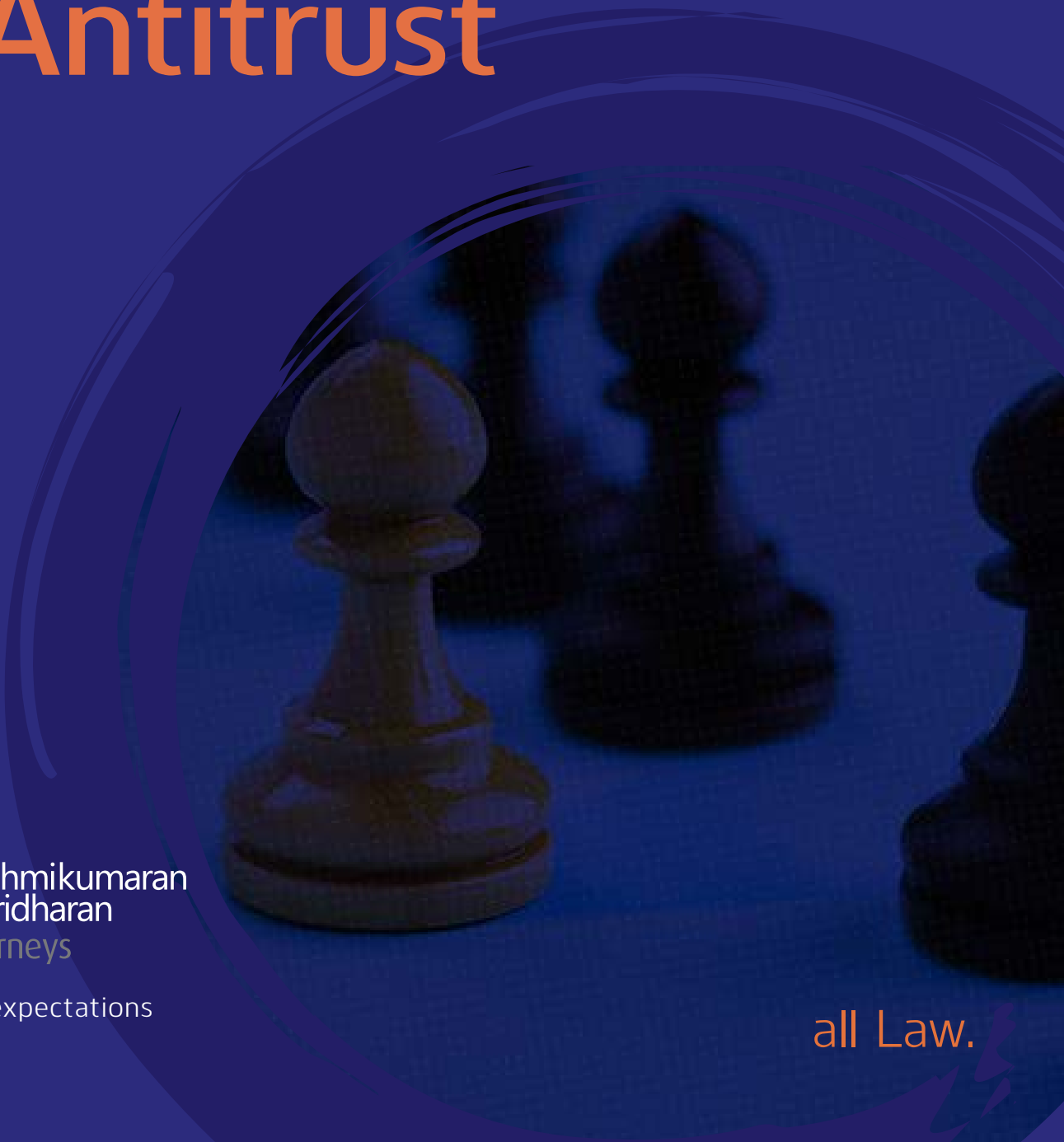
L&S UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

JUNE 2020

Competition & Antitrust



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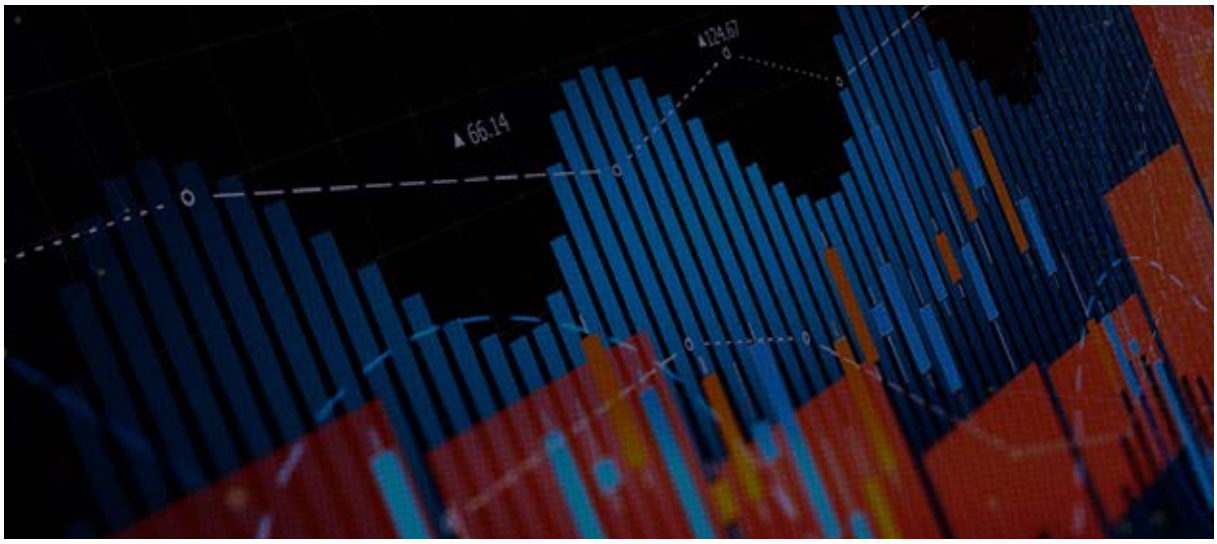
This newsletter is authored by the Competition & Antitrust team at Lakshmikumaran & Sridharan. It includes original articles and research pieces on competition law. It also reviews recent case laws and details regulatory as well as news updates on the subject.

ARTICLES



Regulatory Tussle: *Competition Commission of India* v. *Controller of Patents & Ors.*

While the *Competition Act, 2002* (**"Competition Act"**) is sector agnostic and the Competition Commission of India (**"CCI"**) enforces the provisions of the Competition Act across all industries, several sectors are also regulated by specific statutory bodies. On several occasions, the overlap in the scope and functioning of CCI and the various statutory regulators has been raised before various judicial authorities.

In the recent case of ***Monsanto Holdings Pvt. Ltd. & Ors.* v. *Competition Commission of India & Ors,*** the Delhi High Court has considered the issue of conflict between the jurisdiction of the Controller of Patents and the CCI.

In this article, Charanya Lakshmikumaran and Neelambera Sandeepan analyse the evolution of this interplay and find that the question of jurisdiction between the CCI and other statutory regulators is evolving on a case to case basis over time. Moreover, the scope of CCI's powers is also being determined in relation to the extent of authority of the sectoral regulators.

READ MORE

RATIO DECIDENDI

1. CCI finds cartel of four bearings manufacturers but foregoes levying penalty

KEY POINTS

The existence of an agreement between four industrial and automotive bearings manufacturers was established in relation to price revision as well as minimum percentage of price increase to be quoted to automotive and industrial Original Equipment Manufacturer (**"OEM"**) customers. The existence of the cartel was established by way of records of meetings wherein pricing strategies were discussed as also through the call data records of the personnel of the bearings' manufacturers. The CCI directed the parties to cease and desist from such coordinated actions without levying any penalty.

BRIEF FACTS

The CCI initiated proceedings *suo motu* based on application received on June 26, 2017 filed on behalf of FAG Bearings India Ltd. (now, Schaeffler India Ltd.). (**"Schaeffler"**) under Section 46 of the Competition Act read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (**"LPR"**). In the said application, it was disclosed that Schaeffler, along with four other companies, namely ABC Bearings Limited (now amalgamated with Timken India Limited) (**"Timken"**), National Engineering Industries Ltd. (**"NEI"**), SKF India Ltd. (**"SKF"**) and Tata Steel Ltd., Bearing Division (**"Tata Bearing"**), were involved in cartelisation in the domestic industrial and automotive bearings market from 2009 to 2014. The DG did not find any evidence of cartelisation against Timken and it was accordingly removed from the scope of the investigation.

OBSERVATIONS OF THE CCI

Whether the parties had engaged in cartelisation in the domestic industrial and automotive bearings market?

Held: Upon investigation by the DG, it was found that the representatives of four of the bearing manufacturers (Schaeffler, NEI, SKF and Tata Bearing, hereinafter referred to as **"OPs"**) had participated in meetings held on at least two occasions i.e., November 3, 2009 and January 31, 2011. In such meetings, they had shared price sensitive information and discussed several covert actions

regarding price revisions. The evidence in relation to such meetings were submitted by Schaeffler – the whistleblower who provided e-mails recording the discussions in such meetings.

Whether the meetings between the parties to discuss and share pricing information has caused appreciable adverse effect on competition ("AAEC")?

Held: In its investigation report, the DG had noted that the OPs controlled nearly 3/4th of the market for automotive and industrial bearings in India. From the record of the meetings it is evident that the OPs shared confidential and sensitive business information with a clear intent to collectively increase the price of bearings sold to OEMs. The OPs contended that since they had not relied upon this information exchange for their pricing decisions, no AAEC had been caused by their actions and therefore the presumption had been rebutted. While dismissing this argument, the CCI relied upon the decision of the Hon'ble Supreme Court of India in *Rajasthan Cylinders and Containers Ltd.* v. *Union of India and Others*, 2018 SCC OnLine SC 1718, and concluded that once it is established that an agreement falls within the ambit of Section 3(3) of the Competition Act, the same is presumed to have an AAEC within India. Thereafter, the burden shifts on the accused parties to rebut the presumption by leading adequate evidence. Since the parties were unable to rebut the presumption of AAEC, their cartel arrangement stood established.

JUDGEMENT

The CCI passed an order in terms of Section 27(a) of the Competition Act and directed the OPs and their respective officials liable for the conduct of the OPs to cease and desist such practices. However, given that the pricing discussions could not be corroborated with the subsequent price revisions and the OEMs interviewed by the DG also submitted that based on the price revisions effected by the bearings manufacturers they could not perceive cartel-like conduct on their part, the CCI did not impose any penalty on the parties involved since it was of the view that *"ends of justice would be met if the parties cease such cartel behaviour and desist from indulging in it in future".* [*In re: Cartelisation in Industrial and Automotive Bearings.* Suo Motu Case No. 05 of 2017, Judgement dated June 5, 2020]

2. NCLAT admits compensation application filed by Food Corporation of India against Excel Corp Care Ltd, UPL Ltd. and Sandhya Organic Chemicals (P) Ltd.

KEY POINTS

Limitation period for filing an application for compensation under Section 53N(1) of the Competition Act starts only after the CCI order attains finality upon determination of the final round of appeal, whether it be before the appellate tribunal or the Supreme Court.

BRIEF FACTS

Food Corporation of India (**"FCI"**) has filed a compensation application under Section 53N(1) of the Competition Act before National Company Law Appellate Tribunal (**"NCLAT"**) seeking compensation from Excel Corp Care Ltd., UPL Ltd. and Sandhya Organic Chemicals (P) Ltd. (**"Respondents"**) to the tune of INR 26,12,00,141 pursuant to the proceedings between the parties having been finally concluded by the Supreme Court. The Supreme Court had affirmed the finding of CCI that the respondents had violated Section 3(3) of the Competition Act and had rigged bids submitted in the tenders floated by the FCI for the procurement of aluminum phosphide tablets. As a result of the bid-rigging, FCI was forced to pay higher prices for the aluminum phosphide tablets and consequently suffered a loss. Following the final order passed by the Supreme Court on May 8, 2017, FCI filed the compensation application before NCLAT on July 11, 2019.

OBSERVATIONS OF THE NCLAT

What is the starting point for computing the limitation period for filing an application for compensation under Section 53N(1) of the Competition Act?

Held: The Competition Act does not provide for any period of limitation for the purpose of filing an application for compensation. It is a well settled principle in law that when no time limit is prescribed, the relevant proceedings ought to have been filed within a reasonable period of time and failure to do so results in serious prejudice and harm to the concerned party and adversely affects the ability of the party to defend itself. Based on the various judgments of the Supreme Court as well as Section 137 of the *Limitations Act, 1963* which applies to applications which have no limitation specified anywhere else, a reasonable

period of time is considered to be three years from the date of when the right to apply accrues. The information was filed before CCI by the FCI on February 4, 2011 and the CCI passed its final order under Section 27 of the Competition Act on April 23, 2012. The erstwhile Competition Appellate Tribunal (**"COMPAT"**) affirmed the order on October 29, 2013. Finally, the Supreme Court settled the issue by a final order dated May 8, 2017. While the proceedings were on-going before the Supreme Court, the earlier compensation application filed before the COMPAT was stayed.

It was contended by the Respondents that the period of limitation would begin from the date of the COMPAT order as applications for compensation under Section 53N(1) could only be filed pursuant to orders passed by either CCI or COMPAT and therefore, the application was barred by limitation since it had been filed after a reasonable period of three years since the COMPAT order had been passed on October 29, 2013.

In the considered opinion of NCLAT, the proceedings ultimately ended before the Supreme Court and it was only at this stage that the order had attained finality and limitation period for filing a compensation application would begin from the date of the final order of the Supreme Court, i.e. May 8, 2017. Therefore, FCI had filed its application for compensation within 2 years and 2 months from the date on which the CCI order attained finality before the Supreme Court.

JUDGEMENT

NCLAT held that the compensation application was filed within a reasonable period and consequently maintainable. [*Food Corporation of India* v. *Excel Corp Care Ltd. & Ors.*, Compensation Application (AT) No. 01 of 2019 in Competition Appeal (AT) No. 79-81 of 2012, Judgement dated June 3, 2020]

3. NCLAT dismisses appeal against allegations of price fixing by Uber/Ola on grounds of *locus standi*

KEY POINTS

The Competition Act specifically provides the modes by which the CCI may take cognizance of allegations of contravention of the Competition Act. An information concerning any allegations may be filed before CCI under Section 19(1)(a) of the Competition Act, only by a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices.

BRIEF FACTS

An information was filed before the CCI by Mr. Samir Agarwal, an independent law-practitioner, under Section 19(1)(a) of the Competition Act alleging *inter alia* that cab aggregator platforms viz. Uber and Ola facilitated collusion on the part of drivers through the use of their algorithm to fix prices which the drivers were bound to accept. The information was dismissed by CCI as there did not appear to be a *prima facie* case since there appeared to be neither any agreement, understanding or arrangement between the cab aggregators and their respective drivers nor any such understanding between the drivers *inter se* qua price fixing. CCI's order rejecting the information was challenged before the NCLAT, where the primary issue for consideration was whether the appellant/informant, who was an independent law-practitioner, had the *locus standi* to maintain an action against Uber/Ola regarding the alleged contraventions of the Competition Act.

OBSERVATIONS OF THE NCLAT

Whether a 'person' would mean any natural person irrespective of his being a consumer who has suffered invasion of his legal rights or a person whose legal rights have been or are likely to be jeopardised by the alleged anti-competitive agreement or abuse of dominant position?

Held: The Competition Act provides the mechanism for initiating an investigation: (a) *suo moto* – on its own motion; (b) reference by the Central/State government or a statutory body; and (c) information by any person, consumer or their association or trade association. According to the NCLAT, "any person" in Section 19(1) (a) of the Competition Act has necessarily to be construed as a reference to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices. Any other interpretation would make room for unscrupulous people to rake issues of anti-competitive

agreements or abuse of dominant position targeting some enterprises with oblique motives. In the instant case, the informant was an independent law-practitioner who had not placed anything on the record to show that he has suffered a legal injury at the hands of Ola and Uber as a consumer or as a member of any consumer or trade association. Therefore, there was no *locus standi* to maintain an action qua the alleged contravention of Competition Act.

Whether Uber and Ola were acting as a hub and spoke cartel engaged in price fixing amongst their drivers through their respective pricing algorithms?

Held: The informant had relied upon the findings in a class action suit in the United States titled "*Spencer Meyer* v. *Travis Kalanick*" [No. 16-2750 (2d Cir. 2017); 200 F. Supp. 3d 408] to assert that Uber and Ola were operating in a hub and spoke cartel with their drivers. The NCLAT disregarded the above case as its findings were inapplicable to the business models of Uber and Ola in India. as they did not result in restricting price competition among drivers to the detriment of riders.

JUDGEMENT

NCLAT dismissed the appeal since the appellant did not have any *locus standi* to initiate action under the Competition Act in the first place. Further, it confirmed that there was no infirmity in the *prima facie* findings of the CCI. [*Samir Agrawal* v. *Competition Commission of India & Ors.* Competition Appeal (AT) No. 11 of 2019, Judgement dated May 29, 2020]

MERGER CONTROL

FORM II PHASE II

1. *Acquisition of WABCO Holdings Inc. ("WABCO") by ZF Friedrichshafen AG ("ZF")*

ZF is a global technology company, headquartered in Germany which develops, manufactures and distributes products and systems for passenger vehicles (**"PVs"**), commercial vehicles (**"CVs"**), off highway vehicles (**"OHVs"**) and industrial technology. ZF is present in India by way of its various subsidiaries and joint ventures (**"JV"**), including Brakes India Private Limited (**"Brakes India"**), a JV with TVS group, engaged in manufacturing of braking products for PVs, CVs and OHVs. It also has a foundry and polymers product division.

WABCO is a public company, listed on the New York Stock Exchange with its registered office in Delaware, USA and its headquarters in Bern, Switzerland. It is primarily a global supplier of pneumatic braking control systems, technologies and services that improve safety, efficiency and connectivity of CVs including trucks, buses and trailers.

The proposed combination relates to the acquisition of 100% shareholding of WABCO by ZF. The combination was notified to the CCI in India as WABCO is present in India by way of its several subsidiaries and JVs, including WABCO India Limited, a listed company.

Based on the assessment, the CCI noted that there were actual and potential horizontal overlaps between WABCO and ZF (through Brakes India) in relation to (i) foundation brakes for CVs; (ii) pneumatic brake actuation / system for CVs; (iii) hydraulic brake auction for LCVs; and (iv) electronic braking system in the braking systems category as well as, (v) in the manufacture and supply of clutch boosters and clutch master cylinders – which are sub-components of passive hydraulic clutch actuation systems.

As a result, the CCI was of the view that the proposed combination, *prima facie*, appears to reduce / eliminate the incentives of WABCO and Brakes India to compete in terms of price, products, innovation and areas of operation in the above product categories in India. Further, in the clutch systems categories, the parties together represent around 3/4th of the supply. Thus, the proposed combination would not only result in perpetuating the substantial market position of the parties but would also reduce or eliminate the competitive pressure that would prevail in the absence of the proposed combination.

Based on the above, it was evident to the CCI that WABCO and Brakes India have independent capabilities to offer full systems in the said areas efficiently. However, the proposed combination is likely to result in a strong systems player in the said domains at the expense of two independent system suppliers in the near future. Such a position is likely to result in reduced degree of countervailing power on the part of OEMs, higher price, and barrier for new entrants. Accordingly, it was observed that, *prima facie*, the proposed combination is likely to result in AAEC.

●●●

In order to remedy the competition concerns arising out of the transaction, ZF proposed certain behavioural remedies which were not acceptable to the CCI. Ultimately, the transaction was conditionally approved with the following modification:

A commitment on the part of ZF to (i) transfer its complete shareholding interest of 49% in Brakes India to a purchaser approved by the CCI; (ii) not acquire any stake or the possibility of exercising an influence (by way of shareholding, change in the charter documents, or by exercising affirmative rights or right to appoint a director on the board of Brakes India or otherwise) over the whole or part of Brakes India for an agreed period of time; and (iii) to not enter into any new joint ventures with TVS within India relating to braking, clutch and steering products / services for commercial and off-highway vehicles, without the CCI's approval.

FORM II

2. *Joint Venture ("JV") between Mahindra & Mahindra ("M&M") and Ford Motor Corporation ("FMC")*

The CCI has approved the formation of a JV between M&M and FMC and the transfer of the automotive business of Ford India Private Limited (**"FIPL"**) to the JV. As per the business transfer agreement (**"BTA"**), the business of FIPL, other than certain assets relating to its powertrain business, will be transferred to Ardour Automotive Private Limited (**"AAPL"**), on a slump sale basis. Pursuant to the proposed combination, M&M would hold 51% of the shareholding in AAPL and the remaining 49% would be held by FMC through Ford Motor International Holdings Limited (**"FMIHL"**), a wholly owned subsidiary of FMC. M&M will integrate, manage and operate AAPL as its fourth business vertical i.e., in addition to its existing three verticals of automotive, farm equipment and agricultural businesses.

While both FIPL and M&M operate in the market for manufacture and supply of PVs and automobile components in India, the CCI noted that at the broader industry level, the incremental market share as a result of this combination is insignificant. Further, in the narrower market, M&M has negligible presence in the passenger car business and the overlap between the parties is limited to utility vehicles – the market for which has several formidable players and few entrants are also coming up as significant competitors. Further, the features of models offered by M&M that constitute a majority of its sales in utility vehicle segment do not appear to be close substitutes to that of the models offered by FMC. Taking into consideration all the above factors, the CCI approved the said combination by noting that the proposed combination is not likely to result in any AAEC.

FORM I

3. *Acquisition of shareholding in Hero Fincorp Limited ("HFL") by Otter Limited ("Otter") and Link Investment Trust ("Link")*

HFL, is a non-deposit taking non-banking financial company registered with the Reserve Bank of India (**"RBI"**). It is primarily engaged in the businesses of consumer finance and different types of commercial lending. Otter is an investment company incorporated in Mauritius and controlled by ChrysCapital VII, LLC (**"ChrysCapital"**) while Link is an affiliate of ChrysCapital.

Otter and Link are existing shareholders of HFL. However, HFL proposes to raise further capital from various investors, which is likely to reduce the extent of shareholding held by Otter and Link. Therefore, the proposed combination is envisaged to maintain their shareholding at a particular level and reduce the extent of dilution that would result otherwise. Further, Otter and Link will not acquire any additional rights pursuant to the increase in the shareholding. Given these factors, the proposed combination is not likely to raise any competition concerns and was approved by the CCI.

4. JV between Total S.A. ("Total") and Adani Green Energy Limited ("AGEL")

The proposed combination was notified to the CCI on the basis of a binding term sheet entered into between Total and AGEL. The combination envisages the transfer of several direct/indirect subsidiaries of AGEL engaged in the business of solar power generation, in India to the JV entity. Subsequent to the transfers,

Total directly or indirectly would acquire 50% of the equity share capital of the JV. Total and AGEL will thereafter enter into a JV agreement to *inter alia* regulate the management of JV as well govern the relationship amongst the Total, AGEL and the target companies. Moreover, the binding term sheet further contemplated the possibility of certain other solar power generation assets being transferred to the JV, at the option of Total. AGEL is in the process of acquiring such assets from third party(ies).

In India, Total and AGEL have an insignificant presence in the power generation sector both, on the basis of installed capacity as well as units of power generated. The combined market share of the parties in the narrower business segments for power generation from (i) renewable sources; and (ii) solar power, in India, would range between 0-5% and 5-10% respectively. In these business segments, the incremental market share as a result of the proposed combination would also be insignificant due to the limited presence of Total Group in power generation business in India. Accordingly, the proposed combination did not raise any competition concerns in India and was approved by the CCI.

5. Acquisition of shareholding in Apollo Tyres Limited ("Apollo") by Warburg Pincus LLC ("Warburg")

The proposed transaction related to the acquisition of approximately 9.93% of the post-issue share capital of Apollo Tyres by Emerald Sage Investment Ltd. (**"Emerald Sage"**) – a company incorporated in Mauritius and wholly owned by certain private equity funds managed by Warburg. Along with the shareholding, Emerald Sage would also acquire the rights to (i) appoint a non-executive director on the board of directors of Apollo (Investor Director) and two of its subsidiaries based outside India; and (ii) nominate the Investor Director on various board committees of Apollo.

Neither the Acquirer nor any of the portfolio companies of the Warburg Group is engaged in any business relating to automotive tyres, in India. Warburg Group has investments in logistic service providers, which may buy automotive tyres, however, in limited quantities. Based on the above factors, the proposed combination was not likely to raise any competition concern and received an approval from the CCI.

6. Acquisition of shareholding in Teesta Urja Limited ("TUL") by Greenko, Mauritius ("Greenko")

The CCI has approved an acquisition of approximately 35% of the issued and paid-up equity share capital of TUL by Greenko by way of secondary purchase

of shares held by existing shareholders of TUL.

Greenko is a wholly-owned subsidiary of Greenko Energy Holdings (**"GEH"**). Greenko has investments in a portfolio of companies engaged in power generation that operate solar, hydropower, wind, biomass, and gas plants in India. TUL is a special purpose vehicle incorporated for the purposes of implementation of 1200 megawatt hydro power project in Sikkim, India. The Government of Sikkim holds 60% shareholding in TUL through its company Sikkim Power Investment Corporation Limited.

The CCI observed that there are horizontal overlaps between TUL and the portfolio companies of the Greenko group at a broader level of total power generation in India and at a narrow level in (i) all sources of power generation except renewable energy sources; and (ii) hydro power generation.

Given the insignificant market share of the entities in the various segments as well as the insignificant incremental market share as a result of the proposed combination, CCI was of the view that there is unlikely to be an AAEC and accorded its approval of this acquisition

NEWS NUGGETS

CCI initiates study on telecom sector and mergers and acquisitions in the digital market

On June 8, 2020, the Chairman of CCI, Mr. Ashok Kumar Gupta, observed that the competition watchdog had initiated study reports on the telecom sector as well as on 'mergers and acquisitions in the digital market' in order to bolster its capacity to deal with unfair business practices in these two sectors. Mr. Gupta also said that the CCI was planning to undertake market studies in other sectors as well, starting with the pharmaceutical sector. The Indian Council for Research on International Economic Relations (**"ICRIER"**) had started the market study on the telecom sector at the behest of CCI and had already submitted its interim report.

European Union Competition Commission ("EU Commission") grants approval to Elanco Animal Health's USD 7.6 Billion deal for buying Bayer's veterinary drugs unit

The EU Commission, on June 8, 2020, approved Elanco Animal Health's proposal to buy Bayer's veterinary drugs unit. The USD 7.6 billion deal had been stalled initially on account of the competition concerns raised by the EU Commission about the deal, which have been resolved after Elanco pledged to sell either Elanco or Bayer's products or those in the pipeline, including licenses, contracts and brands, to treat otitis, anticoccidials, parasiticides for pets in Europe.
Once the deal is completed, it will create the world's second largest animal health company, in a sector which is expected to grow 5%-6% per year, driven by an increase in livestock farming and spending on pets.

Merger between Peugeot SA and Fiat Chrysler Automobile gets different reactions from CCI and EU Commission

Fiat Chrysler's planned USD 50 Billion merger with Peugeot SA, which seeks to create the world's fourth biggest car-maker, has met with varied reactions from market regulators in India and the EU.

While the CCI has approved the merger between the two automakers, who have a presence in the Indian market for the sale of PVs and powertrains, the EU

Commission, however, has raised concerns about the companies' share in small vans segment, and has indicated that concessions may be required from the parties in order to mitigate the potential competition concerns before an approval can be granted.

WhatsApp facing proceedings regarding contraventions of the Competition Act and RBI guidelines, before CCI and the Supreme Court respectively

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Reliance Jio – Facebook, parties file application for approval before CCI

Reliance Industries' owned Jio Platforms and social media giant Facebook through its newly incorporated indirect wholly-owned subsidiary proposes to acquire a 9.99% non-controlling stake in Jio Platforms. A notification in this regard has been filed with the CCI for its approval, citing that the USD 5.7 billion deal, which is the largest investment by a technology company worldwide, is "pro-competitive, benefits consumers, Kirana stores and other small and micro local Indian businesses and furthers the vision behind digital India." Simultaneously, Jio Platforms, WhatsApp Inc., and Reliance Retail Limited (**"RRL"**) are also proposing to enter into a separate commercial arrangement which would enable JioMart (a new RRL commerce marketplace which connects customers with Kirana stores and other small and micro local Indian businesses) to integrate certain services with WhatsApp.

TEAM PROFILE

L BADRI NARAYANAN

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

CHARANYA LAKSHMIKUMARAN

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

NEELAMBERA SANDEEPAN

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

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

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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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