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In This Issue

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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Defining and Identifying 'Group' Entities
The Slippery Slope of 'Control'

Competition regulators rely primarily on information furnished by parties notifying transactions, while assessing the potential impact on competitive conditions. To ensure that notifying parties provide all the information necessary for regulators' assessment, merger control regulations usually contain a laundry list of information that must accompany merger notifications. Merger control regulations also empower regulators to seek additional information from notifying parties as well as third parties during their review process. As an extraordinary measure, merger control regulations empower regulators to take punitive actions against notifying parties for providing incorrect information or withholding information that the regulator considers material for their review.

Exercising its power to penalize companies for material non-disclosure for the very first time, CCI recently penalized UltraTech Cement Limited ('**UltraTech**') for not disclosing the details of shareholdings of Kumar Mangalam Birla (and his family members) ('**KMB**' / '**KMB Family**') and the companies owned/ controlled by them in companies competing with Jaiprakash Associates Limited whose cement manufacturing plants were being acquired by UltraTech ('**Decision**'). While this *Decision* marks the beginning of CCI's use of its powers under Section 44 of the Competition Act, 2002 ('**Act**'), it equally increases the scope of disclosures for notifying parties and adds to the uncertainty surrounding the already somewhat muddled discourse on 'control'.

The prescribed longer form II requires notifying party(ies) to provide information on horizontal and vertical overlaps not just between the immediate parties to the transaction (i.e. the acquirer and the target enterprises[1], including their subsidiaries) but also between the group to which the acquirer belongs (i.e. the acquirer group) and the target enterprise (including its subsidiaries).

While determining the extent of UltraTech's obligation to disclose its own and KMB's shareholding in companies engaged in cement business that competed with the acquired target business, namely, Century Textiles and Industries (**Century**) and Kesoram Industries (**Kesoram**), CCI expanded the meaning of the term 'control' to include 'material influence' in addition to 'de-facto' and 'de-jure' control. In doing so, the *Decision* has altered one of the three tests for determining whether two or more enterprises belong to the same 'group'.

Statutory Tests for 'Group'

The Act defines a 'group' as: two or more enterprises that are directly or indirectly in a position to ('**Group Tests**'):

i. exercise 50%[2] or more of the voting rights in the other enterprise ('**Voting Rights Test**'); **OR**
ii. appoint more than 50% of the members of the board of directors in the other enterprise ('**Board Test**'); **OR**
iii. control the management or affairs of the other enterprise ('**Control Test**').[3]

While the Voting Rights Test and the Board Test are premised on objective parameters, the Control Test is nebulous. 'Control' is defined under the Act to 'include' *controlling the affairs or management* by one or more enterprises or groups, over another enterprise or group. This broad definition has led CCI to clarify the meaning of the term 'control' through its decisions.

Implications of the Decision

When examining whether Kesoram and Century satisfied the Control Test, the *Decision* does not identify any rights that KMB had in Kesoram and Century. Instead, CCI clarifies that while the *ability to manage the affairs of the other enterprise* (the definition of control under the Act) may be inferred from special or veto rights, *other sources of control* including, "*status and expertise of an enterprise or person, board representation, structural/financial arrangements*" may equally also exist. On this basis, CCI concludes in the *Decision* that all degrees and forms of control constitute control (within the meaning of the Act) and that 'material influence' is the lowest form of control followed by *de facto* control and controlling interest (*de jure* control).

In doing so, the *Decision* appears to expand an already diluted interpretation of the term

1 The term "enterprise" is defined under the Act to include its "subsidiaries".

2 In 2011, by way of a notification, the MCA increased the percentage thresholds in the Voting Rights Test from 26% to 50% such that any 'group' exercising less than 50% of the voting rights in another enterprise is exempt from the provisions of Section 5 of the Act for a period of 5 years. The operation of the notification was further extended for 5 years (until 2021) in 2016.

3 *See* Explanation (b) to Section 5 of the Act.

'control', to now include all forms of 'material influence'. Not only does this interpretation deviate from a well-established, globally acceptable, definition of 'control' *i.e.* '*the ability to exercise* ***decisive influence*** *over the management or affairs*' of another enterprise,[4] but owing to the definitional link between 'group' and 'control', expands the scope of the term 'group'.[5]

The interlacing of the statutory definition of the term 'group' with the definition of the term 'control' and the subsequent dilution of the meaning of 'control' to include 'material influence' has far reaching implications (a) the computation of jurisdictional thresholds and the application of various exemptions available to intra-group transactions; and (b) ascertaining the extent of horizontal and vertical overlaps in merger filings.

Computation of jurisdictional thresholds

One of the eight jurisdictional thresholds/tests to determine whether a transaction is notifiable to CCI, involves computing the value of assets and turnover generated by the group to which the target/ merged entity will belong post the transaction ('**Group Thresholds**'). Further to the *Decision*, notifying parties can arguably be required to carry out an onerous time-consuming self-assessment to identify *each such enterprise* in which it may *directly or indirectly* exercise 'material influence'[6] to conclusively determine if the Group Thresholds are breached.

Consider the example of Enterprise A, that proposes to acquire 51% of the total share capital of Enterprise B. Enterprise A, also owns 25% of the total share capital of Enterprise C and has the right to appoint 1 director to the board of Enterprise C. Enterprises B and C operate in the same relevant market. Enterprise A satisfies neither the Voting Rights Test nor the Board Test in relation to enterprise C. Yet, the newly coined test of "material influence" can lead to the inference that as a result of its shareholding and presence on the board of enterprise C, Enterprise A controls Enterprise C. Such an inference, premised on the *Decision* is likely to lead to an incorrect agglomeration of minority investments made by an enterprise to comprise a larger group. This would increase the possibility of Group Thresholds being breached, resulting in the notification of transactions over which CCI lacks jurisdiction.

Yet, the expanded Control Test may not enable notifying parties to benefit from the "intra-group" exemption (provided under Item 8 of Schedule I of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('**Combination Regulations**') ('**Intra-Group Exemption**').[7] Consider the same example as above where Enterprise A decides to acquire additional shares in Enterprise C. Further to the *Decision*, while Enterprise A may arguably claim that Enterprise C satisfies the Control Test (and Enterprises A and C are part of the same group), the expanded scope of the Control Test may well allow Enterprise C to now belong to more than one 'group'. Where a target (Enterprise C) is under the 'joint control' of a group *other than* that of the acquirer, the Intra-Group Exemption would not be available.

Mapping overlaps

The longer form II requires notifying party(ies) to provide information on horizontal and vertical overlaps not just between the immediate parties to the transaction (i.e. the acquirer and the target enterprises, including their subsidiaries) but also between the group to which the acquirer belongs (acquirer group) and the target enterprise (including its subsidiaries). Although the shorter form I does not require parties to map overlaps vis-à-vis the acquirer group, CCI nonetheless expects notifying parties to do so.

The expanded meaning of the term 'control' and the consequent possibility of a wider set of enterprises being agglomerated to comprise a 'group' adds another layer of complexity to the exercise of mapping overlaps. An informed mapping of overlaps requires the acquirer and the target to share the entire list of products/ services offered by them with their advisors. Companies which have been agglomerated as part of the acquirer or target group, only because of the material influence test may not share details of the products or services offered by them to help map overlaps exhaustively, thereby exposing the notifying party(ies) to potential risk of penalty for material non-disclosure.

4 **Independent Media Trust**, C-2012/03/47.

5 The European Commission ('**EC**')considers 'decisive influence' *i.e.*, the 'power to block actions which determine the strategic commercial behavior of an undertaking'. In essence, EC may assess minority acquisitions only when such acquisitions result in the investor being conferred AV₹ that allow it to veto decisions that are 'essential for the strategic commercial behavior' of an enterprise. The EC appears to distinguish between investor protection AV₹ from those that relate to strategic decisions of business policy of the proposed target.

6 In the *Decision*, CCI defined 'material influence' as "*the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc.*".

7 Item 8 exempts "*an acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.*"

Conclusion

The first two Group Tests, *i.e.*, the Voting Rights Test and the Board Test clearly set out the legislative intention for identifying a 'group'. The MCA in 2011 specifically increased the percentage thresholds in the Voting Rights Test to 50% (from 26%) so that *only* those entities that directly or indirectly held 50% or more shareholding or votes in another enterprise would constitute a group. The well-established statutory interpretation principle of *ejusdem generis* requires that the Control Test be interpreted in accordance with the Voting Rights Test and the Board Test. No wider construction may be afforded. However, the expansive interpretation of the Control Test in the *Decision* effectively dilutes, if not entirely negates, the statutory Voting Rights and Board Tests.

In sum, the *Decision* raises more questions than it answers. By expanding the meaning of the term 'control' to include control by way of 'material influence'–a term open to multiple interpretations, CCI has unwittingly also changed the meaning of the term 'group'. Notifying parties must tread with caution and till the time CCI issues a clarification, it would perhaps help to err on the side of caution. Notifying parties may also consider approaching CCI for pre-filing consultations, which may help address some of the ambiguities discussed above.

Behavioural Decisions by the National Company Law Appellate Tribunal

NCLAT Dismisses the Appeal Filed by the Cement Companies and Upholds ₹ 63 billion Fine Levied by CCI

On July 25, 2018, National Company Law Appellate Tribunal ('**NCLAT**') pronounced its judgment in upholding the order of the Competition Commission of India ('**CCI**') dated August 31, 2016 finding 10 cement companies[8] and their trade association, Cement Manufacturers Association ('**CMA**'), guilty of fixing prices and limiting supply in contravention of Section 3(3) of the Competition Act ('**Act**').

As evidence of an 'agreement' between the cement companies, NCLAT found that the companies used the CMA as a platform for exchanging '*pricing and sensitive information relating to production, capacity, dispatch etc.*' Reviewing the minutes of CMA's Managing Committee between 2007 and 2009 and three High Powered Committee meetings in 2011, NCLAT found CMA to have provided a platform to collect prices in minimum and maximum ranges for different regions in India. NCLAT also considered (i) ACC and Ambuja's withdrawal from CMA activities; and (ii) CMA's amendments to its regulations post initiation of the CCI investigation, as further proof that CMA provided a platform to coordinate amongst its members. *Per* NCLAT, CMA's collection of business sensitive information further to directions of the Department of Industrial Policy and Promotion ('**DIPP**') was not adequate justification for such conduct. While DIPP requested information relating to retail and wholesale prices from different centers, NCLAT held CMA's process of providing DIPP this information by collecting this information through its members, such that cement companies were able to access each others sensitive price and non-price information, may not be said to have been sanctioned by the government. Finding that "*information exchange can constitute concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion,*" NCLAT concluded that there was a *meeting of minds* between cement companies to fix the sale price of cement and regulating production and supply.

To determine whether the 'agreement' resulted in fixing prices or reduction in production or supply, NCLAT reviewed the data on record. On the basis of price charts, NCLAT found there existed price parallelism on the basis of absolute changes in cement prices in each state. This, NCLAT held, indicated that cement companies hiked prices without justification in departure from "*normal trends over the previous years*".

NCLAT also found dispatch and production coordination amongst cement companies on the basis of reduced production and dispatch of cement *despite* increased demand over corresponding months (November – December 2010) and a subsequent increase in prices (January – February 2011). Relying on statements made by third party cement distributors, NCLAT concluded that this coordination amongst cement companies resulted in reduction in supplies. NCLAT also noted that while installed capacity increased in 2009-10 and 2010-11, production growth and capacity utilization decreased in 2010-11, along with corresponding price increases across all regions- south, central, north and eastern, while this was not the case in 2009-10.

8 ACC Ltd. (ACC), Ambuja Cement Ltd. (**Ambuja**), Binani Cement Ltd. (**Binani**) , Century Textiles & Industries Ltd. (**Century Cement**), India Cement Ltd. (**India Cement**), JK Cement Ltd. (**JK Cement**) , Nuvoco Vistas Corporation Limited (**Lafarge**), Ramco Cements Ltd, (**Ramco**), Ultra Tech Cement Ltd. (**Ultra Tech**) and Jaiprakash Associates Limited.

Notably, NCLAT clarified the standard of evidence for cartel cases as being one of 'balance of probabilities' as distinguished from 'beyond reasonable doubt', unlike criminal law.

The NCLAT also referred to the Supreme Court ('**SC**') decision in **Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Film Television & Ors.**[9] ('**WBFT Case**') which held that it was necessary to delineate the relevant market in which competition may be said to be affected, and *"in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effect of conduct in a market"*. Relying on the SC decision in the WBFT Case, NCLAT held that as market power analysis was key, it was necessary to delineate a relevant market in this case as well. Reviewing the price and non-price data collected and relied on by CCI, NCLAT clarified that CCI identified the relevant market as '*all regional markets for cement*.'[10]

Finally, observing that CCI had imposed "*mere minimum penalty,*" NCLAT held there was no need to interfere with CCI's penalty computation. On this basis, NCLAT dismissed the appeals filed by the cement manufacturers.

Appellate Tribunal Sets Aside the Penalty Levied by CCI Against AKMN Cylinder

NCLAT on August 20, 2018 set aside a penalty of ₹1 million levied on AKMN Cylinder (P.) Ltd. ('**AKMN**') by CCI for failing to comply with the Office of Director General's directions. On January 02, 2014, CCI directed the Office of Director General ('**DG**') to carry out a detailed investigation in respect of the allegations against AKMN in accordance with its order issued under the Section 26(1) of the Act. During the course of investigation issued by the DG, AKMN consistently failed to appear despite repeated notices. As a result, CCI initiated *suo moto* proceedings against AKMN and imposed a penalty of ₹10 lakhs.

Taking cognizance of the Appellant's age and the fact that AKMN's representative had (i) duly furnished the information requested by the DG on affidavit and no further information was required to be provided; and (ii) tendered an apology to the DG for failing to appear on an earlier occasion, the NCLAT set aside the penalty.

CCI Orders

CCI Rejects Allegations of Abuse of Dominance Against Mondelez

In its order dated August 27, 2018, CCI rejected allegations of abuse of dominance against Mondelez India Foods Private Limited ('**Mondelez**') raised by its terminated distributor, Khemsons Agencies' ('**Khemsons**'/'**Informant**')). It was *inter alia* alleged that the dealership agreement was one-sided, without scope for negotiation and that Mondelez had terminated Khemson's dealership on frivolous and false grounds. It was also alleged that Mondelez's software was creating barriers for free flow of products and that its distributors were obligated to purchase visi-coolers from Mondelez to be eligible for various incentive schemes. Mondelez was also accused of engaging in resale price maintenance by controlling the price of goods sold and related discounts.

CCI held that as the Informant itself was desirous of becoming a distributor of Mondelez, it was fully aware of the terms and conditions of the agreement. Accordingly, it could not be said that it was coerced into executing the dealership agreement in 2010 with Mondelez. CCI also reviewed the termination notice and accompanying email correspondences between Mondelez and Khemsons, and concluded that the dealership was terminated on account of Khemsons unsatisfactory performance and could not be said to be without reason or unjustified.

Turning to allegations of abuse of dominance, CCI defined the market as the "*market for chocolate in India*". In doing so, CCI referenced its earlier order in **Sri Rama Agency v. Mondelez India Foods Private Limited**[11] in which it had defined the market as the *"market for chocolates in the State of Karnataka"*. CCI, however, acknowledged that with the introduction of the Goods and Services Tax, chocolates may be purchased across India at the same price. Accordingly, Mondelez's conduct would have a pan-India effect.

On the basis of publicly available information, CCI noted that Mondelez's market share in 2014 was 55.5% whereas its nearest competitor, Nestle SA had a market share of 17%. On this basis alone, CCI concluded that Mondelez was dominant in the relevant market for chocolates in India.

9 (2017) 5 SCC 17

10 We request our readers to note that by way of an order dated 7 May 2018 pursuant to a review application filed by CCI in the WBFT *Case*, the Supreme Court clarified that the "*determination of 'relevant market' is not a mandatory pre-condition for making assessment of the alleged violation under Section 3 of the Act.*"

11 Case No. 58 of 2015

CCI, however, found that Mondelez had not abused its dominance in respect of any of the allegations raised by the Informant. Mondelez's software that allowed sales to be made through registered distributors appeared to be an organized set up for data and inventory management and could not be said to be abusive. Similarly, CCI found the requirement for procuring vizi-coolers was to ensure that temperature sensitive perishable goods were appropriately stored to maintain the quality of chocolates and did not violate the provisions of the Act. On the issue of Mondelez allegedly requiring the Informant to provide pre-signed post-dated cheques, CCI held this was simply a payment mechanism that cannot be said to anti-competitive. CCI found the Informant's allegations of Mondelez saddling its distributors with near expired products and failing to take back expired products was in the nature of a business dispute. Admittedly, the Informant was contesting this issue in other legal fora and was thus not a competition issue.

Finally, against allegations of Mondelez engaging in resale price maintenance ('**RPM**'), CCI found that the Informant failed to provide any evidence or communication to support its allegations. CCI further observed that RPM is not a *per se* violation under the Act. Absent any information to suggest that Mondelez's conduct resulted in an appreciable adverse effect on competition ('**AAEC**') in the market, no *prima facie* case of violation of Section 3 of the Act may be sustained.

Mondelez was successfully represented by AZB & Partners.

CCI Grants Interim Relief to Confederation of Real Estate Developers Association of India – NCR Against HUDA's Conduct

In its order dated August 1, 2018, CCI issued an order under Section 33 of the Act, granting interim relief to the Confederation of Real Estate Developers Association of India – NCR ('**Developers**') against the conduct of Department of Town and Country Planning ('**DTCP**') and Haryana Urban Development Authority ('**HUDA**') (collectively, '**Respondents**').

The primary allegation was with respect to compelling Developers to pay External Development Charges ('**EDC**') and Infrastructure Development Charges ('**IDC**'). The Developers requested CCI to restrain the Respondents from invoking the bank guarantee against them and sought a cease and desist order against the Respondents from taking any coercive actions including compelling the Developers to pay EDC or IDC or any increase or any penalty payment until the disposal of the case.

While considering the application for interim relief, CCI relied on the factors laid down in **M. Gurudas and Others v. Rasaranjan and Others**[12] *i.e.* (i) existence of *prima facie* case; (ii) balance of convenience and (iii) irreparable injury.

To determine the existence of the first element of *prima facie* case, CCI referred to its *prima facie* order issued under Section 26(1) of the Act, directing the DG to conduct an investigation. However, citing the SC decision in **Competition Commission of India *v.* Steel Authority of India Limited** ('**SAIL Case**') that required CCI to apply a higher standard for establishing a *prima facie* case than the one required under Section 26(1) of the Act, CCI considered the Respondents' conduct beyond its *prima facie* order under Section 26(1) of the Act. In doing so, CCI noted that despite collecting EDC from Developers, the Respondents had failed to undertake external development services ('**EDS**') or infrastructure work. While the Respondents contended that other government agencies had indeed undertaken some infrastructure works, CCI noted that they did not cover basic facilities like water supply, sewerage, drains, roads, electrical works, *etc.* without which the flats would be uninhabitable.

CCI also noted that a policy was issued in 2010 that allowed relaxations with respect to collecting EDC up until the time the rates for medium and low potential zones were finalized and also, the Developers were exempted from payment of any EDC when it wasn't charged to the allottees. However, no such benefit or a similar policy was in place for high potential zone. Additionally, 60% of the collected IDC was already transferred and utilized for refund purposes for other projects by HUDA. In view of the above fact, the CCI noted that the alleged anticompetitive conduct has been continued by the Respondents and there was a *prima facie* case to intervene.

On the following two elements of balance of convenience and irreparable injury, CCI noted that to obtain a license to set up a colony in Sohna, a Letter of Intent ('**LOI**') and LC-IV (Agreement by owner of land intending to set up a colony) ('**Agreement**') between the Developers and DTCP had to be executed. The LOI and the Agreement required Developers to pay the EDC either within 30 days of grant of license or in 8 to 10 six monthly installments. The Agreement additionally, contemplated annual interest in case of delayed EDC payment by Developers. CCI also noted that licenses were to be renewed every five years and renewal fee deposited each time, even if the reason for non completion of the project was limited to EDS.

Citing **Dalpat Kumar and Anr. *v.* Prahlad Singh and Ors.**,[13] CCI held that in order for the

12 AIR 2006 SC 3275
13 (1992)1 SCC 719

third element of 'irreparable injury' to be satisfied, it needed to be reasonably satisfied that absent its interference, Developers and consumers would suffer irreparable loss. To this extent, CCI noted that without interim relief, Developers, and consequently consumers, would suffer significant damages for which they were unlikely to be appropriately compensated. CCI also noted that if interim relief is not granted, Developers may lose their licenses and be forced to pay penal interest even when the Respondents are at fault. Such actions will cause irretrievable harm to Developers.

On this basis, CCI noted that the balance of convenience lay in favour of the Developers and absent intervention, irreparable harm would be caused to Developers and consumers alike. In order to preserve *status quo*, CCI noted that it was important to intervene and restrain the Respondents from taking coercive steps with respect to EDC installment payments. CCI, in its order, also took cognizance of the fact that EDC was imperative in order carry out EDS, but as Respondents had failed to take requisite action, CCI granted interim relief to Developers. Specifically, CCI directed that, where Developers had already paid 10% of EDC and deposited 25% of EDC in the form of bank guarantee, DTCP will not coerce the Developers for remaining installments or take coercive measures with respect to licenses granted to the Developers. Expressly CCI has directed that the *status quo* be maintained until final disposal of the matter.

CCI Dismisses Information Alleging Abuse of Dominance Against Social Welfare and Nutritious Meal Program Department and Cooperation, Food and Consumer Protection Department

On August 6, 2018, CCI dismissed information against the Principal Secretary, Social Welfare and Nutritious Meal Program Department ('**SWNMPD**') and Principal Secretary, Cooperation, Food and Consumer Protection Department ('**FCPD**') (collectively, '**Respondents**'). It was alleged that by modifying the pre-qualification criteria in the tender process for procuring tur dal/Canadian yellow lentil, palmolein oil and eggs ('**Products**'), the Respondents had restricted several stakeholders from participating in the tender process allegedly resulting in a contravention of Section 4 of the Act. CCI duly noted that the Government of Tamil Nadu had appointed Tamil Nadu Civil Supplies Corporation ('**TNCSC**') to procure tur dal/Canadian yellow lentil and palmolein oil to distribute the Products to family cardholders under the Special Public Distribution Scheme ('**SPDS**'), by way of a tender process

For the purpose of defining the relevant market, CCI noted that the demand and supply of each of the Products were distinct. CCI noted that while the Products were not fungible, they were complementary. It was also noted that the producers/ distributors of each of the Products were separate. CCI accordingly delineated three distinct relevant markets, namely, the market for (a) procurement of tur dal in India; (b) procurement of palmolein oil in India; and (c) market for procurement of eggs for noon meal scheme in India.

1. *Market for Procurement of Tur Dal in India*: Relying on its decision in **Maheshwari Agro Products v. Tamil Nadu Civil Supplies Corporation,**[14] CCI found that there existed several State and Central agencies engaged in procuring tur dal, similar to TNCSC, that were equally supported by various corporations. As the TNCSC faced competitive constraints from such central and state agencies, CCI held that it could not be held dominant in the market for procurement of tur dal in India. CCI also noted that the relevant market appeared fragmented and no evidence was furnished to conclude otherwise. CCI also rejected the contention that the introduction of certain pre requisites that resulted in the elimination of certain bidders, was in and of itself as abuse of dominance. CCI was of the opinion that TNCSC has the right to determine necessary pre requisites to ensure that bidders have requisite capacity and resources to meet high demand to avoid subsequent concerns relating to scarcity, once the tender has been allotted.
2. *Market for Procurement of Palmolein* Oil: For palmolein oil, CCI noted that the pre requisites were to be decided by TNCSC, and TNCSC in order to ensure seamless supply of palmolein oil, ensured that the potential bidders had the capacity and resources to provide the said product by adding such pre requisites. TNCSC faced competitive constraints from various other State agencies and did not have the capability to operate independently of its competitors. For these reasons, TNCSC could not have said to be dominant. CCI also noted that asking bidders to abide with statutory compliances, that may have the potential effect of eliminating certain bidders, could not be construed as anti competitive.
3. *Market for Procurement of Eggs for noon meal scheme*: In addition to the aforementioned factors, CCI noted that the bidder pre-requisites introduced in this market had been issued under the Integrated Child Development Services scheme

14 Case No. 2 of 2018

('ICDS') for children. Several States had issued similar tenders under the Public Distribution Scheme ('PDS') and at least 13 States had issued tenders under the ICDS – each of which had similar pre-requisites. CCI also noted the presence of several procurement agencies in the market, because of which it held that the Respondents could not be held dominant. It was also noted that SWNMPD was procuring eggs for the benefit of weaker sections of society because of which certain conditions were necessary to ensure capacity for the tendered product. Additionally, the seamless delivery of eggs also ensures efficient use of funds by the State Government as suggested by the Accountant General since a bidder with sufficient resources and capacity would only be able to bid and the State Government will not have to employ other suppliers at the last minute.

CCI accordingly concluded there was no *prima facie* case of contravention and dismissed the information.

CCI Expands the Scope of Investigation to Consider the Pricing Practices in the Aftermarkets Healthcare Products and Services Provided by Super Specialty Hospitals in Delhi

On August 31, 2018, CCI published an order in **Vivek Sharma v. Becton Dickinson India (P) Ltd.**[15] directing the DG to carry out further investigation and furnish a detailed supplementary investigation report, including on the issues specifically identified by CCI in its order.

By way of background, in 2015, Vivek Sharma ('**Informant**') had filed information against Becton Dickinson India (P) Ltd.('**BDIL**') and Max Super Specialty Hospital ('**Max**') alleging that Max, in collusion with BDIL, was selling disposable syringes at a price well above the maximum retail price ('**MRP**') and the open market price. This was alleged to be in contravention of Sections 3(1) and 4 of the Act. Having found a *prima facie* case of contravention of 4 of the Act, CCI directed the DG to carry out a detailed investigation.

Pursuant to reviewing the findings of the DG and submissions of Max and BDIL, CCI disagreed with the DG's identification of the relevant market as the "*provision of healthcare services/ facilities by private super-specialty hospitals within a distance of about 12 kms from Max Super Specialty Hospital, Patparganj*". Instead, CCI directed the DG to consider the concept of 'aftermarket abuse' to define the relevant market and directed the DG to identify the relevant market as the "*market for healthcare services/ facilities in the after-market for in-patients in super-specialty hospital*". CCI appears to be concerned that, once admitted for treatment, a patient is effectively '*locked-in'* to the services and products as made available by the hospital. This '*locked-in*' effect, in turn, increases the ability of hospitals to '*exercise its dominance over its in patients*" by requiring its patients "*to purchase aftermarket products from its in-house pharmacy only.*" CCI observed that "*such conduct may be considered as an aftermarket abuse even if [Max] is found to be not dominant in the primary market for provision of healthcare services in Delhi.*" CCI also disagreed with the DG's identification of the relevant geographical market and directed the DG to consider 'Delhi' as the relevant geographic market – as CCI had done at the time of issuing its *prima facie* order.

CCI further opined that the DG report did not adequately make a case of excessive pricing and directed the DG to carry out further investigation. CCI noted that although the DG had recorded high profit margins in the sale of syringes to conclude an abuse of dominance, it failed to look at the absolute profits from the sale of syringes "*and other products in the after markets.*" Referring to concerns of "locked-in effects" CCI directed the DG to further investigate other products such as medicines, surgical tools *etc.* to "*establish that the higher profit margins from sale of syringes or any other products cause consumer harm due to lack of competition.*" Moreover, it specifically directed the DG to focus on those after-market products that are not required urgently to "*examine whether [Max] abuses its dominant position by forcing in-patients to purchase those at higher/unfair prices from its in-house pharmacy though the same are available at discounted rates in the open market.*"

Competition Commission of India Orders Probe Against Star India, Sony Pictures and Indian Broadcasting Foundation

On July 27, 2018, CCI directed the DG to investigate allegations against Star India Pvt. Ltd. ('**Star India**'), Sony Pictures Network India Pvt. Ltd. ('**Sony Pictures**') and Indian Broadcasting Foundation ('**IBF**') (collectively, '**Broadcasters** ') for engaging in unfair business practices with regard to pricing of television channels.

Information was filed by Noida Software Technology Park Ltd. ('**NSTP**'), a public limited company, which is a 'distributor' of television channels, has been issued a license to establish,

15 Case No. 77 of 2015

install, operate and maintain Head-End In The Sky ('**HITS**') project for digital cable services in India. NSTP alleged collusion between the Broadcasters in determining prices and supply to distributors in contravention of Section 3(3) of the Act. It also alleged (i) price discrimination by Broadcasters in the supply of television content to it in comparison to similarly placed Multi System Operators ('**MSOs**')/distributors/ operators under Section 4 of the Act; and (ii) anti-competitive vertical agreements under Section 3(4) of the Act in the form of 'refusal to deal.'

CCI rejected allegations under Section 4 of the Act against the Broadcasters, holding that the Act does not envisage the concept of 'collective dominance.' Absent credible evidence, CCI found allegations of collusion as being conjecture. CCI specifically held that forming an association or taking a favourable stand by such association before a regulatory authority cannot, in and of itself, be deemed anti-competitive. CCI also noted the lack of evidence *re* exchange of business sensitive information amongst Broadcasters. On this basis, CCI dismissed allegations of a cartel under Section 3(3) of the Act.

To examine whether the alleged conduct may be scrutinized as a potential vertical anti-competitive arrangement under Section 3(4) of the Act, CCI clarified that the Broadcasters market power would need to be considered in a relevant market. While acknowledging that narrower markets on the basis of genres and regional preferences may exist, CCI identified the relevant market as the "*market for broadcasting of television channels in India*".

While noting that the Broadcasters did not hold significant market shares in the identified relevant market, particularly as there existed over 500 channels, CCI nevertheless found that the Broadcasters enjoyed 'significant market power' in the relevant market of 'sports' and 'entertainment' genre in India. Relying on (i) the size and importance of the Broadcasters as compared to their competitors; (ii) commercial advantage over competitors; and (iii) consumer dependence as a result of their extensive channel portfolio in the sports and entertainment genre, CCI was of the preliminary opinion that the Broadcasters had sufficient market power.

Having determined that Broadcasters enjoyed sufficient market power, CCI turned to examining allegations of price discrimination. It was alleged that Broadcasters made disparate payments in the form of 'carriage fees' (to carry channels) and 'placement fee' (to place channels at prominent positions) to their 'favoured' distributors. Allegedly, these fees were often greater than the license fee ordinarily charged to distributors that significantly reduce costs for such 'favoured' distributors' *vis-à-vis* others. While Broadcasters made channels available on an *a-la-carte* basis, the terms at which they were offered, including pricing, made the choice between a bouquet of channels and *a-la-carte* illusory.

Relying on the decision of the Telecom Disputes Settlement and Appellate Tribunal ('**TDSAT**')[16], CCI opined that despite regulatory oversight, Broadcasters had the ability to discriminate amongst distributors. CCI rejected the Broadcasters' contention that the very offer of channels at rates mentioned in the Reference Interconnect Offer ('**RIO**') (in Interconnect Agreements filed with the Telecom and Regulatory Authority ('**TRAI**')) negates allegations of 'refusal to deal'. However, referring to observations of the TDSAT and TRAI's issuance of new regulations to ensure non-discrimination, CCI was of the *prima facie* opinion that the RIO terms by Broadcasters may well qualify as a mechanism for refusal to deal in contravention of Section 3(4)(d) of the Act.

Finally, responding to the Broadcasters' challenge of CCI's jurisdiction to take cognizance of information, CCI held that its powers are in addition to, and not in derogation of, TRAI's mandate to regulate Broadcasters. CCI also noted that as TDSAT and TRAI have decided the matter fully and recognized that Broadcasters had engaged in the practice of price discrimination/ refusal to deal, nothing precluded it from taking cognizance of this matter.

CCI dismissed allegations of resale price maintenance against Timex

On August 14, 2018, CCI dismissed information filed against the Timex Group India Limited ('**Timex**') filed by one of its non-exclusive online distributors, M/s Counfreedise ('**Informant**'). The Informant is engaged in purchasing lifestyle products such as belts, wallets, sunglasses *etc.* and selling them on several e-commerce platforms such as Flipkart, Paytm Mall and Amazon (under the trade name 'BUYMORE').

The Informant alleged that Timex stopped doing business with it after it chose not to comply with Timex's RPM 'diktat' – which was in contravention of Section 3(4)(e) of the Act. It was also alleged that by engaging with other online distributors that offered similar discounts, Timex discriminated against the Informant under Section 4 of the Act. It was also alleged that Timex had abused its dominant position by initiating sham litigation and allegedly failing to provide after-sale services to customers who purchased Timex wrist watches from the Informant in contravention of Sections 3 and 4 of the Act.

16 *M/s Noida Software Technology Private Limited v. M/s Media Pro Prvt. Ltd. & Ors.* (Petition No. 295 (C)/ 2014 decided on 07 December 2015

For the purpose of delineating the relevant market to examine allegations under Section 4 of the Act, CCI opined that consumers who were interested in durability, quality, established network for sales, after-sales and warranty services tended to prefer branded wrist watches over unbranded ones. CCI therefore believed this distinction separated the organized (where Timex was present) from the unorganized market for watches. On this basis, CCI defined the relevant market as the "*market for manufacture and sale of wrist watches in the organized watch industry in India.*" While CCI acknowledged that wrist watches may be further categorized into three segments based on price *i.e.*, (a) mass-price segment for primarily unorganized manufacturers; (b) mid-segment (that included Titan, Citizen and Timex); and (c) premium segment which included international players like Rolex, Tagheuer, Rado *etc*.. However, CCI observed that as Timex (along with its competitors) existed in all three categories, competitive assessment would not undergo any material change, even if the market was not segregated under each of these segments.

On dominance, CCI observed that Titan admittedly held the largest market share at 60% and Timex could not thus be 'dominant.' Whilst CCI held that absent dominance, no case of abuse may be sustained against Timex, it nevertheless examined the allegations of abuse of dominance against Timex.

Against allegations of Timex having initiated sham litigation against the Informant by instituting (and obtaining an *ex parte* injunction in) a suit for trademark infringement, CCI observed that Timex had initiated similar suits against several others, including around the same time, and was able to seize thousands of counterfeit goods. As holders of intellectual property have the right to take reasonable actions to protect their right, such action cannot be said to violate the provisions of the Act.

In relation to allegations of RPM, CCI observed that an isolated email to the Informant by Timex asking to control discounts without any evidence of follow on adverse action (from the record CCI observed that Timex continued to supply to the Informant even after the said email) cannot qualify as an RPM. CCI also observed that for RPM to be effective, it has to be imposed on all online retailers. Admittedly, Timex supplied to other online platforms that offered greater discounts. CCI additionally noted that in order for RPM to be anti-competitive, it needed to result in an AAEC. To the extent that Timex did not have sufficient market, was just one of several watch manufacturers and did not enforce RPM across the distribution channel, it could not be said to have caused an AAEC. Accordingly, the allegation of RPM could not be sustained.

Placing reliance on **Ashish Ahuja v. Snapdeal.com**[17], CCI observed that market players have a right to deny after sale or warranty services to discourage counterfeit good- that cannot be termed anti competitive. CCI equally dismissed the charge that Timex's refusal to deal with the Informant was an anti-competitive refusal to deal under Section 3(4) of the Act. CCI held that as (i) sales by Timex to the Informant was insignificant compared to Timex's total sales and (ii) revenue derived by the Informant from selling Timex watches was not significant, any refusal to deal could not be said to result in an AAEC, particularly when, as in this case, there existed reasonable apprehension of brand dilution by the Informant.

CCI Dismisses Allegations of Anticompetitive Conduct and Abuse of Dominance Against UP Housing & Development Board

On August 14, 2018, CCI dismissed information filed by Mr. DK Srivastava ('**Informant**') against UP Housing & Development Board ('**UPHDB**'). It was alleged that UPHDB arbitrarily charged higher prices for the sale of Lower Income Group ('**LIG**') residential flats *after* allotment and threatened to cancel allotment for failure to pay. Basis such threats, the Informant alleged that he was required to pay Goods and Services Tax ('**GST**') and restoration costs. Moreover, UPHDB had failed to deliver possession of the flat *per* the terms of the brochure. This, it was alleged, amounted to an abuse of dominance under Section 4 of the Act.

In order to define the relevant market, CCI noted that residential flat and commercial units were different in terms of end use and intent for which they are bought. CCI also distinguished between residential plots and residential flats in terms of end use. CCI observed that residential plots are purchased with intent to build and provide flexibility to purchasers with respect to floor plans, number of floors and space utilization. On the other hand, this kind of discretion is missing when it comes to purchasing a residential flat. In view of the above, CCI defined the relevant market as the market for "*provision of services of development and sale of residential flat*".

While defining the geographic market, CCI noted that the consumer purchasing a residential flat in Ghaziabad may not prefer purchasing a residential flat anywhere else due to several factors such as price, availability of transport facilities, proximity to the places of frequent commute and locational preferences. Further, it was observed that conditions for demand and supply may change between Noida and Delhi and thus, may not be considered substitutable. How-

17 Case No. 55 of 2017

ever, as CCI found conditions within Ghaziabad to be homogenous, it identified the relevant geographic market as Ghaziabad. Accordingly, the relevant market was defined as the "*market for provision of services of development and sale of residential flats in Ghaziabad*".

To determine whether UPHDB was dominant in the identified relevant market, CCI relied on its decision in **Shri Masood Raza and Uttar Pradesh Avas Avam Vikas Parishadi.**[18] In this decision, CCI recognized that while the Ghaziabad Development Authority ('**GDA**') also developed residential flats of varying size in Ghaziabad and allotted them to the public under various schemes; it had the exclusive power to undertake development work in Ghaziabad. It also noted that GDA was larger than UPHBD in size. Noting the presence of several large private developers of residential flats in Ghaziabad, CCI observed that consumers may not be said to be dependent on UPHDB alone for the provision of real estate services.

Absent dominance, CCI dismissed allegations pertaining abuse of dominance against UPHDB.

CCI Dismisses Complaint Against Shoppers Stop

By way of an order dated July 30, 2018, the CCI dismissed information received against Shoppers Stop Limited ('**SSL**') alleging a contravention of Section 3 of the Act and unfair trade practices.[19] The Informant was aggrieved by the requirement to meet a minimum purchase amount in order to successfully redeem a discount coupon issued on a previous purchase. It was further alleged that SSL failed to direct the Informant to a competent authority to address his grievance.

CCI held that the information was in the nature of an individual consumer dispute rather than a matter of competition concern and did not cause an adverse effect on competition. In arriving at its finding, CCI referred to its earlier decisions in **Sanjeev Pandey v. Mahindra & Mahindra**[20] and **Subash Yadav v. Force Limited**[21] in which it clarified that the scope of the Act is limited to curbing anti-competitive practices that have an adverse effect on competition, while the Consumer Protection Act, 1986 protects individual consumer interest against deficiencies in goods and services. On this basis, CCI held that the information did not make out a *prima facie* case against Shopper Stop and accordingly dismissed the information.

CCI Dismisses Swarna Properties' Complaint Against Vestas Wind Technology India Private Limited

On August 7, 2018, CCI dismissed information filed by Swarna Properties ('**SP**')–owner of a wind energy generator system in Karnataka against Vestas Wind Technology India Private Limited ('**Vestas**'). Vestas is engaged in the business of manufacture, sales, marketing and maintenance of wind power systems in India.

SP contended that Vestas made the supply of wind turbines equipment conditional upon executing an annual maintenance contract ('**AMC**') with Vestas. This exclusivity condition, SP alleged, resulted in a contravention of Section 3 and resulted in a denial of market access under Section 4 of the Act. It was also alleged that Vestas was using its dominant position in one market to enter into or protect other market in contravention of Section 4(2)(e) of the Act.

CCI noted that the generation of electricity using wind turbines, owing to their distinct way of functioning, cannot be substituted with any other form of power generating equipment. Accordingly, CCI defined the relevant market as the "*market for supply of wind turbines in India*". As there existed several players in the market, many of which had a greater or similar market share as Vestas, CCI concluded that Vestas was not in a dominant position. Absent dominance, CCI found no case of abuse of dominance may be said to exist.

CCI also noted that there existed no *prima facie* case for an anti-competitive tie-in arrangement or exclusive supply agreement. CCI noted that even if Vestas made the sale of wind turbines contingent on entering into an AMC with it, there existed several other suppliers of wind turbines. SP therefore had the choice to procure wind turbines from vendors that didn't require similar conditions to be satisfied. Noting that SP was restrained for a period of five years from procuring services or spare parts from other vendors, CCI held that SP had the additional option of terminating the agreement for non-performance of duties. As there existed several other vendors in the market, CCI held that SP was not precluded from switching to another vendor. Observing that vertical restrictions were not a *per se* contravention and having found no evidence of the agreement resulting in AAEC. CCI dismissed the information against Vestas.

18 Case No. 09 of 2018

19 Case No. 21 of 2018

20 Case No. 17 of 2012

21 Case No. 32 of 2012

Combination Decisions

CCI Approves Walmart's Acquisition of the Outstanding Shares of Flipkart

On August 08, 2018, CCI approved the proposed acquisition of 51% to 77% of outstanding shares of Flipkart Private Limited ('**Flipkart**') by Wal-Mart International Holdings, Inc. ('**Walmart**').[22] Walmart, which is part of the Walmart group, is present in India through its indirect wholly-owned subsidiary Walmart India Private Limited ('**Walmart India**'). Flipkart, on the other hand, is principally an investment holding company incorporated in Singapore with presence in India. Walmart and Flipkart are together referred to as '**Parties.**'

Walmart India is engaged in wholesale cash and carry of goods ('**B2B Sales**') operating: (i) 20 B2B Sales stores spread across nine states in India; and (ii) a B2B e-commerce platform. Both operate on a 'members-only' model. While Flipkart is also present in B2B Sales, unlike Walmart India, it (i) operates a marketplace based e-commerce platforms (**B2C Sales**); and (ii) other ancillary services such as payment gateway, unified payment interface, advertising services, information technology product related issues, *etc.*.

CCI noted that the presence of both Walmart India and Flipkart in overall B2B Sales or in any narrower segment was insufficient to raise competition concerns. The combined market share of the Parties was less than 5%, with Walmart India's market share being less than 0.5%. CCI also considered a narrower B2B Sales market on the basis of vertical segmentation. While Flipkart was relatively strong in the mobile and electronic market, Walmart's operations in this segment were insignificant. Operations of Walmart focused on groceries whereas Flipkart was not present in this market. While both were present in the market for lifestyle products, the combined value of both Parties' was low and relatively insignificant in comparison to the size of the markets. CCI did not distinguish between organized and unorganized B2B Sales as the market was found to be competitive on account of larger players such as Reliance Retail, Metro Cash and Carry, Amazon wholesale *etc.*.

In terms of the vertical overlap, CCI noted that both Walmart India and Flipkart were restricted under the foreign direct investment ('**FDI**') policy from participating in B2C Sales. In any event, it was noted that, while Flipkart offered online marketplace platform to facilitate B2C Sales, Walmart was not engaged in any such services. Accordingly, no vertical overlap existed.

CCI's order records that it had received representations against this transaction from traders and retailers relating to: (i) allegations of predatory pricing; (ii) concerns over compliance of FDI norms; (iii) concerns over preferential treatment to specified sellers in Flipkart's online marketplaces and (iv) concerns over impact of the transaction on employment, entrepreneurship, and retailing among other things. CCI noted that the majority of concerns raised had no nexus with competition law and were beyond CCI's jurisdiction. Against allegations of deep discounting and preferential treatment to select sellers that were within CCI's domain, CCI observed that Flipkart's discounting practice and preferential treatment to some of its retailers was not specific to, and did not result from the proposed combination under review. Clarifying the scope of regulation under Sections 5 and 6 of the Act, CCI opined these practices were unrelated to the proposed combination although CCI may examine these concerns under Sections 3(4) and 4 of the Act.

The retailers and traders have now appealed CCI's decision before NCLAT. NCLAT has directed Walmart and Flipkart to provide details of their business models in the relevant markets in India.

CCI Approves Acquisition of Alight HR Services India Private Limited by Wipro Limited

On August 3, 2018, CCI approved the proposed acquisition by Wipro Limited ('**Wipro**'/ '**Acquirer**') of Alight HR Services India Private Limited ('**Alight**'/ '**Target**').

Wipro operates in the Information Technology – Business Process Management ('**IT- BPM**') industry and provides: (a) Information Technology ('**IT**') products; (b) IT services; (c) Business Project Management ('**BPM**'); and (d) E-commerce. Further, Wipro's IT services include IT and IT enabled services such as digital strategy advisory, customer centric design, technology consulting. Alight, on the other hand, provides only BPM services to its overseas group entities and cloud deployment services.

CCI observed that as the market dynamics were unlikely to change further to the proposed combination, it is unlikely to result in an AAEC. The proposed combination was accordingly approved.

22 Combination Registration No. C-2018/05/571

CCI Approves Acquisition of Intelnet BPO Holdings Private Limited by Dutch Contact Centres B.V

On August 08, 2018, CCI approved the proposed acquisition of 100% of equity shares of Intelenet BPO Holdings Private Limited and Intelenet Global Services Private Limited (collectively, '**Targets**') by Dutch Contact Centres B.V ('**DCC**'/'**Acquirer**'). The proposed acquisition contemplates acquisition of shares in the Targets, both directly and indirectly, *i.e.* through the Acquirer's wholly owned subsidiary, Teleperformance Services India Private Limited. The Acquirer will also acquire group debentures and group loans of the Targets.

The Acquirer is engaged in the business of providing information technology and information technology enabled services, particularly, business process outsourcing ('**BPO**') services. The Targets are also engaged in the same business.

CCI identified overlaps in the market for provision of (a) information technology and information technology enabled services; and (b) BPO services. However, as the market shares of the parties were insignificant in both markets, the relevant market was left open. CCI concluded that the proposed combination will not result in an AAEC and thus, approved the transaction.

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Thomson Reuters' Emerging Markets M&A Legal Rankings, Q1 2018

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