

# 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



### Draft E-commerce Rules: Blurring the lines between Consumer Protection and Competition Law

The Union Government with an ambitious plan to regulate the e-commerce platforms has sought to bring substantive changes through the proposed Consumer Protection (E-Commerce) Rules, 2020. The draft rules which are apparently drafted in the name of the consumer welfare and therefore, to promote the objective of the Consumer Protection Act, 2019, in fact seems to be an *ex-ante* regulation determined to regulate e-commerce markets including certain business aspects which squarely fall within the mandate of the Competition Act, 2002 ("**Act**"). The proposed amendments also address some of the issues related to the e-commerce platforms pending investigation before the Competition Commission of India ("**CCI**") and therefore the draft rules have the potential to create regulatory confusion.

In this article, **Neelambara Sandeepan, (Joint Partner)** analyses the draft rules from the perspective of how they interact with the competition law regime in India and the impact of pre-judging contentious issues on consumer welfare which demands more considered approach

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# ***RATIO DECIDENDI***

## **1. Tamil Film Producers Council & the Telegu Film Chambers of Commerce found to be limiting and controlling the production, supply and provision of services in Tamil film industry**

### **KEY POINTS**

Once an information has been filed before the CCI, the role of the informant is confined to providing assistance as the CCI may require. The office of the Director General ("**DG**") conducts the investigation based on the regulations.

Trade associations have a role in furthering and promoting the cause of their respective members, yet such conduct cannot transgress into commercial matters whereby collective decisions are taken which result, directly or indirectly, in determination of price.

Calls for strike and boycott by trade associations are captured within the framework of competition law which prohibits anti-competitive agreements.

### **BRIEF FACTS**

An information was filed claiming confidentiality over the identity of the informant against Tamil Film Producers Council ("**TFPC**"), its office bearers, its executive committee and the Telegu Film Chambers of Commerce ("**TFCC**"), its office bearers and its executive committee, collectively ("**the Associations**"). While TFPC is an association of film producers, TFCC is an association of film producers, exhibitors, studio artists and distributors.

It is alleged that the Associations collectively boycotted the production and supply of films and refused to deal with stakeholders of the industry.

The informant alleged that TFCC spearheaded a protest in respect of high Virtual Print Fee ("**VPF**") charged by the Digital Cinema Service Providers/Digital Service Providers ("**DCSPs/ DSPs**") and called for an absolute industry wide ban on release of films. A Joint Action Committee ("**JAC**"), comprising TFCC and TFPC was constituted to resolve concerns which primarily related to VPF, and a letter was issued to DSPs in this regard which stipulated that in case issues were not resolved, the entire South Indian film industry would stop screening films.

However, even after closing negotiations with DSPs wherein they agreed to offer a discounted rate of up to 23% on VPF, TFPC and TFCC held on to their claim of abolition of VPF and pressurized producers to halt shooting, production and release of their films and to boycott DSPs, in derogation of their previous agreement on discounted VPF rates.

The informant alleged that TFPC used coercive practices to distort competition by introducing DSPs of its own choice and by coercing the theatre owners and operators to deal with these DSPs when there were valid contracts with existing DSPs.

## **OBSERVATIONS OF THE CCI**

### **What is the role of trade associations and the legitimate boundaries within which they may operate and promote the cause of their members?**

CCI noted that the members of trade associations typically are competitors, the varied activities that associations conduct may sometimes fall foul of competition law. The collective power by the trade association to boycott a competitor, a supplier, or a customer etc., may violate the Act and an agreement among competing sellers under the aegis of trade associations jointly setting the prices of their products or services is a violation of the Act and such price fixing related activities pose threat to trade association.

CCI opined that the role of trade associations is furthering and promoting the cause of their respective members, yet such conduct cannot transgress into commercial matters whereby collective decisions are taken which result, directly or indirectly, in determination of prices. If the impugned conduct limits or controls the value chain or results in sharing of market, such conducts are presumed to have appreciable adverse effect on competition.

### **Whether the conduct of TFCC and TFPC amounts to an anti-competitive agreement under the Act?**

CCI noted that evidence suggests that both TFPC and TFCC issued strike calls. TFPC and TFCC being associations, took decisions which limited and controlled the production and supply in the Tamil cinema market. Such action under the Competition Act are presumed to have appreciable adverse effect on competition unless rebutted by the opposite parties. Further, the Associations could not dislodge the presumption, and no pro-competitive effects resulted from the action of the Associations e.g., benefits to consumers, improvement in the distribution or production chain in any manner the Associations.

In relation to the allegation that, by forming a Release Regulation Committee which decided the release dates of movies the Associations controlled the supply of films, the CCI noted that regulating release dates ensures fair treatment to all producers and is an efficient way of allocating the theatres so as to exploit the full potential of their movie. Therefore, the actions of the committee are fair and do not raise competition concerns.



## CONCLUSION

The CCI in conclusion held the conduct of TFCC and TFPC in issuing boycott calls to their respective members, to be violative of provisions of Section 3(1) of the Act read with Section 3(3)(b). Accordingly, the Associations along with their respective office bearers were directed to cease and desist from indulging in such conduct in future. Considering the nature/ duration of and level of participation in the strike/ boycott call as also considering the submissions that movies continued to be released during the period of strike, on a holistic and comprehensive assessment, the CCI refrained from imposing any monetary penalty upon the associations with a firm warning that any such future conduct would be construed as a repeat offence and will attract aggravated consequences. (XYZ v. Tamil Film Producers Council and Ors., Case No. 07 of 2018; Order dated 22.06.2021)

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## 2. CCI found no anti-competitive agreement or cartel in the operations of five airlines

### KEY POINTS

Proceedings before the CCI are inquisitorial in nature and remedies issued are to the world at large (*in rem*). After bringing the alleged anti-competitive conduct to the notice of CCI, the role of the informant would be confined to such assistance, as may be required. He cannot be allowed to act as the *dominus litis* (master of the suit).

Widespread usage of algorithms in price determination by individual firms could pose possible anti-competitive effects by making it easier for firms to achieve and sustain collusion without any formal agreement or human interaction.

### BRIEF FACTS

The information was filed by Ms. Shikha Roy ("**informant**") alleging that steep and simultaneous fluctuation in air ticket prices, was a result of cartelization by Jet Airways (India) Limited ("**Jet**"), SpiceJet Limited ("**Spice Jet**") and InterGlobe Aviation Limited ("**Indigo**"), collectively referred to as ("**Airlines**"). The Airlines are domestic airlines that provide air transportation services to passengers in India.

The informant alleged that during the Jat agitation in February 2016, the airline tickets became very expensive on Delhi-Chandigarh and Delhi-Amritsar routes.

The CCI reviewed certain data collected from the Airlines on prices and observed that there was a price increase on certain routes, during the jat agitation for a short time frame. Further, it noted that with the use of algorithms, a high possibility of collusion exists and warrants an investigation by the DG with respect to alleged cartelization. The DG in its report found no contravention.

### OBSERVATIONS OF THE CCI

#### **What is constitutes an agreement under the Competition Act and how is its existence determined?**

CCI noted that existence of an 'agreement' is sine qua non before ascertaining whether the same is anti-competitive or not. The definition of 'agreement'



requires inter alia any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition is a wide one. The understanding may be tacit and the definition even covers situations where the parties act on the basis of a nod or a wink. There is rarely any direct evidence of action in concert and in such a situation the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement. CCI has to find sufficiency of evidence on the basis of benchmark of preponderance of probabilities.

### **Whether the Airlines entered into an anti-competitive agreement to cartelize?**

Upon investigation, no evidence (including e-mails) was found to show any exchange of information among the Airlines to establish collusion during or after the period of jat agitation, neither was there any other information that would show concerted behavior among the Airlines.

Further, as per the report of the DG, there was no uniformity in individual fare buckets, total revenue, average ticket price per ticket, peak demand being experienced by Airlines in different sectors and deployment of scheduled and additional flights to indicate any form of arrangement/agreement among the Airlines and further no price parallelism or identical pricing was found.

CCI also noted that widespread usage of algorithms in price determination by individual firms could pose possible anti-competitive effects by making it easier for firms to achieve and sustain collusion without any formal agreement or human interaction. However, the Airlines were using different softwares for pricing in different fare buckets, which are custom-made for the needs of a particular airline. Therefore, there was no evidence that could establish cartel amongst the Airlines during the period of the jat agitation.



### **CONCLUSION**

The CCI held that there was no evidence to establish the existence of a cartel among the Airlines and hence no contravention of the provisions of Section 3(1) of the Act read with Section 3(3) by any of the Airlines. (Ms. Shikha Roy v. Jet Airways and Ors., Case No. 32 of 2016; Order dated 03.06.2021)

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### 3. CCI opens an investigation against Amateur Baseball Federation of India for allegedly abusing its dominance and limiting the provision of services.

#### KEY POINTS

The practice of restricting sports clubs/associations and their respective players from participating in tournaments organized by other bodies results in denial of market access to other such associations and results in limiting and restricting the provision of services, hence amounting to abuse of dominance.

The thrust of the definition of the term 'enterprise' is on the economic nature of the activities discharged by the entities concerned. It is immaterial whether such economic activities were undertaken for profit making/ commercial purpose or for philanthropic purpose.

#### BRIEF FACTS

The information was filed by Confederation of Professional Baseball Softball Clubs ("**CPBSC**") against Amateur Baseball Federation of India ("**ABFI**") alleging that it denied access to utilize the services of players and also abused its dominance by placing restrictions on players participating in events not recognized by ABFI.

CPBSC further alleged that the AFBI prohibited the state associations to deal with unrecognized bodies and threatened disciplinary action by issuing a letter and organized a tournament during the same time period as of CPBSC's tournament, in order to sabotage the latter's tournament.

AFBI in its response to the information stated that it is not an enterprise within the meaning of the Competition Act and is not in a dominant position. Further, the letter being complained of was addressed generally and not to the prejudice of any specific organization.

#### OBSERVATIONS OF THE CCI

##### **Whether ABFI is an enterprise within the meaning of the Act?**

CCI takes note of the definition of 'enterprise' which includes provision of services and states that the definition is very wide in its amplitude. It further

states that, 'service' is defined in the Act as service of any description which is made available to potential users. Based on the facts in the information, it is evident that ABFI inter alia is involved in controlling the provision of services which is manifested from its letter issued to state associations, warning players not to participate in tournaments organized by unrecognized bodies. The thrust of the definition of 'enterprise' is on the economic nature of the activities discharged by the entities concerned. It is immaterial whether such economic activities were undertaken for profit making/ commercial purpose or for philanthropic purpose. Hence, provision of services by ABFI whether for profit or not is an activity covered under the definition of enterprise. Thus, ABFI is an 'enterprise' and is therefore prohibited from abusing its dominant position.

### **Whether ABFI is dominant and whether it has abused such dominance?**

CCI held that *prima facie*, the relevant market for assessment of dominance appears to be 'market for organization of baseball leagues/events/ tournaments in India'.

Since ABFI enjoys an apex position in the baseball ecosystem coupled with linkages/ affiliations with continental and international organizations, it is apparent that ABFI plays a decisive role in the governance of this sport discipline in the country. This makes it dominant in the relevant market.

CCI also noted that request by ABFI to its affiliated State Baseball Associations to not allow their respective players to participate in any tournaments organized by unrecognized bodies, makes it a case of denial of market access to other federations and also restricts the provision of services and market thereof. Further, warning of strict action against players who participate in the tournaments organized by bodies which are not 'recognized' by ABFI amounts to imposing an unfair condition upon the player.



### **CONCLUSION:**

The CCI was of *the prima facie* opinion that ABFI was in contravention of the provisions of Section 4 of the Act. Additionally, it was stated that though CPBSC has alleged contravention of the provisions of Section 4 of the Act only, the DG may examine the impugned conduct under section 3 as well, since letter issued by ABFI *prima facie* seems to limit or control provision of services, and thereby captured under Section 3(1) read with Section 3(3) of the Act. (Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India, Case No. 03 of 2021; Order dated 03.06.2021)

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## 4. CCI opens an investigation against Google for alleged abusive conduct in the market for smart TVs

### KEY POINTS

Imposing restrictive conditions in contracts by virtue of enjoying a dominant position may result into abuse of dominance.

### BRIEF FACTS

The information is filed by Mr. Kshitiz Arya and Mr. Purushottam Anand, collectively, ("**informants**") alleging inter alia imposition of restrictive obligations and abuse of dominant position against Google LLC and Google India Private Limited, collectively ("**Google**"), Xiaomi Technology India Pvt. Ltd. & TCL India Holdings Pvt. Ltd.

The informants alleged that Google has imposed several restrictions upon smart television ("**smart TV**") and smart mobile device Original Equipment Manufacturers ("**OEMs**"), by virtue of the agreements entered into with them which tantamount to abuse of dominance. These restrictions include, (i) bundling of two different products together i.e., Google's play store being pre-installed in all smart TVs that opt for android TV (Operating System ("**OS**") developed by Google); (ii) agreements called Android Compatibility Commitments ("**ACC**") preventing OEMs from manufacturing/ distributing/ selling any other smart TV or mobile devices which operate on a competing forked android OS; (iii) non-availability of play store to any Television ("**TV**") operating on a forked android; restricting OEMs by way of ACC from developing their own OS based on forked android for TVs; and (iv) restricting OEMs from exercising freedom over their whole device portfolio, and not just on devices on which the play store or android TV OS is pre-installed. Thus, this results in denial of market access, creation of entry barriers and limits further development of forked android-based OS.

### OBSERVATIONS OF THE CCI

#### What is the relevant market and whether Google is dominant in it?

CCI stated that from the OEM's perspective, only those OS which are accessible through licensing will form part of the relevant market and thus for a *prima facie*

assessment, it will be "market for licensable smart TV device operating systems in India".

Due to lack of data on market share of licensable smart TV OS, CCI used the data on "market share of smart TV OEMs", as it gave a reasonable approximation of market share of android TV OS in the relevant market. Since on a preliminary estimation, market share of OEMs using android TV OS was found to be 90%, it gave a reasonable approximation of market power enjoyed by different smart TV OS providers. CCI also noted that android TV was used by 7 out of top 10 smart TV OEMs. Further, the profound network effects operating in the relevant markets which attract more and more users, app developers and OEMs, results in entry barriers for the competitors of Google. Thus, CCI observed that these parameters are sufficient to indicate the extent of market power enjoyed by Google and accordingly was of the *prima facie* view that Google is dominant in the relevant market for licensable smart TV device OS in India.

### **Whether Google by virtue of its conduct has *prima facie* abused its dominant position?**

CCI noted that Google offers an optional Television App Distribution Agreement ("**TADA**"), which is necessary to obtain right to use Google's proprietary apps like play store etc. Further, TADA requires OEMs to enter into an ACC which inter alia requires all devices of the OEM to be based on android.

CCI formed a *prima facie* opinion that Google's app store, i.e., play store is a 'must have' app, in the absence of which the marketability of android devices may get restricted. Since, the license to pre-install play store is dependent on execution of TADA and ACC between Google and OEMs, therefore, these agreements become de facto compulsory.

It was observed that by making pre-installation of Google's proprietary apps conditional upon signing of ACC, Google has reduced the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of android, thereby limiting technical or scientific development relating to goods or services to the prejudice of consumers. Further, preventing OEMs from manufacturing or selling etc., other device on competing forked android eventually denied access to developers of forked android.

CCI noted that by imposing obligations which appear to be applicable across all the devices manufactured by the OEMs, Google made conclusion of contracts subject to acceptance by other parties of supplementary obligations which, have no connection with the subject of such contracts.

Finally, the CCI *prima facie* noted that mandatory preinstallation of all the Google applications under TADA amounts to imposition of unfair condition on the smart TV device manufacturers and amounts to *prima facie* leveraging of Google's dominance in play store to protect the relevant markets such as online video hosting services youtube.



## CONCLUSION

CCI found a *prima facie* case of violation of provisions of Section 4 and passed an order for investigation into the matter under section 26(1) of the Act. CCI held that no separate directions are required to be passed in respect of anti-competitive impact resulting from 'refusal to deal' and 'exclusive supply agreement' under section 3(4) read with Section 3(1) of the Act, as alleged by the Informants and the same may be looked into by the DG in his investigation.(Kshitiz Arya and Anr. v. Google LLC and Ors., Case No. 19 of 2020, Order dated 22.06.2021)

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## 5. CCI absolves Volleyball Federation of India and Baseline Ventures Pvt. Ltd. of abuse of dominant position and anti-competitive agreements.

### KEY POINTS

The competition issues in the sports sector emerge on account of the inherent conflict of interest that arises when the sports regulator dons the mantle of a business entity. Such a role is neither prohibited, nor can be frowned upon under the provisions of the competition law, if the regulatory powers are not acted upon to stifle competition that may be existent or can likely emerge, having regard to the nature of the sport.

### BRIEF FACTS

The information was filed by Mr. Shravan Yadav Mr. Amit Singh Tanvar and Mr. Lavmeet Katariya, collectively referred to as the ("**Informants**") alleging abuse of dominant position and existence of anti-competitive agreements against (i) Volleyball Federation of India ("**VFI**"), and (ii) Baseline Ventures (India) Private Limited ("**BVPL**"). VFI is a National Sports Federation for volleyball in India. It is the exclusive holder of all the rights pertaining to volleyball including commercials associated with it. BVPL is engaged in the business of providing consultancy services, arranging sponsorships, marketing brands and sports events, brand licensing, including providing consultancy for sports management, celebrity endorsements and management, etc.

VFI decided to organize Volleyball League ("**League**") in India similar to Indian Premier League pursuant to which it entered into an exclusive agreement ("**Impugned Agreement**") with BVPL granting it exclusive rights for organizing a volleyball league for men, women and beach volleyball in India for the next 10 years.

In the information filed, it was alleged that VFI restricted the market of organizing volleyball leagues for all other persons/enterprises except for BVPL for a period of ten years at any level in India or abroad. It was further alleged that VFI has imposed restriction on the volleyball players by (i) restricting players from playing in any other event similar to the format of the League during the term of the agreement i.e., 10 years; (ii) restricting players from participating in any national or international tournament if it coincides with the League (iii) restricting any other Indian volleyball club to participate in the Asian championship except the winning team of the League.

Upon consideration of information, the CCI was of the view that there existed a prima facie case of contravention of the provisions of the Act by VFI. Accordingly, the CCI passed an order directing the DG to cause an investigation into the matter. Upon investigation DG found that by virtue of the Impugned Agreement, market access was denied to the other competitors of BVPL. DG further found that VFI abused its dominant position through incorporating anti-competitive clauses in the Impugned Agreement. The same resulted in restricting players and foreclosure of the market to prospective organizers for the organization of the volleyball league for the term of the Impugned Agreement.

## **OBSERVATIONS OF THE CCI**

### **Whether VFI is an enterprise?**

CCI noted that VFI, in terms of its Constitution and Byelaws, has been established to organize national and international championships. Organization of volleyball events/ tournaments is, *inter-alia*, a revenue generating activity and falls within the ambit of service, as covered by the definition of 'enterprise' under the Act. Therefore, the fact that VFI has a mandate to undertake the economic activity of organizing volleyball events and tournaments under its Constitution within and outside India, makes it an enterprise under the Act.

### **Whether VFI holds a dominant position in the relevant market?**

VFI is the sole authority at the national level which governs the sport of volleyball in India. Regulatory powers coupled with right to carry out economic activity (such as organizing professional leagues) to the exclusion of any other body in the field grants virtual monopoly rights to VFI. Therefore, it enjoys a dominant position in both the relevant markets i.e., "market for organization of professional volleyball tournaments/events in India" and "market for services of volleyball players in India".

### **Whether VFI has abused its dominant position in the said relevant market(s)?**

The CCI noted that the exclusivity and restrictions as alleged by the informants against VFI were purely with the purpose of promotion and development of an underdeveloped and less popular game like volleyball in the country and without affording such a commitment, it would have been difficult to ensure professional agencies like BVPL on board.



Further, the CCI found nothing on record that would have indicate that players of volleyball were denied any effective opportunity to participate either in the Volleyball League or any other tournament of volleyball, held in the country or abroad during the relevant period. There was also nothing on record to indicate that formation of any other league for volleyball or any tournament during the period was thwarted either directly or indirectly by VFI. Therefore, the CCI noted that no case of abuse of dominant position and anti-competitive agreements can be found against VFI and BVPL.



## CONCLUSION

The CCI found no contravention against VFI or BVPL under the provisions of Sections 3 and 4 of the Act. (Shravan Yadav and Ors. v. Volleyball Federation of India and Anr., Case No. 01 of 2019; Order dated 03.06.2021)

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# **MERGER CONTROL**

## **1. Acquisition of majority shareholding in Gangavaram Port Ltd. by Adani Ports and Special Economic Zones Ltd.**

Adani Ports and Special Economic Zones Ltd. ("**APSEZ/Acquirer**") is a private sector port operator, currently operating in six Indian states through 10 ports. It provides various marine services such as pilotage & towage of vessels, berthing and de-berthing; cargo handling services; value added services such as bagging and packaging, etc. Adani Logistics Limited ("**ALL**"), a subsidiary of APSEZ, manages its complete logistics chain. Along with marine services, the APSEZ also provides dredging and reclamation solutions primarily for port and harbour construction and currently operates a fleet of 23 dredgers in India.

Gangavaram Port Ltd. ("**GPL/Target**") provides cargo handling, marine services and other activities within its port premises. It is engaged to own, develop and operate the deep-water port at Gangavaram, Andhra Pradesh, pursuant to a concession agreement to Build-Own-Operate-Transfer ("**BOOT**") with the Government of Andhra Pradesh for a period of thirty years from the date of commercial operations ("**COD**").

The proposed combination relates to the acquisition of 89.6% of equity shareholding of the GPL by the APSEZ, collectively referred to as ("**Parties**"). Further, APSEZ also proposes to acquire addition shareholding (58.1%) in GPL from DVS Raju and family.

With regards to the horizontal overlaps, CCI noted that the effect of the combination is to be seen on the common areas where Parties to the combination provide port services and observed that:

- i. GPL's port at Gangavaram and APSEZ's two ports at Krishnapatnam and Dharma are separated by 600 kms. Therefore, the Parties did not appear to be close competitors. However, according to the extent of road connectivity the Parties appeared to compete in the contiguous districts/regions of North-Odisha, North-Chhattisgarh and South-Jharkhand.
- ii. APSEZ's two ports at Krishnapatnam and Dharma compete with GPL for supply of dry bulk cargo and coal to serve some regions of Chhattisgarh.

However, the CCI observed that the volumes of cargo handled by the Parties were not significant enough to cause any competition concern in the market. CCI also observed that the coal trading activities, logistics and

the dredging and reclamation services of APSEZ exhibit vertical overlaps with the port related activities of GPL. However, the extent of overlap in the upstream businesses of the Parties do not appear to have any appreciable adverse effects on competition. Further, there are also other players present in the relevant upstream businesses having considerable operations. CCI decided to leave the precise delineation of the relevant market open as it was observed that the proposed combination is not likely to cause an appreciable adverse effect on competition in any of the plausible alternative relevant markets.

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

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## 2. Acquisition of WABCO Holdings Inc. by ZF Friedrichshafen AG

ZF Friedrichshafen AG ("**ZF/Acquirer**") is a global technology company headquartered in Germany. It develops, manufactures and distributes products and systems for passenger vehicles, commercial vehicles, off-highway vehicles and industrial technology. Its products include in particular gearboxes, steering, axles, clutches, dampers, chassis components and systems, active and passive safety technology for automotive applications and other associated components.

WABCO Holdings Inc. ("**WABCO/Target**"), with its registered office in Delaware (USA) and its headquarters in Bern, Switzerland is a global supplier of primarily pneumatic braking control systems, technologies and services that improve safety, efficiency and connectivity of commercial vehicles including trucks, buses and trailers. Its products and services include integrated braking systems and stability control, air suspension systems, transmission automation controls as well as aerodynamics, and telematics. WABCO also supplies fleet operators with fleet management solutions, diagnostic tools, training and other expert services.

The proposed combination relates to ZF acquiring 100% shares in WABCO via its indirect wholly owned subsidiary Verona Merger Sub Corp, a Delaware corporation, which will result in the acquisition of sole control over WABCO by ZF. ZF and WABCO are collectively referred to as ("**Parties**").

The CCI approved the proposed combination in its order dated 14.02.2020 ("**Order**") subject to certain commitments which were necessary to alleviate the concerns arising from horizontal and vertical overlaps in the manufacture and sale of automotive components forming break, steering and clutch system. The Order required ZF to divest 49% of its indirect shareholding in Brakes India Pvt. Ltd. ("**Brakes India**") within a period or such extended period as may be agreed by the CCI ("**First Divestiture Period/FDP**"). The Order further required ZF to submit a fully documented and reasoned proposal for the divestment ("**Proposal**").

ZF requested the CCI to extend the time period for submission of transaction documents of the divestment and therefore also extending the FDP. While CCI granted time to file transaction documents, it however, refused to extend the FDP via order dated 02.12.2020. Subsequently, CCI reconsidered ZF's letters to extend the FDP and via its letter dated 18.12.2020 directed ZF to submit all details, including the chronology of events, action plan, if any, devised to complete the Brakes India divestment within the FDP. Further, ZF was directed to furnish all steps and measures taken by it to complete Brakes India divestment since the approval of the combination.

A writ petition was filed before the Delhi High Court in the said matter challenging CCI's order dated 02.12.2020 ("**Impugned Order**"). ZF submitted that the impugned order had extended the time for submitting transaction documents till 29.12.2020 and therefore it is apprehended that while the decision is taken on the letter dated 18.12.2020, CCI might take coercive action to enforce this condition. The Hon'ble Court directed that upon the submission of documents by ZF, the CCI would consider the same in accordance with law and in the meantime, no coercive action could be taken against ZF for non-submission of transaction documents in accordance with the impugned order. Post the submissions made by ZF, the CCI gave the opportunity of oral hearing to ZF.

After the oral hearing the CCI made the following observations:

- i. As to ZF's contention that the CCI had summarily rejected its plea to extend the FDP, the CCI stated that there was no visibility as to the end of the divestiture process to grant a 6-month extension of the FDP, and there was still time for the FDP to end.
- ii. ZF submitted that the 'ring-fencing' and 'hold-separate' obligations imposed by the CCI as transitory arrangements till the time disinvestment takes place would ensure the independence of Brakes India and the same was also recognized by the CCI. To this the CCI stated that hold-separate arrangement is only a necessary requirement for facilitating the simultaneous process of consummation of the combination and the divestment of Brake India but not a sufficient one to restore the competitive landscape in the market. The CCI further noted that more the delay, higher the risk of reducing the competitiveness and economic viability of Brakes India, which are the basic objectives of ordering the remedies.
- iii. Regarding submissions about delay caused by COVID-19, the CCI noted that the Parties consummated the merger during the peak of the COVID-19 period in May 2020. Therefore, it found no explanation forthcoming in their submissions for not having negotiations with the joint venture partner of Brakes India during the same period as per the agreement between them.
- iv. In relation to ZF's argument about weighing the benefits and harms of granting an extension to ZF, and likely commercial losses to ZF, the CCI observed that by holding on to the shares in a competing entity, which ZF must divest at the earliest, the ability of the competing entity to operate autonomously and effectively compete is stifled. It stated that the divestment is necessary for protection of the dispersed interest of consumers.

However, the CCI also noted that certain steps had been taken by ZF which showed presence of some progress on the divestment, on the basis of which the CCI felt it appropriate to grant extension to ZF beyond the FDP. The CCI also stated that it would review interim progress before deciding further course of action.

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### 3. Acquisition of majority shareholding by Tata Digital Ltd. in BigBasket

Tata Digital Limited ("**TDL/Acquirer**") is a wholly owned subsidiary of Tata Sons Private Limited ("**Tata Sons**"), which is the ultimate holding company of the entities belonging to the Tata group. TDL is engaged in the business of providing technology services related to identity & access management, loyalty program, offers and payments.

Supermarket Groceries Pvt. Ltd. ("**SGS/Target 1**") is a company engaged in online B2B sales of food and grocery, household products and personal and beauty care products ("**Relevant Products**") in India through bigbasket.com. SGS owns the domain registration for the website named "bigbasket.com" and the brand name "bigbasket".

Innovative Retail Concepts Pvt. Ltd. ("**IRC/Target 2**") is engaged in online B2C sales of the relevant products in India and operates the website www.bigbasket.com and related mobile applications. The brand "bigbasket" and the domain name www.bigbasket.com have been licensed to IRC by SGS pursuant to a license agreement.

Tata Sons has presence in multiple businesses ranging from information technology services, steel manufacturing, automotive, power, consumer products, retail, aviation, infrastructure & real estate, defence, hospitality, direct to home, non-banking financial company, insurance etc.

The proposed combination relates to acquisition of 64.3% of the total share capital of SGS by TDL and SGS subsequently acquiring sole control over IRC. TDL, SGS and IRC are collectively referred to as ("**Parties**").

With respect to horizontal overlaps, it was submitted that Trent Ltd., an entity belonging to Tata Sons is also engaged in the business of B2B and B2C sales of relevant products in India. Similarly, Tata Consumer Products Limited ("**TCPL**") and Tata Smartfoods Ltd. ("**TSL**") belonging to Tata Sons are engaged in manufacturing and sale of certain packaged good and grocery products. Also, IRC is engaged in online B2C sales in certain specific cities in India and Trent Ltd. is present in both online and offline B2C sales in certain specific cities in India.

With regards to vertical relationships between the Parties, it was submitted that certain supply arrangements exist between Tata Sons entities and SGS involving procurement by SGS of products in the food and grocery segment from certain Tata Sons Group entities. Thus, indicating a relationship between the entities with

the Tata group entities operating at the upstream level i.e., manufacture and sale of food and grocery products and SGS being present at a downstream level i.e., market for B2B sales.

The CCI decided to leave the exact delineation of the relevant market open as the material available on record did not suggest that the proposed combination was likely to cause an appreciable adverse effect on competition in India. It noted that the combined as well as the incremental market shares of the Parties in each of the relevant markets i.e., B2B and B2C markets are not significant to raise any competition concern. It was also noted that there were significant competitive restraints due to existence of a large number of players in the market for B2B and B2C sales. Similar observations were made regarding the vertical relationships between the Parties to the effect that no competition foreclosure concerns were arising at any level and a similar point of reasoning was used.

The Parties also proposed to enter into a business service agreement between TDL and IRC where TDL would offer its digital payments services to IRC. The CCI noted that the digital payments service was started very recently and there is an existence of other significant players in the upstream market of digital payments. The CCI also noted that in the downstream market IRC has a market share of less than 1%, and therefore no competition concern would arise.

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

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#### 4. Merger of NAM Estates Private Limited, Embassy One Commercial Property Developments Private Limited and Indiabulls Real Estate Limited and Others.

NAM Estates ("**NAM**") is engaged in the business of developing commercial and residential real estate and other activities. Embassy One Commercial Property Developments Private Limited ("**Embassy One**") is engaged in the business of providing common area maintenance services for construction and development of residential as well as commercial real estate projects. Both NAM and Embassy One are part of the Embassy group, which is a real estate development group. Its operations include leasing office space and developing integrated office parks, including certain commercial space of Embassy Office Parks, an equal joint venture between Embassy group and Blackstone Group. Embassy Office Parks has now been transferred to Embassy Office Parks Real Estate Investment Trust ("**Embassy REIT**")

Indiabulls Real Estate Limited ("**Indiabulls**") is involved in the business of real estate project advisory, construction and development of real estate projects, real estate rental and other services that are related, and ancillary, to the real estate sector. It is involved in both commercial and residential real estate development.

The proposed combination relates to the merger of NAM and Embassy One with **Indiabulls**, hereinafter referred to as ("**Parties**"). Further, before the merger (i) Embassy group will be reorganized and assets/securities, interests or investments of some entities will be transferred to NAM; and (ii) Certain third-party investors and Embassy Property Developments Private Limited ("**EPDPL**"), a part of Embassy group, would swap their current shareholding held in certain entities in exchange for shares in NAM / Embassy One.

Parties submitted that since the Blackstone group and Embassy REIT are not getting transferred to the resultant entity – post merger, the market shares of Blackstone group and Embassy REIT should not be aggregated while performing the competition assessment. To this end, the CCI observed that Blackstone group would have more than 10% shares, affirmative voting rights and right to be on the board of directors of the resultant entity, and would therefore, exercise influence over the entity. The CCI therefore included the Blackstone group in the competition assessment. With respect to Embassy REIT, the CCI noted that according to the SEBI (Real Estate Investment Trusts) Regulations, 2014, a manager shall undertake management of the REIT assets including lease management and therefore is likely to have the ability to significantly influence the policies and practices relating to lease of assets of REIT. CCI observed that Embassy Office Parks Management Services Private Limited ("**EOPMSPL** /

**Manager**") is the manager of Embassy REIT. Significant share capital of the Manager is held by EPDPL and its remaining share capital is held by entities forming part of the Blackstone group, which is why it was necessary to make the Embassy REIT a part of the assessment as well.

The CCI also noted that details regarding the acquisition of certain real estate businesses of the Prestige group by Blackstone group were not furnished before the CCI. The reason given was that the transaction had not been consummated. In this regard the CCI observed that combination assessment is *ex-ante* in nature and therefore, it is imperative to look into the future impact on competition caused by such transactions.

The CCI noted that the proposed combination exhibited horizontal overlaps in segments of (i) Commercial Real Estate in overlapping cities i.e. Mumbai Metropolitan Region and National Capital Region; and (ii) Residential Real Estate in the overlapping cities i.e. Bangalore and Mumbai Metropolitan Region. However, it did not precisely delineate the relevant market as it believed that the proposed combination would not cause appreciable adverse effect on competition.

In the Commercial segment, the CCI noted that Indiabulls did not have any Commercial project in Bangalore, whereas Embassy group, Blackstone, and Embassy REIT do have a presence in the Commercial segment, particularly office space, in Bangalore with a combined market share of 20-25%. The CCI also noted that post combination, the Embassy group planned to transfer five of its Commercial projects to the resultant entity. However, it was also seen that the volume of the projects in the medium term wasn't significant. Based on the above it was concluded that the proposed combination would not raise competition concerns in Bangalore as well as the other overlapping cities of Delhi NCR and Mumbai. The same conclusion was with respect to the Residential segment in the overlapping cities of Bangalore and Mumbai.

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

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# NEWS NUGGETS

## 1. Union cabinet approves memorandum of cooperation between CCI and Japan Fair Trade Commission (“JFTC”)

The cabinet has approved the Memorandum of Cooperation (“**MoC**”) between the CCI and JFTC to promote and strengthen cooperation between India and Japan in the matter of competition law and policy. The same is expected to improve CCI’s efficiency by enabling it to learn from the experiences of its counterpart competition agency in Japan. The MoC will also help improve enforcement of the Act by CCI.

## 2. Restaurant industry body seeks CCI intervention into anti-competitive practices by Swiggy, Zomato

National Restaurants Association of India (“**NRAI**”) has alleged anti-competitive practices by food aggregators Swiggy and Zomato and sought a detailed probe by the CCI. The primary issues highlighted by NRAI are bundling of services, deep discounting, data masking, price parity agreements, exclusivity of listed restaurants, charging exorbitant commission and violation of platform neutrality by the food aggregators. NRAI stated that during the pandemic, the magnitude of anti-competitive practices by Zomato and Swiggy had increased manifold and despite discussions no amicable solution could be reached.

## 3. Joe Biden’s executive order to crack down on big tech and promote competition amongst the companies

United States’ president, Joe Biden has signed an executive order on 09.07.2021 targeting anti-competitive practices, particularly among big tech companies. The order includes 72 actions and suggestions meant to promptly tackle some of the most pressing competition problems across the US economy. The order announces an administrative policy of greater scrutiny of mergers, especially by dominant internet platforms. It also deals with big tech platforms gathering too much personal information and unfairly competing with small businesses. The order encourages the United States Federal Trade Commission (“**FTC**”) to establish rules on surveillance and the accumulation of data and rules barring unfair methods of competition on internet marketplaces.

# REGULATORY UPDATES

## **CCI issues practice direction to allow signing of pleadings by any employee authorized by the board.**

As per the practice direction by CCI dated 01.07.2021, regulation 11 of the CCI (General) Regulations, 2009 provides the mechanism for signing of pleadings including that, pleadings shall be signed by the managing director and in his absence, any director, duly authorized by the board in case of a company. CCI noted the difficulties which may be faced by the parties representing companies in getting the pleadings signed by the managing director/director and hence, directed that in addition to the existing modes of signing of pleadings, the parties shall be at liberty to sign the pleadings through any of their employees, who has been authorized by the board or any other equivalent body to issue such authorizations on behalf of the concerned entity and this arrangement shall hold for all entities irrespective of their constitution i.e. be it company, partnership firm, limited liability partnership etc. It is, however, made clear that the authorized representative must be an employee of the entity concerned and not the specified professionals (including the counsel) in terms of regulation 35 of the General Regulations who are authorized to appear before the CCI.

# TEAM PROFILE



**L BADRI  
NARAYANAN**

PARTNER  
(Advisory, Corporate,  
Competition and Regulatory)

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



**CHARANYA  
LAKSHMIKUMARAN**

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



**NEELAMBERA  
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JOINT PARTNER  
(Competition and Antitrust)

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.



**RISHABH  
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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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in Law Excellence Awards  
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**Legal Era Awards 2020**

Adjudged "winner" in the Competition  
& Antitrust Firm category in the **Indian  
Business Law Journal Law Firm Awards  
2021**

ALB's Super 50 Dispute Lawyers in Asia  
2021 *Charanya LakshmiKumaran*  
**Asian Legal Business**

LakshmiKumaran & Sridharan recognised  
as a Leading Law Firm in 2021 in the  
Competition & Antitrust category **Legal  
500**

Recommended practice for its trusted  
advice in abuse of dominance, cartel  
investigations and anti-trust litigation  
**Asialaw Profile 2018**

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exceeding expectations  
SINCE 1985