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## Buyer-Seller Arrangements: Is CCI Expanding the Cartel Horizons?

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## Buyer–Seller Arrangements: Is CCI Expanding the Cartel Horizons?

On January 15, 2019, Competition Commission of India ('CCI') imposed a penalty on Godrej and Boyce Manufacturing Company Limited ('Godrej') and four of its officials for entering into a price fixing arrangement with Panasonic Energy India Company Limited ('Panasonic') in violation of Section 3(3) of the Competition Act, 2002 ('Competition Act') ('Godrej Order').<sup>1</sup> By way of a separate order, involving similar facts, CCI imposed a penalty on Geep Industries (India) Private Limited ('Geep') and its officials for a similar arrangement with Panasonic ('Geep Order').

To appreciate the implications of the Godrej Order and the Geep Order, the background and facts of these cases are particularly important<sup>2</sup>: (i) on one hand, Panasonic was a manufacturer of zinc-carbon dry cell batteries ('DCBs'), on the other hand, Godrej did not have the capability to manufacture DCBs; (ii) Panasonic and Godrej entered into a product supply agreement ('PSA') for supply of DCBs starting from early 2012 until late 2014; (iii) similar to customary contract manufacturing arrangements, the DCBs were procured by Godrej from Panasonic in a ready to sell form *i.e.*, the labelling and packaging of the battery was also done by Panasonic; (iv) the DCBs procured by Godrej from Panasonic were sold by Godrej under its own brand name, giving due credit to Panasonic as manufacturer of such batteries, on the labelling of the DCB.

In parallel, Panasonic entered into a price fixing arrangement with its competitors *i.e.*, Eveready Industries India Ltd. ('Eveready') and Indo National Limited ('Nippo') during the period between May, 2009 and August, 2016. Panasonic filed a leniency application before CCI disclosing this conduct and CCI found Panasonic, Eveready and Nippo guilty of a cartel conduct. In the Godrej Order, CCI specifically notes that Panasonic used its knowledge of future prices fixed with Eveready and Nippo and used '*its position of leverage to extract higher procurement price*' from Godrej, by indicating that the prices will go up. Yet, CCI held Godrej guilty of entering into a cartel with Panasonic on the basis of: (i) a specific mutual comfort clause under the PSA effectively stating that the buyer and seller would not act against each other's market interests; and (ii) e-mails that were exchanged between the officials of Panasonic and Godrej in relation to procurement price of DCBs pursuant to the PSA.

CCI's reasoning appears to be primarily based on the following premise: (i) Godrej and Panasonic were identified as '*independent principals*' under the agreement and therefore, a mutual comfort clause was inherently anti-competitive; and (ii) none of the e-mail exchanges used the term 'procurement price' and therefore, could not have been viewed as negotiation between buyer and seller in relation to procurement price. As a corollary, CCI reasoned that price related discussion on e-mails could only be viewed as an anti-competitive price fixing of DCBs.

The Godrej Order appears to suggest that an agreement entered between a buyer and seller on a *principal-to-principal* basis could be viewed as akin to an agreement between independently operating competitors and therefore, could be scrutinized under the ambit of Section 3(3) of the Competition Act. Section 3(3) of the Competition Act (*i.e.*, horizontal agreements) which precludes collusion between competitors *i.e.*, independent operating entities at the same level of the production chain. In contrast, Section 3(4) (*i.e.*, vertical agreements) of the Competition Act deals with agreements between two or more enterprises that are at different stages of the production chain. Vertical agreements manifest an interdependent relation between (non-competing) enterprises as a result of being staged at different points of a value chain and generally proscribe harm associated with unilateral conduct. On the other hand, Section 3(3) of the Competition Act governs agreements between competitors, who were otherwise required to act independently. EU does not consider agreements between enterprises at different levels of the production chain as horizontal agreements, unless the parties are potential competitors. By way of an example, a seller could be considered to be a potential competitor to a buyer if in the event of non-supply or increase in prices of products provided by the seller, the buyer could be reasonably expected to manufacture the product supplied on its own in a short period of time.

In fact, the EU and US antitrust regimes do not view the type of arrangement entered into between Panasonic and Godrej in the present matter as akin to a horizontal agreement between competitors. The very reason for not considering these types of agreements between competitors as horizontal, but only as vertical, is the inability of one party to compete at the manufacturing level with the other and therefore, an inherent inability of the buyer to enter the market where the manufacturer is present. CCI appears to have overlooked the fact that Godrej and Panasonic could not have been treated as competitors, *i.e.* Godrej could not have reasonably been

<sup>1</sup> Suo Moto Case No. 3 of 2017.

<sup>2</sup> For the purposes of this article, we have referred to the specific facts in the Godrej Order.

expected to start manufacturing DCBs and therefore, could not have been expected to compete independent of Panasonic's manufacturing capabilities.

The Godrej Order rings an alarm, given that buyer-seller, distributorship, dealership or contract manufacturing arrangements which are generally viewed as vertical arrangements and are all entered on a principal to principal basis could potentially be categorized, scrutinized and punished under the cartel provisions of the Competition Act.

Another key takeaway is that a buyer, distributor, or dealer needs to exercise caution in terms of their agreement and interactions with their respective manufacturer, contract manufacturer, and supplier, as the case may be, if both of them are present in the market for sale of products or provision of services. Such agreements and interactions/price negotiations pursuant to such agreements could, contrary to commercial realities, be viewed and scrutinized under Section 3(3) of the Competition Act as agreement between competing enterprises.

In order to mitigate the possibility of any potential risk, until there is settled jurisprudence on this issue, entities involved in similar arrangements should closely look at their existing legal arrangements and all communications should clearly reflect the necessity of negotiations in such commercial arrangements.



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## Combinations

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### CCI approves acquisition of minority stake in IndiaIdeas.com Limited by Visa International Service Limited<sup>3</sup>

On January 10, 2019, pursuant to the execution of transaction documents on November 16, 2018, CCI approved the acquisition of 13.12% of the total equity share capital in IndiaIdeas.com Limited ('IndiaIdeas') by Visa International Service Limited ('Visa') (collectively referred to as 'Parties').

Visa is engaged in the provision of various services relating to digital payments around the globe. In India, Visa provides affiliation of credit cards, debit cards, prepaid cards issued by the banks; provision of payment gateways technology services; and data analytics for fraud detection/ protection. IndiaIdeas offers technology platform and services that primarily assist utility businesses to receive payments from their customers, under the brand name 'BillDesk'.

CCI observed that the Parties are primarily engaged in provision of services facilitating digital payments. It was noted that facilitation of digital payments requires a whole host of enabling services that act near simultaneously. Within this space, Visa enables the banks to operate payment gateways and connect to card networks. On the other hand, IndiaIdeas operates as a payment gateway to merchants. The services provided by the Parties were seen as complementary. In light of these facts, CCI assessed the impact of this combination in the overall digital payment space.

In its competitive assessment of the overall digital payment space, CCI noted that typically banks will have several payment gateways. A payment aggregator (such as BillDesk) will connect to one of these payment gateways (such as Visa) to process the payments. Additionally, CCI noted that it was not commercially viable for IndiaIdeas to enter into an exclusivity arrangement with Visa and *vice versa* since the competitors of IndiaIdeas would be offering a wider range of options for payments gateways.

In light of the above, CCI approved the combination since it was not likely to have any appreciable adverse effect on competition ('AAEC') in India in any of the markets.

### CCI approves acquisition of minority stake in IndiaIdeas.com Limited by Springfield Investments International B.v.<sup>4</sup>

On January 10, 2019, pursuant to the share purchase agreement dated November 16, 2018, CCI approved acquisition of 3.28% in IndiaIdeas.com Limited ('IndiaIdeas') by Springfield Investments International B.v. ('Springfield Investments') (collectively referred to as 'Parties').

Springfield Investments is an investment company forming a part of March Capital Partners ('March Capital'), a venture capital firm having investments in breakthrough technology companies globally. The services offered by IndiaIdeas have been set out above.

CCI noted that once the transaction is consummated, Springfield Investments will also become a part of the Clearstone Venture Mauritius ('CVM'). It was further noted that March Capital and CVM group were both existing shareholders of IndiaIdeas. Additionally, based on the individual and combined incremental shareholding in IndiaIdeas of March Capital and CVM

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<sup>3</sup> Combination Registration No. C- 2018/12/620

<sup>4</sup> Combination Registration No. C- 2018/12/621



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group, CCI noted that the proposed combination was not likely to change the competition dynamics in any market in India and accordingly approved the combination.

### **CCI approves acquisition of minority stake in IndiaIdeas.com Ltd by Claymore Investments (Mauritius) Pte. Limited<sup>5</sup>**

On January 10, 2019, pursuant to the execution of transaction documents dated November 16, 2018, CCI approved acquisition of 0.12% in IndiaIdeas by Claymore Investments (Mauritius) Pte. Limited ('Claymore Investments') (collectively referred to as 'Parties').

Claymore Investments is an indirect wholly owned subsidiary of Temasek Holdings (Private) Limited ('Temasek'). The services offered by IndiaIdeas have been set out above. It was noted that Claymore Investments was an existing shareholder of IndiaIdeas holding 8.75%. After the consummation of the transaction, Claymore Investments' shareholding would increase to 8.87%. CCI noted that Claymore Investments would not secure any additional rights and hence, the said acquisition was unlikely to result in any change in competition dynamics. In view of the above, CCI approved the combination.

### **CCI approves acquisition of EPC Constructions India Limited by ArcelorMittal India Private Limited<sup>6</sup>**

On January 10, 2019, CCI approved the acquisition of 100% equity shares of EPC Constructions India Limited ('EPCC') by ArcelorMittal India Private Limited ('AMIPL'). The said transaction is subject to the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016.

AMIPL is a part of ArcelorMittal group ('AM Group'). AM Group does not have a steel manufacturing unit in India but is engaged in sale of steel products through other channels.

EPCC is a part of the Essar Group. EPCC is engaged in the supply of Engineering Procurement Construction ('EPC') services, which includes undertaking and executing projects involving industrial plants, civil and infrastructure projects, laying onshore pipeline for oil, gas and water, and working in marine constructions.

In its competitive assessment, CCI noted that there were no horizontal and vertical overlaps between EPCC and AMIPL. CCI, however, observed that AMIPL had also filed a resolution plan with respect to acquisition of Essar Steel India Limited ('ESIL'). If the acquisition of ESIL by AMIPL were to be successful, the services of EPCC could also be utilized by ESIL. In this regard, CCI noted that this potential vertical relationship may not cause any potential competition concerns due to lack of ability and incentive to foreclose the market by EPCC.

In light of the above, CCI approved the combination since it was not likely to have any AAEC in India in any of the markets.

### **CCI approves acquisition of EPC Constructions India Limited by Royale Partners<sup>7</sup>**

On January 31, 2019, CCI approved the acquisition of 100% of the equity shares of EPC Constructions India Limited ('EPCC') by Royale Partners. The said transaction is subject to the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016.

Royale Partners is engaged in the business of investing in companies. EPCC is engaged in the supply of EPC services as covered above.

In its competitive assessment, CCI noted that there were no horizontal or vertical overlaps between EPCC and Royale Partners. In light of the above, CCI approved the combination since it was not likely to have any AAEC in India in any of the markets.

### **CCI approves acquisition of Heinz India Private Limited by Zydus Wellness Limited and Cadila Healthcare Limited<sup>8</sup>**

On December 6, 2018, CCI approved acquisition of 100% shareholding of Heinz India Private Limited ('Heinz India') by Zydus Wellness Ltd. ('Zydus') and Cadila Healthcare Ltd. ('Cadila').

Zydus operates in the consumer products segment with products ranging from healthy fat spreads, personal care to sugar substitutes. Cadila, is stated to be engaged in the business of pharmaceutical formulations, biologics, etc. Both Zydus and Cadila are stated to belong to the Zydus Family Trust group.

Heinz India belongs to the Kraft Heinz Group and manufactures food and other products, including tomato ketchup, energy drinks, ghee etc., through brands such as Complian, Glucon-D, Nycil, and Sampriti Ghee etc.

<sup>5</sup> Combination Registration No. C- 2018/12/623

<sup>6</sup> Combination Registration No. C- 2018/12/624

<sup>7</sup> Combination Registration No. C- 2019/01/632

<sup>8</sup> Combination Registration No. C- 2018/11/612



The proposed combination related to acquisition of Heinz India's businesses relating to four brands, namely, Glucon-D, Nycil, Sampriti Ghee and Complian ("Target Business"). The transaction was structured in a way such that a new company incorporated by Heinz Italia would acquire all the assets, facilities, employees, contracts, IP, etc., that are not related to the Target Business.

In its competitive assessment, CCI noted that there were no horizontal overlaps or vertical relationships between Zydus/ Cadila and Heinz India. In light of the above, CCI approved the combination as it was not likely to have any AAEC in India in any of the markets.

### **CCI approves acquisition of minority stake by True North Fund v LLP, True North Fund VI LLP and Pioneer Investment Fund in Zydus Wellness Limited<sup>9</sup>**

On January 23, 2019, CCI approved the acquisition of 12.54% and 1.25% shareholding in Zydus by True North Fund v LLP and True North Fund VI LLP ("True North Funds") and Pioneer Investment Fund ("Pioneer"). Separately, Cadila and Zydus Family Trust ("ZFT"), existing shareholders in Zydus, proposed to acquire additional equity shares in Zydus.

The parties specifically submitted that the said transaction was undertaken to finance the acquisition by Zydus of Heinz India and both the acquisitions were submitted to be interconnected transactions under Regulation 9(4) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

As per the transaction, True North Funds would acquire the right to appoint a director/ observer to the board of director. Additionally, following the acquisition of Heinz India, True North Funds would also have a right appoint a director/ observer in Heinz India. CCI observed that True North Funds (directly or indirectly) were neither engaged in the same business nor in any business that may considered to be vertically linked with that of Zydus/ Heinz India. With respect to ZFT and Cadila, it was noted that both were already majority shareholders in Zydus and also, that the acquisition of additional equity shares in Zydus was unlikely to cause any concern.

In light of the above, CCI concluded that this combination was unlikely to cause AAEC in India.

### **CCI approves acquisition of Usha Martin Limited by Tata Steel Limited<sup>10</sup>**

On December 7, 2018, pursuant to a business transfer agreement signed on September 22, 2018 and novation agreement signed on October 24, 2018, CCI approved the acquisition of the steel division of Usha Martin Limited ("UML") by Tata Steel Limited ("TSL") through Tata Sponge Iron Limited ("TSIL") (collectively referred to as "Parties").

CCI, relying on its previous decisional practice, noted the technical characteristics, intended use, price levels, etc. for each of the product segments/sub-segments of steel, concluding that each steel product would form its separate relevant product market. However, the exact definition of the relevant market was left open.

The Parties overlapped in the market for manufacturing and sale of certain steel products in India, i.e., (i) sponge iron; (ii) long carbon steel products, in particular carbon wire rods; (iii) pig iron; (iv) alloy billets; and (v) special steel products.

In its competition assessment, CCI observed that this combination was unlikely to cause AAEC since in the market for manufacturing/sale of sponge iron, carbon steel wire rods, pig iron and alloy billets, the combined market share was less than 20% and the increment was within the range of 0-5 %. Specifically, in the market for special steel, the overlaps were found to be insignificant. Additionally, in the vertically linked markets, the Parties were unlikely to have any ability/ incentive to foreclose. Based on the above, CCI decided to approve this combination.

### **CCI approves acquisition of Prayagraj Power Generation Company Limited by Renascent Power Ventures Private Limited<sup>11</sup>**

On December 27, 2018, CCI approved the acquisition of 75.01% of the total paid up equity share capital and 270 million optionally convertible redeemable preference shares of Prayagraj Power Generation Company Limited ("PPGCL") by Renascent Power Ventures Private Limited ("Renascent") (collectively referred to as "Parties") pursuant to the execution of share purchase agreement dated November 13, 2018.

PPGCL is engaged in the business of thermal power generation. Renascent, a wholly owned subsidiary of Resurgent Power Ventures Pte. Ltd. ("Resurgent"), did not have any investments in the power sector in India. Further, Resurgent or any of its subsidiaries, prior to this transaction, did not have any investments in the power sector in India. However, in its competitive as-

<sup>9</sup> Combination Registration No. C- 2018/12/622

<sup>10</sup> Combination Registration No. C-2018/10/608

<sup>11</sup> Combination Registration No. C-2018/11/616



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assessment, CCI considered the overlaps between the shareholders of Resurgent (including Tata Power International Ltd.) and PPGCL.

CCI noted that the Parties were engaged in the similar business and involved vertically linkages in the market for power generation. In the competitive assessment, CCI noted that the combined market share of the Parties was within the range of 0-5% and the increment was less than a percent. Additionally, PPGCL had a long term obligation to supply a large part of its power generation to Uttar Pradesh power distribution utilities and had entered into interconnection agreement with Uttar Pradesh power transmission utilities.

Given the particulars of this transaction, CCI concluded that this transaction was unlikely to cause AAEC in India.

### **CCI approved the acquisition of 26% stake in State Bank of India Payment Services Private Limited by Hitachi Payment Services Private Limited<sup>12</sup>**

On December 19, 2018, pursuant to a joint venture agreement signed on October 27, 2018, CCI approved the acquisition of 26% of issued equity share capital of State Bank of India Payment Services Private Limited ('SBIPSPL') by Hitachi Payment Services Private Limited ('HPY') (collectively referred to as 'Parties'). The remaining 74% of the equity share capital was to be held by State Bank of India ('SBI').

HPY, an Indian entity, is a wholly owned subsidiary of Hitachi Limited ('Hitachi'). Hitachi, directly or indirectly, is engaged in various industries, including information and telecommunications systems, financial services, urban development, power systems, transportation, electronic systems and equipment, construction machinery, and automotive systems. HPY provides services including: (i) ATM Services; (ii) sale of cash recycling machines; (iii) Card Issuance Solutions; and (iv) the provision of Point of Sale services ('PoS') along with certain ancillary services such as hardware maintenance and merchant support services ('Payment Processing and Outsourced Services'). SBIPSPL is engaged in the Merchant Acquiring Business ('MAB'). The provision of MAB include identification and acquisition of merchants for Relevant Payment Devices ('Merchant Acquisition') and provision of transaction processing services ('Transaction Processing Services') to enable merchants to accept payment.

CCI observed that the Parties were not engaged in overlapping activities but were rather providing services that are regarded as complementary in nature. In its competition assessment, CCI examined market for Merchant Acquisition and Transaction Processing Services. In the Merchant Acquisition Market, SBI (parent of SBIPSPL) was found to be the market leader with a market share of 10%-20%. However, it faced competitive constraint from other players in the market with similar market shares such as Ratnakar Bank, Axis Bank, HDFC Bank and ICICI Bank. CCI, in the market for Transaction Processing Services, considered the market shares in narrower market (limiting to PoS Terminals) and HPY's market share was found between 20%-30%. It was noted that HPY faced competitive constraints from comparable players in the market such as Worldline, HDFC and First Data. In light of the above, CCI approved the combination as it was unlikely to have any AAEC in India.

### **CCI approves acquisition of GrazianoFairfield AG by Dana International Luxembourg S.Á R.L<sup>13</sup>**

On December 19, 2018, CCI approved the acquisition of 100% stake of GrazianoFairfield AG ('Graziano'/'Target') by Dana International Luxembourg S.Á R.L ('Dana'/'Acquirer') (collectively referred to as 'Parties') pursuant to execution of a share and loan purchase agreement signed on July 29, 2018.

The Acquirer is engaged in the business of engineering, manufacturing and sales of planetary gearboxes, axles and transmissions for automotive, commercial vehicle and off-highway vehicles. The Acquirer also operates Dana India Technical Center that engineers design, develop, and validate axles, driveshafts, sealing, and thermal management products.

Graziano, in India, is present through its subsidiaries, namely: (i) Fairfield Atlas Limited; and (ii) Graziano Trasmissioni India Private Limited. These subsidiaries offer products, including: (i) gear components; (ii) shifting solutions (synchronizers and clutches); (iii) driveline products (axles); and (iv) custom gear assemblies and solutions.

CCI found overlaps in several product segments in India, such as: (i) planetary gearboxes for off highway vehicles; and (ii) axles for construction vehicles. Further, the Parties were also found to be present in the vertically linked market i.e., in the manufacture and supply of gears (upstream) used in axles for commercial and off-highway vehicles in India (downstream).

In its competition assessment, CCI observed that in the market for planetary gearboxes for

<sup>12</sup> Combination Registration No. C-2018/11/617

<sup>13</sup> Combination Registration No. C-2018/10/607



off highway vehicles in India the combined market shares of the Parties were insignificant. In the market for axles for construction vehicles in India, CCI assessed the narrower segments<sup>14</sup> and concluded that there were no overlaps in the narrower market segments. However, in the broader market for axles for construction vehicles, the combined market share was within the range of 20%- 25% with an increment between 5%-10% (in terms of value) but considerably lesser in terms of volume. Additionally, there were several other players in the market such as Carraro, Kessler and Meritor.

While assessing the vertical links between the Target and the Acquirer, CCI observed that Graziano had a market share between 10%-15% in the upstream market for manufacture and supply of gears and Dana in the downstream market for axles had a market share between 15%-20%. Both, the upstream and downstream market had several players. Additionally, Acquirer's requirement for gears was significantly small *vis- á- vis* the total sales of gears of the Target. Therefore, it was unlikely that there would be an incentive to foreclose. Therefore, CCI approved the combination as it was unlikely to have any AAEC in India.

### **CCI approves acquisition of Sona BLW Precision Forgings Ltd. by BCP Topco VI Pte. Limited and Singapore VII Topco III Pte. Limited<sup>15</sup>**

On December 19, 2018, CCI approved the acquisition of Sona BLW Precision Forgings Limited ('Sona India') by BCP Topco VI Pte. Limited ('BCP Topco') and Singapore VII Topco III Pte. Limited ('Singapore Topco') (collectively referred to as 'Parties').

This transaction consisted of series of inter-connected steps:

- i. carving out Sona Holdings B.V. ('Sona Netherlands') from Sona India to the extent that Sona Autocomp Holding Private Limited ('SAHPL') would exercise direct control over it, as opposed to the indirect control that it exercised through Sona India;
- ii. acquisition of up to 66.28% share capital on a fully diluted basis in Sona India by BCP Topco, which may assign its rights and obligations in connection with this transaction to Singapore Topco; and
- iii. acquisition of 100% shares of the Comstar Entities<sup>16</sup> by Sona India.

CCI noted that Sona India and Comstar Entities were engaged in the auto component industry. In its competition assessment, CCI observed that there was no horizontal overlap or vertical relationship between the activities of the parties. Therefore, CCI approved the combination as it was unlikely to have any AAEC in India.

### **CCI approves the transaction between Nippon Steel & Sumitomo Metal Corporation and Sanyo Special Steel Company Limited<sup>17</sup>**

On November 30, 2018, CCI approved (i) the acquisition of 51.5% shares in Sanyo Special Steel Company Limited ('Sanyo') by Nippon Steel & Sumitomo Metal Corporation ('NSSMC'); and (ii) transfer of Ovako AB ('Ovako')<sup>18</sup> from NSSMC to Sanyo. NSSMC, Ovako and Sanyo are collectively referred to as 'Parties'.

In its competition assessment, CCI found that the Parties overlapped in respect of sale of certain special steel products in India *i.e.*, (i) specialty steel bars; (ii) seamless pipes; and (iii) rings. The combined market share of the Parties in the specialty steel bars segment was within the range of 15%-20% with less than 5% increment. In the segment of seamless pipes, the combined market share was under 5%. In the segment of rings, it was noted that Ovako supplied rings for wind power bearings whereas Sanyo sells bearings for only automobiles. One of Sanyo's subsidiaries was found to be in the process of entering the market for the manufacture and sale of fabricated materials for wind power bearings and had started manufacturing. However, the combined market share was found to be insignificant. Therefore, CCI concluded that this transaction was unlikely to cause AAEC in India.

<sup>14</sup> Dana supplied axles for compactor, front end loader, mining loader and Graziano supplied axles only for motor grader and wheel loader.

<sup>15</sup> Combination Registration No. C-2018/11/611

<sup>16</sup> Including Comstar Automotive Technologies Pvt. Ltd. and Comstar Automotive Hong Kong Limited (wholly owned subsidiaries of Singapore Topco)

<sup>17</sup> Combination Registration No. C-2018/09/597

<sup>18</sup> Wholly owned subsidiary of NSSMC



## Behavioral Cases

### CCI Dismisses Allegations against Royal Western Turf Club India Limited<sup>19</sup>

On January 15, 2019, CCI dismissed information filed by Mr. Habib Rajmohamad Patel ('Informant') against Chairman/Secretary, Royal Western Turf Club India Ltd. ('RWTCIL/ OP') alleging violation of Section 3 and Section 4 of the Competition Act.

The Informant alleged that the OP controlled horse racing activity and imposed unfair and discriminatory conditions for getting results in their favour. The RWTCIL comprises three committees i.e., (i) Management Committee; (ii) Stewards of the Club; and (iii) Board of Appeal. It was alleged that members of these committees were race horse owners, stud farm owners or breeders having a direct interest in the horse races. Without RWTCIL's prior approval, no person could own any race horse, train any horse or ride any horse. The Stewards of the Club could revoke or suspend the approved race horse owners and levied fines if any jockey/ horse owner/ trainer violated racing rules that ultimately caused loss to racing punters. The approval of licenses was done by the seven members of Managing Committee having vested interest. The members of Board of Appeal deciding contentious issues were horse owners themselves.

The OP argued that horse racing was regulated under Bombay Race Course Licensing Act, 1912 and racing licenses are typically granted for a year. The terms and conditions for these licenses were stringent and had to be adhered to. There were additional checks and balances in place to govern horse racing. The objections regarding any race event are taken up under close public vigilance and there was no scope for foul play. It was also argued that betting for horse racing was legalized in India after obtaining a license under the abovementioned statute.<sup>20</sup>

CCI noted that the allegations were vague and lacked evidence. With respect to Section 3 allegations i.e. allegations with respect to anti-competitive agreements, the Informant did not provide evidence of any agreement. The Section 4 allegations i.e. allegations regarding abuse of dominance were made without defining any relevant market. CCI defined the market as 'market for organization of horse races by turf clubs in India'. In the said market, CCI assessed whether OP was in dominant position. However, it was found that OP had a market share of only 23%. Therefore, OP was not found to be dominant and CCI concluded that there was no contravention of Section 3 or 4 of the Competition Act and the complaint was dismissed.

### CCI dismisses complaint against KAFF Appliances on minimum resale price by Snapdeal<sup>21</sup>

On January 15, 2019, CCI dismissed allegations of resale price maintenance ('RPM') filed by Jasper Infotech Private Limited ('Snapdeal') against KAFF Appliances (India) Private Limited ('KAFF').

KAFF's products were being sold on Snapdeal for a discounted price. KAFF, on its website, displayed a caution notice alleging that KAFF's products sold on Snapdeal's website were counterfeit and that Snapdeal would not honour warranties.

Snapdeal alleged that this statement was due to Snapdeal's discounts on KAFF's products on its online portal. Snapdeal further provided the documentary evidence i.e., an email by KAFF which revealed that KAFF tried to impose the market operating price on Snapdeal ('MOP').

CCI in its *prima facie* order found contravention of Section 3(4)(e) read with Section 3(1) of the Competition Act and the Director General ('DG') was asked to further investigate. After the investigation, the DG concluded that KAFF did not violate Section 3(4) (e) of the Competition Act.

The DG concluded that since Snapdeal was a marketplace, facilitating exchange of products between buyers and sellers, it would not form a part of the vertical chain. The DG, in its investigation report, noted that an online platform does not perform any material function which could make it a part of the vertical chain. With respect to RPM, there needs to a presence of a buyer-seller relationship, which in this case was not present; further, Snapdeal did not influence the price of the products listed on its website.

CCI observed that online platforms act as a parallel distribution chain, to their offline counterparts. CCI relied on its previous decisions<sup>22</sup> and observed that online and offline platforms are not two separate relevant markets, but two different channels of distribution in the same relevant market. While noting that the DG had taken a myopic view, CCI stated that the online

19 Case No. 40 of 2018

20 *Dr. K R Lakshmanan v. State of Tamil Nadu*, AIR 1996 SC 1153

21 Case No. 61 of 2014

22 *Mr. Deepak Verma vs. Clues Network Pvt. Ltd.*, Case No. 34 of 2016; *Confederation of Real Estate Brokers' Association of India vs Magicbricks.com & Ors.*, Case No. 23 of 2016

platforms are peculiar in nature and cannot be compared to the traditional buyer-seller relationship. CCI stated that instead of looking at the vertical chain in a traditional manner, the test for determining whether a firm can be deemed to be a part of the product chain should be whether it contributes value to the product (or service). Online platforms can influence the prices by giving discounts or cashback that are limited only to online platforms.

KAFF argued that the caution notice was a knee jerk reaction to the excessively low priced products being displayed on Snapdeal's online portal which raised a genuine apprehension on the part of KAFF of such products being counterfeit.

KAFF further demonstrated that it never hindered the sale of its products on online portals and the caution notice was not followed by any concrete action on its part and hence, there was no impact on the online sale of OP's products.

While dismissing the information, CCI held that the manufacturers have a right to choose the most efficient distribution channel, unless the said choice leads to AAEC. Therefore, the contravention of Section 3(4)(e) read with Section 3(1) of the Competition Act was not established and the complaint was dismissed.



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*Inter alia...*

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