



## Update and Analysis of the Revised Notes to Form 1 Issued by CCI

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## Update and Analysis of the Revised Notes to Form 1 Issued by CCI

### Introduction

Competition Commission of India ('CCI') on March 27, 2020, issued guidance for parties ('Revised Notes') to file a Form I<sup>1</sup> under the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Amendment Regulations, 2011 ('Combination Regulations').

The Revised Notes have been issued to incorporate the amendments brought in to Form I by CCI ('Revised Form 1') last year by way of the notification dated August 13, 2019, ('CCI Notification'). The Revised Form 1 clarified the scope of information to be provided to CCI while notifying a combination in Form 1.

The Revised Notes, to a large extent, are a welcome development, especially for private equity investors and enterprises that do not have substantial overlaps with the target entity. The Revised Notes: (i) provide relaxation in mapping overlaps between the parties; (ii) provide relaxation in providing market facing information; and (iii) clarify the scope of 'complementary' products and services. The Revised Notes also require an enhanced level of disclosure: (i) from the acquirer with respect to its group activities; and (ii) on the intricacies of the transaction. In addition, the Revised Notes mandate the presence of a senior officer of each of the parties to the combination during meetings with CCI, which may be arduous for some enterprises.

### Key Changes

Some of the key changes in the Revised Notes and their implications have been explained below:

- i. **Relaxation in Mapping Overlaps between Parties:** Until now, while mapping overlaps between an acquirer and a target, the parties were required to provide such information if the (i) parties to the combination; and/or (ii) their respective group entities were directly or indirectly engaged in any: (a) horizontal (i.e. *producing or providing similar or identical or substitutable products or services*); (b) vertical (i.e. *they must not be engaged in commercial activities at different levels of production chain*); or (c) complementary (i.e. *they must not be engaged in any complementary activities*) activities ('Overlaps').

Additionally, the CCI Notification also introduced the Green Channel regime ('GC Regime') granting deemed approval to combinations involving no Overlaps (for both (i) and (ii) above) on receiving an acknowledgement of filing. Therefore, the parties were required to map overlaps with all investments, regardless of how limited (arguably even one share) in an 'overlapping business'.

The Revised Notes have now relaxed the eligibility criteria for (a) mapping Overlaps; and (b) applicability of the GC Regime. For (a) and (b), the parties are now required to consider only those entities in which they hold:

- (a) a direct or an indirect shareholding of 10% or more; or
- (b) a right or an ability to exercise any right (including any advantage of commercial nature) that is not available to an ordinary shareholder; or
- (c) a right or an ability to nominate a director or observer in another enterprise.

This relaxation in mapping Overlaps and the applicability of the GC Regime is important as it reduces the burden for various enterprises (*including private equity investors*) holding minority investments in numerous companies who can now still approach CCI under the GC Regime.

- ii. **Relaxation on Providing Market Facing Information of Parties:** In transactions involving Overlaps, the Revised Form 1 had previously increased the scope of disclosure on the market share information of parties to three years (*as opposed to the earlier requirement of one year*).

The Revised Notes have clarified that the market share data of the parties for the past three years is required to be provided **only** where the combined market share of parties for any plausible alternative market(s) (*whether horizontal, vertical or complementary*) exceeds 10%. This substantially reduces the burden of the parties to collate information in transactions where the parties do not have substantial combined market shares.

- iii. **Clarification on 'Complementary Products':** The Revised Form 1 introduced

<sup>1</sup> Notification to CCI is made either in Form I (shorter form) or Form II (longer form). The parties may at their option file notification in Form II where (a) the combined market shares of the parties post-combination is more than 15% in any horizontal market; or (b) the individual or combined market shares of the parties is more than 25% in any vertical market.

the requirement to disclose and also map overlaps with respect to complementary activities of the parties. However, no guidance was provided on the definition of ‘complementary’ products/services. CCI has now clarified ‘complementary’ as products/services which:

- (a) are related because they are combined and used together (e.g., *printers and ink cartridges*);
- (b) do not compete and are not vertically related; and
- (c) enhance the value of a combined product/service.
- (d) **Threshold Assessment to be done in Substance, not Form:** The Revised Notes also clarify that the parties are required to calculate the total value of assets and turnover of the combination based on the substance of the transaction and not its form<sup>2</sup>.
- (e) **Clarification on Entities Belonging to the Target ‘Group’:** The Revised Notes have clarified that the target group means all the entities belonging to the group starting from the target entity to its downstream affiliates and not the target and its group entities, as was suggested in the Revised Form.

## Other Changes

- i. **Disclosure on Rights Acquired in a Combination:** The Revised Notes expressly require a disclosure of the following rights acquired as a result of the transaction: (a) veto rights; (b) affirmative voting rights; (c) any other rights or advantage of commercial nature (likely to include rights such as rights of first refusal/offer, pre-emptive rights, tag-along and drag along rights, call options, put options, etc.); (d) right or ability to appoint a member or observer on the board of directors; and/or (e) information sharing rights.
- ii. **Additional Disclosure from the Acquirer Group:** The Revised Notes also require the acquirer to provide a diagrammatic representation of its group *i.e.*, from the ultimate controlling entity of the party to the transaction to the downstream affiliates, along with the shareholdings in each affiliate<sup>3</sup>.

## Behavioural Orders

### CCI Dismisses Complaint against State Bank of India and Patanjali Ayurveda and International Traders

On May 14, 2020, CCI dismissed allegations against State Bank of India (‘SBI’), M/s Patanjali Ayurveda (‘Patanjali’) and M/s International Traders (‘IT’) of committing fraud and colluding with the objective of taking the informant’s basmati rice processing unit in the garb of debt recovery under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (‘SARFAESI Act’)<sup>4</sup>. The informant had alleged that SBI being the leader of a consortium of lender banks had declared its account as a Non-Performing Asset (‘NPA’), and initiated debt recovery proceedings under the SARFAESI Act. To this extent, SBI had invited bids for sale of the informant’s basmati rice processing unit which was mortgaged as the primary security to the consortium. The Informant alleged that SBI committed fraud by undervaluing the processing unit for the purposes of inviting public bids with a view to ensure a favourable treatment to Patanjali and IT during the auction. It further alleged that while Patanjali and IT participated as independent bidders in the bidding process, they were working in tandem as Patanjali had paid the token money on behalf of the latter, to enable it to participate as an independent bidder. Lastly, it also alleged that SBI had abused its dominant position by conducting the auction in an illegal fashion, violating Section 4 of the Competition Act, 2002 (‘Competition Act’).

As a preliminary objection to CCI’s jurisdiction on the issue, SBI argued that the auction was conducted under the SARFAESI Act which was a special act and therefore, such auction could not be investigated under any other law. However, CCI rejected this argument citing Section 62 of the Competition Act which clarifies that the Competition Act is applicable in addition to all the existing enactments, to all matters that fall within its purview. Since the allegations in the

<sup>2</sup> The clarification is in line with Regulation 9(5) of the Combination Regulations which requires that notifications to CCI are to be determined with respect to the substance of a transaction and any structure of the transaction that has the effect of avoiding notice shall be disregarded. While parties were following this approach in practice, the clarification formally records CCI’s interpretation of Regulation 9(5).

<sup>3</sup> Before the amendments to Form I by way of Revised Notes, the requirement was to only provide the details of the enterprises whose structure, ownership and control was likely to be affected by the combination.

<sup>4</sup> *RH Agro Private Limited v. State Bank of India & Ors.*, Case No. 44 of 2019, order delivered on 14 May 2020.



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information were those of bid-rigging (specifically provided for under Section 3(3)(d) of the Competition Act), CCI had jurisdiction to assess those allegations.

CCI at the outset noted that any bank under the SARFAESI Act had a right to enforce its security interest and classify the account of a defaulter as an NPA. It further noted that SBI being a secured creditor was not similarly placed as Patanjali and IT, which were both traders; and therefore, an allegation against SBI under Section 3(3)(d) of the Competition Act would not materialise. Specifically, with regard to Patanjali and IT, it noted that the informant did not adduce any evidence to support its allegation that Patanjali and IT acted in tandem during the bidding process.

Lastly, it was also noted that an auction/transaction initiated by a bank/financial institution for the purpose of recovery in terms of provisions of the SARFAESI Act may not amount to violation of the provisions of the Competition Act. Accordingly, CCI rejected the allegation of abuse of its dominance position against SBI closed the matter in terms of Section 26(2) of the Competition Act.

### **CCI Dismisses Allegations of Abuse of Dominance against Punjab National Bank**

On May 22, 2020, CCI dismissed allegations against Punjab National Bank ('PNB') that it had abused its dominant position in terms of Section 4 of the Competition Act<sup>5</sup>. The informant alleged that PNB abused its dominant position by auctioning a property through a bidding process without first obtaining the possession of the property from its incumbent owners. As per the informant, the property was being auctioned by PNB for debt recovery, pursuant to the provisions of the SARFAESI Act. However, it was alleged that the debtor was interested in retaining the possession of the property (and had preferred any application to the Debt Recovery Tribunal ('DRT') in this regard) and yet PNB had initiated recovery proceedings in violation of the provisions of the SARFAESI Act. Further, PNB had also transferred the bid amount received from the informant to the incumbent owner of the property, without ensuring the clearance of title. This, as per the informant amounted to abuse of its dominant position by PNB, in terms of Section 4 of the Competition Act.

At the outset, CCI observed that the issue pertained to debt recovery by a secured creditor i.e., PNB, under the provisions of the SARFAESI Act. It further noted that any bank under the SARFAESI Act had a right to enforcing its security interest classify the account of a defaulter as a NPA. As such, a bank cannot be considered as dominant when exercising a statutory remedy available to it under the SARFAESI Act. To this extent, CCI also did not identify a relevant market for determining the dominance of PNB within that market. It also noted that the informant did not suggest the way in which allegations of violation of the SARFAESI Act would result in a violation of the provisions of the Competition Act, and reiterated its observation in **M/s RH Agro Private Limited v. State Bank of India & Ors. (Case no 44 of 2019)** that an auction/transaction initiated by a bank/financial institution for the purpose of recovery in terms of provisions of SARFAESI Act may not amount to violation of the provisions of Competition Act. Accordingly, CCI closed the matter in terms of Section 26(2) of the Competition Act.

### **CCI Unearths a Cartel in the Domestic Industrial and Automotive Bearings Market**

On June 5, 2020, CCI concluded that five domestic and industrial bearings manufacturers, namely, Schaeffler India Limited ('Schaeffler'), ABC Bearings Limited (now amalgamated with Timken India Limited) ('Timken'), National Engineering Industries Limited ('NEI'), SKF India Limited ('SKF'), and Tata Steel Limited, Bearing division ('Tata Bearing') (collectively referred to as 'Opposite Parties') were part of a cartel which was active for a period of 2009 to 2014<sup>6</sup>. The investigation was initiated by CCI based on a leniency application filed by Schaeffler dated June 26, 2017, ('LA') under Section 46 of the Competition Act, read with Regulation 5 of CCI (Lesser Penalty) Regulations, 2009.

CCI noted from the LA that when steel prices (a primary raw material for manufacturing bearings) started increasing from 2009, there was coordinated action among the five companies to pass on such increase to the automotive and industrial original equipment manufacturers ('OEM Customers') and in the distribution segment of the market across India. As practice, if there was an increase in the manufacturing cost of bearings, including due to increase in the steel prices, the OEM Customers accommodated certain price increase from time to time. However, they generally did so only when all the suppliers demanded for such an increase. Hence, under the cartel arrangement, the Opposite Parties agreed on the percentage increase in steel price that each of them would represent to the OEM Customers, to seek a price increase from them. To achieve this, they would simultaneously send out price increase letters to the OEM Customers and distributors in the aftermarket, specifying the percentage increase in steel prices and a request to increase the existing supply prices.

<sup>5</sup> *Lakshmi Sharma v. Punjab National Bank*, Case No. 48 of 2019, order delivered on 22 May 2020.

<sup>6</sup> *In Re: Cartelization in Industrial and Automotive Bearings, Suo Motu* Case No. 05 of 2017, order delivered on 5 June 2020.



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Based on its observations, CCI directed the Director General ('DG') to investigate the matter. During the DG's investigation period, NEI also submitted a leniency application. Based on documentary evidence (such as e-mails), the DG in its report ('DG Report') noted that the representatives of four Opposite Parties namely NEI, Schaeffler, SKF and Tata Bearing attended two meetings in Delhi. Here, the Opposite Parties discussed and fixed the pricing strategies to be adopted for seeking price increase from the industrial and automotive OEM Customers and in the aftermarket. However, the DG Report also concluded that the Opposite Parties did not collude in the aftermarket segment for bearings distribution. Similarly, the DG also could not find any evidence of cartelisation against Timken.

The DG also noted that there was no indication of any actual concerted price increase except in a few cases such as with respect to Bajaj Auto Limited and Maruti Suzuki India Limited in July 2010, and March to July 2011, respectively. Further, the price revision data also did not indicate that the prices of bearings sold by the four entities to the OEMs moved in tandem with each other. However, given that the four remaining Opposite Parties controlled approximately 3/4th of the market and were sharing confidential business information with an objective to achieve higher than competitive prices of bearings sold by them to the OEM Customers, the DG opined that there was a likely appreciable adverse effect on competition ('AAEC') caused in the market.

CCI, based on the DG's findings in the DG Report, and the submissions of the Opposite Parties, concluded that a 'cartel' in terms of Section 3(3) of Competition Act existed between NEI, Schaeffler, SKF and Tata Bearing. With respect to the Opposite Parties' argument that regardless of the exchange of confidential information between them no AAEC was caused as a result, the Opposite Parties relied on: (i) the price analysis in the DG Report; (ii) statements of OEM Customers exonerating them of cartelisation; and (iii) the substantial countervailing buying power which existed with the OEM Customers.

CCI rejected the contentions raised by the Opposite Parties and observed that the Competition Act prohibits both kinds of the agreements, i.e., those that cause AAEC and those that are likely to cause AAEC. CCI also clarified that once an agreement in terms of Section 3(3) of the Competition Act was established between the Opposite Parties, the fact that it would result in AAEC in the concerned markets was to be presumed. This presumption of AAEC could be rebutted. However, none of the Opposite Parties were able to demonstrate the existence of any of the rebuttable factors listed under clauses (a) to (c) of Section 19(3) of the Competition Act. It also noted that the fact that the Opposite Parties did not implement the collusive decision was not sufficient to rebut the statutory presumption of AAEC under the Competition Act.

Based on the above, CCI directed the Opposite Parties (excluding Timken since there were no findings against it) to cease the cartel and desist from colluding on the prices in the future. However, given the specific circumstances of the case (discussed above) CCI did not impose a penalty on the Opposite Parties.

### CCI Dismisses Complaint Against Swiggy

On June 19, 2020, CCI dismissed an allegation of abuse of dominance against Bundl Technologies Private Limited ('Swiggy')<sup>7</sup>.

The informants alleged that the food rates charged by Swiggy on its website and application are much higher than the rates offered by the restaurants at their outlets, over and above delivery charges levied by Swiggy. The informants further alleged that Swiggy intentionally refrained from disclosing to its customers that it levies rates which are higher than those on the original menu of any particular restaurant. This led the customers to believe that only delivery charges were applicable on their order. This practice, amounted to imposition of unfair prices on customers, in violation of Section 4(2)(a) of the Act.

Based on information received from Swiggy, CCI observed that Swiggy had no role to play in the pricing of products offered by the restaurants on its platform, and it did not modify or select the information posted by the restaurant partners. CCI also noted the existence of agreements between Swiggy and the restaurant partners under which the restaurants had to maintain a uniform price of food items both on and off the Swiggy platform. CCI finally noted that historically, Swiggy would take up any complaint on difference in pricing from its customers with the concerned restaurant partner as and when such complaint was received. Based on this CCI observed that the allegations against Swiggy were unsubstantiated and thus dismissed the complaint.

### NCLAT Upholds CCI's Order Rejecting Complaints of Anti-Competitive Conduct Against Cab Aggregation Companies

On May 29, 2020, the National Company Law Appellate Tribunal ('NCLAT') upheld CCI's order in Case No. 37/2018 rejecting complaints of anti-competitive conduct against cab aggregation companies namely, ANI Technologies Private Limited ('Ola') and Uber India Systems Private

<sup>7</sup> Prachi Agarwal & Anr. v. Swiggy, Case No. 39 of 2019, order delivered on 19 June 2020.





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Limited ('Uber', including its group companies i.e., Uber B.V. and Uber Technologies Inc.)<sup>8</sup>.

CCI, through its order dated November 06, 2018 ('Impugned Order')<sup>9</sup>, had rejected allegations that (i) driver partners active on the different cab aggregation applications of Ola and Uber respectively ('Apps'), were using their pricing algorithms to facilitate price fixing among themselves, in violation of Section 3(3) of the Competition Act; (ii) by determining the prices to be charged by the driver partners from the passengers (through its Apps), Ola and Uber had implemented a resale price maintenance agreement in terms of Section 3(4)(e) of the Competition Act. Notably, this allegation was not raised by the appellant before the NCLAT; and (iii) Ola and Uber were charging discriminatory prices from the passengers in terms of Section 4(2)(a)(i) of the Competition Act.

The appellant (an independent legal practitioner) *inter alia* argued that CCI erred in concluding on the genuineness and legality of the pricing models of Ola and Uber respectively, and also did not refute that the Apps determined the prices which were being charged by the driver partners listed with the Apps. He also argued that CCI erred in holding that no agreement existed between the driver partners, and in treating the driver partners and the respective cab aggregators as single economic entities.

At the outset, the NCLAT clarified that the phrase 'any person' as used under Section 19(1) (a) of the Competition Act referred to 'a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices.' Given that the appellant did not fall in any of the categories specified by it, the NCLAT observed that he did not have *locus standi* in the instant case. Nevertheless, the NCLAT scrutinized the allegations made by the appellant on merit and agreed with the findings of CCI. It noted that the appellant did not imply that Ola and Uber, being competitors, colluded on the prices of their services through the algorithms of their individual Apps. It further observed that absent any evidence to suggest that the driver partners being independent service providers, colluded to fix prices being charged to the passengers, the appellant's allegations were rightly rejected by CCI. It further observed that based on distinct reasons provided by Ola and Uber, the theory of a hub and spoke cartel did not materialise. Under Ola's business model, there was no *inter se* information sharing among the driver partners and ruled out scope of collusion among them. With respect to Uber's model, NCLAT noted that while Uber's App assisted them in finding a potential passenger and also recommended the fares to be charged, the driver partners were free to accept the ride and negotiate a lower fare with the passengers. NCLAT also upheld CCI's observations that neither Ola nor Uber was dominant in the cab aggregation market. Further, since the two were neither acting as a joint venture nor belonged to the same group, they could not be considered collectively to determine their market position, under Section 4 of the Competition Act.

Lastly, the NCLAT also observed that the Impugned Order did not suffer from any infirmity as CCI dealt with the allegations while clearly identifying the issues and recording its opinion. Thus, nothing to the contrary could be demonstrated by the appellant to warrant any interference. Based on these observations, the NCLAT upheld the Impugned Order and dismissed the appeal filed by the appellant.

### **NCLAT Upholds CCI's Order Dismissing Complaints against Goel Enclave and Eight Residential Developers**

On May 22, 2020, the NCLAT upheld CCI's order dismissing complaints of contravention of the Competition Act against Goel Enclave and Eight Residential Developers ('Opposite Parties')<sup>10</sup>.

The informants had booked two residential flats in the housing project named Silver Line Apartments which was developed by the Opposite Parties. At the time of booking, the Opposite Parties had allegedly assured the Informant that all necessary approvals had been obtained for the residential project and that the cost of each flat was to be inclusive of all charges. However, despite paying the entire cost of the flats, the Opposite Parties compelled the informant to pay additional amount on the pretext of parking and maintenance charges, without handing over possession of the flat. Additionally, the informants alleged that the Opposite Parties had used poor quality material and that certain areas earmarked for common facilities were utilised illegally for raising additional apartment blocks. Thus, the informant alleged that the Opposite Parties had violated Section 3 of the Competition Act (relating to anticompetitive agreements), and that Goel Enclave had abused its dominance.

CCI noted that the informant failed to disclose any agreement which could be considered as anticompetitive amongst the Opposite Parties. On allegations of abuse of dominance, CCI noted the presence of several entities competing with Goel Enclave and absent any dominance, dis-

<sup>8</sup> *Samir Agrawal v. Competition Commission of India & Ors.*, Competition Appeal (AT) No. 11 of 2019, order delivered on 29 May 2020.

<sup>9</sup> *Samir Agrawal v. ANI Technologies & Ors.*, Case No. 37 of 2018, order delivered on 6 November 2018.

<sup>10</sup> *Ujjawal Narain & Anr. V. Goel Enclave & Ors.*, Competition Appeal (AT) No. 18 of 2017, order delivered on 22 May 2020.

missed the complaint. The NCLAT agreed with CCI's findings, noting that in essence the complaint related to a breach of contractual obligations. Additionally, the NCLAT noted that owing to the presence of several competitors the Opposite Parties could not be said to be dominant, rendering all issues on abuse of dominance redundant. The NCLAT stated that while the informants could claim compensation for breach of contract before the appropriate forum, the competition concerns raised by the informants were unfounded. Accordingly, the NCLAT dismissed the appeal.

### **NCLAT Dismisses Appeal against CCI's Order Dismissing Complaints against NIIT Limited**

On May 29, 2020, the NCLAT dismissed an appeal filed against CCI's closure of complaints relating to anticompetitive agreement and abuse of dominant position against NIIT Limited ('NIIT')<sup>11</sup>. CCI noted that NIIT was not dominant in the relevant market of computer/IT training centres in Hyderabad. Further, CCI did not find the pricing adopted by NIIT to be arbitrary, since these prices considered the lack of affordability and awareness in non-metros among other factors. Therefore, allegations of abuse of dominance stood unsubstantiated. Additionally, CCI found no substance in the allegation relating to anticompetitive agreements. Accordingly, CCI closed the case since no *prima facie* case of contravention was made out against NIIT.

The appellant approached the NCLAT in appeal 730 days after CCI issued its order. The NCLAT noted that the Competition Act requires appeals to be filed before it within 60 days of CCI's order. This period can be extended by the NCLAT upon being satisfied that there is 'sufficient cause' for not filing an appeal within the prescribed period. Thus, the NCLAT assessed whether appellant's reasons for delay were sufficient to allow admission of the appeal at such a delayed stage.

The appellant said that the delay occurred on account of the appellant filing a writ petition before the Telangana High Court ('THC'), since CCI's order was obtained by fraud. This resulted in the passing of 693 days. The NCLAT noted that the appellant sought writ jurisdiction on the grounds that CCI's order was biased and influenced by the counsel of NIIT, who had previously served as a Chairman of CCI. THC, through a decision of the single bench, and followed by the decision of the division bench dismissed the writ petition since Competition Act provided for remedy against CCI decisions through appeal before the NCLAT.

The NCLAT noted that the Competition Act provides for an appeal mechanism owing to which, an unscrupulous litigant aggrieved of CCI's order cannot be allowed to choose the remedies under law and invoke writ jurisdiction under various pretexts. Such course, per the NCLAT, would provide leverage to litigants to go forum shopping.

The NCLAT noted that the appellant, despite being told by THC's single bench to approach the NCLAT as the relevant forum, approached the division bench and further approached the Indian Supreme Court ('SC') to intervene. The NCLAT opined that this delay which was evidently a result of the appellant's stubborn attitude could not constitute a 'sufficient cause' for not exercising the statutory right of appeal. Accordingly, the NCLAT dismissed the appeal as being barred by limitation.

### **DHC Dismisses Writ Petitions Challenging CCI's Order Directing the DG to Investigate Monsanto for Violating Various Provisions of the Competition Act**

On May 20, 2020, the Delhi High Court ('DHC') dismissed two writ petitions collectively filed by Monsanto Holdings Private Limited ('MHPL'), Monsanto Company ('MonCo'), and Mahyco Monsanto Biotech (India) Private Limited ('MMBL') (MHPL, MonCo, and MMBL are collectively referred to as 'Monsanto')<sup>12</sup>. The writ petitions, in substance, were targeted against CCI's common *prima facie* order under Section 26(1) of the Competition Act, directing the DG to investigate the alleged anti-competitive conduct of Monsanto in multiple cases.<sup>13</sup>

CCI issued its *prima facie* order based on multiple allegations made against Monsanto of *inter alia* charging an unfair 'trait value' (royalty/licensing fee), and imposing other unfair conditions in sub-licensing its Bt. cotton seeds technology, namely Bollgard-I and Bollgard-II (collectively 'Bt. Cotton Technology'). It was alleged that absent any substitutes of the Bt. Cotton Technology being available, Monsanto was dominant in the upstream market for licensing of Bt. Cotton Technology in India and that it abused its dominant position in terms of Section 4 of the Competition Act, in the following ways:

- i. by linking the 'trait value' to the maximum retail price of the cotton seeds, which

<sup>11</sup> Maj.Pankaj Rai v. Secretary, Competition Commission of India & Ors., Competition Appeal (AT) No. 01 of 2020, order delivered on 29 May 2020.

<sup>12</sup> Monsanto Holdings Private Limited & Ors. v. Competition Commission of India & Ors., W.P. (C) 1776/2016 and CM Nos. 7606/2016, 12396/2016 & 16685/2016, order delivered on 20 May 2020.

<sup>13</sup> Case Nos. 02/2015; 107/2015; 10/2016; 03/2016; 01/2016; 37/2016; 38/2016; 39/2016; and 36/2016; and 88/2016 (collectively referred to as 'Cases').



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was unreasonable and resulted in excessive prices that did not reflect the economic value of the said technology;

- ii. by requiring seed manufacturers (that are downstream to Monsanto) to notify it if they initiated any negotiations with its competitors (within 30 days of commencing negotiations). Since these negotiations are commercially sensitive, such disclosures would have resulted in irreparable harm to the informants. It was alleged that with this knowledge Monsanto could also take steps against informants, as it had a tendency of selectively sub-licensing its Bt. Cotton Technology;
- iii. by requiring seed manufacturers to destroy all parent lines or cotton germplasm which were modified to contain its technology once the sub-license was terminated.
- iv. by offering favourable sub-licensing agreements to its own group companies that manufacture seeds, thereby discriminating against other seed manufacturers in the downstream market; and
- v. by unfairly terminating sub-licensing agreements with other seed manufacturers, while continuing with its own seed manufacturers, thereby distorting competition in the downstream market in favour of its group companies.

Monsanto challenged CCI's jurisdiction over the Cases, asserting that the allegations on 'trait value' squarely fell within the jurisdiction of the Patents Act, 1980 ('**Patents Act**') and authorities established under it, i.e., the Controller of Patents ('**CoP**'). It argued that a remedy against abuse of a patent (if at all) existed under the Patents Act, and CCI had no jurisdiction over the matter.

It was also asserted that the DHC's order in **Telefonaktiebolaget L.M. Ericsson v. Competition Commission of India & Anr.**<sup>14</sup>, ('**Ericsson Case**') was no longer a good law, given the SC's order in **Competition Commission of India v. Bharti Airtel Limited And Ors.** ('**Bharti Case**')<sup>15</sup>. To this extent, Monsanto argued that the CoP was analogous to the Telecom Regulatory Authority of India ('**TRAI**') under the TRAI Act, 1997 and based on the Bharti Case, *inter alia* argued the following:

- i. CoP had exclusive powers to regulate the grant of patents and exercise of rights under the Patents Act. Such as in terms of Section 84 (issuance of a compulsory licenses – the only remedy available against unjust refusal of licensing a patent); Section 140 (proscribes restrictive (anti-competitive) conditions in agreements concerning selling/leasing of patented article and licensing of the patent); and Section 66 and 85 (revocation of patents in public interest). Per Monsanto, the CoP would consider anti-competitive harm (if any, in terms of Section 140) while dealing with a claim under Section 84 and also under Section 85 as 'public interest' also includes promotion of healthy competition.
- ii. the fact that Section 140 of the Patents Act was retained despite the enactment of the Competition Act, suggested the legislative intent that allegations such as those raised by the informants were to be scrutinized by the CoP and not CCI;
- iii. to harmoniously reconcile the Patents Act and the Competition Act, CCI should be allowed to exercise its jurisdiction only after the CoP has exclusively assessed the allegations, in terms of the Patents Act. This would also ensure that parties do not resort to approaching CCI instead of resorting to the remedies under the Patents Act;
- iv. Section 3(5) of the Competition Act excluded all agreements restraining infringement of intellectual property rights ('**IPR**') from the purview of the Competition Act and CCI, regardless of whether they were 'reasonable' or not. The condition of reasonableness was only with respective clauses (if any) which were to protect the IPRs (as opposed to restraining their infringements).

Lastly, Monsanto argued that the allegations had been incorrectly stated as violations of Section 4 of the Competition Act when in fact these related to Section 3 of the Competition Act (perhaps since the IPR protection was applicable only on Section 3 violations).

The DHC while relying on the Ericsson Order reiterated that there was no repugnancy between the Patents Act and the Competition Act. Further, while in certain circumstances the two may overlap, the remedies available under each of them (grant of a compulsory license and an order under Section 27 of the Competition Act, respectively) were completely distinct and not inconsistent with each other. It further noted that various provisions of the Competition Act indicate that it was to be in addition to and not in derogation of the other statutes, including the Patents Act.

It also observed that Monsanto's reliance on the Bharti Case was misplaced since the SC did not oust CCI's jurisdiction with respect to issues covered under the Competition Act, even though the case concerned the telecom sector which was regulated by TRAI. As such, the Bharti Case did not overrule the Ericsson Case.

<sup>14</sup> W.P. (C) 462/2014

<sup>15</sup> Civil Appeal No. 11843/2018



Lastly, it also rejected Monsanto's contention that Section 3(5) of the Competition Act imposed an absolute restraint on CCI from assessing agreements entered into with a view to restraint patent infringement, regardless of them being unreasonable. It clarified that Section 3(5) of the Competition Act allowed IPR holders to 'impose reasonable conditions' with a view to restrain the infringement of, or protect their IPRs (as specified under the provision itself). Further, the question of whether an agreement is limited to restraining infringement of patents and includes reasonable conditions or not was within CCI's exclusive domain to determine. As such, finding no merit in the arguments raised by Monsanto against CCI's *prima facie* order, the DHC dismissed the writ petitions.

This decision was appealed by Monsanto before DHC's division bench.<sup>16</sup> The division bench admitted the appeal, and pending its decision passed an order restraining CCI from issuing any final decision on the Cases.

## Combination Orders

### CCI Approves Acquisition of Shareholding by Total S.A. in JV Entity Incorporated by Adani Green Energy Limited

On April 1, 2020, CCI approved the acquisition of 50% of the shareholding in a joint venture entity ('JV Entity') by Total S.A.<sup>17</sup> to be incorporated by Adani Green Energy Limited ('AGEL'). Prior to the acquisition by Total S.A., AGEL will transfer certain solar energy assets held by it ('Target Companies') to the JV Entity. The transaction documents executed between Total S.A. and AGEL also contemplated transfer of additional solar energy assets to the JV Entity, which Total S.A. undertook to notify to CCI separately.

The Target Companies are directly or indirectly held by AGEL and are engaged in solar power generation in India.

Total S.A. is the ultimate parent entity of the Total group, which is engaged in *inter alia* the renewable and power generation sectors across the world. Total S.A., through one of its group entities has shareholding in Total Eren Holdings which in turn has interest in EDEN Renewables India LLP, which is engaged in solar power generation in India, thereby creating a horizontal overlap between Total S.A. and the Target Companies.

CCI noted the insignificant combined market shares of the parties in the broader market for power generation, as well as the narrower segments for power generation through renewable energy and solar energy. Additionally, CCI also noted that due to the limited presence of Total group in power generation, there was an insignificant increment in Total's market share as a result of the transaction (even after accounting for pipeline projects). Thus, CCI approved the transaction based on its assessment that it would not cause any competition concerns.

### CCI Approves Emerald Sage Investment Limited's Acquisition of Compulsorily Convertible Preference Shares of Apollo Tyres Limited

On April 13, 2020, CCI approved Emerald Sage Investment Limited's ('ESIL') acquisition of compulsorily convertible preference shares ('CCPS') in Apollo Tyres Limited ('Apollo')<sup>18</sup>. The CCPS would constitute approximately 9.93% of the post-issue share capital of Apollo. Additionally, ESIL would acquire rights to: (i) appoint a non-executive director on the board of directors of Apollo ('Investor Director') and two of its subsidiaries based outside India; and (ii) nominate the Investor Director on various board committees of Apollo.

Apollo is the parent company of Apollo group, and its principal business activity is manufacturing and sale of automotive tyres.

ESIL is an investment holding company, wholly owned by certain private equity funds managed by Warburg Pincus LLC ('Warburg'), which indirectly holds 8.92% of Apollo's shareholding. Post the transaction, Warburg's shareholding in Apollo would increase to approximately 17.97%.

CCI noted the absence of horizontal overlaps between ESIL, Warburg's portfolio companies, and Apollo. While Warburg group has investments in logistic service providers, which may buy automotive tyres in limited quantities, CCI noted that transaction was unlikely to have any AAEC in India and approved it accordingly.

<sup>16</sup> Monsanto Holdings Private Limited & Ors. v. Competition Commission of India & Ors., LPA 150//2020, C.M. Nos 11724-11731/2020, order delivered on 3 June 2020.

<sup>17</sup> Combination Registration No. C-2020/03/736.

<sup>18</sup> Combination Registration No. C-2020/03/738.



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