

LKS UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

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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



“To Deal or Not to Deal is the real question” - Vertical Restraints in the FMCG Sector

The Competition Commission of India (“**CCI**”) aims to eliminate anti-competitive practices and to ensure that all market players enjoy freedom of trade and are able to freely decide upon their choice of business, *modus operandi*, and other commercial decisions based on their commercial wisdom. Thus, the CCI as a regulator, tries to adopt a balanced approach by preventing enterprises from entering into exclusive arrangements and arbitrarily refusing to deal with other market players, without undermining the autonomy of businesses to choose their trading partners and the functioning of such business relationships.

In this article, **Neelambara Sandeepan**, Partner discusses recent judgements of the CCI in two similar cases against Britannia & Parle where the CCI opined upon selective distribution system and the right to choose one’s trading partners as part of the right to freedom of trade.

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RATIO DECIDENDI

1. CCI directs investigation against BookMyShow for alleged Abuse of Dominance through exclusive contracts with Cinemas.

BRIEF FACTS

Mr. Vijay Gopal (**'Informant'**) founder of an online movie ticketing portal '*Showtyme*', filed an information before the CCI alleging contravention of Sections 3 & 4 of the Act, against Big Tree Entertainment Pvt. Ltd. (**'BookMyShow/OP-1'**), and major multiplexes/theatres like Asian Cinemas, Cinepolis, INOX, PVR etc (**'Theatres'**).

Informant alleged that BookMyShow charged exorbitant convenience fee from consumers and shared it with the theatres. On the contrary, the Informant charged a lower fee and offered up to 50% of it to the theatres. Despite this business model, the theatres did not associate with the Informant because of huge cash loans & monetary deposits given by OP-1. Further, OP-1 signed exclusive contracts with theatres which restricts the sale of tickets through its platform only, and refusal to deal agreement ranging 2-5 years with the theatres to ensure that they do not sell their tickets on any other online platform. Thus, it was alleged by the Informant that BookMyShow and the theatres have formed an explicit cartel to thwart entry of any other online platforms selling cinema tickets.

It was further contended that BookMyShow is abusing its dominance in the market for '*sale of movie tickets in India*', by imposing unfair and discriminatory conditions on the theatres i.e., making them sign contracts for selling 100% of their tickets on its platform and thereby creating a hostile effect upon fair competition in the market.

OBSERVATIONS OF THE CCI

I. Whether BookMyShow is dominant in the relevant market?

The CCI opined that features such as, ease of use, convenience of booking, comparing theatres, select seats, reduced search costs owing to aggregation of tickets of multiple theatres on the platforms, etc., a large segment of customers as well as theatres perceive online intermediation services for booking of movie tickets as distinct service, which is not interchangeable or substitutable with other modes of booking tickets. Thus, it defined the relevant market as "*market for online intermediation services for booking of movie tickets*".

With regards to dominance in the relevant market, CCI observed that BookMyShow had the highest market share. High market share, in conjunction with its reach, scale, network effects and its ability to enter into exclusive agreements with certain big theatres/multiplexes, corroborates its position of strength and superior bargaining power. As such, it prima facie appears to enjoy a dominant position in the relevant market.

II. Whether there's a *prima facie* case of abuse against BookMyShow for the alleged conduct?

On the issue of abuse, the CCI considered various Agreements signed between BookMyShow and the theatres/multiplexes and noted that the exclusivity clause in the agreements with single screen cinema theatres, prevent the sale of tickets through any other online intermediary. Such exclusivity has the potential to foreclose or reduce competition in the relevant market, as rival intermediary platforms or new entrants would have to incur significant additional cost to induce the cinemas to give up their exclusive contracts with the leading platform.

The CCI also found the agreements with major multiplexes and theatres to be restrictive in nature, which not only restrict their freedom but may also directly or indirectly incentivize exclusivity.

Separately, with respect to data collection, ownership and storage, the CCI observed that BookMyShow was discriminating between single screen cinemas and multiplexes. While in its agreements with single screen cinemas, BookMyShow reserved the right of data collection, ownership, and storage thereof without the cinemas having any right, title, interest to such data, in its agreements with multiplexes, there is provision for sharing of data. This data ownership can increase the bargaining power of the platform over time and this aspect of exclusive ownership of and access to data by a dominant intermediary necessitates investigation.

III. Whether the convenience fee charged by BookMyShow from consumers was exorbitant in nature?

The CCI held that though it cannot act as a price regulator to determine the correct fees but, exclusivity arrangements by BookMyShow may result in softening of competition and therefore bolster the market power of BookMyShow without any incentive to reduce such fees in future.



CONCLUSION

The CCI observed that the impugned exclusive and restrictive agreements *prima facie* appear to have the potential of denying market access to competing platforms and potential entrants. They restrict the choice of cinema theatres as well as the cine-goers. Accordingly, there exists a *prima facie* case against BookMyShow and the CCI ordered the Director General ("**DG**") to conduct an investigation in the said matter, under section 26(1) of the Act.

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The determination of 'online ticket booking' as a separate relevant market by the CCI is in line with the current international practice and its own prior practice, wherein it observed that owing to the ease of use, convenience and unique features of online platforms users on both demand and supply side consider it to be un-substitutable from its offline counterparts. Interestingly, the CCI also took note of how exclusivity relating to data ownership can increase the bargaining power of the platform over time and further strengthen the network effects limiting inter-platform competition.

[*In re Vijay Gopal v. Big Tree Entertainment Pvt. Ltd.*, Reference Case No. 46 /2021, CCI order dated 16/06/2022]

2. CCI Exonerated Punjab State Warehousing Corporation of allegations of anti-competitive conduct

BRIEF FACTS

Private Entrepreneurs Godowns Association (**'Informant'**) is a registered association of private entrepreneurs which provides food-grains storage space to various procurement/warehouse agencies in Punjab. The Informant filed an information alleging contravention of Sections 3 & 4 of the Act, against Punjab State Warehousing Corporation (**'OP-1'**), a public sector enterprise entrusted with the responsibility of storage, handling and warehousing of agricultural produce, and State of Punjab (OP-2) which through its various Departments, undertake procurement of goods for storage in the State of Punjab.

The informant alleged that there was a collusive arrangement between OP-1 and 2 for not increasing the rent payable to private godown owners as both OP-1 & 2 (through its departments) are engaged in availing the services of godowns for storage of food-grains in Punjab, thus operating at the same level of market. The Informant further alleged that OP-1 was abusing its dominance by imposing unfair conditions in purchase of godown storage space and not forwarding the financial benefit of I grants from Food Corporation of India to the Informant

OBSERVATIONS OF THE CCI

I. Whether conduct of OP-1 amounts to abuse of dominance?

Relevant Market- On the issue of the relevant market the CCI observed that all godowns, compete against each other for getting hired for storage of foodgrains. Therefore, the relevant market should be the "*market for hiring of godown services for storage of foodgrains in Punjab*".

Dominant Position- From the material available on record, the CCI observed that OP-1 faces tough competition in the relevant market. It was evident that it faced strict competition from Government. storage agency 'PUNGRAIN', which has a hired storage capacity of 50.85 LMT while OP-1, in comparison, only had a hired storage capacity of just 22 LMT. Therefore, OP-1 cannot be said to be in a dominant position in the relevant market.

Abuse- In the absence of dominant position of OP-1 in the delineated relevant market, the allegations of abuse made against it need not be examined. Therefore, the CCI found no contravention of the provisions of Section 4 of the Act by OP-1.

II. Whether there was a collusive arrangement between OP-1 and OP-2?

The CCI observed that the Informant placed no material, which may even prima facie hint at existence of an 'agreement' between OP-1 & OP-2, for not increasing the rates of rent for hiring of godowns from private parties, in the State of Punjab.

Further, it was observed that OP1 and OP-2 can't be said to be engaged in identical or similar trade of goods or provision of services, as OP-1 is a statutory body indulged in storage, handling and warehousing of agricultural produce. Whereas OP-2 is the state government of Punjab, which procures goods for storage through Department of Food Civil Supplies.

Even if the State Government is indulged in procurement and storage of foodgrains through its agencies like PUNGRAIN, PUNSUP etc. it does not put it in trade of goods or provision of services, similar or identical to OP-1. Thus, OP-1 and OP-2 cannot be analysed under the provisions of Section 3(3) of the Act.



CONCLUSION

Recognizing the presence of effective competitor with almost double hired storage capacity, the CCI opined that OP-1 can't be said to be dominant in the relevant market, and thus no question of abuse arises. Regarding the alleged collusive agreement, the CCI opined that Informant failed to place any material which may prima facie establish existence of an 'agreement' between OP-1 & OP-2, for not increasing the rates of rent. Thus, no case of contravention of any of the provisions of the Act was made out against either OP-1 and/or OP-2 and the matter was closed.

LKS INPUT

Interestingly, in this case the CCI observed that, merely because the State Government was engaged in procurement of goods for storage through its agencies, it cannot be said that the Government itself was engaged in identical or similar trade of goods or provision of services. Neither can they be said to be operating in products/services at different levels in the production chain.

[In Re: Private Entrepreneurs Godowns Association v. Punjab State Warehousing Corporation and State of Punjab, Case No.43 of 2021, order dated 16/06/2022].

3. CCI finds no violation of the Act by Chhattisgarh Chemist and Druggist Association and certain pharmaceutical companies

BRIEF FACTS

The CCI initiated a *suo moto* case after it received a complaint alleging that Chhattisgarh Chemist Druggists Association ('**CCDA**') was coercing pharmaceutical companies to pay Product Information Service ('**PIS**') charges, as a precondition for the launch of new medicines in the State of Chhattisgarh. These charges were purportedly being collected under the garb of payments towards the CCDA's "building and bulletin fund".

Based on the said complaint, the CCI passed an order under Section 26(1) directing the DG to investigate CCDA for an anti-competitive agreement to restrict production or supply of goods. The CCI also directed an investigation into the conduct of pharmaceutical companies Alkem, Intas, and Koye, although no specific allegation was made against them in the complaint.

OBSERVATIONS OF THE CCI

I. Whether payment of PIS charges to CCDA was mandatory for launching new medicines?

Based on the e-mails of CCDA, statements by Macleods and exchanges between the CCDA and the All India Organisation of Chemists and Druggists ('**AIOCD**'), etc., DG concluded that CCDA had coerced pharmaceutical companies to make payment of PIS charges prior to the launch of new medicines. However, the CCI reviewed the submissions of several pharmaceutical companies such as, Intas and Koye, and observed that except Macleods, every company had submitted that the launch of medicines was not impeded by the CCDA for want of PIS. Instead, the payment of PIS was made on a voluntary basis towards the publication of information on new launches in the CCDA bulletin. Due to the wide network of CCDA such publication facilitated the dissemination of information regarding the new medicine to stockists and retailers.

The CCI also acknowledged Macleods' submission that the PIS charges were mandatory, however it also stated that CCDA never hindered launch of any new medicine and sometimes PIS was paid even after the launch of a medicine. Thus, the CCI opined that pharmaceutical companies made voluntary payment of PIS charges to the CCDA.

II. Whether CCDA was controlling/limiting the appointment of stockists by requiring applicants to obtain No Objection Certificates ('NOC')?

On the issue of CCDA controlling/limiting the appointment of stockists in Chhattisgarh by requiring potential stockists to obtain NOC, the DG did not find sufficient evidence to showcase that there was any mandate on the prospective stockists to obtain an NOC from the CCDA. Thus, relying on the DG's report the CCI did not delve into the question at all, during its assessment.



CONCLUSION

The CCI rejected the DG's findings and held that the CCDA was not in contravention of Section 3(3)(b) read with 3(1) of the Competition Act. Further, in the absence of a contravention by the CCDA, no question of individual liability of the office bearers of CCDA arose. The CCI did not make any observations against the pharmaceutical companies.

LKS INPUTS

Although the CCI took note of the evidence relied upon by the DG, such as email dumps and communications between CCDA and AIOCD, it laid more emphasis on the categorical submissions made by several pharmaceutical companies that the PIS charges were paid voluntarily and thus decided to extend the benefit of doubt in favour of the CCDA. This reflects the CCI's current approach of not interfering with commercial wisdom of the businesses until it adversely affect the competition in the market.

[In Re: Alleged anti-competitive practices by the Chhattisgarh Chemist and Druggist Association in limiting supply of drugs/medicines in the State of Chhattisgarh, Suo Motu Case No. 04 of 2020) dated 5 July 2022.]

4. CCI issues cease & desist order against Trailer Owner Associations based in Chennai for indulging in anti-competitive practices

BRIEF FACTS OF THE CASE

The National Association of Container Freight Stations (**'Informant'/'NACFS'**) filed an information, against several Trailer Owner Associations (**'TOAs/OPs'**) for organizing collusive conduct. It was alleged that the OPs, in their respective areas, organized trade association meetings wherein the participants decided to: (i) interfere in the fixation of tariffs for trailers by not allowing Container Freight Station (**"CFS"**) operators to reduce the rate from what was decided by OPs; and (ii) restrict the members of the Informant and their sister concerns from plying of their own trailers for movement of containers. The OPs then imposed these decisions on the members of the Informant by coercing them with threats of strikes.

OBSERVATIONS OF THE CCI

I. Whether there was any anti-competitive agreement/understanding on the part of the OPs?

The DG report shows enough evidence to establish that the prices were increased, and certain restrictions were imposed collectively by OP-1 to OP-10 through association meetings from 2014 till 2018. Further, the minutes of various meetings and various letters exchanged between the Informant and these OPs, relied upon by the DG, establish that the prices for container trailer services were being fixed and increased from time to time, collectively by the OPs, and also that decisions were taken to restrict the number of trailers plied/operated by the members of the Informant and their sister concerns. Since none of the TOAs denied having participated in these meetings, the CCI observed there existed an anti-competitive agreement/understanding amongst them under Section 3(3)(a) and (b) of the Act, which are presumed to have an appreciable adverse effect on competition (**"AAEC"**).

II. Whether the OPs were able to rebut the presumption of AAEC caused by the horizontal agreements?

The CCI assessed whether the OPs have been able to rebut the said presumption so as to absolve them of the liability that has arisen. The OPs contended that their conduct was justified as the price increase was reasonable subject to rise in operating costs of running trailers such as fuel prices, repair & maintenance, driver salary, labour charges, etc. Moreover, CFSs entering the

transportation business side-lined the members of the TOAs, whose only means of survival was through these transportation services, etc. Lastly it was stated that the members of the Informant were also part of the impugned meetings and thus these decisions were mutually taken and had an active involvement of the informant, therefore cannot be held as unilateral price.

In this regard the CCI examined the role of trade associations and the legitimacy of actions taken by them. It recognized that the Association may act in a manner to protect the collective interests of its members and to alleviate their hardships, however it shall not provide its aegis to facilitate coordinated conduct which are in contravention of the Act. The CCI held that in the present matter, OPs transgressed their legal contours as an association, manipulated the market forces and narrowed the scope of competition through the aforesaid collective collusive action. Moreover, the participation of the Informant in the meeting did not alter the characterisation of an otherwise collusive conduct, and thus the presumption of AAEC wasn't rebutted. Therefore, the conduct of the OP's was held to be in contravention of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act.



CONCLUSION

Based on evidence on record, the CCI directed the TOAs to cease and desist from indulging in practices that were found to be in contravention of the provisions of Section 3 of the Act.

LKS INPUTS

Interestingly, this was a unique case where CCI proceeded *ex-parte* and even passed a final order as 11 out of the 12 OPs did not file any submissions or appear in any of the hearings before the CCI. Moreover, the CCI reiterated the principle that in a competitive market, the prices should be determined by free play of market forces, and any collusive action that may manipulate the independent decisions of market participants, would be falling foul of the provisions, irrespective of the fact that such actions were taken by the association to protect the interests of its members. Furthermore, mere participation of the informant does not dilute the responsibility of the associations involved in such collusive decision making.

[*In Re: National Association of Container Freight Stations, v. Trailer Owners Association* (CCI). Case No. 04 of 2018, order dated 20/07/2022]

5. NCLAT upholds CCI order setting aside allegations of predatory pricing by WhatsApp.

BRIEF FACTS OF THE CASE

The appeal was filed by Vinod Gupta ('Appellant') against the CCI order dated 01.06.2017, in **Shri Vinod Kumar Gupta v. WhatsApp**, dismissing allegations of predatory pricing by Whatsapp for providing its services without charging any subscription fee from the users, and that unreasonable data collection and sharing by WhatsApp would potentially provide a competitive advantage to dominant players (*Facebook group of companies*).

In the impugned order, the CCI found WhatsApp to be dominant in the market for "*instant messaging services using consumer communication App through Smartphones in India*", as it was the most popular messaging service used in around 96% of smartphones, but noting that the revenue model in the given industry is of providing free services and that there was availability of substitutable apps at zero switching costs, the CCI did not find alleged conduct to be predatory. It was further observed that the data policy as updated in 2016, provided *the option to its users to 'opt out' of sharing user account information with 'Facebook' within 30 days of agreeing to the updated terms of service and privacy policy*. CCI agreed with the submission of WhatsApp that no user data or account information will be shared on to Facebook or any other apps of "*Facebook family of companies*" for any third party to use. Accordingly, the matter was closed under the provisions of Section 26(2) of the Act.

NCLAT FINDINGS

The NCLAT observed that simply updating the terms and conditions and the users consenting or non-consenting does not amount to an abuse of dominant position in the relevant market where WhatsApp is competing with multiple messaging apps providing similar services. Thus, it upheld the CCI's finding that although WhatsApp was dominant in the relevant market, its conduct did not amount to abuse of Dominance.

NCLAT also supported CCI's observation that the issue of whether WhatsApp's conduct was in breach of the IT Act, 2000 and the right of privacy, was not a competition issue and was thus outside the purview of the Competition Act. Moreover, since the issue was already *sub-judice* in an appeal pending before the Hon'ble Supreme Court, in *Karmanya Singh Sareen Vs. Union of India*, CCI shall not adjudicate the issue.



CONCLUSION

The tribunal did not find any inconformity in the findings of the CCI and upheld that WhatsApp's conduct does not amount to abuse of dominance and thus, was not in contravention of the provisions of the act. Hence, the Appeal was dismissed by an order dated August 2, 2022.

LKS INPUTS

Interestingly in the Market Study Report on the Telecom Sector published last year, CCI acknowledged that "*privacy can take the form of non-price competition*" and this view was also reflected in practice when it passed a *suo moto* investigation order against WhatsApp's 2021 policy update, *prima facie* opining that unreasonable data collection and sharing could provide a competitive advantage to dominant players potentially resulting in abuse of dominance. This was a significant turn around from its decision in Vinod Gupta case. However, with the Personal Data Protection Bill now withdrawn, this order by NCLAT upholding Vinod Gupta case, has not just created uncertainty about the future of the on-going *suo moto* inquiry against WhatsApp, but has also raised doubt on CCI's stance on data and privacy as competition concerns.

[*Sri Vinod Kumar Gupta v. The Competition Commission of India & WhatsApp LLC*, C. A. No. 13/2017, NCLAT]

6. Karnataka HC denies Intel's plea to interfere with CCI investigation and imposes a cost of INR 10 lakhs

BRIEF FACTS OF THE CASE

In 2019, the CCI received an information from Matrix Info Systems, alleging abuse of dominance by Intel India (**'Petitioner'**) that as per its Indian Warranty policy, Intel denied warranty services to the consumers who purchased Intel Boxed Micro Processor from outside India. It was contended that such conduct restricted parallel imports of its product from outside India where it was available for 60% lower prices. Finding a *prima facie* case of violation, the CCI directed the DG to cause an investigation into the matter within 150 days. Intel aggrieved by the said order filed a writ before the Karnataka High Court (**'KHC'**), which granted an interim stay on the proceedings before the CCI.

The petitioner placing reliance on ***Kapil Wadhwa v. Samsung Electronics Co. Ltd'*** and ***Ashish Ahuja v. Snapdeal***² contended that it was justified on their part to not provide warranty for products that are not sold by its authorized distributors in India. Thus, the petitioner alleged that the impugned order of the CCI was inconsistent with observations made in similar cases, and thus being arbitrary, discriminatory and violative of principles of natural justice. It was further stated that such investigation had serious consequences and implications on the business reputation.

The CCI in response contended that the cases relied by the petitioner were factually dissimilar and didn't apply to the instant case. The impugned warranty policy *prima facie* involves issue of abuse of dominance and the impugned order being administrative in nature does not require deeper examination by Writ Courts.

HIGH COURT FINDINGS

The KHC observed that the CCI was the statutory body which has the requisite qualification & expertise to decide competition law matters and thus writ courts should avoid interfere in such matters without justified cause. The KHC further observed that filing information only initiates the case, and the scheme of the Act envisages layered proceedings. While passing an order under section 26(1) of the Act, the CCI only examines the *prima facie* indication of violation of the

1. SCC OnLine DEL 5172 (2012)

2. CCI, Case No. 17 of 2014

provisions of the Competition Act based on the information and other material on record. At this stage the CCI does not make the final adjudication of the case, the scope of inquiry is much broader, and the impugned order is only a step-in-aid of that.

With respect to the issue of 'detrimental effect' on the business reputation of the petitioners once an investigation had been ordered, the KHC observed that there may be damage to reputation of the petitioner caused by such investigation, however there is no legal injury that could be claimed. If such damage to reputation as a result of investigation is considered as a 'grave consequence', no preliminary inquiry by the CCI or investigation by DG can be undertaken and that would render the very scheme of Section 26 of the Act, virtually useless.



CONCLUSION

Based on the above observations, the KHC held that the writ petition filed by Intel was not just premature and absolutely devoid of merits, but also an abortive attempt to thwart the appropriate statutory proceedings of the CCI. Thus, the KHC dismissed the petition and imposed a cost of INR 10 lakh payable to the CCI.

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The KHC has reaffirmed the stance that an order of investigation under Section 26(1) of the Act, does not adjudicate upon the substantive right of the parties, thus the writ courts must restrain from interfering with such orders. Moreover, the costs imposed by the KHC on the petitioner would create deterrence for the parties using writ petition as a tool to delay investigations.

[Intel Technology India Pvt Ltd. v. Competition Commission of India & Anr. Writ Petition No.50727 of 2019]

MERGER CONTROL

1. Corporate restructuring of GlaxoSmithKline Consumer Healthcare Holdings (No.2) Limited (“JVCo”).

GSK Plc (“**GSK**”), a pharmaceuticals company, is the ultimate holding company of the GSK Group and is registered in England and Wales. It has a worldwide presence with respect to research and development, production and marketing of prescription pharmaceuticals, vaccines, and other consumer healthcare products.

Pfizer Inc. (“**Pfizer**”) is a research-oriented biopharmaceutical company incorporated in the United States of America (“**USA**”) and is involved in research and development, production and marketing of pharmaceutical drugs, vaccines etc.

Haleon Plc (“**Haleon**”), incorporated in the United Kingdom, is a newly incorporated overseas holding company. Haleon’s entire shareholding is currently held by four individual shareholders, who are all presently GSK employees and it currently does not hold shares in any entity and does not engage in any business activity. It will be the ultimate holding company of the respective consumer healthcare businesses of GSK and Pfizer.

JVCo was incorporated as a joint venture between GSK and Pfizer, wherein GSK and its affiliates hold 68% shareholding, directly and indirectly respectively. Further, Pfizer holds 32% of the shareholding indirectly (“**JVCo Transaction**”). The JVCo houses certain consumer healthcare products of GSK and Pfizer. Following this, GSK and Pfizer have been seeking to separate their consumer healthcare business, in pursuance of the same, a transaction was undertaken wherein JVCo proposed to acquire certain additional brands of GSK; by acquisition of 100% shareholding in GlaxoSmithKline Asia Private Ltd (“**GSKAPL**”) and acquisition of certain other consumer brands from GlaxoSmithKline Pharmaceuticals Ltd. (“**GSKAPL Transaction**”).

GSK, Pfizer and Haleon jointly notified to the CCI of the execution of an Implementation Agreement pertaining to the corporate restructuring of the JVCo. This is proposed to be achieved in two steps; (i) demerger of JVCo, followed by (ii) series of share exchanges by Pfizer and GSK/GSK affiliates for shares in Haleon. As a result, the entire shareholding of JVCo will be transferred to Haleon. Thus, Haleon will now indirectly hold 100% of the ordinary share capital of JVCo. Therefore, GSK and its affiliates will now be holding 68% of shareholding in Haleon and Pfizer will now be holding 32% of shareholding in Haleon. (“**Proposed Transaction**”).

Regarding possible market overlaps, the CCI examined that JVCo conducts its business in India through its wholly owned subsidiary, GlaxoSmithKline Consumer Private Ltd ("**GSKCPL**") which only undertakes manufacturing of drugs involved in treatment of common cold and its related symptoms. The CCI further noted that GlaxoSmithKline Asia Private Ltd ("**GSKAPL**") whose 100% shareholding was acquired by JVCo earlier, is a consumer healthcare company which undertakes marketing and distribution of over-the-counter oral healthcare products under various brands such as Sensodyne, Parodontax, Polident, Iodex and Ostocalcium and over-the-counter medicine products under brand names such as Crocin and ENO. It was further clarified to the CCI that, under the Proposed Transaction, no new products are sought to be added to JVCo beyond the contribution of consumer healthcare products by GSK and Pfizer to JVCo, which were the subject matter of earlier transactions.

Considering these facts, the CCI observed that the proposed combination is not altering the product scope of JVCo and the same is not likely to cause any significant change in the competition synergy thereby or cause AAEC on competition in India regardless of the manner in which relevant market are defined. Hence it approved the proposed combination under section 31(1) of the Act.



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Multi-step corporate restructuring transactions involving entities incorporated in various jurisdictions are subjected to assessment and approval requirements under the competition regime in India, so long as the parties to the restructuring have an India nexus. While transactions such as the above transaction, does not affect the competitive landscape, however, would trigger a notification requirement on technical grounds.

[Combination Registration No. C-2022/05/930]

2. *Acquisition of biosimilars portfolio of Viartis by Biocon Biologics*

Mylan Inc. ("**Mylan**") is a corporation incorporated in the USA and is an indirect, wholly owned subsidiary of Viartis.

Viartis Inc. ("**Viartis**"), headquartered in Pennsylvania, USA, is a global pharmaceutical company which manufactures oral solid doses, injectables, active pharmaceutical ingredients and complex dosage forms globally while offering

medicines, biosimilars and over-the-counter products around the world. Biocon Biologics Ltd ("**Biocon Biologics**"), a subsidiary of Biocon Ltd ("**Biocon**") is a company incorporated in India and is involved in the manufacture and commercialization of pharmaceutical formulations like biosimilars, insulin and other drugs in India. It also includes a branded formulation business which is responsible for B2C sales.

Serum Institute Life Sciences Pvt. Ltd. ("**Serum**") is a private limited company incorporated in India and is a subsidiary of the Serum Institute of India Pvt. Ltd. which belongs to the Serum Group. It is involved in the development and commercialization of vaccines and therapies against infectious diseases such as Covid-19. Its commercial endeavors include the development and sale of the Covid-19 vaccine called Covishield in India and exports to foreign countries under a Government of India initiative called Vaccine Maitri.

A notice was jointly filed by Mylan, Biocon Biologics and Serum, pursuant to a transaction agreement entered between Viartis and Biocon Biologics regarding a proposed combination. Under the proposed combination, the following steps are involved:

- i) Sale of global biosimilars portfolio of Viartis to Biocon Biologics and its subsidiary with consideration of cash and stock;
- ii) Acquisition of one common equity share and compulsory convertible preference shares which are convertible into common equity shares, that collectively represents 12.9% of the fully diluted equity share capital of Biocon Biologics, by Mylan. This acquisition constitutes part consideration for the acquisition of global biosimilars portfolio of Viartis.
- iii) Eventual equity infusion in Biocon Biologics by Biocon Ltd. and Serum.

Regarding possible market overlaps, the parties have examined that, out of the nine biosimilars manufactured and supplied by Biocon Biologics in India, two are supplied in India by Viartis (Trastuzumab and Bevacizumab). These two common biosimilar products produced by Viartis will now be acquired by Biocon Biologics and will constitute **acquired products**. The market for biological drugs based on Trastuzumab is referred to as **Relevant Market I** and the market for biological drugs based on Bevacizumab is referred to as **Relevant Market II**.

Additionally, Biocon Biologics and Viartis harbor an existing collaboration pertaining to these two biosimilars wherein Biocon Biologics manufactures and supplies these biosimilars to Viartis and both Biocon Biologics and Viartis have commercialization rights in India. Both Biocon Biologics and Viartis will continue to compete independently in the relevant markets for the supply of various branded formulations.

Following the assessment of the Parties' submissions in the notice to the CCI, it determined that the proposed combination is not likely to cause appreciable adverse effect on competition in any of the possible alternative relevant markets due to combined market share of Viartis and Biocon being in the range of 15-20% in Relevant Market I and II, incremental market share of Viartis and Biocon being in the range of 0-5% and presence of other competitors capable of casting competitive constraint on the parties in the relevant markets of the acquired and non-acquired products alike and thereby approved the proposed combination under section 31(1) of the Act.

[Combination Registration No.C-2022/04/924]

3. Acquisition of sole control and 100% shareholding of Air Asia India Ltd by Air India Limited

Tata Sons Pvt. Ltd. ("**TSPL**") is the ultimate holding company of entities belonging to the Tata Sons Group. It is an investment holding company operating in the passenger air transport sector through Air India Ltd, Air India Express Ltd ("**AIXL**"), Air India SATS Airport Services Pvt Ltd ("**AISATS**"), Tata SIA Airlines Ltd ("**Vistara**") and AirAsia India. It currently holds 83.67% shareholding in AirAsia India Ltd.

Air India Ltd ("**Air India**"), is a wholly owned subsidiary of TSPL which operates in the domestic scheduled air passenger transport service, air cargo transport services and charter flight services, in India and provides international scheduled air passenger transport service.

AIXL is a wholly owned subsidiary of Air India operating in the domestic air passenger transport service, air cargo transport service and charter flight services sector.

AirAsia Investment Ltd ("**AAGL**") currently holds 16.33% shareholding of AirAsia India as a joint venture ("**JV**") with TSPL.

AirAsia (India) Ltd ("**AirAsia India**") is a JV between TSPL and AAGL wherein TSPL and AAGL hold 83.67% and 16.33% of the shareholding of AirAsia India, respectively. Operating under the brand name 'AirAsia' it is engaged in the business of providing the services pertaining to domestic scheduled air passenger transport service, air cargo transport services, and charter flight services in India. However, it does not provide scheduled air passenger transport services on international routes.

Air India proposes to acquire 16.33% shareholding of AAGL in AirAsia India pursuant to exercise of a call option under the shareholders agreement executed between AAGL, AirAsia India and TSPL. This is to be followed by transfer of 83.67% of already existing shareholding of TSPL in AirAsia India to Air India. As a result, the entire shareholding of AirAsia India will now belong to Air India and AAGL will exit the JV.

With respect to the proposed combination, as notified to the CCI by Air India, the CCI observed that the joint venture between TSPL and AirAsia has such an arrangement that TSPL holds a majority of the share capital of AirAsia India. Additionally, the Tata Sons group is present in passenger air transport operations in India; through two JVs, AirAsia India and Vistara, and through Air India including AIXL. Out of these two JVs, in AirAsia India, the control exerted by Tata Sons group is significant as it already holds 83.67% shareholding which is subject to be magnified upon execution of the proposed combination wherein the other JV partner, AAGL will completely exit from the AirAsia India.

However, the CCI acknowledged that the influence exerted by AAGL over AirAsia India is not sufficiently significant that its exit from the JV is likely affect market behaviour of AirAsia India and the overlapping entities of Tata Sons Group so as to induce or raise any competition concern. Hence the CCI determined that the proposed combination is not likely to cause AAEC in India, in any of the relevant markets and thereby approved the same under Section 31(1) of the Act.

[Combination Registration No. C-2022/04/922]

4. Acquisition of control of Citrix jointly by Vista and Elliot

Citrix Systems, INC ("**Citrix**"), is a multinational public company with shares listed on NASDAQ, headquartered in Florida, USA and operates in India via its Indian subsidiaries; Citrix Systems India Pvt Ltd ("**Citrix India**") and Citrix R&D India Private Limited ("**Citrix R&D**"). It operates in the areas of virtual client computing, work solutions, networking and IT security software.

Vista Equity Partners Management, LLC ("**Vista**"), is an LLC which is ultimately controlled by the VEP Group, LLC ("**Vista Group**"). The Vista Group is a non-economic governance vehicle, a USA-based investment firm aiming at strengthening enterprise software, data and tech-enabled businesses and is also the Senior Managing Member of Vista.

Elliott Investment Management GP LLP ("**Elliott**"), is a limited liability company and an investment firm based in Delaware, USA which employs a multi-strategy

trading approach in securities, private equity, distressed securities, commodities trading, portfolio volatility protection etc.

The proposed combination relates to indirect acquisition of joint control by Vista and Elliott (collectively referred to as "**Acquirers**") over Citrix through certain interconnected steps.

The CCI observed that the Acquirers and Citrix are majorly engaged in the IT and ITES sector, but their activities are not overlapping considering the fact the end use of their products are distinct and non-substitutable. However, the CCI has identified the potential overlap between Vista and Citrix in the networking and IT security software business. Regardless, the combined market share of the parties in the networking and IT security software business is less than 5% with the presence of numerous competitors. Thus, the CCI held that considering the above-mentioned analysis, the proposed combination is not likely to cast AAEC in India and thereby approved the proposed combination under Section 31(1) of the Act.

[Combination Registration No. C-2022/04/919]

NEWS NUGGETS

1. The New Competition (Amendment) Bill, 2022, tabled in the Lok Sabha of the Indian Parliament

The Competition (Amendment) Bill, 2022 was tabled in the Lok Sabha by the Law Minister, Kiren Rijju as of August 2022. This bill aims at introducing essential structural changes in the governing structure of the CCI and changes to substantive provisions to address the needs for new age markets, lessen litigation and obtain faster merger and acquisition related approvals. Furthermore, this bill strives to expedite the decision-making process of the CCI in the merger control regime and grant extensive powers to the CCI to impose higher penalties while broadening the scope of anti-competitive agreements.

2. CCI reaches final leg of the investigation against major cement manufacturers of India and Indian subsidiaries of Swiss Cement industry leader LafargeHolcim

The CCI had initiated an investigation in 2019, against the ACC Cement, Ambuja Cement, UltraTech Cement, Shree Cement, Dalmia Cement and 15 other firms for competition law violations pertaining to price fixing and coordinated price hikes discussed over Zoom calls, WhatsApp and in in-person meetings. Pursuant to the same, the office of the DG has prepared an investigation report recently, discussing the alleged price hike agreements. The final analysis of the alleged violations and imposition of penalties are awaited.

3. Representatives of leading startups to appear before a critical Parliamentary Standing Committee on Finance.

Representatives from Zomato, Flipkart, Swiggy, Ola, Oyo and All India Gaming Association recently attended a Parliamentary Standing Committee on Finance to present their submissions regarding marketplace competition, their market conduct and complaints received against such e-commerce companies, digital gaming companies and online aggregators in the online taxi industry.

4. European Commission ("EC") conducts announced inspections in the water infrastructure sector over alleged bid rigging.

The EC conducted unannounced inspections, at the premises of the companies involved in the construction of networks and treatment plants for drinking water

and treating wastewater on the grounds of alleged bid-rigging in the tenders pertaining to EC funds attested to use for construction of plants and water networks. This constitutes the preliminary step of the investigation on the basis of suspicion of anti-competitive practices.

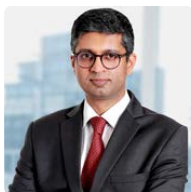
5. EU Competition Regulator launches unannounced raids on the auto-motive companies in the EU.

Recently, EU antitrust regulators raided numerous automotive companies and associations in on the grounds of suspicion of breach of EU's cartel rules regarding possible collusion in relation to collection, treatment and recovery of end-of-life cars and vans categorized as waste products i.e., recycling of end-of-life vehicles. It also issued requests for information from the carmakers. Some of the car makers include Renault, BMW, Stellantis, Mercedes Benz, which volunteered as a leniency applicant. If found in violation of EU Cartel rules, the companies could face a fine of up to 10% of their global turnover.

6. Match Group files antitrust case against Apple with the CCI over monopolistic conduct.

Match Group has filed an antitrust case against Apple with the CCI, alleging a monopolistic conduct pertaining to imposition of excessive commission of up to 30%, on developers, on in-app purchases made by the customers thereby restricting innovation and improvement of developers. It has alleged that Apple is abusing its dominant position in the iOS App Store market to promote the exclusive use of its own in-app payment solution, which Apple has mandated and includes high commission rates on developers.

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 LKS.



CHARANYA LAKSHMIKUMARAN

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



NEELAMBERA SANDEEPAN

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



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Adjudged "winner" in the Competition
& Antitrust Firm category in the **Indian
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2021**

ALB's Super 50 Dispute Lawyers in Asia
2021 *Charanya LakshmiKumaran*
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LakshmiKumaran & Sridharan recognised
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