



Revisiting Behavioural Remedies in Merger Control

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Revisiting Behavioural Remedies in Merger Control

Introduction

Competition agencies across the world use **structural remedies** (*i.e.*, one-time remedies intended to maintain or restore the competitive structure of the market)¹ and **behavioural remedies** (*i.e.*, remedies affecting the future behaviour of a merged entity)² to address anti-competitive harm from transactions. Traditionally, competition agencies and merging parties have favoured structural remedies over behavioural remedies, since the latter are difficult to craft and enforce,³ involve time and cost to monitor and may only temporarily ‘fix’ the market conditions by changing the conduct of a merged entity. That said, behavioural remedies can be flexible, tailored to address the specific conduct of an entity,⁴ and are arguably ‘proportionate’ to the harm caused. Also, behavioral remedies are more appropriate when structural remedies to address anti-competitive harm may result in significant loss of efficiencies from the transaction.⁵ In the past few years, the Competition Commission of India (‘CCI’) has increasingly used behavioural remedies, as standalone measures and in conjunction with structural remedies. We analyse the CCI’s jurisprudence to demonstrate that behavioural remedies can be successful tools even in complex transactions to remedy the harm caused to the competition in the market.

The CCI’s cases so far

The CCI’s early cases involving behavioral commitments from parties were related to assessing non-compete covenants in transactions. Notifying parties typically addressed the CCI’s concerns by reducing the duration of the non-compete transactions⁶.

In later cases, the CCI has used a combination of structural and behavioural remedies to minimize the post-combination unilateral and coordinated effects in transactions between competitors. The CCI accepted a hybrid structural and behavioural remedy for the first time in **PVR/DT**⁷ where the parties offered to leave out certain screens in a geographic market from the transaction’s scope (structural remedy) and provided undertakings to not expand organically or acquire new screens (behavioural remedy). The CCI has also used behavioural remedies to address concerns of bundling and other portfolio effects arising due to the parties’ complementary products and services (*i.e.*, a conglomerate merger). In **Bayer/Monsanto**⁸, while divestments of overlapping businesses addressed the unilateral and coordinated effects, the CCI required parties to commit to a number of obligations including non-bundling of products, non-exclusive distribution channels, licensing of certain products on fair, reasonable, and non-discriminatory terms, etc. to offset the transaction’s portfolio effects. Similarly, in **ChinaChem/Syngenta**⁹, the CCI accepted parties’ commitment to divest certain crop protection products along with the commitment that the parties’ Indian entities would operate as competitors for 7 years. It appears that the CCI has used behavioral remedies in conjunction with the structural remedies in these cases since structural remedies alone would not sufficiently address the purported anti-competitive concerns.

The CCI has also used behavioral remedies to allay any concerns of post-transaction collusion between the competitors. In **Northern TK**¹⁰, the CCI was concerned that the acquirer group’s joint venture (‘JV’) with a competitor could become a platform for coordination between the JV and its parents. Parties offered to have “firewalls” to avoid exchange of commercially sensitive information and a commitment to avoid common directors between the companies. Similar commitments were offered in the **Nippon**¹¹ and **Valkyrie**¹² cases to address concerns with respect to potential collusive behavior. The CCI’s acceptance of behavioral commitments in these cases demonstrates that these can be used effectively to strike a balance between addressing the

1 International Competition Network- Merger Remedies Guide 2016 (available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf)

2 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, para 17 (available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)&from=EN))

3 Merger Remedies Manual, Antitrust Division U.S. Department Of Justice, September 2020 (available at <https://www.justice.gov/atr/page/file/1312416/download>)

4 *Supra*, note 1

5 *Supra*, note 3

6 Orchid Chemicals and Pharmaceuticals Limited and Hospira Healthcare India Pvt. Ltd., Combination No. C-2012/09/79; Mylan Inc., Combination No. C-2013/04/116

7 PVR Limited, Combination No. C-2015/07/288

8 Bayer AG, Combination No. C-2017/08/523

9 China National Agrochemical Corporation, Combination No. C-2016/08/424

10 Northern TK Venture, Combination No. C-2018/09/601

11 Nippon Yusen Kabushiki Kaisha Ltd., Mitsui O.S.K. Lines Ltd. and Kawasaki Kisen Kaisha, Ltd, C-2016/11/459

12 TRIL Urban Transport Private Limited, Valkyrie Investment Pte. Limited and Solis Capital (Singapore) Pte. Limited, Combination No. C-2019/07/676

anti-competitive concern and preserving the efficiencies of a transaction that could be lost if structural remedies were used.

Equally, behavioral remedies have proved effective in allaying customer and input foreclosure concerns in transactions between companies at different levels of a production chain (i.e., a vertical merger). In **Schneider/L&T**¹³, the CCI accepted behavioural remedies to offset foreclosure effects without seeking any structural remedy. The CCI asked the parties to commit to long term white labelling, price caps, non-exclusive licensing of technology, non-exclusive distribution networks, etc.

In the past few years, the CCI has required behavioral commitments to address any adverse effects on customers. In **Hyundai/Ola**¹⁴, the parties had to ensure that Ola's algorithms would not prefer/discriminate between drivers based on the brands of their cars. Similarly, in **Videocon/Dish**¹⁵ and **Jio**¹⁶ cases, parties undertook to bear the cost of change in technology, technical realignment, etc., to obviate the transaction's effects on end customers.

Conclusion

The CCI's decisional practice demonstrates that behavioural commitments can effectively address a range of anti-competitive harms. In the CCI's early days in **PVR/DT**, it had initially rejected the behavioural remedies offered by the parties because of the difficulty in implementing and monitoring them. However, in **Schneider/L&T**, the CCI recognized the difficulty in implementing the proposed divestments (due to integrated production plants, common personnel, etc.) and ultimately accepted the behavioural remedies offered by the parties. The CCI's more recent approach appears to be that behavioural commitments are a good option where they are reasonable to formulate, implement and monitor. Notifying parties may need to consider the CCI's renewed flexibility towards behavioural commitments while planning their remedy proposal.

Behavioural Cases

CCI Dismisses Allegations of Anti-Competitive Agreements against Hindalco and Vedanta¹⁷

On October 8, 2020, the CCI dismissed an information filed by an anonymous complainant against Hindalco Industries Limited ('**Hindalco**') and Vedanta Limited ('**Vedanta**') alleging a contravention of provisions of Section 3(3) of the Competition Act, 2002 ('**Competition Act**').

The complainant alleged that Hindalco and Vedanta engaged in cartelisation in production and supply of refined copper products and certain additional charges related to its sale. The complainant: (i) relied upon simultaneity in the issuance of price circulars; and (ii) alleged (a) discussion of granted discounts, (b) identical charging of premium on certain products, and (c) identical additional charges and freight charges (despite difference in costs), among Hindalco and Vedanta. The complainant further alleged that Hindalco and Vedanta engaged in customer allocation and entered into verbal agreements to maintain parity in sale volumes by making sales to each other whenever either entity failed to make desired sales, under fake identity billing. Lastly, the complainant alleged bid-rigging among Hindalco and Vedanta in tenders issued by the Indian Ordnance Factories, for supplies to the Indian defence industry, allowing them to quote invariably higher rates.

The CCI observed that mere price parallelism is not sufficient to order probe, in the absence of any material on record indicating collusion among Hindalco and Vedanta. Regarding the allegations of collusion on freight charges, the CCI noted that buyers of copper products have the option of using their own vehicles for transportation of copper products from the manufacturers' warehouse/ go-downs/ depots. With respect to allegations on exchange of pricing information, customer allocation and bid-rigging, the CCI noted that the complainant failed to file any reliable source of information or documents indicating contacts among Hindalco and Vedanta to substantiate the allegations. Particularly, with respect to the unsubstantiated allegation of bid rigging, the CCI observed that the regulatory resources have to be optimally deployed so as to prioritise the enforcement task.

Accordingly, the CCI passed a closure order under Section 26(2) of the Competition Act.

13 Schneider Electric India Pvt. Ltd. and MacRitchie Investments Pte. Ltd., Combination No. C-2018/07/586

14 Hyundai Motor Company and Kia Motors Corporation, Combination No. C-2019/09/682

15 Dish tv India Limited, Videocon D2h Limited, Combination No. C-2016/12/463

16 Jio Futuristic Digital Holdings Pvt. Ltd., Jio Digital Distribution Holdings Pvt. Ltd. and Jio Television Distribution Holdings Pvt. Ltd., Combination No. C-2018/10/609; Jio Content Distribution Holdings Pvt. Ltd., Jio Internet Distribution Holdings Pvt. Ltd., and Jio Cable and Broadband Holdings Pvt. Ltd., Combination No. C-2018/10/610

17 Case No. 18 of 2020, Order dated 8 October 2020



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CCI Dismisses Allegations of Anti-Competitive Agreements and Abuse of Dominance against 19 importers of Phenol¹⁸

On October 8, 2020, the CCI passed an order dismissing an information filed by Indian Laminate Manufacturers Association against 19 importers of Phenol alleging a contravention of the provisions of Section 3(3) and 4 of the Competition Act.

It was alleged that the identified importers of Phenol formed a cartel and hiked the prices of Phenol in January – March 2016. Due to this, the decorative laminate manufacturers who used Phenol as raw material were compelled to buy it at higher prices. It was further alleged that the identified Phenol importers spread rumours about shortage of Phenol, and prompted laminate manufacturers to buy Phenol at high prices. It was further highlighted that during the alleged period of cartel, the international prices of Phenol were low. It was alleged that the cartel continued from March 2016 till May 2016 where the price of Phenol were reduced by the identified Phenol importers upon receipt of information of a possible complaint to the CCI. Lastly, it was alleged that the identified Phenol importers abused their dominant position in the market for Phenol in India.

On January 31, 2020, the CCI directed the Director General ('DG') to conduct an investigation. While the DG considered the relevant period for investigation from January till June 2016, in order to maintain uniformity in analysis, the DG also analysed 6 months before and after the alleged cartel i.e., July 2015–December 2016, to create benchmarks for comparative analysis. To conduct the investigation in a time-bound manner, the DG investigated top 12 importers of Phenol accounting for more than 95% of the total sales volume of Phenol. The DG conducted a Herfindahl-Hirschman Index (HHI) analysis and found that the market for Phenol during the alleged cartel was highly competitive. The DG further conducted a price co-relation analysis to assess price parallelism and observed that the co-relation of prices was strongly positive between Phenol suppliers during January – March 2016, and weakened drastically during April – June 2016. A market level analysis of the profitability showed that the 12 importers of Phenol made profits during the alleged cartel.

The DG also perused the call detail records, emails of employees responsible for conduct of business of the 12 importers of Phenol, and minutes of certain meetings. However, the DG did not find any evidence indicating collusion.

The CCI compared the average domestic and international prices of Phenol during the alleged cartel and observed that contrary to the allegations, during February – March and May 2016, both the domestic and international prices of Phenol had increased during the alleged cartel. Further, noting the profitability analysis and price parallelism among the 12 Phenol importers, the CCI observed that the conduct *prima facie* raised suspicion of collusive behavior. However, in the absence of any evidence indicating meeting of minds or an agreement, the CCI concluded that mere price parallelism does not indicate collusion as pricing behavior of enterprises can depend on independent response to the economic conditions which indicated rise in demand of Phenol.

The CCI accordingly dismissed all the allegations and passed a closure order under Section 26(6) of the Competition Act.

Combination Orders

CCI Approves Brookfield's Acquisition of Real Estate Projects held by RMZ Group and 100% equity shareholding in CoWrks¹⁹

On September 29, 2020, the CCI approved the acquisition of: (i) 11 real estate projects held by RMZ group; and (ii) 100% equity shareholding in CoWrks India Private Limited ('CoWrks'), by Brookfield Private Capital (DIFC) Limited's ('Brookfield') affiliate entity. The acquisition was made pursuant to a Binding Term Sheet *inter alia* between the promoters of RMZ group, CoWrks and Brookfield.

Brookfield and its affiliate entity belong to the Brookfield Group which is a private equity business operating as a global alternative asset manager with a focus on real estate, renewable power, infrastructure and private equity. Brookfield Group has investments in India across several sectors such as infrastructure, renewable power and private equity including the commercial real estate sector.

RMZ Group and CoWrks are controlled by members of the Menda family. RMZ Group op-

¹⁸ Case No. 61 of 2016, Order dated 8 October 2020

¹⁹ Combination Registration No. C-2020/09/768

erates as developers, managers and investors of real estate assets (primarily office spaces) with operational and under-construction assets across Bengaluru, Chennai, Delhi NCR, Hyderabad, Mumbai, and Pune. 10 out of the 11 real estate projects which were to be acquired are engaged in the business of leasing commercial real estate properties to third party entities for use as traditional office spaces and 1 real estate project is in the business of leasing commercial real estate to third party entities for use as retail spaces.

CoWrks provides co-working spaces in India across Bengaluru, Chennai, Delhi-NCR, Hyderabad, and Mumbai to third parties for commercial use. These co-working spaces are provided to many individual customers in terms of desks/seats.

The CCI observed that the combined market share of Brookfield, RMZ Group and CoWrks in commercial real estate projects in Bengaluru and Pune is less than 5% both in terms of value and volume. The CCI further observed that the activities of Brookfield and CoWrks vertically overlap in Mumbai and Delhi-NCR since Brookfield is engaged in leasing traditional office space and CoWrks is in the business of taking office space, converting it into desks/ seats and offering it as co-working space. However, since CoWrks has limited presence in co-working space business in Mumbai and Delhi-NCR, the CCI approved the combination while observing that to the proposed combination will not have any appreciable adverse effect on competition ('AAEC').

CCI Approves Comfort Investments' Acquisition of Nxtra Data²⁰

On August 26, 2020, the CCI approved Comfort Investment II's ('CI-II') acquisition of Nxtra Data Limited ('Nxtra'), pursuant to an investment agreement.

CI-II is an investment company owned and controlled by investment funds advised by affiliates of the Carlyle Group Inc. CI-II is specifically created for the purposes of this combination. Carlyle Group is a global alternative asset manager, which manages funds that invest globally on: (i) corporate private equity; (ii) real assets (real estate, infrastructure and energy and renewable resources); (iii) global credit; and (iv) solutions (private equity fund of funds program and related co-investment and secondary activities).

Nxtra was a wholly owned subsidiary of Bharti Airtel Limited prior to the combination. Nxtra *inter alia*, provides services such as data center colocation, IT Hardware supply, installation and support.

The CCI observed that there are no horizontal overlaps between CI-II or any of the entities controlled by Carlyle Group and Nxtra. With respect to vertical relationships, the CCI observed that two entities controlled by Carlyle Group namely, Veritas Technologies India Private Limited ('Veritas') and Syniverse Technology Services India Private Limited ('Syniverse') employ services provided by Nxtra.

Veritas is engaged in developing, manufacturing and selling storage software products. It offers solutions for backup and recovery, disaster recovery, storage management, business continuity, archiving and eDiscovery. Syniverse provides mobile transaction products and services such as wireless number portability, data clearing, messaging, signalling and roaming services to mobile network operators to facilitate carrier interconnection and interoperability globally. Nxtra at the upstream level provides data center colocation services to Veritas and Syniverse.

In its competition assessment, the CCI assessed the "market for provision of data center colocation services in India" as the upstream segment and Veritas' presence in the "market for provision of back-up & recovery Software in India" ('Downstream Segment-1') and Syniverse's presence in the "market for provision of mobile network services and solutions in India" ('Downstream Segment - 2') as the downstream segments. The CCI observed that Nxtra's market share in the upstream segment is 20 - 25%. However, other players such as STT GDC, NTT, Sify and CtrlS would continue to pose competitive constraints to Nxtra. Further, the CCI observed that Veritas' market share in the Downstream Segment-1 is 10 - 15%, and that Veritas would face competitive constraints from other players such as DELL, IBM, Commvault and Veeam. With respect to Syniverse, the CCI observed that it has a market share of 15-20% in Downstream Segment - 2, and that it would face competitive constraints from other players such as iConnective, SAP, Ericsson, Tata, FT, BICS, GMS, Mobilium, etc.

In light of the above, the CCI was of the opinion that the combination was not likely to have any AAEC and accordingly, approved the combination.

CCI Approves Acquisitions of Kubota Agricultural Machinery India Private Limited and Escorts Limited by Kubota Corporation²¹

On July 10, 2020, the CCI approved two acquisitions by Kubota Corporation ('Kubota') of: (i) 9.09% of the equity shares of Escorts Limited ('Escorts'); and (ii) 40% of the total share capital from Sumitomo Corporation ('Sumitomo') in Kubota Agricultural Machinery India Private



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²⁰ Combination Registration No. C-2020/07/755

²¹ Combination Registration No. C-2020/06/750



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Limited ('KAI'), a 60:40 joint venture ('JV') between Kubota and Sumitomo respectively. Subsequently, Escorts will acquire 40% shareholding in KAI from Kubota. Accordingly, KAI will become a 60:40 JV between Kubota and Escorts.

Kubota is globally present in sectors including tractors, combine harvesters and rice transplanters, utility vehicles, turf equipment, construction machinery, engines, weighing & measuring control systems, ductile iron pipes, valves, pumps, membrane solutions and waste water treatment plants. Kubota is active in India through two JVs, 'KAI' and Escorts Kubota India Private Limited ('EKI'). KAI is engaged in the business of supplying tractors, rice transplanters, combine harvesters and power tillers, as well as implements and attachments in India. EKI is engaged in the manufacturing of tractors for both Indian and export markets and is yet to start production.

Escorts is in the business of manufacturing and sale of agri-machinery, construction equipment and railway equipment in India. It also trades in oils & lubricants, implements, trailers, tractors, construction, earth moving and material handling equipment. Further, Escorts through its subsidiaries and JVs is also engaged in the business of crop solutions, security trading and financial activities in India.

The CCI in its assessment observed that there are horizontal overlaps between Kubota and Escorts in the segments of manufacture and sale of: (i) tractors; (ii) combine harvesters; and (iii) diesel engines. The CCI further observed that after the transaction, the combined market share of Kubota and Escorts will be in the range of 10-15% in the segment of tractors and combine harvesters and 0-5% in the segment of diesel engines.

With respect to potential vertical relationships, the CCI observed that the activities of KAI in trading and assembly of agricultural equipment could be considered as an upstream relationship to the activities of Escorts Crop Solution Limited (a wholly owned subsidiary of Escorts), in provision of agri-services—harvesting, transplanting, rotavating, spraying, etc. However, Escorts Crop Solution Limited's low market shares indicated that the transaction will not foreclose competition in the vertically related markets.

With respect to potential complementary relationships, the CCI observed that: (i) implements (which are usually connected to tractors and perform variety of activities such as ploughing, threshing etc.) could be considered as complementary to sale of tractors; and (ii) spare parts and lubricants may be considered as complementary to agriculture equipment. However, the combined market shares of Kubota and Escorts were in the range of 0-5% and therefore, insignificant. Accordingly, the CCI held that the transaction is not likely to have an AAEC in India, and granted its approval.

CCI approves acquisition of approximately 9.99% of Jio Platforms by Facebook²²

On June 24, 2020, the CCI approved the: (i) acquisition of 9.99% equity share capital in Jio Platforms Limited ('Jio Platforms'), a subsidiary of Reliance India Limited ('RIL'), by Jaadhu Holdings LLC ('Jaadhu'), an indirect wholly owned subsidiary of Facebook Inc. ('Facebook'); and (ii) Master Services Agreement ('MSA') between Whatsapp Inc. ('Whatsapp'), another subsidiary of Facebook, Jio Platforms and Reliance Retail Limited ('RRL').

Jaadhu is not engaged in any business in India. It is a wholly owned subsidiary of Facebook, which offers products and services in the market for social networking and advertisement. Its most popular products include Facebook, Messenger, Instagram, WhatsApp, Oculus, Workplace and Portal.

Jio Platforms operates digital applications and holds controlling investments in a number of technology firms. It also holds 100% of the share capital of Reliance Jio Infocomm Limited ('RJIO'), a licensed telecommunications operator in India.

The CCI observed that as a result of the transaction, Jaadhu would hold 9.99% of the shares of Jio Platforms and have the right to appoint a director to the board of directors of Jio Platforms and an observer to board meetings. Jaadhu would also receive some benefits relating to buyback of shares and IPOs, and to receive financial information of Jio Platforms as would be necessary for tax and other compliances. Under the MSA, Whatsapp would develop an electronic chat feature to connect users with JioMart, an ecommerce marketplace developed by RRL.

The CCI observed that the activities of the Facebook group and Jio Platforms are similar in consumer communication applications and advertisement services. Moreover, the instant messaging application provided by Whatsapp and the telecommunication services provided by RJIO are complementary.

In its assessment of the horizontal overlaps, the CCI observed that Jio Platforms and Facebook horizontally overlap in two market segments: (i) consumer communication applications; and (ii) advertising services. The CCI observed that in the market for consumer communication applications, Jio offers telecommunication services and digital services including music and TV

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²² Combination Registration No. C-2020/06/747

content and a messaging and calling application–JioChat. Facebook offers two similar communication applications *i.e.*, WhatsApp and Messenger. The CCI segmented the relevant market based on functionality, platforms and operating systems. The CCI observed that the combined market share of WhatsApp and Facebook in the relevant market of consumer communication application is 45-50% and JioChat’s market share is 5%. The CCI also observed the presence of other players like Google and Microsoft in the market and noted that there was no barrier to entry. Accordingly, the CCI held that the transaction would not lead to anti-competitive effects in this market.

For advertising services, the CCI observed that both Facebook and Jio Platforms offer advertising services. The CCI noted that online advertising allows sellers to target the audience which is not possible in offline advertising. Moreover, search advertising offers more precise advertisements compared to non-search advertisements. The CCI observed that although Facebook earns a majority of its revenue from advertising, Jio earns less than 1% of its total revenue from advertising, and the presence of Google as a significant player in the market operates as a competitive constraint. Accordingly, the CCI concluded that the combination is unlikely to increase the concentration.

With respect to the business collaboration between WhatsApp and Jio Platforms under the MSA, which would enable WhatsApp users to access JioMart, the CCI observed that both WhatsApp and Jio Platforms would aim to penetrate into the e-commerce market using each other’s market presence. However, the CCI observed that WhatsApp is one of the several ways to access JioMart, and is free to offer its services to other market participants. JioMart is a new entrant in the market where other players like Flipkart and Amazon are present, and hence, the business arrangement between WhatsApp and Jio would not adversely affect the competition in any of the plausible relevant markets in e-commerce space in India.

In the market for digital payments based on the Unified Payment Interface (UPI), the CCI observed that according to the terms of the agreement between WhatsApp and RIL, JioMart will not limit its payment channels to only WhatsApp Pay. There are several other players like Google Pay and PhonePe that offer UPI based payment services in India who will impose significant competitive constraints. Further, digital payments in India are subject to strict regulation including from the National Payments Corporation of India (NPCI). Accordingly, the CCI concluded that there would not be any adverse effects on competition in any of the plausible relevant markets for UPI based digital payment application business.

The CCI observed that the product lines of Facebook group and telecommunication services by RJIO, are complementary to each other and examined whether the transaction would lead to any preferential treatment to Facebook applications or content in RJIO’s network. The CCI observed that according to the legal framework laid down by the Telecom Regulatory Authority of India, RJIO cannot provide preferential treatment to Facebook. The Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, prohibit discrimination by service providers on the basis of content while the Unified License Conditions laid down in 2018 by the Department of Telecommunications further clarify that providing different speeds or blocking on the basis of content amounts to discrimination and is prohibited. Accordingly, the CCI concluded that the combination will not threaten net neutrality in India.

Investigating the possible harms from data sharing, the CCI noted that both Facebook and Jio Platforms collected non-personal information as provided in their privacy policies with a view to improve their services. The CCI observed that Jaadhu would acquire a 9.99% stake in Jio Platforms and the entities would remain distinct, so the possibility of information-sharing is bleak. It relied on Jaadhu’s claim that the aim of the combination is not to share data, and observed that there is nothing to apprehend any anti-competitive harms arising out of such sharing at present, but warned that investigations may be initiated in the future if it is observed that the parties are sharing information. Based on the above, the CCI approved the acquisition noting the absence of AAEC arising out of the combination.



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