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Inter alia... is a legal newsletter published each quarter by AZB & Partners for a select list of clients and colleagues. Each issue aims to provide a snapshot of the recent legal developments in certain critical areas: infrastructure, foreign direct investment, securities law, exchange control regulations, corporate law, media and entertainment, intellectual property and banking. We hope you will find the content informative and useful. If you have any questions or comments, please email us at: editor.interalia@azbpartners.com or call AZB & Partners.

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Introduction of alternative merger control thresholds– Is it the way forward?

Background–traditional jurisdictional thresholds and perceived enforcement gap

Since the aim of merger review by a competition authority is to examine whether a transaction causes an adverse effect on the market, merger notification thresholds should screen out transactions that are unlikely to result in appreciable adverse effects in a market.[1] Turnover and asset based jurisdictional thresholds have generally been considered by most competition agencies, including the Competition Commission of India ('CCI'), as an effective tool to identify potential transactions which may have an effect on the competitive dynamics of a market.

However, with the advent of digital economy, there have been discussions across competition agencies as to whether these thresholds are indeed effective in capturing all categories of transactions and if not, whether there is a demonstrable 'enforcement gap'. There has been concern expressed over some high-profile global transactions in the digital sector in the recent past (like Facebook's acquisition of Whatsapp) which have escaped review by the competition agencies on account of the parties not generating substantial turnover or having a significant asset value. This is because companies in the digital sector mostly provide services for 'free' which has not given them the ability to scale their activities to such a level which translates into significant revenues or a large asset base. Further, these companies may have low turnover in the early stages but their valuation may be quite significant as a result of their degree of innovation, technical know-how and the perceived ability to disrupt the market for the incumbents. Given this, competition authorities may want to review such acquisitions since they may lead to an adverse impact on competition.

For example, consider an established online logistics services provider acquiring a new entrant in the online logistics services segment. Given the nature of the industry (characterized by low turnover), the transaction may not be notifiable, but in effect the purchase made by the large logistics company may be of an innovative business idea with great competitive market potential. Consequently, a competition authority may want to review the transaction to ensure that the market remains competitive. Other than digital markets described above, markets characterized by low turnover (but potentially high valuation) are pharmaceuticals[2], biotechnology as well as patent portfolio acquisitions[3].

Is there a need for alternative jurisdictional thresholds?

The perceived enforcement gap has led to an increased demand to find better means of capturing such transactions. These include considering new thresholds which can either replace the existing thresholds or complement them in a manner which would result in such transactions being potentially notifiable–for example, transaction value thresholds[4] or market share thresholds[5].

The German and Austrian competition authorities have recently introduced alternative criteria *i.e.*, transaction-size threshold to capture transactions where companies may have low turnover but due to the value of the transaction or 'deal size', the competition agency will have jurisdiction (the United States already has this rule)[6]. The European Union ('EU') considered introducing transaction value thresholds but ultimately decided against it. The Korean Fair Trade Commission has also recently proposed alternative jurisdictional thresholds to complement the traditional jurisdictional threshold. Finally, even the CCI has considered whether the current thresholds (based on assets and turnover of companies) might have a 'blind spot' when it comes to transactions where the target's asset and turnover value are relatively low[7].

1 The 2008 ICN Recommended Practices for Merger Notification and Review Procedures.

2 In relation to the pharmaceutical industry, the concern appears to be that if a new drug is being developed but has not been approved for sale, it will have little or no turnover (and therefore may miss the scrutiny of agencies) but may be a critical and 'high value' asset for the acquirer.

3 Summary of replies to the Public Consultation on evaluation of procedural and jurisdictional aspects of EU merger control accessible at http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf.

4 Transaction size or value threshold means that mergers between parties exceeding certain size or value will be notified to a competition agency for its review.

5 Market share thresholds means that if the market shares of the parties to a combination exceed a pre-determined market share threshold, they will be subject to the jurisdiction of the particular competition authority.

6 German and Austrian competition authorities introduce alternative notification threshold to the existing thresholds, accessible at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

7 CCI chief D.K. Sikri seeks changes in uniform threshold norms for M&As, accessible at https://economictimes.indiatimes.com/news/economy/policy/competition-law-cci-chief-d-k-sikri-seeks-changes-in-uniform-threshold-norms-for-mas/articleshow/64125187.cms.

A critical question before introducing new thresholds is whether there is indeed an empirically tested enforcement gap, *i.e.* whether there are transactions that a competition authority should have reviewed but missed as a result of the traditional jurisdictional thresholds. In the absence of cogent evidence on enforcement gap, the introduction of additional thresholds may be disproportionate and create unnecessary administrative burden. For instance, the Facebook-WhatsApp transaction which is often used as an example in support of introduction of transaction value thresholds was examined by the European Commission and cleared without a detailed review or any remedies. Further, unlike the German and Austrian merger control regimes, acquisition of "control" or some form of competitively significant influence is not a prerequisite to notifiability in India. The introduction of a transaction value threshold in the absence of such a prerequisite could result in unintended consequences and exacerbate the risk of false positives.

This may also lead to a chilling effect on innovation and investments in the jurisdiction where such thresholds are introduced. In the context of India which has emerging digital markets, introducing alternative thresholds may lead to a prolonged wait for competition approval before a cash-strapped start-up company actually receives investments. The downside of this process may be the loss of competitive edge for the start-up company. Further, adding to the existing competition approval requirements may discourage investment in these companies. Moreover, the culture of start-up companies is at a nascent and developing stage in India compared to more developed economies like Germany and South Korea. Given their lack of expertise, these companies are often characterized by cash burn and more often than not require external investments from experienced, established players in the market for their survival.[8] In a recent decision[9] of the CCI, an information alleging abuse of dominance against e-commerce company Flipkart India Private Limited was dismissed with the CCI specifically noting that intervention in such nascent markets should be carefully crafted lest it stifles innovation.

In addition, even though a particular transaction is not notified to the competition authority, the authority is likely to still have the ability to review its conduct under abuse of dominance or vertical restraints provisions. For example, the Competition Act, 2002 ('**Act**') provides a prohibition on these conducts. Even in the past 9 years since the Act has been enforced, the CCI has already used its powers under these sections to conduct investigations against e-commerce companies, search engines, radio-taxi services, pharmaceutical companies, etc.

Points to consider regarding transaction-size and market share thresholds

The German and Austrian competition authorities have introduced 'transaction-size' thresholds to catch transactions with a high valuation. With respect to these thresholds, some points to bear in mind are: (i) the purchase price/ transaction value is subjective and does not give any indication of the possible competitive significance of a transaction; (ii) the valuation of transaction may pose a big challenge in itself and may vary significantly across sectors; and (iii) critically, the deal-size test may not account for local nexus (for example, whether a target has any geographic presence in a particular jurisdiction)[10]. This may mean that a US$ 1 billion transaction may get notified in a country that has these thresholds even if the target company's activities are outside that country.

Similarly, market share thresholds also introduce uncertainty into the notification process and is not consistent with internationally recognized best practices since consideration of the appropriate 'market' is inherently subjective. Further, using market shares as notification thresholds may impose costs on all transactions *i.e.* the parties to any merger would have to calculate their market shares regardless of whether the transaction ultimately needs to be notified. Also, parties are usually not in possession of robust data on market shares and may lack the ability to properly define markets in the first place. In the online logistics company example mentioned above–the company itself may consider brick-and-mortar logistics providers as competitors and the market to be for overall 'logistics services'. However, the competition authority may consider the market to be only for 'online logistics services'. Accordingly, given the likely differing views of the regulator and transaction parties on definition of the appropriate 'market', market shares may not constitute objectively quantifiable criteria.

Even the International Competition Network ('**ICN**') (a network of competition agencies and practitioners) in its set of recommended practices for merger notification and review procedures[11] states that asset and turnover notification criteria are the preferred types of notification thresholds. While the specific level of assets and/or turnover required to trigger a notifica-

8 The rise and fall of TinyOwl: Lessons that start-up founder Saurabh Goyal learnt, accessible at https://economictimes.indiatimes.com/magazines/panache/the-rise-and-fall-of-tinyowl-lessons-that-start-up-founder-saurabh-goyal-learnt/articleshow/60069036.cms.

9 Case No. 20 of 2018.

10 *Supra note* 3.

11 The 2008 ICN Recommended Practices for Merger Notification and Review Procedures.

tion requirement may vary among the various jurisdictions, the requirement for these is similar across competition agencies.

Conclusion

Competition authorities including the CCI should consider carefully whether there is cogent evidence that suggests an enforcement gap before introducing any new type of notification thresholds. Further, the ICN recommends that setting objectively quantifiable criteria as thresholds (that are clear and understandable) are a key requisite to bring legal certainty to both the competition authority and the merging parties. Ultimately, the competition agency should aim to minimize the number of transactions that must be notified *i.e.* the ones that are unlikely to raise competitive concerns, without allowing transactions that do raise concerns to fall outside the notification requirement.

CCI Orders

CCI Dismisses Allegations of Abuse of Dominance against Trans Union

On November 8, 2018, CCI dismissed allegations of abuse of dominance filed by Mr. M. Venugopal Reddy against credit information providing company–Trans Union CIBIL Limited ('**Trans Union**') and its director/chief executive officer, Mr. Satish Kumar Pillai.[12] The allegations were with respect to reducing the CIBIL score of Mr. Reddy (a credit score based on analysis of credit files to determine creditworthiness) and not updating Mr. Reddy's CIBIL score despite Mr. Reddy having sent a legal notice dated June 1, 2018 ('**Legal Notice**') to Trans Union.

Mr. Reddy was denied credit approvals in the form of loans, credit cards *etc*., by banks and financial institutions on the basis of Trans Union's Credit Report dated May 18, 2018 ('**Report**'), which showed a low CIBIL score for Mr. Reddy. This prompted Mr. Reddy to send Trans Union the Legal Notice alleging that Trans Union: (i) had not reviewed Mr. Reddy's score; (ii) built its scores on the basis of fake data; (iii) was not updating its data; and (iv) was breaching Mr. Reddy's privacy by disclosing PAN number, passport number, voter ID number, ration card number *etc*., in the Report. Mr. Reddy also submitted that his Legal Notice detailing the allegations mentioned above was also not replied to by Trans Union.

While assessing the allegation of abuse of dominance, CCI identified the relevant market as the '*market for the provision of services by credit information companies in India*'. CCI was of a *prima facie* view that Trans Union enjoys a dominant position in the relevant market. It came to this conclusion because: (i) Trans Union has gained prominence over a period of time and has established itself as a key player in the relevant market; (ii) CIBIL scores are widely relied upon by credit institutions to determine credit worthiness of a borrower.

Trans Union is governed by the CIC Credit Information Companies (Regulation) Act, 2005 ('**CIC Act**'). Keeping in mind that the CIC Act already provides safeguards for issues like breach of privacy and accuracy of data, CCI held that no competition concerns were established in the present case. On the allegation of building CIBIL scores on the basis of fake data, CCI noted that Trans Union is statutorily barred from modifying credit information unless it receives confirmation from the relevant credit institutions providing the information used to create the CIBIL score. Therefore, the allegation of reliance on fake data was also held to be untenable. CCI concluded that there is no *prima facie* case of contravention of Section 4 of the Act.

CCI Dismisses Yet another Allegation of Contravention of Section 3 of the Act against Cab Aggregators Ola and Uber

On November 6, 2018, CCI dismissed the information filed by Mr. Samir Agrawal against ANI Technologies Private Limited ('**Ola'**), Uber India Systems Private Limited ('**Uber**'), Uber B.V. Amsterdam, Netherlands ('**Uber B.V.**') and Uber Technologies Inc., San Francisco, U.S.A ('**Uber Technologies**').[13] The information alleged violation of Section 3 of the Act by Ola and Uber. The information had three allegations and they were considered and decided by CCI in the following manner:

i. It was alleged that Ola and Uber were acting as 'hubs' for their respective drivers (the 'spokes') and colluding on prices. More specifically, it was alleged that Ola and Uber were using their respective pricing algorithms to fix prices between their drivers thereby facilitating a cartel in contravention of Section 3 of the Act. It was contended that absent the pricing algorithm, drivers would compete on prices

12 Case No. 36 of 2018.

13 Case No. 37 of 2018.

which, in turn, would prevent them from commanding high prices (as calculated by the algorithm). CCI dismissed these allegations and held that for a 'hub and spoke cartel' to exist: (i) the 'spokes' must use a third party platform (or, 'the hub') to exchange sensitive information, including information on prices which can facilitate price fixing; and (ii) there needs to be a conspiracy to fix prices, which requires existence of collusion. CCI then noted that although the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), it did not amount to collusion between the drivers. CCI also did not find any agreement between the drivers *per se* on the basis of which they delegated pricing decisions to the platform. Instead, ride prices were determined by algorithms using multiple factors for each rider (time of the day, traffic situation, special conditions/events, festival, weekday/weekend) to determine the demand/supply.

ii. It was also alleged that Ola/Uber and its drivers are in a vertical relationship. As per this relationship, Ola/Uber impose a floor price on drivers, creating a resale price mechanism ('**RPM**') in contravention of Section 3(4)(e) of the Act. Drivers have no liberty to reject prices calculated by Ola/Uber's algorithm or offer their services at a price lower than the said price. CCI rejected this allegation on the grounds that Ola/Uber do not resell a service, which is an essential ingredient for an RPM allegation. There is an agency relationship and a single transaction takes place between a rider and Ola/Uber. In this single transaction, the drivers are paid for the ride after Ola/Uber deducts their commission. CCI also held that the centralized pricing mechanism adopted by Ola/Uber allows for adjustment and optimization of prices based on multiple factors. It held that this cannot be viewed as a vertical instrument employed to orchestrate price-fixing cartel amongst the drivers.

iii. It was alleged that the cab aggregators possess considerable personalized information about every rider and use it to price discriminate amongst riders. CCI dismissed this allegation and referred to its earlier decisions (**Fast Track Call Cab and Meru *v* ANI Technologies**[14] **and Meru *v* ANI Technologies**[15]), stating that Section 4 the Act (the only provision where a price discrimination allegation may be examined) does not recognize the concept of 'joint or collective dominance'. CCI also noted that the information did not allege Ola/Uber to be in a dominant position in the market.

Additionally, CCI distinguished Ola/Uber applications from other platform applications like Airbnb, Trivago and Zomato *etc*., by observing that unlike these applications, riders on Ola/Uber have no material information or preference about drivers available in their area of demand. CCI relied on its earlier decision in **Fast Track Call Cab and Meru *v* ANI Technologies**[16] and ECJ's decision in **Asociación Profesional Élite Taxi *v* Uber Systems Spain SL**[17], to hold that Ola/Uber were not pure platforms like Airbnb, Trivago and Zomato, but qualified as '*radio taxi operators*' or '*transport service companies*'. CCI held that Ola/Uber were not limited to intermediating between drivers and also acted as service providers.

CCI Dismisses Allegations of Abuse of Dominance against M/s Indus Towers by BSNL

On November 9, 2018, CCI dismissed information filed by Bharat Sanchar Nigam Limited ('**BSNL**') against M/s Indus Towers Limited ('**Indus**'), alleging violation of Section 4(2)(a)(ii) and Section 4(2)(e) of the Act.[18] Indus and BSNL had entered into an Infrastructure Sharing Agreement ('**ISA**') on September 9, 2008 for provision of existing and viable telecom tower sites ('**Sites**') to BSNL on mutually agreed terms under the ISA. BSNL had alleged that Indus was abusing its dominant position in the infrastructure provider market by refusing to provide existing viable Sites to BSNL as required under the ISA.

CCI determined the relevant market as the '*market for provision of passive infrastructure services to telecom service providers in Kolkata Circle*' since: (i) the market for active infrastructure provider is not substitutable with passive infrastructure provider; and (ii) the demand for passive infrastructure varied from circle to circle.

The CCI observed that Indus's market share during 2016-2018 was 60.06–63.80%. Considering Indus's market share, the CCI held that Indus was dominant in the relevant market for provision of passive infrastructure services to telecom service providers in Kolkata Circle.

14 Case Nos. 6 & 74 of 2015.
15 Case Nos. 25, 26, 27 & 28 of 2017.
16 Case Nos. 6 & 74 of 2015.
17 Case C-434/15
18 Case No. 10 of 2018.

However, CCI dismissed the information filed by BSNL on the following grounds:

i. there were unresolved contractual issues between Indus and BSNL which were germane for provision of the services;
ii. BSNL had failed to show any instance where Indus had not agreed to provide the Sites;
iii. it was BSNL who had not provided the required information in the prescribed format (and it was aware of the format that had to be used for placing a valid Site request); and
iv. Indus had fulfilled its obligations under the agreed terms of the ISA.

AZB & Partners successfully represented Indus in these proceedings and the case was argued by Mr. Samir Gandhi (partner and head of the competition law practice).

CCI Dismisses Allegations of Abuse of Dominance and Contravention of Section 3 of the Act against Oppo

On November 8, 2018, CCI dismissed the information filed by M/s K. C. Marketing (‘**K.C. Marketing**’) against OPPO Mobile MU Private Limited (‘**Oppo**’) under Section 3 and 4 of the Act.[19]

K.C. Marketing, a proprietorship firm in Pune, entered into a sub-super mobile distributorship agreement dated July 1, 2016 (‘**SSMD Agreement**’), with Oppo as the exclusive sub-super mobile distributor of their brand’s mobiles in south and central Maharashtra. Oppo is engaged in the business of trading and distribution of mobile phones and accessories under the brand name ‘OPPO’ in India. It was alleged that certain clauses of the SSMD Agreement restricted K.C. Marketing from selling OPPO products online and outside the sales region of K.C. Marketing (as defined in the SSMD Agreement). For violation of these clauses, Oppo imposed certain specified penalties on K.C. Marketing as provided in the Agreement. It was also alleged that Oppo had illegally charged certain other costs which were not required under the SSMD Agreement and had failed in paying dues.

Since Oppo only manufactured and sold smartphones, the relevant market was defined by CCI as ‘*smartphones in India*’. CCI considered the market shares of Oppo (10–13% in 2017-2018), as well as the combined market shares of Oppo’s group company – BBK Electronics, a Chinese consumer electronics manufacturer owning other brands under the name of ‘Vivo’ and ‘OnePlus’. CCI concluded that the combined market shares of BBK Electronics make it a significant player, but still not dominant in the defined relevant market. CCI also observed that the allegations regarding abuse of dominance by stopping supply and charging amounts beyond what is provided under the SSMD Agreement are unsubstantiated.

Further, CCI dismissed the allegations of violation of Section 3(3) of the Act based on restrictions against selling products online and outside demarcated sales region. The reason cited by CCI for this was the established jurisprudence under Section 3(3) of the Act which restricts it to agreements between parties involved in ‘identical or similar trade of goods or provision of services’. CCI held that since the relationship between Oppo and K.C. Marketing is not in ‘identical or similar trade of goods or provision of services’, violation of Section 3(3) cannot exist. CCI also examined the conduct of Oppo under Section 3(4) of the Act and concluded that for violation of Section 3(4) of the Act, an analysis of the factors to determine appreciable adverse effect in India as provided under Section 19(3) of the Act is necessary. After considering the factors under Section 19(3) of the Act, CCI concluded that Oppo had not violated Section 3(4) of the Act by restricting the sales region of K.C. Marketing. It also held that there is no violation of Section 3(4) of the Act by restricting sales of the product online since OPPO mobiles are freely available in the market at competitive prices on all major websites.

CCI Dismisses Allegations of Bid Rigging against Hitachi Systems Micro Clinic and IL and FS Technologies

On November 9, 2018, CCI dismissed allegations of bid rigging against Hitachi Systems Micro Clinic Private Limited (‘**Hitachi**’) and IL and FS Technologies Limited (‘**IL&FS**’).[20] The allegations against Hitachi and IL&FS were under Section 3(3)(d) of the Act in the information filed by Reprographics India, through Mr. Deepak Khanna (‘**Reprographics India**’). Reprographics India is an ancillary unit of Bharat Heavy Electricals Limited (‘**BHEL**’) being a distributor of Information Technology (‘**IT**’) products either directly or through System Integrators of Original Equipment Manufacturers (‘**SIS**’). Reprographics India alleged that Hitachi and IL&FS were guilty of bid rigging in the tender floated by BHEL on April 1, 2017, for supply, installation and maintenance of personal computers, servers, printers, uninterrupted power suppliers, network equipment and other computer peripherals throughout India, at more than 20 locations. Ten-

19 Case No. 34 of 2018.
20 Case No. 41 of 2018.

ders were floated by BHEL for items categorized in two different groups – group A and group B. Hitachi works in close collaboration with leading Original Equipment Manufacturers and IL&FS provides IT solutions for efficient citizen service delivery through smart governance and infrastructure.

The allegations and their consideration by CCI are as follows:

i. There were only two bidders (for the tender of items in group A) and both the bidders have connections/were partners of Hewlett Packard ('**HP**'). It was alleged that this indicates meeting of the minds between Hitachi and IL&FS while bidding for the tenders. However, CCI held this allegation to be *prima facie* not convincing since the tender was open and without embargo on any SI to participate. Moreover, in the tender for group B, four bidders had participated. CCI held that low participation may not necessarily be indicative of or be an outcome of any concerted action.
ii. It was alleged that IL&FS submitted a 'supportive bid' in favor of Hitachi because they have common business linkages. CCI was of the view that mere existence of common linkages between Hitachi and IL&FS cannot be the basis to suggest collusion in the bidding process, in the absence of material on record to show bid rotation, *etc*.
iii. The CCI held that documentary proof showing that officials of one party earlier worked with another party did not indicate proximity or meeting of minds. CCI opined that a person working in one IT firm will move to another IT firm and this activity does not tantamount to meeting of minds between the bidders.
iv. The allegation that Hitachi quoting majority items of HP for the tender suggests meeting of minds was also rejected by the CCI. CCI opined that such an action was a unilateral action on Hitachi's part.
v. It was finally alleged that the quantum of discount given by Hitachi to BHEL post winning the tender is suggestive of the bid not being an independent bid was also rejected by CCI. To arrive at this conclusion, CCI considered BHEL's submissions that the process followed for arriving at the final price was as per statutory guidelines and was reduced during negotiations between BHEL and Hitachi. According to BHEL, this was done to keep the final price within BHEL's decided estimate.

In light of the reasons mentioned above, CCI found no contravention of Section 3(3)(d) read with Section 3(1) of the Act and dismissed the allegations.

CCI Dismisses Allegations of Abuse of Dominance against Flipkart India

On November 6, 2018, CCI dismissed information alleging abuse of dominance under Section 4 of the Act by All India Online Vendors Association ('**AIOVA**') against Flipkart India Private Limited ('**Flipkart**') and Flipkart Internet Private Limited ('**Flipkart Internet**'), collectively referred to as '**Flipkart entities**'.[21]

It was argued that Flipkart sells goods to WS Retail Services Private Limited ('**WS Retail**') which was owned by Flipkart Internet (till 2012) at a discounted price and these goods are then sold on Flipkart Internet's platform *i.e.*, Flipkart.com. This was alleged to amount to preferential treatment to certain sellers. Further, it was alleged that Flipkart Internet is using its dominance in the relevant market to enter into another market of manufacturing products by providing discounts under private labels.

In order to analyze the conduct under Section 4 of the Act, CCI defined the relevant market as '*services provided by online marketplace platforms for selling goods in India*'. CCI observed that there are multiple players in the online marketplace platforms and though the size and resources of Flipkart are large, no one player is commanding a dominant position in the relevant market at this stage of the evolution of the market. Considering that the Flipkart entities are not dominant in the relevant market, abuse of dominance does not arise. However, CCI did note the submissions made by the Flipkart entities on merits, namely:

i. there is no abusive conduct by Flipkart or its entities since their B2B arrangements are neither exclusive nor do they impose any restraints on any reseller choosing to sell its product through Flipkart's platform;
ii. structural link with WS Retail, as admitted in the information, existed only till 2012 and WS Retail is no longer a seller on Flipkart's marketplace;
iii. as regards abusive conduct by Flipkart Internet, the terms and conditions on which sellers access the marketplace are standard; and
iv. the marketplace is bound and compliant by the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017.

21 Case No. 20 of 2018.

CCI held that no case of contravention of the provisions of Section 4 of the Act is made out against the Flipkart entities. The decision also notes that CCI came to this conclusion after holding preliminary conferences with Amazon Seller Services Private Limited (being a key player in the relevant market) while noting that intervention in the relatively nascent and evolving model of retail distribution in India needs to be carefully crafted, lest it stifles innovation.

CCI Orders Investigation against Ministry of Railways and Online Ticketing Operations of Indian Railways – IRCTC regarding Abuse of Dominance in the Market for Sale of Tickets by Railways in India

On November 9, 2018, CCI ordered investigation into the information alleging violation of Section 4 of the Act, filed by Mr. Meet Shah and Mr. Anand Ranpara against Ministry of Railway ('**MoR**') and Indian Railway Catering and Tourism Corporation Limited ('**IRCTC**').[22] The informants in this case alleged that the MoR and IRCTC, according to their pricing policy, round off the base fare of the railway ticket to the next higher multiple of ₹5 (as per Circular no. 6 of 2013, the Ministry of Railways, with effect from January 22, 2013). This act of rounding off is an unfair and discriminatory condition imposed on the informants and merits examination of abuse of dominance by the MoR and IRCTC.

In order to determine the alleged abuse of dominant position, CCI held the relevant market to be '*market for sale of tickets by railways in India*'. CCI relied on its earlier decisions in **Shri Sharad Kumar Jhunjhunwala *v* Union of India[23], Shri Ismail Zabiulla *v* Union of India[24] and Shri Yaseen Bala *v* Union of India[25]**, where MoR and IRCTC were collectively considered as a 'group' for the purpose of the Act and dominant in the market of transportation of passengers through railways across India including ancillary segments like ticketing, catering on board, platform facilities, *etc.* provided by the Indian Railways. On the basis of this decision, CCI held that MoR and IRCTC are dominant in the defined relevant market in the present case.

MoR and IRCTC submitted that the rounding off was done to reduce transaction time and serve passengers expeditiously. CCI was of the opinion that this rationale does not stand with respect to online sale of tickets where the transaction can take place to one paisa precision electronically. CCI also held that MoR and IRCTC had been unable to explain why rounding off is done separately for each passenger even when more than one ticket are booked through one account at the same time for a journey.

CCI found the practice of rounding off actual base fares to the next higher multiple of ₹5 by MoR and IRCTC *prima facie* amount to imposition of unfair conditions in the relevant market. CCI directed the Director General to conduct an investigation into the contravention of Section 4, more particularly Section 4(2)(a)(i) of the Act for unfair or discriminatory pricing or conditions.

CCI Orders Investigation for Abuse of Dominance Allegations against Intel Corporation

On November 9, 2018, CCI dismissed the information filed by Velankani Electronics Private Limited ('**VEPL**') against Intel Corporation ('**Intel**'). The information alleged contravention of the provisions of Section 4 of the Act.[26] Intel is in the business of designing, manufacturing and distribution of a wide range of IT components, peripherals, computer systems, *etc.* Intel is also in the business of designing, manufacturing and distribution of electronic devices related to communications and computing such as processors, chipsets, mother-board/ server-board, integrated circuits, network interface controllers, flash memory, *etc.* VEPL manufactures 'servers', a type of computer designed to process requests and deliver data to another computer over the internet or a local network. Servers have various sub-assemblies which are not manufactured by VEPL but assembled after purchase from the market. VEPL had entered into a Manufacturing Enablement Agreement with Intel to enable itself to manufacture server-boards based on Intel's designs, in exchange for a license fee.

VEPL submitted that Intel has a market share of more than 80% and most consumers of servers treat and accept Intel's processors as the industry standard, preferring it over other micro-processor manufacturers. Therefore, VEPL was completely dependent on Intel for procuring processors for its servers and in its information has alleged refusal on Intel's part in providing the reference design files required to manufacture server-boards. VEPL has also submitted that these reference design files are provided by Intel to VEPL's competitors in the server market like Dell, HPE, *etc.* ('**ODMS/OEMS**'). The reason given by Intel for not providing the required reference designs to VEPL is that VEPL does not have '*sufficient technical and sales scope and expertise*'.

22 Case No. 30 of 2018.
23 Case No. 100 of 2013
24 Case No. 49 of 2014
25 Case No. 89 of 2014
26 Case No. 16 of 2018.

CCI determined the relevant market to be the market for '*processors for servers in India*'. CCI concluded that Intel is in a dominant position in the relevant market having more than 90% share globally and at least 80% market share in India. CCI also relied on its previous decision in **ESYS Information Technologies Private Limited v Intel Corporation**[27] where Intel was considered dominant in the market for micro-processors for servers in India. According to CCI, Intel:

i. was unable to provide a reasonable explanation for not allowing VEPL access to reference design files in order to develop processors when it has provided them to other ODMs/OEMs (discriminatory treatment);
ii. had denied market access to VEPL in contravention of Section 4 (2)(c) of the Act;
iii. had limited and restricted the production of servers and the market and has also limited the technical/ scientific development relating to servers in the market, in violation of Section 4 (2)(b) of the Act.

Consequently, without going into Intel's intent for alleged contravention of the provisions of the Act, CCI directed the Director General to ascertain whether Intel has abused its dominant position in the relevant market.

Combination Decisions

CCI Approves Application Filed Jointly by Siemens AG, Germany and Alstom SA, France

On November 1, 2018, CCI approved the proposed acquisition of 50% of Alstom S.A.'s ('**Alstom**') share capital by Siemens Aktiengesellschaft ('**Siemens**'), filed under Section 6(2) of the Act.[28] The proposed combination relates to the combination of Alstom and the mobility business of Siemens by way of a contribution of Siemens's mobility business to Alstom. This contribution of Siemen's mobility business to Alstom is in consideration for newly issued Alstom shares (representing 50% of Alstom's share capital) on a fully diluted basis ('**Proposed Combination**').

In India, Siemens provides services concerning transportation of people and goods by rail and road and operates through its three subsidiaries which are part of the Proposed Combination. Further, Alstom is engaged in the business of products, services and solutions relating to mobility business. It manufactures and supplies signaling systems, rolling stock (including locomotives), rail electrification, track works, maintenance services and also provides associate construction and engineering services through its subsidiaries.

CCI considered the wide product portfolio of Alstom and Siemens and segmented the product market for assessment, without defining it, as:

i. Signaling solutions (systems providing safety controls on mainline and urban rail networks);
ii. Rail electrification (power supply and contact line systems for urban mainline railways);
iii. Rolling stock (trains including locomotive, mainline stock such as intercity and regional trains and urban rolling stock such as metros).

This was done since both Alstom and Siemens competed in tenders only in the above-mentioned products/services. However, as mentioned above, the relevant product and geographic market definition was left open by CCI for all the three segments since the Proposed Combination did not raise any competition concerns irrespective of the manner in which the market is delineated. CCI approved the Proposed Combination since the CCI held that it will not have any appreciable adverse effect on competition in any of the relevant markets after considering: (i) the combined market share of the relevant parties; (ii) other players in the market competing for and winning bids; and (iii) third party responses on the other credible and big competitors in the market.

27 Case No. 48 of 2011.
28 Combination Registration No. C-2018/07/588.

Delhi High Court

Delhi High Court Dismisses Writ Petition Filed by Abbott Healthcare

On November 13, 2018, the Delhi High Court ('**DHC**') dismissed the writ petition filed by Abbott Healthcare Private Limited ('**Abbott**'), challenging the order dated July 5, 2018 passed under Section 26(1) of the Act by CCI.[29] In this order, CCI had directed investigation into the anti-competitive agreements between four leading pharmaceutical companies, namely, Novartis India, Abbott, USV Limited and Emcure Pharmaceuticals Limited. Abbott also challenged the CCI order dated October 29, 2018 rejecting Abbott's application for review and recall of the aforesaid order.

The information regarding the alleged contravention was received by CCI pursuant to: (i) a letter dated March 22, 2017 from the National Pharmaceutical Pricing Authority, Department of Pharmaceuticals ('**NPPA**'); and (ii) an anonymous e-mail purportedly sent by one of the employees of Abbott ('**Email**') containing another e-mail dated July 29, 2016. The Email indicated that there was an understanding to maintain the price of drugs across the country.

According to Abbott, the Email is forged and the data provided by NPCC is inaccurate. Abbott challenged the CCI's order on the ground that CCI could not have issued the order without employing appropriate tools to test the veracity of the contents of the Email.

While dismissing Abbott's writ petition, DHC referred to **Competition Commission of India *v* Steel Authority of India Limited**[30]. Relying on this decision, DHC held that an order passed by CCI under Section 26(1) of the Act is essentially an administrative order, akin to a direction from one wing of the department to another. The decision further explains that an order under Section 26(1) of the Act passed by CCI can at best direct investigation and does not amount to an adjudicatory function.

The DHC noted CCI's powers under the following provisions: (i) under Section 36 of the Act, the CCI has powers of a civil court to try matters before it including discovery, production of documents and receiving evidence on affidavit; and (ii) under Regulation 17 and Regulations 41 and 44 of the CCI (General) Regulations, 2009 ('**General Regulations**'), the CCI has power and jurisdiction to take evidence and call for information in accordance with provisions of the Act. However, while dismissing the writ petition, DHC rejected the contention that it was incumbent upon CCI to take evidence under Section 36(2) of the Act or Regulation 41 of the Regulations before issuing an order under Section 26(1) of the Act. It held that a decision under Section 26(1) of the Act is only a preparatory measure which precedes an inquiry.

29 W.P. (C) No. 12129 of 2018.

30 (2010) 10 SCC 744.

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Thomson Reuters' Emerging Markets M&A Legal rankings Q1 2018

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

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

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