

Competition & Antitrust



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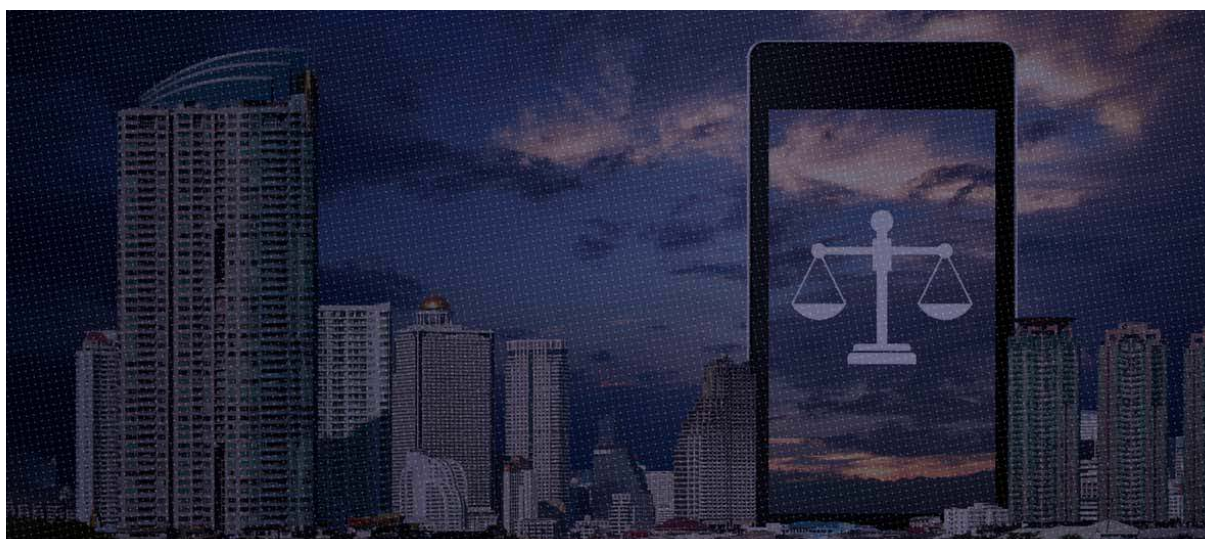




This newsletter is authored by the Competition & Antitrust team at Lakshmikumaran & Sridharan. It includes original articles and research pieces on competition law. It also reviews recent case laws and details regulatory as well as news updates on the subject.



ARTICLE



A multi-jurisdictional review of legislative trends in antitrust regulation of digital markets

Big-tech giants such as Google, Amazon, Apple and Facebook have been under constant scrutiny by antitrust regulators globally. Access to large amounts of data and lack of genuine competitor(s) (due to the scale-favoring nature of the digital markets) these companies operate in a unique position. While antitrust scrutiny by regulators is on-going, there is consensus amongst jurisdictions that the existing antitrust framework may not be sufficient for addressing the various competition and privacy challenges arising from the conduct of these companies. As a result, different jurisdictions have been working on amending their current laws and implementing new ones to deal with the issues emanating from the practices of the giants of the digital markets.

In this article, Charanya Lakshmikumaran and Neelambara Sandeepan discuss the major legislative and policy developments being proposed in India, US, EU and UK.

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RATIO DECIDENDI

1. CCI directs investigation into allegations of abuse of dominance by Google in the Android App Store Market

KEY POINTS

- i. Even in cases where an information is filed anonymously before the Competition Commission of India ("**CCI**"), it is within the powers of the Director General ("**DG**") to cross-examine the informant;
- ii. Googles' market position in the android app market provides it with a significant market advantage over other App developers;
- iii. Allegations pertaining to compliance with sectoral / regulatory guidelines has to be examined by the designated regulator and do not constitute a *prima facie* ground for investigation by CCI.

BRIEF FACTS

Reference was made to CCI by an anonymous informant under Section 19(1)(a) of the Competition Act, 2002 ("**Act**") against (i) Alphabet Inc. and its subsidiaries, namely, (ii) Google LLC, (iii) Google Ireland Ltd., (iv) Google India Pvt. Ltd. and (v) Google India Digital Services Pvt. Ltd. (collectively referred to as "**Google**") for allegedly contravening the provisions of Section 4 of the Act.

The information was filed on the following grounds –

- 1) That Google's android app store, Google Play Store ("**Play Store**") mandates the use of its own payment system in order to buy apps or make in-app purchases in the Play Store and does not allow mobile wallet/UPI apps other than Google Pay to be used as a mode of payment.
- 2) That Original Equipment Manufacturers ("**OEMs**") are encouraged to pre-install Google Pay on their devices and users are prompted to set Google Pay as the default payment app on initial set-up of the device which results in a "*status quo*" bias.
- 3) That Google skews its search on the Play Store in order to give preference to its own app, Google Pay.

- 4) That Google places the Google Pay App in the featured app lists and other top app lists of the Play Store by manipulating it.
- 5) That Google manipulates search advertisements on the Play Store to show its own apps (Google Pay).
- 6) That unfair terms are imposed on users of Google Pay.

OBSERVATIONS OF THE CCI

Whether the informant needs to be an aggrieved party in order to file a case before the CCI?

Held: CCI placed reliance on amendments made to the Act under the Competition (Amendment) Act, 2007 ("**Amendment Act**"). Under the Amendment Act, the words "receipt of a complaint" in Section 19(1)(a) were replaced with "receipt of any information". Moreover, the words "complainant or defendant" in Section 35 were replaced with "person or an enterprise" signifying the move from an adversarial system to an inquisitorial system. Further, CCI also referred to the decision of the Competition Appellate Tribunal ("**COMPAT**") in *Surendra Prasad v. Competition Commission of India, Appeal No. 43 of 2014*, where it was explicitly stated that the CCI does not have the power to reject a prayer for investigation in cases of a Section 3 or 4 violation on the sole grounds that the informant does not have interest in the matter or is acting at someone else's behest. Therefore, the informant does not need to be an aggrieved party in order to be able to file a case before CCI.

What is the relevant market in the present case and is Google dominant in it?

Held: CCI relied on its own order in *Umar Javeed v. Google, CCI Case No. 39 of 2018*, to conclude that the relevant markets to be considered are the market for licensable mobile OS for smart mobile devices and the market for app stores for Android OS and that Google is dominant in both these markets. Google's averments refuting the claims of dominance in these markets were side lined by the CCI on the grounds that their claims would require further empirical validation.

In terms of the market for apps facilitating payment through UPI, CCI., agreed this fell within a separate relevant market which had been considered by it previously in the case of *Harshita Chawla v. WhatsApp Inc. & Ors., CCI Case No. 15 of 2020*.

Whether a prima facie case of abuse of dominance is made out on the grounds laid down by the informant?

Held:

- 1) Play Store's mandate for developers to use its payment system for paid apps and in-app purchases was restrictive, especially considering its dominance in the app-store market. The CCI also stated that the 30 per cent. commission taken by Google from developers on every purchase would increase the cost incurred by its competitors in downstream markets like music and audiobook apps, and effect their competitiveness, which may lead to a rise in prices for consumers due to developers offloading their costs on the users. Therefore, this condition was found to be *prima facie* violative of Section 4(2)(a) of the Act.
- 2) With relation to Google Pay being the exclusive UPI payments App on the Play Store, CCI observed that in one of the support pages of the Play Store, it was stated that Google Pay is the only UPI based app allowed to be used as a valid payment method. Therefore, this amounted to a *prima facie* violation of Section 4(2) of the Act since it constituted the imposition of unfair and discriminatory conditions and denial of market access to Apps competing with Google Pay.
- 3) On the ground of pre-installation of Google Pay on Android smartphones and the *status quo* bias, Google contended that its Mobile Application Distribution Agreement ("**MADA**") does not require OEMs to preinstall the Google Pay App; rather, it incentivizes OEMs to pre-install Google Pay on their devices by way of optional Revenue Sharing Agreements ("**RSA**"). Considering the significant market presence of Google Pay in the UPI payments App market, CCI stated that such agreements would affect the transitory market in its favour. Further, CCI also noted that Googles' market position gives it an advantage over other UPI app developers. Therefore, CCI concluded that this amounted to a *prima facie* ground for a detailed investigation.
- 4) Claims that Google was manipulating its search results on the Play Store as well as its search advertisement services, in the opinion of the CCI were acts that would heavily affect competition and come under the scope of abuse of dominance, however, the informant was unable to provide enough evidence to corroborate the claims made in this regard.
- 5) It was contended that Google Pay collects a huge amount of data from users on top of all the data it already collects from its other services. These practices were not in consonance with the guidelines issued by the Reserve Bank of India ("**RBI**") and the National Payments Corporations of India ("**NPCI**") respectively. However, CCI opined that compliance with sectoral regulations / guidelines has to be examined by the concerned regulator.



CONCLUSION

CCI held that there is a *prima facie* case of contravention of various provisions of Section 4 of the Act. Accordingly, it directed the DG to investigate and file a report within 60 days of the order.

Further, CCI also made clear that the informant would not have any immunity from being cross-examined, if deemed fit by the DG and any refusal to participate in such cross examination by the informant would lead to extinguishment of his rights to participate in these proceedings. (*XYZ v. Alphabet Inc. & Ors., CCI Case No. 07 of 2020*).

2. CCI dismisses allegations of bid rigging / collusive bidding against Hindalco

KEY POINTS

While the standard of evidence required to be provided by an informant is not very high, however, the CCI's resources cannot be used to further open-ended bald allegations in an omnibus manner which do not further the public cause. In the absence of any material showing even prima facie concerted action or specific averment as to collusion, it is neither feasible nor desirable to embark upon any roving probe.

BRIEF FACTS

An information was filed under Section 19(1)(a) of the Act by an advocate registered with the Bar Council of India, who also made a request for anonymization, after they came to know about cartelization by Hindalco Industries Ltd. ("**Hindalco**") and Vedanta Ltd. ("**Vedanta**") through "informed and credible sources"

It was alleged that starting from 2011-12, Hindalco and Vedanta engaged in cartelisation in production and supply of refined copper products and specifically, that they cartelized with respect to additional charges for copper products that could be freely determined by the manufacturers and that till about 2018, the officials of both the companies would frequently discuss and set the prices over meetings and phone calls. Further, the two companies would issue price circulars to their consumers, simultaneously based on their discussions to maintain parity in the market.

OBSERVATIONS

Whether CCI can initiate an investigation into allegations and averments made by an informant who is unable to provide any documents or exact details?

Held: CCI noted that to assess allegations of cartelization, mere price parallelism amongst the cartel participants in itself is not sufficient to order probe in the absence of any other material on record wherefrom collusion or concerted action between the companies can be inferred. When the informant is unable to place any document(s) to support their allegations, it is neither feasible nor desirable to embark upon any roving probe.



CONCLUSION:

Therefore, since the informant was unable to substantiate the allegations made in the information, CCI found no prima facie case of contravention of Section 3 of the Act. Therefore, the allegations were dismissed. (*XYZ v. Hindalco Industries Ltd., & Anr., CCI Case No. 18 of 2020*)

3. CCI dismisses allegations of rotational bid rigging against Lakeforest Wines Private Limited

KEY POINTS

Mere contravention of tender policies does not imply a contravention of Section 3(3) of the Act, unless there is additional material to substantiate allegations of collusion.

BRIEF FACTS

A Reference was made to CCI under Section 19(1)(a) of the Act, against Lakeforest Wines Private Limited ("**Lakeforest**"), Ashir Marketing (India) Private Limited ("**AMP**"), Sarja Associates Private Limited ("**SAP**"), alleging that the OPs were cartelising to limit and control the supply of Imported, Bottled in Original ("**BIO**") Foreign Liquor being sold within the state of Haryana. It was contended that the OPs rigged the tenders for the License for supply of BIO in the state of Haryana i.e. L-1BF license, floated by the Excise and Taxation Department, Government of Haryana.

The Information was filed on grounds that (i) the OPs all participated in the tendering process for the L-1BF license despite operating from the same office, having the same Chartered Accountant (CA) firm as the statutory auditor, having identical Memorandum of Associations, having the same e-mail IDs, and having the same person, a Mr. Neeraj Sachdeva, with a controlling interest in all the OPs; (ii) the OPs engaged in rotational bidding in the bidding process for the L-1BF license; (iii) the OPs entered horizontal agreements, whereby SAP purchased the majority of its stock from Lakeforest despite both being participants in the L-1BF licenses bid, (iv) transfer of funds between Lakeforest and AMP reaffirm the fact that all the OPs are very closely related to each other, and (v) the manner in which the OPs engage in transactions with their purchaser shows the existence of an agreement to limit and control the supply of BIO.

OBSERVATIONS OF THE CCI

Whether the OPs have entered into a horizontal agreement to rig tenders for L-1BF licenses floated by the Excise and Taxation Department of Haryana?

Held: The informant was unable to provide CCI with any details or documents relating to the tenders which were alleged to have been rigged by way of bid rotation. Moreover, CCI observed that there was no other evidence that could

indicate any meeting of minds or collusive behaviour by the OPs. The information furnished before CCI only established that the OPs may have been related parties.

Further, CCI noted that mere contravention of the tender policy does not imply contravention of the provisions of Section 3 (3) (d) of the Act unless there is material to substantiate the allegations of bid rigging by way of collusion amongst the OPs.



CONCLUSION:

Therefore, CCI was of the opinion that the facts and evidence in the instant case are not sufficient to establish even a prima facie case of contravention of the provisions of Sections 3 of the Act against the OPs. Accordingly, the information was disposed of and the matter was closed in terms of the provisions of Section 26(2) of the Act. (*XYZ v. Lakeforest Wines Pvt. Ltd. & Ors., CCI Case No. 36 of 2020*)

4. CCI directs closure of investigation against 19 importers of Phenol

KEY POINTS

- i. To conduct an investigation in a time bound manner, out of the 19 phenol importers, the DG investigated 12 that accounted for 95% of the total sales volume of phenol.
- ii. In the absence of any evidence indicating an agreement or meeting of minds amongst the phenol importers, a mere price parallelism does not indicate collusion.

BRIEF FACTS

An information was filed before CCI under Section 19(1)(a) the Act, alleging that 19 phenol importers had formed a cartel to artificially hike the price of phenol by about 90% between January – March 2016. During this period, even though the international price of phenol were low, the cartel members orchestrated an artificial hike in prices by spreading the rumor that there was a shortage of phenol. This artificial hike in price had created a lot of stress amongst decorative laminate manufacturers.

It was further alleged that although the cartel was in operation even between April – May 2016 as the phenol importers collectively reduced the price of phenol after being warned of a possible CCI inquiry.

To conduct the investigation in an expeditious manner, the DG investigated the 12 phenol importers that constituted 95% of the total sales volume of phenol in India.

OBSERVATIONS OF THE CCI

Whether the phenol importers had artificially manipulated the price of phenol between January – May 2016?

Held: Although the time period mentioned in the information was only from January – May 2016, to maintain uniformity, the DG investigated 6 months before and after the said time period. Accordingly, the activities of the 12 phenol importers were analyzed for the time-period, July 2015 to December 2016. The DG Herfindahl-Hirschman Index (“**HHI**”) analysis (econometric assessment to

test the level of competitiveness in the market) and found that the market for phenol was highly competitive. Further, the DG observed that 12 of the OP's had made a profit during the alleged cartelisation period.

The DG also analysed communication records of the employees of the parties as well as minutes of certain meeting but did not find any evidence indicating collusion between them.

Even though the pricing behaviour of the phenol importers raised *prima facie* suspicions of collusive behaviour, in the absence of evidence of any agreement or meeting of minds amongst the parties, it was concluded that mere price parallelism could be on account of strong competition in the market as the firms were all subject to similar demand-supply conditions, which may explain the synchronous response in terms of price changes and did not indicate collusion.

In addition to the issue under investigation, the DG penalized two of the parties INR 1 lakh each for non-cooperation with the investigation process and the same was realized by the CCI.



CONCLUSION:

CCI agreed with the report of the DG and held that there was no corroborative evidence of anti-competitive agreement or arrangement amongst the parties investigated by the DG. Even though the DG found certain correlation in the prices of some of the phenol importers during the alleged cartel period, as also evidence to the fact that the importers, trader and brokers of phenol used to meet, though purportedly infrequently. However, in the absence of any corroborative evidence, in the facts and circumstances of this case, the investigation does not bring out that the increased prices were an outcome of collusion. Therefore, CCI concluded that it could not be established that the parties had acted in contravention of provisions of Section 3 of the Act and the matter was closed. (*Indian Laminate Manufacturers Association v. Sachin Chemicals & Ors.*, CCI Case No. 61 of 2016)

5. CCI dismisses allegations of abuse of dominance by Ghaziabad based Uppal Chadha developers.

KEY POINTS

Unilateral and unfair conduct by an entity cannot be a subject of investigation by the CCI in the absence of dominance. However, consumers can still reach out to the consumer forum for seeking relief against unfair practices of enterprises.

BRIEF FACTS

An information was filed before CCI under Section 19(1)(a) of the Act alleging that Uppal Chadha Hi-Tech Developers Pvt. Ltd. ("**Uppal Chadha**") and its Director, Mr. Manpreet Singh Chadha were imposing unfair conditions upon allottees of one of its residential projects in Ghaziabad.

The information was filed on grounds that (i) procurement of thousands of acres of land was done by Uppal Chadha, but possession was deliberately not taken and that resulted in an increase in cost of registry and cost of construction, (ii) no time limit or benchmark date has been given till date to the allottees, (iii) several unfair modifications were made to the offer of allotment such as adding a requirement to pay peripheral / infrastructural development charges ("**PDC**") and other fees / taxes payable to the government, and (iv) the offer of allotment to Informant was for Plot No. 498, Sector 3, measuring 485.6 sq. yard (instead of 500 sq. yard), and demand was made for an additional substantial payment (Rs. 4,46,144/-) to be made with the application of allotment in the prescribed form, which was mandatorily taken from the informant and other buyers, without providing ownership and possession of relevant lands.

OBSERVATIONS OF THE CCI

What would constitute as the relevant market?

Held: CCI relied on its earlier decision in *Ms. Usha Roy v. ANS Developers Pvt. Ltd. & Anr.*, CCI Case No. 96 of 2016, wherein "integrated township" and "hi-tech Township" were discussed according to a policy laid down by the Uttar Pradesh Government. Thus, in the present case the relevant market was delineated as "the provision of services for development and sale of plots of land for residential use in Ghaziabad region".

Whether Uppal Chadha holds a dominant position in the delineated relevant market?

Held: Upon examining the public records, CCI observed that several real estate developers are operating in the relevant market such as, Unitech, Supertech, Eldeco, Amrapali Group, Omaxe, etc. The presence of such a variety of well-known players shows that consumers have a high number of options. Therefore, Uppal Chadha could not be said to have enjoyed a dominant position in the relevant market.



CONCLUSION:

Given that Uppal Chadha was not in a dominant position, the question of abuse of dominance in terms of Section 4 of the Act did not arise. Further, CCI also observed that the issues arising in the present matter were more suited for adjudication by the consumer forum, and in fact, the informant had already approached the National Consumer Disputes Redressal Commission ("NCDRC") for relief in Case no. CC/80/2018 which is still pending adjudication.

Accordingly, the information was dismissed by the CCI. (*Ms. Saumya Agrawal v. Uppal Chadha, Case No. 33 of 2020*)

6. CCI dismisses allegations against Security Paper Mill for abusing its dominant position by inserting unfair condition in tenders.

KEY POINTS

CCI opined that a tenderer inviting bids only from certain brands does not amount to abuse of dominance by the tenderer. The tenderer has the right as a consumer to choose which brands can apply for the tender.

BRIEF FACTS

Information was filed with the CCI under Section 19(1) (a) of the Act against Security Printing and Minting Corporation of India ("**SPMCIL**") and Security Paper Mill ("**SPM**"), alleging contravention of provisions of Section 4 of the Act for inserting unfair / discriminatory conditions in a tender for bearings being procured for printing machines. Through the impugned unfair conditions (i) tenderers were disqualified on technical grounds without citing any specific reason for being rejected; and (ii) the tender was restricted to only bids submitted by one of four pre-designated OEMs – SKF / Schaeffler / FAG or Timken or any of their authorised industrial distributors.

OBSERVATIONS OF THE CCI

Whether SPMIL and SPM have significant market power?

Held: Upon examination, CCI observed that the parties were procuring numerous types of bearing through the tender. Further, the information also admitted that there were various customers and public sector undertakings that have been procuring bearings from the informant for past many years. Additionally, CCI noted that bearings have an extensive demand in various different sectors such as the automobile sector or the agriculture sector. Therefore, CCI held that the parties cannot be said to be enjoying a dominant position in a market with a wide variety and usage across different industries along with numerous buyers and sellers.

Whether calling out only certain brands, amounted to an abuse of power?

Held: Placing reliance on its previous decision in *Pandrol Rahee v. DMRC, CCI Case No. 03 of 2010*, CCI noted that it is for the procurer of the product, i.e. SPMIL and SPM, to decide which product manufactured by which OEM meets its

need. CCI further noted that the procurer / consumer, based on its requirement and other commercial considerations, has the right to specify the kind of product, the quantity thereof, timelines, mode and the manner in which it requires the same; and the same cannot be dictated by the bidders / suppliers.



CONCLUSION:

Upon analysis of the relevant market and active players, CCI found that SPMIL and SPM did not have a dominant market position in the market for procurement of bearings in India. Further, CCI also acknowledged a consumers' right to choose and freely select between products. Therefore, it was held that there exists no *prima facie* case and accordingly, the information was dismissed. (*Deepak Sultania v. Security Printing and Minting Corporation of India & Ors.*, CCI Case No. 41 of 2020)

MERGER CONTROL

1. CCI approves Facebook's minority investment in Reliance Jio

Jaadhu Holdings LLC ("**Jaadhu**"), is an indirect wholly owned subsidiary of Facebook Inc. ("**Facebook**"), incorporated in the state of Delaware, USA.¹

Jio Platforms Ltd. ("**Jio**"), a subsidiary of Reliance Industries Ltd ("**RIL**"). Jio owns and operates digital applications and holds controlling investments in certain technology related entities. Jio also holds 100% share capital of Reliance Jio Infocomm Ltd. ("**RJI**"), a telecom operator providing mobile telephone services to users across India.

The combination relates to the acquisition of 9.99% equity shares of Jio by Jaadhu by execution of an investment agreement dated April 21st, 2020 ("**Investment Agreement**"). Pursuant to the Investment Agreement, Jaadhu would be entitled to appoint (i) a director on the board of directors of Jio; and (ii) an observer to attend board meetings. Additionally, Jaadhu will also have certain affirmative rights in relation to (i) buyback and redemption of shares, (ii) IPO, (iii) amendment to constitutional documents that adversely affects the rights or obligations of Jaadhu, (iv) investment into new line of business beyond a financial limit, (v) related party transactions beyond a financial limit, (vi) borrowing beyond a financial limit and winding up or liquidation of Jio Platforms. Additionally, Jaadhu would also be entitled to receive information relating to financial performance of Jio Platforms and those required for tax and other compliances.

Additionally, WhatsApp Inc. ("**WhatsApp**"), another subsidiary of Facebook proposes to enter into a Master Service Agreement with Jio and another subsidiary of RIL, Reliance Retail Ltd. ("**RRL**"). The objective behind this agreement is for WhatsApp to develop an electronic chat feature to connect users with JioMart, a new e-commerce marketplace being launched by RRL.

HORIZONTAL OVERLAPS:

The Commission noted that the activities of Jio and Facebook group are similar in communication applications and advertisement services. Additionally, the social media applications owned by Facebook group and the telecommunication

1. The Facebook group offers various products and services in the market for social networking and advertisements, with its main products and service including Facebook, Messenger, Instagram, WhatsApp, Oculus, Workplace and Portal. Facebook's major revenue source is the selling of advertising placements on its products/ services.

services of RJL are complimentary in nature. In this regard, the overlaps were assessed vis a vis the following market:

i. Markets for consumer chat applications: The Commission observed that all the three consumer communication applications of the parties viz. WhatsApp, Messenger and Jio Chat offer similar functionalities and are available free of cost. Further, the Commission noted that all communication applications, started with a specific functionality and thereafter added other features and most of them today offer multiple functionalities including personal chat, group chat, video call and voice call. These additions were done within short intervals and appear to have been propelled by the demand for a composite communication application, innovation and competition. Applications like Skype and WhatsApp might not have been perceived as competitors initially, but both of their applications today have similar functionalities. Thus, a realistic competition assessment should factor-in the stage of evolution and convergence in the industry and identify players who are competing with similar focus and incentives. The estimate of the parties stated above showed that WhatsApp is the leading player in the market for consumer communication applications. The combined share of WhatsApp and Messenger in consumer communication application is [45-50] % and JioChat commands [0-5] % market share. Although Facebook has a considerable share, the same may not be an appropriate metric to gauge its market position given the above discussed market dynamics. The Commission notes that the impugned market is characterised by the presence of big tech giants like Microsoft and Google as well as start-ups emerging as significant competitors within a reasonable period of time. Sudden rise of apps like Hike and Houseparty indicates that consumer communication applications market does not exhibit significant entry barriers. While WhatsApp is the largest consumer communication network, the industry also has the presence of comparable innovators offering similar applications free of cost. Considering these market attributes, it appears that the parties do not have incentives to engage in any anti-competitive conduct in the market for consumer communication applications in India.

ii. Market for advertisement services: Facebook provides advertising services:

- a. on some of its own platforms (i.e., on Facebook, Instagram and Messenger, but not on WhatsApp); and
- b. to a limited extent on certain participating third-party mobile apps, through Facebook Audience Network ("**FAN**").

The most commonly used advertisement products of Facebook are: (i) Ads Manager - a self-service advertising platform; and (ii) Business Manager: Similar to Ads Manager, Business Manager enables advertisers to create and manage multiple advertising accounts for separate campaigns. Facebook also provides

ready access to a range of informative materials, portals and e-learning courses across its platforms as selling aids. Jio Platforms also offers advertising services on its own apps / websites or mobile devices (JioSaavn, JioTV, JioNews, JioChat, JioBrowser, JioCloud, JioGames and MyJio). However, it does not provide advertising services on third party platforms. The Commission observed that advertisement is a marketing measure to increase awareness and sales of a given product or service. The Commission was of the view that the market definition for advertisement services may be left open as the Proposed Combination is not likely to increase concentration in any of the plausible relevant markets for advertisement services. While earnings from advertisement is the main stream of revenue for Facebook, revenue of Jio Platforms from advertisement services is insignificant and constitutes less than 1% of its total revenue. The Commission also observed that online advertisement space features the presence of Google, which as per the data provided by Jaadhu, has a significant market position. Keeping the above factors in mind, the parties do not appear to have incentives to engage in anti-competitive conduct in any of the plausible relevant markets for online advertisement services. The above assessment suggests that the Proposed Combination is not likely to raise competition concern.

VERTICAL OVERLAPS:

In addition to the above, the Commission also assessed the impact of the business collaboration between JioMart and WhatsApp. In this regard, the Commission observed that JioMart is a recent entrant in the e-commerce business and WhatsApp Pay is the proposed UPI based digital payment feature within the WhatsApp messaging application. The recent focus of tech giants and e-commerce players to establish their platform for kirana aggregation and/or operate their own warehouses to supply groceries and daily essentials suggests that they all anticipate a digital revolution in the said space and are gearing themselves to grab the resultant opportunities. Given the presence of entrenched incumbents like Amazon and Walmart-Flipkart and other valuable contenders, the business collaboration between the parties does not raise any competition concern in any of the plausible relevant markets in e-commerce space, in India.

WhatsApp Pay, the proposed UPI based digital payment feature would be integrated into WhatsApp chat application, upon receiving relevant regulatory approval. Upon such integration, WhatsApp will be a composite application for consumer communication as well as UPI based digital payments. The Commission observed that the market for UPI based digital payment applications is a typical new-age market with dynamic industry attributes and rapid evolution. With the surge in UPI transactions, Google Pay, Paytm and PhonePe have become the known UPI based digital payment applications. The said figures and the progressive growth trend of UPI Payments in India suggest that, the overall

value and quantum of UPI based digital payments to JioMart (an entrant in ecommerce space) through WhatsApp Pay (an entrant in digital payment applications space) is not likely to be significant. Thus, the proposed combination is not likely to cause appreciable adverse effect on competition in any of the plausible relevant markets for UPI based digital payment applications business.

COMPLEMENTARY OVERLAPS:

Given the complementary nature of products and services offered by the parties, the Commission also looked into aspects of net neutrality and data integration.

In this regard, the Commission noted that the product lines of Facebook group and telecommunication services such as those offered by RJI, are complementary to each other. In this context, it was examined whether the proposed combination could lead to any preferential treatment to Facebook applications or content in RJI's network, i.e. whether the 'net neutrality' of RJI's telecommunication network is likely to be affected in view of the proposed combination. The Commission noted that the proposed combination is a partial acquisition and non-observance of net neutrality obligation may be prejudicial not only to the licensee (i.e. RJI) but also to the investment made by Jaadhu. Further, given the telecom regulatory instruments governing net neutrality obligations of Telecommunications Service Providers, the Commission did not find it necessary to separately examine the issue further.

Further, Facebook application is a social media platform. One side of its platform offers free services to users for social interaction and on the other side, the monitored behaviour of the users is used as an input to offer advertisement services (targeted display ads). Jio Platforms including RJI, is also in a position to collect and possess consumer data, which it uses, *inter-alia*, to tailor its services to the interests of its users, to measure traffic within its services, to improve the quality, functionality and interactivity and let advertisers know the geographic locations from where its users/ visitors come. Business combination between entities having access to user data can be analysed from the perspective of data backed market power. The assessment in such instances needs to focus on the incentives of parties to pool or share their databank and monetize such data in possible means. The Commission noted that the proposed combination may not result in unrestricted access to each other's resources including user data. Nevertheless, the parties may have incentives to engage in mutually beneficial data sharing. Thus, any anti-competitive conduct resulting from any data sharing in the future could be taken up by the Commission under Sections 3 and/or 4 of the Act having due regard to the dynamics of the concerned markets and position of the parties therein.

Considering the material on record including the Commission is of the opinion that the proposed combination is not likely to have any appreciable adverse effect on competition in India. Therefore, the Commission approved the proposed combination under Section 31(1) of the Act. The Commission also notes that the parties confirm that the proposed combination does not contemplate any non-compete covenants.

2. Acquisition of minority shareholdings in Aahaan, 91Street & others by Lightstone

Lightstone Fund S.A. ("**Lightstone**"), is an alternative investment fund incorporated in Luxembourg, that was established as an umbrella fund structure with initially one sub-fund, i.e. Lightstone Global Fund ("**LGF**"). Lightstone does not have any direct presence in India. Lightstone is managed by its alternative fund manager i.e. LGT Capital Partners (Ireland) Ltd. ("**LGT Partners**"), which is an indirect wholly-owned subsidiary of LGT Group Foundation, the ultimate holding company of the LGT group of companies ("**LGT Group**"). In 2019, LGT Group acquired a majority interest in Aspada Investment Company ("**Aspada**"), an India-focused investment fund, to expand its investing platform to India, branded under the name "LGT Lightstone Aspada" ("**LGTA**").

Ascent Health and Wellness Solutions Pvt. Ltd. ("**Ascent**") incorporated in India, is engaged in wholesale ("**B2B**") and distribution of pharmaceutical products, medical devices and over the counter FMCG and nutraceutical products. It also is engaged in the business of owning and developing an online application named 'Retailio'.

Aahaan Commercials Pvt. Ltd. ("**Aahaan**") and Lokprakash Vidhya Pvt. Ltd. ("**Lokprakash**") respectively hold 10.81% and 4.36% equity stake (on a fully diluted basis) in Ascent, but do not carry any business activities and do not have any subsidiaries.

91Streets Media Technologies Pvt. Ltd. ("**91Streets**") is incorporated in India and, offers various products and services in India which includes provision of licensing technology and intellectual property required to develop e-commerce platforms; wholesale and distribution of pharmaceutical products etc. It also owns and develops a tele-medical consultation platform, 'DocStat' for doctors to consult patients and generate electronic copy of a prescription.

API Holdings Pvt. Ltd. ("**API**") was incorporated in India. Aycon Graph Connect Private Limited ("**Aycon**"), which is a wholly-owned subsidiary of API Holdings, acquired 98.45% stake in Instinct Innovations Private Limited ("**Instinct Innovations**"), which is engaged in the business of developing software and enterprise resource planning solutions for healthcare business.

Pursuant to the proposed combination, Lightstone will acquire the following:

- 2.10% equity stake on a fully diluted basis in Ascent by way of secondary purchase of shares ("**Ascent Acquisition**")
- 10.44% equity stake on a fully diluted basis in Lokprakash by way of secondary purchase of shares ("**Lokprakash Acquisition**")
- 2.43% equity stake on a fully diluted basis in Aahaan by way of secondary purchase of shares ("**Aahaan Acquisition**")

- Additional 0.01% equity stake on a fully diluted basis in 91Streets by way of secondary purchase of shares ("**91Streets Acquisition**")

The Commission noted that horizontal overlaps exist between LGTA and the Targets, Ascent, Lokprakash, Aahaan, and 91Streets. These overlaps are in the broad segment of wholesale and distribution of drugs in India and at narrower segments in wholesale and distribution of (a) pharmaceuticals, (b) medical devices and (c) OTC drugs. However, CCI decided to keep the delineation of relevant market open, as it wasn't going to create any adverse market effects since the incremental market share was insignificant. Further, the Commission noted that there are various vertical relationships, existing and potential. But it was also observed that the market share of the companies is insignificant and there exists several players in each segment and therefore, the parties do not have any ability or incentive to foreclose competition.

Since the proposed combination is not likely to have any appreciable adverse effect on competition in India, the Commission approved the proposed combination under Section 31(1) of the Act.

3. Acquisition of additional shareholding in Clariant by SABIC

SABIC International Holdings B.V. ("**SABIC BV**") is a wholly owned affiliate of Saudi Basic Industries Corporation ("**SABIC**") and is the holding company of SABIC's international operations, including SABIC's investments in the specialties sector. It was incorporated in Kingdom of Saudi Arabia. In India, SABIC has four subsidiaries and these subsidiaries are engaged *inter alia* in compounding of engineering plastics and polycarbonate film and sheets, captive research and development services etc. However, one of the subsidiaries, High Performance Plastics India Pvt. Ltd. ("**HPPIPL**") has been recently incorporated and is not yet operational.

Clariant AG ("**Clariant**") a Swiss chemicals company, is the parent company of the Clariant Group and is listed on the 'SIX' Swiss Exchange. In India, it is present *inter alia* through its subsidiaries. It operates in the business areas of: (i) care chemicals; (ii) natural resources; and (iii) catalysis, in India.

Pursuant to the proposed combination, SABIC BV, which already holds 24.99% of the share capital of Clariant, will acquire an additional 6.51% shareholding via an escrow mechanism in a global transaction. After the completion of the proposed combination, the total shareholding of SABIC in Clariant will reach 31.5%.

CCI noted that the activities of the parties exhibit horizontal overlaps in the broader segments of (i) non-ionic surfactants and (ii) Polyalkylene Glycol ("**PAG**"). At a narrower level, the parties exhibit overlaps only in the sub-segment of Polyethylene Glycol ("**PEG**"), which is a further subdivision of PAG. Nevertheless, CCI decided to leave the delineation of the relevant market open as it observed that the Proposed Combination is not likely to cause an appreciable adverse effect on competition. Further, CCI also noted that the combined market shares of parties in the broader and narrower segments are insignificant. On top of that, there are a large number of players in India in each of the above-mentioned segment / sub-segments.

The Commission noted the existence of vertical relations between the parties in two product segments viz. Linear Low-Density Polyethylene ("**LLDPE**") and Masterbatches. However, it was observed that sales made by SABIC BV and Clariant to each other were insignificant and there are several other players present in both these segments. Additionally, Clariant has also sold its entire Masterbatches business unit to PolyOne Corporation.

Therefore, the Commission held that the proposed combination is not likely to have any appreciable adverse effect on competition in India and accordingly, approved the same under Section 31(1) of the Act.

4. Acquisition of Garden Silk by MCPI Polyester under Corporate Insolvency

MCPI Pvt. Ltd. ("**MCPI**") is part of The Chatterjee Group ("**CG**") and is engaged in the business of manufacturing and supply of Purified Terephthalic Acid ("**PTA**"). MCPI has a wholly owned subsidiary, MCPI Polyester Pvt. Ltd. ("**MCPI Polyester**"), a newly incorporated entity which currently does not have any business operations within or outside India.

Garden Silk Mills Ltd. ("**GSML**") is stated to be a part of the Praful Shah Group, which holds 57.63% shareholding in GSML. GSML is a manufacturer of polyester yarn and textile products, which falls in the category of man-made fibres. GSML is vertically integrated and is engaged in the production and sales of (i) PET Chips ("**Polyethylene Terephthalate**") and (ii) Polyester Yarn in India. The proposed combination relates to the acquisition by MCPI, through MCPI Polyester, of GSML, which is undergoing Corporate Insolvency Resolution Process ("**CIRP**") under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

The Commission noted that the acquisition does not exhibit any horizontal overlaps. With regards to vertical relationships MCPI is engaged in the manufacturing and sale of Purified Terephthalic Acid ("**PTA**") in India (upstream market). GSML utilizes this PTA, which is used as a raw material to manufacture polyester (downstream market). Upon analysis of the vertical overlaps, the Commission observed that the market share of MCPI is between 15 – 20 % in the upstream market of manufacturing and sale of PTA, in terms of both installed capacity and actual production. The market share of GSML in the broad segment of polyester is between 5 – 10 % in terms of installed capacity (in Kilo tonnes per annum) and between 0 – 5 % in terms of total production (in Kilo tonnes per annum). The market share of GSML in each of the sub-segments is also in similar range. In view of the above, the Commission opined that the parties may not have any ability or incentive to foreclose competition in any segment / sub-segment.

Therefore, the Commission held that the proposed combination is not likely to have any appreciable adverse effect on competition in India and accordingly, approved the same under Section 31(1) of the Act.

5. Acquisition of majority shareholding in Krishanapatnam Engineering Co. Ltd. by Adani Ports and Special Economic Zones Ltd.

Adani Ports and Special Economic Zones Ltd. ("**Adani Ports**") is a private sector port operator, currently having presence in six maritime states in India viz. Gujarat, Goa, Kerala, Andhra Pradesh, Tamil Nadu and Odisha through 10 ports, where it provides (i) full marine services including piloting and towage of vessels, berthing and de-berthing, (ii) cargo handling services, and (iii) value added services such as bagging and packaging.

Krishanapatnam Engineering Co. Ltd. ("**KEC**") is part of Hyderabad based CVR Navayuga Group ("**CVRN Group**") and is a special purpose vehicle promoted for designing, financing, maintaining, owning, operating and transferring an all-weather, deep water, multi-purpose port at Krishanapatnam. KEC also provides integrated cargo handling and marine services including but not limited to pilotage berth hire, wharfage, stevedoring, railway rake loading, transporting, storage and other activities within port premises.

Pursuant to the proposed combination, Adani Ports will acquire 75% of the equity share capital and all the preference shares of KEC.

With respect to horizontal overlaps, the Commission observed that both Adani and KEC are primarily engaged in the business of operating ports in India. Both Adani and KEC are similar in the domain of port services relating to containerized cargo, coal, other dry bulk cargo and break-bulk cargo. KEC handles containerized cargo of customers located in Karnataka, Andhra Pradesh and Karnataka; where it competes with ports located at Chennai, Ennore and a port operated by Adani at Kattupalli. CCI noted that although both KEC and Adani handle break bulk cargo at Krishanapatnam and Kattupalli respectively, the volume of cargo handled by Adani at Kattupalli was insignificant and constituted less than 2% of the total breakbulk cargo handled by the said four ports. Accordingly, the Commission was of the opinion that the proposed combination was not likely to increase concentration to raise any competition concern.

In relation to vertical overlap in (i) oil terminalling services of KEC and the edible oil business of Adani and (ii) the dredging and reclamation services of Adani and the ports operation of KEC., given the relatively limited presence of both the parties in downstream operations, the Commission was of the opinion that neither would have any incentive to engage in any anti-competitive conduct.

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

6. Global merger of International Flavours & Fragrances into DuPont

International Flavors & Fragrances Inc. ("**IFF**") is a public company, listed on the New York Stock Exchange, the Tel Aviv Stock Exchange, the Euronext Paris, and is based in New York City, United States of America. IFF is active worldwide in the development, creation, and sale of flavours and fragrances that are used in consumer goods industries (such as food and beverage, personal care, home care industries). IFF's main business units are 'Scent' and 'Taste'. In India, IFF is engaged in the manufacture, trade and sale of fragrances, flavours and related products. It is also engaged in the manufacture and sale of certain food ingredients. IFF has seven manufacturing plants, one R&D office, three Creative & Application Centres and various sales offices and depots. It is present through the following four subsidiaries:

- i. International Flavors & Fragrances India Private Limited
- ii. Frutarom Flavors (India) Private Limited
- iii. BSA India Food Ingredients Private Limited
- iv. Sonarome Private Limited

DuPont de Nemours ("**DuPont**"), is a company incorporated in the United States of American formed by the merger of Dow Chemical and E. I. du Pont de Nemours and Company and the subsequent spinoffs of Dow Inc. and Corteva. DuPont is one of the largest United States Public Corporations and is in the process of splitting its business into three publicly traded companies focusing on (i) Agriculture (Corteva), (ii) Material Sciences (Dow Inc.) and (iii) Specialty Products (DuPont).

Nutrition & Biosciences, Inc. ("**SpinCo**"), is a recently incorporated company to which DuPont will transfer its Nutrition & Biosciences Business ("**N&B Business**"). The N&B Business is active worldwide in the development, production, and marketing of food science, taste, and texture applications, and biotechnology products that are used in various industries, including food and beverage, dietary supplements, home and personal care, animal nutrition and pharmaceutical excipients. The N&B Business operates through its 'Food & Beverage', 'Health & Biosciences', and 'Pharma Solutions' units.

Neptune Merger Sub I Inc ("**Merger Sub I**") is a newly incorporated and wholly owned subsidiary of IFF, which was incorporated for the purpose of the present combination.

The present notice was filed pursuant to the execution of (i) a Separation and Distribution Agreement between IFF, DuPont, and SpinCo and (ii) a Merger

Agreement between IFF, DuPont, SpinCo and Merger Sub I. Subsequent to the proposed transaction, IFF will acquire sole control over SpinCo, a recently incorporated company to which DuPont will transfer its N&B Business.

The Commission observed that the overlaps between the products manufactured / supplied / distributed / sold by IFF and the N&B Business in India are:

- i. Antioxidants for food applications;
- ii. Plant-based proteins;
- iii. Cosmetic ingredients; and
- iv. Systems for food and beverages

However, the Commission decided to leave the delineation of the relevant market open as it opined that the proposed combination is not likely to cause an appreciable adverse effect on competition within India in any of the possible alternative relevant markets.

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

7. Acquisition of 49% shareholding in Odisha Power by Adani Power Ltd

Adani Power Ltd. ("**APL**") is a public listed company primarily engaged in the business of power generation by using coal based thermal power plants. APL directly and through its subsidiaries, operates several thermal power plants. The Adani Group is stated to be a business conglomerate with operations including in renewable power generation, thermal power generation, power transmission, power distribution, gas distribution, housing finance, operating ports, coal mining, etc.

Odisha Power Generation Company Ltd. ("**OPGC**") is a joint venture between the Government of Odisha and the sellers, AES India Pvt. Ltd. ("**AES**") and AES OHPG Holding ("**AES Holding**"), stated to be engaged in the business of power generation through coal-based thermal power plants as well as hydro power plants. It has two plants in Odisha.

The proposed combination relates to acquisition by APL of 49% of the total equity share capital of OPGC, on a fully diluted basis.

CCI relied on previous cases pertaining to power sector, where it had held that the production chain can be segmented in three parts namely generation, distribution and transmission and each of these segments has distinct producers and consumers. Further, substitutability only exists within these segments. Also, each segment is governed by different government regulations and competitive dynamics. This is why these segments are delineated as separate relevant product markets. Further since the regional grids have all been synchronized into one seamless national grid, the relevant geographical market for power generation will be India as a whole. It was submitted by the parties that the relevant market(s) for the proposed combination are (a) market for power generation in India; and (b) market for power generation in India through thermal source (using coal).

While assessing horizontal overlaps, the Commission observed that Adani Group and OPGC are active in the markets of generation of power in India with less than 10% market share and the incremental market share is also insignificant to raise any competition concern. Further, there exist other players like National Thermal Power Corporations ("**NTPC**"), Maharashtra State Power Generation Corporation Ltd. ("**MSPGCL**") etc. in these segments.

With respect to vertical overlaps, the Commission noted that Adani Group, through Adani Transmission Ltd ("**ATL**"), is present in the market of transmission (Downstream Market-1) of power in India, while OPGC is present in the market of generation (Upstream Market) of power in India. Therefore, there exists a potential for vertical relationship between the activities of the parties in India. It

is observed that potential vertical link may also exist in the market for generation of power in India and the market for distribution of power in India (Downstream Market-2). However, CCI noted that OPGC is committed for sale of its entire output to Grid Corporation of Odisha ("**GRIDCO**"). Further considering the presence of ATL in the Downstream Market and other players such as Power Grid Corporation of India Ltd, the aforementioned potential vertical relationships are not likely to raise foreclosure concern.

Therefore, the Commission approved the same under Section 31(1) of the Act.

NEWS NUGGETS

1. New investigation on Amazon by the European Commission (“EC”)

The EC announced a second antitrust investigation into the conduct of Amazon in November, 2020, on the grounds that Amazon utilized independent sellers' data for its own benefit. While the first EC probe into Amazon's conduct was launched in August 2019, for use of sensitive data from independent retailers who sell on its marketplace; the second probe has been launched to review how Amazon chooses which sellers offer products via Amazon Prime, its paid-for premium service. It will also investigate the possible preferential treatment of Amazon's own retail business and those that use its logistics and delivery services (known as “fulfilment by Amazon” sellers) over other sellers. Finally, the probe also look into the Amazon's “buy box” function, which offers customers a one-click button to add a product to their shopping cart.

2. The United Kingdom's Competition and Markets Authority announces plans for establishing a Digital Markets Unit

On November 27th, 2020, the Competition and Markets Authority (“CMA”) announced that it would establish a dedicated Digital Markets Unit (“Unit”) for regulating monopolies in the digital sector. The Unit will be established with the objective of covering platforms funded by digital advertising and designated as having “strategic market status”.

Although, what the term “strategic market status” would cover is not yet clear, CMA has stated that big tech giants such as “Facebook” and “Google” will be covered within its ambit since these two companies' combined received about two-thirds of the UK's digital ad spending.

3. Google faces fresh antitrust law suit in the United States of America, initiated by 38 states

On December 17th, 2020, attorney generals of 38 states and territories, led by Colorado and Nebraska, initiated law suits against Google for having solidified its dominance in the search engine market, where it captures approximately 90% of all queries, through a wide variety of anti-competitive practices that have created a “moat around its kingdom”. According to the law suit, the major

anti-competitive practice utilized by Google to solidify its monopoly is the practice of entering into special deals to ensure that the default option on many web browsers, smartphones and newer connected devices such as smart televisions and speakers.

Further, the law suit also brings into question how search results are structured by Google; alleging that the method employed by Google often requires companies to purchase ads to rise to the top of a users' search results.

4. Supreme Court of India clears cab aggregators of anti-competitive conduct

On December 15th 2020, the Supreme Court of India ("**SC**") upheld the Commission's decision and declined to direct an investigation into the allegations that Uber and Ola were engaging in anti-competitive practices, by entering into horizontal agreements to fix market prices through their drivers in a hub and spoke model.

Although the SC agreed with NCLAT's decision to not direct an investigation, it set aside a part of the order dealing with locus to file an information on the grounds of an extremely narrow construction of Section 19 of the Act and held that the concerned section is clear and unambiguous that "any person" may approach the Commission with an information and therefore, the question of *locus standi* does not arise.

5. Commission announces plans to initiate market studies in the Pharmaceutical and Private Equity Sectors

The Commission has disclosed plans to initiate a market study in the pharmaceutical industry in light of the COVID – 19 pandemic and the huge number of cases relating to trade practices in the sector. The study will primarily focus on the role of trade associations and e-pharmacies in the distribution chain and whether it is distorting markets and competition in the sector.

Additionally, the Commission has also disclosed plans to initiate a study into the behaviour of the Private Equity ("**PE**") in light of PE investments having surpassed strategic investments in India during the course of the current year.

6.CCI carries out dawn raids on the offices of major cement manufacturers

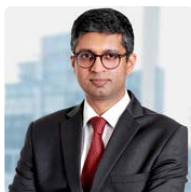
On December 9th, 2020, the DG carried out dawn raids at the offices of top cement manufacturing companies, including UltraTech Cement, Shree Cement, Ambuja Cement, ACC, Dalmia Cement, and Rockstrong Cement, over allegations of price coordination and collaborating levels of cement supply. The raids were carried out following a slate of allegations levelled by various builders associations against the cement manufacturers' and the Cement Manufacturers' Association ("**CMA**").

REGULATORY UPDATE

1. Amendment to merger regulations removes disclosure of Non-Compete Clauses

Vide press release No. 44/2020-21, dated November 26th, 2020, the Commission announced that it has done away with disclosure requirements relating to non-compete covenants at the time of entities seeking approval for merger deals. Therefore, parties filing a notice for combinations before the CCI will not be required to give separate details regarding their non-compete restrictions, in the combination notice. However, this move increases the need for self-assessment of non-compete obligations by parties to avoid scrutiny for anti-competitive practices.

TEAM PROFILE



**L BADRI
NARAYANAN**

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



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



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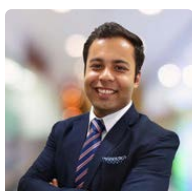
Neelambera advises on the full range of competition law matters including cartel enforcement, abuse of dominance, leniency applications, merger control, audits and compliance. She appears before the CCI, NCLAT and various High Courts. Neelambera has represented clients in high-profile, precedent setting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



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



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

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