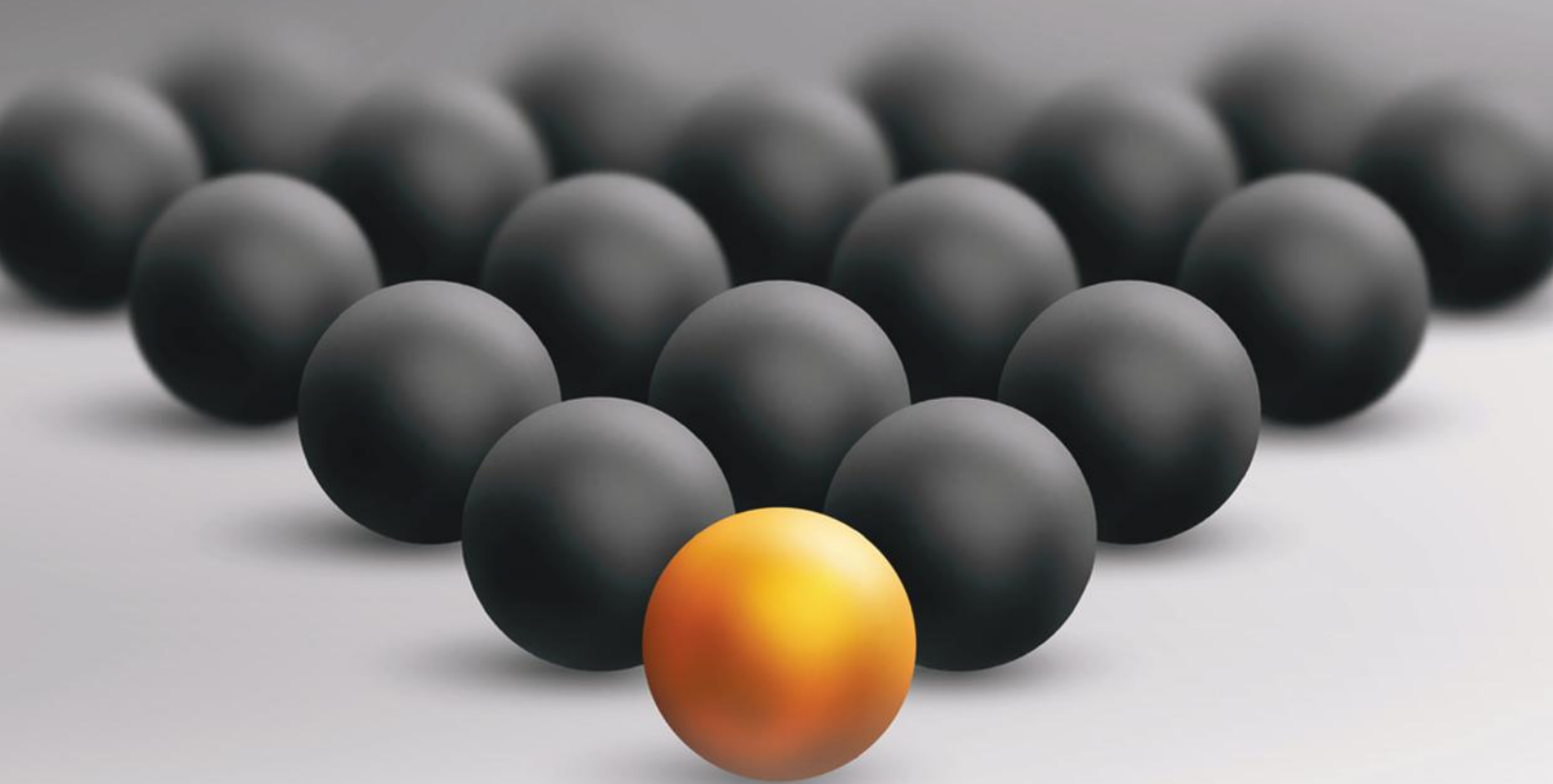




ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS

# COMPETITION LAW & POLICY UPDATE

QUARTER 3 OF 2020





## SNAPSHOT

### CCI finds no case of cartelization against LPG cylinder manufacturers

02

*In two separate cases of alleged cartelization amongst LPG cylinder manufacturers, CCI finds no contravention after considering the nature of the market.*

### CCI finds cartelization by composite brake block manufacturers for railways, passes only a cease and desist order

04

*In a case of alleged cartelization by composite brake block manufacturers for railways, CCI finds contravention but stops short of imposing a monetary penalty.*

### CCI closes a case against WhatsApp

06

*In a case of alleged abuse of dominance by WhatsApp in respect of WhatsApp Pay, CCI closed the case on grounds of sufficient competition in the market while also elaborating on the locus standi of an informant before it.*

### CCI closes case against Amazon in respect of online sale of fashion merchandise

08

*Finding multiple players operating on online platforms for selling fashion merchandise, CCI held Amazon not to be dominant and closed the case.*

### DG and Secretary, CCI may now seek information from Income Tax Authorities

09

*Central Board of Direct Taxes has added DG and Secretary, CCI to the list of officers who may seek information from Income tax authorities regarding an assessee.*

## SECTORS COVERED IN THIS ISSUE



Oil &amp; Gas



Railways



Digital payments



E-commerce



Technology



Automobiles



Minerals



## Anti-competitive agreements

### CCI closes matters against LPG cylinder manufacturers for alleged cartelization

On August 20 and August 26, 2020, the Competition Commission of India (CCI) closed two *suo moto* cases relating to cartelization by manufacturers of 14.2 kg LPG cylinders in response to the e-tender floated by Bharat Petroleum Corporation Limited (BPCL). The CCI primarily relied on the decision of the Supreme Court in [Rajasthan Cylinders and Containers Limited v. Union of India](#) where the Court took into account the distinctive features of the market for manufacturing and supply of 14.2 kg LPG cylinders and concluded that there was insufficient evidence to hold that there had been any agreement to rig bids.

The CCI, in its latest decisions, noted that it was a market largely driven and controlled by the oil marketing companies (OMCs) like BPCL and that the manufacturers of LPG cylinders had to adhere to the framework and the tender conditions stipulated by such OMCs. The CCI further noted that there was no scope for innovation, efficiency gains or product differentiation and price discrimination, as OMCs were the only purchasers of the said product.

The CCI took note of the investigation report, filed by the Director General, CCI, (DG) which had returned a finding of price parallelism and had further observed that

quoting of identical prices in their respective bids could have been a result of concerted action by the parties. However, considering the nature of the market, as disclosed in the investigation report, and in the Supreme Court's judgment in Rajasthan Cylinder case, the CCI concluded that the present cases did not require it to delve into the individual conduct of each of the parties.

The orders of the CCI can be accessed [here](#) and [here](#).

### CCI decides not to impose penalty on cartelizing brake block manufacturers

On July 10, 2020, the CCI found Composite Brake Blocks (CBB) manufacturers (Opposite Parties/OPs) to have cartelized in contravention of Section 3(3) of the Act. These cases were investigated pursuant to references filed by the Chief Materials Manager, South Eastern Railway; the Controller of Stores, Central Railway; the Chief Materials Manager, Eastern Railway; the Chief Materials Manager-I, North Western Railway and the Chief Materials Manager-Sales, North Western Railway (collectively, Informants). The allegations of cartelization related to tenders floated by the various divisions/zones of the Indian Railways (including by the Informants) for procuring of different types of CBBs, during the period 2009 to 2017.



The DG, in its Investigation Report, had found direct evidence of the OPs' involvement in cartelization. Certain individual officials of the OPs had discussed every detail of the tenders and the process to rig the bid at every step. The Investigation revealed that these individuals had even discussed how they would be compensated if they did not win the previous or earlier tenders.

In their defence, the OPs raised certain contentions viz., (a) that even though they had cartelized, there was no AAEC in the market for CBBs in India; and (b) that the Indian Railways, being a monopolistic buyer, controlled the price and quantity supplied to it and resultantly, the OPs had no control over the Indian Railways.

On the first contention of no AAEC, the CCI observed this plea is misdirected and untenable in the face of clear legislative intent whereby even the conduct which can *potentially* cause AAEC, is prohibited. The CCI also observed that under Section 3(3) of the Act, once an agreement is established, the same is presumed to have an AAEC in India. On the OPs second contention of the

Indian Railways being a monopolistic buyer, the CCI noted that negotiations/bargaining done by the Indian Railways does not detract from the fact of the bid-rigging indulged in by the OPs in violation of the Act. Therefore, the CCI found that the OPs and their respective individuals had indulged in cartelization in the CBB market in India, at least from 2009 till 2017, by means of directly or indirectly determining prices, allocating markets, coordinating bid response and manipulating the bidding process, which had an AAEC in India.

Accordingly, the CCI ordered the OPs to cease and desist from engaging in anti-competitive conduct but did not impose a penalty taking into account the cooperation extended by the OPs and their economic situation due to COVID-19 and otherwise.

The order of the CCI can be accessed [here](#).



# Abuse of Dominant Position

## CCI closes case against WhatsApp, elaborates on the aspect of locus standi

In its order dated August 18, 2020, the CCI found no prima facie case for investigation under the provisions of Section 4 of the Act in relation to allegations against WhatsApp and Facebook and closed the matter under Section 26(2) of the Act.

The Informant, Harshita Chawla, a practicing advocate, had filed the information allegedly to highlight the anti-competitive practices followed by platforms in the unified payment interface (UPI) market in India. According to the informant, such practices would not only affect the participants/players in the said market rather they would also impact an individual customer/consumer, in the long run. It was specifically alleged that - (i) the automatic pre-installation of WhatsApp Pay onto WhatsApp mobile application is an unfair condition in the sale of a good/service and against Section 4(2)(a)(i) of the Act; (ii) offering WhatsApp Pay with WhatsApp amounts to bundling since the two products are offered as a package, not available independent of each other and is against Section 4(2)(d) of the Act; (iii) WhatsApp uses its dominance in the Internet based instant messaging app market to favor and protect its position in the UPI enabled Digital Payments App Market, and is against Section 4(2)(e) of the Act; and (iv) the acquisition of WhatsApp, Instagram and Oculus by Facebook caused an adverse effect on competition as these companies have huge data sets of users which they can use for their commercial advantage.

While differentiating the inherent nature of apps of WhatsApp and Facebook, the CCI defined the relevant market as the *market for Over-The-Top (OTT) messaging apps through smartphones in India*. With respect to allegations pertaining to WhatsApp Pay, the CCI defined the relevant market as *market for UPI enabled Digital Payments Apps in India*.

On the point of dominance, the CCI noted that the market share of WhatsApp pointed towards dominance and WhatsApp benefitted from network effects, which ensured that customers did not switch to other platforms easily unless there was a new competitor

entering the market with an altogether disruptive technology. However, for the reasons elaborated below, the CCI found no *prima facie* case of an abuse of dominance by either WhatsApp or Facebook:

- The pre-installation or mere existence of WhatsApp Pay on WhatsApp did not necessarily convert into a transaction/usage. A user keen to use the pay app would have to separately register for it.
- The requisite conditions necessary to prove a practice of ‘tying’ were found to be absent.
- The presence of other already “established” players in the UPI enabled digital payment Apps such as Google Pay, PayTM, Phone Pe, Amazon Pay etc. which were backed by big companies/investors.
- Vigorous competition between the established players as evident from the offers/discounts/incentives offered by them.
- The evolving nature of the market for UPI enabled digital payment Apps is such that it was unlikely that WhatsApp Pay would automatically garner a market share merely on account of its pre-installation.
- With respect to the allegation that Facebook and its group entities deal with customer sensitive data which is amenable to misuse and may raise potential antitrust concerns among other data protection issues, CCI found no concrete allegation, nor any specific information or evidence to support the allegation.

The CCI, also considered the contention raised by WhatsApp and Facebook with respect to the Informant having no *locus standi* to approach the CCI because neither had she claimed any injury nor suffered an invasion of her legal rights as a consumer (i.e. not an aggrieved party). The CCI, based on the Competition (Amendment) Act, 2007, which substituted the words “*receipt of a complaint*” with “*receipt of any information*” in Section 19(1)(a) of the Act and relying on decisions of the Supreme Court, NCLAT and its own orders observed that an informant before the CCI need not be an aggrieved party only.

The order of the CCI can be accessed [here](#).



## CCI finds no prima facie case against Amazon in online fashion retail market

Through its order dated September 11, 2020, the CCI dismissed allegations of abuse of dominance against Amazon Seller Services Private Limited (**Amazon**), Amazon Export Sales LLC (**Amazon Export**) and Cloutail India Private Limited (**Cloutail**) (collectively **A&S**), while finding A&S not to be in a position of dominance. The CCI further dismissed the allegations against A&S that their inter-se agreements and agreements with other brands, have created significant entry barriers and foreclosed the market.

Lifestyle Equities C.V. and Lifestyle Licensing B.V. (collectively **Lifestyle**), the informants in the matter and proprietors of the brand 'Beverly Hills Polo Club' (**BHPC**) had raised the following allegations against A&S in respect of the market for 'online fashion retail in India' -

- **Dominance of Amazon:** According to Lifestyle, Amazon holds 31.1% of market share in the online fashion retail and has the highest gross merchandise value for the financial year ending March 2018. Further, according to Lifestyle, the increased expenditure for offering discounts to the customers by Amazon, despite suffering huge losses, indicates the position of strength enjoyed by it.
- **Unfair and anti-competitive practices:**
  - **Pricing:** According to Lifestyle, Amazon indulged in the practices of selling counterfeit/unlicensed/unauthorized products of BHPC at predatory or at unfair and discriminatory prices. These practices of Amazon have caused Lifestyle to be unable to compete with Amazon in online retail market and the inferior counterfeit/unlicensed/unauthorized products of BHPC sold by Amazon has caused reputational harm to Lifestyle. It was alleged that these pricing practices of Amazon would lead to closure of all other fashion retail websites; and

- **Leveraging:** According to Lifestyle, Amazon indulged in practices of promoting its own or preferred sellers or labels by awarding them higher search ranking through an allegedly opaque ranking system.

- **Anti-competitive agreements:** According to Lifestyle, Amazon was indulging in inventory-based e-commerce services due to its alleged anti-competitive agreements with Amazon Export and Cloutail and cross subsidizing products for sale on its website. This practice, according to Lifestyle, leads to the prices charged by the preferred sellers being lower than the prices charged by the other sellers or manufacturers themselves. These factors have resulted in foreclosing of competition and has led to manufacturers selling the products exclusively on Amazon's platform.

The CCI in its assessment identified the '*market for services provided by online platforms for selling fashion merchandise in India*' as the relevant market. The CCI took note of the *Red Seer Report June 2019* which recorded that the collective market share of large horizontal/multiproduct marketplace to be around 35%. The CCI observed that there were multiple players operating in the relevant market and that Flipkart was a close competitor of Amazon. In light of these facts, the CCI concluded that Amazon was not in a dominant position in the relevant market and that it was constrained from looking into the allegations of alleged practices of selling counterfeit/unlicensed/unauthorized products at prices lower than the original product on Amazon's platform.

Further, in respect of anti-competitive agreements, the CCI observed that the retailers and manufacturers have various avenues through which they could sell their products and hence held that *prima facie* the alleged agreements did not appear to cause exclusivity or appear to have an appreciable adverse effect on competition. The CCI in light of the above findings closed the matter.

CCI's order can be accessed [here](#).



## Mergers and Acquisitions

### CCI approves merger of Peugeot S.A. and Fiat Chrysler Automobiles

On June 04, 2020, CCI approved a Proposed Combination between Peugeot S.A. (**PSA**) and Fiat Chrysler Automobiles N.V. (**FCA**) (collectively, **Parties**). Based on activities of the Parties, the CCI observed that there could be a potential horizontal overlap in future between the passenger vehicles sold by FCA and PSA.

The CCI noted that the market of passenger vehicles in India could be broadly segmented into markets for - (i) passenger cars, (ii) utility vehicles, and (iii) vans, which could be further sub-segmented based on factors such as price and features. However, the CCI decided to leave the exact definition of relevant market open since the Proposed Combination did not give rise to any competition concerns irrespective of the manner in which the market is defined.

The CCI noted that potential overlap emanating from the Proposed Combination was not likely to raise any competition concern considering the overall market presence of the Parties and presence of other players such as Maruti Suzuki, Honda, Toyota, Tata. In addition to passenger vehicles, the CCI also identified another potential overlap between the Parties in the automotive finance segment. However in view of the presence of large number of financing institutions such as banks and NBFCs, the CCI found that any appreciable adverse effect on competition was unlikely and approved the Proposed Combination.

The order of the CCI can be accessed [here](#).

### CCI approves the combination between Outotec and Metso with modifications

On June 18, 2020, the CCI approved the acquisition of the mineral business of Metso OYJ (**Metso**) by Outotec OYJ (**Outotec**). The proposed combination involved a partial demerger of Metso pursuant to the Finnish Companies Act, whereby all such assets, rights, debts, and liabilities of Metso that relate to, or primarily serve, its minerals business would be acquired by Outotec. The combined entity, the CCI observed, would operate under the name of Mesto Outotec, while the flow control business of Metso would continue independently under the name Neles.

The CCI observed that Outotec was present in India in the supply of equipment for the processes of (i) Flotation (ii) Sedimentation (iii) Filtration (iv) Thermal Processing i.e. Iron Ore Pelletizing (**IOP**) (v) Hydrometallurgy and (vi) Refining. Further, the CCI noted that Metso was present in India in the supply of equipment for the processes of (i) Crushers (ii) Grinding Mills (iii) Magnetic Separation (iv) Flotation (v) Filtration, (vi) IOP (vii) Slurry handling (viii) Materials handling (ix) Size control (x) Aggregates Capital Equipment and (x) Recycling.

Based on the information filled by the Outotec and Metso (collectively parties), the CCI noted that the parties exhibited horizontal overlap in the broad segments of –

- **Filtration:** The process through which liquids are removed from a slurry to obtain the solids in a suitable form;
- **Flotation:** The process through which selected minerals are separated from a water-mineral mix;
- **IOP:** The process through which iron ore fines are agglomerated into “iron ore pellets” suitable for use in an iron-making furnace; and
- **After sales products and services:** That includes advisory; maintenance; operations upgrades; remote services; training; and spare & wear parts and service labour. Parties exhibit overlap in market for aftersales Filtration, Flotation and IOP in India.

The CCI considering the material on record formed a *prima facie* opinion that the proposed combination was likely to cause an AAEC in the segment of IOP in India. Accordingly, a show cause notice (**SCN**) was issued to the Parties, in response to which the parties submitted a voluntary remedies proposal (**VRP**).

The CCI in its analysis assessed the market of IOP equipment in India by observing the nature of the market, the level of concentration in the market and by conducting bid data analysis. Based on these the CCI observed that the parties appeared to be close competitors. It further observed that based on the combined installed capacity for pellet production in India along with factors such as non-standardization, non-transparent pricing in the market and historical



relationships, the parties appeared to be in a position to command some degree of market power vis-à-vis its competitors. The CCI further observed that a merger amongst close competitors could generate horizontal AAEC, if the combined entity significantly constrains the behavior of other firms active in the market.

Relying on the assessment of the market, the response by competitors of the parties, the information filed by the parties and their response to the SCN, the CCI observed that the proposed combination was an integration of two close competitors in the market of IOP equipment in India and appeared to:

- Limit the number of suppliers available to customers in the market;
- Reduce the intensity of innovation in pelletizing technology and equipment;
- Perpetuate the substantial market position of the parties in the market; and reduce or eliminate the competitive pressure that would prevail in the absence of the proposed combination;
- Reduce the extent of countervailing bargaining power that the customers enjoy on account of the competition exerted by independent presence of Metso and Outotec;
- Increase the cost of the entrants and rivals to compete and increase their presence in the market given that there is no likelihood of a timely and sufficient entry that could act as a competitive constraint to the combined entity; and
- Result in the creation of a strong integrated player.

The parties had offered to transfer Metso Mineral's India Straight Gate (SG) IOP capital equipment business to a suitable buyer, thereby preserving competition. The CCI noted that the divestment of Indian SG IOP capital equipment business essentially involves transferring a right to fully use and exploit the SG IOP capital equipment drawings, including the related registered IP by way of an exclusive and irrevocable license, subject to a lump sum upfront payment and no ongoing royalties. The CCI further noted that the VRP package comprised all that was required to replicate Metso Mineral's SG IPO products sold in India.

The CCI observed that the VRP would allow the emergence of a new competitor, thus resolving any concerns of AAEC. The CCI held that until the divestiture was complete, the parties were required to take such steps as necessary to maintain viability, marketability and competitiveness of the Metso Minerals' India SG IOP capital equipment business. The CCI indicated that it would appoint an independent agency as a Monitoring Agency for the purpose of, inter alia, supervision of the VRP.

The CCI, while accepting the duties and obligations of the parties under the VRP, provided a detailed purchaser requirement for the divestiture of the proposed business segment of Metso. The CCI noted that final agreements relating to the divestiture would require the approval from the CCI and if the parties failed to comply with the VRP, the proposed combination would be deemed to have caused AAEC and would make the parties liable for being proceeded under the relevant provisions of the Act.

The order of the CCI can be accessed [here](#).



## Policy Update

### CBDT includes the DG and Secretary, CCI to the list of persons who may seek information

Through a Gazette notification dated July 30, 2020 (**Notification**), the Central Board of Direct Taxes, Ministry of Finance (Department of Revenue) (**CBDT**), has included the DG, CCI and the Secretary, CCI (**Secretary**) as officer/authority which may seek information from the Income Tax Authorities regarding an assessee. Section 138(1)(a)(ii) of the Income Tax Act, 1961 (**Income Tax Act**) permits the Central Government to notify any officer/authority/body which is performing functions under any law at the time being in force, to be eligible to seek all/any information about an assessee which the Income Tax Authorities may have received in performance of their functions under the Tax Act.

#### *Key Takeaways:*

If a party, before any statutory authority, raises an issue that the decision taken or proposed to be taken by such authority will be contrary to the provisions of the Act, the authority may make a reference to the CCI on such issue in accordance with provisions of the Act and the relevant regulations. Similarly, under the provisions of the Act, the CCI can refer an issue to a statutory authority which is empowered to implement provisions in respect of such issue. The Act, however, does not specifically empower CCI to seek/request the records/information collected by a statutory authority in performance of its functions. The present amendment by the CBDT authorizes the DG/Secretary to seek all information of an assessee available with the Income Tax Authorities in the course of performance of their duties under the Income Tax Act.

Under Section 2 of the Income Tax Act, an assessee has been defined to include any individual, a Hindu Undivided Family, a company, a firm, an association or body of individuals, local authority or any other juridical person. An assessee under the provisions of the Income Tax Act, in addition to their earning/income are, as per applicable provisions, required to provide details in respect of any related party transactions, non-deductible expenditure, shareholding or interest in a company/firm, etc.

Such information may be relevant for the CCI to conduct its analysis under the provisions of the Act, in respect of cases of anti-competitive agreements and abuse of dominance as well as in cases of combinations. For example, such information may assist the CCI in establishing cartelization through receipts of monetary payments, establishing that an entity indulged in predatory pricing, determination of turnover of a person or entity for imposition of penalty, or for establishing related parties or interests in another entity in respect of competition assessment for a proposed combination.

Whereas, much of the information about a Company or some juridical entities may also be obtained from the respective Registrars or any other designated authority, this inclusion will assist the CCI in obtaining financial and other information in respect of an individual, Hindu Undivided Family, partnership firms and other juridical entities. This will ensure that the decision of the CCI, under the provisions of the Competition Act, is not delayed due to any hinderances caused in obtaining the financial or other information as may be available with Income Tax Authorities relating to an assessee.

The DG/Secretary, however, under Section 138(1)(b) of the Tax Act, will be required to seek such information by making an application and convincing the Income Tax Authorities that such disclosure is required in public interest. The Notification also requires the DG/Secretary to maintain complete confidentiality over any information received pursuant to such application to the Income Tax Authorities.

The CBDT's notification can be accessed [here](#).

# Review

## CCI completes one year of Green Channel under Combinations

On August 13, 2019, the CCI amended the Combination Regulations and introduced an automatic channel for approval (Green Channel) based on self-assessment by the parties, which came into effect from August 15, 2019 as an initiative which was introduced towards furthering the cause of ease of doing business in India.

As per the CCI, in this past year, one out of every five notifications filed with it has been under the Green Channel and a total of 14 Green Channel notifications have been filed till August 15, 2020. According to the CCI, none of the transactions have yet been declared *void ab initio* and were deemed approved on the date of filing of the notification with it.

The relevant provision in respect of Green Channel provide that a transaction, where under all plausible alternative market definitions, the parties, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control, are:

- not engaged in similar or identical products or services i.e., have no horizontal overlaps;
- not in different stages or levels of production chain; or
- not engaged in products or services complementary to each other,

would, upon filling a notice to the CCI under revised Form-I, be deemed to be approved.

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