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Aftermarkets – Recent Trends in CCI's Enforcement

Background

Antitrust regulators, including the Competition Commission of India ('CCI'), typically reserve the '*special responsibility*' of not distorting competition only for dominant enterprises. Enterprises that do not enjoy market power have little ability to behave independently of market forces and consequently, any exploitative or exclusionary conduct by them is expected to be corrected by market forces. Dominance is tested in a '*relevant market*', which is in essence the boundary within which a firm competes with other products and firms. This is what makes relevant market delineations perhaps the most crucial determinants that decide the outcome of most behavioral enquiries and merger clearances before CCI. In fact, a predictable relevant market regime directly translates into a greater degree of legal certainty and consequently, a more streamlined competition compliance by the industry.

There often exists a special kind of relevant market – usually termed as an '*aftermarket*' – for narrow goods or services that are complementary to a product or service, such as unique replacement parts of certain kinds of equipment, post warranty services or consumables specific to some primary product. Although the Competition Act, 2002 ('**Act**') does not provide any guidance on aftermarkets, CCI has analysed aftermarket concerns in many decisions so far – basing its analysis primarily on the United States Supreme Court's decision in **Eastman Kodak Company** *v.* **Image Technical Services Inc** ('**Kodak**').[1]

The most significant decision of CCI on aftermarkets was in **Shri Shamsher Kataria** *v.* **Honda Siel Cars India Ltd. & Ors**[2] ('**Autoparts Decision**'), where CCI had found fourteen car manufacturers to be dominant in the aftermarket for their own genuine spare parts and after-sale services, and thereby subjected these narrow '*aftermarkets*' to Section 4 jurisdiction of the Act. Equally, CCI also rightly rejected existance of aftermarkets in other sectors, such as market for bank loans[3], RO water purifiers[4] *etc.*, after carefuly examining these sectors through settled economic principles. CCI has also rightly refused to interfere with products sold within a retail outlet, finding that '*...relevant geographical market cannot be confined to the closed market inside the premises of multiplexes.*'[5]

CCI's extensive powers to impose significant penalties and remedies having far-reaching commercial implications make it imperative that it carries out a careful analysis of the existence of aftermarkets. '*False-positive*' decisions, especially in situations where the competition takes place at the broader level of primary products, could unncessarily regulate narrow complementary markets which may not have been intended to be within the purview of Section 4. In light of this background, we have analysed CCI's consistency in applying the necessary economic analysis for finding aftermarkets in the healthcare and automobiles sector.

The Necessary Economic Analysis

CCI's aftermarket analyses in most cases have relied on a 1991 decision of the U.S. Supreme Court in *Kodak,* in which, the U.S. Supreme Court found the customers of Kodak's photocopying machines to be locked-in with the enterprise once they purchased the machine. In *Kodak,* on account of high switching cost, the customers could be subject to unlawful tying and monopolization in the aftermarket consisting of Kodak's own after sales market. While *Kodak* assumes importance in any aftermarket analysis, an unquestioning reliance on it for defining narrow aftermarkets is in fact detached from the subsequent antitrust decisions in the U.S. itself. Since *Kodak,* the U.S. Courts have themselves defined aftermarkets primarily when there's clear evidence of a manufacturer changing its policies *after* locking in their customers.[6]

Once CCI defines an aftermarket, it uses it as a framework to review exploitative practices such as fairness of prices and contract conditions, parity of conduct with similarly placed customers and exclusionary practices such as denial of market access *etc.* That said, the most critical aspect in such an analyis is that the market for a primary product (such as a coffee machine) and that of complementary product (such as coffee capsules) is always economically distinct. Their closeness is largely a factual and economic assessment that's essential to any aftermarket analysis. For example, will every flat buyer who purchases a flat from a developer be locked in with that developer (as the minority view in a decision involving DLF Limited had suggested[7])?

1 Eastman Kodak Co. *v.* Image Technical Services, Inc., 504 U.S. 451 (1992)
2 Shri Shamsher Kataria *v.* Honda Siel Cars India Ltd. & Ors., Case No. 3 of 2011
3 Shri Pravahan Mohanty *v.* HDFC Bank Limited and Card Services Division of the HDFC Bank, Case No. 17 of 2010
4 Shri Amitabh *v.* M/s KENT RO Systems, Case No. 100 of 2014
5 Consumers Guidance Society Informant *v.* Hindustan Coca Cola Beverages Pvt. Ltd., Case No. UTPE 99/2009
6 Competition Issues in Aftermarkets–Note from the United States (https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/aftermarkets.pdf)
7 Belaire Owner's Association *v.* DLF Limited Haryana Urban Development Authority Department of Town and

Will every purchaser of an air purifier or a mobile phone be locked in with the enterprise selling these products?

The answer to these questions lies in an economic assessment of whether a small but significant increase in price of the complementary product (*i.e.*, the coffee capsules) will make the customer to switch a different primary product (*i.e.*, coffee machine) or dissuade the customer from buying the coffee machine that's only compatible with the more expensive capsules in the first place. In most of its decisions, CCI[8] has made it clear that for aftermarket analysis, it will take into account the quantum of the initial investment made by the purchaser, the ability of the customer to know how much they will spend on complementary items throughout the lifetime of the product (*i.e.*, '*whole life costing*' analysis) and the proportion of price of the complementary product to the primary product. To avoid arbitrary outcomes, it's pertinent to examine these factors in detail before adopting any aftermarket definition. That's because in most cases, anti-competitive conduct in a complementary market will deter potential buyers from purchasing the primary product from the exploiting manufacturer, or switch to another one with ease. Such practices will also be *auto-corrected* by potential reputational effects that the enterprise may face in the primary market. Indeed, customers today make purchasing decisions after evaluating extensive information available to them from various sources such as mobile applications, search engines, consumer forums, reviewing websites and so on. Adequate transparency in prices ensures that competition takes place at the combined level – and in such instances – the relevant market consists of a *unified systems market* comprising both, the primary and the complementary products.

CCI's Aftermarket Analysis in the Healthcare Sector & the Need for Deeper Economic Assessment at the Initiation Stage

Last month, CCI decided to investigate all hospitals in Delhi, particularly to see if the prices of syringes and other consumables sold to patients within the hospital premises are *unfair* ('**Hospital Investigation Decision**')[9]. In its preliminary analysis, CCI seems to suggest that regardless of a hospital's market power in the healthcare market, its in-patients could be '*locked-in*' within the hospital premises, giving the hospital an ability to behave independently of competitive forces. With this assumption, CCI seemed to suggest that all products made available to admitted patients on an urgent basis that do not involve any high degree of quality issue must be priced '*fairly*'. This preliminary decision raises some important questions that could potentially have far-reaching consequences on how the Act is applied to aftermarkets.

Although CCI's finding in the Hospital Investigation Decision are preliminary in nature, sector-wide orders of CCI like these merit an assessment of threshold questions such as an existence of aftermarkets at the initiation stage in some detail. The Hospital Investigation Decision could have possibly taken a different direction if CCI had instead examined whether patients once admitted into a hospital are really '*locked in*' in the traditional sense. For instance, the decision ought to have examined factors such as: (i) the extent of information of cost of consumables *etc.*, available to patients at the time of their admission; (ii) number of patients that opt to get admitted on basis of pre-packaged cost structures; (iii) level of simultaneity in customers' decision making; (iv) proportion that consumables form part of the total cost of treatments *etc.* These factors would determine if patients are really precluded from making an informed choice at the admission level; and if there are enough information barriers differentiating the primary market from the secondary one. Lack of robust analysis in preliminary findings, and a broad mandate to the Director General ('**DG**') to premise its investigation on existance of aftermarkets also dilutes the DG's role in carrying out this assessment independently, which may be persuaded to act on the broad market parameters laid down by CCI in its iniation order.

CCI's Aftermarket Analysis in the Automobile Sector & CCI's Extensive Application of the Autoparts Decision

Another recent decision of CCI on this subject is one in which CCI has suggested presence of an aftermarket, without analyzing it as such. Last year, CCI imposed a huge penalty on Hyundai India ('**HMIL**')[10] for implementing a '*Discount Control Mechanism*' on its dealers – which allowed HMIL to prescribe the maximum permissible discount that its distributors could offer to the customers. CCI found this restriction to stifle intra-brand competition and result in higher prices for the consumers.

By way of background, Section 3(4) of the Act prohibits 'resale price maintanence', *i.e.*, fixa-

Country Planning, State of Haryana (View of R. Prasad), Case No. 19 of 2010

8 Shri Shamsher Kataria *v.* Honda Siel Cars India Ltd. & Others, Case No. 3 of 2011

9 Vivek Sharma *v.* Becton Dickinson India(P) Ltd. and Ors., Case No. 77 of 2015 By way of disclosure, AZB & Partners is representing one of the opposite parties in this case.

10 Fix Enterprise Solution India Pvt. Ltd. *v.* Hyundai Motor India Limited, Case No. 36 & 82 of 2014

tion of a minimum price that a distributor could offer to its customers if such a restriction causes an adverse effect on competition ('**AAEC**') in India. CCI's own decisions clarify that in order for a resale price maintenance to cause an AAEC, the enterprise imposing that restriction must have some market power in a market. Naturally, this market power has to be assessed in relation to a market in which the enterprise competes with substitutible products (which in this case, should have been other car dealerships of all car manufacturers). In *Hyundai,* however, CCI sought to satisfy this requirement by defining the '*upstream market*' as the market for all passenger cars, but the '*downstream market*' as market for dealership and distribution of only Hyundai cars in India. This market definition that only comprised of Hyundai's dealerships was premised on the assumption that a consumer would visit a '*Hyundai dealer to test drive and purchase only a Hyundai car – as new Hyundai cars can only be purchased at a Hyundai showroom*').

CCI's Order in *Hyundai* does not explain how a customer's visit to a desired showroom cannot be a factor for adopting a market definition. Potential customers are not '*locked in*' within a car showroom. They incur no initial investment and face no exit barriers. The dealership would naturally face competition from competing car dealerships as well. CCI's reliance on its Autoparts Decision to support this market definition also appears to be misplaced. The aftermarket definition of genuine spare parts and after-sale services was primarily based on the level of initial investment made by car owners while purchasing a car, their inability to switch to competing spare part providers *etc.*[11] As explained above, these factors are not applicable to a new car in a showroom.

Notably, the National Company Appellate Tribunal ('**NCLAT**')[12] has very recently set aside *Hyundai* for defining the relevant market incorrectly. While this is a welcome decision, the NCLAT does not explain the real errors in CCI's market defintiion in *Hyundai,* or suggest the appropriate market in which this decision ought to have been analysed.

Conclusion

An inconsistent application of the economic tools necessary for finding aftermarkets could lead to opening up of copy-cat complaints, where for example, a dealership network of any one car manufacturer may be said to be dominant within itself. This has the potential of over-regulating sectors where competition may be thriving, something that the Act may not have originally contemplated. While CCI has, in the past, issued cogent and well-reasoned decisions wherein it refused to define aftermarkets within retail outlets, after-sale services of water purifiers *etc.*, clear guidelines from CCI exlaining its enforcement priorities in aftermarkets will assist the industry to strenghthen its competition compliance. As existence of aftermarkets largely depends on sectoral and product-related factors, CCI may also look to international guidance to see how other regulators examine these questions in similar markets.

Orders under Section 26(1)

CCI Directs Investigation Against Liquor Distributors in Uttar Pradesh for Alleged Discrimination in Procurement from Manufacturers of Country Liquor.[13]

On July 9, 2018, CCI directed an investigation against Flora and Fauna Housing & Land Developments Private Limited ('**OP 1**'), Patiala Kings Liquor Pvt. Ltd. ('**OP 2**'), Royal Beverages Pvt. Ltd. Ltd. ('**OP 3**'), Kiwi Wines And Beverages Pvt. Ltd. ('**OP 4**'), Chadha Holdings Pvt. Ltd. ('**OP 5**') and Government of Uttar Pradesh ('**OP 6**') (collectively, '**OPs**'), alleging *inter alia* discrimination in procurement of country liquor in violation of Section 3 and Section 4 of the Act. As per the information, OP 1 to OP 4 are controlled by the same parent holding company, *i.e.,* OP 5, which in turn is the holding company for the Chadha Group. OP 6 is the Government of the State of Uttar Pradesh which is responsible for framing policy for the manufacture, sale and distribution of liquor in the State of Uttar Pradesh under the powers granted by the United Provinces Excise Act, 1910 ('**UPE Act**'). It is also empowered to grant licenses under the UPE Act.

Starlight Bruchem Ltd. ('**Informant**') is engaged in the business of manufacturing and trading liquor and is present in the states of Uttar Pradesh, Madhya Pradesh, Punjab and Hary-

11 Although CCI did not analyse actual customer behavior or preferences, submission of car manufacturers and empirical evidence convinced CCI that automobile customer aren't able to carry out a sophisticated whole life *costing* analysis while purchasing a car on account of factors such as frequency of breakdown, degrees of equipment use, future fluctuations of price of spare parts, development of advances features. It also found that reputational concerns in the primary automobile market weren't sufficient enough to dissuade the OEMs from charging supra-competitive prices in the aftermarket.

12 Hyundai Motors India Ltd. *v.* Competition Commission of India and Ors., Competition Appeal No. 6 of 2017

13 Case No. 53 of 2017 (Order dated July 9, 2018)

ana among others. The Informant alleged that the OPs have been abusing their dominant position by following a non-transparent policy of procurement, based on an arrangement/understanding to buy from only certain manufacturers who belong to the same group, or from some 'favoured' manufacturers. Since manufacturers/ distillers cannot sell liquor directly to the retailer or end-consumer, such conduct of denial of market access to the other manufacturers from selling their products. This has resulted in severe losses for the other manufacturers. They also allege that OP 6 has framed a policy stipulating that a single wholesaler would be granted license in each zone of the State, without any safeguards to ensure that not all the wholesale licenses are with a single group. Further, the conditions for eligibility to apply for licenses were so restrictive that only a certain business group could apply for license, thus creating conditions whereby OP 5 group became a monopsony.

While assessing the allegations of the Informant, CCI noted that that there was no credible evidence on record to show the existence of any agreement amongst OP 1 to OP 4 in violation of Section 3 of the Act. In examining the allegations under Section 4, CCI delineated five relevant markets, namely: (i) market for procurement of country liquor from licensed manufacturers within the Special Meerut Zone in the State of Uttar Pradesh; (ii) market for procurement of country liquor from licensed manufacturers within the Lucknow Zone in the State of Uttar Pradesh; (iii) market for procurement of country liquor from licensed manufacturers within the Gorakhpur Zone in the State of Uttar Pradesh; (iv) market for procurement of country liquor from licensed manufacturers within the Agra Zone in the State of Uttar Pradesh; and (v) market for procurement of country liquor from licensed manufacturers within the Varanasi Zone in the State of Uttar Pradesh. In all such markets, CCI was of the *prima facie* view that OP 1 to OP 4 are dominant. CCI observed that OP 1 to OP 4 have been procuring country liquor from more than one distillery. However, significant percentage *i.e.*, around 25 to 55%, of the procurement by OP 1, OP 3 and OP 4 in this period was from two distilleries, namely, Wave Distilleries and Breweries Limited and Lords Distilleries Limited, which are group companies of OP 5.

CCI also noted several contradictions in the contentions put forward by the OPs. In addition, the facts of the case clearly demonstrated that procurement by each OP was not restricted by the zone to which the distilleries belonged.

Based on the above, CCI opined that the reasons given by the OPs appear to be an attempt to subvert the fact that procurement from various distillers/ manufacturers was being made in an arbitrary and discriminatory manner, thereby resulting in denial of market access to certain distillers/ manufacturers like the Informant. Given this, CCI was of a *prima facie* view that there was a violation of Section 4(2)(a)(i) and Section 4(2)(c) of the Act and directed an investigation into the matter.

Orders under Section 26(2)

CCI Dismisses Allegations of Price Fixing and Abuse of Dominance against Arthur Flury AG Switzerland and PPS International, Delhi.[14]

On August 27, 2018, CCI dismissed information filed by the Central Organisation for Railway Electrification ('**CORE**') under Section 19(1)(a) of the Act, alleging violations of Section 3 and 4 of the Act by PPS International, Delhi ('**PPS**'). CORE operates under the Ministry of Railways, Government of India and is concerned with railway electrification of the entire network of the Indian railways. To carry out its functions, CORE procures Short Neutral Section Assembly ('**SNS Assembly**'/ '**phase break**') from the authorised Indian distributors of Research Design and Standards Organisation ('**RDSO**'), an original equipment manufacturer namely, Arthur Flury AG Switzerland ('**Arthur**').

As per the information, PPS was alleged to have imposed unfair conditions and artificially increased the prices for sale of SNS Assembly in contravention of Section 4(2)(a)(i) and Section 4(2)(a)(ii) of the Act. It was also alleged that the price increase was pursuant to a concerted decision between Arthur and PPS, in violation of Section 3(3)(a) of the Act. CCI in its assessment at the outset dismissed allegations of violation of Section 3(3)(a) since Arthur (manufacturer) and PPS (distributor) were operating at different levels of the production chain in different markets and Section 3(3) is only applicable to concerted actions between competitors (enterprises active in the same market). As regards allegations of abuse of dominance, CCI identified the relevant market as the '*market for supply of SNS Assembly in India*' given the specific physical characteristics of SNS Assembly and the geographic scope of homogenous competitive conditions. In

14 Central Organisation for Railway Electrification v. M/s PPS International, Case No. 05 of 2018 (Order dated August 27, 2018)

the concerned market, CCI observed that PPS was a dominant enterprise since it was the only distributor for Arthur (and Arthur was the only RDSO approved original equipment manufacturer for SNS Assembly). However, as regards allegations of abuse, CCI observed that a case for violation of Section 4(2)(a)(i) was not made out. As regards excessive pricing, CCI analysed the prices charged by PPS over the period of 2006-2018 and observed that the price increase was not continuous and in fact decreased in 2016. For the above reasons, CCI dismissed the allegations of abuse of dominance as well.

CCI Dismisses Allegations of Abuse of Dominance against Nutritia International Pvt. Ltd.[15]

On August 28, 2018, CCI dismissed allegations of abuse of dominance against Nutritia International Pvt. Ltd. ('**Nutritia**') with respect to the failure of Nutritia to supply goods to Mr. Prabhakhar Pandey, a stockist for Nutritia's goods ('**Informant**').

The Informant filed the information before CCI against Nutritia alleging that Nutritia had abused its dominant position by ceasing its business operations with the Informant and by not supplying goods even though the Informant had already deposited an advance towards the procurement of goods from Nutritia. CCI initiated its assessment by delineating the relevant markets as '*(i) market for infant formula milk in India; (ii) market for baby food nutritional supplements in India; and (iii) market for protein based nutritional supplement products in India*', keeping in mind the business activities of Nutritia (protein based nutritional supplements, including '*Protinex*') and the geographic scope of homogenous competitive conditions. As regards Nutritia's dominance, CCI observed that Nestle was a market leader with 63% market share in the market for baby food in India and collectively held 83% market share, along with Gujarat Cooperative Milk Marketing Federation in this market (in 2017). It was further observed that Protinex too had numerous substitutes available in the market such as '*Horlicks Protein Plus*' *etc*. In light of the same CCI did not considered Nutritia to be dominant either in the baby food market or nutritional supplements market in India. In absence of dominance, CCI did not assess the allegations of abuse.

CCI Dismisses Allegations of Abuse of Dominance against Department of Agriculture and Farmers Welfare, Government of Haryana[16]

On August 30, 2018, CCI dismissed allegations of abuse of dominance against the Department of Agriculture and Farmers Welfare, Government of Haryana ('**DAFW**') with respect to qualification criteria provided by DAFW for the bidders in its tenders.

Mr. G. P. Konar filed the information before CCI against DAFW alleging that DAFW had abused its dominant position by putting unfair qualifying requirements in its tender floated in the month of April 2018 for outsourcing of soil testing, data entry on portal and printing of cards services under the Soil Health Card ('**SHC**') scheme of the Government of India. As per the information, the Government had provided that all the National Accreditation Board for Testing and Calibration Laboratories ('**NABL Laboratories**') would be eligible for participation in the tender. However, DAFW through the impugned requirements had essentially restricted eligibility to only those NABL Laboratories that could *inter alia,* (a) provide data entry services as well as printing services for SHCs, alongside soil testing services (without outsourcing); and (b) were not involved in any legal disputes with any Government in relation to a similar business activity. CCI initiated its assessment by clarifying that DAFW was an 'enterprise' for the purposes of the Act that was active in the '*market for provision of soil testing services in the Territory of India*'. However, CCI observed that DAFW did not enjoy any dominance in the concerned market, even though it was the implementing authority under the SHC scheme simply because numerous enterprises in the agriculture sector procured soil testing services and any service provider could switch between such procurers. In the absence of dominance, CCI did not assess the allegations of abuse of dominance. Lastly, CCI reiterated that it is the procurer's prerogative to determine tender conditions as per its requirements.

CCI Dismisses Allegations of Abuse of Dominance Against a Trading and Distribution Company of Mobile Handsets[17]

On October 4, 2018, CCI dismissed allegations of abuse of dominance against Fangs Technology Private Limited ('**OP 1**') and Vivo Communication Technology Company ('**OP 2**') with respect to certain clauses in a VIVO Distributorship Agreement ('**Agreement**') entered into by the OP 1

15 Mr. Prabhakar Pandey *v.* Nutricia International Private Limited, Case No. 28 of 2018 (Order dated August 28, 2018)

16 Mr. G. P. Konar *v.* Department of Agriculture and Farmers Welfare, Government of Haryana, Case No. 22 of 2018 (Order dated August 30, 2018)

17 Case No. 15 of 2018 (Order dated October 4, 2018)

with its distributors.

The distributors are members of Tamil Nadu Consumer Products Distributors Association ('**Informant**') which is registered under the Tamil Nadu Society Registration Act, 1975. The Informant pointed out several concerns with regards to the clauses of the Agreement, *inter alia* that the conditions imposed were unfair and unreasonable for the distributors, resulting in foreclosure of competition by creating barriers to new entrants. The Informant also alleged that the Agreement prohibited the distributors from doing business in Oppo and Honor brand of mobile phones. Thus, the Informant alleged that the conduct of the OPs was in violation of Section 3 (4) and Section 4 of the Act.

While assessing the allegations of abuse of dominance, CCI defined the relevant market as 'market for smartphones in India'. Placing reliance on the GFK Report ('**Report**'), prepared by GfK SE (Germany's largest market research institute) for the year 2017-18, it was observed that the market for smartphones in India is highly competitive with several players. Moreover, the Report indicated that the brand share of Vivo in the Indian market declined from 14.4% to 12.1% during this period. Additionally, CCI observed that other competitors in the market such as Samsung and Xiaomi held close to 33% and 16.6% respectively. As a result, CCI opined that OP 1 is not dominant in the relevant market. In the absence of dominance, no case can be made against OP 1 in violation of Section 4 of the Act.

With regard to the allegation of resale price maintenance ('**RPM**') under provisions of Section 3(4) of the Act, CCI observed that the Informant had not submitted any evidence to prove that OP 1 has imposed RPM on the Informant. CCI also observed that there exists high inter-brand competition in the smartphone market in India. On this basis, CCI held that OP 1 does not have the significant market power required to impose anti-competitive vertical restrictions. In addition, CCI opined that the restriction imposed by the Agreement on doing business with Oppo and Honor was justified on the ground that it was to avoid leakage of intellectual property of Vivo. CCI also justified some of the other contentious clauses of the Agreement as being reasonable restrictions imposed by OP 1. Therefore, CCI ordered the matter to be closed under Section 26(2) of the Act.

Orders under Section 27

CCI *Suo Motu* Imposes Penalty on Geep Industries (India) Pvt. Ltd., for Participating in a Cartel, Concerning Institutional Sales of Zinc Carbon Dry-Cell Batteries[18]

On August 30, 2018, CCI imposed a penalty on Geep Industries (India) Pvt. Ltd. ('**Geep**') and Panasonic Energy India Co. Ltd. ('**Panasonic India**') for participating in a cartel concerning institutional sales of zinc carbon dry-cell batteries, for the period from October 01, 2010 to May 30, 2016. Panasonic India was a contract manufacturer of zinc carbon dry-cell batteries for Geep. CCI directed an investigation into the matter by the Director General ('**DG**') pursuant to a leniency application filed by Panasonic Corporation, Japan ('**Panasonic Japan**') on behalf of itself and its Indian subsidiary, Panasonic India (including the Directors, officers and employees). Notably, Panasonic in the past as well had been party to a cartel concerning zinc carbon dry-cell batteries (Panasonic was granted 100% immunity from penalty, for disclosing the cartel and also for providing vital evidence to the CCI). As per the Act, any member of a cartel can file a leniency application with the CCI, (at any time prior to the DG submitting its investigation report with the CCI) seeking immunity from penalty in exchange for vital information and evidence of substantial value as regards the existence of the cartel, its members, duration *etc*.

At the outset, CCI clarified that it did not err in identifying Panasonic Japan as an opposite party while directing and investigation into the matter, as it was in fact Panasonic Japan that had filed the leniency application with CCI. Moreover, in any case, DG had not made any observation as regards Panasonic Japan in its investigation report. On merits, CCI considered the provisions of the product share agreement executed between Geep and Panasonic India pursuant to which Geep was not to '*take any steps which [were] detrimental to [Panasonic India's] market interests particularly with respect to the market prices which [were to] be reviewed and maintained at agreed levels from time to time*'. As per CCI, such clauses inherently impeded competition between two competitors such as Geep and Panasonic India. Thereafter, CCI also clarified that even unilateral dissemination of information (from Panasonic India to Geep) was sufficient for Geep's liability in violation of Section 3(3). As per CCI, Geep could have refused to enter into any

18 In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India *v*. Panasonic Corporation, Japan & Others, Case No. 02 of 2017 (Order dated August 30, 2018)

such agreements with such anti-competitive clause (as described above). Further, irrespective of the fact that Geep may not be sharing its strategic market information with Panasonic India, it was aware of Panasonic India's existing cartel with other battery manufacturers and chose to maintain Market Operating Price ('**MOP**') co-ordination in line with the prices as determined by Panasonic's existing cartel. DG, in its investigation, also relied on inculpatory evidence comprising e-mail communications and statements of representatives of Panasonic India and Geep.

CCI imposed a penalty of approximately ₹74 crore (approx. US$10 million) (1.5 times the profit for each year of the continuation of the cartel) on Panasonic and a penalty of approx. ₹10 lakhs (approx. US$12,000) (4% of the turnover for each year of the continuance of the cartel) on Geep. However, in consideration of the fact that Panasonic Japan had filed a leniency application on behalf of itself and Panasonic India (including their employees), disclosing vital information (including evidence on the *modus operandi* of the cartel) for CCI to form a *prima facie* opinion regarding existence of the cartel, CCI granted Panasonic a 100% penalty reduction.

CCI Fines Film Associations Once Again[19]

On August 30, 2018, CCI imposed a penalty on Karnataka Film Chamber of Commerce ('**KFCC**'), Kannada Okkuta ('**Okkuta**') and their officials for indulging in practices that were in violation of Section 3(1) and Section 3(3)(b) of the Act.

The information was filed by Mr. G Krishna Murthy, a former member of KFCC ('**Informant**'). As per the information, the Informant is engaged in the business of production and distribution of films in Karnataka and KFCC is a society of producers, directors, technical staff, distributors and exhibitors of Kannada films in the State of Karnataka and Okkuta is an unregistered organization formed for the protection of Kannada language and culture. The Informant had alleged that KFCC and Okkuta had been consistently obstructing him from exhibiting and distributing, Tamil films namely, '*Yennai Aridhal*' and '*Sathyadev IPS*' (dubbed in Kannada) in the State of Karnataka. Further, KFCC and Okkuta had also threatened the Informant through social media and newspaper interviews, of retributive actions in the event that the films were released in theatres. In order to make his case, the Informant relied on CCI's decision in **Kannada Grahakara Koota and Anr. *v.* Karnataka Film Chamber of Commerce**[20], penalizing KFCC for indulging in similar activities. The Informant also relied on the Supreme Court's order in **Competition Commission of India *v.* Co-ordinated Committee of Artists and Technicians of W.B. Film and Television and Ors.**[21] that upheld CCI's penalty on an organization analogous to KFCC, based out of West Bengal, for indulging in anti-competitive activities similar to the ones that were impugned in the information. Based on its *prima facie* opinion of a violation, CCI directed a the DG to investigate the matter through an order dated September 14, 2017 and the DG submitted a detailed investigation report ('**IR**') to CCI on April 04, 2018.

In its decision, CCI relied on various social media statements made by KFCC and Okkuta, including through the medium of Twitter, YouTube, statements of officials of KFCC and Okkuta, third party statements, and other evidence adduced by the DG to determine that KFCC and Okkuta had been making incendiary remarks directed towards the films dubbed by the information. Based on the same, CCI was of the opinion that KFCC, Okkuta and their officials had been acting in agreement (tacit) with the objective of restricting the distribution and exhibition of dubbed films in Karnataka. CCI further noted that such conduct was anti-competitive, as it reduced consumer choice and created entry barriers for films dubbed in languages other than Kannada.

More specifically, CCI relied on the fact that KFCC and Okkuta officials had organized a press meet right before the release date of '*Sathyadev IPS*', with the intention of hampering the release of the Informant's film. In this regard, CCI rejected the contention that the purpose of the press meet was not as was recorded in the IR, and observed that in such cases the general nature of press meets needs to be pierced through to see the purpose behind them. As per CCI, this press meet was the 'connecting link' that showed the unity of cause and a meeting of minds of KFCC and Okkuta officials, as was required under Section 3(3) of the Act.

CCI also rejected KFCC's contention that the ban on dubbed films was justified in order to protect Kannada language and literature and to ensure livelihood for artists active in Kannada film industry. As per CCI, irrespective the cause, the impugned activity of banning and obstructing the release of dubbed films within Karnataka was in violation of Section 3(1) and Section 3(3)(b) of the Act. CCI reiterated that the presumption of AAEC under Section 3(3) was rebuttable, and observed that KFCC had failed to provide any justifiable basis for the impugned activities. Additionally, based on the abovementioned observations, CCI also concluded that

19 Mr. G. Krishnamurthy *v.* Karnataka Film Chamber of Commerce (KFCC) & Others, Case No. 42 of 2017 (Order date August 30, 2018)

20 Kannada Grahakara Koota and Anr. *v.* Karnatake Film Chamber of Commerce, Case No. 58 of 2012 (Order dated July 27, 2015)

21 Competition Commission of India *v.* Co-ordinated Committee of Artists and Technicians of W.B. Film and Television and Ors., Civil Appeal No. 6691/2014

KFCC had also been continuously violating the directions of CCI as specified in **Kannada Grahakara Koota and Anr. *v.* Karnataka Film Chamber of Commerce**[22] by way of its order dated July 27, 2015.

In its assessment of the penalty to be levied, CCI considered aggravating factors such as the fact that KFCC had consistently been violating the provisions of the Act and had been penalized by CCI on numerous occasions.[23] CCI also noted the fact that KFCC had failed in bringing out a competition compliance manual in abrogation of CCI's order in **Kannada Grahakara Koota and Anr. *v.* Karnataka Film Chamber of Commerce.**[24] Accordingly, CCI imposed a penalty at 10% of the average of the income of KFCC, Okkuta and their officials for the past three years, respectively and also directed KFCC to bring out a competition compliance manual.

CCI Imposes Penalty on Members of the 'Ethanol' Cartel[25]

On September 18, 2018, CCI imposed a penalty on various sugar mills[26] and sugar mills trade associations (namely Indian Sugar Mills Association ('**INSA**'), National Federation of Cooperative Sugar Factories Ltd. ('**NFCSF**') and Ethanol Manufacturers Association of India ('**EMAI**')), operating in Uttar Pradesh, Gujarat and Andhra Pradesh, for rigging bids in relation to tenders floated by Public Sector Oil Marketing Companies[27] ('**PSU OMCS**'/ '**OMCS**'), for procurement of anhydrous alcohol ('**Ethanol**') pertaining to 110 depots of the OMCs, spread across the country. The tenders were floated pursuant to the Ethanol Blended Petrol Programme ('**EBP Programme**') that was initiated by the Government of India.

The violations came to light pursuant to two separate complaints filed by India Glycol Ltd. and Ester India Chemicals Ltd., respectively ('**Informants**'). Notably, the Informants had also alleged that even the act of issuing a joint tender for the purposes of procuring Ethanol, by the PSU OMCs was in violation of Section 3(1) and 3(3)(a) of the Act, in light of it being an agreement amongst horizontal players. CCI, based on its *prima facie* view of violations having taken place, clubbed the complaints together and directed the DG to investigate the allegations raised in the complained, through an order dated May 27, 2013 ('**DG Order**').[28] Pursuant to its investigation, DG submitted an investigation report to CCI, upholding the allegations raised in the complaints, however, NFCSF, PSU OMCs and Kisan Sahkari Chini Mills Ltd. were exonerated of the allegations.

Allegations against PSU OMCS

CCI in its assessment of the investigation report, at the outset, confirmed DG's conclusion on the lack of culpability of PSU OMCs. In its opinion, CCI observed that the Government was a majority shareholder in each of the PSU OMCs. CCI primarily relied on the various efficiencies that resulted from the issuance of a joint tender. As per CCI's observation, the issuance of joint tender by the PSU OMCs prevented wastage of money, time and resources that otherwise would have been spent, in the event that separate tenders would have been issued. More specifically, CCI observed that a joint tender ensured that the limited quantity of available Ethanol was equitably distributed among the OMCs. This was essential considering that in the event of inequitable distribution, certain OMCs would have been forced to procure Ethanol at higher prices (given the excessive demand and decreased availability of Ethanol). An inequitable distribution of Ethanol would also have resulted in potential anti-competitive effects, whereby OMCs with Ethanol may have sold Ethanol-blended petrol to the exclusion of the OMCs without Ethanol. Lastly, CCI reaffirmed the scheme of Section 3(3) of the Act, to the extent that it only raised a rebuttable presumption of AAEC that may be sufficiently offset by demonstrable efficiencies *etc*.

22 Kannada Grahakara Koota and Anr. *v.* Karnatake Film Chamber of Commerce, Case No. 58 of 2012 (Order dated July 27, 2015)

23 Case Nos. 25, 41, 45, 47, 48 of 2010; Case No. 56 of 2010 and Case Nos. 56 and 71 of 2011

24 Kannada Grahakara Koota and Anr. *v.* Karnatake Film Chamber of Commerce, Case No. 58 of 2012 (Order dated July 27, 2015)

25 India Glycols Limited *v.* Indian Sugar Mills Association & Ors., Case No. 21 of 2013; Ester India Chemicals Limited *v.* Bajaj Hindusthan Limited & Ors., Case No. 29 of 2013; Jubilant Life Sciences Limited *v.* Bharat Petroleum Corporation Limited & Ors., Case No. 36 of 2013; A B Sugars Limited *v.* Indian Sugar Mills Association & Ors., Case No. 47 of 2013; Wave Distilleries and Breweries Limited *v.* Indian Sugar Mills Association & Ors., Case No. 48 of 2013; and Lords Distillery Limited *v.* Indian Sugar Mills Association & Ors., Case No. 49 of 2013 (through common Order dated September 18, 2018)

26 Sahakari Khand Udyog Mandal Ltd., Shree Ganesh Khand Udyong Mandali Ltd., Shri Kamrej Vibhag Sahaari khand Udyong Mandali Ltd., Shree Mahuva Pradesh Sahakari Khand Udyog Mandali Ltd., The Andhra Sugars Ltd., The Sarvarya Sugars Ltd., Bajaj Hindusthan Ltd, Triveni Engineering Industries Ltd., Simbhaoli Sugars Ltd., Avadh Sugar & Energy Ltd., Dhampur Sugar Mills Ltd., Balrampur Chini Mills Ltd., Mawana Sugars Ltd., KM Sugar Mills Ltd., Uttam Sugar Mills Ltd., Dalmia Bharat Sugar & Industries Ltd.., Seksaria Biswan Sugar Factory Ltd., Sir Shadi Lal Enterprises Ltd.

27 Indian Oil Corporation Ltd., Bharat Petroleum Corporation Ltd. and Hindustan Petroleum Corporation Ltd.

28 Subsequently, Case Nos. 36 of 2013, 47 of 2013, 48 of 2013 and 49 of 2013 were also clubbed with the ongoing DG investigation.

Allegations against Sugar Mills

As regards the allegations of bid rigging against the sugar mills situated in Uttar Pradesh and the sugar mills trade associations, CCI at the outset, rejected preliminary objections regarding DG's jurisdiction to investigate sugar mills that were not specifically named as 'Opposite Parties' in the complaints (sugar mills situated outside Uttar Pradesh). As per CCI, irrespective of the above, details regarding such sugar mills were specified in the DG Order, and the DG Order was not limited to only the state of Uttar Pradesh in its scope.

On bid rigging, CCI observed that the selection of suppliers was based on the Basic Price (ex- factory) of Ethanol and the Net Deliverable Cost ('**NDC**') that was quoted by each bidder. NDC comprised of Basic Price along with tax and freight charges. In order to determine the prospective supplier, NDCs were to be compared to a benchmark price that was set by the OMCs, post closing of the bid, for each location after considering the landed cost of motor spirit, excise duty and cost of Ethanol blending.

As regards bidders situated in Uttar Pradesh, CCI was of the opinion that the bidders had quoted similar or narrowly distinguishable bids for most of the depots, in terms of both the basic price as well as the NDC. In its assessment, CCI rejected bidders' contention that there was no collusion, considering that similarity in bids was limited to only few of the 110 depots within the tender. As per the CCI, this was because bidders were not competing for all the depots and were largely concentrated to the depots located near their respective distillery, and therefore, the bidders' conduct was not to be judged on a pan-India basis. CCI further noted that the quantity quoted by the bidders matched the total required quantity in most of the depots. As regards bidders situated in Gujarat, and Andhra Pradesh, CCI recorded similar observations and further observed that similarities in bids up to decimal figures (basic price and NDC) could not be an outcome of price discovered through a competitive bidding process. In the end, it noted that although price parallelism *per se* did not amount to bid rigging, however, it may be considered as such, in the absence of any justifiable explanation for the bid quotations being same or similar in most of the cases. CCI also reiterated its observation that generally in cases involving cartels, documentary evidence is seldom available and investigating agencies rely largely on circumstantial evidence to deduce the existence of collusion and in the instant case, circumstantial evidence was enough for CCI to clearly establish the element of collusion.

Allegations against Sugar Mills Trading Association

Further, CCI assessed the role of ISMA and EMAI in facilitating collusions between the sugar mills through various meetings that were conducted with sugar mills at the time when tenders were released by PSU OMCs. It was noted by CCI that ISMA had attempted to conceal the fact of the meetings from CCI, and its officials failed to provide any justifiable reasons for organising such meetings. CCI further observed that the meetings also included Bajaj Hindusthaan ('**Bajaj**'), the largest Ethanol manufacturer, even though Bajaj was not a member of ISMA. Moreover, officials of ISMA had been in constant touch with officials of sugar mill manufacturers. EMAI, on the other hand had also conducted meetings with its member sugar mills after the tenders had been released. Based on the above, CCI concluded that ISMA and EMAI had facilitated collusion in violation of Section 3(1), 3(3)(a) & 3(3)(b) and 3(1) & (3)(3)(a) of the Act, respectively.

In light of the above, CCI imposed a penalty of approx. ₹37 crore (approx. US$ 5 million) on the sugar mills, computed at 7% of their relevant turnover of the preceding three financial years and approx. ₹50 lacs (approx. US$ 65,000) on ISMA and EMAI computed at 10% of their average receipts of the preceding three years.

CCI Imposes Penalty on Esaote S.p.A and Esaote Asia Pacific Diagnostic Private Limited[29]

On September 27, 2018, CCI (by a majority of two out of three members) passed an order under Section 27 of the Act and imposed a penalty on Esaote S.p.A and Esaote Asia Pacific Diagnostic Pvt. Ltd. ('**EAPD**') (collectively, '**Esaote**'), for contravention of Section 4 of the Act.

The information was filed by M/s House of Diagnostics LLP ('**HoD**'), engaged in the business of medical diagnostics and diagnostic imaging services. The allegations of HoD pertained to the purchase of three 'Dedicated Standing/ Tilting MRI machines' manufactured by Esaote ('**G-scan Machines**') for HoD's diagnostic centers. It was alleged that Esaote was dominant in the defined market and had abused its dominance as: (i) Esaote misled HoD that new machines were being supplied to it; (ii) acted unfairly by refusing to supply 'See through Perforated RF Cage' and 'Head Coils' to HoD; (iii) insisted that the Comprehensive Maintenance Contract ('**CMC**') was to be paid for each machine supplied; and (iv) limited the provision of services in the after sale market and denied market access to third party service providers.

CCI after considering the information was of the view that a *prima facie* case of contra-

29 Case No. 9 of 2016 (Order dated September 27, 2018)

vention of the provisions of Section 4 of the Act by Esaote was made out. Therefore, it passed an order under Section 26(1) of the Act, directing the DG to investigate the matter and submit its report to CCI ('**DG Report**'). The DG Report came to following conclusions: (i) the relevant market was found to be the market for 'Dedicated Standing/ Tilting MRI machines in India'; (ii) Esaote was dominant in the market for 'Dedicated Standing/ Tilting MRI machines in India'; and (iii) Esaote abused its dominance in the defined market.

In its analysis, CCI observed that G-scan Machines are a distinct product that can tilt the patient up to 90 degrees which is not possible in conventional supine MRI machines. It was also observed that conventional MRI machines can scan the whole body of a patient whereas the dedicated standing/ tilting MRI is meant specifically for joint and spines. In addition, the fact that there are diagnostic centers which have both types of MRI machines indicate that the products are distinct. Therefore, CCI found the relevant market to be the 'market for dedicated standing/tilting MRI machines in India' ('**Relevant Market**'). Further, CCI found Esaote to be dominant in the Relevant Market as Esaote had patent rights over its G-scan Machines and due to the absence of other companies who manufacture such machines in the Indian market, Esaote is able to operate independently of competitive forces.

CCI observed that the G-scan Machines supplied to HoD were not performing to the level as promised by Esaote and were more than a year old. CCI also held that Esaote acted unfairly by refusing to supply 'See through Perforated RF Cage' and 'Head Coils' to HoD despite HoD being promised these products by way of email correspondence.

On a reading of the relevant purchase order, CCI found Esaote to have abused its dominance by insisting that the CMC was to be paid for each machine. Further, the exclusive rights given to EAPD for supply of spare parts and for providing after sales services for G-scan Machines in India limited the provision of services in the after sale market and denied market access to third party service providers. Based on the above, CCI found Esaote to have abused its dominance under Section 4 of the Act and imposed a penalty of ₹9.33 lakhs while also directing Esaote to 'cease and desist' from the infringing conduct.

The CCI Chairperson wholly disagreed with the majority's view on the delineation of the Relevant Market. The dissent note observes that the market cannot be narrowed to standing/ tilting MRI machines alone as any market delineation would have to necessarily include all MRI machines. Once the market is defined in this manner, the behavior of Esaote stands constrained by the presence of many other players as Esaote is a small player in the market of all MRI machines. Therefore, there was no question of dominance or abuse of dominance.

Combination Orders

CCI Approves the Acquisition by Tata Steel Limited of Bhushan Power and Steel Limited[30]

On August 6, 2018, CCI approved the acquisition of up to 100% of the total issued and paid up share capital of Bhushan Power and Steel Limited ('**BPSL**') by Tata Steel Limited. ('**TSL**'). The combination was proposed pursuant to proceedings under Insolvency and Bankruptcy Code, 2017 ('**IBC**') that BPSL had been subject to ('**Proposed Combination**'). TSL and BPSL are collectively referred to as '**Parties**'.

TSL is a public limited company engaged in integral steel manufacturing operations, ranging from mining to steel-making and further downstream processing. Similarly, BPSL is also engaged in steel manufacturing operations, including downstream processing of flat carbon steel products as cold rolled sheets and coils, surface coated products, tubes and pipes and alloy based long steel products, *etc*. CCI observed that TSL's annual crude steel capacity across India is nearly 18.6 million ton per annum ('**MTPA**') and that of BPSL is 2.30 MTPA.

In consideration of the fact that steel making process involves various steps and the finished products obtained pursuant to each step could also be sold in the market, CCI identified the following overlapping product segments between TSL and BPSL:

i. Hat rolled coils ('**HR-CS**') and plates ('**HR-P**') (together '**HR-CSP**');
ii. Cold rolled coils and sheets ('**CR-CS**');
iii. Surface coated products ('**SCP**') (including galvanized products ('**GP**') and colour coated products ('**CCP**')); and
iv. Flat steel tubes and pipes ('**T&P**') (including precision and non-precision T&Ps).

(collectively '**Identified Overlaps**')

30 Combination Registration No. C-2018/07/582

In identifying the abovementioned product segments as distinct from each other, CCI relied on the fact that HR-CSP, CR-CS, SCP and T&P differ on the basis of technical characteristics, intended use, price levels, *etc.* However, CCI did not define the exact relevant market in consideration of the fact that the Proposed Combination was not likely to give rise to AAEC regardless of how the relevant market was defined.

For its assessment of the competitive effects of the combination, CCI considered market share data in terms of installed production capacity, gross production, production for sale, and domestic sales. CCI noted that the combination was not likely to cause AAEC in any of the Identified Overlaps since the post combination market shares of TSL and BPSL in each of the Identified Overlaps would be in a range of 20%–30% with an insignificant increment of 0-5% Even in certain Identified Overlaps such as CR-CS, GP and CCP, where the increment in market share was 5-10%, CCI noted that the combined market share was in the range of 20%–30% and that the parties would continue to compete with several large and significant competitors such as JSW, Essar and SAIL *etc.* CCI also took into consideration the fact that the Parties' competitors in the Identified Overlaps had significant unutilized production capacity, and such competitors could increase their production, if required, thereby impeding any attempts of the Parties at capturing the market. In the GP segment, CCI also observed that imports constituted 15%–20% of the total domestic sales and therefore exerted considerable competitive constraint on the Parties. CCI also observed that Parties were also present in the markets for pig iron, sponge iron and alloy billets although the Parties either had limited presence in the domestic market, or produced qualitatively distinguishable products, such as basic pig iron (BPSL) and foundry pig iron (TSL). Accordingly, as per CCI, it was unlikely that the Proposed Combination would have adversely impacted the market.

CCI Approves the Acquisition of 21 Century Fox by The Walt Disney Company[31]

On August 10, 2018, CCI approved the acquisition of Twenty-First Century Fox ('**21CF**') by The Walt Disney Company ('**TWDC**') (TWDC and 21CF are collectively referred to as '**Parties**'). Notably, 21CF's news, sports, broadcast businesses, including *inter alia* Fox News Channel, Fox Business Network, and certain other assets ('**Separated Assets**') were to remain with 21CF pursuant to the Proposed Combination.

For the purposes of its assessment, CCI identified the following overlapping product segments between TWDC and 21CF ('**Identified Overlaps**') in India and analysed the competitive scenario in each overlapping segment as follows and concluded that the Proposed Combination would not lead to AAEC in any of the Identified Overlaps.

i. *Production and supply of films to third-party distributors and exhibitors for theatrical release in India*: CCI observed that this segment could be further sub-segmented on linguistic basis, however, it did not go to the extent of defining the exact relevant market. CCI observed that the combined market share of the Parties (in terms of gross box office receipt) had reduced from 60%–65% in 2016 to 30%–35% in 2017 for English films, and to 15%–20% in 2017 from 35%–40% in 2016 for Bollywood films. In this regard CCI observed the hit-driven nature of this segment. It also considered Parties' market share in terms of top 5 grossing films across 15 years, which was 20%–25%, and at par with Warner Bros, a significant player in this market. CCI also noted that Parties had insignificant market share at 0-5% for 2017 in the sub-segment of regional films. Further, the Parties also faced significant competitive constraints from existing large competitors.

ii. *Business of licensing of audio-visual content in India*: CCI observed that Parties' activities overlapped in the sub-segments of film-content rights, sports-content rights and non-film and non-sports rights, although, it did not define the exact relevant market. CCI observed that the Parties did not have significant business activities in these sub-segments, and TWDC at the moment was not active in the sub-segment of sports-content rights.

iii. *Business of operation and wholesale supply of TV channels*: CCI observed that Parties' activities overlapped in the sub-segments of films, kids, infotainment & Lifestyle, sports, Hindi general entertainment channels ('**GEC**'), English GEC and Regional GEC, and music. CCI noted that in the sub-segments of films, infotainment & lifestyle, kids, Hindi GEC, and Regional GEC, the combined market share of the Parties was in the range of 25%–35% and, further, in the sub-segments of music, English GEC, the market share was even lower and in the range of 0-5% and 15%–20%, respectively. It was further observed by the CCI, that in all these markets, the Parties would continue to face substantial competitive constraints from significant players.

31 Combination Regulations C-2018/07/582

iv. *Retail supply of Audio Visual Content in India*: While assessing this segment, CCI observed that the Parties' competed in the segment of supply of audio-visual content in India through over-the-top applications ('**OTT**') with a combined market share of 30%–35%, but that TWDC only had a negligible presence. Further, CCI noted that the concerned segment was marked by the presence of numerous players such as Amazon Prime, Netflix *etc.* and therefore the Parties would remain competitively constrained.

v. *Supply of advertising airtime on TV channels in India*: CCI observed that advertisements were not genre specific and that targets of advertisements (viewers) were largely genre agnostic. CCI observed that 21CF had a market share of 20%–25% but TWDC had a much smaller share and, therefore, the Proposed Combination would have resulted in only an insignificant increment in market shares.

vi. *Supply of consumer products*: CCI observed that the Parties were active in 'character merchandising' only by licensing of intellectual property ('**IP**'), and that the combined market share of the Parties was insignificant in the segment.

vii. *Licensing of Music rights in India:* CCI observed that both TWDC and 21CF had only insignificant market share in this segment.

viii. *Licensing of Publication Rights in India:* CCI observed that both TWDC and 21CF license their intellectual property to third-party publishers who published non-academic books and magazines. It was observed that the Parties had insignificant market share in this segment.

ix. *Interactive Media in India:* CCI observed that interactive media is a means of actively engaging with the customers by providing an interactive form of entertainment, which includes games, digital media *etc.* and the Parties were active in this segment through licensing of IP. However, the market share of the Parties was insignificant in this segment.

National Company Law Appellate Tribunal

NCLAT Sets Aside CCI's First Ever Order on Resale Price Maintenance

On September 19, 2018, the NCLAT set aside an order of CCI against Hyundai Motor India Limited ('**Hyundai**'). CCI had imposed a penalty of ₹87 crores (approximately US$12 million) on Hyundai for violation of the 'resale price maintenance' ('**RPM**') and 'tie-in' provisions of the Act. CCI had decided that (i) by setting and implementing a 'Discount Control Mechanism' on its dealers, Hyundai had implemented an RPM, and (ii) by mandating its dealers to use recommended lubricants ('**tie-in agreements**'), Hyundai had implemented a tie-in agreement ('**CCI Order**').[32]

NCLAT in its assessment did not discuss CCI's substantive findings against Hyundai on RPM and tie-in agreements in detail. CCI in its assessment had identified two relevant markets, namely (i) '*upstream market of inter-brand sale of passenger cars in India*' ('**Upstream RM**') and (ii) '*the downstream market for the dealership and distribution of Hyundai cars in India*' ('**Downstream RM**'). As per NCLAT, in identifying the relevant markets, CCI had failed to consider (i) the factors under Section 19(6) of the Act such as regulatory trade barriers, local specification requirements, *etc.* in determining the relevant geographic market; and (ii) factors under Section 19(7) of the Act, such as the physical characteristics and end-use of goods, and consumer preferences, *etc.* in determining the relevant product market, respectively.

Notably, NCLAT observed that CCI couldn't merely rely on the findings of the DG's investigation report in order to establish a contravention under Section 27 of the Act and was also required to make an independent analysis of the evidence that was available on record.

Further, NCLAT noted that the CCI Order was self-contradictory, and reflected non-application of mind by CCI. NCLAT also observed that CCI and DG had failed in supporting their findings that Hyundai had penalized its dealers for not acting in accordance by implementing tie-in agreements, by providing cogent evidence in this regard. Moreover, NCLAT observed that CCI and the DG should have taken into consideration the fact that it was normal for car dealers of all companies to make recommendations regards the use of a particular quality of lubricants and oils based on the type of vehicle.

32 FX Enterprise Solutions India Pvt. Ltd. & St. Antony's Cars Pvt. Ltd. *v.* Hyundai Motor India Limited, Case Nos. 36 & 82 of 2014 (Order dated June 14, 2017)

Supreme Court

Supreme Court Recognizes Principles of 'Oligopsony' under Competition Law and Exonerates 44 Liquefied Petroleum Gas Cylinder Manufacturers

CCI and the Competition Appellate Tribunal ('**COMPAT**') found collusive behavior among the 45 LPG Cylinder manufacturers ('**LPG manufacturers**') holding them in violation of Section 3(1) read with Section 3(3)(a) and Section 3(3)(d) of the Act. CCI imposed a penalty of ₹165.58 crores on the LPG manufacturers. However, in appeal, the COMPAT directed reduction of penalty.

In appeal, the Supreme Court rejected the two arguments raised by the LPG manufacturers *i.e.,* (i) there is no possibility of competition in this market, therefore the CCI has no jurisdiction to deal with the case; and (ii) the LPG manufacturers have not engaged in 'collusive bidding'. While rejecting the above two arguments, the Supreme Court observed that the real question in the present case is whether there was a possibility of a collusive agreement having regard to market conditions in the industry, even assuming that the meeting between competitors did take place.

In sum, the Supreme Court agreed that the presence of an active trade association, a meeting of the bidders held in Mumbai just before the submission of the tenders, submission of identical bids despite varying cost, products being identical and the presence of a small number of suppliers with few new entrants are supporting factors which may be suggestive of collusive bidding. However, these factors are to be analyzed keeping in mind the ground realities, namely:

i. There were only three buyers in the market for cylinders, namely Indian Oil Corporation Limited ('**IOCL**'), Bharat Petroleum Corporation Limited ('**BPCL**') and Hindustan Petroleum Corporation Limited ('**HPCL**');
ii. All the LPG manufacturers manufacture 14.2 kg gas cylinders to the three buyers. If a LPG manufacturer fails to sell its product to any of the three buyers, it won't able to survive in the market;
iii. The market is not attractive for new entrants to manufacture the cylinders in the market on account of presence of a very limited number of buyers;
iv. The manner in which the tenders are floated by IOCL and the rates at which these are awarded, are an indicator that it is IOCL which calls the shots insofar as price control is concerned. Negotiations are held with a L-1 bidder generally leads to further reduction of price than the one quoted by L-1. Thereafter, the other bidders who may be L-2 or L-3 etc. are awarded the contract at the rate at which it is awarded to L-1;
v. Entry of 12 new entrants in the relevant market shows low entry barriers in the market;
vi. Since there are few manufacturers and supplies are needed by the three buyers on regular basis, IOCL ensures that all the LPG manufacturers whose bids are technically viable, are given some order for the supply of specific cylinders;
vii. The price at which the LPG cylinder is to be supplied to the consumer is controlled by the Government vide LPG (Regulation and Distribution) Order, 2000;
viii. Just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. This obviously becomes a guiding factor for the other bidders to submit their bids;
ix. The meetings prior to submission of the bids were attended by only 19 LPG manufacturers. The LPG manufacturers who were not a member of the association or who did not attend the meetings also submitted identical bid quotes.

Therefore, the Supreme Court held that the reason for identical bids is the prevalent market conditions and not the meetings of the association. Market conditions led to the situation of an oligopsony because of limited buyers and the influence of these buyers in fixing prices. In an oligopsony, a manufacturer with no buyers will have to exit from the trade. Therefore, the first condition of oligopsony stands fulfilled in this case.

The other condition for the existence of oligopsony is also fulfilled in this case, *i.e.,* whether the buyers have some influence over the price of their inputs. It is also to be seen as to whether the seller has any ability to raise prices or it stood reduced/eliminated by the aforesaid buyers. Since both the conditions were fulfilled, the Supreme Court concluded that the LPG manufacturers were able to demonstrate that the parallel behaviour was not the result of any concerted practice.

For the abovementioned reasons, the Supreme Court concluded that there is no sufficient evidence to hold that there was any agreement between the LPG manufacturers for bid rigging.

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Law Firm of the Year
VC Circle, 2018, 2017, 2016 & 2015

❖

Outstanding Law Firm of the Year, India
Corporate and Mergers & Acquisitions | Highly Recommended Law Firm of the Year
Asialaw Profiles, 2018

❖

India Deal Firm of the Year
ALB SE Asia Law Awards, 2018

❖

Best Law Firm of the Year – India
Corporate USA Today – Law Awards 2018

❖

Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2017-18

❖

Ranked No.1
RSG Top 40 Indian Law Firms Ranking, 2017

❖

Client Service Law Firm of the Year
Chambers Asia-Pacific Awards, 2017

❖

Best Indian Law Firm
International Legal Alliance Summit Awards, 2017

❖

Tier 1 in India M&A Rankings
Asian Legal Business 2018

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Ranked No.1
for the Indian M&A Announced Deals League Table by Value and Volume
Ranked No. 1
for the Indian M&A Completed Deals League Table by Value and Volume
Thomson Reuters' Emerging Markets M&A Legal rankings Q1 2018

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

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

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Ranked No. 1
for PE and M&A Rankings by Deal Count and Deal Value
Venture Intelligence League Tables of Legal Advisors 2017

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