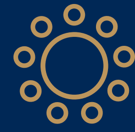


Shardul Amarchand Mangaldas

Navigating Tricky Waters

RECENT DEVELOPMENTS IN INDIAN COMPETITION LAW - APRIL 2024

Preface

We are delighted to present our review of developments in Indian competition law and policy in 2023-24.

This has perhaps been the most dramatic period since the Competition Act, 2002 (*Act*), entered into force. Last year's Competition (Amendment) Act introduced significant changes across the board, affecting the institutional structure under the Competition Act as well as its enforcement and merger control provisions. A few of these have already been implemented, with others likely to come into force in the next few months.

In the area of enforcement, 'hub and spoke' cartels and facilitators of cartels have become the subject of specific provisions in the Act. Penalties for breach of the enforcement provisions are now to be assessed on the basis of *global* turnover. Although this may worry defaulting enterprises with international operations, comfort may be taken from the fact that guidelines on determining penalties have at long last been published and the concept of 'relevant turnover' has been retained. Most important, perhaps, is the coming into operation of a settlements and commitments regime which will apply to all areas except for cartels and offers the chance for speedier market correction than long drawn-out investigations and appeal processes.

In the area of merger control, a new deal value threshold (*DVT*) is set to become operational. Though the introduction of DVT was envisaged to catch more transactions involving the digital sector, which have so far escaped scrutiny by the Competition Commission of India (*CCI*), the current provisions will apply across the board. Other changes currently in the pipeline are welcome. Review timelines will be shortened and derogations will be made from filing obligations for open-market transactions. Less welcome will be the codification of the 'material influence' standard for control.

The question as to whether transactions have to be notified remains a minefield. The fact remains that most notified mergers raise no concerns but take up large amounts of parties' and CCI time and resources which could be put to better use. At a time when private equity investment needs to be encouraged, acquirers are unable to benefit from exemptions covering minority investments and are subject to rigorous information requirements when notifying. The Green Channel route has been a welcome channel but, following greater scrutiny by the CCI (including recent penalty proceedings), parties will need to ensure the conditions for the route are satisfied – again, not an easy task for investors.

Some solace may be drawn from the recent raising of assets and turnover thresholds which will result in more transactions of minor importance being exempted. The CCI is also looking to recast its merger exemptions for minority acquisitions, intra-group acquisitions, etc. and difficult questions of interpretation will doubtless arise.

Important changes in the shape of competition in the digital world have also been proposed. The report of the Committee on Digital Competition Law was published in March 2024, together with a draft Digital Competition Bill. This proposes the *ex ante* regulation of digital enterprises with a significant presence in certain pre-identified 'Core Digital Services' in India as 'Systemically Significantly Digital Enterprises'. Whether such legislation is necessary in the light of existing provisions and whether it will stymie innovation will be the subject of intense debate over the next months.

The CCI was inquorate in the early part of last year. Though the doctrine of necessity removed the block on deciding on merger cases in February 2023, the block on deciding enforcement cases continued until new members, including a new Chairperson, were appointed later in the year. The new Commission has taken time to bed down and has had the added challenge of drafting and adopting new measures required under the Competition (Amendment) Act. These challenging times will certainly continue and safe and effective navigation through complex issues will be more necessary than ever.

We have over 50 dedicated competition lawyers working from our Delhi and Mumbai offices. We have continued to be at the centre of the debate. With our bench strength – now 12 partners, a senior adviser and associates at all levels – we can handle the entire range of challenging and cutting-edge competition work.

We hope that this review will give you an idea of some of the key developments in Indian competition law and policy over the last 15 months and the tough challenges involved in arriving at a safe harbour. We look forward to helping you to your destination.

Pallavi Shroff | John Handoll | Naval Satarawala Chopra | Shweta Shroff Chopra | Harman Singh Sandhu | Manika Brar | Aparna Mehra | Gauri Chhabra | Yaman Verma | Rohan Arora | Aman Singh Sethi | Nitika Dwivedi | Ritwik Bhattacharya

CONTENTS

Competition Law - Key Trends of 2023 and Looking Forward to 2024 7
By Naval Satarawala Chopra, Harman Singh Sandhu, Rohan Arora and Ritwik Bhattacharya

10 Important Judgments on Competition Law by Indian Courts in 2023 10
By Shweta Shroff Chopra, Rohan Arora and Shivek Sahai Endlaw

Summary of the Report of the Committee on Digital Competition Law 14

Assessing Dominance for Statutory Monopolies: Lessons from Coal India Ltd. v. Competition Commission of India 21
By Yaman Verma, Abhishek Hazari and Sanjana L.B.

CCI Penalties to be Based on Global Turnover: Will They be Relevant and Proportionate? 24
By Aman Singh Sethi and Nitika Dwivedi

The CCI's Remedies: Achieving the Intended Objectives? 30
By Rohan Arora and Arjav Kulshreshtha

Indian Merger Control in 2023: A Year in Flux 35
By Aparna Mehra, Ritika Sood and Karan Arora

Indian Merger Control and Private Equity: Recent Trends and Updates 40
By Gauri Chhabra, Gargi Yadav, Saumya Raizada and Eesha Sheth

Navigating the Complex Landscape of Interlocking Directorates in India 44
By Aparna Mehra, Krithika Ramesh and Sarthak Mishra

Complementary Mergers: A Coming of Age Story 48
By Gauri Chhabra, Gargi Yadav and Anjana Ravikumar

Common Ownership and Competition Concerns: More Smoke Than Fire? 53
By Naval Satarawala Chopra, Gauri Chhabra, Gargi Yadav and Anjana Ravikumar

Maverick Merger: Illumina/Grail – A Case Study on Tighter Scrutiny of Vertical Mergers 58
By Shweta Shroff Chopra, Gauri Chhabra, Aakriti Thakur and Ujwala Kishore Adikey

Glossary 64

Our Competition Law Team 65

Competition Law - Key Trends of 2023 and Looking Forward to 2024

By Naval Satarawala Chopra, Harman Singh Sandhu, Rohan Arora and Ritwik Bhattacharya[1]

2023 was an important year with sweeping amendments to the law, a change in guard at the Competition Commission of India (*CCI*) and its jurisdiction being tested multiple times. We look back at five key developments in 2023 and crystal ball gaze on five trends we expect in 2024.

Looking Back at 2023

Revamping of the Competition Act

We saw the most significant changes to Indian competition law since its enforcement. On the merger control front, changes include: (a) the introduction of a deal value threshold (*DVT*) which is sector agnostic; (b) codification of the definition of control to the low "material influence" standard; (c) expedited merger review timelines; and (d) derogation of the standstill obligations for certain on-market purchases. These have still not come into effect and require the CCI to issue implementing regulations which are expected in early 2024.

On the enforcement front, a significant number of changes have been brought into effect, including: (a) the introduction of a settlements and commitments framework; (b) enhanced penalties based on 'global turnover'; (c) the recognition of hub and spoke cartels and facilitators of cartels; and (d) the introduction of a 'leniency plus' mechanism.

A New Commission

A refreshed CCI now has full bench strength with the appointment of 4 new Members (including a new Chairperson) in 2023. Competition law in India could take an entirely new direction with these appointments, with increased levels of scrutiny expected in both merger as well as enforcement cases.

Closer Scrutiny of Private Equity Deals / Minority Investments

The CCI kept a close watch on private equity investments and other minority share acquisitions and has moved away from its previous light-touch approach. Minority investments are increasingly being subject to remedies to ensure that the investor does not have influence on competing portfolio entities.

In terms of substantive analysis, the CCI is now requiring more detailed information on investor portfolio entities and the review can be intrusive. This trend is likely to continue and investors should expect a detailed examination if they are proposing to make competing minority investments in the same sector.

Increased Scrutiny for Green Channel Filings

The green channel route (which provides for deemed approval for transactions with no horizontal overlaps or vertical / complementary relationships) has proven to be a huge success, benefitting the CCI as well as investors. In 2023, green channel filings accounted for approximately one-third of all the notification filings made with the CCI (25 out of 80 filings).

The green channel filing is a "trust based" process with the CCI relying on the parties' representations that the criteria to benefit from the green channel route are satisfied. In August, the CCI imposed its first ever penalty for incorrect disclosure regarding the green channel conditions. It emphasised that parties must observe utmost good faith while considering whether the conditions have been satisfied. This provides a clear signal to the market that investors must conduct rigorous due diligence to ensure that all the criteria for green channel approval are met. It also underscores the need to undertake substantive pre-filing consultations (*PFCs*), although these are non-binding, to ensure that the CCI agrees that the green channel route is available.

Jurisdictional Turf Battles Continue

In several cases, the CCI's jurisdiction was challenged with varying degrees of success. The Supreme Court of India (*Supreme Court*) rejected the argument that the Competition Act, 2002 (*Competition Act*) did not cover statutory monopolies formed to further the objectives of the Constitution of India. The Supreme Court clarified that, if an enterprise is not explicitly excluded from the scope of the Competition Act, it will not be inclined to accept any implicit exclusions.

Separately, the Delhi High Court held that the CCI does not have jurisdiction to examine issues relating to abuse of dominance arising from the licensing of patents. It held that such disputes should be examined exclusively under the Patents Act, 1970 which is a specialised statute to govern such disputes.

In another case, the Delhi High Court held that, if a statutory body is performing activities relating to its statutory duties as a regulator, the CCI does not have the jurisdiction to examine such activities.

Looking into the Future

With a new Commission in place and a new-look Competition Act on the way, 2024 should be an interesting year for Indian

1 Naval Satarawala Chopra, Harman Singh Sandhu, Rohan Arora and Ritwik Bhattacharya, Partners, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

competition law. We have set out below our predictions on five key trends to expect.

Increase in the Number of Merger Filings

With the Competition (Amendment) Act, 2023 (*Amendment Act*) introducing DVT, we expect a significant increase in the number of merger filings. DVT was originally envisaged to capture transactions in the digital sector that fell between the cracks. However, in its current draft form, the new regime will also capture infrastructure projects, transactions in other sectors and even follow-on / anti-dilution investments in start-ups. We hope the CCI will increase the resources required to process these filings speedily, while also having the bandwidth to review transactions that do require additional scrutiny.

Revamped Enforcement Framework

The final regulations on settlements and commitments have been notified and brought into effect by the CCI. We have high hopes that this new mechanism (which applies to abuse of dominance and vertical agreements cases, but not cartels) will enable speedier market correction. The CCI will also be able to settle cases where business disputes are masquerading as competition law cases. Further, the introduction of a 'leniency plus' regime should facilitate the detection of more cartels by the CCI, which could lead to an increase in the number of follow-on damage claims.

For these mechanisms to work efficiently, however, the CCI must refrain from over-correcting to an extent that leads to chilling competition or imposing corrective measures that are impractical to implement. Similarly, while the Amendment Act allows the CCI to levy penalties based on global turnover, a disproportionate use of such power will likely result in increased litigation instead of leading parties to use the settlements and commitments options.

Spotlight on the Digital Sector

The digital sector will continue to be a priority, both for enforcement as well as merger control cases. On the enforcement front, several important investigations into big tech companies (including Google, Apple and various large e-commerce platforms) may conclude. On the merger control front, with the introduction of DVT, there will be an increase in the number of filings in the digital sector.

On the enforcement front, the Report of the Committee on the Digital Competition Act (*CDCL*) was issued along with the draft of the specific legislation regulating competition in this sector. The CDCL recommends the introduction of separate ex-ante legislation, applicable to digital enterprises that have significant presence in certain pre-identified 'Core Digital Services' in India, which are susceptible to concentration, to be designated as 'Systemically Significant Digital Enterprises'. The CCI will also launch a market study on artificial intelligence, staying ahead of the global curve (as it did with blockchain).

Extended Timelines?

Whilst the Amendment Act contemplates a shorter formal review period for combinations, we expect lengthy overall timelines to continue. The new tighter timelines could lead to increased "invalidations" (resetting the review clock to 'Day 0' on account of some defect in the filings) or longer PFCs to allow for a detailed informal review prior to starting the formal review clock. We also expect continued delays on the enforcement side, given the backlog of cases (at both the CCI and appellate authority levels), the Director General's office being short-staffed and the CCI's additional workload relating to anti-profiteering cases under the Goods and Services Tax regime.

Continued Scrutiny of Gun Jumping Cases and More Behavioural Remedies

We expect the CCI to continue to adopt a hard line on gun-jumping cases. The uncertainty around the application of the new DVT regime and conditions for derogation for certain on-market purchases may result in inadvertent gun-jumping by parties, leading to the initiation of more cases (with penalties now also based on the value of the transaction). Further, the maximum penalty amount for false / incomplete information in a merger case has also been increased and the CCI has shown that it takes such cases seriously. We are hopeful that early cases in these areas are educational and clarificatory rather than punitive.

Finally, the CCI has proved its mettle in crafting detailed behavioural remedies and addressing new theories of harm in several combination decisions. We expect an increase in the number of decisions involving detailed behavioural remedies, including in private equity transactions. This will require greater planning in relation to proposed transactions, to allow for the possibility of remedies.

10 Important Judgments on Competition Law by Indian Courts in 2023

By Shweta Shroff Chopra, Rohan Arora and Shivek Sahai Endlaw[1]

2023 has been an important year in the development of competition law jurisprudence in India. While the Competition Commission of India (*CCI*) remained inquorate for a substantial part of the year, the Supreme Court of India (*Supreme Court*), the High Courts, and the National Company Law Appellate Tribunal (*NCLAT*) (the appellate authority under the Competition Act, 2002 (*Competition Act*) pronounced a number of judgments that impact the jurisdiction and functioning of the CCI, and address contentious issues within the Indian competition law framework. These key decisions are summarised below.

1 Shweta Shroff Chopra, Partner, Rohan Arora, Partner, and Shivek Sahai Endlaw, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

Coal India Ltd & Another v. Competition Commission of India & Another[2] (Supreme Court – June 2023) - Competition Act is Applicable to State-owned Monopolies.

After a 10-year legal battle between Coal India Ltd (*CIL*) and the CCI on its jurisdiction to examine the conduct of state-owned monopolies, the Supreme Court held that the provisions of the Competition Act apply to CIL and similar public sector undertakings. The Supreme Court decision clarified that the Competition Act is applicable to all government companies and statutory monopolies that operate to further the "common good" under the Constitution of India.

Given the Supreme Court's decision, the CCI's jurisdiction to investigate and take measures against statutory monopolies similar to CIL in abuse of dominance cases has been confirmed.

Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India & Another[3] (Delhi High Court – July 2023) – Patents Act, 1970 is a Code in Itself and Prevails Over the Provisions of the Competition Act

A division bench of the Delhi High Court held that disputes relating to allegations of anticompetitive conduct in the licensing of patents cannot be examined under the Competition Act and should be examined under the Patents Act, 1970.

This decision has effectively barred the jurisdiction of the CCI in examining disputes relating to the licensing of patents. Previously, a licensee could approach the CCI impugning terms and conditions in licensing agreements which potentially violated the provisions of the Competition Act. Now, a licensee will have to approach the Controller of Patents on all issues relating to alleged unreasonable conditions in patent license agreements, including allegations of anticompetitive conduct.

The CCI has appealed the Delhi High Court's decision before the Supreme Court.

Institute of Chartered Accountants of India v. Competition Commission of India & Others[4] (Delhi High Court – June 2023) – The CCI does not have the Jurisdiction to Examine Decisions of Other Statutory Regulators

The Delhi High Court held that the CCI does not have jurisdiction to examine the decisions of other statutory regulators taken by them in exercise of their regulatory functions, with no interface with trade or commerce. The Delhi High Court also held that the Competition Act does not contemplate the CCI acting as an appellate court or a grievance redressal forum against decisions of statutory bodies which are taken in exercise of their statutory powers.

The Delhi High Court decision creates an important exception for statutory regulators / bodies from the CCI's scrutiny, even if their decisions may create anticompetitive effects.

No appeal has been filed against this decision as on the date of writing.

Matrimony.com Ltd v. Alphabet Inc and Others[5] (Madras High Court – August 2023) – Civil Courts' Jurisdiction is Ousted by the Competition Act in Abuse of Dominance Cases

Several parties approached the Madras High Court under its civil jurisdiction seeking a declaration that the terms and conditions imposed by a dominant entity in a commercial agreement were illegal and unenforceable. Rejecting the plaint, the Madras High Court held that Section 61 of the Competition Act expressly bars the jurisdiction of civil courts from entertaining suits based on the cause of action relating to the abuse of a dominant position by an enterprise. The Madras High Court further held that, even though civil courts are empowered to go into the question of the unconscionable nature of agreements entered between parties of unequal bargaining power under the Indian Contract Act, 1872 (*ICA*), the Competition Act, being a special law, will prevail over the ICA. On appeal, the decision of the single judge was upheld by the division bench of the Madras High Court.

This decision is significant as it upholds the jurisdiction of the CCI to examine the conduct of dominant enterprises under Section 4 of the Competition Act.

The decision is currently pending in appeal before the Supreme Court.

Alliance of Digital India Foundation v. Competition Commission of India & Others[6] (Delhi High Court – April 2023) – Mere Defect or Vacancy in the Constitution of the CCI does not Impede its Jurisdiction to Adjudicate Complaints or any Other Proceedings Pending Before it

The Delhi High Court held that the CCI could continue its adjudicatory process even in the absence of a quorum of three members. The decision noted that a mere defect or vacancy in the constitution of the CCI would not invalidate the proceedings before it.

2 *Coal India Limited and Another v. Competition Commission of India and Another*, Supreme Court, Civil Appeal No. 2845 of 2017 (15 June 2023).
3 *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India & Another*, Delhi High Court, LPA 247 of 2016, (13 July 2023).
4 *Institute of Chartered Accountants of India v. Competition Commission of India & Others*, Delhi High Court, W.P.(C) 2815 of 2014, (2 June 2023).
5 *Matrimony.com Ltd v. Alphabet Inc and Others*, Madras High Court, C.S. (Comm. Div.) No. 98 of 2023, (3 August 2023).
6 *Alliance of Digital India Foundation v. Competition Commission of India & Others*, Delhi High Court, W.P. (C) 4599 of 2023, (24 April 2023).

Prior to the pronouncement of the judgment, the CCI was unable to issue orders for approximately six months due to it being inquorate. In February 2023, the Ministry of Corporate Affairs, Government of India allowed the CCI to invoke the "*doctrine of necessity*" to examine combinations under its merger control mandate to clear the backlog of transactions awaiting approval. However, no such direction was seemingly provided for the adjudication of pending enforcement cases.

When a party approached the Delhi High Court seeking directions to the CCI to act on its complaints and provide interim relief, the Court examined various provisions of the Competition Act and noted a distinction between administrative functions (where the Court held that quorum requirements may apply) and adjudicatory functions (where the Court held that there were no strict quorum requirements prescribed under the Competition Act). The High Court also appreciated that preventing the CCI from passing adjudicatory orders would effectively bring its functioning to a standstill, which would go against the spirit of the Competition Act.

This decision will ensure that the CCI will continue to adjudicate enforcement cases (including urgent applications for interim relief) even if it is inquorate in the future, making sure that the adjudication of cases is not halted due to a mere vacancy in the CCI's quorum.

This decision was appealed before the division bench of the Delhi High Court. However, the appeal was subsequently withdrawn.

Ultratech Cement Ltd v. Competition Commission of India & Another[7] (Delhi High Court – December 2023) – The CCI may Allow Impleadment of any Party With "Substantial Interest" and "In Public Interest"

The Delhi High Court ruled that the CCI has the power to implead any party to a competition proceeding at any stage provided it satisfies the two-fold test of 'substantial interest' and 'public interest' under Regulation 25 of the Competition Commission of India (General) Regulations, 2009. It further clarified that such an impleadment does not change the nature of proceedings as proceedings *in personam* but merely assists the CCI to conduct proceedings in a better and effective manner enabling it to reach an informed decision.

This is one of the first decisions where the CCI allowed the impleadment of a party after the DG had concluded its investigation in the matter. The decision also provides much needed clarity regarding the test for impleadment to matters pending before the CCI for third parties who are interested in the outcome of the proceeding.

The decision is currently pending in appeal before the division bench of the Delhi High Court.

Google LLC & Another v. Competition Commission of India & Others[8] (NCLAT – March 2023) – The CCI must Conduct an "Effects Analysis" for Proving Abuse of Dominance Under the Competition Act

The NCLAT held that the CCI must conduct an "*effects analysis*" to prove that an entity has abused its dominant position in violation of Section 4 of the Competition Act. The test to be employed while conducting an "*effects analysis*" is to show whether the abusive conduct in question is anticompetitive. Notably, the NCLAT also held that the CCI cannot impose a behavioural remedy on a dominant enterprise unless there is a specific finding of abuse of dominance in relation to such conduct.

The NCLAT's decision is significant because the wording of Section 4 of the Competition Act does not expressly require the CCI to consider the anticompetitive effects of an impugned conduct to arrive at a finding of infringement. However, in contrast, the legislature has provided for such a stipulation when the CCI examines anticompetitive agreements under Section 3 of the Competition Act.

The NCLAT's decision marks an important shift in Indian competition law jurisprudence; previously, the CCI found dominant entities to have violated Section 4 of the Competition Act irrespective of whether their conduct led to an anticompetitive effect in the market. There have also been instances of the CCI imposing positive behavioural remedies on dominant entities, without finding a specific finding of abuse in relation to such conduct.

Given the NCLAT's decision, the CCI will have to conduct a thorough examination of the anticompetitive effects of a dominant entity's conduct, if any, to support a finding of infringement and before imposing any behavioural remedies on the entity in ongoing and future cases.

7 *Ultratech Cement Ltd. v. Competition Commission of India & Another,* Delhi High Court, W.P. (C) 9854 of 2023, (18 December 2023).

8 *Google LLC v. Competition Commission of India & Others*, NCLAT, Competition Appeal (AT) No. 1 of 2023, (29 March 2023).

The NCLAT's decision is currently pending in appeal before the Supreme Court. However, no stay has been granted on the operation of the decision.

Consumer Unity & Trust Society v. Competition Commission of India & Others[9] (NCLAT – August 2023) –Transactions Exempt from Merger Review Cannot be Examined Under the Provisions of Anticompetitive Agreements or Abuse of Dominance

The NCLAT clarified that the provisions relating to anticompetitive agreements or abuse of dominance cannot be invoked to investigate a transaction that is exempt from notification under the merger control provisions of the Competition Act.

The decision provides clarity between the difference in the legal frameworks for horizontal agreements and mergers under the Competition Act (and how they operate in completely different fields). It further clarifies that, while a merger between entities (which is exempt from notification to the CCI) cannot be examined by the CCI *ex-ante* under Section 3 and 4 of the Competition Act, the parties' conduct can be scrutinised under these provisions after the fact if there is some evidence of violation of the Competition Act.

This decision will ensure that mergers which are otherwise exempt from notification to the CCI are not halted by frivolous complaints and interim relief applications filed before the CCI alleging violations of Section 3 or 4 of the Competition Act.

No appeal has been filed against this decision as on the date of writing.

The U.P. Glass Manufacturers Syndicate v. Competition Commission of India & Others[10] (NCLAT - July 2023) – Third-parties do not always have a Right to Submit Comments against Combinations Pending Approval before the CCI

The NCLAT held that third parties are not entitled to submit comments / submissions against or in favour of combinations pending approval before the CCI unless the CCI invites such comments or information. The NCLAT clarified that the public's right of participate arises only when the CCI directs the parties to the combination to publish the details of the combination to bring the combination to the knowledge of the public and persons affected or likely to be affected.

The NCLAT's decision clarified that combination orders cannot be challenged by third parties on the grounds of violation of principles of natural justice for failing to consider suggestions / objections by the public, unless the CCI has specifically directed the parties to publish the details of the combination and sought comments from the public.

The NCLAT's decision is currently pending in appeal before the Supreme Court. However, no stay has been granted on the operation of the decision.

Balrampur Chini Mills Limited v. Competition Commission of India & Others[11] (NCLAT – October 2023) – One Who Hears Should Decide

The NCLAT held that the composition of CCI members who hear final arguments in a matter must be part of the decision making and pronouncement of the final judgment. The appellant submitted that the CCI's order was patently illegal since it was pronounced by a composition of three CCI members, whereas the final arguments were heard by a composition of six CCI members. The NCLAT broadly accepted the argument and set aside the CCI's order on the grounds that: (a) it was pronounced after an inordinate delay of 13 months after the matter was heard; and (b) due to this inordinate delay, some of the members that heard final arguments in the matter had left office before the final order could be pronounced.

This decision is significant considering that several cases during the inception years of the CCI were heard by a composition of different members, some of which are still pending in appeal.

No appeal has been filed against this decision as on the date of writing.

9 *Consumer Unity & Trust Society v. Competition Commission of India & Others*, NCLAT, Competition Appeal (AT) No. 61 of 2022, (10 August 2023).

10 *The U.P. Glass Manufacturers Syndicate v. Competition Commission of India & Others*, NCLAT, Competition Appeal (AT) No. 07 of 2023, (28 July 2023).

11 *Balrampur Chini Mills Limited v. Competition Commission of India & Others*, NCLAT, Competition Appeal (AT) No. 86 of 2018, (10 October 2023).

Summary of the Report of the Committee on Digital Competition Law[1]

On 12 March 2024, the Ministry of Corporate Affairs (*MCA*) published the Report of the Committee on Digital Competition Law's (*Committee*) Report (*Report*) along with a draft of the Digital Competition Bill, 2024 (here) (*DCB*).[2] The summary of the Report and DCB is set out below:

1 The authors would like to thank Krithika Ramesh (Principal Associate), Saumya Raizada (Senior Associate), and Sai Divkanwar Singh (Associate) for their contributions.

2 Mrs. Pallavi Shroff (Managing Partner, Shardul Amarchand Mangaldas & Co.), was part of the Committee in her personal capacity as a legal expert and provided inputs in the preparation of the Report, along with Mrs. Shweta Shroff Chopra (Partner) and Mrs. Nitika Dwivedi (Partner).

Background

The 53rd Report on 'Anti-Competitive Practices by Big Tech Companies' was presented by the Parliamentary Standing Committee on Finance (*SCR*) before the Lok Sabha on 22 December 2022. The SCR identified ten Anti-Competitive Practices (*ACPs*) undertaken by large digital enterprises to abuse and consolidate their position in digital markets. These ACPs are set out below.

Table 1: ACPs Identified by the SCR

S.No.	ACP	Description
1.	Anti-steering provisions	Exclusionary behaviour that hinders business users and consumers from switching to third-party service providers.
2.	Platform neutrality/ self-preferencing	A digital enterprise according favourable treatment to its own products on its own platform.
3.	Adjacency/ bundling and tying	Combining or bundling core or essential services with complementary offerings, forcing users to buy related services.
4.	Data usage (use of non-public data)	Using personal data for consumer profiling to offer targeted online services and products.
5.	Pricing/ deep discounting	Predatory pricing strategies, or intentionally setting prices below cost price to exclude competitors.
6.	Exclusive tie-ups	Exclusive agreements with business users or sellers, preventing them from dealing with other enterprises.
7.	Search and ranking preferencing	Controlling search ranking to prioritise sponsored or own products and reducing the visibility of other products.
8.	Restricting third-party applications	Restricting users from accessing or utilising third-party applications.
9.	Advertising policies	Increasing market concentration, consolidation, and integration across many levels in the ad-tech supply chain which gives the incumbent platform an unfair edge over the market.
10.	Acquisitions and mergers	Acquisitions of smaller successful start-ups by dominant firms in the digital space tends to escape regulatory scrutiny because they do not often meet the asset and turnover based thresholds under the Competition Act, 2002 (*Competition Act*).

The SCR observed that an *ex-post* approach may not be sufficient to remedy the ACPs in fast-paced digital markets. It recommended that the behaviour of large digital enterprises be monitored *ex-ante*, with an emphasis on preventing such anti-competitive conduct from occurring. The SCR amongst other matters recommended setting up of a 'Digital Competition Act' to ensure contestability of digital markets, and establishment of a 'Digital Markets and Data Unit (*DMDU*)' within the Competition Commission of India (*CCI*) to monitor the ACPs of identified digital enterprises.

Following the SCR's recommendation, the MCA constituted the Committee to, amongst other matters: (a) review whether existing provisions in the Competition Act are sufficient to address challenges in the digital economy; (b) examine whether an *ex-ante* digital competition law is required; and (c) study international best practices in relation to competition in digital markets.

The Report highlights the findings and recommendations of the Committee. With regard to the ACPs identified by the SCR, the Committee was of the opinion that only the first nine ACPs should be discussed in the Report and that anti-competitive mergers and acquisitions do not need to be dealt with extensively in the Report since the Competition (Amendment) Act, 2023 (*Amendment Act*) sufficiently addressed these with the introduction of a deal value threshold for notification of transactions to the CCI.

Limitations of the Indian Regulatory Landscape

The regulation of large digital enterprises in India is carried out under a host of different statutory measures, which are enforced by a number of ministries and regulators. In light of this, the Committee examined: (a) the current competition framework and its limitations; and (b) other existing regulations/ policies, along with their ability to address the issues in the digital economy.

The Committee highlighted that the existing investigations and enforcement framework was time consuming due to: (a) the structure of the Competition Act involving several stages in enforcement proceedings; and (b) the complexity of delineating a 'relevant market' and assessing the dominance of digital enterprises.

The Committee felt that the powers of the CCI under the present *ex-post* model (Sections 3 and 4 of the Competition Act) may not sufficiently enable the early detection and intervention required to prevent digital markets from irreversibly tipping. Accordingly, the Committee found that new tools that strengthen and supplement the CCI's existing *ex-post* powers are needed. Although the *ex-ante* framework may still be subjected to judicial interventions, it will be a much more efficient market correction mechanism compared to Sections 3 and 4 of the Competition Act.

The Committee analysed various existing legal policy frameworks in the digital, data and e-commerce space, such as the Foreign Direct Investment Policy and Foreign Exchange Management (Non-debt Instruments) Rules, 2019, the Consumer Protection Act, 2019, and the Digital Personal Data Protection Act, 2023. However, the Committee noted that the primary mandate of such instruments is to ensure orderly growth of the specific sectors within which they operate. The Committee therefore took the view that, while such instruments have sporadic points of interaction with the Indian competition law regime, their ability to holistically ensure fair competition in digital markets in an *ex-ante* manner was limited.

Emerging International Practice Supports the Case for *Ex-Ante* Regulation

While noting the inadequacy of the existing Indian legal instruments in ensuring effective contestability in the digital economy, the Committee also considered the *ex-ante* laws prevailing in/ proposed to be issued in other jurisdictions.

In doing so, the Committee noted that several mature jurisdictions have already enacted/ are in the process of enacting *ex-ante* laws for digital markets, e.g., the European Union (*EU*) (Digital Markets Act), the United Kingdom (*UK*) (Digital Markets Competition and Consumer Bill) and the US (such as the American Innovation and Choice Online Act).

The Need for *Ex-Ante* Competition Intervention in Digital Markets

The Committee recommended a separate *ex-ante* law for digital markets to regulate enterprises that have a significant presence because:

- ***Ex-post* Investigations are Time Consuming and Resource-intensive**: By the time *ex-post* investigations conclude, the market may irreversibly tip in favour of the market player (due to factors such as the data-driven nature of the market and network effects) and raise entry barriers/ drive out competitors. Further, the benefits of early detection and intervention outweigh the costs associated with over-regulation;
- ***Ex-ante* Regulations Would Reduce the Administrative Burden and Lead to Efficient Regulation in Digital Markets**: *Ex-post* competition investigations are limited only to the claims made in each case. They may not effectively address similar conduct by the same or different enterprises in the same sector; and
- ***Ex-post* Competition Enforcement Works Best When Complemented with *Ex-ante* Enforcement**: Typically, the sectoral regulator sets the 'rules of the game' and the competition regulator, through *ex-post* regulation, acts as the 'umpire'. However, digital enterprises do not fall within the purview of a specific sector, although aspects of their operations are regulated in a fragmented manner by a host of different regulators. The Competition Act is sector-agnostic, and inclusion of a separate chapter on *ex-ante* provisions for regulating digital enterprises may therefore not be appropriate.

Key Features of the Proposed Digital Competition Act

Services / Markets Proposed to be Regulated Under the DCB

The Committee took note of the two divergent international approaches in determining the applicability of *ex-ante* competition instruments: (a) service market specific approach (adopted by the EU, Australia, and South Korea); and (b) service/ market agnostic approach (proposed by the UK and followed by Japan). The Committee noted that pre-identifying the service/ markets instils certainty, while refraining from pre-identifying the service/ markets allows for greater adaptability, enabling swift responses to the dynamism in digital markets.

To strike a balance between the two approaches, the Committee proposed that the DCB apply to a pre-identified list of Core Digital Services (*CDS*) that are susceptible to concentration and at the same time allow flexibility to the Central Government to add or delete services/ markets from the pre-identified list. Accordingly, the DCB lists the 'Core Digital Services' (Schedule 1) and empowers the Central Government, in consultation with the CCI, to notify new services, or alter or delete services/markets from the list.

The list of CDS comprise: (a) online search engines; (b) online social networking services; (c) video - sharing platform services; (d) interpersonal communication services; (e) operating systems; (f) web browsers; (g) cloud services; (h) advertising services; and (i) online intermediation services. Each CDS has also been defined. From this list, 'online intermediation services' is widely defined and includes web-hosting service providers, payment sites, auction sites, online application stores, online marketplaces and aggregators providing services such as mobility aggregation, food ordering, food delivery services and match-making. The list has been prepared based on the CCI's enforcement experience, market studies and emerging global practices.

Threshold and Criteria for Designation as a Systematically Significant Digital Enterprises

Under the DCB, an enterprise that crosses the thresholds under Section 3(2) or satisfies the qualitative criteria under Section 3(3) shall be designated as a Systematically Significant Digital Enterprise (*SSDE*) with respect to one or more CDS which will be identified in the CCI's designation order.

The Committee recommended that the DCB should only regulate enterprises which have a 'significant presence' in the provision of a CDS in India and the ability to influence the Indian digital market. To determine if an enterprise has significant presence, the Committee has laid down the following thresholds:

(i) Quantitative Thresholds

Quantitative Thresholds (in each of the preceding three financial years)								
A. FINANCIAL THRESHOLDS								
Turnover in India[3]	OR	**Global turnover[4]**	**OR**	**Gross merchandise value in India[5]**	**OR**	**Global market capital[6]**	**OR**	**Fair market value**
≥ INR 4,000 crore (approx. USD 482.81 million)		≥ USD 30 billion		≥ INR 16,000 crore (approx. USD 1,931.25 million)		≥ USD 75 billion		≥ USD 75 billion
AND								
B. USER THRESHOLDS IN INDIA								
End users of the core digital service provided by the enterprise in India	**OR**	**Business users of the core digital service provided by the enterprise in India**						
≥ 10 million		≥ 10,000						

** Provided that if the enterprise does not maintain or fails to furnish data, it shall be deemed to be an SSDE if it meets any of the thresholds mentioned in (A) or (B) above.*

When the enterprise is part of a group, then the quantitative thresholds shall be computed with reference to the entire group. The wording of the DCB further seems to suggest that only the end users/ business users pertaining to that relevant CDS may be considered while undertaking the user threshold computation; however, this will need to be relooked once the implementing regulations are in place.

The Central Government shall, every three years from the commencement of the DCB and in consultation with the CCI, by notification enhance or reduce these thresholds or keep them at the same level.

The manner of calculation of "turnover in India", "global turnover", "gross merchandise value" and "global market capitalisation" will be prescribed.

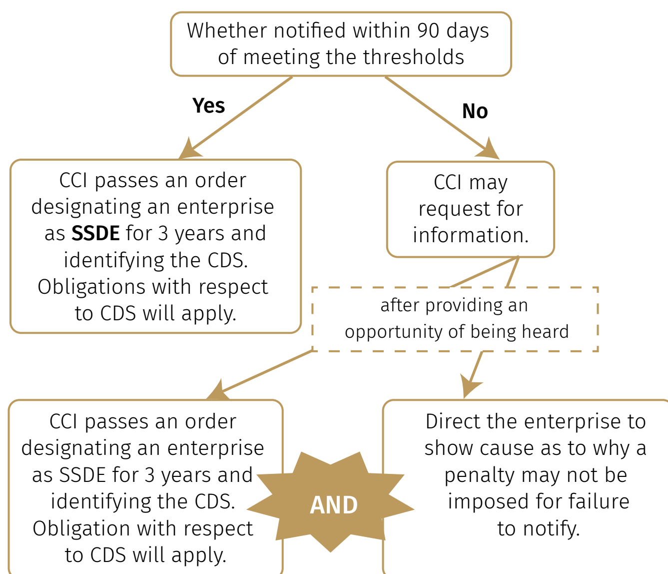
(ii) Qualitative Thresholds

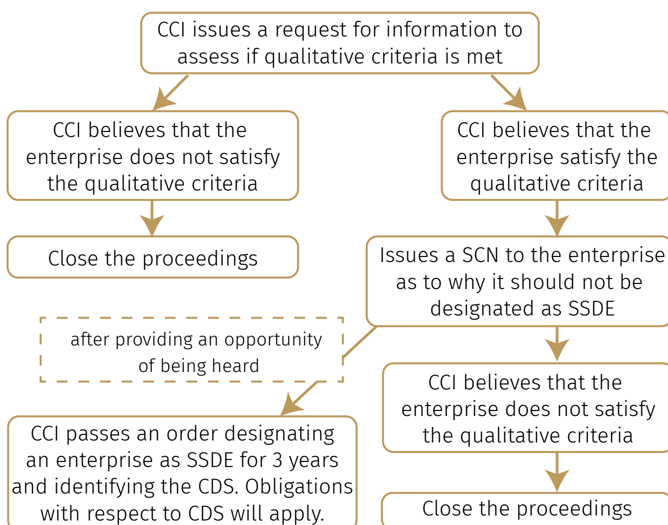
Under the residuary powers envisaged in the DCB, the CCI has the discretion to designate an enterprise as an SSDE in respect of a CDS, even if it does not meet the quantitative criteria above, if it opines that the enterprise has a significant presence in respect of such a CDS, based on an assessment of information available with it, and based on any or all of the factors mentioned in Section 3(3) of the DCB. An indicative list of factors includes: (a) economic power of the enterprise; (b) network effects and data driven advantages; (c) volume of commerce of the enterprise; (d) size and resources of the enterprise; (e) countervailing buyer power and (f) extent of business user or end user lock-in.

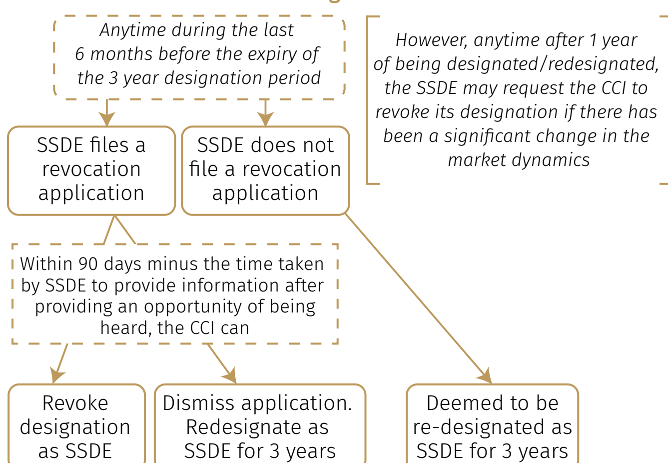
3 Includes revenue derived in India from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise.
4 Includes revenue derived from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise.
5 Refers to the total value of goods or services, or both, sold by, or through the intermediation of, the enterprise through all the CDS it provides.
6 Refers to the market capitalisation of the enterprise calculated at the global level.

Self-Reporting Obligation and Designation

The process of designation is set out below.







Designating an Associate Digital Enterprise

The Committee recommended that, where enterprises providing CDS are part of a group, the designation envisaged may not be limited to just one enterprise in the group. The Committee deliberated on a potential scenario in which compliance may be required from multiple digital enterprises within a group that are engaged in providing CDS. Depending on the involvement of different enterprises within the group in providing a CDS, the Committee envisaged two scenarios: (a) where the holding enterprise is designated as an SSDE and other enterprises within the group, directly or indirectly involved in provision of the same CDS, are designated as Associate Digital Enterprises to the SSDE (*ADEs*); and (b) a non-holding enterprise most directly involved in providing the CDS is designated as an SSDE and its holding enterprise and other group entities directly or indirectly involved in providing the same CDS are designated as its ADEs. In this regard, the Committee recommended that the CCI be given flexibility to identify the appropriate enterprises for SSDE and ADE designations.

Obligations of SSDEs / ADEs

The Committee considered whether all nine ACPs should be prohibited in a similar manner. The Committee recognised that some ACPs like tying and bundling have pro-competitive benefits in certain situations but may also lead to anti-competitive effects in other situations. The Committee agreed that the *ex-ante* obligations in the form of broad principles would be laid down in the DCB and the regulations would take into account the pro-competitive effects and set out the applicability of the obligation. The regulations shall be drafted by the CCI through a consultative process.

The CCI may also specify different conduct requirements for various business models such as cab aggregators, food delivery apps and e-commerce platforms, all of which come under the purview of a single CDS (online intermediaries).

Once designated, the SSDE must follow all the obligations applicable to the CDS it provides. By default, all the obligations will also apply to the ADE. However, in cases where the ADE is partly or indirectly involved in the provision of the CDS, the CCI may reduce their compliance burden through regulations.

The Committee identified two categories of obligations - general obligations (applicable to all CDS) and specific obligations (applicable to specific ACPs).

(i) General obligations on the SSDE/ ADE

These include obligations like: (a) reporting and compliance; and (b) fair and transparent dealing.

(ii) Specific obligations on the SSDE/ ADE as per the DCB

These are discussed in table 2.

Table 2: Obligations on the SSDE/ ADE

S.No.	Anti-competitive Conduct	Obligations
1.	Self-preferencing	An SSDE shall not favour— (a) its own products, services, or lines of business; or (b) those of related parties; or (c) those of third-parties with whom the SSDE has arrangements for the manufacture and sale of products or provision of services over those offered by third-party business users on the CDS, in any manner.
2.	Data usage	An SSDE shall not, directly or indirectly, use or rely on non-public data of business users operating on its CDS to compete with such business users on the identified CDS of the SSDE. An SSDE must obtain consent of end users and business users before: (a) intermixing / cross-using their personal data; or (b) permitting usage of their data by third-parties.
3.	Restricting third-party applications	An SSDE shall— (a) not restrict or impede the ability of end users and business users to download, install, operate or use third-party applications or other software on its CDS; and (b) allow end users and business users to choose, set and change default settings.
4.	Anti-steering	An SSDE shall not restrict business users from, directly or indirectly, communicating with or promoting offers to their end users, or directing their end users to their own or third-party services, unless such restrictions are integral to the provision of the CDS of the SSDE.
5.	Tying and bundling	An SSDE shall not— (a) require or incentivise business users or end users of the identified CDS to use one or more of the SSDE's other products or services; or (b) those of related parties; or (c) those of third-parties with whom the SSDE has arrangements for the manufacture and sale of products or provision of services alongside the use of the identified CDS, unless the use of such products or services is integral to the provision of the CDS.

Exemptions

Exemptions by the CCI

The CCI can exempt certain CDSs from complying with one or more obligations through regulations. The exemptions can be formulated keeping in mind factors such as: (a) economic viability of operations; (b) prevention of fraud; (c) cybersecurity; and (d) prevention of infringement of Intellectual Property Rights.

Exemptions by the Central Government

Analogous to Section 54 of the Competition Act, the Central Government shall have the overarching power to exempt enterprises from the application of the DCB in: (a) the interest of security or the public interest; (b) in accordance with any obligation under any treaty; or (c) if the enterprise performs a sovereign function.

Inquiry and Appeal Process

The inquiry process provided under the DCB is similar to the Competition Act. The CCI has been authorised to conduct an inquiry on its own knowledge, or on receipt of an information or a reference by the Central/ State Government or a statutory authority along with the Director General (*DG*).

The DCB also contemplates a limitation period of three years from the date on which the cause of action arose. However, the limitation period may be extended if sufficient cause is exhibited to the CCI's satisfaction.

As under the Competition Act, appeals under the DCB shall lie to the National Company Law Appellate Tribunal (*NCLAT*) and thereafter to the Supreme Court of India (*Supreme Court*), within 60 days from the receipt of the order/ decision by the relevant authority.

Lastly, a claim for compensation can be made by any person aggrieved by the non-compliance of obligations by a SSDE or its ADE (as determined by the CCI) before the NCLAT or the Supreme Court for compensation in accordance with Section 53N of the Competition Act.

Enforcement, Remedies and Penalties

Enforcement

The DCB largely borrows its enforcement framework from the Competition Act. Provisions of the Competition Act pertaining to powers of the CCI and the DG, the right to claim compensation, the power to issue interim orders, and other provisions will apply *mutatis mutandis* to the DCB. In addition to its power to conduct dawn raids, the DG has also been granted the power to enter the premises of the SSDE or ADE to verify information received by it. Similarly, the settlements and commitments regime envisaged under the DCB shall be the same as the Competition Act. *(Read more on the settlement and commitment regime under the Competition Act here.)*

The Committee took note of the fact that there may be overlapping proceedings against the same enterprise under the DCB and the Competition Act, with the possibility of contrary outcomes or penalties

emanating from both proceedings. The Committee recommended that the CCI may deal with such situations on a case-by-case basis.

The Committee observed that the CCI had already set up the DMDU, a specialised interdisciplinary centre of expertise for digital markets housed within the CCI. The Committee urged that the CCI must strengthen the technical capacity of the DMDU with experts to gain enough experience by the time the DCB is enacted. In response to stakeholder suggestions, the Committee also recommended instituting a separate bench within the NCLAT to ensure timely disposal of appeals filed against the CCI's orders, particularly those relating to digital markets.

Remedies

Section 17 of the DCB empowers the CCI to issue an order directing any enterprise to modify or to discontinue the contravening conduct.

Penalties

A snapshot of the penalties recommended by way of the DCB is set out below.

Table 3: DCB Penalty Matrix

Provision of DCB	Contravention	Party on whom penalty will be imposed	Legal Cap
Section 28(1)	Failure to comply with the applicable obligations	SSDE or its ADEs	10% of the SSDE group's* global turnover in the preceding financial year.
Section 28(2)	Enterprise engaging in circumvention from designation	SSDE or its ADEs	10% of its global turnover* in the preceding financial year.
Section 28(3)	Failure to self-report to the CCI	Enterprise	1% of the global turnover*.
Section 28(4)	Failure to provide information, or providing incorrect, incomplete or misleading information as sought under the provisions of the DCB	Enterprise	1% of the global turnover*.
Section 27(2)	Failure to comply with the orders or directions of the CCI issued amongst other matters in relation to (a) failure to comply with applicable obligations; (b) interim orders; and (c) penalties	Person	INR 10 crore (approx. USD 1.2 million) (*INR 1 lakh (approx. USD 1,203) for each day during which such non-compliance occurs*)
Section 27(3)	Failure to comply with the orders or directions issued, or failure to pay the penalty imposed under Section 27(2)	Person	Imprisonment for up to three years or Fine which may extend to INR 25 crore (approx. USD 3 million) or Both.
Section 29(1) and Section 29(3)	Individual liability	Person who, at the time the contravention was committed, was in charge of the SSDE or its ADE and was responsible to the SSDE or its ADE for the conduct of its business. Any director, manager, secretary or other officers of the company (when the contravention took place with their consent or connivance or can be attributed to neglect on their part).	10% of the average of the income for the last three preceding financial years.

* The explanation to Section 28 of the DCB provides that where the SSDE is part of a group of enterprises, the 'global turnover' cap be calculated in relation to the turnover of the entire group of enterprises.

Assessing Dominance for Statutory Monopolies: Lessons from Coal India Ltd. v. Competition Commission of India

By Yaman Verma, Abhishek Hazari and Sanjana L.B.[1]

Introduction

The assessment of abuse of dominance by enterprises is a crucial aspect of competition law enforcement. Section 4 of the Competition Act, 2002 (*Competition Act*) aims to prevent enterprises from abusing their dominant position in any given relevant market. The Competition Commission of India (*CCI*) follows a three-step process to assess cases under Section 4 of the Competition Act: (i) determining whether the entity in question may be considered as an 'enterprise' within the meaning of the Competition Act; (ii) if the entity is an enterprise, assessing whether it is dominant in any given relevant market; and (iii) evaluating whether the dominant enterprise has engaged in conduct that may be considered as an abuse of its dominant position. While this process may appear straightforward, many factors can increase the complexity of cases, including market realities and the regulatory framework governing the market in question.

With this background, on 15 June 2023, the Supreme Court of India (*Supreme Court*) delivered a judgment in the case of *Coal India Limited and Another v. Competition Commission of India and Another* (*Judgment*).[2] While the Judgment mainly pertains to the issue of whether the Competition Act applies to Coal India Limited (*CIL*) (with the court finding that the Competition Act does indeed apply to CIL), it provides valuable guidance on assessing dominance and abuse of dominance under Section 4 of the Competition Act.

Assessing Dominance in the Context of Monopolies

Explanation (a) to Section 4 of the Competition Act defines 'dominant position' as a position of strength in a relevant market in India, which enables an enterprise to operate independently of competitive forces, and influence competitors, consumers, or the relevant market in its favour.

Section 19(4) of the Competition Act outlines several factors that the CCI must consider when determining whether an enterprise enjoys a dominant position. These factors include market share, significance of competitors, economic power, commercial advantages, vertical integration, consumer dependence, entry barriers, market structure, and size. According to the residual clause, Section 19(4)(m), the CCI should also consider 'any other factor' which it may consider relevant to the inquiry.

In the past, the CCI has not carried out a detailed examination of the dominance of enterprises holding a monopoly position, whether acquired through statutory means[3] or otherwise[4]. In such cases, the CCI appears to have presumed that the enterprise in question holds a dominant position merely because of its monopoly status, and it has not been very receptive to arguments challenging this presumption.

The Judgment is the first from the Supreme Court to address these issues. Specifically, regarding whether enterprises enjoying a statutory monopoly should be considered dominant under Section 19(4)(g) of the Competition Act, the Supreme Court held:

"*86..... A monopoly position under Section 19 (4)(g) is treated essentially as being in the league of a dominant position.*

87. But does the inquiry end on an enterprise answering the description of a monopoly or having a dominant position pertinent to Section 19(4)(g)? In a given case, it may. On the other hand, in the facts, it may provide the CCI with one part of a larger whole. ***Other factors whether expressly culled out or forming part of the inexhaustibly large residuary clause, viz., Section 19(4)(m), may be projected to contend that, in reality, despite its appearance, it is wholly but deceptive. In other words, the CCI may be invited to have a cumulative view of all the factors which are relevant in a given case.*** *In fact, the learned Additional Solicitor General fairly states that the factors may be read as cumulative.*

88. ***Apposite in the facts is Section 19(4)(k). It requires the CCI to factor in social obligations and social cause. Equally, we may notice Section 19(4)(l). It declares the relative advantage by way of contribution to economic development having or likely to have an appreciable effect on competition to be a relevant factor.*** *What we have deliberately omitted and now supply are the following words to be found in Section 19(4)(l). They are the words "by the enterprise enjoying the dominant position".* ***Therefore, being found in a dominant position under Section 19(4)(g) is only one of the factors.*** *We do not intend to elaborate further on the scope and impact of the other factors.* ***It would all depend upon the facts of the individual case. Equally, we may only indicate, that, in particular, countervailing buying power would be a relevant factor*****.....**" (*Emphasis Added*)

---

1 Yaman Verma, Partner, Abhishek Hazari, Associate, and Sanjana L. B., Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 *Coal India Limited v. Competition Commission of India and Another*, Supreme Court of India, Civil Appeal No. 2845 of 2017 with T.C.(C) No.19/2023, T.C.(C) No.20/2023, T.C.(C) Nos.16-18/2023, and T.C.(C) No.21/2023 (15 June 2023).

3 *Consumer Educational and Research Society v. Union of India*, CCI, Case No. 20 of 2019 (28 June 2019); *International Spirits and Wines Association of India v. Prohibition & Excise Department, Government of Andhra Pradesh and Another,* CCI, Case No. 45 of 2021 (19 September 2022); *M/s Sai Wardha Power Company Ltd. v. M/s Western Coalfields Ltd. & Others*, CCI, Case No. 88 of 2013 (27 October 2014).

4 *Kalpit Sultania v. IREL (India) Ltd*., CCI, Case No. 22 of 2021 (3 January 2022).

Based on these findings, it is possible to argue that, even if an enterprise enjoys a monopoly position in a market, such an enterprise may not enjoy a dominant position under Section 4 of the Competition Act. This understanding is consistent with the statutory framework of the Competition Act, which suggests that multiple factors (under Section 19(4) of the Competition Act) could indicate dominance, and no one factor is dispositive. The Supreme Court appears to appreciate that a monopoly position does not automatically equate to an enterprise enjoying a position of strength in a market that enables it to: (i) operate independently of competitive forces; or (ii) affect competitors or consumers or the relevant market in its favour. Such an assessment should necessarily entail a more holistic consideration of the market dynamics. In such instances, a monopoly position would be just one factor among many when assessing the dominant position of an enterprise. The legislative intent in this regard is also clearly reflected by virtue of the wordings of Section 19(4) of the Competition Act which, in the introductory part, notes that the CCI shall have regard to "*all or any*" of the factors listed. Further, reference to the Raghavan Committee Report[5] shows that the purpose of Section 19(4) of the Competition Act is "*to consider the constraints that an enterprise faces on its ability to act independently*".[6] During such an assessment of the constraints on an enterprise, a plethora of factors may be considered including those listed under Section 19(4)(a)-(l) of the Competition Act, as well as any other relevant factor under Section 19(4)(m) of the Competition Act.

Interestingly, in one of its earlier cases, the CCI itself recognised the importance of such a holistic appreciation. In *MCX Stock Exchange Limited v. National Stock Exchange of India Limited,*[7] it held:

"*Unlike in some international jurisdictions, the evaluation of this "strength" is to be done not merely on the basis of the market share of the enterprise but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19(4) of the Act.* ***This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry.***" (*Emphasis Added*)

For example, in the scenario where an enterprise holds a statutory monopoly as defined in Section 19(4)(g) of the Competition Act, the enterprise could potentially argue that it bears significant social obligations under Section 19(4)(k) of the Competition Act and should not be treated as occupying a dominant position since it is not able to affect competitors or consumers in its favour. Alternatively, an enterprise enjoying a monopoly position might be able to argue that it faces competition from other sources, such as imports or captive sources, in relation to products for which it enjoys a monopoly showing that it is unable to operate independently of competitive forces or affect the competitors or consumers in its favour.

With the recognition by the Supreme Court that a monopoly position does not automatically equate to a dominant position, a new avenue may be available for enterprises to present a defence before the CCI, demonstrating that they do not possess a position of strength in the market. This also underscores the need for the CCI to conduct a comprehensive analysis when assessing dominance, even in cases where entities may potentially hold a monopoly position.

Conclusion

Effective enforcement in the context of abuse of dominance cases is complex and demands a sophisticated regulatory approach capable of capturing the intricacies involved. Market realities must not be ignored while assessing the dominance of enterprises, even when there may be a *prima facie* reason to view such enterprises as enjoying a monopoly position. Further, in the context of the assessment of abuse of a dominant position, a rigid *per se* rule could lead to excessive enforcement, hindering legitimate business practices and the ability of enterprises to operate within the rigours of their regulatory environment.

The Supreme Court also acknowledged the difficulty in applying the Competition Act to a statutory monopoly like CIL without allowing enough flexibility for CIL to perform its functions as per government directives. In setting out the manner in which the dominance provisions of the Competition Act must be interpreted, it has sought to reach that balance between the provisions of the law and the policy imperatives that govern the functioning of a statutory monopoly like CIL.

5 *Report of the High-Level Committee on Competition Law and Policy* (2000) (*Raghavan Committee Report*).

6 Raghavan Committee Report, Paragraph 4.4.8.

7 *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*, CCI, Case No. 13 of 2009 (23 June 2011).

CCI Penalties to be Based on Global Turnover: Will They be Relevant and Proportionate?

By Aman Singh Sethi and Nitika Dwivedi[1]

Introduction

Section 27 of the Competition Act, 2002 (*Competition Act*) empowers the Competition Commission of India (*CCI*) to levy a penalty on enterprises involved in any anti-competitive agreement or found to be abusing their dominant position. The CCI can penalise an offending enterprise up to 10% of its average turnover for the last three years.[2]

During its first eight years, the CCI levied penalties based on the total turnover of an enterprise. The term *total* turnover related to all the goods sold or services provided by the enterprise in question, and not just the goods or services which were the subject matter of the breach of the Competition Act. This resulted in harsh and disproportionate[3] penalties as between single and multi-product enterprises for the same offence. Separately, these penalties ranged from 1% to 10% of turnover and, given the lack of reasoning, there was no discernible trend linking the penalty to the severity of the offence committed.

Eventually, the Supreme Court of India (*Supreme Court*) had to step in and, in 2017, it interpreted *turnover* under these penalty provisions to mean *relevant* turnover, i.e., turnover of the products or services which were the subject matter of the contravention.[4] Following this, the CCI generally levied penalties based on the yardstick of *relevant* turnover.

Through a recent amendment to the Competition Act, which is yet to be notified,[5] the definition of turnover has been expanded to mean "*global turnover*" and, as it was not addressed in the amendment, it is unclear whether the requirement to levy penalty based on *relevant* turnover has been retained or removed by implication. Once the amendment comes into effect, the CCI will have to consider the *total*, *global* turnover of an enterprise as the basis for levying penalties.[6] This risks turning the clock back on the progress made in the past six years in applying the CCI's penalty regime.

While there can be no excuse for breaking the law, this amendment may lead to very high, even stratospheric, penalties based on the *global* turnover of enterprises which may not be proportionate to the degree of harm identified in India. The amendment may impact multi-product companies more than single product players. It could also lead to unfair outcomes and discrimination between domestic companies and entities with global operations whose *global* turnover could include export turnover or turnover otherwise having no link to India.

This article examines the pressing need for objective guidelines for the definition of *global* turnover and the need to apply penalties in a fair and proportionate manner. We also mention some useful measures from more experienced jurisdictions that should be considered while drafting these guidelines.

The Law as it Currently Stands

What Constitutes "Turnover"?

In contrast to traditional penal provisions, the penalty under the Competition Act is not a fixed amount. It is effectively linked to the value of the goods or services of a contravening enterprise. The word "*turnover*" is defined under the Competition Act as the "*value of sale of goods or services*",[7] however, the penalty provision as it currently stands does not specify whether if it was to be based on *total* or *relevant* turnover.

In its formative years, the CCI tried to reach the largest possible figure for the purpose of levying penalties and used *total* turnover as the benchmark. As a result, penalty amounts involved were significant and, more often than not, different parties would be penalized different (and at times, disproportionate) amounts for the same offence.

These disparities were seen as harsh and disproportionate.[8] Consequently, there was increased litigation in the form of appeals to the then Competition Appellate Tribunal (*COMPAT*) and on further appeal to the Supreme Court.

Supreme Court's Attempt to Ensure Clarity

Appellate courts disagreed with the CCI's approach; the COMPAT and eventually the Supreme Court settled the position in the *Excel Crop Care* case. This case involved bid rigging for tenders for the supply of aluminum phosphide tablets (*APT*). Three companies were penalized by the CCI at 9% of their *total* turnover amounting to INR 252.44 crores (USD 30.84 million) on United Phosphorous Limited (*UPL*), INR 63.90 crores (USD 7.80 million) on Excel Crop Care Limited, and a paltry INR 1.57 crores (USD 0.24 million) on Sandhya Organics Chemicals Private Limited. Excel Crop Care Limited and UPL were multi-product companies and APT represented a small proportion, *i.e.*, in the case of UPL, as low as 0.3%, of its overall business.[9]

In appeal, the COMPAT, while agreeing with the CCI's finding of contravention, was of the view that *relevant* turnover - *i.e.,* the turnover of the product that was the subject of the infringement - would be more appropriate and proportionate for assessing the level of penalty than *total* turnover.[10] Both the CCI (on this interpretation of turnover)

1 Aman Singh Sethi, Partner, and Nitika Dwivedi, Partner, Shardul Amarchand Mangaldas & Co. The views expressed here are personal. (An earlier version of this piece was nominated for the Concurrences: 2024 Antitrust Writing Awards – Business Articles. This article stays true to the theme of the nominated piece, with an important post script).

2 In the case of cartels, the CCI may instead impose a penalty of up to three times of the profit or 10% of the turnover of the offending enterprise for each year of the continuance of the cartel.

3 *Excel Crop Care Limited. v. Competition Commission of India and Another* (*Excel Crop Care*), Supreme Court, Civil Appeal No. 2480 of 2014 (8 May 2017), Paragraph 70.

4 *Excel Crop Care*, Paragraph 74.

5 Under the Competition (Amendment) Act, 2023 (*Amendment Act*).

6 Explanation 2, Section 20 of the Amendment Act.

7 Section 2(y) of the Competition Act.

8 *Excel Crop Care,* Paragraph 70.

9 *In Re: Aluminum Phosphide Tablets Manufacturers*, CCI, *Suo Moto* Case No. 02 of 2011 (23 April 2012).

10 *Excel Crop Care Limited v. Competition Commission of India and Others*, COMPAT, Appeal No. 79 of 2012 (29 October 2013).

and the enterprises concerned (on the upholding of the finding of contravention) appealed this decision to the Supreme Court.

Relying on jurisprudence and principles from other jurisdictions on the application of penalties in competition law cases, which placed primacy on the doctrine of proportionality,[11] the Supreme Court agreed with the COMPAT's view that the penalty should be based on *relevant* turnover. The Supreme Court noted that when the contravention of the Competition Act involved a given product, there was absolutely no justification for including other products for the purpose of imposing penalty. It stressed the importance of ensuring that penalties should neither over-deter nor discourage business or potential investors. The Supreme Court ruled that imposing penalties based on *total* turnover would go against the "*ethos*" of competition law.[12]

Doctrine of Proportionality

The doctrine of proportionality is a settled principle of administrative law, entrenched in equity and rationality, which mandates that "*a punishment* [should] *be proportionate to the offence committed*".[13] While applying the doctrine in *Excel Crop Care*, the Supreme Court held that penalties under the Competition Act could not be disproportionate and should not lead to "*shocking*" results.[14] It further noted that proportionality was a constitutionally protected right which could be traced to key provisions on the right to equal treatment enshrined in the Constitution of India.

Specifically, the Supreme Court held that:

> *"The doctrine of proportionality is aimed at bringing out 'proportional result or proportionality stricto sensu'. It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.*
>
> *No doubt, the aim of the penal provision is also to ensure that it acts as deterrent for others. At the same time, such a position cannot be countenanced which would deviate from 'teaching a lesson' to the violators and lead to the 'death of the entity' itself."*[15]

The *Excel Crop Care* case emphasized that the purpose and objective behind the Competition Act was not to "*finish*" industries altogether by imposing penalties which were beyond their means[16] but rather to discourage and stop anti-competitive practices for consumer benefit and market welfare. The penalty provisions under the Competition Act helped serve this purpose, as they aimed at punishing the offender while acting as a deterrent to others. Using *relevant* turnover as the appropriate measure would be in consonance with the purpose of the provision as it served the public interest as well as the interest of the national economy.

Lack of Objectivity in Arriving at the Percentage of Penalty

Separately, in a large number of cases where penalties were imposed, the CCI's penalties ranged from less than 1% to 10% of turnover and there was no discernible trend linking the penalty percentage to the severity of the offence committed.

This indicated that CCI's penalty regime lacked consistency and was not guided by any objective criteria in its application. Most of the orders passed by the CCI did not contain sufficient reasoning setting out how the penalty percentages were set. It was therefore not possible to discern why differing percentages were set in different cases and on what basis these were arrived at. The lack of penalty guidelines added to the inconsistency making it difficult for any comparative analysis to be made.

The Supreme Court in *Excel Crop Care* noted the wide discretion given to the CCI under the Competition Act. In fact, Justice N. V. Ramana lamented the absence of objective criteria to determine penalties, while noting that:

> *"109. At this point, I would like to emphasise on the usage of the phrase "as it may deem fit" as occurring under Section 27 of the Act. At the outset this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by rule of law and not by arbitrary, vague or fanciful considerations."*[17]

The COMPAT, in its *Excel Crop Care* decision[18] had also called out the CCI for failing to set out any reasons, justifications, or even a discussion on how it arrived at the penalty in this case. The COMPAT further stressed that it had, time and again, directed the CCI to provide reasons while determining the amount of penalty.[19]

11 For example, the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 (2006/C 210/02) issued by the European Commission (*EC Guidelines*); Section 36(8) of the (United Kingdom) Competition Act, 1998 (*UK Competition Act*); Office of Fair Trading (*OFT*)'s guidance as to the appropriate amount of a penalty (*OFT Guidelines*) (September 2012); and *Southern Pipeline Contractors v. Competition Commission*, Case No. 105/CAC/Dec 10; 106/CAC/Dec 10.

12 *Excel Crop Care*, Paragraph 74.

13 *Excel Crop Care*, Paragraph 68.

14 *Excel Crop Care*, Paragraph 74.

15 Paragraph 74, *Excel Crop Care*.

16 Paragraph 74, *Excel Crop Care*.

17 Paragraph 109, *Excel Crop Care*.

18 Paragraph 43, *Excel Crop Care Limited v. Competition Commission of India and Others*, COMPAT, Appeal No. 79 of 2012 (29 October 2013).

19 Paragraphs 64 - 68, *Gulf Oil Corporation v. Competition Commission of India and Others*, COMPAT, Appeal No. 82-90 of 2012 (18 April 2013); Paragraphs 22, 26 - 31, *MDD Medical Systems India Private Limited v. Competition Commission of India and Others*, COMPAT, Appeal Nos 93-95 of 2012 (25 February 2013).

The Supreme Court referred to the decision of the Competition Court of Appeal of South Africa, in the *Southern Pipeline Contractors* case,[20] and identified certain illustrative factors that could aid objectivity. These included: (a) the nature, gravity and extent of the contravention; (b) the role played by the infringer (a ringleader might face a higher penalty in contrast to a follower); (c) the duration of participation; (d) the intensity of participation; (e) loss or damage suffered as a result of the co ntravention; (f) market circumstances in which the contravention took place; (g) the nature of the product; (h) the market share of the entity; (i) barriers to entry in the market; (j) the nature of involvement of the company; (k) *the bona fides* of the company; and (l) profit derived from the contravention.[21]

The Impact of Relevant Turnover in Big Tech and Other Cases

While *Excel Crop Care* settled the basis of turnover to be applied in determining the penalty, the CCI still grappled with the issue of applying it for certain cases, specifically those where there is no *relevant* turnover, such as in cases involving Big Tech companies and cover bidding.

Big Tech Cases

India has seen an unprecedented expansion of technology driven businesses and digital enterprises whose operations are scalable across jurisdictions and are not constrained by national boundaries. The CCI has criticized the concept of *relevant* turnover when it comes to penalising Big Tech players. Such cases usually involve multiple products / markets which are intricately intertwined and interwoven with each other, and the products / services offered by the enterprise derive strength from each other due to economies of scope and scale. Further, more than one side of these markets could be free to users and therefore have no turnover. In its decision in *Matrimony.com v. Google*,[22] the CCI noted that the concept of *relevant* turnover might not be appropriate to digital / technology driven enterprises as opposed to conventional multi-product companies.

The CCI concluded that applying the *relevant* turnover standard in multi-sided markets would defeat the very object and intent of the Competition Act. This would be the case if, for example, Google was able to contend that, since its search was free, no penalty could be levied in the case of a breach of the Competition Act, as there was no revenue stream from this side of the market. Therefore, in cases involving Big Tech, the CCI was of the view that the entire platform had to be taken as one unit and the revenue generated by the platform has to be seen as a whole. Similarly, in the *Google Android*[23] and *XYZ v. Google*[24] decisions, the CCI again emphasized these challenges and adopted a platform-based *total* turnover approach to penalties.[25]

Separately, in the *MakeMyTrip – Go-Ibibo* (*MMT-Go*) decision,[26] the CCI found that MMT and Go-Ibibo had abused their dominant position in the market for online intermediation services for the booking of hotels in India. The CCI rejected MMT-Go's submission that any penalty had to be based on *relevant* turnover and, therefore, be limited to the commission charged by MMT-Go to hotels for rendering online hotel booking services. Reiterating its view in the *Google* cases, the CCI noted that while the *relevant* turnover approach might be appropriate in traditional markets, it would not be appropriate where the various segments were intricately intertwined with each other, and one product / service derived strength from the other(s). The CCI held that not considering the *global* turnover in such cases would defeat the deterrent effect that the penalties were required to have on enterprises.

Cover Bidding Cases

The CCI also held a similar view in cases involving bid rigging through cover bidding, where a party not supplying the product concerned or otherwise not serious about participating in a tender, would put in a 'false' bid in order to facilitate another party winning the bid. In its decision in the *Nagrik Chetna Manch* case,[27] the CCI held that *relevant* turnover could not be applied to cases involving cover bids. This case involved bid rigging of certain tenders floated by Pune Municipal Corporation for solid waste management. The CCI distinguished this case from *Excel Crop Care* and held that the imposition of penalty on the basis of *relevant* turnover would mean that no penalty would be levied on several infringing parties, thereby defeating the objective of deterrence.[28] On appeal, the NCLAT remanded the case back to the CCI to revise this penalty as it believed that the CCI failed to provide adequate reasons while exercising its discretion on the amount of penalty. The NCLAT further noted that, where the CCI was imposing the highest possible penalty of 10% of turnover, it had to afford a full opportunity to the concerned parties to address them as to why such penalty should not be imposed.[29]

The Amendment Act

Doing Away with Relevant Turnover

The Amendment Act revises the penalty regime under the Competition Act. Once the relevant provisions come into effect, it will include two

20 *Southern Pipeline Contractors and Conrite Walls v. the Competition Commission*, Case No. 105/CAC/Dec 10; 106/CAC/Dec 10.

21 *Excel Crop Care*, Paragraph 71.

22 *Matrimony.com Limited and Another v. Google LLC and Others*, CCI, Case Nos. 07 and 30 of 2012 (8 February 2018).

23 *Google Android* case.

24 XYZ (*Confidential) v. Alphabet Inc. and Other*s, CCI, Case No. 07 of 2020 (25 October 2022).

25 *Google LLC and Others v. Competition Commission of India and Others*, NCLAT, Appeal No. 01 of 2023 (29 March 2023). The National Company Law Appellate Tribunal (NCLAT) upheld the CCI's approach to platform-based turnover in the *Google Android* case.

26 *Federation of Hotel and Restaurant Associations of India and Others v. MakeMyTrip and Others*, CCI, Case No. 14 of 2019 (19 October 2022).

27 *Nagrik Chetna Manch v. Fortified Security Solutions*, CCI, Case No. 50 of 2015 (1 May 2018).

28 *Nagrik Chetan Nanch* case, Paragraph 96.

29 Paragraph 25, *Manoj Gupta and Others v. Competition Commission of India and Others*, NCLAT, Competition Appeal (AT) No. 44 of 2018 (23 December 2022). The CCI has filed an appeal against the NCLAT's decision before the Supreme Court.

explanations that may negate the Supreme Court's decision in *Excel Crop Care*.

The *first* explanation provides that a penalty may be imposed up to 10% on either the average turnover or 'income' of enterprises found to have engaged in anti-competitive agreements or abused their dominant position.

The *second* explanation expands the definition of turnover by qualifying it with the term "*global*". This will enable the CCI to impose a penalty of up to 10% of the *global* turnover of the offending enterprise, which includes export sales and sales derived from products or services that are not related to the offence in India.

The Amendment Act does not refer to the concept of 'relevant' turnover introduced by the Supreme Court in *Excel Crop Care.* It is not clear whether this concept will remain by implication or whether the failure to include in the new provisions means that it has been abandoned. It should be noted that this amendment was not included in the original bill introduced by the Government in the Indian Parliament. Accordingly, the Parliamentary Standing Committee on Finance, which undertook a detailed examination of the provisions of the original bill, was not able to examine this issue. The Amendment Act was passed without debate and therefore no discussion on this point took place at all.[30] This is, to say the least, regrettable. Whether the concept of 'relevant' turnover with justified exceptions will continue will likely turn on penalty guidelines to be adopted by the CCI.

A Positive Obligation on the CCI to Adopt Penalty Guidelines

The Amendment Act has introduced a requirement for the CCI to frame guidelines regarding the imposition of penalties as well as requiring the CCI to provide reasons in case a penalty decision is arrived at without adhering to these guidelines.[31] This may be a silver lining that, if implemented well, could address concerns relating to *relevant* and *proportionate* turnover.

Way Forward: Penalty Guidelines To Bring Proportionality?

While it is yet to be seen how the new *global* turnover regime would be implemented by the CCI, one should be mindful of the factors set out by the Supreme Court in *Excel Crop Care* as well as positions adopted by mature competition regulators elsewhere. Several regulators have adopted penalty guidelines / guidance notes to ensure objectivity and proportionality while implementing their penalty regimes.

Although still on the drawing board, we are hopeful that the penalty guidelines will take into account global best practices including taking an appropriate cue from the factors discussed by the United Kingdom – Competition and Markets Authority (*CMA*) in the CMA Guidance as to the appropriate amount of penalty (2018) and the EC Guidelines.

Useful Measures From the CMA Guidance and the EC Guidelines that Should be Considered

Starting Point: The CMA Guidance systematically lays down six steps for determining the penalty to be imposed on infringing parties. It states that the starting point must be to identify the *relevant* turnover of the undertaking. This is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement. Similarly, under the EC Guidelines, when determining the basic amount of the fine to be imposed, the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the European Economic Area is used as a starting point.

Company Figures: The CMA Guidance also adds that *relevant* turnover is to be calculated after the deduction of sales, rebates, etc. and taxes. While *relevant* turnover figures are normally based on figures from an undertaking's financial statements, where these are not available the CMA Guidance also proposes to assess the true scale of an undertaking's activities in the relevant market.

Aggravating and Mitigating Factors: Both the CMA Guidance and the EC Guidelines then consider aggravating and mitigating factors. They provide a non-exhaustive list of indicative factors to consider while increasing or decreasing the penalties. The penalties are increased (owing to aggravating factors) for: (a) repetition of the offence by the undertaking; (b) refusal to cooperate with the investigation; or (c) assessing the steps taken to coerce other undertakings to participate in the infringement. The penalties are decreased (owing to mitigating factors) where the undertaking: (a) is acting under duress or pressure; (b) cooperates with the investigation; or (c) provides evidence to show that the infringement occurred out of negligence.

Deterrence: Once the *relevant* turnover and aggravating and mitigating factors are considered, the CMA Guidance prescribes that the tentative penalty arrived at is assessed under the lens of deterrence. The intent of the CMA Guidance is that the penalty to be imposed must be sufficient to deter the infringing undertaking from breaching competition law in the future and must be imposed in accordance with the undertaking's specific size and financial position, and any other relevant circumstances.

Cap on Penalty: The CMA Guidance and the EC Guidelines recognize the statutory upper limit when determining the penalty. They state that the final amount of the fine shall not exceed 10% of the *total* turnover. Accordingly, they must ensure that the penalty calculated up to this stage does not breach this cap.

30 It is also worth noting that the proposal to do away with penalties based on *relevant* turnover and replace it with penalties based on global turnover was not discussed in the Report of the CLRC, nor found mention in the Draft Competition (Amendment) Bill, 2020 which was published on 12 February 2020 inviting stakeholder comments.

31 Section 45 of the Amendment Act.

Ability to Pay: In the next step, the EC Guidelines and CMA Guidance provide that, in exceptional circumstances, the penalty may be reduced where an undertaking is unable to pay the penalty proposed due to its financial position. A financial hardship claim needs to be made by the undertaking concerned (which has the burden of proving that it merits such a reduction). Interestingly, the CCI has recently been aware of an undertaking's ability to pay and has reduced the penalty,[32] as well as imposed no monetary penalties[33] on certain companies, despite finding a contravention. The CCI has done this keeping in mind the financial hardships endured (particularly by micro, small and medium sized enterprises) during the Covid-19 pandemic.

Assessment of Proportionality: As a final step, the CMA Guidance requires taking "*a step back*" to check whether the overall penalty reached after following the steps above is proportionate. This assessment of proportionality is not a mechanical assessment, but one of evaluation and judgement. It is required to ensure that the penalty proposed to be imposed is not disproportionate to the level of infringement.

Conclusion

The change of the penalty regime on account of the Amendment Act is a mixed bag. The nature of the penalty regime based on *global* turnover in India will turn on the penalty guidelines that are expected to be issued soon. The focus on the Supreme Court's jurisprudence, as well as the CMA Guidance and the EC Guidelines, has been on the principle of proportionality and the CCI should place reliance on them when framing its own guidelines.

It is hoped that the CCI's guidelines will aid in ensuring transparency in the delivery of justice and will also expedite the decision-making process of the CCI. This would also enable the CCI to be consistent and predictable with its penalty regime. By giving businesses greater certainty on how the amount of penalty, and any reductions to it, will be calculated, it may encourage applicants to consider offering commitments or settling a case[34] leading to quicker disposal. It will also be instrumental in safeguarding due process.

We hope that the CCI, through these guidelines, will build on the principle of proportionality, and adopt a balanced approach in their design and application. A failure to do so could result in further litigation and uncertainties, raising the issues seen in the *Excel Crop Care* case. A failure to strike a balance through the CCI's guidelines may even risk attempts at striking down this expansion for being discriminatory, disproportionate, and therefore unconstitutional.

If the concept of 'relevant' turnover is abandoned, it also cannot be excluded that the National Company Law Appellate Tribunal (*NCLAT*) and Supreme Court will, in time, repeat the approach taken in *Excel Crop Care* and affirm the position that 'relevant' rather than 'total' turnover should be taken into account in setting penalties. The sting of a move to 'global' turnover would be reduced if it was turned into 'relevant global' turnover. It is an open question whether the CCI would 'bite the bullet' and continue with the concept or revert to 'total' turnover unless the Supreme Court decides otherwise.

Postscript

On 6 March 2024, after completion of this article, the CCI notified the Penalty Guidelines.[35] Whilst these cannot be discussed in detail here, two important elements in the Penalty Guidelines should be mentioned here.

First, the concept of 'relevant turnover' has been retained. This is defined to mean "*the turnover derived by an enterprise directly or indirectly from the sale of products and/or provision of services, to which the contravention relates and determined for the purposes of imposition of penalty*". The CCI is free to divert from this, and other guidelines, "*considering the particularities of a given case and in exceptional circumstances*", in which case it shall record reasons in writing.

Second, in determining penalties for enterprises under Section 27(b) of the Competition Act, the CCI will start its assessment on the basis of an amount up to 30% of average relevant turnover or income of the enterprise, having regard to a number of factors: (a) the nature and gravity of the contravention; (b) the nature of the industry or sector affected and its implications on the economy; and/or (c) any other factor it deems appropriate in the facts and circumstances in each case. The amount determined under this initial assessment may be adjusted, subject to the legal maximum under the Competition Act, by having regard to a wide range of listed aggravating or mitigating factors (including a catch-all provision).

The retention of 'relevant turnover' in the Penalty Guidelines is indeed welcome. Further, these Guidelines provide a long-overdue framework for more transparent and consistent assessment of penalty. The 30% rule seems to take at least some of the sting out of the move to 'global turnover'. However, much will depend on how these new provisions are applied in practice.

---

32 *Chief Materials Manager, Northwestern Railway v. Moulded Fibreglass Products and Others*, CCI, Reference Case No. 03 of 2018, (4 April 2022).

33 *In Re: Mr. Rakesh Khare, Chief Materials Manager (Stores), Eastern Railway v. Krishna Engineering Works and* Others, CCI, Reference Case No. 02 of 2020 (11 October 2022), Paragraphs 108 and 110; *In re: Federation of Corrugated Box Manufacturers of India v. Gujarat Paper Mills Association,* CCI, Case No. 24 of 2017 (12 October 2022), Paragraph 166.

34 Under a separate regime also introduced by the Amendment Act.

35 The Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024.

The CCI's Remedies: Achieving the Intended Objectives?

By Rohan Arora and Arjav Kulshreshtha[1]

Introduction

Remedies imposed by the Competition Commission of India (*CCI*) under the Competition Act, 2002 (*Competition Act*) are designed to address identified anti-competitive conduct and restore the competitive landscape of the affected market. In the context of combinations, the CCI has observed that the "*purpose of remedies is to preserve, to the extent possible, the pre-combination level of competition by recreating as far as possible the competitive status quo in the affected markets.*"[2]

It is interesting to note that, since the Competition Act came into force on 20 May 2009, the CCI has never carried out a review of the remedies that it has imposed in order to determine their impact on competition and whether the remedies have "*preserved to the extent possible the…level of competition by recreating as far as possible the competitive status quo in the affected markets*".

This article will set out the reasons why the CCI should engage in an extensive review of the remedies that it has directed, to determine whether these remedies have enabled the CCI to achieve its objectives. This article will draw from the experiences of other, more mature, jurisdictions. A review of the remedies the CCI has ordered will assist the CCI in formulating a robust and more modern approach to the enforcement of the Competiton Act, which will be more in tune with current economic realities.

Experiences in Other, More Mature, Jurisdictions

The Google Experience in the European Union and Russia

In 2018 the European Commission (*EC*) directed a variety of remedies to fix Google's anti-competitive practices with respect to Google Android.[3] Some of the remedies imposed addressed Google's tying practice in relation to its proprietary mobile apps. As a result, Google and Alphabet (Google's parent company) were directed to *"refrain from licensing the Play Store to hardware manufacturers only on [the] condition that they pre-install the Google Search app"*.

Google implemented the remedies by introducing a choice screen for users when setting up their phone. The choice screen enabled users to select their preferred search engine from a list of competing search engines. The choice screen was introduced to restore competition that had been harmed by Google's exploitation of the *status quo* bias of consumers. However, to determine the order in which these alternatives would be displayed, Google conducted so-called "*pay-to-play*" auctions for priority on the preference menu.

While the remedy would theoretically address the competition concerns identified, the remedy was criticized by market participants. For instance, in March 2020 DuckDuckGo (a competing search engine) claimed that the search preference menu auction that Google introduced would result in them eventually being priced-out of the auction and not be visible to consumers.[4] DuckDuckGo claimed that the proposed auction system was constructed to make Google money and not provide *"meaningful consumer choice"*.

According to them, the auction system meant that search engines that *"squeeze money out of every last drop of people's personal information"* would easily be able to outbid search engines like DuckDuckGo that were premised on respecting their consumers' privacy. Simply put, DuckDuckGo believed that this auction system was *"rigged in favour of big companies and search engines with intentionally ad-heavy search results"* and that only those search engines that could afford to pay would be visible to consumers.

In August 2020, DuckDuckGo conducted a study to demonstrate that a properly designed search preference menu would significantly increase competition in the markets concerned.[5] It presented users with a search preference menu that they had designed and asked them to choose which search engine they would prefer.

In the search preference menu that DuckDuckGo designed, the alternative search engines with the largest market share in each market were displayed in a random order on the first screen. The remaining alternative search engines were available in a random order and could be viewed by scrolling through the choice screen. Notably, Google was deliberately placed on the last screen in this search preference menu. DuckDuckGo claimed that such a search preference menu would result in Google's market share dropping by approximately 20% in the US, UK, and Australia.

DuckDuckGo's concerns were not unfounded as, in September 2020, it announced that it had been "*eliminated*" from the search preference menu because of the auction system designed by Google.[6] It claimed that this was because Google's search preference auction was designed to incentivize bidders to bid what they could expect to profit per user.

Search engines that would worsen user privacy, increase the number of advertisements displayed and not donate money to good causes would be best placed to make successful bids in this system. On the other hand, a search engine such as DuckDuckGo that claimed

---

1 Rohan Arora, Partner, and Arjav Kulshreshtha, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 *PVR/DT*, CCI, Combination Registration No. C-2015/07/288 (4 May 2016)

3 *Google Android* AT.40099 (18 July 2018). The General Court upheld the EC's approach in the *Google Android case.*

4 DuckDuckGo, *Search Preference Menus: No Auctions Please*, Spread Privacy (2020), https://spreadprivacy.com/search-preference-menu-auctions/.

5 DuckDuckGo, *Google Search Mobile Market Share Likely to Drop Around 20% through Search Preference Menus,* Spread Privacy (2020), https://spreadprivacy.com/search-preference-menu-research/.

6 DuckDuckGo, *As Predicted, Google's Search Preference Menu Eliminates DuckDuckGo,* Spread Privacy (2020), https://spreadprivacy.com/search-preference-menu-duckduckgo-elimination/.

to prioritise user privacy would make less money per search. As a result, it lost in the auction set up by Google and would no longer be displayed to consumers as an option to be their default search engine.

Subsequently, in October 2020 five competing search engines (DuckDuckGo, Ecosia, Lilo, Qwant and Seznam) published an open letter to the EC requesting a trilateral meeting among themselves, Google, and the EC to improve the search preference menu.[7] These five companies believed that Google was not providing complete and accurate information to the EC regarding the preference menu auction. They believed that a trilateral meeting would be a helpful step in the correction of the competitive harms caused by Google.

After much criticism, Google announced in 2021 that they would switch to a search preference menu where the most popular search engines would be displayed, and the auction system was discontinued.[8] As such, for three years since the EC's decision, the remedy directed was unlikely to have achieved the intended objective of effectively restoring competition in the market. As a result, Google's market share in the search engine market continues to be more than 90% in Europe.

This experience in the European Union (*EU*) differs to the treatment of Google's Android practices by the Russian Federal Anti-Monopoly Service (*FAS*). Notably, the Russian search engine market is competitive where Yandex, a Russian search engine provider (who, like Google, provides email, browser, and navigation services in addition to search services), commanded more than 50% of the market at the time of the complaint before the FAS in 2015.

Like the EC, the FAS found that Google had violated Russian competition law by making Google Search the default search engine for phones that used Google Android.[9] However, there was a significant difference in the approach of the EC and the FAS. The EC left it open for Google to decide how to comply with the EC's directions. On the other hand, as part of the settlement with the FAS, Google was directed to design the user choice screen in such a manner that users would be able to choose which search engine to use in a neutral manner. Therefore, neither was the auction system introduced nor were the choices offered to consumers based on any subjective criteria determined by Google.

Once this search preference menu was introduced, Yandex was able to recapture the market share it had lost to Google and, since 2017, Google and Yandex have continued to fiercely compete in the market.[10] The contrasting experiences in the EU and Russia demonstrate the importance of the role that competition regulators play when formulating the appropriate remedies to address the anti-competitive conduct that they have identified.

The UK Case Study on Merger Remedies

In 2019, the UK Competition and Markets Authority (*CMA*) conducted a case study regarding the effectiveness of the remedies that it had imposed in its evaluation of mergers.[11] After evaluating the remedies ordered in 18 mergers, the CMA concluded that not only was the process of implementation of remedies problematic, but the remedies themselves had not been as successful as intended.

One of the key learnings for the CMA was that structural remedies are generally superior to behavioural ones. The CMA found that behavioural remedies involve a higher degree of risk and are more complex and resource intensive to design than divestiture remedies. In addition, with meticulous and rigorous implementation, behavioural remedies can operate satisfactorily for a limited period and in narrowly defined circumstances. This is more likely to happen when the entity in question already operates in a regulated environment and where the CMA can delegate aspects of the monitoring to an expert third party.

Even in circumstances which are relatively favourable to behavioural remedies, the CMA found that it is very unlikely for behavioural remedies to be effective indefinitely without creating substantial distortion risks. If a behavioural remedy is to be accepted, it must be clear at the time of acceptance that an event is likely to arise in the future that would make the need for the behavioural remedy redundant. Considering the above examination, the CMA concluded that behavioural remedies should only be used in very limited circumstances.

As part of this exercise, the CMA also removed measures that were no longer necessary or were possibly restricting or distorting competition. Out of the 99 merger remedies that the CMA reviewed, the CMA removed 72 remedies. Thus, this exercise enabled the CMA to improve its remedy design as well as the implementation process of these remedies.

The Australian Digital Platform Services Inquiry

On 10 February 2020, the Australian government directed the Australian Competition and Consumer Commission (*ACCC*) to conduct

7 DuckDuckGo, Ecosia, Lilo, Qwant and Seznam, *Open Letter to European Commission: Request for Trilateral Meeting among Google, the EC, and Alternative Search Engines to Improve Search Preference Menu,* Spread Privacy (2020), https://spreadprivacy.com/trilateral-search-meeting/.

8 Hausfeld, *Google finally amends Choice Screen remedy to prevent non-compliance proceedings in EU Android case,* Hausfeld (2021), https://www.hausfeld.com/what-we-think/perspectives-blogs/google-finally-amends-choice-screen-remedy-to-prevent-non-compliance-proceedings-in-eu-android-case/.

9 Stoller, *M., How Russia Defeated Google's Monopoly,* BIG (2019), https://www.accc.gov.au/system/files/Matt%20Stoller.pdf.

10 StatCounter, *Search Engine Market Share Russian Federation,* StatCounter, https://gs.statcounter.com/search-engine-market-share/all/russian-federation#monthly-201001-202307.

11 Competition & Markets Authority, *Merger Remedy Evaluations: Report on case study research,* Competition & Markets Authority (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811252/Merger_remedy_evaluations_2019.pdf.

an inquiry into markets for the supply of digital platform services. Although this inquiry is not specifically for the review of the remedies that have been imposed in the past by the ACCC, the ACCC has recommended certain reforms based on its findings (as published in their interim reports).

The ACCC has published several interim reports through the course of their inquiry with each inquiry considering whether traditional tools are sufficient to address the competition concerns that arise from the behaviour of platforms. For instance, in its 5th interim report on regulatory reform, published in November 2022, the ACCC recommended more targeted competition obligations that should be enforced through sector-specific codes.[12]

The ACCC has specifically recognized that "*the case-by-case enforcement of competition and consumer laws through the courts may also be poorly suited to the range of broad and systemic conduct that a single digital platform can engage in*". Therefore, after a review of the past remedies it had imposed, the ACCC concluded that ex ante obligations might be more suited for the regulation of competition among digital platforms.

German Enforcement Priorities in the Context of the Digital Markets Act

To ensure strong enforcement of the European Digital Markets Act (*DMA*), the German Federal Government published a call for comments in the autumn of 2022 and exchanged views with affected companies, civil society and competition experts to identify those business models and behaviours placing a particular burden on consumers, small and medium enterprises and other competitors.[13] This feedback helped the Bundeskartellamt to evaluate its enforcement priorities with respect to the DMA.

Notably, these enforcement priorities have been set out to focus on the tangible benefits of SMEs and consumers, design an efficient enforcement process and ensure that that there is better utilisation of resources in the enforcement process.

Implications for the CCI

Since the Competition Act has been brought into force, the CCI has been active in the enforcement of competition law in various sectors. This has included the imposition of remedies in appropriate cases. However, like the EC, the CCI has largely allowed the enterprises to decide how to comply with the remedies imposed on them. For instance, the CCI has allowed Google to determine how to comply with the remedies directed in *Umar Javeed v. Google LLC*,[14] (*Google Android*) and *XYZ (Confidential) v. Alphabet Inc.* (*Google Pay*).[15]

In *Matrimony.com v. Google LLC and Others*, the CCI directed Google to display a disclaimer in the commercial flight unit box indicating clearly that the "search flights" link placed at the bottom leads to Google's Flights page, and not the results aggregated by any other third party service provider, so that users were not misled.[16] However, with respect to the remaining directions, the CCI did not specify the manner in which Google had to comply.

Given that the CCI has recently held that Google has contravened the provisions of Competition Act and is also currently conducting two investigations into Google's conduct, there have been concerns with regard to Google's compliance with the remedies directed by the CCI and the effectiveness of such directions.

These concerns have already been raised in relation to Google's compliance with the directions issued by the CCI in Google Pay. Since April 2023, several app developers have approached the High Court of Delhi,[17] the High Court of Madras,[18] and the CCI[19] alleging that Google is not in compliance with the directions issued by the CCI in Google Pay. Both the High Courts independently observed that the CCI is best suited to examine allegations of non-compliance of the remedies that it has issued and directed the app developers to approach the CCI. In February 2024, the CCI even scheduled a hearing on Google's alleged non-compliance with the remedies it imposed.[20]

The CCI should regularly and proactively review the remedies that it has issued in enforcement and combination cases to determine whether the objectives of the Competition Act have been achieved. Such a review would also help the CCI understand the substantive

12 *Digital platform services inquiry – September 2022 interim report – Regulatory reform,* ACCC (published on 11 November 2022), https://www.accc.gov.au/about-us/publications/serial-publications/digital-platform-services-inquiry-2020-25-reports/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform.

13 Proposals from Germany for a strong enforcement of the DMA, Federal Ministry for Economic Affair and Climate Action, https://www.bmwk.de/Redaktion/DE/Downloads/C-D/digital-markets-act-enforcement-priorities-anlage-01.pdf?__blob=publicationFile&v=4#:~:text=The%20provisions%20of%20the%20DMA,difficult%20than%20the%20designation%20process.

14 *Umar Javeed v. Google LLC,* CCI, Case No. 39 of 2018 (21 October 2022). The NCLAT upheld the CCI's assessment of Google's conduct but set aside some of the remedies directed by the CCI.

15 *XYZ (Confidential) v. Alphabet Inc.*, CCI, Case No. 07 of 2020 (25 October 2022).

16 *Matrimony.com v. Google LLC and Others*, CCI, Case Nos. 07 and 30 of 2012 (8 February 2018).

17 The Economic Times, *Take up ADIF's complaints against Google: Delhi HC tells CCI,* The Economic Times (2023), https://economictimes.indiatimes.com/tech/technology/delhi-hc-orders-cci-to-look-into-adifs-complaint-against-google/articleshow/99728641.cms?from=mdr.

18 The Economic Times, *Madras HC dismisses appeals of Indian startups against Google's billing policy,* The Economic Times (2024) https://economictimes.indiatimes.com/tech/technology/madras-hc-dismisses-appeals-of-indian-startups-against-googles-billing-policy/articleshow/107011787.cms?from=mdr.

19 PTI, *CCI opens inquiry against Google for non-compliance with directions in Play Store Case,* Zee Business (2023), https://www.zeebiz.com/companies/news-cci-opens-inquiry-against-google-for-non-compliance-with-directions-in-play-store-case-234793.

20 Kaushik, M., *HC dismisses digital start-up body's plea against the CCI,* The Financial Express (2024), https://www.financialexpress.com/business/industry-hc-dismisses-digital-start-up-bodys-plea-against-cci-3396804/.

Indian Merger Control in 2023: A Year in Flux

By Aparna Mehra, Ritika Sood and Karan Arora[1]

Introduction

2023 was a year in flux for India's merger control regime. The year started with the Competition Commission of India (*CCI*) lacking the quorum to approve notified transactions, and ended with more than 90 approved transactions (of which more than 25 were under the 'green channel' route), a comprehensive public consultation process on revised regulations, the imposition of penalties totaling INR 2.55 crore (including the first ever penalty for non-adherence to the conditions of the 'green channel' route), a slew of decisions which augmented the CCI's jurisprudence on gun jumping, and the imposition of consumer-centric remedies in four instances in sectors ranging from pharmaceuticals to civil aviation.

Despite more than its fair share of challenges, the CCI ensured that 2023 was another strong year for the Indian merger control regime. We track the key developments below.

CCI's Quorum Quandary

In October 2022, upon the retirement of former Chairperson Mr. Ashok Kumar Gupta, the CCI lost the quorum to approve any notified transactions. With around 20 M&A deals worth USD 1.5 billion in limbo, the Ministry of Corporate Affairs (*MCA*) was at the receiving end of concerns expressed by the business community. To remedy this unprecedented situation, the MCA, after receiving the nod from the Attorney General of India, permitted the invocation of the 'doctrine of necessity' after nearly three months of the CCI first being inquorate. To the relief of foreign and domestic investors, this paved the way for the CCI to clear the back log of pending transactions.

In May 2023, the Government appointed Ms. Ravneet Kaur as the Chairperson of the CCI.[2] Ms. Kaur, along with members Mr. Bhagwat Singh Bishnoi and Ms. Sangeeta Verma, restored the quorum to the CCI. Upon the retirement of Mr. Bishnoi and Ms. Verma in August and September, the CCI appointed three new members - Mr. Anil Agrawal, Ms. Sweta Kakkar (the first CCI member from the private sector), and Mr. Deepak Anurag. The CCI now has four members (including the Chairperson) and is quorate.

Remedies Galore

The CCI has the power to seek and/ or impose remedies if it is of the view that a transaction is likely to negatively impact competition in India. To date, the CCI has adopted a mix of structural remedies (divestments), behavioural remedies, and hybrid remedies (a combination of structural and behavioural remedies) to conditionally approve transactions.

2023 saw the CCI impose remedies in four transactions, the second highest number of remedy decisions in a single calendar year since the CCI's inception. The CCI continues to adopt both behavioural and structural remedies in different cases, depending on its in-depth assessment of the affected markets and the operations of the transacting parties.

1 Aparna Mehra, Partner, Ritika Sood, Senior Associate, and Karan Arora, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal. A version of this article was published by Mondaq on 29 January 2024.

2 Notification by the MCA appointing Ms. Ravneet Kaur as Chairperson of the CCI https://www.cci.gov.in/legal-framwork/notifications/details/155/0.

First Remedy in a Transaction Involving an Entity Undergoing the Corporate Insolvency Resolution Process

The CCI conditionally approved AGI Greenpac's (*AGI*) acquisition of 100% of the equity share capital of Hindusthan National Glass & Industries (*HNG*), which was undergoing the corporate insolvency resolution process.[3] Both AGI and HNG operated in the market for the manufacture and supply of packaging materials and catered to a broad range of industries. AGI and HNG were the top two players in the overlapping markets with capacities/ volumes which imposed strong competitive constraints on each other. Unsurprisingly, the CCI's assessment found that AGI and HNG had high combined and incremental market shares in the segments for 'container glass' (55-60%), 'food & beverage' (80-85%) and 'alco-beverages' (45-50%). On account of such high combined and incremental market shares, the CCI was of the *prima facie* opinion that the transaction was likely to cause an appreciable adverse effect on competition (*AAEC*) in India. To alleviate the CCI's concerns, AGI offered the voluntary divestment of the Rishikesh manufacturing plant of HNG. Considering that the Rishikesh plant was engaged in the manufacture and sale of container glass for all sub-segments, the divestment was accepted by the CCI as it was self-contained and would either incentivize a new entry or augment the capacity of an existing competitor of AGI and HNG.

Addressing Issues of Common Ownership

An additional investment in Acko Technology and Services (*Acko*) by General Atlantic (*GA*), a private equity fund, got caught in the crosshairs of the CCI, owing to concerns of common ownership of and information exchange between direct competitors.[4] After its 2020 decision on ChrysCapital's investment in Intas Pharmaceuticals in the private equity space and several other decisions, this was the sixth instance of the CCI addressing issues of common ownership through remedies.

Acko[5] held certain shares and the right to appoint an observer in Vivish Technologies (*Vivish*), which ran the gated community management software 'MyGate'. GA held an approximately 32% stake in NoBroker Technologies Solutions (*NoBroker*) which was also engaged in a similar business to that of Vivish. Both Vivish and NoBroker were considered to be significant players in the 'gated community management solutions' market in India by the CCI. Owing to GA's common ownership in the two prominent players in the gated community management solutions market after the proposed transaction, the CCI raised concerns of softening of competition. To alleviate these concerns, GA committed to implement strict firewalls between NoBroker and Vivish, ensuring that it would not participate in affairs related to Vivish or Acko's investment in Vivish, would not access any non-public information relating to Vivish possessed by Acko, and would not influence or engage any person appointed by Acko in any capacity in Vivish (including as an observer on its board).

CCI Imposes Remedy on 'Potentially' Overlapping Markets

The Indian pharmaceutical sector has been a hotbed for M&A for the past few years. In 2023, the sector saw M&A deals worth INR 469 billion.[6] Among these deals, Ipca Laboratories' (*Ipca*) acquisition of an approximate 60% shareholding of Unichem Laboratories (*Unichem*) was approved by the CCI subject to behavioural remedies, on account of certain 'potential' overlaps in the market for formulations.[7] Interestingly, this is the first remedy decision in relation to a 'potential' overlap between parties on a standalone basis.

Both Ipca and Unichem were active in the overlapping markets of the sale and manufacture of certain identical/ substitutable active pharmaceutical ingredients (*APIs*) in India. These overlapping markets were assessed by the CCI, and the CCI did not find any AAEC concerns in India on account of low-combined market shares of Ipca and Unichem, combined with the presence of several other players in each overlapping market.

Ipca and Unichem also 'potentially' overlapped in the horizontal market for manufacture of formulations and the vertical market for the manufacture of APIs (*upstream*) and manufacture of formulations (*downstream*). These 'potential' overlaps were not identified in the notification form because, even though Ipca sold formulations in India, Unichem did not sell formulations in India and its formulations business is entirely export oriented. Nonetheless, the CCI analysed these 'potential' horizontal/ vertical overlaps and found that, based on estimates, both Ipca and Unichem were insignificant players in the formulations market in India. However, despite this finding, Ipca and Unichem provided voluntary behavioural commitments under which Unichem would not re-enter the Indian formulations market for a period of 36 months from the date of closing of the transaction.

Behavioural Remedies for a Transaction Between Competitors in the Airlines Sector

In what was the most anticipated transaction in the Indian civil aviation sector, the merger of Tata SIA Airlines (which operates under the name 'Vistara') (*Vistara*) with Air India was approved by

3 *AGI Greenpac Limited and Hindusthan National Glass & Industries Limited*, CCI, Combination Registration No. C-2022/11/983 (15 March 2023).
4 *General Atlantic and Acko Technology and Services Private Limited*, CCI, Combination Registration No. C-2023/04/1017 (6 June 2023).
5 GA already had 15.54% of the equity share capital in Acko prior to the transaction.
6 M&A and investing activity in India healthcare sector likely to continue at strong levels, Financial Express (2023), https://tinyurl.com/mvksx62b.
7 *Ipca Laboratories Limited and Unichem Laboratories Limited*, CCI, Combination Registration No. C-2023/05/1028 (26 July 2023).

the CCI, subject to certain behavioural remedies.[8] This marks only the second instance of the CCI imposing pure behavioural remedies in a direct competitor deal.[9]

Air India and Vistara had horizontal overlaps in several segments of the air transportation services market and enjoyed high market shares in respect of destinations in South-East Asia, South Asia, Middle East, and Europe. Based on its *prima facie* assessment, the CCI was of the view that the transaction would lead to an oligopolistic market structure where only 30%-35% of the market would remain contestable between competitors of Air India and Vistara. This would result not only in increased prices for end-consumers, but also in limited choices in terms of number of airlines.

The CCI concluded that, subject to certain capacity commitments on specific domestic and international routes (voluntarily proposed by Air India and Vistara), the transaction would enable the merged entity to perform better through improved efficiencies, network integration and financial stability, leading to the creation of an effective and credible domestic airline competitor. The capacity commitments would preserve competitor pressure on prices, discourage price escalation, and strike a balance between allowing a merger for potential efficiency gains while safeguarding consumers against the adverse effects of reduced competition.

CCI's Hard Stance on Contravention

The CCI imposed fines totaling INR 2.55 crores for contravention of the key provisions on merger control under the Competition Act, 2002 (*Competition Act*). Notably, the CCI imposed the first ever penalty for non-adherence to the conditions of the 'green channel' route.[10]

Introduced in 2019, the 'green channel' route allows parties to obtain deemed approval of the CCI for their transaction provided the transacting parties directly or indirectly do not have any horizontal overlaps in India, actual or potential vertical relationships in India and complementary products in India. The 'green channel' route has been lauded by industry for simplifying the process in non-problematic cases and reducing the timelines for approval.

ADIA and TPG jointly notified their acquisition of a 5% shareholding of UPL Sustainable Agri Solutions (*UPL SAS*) under the 'green channel' route. However, the CCI observed that TPG already held a 22.2% stake in UPL Corporation, a subsidiary of which was engaged in the business of manufacturing and distribution of formulated crop protection products. UPL SAS was also engaged in the same business as UPL Corporation. Hence, given this horizontal overlap, the CCI observed that the transaction did not satisfy the conditions prescribed for availing of the 'green channel' route. For this contravention, the CCI levied a penalty of INR 55 lakhs on ADIA and TPG.

This decision of the CCI underscores two critical aspects. First, the importance of rigorous due diligence, ensuring that all criteria of the 'green channel' route are met before a filing is made. Second, the importance of being on the same page with the CCI before formally filing under the 'green channel' route.

CCI's Increased Focus on Complementary Relationships

The CCI stepped up its focus on assessment of complementary relationships while assessing transactions. In recent decisions[11], the CCI closely assessed the competitive effects of complementary relationships between the acquirer and the target.

In *Atlas 2022 Holdings and Vodafone Group Plc*[12], an acquisition by Atlas 2022 Holdings (a subsidiary of Emirates Telecommunications Group Company PJSC (*e&*)) of an additional shareholding in Vodafone Group Plc, there were no horizontal or vertical overlaps. However, the CCI assessed complementary relationships between e&, an affiliate of e& (*du*), and Vodafone Idea Limited (*VI*). The complementary relationships were in relation to interconnection services and international roaming services between e&, du, and VI. Owing to low market shares and no foreclosure concerns, the CCI unconditionally approved the transaction.

In *V-Sciences Investments and Niva Bupa Health Insurance*[13], V-Sciences Investments (*V-Sciences*), a wholly owned subsidiary of Temasek, proposed to acquire a 2.63% shareholding in Niva Bupa Health Insurance Company (*Niva Bupa*). The CCI observed that certain affiliates of Temasek operated hospitals in India. Niva Bupa, which offered health insurance products as part of its product portfolio in India, had entered into agreements with such hospitals to provide cashless services to insurance policyholders. The acquirer had submitted that the provision of healthcare services and provisions of health insurance products should not

8 *Air India Limited and Tata SIA Airlines Limited*, CCI, Combination Registration No. C-2023/04/1022 (1 September 2023).

9 Prior to the CCI's conditional approval in *Air India and Vistara*, the only instance of pure behavioural remedies in a case involving horizontal overlaps was Schneider Electric's acquisition of the electrical and automation business of Larsen & Toubro, CCI, Combination Registration No. C-2018/07/586 (18 April 2019).

10 *In re: Proceedings against Platinum Jasmine A 2018 Trust, acting through its trustee Platinum Owl C 2018 RSC Limited and TPG Upswing Limited under Section 43A and 44 of the Competition Act,* CCI (18 August 2023).

11 *Atlas 2022 Holdings Limited and Vodafone Group Plc*, CCI, Combination Registration No. C-2023/10/1059 (29 November 2023) and *V-Sciences Investments Private Limited and Niva Bupa Health Insurance Company Limited*, CCI, Combination Registration No. C-2023/10/1071 (12 December 2023).

12 *Atlas 2022 Holdings Limited and Vodafone Group Plc*, CCI, Combination Registration No. C-2023/10/1059 (29 November 2023).

13 *V-Sciences Investments Private Limited and Niva Bupa Health Insurance Company Limited*, CCI, Combination Registration No. C-2023/10/1071 (12 December 2023).

be considered as a complementary relationship since the two services were not combined and used together. However, the CCI considered this interlinkage to be a complementary relationship. This was because the linkages between health insurance providers and hospitals ensured increased patient footfall as well as revenue generation for hospitals. Owing to low market shares and no foreclosure concerns in any of the overlapping markets, the CCI unconditionally approved the transaction.

Competition Amendment Act, 2023 – New Wine in a New Bottle

Another key highlight of 2023 was the Competition Amendment Act, 2023 (*Amendment Act*). The Amendment Act received Presidential assent on 11 April 2023, following which certain of its provisions were notified on 18 May 2023.[14]

The Amendment Act introduced several new provisions relating to merger control, including the highly anticipated 'deal value threshold' and certain relaxations on acquisitions through open market purchases. The specific operating mechanism of most of these provisions were clarified in the draft Competition Commission of India (Combinations) Regulations, 2023 (*Draft Combination Regulations*).[15]

The CCI issued the Draft Combination Regulations for public consultation on 5 September 2023,[16] seeking inputs from various stakeholders. In addition to introducing new provisions, the Draft Combination Regulations aim to modify and bring up-to-date various aspects of the existing combination regulations. Upon implementation, the Draft Combination Regulations will replace the current Combination Regulations. The relevant provisions of the Amendment Act relating to merger control will only be brought into force after that.

Deal Value Thresholds

A notable change under the Amendment Act was the introduction of the deal value threshold (*DVT*) to include transactions that are presently not required to be filed under the existing thresholds based on assets or turnover. Under the proposed DVT, transactions with deal values greater than INR 2,000 crore (approximately USD 240 million) will have to be notified to the CCI, provided that the target enterprise has '*substantial business operations in India*'. While the provisions in relation to DVT are yet to be notified and brought in force, the Draft Combination Regulations have provided guidance on the calculation of the value of transactions and determination of '*substantial business operations in India*'.

Under the Draft Combination Regulations, the methodology for calculation of the value of transaction has been set out in a catch-all provision and includes every consideration, irrespective of whether it is direct, indirect, immediate, deferred, cash or otherwise.[17] This catch-all definition also provides for an indicative list of inclusions for this computation, such as non-compete fees, consideration for options and securities, and contingency payments.[18] Interestingly, the Draft Combination Regulations provide that, where the true and complete transaction value is not recorded in the transaction documents, the value considered by the board of directors (or any other approving authority) while considering the transaction is to be factored in.[19] In case the precise transaction value cannot be established with 'reasonable certainty', it is to be presumed that the INR 2,000 crore threshold is breached.[20]

By providing for a catch-all definition of DVT, the CCI has tried to ensure that stakeholders are not able to circumvent the new threshold. Stakeholders have expressed concerns over the ambiguous and widely inclusive nature of the DVT, including the fact that its application has been extended to traditional markets despite the intention to catch transactions in new-age, asset-light markets like 'big tech'. The widely inclusive nature of the DVT may compel some stakeholders unnecessarily to notify their transactions.

Relaxations for On-market Transactions Prior to CCI Approval

Another key change introduced by the Amendment Act, in line with other jurisdictions, is the ability of parties to close open market purchases on a stock exchange without the CCI's prior approval. While this welcome change, which will allow businesses to make time-sensitive acquisitions without concerns about having to publicly disclose such transactions and being subject to any resultant price changes, is yet to be notified, the Draft Combination Regulations provide additional clarity on its operation.[21]

To avail of the benefits of this provision, the acquirer must notify

14 Among the limited provisions notified currently is the provision in relation to the furnishing of false information or failure to furnish material information for a transaction, the penalty for which has been increased from INR 1 crore to INR 5 crore.

15 Draft Combination Regulations, released for public/ stakeholder consultation. https://tinyurl.com/5n764anr.

16 Background Note to the Draft Combination Regulations. https://tinyurl.com/mrxvmzes.

17 Regulation 4(1), Draft Combination Regulations.

18 Regulation 4(1), Draft Combination Regulations.

19 Explanation (c) to Regulation 4(1), Draft Combination Regulations.

20 Explanation (g) to Regulation 4(1), Draft Combination Regulations.

21 Regulation 6, Draft Combination Regulations.

the transaction within 30 days of the date of acquisition of the shares on the open market. During the CCI's review and approval of this on-market transaction, the acquirer can only avail of economic benefits like receiving dividends, disposing of the shares, and exercising voting rights in matters relating to liquidation or insolvency proceedings. Further, during this period, the acquirer cannot influence the target's activities in any direct or indirect manner.

Increase in Filing Fees

Last but not least, the Draft Combination Regulations propose to increase the filing fee from INR 20 lakhs to INR 30 lakhs for a short form filing (a 50% increase), and from INR 65 lakhs to INR 90 lakhs for a long form filing (a 38% increase).[22]

What's Next?

Although many provisions of the Draft Combination Regulations are sound and pragmatic, there are certain aspects that require closer scrutiny. Stakeholders have provided their inputs on the Draft Combination Regulations to the CCI through the public consultation process, and the CCI is expected to release the finalised regulations early in 2024.

2024 – What's in Store?

Despite a shaky start, 2023 has been another strong year for the CCI, with emphasis being placed on bringing the remaining provisions of the Amendment Act into force. The publication of the Draft Combination Regulations for public consultation was another step closer to this goal. Under a completely new leadership, the CCI has also continued to keep a close eye on contraventions and problematic transactions and has taken the necessary steps to maintain a balance between ensuring competition in the Indian market while also making it easier for parties to undertake business in India.

2024 marks the 14th year of the Indian merger control regime. In the last few years, several new-age merger control issues have come under the CCI's radar. With increasing investments by private equity funds bringing with them concerns of cross-ownership in competitors, information exchanges between portfolio companies and interlocking directorates, the CCI is set to be hot on the heels of the private equity sector in 2024, making antitrust-related due diligence even more critical.

All eyes are now set on 2024, which could be the biggest year for the Indian merger control regime, with the remaining provisions of the Amendment Act as well as the revised Combination Regulations likely to be notified. It is to be seen how the CCI manages the introduction of the new, more sophisticated law, a heavier caseload on account of the DVT, and new-age problems coming to the fore.

22 Regulation 11, Draft Combination Regulations.

Indian Merger Control and Private Equity: Recent Trends and Updates

By Gauri Chhabra, Gargi Yadav, Saumya Raizada and Eesha Sheth[1]

Introduction

The Indian merger control regime, which came into force on 1 June 2011, provides for the *ex ante* review of qualifying mergers to prevent any transaction which causes or is likely to cause an appreciable adverse effect on competition (*AAEC*) in the relevant market(s) in India. The Competition Act, 2002 (*Competition Act*) requires prior notification to the Competition Commission of India (*CCI*) for acquisitions of shares, voting rights, assets, or control, as well as mergers or amalgamations, that meet certain jurisdictional thresholds (called 'combinations') and that cannot avail of any of the exemptions provided under the Competition Act or related regulations. No such combination can come into effect until the receipt of CCI approval or the lapse of 210 days from the day of filing .

The CCI has reviewed more than 1100 combinations till date and has not blocked any combination so far. Further, only about 29 combinations

1 Gauri Chhabra, Partner, Gargi Yadav, Consultant, Saumya Raizada, Senior Associate, and Eesha Sheth, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal. This article is an updated version of the article published in the 2023 edition of Navigating Tricky Waters).

have entailed remedies.[2] As such, the CCI has been a versatile, facilitative and business friendly regulator, that is accommodating of industry concerns. However, certain industry concerns remain to be addressed. This article focusses on the issues faced by the private equity (*PE*) sector while navigating the CCI's merger control terrain.

The significance of the PE sector for the Indian economy cannot be overstated. In 2023, PE investments and venture capital investments in India stood at USD 49.8 billion.[3] Given the nature of PE investments, with tight deal timelines and timely exit requirements, regulatory certainty is key for PE investors. The Indian government has been taking steady steps to improve the ease of doing business ranking of India. This includes taking steps towards cutting red tape and improving the regulator-user interface. To this end, the CCI has been keen on studying and analysing the PE sector and addressing its concerns. In December 2020, the CCI commissioned a market study on PE investors and the competitive impact of common ownership,[4] that is yet to be published.

Given this background, this article first gives a brief overview of the Indian merger control regime and certain recent developments. Then, it explores some CCI-related concerns of the PE sector and provides some guidance for the PE players.

Brief Overview of the Indian Merger Control Regime

Notification Requirement

The Indian merger control regime is mandatory and suspensory in nature. Combinations that meet the jurisdictional thresholds and cannot avail of any exemption are required to be notified to the CCI. A combination may be notified by way of a long form or a short form. A Form I (short form) may be filed if the post-combination combined market share of the parties is less than: (a) 15% in horizontally overlapping markets; and (b) 25% in any vertically related markets. If these market share thresholds are exceeded, a Form II (long form) is recommended. Further, a Form III (a *post-facto* filing) should be filed for a limited category of transactions by public financial institutions, foreign institutional investors, banks or venture capital funds, for certain type of acquisitions.

Green Channel Route

In August 2019, the CCI introduced a fast-track approval process for certain combinations, known as the 'green channel' route. Under this route, combinations where there are no horizontal overlaps, vertical relationships, or complementary activities (*Overlaps*) between the parties (including their group entities and affiliates)[5] are 'deemed approved' on filing a shorter version of the Form I (short form) with the CCI.

Exemptions from Notification

Three types of exemptions are currently available under the Indian merger control regime: (a) the Target Exemption;[6] (b) exemptions available to certain specified types of transactions (such as transactions relating to banking companies,[7] and regional rural banks);[8] and (c) exemptions for certain types of transactions that are not expected to have an AAEC and need not normally be notified (as set out in Schedule I to the CCI (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 (*Combination Regulations*) (*Schedule I Exemptions*).

Minority Exemption

Of these, the exemption for minority acquisitions (set out in Item 1 of the Schedule I Exemptions) is most pertinent from a PE perspective. Currently, a minority acquisition does not need to be notified to the CCI if the acquisition: (a) does not entitle the acquirer / its group to hold 25% or more of the total shares / voting rights of the target; and (b) is made either solely as an investment (*SIP*) or in the ordinary course of business (*OCB*); and (c) does not lead to an acquisition of control (*Item 1 Exemption*). Over time (as discussed below), the CCI has interpreted key concepts like '*control*', '*OCB*', and '*SIP*' in a way that effectively renders the Item I Exemption largely unavailable to most PE transactions.

Recent Developments in the Indian Merger Control Regime

The CCI has been very active over the last year and has introduced a flurry of proposed changes to the merger control regime, as outlined below.

Amendment Act

In April 2023, certain provisions of the Competition Amendment Act, 2023 (*Amendment Act*) came into effect (while certain key merger control related provisions of the Amendment Act are yet to be enforced). The Amendment Act introduced certain paradigm changes to the merger control provisions of the Competition Act. In particular, the Amendment Act introduces a deal value threshold (*DVT*) of INR 2000 crore together with a local nexus element as an additional basis for notification to the CCI. Once the DVT provisions come into effect, many deals, especially in the digital space and real estate / infrastructure sector, which currently benefit from the Target Exemption may get caught in the CCI's net of notifiable transactions.

The Amendment Act also reduces the CCI's review timelines. Illustratively, the overall CCI review period is reduced from 210 calendar days to 150 calendar days; and the initial review timeline to

2 As on 28 March 2024. These do not include cases where parties voluntarily amended their non-compete provisions.

3 *2023 records USD 49.8 billion PE/VC investments across 853 deals*, EY-IVCA report (24 January 2024).

4 *CCI To Conduct Market Study on Private Equity Investments: Chairperson*, Bloomberg Quint (4 December 2023). The study has not yet been completed.

5 Affiliates include companies in which the acquirer has: (a) a shareholding in excess of 10%, or (b) the right to appoint a director / observer, or (c) any other special rights not available to ordinary shareholders.

6 Investors investing in smaller companies (in terms of turnover and assets) can avail of the *de minimis* target based exemption (*Target Exemption*). The Target Exemption has been revised and is now available for proposed transactions where the target does not have assets of more than INR 450 crore *or* turnover of not more than INR 1250 crore, in India.

7 Notification regarding exemption of certain banking companies from Sections 5 and 6 of the Competition Act, S.O. 1034(E) (11 March 2020).

8 Notification regarding exemption of regional rural banks from Sections 5 and 6 of the Competition Act, S.O. 3238(E) (14 July 2023).

arrive at a *prime facie* view by the CCI is proposed to be shortened from 30 working days to 30 calendar days.

Draft Combination Regulations

Additionally, in September 2023, the CCI published draft CCI (Combinations) Regulations, 2023 that include regulations implementing certain provisions of the Amendment Act, including DVT.

Draft Rules

On 11 March 2024, the Ministry of Corporate Affairs released draft rules in relation to the Target Exemption, green channel route (the draft CCI (Green Channel) Rules, 2024 (*Draft Green Channel Rules*)), and Schedule I Exemptions (the draft CCI (Exempted Combinations) Rules, 2024 (*Draft Exemption Rules*)) (together, *Draft Rules*) for public comments. Some of the key changes proposed in the Draft Rules that may have significant impact on PE deals relate to the changes in the definition of 'affiliates',[9] changes to Schedule I Exemptions, and crystallising the change in control test while applying the Schedule I Exemptions (discussed in Part C below).

The Indian Merger Control Regime and PE Deals – Some Key Concerns

Several merger control related issues have been plaguing the PE industry, including issues such as the expansive interpretation of control, narrowing the interpretation of the minority acquisition-related exemption, common directorships, overreach in the Overlaps assessment to narrow the green channel route, and expansion of the competition assessment These have made the approval process onerous and time consuming.

Material Influence Standard of Control

In September 2022, the CCI published a revised version of the '*Frequently Asked Questions*' (*FAQs*) on its website. While the FAQs do not have the force of law, they are indicative of the CCI's thought process and the likely approach that it will take. Before the FAQs, the CCI's interpretation of control oscillated between the '*material influence*' standard'[10] and the '*decisive influence*' standard.[11] In the FAQs, the CCI has unequivocally adopted the '*material influence*' standard (the lowest threshold of control) as being indicative of '*control*'. The FAQs note that control exists regardless of the degree of control and clarify that '*material influence*':

- implies the presence of factors that give an enterprise / person the ability to influence the affairs and management of the other enterprise, including factors such as shareholding, special rights, status and expertise of an enterprise or person, board representation, and structural / financial arrangements;
- includes within its scope *de facto* control (i.e., control over half of the votes actually cast at a meeting regardless of actual shareholding held) and *de jure* control (i.e., a shareholding conferring more than 50% of the voting rights of the target); and
- will include negative control, positive control, sole control or joint control.

Therefore, the CCI has significantly widened the scope of control. The Amendment Act cements this understanding by including the term 'material influence' in the explanation of the term 'control' (this provision is yet to be implemented).[12] This is a common theme that runs across the Draft Exemption Rules, which restrict the availability of the proposed exemptions in case of any change in control (which is different from the current standard of change from joint to sole control).

Narrow Interpretation of Minority Exemption

Until recently, the CCI used to consider rights being acquired in a transaction on an aggregated basis to assess if it leads to any acquisition of control. However, in recent cases (*Trian / Unilever PLC*,[13] *Trian Fund/ Invesco Limited*[16] (together, the *Trian Cases*)) and the *PI Opportunities Fund / Future Retail Limited* (*PI Opportunities Case*)),[14] the CCI has taken a blinkered view that an acquisition of a board seat alone (without concomitant special rights) gives the acquirer the ability to participate in the affairs of the target and therefore such acquisition cannot avail of the Item 1 Exemption. This narrow interpretation of the Item 1 Exemption by the CCI makes the exemption effectively redundant, especially for PE deals that typically entail appointment of a nominee director / observer.

Death Knell to OCB

Earlier, a transaction was deemed to be in the OCB if it was "*frequent, routine and usual*" and if the activities were in the nature of revenue transactions (which would depend on the business activities of the entity in question).[15] In the context of securities transactions, the CCI observed[16] that transactions that aim to benefit from short term price movement of securities would qualify as being OCB. Further, in the *Trian Cases* and the *PI Opportunities Case*,[17] the CCI narrowly interpreted PE investments as not being eligible for the OCB route to avail of the Item 1 Exemption.

Common Directorship Concerns

Given that PE firms often have sector-based specialisations, they are likely to hold investments in competing entities. The CCI in the *PI Opportunities Case*,[16] has taken a very stringent view of the ability of a board director to access CSI of the target and viewed this as a significant

9 The Draft Green Channel Rules provides that an enterprise is an affiliate of another enterprise if that other enterprise has: (a) a shareholding in excess of 10%; or (b) the right or ability to appoint a director / observer; or (c) right or ability to access commercially sensitive information (*CSI*) of the enterprise.

10 *UltraTech Cement Limited and Jaiprakash Associates Limited*, CCI, Combination Registration No. C-2015/02/246 (12 March 2018).

11 *Aditya Birla Chemicals Limited and Grasim Industries Limited*, CCI, Combination Registration No. C-2015/03/256 (31 August 2015).

12 Amendment Act on "control" – "*the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by: (i) one or more enterprises, either jointly or singly, over another enterprise or group; or (ii) one or more groups, either jointly or singly, over another group or enterprise.*"

13 *Trian Fund and Unilever PLC*, CCI, Combination Registration No. C-2022/06/940 (17 June 2022).

14 *Proceedings against PI Opportunities Fund under Section 43A of the Competition Act*, CCI (30 September 2022).

15 *Proceedings against Reliance Jio Infocomm Limited under Section 43A of the Competition Act*, CCI (11 May 2018).

16 *Supra*, n. 14 at paragraph 37.

competition concern. In several earlier cases as well, the CCI alluded to its reservations about issues arising from common directorships[17] and has viewed common directorships amongst competitors (and the potential flow of CSI of the companies through the common directors) unfavourably. In a recent case, General Atlantic[18] offered voluntary modifications to address any concerns of the CCI in relation to Overlaps between its portfolio entity and the target's affiliate. General Atlantic held merely a 2.95% stake along with the right to appoint an observer in the concerned affiliate.

Stringent Application of Green Channel Conditions

In August 2023, the CCI for the first time, imposed a penalty for an incorrect Overlaps assessment for a green channel filing and declared it void *ab initio*.[19] The acquirers in the deal were penalised by the CCI for gun-jumping, making a false statement and incorrect disclosure for a green channel filing despite horizontal overlaps between the parties. Although the overlap analysis was wrongly presented by one acquirer, the CCI held both the acquirers liable, given that it was a joint filing.

Overreach in Overlaps Assessment

At the heart of a merger control analysis is the assessment of Overlaps between the acquirer group and the target group. The CCI guidance requires that all the downstream affiliates of the target and of the ultimate parent entity of the acquirer be considered for such an assessment. The information mapping obligation on the acquirer is clearly more onerous given that the mapping begins from the ultimate parent entity of the acquirer group. From a PE fund structure perspective, finding the ultimate parent entity and identifying its affiliates (especially given the widened scope of what constitutes '*special rights*') is challenging. Usually, a PE fund's structure has layers of entities with differing governance models and complex holding structures that makes determination of the ultimate parent entity a challenging task. Further, given that PE firms often invest through blind pool vehicles, it is cumbersome to ascertain the ultimate parent entity and the respective affiliates to undertake the Overlaps assessment, especially when the portfolio companies are not under an obligation to share information with the acquirer.

Recent Proposed Regulatory Changes

The changes proposed in the Draft Rules are likely to impact the PE industry greatly. For instance, changes to the definition of affiliate to include access to CSI as a metric for defining affiliate (notably, CSI has not been defined), changes to the contours of SIP and OCB, and the introduction of a 'change of control standard' may have far reaching impact on PE deals. A key feature of the changes proposed by the Draft Exemption Rules is the concept of 'change in control' from the current threshold of 'change from joint to sole control'. This signifies that if there is any change in the nature or degree of control exercised by an acquirer, certain exemptions may not apply. Further, in a marked departure from the previous framework, the OCB criterion is defined to include acquisitions under certain shareholding thresholds by registered underwriters, stockbrokers and mutual funds. The SIP criterion is defined as minority acquisitions of up to 25% not leading to acquisition of control, board rights and CSI access (with certain added conditions in case there are Overlaps between parties). Similarly, exemption is also provided for creeping acquisitions where the acquirer group holds less than 25% shareholding / voting rights in the target and there is no acquisition of control of the target (in case of no Overlaps between the acquirer group and the target group). The creeping acquisition exemption applies differently when Overlaps are involved. All this – if reflected in the final Rules - will make the process of determining whether a transaction is notifiable even more complex.

Some Guidance for PE Investors

Given these key developments in the Indian merger control regime that impact PE deals, deal makers have good reason to be wary. The CCI is taking the 'substance over form' approach rather strictly. This may render futile any innovative deal structuring to circumvent a filing requirement. Some guiding notes for PE players to navigate tricky merger control waters are set out below.

Broadly speaking, it would be prudent for deal makers to allow extra time for the merger filing process when chalking out deal timelines. Next, Overlaps mapping needs to be done exhaustively, particularly when seeking to avail of the green channel route and a pre-filing consultation should be considered a mandatory milestone in the deal timeline. Further, PE players need to be careful regarding internal and external documentation regarding transactions as the CCI may rely on this to infer whether there was an 'intention' to acquire 'control'. Another note of caution relates to the appointment of directors/ observers to the board of portfolio companies, especially within the same sector. It is imperative to institute and observe strict protocols regarding who can access CSI of a portfolio company within the fund and to erect Chinese walls to prevent any leakage of CSI.

While one might hope that the CCI will address many of the industry concerns in the future, dealmakers are advised to tread softly, for they tread a regulatory minefield.

17 *Canary Investment Limited and Link Investment Trust*, CCI, Combination Registration No. C-2020/04/741 (30 April 2020).
18 General Atlantic Singapore ACK Pte. Ltd., CCI, Combination Registration No. C-2023/04/1017 (6 June 2023).
19 *Platinum Jasmine A 2018 Trust.*, CCI, Combination Registration No. C-2022/12/995 (18 August 2023).

Navigating the Complex Landscape of Interlocking Directorates in India

By Aparna Mehra, Krithika Ramesh and Sarthak Mishra[1]

Introduction

In a recent landmark decision,[2] the Competition Commission of India (*CCI*) examined the competitive effects arising from a prominent private equity (*PE*) player's acquisition of a stake in a tech company, when it already had an existing stake in another tech company. The crux of the matter? The CCI's worry was that this deal could soften the competitive edge between the investees or could lead to potential exchange of competitively sensitive information (*CSI*) between the two. Remedial measures emphasizing non-interference with one of the competing investee companies were accepted. This sets the stage for a deeper dive into the role of common directors in investee companies, exploring how their shared positions could influence competitive dynamics beyond mere investment overlaps.

This concept under the antitrust regime is that of interlocking directorates, that occurs when a single individual serves on the boards of directors of two or more different companies, a practice typically present in scenarios of common ownership. This practice can raise competition concerns, especially when these companies are competitors in the same market. While the Companies Act, 2013 allows for common directors, emphasising their fiduciary responsibility (which implicitly includes restrictions on the sharing of confidential information), the reality of enforcing these provisions is complex. Detecting this information exchange/ coordination on part of the director/ investee company remains a challenge for competition authorities. The CCI therefore approaches its review of mergers with *a priori* concerns of the possibility of common influence such as information exchange and the risk of coordinated effects.

This prompts an important question: have the detrimental effects of interlocking directorates been conclusively established, or do they, in certain scenarios, contribute to a more dynamic and efficient market?

Comparative Analysis Between the USA, the EU, and India

The treatment of interlocking directorates varies significantly across the USA, EU, and India. The USA's Clayton Act explicitly prohibits interlocking directorates in competing companies, intended to prevent the exchange of CSI and coordination that could harm the economy, demonstrated by high-profile cases like those involving Google and Apple, where directors resigned to comply with the law.[3] In October 2022, the United States Department of Justice announced the resignation of seven directors from five companies in response to concerns raised by the Antitrust Division, reflecting a renewed interest in the enforcement of interlocking directorates.[4] Further, proposed changes to the Hart–Scott–Rodino Antitrust Improvements Act now call for a detailed disclosure of officers, directors, and board observers across acquiring and acquired entities enabling review and the screening of interlocking directors prior to the implementation of a proposed transaction.[5] This information would allow the antitrust agencies to know of existing, prior, or potential interlocking directorates and to assess the competitive implications of such relationships.

Conversely, the EU does not have a specific provision against interlocking directorates but assesses them on a case-by-case basis. Remedies in the EU often involve companies offering commitments to resolve concerns stemming from interlocking directorates. Similarly, India's Competition Act, 2002 does not explicitly ban interlocking directorates but, like the EU, the CCI has more actively engaged with their impact in merger control cases.

Case Studies from the CCI

The CCI's approach to interlocking directorates, especially in the context of PE investments, reflects a keen interest in the potential for anti-competitive behaviour. In the recent past, the CCI has examined two cases involving PE players on concerns of common ownership, which are discussed below.[6] Further, in cases like *Northern TK/FHL*[7] and *Nippon/Kawasaki*,[8] the CCI scrutinized arrangements where the acquirers (directly or through portfolio companies) and the targets were competitors in the same market. The concerns centred on the possibility of collusion and exchange of CSI due to common directorships. To mitigate these risks, the parties in these cases offered commitments such as ensuring no common directors between competing entities and establishing rules of information control.

1 Aparna Mehra, Partner, Krithika Ramesh, Senior Associate, and Sarthak Mishra, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 *General Atlantic/ Acko Technology and Services Private Limited*, CCI, Combination Registration No. C-2023/04/1017 (6 June 2023).

3 The Guardian, "*Google chief executive Eric Schmidt resigns from Apple Board over "conflicts of interest*," (3 August 2009), https://tinyurl.com/3ua3mb7x.

4 United States Department of Justice, *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates* (19 October 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

5 Federal Trade Commission, *FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review* (27 June 2023), https://tinyurl.com/2mntkce2.

6 *Canary Investment Limited and Link Investment Trust II/ Intas Pharmaceuticals Limited*, CCI, Combination Registration No. C-2020/04/741 (20 April 2020) and *General Atlantic/Acko Technology and Services Private Limited*, CCI, Combination Registration No. C-2023/04/1017 (6 June 2023).

7 *Northern TK Venture Pte. Ltd./ Fortis Healthcare Limited*, CCI, Combination Registration No. C-2018/09/601 (29 October 2018).

8 *Nippon Yusen Kabushiki Kaisha Ltd., Mitsui O.S.K. Lines Ltd. and Kawasaki Kisen Kaisha, Ltd.*, CCI, Combination Registration No. C-2016/11/459 (29 June 2017).

The 2020 *ChrysCapital/Intas* case along with the 2023 *GA/Acko Tech* case further show the evolving regulatory stance of the CCI.

In 2020, ChrysCapital sought to increase its stake in Intas Pharmaceuticals. However, the CCI identified potential anti-competitive risks due to ChrysCapital's existing investments in Intas' competitors, i.e. other competing pharmaceutical firms. One of the major points of concern was the presence of interlocking directorates, where ChrysCapital had the right to appoint board members in companies that were direct competitors to Intas, raising fears of anti-competitive coordination. To mitigate these concerns, ChrysCapital made several commitments, including the removal of a director from a competitor's board and imposing restrictions on the use of sensitive information.

In 2023, in the *GA/Acko Tech* case, the CCI closely scrutinized the PE player General Atlantic's (*GA*) acquisition of an additional stake in Acko Tech, particularly due to GA's existing investment in NoBroker (a player in the market for society/gated community management solutions). Acko Tech had a stake and board observer rights in Vivish Technologies (*Vivish*), which operated MyGate, a competitor to NoBroker. The CCI was concerned that this deal could soften competition between NoBroker and Vivish who were both significant players in society/gated community management solutions. To address these concerns, GA proposed voluntary modifications, including non-involvement in matters related to Vivish, refraining from accessing non-public information about Vivish, and not influencing any appointments by Acko Tech. This modification in effect also restricted GA's ability to appoint a common director on the boards of Vivish and NoBroker, and would be applicable as long as GA had a stake in NoBroker. Based on these voluntary commitments, the CCI approved the transaction, concluding it was unlikely to adversely affect competition in India.

The *Google/Airtel* case,[9] while not directly addressing interlocking directorates, highlights concerns around sensitive data sharing—a critical issue also pertinent to scenarios involving common ownership/ interlocking directorates. The CCI raised concerns regarding information sharing in Google's minority investment in Airtel, particularly due to possible sensitive data exchange with Jio, another of Google's investments. Google addressed these issues by establishing a firewall to limit information flow and amending parts of the Co-Marketing Agreement to prevent data sharing.

These cases reflect the CCI's cautious approach in examining risks of coordination/ collusion in transactions involving common shareholders. However, is it possible that common ownership can enhance, rather than hinder, competitive dynamics?

The Complex Reality

The perception that common ownership leads to anti-competitive behaviour lacks substantial empirical support. A 2014 study critically examines the relationship between interlocking directorates and collusion in Europe.[10] Contrary to common assumptions, it finds that interlocking directorates rarely lead to collusive activities. Utilizing network analysis and a dataset of European Union cartel cases, the study reveals that only a few instances of collusion involved companies previously connected via interlocking directorates. This suggests that, especially in a regulatory environment which remains vigilant against anti-competitive practices, interlocking directorates may not be a prevalent or effective tool for facilitating collusion, with their potential impact on cartels being far less significant than previously thought. Therefore, if cartel cases do not demonstrate a clear link between interlocking directorates and anti-competitive behaviour, this suggests that the regulators should, on balance, not necessarily intervene in such arrangements in merger control cases, especially considering evidence that they may lead to efficiencies.

Furthermore, the impact of common ownership on competition is complex. For instance, if an investor holds stakes in two competing firms, it is simplistic for the antitrust authorities to assume that both firms would collude to increase prices or reduce quality. The investor only owns a portion of each firm, diluting the potential for anti-competitive behaviour. Moreover, non-common shareholders and directors who stand to lose from any collusion that benefits a rival would likely oppose such practices. That said, it is equally likely that the non-common directors will be unable to detect the collusion by the common directors. This complexity is further enhanced by the firm's internal incentive structures. Directors/ managers typically aim to maximize the firm's individual revenues, aligning with non-common shareholders' interests. This objective may take precedence over any theoretical benefit common shareholders might gain from reduced competition. Additionally, corporate governance mechanisms, like fiduciary duty suits, play a critical role in ensuring that directors/ managers act in the best interest of the firm, countering any potential influence from common ownership.

9 *Google International LLC/ Bharti Airtel Limited*, CCI, Combination Registration No. C-2022/03/913 (30 June 2022).

10 Buch-Hansen, H., *Interlocking directorates and collusion: An empirical analysis,* International Sociology, Volume 29, Issue 3, 249-267 (2014), https://journals.sagepub.com/doi/10.1177/0268580914527021

Another study has also shown that the role of common ownership also extends significantly into fostering innovation.[11] The study pertained to the pharmaceutical industry, involving over a thousand drug projects, and revealed that innovation efficiency could be enhanced when venture capital firms had stakes in multiple competing startups. By strategically redirecting investments from less promising ventures to those with higher potential, the venture capital firms not only optimised resource allocation but also encouraged startups to diversify their projects, thereby reducing redundant R&D efforts. This approach, correlating with a higher ratio of Food and Drug Administration approved drugs to funding, suggests that common ownership can effectively minimize inefficient duplication in R&D, addressing a crucial market failure in patent races.

Thus, while common ownership poses theoretical concerns, its real-world impact on competition needs to be tested in individual cases. The interplay of shareholder interests, management incentives, and corporate governance structures creates a balance that might not only maintain competitive dynamics but could also potentially foster innovation.

Conclusion

Empirical evidence is paramount in gauging the true impact of interlocking directorates and common ownership. Without empirical evidence to back it up, remedies like director removal might be excessive, leading to reduced investments—a critical aspect as India seeks to attract more international investment. Such stringent measures could deter and disincentivise inbound investments, which are essential for economic growth. Introducing less onerous guardrails like introducing stricter information exchange controls, recusing directors from taking part in certain decisions, and increasing competition compliance awareness through training at the managerial level, could be solutions worth exploring. Moving forward, while the CCI is navigating these complexities, a balanced assessment by the CCI and proactive compliance by companies, will be the key to balance healthy competition with the potential benefits of common ownership and interlocking directorates.

11 Li, Xuelin and Liu, Tong and Taylor, Lucian A., *Common Ownership and Innovation Efficiency,* Journal of Financial Economics (JFE), forthcoming, Jacobs Levy Equity Management Center for Quantitative Financial Research Paper (2022), http://dx.doi.org/10.2139/ssrn.3479439.

Complementary Mergers: A Coming of Age Story

By Gauri Chhabra, Gargi Yadav and Anjana Ravikumar[1]

Abstract

Should mergers of complementary products (i.e., non-competing and non-vertically linked products with a common user base) be subject to the same standard of review as vertical mergers? How has the approach of the Competition Commission of India (*CCI)* to complementary mergers evolved over the last decade? If parties to a complementary merger have insignificant market shares (say less than 5%) in the relevant markets, should the parties still be asked to provide detailed market data? Is there anything one can borrow from other jurisdictions? This article delves into the world of complementary mergers and explores these questions to arrive at some broad policy recommendations.

Introduction

Complementary mergers refer to mergers that involve products that are neither competing nor vertically linked but are used together. In other words, the merging firms are neither competitors nor vertically linked, but are present in closely related markets. Accordingly, when the demand for one product increases, the demand for the other (complementary) product also increases. Some examples of complementary products are health care products and healthcare services, tractors and implements connected to tractors, and electronic vehicles and their charging stations. Theories of harm commonly invoked in a complementary merger include market foreclosure (through tying, bundling, or creation/increase of entry barriers) and coordinated effects (such as sharing of competitively sensitive information amongst merging parties and price fixing).[2]

On the procedural side, the competition analysis of complementary mergers typically involves defining the market for complementary products, identifying the (direct and indirect) customers, conducting a market share analysis, and examining the possibility of foreclosure. Notably, the Indian merger control regime requires the same levels of information for vertical linkages and complementary linkages.

In this article, we first take a cursory look at how the EU and the US assess complementary mergers. Then, we turn to the Indian experience and trace the CCI's jurisprudence on complementary mergers. We then consider the optimal way forward and present certain policy recommendations. The article does not consider complementary linkages in digital ecosystems or enforcement matters.

Complementary Mergers in the US and the EU – A Cursory Look

In the United States (*US*) the agencies have not since the 1970s pursued complementary mergers on account of complementary linkages alone.[3] This approach was largely influenced by the Chicago School's consumer welfare manifesto[4] and the absence of cogent theories of harm that could be used to assail complementary mergers. In 2023, departing from this practice, the Federal Trade Commission (*FTC*) challenged Amgen Inc.'s proposed acquisition of Horizon Therapeutics, arguing that the parties could offer discounts to customers conditioned on the purchase of multiple products from the merged firm, which might lead to market foreclosure.[5] Further, the new merger guidelines, released in December 2023,[6] erased the earlier distinction between horizontal and non-horizontal mergers. The new guidelines also mark a departure from the more structural approach to the analysis of mergers followed earlier.

In the EU as well, there is a renewed interest in complementary mergers.[7] Notably, the European Non-Horizontal Merger Guidelines, 2008[8] (*NHMG*) provide that a complementary merger raises concerns only if there is significant market power, together with a considerable overlap in the customer base and market conditions that limit rivals' ability and/ or incentive to compete.[9]

Complementary Mergers and the CCI – The Story So Far

Since the introduction of the merger control regime in June 2011, there have been around 1110 merger filings with the CCI. Of around 1010 merger control orders released, around 75 mention complementary linkages. The CCI's approach to complementary linkages, so far, can be segmented into cases where it has:

- not discussed the complementary linkage (despite submissions of the parties relating to complementary linkages);[10]

1 Gauri Chhabra, Partner, Gargi Yadav, Consultant, and Anjana Ravikumar, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 ICN Conglomerate Mergers Project Report (2019-2020), https://tinyurl.com/yk3arfy5.

3 Greenfield Leon B., et. al, *Blast From the Past: FTC Revives Conglomerate Concerns as Basis for Merger Challenges* (18 May 2023), https://tinyurl.com/52323uar.

4 Witt, Anne C., *Who's Afraid of Conglomerate Mergers?*, Antitrust Bulletin, Volume 67, Issue 2 (January 31, 2022), https://tinyurl.com/mrysc99x.

5 *Amgen and Horizon Therapeutics*, FTC, Docket No. 9414 (14 December 2023).

6 U.S Department of Justice and the FTC, *Merger Guidelines* (18 December 2023), https://tinyurl.com/5bwpwbea.

7 Sherman & Sterling, *Conglomerate Effects: An EU Resurgence?* (19 August 2019), https://tinyurl.com/3vhj5um4; Paragraph 218, *NVIDIA and Mellanox*, EC, Case M.9424 (19 December 2019); French Competition Authority, *Acquisition of joint control of Cityscoot by RATP Capital Innovation and Caisse des Dépôts et Consignations*, (16 May 2023), https://tinyurl.com/4vz585pn; *Google and Fitbit*, EC, Case M.9660 (17 December 2020); *Dentsply and Sirona*, EC, Case M.7822 (25 February 2016); *Worldline, Equens and Paysquare*, EC, Case M.7873 (20 April 2016); *Microsoft and LinkedIn*, EC, Case M.8124 (6 December 2016); *Bayer and Monsanto*, EC, Case M.8084 (29 May 2018); *Qualcomm and NXP*, EC, Case M.8306 (18 January 2018); *Essilor and Luxottica*, EC, Case M.8394 (1 March 2018) and *Broadcom and Brocade*, EC, Case M.8314 (12 May 2017).

8 EU, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings issued*, 2008/C 265/07 (18 October 2018).

9 Paragraph 100 and 101 of NHMG.

10 *India Business Excellence Fund IV, Aghara, Ceramiche and Simpolo*, CCI, Combination Registration No. C-2022/07/954 (18 August 2022); *Archroma and Huntsman*, CCI, Combination Registration No. C-2022/09/970 (9 February 2023); *DowDuPont*, *Diamond* and *Orio*, CCI, Combination Registration No. C-2016/05/400 (8 June 2017); *Capital First* and *IDFC Bank*, CCI, Combination Registration No. C-2018/02/555 (7 March 2018); *Outotec Oyj* and *Metso Oyj's*, CCI, Combination Registration No. C 2020/03/735 (18 June 2020) and *Capegemini* and *Altran*, CCI, Combination Registration No. C-2019/08/677 (2 September 2019).

- clubbed the analysis of complementary linkages and vertical linkages; [11] and
- separately analysed complementary linkages and their effects.

The first two categories of cases provide little to no substantive guidance on the treatment of complementary mergers. The third category is the useful one that provides more guidance on the treatment of complementary linkages. Thus, to understand the CCI's stance on complementary mergers, some of the key cases where the CCI has analysed complementary linkages in some detail are discussed here. It should be noted that, between 2011 and 2019, the Indian merger control rule book did not include provisions on complementary mergers / linkages. It was only with the introduction of the green channel route (that provides for deemed approval in case of mergers where no horizontal/vertical/ complementary overlaps exist between the parties) in 2019 that complementary linkages formally found their way into the merger regulations (as a younger sibling of vertical linkages, so to speak). That said, even before 2019, the CCI had examined complementary linkages in several cases.[12]

Bayer / Monsanto (2018)[13] is believed to be the watershed moment that put complementary linkages on the radar of the CCI. In this case, the CCI assessed the conglomerate effect arising from the complementary product portfolios of the parties. Bayer was focused on agrochemicals and vegetable seeds, and Monsanto was focussed on non-selective herbicides, traits, and agricultural seeds. Both parties wielded high market power across agrochemical and seed segments (indicated by very high market shares, high entry barriers in the relevant markets, deep and wide distribution channels of the parties, international licensing deals, access to agricultural & climatic data, broad product offering, etc.). Eventually, the parties agreed to tailored remedies (involving both structural and behavioural modifications). The CCI categorically noted that portfolio effects might lead to competition concerns if parties to a combination commanded significant market power.[14]

In certain cases relating to complementary linkages, the CCI has noted that wielding significant market power in at least one market is a pre-requisite for raising competition concerns. This stance was articulated in *Bayer / Monsanto* (2018). Subsequently, in *Pay U / Bill Desk* (2022),[15] the CCI noted that the key for triggering complementary effects / portfolio effects was the significant position of strength in at least one segment which could act as the source of leveraging the presence of the entity in other segments of the ecosystem. It noted that the multilayered presence of a party would raise competition concerns only if the entity also held very strong market influence across the relevant segments.[16] A similar approach was adopted in *AGI / Greenpac* (2023),[17] *DSM / Danube* (2023),[18] *GPL / Yesbank* (2021),[19] *Kubota / Escorts* (2022),[20] and *V Sciences / Temasek*[21] where the CCI found no competition concerns due to, amongst other things, the low market shares of the parties. Recently, in *IMCD / Signet* (2024),[22] the CCI analysed complementary linkages and found no competition concerns given the low market shares and the presence of significant players in the relevant markets.

In several other cases, the CCI has applied a foreclosure analysis to assess if the complementary linkages raised competition concerns.[23] In *Vodafone / Atlas* (2023),[24] the CCI examined complementary linkages between two telecommunications operators based in the UAE and an Indian mobile network operator. Broadly, it was noted that the interconnection services and international roaming services were complementary from the perspective of the end user and the CCI concluded that the parties lacked the incentive to raise foreclosure concerns. This case is unusual in that the parties had no other overlaps other than the complementary linkages.

Based on the development of the CCI's approach to complementary linkages considered above, four key trends emerge. First, the CCI is scrutinizing complementary linkages carefully and accepting filings based on complementary linkages alone and has developed a deep understanding of complementary products. Second, the CCI places complementary linkages at par with vertical linkages (by applying the same competition analysis and foreclosure analysis to

11 *HCJI Holdings and Hitach*, CCI, Combination Registration No. C-2022/03/916 (30 May 2022); *AGI Greenpac and HNG*, CCI, Combination Registration No. C-2022/11/983 (15 March 2023); *BXG and BusyBees*, CCI, Combination Registration No. C-2022/02/906 (23 March 2022); *Talace and Air India*, CCI, Combination Registration No. C-2021/11/883 (20 December 2021); *TS Rajam and TVS*, CCI, Combination Registration No. C-2021/08/860 (31 August 2021); *ZF Friedrichshafen and WABCO*, CCI, Combination Registration No. C-2019/11/703 (14 February 2020).

12. *Bayer and Monsanto*, CCI, Combination Registration No. C-2017/08/523 (14 June 2018), *Emerson and Pentair*, CCI, Combination Registration No. C-2016/09/434 (29 December 2016), *Hitachi Payment Services and SBI Payment Services*, CCI, Combination Registration No. C-2018/11/617 (19 December 2018).

13 *Bayer and Monsanto,* CCI, Combination Registration No. C-2017/08/523 (14 June 2018).

14 *Bayer and Monsanto,* CCI, Combination Registration No. C-2017/08/523 (14 June 2018), Para 154.

15 *PayU and BillDesk*, CCI, Combination Registration No. C-2022/04/920 (5 September 2022).

16 *Ibid*, at Paragraph 155 and 156.

17 *AGI and Greenpac*, CCI, Combination Registration No. C-2022/11/983 (15 March 2023).

18 *DSM and Danube,* CCI, Combination Registration No. C-2023/03/1009 (3 April 2023).

19 *GPL and Yesbank*, CCI, Combination Registration No. C-2021/03/823 (17 May 2021).

20 *Kubota and Escorts,* CCI, Combination Registration No. C-2021/12/890 (1 February 2022).

21 *V Life Sciences and Temasek,* CCI, Combination Registration No. C-2023/10/1071 (12 December 2023).

22 *IMCD and Sygnet*, CCI, Combination Registration No. C-2023/12/1083 (9 January 2024).

23 *Hitachi Payment Services and SBI Payment Services*, CCI, Combination Registration No. C-2018/11/617 (19 December 2018), Para 7; *MacRitchie Investments, Schneider Electric and L&T,* CCI, Combination Registration No. C-2018/07/586 (18 April 2019).

24 *Vodafone / Atlas,* CCI, Combination Registration No. C-2023/10/1059 (29 November 2023).

complementary linkages as well). Third, the CCI has in certain cases considered complementary linkages to be problematic only if one or more parties enjoy significant market power.[25] Fourth, the CCI is alive to the reality of markets operating as composite ecosystems, and not just as linear value chains.[26]

Where Do We Go from Here?

While there is a trend towards the increased scrutiny of complementary mergers in the US, the EU and India, there is a case to be made for a more nuanced approach to complementary mergers. Non-horizontal mergers in general, and complementary mergers in particular, are traditionally not viewed as being problematic[27] (absent certain aggravating factors such as market power and/ or high levels of concentration). In fact, complementary mergers can bring several benefits,[28] such as providing customers with an option of one-stop shopping (thus reducing transaction costs), potentially lower prices (as the merged entity may be able to offer complements at reduced prices),[29] and more efficient spend on research and development, thus yielding positive externalities.

We propose four broad policy recommendations for dealing with complementary mergers.

First, antitrust agencies should consider the positive effects of a complementary merger.[30]

Second, there should be a rigorous and objective economic analysis when assessing the theories of harm arising from complementary mergers, to rule out any false positives. Any regulatory intervention should be based on evidence-based likelihood and not just apprehension of harm.[31]

Next, the CCI should consider making certain changes to the merger control regime in relation to analysis of complementary mergers. Only such complementary mergers that entail individual or combined market shares of more than a suitable threshold should require detailed market analysis and competition analysis. This approach will help filter complementary mergers that are not likely to raise competition concerns and help focus the (already stretched) energy and resources of the CCI on cases that are likely to raise competition concerns. The CCI has itself in several cases noted that complementary linkages raise concerns only if accompanied by significant market power in at least one relevant market. Accordingly, seeking detailed market information relating to competitors and competition analysis of complementary linkages in cases where the individual / combined market share of the parties is insignificant is onerous for all stakeholders and wasteful of the CCI's scarce time and energy.

Finally, it may also be useful to align the approach on complementary mergers with that of other national competition authorities to ensure that cross border mergers are subjected to similar standards. Such measures can go a long way in facilitating commerce and reducing transaction costs.

To conclude, it appears that complementary mergers have come of age, and cannot make do with 'hand-me-down' frameworks from older siblings. It is about time that the regulators specifically tailor frameworks and guidelines for the youngest sibling of the overlap family.

25 *Ibid*; *Bayer and Monsanto,* CCI, Combination Registration No. C-2017/08/523 (14 June 2018); *PayU and BillDesk*, CCI, Combination Registration No. C-2022/04/920 (5 September 2022).

26 *Bayer and Monsanto,* CCI, Combination Registration No. C-2017/08/523 (14 June 2018).

27 OECD, *Executive Summary of the roundtable on Conglomerate effects of mergers* (4 February 2021), https://tinyurl.com/yww6rfub.

28 Paragraph 13 and 14, NHMG.

29 Alessandro S. Kadner-Graziano, *Criticism of the Cournot Model at A New Merger Tool Protects Consumers from Limits of the Cournot Effect* (20 February 2023), https://tinyurl.com/48a2jfap; Zhijun Chen, and Patrick Rey, *A Theory of Conglomerate Mergers*, TSE Working Paper 23-1447 (June 2023), https://tinyurl.com/yckmxhhy; Kadner Graziano and Alessandro, *Mergers of Complements: On the Absence of Consumer Benefits* (2022), hhttps://tinyurl.com/mwj3mp3f.

30 Herbert Hovenkamp, *Mergers of Complements*, SSRN (12 March 2024), https://tinyurl.com/ynxrrjne.

31 Witt, Anne C., *Who's Afraid of Conglomerate Mergers?*, Antitrust Bulletin, Volume 67, Issue 2 (January 31, 2022), https://tinyurl.com/mrysc99x; *Tetra Laval v. Commission*, ECJ, T-5/02 (31 March 2012), upheld on appeal in *Commission v. Tetra Laval*, ECJ, C-12/03P (15 February 2005); *General Electric Company v. Commission*, ECJ, T-210/01 (14 December 2005).

Common Ownership and Competition Concerns: More Smoke Than Fire?

By Naval Satarawala Chopra, Gauri Chhabra, Gargi Yadav and Anjana Ravikumar[1]

Abstract

Antitrust regulators across the globe are increasing the heat on common ownership – *i.e.*, where an investor holds parallel interests in competing firms. Regulators fear that a few institutional investors may dominate an industry and distort competition by picking stakes in competing firms and use sensitive information of the competing firms to maximize their profits - sometimes at the cost of competition or a portfolio firm's interest. These are all valid concerns. However, one must pause to ask if common ownership is really an antitrust goliath. Unaccompanied by any anti-competitive conduct, does common ownership by itself raise any competition concerns? Even if one assumes that common ownership can lead to anti-trust concerns, is the existing regulatory toolkit adequate to address it? Must we tighten the regulatory noose so as to kill the institutional investor goose? This article delves into these questions and recommends the way forward for the regulators and the dealmakers.

Introduction

The practice of common ownership, describing a situation where an investor holds interests in competing firms in the same industry,[2] is increasingly attracting antitrust attention across the globe. It has been labelled as one of the greatest antitrust threats of our times.[3] The opponents of common ownership argue that common ownership can be used as a conduit for the flow of competitively sensitive information (*CSI*) of competing firms. Such CSI of portfolio firms may then be used to influence the pricing / management decisions of the competing firms or drive investor return at the cost of firm level profitability, thus causing distortion of the markets. Many such opponents find common ownership in itself problematic,[4] regardless of the nature of the interest / voting rights held in the target firm.[5] While there is a real possibility that the CSI may be accessed by a common investor, by way of shareholder rights and/or nominee directors / observers. and used to distort markets, one needs to assess whether common ownership-related competition concerns are well founded in theory and in reality. To this end, the first part of this article explores the approach taken to common ownership by India's antitrust authority, the Competition Commission of India (*CCI*), and briefly looks at antitrust developments related to common ownership in the United States (*US*) and the EU. The second part explores if common ownership related competition concerns are well founded. Finally, the best way forward on the issue is considered.

The CCI's Stance on Common Ownership

The CCI's jurisprudence in relation to common ownership has been steadily firming up. This regulatory trend of increasing cognisance of common ownership is accompanied by another trend, the stricter regulation of acquisitions of minority non-

1 Naval Satarawala Chopra, Partner, Gauri Chhabra, Partner, Gargi Yadav, Consultant, and Anjana Ravikumar, Associate. The views expressed here are personal.

2 Thomas A. Lambert, *Mere Common Ownership and the Antitrust Laws*, Boston College Law Review, Volume 61, Issue 8, 2913-2964 (2020), https://scholarship.law.missouri.edu/facpubs/985.

3 Einer Ehauge, *The Greatest Anticompetitive Threat of Our Time: Fixing the Horizontal Shareholding Problem*, Promarket (2019), https://tinyurl.com/29vk6fs8.

4 Einer Elhauge, Horizontal Shareholding, Harvard Law Review, Volume 109, Issue 1267, Harvard Public Law Working Paper No. 16-17 (2016), https://tinyurl.com/3vpckny7; Eric A. Posner et al., *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, Antitrust Law Journal, Volume 81, Issue 669, 669-70 (2017), https://tinyurl.com/5b47vjnc; Eric A. Posner et al., *A Monopoly Donald Trump Can Pop*, New York Times (2016), https://tinyurl.com/ptserr2u.

5 Gian Diego Pini, *Passive Aggressive Investments: Minority Shareholdings and Competition Law*, European Business Law Review, Volume 23, Issue 5 (2012), https://ssrn.com/abstract=2233350.

controlling interests. Taken together, these trends are a cause of alarm for financial investors.

The CCI's rising scrutiny of common ownership-related concerns has so far been seen in two ways: (a) as part of the remedies (mostly voluntary) accepted in merger cases; and (b) as part of its observations in enforcement orders. The CCI's approach is discussed below:

a) *Nippon / Mitsui*[6] - This case related to the merger and integration of the worldwide container line shipping business and container terminal business of the parties. The CCI examined certain other business lines such as bulk shipping, car transport, logistics and freight forwarding and heavy lifters that were not part of the businesses being integrated as part of the merger. The parties offered voluntary commitments to safeguard the CSI relating to such non-integrated businesses. This included the merged entity providing an undertaking not to receive / disclose any CSI regarding non-integrated businesses, and not to appoint common directors in the integrated business and non-integrated business.
b) *IHH Healthcare / Fortis Healthcare*[7] - This case related to a strategic acquisition of a hospital and diagnostic center chain operator in India. The voluntary commitments related to a pre-existing joint venture of the acquirer (with a third party) that competed with the target. The acquirer offered voluntary commitments similar to those offered in the Nippon / Mitsui Order.
c) *Canary Investments / Intas Pharmaceuticals*[8]- This case related to increase of Chrys Capital's (a private equity (*PE*) firm) shareholding in the target (a pharmaceutical company) from 3% to 6%, together with acquisition of certain information rights and veto rights in the target. Chrys Capital held similar rights and minority shareholding in other pharmaceutical companies that competed with the target. The CCI noted that while Chrys Capital's rights in competing firms would not have allowed for unilateral action, there was a possibility of flow of CSI and Chrys Capital's increased ability to influence the affairs of its portfolio firms.[9] To allay the concerns of the CCI, Chrys Capital offered, amongst other things, to remove its nominee director from the board of one of the competing portfolio firms and abstain from exercising veto rights in the same firm. Chrys Capital also offered not to nominate any person who was on the board of a competing portfolio firm in the preceding year on the board of the target.
d) *General Atlantic (GA) / Acko Technology and Services Private Limited*[10] – This recent case related to an increase in shareholding and rights held by GA, a PE firm, in Acko. A portfolio firm of GA competed with a portfolio firm of Acko (*Acko Port Co*) in the market for providing society / gated community solutions. Given this, GA undertook not to exert any influence on or associate with Acko Port Co /Acko's nominee on Acko Port Co, or access / receive any CSI relating to Acko Port Co.
e) Earlier, in 2018, in *Meru / Uber*,[11] the CCI noted that both Ola and Uber had common investors which could lead to reduced competition amongst them. While this order related to alleged abuse of dominance, the CCI articulated two theories of harm that may arise from common ownership: (a) unilateral effects, such as unilateral price / quality changes, which might harm one portfolio firm and benefit other portfolio firms of the common investor; and (b) coordinated effects, where common ownership facilitated collusive behaviour amongst competing firms.[12]

Common Ownership Concerns in the US and the European Union (EU)

In the US, both the Federal Trade Commission (*FTC*) and the Department of Justice (*DoJ*) have strongly voiced their concerns arising from interlocking directorates that violate the hitherto mostly unenforced Section 8 of the Clayton Act. [13] Section 8 of the Clayton Act bars individuals from serving on the board of competitors, except in certain circumstances.[14] Further, the recent proposed changes to the pre-merger notification form in the USA[15] seek more information regarding the previous acquisitions in the same sector[16] and may require disclosure of limited partner (*LP*) level information of investing firms.[17] The recent US Merger

6 *Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines and Kawasaki Kisen Kaisha,* CCI, Combination Registration No. C-2016/11/459 (29 June 2017).
7 *Northern TK Venture and IHH,* CCI, Combination Registration No. C-2018/09/601 (29 October 2018).
8 *Canary and Intas*, CCI, Combination Registration No. C-2020/04/741 (30 April 2020).
9 *Ibid.*
10 *General Atlantic Singapore and Acko Tech,* CCI, Combination Registration No. C-2023/04/1017 (6 June 2023).
11 *Meru Travel Solutions Pvt. Ltd v. M/S ANI Technologies & Ors*, CCI, Case No. 25-28 of 2017.
12 *Ibid.*
13 DOJ Press Release, *Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates*, US Department of Justice (9 March 2023), https://tinyurl.com/mr324f6c; DOJ, *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit*, US Department of Justice (4 April 2022), https://tinyurl.com/ytydbps3; FTC Press Release, *FTC Approve Final Order Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics* (14 October 2022), https://tinyurl.com/4d8tzj3c.
14 15 U.S. Code § 19 - *Interlocking directorates and officers, https://www.law.cornell.edu/uscode/text/15/19.*
15 FTC, *Premerger Notification; Reporting and Waiting Period Requirements*, https://tinyurl.com/k25wj9eh.
16 FTC, *Prepared Statement of the FTC before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights Oversight of the Enforcement of the Antitrust Laws* (20 September 2022), https://tinyurl.com/6m2f9r4u.
17 Jessica Hamlin, *FTC may require PE funds to disclose LPs* (29 June 2023), https://tinyurl.com/4934s5m9.

Guidelines (introduced in December 2023)[18] spotlight common ownership-related concerns arising from minority investment (see Guideline 11) and assume that common ownership as well as cross ownership can soften competition.

In the case of the EU, the European Commission (*EC*) has not yet used common ownership as an independent theory of harm to find a violation. However, in *Dow / Du Pont* (2017),[19] the EC analysed the concerns arising from common ownership in the agrochemical industry, particularly in relation to the adverse effect on research and development[20] in that market, and held that market share alone did not suffice for competition assessment and the effect of common ownership would also need to be analysed.[21] In *Bayer / Monsanto* (2018),[22] the EC noted that the debate related to common ownership was still in its early stages. Other jurisdictions, such as Greece,[23] Japan,[24] Germany and Austria[25] are also taking active note of competition issues that may arise from common ownership.

Common Ownership Related Antitrust Concerns – More Smoke Than Fire?

While it cannot be argued that common ownership cannot lead to competition concerns under any circumstances, it needs to be recognised that common ownership by itself is not problematic; it only becomes so where it is coupled with anti-competitive conduct. The reasons why common ownership, absent anti-competitive conduct, is not the big anti-trust issue that it is made out to be, are discussed below.

AIFs are not Conducive to Common Ownership Based Theories of Harm

In India, alternative investment funds (*AIF*), which includes PE, venture capital firms and hedge funds, are governed by the Securities and Exchange Board of India (*SEBI*) and regulated by the SEBI (Alternative Investment Funds) Regulations, 2012, as amended (*AIF Regulations*). Essentially, AIFs are private pooled investment vehicles with capital pooled from various LPs. AIFs invest capital in accordance with the investment policy that is set out in the respective private placement memorandum. An AIF is managed by its investment manager, who in turn sets up an investment committee (*IC*), the highest governing body within an AIF. The IC is responsible for approving investment decisions, fund disposal and management decisions, and other matters related to investee companies. Owing to their organisational structures and strict regulatory oversight by SEBI, AIFs are not very conducive to anti-competitive conduct, as explained below.

- **Fund Managers** - Different schemes launched by the same AIF[26] typically have different fund managers. Each fund manager owes fiduciary obligation to the contributors to their respective schemes. Further, different schemes of a fund may have distinct or overlapping investments strategies and/or objectives. This implies that, while the same AIF may have investments in two competing firms, the respective fund manager may be different if the investment is made through separate schemes, thus obviating any coordinated effects-related concerns.
- **Conflict of Interest Disclosures and Checks** - Under the AIF Regulations, the fund managers are required amongst other matters to: disclose all conflicts of interest to the respective investors as and when they arise[27] and establish and implement written policies and procedures to identify, monitor and mitigate conflicts of interest; ensure transparency and periodically disclose information to investors;[28] and operate in accordance with the code of conduct that requires them to guard the confidential information of the investee companies, unless specifically waived. Further, the IC is also bound by similar confidentiality obligations *vis-à-vis* the investee companies.[29] The private placement memorandum must record conflict of interest and related procedures[30] and the fund managers are required to have written policies and procedures to identify, monitor and appropriately mitigate any potential conflict of interest throughout the scope of their business.[31]
- **Investment Obligation of the Fund Manager** - The fund managers are required to have a minimum skin in the game by way of certain

18 FTC, *Merger Guidelines* (18 December 2023), https://tinyurl.com/4mdhwkmr.
19 *Dow and DuPont*, EC, Case No M.7932 (27 March 2017).
20 *Ibid*, at Paragraph 2352, Page 383.
21 Policy Department for Economic, Scientific and Quality of Life Policies, *Barriers to Competition through Joint Ownership by Institutional Investors,* 48 (May 2020), https://tinyurl.com/fh5n5kwy.
22 *Bayer and Monsanto,* EC, Case M.8084 (21 March 2018).
23 Bryan Cave Leighton Paisner LLP, Theories of Harm: Common Ownership - where the Greeks walk the world follows?" (16 March 2023), https://tinyurl.com/yp684jev.
24 Dealreporter, *Japan's proposed strengthening of strategic shareholding disclosures gets mixed reception* (21 November 2022), https://tinyurl.com/45z238r7.
25 White & Case LLP, "Renewed Focus on Common Ownership" (18 May 2018); OECD, *Common Ownership by institutional investors and its impact on Competition - Note by Germany* (29 November 2017).
26 Regulation 12, AIF Regulations, 2012.
27 Regulation 21, AIF Regulations, 2012.
28 Regulation 22, AIF Regulations, 2012.
29 *Ibid.* Part 3(d), Fourth Schedule.
30 *Ibid.* Regulation 11.
31 *Ibid.* Regulation 21, Part 1(f), Fourth Schedule.

economic contribution to the AIF.[32] Such a requirement acts as a deterrent to any actions that diminish the overall returns to the AIF. In other words, suppressing the profitability of a portfolio firm will directly impact the economic interest of the fund manager.

Lack of Empirical Evidence to Support Common Ownership Related Concerns

It is often argued that a common investor may, especially in the case of concentrated markets, compromise the interests of a portfolio firm to maximize its overall returns from the industry. For instance, if a common investor holds interests in two airline companies, the common investor may cause an increase in airfares on a certain route of one of its portfolio firms, such that the other portfolio firm (offering lower airfares on that route) becomes dominant in respect to that route. To support this argument, Jose Azar's studies relating to the anti-competitive effects of common ownership on the domestic airlines industry[33] and the banking sector in the US[34] (together, *Azar Studies*)[35] are often relied upon. The Azar Studies used a metric known as '*MHHI delta*' (based on the Modified Herfindahl Hirschman Index (*MHHI*)) to measure market concentration on account of common ownership, since the traditional Herfindahl Hirschman Index (*HHI*) does not account for the effects of common ownership on market concentration. Since its release, the Azar Studies have been variously criticised, including for adopting flawed methodology.[36] Up to now, there is a conspicuous absence of any empirical evidence to show that common ownership by itself raises competition concerns.

A Minority Investor Cannot Drive Company Management

One of the key assumptions underlying the thesis that common ownership in itself (regardless of whether it involves a majority / minority / controlling / non-controlling stake) is anti-competitive in nature, is that a common investor can influence the affairs and management of its portfolio firms. Typically, financial investors pick a minority non-controlling stake and do not have the ability to actively steer the course of the portfolio firm. The majority shareholders / promoters / bigger voting blocs instead drive the management decisions. While there may be situations where common investors may wield control of the portfolio firms and also have the incentive to compromise the interest of a portfolio firm in favour of better financial returns, the probability of such ability and incentive alignment materializing is a bit far-fetched.[37] Another key question to ask is why the company management would defer to wishes of a minority investor. The opponents of common ownership argue that the company management is more susceptible to the influence of an organised institutional investor *vis-à-vis* disaggregated majority shareholders. This argument has to be considered in the light of the deterrents to such biased behavior by the company management. The deterrents include factors such as reputational risk arising from taking compromised calls *vis-à-vis* the company, oppression and mismanagement lawsuits under the corporate laws, breach of fiduciary duty (discussed below), and contractual obligations arising from employment agreements (in case of professionally run companies).

Fiduciary Duty of Nominee Directors

A nominee director owes duties to two different sets of stakeholders – the company, on the one hand, and the parent institution that nominates her to the board of the company, on the other. Given this, the regulatory apprehension regarding the possible flow of CSI across competing firms is understandable. However, such concerns need not be overblown, given that necessary checks and balances are already in place to address the concern. The stance of Indian corporate law[38] and the courts on the issue is clear; the fiduciary duty of a director[39] towards the company is paramount.[40] If there is a conflict between the duty owed by the nominee director under any contractual arrangement and the duty owed by the nominee director to the company, the courts have held that the latter trumps the former.[41] Further, nominee directors of institutional investors are also bound by the norms of corporate governance,

32 *Ibid*. Regulation 10 (d).

33 Jose Azar, Martin C Schmalz and Isabel Tecu, *Anticompetitive Effects of Common Ownership*, *The Journal of Finance,* Volume 73, Issue 4 (2018).

34 Jose Azar, Sahil Raina and Martin C Schmalz, *Ultimate Ownership and Bank Competition* (2019).

35 Daniel Chen, *Anti-Competitive Effects of Common Ownership: Summary*, https://tinyurl.com/2zcvxmpz.

36 Daniel P. O'Brien & Keith Waehrer, *The Competitive Effects of Common Ownership: We Know Less Than We Think*, Antitrust Law Journal, Volume 81, 729-732 (2017); Edward B Rock and Daniel L Rubinfeld, *Antitrust for Institutional Investors*, NYU Law and Economics Research Paper No. 17-23 (2017); Patrick Dennis et al., *Common Ownership Does Not Have Anticompetitive Effects in the Airline Industry*, Working Paper No. 15, Federal Reserve Bank of Atlanta (2021); Merritt B. Fox and Menesh S. Patel, *Common Ownership Do Managers Really Compete Less*, Yale Journal, Volume 39 (2021); Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, Yale Law Journal, Volume 127, 2026-2031 (2018); Matthew Backus, et al, *The Common Ownership Hypothesis: Theory and Evidence* (July 2019).

37 Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, Colombia Law Review, Volume 114, Issue 2, 449-477 (2014); Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, Journal of Economic Perspectives, Volume 31, Issue 3, 89-110 (2017).

38 Section 166, The Companies Act, 2013.

39 *Ibid*; *Nanalal Zaver v. Bombay Life Assurance Company Limited,* Supreme Court of India, AIR (1950) SC 172.

40 *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.,* Supreme Court, (1981) 3 SCC 333*; AES OPGC Holding (Mauritius) v. Orissa Power Generation Corporation Limited*, Company Law Board, (2005) Comp Cas 299; Avimukta Dar et al, *An Analysis Of The Duties Of Directors In India*, Indus Law, (May 2023).

41 *Union of India v. Central Informational Commission,* Delhi High Court, (2009) 165 DLT 559.

such as related party disclosures[42] and disclosure requirements under AIF regulations towards its investors. These act as bulwarks against any coordinated conduct. Notably, there has not been any instance where any institutional investor in India has been found to be engaging in any unilateral coordinated conduct on account of common ownership.

Absent Accompanying Anti-Competitive Conduct, Common Ownership is not *per se* Problematic

Holding common ownership by itself is not problematic. However, one needs to examine the nature of control held in the portfolio firm, the level of concentration in the industry, the level of correlation between the concentration and common ownership (as measured by the MHHI).[43] It is pertinent to point out here that, while in several cases the CCI has found trade associations to be conduits of CSI, their existence has not been banned.[44] Similarly, only when common ownership is found to be facilitating anti-competitive conduct (by way of collusion or unilaterally) should the regulator swing into action.

Way Forward

Based on the above, it is clear that common ownership, is not in itself problematic. It only becomes so if there is accompanying anti-competitive conduct. Further, the regulatory tool kit – whether used by the CCI or by SEBI - is well equipped to deal with any competition concerns arising on account of common ownership. As a starting point, a light touch approach is appropriate for common ownership related issues. Where concerns are only theoretical, they can be addressed if and when they materialise.

To conclude, a measured and well-studied regulatory response is warranted to preclude any false positives. As well as not jumping to unfounded conclusions of anti-competitive effects, regulators could also look at the positive consequences of common ownership, including efficiencies. In this regard, it would be helpful to undertake retrospective studies regarding the effect of common ownership on industry concentration and study the pro-competitive effects of institutional investment in competitors.

From the dealmaker's perspective, common ownership should clearly not result in collusion or unlawful unilateral conduct. Care should be taken to maintain strict hygiene and processes around receipt, storage and disclosure of CSI of any company. To preclude any common ownership-related concerns, the same nominee directors should not be circulated in an industry. Extreme care should be taken to ensure that there is no exchange of CSI pertaining to the competing target firms. Internal processes and protocols should be strictly observed to avoid the cross pollination of CSI regarding competing target firms. Chinese walls, iron curtains, information barriers and strict information technology processes should be installed. Robust internal governance, transparency and adherence to regulations should be a top priority for any institutional investor.

42 Section 188, The Companies Act, 2013.

43 Jose Azar et al, Daniel Chen, *Summary of Anti-Competitive Effects of Common Ownership*.

44 *In Re: Alleged anti-competitive conduct in the Beer Market in India*, CCI, Suo Motu Case No. 06 of 2017, (24 September 2021); *In Re: Ministry of Corporate Affairs v Apollo Tyres Ltd. & Ors.*, CCI, Reference Case No. 08 of 2013, (31 August 2018).

Maverick Merger: Illumina/Grail – A Case Study on Tighter Scrutiny of Vertical Mergers

By Shweta Shroff Chopra, Gauri Chhabra, Aakriti Thakur and Ujwala Kishore Adikey[1]

Introduction

DNA-sequencing giant Illumina, Inc.'s (*Illumina*) bid to acquire Grail, LLC (*Grail*), a leading cancer early detection developer, faced troubled times when put to the test by anti-trust regulators in the United States (*US*) and the European Union (*EU*). The three-year-long proceedings culminated in the parties calling off the deal after the European Commission (*EC*) directed the parties to unwind the transaction[2] and the Court of Appeals, Fifth Circuit (*Fifth Circuit Court*) in the US remanded the case to the Federal Trade Commission (*FTC*).[3] This has sparked anxieties in the international competition community on tighter scrutiny of pure-play vertical mergers[4] having implications on innovation.

While the EC's order is yet to be made public, the decisions of the FTC and the Fifth Circuit Court provide the industry with crucial insights on a regulator's assessment of an anti-competitive vertical merger. Despite remanding the matter to the FTC due to procedural irregularities, the Fifth Circuit Court agreed with the merits of the FTC's findings. In its decision, the FTC found the proposed acquisition likely to harm competition owing to Illumina's dominance in next-generation sequencing (*NGS*) platforms which had the potential of crippling competition in the nascent multi-cancer early detection (*MCED*) market. This case is relevant as it witnesses a dominant incumbent in an emerging market facing critical challenges in highlighting the efficiencies resulting from its transaction. This landmark decision also saw the FTC focus on the harm to future competition in nascent markets and offer further guidance on assessing vertical mergers with foreclosure risks.

This article analyses the way the FTC, the Fifth Circuit Court, and the EC assessed the Illumina / Grail transaction. It aims to highlight the most relevant aspects considered by regulators while blocking the transaction and to extract the learnings to be applied in the Indian context.

The Transaction

To begin at the beginning, Illumina founded its wholly owned subsidiary, Grail, in September 2015 with the goal of reaching the "Holy Grail" of cancer research. Grail was tasked with the creation of an MCED test that could identify the presence of multiple types of cancer from a single blood sample. In 2016, Grail was spun off into a separate entity with Illumina possessing a controlling stake. Other investors invested in Grail in February 2017, and Illumina diluted its own stake to 12%. On 20 September 2020, Illumina entered into an agreement to reacquire a 100% stake in Grail for USD 8 billion.[5]

Procedural History

US

Illumina's re-acquisition of Grail tripped the merger thresholds and required Illumina to file a merger application with the relevant authorities in the US.[6] On 30 March 2021, FTC's complaint counsel issued a complaint against the Illumina / Grail merger agreement.[7] Illumina was the only supplier of NGS platforms, a critical input for developing MCED tests. As the sole supplier of NGS platforms, the complaint set out foreclosure concerns stemming from the vertical link between the activities of Illumina and Grail, such as:

- Illumina could raise other test developer's prices for NGS instruments and consumables;
- Illumina could impede Grail's rivals' R&D efforts by denying important technical assistance and other proprietary information needed to obtain FDA approval or design a commercially successful MCED test; or
- Illumina could refuse or delay the execution of a license agreement required to sell distributed in-vitro diagnostic versions of the test.

On the same day as the FTC's complaint, Illumina launched the standardised supply contract (*Open Offer*) on its website, which was made available to all for-profit U.S. oncology customers. The Open Offer was to become effective from the merger's closing until 2033. The Open Offer essentially granted access to Illumina's NGS platforms at the same price and with the same access to services and products that was provided to Grail. Therefore, to allay the competition concerns stemming from the merger, Illumina launched the Open Offer, akin to an MFN clause, even before the FTC's investigation had kicked off.

Although the merger was consummated on 18 August 2021, due to the regulatory review by the EC, Illumina held Grail as a separate company. On 9 September 2022, the administrative law judge (*ALJ*)[8] issued his initial decision in favor of Illumina, holding that the merger did not cause a substantial lessening of competition in the market. The ALJ also noted that the FTC's complaint counsel did not show any likelihood that Illumina would foreclose against Grail's

---

1 Shweta Shroff Chopra, Partner, Gauri Chhabra, Partner, Aakriti Thakur, Senior Associate, and Ujwala Kishore Adikey, Associate, Shardul Amarchand Mangaldas & Co. The views expressed here are personal.

2 *Commission orders Illumina to unwind its completed acquisition of GRAIL*, EC – Press Release, M.10939 (12 October 2023).

3 *Illumina, GRAIL v. FTC,* Fifth Circuit Court, No. 23-60167 (15 December 2023) (*US Judgment*).

4 Vertical mergers involve firms in a buyer-seller relationship — for example, a manufacturer merging with a supplier of an input product, or a manufacturer merging with a distributor of its finished products. Vertical mergers can generate significant cost savings and improve coordination of manufacturing or distribution. But some vertical mergers present competitive problems. For instance, a vertical merger can make it difficult for competitors to gain access to an important component product or to an important channel of distribution. This problem occurs when the merged firm gains the ability and incentive to limit its rivals' access to key inputs or outlets. See: *Competition Guidance - Guide to Mergers (Competitive Effects),* FTC.

5 Sect I.A, US Judgment.

6 *How the Illumina / Grail Opinion Updates Case Law on Vertical Mergers and "Litigating the Fix"*, Promarket (18 December 2023).

7 *In the Matter of Illumina, Inc., a corporation and GRAIL, Inc., a corporation,* FTC, Complaint – Docket No. 9401 (13 March 2021).

8 The ALJ is the authority before whom the charges set forth by the FTC may be appealed by the respondent.

rivals.[9] While quoting *US v. AT&T*,[10] the ALJ emphasised that, unlike horizontal mergers, a short-cut could not be used to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produced no immediate change in relevant market shares.[11] Upon appeal, the FTC overturned the ALJ's decision and ordered Illumina to divest Grail.[12]

In June 2023, Illumina petitioned the Fifth Circuit Court to review the FTC's order. This led to the decision on 15 December 2023, in which the Court held that there was substantial evidence supporting the FTC's ruling that the deal was anticompetitive. However, the Fifth Circuit Court vacated the FTC's order and remanded it for further proceedings due to the incorrect standard that was applied by the FTC while reviewing Illumina's rebuttal evidence.[13]

While the order elaborates on the Fifth Circuit Court's analysis of the legal questions pertaining to the FTC's order, what led to the case being remanded was a procedural issue. The Fifth Circuit Court found that the FTC had applied an erroneous legal standard at the rebuttal stage of its analysis for two main reasons:

- ***Timing:*** The FTC treated Illumina's proposed Open Offer as a remedy to be considered only after the merger was found likely to cause harm to competition. The Fifth Circuit Court, however, noted that the Open Offer did not squarely fit the bill as a remedy, since it was launched at a stage before the FTC had finally determined liability, and was not a culmination of the FTC's or any court's decision. The Open Offer should have been considered at the liability stage, i.e., in determining whether the merger itself violated the law.[14]
- ***Burden of Proof:*** The Court noted that the *prima facie* case preemptively addressed the Open Offer, which led to Illumina's burden on rebuttal getting heightened. Illumina was only required to demonstrate that the Open Offer effectively mitigated any competitive harm. However, the FTC increased the burden by requiring the Open Offer to be ironclad, by applying the total negation standard and requiring Illumina to show that the Open Offer restored the pre-merger level of competition or eliminated Illumina's ability to favour Grail and harm Grail's rivals.[15] This imbalance in the burden of proof tilted the scales against Illumina at the rebuttal stage.

This procedural error led to the Fifth Circuit Court vacating the FTC's order and remanding the case for further analysis, taking into account the Open Offer at the appropriate stage and with the correct burden of proof. It must be emphasised at this stage that the Fifth Circuit Court did not negate the FTC's overall argument about the merger's potential harm, as discussed in the next section.

EU

Meanwhile, in the EU, the acquisition of Grail by Illumina did not breach the notification thresholds set out in the EU Merger Regulation (*EUMR*). However, on 19 April 2021, the EU accepted the requests submitted by Belgium, France, Greece, Iceland, the Netherlands, and Norway to assess the proposed acquisition of Grail by Illumina under the EUMR.[16]

During the EC's investigation, Illumina completed its acquisition of Grail. Following this, the EC imposed temporary restrictions to prevent it from integrating Grail before its investigation. After a thorough investigation over ten months, the EC blocked the acquisition in September 2022 and proposed corrective measures, including forcing Illumina to undo the merger.[17] In July 2023, both companies were fined for illegally implementing the merger before approval. The EC's investigation mirrored the FTC's concerns – that the acquisition would enable and incentivise Illumina to foreclose GRAIL's rivals, who were dependent on Illumina's technology, from access to an essential input needed to develop and market their own tests. Finally, in October 2023, the EC formally mandated the unwinding of the acquisition over concerns that the merger would have stifled innovation and reduced choice in the emerging market for blood-based early cancer detection tests.[18]

As a result of the stalemate with the two regulators, on 17 December 2023 Illumina ultimately decided to divest Grail (in accordance with the EC's order) and not to pursue any further appeals against the Fifth Circuit Court's decision.[19]

Decision and Reasoning

In the US

The findings of the Court were centred on whether the analysis would be conducted based on current market realities (as pitched by Illumina) or on future market conditions (as decided by the FTC). This signified the crux of the Fifth Circuit Court's decision while assessing each argument, as highlighted below.

Market Definition: The determination of whether the proposed

9 In re: *Illumina, Inc., and GRAIL, Inc.*, FTC, Initial Decision – Docket No. 9401 (9 September 2022).
10 *US v. AT&T*, United States District Court, District of Columbia, 552 F. Supp. 131 (D. D.C. 1982) (28 February 1983).
11 In re: *Illumina, Inc., and GRAIL, Inc.*, FTC, Initial Decision – Docket No. 9401 (9 September 2022), at pp. 131.
12 In re: *Illumina, Inc., and GRAIL, Inc.*, FTC, Final Order – Docket no. 9401 (31 March 2023).
13 *Illumina, Inc., and GRAIL, Inc., In the Matter of*, Case Summary, FTC (27 February 2024).
14 Sect. IV.B.1.a., US Judgment.
15 Sect. IV.B.1.b., US Judgment.
16 *Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction*, EC – Press Release, M.10188 (20 August 2021).
17 *Mergers: Commission prohibits acquisition of GRAIL by Illumina*, EC – Press Release, M.10188 (6 September 2022).
18 *Commission orders Illumina to unwind its competed acquisition of GRAIL*, EC – Press Release, M.10939 (12 October 2023).
19 *Illumina Announces Decision to Divest GRAIL*, Illumina – Press Release (17 December 2023).

merger is likely to substantially lessen competition depended on defining the relevant market. Illumina argued that the market should be the existing '*commercial market*' for MCED tests. However, the Fifth Circuit Court delineated the market as one for '*research, development and commercialization*' of MCED tests considering, amongst other things: (a) the upcoming entry of other tests in the market; (b) competition prospectively occurring between MCED test developers at price levels where one player could take sales from the other; and (c) the internal documents of Grail in which it viewed itself as competing with other MCED test developers.[20]

Competitive Harm: The FTC deployed two tests for assessing vertical mergers:

- The *Brown Shoe* standard, which required courts to look at the factors first enunciated in *Brown Shoe Co. v. United States*[21] and carried on through in later cases, including *Fruehauf Corp. v. FTC*[22]. The test included the following factors - "*nature and economic purpose of the transaction, the likelihood and size of any market foreclosure, the extent of concentration of sellers and buyers in the industry, the capital cost required to enter the market, the market share needed by a buyer or seller to achieve a profitable level of production (sometimes referred to as "scale economy"), the existence of a trend toward vertical concentration or oligopoly in the industry, and whether the merger will eliminate potential competition by one of the merging parties. To these factors may be added the degree of market power that would be possessed by the merged enterprise and the number and strength of competing suppliers and purchasers, which might indicate whether the merger would increase the risk that prices or terms would cease to be competitive.*"
- The "*ability-and-incentive*" standard, which asks whether the merged firm will have both the ability and the incentive to foreclose its rivals, either from sources of supply or from distribution outlets. The test essentially envisaged the balance of two competing interests: "*Illumina's interest in maximizing its profits in the downstream market for MCED tests vis-à-vis its ownership interest in Grail v. Illumina's interest in maximizing its profits in the upstream market for NGS platforms vis-à-vis its sales to all MCED-test developers.*"

The Fifth Circuit Court found merit in the FTC's reasoning, which highlighted that Illumina could use its NGS dominance to stifle Grail's competitor's access to a key resource. The following became crucial in the Fifth Circuit Court's decision:

- The greater Illumina's ownership interest in Grail, the greater its incentive to maximise profits in the downstream markets.
- In terms of foreclosing strategy, Illumina could potentially make late deliveries or subtly reduce the level of support services to other downstream players, which might not raise any warnings instantly amongst the customers.
- Pertinently, Illumina's monopoly power in the NGS-platform market meant that customers were solely dependent on Illumina and could not divert their business to any other player, even if they learned about the foreclosing behaviour.
- Illumina's plan to transform itself from a life sciences tools and diagnostics company to a clinical testing and data driven healthcare company and its internal documents indicated how Illumina itself was prepared to bear losses in its NGS business post the merger. This also highlighted how losses to its NGS business were irrelevant while analysing its foreclosure incentive in the downstream market.

To conclude, the Fifth Circuit Court found that the merger resulted in the sole supplier of a key input purchasing the first mover in a new market, which posed significant competition concerns.

In the EU

The EC's orders had not been made public as on the date of this article. The EC's rationale behind its decision has been pieced together through its press releases. In prohibiting the transaction, the EC applied the "*ability and incentive*" test to conclude that it was likely that Illumina would engage in foreclosure strategies against Grail's rivals.[23] The EC noted that there was still uncertainty about the exact results of the innovation race to develop and commercialise early cancer detection tests and the future shape of this market, but it was crucial to protect the current innovation competition to ensure that early cancer detection tests with different features and price points came to the market. Despite Illumina offering remedies,[24] the EC was of the view that they were insufficient to prevent the transaction's detrimental effect on competition.[25]

Following the EC's decision to prohibit Illumina's acquisition of Grail, on 12 October 2023, the EC adopted restorative measures requiring Illumina to unwind its completed acquisition of Grail. These comprised: (i) divestment measures requiring Illumina to unwind the transaction with Grail; and (ii) transitional measures that Illumina and Grail would need to comply with until Illumina dissolved the transaction.[26]

Consequently, Illumina decided to divest Grail (in accordance with the EC's order).[27] However, on 29 April 2021, Illumina supported by Grail brought an action for annulment against the EC's decision

20 Para I, US Judgment.
21 *Brown Shoe Co. Inc. v. United States*, U.S. Supreme Court, 70 U.S. 294, 336 (1962) (25 June 1962).
22 *Fruehauf Corp. v. FTC*, United States District Court for the Eastern District of New York. 603 F.2d 345, 353, (2d Cir. 1979) (28 June 1979).
23 *Mergers: Commission prohibits acquisition of GRAIL by Illumina*, EC – Press Release, M.10188 September 2022 (6 September 2022).
24 The remedies offered by Illumina were: (a) a licence open to NGS suppliers to some of Illumina's NGS patents, and a commitment to stop patent lawsuits; and (b) a commitment to conclude agreements with Grail's rivals under the conditions set out in a standard contract.
25 *Mergers: Commission prohibits acquisition of GRAIL by Illumina*, EC – Press Release, M.10188 (6 September 2022).
26 *Commission orders Illumina to unwind its completed acquisition of GRAIL*, EC – Press Release, M.10939 (12 October 2023).
27 *Illumina Announces Decision to Divest GRAIL*, Illumina – Press Release (17 December 2023).

asserting jurisdiction to review Illumina's acquisition of Grail before the General Court (*GC*).[28] On 13 July 2022, the GC upheld the jurisdiction of the EC.[29] Subsequently, Illumina and Grail appealed the GC's decisions before the Court of Justice of the EU (*CJEU*). The proceedings before the CJEU are still pending. However, on 21 March 2024, Advocate General Nicholas Emiliou proposed that the CJEU should set aside the GC judgment as it had erred in its judgment.[30] The Advocate General's opinion, if subsequently followed by the CJEU judges, could influence the EC's planned assessment of three other merger deals where innovation concerns are central, one of which involves U.S. chipmaker, Qualcomm.[31]

Learnings – The Indian Context

The Competition Commission of India (*CCI*) is responsible for enforcing the Indian Competition Act, 2002 (*Competition Act*). The Competition Act requires notification to the CCI for transactions which meet the prescribed thresholds and approval to be given before implementation. Once notified, the transactions are assessed based on the factors set out in Section 20(4) of the Competition Act. In addition to these factors, the CCI has also analysed foreclosure concerns from vertical linkages in several transactions.[32]

Although the Competition Act and the accompanying guidance notes[33] do not set out any specific tests to assess vertical mergers, if one were to look at the Illumina / Grail merger from the CCI's lens, factors such as (a) the nature and extent of vertical integration in the market; and (b) the nature and extent of innovation in the market, would be relevant. That said, the tests the CCI deploys for assessing foreclosure concerns are not always clear. Therefore, the analysis of the Fifth Circuit Court and the EC, in the undoing of the Illumina / Grail merger, is relevant for transacting parties in understanding a regulator's scrutiny of vertical mergers, as shown below.

Assessment of Nascent Markets

The MCED market in the Illumina case can be likened to the rapidly growing technological markets in India. While the CCI has assessed the competition implications in nascent markets,[34] the analysis conducted by the Fifth Circuit Court / FTC and the EC in *Illumina / Grail* could contribute to setting objective criteria for such assessments. This could also act as an indication for industries where rapid changes are anticipated in the near future. Given the rate at which the new age markets are growing, it is increasingly evident that the regulators will look to the future while delineating markets and carrying out their market assessments. From the perspective of parties to a transaction in the new age markets, it is critical not only to consider their own position, the players, and the nature of the competition in the market at the moment, but also to be mindful of their future position, players who are aspiring to enter the market, and the potential impact of the transaction in such future market conditions.

Impact on Innovation

Regulators around the world, including India, are aware of the need not to over-regulate markets witnessing significant innovations.[35] The same is made clear from the Advocate General's opinion in Illumina's appeal pending at the CJEU (discussed above). It will be interesting to see the CJEU's ruling in the case. While it is important for the regulators to keep a close eye on the new age markets, such as MCED tests in this case, over-regulation could stifle competition by acting as a barrier to entry. However, preserving the competitive landscape which harbours further innovation is also imperative. Much like the EC and the Fifth Circuit Court / FTC, the CCI has not shied away from addressing harm to innovation arising from a transaction.[36] With the regulatory trend heading towards putting innovation under the spotlight, industries should tread with caution while dealing with transactions which could have an impact on innovation in the markets.

Focus on Foreclosure

The Competition Act prohibits combinations which may have an appreciable adverse effect on competition in India. Similar to the Illumina case, the CCI has also paid heed to foreclosure concerns arising from vertical mergers, especially in sectors with significant

28 *Illumina Files Action for Annulment of European Commission's Decision Asserting Jurisdiction to Review GRAIL Acquisition*, Illumina – Press Release (29 April 2021).

29 *The General Court upholds the decisions of the Commission accepting a referral request from France, as joined by other Member States, asking it to assess the proposed acquisition of Grail by Illumina*, Court of Justice of the EU - Press Release, Case T-227/21 (13 July 2022).

30 *Illumina-Grail Merger: AG Emiliou proposes to set aside the General Court judgment and annul Commission decisions on referral request*, CJEU – Press Release, Advocate General's Opinion in Joined Cases C-611/22 P (21 March 2024).

31 *EU merger powers may be curbed after court adviser backs Illumina fight*, Reuters (21 March 2024).

32 *Bayer AG / Monsanto Company and KWA Investment Co.*, CCI, Combination Registration No. C-2017/08/523 (14 June 2018); *JSW Energy Limited / GMR Kamalanga Energy Limited*, CCI, Combination Registration No. C-2020/03/731 (7 April 2020); *Kangto Investments Pte. Ltd., and others / Manipal Health Enterprises Private Limited*, CCI, Combination Registration No. C-2023/04/1019 (6 June 2023); *Epic Concesiones Private Limited and Infrastructure Yield Plus II / L&T Infrastructure Development Projects Limited and Kudgi Transmission Limited*, CCI, Combination Registration No. C-2023/01/999 (14 March 2023).

33 Notes to Form I issued by the CCI (2020).

34 *Hyundai Motor Company and Kia Motors Corporation / ANI Technologies Pvt. Ltd. and Ola Electric Mobility Private Limited*, CCI, Combination Registration No. C-2019/09/682 (30 October 2019); *Globalfoundries U.S. Inc / International Business Machines Corporation*, CCI, Combination Registration No. C-2014/11/223 (23 December 2014); *XYZ v. Ola Electric Limited and Others*, CCI, Case No. 31 of 2023 (23 January 2024); *Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd. & Others*, CCI, Case No. 25-28 of 2017 (20 June 2018); *RKG Hospitalities Pvt. Ltd. v. Oravel Stays Pvt. Ltd*, CCI, Case No. 03 of 2019 (30 July 2019).

35 *Fast Track Call Cab Pvt. Ltd. vs. ANI Technologies Pvt. Ltd.*, CCI, Case No. 6 & 74 of 2015 (19 July 2017). The CCI was "*hesitant to interfere in a market, which is yet to fully evolve. Any interference at this stage will not only disturb the market dynamics, but also pose a risk of prescribing sub-optimal solution to a nascent market situation.*"

36 *Metso Oyj / Outotec Oyj*, CCI, Combination Registration No. C-2020/03/735 (18 June 2020); *Bayer Aktiengesellschaft / Monsanto Company*, CCI, Combination Registration No. C-2017/08/523 (14 June 2018); *China National Agrochemical Corporation / Syngenta AG*, CCI, Combination Registration No. C-2016/08/424 (16 May 2017); *Sun Pharmaceutical Industries Limited / Ranbaxy Laboratories Limited*, CCI, Combination Registration No. C-2014/05/170 (17 March 2015); *Dow Chemical Company / E.I. du Pont de Nemours and Company*, CCI, Combination Registration No.C-2017/06/519 (18 September 2017); *ZF Friedrichshafen AG / WABCO Holdings Inc.*, CCI, Combination Registration No. C-2019/11/703 (14 February 2020).

players like airlines / airports, telecoms and pharmaceuticals.[37] The ability and incentive tests laid down by the EC and FTC have been reflected in the CCI's analysis of foreclosure concerns.[38] That said, these tests have not been expressly captured in the Competition Act and accompanying guidance notes till date, and its application will depend upon the CCI's approach in the coming years. To assess any foreclosure concerns in advance, the parties can look at the tests used in EC and US (as depicted in Illumina / Grail) until the CCI lays down objective criteria for its assessment.

Balancing Competition and Efficiency

The CCI may take guidance from its US counterparts in quantifying the potential efficiency gains based on evidence in merger analysis and balancing these with the risk of long-term harm to competition. Illumina / Grail would provide a valuable precedent for considering both sides of the equation.

Need for Better Guidance

The 2023 Merger Guidelines in the US,[39] and the guidelines on the assessment of non-horizontal mergers in the EU,[40] help understand the key requirements and best practices within the existing regulatory framework. Guidance documents such as these assume more importance particularly with respect to vertical / complementary linkages between parties, which are more complex in nature than horizontal overlaps. There is an absence of such guidance in India. After the Illumina / Grail transaction, regulators around the world are likely to make their scrutiny of vertical mergers more objective and evidence based. In the spirit of greater regulation for vertical mergers, we hope that the CCI will issue guidance with respect to the scrutiny of such mergers.

Scrutiny of Vertical Mergers

While the CCI has never blocked any transactions, in cases where there were appreciable adverse effect on competition concerns, the CCI approved orders with modifications (either voluntarily submitted by the parties or directed by the CCI). However, it is interesting to note that up to now there have only been two pureplay vertical mergers where the CCI approved the transaction conditional on modifications.[41] When compared with the total of 29 cases where the CCI accepted modifications, it may be concluded that vertical mergers have not usually been as pernicious as anti-competitive horizontal mergers. Similarly, in the past ten years, the EC has approved over 3000 mergers, and the prohibition of the Illumina / Grail transaction was only the tenth merger that it blocked over the same period.[42] With the decisions of the EC and Fifth Circuit Court / FTC in Illumina / Grail, there is a chance that the CCI may also increase its scrutiny of pure vertical mergers.

Conclusion

The Illumina / Grail merger emphasises the importance of a competitive market, particularly for life-saving technologies like cancer detection tests. It also highlights the growing scrutiny of innovation arguments in competitive assessment. There is a need for greater guidance and certainty from the regulators, particularly in the Indian context. The CCI is encouraged to issue guidelines or a framework within which stakeholders in such sectors can operate while simultaneously protecting access and innovation.

The Illumina / Grail merger is just one example, and anti-trust concerns can arise in various mergers relating to healthcare and other critical sectors as well. It can be treated as a great learning opportunity for India, with respect to regulation in nascent markets, the impact of such regulation on the markets, and the need to balance regulation without stifling growth.

While the long-term consequences of the Illumina / Grail merger will depend on the market reactions and future regulatory actions, it has sparked important discussions about vertical mergers, innovation, and access to healthcare in the age of rapidly evolving technologies. It will be interesting to see how the case will act as a catalyst for further discussions and potential reforms in India's competition law framework to align with evolving global trends and better address new market dynamics.

37 *Sun Pharmaceutical Industries Limited / Ranbaxy Laboratories Limited*, CCI, Combination Registration No. C-2014/05/170 (17 March 2015); *Google International LLC / Bharti Airtel Limited*, CCI, Combination Registration No. C-2022/03/913 (30 June 2022); *TRIL Urban Transport Private Limited and others / GMR Airports Limited*, CCI, Combination Registration No. C-2019/07/676 (1 October 2019); *Mumbai International Airport Private Limited and Mumbai Aviation Fuel Farm Facility Limited / Indian Oil Corporation Limited, Bharat Petroleum Corporation Limited and Hindustan Petroleum Corporation Limited*, CCI, Combination Registration No. C-2014/04/164 (29 April 2014).

38 *Schneider Electric India Private Limited and MacRitchie Investments Pte. Ltd. / Larsen & Toubro Limited*, CCI, Combination Registration No. C-2018/07/586 (18 April 2019); *Sun Pharmaceutical Industries Limited / Ranbaxy Laboratories Limited*, CCI, Combination Registration No. C-2014/05/170 (17 March 2015).

39 *Merger Guidelines,* US Department of Justice and FTC (18 December 2023).

40 *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal of the European Union, (2008/C 265/07) (18 October 2008).

41 *TRIL Urban Transport Private Limited / Valkyrie Investment Pte Limited / Solis Capital (Singapore) Pte. Limited*, CCI, Combination Registration No. C-2019/07/676 (1 October 2019); *Mumbai International Airport Private Limited / Indian Oil Corporation Limited / Bharat Petroleum Corporation Limited / Hindustan Petroleum Corporation Limited / Mumbai Aviation Fuel Farm Facility Limited*, CCI, Combination Registration No. C-2014/04/164 (29 September 2014).

42 *Mergers: Commission prohibits acquisition of GRAIL by Illumina*, EC – Press Release, M.10188 (6 September 2022).

Glossary

Abbreviation	Terms
AAEC	Appreciable Adverse Effect on Competition
ACCC	Australian Competition and Consumer Commission
ACP	Anti-Competitive Practices
ADE	Associate Digital Enterprises
AIF	Alternative Investment Funds
AIF Regulations	SEBI (Alternative Investment Funds) Regulations, 2012
ALJ	Administrative Law Judge
Amendment Act	Competition (Amendment) Act, 2023
CCI	Competition Commission of India
CDCL	Committee on Digital Competition Law
CDS	Core Digital Services
CIL	Coal India Limited
CJEU	Court of Justice of the EU
CMA	Competition and Markets Authority
Combination Regulations	CCI (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011
COMPAT	Competition Appellate Tribunal
Competition Act	Competition Act, 2002
CSI	Competitively Sensitive Information
DCB	Digital Competition Bill, 2024
DG	Director General, Competition Commission of India
DMA	Digital Markets Act, 2022
DMDU	Digital Markets and Data Unit
DOJ	Department of Justice

Abbreviation	Terms
DVT	Deal Value Threshold
EC	European Commission
EU	European Union
EUMR	EU Merger Regulation
FAQs	Frequently Asked Questions
FAS	Russian Federal Anti-Monopoly Service
FTC	Federal Trade Commission
GC	General Court
IC	Investment Committee
ICA	Indian Contract Act, 1872
LP	Limited Partner
MCA	Ministry of Corporate Affairs, Government of India
MCED	Multi-Cancer Early Detection
MFN	Most-favoured Nation
MHHI	Modified Herfindahl Hirschman Index
NCLAT	National Company Law Appellate Tribunal
NGS	Next-Generation Sequencing
NHMG	European Non-Horizontal Merger Guidelines, 2008
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
PE	Private Equity
PFC	Pre-Filing Consultation
SCR	Parliamentary Standing Committee on Finance
SEBI	Securities and Exchange Board of India
SSDE	Systemically Significant Digital Enterprise
Supreme Court	Supreme Court of India

Our Competition
Law Team

Pallavi Shroff, *Managing Partner*
E-mail: pallavi.shroff@AMSShardul.com | Phone: +91 98100 99911

Pallavi Shroff is the Managing Partner of Shardul Amarchand Mangaldas and National Practice Head of the Dispute Resolution Practice. With more than 40 years of extensive experience, her broad and varied representation of public and private corporations and other entities before various national courts, tribunals and legal institutions has earned her national and international acclaim.

Pallavi mentors the Competition Law practice at the Firm bringing her unparalleled commercial judgement to complex cases. She regularly argues competition law cases before the Competition Commission of India (*CCI*) and the National Company Law Appellate Tribunal (*NCLAT*).

Pallavi was a key member of the high-powered SVS Raghavan Committee, which contributed to formulating the legal framework for the new competition law and a draft of the Competition Act. She was also a member of the Competition Law Review Committee and the Committee on Digital Competition Law, which evaluated the need for a separate competition law on digital markets and drafted a Digital Competition Bill.

Pallavi has been ranked as an Eminent Practitioner for Competition Law by Chambers and Partners 2023. She is acknowledged as *"a stalwart in the field of competition laws,"* best known for her handling of cartel, abuse of dominance and other contentious issues, but increasingly active in providing strategic oversight on very large-scale, multi-jurisdictional merger control mandates. One client, who identifies her as *"a main reason for going to the firm,"* speaks of a *"great sense of comfort that she was handling the matter - always there to step in at a critical junctures."* Pallavi was conferred the 'Lifetime Achievement Award' at the Chambers India Awards - 2019. She has also been recognised as a 'Thought Leader' for Competition and Commercial Litigation by Who's Who Legal 2023.

John Handoll, *Senior Advisor – European & Competition Law*
E-mail: john.handoll@AMSShardul.com | Phone: +91 98100 98316

John Handoll is Senior Advisor, European and Competition Law.

John is a specialist competition and regulatory lawyer with extensive experience of over 45 years. He arrived in India in 2012. Bringing his European and international experience to bear, he has worked with members of the Competition Team in relation to a wide range of matters.

Working for a wide range of domestic and international clients in a wide spectrum of economic activity, he has practiced in the United Kingdom, Belgium and Ireland. John has also published and lectured widely in the area of EU law. He has also previously acted as a non-governmental adviser in the International Competition Network, working in the areas of mergers, cartels and unilateral behaviour. Widely acclaimed as a top practitioner of European and Competition Law, John is also the author of two full length volumes: *Capital, Payments and Money Laundering in the European Union* (2006) and *Free Movement of Persons in the EU* (1995). He writes in the area of competition law and frequently lectures to professional and student audiences. John has been recognised by Who's Who Legal as a Global Elite Thought Leader.

Naval Satarawala Chopra, Partner

E-mail: naval.chopra@AMSShardul.com | Phone: +91 98100 11191

Naval Satarawala Chopra is a Partner in the Firm's Competition Law Practice. He focuses on both contentious and non-contentious matters before the CCI and appellate forums. His prominent clients include *Microsoft*, *Meta*, *Bayer*, *National Stock Exchange*, *Uber*, *VeriFone*, *DLF*, *PVR* and *Abbott*. Naval is focused on disruptive industries and issues arising from the confluence of technology, intellectual property and competition law. He is best known for strategic antitrust litigation especially on complex abuse of dominance and merger control proceedings.

On the enforcement front, Naval has successfully represented several clients in separate abuse of dominance cases against *Google* relating to search, Android and payments, where the CCI has fined Google in excess of USD 350 million in aggregate. These include successfully opposing (at first and final appellate stages) Google's pleas to suspend wide ranging behavioural remedies imposed by the CCI in the Android case. He also successfully defended *WhatsApp* in relation to its 2016 privacy policy and allegations of tying; *Microsoft* in relation to licensing terms; and *Uber* in relation to alleged predatory pricing.

On merger control, Naval has amongst other matters, advised *Facebook* on its investment in *Jio Platforms* (the largest foreign direct investment in the technology sector in India), *Think and Learn* on its acquisition of *Aakash Educational Services* (India's largest ever education sector transaction). Naval also advised *PVR* in successfully defending a challenge to its acquisition of a competitor.

Naval was the first Indian lawyer to be ranked in *Global Competition Review* among the top *"40 under 40"* competition lawyers in the world (2016). He is valued by referees as a "*very practical, commercially sound and solution-oriented business partner*" who serves, not only as a "*master of the subject*" but a "*go-to person for any kind of dispute resolution issue.*" Naval has also been listed as a "*Thought Leader*" in competition law, Who's Who Legal since 2017. The 2021 listings ranked Naval as a "*Global Leader*" and in 2022, he was described as "*one of the best-known competition lawyers in the market*". Naval has been ranked among the Top 100 Individual Lawyers in the Forbes India Legal Powerlist, 2020, and featured among the BW Business World "*40 under 40*", in 2020.

Naval is qualified to practise in New York, England & Wales and India.

Shweta Shroff Chopra, Partner

E-mail: shweta.shroff@AMSShardul.com | Phone: +91 98100 98335

Shweta Shroff Chopra is a Partner in the Firm's Competition Law Practice. She has been involved in some of the most-high profile and complex cartel and merger control cases in India spanning various sectors.

In relation to merger control, Shweta has advised on many complex mergers. She advised *Reliance Retail Ventures* in its acquisition of stores of the *Future Group* together with its wholesale, logistics and warehousing businesses and *Flipkart* (a subsidiary of *Walmart*) in its acquisition of a minority stake in *Aditya Birla Fashion & Retail*. She acted for *Delhivery* in the notification of its arrangements with *FedEx* and for *CA Magnum Holdings* (part of the *Carlyle* Group) in its acquisition of a majority shareholding in *Hexaware Technologies Limited*. More recently, she steered *PVR Cinemas* in its merger with *INOX Leisure*, and advised *MetroAG* in the sale of its wholesale business in India.

On the enforcement front, Shweta has represented *Meta* and *WhatsApp* in relation to *WhatsApp's* 2021 update to its privacy policy, *Jai Polypan* in the Protective Tubes cartel case, and *Flipkart* against allegations of preferential treatment and discrimination. She has acted for *Carlsberg* in cartel proceedings and for car manufacturer *Maruti Suzuki* in an investigation into allegations of resale price maintenance. She also advised *Mitsui O.S.K. Lines* and *Nissan Motor Car Carrier Co.* in relation to their successful applications for leniency in a cartel involving the transport of motor vehicles. She was involved in the successful challenge before the NCLAT of the CCI's order in the *Tyre Cartel* case.

Shweta is a Non-Governmental Advisor in the ICN, participating in annual conferences and workshops. She also worked with Mrs. Pallavi Shroff in preparing proposals for reform of the Competition Act for consideration by the Competition Law Review Committee. Shweta was recognised in Global Competition Review's '*Women in Antitrust*' 2021. She is regarded as a Global Thought Leader by Who's Who Legal 2023. According to Chambers and Partners 2022, she "*has incisive knowledge of competition law and all its facets*". The Chambers 2023 Guide states that "*where there is a business problem, you know she will give you a few solutions, rather than one. Before providing solutions, she deep-dives to understand the problem, asking pertinent questions. A rock star to work with!*".

Harman Singh Sandhu, Partner

E-mail: harman.sandhu@AMSShardul.com | Phone: +91 98717 92738

Harman Singh Sandhu is a Partner in the Firm's Competition Law Practice. He has extensive experience in advising Indian and foreign companies in relation to a whole range of competition issues (both merger control and enforcement proceedings) before the CCI, the NCLAT, various High Courts and the Supreme Court of India.

In relation to merger control, Harman has extensively advised on Indian competition clearances for complex multi-jurisdictional mergers. He has acted for clients in several significant global transactions, including *Alstom* in its acquisition of *Bombardier Transportation*, Finnish companies *Metso* and *Outotec* in their merger, *Fiat Chrysler* in its merger with *Peugeot*, *Baring Private Equity Asia* on its acquisition of the healthcare business of *Hinduja Global Solutions Lim*ited, and *Siemens Healthineers* in its acquisition of *Varian Medical Systems*. He also acted for *Delhivery* in relation to its arrangements with *FedEx* and for *Zomato* in its acquisition of a minority shareholding in *Grofers*. More recently, he acted for *Saudi Aramco* in its acquisition of the global products business of *Valvoline Inc.*, for *e& (Etisalat)* in its minority acquisition in *Vodafone Group Plc.*, and for the *Ontario Teachers' Pension Plan Board* in its minority acquisition in *BusyBees Logistics Private Limited.*

On the enforcement side, Harman represents *Coal India* in relation to abuse of dominance allegations. He is also advising clients on ongoing cartel investigations in the auto parts and other industrial sectors. He recently represented *Oravel Stays* (*OYO*) and *Zomato* in allegations relating to vertical agreements, and successfully defended *Asian Paints* in an abuse of dominance case.

In 2023, Harman was recognised as a Thought Leader by Who's Who Legal. He also rose to Band 1 in Chambers and Partners 2022 with sources appreciating that "*he holds the brief and handholds the client through the entire process*" and considering "*his legal advice to be an excellent bridge between stakeholder demands and the regulators*". Chambers and Partners 2024 noted that *"Harman is an excellent lawyer with good commercial sense and the ability to remain calm even in challenging situations, while remaining focused on finding a solution"*. He has also authored chapters on Dominance and Merger Control in "*Getting the Deal Through*" publications for several years.

Manika Brar, Partner

E-mail: manika.brar@AMSShardul.com | Phone: +91 98100 98321

Manika Brar is a Partner in the Firm's Competition Law Practice. She has carved her niche in enforcement and merger control cases. She is regarded as a well-seasoned and experienced abuse of dominance and cartel specialist.

On the cartel enforcement front, Manika acted for *Indo National Limited* in successfully overturning a finding of cartelisation, despite leniency applications filed by the two other market players. She also represented *Carlsberg India Private Limited* on the *suo moto* proceedings initiated by the CCI against beer companies in India for price fixing and cartelisation. This matter won the GCR award for *Behavioural Matter of the Year, Asia-Pacific, Middle East and Africa*. Manika has been involved in numerous other domestic and global cartel investigations, including in the auto parts sector.

Manika also successfully defended the *National Stock Exchange* before the CCI against allegations that the provision of colocation services was anti-competitive. She is also acting for the *National Stock Exchange* on its appeal before the Supreme Court of India and in compensation claims filed before the NCLAT in a predatory pricing case. She recently successfully represented *PVR-INOX* against a complaint filed challenging the merger under the enforcement provisions of the Competition Act, 2002.

On the merger control front, Manika has advised various international and domestic companies. More recently, she worked on *Reliance's* acquisition of the Retail & Wholesale Business and the Logistics & Warehousing Business of the *Future Group, EQT Fund Management S.à r.l.* and the *Goldman Sachs Group, Inc*. acquisition of *Parexel International Corporation, UBS's* acquisition of *Credit Suisse* and *Titan's acquisition of Caratlane*.

Manika was called out among the four "*Most Highly Regarded*" partners in Asia Pacific lawyers in WWL Future Leaders, 2019 and acknowledged for having a reputation as, "*one of the best for matters related to competition law*". Manika has also made valuable contributions to the market intelligence chapters on cartels for Getting the Deal through. She has also been listed as a foremost practitioner under 45 in, "*Who's Who Legal: Competition – Future Leaders*". She was also recognised as Global Leader in Who's Who Legal 2021 and 2022 Global Guides, Competition Law.

Aparna Mehra, Partner

E-mail: aparna.mehra@AMSShardul.com | Phone: +91 85278 83555

Aparna Mehra is a Partner in the Firm's Competition Law Practice. Over the years, Aparna has been involved in many high-profile merger control matters (some involving complex remedies packages).

Notable matters include *ChrysCapital/HDFC Credila* (largest private equity buyout in the financial services sector in India), *Advent/Suven Pharmaceuticals* (one of the largest deals in the Indian pharmaceutical sector), *ADIA/IIFL Home* (largest equity investment in the housing finance segment in India), *ZF/WABCO* (winning matter at Global Competition Review Awards, 2021), *Reliance Retail*'s acquisition of the *Future Group* (largest deal involving the brick-and-mortar retail sector) and the watershed decision in *ChrysCapital/Intas* (first in India involving remedies for private equity and common minority ownership). Aparna also acted in *Bayer/Monsanto (winning matter at Global Competition Review Awards, 2019), KKR/J.B. Chemicals & Pharmaceuticals Limited* (recognized as the *Asia Pacific 'Deal of the Year'* at *Private Equity International Awards, 2020), L&T/Schneider (first ever competitor deal involving behavioural remedies in relation to competitors), GE/Alstom, PVR/DT Cinemas (*first deal involving hybrid remedies*).* More recently, she advised *Sony* on its proposed merger with *Zee,* approved subject to voluntary commitments, and *Billdesk* in its combination with *PayU* (largest deal in the digital payments market in India).

Aparna played an important role in the finalisation of the Indian merger control regime in 2011. She was also involved in the revision of the merger review process in light of the new insolvency law. She regularly comments on elements of the regime which could impact stakeholders. She has also been involved in organising competition advocacy roadshows across India.

Aparna is ranked in Band 3 by Chambers and Partners, Global, 2023-24, where she is hailed as *"very supportive and responsive"* by clients, and an interviewee says "*she has great analytical and drafting skills and is always available*". Chambers 2023 Guide states that "*she is excellent at regulatory issues, very efficient and very proactive*".

Aparna has co-authored several competition law publications, including the India chapter of the *Private Equity Antitrust Handbook* published by the American Bar Association and the India chapters of the GCR *Merger Remedies Guide* (2018 to date), ABA *Private Equity Antitrust Handbook* and the *Chambers Global Practice Guide on Mergers*. She also teaches merger control at O.P. Jindal Global University, Sonipat.

Gauri Chhabra, Partner

E-mail: gauri.chhabra@AMSShardul.com | Phone: +91 96195 70958

Gauri Chhabra is a Partner in the Firm's Competition Law Practice and is the face of the practice in Mumbai. She routinely acts for private equity firms on their proposed investments in India and advises on compliance, vertical arrangements and horizontal joint ventures from a competition law perspective. She has represented Indian and multinational clients across sector, such as airlines, cement, manufacturing, and private equity before the Competition Commission of India.

Gauri has extensive experience in merger control and has successfully obtained unconditional clearances for high profile transactions such as India's second largest real estate investment trust, *Mindspace REIT*, *Ultratech Cement's* acquisition of *Jaypee Cements*, *Reliance Capital Asset Management/Nippon Life Insurance* and *Schneider*'s acquisition of the *L&T* electrical business. Gauri has represented *Blackstone* in various acquisitions, including *Piramal Glass, Mphasis Limited* and, recently, in its global acquisition of the climate and technology business of *Emerson Electric Co*. She represented all three parties in the merger of *Embassy Properties* with *India Bulls Real Estate Limited*, where *Blackstone* was also acquiring a minority stake in the merged entity, and *Warburg's* acquisition in India's second largest retail pharmacy chain *Medplus Healthcare*. She advised various private equity investors in their acquisitions in *Reliance Jio*. She also represented *Carlyle* in its acquisition of *Hexaware* (which was the biggest transaction in the information technology space in India.)

In the area of enforcement, Gauri successfully acted for *Mitsui O.S.K. Lines* and *Nissan Motor Car Carrier Co.* in leniency proceedings relating to the transport of passenger cars before the CCI and secured the maximum permissible reductions of penalty.

Gauri has been ranked as a Future Leader – Partners in Who's Who Legal 2017-2023 She is also recognised as a "*Global Leader*" for Competition & Antitrust in Asialaw Profiles 2022. She has been recognised as a "Rising Star" ***and Leading Lawyer for Competition & Antitrust in*** Asialaw Profiles, 2018-2023. Gauri has co-authored various articles for international publications, including "*India's New Competition Regime Steadily Gaining Ground*", Competition Law International (Antitrust Journal of the International Bar Association) and "*Latest Merger Control Trends Analysed*", International Finance Law Review.

Yaman Verma, Partner
E-mail: yaman.verma@AMSShardul.com | Phone: +91 88004 91490

Yaman Verma is a Partner in the Firm's Competition Law Practice. He advises on complex multi-jurisdictional mergers, abuse of dominance and cartel cases, with a special focus on technology and e-commerce markets. He works with a wide range of clients including *Microsoft*, *Meta Platforms*, *Coal India*, *Walmart*, *WhatsApp*, *Temasek* and *Zomato*.

On the enforcement front, Yaman has acted for a confidential complainant and third parties in obtaining CCI orders against *Google* for abuse of dominance with respect to Android Mobile Device Ecosystem and the Google Play Store Billing System. He has recently represented clients in the NCLAT and Supreme Court in successfully opposing Google's pleas to suspend behavioural remedies imposed by the CCI. Other recent highlights include acting for *Meta Platforms* (formerly *Facebook*), and *WhatsApp* in the CCI's investigation into WhatsApp's 2021 Update to its privacy policy. He was also successful in defending *Coal India* and online food aggregator *Zomato* against allegations of abuse of dominance at the CCI in 2022.

In relation to merger control, Yaman has advised on Indian competition clearance for complex global mergers, recently including the *Linde/ Praxair* and *Fiat/Peugeot* transactions. He obtained CCI approval for *Flipkart's* acquisition of a minority stake in *Aditya Birla Fashion and Retail Limited*, and *Temasek's* and *Broadpeak's* investments in taxi aggregator *ANI Technologies*. Previously, Yaman helped secure unconditional approval for *Facebook's* acquisition of a minority stake in *Jio Platforms Limited, and the Vodafone/Idea* merger. He also regularly advises private equity investors in relation to CCI approvals for their acquisitions.

Yaman was most recently recognised by Chambers and Partners, 2023, with clients commenting that "*his competition law knowledge is extensive, his advice is always focused on what's best for the company, and he effortlessly transitions from explaining legal nuances to providing commercial input*". He has previously been recognised by Chambers and Partnes in 2022 and 2021, by the Indian Business Law Journal as a Future Legal Leader in 2021, and in the Legal 500 list of "*Next Generation Lawyers*" for India for 2017-2019, and "*Next Generation Partners*" from 2020-2023. He also conducts an elective course on competition law and a foundations of legal education course at the National Law School of India University, Bangalore.

Rohan Arora, Partner
E-mail: rohan.arora@AMSShardul.com | Phone: +91 88004 91500

Rohan Arora is a Partner in the Firm's Competition Law Practice. He has been involved in a wide range of enforcement and merger control work, specialising in abuse of dominance cases in the technology sector. His clients include *WhatsApp*, *Meta Platforms*, *National Stock Exchange*, *Alstom*, *AION*, *Uber*, *Monsanto* and *Suzuki Motor Corporation*.

He successfully defended *Facebook* and *WhatsApp* in allegations of leveraging and unfair conditions in the introduction of WhatsApp's payments feature in India. On the predatory pricing front, Rohan currently represents the *National Stock Exchange* before the Supreme Court and in a stayed action for compensation before the NCLAT. Rohan regularly represents *Uber* in predatory pricing allegations and has successfully defended it in the Supreme Court from claims that it was engaged in a hub-and-spoke cartel with its driver-partners. Rohan is currently defending *Maruti Suzuki*, India's largest automobile manufacturer before the NCLAT, against CCI findings that it had engaged in resale price maintenance. He is also involved in several challenges before the High Court of Delhi to the CCI's jurisdiction in relation to auto parts cases.

On the merger control side, Rohan has advised on several complex mergers. Recent matters include the merger of *Air India* with *Vistara Airlines* and an acquisition of a stake by *Singapore Airlines*, the merger of *Sony India* with *Zee Entertainment*, and *Metso's* combination with *Outotec* - all of which were the largest transactions in their respective sectors in India.

Chambers and Partners has recognized Rohan as a ranked lawyer for 2024. He has been recognised by Who's Who Legal from 2017 – 2024 as being "*an excellent competition lawyer*", "*providing practical solutions suited to the business environment and commercial reality*", and is widely recommended for his "*in-depth knowledge, passion and commitment*". Rohan regularly contributes to competition law publications and has co-authored the India chapters on Dominance and Merger Control in "*Getting the Deal Through*" publications. He is also a leading voice on the overlap between ESG principles and competition law in India.

Aman Singh Sethi, Partner

E-mail: aman.sethi@AMSShardul.com | Phone: +91 85276 96027

Aman Singh Sethi is a Partner in the firm's Competition Law Practice. He works on contentious and non-contentious cases, advising clients in high-tech/disruptive industries and in sectors such as agrochemicals, seeds/agricultural traits, cement, petrochemicals and telecommunications.

On the enforcement front, Aman is heavily involved in litigious matters before the CCI, the NCLAT and the Supreme Court. He has also been involved in a number of challenges to CCI orders before the High Courts on due process and natural justice grounds.

Aman has acted for a confidential complainant and a number of third parties in obtaining CCI orders against *Google* for abuse of dominance with respect to the Android Mobile Device Ecosystem and the Google Play Store Billing System (GCR - 'Behavioural Matter of the Year – Asia Pacific, Middle East and Africa' 2023). He has advised and successfully represented clients in the NCLAT and Supreme Court in opposing Google's pleas to suspend wide-ranging behavioural remedies imposed by the CCI.

Aman has also successfully defended *Uber* against many complaints of alleged abuse of dominance and anti-competitive (including hub-and-spoke) agreements and *Oravel Stays* for alleged abuse of dominance. He earlier represented the *National Stock Exchange* in dismissing allegations of abuse of dominance in relation to its colocation facility. He is also representing *Monsanto* (now *Bayer*), and *Abbott Healthcare* in proceedings relating to alleged anti-competitive conduct.

Aman has also been involved in several major mergers including *GSK/ Novartis, Dow/DuPont* and *Vodafone/Idea*.

Aman has been recognised as a "Rising Star" in Euromoney's 2022 Asia-Pacific Awards. He routinely writes on issues related to the interplay of competition law and intellectual property, as well as on digital markets. He has also been writing extensively on the amendments to the (Indian) Competition Act and critically evaluating the expected impact on industry.

Nitika Dwivedi, Partner

E-mail: nitika.dwivedi@AMSShardul.com | Phone: +91 96506 91799

Nitika Dwivedi is a Partner in the Firm's Competition Law Practice. She advises clients on contentious and non-contentious competition law matters and is regularly sought out for abuse of dominance and cartel cases.

On the enforcement front, Nitika has been involved in defending private and public sector companies in cases before the CCI, the NCLAT and the Supreme Court. She has successfully defended *WhatsApp*, *Oil and Natural Gas Corporation* and *Asian Paints* against allegations of abuse of dominance.

Nitika is also representing *Monsanto* (now *Bayer)* and *Meta Platforms* in proceedings relating to alleged anti-competitive conduct. She represented *Globecast Asia* in the first leniency application filed before the CCI and was successful in obtaining a 100% reduction in penalty for Globecast and its officials. She was involved in obtaining an unconditional stay from the NCLAT on the CCI's order against *ACC* in a bid rigging case and successfully represented *Coal India* in a cartel proceeding against its explosives' suppliers.

On the merger control front, Nitika has represented clients across industry segments. She was involved in the India leg of several complex global transactions, including the acquisition of *Bombardier Transportation* by *Alstom*, *Bayer's* acquisition of *Monsanto*, the merger of *Fiat* and *Peugeot* and *Archroma Operations'* acquisition of the textile effects division of *Huntsman International.*

Nitika co-authors the India chapter in GTDT Cartel Regulation and "*Cartel Laws and Regulations*" in Global Legal Insights.

Ritwik Bhattacharya, Partner

E-mail: ritwik.bhattacharya@AMSShardul.com | Phone: +91 96506 30041

Ritwik Bhattacharya is a Partner in the Firm's Competition Law Practice with more than 10 years of experience in this field.

On the merger control side, he has been involved in some of the most complex cases before the CCI. These include *L&T/Schneider* (the first case where the CCI accepted purely behavioural remedies in a phase II investigation), the acquisition of shares by *Singapore Airlines* in the merged entity comprising of *Air India* and *Vistara*, *ZF/WABCO* (the first case where parties successfully challenged certain aspects of the CCI's directed remedies before the High Court), *Facebook/Reliance Jio*, *Siemens Healthineers/Varian*, *PVR/DT* (the first case where the CCI accepted hybrid remedies), *Suzuki/Toyota*, *HP/Samsung* and *Ctrip/MMT*.

On the enforcement side, Ritwik has been involved in some of the most cutting-edge cases before the CCI, including several landmark big-tech related matters. He was involved in: (i) successfully representing a confidential informant in its complaint against *Google* (which resulted in a seminal decision against *Google* in relation to its Play Store related policies); (ii) successfully representing multiple third parties in the separate investigation against *Google's* Android licensing policies; (iii) successfully representing a complainant to initiate an investigation into the amount of fee charged by *Google* on the Play Store; (iv) successfully representing an auto-parts company in a cartel case before the CCI; (v) *DLF* (the country's largest real-estate developer) in an abuse of dominance case; (vi) *Daulat Ram Industries*, in a cartel investigation; and (vii) *PVR Limited*, in several abuse of dominance cases, amongst others.

Ritwik has featured in the WWL: Competition Future Leaders List from 2020 onwards.

He has co-authored several competition law publications on topical merger control as well as enforcement related issues. He also worked closely with the CCI during the Government's review of amendments required to the law. Ritwik has also delivered guest lectures in various law institutions, including Jindal Law University and ILS Law College, Pune.

Ritwik obtained his B Comm. LLB (Hons.) degree from Gujarat National Law University in 2013.

Awards and Recognition

Shardul Amarchand Mangaldas & Co., founded on a century of legal achievements, is one of India's leading full-service law firms. The Firm's mission is to enable business by providing solutions as trusted advisers through excellence, responsiveness, innovation and collaboration.

SAM & Co. is known globally for its exceptional practices in mergers & acquisitions, private equity, competition law, insolvency & bankruptcy, dispute resolution, international commercial arbitration, capital markets, banking & finance, tax, intellectual property, data protection and data privacy, technology law and Infrastructure, Energy and Project Finance.

The Firm has a pan-India presence and has been at the helm of major headline transactions and litigations in all sectors, besides advising major multinational corporates on their entry into the Indian market and their business strategy. Currently, the Firm has over 828 lawyers including 165 Partners, offering legal services through its offices at New Delhi, Mumbai, Gurugram, Ahmedabad, Kolkata, Bengaluru, and Chennai.

Recognised by Morgan Stanley in their Asia Pacific Outside Counsel Diversity Awards 2023.

'Outstanding' in 2023-24 for Banking and Finance, Banking and Financial Services, Capital Markets, Competition/ Antitrust, Construction, Corporate and M&A, Dispute Resolution, Energy, Insurance, Infrastructure, Pharmaceuticals and Life Sciences, Private Equity, Regulatory, Real Estate, Restructuring and Insolvency, Technology and Telecommunications

'Ranked #1' by deal count In the Bloomberg India Capital Markets League Tables 2022

Bloomberg

'Ranked #1' in deal count and value in the annual MergerMarket India League Tables 2023

'Tier 1' in 2024 for Antitrust and Competition, Banking & Finance, Capital Markets, Corporate / M&A, Dispute Resolution-Arbitration, Insurance, Private Client, Private Equity and Investment Funds, Projects and Energy, Real Estate & Construction, Restructuring & Insolvency, Tax, TMT and White Collar Crime

The LEGAL 500

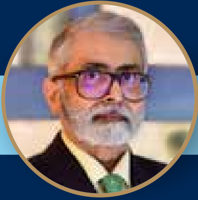
'Tier 1' in 2023 for Banking, Capital Markets: Equity and Debt, M&A, Private Equity, Project Development: Energy, Infrastructure and Transport, Project Finance, Restructuring & Insolvency

Country Firm of the Year 2022, India

'Band 1' in 2024 for
Capital Markets
Competition/Antitrust
Corporate/M&A
Dispute Resolution
Arbitration
Fintech
Private Equity
Projects, Infrastructure & Energy
Restructuring & Insolvency
White Collar Crime

CHAMBERS AND PARTNERS

Firm Management



Dr. Shardul S. Shroff
Executive Chairman
+91 98101 94303
shardul.shroff@AMSShardul.com

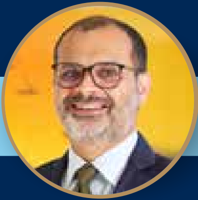
Pallavi Shroff
Joint Managing Partner
+91 98100 99911
pallavi.shroff@AMSShardul.com

Akshay Chudasama
Joint Managing Partner
+91 98210 38898
akshay.chudasama@AMSShardul.com

Jatin Aneja
National Practice Head –
Projects & Project Finance
+91 99100 98314
jatin.aneja@AMSShardul.com

Gunjan Shah
Partner
+91 98100 98326
gunjan.shah@AMSShardul.com

Raghubir Menon
Regional Practice Head – Mumbai
M&A and PE, General Corporate
+91 99109 98321
raghubir.menon@AMSShardul.com



Prashant Gupta
National Practice Head – Capital Markets
+91 97176 22292
prashant.gupta@AMSShardul.com

Naval Satarawala Chopra
Partner
+91 98100 11191
naval.chopra@AMSShardul.com

Shweta Shroff Chopra
Partner
+91 98100 98335
shweta.shroff@AMSShardul.com

Disclaimer
This is intended for general information purposes only. It is not a substitute for legal advice and is not the final opinion of the Firm. Readers should consult lawyers at the Firm for any specific legal or factual questions.

© Shardul Amarchand Mangaldas & Co.