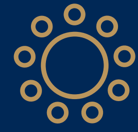

Shardul Amarchand Mangaldas

Navigating Tricky Waters

RECENT DEVELOPMENTS IN INDIAN COMPETITION LAW - MARCH 2023

Preface

We are delighted to present our review of developments in Indian competition law in 2022-23.

Challenges and complexities abound. We continue to "*navigate tricky waters*" helping our clients to chart a safe course through the challenges of Indian competition law.

The Competition Commission of India (*CCI*) was kept busy in enforcement. It continued its fight against anti-competitive agreements, finding cartels in the maritime transport, kraft paper and railway sectors. Leniency remained an important tool for finding infringements. The National Company Law Appellate Tribunal (*NCLAT*) took a critical approach to several CCI orders, sending cases back to the CCI to correct arithmetical errors or to reconsider levels of penalty. It rejected an appeal from participants in the *Beer Cartel*, finding that the absence of a judicial member in the CCI did not vitiate its decision and that successful leniency applicants could not challenge the CCI order on that ground.

In relation to vertical agreements, the CCI ordered an investigation against online food delivery platforms in respect of allegations of self-preferencing , exclusivity and price parity obligations.

In relation to abuse of dominance, this period was marked by the CCI finding that *Google* had abused its dominance in relation to the Android Mobile Device Ecosystem and the Google Play Store Billing System. The NCLAT and Supreme Court refused to suspend behavioural remedies imposed by the CCI and the NCLAT's decision on the appeals are awaited.

The CCI targeted wide price parity clauses and exclusivity in the online travel agency sector. After investigation, it also closed cases against *Asian Paints*.

Important changes were made to the CCI's confidentiality regime, including the self-certification of confidentiality claims and the introduction of "*confidentiality rings*".

On the merger control front, the CCI considered and cleared a large number of transactions, including the *Sony/Zee* merger, the *Veolia/SUEZ* merger and the *Tata* acquisition of *Air India*. The important Target Exemption was extended to 28 March 2027. In several cases, the CCI imposed penalties for the failure to notify transactions and gun jumping. In doing so, it severely limited the scope of exemptions for minority acquisitions. The NCLAT upheld CCI findings that *Amazon* had concealed the real purpose of an acquisition which it had notified in 2019 and had failed to notify an agreement.

The CCI continued its work in competition advocacy, including the publication of studies on cab aggregators and the film distribution chain. Both reports contained suggestions on self-regulation.

Important changes are also afoot. The wide-ranging Competition (Amendment) Bill was introduced in the Indian Parliament in August. The Parliamentary Standing Committee on Finance commented on it in early December. It may be taken up in the current session. It will have important implications for enforcement and the review of mergers. Key game changers will include the introduction of a settlements and commitments mechanism and the introduction of deal value thresholds for merger control.

The debate on the shape of competition in the digital world also continues. The CCI has showed its willingness to take on "*big tech*" and to consider repurposing its regulatory toolkit to account for data-centric ecosystems. The creation of a Digital Markets and Data Unit in the CCI will help in this process. Parliamentary committees have recommended the adoption of an *ex ante* regime, imposing specific obligations on "*gatekeepers*" or "*Systemically Important Digital Intermediaries*". To cap it all, in February 2023, the Government set up a Committee on Digital Competition Law to examine the need for separate legislation providing for *ex ante* regulation in digital markets. It must submit its report, with a draft Digital Competition Act, by May 2023.

The Chairperson of the CCI, Mr. Ashok Kumar Gupta, retired at the end of October 2022 and the hunt is still on for a successor. Unfortunately, the CCI has been left inquorate and has been unable to exercise its adjudicatory role. It also felt unable to make orders in relation to combinations, but, invoking the "*doctrine of necessity*" it has now resumed passing such orders. Enforcement cases remain in limbo. We hope that the CCI will become quorate soon. The new Chairperson will have the responsibility of ensuring that the CCI is ready to enforce the amended competition framework as it evolves.

We have over 50 dedicated competition lawyers based in our Delhi and Mumbai offices. With our bench strength – now 11 partners, a Senior Advisor and associates at all levels – we can handle the entire range of challenging and cutting-edge competition work.

We hope that this review will give you a good idea of the key recent developments in Indian competition law and the continuing challenges in getting to a safe harbour.

Pallavi Shroff | John Handoll | Naval Satarawala Chopra | Shweta Shroff Chopra | Harman Singh Sandhu | Manika Brar | Aparna Mehra | Gauri Chhabra | Yaman Verma | Rohan Arora | Aman Singh Sethi | Nitika Dwivedi

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Indian Competition Law and Policy in 2022-23

By John Handoll and Aman Singh Sethi[1]

In this overview, we outline some of the main developments in Indian competition law and policy from January 2022 to mid-March 2023.

Competition (Amendment) Bill

In August 2022, the Government of India introduced the Competition (Amendment) Bill, 2022 (*Bill*) in the Parliament.[2] This is one of the most eagerly awaited developments in India and is expected to be enacted in Spring 2023.

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.[3] The Ministry of Corporate Affairs will decide if recommendations made by the Standing Committee on Finance in this report and its later December report on Anti-Competitive Practices by Big-Tech Companies (see below) should be reflected in the Bill.

Institutional Developments

CCI Chairperson Retires: Hunt for Successor

The CCI Chairperson, Ashok Kumar Gupta, retired in October 2022. Pending the appointment of a new Chairperson, CCI Member Sangeeta Verma was appointed as Acting Chairperson. The search for a replacement continues and this has severely handicapped the CCI. 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 in enforcement cases and to make orders in merger cases.[4] However, in February 2023, after seeking guidance from government, the CCI decided to invoke the "*doctrine of necessity*" to enable it to examine and clear combination cases. Enforcement cases remain held up.

Anti-Competitive Agreements

Horizontal Agreements

Supreme Court Upholds Bid Rigging Order

In July, the Supreme Court disposed of an appeal by *PES Installation Private Limited* (*PES*)[5] 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.[6] The Supreme Court, while refusing to modify the CCI's directions to cease and desist from anti-competitive conduct, 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*.[7] It rejected the argument that the CCI order[8] 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. In February 2023, the Supreme Court of India conditionally stayed the recovery of penalty proceedings, subject to a deposit of an additional 10% of the total penalty over and above the amount already deposited.[9]

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[10] finding bid rigging in the supply of LPG cylinders.[11] 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

1 John Handoll, Senior Advisor, and Aman Singh Sethi, Partner, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.
2 The Competition (Amendment) Bill, 2022 (http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf). Please see our separate briefing for a more detailed analysis (https://www.amsshardul.com/ insight/competition-amendment-bill-a-modern-law-for-modern-markets/).
3 Standing Committee on Finance (2022-2023), 52nd Report, "*The Competition (Amendment) Bill, 2022*" (http://164.100.47.193/lsscommittee/Finance/17_Finance_52.pdf). Please see our separate briefing for a more detailed analysis (https://www.amsshardul.com/insight/standing-committee-on-finance-presents-report-on-competition-amendment-bill/).
4 The combinations notified under the "*Green Channel*" route were being "*deemed approved*" upon filing, since such transactions are not put up for approval at CCI meetings.
5 *PES Installation Private Limited v. MDD Medical Systems Private Limited and Others*, Supreme Court, Civil Appeal No. 4040 of 2014 (29 July 2022).
6 *MDD Medical Systems India Private Limited v. Foundation for Common Cause and People Awareness and Others*, Competition Appellate Tribunal, Appeal No. 93 of 2012 (25 February 2013).
7 *Pawan Jagetia v. Competition Commission of India and Others*, NCLAT, Competition Appeal (AT) No. 16 of 2021, etc. (23 December 2022).
8 *Alleged Anti-Competitive Conduct in the Beer Market in India*, CCI, *Suo Motu* Case No. 06 of 2017 (24 September 2021).
9 *United Breweries Limited v. Competition Commission of India*, Supreme Court, Civil Appeal No. 747 of 2023 (17 February 2023).
10 *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).
11 *Sahuwala Cylinders Private Limited and Another v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 38 of 2019, etc. (10 November 2022).

have been calculated based on the three financial years preceding the year in which the violation occurred and remanded the cases back to the CCI for re-computation/review of the penalty. The NCLAT also considered that, as a general practice, it was improper to proceed on the basis of 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 2022, the CCI found that four maritime transport companies had cartelised in providing motor vehicle transport services to automobile manufacturers on various routes.[12] 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 also shared commercially sensitive information including freight rates. 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 2022, 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.[13] It found that the Association had acted as a platform for the exchange of sensitive information. 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.[14] The NCLAT found that arithmetical errors had been made by the Director General (*DG*) and the corrected data showed there was no price parallelism. It remitted the matter to the CCI to re-examine the calculations.

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 industry association directives.[15] There was ample evidence of such conduct, including WhatsApp messages and admissions on oath made by representatives of the mills. 31 lesser penalty applicants had admitted to the conduct. The CCI refrained from imposing financial penalties in light of 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.

Bid-Rigging/Collusive Tendering Cases in the Railways Sector

In successive orders, the CCI found that suppliers had cartelised in tenders for bushes,[16] protective tubes[17] and axle bearings[18] 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.

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.[19] 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

12 *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).

13 *Ministry of Corporate Affairs v. Apollo Tyres Limited and 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.

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

15 *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).

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

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

18 *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).

19 *Consumer Unity & Trust Society v. PVR Limited and Another*, CCI, Case No. 29 of 2022 (13 September 2022).

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.

Vertical Agreements

CCI Dismisses Cases Against Platform Operators

In March 2022, 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*".[20] 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.[21]

CCI Orders Investigation into Online Food Delivery Platforms

Following a complaint by the *National Restaurant Association of India (NRAI)*, the CCI in April 2022 ordered an investigation against online food delivery platforms *Zomato Limited* (*Zomato*) and *Bundl Technologies Private Limited* (*Swiggy*).[22] 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.

Abuse of Dominant Position

NCLAT Finds Ola Not Dominant

In January 2022, the NCLAT dismissed an appeal against the 2017 CCI order[23] finding that *ANI Technologies Private Limited* (*Ola*) had not abused its dominant position in the radio-taxi services market in Bengaluru.[24] 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.

WhatsApp Privacy Policy

In August 2022, the NCLAT dismissed an appeal against a 2017 CCI Decision[25] 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.[26] 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 2022, 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,[27] 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. In addition to imposing a provisional penalty on Google of nearly INR 1337.6 crores (approx. USD 164 million), the CCI issued immediate cease and desist orders and directed Google to modify its conduct within a prescribed timeline. Google challenged the CCI's order before the NCLAT including seeking a stay of the behavioural remedies directed. Both the NCLAT[28] and thereafter the Supreme Court[29] refused to stay these remedies. However, the NCLAT has been directed to conclude the appellate proceedings by 31 March 2023. A decision on Google's appeal is expected very soon.

In the *Play Store Billing System* order,[30] 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. Here too, Google challenged the CCI's order before the NCLAT including seeking a stay of the behavioural remedies directed. Again, the NCLAT refused to stay these remedies.[31]

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20 *AIOVA v. Amazon Seller Services Private Limited and Others*, CCI, Case No. 29 of 2020 (3 March 2022).
21 *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).
22 *NRAI v. Zomato and Swiggy*, CCI, Case No. 16 of 2021 (4 April 2022) (NRAI case).
23 *Fast Track Call Cab Private Limited and Another v. ANI Technologies Private Limited*, CCI, Cases No. 6 and 74 of 2015 (19 July 2017).
24 *Meru Travel Solutions Private Limited v. Competition Commission of India and Another*, NCLAT, Competition Appeal (AT) No. 19 of 2017, etc. (7 January 2022).
25 *Vinod Kumar Gupta v. WhatsApp Inc.*, CCI, Case No. 99 of 2016 (1 June 2017).
26 *Vinod Kumar Gupta v. Competition Commission of India and WhatsApp LLC*, NCLAT, Competition Appeal (AT) No. 13 of 2017 (2 August 2022).
27 *Umar Javeed and Others v. Google LLC and Another*, CCI, Case No. 39 of 2018 (20 October 2022).
28 *Google LLC v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 01 of 2023 (4 January 2023).
29 *Google LLC v. Competition Commission of India*, Supreme Court, Civil Appeal No. 229 OF 2023 (19 January 2023.)
30 *XYZ (Confidential) v. Alphabet Inc. and Others*, CCI, Case No. 07 of 2020, etc. (25 October 2022).
31 *Alphabet Inc v. Competition Commission of India*, NCLAT, Competition Appeal (AT) No. 04 of 2023 (11 January 2023).

In the meanwhile, Google has announced some changes to its Android ecosystem and Play Store payments. These have been widely criticised for not being in compliance with the letter and spirit of the CCI's directions. As mentioned previously, the CCI is not currently quorate to examine the issue of compliance.

Earlier, in January 2022, 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.[32] In October, a complaint by the *News Broadcasters and Digital Association* addressing these issues was joined to the investigation.[33]

Online Travel Agency: CCI Targets Wide Price Parity Clauses, Foreclosure

In October 2022, the CCI found that online travel agency (*OTA*) *MMT-Go* had abused its dominant position in the market for online intermediation services provided by OTAs.[34] The CCI considered allegations of abuse including price and room parity obligations, predation, misrepresentation and exclusivity, and held that MMT-Go had imposed wide room rate parity on its hotel partners. It concluded that the parity obligations coupled with deep discounts created an ecosystem that reinforced MMT-Go's dominant position and amounted to an abuse.

The CCI also held that *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. The CCI imposed penalties on the parties of 5% of the average of their turnover over three years.[35] In addition, it prescribed broad behavioural remedies on MMT-Go in order to return to an environment that supported fair competition. The NCLAT in appeal has refused to stay these remedies.[36]

CCI Closes Cases Against Asian Paints

In September 2022, 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.[37] Although Asian Paints was found to be dominant, it was held it had not denied access to JSW Paints; the appointment of a significant number of dealers by JSW 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 2022, the CCI considered allegations by *Asianet Digital Network Private Limited* (*Asianet*), 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 competitors.[38] 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 2022, 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.[39]

Dismissal of Allegations of Abuse at Prima Facie Stage

In March 2022, 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.[40] 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 rejected a claim that bringing a copyright infringement claim was abusive.[41] 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 *prime facie* view that the litigation was brought in good faith.

In April 2022, 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.[42] The CCI noted its findings in an earlier case[43] that Zomato and another food delivery platform operator operated as "*online intermediaries*

32 *Digital News Publishers Association v. Alphabet Inc. and Others*, CCI, Case No. 41 of 2021, etc. (7 January 2022).
33 *News Broadcasters and Digital Association v. Alphabet Inc. and Others*, CCI, Case No 36 of 2022 (6 October 2022).
34 *Federation of Hotel and Restaurant Associations of India and Another v. MakeMyTrip India and Others*, CCI, Case No. 14 of 2019, etc. (19 October 2022).
35 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.
36 *MakeMyTrip (India) Private Limited and Another v. Competition Commission of India and Others*, NCLAT, Competition Appeal (AT) No. 57 of 2022 (6 December 2022).
37 *JSW Paints Private Limited v. Asian Paints Limited*, CCI, Case No. 36 of 2019 etc. (8 September 2022).
38 *Asianet Digital Network Private Limited v. Star India Private Limited and Others*, CCI, Case No. 09 of 2022 (28 February 2022). (Separate orders were issued under Section 26(1) and Section 33 of the Competition Act.)
39 *Vijay Gopal v. Big Tree Entertainment Private Limited (BookMyShow) and Others*, CCI, Case No. 46 of 2021 (16 June 2022).
40 *Vaibhav Mishra v. Spinn India Private Limited*, CCI, Case No. 01 of 2022 (3 March 2022).
41 *Cryogas Equipment Private Limited v. Inox India Private Limited*, CCI, Case No. 08 of 2021 (8 March 2022).
42 *Rohit Arora v. Zomato*, CCI, Case No. 54 of 2020 (4 April 2022).
43 See n. 22, above.

for food ordering and delivery" and competed with each other in the same segment in various ways.

Procedures

CCI Overhauls Confidentiality Regime

In April 2022, 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.[44] 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 2022, the Division Bench of the Delhi High Court[45] 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.[46] A petition for leave to appeal was rejected by the Supreme Court in October.[47] The CCI investigation could thus continue despite a number of challenges to the 2021 Update pending before the Supreme Court of India and the Delhi High Court.

In September 2022, 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.[48] 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 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 2022, 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.[49] 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 2022, the NCLAT allowed an appeal against a CCI order closing a case against real estate developer *DLF*.[50] 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.

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 three acquisitions in the electricity distribution sector.[51] 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 2022, 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. 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. After initially directing the CCI and DG to refrain from taking any further steps in the matter and directing SEBI a chance to arrive at a *prima facie* view within a reasonable period,[52] the Court

44 The Competition Commission of India (General) Amendment Regulations, 2022 (No. 2 of 2022) (8 April 2022). Please see our April 2022 client alert for a more detailed analysis.
45 *WhatsApp LLC v. Competition Commission of India and Another*, Delhi High Court, LPA No. 163 of 2021, etc. (25 August 2022).
46 *WhatsApp LLC v. Competition Commission of India*, Delhi High Court, W.P.(C) No. 4378 of 2021, etc. (22 April 2021).
47 *Meta Platforms Inc. v. Competition Commission of India and Another*, Supreme Court, SLP (C) No. 17121 of 2022 (14 October 2022).
48 *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).
49 *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).
50 *Amit Mittal v. DLF Limited and Others*, NCLAT, Competition Appeal (AT) No. 82 of 2018 (21 December 2022).
51 *Proceedings against Tata Power Company Limited under Section 43A of the Competition Act*, CCI, Ref. No. C-2021/03/824, C-2021/02/825 and C-2021/03/826 (17 March 2022).
52 *Trustees Association of India v. CCI and Others*, Bombay High Court, Writ Petition No. 3781 of 2022, etc. (8 and 11 April 2022).

in February 2023 directed the CCI to decide on the issue of its own jurisdiction.[53]

CCI Jurisdiction in Cases Involving Patents

In July 2022, 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.[54] 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,[55] it affirmed that the jurisdiction of the CCI was not ousted just because the complaint related to patents.

The Delhi High Court also dismissed arguments that disclosure of the information sought would expose it/or 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 the Competition Act.[56]

Merger Control

Target Exemption Extended to 28 March 2027

In March 2022, the Government of India extended the 2017 Target Exemption until 28 March 2027.[57] 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 2022, the NCLAT rejected[58] 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*).[59] 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. This case is pending appeal before the Supreme Court.

Veolia/SUEZ Merger

In January 2022, 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.[60] 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 2022, 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* (collectively, the *Target*).[61]

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 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.

53 *Trustees Association of India v. CCI and Others*, Bombay High Court, I.A. No. 20251 of 2022 with W.P. No. 3781 of 2022 (21 February 2023).
54 *Vifor International Limited v. Competition Commission of India*, Delhi High Court, W.P.(C) No. 11263 of 2022 (28 July 2022).
55 *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).
56 *Swapan Dey v. Vifor International (AG) and Another*, CCI, Case No. 05 of 2022 (25 October 2022).
57 Gazette of India, 16 March 2022.
58 *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).
59 *Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act, 2002*, CCI (17 December 2021).
60 *Notice jointly given by Veolia Environnement S.A., Meridiam Global Infrastructure Management, LLC, Caisse des Dépôts et Consignations and CNP Assurances*, CCI, Ref. No. C-2021/07/852 (23 November 2021).
61 *Talace Private Limited*, CCI, Ref. No. C-2021/11/883 (20 December 2021).

Sony/Zee Merger Cleared Subject to Modifications

In October 2022, 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*).[62] 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 2022, the CCI found that *Adani Green Energy* (*Adani*) had, in its 2021 acquisition of *S. B. Energy Holding Limited*, engaged in gun jumping before CCI approval had been given.[63] 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.[64] Following its approach in the *SCM Solifert Case*,[65] as endorsed by the Supreme Court,[66] 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 2022, the CCI also found that *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.[67] 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 that mere breach of the requirement to notify would attract the penalty.[68] 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 2022, the CCI separately held that *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)*.[69] 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.[70] 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.

CCI Makes Changes to Form II

In April 2022, the CCI introduced changes to Form II, the long-form notification recommended to be filed for combinations where the

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

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

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

65 *SCM Solifert Limited*, CCI, Ref. No. C-2014/05/175 (10 February 2015).

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

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

68 *Competition Commission of India v. Thomas Cook (India) Limited*, Supreme Court, Civil Appeal No. 13578 of 2015 (17 April 2018).

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

70 *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).

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.[71] 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 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 its Chairperson, Ashok Kumar Gupta, in his contribution to the 13th Annual Competition Day in May 2022. 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. The CCI Chairperson 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 2022, the Rajya Sabha's Parliamentary Standing Committee on Commerce (*Standing Committee on Commerce*) published a wide-ranging report on the *Promotion and Regulation of E-Commerce in India*.[72] 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 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 2022, 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

In December, the Standing Committee on Finance issued a wide-ranging *Report on Anti-Competitive Practices by Big Tech Companies*.[73] 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 Finance 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 Finance 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.

Constitution of a New Committee on Digital Competition Law

Following the inputs from the various Parliamentary Standing Committees, in February 2023, the Government constituted a Committee on Digital Competition Law (*CDCL*) to evaluate the need for a separate competition law for digital markets.[74] The Firm's Managing Partner, Mrs. Pallavi Shroff, has been nominated by the Government as a Member of the CDCL.

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72 Promotion and Regulation of E-Commerce in India (https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/159/172_2022_7_14.pdf.) Please see our June 2022 client alert for a more detailed analysis (https://www.amsshardul.com/insight/indian-competition-law-roundup-june-2022/).

73 Standing Committee on Finance (2022-2023), 53rd Report, "*Anti-Competitive Practices by Big Tech Companies*" (http://164.100.47.193/lsscommittee/Finance/17_Finance_53.pdf).

74 Ministry of Corporate Affairs, "*Constitution of the Committee on Digital Competition Law*" (https://images.assettype.com/barandbench/2023-02/7e93ae0c-05b9-4565-9b5b-a9a6103ac6ff/Order.pdf).

The CDCL is to review whether the existing Indian competition law regime is sufficient to deal with the challenges emerging from the digital economy. The CDCL will: (a) examine whether there is need for a separate legislation providing for ex-ante regulation in digital markets; and (b) study the practices of SIDIs. The CDCL is required to submit its report, along with a draft Digital Competition Act, to the Government by May 2023.

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.*[75] 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.[76]

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.*[77] 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.

75 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).

76 CCI, *Advisory on Self-Regulatory Measures* (9 September 2022).

77 CCI, *Market Study on the Film Distribution Chain in India: Key Finding and Observations* (14 October 2022). Please see our October 2022 client alert for a more detailed analysis (https://www.amsshardul.com/insight/indian-competition-law-roundup-october-2022/).

Does India Require Ex-Ante Competition Regulation in Digital Markets?

By Naval Satarawala Chopra, Yaman Verma, Supritha Prodaturi and Shivek Sahai Endlaw[1]

Introduction

Between 2014 and 2019, India's "*digital economy*" (which includes digital technologies, products and services across a wide spectrum of sectors) grew 2.4 times faster than the Indian economy as a whole. A few large technology companies have significantly contributed to this growth. However, globally as well as in India, often these companies act both as intermediary platforms and providers of services and goods on those platforms. This has heightened concerns about potential economic harm brought about by the concentrated structure of the digital economy.[2] Therefore, competition regulators across jurisdictions have highlighted the need to regulate the behaviour of big-tech companies in digital markets.

In India, competition in digital markets is regulated by the Competition Commission of India (*CCI*) under the Competition Act, 2002 (*Competition Act*). The Competition Act contains several provisions that prohibit businesses with market power from entering into anti-competitive agreements and abusing their dominant position. The Competition Act also reviews mergers and acquisitions that cross certain jurisdictional thresholds, to avoid concentration of power and a potential appreciable adverse effect on competition (*AAEC*).

Despite this existing regulation, due to the rapid pace at which digital businesses grow a need was felt to evaluate competition in digital markets *ex-ante*. Accordingly, the Parliamentary Standing Committee on Finance (*Standing Committee*) presented its 53rd Report on 'Anti-competitive Practices by Big Tech Companies' (*Report*) in December 2022. The Report, among other things, recommended the introduction of an *ex-ante* regime through a new 'Digital Competition Act' (*DCA*), to ensure a fair, transparent and contestable digital ecosystem in India. The objective of the DCA would be to: (a) identify 'market winners' or 'Systemically Important Digital Intermediaries' (*SIDIs*), based on their revenue, market capitalisation and number of active business and end users; (b) impose *ex-ante* obligations on them to deter self-preferencing, deep discounting, anti-steering, exclusive tie-ups, and bundling and tying of services; and (c) allow for scrutiny of their potential mergers and acquisitions, and regulation of their internal advertising, data, and search policies.

Following the Standing Committee's recommendations, the Ministry of Corporate Affairs (*MCA*) constituted a Committee on Digital Competition Law (*CDCL*) to evaluate the need for a separate competition law for digital markets.

While correcting competition distortions in digital markets is (and ought to be) a top priority for the government and the CCI, the requirement for *ex-ante* competition regulation needs to be assessed against two parameters. First, whether the existing regime can sufficiently tackle competition issues in the digital ecosystem (i.e., is *ex-ante* regulation necessary?). Second, whether the benefits of *ex ante* regulation outweigh the potential costs, in terms of over-regulation, false positives, regulatory tussles, and the potential chilling of innovation in evolving digital markets.

The first part of this article discusses the sufficiency of the existing regime to tackle the issues identified by the Standing Committee in digital markets. The second, assesses whether the benefits of ex-ante regulation outweigh its potential costs. The third, provides the authors' recommendations on whether additional *ex-ante* regulation is required in India.

Sufficiency of the Current Regime to Regulate Digital Markets and other Developments

The goal of the Competition Act set out in its preamble, namely "*to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India…*", remains relevant and valid even for digital markets.

This basic framework of the Competition Act (including Section 3 (anti-competitive agreements), Section 4 (abuse of dominant position) and Section 5 (combinations)) provides a sufficient basis for addressing competition issues in digital markets identified by the Standing Committee (see table below). In fact, the high-level Competition Law Review Committee (*CLRC*)[3] conducted extensive consultations and review, and concluded that the existing provisions were sufficient to address pressing enforcement issues in digital markets.

Competition Issues identified by the Standing Committee	Provisions of the Competition Act
Anti-steering provisions (*i.e., provisions where a platform prevents the business users of the platform from 'steering' its consumers to offers other than those provided by the platform that may be cheaper or otherwise potentially attractive alternatives*)[4]	• Section 4(2)(a) (Imposing unfair or discriminatory conditions or prices) • Section 4(2)(c) (Denial of market access)
Self-preferencing / Platform neutrality (i.e., *practice where a platform favours its own services or its subsidiaries directly or indirectly in situations when it has a dual role of providing the platform and competing on the same platform*)[5]	• Section 4(2)(a) • Section 4(2)(e) (Using its dominant position in one relevant market to enter into, or protect, another relevant market) • Section 3(4) (Vertical anti-competitive agreements)

1 Naval Satarawala Chopra, Partner, Yaman Verma, Partner, Supritha Prodaturi, Principal Associate and Shivek Sahai Endlaw, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 S. Prado, T. (2020), "*Assessing the Market Power of Digital Platforms*", *SSRN Electronic Journal*, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747793).

3 The CLRC was constituted by the MCA in 2018 to review the Competition Act and to ensure that it was in sync with the needs of strong economic fundamentals.

4 Report, Paragraph 1.12.

5 Report, Paragraph 1.14.

Competition Issues identified by the Standing Committee	Provisions of the Competition Act
Bundling and Tying (i.e., *binding developers into taking all services from app store operators and removing competition from the market"*)[6]	• Section 4(2)(a) • Section 4(2)(d) (Making conclusion of contracts subject to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts) • Section 3(4)(a) (Tie-in arrangements)
Data usage (i.e., *leading platforms leveraging their position and putting consumer preference data to their own use, or platforms collecting and storing large amounts of data for profiling consumers, or using privileged data from one market to gain competitive advantage in another market*)[7]	• Section 4(2)(a) • Section 4(2)(c) • Section 4(2)(e)
Pricing / deep discounting (i.e., *platforms offering bogus sales and markdowns, resulting in service providers losing control over the final price of their services*)[8]	• Section 4(2)(a)
Exclusive tie-ups (i.e., *an agreement with a brand to allow sale of the brand's products on the platform, absolutely exclusively*)[9]	• Section 4(2)(a) • Section 4(2)(c) • Section 3(4)
Search and ranking preferencing (i.e., *search bias in favour of sponsored products, or orders fulfilled by the marketplace itself*)[10]	• Section 4(2)(a) • Section 4(2)(e) • Section 4(2)(c)
Restricting third party applications (i.e., *restricting the installation or operation of third-party applications*)[11]	• Section 4(2)(a) • Section 4(2)(b) (Limiting technical or scientific development relating to goods or services) • Section 4(2)(c) • Section 4(2)(e) • Section 3(4)(d) (Refusal to deal)
Advertising policies (i.e., *"policies through which consumer data can be leveraged with the help of artificial intelligence and machine learning for cost-effective targeted advertising"*)[12]	• Section 4(2)(a) • Section 4(2)(c) • Section 4(2)(e)

Further, Section 5 of the Competition Act states that acquisitions, mergers and amalgamations crossing specified assets or turnover thresholds must be notified in advance to the CCI. Once notified, the CCI assesses whether the transaction causes or is likely to cause an AAEC. The Competition (Amendment) Bill, 2022 (which was introduced by the Government in the lower house of the Parliament in August 2022) introduces 'deal value' thresholds to target high value deals (especially within the digital space) which would have otherwise escaped the scrutiny of the of the CCI as the parties involved have few assets and low turnover in India. This amendment is likely to address the concern of the Standing Committee with regard to mergers and acquisitions.

The Competition Act also provides the CCI with powers to investigate and impose targeted remedies on digital platforms.[13] In fact, in the past 10 years, the CCI has initiated investigations / investigated digital companies in more than 30 cases (for similar issues identified by the Standing Committee) and has in many cases imposed effective remedies on large digital platforms (such as *Google* and *MakeMyTrip*). Some of these are discussed in this article.

6 Report, Paragraph 1.16.
7 Report, Paragraph 1.18.
8 Report, Paragraph 1.22.
9 Report, Paragraph 1.22.
10 Report, Paragraph 1.26.
11 Report, Paragraph 1.28.
12 Report, Paragraph 1.30.
13 For abusing its dominant position, Section 27 of the Competition Act enables the CCI to require changes to business practices, including cease and desist orders and targeted behavioural remedies. Section 28 of the Competition Act allows the CCI to order the division of a dominant enterprise and creates a strong deterrent against anti-competitive behaviour.

Anti-Steering Provisions

In *XYZ v. Alphabet Inc and Others*[14] the CCI found that Google abused its dominant position by, amongst other things, imposing unfair and discriminatory conditions on app developers to mandatorily use Google Play's Billing System (*GPBS*) for paid app downloads and in-app purchases. The CCI found that the mandatory imposition of the GPBS foreclosed other payment gateways such as PayPal and RazorPay (i.e., a restriction on third party applications, an issue identified by the Standing Committee). The CCI additionally imposed a monetary penalty of INR 937 crores on Google to deter it from indulging in such conduct in the future. Google appealed the CCI's order on merits before the National Company Law Appellate Tribunal (*NCLAT*) and sought a stay on the behavioural remedies imposed. The NCLAT rejected Google's application for interim stay on the remedies, and subsequently Google has publicly announced how it proposes to comply with the CCI's directions.

The CCI has also initiated an investigation into *Apple* (in *Together We Fight Society v. Apple Inc*[15]) for similar conduct. These proceedings are ongoing. The CCI is also investigating Apple for prohibiting third party app stores from being listed on its App Store.

Self-Preferencing / Platform Neutrality

In *Umar Javeed and Others v. Google LLC and Another,*[16] the CCI found Google to have abused its dominant position by, amongst other things, pre-installation and premium placement of its applications. The CCI directed Google not to impose any restrictions on Original Equipement Manufacturers (*OEMs*) from: (a) choosing which Google's proprietary apps were to be pre-installed on their smart mobile devices; and (b) deciding the placement of pre-installed apps. Further, the CCI also prohibited Google from restricting its users from uninstalling its pre-installed apps. The CCI also imposed a monetary penalty of INR 1337.6 crores on Google. Google appealed the CCI's decision on merits and argued for a stay on the remedies imposed by the CCI before the NCLAT and the Supreme Court. Google's application for an interim stay on remedies was rejected by both, and Google has subsequently announced significant changes to its Android OS business model in compliance with the CCI's directions.

Previously, in *Matrimony.com Limited v. Google and Others,*[17] the CCI also found *Google*'s conduct in violation of Section 4 of the Competition Act for, amongst other things, engaging in search bias through prominent placement of Google's Flights Unit on the results page. The CCI directed Google to display a disclaimer in the commercial flight unit box indicating clearly that the "*search flights*" link placed at the bottom led to Google's Flights page, and not the results aggregated by any other third party service provider. The CCI imposed other remedies and a fine of INR 135.86 crores on Google for violating the Competition Act. Google subsequently challenged the CCI's order before the NCLAT, which is still pending in appeal.

Bundling and Tying

In *Umar Javeed and Others v. Google LLC and Another,*[18] the CCI found *Google* to have abused its dominant position by, amongst other things, tying the Play Store with Google Search, Google Chrome, and YouTube. The CCI directed Google to cease and desist from such tying.

Similarly, the CCI has initiated an investigation into *Apple* (in *Together We Fight Society v. Apple Inc*[19]) for allegedly tying its: (a) distribution service and payment processing service for in-app purchases; and (b) app store to the use of its in-app payment solution.

In *Kshitiz Arya and Another v. Google LLC and Others,*[20] the CCI has initiated an investigation into Google for allegedly entering into agreements with device manufacturers that require them to pre-install the entire suite of Google apps, and prohibit them from picking and choosingcamongst the Google apps. These proceedings are ongoing before the CCI.

Data Usage

The CCI has also initiated an investigation into *WhatsApp* and *Meta* (*In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*[21]) for allegedly abusing their dominance with respect to data practices pursuant to WhatsApp's 2021 privacy policy. The proceedings before the CCI are ongoing.

Pricing / Deep Discounting

In *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Another,*[22] the CCI initiated an investigation into Flipkart and Amazon for alleged deep discounting practices. *Flipkart* and *Amazon* challenged the CCI's investigation order on jurisdictional grounds before the Karnataka High Court and the Supreme Court, where their appeal was finally dismissed. The proceedings before the CCI are ongoing.

Exclusivity Tie-ups

In *FHRAI and Others v. MakeMyTrip and Others,*[23] the CCI found *MakeMyTrip*'s and *GoIbibo*'s (collectively referred to as *MMT-Go*) wide price parity clauses and exclusivity conditions with hotel partners, as

14 *XYZ v. Alphabet Inc. and Others*, CCI, Case No. 07 of 2020 (25 October 2022).
15 *Together We Fight Society v. Apple Inc.*, CCI, Case No. 24 of 2021 (31 December 2021).
16 *Umar Javeed v. Google LLC and Others*, CCI, Case No. 39 of 2018 (20 October 2022).
17 *Matrimony.com Limited v. Google LLC and Others*, CCI, Case No. 07 and 30 of 2012 (8 February 2018).
18 *Umar Javeed v. Google LLC and Others*, CCI, Case No. 39 of 2018 (20 October 2022).
19 *Together We Fight Society v. Apple Inc.*, CCI, Case No. 24 of 2021 (31 December 2021).
20 *Kshitiz Arya and Another v. Google LLC and Others*, CCI, Case No. 19 of 2020 (22 June 2021).
21 *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, CCI, Suo Moto Case No. 01 of 2021 (24 March 2021).
22 *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Another*, CCI, Case No. 40 of 2019 (13 January 2020).
23 *Federation of Hotel and Restaurant Associations of India and Another v. MakeMyTrip India Private Limited and Others*, CCI, Case No. 14 of 2019 (19 October 2022).

well as misrepresentation of information to users, to be in violation of of the Competition Act. Further, the CCI found an exclusionary and mutually beneficial agreement between MMT-Go and *Oravel Stays* (*OYO*) to have resulted in denial of market access to FabHotels and Treebo hotels by delisting them. MMT-Go was ordered to modify its agreements with hotels to remove parity obligations, exclusivity conditions and provide access to its platform on fair, transparent and non-discriminatory terms. The CCI also imposed a penalty of INR 223.48 crores on MMT-Go and INR 168.88 crores on OYO for violating the Competition Act. MMT-Go and OYO have challenged the CCI's findings before the NCLAT, which is still pending in appeal.

In *NRAI v. Zomato Limited and Another*,[24] the CCI ordered investigation of leading online food aggregators *Zomato* and *Swiggy* in relation to allegations of preferential treatment, exclusivity, and imposition of price parity clauses. The allegations against Zomato and Swiggy are still being investigated.

The CCI has also initiated an investigation into Amazon and Flipkart (in *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Another*)[25] for their alleged exclusive tie-ups for the sale of certain mobile devices.

Search and Ranking Preferencing

In *Matrimony.com Limited v. Google and Others*,[26] the CCI found *Google* to have engaged in search bias. It also found Google to be in contravention of the Competition Act for assigning, until 2010, predetermined fixed positions to universal search results which were not reflective of the most relevant results for the user's queries. The CCI also prohibited Google from resorting to such fixing of positions in the future.

Advertising Policies

As discussed above, the CCI has also initiated an investigation into WhatsApp's and Meta's data practices including whether the data sharing provision may have exclusionary effects in the display advertising market (*In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*)[27].

Further, one of the primary reasons for the Standing Committee to recommend *ex-ante* regulation of the digital markets was that the "*digital markets 'tip' quickly and one or two winners of leading players emerge in a short span of time*". Section 33 of the Competition Act provides enough armour to the CCI to impose interim measures to alleviate such concerns and avoid short term harms in cases of abuse of dominance, until the conclusion of the investigation. In fact, in *FHRAI and Others v. MMT and Others*,[28] while the matter was being investigated, the CCI used its powers under Section 33 of the Competition Act and directed *MMT-Go* to re-list certain affected hotels on its platforms that were excluded due to an agreement MMT-Go had with *OYO*. The Gujarat High Court set aside the CCI's interim order as it was passed without hearing OYO and remanded the matter to the CCI for reconsideration. At the subsequent hearing, OYO and MMT-Go did not object to the re-listing of the excluded hotels and the CCI recorded this consent while disposing of the interim applications.

Section 49 of the Competition Act also allows for the CCI to undertake advocacy for promoting competition. Making use of such powers, the CCI had published a market study on e-commerce back in 2020, which identified competition issues similar to the ones identified in the Report (like anti-competitive exclusive agreements, deep discounting, platform neutrality, search rankings and usage and sharing of data) and clarified its position on examining these issues under the existing Competition Act on a case-by-case basis if required. Similarly, in 2021, the CCI published a discussion paper on competition issues in blockchain technology, advising stakeholders to be mindful of their conduct while using smart contracts to avoid enforcement action.

In addition to the CCI's decisional practice in digital markets described above, it has been reported that the CCI is setting up a dedicated internal unit to deal with digital markets, in view of the number of cases and complexity in the digital sector and the increasing need for data and technology skills.[29] The unit should significantly complement the CCI's enforcement as it is expected to: (a) be staffed with specialists with expertise on digital markets, including data scientists and algorithm experts; (b) monitor and govern the digital app ecosystem in the country; and (c) be a nodal point for stakeholder engagement across industry, academia, other regulators and the Government.

The above precedents and CCI's advocacy initiatives evidence the CCI's foresight and ability to effectively tackle abusive conduct including self-preferencing, deep discounting, anti-steering, exclusive tie-ups, and bundling and tying of services, and therefore reduces the need for new legislation to regulate competition in India's digital markets.

Implications of Ex-Ante Regulation in India

Ex-Ante Regulation May Result in False Positives

As set out above, the Standing Committee recommends *ex-ante* measures to regulate competition in digital markets to deter possible

24 *National Restaurant Association of India v. Zomato Limited and Others*, CCI, Case No. 16 of 2021 (4 April 2022).
25 *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Another*, CCI, Case No. 40 of 2019 (13 January 2020).
26 *Matrimony.com Limited v. Google LLC and Others*, CCI, Case No. 07 and 30 of 2012 (8 February 2018).
27 *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, CCI, Suo Moto Case No. 01 of 2021 (24 March 2021).
28 *Federation of Hotel and Restaurant Associations of India and Another v. MakeMyTrip India Private Limited and Others*, CCI, Case No. 14 of 2019 (19 October 2022).
29 The Economic Times, "*CCI to set up dedicated Digital Markets & Data Unit to address complexities in digital sector: Chairperson AK Gupta*", available at https://government.economictimes.indiatimes.com/news/governance/cci-to-set-up-dedicated-digital-markets-data-unit-to-address-complexities-in-digital-sector-chairperson-ak-gupta/94891185, last accessed on 9 March 2023.

monopolisation. However, regulating the digital sector *ex-ante* may lead to multiple *"false positives"*, i.e., where conduct which does not lead to anti-competitive effects is labelled anti-competitive. An *ex-ante* regime, by definition, would create rule-based restrictions, instead of effects-based restrictions. As a result, digital businesses will not be able to highlight consumer benefits or other positive effects that offset competition concerns when their conduct is being assessed. This is particularly relevant because there are a number of cases where the CCI has refrained from condemning allegedly abusive conduct which has served the purpose of fostering competition in digital markets.

In *Harshita Chawla v. WhatsApp and Others*,[30] an informant alleged that launching an integrated *WhatsApp* Pay feature in the WhatsApp application amounted to anti-competitive bundling with WhatsApp's messaging services. The CCI, after considering WhatsApp's submissions, concluded that WhatsApp pay was an optional feature which required users to sign in and register separately, and could not amount to any 'imposition' or implied or explicit coercion. The CCI also agreed with WhatsApp that, in the market for payment services, WhatsApp Pay was constrained by several large incumbents, including Google and Amazon, and the entry of WhatsApp Pay would not adversely affect competition. In doing so, the CCI adopted a nuanced approach by awarding WhatsApp a hearing at the *prima facie* stage of the proceedings, taking into account the potential effects of the alleged futuristic offending conduct, and thereafter concluding that no investigation was required into WhatsApp's conduct. The CCI's order was appealed, and the appeal was eventually dismissed by the NCLAT for want of prosecution.

In *Vinod Kumar Gupta v. WhatsApp and Others*,[31] the CCI *prima facie* dismissed allegations of abuse of dominance by *WhatsApp* in relation to its 2016 privacy policy. The CCI noted that WhatsApp collected limited information, and that the users had a choice to 'opt out' of sharing their account information with *Facebook* within 30 days of agreeing to the updated terms of service and privacy policy. The CCI also appreciated WhatsApp's submission that the messages between users were end-to-end encrypted and could not be accessed by WhatsApp or any third party. This decision was appealed, and the NCLAT upheld the decision of the CCI.

In *Meru Travel Solutions Private Limited v. Uber India Systems Private Limited and Others*,[32] *Meru* filed a case before the CCI against *Uber* (a competing player) alleging abuse of dominance in the radio taxi services market in Kolkata. The CCI *prima facie* dismissed Meru's allegations, holding that Uber was not dominant in the relevant market, *inter alia*, due to the presence of strong competitors in the market. In a separate case, while examining Uber's pricing policies in the *Delhi Market*,[33] the CCI once again refrained from penalising Uber, reasoning that Uber's incentives and introductory prices were justified to attract riders and driver partners to a growing platform.

In *Prachi Agarwal v. Urbanclap Technologies India Private Limited*,[34] the CCI refrained from acting against *Urbanclap*, a platform which offered salon services through an app / internet browsing, holding that the objective justifications offered by Urban Clap regarding its customer experience and quality of service were reasonable grounds to rebut the informant's allegations of denial of market access and imposition of unfair conditions.

In *Baglekar Akash Kumar v. Google LLC and Others*,[35] the CCI *prima facie* dismissed allegations of abuse of dominance by Google in relation to the integration of Google Meet with Gmail considering the submissions made by Google that users had a choice to use either of the apps with all their functionalities without necessarily having to use the other. The CCI also noted that, even though the Meet tab had been incorporated in the Gmail app, Gmail did not coerce users to use Meet exclusively and the consumers were also free to use Meet or any other app for video conferencing.

The above cases are prime examples of digital markets flourishing when the CCI has examined allegedly abusive conduct *ex-post* and allowed businesses to highlight the efficiencies arising from their impugned conduct, and decided that intervention was not necessary. An *ex-ante* framework may not afford this protection to businesses, to defend themselves, provide objective justifications, and highlight efficiencies arising out of their conduct and, therefore, has a greater possibility of chilling innovation, competition, and consumer choice. In the absence of such protection, digital players in India may suffer and remain chary of innovating and producing consumer benefitting products in fear of violating the law.

Step Backwards to 'Big is Bad'?

The recommendation to identify SIDIs based on restricted criteria such as revenues, market capitalisation and number of users is a step back to the times of the Monopolies and Restrictive Trade Practices Act, 1969 (*MRTP Act*) (the legislation which was eventually replaced by the Competition Act), which sought to provide control over monopolies.

The MRTP Act was criticised for a variety of reasons, but mainly for its assessment of dominance, which restricted expansion, diversification and competitiveness of businesses. Under the MRTP Act, dominance, if established, was considered bad *per se*, regardless of whether or not a party had abused it.

30 *Harshita Chawla v. WhatsApp Inc.* and Another, CCI, Case No. 15 of 2020 (18 August 2020).
31 *Shri Vinod Kumar Gupta v. WhatsApp Inc.*, CCI, Case No. 99 of 2016 (1 June 2017).
32 *Meru Travel Solutions Private Limited v. Uber India Systems Private Limited and Others*, CCI, Case No. 81 of 2015 (22 December 2015).
33 *Meru Travel Solutions Private Limited v. Uber India Systems Private Limited*, CCI, Case No. 95 of 2015 (14 July 2021).
34 *Prachi Agarwal v. Urbanclap Technologies India Private Limited*, CCI, Case No. 30 of 2020 (24 March 2021).
35 *Baglekar Akash Kumar v. Google LLC and Others*, CCI, Case No. 39 of 2020 (29 January 2021).

The MRTP Act envisaged a strict mathematical criterion to determine dominance; essentially, an enterprise with 25% or more market share (or control over it) would be considered dominant. However, this was a faulty approach because, at the same time, if an enterprise would have, say, a 24% market share (or control over it), it would not be considered dominant. This was unfair, and a huge price to pay for the extra one per cent.

In a bid to modernise the competition regulation of the country, the Government of India constituted the Raghavan Committee to advise on a new competition law for the country in line with international developments. It is noteworthy that, while comparing the MRTP Act and the (then) Competition Bill, 2001, the Raghavan Committee acknowledged that the MRTP Act frowned upon dominance, whereas the new legislation would frown upon the abuse of dominance.

However, the Standing Committee's recommendation intends to take a step that will set Indian competition backwards. Similar to the MRTP Act, the Report states that the proposed DCA will identify 'market winners' that can negatively influence competitive conduct in the digital ecosystem based on mathematical criteria such as revenues, market capitalisation, and number of active business and end users.

The overarching *ex-ante* obligations sought to be imposed on such 'big' digital players under the proposed DCA contradicts modern competition jurisprudence, which functions on the principle that mere size is not an offence under competition law. Such obligations may fail to capture the diverse ways in which digital platforms compete and innovate, and eventually harm consumers and chill innovation.

Lack of Flexibility and Business Welfare

Notably, the Report does not consider the inflexible nature of *ex-ante* competition regulation which is less attuned to the dynamics of the digital markets and carries a greater likelihood of error costs. On the other hand, as seen above, an *ex-post* regime provides competition regulators with the flexibility of utilising existing methods for competition assessment, which are specifically suited to assess allegedly offensive conduct in digital markets.

Moreover, an *ex-ante* regulation model is ill suited for digital markets as it is not placed to predict what the future of these markets holds, who the new market entrants will be, or how they will be entering into a certain market. On the other hand, *ex-post* competition policy remedies serve the objective of fostering competition for the incumbent and future digital platforms. They assume that concentration is not necessarily welfare diminishing, as direct and indirect network effects and economies of scale bring great value for consumers and suppliers that use the intermediation platform, i.e., big is not necessarily bad.

Overlap with Other Legal Regimes

The Standing Committee's recommendation for an *ex-ante* competition framework also does not consider that some digital players are already subject to / will be subject to multiple *ex-ante* regulations in India, including those that are / will clearly overlap with the Competition Act.

For example, e-commerce players in India have *ex-ante* obligations under the Foreign Direct Investment Policy (*FDI Policy*) under the Foreign Exchange Management Act, 1999, the Consumer Protection Act, 2019 and the Competition Act.

Under the FDI Policy, foreign funded e-commerce entities must not directly or indirectly influence the sale price of goods and services sold on its platforms, ensure parity between contracts to all sellers indiscriminately, and not mandate any seller to sell its goods on the platform exclusively. Under the Consumer Protection (E-commerce) Rules, 2020 (*Consumer Protection Rules*), e-commerce players must not manipulate prices, discriminate between consumers, or indulge in unfair trade practices.

An ex-ante competition regime may also clash with the proposed Digital Personal Data Protection Bill (*DPDP Bill*), which suggests that "*data fiduciaries*" must use data in a manner which is lawful, transparent and fair. The DPDP Bill also mandates organisations to collect only those items of personal data required for attaining a specific purpose, and not to use personal data for purposes except for what it was collected.

Further, the Government of India is close to drafting the Digital India Act, a proposed legislation to replace the Information Technology Act, 2000 and govern the digital space on key issues such as online harm, de-platforming, doxxing, and social media algorithms. While it is too early to comment on the detail, there may be an enforcement overlap between the Digital India Act and any proposed ex-ante competition legislation.

Therefore, *ex-ante* competition legislation for digital markets will further add another conflicting legal regime and create uncertainty in cases where the conduct in question is addressed by both *ex-ante* and *ex-post* regulation. The uncertainty may also lead to enforcement overlaps, forum shopping and regulatory arbitrage.

Lack of Global Consensus on Ex-Ante Competition Regulation

The Standing Committee's recommendation for specialised legislation to regulate competition in the digital sector *ex-ante* mirrors developments in jurisdictions like the European Union (*EU*), the United States and the United Kingdom (*UK*), which have introduced or are currently developing their own legislation for similar purposes. However, the Standing Committee has not considered that there continues to be a lack of local and global consensus on the merits of such legislation.

The Digital Markets Act (*DMA*), which has been introduced in the EU has been criticised globally, including a critique by Fredric Jenny, the Chair of the OECD Competition Committee, who stated that the DMA could actually result in restriction on competition or innovation in the name of protecting competition in the digital ecosystem. The DMA has also been criticised for its lack of flexibility to adapt to future markets and platforms, its other anti-competitive practices, as well as its questionable impact on the acceleration of antitrust proceedings.[36]

Similarly, in the United States, the American Innovation and Choice Online Act and the Open App Market Act have failed to attain congressional support across the board due to substantive disagreements and concerns for unintended consequences of *ex-ante* regulation on consumers, growth and innovation.

In the UK, there is currently no *ex-ante* competition regime for digital markets. However, consultations are underway on a new pro-competitive regime to shape the behaviour of power technology firms with strategic market intent. It is noteworthy that, while the UK has a similar recommendation to tackle competition issues in the digital markets by adopting an *ex-ante* framework, the proposed approach is in stark contrast to the one adopted in the EU. The DMA adopts a one-size fits all approach, where all *ex-ante* obligations apply to all gatekeepers regardless of their activity. The UK government is critical of this stance and recommends imposing a code of conduct only on specific companies, which would be tailored to the exact circumstances of each firm.

Apart from failing to consider the lack of consensus, the Standing Committee has also not considered that legislation like the DMA has a long transition and implementation period and, therefore, there is a lack of any hard evidence that this new and experimental model is necessary and will be able to deliver the benefits that it claims.

The Standing Committee should have considered that, if individual nations introduce overarching *ex-ante* regulation in the absence of a global consensus, it will result in a multitude of conflicting legal positions. This will disproportionately affect the overall digital landscape in India, and across borders.

Conclusion

An analysis of the CCI's decisional practice indicates that the existing competition regime is well equipped to tackle competition concerns in digital markets effectively and in a timely manner. As discussed above, a 'big is bad' approach has the potential to discourage global businesses from establishing a presence in India due to lower incentives, added regulatory costs and barriers to entry. It could also reduce incentives to innovate amongst local online businesses and start-ups, thus going against the Government's "*Digital India*" mission. It is hoped that these potential implications find their way in the CDCL's report to the government to enable the legislature to arrive at an informed decision before enacting any legislation.

It is important to note that the recommendations for a new Digital Competition Act and *ex-ante* regulation come at a time when the Parliament is at the threshold of approving the revised Digital Personal Data Protection Bill and the new Competition (Amendment) Bill, both of which are expected to plug existing loopholes and herald a new age of operation for tech companies in India.

In this precarious situation, competition in digital markets may be better regulated with an increase in competition advocacy initiatives in the digital sector, consultation with expert witnesses like data scientists and algorithm experts in digital competition cases and the addition of a digital markets and data monitoring unit in the CCI. Further, the CCI could continue to publish measures for self-regulation for digital players across markets, and follow-up with regulatory action if required.

36 Kluwer Competition Law Blog, "*The Digital Markets Act - We gonna catch'em all?*" (https://competitionlawblog.kluwercompetitionlaw.com/2022/06/13/the-digital-markets-act-we-gonna-catch-em-all/).

Interim Measures in Indian Antitrust Cases: Past, Present and Future

By Shweta Shroff Chopra, Yaman Verma and Neetu Ahlawat[1]

Introduction

Interim measures, providing temporary relief pending the outcome of a case, are a potent tool to preserve competition during ongoing antitrust investigations as well as to improve the effectiveness of the ultimate enforcement decision. Thus, their objective is two-fold, protective and corrective.

While interim measures have been in the arsenal of many antitrust authorities for decades, they have recently sparked interesting discussions on their optimal use, keeping in mind the effectiveness of antitrust enforcement and the length of investigations – especially in dynamic markets.

This article discusses: (a) the interim relief powers of the Indian competition agency, the Competition Commission of India (*CCI*); (b) the use of interim relief powers by the CCI so far; and (c) the outlook on such use, going forward.

CCI's Powers

The CCI's power to grant interim relief during an ongoing antitrust investigation emanates from the statute itself. Section 33 of the Competition Act, 2002 (*Competition Act*) specifies that where, during an inquiry, the CCI is *satisfied* that an act in contravention of substantive provisions of the Competition Act (broadly, anti-competitive agreements, abuse of dominant position and regulation of combinations) has been committed and continues to be committed or that such act is about to be committed, the CCI may, by order, temporarily restrain *any* party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

Further, the law presumes that an 'inquiry' is commenced when the CCI, in exercise of its powers under Section 26(1) of the Competition Act, issues a direction to the Director General (the investigative arm of the CCI).[2] Till the time a final order is passed by the CCI in accordance with law, the inquiry under the Competition Act continues.

A bare reading of Section 33 of the Competition Act implies that the CCI: (a) has to record its satisfaction on contravention of the provisions of the Competition Act (either through a past, continuing or imminent act/conduct); (b) can restrain any party (not necessarily a named opposite party) from carrying out an act of contravention; and (c) does not have to grant such a party an opportunity of being heard before passing an interim relief order.

Principles and Safeguards Applicable

The principles for deciding the interim relief application under Section 33 of the Competition Act were laid down early on by the Supreme Court of India (*Supreme Court*) in *CCI v. SAIL*[3] where the court mandated that, while recording a reasoned order under Section 33 of the Competition Act, the CCI should, *inter alia*, ensure fulfilment of the following conditions:

- record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Competition Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed;
- it is necessary to issue an order of restraint; and
- from the record before the CCI, there is every likelihood that the party to the *lis* would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have an adverse effect on competition in the market.

Further, the Court cautioned that this power must be exercised by the CCI sparingly and only under compelling and exceptional circumstances.

The CCI has followed this directive of the Supreme Court in spirit and letter, as can be seen from the statistics. Of more than a thousand enforcement matters taken note of by the CCI, 480 investigations have been ordered.[4] Of these, contravention has been found only in 172 cases (i.e., cases closed through orders passed under Section 27 of the Competition Act).

Therefore, to date, the CCI theoretically has had the opportunity to grant interim relief in 480 instances. However, based on publicly available information, this power has been exercised by the CCI in only 9 cases so far.

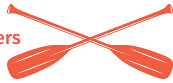
Given the far-reaching consequences of interim relief orders (keeping in mind that in India investigations may take years to complete), there are certain procedural safeguards in place for parties if an interim relief is granted by the CCI, specifically if the relief is granted *ex-parte*.[5]

First, the CCI has to pass a separate order in relation to grant of an interim relief recording its reasons. Second, wherever the CCI has passed an interim order *ex-parte*, it is mandated to hear the parties against whom such an order has been made *"as soon as possible"*. Third, in cases where an interim order has been passed, the CCI is required to pass a final order, as far as possible, within ninety days from the date of the interim order (although, given the broad wording of the regulation, this time-period has not been strictly observed by the CCI).

CCI's Decisional Practice

The first ever decision of the CCI in relation to interim relief came in September 2015 when the CCI denied granting interim relief to

1 Shweta Shroff Chopra, Partner, Yaman Verma, Partner, and Neetu Ahlawat, Senior Associate, Shardul Amarchand & Co. The views expressed here are personal.
2 Regulation 18 (2) of The Competition Commission of India (General) Regulations, 2009 (as amended from time to time).
3 *Competition Commission of India v. Steel Authority of India Limited and Another*, Supreme Court, Civil Appeal No. 7779 of 2010 (9 September 2010).
4 CCI, Annual Report, 2021-22.
5 Regulation 31 of The Competition Commission of India (General) Regulations, 2009 (as amended from time to time).



Fast Track Call Cab in the market related to radio taxi services in Bengaluru.[6] Fast Track primarily prayed for an order directing ANI (a cab aggregator which uses the brand name Ola in the market) to refrain from indulging in the alleged practice of predatory pricing for taxi services. The CCI in this case did grant the parties a hearing before deciding on the interim relief application.

The CCI noted in its majority order that the simple fact that Fast Track had a *prima facie* case would by itself not entitle it to the grant of interim relief, unless it was satisfied that there was irreparable loss and injury and that the balance of convenience also lay in its favour, which was not satisfied in this case. One CCI member disagreed with the CCI's majority order and wrote a dissenting order. The dissenting member considered that the strategy of pricing below average variable cost by Ola necessitated interim measures given the structure and the characteristics of the relevant market, and ordered that Ola organise its pricing system in the relevant market in such a way that the incentives paid to the cab operators/ drivers together with the share of the passenger revenue passed on to the cab operators and other variable costs, did not exceed the passenger revenue collected by it.

The decision of the CCI was challenged by Fast Track before the then appellate tribunal, the Competition Appellate Tribunal (*COMPAT*).[7] The COMPAT held that the CCI's order did not suffer from "*any patent legal infirmity, which may justify interference by the Tribunal in exercise of its appellate power*". The COMPAT also specifically noted that, if the CCI was to pass an order along the lines suggested by the dissenting member and ultimately it was held that no case of violation was made out, there would be no mechanism to compensate the public.

This investigation was closed by the CCI nearly two years later in July 2017. As can be seen, such an interim relief granted for almost 2 years could have had far reaching consequences on Ola's pricing strategy, especially given that the CCI finally did not find it guilty of predatory pricing. The CCI's caution and restraint in exercising powers under Section 33 was thus rightly directed to be used sparingly.

Within a year of the *Fast Track* decision, the CCI passed its first decision granting interim relief, in a case against *Monsanto*.[8] *Nuziveedu Seeds* essentially prayed that Monsanto be restrained from terminating the sub-license agreements entered into with it and its group companies till the disposal of the matter. The CCI in this case again granted the parties a hearing before deciding on the interim relief application. The CCI was satisfied that thresholds laid above were met in this case. The CCI specifically relied on the fact that the process of development of the Bt. cotton seeds entailed various stages and spans (over 5 to 7 years). Therefore, if the seeds, parent-lines and germplasm containing the technology of Monsanto were destroyed as per the post termination obligations imposed, it might not be possible to restore the same at a later point of time. The CCI, while noting that it should exercise these powers very sparingly, found the facts of this case to be exceptional in nature and that intervention was merited. The CCI thus restricted Monsanto from enforcing the post-termination obligations till the final disposal of the proceedings. Given the ongoing litigation and other orders passed by the Delhi High Court in these matters, certain ancillary directions were also passed by the CCI. The CCI also directed Nuziveedu Seeds to adhere to the requirements of maintenance of records, inspection, reporting, audit, etc. as were stipulated in the sub-licence agreements. Interestingly, the CCI also directed the seed companies to extend their full cooperation to Monsanto to protect its IPR and to furnish undertakings in this regard.

Given the various proceedings at different fora in this case, this order remains operative till date, again showcasing the potency and far-reaching consequences of such orders.

The CCI's next order in relation to interim relief came only in June 2018 in a case involving *ONGC* (a public sector enterprise).[9] This was the first time that the CCI did not grant a hearing to the parties before granting interim relief. The facts of the case were peculiar. Ship-owners had complained that ONGC had abused its agreement with them, especially in relation to a unilateral termination right. To prevent further invocation of the relevant clause, which was apparently abusive, the CCI had directed ONGC (through an order dated 8 May 2018) to furnish an undertaking to the effect that it would not invoke the clause in any manner against the ship-owners until the date of preliminary hearing scheduled in the matter (17 May 2018).

The undertaking was provided by ONGC. The order of the CCI is not available in the public domain and it is therefore unclear under which powers the order was passed by the CCI (given that the CCI had not even found a *prima facie* case under Section 26 (1) of the Competition Act by then). The CCI passed the *prima facie* order on 12 June 2018 and passed the interim relief order 3 days after.

The CCI in its interim relief order dated 15 June 2018 referred to its detailed *prima facie* order which brought out how use of certain clauses of the special contract conditions of the agreement in issue *prima facie* amounted to an abuse of dominant position. The CCI was of the opinion that interim relief was warranted in this case. However, it did not grant any interim relief on account of its order dated 8 May 2018, noting that the order would address the concerns and only directed that the undertaking provided earlier would remain operative till further orders. The CCI ultimately found no abuse in this case (order dated 2 August 2019) and closed the matter. However, in an interesting turn of events, in an appeal filed by the

6 *Fast Track Call Cab Private Limited v. ANI Technologies Private Limited*, CCI, Case No. 6 of 2015 (3 September 2015).

7 *Fast Track Call Cabs Private Limited v. Competition Commission of India and ANI Technologies Private Limited*, Competition Appellate Tribunal, Appeal No. 04 of 2016 (9 March 2016).

8 *Nuziveedu Seeds Limited and Others v. Mahyco Monsanto Biotech (India) Limited and Others*, CCI, Case No. 107 of 2015 (13 April 2016).

9 *Indian National Shipowners' Association v. Oil and Natural Gas Corporation Limited*, CCI, Case No. 1 of 2018 (15 June 2018).

ship owners before the National Company Law Appellate Tribunal (*NCLAT*) against the CCI's closure of the case, the NCLAT granted the same interim relief till the final decision on appeal. Since NCLAT proceedings can take anywhere between one and four years, it looks like ONGC is stuck with the interim order for some time.

The CCI's next grant of interim relief came two months later, in August 2018.[10] In this case against a state government department of town and country planning and the relevant development authority (*HUDA*), various developers prayed that HUDA should be restrained from invoking the bank guarantee against the developers and the collection of various pending dues should be restrained as well. It was noted that the Supreme Court in connected proceedings had already restrained HUDA from encashing the bank guarantees submitted by the developers, on account of non-payment of certain charges, but this was limited to certain developers. The CCI noted the conduct of HUDA before and after the passing of its *prima facie* order and concluded that the alleged anti-competitive conduct was continuing to be committed and the consumers continued to be adversely affected by such conduct. Thus, the CCI restrained the opposite parties from taking any coercive steps with respect to the payment of remaining instalments of deposit from those developers who had paid 10% of the deposit and deposited 25% in the form of bank guarantee. It also said that no interest or penal interest should be charged on the remaining instalments from such developers. It clarified that no coercive action would be taken by the opposite parties with respect to the licences granted to the developers and the status quo should be maintained. However, the opposite parties were given liberty to approach the CCI for variation of the order if they undertook certain steps. It also instructed the developers that any amount collected by the developers from consumers towards the deposit should be deposited with the government department. The final order in this case is still pending and therefore the interim relief has been in operation for over 4 years now.

The CCI's next interim relief was granted in March 2021[11] in a case concerning hotel aggregators and franchisees (the first interim relief case in a digital market). The CCI directed investigation of *MMT-Go* (a major online hotel booking player) for allegations of violating Sections 3(4) and 4 of the Competition Act, and *OYO* (a notable budget hotel provider) for violating Section 3(4) of the Competition Act. It was alleged amongst other matters that MMT-Go had under an agreement with OYO delisted the hotel properties of FabHotels and Treebo from its portals. The CCI noted that, if the CCI reached a definite expression of satisfaction at the *prima facie* stage itself, it was not required to apply an even higher standard under Section 33 of the Competition Act. In the context of the *SAIL* judgement, this interpretation adopted by the CCI should give it some breathing room to grant interim relief on the basis of its *prima facie* orders without having to justify satisfaction of a higher threshold every time. The CCI passed an order directing MMT-Go to re-list all the hotel properties of FabHotels and Treebo on MMT-Go's portals.

This interim relief order was challenged by OYO before the Gujarat High Court on account of it not being given an opportunity to be heard before the proceeding. The Gujarat High Court set aside the interim relief order and remanded the matter to the CCI. Pursuant to the High Court's direction, the CCI called the parties for a fresh hearing. During the hearing, OYO submitted that it had no objection to the relisting of FabHotels and Treebo on MMT-Go's portals. MMT-Go also consented to relist FabHotels and Treebo within a period of three to four weeks from the date of the hearing. In view of these submissions, the CCI, with the consent of the parties, decided to dispose of the interim relief applications.

The final order of the CCI was published on 19 October 2022 where MMT-Go was, amongst other matters, directed to provide access to its platform on a fair, transparent and non-discriminatory basis, by formulating the platforms' listing terms and conditions in an objective manner, and to provide transparent disclosures on its platform as regarded the properties not available on its platform.

Three months after the hotel aggregators case, the CCI granted interim relief in June 2021 in a sports association case.[12] The CCI in its *prima facie* order had held that the Amateur Baseball Federation of India (*ABFI*), by issuing communications to its affiliated state baseball associations requesting them not to entertain unrecognised bodies and by requesting them not to allow their respective state players to participate in any of the tournaments organised by such unrecognised bodies, had violated the provisions of Section 4(2)(c) of the Competition Act. The informant (a private league) sought interim relief by way of a direction to ABFI to withdraw steps taken in restraining players, officials, clubs and state baseball associations from participating in private leagues or seeking issuance of 'no-objection certificates (*NOCs*) from players/ officials/ clubs and state baseball associations who were interested in participating in any capacity in the informant's event (which was rescheduled because of ABFI's alleged anti-competitive directions). The CCI held that "*all the ingredients for grant of interim injunction are overwhelmingly present in the instant case*". It restrained ABFI from issuing any communication to its affiliated state associations dissuading them, in any manner whatsoever, from allowing their players to participate in tournaments organised by the associations which were purportedly not 'recognised' by ABFI. ABFI was further directed not to threaten the players who wanted to participate in such events. An investigation is currently ongoing in this case.

Later in the year, in December 2021, the CCI passed a very short

10 *Confederation of Real Estate Developers Association of India-NCR v. Department of Town and Country Planning, Government of Haryana and Haryana Urban Development Authority*, CCI, Case No. 40 of 2017 (1 August 2018).

11 *Federation of Hotel and Restaurant Associations of India and Another v. MakeMyTrip India Private Limited (MMT-Go) and Others* with *Rubtub Solutions Private Limited v. MakeMyTrip India Private Limited and Others*, CCI, Cases 14 of 2019 and 01 of 2020 (9 March 2021).

12 *Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India*, CCI, Case No. 3 of 2021 (3 June 2021).

order[13] which counts as the CCI's second denial of grant of interim relief. The case was related to an automotive dealership agreement, and the CCI found it unnecessary to examine the application in any detail given the facts of the case and the significant delay in filing for the interim relief. An investigation is currently ongoing in this case. On the same day, the CCI passed another order[14] with better news for the informants. Like the baseball case, the CCI had directed investigation as the informant had been denied access to utilise the services of table tennis (*TT*) players because of a notice posted by the secretary of the opposite party as well as certain clauses of India's TT federation's memorandum of association. Similar to the baseball case, the CCI held that "*all the ingredients for the grant of interim injunction are overwhelmingly present in the instant case*." Thus, the CCI restrained the TT Association from issuing any communication to players/parents/coaches/clubs restricting or dissuading them, in any manner whatsoever, from joining or participating in tournaments organised by associations unrecognised by the TT Association. The TT Association was further directed not to threaten players who wanted to participate in such events. Going a step further than the baseball case, to ensure strict compliance, the CCI also noted that in case of failure to comply with the directions, the TT Association would render itself liable to be proceeded in terms of Sections 42 (2) and 42 (3) of the Competition Act. An investigation is currently ongoing in this case.

The final order on grant of interim relief by the CCI so far, and the only decision in 2022, relates to the broadcasting market.[15] The informant (a regional multi system operator) had essentially alleged abuse of dominant position by the opposite parties (broadcasters of satellite-based TV channels) by discriminating against the informant in not extending it discounts which were offered to its competitors. The CCI was of the opinion that the facts of this case did not fulfil any of the criteria for the grant of interim protection. An investigation is currently ongoing in this case.

The Way Forward

The increasing call for use of interim relief powers by competition authorities across the world should bolster the CCI's way forward in these markets. The European Commission finally broke its 18-year hiatus on interim measures and adopted interim measures against *Broadcom* in October 2019.[16] Following the imposition of interim measures, Broadcom offered commitments to address the European Commission's concerns and thus the case was closed. In fact, Commissioner Vestager specifically noted that "*interim measures are one way to tackle the challenge of enforcing our competition rules in a fast and effective manner and... whenever necessary, I am therefore committed to making the best possible use of this important tool*".[17] Authorities in other European Union Member States such as France and Belgium frequently use this tool.

In April 2022, the UK government also announced amendments to the UK competition and consumer law regimes which include revised interim measures that will change the standard of appeal against interim measures to judicial review principles and restrict access to the Competition and Markets Authority's (*CMA*) case files.[18] Appeals against decisions imposing interim measures will no longer involve a merits-based review, but an assessment that meets the judicial review standard, meaning that an interim decision can only be set aside on grounds of illegality, procedural defects or irrationality. This change will make it difficult to challenge an interim measure decision of the CMA.

Thus, in the last few years, there have been increasing calls for more frequent and faster use of interim measures across the globe, especially in digital markets, as part of a broader clamour for "*ex ante*" regulation of these markets. While the lure for such a call may seem obvious (it is relatively easier to meet the condition of urgency considering the nature of markets, the asymmetry of the magnitude of the two potential harms (to competition and to the investigated party) and the ease of showing irreparability of the harm), it has to be kept in mind that digital markets are subject to fast technological (and business) changes, adding complexity and increasing asymmetries of information between investigated parties and authorities contemplating interim measures. Further, there can be no doubts regarding the intrusiveness and possible harm (short term as well as long term) that may be caused by such measures.

The fast-moving nature of these markets also exacerbates the effects of interim measures, thereby increasing the need to be circumspect in their application. By their nature, interim orders are issued before a complete assessment of the market and any potential anti-competitive conduct has been carried out and, therefore, there is a grave danger of false positives if the regulator does not act with restraint when issuing interim orders. Having said that, and as seen from the CCI's journey so far, it appears that interim measures are being employed sparingly.

It should be noted that the Indian antitrust law is set to include settlement and commitments mechanisms[19] soon. The settlement and commitments mechanism allow parties to apply to the CCI to settle / make commitments in cases of anti-competitive vertical agreements and abuse of dominance cases.

13 *Nishant P. Bhutada v. Tata Motors Limited and Others*, CCI, Case No. 16 of 2020 (21 December 2021).

14 *TT Friendly Super League Association v. The Suburban Table Tennis Association and Others*, CCI, Case No. 19 of 2021 (21 December 2021).

15 *Asianet Digital Network Private Limited v. Star India Private Limited and Others*, CCI, Case No. 9 of 2022 (28 February 2022).

16 Press Release, *Commission accepts commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes*, European Commission (7 October 2020).

17 Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets, European Commission (16 October 2019).

18 Consultation Outcome: Reforming Competition and Consumer Policy: Government Response, United Kingdom (20 April 2022).

19 Proposed to be introduced in the Competition (Amendment) Bill, 2022.

While the details on the working of these mechanisms will be fleshed out through regulations, they are likely to have a major impact on the way cases are addressed before the CCI. Commitments will be considered between the commencement of an investigation and its completion (marked by the issuance of the investigation report), whereas settlements will be considered after the report is submitted but before a final order is issued by the CCI. Therefore, interim measures and commitments can be seen as complementary tools in antitrust investigations, especially in the digital space.

The Indian government has also ordered setting up a committee that will review whether existing antitrust laws in the country are equipped to deal with the challenges that have emerged from the digital economy.[20] It will also examine the need for an *ex-ante* regulatory mechanism for digital markets through legislation and study the practices of "*systemically important digital intermediaries*" which "*limit or have the potential to cause harm in digital markets*". Therefore, the focus on digital markets is going to be the way forward in India and interim measures (whether part of current law or under separate digital market legislation) will be an important tool for *ex ante* regulation in these markets.

While the next phase for the CCI's use of interim relief powers is sure to be interesting, specifically given the increase in antitrust investigations in the fast-moving digital sector, the way forward will have to be carefully paved on a case-to-case basis.

Conclusion

Interim orders are a powerful tool for market correction, allowing the CCI to intervene in a timely and, effective manner. The scope of the CCI's power is also broad, and the range of potential interim orders allows the necessary intervention in all kinds of cases. However, there is scope for over-regulation when it comes to interim measures, especially because the analysis of the market and potential anti-competitive conduct is incomplete when these are ordered (and, in most cases, the CCI does not have sight of any investigative report when interim orders are issued). Therefore, the use of interim measures is likely to be meticulously considered on the merits of each individual case.

The timelines for interim measures are also an important aspect to be kept in mind. It is important for any investigating authority to consider the length of imposition of interim relief and to revisit both its terms and monitoring, as required. Further, certain investigations may require the imposition of interim measures at well-advanced stages and such possibilities cannot be excluded as the dynamics of industries might change throughout the course of (multi-year) investigations. It is also to be kept in mind that interim measures may produce their effects beyond a single jurisdiction and international cooperation may therefore be necessary to be balanced in such cases. The flexibility to modify the interim relief has been hinted in one of the CCI's cases but has not been meaningfully applied so far. The CCI's journey forward is also impacted by the way the legal tests and conditions for grant of interim relief are interpreted by judicial bodies (keeping in mind the respective evidentiary standards), including intervention by courts. The balance between harm (to parties as well as consumers) and due process rights must be carefully maintained by the CCI.

Finally, as the CCI looks at increasing cases in the digital space, its interim relief measures will have to be tailored to these fast-moving markets and will also have to work together with the proposed legislative changes being enacted for this space.

20 Ministry of Corporate Affairs, "*Constitution of the Committee on Digital Competition Law*" (https://images.assettype.com/barandbench/2023-02/7e93ae0c-05b9-4565-9b5b-a9a6103ac6ff/Order.pdf). The Firm's Managing Partner, Mrs. Pallavi Shroff, has been nominated by the Government as a member of the CDCL.

Most Favoured Nation Clauses – What is the Way Forward?

By Harman Singh Sandhu, Nitika Dwivedi, Abhishek Hazari and Apurv Jain

Introduction

With the digital space booming with online intermediaries connecting buyers and sellers, *"most-favoured nation"* (*MFN)* clauses have drawn the attention of enforcement agencies across the world. MFN clauses, or parity clauses, are contractual terms agreed between the seller and the buyer that prevent the seller from selling its products or services to the buyer's competitors for a lower price, or on better terms, than the seller sells the products or services to the buyer.

Such clauses can have the potential of restricting competition by preventing the seller from negotiating better terms with third parties, leading to a reduction in competition between parties and a subsequent reduction in consumer welfare. However, this does not mean that MFN clauses are always anti-competitive. In fact, their competitive effects are often unclear and require a careful case-by-case analysis.

In India, with the recent order of the Competition Commission of India (*CCI*) in the *MMT-Go Case,*[2] there is some degree of clarity on how these clauses are viewed by the Indian regulator. With this decision, parties, especially online platforms, may need to rethink the nature of MFN clauses that they include in their agreements.

This article considers the legality and use of retail MFN clauses in agreements between sellers and platforms on which they sell their products (online marketplaces, price comparison tools, etc.) under the Competition Act, 2002 (*Competition Act*), especially considering the MMT-Go Case and drawing from the experience of other jurisdictions.

Nature and Types of MFN Clauses

Two types of retail MFN clauses have generally been considered by regulators across jurisdictions: (a) 'wide' MFN clauses; and (b) 'narrow' MFN clauses. Wide MFN clauses typically require the seller to offer the platform the same or better prices and conditions as those offered by the seller to any other sales channel (third party or its own website). 'Narrow' MFN clauses, on the other hand, are clauses that prevent a seller from offering better prices or conditions on its own website than those offered to the platform.

Learnings from Other Jurisdictions

Retail MFN clauses have been under the close scrutiny of competition law regulators and courts across jurisdictions, particularly for platforms that enjoy a position of dominance. Some of the most prominent developments emerge from the European Union (*EU*) and its Member States, as well as the United Kingdom (*UK*). Some of these developments are discussed in detail below.

The European Union

In the EU, retail MFN clauses are governed by the Treaty on the Functioning of the European Union (*TFEU*), which is enforced by the European Commission (*EC*).

In 2015, the EC opened an investigation into *Amazon*,[3] in particular, the MFN clauses included in its contracts with certain e-book publishers, and their compatibility with Article 101 (dealing with anti-competitive agreements) and Article 102 (dealing with abuse of dominant position) of the TFEU. The MFN clauses required publishers to intimate Amazon regarding more favourable or alternative terms offered to competitors of Amazon and/or to offer Amazon similar terms and conditions as offered to its competitors. There were various clauses in the contracts to ensure that Amazon was offered terms by the publishers that were at least as good as those offered to its competitors.

In its preliminary assessment, the EC noted that the clauses in question had the potential to make it more challenging for Amazon's competitors to effectively compete with it. This was because publishers' and competitors' incentives to develop new types of e-books and alternative distribution services would be reduced. Accordingly, such MFN clauses would lead to less choice, less innovation and, overall, a higher price for consumers due to lessening of competition in the market. However, the case was settled when certain commitments were offered by Amazon not to enforce its MFN clauses. While this is a commitments decision, the EC's stance indicates that it does not view wide MFN clauses favourably.

While there has been a lack of EC case law on the subject of retail MFN clauses, there have been developments under EU legislation. The Digital Markets Act[4] (*DMA*), which seeks to provide rules for digital gatekeepers to ensure open markets, prohibits the use of both wide and narrow MFNs by large online platforms considered as 'gatekeepers' in the market. The EU's new Vertical Block Exemption Regulation No. 2022/720[5] (*new VBER*), which provides a safe harbour for certain vertical agreements, also contains provisions relating to MFN clauses. The old Vertical Block Exemption Regulation No. 330/2010[6] generally exempted MFN clauses in agreements if both the supplier and buyer did not exceed a market share of 30%. Owing to some concerns regarding the potential negative effects on price competition of using MFNs in the platform context, the new VBER introduces a special rule for online marketplaces. Wide MFN clauses

1 Harman Singh Sandhu, Partner, Nitika Dwivedi, Partner, Abhishek Hazari, Associate, and Apurv Jain, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 *Federation of Hotel and Restaurant Associations of India (FHRAI) and Another v. MakeMyTrip India Private Limited and Others*, CCI, Case No. 14 of 2019 (19 October 2022).

3 *E-Book Amazon*, EC, Case AT.40153 (4 May 2017).

4 *Commission Regulation (EU) 2022/1925* on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (14 September 2022).

5 *Commission Regulation* (EU) No. 2022/ 720 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (10 May 2022).

6 *Commission Regulation* (EU) No 330/2010 of on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (20 April 2010).

are excluded from the benefit of the exemption under the new VBER. By contrast, MFN clauses of offline players and narrow MFNs of online players continue to benefit from the block exemption if both the supplier and buyer do not exceed a market share of 30%.

A perusal of the developments in the EU thus indicates that there is some scope for narrow MFN clauses being considered as consistent with competition law (except for those potentially falling within the scope of the DMA).

Germany

In Germany, the German Federal Cartel Office (*FCO*) regulates retail MFN clauses on the basis of the TFEU and the German Competition Act.

In 2015, the FCO decided a landmark case against *Booking.com,* a leading hotel booking platform in Europe, holding that the narrow MFN clauses in their agreements with hotels led to appreciable competitive restraints.[7] Narrow MFN clauses were used by Booking.com in its agreements with hotels, prohibiting them from offering their rooms on their own website at a lower price than on Booking.com. The FCO noted that the narrow MFN clauses reduced the attractiveness of the hotel's own sales channel and restricted its pricing sovereignty. The FCO found that such clauses also resulted in market foreclosure with regard to potential competition with established hotel portals and represented an unfair impediment for small and medium hotels.

However, on appeal this decision was quashed by the Dusseldorf Court of Appeal in 2019 which noted that such clauses were not restrictive of competition, but rather necessary for a fair and balanced exchange of services between online portals and hotels.[8] Such clauses ensured that hotels did not use Booking.com's services to expand their reach and then offered a cheaper option on their own websites after being found by potential customers on Booking.com (*free-rider problem*).

In 2021, the Federal Court of Justice overturned this decision and upheld the decision of the FCO holding these narrow MFN clauses to be restrictive of competition.[9] The Federal Court of Justice found that, because of this clause, hotels were unable to offer better room prices on their own online sales channels than on Booking.com (by way of savings made on commissions). The Federal Court of Justice noted that, while the free-rider problem could not be completely disregarded, a balance had to be struck between the pro-competitive and the anti-competitive aspects of any conduct. Based on the evidence, the Federal Court of Justice found that it could not be conclusively shown that the free-rider problem severely threatened the efficiency of the services offered by Booking.com. On the other hand, however, it found that the narrow MFN clauses significantly restricted the online sales managed by the hotels themselves without using the platform.

The Federal Court of Justice's judgment means that, for the moment, large platforms in Germany may have difficulty in including narrow MFN clauses in their agreements. Interestingly, the Court did accept that a free-rider problem might exist, and it was only the evidence that was lacking in this case. It is possible that a different position may be adopted in future cases, if the free-rider problem is shown to exist in the market.

The United Kingdom

In the UK, MFN clauses are governed by the Competition Act, 1998.

The competition regulator in the UK, the Competition and Markets Authority (*CMA*), in November 2020, issued a decision against a price comparison website, *Compare the Market* (*CTM*).[10] In this decision, the CMA found an infringement of Section 2(1) of the Competition Act 1998 and Article 101 of the TFEU (which applied during the relevant period). The case concerned certain wide MFN contractual obligations included by CTM in its agreements with numerous home insurance providers. These clauses required that home insurance providers gave to CTM the lowest or equal lowest prices offered by them on any other sales channel. The CMA ruled that the wide MFN clauses had the following anti-competitive harms: (a) they led to a reduction in the incentives for home insurance providers to lower prices (including by way of promotional deals); (b) they reduced competitors' incentives to lower the commission charged by them to home insurance provider; (c) they insulated CTM from competition in the market; (d) they stifled the growth and expansion of competitors; and (e) they generally impacted home insurance providers subscribing to price comparison websites.

Subsequently, on appeal, the Competition Appeal Tribunal (*CAT*) overturned the decision of the CMA and found that the CMA incorrectly found infringement on the basis of the MFN clauses in the agreements involving CTM.[11] The CAT found that there was no evidence in support of a conclusion that the wide MFN clauses were forced upon insurance providers or that they had any anti-competitive effect. The CAT provided its own relevant market definition and found that significant competitive constraints were posed upon CTM by other sales channels and there was accordingly strong competitive pressure. The CAT also found that the CMA failed to show any actual anti-competitive effect of the MFN clauses. It noted that that the wide MFN clauses in question only restricted the price at which insurance providers could offer their products through price comparison websites – they did not restrict competition on the level of premiums.

7 *Booking.com Case*, FCO, Case B9–121/13 (22 December 2015).

8 *Booking.com Case*, Düsseldorf Higher Regional Court, Case VI-Kart 2/16(V) (4 June 2019).

9 *Booking.com*, FCJ, Case KVR 54/20 (18 May 2021).

10 *Price Comparison Website*, CMA, Case 50505 (19 November 2020). The investigation was opened in 2017 when the EU competition rules applied. Following Brexit, the EU competition rules no longer apply in the UK.

11 *BGL (Holdings) Limited and Others v. Competition and Markets Authority*, CAT, 1380/1/21 (8 August 2022).

On the basis of the decision of the CAT, it appears to be possible for enterprises to argue that their MFN clauses (regardless of whether they are wide or narrow) are consistent with competition law after showing that they have a minimal impact on the market. Pertinently, this could be done by showing that there is 'strong competitive pressure' on these enterprises (which, in turn, shows that they do not enjoy dominance or significant power in the market).

The CCI's Treatment of MFN Clauses

MFN Clauses – Abuse of Dominance

In the MMT-Go Case,[12] the CCI addressed allegations of abuse of dominance and anti-competitive vertical agreements levelled against online travel agencies (*OTAs*) MakeMyTrip and Goibibo (*MMT-Go*) by hotel operators. One of the allegations was that MMT-Go entered into price parity and room parity agreements with the hotels listed on its platform. Under the price parity agreements, the hotels were obliged to provide the rooms on all OTAs including MMT-Go and their own website at the same price. The room parity agreements required the hotels to provide rooms on the MMT-Go platform if the rooms were being provided on other OTAs and their own website. The CCI had initially ordered an investigation in this matter as it was of the *prima facie* view that such agreements might result in removal of incentives for OTA platforms to compete and might also prevent entry of new players in the market.

The allegations were investigated under Sections 4(2)(a)(i) (imposition of an unfair or discriminatory condition in purchase or sale of goods or services by a dominant enterprise) and 4(2)(c) (denial of market access by a dominant enterprise) of the Competition Act. In its final decision, the CCI observed that these agreements were anti-competitive in nature. Price parity agreements meant that there was no incentive for other OTAs to offer lower commission rates to hotels as the price for the rooms would be the same for all the OTAs regardless of the commission.

In relation to room parity agreements, the CCI observed that these agreements ensured that, if a room was available in a hotel, it would be listed on all the OTA platforms that had signed a room parity agreement. This would further lead to a higher number of bookings from the platform which was offering the maximum discounts even if it was charging the highest commission from the hotels. Room parity agreements would also mean that the hotels would have to make their rooms available on platforms charging high commissions and lower commissions alike and that they could not favour a platform that might be offering the hotels better terms.

Considering these anti-competitive effects, the CCI noted that, as most bookings could be taking place on the platform which had the ability of giving maximum discounts and was also charging the maximum commission, the commission received from the hotels would be used to fund the discounts. More commission meant more discounts which in turn would make the platform more attractive for the customers. The CCI noted that this was a vicious cycle leading to foreclosure of competition as other platforms would not be able to compete. The investigation had shown that the market share of Booking.com had shifted to MMT-Go and the other players were not able to compete because of the price and room parity agreements. Further, in the long run, higher commission would converge into the prices the hotels offered and hence would lead to higher priced rooms being offered to the end consumers.

The CCI observed that these agreements were also taking away the price setting freedom of the hotels that were listed on the MMT-Go platform because the hotels had to provide the same price to all the platforms and offer differential prices to platforms with lower commissions or provide them differential availability of rooms when they had unmet demand. The CCI thus held that these agreements led to reinforcement of the dominant position of MMT-Go in the relevant market because they helped MMT-Go in increasing its network of consumers who increasingly used the platform to grab the best deals and impeded the competitive ability of other OTAs from offering a lower commission and negotiating a lower price from the hotels.

In its defence, MMT-Go had argued that price and room parity terms were an industry practice. The CCI considered this argument and observed that parity agreements entered by a dominant player and parity agreements by small players were not comparable. MMT-Go was the largest platform and hence an essential trading partner for hotels to ensure discoverability, which made its MFN clauses more egregious than those of other players.

MMT-Go had also argued that the parity agreements addressed concerns of free riding by other OTAs or the hotels on the investment (in terms of promotion of the hotel) made by MMT-Go. The CCI rejected this argument, noting that MMT-Go provided discounted rates (offered by the platform itself), and therefore it seemed improbable that a customer would free ride by looking for a hotel on MMT-Go and then buying it on a different platform at a higher price. Moreover, when there were more OTAs to choose from, the customer would not have an incentive to free ride because a higher number of OTAs would itself ensure that competitive price were offered on the platforms.

The CCI therefore concluded that wide price parity agreements as imposed by MMT-Go on hotels were not justified to address any free riding concerns as they led to foreclosure of competition amongst OTAs and high prices to the end consumers. However, the CCI did acknowledge that narrow price parity agreements might

12 See n. 2., above.

be justified to address free riding concerns on account of the contractual relationship between OTAs and hotels.

MFN Clauses – Vertical Concerns

MFN clauses have largely been analysed as an imposition of an unfair condition by a dominant enterprise. However, since they are entered between enterprises at different stages of the production chain, they may also be analysed as a vertical restraint under Section 3(4) of the Competition Act. In a complaint by the National Restaurant Association of India (*NRAI*), the CCI considered a number of allegations against online food delivery platforms Zomato Limited (*Zomato*) and Bundl Technologies Private Limited (*Swiggy*).[13] It found a *prima facie* case of breach of Section 3(4) and ordered an investigation by the Director General.

It was alleged that there were price parity terms in the agreements/ contracts between Zomato/Swiggy and restaurant partners which did not allow such restaurant partners to develop their own direct ordering channels or a competing platform by offering more competitive rates, thereby directly reducing inter-platform competition. Identifying the competition concerns of price parity clauses for food delivery apps, the CCI noted that it might "*result in removal of the incentive for platforms to compete on the commission they charge to restaurants, may inflate the commissions and final prices paid by consumers and may also prevent entry of new low-cost platforms*". The CCI further opined that the price parity clauses imposed by Swiggy and Zomato were in the nature of wide MFN clauses which did not allow the restaurant partners to maintain lower prices or higher discounts on any of their own supply channels or on any other aggregator, so that the minimum price or maximum discounts could be maintained by the platform. Considering that Zomato and Swiggy were the "*two biggest platforms*" present in the food delivery segment, the CCI *prima facie* considered that such clauses merited a detailed investigation as they were likely to have an AAEC in breach of Section 3(4) read with Section 3(1) of the Competition Act.

The CCI has thus made it clear that not just dominant enterprises but also enterprises with "*market power*" can be investigated for imposing MFN clauses.

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

MFN Clauses – Risk of Collusion

Whilst not tested by the CCI, MFN clauses can facilitate and sustain coordination or tacit collusion that exists between different platforms. Imposition of price parity clauses can increase transparency in the market and encourage enterprises to collude on price and commissions charged from the sellers. This could lead to collusion among competitors to raise prices and share price sensitive information in violation of Section 3(3) of the Competition Act.

Conclusion

Competition jurisdictions around the world have taken an increasing interest in MFN clauses, especially those imposed by large digital platforms. Generally, wide MFN clauses, when imposed by a dominant entity, are found to be anti-competitive by competition authorities. On the other hand, the view towards narrow MFNs is mixed, with regulators allowing them if there is no evidence of any anti-competitive effect in the relevant market.

In India, the CCI seems to have taken a measured approach. It found MMT-Go's wide MFNs to be anti-competitive but noted that narrow MFNs may potentially be justifiable in certain situations. In the MMT-Go Case, the CCI was concerned with MFN clauses imposed by a dominant entity. The likelihood of such concerns increases if the MFN clauses are accompanied by other restrictions such as exclusivity, which further increase the dependence of an entity on the dominant platform. Even though there were other players in the relevant market imposing similar MFN clauses, the CCI did not find any fault with them owing to their position in the market.

In the *NRAI* case, the CCI has taken the view in *prima facie* proceedings that the imposition of MFN clauses by enterprises having market power could also raise competition concerns given the risk of foreclosure without any benefit accruing to the consumer. Considering that vertical agreements are not *per se* void, it will be interesting to see how the CCI will assess the pro-competitive effects of MFN clauses such as prevention of free riding, hold up problems and lowering of transaction costs.

Hub-and-Spoke Cartels: The Next "Big Thing"?

By Manika Brar and Anik Bhaduri[1]

Introduction

Hub-and-spoke cartels are horizontal restrictions at the supplier or retailer level (the "*spokes*") which are implemented through vertically related players that serve as a common "*hub*" (e.g., a common manufacturer, retailer or service provider).[2] The "*hub*" facilitates the co-ordination of competition between the "*spokes*" without direct contacts between the spokes, making it difficult to prove that the "*spokes*" had engaged in concerted action.[3] Hub-and-spoke arrangements may be used to facilitate various types of horizontal agreements between the "*spokes*" such as price-fixing and territorial allocation.

The use of arrangements with a common "*hub*" to facilitate collusive outcomes has increased in frequency with the rise of e-commerce over the past decade. Online marketplaces, price monitoring software and algorithms are vertically related to various competing sellers and may facilitate the exchange of competitively sensitive information between the sellers without any actual communication between them.[4] While different jurisdictions have responded to this emerging antitrust threat in different ways, the difficulty in assessing the liability of the hub for facilitating and sustaining the anti-competitive conduct has emerged as a common concern. Online platforms have often pleaded that they have no knowledge whatsoever about the conduct of various sellers using the platform and did not play any role in facilitating the concerted action, while competition authorities have argued that the platform, in its role as the hub, actively furthered the anti-competitive agreement.[5] As technology driven e-commerce continues to evolve, the business community faces the challenge of staying compliant with law where standards are still not clearly defined, and are awaiting clarification by the authorities through enforcement practice or guidelines.

In India, the Competition Act, 2002 (*Competition Act)* recognizes two distinct categories of agreements - horizontal agreements and vertical agreements. Since hub-and-spoke arrangements involve both horizontal and vertical elements, it is difficult to place them under one or other of these categories. Further, since the computation of penalty and the availability of leniency are premised on the understanding that all anti-competitive agreements fall into either of these categories, the legal framework governing hub-and-spoke arrangements is currently mired in ambiguity. The Competition Law Review Committee (*CLRC*), instituted by the Ministry of Corporate Affairs in India, acknowledged this ambiguity, and recommended the inclusion of hub-and-spoke arrangements within horizontal agreements, which has been reflected in the Competition Amendment Bill, 2022 (*Bill)* currently before the Indian Parliament. However, it remains to be seen under what circumstances the hub will itself become liable for the horizontal conduct between competitors. This article provides an overview of the current regime and the proposed amendments and outlines some proposals to bring the Indian regime in line with the best practices in other jurisdictions.

The Journey so Far

Statutory Provisions and Interpretative Questions

Locating hub-and-spoke arrangements under Section 3

In India, anti-competitive agreements *which cause or are likely to cause an appreciable adverse effect on competition (AAEC) within India* are prohibited under Section 3 of the Competition Act. Section 3(1) of the Competition Act provides:

"*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*"

Section 3(3) sets out an exhaustive list of different categories of horizontal agreements, including cartels, that shall be presumed to have an AAEC. On the other hand, Section 3(4) provides a non-exhaustive list of various categories of vertical agreements that may lead to an AAEC, but are not presumed to have such effect. In its decisional practice, the Competition Commission of India (*CCI*) has clarified that vertical agreements falling under Section 3(4) shall be examined under a rule of reason approach,[6] while agreements falling under Section 3(3) are presumed to be anti-competitive.[7]

Over the years, the approach followed by the CCI in assessing agreements that are neither horizontal nor vertical or have both these elements has been to review them under Section 3(1). In the *Hiranandani Hospital* case,[8] the majority of the CCI expressly held that anti-competitive agreements that did not fall within the scope of Section 3(3) or Section 3(4) might still come under Section 3(1) which prohibited all forms of anti-competitive conduct, and was not limited by sub-sections (3) or (4). The majority order observed that Section 3(1) was enforceable independent of Section 3(3) and 3(4) because the latter were expansions of Section 3(1) and did not limit the scope of Section 3(1). While the majority order was set aside on appeal,[9] the then appellate tribunal, COMPAT, did not specifically discuss whether Section 3(1) could be enforced without any reference to Sections 3(3) and 3(4). Over the years, Section 3(1) has been used independently and

1 Manika Brar, Partner, and Anik Bhaduri, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.
2 OECD, Background Note by the Secretariat, *Roundtable on Hub and Spoke Agreements* (2019).
3 Barak Orbach, 'Hub-and-Spoke Conspiracies' 15 *Antitrust Source* 1 (2016).
4 See n.2, above.
5 See, for instance, *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).
6 *Jasper Infotech v. KAFF Appliances*, CCI, Case No. 61 of 2014 (15 January 2019).
7 *Ghanshyam Dass Vij v. Bajaj Corp Limited and Others*, CCI, Case No. 68 of 2013 (12 October 2015).
8 *Ramakant Kini v. Dr. L.H. Hiranandani Hospital*, CCI, Case No. 39 of 2012 (24 February 2014).
9 This was appealed to the Supreme Court where it is currently pending.

the current position seems to be that, even if hub-and-spoke arrangements cannot be viewed under the cartel provisions of Section 3(3), they can still be assessed under Section 3(1).

In the initial cases where it was alleged that a hub-and-spoke arrangement had been used to facilitate resale price maintenance (*RPM*), the CCI confined its inquiry to assessing whether the alleged vertical agreements were in violation of Section 3(4) and did not inquire into the question of a hub-and-spoke cartel.[10] Later, in the *Samir Agrawal* case,[11] the Informant had alleged collusion between cab drivers through cab aggregators such as Uber. The CCI observed that there was no evidence to indicate any agreement between various drivers using a common cab aggregator and, accordingly, it could not be held that the cab aggregators were facilitating collusive conduct between various cab drivers. The decision of the CCI was upheld on appeal by both the National Company Law Appellate Tribunal (*NCLAT*)[12] as well as the Supreme Court of India,[13] which affirmed that evidence *of collusion between the spokes was essential to demonstrate the existence of a hub-and-spoke cartel*. The CCI has followed a similar approach in subsequent cases and has dismissed allegations of hub-and-spoke agreements unless an agreement between the spokes can be demonstrated.[14]

Calculating Penalty for the Hub

Under Section 27(b) of the Competition Act, the maximum permissible penalty for cartels is substantially higher than the maximum penalty for other infringements. Under special, alternative provisions for cartels, the maximum penalty for cartels is up to 10% of the turnover of the enterprise or 3 times its profits, for each year of the continuance of the cartel, whichever is higher, whereas the maximum penalty for other infringements is limited to 10% of the *average* turnover for the last three years.

Cartels are defined as *"an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services"*.[15] Therefore, if cartels are considered as agreements between competitors, the spokes can be penalised under cartel specific penalty provisions. The hub could possibly be penalised under the more general provisions, which could result in lower penalty for the hub as compared to the spokes. This clearly would create an unequal penalty regime for the same offence. The CCI has not yet found a hub-and-spoke cartel to exist, but if it did, it would have been interesting to see how this issue of penalty would have been addressed.

Availability of Leniency Programme

Section 46 of the Competition Act is the substantive provision which empowers the CCI to impose lesser penalty if, *"it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital*.[16] Further, under the Competition Commission of India (Lesser Penalty) Regulations, 2009, the "*applicant*" is defined as "*an enterprise who is or was a member of a cartel and includes an individual who has been involved in the cartel on behalf of an enterprise, and submits an application for lesser penalty"* to the CCI.[17]

As discussed above, it is difficult to determine whether the hub, which operates in a different market and is only vertically related to the spokes, can be said to be "*included in any cartel*" or "*a member of the cartel*". Accordingly, whether hubs can apply for leniency under the current regime remains unclear.

In conclusion, the CCI has looked at hub-and-spoke arrangements under Section 3. However, it did not make any specific observation on whether these are covered under the cartel specific provisions – therefore making the cartel-specific penalty, leniency and other provisions also applicable to hub-and-spoke arrangements. The CCI has tried to address these concerns in the Bill, as discussed below.

Proposed Changes in the Bill to Address Hub-and-Spoke Arrangements

Hub-and-Spoke Arrangements to be Assessed under Section 3(3) of the Competition Act

Given the ambiguity surrounding the standing and legal liability of the hub in hub-and-spoke arrangements, the CLRC recommended the express inclusion of hub-and-spoke cartels within Section 3(3), clarifying that the hub was as equally culpable as the spokes that took part in the agreement. In its report, the CLRC noted that in the UK, hubs were penalised only if it was demonstrated that they had the *intention* to facilitate anti-competitive conduct. However, the CLRC disagreed with such an approach, and recommended that no inquiry of knowledge *or* intention should be required to impute liability to the hub.[18]

The recommendation was reflected in the Bill, which seeks to amend Section 3(3) to include hub-and-spoke agreements. Under the Bill, a hub would be presumed to have participated in the horizontal agreement *"if it actively participates in the furtherance of such*

10 *Jasper Infotech v. KAFF Appliances*, CCI, Case No. 61 of 2014 (15 January 2019); *Fx Enterprise Solutions Limited v. Hyundai Motor India Limited*, CCI, Case Nos. 36 and 82 of 2014 (14 June 2017).

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

12 *Samir Agrawal v. Competition Commission of India and Others*, NCLAT, Competition Appeal (AT) No. 11 of 2019 (29 May 2020).

13 *Samir Agrawal v. Competition Commission of India and Others*, Supreme Court, Civil Appeal No. 3100 of 2020 (15 December 2020).

14 *CP Cell, Directorate General Ordnance Service Master General of Ordnance Service v. UP State Handloom Corporation Limited*, CCI, Reference Case No. 04 of 2019 (3 November 2021).

15 Emphasis supplied.

16 Emphasis supplied.

17 Regulation 2(b), Competition Commission of India (Lesser Penalty) Regulations, 2009. Emphasis supplied.

18 Ministry of Corporate Affairs, Government of India, *Report of the CLRC* (2019) 60-62.

agreement."[19] Such explicit inclusion of hub-and-spoke agreements within Section 3(3) would likely reduce the legal ambiguity since the liability of the hub and the availability of the leniency programme would become clear. However, it is not yet clear what active participation in the furtherance of the agreement would entail, and how participation of the hub in the agreement will be proved or disproved.

In this regard, the Parliamentary Standing Committee on Finance (*Standing Committee*) has recommended further amendments in the text of the Bill to ensure that hubs such as online marketplaces are not unduly penalised for collusive conduct between third parties using their services. The Standing Committee recommended that the liability of the hubs should be restricted to cases where the hub had the *intention* to participate in the anti-competitive conduct.[20] It is yet to be seen whether the changes proposed by the Standing Committee will be incorporated into the Bill.

Active participation

It is not unusual for resellers to share certain competitively sensitive information with suppliers. This may be done for many reasons, such as to improve foothold in the market, to get a better deal or to obtain bigger discounts. However, issues will begin to arise when such information is passed on by the supplier to a competing reseller.[21] Therefore, extreme caution will have to be exercised when any confidential information is being shared between retailers and suppliers. Not every retailer-to-supplier exchange of information will be problematic. However, where such information finds its way to the competitor in question, the triangular nature of the conduct can be seen in terms of being a horizontal agreement. The challenge will be to identify such situations.

What is clear is that competitor-to-competitor exchanges and reseller-to-supplier-to-competing reseller exchanges can both involve *de facto* horizontal agreements. Where the supplier is a conduit for sharing information between the competing resellers, the analysis will likely be fairly straightforward. This is simply competitors talking to each other where the supplier replaces the telephone, and the presence of the supplier will not negate the existence of a horizontal agreement between the resellers.

Things can get complicated where the role of the supplier gets blurred. Would the supplier be said to be actively participating in a situation where the supplier is a chatter and simply likes to discuss every detail of his dealings with his two/three resellers? He is clearly not aware of his role as a hub/facilitator, and therefore, arguably cannot be said to be actively participating in the furtherance of such agreement. This may get further complicated when the resellers are aware of this peculiar habit of the supplier and continue to engage with him – would this aspect change any assessment?

It may very well be the case that active participation is only found in circumstances where the reseller can reasonably foresee that information shared with the supplier will get passed on to the competing reseller/s. Where the information is shared by the reseller for a legitimate purpose and it could not have been foreseen that the supplier would direct this information to a competing reseller, it may be more likely that the CCI will not find a hub-and-spoke agreement. Subject to what we see in the final Bill, these issues will have to be addressed by the CCI. However, what is key is that the players in vertical markets will have to exercise extreme caution when sharing information with each other and non-disclosure restrictions will have to be a necessary part of these arrangements.

Hub-and-Spoke Cartels in the US and the EU.

While the proposed changes to the legal framework on hub-and-spoke arrangements is still under discussion in the Indian Parliament, it may be helpful to look at how mature competition regulators in jurisdictions like the United States (*US*) and the Eurpean Union (*EU*) have understood hub-and-spoke cartels.

United States

In the US, conspiracies in restraint of trade are prohibited under Section 1 of the Sherman Act, 1890. The statute is broadly worded and does not distinguish between horizontal agreements and vertical agreements. Although there is no express reference to hub-and-spoke cartels in the statute, US courts have recognised the illegality of hub-and-spoke agreements for almost a century.[22] In its decisional practice, the court has repeatedly clarified that it is essential to demonstrate the existence of a rim that connects the spokes. According to the case law, the "*rim*" connecting the horizontal spokes, which are otherwise just individual parties to parallel vertical agreements, draws the line between presumptively legal vertical agreements and illegal horizontal agreements. The rim establishes the agreement needed to conclude a *per se* violation of Section 1 of the Sherman Act, 1890. Without the rim, the parallel vertical agreements can only be subject to a rule of reason analysis.[23]

Once a rim between the spokes has been established, the agreement is illegal *per se*. The hub which facilitates concerted action between the spokes is equally culpable if it can be shown that the hub was a knowing participant in that agreement and facilitated the scheme.

European Union

In the EU, anti-competitive agreements are prohibited under Article 101 of the Treaty on the Functioning of the European Union (*TFEU*).

19 Competition Amendment Bill (2022). Emphasis supplied.

20 Standing Committee on Finance, *Fifty-Second Report* (December 2022).

21 Hub-and-spoke arrangements can, of course, also involve vertical exchanges which facilitate collusion between suppliers and the arguments here apply *mutatis mutandis*.

22 *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939).

23 For a detailed discussion on the evidentiary standards required to show hub-and-spoke agreements, see Benjamin Klein, "*Inferring Agreement in Hub-and-Spoke Conspiracies*", 83 *Antitrust Law Journal* (2020).

While the text of the TFEU is broadly worded, various possible scenarios in which hub-and-spoke arrangements may be used to facilitate anti-competitive conduct have been discussed in Guidelines on both horizontal as well as vertical agreements.[24]

The European Court of Justice has clarified that an undertaking may be held liable for a concerted practice on account of the acts of an independent service provider if the undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or if that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider. If the third-party service provider shared the commercially sensitive information of an undertaking with its competitors without the knowledge or consent of the undertaking, the undertaking cannot be held liable for the anti-competitive conduct.[25] Further, once it is established that an undertaking was aware of the anti-competitive agreement, it may rebut the presumption that it participated in the concerted practice by demonstrating that it had publicly distanced itself from the practice.[26]

The liability of the hub is determined in a similar way. In order to hold the hub liable for anti-competitive conduct, it would be necessary to prove that it was aware of the upstream/downstream coordination, or at least that it could have reasonably foreseen the possibility, and that it contributed to the realisation of the conduct through its actions.[27]

The Way Ahead

The express inclusion of hub-and-spoke agreements within Section 3(3) resolves the legal ambiguity surrounding hub-and-spoke agreements. However, in the current proposed form the provisions may open floodgates of enforcement cases. The evidentiary standards that are to be followed by the CCI in assessing hub-and-spoke cartels should accordingly be set out in clear terms and guidance should also be issued.

An important aspect is the determination of the evidentiary threshold after which the CCI may presume that the agreement may lead to an AAEC. Hub-and-spoke agreements typically involve a number of similar independent vertical agreements between various enterprises. The vertical agreements, individually or collectively, are not anti-competitive unless it can be shown that they lead to collusion. As the discussion above illustrates, under US and EU law, the evidence of an agreement between the spokes is a *sine qua non* in establishing the existence of a hub-and-spoke cartel and imputing liability to the hub. In India, the Bill stipulates that the hub shall be presumed to be a part of the agreement if it actively participates in the furtherance of the agreement. However, the role of the supplier, his knowledge of the conduct and the reseller's knowledge of the supplier's role will become key aspects and will put a significant evidentiary burden on the CCI.

Further, in order to ensure that the business activities of online platforms are not unduly jeopardized, it is crucial that the recommendations of the Standing Committee on assessing the intention of the hub is incorporated into the proposed amendment. In mature antitrust regimes such as the EU or the US, intention or knowledge of the anti-competitive activity is necessary to establish the culpability of the hub. If penalties are imposed on online platforms or other third parties that may have unwittingly facilitated concerted action between upstream or downstream players without any knowledge of the concerted action, it would result in overdeterrence and may have a chilling effect on the market.

Conclusion

Hub-and-spoke arrangements are not new to the CCI's enforcement regime. However, the specific inclusion of these in Section 3(3) will undoubtedly remove legal ambiguity and increase scrutiny. The challenges will be to apply this provision in a manner consistent with international practices. It would be good if a soft touch approach is adopted till such time there is clarity on the issues raised in new provision. However, the key aspect remains that the players in the vertical chain will have to careful about information sharing, irrespective of the approach that may eventually be adopted by the CCI. Any retailer-to-competitor information exchange should be duly protected in a manner that it does not result in a situation where rival players get access to this information. If this happens, the CCI will most likely view this as tantamount to a competitor-to-competitor information exchange and the harsher cartel regime will get triggered.

24 See n. 2.
25 Case C-542/14, *SIA 'VM Remonts' (formerly SIA 'DIV un KO') and Others v. Konkurences padome*, ECLI:EU:C:2016:578.
26 Case C-74/14, *Eturas UAB and Others v. Lietuvos Respublikos konkirencijos taryva (Eturas)*, ECLI:EU:C:2016:42.
27 Case C-194/14 P, *AC-Treuhand v. Commission*, ECLI:EU:C:2015:717.

Charting New Territory: Introducing Commitments and Settlements in India

By Rohan Arora, Aakash Kumbhat and Anik Bhaduri[1]

Introduction

Over the last two decades, consensual mechanisms of competition law enforcement have become increasingly popular across the world with a number of jurisdictions introducing settlements and commitments into their competition law toolkits.[2] Consensual modes of competition law enforcement are expected to be faster and more resource-efficient when compared to enforcement proceedings as the parties being investigated voluntarily offer remedies to the competition authority.[3] However, commitments and settlements have been criticised on the grounds that they vest broad discretionary powers in competition authorities and reduce the transparency and predictability of competition enforcement.[4] Despite these criticisms, the reliance of competition authorities on these mechanisms is on the rise, with authorities in the EU and the US resolving almost all their non-cartel competition law cases through them.[5]

Through the Competition Law (Amendment) Bill, 2022 (*Bill*), India has sought to introduce commitments and settlements into the Competition Act, 2002 (*Competition Act*).[6] While the proposal will, if enacted as it currently stands, yield some obvious benefits, it may also unleash a Pandora's box of legal and practical problems that may undermine the efficiency of competition enforcement. In this article, we set out a few risks within the proposed settlements and commitments regime in India that may impede its efficient implementation and suggest solutions.

Commitments and Settlements in India: Background and Proposals

The Competition Act allows the Competition Commission of India (*CCI*) only to conduct enforcement proceedings for alleged violations of competition law and does not provide a mechanism for the CCI to accept commitments and settlements. While the Madras High Court has held that the statute vests the CCI with powers to issue a wide variety of residuary orders, including settlement orders,[7] the CCI typically conducts only enforcement proceedings, concluding with either a finding of violation or the closure of a case.

The July 2019 Report of the Competition Law Review Committee (*CLRC Report*) recommended the introduction of commitments and settlements in India on the grounds that it would allow the speedy resolution of competition law investigations and as well as the imposition by the CCI of *"innovative deterrents upon respondents while achieving equitable remedies for victims"*.[8]

Based on the recommendations of the CLRC Report, the Bill introduces two different kinds of negotiated remedies, i.e., *"commitments"* and *"settlements"*. Under the Indian competition law regime, an inquiry is initiated by the CCI by directing the Director-General (*DG*) to investigate into the alleged violations and present its findings to the CCI. *"Commitments"*, as introduced in the Bill, refer to remedies offered by the parties under investigation prior to the receipt of the DG's report. On the other hand, *"settlements"* refer to remedies offered by the parties after the receipt of the DG's report, but before the CCI passes a final order. The Bill further provides that there can be no appeal against commitment and settlement orders.

Potential Misses under The Bill

The Bill does not mention whether commitments or settlements would require an admission of guilt and is silent on whether a settlement or commitment order passed by the CCI will assume the impugned conduct to be an infringement of the Competition Act. This may cast doubts on whether any follow-on action for damages pursuant to the CCI's settlement or commitment order would be permissible under Section 53N of the Competition Act, which allows for compensation claims against any *"violation of the provisions of Chapter II"* of the Competition Act.[9] However, after taking into account the submission of various stakeholders on this issue, including the CCI and the Ministry of Corporate Affairs (*MCA*), the Standing Committee on Finance (2022-23) (*Standing Committee*)[10] has recommended an amendment to the Bill to allow consumers to be able to seek damages from enterprises following settlement orders. Notably, the Standing Committee does not refer to commitment orders in the discussion on follow-on damages actions, which is encouraging given the early stage at which such commitments are offered.

The Bill currently allows the parties to invoke the settlement regime only in cases of alleged violations of the provisions of Section 3(4) (vertical agreements) and Section 4 (abuse of dominant position) and does not allow enterprises participating in a cartel to offer commitments or settlements. A mechanism of consensual enforcement is already available to cartel participants through the cartel leniency programme, available under Section 46 of

1 Rohan Arora, Partner, Aakash Kumbhat, Associate, and Anik Bhaduri, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 OECD Secretariat, 'Commitment decisions in Antitrust Cases' (2016); Giovanna Massarotto, *Antitrust Settlements: How a Simple Agreement can Drive the Economy* (Wolters Kluwer, 2019).

3 Joshua D. Wright & Douglas H. Ginsburg, 'The Costs and Benefits of Antitrust Settlements' (George Mason Law & Economics Research Paper No. 16-42, 2016). Competition authorities across the world have regularly described settlement proceedings as more resource-efficient than enforcement proceedings. For example, see Alexander Italianer, 'To Commit or Not to Commit: That is the Question', Remarks at the CRA Conference, Brussels, Belgium (2013) (https://ec.europa.eu/competition/speeches/text/sp2013_11_en.pdf).

4 Ryan Stones, 'Commitment decisions in EU Competition Enforcement: Policy Effectiveness v. The Formal Rule of Law', *38 Yearbook of European Law 361* (2019); Niamh Dunne, 'From Coercion to Cooperation: Commitments in EU Competition Law' (LSE Law, Society and Economy Working Paper No. 14/2019).

5 Douglas H. Ginsburg & Joshua D. Wright, 'Antitrust settlements: The culture of consent' in Nicholas Charbit et al., *William Kovacic: An Antitrust Tribute – Liber Amicorum* (Vol. I, Concurrences, 2013) (observing that both the US Department of Justice and the Federal Trade Commission have resolved over 90% of their civil antitrust cases through consent decrees since the 1990s); Damien Geradin & Evi Mattioli, 'The transactionalization of EU Competition Law: A Positive Development?' 8(10) *Journal of European Competition Law and Policy* 634-643 (2017) (the European Commission relies on commitments and settlements in more than half of its competition law cases).

6 Section 35, Competition (Amendment) Bill, Bill No. 185 of 2022 (http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf).

7 *Tamil Nadu Film Exhibitor's Association v. CCI,* Madras High Court, 2015 SCC OnLine Mad 7099 (27 March 2015).

8 Ministry of Corporate Affairs, Government of India, *Report of the Competition Law Review Committee* (2019) 42.

9 Chapter II of the Competition Act (Sections 3-6) deals with provisions on *"Prohibition of certain agreements, abuse of dominant position and regulation of combinations"*.

10 Standing Committee on Finance, *Fifty-Second Report on the Competition (Amendment) Bill 2022* (December 2022).

the Competition Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009. Under the leniency programme, participants in an alleged cartel can seek a reduction in penalty in exchange for disclosure of vital evidence about the cartel at any time prior to the receipt of the DG's report by the CCI. As clarified by the MCA to the Standing Committee, there are two reasons for the exclusion of Section 3(3) (horizontal agreements, including cartels) from the proposed commitments and settlements framework: first, the existing leniency mechanism for cartels precludes the need to include these under the settlement regime; and, second, cartels and horizontal agreements being *"egregious and pernicious in nature"* are anti-competitive by their very nature and, therefore, do not fall within the envisaged settlement mechanism. However, disagreeing with the MCA, the Standing Committee has recommended an amendment to the Bill to include horizontal agreements within the settlement regime (and notably, again, not the commitments regime), thereby extending the consensual modes of enforcement in cartel cases after the receipt of the DG's investigation report by the CCI, unlike the existing leniency mechanism.

General Risks of Commitments and Settlements

Despite the benefits of faster resolution of competition law cases and greater flexibility in crafting viable remedies for market correction,[11] commitments and settlements may undermine legal certainty and the deterrent effect of competition law enforcement. Investigations followed by detailed enforcement proceedings, although long and costly, ultimately lead to binding legal pronouncements by the competition authority, appellate tribunals, and courts that allow competition authorities as well as market participants clearly to discern the limits of legal conduct and act accordingly in the future. Commitments and settlements do not offer an equivalent generation of precedents that may be applied uniformly across cases, and therefore provide limited guidance, if any at all.[12]

Further, the implementation of such consensual mechanisms necessarily vests the competition authority with broad discretionary powers to decide whether to accept the commitments/ settlements offered in any case. Allowing appellate bodies or courts to examine the appropriateness of settlements through litigation may jeopardize the faster resolution of cases, which is also illustrated in the absence of any appeal mechanisms in settlements and commitments cases in the Bill. Generally, enterprises facing a competition investigation may face significant losses in their reputation and business prospects,[13] and may also fear high litigation costs if they challenge the competition authority's theory of harm before a judicial authority. Consequently, parties under investigation typically try to offer appropriate commitments or settlements to bring a quick end to the proceedings, which potentially provides the authority with an upper hand in negotiations.[14]

In the absence of judicial scrutiny, competition authorities also have *carte blanche* in framing the theory of harm, and deciding what remedies are appropriate to remedy the harm. Competition authorities usually have the power to accept long-term behavioural commitments and can therefore engage in *ex ante* regulation of the parties' future conduct, which typically falls within the domain of various sectoral regulators.[15] Further, competition authorities may identify broader socio-economic issues, such as privacy violations[16] or labour rights concerns[17] as competition law issues, and secure commitments from the parties to cease and desist from certain conduct. In India, the CCI has shown a consistent trend of attempting to enhance its jurisdictional reach, often leading to turf wars with other regulators.[18] Further, the CCI recently secured a landmark victory before the Supreme Court of India, which affirmed that the CCI is empowered to initiate an investigation into any issue which, in the opinion of the CCI, may have anti-competitive effects.[19] In the absence of judicial review, the introduction of commitments and settlements may provide the CCI with the liberty to engage in *ex ante* socio-economic regulation, leading to an ever-broadening scope of anti-competitive harms.

Recommendations Towards Mitigating the Risks Emanating from the Bill

It remains unclear how the proposed framework will work in practice, and the Bill provides that the CCI will introduce regulations that set out the operational procedure of commitments and settlements.[20] With a view to averting, or at least mitigating the potential risks outlined above, the regulations should seek to ensure that the quest for speedy competition enforcement does not undermine the fundamental principles of clarity and predictability in the operation of the legal regime.

Ensuring Clarity and Predictability

The Bill does not envisage any procedural safeguards in the

11 Yane Svetiev, 'Settling or Learning: Commitment Decisions as a Competition Enforcement Paradigm', 33 *Yearbook of European Law* 466 (2014).

12 See sources cited in n. 3, above, and Korbinian Reiter, 'The Impact of Commitment Decisions on Legal Certainty' in *Market Design Powers of the European Commission?* (Munich Studies on Innovation and Competition, Volume 13, 2020).

13 *Google Inc. v. Competition Commission of India*, Delhi High Court, (2015) 150 DRJ 192 (DB) (27 April 2015).

14 Florian Wagner-von Papp, 'Best and even better practices in commitments after Alrosa: The dangers of abandoning the *"Struggle for Competition Law"*', 49 *Common Market Law Review* (2020) 929.

15 Firat Cengiz, 'Judicial Review and the Rule of Law in EU Competition Law after Alrosa', 7(1) *European Law Review* (2011) 127.

16 *'Case B6-22/16 Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing'*. Bundeskartellamt (Germany), (https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3600108).

17 Labour issues are increasingly coming within the ambit of antitrust authorities. For instance, see The White House, *Executive Order on Promoting Competition in the American Economy*, July 9, 2021 (https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/); *United States v. Jindal, United States v. Rodgers*, Case No. 20-CR-358 (E.D. Tex. Apr. 14, 2022).

18 For an overview, see Madhavi Singh, 'The competition for India's antitrust jurisdiction: Competition Commission versus sectoral regulators', *Journal of Antirust Enforcement* (2022) (https://doi.org/10.1093/jaenfo/jnac01).

19 *Meta Platforms Inc. v. Competition Commission of India and Another*, Supreme Court, SLP (C) No. 17121/2022 (14 October 2022).

20 Section 35, Competition (Amendment) Bill, Bill No. 185 of 2022 (http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf).

operation of the commitments and settlements regime and does not set out how the appropriateness of proposed commitments and/or settlements will be assessed by the CCI. However, it is expected that the CCI will address these issues by way of detailed regulations to ensure clarity and consistency in the assessment of commitments and settlements.

In this regard, the CCI could take inspiration from the regulations governing the settlement proceedings before the Securities and Exchange Board of India (*SEBI*). Regulation 23 of the SEBI (Settlement Proceedings) Regulations, 2018 (*SEBI Regulations*) mandates SEBI to publish a settlement order containing "*the details of the alleged default(s), relevant provisions of the securities laws, brief facts and circumstances relevant to the alleged default, the admissions made by the applicant, if any and the settlement terms.*"[21] While the SEBI Regulations do not require SEBI to outline its reasoning in its settlement orders, the orders are still expected to contain enough information for readers to gauge the specific legal violation committed by the respondent, and the precise terms of the settlement agreed upon between the respondent and SEBI, thereby ensuring transparency in the proceedings.

Further, Regulation 10 of the SEBI Regulations sets out a list of factors, such as the gravity of the alleged default, the conduct of the applicant during the proceedings and the extent of harm caused to investors, that SEBI is required to consider while assessing the appropriateness of proposed settlements, which limits the discretion of SEBI.[22] Such enumeration of factors allows market participants to anticipate the decision-making procedure of SEBI regarding settlements, and therefore considerably reduces legal uncertainty. The SEBI Regulations also provide for the review of the proposed settlement terms by a High-Powered Advisory Committee (*HPAC*) after an initial assessment by an internal committee constituted by SEBI. The settlement terms are then placed before a panel of whole-time members of SEBI, which takes a final decision on whether to accept the proposed settlement terms. The HPAC, which is comprised of leading industry experts and at least one judicial member, is tasked with determining the appropriateness of the proposed settlement in light of the factors specified in Regulation 10.[23] The assessment of settlement terms by the HPAC ensures consistency and coherence in the assessment of settlement terms by SEBI.

The Bill, as it currently stands, does not envisage such external review of proposed commitments and settlements.

Mandatory Market Testing

Similar to the practice followed by the European Union (*EU*),[24] the Bill requires the CCI to seek suggestions and/or objections from third parties prior to the acceptance of commitments or settlements as a mandatory part of the procedure. However, in contrast to the EU practice, the Standing Committee's Report has recommended that market testing should be *discretionary* and not *mandatory*, since consultation with third parties may compromise confidential information pertaining to the enterprises offering commitments and/or settlements.

The EU experience shows that mandatory market testing does not necessarily jeopardize the confidentiality of information. The European Commission (*EC*) only publishes the alleged theory of harm and the commitments made by the parties in the Official Journal of the EU, and there is no disclosure of confidential information.[25] Inviting comments from third parties is not inherently antithetical to confidentiality concerns as third parties would not generally need access to confidential information of the enterprise in order to assess whether the proposed remedies are adequate to address the potential anti-competitive harm.

The opportunity provided to various market participants to voice their grievances concerning the proposed commitments also ensures that the rights of third parties are not adversely affected as a result of the commitments being proposed, while simultaneously ensuring that the undertaking in question is not forced to propose any excessive remedies. Accordingly, *mandatory* market testing may be necessary for the success of the proposed commitments and settlements mechanisms. To protect against the risks regarding disclosure of confidential information, the regulations should seek to limit the disclosure of information to the alleged theory of harm and the proposed commitments/ settlements only.

Disallowing Compensation Claims

Enterprises generally have an incentive to offer commitments or settlements as these negotiated means of competition law enforcement bring the enforcement proceedings to an end without any significant reputational and/or financial losses.[26] However, a mandatory requirement of admission of guilt, and/or allowing affected consumers to seek compensation from enterprises that have offered settlements, may undermine such incentives. The admission of guilt may jeopardize the reputation of the enterprise,[27] while the possibility of future claims seeking damages may open the floodgates of competition law litigation.

Moreover, the enterprise may stand a chance of successfully defending any allegations if it continues with enforcement

21 SEBI (Settlement Proceedings) Regulations, 2018, Regulation 23.
22 *Ibid.*, Regulation 10.
23 *Ibid*, Regulation 14.
24 Regulation (EC) No 1/2003, Article 27(4).
25 Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06, paragraphs 129-133.
26 See n. 14 above.
27 Stijn van den Broek & Ron G.M. Kemp & Willem F.C. Verschoor & Anne-Claire de Vries, 'Reputational Penalties to Firms in Antitrust Investigations', 8(2) *Journal of Competition Law and Economics* 8(2) 231-258 (2012).

proceedings. If settlements mandatorily require an admission of guilt and subsequent claims for compensation are allowed, as the Standing Committee recommends, enterprises under investigation are likely to prefer enforcement proceedings which provide the possibility of averting, or at least delaying, a conclusive finding of guilt and claims for damages. Accordingly, the recommended inclusion of a settlement order in the compensation provisions of the Competition Act may deter enterprises from offering settlements and, as a result, impede the functioning of consensual modes of enforcement.

Harmonising Cartel Settlements with the Existing Leniency Regime

The extension of commitments and settlements to cartels may be at odds with the existing leniency programme. The success of the leniency programme is premised on the proverbial 'race to the courthouse' where each enterprise in the cartel has an incentive to disclose information about the cartel to the competition authority before its co-conspirators, in the hope of securing a greater reduction in penalty. The first enterprise to provide vital information about the cartel to the competition authority may secure up to 100% reduction in penalty, while other enterprises are granted a reduction in penalty in the order in which they approached the CCI.[28] If the settlement mechanism allows an enterprise to secure a substantially greater reduction in penalty than that available under the leniency programme, the enterprise would prefer offering a settlement over seeking amnesty through the leniency programme. On the other hand, if the permissible reduction in penalty under the settlement mechanism is significantly less than the amount of penalty reduction that the enterprise may be able to secure through the leniency programme, enterprises participating in a cartel are unlikely to offer settlements.

Further, an application for leniency necessarily requires an admission of guilt and exposes the enterprise to follow-on damages actions, which may not be the case with settlements. Follow-on actions for damages may involve a variety of commercial, legal and reputational risks stretching on for years. Accordingly, under some circumstances, settlements may be a more prudent alternative even when the reduction in penalty is less than that available under the leniency programme. Therefore, if cartels are brought within the ambit of the settlement regime, it should be done in a manner that does not affect the existing leniency regime while ensuring the new settlement regime is effective.

Conclusion

Commitments and settlements are undoubtedly a welcome development in the Indian competition law regime with the potential to enhance the efficiency of the Indian enforcement mechanism. However, in the absence of a carefully designed mechanism which is consistently enforced by the CCI, settlements and commitments may lead to legal uncertainty or introduce further complications to a regime intended to simplify the enforcement of competition law.

28 Nikita Koradia, Kiran Manokaran and Juhi Hirani, 'The Leniency Program under the Indian Competition Law' in Steven Van Uytsel, Mark Fenwick & Yoshiteru Uemura eds., *Leniency in Asian Competition Law* (Cambridge University Press, 2022).

Is Indian Competition Law ESG Ready?

By Rohan Arora and Shivek Sahai Endlaw

ESG, an acronym for 'Environmental, Social and Governance' is a framework that helps stakeholders understand how an organization is managing risks and opportunities related to the environment, society and its internal governance. Indian companies have started taking steps to further their ESG responsibilities to attract higher investments and valuations. The rationale behind this move is simple; companies that work towards promoting their workers, customers, shareholders, and society are companies that are better run, therefore making them attractive for long term investments and high valuations. Holistic ESG adoption is on the rise in India, creating value and profit for managers and assuring long term returns for investors at the same time.

In most cases, a company can better its ESG performance by internal structuring. However, some situations may require a company to collaborate with its competitors to achieve broader ESG goals. Take the example of an airline that wishes to switch to a cleaner jet-fuel. To offset the major costs that this will require, the airline (acting alone) will have to increase its airfare, and risk losing a competitive advantage *vis-à-vis* its competitors. To remedy this 'first mover disadvantage', the airline can collaborate with other airlines to adopt the cleaner fuel together, which will result in an increased airfare spread across the board. While this collaboration will be a step in the right direction towards a sustainable and environmentally conscious airline industry, it may raise alarm bells from a competition law perspective, inviting allegations of cartelization or anti-competitive behaviour from the Competition Commission of India (*CCI*).

The CCI would be justified in drawing an inference of potential anti-competitive behaviour from competitor collaborations, considering such collaborations often require key management of competitors to meet, exchange commercial information, and regularly communicate with each other. However, in the light of increasing ESG conscious corporate environments, it is important to assess whether the Indian competition framework is appropriately equipped to consider ESG collaborations between competitors.

The intersection between Indian competition law and ESG collaboration has largely remained unexplored due to a general lack of guidance on the issue. There are no guidelines or regulations published by the CCI which address the needs of businesses who wish to collaborate to achieve ESG goals. However, there are several enabling provisions in the Competition Act, 2002 (*Competition Act*) which can be interpreted to facilitate ESG collaborations between competitors.

For example, the preamble to the Competition Act expressly contextualises its provisions within the broader framework of 'economic development of the country' and recognises 'consumer interests' as one of its goals. Further, under Section 19(3) of the Competition Act, which sets out the factors for determining whether an agreement has an appreciable adverse effect on competition (*AAEC*), the CCI can assess potentially anti-competitive ESG-facilitating agreements in terms of benefits to consumers, improvements in the production / distribution of goods, and promotion of scientific and economic development. Similarly, under Section 20(4) of the Competition Act, setting out the AAEC factors to be used in assessing mergers, the CCI can assess the potential anti-competitive effects of ESG-facilitating mergers in terms of innovation, economic development and benefits of the combination to consumers or society as a whole.

Further, the statutory presumption that agreements between competitors have an AAEC does not apply to efficiency-enhancing joint ventures. To justify an efficiency defence, parties should be able to provide clinching evidence on specific efficiencies arising from their arrangement, demonstrate how such efficiencies would be passed on to current consumers in a foreseeable timeframe and show that the arrangement is proportionate to the goal to be achieved.

Despite the above provisions, relying on efficiency defences for ESG-related collaborations under the existing regime poses three challenges. First, the Competition Act does not expressly allow competitors to collaborate on ESG initiatives. Second, the current framework does not contemplate assessing efficiencies arising out of competitor collaborations for future consumers, and only focusses on current consumers. Third, the Competition Act requires parties to self-assess whether their collaboration can result in any anti-competitive effects and does not contemplate communication channels with the CCI to seek guidance. Due to the lack of precedent and guidance on the subject, businesses are forced to adopt conservative strategies to the potential detriment of ESG interests.

The Dutch competition regulator was the first to alleviate stakeholder concerns regarding such issues,[2] followed by regulators in Greece[3] and the United Kingdom.[4] These competition regulators have published substantive guidelines on the application of competition law to 'sustainability agreements', paving the way for competitor collaboration where societal benefits outweigh any real or potential disadvantages to competition in the market. Common factors considered in these guidelines to green-light competitor collaborations include: clear evidence of sustainability benefits; the users (current or future) of the impacted product or service being allowed a fair share of such benefits; the restriction of competition being necessary for reaping such benefits; and competition in the market not being eliminated substantially.

1 Rohan Arora, Partner, and Shivek Sahai Endlaw, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 ACM, "*Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law*" (https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law).

3 HCC, Staff Discussion Paper on "*Sustainability Issues and Competition Law*" (https://epant.gr/en/enimerosi/competition-law-sustainability.html).

4 CMA, "*Environmental sustainability agreements and competition law*" (https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law).

Such guidelines offer much needed clarity on the position of competition authorities to stakeholders across industries, leading to a boom in collaborative ESG initiatives. Relying on its guidelines, the Dutch competition regulator recently allowed direct competitors Shell and TotalEnergies to collaborate[5] in the storage of CO_2 in empty natural-gas fields in the North Sea, stating that the collaboration was necessary to reduce CO_2 emissions, despite the slight restriction of competition in the market. The same regulator also blessed a joint agreement between Coca-Cola and other soft-drink suppliers[6] to discontinue plastic handles on all soft-drink and water multipacks. By removing plastic handles, over 70% of these multipacks will become more recyclable and consume lesser plastic.

While the CCI has not yet reviewed the impact of conduct intended to further environmental and governance principles in its decisional practice, it has shown some sensitivity to broader economic / social goals in some decisions. In *Vipul Shah v. AIFEC and Others*,[7] the CCI refrained from imposing penalties on film associations for alleged cartelisation since they were formed by daily-wage earners and craftsmen. In *FCI v. SAPPL and Others*,[8] the CCI again refrained from imposing a penalty on small / medium offending enterprises, taking note of the fact that the MSME sector in India was under stress due to the economic situation caused by COVID-19. In *Ceat Limited v. CCI and Others*[9], the National Company Law Appellate Tribunal, in remanding the matter, directed the CCI to review the excessive penalty amount and consider a reformative penalty rather than one putting the industry in weak health.

The above examples highlight that the CCI, though facilitative of economic growth and competition in the market, currently lacks the powers to expressly consider / approve ESG collaborations between competitors. To remedy this situation, the CCI can offer positive formal guidance as to what businesses can do in this area, or alternatively open channels of communication for businesses to approach the CCI with their collaborative proposals. This effort should be combined with legislative support to expressly incorporate provisions that promote collaborative ESG initiatives.

The Competition Act is facing a revamp with the proposed Competition (Amendment) Bill, 2022 (*Bill*), which is at the time of writing yet to be further debated in Parliament. The Bill misses out on incorporating express provisions to bolster the ESG framework. Considering the upward trend of companies desiring to better their ESG score, along with the CSR and net-zero carbon emission targets regularly committed to by the government, it is imperative for the CCI or the government to open the door for ESG collaborations to align India's competition regime with international best practices.

5 Press Release, ACM, "*ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields*" (https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields).

6 Press Release, ACM, "*ACM is favourable to joint agreement between soft-drink suppliers about discontinuation of plastic handles*" (https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles).

7 *Vipul A. Shah v. All India Film Employee Confederation and Others*, CCI, Case No 19 of 2014 (31 October 2017).

8 *Food Corporation of India v. Shivalik Agro Poly Products Limited and Others*, CCI, Reference Case No. 07 of 2018 (29 October 2021).

9 *Ceat Limited v. Competition Commision of India and Others*, NCLAT, Competition Appeal (AT) No. 05 of 2022 (1 December 2022).

Merger Control Wrapped 2022 and What's in Store for 2023

By Aparna Mehra, Ritika Sood and Karan Arora[1]

Introduction

The year 2022 was an eventful year for Indian competition law. With India and Indian businesses slowly pulling themselves out of the tight grapples of COVID-19, India's market regulator, the Competition Commission of India (*CCI*), continued its operations in full-swing. Now in its 11th year of merger control, the CCI was consistent with its approach of being a responsive, objective, and focused competition authority. Over the course of the past year, the CCI approved 87 combinations and passed orders in 11 instances of gun jumping – a remarkable feat considering that it was inquorate in the last 2 months of 2022.

From revising its approach on key points of law and the merger review process, and to being inquorate for the first time in its history, the key highlights from the CCI's merger control regime in 2022 are set out below.

The CCI Significantly Diluted its Approach on the Minority Share Acquisition Exemption

Perhaps the biggest highlight of 2022 has been the CCI's revised approach towards the minority share acquisition exemption (*Item 1 Exemption*).[2] While earlier, private equity investors could argue that their investments were in the ordinary course of business (*OCB*), the CCI, through its gun jumping penalty orders against PI Opportunities Fund – I and Pioneer Investment Fund (*Pioneer Decision*),[3] and Trian Partners AM Holdco, Limited and Trian Fund Management, L.P.,[4] has significantly diluted the OCB limb of the Item 1 Exemption. As a result of this dilution, no 'investment' can going forward avail of the OCB limb of the exemption.

In doing so, the CCI relied on its past decisional practice,[5] where it had observed that the test for a transaction to qualify as in the OCB of an entity was two-fold: (a) the transaction should be a revenue transaction and not a capital transaction; and (b) the transaction should be undertaken solely to get benefit from short term price movement of securities.

An 'investment' by its very definition is a capital transaction, thereby failing the key consideration for the OCB test. Further, even in cases where the sole intention of an investment might be to 'get benefited from short term price movement of securities', the CCI's decisions suggest that the OCB test would not be applicable if the investments are held for a considerably long time and the acquirer(s) are participating in the management of the investment with a view to obtain appreciation of value of their holdings. This effectively renders the OCB limb of the exemption nugatory and makes it difficult to rely it in the future.

The CCI also clearly indicated its position on transactions involving a board seat. In the *Pioneer Decision*, the CCI observed that for a transaction to qualify as solely for investment purposes (*SIP*), it should meet the following criteria (as already set out under the relevant regulations):

- There is no representation of the acquirer on the board of directors of the target, to ensure that an acquirer with a minority shareholding does not become privy to competitively sensitive information (*CSI*);
- The acquirer should not have a right or intention to nominate a director on the board of directors of the target, or an intention to participate in the affairs or management of the target; and
- The acquirer should only have the ability to exercise rights that are exercisable by an ordinary shareholder of the target.

On the basis of the above observation, the CCI held that all share acquisitions which involve a board seat appointment will likely need to be notified, as such transactions will not be viewed as SIP (or based on the analysis above, in the OCB), and the Item 1 Exemption will therefore be inapplicable to transactions involving a board seat. This overall weakening of the Item 1 Exemption is a huge blow to private equity players and is likely to result in a greater number of notifications.

A New Phase for Incremental Share Acquisitions by a Majority Shareholder – The CCI Revised its Approach

In the revised responses to the frequently asked questions (*FAQs*) published by the CCI in September 2022,[6] the CCI revised its approach to the exemption applicable to incremental share acquisitions (*Item 2 Exemption*).

Prior to the publication of the revised FAQs, the Item 2 Exemption was applicable in *all* instances where the acquirer, prior to the acquisition, held 50% or more shares or voting rights in the target enterprise, provided that the transaction did not result in a change in the degree of control, i.e., transfer from joint control to sole control. However, through the revised FAQs, the CCI has created an artificial distinction in the change in the degree of control. The CCI has changed the interpretation of the exception to the Item 2 Exemption which contradicts the CCI's past guidance on 'control' and creates separate class of 'control' for the purposes of the Item 2 Exemption.

Prior to the publication of the revised FAQs, an acquirer increasing its shareholding in the target enterprise from 50%, with other existing shareholders having contractual rights that amounted to control as per the CCI's past jurisprudence, could avail of the Item 2 Exemption as there would be no change in control from joint control to sole control. However, through the revised FAQs, the CCI has created a new artificial class of control, stating that an acquirer moving from 50% to 75% or more of the shareholding in the target enterprise effectively acquires 'sole control' *vis-à-vis* matters requiring special resolutions (even in situations where other shareholders hold contractual rights conferring the ability to materially influence the management or affairs

1 Aparna Mehra, Partner, Ritika Sood, Senior Associate, and Karan Arora, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.
2 See, for a more detailed assessment, see '*The "Ordinary Course of Business"* Exemption', in this publication.
3 *PI Opportunities Fund – Pioneer Investment Fund/ Future Retail Limited,* CCI, Ref.No. M&A/Q1/2018/18 (30 September 2022).
4 *Trian Partners AM Holdco, Limited and Trian Fund Management L.P.,* CCI, Ref. No. C-2021/01/810 (30 September 2022).
5 *Bharti Airtel Limited,* CCI, Ref. No. C-2017/05/509 (11 May 2018).
6 FAQs published by the CCI (https://www.cci.gov.in/images/whatsnew/en/faq-english-compressed-31020221664785663.pdf. google).

or strategic commercial decisions of the target, which would constitute control). The Item 2 Exemption would be unavailable in such a scenario.

While the FAQs do not possess the force of law, they do reflect the CCI's thinking in relation to acquisitions where the acquirer, prior to the acquisition, holds 50% or more shares or voting rights in the target enterprise. As such, the FAQs provide little or no certainty in respect of the various 'degrees of control' which may render the Item 2 Exemption inapplicable. It remains to be seen if the CCI will provide any additional guidance on this aspect, either formally or informally, or legally formalize the view taken in the FAQs.

The Green Channel Route – A Sustained Success Story

The Green Channel filing route was introduced by the CCI to facilitate the speedy and automatic (deemed) approval of combinations which pose no underlying risk of any appreciable adverse effect on competition (*AAEC*), owing to the lack of any horizontal, vertical, or complementary overlaps between the parties to the combination. Until December 2022, over 70 combinations were thus deemed to be approved on notification, of which more than 20 were approved in 2022.

The CCI Adopted Both Behavioural and Structural Remedies in Conditionally Approving Three Combinations

The CCI has the power to seek and/ or impose remedies to a transaction if it is of the view that the transaction is likely to cause an AAEC in the relevant market(s) in India. Till date, the CCI has adopted a mix of structural remedies (divestments), behavioural remedies and hybrid remedies (a combination of structural and behavioural remedies).

After a hiatus of almost two years (since the *ChrysCapital/ Intas* decision in 2020), 2022 saw the CCI conditionally approving three transactions. by accepting voluntary modifications offered by the parties, consisting of both structural and voluntary remedies:

- In *Google/ Airtel,*[7] the CCI conditionally approved *Google International LLC's* (*Google*) acquisition of a non-controlling minority stake of 1.28% in Bharti Airtel Limited (*Airtel*) owing to Google's stake in Jio Platforms Limited (*Jio*) which was active in similar businesses to Airtel. The CCI raised concerns of a potential flow of CSI between Airtel and Jio which were allayed by certain voluntary behavioural remedies including an information firewall between Airtel and Jio.[8] Interestingly, the remedies stemmed owing to *only* the minority stake of Google in Jio.
- In *Sony/ Zee,*[9] the CCI, based on its *prima facie* review of the transaction, expressed apprehensions that the resultant entity would be the largest broadcasting house in India with vast content and higher market shares across the channel genres of Hindi General Entertainment Channels (*GEC*), Hindi Films, Marathi GEC, and Bengali GEC. The CCI conditionally approved the merger subject to a voluntary structural remedy entailing the divestment of three GEC channels.
- In *Umang Birla Commercial Company and Aditya Marketing and Manufacturing,*[10] the CCI conditionally approved the merger of Aditya Marketing and Manufacturing Private Limited (*Aditya Marketing*) with and into Umang Commercial Company Private Limited (*Umang*) subject to certain voluntary behavioural commitments. This was owing to substantive horizontal and vertical overlaps between Grasim Industries Limited (*Grasim*), an affiliate of Aditya Marketing, and Kesoram Industries Limited (*Kesoram*) and Mangalam Cement Limited (*Mangalam Cement*), affiliates of Umang. The behavioural commitments entailed, amongst other matters, Umang neither interfering with the composition of the board of directors, nor engaging in the management and affairs of Kesoram and Mangalam Cement. Additionally, Umang would dilute its direct and indirect shareholding in Kesoram to below 25%.

2022 also witnessed the CCI for the very first time unconditionally approving a transaction after issuing a show-cause notice in *PayU/ BillDesk*[11] which involved an acquisition of 100% of the equity share capital of BillDesk by PayU Payments. Given the niche aspects of the market (which the CCI assessed in detail for the first time) the transaction was closely scrutinized. The CCI's approval order will be determinative of the CCI's approach towards transactions in the digital payments space in India going forward. The maturity displayed by the CCI in assessing the transaction in a new-age, digital market is likely to increase business confidence as India continues to thrive with increased domestic and foreign investments.

The CCI, for the First Time since Becoming Fully Functional, has Been Inquorate

In 2022, the CCI became inquorate for the first time since becoming fully functional in 2009. The retirement of Chairperson Mr. Ashok Kumar Gupta in October 2022 resulted in the CCI being reduced to two members. While member Dr. Sangeeta Verma has been promoted to the position of 'Acting Chairperson',[12] the Government is yet to appoint either a regular Chairperson or additional member(s) to make the CCI quorate again.

The lack of quorum significantly affected the approval of combinations by the CCI, except in the case of filings made under the Green Channel route. Under the Competition Act, 2002, (*Competition Act*) the quorum for any meeting of the CCI where a decision has to be taken (including decisions of combinations filed with the CCI) is *three members*. It is unprecedented in the CCI's history of 11 years that the CCI has remained inquorate.[13]

To bypass the quorum requirement, the Ministry of Corporate Affairs

7 *Google International LLC*, CCI, Ref. No. C-2022/03/913 (30 June 2022).
8 While the parties also offered a second voluntary modification, it has been redacted from the public order.
9 *Culver Max Entertainment Private Limited, Bangla Entertainment Private Limited and Zee Entertainment Enterprises Limited,* CCI, Ref. No. C-2022/04/923 (4 October 2022).
10 *Umang Commercial Company Private Limited and Aditya Marketing and Manufacturing Private Limited,* CCI, Ref. No. C-2022/07/952 (30 August 2022).
11 *PayU Payments Private Limited,* CCI, Ref. No. C-2022/04/920 (5 September 2022).
12 Appointment of Dr. Sangeeta Verma (https://economictimes.indiatimes.com/news/india/govt-appoints-sangeeta-verma-as-acting-chairperson-of-cci/articleshow/95084896.cms).
13 At the time of the publication of this article, the MCA is yet to appoint a regular chairperson.

(*MCA*), invoked the 'doctrine of necessity' on 9 February 2023,[14] since when the CCI has cleared all pending combinations. It is expected that the CCI will continue to approve combinations under the doctrine of necessity until the appointment of a regular Chairperson or additional members(s) to make the CCI quorate again.

The Competition Amendment Bill was Tabled before the Parliament

The Competition Amendment Bill, 2022[15] (*Bill*), introduced in the Indian Parliament in August 2022, proposes to bring a slew of changes to Indian competition law, not least to the Indian merger control regime. The key changes proposed to the merger control regime are set out below.

Introduction of Deal Value Thresholds

The most notable change proposed to be brought by the Bill to the Indian merger control regime is the introduction of 'deal value' thresholds for determining whether a merger, amalgamation or acquisition qualifies as a combination and requires notification to the CCI.

Presently, Section 5 of the Competition Act only prescribes asset and turnover based thresholds. If either test is met and provided that no exemption is available, the parties to such combination are required to notify it to the CCI. The Bill proposes the introduction of an additional threshold based on 'deal value', which will require notifications where: (a) the transaction has a deal value of more than INR 2,000 crores; and (b) where either party has 'substantial business operations in India'. The proposed introduction of the deal value threshold stems primarily from concerns that transactions in the digital and infrastructure spaces escaping the CCI's radar because the assets and turnover of the parties to such transactions are below the current jurisdictional thresholds.

The Parliamentary Standing Committee on Finance, in its December report on the Bill (*PSC Report*),[16] expressed concerns on the lack of clarity about the computation of the deal value threshold. It recommended that the methodology for computing the deal value threshold should be specified by regulations, and that the deal value threshold should only apply where the target enterprise has substantial operations in India.

With the INR 2,000 crore deal value threshold being rather low, and the CCI yet to adopt a standard for assessing 'substantial business operations' in India, it remains to be seen whether the introduction of the deal value threshold will open the floodgates to additional merger filings, some of which may not have any AAEC in India.

Shorter Merger Review Timelines

Presently, the CCI has 30 working days to arrive at its *prima facie* view on whether a combination raises any concerns of AAEC in India, and 210 calendar days to arrive at an overall decision on a transaction. The Bill seeks to shorten these timelines – 20 calendar days for the CCI to form its *prima facie* view and 150 calendar days for the CCI to arrive at a decision, with a maximum extension of 30 calendar days. The Bill also expedites the timelines for all other steps in the merger review process, potentially resulting in quicker approvals but also adding pressure on parties to combinations as well as the CCI case teams.

The expedited merger timelines have been met with resistance from the CCI. The PSC Report has recommended that the existing timelines be retained.

Amendment of the Definition of 'Control'

The CCI's definition of 'control' has been fluid, and the standard has significantly shifted over the years – moving from 'decisive influence' in the CCI's early decisional practice to the more recent 'material influence', considered to be the lowest standard of control. While the CCI has time and again used the 'material influence' standard of control in its decisional practice, the Bill finally codifies this standard. However, lack of explicit guidance and spelling out of the matrix of factors which need to be assessed in determining whether the standard is met, potentially takes away from the clarity that the amendment intends to bring about. This has been recognised by the PSC Report, which has recommended that 'material influence' be specified by regulations.

The final shape that the Bill takes is yet to be seen.

The CCI Continued with its Mission of Facilitating the Ease of Doing Business and Reducing the Compliance Burden on Parties

The Ministry of Corporate Affairs Renewed the Target Based Exemption for an Additional 5 Years

The Target Based Exemption, which exempts the notification of transactions where the target enterprise *either* has assets of less than INR 350 crores in India or has a turnover of less than INR 1000 crores in India, was set to expire in March 2022. The MCA extended the applicability of the Target Based Exemption for an additional 5 years (until March 2027), without changing the alternative asset and turnover thresholds.[17]

The CCI Introduced a Revised Form II

In April 2022, the CCI introduced a revised, more simplified Form II (*Long Form*),[18] which substantively changed the format and the scope of queries posed to transacting parties whose post-combination

14 CCI to invoke doctrine of necessity (https://economictimes.indiatimes.com/news/economy/policy/competition-commission-set-to-invoke-doctrine-of-necessity-principle-to-examine-ma-deals/articleshow/97559487.cms).

15 The Competition (Amendment) Bill, 2022 (http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf).

16 Standing Committee on Finance, *Report on the Competition (Amendment) Bill, 2022* (https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf).

17 *Gazette of India*, 16 March 2022.

18 CCI revises long form for Mergers & Acquisitions (https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1813318).

market shares exceed 15% in the case of horizontal overlaps and 25% in the case of vertical linkages. The revised form, which came into effect on 1 May 2022, was aimed at making the assessment process more objective and focused, and, in doing so, did away with a number of onerous information requirements and duplicated queries which riddled the old Form II.

The new Form II, with its streamlined format, fewer queries and subject-wise clubbing of queries has reduced the compliance burden on filing parties to some extent. While the revised Form II does increase the duration for which market-facing data is to be provided from three years to five years and seeks additional details in relation to the vertically overlapping and complementary activities of the parties, the revised Form II has overall been welcomed by the industry. As part of the announcement of the revised Form II, the CCI also expressed its intention to issue a guidance note on the revised Form II in the future, another move that is sure to make the notification process more objective.

The MCA Extended the Suspension of the 30-day Filing Rule

Section 6 of the Competition Act requires transactions to be notified to CCI within 30 days of the trigger event (such as the execution of transaction documents). This requirement was suspended for five years through a notification passed in June 2017. In June 2022, the MCA extended the suspension period for another five years (until 28 June 2027).[19]

The continued suspension of this statutory requirement, considered by most to be onerous and impractical, means that transacting parties can continue to file a notification with the CCI at any stage after the trigger event but prior to the completion/ closing of a transaction.

Big Tech - A More Onerous Notification Framework Proposed

The winter session of the Parliament in December 2022 saw the release of the Standing Committee on Finance's report on 'Anti-Competitive Practices by Big Tech Companies' (*Big Tech Report*)[20] which presented the Standing Committee's views on mergers and acquisitions by large technology enterprises (*Big Tech Companies*). The Big Tech Report acknowledges that certain mergers and acquisitions are not captured by the Competition Act because they do not meet the thresholds of assets and turnover.

While the deal value thresholds have been generally recognised as one possible solution to the issue, the Big Tech Report recommends that certain Big Tech Companies (specifically recognised as 'Systematically Important Digital Intermediaries') inform the CCI of any intended merger/ acquisition, where the merging entities or the target enterprise provide services in the digital sector or enable the collection of data, *irrespective of whether it is notifiable to the CCI*. The Big Tech Report further recommends that Big Tech Companies inform the CCI of such proposed mergers and acquisitions prior to their implementation.

While these recommendations would impose arduous requirements on such Big Tech Companies, it is a matter of time to see precisely how such recommendations would be implemented and whether they are included in the Bill or other legislative proposals. In this regard, it should be noted that, in February 2023, the MCA set up a Committee on Digital Competition Law (*CDCL*) to assess the need for a separate law on competition in digital markets.[21] The CDCL[22] will review whether existing provisions in the Competition Act and the rules and regulations under the Competition Act are sufficient to deal with the challenges posed by the digital economy. The CDCL has been given a deadline of three months to submit its report, including a draft Digital Competition Act.

Conclusion

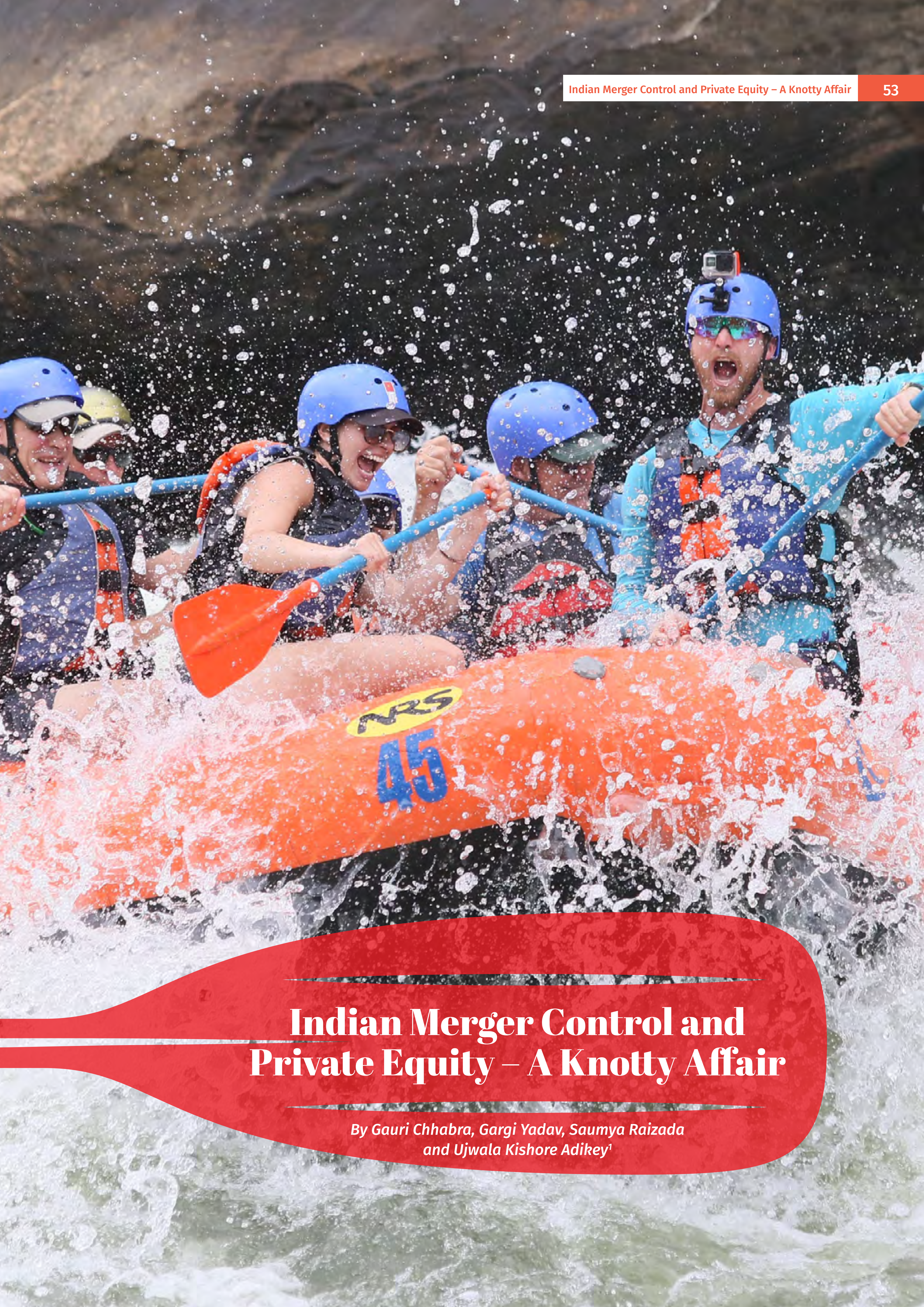
2022 has been an important year for the CCI, with a number of changes introduced by it focused squarely on making the merger control regime more business friendly. However, concerns persist. The CCI's revised approach on the Item 1 and Item 2 Exemptions, the potential introduction of deal value thresholds and shortened merger review timelines, as well as the potential ambiguity in the standard of control, all have the potential to compromise the positive work done by the CCI to make merger notifications less burdensome and more objective. 2023, again, promises to be a big year for the CCI, with a new Chairperson at its helm, the Bill potentially seeing the light of the day and the report on digital competition law. As always, it is hoped that the CCI and the legislator continue to maintain the appropriate balance between ensuring competition in Indian markets and making it easier for parties to undertake business in India.

19 *Gazette of India*, 16 March 2022.

20 Standing Committee on Finance, *Report on Anti-Competitive Practices by Big Tech Companies* (https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf).

21 MCA orders constitution of the Committee on Digital Competition Law (https://images.assettype.com/barandbench/2023-02/7e93ae0c-05b9-4565-9b5b-a9a6103ac6ff/Order.pdf).

22 The Firm's Managing Partner, Mrs. Pallavi Shroff, has been nominated by the Government as a member of the CDCL.



Indian Merger Control and Private Equity – A Knotty Affair

By Gauri Chhabra, Gargi Yadav, Saumya Raizada and Ujwala Kishore Adikey[1]

Introduction

The Indian merger control regime, that came into force on 1 June 2011, provides for the *ex-ante* review of qualifying mergers in order to prevent any transaction which cause or are likely to cause an appreciable adverse effect on competition in relevant markets in India (*AAEC*). The Competition Act, 2002 (*Competition Act*) requires the prior notification to the Competition Commission of India (*CCI*) of acquisitions of shares, voting rights, assets or control, as well as mergers or amalgamations, that meet certain jurisdictional thresholds (called *combinations*) and that cannot avail of any of the exemptions provided under the Competition Act or related regulations. No such combination can come into effect until it has been approved by the CCI, whether or not subject to conditions, or a 210 day period has passed without a CCI order.

The CCI has received more than 1000 combinations up to now, and it has so far not blocked any combination. It has imposed remedies only in 25 combinations.[2] The CCI has proved itself to be a highly versatile and business friendly regulator, understanding and accommodating industry concerns, for example by introducing the fast-track approval process under the green channel filing procedure and shifting to e-filings and virtual consultations.

In October 2022, the Chairperson of the CCI, Mr. Ashok Kumar Gupta retired, leaving only two members in the CCI. Since the CCI requires a quorum of three members to make orders in relation to combinations, it could not approve the more than 20 notified transactions, and many were held in suspense. In early February 2023, the CCI, after seeking guidance from the Ministry of Corporate Affairs and the Attorney General of India, invoked the doctrine of necessity and approved the pending combinations. Further, the appointment of a new Chairman is under way and the process should be completed soon.

The CCI has proven its mettle and shown to the world at large that is here to expedite the approval process and conform with the overall objective of facilitating ease of doing business in India. However, certain industry concerns are long standing and remain to be addressed. These include concerns raises by the private equity (*PE*) industry that has been awaiting clarity on certain key merger control issues for a long time.

The significance of the PE industry for the Indian economy cannot be overstated. PE investments bolster the economy and encourage overall technical and entrepreneurial advancement. In 2022, PE investments in Indian companies stood at USD 46 billion.[3] Given the nature of PE investments (with crunched deal timelines and timely exit requirements), regulatory certainty is key for PE investors. The Indian government has been taking steady steps to improve the ease of doing business ranking of India. This includes taking steps towards cutting red tape and improving the regulator-user interface. To this end, the CCI has been keen on studying and analysing the PE sector and addressings it concerns. In December 2020, the CCI commissioned a market study on PE investors and the competitive impact of common ownership (*PE Market Study*).[4] However, the PE Market Study is yet to be published.

Given this background, some of the recent merger control developments that are likely to have a bearing on PE and some common CCI-related issues faced by PE players are discussed below.

Brief Overview of the Indian Merger Control Regime

The Indian merger control regime is mandatory and suspensory in nature. Combinations that are notifiable in advance to the CCI can be filed in three types of forms.

Types of Notifications

Depending on the nature of the transaction and its impact of market structure, a notifying party can either file a combination under Form I (short form) or Form II (long form). A Form I (short form) may be filed if the post-combination combined market share of the parties is less than: (a) 15% in horizontally overlapping markets; and (b) 25% in any vertically related markets. If these market share thresholds are exceeded, a Form II (long form) is recommended.

In August 2019, the CCI introduced a fast-track approval process for certain combinations, known as the 'Green Channel' route. Under this route, combinations where there are no horizontal overlaps, vertical relationships or complementary activities between the parties (including their group entities and affiliates)[5] are 'deemed approved' on filing a shorter version of the Form I (short form) with the CCI.

In April 2022, the CCI revised the details required for a Form II filing. In doing so, 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. At the same time, it increased the duration of market-facing data required from 3 to 5 years and increased the scope of information required to include detailed analysis of vertical and complementary activities and the presence of the parties in such integrated markets.

Exemptions from a CCI Notification

Three types of exemptions are available under the Indian merger

1 Gauri Chhabra, Partner, Gargi Yadav, Consultant, Saumya Raizada, Associate, and Ujwala Kishore Adikey, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 As on 3 March 2023.

3 *PE-VC investments in India fell by 29% in 2022*, The Economic Times (2 January 2023).

4 *CCI To Conduct Market Study on Private Equity Investments: Chairperson*, Bloomberg Quint (4 December 2023). The study has not yet been completed.

5 Affiliates include companies in which the acquirer has a shareholding in excess of 10%, or the right to appoint a director, or any other special rights not available to ordinary shareholders.

control regime: (a) the *de minimis* exemption (available based on the assets and turnover of the target);[6] (b) exemptions for certain types of transactions that are not expected to adversely affect competition and therefore need not normally be notified (as set out in Schedule 1 to the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations 2011 (*Combination Regulations*)); and (c) certain specified types of transactions (such as transactions relating to banking companies,[7] and nationalized banks).[8]

Of these, the exemption for minority acquisitions is most pertinent from a PE perspective. This is contained in Item 1 of Schedule I of the Combination Regulations that exempts transactions involving non-strategic acquisitions of shareholding of less than 25% (*Item 1 Exemption*). Parties may avail of the Item 1 Exemption if the acquisition: (a) does not entitle the acquirer / its group to hold 25% or more of the total shares / voting rights of the target; and (b) is made either solely as an investment (*SIP*) or in the ordinary course of business (*OCB*); and (c) does not lead to an acquisition of control. Over time (as discussed below), the CCI has interpreted key concepts like '*control*', '*ordinary course of business*', and '*solely as an investment*' in a manner that effectively renders the Item 1 Exemption mostly redundant. Much to the discontent of the financial investors, such diluted and skewed interpretations of the Item 1 Exemption makes it elusive at best and a mirage at worst.

The Indian Merger Control Regime and PE Deals – Some Key Concerns

There are a number of key questions that have been preoccupying the PE industry *vis-à-vis* the Indian merger control regime. For example, should the PE investor be deemed to be in control of the portfolio company even if it is acquiring less than a 10% shareholding and qualified voting rights in the target? What is the perimeter of rights and investment thresholds within which PE deals are safe from the CCI's radar?

Some important recent developments in the merger control regime that may have a bearing on the assessment and approval of PE deals are discussed below.

Control – Diluting Standards.

In September 2022, the CCI published a revised version of the '*Frequently Asked Questions*' (*FAQs*) on its website. While the FAQs do not have the force of law, they are indicative of the CCI's thought process and the likely approach it will take. Prior to the introduction of the FAQs, there was uncertainty regarding the definition of '*control*'. The Competition Act defines '*control*' rather circuitously, as "*controlling the affairs or management by one or more enterprises, either jointly or singly, over another enterprise or group; or one or more groups, either jointly or singly, over another group or enterprise*". Before the revisions, the CCI's interpretation of control oscillated between the '*material influence*' standard[9] and the '*decisive influence*' standard.[10] In the FAQs, the CCI has unequivocally adopted the '*material influence*' standard (the lowest threshold of control) as being indicative of '*control*'. The FAQ note that control exists regardless of the degree thereof. The FAQs further clarify that '*material influence*':

- implies the presence of factors that give an enterprise / person the ability to influence the affairs and management of the other enterprise, including factors such as shareholding, special rights, status and expertise of an enterprise or person, board representation, structural / financial arrangements;
- includes within its scope *de facto* control (i.e., control over half of the votes actually cast at a meeting regardless of actual shareholding held) and *de jure* control (i.e., shareholding conferring more than 50% of the voting rights of the target); and
- may be classified as negative control, positive control, sole control or joint control.

Therefore, the CCI has significantly diluted the threshold of what may constitute control. This is critical from a PE perspective as it significantly narrows the scope of what may now constitute non-controlling transactions (that typically qualify for an Item 1 Exemption).

From Broad Based Assessment to Narrow Assessment

Until recently, the CCI considered the range of rights being acquired in a transaction on an aggregated basis to assess if control was being acquired and consequently whether the Item 1 Exemption was available. In its previous decisional practice, the CCI had for a long time considered the acquisition of a board seat together with a bouquet of certain types of rights attached to a minority shareholding (such as rights to approving, adopting, amending, or modifying annual budget and business plans[11] / changes to the dividend policy[12] / charter documents of the target)[13] as being indicative of control and hence disqualifying such combinations from the ambit of the Item 1 Exemption. However, in recent cases - *Trian / Unilever PLC,*[14] *Trian Fund / Invesco Limited*[16] (together, the *Trian Cases*) and the *PI*

6 Investors investing in smaller companies (in terms of turnover and assets) can avail of the *de minimis* target based exemption (*Target Exemption*). The Target Exemption is available for investments in a target that has assets not exceeding INR 350 crores in India or turnover not exceeding INR 1000 crores. This exemption may not be available when making smaller investments in a larger target. In March 2022, the Government of India extended the Target Exemption until 28 March 2027.

7 Notification regarding exemption of banking companies in respect to which Central Government has issued notification under Section 45 of the Banking Regulation Act, 1949, S.O. 1034(E) (11 March 2020).

8 Notification regarding exemption of nationalized banks from Section 5 and 6 of the Competition Act, S.O. 2828 (E) (30 August 2017).

9 *UltraTech Cement Limited/ Jaiprakash Associates Limited,* CCI, Ref. Ref. No. C-2015/02/246 (12 March 2018).

10 *Aditya Birla Chemicals Limited / Grasim Industries Limited*, CCI, Ref. No. C-2015/03/256 (31 August 2015).

11 *Alpha TC Holdings / Tata Capital Growth,* CCI, Ref. No. C-2014/07/192 (9 September 2014).

12 *Caladium Investment Pte. Limited / Bandhan Financial Services Limited,* CCI, Ref. No. C-2015/01/243 (5 March 2015).

13 *Alpha TC Holdings / Tata Capital Growth,* CCI, Ref. No. C-2014/07/192 (9 September 2014).

14 *Trian Fund / Unilever PLC*, CCI, Ref. No. C-2022/06/940 (17 June 2022).

Opportunities Fund / Future Retail Limited (*PI Opportunities Case*),[15] the CCI has taken a view that the acquisition of a board seat alone (without concomitant special rights) gives the acquirer the ability to participate in the affairs of the target entity and, as such, cannot avail of the Item 1 Exemption. This inevitably opens the door for more CCI notifications being made by PE firms in the future given that most PE deals see a nominee director being appointed on the board of investee companies to protect the investment.

Common Directorships

Given that PE firms often have sector-based specialisations, they are likely to hold investments in competing entities. The CCI in the *PI Opportunities Case*[16] has taken a very stringent view of the ability of a board director to access the competitively sensitive information of the target and viewed this as a significant competition concern. In several earlier cases as well, the CCI alluded to its reservations about issues arising from common directorships[17] and has viewed common directorships amongst competitors (and the potential flow of confidential information of the companies through the common directors) unfavourably. To this end, PE players will have to be careful in their selection of nominee directors and managing information flows within their hierarchies.

Extinguishing the OCB Limb of the Item I Exemption

According to the earlier decisional practice of the CCI, a transaction was deemed to be in the OCB if it was "*frequent, routine and usual*" and if the activities were in the nature of revenue transactions.[18] The CCI also held that whether a transaction was revenue or capital in nature needed to be determined by looking at the nature of the business activities of the enterprise in question. In the context of securities, the CCI has observed[15] that "*transactions in ordinary course of sale and purchase of securities are done solely with the intent to get benefited from short term price movement of securities*" which emphasises the underlying aspects of frequency, duration of holding, intent, etc. In the *Trian Cases* and the *PI Opportunities Case*,[17] the CCI has effectively annihilated the possibility of a PE transaction ever availing of the OCB route. In the *PI Opportunities Case*, the CCI narrowly interpreted PE investments as being definitionally in the nature of '*investments*' that will rarely fall in the SIP bucket and will certainly not be considered in the OCB bucket.

Effectively extinguishing the availability of the OCB route to PE deals, coupled with the diluted definition of '*control*' (courtesy of the FAQs) and the interpretation that the acquisition of even a single board director leads to material influence, is concerning from the perspective of any financial investor. Any PE deal that entails the acquisition of any special right (not available to an ordinary shareholder of the target) or a board seat or access to information of the target would deprive the transaction of the Item 1 Exemption, regardless of the shareholding / voting rights being acquired. For instance, in *Caladium Investment Pte. Limited / Bandhan Bank Limited*, the acquisition of only a 4.99% shareholding together with certain affirmative voting rights with respect to certain reserved matters was notified to the CCI.[19]

Given the nature of minority protection rights that typically get woven into most PE transactions (such as information rights, board seats and veto rights), most PE transactions that meet the jurisdictional thresholds and entail overlaps, are headed toward a mandatory visit to the CCI.

Potential Impact of the Competition Amendment Bill (*Bill*)

The Bill, introduced in the Indian Parliament in August 2022 and likely to take effect this year, proposes some key changes in the Indian merger control regime. In particular, the Bill moots a deal value threshold of INR 2000 crore together with an India nexus element as an alternative basis for notification to the CCI. If this proposal bears fruit, many PE deals that do not currently meet asset / turnover-based thresholds may require approval by the CCI.

Overreach in Assessment of Overlaps

One of the pivotal aspects of merger control assessment is an assessment of overlaps between the acquirer side and the target side. The CCI requires that, for such an assessment, all the downstream affiliates of the target and all the downstream affiliates of the ultimate parent entity of the acquirer, are considered. The information mapping obligation on the acquirer is clearly more onerous given that its mapping begins from the ultimate parent entity of the acquirer group.

From a PE firm's fund structure perspective, finding the ultimate parent entity and identifying its affiliates (especially given the widened scope of what constitutes '*control*') is a challenging exercise. More often than not, a PE fund's structure involves layers of entities with differing governance models and complex holding structures (which may involve several funds being housed within a fund) that makes determination of the ultimate parent entity a challenging task. Further, given that PE firms often invest in blind pool vehicles, it is challenging to ascertain the ultimate parent entity and the affiliates to undertake the overlaps assessment in accordance with the CCI's requirements.

Given this, applying a simplistic approach to mapping overlaps from the ultimate parent entity of an acquirer fund (that typically rests atop a complex web of entities that may be operating separately with their own governance structures) is not only misplaced but also highly onerous (as overlap mapping may need to be undertaken vis-à-vis portfolio companies held by unrelated funds under the same

15 *PI Opportunities Fund I / Future Retail Limited*, CCI, Order under Section 43A of the Act pertaining to Ref. No. M&A/Q1/2018/18 (30 September 2022).
16 *Ibid.*, at para. 37.
17 *Canary Investment Limited and Link Investment Trust II / Intas Pharmaceuticals Limited*, CCI, Order under Section 43A of the Act pertaining to Ref. No. C-2020/04/741 (30 April 2020).
18 *Reliance Jio Infocomm Limited*, CCI, Order under Section 43A of the Act pertaining to Ref. No. C-2017/06/516 (11 May 2018).
19 *Caladium Investment Pte. Limited / Bandhan Bank Limited, Bandhan Financial Services Limited and Bandhan Financial Holdings Limited*, CCI, Ref. No. C-2015/05/278 (25 June 2015).

parent entity). To ease the challenges highlighted above and attract more PE opportunities, it may be helpful if the CCI provides guidance to distinguish between: (a) the '*group*' that is ultimately part of the transaction, from the other '*group*' of funds that are not related to the transaction; and (b) funds established by different general partners / investment committee / advisory committee. The CCI should be careful of not casting the net of entities to be mapped too wide, given that, in most situations, a PE firm's stake / interest in a portfolio company is unlikely to translate into anything that impacts the portfolio company's competitive decisions.

Apart from this technical paternity test, there is the operational challenge of procuring correct and detailed information from the relevant portfolio companies (that have little / no incentive or legal obligation to share such information) to furnish information in relation to the merger filing (for which the legal liability ultimately vests with the notifying party, i.e., the acquirer in case of acquisitions). In light of the above, it would be prudent for deal makers to budget extra time for the merger filing process when chalking out deal timelines. Separately, a lot of this operational pain could be alleviated if the CCI allows the PE firms to submit information from portfolio companies on a best-efforts basis or asks for portfolio company related information only in problematic transactions.

The Road Ahead

Given the key developments in the Indian merger control regime that impact PE deals, as discussed above, and while one awaits the PE Market Study, deal makers have good reason to be wary. The CCI is taking the *'substance over form'* approach rather strictly. This may render any innovative deal structuring to circumvent CCI approval requirement futile. Whether it is on-market operations or *post facto* offerings of directorships to the acquirer or manoeuvrings not captured in the transaction documents, the CCI is likely to adopt an *effects-based* approach to determine whether a notification of a transaction is required. Further, PE players need to be careful regarding internal documentation regarding transactions as the CCI may rely on this to infer whether there was an '*intention*' to acquire '*control*'. Another note of caution relates to the directors being appointed to the board of portfolio companies. It may be useful to institute and observe strict protocols regarding who can access the commercially sensitive information of a portfolio company within the fund and to construct Chinese walls between information of competing portfolio companies. Additionally, care must be taken by the CCI during overlaps assessment and deal times adjusted to account for the extracting information from portfolio companies. While one might expect the CCI to address many of the industry concerns in the times to come, dealmakers are advised to tread softly, for they tread a regulatory minefield.

The "Ordinary Course of Business" Exemption: A Dead Letter?

By Aparna Mehra, Ritwik Bhattacharya and Neetu Ahlawat[1]

Introduction

India follows a mandatory merger control regime and any transaction which exceeds the specified asset / turnover thresholds must be notified to the Competition Commission of India (*CCI*) for its prior approval. Given the wide net cast by the mandatory regime, the Government of India and the CCI have rightly introduced various "*exemptions*" for transactions which meet the thresholds but are ordinarily unlikely to cause any competition concerns in India.

One key exemption introduced by the CCI under the Merger Control Regulations is for minority share acquisitions. This is an important exemption and one that is most frequently relied upon by the M&A world. The intention in introducing this exemption was to aid "*ease of doing business*", by filtering out certain minority share acquisitions which are made purely for financial gain and do not provide the acquirer with any control over the target. Such transactions do not impact the competitive landscape in any manner or "*move the needle*" in any way which requires regulatory oversight. It was a much-needed exemption as a large number of such minority share acquisitions occur in the country on a regular basis (both on-market as well as through private deals) merely for financial gain. It would be overly burdensome to require notification of such transactions (which do not result in any change in the controlling structure of the target) merely because of the size of the target.

However, the true intent and objective of this exemption seems to have been diluted by CCI practice and lost over time.

The Minority Acquisition Exemption

The Merger Control Regulations exempt from notification an acquisition of less than 25% of the shares or voting rights of an enterprise made solely as an investment (*SIP*) *or* in the ordinary course of business (*OCB*), not leading to an acquisition of control (*Minority Acquisition Exemption*). Thus, to avail of the Minority Acquisition Exemption, a transaction must necessarily meet all three conditions:

- the shareholding condition (less than 25% shareholding);
- the purpose condition (SIP *or* OCB); and
- the control condition (no acquisition of control).

It should be noted that the purpose condition (the second above) provides that the transaction must be SIP "*or*" in the OCB. These are therefore alternative conditions, and if either is met, the purpose condition is met. This article is focused on the OCB limb of the purpose condition.

Interpretation of the Minority Acquisition Exemption

Painting SIP and OCB with The Same Brush

In its early decisional practice relating to the Minority Acquisition Exemption, the CCI largely treated SIP and OCB as the same condition (rather than two different alternative conditions). The CCI's orders initially did not provide separate reasoning in relation to the availability / unavailability of SIP and OCB and essentially painted them with the same brush. In orders where detailed reasoning was provided for the unavailability of SIP, the conclusion that followed was that the transaction was neither "*SIP nor in the OCB*"[2] (without any separate reasoning for the unavailability of OCB being provided). However, the CCI subsequently corrected for this.

Initial Interpretation Given to "OCB"

The first detailed decision of the CCI in relation to the interpretation of OCB (as a separate limb) was in the *Telecom Spectrum* case[3] in 2018 (although this case related to a different exemption which also used the term OCB it was clearly applicable to the term in Minority Acquisition Exemption). The CCI held that the term OCB was meant to refer to transactions which were "*frequent, routine and usual*" and "*corresponds to revenue transactions for competition law purposes*". The CCI further clarified that "*revenue transactions*" were short term transactions, did not impact operating potential, and were reflected in the profit and loss account or income statement of the enterprise, as opposed to "*capital transactions*" which affected non-current items such as fixed assets and long-term debt and were reflected in the position statement of an enterprise.

The CCI also fairly noted that what constituted revenue and capital transactions varied from business to business, so that a capital transaction for one business might be a revenue transaction for another and *vice versa*. For instance, it explained that, for a seller of machinery, the sale of machinery might be an activity in the OCB as the same constituted its regular trade while for another entity, who was using a machine to produce goods for sale, the sale of such machine would be a capital transaction. Further, furniture held for sale by a furniture seller would be a current asset but, for the same business, the stock of furniture held for use in office furnishings would be a non-current asset.

This was the first real guidance provided by the CCI on the term "*OCB*" and provided much needed clarity to stakeholders. Further, it rightly considered the nature of business activities of the acquirer as a key consideration to assess whether the transaction in question was "*frequent, routine and usual*" for that business.

Shifting the Goalposts: Duration of Investment Becomes The Key Test

In March 2022, in the *TPG* case,[4] the CCI held that transactions in ordinary course of sale and purchase of securities were done "*solely with the intent to get benefited from short term price movement of securities*". The CCI also noted that acquisition in the OCB of sale and purchase of securities "*neither entails right or ability of any of the party to the acquisition to participate in decision making process of another party(ies) to the acquisition nor results into access to commercially sensitive information nor envisages any other agreement or understanding having commercial significance*".

1 Aparna Mehra, Partner, Ritwik Bhattacharya, Principal Associate, and Neetu Ahlawat, Senior Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 *SCM Soilfert Limited*, CCI, Ref. No. C-2014/05/175 (10 February 2015); *Zuari Fertilisers and Chemicals Limited and Zuari Agro Chemicals Limited*, CCI, Ref. No. C-2014/06/181 (10 February 2015); *EMC Limited*, CCI, Ref. No. C-2015/07/293 (26 April 2017).

3 *Reliance Jio Infocomm Limited*, CCI, Ref. No. C-2017/06/516 (11 May 2018). Before this, the CCI in another case (*ITC Limited*, CCI, Ref. No. C-2017/02/485 (11 December 2017)), had held that the purchase of intellectual property of a competitor *"cannot be construed as being a transaction in the ordinary course of its business"*. However, the CCI still concluded that the exemption was unavailable given that neither SIP nor OCB was available.

4 *TPG Growth v. SF Markets Pte. Limited*, CCI, Ref. No. C-2022/02/905 (23 March 2022).

Therefore, unlike the *Telecom Spectrum* case, the CCI did not in this case consider the business activities of the investor / acquirer at all, which should typically be a key consideration to assessing whether the transaction is "*frequent, routine and usual*" for that kind of investor (as was the approach followed by the CCI in the *Telecom Spectrum* case).

This decision significantly diluted the ability of various private equity and other institutional investors to rely on the OCB limb of the Minority Acquisition Exemption as one of the key yardsticks that the CCI seemed to consider for OCB was the duration of the investment.

Therefore, investors undertaking medium to long term acquisitions as financial investments (merely for financial gain, without any controlling rights), effectively cannot rely on the OCB limb even though their "*frequent, routine and usual*" business is to undertake such investments, simply because the duration of the investment may be more than 1-2 years. This significantly dilutes the scope and availability of the exemption and brings back transactions that have no competitive effect in the market under the radar of the CCI. For instance, the average holding period for private equity players has been above 4 years in Europe since the start of the millennium[5] and, in India, this is estimated to be 5.4 years on average.[6] Data also reflects that financial investments held for longer periods tend to produce higher returns. However, all such "*purely financial*" investments cannot avail of the OCB limb of the Minority Acquisition Exemption merely owing to the holding period of the investments (notwithstanding that they may not impact the competitive landscape in any manner).

The Final Nail in the Coffin

Most recently, in September 2022, in the *PI Fund* case[7] (involving acquisition by an investment fund) the CCI has diluted the OCB limb even further. The CCI held that no "*investment*" can rely on the OCB limb of the Minority Acquisition Exemption. The reasoning provided by the CCI was that all investments were "*capital transactions*" (as discussed in the *Telecom Spectrum* case) and, therefore, no "*investment*" can rely on the OCB limb of the exemption. A similar finding was arrived at by the CCI in the *Trian* case.[8]

Given this interpretation of OCB, it is now next to impossible to rely on this exemption. Given that the Minority Acquisition Exemption is meant for share acquisitions only (and not for other form of combinations such as mergers), the disqualification of share acquisitions (which are all generally considered to be "*investments*") from the ambit of the exemption seems rather contradictory to the very purpose of its introduction. Such an interpretation is likely to lead to the OCB limb being rendered a dead letter and raises the question as to what transactions if any can rely on this exemption if "*investments*" of any nature are excluded from its ambit.

Such outcomes are likely to have a huge impact on the Government's "ease of doing business" policy in India, impose significant transaction costs and compliance burden on parties, as well as impact the overall investment climate and appeal of India. Therefore, an alignment of the spirit and intent of the Minority Acquisition Exemption with its actual application by the CCI is warranted.

Conclusion

The spirit and purpose of the Minority Acquisition Exemption was to provide relief to investors and weed out transactions which would likely not cause any appreciable adverse effect on competition in the Indian market, given the minority non-controlling shareholdings involved in such transactions. It is important that the spirit and purpose of the investment is not overlooked while interpreting it.

The approach adopted by the CCI in the *Telecom Spectrum* case (of considering the nature of business activities of the acquirer while determining whether the transaction was in its OCB) seemed to be a balanced approach, and it would be helpful to revert to that approach (rather than the more recent approach of altogether disqualifying "all" investments). The approach of considering the business activities of the acquirer on a case-to-case basis has a reasonable foundation as they are a good indicator for determining whether the purpose and control conditions are both satisfied. For example, if the business activities of an acquirer clearly indicates that it undertakes share acquisitions for financial gain (purpose) without gaining any control over the target (control) on a routine basis (in the OCB), the exemption should be available to such entities, as such transactions are unlikely to cause any competition concerns in India.

Such an interpretation (focusing on business activities) will also be in line with jurisprudence from other antitrust jurisdictions which also have an OCB exemption as well (such as, Canada, where OCB transactions are considered as: "*a routine business transaction, that is, the transaction is one which firms carry out in the conduct of business in general*").[9] Further, it will also be consistent with the interpretation provided to OCB under other statutes in India by numerous other courts, including the Supreme Court of India.[10]

Accordingly, the interpretation of the OCB limb should be revisited, to ensure that it does not remain a dead letter in the statute and is interpreted in such a manner which fixes the issue for which it was originally introduced.

5 *Prolonged Private Equity Holding Periods: Six Years Is the New Normal*, Juha Joenväärä, Juho Mäkiaho and Sami Torstila, The Journal of Alternative Investments Summer 2022, (15 June 2022) (https://jai.pm-research.com/content/early/2022/06/15/jai.2022.1.165).

6 *Private equity holding periods reach all-time high in 2020,* Private Equity Wire (22 April 2021) (https://www.privateequitywire.co.uk/2021/04/22/299092/private-equity-holding-periods-reach-all-time-high-2020).

7 *PI Opportunities Fund – Pioneer Investment Fund/ Future Retail Limited,* CCI, Ref.No. M&A/Q1/2018/18 (30 September 2022).

8 *Trian Partners AM Holdco, Limited and Trian Fund Management L.P.,* CCI, Ref. No. C-2021/01/810 (30 September 2022).

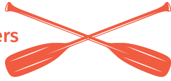
9 See Section 111(a) of the (Canadian) Competition Act, R.S.C. 1985, C. 34 read along with its guidance notes.

10 Guidance Note under Section 188 of the Companies Act issued by the Institute of Company Secretaries of India; *Anuj Jain v. Axis Bank and Others,* Supreme Court, (2020) 8 SCC 401 (26 February 2020)*; Seksaria Biswan Sugar Factory Limited v. Commissioner of Income Tax, Bombay,* Bombay High Court, AIR 1950 Bom 200 (19 September 1949) *and Sheonandan Singh and Others v. Jeonandan Dusadh and Others,* Calcutta High Court, 1908 SCC OnLine Cal 177 (30 July 1908).

Glossary

Abbreviation	Terms
AAEC	Appreciable Adverse Effect on Competition
AI	Artificial Intelligence
Bill	Competition (Amendment) Bill, 2022
CAT	Competition Appeal Tribunal
CCI	Competition Commission of India
CDCL	Committee on Digital Competition Law
CLRC	Competition Law Review Committee
CMA	Competition and Markets Authority
COMPAT	Competition Appellate Tribunal
Competition Act	Competition Act, 2002
Consumer Protection Rules	Consumer Protection (E-commerce) Rules, 2020
CSI	Competitively Sensitive Information
DCA	Digital Competition Act
DG	Director General, Competition Commission of India
DMA	Digital Markets Act, 2022
DPDP Bill	Digital Personal Data Protection Bill
EC	European Commission
EU	European Union
FAQs	Frequently Asked Questions
FCO	Federal Cartel Office
FDI Policy	Foreign Direct Investment Policy
GPBS	Google Play Store Billing System

Abbreviation	Terms
HPAC	High-Powered Advisory Committee
MCA	Ministry of Corporate Affairs, Government of India
MFN	Most-favoured Nation
MRTP Act	Monopolies and Restrictive Trade Practices Act, 1969
MSMEs	Medium, Small or Medium-Sized Enterprises
NCLAT	National Company Law Appellate Tribunal
NOCs	No-objection Certificate
OCB	Ordinary Course of Business
OECD	Organisation for Economic Cooperation and Development
OEM	Original Equipment Manufacturer
OTA	Online Travel Agency
PE	Private Equity
RPM	Resale Price Maintenance
SEBI	Securities and Exchange Board of India
SEBI Regulations	SEBI (Settlement Proceedings) Regulations, 2018
SIDIs	Systematically Important Digital Intermediaries
SIP	Solely for Investment Purposes
Supreme Court	Supreme Court of India
TFEU	Treaty on the Functioning of the European Union
UPI	Unified Payments Interface
VBER	EU Vertical Block Exemption Regulation



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Pallavi Shroff is the Managing Partner of Shardul Amarchand Mangaldas and National Practice Head of the Dispute Resolution Practice. With more than 40 years of extensive experience, her broad and varied representation of public and private corporations and other entities before various national courts, tribunals and legal institutions has earned her national and international acclaim.

Pallavi mentors the Competition Law practice at the Firm bringing her unparalleled commercial judgement to complex cases. She regularly argues competition law cases before the Competition Commission of India (*CCI*) and the National Company Law Appellate Tribunal (*NCLAT*).

Pallavi was a key member of the high-powered SVS Raghavan Committee, which contributed to formulating the legal framework for the new competition law and a draft of the Competition Act. She was also a member of the Competition Law Review Committee, constituted by the Government of India to ensure that the legislation was in tune with the changing business environment. She has recently been nominated as a member of the Committee on Digital Competition Law to evaluate the need for a separate competition law on digital markets.

Pallavi has been ranked as an Eminent Practitioner for Competition Law by Chambers and Partners 2023. She is acknowledged as *"a stalwart in the field of competition laws,"* best known for her handling of cartel, abuse of dominance and other contentious issues, but increasingly active in providing strategic oversight on very large-scale, multi-jurisdictional merger control mandates. One client, who identifies her as *"a main reason for going to the firm,"* speaks of a *"great sense of comfort that she was handling the matter - always there to step in at a critical junctures."* Pallavi was conferred the 'Lifetime Achievement Award' at the Chambers India Awards - 2019. She has also been recognised as a 'Thought Leader' for Competition and Commercial Litigation by Who's Who Legal 2023.

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John Handoll is the National Practice Head, Competition Law with the Firm, where he also works as Senior Advisor, European and Competition Law.

John is a specialist competition and regulatory lawyer with extensive experience of over 45 years. He arrived in India in 2012. Bringing his European and international experience to bear, he has worked with members of the Competition Team in relation to various matters.

Working for a wide range of domestic and international clients in a wide spectrum of economic activity, he has practiced in the United Kingdom, Belgium and Ireland. John has also published and lectured widely in the area of EU law. He has also previously acted as a non-governmental adviser in the International Competition Network, working in the areas of mergers, cartels and unilateral behaviour.

Widely acclaimed as a top practitioner of European and Competition Law, John is also the author of two full length volumes: *Capital, Payments and Money Laundering in the European Union* (2006) and *Free Movement of Persons in the EU* (1995). He writes in the area of competition law and frequently lectures to professional and student audiences. John has been recognised by Who's Who Legal as a Thought Leader – Competition in 2023.

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Naval Satarawala Chopra is a Partner in the Firm's Competition Law Practice. He focuses on both contentious and non-contentious matters before the CCI and appellate forums. His prominent clients include *Microsoft*, *Meta*, *Bayer*, *National Stock Exchange*, *Uber*, *VeriFone*, *DLF*, *PVR* and *Abbott*. Naval is focused on disruptive industries and issues arising from the confluence of technology, intellectual property and competition law. He is best known for strategic antitrust litigation especially on complex abuse of dominance and merger control proceedings.

On the enforcement front, Naval has successfully represented several clients in separate abuse of dominance cases against Google relating to search, Android and payments, where the CCI has fined Google in excess of USD 350 million in aggregate. These include successfully opposing (at first and final appellate stages) Google's pleas to suspend wide ranging behavioural remedies recently imposed by the CCI. He also successfully defended *WhatsApp* in relation to its 2016 privacy policy and allegations of tying; *Microsoft* in relation to licencing terms; and *Uber* in relation to alleged predatory pricing.

On merger control, Naval advised *Facebook* on its investment in *Jio Platforms* (the largest foreign direct investment in the technology sector in India), *Think and Learn* on its acquisition of *Aakash Educational Services* (India's largest ever education sector transaction), amongst others. Naval also advised *PVR* in successfully closing a case challenging its acquisition of one of its competitors.

Naval was the first Indian lawyer to be ranked in *Global Competition Review* among the top *"40 under 40"* competition lawyers in the world (2016). He is valued by referees as a "*very practical, commercially sound and solution-oriented business partner*" who serves, not only as a "*master of the subject*" but a "*go-to person for any kind of dispute resolution issue.*" Naval has also been listed as a "*Thought Leader*" in competition law, Who's Who Legal since 2017. The 2021 listings ranked Naval as a "*Global Leader*" and in 2022, he was described as "*one of the best-known competition lawyers in the market*". Naval has been ranked among the Top 100 Individual Lawyers in the Forbes India Legal Powerlist, 2020, and featured among the BW Business World "*40 under 40*", in 2020.

Naval is qualified to practise in New York, England & Wales and India.

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Shweta Shroff Chopra is a Partner in the Firm's Competition Law Practice. She has been involved in some of the most-high profile and complex cartel and merger control cases in India spanning various sectors.

In relation to merger control, Shweta has advised on many complex mergers. She advised *Reliance Retail Ventures* in its acquisition of stores of the *Future Group* together with its wholesale, logistics and warehousing businesses and *Flipkart* (a subsidiary of *Walmart*) in its acquisition of a minority stake in *Aditya Birla Fashion & Retail*. She acted for *Delhivery* in the notification of its arrangements with *FedEx* and for *CA Magnum Holdings* (part of the *Carlyle* Group) in its acquisition of a majority shareholding in *Hexaware Technologies Limited*. More recently, she steered *PVR Cinemas* in its merger with *INOX Leisure*, and advised *MetroAG* in the sale of its wholesale business in India.

On the enforcement front, Shweta has acted for *Carlsberg* in CCI cartel proceedings and for car manufacturer *Maruti Suzuki* in an investigation into allegations of resale price maintenance. She also advised *Mitsui O.S.K. Lines* and *Nissan Motor Car Carrier Co.* in relation to their successful applications for leniency in a cartel relating to the transport of motor vehicles. She was also involved in the successful challenge before the NCLAT of the CCI's order in the *Tyre Cartel* case.

Shweta is a Non-Governmental Advisor in the ICN, actively participating in annual conferences and workshops. She also actively worked with Mrs. Pallavi Shroff in preparing proposals for reform of the Competition Act for consideration by the Competition Law Review Committee. Shweta was recognised in Global Competition Review's '*Women in Antitrust*' 2021. She is regarded as a Global Thought Leader by Who's Who Legal 2022. According to Chambers and Partners 2022, she "*has incisive knowledge of competition law and all its facets*". The Chambers 2023 Guide states that "*where there is a business problem, you know she will give you a few solutions, rather than one. Before providing solutions, she deep-dives to understand the problem, asking pertinent questions. A rock star to work with!*".

In addition to her competition work, Shweta is responsible for human resources in the firm. She also oversees the firm's Mental Health & Wellness Alliance as well as the Diversity Collective.

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Harman Singh Sandhu is a Partner in the Firm's Competition Law Practice. He has extensive experience in advising Indian and foreign companies in relation to a whole range of competition issues (both merger control and enforcement proceedings) before the CCI, the NCLAT, various High Courts and the Supreme Court of India (*Supreme Court*).

In relation to merger control, Harman has extensively advised on Indian competition clearances for complex multi-jurisdictional mergers. Harman has acted for clients in several significant global transactions, including *Alstom* in its acquisition of *Bombardier Transportation*, Finnish companies *Metso* and *Outotec* in their merger, *Fiat Chrysler* in its merger with *Peugeot*, *Baring Private Equity Asia* on its acquisition of the healthcare business of *Hinduja Global Solutions Lim*ited, and *Siemens Healthineers* in its acquisition of *Varian Medical Systems*. He also acted for *Delhivery* in relation to its arrangements with *FedEx* and for *Zomato* in its acquisition of a minority shareholding in *Grofers*. More recently, he acted for *SALIC* in its acquisition of a stake in *Olam Agri Holdings* and for *Baring Private Equity Asia* on its acquisition by *EQT*.

On the enforcement side, Harman represents *Coal India* in relation to abuse of dominance allegations. Harman is also advising clients on ongoing cartel investigations in the auto parts and other industrial sectors. He recently represented *Oravel Stays* (*OYO*) and *Zomato* in allegations relating to vertical agreements, and successfully defended *Asian Paints* in an abuse of dominance case.

In 2023, Harman was recognised as a Thought Leader by Who's Who Legal. He also rose to Band 1 in Chambers and Partners 2022 with sources appreciating that "*he holds the brief and handholds the client through the entire process*" and considering "*his legal advice to be an excellent bridge between stakeholder demands and the regulators*". Chambers and Partners 2023 stated that "*along with subject matter expertise, Harman can maintain a calm outlook even during challenging times*", He has also authored chapters on Dominance and Merger Control in "*Getting the Deal Through*" publications for several years.

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Manika Brar is a Partner in the Firm's Competition Law Practice. She has carved out her niche in enforcement and merger control cases. She is regarded as a well-seasoned and experienced abuse of dominance and cartel specialist.

On the enforcement front, Manika successfully represented the *National Stock Exchange* in proceedings before the CCI alleging abuse of a dominant position in relation to the provision of colocation services. She is also currently acting for the *National Stock Exchange* in its appeal of an earlier CCI order on predatory pricing before the Supreme Court and in the compensation claims filed before the NCLAT.

On the cartel enforcement front, Manika acted for *Carlsberg* in a cartel investigation before the CCI involving multiple leniency applications, where the client received a substantial reduction in penalty. This matter won the GCR award for Behavioural Matter of the year Asia Pacific, Middle East and Africa. She continues to be involved in several long-running domestic and global cartel investigations in the auto parts sector (including a challenge before the Delhi High Court).

Manika also continues to work on merger control matters. She has advised various international and domestic companies on the merger control aspects of creation of joint ventures, reorganisations and asset sales. She recently acted for *EQT Fund Management* and *Goldman Sachs* in their acquisition of *Parexel International*. She also acted for *Reliance* in relation to the acquisition of the Retail & Wholesale Business and the Logistics & Warehousing Business of the *Future Group*.

Manika is recognised as a Global Leader by Who's Who Legal. She was called out among the four "*Most Highly Regarded*" partners in Asia Pacific lawyers in WWL Future Leaders 2019 and acknowledged for having a reputation as "*one of the best for matters related to competition law*". She has contributed to a number of publications including co-authoring the Indian chapter on cartels in the "*Getting The Deal Through*" publication.

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Aparna Mehra is a Partner in the Firm's Competition Law Practice. Building on her experience in corporate and commercial law, she has evolved as a reputed merger control specialist. Over the years, Aparna has been involved in many high-profile matters (some involving complex remedies packages).

Notable matters include *ZF/WABCO* (winning matter at Global Competition Review Awards, 2021)*, Reliance Retail*'s acquisition of the *Future Group* (largest deal involving the brick-and-mortar retail sector) and the watershed decision in *ChrysCapital/Intas* (first in India involving remedies for private equity and common minority ownership). Aparna also acted in *Bayer/Monsanto (winning matter at Global Competition Review Awards, 2019), L&T/Schneider (first ever competitor deal involving behavioural remedies in relation to competitors), and PVR/DT Cinemas (first deal involving hybrid remedies).* More recently, she advised *Sony* on its merger with *Zee*, which was approved subject to voluntary commitments, and *Billdesk* in its combination with *PayU (nominated at the Global Competition Review Awards 2023).*

Aparna played an important role in the finalisation of the Indian merger control regime in 2011. She was also involved in the revision of the merger review process considering the new insolvency law. She regularly comments on elements of the regime which could impact the stakeholders. She has also been involved in the organization of competition advocacy roadshows across India.

Aparna is ranked in Band 3 by Chambers and Partners 2022, where an interviewee says, *"she has great analytical and drafting skills and is always available"* and is hailed as *"very supportive and responsive"* by clients. Chambers 2023 Guide states that *"she is excellent at regulatory issues, very efficient and very* proactive". She is also recognised as Global Leader, Competition in Who's Who Legal 2021.

Aparna has co-authored several competition law publications, including the India chapters of the GCR *Merger Remedies Guide* (2018 to date), ABA *Private Equity Antitrust Handbook* (2016) and the *Chambers Global Practice Guide on Mergers*. She has also taught the Competition Law course at Jindal Global Law School.

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Gauri Chhabra is a Partner in the Firm's Competition Law Practice and is the face of the Practice in Mumbai. She routinely acts for private equity firms on their proposed investments in India and also advises on compliance, vertical arrangements and horizontal joint ventures from a competition law perspective.

Gauri has extensive experience in merger control and has successfully obtained unconditional clearances for high profile transactions such as India's second largest real estate investment trust, *Mindspace REIT*, *Ultratech Cement's* acquisition of *Jaypee Cements*, *Reliance Capital Asset Management/Nippon Life Insurance* and *Schneider*'s acquisition of the *L&T* electrical business. She represented all three parties in the merger of *Embassy Properties* with *India Bulls Real Estate Limited,* where *Blackstone* was also acquiring a minority stake in the merged entity, and *Warburg's* acquisition in India's second largest retail pharmacy chain *Medplus Healthcare*. She advised various private equity investors in their acquisitions in *Reliance Jio*. She also represented *Blackstone* in its acquisitions of the *Piramal Glass* business and of *Mphasis Limited*, *National Investment and Infrastructure Fund-II* in its acquisition in *Manipal Hospitals* and *Carlyle* in its acquisition of *Hexaware* (which was the biggest transaction in the information technology space in India.)

In the area of enforcement, Gauri successfully acted for *Mitsui O.S.K. Lines* and *Nissan Motor Car Carrier Co.* in relation to their applications for leniency in a cartel relating to the maritime transport of motor vehicles.

Gauri has been ranked as a Future Leader – Partners in Who's Who Legal 2022. She is also recognised as a "*Leading Lawyer*" for Competition & Antitrust in Asialaw Profiles 2019 and 2020. Gauri has co-authored various articles for international publications, including "*India's New Competition Regime Steadily Gaining Ground*", Competition Law International (Antitrust Journal of the International Bar Association) and "*Latest Merger Control Trends Analysed*", International Finance Law Review.

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Yaman Verma is a Partner in the Firm's Competition Law Practice. He advises on complex multi-jurisdictional mergers, abuse of dominance and cartel cases, with a special focus on technology and e-commerce markets. He works with a wide range of clients including *Microsoft*, *Meta Platforms*, *Coal India*, *Walmart*, *WhatsApp*, *Temasek* and *Zomato*.

On the enforcement front, Yaman has acted for a confidential complainant and third parties in obtaining CCI orders against *Google* for abuse of dominance with respect to Android Mobile Device Ecosystem and the Google Play Store Billing System. He has recently represented clients in the NCLAT and Supreme Court in successfully opposing Google's pleas to suspend behavioural remedies imposed by the CCI. Other recent highlights include acting for *Meta Platforms* (formerly *Facebook*), and *WhatsApp* in the CCI's investigation into WhatsApp's 2021 Update to its privacy policy. He was also successful in defending *Coal India* and online food aggregator *Zomato* against allegations of abuse of dominance at the CCI in 2022.

In relation to merger control, Yaman has advised on Indian competition clearance for complex global mergers, recently including the *Linde/Praxair* and *Fiat/Peugeot* transactions. He obtained CCI approval for *Flipkart's* acquisition of a minority stake in *Aditya Birla Fashion and Retail Limited*, and *Temasek's* and *Broadpeak's* investments in taxi aggregator *ANI Technologies*. Previously, Yaman helped secure unconditional approval for *Facebook's* acquisition of a minority stake in *Jio Platforms Limited, and the Vodafone/Idea merger*. He also regularly advises private equity investors in relation to CCI approvals for their acquisitions.

Yaman was most recently recognised by Chambers and Partners, 2023, with clients commenting that "*his competition law knowledge is extensive, his advice is always focused on what's best for the company, and he effortlessly transitions from explaining legal nuances to providing commercial input*". He has previously been recognised by Chambers and Partnes in 2022 and 2021, by the Indian Business Law Jouranl as a Future Legal Leader in 2021, and in the Legal 500 list of "*Next Genration Lawyers*" for India for 2017-2019, and "Next Genration Partners" from 2020-2023. He also conducts an elective course on competition law and a foundations of legal education course at the National Law School of India University, Bangalore.

Rohan Arora, Partner

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Rohan Arora is a Partner in the Firm's competition Law Practice. He has been involved in a wide range of enforcement and merger control work, specialising in abuse of dominance cases in the technology sector. His clients include *WhatsApp*, *Meta Platforms*, *National Stock Exchange*, *Alstom*, *AION*, *Uber*, *Monsanto* and *Suzuki Motor Corporation*.

He successfully defended *Facebook* and *WhatsApp* in allegations of leveraging and unfair conditions in the introduction of WhatsApp's payments feature in India. On the predatory pricing front, Rohan currently represents the *National Stock Exchange* before the Supreme Court and in a stayed action for compensation before the NCLAT. Rohan regularly represents *Uber* in predatory pricing allegations and has successfully defended it in the Supreme Court from claims that it was engaged in a hub-and-spoke cartel with its driver-partners. He recently succeeded in obtaining leniency for *Jai Polypan* in relation to bid rigging in the railway sector. Rohan is currently defending *Maruti Suzuki*, India's largest automobile manufacturer before the NCLAT, against CCI findings that it had engaged in resale price maintenance. He is also involved in several challenges to the CCI's jurisdiction before the High Court of Delhi in relation to auto parts cases.

On the merger control side, Rohan has advised on several complex mergers. Recent matters include the merger of *Sony India* with Zee *Entertainment*, *Metso's* combination with *Outotec*, *Kubota's* acquisition of *Escorts* and *Nuvoco's* acquisition of *Emami Cement*. Earlier cases include *Bayer's* acquisition of *Monsanto* and the acquisition of *Alstom's* power and grid business by *GE*.

IBLJ has recognised Rohan as a Future Legal Leader for 2023. He has been recognised by Who's Who Legal from 2017 – 2023 as being "*an excellent competition lawyer*", "*providing practical solutions suited to the business environment and commercial reality*", and is widely recommended for his "*in-depth knowledge, passion and commitment*". He has also been recognised as a 'Rising Star' by Expert Guides 2021. Rohan regularly contributes to competition law publications and has co-authored the India chapters on Dominance and Merger Control in "*Getting the Deal Through*" publications.

Aman Singh Sethi, Partner

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Aman Singh Sethi is a Partner in the firm's Competition Law Practice. He works on contentious and non-contentious cases, advising clients in high-tech/disruptive industries, seeds, agrochemicals and agricultural traits, cement, petrochemicals and telecommunications sectors.

On the enforcement front, Aman is heavily involved in litigious matters before the CCI, the NCLAT and the Supreme Court. He has also been involved in a number of challenges to CCI orders before the High Courts on due process and natural justice grounds.

Aman has acted for a confidential complainant and a number of third parties in obtaining CCI orders against *Google* for abuse of dominance with respect to Android Mobile Device Ecosystem and the Google Play Store Billing System. He has advised and successfully represented clients in the NCLAT and Supreme Court in opposing Google's pleas to suspend the wide-ranging behavioural remedies imposed by the CCI.

He has also successfully defended *Uber* against multiple complaints of alleged abuse of dominance and anti-competitive (including hub-and-spoke) agreements and *Oravel Stays* for alleged abuse of dominance. He earlier represented the *National Stock Exchange* in dismissing allegations of abuse of dominance in relation to its colocation facility. Aman is also representing *Monsanto* (now *Bayer*), and *Abbott Healthcare* in proceedings relating to alleged anti-competitive conduct.

Aman has also been involved in several major mergers including *GSK/ Novartis, Dow/DuPont* and *Vodafone/Idea*.

Aman has been recognised as a "*Rising Star*" in Euromoney's 2022 Asia-Pacific Awards. He routinely writes on issues related to the interplay of competition law and intellectual property, as well as on digital markets. He has also been writing on the proposed amendments to the Competition Act and critically evaluating the expected impact on industry.

Nitika Dwivedi, Partner

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Nitika Dwivedi is a Partner in the Firm's Competition Law Practice. She advises clients on contentious and non-contentious competition law matters and is regularly sought out for abuse of dominance and cartel cases.

On the enforcement front, Nitika has been involved in defending private and public sector companies in cases before the CCI, the NCLAT and the Supreme Court. She has successfully defended *WhatsApp*, *Oil and Natural Gas Corporation* and *Asian Paints* against allegations of abuse of dominance.

Nitika is also representing *Monsanto* (now *Bayer)* and *Meta Platforms* in proceedings relating to alleged anti-competitive conduct. She represented *Globecast Asia* in the first leniency application filed before the CCI and was successful in obtaining a 100% reduction in penalty a for Globecast and its officials. She was involved in obtaining an unconditional stay from the NCLAT on the CCI's order against *ACC* in a bid rigging case and successfully represented *Coal India* in a cartel against its explosives' suppliers.

On the merger control front, Nitika has represented clients across industry segments. She was involved in the India leg of several complex global transactions, including the acquisition of *Bombardier Transportation* by *Alstom*, *Bayer's* acquisition of *Monsanto*, the merger of *Fiat* and *Peugeot* and *Archroma Operations'* acquisition of the textile effects division of *Huntsman International*.

Nitika co-authors the India chapter in GTDT Cartel Regulation and "*Cartel Laws and Regulations*" in Global Legal Insights.

About Us

Shardul Amarchand Mangaldas, founded on a century of legal achievement, is one of India's leading full service law firms. Our mission is to enable business by providing solutions as trusted advisors through excellence, responsiveness, innovation, and collaboration.

We are one of India's most well recognised firms, and are known globally for our integrated approach. With approximately 775 lawyers including 160 partners, we provide exceptional services across practice areas which include General Corporate, Merger & Acquisition, Private Equity, Banking & Finance, Insolvency & Bankruptcy, Competition Law, Dispute Resolution, Projects & Project Finance, Capital Markets, Tax, Intellectual Property and Venture Capital. We are at the forefront of global and Indian M&A and Private Equity transactions, cutting edge high risk litigation and advice on strategically important matters across a spectrum of practices and industries for our multi-jurisdictional clients.

We have a pan India presence, with offices in seven cities across India - New Delhi, Mumbai, Gurugram, Bengaluru, Chennai, Ahmedabad and Kolkata.

'Outstanding'
in 2023 for Banking and Finance, Banking and Financial Services, Capital Markets, Competition/Antitrust, Construction, Corporate and M&A, Dispute Resolution, Energy, Insurance, Infrastructure, Private Equity, Regulatory, Real Estate, Restructuring and Insolvency, Technology and Telecommunications

'Ranked #1'
by deal count
In the Bloomberg India Capital Markets League Tables 2022

'Ranked #1'
by deal count
In the MergerMarket India League Tables 2022

'Tier 1'
in 2023 for Antitrust and Competition, Banking & Finance, Capital Markets, Corporate / M&A, Dispute Resolution, Insurance, Private Client, Projects and Energy, Real Estate & Construction, Restructuring & Insolvency, Tax, TMT and White Collar Crime

'Tier 1'
in 2022 for Banking, Capital Markets: Equity and Debt, M&A, Private Equity, Project Development, Project Finance, Restructuring & Insolvency

Country Firm of the Year 2022, India

'Band 1' in 2023 for
Capital Markets
Competition/Antitrust
Corporate/M&A
Dispute Resolution
Private Equity
Projects, Infrastructure & Energy
Restructuring & Insolvency
White Collar Crime
India National Firm of the Year, 2020

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