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FEBRUARY 2018 • SPECIAL EDITION • STRICTLY FOR PRIVATE CIRCULATION

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CCI's Approach to 'Indirect' Acquisitions in Merger Control

The Competition Commission of India ('**CCI**') has made rapid strides in the development of its merger control regime in six short years. Despite facing a significant increase in the volume of notified transactions (almost 150% from 2013-14 (43) to 2016-17 (111)), CCI has cleared more than 450 transactions in a timely fashion.

However, CCI's decisions on the acquisition of minority, non-controlling shareholding appear to have created some uncertainty in respect of the notification assessment under Section 6(2) of the Competition Act, 2002 ('**Act**').

In *Alfa Laval*[1] *and TPG Manta,*[2] CCI appears to have taken an expansive view of indirect acquisitions. In *Alfa Laval*, CCI treated the acquisition of shares in the offshore holding company (Alfa Laval) as an acquisition of shares in the indirect Indian subsidiary, Alfa Laval India. In this case, Tetra Laval had raised its shareholding in Alfa Laval from 18.83% to 26.1%, still a minority non-controlling stake (as recognized by CCI itself in the approval order),[3] which was interpreted by CCI to mean that Tetra Laval had acquired an *indirect* 23.1% stake in Alfa Laval's indirect Indian subsidiary, Alfa Laval India.

Similarly, and more recently, in *TPG Manta,* GIC and Thoma Bravo had acquired certain non-controlling shareholding in TPG Manta (acquirer/immediate target) pursuant to a co-investment agreement.[4] In the meantime, TPG Manta sought to acquire 51% of the shareholding of another entity, FTW (target) and notified its proposed acquisition of shares in FTW to CCI. In its decision, CCI expressly acknowledged that neither GIC nor Thoma Bravo would acquire any shares or voting rights in FTW. Yet, CCI held that as a result of its shareholding in TPG Manta, Thoma Bravo would acquire "economic interest" in FTW commensurate with its shareholding. CCI observed that Thoma Bravo received "economic interest" in FTW along with the right to appoint a director on the board of FTW. Based on this perceived 'acquisition' of an 'economic interest', CCI went on to review the applicability of the specific exemption available for minority non-controlling acquisitions under Item I, Schedule I of CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 ('**Minority Acquisition Exemption**'). CCI then concluded that despite there being *no* acquisition of shares, voting rights (or assets or control[5]) in FTW, Thoma Bravo's acquisition of 'economic interest' did not benefit from the Minority Acquisition Exemption.

In light of CCI's decisions in *TPG Manta* and *Alfa Laval*, we examine more closely the concerns that arise with CCI's interpretation of indirect acquisitions, particularly in the context of the Minority Acquisition Exemption.

Consider the following example: Immediate Target Co. ('**IT**') holds a 55% stake in Target Subsidiary ('**TS**'). Acquirer Co. ('**A**') subsequently proposes to acquire a 20% non-controlling stake in IT. To what extent can it then be argued that A has 'acquired' an indirect stake in TS under the Act, such that it now needs to carry out a notification assessment not only with respect to the acquisition of shares in IT, but also in TS.

Section 2(a) of the Act defines an 'acquisition' as "directly or *indirectly*, acquiring or agreeing to acquire - (i) *shares*, *voting rights* or *assets* of any enterprise; or (ii) *control over management* or *control over assets of any enterprise*." Applying this definition to the illustration above: while A may have directly acquired shares (and attendant *voting rights*) in IT, may it equally be said that A has *acquired* 'shares' or 'voting rights' in TS? Or *per* the definition of 'acquisition' above, has A arguably *indirectly* 'acquired' shares, or voting rights, in TS?

Notably, the Securities and Exchange Board of India ('**SEBI**') does not follow a *pro-rata* approach when examining a party's obligation to make an open offer under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 ('**Takeover Code**') for indirect share acquisitions. Under the Takeover Code, investments that confer upon the acquirer, control over the immediate target company would qualify as an indirect acquisition of *all* the shares held by the immediate target company in the ultimate target.[6] However, a non-controlling investment in the immediate target by the acquirer does not imply an indirect acquisition of a prorated percentage of shares in the ultimate target company. Similar treatment can be found in the

1 *Alfa Laval and Tetra Laval* (C-2012/02/40)

2 *Manta Holdings LP and Thomas Bravo Funds XII LP (C-2016/10/439)*

3 Paragraph 11, *Alfa Laval and Tetra Laval (C-2012/02/40)*

4 From the approval order published by CCI, the shareholding in TPG Manta by Thoma Bravo and GIC is not clear.

5 CCI acknowledged that Thoma Bravo had only the right to appoint one director on the board of FTW. Accordingly, such purely investor protection rights may not reasonably be regarded as an "acquisition of control"

6 See, https://www.sebi.gov.in/sebi_data/faqfiles/aug-2017/1503313163982.pdf. As the SEBI website explains, if A acquires 40 per cent shares of IT along with majority control of IT which, in turn, holds 70 per cent shares of TS, a listed company, along with majority control of TS, then A, in effect, acquires control over 70 per cent shares of TS held by IT.

merger control provisions in the United States. *Per* the Hart–Scott–Rodino Antitrust Improvements Act of 1976 ('HSR') – only *controlling* investments in a company would constitute indirect acquisitions of the shares held by the immediate target in the ultimate target company

The argument that A may have made an 'indirect' acquisition of shares in TS may not be in consonance with the spirit and purpose of the definition of 'acquisition' under Section 2(a) of the Act. Reference to 'indirect' acquisition is more likely to include those acquisitions where an ultimate acquirer uses a *controlled* intermediate corporate vehicle to carry out the intended acquisition, *e.g.* a special purpose vehicle set up for an acquisition. In such a case, an acquisition by the otherwise inconsequential controlled entity may effectively be viewed as an acquisition by the controlling holding entity. To go beyond this, as in the example above, raises several uncertainties for businesses while assessing the notification requirements for acquisitions.

The first uncertainty arises while assessing the applicability of the target based (*de minimis*) exemption.[7] Even if the intended/immediate target, IT satisfies the *de minimis* asset or turnover thresholds in India, the *indirect, unintended* target, TS, may not benefit from the target based (*de minimis*) exemption.

The second set of uncertainty arises on account of CCI's fairly conservative view on 'strategic acquisitions.' Apart from the limited carve-out provided under the Minority Acquisition Exemption, [8] CCI appears to have taken the position that any acquisition of shares in a competitor will likely be viewed as a 'strategic' acquisition *i.e.* neither in the 'ordinary course of business', nor made 'solely as an investment.'[9] Accordingly, besides the very narrow exception provided for in the explanation to the Minority Acquisition Exemption, acquisition of minority, non-controlling shares in inter-competitor transactions engaged in the same or similar business is unlikely to benefit from the Minority Acquisition Exemption.[10]

The difficulty with this interpretation is illustrated below using the example above. Assume that A (acquirer) and T (ultimate target) are engaged in the same business, but IT (immediate target company) is neither a competitor to A nor T. If A is viewed as having *indirectly* acquired a 14% shareholding in T, by way of its acquisition in IT, A's acquisition in IT would result in a separately notifiable transaction, on account of A being unable to benefit from the Minority Acquisition Exemption (since, A and T are engaged in similar businesses).[11]

Extending CCI's reasoning further, in the example above, consider a situation where A holds 50% or more of the shareholding of IT and IT is engaged in a similar business as T. If IT were to acquire a minority stake (5%) in T such that 'it is viewed as triggering an indirect acquisition by A in T, then, in light of CCI's expansive definition of 'strategic acquisitions,' T will once again be unable to benefit from the Minority Acquisition Exemption (having an indirect horizontal overlap with T (on account of IT's shareholding in T). As a result, even though A is not actually *acquiring* shares in T and has no overlaps with T, it will nonetheless be subject to a notification requirement.

The situations contemplated above create a great deal of uncertainty, particularly when assessing the notifiability of non-controlling acquisitions. The uncertainty means that potential acquirers would need to assess notification requirements in all such companies where their intended target company may have a shareholding.

The uncertainty with this interpretation is exacerbated on account of CCI's selective application of its interpretation of 'indirect acquisition.' In several other cases, CCI has not always followed or at the very least expressed in writing, its expansive interpretation of what it consider as an *indirect* acquisition.

An overly broad interpretation of 'indirect' acquisition may create additional difficulties for non-controlling shareholders. Take the same example as above, and assume that once A has acquired the 20% non-controlling stake in IT, which then subsequently decides to acquire a 55% stake in A's competitor, C. Now, as a minority, non-controlling shareholder in IT, A may not have any meaningful ability to control such a decision by IT. Yet, owing to its minority shareholding in IT, A may nevertheless be subjected to notification requirements before CCI, on account of it having acquired an *indirect* stake in a competing concern. Thus, even though the acquisition was not contemplated by A, and could not therefore have been a 'strategic' investment, this acquisition would still be unable to benefit from the Minority Acquisition Exemption.

7 Any transaction where the 'target' enterprise (*i.e.* the enterprise whose shares, voting rights, assets or control are being acquired or are being merged/amalgamated, and including such enterprise's subsidiaries) either has assets not exceeding ₹3,500 million (approx. US$ 54.4 million) in India, OR has a turnover not exceeding ₹10,000 million (approx. US$ 155.3 million) in India, are currently exempt from the mandatory notification requirement.

8 *Per* the explanation to the Minority Acquisition Exemption, acquisition of shares of less than 10 per cent, subject to the satisfaction of certain additional conditions (no board seat, acquisition of ordinary shareholder rights, no intention to nominate board seat or participate in the management of the target), would be deemed to be as "solely as an investment" and absent any acquisition of control, would be eligible for the Minority Acquisition Exemption.

9 *Copper Technology/ ANI Technologies, C-2017/08/525. Abbott/ Mylan – C-2014/08/202*

10 *See Alibaba/Singapore, C-2015/08/301; Tencent/Flipkart, C-2017/04/501*

11 In this example, as well as in the others, we assume that the parties satisfy all jurisdictional thresholds.

CCI's approach for implementation of indirect acquisitions is inconsistent with the practice followed by other jurisdictions (*e.g.*, European Union, United States, Australia, Canada, etc.). CCI has in the past been proactive in addressing similar problematic provisions and interpretations within merger control. We look forward to receiving definitive guidance from CCI to address the ambiguities associated with its selective interpretation of 'indirect acquisitions'.

Behavioural Cases

CCI slams penalty on chemists and druggists association in Gujarat for anti-competitive conduct[12]

On January 4, 2018, CCI levied a penalty of ₹1, 08,588 and ₹11,11,549 on the Chemists and Druggists Association of Baroda ('**CDAB**') and Federation of Gujarat State Chemists and Druggists Association ('**FGSCDA**') respectively. The penalty was calculated at 10% of the average annual income of financial years 2011-12, 2012-13 and 2013-14, for contravening Section 3 of the Act. The office bearers of CDAB and FGSCDA were also penalized for being actively responsible for engaging in anti-competitive conduct of their organizations.

The informant, Reliance Agency ('**Reliance**'), alleged that CDAB and FGSCDA limited the supply of drugs and medicines by mandating issuance of no objection certificates ('**NOC**') from the concerned chemists and druggists association prior to the appointment of stockists for the supply of drugs and medicines. It was also alleged that Abbott India Ltd. ('**Abbott**') was an active participant in such anti-competitive practices along with other parties, as it willingly adhered to these directives.

It was observed by CCI that the allegation of ill-motives of Reliance in filing the above information, made by CDAB and FGSCDA, has no relevance since the proceedings before CCI are inquisitorial in nature and therefore the *locus* of Reliance is not relevant in deciding whether the case filed before CCI should be entertained or not. Further, it was noted that as per the scheme of the Act, it is not necessary that there must be an informant to initiate an inquiry or investigation. Relying on the judgment passed by the Hon'ble Supreme Court in *Competition Commission of India v. Steel Authority of India Limited*[13], CCI held that given the inquisitorial nature of the proceedings before CCI, it is not required to confine the scope of inquiry to the parties whose names are mentioned in information. CCI observed that the scope of inquiry is much broader and it is not restricted in its inquiry to investigate only the parties arrayed in the information.

On the substantive allegations, further to the evidence collected by the Director General, CCI ('**DG**'), which included statements of witnesses on cross-examination, CCI concluded that CDAB and FGSCDA had engaged in anti-competitive conduct and contravened Sections 3(3)(b) and 3(1) of the Act. It was observed that the requirement of an NOC posed a hindrance that dissuaded new and existing stockists from entering and expanding in the market and this practice amounted to an entry barrier for other pharmaceutical stockists.

CCI also reviewed allegations against the FGSCDA's practice of mandatorily requiring payment of Product Information Service ('**PIS**') charge in order to introduce new products in the market. CCI dismissed arguments made by CDAB and FGSCDA that the PIS charge was beneficial to pharmaceutical companies and found that on account of PIS charge pharmaceutical companies were unable to launch new products without first paying for the publication of their products in the FGSCDA magazine. Accordingly, CCI held that the practice of imposing mandatory PIS charges by FGCDA and CDAB resulted in limiting supplies in the market in contravention of Section 3(3)(b) read with Section 3(1) of the Act. In respect of Abbott, the DG noted that it was the only distributor of Novo Nordisk ('**Novo**') products. CCI noted that Abbott was neither in a position to appoint Reliance (who was not an authorised wholesaler of Abbott) as a stockiest, nor as a supplier of Novo products since it had a limited role in the supply of Novo products. Therefore, CCI agreed with the findings of the DG that Abbott could not be faulted for returning the order and demand draft of Reliance and advising it to approach Novo for supplies.

With the exception of the Secretary of CDAB, CCI found that the respective presidents of CDAB and FGSCDA were responsible for the anti-competitive conduct of their respective associations, and accordingly imposed a penalty of 10 per cent of their average income under Sections 48(1) and (2) of the Act.

AZB & Partners successfully represented Abbott in these proceedings.

12 Case No. 97 of 2013.

13 (2010) 10 SCC 744

CCI imposes penalty on Nair Coal Services Pvt. Ltd., Karam Chand Thapar & Bros. (CS) Ltd. and Naresh Kumar & Co. Pvt. Ltd. for engaging in collusive conduct[14]

By way of its order dated January 10, 2018, CCI imposed a penalty of ₹7,16,00,000, ₹16,92,00,000 and ₹111,60,00,000 on Nair Coal Services Pvt. Ltd. ('**NCSL**'), Naresh Kumar & Co. Pvt. Ltd. ('**NKC**') and Karam Chand Thapar & Bros. (CS) Ltd. ('**KCT**') respectively for engaging in collusive bid rigging in contravention of Sections 3 and 4 of the Act. The information was filed by Shri Surendra Prasad ('**SP**'), an advocate purportedly aggrieved by the sudden rise in electricity charges in the state of Maharashtra, against Maharashtra State Power Generation Co. Ltd. ('**MAHAGENCO**'), NCSL, KCT and NKC alleging collusive bid-rigging and geographical bid allocation under Section 3(3) and denial of market access under Section 4 of the Act.

MAHAGENCO is a state-owned company engaged in the business of generating power in the state of Maharashtra. It runs seven thermal power stations ('**TPS**') and obtains raw coal from various subsidiaries of Coal India Limited ('**CIL**') through liasoning agents, who are responsible for ensuring quality coal procurement. NCSL, KCT and NKC are all coal liasoning agents (collectively referred to as '**CL Agents**').

CCI had originally dismissed the information under Section 26(2) of the Act by way of its order dated December 11, 2013. SP then appealed to the erstwhile Competition Appellate Tribunal ('**COMPAT**'). By way of its order dated September 15, 2015, COMPAT then set aside CCI's closure order and directed the DG to investigate the allegations raised by SP.

After considering the DG investigation report and the preliminary objections raised by the CL Agents, CCI stated that in the absence of a Section 26(1) order, the DG investigation was void. CCI held that once COMPAT had directed the DG to investigate, it could not sit in appeal over COMPAT's direction. It opined that doing so would constitute an act of judicial indiscipline that would border on contempt. CCI also considered the allegation that SP had approached CCI with unclean hands, as SP was associated with the advocates representing B.S.N. Joshi & Sons Ltd. ('**BSN**'), a rival of the defendant CL Agents. It was noted that SP had fraudulently circulated a copy of the DG's investigation report to BSN, who was not a party to the investigation. However, further to an apology tendered by SP's advocate, CCI didn't penalize SP for making fraudulent statements.

On the issue of illegal/unwarranted expansion of investigation by the DG, CCI agreed with the CL Agents that the DG had exceeded the scope of its investigation by considering the conduct of the CL Agents also in respect of tenders issued by various power generation companies other than MAHAGENCO. CCI noted that absent any material on record to prove that the CL Agents had cartelized in these tenders, the DG was wrong in drawing speculative and conjectural observations in respect of such other tenders. On this basis, CCI did not consider evidence relating to tenders in the DG Report that were not issued by MAHAGENCO.

CCI then examined several factors to conclude that the CL agents had entered into an arrangement in respect of the tenders floated by MAHAGENCO and had rigged the bid: (i) identical basic rates quoted by both NCSL and NKC; (ii) a pattern of geographical allocation of TPS in response to the tenders floated by MAHAGENCO; (iii) purchasing of the tender documents by NCSL and NKC on the same day; (iv) NCSL and NKC were engaged in discussions with each other at every stage of tendering process through exchange of letters/pre-bid queries for MAHAGENCO tenders; (v) NCSL and NKC had various financial transactions which were done to share profits or make payments for cover bids; and (vi) bogus expenses shown by NCSL and NKC in order to show less profits arising out of the MAHAGENCO tenders. As apparent from the above, apart from price parallelism, CCI also referred to the above factors to conclude that the parties had engaged in collusive bid rigging.

CCI noted the mitigating factors asserted by NKC: (i) NKC had a very limited role to play; (ii) no appreciable adverse effect on the competition ('**AAEC**') as a result of the cartel agreement; (iii) NKC was a small and medium enterprise company, and any penalty would ruin its viability; and (iv) NKC was engaged in various other businesses apart from coal liasoning services, and therefore, only the revenue pertaining to coal liasoning services should be considered for determining the penalty. CCI was however of the opinion that the contention of NCSL and NKC that only the revenue generated from the impugned tender alone would constitute relevant turnover was not tenable. CCI then, without considering the mitigating factors, held that the CL Agents had engaged in market allocation and bid rigging in respect of MAHAGENCO tenders during the period between 2005 and 2013, amounting to hard core cartel, in violation of Sections 3(3)(c) and 3(3)(d) read with Section 3(1) of the Act. It thus directed them to cease and desist from the cartel activity. The present case is one of the rare cases (after the *cement cartel case*[15]) where CCI ignored the mitigating factors and imposed a high penalty on the parties involved.

CCI was of opinion that the present case falls in the category of hard core cartels as NCSL and NKC reached an agreement to submit collusive tenders and to divide the markets. CCI also

14 Case No. 61 of 2013

15 Case No. 29 of 2010

specifically noted that while the investigation was for the period between 2005 and 2013, the findings of CCI are limited to the conduct that occurred after 20 May 2009 to 2013. Further, it noted that "relevant turnover" did not mean the relevant turnover from the impugned tender alone, and in line with the *Excel Crop* decision of the Supreme Court[16], held that it was the total revenue generated from all coal liasoning services which should be considered as the "blemished product" and relevant for the purposes of calculating the turnover. Accordingly, CCI imposed a penalty at the rate of 2 times the profits of the CL Agents between 2010-11 and 2012-13.

CCI orders investigation by DG against Star India Private Limited[17]

Further to information filed by Thiruvananthapuram Entertainment Network (P) Ltd. ('**TENL**') against Star India Pvt. Ltd.('**Star**'), CCI, on December 29, 2017 directed the DG to investigate into the matter and ascertain if there was a contravention of Section 4 (2) (a) (ii) of the Act by Star.

TENL supplies signals for telecasting various TV channels including Star's channels to customers at different places. It has around 22,000 customers in the State of Kerala. Star is a broadcaster of satellite based television channels in India, including popular channels such as Star Plus, Star Sports and Star Gold. In its information filed under Section 19 (1) (a) of the Act, TENL alleged that Star was engaging in price discrimination with TENL, by consistently increasing its license fee to TENL from June 30, 2014, even though other larger distributors were not asked to pay higher license fees to Star for the same set of channels. TENL alleged that the license fee was increased once Star took over certain Malayalam channels in June 2014 and that such conduct contravened Sections 3 and 4 of the Act.

CCI held that the alleged conduct did not fall within the scope of Section 3(3) of the Act, which deals with competitor conduct. Since the scope of the agreements between Star and TENL did not fall within the specific clauses of Section 3(4) of the Act, CCI ruled out contravention of Section 3(4) of the Act as well.

For examining the alleged conduct under Section 4 of the Act, CCI identified the relevant market as the '*market for provision of broadcasting services in the State of Kerala*'. To assess Star's market position CCI directed Star to provide the names and market share of its competitors in the state of Kerala. CCI noted that since Star provided a generic response (simply stating that 881 private channels were registered with the Ministry of Information and Broadcasting and Star competed with all 881), it was constrained to rely on information from the public domain to complete its preliminary assessment. On the basis of publicly available data, namely, viewership data issued by the Broadcast Audience Research Council for April, 2017, CCI noted that Star was a leading player with approximately 40-50 % share of viewership in Kerala, with the next closest competitors enjoying a viewership share of 20%t and 10% respectively. Accordingly, CCI concluded that Star enjoyed a dominant position in the relevant market.

To examine whether Star had contravened Section 4 of the Act by engaging in price discrimination, CCI directed TENL and Star to provide details of actual rates charged from TENL's larger competitors, *i.e.* Kerala Communicators Cable Limited ('**KCCL**'), Asianet Cable Vision ('**ACV**') and DEN Networks Limited ('**DEN**'). On the basis of information received from Star, CCI noted that Star provided incomplete, inconclusive and even contradictory information to it. Star contended that relevant regulations issued by the Telecom Regulatory Authority of India ('**TRAI**') required it to treat similarly placed customers equally. To the extent that TENL had a much smaller subscriber base than other multi system operators ('**MSO**'), it was not similarly placed. However, CCI noted that Star failed to provide relevant details of the size of the subscriber base of other similarly placed MSO's or the prices it charged to MSOs with a larger subscriber base.

In response to CCI's queries on market share information, TENL sought to withdraw the information filed with CCI stating that its dispute with Star was resolved, as Star had agreed to reconsider its tariff rates. CCI rejected TENL's request for withdrawal on the grounds that a settlement between an informant and the alleged contravening entity cannot be the basis for terminating proceedings before it and that, in any event, the alleged contravention needed to be examined in relation to the market in general, and not only from TENL's perspective. CCI accordingly found that (i) Star's inability to provide any reliable evidence to refute the allegations of price discrimination; (ii) price discrimination brought out in the information; and (iii) Star's speedy resolution of the infomant's grievance followed by an evasive reply to CCI, *prima facie*] indicated that Star was is acting in contravention of the provisions of the Act and directed the DG to conduct an investigation under Section 4(2)(a)(ii) of the Act.

In its order, CCI noted that its jurisdiction was complementary to and in addition to that of TRAI and specifically observed that its powers and functions under the Act appeared to be distinct in terms of investigation process, inquiry and remedies from that of TRAI under the TRAI Act, 1997.

16 Appeal No. 79 of 2012
17 Case No.13 of 2017

CCI dismisses allegations of abuse of dominance against Viacom 18, UFO Movies, E-city Digital Cinema, Real Image Media Technology, United Media Works, K Sera Sera Digital Cinema and The Film and T.V. Producers Guild of India.[18]

On December 29, 2017, CCI dismissed information filed against Viacom 18, Aditya Chowksey, UFO Movies India Ltd., E-city Digital Cinema Pvt. Ltd., Real Image Media Technology Pvt. Ltd., United Media Works Pvt. Ltd., K Sera Sera Digital Cinema Pvt. Ltd. ('**KSS**') and the Film & T.V. Producers Guild of India Ltd. ('**the Guild**') (collectively referred to as '**Cinema Operators**') by the sole proprietor 'M/s Prakash Cinema' in Madhya Pradesh by way of an order under Section 26(2) of the Act.

Cinema Operators are in the business of supplying necessary digital cinema equipment ('**DC Equipment**') used to capture signals of films to be exhibited in the cinema hall. The Guild is the parent body of all the producer associations.

It was alleged that KSS wrongly terminated its agreement with the Mr. Arjun (the Informant) and proceeded to remove DC Equipment from Arjun's premises, preventing Arjun from carrying on its business. It was also alleged that the Guild, the parent body of all producers' associations to which most producers were affiliated, issued a directive to all producers not to exhibit their movies in the Arjun, the Informant's cinema. Accordingly, it is alleged that by failing to provide DC Equipment to Arjun, the Cinema Operators together and, KSS in particular, abused their dominant position under Section 4 of the Act. Similarly, the Guild had contravened Section 4 of the Act by preventing film producers from exhibiting movies in the Informant's cinema.

CCI dismissed allegations against the Cinema Operators on the ground that the scheme of the Act does not provide for 'collective dominance.' CCI also observed that since Cinema Operators weren't engaged in same line of business, their conduct could not be scrutinized under Section 3(3) read with Section 3(1) of the Act for concerted/collusive action. To examine allegations of abuse of dominance against KSS, CCI defined the relevant market as the "*provision of DCE services for the purpose of screening/exhibiting films in India.*" However, CCI observed that various other players offered DC Equipment from whom Arjun could procure necessary equipment, thus demonstrating that the relevant market was competitive. Absent dominance, no case for abuse of dominance was made out against KSS. In any event, CCI held that the agreement between Mr. Arjun, Informant and KSS did not appear to be onerous or one-sided and allegations of wrongful termination was not a competition concern, and appeared to be in the nature of a contractual breach.

CCI equally dismissed allegations of abuse of dominance against the Guild as Arjun failed to provide any material to substantiate that the Guild had, in fact, issued any oral or written directions to its producer members not to exhibit their films in Arjun's cinemas.

CCI dismisses complaint against Kerala State Electricity Board Limited[19]

On December 29, 2017, CCI dismissed information filed by the proprietor of Paulson Park Hotel ('**Proprietor**') in Kerala against the Kerala State Electricity Board Limited ('**KSEBL**') alleging the contravention of Section 4 of the Act by way of an order under Section 26(2) of the Act.

The Proprietor's primary grievance related to the application of an incorrect tariff by KSEBL in its supply of electricity to its hotel. The Proprietor alleged that its hotel was entitled to the supply of electricity at industrial tariff rates as it had been classified as a star hotel by the Tourism Department from August 1, 1988 for a period of three years. While the Proprietor's application for renewal of star classification was pending, KSEBL raised a bill charging the Proprietor's hotel at a higher tariff under LT-VII category instead of the applicable LT-IV category.

CCI noted that the Proprietor had challenged KSEBL's conduct before the Kerala High Court who had issued decisions in its favour. However, despite the Kerala High Court issuing an order in favour of the Proprietor, KSEBL continued to raise excessive charges on the Proprietor's hotel for the supply of electricity. When the Proprietor failed to pay the bill in light of the decision of the Kerala High Court, KSEBL disconnected the power supply and refused to reinstate the supply despite the Proprietor's request for re-connection. KSEBL's conduct was alleged by the Proprietor to be unfair and discriminatory and in contravention of Section 4 of the Act.

On the basis of the information filed by the Proprietor, CCI held that there did not appear to be any competition law issue at hand. CCI also observed that the information appeared to be a case of forum shopping by the Proprietor, and accordingly closed the matter.

18 Case No. 57 of 2017.

19 Case No. 74 of 2017.

CCI dismisses allegations of cartelization and price fixation against Wave Distilleries & Breweries Ltd. and 8 other country liquor manufacturers.[20]

On December 29, 2017, CCI dismissed information filed by Dwarikesh Sugar Industries Ltd. ('**DSI**'), manufacturer of crystal sugars, against several manufacturers of country liquor based in Uttar Pradesh, namely, Wave Distilleries & Breweries Ltd., National Industrial Corporation Ltd., Unnao Distilleries & Breweries Ltd., Lord Distillery Ltd., Superior Industries Ltd., Sir Shadilal Distillery & Chemical Works, Radico Khaitan Ltd., Brijnathpur Distillery Division and Simbhaoli Sugars Ltd. (collectively, '**Liquor Manufacturers**') the determination of the purchase price of molasses at unreasonably low rates.

Molasses, a natural by-product of the sugar manufacturing process, serves as a basic raw material for potable liquor. The supply and distribution of molasses is governed by the U.P. Sheera Niyantram Adhiniyam 1964 and the Molasses Policy ('**Policy**') issued by the Controller of Molasses, Uttar Pradesh ('**U.P.**') and requires sugar mills (like DSI) to supply a certain percentage of their molasses to manufacturers of country liquor (reserved molasses) in U.P. with the remaining molasses free to be sold in the open market (unreserved molasses). Owing to this Policy, DSI has alleged that Liquor Manufacturers abuse their dominant position by dictating the price of reserved molasses, which is significantly lower than the unreserved section (approximately 9 to 10 times lower), as these prices aren't regulated by the Policy but driven by what Liquor Manufacturers are willing to offer.

CCI initiated a formal inquiry by way of its *prima facie* order dated September 1, 2014 under Section 26(1) of the Act and directed the DG to investigate the possibility of a cartel to fix prices of reserved molasses in contravention of Sections 3(1) and 3(3) of the Act. The DG report found the existence of two distinct markets for reserved and unreserved molasses and suggested a competition impact assessment of the existing Policy, but did not find any contravention under the Act.

CCI agreed with the report of the DG. CCI examined the scope of the Policy and found that in the interests of fair market competition, there should neither be any reservation nor any dispatch ratio. Market forces should be allowed to discover the price of molasses without getting impacted by any policy constraints. While acknowledging that the Supreme Court had upheld the legal validity of the notification and the provisions of the accompanying legislation, CCI nevertheless observed that market allocations or any form of quantitative restrictions on by-products of sugarcane is detrimental for competition in the country.

However, CCI did not find any evidence of price parallelism or any form of price fixing between the Liquor Manufacturers for reserved molasses. CCI observed that there was no fixed pattern in the movement of prices for reserved or unreserved molasses and the prices appeared to be an outcome of independently negotiated prices at market determined rates. Accordingly, CCI concluded that there was no contravention of Sections 3 (3) (a) of the Act and closed the investigation.

CCI penalizes Dumper Owners Association for failing to comply with its order under Section 42 of the Act[21]

In January 2015, CCI passed an order under Section 27 of the Act directing the Dumper Owners' Association ('**DOA**') to cease and desist from engaging in conduct which it found to be in contravention of Section 3 of the Act ('**Final Order**'). Subsequent to the Final Order being passed, Seaways Shipping and Logistics Limited ('**SSLL**') and Paradip Port Trust filed applications before CCI stating that by failing to provide dumpers despite repeated requests, the DOA was in violation of the Final Order. These applications were registered as applications under Section 42 of the Act ('**Applications**'). CCI directed the DG to submit an investigation report on the veracity of the statements in the Applications. In its report, the DG concluded that the DOA had, in fact, contravened the Final Order ('**DG Report on the Applications**').

CCI considered the Applications and the DG Report on the Applications, and issued an order under Section 42 of the Act against the DOA for failure to comply with the Final Order. CCI also imposed a penalty of ₹20,000 on DOA for each day of non-compliance - beginning from the date of the Final Order up to the date on which the DG completed its investigation on the Applications, amounting to ₹1,17,40,000. CCI then imposed a penalty of ₹5,000 on two of the office bearers for non-compliance of the Final Order for each day of non-compliance starting from the date of passing the Final Order to the date on which the DG completed its investigation on the Applications. This amounted to ₹29,35,000 on each of the office-bearers.

In reaching its decision, CCI noted that even during the DG investigation, DOA failed to cooperate with the DG, resulting in a recommendation from the DG to initiate non-cooperation

20 Case No. 47 of 2014.

21 Case No 42 of 2012

proceedings against DOA under Section 43 of the Act. CCI did not adhere to the DG's recommendation, being of the view that in case of proceedings involving anti-competitive conduct, if the party investigated did not respond despite sufficient opportunities being granted, the DG was entitled to prepare the report on the basis of information on record. Even after the DG Report on the Applications was submitted to CCI, DOA failed to provide any responses, despite several extensions been granted by CCI. Instead, DOA preferred a writ before High Court of Odisha ('**Odisha HC**') against CCI order directing investigation for non-compliance of the Final Order and the DG Report on the Applications. The High Court observed that DOA may file an application before CCI seeking adjournment of the proceedings. Several requests for adjournment were accommodated by CCI on the ground that the writ was pending before the Odisha HC. Finally on August 22, 2017, CCI rejected DOA's request to adjourn proceedings (once again citing the pendency of its writ petition before the Odisha HC), as no stay order had been issued by the Court thus far. CCI also clarified that it had given a final opportunity to DOA to submit its response to the DG Report on the Applications and listed the matter for hearing on October 31, 2017. CCI noted that despite several such opportunities to be heard, DOA failed to submit any response to the DG Report on the Applications. DOA's counsel submitted that he had no submissions to make on behalf of DOA.

CCI observed that the DG Report on the Applications clearly established that despite repeated requests and even advance payments by SSLL to DOA to provide dumpers for unloading cargo, DOA failed to supply dumpers to SSLL and disallowed SSLL to use dumpers of third parties. Accordingly, CCI concluded that the DOA had not complied with the Final Order.

Combination

CCI approves acquisition amongst Mr. Sanjit Bakshi, GE Equity International Mauritius, and Oriental Structural Engineers Private Limited.[22]

On October 30, 2017, CCI approved an acquisition of 5.615% shares in Oriental Structural Engineers Private Limited ('**OSE**') by Mr. Sanjit Bakshi ('**SB**') from GE Equity International Mauritius ('**GE**') ('**Proposed Combination**').

SB is an individual director and promoter in OSE and also holds shares and directorship positions in several companies owned by the promoters of OSE. Prior to the Proposed Combination, SB held 3.78% of the shares of OSE in his individual capacity and 9.27% of the shares of OSE through his Hindu Undivided Family ('**HUF**'). Further to the Proposed Combination, his personal shareholding would increase to around 9% and would hold a further 9.27% shares by way of his HUF. OSE, a private company incorporated in India, is *inter- alia*, engaged in the business of road construction, mining of coal and minerals in India.

CCI noted that since an existing shareholder, who is also a director and promoter in OSE, would acquire shares of an exiting shareholder, *i.e.* GE, the Proposed Combination does not appear to change competition dynamics in the markets in which OSE is engaged. On this basis, CCI approved the Proposed Combination under sub-section (1) of Section 31 of the Act.

CCI approves acquisition of 16.33 percent of equity share capital of ReNew Power Ventures Private Limited by Canada Pension Plan Investment Board[23]

By way of its order dated January 9, 2018, CCI approved the acquisition of approximately 16.33 per cent of the fully diluted equity share capital of ReNew Power Ventures Private Limited ('**ReNew**') by Canada Pension Plan Investment Board ('**CPPIB**') ('**Proposed Combination**'), which comprised of the following steps: (i) acquisition of approximately 6.33 per cent shares in ReNew by CPPIB from Asian Development Bank ('**ADB**'), together with substantially all the rights, title, interest and benefits attached or attributable to such shares from the closing of the sale and purchase transaction between ADB and CPPIB ('**Secondary Acquisition**'); and (ii) acquisition of compulsorily convertible preference shares of ReNew by CPPIB that will mandatorily convert into equity shares amounting to not more than 10% of the equity share capital of ReNew (on a fully diluted basis) ('**Primary Acquisition**').

CPPIB, incorporated as a Crown Corporation under the Canada Pension Plan Investment Board Act of Canada, is a professional investment management organization responsible for investing funds of the Canada Pension Plan. CPPIB has investments in various sectors such as infrastructure, real estate and financial services in India. ReNew is an Indian energy compa-

22 Combination Registration No. C-2017/10/533)

23 Combination Registration No. C-2017/11/536

ny engaged in the business of power generation through renewable energy sources – namely wind and solar, as well as incidental management consultancy services and engineering, procurement and construction services. It has operations and clean energy projects across several states in India *viz.*, Andhra Pradesh, Madhya Pradesh, Gujarat, Karnataka, Rajasthan, Telangana, Haryana and Maharashtra.

Having noted that neither CPPIB nor any of its investee companies ('**Portfolio Companies**') have any horizontal overlaps in India and no significant vertical overlaps (one of CPPIB's Indian Portfolio Companies had a vertical relationship with an indirect subsidiary of ReNew), CCI held that the Proposed Combination is unlikely to have any AAEC in India in any of the relevant market(s). On this basis, CCI approved the Proposed Combination under sub-section (1) of Section 31 of the Act.

CCI approves amalgamation of IndusInd Bank Limited and Bharat Financial Inclusion Limited.[24]

On December 19, 2017, CCI approved the amalgamation of Bharat Financial Inclusion Limited ('**BFIL**') into IndusInd Bank Limited ('**IBL**') ('**Proposed Combination**') by way of the following steps: (i) amalgamation of BFIL into IBL ('**Amalgamation**') in which shares of IBL would be issued to shareholders of BFIL in accordance with the share entitlement ratio as set out in the Scheme of Arrangement under Sections 230-232 of the Companies Act, 2013; (ii) preferential allotment of share warrants convertible into one share of IBL to IndusInd International Holdings Limited ('**IIHL**') and IndusInd Limited ('**IL**') (collectively, '**IBL Promoters**'), such that IBL Promoters would hold up to 15% (on an aggregate basis) of the total expanded issued and paid up equity share capital of IBL on a fully diluted basis; and (iii) post the Amalgamation, the transfer of IBL's Business Correspondent Business, as a going concern, to its wholly owned subsidiary ('**Subsidiary**') by way of a slump exchange, in consideration for which the Subsidiary would issue its equity shares to IBL. BFIL and IBL are together referred to as ('**Parties**').

IBL is a private sector bank engaged in the provision of a range of banking and financial services to individual consumers, corporate and commercial entities as well as the provision of affordable financial services in under-served areas through business correspondent arrangements with non-banking financial company - micro finance institutions ('**NBFC-MFIs**'). BFIL is a listed public company, registered with the Reserve Bank of India as a NBFC-MFI. It is primarily engaged in providing small value loans and certain other basic financial services to women, prominently in rural areas in India.

CCI noted the existence of horizontal overlaps between the Parties on account of both entities being engaged in the provision microfinance services. However, CCI noted the existence of different institutional sources for micro finance loans in India as well as the presence of several unorganized/individual lenders. Accordingly, from a supply side perspective, customers had the choice to avail micro financing servicing from several alternatives. CCI reviewed horizontal overlaps between the Parties in the market for provision of micro finance loans, by organized financial institutions as well as by the unorganized sector i.e. non-institutional lenders and concluded that the combined market share of the Parties in all such markets is insignificant to raise any competition concerns as such. On this basis, CCI approved the Proposed Combination under sub-section (1) of Section 31 of the Act.

24 Combination Registration No. C-2017/11/535

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

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

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

❖

Ranked No. 1
for the M&A Announced League Table by Deal Value and Deal Count
Bloomberg's Global M&A, Legal rankings Q1, 2017

❖

Rank 1
for India in the M&A Rankings by Deal Count and Deal Value
Mergermarket's Global and Regional M&A League Tables of Legal Advisors, Q1, 2017

❖

Rank 1 for PE and M&A Rankings by Deal Count and Deal Value
Venture Intelligence League Tables of Legal Advisors, Q1, 2017

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Ranked No. 1
for the Indian M&A Announced League Table
by Deal Completed by Value and Volume
Ranked No.1
for the Indian M&A Announced League Table
by Deal Announced by Volume
Thomson Reuters' Emerging Markets M&A Legal rankings Q1, 2017

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Ranked No. 1
for the Asia- Pacific M&A Announced League Table by Deal Volume
Experian Business Research, M&A Legal Rankings Q1, 2017

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Best Overall Law Firm of the Year
India Business Law Journal, 2016

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Best National Corporate Law Firm
Best Overall National Law Firm of the Year
Legal Era Awards, 2016

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M&A Law Firm of the Year
Private Equity Law Firm of the Year | Overall Law Firm of the Year
Deal Makers – Global Awards, 2016