proposed shareholding of 18-20% in *New Suez* with nomination rights on its Supervisory Board. The CCI considered that any concerns about the common stake would be addressed by internal rules to prevent exchanges of commercially sensitive information within entities in which joint controlling stakes were held, including Chinese walls and IT systems clearances.

### CCI Clears Acquisition of Air India

In March, the CCI published its December 2021 order clearing the acquisition by *Talace Private Limited (Talace)*, a wholly owned subsidiary of *Tata Sons*, of 100% of the equity share capital and sole control of *Air India Limited (Air India)* and *Air India Express Limited* and 50% of the equity share capital and joint control of *Air India SATS Airport Services Private Limited*.<sup>66</sup>

The CCI found horizontal overlaps in the provision of passenger air transport services and air cargo services. The CCI had no competition concerns in relation to cargo services. For passenger air transport services, the CCI considered overlapping origin-destination pairs and found certain pairs where concentration was increasing. However, there were mitigating factors – both market-based forces and target-specific factors – which meant that the potential benefits would outweigh the possible harm resulting

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<sup>62</sup> Gazette of India, 16 March 2022.

<sup>63</sup> *Amazon.com NV Investment Holdings LLC v. Competition Commission of India and Others*, NCLAT, Competition Appeal (AT) No. 01 of 2022, etc. (13 June 2022).

<sup>64</sup> *Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act, 2002*, CCI (17 December 2021).

<sup>65</sup> *Notice jointly given by Veolia Environnement S.A., Meridiam Global Infrastructure Management, LLC, Caisse des Dépôts et Consignations and CNP Assurances*, CCI, Combination Reg. No. C-2021/07/852 (23 November 2021).

<sup>66</sup> *Talace Private Limited*, CCI, Combination Registration No. C-2021/11/883 (20 December 2021).



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from the transaction. These mitigating factors were considered in the context of concerns about the viability of debt-laden Air India were it not acquired by a private entity.

## Sony/Zee Merger Cleared Subject to Modifications

The CCI cleared the amalgamation of *Zee Entertainment Enterprises Limited (ZEE)* and *Bangla Entertainment Private Limited (BEPL)* with and into *Culver Max Entertainment Private Limited (CME)*.<sup>67</sup> BEPL and CME are indirect wholly owned subsidiaries of the Sony Group Corporation.

The CCI cleared the transaction subject to structural modifications offered by the parties entailing the divestment of three TV channels engaged in the Hindi general entertainment and Hindi films segments.

## CCI Penalises Acquirers for Gun Jumping

In March, the CCI found that *Adani Green Energy (Adani)* had, in its 2021 acquisition of *S. B. Energy Holding Limited*, engaged in gun jumping before the CCI approval had been given.<sup>68</sup> The share purchase agreement allowed the parties to discuss the ongoing business of the target and provided for acquirer inputs into the target's business. Despite a "clean team" protocol and the fact that the acquirer inputs were non-binding, the CCI considered that this potentially facilitated the exchange of commercially sensitive information with the potential for tacit collusion, which went beyond what was necessary to preserve the economic value of the business. A nominal penalty of INR 5 lakhs (approx. USD 6,000) was imposed on Adani.

In July, the CCI found that *SABIC International Holdings BV (SABIC)* had acquired a 6.15% shareholding in *Clariant AG* via an escrow mechanism, under which the shares were credited into an escrow account before notification to the CCI, with the shares to be released to SABIC on receipt of merger clearance.<sup>69</sup> Following its approach in the *SCM Solifert Case*,<sup>70</sup> as endorsed by the Supreme Court,<sup>71</sup> the CCI found that the use of the escrow mechanism constituted gun jumping. Taking account of a number of mitigating factors, the CCI imposed a "token" penalty of INR 5 lakhs (approx. USD 6,000).

## Veolia Fined for Failure to Notify Engie Block Transaction

In May, the CCI also found that *Veolia Environnement S.A. (Veolia)* had failed to notify its acquisition of a 29.9% shareholding in *Suez* from an existing Suez Shareholder, *Engie Block S.A.*, as part of its proposed takeover of Suez.<sup>72</sup> This was a hostile takeover and Suez raised the question of non-notification with the CCI. In submissions to the CCI, Veolia argued that, based on publicly available information and its own knowledge and best estimates, the Target Exemption applied. This was rejected by Suez. In subsequent gun jumping proceedings, the CCI rejected Veolia's arguments that it had acted in good faith and had made reasonable attempts to ascertain Suez's assets and turnover in assessing the applicability of the Target Exemption. It pointed out that it had earlier indicated the inapplicability of the Target Exemption and that Veolia could have sought clarification from it. It also pointed out that the question of good faith was not relevant, and that the Supreme Court had made it clear

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67 *Culver Max Entertainment Private Limited, Zee Entertainment Enterprises Limited, Bangla Entertainment Private Limited, and Essel Group Participants*, CCI, Combination Registration No. C-2022/04/923 (4 October 2022).

68 *Proceedings against Adani Green Energy Limited under Section 43 A of the Competition Act*, CCI, Combination Registration No. C-2021/05/837 (9 March 2022).

69 *Proceedings against SABIC International Holdings BV under Section 43A of the Competition Act, 2002*, CCI (19 July 2022).

70 *SCM Solifert Limited*, CCI, Combination Registration No. C-2014/05/175 (10 February 2015).

71 *SCM Solifert and Another v. Competition Commission of India*, Supreme Court of India, Civil Appeal No. 10678 of 2016 (17 April 2018).

72 *Proceedings Against Veolia Environnement S. A. under Section 43A of the Competition Act*, CCI (17 May 2022).



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that mere breach of the requirement to notify would attract the penalty.<sup>73</sup> Taking account of mitigating factors, the CCI imposed a penalty of INR 1 crore (approx. USD 121,000).

## CCI Finds that Minority Acquisition not “Made Solely as an Investment” or “In the Ordinary Course of Business”

In July, the CCI held that *SABIC International Holdings BV (SABIC)* had wrongly considered that an acquisition of a 24.99% equity stake in *Clariant AG (Target)* fell within the exemption from notification of acquisitions of less than 25% of the total shares/voting rights made “solely as an investment” or in the “ordinary course of business” and where there is no acquisition of control (the *minority acquisitions exemption*).<sup>74</sup> This exemption applies where, amongst other matters, the acquirer is not a member of the target’s board and has no right or intention to nominate a director on the target’s board, and does not intend to participate in the affairs or management of the target. The CCI found that SABIC intended to participate in the affairs and management of the Target, which was corroborated by the fact that it was vested with the right to appoint up to four persons for election as directors in the Target. Finding a failure to notify, the CCI imposed a penalty of INR 40 lakhs (approx. USD 48,000).

In October, the CCI found that two alternative investment funds (*Acquirers*) acquiring a 6.3% shareholding in Future Retail Limited had failed to notify the transaction to the CCI.<sup>75</sup> They had argued that the acquisition was covered by the minority acquisitions exemption. The CCI found that the acquisition could not be treated “solely as an investment” since the Acquirers had acquired a board seat soon after the sale purchase agreement and their intention to participate in the

management and affairs of the target could not be ruled out. The CCI also held that the transaction was not “in the ordinary course of business”, which would apply only to revenue transactions, since the acquisition involved an investment which constituted a capital transaction. The CCI imposed a penalty of INR 20 lakh (approx. USD 24,000) on the Acquirers.

## April: CCI Makes Changes to Form II

In April, the CCI introduced changes to Form II, the long-form notification recommended to be filed for combinations where the parties have more than 15% combined market shares in horizontally overlapping markets or more than 25% (individual or combined) market shares in vertically related markets.<sup>76</sup> The CCI did away with several information/data requests that were not very relevant for its review of market dynamics in relation to a transaction. However, it increased the duration of market-facing data from three to five years. It also required a detailed analysis of vertical and complementary activities as well as details of shareholdings/rights held in any other entity in overlapping, vertical or complementary markets.

## Competition (Amendment) Bill

The Bill contains several proposed amendments in relation to merger control. In particular:

- The introduction of a “deal value” threshold requiring the notification to the CCI of transactions with a deal value of INR 2,000 crores (approx. USD 240 million) where either party has “substantial business operations in India”. This will allow the CCI to review transactions in the digital and infrastructural spaces which do not currently meet the asset/turnover thresholds under the Competition Act. The Standing Committee on Finance

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<sup>73</sup> *Competition Commission of India v. Thomas Cook (India) Limited*, Supreme Court, Civil Appeal No. 13578 of 2015 (17 April 2018).

<sup>74</sup> *Proceedings against SABIC International Holdings BV under Section 43A of the Competition Act, 2002*, CCI (15 July 2022).

<sup>75</sup> *Proceedings against PI Opportunities Fund – I and Pioneer Investment Fund under Section 43A of the Competition Act, 2002*, CCI, Ref. No. M&A/Q1/2018/18 (30 September 2022).

<sup>76</sup> The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2022 (31 March 2022). Please see our more detailed analysis of the amendment to the long form (<https://www.amsshardul.com/insight/competition-commission-of-india-amends-the-long-form-notification-form-ii/>).



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has recommended that the India nexus should apply only to the target.

- Merger review timelines are to be shortened from 30 working days to 20 calendar days for *prima facie* review and for 210 to 150 calendar days for overall review. The Standing Committee on Finance considers these could be burdensome and recommends that the existing timelines be retained.
- “Control” is to be defined in terms of “*the ability to exercise material influence*”. The Standing Committee on Finance has endorsed this “*lowest and weakest*” standard but recommends that this be specified by regulations.
- A derogation from the standstill obligation is proposed for open market purchases and other transactions undertaken on stock exchanges.

## Competition in the Digital World

### Competition Challenges in Today’s World

The ability and willingness of the CCI to take on the challenges of applying competition law to e-commerce and digital technologies has been shown in cases covered in the sections above.

The CCI’s broad approach was exemplified by (now former) Chairperson, Ashok Kumar Gupta, in his contribution to the 13<sup>th</sup> Annual Competition Day in May. He recognised that new skill sets were needed in areas such as AI, machine learning, data analytics and algorithm design. Given the size and rapid growth of India’s digital consumer base, the regulatory toolkit for antitrust and merger control cases had to be sharpened and chiselled to account for data-centric ecosystems. Whilst market distortions had to be promptly corrected, it was important not to compromise incentives for innovation. Mr. Gupta also referred to the importance of looking at global developments, where *ex-ante* measures were increasingly supplementing *ex-post* antitrust tools.

### Promotion and Regulation of E-Commerce in India

In June, the Rajya Sabha’s Parliamentary Standing Committee on Commerce published a wide-ranging report on the *Promotion and Regulation of E-Commerce in India*.<sup>77</sup> It made a number of recommendations relating to competition law and the promotion of competition in e-commerce markets. The Committee addressed issues of platform neutrality and recommended a number of changes for platforms operating under marketplace and inventory models. In relation to the relationship between consumer protection and competition, it recommended a clear division between regulators to avoid overlaps and a robust mechanism for cooperation. More generally, the fragmented governance of e-commerce meant there was a need for a framework to enable periodic interaction and information between the CCI and other regulators/Ministries and for the creation of a Digital Markets and Data Unit within the CCI. The Committee pointed to the difficulties with *ex post* enforcement, especially with regard to “*gatekeepers*”. It recommended the development of an *ex-ante* regime and mechanisms for identifying such gatekeepers. The CCI should also formulate a mandatory code of conduct to cover relations between e-marketplace operators and business users/consumers. The Committee finally called for the prompt enactment of data protection legislation.

### CCI: Setting Up of a Digital Markets and Data Unit

In September, the CCI Chairperson announced that the CCI was in the process of setting up a Digital Markets and Data Unit which would act as a centre of expertise for digital markets. The Unit would engage with stakeholders, provide inputs on policy issues and support data analytics/management.

### Parliamentary Committee on Finance Reports on Anti-Competitive Practices by Big Tech Companies

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<sup>77</sup> [https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/13/159/172\\_2022\\_7.14.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/159/172_2022_7.14.pdf). Please see our June 2022 client alert (<https://www.amsshardul.com/insight/indian-competition-law-roundup-june-2022/>).



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In December, the Parliamentary Standing Committee on Finance issued a wide-ranging Report on Anti-Competitive Practices by Big Tech Companies.<sup>78</sup> The Committee observed that digital markets were essentially different from traditional markets given increasing returns to scale and network effects, which led to “winner takes all” markets evolving in short timeframes. It recommended that competitive behaviour in these markets needed to be evaluated *ex ante* rather than, as at present, after the event. Leading players that could negatively influence competitive conduct in the digital ecosystem should be designated as “Systemically Important Digital Intermediaries” (SIDIs) and be subject to a number of mandatory obligations. The Committee identified ten anti-competitive practices by SIDIs with corresponding obligations covering: (a) anti-steering provisions preventing users from moving to other platforms; (b) self-preferencing; (c) bundling and tying; (d) data usage; (e) mergers and acquisitions, including “killer acquisitions”; (f) dynamic pricing and deep discounting; (g) exclusive tie-ups; (h) search and ranking preferencing; (i) restricting third-party applications; and (j) advertising policies.

The Committee recommended the introduction of a Digital Competition Act to ensure a fair and contestable digital ecosystem. It also recommended revamping the CCI (including strengthening the capacities of its Digital Markets and Data Unit), to focus on SIDIs and unfair practices of other digital players.

## Competition Advocacy

### CCI Publishes Cab Aggregator Study and Issues Advisory

The CCI published *Key Findings and*

*Recommendations on a Market Study on Competition and Regulatory Issues related to the Taxi and Cab Aggregator Industry.*<sup>79</sup> This study, focusing on surge pricing, recommended: (a) greater transparency in the definition and components of “total fares”; (b) addressing aberrations in pricing through regulation and ensuring greater transparency; and (c) addressing information asymmetries between cab aggregators and riders/drivers. The CCI issued a short advisory setting out self-regulatory measures to address information asymmetry and transparency concerns.<sup>80</sup>

### Film Distribution Study: CCI Recommends Charter of Self-Regulation

The CCI published its key findings and observations in its *Market Study on the Film Distribution Chain in India.*<sup>81</sup> The CCI identified a range of competition issues in relation to revenue-sharing arrangements, box office collections for the theatrical exhibition of films, digital cinema equipment and trade associations. The CCI noted imbalances of bargaining power of various elements in the film distribution value chain and stated that promoting fair competition required the attenuation of such imbalances. Whilst committing to continuing to address these issues within the scheme of the Competition Act, the CCI saw a vast potential for players to adopt self-corrective mechanisms. It therefore devised a charter of self-regulation for stakeholders in order to minimise future interventions by the CCI and to encourage the development of a thriving film industry with minimum friction.

## Looking Forward to 2023

The “elephant in the room” in 2023 is the Competition (Amendment) Bill. The

<sup>78</sup> Standing Committee on Finance (2022-2023), 53rd Report, “Anti-Competitive Practices by Big Tech Companies” ([http://164.100.47.193/lssccommittee/Finance/17\\_Finance\\_53.pdf](http://164.100.47.193/lssccommittee/Finance/17_Finance_53.pdf)). See our detailed briefing (<https://www.ams-shardul.com/insight/standing-committee-on-finance-presents-report-on-competition-amendment-bill/>).

<sup>79</sup> CCI, *Market Study on Competition and Regulatory Issues related to the Taxi and Cab Aggregator Industry: With Special Reference to Surge Pricing in the Indian Context. Key Findings and Recommendations* (9 September 2022).

<sup>80</sup> CCI, *Advisory on Self-Regulatory Measures* (9 September 2022).

<sup>81</sup> CCI, *Market Study on the Film Distribution Chain in India: Key Finding and Observations* (14 October 2022).

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# Competition Matters

Ministry of Corporate Affairs will doubtless be examining the reports of the Standing Committee on Finance on the Bill and on Anti-Competitive Practices by Big Tech Companies to see if further changes should be made to the Bill. When the Bill is enacted, it will have important implications for enforcement and the review of mergers. Real game changers will be the introduction of a settlements and commitments mechanism, the changed and enhanced role of the DG and the introduction of deal value thresholds. The (amended) Competition Act will then be more suited to modern markets.

Many of the amendments will require detailed regulations and guidance from the CCI. So, once the (amended) Competition Act comes into force, we would anticipate a lot of work, including consultation of stakeholders, on the detailed rules.

After the retirement of Mr. Gupta in October, the appointment of a CCI Chairperson is eagerly awaited. Once appointed, the new Chairperson will have to ensure that the CCI catches up on delayed business and addresses matters arising from the expected new legislation. The question of competition law in the digital world will doubtless be top of the agenda.

In December, the NCLAT firmly held, on the basis of the wording of the Competition Act, that there was no requirement for the CCI to include a judicial member. The question is currently before the Supreme Court. Whether or not the Supreme Court decides that this should be a mandatory requirement (the Bill does not address the issue), we hope that a judicial member will be appointed. At the end of the day, the CCI is a creature of law, it is bound to act within the law and it has to apply increasingly complex laws; this would be better ensured with a judicial member.

The NCLAT has, since the appointment of new members, taken on more competition cases. We expect it to continue to hear competition

cases and address a significant backlog. It has already shown it is not a “*rubber stamp*”. Though it may be reluctant to interfere with complex findings of fact, it will make sure that the CCI adheres to the legal framework for decision making and that it applies fair penalties designed to ensure the preservation and growth of the economic sector.

The CCI will continue its campaign against cartels. Leniency is alive and kicking. The CCI’s acceptance this year of “*leniency plus*” anticipates a proposed amendment in the Bill. The integrity of the leniency regime has been reinforced by the NCLAT’s decision not to countenance appeals by successful leniency applicants. The DG will enjoy enhanced powers under proposed amendments to the Competition Act. If they come to pass, the DG’s task of identifying cartelisation and other infringements of the Competition Act will be more effective. We might also see the CCI exercising proposed new powers to look at the “*facilitators*” of horizontal agreements and at “*hub and spoke*” arrangements.

The CCI may be expected to continue its generally balanced approach in deciding on abuse of dominance cases. It will continue its push in the digital space. Investigations against WhatsApp (in relation to its privacy policy), Google (in the digital advertising space) and online food delivery platforms will continue, and may even come to final orders in 2023, and new investigations will start. The recommendation of the Standing Committee on Finance that a general effects-based test be introduced for Section 4 would, if accepted, require a significant change in the way the CCI looks at Section 4 cases.

In relation to sanctions, the proposed enhanced penalties for providing false information or failing to furnish material information in relation to a combination, as well as increased penalties for failure to comply with CCI directions/orders and/or providing false information and documents, will doubtless act as an incentive for compliance. The Supreme Court may also be

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# Competition Matters

expected to rule on the *Amazon* case, which has already sounded a cautionary bell for notifying parties tempted to misrepresent the position in notifications.

The proposed requirement that the CCI publish guidelines on penalties for infringement of the Competition Act, that it should consider these guidelines in imposing penalties and give reasons for any divergence, will be a welcome and long-overdue development.

In the merger control field, the CCI continues to decide on many cases (though there has been a lull since the end of October since it has been inquorate). Most cases have raised no competition issue and have been readily cleared, though a couple have been cleared subject to commitments. So far, after more than 10 years of operation of the merger control regime, no transaction has been blocked by the CCI. The Green Channel route, allowing notifiable transactions to be deemed cleared on notification where there are no horizontal overlaps, no material actual or potential vertical relationships and no complementary relationships, has been regularly taken and this is likely to continue. The CCI is also likely to continue its policy of targeting and penalising parties who fail to notify, mislead the CCI in notifications or engage in gun jumping.

The proposed introduction of deal value thresholds will doubtless give the CCI more

work, especially in relation to transactions in the digital and infrastructural spaces. Much will depend on the detailed workings of the new regime and it is to be hoped that the India nexus test will be limited to the target and that value thresholds are set to ensure that only competitively significant transactions are caught.

Finally, the CCI will continue to engage with issues of competition in the digital economy. The Competition (Amendment) Bill has taken a largely neutral approach, so that the provisions of the Competition Act apply to the traditional and the digital economy (though the deal value test seems to have a particular importance for the latter). However, in applying these provisions, the CCI has already shown that it can take on big tech companies like Google, that it will consider matters specific to the digital economy such as wide price parity clauses and (controversially) privacy concerns in relation to consumer communication apps. The CCI is setting up a Digital Markets and Data Unit which will act as a centre of expertise for digital markets. If the proposals for *ex ante* regulation of “Systemically Important Digital Intermediaries” by the Standing Committee on Finance are taken up and incorporated in new legislation, this will radically change the approach the CCI will take towards “big tech” companies. It goes without saying that a successful outcome in this and in other work of the CCI will depend on appropriate increases in resourcing.

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