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**AZB & PARTNERS**  
ADVOCATES & SOLICITORS

**MUMBAI:** AZB House | Peninsula Corporate Park | Ganpatrao Kadam Marg | Lower Parel | Mumbai 400013 | India | TEL +91 22 66396880 | FAX +91 22 66396888 | E-MAIL [mumbai@azbpartners.com](mailto:mumbai@azbpartners.com)

**MUMBAI:** Sakhar Bhavan | 4th Floor | Nariman Point | Mumbai 400021 | India | TEL +91 22 66396880 | FAX +91 22 49100699 | E-MAIL [disputeresolution.mumbai@azbpartners.com](mailto:disputeresolution.mumbai@azbpartners.com)

**DELHI:** AZB House | Plot No. A8 | Sector 4 | Noida 201301 | National Capital Region Delhi | India | TEL +91 120 4179999 | FAX +91 120 4179900 | E-MAIL [delhi@azbpartners.com](mailto:delhi@azbpartners.com)

**GURGAON:** Unitech Cyber Park | 602 Tower-B | 6th floor | Sector 39 | Gurgaon 122001 | National Capital Region Delhi | India | TEL +91 124 4200296 | FAX +91 124 4038310 | E-MAIL [gurgaon@azbpartners.com](mailto:gurgaon@azbpartners.com)

**BANGALORE:** Embassy Icon | 7th Floor | Infantry Road | Bangalore 560 001 | India | TEL +91 80 42400500 | FAX +91 80 22213947 | E-MAIL [bangalore@azbpartners.com](mailto:bangalore@azbpartners.com)

**PUNE:** Onyx Towers | 1101-B | 11th floor | North Main Road | Koregaon Park | Pune 411001 | India | TEL +91 20 67256666 | FAX +91 20 67256600 | E-MAIL [pune@azbpartners.com](mailto:pune@azbpartners.com)

# Jurisdictional Conflicts: Reconciling the Mandates of the Telecom Regulator and the Competition Commission

## Introduction and Background

The commercial landscape in India is characterised by the presence of several regulators, each tasked with regulating different types of conduct or different sectors. The mandates of regulators have led to jurisdictional conflicts that have resulted in protracted legal proceedings, evidenced by the ongoing tussle between two regulators – the Competition Commission of India ('CCI') and the Telecom Regulatory Authority of India ('TRAI') – on regulation of the telecom sector in India.

CCI is a sector-agnostic regulator tasked with preserving and promoting competition in India. In carrying out its mandate, CCI regulates conduct in sectors that are characterised by specialized sector-specific regulators, such as the telecom sector. TRAI is a sectoral regulator tasked with regulating telecom services, and promoting and ensuring orderly growth of the telecom sector in India.

The debate on the appropriate authority to regulate competition in the telecom sector has often been discussed, but has become the subject of some debate recently. In February 2017, when TRAI issued a Consultation Paper on Regulatory Principles of Tariff Assessment ('**TRAI Consultation Paper**') seeking stakeholders' opinion on various issues such as transparency in tariff offers, non-discriminatory offers and predatory pricing by operators, the Chairman of CCI wrote in response that it was the CCI's domain to assess market dominance and predatory pricing and that CCI alone had the "technical capacity and the supporting statutory framework" to delineate the relevant market and assess abuse of dominant position.<sup>1</sup>

The tension between the two regulators escalated when the Bombay High Court set aside the order of CCI directing a probe against Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited on the basis of complaints of cartelization made by Reliance Jio, alleging that the three telecom operators were preventing Reliance Jio from building its customer base. The Bombay High Court ruled that CCI had no jurisdiction to interpret contract conditions or policies of the telecom sector, which was governed by the Telecom Regulatory Authority of India Act, 1997 ('**TRAI Act**').<sup>2</sup>

CCI moved the Supreme Court of India ('SC') in December 2017, claiming that any dispute pertaining to anti-competitive practice or abuse of a dominant position in the market fell within its exclusive domain, regardless of the existence of a sectoral regulator. TRAI then filed an application of intervention before the SC to oppose attempts by CCI to secure exclusive jurisdiction in matters of competition law even in the telecom sector.

Further, on February 16, 2018, TRAI issued a tariff order on predatory pricing ('**TRAI Tariff Order**')<sup>3</sup>, which imposed a penalty of ₹50,00,000 (approx. US\$ 75,000) per circle for each tariff plan that was deemed predatory and changed the definition of significant market power ('SMP'), giving pricing flexibility only to operators with less than 30% of the market's subscribers or revenue and scrapping volume of traffic and network capacity as criteria.

## Roles of CCI and TRAI

The mandate of CCI, as set out in the preamble of the Competition Act, 2002 ('**Competition Act**'), specifies that it must prevent practices having an adverse effect on competition and promote and sustain competition in markets. CCI is a market referee and not a sectoral regulator. An important distinction between a market referee and a sectoral regulator is that CCI's intervention is usually *ex-post*, while a sectoral regulator is entrusted with the function of regulating the market *ex-ante* to ensure that the sector functions efficiently.

The TRAI Act explicitly excludes the jurisdiction of TRAI in relation to matters relating to monopolistic and restrictive practices that fell under the jurisdiction of the erstwhile Monopolies and Restrictive Trade Practices Commission. However, after the enactment of Competition Act in 2009, the TRAI Act has not been amended in relation to anti-competitive agreements and abuse of dominant position. Notably, the Competition Act prescribes for voluntary consultation between CCI and the sectoral regulator, but the opinion of CCI is not binding on the sectoral regulator, and *vice versa*. It is relevant to note that Section 60 of the Competition Act clarifies

<sup>1</sup> <https://www.thehindubusinessline.com/info-tech/turf-war-rages-between-cci-and-tra-ai-over-telecom-tariffs/article9791247.ece>

<sup>2</sup> Order dated 21 February, 2017 in Writ Petition No. 8594 of 2017

<sup>3</sup> On 24 April 2018, the Telecom Disputes Settlement and Appellate Tribunal ('**TDSAT**') passed an interim stay order on the TRAI Tariff Order. On appeal by TRAI to the Delhi High Court, the Delhi High Court *vide* its order dated May 4, 2018 upheld the interim stay order passed by TDSAT.

that the provisions of the Competition Act should have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further, per Section 62 of the Competition Act, the provisions of the Competition Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.



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### Flaws in TRAI's approach to market regulation

The TRAI Tariff Order reflects adherence to the market-share model in examining allegations of predatory pricing. While the Competition Act allows for the possibility of a new entrant with deep pockets distorting the market, as a result of the TRAI Tariff Order, only an incumbent telecom operator who enjoys SMP can distort the market. TRAI's observation that a telecom operator will be considered to have SMP only if it has a minimum of 30% share in a relevant market, means that it will not investigate a new entrant for predatory pricing even if it offers its services for free, since the new entrant will not have a minimum of 30% share of the relevant market. This also means that the actions of other more established incumbents, can be investigated for predatory pricing for matching the tariffs of new entrants.

### Conclusion

Anti-trust regulators in other jurisdictions have been able to resolve similar conflicts between sectoral regulators and competition authorities by crafting specific exemptions in areas of conflict between sectoral regulators and competition authorities. India can benefit from the experience of other regimes by conducting a comprehensive review of the mandate of TRAI and CCI, and identify potential areas of conflict in the legislations underlying TRAI and CCI. This would ensure minimum friction between the sectoral regulators and CCI, and the reconciliation of the mandates of CCI and TRAI. The Competition Act, in its current form, allows CCI to make a reference to a statutory authority (and *vice versa*) in case any decision of CCI is on an issue entrusted to a statutory body (and *vice versa*). Indeed, the Bombay High Court, while setting aside the order of CCI directing a probe against Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited on the basis of complaints of cartelization made by Reliance Jio, noted that CCI ought to have invoked the reference power under the Competition Act and consulted TRAI.

Further, the SC's consideration of the conflicting mandates of CCI and TRAI will result in a conclusive determination of the roles of CCI and TRAI in regulating the telecom market, paving the way for effective utilization of CCI and TRAI's resources and expertise.

## Behavioural Cases

### CCI Grants Relief of Lesser Penalty in the case of Cartelization for Zinc-Carbon Dry Cell Batteries in India

On April 19, 2018, CCI imposed a penalty on Eveready Industries India Limited ('Eveready'), Indo National Limited ('Nippo'), Panasonic Energy India Company Limited ('Panasonic') and their Association of Indian Dry Cell Manufacturers ('AIDCM') for colluding to fix prices of zinc-carbon dry cell batteries in India in violation of Section 3 of the Competition Act.<sup>4</sup>

In an application dated May 25, 2016, made under Regulation 5 of the CCI (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations') read with Section 46 of the Competition Act ('Leniency Application'), Panasonic admitted to the existence of a cartel arrangement with Eveready and Nippo to control the distribution and price of zinc-carbon dry cell batteries through AIDCM, which facilitated transparency between them by collating and disseminating data pertaining to sales and production of each manufacturer. On the basis of the Leniency Application, CCI directed the Director General ('DG') to conduct an investigation into the matter and submit a report. DG was also directed to investigate the role of officers who were in-charge of and responsible for the conduct of business at the time of contravention. During the course of investigation conducted by the DG, pursuant to the issue of a search warrant from the Chief Metropolitan Magistrate, Delhi, the DG carried out simultaneous search and seizure operations at the premises of Eveready, Nippo and Panasonic, and seized incriminating material. Subsequently, Eveready and Nippo also filed Leniency Applications with CCI. The DG also obtained statements on oath of certain officers of the companies.

From the evidence gathered in the case, the DG found that Eveready, Nippo and Panasonic had an arrangement whereby they exchanged commercially sensitive information among themselves for the purpose of price coordination, and that this arrangement was in effect since

<sup>4</sup> *Suo Motu* Case No. 02 of 2016.



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2008 until August 23, 2016, i.e., the date of search and seizure operations. Based on the DG's investigation report along with the Leniency Applications filed in the matter, CCI noted that the manufacturers had admitted to cartelization. In order to increase prices, they mutually agreed on implementation modalities of maximum retail prices ('MRP'). The price coordination among them encompassed not only the increase in MRP but also the exclusion of price competition at all levels in the distribution chain of zinc-carbon dry cell batteries to ensure implementation of the agreement to increase price. Further, they also agreed to control supply in the market to establish higher prices and indulged in market allocation by requesting each other to withdraw their products from certain markets. CCI found that individual officers of the companies regularly discussed and agreed on when to give effect to price increases during personal meetings as well as in meetings under the aegis of AIDCM, wherein senior management discussed various aspects of coordination. Further, there were several email/ fax communications among these individuals to show their friendly relations and deep commitment to adhere to the cartel arrangement.

On the question of penalties, after considering the aggravating and mitigating factors in the case, CCI imposed a penalty of 1.25 times the profits of the companies for each year of the duration of the cartel. CCI was of the view that the Leniency Application filed by Panasonic was crucial in identifying significant details regarding the cartel activities including the market structure, manner of information exchanges, as well as names, locations and email accounts of key persons of the companies actively involved in the cartel activities. Panasonic was therefore granted 100% immunity and a nil penalty for full disclosure of information and continuous cooperation during the investigation. In relation to the Leniency Applications filed by Eveready and Nippo, CCI acknowledged that while these did not result in significant value addition, there was full and true disclosure of information as well as continuous and expeditious cooperation during the investigation. Accordingly, Eveready, which was second in filing the Leniency Application, was granted 30% reduction with a penalty of ₹171.55 crore (approx. US\$ 26 million) and Nippo, which was third in filing the Leniency Application, was granted 20% reduction with a penalty of ₹42.26 crore (approx. US\$ 6.3 million). In case of AIDCM, CCI imposed a penalty at the rate of 10% of the average of its gross receipts for the last preceding three financial years, amounting to approximately ₹1,85,000 (approx. US\$ 3,000). CCI also imposed a penalty on individual officers at the rate of 10% of their average income and reduced their penalties in proportion to leniency shown to the respective company.

### **CCI Directs Investigation into the Conduct of Department of Town and Country Planning, Government of Haryana and Haryana Urban Development Authority relating to Sohna Master Plan 2013**

On April 6, 2018, CCI directed an investigation into the complaint filed under Section 19(1)(a) of the Competition Act by Confederation of Real Estate Developers Association of India – NCR ('CREDAI-NCR') against Department of Town and Country Planning, Government of Haryana ('DTCP') and Haryana Urban Development Authority ('HUDA') alleging that DTCP and HUDA have imposed unfair and unilateral terms and conditions in the agreements relating to the development of Group Housing Colony in the revenue estate of Tehsil Sohna, Gurugram district in Haryana, and thereby contravened provisions of Section 4 of the Competition Act.<sup>5</sup>

CREDAI-NCR is the National Capital Region chapter of Confederation of Real Estate Developers Association of India, which is an organisation representing around 12,000 real estate developers spread across 23 States. DTCP is a department of the Government of Haryana empowered to regulate urban development in the State of Haryana, while HUDA is an authority created under the Haryana Urban Development Authority Act, 1977 ('HUDA Act'), which has been delegated the task of planned development of urban areas in Haryana.

CCI defined the relevant product market as the 'market for issue of licenses and development of infrastructure for residential plotted/ group housing/ commercial colonies'. With respect to the relevant geographic market, CCI opined that the jurisdiction of DTCP and HUDA covers all the urban areas of Haryana and, therefore, cannot be restricted to a particular tehsil, and thereby defined it as the State of Haryana. Having defined the relevant market, CCI noted that DTCP and HUDA, being the sole statutory authorities under the Haryana Development and Regulation of Urban Areas Development Act, 1976 and the HUDA Act for issue of licenses and development of infrastructure in the State of Haryana, are *prima facie* in a dominant position.

CREDAI-NCR alleged that some of the terms and conditions of the licenses issued to the developers, letter of intent and agreements executed between the developers and DTCP are one-sided, unfair and discriminatory. For example: (i) External Development Charges ('EDC') are subject to revision as per the actual charges incurred, including any enhanced land acquisition charges, and are to be paid on demand; (ii) exorbitant interest rates are levied on delayed pay-

<sup>5</sup> Case No. 40 of 2017.

ment of EDC and Internal Development Charges ('IDC'); (iii) and charges and interest continue to be imposed despite no activity being undertaken by DTCP and HUDA in relation to infrastructure development.

DTCP and HUDA resisted the allegations both on preliminary grounds of jurisdiction regarding maintainability of the complaint as well as on substantive grounds. On the preliminary issue of jurisdiction, CCI rejected the assertion of DTCP and HUDA that they are not enterprises under Section 2(h) of the Competition Act and held that even if issuance of license were to be construed as exercise of sovereign power, the levy of EDC/IDC on developers and ultimately, consumers has a direct economic/ commercial impact and thus DTCP and HUDA are indeed enterprises. CCI further held that the developers fall within the ambit of Section 2(f) of the Competition Act since consumers not only include end consumers but also intermediate consumers. As far as maintainability of the complaint in view of Special Leave Petitions<sup>6</sup> ('SLPs') involving similar grounds pending before the SC was concerned, CCI noted that availability of remedies before any other forum or under any other law does not oust the jurisdiction of CCI. It relied on Sections 61 and 62 of the Competition Act to maintain that the proceedings before CCI can proceed simultaneously along with the proceedings before the SC. CCI also stated that the proceedings before the SC do not involve the issue of abuse of dominance under Section 4 of the Competition Act.

CCI further noted the justifications enumerated by DTCP and HUDA, that: (i) the developers did not raise the plea that the EDC should be linked to the execution of the external development works by the Government at the time of entering into agreements; (ii) several developers have not paid the EDC dues, as a result of which external development works could not be taken up in parts nor funds from other projects be diverted to the concerned project; (iii) the developers have the option to pay the charges within 30 days of grant of license without interest; and (iv) the agreement clauses are part of Haryana Development and Regulation of Urban Areas Development Rules, 1976 itself. CCI however observed that: (i) even though the terms of the agreements emanate largely from the statutory provisions, the terms of the documents *prima facie* appear to be one-sided and in favour of DTCP and HUDA; (ii) the alleged failure of DTCP and HUDA to adhere to their obligations under the Sohna Master Plan, 2013 in a time-bound manner while imposing onerous obligations on the developers to pay EDC/ IDC is *prima facie* abusive and; (iii) not undertaking any external development works is ultimately affecting the consumers. Therefore, CCI concluded that the conduct of DTCP and HUDA *prima facie* contravenes Section 4(a)(i) of the Competition Act and directed the DG to investigate the matter.

### CCI Directs Investigation into the Conduct of Honda Motorcycle and Scooter India Private Limited

On March 14, 2018, CCI directed an investigation into the complaint filed by Mr. Vishal Pande against Honda Motorcycle and Scooter India Private Limited ('Honda'), alleging contravention of several provisions of Sections 3 and 4 of the Competition Act through tie-in arrangements, resale price maintenance and maintaining a discount control mechanism with a standard dealership agreement.<sup>7</sup> While defining the relevant market, CCI delineated two separate relevant product markets for motorcycles and scooters rather than defining the market to be that of two-wheelers. CCI reasoned that motorcycles and scooters are *prima facie* not substitutable in terms of characteristics and consumer preference. As regards the geographic market, CCI noted that the conditions of competition for sale of motorcycles and scooters are apparently homogenous across the Indian territory, and thereby defined the relevant markets as: (i) 'market for manufacture and sale of motorcycles in India'; and (ii) 'market for manufacture and sale of scooters in India'.

Upon defining the relevant market, based on the market share of Honda which varied between 7.14% and 12.63% during 2010-11 to 2016-17, CCI concluded that it did not appear to be in a dominant position in the market for the manufacture and sale of motorcycles in India and held that this did not merit investigation into any abuse.

However, since Honda's market share ranged between 43.30% and 56.82% during 2010-11 to 2016-17, CCI held Honda to be dominant in the market for manufacture and sale of scooters in India. With respect to the issue of abuse of dominance, CCI noted *inter alia* the following factors: (i) the restriction imposed by Honda on dealers that they are required to source oil & lubricants, batteries, accessories, merchandise items and insurance and finance services only from designated sources are unfair and in contravention of Section 4(2)(a)(i) of the Competition Act; (ii) the condition for mandatory purchase of accessories, merchandise items, forceful billing of slow moving vehicles, compulsory deduction of advertising expenses, restrictions on insurance and finance options, making purchase of Annual Maintenance Contract ('AMC'), Ex-



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<sup>6</sup> Main SLP being SLP No. 5459 of 2016 titled Magnolia Propbuild Private Limited v. State of Haryana.

<sup>7</sup> Case No. 40 of 2017.





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tended Warranty ('EW') and Road Side Assistance ('RSA') contingent upon purchase of booklets from Corporate India Warranties (I) Private Limited, termination of dealership without prior notice, and refusal for stock buyback, all appear to be unfair and *prima facie* in contravention of Section 4(2)(a)(i) of the Competition Act; and (iii) the dealership agreement were concluded with supplementary obligations which, by their nature or commercial usage, have no connection with the subject of the contract, and such conduct merits examination under Section 4(2)(d) of the Competition Act.

CCI then examined the allegations made under Section 3 of the Competition Act and noted that: (i) the mandatory requirement imposed by Honda on its dealers for purchase of oil and consumables, genuine accessories, AMC, EW and RSA, advertising services, merchandise items, batteries, insurance and finance options, from designated sources; (ii) resale price maintenance and discount control mechanism; (iii) allocation of any area or market for the disposal or sale of the goods; and (iv) exclusive supply agreement/refusal to deal, also appear to be in the nature of anticompetitive restraints covered under Section 3(4) of the Competition Act. In light of the above *prima facie* findings, CCI directed the DG to investigate into the complaint.

### **CCI Disposes of Information filed against Coal India Limited and its Subsidiaries**

On March 16, 2018, CCI disposed of the information filed by Karnataka Power Corporation Limited ('Karnataka Power') alleging violation of Section 4 of the Competition Act against Coal India Limited ('Coal India') and its subsidiaries, Mahanadi Coalfields Limited ('Mahanadi Coalfields') and Western Coalfields Limited ('Western Coalfields'). Karnataka Power, a government company, is engaged in the business of generating electric power in State of Karnataka and purchases coal from Mahanadi and Western Coalfields for power generation by way of Fuel Supply Agreements ('FSAs').<sup>8</sup> Karnataka Power raised issues relating to lack of negotiations in drafting of FSAs entered into with Mahanadi and Western Coalfields, issues pertaining to qualities and quantities of coal supplied under FSAs, including those related to sampling procedure, grade slippage/ mis-declaration of grades, deemed delivery, lack of investments in coal mining and handling infrastructure.

In this case, based on the earlier coal cases<sup>9</sup>, CCI defined the relevant market to be the 'market for production and sale of non-coking coal to thermal power generators in India' and held Coal India and its subsidiaries to be in a dominant position in the market. CCI then observed that the issues raised by Karnataka Power have been substantially dealt with in the previous coal cases, and as such, no further orders are required to be passed in the matter. As far as freight issue relating to alleged overloading of wagons at railway sidings was concerned, CCI noted that although Coal India has provided detailed reasons for overloading, yet it has not taken any steps to remedy the situation. In this regard, CCI took on record assertions made by Coal India and its subsidiaries that the relevant clause in the FSAs casts a positive obligation upon the seller to rectify any overloading issues and accordingly, CCI directed Coal India to take remedial measures immediately on being intimated by Karnataka Power. CCI further observed that the request of Karnataka Power to direct Coal India to compulsorily invest in coal mining and handling infrastructure do not raise any competition issues, and in these terms, disposed of the information.

### **CCI Disposes of Information filed by Indian Motion Picture Producers' Association against Federation of Western India Cine Employees and its Affiliates**

On April 18, 2018, CCI disposed of the information filed by Indian Motion Picture Producers' Association ('IMPPA') against Federation of Western India Cine Employees ('FWICE') and its affiliates alleging a violation of Sections 3 and 4 of the Competition Act.<sup>10</sup> The members of IMPPA are engaged in the production of films and daily programmes for television channels. FWICE, which is registered under the Trade Unions Act, 1926, is a federation of different craft associations associated with the Mumbai based film & television industry and it is the parent body of all its affiliate associations.

IMPPA alleged that FWICE and its affiliates were compelling IMPPA to use their services by dictating certain terms and monopolizing the film production business and that without their consent, no producer could proceed to produce a film or television program. IMPPA alleged specific anti-competitive behavior by citing certain non-cooperative directives and imposing of compulsory holidays, thereby stalling the shooting and post-production activities of tele-series/ films all over India.

CCI considered these allegations and found that the information in the case was filed when

<sup>8</sup> Case No. 11 of 2017.

<sup>9</sup> Case Nos. 03, 11 and 59 of 2012.

<sup>10</sup> Case No. 45 of 2017.

a similar matter, *Shri Vipul A. Shah v. All India Film Employee Federation*<sup>11</sup> was pending before it involving similar issues against FWICE and its affiliates. CCI noted that the matter had been disposed of by passing a cease and desist order. Since IMPPA had made submissions in that case which overlapped with the instant case, CCI noted that the order which had already been passed settled its position on issues in the present complaint. Specifically, in relation to the issue of circulars directing producers to observe specific holidays, CCI held that in the previous case it had already observed that the fixing of holidays is not a matter within the domain of the Competition Act. Similarly, CCI observed that although prescribing wages has the effect of fixing the prices of services, such wages/ increments are also part of the conditions of labour/ terms of employment falling within the realm of legitimate trade union activities when duly negotiated by a registered trade union and are thus not anti-competitive. However, with regard to the issue of non-cooperation directives against members of IMPPA, as held in the previous case, CCI noted that this tends to disrupt competition in the market and amounts to limiting and controlling services in contravention of Section 3(3)(b) of the Competition Act. CCI concluded that its orders are *in rem* and not *in personam* and since it had already passed a cease and desist order after dealing with all the allegations, it is not expected to do so again by dealing with successive complaints for the same conduct against the same parties by separate orders. CCI nevertheless clarified that if the alleged conduct of FWICE and its affiliates continues in defiance of the previous order, IMPPA is at liberty to approach it for appropriate orders.

With regard to the allegations on the violation of Section 4 of the Competition Act, CCI held that no material was placed on record by IMPPA to suggest that FWICE and its affiliates are engaged in any economic activity in order to be considered as an 'enterprise' under the Competition Act and stated that no conclusion of abuse can be drawn on the basis of such allegations.



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## Combinations

### CCI Approves Acquisition of Signode Industrial Group Holdings (Bermuda) Limited by Crown Holdings, Inc.

On February 7, 2018, CCI approved the acquisition of all shares of Signode Industrial Group Holdings (Bermuda) Limited ('Signode') by Crown Holdings, Inc. ('Crown') ('Proposed Combination') through Cobra Merger Sub, Limited ('Merger Sub'), whereby Merger Sub will cease to exist and Signode will become a wholly owned subsidiary of Crown.<sup>12</sup>

Crown, a company incorporated in United States and listed on the New York Stock Exchange, is engaged in design, manufacture and sale of packaging products, for consumer goods, like steel and aluminum cans for food, beverage, household and other consumer products, glass bottles for beverage products, etc. It exports these products into India. Signode, a company incorporated in Bermuda, is engaged in providing transit and protective packaging systems and solutions, which consist of strap, protective, and stretch packaging consumables and equipment. Its products are used to contain, unitize, and protect goods during manufacturing, transport, and warehousing. In India, Signode is present through its wholly owned subsidiaries, namely: (i) Signode India Limited, which is engaged in transit and protective packaging sector, manufacture and sell products such as steel strap, plastic strap, specialty tape, etc.; and (ii) Stopak India Private Limited, a 100% export oriented unit, which is engaged in manufacture of cargo securing products.

In its competition assessment, CCI observed that although Crown and Signode are engaged in overall packaging industry, their activities pertain to different areas of operations. CCI further noted that while Crown purchases some transit and protective packaging consumables of the type supplied by Signode as an end consumer and uses them for logistics purposes, however, the total value of purchase made by Crown worldwide from Signode is insignificant. CCI also added that Signode has no purchase from Crown either in India or worldwide. Having regard to absence of any horizontal overlap and insignificant vertical relationship between the Crown and Signode, CCI held the proposed combination was not likely to raise any substantial competition concerns, and approved it under Section 31(1) of the Competition Act.

<sup>11</sup> Case No. 19 of 2014.

<sup>12</sup> Combination Registration No. C-2018/01/549.



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### CCI Approves Acquisition of Subsidiaries of Dilip Buildcon Limited by Chhatwal Group Trust

On February 19, 2018, CCI approved the acquisition of entire share capital of 23 special purpose vehicles and wholly owned subsidiaries ('Target Entities') of Dilip Buildcon Limited ('DBL') by Chhatwal Group Trust ('CGT') through Shrem Infraventure Private Limited ('SIPL') and/or Shrem Roadways Private Limited ('SRPL').<sup>13</sup>

CGT is a family trust, which, through its group of companies known as Shrem Group, is engaged in making investments in various sectors such as hospitality, manufacturing, finance, healthcare, real estate, etc. SIPL and SRPL, both part of Shrem Group, are incorporated with the objective of investing in road projects. SIPL invests in hybrid annuity model projects while SRPL invests in toll projects. The Target Entities are special purpose vehicles incorporated for the purpose of construction, operation and maintenance of specific road projects.

CCI noted that the proposed combination relates to development of road projects in India. It then observed that while DBL, through its subsidiaries, is undertaking various road infrastructure projects, Shrem Group is present in this sector only through a joint venture with DBL in the State of Maharashtra. Given the insignificant overlap, CCI concluded that the transaction is unlikely to raise any competition concerns in India.

### CCI Approves Acquisition by Principal International India Limited from Punjab National Bank

On January 15, 2018, CCI approved the acquisition of 21.38% and 30% of the equity share capital of Principal PNB Asset Management Company Private Limited ('Target AMC') and Principal Trustee Company Private Limited ('Target Trustee'), respectively by Principal International India Limited ('Principal') from Punjab National Bank ('PNB').<sup>14</sup>

Principal, an investment company, is a wholly owned subsidiary of Principal Financial Services Asia Limited, which in turn is a subsidiary of Principal Financial Services Inc., USA ('PFSI'), an entity belonging to Principal Financial Group, USA ('Principal Financial Group'). Principal Financial Group is the sponsor of the Principal Mutual Fund ('Target MF'). Principal Financial Group (Mauritius), a subsidiary of PFSI, already owns 78.62% and 70% of the equity share capital of the Target AMC and of Target Trustee respectively. Target AMC is an asset management company of Target MF and Target Trustee provides trustee services to Target MF. Both Target AMC and Target MF are joint ventures between the Principal Financial Group and PNB.

CCI observed that Target AMC and Target Trustee are under the joint control of the Principal Financial Group and PNB and post combination, they will be under the sole control of the Principal Financial Group. CCI also noted that there will not be any change in the market dynamics as a result of the acquisition, and accordingly, approved the combination.

### CCI Approves Acquisition of Brahmani River Pellets Limited by Thriveni Pellets Private Limited, JSW Techno Projects Management Limited and Mitsun Steels Private Limited

On January 22, 2018, CCI approved the acquisition of 100% equity shares of Brahmani River Pellets Limited ('BRPL') from its holding company, Aryan Mining and Trading Corporation Private Limited ('AMTC') by Thriveni Pellets Private Limited ('TPPL'), JSW Techno Projects Management Limited ('JTPML') and Mitsun Steels Private Limited ('MSPL') in such a manner that TPPL and JTPML each would acquire 49% and MSPL would acquire 2% of BRPL's shares. TPPL would be responsible for the day-to-day operation and management of BRPL.<sup>15</sup>

TPPL is a subsidiary of Thriveni Earthmovers Private Limited ('TEMPL'), which is engaged in the business of providing mining services and has mining operations relating to iron-ore, bauxite, barite, copper, coal, graphite, etc. Post the proposed combination, TPPL will be engaged in selling pellets produced by BRPL. JTPML is owned by the Sajjan Jindal family trust and is a part of the JSW group. JTPML is engaged in project management consultancy services, strategic investments and manufacture of industrial gases. MSPL is a distributor and dealer of various steel and structural products. BRPL is a wholly owned subsidiary of AMTC and is engaged in the business of producing and selling iron ore pellets. BRPL exports a majority of its production of iron ore pellets.

CCI noted that TPPL, JTPML, MSPL and BRPL are not engaged in the production and distribution of similar products. It also noted that JSW's group entities are engaged in the production of iron ore pellets which are used for captive consumption only. CCI further acknowledged the potential vertical relationship between BRPL and JTPML where JTPML may supply BRPL's iron

<sup>13</sup> Combination Registration No. C-2018/01/544.

<sup>14</sup> Combination Registration No. C-2018/01/543.

<sup>15</sup> Combination Registration No. C-2017/12/539.



ore pellets to JSW Steel Limited. However, after taking note of the total capacity and the actual production of iron ore pellets in India, CCI observed that the market share of BRPL is unlikely to raise any competition concerns in the market for iron ore pellets in India because of the presence of other significant players. In view of the absence of any competition concerns, CCI decided to leave the market definition open and passed an order approving the combination.



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### SC Restores Penalty imposed by CCI on Thomas Cook (India) Limited, Thomas Cook Insurance Services (India) Limited and Sterling Holiday Resorts (India) Limited

On April 17, 2018, in the matter of *CCI v. Thomas Cook (India) Limited*, a division bench of SC passed its final decision by allowing the appeal filed by CCI against the order of the erstwhile Competition Appellate Tribunal ('COMPAT') and restored CCI's order imposing penalty of INR 1 crore (US\$ 0.15 million) on the ground of non-compliance with the provisions contained in Section 6(2) of the Competition Act, which requires advance notice of the proposal to enter into a combination before such combination takes effect.<sup>16</sup>

In February 2014, Thomas Cook (India) Limited and Thomas Cook Insurance Services (India) Limited (collectively, 'Thomas Cook') entered into a part equity part merger deal with Sterling Holiday Resorts (India) Limited ('Sterling'). This involved *inter alia* the purchase of 9.93% shares of Sterling on the Bombay Stock Exchange ('Market Purchases'), as well as a composite scheme of demerger/amalgamation ('Scheme'). Thomas Cook and Sterling notified only the Scheme which was the part of the multi-step transaction that qualified as a 'combination' under Section 5 of the Competition Act. Thomas Cook claimed that the remaining steps were all acquisitions of shares that could avail of the *de minimis* target based exemption<sup>17</sup> as Sterling did not have turnover in excess of INR 750 crore (approx. US\$ 112 million). CCI approved the Scheme after noting that it was unlikely to raise any competition concerns in India, as the parties were not engaged in similar businesses. However, it held that the Market Purchases and the Scheme were inter-connected and inter-dependent on each other and formed part of a 'composite combination' which ought to have been notified and imposed a penalty of INR 1 crore (approx. US\$ 0.15 million) under Section 43A of the Competition Act. COMPAT set aside CCI's order on appeal and aggrieved by this, CCI preferred an appeal to SC against COMPAT's decision.

SC held that the Market Purchases in question were not independent and were intrinsically related to the Scheme. In coming to this finding, SC considered the following:

- i. Though the Market Purchases were not mentioned in the various transaction documents executed between the parties, the Scheme was prepared on the same day as the passing of the corresponding board resolutions and all other acquisitions were made on the same day.
- ii. If the Market Purchases were not part of the Scheme, they would not have been referred to in the notice filed with CCI, where it was mentioned that the parties have contemplated certain other transactions including substitution of equity shares, share purchase agreement, open offer and Market Purchases.
- iii. The Market Purchases were consummated before giving notice to CCI thereby suggesting that they would not have taken place in the absence of the Scheme.
- iv. The joint press release clearly indicated the share purchase agreement as an open offer and the board of directors of the parties authorized Market Purchases on the same day. Therefore, all the transactions form part of one viable business transaction.
- v. Market Purchases having been consummated almost after finalizing the composite combination clearly suggested that these purchases would not have taken place in the absence of the scheme and the other acquisitions.
- vi. SC held that while it is open for parties to structure their transactions in a particular way, the substance of the transactions would be more relevant to assess the effect on competition irrespective of whether such transactions are pursued through one or more steps. Structuring cannot be permitted in such a manner so as to avoid compliance with the provisions of the Competition Act. For ensuring compliance with the requirements of the Competition Act, it is open to consider whether the particular step was an individual transaction or part of the whole transaction.
- vii. Technical interpretation to isolate two different steps of transactions of a composite combination would be against the spirit and provisions of the Competition Act,

<sup>16</sup> Civil Appeal No. 13578 of 2015.

<sup>17</sup> By way of Ministry of Corporate Affairs Notification No. S.O. 482 (E), acquisitions where the assets or turnover of the target enterprise were below ₹ 250 crore (approx. US\$ 37 million) in India or ₹ 750 crore (approx. US\$ 112 million) in India, respectively were exempt from the provisions of Section 6 of the Competition Act.



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therefore subsequent changes to Regulation 9(4) of the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 do not take away from a substantive assessment of the Scheme.<sup>18</sup>

- viii. Even on application of the ultimate objective test, sc held that the Market Purchases were connected to the scheme even if not expressly mentioned within the scheme forming part of the same transaction and as such, considering the substance of the transaction, subsequent change of law does not help the parties.
- ix. Lastly, sc held that an action may not be *mala fide*, however if there is a breach of the statutory provisions of civil law, a penalty is attracted *simpliciter* on its violation. There is no requirement of *mens rea* or an intentional breach under Section 43A of the Competition Act as an essential element for the levy of penalty.

In light of the above, sc set aside the order of the COMPAT, and restored the penalty imposed by CCI on the parties.

### sc Upholds Decision to impose Penalty on scm Solifert Limited and Deepak Fertilizers and Petrochemicals Limited

On April 17, 2018, in the matter of *scm Solifert Limited v. CCI*, sc upheld COMPAT's order which affirmed CCI's decision imposing a penalty of ₹ 2 crore (approx. US\$ 0.3 million) on SCM Solifert India Limited ('SCM') and Deepak Fertilizers and Petrochemicals Limited ('DFPL') under Section 43A of the Competition Act for failure to notify the acquisition of shares in Mangalore Chemicals and Fertilizers Limited ('MCFL').<sup>19</sup>

On July 3, 2013, SCM along with DFPL had purchased 24.46% of the share capital of MCFL on the Bombay Stock Exchange ('First Acquisition'). This was followed by a press release on the same day by DFPL, which was filed with the stock exchanges, in compliance with the requirements of the Listing Agreement ('Press Release'). Thereafter on April 23, 2014, SCM and DFPL made a purchase in the open market for 0.8% of the shares of MCFL ('Second Acquisition') and subsequently, an open offer was made for acquiring up to 26% of the shares of MCFL in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Public Announcement').

SCM filed a notice disclosing details of the First Acquisition and notifying the Second Acquisition within 30 days of the Public Announcement. CCI passed an order approving the proposed combination. However, because SCI and DFPL did not seek approval prior to consummating the First Acquisition, CCI commenced proceedings for filing the belated notice. In this regard, SCM claimed that the First Acquisition was exempt, under Schedule 1 of the CCI (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 ('Combination Regulations'). SCM argued that the First Acquisition was as an acquisition of shares less than 25% in MCFL solely as an investment. On this basis, SCM assumed that the First Acquisition would qualify for the Item 1 exemption available under Schedule 1 of Combination Regulations. In any event, SCM submitted that a notice was filed within the 30 days of the Public Announcement made pursuant to the Second Acquisition. Further, it was submitted that with regard to the Second Acquisition, the shares were credited to an escrow account, created specifically to avoid consummation prior to CCI approval.

CCI dismissed SCM's submissions after noting that the First Acquisition was notifiable. This was because the acquisition of shares was not made solely as an investment. By its own admission, SCM in the Press Release and the Public Announcement had claimed that the investment was 'very strategic'. Further, CCI noted that MCFL was not very profitable, which further went to show that the First Acquisition could not be considered to be an investment by a prudent investor.

sc while agreeing with CCI's rationale held that SCM had not complied with Section 6(2) of the Competition Act and there was a failure to file notice for the First Acquisition. In relation to the Second Acquisition, sc held that SCM ought to have notified the transaction prior to the acquisition and rejected SCM's claim that it was enough to hold the shares in an escrow account, which could not be accessed prior to CCI approval. sc observed that the Competition Act does not contemplate *post facto* notice as this would defeat CCI's opportunity to assess whether the proposed combination could cause any appreciable adverse effect on competition. Accordingly, SCM was required to notify the proposed combination without giving effect to it prior to CCI ap-

<sup>18</sup> Regulation 9(4) of the Combination Regulations (prior to the amendment dated July 1, 2015), offered a facility allowing a single notice to be filed. This applied where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions, which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination. In 2015, the Combinations Regulations were amended from "... a single notice, covering all transactions, may be filed ..." to "... a single notice, covering all these transactions, shall be filed...". Since 2016, the words "...or inter-dependent on each other" have also been omitted.

<sup>19</sup> Civil Appeal No. 10678 of 2016.

proval or the end of the 210-day period, whichever is earlier.

On SCM's submission that the violation, if any, was technical, not willful, deliberate or *mala fide*, SC observed that CCI had already imposed a nominal penalty of INR 2 crore (approx. US\$ 0.3 million) (even though it had the discretion to go up to 1% of the value of the transaction, which would have been INR 33.22 crore (approx. US\$ 5 million) in the instant case). SC further observed that CCI approval of a transaction cannot by itself condone gun-jumping violations. SC also held that CCI was not required to demonstrate *mens rea* or intentional breach as an essential element for imposing penalty as this was not a requirement in case of violation of the civil statutory provision. On this basis, SC concluded that the order passed by CCI as affirmed by COMPAT, is in accordance with the law and dismissed SCM's appeal as being devoid of any merit.



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### CCI Dismisses Complaints Alleging Abuse of Dominant Position by way of Non-Delivery of Goods to Cement Dealer

On February 28, 2018, CCI dismissed the information filed by Mr. Ramachandra V. ('Ramachandran') under Section 19(1)(a) of the Competition Act against JSW Cements Limited ('JSWCL') alleging contravention of Section 4 of the Competition Act.<sup>20</sup> There was an agreement between JSWCL and Ramachandran as per which all consignments of cement and construction products were to be dispatched and delivered by JSWCL to the dealer's consignee location from any of JSWCL's manufacturing units or warehouses. It was alleged by Ramachandran that JSWCL was making deliveries to other dealers in the region but not to his consignees and therefore, there was manifest collusion with other dealers which has caused him irreparable losses. In response, JSWCL contended that the required order procedure had not been followed by Ramachandran and that if he wanted supplies to be delivered to his consignees, he may direct them to place orders after registering their addresses with JSWCL as they only deliver cement at registered addresses.

Determining the relevant market to be the '*market for manufacture and sale/supply of cement in Kerala*', CCI held that the cement market in South India has no clear leader, and even JSWCL enjoys only 22% market share thereof. Further, it specializes only in Portland Slag Cement, and is part of a multinational conglomerate. Its chances of being immune to competitive forces prevailing in the market are further diminished by the existence of other established players in the market, such as ACC, UltraTech, etc. CCI concluded that JSWCL was not in a dominant position, and therefore, the question of abuse did not arise.

### CCI Dismisses Complaint claiming Violation of Section 4 by Judgement-Debtor as a result of Selective Non-Payment to Certain Judgement-Creditors

On February 27, 2018, CCI while deciding on information provided under Section 19(1)(a) of the Competition Act against Sri Ram Housing Finance & Investment of India Limited ('Sri Ram Housing'), dismissed the batch of claims alleging abuse of dominance.<sup>21</sup> In 2003, the SC declared the commercial complex constructed by Sri Ram Housing to be illegal and worthy of being demolished. Accordingly, the Municipal Authorities demolished the commercial complex. Consequently, a string of petitions were filed before the erstwhile Monopolies and Restrictive Trade Practices Commission ('MRTP Commission') claiming refund. The MRTP Commission ordered Sri Ram Housing to repay the principal amount, but did not decide on the interest to be paid.

Since the issue of interest was pending, Sri Ram Housing paid the principal amount to the informants, but did not pay interest. Note that the informants were not party to the proceedings before the MRTP. Thereafter, compensation applications were filed which were decided by the COMPAT, being its successor. COMPAT directed Sri Ram Housing to pay interest at 15% from the date of deposit of principal amount till the date of refund. Even then, interest was not paid. It was alleged by the informants that interest was paid to the other buyers but not to them, and this amounted to an infringement of Section 4.

CCI held that nothing had been placed on record to show that Sri Ram Housing was in a dominant position in any relevant market, and therefore, no *prima facie* case of contravention of Section 4 could be made out. Further, CCI clarified that non-payment of interest was not within its scope.

### CCI Rejects Claims regarding AAI and PGCIL Acting in Abuse of their Dominant Positions in Setting Unreasonable Accreditation Standards

On February 27, 2018, CCI, while considering the information filed under Section 19(1)(a) of the Competition Act by Shri Prem Prakash, against Airport Authority of India ('AAI') and Power Grid Corporation of India Limited ('PGCIL'), held the same to be insufficient to constitute

<sup>20</sup> Case no. 76 of 2017.

<sup>21</sup> Case no. 67 of 2017.



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abuse of dominance under Section 4 of the Competition Act.<sup>22</sup> The primary grievance of Sri Prem Prakash concerned the policy/guidelines of the AAI and PGCIL which require testing of construction materials to be done only by laboratories which are accredited by a full member Mutual Recognition Arrangement ('MRA') of International Laboratory Accreditation Cooperation ('ILAC')/ Asia-Pacific Laboratory Accreditation Cooperation ('APLAC')/ International Accreditation Forum ('IAF').

Shri Prem Prakash's laboratory was Accreditation Commission for Conformity Assessment Bodies ('ACCAB') accredited, but the AAI required National Accreditation Board for Testing and Calibration Laboratories ('NABL') accreditation. Based on an application filed by Sri Prem Prakash under the Right to Information Act, 2005, it was determined that the AAI did not have any scientific basis for its insistence on NABL accreditation. Similarly, PGCIL being a government company having monopoly over developing infrastructure for inter-state power transmission systems, maintained standards by accepting only private testing laboratories which operated in accordance with ISO/IEC 17011, having full membership and MRA of ILAC/ APLAC. It was contended that ILAC/ APLAC/ IAF were foreign private bodies, and no records pertaining thereto were available with the Bureau of Indian Standards or the Quality Council of India.

It was alleged by Sri Prem Prakash that by requiring accreditation by NABL or by labs having full membership of ILAC/ APLAC/ IAF, AAI and PGCIL put him and other accreditation bodies out of competition, and facilitated the monopoly of NABL. Such stipulation was alleged to be a contravention of Section 4 of the Competition Act.

CCI took notice of earlier information filed by the Sri Prem Prakash alleging abuse of dominance by PGCIL on a similar count, which was dismissed by the COMPAT in appeal after holding that PGCIL did not operate in the same market as Sri Prem Prakash did and instead, was a consumer of laboratory services. The COMPAT had also held that every consumer/procurer must have the freedom to exercise its choice freely in procurement of goods and services and such a choice was sacrosanct in a market economy as the consumers were best placed to evaluate what meets their requirements and has a competitive advantage. Further, while exercising the choice, they are free to stipulate standards for procurement and the same cannot be held to be anti-competitive.

Agreeing with and reaffirming the reasoning given in the above case, CCI concluded that PGCIL operated in a market different from that of Sri Prem Prakash's, and being a consumer of services, had the right to choose. Accordingly, Shri Prem Prakash failed to prove that PGCIL was dominant or even present in the relevant market and therefore, there was no contravention of Section 4 of the Competition Act. Similarly, AAI was held to be a consumer as well, and not dominant in the ascertained relevant market - "market for laboratory services for testing construction materials in India."

### **CCI finds Ghaziabad Development Authority Guilty of Abusing its Dominance by imposing Unfair Conditions on EWS Flat-Buyers**

On February 28, 2018, CCI while deciding on a disputed DG investigation, based on information filed by Shri Satyendra Singh ('Mr. Singh') against the Ghaziabad Development Authority ('GDA'), held GDA to be guilty of conduct in contravention of Section 4 of the Competition Act.<sup>23</sup>

GDA is a statutory body created under the Urban Planning and Development Act, 1973 of Uttar Pradesh, engaged in developing and selling real estate in Ghaziabad district of Uttar Pradesh. On May 4, 2014, Mr. Singh was allotted a low cost residential flat under the GDA's housing scheme ('Scheme') for the Economically Weaker Sections ('EWS') in Ghaziabad. The final price of the flat was stated to be INR 2 lakhs (approx. US\$ 3,000) but the GDA later informed all allottees that based on the real construction cost of the project, the price had increased to INR 7 lakhs (approx. US\$ 11,000) vide letter dated November 27, 2015. GDA asked all allottees to consent in writing to the increased price of the flat within 15 days, failing which their allotment would stand cancelled.

Delineating the relevant market as "market for provision of services for development and sale of low cost residential flats under affordable housing schemes for the EWS in the district of Ghaziabad", and the relevant product market as "market for provision of services for development and sale of low cost residential flats under affordable housing scheme for EWS", the DG concluded that the GDA abused its dominance by imposing unfair conditions and price on the allottees, and even found 11 individual officers of GDA responsible. The investigation report of the DG was provided to the parties to file their objections/replies/suggestions to the same. In pursuance of the same, GDA argued that (i) Section 4 of the Competition Act was notified on May 20, 2009, and the scheme belonged to 2008, therefore it cannot apply retrospectively; (ii) GDA is not an 'enterprise' in terms of Section 2(h) of the Competition Act because it was

<sup>22</sup> Case no. 75 of 2017.

<sup>23</sup> Case no. 86 of 2016.





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performing a sovereign function under the Scheme; (iii) GDA is not-for-profit and constructs houses for general public, working out their final price on the basis of the actual construction cost incurred on the project, and the costing procedure drawn from the Guidelines for Costing issued by the UP Government, which provides that if the cost of the house increases more than 10% then the allottee may get the money back with 9% interest; (iv) as for the relevant market, the GDA's Scheme was not the only scheme – Uttar Pradesh Avas Evam Vikas Parishad (UPAVP) had also launched an EWS scheme and several other options were available in Delhi and NCR, additionally, the relevant geographical market should not be restricted to Ghaziabad, since residents of NCR could also apply; (v) allottees had the option to withdraw from the Scheme, therefore no unfair conditions were imposed; (vi) estimation done at the time of announcement was incorrect and proceeding against the responsible officers were being conducted.

On GDA's objection of the Competition Act not being retrospective, CCI relied on **Kingfisher Airlines Limited and Another v. Competition Commission of India**,<sup>24</sup> where the Bombay High Court had held that “the Act does not render the agreement entered into, prior to coming into force of the Act, void ab initio.... But if the parties want to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature, therefore, would, from that time, be opposed to the public policy.”

CCI also made a reference to the observations of the erstwhile COMPAT in the matter of **DLF Limited v. Competition Commission of India**,<sup>25</sup> wherein COMPAT has held that “Any imposition, or the act after 20th May, 2009 could be validly inquired into by the CCI, as the language of section 4 of the Act is not retrospective, but prospective. Therefore, any tainted imposition after that date could be a subject matter of the inquiry, but it cannot be said that the entering into the agreement in the year 2006-07, as the case may be was an imposition after the Act”. Therefore, the Scheme could have been of 2008, but the letter of increased price was sent in 2015.

With regard to the GDA not being an enterprise under Section 2(h) of the Competition Act, the COMPAT has held in **India Trade Promotion Organization v. Competition Commission of India**,<sup>26</sup> that the functions which are an integral part of the Government and which are inalienable, are ‘sovereign functions’ and commercial actions/ trading activities and actions, which can either be delegated or performed by the third parties, are alienable and are not ‘sovereign functions’. CCI concluded that the GDA's actions were not inalienable sovereign functions, and thus, not immune to the Competition Act.

CCI rejected the contention that the relevant market included NCR and other areas, keeping in view the economic conditions of EWS persons, and the restrictions on their choices. Considering the 81.45% market share of the GDA, the dependence of EWS consumers on GDA as a result of lack of other options in Ghaziabad, and the surplus of resources at its disposal, CCI verified its dominance in the relevant market. The GDA had abused its dominant position knowing well that the informants belonged to the EWS category, by changing its stance from ‘final cost – INR 2 lakhs (approx. US\$ 3,000)’ to ‘estimated cost’, by not including any stipulation in the brochure about a potential change in prices, and by including only one-sided conditions in the scheme, etc.

CCI held that the GDA was guilty and imposed a penalty of approximately INR 1 crore (approx. US\$ 0.15 million). A cease and desist order was also passed against GDA.

### **CCI Dismisses Allegation of Collusive Refusal to Grant Exhibition/ Display Rights of Movies to Informant's Multiplex**

On March 8, 2018, CCI dismissed information filed by Sarv Prakash Developers (‘SDP’) under Section 19 of the Competition Act against Phantom Films (‘Phantom’), Zee & Essel Group (‘Zee-Essel’) and Fox Stars India (‘Fox’) (collectively the ‘Parties’).<sup>27</sup> According to the information, the Parties and an ex-lessee of SDP's multiplex had colluded with each other, as a result of which the Parties allegedly refused to grant exhibition rights of movies to SDP's multiplex. SDP claimed that the collective ban against it was imposed at the behest of the ex-lessee and that the ex-lessee was ousted by SDP because of breach of contract.

CCI on examining the merits of the information observed that cinemas/ theaters had the option of simultaneously procuring rights of exhibition of movies from multiple distributors; and therefore, it cannot be said that the alleged non-supply of movies by the Parties is creating barriers for SDP to operate in the cinematographic exhibition market. As regards the alleged collusion, CCI scrutinized the communications exchanged between the parties and concluded that no such collusion could be ascertained therefrom.

24 Writ Petition 1785 of 2009.

25 (2014) Comp LR 1 (COMPAT).

26 Appeal No. 36 of 2014.

27 Case no. 65 of 2017.





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## CCI Penalises SpiceJet, Jet Airways, IndiGo Airlines, Air India, and Go Air over Surcharge Levy on Cargo Transport

On March 7 2018, CCI fined Jet Airways (India) Limited ('Jet Airways'), Interglobe Aviation Limited ('IndiGo'), SpiceJet Limited ('SpiceJet'), Air India Limited ('Air India') and Go Airlines (India) Limited ('Go Airlines') (collectively 'Airlines') on the basis of an information filed by Express Industry Council of India ('EICI'), alleging *inter alia* collusion on fixing of Fuel Surcharge ('FSC') rates for cargo transportation, and thereby contravening Section 3 of the Competition Act.<sup>28</sup> Though the DG found insufficient evidence to prove collusion, CCI noted that three of the named airlines (Jet Airways, IndiGo and SpiceJet) had acted in collusion in fixing FSC rates and collectively imposed a fine of about ₹55 crore (approx. US\$ 8.25 million) on the three airlines. No penalty however, was imposed upon Air India as its conduct was not found to be in conjunction with the other airlines, or on Go Airlines, as it leased its cargo belly space to thirdly party vendors with no control on any part of commercial/ economic aspects of cargo operations done by vendors including imposition of FSC. The conduct on part of Jet Airways, IndiGo and SpiceJet was found to have resulted in directly determining the rates of air cargo transport and thereby to be in contravention of Section 3(1) read with Section 3(3)(a) of the Competition Act. Accordingly, penalties of ₹39.81 crore (approx. US\$ 6 million), ₹9.45 crore (approx. US\$ 1.4 million), and ₹5.1 crore (approx. US\$ 0.8 million), were imposed upon Jet Airways, IndiGo and Spice Jet respectively. Besides, a cease and desist order was also issued against the Airlines.

While imposing penalties, CCI applied the principle of relevant turnover and the penalties were based on the revenue generated by the airlines from air cargo transport services only. Considering the financial position of the Airlines at the relevant time and noting that FSC constitutes about 20-30% of cargo revenue, a penalty was imposed by CCI at 3% of their average relevant turnover of the last three financial years.

CCI denounced the Airlines for using FSC as a pricing tool which was essentially introduced to mitigate the fuel price volatility. The final order was passed by CCI pursuant to the directions issued by the erstwhile COMPAT remanding the matter back to CCI while setting aside the original order of CCI.

## Cadila Healthcare Limited v. Competition Commission of India

On March 9, 2018, the Delhi High Court ('DHC') dismissed a writ petition filed by Cadila Health Care Limited ('Cadila'/ 'Petitioners') and refused to interfere in a pending inquiry after the submission of the DG investigation report.<sup>29</sup> The writ petition filed by Cadila challenged the order under Section 26(1) of the Competition Act ('Prima Facie Order') passed by CCI dismissing the review/recall application preferred by Petitioner insofar as the Prima Facie Order extends to the Petitioners. The information was filed by Alis Medical Agency, Ahmedabad, Stockwell Pharma, Surat and Apna Dawa Bazar, Vadodara, alleging that when they approached certain pharmaceutical companies or their clearing and forwarding agents for supply of medicines, they were allegedly denied the same on the alleged directions of Federation of Gujarat State Chemist & Druggists Association in the State of Gujarat.

The Petitioners had submitted that they can approach the DHC for review/recall of the order under Section 26(1) of the Competition Act (on the basis of the legal position set out in *Google v. CCI*<sup>30</sup>). The Petitioners had further submitted that the question of jurisdiction or matters which goes to the root of jurisdiction and where CCI has acted beyond the provisions of the Competition Act cannot be decided by CCI at the time of final arguments or later by the appellate court and as such, has to be seen by the DHC.

## Key Observations of the DHC

In relation to the issue of whether the Prima Facie Order can be reviewed/recalled, the DHC distinguished the case from *Google v. CCI*<sup>31</sup> by reasoning that in that case, it was held that person/ enterprise would have a right to apply for review/recall of that order but such a power has to be exercised on the well-recognized parameters of the power of review/recall and without lengthy arguments and without the investigation already ordered being stalled indefinitely. In that case it was also noted that the investigation was still underway, when the application for recall was filed and also when the petition was filed in the court. In the present case, the recall application was filed after the report had been submitted by the DG to CCI. The conclusion in *Google v. CCI* needs to be read to mean a recall/review application can be filed during investigation and not after the submission of the report by the DG.

The DHC observed that once a DG report is submitted, the case is out of the realm of Sec-

<sup>28</sup> Case No.30 of 2013.

<sup>29</sup> W.P.(C) 2106/2018.

<sup>30</sup> LPA No. 733/2014.

<sup>31</sup> Ibid



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tion 26(1) or 26(2) of the Competition Act and the only remedy for the parties is to challenge the report before CCI and not the order under Section 26(1). With regard to the issue of whether CCI should have formed a *prima facie* opinion specifically against the Petitioners under Section 26(1) of the Competition Act and a general direction to the DG to investigate would not suffice, the DHC quoted the Supreme Court decision in *Excel Crop Care Limited v. Competition Commission of India*<sup>32</sup> to hold that even if CCI has not formed *prima facie* opinion against the Petitioners in the Prima Facie Order, the DG would still be within its power to investigate them if the investigation revealed facts that the Petitioners have indulged in anti-competitive conduct. The DHC further noted that the Petitioners had also filed a review/recall application before CCI, whereby CCI considered the objections and applied its mind fresh on the Prima Facie Order and this additionally supported the reasoning of the DHC to restrain itself from interfering with it.

On the assertions made by the Petitioners that they were of the assumption until the issuance of the DG report that the notices issued by the DG to them were only to elicit information in general course and not as opposite parties did not find favour with the DHC either. The DHC held that this could not be a ground to challenge the Prima Facie Order once the DG report has been submitted and more so when the Petitioners never challenged the authority of the DG to issue notices under Section 36(2) read with Section 41(2) of the Competition Act.

Further, as far as issues on merits like malafides/ suppression of facts amounting to fraud, lack of vertical and horizontal relationships between the Petitioners and the Federation, proceedings being barred by *res judicata*, premature initiation of proceedings under Section 48 of the Competition Act were concerned, the DHC noted that the Petitioners could argue these matters before CCI while rebutting the evidence collected by the DG during investigation.

## Mergers

### CCI Approves Proposed Combination between Reliance Aero Limited and Thales India Private Limited

On February 9, 2018, CCI approved the notice given under Section 6(2) of the Competition Act with respect to the proposed combination ('Proposed Combination') between Reliance Aero Limited ('Reliance Aero') and Thales India Private Limited ('TIPL').<sup>33</sup> The Proposed Combination contemplated the creation of a joint venture i.e., Thales Reliance Defence Systems Limited ('JVCo.') in a 51:49 equity share. Reliance Aero is a company incorporated in India and is a subsidiary of Reliance Infrastructure Limited ('RInfra') (belonging to the Reliance Group) having no activities worldwide, except in relation to work being done through the existing JV with Dassault Aviation i.e., Dassault Reliance Aerospace Limited. TIPL, a wholly-owned subsidiary of Thales, is a private company registered in India and is engaged inter alia in the business of rendering technical support to its group companies vis-à-vis radars, air-borne electronic systems, avionics, optronics, air-traffic management, etc. and also undertakes activities relating to transportation industry including railways and metros.

CCI after perusing the information provided, concluded that the parties do not produce/ provide identical or substitutable services/products, and are not engaged in any activity relating to the production, supply, distribution, sale, storage, and services or trade in products or provision of services, which is at different stages or levels of the production chain, and that therefore, the Proposed Combination is not likely to have appreciable adverse affect on competition in India.

### CCI Approves Proposed Combination between Wilmar Sugar Holdings Private Limited and Shri Renuka Sugars Limited

On February 9, 2018, CCI approved a Share Subscription Agreement ('SSA') between Wilmar Sugar Holdings Private Limited ('WSH') and Shri Renuka Sugars Limited ('SRS') and concluded that it is not likely to have an appreciable adverse effect on competition in India.<sup>34</sup>

WSH, a company incorporated under the laws of Singapore, is a wholly owned subsidiary of Wilmar International Limited (the parent company of the Wilmar International group of companies ('Wilmar Group')). SRS, a company incorporated in India, is engaged in the business of refining raw sugar; production, sale, distribution and branding of sugar and ethanol derived from sugarcane; and generation, distribution, sale and trading of electricity/power. WSH's only investment in India is in SRS. It is already a shareholder of SRS having joint control over its oper-

<sup>32</sup> (2017) 8 SCC 47.

<sup>33</sup> Combination Registration No. C-2017/12/541.

<sup>34</sup> Combination Registration No. C-2018/01/548.

ations along with the original promoters. CCI noted that Wilmar Group is active in the business of trade of raw sugar and refined sugar whereas SRS is active in the business of manufacture and distribution of sugar, ethanol and power business, therefore the activities of the parties overlapped in the business of sugar only.

CCI then noted that Wilmar Group has a very limited presence in the overlapping market through small volume of export/ import of sugar and the combined market share of the parties will be insignificant to raise any competition concerns. Further, in view of large number of organized and unorganized players in the sugar industry in India, CCI approved the transaction.

### **CCI approves combination between MIIT African Management Limited and ETC Group (Mauritius) Limited**

On February 1, 2018, CCI approved the proposed acquisition of equity shares of ETC Group (Mauritius) Limited ('ETC'), by MIT African Management Limited ('MAML') in two phases: (i) acquisition of equity shares that represent approximately 22.44% of the equity share capital of ETC by MAML from ETC Holdings (Mauritius) Limited ('ETC Holdings') ('Phase I'); and (ii) acquisition of additional equity shares ranging from 7.30% to 9.10% of the equity share capital of ETC from ETC Holdings, depending on the financial performance of ETC, within two years of closing of Phase I ('Phase II').<sup>35</sup>

MAML, a newly incorporated company in Dubai, UAE, is a subsidiary of Mitsui & Co., Limited ('Mitsui'). Mitsui is a Japanese trading house engaged in a number of world-wide commodities and other businesses; including sale, distribution, purchase, marketing and supply of products in business areas such as iron and steel, coal and nonferrous metals, machinery, electronics, chemicals and energy-related commodities. Whereas, ETC is a company incorporated and registered in the Republic of Mauritius which conducts diversified agricultural trading and processing business and has activities in 27 countries across Africa, North America, Europe, Middle East and South East Asian countries.

CCI noted that in India, Mitsui is engaged in manufacture, production and sale of mineral fertilizers and sale of pulses while ETC is engaged in trading of sesame seeds, cashews, pulses and wheat, which meant that the activities of the parties overlapped only in respect of trading of pulses.

CCI on assessing the proposed combination in terms of the overall market for pulses in India and in terms of the narrower market for import of pulses in India, concluded that their market share is not significant to cause any change in competition dynamics and that their presence globally is not likely to cause appreciable adverse effect on competition in India either. CCI also took into account their customer and supplier relationship and held that it is not significant to cause any appreciable adverse effect on competition in India.

### **CCI gives a green light to proposed acquisition between Amazon.com NV Investment Holdings LLC and Shoppers Stop**

On January 2, 2018, CCI affirmed the proposed acquisition of 5% stake in Shoppers Stop Limited ('Shoppers Stop') by Amazon.com NV Investment Holdings LLC ('Amazon'). Amazon, a wholly-owned subsidiary of Amazon.com Inc. ('ACI') is registered as a foreign portfolio investor with the Securities and Exchange Board of India and has the following investments through its Indian and overseas subsidiaries: (i) Amazon Seller Services Private Limited ('Marketplace Affiliate'); (ii) Amazon Wholesale (India) Private Limited ('Amazon Wholesale Platform'); and (iii) Amazon Payments (India) Private Limited ('Amazon Payments'). Shoppers Stop, an entity listed on the Bombay Stock Exchange and the National Stock Exchange is engaged in selling apparel, accessories, beauty care products, etc., and sells products through the Marketplace Affiliate.<sup>36</sup>

ACI, through its subsidiaries, is engaged in businesses relating to wholesale (B2B), retail (B2C), e-commerce platform, digital payments, etc. and Shoppers Stop is engaged in retailing products through its stores and e-commerce platforms (including Marketplace Affiliate). Apart from the existing relationship between Shoppers Stop and Marketplace Affiliate, there exists a potential relationship between: (i) Shoppers Stop and Amazon Wholesale Platform; and (ii) Shoppers Stop and Amazon Payments.

CCI noted that the presence of Shoppers Stop in overall B2C or in any narrower segment is insufficient to raise competition concerns. This was reaffirmed by the presence of other big players in the market such as Flipkart, Reliance Retail, PayTM, ZIP Cash, etc. providing similar products/services.

<sup>35</sup> Combination Registration No. C-2017/12/540.

<sup>36</sup> Combination Registration No. C-2017/12/538.



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FOR FURTHER INFORMATION RELATING TO THIS SPECIAL EDITION, PLEASE CONTACT:



MUMBAI

**ZIA MODY** [zia.mody@azbpartners.com](mailto:zia.mody@azbpartners.com)

**RAHUL RAI** [rahul.rai@azbpartners.com](mailto:rahul.rai@azbpartners.com)



NEW DELHI

**SAMIR GANDHI** [samir.gandhi@azbpartners.com](mailto:samir.gandhi@azbpartners.com)



BANGALORE

**ADITYA BHAT** [aditya.bhat@azbpartners.com](mailto:aditya.bhat@azbpartners.com)



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