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PAGE

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The Horizontal/Vertical Dichotomy Presented by the Dual Distribution Model

Introduction

Deploying an efficient distribution strategy is essential for enterprises to sell their products / provide services to its customers. Often, a manufacturer's distribution strategy may involve multiple channels of distribution, *i.e.*, multi-channel distribution. This helps enterprises make their products/services more widely available and concurrently adds to the convenience of the consumers who have multiple options to make their purchases. Manufacturers often choose to sell through a distribution network and simultaneously supply goods to their customers directly – this is referred to as a dual distribution model.

It is common practice for manufacturers of white goods, electronic gadgets, apparel, footwear, accessories, etc., to distribute their products through multiple channels including: (i) company showrooms (directly to consumers); (ii) multi-brand retail stores (through retailers); and (iii) e-commerce platforms. Such strategies are becoming increasingly common for a number of reasons, including developments in e-commerce and third -party logistics, which encourage manufacturers to engage in direct sales in addition to the conventional distribution channel through distributors. Consequently, an enterprise may act as both a supplier and competitor to its distributors. From a competition law perspective, this gives rise to the question whether such arrangements between a manufacturer and its own distributors, which are typically characterized as arrangements across the vertical supply chain, could also be characterized as horizontal arrangements given the competitive nature of their relationship. The characterization of a manufacturer as being both in a horizontal competitive relationship with its own distributors, as well as being part of the vertical supply chain may result in such arrangements being analyzed as a potential cartel arrangements, in addition to vertical restraints. This has obvious repercussions in how these arrangements are reviewed under competition law.

Under the Competition Act, 2002 ('**Act**'), certain anti-competitive agreements such as agreements between or among competitors (horizontal agreements, including cartels) and agreements between enterprises or persons at different stages or levels of the production chain (vertical agreements) are prohibited. While horizontal agreements, barring joint efficiency enhancing joint ventures, are presumed to cause an appreciable adverse effect on competition ('**AAEC**'), vertical agreements often serve legitimate business purposes and are therefore assessed under the 'rule of reason' approach.

For example, consider a case where a manufacturer adopts a dual distribution model, and enters into an exclusive distribution agreement (in terms of territory, customers or products) with its distributors in the vertical supply chain, and simultaneously sells its products directly to customers through its website. Since the exclusive distributor potentially competes with the manufacturer who makes direct online sales to customers, it is possible that an otherwise typical vertical 'exclusivity' arrangement, between manufacturer and its distributor, may also be viewed as a horizontal market allocation arrangement and be presumed to cause AAEC. By the same token, if a distributor accepts a resale price suggestion by the manufacturer, it may also be construed as horizontal price-fixing arrangement.

Treatment of Dual Distribution under the Competition Act, 2002

These unique situations give rise to the dilemma of whether to categorize the agreement between the manufacturer and its third-party retailer as a horizontal or vertical agreement.

There is no explicit guidance by the Competition Commission of India ('**CCI**') on the treatment of dual distribution agreements within the framework of regulation of anti-competitive agreements under the Act. While CCI is yet to examine issues arising out of dual distribution arrangements, in a recent decision relating to the zinc chloride batteries segment in India ('**Batteries Case**'),[1] CCI found a similar relation between Panasonic (manufacturer-supplier) and Godrej (buyer-reseller) to be an anti-competitive horizontal agreement. Importantly, one of the factors that distinguishes the Batteries Case from a typical dual distribution arrangement was that while Godrej procured batteries from Panasonic, it eventually sold them in the market under its own brand. Hence, CCI noted that from a demand-side perspective, consumers viewed the products of Godrej and Panasonic to be interchangeable and thus considered their relation to be horizontal in nature. Accordingly, it appears that CCI regarded demand-side substitutability as the key determinant in characterizing the nature of their agreement. Notably, the agreement between Godrej and Panasonic was not a typical dual distribution agreement, wherein the reseller merely acts as a distributor and does not sell under its own brand.

1 Suo Moto Case No. 3 of 2017. This case is presently under appeal before the National Company Law Appellate Tribunal.

Treatment of dual distribution in jurisdictions other than India

In most mature jurisdictions, horizontal restraints are likely to be assessed under the 'per se' rule[2] and vertical restraints, since they often serve legitimate business practices are therefore assessed under the 'rule of reason' approach that entails an inquiry of anti-competitive harm. The European Commission ('**EC**') assesses dual distribution agreements under the 'rule of reason' approach, as opposed to the assessment of vertical agreements entered into between competitors, which are examined under the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. The European Commission's Guidelines on Vertical Restraints ('**EC Vertical Guidelines**') acknowledges that while assessing a '*dual distribution model, i.e. the manufacturer of particular goods also acts as a distributor of the goods in competition with independent distributors of his goods, any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level.*'.

In the United States ('**US**'), in a class action antitrust suit against Baskin-Robbins Ice Cream Company ('**BR**')[3], certain franchisees of BR, *inter alia*, alleged that the dual distribution model adopted by BR involved an unlawful horizontal market allocation. Notably, BR's distribution model involved licensing its trademarks and formulae to independent area franchisors to produce its ice cream and establish franchised stores, thereby comprising a vertical agreement. At the same time, BR also operated as an area franchisor itself, thereby acting as a competitor *vis-à-vis* the other area franchisors. The United States Court of Appeals (9th Circuit) ('**USCA-9**') observed that '*when a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints.*' Furthermore, in the absence of a clear precedent on the applicability of the 'per se' rule to dual distribution agreements, the USCA-9 examined the actual competitive impact (applying the 'rule of reason' approach) of the dual distribution model of BR. Ultimately, the USCA-9 noted that the dual distribution model may have fostered inter-brand competition, resulting in BR's expansion into new geographic markets as a vigorous competitor. Aligned with this approach, the majority of the courts in the US have classified dual distribution as a form of vertical restraint. However, in 2016, the Federal Trade Commission ('**FTC**') re-initiated the debate when it started an inquiry on the exchange of pricing information (an invitation to collude) between a manufacturer and its distributor in a dual distribution model, alleging it to be a horizontal agreement.[4] Ultimately, the parties entered into a settlement with the FTC and there was no in-depth inquiry into the matter that could have suggested if there was to be a deviation from the 'rule of reason' approach being followed in US.

A similar issue was placed before the Competition Appeal Court of South Africa ('**CACSA**') in **The Competition Commission *v.* South African Breweries Limited & Ors**.[5] In this case, South African Breweries Limited ('**SAB**') deployed a dual distribution model wherein its products were sold through its wholly owned depots as well as appointed dealers ('**ADs**'). The Competition Commission of South Africa contended before the CACSA that by way of this arrangement, SAB had indulged in market allocation, as it had appointed its ADs as exclusive distributors for various territories, while continuing to operate its own depots as well. Interestingly, the CACSA observed that but for the supply agreement between SAB and the ADs, the ADs would not have been able to compete with SAB. In other words, the horizontal element of the arrangement was only incidental to the arrangement. Accordingly, the CACSA noted that '*the evidence indicates that the relationship between the parties is primarily a vertical one. Although there is also a horizontal component, the latter component is incidental to, and flows from, the vertical agreement.*' Eventually, the CACSA overturned the Competition Commission of South Africa's decision, which had assumed SAB's relation with its ADs as anti-competitive and constituting a horizontal agreement.

Conclusion

Clearly, the characterization of an agreement as horizontal or vertical significantly impacts its competition analysis. If CCI were to treat an agreement as horizontal, it will apply the 'per se' test and the onus would lie on the defendant to prove its innocence. A vertical agreement would be assessed under the 'rule of reason' approach and the onus to examine the effects of the agreement on the market would lie on CCI. It appears that globally, authorities are inclined towards assessing dual distribution models using the 'rule of reason' approach. This is because the dual distribution model presents various pro-competitive benefits to the enterprise(s) as well as the consumers, which may not be achievable solely through a single distribution strategy. Most im-

2 The authority presumes anti-competitive harm without an inquiry or analysis.

3 Krehl *v.* basin Robbins Ice Cream Company 664 F.2d 1348, (9th Cir 1982).

4 *In re: Fortiline,* LLC (FTC Matter/file number 151 0000).

5 Case No: 129/Cac/Apr14 (2015).

portantly, adopting a dual or multi-channel distribution strategy increases the manufacturer's ability to compete in the market, thereby promoting inter-brand competition and leading to improved consumer welfare.

Dual and multi-channel distribution models are increasingly common in Indian markets and CCI has already received multiple complaints[6] from distributors of manufactures who sell their products through online channels as well as through independent distributors. CCI is likely to face potential anti-competitive issues emerging from these arrangements and will need to follow an objective approach in assessing dual distribution arrangements. In view of the jurisprudence of more mature antitrust jurisdictions as well as the range of pro-competitive effects arising from dual distribution agreements, CCI should also adopt a similar approach of assessing such agreements under the 'rule of reason' approach. Treating dual distribution arrangements as horizontal agreements could potentially result in a legitimate vertical agreement with pro-competitive benefits being treated as a horizontal agreements, thereby leading to adverse consequences for enterprises.

Since CCI's views on dual distribution remain largely untested, enterprises need to be more careful while entering into agreements with their distributors or contract manufacturers. A key takeaway from the Batteries Case, for enterprises operating a dual or multi-channel distribution model, is that the agreements should unambiguously spell out the vertical relationship with their distributors / suppliers.

Behavioral Orders—CCI

CCI orders investigation into abuse of dominance allegations against Google[7]

On April 16, 2019, CCI ordered an investigation into the information filed by three consumers of Android based smartphones in India, namely Mr. Umar Javeed, Ms. Sukarma Thapar and Mr. Aaqib Javeed ('**Informants**') against Google LLC and Google India Private Limited (collectively, referred to as '**Google**'). The allegations in the information were under Section 4 of the Act and related to Google's Android operating system, which is an open-source, mobile operating system ('**Android OS**') installed by original equipment manufacturers of smartphones and tablets ('**OEMs**').

The key allegations in the information related mainly to two agreements, *i.e.*, the Mobile Application Distribution Agreement ('**MADA**'), and the Anti Fragmentation Agreement ('**AFA**'), which were entered into by the OEMs of Android OS with Google. Under the AFA, OEMs were restricted from developing and marketing the incompatible modified version of Android OS, Android forks, on other devices, which is alleged to restrict access to potentially superior versions of Android OS. AFA is a pre-condition to signing the MADA. It was further alleged that while signing the MADA is optional, OEMs are required to pre-install Google's own applications in order to get any part of Google Mobile Services ('**GMS**'), *i.e.*, Google applications like Maps, Gmail and Youtube, thereby hindering development of rival applications.

For the purpose of assessment, CCI *prima facie* delineated the following relevant markets: 'market for licensable smart mobile device operating systems in India', 'app stores for android mobile operating systems' and 'general web search service' and found Google to be *prima facie* dominant in these markets. Separately, CCI also noted that each application like online hosting platform, browser, map, could be a separate relevant market.

CCI issued an order under Section 26(1) of the Act, instructing the Director General ('**DG**') to investigate Google on the allegations made in the information, based on the following factors:

i. **AFA**: According to CCI, conditions under the AFA, *prima facie* seem to reduce the ability and incentive of OEMs to develop and sell alternative versions of Android OS, in contravention of Section 4(2)(b) of the Act, *i.e.*, limiting technical or scientific development relating to goods and services to the prejudice of consumers; and

ii. **MADA**: According to CCI, conditions under the MADA, *i.e.*, mandatory pre-installation of GMS suite, *prima facie* seem to amount to imposition of unfair condition on the OEMs in contravention of Section 4(2)(a)(i) of the Act.

6 M/s K.C. Marketing *v.* OPPO Mobiles MU Private Limited (Case No. 34 of 2018); M/s Karni Communication Private Limited & Anr. *v.* Haicheng Vivo Mobiile (India) Private Limited (Case No. 35 of 2018).

7 Case no. 39 of 2018

CCI Dismissed Allegations of Anti-competitive Agreement against Haicheng Vivo Mobile (India) Private Limited, Vivo Mobile India Private Limited and Vivo Communication Technology Company Limited[8]

On June 19, 2019, CCI dismissed allegations against Haicheng Vivo Mobile (India) Private Limited ('**Vivo India**'), Vivo Mobile India Private Limited ('**Vivo Co.**'), and Vivo Communication Technology Company Limited ('**Vivo Tech**') (collectively, referred to as '**Vivo Companies**'). The information was filed by M/s Karni Communication Private Limited and M/s Karni Telnet Private Limited (the filing parties hereinafter referred to as '**Karni**') who had entered into a distributorship agreement to sell mobile phones under the brand name 'Vivo'. Karni alleged that Vivo imposed vertical restraints on its distributors in the form of: (i) restricting online sales by distributors; (ii) allocating territories for their dealers; (iii) imposing penalties on distributors in the event of market infiltration; and (iv) mandating a minimum operating price policy ('**MOP**'), which amounts to minimum resale price maintenance ('**RPM**'). To assess the allegations, CCI considered the market for 'smartphones in India'.

CCI's dismissed the allegations under Section 3(4) of the Act and observed the following:

i. **Vivo's Lack of Market Power:** CCI observed that Vivo Companies did not appear to command a position which could have enough influencing power to adversely affect competition in India. It was contended that Vivo Companies were controlled by BBK Electronics Corporation ('**BBK Group**'), which owns four mobile phone selling brands in India, *i.e.*, Oppo, Vivo, OnePlus and Realme. Accordingly, it was further contended market share of the Vivo Companies should include the market share of all brands controlled by BBK Group. CCI did not find any evidence of controlling influence by BBK Group on Vivo since: (i)Vivo India was held by two individuals, *i.e.*, Mr. Hexi and Mr. Tangwensheng (holding 99.9% and 0.01%, respectively). Similarly, Vivo Co.'s shares were held by Multi Accord Limited (solely held by Lucky City International Limited) and Ms. Aruna Sharma; and (ii) BBK Group does not have any directors on the board of directors of any of the Vivo Companies, thereby resulting in autonomy in decision making. CCI further observed that Vivo had an independent marketing team and competed in the market for sale and distribution of smartphones in India with other BBK Groups brands. Accordingly, the market shares of Vivo Companies should not include market shares of Oppo, OnePlus and Realme.

ii. **No Restriction on Online Sales:** CCI held that the restriction on distributors to sell products through online portals, does not directly withhold the supply of Vivo products in the market, and consumers have the option to buy such products through online platforms such as Flipkart, Amazon and Vivo's website. Further, the 'Primary Distribution Agreement' between Vivo India and Vivo Co. was with respect to offline sales only and not online sales of products. Considering Vivo India did not have rights for online sales, the question of restriction on online sales by Vivo India in the secondary agreement with sub-distributors did not arise. Additionally, CCI noted that there were no exit barriers in the market and the complainants could opt out of distributorship if the terms were not agreeable. Therefore, this allegation was also dismissed.

iii. **No Allocation of Territory**: CCI observed that the distributors were not restricted from dealing with other brands either within or outside the allocated territory. In this case, the territory allocation did not appear to cause or was unlikely to cause AAEC in the market for sale and distribution of smart phones in India. CCI relied on **M/s K.C. Marketing *v.* OPPO Mobiles MU Private Limited**[9] to ascertain this.

iv. **No Imposition of RPM through MOP**: CCI noted that there were several players in the market for sale and distribution of smart phones in India and there were sufficient number of distributors/retailers from whom the consumers could purchase Vivo smart phones (online and offline). The imposition of RPM through the MOP Policy did not appear to cause or was unlikely to cause AAEC in the market for sale and distribution of smartphones in India since there was intense inter-brand competition in the said market. Further, it was observed that there were no entry/exit barriers or foreclosure of competition. Accordingly, this allegation was not founded.

CCI also observed that in addition to the allegations under Section 3(4) of the Act, Karni in a subsequent submission to CCI also alleged that the Vivo Companies were facilitating a cartel at the retailer level under the aegis of the All India Mobile Retailers Association ('**AIMRA**'), in violation of Section 3(3) of the Act. However, in the absence of any evidence to prove such an

8 Case no. 35 of 2018

9 Case No. 34 of 2018

allegation and considering that no retailers or AIMRA had been impleaded in the matter, this allegation was also dismissed by CCI.

CCI Penalises Jalgaon District Medicine Dealers Association and its Office Bearers for the Imposition of PIS charges on Pharmaceutical Companies[10]

On June 20, 2019, CCI penalised Jalgaon District Medicine Dealers Association ('**JDMDA**') as well as its office bearers, *i.e.*, the President and Secretary of JDMDA (JDMDA and its office bearers are together referred to as '**Parties**') on an information filed by Mr. Nadie Jauhri alleging anti-competitive conduct by that JMDA. CCI levied a penalty of ₹80,185 (approx. US$1200) on JDMDA for imposing a mandatory condition on pharmaceutical companies to pay Product Information Service charges ('**PIS**'), which ultimately resulted in the limiting the supply of drugs in the market.

PIS is in the nature of a fee charged by chemists and druggists associations for introducing a new product/drug launched by the pharmaceutical companies in the bulletins/ newsletters published by such associations. In return, the said associations publish the information and circulate it among all the dealers, distributors, etc.

CCI has previously in **Santuka Associates Pvt. Limited *v.* AIOCD and others**[11] ('**Santuka Case**'), held that while collection of PIS charges may be beneficial for drug manufacturers, making the payment of PIS charges 'mandatory' resulted in denial of market access and limited the supply of drugs in the market, in violation of Section 3(3)(b) of the Act. Mandatory PIS effectively amounted to requiring permission of the associations to launch any new drugs. CCI then issued a public notice on January 31, 2014 directing the Chemists and Druggist Association to discontinue practice of mandating collection of PIS.

Given the above, CCI finally considered: (i) whether the PIS charges by JDMDA were mandatory/compulsory in nature; and (ii) if yes, whether office bearers of JDMDA were responsible for the violation of Section 48 of the Act.

On the first issue, after considering the statements of the witnesses and documentary evidence (emails, letters between JDMDA and pharmaceutical companies) part of the DG report, CCI concluded that JDMDA was imposing PIS charges mandatorily on the pharmaceutical companies. Accordingly, JDMDA was found to be limiting and controlling the supply of drugs in contravention of Section 3(3)(b) read with Section 3(1) of the Act. On the second issue, while the DG investigated fourteen office bearers of JDMDA, only the President and Secretary were considered to be in-charge of the day-to-day affairs of JDMDA. Thus, CCI penalised them at 10% of their average income for three financial years (FY 2013-16) under Section 48 of the Act.

Notably, the JDMA had also initiated connected proceedings before the Delhi High Court ('**DHC**') in W.P. (C) No. 11163 of 2015 challenging the *prima facie* order passed under Section 26(1) of the Act. Since the DHC has directed CCI to take no coercive steps against Parties, till the continuation of proceedings before it, implementation of CCI's order is subject to the outcome of the proceedings before DHC.

CCI Dismissed a Complaint Alleging Abuse of Dominance by the Indian Railways[12]

On June 28, 2019, CCI dismissed an information filed by Consumer Educational and Research Society ('**IP-1**') and its member, Ms. Parul Choudhary ('**IP-2**') (collectively, referred to as '**IPs**'), against Union of India, Ministry of Railways ('**MoR**') and the Indian Railway Catering and Tourism Corporation Limited ('**IRCTC**') (collectively, referred to as '**Indian Railways**') alleging contravention of the provisions of Section 4 of the Act.

The allegation in the information pertained to Indian Railways abusing its alleged dominant position in the railways sector in India and challenged the ticket refund rules as being arbitrary, unjust and against public interest. The IPs alleged that the rule regarding refund under the Railway Passengers (Cancellation of Tickets and Refund of Fare) Rules, 2015 ('**Refund Rules**'), empowered the Indian Railways to forfeit the full ticket fare even in cases where the passengers fail to cancel the ticket for reasons attributable solely to the Indian Railways and/or circumstances beyond the control of the passenger.

CCI first noted and agreed that as a result of the statutory and regulatory framework, Indian Railways is dominant in the market of 'transportation of passengers through railways across India', but dismissed the information on the ground that no anti-competitive conduct could be said to have arisen for the allegations made. The Refund Rules have been notified in the Gazette by the Central Government in exercise of its powers under the provisions of the Railways Act, 1989 and if there is deficiency in service on part of Indian Railways, IPs can initiate action before an appropriate forum. CCI however mentioned that the Indian Railways may consider

10 Case no. 61 of 2015
11 Case No. 20 of 2011
12 Case no. 20 of 2019

reviewing the existing rules of refund of fare and make them more consumer friendly.

CCI Dismisses Information against Bentley Systems for Violation of Sections 3 and 4 of the Competition Act[13]

On July 2, 2019, CCI passed an order dismissing an information filed by SOWIL Limited ('**Sowil**'), a consultancy, against Bentley Systems India Pvt. Ltd. ('**Bentley**') alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act. Sowil provides consultancy in preliminary planning, feasibility studies, traffic studies, railway works, bridges, structures and tunneling. Bentley is a subsidiary of Bentley Systems, Incorporated, registered in the United States of America, and is engaged in the business of providing software solutions to engineers, architects, etc. for design construction, and allied operation of infrastructure.

Sowil had purchased certain software from Bentley and had also entered into a 'SELECT Agreement' with Bentley, which enabled Sowil to acquire licensing privileges and services. Sowil primarily alleged that the SELECT agreement imposed a condition to compulsorily renew all licenses, even in a case where Sowil wished to renew three out of the eight licenses it owned because of financial difficulties. Further, to prove dominant position of Bentley, Sowil submitted that: (i) Bentley has a market share of more than 80% in the field of providing 'software services to more than 170 countries', without defining a specific relevant market in the information; and (ii) purchase of Bentley's softwares is a mandatory pre-condition to participate in the tenders floated by State Government and Central Government agencies including Railways, National Highways Authority of India and Rail Vikas Nigam Limited etc.

CCI dismissed the information on the following grounds:

i. **No Anti-Competitive Agreement**: CCI held that under Section 3(3) of the Act, only agreements entered into between entities involved in similar trade of goods and services can be tested. Considering Sowil had purchased licenses over Bentley's software, this arrangement could not qualify as a horizontal relationship. Further, since the licensing services availed by Sowil were in the capacity as a captive consumer, the arrangement could also not be an agreement entered into between entities at different stages/levels of the production chain.

ii. **Test under Section 4**: To test violation of Section 4 of the Act, CCI defined the relevant market as the 'supply of computer-aided design (CAD) software services in civil engineering works in India', bearing in mind that CAD software used in different fields are not substitutable and the software used by Sowil is related to designing for use in civil construction. CCI held that in this relevant market, Bentley was not in a dominant position considering that there were many competitors in the market providing CAD disabling (*e.g.*, AutoDesk, Carlson, Site3D, SierraSoft, Trimble etc.).

iii. **Other Allegations to Prove Dominance**: After considering the tenders and documents relied on by Sowil, CCI concluded that they did not support Sowil's allegation that only Bentley's software have to be used to qualify for participation in the tender process as a pre-condition, since the tenders allowed other products *viz.*, AutoDesk's Civil 3D or other similar software for designing of railway projects without any exclusivity.

CCI Launches Investigation against Maruti Suzuki over Dealer Discounting Practices[14]

Background

On July 4, 2019, CCI passed an order under Section 26(1) of the Act, ordering investigation against Maruti Suziki India Limited ('**MSIL**'). CCI had taken *suo moto* cognizance in this matter, on receiving an anonymous e-mail sent by certain dealers of MSIL in the west region in India (State of Maharashtra – except Mumbai and Goa) alleging RPM against MSIL. As per the anonymous e-mail, MSIL was restricting its dealers from giving discounts over and above a specified quantum. If a dealer was found exceeding this quantum, the dealership was penalised.

Allegations

It was alleged that: (i) MSIL appointed an agency for the purpose of mystery shopping to check whether any dealer was giving discounts in excess of the specified quantum and the 'Mystery Shopping Audit Report' was sent to dealers asking them to justify why an additional discount may have been given in a particular case; (ii) in case a dealer was not able to justify this to the satisfaction of MSIL, a penalty was levied; (iii) the penalised dealer(s) was asked to deposit a cheque in the name of a MSIL dealer in Pune, Maharashtra; (iv) the money collected was utilised

13 Case no. 8 of 2019

14 Case no. 1 of 2019

by MSIL for various expenses, as decided by the management; and (v) a similar discount control policy was implemented by MSIL across India – especially in cities where there were more than four to five dealers.

CCI's preliminary inquiry and MSIL's submissions
CCI sought certain information from MSIL and held a preliminary conference with MSIL. MSIL stated that it exercises no control over the dealers and has no agreement with or directive to the dealers in relation to discounts. MSIL placed on record the dealership agreements with its dealers to demonstrate that there were no clauses in these agreements, which involve discount control policy and MSIL encourages its dealers to offer discounts, as they deem fit. MSIL also demonstrated that in certain cases, dealers offered discounts more than the 'consumer offers' (run by MSIL from time to time). In relation to the allegation on penalties, MSIL stated that the penalties relate to schemes and guidelines that ensure customer satisfaction and compliance of such guidelines is monitored by MSIL since MSIL, too, contributes to these schemes (and they were not entirely borne out by dealer margins). MSIL also filed an affidavit stating that MSIL does not levy any penalty or discount control policy and simply communicates the understanding by and among the dealers.

Findings of CCI on existence of an RPM
CCI found MSIL to be a market leader in the 'passenger cars segment in India', with a market share of more than 50%. Notably, this observation of CCI was based on a newspaper report of April, 2018. CCI noted that: (i) while the dealership agreements do not contain any clause(s) in relation to the discount control policy, there appears to be an informal directive from MSIL to its dealers to not offer discounts over and above a specified quantum decided by MSIL; (ii) while MSIL gave instances where cars were sold by certain dealers below the 'consumer offer' price, these instances pertained to only nine dealers in the western regions, while MSIL has 2627 dealers across India Thus, the instances were too small to rule out RPM; and (iii) CCI was not satisfied with MSIL's argument that mystery shopping agencies were appointed by dealers to ensure maintenance of quality standards and consumer satisfaction and that MSIL had no role in their employment, given that MSIL itself has stated that it is discharging the role of an independent third party in ensuring compliance of Sales Operating Procedure ('**SOP**') among dealers.

Basis the above, CCI came to the conclusion that the matter did merit a detailed investigation by the DG and passed an order under Section 26(1) of the Act.

Behavioral Orders—NCLAT

NCLAT Dismisses Appeal Filed Challenging the Shell-BG Combination[15]

On July 2, 2019, the National Company Law Appellate Tribunal ('**NCLAT**') dismissed an appeal filed by Mr. Piyush Joshi ('**Appellant**'), a third party alleging CCI's inaction on the information(s) submitted by the Appellant regarding the acquisition of BG Group Plc by Royal Dutch Shell Plc ('**Combination**'). The Combination was duly considered and approved by CCI, as not likely to cause any AAEC vide order dated September 17, 2015('**Order**').

The Appellant filed an information with CCI after the Combination was already approved, alleging that the parties to the Combination had not provided complete information on the relevant markets involved in the Combination, along with allegations under Section 4 of the Act. The Appellant further alleged that CCI failed to follow the procedure under sections 29 and 30 of the Act (as per which CCI is required to issue a show-cause notice to the parties to the combination, only if CCI is of the *prima facie* opinion that the combination is likely to cause AAEC), in order to conduct a thorough assessment of a proposed combination.

NCLAT dismissed the appeal and made the following observations:

i. **Procedure Adopted by CCI**: NCLAT held that the procedure under sections 29 and 30 of the Act is initiated by CCI only if it first forms a *prima facie* opinion that a combination has or is likely to cause AAEC. Appreciating the fact that CCI had not formed a *prima facie* opinion on AAEC in this case, NCLAT held that there is no procedural violation by CCI in approving the Combination without issuing a show cause notice to the parties to the Combination under sections 29 and 30 of the Act.
ii. **Allegations on Abuse of Dominance Cannot be Considered at the time of Approving the Combination**: While hearing the Informant on merits of his information, NCLAT held that allegations regarding abuse of dominance under Section 4 can only be heard by CCI after the stage of approval of the Combination under

15 TA (AT) (Competition) No. 32 of 2017

Section 6 of the Act. Therefore, CCI's dismissal of the information was also upheld by the NCLAT since it could not have been required to assess Section 4 violations while at the stage of approval of the proposed Combination under Section 6 of the Act.

iii. **Maintainability of the appeal and *locus standi* of the Appellant**: NCLAT held that it can hear and dispose of appeals under Section 53B of the Act against any '*direction issued or decision made or order passed*' by CCI under the relevant provisions under Section 53A(a) of the Act. NCLAT noted that the Appellant did not file the appeal against the Order and that CCI did not consider the information since it had already approved the Combination ('**Intimation**'). Considering this, NCLAT held that this Intimation by CCI did not qualify as a '*direction issued or decision made or order passed*' and was therefore not a valid ground for appeal under Section 53B read with Section 53A(a) of the Act.

iv. NCLAT also held that the Appellant failed to show that the Combination resulted in AAEC.

Combination Orders

CCI Approves Glenville's Acquisition of Sole Control over TJ Holdings and an Increase in Shareholding in CapitaLand from 40.79% to 51% [16]

On May 8, 2019, CCI approved the acquisition of sole control by Glenville Investments Pte. Limited ('**Glenville**') over TJ Holdings (III) Pte. Limited ('**TJ Holdings**') and increase in its shareholding in CapitaLand Limited ('**CapitaLand'**) from 40.79% to 51% ('**Proposed Combination**'). Glenville, TJ Holdings and CapitaLand are hereinafter collectively referred to as '**Parties**'. The Proposed Combination also envisaged restructuring of certain businesses between CapitaLand and Ascendas-Singbridge Pte. Limited ('**Ascendas-Singbridge'**), which is also a wholly owned subsidiary of TJ Holdings.

Glenville, is a wholly owned subsidiary of investment holding company Temasek Holdings (Private) Limited ('**Temasek**'). It is an investment holding company having subsidiaries engaged in real estate development/rental services and building/project consultancy services in India.

TJ Holdings, is present in the real estate development/rental services through its wholly owned subsidiary Ascendas-Singbridge, with a focus on business, science and industrial parks market in India. CapitaLand is headquartered in Singapore, and is primarily engaged in real estate investment, development services, that include, shopping malls, serviced residences, offices and homes.

Considering the overlaps in the real estate sector, the Parties defined the market as 'real estate development and related services', as well as the narrower segment of 'commercial real estate development and related services' segment, which was taken to include the hospitality segment and 'Commercial real estate rental services'. CCI however refrained from delineating a relevant market. In its assessment, the proposed transaction did not raise any competition concern, and CCI accordingly approved the Proposed Combination given that: (i) the resultant incremental market share was below 5% in all segments and the combined market shares of the Parties was below 5% at a pan India level (except in Chennai where it is in the range of 5-10%); and (ii) there were no vertical foreclosure concerns arising out of the Proposed Combination.

CCI Approves the Proposed Combination of GSK and Pfizer's Consumer Healthcare Products into a New JV Co.[17]

On May 22, 2019, CCI approved the merger of certain consumer healthcare products of GlaxoSmithKline Plc. ('**GSK**') and Pfizer Inc. ('**Pfizer**', together with GSK referred to as '**Parties**') into a new incorporated entity, New JV Co, with GSK (indirectly) and Pfizer holding 68% and 32% shares in the New JV Co., respectively ('**Proposed Combination**').

GSK is a pharmaceutical company engaged globally in research, development, manufacturing, and marketing of medicines. The consumer healthcare products ('**GSK CH Business**') of GSK in India were housed in two separate entities and would be contributed to the New JV Co. by way of the Proposed Combination. Pfizer is a pharmaceutical company engaged in research, development, manufacturing, and marketing of medicines and its consumer healthcare products ('**Pfizer CH Business**') were being contributed to the New JV Co.

16 Combination Registration No. C-2019/03/647

17 Combination Registration No. C-2019/03/654

CCI noted the overlap between the Parties' business activities in three product categories: (i) Non-narcotics and anti-pyretics (including paracetamol + caffeine); (ii) antacids and anti-flatulents; and (iii) calcium preparations along with colecalciferol solids. Based on the IQVIA-IMS India Database, which adopts European Pharmaceutical Marketing Research Association's anatomical therapeutic chemical ('**ATC**') classification of medicine, CCI noted that the overlaps were at ATC3 level and ATC4 level. CCI also noted that Ayurvedic medicines are not a direct substitute of the allopathic medicines and therefore, excluded the ENO, an ayurvedic product being contributed by GSK to the New JV Co.

Further, CCI defined the relevant geographic as 'whole of India' and assessed the retained and contributed products of GSK and Pfizer to the New JV Co. at ATC 3 and ATC 4 level.

Despite the high combined market shares in all three categories, CCI allowed the Proposed Combination after considering the presence of multiple competitors having more or competing market shares in all three categories, which ensured the presence of competitive restraint in all the relevant markets. CCI also noted that no vertical overlap existed between the business activities of the Parties. Finally, in the absence of any likely AAEC being caused as the result of the Proposed Combination, CCI decided that the exact delineation of the relevant market may be left open.

CCI Approves Joint Acquisition of Uttam Galva Metallics Limited and Uttam Value Steel Limited by CarVal Funds and Nithia[18]

On June 3, 2019, CCI approved the proposed joint acquisition of up to 100% of the total issued and paid up share capital of each of Uttam Galva Metallics Limited ('**UGML**') and Uttam Value Steel Limited ('**UVSL**') by CVI CVF IV Master Fund II LP, CVI AA Master Fund II LP, CVI AV Master Fund II LP, CVIC Master Fund LP, Carval GCF Master Fund II LP, CarVal GCF Lux Securities S.ÀR.L., CVI AA Lux Securities S.ÀR.L., CVI AV Lux Securities S.ÀR.L., CVI CVF IV Lux Securities S.ÀR.L., CVIC Lux Securities Trading S.ÀR.L. (collectively, referred to as '**Carval Funds**') and Nithia Capital Resources Advisors LLP (including Mr. Jai Saraf) ('**Nithia**') ('**Proposed Combination**'). The notice for the proposed acquisition was filed pursuant to resolution plans submitted by Carval Funds and Nithia in relation the insolvency proceedings initiated under the Insolvency and Bankruptcy Code, 2016 for corporate insolvency resolution process of UGML and UVSL.

Carval Funds are global investment funds managed by CarVal Investors, LLC ('**Carval**'), a global investment fund manager that invests in distressed securities belonging to various sectors, globally. Carval has a minor, non-control conferring 0.7% investment in Tata Steel BSL Limited, as a result of conversion of debt investment. Nithia is engaged in providing advisory services in relation to, *inter alia*, distressed companies globally, and is not currently present in India either directly or indirectly. UGML is a public company incorporated in India, engaged in the business of manufacture of hot metal/pig iron and UVSL is a public company, engaged in the business of manufacture and sale of finished flat carbon steel products.

CCI approved the Proposed Combination given that it did not change the competition dynamics in any market in India and is thus not likely to result in AAEC in any of the markets in India.

CCI Approves 75% Acquisition of EPL by Epsilon[19]

On June 3, 2019, CCI approved the acquisition of up to 75% shareholding of Essel Propack Limited (**EPL**) by Epsilon Bidco Pte. Limited (**Epsilon**) an affiliate of funds (collectively, referred to as '**Parties**'), managed or advised by The Blackstone Group L.P. (**Blackstone**) ('**Proposed Combination**'). Pursuant to the Proposed Combination, Epsilon will acquire full control over EPL and will also become a promoter of EPL.

Epsilon's principle activity is investment holding and other related activities, and EPL is a Public listed company engaging in the business of manufacturing, marketing and sale of specialty packaging. While there are certain affiliates of Blackstone engaged in the packaging sector, these affiliates are either located outside or have minimal presence in India. Considering that there were no horizontal and/or vertical overlaps between the Parties either directly or indirectly, CCI approved the Proposed Combination for being unlikely to cause any AAEC in India.

18 Combination Registration No. C-2019/04/659

19 Combination Registration No. C-2019/04/660

CCI Approves Acquisition of Approximately 7.98% of the Total Outstanding Equity Share Capital of Ajax by Kedaara[20]

On June 20, 2019, CCI approved the acquisition of approximately 7.98% of the total outstanding equity share capital of Ajax Engineering Private Limited ('**Ajax**') by Kedaara Capital Fund II LLP ('**Kedaara**') along with right of representation on the Board of Directors of Ajax ('**Proposed Combination**').

While Kedara is a private equity fund having no current presence in India, Ajax is a private limited company, engaged in the manufacture and sale of concreting equipment within India, under the brand name of Ajax.

CCI approved the Proposed Combination, considering that there were no direct or indirect horizontal or vertical overlaps between the business activities of Ajax and Kedaara. Therefore, the Proposed Combination was unlikely to cause any AAEC in India.

20 Combination Registration No. C-2019/06/666

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Tier 1 in Competition / Antitrust
Benchmark Litigation Asia-Pacific, 2019

❖

Competition & Antitrust Law Firm of the Year
Global Leading Lawyers, 2017

❖

Competition Law Firm of the Year
Corporate INTL, 2016

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Corporate Law Firm of the Year
Chambers Forum India Awards 2019

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Law Firm of the Year
VC Circle, 2018, 2017, 2016 & 2015

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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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