

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



Vertical restraints: A competition analysis of car dealer discount policy

The Competition Commission of India (“**CCI**”) in a recent judgment fined Maruti for its discount control policy (“**DCP**”). The CCI found that the DCP imposed on the distributors of Maruti cars was a form of resale price maintenance which restricted the amount of discount that dealers could offer to their customers. Maruti exercised control over the dealers and implemented the DCP in a stringent manner. Moreover, the CCI also found that a monitoring system was put in place by Maruti to ensure that the dealers adhered to the policy. The CCI held that the DCP had an adverse effect on both intra-brand as well as inter brand competition and was detrimental to consumers as well. Accordingly, a penalty of INR 200 crore was imposed on Maruti.

In this article, **Charanya Lakshmikumaran** (Partner) and **Neelambara Sandeepan** (Joint Partner) discuss the various factors considered by the CCI while arriving at a finding of violation against Maruti.

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RATIO DECIDENDI

1. Supreme Court allows antitrust probe against Amazon and Flipkart

KEY POINTS

Passing of an order by the CCI directing investigation is administrative and not judicial/quasi-judicial in nature and therefore a *prima facie* opinion by the CCI does not necessitate the opportunity of hearing to the parties.

BRIEF FACTS

An information was filed by Delhi Vyapar Mahasangh (“DVM”) against online marketplaces Amazon Seller Services Pvt. Ltd (“Amazon”) and Flipkart Internet Pvt. Ltd. (“Flipkart”). DVM, a registered society comprising of micro, small and medium enterprise traders, alleged existence of anti-competitive vertical agreements and abuse of dominance.

Pursuant to the information the CCI, in its order dated 13.01.2020 (“CCI Order”), found that there exists a *prima facie* case which needs to be investigated by the Director General (“DG”). The following actions were identified for investigation: (a) exclusive arrangements in respect of launch of mobile phone brands on the marketplace platforms, (b) treatment of preferred sellers on the marketplaces, (c) deep discounting, and (d) preferential listing and promotion of private labels.

CCI Order was challenged before the Hon’ble Karnataka High Court (“KHC”). The learned Single Judge dismissed the petition and held that the CCI Order does not warrant an interference. Consequently, Amazon and Flipkart filed separate writ petitions to the division bench of KHC challenging the learned Single Judge’s decision. The division bench refused to quash the investigation directed by the CCI.

OBSERVATIONS OF THE CCI

What is the nature of the CCI Order? Should there be an opportunity of hearing at the stage of issuing a direction to the DG?

KHC first observed that the decision of the CCI at a pre-investigation stage is merely an administrative decision and not quasi-judicial in nature. Relying upon precedents in the cases of *CCI v. SAIL* and *CCI v. Bharti Airtel*, KHC noted that

the discretion of the CCI to call parties for a hearing or not, rests upon the fact that it is an action that enables one of its wings to perform its administrative functions, and not a judgement that decides whether the opposite parties (in this case Amazon and Flipkart) have violated the Act.

Whether DVM had the locus standi to file an information before the CCI?

KHC observed that the proceedings under the Act are proceedings *in rem* (i.e., against the world at-large) which affect the market in India and public interest and a complaint can be filed by any person whether personally affected or not. Therefore, CCI was justified in directing an enquiry based upon the complaint made by DVM.

Whether principle of *res judicata* (a matter has been decided) has an application in the present case?

It was argued that CCI had recently closed a matter brought against Flipkart by the All India Online Vendors Association and did not order an investigation (*All India Online Vendors Association v. Flipkart and Ors.*). Accordingly, the information filed by DVM should have been treated in a similar manner. KHC observed that after a lapse of considerable time, CCI Order has been passed and given the nature of a market place which is constantly evolving and is a dynamic space, principle of *res judicata* has no application.

Whether the CCI Order calls for interference?

KHC observed that the limited issue before it was the legality of the CCI Order. Given that the CCI Order is administrative in nature, and the enquiry is yet to commence, wherein all grounds regarding the merits of the case, which have been raised in the petition can be looked into, it is concluded that the appeal is premature. Thus, KHC held that the CCI Order does not warrant interference at this stage.

This division bench judgement of KHC was challenged by Amazon and Flipkart before the Hon'ble Supreme Court of India ("Supreme Court"). The Supreme Court while dismissing the Special Leave Petitions, observed in its order dated 09.08.2021 that it sees no reason to interfere with the KHC's judgment.



CONCLUSION

The division bench of KHC held that the CCI Order passed under Section 26(1) is administrative in nature and the investigation under Section 26(1) does not mandate an opportunity of hearing. Thus, CCI Order does not call for an interference. The KHC consequently dismissed the writ petitions. (*Amazon Seller Services Pvt. Ltd. v. Competition Commission of India and Ors. Clubbed with Flipkart Internet Pvt. Ltd. v. Competition Commission of India and Ors. – Writ Appeal No. 562/2021 C/W Writ Appeal No. 563/2021*)

2. CCI dismisses anti-competitive concerns raised against Siemens

KEY POINTS

While determining the bifurcation of relevant market into primary (manufacture and sale) and secondary (spare parts and after-sales services) markets, factors such as the product/service's whole-life cost analysis and independent aftersales service providers are crucial. The consumer's ability to analyze the whole-life cost of a product at the time of purchase depends upon (i) the access to the prices of the primary product, and (ii) terms of aftermarket supply contracts among other things.

BRIEF FACTS

Star Imaging and Path Lab Pvt. Ltd. ("**Star Imaging**") and Janta X-Ray Clinic Pvt. Ltd ("**Janta Clinic**") (collectively referred to as "**Diagnostic Labs**") filed an information against Siemens Ltd., Siemens Aktiengesellschaft and Siemens Healthcare Pvt. Ltd. ("**Siemens Healthcare**") (collectively referred to as "**Siemens**") alleging abuse of dominant position and the imposition of the unfair and discriminatory conditions by Siemens.

Siemens Ltd. and Siemens Healthcare are subsidiaries of Siemens Aktiengesellschaft. Siemens Ltd. manufactures, *inter alia*, advanced medical imaging equipment. Siemens Aktiengesellschaft is positioned along the value chain of distribution and application of energy to medical imaging and laboratory diagnostics. Siemens Healthcare is a global provider of healthcare solutions and services.

The Diagnostic Labs are in the business of providing diagnostics and pathology lab services to patients in Delhi/NCR for the past several decades. The diagnostic labs had installed CT Scan and MRI Machine purchased from Siemens. It was alleged that Siemens, has charged different customers different prices for the same Comprehensive Maintenance Contract ("**CMC**"), Annual Maintenance Contract ("**AMC**"), spares and service of the diagnostics machines. Further, it alleged that Siemens has abused its dominant position by virtue of its exclusive control over the diagnostic equipment purchased by the Diagnostic Labs and the spare parts, machinery and attachments required for the same. Lastly, it was alleged that not sharing of the passwords of the diagnostic machines by Siemens hindered the ability of independent technicians to service them and amounts to refusal to deal with the Diagnostic Labs.

OBSERVATIONS OF THE CCI

What is the relevant Market?

CCI observed that while bifurcating the relevant market into primary (supply and manufacture of the machines) and secondary (spare parts and after-sales services) market, it is crucial to analyze the ability of a consumer to undertake a whole-life cost analysis of the product/service and availability of independent aftersales service providers. CCI further observed that, since the Diagnostic Labs had access to the prices of CT scan machines and MRI machines as well as prices of AMC and CAMCs at the time of making the purchase, they were able to estimate the life-cycle costs of the original equipment. Therefore, CCI noted that, there is no basis for concluding on the existence of any separate market of aftersales. CCI further observed that since, CT Scan and MRI machines can be substituted with other machines of similar types, a narrow approach with respect to the machines is not warranted. Therefore, CCI did not see the requirement of defining precise relevant markets in the present case.

Whether Siemens is dominant?

CCI observed that Siemens did not possess a dominant position as big players like GE Healthcare and Philips have a strong presence in the market of CT Scan and MRI machines. Also, some domestic medical equipment manufactures like Tata Group have also entered in this primary market. CCI noted that the Diagnostic Labs have neither been able to demonstrate at the time of purchase of respective machines nor at the time of alleged abusive conduct of Siemens that there were no alternatives available from other manufacturers. Therefore, Siemens cannot be said to be dominant.

Whether Siemens abused its dominant position?

CCI observed that a separate finding on the instances of abuse may not be required given the lack of dominance. Nonetheless, CCI noted that with respect to refusal to deal in terms of non-sharing of passwords, that the same was never prohibited and can be shared with the Diagnostic Labs for a price, as stated by Siemens. As regards to the other allegations relating to various abusive clauses of the CMC agreement and overcharging of spare parts, CCI noted that the Diagnostic Labs had an opportunity to negotiate agreements and have the freedom to enter into an agreement with other Independent Service Operators for availing aftersales services.



CONCLUSION

The CCI held that there exists no prima facie case under Section 3(4) and Section 4 of the Act, and the information filed is closed under Section 26(2) of the Act. (*Star Imaging and Path Lab Pvt. Ltd. and Ors. v. M/s Siemens Ltd. and Ors.* - Case No. 06 of 2020; Order dated 13.08.2021)

3. CCI dismisses information against the officials of the Registrar (Cooperative), Uttar Pradesh

KEY POINTS

Administrative directions emanating from the implementation of a policy decision do not warrant investigation under the provisions of the Act.

BRIEF FACTS

The information was filed by Vardaan Agriculturist Development Cooperative Society Limited ("**Vardaan**") against Deputy Commissioner and Deputy Registrar (Cooperative) Saharanpur Division and Assistant Commissioner and Assistant Registrar (Cooperative), Muzaffarnagar "**Officials of Cooperative**") alleging abuse of dominant position.

Vardaan is a multi-state cooperative society and a member and shareholder of the national cooperative called Krishak Bharati Cooperative Limited ("**KRIBHCO**") and holds a valid wholesale fertilizer license issued by KRIBHCO for selling KRIBHCO's fertilizers in the district of Muzaffarnagar and Saharanpur in Uttar Pradesh.

Vardaan averred that to break the monopoly of Primary Agriculture Credit Cooperative Societies ("**PACCS**"), KRIBHCO appointed Vardaan as its distributor to sell its fertilizers. It was alleged that the Officials of Cooperative issued the directions to District Cooperative Development Federation ("**DCDF**") and Pradeshik Co-operative Federation ("**PCF**"), which are cooperative societies of the Government of Uttar Pradesh and shareholders and member cooperatives of KRIBHCO, to not release KRIBHCO fertilizer to Vardaan as it was adversely affecting the business of PACCS. Vardaan stated that due to the ban, its business has suffered huge losses and therefore, it has sought interim relief that the ban imposed by PCF and DCDF on supply of KRIBHCO fertilizers to Vardaan should be removed with immediate effect.

OBSERVATIONS OF THE CCI

Whether the Officials of Cooperative are an "enterprise" within Section 2(h) of the Act?

CCI observed that the activities carried out by the Registrar Cooperative, Uttar

Pradesh in context of fertilisers is receipt, storage, dispatch, allocation etc. before and during every crop season. CCI also noted that the Registrar, regulates the supply of fertilisers in Uttar Pradesh, by issuing instructions and directives, and therefore plays a crucial role in distribution of fertilisers. Accordingly, the Registrar engages in economic activity under the Act. In view of the above the CCI held the Registrar Cooperative and the officials functioning under it viz. Officials of Cooperative to be enterprise(s) and amenable to the jurisdiction of the CCI under the Act.

Whether there was distortion of level playing field in favour of PACCS?

CCI noted that the alleged distortion of level playing field in favour of PACCS has arisen due to policy formulated to strengthen PACCS centers. It is done for the larger cause of making available the agricultural inputs including fertilisers of cooperative sector to the farmers at reasonable/ subsidised prices. CCI though observed that presence of other cooperative societies in the area of PACCS has the potential to enhance the choices available to farmers in terms of ease of availability and better service, yet in its *prima facie* view, the restrictions if any have been brought in furtherance of a policy of the State Government, stated to be in spirit of the cooperative movement, and cannot be said to be in contravention of the provisions of the Act.

With respect to the relevant market and dominance, CCI was of the opinion that an exact delineation of relevant market or an assessment of dominance will not be necessary.



CONCLUSION

CCI concluded that no *prima facie* case could be made out against the Officials of Cooperative for contravention of the provisions of the Act and therefore, the matter was closed. (*Vardaan Agriculturist Development Co-operative Society Limited Vs. Deputy Commissioner and Deputy Registrar (Co-operative), Office of the Joint Commissioner and Joint Registrar (Co-operative), Saharanpur Division and Another, Case No. 12 of 2020; Order dated 14.07.2021*)

4. Odisha State Civil Supplies Corporation held to be abusing its dominant position

KEY POINTS

Unjustified and unreasonable conditions in contracts and delay in releasing of legitimate payment due to an enterprise by a dominant enterprise amounts to abuse.

BRIEF FACTS

The information was filed by M/s. Maa Metakani Rice Industries ("**Metakani**") alleging abuse of dominant position, by Government of Odisha ("**Odisha Government**") and Odisha State Civil Supplies Corporation Ltd. ("**OSCSCL**").

Metakani is engaged in the business of rice (paddy) milling, production of rice etc. to act as a custom milling agent of OSCSCL. OSCSCL is fully owned by the Odisha Government and is the largest agency involved in paddy procurement in the State of Odisha.

Metakani had entered into an agreement with OSCSCL for custom milling of paddy for the Kharif Marketing Season ("**KMS**") 2015-16 which, *inter alia*, provided for Standard Fire Insurance coverage of the stock of OSCSCL kept and maintained at the Metakani's premises. Later, due to floods, the stored crops were destroyed, and the final survey report assessed the net adjusted loss of stock at INR 87.15 lakh approx. It was alleged that after completion of KMS 2015-16, approx. INR 1.20 Cr Custom Milling Rice ("**CMR**") dues of Metakani, were withheld by OSCSCL until the settlement of the claim by the insurance company. Consequently, Metakani filed a consumer complaint before State Consumer Disputes Redressal Commission, Cuttack ("**SCDRC**") against the said insurance company and OSCSCL. The SCDRC ruled in Metakani's favour. Thereafter, OSCSCL released certain amounts but still withheld prior CMR dues of INR 85 lakh. The order of SCDRC was then appealed before the National Consumer Disputes Redressal Commission ("**NCDRC**"). It was also alleged that OSCSCL modified the criteria for the selection of custom millers for Rabi season for KMS 2017-2018 without any prior intimation to millers and gave only 2 days to make representation for participation to OSCSCL. Lastly, it was alleged that not only Metakani, but other millers were also facing challenges with respect to non-payment of arrears and timely disclosure of charges for KMS. Due to the stated reasons, all the millers refused to enter into any agreement with OSCSCL for KMS 2018-19. It was further alleged that millers were threatened that certain outstanding charges for KMS 2017-18 would not be paid unless they executed

an agreement for KMS 2018–19 to participate in procurement.

OBSERVATIONS OF THE CCI

Whether Odisha Government and OSCSCL are 'enterprises' as per the provisions of Section 2(h) of the Act?

With respect to Odisha Government, CCI found that issuance of the Food and Procurement Policy by the State cannot be termed as an economic activity, and consequently, Odisha Government, while laying down such a policy, cannot be said to be an 'enterprise' under the Act. With respect to OSCSCL, CCI noted that it is a corporate entity involved in the economic activity of procurement of paddy and distribution and delivery of CMR through Public Distribution System ("PDS") in the State of Odisha. Therefore, OSCSCL qualifies as an 'enterprise', irrespective of the fact that whether such an activity is undertaken by OSCSCL with or without an underlying profit motive.

What is the Relevant Market?

With respect to the delineation of relevant market, CCI agreed with the observation of the DG that the relevant market in the present matter is "*market for procurement of custom milling services for rice in the State of Odisha*".

Whether OSCSCL is dominant in the identified Relevant Market?

CCI observed that OSCSCL is a dominant enterprise, on account of its (i) market share i.e., 94-99%, (during the period 2014–15 to 2018–19), (ii) unparalleled size (iii) vast resources at its disposal, and (iv) substantial dependence of millers on OSCSCL for their milling activity in the State of Odisha.

Whether the conduct of OSCSCL tantamount to abuse of dominance?

In this regard, the following conduct of OSCSCL was analysed:

- (i) *Non-settlement and consequent withholding of the CMR dues* - CCI observed that such unjustified withholding of dues by a dominant entity may amount to abuse of dominant position. However, since the issue relating to tenability of the insurance claim and the withholding of the amounts is *sub judice* in another forum i.e., NCDRC, CCI did not delve further into this matter.

- (ii) *Arbitrary modification of selection criteria for Custom Millers* - the CCI observed that OSCSCL is competent to determine the manner in which it seeks to procure paddy and consequent milling services. Based on its requirements, it can provide for separate criteria for different districts. CCI further observed that nothing has been filed on record that indicates that the custom millers were unfairly affected or were absolutely foreclosed by the modification in the eligibility criteria.
- (iii) *Unfair terms in the contract with the Custom Millers* - The threat that certain outstanding charges would not be paid to Custom Millers unless they execute the agreement to participate in procurement for KMS 2018-19, the CCI observed that a bare reading of the said letter discloses that the payment of legitimate dues of millers were predicated somewhat on them committing to a future relationship. CCI, thus, held that, OSCSCL introduced unfair terms which is not in consonance with the provisions of the Act.
- (iv) *Delay in disclosure of the rates for KMS* - CCI observed that delay in communication of rates to millers by OSCSCL was caused on account of abnormal delay in the receipt of economic costing from the Government of India. Therefore, the said action cannot be termed unfair or abuse of dominance.
- (v) *Delay in payment of arrears* - In relation to the delay in reimbursement of charges incurred by millers in providing services, CCI observed that withholding legitimate dues of millers without a justifiable reason by OSCSCL is an abuse of dominant position.



CONCLUSION

CCI held that the impugned conduct of OSCSCL is in violation of the provisions of Section 4(2)(a)(i) of the Act. However, CCI noted that certain measures have been taken by OSCSCL to facilitate quick processing and settlement of bill of custom millers. Therefore, on a holistic assessment, CCI believed that a cease-and-desist would be sufficient and no penalty was levied. (*M/s Maa Metakani Rice Industries Vs. State of Odisha and another*, Case No. 16 of 2019; Order dated 05.08.2021).

MERGER CONTROL

FORM I

Acquisition of majority shares in Kamachi Industries Limited by Suryadev Alloys and Power Ltd.

Suryadev Alloys and Power Ltd. ("**Suryadev/Acquirer**") is a private limited company, engaged in the production and sale of steel billets and long steel products, i.e., QST/TMT Bars. It also operates a coal-fired thermal power plant under the captive model, which caters to the requirement of steel production. Kamachi Industries Limited ("**KIL/Target**") is a public limited company, engaged in the production and sale of sponge iron, steel billets and long steel products, i.e., QST/TMT Bars. It also operates a thermal power plant for captive and group captive consumption.

Suryadev filed a notice to the CCI, pursuant to a resolution plan filed by it in the Corporate Insolvency Resolution Proceedings initiated against KIL under the Insolvency and Bankruptcy Code, 2016. Suryadev and KIL will collectively be referred to as ("**Parties**").

The proposed transaction relates to the acquisition of majority shares in KIL, and thus, the acquisition of management and control of KIL ("**Proposed Combination**").

The activities of the Parties horizontally overlap in the manufacture and sale of TMT bars and steel billets in India.

Further, the notice stated that the Parties also generate electricity under the captive power generation model primarily to meet their own requirements and surplus electricity generated by the Parties is transferred to the state grid run by the Tamil Nadu Electricity Board. The combined power generation capacity of the Parties is 230 MW, and the total installed power generation capacity in the State of Tamil Nadu is ~31,000 MW. Hence, the combined market share of the parties in terms of the combined power generation capacity is less than 1 %.

The Parties have submitted that the relevant markets for competition assessment of horizontal overlaps may be considered as "the market for manufacture and sale of TMT bars in India" and "the market for manufacture and sale of steel billets in India", collectively ("**Relevant Markets**").

Further, it was submitted that KIL manufactures sponge iron which is used as input in the manufacture of steel billets and QST Bars. Therefore, there exists a potential vertical relationship between the activities of the Parties, for which, the following relevant markets may be considered:

- i. the “market for manufacture and sale of sponge iron (pig iron) in India” (“**Upstream Relevant Market**”).
- ii. the “market for manufacture and sale of steel billets in India”. (“**Downstream Relevant Market**”).

The CCI decided to leave the delineation of the relevant market open as the Proposed Combination is not likely to cause AAEC in any of the possible alternative relevant markets that could be delineated. It noted that the combined market share of the Parties in relation to horizontal overlaps in the Relevant Markets is less than 5% in terms of (a) installed capacity, (b) domestic sales, and (c) gross production. Further, incremental market share is insignificant for all parameters, and there are other players, such as JSW Steel, SAIL, Tata Steel and RINL, in the Relevant Markets who will continue to pose competitive constraints to the Parties post the Proposed Combination.

With regard to the vertical relationship, it is noted that the presence of Parties in any of the upstream and downstream relevant market is not significant enough to raise any competition foreclosure concern.

Accordingly, the Proposed Combination was approved.

FORM I

Acquisition of sole control of Aakash Educational Services by BYJU'S.

Think & Learn Private Limited (“**BYJU'S/Acquirer**”) is a private limited company. It offers an online education platform for primary and secondary school subjects, overseas and domestic test preparatory coaching services for entrance examinations for engineering, medical, etc.

Aakash Educational Services Limited (“**Aakash/Target**”) is a public limited company. Aakash provides curriculum-based coaching for K-12 students and test preparatory services for various competitive examinations such as, engineering examinations, medical examinations etc., through multiple modes like classroom, online, distance and hybrid learning programmes.

BYJU'S and Aakash jointly filed a notice pursuant to the merger framework agreement, various share purchase agreements and fall-back agreements between, *inter alios*, BYJU'S, Aakash and various shareholders of Aakash. BYJU'S and Aakash are collectively referred to as (“**Parties**”).

BYJU'S proposes to acquire approximately 70% of the equity shareholding (fully diluted basis) of Aakash followed by a merger of Aakash with BYJU's ("**Proposed Combination**") giving BYJU'S sole control over Aakash.

The Proposed Combination pertains to the education sector in India. The Parties submitted that it can be segmented into formal and informal segments. The formal segment comprises K-12 school education and higher education (including graduation and post-graduation courses). The informal segment comprises pre-school, coaching classes for school courses and competitive examinations, test preparatory coaching services for entrance examinations, vocational training and publishing. At a narrower sub-segment level, the informal sector includes (a) test preparatory coaching services for medical examinations, engineering examinations, management examinations and government examinations; (b) coaching services from classes 1 to 12; (c) coaching services for coding and non-curriculum-based mathematics.

Further, the Parties have submitted that in the informal segment, classroom coaching is easily substitutable with online mode as both offer students similar levels of opportunity to interact with tutors on a real-time basis and standardised school boards and entrance examinations ensure uniformity in the curriculum-based online and offline coaching services of players.

With respect to relevant geographic market, the Parties have submitted that informal educational services can be provided to students throughout India including through online platforms and the Parties are competing on a pan-India basis. Further, the conditions for competition are homogenous throughout India. Thus, Parties have submitted that they are present in the informal education segment in India. At the narrower level, the Parties have overlaps in test preparatory coaching services for medical examinations; test preparatory coaching services for engineering examinations; coaching services for classes 1 to 7 and 8 to 10; and coaching services for classes 11 to 12 in commerce.

The CCI decided to leave the delineation of the relevant market open as it was observed that the Proposed Combination is not likely to cause an AAEC in any of the relevant markets. It was noted that the combined market share of the parties and the incremental market share in all segments/sub-segments is less than 10%. Further, the informal education sector in India is characterized by the presence of several players, such as, Allen Career Institute, FIITJEE, Rao Academy, Bansal classes, Udemy, Khan Academy, etc. which will continue to pose significant competitive constraints.

Therefore, the CCI approved the Proposed Combination.

FORM II

Heineken International B.V. acquires sole control over United Breweries Limited.

Heineken International B.V. ("**HIBV/Acquirer**") is an investment holding company belonging to the group of companies held by Heineken N.V. ("**Heineken Group**") and is itself not engaged in any business activity and is a direct/indirect shareholder for all non-Dutch companies that form part of the Heineken Group. The Heineken Group consists of companies engaged in the production, manufacture, packaging, distribution, marketing and sale of beer, non-alcoholic beer, cider and cider-based beverages, and a range of other beverages.

United Breweries Limited ("**UBL**") is a listed company in India. It is a joint venture between the Heineken Group and the VJM Group and is under their joint control. UBL is engaged in the manufacture, distribution and sale of beer in India.

HIBV filed a notice involving the acquisition of (i) up to a maximum of approximately 16.40% shareholding of UBL, which shall be an addition to 46.53% shareholding of UBL already held by the Heineken Group; and/or (ii) sole control in UBL by Heineken Group, subject to certain scenarios ("**Proposed Combination**"). HIBV and UBL are collectively referred to as ("**Parties**").

The CCI observed that the Proposed Combination involves a change from the existing joint control to sole control over UBL by the Heineken Group. In cases involving change from joint to sole control, the extent to which the parties competed with each other prior to change in control is primarily considered relevant for competition assessment.

The CCI noted that the Heineken Group is primarily selling its beers in India through UBL by way of agreements and does not directly manufacture and sell beer in India, which implies a lack of direct and independent presence of the Heineken Group in India in the larger beer segment. Accordingly, the Proposed Combination is not likely to alter the competition dynamics in any relevant market that could have been delineated relating to the larger segment of manufacture and sale of beer in India.

However, the CCI observed that Heineken Group is engaged in export sales to India in the duty-free segment through two modes: (i) export sales to local distributors for onward retail sale at duty-free outlets; and (ii) export sales to airline customers in India, and accordingly, has direct and independent presence in the duty-free segment. However, the presence of Heineken Group is not significant to cause any change in competition dynamics.

The CCI also assessed the Proposed Combination for any likelihood of

foreclosure of other manufacturers who may have any arrangements with UBL for manufacture/sale of beer resulting from change in control of UBL. In this regard, it is noted that UBL does not have any agreement(s)/arrangement(s) for manufacture or sale of beer with any other domestic or international beer company, apart from the agreements with the Heineken Group in India. Accordingly, the Proposed Combination is not likely to result in any harm to competition from this perspective as well.

Therefore, the CCI approved the Proposed Combination.

FORM II

Nuvoco Vistas's acquisition of Emami Cement

Nuvoco Vistas Corporation Limited ("**Nuvoco**"), a public limited company is a part of Nirma promoter group company, engaged in the businesses of manufacturing and sale of varieties of grey cement ("**GC**") including Portland Pozzolana Cement ("**PPC**"), Portland Slag Cement ("**PSC**") and Ordinary Portland cement ("**OPC**") etc. It has cement manufacturing facilities operational in the states of Chhattisgarh, Jharkhand, West Bengal, Rajasthan and Haryana. It also has a contract manufacturing facility in Chunar (Mirzapur, UP) mainly for its institutional customers.

Emami Cement Limited ("**Emami**"), a public company is a part of the Emami group, engaged in the manufacturing and sale of varieties of GC including PPC, PSC, OPC etc. Emami predominantly operates in eastern region of India with facilities in the states of West Bengal, Chhattisgarh, Bihar and Odisha and an installed capacity of 8.30 MTPA.

A notice was filed by Nuvoco pursuant to execution of share purchase agreement entered inter alia, between Nuvoco and Emami. Nuvoco proposes to acquire 100% of the total issued and paid-up share capital of Emami on a fully diluted basis ("**Proposed Combination**"). Nuvoco and Emami are collectively referred to as ("**Parties**").

Parties are *inter alia*, involved in manufacture and sale of cement in India. With regard to vertical relationship, Parties clarified that vertical integration is fundamental to the GC industry and is imperative for its operations. It is stated that clinker is one of the most essential input materials for the manufacturing of GC. It is common industry practice for GC manufacturers to produce clinker internally for their captive consumption. However, certain cement manufacturers tend to engage in the sale of surplus clinker to other manufacturers. Further, it is stated that it is standard practice for ready-mix concrete manufacturers to source GC as input both from in-house facilities and third-party manufacturers. Nuvoco sources GC from Emami for its production of ready-mix concrete.

In this regard, it was submitted that Emami engages in the sale of surplus clinker to other cement manufacturers but does not supply/sell any clinker to Nuvoco. For the purpose of the Proposed Combination, the relevant product market is market for GC.

While delineating the relevant geographic market, the CCI used the catchment area test, the Elzinga Hogarty Test and other tools of economic assessment. The CCI noted that West Bengal and Chhattisgarh are the only overlapping states in which both Nuvoco and Emami have cement manufacturing facilities.

Further, Chhattisgarh and West Bengal form part of relevant geographic market which also includes the states of Bihar, Jharkhand and Odisha. Hence, the relevant geographic market for the overlaps in Chhattisgarh and West Bengal may be identified in terms of area comprising the states of Chhattisgarh, West Bengal, Bihar, Jharkhand and Odisha, or subsets of these respective states.

However, the exact definition of relevant product or geographic market was left open as the transaction was not likely to create competition concern in India irrespective of the manner in which the market is defined.

It was stated that the market in Eastern India is moderately concentrated with presence of some major players such as Holcim, Ultratech, Dalmia, Shree Cement etc., who will continue to exert competitive constraints on combined entity post the Proposed Combination.

The change in market concentration in terms of sales volume is not significant to cause competition concerns in any of the plausible combination of the five states Chhattisgarh, Bihar, Jharkhand, Odisha and West Bengal.

In terms of sales volume, the pre-combination market share of Nuvoco in the Relevant Market is [10-15] % and that of Emami is [5-10] %, thus resulting in a market share of around [15-20] %, post combination.

The Proposed Combination is insignificant to raise any concerns of AAEC and there are other players present such as Shree Cement, Holcim, Ultratech and Dalmia operating in each state to pose competitive constraints on the combined entity.

Accordingly, CCI decided that the Proposed Combination is not likely to result in an AAEC in any of the above discussed markets. With regard to vertical relationships, the CCI noted that the Proposed Combination is not likely to cause any foreclosure concerns.

Accordingly, the CCI opined that the Proposed Combination is not likely to have AAEC in India.

NEWS NUGGETS

1. Udaan files a complaint against Parle Products Private Limited (“Parle”).

B2B e-commerce unicorn Udaan filed a complaint before the CCI alleging abuse of dominance by Parle by refusing to supply their fast-moving products directly to Udaan, without any objective justification. Udaan stated that the continued refusal to supply is a clear refusal to deal and thus, abuse of dominance. Further, forcing Udaan to buy directly from Parle’s distributors is a constructive refusal to deal.

2. CCI raids BASF for alleged vegetable seeds price fixing.

The CCI conducted raids on BASF India, a unit of Germany’s BASF and three other vegetable seed companies for alleged collusion for fixing prices. The raids were conducted by CCI across cities in India such as Gurugram, Bengaluru and Hyderabad. However, BASF India has issued a clarification to the stock exchanges that the entity raided is a separate legal entity i.e., Nunhems India Private Limited, a 100 % subsidiary of BASF SE, Germany and not part of BASF India.

3. Complaint filed against Apple for in-app payment issues

A complaint has been filed before the CCI against Apple for allegedly abusing its dominant position in the apps market by forcing developers to use its proprietary in-app purchase system. Apple imposes an in-app fee of up to 30% for distribution of paid digital content which hurts competition by raising cost for app developers and customers, and acts as a barrier to market entry. Apple is facing an investigation for similar allegations in the European Union.

4. South Korea’s parliament approved a bill to curb dominance of major app store operators like Google and Apple.

South Korea recently became the first country to pass a bill to curb the payment policies of the likes of Google and Apple by amending its Telecommunications Business Act. The payment policies forced the developers to use only the proprietary billing system of the tech giants which charged a commission as high as 30% on every transaction. The amendment effectively stops them from charging commission on in-app purchases.

5. A US Court ruled that Apple cannot force developers to use its in-app-purchasing system

Epic Games, the maker of video game Fortnite had challenged the policy of Apple requiring app makers to pay a commission of 15-30% on sale of any digital content. This commission was charged for in-app transactions on iPhone, iPad and iPod. When Epic Games introduced an alternative payment system in Fortnite to evade the commission, Apple removed it from its app store. A US District Court of Northern district of California ruled that Apple cannot prohibit the developers from providing any communication to users, providing them an alternative of Apple's in-app purchasing system. This ruling allows the developers to bring users from Apple's app-store to their own websites to purchase digital content.

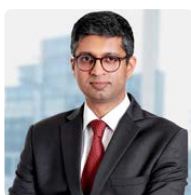
6. CCI found Grasim Industries to be abusing its dominant position in the market for supply of Viscose Staple Fibre ("VSF") to spinners in India.

CCI found that Grasim has abused its dominant position in the market for supply of VSF to spinners in India by charging discriminatory prices to them, denying market access and imposing supplementary obligations upon them in violation of the Act. CCI directed Grasim to cease and desist but did not impose any penalty since penalty of INR 301.61 crore had already been imposed on Grasim in a similar case involving similar conduct and partly similar period of contravention.

7. Korea Fair Trade Commission ("KFTC") fined Google for abuse of dominance.

South Korea's antitrust regulator, KFTC, fined Google a whopping 207.4 billion Korean won (approximately INR 1338 crores) for abusing its dominance. Google required smartphone manufacturers to enter into an Anti-Fragmentation Agreement ("AFA") while signing contracts for app store licenses and early access to operating system. The AFA restricted smartphone manufacturers from installing modified versions of the operating system, called android forks. Further, the manufacturers were also restricted from developing their own android forks. KFTC noted that by using such practices, Google strengthened its market dominance in the smartphone market and undermined innovation in development of competing operating systems for smartphones. In addition to the fine, KFTC has also ordered Google to ban the practice of mandatory signing of the AFA.

TEAM PROFILE



**L BADRI
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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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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.



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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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