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Inter alia... is a legal newsletter published each quarter by AZB & Partners for a select list of clients and colleagues. Each issue aims to provide a snapshot of the recent legal developments in certain critical areas: infrastructure, foreign direct investment, securities law, exchange control regulations, corporate law, media and entertainment, intellectual property and banking. When a significant development demands it, *Inter alia...* is published as a Special Edition to provide an indepth analysis of that development. 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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Pricing Algorithms | CCI's First Major Encounter with Assessing New-Age Collusions

Introduction

In January 2014, the Competition Commission of India ('CCI') initiated a rather complex investigation involving the allegation of a price cartel in the airline industry ('Airlines Cartel'). The investigation, which was based on a letter from the Lok Sabha Secretariat, lasted seven years and included all the major domestic airlines operating at the time *i.e.*, Jet Airways, Indigo, Go Air, Spice Jet, and the Government-owned, Air India.

With the technological advancement and unprecedented growth of air travel over the last couple of decades, airlines have implemented third party software(s) that helps them determine, implement and dynamically change the fares offered to consumers, on a real time basis. Each such software is based on an increasingly complex set of algorithms that take into consideration factors such as demand conditions, actual booking, price of competitors, seasonality, *etc.*, to determine the airfares.

Accordingly, one of the key points of investigation and determination for the CCI was whether: such third-party software(s) have been implemented by airlines by way of a common understanding, or such software(s) result in or facilitates price collusion in some other way. The CCI recently concluded that there was no evidence to suggest that the airlines entered into a price cartel since: (i) the ultimate decision on pricing was undertaken by a revenue management teams of the respective airlines and the software only assisted in price determination; and (ii) the heavily fluctuating market shares of the respective airline during the period under investigation, strongly indicated the absence of a cartel. This article examines the key reasons for growing concern over price collusions facilitated by algorithms, in the matured antitrust jurisdictions, and examines the line of reasoning adopted by the CCI in the Airlines Cartel.

Concerns over Algorithm Facilitated Collusion: Global Perspective

In almost all the antitrust law jurisdictions, price fixing cartels are considered anti-competitive irrespective of the mode or manner in which they are implemented or operated. In the digital age, the equivalent of a 'smoked filled room conversations' is the use of algorithms to implement, monitor, and operate a cartel. From a legal perspective, there seems to be a general consensus that if the decision to use the same software, or sharing of algorithms, is agreed between competing enterprises to facilitate or implement price fixing arrangement, then such conduct would invariably be viewed as an anti-competitive arrangement. Therefore, while the use of algorithms by businesses to determine prices dynamically has invariably resulted in an increased level of efficiency, it has also led to potential concerns from an antitrust perspective:

Hub and Spoke Scenario: Online retailers (the spokes) using common third-party algorithm software (the hub) may find themselves facing a cartel investigation, due to unintentional similarity in prices. On the other hand, the knowledge of the use of common software by competing enterprises and determination of prices, accordingly, could lead to allegations involving *tacit* collusion. To give an example, in a case involving the administrator of a Lithuanian online travel booking system *i.e.*, E-turas ('Eturas'), the question of knowledge was the focal point for EU Court of Justice. In Eturas, the administrator of the online booking travel system sent a message to all the travel agents registered with it to cap the discount rates. The Court of Justice of the EU held that travel agents who knew of the administrators' message capping the discounts could be presumed to have participated in a cartel unless they publicly distanced themselves from the message.

Therefore, firms who independently procure services of an algorithm provider, knowing that their competitors are using the same services and that the algorithm fixes prices at a certain level, need to exercise effective due diligence to avoid any inference of collusion.

Self – Learning Algorithms: the artificial intelligence capabilities of software *i.e.*, the increasing ability of algorithms to learn through experiences and make autonomous decisions may lead to potential collusive outcomes without any intent or explicit meeting of minds between humans.

Market Transparency and Tacit Collusion: the use of pricing algorithms combined with growing market transparency of current prices may also lead to collusion like effects. However, in a market where firms take unilateral decisions based on their own assessment of the input from algorithms, including by way of access to competitors' real time pricing would not result in any form of anti-competitive arrangement or understanding absent any form of agreement or understanding. In other words, monitoring competitors' prices in an increasingly price transpar-

¹ In Re: Alleged Cartelization in the Airlines Industry, *Suo Motu* Case No. 03 of 2015.

ent markets and reacting to competitors' price changes, absent any agreement or understanding, is outside the preview of legal intervention of antitrust laws.

CCI's Reasoning in the Airline Cartel

Interestingly, CCI did recognise the presence of similar or same software used by the airlines, but more importantly, applied the very basic principle of the evidentiary standard required to prove direct or circumstantial evidence to prove a cartel conduct. The CCI reasoned that the significant fluctuation in market shares of competing airlines over a period of 4 – 5 years indicated competitive behavior in the industry, where multiple existing players lost share to a new or recent player. Further, the CCI did not find any direct evidence to the effect that the common software was implemented by competing airlines with a view to fix prices. In the relation to the modality of determination of prices, the CCI noted that the involvement of 'human' element to decide the final prices indicated that the use of algorithms was only to facilitate genuine price determination in an industry that requires dynamic pricing and was not done with a view of implement price cartel.

Conclusion

CCI's approach in the Airline Cartels case appears to be in line with its global counterparts, which stress the importance of evidence-based approach. Fluctuating market shares and the fact that the ultimate decision was taken by the revenue management team helped the CCI conclude that use of common software, does not necessarily equate to a finding of collusion. However, it is yet to be seen how the CCI would approach the issue of algorithm-based collusion in facts involving self-learning algorithms, increasing market transparency and tacit collusion.

Pharmaceutical Sector Market Study

CCI begins Consultation Process with Stakeholders

In October 2020, the Competition Commission of India ('CCI') launched a market study to assess the competitive landscape in the pharmaceutical sector. The CCI indicated that the objective of the study is to assess antitrust concerns in the drug supply chain. The market study would help the CCI assess the business practices prevailing in this sector, instead of discovering conduct by way of a formal investigation at a later stage. In the words of the CCI Chairperson, Mr. Ashok Gupta, the aim is to "come out with an advisory for all the participants in the drug supply chain – from pharma companies to retailers – that may take the form certain dos and don'ts". In the past, the pharmaceuticals sector has been one of the CCI's topmost enforcement priorities.

CCI's approach towards this study is similar to what it has carried out previously in relation to the e-commerce and telecom sector, i.e., to engage in an efficient and productive consultative process with the relevant stakeholders. To this extent, the CCI recently issued a public notice dated February 19, 2021, which welcomed participation from relevant stakeholders in the pharmaceutical industry, especially, pharmaceutical companies, stockists, chemists, sector experts, trade associations, doctors, and regulators. The CCI is likely to publish the key findings and observations arising out of the study in a report, as has been its practice.

The CCI has indicated that the study would primarily focus on the distribution segment of the pharmaceutical market, with a view to understanding:

discounts and margin policies at the wholesale and retail levels of the distribution system; the role of trade associations vis-à-vis various aspects of the distribution business; regulatory rationalization of trade margins and its impact on price and competition; and the impact of e-commerce on price and competition.

The study also aims to investigate the extent of proliferation of branded generic drugs in India along with its implications for competition, and to assess potential hurdles relating to the entry of bio-similar drugs in India.

The consultation process will also provide the relevant stakeholders the opportunity to engage in a productive dialogue with the regulator and share their views on the rationale for business practices, key concerns in the sector, and the means for ensuring competitiveness in this industry.

Any of the abovementioned stakeholders willing to participate in this process may reach out to the CCI at pharmastudy@cci.gov.in till March 19, 2021.



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CCI Inaugurates First Regional Office in Chennai

On February 26, 2021, the Union Minister for Finance and Corporate Affairs ('MCA') Smt. Nirmala Sitharaman virtually inaugurated the first of the Competition Commission of India's ('CCI') Regional Offices in Chennai. The official press release issued by the Ministry of Corporate Affairs ('MCA') stated that the Chennai office of CCI will cater to the requirements of Tamil Nadu, Kerala, Karnataka, Andhra Pradesh, Telangana, and the Union Territories of Puducherry and Lakshadweep.

It will act as an office to facilitate enforcement, investigation, advocacy function in coordination with the Delhi office, and as a centre for coordination of filing of documents, online depositions, etc. Two more regional offices in Mumbai and Kolkata respectively are planned to be established.

This is a welcome move that will make coordination with the CCI in relation to filings, etc. more convenient for businesses, who have until now had to travel to New Delhi for each engagement with the regulator (though the CCI has been accepting electronic filings and has been conducting pre-filing consultations and hearings by way of video-conferencing in the aftermath of the COVID-19 pandemic).

Behavioural Cases

Supreme Court Dismisses Allegations of Cartelisation against Ola and Uber, Upholds NCLAT Order²

On December 15, 2020, the Supreme Court of India ('Supreme Court') upheld an NCLAT order dismissing allegations of anti-competitive practices against ANI Technologies Pvt. Ltd. ('Ola'), Uber India Systems Pvt. Ltd., Uber B.V. and Uber Technologies Inc. (together referred to as 'Uber') (collectively, 'Cab Aggregators').

The informant in this case, who is an independent practitioner of law, claimed that the Cab Aggregators had entered into price fixing and resale price maintenance agreements on their respective platforms. According to the informant, as a result of algorithmic pricing, drivers and riders were unable to negotiate fares and discounts, thus taking away their freedom to choose the best price on the basis of competition, and forcing the acceptance of the price calculated via the platform algorithm. The informant further claimed that despite drivers not being employees or agents of the Cab Aggregators, they were forced to accept the trip fare reflected on the platform, leading to an artificial manipulation of supply and demand, guaranteeing higher fares to drivers who would otherwise compete against each other. Thus, the Cab Aggregators' apps function akin to a trade association, facilitating the operation of a cartel (i.e., a hub-and-spoke cartel). Further, since the Cab Aggregators have greater bargaining power than riders in the determination of price, they are able to implement price discrimination, whereby riders are charged on the basis of their willingness to pay and as a result, artificially inflated fares are paid.

The CCI issued an order dated November 6, 2018, observing that no *prima facie* case was made against the Cab Aggregators. The CCI noted that for an allegation of cartelisation to stand, there needs to be concerted action to fix prices. In the present case, there was no evidence of collusion, as the drivers are not agreeing to set prices. Rather, the prices are algorithmically determined, and there is no agreement between the drivers to delegate the pricing power to the Cab Aggregators. The CCI held that the Cab Aggregators are not an association of drivers, but rather act as separate entities from their respective drivers. A rider books his/her ride at any given time which is accepted by an anonymous driver available in the area, and there is no opportunity for such driver to coordinate its action with other drivers.

Pursuant to the order issued by the CCI, the informant filed an appeal before the National Company Law Appellate Tribunal ('NCLAT'). The NCLAT, in its order dated May 5, 2020, delved into the *locus standi* of the informant to move the CCI and held that the Act must be construed to only allow reference to receipt of information from a person who has suffered an invasion of his legal rights as a consumer or beneficiary of healthy competitive practices.

The NCLAT further noted that there was no evidence to show that the informant had suffered an injury at the hands of the Cab Aggregators and that there is no possibility of information exchange between the drivers of the Cab Aggregators. Further, driver partners and riders are free to accept the ride or choose the app of a competing service and therefore have the liberty to negotiate a lower fare. Thus, the Cab Aggregators were not found to be facilitating a cartel.

Pursuant to this, the informant preferred an appeal before the Supreme Court. The inform-

² Civil Appeal No. 3100 of 2020, Order dated December 15, 2020.

ant argued that any person may approach the CCI and that for the purposes of filing an appeal, any informant who had moved the CCI would be a ‘person aggrieved’.

On the point of the informant’s *locus standi*, the Supreme Court held that it was difficult to agree with the NCLAT’s narrow reading of the Act. The Supreme Court held that proceedings before the CCI are proceedings *in rem* that affect the public interest. The Act and the various regulations made under the same allow information to be filed with the CCI by any person (“...any person, consumer or their association or trade association”), irrespective of whether such person is or is not personally affected. The Supreme Court also noted that the term ‘person’ under the Act is an inclusive and wide term, including individuals of all kinds and every artificial juridical person.

Similarly, the term ‘person aggrieved’ was held to be broad enough to encompass all persons who bring the CCI information of practices contrary to the provisions of the Act, who are then aggrieved by an adverse order of the CCI in case it refuses to act upon the information supplied.

On the merits of the case, however, the Supreme Court upheld the order of the NCLAT and CCI, finding no reason to interfere.

CCI Dismisses Allegations of Abuse of Dominance against Google³

On January 29, 2021, the CCI dismissed allegations of abuse of dominance against Google LLC and its subsidiary, Google India Digital Services Private Limited (collectively, ‘Google’). The informant, in this case, alleged that Google, a dominant player in internet-related services and products, has integrated the Meet App (a video-conferencing app of Google) into the Gmail App (which as per the informant enjoys a dominant position in the e-mailing and direct messaging market), which amounted to abuse of dominant position by Google, *viz.* use of its dominant position in one relevant market to enter into another relevant market.

At the outset, the CCI rejected the informant’s delineation of the relevant market as the ‘e-mailing and direct messaging market.’ Relying on the CCI’s analysis in the case of **Re: Harshita Chawla and WhatsApp Inc. & Ors.**⁴, the CCI reiterated the differences between e-mailing and direct messaging services, such as (i) e-mail services do not exhibit any network effects, *i.e.*, a user of Gmail can send emails to a user of any other email service provider, *viz.* Yahoo, Outlook, *etc.*, unlike in the case of direct messaging services like WhatsApp, as a user of WhatsApp can send messages only to another user of WhatsApp and no other messaging platform; (ii) e-mail services are primarily used for formal communications whereas direct messaging services are used for informal messaging or personal chat; (iii) WhatsApp-like services have in-built features to record audio/video messages whereas e-mail services do not, *etc.* Accordingly, the CCI delineated the primary relevant product market as the ‘market for providing e-mail services.’

In relation to the relevant market in respect of which the allegations of leveraging had been made, the CCI rejected Google’s argument comparing Google Meet with video-conferencing (‘vc’) offered by WhatsApp, Truecaller, Facebook messenger, Instagram, *etc.* The CCI noted the difference in scale and functionalities such as sharing of screen, *etc.* and observed that the number of participants allowed in vc by such apps is very limited, and so is the utility of these apps for video conferencing. A more appropriate comparison for Google Meet would be Zoom, Skype, Cisco Webex, Microsoft Teams, *etc.* Therefore, the appropriate secondary relevant product market in terms of the functionalities was held to be the ‘market for providing specialised video conferencing services.’

The relevant geographic market was considered to be the whole of India as conditions of competition are homogeneous.

In relation to Google’s dominance, the CCI noted Google’s contention that it was not dominant in the market for e-mailing and direct messaging in India, as well as the fact that the informant had failed to place on record any substantive material to support his contention regarding Google’s dominance. With respect to leveraging, the CCI noted that the users of Gmail are not forced to necessarily use Google Meet, and there were no adverse consequences for the users of Gmail for not using Google Meet (such as withdrawal of Gmail or any of its functionalities, *etc.*). A Gmail user was free to use any of the competing vc apps, such as Zoom, Skype, Cisco Webex, Microsoft Teams, *etc.* Further, anyone with a Google account (not necessarily a Gmail user) can create an online meeting using Google Meet. Thus, Google Meet is available as an independent app outside the Gmail ecosystem also.

The CCI also assessed the integration of the Meet tab within Gmail from the perspective of the imposition of supplementary obligations as provided under Section 4(2)(d) of the Act. Observing that even though the Meet tab has been incorporated in the Gmail app, Gmail does not coerce users to use Meet exclusively, and the consumers were free to use either Meet or any other vc apps, the CCI did not find any *prima facie* case against Google. Accordingly, the CCI dismissed the information.



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³ Case No. 29 of 2020, Order dated January 29, 2021.

⁴ Case No. 15 of 2020, Order dated August 18, 2020.



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CCI Dismisses Allegations of Abuse of Dominance against Haryana Urban Development Authority⁵

On January 14, 2021, the CCI closed an investigation into allegations of abuse of dominance against the Haryana Urban Development Authority ('HUDA').

The informant claimed that HUDA was dominant in the market for supply and sale of institutional plots in urban estates in the State of Haryana. It was alleged that HUDA imposed illegal terms and conditions for execution of conveyance/sale deed in favour of the allottees, who were allotted institutional plots on a freehold basis, even though the allottees had paid the entire consideration as demanded by HUDA and completed construction of buildings. It was also alleged that HUDA imposed an *ex facie* illegal and void condition restricting the rights of the allottees to further sell, mortgage, lease out the plots purchased and buildings constructed by them.

Pursuant to a *prima facie* order issued by the CCI on October 31, 2017, the DG conducted an investigation and delineated the relevant product market as 'market for provision of services for development and sale of institutional plots'. The DG also suggested an alternate relevant product market as 'the market for provision of services for development and sale of institutional plots (other than in residential projects)'. The relevant geographic market was delineated as 'the State of Haryana'. The DG found HUDA to be dominant in the relevant market. The DG concluded that the conduct of HUDA in not allowing the transfer of institutional plots was unfair as it led to exit barriers by closing the opportunities for allottees to resell those institutional plots. The restriction also created entry barriers as it prevented subsequent buyers to deal in these plots/ properties, ultimately creating impediments in the development of secondary market for resale of institutional plots. Further, the same was also considered exploitative as the only exit route available to the buyer of an institutional plot was to return it to HUDA and receiving 90% of the actual price in return.

The DG also noted that the arbitration clause in the conveyance deed between HUDA and the allottees left the latter with no right to challenge the appointment of the arbitrator, which effectively took away the right of the informant to appeal. HUDA was therefore in contravention of the provisions of the Act.

Before the CCI, HUDA argued that it was a statutory authority discharging sovereign functions (of regulating the use of land (product) in order to prevent ill-planned and haphazard urbanisation in or around towns in the State of Haryana and administering the directions and policies of the State Government. Therefore, it cannot be viewed as an 'enterprise' under the provisions of the Act. The CCI rejected this contention observing that all of HUDA's functions may not be classifiable as statutory functions more so of a sovereign nature, especially when it allows various types of plots to third parties for a consideration.

In relation to restrictions on sale/mortgage of the plots, HUDA argued that such institutional plots have been allotted for specific purposes, at a price much below the then prevailing market prices and the owners of such plots cannot be allowed to profit from the sale/transfer of such plots. It was never its objective to allow sale of such institutional plots and it was for this precise reason, these plots were given to seekers satisfying the eligibility conditions at concessional rates. The CCI agreed with these submissions and noted that HUDA has not permitted transfer of the institutional plots in public interest and as a matter of policy to prevent unjust enrichment and profiteering by allottees of such plots.

With respect to the arbitration clause, the CCI held that aspects relating to the appointment of the arbitrator, etc., can be suitably dealt with under the provisions of the Arbitration and Conciliation Act, 1996.

Thus, the CCI concluded that HUDA cannot be said to have contravened the provisions of the Act.

Combination Orders

CCI Approves Acquisition of Retail and Wholesale Undertaking and Logistics and Warehousing Undertaking of the Future Group by Reliance⁶

On November 20, 2020, the CCI approved the acquisition of the (i) retail and wholesale undertaking ('RWU'); and (ii) the logistics and warehousing undertaking ('LWU') of the Future Group (collectively, 'Target Businesses') carried out through various entities of the Future Group, by Reliance Retail Ventures Limited ('RRVL') and Reliance Retail and Fashion Lifestyle Limited ('RRVL WOS') (collectively, 'Acquirers') respectively.

⁵ Case No. 94 of 2016, Order dated January 19, 2021.

⁶ Combination Registration No. C-2020/09/771.



The Target Businesses were carried out by the following Future Group entities, namely, Futurebazaar India Limited ('FIL') and its subsidiaries, Future Consumer Limited ('FCL'), Future Lifestyle Fashions Limited ('FLFL'), Future Retail Limited ('FRL'), Future Market Networks Limited ('FMNL') and Future Supply Chain Solutions Limited ('FSCSL') (collectively, 'Transferor Companies'). The combination involved the following steps:

Internal Restructuring by Future Group: Consolidation of the Target Businesses by amalgamating them into Future Enterprises Limited ('FEL').

Acquisition of the Target Business: Transfer of the LWU from FEL to RRVL and transfer of the RWU from FEL to RRVL WOS on a slump sale basis.

Investment by RRVL WOS in the remaining business of FEL ('Remaining Business'): The Remaining Business of FEL consists of manufacturing (including through contract manufacturing) and processing of fast moving consumer goods ('FMCG') products, processed food, and apparels and their distribution to third-party wholesalers and retailers (other than through online or physical stores), certain investments and interest in certain immovable and movable properties/assets. RRVL WOS would invest in the Remaining Business of FEL by subscribing to a mix of equity shares and warrants FEL in the aggregate, up to 13.14% of the total equity share capital of FEL.

RRVL, a subsidiary of Reliance Industries Limited ('RIL'), is engaged in the business of retail supply chain management. Reliance Retail Limited ('RRL'), a subsidiary of RRVL, undertakes retail operations in India across segments such as food and grocery, consumer electronics, apparel, footwear, and accessories. RRL operates its retail businesses (online and offline) through a chain of stores spread across India which includes Reliance Fresh, Reliance Smart, Reliance Digital, etc.

RRVL WOS, a wholly-owned subsidiary of RRVL, has been recently incorporated to carry out various businesses including the businesses proposed to be transferred to RRVL WOS post the acquisition of the RWU.

The Future Group consists of several companies engaged primarily in retail and wholesale business as well as logistics and warehousing business that operate on a pan-India basis. Their business includes retail operations across segments such as food and grocery, apparel, footwear and accessories, home furnishings, other merchandise, etc. It operates its retail businesses through a chain of stores spread across India which include Big Bazaar, Central, Brand Factory, Foodhall, etc. The Future Group also manufactures various food and grocery products and sells these products under different brand names to end consumers through their retail store chains. FEL, a part of the Future Group, is engaged in the business of manufacturing and sourcing of fashion merchandise.

The following horizontal overlaps were identified: (i) at the broad level, the market for retail/B2C retail in India, and at a narrower level, in the sub-segments of retail for food & grocery ('F&G'), apparel, footwear and accessories ('AFA'), and general merchandise ('GM') in India, and in cities/towns where both the parties are present; (ii) at the broad level, the market for wholesale/B2B sales in India; and (iii) third-party logistics ('3PL') activity of FSCSL and last mile delivery service of Grab A Grub Services Private Limited ('Grab A Grub') (an indirect subsidiary of RIL).

With respect to the B2C market, the CCI assessed the relevant geographic market on a: (i) pan-India basis; (ii) city-wise basis; and (iii) five kilometer catchment level, for certain product categories.

The CCI noted that unorganised retail sector in India exerts competitive constraint on the organised retail. Further, at the pan-India level, the combined market shares of the parties was in the range of 0-5% in the overall retail market for the FY 2019-20.

In the F&G segment, the CCI further noted that this segment is largely dominated by kirana stores and that the nature of the products under F&G retail (based on parameters like quality, packaging, taste, colour, etc.) are homogenous across brands, regardless of the medium/point of sale. At the city-wise level, the overlaps between the parties were in 120 cities where their combined market shares did not exceed 10% in any city, with incremental share remaining within the range of 0-5%. The CCI also noted the presence of existing large players and new players in the segment.

In the AFA segment, the CCI assessed the overall AFA retail (as opposed to further segmenting it between organised and unorganised sectors) since the differentiated nature of AFA products and different retail formats do not allow a clear demarcation between organised and unorganised AFA retail. The CCI also noted that the AFA segment is dynamic in nature and continuously adapts to changing trends and consumer preferences. At the city-wise level, the overlaps between the parties were in 162 cities and towns where their combined market shares did not exceed 10% in any city, with incremental share remaining within the range of 0-5%.

In the GM segment, the CCI noted that GM is typically other non-food consumer goods, primarily sold by F&G, such as books and stationery, floor mats, batteries and bulbs, home furnishings, etc. Observing the lesser relevance of brands in this segment and the comparable availability



of the range of products across retail formats, the CCI noted that the unorganised retail segment may provide sufficient competitive constraint to the organised segment. Further, at the city-wise level, the overlaps between the parties were in 119 cities and towns where their combined market shares were less than 10%, with incremental share remaining within the range of 0-5%.

In the B2B market, the CCI ultimately considered the following relevant product markets: (i) overall wholesale market; and (ii) narrower segments of F&G, AFA, and GM. The relevant geographic markets were considered on a: (i) pan-India basis; and (ii) city-wise basis.

The CCI noted that no competition concerns would arise since the overlaps between the parties were limited to the F&G segment and the post combination market share of the parties in the B2B sales market as well as in all the overlapping segments would be between 0-5%. The CCI also noted the competitive pressure exerted by unorganised wholesalers, the low entry barriers, as well as the presence of players such as Indiamart, Walmart, Amazon, Alibaba, Ninjacart, TradeIndia, etc. in this market.

For the 3PL market, the CCI held that the said overlap would not lead to any competition concerns as the market share of FSCSL in the 3PL segment in India is in the range of 0-5% and the segment has seen the entry of several new players such as E-kart, Gati Limited, etc. Further, Grab A Grub's total income during FY 2019-20 was minuscule.

The parties also identified vertical overlap between (i) the last mile delivery services of Grab A Grub and merchandise sale business of Target Businesses; and (ii) 3PL services of FSCSL and last mile delivery services of Grab A Grub. The CCI however noted that the value of service procured by Target Businesses from Grab A Grub were insignificant to raise any concern. Further, the market for last mile delivery services is characterised by the presence of numerous players in India such as Shadowfax, Delhivery, Ecom Express, etc. Accordingly, the CCI granted approval.

CCI Approves Acquisition of Minority Shareholding of 7.8% of Aditya Birla Fashion and Retail Limited by Flipkart Investments Private Limited⁷

On January 20, 2021, the CCI approved the acquisition of a minority shareholding of 7.8% on a fully diluted basis in Aditya Birla Fashion and Retail Limited ('ABFRL') by Flipkart Investments Private Limited ('FIPL').

FIPL is a wholly-owned subsidiary of Flipkart Private Limited ('FPL'). It is a newly incorporated company under the laws of Singapore and is registered as a category II foreign portfolio investor under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019. FPL belongs to the Walmart Group.

The Walmart Group consists of Walmart Inc. ('Walmart') and its affiliates. Walmart, a company incorporated in Delaware, USA is engaged in retail and wholesale operations globally. Walmart undertakes the following businesses in India: (i) wholesale cash and carry of goods (across various product categories such as mobiles, electronics, lifestyle (including apparels, footwear and accessories ('AFA')), books & general merchandise (including groceries, toys), home furnishing (including kitchenware) and furniture); (ii) provision of market based e-commerce platforms; and (iii) UPI and prepaid payment instrument services through PhonePe.

Additional ancillary services that the Walmart Group provides in India include (i) payment gateway; (ii) advertising services; (iii) information technology product related issues; (iv) logistics, courier, and other allied services; (v) installation, repair, and other allied services; (vi) technology based services; and (vii) sale of private label products.

ABFRL is part of the Aditya Birla conglomerate, engaged in the business of manufacturing and retailing branded AFA, through its retail stores, multi-brand outlets, departmental stores, online retail platforms and e-commerce marketplaces, across India. It has three subsidiaries in India, namely Jaypore E-commerce Private Limited ('Jaypore'), TG Apparel & Décor Private Limited ('TG Apparel') and Finesse International Design Private Limited ('Finesse').

The parties identified horizontal overlaps in the broader market for B2B sales in India ('Broad Relevant Market') and in the narrower market for B2B sale of AFA products in India ('Narrower Relevant Market'). The CCI, noting that the combination is not likely to cause an appreciable adverse effect on competition ('AAEC'), decided to leave the exact delineation of the relevant market open, as the combined market share of the parties in the Broad and Narrow Relevant Market were 0-5% and 5-10% respectively. The CCI further noted that the incremental market share is insignificant, and the market is characterised by the presence of various other players, such as Amazon Wholesale, Reliance Retail in the Broad Relevant Market; and Page Industries, Raymond, etc. in the Narrow Relevant Market.

With regard to vertical/complementary relationships, the parties identified the following relationships:

⁷ Combination Registration No.C-2020/12/792.



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ABFRL's B2B sales and Walmart Group's B2B distribution: ABFRL manufactures and sells products within the AFA category, and also sells jewellery, home décor and furnishing products to both B2B and B2C customers. The Walmart Group on the other hand, trades in products under various categories, within the B2B segment in India. As such, the Walmart Group is a customer of ABFRL, situated downstream to ABFRL in terms of its B2B sales.

Walmart Group's B2B sales and ABFRL's B2C sales/distribution: Potential vertical relationship between the B2B business of the Walmart Group (upstream) and ABFRL (downstream) whereby the Walmart Group can supply its AFA category products to ABFRL on a B2B basis, which ABFRL may then sell on to end-customers.

Walmart Group's e-commerce marketplaces and ABFRL's B2C sales: ABFRL uses the Walmart Group's e-commerce marketplace services as just one of the channels through which sales are undertaken.

PhonePe's UPI and wallet payment services and ABFRL's sales (both B2B and B2C): PhonePe's UPI payment application and mobile wallet are complementary to ABFRL's sales in India, among other digital payment solutions.

ABFRL's sales through the Walmart Group's e-commerce marketplaces and the Walmart Group's logistics services offered to sellers on its marketplaces: ABFRL is a seller on the Walmart Group's e-commerce marketplaces in India, though there is no exclusivity or preferential treatment provided towards any sellers, including ABFRL.

The CCI noted that the existing or potential vertical/ complementary relationship(s) between the parties did not raise any competition concerns as the presence of the parties in the identified upstream and downstream markets was insignificant to raise any competition foreclosure concerns in India. As such, the CCI granted its approval.

However, in addition to the above, the CCI highlighted the strategic commercial arrangement proposed to be entered between FPL's Indian subsidiary, Flipkart India Private Limited and ABFRL pertaining to the distribution of certain identified branded products of ABFRL through e-commerce platforms of Walmart Group to the exclusion of certain platforms identified therein, for a limited period of time. The CCI noted that such exclusive arrangement raises potential concerns regarding preferential treatment of ABFRL brands on the e-commerce platforms run by the acquirer's group in India, which may affect intra-platform competition between brands/sellers. The CCI accordingly observed that if any anti-competitive conduct results from any exclusive arrangement or otherwise, it could initiate an action under Section 3 and/or 4 of the Act.

CCI Approves transfer of 100% Shareholding of Sinochem Group Company Limited and China National Chemical Corporation Limited to a New Company Wholly Owned by China State-owned Assets Supervision and Administration⁸

On November 12, 2020, the CCI approved the transfer of 100% shareholding of Sinochem Group Company Limited ('**Sinochem**') and China National Chemical Corporation Limited ('**ChemChina**') to a new company wholly owned by China State-owned Assets Supervision and Administration Commission of the State Council ('**Central SASAC**').

The proposed transaction involved an internal restructuring of Sinochem and ChemChina, both of which are wholly-owned by Central SASAC. Central SASAC will incorporate a new holding company and transfer 100% shares of both Sinochem and ChemChina to the new company. Effectively, Sinochem and ChemChina would amalgamate into the new company and ultimately still belong to Central SASAC. The new company would be the sole shareholder of Sinochem and ChemChina. (As per the laws applicable in China, Sinochem and ChemChina are regarded as independent economic entities with independent decision-making power and thus, belong to two independent economic groups).

Sinochem is incorporated under the laws of the People's Republic of China. Globally, its businesses are spread across energy, real estate, finance and chemical sectors. In India, it is directly or indirectly engaged in the sale of crude oil, natural rubber and rubber antioxidants, a variety of chemicals, including agrochemicals, and pharma and health products. Sinochem operates in India through Sinochem India Company Pvt. Ltd. ('**Sinochem India**') in the agrochemicals sector.

ChemChina is also incorporated under the laws of China and its business units are divided into oil and processing refined products, chemical equipment, tyre and rubber products, new chemical materials and specialty chemicals, R&D design and agrochemicals. ChemChina is present in the agrochemical sector in India through Syngenta India Limited ('**SYT-IN**') and Adama India Private Limited ('**ADA-IN**'). They are also required to operate as independent competing entities till January 3, 2026 (pursuant to the CCI's approval order dated May 16, 2017, for

⁸ Combination Registration No. C-2020/09/776.

Combination Registration No. C-2016/08/424).

SYT-IN is engaged in the business of manufacture and sale of various agrochemicals including herbicides, insecticides and fungicides, and vegetable seeds. ADA-IN is also present in the business of sale of various agrochemicals including herbicide, insecticide, fungicide, and growth regulators. Both SYT-IN and ADA-IN sell active ingredients and formulated products in the agrochemicals sector in India.

The CCI noted the parties' submission that the proposed transaction is only an internal strategic restructuring of Sinochem and ChemChina in China without any plans to alter the business operations either in China or outside, including India.

The overlaps identified in relation to the proposed transaction related to sale of formulated crop protection products ('CPPs') in India. Sinochem, SYT-IN and ADA-IN sell certain similar products in CPPs and more specifically in (i) herbicides; (ii) insecticides; (iii) fungicides; and (iv) bio-stimulants.

The CCI observed that CPPs can be normally sub-divided based on crop and class of pest. In respect of herbicides, there is a distinction between selective and non-selective herbicides. The CCI noted that in each of the segments of overlap, except 'herbicide-rice', 'herbicides-rice-preemergent', 'herbicides-General weed control', and 'fungicides-rice-blast, sheath blight', the market share of Sinochem was less than 3% and therefore the incremental market share post-combination would be insignificant. In the segments for herbicide rice, herbicides-rice-post emergent, herbicides-general weed control, and fungicides-rice-blast, sheath blight, the market shares of Sinochem range between 2-12%. However, the CCI noted that these markets are fragmented in nature and characterised by the presence of several other players. In the segment for bio-stimulants, only Sinochem and SYN-IN are present in India, where Sinochem had a market share of less than 1%.

As such, the CCI concluded that in each segment with overlaps, the incremental market share as a result of the combination would be insignificant and not likely to cause any AAEC. In light of this, the CCI approved the proposed transaction. However, the CCI highlighted that the relevant parties should continue to comply with its commitments under the CCI's approval order for Combination Registration No. C-2016/08/424.

CCI Approves Acquisition of Sole Control over Bombardier Transportation's by Alstom S.A., and Acquisition of Approximately 18% and 3% Share Capital of Alstom S.A. by Caisse de dépôt et placement du Québec and Bombardier Inc., Respectively⁹

On September 18, 2020, CCI approved the acquisition of (i) sole control over Bombardier Transportation UK Limited ('Bombardier') by Alstom SA ('Alstom'); (ii) 18% of the share capital of Alstom by Caisse de Dépôt et Placement du Québec ('CDPQ') (which is currently the second largest shareholder of Bombardier Transportation); and (iii) approximately 3% shareholding in Alstom by Bombardier.

Alstom is a corporation registered in France. Globally, it is active in the rail transport industry and develops & markets systems and equipment and services for the rail industry. In India, it is present in the mobility business, including signaling solutions, rail electrification, track works and rolling stock (locomotives and metros) and maintenance services through its subsidiaries.

CDPQ is a long-term institutional investor registered in Canada. It manages funds and invests in major financial markets, private equity, fixed income, infrastructure and real estate. It is present in India through its indirect subsidiary, CDPQ India Private Limited. The activities of CDPQ India Private Limited are advisory services to another subsidiary located in Singapore. CDPQ has investments in three portfolio companies that are active in the broader railway sector in India. It does not engage in the sale of any components/products on a standalone basis and provides complete project solutions only.

Bombardier is a Canadian multinational manufacturer of business jets and rail. It has two business divisions, i.e., Bombardier Aviation and Bombardier Transportation. Its business includes segments of transportation, engineering services & railway transport. In the aviation business, it does not have any manufacturing facility in India and is only engaged in providing engineering services.

Bombardier Transportation is the global rail solutions division of Bombardier. Its services range from trains to sub-systems and signalling to complete turnkey transport systems, e-mobility technology and data-driven maintenance services. It has an international presence and globally, it provides (i) urban rolling stock (including metro rolling stock, light rail vehicles, monorails, etc.); (ii) mainline rolling stock (including mainline trains, commuter trains, etc.); (iii) e-mobility battery technology; (iv) other rolling stock (including locomotives); (v) urban equipment and mainline equipment; (vi) signalling solutions (mainline and urban transit systems); and (vii) maintenance services. In India, Bombardier Transportation is engaged in the

⁹ Combination Registration No. C-2020/07/759.

sale of rail vehicles, propulsion, control equipment and signalling solutions.

With regards to the overlapping products and services in India, the CCI noted that the parties compete for the manufacture and/or supply of (i) signalling solutions; and (ii) rolling stock (trains including locomotive).

It was observed that with respect to signaling solutions, which could be categorised into mainline and urban signalling, the overlaps existed only in relation to urban signalling segment which includes communications-based train control ('CBTC') and Non-CBTC sub-segments. Alstom and Bombardier Transportation are active in both segments. The CCI conducted its competitive assessment at the broader urban signalling level as well as at narrower CBTC and Non-CBTC segments separately.

The CCI observed that urban signalling segment is a bidding market, and past bidding data indicated that there are other global players who are not only competing in terms of participation in tenders but also won several bids. Further, the parties participated in a limited number of common projects, thereby indicating that they were not competing with each other in a significant number of contestable projects.

In the CBTC segment, bids were mostly won by Alstom, Hitachi/Ansaldo, Nippon Signal, Siemens and Thales and Bombardier did not appear to be a credible competitor to Alstom. In the Non-CBTC segment, the CCI noted that a sizeable proportion of the projects constitute non-contestable bids with a limited number of contestable projects. Bombardier is an insignificant player in these contestable bids. Siemens is a major player in projects with a significant market share. Further, basis the third-party responses and data submitted by the parties, the CCI noted the presence of other credible and big competitors operating in the urban signaling segment, such as Siemens, Hitachi-Ansaldo, Nippon and Thales. A number of international suppliers such as Hyundai Rotem, Stadler Rail AG, etc., with their own CBTC signalling solutions also have considerable presence in the international markets and are expected to enter the CBTC signalling segment in India. Further, the CCI observed that the main customers / end-users for solutions in the urban signaling segment are metro rail corporations, who possess significant countervailing buyer power as they are capable of designing tenders and structuring the bidding contest in such a way that fosters competition and maximizes their incentives. Therefore, the proposed transaction would not lead to any AAEC in the broader urban signalling market in India and in the narrower sub-segments, i.e., CBTC and Non-CBTC.

With respect to the rolling stock segment, the same can be further divided into the following categories: (i) mainline rolling stock; (ii) urban rolling stock; and (iii) locomotives. Since Alstom is not present in mainline rolling stock, there was no overlap in respect of the same. Similarly, Bombardier Transportation is not present in the locomotives segment.

Urban rolling stocks may be categorised into (i) trams / light rail vehicles, (ii) APM, (iii) metros. The CCI noted that overlaps exist only within the sub-segment of metro rolling stock since Alstom is not present in the other two sub-segments. Further, in the metro rolling stock segment, the CCI observed that same is a bidding market and past bidding data indicated that (i) there are other global players who are participating in and winning tenders; (ii) the parties have participated in limited common contestable projects; and (iii) other players were successful in winning the bids in which the parties commonly participated. In the non-contestable projects, Bombardier was found to be an insignificant player. Further, the CCI also noted that the main customers / end-users are metro rail corporations, who possess significant countervailing buyer power, as they are capable of designing tenders and structuring the bidding contest in such a way that fosters competition and maximizes their incentives.

The CCI also observed that while the parties did not have any direct vertical relationships, there are indirect vertical relationships between Alstom and CDPQ (through the subsidiaries of one of its portfolio companies), but they were not significant in terms of value or share.

Accordingly, the CCI noted that the proposed transaction was unlikely to cause any AAEC in India and granted its approval.

CCI Approves Acquisition of 90% Shareholding in Videocon Group of Companies by Twin Star Technologies Limited¹⁰

On November 9, 2020, CCI approved the acquisition of 99% shareholding by Twin Star Technologies Limited ('Twin Star') of 13 companies belonging to the Videocon group, namely, (i) Videocon Industries Limited ('VIL'); (ii) Videocon Telecommunications Limited ('VTL'); (iii) Applicomp India Limited; (iv) CE India Limited; (v) Century Appliances Limited; (vi) Electroworld Digital Solutions Limited; (vii) Evans Fraser & Company (India) Limited; (viii) Millennium Appliances (India) Limited; (ix) PE Electronics Limited; (x) SKY Appliances Limited; (xi) Techno Kart India Limited; (xii) Techno Electronics Limited; and (xiii) Value Industries Limited (collectively, 'Videocon Companies').

¹⁰ Combination Registration No. C-2020/11/786.





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Inter alia...

The notice was filed by Twin Star pursuant to the resolution plan dated November 7, 2020, submitted by it under the Corporate Insolvency Resolution Process ('CIRP') of the Videocon Companies.

The ultimate parent entity of Twin Star group is Volcan Investments Limited, which is engaged in: (i) mining and processing of raw materials (such as aluminium, copper, iron ore, zinc, lead, silver, etc.) and steel; (ii) exploration and production of crude oil and natural gas; (iii) generation of power through wind and coal based thermal power generation plants; (iv) providing network solutions through various software solutions and manufacturing of optical fibre performs, fibre cables, etc.; and (v) providing power transmission infrastructure.

Most of the businesses of the Videocon Companies (all of which are undergoing CIRP) are non-functional, i.e., out of 13 Target Companies only three companies, viz. VIL, Value Industries Limited and Techno Electronics Limited continue to make retail sales of certain consumer durables.

Twin Star submitted that the notice had been filed by it as it was the entity that submitted the resolution plan. However, the acquiring vehicle for the proposed transaction is not yet finalised and Twin Star or any of its group companies including a special purpose vehicle set up by any of the entities forming part of the group may implement the resolution plan. Twin Star also submitted that in case the acquiring entity changes, it would inform the CCI of the same ('Intimation').

However, the CCI noted that in terms of Regulation 17 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('Combination Regulations'), proceedings under the Act relating to the combinations stand terminated *inter alia* upon passing of an order by the CCI under Section 31 of the Act. Accordingly, in the instant case, proceeding under the Act would stand terminated upon passing of this approval order and any Intimation post termination of proceeding, will not be in conformity with Regulation 17 of the Combination Regulations. Further, even though Twin Star in its notice to the CCI, provided an overlap assessment considering all the activities of the Twin Star group, the CCI observed that if acquisition is ultimately done by any jointly controlled entity, overlap assessment with joint controller (not forming part of the Twin Star group) would also need to be done and therefore, giving of notice by one enterprise and actual acquisition by another is not envisaged under the Act. Considering the above, the CCI stated that the present approval order was only in respect of the acquisition by Twin Star.

The CCI noted horizontal overlaps between the Twin Star Group and Videocon Companies through their activities in India in the segments of (i) production and wholesale supply of crude oil; and (ii) production and wholesale supply of natural gas. CCI left the delineation of the relevant market open, as the combination was not likely to cause an AAEC, as for both production and wholesale supply of crude oil; and production and wholesale supply of natural gas, the combined market shares of parties were minimal and incremental market shares are also insignificant.

Twin Star also identified certain potential vertical relations between activities of Twin Star group and Videocon Companies, but the CCI noted that the potential vertical relations are not such as to raise any competition concern. Accordingly, CCI granted approval.



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Inter alia...

❖
'Band 1 Firm' for Competition & Antitrust
Chambers & Partners Global /Asia-Pacific, 2021

❖
Outstanding Law Firm for Competition & Antitrust
Asialaw Profiles, 2020 & 2021

❖
'Tier 1 Firm' for Competition & Antitrust
Legal 500, 2021

❖
Tier 1 in Competition / Antitrust
Benchmark Litigation Asia-Pacific, 2019

❖
Firm of the Year – Antitrust and Competition
Asian Mena Counsel, 2019

❖
Competition & Antitrust Law Firm of the Year
Lawyers Worldwide Awards, 2019

❖
Competition & Antitrust Law Firm of the Year
Global Leading Lawyers, 2017

❖
Competition Law Firm of the Year
Corporate INTL, 2016

❖
Law Firm of the Year | Best Overall Law Firm of the Year
India Business Law Journal, 2020

❖
Law Firm of the Year
VC Circle, 2020, 2018, 2017, 2016 & 2015

❖
Ranked No.1
RSG Top 50 Indian Law Firms Ranking, 2019

❖
'Tier 1 Firm' for: Banking, Capital Markets, M&A, Private Equity and Restructuring & Insolvency
IFLR1000, 2021

❖
'Tier 1 Firm' for: Banking & Finance, Capital Markets, Corporate/M&A, Dispute Resolution
(Arbitration & Litigation), Private Client, Private Equity & Investment Funds, Real Estate &
Construction, Restructuring & Insolvency, Tax, White-Collar Crime
Legal 500, 2021

❖
Tier 1 in India M&A Rankings
Asian Legal Business, 2020

❖
Corporate Law Firm of the Year
Chambers Forum India Awards, 2019

❖
Ranked No. 1 by Deal Value and No.2 by Deal Count in Any Indian Involvement Announced League
Table
Refinitiv Emerging Markets M&A Review–Legal Rankings, 2020

❖
Ranked No. 2 by Deal Count and by Deal Volume in India Announced League Table
Bloomberg's Global M&A Market Review- Legal Rankings, 2020

❖
Ranked No. 2 by Deal Value in the India League Table
Mergermarket Global & Regional M&A Report –League Tables of Legal Advisors, 2020

❖
Ranked No. 1 for PE by Deal Value
Venture Intelligence League Tables of Legal Advisors, 2020

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