



# COMPETITION LAW & POLICY NEWSLETTER

Quarter 3 of 2023

## SECTORS COVERED IN THIS ISSUE



Automobiles  
/Auto  
components



Pharmaceutical



Media and  
Entertainment



Manufacturing



Telecom



Banking &  
Finance

## INSIDE

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- CCI notes corrective action by Chemists Associations and Chandigarh Housing Board; refrains from imposition of monetary penalties.
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- Madras HC upholds CCI's power to post-facto examine a notice of a combination.
- Delhi HC Division Bench rules that the Patents Act prevails over the Competition Act on issues relating to exercise of patent rights.

### Merger Control

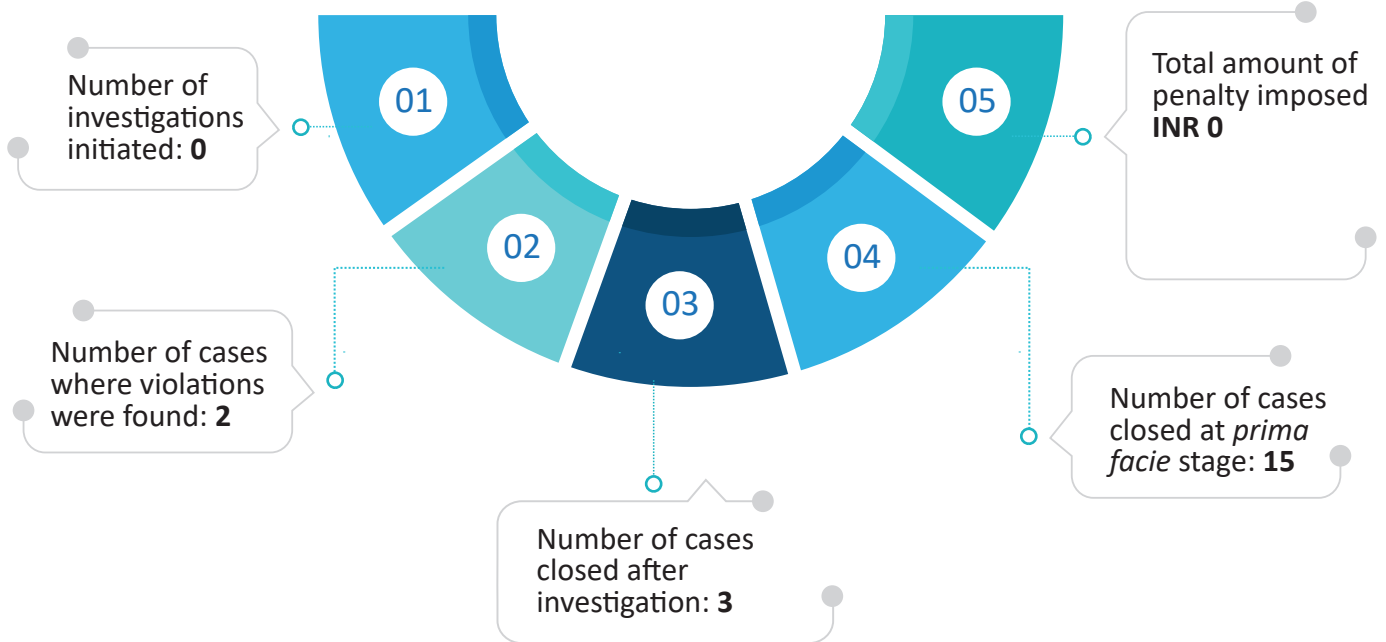
- CCI imposes penalties for gun jumping on entities including Bharti Airtel, Axis Bank.

### Other Key Developments

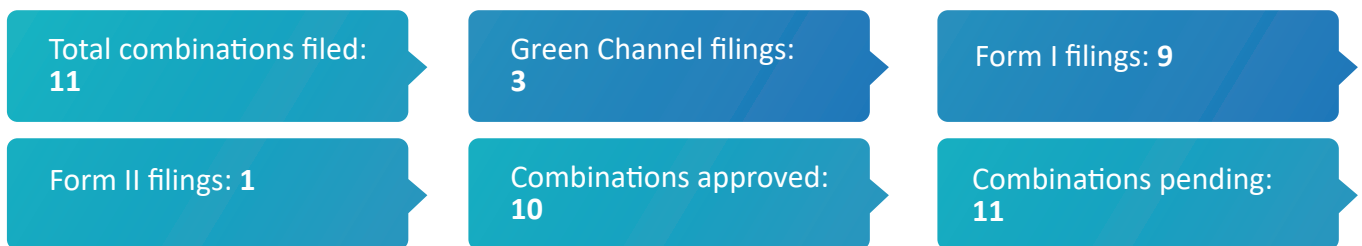
- Mr. Anil Agarwal, Mr. Deepak Anurag, and Ms. Sweta Kakkad appointed as members of the CCI.
- CCI releases draft regulations on Commitments and Settlements and Combinations for stakeholder consultation.

# A QUICK SNAPSHOT

## Enforcement Matters



## Mergers & Acquisitions



# ENFORCEMENT

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## #1 CCI closes investigation against Tata Motors noting lack of AAEC in the market.

On 23 August 2023, the Competition Commission of India (CCI) closed an investigation against Tata Motors Limited (**Tata Motors**) on allegations of abuse of dominance and imposition of vertical restraints on its dealers. The information, filed by two authorized dealers of Tata Motors, alleged that Tata Motors: (i) abused its dominant position by dictating vehicle off-take preferences to dealers; (ii) imposed restrictive clauses in its dealership agreements by requiring dealers to obtain a no-objection certificate (**NOC**) before venturing into or acquiring new businesses; and (iii) restricted dealers from selling vehicles outside their designated territory (collectively referred to as **Impugned Conduct**).

The Director General (**DG**), after having found Tata Motors dominant in the '*market for the manufacture and sale of commercial vehicles in India*' concluded that Tata Motors imposed off-take requirements and territorial restrictions on its dealers. However, the DG did not find a contravention on the allegation of the NOC requirement as there was no evidence to show that Tata Motors had unreasonably withheld its consent to allow dealers from engaging in new business as long as the dealer had the financial ability to sustain different businesses.

The CCI also agreed with the DG that the mere inclusion of an NOC requirement for the dealers, without evidence of it being unjustly enforced, could not be held as a contravention. However, the CCI disagreed with the DG on the other findings noting that (i) the imposition of off-take requirement was found to be contradicted by several dealer testimonials; and (ii) there was no substantial evidence to show that the territorial restrictions on the dealers led to an AAEC in the market. As far as the allegations with respect to the territorial restrictions imposed on the dealers were concerned the CCI noted that such restrictions placed by Tata Motors did not lead to an appreciable adverse effect on competition (**AAEC**) in the market. The CCI took note of the justifications put forth by Tata Motors which included ensuring that dealers do not free-ride another dealer's marketing and investments incentivizing dealers to invest in the dealership, enhancing intra-brand competition, etc.

Further, the CCI specifically noted that the informants were long-standing dealers of Tata Motors and had never raised the same concerns before and that they approached the CCI only owing to the termination/ non-renewal of their dealership agreements with Tata Motors.

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

## #2 No monetary penalties in two recent cases where the opposite parties took corrective action to address the CCI's concerns before the hearing.

On August 22, 2023 and 23, 2023, in two separate cases against the Chandigarh Housing Board (**CHB**) and Chemist Association, Raisingh Nagar and Sri Ganganagar Chemists Association (collectively, **Chemists Associations**) respectively, the CCI passed orders directing the CHB and Chemist Associations not to engage in anti-competitive conduct.

However, the CCI did not impose monetary penalties since these opposite parties took corrective action to address CCI's concerns by withdrawing the resolution directing boycott of the informant in one of the instances. A snapshot of the CCI's findings is provided below:

Finding	Brief
<b>Chandigarh Housing Board</b>	<p>The CCI noted that CHB was dominant in the market for <i>'the provision of services for development and sale of residential flats in the Union Territory of Chandigarh'</i> and found CHB to be abusing its dominant position in contravention of Section 4 of the Competition Act, 2002 (<b>Competition Act</b>) for:</p> <ul style="list-style-type: none"><li>▪ Failure to mention the timeline for completion of the relevant project in the brochure/ other documents and only mentioning that possession would be handed over upon completion of formalities and receipt of full payment; and</li><li>▪ Levying interest for one month for a delay of one day in payment of the installment amount and no provision for charging of interest in such a manner was included under the brochure/ other documents.</li></ul> <p>The CCI noted that CHB had taken steps, including, (i) registering new schemes with the Real Estate Regulatory Authority, Chandigarh; (ii) efforts to complete the construction of flats at the earliest; and (iii) discontinued charging interest for a full month for a few days' delay in payment of installments. Therefore, the CCI directed the CHB to cease and desist from engaging in the anti-competitive practices but did not impose any monetary penalty.</p> <p>The order of the CCI can be accessed <a href="#">here</a>.</p>
<b>Chemist Association, Raisingh Nagar and Sri Ganganagar Chemists Association</b>	<p>The CCI found that the Chemists Associations, along with their presidents, had engaged in anti-competitive non-cooperation/ boycott of the products of Solar Life Sciences Medicare Private Limited (<b>Informant</b>) for:</p> <ul style="list-style-type: none"><li>▪ Issuing notices clearly indicating a decision to boycott the Informant and threatening such action against the Informant in other districts as well. The boycott was to seek higher margins and control over the stockists.</li></ul>

However, during the penalty assessment, the CCI noted that the Chemists Associations were operational at the tehsil/ district level and were also first-time offenders. The presidents of two of the Chemists Associations also highlighted the welfare motive on their part towards the members of the Chemists Associations and contended that their respective associations received no fees/payments from the members for membership or any other purpose. During the hearing, one such president also stated that he was already the stockist of Informant's products. Particularly, resolution boycotting the Informant was also withdrawn by the Chemists Associations. The CCI directed the Chemists Associations and their presidents to cease and desist from engaging in anti-competitive conduct and did not impose any monetary penalty.

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

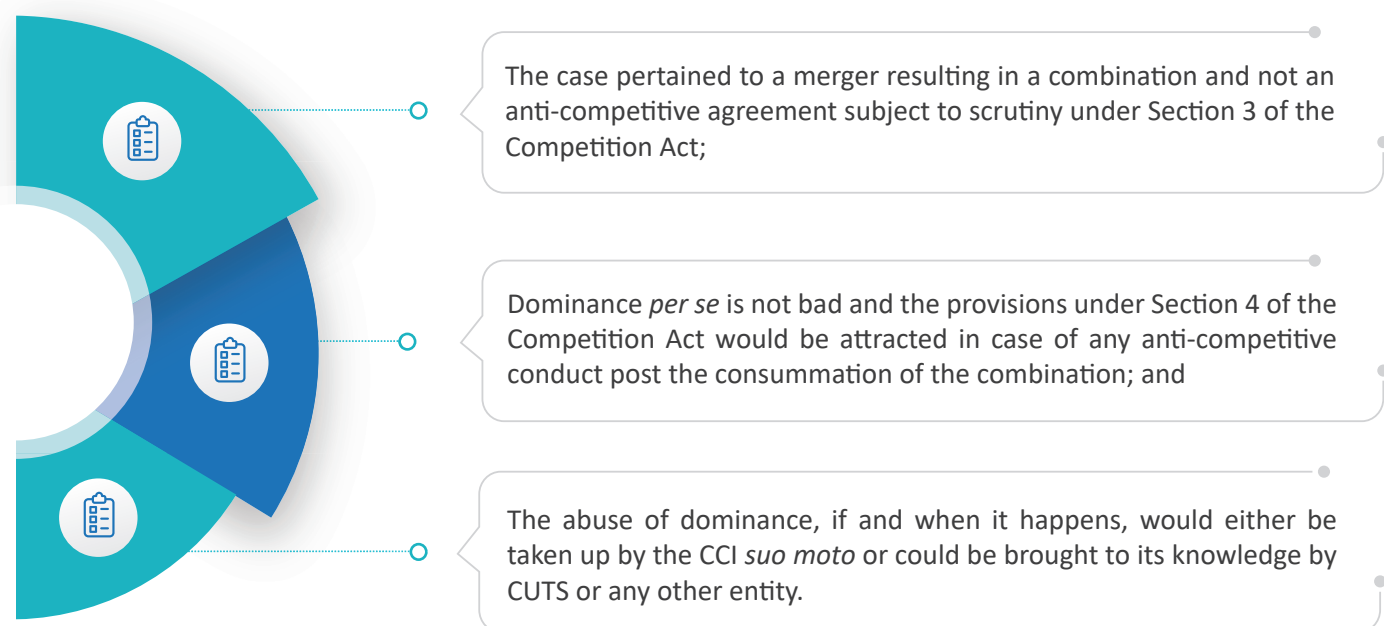


## #3 NCLAT upholds CCI's order dismissing CUTS' allegations against the PVR- INOX merger.

On August 10, 2023, the National Company Law Appellate Tribunal (**NCLAT**) upheld the CCI's order dated September 13, 2022 (**CCI Order**), dismissing a complaint filed by Consumer Unity and Trust Society (**CUTS**) alleging a contravention of Section 3 of the Competition Act by PVR Limited and (**PVR**) and INOX Leisure Limited (**INOX**).

CUTS alleged that PVR and INOX entered into an anti-competitive agreement by entering into a merger agreement aimed at creating the largest and the dominant cinema exhibition entity i.e., 'PVR INOX Limited' (**PVR INOX**). CUTS, in its complaint to the CCI has alleged that the merger of PVR and INOX would likely cause AAEC in the market. The CCI dismissed the allegations noting that for examination under Section 3 of the Competition Act, an anti-competitive conduct must exist, and the mere apprehension of any future anti-competitive conduct on account of dominance resulting in AAEC is not sufficient. Notably, the CCI had observed that Section 3 of the Competition Act deals with scrutinizing the likelihood of AAEC in terms of any conduct which is an anti-competitive agreement and not a likelihood of conduct itself. Such assessment, according to the CCI, is mainly ex-ante and was not pertinent to the circumstances of this case.

CUTS filed an appeal before the NCLAT challenging the CCI Order. The NCLAT agreed with the CCI and dismissed the appeal filed by CUTS on following grounds:



The decision of the NCLAT can be accessed [here](#) with the case details as Competition Appeal (AT) No. 61 of 2022.



## #4 The Madras HC dismissed writ petitions filed by Pricol Limited holding that the CCI has the power to examine a combination notice after the combination has been effected.

On July 11, 2023, a Division Bench of the Madras High Court (**Madras HC**) dismissed writ petitions filed by Pricol Limited (**Pricol**) requesting the Madras HC to: (i) prohibit the CCI from examining the Form II (**Notice**) filed by Minda Corporation Limited (**Minda**), and (ii) hold that the CCI cannot accept a notice of combination under Section 6(2) of the Competition Act, *post facto* after the combination had been effected.

The Madras HC dismissed the writ petitions holding that the Notice under Section 6(2) of the Competition Act was permissible even after the combination has been effected. The Madras HC observed that Regulation 8 of the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (**Combination Regulations**), allows a party to post-facto file a notice to the CCI after the combination has been effected. The CCI has the power to accept such notices under Section 20(1) of the Competition Act. The Supreme Court's decision in [\*SCM Solifert Limited and another v. CCI\*](#) supports this interpretation.

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



## #5 The Delhi HC holds that the Controller of Patents has the exclusive jurisdiction to inquire into the anti-competitive actions of a patent holder who exercises their rights under a patent.

On July 13, 2023, a Division Bench of the Delhi High Court (**Delhi HC** dismissed appeals/ petitions holding that the Patents Act, 1970 (**Patents Act**) prevails over the Competition Act for an inquiry into the actions of a patent holder who exercise their rights under a patent. The decision of the Delhi HC was based on the following:



**Only the Patents Regulator can inquire into the anti-competitive actions of a patent holder who exercises their rights under a patent.** The Delhi HC held that the Patents Act is a complete code on all issues pertaining to unreasonable conditions in patent licensing agreements, abuse of status as a patent holder, inquiry in relation to and relief to be granted for such conduct. Specifically, Chapter XVI of the Patents Act (titled “Working of Patents, Compulsory Licenses and Revocation”) regulates “*unreasonable conditions in agreements of licensing of patents, abuse of status as a patentee*”. These factors, according to the Delhi HC, are “*nearly identical*” to those that are required to be examined by the CCI. Therefore, the Delhi HC held that on the issue under consideration (that is not merely related to anti-competitive agreements and abuse of dominant position but such conduct by a patent holder in the exercise of their rights under the Patents Act), the Patents Act is a special statute and Chapter XVI being a subsequent statute must necessarily prevail over the Competition Act.



**The CCI, under Section 3(5) of the Competition Act, cannot examine the reasonableness of conditions imposed by a patent holder in the exercise of their rights under the patent.** The Delhi HC held that the Controller of Patents has exclusive jurisdiction to examine whether a patent holder has imposed unreasonable conditions under a licensing agreement. The Delhi HC held that these conditions are exempted from any review by the CCI under Section 3(5) of the Competition Act.



**Settlement between parties ends the dispute before the CCI.** The Delhi HC also held that the CCI does not have the power to continue its investigation if a settlement is reached between the informant and opposite party in a CCI proceeding. According to the Delhi HC, the substance of the CCI proceedings was lost due to the settlement between the parties.

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

The order of the Delhi HC has been challenged by the CCI by way of a Special Leave Petition (**SLP**) before the Supreme Court of India (**Supreme Court**). However, the SLP is currently in defect and will be subsequently listed before the Supreme Court once the defects have been cured.

### ELP Comment

The Delhi HC’s decision ousts the CCI’s jurisdiction over issues relating to the Patents Act. A narrower interpretation of the decision would suggest that this ouster only extends towards compulsory licensing of standard essential patents (**SEPs**). This approach is contrary to that of the regulators in the EU and USA where the antitrust regulators examine allegations of abuse of dominance in relation to SEPs.



## #6 NCLAT dismisses all four appeals challenging CCI's approval of AGI Greenpac's acquisition of HNG.

On July 28, 2023, the NCLAT upheld the CCI's order dated March 15, 2023 (**CCI Order**), approving the acquisition of 100% of the shareholding in Hindusthan National Glass & Industries Limited (**HNG**), by AGI Greenpac Limited (**AGI Greenpac**). The CCI sought a divestiture of the Rishikesh plant of HNG to approve the proposed combination.

Four appeals were filed before the NCLAT against the CCI Order by: a) Independent Sugar Corporation Limited; b) U.P. Glass Manufacturers Syndicate (**UP Glass**); c) Geeta & Company; and; d) HNG Industries Thozilalar Nala Sangam (collectively, the **Appellants**). The Appellants argued that the CCI did not apply its mind and approved the combination in a hurried manner, disregarding the due process to be followed.

In response, the CCI contended that none of the Appellants had any locus to challenge the CCI Order as an appeal under Section 53B of the Competition Act can only be filed by an '*aggrieved person*'. The CCI also submitted that due process was followed in approving the combination and the modification proposed had addressed the CCI's concerns of AAEC, among other things. Rejecting the CCI's arguments on *locus*, the NCLAT proceeded to adjudicate the matter on merits and dismissed the appeals, observing the following:

### Annulment of the proceedings:

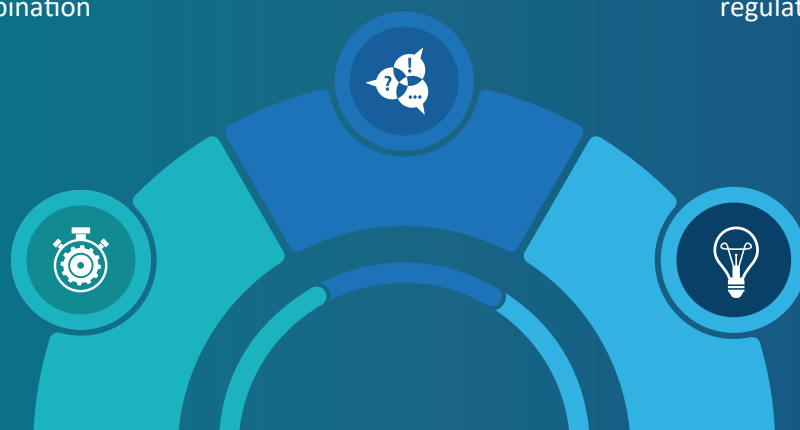
As per Section 29(1) of the Competition Act, a show cause notice (**SCN**) must be issued to both parties to the combination i.e., the acquirer and target entity. However, the non-issuance of an SCN to HNG alone was not sufficient to quash the proceedings before the CCI, given that the combination was approved in accordance with the statutory procedures prescribed under Section 29 of the Competition Act as well as the Combination Regulations.

### Right of public participation:

The right of public participation arises once the Phase II investigation under Section 29(2) of the Competition Act has been initiated by the CCI. A Phase II investigation is not compulsory as per Section 29(2) of the Competition Act if the CCI is convinced with the response to the SCN suggesting that the proposed combination will not result in AAEC. Thus, the CCI may decide not to proceed further and grant its approval to the combination.

### CCI approved the acquisition after a detailed consideration of proposed modifications:

The NCLAT noted that the CCI considered the modification proposed by AGI in detail before accepting the modification and approving the proposed acquisition. Further, the NCLAT noted that decision of an expert body, such as the CCI, should not be interfered with if it is in accordance with the Act and the regulations.



The decision of the NCLAT can be accessed [here](#) with case details as Competition Appeal (AT No. 07 and 08 of 2023).

The order of the NCLAT has been challenged by the Appellants by way of a civil appeal before the Supreme Court with case details as Civil Appeal No(s). 4924/2023. As per the order dated August 28, 2023, the Supreme Court has adjourned the matter since the NCLAT's orders in the insolvency appeals against HNG arising out of the same matter are reserved.

# MERGER CONTROL

## Snapshot of CCI's latest jurisprudence on gun jumping in Quarter 3 of 2023

Acquirer	Exemption wrongly claimed	CCI's observations	Penalty	Mitigating factors
Bharti Airtel Ltd ( <b>Bharti Airtel</b> ) and Lion Meadow Investment Limited ( <b>LMIL</b> )	Schedule I, Item 2 exemption	<ul style="list-style-type: none"> <li>The acquisition of 20% shareholding in Bharti Telemedia Limited (<b>BTL</b>) from LMIL was ineligible for the exemption claimed as LMIL enjoyed considerable shareholding and a host of rights in BTL, such as the right to appoint a non-executive director on the board of BTL, affirmative veto rights, rights in subsidiaries, right to access the books, accounts, records, properties, and facilities, among others, thereby amounting to the ability to exercise material influence over BTL;</li> <li>The acquisition of 0.664% shares in Bharti Airtel by LMIL was found to be interconnected to the abovementioned acquisition and the two, together were required to be notified to the CCI; and</li> <li>The test for applicability of the Item 2 exemption illustrates that 'joint control' and 'sole control' shall imply the ability to exercise material influence over the management or affairs or strategic commercial decisions of the target entity.</li> </ul>	INR 1 Crore	None.
Platinum Jasmine A 2018 Trust, acting through its trustee Platinum Owl C 2018 RSC Limited, and TPG Upswing Ltd. ( <b>TPG Upswing</b> )	Green Channel	<ul style="list-style-type: none"> <li>The combination was declared <i>void ab initio</i> effectively making the consummation of the combination subject to penalties for gun jumping under Section 43A of the Competition Act.</li> <li>The acquisition was not eligible for the benefit of the Green Channel and the declaration in the notice was incorrect and false since there were explicit overlaps in activities of target entity and TPG Upswing's portfolio company UPL Corporation's indirect subsidiary, Arysta India.</li> </ul>	INR 55 Lakhs	None.

Acquirer	Exemption wrongly claimed	CCI's observations	Penalty	Mitigating factors
NTPC Ltd. ( <a href="#">NTPC</a> )	Schedule I, Item 1A exemption	<ul style="list-style-type: none"> <li>NTPC already held 25.51% equity shareholding in Ratnagiri Gas &amp; Power Private Limited (<b>RGPP</b>L) and upon acquiring a 35.47% equity stake in RGPP L, its shareholding increased from 25.51% to 60.98%, resulting in it crossing the threshold of 50% for the purpose of availing the benefit of the Schedule I, Item 1A exemption.</li> <li>The transaction was required to be notified to the CCI considering the increased stake enjoyed by NTPC, even if no additional control rights were conferred or the transaction did not result in change in control from joint to sole control.</li> </ul>	INR 40 Lakhs	<ul style="list-style-type: none"> <li><i>Bona fide</i> intentions;</li> <li>Full cooperation and disclosure from NTPC;</li> <li>The creation of RGPP L was a Government of India (<b>GOI</b>) initiative,</li> <li>The transaction neither caused an AAEC nor was a transfer from joint to sole control;</li> <li>No history of default, and</li> <li>Positive impact of the transaction on competition in the power industry which was fragmented and highly competitive.</li> </ul>
Axis Bank Ltd. ( <a href="#">Axis Bank</a> )	Schedule I, Item 1 exemption	<ul style="list-style-type: none"> <li>Axis Bank erred in assuming that the transaction was eligible to avail the <i>de minimis</i> exemption as both the assets and the turnover crossed the threshold prescribed under the exemption;</li> <li>Axis Bank was ineligible to avail Item 1 exemption since it had/has representation on the board of CSC e-Governance and also had the intention to participate in CSC's management or affairs; and</li> <li>Axis Bank could not be absolved of the duty to notify the transaction solely on the grounds of an error made in the assessment of applicability of the <i>de minimis</i> exemption, either on <i>bonafide</i> or <i>malafide</i> grounds.</li> </ul>	INR 40 Lakhs	<ul style="list-style-type: none"> <li><i>Bonafide</i> intentions;</li> <li>Extension of full cooperation by Axis Bank;</li> <li>No history of default in the past; and</li> <li>The objective of the transaction was to support the GOI's initiative towards financial inclusion.</li> </ul>
Cummins Inc. ( <a href="#">Cummins</a> )	<i>De Minimis</i> Exemption	<ul style="list-style-type: none"> <li>Cummins failed to observe the standstill obligation in terms of Section 6(2A) of the Competition Act of waiting for 210 (two hundred ten) days from the date of giving notice to the CCI or date of approval by the CCI,</li> </ul>	INR 10 Lakhs	<ul style="list-style-type: none"> <li>Extension of full cooperation by Cummins with the CCI; and</li> </ul>

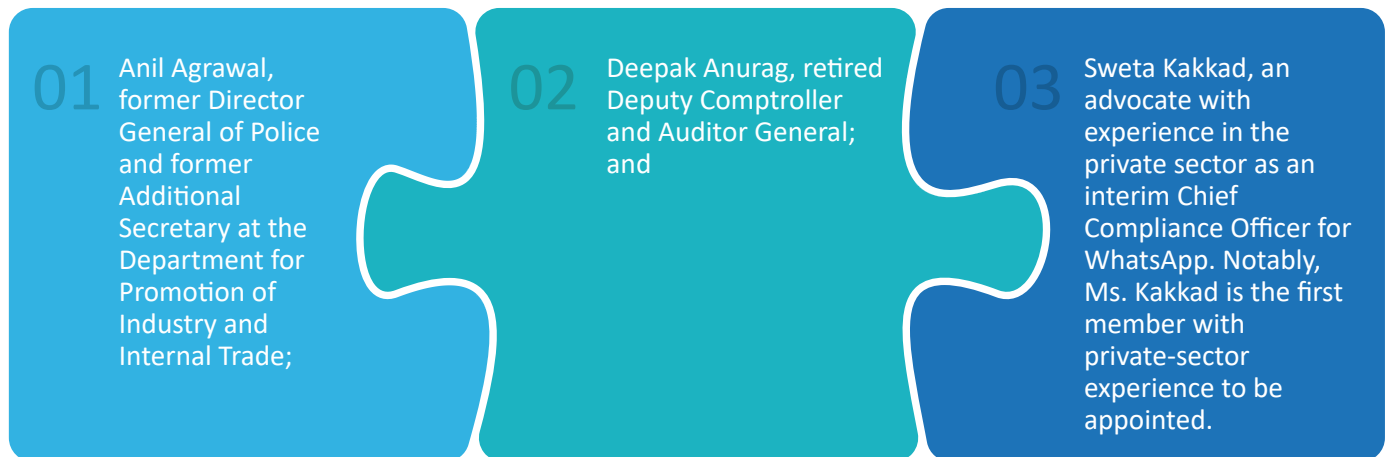
Acquirer	Exemption wrongly claimed	CCI's observations	Penalty	Mitigating factors
		<p>whichever is earlier and consummated the transaction.</p> <ul style="list-style-type: none"> <li>For a liability under Section 43A of the Competition Act, the lack of intention is immaterial. Therefore, Cummins could not be absolved of its duty to notify the transaction to the CCI.</li> </ul>		<ul style="list-style-type: none"> <li>Voluntary notification by Cummins upon being made aware of the requirement to notify.</li> </ul>
Massachusetts Mutual Life Insurance Company ( <a href="#">MassMutual</a> )	<i>De Minimis</i> Exemption	<ul style="list-style-type: none"> <li>MassMutual had only considered the aggregate value of assets of target's subsidiaries in India based on their financial statements, when the aggregate value of assets of both entities i.e., target's subsidiaries in India as well as target's mutual fund business in India were to be considered and in either case, the threshold was breached.</li> <li>In respect of turnover, MassMutual failed to account for target's mutual fund business in India and only accounted for target's subsidiaries in India.</li> </ul>	INR 5 Lakhs	None.



# OTHER DEVELOPMENTS

## #1 Three new members appointed by the CCI.

Following the recent retirement of two members, i.e., Ms. Sangeeta Verma and Mr. Bhagwant Singh Bishnoi, the Appointments Committee of the Cabinet, GOI, approved the appointment of three new members to the CCI:

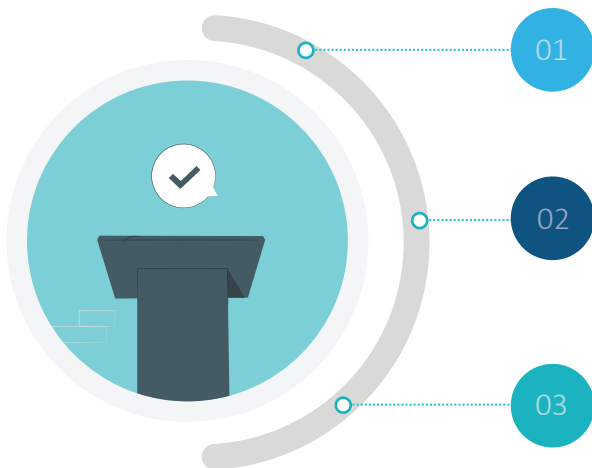


With these appointments, the total strength of the CCI stands at four, including the chairperson, Ms. Ravneet Kaur, who was appointed earlier this year.



## #2 The CCI releases draft regulations for stakeholder consultations.

### I. Draft Commitment and Settlement Regulations

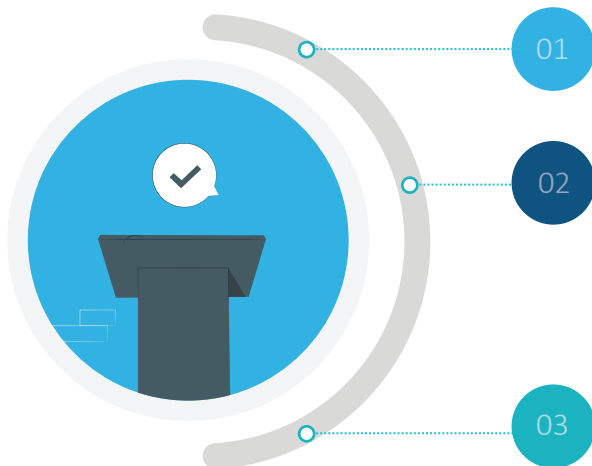


The Competition (Amendment) Act, 2023 (**Amendment Act**) introduced provisions relating to ‘settlements’ and ‘commitments’ under the Competition Act.

In this regard, the CCI published the draft CCI (**Settlement**) Regulations, 2023 (**Draft Settlement Regulations**) and the draft CCI (**Commitment**) Regulations, 2023 (**Draft Commitment Regulations**) on August 23, 2023 (collectively **Draft Settlement and Commitment Regulations**) seeking comments from stakeholders.

The Draft Settlement and Commitment Regulations set out the process for implementing settlement and commitment procedures including: (i) form and contents of an application; (ii) timelines for filing an application; (iii) filing of objections/suggestions to such an application; (iv) determination of settlement amount; (v) commitment/ settlement order; (vi) monitoring and implementation of the settlement/commitment.

### II. Draft Combination Regulations



The Amendment Act also introduced significant amendments to the provisions relating to combinations under the Competition Act.

In this regard, the CCI published the draft CCI (**Combination**) Regulations, 2023 (**Draft Combination Regulations**) on September 05, 2023, seeking comments from stakeholders.

The Draft Combination Regulations is intended to replace the existing Combination Regulations and seeks to implement the newly introduced combination provisions of the Amendment Act. The Draft Combination Regulations sets out the process for operationalizing various amendments pertaining to the merger control provisions under the Amendment Act including: (i) the deal value threshold; (ii) substantial business operations in India; (iii) open offer acquisitions, (iv) process for proposing modifications, among others.

The CCI is currently taking into consideration the stakeholder comments received on these draft regulations. Once this process is complete, the relevant provisions of the Amendment Act and the final regulations are expected to be brought into effect by way of a Gazette Notification.



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