



ECONOMIC
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COMPETITION LAW & POLICY NEWSLETTER

Quarter 3 of 2021

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- CCI approves SoftBank Group stake purchase in Swiggy
- CCI gives nod to Zomato's acquisition of stake in Grofers

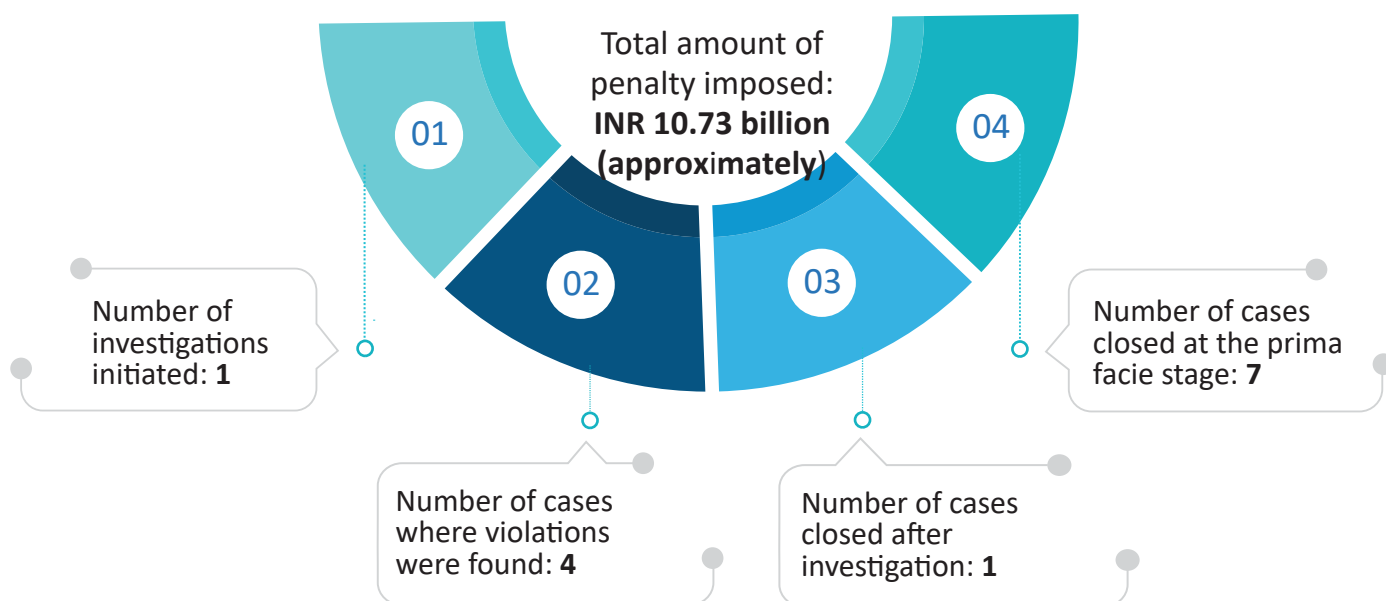
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KEY ENFORCEMENT MATTERS

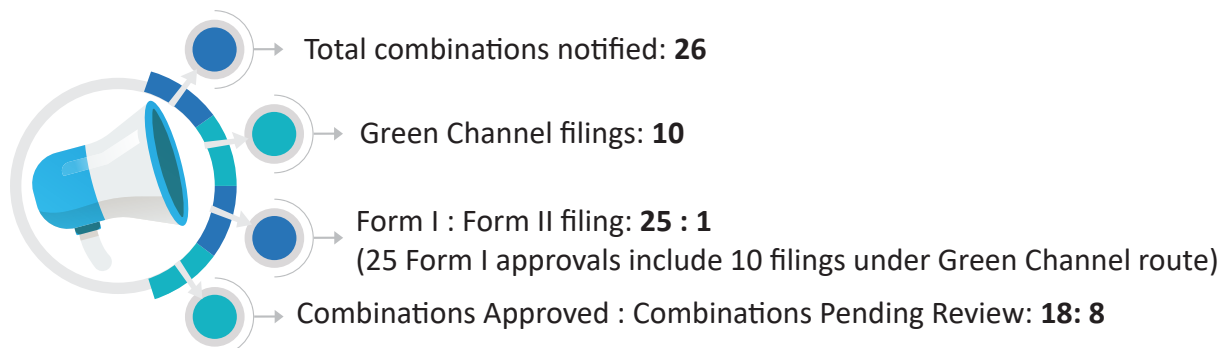
- CCI penalizes beer companies for cartelization
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- Courts dismiss appeals filed by Amazon, Flipkart challenging probe by CCI
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A QUICK SNAPSHOT:

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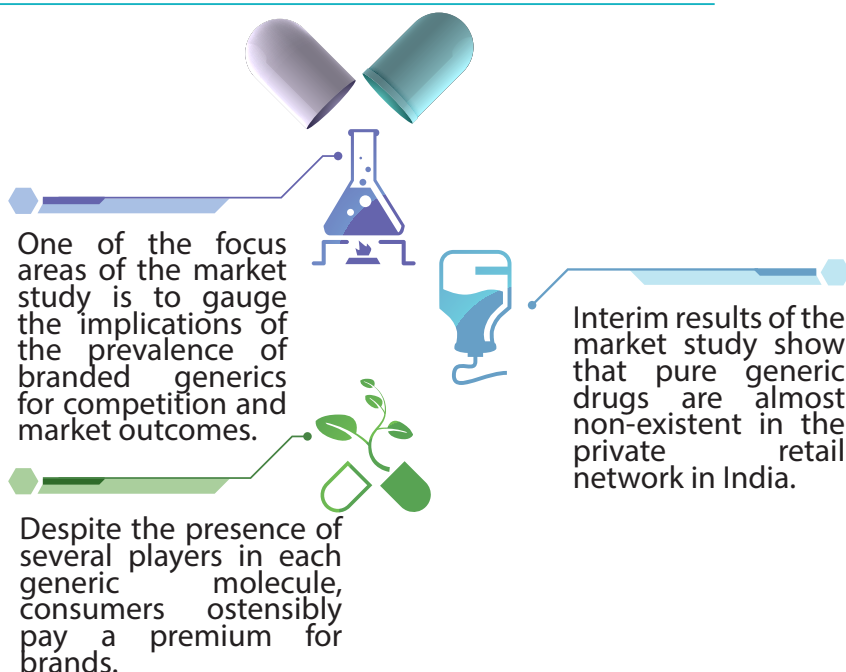


Mergers & Acquisitions:



Competition Law Trends:

A recent workshop conducted by the CCI on 'Competition Issues in the Pharmaceutical Sector in India' shows that the CCI is again actively examining the pharmaceutical industry. The CCI had initiated a market study in October 2020 to assess the competitive landscape in the pharmaceutical sector. Key highlights from the workshop are:



KEY ENFORCEMENT MATTERS

#1 CCI penalizes beer companies for cartelization

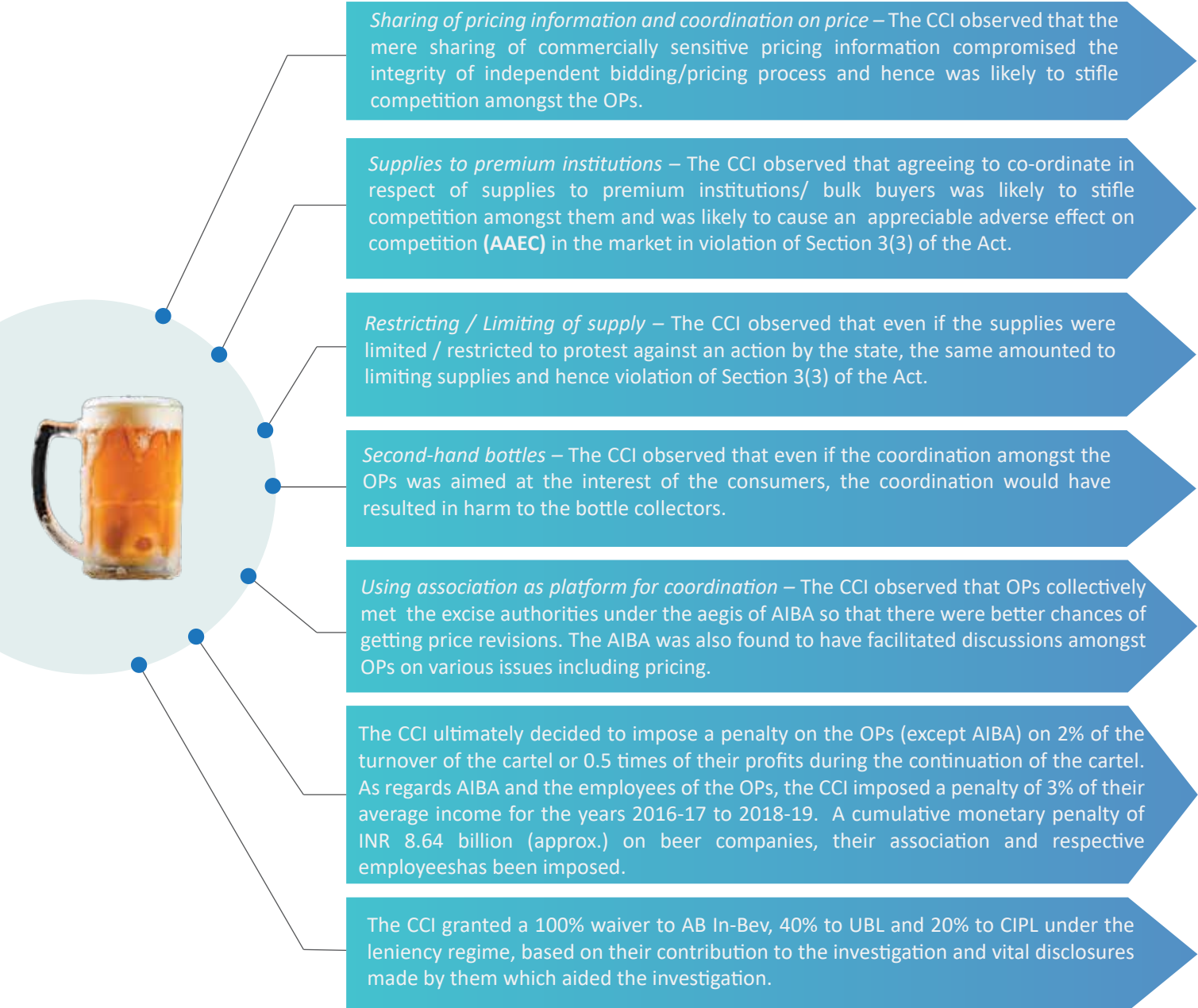
Background and Allegations

A *suo-moto* investigation was initiated by the CCI in 2017, pursuant to an application filed by AB In-Bev under the lesser penalty provisions under the Competition Act, 2002 (**Act**). The allegations pertained to determination/fixing of prices in certain states, by four beer manufacturing companies, United Breweries Limited (**UBL**), Carlsberg India Pvt Ltd (**CIPL**), Crown Beers India Pvt. Ltd. and SABMiller India Limited (now known as Anheuser Busch InBev India Ltd. (**AB In-Bev**), and their association (All India Brewers' Association (**AIBA**) (collectively **OPs**).

The DG during its investigation also conducted a search and seizure, pursuant to which, UBL and CIPL also filed their respective leniency applications before the CCI.

Key Observations and Conclusion

The CCI observed that the OPs had engaged in anti-competitive conduct in respect of the following:



Sharing of pricing information and coordination on price – The CCI observed that the mere sharing of commercially sensitive pricing information compromised the integrity of independent bidding/pricing process and hence was likely to stifle competition amongst the OPs.

Supplies to premium institutions – The CCI observed that agreeing to co-ordinate in respect of supplies to premium institutions/ bulk buyers was likely to stifle competition amongst them and was likely to cause an appreciable adverse effect on competition (**AAEC**) in the market in violation of Section 3(3) of the Act.

Restricting / Limiting of supply – The CCI observed that even if the supplies were limited / restricted to protest against an action by the state, the same amounted to limiting supplies and hence violation of Section 3(3) of the Act.

Second-hand bottles – The CCI observed that even if the coordination amongst the OPs was aimed at the interest of the consumers, the coordination would have resulted in harm to the bottle collectors.

Using association as platform for coordination – The CCI observed that OPs collectively met the excise authorities under the aegis of AIBA so that there were better chances of getting price revisions. The AIBA was also found to have facilitated discussions amongst OPs on various issues including pricing.

The CCI ultimately decided to impose a penalty on the OPs (except AIBA) on 2% of the turnover of the cartel or 0.5 times of their profits during the continuation of the cartel. As regards AIBA and the employees of the OPs, the CCI imposed a penalty of 3% of their average income for the years 2016-17 to 2018-19. A cumulative monetary penalty of INR 8.64 billion (approx.) on beer companies, their association and respective employees has been imposed.

The CCI granted a 100% waiver to AB In-Bev, 40% to UBL and 20% to CIPL under the leniency regime, based on their contribution to the investigation and vital disclosures made by them which aided the investigation.

The decision of the CCI is available [here](#)

#2 Maruti's dealer discount control policy costs them INR 2 billion

Background and Allegations

A *suo-motu* inquiry which the CCI initiated in 2019 was based on an anonymous email to the CCI which revealed that the dealers of Maruti are restricted from giving extra discount to their customer. It was alleged that if a dealer is found giving discounts higher than the permitted level, penalties are levied based on the number of incidents found in a particular financial year. It was also alleged that Maruti's management sends an e-mail with a "Mystery Shopping Audit Report" to the dealers and asks for clarification regarding the discounts offered. Further, this Mystery Shopping Audit Report was generated pursuant to a mystery shopping audit by Maruti's independent agency where a fake customer visits the dealer in order to check whether extra discount is being offered or not along with an audio proof of the same.

Other Noteworthy facts

- In 2017, Hyundai Motors India Ltd. was fined INR 870 million by the CCI on complaints that alleged precisely the same *modus operandi* of controlling dealers' discounts.
- However, the National Company Law Appellate Tribunal (NCLAT) subsequently set aside the order and stayed the penalty on procedural grounds.
- This time, the CCI has thoroughly deliberated upon the evidence provided and arguments advanced, and, has set out cogent reasoning in support of its findings of contravention.
- This is perhaps the maximum penalty imposed by the CCI in a RPM matter

Key Observations and Conclusion

The CCI while analyzing the various aspects of the discount control policy adopted by Maruti considered the following:

- *Discount Control Policy by Maruti* – Maruti, through such a policy was also found to have limited the maximum discount allowed in cash or in terms of accessories, etc. to consumers.
- *Penalty warnings on offering extra discounts* – Dealers were threatened with imposition of penalty, not only upon the dealership, but also upon individual persons, including the direct sales executive, regional manager, showroom manager, team leader, etc., and stoppage of supplies.
- *Mystery Shopping tool to monitor dealers* - To enforce its Discount Control Policy, Maruti used to appoint Mystery Shopping Agencies.
- *Restricting intra-brand competition* – According to the CCI, Maruti's policy led to a reduction in intra-brand competition, as it eliminates price competition. This would indeed lead the consumers to purchase Maruti vehicles at fixed prices without flexible discounts being offered to them by Maruti dealers, thereby resulting in higher purchase prices or denial of discounts.
- *Lowering of inter-brand competition in the passenger vehicles market* – The CCI observed that when a significant player such as Maruti imposes minimum selling price restrictions in the form of maximum discount that can be offered by the dealers, such RPM can decrease the pricing pressure on competing manufacturers. It was also noted that preventing price competition on a popular brand would result in higher prices of competing brands as well, including those that have not adopted RPM.
- *No benefit to consumers* –The CCI noted that the agreement/arrangement did not result in accrual of any consumer benefits; rather, it resulted in denial of benefits to consumers as they were made to pay high prices.
- *No improvement but entry barriers* - The said arrangement has not resulted in any improvements in production or distribution of goods or provision of services. On the contrary, Maruti's conduct, according to the CCI, resulted in creation of barriers to new entrants/dealers in the market as new dealers would take into account such restrictions on their ability to compete with respect to prices in the intra-brand competition of Maruti brand of cars.

Based on its findings above, the CCI directed Maruti to cease and desist from indulging in RPM directly and/or indirectly and accordingly imposed a fine of INR 2 billion.

The decision of the CCI is available [here](#)

#3 Google gets relief from the CCI in relation to disclosure of confidential information

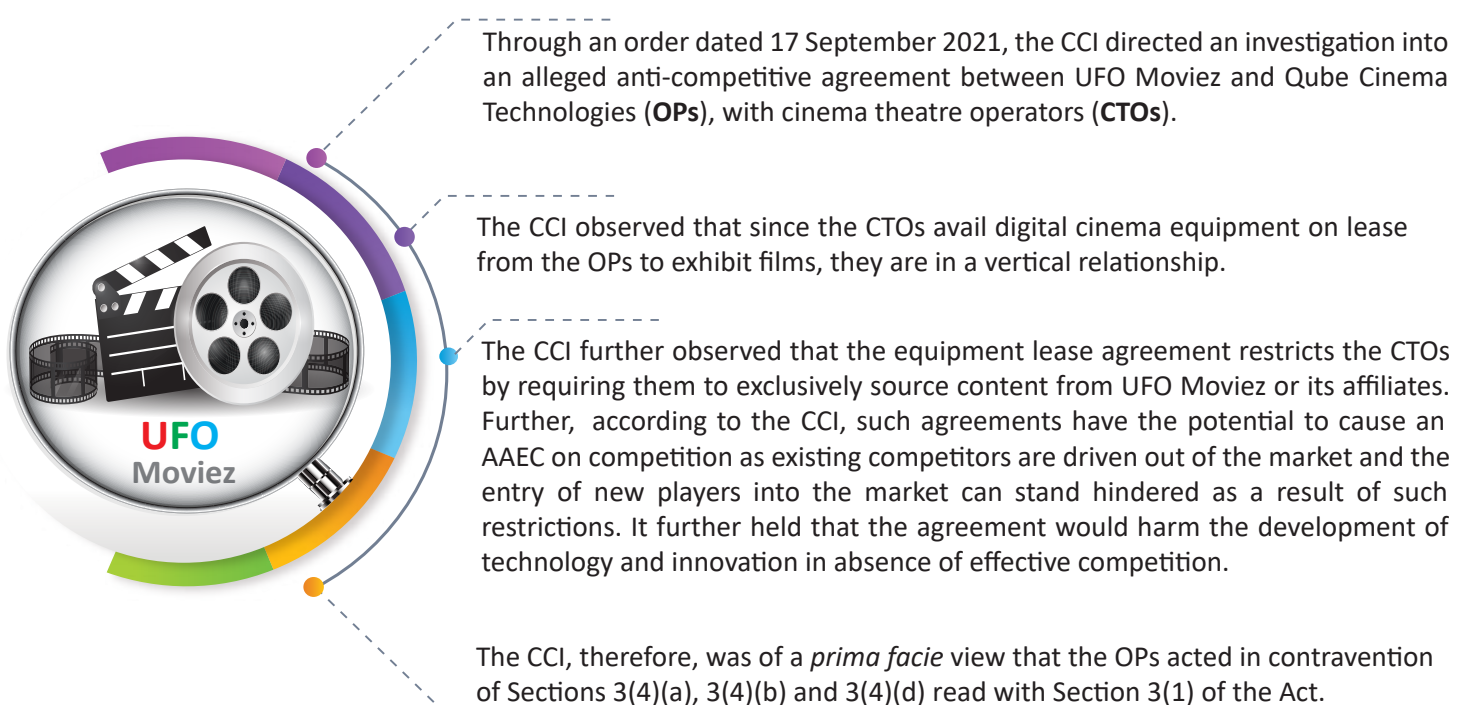
- Google filed a writ against the CCI before the Delhi High Court (**DHC**) following an unlawful disclosure of the confidential DG report to unauthorized persons in the ongoing Android smartphones investigation initiated by the CCI in April 2019.
- Google also challenged the CCI's order which failed to grant Google adequate protection over its confidential information submitted to the DG during the investigation.
- Google sought certain remedies aimed at avoiding any further unlawful disclosure of its confidential information and also prayed for setting aside the CCI's confidentiality order.
- While the CCI's counsel denied that CCI was responsible for unlawful disclosure, the Court was informed that the CCI had already directed the constitution of a fact finding enquiry panel to look into the aspect of the unlawful disclosure of the confidential DG Report.
- The CCI further informed the court of its willingness to recall its confidentiality order and grant full confidentiality to Google over all its claims.

Based on the above, the DHC disposed the writ petition and in its order recorded that Google has the option to come back to court if any grievance about the leak of its confidential information remained.

The Order of the DHC can be accessed [here](#)



#4 UFO Moviez brought under the scanner for alleged abuse of dominance



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

#5 CCI finds Grasim abusing its dominant position, yet again but refrains from imposing a monetary penalty

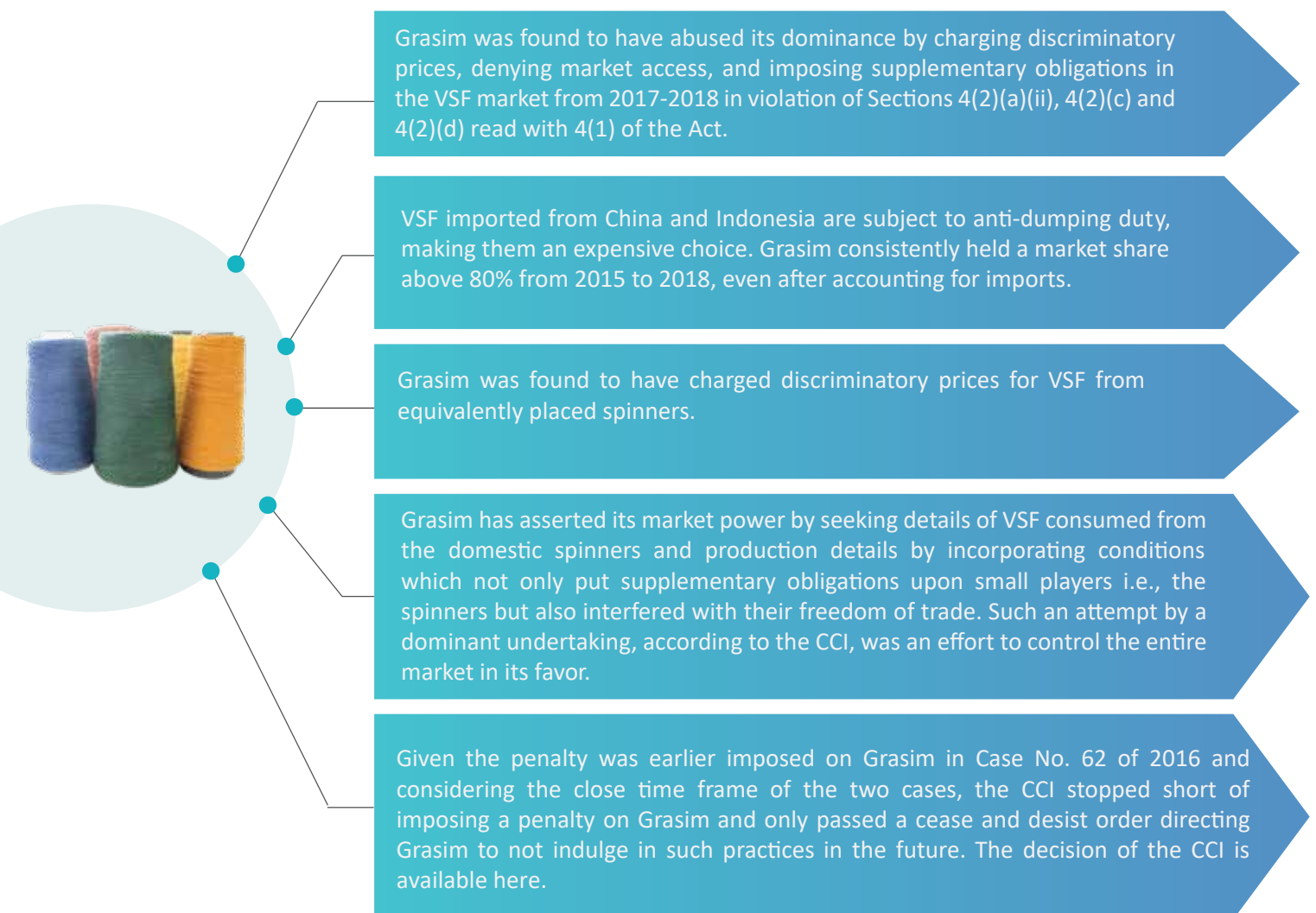
Background and Allegations

In 2017, three spinners of yarn/ fiber filed separate complaints to the CCI against Grasim, alleging abuse of dominance in viscose staple fibre (VSF). VSF is a man-made biodegradable material used as an alternative to cotton. It was alleged that Grasim did not disclose its discount policy and provided differential treatment to its customers and also forced its customers to provide production and export information as a precondition to get any discounts. The CCI decided to club the complaints together and directed the DG to investigate the allegations.

Other Noteworthy facts

- On 16 March 2020, the CCI imposed a penalty of INR 3.02 billion (approx.) on Grasim, for abusing its dominant position in 'the market for supply of viscose staple fibre (VSF) to spinners in India' by charging discriminatory prices from its customers and imposing supplementary obligations upon them in violation of the provisions of Sections 4(2)(a)(ii), 4(2)(d) read with 4(1) of the Act.

Key Findings and Conclusion



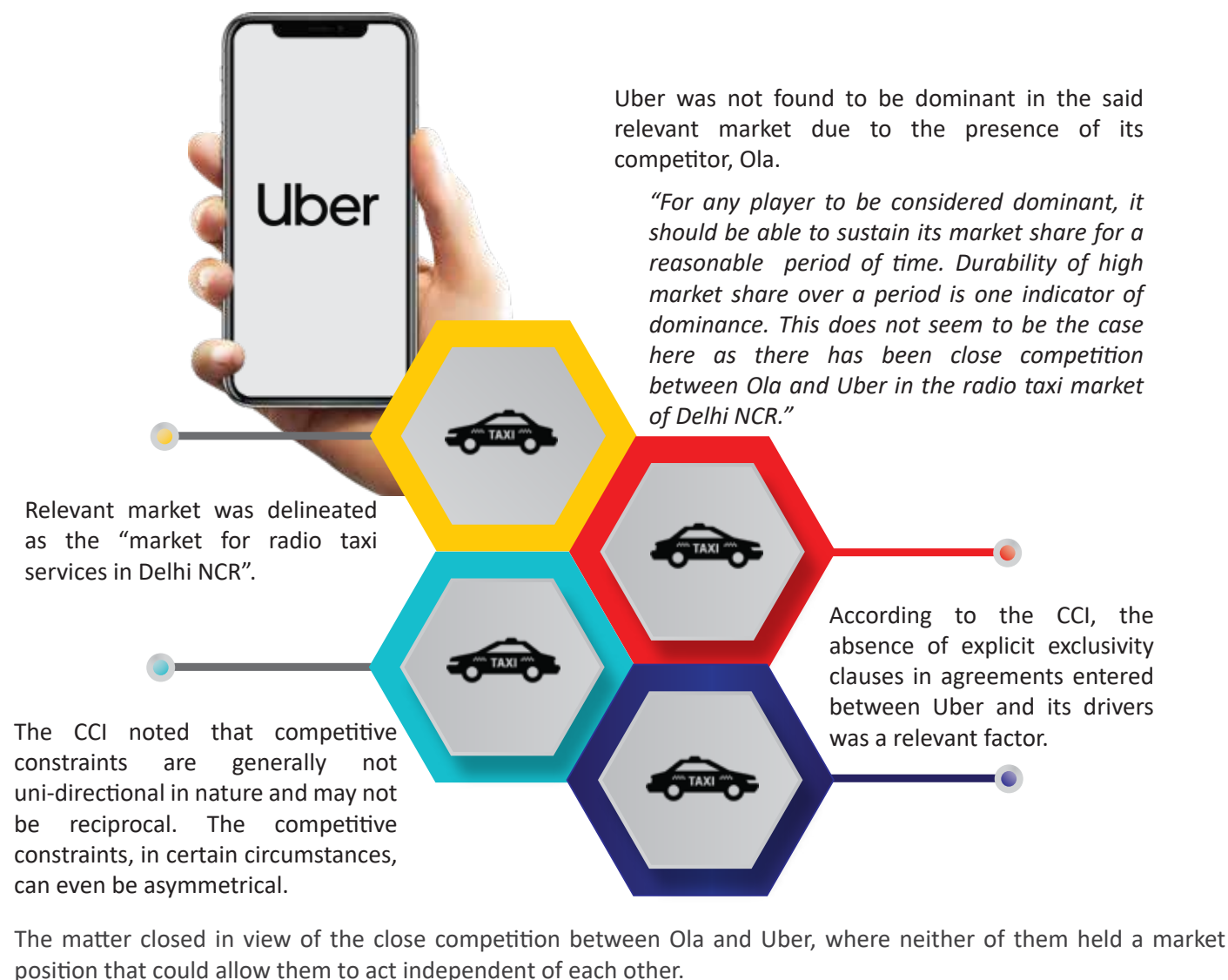
The Order of the CCI can be accessed [here](#)

#6 CCI dismisses allegations of anti-competitive conduct against Uber

The genesis of allegations against Uber began in 2015 upon information filed by Meru with the CCI. The allegations *inter alia* stated that Uber, being a dominant entity in the market for ‘radio taxi services in Delhi-NCR’ was abusing its position by offering unreasonable discounts to customers. This in turn led to predatory pricing and ouster of its competitors from the market. The [CCI, however, dismissed](#) the matter at the *prima facie* stage itself under Section 26(2) of the Act, on the grounds that Uber, *prima facie*, was not dominant in the relevant market as market share of the various players was vibrant and dynamic.

The order of the CCI dismissing the allegations against Uber was challenged by Meru before the COMPAT (erstwhile appellate authority of the CCI) which set aside the CCI’s order under Section 26(2) of the Act and directed the DG to conduct an investigation into the allegations. Aggrieved by the order of the COMPAT, Uber preferred an appeal before the Supreme Court, which upheld the order of the COMPAT and directed the DG to complete the investigation within 6 months.

Key Findings and Conclusions



The decision of the CCI is available [here](#)

#7 Division Bench of Karnataka HC and Supreme Court dismiss appeals filed by Amazon and Flipkart challenging CCI's probe

Background and Litigation History

On 13 January 2020, the CCI passed an [order](#) to investigate the conduct of Amazon and Flipkart with respect to certain practices, viz., their exclusive arrangements in respect of launch of products of certain mobile phone brands on their platforms, their arrangements with preferred sellers on the marketplaces, the deep discounting, and preferential listing and promotion of private labels.

Aggrieved by the order of the CCI, both Amazon and Flipkart filed separate writ petitions before the Karnataka High Court with a prayer to set aside and quash the order of the CCI. The CCI order against Amazon and Flipkart was stayed by a Single Judge of the Karnataka High Court on [14 February 2020](#).

However, on [11 June 2021](#), the Single Judge of Karnataka High Court dismissed the writs and the stay was vacated on the grounds that:

- *Prima facie* order under Section 26(1) is simply an administrative order (and not a quasi-judicial order) and therefore, the CCI is not mandated to issue a notice to the opposite parties or to provide an opportunity for a hearing or record detailed reasons for passing such an order as long as it records some reasons to form a *prima facie* opinion; and
- In the absence of any sectoral regulator for e-commerce, the CCI's investigation is permissible

Both Flipkart and Amazon challenged the dismissal order of the Single Judge before the division bench and on 23 July 2021, the division bench of Karnataka High Court [dismissed their appeal](#).

Other Noteworthy facts

- The CCI has dealt with 4 cases relating to abuse of dominance filed against Amazon, out of which 3 were closed at the *prima facie* stage.
- The CCI has dealt with 3 cases relating to abuse of dominance filed against Flipkart, out of which 2 were closed at the *prima facie* stage.
- The Supreme Court, on earlier two occasions, had stalled the CCI investigation where a sectoral regulator exists – [Airtel](#) and [Star India](#).
- Earlier the Delhi High Court, in [Monsanto](#), laid down that the legislative intent brought forth from Section 62 of the Act is that the Competition Act is in addition to other laws and not in substitution (or derogation) thereof.

Key Findings by Division Bench of Karnataka High Court

- At the initial stage, when the information is filed, the CCI cannot foresee and predict any violation of the Act. This, according to the High Court, can be investigated by the DG which will ultimately reveal the nature of violation;
- An order passed under Section 26(1) of the Act is purely administrative in nature and is passed at a preliminary stage;
- Section 26 of the Act discloses a comprehensive scheme which contemplates not only a fair hearing but is characterized by an inherent robustness by which the proceedings may culminate in closure;
- The question of giving a finding in respect of the violation of the statutory provisions, can only arise after detailed enquiry; and
- The investigation ordered by the CCI will not cause any harm to the business reputation of Amazon and Flipkart.

Verdict by the Supreme Court of India

Flipkart and Amazon appealed the decision of the division bench before the Supreme Court. The appeal was dismissed by the Supreme Court noting that there was no reason to interfere with the decision of the Karnataka High Court.



#8 Madras High Court orders probe into alleged steel cartel



- On 29 July 2021, the Madras High Court, while observing that the Central Bureau of Investigation (CBI) had already forwarded the complaint to the DG, CCI, issued an order directing the DG to take “necessary and appropriate action” into the alleged cartel conduct by domestic steel producers, on a petition filed by the Coimbatore Corporation Contractors Welfare Association (**the Association**).
- A complaint by the Association was previously filed with the CBI alleging that 9 steel manufacturing companies participating in the government contracts / tenders were in fact involved in “criminal acts for illegal gain to fix steel price” in the market to cheat the government. The complaint further alleged that the steel companies had engaged in anticompetitive activities and have collectively sought to control the supply of steel.
- The CBI forwarded the complaint to the CCI since it had no jurisdiction over the matter.

The order of the Madras High Court can be accessed [here](#).

Quick bites on CCI’s Closure Orders under Section 26(2) of the Act

1	<p>“... bald allegations not supported by any kind of supporting material/documents cannot be the basis for initiating an investigation under the provisions of Section 26(1) of the Act.”</p>	<p><u><i>In Re: Steel Authority of India Limited & Other Vs. M/s. Mahimanand Mishra & Others (Para. 5)</i></u></p>
2	<p>“...administrative directions emanating from the implementation of a policy decision does not warrant investigation under the provisions of the Act.”</p>	<p><u><i>Vardaan Agriculturist Development Co-operative Society Limited Vs. Deputy Commissioner and Deputy Registrar (Co-operative), Office of the Joint Commissioner and Joint Registrar (Co-operative), Saharanpur Division and Another (Para. 28)</i></u></p>
3	<p>“...ability of a consumer to undertake a whole-life cost analysis of the product/service and availability of independent aftersales service providers are crucial factors in determining the bifurcation of relevant market into primary (manufacture and sale) and secondary (spare parts and after-sales services) markets.”</p>	<p><u><i>Star Imaging and Path Lab Pvt. Ltd and another Vs. M/s Siemens Ltd. and others (Para. 82)</i></u></p>

KEY DEVELOPMENTS IN M&A

#1 CCI approves SoftBank Group stake purchase in Swiggy

Transaction:

- The transaction relates to the acquisition by SVF II Songbird (DE) LLC (belonging to the Softbank Group) of 8.37% shareholding in Bundl Technologies Private Limited (which operates a food/grocery delivery app under the brand name Swiggy)

Relevant Markets:

- The activities of the acquirer (at group-level) and the target overlap in following markets:
 - Retail sale of groceries and daily essentials
 - Organized food services
 - Food packaging material
- With regard to horizontal overlaps, the CCI noted that the overlaps between the activities of the parties were not significant and their presence in the identified markets is not substantial when compared to the overall size of the markets. The CCI noted that each of the markets are characterized by presence of other players.
- The existing or potential vertical relationship between the acquirer and target in the digital payment services does not appear significant to raise any competition foreclosure concern.

#2 CCI gives nod to Zomato's acquisition of stake in Grofers

Transaction:

- Zomato Limited (**Zomato**) acquired 9.3% stake each in Grofers India Private India (**Grofers**) and Hands on Trades Pvt Ltd (**HoT**), both of which are subsidiaries of Grofers International Pte. Ltd (**Grofers International**).
- In addition, Zomato acquired one board seat and certain affirmative rights in Grofers, HoT and Grofers International.
- HoT is engaged, *inter alia*, in the business of B2B wholesale trading with third-party merchants; contract manufacturing of grocery, food-related products and other goods for onward sales on a wholesale basis; and warehousing services to third-party merchants.

Relevant Markets:

- The CCI considered the following four relevant market definitions, while leaving the exact market definitions open due to the absence of any appreciable adverse effect on competition in India:

Broad relevant market: market for supply of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India

Narrower relevant market: market for B2B supply of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India

Narrowest relevant market: market for supply of groceries, fruits and vegetables in India

Online market-place segment: market for services provided by online platforms for the sale of groceries, household items, general merchandise, personal hygiene products, fruits and vegetables in India;

The CCI approved the combination observing that - the combined market share of the parties in all possible relevant markets is negligible and that the presence of other players/ competitors in the market would continue to pose competitive constraints on Zomato and Grofers.

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

#3 Future / Reliance deal continues to be under scanner



The Supreme Court on September 9, 2021 in its order, directed all authorities including CCI, NCLT and SEBI to not pass any orders in respect of the transaction between Future Enterprises Limited and Reliance Retail Ventures, for a period of four weeks.

This comes after the parties submitted before the Supreme Court that the arguments before the Singapore International Arbitration Centre have concluded and the decision is awaited.



Amazon had in October 2020 filed for an arbitration before the Singapore International Arbitration Centre and received an emergency award barring Future Retail from disposing of or encumbering its assets or issuing any securities to secure any funding from a restricted party.

The CCI had already approved the proposed transaction between Future Enterprises Limited, Reliance Retail Ventures Limited and Reliance Retail and Fashion Lifestyle Limited through its order dated November 20, 2020.



Previously Amazon had received an approval from the CCI for its share purchase in Future Coupons on November 28, 2019. However, the CCI has now issued a show-cause notice suggesting that Amazon had withheld the facts relating to its strategic interests in Future Coupons Limited while seeking approval for the deal back in 2019

CCI Approval Order for Future / Reliance deal can be accessed [here](#)

CCI Approval Order for Future / Amazon deal can be accessed [here](#)

Media coverage in respect of the notice by CCI can be accessed [here](#)

The Order of the Supreme Court can be accessed [here](#)

CCI receives 10 combination filings under the Green Channel route

The green channel route

The Green Channel route for combination filings treats certain combinations in which there are no overlaps between the parties in all plausible alternative markets as 'deemed approved' upon filing a valid short form notification with the CCI.

Some notable transactions

Some notable transactions, approved by the CCI in this quarter under the Green Channel route are:

- i The acquisition of up to ~56.29% (assuming full tendering and acceptance in the mandatory open offer) by Pluto and ~0.24% of the post-preferential allotment equity share capital by Salisbury in PNB Housing Finance Ltd.
- ii The minority equity acquisition in JSW Cement Ltd. by Synergy Metals Investments Holding Limited and AP Asia Opportunistic Holdings Pte. Ltd. (in separate filings).
- iii An internal corporate reorganization of the Daimler AG group of companies.
- iv The minority acquisition of shares by AP Asia Opportunistic Holdings Pte. Ltd. in JSW Cement Ltd.

OTHER KEY DEVELOPMENTS

Directions by CCI on signing of pleadings

On July 1, 2021, the CCI issued a direction allowing companies/ firms to sign the pleadings through any of their employees, who have been duly authorized by the Board/ any other equivalent body to do so. Earlier, only a Managing Director (and in his absence any Director) could sign such pleadings. However, the directions issued by the CCI clarify that counsels may also append their signatures, if so desired, in addition to the signatures impressed by authorized representative(s).

Memorandum on Co-operation between CCI and JFTC

- The Union Cabinet of India on July 8, 2021 approved the Memorandum on Co-operation (MoC) between the CCI and Japan's competition agency, the JFTC.
- The MoC aims to promote and strengthen co-operation in matters of competition law and policy.
- The MoC will enable the CCI to emulate and learn from the experiences and lessons of JFTC.

The press release can be accessed [here](#).



Links to Recent Publications by the Competition Law Team:

- [How Should the CCI Market Its 'Market Studies'? A Case for Incentivizing Industry Participation'](#)
 - [Importance of Disclosures Before The CCI And Key Takeaways](#)
 - [ELP Knowledge Series – Part 2 of 2021](#)
 - [ELP Quarterly Update - Competition law policy Q2 of 2021](#)
 - [CCI eases regulatory compliance, recapitulates the practice of signing pleadings by any authorized employee](#)
 - [ELP - Knowledge Series – Part 1 of 2021](#)
 - [Quarterly Update – Competition law & policy- Q1 of 2021](#)
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Recognitions





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