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# Competition & Antitrust

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This newsletter is authored by the Competition & Antitrust team at Lakshmikumaran & Sridharan. It includes original articles and research pieces on competition law. It also reviews recent case laws and details regulatory as well as news updates on the subject.

# ARTICLES

## CCI's changed approach to enforcement amidst the pandemic

Despite suspension of regular functioning due to the COVID-19 pandemic, the Competition Commission of India (**"CCI"**) has adapted its *modus operandi* and has cleared a large number of combinations, disposed of several informations and pronounced final orders. Two of the final orders recently pronounced by the CCI finding parties in violation of the cartel and bid-rigging provisions of the *Competition Act, 2002* (**"Act"**) have come as a surprise to many.

In the case of *In Re: Cartelisation in Industrial and Automotive Bearings*, while the CCI found clinching evidence regarding the existence of an agreement to cartelize and rig bids, for the first time in a case of cartelization, the CCI refrained from imposing penalties and instead only issued '*cease and desist orders*'. The CCI continued this approach in the case of *In Re: Chief Materials Manager, South Eastern Railway v. Hindustan Composites Limited & Ors.*

In this article, Neelambera Sandeepan & Charanya Lakshmikumaran analyse the specific facts of both cases, and discuss the impact such rulings (bearing in mind the current economic hardships to companies) might have on future competition cases.

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# *RATIO DECIDENDI*

## 1. CCI dismisses allegations of abuse of dominance against WhatsApp and Facebook

### KEY POINTS

The mere fact that a case has been filed by an aggrieved party under the Act, does not take away its character of being a case *in rem* involving a larger question of fair and competitive markets. This leads to the inevitable conclusion that the informant need not necessarily be an aggrieved party to file a case before the CCI.

The CCI distinguished the concepts of 'tying' and 'bundling' and laid down the criteria that needs to be met to make out a case for tying of products / services. Further, the mere existence of a service on account of pre-installation of an mobile phone app, when it does not take away consumer choice cannot amount to abuse.

### BRIEF FACTS

An information was filed against WhatsApp by a practicing advocate, alleging *inter alia* that WhatsApp abused its dominance by mandating that its WhatsApp Pay app (yet to be released) be pre-installed within its highly popular WhatsApp messenger app. The crux of the information was that WhatsApp was violating provisions of Section 4 of the Act by abusing its dominant position in one market to distort competition in a different market.

### OBSERVATIONS OF THE CCI

#### Whether the informant has the locus to file information before CCI?

**Held:** WhatsApp contended that the information was filed by a practicing advocate who had suffered neither injury nor suffered the invasion of her legal rights and therefore, did not have a *locus standi* to file the information in terms of the National Company Law Appellate Tribunal's order in *Samir Agarwal* v. *Competition Commission of India* [Competition Appeal (AT) No.11 of 2019]. CCI rejected this contention as being misconceived and held that CCI in its role as an overarching market regulator performs an inquisitorial function which was clearly

reflected in the amendments introduced by the *Competition (Amendment) Act, 2007*, whereby the provisions of Section 19 (1) (a) were amended substituting the words "receipt of a complaint" with "receipt of any information", which was also noted by the Supreme Court in *Competition Commission of India* v. *Steel Authority of India Ltd.* [Civil Appeal No. 7779 of 2010].

In an inquisitorial system, CCI is expected to investigate cases involving competition issues *in rem*, rather than acting as a mere arbiter to ascertain facts and determine rights *in personam* arising out of rival claims between parties. The mere fact that a case has been filed by an aggrieved party does not take away its nature of being a case *in rem* involving a larger question of market distortion. Therefore, the informant need not be an aggrieved party to file a case before CCI and the Act does not specify such a requirement explicitly and the provisions clearly point towards the inquisitorial system.

## Whether the informant has indulged in forum shopping?

**Held:** WhatsApp also alleged forum shopping since the informant was closely associated with the petitioner who has approached the Supreme Court of India against Facebook and WhatsApp for alleged contravention of data localization guidelines. This was dismissed outrightly by CCI as being legally untenable.

## Whether WhatsApp is a dominant entity in the relevant market?

**Held:** CCI delineated two relevant markets, the first being the 'market for Over-The-Top messaging apps through smartphones in India' (**"OTT Market"**), which had market players such as WhatsApp messenger, Facebook messenger, Hike etc., and the second being the market for UPI enabled digital payment applications in India' (**"UPI Market"**), a market which includes other players such as PayTM, Google Pay, Phone Pe, Amazon Pay etc. On studying the OTT Market, CCI was able to determine that WhatsApp Messenger was by far the most widely used application. CCI also observed that WhatsApp Messenger operates on 'direct network effects' where an increase in usage of a particular platform leads to a direct increase in the value for other users – and the value of a platform to a new user will depend on the number of existing users on that platform. Given that there was an absence of interoperability amongst the OTT platforms, the network effects effectively function as a barrier to prevent consumers from switching from one platform to another.

## Whether mandating installation of WhatsApp Pay with the WhatsApp messenger app amounts to a contravention of Section

## 4(2)(a)(i) of the Act - imposition of unfair terms / conditions on the user by a dominant entity i.e., WhatsApp Messenger?

**Held:** CCI did not find any merit in the allegations as it opined that the mere existence of an app on the smartphone does not necessarily convert into transaction/usage since potential users would have to separately register for Whatsapp Pay. Such registration requires providing additional information and undertaking additional steps to link bank accounts. Therefore, users would have full discretion whether they would like to use WhatsApp Pay or any other payments application. Thus, in the absence of any explicit or implicit imposition which takes away user discretion, mere integration of WhatsApp Pay with WhatsApp messenger does not contravene Section 4(2)(a)(i) of the Act.

## Whether the conduct of WhatsApp is a violation of Section 4(2)(d) of the Act, amounting to bundling of its messaging services with the UPI enabled digital payments app?

**Held:** CCI observed that although the information alleges that WhatsApp is 'bundling' two services together, i.e., WhatsApp messenger and WhatsApp Pay, the conduct was more akin to 'tying' whereby, the seller of a product or service (**'tying product'**) requires the buyers to also purchase another separate product or service (**'tied product'**). This is different from 'bundling' where the seller offers a bundle of two products in a fixed proportion at a particular price. Further, CCI noted that certain conditions need to exist for concluding a case of tying:

i. the tying and tied products are two separate products;
ii. the entity concerned is dominant in the market for the tying product;
iii. the customer or consumer does not have a choice to only obtain the tying product without the tied product;
iv. the tying is capable of restricting / foreclosing competition in the market

The first two conditions were clearly established as WhatsApp messenger and WhatsApp Pay were two separate products, and WhatsApp was dominant in the market for the tying product, i.e., the OTT Market. With respect to the third condition, CCI held that installation of WhatsApp messenger did not explicitly or implicitly mandate or coerce consumers to also register for WhatsApp Pay. For the fourth condition, it was observed that the UPI market consists of established players in a vigorously competitive market, backed by big companies / investors.

Therefore, to perceive that WhatsApp Pay would automatically get a big share on the basis of pre-installation was implausible. Since WhatsApp Pay had not yet been launched for use by the Indian public, such an argument was rejected as being premature.

### Whether such pre-installation of WhatsApp Pay with WhatsApp messenger amounts to a contravention of Section 4(2)(e) of the Act, as leveraging of dominance by WhatsApp in the first relevant market to influence another relevant market?

**Held:** CCI outrightly dismissed the contention that WhatsApp could leverage its dominance in the OTT market to establish WhatsApp Pay in the UPI market since it had already been noted that the UPI market was quite established with renowned players embroiled in vigorous competition and therefore, it was implausible that WhatsApp Pay would automatically garner a market share merely on account of pre-installations.

## JUDGEMENT

CCI held that no case was made out against WhatsApp for contravention of Section 4 of the Act. Accordingly, the matter was closed under Section 26(2) of the Act. [*Ms. Harshita Chawla* v. *WhatsApp Inc. & Anr., CCI Case No. 15 of 2020*]

## 2. No penalty for companies bid-rigging in railway tenders

### KEY POINTS

While the CCI found sufficient evidence to hold that there existed a contravention of Section 3(3) of the Act, given the economic downturn due to the pandemic faced by Micro Small and Medium Enterprises (**"MSMEs"**) in India, and other public interest considerations, the CCI imposed no penalty and only directed the parties to cease and desist from indulging in such activities in the future.

### BRIEF FACTS

Multiple references were made to CCI by (i) Chief Materials Manager, South Eastern Railway, (ii) the Controller of Stores, Central Railway, (iii) the Chief Materials Manager, Eastern Railway, (iv) the Chief Materials Manager-I, North Western Railway and (v) the Chief Materials Manager-Sales, North Western Railway under Section 19(1)(b), alleging that 12 manufacturers and suppliers, namely (i) Hindustan Composites Ltd., (ii) Industrial Laminates (India) Pvt. Ltd., (iii) BIC Auto Pvt. Ltd. (now Masu Brake Pads Pvt. Ltd.), (iv) Escorts Ltd. (Railway Equipment Division), (v) Rane Brake Lining Ltd., (vi) Om Besco Super Friction Pvt. Ltd., (vii) Cemcon Engineering Co. Pvt. Ltd., (viii) Sundaram Brake Lining Ltd., (ix) Bony Polymer Pvt. Ltd., (x) Daulat Ram Brakes Mfg. Co., (xi) Hindustan Fibre Glass Works, and (xii) Precision Industrial System (**"Opposite Parties"**), of composite brake blocks (**"CBB"**) to the Indian railways had indulged in bid-rigging in various tenders from 2009 to 2017.

Reference was made to CCI after it was noticed that the Opposite Parties had been submitting identical tender bids across tenders issued by different railways divisions despite the geographical differences.

### OBSERVATIONS OF THE CCI

#### Whether the Opposite Parties and suppliers had acted in a manner which was in contravention of provisions under Section 3(3) of the Act?

The evidence collected by the DG showed that key personnel from the Opposite Parties were constantly in touch with each other through e-mails, SMSes, WhatsApp, and through phone calls. These exchanges regularly involved exchange of Excel sheets as attachments containing information pertaining to various railway tenders of CBB, price bids, distribution of CBB tenders among

different manufacturers along with compensation and other details relating to location and timing for cartel meetings. The content and context behind these e-mails was also clarified in statements given to the DG in the course of its investigation, when the concerned officials of the Opposite Parties were confronted with the evidence. Therefore, CCI concluded that such exchange of information was direct evidence of involvement of the parties in bid-rigging and the evidence was sufficient to hold the opposite parties liable for contravention of Section 3(3) of the Act.

### Whether in a monopsony – a market with a single buyer i.e., the Indian railways, the Opposite Parties could potentially control prices by cartelizing?

Given the overwhelming evidence to the fact that the parties had colluded by quoting identical prices, CCI held that it was futile for the Opposite Parties to take such a plea. As a consumer, the Indian railways is free to make a choice as far as selection of goods or services and merely putting an emphasis on the market conditions without considering the actual anti-competitive conduct was selective and misconceived.

### Whether the actions of the Opposite Parties had caused an Appreciable Adverse Effect on Competition ("AAEC")?

Once an agreement of the type specified under Section 3(3) of the Act is established, the same is presumed to have an AAEC within India. On considering the replies filed by the Opposite Parties, CCI was of the opinion that the Opposite Parties were unable to provide any evidence to dispute this presumption. Further, Section 3(3) does not require an actual effect to take place for concluding bid-rigging. The likelihood of an AAEC is sufficient to find the cartelists in violation. Further, the smoking-gun evidence relied upon by the DG left nothing to explanation and accordingly, the CCI observed that "nothing can be more incriminating than these".

## JUDGEMENT

While the Opposite Parties were unable to rebut the presumption of AAEC caused by their activities and despite clinching evidence and clear admission of guilt by 8 of the Opposite Parties, the CCI did not impose any penalty on the parties on account of economic downturn as well as continued cooperation by the Opposite Parties and rather chose to issue a cease and desist order. [*In re: Chief Materials Manager, South Eastern Railway,* (Reference Case No. 03 of 2016)]

## 3. CCI dismisses allegation of abuse of dominance against Swiggy

### KEY POINTS

Swiggy does not select or modify the rates charged by its partner restaurants and therefore, any discrepancy in the rates is solely attributable to the partner restaurants.

### BRIEF FACTS

An Information was filed under Section 19(1)(a) of the Act, alleging that the popular app-based food ordering and delivery platform "Swiggy" was abusing its dominance in the market for 'app-based food delivery with restaurant search platform across territory of India' by charging unreasonable and unfair prices from customers, which were higher than the ones charged by the partner restaurants of Swiggy at their respective outlets.

## OBSERVATIONS OF THE CCI

### Whether Swiggy was abusing its dominant position in the relevant market by charging unreasonably high prices?

**Held:** In the information, the relevant market was identified as the 'market for app-based food delivery with restaurant search platform across territory of India'. Swiggy contended that the distinguishing factor of the food delivery business was providing the service of receiving one's food without leaving the comfort of one's home and customers could avail the same service by directly ordering from the restaurants. Therefore, Swiggy suggested that the relevant market be defined as the "market for food delivery".

Further, the CCI noted that Swiggy's contractual arrangement with its various partners restaurants required them to maintain a uniform price of food items sold by such partners to customers when dealing with them directly or through the platform of Swiggy. On examining the evidence before it, CCI observed that whenever Swiggy received complaint against the prices listed on its platform, it took the same up with the respective partner restaurant. This indicated that the partner restaurants were responsible for the prices listed on the Swiggy app and therefore, allegations against Swiggy did not seem substantiated.

Given that the allegations against Swiggy were not substantiated and it was also submitted by Swiggy that it merely functions as an 'intermediary' in terms of Section 79 of the *Information Technology Act, 2000*, CCI observed that it would not be germane to define a precise relevant market and conduct any further analysis.

## JUDGEMENT

CCI held that a *prima facie* case of contravention of Section 4 of the Act was not made out against Swiggy since it had no role to play in the pricing of the products offered by the partner restaurants on its platform. However, to allay any misgivings in the minds of the stakeholders including consumer, the CCI observed that it would be apposite for Swiggy to give sufficient disclosures on its platform that it is not involved in fixation of price of the products/menus of the restaurants on its platform. Accordingly, the matter was closed under Section 26(2) of the Act. [*Ms. Prachi Agarwal & Anr.* v. *M/s. Swiggy (Bundl Technologies Pvt. Ltd.)*, (Case No. 39 of 2019)]

## 4. CCI dismisses allegation of abuse of dominance arising from Corporate Insolvency Resolution Process ("CIRP")

### KEY POINTS

To bring an allegation of abuse of dominance before CCI, the informant ought to show that some right it possessed had been infracted by the conduct of the opposite party in terms of Section 4 of the Act.

An announcement made in the newspapers as a public notice is merely a declaration of the existence of a right that the opposite party claims to vest in them and which they want to safeguard against any misuse.

### BRIEF FACTS

An Information was filed under Section 19(1)(a) of the Act, by Prashant Properties Pvt. Ltd. (**"Informant"**) on being aggrieved by a public notice issued by Shakambhari Ispat & Power Ltd. (**"SIPL"**) on April 18, 2019, declaring that any entity using any trademark anyone using trademark "ELEGANT" and / or associated trademarks thereof or any deceptively similar trademarks belonging to SPS Steel Rolling Mills Ltd. (**"SPS"**) would expose itself to civil and criminal prosecution. At the time of issuing the notice, SPS was undergoing CIRP and SIPL had taken over the management of SPS as the successful resolution applicant (**"RA"**) under the National Company Law Tribunal's order.

The Informant had entered into a permitted user agreement (**"PMA"**) on May 30, 2014 for 21 years with SPS, which entitled it to certain rights including that of manufacture, use, distribution and sale of certain products and similar goods/services with the said "Elegant Brands" or "Family of Marks" within the geographic territory of India. Under the PMA, the Informant manufactured, supplied and distributed goods in the market utilizing the said family of marks, from time to time and royalty for the same was paid to SPS from time to time, which continued even after the initiation of the CIRP against SPS.

### OBSERVATIONS OF THE CCI

#### Whether the Informant made out a sufficient *prima facie* case for CCI to direct further investigation by the DG under Section 26(1) of the Act?

**Held:** CCI observed that the Informant's grievance arose from the public notice issued by SIPL. Upon further examination of the material on record, CCI noticed

that the Informant had advanced several loans to SPS in and around 2011, which had only been partially repaid. The PMA was entered between SPS and the Informant as a way of settling the unpaid dues owed to the Informant by SPS. Subsequently, when the insolvency process was initiated, the Informant staked its claims before the resolution professional (**"RP"**) but it did not get the sum due to it under the resolution plan approved by the committee of creditors. Further, during pendency of the resolution process, the RP had filed two separate applications seeking *inter alia* the temporary suspension of brand sharing agreements like the PMA.

Hence, CCI observed that the recourse sought by the Informant before it related to its claims made under CIRP and allied proceedings, which had already been rejected by all forums. Further, there was nothing to show any legal right that is inherent in the Informant in relation to aforementioned marks and no abuse of dominance could be seen to have arisen based on the facts and circumstances disclosed in the information.

## JUDGEMENT

The CCI held that a public announcement by a party of the existence of a legal right, that it validly possesses, may not tantamount to an abuse.

CCI held that when the rights of the Informant to use of such mark appears to have been extinguished under the legal process of *Insolvency and Bankruptcy Code, 2016*, it would not be worthwhile from a competition standpoint to firstly undertake a relevant market analysis and assessment of dominance of the opposite parties in such market. No competition concern could be said to have arisen, and accordingly, the matter was closed under Section 26(2) of the Act. [*Prashant Properties Pvt. Ltd.* v. *SPS Steel Rolling Mills Ltd. & Ors.*, (Case No. 17 of 2020)]

## 5. Prescribing sub-criteria for engaging consultants by NHAI not found to be abuse of dominance

### KEY POINTS

It is the prerogative of the procurer / buyer to decide technical specifications in the tender document as per its requirement. Such specifications would only be subject to the provisions of the Act if the tender document framed by a dominant entity contained provisions which were demonstrably unfair or discriminatory.

### BRIEF FACTS

An information was filed under Section 19(1)(a) by Mr. Sandeep Mishra (**"Informant"**) against the National Highway Authority of India (**"NHAI"**), alleging that NHAI was abusing its dominance by prescribing a 'relevant experience criteria' in its request for proposal (**"RFP"**) for engaging consultants. Essentially, it was alleged by the Informant that the sub-criteria specified for relevant experience in the RFP was different from the criteria followed by the Ministry of Road Transport and Highways and the National Highways and Infrastructure Development Corporation Ltd. Therefore, NHAI was engaging in monopolistic and restrictive trade practices to abuse its dominant.

### OBSERVATIONS OF THE CCI

#### Whether NHAI falls within the purview of the Act?

**Held:** First and foremost, CCI examined if NHAI fell within the definition of 'enterprise' under Section 2(h). CCI held the answer to be in the affirmative since NHAI is engaged in economic activities like development, maintenance and management of national highways, collecting fee on national highways, providing consultancy and construction services in India and abroad, etc., and NHAI is not performing any sovereign functions. Accordingly, the NHAI is an enterprise within the meaning of the Act.

#### Whether NHAI has abused its dominant position by prescribing a criteria for selection?

**Held:** Given that the Informant had not defined the relevant market for the alleged abuse of dominance, the CCI delineated the relevant market as *"the market for procurement of highway engineering consultancy services within the*

*territory of India".*

The Informant had not placed any information on record to establish dominance of NHAI in any relevant market and CCI noted that information available in the public domain was insufficient to conclude that NHAI enjoyed a dominant position in the market as a procurer, even though it was clearly a key player.

In relation to the selection criteria prescribed in the RFP, CCI noted that it has held on numerous occasions that it was the prerogative of the procurer to decide the technical specifications in the tender document as per its requirements and the same did not amount to abuse of dominance.

## JUDGEMENT

CCI held that no case was made out against NHAI for contravention of Section 4 of the Act. Accordingly, the matter was closed under Section 26(2) of the Act. [*Mr. Sandeep Mishra* v. *National Highway Authority of India,* (CCI Case No. 13 of 2020)]

# MERGER CONTROL

## I. FORM II

### 1. Acquisition of Emami Cement Ltd. ("ECL") by Nuvoco Vistas Corporation Ltd. ("NVCL")

NVCL, a public limited company incorporated in India, is part of Nirma promoter group company. It is stated to be engaged in the businesses of manufacturing and sale of varieties of grey cement including portland pozzolana cement (**"PPC"**), portland slag cement (**"PSC"**) and ordinary portland cement (**"OPC"**). It is also engaged in the manufacture and sale of ready-mix concrete (**"RMC"**) and certain other value-added products like construction chemicals, wall putty, and cover blocks etc. It has cement manufacturing facilities operational in the states of Chhattisgarh (**"CG"**), Jharkhand (**"JH"**), West Bengal (**"WB"**), Rajasthan (**"RJ"**) and Haryana (**"HR"**). It also has a contract manufacturing facility in Chunar (Mirzapur, Uttar Pradesh) mainly for its institutional customers.

ECL, a public company incorporated in India, is a part of the Emami group. It is stated to be engaged in the manufacturing and sale of varieties of grey cement including PPC, PSC, OPC and plain cement concrete i.e., composite cement. ECL is a cement manufacturer predominantly operating in eastern region of India with cement facilities in the states of WB, CG, Bihar (**"BI"**) and Odisha (**"OD"**) and has an installed capacity / nameplate capacity of 8.30 metric tons per annum (**"MTPA"**).

By the proposed combination, NVCL will acquire 100% of the total issued and paid up share capital of ECL. Both parties are *inter alia* involved in manufacture and sale of cement in India. While delineating the relevant product market, CCI relied on past cases pertaining to the cement industry to observe the substitutability of various types of cements viz., grey cement and white cement and between different varieties of grey cement, viz., OPC, PPC, PSC, rapid hardening portland cement, etc. CCI also observed that white cement and grey cement differ in terms of their physical characteristics and intended use and therefore, constitute separate relevant product markets, but different varieties of grey cement are considered largely interchangeable.

CCI relied upon two tests to define the relevant geographic market in the cement sector – (i) catchment area test, and (ii) Elzinga Hogarty Test (**"EH Test"**). Relying on the EH Test, CCI noted that NVCL has cement manufacturing facilities in the following states of: (i) CG, (ii) JH, (iii) WB, (iv) RJ and (v) HR. Separately, ECL has cement manufacturing plants in the states of: (i) WB, (ii) CG, (iii) BI and

(iv) OD. The overlapping states between ECL and NVCL were WB and CG where both parties have a manufacturing facility. In an earlier combination assessed by CCI, C-2014/07/190 – Lafarge / Holcim, it was observed that CG and WB form part of relevant geographic market which also includes the states of BI, JH, and OD. Based on the same, the relevant geographic market for the overlaps in CG and WB may be identified in terms of area comprising the states of CG, WB, BI, JH and OD, or subsets of these respective states.

In the instant case, neither of the parties to the proposed combination produce white cement. Accordingly, the assessment was carried out for the market for grey cement. However, CCI did not give an exact definition of the relevant product or geographic market as owing to the market shares of the parties (10-15% for NVCL and 5-10% for ECL) and the presence of other major players (such as Shree Cement, Holcim, Ultratech, and Dalmia) in the cement industry, the transaction was not likely to result in any AAEC within the geographic territory of India. Therefore, CCI approved the proposed combination under Section 31(1) of the Act.

## II. FORM 1

### 1. Acquisition of share capital of THDC India Ltd. ("THDC") and North-Eastern Electric Power Corporation Ltd. ("NEEPCO") by NTPC Ltd. ("NTPC")

NTPC is a public company incorporated in India under the administrative control of the Ministry of Power, Government of India (**"GoI"**). NTPC is an energy conglomerate primarily engaged in electric power generation through coal based thermal power plants, generation of electricity from hydro and renewable energy sources, as well as the business of providing consultancy services in engineering, operation and maintenance management, project management, contracts and procurement management, quality management, training and development, solar and renewable power projects etc.

THDC is a public sector enterprise, operating under the administrative control of the Ministry of Power, GoI. It is a government company with 74.50% of its total shares held by the GoI and 25.50% of its shares held by the Government of Uttar Pradesh. THDC is involved in the business of generation of power through hydro and wind power stations. It is also involved in provision of engineering consultancy services.

NEEPCO is a central public sector enterprise, operating under the administrative control of the Ministry of Power, GoI. It is a 100% GoI owned company, engaged in the business of generation of power through hydro, thermal and solar power

stations.

Notices for both acquisitions were filed pursuant to decision of Cabinet Committee of Economic Affairs for implementing strategic disinvestment of GoI shareholding in THDC and NEEPCO along with transfer of management control to an identified Central Public Sector Enterprise (**"CPSE"**) strategic buyer, i.e., NTPC which has an "in principal approval" of the Board of Director of NTPC. Upon execution of the transactions, NTPC will acquire 100% of the issued and paid up share capital of NEEPCO and 74.50% of the issued and paid up capital of THDC.

NTPC, NEEPCO and THDC are all engaged in the business of power generation in India, which CCI delineated as the relevant product market. Since all regional power transmission grids were synchronized through interconnection into a single seamless national power transmission network, the relevant geographic market was defined as the 'entire territory of India'. Further, CCI observed that the power generation market could be segmented based on the source of power generation such as thermal, hydro, nuclear, solar and other renewable sources, because of the varied characteristics, extent of availability and regulations related to each of these sources of energy.

CCI noted that vertical overlaps were present between NTPC and each of NEEPCO and THDC in the upstream market of providing resource management services, and in the downstream market for operating power projects and power generation in India. Activities of the parties were noticed to be overlapping in the larger market for power generation in India, and at a narrower level in market for power generation through hydro source, other renewable sources, and provision of overall consultancy services in power sector.

However, the precise definition of the relevant market was left open as CCI was of the opinion that the transactions were unlikely to have an AAEC in India, given the small market share of the parties (in the range of 15-20%) and the presence of other players in the market for generation of power (such as Damodar Valley Corporation, NHPC Ltd., Adani Power, Tata Power etc.). The incremental share of the parties from the transaction was likely to be in the range of 0-5% and therefore, CCI was of the opinion that the presence of the parties in the power generation market were not significant. Further, the vertical overlap between the parties was not seen as significant to raise any competition concerns and there are other players such as WAPCOS, Mercom, TCE etc. who are engaged in the business of providing similar consultancy services in India.

Therefore, CCI concluded that the proposed combination was not likely to have any AAEC in India and therefore, approval was given under Section 31(1) of the Act.

## 2. Acquisition of Peugeot S.A. (**"Peugeot"**) by Fiat Chrysler Automobiles N.V. (**"Fiat"**)

Peugeot is a publicly listed limited liability corporation, incorporated in France, as the holding company of a French-based group, which is mainly an OEM and dealer of motor vehicles, passenger cars as well as light commercial vehicles (**"LCV"**) under the brands Peugeot, Citroën, Opel, Vauxhall and DS. It also provides ancillary services such as financing solutions for the acquisition of motor vehicles and mobility services and solutions. In India, PSA is presently active through a joint venture (**"JV"**) which manufactures 'MB6 Gearboxes', which are a component in powertrains. However, it is stated that the entire production of MB6 gearboxes has been for the captive consumption by the Peugeot Group.

Fiat is a public company, headquartered in London and incorporated in Netherlands. It is stated to be engaged in designing, engineering, manufacturing, distributing and selling vehicles, components and production systems worldwide. It is also engaged in retail and dealer financing, leasing and rental services through its subsidiaries, JVs and commercial arrangements with third party financial institutions.

By the proposed transaction, Peugeot will be merged with and into Fiat. CCI observed that PSA and FCA are not currently engaged in the production / provision of similar or identical or substitutable products or services, either directly or indirectly in India. However, Peugeot submitted that although it is not currently engaged in manufacture or sale of automobile vehicles in India, it has plans to enter the Indian automobile market in the first quarter of 2021. On the other hand, Fiat owns 50% in Fiat India Automobiles Pvt. Ltd. (**"FIAPL"**), a JV between Fiat and Tata Motors, which manufactures a vehicle named 'Jeep Compass' that is sold in the Indian market through FCA India Automobiles Private Limited (**"Fiat India"**), a wholly owned subsidiary of Fiat. Fiat India is also engaged in the sale of passenger vehicles of the Fiat brand. Therefore, CCI noted that there was a possibility for a potential overlap between PSA and FCA in the market delineated as "the market for passenger vehicles in India".

While assessing the relevant market, CCI noted that the market could be divided into three broad segments – (i) passenger cars, (ii) utility vehicles, and (iii) vans; which could be further segmented based on price and features. However, CCI was of the opinion that the merger would not result in any competition concerns within India given the presence of several players (Maruti Suzuki, Toyota, Honda, Tata Motors etc.) and therefore the exact delineation of the relevant market was left open. Since the material on record did not suggest that the merger would result in any AAEC within India, the proposed combination was approved under Section 31(1) of the Act.

## 3. Global merger of Upjohn Inc. (**"Upjohn"**) and Mylan N.V. (**"Mylan"**)

Mylan is a global pharmaceutical company incorporated in Netherlands, having a broad portfolio of products sold in 165 countries. Mylan is present in India through three registered entities namely – Mylan Laboratories Ltd. (**"MLL"**), Mylan Pharmaceuticals Pvt. Ltd. (**"MPPL"**) and Mylan Laboratories India Pvt. Ltd. (**"MLIPL"**) and has 19 manufacturing facilities in India, including eight Active Pharmaceutical Ingredients (**"API"**) facilities, six Oral Solid Dosage (**"OSD"**) facilities and five injectable facilities, which manufacture medicines for markets across the world.

Upjohn Business (**"UB"**) is  a division of Pfizer, headquartered in China and engaged in operation Pfizer's off-patent, branded and generic (non-sterile injectables) established medicines business. At present, Upjohn is an integrated part of Pfizer business in India but does not have dedicated legal entity or research & development or manufacturing facilities. It distributes and markets its products via two local Pfizer entities - Pfizer Limited and Pfizer Products India Private Limited.

Upjohn is a Delaware (USA) corporation, currently a wholly-owned subsidiary of Pfizer created in 2019 for the purpose of its separation from Pfizer and subsequent combination with Mylan.

By the proposed transaction – (i) Upjohn Business will be separated from Pfizer and contributed to Upjohn, currently a wholly-owned subsidiary of Pfizer and (ii) Upjohn and Mylan will combine by implementing a merger or asset sale, resulting in the transfer of all of Mylan's assets and liabilities to Upjohn. Upon completion of the combination, the Upjohn business and Mylan's business will be wholly-owned by Upjohn, which will be renamed "Viatris". Once the transaction is completed, existing shareholders of Mylan and Pfizer will account for 43% and 57% of the total share capital of Viatris respectively.

CCI observed that both parties are engaged in the business of supply of APIs and Finished Dosage Products (**"FDPs"**), mainly prescription drugs, in India. Products of each party are characterized based on the hierarchy of either the therapeutic area and/or the molecule level and did not present any horizontal overlaps in the existing line of products. However, two pipeline products were identified as potential horizontal overlaps, as Mylan intends to launch therapeutic products in two categories in which Upjohn is already present.

CCI noted that there is no existing vertical or complimentary relationship between the parties either, and in any case, neither of the parties were large players in either (i) the upstream market (market for sale of APIs), key players in

which are Dr. Reddy's Laboratories, Hetero Drugs Ltd., Cadila Healthcare Ltd., Aurobindo Pharma, and Teva Pharmaceuticals. Mylan is present in the upstream market and has a share of [0-5%] for Amlodipine and Sildenafil Citrate and in the range of [5-10%] for Sertraline.; or (ii) the downstream market (market for manufacture of FDPs), which had other large players apart from Upjohn such as Mankind Pharma, Zydus Cadila, Dr Reddy's Laboratories and Ranbaxy. Upjohn is present in the downstream market and has a share of for Norvasc - in the range of [0-5%] in terms of volume and value, for Viagra - in the range of [0-5%] in terms of volume and [3-8%] in terms of value, for Daxid - in the range of [0-10%] in terms of volume and value. Further, the market share for Daxid at the molecular level was observed to be in the range of [20-35%] in terms of volume and [30-35%] in terms of value.

Given that there was the presence of several large players in both the upstream as well as the downstream market, CCI was of the opinion that the proposed combination was not likely to have any AAEC within India and therefore, the same was approved under Section 31(1) of the Act.

## 4. Acquisition of Tech Data Corporation (“TDC”) by Tiger Midco LLC (“TM”)

TM is a special purpose vehicle (**“SPV”**) set up and managed by investment funds managed by affiliates of Apollo Management, L.P. (collectively referred to as **“Apollo”**). Apollo invests in equity and debt issued by entities involved in businesses such as chemical, hospital, security, insurance, financial services, and real estate throughout the world. TM is not directly present in India, but Apollo has investments in various entities within India. One such investment of Apollo is Rackspace Inc., (**“RI”**) which has an Indian subsidiary named Rackspace India Pvt. Ltd. (**“RIPL”**) engaged in the activities of application services, provision of cloud solutions, and professional services.

TD is a US based corporation listed on NASDAQ, and globally active in the wholesale distribution of technology products and solutions to resellers and other customers. TD has a presence in India through its subsidiary Tech Data Advanced Solutions (India) Pvt. Ltd. (**“TDI”**).

CCI did not find any horizontal overlaps but noticed the existence of a potential vertical overlap on account of RIPL providing cloud solutions, which required it to maintain business arrangements with wholesale distributors within India. It noted that RIPL is involved in the upstream market of provision of cloud services while TDI is engaged in the downstream market of distribution of cloud services, which could allow for link vis-à-vis the activities of the parties within India. However, the market share for RIPL in the upstream market and TDI in the downstream market was observed to be negligible. Further, CCI noted the existence of major players such as Microsoft, AWS, Google Cloud present in upstream segment and Ingram India, Redington India, Crayon India engaged in downstream segment. Therefore, CCI decided to leave the precise delineation of the relevant market open since the material on record did not suggest that the proposed combination would result in any AAEC within India and accordingly, the proposed combination was approved under Section 31(1) of the Act.

# NEWS NUGGETS

## EU antitrust authority initiates probe into Google's USD 2.1 billion Fitbit deal

Google's USD 2.1 billion proposed acquisition of Fitbit is being examined by the European Commission (**"EC"**) amidst fears that the transaction would only increase Google's strength in the online advertising market by increasing the vast amount of data available for Google to use for personalizing its ads and services. Last month, Google had pledged not to use the fitness tracking data for advertising purposes, but the proposal was insufficient to allay EC's concern that the deal would affect online search and display advertising services and ad tech services. EC has set December 9, 2020 as the date for the next hearing, when it will take the final decision whether to clear or block the deal.

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## CBDT directs all income-tax authority to share information with CCI

On July 30, 2020, the Central Board for Direct Tax (**"CBDT"**) amended notification *S.O. No. 731 (E)*, originally issued on July 28, 2000, which specifies the terms and conditions for the disclosure of information to any officer, authority or body in regards with imposition of any tax, cess or duty under Section 138 of the *Income-Tax Act, 1961* (**"Income-Tax Act"**). By way of the amendment, the office of the DG, CCI is specified as an office within the income tax authorities for the purposes of Section 138 of the Income-Tax Act which deals with disclosure of information with respect to an assessee; thereby authorizing tax authorities to share information with CCI through the DG. CBDT has clarified that income-tax authorities shall only furnish relevant and precise information after forming an opinion that furnishing such information is necessary to enable CCI to perform its functions. This development is likely to expedite the CCI's investigations.

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## US Congress sub-committee questions CEO's of Amazon, Apple, Google, and Facebook for antitrust concerns

On July 29, 2020, Chief Executive Officers (**"CEOs"**) of Amazon, Apple, Google and Facebook were questioned by the congressional antitrust committee over the course of a marathon six-hour hearing. It was the objective of the committee to explore "*whether the tech-giants had attained and maintained*

*their status through potentially anti-competitive means"*. While Facebook's Mark Zuckerberg was confronted with his past e-mails and messages, describing the company's acquisition strategy as a "land grab" and highlighting Facebook's acquisition of Instagram as neutralization of a competitive threat, Google's Sunder Pichai was aggressively questioned on the issue of bias against 'conservatives' on the platform. Amazon's Jeff Bezos was questioned on how the company was utilizing competitive data from third-party sellers and Apple's Tim Cook was confronted with the companies App Store policies.

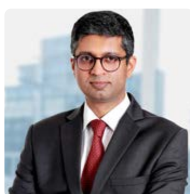
## The U.K. Competition and Markets Authority ("CMA") releases report highlighting path for UK to deal with Big tech.

On July 1, 2020, CMA released its report on 'Digital Advertising and Online Platforms', which suggests initiatives for dealing with market distortions caused by big tech companies. CMA has suggested that there is a need for establishing a new regulatory regime to tackle big-tech issues as the current competition law regime is simply not equipped to tackle the same. The proposed new regime would involve an unprecedented cross-collaboration between the different U.K. regulatory bodies and is aimed at creating a pro-competition regulatory framework. The report specifically highlights 'Google' and 'Facebook' as big tech companies with entrenched market power – Google has more than 90% share of the GBP 7.3 billion search advertising market in the U.K., while Facebook holds over 50% of the GBP 5.5 billion display advertising market.

## Expert committee constituted by the Electronics and IT Ministry ("MeitY") in 2019 proposes framework for regulating Non-Personal Data ("NPD")

Even as the *Personal Data Protection Bill* (**"PDP Bill"**) continues to be analyzed by a joint parliamentary committee, in consultation with experts and stakeholders, an expert committee constituted by MeitY has recommended a framework for regulating NPD which involves the creation of a new national law which will be separate from the PDP Bill. The report defines NPD as any data which is not 'Personal Data' (**"PD"**) as defined under PDP. Further, the report treats data as an economic good or an asset in similar terms as reflected in PDP Bill. The report recommends the creation of an entirely new regulator, the Non-Personal Data Authority (**"NPDA"**) which with the aim of improving coordination between existing regulators such as CCI and the Data Protection Authority proposed under the PDP Bill.

# TEAM PROFILE



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Badri specialises in Corporate, Competition and Regulatory matters. He is qualified to practice as a lawyer in India and New York. He advises on various issues involving consortiums and joint ventures such as contract manufacturing scenarios, valuation, secondment, royalties and license fee arrangements. He has represented parties before various fora in tax and commercial disputes. He practiced as a patent attorney in the United States before moving to L&S.

### CHARANYA LAKSHMIKUMARAN

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Charanya has over a decade of experience working in the fields of intellectual property, taxation and regulatory litigation. She is an Advocate-on-Record designated by the Supreme Court and was a former associate in the chambers of the Attorney General of India. Charanya regularly appears before the Supreme Court and focuses on competition and regulatory litigation before the NCLT and the NCLAT.

### NEELAMBERA SANDEEPAN

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Neelambera advises on the full range of competition law matters including cartel enforcement, abuse of dominance, leniency applications, merger control, audits and compliance. She appears before the CCI, NCLAT and various High Courts. Neelambera has represented clients in high-profile, precedent setting behavioral cases (Cement Cartel case) and advised on complex M&A transactions. She has previously worked at the WTO in Geneva.

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Aditya has worked with L&S since 2010 and regularly appears before the Supreme Court of India, various High Courts, the Competition Commission, NCLT and the NCLAT. His practice is focused on litigation emanating from the manufacturing sector, including matters of taxation, competition and regulatory issues.

### RISHABH CHOPRA

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Rishabh advises companies across various sectors on competition law issues such as anti-competitive/restrictive practices, cartel investigations and market dominance. Along with the team, he is also adept in running bespoke competition compliance programs, audits and trainings for various clients. He also leads the firm's initiatives on business development, communication and account management.

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