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## Importance of Clean Teams: Investments in Competing Enterprises

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## Importance of Clean Teams: Investments in Competing Enterprises

### Introduction

The cartel prohibition contained in Section 3(3) of the Competition Act, 2002 ('CAO2') prohibits certain types of agreements that are entered into between competitors *i.e.* enterprises engaged in identical or similar trade of goods or provision of services, if such agreements result in the fixation of prices, limitation of supply or results in bid-rigging. An agreement between competitors to exchange competitively sensitive information ('CSI') must result in the fixation of prices, limitation of supply *etc.*, and cannot in and of itself be termed as contravention under the CAO2. However, the Competition Commission of India ('CCI') is likely to consider the exchange of CSI as indicative of the existence of an anti-competitive arrangement and competitors must ensure that CSI if exchanged for lawful purposes must be subject to certain basic 'hygiene' processes, such as the establishing of 'clean teams'. One such instance where competitors may legitimately access each other's CSI is at the time of entering into potential transactions (*e.g.* mergers, acquisition or joint ventures) involving competing enterprises. Naturally, enterprises involved in or contemplating a potential deal would typically have a legitimate need to access CSI<sup>1</sup> about the counterparty's business in order to negotiate and evaluate the viability of the transaction, and in certain cases, to implement the transaction.

### What is a 'Clean Team'?

A 'clean team' generally consists of employees, consultants or advisors of each party who do not carry out any operational activities or who are, for a reasonable period of time, not involved in the operational business, coupled with non-disclosure agreements ('NDA'). Members of such clean teams must not pass on CSI to other members of the transaction /operational teams working on the deal, unless the information is sufficiently aggregated or anonymized so as not to reduce competitive uncertainty in the interim. Further, it would be prudent to appoint a 'custodian' in such clean teams. These custodians are individuals who are tasked with the responsibility to destroy and/or return all CSI obtained upon the termination of any potential transaction/agreement between competing enterprises. In addition, it would be necessary for members of clean teams to be subject to a 'cooling off' period. During this period (typically one to two years), these members should not return to their roles in the the company's day to day operations or take up responsibilities which may enable them to use the CSI obtained through their participation in such clean teams.

### Necessity of Clean Teams

The primary objective of establishing a 'clean team' is to limit access to CSI to a set of pre-identified individuals in either corporation, with clear processes in place to ensure that such individuals utilize the CSI for the limited purpose of evaluating the viability of and completing the transaction. Such individuals are usually precluded from making or influencing business decisions of the parties during this evaluation process and are subject to strict non-disclosure requirements. A clean team ensures that as long as the two (competing) entities continue to operate independently and the transaction is not completed, the two parties are insulated from a potential cartel risk. Further, a clean team also ensures that should the transaction not be completed for any reason, the CSI exchanged during the negotiation and the due diligence ('DD') process is not misused by either party to collude in an anti-competitive manner.

In the one instance where CCI was called upon to look into an issue of this nature<sup>2</sup>, it penalized two enterprises for using bid-related CSI obtained during negotiations for an acquisition which did not ultimately get completed. The CSI obtained in that case was subsequently used by the parties to co-ordinate their bids while tendering for the procurement of broadcasting services. The case underscores the necessity for transacting parties to ensure strict adherence to clean team protocols while negotiating transactions with competitors, so that they insulate themselves from potential cartel scrutiny under Section 3(3) of CAO2.

The CCI's (non-binding) compliance manual also recommends that the information obtained during DD exercises must not be commercially used by the company which is conducting the DD. While the manual acknowledges the need to share CSI during DD exercises, it essentially

<sup>1</sup> Examples of information that is generally CSI: (a) current and future pricing – including discounts, rebates, price formulae, timing of price reductions or increases; (b) sales and market shares; (c) profit margins; (d) current and future confidential product or brand-specific costs; (e) production, capacity or investment levels or limits; (f) customer lists and customer sales/orders; (g) commercial terms with customers and suppliers; customer or commercial strategies and marketing plans; (h) non-public R&D plans, strategies, investments or results.

<sup>2</sup> *Suo Motu* Case No. 02 of 2013.



suggests that: (i) a DD should be conducted by a limited team of individuals not involved in the company's day to day operations; and (ii) appropriate NDAs should be executed by members of such teams. In terms of information that it considers to qualify as CSI, the guidance suggests that (i) forward-looking planning documents, pipeline project details and strategic plans; and (ii) cost data, pricing and discount policies that are not publicly available; may reduce competition and therefore should not be exchanged between parties.

A secondary but related risk that a clean team will help mitigate, is that of potential 'gun-jumping'. Indian competition law provides for a suspensory regime *i.e.* the parties to a notifiable transaction are restricted from taking any steps towards consummation of such a transaction prior to the receipt of CCI's approval. The rule of thumb is that the parties to the transaction should conduct their business operations as usual *i.e.* as if no transaction was contemplated, until the transaction closes. Arguably, the exchange of CSI if acted upon by either party may entail either or both of them taking business decisions to give effect to their proposed combination prior to the receipt of CCI approval. The existence of robust clean teams may mitigate the risk of CCI viewing the conduct of business as being directed at giving effect to a transaction prior to its approval.

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## Behavioural Cases

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### Supreme Court Refuses to Interfere with Appellate Tribunal's Order Pertaining to Uber<sup>3</sup>

On December 22, 2015, the CCI had passed a closure order,<sup>4</sup> rejecting Meru Travel Solutions Private Limited's ('Meru') allegations that Uber India Systems Private Limited ('Uber') was engaging in predatory pricing and imposing exclusivity restrictions on its drivers, in violation of Sections 4 and 3(4) of CA02. The CCI questioned the credibility of the market report submitted by Meru ('Tech Sci Report') because it was prepared without interviewing any of the personnel of Uber. Further, the CCI noted a disparity between information in the Tech Sci Report, and another market report ('6wresearch Report') relied upon by the CCI in an prior similar case<sup>5</sup>. Thus, in the absence of any credible market related information, the CCI refused to consider Uber as a dominant entity in the relevant market.

Meru challenged the CCI's decision before the Competition Appellate Tribunal ('COMPAT'), which was of the opinion that the disparity in the information between the Tech Sci Report and the 6wresearch Report was an adequate justification for directing the Director General ('DG') to investigate further into the matter. Further, while the COMPAT did not conclusively hold Uber to have violated CA02, it noted that the large discounts provided by Uber certainly warranted further investigation. In light of the above, the DG was directed to investigate and submit its report on the matter. This order of the COMPAT was appealed by Uber to the Supreme Court of India ('SC').

The SC passed its decision on the matter on September 3, 2019. The SC observed that Uber priced its services such that it intentionally made a loss of Rs. 204 per trip, and could not find any valid economic rationale for the same. The SC opined that the aforementioned pricing pointed towards Uber's intent to eliminate competition in the market. Further, the SC noted that as per Explanation (a)(ii) to Section 4 of CA02, an entity would be considered 'dominant' if it held a position of strength which would affect its competitors in its favour. Accordingly, the SC held that the abovementioned pricing would certainly affect Uber's competitors in an adverse manner, which would be advantageous to Uber, and saw it fit to not interfere with the COMPAT's order. The appeal was dismissed, and the DG was directed to complete its investigation within six months.

### CCI Dismisses Complaint against New Gurgaon Real Estate Developer<sup>6</sup>

On October 3, 2019, the CCI dismissed allegations of violations of Sections 3 and 4 of CA02 against Vatika Limited ('Vatika'), filed by Mr. Suresh Chander Gupta ('Informant'). Vatika is one of the top real estate developers in new Gurgaon and was developing 'Vatika Town Square', a commercial tower in a commercial-cum-retail shopping complex, at the junction of Dwarka Express Highway and the Delhi-Jaipur Highway.

The Informant was told by Vatika in 2012 that construction of Block-D of Vatika Town

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<sup>3</sup> *Uber India Systems Private Limited v. Competition Commission of India*, Civil Appeal No. 641 of 2017.

<sup>4</sup> *Meru Travel Solutions Private Limited v. Uber India Systems Private Limited*, Case No. 96 of 2015.

<sup>5</sup> *Fast Track Call Cabs Private Limited v. ANI Technologies*, Case No. 6 & 75 of 2015.

<sup>6</sup> *Suresh Chander Gupta v. Vatika Limited*, Case No. 26 of 2019.



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Square, where the Informant was looking to purchase commercial space, would be completed by the end of June 2015. The Informant paid a sum of Rs. 2,50,000 on January 3, 2013, and signed the application for allotment. The Informant also paid an advance of 40% of the total amount on February 18, 2013, with the remaining 60% being due at the time of possession. Lastly, the Informant was told verbally that if, for any reason, there was a delay in construction or any other default by Vatika, the Informant would be paid simple interest @ 8% per annum by Vatika. However, this condition was never included in the Builder-Buyer Agreement ('BBA') executed between Vatika and the Informant.

The Informant noted that despite being told otherwise by Vatika, the construction of and leasing/renting of commercial units in Vatika Town Square had not made adequate progress. Accordingly, the Informant inquired several times about the terms and conditions pertaining to the refund of the amount already paid by him, without any response from Vatika. The Informant approached the CCI against Vatika, alleging that the BBA imposed unfair and discriminatory terms on the buyer, as well as covered the builder from all foreseeable and unforeseeable events at the cost of the buyer.

The CCI noted that the issue at hand arose out of an agreement with a customer, which does not fall under Section 3 of CA02. The CCI then went on to assess the issue under Section 4. The CCI stated that based on customer use and price, commercial real estate and residential real estate formed two separate relevant product markets. Further, with respect to the relevant geographic market, customers looking for commercial units in one area would not prefer any other areas. Furthermore, the market conditions in Gurugram were different as compared to other NCR regions. Accordingly, the CCI defined the relevant market as the market for 'provision of services for development and sale of commercial space in Gurugram'.

Within the relevant market, the CCI relied on a prior case pertaining to Vatika's dominance,<sup>7</sup> and noted that there were enough players providing same or similar services as Vatika, which imposed competitive restraints on Vatika. Accordingly, the CCI held Vatika to not be a dominant player in the relevant market, and did not examine any abuse of dominance. CCI found no *prima facie* case against Vatika and dismissed the matter.

#### **CCI Dismisses Allegations of Abuse of Dominance against SBI<sup>8</sup>**

On October 11, 2019, the CCI dismissed allegations of abuse of dominance under Section 4 of CA02 against the State Bank of India ('SBI'), filed by Sainath Autolinks Private Limited ('Informant'). The Informant was an authorised dealer of Maruti Suzuki India Limited ('Maruti') in West Bengal. The Informant opened a Supply Chain Finance Unit account with SBI's Durgapur branch in 2011. As per the terms and conditions of the account, Maruti would dispatch cars to the Informant after receipt of payment from SBI after which, the Informant would deposit the sales proceeds of the cars into the account.

On July 23, 2018, SBI allegedly informed the Informant of an accounting error from the financial year 2013-2014 due to which, the Informant was liable to pay SBI a sum of Rs. 2.13 Crore. The Informant also alleged that SBI did not provide any documentation or explanation for raising such a demand. Moreover, the Informant was compelled to pay the amount to SBI after SBI threatened to transfer the Informant's account to the 'Non-Performing Asset' category. The Informant filed a complaint with the Banking Ombudsman on the grounds that the demand was time barred under the Limitation Act, 1963, which was dismissed. The Informant alleged that the terms and conditions of the letter of arrangement signed between them were unfair, discriminatory, and favoured SBI. Further, the Informant alleged that SBI was a dominant entity in the banking sector, which SBI had abused.

The CCI observed that loans could be availed from SBI for either business or personal purposes. Further, within the business segment, loans could further be categorized into credit facilities to large corporate borrowing, mid-corporate borrowing, etc. The CCI noted that in terms of Priority Sector Lending requirements, there existed regulatory provisions by the RBI specific to Micro, Small and Medium Enterprises ('MSMES'). Pertaining to the relevant geographic market, the CCI relied on an earlier case pertaining to the banking sector where the relevant geographic market was limited to the confines of a particular state<sup>9</sup>. Given the nature of the business of the Informant, and the state of business, the CCI defined the relevant market as the 'market for provision of loans to MSMEs in State of West Bengal'.

The CCI noted that the Informant was unable to provide any evidence backing its claim pertaining to SBI's dominance. The CCI also noted the market share of SBI was around 11%, and that there were a large number of competitor banks within the relevant market which imposed competitive restraints on SBI. Accordingly, SBI was not held to be a dominant enterprise and the CCI found no contravention of Section 4 of the CA02.

<sup>7</sup> *Shri Dominic Da'Silva v. M/s Vatika Group*, Case No. 101 of 2014.

<sup>8</sup> *Sainath Autolink Private Limited v. State Bank of India*, Case No. 15 of 2019.

<sup>9</sup> *Matha Timbers Private Ltd. v. Tamil Nad Mercantile Bank Ltd.*, Case No. 02 of 2015.

## CCI Dismisses Complaint against Alcohol Manufacturer and Distributor<sup>10</sup>

On October 16, 2019, the CCI dismissed allegations of violations of Sections 3 and 4 of CA02 against Pernod Ricard India Private Limited ('PRIPL'), filed by Mr. Ashok Suchde ('Informant'). The Informant was the proprietor of Vyn Marketing (having registered office in Mumbai). PRIPL was engaged in the manufacturing, sale and distribution of various alcoholic products in India.

The Informant submitted that his enterprise, Vyn Marketing, was a service provider for PRIPL for a period of ten years. Vyn Marketing and PRIPL entered into an agreement dated December 19, 2016, whereby Vyn Marketing was to provide marketing and sales assistance to PRIPL. However, it is alleged that on November 3, 2017, PRIPL abruptly terminated the agreement without giving the due notice period required under the agreement. Subsequently, PRIPL engaged the services of ZK Marketing to carry out the same services that Vyn Marketing provided to PRIPL. The Informant alleged that ZK Marketing was engaged for the services despite not having any prior experience in the relevant field, solely because its officers were persons belonging to political parties. The Informant further alleged that such decision was taken by PRIPL with the motive to gain an unfair advantage as it would be able to receive kick-backs from ZK Marketing in lieu of dealership. The Informant submitted that such an agreement ought to be considered anti-competitive under Section 3(4) of CA02.

The CCI noted that the primary issue of the Informant pertained to the fact that PRIPL had terminated the agreement with Vyn Marketing and engaged another entity in its place. The CCI was unable to find any competition issues or concerns which were arising out of the case, which could be examined within the framework of CA02. Accordingly, the CCI was of the view that no case of contravention was made out, either for Section 3 or Section 4, and dismissed the complaint under Section 26(2) of CA02.



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## Combination Orders

### CCI Approves Barolo Holdings B.V.'s Acquisition of 74.5% Stake in CitiusTech Healthcare<sup>11</sup>

On August 22, 2019, CCI approved the acquisition of approximately 74.5% of the shareholding of CitiusTech Healthcare Private Limited ('Citius') by Barolo Holdings B.V. ('Barolo') on a fully diluted basis, pursuant to purchase of shares from General Atlantic Singapore Fund Pte. Limited and certain other investors.

Barolo is a company incorporated in the Netherlands and belongs to Baring Private Equity Asia ('Baring'). While Barolo has no direct physical presence in India, Baring is present in India through its investments in NIIT Technologies Limited ('NIIT'), Hexaware Technologies Limited ('Hexaware'), Xavient Digital ('Xavient'), and AGS Health Private Limited ('AGS Health'). NIIT and Hexaware are both active in India, and provide business process outsourcing and IT outsourcing services. While Xavient and AGS Health are physically present in India, they do not generate any revenue from within India. Citius is an Indian incorporated company engaged in the business of technology services solutions with a focus on the healthcare sector. It is not active in India in the market for consulting services, and only provides implementation services.

The CCI noted that there was some horizontal overlap between the activities of Citius, and those of Baring's entities in India. However, the combined market share of the entities was found to be between 0-5%, owing to the presence of other large players in the market, which would impose competitive restraints on the parties. Further, the CCI also noted that none of the entities party to the transaction had any activities which belonged to different levels of the same production chain. In light of the above factors, the CCI was of the opinion that the combination was not likely to have any Appreciable Adverse Effect on Competition ('AAEC') and accordingly, approved the combination.

### CCI Approves Capgemini SE's Acquisition of Sole Control over Altran Technologies SA<sup>12</sup>

On September 2, 2019, the CCI approved Capgemini SE's ('Capgemini') acquisition of sole control over Altran Technologies SA ('Altran'). Capgemini already held 11.43% of the shareholding in Altran prior to the combination.

Capgemini is a French company which is the parent entity of its group. Capgemini provides

<sup>10</sup> Ashok Suchde v. Pernod Ricard India Private Limited, Case No. 25 of 2019.

<sup>11</sup> Combination Registration No. C-2019/07/674.

<sup>12</sup> Combination Registration No. C-2019/08/677.



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a wide range of services including IT services, and supports major companies and organizations in creating new products and services within the digital economy. Capgemini is present in India through six subsidiaries. Altran is also a French company which is the parent entity of its group. It is active worldwide in the provision of engineering services. With respect to the Indian market, Altran through its subsidiaries provides engineering services to the local Indian market, catering primarily to industries relating to semiconductors, telecom, and enterprise and consumer software. Altran has other entities which have limited presence in automotive, energy, industrial & consumer and aeronautics industries in India.

The CCI noted that the activities of the parties overlapped in the broader segment of provision of engineering services in India, as well as in the narrower segments of provision of engineering services in aeronautics, energy, industry and consumers, and automotive sectors. The CCI noted that the combined market shares of the parties in both segments were insignificant, owing to the presence of other players in the segments. In light of the above factors, CCI was of the opinion that the combination was not likely to have any AAEC and accordingly, approved the combination.

### **CCI Approves Mitsubishi's Acquisition 22% Stake in TVS<sup>13</sup>**

On September 6, 2019, the CCI approved Mitsubishi Corporation's ('Mitsubishi') acquisition of approximately 22% of the total equity share capital of TVS Automobile Solutions Private Limited ('TVS'). Mitsubishi already held 3.26% shareholding in TVS prior to the combination. Mitsubishi sought to increase its shareholding to approximately 25% by means of share subscription along with secondary purchase from some existing shareholders.

Mitsubishi is a global entity operating in various industries including automotive and mobility, natural gas, industrial materials, petroleum & chemicals, mineral resources, industrial infrastructure, food industry, consumer industry, power solution, and urban development. TVS is in the business of distribution and sale of automobile spare parts, multi brand vehicle service, trading and distribution of automobile accessories, 24x7 emergency roadside assistance ('RSA') service, non-life/general insurance intermediary services, sale of tyre repair product supplies, etc.

The CCI noted that neither Mitsubishi nor TVS were engaged in the production/provision of any identical or similar goods or services in India. CCI also noted that Mitsubishi had equity stake in Isuzu Motors India ('IMI') which availed RSA service from TVS. However, IMI vehicles which were enrolled with and attended by TVS for RSA services were insignificant compared to the total number of vehicles enrolled with and attended by TVS. Further, the market presence of IMI in the supply of passenger vehicles in India was not considered significant. In light of the above, CCI opined that the combination was not likely to incentivize the parties to engage in any anti-competitive conduct and was not likely to raise any AAEC. Accordingly, CCI granted its approval to the combination.

### **CCI Approves Blackstone's Acquisition of 51% Stake in Aakash Educational Services<sup>14</sup>**

On September 6, 2019, the CCI approved the acquisition of 51% of the shareholding in Aakash Educational Services Limited ('Aakash') by Singapore VII Topco I Pte. Ltd. ('Acquirer'). The Acquirer is a special purpose vehicle incorporated under the laws of Singapore and is an affiliate of funds managed by the affiliates of The Blackstone Group ('Blackstone').

Blackstone does not have any portfolio companies engaged in business operations where Aakash is active in India. Aakash is a public limited company, engaged in providing test preparatory services for Class Eleven, Class Twelve, and post Class Twelve students, preparing for medical and engineering entrance exams. These services are provided through classroom based coaching, as well as digital distance learning.

The CCI noted the absence of horizontal and vertical overlaps between Blackstone and Aakash. In light of the same, CCI was of the opinion that the combination was not likely to have any AAEC and accordingly, approved the combination.

### **CCI Approves Amazon's Acquisition of 0.51% of Stake in Quess Corp<sup>15</sup>**

On September 6, 2019, the CCI approved Amazon.com NV Investment Holdings LLC's ('Amazon') acquisition of approximately 0.51% of the equity share capital of Quess Corp Limited ('Quess') on a fully diluted basis.

Amazon is a wholly-owned subsidiary of Amazon.com, Inc. ('ACI') and is engaged in the business of making investments at a global scale. While Amazon is not engaged in any business in India, ACI has some subsidiaries that are active in the Indian retail and payment processing markets. Quess is a part of the Quess Corp Group, which is engaged in various business activi-

<sup>13</sup> Combination Registration No. C-2019/07/675.

<sup>14</sup> Combination Registration No. C-2019/08/678.

<sup>15</sup> Combination Registration No. C-2019/08/680.



ties in India, including the provision of facilities management services in India.

The CCI noted that neither of the parties was engaged in any identical or similar business activities. However, Amazon had portfolio companies that were engaged in the business of providing facilities management services in India. The market shares of such portfolio companies were in the range of 0-5%. The CCI also noted the existing business relationship between Amazon Seller Services Private Limited ('ASSPL'), an affiliate of Amazon, and Qess, for the provision of after-sales services to customers for products ordered on the online marketplace operated by ASSPL. This revenue generated by Qess out of its relationship with ASSPL was negligible. Moreover, the affiliates of Amazon in India and Qess were not considered to be operating in the same production chain.

The CCI noted that as a part of the pre-existing relation between ASSPL and Qess, Qess was restricted from providing similar services to a specific list of persons. Such a restriction was found to be not ancillary to the combination. In any case, in light of the above factors, CCI was of the opinion that the combination was not likely to have any AAEC and accordingly, approved the combination.

### **CCI Approves Varena's Acquisition of 40% Stake in Dixcy Textiles<sup>16</sup>**

On September 23, 2019, the CCI approved Varena Holdings Limited's ('Varena') acquisition of approximately 40% of the shareholding in Dixcy Textiles Private Limited ('DTPL'). Varena already held 60% of the shareholding in DTPL and sought to purchase the remaining shares from other existing shareholders.

Varena is a Cyprus-based special purpose vehicle that operates as an investment holding company for Advent International Corporation. DTPL is in the business of manufacturing hosiery products including men's inner wear, women's inner wear, kid's inner wear, and casual wear such as shorts and sweatshirts.

The CCI noted the absence of horizontal and vertical overlaps between the business activities of DTPL and Varena. The CCI also noted that at the time of filing, Varena had entered into an agreement to purchase 100% of the shareholding in another entity, which would result in some horizontal overlaps. In any case, the CCI was of the view that the combined market share of the parties despite the overlaps would be insignificant, owing to the presence of a large number of competitors. In light of the same, the CCI opined that the combination was not likely to have any AAEC and accordingly, approved the combination.

### **CCI Approves Icahn Enterprises, American Entertainment Properties, and IEH FMGI Holdings' Acquisition of 25.02% Stake in Federal-Mogul India<sup>17</sup>**

On September 23, 2019, the CCI approved Icahn Enterprises L.P. ('IEP LP'), American Entertainment Properties Corp. ('AEP'), and IEH FMGI Holdings LLC's ('IEH') acquisition of 25.02% of the shareholding in Federal-Mogul Goetze (India) Limited ('FMGI'). The acquisition was proposed to be made from public shareholders of FMGI under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011.

IEP LP is a publicly traded master limited partnership formed in Delaware, USA. It is a holding company engaged in a diverse range of business activities including those relating to investment, automotive, energy, food packaging, metals, real estate, and home fashion. AEP is a limited liability corporation incorporated under the laws of the United States. It is an indirect wholly owned subsidiary of IEP LP, and is engaged in business activities relating to investment, energy, automotive, metals, real estate, and home fashion. IEH is a wholly owned subsidiary of AEP created specifically for the acquisition of shares in FMGI. FMGI is an Indian listed company engaged in the manufacturing and sale of automotive components.

The CCI noted the absence of horizontal and vertical overlaps between the business activities of the parties, and was of the opinion that the combination was not likely to raise any AAEC. Accordingly, the CCI granted its approval to the combination.

<sup>16</sup> Combination Registration No. C-2019/09/685.

<sup>17</sup> Combination Registration no. C-2019/08/679.



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