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The Need for Settlements and Commitments Under the Competition Act

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The Need for Settlements and Commitments Under the Competition Act

Background – The Problem of Pendency

The Competition Commission of India ('**CCI**' or '**Commission**') receives a number of cases year on year pertaining to antitrust matters (*i.e.,* cases relating to anticompetitive agreements and abuse of dominant position). Unlike combinations, these 'behavioural' cases before CCI take several years to dispose of.

For instance, CCI took five years to issue its decision in **India Glycols Limited *v.* Indian Sugar Mills Association and Others**[1] and seven years to issue its decision in **East India Petroleum Private Limited *v.* South Asia LPG Company Private Limited.**[2] On average, CCI has taken approximately four years to reach the final decisions it had issued in the year 2018 under Section 27 of the Competition Act, 2002 ('**Act**'). Further, approximately 476 orders of CCI have been appealed before the Competition Appellate Tribunal ('**COMPAT**'), between the years 2009 and 2017. The COMPAT has set aside 213 matters *i.e.*, about 44.75% of these orders. There is also a growing backlog of cases pending before CCI's investigative arm, the Office of the Director-General ('**DG**'). As per the CCI Annual Report 2016-17 ('**Report**'), 129 cases were pending before the DG in the year 2016-2017. Pertinently, the Report notes the following: "*It is observed that the investigations are taking increasingly more time for completion. This partly reflects inadequate staff strength in the office of the DG and partly reflects increasing complexity of cases being referred to the DG by the Commission.*"

The above statistics demonstrate that a significant amount of CCI's resources are being expended on long-drawn investigations and defending appeals against its orders. It is therefore imperative to consider adopting new methods through which CCI's resources may be utilized more optimally, , *i.e.,* a mechanism which ensures that the adjudication of cases by CCI is put on a fast track and consumes fewer of CCI's resources, without affecting the quality of adjudication and investigation.

In more mature jurisdictions, such as the European Union ('**EU**') and the United Kingdom ('**UK**'), competition law enforcement is streamlined and expedited by way of 'commitments' and 'settlements'. The adoption of these mechanisms has been recently considered by the Competition Law Review Committee ('**CLRC**'), a panel set up by the Government of India with a view to review and amend the Act. Drawing from such other jurisdictions, this article will examine the effects of adopting these enforcement tools in India.

Commitments

Commitment decisions in antitrust cases are enforcement tools by which a competition authority can terminate the investigation initiated against a party, on the basis of certain behavioural remedies ('**Commitments**'). This is carried out by accepting such behavioural remedies, voluntarily proposed by the parties to address the initial concerns identified by the authority. Barring the United States of America ('**US**'), Commitments are a relatively new enforcement tool for most competition authorities worldwide. For example, the European Commission ('**EC**') formally adopted the commitment procedure only in the year 2004.

Notably, Commitments cannot be offered in every case. Agencies worldwide consider certain criteria when deciding whether to accept a Commitment. These are: (i) the nature of the suspected infringement; (ii) the nature and ability of the Commitments offered to quickly and effectively solve the competition concerns; and (iii) ensuring sufficient deterrence in the future. In addition, agencies consider the interests of the parties involved in the investigation, interests of third parties and of the market in general.

In the US, the Federal Trade Commission ('**FTC**') and the Department of Justice ('**DOJ**') follow parallel procedures to impose commitment decisions. The DOJ files consent decrees, or civil consent judgments, in a US federal district (trial) court to obtain effective relief without taking a case to trial while the FTC issues negotiated administrative consent orders to resolve violations without a trial under its statutory authority. In addition to using consent decrees/orders in merger cases, the DOJ and FTC also use these tools to settle alleged competition violations that include both unilateral conduct, such as exclusive dealing and monopolization, and unlawful vertical agreements. Separately, the EC, though not obligated to do so, may consider a commitment decision if and when:

i. The companies under investigation are willing to offer Commitments which remove the EC's initial competition concerns as expressed in a preliminary assessment;

1 Case No. 21, 29, 36, 47, 48, 49/2013.

2 Case No. 76/ 2011.

ii. The case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases);
iii. Efficiency reasons justify that the EC limits itself to making the Commitments binding, and does not issue a formal prohibition decision; and
iv. The Commitments can be either behavioural or structural and may be limited in time. Moreover, the EC can reassess the situation if a material change takes place in any of the facts on which the decision was based. It is also possible for the company to ask the EC to lift a Commitment which is no longer appropriate.

Adopting commitment mechanisms to address competition concerns has a number of benefits for the enforcers, the enterprises involved in these proceedings, and for the market at large. First, commitment decisions are often driven by procedural economy. If negotiations start early in the process, the timelines of the investigation will shorten as a full investigation will become unnecessary. Second, commitment procedures can facilitate a quicker resolution of cases with swifter changes to the market, and certain and ready results, as opposed to long, costly and often uncertain outcomes. They are beneficial for the business of the companies as the time invested in resources, and burdensome and lengthy antitrust investigations would be saved. Third, the investigated companies are not required to admit liability for the alleged infringement and in many jurisdictions, companies can avoid the threat of high, unpredictable fines associated with a possible infringement decision. In addition, as there is no fining of infringement, aggrieved third parties would not be successful in suing for damages (for losses suffered as a result of the alleged anticompetitive practises). Other factors, such as the positive media exposure (as the firm or company in question, is perceived as co-operative and willing to solve a possible competition concern) are also added benefits of the commitments process.

Presently, the Act is silent on the possibility of offering Commitments to CCI, although this may be amended in the near future. The obvious benefits of Commitments are the proficient disposal of cases while still addressing competition concerns, as well as the effect on CCI's caseload as a result. The person/enterprise should be willing to offer commitments to remove CCI's competition concerns, without an admission of infringement. Therefore, if the commitment procedure is adopted in India, the facility to offer Commitments should be available to less egregious practices–unlike cartels under Section 3(3) of the Act. Such an amendment will be consistent with the position in various other jurisdictions, including the EU.

Settlements

Like Commitments, settlements allow agencies/regulators to terminate cartel and other investigations early on, thus saving investigative resources. The investigated parties are rewarded for their cooperation with a reduction of the fine that would have otherwise been imposed by the agency. In some jurisdictions, settlements also offer 'finality' as they provide certainty to the outcome of the investigation.[3]

There are important differences between settlement procedures and commitment procedures:[4]

i. To enter into a settlement negotiation, the agency is typically required to establish an infringement of the competition law as full investigation is required;
ii. Settlements require the company to admit liability for the infringement, whereas Commitments usually do not require the company to do so;
iii. Settlements still require the imposition of a fine, albeit with a reduction for cooperation with the agency; and
iv. Settlements constitute legal precedents for the treatment and establishment of an infringement, which have precedential value and can be used for establishment of recidivism or for purposes of filing a private action for damages.

The EU uses a settlement mechanism to speed up the procedure for adoption of a cartel decision when the parties admit to the EC's objections, and in return such parties receive a 10% reduction in the fine.[5] The EC has to show the parties that it has sufficient evidence to bring a final decision, and the parties must respond with a statement of objections. Since the 'Settlement Notice'[6] was announced in June 2008 in the EU, several cartel cases have been settled.[7]

Some jurisdictions also allow settlements for all types of antitrust proceedings. In Germany, on December 23, 2013, the Federal Cartel Office ('FCO') through its settlement note clarified

3 Available at https://one.oecd.org/document/DAF/COMP(2016)7/en/pdf.
4 Available at https://one.oecd.org/document/DAF/COMP(2016)7/en/pdf.
5 Available at http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html.
6 Available at http://ec.europa.eu/competition/cartels/legislation/settlements.html.
7 Till 2016, EC had successfully settled cases of varying degrees of complexity and with different unique feature in the pragmatic resolution of cartel cases: 21 out of 35 cases decided since 2010 are settlement cases, while eight out of 10 cases settled in 2014, and two out of five cases settled in 2015.

that settlements are possible in all types of antitrust proceedings.[8] The US has a longstanding practice of using the settlement mechanism and settles a large majority of its cartel cases. A credible track record and clear fining guidelines provide useful guidance to defendants and their counsel when they assess the benefits and costs of entering into a settlement.[9] Therefore, by implementing a settlement process, competition authorities can save resources that would have otherwise been utilized for more detailed investigations, prosecutions, reasoning of detailed decisions and litigation of cartel cases.

The Act is silent on the adoption of a settlement process. However, the concept of settlements is not unknown in India. Notably, the Securities and Exchange Board of India (‘**SEBI**’) has already implemented a mechanism for settlements. The SEBI Act, 1992 (‘**SEBI Act**’) read with the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014[10] (‘**SEBI Settlement Regulations**’), envisages a mechanism for settlement of specific violations of various laws in relation to the securities market, by the payment of fees without admitting guilt.[11] Any person, against whom any proceedings have been initiated or may be initiated under Section 11, Section 11B, Section 11D, Section 12(3) or Section 15-I of SEBI Act, may file an application in writing to SEBI seeking a settlement (without admitting or denying the findings of fact and conclusions of law) of the proceedings initiated or to be initiated for the alleged defaults. On receipt of the application, SEBI may, after taking into consideration the nature, gravity and impact of defaults, agree to the proposal for settlement, on payment of such sum by the alleged defaulter or on such other terms as may be determined by SEBI. Therefore, CCI would not be the first regulatory body adopting such a settlement mechanism.

Conclusion

From an enterprise’s perspective, the main advantage of settlement mechanisms and commitment procedures is the ability to expedite the closure of the matter. The broad principle of these procedures, the importance of transparency and predictability, are additional benefits to an enterprise. By choosing a settlement/commitment process, an enterprise negates the impact an investigation may have on its reputation. This includes the negative impact of an unclear outcome of the investigation (*i.e.*, the possibility of a high amount of penalty on the enterprise or its employees) and the negative influence of the investigation on an enterprise’s stock prices.

The end purpose of any antitrust legislation and its related agency should be to provide consumers and competitors a free market with healthy competition. For this, CCI should be given the necessary flexibility and discretion to perform its function in such a manner that it meets the objectives of the Act. Bringing an end to antitrust concerns should be the primary objective of the CCI, and by instituting mechanisms for settlements and commitments procedures, it should be possible to achieve this goal in a more efficient manner.

Behavioural Orders

CCI Dismisses Allegations of imposing vertical restraints against Inox Leisure Limited and Hindustan Coca-Cola Beverages Private Limited[12]

On February 28, 2019, CCI dismissed allegations of violations of Section 3 of the Act by Inox Leisure Limited (‘**Inox**’) and Hindustan Coca-Cola Beverages Private Limited (‘**Coke**’), made by Mr. Vijay Gopal (‘**Informant**’).

The allegations pertained to an arrangement between Inox and Coke whereby Inox would only sell Coke’s products in its multiplexes, to the exclusion of its competitors, amounting to an exclusive supply agreement as well as an exclusive distribution agreement between Inox and Coke (in violation of Section 3(4)(b) and (c) of the Act). Further, given that Inox did not allow its patrons to carry any eatables from outside to within its premises, the patrons were forced to purchase essential commodities such as water from within the premises of Inox, and to this extent the sale of such commodities were in essence tied to the provision of watching movies in Inox’s theatre, in violation of Section 3(4)(a) of the Act. Additionally, it was also alleged that Coke’s products that were sold within Inox’s premises were priced differently (higher) than the retail price at which they were generally available in the market, leading to a loss to consumers.

8 Available at: http://competitionlawblog.kluwercompetitionlaw.com/2014/01/17/the-fco-publishes-note-on-settlement-procedures-in-antitrust-proceedings-in-germany/.

9 Available at https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/singapore.

10 Last amended on December 27, 2017

11 SEBI had settled 378 cases during 2014-15 to 2017-18 and collected approximately ₹52.25 crore as settlement amount

12 Case No. 29/2018

CCI in its analysis relied on its observations in **In Re M/s Cine Prekshakula Viniyoga Darula Sangh *v.* Hindustan Coca Cola Beverages Private Limited**[13] and **In Re Consumers Guidance Society *v.* Hindustan Coca Cola Beverages Private Limited and Inox Leisure Private Limited**[14] (decided collectively by a common order dated May 23, 2011) and noted that in these cases, the DG had delineated two markets for the purpose of the investigation namely; (i) "*market of retail sale of bottled water and cold drinks inside the multiplexes of Inox*"; and (ii) "*the market of supply of bottled water and cold drinks to the owners of closed market of multiplexes and to other commercial enterprises where it is treated as the preferred beverage supplier*".

Thereafter, CCI specified the pre-requisites which were to be satisfied for a violation of Section 3(4), detailed as follows:

i. Existence of an agreement;
ii. Between 'enterprise' or 'persons';
iii. Engaged at different stages or levels of the production chain in different markets;
iv. With respect to production, supply, distribution, storage, sale or price of, or trade in goods, or provisions of services;
v. Including tie-in-arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, and resale price maintenance; and
vi. Which agreement causes or is likely to cause an appreciable adverse effect on competition ('**AAEC**') in India.

CCI observed that points (i), (ii), (iii), and (iv) were applicable to the present case. However, it clarified that the allegation of a tie-in was not made out given the facts on record. As per CCI, there was no explicit condition that the consumers had to necessarily buy Coke's products to watch the movies. Therefore, Coke's products were incidental to the activity of watching a movie and not the main driving force for customers to visit Inox's multiplexes. CCI also noted that, in any case, free water was available within Inox's multiplexes.

Regarding the allegation of an exclusive supply arrangement between Inox and Coke, CCI observed that Coke did not have significant market power, given the presence of multiple competitors. Further, after analysing the Sale and Supply Agreement between Inox and Coke ('**Agreement**'), CCI noted that the Agreement was only for a period of three years initially, but Inox and Coke had continued their arrangement through fresh agreements thereafter. However, the successive agreements had been revised to the extent that Coke was no more an exclusive partner to Inox, thereby providing complete autonomy to Inox to market products from any manufacturer, including Coke's competitors. CCI also noted that the Agreement could be terminated by either party by giving a 60 days notice and to this extent, there were no exit barriers which were implemented by Inox or Coke.

Accordingly, after considering the factors for determining AAEC as specified under Section 19(3) of the Act, CCI observed that the impugned arrangement: (i) lacked any entry/exit barriers; (ii) did not posses any ability to drive any existing competitors out of the market (or had not driven any existing competitors out of the market); and (iii) did not result any market foreclosure.

National Company Law Appellate Tribunal

NCLAT affirms CCI's order dismissing allegations of collusive bid-rigging against Bharat Heavy Electricals Limited, IL&FS Technologies Limited, and Hitachi Systems Micro Clinic Private Limited

On February 26, 2019, the National Company Law Appellate Tribunal ('**NCLAT**') dismissed an appeal filed by Reprographic India ('**Appellant**') filed against the order of CCI dismissing allegations of collusive bid-rigging against Bharat Heavy Electricals Limited ('**BHEL**'), IL&FS Technologies Limited ('**ILFS**'), and Hitachi Systems Micro Clinic Private Limited ('**Hitachi**') (collectively '**Respondents**'), in violation of Section 3(3) of the Act.[15]

The Appellant was an ancillary to BHEL's Haridwar unit, engaged in the manufacture of folding and finishing systems as well as the manufacture and distribution of information technology ('**IT**') products and provision of services. The Appellant had been supplying IT products to BHEL directly, or through System Integrators ('**SI**') of Original Equipment Manufacturers ('**OEMs**'). ILFS and Hitachi were SIs, which sourced Hewlett Packard ('**HP**') products and provided IT solutions. As per the Appellant, BHEL floated a tender on April 1, 2017, for supply, installation and mainte-

13 Case No. RTPE 16/2009
14 Case No. UTPE 99/2009.
15 Case No. 41/2018

nance of personal computers ('**PCs**') and peripherals for more than 20 locations, for a period of five years on lease basis on 'Corporate Rate Contract' ('**Tender**'). The total items which were being sought pursuant to the Tender were grouped into two categories, namely, group-A comprising 24 items pertaining to PCs and peripherals, and group-B comprising 47 items pertaining to 'Enterprise Equipment'. The bidders were at liberty to bid for either group A or both groups A and B. As per the conditions of the Tender, with regard to group A, only OEMs and SIs were eligible to bid. Further, all items in each group were supposed to be of the same OEM. Pursuant to the Tender, only two bids, *i.e.*, of ILFS and Hitachi were received with regard to group A products and ultimately the Tender was awarded to Hitachi. As per the Appellant, both Hitachi and ILFS acted in collusion through out this process in violation of Section 3(3) of the Act.

CCI in its observation noted that the Tender was an open tender with no embargo on any SI or OEM to participate. Moreover, various SIs and OEMs had participated in the pre-bid discussions. It further observed that only ILFS and Hitachi submitted bids with regard to group A since the Tender with regard to group A mandated a provision for maintenance and other services for a five year lease period. CCI noted that the stringent requirements of group A may have resulted in low bidding. Additionally, it stated that the facts on record did not support the allegation of supportive bidding on part of ILFS, or that ILFS and Hitachi were engaged in bid rotation. Moreover, the fact that both ILFS and Hitachi had common business links with HP was not in itself sufficient to confirm an allegation of collusion. Further, CCI also did not consider the fact that some employees of one Respondent were working with the other Respondent at some point of time, as relevant for the purposes of the allegations, clarifying that this was a routine affair in the IT industry. In sum, CCI was of view that a meeting of minds for purposes of bid rigging/collusive bidding could not be inferred from mere proximity and the Appellant had failed to furnish any evidence that would suggest otherwise. Accordingly, CCI through an order under Section 26(2) of the Act had dismissed the allegations.

NCLAT at the outset clarified that directing an investigation to be conducted by the DG is entirely dependent on existence of a *prima facie* case warranting such investigation, and unless CCI is so satisfied, the informant has no vested right to seek investigation into the alleged contravention of the provisions of the Act. It further clarified that it was the obligation of the informant to make out a *prima facie* case based on proven facts warranting an investigation by the DG. Further, NCLAT stated that as the successful bidder, Hitachi had the discretion to quote products of any OEM, especially given that it would have to provide maintenance and other services during the entire lease period. Additionally, it reiterated that there may have been business links between ILFS and Hitachi; however, in the absence of any material to suggest any collusion between ILFS and Hitachi, no adverse inference suggesting collusive bidding could be drawn against them. Accordingly, NCLAT affirmed CCI's observations and dismissed the appeal filed by the Appellant.

Combination Orders

CCI Approves SVF Doorbell (Cayman) Limited's Acquisition of 22.44% of shareholding of Delhivery Private Limited[16]

On February 02, 2019, CCI approved the acquisition by SVF Doorbell (Cayman) Limited ('**SVFD**' or '**Acquirer**') of approximately up to 22.4% of shareholding of Delhivery Private Limited ('**DPL**') on a fully diluted basis ('**Proposed Combination**'). The Proposed Combination was notified to CCI pursuant the Memorandum of Understanding dated October 15, 2018, executed between Softbank Group entity and DPL ('**MoU**'), Share Subscription Agreement ('**SSA**') and the Shareholders Agreement ('**SHA**'), both dated December 20, 2018, executed between DPL and SVFD. The Proposed Combination also stipulated that a potential subsequent acquisition of additional equity securities by SVFD, from the existing security holders of DPL at such price and on such terms to be agreed between SVFD and such security holder ('**Step 2**'), was to take place. However, given that the parties had not executed any binding document in relation to Step 2 (the SSA did not cover Step 2), as is required under Section 6(2) of the Act read with Regulation 5(8) of the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 ('**Combination Regulations**'), CCI did not include Step 2 within its assessment of the Proposed Combination (even though the same was interconnected with the Proposed Combination).

SVFD has been established for the purposes of the Proposed Combination by SoftBank Vision Fund L.P. ('**SVF**'). SVF is a venture capital investment fund, focused on making long-term

16 Combination Registration No.C-2019/01/633

financial investments in companies. Both SVF and SVFD are part of the SoftBank Group ('**SB Group**'). DPL is engaged in the provision of third-party logistics ('**3PL**') services in India and provides transportation, warehousing, freight services, *etc.* to third-party enterprises/persons who operate across different business models and are present across the value chain. Additionally, through its wholly owned subsidiary Delhivery USA LLC, DPL also provides last mile logistics solution/deliveries of cross border shipments from India to the United States of America through the United States Postal Service. As per CCI, DPL has a minimal market share of zero to five percent in the overall logistics market and a share of zero to five percent for provision of 3PL services in India.

Based on the information provided by the parties to the Proposed Combination, CCI observed that there is no horizontal overlap between DPL and SVFD, SVF (neither SVF nor SVFD is engaged the provision of any services or sale of goods), or any of the subsidiaries, affiliates and portfolio companies of the SB Group, including those entities in which the SB Group has non-controlling investments or special rights. Additionally, CCI also observed that although certain portfolio companies of SB Group were involved in the provision of 'business-2-business' ('**B2B**'), 'business-2-customers' ('**B2C**') sales, supply of landline phones, IT peripherals, and provision of vehicles on contractual basis in India and the same may use 3PL services. However, given the minimal shares of DPL, and the presence of several enterprises in the market for logistics services, such as Gati, Xpressbees, *etc.*, CCI held that the Proposed Combination was not likely to have any AAEC in India. Accordingly, CCI approved the acquisition under Section 31(1) of the Act.

The Proposed Combination also stipulated a non-compete clause ('**NCC**'). CCI, without disclosing the duration and scope of the NCC observed that it was beyond what was necessary for the implementation of the Proposed Combination and to this extent was not ancillary to the Proposed Combination.

AZB & Partners represented the Acquirer in the Proposed Combination.

CCI Approves Acquisition by Reliance Industries Limited Group Companies of 65.96% and 51.34% Shareholding of Den Networks Limited and Hathway Cable and Datacom Limited, respectively[17]

On January 21, 2019, CCI through a common order, approved the acquisition by Reliance Industries Limited ('**RIL**') group companies, namely (i) Jio Futuristic Digital Holdings Private Limited ('**JFDHPL**'), Jio Digital Distribution Holdings Private Limited ('**JDDHPL**'), and Jio Television Distribution Holdings Private Limited ('**JTDHPL**') (collectively '**Acquirers 1**') of 65.96% of the expanded equity share capital of Den Networks Limited ('**Den**') ('**Den Transaction**'); and (ii) Jio Content Distribution Holding Private Limited ('**JCDHPL**'), Jio Internet Distribution Holdings Private Limited ('**JIDHPL**'), and Jio Cable and Broadband Holdings Private Limited ('**JCBHPL**') (collectively '**Acquirers 2**') of 51.34% of the expanded equity share capital of Hathway Cable and Datacom Limited ('**Hathway**') ('**Hathway Transaction**'), respectively. (Den Transaction and Hathway Transaction are collectively referred to as the '**Proposed Combination**'). The Proposed Combination would have triggered open offer obligations under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('**SAST**') in relation to Den, Hathway and two listed entities controlled jointly by Hathway and a third party, *i.e.*, Hathway Bhawani Cabletel and Datacom Limited ('**HBCDL**') and GTPL Hathway Limited ('**GTPL Hathway**'). (Den, Hathway, HBCDL, GTPL Hathway are collectively referred to as '**Targets**'. Acquirers 1, Acquirers 2 and the Targets are collectively referred to as the '**Parties**').

Acquirers 1 and 2 have been recently incorporated and belong to the RIL group. RIL group is broadly engaged in the business of hydrocarbon exploration and production, petroleum refining and marketing, petrochemicals, retail, telecommunications, broadcasting and content creation. Den and Hathway are both registered Multi-system Operators ('**MSO**') under the Cable Television Networks (Regulation) Act, 1995 and categorized as national MSOs by the Telecom Regulatory Authority of India ('**TRAI**'). Additionally, both Den and Hathway also provide broadband internet services ('**BIS**'), and supply advertising airtime on server based local cable television channels. Further, Den also supplies audio-visual ('**AV**') content (retail) through its online complementary streaming application *i.e.*, 'Den TV+' to its cable television subscribers, whereas Hathway supplies server based local cable television channels.

Horizontal Overlaps

Based on the overlapping business activities of the Parties, CCI identified the following relevant market(s)/segment(s) ('**Relevant Market**'/ or '**Segment**' as the case may be) for the purposes of its assessment. However, CCI did not define the exact market definition, since the Proposed Combination would not have led to any AAEC in India. CCI analysed the competitive scenario in each Relevant Market/Segment for AAEC as follows:

17 Combination Registration No.C-2018/10/609 & C-2018/10/610

i. Aggregation and distribution of broadcast TV channels to homes through cable TV and direct-to-home ('**DTH**') services: At the outset, CCI excluded Internet Protocol Television ('**IPTV**') and Headend in the Sky ('**HITS**') from its assessment, given that these are nascent technologies, with minimal TV household penetration. Further, CCI observed that cable TV and DTH services may be viewed at par with each other given their; (i) nearly similar pricing (pursuant to digitization of cable TV and provision for cable TV services on a pan-India basis because of national MSOs); (ii) similar end use and quality of services; and (iii) TRAI regulations treat the two to be par with each other. In terms of the geographic scope of this market, CCI considered it to be pan-India, given that both cable TV as well as DTH service providers can operate nationwide. This is in contrast to CCI's decisional practice of distinguishing between DTH services and cable TV services based on different *inter alia* packaging, pricing, infrastructure requirements, and the fact that MSOs operate locally state-wise and DTH service providers have a pan-India presence.[18]

   In its assessment, CCI observed that the Parties' post combination market share of 15-20% coupled with the presence of multiple DTH and cable TV service providers would ensure that the Proposed Combination does not cause any AAEC in this market. Additionally, CCI also noted that even within the narrower segment of cable TV only, the combined market share of the Parties would only be 20-25%, recording an increase in the range of 5-10%, which would be insufficient to raise any competition concerns.

ii. Retail supply of AV content in India: CCI noted that Parties to the Proposed Combination distributed AV content either through server based local cable TV channels or over-the-top applications ('**OTT**'). Further, it noted that the provision of server based local cable TV services of Den and Hathway was complementary to their cable TV services, respectively. Accordingly, the same was disregarded as an area of overlap by CCI.

   As regards the distribution of AV content through OTT, CCI firstly observed that OTT is not substitutable with cable TV and DTH given the price disparity and different modes of distribution. Additionally, it noted that in terms of monthly active users ('**MAUs**'), Den had an insignificant share and this Segment comprised various enterprises with large consumer bases and varied content offerings. Thus, CCI disregarded any likelihood of AAEC pursuant to the Proposed Combination in this Segment in India.

iii. Provision for Wired-BIS: At the outset CCI distinguished between Wired-BIS and Wireless-BIS, given their distinctive pricing, speed, data usage and portability. Further, it noted that both Den and Hathway hold a pan-India Internet Service Provider license ('**ISP license**') under the Department of Telecommunications Guidelines for Granting a Unified License ('**DoT Guidelines**') and provide Wired-BIS services in Delhi and Rajasthan. However, Den has optical fiber measuring less than 25,000 kms and Hathway has optical fiber measuring less than 40,000 kms spread across India. In terms of the geographical scope of this market, CCI assessed the market for competition scenario on both pan-India as well as state-wise basis. CCI also observed that the presence of the Parties in the two segments of, business and household (total number of subscribers) may also be viewed separately.

   Pursuant to its assessment, CCI noted that the Proposed Combination would not lead to any AAEC in this Relevant Market, given the (i) minimal combined market shares of the Parties at both pan-India, as well as state-wise basis; and (ii) presence of significantly large enterprises such as Bharat Sanchar Nigam Limited ('**BSNL**'), Bharti Airtel Limited, *etc*. CCI also observed that the Parties had insignificant presence in terms of their optical fiber networks as well as in the business and household segments.

iv. Supply of advertising airtime on TV channels: CCI observed that RIL through TV18 provided advertising services on a pan-India basis, as against Den and Hathway, who catered to local audience. There further existed disparity in the services offered by RIL and the Targets, in terms of pricing. In any case, CCI was of the view that given the insignificant increment (as market share of Den and Hathway less than one percent), the Proposed Combination would not cause any AAEC in this market.

18 Combination Registration No. C-2016/12/463

Vertical Overlaps

CCI also identified certain overlaps between the Parties, namely:

i. Wholesale supply of TV channels in India (upstream), and aggregation and distribution of TV channels to homes in India (downstream): As per CCI, the Parties did not have considerable market shares either in the upstream or the downstream market. Further, CCI also noted the existing TRAI regulatory regime imposed various obligations on both distribution platform operators ('**DPOs**') and broadcasters, such as 'must carry and must provide', publication of tariff breakup on individual websites and so on. Moreover, the maximum retail price for each channel was to be determined by the retailer.

ii. Licensing of AV content, including licensing of linear feeds of TV channels in India (upstream) and retail supply of AV content (downstream): As per CCI both the upstream and the downstream markets are highly competitive because of the presence of multiple enterprises in this Segment. Further, the increment in the market shares of the Parties, because of the Proposed Combination would be negligible to raise any competition concerns.

iii. Advertising on TV channels (upstream) and Supply of Advertising Airtime on TV channels (downstream): CCI observed that RIL advertised on Den's server based local cable TV channels; however, Den earned insignificant revenue from the same. To this extent, the Proposed Combination would not raise any competition concerns

In light of the above, CCI approved the Proposed Combination under Section 31(1) of the Act. However, the approval was subjected to certain voluntary obligations undertaken by the Parties, to ensure that the customers of the Parties do not have to incur the cost of any technical re-alignment which may accrue pursuant to the Proposed Combination.

AZB & Partners represented RIL in the Den Transaction.

CCI Approves Acquisition by BCP Acquisitions LLC, and CDPQ Fund 780 L.P. and CDP Investissements Inc. (collectively) of the Global Power Solutions Business of Johnson Controls International Plc[19]

On February 14, 2019, CCI approved the acquisition by BCP Acquisitions LLC ('**BCP**'), CDPQ Fund 780 L.P. ('**CDPQ Fund**') and CDP Investissements Inc. ('**CDP**') (collectively) of the global power solutions business ('**Target Business**') of Johnson Controls International plc ('**JCI**') ('**Proposed Combination**'). BCP is a part of Brookfield Assets Management Inc. ('**Brookfield**') whereas both CDPQ Fund and CDP are wholly owned by Caisse de dépôt et placement du Québec ('**CDPQ**'). Pursuant to the Proposed Combination, Brookfield (through BCP) and CDPQ (through CDPQ Fund and CDP) will own 70% and 30% of the Target Business, respectively. The Proposed Combination was notified to CCI pursuant to the share and asset purchase agreement dated November 13, 2018, executed between JCI and BCP ('**SAPA**'), and a binding term sheet, entered into between Brookfield and CDPQ pursuant to which both Brookfield and CDPQ had proposed to enter into a shareholders agreement ('**SHA**'). (BCP, CDPQ Fund, CDP and JCI are collectively referred to as '**Parties**').

BCP is a special purpose vehicle ('**SPV**') formed for the purposes of the Proposed Combination, and is not engaged in any business activity in India. Brookfield has various investments across multiple sectors such as real estate, infrastructure *etc*. in India and elsewhere. CDPQ Fund and CDQ do not have any direct presence in India and CDPQ is a Canadian institutional investor that manages funds primarily for public and para-public pension and insurance plans. The Target Business is engaged in the business of *inter alia* manufacturing and distribution of low voltage energy storage products using lead-acid and lithium-ion technologies, primarily for use in passenger vehicles, trucks and other motive applications. The Target Business' products are sold to, or distributed through, original equipment manufacturers and aftermarket retailers and distributors, and the Target Business is present in India only through its 26% equity shareholding in Amara Raja Batteries Limited ('**ARBL**').

Based on the information provided by the Parties, CCI noted that Brookfield does not have any portfolio investments in India in the same business as that of the Target Business. Further, CDPQ holds certain investments in entities engaged in manufacturing and sale of lead acid-based batteries in India or may have potential vertical linkages with the Target Business. However, given that these investments of CDPQ were of less than five percent of the total equity share capital and in the absence of any special veto/governance rights, CCI approved the Proposed Combination in light of there being no substantial horizontal or vertical overlap between the Parties.

19 Combination Registration No.C-2019/01/630

CCI approves the amalgamation of GlaxoSmithKline Consumer Healthcare Limited and Hindustan Unilever Limited[20]

On January 23, 2019, CCI approved the amalgamation of GlaxoSmithKline Healthcare Limited ('**GSKCH**') and Hindustan Unilever Limited ('**HUL**', collectively with GSK referred to as '**Parties**') ('**Proposed Combination**'). The Proposed Combination was notified to CCI, (i) pursuant to a resolution passed by the board of directors of GSKCH and HUL, each on December 03, 2018, and (ii) execution of merger co-operation agreement among *inter alia*, HUL, Unilever Plc, GSKCH, GlaxoSmithKline ('**GSK**') Pte. Limited, Horlicks Limited and GlaxoSmithKline plc on December 03, 2018 ('**Merger Agreement**'). Pursuant the Proposed Combination, HUL would also enter into a non-exclusive consignment selling agency arrangement with various GSK group entities in relation to marketing and selling of certain over-the-counter medicinal ('**OTC**') products and oral healthcare ('**OH**') products in India, Bhutan and Nepal for a period of five years. ('**CSA Products**').

HUL belongs to the Unilever group which is globally present in home-care, beauty and personal care and foods and refreshments product segments. In India, HUL is primarily involved in the business of manufacture and sale of: (i) home care products; (ii) personal care products; (iii) food products; and (iv) refreshments.

GSKCH belongs to the GSK group which is globally present in prescription medicines, vaccines, consumer healthcare products *etc*. In India, GSKCH is engaged in *inter alia*, manufacture and sale of: (i) malt based and protein based health food drinks; (ii) food products; (ii) nutrition drinks (ready to drink). Additionally, GSKCH is also the consignment selling agent for other GSK group entities (including for OTC and OH products).

Based on the business activities of the Parties, CCI identified overlaps between the Parties in two categories, namely, (i) instant noodles; and (ii) breakfast cereals (potential overlap). However, given that the Proposed Combination would not have led to any AAEC in any of the alternative relevant markets, CCI did not conclusively define the relevant market(s). As per CCI, the Parties did not have a significant presence in the instant noodles segment, which is marked by the presence of numerous significant enterprises. With respect to the breakfast cereals segment, CCI noted that HUL did not have a significant presence in such a segment. Accordingly, CCI concluded that the Proposed Combination would not lead to any AAEC in any market in India.

Additionally, CCI also analysed CSA Products and products sold by HUL for overlaps and identified OH as an overlapping product market. However, as per CCI, the combined market share of the Parties of 20% (with a minimal increment of zero to five percent), coupled with numerous significant competitors (*e.g.*, Colgate, Dabur *etc.*) would prevent the Proposed Combination from causing any AAEC in this segment. Accordingly, CCI approved the Proposed Combination under Section 31(1) of the Act.

AZB & Partners represented GSKCH in the Proposed Combination.

CCI Approves the Acquisition by Power Finance Corporation Limited of 52.63% equity stake along with management control in REC Limited

On January 31, 2019, CCI approved the acquisition by Power Finance Corporation Limited ('**PFC**') of 52.63% equity stake along with management control in REC Limited ('**REC**', collectively with PFC as '**Parties**') ('**Proposed Combination**'). The Proposed Combination was notified to CCI pursuant to the decision of the Cabinet Committee on Economic Affairs dated December 06, 2018 granting in-principle approval for strategic sale of Government of India's ('**GoI**') 52.63% shareholding in REC to PFC along with a resolution dated December 20, 2018 passed by the board of directors of PFC granting an in-principle approval to the Proposed Combination.

PFC is a public sector enterprise, which is registered with the Reserve Bank of India ('**RBI**') as a Non-banking Finance Company – Infrastructure Finance Company, since 1990 and was declared as a Public Financial Institution ('**PFI**') in 2010. It provides (directly and indirectly) various financial products and services from the project conceptualization stage to the post commissioning stage, for clients in the power sector. PFC is also a nodal agency for various schemes of GoI in the power sector, including; (i) Ultra Mega Projects ('**UMPPS**'); (ii) Restructured Accelerated Power Development and Reforms Program ('**R-APDRP**')/ Integrated Power Development Scheme ('**IPDS**'); and (iii) Independent Transmission Projects ('**ITPS**').

REC is also a public sector enterprise, registered as a Non-banking Finance Company – Infrastructure Finance Company with RBI since 2010. REC is engaged in financing projects/ schemes for *inter alia* power generation, transmission, distribution, *etc.* REC is also designated as a nodal agency for various schemes of GoI in the power sector such as; (i) Pradhan Mantri Sahaj Har Ghar Yojna; and (ii) Deendayal Upadhyaya Gram Jyoti Yojna; *etc.*

Based on the business activities of the Parties, CCI identified overlaps between the Parties in two product segments, as detailed below. However, CCI did not provide the exact market defi-

20 Combination Registration No. C-2018/12/625

nition, since the Proposed Combination would not have led to any AAEC in India.

i. Provision of credit for power sector in India: CCI observed that this market may be further classified based on varied criteria such as instrument of financing, type of loan products, nature of power project such as generation, transmission or distribution etc. For assessing the presence of the Parties, CCI stated that market share estimates in terms of gross loan assets would not provide a fair indication of current competition dynamics, and assessed the Parties presence based on bidding data. Accordingly, based on the bidding data of the Parties (including the winning bids), CCI observed that the presence of the Parties was not significant and was constrained by the presence of various enterprises, especially banks.

ii. Provision of consultancy services in the power sector in India: CCI noted that the Parties did not have a significant presence in this market, with a less than 10% combined market share pursuant to the Proposed Combination. Further, the market was also characterized by significant competitors such as WAPCOS Limited, Tata Consulting Engineers Limited, *etc*.

In its assessment, CCI also noted that the Parties had common shareholding in certain entities namely, Energy Efficiency Services Limited ('**EESL**'), Shree Maheshwar Hydel Power Corporation Limited ('**SMHPCL**') and NHPC Limited ('**NHPC**'). However, given that (i) EESL was not engaged in any business activity as that of the Parties; (ii) SMHPCL had been classified as a non-performing asset ('**NPA**'); (iii) SMHPCL had limited capacity under implementation; and (iv) NHPC's total installed capacity constituted an insignificant part of the total installed capacity in India, CCI observed that the common shareholding would not be likely to cause any AAEC in any market in India.

CCI also observed that the Parties work closely with GoI, and even pursuant to the Proposed Combination would continue to follow the mandate as decided by GoI. Given that the Proposed Combination does not lead to any AAEC in any of the markets identified above, CCI approved the Proposed Combination under Section 31(1) of the Act.

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Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2018 & 2017

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Best Law Firm of the Year – India
Corporate USA Today – Law Awards, 2018

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India Deal Firm of the Year
ALB SE Asia Law Awards, 2018

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Tier 1 in India M&A Rankings
Asian Legal Business 2018

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Outstanding Law Firm of the Year, India | Corporate and Mergers & Acquisitions
Highly Recommended Law Firm of the Year
Asialaw Profiles, 2018

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Ranked No.1
for the Indian M&A Announced Deals League Table by Value and Volume
Ranked No. 1
for the Indian M&A Completed Deals League Table by Value and Volume
Thomson Reuters' Emerging Markets M&A Legal rankings Q1 2018

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Ranked No. 1
for India in the M&A Announced Deals League Table
by Deal Value and Deal Count
Bloomberg's Global M&A, Legal rankings Q1 2018

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Ranked No. 1
for India in the M&A Rankings by Deal Value and Deal Count
Mergermarket's Global and Regional M&A League Tables of Legal Advisors Q1 2018

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Ranked No. 1
for PE and M&A Rankings by Deal Count and Deal Value
Venture Intelligence League Tables of Legal Advisors 2017

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Ranked No.1
RSG Top 40 Indian Law Firms Ranking, 2017

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Client Service Law Firm of the Year
Chambers Asia-Pacific Awards, 2017

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Best Indian Law Firm
International Legal Alliance Summit Awards, 2017

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