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## COMPETITION LAW

## SETTING THE CONTEXT

- The relevant provisions of the Competition Act, 2002 (Act) were enforced in 2009 and the year 2019 marks a decade of effective enforcement of competition law in India. The Act deals with three main areas of conduct of a business:

- Prohibition of anti – competitive agreements under Section 3 of the Act
- Prohibition of abuse of dominance under Section 4
- Regulation of mergers and acquisitions under Section 5 and 6 of the Act

The conduct regulated by the Act, impacts day to day operations of any business and extends to not just interaction with competitors but also business associates (both in upstream and downstream markets) and consumers. In addition to this, the Act regulates the inorganic growth by companies as well.

- The Act creates a three-stage hierarchical structure comprising of:
  - The Competition Commission of India (CCI) which is the primary adjudicatory and regulatory authority created under the Act and tasked with maintaining competition in the market. The CCI is assisted in its investigative process by the office of the Director General (DG)
  - The National Company Law Appellate Tribunal (NCLAT) is the first appellate authority created under the Act. The NCLAT also has the power to entertain follow-on private damage claims.
  - The Supreme Court of India (SC) is the final appellate body under the Act to hear appeals from the orders passed by the NCLAT.

- The Act empowers the CCI to impose significant penalties of upto 10% of the average of a businesses' turnover for three years and in case of a cartel, even upto three time of the profit. In the past the CCI has imposed penalties of upto INR 1300 crores (approx 190 million USD) for contravention of the Act.
- In addition to the significant deterrent remedies that the CCI is empowered to impose, a company runs the risk of its business practices being altered. The CCI also has the power to direct that a dominant company should be broken up. This power to direct for divestiture of certain parts of the concerned enterprise, has however not been exercised by the CCI till date.
- The CCI is not just tasked with enforcement but also obligated to implement advocacy measures to create a culture of compliance and increase awareness about competition law.
- While Act is heavily influenced by the Treaty of Functioning of the European Union, the application of the provisions of the Act and the unique conditions of competition in the India, limits the direct applicability of foreign precedents in India.
- With effective enforcement over the past 10 years accompanied by the significant penalties that the CCI has imposed, assessment of compliance with the Act is critical for all businesses.



### Cartels

- Preventive compliance advisory and solutions
- End to end support on legal and regulatory issues
- Representation before the DG and CCI appellate authorities and writ courts
- Evidence analysis and defense strategy formulation
- Advise to victims of cartels on leniency
- Strategy on engagement with media at various levels and stages of a life cycle of a matter

### Leniency

- Comprehensive and tailored assessment in relation to prospects of leniency with focus on detection, risk exposure, and careful examination of evidence
- End to end support and representation before the DG and CCI and appellate authorities
- Strategy on engagement with media at various levels and stages of a life cycle of a matter

### Horizontal and Vertical agreements

- Review of risks under the Act and providing bespoke legal advice, while catering to the business requirements and realities
- Preventive compliance advisory and solutions
- Representation before the DG and CCI and appellate authorities in case of an inquiry
- Evidence analysis and defense strategy formulation in case of an inquiry
- Assessment of a potential violation and available legal recourse for clients concerned with terms and conditions of agreements and impact on their businesses
- Strategy on engagement

### Abuse of dominance

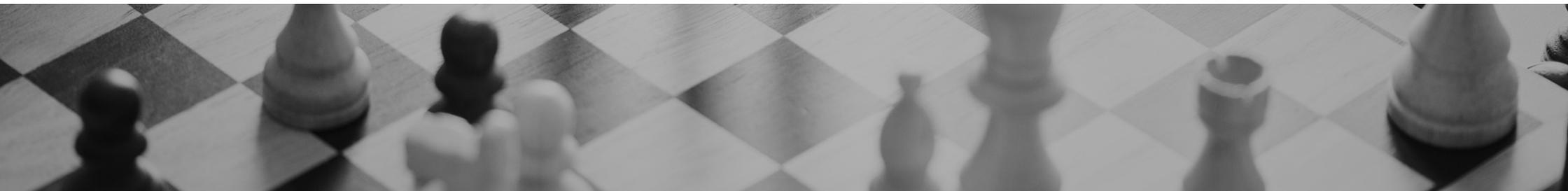
- Risk assessment exercise and providing business oriented legal solutions to companies across various sectors
- Comprehensive assessment of prospective / proposed business models and practices to identify the risks posed under the Act and provide bespoke legal solutions
- Competition compliance health check / audits of the existing agreements and practices to identify potential risks and generating reports with bespoke recommendations
- End to end support on representation before the DG, CCI, appellate authority and writ courts –on behalf of informants and defendants

### Merger approvals

- Preliminary merger control assessment regarding the requirement of notification including guidance on availability of any exemptions based on structure of transaction
- Review of transaction documents and advisory in relation to gun jumping
- End to end support in relation to merger notification with the CCI, including assistance with preparing divestitures and other structural proposals
- Preparing comprehensive competition analysis / reports on behalf of prospective acquirers of assets under divestiture plans ordered by the CCI
- Representation before the CCI in any proceedings arising out of imposition of penalty for failure to notify or consummation prior to approval

### Risk management & Competition compliance

- Comprehensive risk assessment exercise and preparation of reports identifying & categorizing risks, and proposing suitable mitigation strategies
- Comprehensive and bespoke competition compliance programs and policies
- Training and educating the management and employees on competition law basics, highlight the risks involved and the mechanisms to mitigate potential risk exposure



## 'Big data' and its assessment under the Act

- The CCI may need to undergo some dynamic policy revisions on certain factors including:
  - Access to 'big data' which may translate into dominance.
  - The increased use of AI raises issues of anti-competitive agreements being facilitated through AI and algorithms.
- Recognising this, the CCI has indicated that it will conduct a market survey to understand the implications of 'big data' in competition markets. The primary basis for assessment under the Act does not change however the manner of application of the existing jurisprudence and principles would have to undergo a dynamic change to deal with issues of big data and AI.

## The dangers of jumping the gun in mergers and acquisitions

- The CCI's broad understanding of what constitutes 'gun jumping' has been a cause of valid concern for a lot of companies who enter into agreements for mergers and acquisitions.
- The CCI regards part-payment of consideration as consummation of a transaction and has penalised in the past for it.
- Even a small acquisition, otherwise exempted by the Act, is considered notifiable if the acquisition in a competing or vertically related entity.

## Jurisdiction woes of the CCI

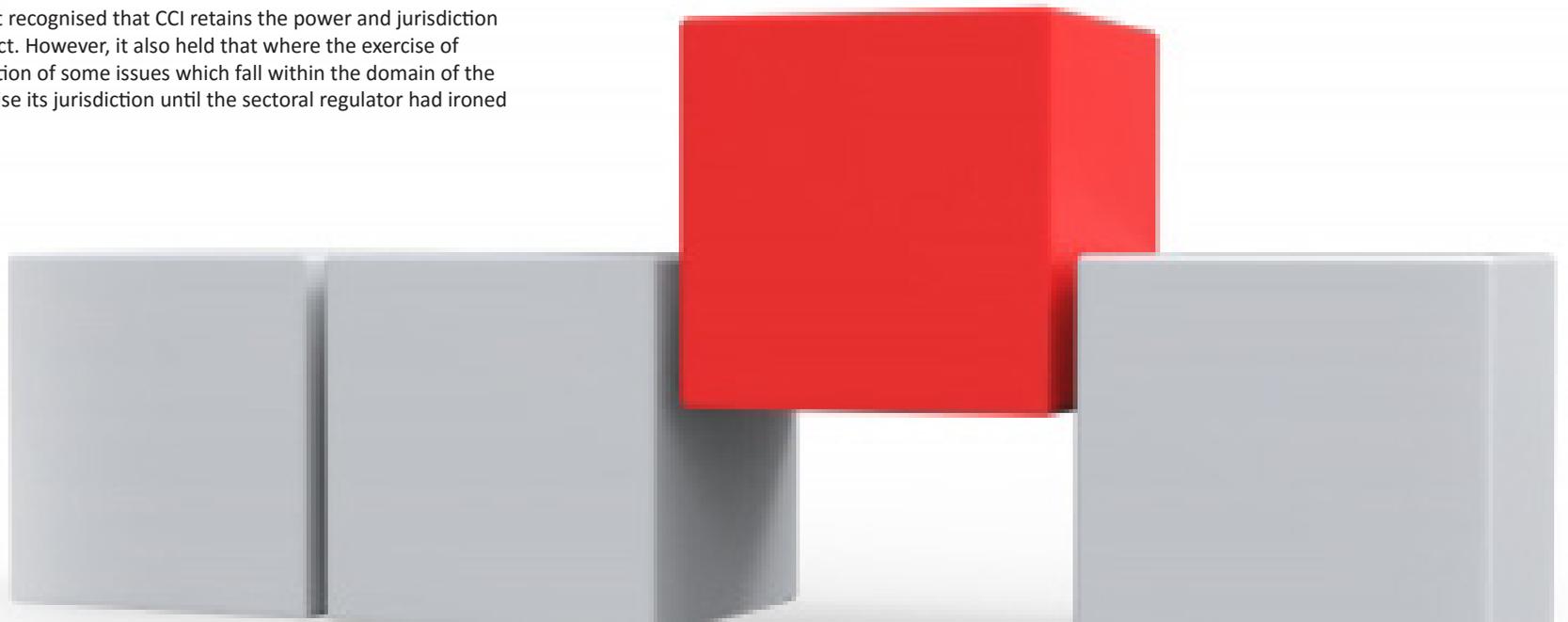
- The issues of 'turf wars' has troubled the CCI since its inception, stalling various investigations directed by the CCI.
- A recent judgement by the Supreme Court recognised that CCI retains the power and jurisdiction to decide on any issue arising under the Act. However, it also held that where the exercise of jurisdiction by the CCI requires determination of some issues which fall within the domain of the sectoral regulator, the CCI could not exercise its jurisdiction until the sectoral regulator had ironed out the issues.

## The success of leniency applications

- In 2018 alone, the CCI granted lesser penalty in around eight distinct leniency applications by notable companies in various sectors such as power/hardware.
- Given this healthy trend, it is possible that in the future more companies make use of this option and thus in deterrence avoid the possibility of fully functioning cartels.

## A timely review of the Act

- The aim of the Competition Law Review Committee (constituted by the GoI) , is
  - to review the Competition Act/ Rules/ Regulations, in view of changing business environment and bring necessary changes, if required
  - look into international best practices in the competition fields, especially anti-trust laws, merger guidelines and handling cross border competition issues and to study other regulatory regimes/ institutional mechanisms/ government policies which overlap with the Competition Act.



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