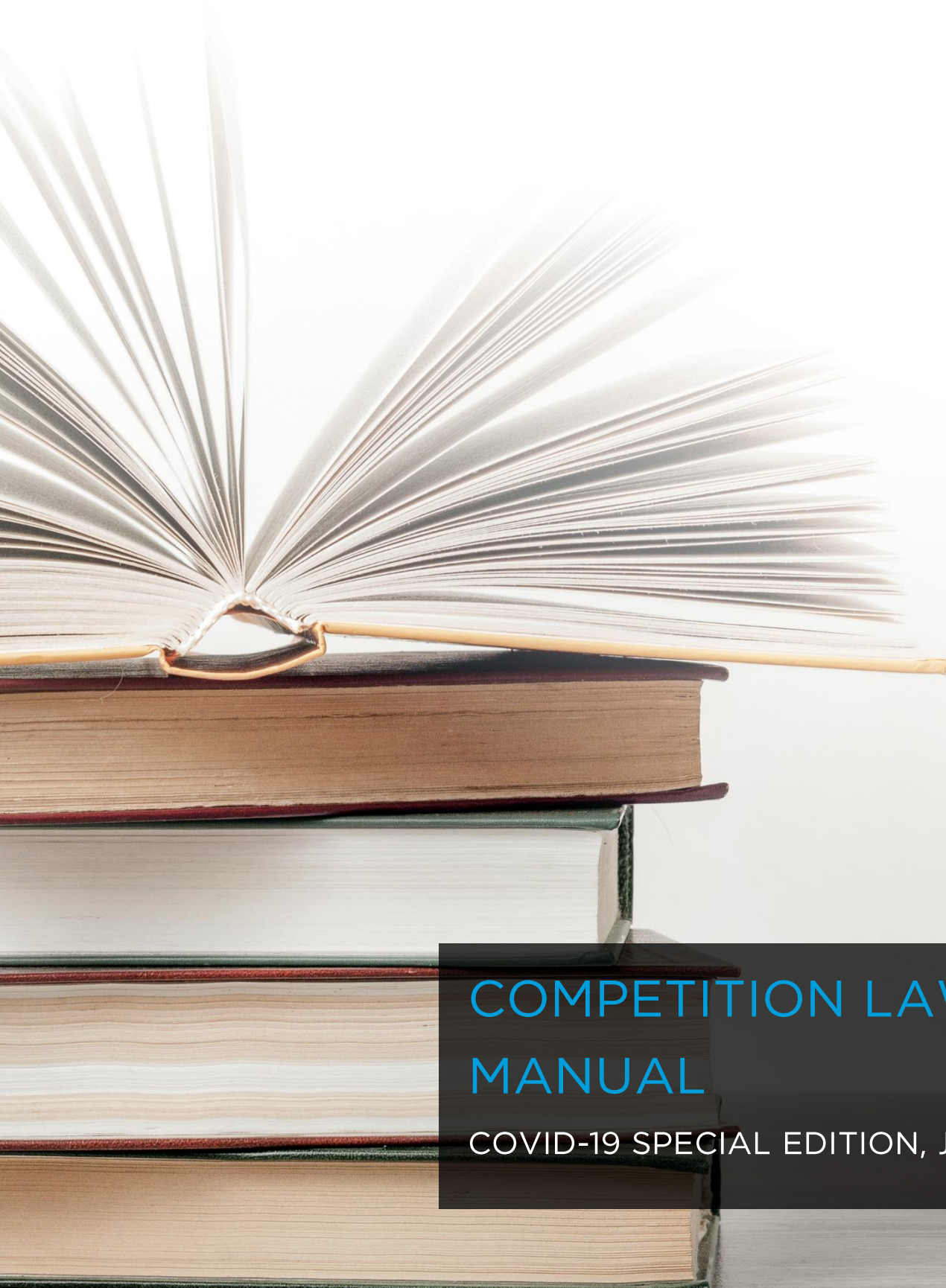




KHAITAN  
& CO

*Advocates since 1911*



# COMPETITION LAW MANUAL

COVID-19 SPECIAL EDITION, JUNE 2020



सत्यमेव जयते

*Ashok Kumar Gupta*  
Chairperson



Fair Competition  
For Greater Good

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## Foreword

The COVID-19 pandemic has completely changed the economic landscape in India as well around the globe. The government's response to the COVID-19 pandemic has been to adopt timely and targeted measures to support the economy. For businesses, these are challenging times and they have to reorient and adapt to a new normal. A pertinent question arises as to how should the Indian legal and regulatory framework governing businesses be reworked to safeguard against the fallout from COVID-19?

In the specific context of competition laws, there has been a debate on the compatibility of the provisions of the Competition Act, 2002 (Act) and measures adopted by businesses in response to COVID-19. As mentioned in our Advisory to businesses, the legislative scheme of the Act is well equipped to accommodate the unprecedented business realities of today. The Act has long recognised the benefits of certain competitor collaborations that are efficiency enhancing. We appreciate that businesses may need to coordinate certain activities to maintain supply chains of certain products and ensure smooth provisioning of services. In that sense, the Indian Competition Law is sufficiently flexible and far-reaching to account for changing market conditions, even during times of economic and non-economic stresses.

Thus, even though the anti-trust statutory framework provides flexibility to businesses, it is imperative that competition principles are respected during the pandemic as we endeavour to come out of the crisis. I hope that this Competition Manual will not only provide adequate guidance to industry stakeholders, but will also instil a sense of trust in the Commission's efforts to safeguard the competitive landscape in India.

(Ashok Kumar Gupta)

24<sup>th</sup> June, 2020





MESSAGE FROM  
SECRETARY GENERAL,  
ASSOCHAM  
AND  
SENIOR PARTNER,  
KHAITAN & CO



The onset of the COVID-19 pandemic has forced many market players to adopt new business practices overnight, while at the same time ensuring that they comply with pre-existing as well as new sets of laws and regulations. During this unprecedented time, sectors may be exposed to monopolistic practices and cartelisation, resulting in adverse implications on pricing and consumer protection.

Given the market distortion, regulators around the world have recognised the need for reasonable and limited coordination amongst competitors for functioning in the market. However, authorities have also recognised that opportunism and exploitation of COVID-19 will not be taken lightly and will attract strict scrutiny from regulators. The Competition Commission of India (Commission) has also followed suit and acknowledged that businesses may collaborate, where necessary, to combat disruptions caused by the pandemic.

The preamble of the Indian Competition Act, 2002 (Act) discourages anticompetitive practices, promotes fair competition and transparency, greater efficiency and leaves no room for complacency or time to "rest on your laurels". The ethos of the Act is to uphold benefits of competitive processes resulting in consumer welfare in the market. Given the current state of the market, the relaxations offered by the Commission are aimed at ensuring its basic tenets, remedying supply disruption, and ensuring ease of doing business.

It is emphasised that given that markets have become difficult to navigate, it is essential to consult lawyers and other professionals conversant with the market dynamics that are prepared to combat such ordeals in order to ensure regulatory compliance.

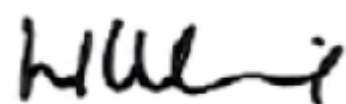
With the necessary infrastructure and support of ASSOCHAM and experience of Khaitan & Co, we introduce to you the "Competition Law Manual". This handbook will enable our audience to tread troubled waters smoothly and ensure that their business can continue flourishing with least levels of intervention by the Commission.

We, on behalf of ASSOCHAM and Khaitan & Co acknowledge the initiative and compliment the joint efforts of the expert Khaitan & Co Competition / Antitrust Team and Corporate Affairs Team, ASSOCHAM. We are sure that this manual will provide rich insights and adequate knowledge to all corporate stakeholders.



Deepak Sood

With Best Wishes,



Haigreve Khaitan

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## COMPETITION LAW MANUAL

*This manual first aims to provide a fresh take on the challenges to various industries put forth by the novel corona virus and necessary precautions for businesses to tackle these challenges head on. The manual will then proceed to elucidate new trends in the enforcement aspects of competition law wherein it will discuss ways to mitigate regulatory intervention and various safeguards in the Competition Act, 2002 itself which allow ease of doing business. The manual will finally address nuances in mergers and acquisitions with a special focus on apprising readers on ways to expedite the regulatory process and acquire speedy approval.*

# ADAPTING TO THE NEW NORMAL OF BUSINESS IN INDIA

## COVID 19 – The Path to regulating the Indian Merger Control process

The COVID-19 pandemic has undoubtedly delivered a blow to the global economy, disrupting supply chains and choking off demand. On the supply side, the pandemic and ensuing lockdown have adversely affected businesses, in particular those with high fixed costs. For instance, the automobile sector along with the entertainment industry have recorded negligible sales owing to the lockdown. On the contrary, sectors such as retail of essential products, e-commerce, healthcare and pharmaceuticals are the outliers and have either seen a surge in sales (due to panic buying) or have been COVID proof. However, even these sectors are not immune to supply chain disruptions and have had to adapt to changes in their logistics management.

On the demand side, we are witnessing an emergence of new buying behaviour, as consumers who preferred to buy offline are also shifting to shopping online. Further, buyer demand for sectors which are dependent on customer footfall (such as, hospitality, entertainment, aviation, sports, etc.) has been effectively suppressed.

In a bid to protect operational viability, businesses must answer difficult questions on how to overcome suppressed demand, capacity shortages, labour shortages, and coordinate last-mile deliveries. Businesses may find the adoption of a collaborative approach i.e., competitor collaboration a feasible method of maintaining operational viability - at least during the period of the continuance of the pandemic and period its aftereffects continue. One way in which competitor collaboration could be achieved includes, the pooling of logistics and distribution networks to address supply chain bottlenecks. For instance, the shortage of trucks and inter-state transport restrictions may prompt manufacturers of bulky goods to pool resources for transportation. This would allow for cost optimisation and avoid inefficiencies. Another illustration of competitor collaboration could be joint research and development projects undertaken by pharmaceuticals to formulate a vaccine for COVID-19.

The resulting economic peculiarities and unconventional recovery plans raise concerns regarding whether the existing antitrust / competition framework is armoured to tackle challenges during these unprecedented times. Certain jurisdictions were of the view that their antitrust frameworks were broad enough to protect any collaborative / joint measures taken by market players (including direct competitors) to meet exigencies. For instance, the European Competition Network (ECN) observed it will not “actively intervene” against “necessary and temporary” cooperation of companies undertaken to avoid a shortage of supply.<sup>1</sup> The ECN also stated that companies with doubts about compatibility of cooperation initiatives should reach out to the European Commission or national

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<sup>1</sup> European Competition Network “Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis” dated 23 March 2020, available at <[https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf)> last accessed on 07 April 2020.

competition authorities for informal guidance.<sup>2</sup> However, this does not suggest the suspension of the European Commission's framework and no exemptions have been granted from the operability of the same.

Other jurisdictions such as the United Kingdom, amended the Competition Act, 1998 to provide temporary relaxation to retailers and logistics providers with the caveat that it cannot be allowed to exploit consumers under the guise of essential collusion.<sup>3</sup>

In India, market players are required to act within the confines of the Competition Act, 2002 (Competition Act). This includes complying with the prohibition against engaging in anticompetitive horizontal restraints such as cartelisation<sup>4</sup>; and the abuse of dominant positions such as through price gouging.<sup>5</sup>

On 19 April 2020, the Indian antitrust / competition regulator (i.e., the Competition Commission of India (Commission)) published an advisory stating that the existing legislative scheme of the Competition Act would protect outbreak management responses that are found to be "*efficiency enhancing*". The advisory highlighted that the appreciable adverse effects on competition (AAEC) test, also internationally known as the "*rule of reason*" test, would take care of any coordination that enhances efficiency in the market. We will touch upon the AAEC in the subsequent chapter titled "*Walking the regulatory tightrope: Appreciating the enforcement landscape and minimizing regulatory concerns*". Therefore, businesses may be assured that the Commission will take into account business /commercial rationale when investigating conduct / arrangements brought to its notice.

Businesses may also seek respite from the Commission's statement concerning the capping of airfares by the Ministry of Civil Aviation.<sup>6</sup> The statement acknowledges that it would be inappropriate to expect the principles of free-markets to apply during a crisis. Therefore, it provides an insight into the Commission's temperament and businesses can be assured that the Commission's decision will account for the hardship ripples caused by the COVID-19 pandemic.

Accordingly, while certain measures which are aimed at generating efficiencies may be exempt from scrutiny under the Competition Act, other measures may fall afoul of its provisions. For instance, businesses may be tempted to engage in discussions on hard core competition variables such as price, output, volume of production as a viable option for post-COVID recovery. For example, businesses may propose tying non-essential products with essential products to spur the sale of the non-essential product. Further, competitors may discuss strategies aimed at recouping losses. Such measures are risky and more often than not could amount to taking advantage of the COVID-19 situation.

Whichever way businesses adapt, it is crucial that outbreak management responses remain competition compliant. As a result, businesses are urged to exercise prudence and keep

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<sup>2</sup> European Competition Network "*Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis*" dated 23 March 2020, available at <[https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf)> last accessed on 07 April 2020.

<sup>3</sup> The Competition Act, 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, available at <<http://www.legislation.gov.uk/uksi/2020/369/made>> last accessed on 07 April 2020.

<sup>4</sup> Section 3 of the Competition Act, 2002.

<sup>5</sup> Section 4 of the Competition Act, 2002.

<sup>6</sup> The New Indian Express "*Can't expect the normal free-market principles in crisis situation: CCI chief on capping of airfares*" dated 10 June 2020, available at <<https://www.newindianexpress.com/business/2020/jun/10/cant-expect-normal-free-market-principles-in-crisis-situation-cci-chief-on-capping-of-airfares-2154829.html>> last accessed on 16 June 2020.

abreast of developments in the sphere of competition regulation as it has the potential to severely impact commercial operations.

In terms of merger control, it is understood that entities may suffer losses due to COVID-19 disruptions and therefore, would be looking to enter into transactions to sustain themselves or exit the market entirely. Accordingly, it should be noted for such transactions or “fire sales”, the Commission may consider the “failing firm defence” in allowing such transactions to consummate. A recent example of the application of the failing firm defence comes from the competition regulator in the United Kingdom. In said case, the regulator allowed an investment by Amazon in a food delivery app called Deliveroo, owing to the financial distress caused by the pandemic and likelihood of Deliveroo’s exit from the market.

However, it should be kept in mind that the Commission is incredibly cautious in utilising such a defence. Regardless, given the challenges posed by COVID-19, it is likely that the Commission will be more amenable to allowing the arguments of failing firm defence.

Further, and to ensure a smooth sailing approval process, businesses participating in fire sales should ensure that thorough competition law due diligence is undertaken for the failing firm so that minimum risk is acquired. The acquirer of the failing firm must bear in mind the long-term and medium-term viability of its acquisition. Changing market dynamics and change in consumer preferences should also be accounted for before making the decision.

Finally, the Commission has pre-filing consultation mechanisms in place, where parties can have a discussion with the Commission on a names or no-names basis. Regular consultation with the Commission assists in gaining clarity on what information the Commission requires and hastens the review process.

In continuance of the foregoing objective and economic justifications, the Commission has invited stakeholders to share views regarding whether or not the “non-compete” obligations which in many commercial transactions an acquirer imposes upon the seller, should continue under the merger control regime of the Competition Act. A decision in this behalf is expected to be made available in the public domain soon. In case the “non-compete” obligation is done away with based on the rationale that such an obligation in merger control assessment processes may not add any additional benefit to the competitive process, the industry and competitive landscape of Indian markets would benefit

In conclusion, not only does the spread of COVID-19 challenge the functioning of businesses, it also challenges the traditional metrics of antitrust enforcement. In these testing times, the Commission has risen to the challenges and therefore, it is expected that it will be increasingly vigilant and on the lookout for any anticompetitive conduct. At the same time, it is expected to be lenient towards procompetitive collaborative efforts designed to combat the supply chain disruptions. Businesses should stay alert and consult with their legal counsel before entering into any agreement or transaction.



Golden rules to abide by for collaborating during tough times:

- *Enter into only such collaborations that are efficiency enhancing or for a procompetitive purpose, which cannot be achieved alone.*
- *Any meetings between competitors should have a pre-fixed agenda which should be reviewed by legal counsels.*
- *Create firewalls when collaborating with competitors to ensure prevention of information leakage.*
- *Collaboration / restrictions must be limited in time and in geography for the duration to be defined by the COVID-19 pandemic.*

## ENFORCEMENT TRENDS

### Walking the regulatory tightrope: Appreciating the enforcement landscape and minimizing regulatory concerns

The Government of India's push towards "*ease of doing business*" has raised two broad questions for policy makers and enforcers. Firstly, how do we orient our legal and regulatory framework to facilitate the ease of doing business in India? And secondly, a question that is perhaps less easily answered - how do we facilitate growth while continuing to promote, sustain and protect "*competition*"?

The past two years of the Indian competition / antitrust regime indicate that the legislature and Commission have taken it upon themselves to meet the challenges posed by these questions. Attempts to reorient the landscape are evidenced by a flurry of amendments in the enforcement and merger control spaces. Other markers include, the organisation of inclusive stakeholder consultations to propose amendments to the Competition Act, in-depth market studies in emerging sectors (such as, digital markets, telecom, media, etc.), competition awareness road-shows, and a fresh appreciation for the commercial rationale behind business conduct / agreements.

This chapter will provide readers insights on (i) whether the scheme of the Competition Act promotes effective antitrust enforcement while ensuring minimal regulatory interference, (ii) whether the Commission (in practice) accounts for business realities during its decision-making, and (iii) whether the legislature has been proactive in addressing stakeholder concerns. It is expected that if and when these questions are answered in the affirmative, the Indian competition regime will be well positioned to meet its objectives and cater to policy considerations of the government.

#### In the spotlight: "*competition*" v. "*competitors*"

One way in which the Competition Act seeks to achieve its objectives is by prohibiting conduct / agreements that cause or are likely to cause an AAEC in India. That is, the Competition Act prohibits conduct / agreements that cause(s) "*harm to competition*" and not "*harm to competitors*". Therefore, it is insufficient for a business to allege harm to itself *alone*, without proving an adverse impact on competition in the market. While the distinction between "*harm to competition*" versus "*harm to competitors*" is nuanced, the following illustration may help provide clarity to our readers:

Consider how a discount offered by a business may deprive its competitors of a valued customer. On the flip side, customers directly benefit from the price-cut. Further, and in a bid to win back its customers, competitors may attempt to match the discount by lowering their own cost of production. This may be achieved through heightened efficiencies in the production process. Consequently, the discount spurred competition and resulted in tangible benefits including, reduced prices and a cost-efficient production process. Evidently, a straightforward evaluation of the impact on the "*competitor*" was not sufficient to conclude harm to "*competition*".

### Striking a balance: Identifying harm to competition

This begs the next question, which is, what constitutes an AAEC (i.e., harm to competition)? The Competition Act does not define AAEC. Instead, it requires the Commission to weigh the anticompetitive effects of the conduct / agreement in question against its procompetitive effects. If the anticompetitive effects outweigh the procompetitive effects, the conduct / agreement is said to cause or be likely to cause an AAEC.

Section 19(3) of the Competition Act prescribes certain factors to aid the Commission's determination of the likelihood of AAEC. This includes anticompetitive factors such as, whether the conduct / agreement leads to the creation of entry barriers, drives existing competitors out of the market, or leads to the foreclosure of competition. It also includes procompetitive considerations such as, whether the conduct / agreement results in the accrual of benefit to consumers, improvements in the production or distribution of goods, or the promotion of technical, scientific and / or economic development by means of production or distribution of a good.

As such, the Competition Act is designed to allow the Commission flexibility during AAEC assessment, albeit within a well-defined framework.

#### DID YOU KNOW?

*Interestingly, the Commission has long recognised that a business is only capable of causing an AAEC if it exercises a certain degree of market power. For instance, in the Bajaj Corporation case,<sup>7</sup> the Commission held that an agreement entered between enterprises was unlikely to cause an AAEC where the position of the enterprise was "...weak in the market..." Therefore, even prior to delving into an AAEC assessment, businesses may benefit from demonstrating that they do not exercise power in the market being scrutinised.*

### Appreciating procompetitive justifications: Recent past in review

Businesses will also be glad to learn that pursuant to 2018, the Commission's decisions demonstrate its willingness to undertake seemingly thorough AAEC analyses, particularly during the evaluation of vertical restraints. Vertical restraints refer to conduct / agreements entered between players operating at different levels of the supply chain (for e.g., a manufacturer and a distributor). Such restraints are prohibited under Section 3(4) of the Competition Act if they are found to cause or be likely to cause an AAEC in India.

While Section 3(4) of the Competition Act lists five types of potentially anticompetitive vertical restraints,<sup>8</sup> the list is not exhaustive and vertical restraints which do not find explicit mention may also be subject to scrutiny under the Competition Act.

<sup>7</sup> Case No. 68 of 2013 dated 12 October 2015.

<sup>8</sup> The five types of vertical agreements listed in the Competition Act, 2002 are as follows: (i) tie-in arrangements, (ii) exclusive distribution agreements, (iii) exclusive supply agreements, (iv) refusal to deal, and (v) resale price maintenance.

A brief overview of the Commission's considerations in decisions where it concluded that the challenged vertical restraints did not cause an AAEC may be helpful.

In November 2018 and June 2019, the Commission investigated two separate allegations against smartphone manufacturers *OPPO*<sup>9</sup> and *Vivo*,<sup>10</sup> respectively. It had been alleged that they had entered exclusive distribution agreements whereby they (i) allocated the territory within which the distributors could operate, and (ii) restricted the online sale of their smartphones. In both cases, the Commission found that the territorial allocation did not cause an AAEC since passive sales were allowed. Further, the restriction on online sales did not cause an AAEC because both brands of smartphones were easily available at discounted prices on all major e-commerce platforms.

In another case involving *Vivo*,<sup>11</sup> the Commission assessed whether the exclusive supply agreement, whereby distributors of *Vivo* were restricted from dealing with the smartphones of *Oppo* and *Honor*, harmed competition. No case for an AAEC was made out because (i) the restriction was against dealing with only two competitors of *Vivo* (while there were multiple other competitors such as, Micromax and Xiaomi in the market); and (ii) the restriction prevented leakage of *Vivo*'s intellectual property (IP) / technical know-how, since *Oppo* and *Honor* were familiar with functioning of *Vivo*.

Most notably, the years 2018 and 2019 witnessed the Commission categorically applying the *rule of reason* test to exonerate various companies from allegations of resale price maintenance (RPM).<sup>12</sup> That is to say, that the Commission did not *presume* that the alleged RPM caused or was likely to cause an AAEC. This is unlike foreign jurisdictions such as the European Commission, which view RPM's as "*hardcore restraints on competition*". Instead, in most of these cases, the Commission found no proof of an AAEC and highlighted the existence of inter-brand competition. In one case, the Commission even clarified that no contravention could be found since evidence of only one instance of RPM was not sufficient to cause an AAEC.<sup>13</sup>

While challenges to vertical restraints in the past two years have not been met with much success, allegations of conduct / agreements entered between competitors (i.e., horizontal restraints) have fared significantly better. This is primarily because horizontal restraints under Section 3(3) of the Competition Act are viewed as the most pernicious economic offences and therefore, presumed to cause an AAEC.

However, parties may obtain a waiver / mitigation from penalties if they disclose their engagement in the contravention of Section 3(3) of the Competition Act. To this effect, the Competition Act provides for a framework commonly referred to as the "*leniency programme*". The leniency programme is a scheme which allows participants in a cartel to volunteer details of its existence and / or details of its operations in exchange for reduced penalties, subject to certain conditions under the Competition Act. It is a whistle-blower programme that aids in the detection and subsequent penalisation of cartels by the Commission.

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<sup>9</sup> Case No. 34 of 2018 dated 8 November 2018.

<sup>10</sup> Case No. 35 of 2018 dated 19 June 2019.

<sup>11</sup> Case No. 15 of 2018 dated 4 October 2018.

<sup>12</sup> Case No. 35 of 2018 dated 19 June 2019, Case No. 17 of 2018 dated 27 August 2018, Case No. 61 of 2014 dated 15 January 2019 and Case No. 55 of 2017 dated 14 August 2018.

<sup>13</sup> Case No. 55 of 2017 dated 14 August 2018.



Most recently, the Commission passed an order pursuant to the filing of a leniency application by Schaeffler India Limited (Schaeffler)<sup>14</sup>. Schaeffler had disclosed cartel conduct in the domestic automotive and industrial bearings market between itself and National Engineering Industries Limited, SKF India Limited and Tata Steel Limited, Bearing Division. While the Commission found that the cartel conduct caused an AAEC in the concerned market, no penalty was imposed on Schaeffler, or any of the subsequent applicants. The order is significant since imposition of zero penalty reflects that the Commission wishes to encourage the disclosure of more cartel conduct through the leniency framework.

Separately, it may also be highlighted that efficiency enhancing joint ventures (JVs) entered between competitors are explicitly exempt from scrutiny under Section 3(3) of the Competition Act.

For instance, in the 2015 *K Sera*<sup>15</sup> case, the Commission refused to investigate allegations of anticompetitive horizontal restraint against Digital Cinema Initiatives (DCI). This was because DCI was found to be an efficiency enhancing joint venture between, among others, Walt Disney Company India, Fox Star Studios, NBC Universal Media Distribution Services Private Limited and Paramount Films India Limited. It is anticipated that the JV defence will find wide applicability in the post-COVID scenario.

#### Alternative exemptions: IPR and Import / Export

Apart from the JV defence, Section 3(5) of the Competition Act, provides two other exemptions to allegations of contravention of Sections 3(3) and 3(4) of the Competition Act (i.e., anticompetitive horizontal restraints and anticompetitive vertical restraints).

The first exemption under Section 3(5)(i) of the Competition Act states that Sections 3(3) and 3(4) of the Competition Act do not restrict the right of any person to “*restrain any infringement of, or to impose reasonable conditions ... necessary ...*” to protect IP rights conferred under certain statutes, including the Patents Act, 1970, Trade Marks Act, 1999, among others.

The now dated *FICCI* order<sup>16</sup> clarified that the exemption cannot be interpreted to give intellectual property laws an “*absolute overriding effect on competition law*”. The provision merely exempts “*reasonable measures*” adopted by a right holder to protect his / her rights under the specified enactments. Guidance on what constitutes a necessary measure is found in the seminal decision *Shamsher Kataria*<sup>17</sup>. The Commission noted that to avail of the defence under Section 3(5)(i) of the Competition Act, the question of whether the IP right holder could protect his IP right, “*even if such restriction was not present*” was relevant to be determined.

The exemption prescribed under Section 3(5)(ii) of the Competition Act expressly exempts export cartels from liability under Section 3 of the Competition Act.<sup>18</sup> More specifically, it exempts agreements which cause or are likely to cause an AAEC within India, if they protect

<sup>14</sup> Case No. 05 of 2017 dated 5 June 2020.

<sup>15</sup> Case No. 30 of 2015 dated 22 April 2015.

<sup>16</sup> Case No. 1 of 2009 dated 25 May 2011.

<sup>17</sup> Case No. 3 of 2011 dated 25 August 2014.

<sup>18</sup> RTPE No. 20 of 2008 dated 30 December 2012.

the right of persons who export goods from India - provided the agreement exclusively relates to the supply, production, distribution, etc. of this good, for such export. However, the exemption is not available to agreements / arrangements entered in the value chain of goods that are ultimately exported. As *per* the Commission in the *Ruchi Soya* order<sup>19</sup> anticompetitive agreements entered would not be immunised "*merely because the end product is being exported*". Such interpretation would be "*absurd*" and render "*the country's exports uncompetitive.*"

#### Safeguard yourself?

Having said that, AAEC assessments and / or availing of exemptions are often complicated exercises requiring the Commission and the party's legal counsels to engage in intensive fact-gathering exercises. Therefore, businesses may benefit from maintaining documentation that expresses the business / economic justification for the adoption of measures that may come under the Commission's scrutiny. Further, businesses may also benefit from undertaking a comprehensive legal and business analysis before imposing restrictions for products in which they have consistently enjoyed market power.

#### ILLUSTRATIVE WORD OF ADVICE

*Looking to maintain exclusive distribution agreements? We propose recording how exclusive distribution and territorial restrictions bring efficiency, cost-gains and enable better management of distribution channels. Businesses may also document how it leads to improvement in the distribution of goods, timely catering to the retailers and comprehensive coverage of the Indian territory including, rural and other outskirt areas which otherwise may not be covered properly.*

#### Addressing stakeholder concerns

In the pipeline: Proposed Bill

More recently, the Ministry of Corporate Affairs, Government of India proposed certain amendments to the Competition Act through the Competition (Amendment) Bill, 2020 (Bill). The Bill was drafted pursuant to receiving stakeholder recommendations from the Competition Law Review Committee (CLRC).

While the CLRC recommended several changes that the Bill proposes to implement, possibility of the introduction of a mechanism for the settlement and / or commitment of competition proceedings is a welcome step for the industry.

In this regard, the CLRC highlighted the existence of (i) domestic regulatory frameworks, such as the framework under the SEBI Act, 1992 and its accompanying regulations and (ii) foreign antitrust regulatory frameworks, such as that of the European Commission, which envisage "*settlements*" whereby authorities can terminate enforcement proceedings; and cited justifications for their adoption.

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<sup>19</sup> Case No. 76 of 2012 dated 28 June 2016.

In line with the recommendations made by the CLRC, the amendment proposes the insertion of two new sections to introduce distinct frameworks for *settlements*<sup>20</sup> and *commitments*<sup>21</sup>. The settlement or commitment can only be made for inquiries pertaining to contraventions of Section 3(4) (vertical restraints) and / or Section 4 (abuse of dominant position) of the Competition Act. The framework is designed to encourage participation of parties being investigated by the Commission for alleged contraventions.

It is anticipated that the introduction of a mechanism for settlements and / or commitments in the Indian competition framework would result in procedural economy and encourage the imposition of innovative deterrents by the Commission. Further, the Ministry of Corporate Affairs, Government of India's spirit of public consultation will aid in minimising unforeseen challenges to the Bill.

#### Streamlining regulations

On 20 November 2019, certain amendments were made to the Competition Commission of India (General) Regulations, 2009 (General Regulations).<sup>22</sup> The amendments included the following changes:

- an increase in the fees for filing an information / complaint against another business for engaging in anticompetitive conduct;
- guidelines for the disclosure of the identity of informants / complainants in certain circumstances; and
- introduction of the requirement to provide details of any pending disputes between the complainants and party against whom the allegation is being made.

While the implications of the amendments will only unfold in times to come, it seems to be focussed at enhancing the accountability of informants / complainants. We anticipate that the amendment is likely to discourage forum shopping, and align the Commission's investigation with the Supreme Court's findings which require that in certain situations, the Commission look into matters pertaining to a certain sector only after the sectoral regulator has provided its findings.

#### Key Takeaways

The key takeaways from the chapter are as follows:

- a review of recent developments indicate that the Commission and the legislature are committed to revamping the competition regime;

<sup>20</sup> Section 48A of the Bill prescribes that any party against whom an inquiry has been initiated may submit an application to the Commission proposing a settlement of the proceeding initiated against them. The inquiry must be for the alleged contravention of Sections 3(4) or 4 of the Competition Act. Further, this application must be submitted, *in writing*, after the receipt of the Report of the Director General (Investigative wing) under Section 26(4) of the Competition Act *but* before any order is passed under Sections 27 or 28 of the Competition Act.

<sup>21</sup> Section 48B of the Bill prescribes that any party against whom an inquiry has been initiated may submit an application to the Commission offering commitments in relation to the alleged contravention. The inquiry must be for the alleged contravention of Sections 3(4) or 4 of the Competition Act. Further, this application must be submitted, *in writing*, after an order is passed under Section 26(1) of the Competition Act *but* before receipt of the Report of the Director General under Section 26(4) of the Competition Act.

<sup>22</sup> The Competition Commission of India (General) Amendment Regulations, 2019.



- the Commission has displayed an increased propensity to account for procompetitive justifications; and
- realignment of the regime will enhance stakeholder trust in the regulator and minimise unwanted regulatory interference.



## Ubiquity of Algorithms: Emerging Challenges for Antitrust Enforcement

As industry leaders race towards employing the transformative benefits of algorithms to their business models, antitrust / competition regulators grapple with addressing the new wave of legal challenges algorithms introduce to effective enforcement.

In particular, regulators are concerned with whether algorithmic decision making can be made compatible with our traditional understanding of "*anticompetitive agreements*". Of specific interest is algorithmic price-setting, whereby algorithms unilaterally react to competitor pricing, thereby posing the risk of price parallelism. However, the true ambit of anticompetitive activities that can be undertaken and / or facilitated by algorithms is, for most part, uncharted.

Developments on this front coincide with the Commission's own growing interest in algorithms deployed by e-commerce platform markets.<sup>23</sup> Further, the Commission has reportedly undertaken a study on the effects of technological advancements in the media and broadcasting sector. These will presumably assess the role of algorithms adopted by marketplace and Over the Top (OTT) platforms; and their implication on live issues, such as platform neutrality<sup>24</sup>.

Prompted by the growing interest of regulators in the interplay between algorithms and competition laws, the present chapter highlights methods by which algorithms can facilitate and / or give rise to anticompetitive behaviour; and the plausibility of algorithmically induced collusion in India.

### The Advantage?

Presently, antitrust regulators have identified the risk that companies using advanced algorithms and / or big data sets can exploit their advantage to further entrench their market power.

Algorithms may contribute to market power if (i) the market is such that it requires the use of algorithms for effective operation and (ii) the costs associated with the development and / or implementation of the algorithm is significant. The Commission's findings in the *Google case*<sup>25</sup> reflect the above understanding. In said case, the Commission found that the algorithm operating Google's search engine acted as an entry barrier in the market for online general web search services, thereby entrenching Google's market power.

Market power may also result from algorithms if competitive advantage is linked to access to data. For instance, the European Commission's *Google Shopping case*<sup>26</sup> noted that access to data directly impacted the viability of effectively competing with Google. In the Indian context, the *Google case*<sup>27</sup> highlights the role of "Big Data" and how machine-

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<sup>23</sup> In April 2019, the Commission commenced a market study to better understand the workings of the e-commerce sector in India. Subsequently, the Commission published its interim / preliminary findings in August 2019. The final findings were published on 8 January 2020, in the Commission's report titled "Market Study on E-commerce in India: Key Findings and Observations".

<sup>24</sup> Platform neutrality refers to the notion that online platforms (such as OTTs) must not discriminate in favour of their own services and/or any other service, during the display of search results to consumers.

<sup>25</sup> Case Nos. 07 and 30 of 2012 dated 8 February 2018.

<sup>26</sup> Google Search Shopping Case AT. 39740 dated 27.06.2017.

<sup>27</sup> Case Nos. 07 and 30 of 2012 dated 8 February 2018.

learning enables companies to procure and process such data; and hence, offer innovative, highly customised solutions to consumers.<sup>28</sup>

However, Indian jurisprudence on this front remains limited owing to the Commission's demonstrable reluctance to interfere with the data-driven technology markets (often characterised as nascent) which are most likely to employ algorithms.<sup>29</sup> It is yet to be seen whether the Commission will continue to justify non-intervention on the basis of nascency where there is no evidence to suggest the possibility of new-entrants or competitive incumbents.<sup>30</sup>

#### Cross-Sectoral Woe: Resale Price Maintenance

In India, the Commission has readily investigated allegations of RPM across sectors including, home appliances<sup>31</sup>, automobiles<sup>32</sup> and Fast-Moving Consumer Goods (FMCG)<sup>33</sup>. However, the mode of implementation of the alleged RPM, in the aforementioned cases, include traditional (physical) methods of monitoring, such as appointment of mystery-shopping agencies and the physical inspection of price lists. As of date, the Commission is yet to investigate cases where algorithms were adopted to detect deviations from resale prices.

However, there is an increasing possibility that algorithms are deployed to monitor resale prices across industries. For instance, market players maintaining distribution management software<sup>34</sup> (characteristic of the FMCG industry) could use algorithms to detect deviations on the basis of input provided by distributors and / or retailers in the software. Further, as online channels of distribution gain prominence, algorithms developed by marketplace platforms can facilitate the implementation of RPM. It is speculated that automating the process by using algorithms would in reality ease the ability to check deviations in prices thereby making price monitoring simpler.

#### Collusion: A Spin on Hub and Spoke

A scenario that could lead to algorithmic collusion concerns the provision of the same or coordinated algorithms to competitors, by a third-party. As such, parallels may be drawn to a hub-and-spoke<sup>35</sup> scenario if competitors use the *same* algorithm to determine market prices or react to changes. In such cases, the third-party would be the "*hub*" facilitating cartelisation amongst its "*spokes*", that is, the competitors deploying the algorithm.

However, regulators must be wary when relying on traditional hub-and-spoke jurisprudence to attribute liability to third-party developers. This is because the "*hubs*" in a hub-and-spoke scenario merely facilitate information exchange. However, third-party developers

<sup>28</sup> The CCI is investigating another alleged abuse of dominance by Google in relation to its operating system, Android, in *In Re: Mr. Umar Javeed and Others v. Google LLC and Google India Private Limited*, Case No. 39 of 2018 dated 16 April 2019.

<sup>29</sup> Case Nos. 6 and 74 of 2015 dated 29 October 2018.

<sup>30</sup> The CCI is presently investigating the alleged abuse of dominant position against MakeMyTrip in the market for online intermediation services for booking of hotels in *RKG Hospitality Private Limited v. Oravel Stays Private Limited*, Case No. 03 of 2019 dated 31 July 2019.

<sup>31</sup> Case No. 61 of 2014 dated 15 January 2019.

<sup>32</sup> Case Nos. 36 and 82 of 2014 dated 14 June 2017.

<sup>33</sup> Case No. 68 of 2013 dated 12 October 2015.

<sup>34</sup> For instance, the Commission in Case No. 17 of 2018 dated 27 August 2018 investigated the workings of a distribution management software adopted by Mondelez India Foods Private Limited, albeit not in the context of allegations of RPM.

<sup>35</sup> Hub-and-spoke cartel arrangements involve the facilitation of a cartel by an undertaking, which itself is not active in the market wherein cartelisation is taking place.

acting as “hubs” (through algorithms) are capable of taking even strategic decisions on behalf of the “spokes”, that is, the competitors.

As concerns the Indian competition landscape, the Commission is yet to investigate the adoption of coordinated algorithms by competitors. While the Commission’s orders recognise the concept of a hub-and-spoke cartel, jurisprudence remains heavily underdeveloped to justify its adoption to a novel scenario involving algorithmic collusion facilitated by third-party developers.

Regardless, there may be merit in addressing the one case of algorithmic facilitation of prices that was investigated by the Commission. In the *Ola* case<sup>36</sup> (now confirmed by the National Company Law Appellate Tribunal), the Commission found that the algorithmically determined prices charged to commuters were not “fixed” because the algorithm accounted for various data points, including time of the day and traffic conditions. However, the Commission makes no observations about the consequences that would arise should algorithms determine a standard or “fixed” price that cab drivers / sellers operating on a marketplace platform should charge. Further, the Commission observed that a finding of collusion between cab drivers operating on cab-aggregator platforms would require an inter-se understanding between the drivers to facilitate price coordination through an algorithm (operated by cab-aggregator platforms). However, the *Ola* case does not make detailed observations about situations where there could be an inter-se understanding between cab drivers or the consequence thereof.

#### Collusion: Algorithms as Market Players

Another scenario that could lead to algorithmic collusion involves the parallel use of individual algorithms. This type of collusion is of particular concern with black-box algorithms<sup>37</sup>. Here, algorithms act as a digital eye where they are given targets and act autonomously to meet said target.

However, most regulatory studies are unclear as to how collusion can be attained by such algorithms. Theoretically, collusion could be attained through reinforced learnings wherein algorithms adjust prices in the same direction as that of competitors. Alternatively, black-box self-learning algorithms may even open up a private channel to communicate.

Presently, the likelihood of such a scenario arising is uncertain. This is because, so far, collusion in such scenarios has taken place only in experimental settings. In conclusion, no legal issues resulting from such collusion have been identified owing to lack of data on their operation.

Further, much like foreign antitrust / competition regulators, the Commission is yet to undertake an investigation involving purely autonomous decision making by algorithms.

#### Business considerations: Keeping ahead of the game

Companies must be wary that regulators can adopt several approaches to obtain data pertaining to the functioning of algorithms. For instance, the antitrust regulators in Brazil, Germany, Spain and South Korea use self-learning algorithms to assist in cartel detection. Notably, the extensive powers of the Commission enable it to obtain evidence through

<sup>36</sup> Case Nos. 6 and 74 of 2015 dated 29 October 2018.

<sup>37</sup> Algorithms whose strategy/course of action cannot be fully identified by analysing their code.

various means, including dawn raids. Separately, voluntary disclosures made under the lesser penalty regime may, in the future, allow the Commission access to confidential details about the workings of algorithms.

#### Key Takeaways

An antitrust probe involving algorithms is likely to have the Commission requisitioning information pertaining to the role and the functioning of the algorithm. Accordingly, businesses are well advised to maintain documentation detailing, amongst other things:

- specifications provided by the management in relation to the algorithm;
- the usage pattern and frequency of learning of the algorithm; and
- data sources relied upon for input.

Finally, the adoption of new analytical tools to assess algorithms cannot be disregarded. Therefore, it is in every stakeholder's best interest to keep abreast of developments in the legal and regulatory field.



## Continued focus: Enforcement in the pharmaceutical sector

### Tracing the ongoing saga

The Indian legislative and regulatory framework relating to the marketing, authorisation, pricing and distribution of pharmaceuticals is prescribed in several distinct legislations and regulations such as, the Drug (Price Control) Order 2013 and the Essential Commodities Act, 1955. However, this does not foreclose the possibility of interplay between the Competition Act and the pharmaceutical sector. In fact, the Commission has a long history of having investigated allegations of anticompetitive conduct in the pharmaceutical sector.

This history dates as far back as 2014, where the Commission issued a press release identifying certain sector-wide practices capable of contravening the Competition Act. Issues identified back then included, among other things, the appointment of stockists by a pharmaceutical company conditional on the issuance of a “No Objection Certificate” by local trade associations. These trade associations comprised distributors, wholesalers and retailers of pharmaceuticals. Fast forward to 2018, and the Commission continues to make public statements about the anticompetitive effects arising from the regulation of pharmaceutical supply chains by trade associations. Notably, in October 2018, the Commission released a policy note titled “*Making Markets Work for Affordable Healthcare*” which highlighted how interference by trade associations in drug distribution systems has contributed towards high drug prices.

Unsurprisingly, in 2018 and 2019, the Commission continued to investigate allegations against distortions in pharmaceutical supply chains with fervor. Cases on this point include the imposition of a hefty penalty amounting to INR 450 million (~ USD 5.9 million<sup>38</sup>) on Glenmark Pharmaceuticals<sup>39</sup> and INR 185.96 million (~ USD 2.45 million<sup>40</sup>) on Himalaya Drug Company<sup>41</sup>.

This is not to suggest that every allegation against pharmaceutical companies and trade associations resulted in a finding of contravention. In May 2019, the Commission refused to investigate allegations that *Cipla* had directed prospective stockists to obtain NOCs from the Bengal Chemists and Druggists Association (BCDA).<sup>42</sup> The Commission reasoned that the averments were unsubstantiated by evidence and in any case, there was nothing to suggest that the trade associations had interfered with the commercial decision making process of Cipla.

Further and in an interesting turn of events, on 12 March 2020, the Commission found that, among others, Macleods Pharmaceuticals Limited had contravened the Competition Act by allowing the BCDA to dictate the appointment of its stockists. Surprisingly, the Commission arrived at a finding of contravention despite having acknowledged that Macleods and the other pharmaceutical companies had entered such arrangements under duress / coercion from the BCDA. Instead, the fact of duress was considered a mitigating factor and the Commission did not impose any penalty on the pharmaceutical companies. This view of the Commission diverges from earlier findings of the former Competition Appeal Tribunal on

<sup>38</sup> Exchange rate used 1 INR = USD 75.95 on 14 June 2020.

<sup>39</sup> Case No. 65 of 2014 dated 12 July 2018.

<sup>40</sup> Supra n 38.

<sup>41</sup> Case No. 64 of 2014 dated 3 June 2019.

<sup>42</sup> Case No 43 of 2018 dated 10 May 2019.

certain legal nuisances. It remains to be seen how the divergence is viewed by the appeal courts.

#### Key takeaways

Deciphering the legalities of the interplay between the conduct of pharmaceuticals and trade associations is best left to a businesses' legal counsel. However, readers from the industry may benefit from keeping the following trends in mind and take adequate steps to safeguard against them:

- anticompetitive horizontal and / or vertical restraints entered even unwillingly or under coercion from third-parties can lead to your business violating the Competition Act; and
- the Director General (investigative wing of the Commission) has demonstrated an increased willingness to investigate the conduct of even the highest senior level management. In at least one recent case, this resulted in the imposition of vicarious liability on two C-level executives for being unable to substantiate that the contravention was committed without their knowledge or that they had exercised all due diligence to prevent the contravention.

# MERGER CONTROL TRENDS

## Getting the deal cleared in today's age

### Introduction

The merger control provisions (i.e., Sections 5 and 6) of the Competition Act came into effect on 1 June 2011. These provisions, together with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Regulations), set forth the principal framework for review of pre-merger notifications by the Commission.

However, deal structures are becoming increasingly complex and the legislature and the Commission have to continually align the above competition framework with business realities. The changes take place at a dynamic pace and navigating the constantly evolving regime can be a pain point for many industries. Accordingly, this chapter will discuss developments on two important concepts namely, (i) notifiability obligations and (ii) unknown scenarios for gun-jumping.

### Notifiability obligations

Among other significant developments, the highlights of the relatively nascent Indian merger control regime are undoubtedly the precedent setting order of the National Company Law Appellate Tribunal (NCLAT) in the *Eli Lilly* case<sup>43</sup> and the introduction of the "Green Channel" notification route.

#### Clarification regarding the *de minimis* exemption

Under the Competition Act, mergers and acquisitions are notifiable if they meet certain financial thresholds prescribed under Section 5 of the Competition Act. On 4 March 2011, the Central Government issued a notification which exempted certain transactions from notification obligations *provided* the value of the assets or turnover of the *target* (i.e., enterprise being acquired) fell below a certain threshold (*De Minimis* Exemption). However, there was no clarification issued with respect to what was meant by an "enterprise" that was "being acquired".

This resulted in businesses applying the *De Minimis* Exemption to the value of the portion of the business / asset being acquired. Such an application was presumed commercially sound since only the portion being acquired was relevant from the perspective of the acquirer. That is, what was left over with the sellers after the acquisition would have no role to play in the context of the business conducted by the acquirer post-acquisition.

Based on this understanding, Eli Lilly and Company acquired a business division of Novartis India, however, it did not notify this transaction to the Commission. Subsequently, the Commission imposed a penalty of INR 10 million (~USD 131, 653.00) on Eli Lilly and Company.

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<sup>43</sup> TA (AT) (Competition) No. 03 of 2017 dated 12 March 2020.

On 12 March 2020, the NCLAT set aside the penalty order of the Commission. The NCLAT reasoned that the intention of the notification was for the *De Minimis* Exemption to apply to the business portion being acquired and not the entire incorporated entity. In arriving at its decision, the NCLAT relied on a subsequent target exemption notification of the Central Government dated 27 March 2017 and the press release of Government of India dated 30 March 2017. This press release clarified the intent of the Government that the target exemption dated 27 March 2017 should be available to the business being acquired and not merely to incorporated entities.

This NCLAT's decision puts to rest any doubt about the *De Minimis* Exemption (as it existed then) being applicable to the actual target in cases of asset acquisitions - thereby introducing certainty in the regulatory regime.

#### Green Channel Notification

The Green Channel is significant as it grants automatic clearance to mergers and acquisitions upon filing a notification with the Commission.

Effective from 15 August 2019, the Green Channel was introduced as a part of the 7<sup>th</sup> set of amendments (Amendment Regulations 2019) to the Regulations. The mechanism can be optionally utilised by parties to certain types of transactions set out in Schedule III to the Regulations. Upon receipt of an acknowledgment of a notification filed under the Green Channel, the transaction is deemed approved.

Schedule III of the Regulations stipulates that the Green Channel route will be available to the parties which do not have any horizontal, vertical or complementary overlaps. Further, while determining the existence of overlaps, parties are now formally required to consider "*all plausible alternative relevant market definitions*". The overlaps also need to be evaluated *vis-à-vis* (i) the parties themselves (ii) all the group entities for all the parties, (iii) all entities where the parties directly or indirectly hold shares, and (iv) all entities where the parties directly or indirectly exercise control.

It is advised that due to the manner in which the applicability of the Green Channel has been worded, parties must engage in a pre-filing consultation with the Commission. This will help gauge whether the Commission is amenable to granting the green channel route to a given transaction. This is largely because if the Commission determines that a transaction does not fall within the scope of Schedule III of the Regulations, then the deemed approval shall be *void ab initio* (i.e., invalid at the outset). Thereafter, the Commission can deal with the merger and acquisition in accordance with the provisions of the Competition Act.

Another significant addition to the Indian competition regime is the introduction of "*complementary goods*" into the assessment of overlaps in transaction. The term "*complementary overlaps*" was added to the Regulations through the Amendment Regulations 2019. However, the only guidance on how it would be defined came on 28 March 2020 with the publication of the revised "Notes to Form-I" (Notes). The revised Notes provide broad guidance on complementary goods indicating that it refers to goods that are related because they are combined and used together (for e.g., ink cartridges and printers).



In its recent decision of *ZF Friedrichshafen AG / Holdings Inc.*<sup>44</sup>, the Commission found that slack adjusters and drum brakes are complementary as they work alongside each other from a functional point of view. As for its treatment of complementary overlaps, the overlap assessment by the Commission was similar to the traditional assessment done in the case of vertical overlaps, as is also indicated in the revised Notes.

#### PREMATURE EXPECTATION?

*Presently, mergers and acquisitions are notifiable to the Commission if the combined value of the assets and turnover of the parties to the transaction meet any of the financial thresholds under Section 5 of the Competition Act. However, the CLRC had recently recommended the inclusion of deal value thresholds for notifiability of mergers and acquisitions. The introduction of a deal value threshold would mean that mergers and acquisitions would be notifiable on the basis of the value of the deal / transaction. The recommendation was motivated to allow for assessment of mergers and acquisitions in the digital space, where highly valued targets may not have a huge asset base or generate significant revenue, leading to potential under-enforcement in the market. While the recommendation has not been formally adopted in the Bill, its introduction will better equip the Commission to tackle enforcement concerns in the digital space.*

#### Novel gun-jumping issues in the Indian competition regime

The Indian merger control regime is suspensory in nature. As a result, no notifiable merger and acquisition can be consummated (entirely, or in part) without obtaining the Commission's prior approval. Where the parties to a merger and acquisition consummate the transaction without prior approval, the Commission can (and does) levy a penalty and may even declare the transaction to be void.

However, in certain scenarios, the parties tend to not anticipate the Commission interpreting actions undertaken by the parties as gun-jumping as they believe such actions are standard industry practice and will not constitute consummation of the transaction. Some novel examples of this are as follows:

##### i. Consideration payment before approval

One such instance would be the case of paying consideration in various forms such as refundable deposits, escrow accounts, loans, etc. This constitutes taking steps to complete a transaction from a date prior to the Commission's approval.

Based on reported cases, *Hindustan Colas Limited / Shell India Markets Private Limited*<sup>45</sup> is the most recent order which discusses at length the penalty implications of the payment of consideration similar to putting money or shares in escrow accounts. In the case, Hindustan Colas Private Limited (Hindustan Colas) was acquiring a certain bitumen business plant of Shell Indian Markets Private Limited (SIMPL).

<sup>44</sup> Combination Registration C-2019 / 11/ 703.

<sup>45</sup> Combination Registration No. C-2015/08/299.

The gun-jumping issue arose as Hindustan Colas had paid part of the consideration as refundable “*down payment*” to SIMPL on the date of signing of the trigger document. The Commission highlighted that pre-payment of consideration leads grants the acquiring party a strategic advantage and reduces the overall incentive of the target entity to compete in the market.

Accordingly, the Commission held that part-payment of the consideration violated the standstill obligations of the parties. It noted that the refundable or non-refundable nature of the consideration, or it being equivalent to money being held in an escrow account, was irrelevant. It also reiterated that the creation of an escrow account and the holding of shares in an escrow account does not eliminate the statutory requirement of providing prior notice to the Commission.

Further, the proposed Bill to the Competition Act incorporated a clause which allows for open market purchases, even prior to the Commission’s approval, subject to certain caveats. This implies that post the amendment, the acquiring party may participate in open market purchases. However, the acquiring party must ensure the following:

- the Commission is duly notified of any such acquisition within a reasonable period of time;
- the purchased shares or securities must be maintained in a manner specified (for instance, in an escrow account); and
- the acquiring party must not exercise any beneficial rights (including voting rights) in the shares till the Commission’s approval.

This indicates that the Commission is understanding of business opportunities that may appear while the acquiring party awaits the Commission’s approval. It further accommodates parties which would want to structure transactions with a step involving market purchases. However, till the fruition of the proposed amendment, it is advisable to consult the Commission with the assistance of a legal team to assess whether any open market purchase or refundable consideration would be permissible.

ii. Pre-combination integration and exchange of competitively sensitive information between competitors

Various measures undertaken prior to the Commission’s approval in order to effect integration between parties are considered as consummation (part or full) of a transaction. Even though such measures may be considered to not impact competition in the market, the Commission’s assessment under Section 43A of the Competition Act must be understood to be separate from its assessment under Section 31 of the Competition Act, which empowers it to grants approvals.

In the case of *LT Foods Limited* (LT Foods) and *LT Foods Middle East DMCC* (“LT DMCC”) / *Hindustan Unilever limited* (HUL) <sup>46</sup>, LT Foods and LT DMCC sought the approval of the Commission for their proposed acquisition of HUL’s business of, among other things, processing of raw material for rice. However, it was found that

<sup>46</sup> Combination Registration No. C-2016/04/387.



certain condition precedents in the framework agreement between the parties stipulated a contravention of the standstill obligations of the parties. These included the requirement to handover certain inventories to the LT Foods and LT DMCC, the acquiring parties interacting with suppliers of HUL, restrictions on promotional spending, and the restriction on HUL to enter or exit certain territories.

Similarly, mergers and acquisitions require post-signing integration planning between the parties to the transaction. However, this might entail exchange of competitively sensitive information between the parties, which could violate the standstill obligations on the parties. It is recommended that as part of the due diligence undertaken, a team comprising limited number of individuals from either party, preferably the internal and external legal counsels and members of senior management be formed (Clean Team).

The Clean Team is the only team privy to the competitively sensitive information involved in the post-signing integration planning and is responsible to prevent leakage of such information. The Clean Team should not include any individual who is involved in marketing, pricing, sales, etc. or those that can influence the day-to-day operations of a party. This is also recommended by the Commission as a measure to mitigate the risk of gun-jumping under the Competition Act.<sup>47</sup>

In *Nippon Yusen Kabushiki Kaisha Ltd / Mitsui O.S.K. Lines Ltd. / Kawasaki Kisen Kaisha Ltd.*<sup>48</sup>, the Commission approved a transaction which involved the merger of the parties' worldwide businesses of container liner shipping and container terminal services. However, the approval was only provided after the parties gave a voluntary commitment to introduce a rule of "*information control*". This would ensure that no competitively sensitive information regarding the non-integrated business would be shared with the merged entity or any third-party.

Therefore, it is essential to note that informational exchange of competitively sensitive information or condition precedents which take effect prior to the Commission's approval would be considered a violation of the standstill obligations of the parties. Accordingly, a thorough competition law due diligence is necessary for such notifiable transactions in order to prevent penalty under the Competition Act.

### Conclusion

Mergers and acquisitions are evolving each year and accordingly, more complex issues have arisen which require scrutiny before taking any step forward. Therefore, keeping such issues in mind, it is important to tread these waters carefully with adequate legal guidance. Further, the introduction of the green channel route to allow ease of doing business will also only apply from a case-to-case basis and therefore, the route should only be undertaken after a thorough competition law due diligence is undertaken.

<sup>47</sup> See Compliance Manual for Enterprises, available at: [https://www.cci.gov.in/sites/default/files/manual\\_compliance/manual\\_booklet.pdf](https://www.cci.gov.in/sites/default/files/manual_compliance/manual_booklet.pdf) (last accessed on 14 June 2020).

<sup>48</sup> Combination Registration No. C-2016/11/459.

## To approve or not to approve? Devising remedies and commitments

### The Debate: Structural v. Behavioural

Typically, the Commission approves mergers and acquisitions which do not have any AAEC in the relevant market in which the merger or acquisition lies. However, in the event that the Commission is of the view that a transaction may lead to an AAEC, the parties may voluntarily propose certain modifications to the merger and acquisition to address such concerns. Alternatively, the Commission may itself propose modifications. Such remedies can either be structural or behavioural.

Structural remedies are typically considered one-time measures that are intended to sustain competition in the market by effectively creating a new or enhanced competitive player. These remedies take immediate effect and tend to be irreversible in nature. On the other hand, behavioural remedies are long-term remedies which relate to the future conduct of the merged entity. These usually include providing access to key infrastructure or technology to other players in the market for a certain period of time.

As in most jurisdictions, the Commission has shown a preference for structural remedies as they provide certainty and are easier to monitor. Further, such remedies tend to solve the issues of a competitor being eliminated by strengthening or creating a new competitor.

As of 2019, the Commission has recommended divestments or divestments with certain behavioural commitments too. On 18 April 2019, the *Larsen & Toubro Limited/Schneider Electric India Private Limited*<sup>49</sup> decision became the first of its kind where the Commission accepted voluntary behavioural commitments for three to five years by the parties to solve identified AAEC concerns.

This is a significant change from the traditional approach of the Commission especially since the transaction contemplated the consolidation of the two closest competitors in the LV switchgear industry in India. However, it is key to note that behavioural remedies adopted for prolonged periods of time (over a period of five years) might be onerous on parties and may be considered as an impediment to their ease of doing business. While behavioural remedies are considered to be less intrusive, such broad and long running commitments tend to interfere just as much as complete divestments since they lead to long-term monitoring by the regulator.

### Remedies in the digital space

The Commission has also shown a knack for novel remedies based on new markets investigated by the regulator such as, algorithm-based remedies. In its decision in *Hyundai Motor Company / ANI Technologies Private Limited*, the Commission approved the transaction based on the voluntary commitments of the parties involved. The commitments stated that the marketplace of ANI Technologies Private Limited would be operated in an objective manner and further, the algorithm of the marketplace would not give preference to drivers solely based on the brand of the car they drive.

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<sup>49</sup> Combination Registration No. C-2018/07/586.

As competition regulators around the world, including the Commission, focus resources on investigating digital markets, digital market remedies such as data-sharing have become increasingly relevant.

The European Commission, on 19 February 2020, released “A European Strategy for Data”<sup>50</sup> (EU Strategy) aimed to empower businesses and the public sector in European Union through use of data to make better decisions. Through the EU Strategy, the European Commission is looking at making access to data and data-sharing a requirement. On similar lines, the Commission published its Market Study on E-Commerce in India<sup>51</sup> wherein it issued soft guidelines to e-commerce platforms. The guidelines urged e-commerce platforms to *“set out a clear and transparent policy on data that is collected on the platform, the use of such data by the platform and also the potential and actual sharing of such data with third parties or related entities.”*<sup>52</sup> This might as well be viewed as a precursor to data-sharing remedies in the context of merger control.

However, with India’s personal data protection laws around the corner, data-sharing remedies may fall within the shared domain of data privacy and competition legislations. It would be interesting to see how the authorities deal with this likely overlap and create a balance without compromising on the objectives of two laws.

### Conclusion

With the world transitioning into the digital space, the complexities of transactions have necessitated creative solutions to address market failures and offer remedies that are conducive and equally welcomed by stakeholders - while being sensitive to the need to encourage innovation and growth in technology. The Commission has been increasingly amenable to allowing transactions with AAEC concerns based on voluntary commitments (structural and / or behavioural) provided by parties and therefore, it is necessary to suggest solutions that assuage these concerns while ensuring that the best interests of the parties are also taken care of.

### Key takeaways

- Traditionally, the Commission has preferred structural remedies in the form of divestments to absolute structural divestments to solve AAEC concerns as they are easier to monitor and provide certainty.
- Of late, the Commission has transitioned to offering pure behavioural commitments to parties. However, these behavioural commitments are for prolonged periods of time and may be considered more intrusive due to long-term monitoring by the Commission.
- In the digital space, the Commission has also envisioned the remedy of data-sharing to allow smaller third parties to also effectively compete in the digital arena.

<sup>50</sup> European Commission, *A European strategy for data*, 19 February 2020, available at: [https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf) (last accessed on 24 February 2020).

<sup>51</sup> See Market Study on E-Commerce in India. Available at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf) (last accessed on 24 February 2020).

<sup>52</sup> Ibid at para 113 on page 38.



## ASSOCHAM

### THE KNOWLEDGE ARCHITECT OF CORPORATE INDIA

ASSOCHAM initiated its endeavor of value creation for Indian industry in 1920. Having in its fold more than 400 Chambers and Trade Associations and serving more than 4,50,000 members from all over India. It has witnessed upswings as well as upheavals of Indian Economy and contributed significantly by playing a catalytic role in shaping up the Trade, Commerce and Industrial environment of the country.

Today, ASSOCHAM has emerged as the fountainhead of Knowledge for Indian industry, which is all set to redefine the dynamics of growth and development in the technology driven cyber age of 'Knowledge Based Economy'. ASSOCHAM is seen as a forceful, proactive, forward looking institution equipping itself to meet the aspirations of corporate India in the new world of business. ASSOCHAM is working towards creating a conducive environment of India business to compete globally.

ASSOCHAM derives its strength from its Promoter Chambers and other Industry/ Regional Chambers/Associations spread all over the country.

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## KHAITAN & CO

Founded in 1911 by the Late Debi Prasad Khaitan, a member of the Constituent Assembly of India and the Drafting Committee for the Constitution of India, Khaitan & Co is one of the oldest and largest full-service law firms in India. Built on foundations of integrity, simplicity, dedication and professionalism, Khaitan & Co has expanded its presence in India from Kolkata (1911) to New Delhi (1970), Bengaluru (1994) and Mumbai (2001). Khaitan & Co takes pride in its steady growth and celebrated its centenary in 2011.

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- expert advice by professionals with international and Indian work experience and academic backgrounds;
- partner-led transactions to give clients the comfort and confidence they seek; and
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