

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.



ARTICLE



Merger Control in India

A Review of the Year 2021

Mergers and Acquisitions in India reached near an all-time high in the year 2021 after deals worth US \$90.4 billion were struck in the first nine months. Of these, a total of 95 combinations were notified to the CCI including 6 combinations under Form II and 29 combinations under the green channel. In the past year, the CCI has approved a large number of transactions in the digital markets sector, internal restructurings and some of the largest acquisitions in the airline and renewable energy sector.

In this article, **Neelambara Sandeepan** (Joint Partner) gives a snapshot of the highlights of the year 2021 and a sneak peek into the trends for the upcoming year.

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RATIO DECIDENDI

1. CCI reprimands the National Egg Co-ordination Committee for price fixing

KEY POINTS

The knowledge among members that prices have to be followed strictly to avoid adverse action in itself creates an ecosystem where the requirement of strict adherence permeates to each nook and corner.

BRIEF FACTS

Two separate informations were filed by Mr. T. R. Chandran ("**Mr. Chandran**") and People for Animals ("**PFA**") against National Egg Co-ordination Committee ("**NECC**") and NECC and Agro Complex India Limited ("**ACIL**") respectively. It was alleged that NECC and ACIL's conduct ensures that fluctuation in the demand for eggs, does not affect egg prices negatively. It was further alleged that NECC fixes and declares daily egg prices at various production and consumption centres and publishes price information on its website under the heads, 'NECC Prices' and 'Prevailing Prices'. The price declared by NECC is *de facto* the price in the market, as NECC represents the interests of a majority of the egg producers. It was alleged by Mr Chandran that NECC fixes common prices for all kinds of eggs irrespective of quality, thereby driving down the prices of high-quality eggs and driving up the prices of low-quality eggs. It was also alleged that egg prices are artificially increased around the time of issuance of tenders for large scale procurement of eggs.

Regarding ACIL, it was contended that it is owned and controlled by NECC and its members and that NECC uses ACIL to siphon surplus stocks of eggs by providing cold storage facilities for preservation and movement to areas of high demand, in order to maintain higher prices. It was further stated that ACIL exports eggs to ensure that egg prices in India are maintained at the decided level, thereby deliberately limiting the supply of eggs to customers.

The CCI found a *prima facie* case and ordered an investigation.

The DG carried out an investigation and found NECC in violation of the Act for determining prices of eggs and limiting and controlling the production and supply of eggs. It however, did not find any contravention on the part of ACIL.

OBSERVATIONS OF THE CCI

Whether NECC has violated the Act by declaring daily egg prices which are followed by farmers and poultry stores?

The CCI observed that NECC is the world's largest association of poultry farmers with a membership of 37,000 farmers. NECC's objectives on its website categorically included price declaration and such information is published on the NECC website. Further, various zonal committees of NECC consult with each other before recommending a reasonable price of eggs based on surplus and deficit production. In addition to publishing daily prices, the NECC monitors monthly/annual egg prices at various NECC production and consumption centres. Given that NECC is the sole organization declaring prices of eggs in India, the price declared by NECC is the de facto price in the market.

The NECC held weekly conferences to facilitate understandings / agreements amongst different NECC zones to act on egg prices and facilitated exchange of information about the price of other zones, stock level, movement of stock, etc. Teleconferences also played an important role in national-level coordination amongst the Zonal Chairmen. Further, NECC's central executive committee controls the process of determination and declaration of prices of eggs by active intervention and reporting by the zonal chairmen at annual meetings. Advisories and directions were issued to the farmers and stakeholders to implement the declared price by cooperation and coordination.

Evidences such as WhatsApp messages, emails, minutes of meeting, statements on oath etc., collected during the investigation demonstrate the price control mechanisms of NECC.

The CCI noted that, during the investigation, NECC changed the mandatory price of eggs to 'suggestive price', which shows that NECC had the intention to enforce price of eggs. Though there is no direct evidence of imposition and collection of penalties, but the three-tier structure of NECC coupled with the knowledge among members that prices have to be followed strictly to avoid unpleasant action in itself creates an ecosystem where the requirement of strict adherence permeates to each nook and corner.

Based on the above, the CCI found that NECC is declaring egg prices and the same are also being put to implementation by various means and coordination.

Whether NECC limited and controlled egg supply?

The CCI took note of the DG's observation, that for maintenance and implementation of its declared price, NECC provides cold storage subsidies to the farmers when there is lower demand or surplus supply in the market. As per the DG this ensures that eggs are not sold below NECC declared prices and also has an impact on egg supply in the market. On this, the CCI noted that while provision of this facility and the subsequent subsidy is ameliorative, considering the perishability of eggs, if the said facility is used with the sole intention to limit supply and control prices, the conduct can be examined under the Act. However, the CCI refrained from delving deeper into this issue on the submission by NECC that the intention of this facility was to benefit the poultry industry to maintain surplus eggs in cold storage. It was noted that eggs are perishable in nature and demand is based on a lot of factors such as season etc. and when there is low demand, cold storage provides a way to maintain surplus stock and use it during high demand. Thus, the CCI noted that neither cold storage of perishable commodity such as eggs nor the subsidy for cold storage in this case can be viewed as anti-competitive.

The DG report also concluded that NECC indulged in controlling and limiting supply by directing early culling of birds. In this regard, the CCI observed that for a farmer, the expenditure on laying chick are incurred costs which are constant despite price of poultry products. Therefore, when sales and prices are low, the farmer suffers losses depending upon the scale of operations. Thus, the farmer may decide whether to continue producing eggs or cull the birds earlier. However, these should be independent decisions and not based on diktats or advisories of NECC. In the present case, the CCI concluded that the advisory was issued to maintain prices and not to limit supplies.



CONCLUSION

The CCI observed that while declaration and dissemination of price related information may not be per-se anti-competitive, such price declaration ought not be an outcome of any coordinated or concerted approach. In the present case, NECC's mandatory enforcement of prices by levying penalties / threatening to levy penalties is not in consonance with provision of Section 3(3)(a) and 3(1) of the Act. Thus, the CCI directed NECC to give disclaimers that its prices are suggestive. Further, NECC was directed to cease and desist from issuing any directives / threats for non-adherence. Lastly, it was asked to foster competition compliance within its organization and file a compliance report within 60 days. (T.R. Chandran vs National Egg Co-ordination Committee, Case No. 09/2017, Order dated 14.01.2022)

2. Bid rigging in SBI Infra tenders penalised

KEY POINTS

Actual participation in the tender is not a mandatory for a finding of bid rigging in terms of the Act.

the absence of loss to the tendering authority due to alleged conduct does not rebut the presumption of an appreciable adverse effect on competition ("**AAEC**").

BRIEF FACTS

The case was initiated *suo moto* on the basis of a complaint alleging bid rigging and cartelisation in the tender floated by SBI Infra Management Solutions Pvt. Ltd. ("**SBIIMS**") for supply and installation of new signages / replacement of existing signages of SBI branches / offices etc. located across India.

The complaint, alleged that certain bidders were coordinating and fixing prices of their services and also allocating the market amongst themselves.

The Director General ("**DG**") upon investigation seven enterprises¹⁰ had rigged the bid and geographically allocated tenders between them.

OBSERVATIONS OF THE CCI

Whether the OPs had indulged in collusive bidding?

Evidence in the form of e-mail communication containing circle wise comparison of the bidding sequence and bid figures. Upon comparison with the actual sequence and figures the DG noted that the bidding sequence as well as bid figures - either matched exactly or had minor differences but the winners matched with the pre-decided schedule.

The CCI noted that that it is not necessary that the bidding sequence and bid price should match with each other as any exchange of commercially sensitive

10. Diamond Display Solutions Pvt. Ltd. ("**OP 1**"), AGX Retail Solutions Pt. Ltd. ("**OP 2**"), Opal Signs Pvt. Ltd. ("**OP 3**"), Avery Dennison Pvt. Ltd. ("**OP 4**"), Amreesh Neon Pvt. Ltd. ("**OP 5**"), Macromedia Digital Imaging Pvt. Ltd. ("**OP 6**") and Hith Impex Pvt. Ltd. ("**OP 7**") collectively, ("**OPs**")

information between competitors is captured by the prohibition under the Act and thus presumed to have an AAEC. Whether the actual conduct matched up with the agreed anti-competitive conduct is irrelevant. Moreover, the CCI noted that the commercial information was not only exchanged but also acted upon.

The CCI also noted that some OPs met before the bidding which lends credence to the other evidence that indicates OPs had colluded. The CCI also took note of the call detail records ("**CDRs**") of the key persons of the OPs and noted that they were in constant touch with each other prior to, during and post the bidding process and that the timing of actual bid submissions matches with the telephonic calls.

In view of the above, the CCI found OP 1 – OP 5 to be guilty of allocation of tenders and bid rigging.

Regarding the role of OP 6, which emphasised that it was never a part of the bidding process and that its director Mr. Naresh Kumar Dasari ("**Mr. Dasari**") acted on his own and not on its behalf, the CCI noted that the bidding sequence and bid figures of the OPs were finalized by Mr. Dasari of OP 6 and emailed to OP 1- OP 5. Mr. Dasari stated that OP 1 and OP 6 had formed a joint venture with 50% ownership each ("**JV**"). The CCI noted that after work was awarded to OP 1, OP 6 executed the work in certain states and the JV in certain others. OP 6 also admitted that JV manufactured small volumes of work allotted to OP 1 and billed it to OP 6 who billed it back to OP 1.

The CCI thus noted that this financial involvement of OP 6 makes it difficult to believe that Mr. Dasari acted on his own. Further on the contention of OP 6 that it did not participate in the tender, the CCI noted that participation in the tender is not a *sine qua* non for a finding of bid rigging in terms of the Act. Any collusive or concerted conduct amongst competitors which vitiates the competitive process of bidding or manipulates the bidding process in any manner stands squarely covered by the Act. Thus, the CCI held it liable for allocation of tenders and bid rigging.

Regarding OP 7's role which averred that it was not concerned with the bidding process of supply and installation of signages for SBI, the CCI noted from documents submitted by SBIIMS that OP 7 had submitted applications in response to various expressions of interest invited by SBIIMS. Further it was also noted that OP 7 not only operated as a distributor to OP 4 or a supplier of material in the tender, but also tried to directly participate in the tender. Further OP 7 was also instrumental in providing inputs to OP 6 in order to enable it to work out bid prices for each of the OPs. Thus, the CCI held it liable for allocation of tenders and bid rigging.



CONCLUSION

The CCI based on a holistic assessment of the evidence, concluded that OP 1 – OP 7 entered into an agreement resulting in geographical market allocation as well as bid rigging in violation of Section 3(3) (c) and 3(3) (d) of the Act. It was noted that violations in Section 3(3) have a statutory presumption of AAEC and the OPs failed to rebut the presumption. The CCI also found the officers of OP 1 – OP 7 to be in violation of the Act who were also unable to prove that the contravention was without their knowledge. The CCI imposed penalties on all the parties taking into consideration various factors such as being MSMEs or acknowledging their conduct. In relation to OP 4 which approached the CCI with a lesser penalty application, CCI considering the stage at which OP 4 approached it and the cooperation extended, decided to waive of 90% penalty for it. In addition to the penalties, the CCI also directed the OPs to cease and desist from the practices found to be in violation of the Act in this order. (In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India, *Suo Moto* Case No. 02 of 2020, Order dated 03.02.2022)

3. CCI Directs Dumper Truck Union to cease and desist from anti-competitive price determination and limiting and controlling supply

BRIEF FACTS:

An information was filed by CJ Darcl Logistics Ltd. ("**CJD**") against Dumper and Dumper Truck Union Lime Stone ("**DTU**") and All Members of Dumper and Dumper Truck Union Lime Stone ("**AMDTU**"), collectively ("**OPs**") for restrictions imposed by DTU and its members by not letting CJD, a logistics service provider, carry out the transportation work through its own vehicles and forcing it to use trucks of AMDTU.

CJD was awarded a tender floated by JSW Energy (Barmer) Limited ("**JSW**") for transportation of limestone. CJD alleged that the OPs do not allow any other transporter to ply their vehicles and make it mandatory to take vehicles along with drivers from DTU and its members only on a higher rate vis a vis the tender rate. DTU caused hindrances by not allowing vehicles of CJD to execute the work. CJD wrote to the executive authorities but to no avail. Thereafter, it filed a writ petition in the Hon'ble High Court of Rajasthan seeking protection and security of CJD and its employees, vehicles etc pursuant to which it moved its vehicles which were stopped at some distance from the loading point. A complaint was again filed by CJD but to no avail. CJD then wrote to JSW explaining the difficulty, which responded that non fulfilment of contract would be a breach on part of CJD and it will have to bear the costs and risks associated with it. Having no recourse left, CJD entered into an interim arrangement with OPs at higher than tender rates. Thereafter, it requested JSW to float a new tender with higher rates. It also made a representation that it suffered extreme losses due to the interim arrangement. However, JSW short closed the contract with CJD. In this background, CJD alleged that by not allowing CJD to carry out its contractual obligations through its own vehicles at less rates, OPs were limiting and controlling the supply in contravention of the Act. Further, the fixation of arbitrary prices for transportation by DTU was alleged to be an imposition of unfair and discriminatory price. Additionally, the condition of transferring limestone only through their own trucks and drivers was alleged to be an unfair condition. Based on this, the CCI passed a prima facie order and asked the DG to carry out an investigation.

OBSERVATIONS OF THE CCI

Whether the OPs restricted supply of transportation services for the transport of limestone and determined arbitrary prices for the same?

The CCI noted that the DTU comprises of members who are drivers or truck owners engaged in providing transportation services (identical or similar provision of services).

The CCI observed that the allegations of CJD regarding directly / indirectly determining sale price and / or limiting or controlling provisions of services are substantiated by - the complaints made between various state authorities; writ petition; communication between CJD and JSW. The CCI also noted - the coercion/threat received by employees of CJD; no transportation of limestone until the interim arrangement and the consequential losses to CJD; the consequent short-closing of contract by JSW etc; and permission of JSW to use vehicles of DTU in subsequent tenders indicated toward the anti-competitive actions of the OPs.

Accordingly, the CCI observed that DTU and its members restrained CJD from executing its contract with JSW using its own vehicles. Further, the OPs had directly determined the sale price of transportation services for carrying limestone through the interim arrangement for use of DTU vehicles. Based on the above, the CCI held that the members of DTU had an understanding to limit / control the provision of transportation services and to fix the transportation rate at a rate higher than that determined through open tendering process. The members of DTU whose trucks were used charged uniform prices without any competition.

Whether the OPs imposed unfair price and conditions on CJD?

The CCI noted that the DG had not returned a categorical finding if DTU was indulged in an economic activity by providing trucks and drivers for transportation of goods. The DG only noted that DTU was involved in fixation of price. Thus, the CCI refrained from analysing whether DTU is an enterprise and if any case for abuse of dominance is made out against it.



CONCLUSION

The CCI held DTU to be in violation of Section 3(3) (a) and 3(3) (b) for limiting supply of provision of transportation services for the transport of limestone and determining the prices for the same. As such, it directed DTU and its erstwhile chairman to cease and desist from any anti-competitive conduct. Given that the financial statements requested from DTU or its official was not received, the CCI noted that an order imposing penalty will separately be passed. (CJ Darcl Logistics Ltd. Vs Dumper Truck Union and Anr., Case NO. 31 of 2019, Order dated 07.02.2022)

4. CCI orders an investigation into abuse of dominance by Star India.

BRIEF FACTS:

An information was filed by Asianet Digital Network (P) Ltd. ("**Asianet**") against Star India (P) Ltd. ("**Star**"), Disney Broadcasting (India) Limited ("**Disney**") and Asianet Star Communications Private Limited ("**ASC**") alleging abuse of dominance. Asianet, is a multi-system operator engaged in the provision of digital TV services in the southern states of India. Star is a broadcaster of satellite-based TV channels in India. Asianet receives broadcasting signals from Star for a monetary consideration for the purposes of supplying the channels to its customers. Asianet alleged that Star discriminates against Asianet by not offering discounts that it offers to its competitors, which amounts to an imposition of unfair price and also denial of market access due to inability of Asianet to compete in the market of distribution of TV channels. It is to be noted that the existing regulatory framework requires broadcasters to deal with distributors without discrimination and offer a maximum discount of 15%. However, Star was providing a special discount of 50% to the competitor of Asianet.

Asianet alleged that to flout the rules, Star entered into agreements with Asianet's competitor wherein it pays the advertising expenses for it. Asianet averred that Star is dominant in the market for provision of broadcasting services in Kerala and abuses such dominance by offering discriminatory discounts amounting to unfair price and denial of market access.

OBSERVATIONS OF THE CCI

The CCI noted that the main allegation in the information is that by offering additional discounts to select distributors and competitor of Asianet, Star has placed Asianet and other distributors at a competitive disadvantage, thereby abusing its dominance.

What is the relevant market?

The CCI noted that since Star is engaged in providing the services of broadcasting satellite-based TV channels in India (product market) and since Asianet is alleging price discrimination between various distributors in the State of Kerala, also having regard to language and consumer preferences (geographical market), the relevant market *prima facie* appears to be 'market for provision of broadcasting services in the State of Kerala'.

Whether Star is dominant?

The CCI noted that Star has around 50 entertainment channels and over 15 sporting channels with exclusive content of the major sporting events etc., making access to its bouquet of channels indispensable for operators like Asianet. Further, Star is a part of Disney which has an enormous global revenue. Further, Star's financial statements also revealed its robust revenue numbers. Star and its group companies are present across the entire value chain of the media industry. Thus, on the basis of market share, dependence of consumers, size and resources etc. CCI *prima facie* observed that Star is dominant in the relevant market.

Whether Star has abused its dominance?

CCI noted that Star was providing a bouquet of channels to competitors of Asianet at lesser prices resulting into denial of market access and unfair / discriminatory prices. Star provided more than the permissible discounts by flouting the extant rules. The conduct of Star resulted into Asianet offering its services at loss making prices just to preserve its customer base, which was in vain. As such, the discriminatory conduct of price discrimination by Star resulted into loss of significant consumer base and *prima facie* appeared to be in violation of the Act.



CONCLUSION

The CCI found Star to *prima facie* be in violation of Section 4(2)(a) (ii) and 4 (2) (c) of the Act for discriminatory pricing and denial of market access. Accordingly, an investigation under Section 26(1) of the Act was ordered. (Asianet Digital Network (P) Ltd. Vs Star India Private Limited and Ors., Case No. 09 of 2022, Order dated 28.02.2022)

Asianet had also applied for an interim relief from the CCI requesting it to direct Star to provide its channel at the same fees as offered to its competitors. The CCI observed that in accordance with the principles for grant of relief, Asianet has failed to project any higher level of *prima facie* case warranting grant of an interim relief and has not shown how it will suffer an irreparable harm which cannot be compensated monetarily. The CCI also did not find the balance of convenience in favour of Asianet and thus rejected the request for grant of interim relief. (Asianet Digital Network (P) Ltd. Vs Star India Private Limited and Ors., Case No. 09 of 2022, Order dated 28.02.2022)

MERGER CONTROL

1. Acquisition of majority shareholding of Jindal Power by Worldone

Worldone Private Limited ("**Worldone/Acquirer**") is an investment holding company, engaged in various businesses including the business of manufacturing steel and captive thermal power generation. Worldone presently has shareholding in various entities, including Jindal Power Limited ("**JPL / Target**").

JPL, a subsidiary of Jindal Steel & Power Limited ("**JSPL**"), is engaged in the business of generating thermal power by using coal as a fuel source.

The proposed combination relates to acquisition of 96.42% equity shareholding in JPL by Worldone ("**Proposed Combination**"). JPL, Worldone and JSPL are hereinafter collectively known as "**Parties**".

With regard to the horizontal overlaps, the Parties suggested the following definitions of relevant market for the assessment of the Proposed Combination: (i) the market for power generation in India ("**Broad Relevant Market**"); (ii) market for coal-based thermal power generation in India ("**Narrow Relevant Market**"); and (iii) transmission of Power in India ("**Relevant Market for Transmission**").

With regard to vertical relationship, it was submitted that there may be actual and / or potential vertical overlaps considering the below nature of activities of the Parties:

- i the activities carried on by JPL in coal-based power generation in India (upstream) and JSPL in the mid-stream segment for transmission of power in India (downstream) ("**Vertical Overlap 1**");
- ii the activities carried on by JPL and JSPL, wherein JPL is engaged in the mid-stream segment for transmission of power in India (upstream) and JSPL in the downstream segment for distribution of power in the state of Chhattisgarh (downstream) ("**Vertical Overlap 2**");
- iii the activities carried on by JPL and JSPL, wherein JPL is engaged in coal-based power generation in India (upstream); and JSPL in the downstream segment for distribution of power in the state of Chhattisgarh (downstream) ("**Vertical Overlap 3**").

The CCI noted that the combined market share of the Parties in terms of installed production capacity, units generated, and revenue from sales is insignificant in the relevant markets identified for horizontal overlaps. Further,

there are other significant players present, such as NTPC, Adani Power, TATA Power in Broad and Narrow Relevant Market and PGCIL in the Relevant Market for Transmission.

The CCI further noted that the presence of Parties is not significant in any of the upstream / downstream business activities as identified in relation to Vertical Overlap 1, 2 and 3, to raise any competition foreclosure concern in India.

The CCI decided to leave the precise delineation of the relevant market open as it was observed that the Proposed Combination, is not likely to cause an AAEC in any of the plausible relevant markets that could be delineated.

Accordingly, the Proposed Combination was approved under Section 31(1) of the Act.

2. Reliance New Energy Solar Ltd. acquires Shapoorji Pallonji's solar power solution's vertical

Reliance New Energy Solar Limited ("**Reliance Solar / Acquirer**"), a wholly owned subsidiary of Reliance Industries Limited ("**RIL**"), a newly incorporated entity and does not offer any products or services in India. Recently it has announced the acquisition of a stake in REC Solar, which is engaged in manufacturing of photovoltaic modules.

Sterling and Wilson Renewable Energy Limited ("**Sterling and Wilson**" / "**Target**"), a subsidiary of Shapoorji Pallonji and Company Private Limited ("**SPCPL**"), is engaged in provision of solar engineering, procurement and construction solutions, and operation and maintenance services, including for projects constructed by third parties. Reliance Solar, RIL and Sterling and Wilson are hereinafter collectively referred to as "**Parties**".

The proposed combination envisages acquisition of 40% of total voting equity share capital of Sterling and Wilson expected on the 10th working day from the closure of the tendering period for the open offer ("**Emerging Voting Capital**") by Reliance Solar ("**Proposed Combination**"). The Proposed Combination envisages the following steps:

Step 1: Acquisition of 15.46% of Emerging Voting Capital, by Reliance Solar by way of a preferential allotment;

Step 2: Acquisition of 9.70% of Emerging Voting Capital, by Reliance Solar from SPCPL;

Step 3: Open Offer to acquire up to 25.9% of Emerging Voting Capital, by Reliance Solar from eligible shareholders of Sterling and Wilson;

Step 4: Acquisition of such number of additional equity shares of Sterling and Wilson from SPCPL and Mr. Khurshed Daruvala, (i.e. current promoters of Sterling and Wilson) as may be required after considering the purchases covered in Steps 1, 2 and 3, to ensure that Reliance Solar holds 40% of the Emerging Voting Capital.

The Proposed Combination also envisages a right to nominate two representatives of Reliance Solar to the board of Sterling and Wilson.

The CCI observed that the parties do not exhibit horizontal overlaps. However, there exists a potential vertical overlap between the business activities of REC Solar and Sterling and Wilson. Solar photovoltaic modules are also purchased by solar EPC contractors such as Sterling and Wilson.

The CCI decided to leave the delineation of the relevant market open since the market position of REC Solar and Sterling and Wilson Solar was insignificant to raise foreclosure concern. Further, the segments in which REC Solar and Sterling and Wilson Solar exhibit vertical interface are characterized by presence of other players.

Accordingly, the Proposed Combination was approved under Section 31(1) of the Act.

3. Combination between FedEx India and Delhivery

FedEx Express Transportation and Supply Chain Services (India) Private Limited ("**FedEx India**") is a subsidiary of Federal Express Europe Inc., which is ultimately held by FedEx Corporation, USA ("**FedEx**"), one of the largest express transportation companies in the world.

Delhivery Limited ("**Delhivery**") is an Indian delivery and e-commerce logistics company. It provides services like express services, freight services, fulfilment and end-to-end third-party logistics services, including warehousing services. Both FedEx India and Delhivery are hereinafter collectively referred to as "**Parties**".

The proposed combination relates to the:

- i. Acquisition of 2.9% of equity shares of Delhivery by FedEx India in accordance with terms of Share Subscription Agreement entered into between the Parties.
- ii. Acquisition of operating assets of FedEx India and TNT India Private Limited ("**TNT**"), a part of FedEx Group by Delhivery pursuant to the Asset Purchase Agreement.

Further, a Service Agreement entered into between the Parties has been notified as an interconnected transaction. The effect of the Service Agreement along with Asset Purchase Agreement is that the domestic leg of express transportation in case of an international shipment either out of or into the territory of India will be provided by Delhivery on behalf of FedEx India. Further, FedEx India will undertake the international leg of the operations for the shipments of both Parties in respect of international air express services. However, FedEx India will continue to provide line-haul and PUD in the international gateway cities and limited line-haul in eight more cities i.e., Chennai, Hyderabad, Coimbatore, Cochin, Ahmedabad, Pune, Kolkata and Jaipur.

The Parties submitted the relevant market for the proposed combination as the '*market for Overall Logistics Services in India*' ("**Broad Relevant Market**") and the following narrow / narrower relevant segments:

- A. *market for express services in India* ("**Narrow Relevant Market-I**")
 - i. *market for domestic rpxpress services* ("**Narrower Relevant Market-I**")
 - a. *market for domestic road express service* ("**Narrowest Relevant Market-I**")
 - b. *market for domestic air express service* ("**Narrowest Relevant Market-II**")
 - ii. *market for International Express Service (air)* ("**Narrower Relevant Market-II**")

Further, two more plausible narrower segments for which the competition assessment was carried out was '*market for express parcel delivery*' and its sub-segment, '*market for e-commerce express parcel shipments*'.

- B. *market for Freight Services in India* ("**Narrow Relevant Market-II**")
- C. *market for Warehousing Services in India* ("**Narrow Relevant Market-III**")
- D. *market for 3PL Services in India* ("**Narrow Relevant Market-IV**")

The CCI noted that the combined market share of the Parties in the Broad Relevant Market and three of the narrow relevant markets was in the range of 0-5%. Further, these markets are marked by the presence of other significant

players such as Mahindra Logistics, Blue Dart / DHL, TVS Supply Chain Solutions, Safexpress, and Stellar Value Chain Solutions etc. Further, in the Narrow Relevant Market – I and Narrower Relevant Market – I and II, the combined market share of the parties is in the range of 15-20%, 10-15% and 20-25% respectively. However, the incremental market shares in the various segments and sub-segments of express services are relatively low, as Delhivery is a stronger player in domestic market segments, whereas FedEx is a stronger player in international market segments.

With regard to vertical and complementary relationships, the Parties submitted that there is no overlap. However, pursuant to the Service Agreement, the Parties would occupy different legs in the provision of certain logistics services as Delhivery will act as FedEx India's sales agent for the sale of FedEx's international express logistics services. In this regard, the CCI noted that Parties' combined market share in the upstream market of international express services is in the range of 20-25% and in the downstream market of domestic express service is in the range of 10-15%. Further, in the international express services segment, the main competitor of the Parties is DHL and in domestic express services, there is the presence of other competitors such as Safexpress, DTDC, Blue Dart / DHL, etc.

The CCI left open the delineation of the relevant market as the proposed combination is not likely to cause an AAEC in any of the relevant markets.

Accordingly, the proposed combination was approved under Section 31(1) of the Act.

4. Acquisition of majority shareholding of Forbes Enviro Solutions by Lunolox

Lunolox Limited ("**Lunolux / Acquirer**") is a special purpose vehicle incorporated by AI Global Investments (Cyprus) PCC Limited ("**AI Global**") for the purposes of the proposed combination. AI Global operates as the investment hub for Asia for all the funds managed by Advent International Corporation ("**Advent Corporation**").

Forbes Enviro Solutions Limited ("**FESL / Target**") is presently a subsidiary of Eureka Forbes Ltd. ("**EFL**"). FESL is present in the business of manufacture of water treatment plants in India. EFL is the entity that presently undertakes the business activities of the health and safety business of the Eureka Forbes Group. FESL and Lunolox are hereinafter referred to as "**Parties**".

The notice for the proposed combination was given pursuant to the execution of Share Purchase Agreement ("**SPA**") between the Lunolux, Shapoorji Pallonji and Company Private Limited ("**SPCPL / Seller**"), Forbes & Company Limited ("**FCL**"), Forbes Campbell Finance Limited ("**FCFL**"), EFL and FESL.

The proposed combination related to:

- i. acquisition of up to 72.56% equity stake in FESL by AI Global through Lunolux from SPCPL
- ii. acquisition of up to 26% of the equity share capital of FESL by AI Global (through Lunolux) by way of an open offer.

The proposed combination would result in AI Global through Lunolux, acquiring controlling stake in the health and safety business (i.e., business comprising the following products and services: (i) water purifiers, (ii) air purifiers, (iii) security solutions, (iv) vacuum cleaners and (v) electric air cleaning systems of FESL and its affiliates.

It was submitted by the Parties that one of Advent corporation's portfolio companies, Culligan International ("**Culligan**"), through its subsidiaries, is engaged in the sale of water purifiers and water filters. Therefore, horizontal overlaps exist between Culligan and FESL in the market of water purification and water filtration products in India. To this, the CCI noted that the combined market share of the Parties in the above stated market is in the range of 25–30% for the last three financial years. However, the incremental market share is very minimal and is in the range of 0–5%. Further, other significant competitors such as Kent, Pureit, LG, Livpure, A.O. Smilth, etc. are also present in the market.

With regard to vertical and complementary relationships, it was submitted that there exists no vertical / complementary relationships between the activities of the Parties.

The CCI decided to leave the delineation of the relevant market open as it was observed that the proposed combination is not likely to cause an AAEC in any of the relevant markets.

Accordingly, the proposed combination was approved under Section 31(1) of the Act.

5. Acquisition of GSK Asia by GSK Healthcare Overseas and GSK Healthcare UK

GlaxoSmithKline Consumer Healthcare Overseas Limited ("**GSK Healthcare overseas**") and GlaxoSmithKline Consumer Healthcare UK Trading Limited ("**GSK Healthcare UK**"), (collectively referred to as "**Acquirers**") are wholly owned subsidiaries of GlaxoSmithKline Consumer Healthcare Holdings (No.2) Limited ("**GSK Healthcare HoldCo**"). GSK Healthcare HoldCo was established through the contribution by GlaxoSmithKline plc. ("**GSK**") and Pfizer Inc. ("**Pfizer**") of their respective legacy consumer healthcare businesses and is owned 68% by GSK and 32% by Pfizer.

GlaxoSmithKline Asia Private Limited ("**GSK Asia**"), a subsidiary of GlaxoSmithKline Pte. Ltd. ("**GSK Pte.**"), is involved in the marketing and distribution of over the counter ("**OTC**") oral consumer healthcare products under various brand names such as 'Parodontax', 'Polident' and 'Sensodyne' and OTC medicine products under brand names such as 'Crocin' and 'ENO' ("**GSK Asia Products**"). (Acquirers and GSK Asia are collectively referred to as "**Parties**").

The proposed combination consists of the following inter-connected steps: (i) GSK Asia's acquisition of trademarks pertaining to 'Iodex' and 'Ostocalcium' brands in India along with the legal, economic, commercial and marketing rights of such brands and other associated assets (collectively referred to as "**GSK Consumer Brands**") from GlaxoSmithKline Pharmaceuticals Limited ("**GSK Pharma**"); and (ii) acquisition of 100% shares in GSK Asia by GSK Healthcare Overseas and GSK Healthcare UK, with acquisition of 99.9% and 0.01% respectively of GSK Asia's shareholding ("**Proposed Combination**").

The CCI classified the GSK Consumer Brands and GSK Asia Products in terms of broad therapeutic areas / product segments. Accordingly, (i) Crocin brands, 'Crocin' and 'Crocin Pain Relief,' can be classified as part of the non-narcotic anti-pyretic products (including paracetamol + caffeine combinations) segment, and 'Crocin C&F Max' can be classified as a Nasal Decongestant Product; (ii) 'ENO', including variants ("**ENO Brands**"), can be classified as part of the antacids and anti-flatulent products segment; (iii) 'Sensodyne' and 'Parodontax' can be classified as part of the foaming fluoridated toothpastes segment; (iv) 'Polident' can be classified as a denture adhesive product; (v) 'Iodex', including variants ("**Iodex Brands**"), can be classified as a part of the topical anti-rheumatic products segment; and (vi) 'Ostocalcium' including variants, ("**Ostocalcium Brands**"), can be classified as part of the calcium preparation products segment.

The CCI while considering the overlaps of each of the GSK Asia Products and GSK Consumer Brands with the retained business of Pfizer in India, decided to carry out competition assessment for the three overlapping product segments

of the Parties, i.e., (i) antacids and anti-flatulent products, (ii) topical anti-rheumatic products, and (iii) calcium preparation products. The CCI noted that, for the product segment of antacids and anti-flatulents, GSK would be contributing ENO Brands, while Pfizer has two retained products forming part of the product segment, viz., 'Gelusil MPS' and 'Mucaine'. In the segment of Calcium Preparation Products, GSK would be contributing ostocalcium brands while Pfizer has one retained product forming part of the product segment, viz., 'Ossivite'. In the segment of topical anti-rheumatics, GSK would be contributing Iodex Brands while Pfizer has one retained product under the brand, viz., 'Dolonex', forming part of the product segment.

The CCI while determining the relevant product market considered the IQVIA-IMS India Database, which adopts European Pharmaceutical Marketing Research Association's ("**EphMRA**") anatomical therapeutic chemical ("**ATC**") classification for medicines. The CCI noted that the product segments of the Parties exhibit overlaps at the ATC3 level and / or ATC4 level. With respect to the relevant geographic market, the CCI considered the relevant geographic market as the territory of India.

The CCI made the following observations with respect to overlapping product segment:

- i. with respect to the segment of antacids and anti-flatulents, that GSK's product ENO is an ayurvedic product, and upon the exclusion of ayurvedic medicines, no overlap would exist between GSK's contributed business and Pfizer's retained business. Therefore, no competition concerns are likely to arise given the competition dynamics, as reflected in presence of GSK's product ENO, Pfizer's retained products, and other competing products at the ATC3 and ATC4 level.
- ii. For the product segment of topical Anti-rheumatic products, that the presence of GSK's Iodex Brands and Pfizer's retained product 'Dolonex', as reflected in market share data, is insignificant at both the ATC3 and ATC4 levels, both in terms of value and volume. Further, as observed, the segment is characterised by the presence of other significant players, such as Sun Pharmaceuticals, Reckitt Benckiser etc., which would continue to exercise competitive constraints on the products of GSK and Pfizer.
- iii. For the product segment of calcium preparations, the presence of GSK's ostocalcium brands and Pfizer's retained product 'Ossivite', as reflected in market share data, is insignificant at both the ATC3 and ATC4 levels, both in terms of value and volume. Further, as observed, the segment is characterised by the presence of other significant players, such as Torrent Pharma, Meyer Organics, Alkem Laboratories etc.

The CCI left the exact delineation of relevant market open since the Proposed Combination was not likely to cause any AAEC in any of the alternative and plausible relevant markets.

6. CCI fines Adani Green for gun-jumping

Adani Greens Energy Limited ("**Adani Green/Acquirer**") was served with a show cause notice ("**SCN**") on 14 August 2021 in relation to its acquisition of S.B. Energy Holding Limited ("**S.B. Energy/Target**") ("**Combination**"). The notice for the Combination was filed on 18 May 2021, pursuant to the execution of Share Purchase Agreements by and between Adani Green and Softbank Group Capital Limited ("**Softbank SPA**") and between Adani Green and Bharti Global Limited. The said combination was approved by the CCI on 30 June 2021.

During the review of the Combination, the CCI noted that a clause contained in Softbank SPA ("**Clause**") ,*inter alia*, (i) allowed the parties to discuss the ongoing business and operations of S.B. Energy and its subsidiaries; (ii) allowed Adani Green to provide inputs on the business of the S.B. Energy; and (iii) provided for the S.B. Energy to take such inputs into account in the best interests of S.B. Energy and its subsidiaries.

The CCI was of the *prima facie* view in the SCN that since the purported action under the aforesaid Clause came into effect right from the date of the execution of the Softbank SPA i.e., 18 May 2021, the Clause may have had the impact of consummating a part of the Combination before the expiry of the period specified under Section 6(2A) of the Act which prohibits any combination from "coming into effect" until the final decision has been taken on the combination by the CCI or expiry of 210 days from the date of notification of the combination to the CCI. Further, the CCI observed that discussing the ongoing business and Adani Green providing inputs on the business of S.B. Energy may result in the parties ceasing to act independently or ceasing to compete as the parties were competing before the Combination resulting in coordinated outcomes before the expiry of timelines contained in Section 6(2A) of the Act.

OBSERVATIONS OF THE CCI

Adani Green in response to the SCN submitted that (i) the objective behind the clause was to monitor and preserve the economic value of S.B. Energy; and that (ii) certain safeguards have been laid down in the Softbank SPA in the form of clean team protocols to alleviate potential gun-jumping concerns. However, the CCI observed that the Clause can potentially facilitate the exchange of

commercially sensitive information, and the same is not inherent and proportionate to the objective of preserving the economic valuation of the business and is also not supported by adequate safeguards.

The CCI observed that the Clause, as worded, by itself amounts to consummating a part of the Combination before the approval of the same by the CCI, and by agreeing to the same, Adani Green has violated the requirements under Section 6(2) of the Act. However, considering that, at this stage, it is important to increase awareness amongst the stakeholders with respect to their obligations in terms of standstill obligations in general and specifically relating to exchange of information, the CCI decided to impose a nominal penalty of INR 5 lakh on Adani Green.

In the recent past, the CCI has imposed penalty for gun jumping on (i) Investcorp India Asset Managers Private Limited ("**Investcorp**") for failing to notify its acquisition of venture capital fund and alternate investment funds managed by IDFC Alternatives Limited ("**IDFC**"), pursuant to which, Investcorp became the investment manager of the funds managed by IDFC and acquired operational control over them. Further, till date, the highest fine imposed by the CCI in respect of combinations for false representations and gun-jumping is INR 202 Crore on Amazon in Amazon / Future Coupon deal.

NEWS NUGGETS

1. CCI conducts dawn raids on tyre manufacturers

The CCI on 30.03.2022 raided the premises of three tyre manufactures namely, Apollo, Ceat and Continental in relation to alleged bid-rigging in tenders for procurement of tyres by state public transport authorities. This is the second instance since the coming into force of the Act that the tyre industry has come under the CCI's scrutiny. Previously, the CCI had investigated and given a clean chit to an alleged price fixing cartel in the tyre industry.

2. South Korea finalizes rules on in-app payments

South Korea's telecommunication regulators have banned app store providers such as Google and Apple from forcing app developers to use their payment system, thereby allowing payment through third party payment providers on the platform. In case of non-compliance, the rules allow for fines of up to 2% of local revenue.

3. EU announces antitrust probe against Google and Meta over Ad Deal

The European Commission has launched an antitrust probe over a 2018 deal between Google and Meta (previously known as Facebook) in the online advertising market. The investigation relates to a project Google internally codenamed "Jedi Blue" and aims to determine whether the agreement emanating from it resulted in restricting and distorting competition in the already concentrated ad tech market.

A similar investigation has also been launched by the Competition and Markets Authority ("**CMA**") in UK against Google and Meta.

4. EU Parliament, Council and Commission reach agreement on the Digital Markets Act

The Digital Markets Act seeks will ban certain practices used by large platforms acting as "gatekeepers" and enable the EU Commission to carry out market investigations and sanction non-compliant behaviour.

The provisional text targets large companies providing so-called "core platform services" most prone to unfair business practices, such as social networks and

search engines, with a market capitalisation of at least €75 billion or an annual turnover of € 7.5 billion. To be designated as “gatekeepers”, a company must also provide certain services such as browsers, messengers or social media, which have at least 45 million monthly end users in the EU.

In the recent discussions, EU lawmakers agreed that the largest messaging services will have to open up and interoperate with smaller messaging platforms, if such a request is received. Users of small or big platforms would then be able to exchange messages, send files or make video calls across messaging apps, thus giving them more choice.

5. Irish Competition Regulator suspends data transfers to US by Meta

Data Protection Commission (“**DPC**”), a European Union agency responsible for protecting personal information in Ireland, has ordered to suspend data transfers by Meta Platforms to the United States (“US”). The decision once finalized, would have sweeping impacts on multiple companies that seek to transfer data between the EU and the US for their platforms.

REGULATORY UPDATE

1. The Ministry of Corporate Affairs on 16.03.2022 has extended the applicability of the small target exemption thresholds for another period of 5 years i.e., until 2027. This will allow transactions which are unlikely to trigger competition concerns to continue to consummate without an added regulatory compliance under the Act. Further, it would also save the CCI's time and resources from investigating such transactions.
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TEAM PROFILE



L BADRI NARAYANAN

PARTNER
(Advisory, Corporate,
Competition and Regulatory)

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

PARTNER
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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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