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## ‘Non-Compete Clauses’ Being Ancillary Restraints and Implications Under Indian Competition Law

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## 'Non-Compete Clauses' Being Ancillary Restraints and Implications Under Indian Competition Law

### Introduction

Non-compete clauses ('NCCs') make their way into most contracts/agreements between transacting parties. Competition regulators such as the European Commission ('EC') and the Competition Commission of India ('CCI') consider and analyze NCCs as "ancillary" restraints. Ancillary restraints are restrictions directly related and necessary to transactions, which are entered into by parties to a transaction (*i.e.* a merger, acquisition or joint venture), simultaneously or in close connection with the main agreement. Such NCCs introduce contractual restrictions to the parties' commercial freedom of action that may be viewed as anti-competitive if considered in isolation, but such restraints are crucial for attaining the transaction's economic objectives. Examples of ancillary restrictions include non-compete and non-solicitation clauses, licensing agreements, and exclusive purchase and supply obligations.<sup>1</sup>

### EC's Guidance on Ancillary Restraints

The EC has set out its guidelines on ancillary restraints in '*Commission Notice on restrictions directly related and necessary to concentrations*'<sup>2</sup> ('EC Guidelines'). According to the EC Guidelines, NCCs must be "directly related and necessary to the implementation of the transaction". Therefore, the scope (product and geographic), duration and persons subject to the NCC must not go beyond what is reasonably necessary to achieve the legitimate aim of implementing the transaction. Accordingly, the EC Guidelines allow imposing restrictions on licences of patents, similar rights, or of know-how, which can be considered necessary to the implementation of the transaction. These licenses can be simple or exclusive and may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred.<sup>3</sup> Finally, for transactions involving transfer of an undertaking or a part of it, EC Guidelines allow implementing purchase and supply obligations for vendor and/or purchaser of the undertaking. This ensures maintaining, for a transitional period, the existing or similar links between the vendor and the purchaser of the undertaking.<sup>4</sup>

### CCI's Existing Guidance

To assess ancillary restraints in India, the CCI has also published a guidance note on the broad principles and general approach which it takes into consideration to assess NCCs ('**Guidance Note**')<sup>5</sup>. CCI has clarified in the Guidance Note that the test whether a NCC provision is anti-competitive in nature is directly related and necessary to the implementation of the transaction. While evaluating NCCs, CCI considers the following overarching principles:

- i. **Scope:** The scope of the NCC (both product and geographic) should be reasonable with respect to the business it seeks to curtail. Excessive curtailment, beyond the objective commercial necessity of the agreement, is considered unreasonable by CCI (for example, in an acquisition, the geographical scope of the NCC covering an area in which the target has not made sales before the transfer would be viewed as excessive curtailment).
- ii. **Duration:** CCI also considers the duration of the NCC as a primary factor to assess the balance between commercial necessity of the clause and lack of/harm to competition in the market. CCI's decisional practice demonstrates that it is comfortable with NCCs with a maximum duration of three-four years.

The Guidance Note sets out CCI's general approach in terms of evaluating NCCs in transaction documentation for transactions that reviewed by it. However, the CCI may still review a NCC in a non-notifiable transaction as an anti-competitive agreement based on a complaint or on its own (for example, by reviewing public reports under the provisions of the Competition Act, 2002 ('Act')) that relate to anti-competitive agreements.<sup>6</sup>

1 See: EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy, available at: [https://www.hoganlovells.com/~/\\_media/hogan-lovells/pdf/publication/eclrmetaxasarmengodo805\\_pdf.pdf](https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/publication/eclrmetaxasarmengodo805_pdf.pdf)

2 See: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(02)&from=EN)

3 *Ibid*

4 *Ibid*

5 See: [https://www.cci.gov.in/sites/default/files/Non-Compete/Guidance\\_Note.pdf](https://www.cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf)

6 Recently, the CCI has begun the practice of distinguishing between ancillary and non-ancillary NCCs in its approval orders. Accordingly, for non-ancillary NCCs, the CCI retains a right to subsequently scrutinise these under its antitrust provisions. (See *Atos/Syntel* available at: [https://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/c-2018-08-592%20%28for%20uploading%29.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/c-2018-08-592%20%28for%20uploading%29.pdf))



## Identification of NCC as a Horizontal Agreement

A NCC is usually implemented in a transaction to preserve the value of investment being made by the acquirer/ joint venture parents. Therefore, the NCC is aimed at supporting the underlying economic activity, i.e., the transaction being undertaken. As stated above, if considered in isolation, such NCCs may be considered as anti-competitive. Accordingly, it may be possible for the CCI to review these NCCs under the Act provisions relating to anti-competitive agreements (Section 3(1) read with Section 3(3) of the Act).

Section 3(3) of the Act prohibits any arrangement between active or potential competitors which may directly or indirectly determine purchase or sale prices, limit or control production and supply, and directly or indirectly lead to bid rigging ('Horizontal Agreements'). Horizontal Agreements are presumed to cause an appreciable adverse effect on competition ('AAEC') in India and are therefore void. However, the proviso to Section 3(3) of the Act exempts efficiency enhancing joint ventures from being considered as anti-competitive.

## Points to be considered when CCI assesses these under Section 3(3)

A few points that the CCI is likely to / should consider in assessing NCCs under Section 3(3) are:

- i. The CCI is likely to use the same analytical framework provided under the Guidance Note to assess reasonability of NCCs in transactions that are not notifiable to the CCI (i.e., reasonable based on scope and duration). In addition, it will consider whether in the absence of such NCCs the primary transaction could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period etc.;
- ii. The CCI should also consider whether any efficiencies arise as a result of such NCCs. Of course, the onus would be on the parties to demonstrate the efficiencies to the CCI in form of lower prices or better quality of services to customers; and
- iii. Given that the ambit of Section 3(3) of the Act would apply to competitors (whether actual or potential), the CCI should first assess whether the parties to the NCC are actual and potential competitors. For its analysis on potential competitors, the CCI should assess whether the parties to the NCC intend to be active in the same market. It should not, without any reasonable basis, apply the presumption of AAEC being caused as a result of the NCC.

## Conclusion

The implementation of ancillary restraints requires a fine balance between fostering a healthy environment for business transactions and maintaining effective competition in the market. Given this, it is necessary for transacting parties to ensure that the ancillary restraints considered by them do not go beyond what is strictly necessary for them to protect their investments. Similarly, the CCI should also consider such restraints holistically after considering both the benefits and the potential harm that may be caused by such restraints.

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## Behavioural Cases — High Courts

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### Bombay High Court Quashes CCI's *Prima Facie* Order against Star, Sony TV<sup>7</sup>

On October 16, 2019, the Bombay High Court ('BHC') set aside an order issued by the CCI under Section 26(1) of the Act against Star India Private Limited ('Star') and Sony Pictures Network India Private Limited ('Sony'). On July 27, 2018, the CCI, in its *prima facie* order held that Sony and Star may have engaged in price discrimination against television channel distributor Noida Software Technology Park Limited ('CCI Order'). Sony and Star appealed to BHC insisting that the CCI could not issue such an order.

The BHC relied on the decision issued by Supreme Court of India ('SC') in *CCI v Bharti Airtel*<sup>8</sup> ('Airtel Decision'), where the SC noted that unless the Telecom Regulatory Authority of India ('TRAI') finds fault with the conduct of a service provider, CCI cannot order investigation, despite the overlap between TRAI and CCI's jurisdiction. Each of the issues raised in the Airtel Decision related to *in-personam* disputes between the relevant parties. Therefore, it is evidence that the principles of law laid down in the Airtel Decision apply to *in-personam* disputes. The BHC also noted that the CCI Order lacked the basic finding of an AAEC caused by Sony and Star, and therefore could not be sustained. Finally, with respect to BHC's jurisdiction to review the CCI Order, BHC stated that writ petitions filed against the CCI Order were maintainable, and that BHC had the jurisdiction to review and set aside the CCI Order.

<sup>7</sup> W.P. No. 9175 of 2018, Judgement dated October 16, 2019

<sup>8</sup> (2019) 2 SCC 521



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## Delhi High Court Holds DG Report not Binding on CCI<sup>9</sup>

On October 10, 2019, the Delhi High Court ('DHC') ruled that the CCI is not bound by the Director General's ('DG') report and that the Act does not bind CCI to accept the DG's recommendations.

SRMB Srijan Ltd. ('SRMB') entered into a Gas Sale Purchase Agreement ('GSPA') with Great Eastern Energy Corporation Ltd. ('GEECL'). The petitioner, i.e., Saurabh Tripathy (an employee of SRMB) filed information before the CCI on September 16, 2019 alleging abuse of dominant position by GEECL for imposing unfair and discriminatory conditions for supply of Coalbed Methane Gas ('CBM'). After forming a *prima facie* opinion that GEECL is dominant in the relevant market and that the terms of the GSPA appeared to be in favor of the GEECL and against SRMB, the CCI directed the DG by way of order dated December 29, 2014 to conduct a detailed investigation into the matter. The DG, in its investigation report, concluded that there was in fact abuse of dominance since the clauses in the GSPA were unfair and discriminatory. However, ultimately the CCI decided that GEECL had not abused its dominant position in the relevant market. An appeal was filed against the impugned order before the Competition Appellate Tribunal, which rejected it the ground that it was not maintainable. The petitioner, thereafter, approached the DHC.

At the outset, the DHC observed that in the event that CCI is of the view that no further inquiry is required, it is not necessary for the CCI to conduct any further inquiry or issue any such directions for the DG to conduct the same. The DHC also noted that there is no provision in the Act which mandates that the CCI must accept the recommendations made in the DG report. In other words, the DG report is not binding on the CCI and the opinion of CCI can differ with the findings of the DG. Separately, the DHC also analysed the clauses of the GSPA and concurred with the CCI decision of exonerating GEECL of allegations on abuse of dominance in the 'market for supply of coal bed methane gas in the Asansol-Raniganj-Durgapur industrial area'. Finally, the DHC also held that the petition amounted to abuse of process of law, as Saurabh Tripathy, who is an employee of SRMB, was not authorized by SRMB to advocate its cause (but it appeared that the petitioner had been put up by SRMB to pursue the proceedings before the CCI and the DHC). The DHC, while dismissing the petition, imposed a cost of ₹ 50,000 (approx. US\$ 700) on the petitioner to be paid to each of CCI and GEECL for abusing the process of law.

## National Company Law Appellate Tribunal ('NCLAT')

### NCLAT Rejects Appeal Against BMW India Private Limited<sup>10</sup>

On November 25, 2019, NCLAT dismissed an appeal filed against an order of CCI<sup>11</sup> dated May 30, 2018 which rejected allegations of abuse of dominance against BMW India Private Limited ('BMW') and BMW India Financial Services Private Limited ('BMW IFSP').

The appeal was filed by Parsoli Motors Works Private Limited ('Appellant'), which was a dealer for BMW vehicles for Gujarat since 2011. The Appellant *inter alia* contended that BMW abused its dominant position by (i) terminating the Appellant's dealership without affording it sufficient time to exit; and (ii) allowing dealers from outside Gujarat to sell BMW's cars in Gujarat which led to a financial loss to the Appellant as well as the state exchequer.

NCLAT found that BMW cannot be said to be a dominant player in the passenger car segment in India, which is characterized by formidable competitors like Maruti Suzuki, Hyundai, TATA, etc. Further, while the act of refusal to renew the dealership agreement may have caused pecuniary loss to the Appellant, it did not raise any competition concern.

## Competition Commission of India

### CCI Orders Detailed Investigation on MakeMyTrip, Ibibo Group and Oravel Stays<sup>12</sup>

On October 28, 2019, the CCI issued a *prima facie* order to conduct detailed investigation against online travel agents ('OTAs')—MakeMyTrip India Pvt. Ltd. ('MMT') and Ibibo Group Private Limited ('Ibibo'), and the hospitality service provider Oravel Stays Private Limited ('Oyo') (collectively, 'Opposite Parties').

<sup>9</sup> W.P (c) 2079 of 2018, Judgement dated October 10, 2019

<sup>10</sup> Competition Appeal (AT) No. 52 of 2018.

<sup>11</sup> Parsoli Motor Works India Private Limited v. BMW India Private Limited and Ors., Case No. 11 of 2018.

<sup>12</sup> Case No. 14 of 2019.



The Federation of Hotel & Restaurant Associations of India ('FHRAI') alleged that MMT, Ibibo and Oyo cartelized by entering into anti-competitive agreements, as well as abused their respective dominant positions. It was alleged that the Opposite Parties were charging excessive commission and providing deep discounts. MMT was alleged to have imposed price parity and room parity clauses in their agreements. Allegations of predatory pricing, as well as some miscellaneous allegations of abuse of dominance were also made.

After hearing the parties at the preliminary conference and considering the facts on record, the CCI clarified that the contentions of FHRAI regarding abuse of dominant position by the Opposite Parties collectively were liable to be rejected, since allegations of abuse by collective dominance were beyond the legal framework of Section 4 of the Act. With respect to unilateral abusive conduct the CCI was of the opinion that MMT and Ibibo were present in the 'market for online intermediation services for booking of hotels in India', and Oyo in the 'market for franchising services for budget hotels in India'. Within the market for online intermediation services for booking of hotels in India, MMT and Ibibo as a group<sup>13</sup> was found to be dominant with 63% market share (based on its own investor presentation). With respect to Oyo, CCI relied on its previous decision in *RKG Hospitality Pvt. Ltd. V. Oravel Travels Pvt. Ltd.*<sup>14</sup>, and stated that Oyo was not a dominant player despite being a significant player in the market for franchising services for budget hotels in India.

The CCI assessed the agreements on record and was of the opinion that while there were parity clauses, the magnitude of anti-competitive harm could only be determined by further investigation. Additionally, the CCI ordered investigation regarding whether the commercial agreement between OYO and MMT entails preferential treatment to OYO and consequent exclusion of Treebo, Fab hotel and any other hotel chain. Further, the CCI observed that detailed investigation may also be required for allegations relating to predatory pricing, excessive commissions, misrepresentation due to delayed delisting of hotels from the website, and discriminatory levying of hotel service fees, to assess the anti-competitive effect.

#### **CCI Orders Detailed Investigation Against Odisha State Civil Supplies Corporation Ltd.**<sup>15</sup>

On November 1, 2019, the CCI ordered the DG to further investigate allegations of abuse of dominance, made by M/s. Maa Metakani Rice Industries ('Informant') against Odisha State Civil Supplies Corporation Ltd. ('OSCSCL').

The Informant is engaged in the business of rice (paddy) milling, production of rice, broken rice, bran, etc. and sale thereof, to act as a custom milling agent of OSCSCL. OSCSCL is the largest agency involved in paddy procurement in the State of Odisha, and purchases more than 90% of the total paddy produced in the State. Central Government extends support through Food Corporation of India and State agencies.

The Informant had entered into an agreement with OSCSCL for custom milling of paddy for the Kharif Marketing Season ('KMS') 2015-16 and commenced delivery of rice. OSCSCL bought the Standard Fire Floater Declaration Policy (relating to Standard Fire Insurance coverage of the stock of OSCSCL kept and maintained at the custom miller's premises, with respect to the Informant) but did not share the terms & conditions or a copy of the said insurance with the Informant even though part of the premium was being collected from it. Later, due to floods, the stored crops were destroyed and the Informant suffered a loss of about ₹ 87.10 Lakhs (approx. US\$ 12,000). However, OSCSCL withheld the custom milling dues of the Informant stating that the Custom Milled Rice ('CMR') due of the Informant could not be released unless an insurance claim in relation to damage of stock was settled by the insurance company with OSCSCL.

Consequently, the Informant filed a consumer complaint before State Consumer Disputes Redressal Commission, Cuttack ('SCDRC') against the said insurance company and OSCSCL and obtained a decision in its favour. However, OSCSCL released a fraction of the due amount and debarred the Informant from participation in rabbi paddy procurement and operations for KMS 2017-18 without giving any reasonable justification. Later in 2018, OSCSCL issued a letter dated November 22, 2018, threatening the millers by dictating that the differential custody and maintenance charges arising out of revised duration pertaining to KMS 2017-18, would not be paid to the millers unless they executed the agreement for KMS 2018-19, in order to participate in procurement. The clauses of this agreement favoured OSCSCL.

The Informant made allegations against OSCSCL for non-payment of dues, unfair and discriminatory conditions in purchase of service, abuse of dominance and failure to maintain the "essential facilities" in an efficient manner.

The CCI defined the relevant market as 'market for procurement of custom milling services

<sup>13</sup> MMT had acquired 100% of Ibibo in 2017 which was notified to the CCI under Combination Registration No. C - 2016/10/451

<sup>14</sup> Case no. 03 of 2019, Order dated July 31, 2019

<sup>15</sup> Case No. 16 of 2019, Order dated November 1, 2019



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for rice in state of Odisha' and concluded that (based on market share) OSCSCL was dominant in the said market. Ultimately, the CCI ordered the DG to investigate the alleged abuse of dominance by OSCSCL.

### **CCI Orders Detailed Investigation Against GMR Hyderabad International Airport Limited<sup>16</sup>**

On October 3, 2019, the CCI directed the DG to investigate the allegations of abuse of dominance by GMR Hyderabad International Airport Limited ('GHIAL'), made by Air Works India (Engineering) Private Limited ('Airworks').

GHIAL is the sole concessionaire, engaged in development, construction, operation and maintenance of Rajiv Gandhi International Airport ('RGIA'). Airworks is engaged in the business of providing maintenance, repair and overhaul ('MRO') services of aircraft to airlines and general aviation. MRO services may be further bifurcated into line maintenance services and the base maintenance services. GMR Aero Technic Limited ('GAT') was a group entity of GHIAL, and provided MRO services similar to those of Airworks. Pursuant to execution of a license agreement, Airworks was provided some space within RGIA for setting up, operating and maintaining an airline engineering maintenance office and warehouse in exchange for a license fee, common area maintenance fee and utility charges.

In 2019, GHIAL issued a letter stating that the contract between Airworks and GHIAL will not be renewed since the space erstwhile allotted to Airworks was required by GHIAL for expansion works. Airworks repeatedly wrote to GHIAL requesting it to renew the license agreement, and then to the Ministry of Civil Aviation requesting it to intervene. Thereafter, a writ petition was also filed by Airworks before the Telangana High Court, which was unsuccessful.<sup>17</sup>

Airworks alleged that GHIAL did not renew its licence with the motive to support GAT in its financial hardship. More specifically, Airworks alleged denial of market access, leveraging of dominant position by GHIAL in the upstream market to indulge in exclusionary practices in the downstream market, limiting/restricting provision of services and price discrimination by imposing exorbitant fees.

The CCI assessed the information provided by Airworks and noting that the case was of denial of market access as well that of leveraging, delineated two relevant markets, i.e., the upstream 'market for provision of access to airport facilities/premises at RGIA' and the downstream 'market for the provision of line maintenance services at the RGIA', to assess the dominance of GHIAL.

The CCI observed that GHIAL was the awardee of consortium bid project of RGIA, and had the exclusive right and privilege to carry out the development, design, financing, construction, commissioning, maintenance, operation and management of RGIA for a period of 30 years (extendable by a further 30 years). This necessarily implied dominance of GHIAL in terms of providing access to the facilities/premises at RGIA to various third-party service providers who wish to provide their services at the airport.

In its *prima facie* assessment of abuse of dominance by GHIAL, the CCI noted that as a general principle every entity has the freedom to choose its trading partner and every refusal to deal cannot by itself be classified as violation of the Act. Accordingly, the CCI relied on available literature and case law precedents to determine whether GHIAL's refusal to deal could amount to abuse of dominance. Based on the facts of the case, the CCI concluded that in terms of refused input being essential for the entity to compete in downstream market, elimination of competition and damages caused, GHIAL could be violating its dominant position in the relevant market. It was also seen that GAT and Airworks posed substantive competitive constraint on each other in the downstream market, and therefore, GMR had motive to exclude Airworks in favour of its group entity. After considering the evidence on record, the CCI ordered the DG to conduct detailed investigation.

### **CCI Dismisses Complaint Against RCI India Pvt. Ltd.<sup>18</sup>**

On October 29, 2019, the CCI dismissed the allegations of contravention of Section 3 and 4 of Act against RCI India Private Limited ('RCI'), filed by Ms. Vijayachitra Kamalesh ('Complainant'), a former employee of RCI.

The Complainant alleged that RCI was making illegal transactions with its clients by virtue of various agreements to create barriers to competition for its rival in the timeshare<sup>19</sup> exchange

<sup>16</sup> Case No. 30 of 2019

<sup>17</sup> WP (C) No.13298/ 2019

<sup>18</sup> Case 29 of 2019, Order dated October 29, 2019

<sup>19</sup> Timeshare is a model in which customers own a right to use certain property/ properties, owned by timeshare companies, for a fixed duration every year for a certain number of years, subject to availability. The timeshare model can apply to many different types of properties, such as condominiums, homes, campgrounds, vacation resorts etc.



market and in this respect specifically mentioned the agreements entered between RCI Europe, Covington and Mahindra (India). The CCI analysed the Complainant's allegations and noted that RCI was not even a formal party to the agreement between RCI Europe, Covington and Mahindra (India). The CCI also held that the impugned transaction was an acquisition by Covington and did not appear to raise any competition concern. Moreover, the CCI stated that the provisions of the Act are only attracted when the impact of the alleged conduct has some nexus to the competition in markets in India and is likely to cause an appreciable adverse effect on competition on the Indian market. Further, the CCI also observed that while it has the power to extend its jurisdiction to conducts taking place outside India, the alleged anti-competitive act has to have an impact on India.

The CCI noted that the alleged agreement had no impact on the competition in the Indian markets since the subject matter of the agreement i.e., sale of resorts/part of resorts on time share basis was meant for consumption outside India (the target Holiday Club had resorts only in Finland, Sweden and Spain). Therefore, with no competition being affected in India and no evidence being submitted by the Complainant to prove otherwise, the CCI closed the matter under Section 26(2) of the Act.

### CCI Dismisses Allegations of Cartelization Against 10 Entities<sup>20</sup>

On November 1, 2019, the CCI dismissed allegations of bid rigging among 10 entities<sup>21</sup> in collusion with Tamil Nadu Textbook and Educational Services Corporation ('TNTESC'). The allegations were made by M/s Manjeet Plastic Industries ('MPI'). It was alleged that TNTESC published a tender to procure 7.187 million school bags by entering into a rate contract for one year as per specifications laid down in the tender. Subsequently, TNTESC issued two separate amendments amending the initial tender conditions and allowing the applicants to participate through a consortium of up to three entities.

MPI alleged that TNTESC had abused the tender process through such amendments, extended undue favour to some entities, who despite not being school bag manufacturers were able to participate in the tender process. MPI also alleged collusive practice amongst the 10 entities since the samples submitted by these entities contained specific common markings (in violation of the tender conditions). Further, the Informant submitted that an interim injunction had been granted by the Madras High Court on opening of financial bids by the TNTESC.

The CCI in its order clarified that at the outset no case for vertical restraints or abuse of dominance had been made out and proceeded to evaluate the allegations of cartelisation.

After further assessment, the CCI observed the submissions made by MPI seemed like mere conjectures and there was no evidence to substantiate the claims. The CCI also relied on its precedents, where it had observed that the tendering authority or procurer has a choice to set the terms and conditions of the tender and the conduct of the procurer is not examined under Section 3(3) of the Act. Further, allegations of price parallelism in submission of bids could not be examined since the financial bids were not opened by the TNTESC pursuant to the interim order passed by the Madras High Court. Thus, the CCI dismissed the matter under Section 26(2) of the Act.

### CCI Investigates and Exonerates 3 LPG Cylinder Manufacturers for their Role in the Alleged LPG Cylinder Cartel<sup>22</sup>

CCI decided not to proceed against LPG cylinder manufacturers in the alleged LPG cylinder cartel for bid-rigging in a tender floated by Hindustan Petroleum Corporation Limited ('HPCL'), after an investigation by the DG, because of the nature of the market (monopsony / oligopsony) where prices tend to be similar.

#### Background

CCI took *suo motu* cognizance of alleged cartelization by 8 manufacturers of LPG cylinders in response to a tender dated August 4, 2010 ('Tender') floated by HPCL for supply of 36 lakh LPG cylinders for 18 States. In August 2014, CCI analyzed the price bids submitted by the vendors for each of the 18 States and found that similar price patterns emerged which could indicate collusion ('August Order').<sup>23</sup> Accordingly, it directed the DG to investigate.

Subsequently, five LPG manufacturers challenged the August Order before the DHC on the ground that they were already investigated for cartelization by CCI in a previous case and penalized, and therefore the current investigation against them should be quashed. The DHC agreed

<sup>20</sup> Case No. 27 of 2019, Order dated November 1, 2019

<sup>21</sup> Charanpaaduka Industries Private Limited, xo Footwear Private Limited, Infinity Footwear Private Limited, Vinishma Technology, Sumaja Electro Infra, M B Rubber Private Limited, H B Rubber Private Limited, B.N.G. Fashion Gear Private Limited, Liberty Shoes and Lawreshwar Polymers

<sup>22</sup> *Suo Moto* Case No. 04 of 2014.

<sup>23</sup> *Suo Moto* Case No. 03 of 2011.



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with the contentions presented and set aside the August Order and remanded the matter for fresh consideration by the CCI. The CCI also saw merit in the arguments of the LPG manufacturers who were previously penalized and accordingly directed an investigation into the role of the remaining three LPG manufacturers, viz. Prathima Industries Private Limited ('PIPL'), Prestige Fabricators Private Limited ('PFPL'), and Pankaj Gas Cylinders Limited ('PGCL'). In the DG's investigation, PFPL and PGCL were not found in contravention of the Act.

#### CCI's Assessment

In respect of quotation of identical prices by PIPL, CCI noted that PIPL's quoted price bid in the Tender was identical with the bid of Andhra Cylinders, GDR Cylinders Private Limited, Hyderabad Cylinders Private Limited, Balaji Pressure Vessels Limited, Kurnool Cylinders Private Limited, R.M. Cylinders Private Limited, and Shri Shakti Cylinders Private Limited. PIPL could not provide any justification for submitting identical bids.

Noting that it is the procurer (in this case, HPCL) who decides the final price (the quoted price is not the final price) at which the tender has to be awarded in a monopsony / oligopsony (price is regulated by the OMCS depending upon their internal estimates and negotiations), and relying on the judgment of the SC in the case of **Rajasthan Cylinders and Containers Ltd. v. Union of India & Anr.**<sup>24</sup> ('Cylinder Judgment'),<sup>25</sup> the CCI decided to not proceed against any of the parties or their individuals / officers.

## Combination Orders

### CCI Approves Restructuring, Sale of Apollo Hospitals' Pharmacy Business<sup>26</sup>

On September 23, 2019, CCI approved the transaction notified by Apollo Medicals Private Limited ('AMPL') Apollo Hospitals Enterprise Limited ('AHEL'), Apollo Pharmacies Limited ('APL'), Enam Securities Private Limited ('ESPL'), Jhelum Investment Fund I ('JIF') and Mr. Hemendra Kothari pursuant to a scheme of arrangement. APL, was a wholly owned subsidiary of AMPL, which in turn was a wholly owned subsidiary of AHEL. The transaction involved AHEL carving out and transferring its front end retail pharmacy business to APL by way of slump sale. Subsequently, ESPL, JIF and Mr. Hemendra Kothari would acquire 44.7%, 19.9% and 9.9% shareholding respectively in AMPL with the remaining 25.5% shareholding being held by AHEL.

The parties to the proposed combination disclosed that they were not engaged in activities which are similar or identical to pharmacy business or any business that may have vertical links to the pharmacy business. For completeness, it was stated that Mr. Hemendra Kothari holds substantial interest in Health & Glow Private Limited, an entity engaged in the business of retail trade chain of personal and beauty care products. Both Health & Glow Private Limited and Apollo Pharmacy sold certain common FMCG products. However, given the minimal contribution of these products to the revenue of each of these entities, and availability of these products with several retailers across India, the combination was approved.

### CCI Approves Saudi Arabian Oil Company's Acquisition of 70% Stake in Saudi Basic Industries Corporation<sup>27</sup>

On September 27, 2019, CCI approved Saudi Arabian Oil Company's ('Saudi Aramco') acquisition of 70% shareholding in Saudi Basic Industries Corporation ('SABIC') from Public Investment Fund of Saudi Arabia ('PIF').

The parties overlapped in the market for thermoplastic polymers, which included: (i) poly butadiene rubber; (ii) ethylene, ethylene propylene diene monomer; (iii) polyethylene ('PE') (including its potential sub-segments, i.e. high density PE, low density PE, linear low density PE); (iv) methyl methacrylate, (v) poly methyl methacrylate; and (vi) paraxylene and polypropylene resins. The CCI also assessed the presence of the parties and their competitors in various sub segments. The parties proposed delineation of the relevant geographic market to be worldwide/global, however, the CCI limited it to India. Ultimately, the CCI decided to leave the market open since the proposed transaction was unlikely to raise any competition concerns in India. The combined market shares of the parties in all the overlapping markets were found to be less than or equivalent to 20-25%.

<sup>24</sup> Civil Appeal No. 3546 of 2014

<sup>25</sup> The Cylinder Judgment noted that despite presence of identical prices, exchange of information among bidders, pre-bid meetings prior to tender, active association, it was found that there was no evidence of cartelisation in such a case, as the nature of market was an oligopsony.

<sup>26</sup> Combination Registration No. C-2019/06/665, Order dated September 23, 2019

<sup>27</sup> Combination Registration No. C-2019/09/683, Order dated September 27, 2019

The CCI also noted that while there were no existing vertical relationships, there were potential vertical links between the operations and products of parties. Ultimately, given the presence of other competitors, the CCI concluded that these potential vertical links are unlikely to raise anti-competitive concerns.



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### **CCI Approves Investment by Kora Master Fund LP in Edelweiss Securities Limited and Edelweiss Global Investment Advisory business<sup>28</sup>**

On October 15, 2019, CCI approved the investment by Kora Master Fund LP ('Kora') in Edelweiss Securities Limited and Edelweiss Global Investment Advisory business (including its subsidiaries) (together, 'Target Entities'). The Target Entities are engaged in the business of asset management, wealth management, capital markets, and advisory and asset reconstruction, where as Kora is a foreign portfolio investor registered with the Securities Exchange Board of India ('SEBI').

While approving the investment, CCI noted absence of (i) any vertical relationships between Kora and the Target Entities; and (ii) any horizontal overlaps between them, barring a minority investment of Kora in some companies in India engaged in the provision of loans / credit.

### **CCI Approves Acquisition of Shares of Aditya Birla Capital Limited by Jomei Investments Limited<sup>29</sup>**

On October 24, 2019, CCI approved the subscription of 4.15% of the total issued and paid-up equity share capital of Aditya Birla Capital Limited ('ABCL') by Jomei Investments Limited ('JIL'). JIL is wholly-owned by Advent International GPE IX Limited Partnership ('Advent GPE'), whose investment manager is Advent International Corporation ('Advent International').

CCI observed that the business activities of the Advent group (through ASK Investment Managers Limited, an investee company of the Advent group) and ABCL overlap horizontally in respect of portfolio management services ('PMS'), wealth advisory / management related services and real estate investment services. The Parties also overlapped vertically as (i) ABCL offers mutual fund products and the ASK group distributes such products as a part of its wealth advisory business; and (ii) ABCL is engaged in PMS and the ASK group distributes such services. On account of low incremental market share and presence of other competitors, CCI approved the transaction.

### **CCI Approves acquisition of Additional Shares of Delhivery Private Limited by SVF Doorbell (Cayman) Limited<sup>30</sup>**

On November 14, 2019, CCI approved the acquisition of additional 3.28% of the issued and paid up share capital of Delhivery Private Limited ('DPL'), a third party logistics ('3PL') player, by SVF Doorbell (Cayman) Limited ('SVFD'), which is a holding company of the SoftBank Vision Fund L.P. SVFD is an existing investor in DPL and pursuant to the acquisition, it will hold up to 25.72% of DPL's issued and paid up share capital.

Certain entities of the Softbank group (i.e., the group to which SVFD belongs) already avail/could use logistics/ 3PL services of various vendors (including DPL) to deliver their products. Given the minimal presence of DPL in the logistics market (i.e., market share of 0-5%) and the market for provision of 3PL services (i.e., market share of 0-5%), and the presence of several new players, CCI noted that the transaction is not likely to result in any competitive foreclosure. AZB & Partners acted for SVFD in this transaction.

### **CCI Approves Acquisition of Kwality Limited by Haldiram Snacks Private Limited<sup>31</sup>**

On October 24, 2019, CCI approved the acquisition of 100% of the total issued and paid-up equity share capital of Kwality Limited ('Kwality') (which is undergoing insolvency resolution proceedings under the Insolvency and Bankruptcy Code, 2016) by (i) Haldiram Snacks Private Limited ('Haldiram') and (ii) Pioneer Securities Private Limited ('Pioneer') (together, 'Parties').

While Kwality is engaged in processing and selling milk and related dairy products in India, Haldiram is engaged in the business of manufacturing and marketing of a variety of snacks and Pioneer renders services pertaining to stock and non-banking financial services. Accordingly, CCI noted there were no horizontal overlaps among the Parties. As to vertical overlaps, CCI noted that Haldiram procures ghee (a dairy product) from Kwality. However, the total quantity of the ghee purchased from Kwality in the previous financial year was less than 5% of the total value and volume of ghee purchased. Accordingly, CCI noted that the transaction is not likely to result in any competitive foreclosure.

28 Combination Registration No. C-2019/08/681.

29 Combination Registration No. C-2019/09/686.

30 Combination Registration No. C-2019/09/690.

31 Combination Registration No. C-2019/10/693.



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## CCI Approves Acquisition of Additional Voting Securities of MakeMyTrip by Ctrip<sup>32</sup>

### Background

On August 20, 2019, CCI approved the acquisition of additional 42.52% outstanding voting securities of MakeMyTrip Limited ('MMT') from MIH Internet Sea Private Limited ('MIH') by Ctrip.com International Limited ('Ctrip'). As purchase consideration, Ctrip proposes to issue approximately 5.6% of Ctrip's outstanding ordinary shares to MIH. Subsequently, Ctrip will transfer 4% of outstanding voting securities of MMT to Golden Trip Investment Fund, L.P ('GTIF'). Ctrip, MMT, and GTIF are together referred as 'Parties'.

- i. *Horizontal Overlaps*: CCI observed that Ctrip and MMT are engaged in 'travel, accommodation, and travel related services' in India. Within this sector, Ctrip and MMT exhibit horizontal overlaps in (a) air ticket bookings, (b) accommodation bookings, (c) package holidays, (d) car rentals, (e) B2B services and (f) other services, ('Horizontal Markets').
- ii. *Vertical Overlaps*: CCI observed that the transaction would also give rise to vertical relationships in the following activities of the Parties: (a) supply of 'international air ticket inventory' (upstream) by Ctrip to Ibibo (part of MMT Group) for 'travel market in India' or 'air ticket booking sub-segment in India' (downstream) ('**Ticketing Overlap**'); (b) supply of 'domestic accommodation' (upstream) by MMT Group to Ctrip for 'travel market in India' or 'accommodation booking sub-segment in India' (downstream). ('**Accommodation Overlap**'); (c) supply of 'meta search service ('MSS')' (upstream) by Ctrip (through its subsidiary Skyscanner) which directs end consumers to MMT's websites for booking travel and travel related services in India (downstream) ('**mss Overlap**') (together, '**Vertical Links**').

### Assessment by CCI

- i. *Relevant Market*: Rejecting the parties' submission that the 'travel and travel related services' market should include all travel services (accommodation, transportation, attractions), travel channels (direct suppliers, travel agents, online travel aggregators ('OTAs'), and corporate travel providers, etc.), and all channels of distribution (online and offline), CCI decided to assess the narrower segments of the relevant market of 'travel, accommodation, and other travel services' involving (i) specific distribution channels, (ii) specific travel services, and (iii) specific travel channels. CCI observed that the online channel appears to be a distinct mode of distribution which cannot be substituted by other offline modes or direct sale. CCI noted that travel services are not substitutable, but complementary since a consumer may search for these services at different points of time and may not even require a purchase of all these services. Further, CCI observed that travel channels / players engaged in this sector (direct suppliers, OTAs, travel agents, etc.) operate in different relevant markets because while OTAs are intermediaries between direct suppliers and customers, the direct suppliers (such as airline operators) sell their services to the customers directly.
- ii. *Competition Assessment*: In its assessment of the Horizontal Markets, CCI observed that the increment in the broad segment of 'travel and travel related services' (online and offline), as well as in the narrow segments of the relevant market (online travel and travel related services), would be between 0-5%.

While assessing the Vertical Links:

- (a) *Ticketing Overlap*: CCI noted that the Gross Merchandise Value ('GMV') of the total international tickets supplied by Ctrip to Ibibo was a negligible fraction of the total tickets booked on MMT Group's platforms, and total international flight tickets sold by Ctrip relating to India.
- (b) *Accommodation Overlap*: CCI noted that the total value of the domestic hotel bookings supplied by the MMT Group to Ctrip was a negligible fraction of the total GMV of the domestic hotel bookings sold by MMT Group. Also, there were no exclusivity arrangements between the Parties.
- (c) *MSS Overlap*: CCI noted that (A) MSS is only an ancillary service and is not an essential input for players in the downstream market; (B) Skyscanner has no commercial incentive to foreclose the input (MSS) since comparing a wide range of options allows Skyscanner to remain competitive; (C) GMV of air bookings on MMT Group's platforms through Skyscanner was negligible; and (D) the arrangement between the Parties is on a non-exclusive basis.

On the basis of this analysis, CCI found that the transaction is unlikely to cause any AAEC in India.

<sup>32</sup> Combination Registration No. C-2019/05/664.

## CCI Grants Approval under the 'Green Channel' Mechanism to Three Transactions<sup>33</sup>

### i. Acquisition of IDBI Asset Management Ltd. ('IAML') and IDBI MF Trustee Company Ltd. ('IMTL') by Muthoot Finance Limited ('MFL')<sup>34</sup>

The notification relates to the acquisition of 100% equity shares of both IAML and IMTL by MFL. MFL is a non-deposit taking NBFC registered with the Reserve Bank of India ('RBI') and provides secured and unsecured loan against collateral of gold jewellery. IAML's principal activity is to act as an asset management company to the IDBI Mutual Fund ('IDBI MF'). IMTL acts as the trustee company of IDBI MF in India. IDBI Bank holds 100% shareholding in IMTL. AZB & Partners acted for MFL in this transaction.

### ii. Acquisition of Adani Electricity Mumbai Limited ('AEML') and Adani Electricity Mumbai Services Limited ('AEMSL') by Qatar Holding LLC ('QH')<sup>35</sup>

The notification relates to the acquisition by QH of 25.1% equity shares of AEML and AEMSL from Adani Transmission Limited. QH, registered as a Foreign Portfolio Investor with SEBI, is an investment holding company of Qatar Investment Authority ('QIA'). AEML is the licensee for an integrated power distribution, transmission and generation business. AEMSL is a newly incorporated entity and is currently not engaged in any business activity. AEMSL intends to provide certain captive services to AEML and ATL. AZB & Partners acted for QH in this transaction.

### iii. Acquisition of GVK Airport Holdings Limited ('GVKAHL') by Green Rock B 2014 Limited ('Green Rock'), National Investment and Infrastructure Fund ('NIIF') and Indo-Infra Inc. ('Indo-Infra')<sup>36</sup>

The notification relates to acquisition of (a) shares of, and control over, GVKAHL (and / or of its affiliates); and (b) through GVKAHL (and / or through its affiliates), control over GVKAHL's subsidiaries, Mumbai International Airport Limited ('MIAL') and Navi Mumbai International Airport Private Limited ('NMIA') by Green Rock, NIIF, and Indo-Infra. Green Rock, a trustee of Green Stone Trust has made certain investments in India and does not carry out any business activities directly in India. NIIF is an alternative investment fund with a focus to provide long-term capital to the country's infrastructure sector. Indo-Infra is a holding company and part of the PSP group. PSP is a Canadian Crown corporation established by the Canadian Parliament under the Public Sector Pension Investment Board Act. GVKAHL is an affiliate of the GVK group. GVKAHL is a holding company for MIAL and its subsidiaries and joint ventures, and is engaged in the business of developing infrastructure facilities and investing in companies directly or indirectly developing, operating and managing airports.

## CCI Approves Acquisition of Shares in GMR Airports Limited<sup>37</sup>

On October 1, 2019, CCI approved the acquisition of 44.44% shares in GMR Airports Limited ('GMR') by TRIL Urban Transport Private Limited ('TUTPL'), Valkyrie Investment Pte. Limited ('VIPL'), and Solis Capital (Singapore) Pte. Limited ('Solis') (together, 'Acquirers')<sup>38</sup>. Acquirers and GMR together are referred as 'Parties'.

TUTPL is part of the Tata Sons Private Limited ('Tata Sons') group. Tata Sons group, among other businesses, has majority stake in two airlines, namely, AirAsia India, and Vistara Airlines. VIPL is a private limited company incorporated in Singapore, and is a special purpose vehicle registered with the SEBI as a foreign venture capital investor ('FVCI'), and is a part of a group of investment holding companies managed by GIC Special Investments Private Limited ('GICSI'), which in turn is owned by GIC (Ventures) Private Limited ('GICVPL').<sup>39</sup> Similarly, Solis is also a registered FVCI, and is an investment vehicle advised by SSG Capital Management (Singapore) Pte. Ltd. ('SSG Capital').<sup>40</sup> Tata Sons group, GIC group, and SSG group are collectively referred to as 'Acquirers' Group'.

GMR is a public limited company and a subsidiary of GMR Infrastructure Limited ('GIL'),

<sup>33</sup> CCI, by way of a gazette notification dated August 13, 2019 ('Amendment'), introduced certain amendments to its merger control regulations, i.e., the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2011. The Amendment has been in effect from August 15, 2019 and now allows transactions, that don't involve any form of 'overlaps' in the activities of the parties (vertical, horizontal or 'complementary'), to be notified to CCI under a 'Green Channel'. Such transactions will be deemed approved on receiving an acknowledgment on filing; and parties will no longer have to wait for CCI's approval before giving effect to them.

<sup>34</sup> Combination Registration No. C-2019/12/710.

<sup>35</sup> Combination Registration No. C-2019/12/712.

<sup>36</sup> Combination Registration No. C-2019/12/713.

<sup>37</sup> Combination Registration No. C-2019/07/676

<sup>38</sup> Pursuant to certain clauses in the shareholders agreement, each acquirer may further increase their equity stake in GMR such that the collective shareholding of the Acquirers will increase up to 55.2%.

<sup>39</sup> Both GICSI and GICVPL are wholly-owned by the Minister for Finance, a body corporate established under section 2(1) of the Minister for Finance (Incorporation) Act, Chapter 183 of Singapore. 'GIC group' would refer to a group of investment holding companies managed by GICSI.

<sup>40</sup> SSG Capital is licensed by Monetary Authority of Singapore to undertake fund management activities. Both Solis and SSG Capital are part of the SSG group of companies ('SSG group'). SSG group is an alternative asset management firm founded in 2009 and focuses on investments in the Asia Pacific region.



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which is the ultimate parent entity of the GMR group. GMR, through its subsidiaries, operates and manages the Delhi and Hyderabad airports. In India, GMR is also developing a greenfield airport in Goa and Bhogapuram; and will develop and operate Nagpur airport on public private partnership basis (**‘Target Airports’**).

CCI observed that there were no horizontal overlaps between the Acquirers’ Group and the GMR group. It also observed that there were no vertical relationships between the activities of the GIC group / SSG group and the GMR group.

However, CCI noted that GMR’s upstream business segment of development, operation and maintenance of the airport, is in a vertical relationship with services provided by the entities of the Tata Sons group, namely, provision of scheduled air transport services, non-scheduled air transport service, food and beverage services, retail services, in-flight catering services, ground handling services, cargo services, and maintenance and repair operations (**‘MRO’**). CCI also found that the transaction envisages Tata Sons group’s control over certain reserved matters and a board seat in the entities of GMR. Accordingly, for its analysis of this vertical overlap, CCI delineated the following relevant markets: (i) upstream market for provision of access to airport facilities / premises at each of the Target Airports; and (ii) downstream market for provision of air transport activities and other specific services at each of the Target Airports.

With the acquisition of stake by Tata Sons group in GMR, and its presence in the airlines business and other associated businesses / services provided at airports, Tata Sons group would have presence in both the upstream and the downstream markets, as defined above. CCI observed that the vertical relationship between the Tata Sons group and GMR group, may lead to vertical integration, by virtue of which, Parties may be incentivized to foreclose competing airlines and other service providers. To alleviate any potential conflict of interest arising out of Tata Sons group acquiring stake in GMR, the Acquirers offered the following voluntary modification: (**‘Voluntary Modification’**):

- i. The Acquirers will not appoint a director on the board of directors of the ‘Airport Concession Entities’<sup>41</sup> operating or would be operating in India, and ‘Key Managerial Persons’ in the ‘Airport Concession Entities’ operating or would be operating in India.
- ii. The director nominated by the Acquirers on the board of GMR, shall recuse himself if any discussion of voting takes place on a matter pertaining to allocation of slots to any airline.
- iii. GMR shall ensure that no commercially sensitive information relating to slot allocation should be disclosed to the nominee director of the Acquirers on GMR’s board resulting in Acquirers obtaining an undue commercial advantage.
- iv. The Parties shall put in place adequate monitoring mechanisms and shall ensure that the Airport Concession Entities follow the principles of competition law including competition neutrality, level playing field and fairness.
- v. The Parties commit that there will be no directors by the Parties on the board of GMR who is also a director in any entity operating a scheduled airline in India or outside India.

CCI held that the Voluntary Modification is likely to address the vertical integration concerns and accordingly approved the transaction.

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<sup>41</sup> As defined in the shareholders’ agreement.



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India Business Law Journal, 2019



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