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Fair Play

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Regulation of Combinations

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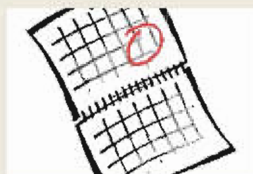

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FROM THE DESK OF THE CHAIRPERSON

In competition law, the term 'combination' is used broadly to cover enterprises coming together in various forms, e.g., merger, amalgamation, acquisition of shares, voting rights or assets etc. World over, combinations are recognized as an effective instrument for inorganic growth of enterprises. While combinations achieve efficiencies, some could adversely affect competition. The underlying principle in exercising control on mergers or combinations is that if it is likely to give rise to undue market power, it is better to prevent this from happening than to regulate behaviour after the consummation. The age-old dictum: 'prevention is better than cure' is applicable in the combination regime also.

Most competition laws follow this dictum and, hence, require prior notification of the combination to the competition authority. It is interesting to note that the Indian Competition Act started with the provision of a voluntary notification regime; this was amended to make it mandatory in 2007. However, the enforcement of the combination provisions of the Act did not commence till June 2011. This was mainly to allay the concerns of business and industry about the impact of the provisions on achieving consolidation and economies of scale.

Even after the enforcement, the Government and the Competition Commission of India (CCI) have been careful to ensure that the provisions do not cast needless burden on the relatively smaller enterprises. It has also been the endeavour to ensure that the 'prima facie' assessment of effect of combination on competition is carried out expeditiously. Only if the 'prima facie' analysis sounds alarm bells, further detailed assessment is made.

CCI has been conscious of the fact that it is helpful to maintain live contact with the stakeholders. We encourage pre-filing consultations both in relation to process as also substantive issues. Regulations and processes are reviewed periodically and changes effected in consultation with industry.

Inspite of many challenges, including the fact that this is virgin territory for professionals within the Commission and outside, we believe that the stakeholders are generally satisfied with the speedy and mature enforcement of the combination regime during the last three years or so. Be that as it may, we are equally conscious that the road ahead will be more and more difficult both in terms of quantity and complexity of transactions. We are geared up for this scenario and will work with stakeholders to ensure effective implementation of the combination regime.

Ashok Chawla

Combination Regulations in India- journey so far

Competition Act was enacted in 2003 and Competition Commission of India came into being on 1st of March, 2009. While most of the provisions of the Competition Act, 2002 were notified with effect from 20th May 2009, the provisions relating to combinations and the Combination Regulations were notified with effect from 1st June 2011.

Considering the objectives of merger control under the Act, the Combination Regulations dispenses with the notification requirement in respect of certain categories of combinations that are considered not likely to cause AAEC (Regulation 4 read with Schedule I of the Combination Regulations). A holistic reading of the categories suggests that the Commission necessarily requires notification when there is a change/acquisition of control. The Central Government vide notification dated 4th March, 2011 exempted an target enterprise, having either assets less than INR 250 crore or turnover less than INR 750 crore, from the application of the merger provisions. Subsequently, vide another notification dated 8th January, 2013; the Government further exempted certain banks, generally considered to be under financial distress (banks in respect of which the Central Government has issued an order of moratorium), from the application of the merger provisions.

First year of Enforcement:

During the first year of enforcement, the Commission received several queries and clarifications on the substantive and procedural issues concerning merger regulations. Issues primarily related to computation of assets and turnover, applicability/scope of exemptions and the framework for assessment of joint ventures. Through pre-merger consultation process, all such queries/issues were clarified by the Commission. Some of the specific queries were also answered by way of decisions in combination cases. For instance, in *Nippon Life Insurance Case* [C-2012/04/50], the Commission ruled that assets under management of asset management companies in the mutual fund sector are required to be taken into consideration for the purpose of computation of thresholds. The Commission also explained the instances of acquisition of control

whenever the determination of the same is considered necessary for the purpose of giving notice to the Commission or assessment of the combination. In *Independent Media Trust Case* [C-2012/03/47], the Commission defined 'control' as the ability to exercise decisive influence over the management and affairs of a company. In *Alok Industries Case* [C-2012/01/28], the Commission noted that the existence of common directors in two companies indicate that they are under common control and under the same management. Though, these decisions did not provide a comprehensive guidance on the notion of control, the stakeholders got a fair idea about the Commission's approach.

The experience gathered in the first year and the concerns raised by the stakeholders brought forth some amendments in February 2012 which included: (a) dispensing notification requirement with respect to certain intra-group mergers and amalgamation (Item 8A of Schedule I) and acquisition resulting in shareholding/voting rights less than 25% of the total shares/voting rights of the target enterprise (Item 1 of Schedule I); (b) introduction of the principle of attribution whereby the Commission clarified the rules for computing assets and turnover of target enterprise in cases where assets are transferred for the purpose of a combination [Regulation 5(9)]; and (c) enabling company secretaries to verify combination notices (Regulation 9(1)).

The Commission also came across the cases of belated filings during this period. Most of these delays were on account of the impression that notice need not be given in respect of intra-group mergers and amalgamations being exempted. But the Commission's decision in *TCL/Wyoming Case* [C-2011/12/12] explained the position that the relevant relaxation is available only for intra-group acquisitions. The penalty proceedings initiated in all such cases were dealt with leniently and no penalty was imposed being the first year of merger enforcement.

Second year of Enforcement:

The second year of merger enforcement was relatively more eventful- witnessing filings in Form II; behavioural remedies in certain cases; and penalties for belated filings. The Commission received notices in Form II in *GSPC Case* [C-2012/11/88] and *Diageo Case* [C-2012/11/97] indicating that the transactions may cause adverse effect on competition and the Commission need to have a greater

would apply.

The Commission imposed a penalty for the first time in *Dewan Housing Case* [C-2012/11/92] as the parties failed to file notice within the prescribed time limit. The Parties claimed that they failed to file notice within the prescribed time on account of an incorrect legal advice. The Commission considered this delay as a mitigating factor and imposed a nominal penalty. *In Titan International Case* [C-2013/02/109], the Commission imposed penalty on the parties based outside India for belated filing. In this case, though the Commission could have imposed higher penalty, considering the fact that the parties to the combination were located outside India and have voluntarily filed the notice, a lenient view was taken by the Commission and a relatively lesser penalty was imposed.

In SPE Investments Case [C-2012/06/63], the Commission held that joint control over an enterprise implies control over the strategic commercial operations of the enterprise by two or more persons. In such a case, each of the persons in joint control would have the right to veto/block the strategic commercial decision(s) of the enterprise which could result in a dead lock situation. It was further clarified that Joint control over an enterprise may arise as a result of shareholding or through contractual arrangements between the shareholders; however, careful scrutiny would be required to differentiate investor protection right from the right that results in a situation of joint control. The Commission's attempt to

Regulation of Combinations : Procedure

Certainty and uniformity in the procedure: Relevant provisions of the Act and Combination Regulations.

Section 5 of the Act describes a combination and Section 6 provides as to when a notice has to be given to the Commission in respect a proposed combination. The thresholds in the Act are prescribed in terms of value of assets or turnover in India and outside India. These thresholds under the Act are prescribed at two levels i.e. (a) enterprise level and (b) group level. Section 20 (3) of the Act provides that on expiry of every two years, Central Government can enhance or reduce the thresholds on the basis of wholesale price index or exchange rate fluctuations in rupee or foreign currencies. Vide notification S.O. 480 (E), dated 4th March 2011, the Central Government also enhanced value of assets and value of turnover by fifty per cent for the purpose of Section 5 at the time of enforcing provisions relating to combinations.

Section 6(2) provides that any person or enterprise proposing to enter into a combination has to give notice to the Commission within 30 days from the date of approval of the board of enterprises in respect of merger or amalgamation or executing an agreement or other document for acquisition or acquiring of control. In terms of Section 6(2A), combinations notified to the Commission are suspended for 210 days, from the day the notice has been given to the Commission, or till the Commission has issued orders under Section 31, whichever is earlier.

Current thresholds for the purpose of Section 5 are as follows:

Criteria		Assets	Turnover
Only within India	No Group	INR 1,500 crore	INR 4,500 crore
	Group	INR 6,000 crore	INR 18,000 crore
Within and Outside India	No Group	US$ 750 million with at least INR 750 crore in India	US$ 2250 million with at least INR 2,250 crore in India
	Group	US$ 3000 million with at least INR 750 crore in India	US$ 9000 million with at least INR 2,250 crore in India

differentiate investor protection rights from a joint control situation could also be seen in *Pipavav Case* [C-2012/11/95]. In *Century Tokyo Leasing Corporation Case* [C-2012/09/78], the Commission recognised the existence of joint control over assets as well as the operations on the basis of a contractual arrangement.

To expand the categories of transactions for which the notification requirement was dispensed with, the Commission again amended the Combination Regulations in April 2013. The relaxations provided include (a) dispensing notification requirement for creeping acquisitions in 25%-50% slab (Item 2A of Schedule I); and (b) expanding the scope of exemption for intra-group mergers and amalgamations. The relaxation was made applicable to mergers/amalgamations involving two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise. Similarly, the requirement of giving notice was also dispensed with for merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group (Item 9 to Schedule I).

Combination Regulations - Some Highlights.

Regulation 19 of the Combination Regulations provides for an initial review period as per which the prima facie opinion as to whether the combination is likely to cause or has caused AAEC is to be formed by the Commission within 30 days of receiving a notice. Regulation 19 also provides for modifications, which can be proposed by the parties for an early decision on the matter, in this initial review period.

Regulation 5 of the Combination Regulations provides for two Forms i.e. Form I & II in which the parties to the combination may file notice of the combination to the Commission. Form I is the short form whereas, Form II is a more detailed form. However, the parties have the option to file the notice in either of the forms.

Regulation 5 (9) of the Combination Regulations provides certainty about those transactions which involve transfers of assets by way of attributing the value of assets and turnover of a transferor company to the transferee company where the assets are transferred by the transferor company to the transferee company for the purpose of effecting a combination under the provisions of the Act.

Regulation 9 (4) of the Combination Regulations provides that where ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent, one or more of which may amount to a combination, a single notice covering all these transactions may be filed by the parties to the combinations. To clarify the issue further, Regulation 9 (5) provides that the requirement of filing the notice shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded.

Third year of Enforcement:

While the Commission did not face cases involving substantial competition issues during the first two years of enforcement, it had to undertake detailed inquiry in the third year of enforcement. The cases where detailed inquiries were made included civil aviation, aviation turbine fuel, pharmaceuticals and cement. The Commission undertook an in-depth analysis of civil aviation industry in Jet-Etihad case [C-2014/05/122] and allowed Etihad's acquisition of 24% stake and certain rights in Jet. The Commission held that the parties had entered into composite combination comprising of inter alia the investment agreement, commercial corporation agreement, and the shareholders agreement together indicating Ethiad's joint control over Jet airways.

The Commission initiated Phase II enquiry in *MIAL* Case [C-2014/04/164] when apprehensions were expressed that the proposed joint venture of three oil PSU's may

monopolise the market for supply of ATF in Mumbai Airport and foreclose the market for other players. The Commission approved the Combination on the basis of voluntary commitments offered by the parties for non-discriminatory access to other players apart from other commitments of installing adequate capacity, taking transparency measures such as publishing details on the website and diluting the restriction on the transfer of ownership over the joint venture, etc.

The Commission imposed penalties on *Ethiad* [C-2014/05/122] and *Thomas Cook* [C-2014/02/153] as some of the transactions of the combination had already been consummated before giving notice to the Commission. In both these cases the parties argued that the transaction(s) consummated were independent of composite combination(s) and were exempted from notification to the Commission. However, the Commission found that the impugned transactions were not independent and would not have been envisaged in absence of the parties going forward with other parts of their composite combination. To clarify this issue further, the Commission introduced a new provision in the Combination Regulations [Regulation 9 (5)] which reads as *"The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded."*

Thus, the Commission has tried to take a balanced approach in merger enforcement. The cases have been disposed of in a fair, transparent and time-bound manner. Pro-active steps have been taken by the Commission to simplify the compliance requirement.

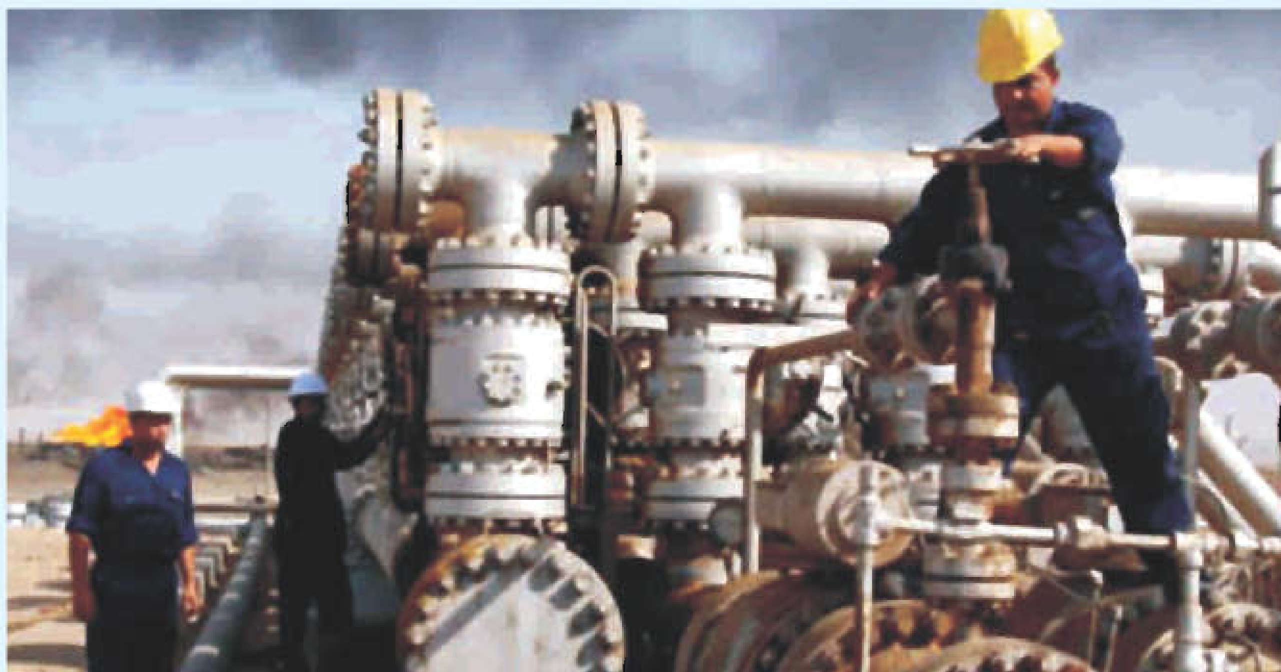
The Commission Imposed Penalty of Rs. 2544.64 crores on 14 Car Companies

In Case No. 03 of 2011 (Shamsher Kataria v. Honda Siel & Others), the Commission has found 14 Car Companies in contravention of the provisions of the Competition Act, 2002 and imposed penalty @ 2% of the average turnover of the car companies amounting to Rs. 2544.64 crores in aggregate.

Ensuing detailed investigation by the Director General (DG), the Commission found that the conduct of the 14 car companies were in violation of the provisions of section 3(4) of the Act with respect to their agreements with local Original Equipment Suppliers (OESs) and agreements with authorized dealers whereby such companies imposed absolute restrictive covenants and completely foreclosed the after market for supply of spare parts and other diagnostic tools. Further, it is found that the car companies, who were found to be dominant in the after markets for their respective brands, abused their dominant position under section 4 of the Act and affected around 2 crore car consumers. Also, the car companies were found to be indulging in practices resulting in denial of market access to independent repairers as the latter were not provided access to branded spare parts and diagnostic tools which hampered their ability to provide services in the aftermarket for repair and maintenance of cars. Having a monopolistic control over the spare parts and diagnostic tools of their respective brands, the car companies charged arbitrary and high prices for their spare parts. The car companies were also found to be using their dominant position in the market for spare parts and diagnostic tools to protect their market for repair services, thereby distorting fair competition.

Besides imposing aggregate penalty of Rs. 2544.64 crores, the Commission directed the car companies to cease and desist from indulging in conduct which has been found to be in contravention of the provisions of the Act. The car companies were also directed to adopt appropriate policies which shall allow them to put in place an effective system to make the spare parts and diagnostic tools easily available in the open market to customers and independent repairers. They are also directed not to put any restrictions or impediments on the operation of independent repairers/garages.

Adani Gas Ltd. Penalised for Abusing Dominant Position

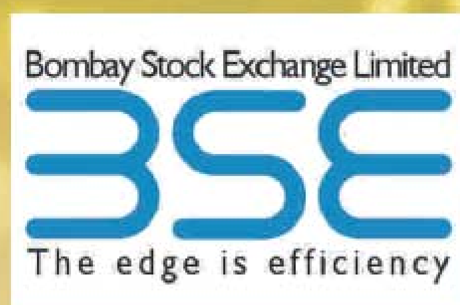


Acting on the information filed by Faridabad Industries Association, the Competition Commission of India (CCI) on 03.07.2014 has imposed a penalty of Rs. 25.67crores (@4% of the average of the turnover for the last 3 financial years) on M/s Adani Gas Limited for abuse of its dominant position. While defining the relevant market in this case, the Commission distinguished natural gas from other sources of energy and the market for supply and distribution of natural gas to industrial consumers in the district of Faridabad, Haryana was considered as the relevant market. Further, M/s Adani Gas Limited was found to be in dominant position in the relevant market defined above.

The Commission examined the various clauses of Gas Sales Agreement (GSA) between M/s Adani Gas Limited and industrial consumers and found some of the clauses were in contravention of the provisions of section 4(2) (a) (i) of the Competition Act, 2002 by imposing unfair conditions upon the gas buyers. While examining the clause relating to Billing and Payment of GSA, it was noticed that the terms and conditions contained therein provides that an excess payment by the buyer to the seller due to erroneous billing/ invoicing on the part of the seller gives rise to no liability whatsoever on the part of the seller including interest, whereas a delayed payment by the buyer renders him liable to pay interest on such rates as may be determined by the seller.

It was observed that in the event of any dispute regarding amount payable, if any, amount eventually becomes payable or reimbursable by M/s Adani Gas Limited to consumers, there was no obligation on the part of M/s Adani Gas Limited to pay interest on the said amount in terms of sub-clause 13.7 of GSA. Thus, the provisions of said sub-clause were found to be unfair. The Commission also observed that despite specifying rate of interest to be levied in the event of delayed payment, the further stipulation in sub-clause 13.5 to the effect that the interest rate may also be 'any such rates as may be communicated by the Seller in future' also amounted to imposition of unfair conditions in contravention of section 4(2) (a) (i) of the Act.

Commission Approves the Combination Between Bombay Stock Exchange Limited and United Stock Exchange of India Limited (C-2014/06/183).



Bombay Stock Exchange Limited ("BSE") and United Stock Exchange of India Limited ("USE") filed a notice for the merger of USE with BSE pursuant to scheme of amalgamation under Sections 391 to 394 of the Companies Act, 1956 and the provisions of the Companies Act, 2013 respectively.

BSE is engaged in the business of providing stock exchange services in product segments of equities, debt instruments, equity derivatives, currency derivatives (CD), etc. and also provides services like clearing, settlement, market data services, index services, and depository services etc. through its subsidiaries, associates and joint venture companies. USE is engaged in the business of providing stock exchange services in the CD segment.

The Commission observed that the dynamics of competition in the stock exchanges relate to wider participation, liquidity, diversified revenue streams, volumes, technology and innovation; which are considered to be critical for the health of an exchange. Stock exchanges in general may also be seen to have the characteristics of a networking industry with focus on innovation and technology. Moreover, as the transaction volumes increase, per unit cost of transaction gets substantially lowered. Accordingly, the strategic choices of stock exchanges include attainment of critical mass of market participants. Given these characteristics, stock markets across the globe have, therefore, witnessed a large number of combinations.

The Commission further examined the structure of stock markets in India and noted that there are four stock exchanges with nationwide terminals in India in CD segment viz., National Exchange of India Limited ("NSE"), BSE, MCX Stock Exchange Limited ("MCX-SX") and USE. NSE and BSE are multi-product exchanges operating in different product segments including equity, derivatives, debt instruments etc. USE is the only exchange which operates in a single product segment of CD. Further, the stock exchanges in India are mostly vertically integrated except USE which has outsourced its operation and maintenance services and clearing and settlement functions to BSE and its subsidiaries. The Commission also considered market shares of the competitors in CD segment and noted that the merged entity would be constrained by NSE and MCX-SX.

Considering the facts on record and the details provided in the notice, the Commission approved the combination under sub-section (1) of Section 31 of the Act.

Commission Approves the Acquisition of Shares in MCFL by SCM Soilfert Limited (C-2014/05/175).

On 22nd May 2014, the Commission received a notice given by SCM Soilfert Limited **("SCM")** pursuant to a public announcement **("PA")** dated 23rd April 2014, issued in terms of the relevant provisions of the SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 2011 **("Takeover Regulations")**. The PA was issued by SCM and SCM's parent Deepak Fertilizers and Petrochemicals Corporation Limited **("DFPCL")** for acquisition of shares of Mangalore Chemicals and Fertilizers Limited **("MCFL")**.

As per information provided in the notice, the combination involved:

(i) acquisition of 0.8 percent (approx.) of the equity share capital of MFCL through open market transactions.

(ii) acquisition of upto 26 percent of the equity share capital of MCFL through open offer as per the relevant provisions of the Takeover Regulations, the PA for which was issued on 23rd April 2014.

Both DFPCL and MCFL are listed companies incorporated in India under the Companies Act, 1956. Both the parties are primarily engaged in the production and trading of fertilisers in India. SCM is a subsidiary of DFPCL and was not engaged in the manufacture of any products.

The fertiliser sector in India has traditionally been regulated due to its importance to India's large agricultural sector. Under the present policy of Government of India, while urea is sold at a statutorily notified uniform sale price, the MRP of phosphatic and potassic fertilizers have been left open and fertilizer companies are allowed to fix the MRP at reasonable rates. Also, P&K fertilisers including complex fertilisers can be imported under the Open General Licence **("OGL")**. Further, under extant government regulations, subsidy is provided for non-urea fertilisers on the basis of their nutrient content under the Nutrient Based Subsidy scheme **("NBS")**.

On the basis of the information furnished in the notice, it was observed that apart from a few fertilisers which are manufactured by the parties, they are largely involved in the trading of fertilisers. Further, it was also noted that with respect to almost all their overlapping fertiliser products, the Parties' presence is through trading only. Most of these overlapping products also fell under the OGL, and therefore, any person with requisite approvals could import them into India. Further, the composite market share of the Parties in both primary nutrients (i.e., Nitrogen, Phosphorus and Potassium) and the overlapping bulk fertilisers (i.e. urea, DAP, MOP and NPK) is less than five percent and therefore minimal. The CCI also observed that most of the other overlapping fertiliser products are under the OGL and there is presence of other competitors like Coromondal International Ltd., DCM Shriram Consolidated Ltd., Nagarjuna Fertilisers Limited, Zuari Agro Chemicals Ltd., etc. in the market. The CCI approved the proposed combination vide its order dated 30th July 2014 under section 31(1) of the Act.

Commission Approves the Combination between Kotak Mahindra Bank Ltd. and Multi Commodity Exchange of India Limited (C-2014/08/197).

Kotak Mahindra Bank Ltd ('Kotak') filed a notice for acquisition of fifteen percent equity interest in Multi Commodity Exchange of India Limited ('MCX') from Financial Technologies (India) Ltd. by Kotak.

Kotak inter alia offers a wide range of banking and financial services. MCX inter-alia offers trading in varied commodity future contracts. Kotak also has an existing investment of forty percent equity interest in Ace Derivatives and Commodity Exchange Limited ('Ace'), which is a national multi commodity exchange.

The Commission observed that the commodities exchanges in India are regulated by the Forward Markets Commission ('FMC'), which is the regulatory authority for the commodity future markets in India. FMC has been progressively revising norms inter alia regarding the shareholding, ownership, net worth, fit and proper criteria of the nationwide multi commodity exchanges with a view to diversify their ownership structure and attract more institutional investors. Further, Kotak's forty percent stake in Ace would have to be brought down to fifteen percent by the year 2019 in accordance with the FMC revised norms. Further, as per the norms of FMC, Kotak would not have any contractual right to appoint directors to the board of MCX in proportion to its shareholding in the exchange.

The Commission also observed that Ace and MCX operate in the commodity derivative exchange market in India and there are nine overlapping commodities traded by Ace and MCX. In two commodities i.e. cotton bales and crude palm oil, Ace and MCX had a combined market share of almost hundred percent. However, it was observed that cotton bales and crude palm oil constituted only around one percent of the total market volumes traded in the commodity exchanges. Also, the specifications of the derivative contracts for Ace and MCX have certain differences so as to cater to the needs of the different market participants. The differences in the contract specifications of these exchanges are in relation to the notified delivery centres, quality of product acceptance, grades and trading units etc.

The Commission observed that MCX is a leading market player followed by National Commodity and Derivatives Exchange Limited and others, with Ace having a market share of approximately less than one percent.

The Commission approved the combination under sub-section (1) of Section 31 of the Act.

Commission Approves the Acquisition of Shares in MCFL by Zuari Fertilisers and Chemicals Limited and Zuari Agro Chemicals Limited (C-2014/06/181).

On 11th June 2014, the Commission received a notice under Section 6(2) of the Act, given by Zuari Fertilisers and Chemicals Limited (**"ZFCL"**) and Zuari Agro Chemicals Limited (**"ZACL"**) (ZFCL and ZACL collectively referred to as the **"Acquirers"**) pursuant to a shareholders agreement dated 12th May 2014, entered into between the Acquirers, and certain UB group entities.

The combination related to acquisition of upto 26% stake in Mangalore Chemicals and Fertilizers Limited (**"MCFL"**) by the Acquirers by way of a competing open offer as per the relevant provisions of Securities and Exchange Board of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011; the public announcement (PA) for which was issued, inter alios, by the Acquirers on 12th May 2014.

As stated, ZFCL is a wholly-owned subsidiary of ZACL, and was setting up a Single Super Phosphate plant at Mahad. Both ZACL and MCFL are public listed companies engaged, inter alia, in the manufacturing and trading of fertilisers, pesticides, chemicals and organic products in India.

On the basis of the information provided by the Acquirers, it was observed that the parties have overlaps in the fertilisers, pesticides and chemicals and organic products. However, it was observed that the overlap in pesticides, chemicals and organic products is minimal. Further, considering the common promoter shareholding and presence of common directors in ZACL, Zuari Global Limited (a holding company of ZACL) and Chambal Fertilisers and Chemicals Ltd. ("Chambal"), for the purpose of competition assessment of the combination, the market shares of **Chambal** in respect of relevant products were ascribed to those of the parties.

The fertiliser sector in India has traditionally been regulated due to its importance to India's large agricultural sector. Under the present policy of Government of India, while urea is sold at a statutorily notified uniform sale price, the MRP of phosphatic and potassic fertilizers have been left open and fertilizer companies are allowed to fix the MRP at reasonable rates. Also, P&K fertilisers including complex fertilisers can be imported under the Open General Licence (**"OGL"**). Further, under extant government regulations, subsidy is provided for non-urea fertilisers on the basis of their nutrient content under the Nutrient Based Subsidy scheme (**"NBS"**).

On the basis of the information furnished in the notice, the CCI observed that apart from a few fertilisers which the Parties manufacture, they are largely involved in trading of fertilisers. Further, the composite market shares of the parties in primary nutrients, as well as in overlapping straight and complex fertilisers such as urea (straight nitrogenous fertiliser), MOP (straight potassic fertiliser), SSP (straight phosphatic fertiliser) and NPK (complex fertiliser), except for in Calcium Nitrate, are not substantial. Also the incremental change in the market share was minimal in most cases. With respect to most of the remaining overlapping fertiliser products, including Calcium Nitrate, the parties' presence was only through trading. Further, most of these overlapping products also fall under the OGL, and therefore, any person with requisite approvals can import them into India. Significant competitors are present in the market, such as Indian Farmers Fertiliser Cooperative Limited, National Fertilisers Limited, Fertilizers & Chemicals Travancore Limited, Coromandel International Limited, Nagarjuna Fertilizers & Chemicals Limited, Deepak Fertilizers and Petrochemicals Corporation Limited, etc. The CCI approved the proposed combination vide its order dated 4th September 2014 under section 31(1) of the Act.

Jai Prakash Associates Ltd. is under CCI lens yet again

M/s Jai Prakash Associates Limited (JAL) is under CCI lens once again for its alleged abuse of dominance (AOD) in sale of a plot to the Informant in JAL's 'Keninsgton Park' project at Jaypee Greens, NOIDA (UP) in case No.56/2014.

CCI in its order under section 26(1) of Competition Act, 2002 (the Act) formed a prima-facie opinion that JAL was in dominant position in the relevant market of 'provision of services for development and sale of residential apartments in the geographic area of NOIDA and Greater NOIDA.

The Commission also considered the buyers' agreement wherein it prima-facie found JAL having imposed unfair and one sided terms and conditions which appears to be abusive in terms of the provisions of section 4(2)(a)(i) of the Act. Inter-alia, the Commission also observed that allegations and the facts of the instant case are akin to the earlier cases (Nos. 72 of 2011, 16 of 2012, 43 of 2012, 53 of 2012, and 45 of 2013) against JAL in which the Commission has already ordered for investigating by the DG.

Accordingly, the Commission directed the DG to investigate the alleged abuse of dominant position under section 4 of the Act in this case too.

Vidarbha Industries Association v. MSEB Holding Co. Ltd.and 03 others.

CCI in Case No.12 of 2014 pertaining to Vidarbha Industries Association (VIA) v. MSEB Holding Co. Ltd.and 03 others (OPs), after forming prima-facie opinion under section 26(1) of Competition Act, 2002 (the Act), directed DG to initiate investigation in the matter.

In this case OPs, as a group, allegedly have abused their dominant position, inter-alia, by deliberating generating and distributing electricity in extremely inefficient manner and by denying market access to other efficient and econominical power generating companies. Informant (VIA) also alleged that but because of inefficiency of OPs the consumers would have saved. Rs.7400/- crore in the year 2013-14.

Commission taking into account the details of information considered ' the market for distribution of electricity in the licensed area of OP 4 in the State of Maharashtra' as relevant market for the case. Commission prima-facie observed that conduct of OPs amounts to denial of market access to other power generating companies for distribution of electricity in the relevant market which is in contravention of the provisions of Section 4(2) (c) of the Act.

Advocacy Initiatives with Central & States Governments, Training Academies

A Brainstorming Session on Public Procurement was held on 2nd July, 2014 at CCI Conference Hall wherein common questions that are raised during interactions with the officials of various Ministries/ Departments were discussed so as to elicit a coherent institutional response from them.

Ms. Payal Malik, Adviser, took a technical session on "Abuse of Dominance: Law and Economics" in the five day residential Antitrust Summer School Programme, 2014 organized by Indian Institute of Corporate Affairs at IICA Campus, IMT Manesar, Gurgaon on 3rd July, 2014.

Shri Sukesh Mishra, Jt. Director (Law) delivered a 'Talk on Competition Law' at Society for International Trade and Competition (SITC), West Bengal National University of Juridical Sciences (NUJS) on 26th July, 2014.

CCI officers consisting Dr. Sadhna Shanker, Adviser (Law), Ms. Payal Malik, Adviser (Economics), Mr. Sukesh Mishra, Joint Director (Law), Dr. K. D. Singh, Deputy Director (Law) & Mr. Sulabh Rastogi, Assistant Director (Advocacy) held a meeting on competition issues with the key functionaries of Ministry of Coal on 21st August, 2014 in Shastri Bhawan, New Delhi .

Dr Satya Prakash, Director (Law) and Dr Vijay Kumar Singh, Dy Director(Law) participated as Resourse Persons in the 'Half Day Orientation Module on Competition Law & Policy' held at UP Academy of Administration & Management(UPAAM) on 08th September, 2014

Dr Satya Prakash, Director (Law) and Dr Vijay Kumar Singh, Dy Director(Law) gave presentations on Competition Law in Ram Monohar Lohia National Law University, Lucknow on 08th September, 2014.

Ms Sayanti Chakrabarti, Dy Director(Eco) held two sessions on 'Competition Act' on 16th September, 2014 at Direct Tax Regional Training Institute, Rowland Road, Kolkata.

Shri Ashok Chawla, Chairperson had addressed the Officer Trainees of All India Services and Group-A Central Services on Competition Law on 26th September, 2014 at Lal Bahadur Shastri National Academy of Administration, Mussoorie.

Advocacy Initiatives with Trade Associations

Shri Ashok Chawla, Chairperson, Competition Commission of India addressing 2nd International Conference on 'Interface between Intellectual Property & Competition Law' organised by ASSOCHAM on 29th August, 2014 in New Delhi.

Shri Augustine Peter, Member, Competition Commission of India addressing 2nd International Conference on 'Interface between Intellectual Property & Competition Law' organised by ASSOCHAM on 29th August, 2014 in New Delhi.

Dr Sadhna Shanker, Adviser (Advocacy) and Shri Sukesh Mishra, Joint Director(Law) addressed CEOs of the member companies of International Spirits & Wines Association of India(ISWAI) on 'Role of CCI, Competition & Compliance' during their quarterly Board Meeting on 10th September, 2014.

Shri Sukesh Mishra, Joint Director (Law) participated as a Resourse Person for the Summit on 'Challenges in Competition Law Enforcement in India' organized by PHDCCI on 27th September, 2014 at Hotel Radisson Blu, NOIDA.

Advocacy Initiatives with Sectoral Regulators

The Competition Commission of India organized an interactive meeting on "Competition Law and Interface with Sector Regulators' at Conference Hall, 7th Floor, HT House, New Delhi on 19th September, 2014 which was attended by Members/Officers of IRDA, AERA, SEBI, PNGRB &CERC.

Chairperson and Members CCI at meeting with Sectoral Regulators

Representatives from Sectoral Regulators

Adviser, CCI, Mr. R.N.Sahay speaking at meeting with Sectoral Regulators

Joint Director, CCI, Mr.Sukesh Mishra speaking at meeting with Sectoral Regulators

Internship Programme

In order to familiarize students with competition law, the CCI conducts Internship programmes wherein students of law, economics and management etc. get an opportunity to do research on various issues concerning competition law under the guidance of a mentor from the Commission. During the period between July to September 2014, 20 students were trained under the internship programme.

Internship Presentation under Progress

Capacity Building

- Half day workshop on Financial Analysis was organized on 4th July 2014 for the officers of CCI.
- Half day orientation program was organized for the newly joined senior officers in D.G.Office on 14th July 2014.
- Half day workshop on Constitutional & Administrative Law was organized on 31st July 2014 for the officers of CCI.
- 2nd Phase of Capacity Building Initiative for Trade Development (CITD) – workshops for CCI was organized on Information request and case analysis during 31st July- 2nd August 2014 in D.G. office of CCI.
- Training on Presentation and Communication Skills for officers of CCI was organized by Indian Institute of Public Administration (IIPA) during 27th -29th August 2014.
- Half day workshop on Industrial Organization and Micro Economics was organized on 15th September 2014 for the officers of CCI.

Eleventh "Distinguished Visitor Knowledge Sharing Series" Lecture was delivered by Shri Gurcharan Das, eminent writer on "A fine balance-Regulators and the market" on 4th August 2014

Ms. Smita Jhingran, Secretary, CCI welcoming Shri Gajendra Haldea who delivered Lecture on Twelfth "Distinguished Visitor Knowledge Sharing Series" on "Competition Issues in the Electricity Sector" on 17th September 2014

Workshop in collaboration with United States Federal Trade Commission (USFTC) on "Competition Investigations and Merger Review in the Healthcare Industry" organized during September, 22-24, 2014 for officers of CCI

ENGAGING WITH THE WORLD

International Events

Participation of Chairperson, Members and officers of CCI in various workshops/seminars/ conferences

1) Sh. Ashok Chawla, Chairperson, Competition Commission of India participated in Annual International Russian Competition Day 2014 during 8th -10th September 2014 at St. Petersburg, Russia.

2) Sh. M.L.Tayal, Member CCI and Sh. P. K Singh Adviser (Law), CCI participated in 14th Intergovernmental Group of Experts (IGE) on Competition Law & Policy of UNCTAD during 7th -11th July 2014 in Geneva, Switzerland.

3) Sh. Augustine Peter, Member CCI participated in 8th Annual Competition Conference and 15th Anniversary of Competition Commission of South Africa during 4th -5th September 2014.

4) Sh. R. N Sahay, Adviser(Economics) participated in 8th Seoul International Competition Forum on 4th September 2014 in Seoul, Korea.

5) Ms. Sunaina Dutta, Dy. Director (Law) attended the International Fellowship Programme of the United States Federal Trade Commission (USFTC) during 2nd September till Mid October 2014 in Washington D.C, U.S.A.

6) Dr. Saurabh, Dy. Director (Economics) attended the SAFE WEB Internship Programme of the USFTC during 22nd -26th September 2014 in Washington. D.C, U.S.A

DEVELOPMENTS IN OTHER JURISDICTIONS

China Fines Audi and Chrysler for Price-Fixing

China's anti-monopoly regulator imposed its first-ever punishment on foreign car makers for fixing the price of spare parts used in vehicles, fining Audi and Chrysler a combined $46 million.

The Chinese National Development and Reform Commission fined FAW-Volkswagen Sales, which markets Audi in the country, $40.6 million. It also fined eight Audi distributors a total of $4.9 million.

Audi's china unit was found to have violated the law by enforcing minimum prices that dealers were required to charge for sales and service and Chrysler enforced minimum sales prices.

EU Fines Marine Harvest €20million over Morpol Takeover

The European Commission levied a fine of €20 million on Marine Harvest ASA, a salmon farmer and processor, for failure to obtain authorisation under the EU merger regulation before acquiring its rival Morpol ASA. The Commission alleges that there was an eight month gap between Marine Harvest completing the deal and later notifying it. Marine Harvest stands accused of 'jumping the gun': rushing to get the deal done without having secured the necessary EU merger approval. The fine, equivalent to approximately 1% of Marine Harvest's 2013 turnover (NOK 19.19bn or €2.3bn), was imposed despite the fact the deal was subsequently cleared by the Commission.

The EC decided on the level of the fine by assessing "the gravity and duration (in this case, over nine months) of the infringement, as well as mitigating and aggravating circumstances".

The level of fine is a further reminder that failure to comply with the EU Merger Regulation can have significant financial and reputational consequences.

KFTC Issued Record Fine for Railway Bid Riggers

South Korea's competition authority imposed a record fine of 435.5 billion won (€317 million) on major builders for "unprecedented" collusion on tenders for a nationwide high-speed railroad project between Seoul and Mokpo.

According to the KFTC, construction companies colluded to predetermine the outcome of the bidding process for each section of the railway project to ensure that nearly all competing companies could win at least one section and the lowest possible bidding price.

Authorities found that all major construction companies, including Hyundai and Samsung, participated in the bid-rigging. It is the heaviest penalty to date for construction bid-rigging by Korea's Fair Trade Commission.

Penalties under the Competition Act

The aim of imposing penalties is to create deterrence in the minds of those who hardly have any respect or regard to obey the law. In the context of markets, business houses are expected to behave fairly without colluding or exhibiting any anti-competitive practices in their business dealings. Anti competitive agreements and abuse of dominant position by market participants are perceived to harm the interest of consumers and cause appreciable adverse effect on competition and therefore, prohibited under the Competition Act, 2002(the Act). The purpose of penalties in such circumstances is two-fold — firstly, to penalize non-compliance so as to deter the contravening person from repeating the act, and secondly, as a general deterrence, to prevent others from engaging in prohibited behaviour.

The Competition Commission of India (CCI) is empowered to impose monetary penalties under different provisions of the Act. The details are as follows:

[Section 27(b)]

For violation of Section 3 & 4: If upon inquiry, a person or enterprise is found to have violated the provisions relating to anti-competitive agreement (section 3) or abuse of dominant position (section 4), the Commission may impose penalty on such person or enterprise which may extend upto 10% of his/its average annual turnover for the last three financial years. Further, in case of cartel, the Commission has power to impose penalty on each of the contravening party, upto three times of their profit for each year of continuance of the cartel or 10% of its average turnover, whichever is higher.

[Section 42]

Failure to comply with the Orders: The Commission is empowered to impose penalty against persons who fails to comply with the order or directions issued under section 27, 28, 31, 32, 33,42A and 43A of the Act. The Commission may impose a fine which may extend upto Rs. 1 lac for each day of non-compliance subject to maximum of Rs.10 Crores. Further, if any person does not comply with the orders under Section 42, the Commission can file a complaint before the Chief Metropolitan Magistrate (CMM), Delhi who in-turn has the power to pass appropriate orders which may entail penal imprisonment upto 3 years or fine upto 25 Crores or both.

[Section 43]

Failure to comply with the Directions of the Commission or DG: Any person who fails to comply with the directions given by the Commission under sub-sections (2) and (4) of Section 36 or the directions given by the Director General (DG), CCI under sub-section (2) of Section 41, may be punished with a fine which may extend to Rs. 1 Lac for each day of such non-compliance subject to maximum of Rs.1 Crore.

[Section 43A]

Power to impose penalty for non-furnishing of information on combination: If any person fails to give combination notice to the Commission under Section 6 (2) of the Act, the Commission may impose a penalty on such person which may extend upto one per cent of the total turnover or the assets, whichever is higher, of such a combination.

[Section 44]

For making the false statement or omission to furnish material information: This provision deals with Combination. It provides that if a person who is party to a combination knowingly makes any false statement or failed to provide any material particular knowingly, then such person shall be liable to pay penalty which shall not be less than Rs. 50 lacs and may extend upto Rs. 1 crore or as may be determined by the Commission.

[Section 45]

Penalty for offences in relation to furnishing of false information or omit to furnish relevant information: Under this provision, the Commission is empowered to impose a fine which may extend upto Rs. 1 crore on such person who knowingly made false statement or furnishes documents which are false in material particular; or omit to state any material fact knowing it to be material; or willfully alters, suppresses or destroys any document which is required to be furnished before the Commission.

[Section 46]

Lesser Penalty: The Commission has power to impose lesser penalty on any producer, seller, distributor, trader or service provider included in any cartel prohibited under section 3 of the Act, if he makes full, true and vital disclosure of such act and co-operates with the Commission till the completion of the proceedings. However, such disclosure shall be made before the submission of the investigation report by the DG. A party is not entitled for lesser penalty, if it is found that the party has given false evidence or did not comply with the condition on which lesser penalty was imposed etc. In this regard, Commission has also issued the Competition Commission of India (Lesser Penalty) Regulations, 2009.

[Section 48]

Contravention by Companies: Where contravention of the provisions of the Act has been committed by a company, every person who is in-charge of and was responsible for managing the affairs of the company shall also be guilty of the contravention of the Act and liable to be proceeded against and punished accordingly.

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Please visit www.cci.gov.in for more information about the Commission.
For any query/comment/suggestion, please write to advocacy@cci.gov.in

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