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## Minority Acquisitions: Trends in CCI Merger Decisions

### I. Introduction

The Competition Act, 2002 ('Act') requires the Competition Commission of India ('CCI') to review all domestic and international mergers, acquisitions, and other types of 'combinations' that exceed certain asset or turnover thresholds. Transacting parties are obligated to notify CCI and observe the applicable waiting period until approval from CCI, before taking any steps towards consummating their transactions. Given the twin objective of preserving competition and protecting consumers, CCI realized that a litmus test of financial thresholds alone could bring within the fray transactions that do not necessarily require prior review and approval.

In this context, a set of combinations were identified in CCI (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 ('Combination Regulations'), that are less likely to raise competition concerns and hence "need not normally" be notified.<sup>1</sup> Minority acquisitions (which entitle the acquirer to hold less than 25% of the total shares or voting rights in the target enterprise) are included in this list and are therefore exempt, to the extent they are made 'solely as an investment' or 'in the ordinary course of business', and do not lead to acquisition of 'control' ('Minority Acquisition Exemption'). The Minority Acquisition Exemption is of particular use to financial investors that make routine and frequent investments without assimilating a significant market position.

The Act provides no guidance on what may constitute, 'solely as an investment' or 'in the ordinary course of business'. Whilst the Act defines the term 'control' to include "controlling the affairs or management by: (i) one or more enterprises, either jointly or singly, over another enterprise or group<sup>2</sup>; (ii) one or more groups, either jointly or singly, over another group or enterprise", the concept of 'control' continues to be a vexed issue. In this regard, a string of CCI decisions have made certain noteworthy observations regarding the applicability of the Minority Acquisition Exemption.

1. CCI has taken the view that minority investments (i.e., less than 25%) by an acquirer in a target enterprise where there are horizontal or vertical overlaps between the business activities of the target and the acquirer (including the controlled portfolio entities of the acquirer) may be construed as being strategic, and therefore cannot ordinarily be treated to be 'solely as an investment' or 'in the ordinary course of business'. For example, in *Copper Technology/ANI Technologies*,<sup>3</sup> the acquisition of 9.57% stake in the target along with the right to appoint a director on the board of the target was notified to CCI. CCI observed that while the acquirer and target were not involved in the production and supply of any substitutable goods or services in India, one of the portfolio companies of the acquirer in India had an overlap with the target in the mobile wallet segment. Whilst CCI in its approval order does not comment on the applicability of the Minority Acquisition Exemption, it appears that the transaction was notified because it may have been construed as being strategic.
2. CCI seems to be of the view that 'control' could arise from holding certain strategic affirmative voting rights in the target enterprise.

By way of amendments to the Combination Regulations in January, 2016, an explanation was inserted to the Minority Acquisition Exemption in relation to investments of less than ten percent of the total shares or voting rights in the target enterprise ('Deeming Provision'). The Deeming Provision states that every transaction involving an acquisition of less than ten percent shall be 'solely as an investment', if the following conditions are satisfied: (i) the acquirer gets only those rights that are exercisable by ordinary shareholders of the target enterprise, to the extent of their shareholding; (ii) the acquirer is not a member on the board of directors of the target nor has the right or intention to appoint a board member or to nominate one; and (iii) the acquirer does not intend to participate in the management or affairs of the target.

<sup>1</sup> Regulation 4 read with Schedule I of the Combination Regulations.

<sup>2</sup> The term 'group' means two or more enterprises which, directly or indirectly, are in a position to: (i) exercise 50% or more of the voting rights in the other enterprise; or (ii) appoint more than 50% of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

<sup>3</sup> Combination Registration No. C-2017/08/525.

## II. CCI Guidance on ‘Solely as an Investment’

In interpreting the term ‘solely as an investment’, CCI’s decisions hold that the Minority Acquisition Exemption does not apply to private equity transactions where there are overlaps between the activities of the target and the controlled portfolio entities of the acquirer.

A strict reading of the Minority Acquisition Exemption would bring one to the conclusion that an acquisition not leading to ‘control’ would not be required to be notified, if the acquisition is *either* solely for investment purposes *or* in the ordinary course of business. The Deeming Provision states that an acquisition of less than ten percent will be considered as ‘solely as an investment’, if the other conditions<sup>4</sup> laid down thereunder are satisfied.

A combined reading of the Minority Acquisition Exemption and the Deeming Provision gives rise to two propositions as set out below:

1. In the absence of control conferring rights, the Deeming Provision should also exempt transactions involving competitor-to-competitor acquisitions, if the transaction in question satisfies the thresholds specified under the Deeming Provision.
2. Arguably, the inapplicability of the Deeming Provision should not automatically render a transaction ineligible for the Minority Acquisition Exemption that has been made solely as an investment *or* in the ordinary course of business.

Having said that, in *Manta Holdings LP and Thomas Bravo Funds XII LP*,<sup>5</sup> CCI appears to have interpreted the Deeming Provision to guide the assessment of the applicability of the Minority Acquisition Exemption. In this case, CCI held that the right to appoint a single director on the board of the target will itself mean that the Minority Acquisition Exemption will not apply. However, from a review of the said decision, it is clear that: (i) the Deeming Provision was inapplicable due to the ability of the acquirer to appoint one director; and (ii) there were overlaps between the activities of the target and one of the controlled portfolio companies of the acquirer which made the Minority Acquisition Exemption inapplicable to the transaction in any event. To the best of our knowledge, this conflation of the Deeming Provision and the Minority Acquisition Exemption has not yet been tested in appeal. In certain other cases, CCI has considered acquisitions involving less than 10% shareholding where the acquirer also had a right to nominate a director and there were no overlaps between the activities of the parties. However, CCI has not made any specific observations in these cases on why the Minority Acquisition Exemption did not apply.<sup>6</sup>

## III. Existing Jurisprudence on ‘Ordinary Course of Business’

The term “ordinary course of business” while not specifically defined, has been widely interpreted to apply to those acquisitions which are not strategic in nature and are made by an entity which usually makes such investments as a part of its ongoing business. While there is limited guidance from CCI on what constitutes “ordinary course of business”, the meaning of this phrase has been examined by various courts in India and offer some guidance. “Ordinary course of business” has been defined to imply “a certain degree of routine in business practice”.<sup>7</sup> The expression “‘in the ordinary course of business’ is susceptible of one meaning viz., that there should be a series of transactions as distinguished from one transaction...A stray transaction may not be said to constitute an ordinary course of business”.<sup>8</sup>

Further, CCI has observed that minority acquisitions of less than 25% shares in the target, where there are overlaps between the acquirer and target, may not be considered as being in the “ordinary course of business” and would generally be construed to be strategic in nature (*Abbott/Mylan*<sup>9</sup> and *Zuari Fertilizers*<sup>10</sup>).

## IV. CCI’s Perspective on ‘Control’ Conferring Rights

The final step in analyzing whether the Minority Acquisition Exemption applies to a given transaction is to ascertain whether the acquirer is also acquiring any control over the target. The concept of what constitutes ‘control’ has been examined by various regulators in India including CCI. Although there are no bright-line tests available, in order to make an assess-



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4 As mentioned in the introduction section the ‘other conditions’ are as follow: (i) the acquirer gets only those rights that are exercisable by ordinary shareholders of the target enterprise to the extent of their shareholding; (ii) the acquirer is not a member on the board of directors of the target nor has the right or intention to appoint a board member or to nominate one; and (iii) the acquirer does not intend to participate in the management or affairs of the target.

5 C-2016/10/439.

6 P5 Asia Holding/Indus Towers Limited, C-2016/10/452, Aceville Pte. Ltd/ Flipkart Limited, C-2017/04/501.

7 Kalapnath Singh v. Surajpal Singh and Ors, AIR 1949 All 425.

8 Peddi Virayya v. Doppalapudi Subba Rao and Anr AIR 1959 AP 647.

9 C-2014/08/202.

10 C-2014/06/181.



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ment in relation to what would constitute the acquisition of control, in the past, CCI has provided an indication of the nature of affirmative voting / consent rights that may result in conferring control in favour of an acquirer. “Control” has been defined merely as ‘control’ over the affairs and management of another enterprise and no substantive test for “control” has been laid out under the Act.<sup>11</sup> Certain rights that have been considered as conferring control as per certain decisions of CCI are veto rights over: (i) approval of the business plan/annual operating plan including budget; (ii) discontinuing an existing line or commencing a new line of business; (iii) setting up new offices in other cities or expanding to new cities; (iv) appointment of key managerial personnel including key terms of their employment and compensation; and (v) material terms of employee benefit plans.<sup>12</sup>

In interpreting “control”, CCI has, in the past, examined the entire bundle of rights secured by the acquirer and their bearing on the strategic commercial decisions of the target enterprise. The European Commission’s (‘EC’) Consolidated Jurisdictional Notice under Council Regulation No. 139/2004 on the control of concentrations between undertakings (2008/C 95/01) (‘EC Jurisdictional Notice’), states that control is acquired where minority shareholders have additional rights which allow them to veto decisions which are essential for strategic commercial behavior of the joint venture.<sup>13</sup> These veto rights must be related to the strategic decisions on the business policy of the joint venture.<sup>14</sup> They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture.<sup>15</sup>

Based on a review of CCI decisions and the EC law, it appears that to assess whether the affirmative rights available to an investor may be said to confer control, it is essential to examine the rights as a whole and ascertain whether they could be said to confer control over the strategic business decisions of the company in question.

## **v. Conclusion**

It is possible that certain competitor-to-competitor minority acquisitions may reduce the minority shareholder’s incentive to compete with the target. For example, if the benefits through dividends (flowing from minority shareholding) outweigh the costs associated with market expansion attempts in the target’s geography, the minority shareholder may well desist from making such efforts. Second, a minority stake is sometimes enough to secure access to business sensitive information, which could reduce competitive uncertainty between two competitors which must otherwise compete with each other. These concerns appear to inform conservative outcomes in the current trend of CCI decisions. However, these concerns should be weighed against the very objective of introducing the Minority Acquisition Exemption, i.e., exempting minority acquisitions made routinely that do not lead to any strategic influence over the activities of the target and do not raise the concerns highlighted above. Applying a conservative lens to such situations is likely to result in ‘false positives’ where scarce regulatory resources are expended in assessing transactions which have not likely to have any effect on the competitive dynamics of the market. Although the jurisprudence on this issue will continue to evolve, it would benefit all stakeholders if CCI were to issue any formal guidance on the applicability of the Minority Acquisition Exemption.

## **Behavioural Cases**

### **CCI dismisses a complaint relating to delay in delivery of possession of an apartment and unfair clauses in an agreement<sup>16</sup>**

On November 14, 2017, CCI dismissed the information filed by R. Ramkumar alleging violation of Section 4 of the Act against Akshaya Private Ltd. (‘Akshaya’). R. Ramkumar alleged that he had booked a residential apartment in a project developed by Akshaya, the delivery of which has been unduly delayed and the agreement entered into between them contains unfair clauses in favour of Akshaya.

<sup>11</sup> The term ‘control’ has been defined to include controlling the affairs or management by: (i) one or more enterprises, either jointly or singly, over another enterprise or group, (ii) one or more groups, either jointly or singly, over another group or enterprise. ‘Control’ was clarified in Independent Media Trust (C-2012/03/47) to mean, “the ability to exercise decisive influence over the management or affairs” of another enterprise.

<sup>12</sup> Alpha TC Holdings Pte Limited, C-2014/07/192.

<sup>13</sup> Para 65, EC Jurisdictional Notice.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Case No. 38 of 2017.



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While defining the relevant product market to be ‘provision of services for development and sale of residential apartments/flats’, CCI noted that a plot of land and commercial space cannot be considered as substitutes for residential apartments because of differences in price, characteristics, and intended use. CCI limited the relevant geographic market to Old Mahabalipuram Road also known as the information technology (‘IT’) corridor in the State of Tamil Nadu, since the conditions of competition for supply and demand for development and sale of residential flats were considered as homogenous and distinguishable from other neighbouring areas in terms of factors like price, land availability, distance and commuting facilities, proximity and connectivity, presence of multinational companies, state of infrastructure, and regional and personal preferences. In light of several other real estate developers operating in the relevant market, CCI found that Akshaya was not in a dominant position. Accordingly, CCI held that absent dominance, no question of abuse of dominant position under Section 4 could arise.

### **CCI dismisses allegations against NIIT<sup>17</sup>**

On November 28, 2017, CCI dismissed allegations of anticompetitive conduct and abuse of dominance against skill and talent development firm, NIIT Limited (‘NIIT’), with respect to franchise agreements.

Separate complaints were filed by NIIT’s three Hyderabad-based franchisees (‘Franchisees’), which were engaged in the business of provision of computer education and training services. Since all the three complaints were against NIIT involving ‘substantially similar’ allegations, CCI passed a common order. The Franchisees alleged *inter alia*: (i) that contrary to the terms agreed in the franchisee agreement, NIIT was directly approaching schools located within the territories of the Franchisees and undercutting them by offering the same courses at highly discounted prices; (ii) that NIIT follows a differential pricing pattern for its consumers in metro and non-metro areas; and (iii) a differential revenue sharing model for franchisees located in metro and non-metro areas.

In this instant case, CCI defined the relevant market to be ‘market for the provision of computer education and training services in India’ since computer and IT skill training requires special knowledge on the subject as compared to skill training services in other professional and non-professional areas in terms of its characteristics, prices, and end use, as well as such training courses could be availed across India.

With respect to the issue of abuse of dominance, CCI held that apart from NIIT, there are many other companies operating in the relevant market offering similar courses, and thus NIIT was not a dominant player and therefore could not violate Section 4 of the Act. While dismissing allegations of anti-competitive conduct under Section 3 of the Act, CCI noted that the prevailing competition has compelled NIIT to venture into online mode of delivery through its online learning portals. It further noted that the differential pricing for metro and non-metro areas was not arbitrary and could be explained on the basis of various factors like lower awareness and lack of affordability by students in non-metro areas, differences in marketing responsibility, and job placements.

### **CCI dismisses complaint alleging cartelisation and anticompetitive practices against certain Registration Plates Manufacturers<sup>18</sup>**

On November 14, 2017, CCI dismissed the information filed under Section 19(1)(a) of the Act by the Association of Registration Plates Manufacturers of India (‘Association’) against Shimnit UTSCH India Private Limited (‘Shimnit’), Real Mazon India Private Limited (‘Real’), and TEST Security License Plates Private Limited (‘TEST’) (Shimnit, Real, and TEST collectively referred to as the ‘Registration Plates Manufacturers’).

The Association had alleged that the Registration Plates Manufacturers had formed a cartel to engage in collusive bidding in various States to get High Security Registration Plates (‘HSRP’) contracts by conniving with the officials of the Transport Departments. The Association further alleged that the rates quoted by the Registration Plates Manufacturers in the bids used to be very high and later when open Notice Inviting Tenders (‘NITS’) were floated by the States and tender conditions were eased, the Registration Plates Manufacturers abuse their dominant position through predatory pricing.

CCI observed that the Association failed to establish any specific case of bid rigging in any State tender post-2009 and that no conduct nor any evidence supporting collusion among the Registration Plates Manufacturers post-2009 was detailed in the information.

<sup>17</sup> Case Nos. 47, 48 and 49 of 2017.

<sup>18</sup> Case No. 58 of 2017.





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## CCI dismisses allegations of abuse of dominance against Maharashtra State Power Generation Company<sup>19</sup>

On November 30, 2017, CCI dismissed the allegations of abuse of dominance against Maharashtra State Power Generation Company ('MAHAGENCO') with respect to the qualification criteria provided by MAHAGENCO for the bidders in its tender.

Shri Vijay Menon filed the information before CCI against MAHAGENCO alleging that MAHAGENCO has abused its dominant position by putting a qualifying requirement in its tender floated in the month of September, 2017 for coal liaisoning services, whereby it disqualified bidders against whom an inquiry was pending before CCI or who have already been penalized by CCI. While holding the issue as purely administrative in nature, CCI recognized the discretion a consumer should have to exercise choice and to frame terms and conditions of tender documents so as to best secure an optimal outcome. CCI was, however, cautious to further point out that consumer discretion should be allowed so long as it does not restrict market entry and allows vendors to freely compete in the procurement process. It also remarked that competition concerns could arise in rare cases where a monopoly buyer exercises the option in an anti-competitive manner. CCI found no case of contravention established against MAHAGENCO, and thereby it closed the matter under Section 26(2) of the Act.

## CCI again slams penalty of ₹52.24 crores on BCCI for abusive conduct<sup>20</sup>

In case of *Surinder Singh Barmi v. Board of Control for Cricket in India* ('BCCI') decided on November 29, 2017, CCI reaffirmed its decision taken in the earlier order dated February 8, 2013, whereby CCI had issued a penalty of ₹52.24 crores (approx. US\$ 8.2 million) on BCCI for abusing its dominance. The CCI order dated February 8, 2013 was set aside by the erstwhile Competition Appellate Tribunal ('COMPAT') vide order dated February 23, 2015 in an appeal filed by BCCI on grounds of violation of principles of natural justice, thereby remitting the matter to CCI for fresh disposal.

While dismissing BCCI's argument that it is not an enterprise under Section 2(h) of the Act, CCI observed that BCCI by organizing matches and tournaments, granting media rights to broadcasters, entering into franchisee arrangements with business houses, raising sponsorship, etc. engages in economic activity and motive to earn profit is irrelevant for defining an entity as an enterprise.

CCI then defined the relevant market to be the market for organisation of professional domestic cricket leagues/events in India and held it to be not substitutable with other formats of cricket, other sports, and general entertainment programmes telecasted on television. While limiting the relevant market to be so, CCI noted a number of factors, *inter alia*: (i) that there is no evidence of price competition and cross elasticity of demand between domestic cricket leagues like Indian Premier League ('IPL') and the alternatives suggested by BCCI; (ii) that other formats of cricket like international and domestic cricket differed on account of selection of the team; (iii) that the different formats of cricket have different objectives and commercial exploitation; and (iv) BCCI's own understanding about the different formats. CCI also stated that applying the '*small but significant non-transitory increase in price*' test conceptually, given the characteristics and consumer preferences for cricket/IPL in India, not significant consumers would substitute IPL with any other form of entertainment e.g., films, television shows, or any other sporting event, thereby making a five to ten percent increase in price unprofitable. Within the relevant market, CCI found BCCI to be dominant because of its status as a *de facto* regulator of cricket in India having the exclusive right to sanction or approve cricket events in India by virtue of its endorsement by the International Cricket Council.

The CCI then examined whether the alleged abusive representation and warranty given by BCCI under Clause 9.1(c)(i) in the IPL Media Rights Agreement entered with the broadcasters of IPL that '*it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league [IPL]*' for a period of 10 years is in contravention of Section 4(2)(c) of the Act. CCI observed that viewed in light of Rules 28(b) and 28(d) of BCCI Rules and Regulations, the representation and warranty created insurmountable entry barriers and left no scope for conducting any kind of professional domestic cricket other than by BCCI or its members. CCI further stated that BCCI has not provided any reasonable or regulatory justification, as also failed to substantiate its claims of nascency, limited time for recoupment, and the need for the self-imposed restriction running for a sustained period of 10 years. CCI thus held that BCCI had foreclosed the market for organization of professional domestic cricket leagues/events in India under Section 4(2)(c) of the Act. Accordingly, CCI directed BCCI to cease and desist from the abusive conduct, precluded it from placing blanket restrictions on organisation of professional domestic cricket league/ events by non-

<sup>19</sup> Case No. 61 of 2017.

<sup>20</sup> Case No. 61 of 2010.

members, and imposed a penalty of ₹52.24 crores (approx. US\$ 8.2 million), which was about 4.48% of BCCI's average revenue from organisation of professional domestic cricket leagues in India during the last three preceding financial years.

### CCI dismisses the reference filed by the Rail Coach Factory, Kapurthala alleging collusive bidding against certain Roof Mounted AC Package Unit Manufacturers<sup>21</sup>

On November 28, 2017, CCI dismissed the reference filed under Section 19(1)(b) of the Act by Shri D. K. Shrivastava, chief material manager, Rail Coach Factory, Kapurthala against M/s Daulat Ram Engg & Services P. Ltd., Madhya Pradesh ('Daulat Ram Engg'), M/s Daulat Ram Industries ('Daulat Ram Industries'), M/s Amit Engineers ('Amit'), M/s Fedders Lloyd Corporation ('Fedders'), M/s Intec Corporation ('Intec'), M/s Lloyd Electric and Engg. Ltd. ('Lloyd'), M/s Sidwal Refrigeration Industries Ltd. ('Sidwal'), M/s Stesalit Ltd. ('Stesalit') and M/s Ess Ess Kay Engg. Co. P. Ltd. ('Ess') (Daulat Ram Engg, Daulat Ram Industries, Amit, Fedders, Intec, Lloyd, Sidwal, Stesalit, and Ess collectively referred to as the 'RMPU Manufacturers') alleging *inter alia* contravention of the provisions of Section 3 of the Act.

Shri D. K. Shrivastava alleged that the RMPU Manufacturers have formed cartel and rigged the tenders floated by the Rail Coach Factory, Kapurthala, other Zonal Railways and the Indian Railways (on pan-India basis) for Roof Mounted AC Package Units ('RMPUs'), which was evident from the collective increase and decrease in the rates quoted by the RMPU Manufacturers during the period of 2011 to 2014, the increase in rates observed in tenders opened in or after June 2013, and instances of identical or similar pricing between several subsets of the RMPU Manufacturers, which contravened the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act.

CCI, having found a *prima facie* case, directed the Director General ('DG') to investigate the matter. The DG, upon the completion of its investigation, concluded that Amit, Fedders, Intec, Lloyd, and Sidwal had contravened Sections 3(3)(a) and 3(3)(d) of the Act. The matter was then considered by CCI. CCI noted that there was collective increase and decrease in the rates quoted by the RMPU Manufacturers, but mere price parallelism, without some conclusive evidence of agreement or arrangement among the RMPU Manufacturers, is not sufficient to conclude that the price parallelism was an outcome of collusion. In sum, CCI acknowledged that parallel behaviour of competitors can be a result of intelligent market adaptation in an oligopolistic market and to arrive at a finding of contravention merely on the basis of suspicion resulting from identical or similar pricing with evidence of possibility of exchange of information is fraught with its own pitfalls. In light of no direct evidence nor even persuasive circumstantial evidence to establish that the RMPU Manufacturers tacitly colluded, CCI held that no case of contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act was established.

## Combination

### CCI approves the acquisition of shares of DCCDL by Reco Diamond<sup>22</sup>

On November 3, 2017, CCI approved the acquisition of 33.34% of the total equity shares of Diamond and DLF Cyber City Developers Limited ('DCCDL') held by Rajdhani Investments & Agencies Private Limited, Buland Consultants and Investments Private Limited and Sidhant Housing and Development Company by Reco Diamond Private Limited ('Reco Diamond/Acquirer'; together with DCCDL referred to as 'Parties') ('Proposed Combination').

DCCDL, incorporated in India is a subsidiary of DLF Limited ('DLF'), which is the holding company of the DLF group of companies. DCCDL, along with its subsidiaries, is engaged in construction, development and leasing of commercial properties in India. Reco Diamond, on the other hand, is incorporated as a private limited company in Singapore and is a wholly owned subsidiary of Recosia Private Ltd, which in turn, is a wholly owned subsidiary of GIC (Realty) Pte Ltd ('GIC Realty'). GIC Realty, incorporated as a private company with limited liability under the laws of Singapore, holds real estate investments made on behalf of the Government of Singapore.

CCI considered the market for leasing of commercial real estate as the relevant product market and noted that the activities of DCCDL and those of the portfolio companies of GIC Realty overlap in the cities of Delhi, Gurgaon, Chennai, and Hyderabad. It held that the Proposed Combination is unlikely to cause an appreciable adverse effect on competition in any of the potential markets and thus, decided to leave the exact delineation of relevant market open. CCI



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<sup>21</sup> Reference Case No. 04 of 2014.

<sup>22</sup> Combination Registration No. C-2017/09/527.



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further noted that the overlaps between the Parties in terms of current inventory and projects under construction are limited and the Proposed Combination is unlikely to change the competition dynamics in the real estate market and approved the Proposed Combination.

### CCI approves the acquisition of Tata CMB by Airtel<sup>23</sup>

On November 16, 2017, CCI approved the acquisition of 100% of the consumer mobile business of Tata Teleservices Limited ('TTS') and Tata Teleservices (Maharashtra) Limited ('TTML') ('Tata CMB') by Bharti Airtel Limited ('Airtel') (Tata CMB together with Airtel referred to as the 'Parties') ('Proposed Combination').

Airtel, a part of Bharti Enterprises group ('Bharti Group'), is a publicly traded global telecommunications corporation while TTS, a part of the Tata Group, is a telecom service provider in a number of telecom circles in India. TTML is an associate company of TTS and provides telecom service in Maharashtra.

CCI opined that the concerned relevant product market of retail mobile telephony services can be classified on the basis of various criteria such as type of service and customer, but in view of the Proposed Combination not likely to result in appreciable adverse effect on competition, it left the exact determination of the relevant product market open. CCI held the geographical market to be the 19 telecom circles where the activities of the Parties overlapped.

In its competition assessment, CCI was concerned that the telecom market is highly concentrated with high Herfindahl-Hirschman Index ('HHI') figures and that the change in HHI post the Proposed Combination would also be significant in many of the overlapping circles. However, in view of the limited product offering of Tata CMB, negligible diversion ratio from Airtel to Tata CMB, and the steady decline in the market share of Tata CMB, CCI observed that Tata CMB neither seems to be a close nor an effective competitor to Airtel going forward. It further noted that spectrum holding is fairly distributed among the Telecom Service Provider ('TSPs') in the overlapping circles and there is a significant quantity of unsold spectrum in each telecom circle which would likely obviate any access issues. CCI also took into account the significant constraint exerted from the buyer side by virtue of multi-simming, ease of substitution due to the option of mobile number portability, and significant churn rates, and that there would be five TSPs in all the telecom circles post the Proposed Combination. Having regard to the fact that the competitors were in a position to exercise adequate competitive constraints on the Parties, CCI held the Proposed Combination not likely to raise any substantial competition concerns, and therefore, approved it under Section 31(1) of the Act.

### CCI approves the acquisition of shares of Indus by VIL Shareholders<sup>24</sup>

On November 16, 2017, CCI approved the acquisition of equity shares of Indus Towers Limited ('Indus') by: (i) Al-Amin Investments Ltd.; (ii) Asian Telecommunication Investments (Mauritius) Ltd.; (iii) CCI (Mauritius) Inc; (iv) Euro Pacific Securities Ltd.; (v) Vodafone Telecommunications (India) Ltd.; (vi) Mobilvest; (vii) Prime Metals Ltd.; (viii) Trans Crystal Ltd.; (ix) Omega Telecom Holdings Private Limited; (x) Telecom Investments India Private Limited; (xi) Jaykay Finholding (India) Private Limited; and (xii) Usha Martin Telematics Limited ('VIL Shareholders/Acquirers'). The acquisition of shares by the Acquirers in Indus was proposed to be *pro rata* to their shareholding in Vodafone India Limited ('VIL') ('Proposed Combination').

CCI noted that the Acquirers are shareholders of VIL and wholly owned indirect subsidiaries of Vodafone Group Plc ('Vodafone'), and that they do not hold interests in any other company. VIL is a licensed telecom service provider ('TSP') and provides a range of telecommunication services in India. Indus, on the other hand, is a joint venture *inter alia* between the entities of Bharti Infratel Limited, VIL, and Idea Cellular Limited ('Idea'), and is engaged in the provision of passive telecommunications infrastructure to TSPs in 15 telecom circles in India.

Given that the Proposed Combination merely envisaged exit of VIL from Indus Towers and its replacement with the VIL Shareholders, CCI opined that the ultimate control of Indus is not undergoing any change. In view of the approved merger of telecommunication services of VIL and Idea, CCI noted that VIL Shareholders will, however, continue to exercise joint control in Indus along with other shareholders of Indus. Despite that, CCI observed that both Idea and Vodafone have insignificant presence in the passive infrastructure market with less than five percent market share in terms of standalone towers and/ or number of tenancies. Having said so, it also noted that competition assessment would not change significantly even if Idea's or VIL's share in towers/tenancies of Indus is considered. Considering this, CCI held the Proposed Combination unlikely to result in an appreciable adverse effect in market for provision of passive infrastructure services through telecom towers in India, and thus approved it.

<sup>23</sup> Combination Registration No. C-2017/10/531.

<sup>24</sup> Combination Registration No. C-2017/10/532.





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