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Inter alia... is a legal newsletter published each quarter by AZB & Partners for a select list of clients and colleagues. Each issue aims to provide a snapshot of the recent legal developments in certain critical areas: infrastructure, foreign direct investment, securities law, exchange control regulations, corporate law, media and entertainment, intellectual property and banking. When a significant development demands it, *Inter alia...* is published as a Special Edition to provide an indepth analysis of that delopment. We hope you will find the content informative and useful. If you have any questions or comments, please email us at: editor.interalia@azbpartners.com or call AZB & Partners.

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CCI's Resale Price Maintenance Decision Against Hyundai: A Step Forward?

Vertical agreements ('**VAs**') or agreements between companies operating on different levels of the supply chain have increasingly become the subject matter of scrutiny before the Competition Commission of India ('**CCI**'). VAs are an important part of how businesses function and CCI's mandate is to scrutinize only those VAs that may adversely effect competition in Indian markets. VAs that look similar can have different effects on competition and under the Competition Act, 2002 ('**Competition Act**'), CCI is required to adopt the 'rule of reason' approach in examining these (i.e., balance the anti-competitive effects of the agreement against any pro-competitive justifications). Certain types of VAs covering exclusive supply, exclusive distribution, tying and bundling, or minimum resale price maintenance have been identified as anti-competitive agreements under Section 3(4) of the Competition Act and require careful consideration from an antitrust perspective.

In a significant recent development (June 2017), CCI has issued its first decision on resale price maintenance ('**RPM**') against Hyundai Motor India Limited ('**Hyundai**'). The CCI held that Hyundai entering into a discount control mechanism with its dealers, resulted in anti-competitive minimum price fixing and imposed a penalty of Rs 87 crore (approx. US$13.43 million) on Hyundai.[1] The *Hyundai* order is important for being the first decision on contravention of the RPM provision under the Competition Act and also for understanding CCI's approach towards exclusive supply arrangements and tying practices. We consider below CCI's assessment of RPM in this case and the likely ramifications for industry.

Brief facts of the Hyundai case

In 2014, Fx Enterprise Solutions India Pvt. Ltd. ('**Fx**') and St. Antony's Cars Pvt. Ltd. ('**SAC**') (collectively, '**Informants**') filed an information before CCI. Briefly, the allegations made by the Informants against Hyundai, *inter alia*, related to the following: (i) exclusivity arrangements with dealers, requiring dealers to take prior permission of Hyundai before entering into dealership agreements with any other automobile manufacturer; (ii) resale price maintenance ('**RPM**'), by imposition of 'discount control mechanism' under which dealers could not provide discounts above the maximum permissible range; and (iii) tying the sale of popular cars to the sale of high-end unpopular cars and designating sources of supply for complementary products such as oils, lubricants and Compressed Natural Gas ('**CNG**') kits.

Delineation of relevant market

For assessing the anti-competitive effects of the alleged VAs, CCI delineated the relevant market into (i) upstream market of inter brand sale of passenger cars in India ('**Upstream RM**') and (ii) the downstream market for the dealership and distribution of Hyundai cars in India ('**Downstream RM**'). While defining the Upstream RM, CCI considered that: (i) passenger cars of different companies were substitutable with each other and (ii) cars could be purchased from anywhere in India. While defining the Downstream RM, CCI observed that the relevant product market should be limited to the market for dealership and distribution of Hyundai cars in India, since: (i) from a demand-side substitutability perspective, a customer who wants to test drive/purchase a Hyundai car will only visit a Hyundai dealership and (ii) in any event, there is only an insignificant level of multi-brand dealerships in India.

Assessment of RPM

Hyundai had implemented a 'discount control mechanism' by prescribing the maximum discount which a dealer could offer to its end consumers. As a result, Hyundai had effectively fixed the minimum resale price. Additionally, Hyundai engaged mystery shopping agencies to monitor the pricing by dealers and penalized dealers who did not adhere to the 'discount control mechanism'. On intra-brand competition, CCI held that discount control mechanism stifled competition amongst dealers by not allowing them to compete on prices. Further, inter-brand competition was seen to have been adversely effected by CCI given Hyundai was a "popular" brand that could ease pricing pressure on competing manufacturers, leading to artificial maintenance of higher prices.

We note that CCI does not appear to have considered the market share or market power of Hyundai in the Upstream RM. By contrast, in *Prime Mag.*[2], a publisher had imposed maximum discount rate on the distributor but CCI acknowledged absence of a *prima facie* case and held that although imposing a maximum discount led to fixing of the lower limit of the price of journals, the impact of such RPM would be limited and not likely to have adverse effect on com-

1 *Case nos. 36 & 82 of 2014.*

2 *Prime Mag, Subscription Services Pvt. Ltd. v. Wiley India Pvt. Ltd. & Anr., Case No. 07 of 2016.*

petition given the negligible market shares of the publishers. Accordingly, CCI's approach in *Hyundai* appears to be inconsistent with its approach in *Prima Mag* where it has placed reliance on market power in the upstream relevant market and its impact on inter-brand competition as an important factor in examining RPMs.

Tying CNG kits and oil/lubricants with Hyundai cars

Hyundai nominated CEV Engineering Panel ('**CEV**') to install CNG kits in Hyundai cars and required cancellation of warranty in the event a customer were to install a non-CEV CNG Kit. Similar conditions were imposed in relation to oil and lubricants. Hyundai justified this tying practice on the basis that CEV CNG kits were of superior quality and were specifically manufactured for Hyundai to ensure smooth running of the Hyundai cars as compared to other CNG kits. The CCI agreed with this business justification provided by Hyundai. It held that Hyundai had a legitimate interest as it was bearing the cost of warranty and was not sure of the quality and operability of CNG kits of other brands. The CCI's appreciation of objective justifications provided by the company is a welcome step for the industry. It also appears that CCI has diluted its stand from the previous *Autoparts*[3] case, where it held that warranty conditions which required customers to only get their automobile repaired through authorized service network of dealers resulted in an adverse impact on competition. Interestingly, a similar quality defense was argued in *Autoparts* as well.

Exclusivity restrictions

On exclusivity restrictions which required the dealer to obtain prior permission from Hyundai before entering into dealership agreements with its competitors, CCI noted that this clause was not effectively an exclusivity restriction as it only required dealers to obtain 'prior permission' from Hyundai. According to CCI, the purpose of this clause was that dealers do not free-ride on the facilities provided by Hyundai. Again, CCI's order appears to have rightly considered the business needs, justifications and reality. Also, in the previous *Autoparts* case, CCI did not consider the "prior consent" requirement as a reasonable restriction while analysing the alleged exclusive supply agreements between OEMs and their suppliers.

Conclusion

In considering whether a VA causes or is likely to cause an appreciable adverse effect on competition, antitrust agencies ('**AAEC**'), including CCI, usually first examine the market power of the parties in the vertical markets.[4] Given this, it is unclear why CCI has not considered the market power of Hyundai in relation to Upstream RMs for its assessment of effect of RPM on competition. That said, an important takeaway from this decision is that a discount control mechanism that has the effect of fixing maximum discounts will be treated by CCI as an anti-competitive RPM. However, it remains to be seen whether CCI will consider the anti-competitive effects of such RPM only on intra-brand competition, and not on inter-brand competition where the product competes without competitors' products. Further, this decision also offers valuable guidance on possible business justifications that could be considered while drafting exclusivity clauses and tie-in arrangements.

Competition Law Alert

On June 29, 2017, the Ministry of Corporate Affairs ('**MCA**') issued a notification ('**Notification**') whereby the requirement of necessarily notifying a combination within 30 calendar days of the trigger event, as specified under Section 6(2) of the Competition Act, was done away with.. The measure has been taken to alleviate the concerns of stakeholders who felt constrained by the deadline stipulated under the Competition Act. The key takeaways from the Notification are set out below.

The Notification does away with the 30-day filing requirement and provides parties the flexibility to file combinations when they are ready to file a notice with CCI. The Notification also puts an end to the possibility of penalties for delayed filing. This means that the transaction parties will no longer be constrained to decide on the strategy, collect information and make the filing within the short window of 30 calendar days. Parties to global transactions requiring notification in multiple jurisdictions can now make the filing in India, contemporaneous with other jurisdictions.

The Notification will not only help the parties align their strategy, but also help CCI align its review timelines with other jurisdictions. Notably, the requirement to file a notice with CCI

3 *Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors, Case No. 03/2011.*

4 *Automobiles Dealers Association, Hathras, U.P. v. Global Automobiles & Pooja Expo India Pvt Ltd., Case No. 33/2011.*

is still mandatory and the suspensory regime (i.e., requirement to receive CCI approval prior to closing) still applies. Accordingly, any breach of these requirements will still lead to penalties under Section 43A of the Competition Act. However, removal of the 30-day deadline makes it significantly easier for businesses to comply with the merger notification requirement in India and is in line with international best practices in merger control.

Behavioural Cases

CCI dismissed the allegations of unfair and illegal ousting of digital cinema service providers by Pen India Ltd., Bound Script Motion Pictures Pvt. Ltd., UFO Moviez India Ltd. and Real Image Media Technologies Pvt. Ltd.[5]

K Sera Sera ('**KSS**') filed an information against Pen India Ltd. ('**Pen India**'), Bound Script Motion Pictures Pvt. Ltd. ('**Bound Script**'), UFO Moviez India Ltd. ('**UFO**') and Real Image Media Technologies Pvt. Ltd. ('**Real Image**') (collectively referred to as the '**Opposite Parties**') before CCI, alleging contravention of Sections 3 and 4 of the Competition Act in relation to the release of the movie '*Kahaani 2*'.

KSS alleged that Pen India and Bound Script, being the producers and presenters of the movie, entered into anti-competitive agreements with UFO and Real Image to limit/control the release of *Kahaani 2*, thereby leading to unfair and illegal ousting of other digital cinema service providers in the market, including KSS. It was further alleged that each of the Opposite Parties had abused their dominant position in violation of Section 4 of the Competition Act.

The CCI noted that Pen India had been providing content to KSS earlier. However, in light of a recent allegation against KSS by Viacom 18 for piracy in relation to the movie 'Force 2', CCI found that it would have been counterintuitive for the producers of *Kahaani 2* to provide the content of the said movie to KSS. The CCI held that 'an objective business rationale to protect the commercial interest of Pen India and Bound Script cannot be overlooked in a proceeding under the Competition Act unless the same is shown to have exclusionary effects or is tainted with an anticompetitive objective'. The CCI viewed the refusal to exhibit movies through KSS's digital service as a precautionary step to protect the copyright.

The CCI noted that no specific conduct was alleged to be abusive by KSS. The CCI dismissed the allegations against the Opposite Parties and held that "*the very objective of competition law is to protect the interest of consumers and the process of competition. It is not concerned with the harm to the competitors unless that also leads to harm to the consumers.*"

CCI dismissed allegations against the Director General, Bureau of Indian Standards for imposing unfair conditions[6]

Shri Prem Prakash ('**SPP**') filed an information against the Director General, Bureau of Indian Standards ('**BIS**') before CCI alleging contravention of Section 4 of the Competition Act in relation to imposition of unfair conditions on SPP, especially, with respect to the Bureau of Indian Standards, Laboratory Recognition Scheme ('**LRS**').

Being the proprietor of Venus testing and Research Scheme, SPP alleged that one of the conditions of LRS required every laboratory seeking recognition under it to have an accreditation to IS/ISO/IEC 17025 or ISO/IEC 17025 in the respective field of testing, such as Mechanical, Electrical, Chemical and Microbiological, as applicable. The accreditation body is required to be a full member of the Asia Pacific Laboratory Accreditation Co-operation ('**APLAC**') and/or the International Laboratory Accreditation Co-operation ('**ILAC**'). SPP was aggrieved that his laboratory could not provide services to BIS for conformity assessment as it was not accredited by a body that was a full member of ILAC/APLAC.

The CCI noted that the activity under consideration, undertaken by BIS was 'prescribing of criteria for recognition of laboratories under LRS'. The CCI noted that such activity was carried out by BIS for ensuring quality in laboratory testing services by outside laboratories and was based on the mandate vested under the BIS Act. The CCI dismissed the allegations against the Director General, BIS as it was inevitable that those entities that did not satisfy the prescribed criteria would be excluded to ensure a particular level of quality in services to the end consumers.

5 *Case No. 97 of 2016.*
6 *Case No. 4 of 2017.*

CCI dismissed the allegations against Reliance Industries Ltd. and Reliance Jio Infocomm Ltd. by Bharti Airtel Ltd.[7]

On June 9, 2017, CCI dismissed a complaint filed by Bharti Airtel Ltd. ('**Airtel**') against Reliance Industries Ltd. ('**RIL**') and Reliance Jio Infocomm Ltd. ('**RJio**') (collectively referred to as the '**Opposite Parties**') alleging contravention of Sections 3 and 4 of the Competition Act. The gravamen of the various allegations made by Airtel was the provision of free services by RJio and the use of its financial strength to enter into the telecom market with the sole intention of eliminating its competitors since the inception of its business from September, 2016.

CCI broadly categorized the provision of telecom services using 2G, 3G and 4G technologies as 'provision of wireless telecommunication services to end users' relying on the fact that the Department of Telecommunications ('**DoT**') grants uniform and same license to all telecommunication service providers *i.e.* Unified Access License, and does not differentiate based on the technologies deployed by them. Since India is divided into 22 telecommunication circles, CCI delineated the relevant market to be the market for provision of wireless telecommunication services to end users in each of the 22 circles in India'.

CCI concluded that RJio was not a dominant player in the relevant market based on the following:

- the relevant market was led by Airtel, having a 23.5% market share followed by Vodafone (18.1%), Idea (16.9%), BSNL (8.6%), Aircel (8%), RCOM (7.6%), RJio (6.4%), Telenor (4.83%), Tata (4.7%), Sistema (0.52%), MTNL (0.32%) and Quadrant (0.27%);
- RJio's customers constituted less than 7% of the total subscriber base at pan-India level;
- Airtel had alleged dominance of RJio on account of its large spectrum holding which is compatible for offering 4G LTE services. To that end, CCI noted that the extent of regulatory requirements of DoT cap the overall and band-wise spectrum holding by telecom operators, hence taking care of undesirable concentration of spectrum in the hands of few operators;
- financial strength is relevant, but it cannot be the sole factor to determine dominant position of an enterprise.

Interestingly, despite RJio gaining a subscriber base of approximately 72 million within 4 months, CCI recognized RJio's schemes to be a short-term business strategy of an entrant with the objective of penetrating a market where there are already big players operating. The CCI held that the provision of free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of eliminating competition, which was not found in the instant case. In addition to the above, and in the absence of any explanation provided by Airtel as to how provision of free services was the outcome of an anti-competitive agreement between RIL and RJio, CCI did not find a *prima facie* case of contravention of Section 3(1) or Section 4(2)(e) of the Competition Act by RJio.

CCI directed DG to probe Prasar Bharti in relation to imposition of unfair conditions while providing infrastructure facilities for FM radio broadcasting services[8]

On July 4, 2017, CCI passed an order under Section 26(1) of the Competition Act, directing an investigation against Prasar Bharti ('**PB**') and Ministry of Information and Broadcasting ('**I&B**'). The complaint was filed by Next Radio Limited ('**Next Radio**') alleging abuse of dominant position by PB in the market of providing infrastructure facilities and licenses to Radio and FM operators in India by, inter alia, (i) charging unfair license fees and escalation of such fees, (ii) compelling payment of license fee even when due to an emergent or technical necessity, Next Radio was disallowed to use the infrastructure of PB while PB was not required to pay any damages/penalty for such non-provision of the licensed infrastructures facility (iii) revising the draft agreement (based on the migration policy of I&B from Phase II to Phase III) by abusing its dominant position to thrust upon Next Radio an increased financial burden in various ways for sharing and using the licensed infrastructure.

PB and I&B countered the allegation by stating that: (i) the license fee was not being determined by PB; (ii) the license fees approval is done by the Government of India after examination and consultation with the Chief Adviser (Cost), Department of Expenditure and Ministry of Finance; (iii) the increased cost was only marginal and nominal as compared to Phase III policy; and (iv) the migration from Phase II to Phase III benefited Next Radio and other FM operators.

CCI first analyzed whether PB and I&B would be considered as an 'enterprise' under the

7 *Case No. 3 of 2017.*
8 *Case No. 29 of 2016.*

ambit of Section 3 of the Competition Act. It was held that since PB provided infrastructure to FM radio broadcasters by charging a license fee, which is a commercial activity, it was an enterprise. On the other hand, I&B was not considered to be an enterprise, since it was engaged in the formulation of guidelines, regulations and policies for matters related to information and broadcasting in India. The CCI held that there was no violation of Section 3 because PB and I&B were not engaged in identical or similar business, nor was the allegation under Section 3(4) sustainable, as I&B was not an enterprise. Therefore, CCI concluded that there was no *prima facie* case of contravention of any provisions of Section 3 of the Competition Act.

CCI then analyzed the allegations of abuse of dominant position by PB and I&B. It was held that since I&B was not an enterprise, its alleged conduct could not be examined in terms of Section 4. To investigate allegations against PB, CCI determined the relevant market as "*market for provision of infrastructure facilities for FM radio broadcasting in each of the six cities (Delhi, Chennai, Pune, Ahmedabad, Kolkata and Bengaluru), where (Next Radio) has been offered to operate FM broadcasting services*". The CCI concluded that PB did enjoy a dominant position in the relevant market and described several clauses of the draft agreement as "*one-sided and heavily titled in favor of PB*". While acknowledging that such terms are standard terms of contracts provided to other FM operators, CCI held that a dominant player ought to be more careful with such terms, to see that such conditions remain fair, reasonable and justified. In view of the above, CCI issued a *prima facie* order under Section 26(1) of the Competition Act, directing the DG to conduct investigation.

Notably, Next Radio and PB were simultaneously litigating at the Hon'ble High Court of Delhi, the result of which led to a settlement between the two, prior to CCI's order, under Section 26(1) of the Competition Act. The CCI opined that the settlement of the parties under the order would not deter the proceedings before CCI, as the Competition Act does not provide for any settlement between parties for any alleged anti-competitive activity.

Merger Decisions

CCI approves acquisition of the electrical lighting business of GE India Industrial Pvt. Ltd. by Venture Lighting India Ltd.

On May 2, 2017, the acquisition of the electrical lighting business of GE India Industrial Pvt. Ltd. ('**GEIIPL**') by Venture Lighting India Ltd. ('**VL India**') was approved by CCI.

CCI observed a horizontal overlap between the products offered by the parties, in respect of different types of lighting products such as electric lamps, fittings or luminaries and accessories or components. It also noted a vertical relationship between the parties, as VL India supplied small quantities of electrical lamps to GEIIPL. However, this was not found to have any AAEC on competition in India. In light of the insignificant combined market shares of the parties [0% to 5%] in each of the markets for electric lamps, fittings or luminaries and accessories or components and the presence of well established competitors, CCI approved the proposed combination as it was unlikely to cause an AAEC in India.

CCI approves the acquisition of 25.12% of Sona Koyo Steering Systems Ltd. by JTEKT Corporation

On May 5, 2017, CCI approved the acquisition of 25.12% of Sona Koyo Steering Systems Ltd. ('**SKSSL**') by JTEKT Corporation ('**JTEKT**') from Sona Autocomp Holding Ltd. ('**Seller**').

JTEKT is a manufacturer and supplier of automotive parts, bearings, and machine tools. SKSSL is engaged in the business of automotive parts such as steering systems and its parts, catering to passenger vehicles, farm equipment and commercial vehicle OEMs. The CCI noted that JTEKT already held 20.1% stake in SKSSL, in addition to the right to appoint two directors on its Board. The CCI observed an inter-connected step involved, i.e., transfer of stake held by SKSSL in Sona Skills Development Centre Ltd. to the Seller. The CCI further observed a vertical relationship between a subsidiary of JTEKT with SKSSL. It was of the view that such vertical relationship was unlikely to cause an AAEC in India.

CCI approves the acquisition of the merchant acquiring business from Citibank NA, Citibank Overseas Investment Corporation ('COIC') and Citibank NA India by Wirecard Acquiring & Issuing GMBH, Wirecard Technologies GMBH, Wirecard Sales International Holding GMBH and Wirecard India Pvt. Ltd.

On May 12, 2017, CCI approved the acquisition of the merchant acquiring business from Citibank NA, COIC and Citibank NA India (collectively referred to as '**Sellers**') by Wirecard Acquiring & Issuing GMBH, Wirecard Technologies GMBH, Wirecard Sales International Holding GMBH and Wirecard India Pvt. Ltd. (collectively referred to as '**Acquirers**').

CCI noted that the merchant acquiring business included merchant acquiring services and acquiring processing services. Further, activities such as settlement of dues, terminals, technical services for online transactions, authentication of transactions and other payment gateways, etc. were associated with merchant acquiring services, while authorization and capture services fell within the ambit of acquiring processing services. The CCI observed that although the Acquirers were present in the upstream market of acquiring processing services and the Sellers were present in the downstream market of merchant acquiring services, there was no actual vertical relationship between the parties. Additionally, given the insignificant market shares of the Acquirers and Sellers in the upstream and downstream markets and in the presence of well-established players, CCI approved the proposed combination as it would not raise any AAEC in India.

CCI approves acquisition of 6.02% of Flipkart Ltd. by Aceville Pte. Ltd.

On May 12, 2017, CCI approved the acquisition of 6.02% of the equity share capital of Flipkart Ltd. ('**Flipkart**') by Aceville Pte. Ltd. ('**Aceville**').

The CCI noted that Aceville was an investment holding company *inter alia*, engaged in: (i) providing internet access; and (ii) providing internet data centre services. It was the wholly-owned subsidiary of TCH Delta Ltd. and its ultimate parent company was Tencent Holdings Ltd., that was *inter alia* engaged in providing value added services and online advertising services in China. Notably, in addition to the acquisition of 6.02% equity shares of Flipkart, Aceville was also entitled to nominate one director on the board of Flipkart.

CCI approves acquisition of 21.63% shareholding in Tata Teleservices Ltd. by Tata Sons Ltd., Tata Steel Ltd., Tata Industries Ltd., Tata Communications Ltd. and Tata Power Company Ltd. from NTT Docomo Inc., Japan.

On May 24, 2017, CCI approved the acquisition of 21.63% shareholding in Tata Teleservices Ltd. ('**TTSL**') by Tata Sons Ltd., Tata Steel Ltd., Tata Industries Ltd., Tata Communications Ltd. and Tata Power Company Ltd. from NTT Docomo Inc., Japan ('**Docomo**').

The proposed combination arose pursuant to certain consent terms entered into between Tata Sons and Docomo in connection with an international arbitration award passed by the London Court of Arbitration ('**LCIA**') to settle the dispute between Docomo and Tata Sons. The CCI noted that Docomo did not have any independent presence in the telecom sector and the proposed combination envisaged its exit from TTSL. Hence, the change in control over TTSL consequent to the proposed combination would not result in change in competition dynamics and was not likely to raise any AAEC in India.

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