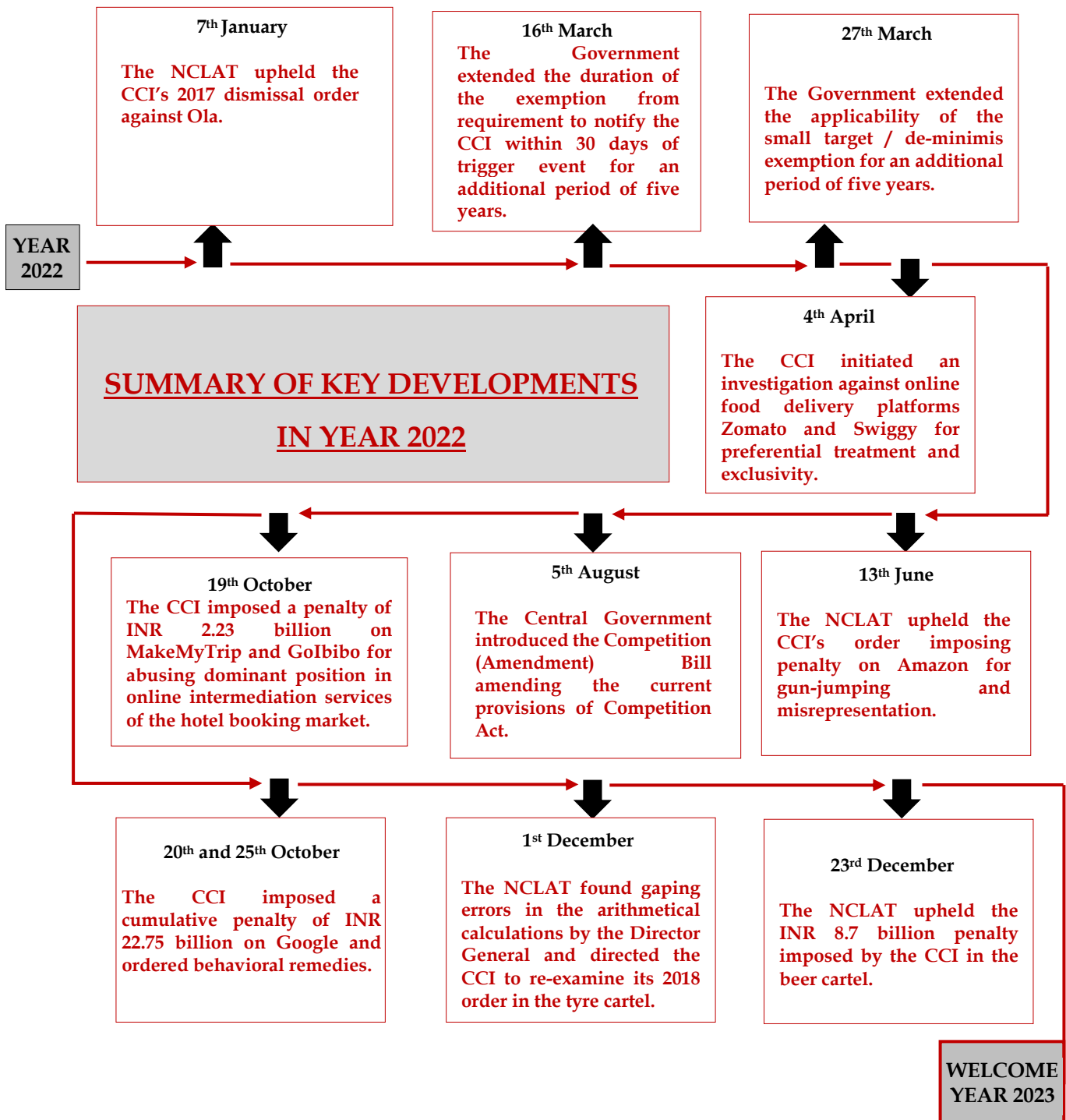


**AN OVERVIEW OF 2022- A LANDMARK YEAR FOR COMPETITION LAW IN INDIA**

The year 2022 was a landmark year for competition law in India as the Competition Commission of India passed key orders which will be pivotal to the development of competition law jurisprudence. A diagrammatic overview of the key developments in the competition law sphere in India is given below:



## 1. INTRODUCTION

- 1.1 The year 2022 has been the year of rebuilding the post pandemic economy, and during this recovery phase, competition law authorities around the globe were very active in taking cognizance of anti-trust violations, particularly in the digital markets. Taking a cue from its global counterparts, the Competition Commission of India (“CCI”) has also been largely focusing its enforcement policies in the digital markets space and has initiated various investigations as well as imposed penalties on major players in the technology sector. Further, the CCI has shown flexibility by adopting a lenient approach towards the erring micro, small, and medium enterprises (“MSMEs”), who are still reeling from the economic aftermath of the pandemic.
- 1.2 This overview is divided into six parts, part I focuses on the noteworthy enforcement cases, part II includes an overview of merger control cases, part III highlights the various regulatory developments, part IV covers the competition advocacy initiatives, part V focuses on institutional developments, and part VI provides the conclusion.

## 2. PART I - NOTEWORTHY ENFORCEMENT CASES

- 2.1 **Penalties imposed on big-tech companies in abuse of dominance cases:** In the year 2022, the CCI passed four penalty orders in relation to abuse of dominance. Out of these four orders, two orders were passed against Google, imposing hefty penalties and the third order penalised MakeMyTrip, GoIbibo, and OYO (defined below).<sup>1</sup>

- A. **A Major setback for Google:** In October, by way of two separate orders, the CCI imposed a penalty of INR 13.36 billion (i.e., approx. USD 163 million) (“**Android Case**”)<sup>2</sup> and INR 9.36 billion (i.e., approx. USD 114 million) (“**Billing Case**”)<sup>3</sup> on Google LLC and Google India Private Limited (“**Google**”), for abuse of dominant position in the market related to licensable operating systems for smart mobile devices and other related markets.

Further, the CCI directed Google to not enforce the anti-competitive clauses of multiple agreements entered with various stakeholders, in India, with immediate effect. Additionally, it also granted Google a period of three months to implement necessary changes and modify its agreements in compliance with the provisions of the Competition Act, 2002 (“**Act**”). In January 2023, the National Company Law Appellate Tribunal (“**NCLAT**”) refused to grant interim relief to Google in the Android Case.<sup>4</sup> The Supreme Court (“**SC**”) also reaffirmed the decision of the NCLAT and refused to grant an interim stay.<sup>5</sup> Further, the SC has directed the NCLAT to decide Google’s appeal by March 31, 2023.

- B. **MakeMyTrip, GoIbibo, and Oyo penalized for abuse of dominance and refusal to deal:** In October, the CCI imposed a penalty of INR 2.23 billion (i.e., approx. USD 27 million) on MakeMyTrip-Goibibo (“**MMT-Go**”) for: (i) imposing price and room parity obligations; (ii) imposing exclusivity conditions; and (iii) discriminating against hotels / chain hotels. The CCI also imposed a penalty of INR 1.69 billion (i.e., approx. USD 20 million) on Oravel Stays Private Limited (“**OYO**”) as well as MMT-Go for

<sup>1</sup> The fourth order of the CCI imposing penalty related to abuse of dominance is Case No. 03 of 2021, *Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India*, order dated June 03, 2022.

<sup>2</sup> Case No. 39 of 2018, *In Re Umar Javed and Ors. v. Google LLC and Anr.* order dated October 20, 2022.

<sup>3</sup> Case No. 07 of 2020, *In Re XYZ v. Alphabet and Ors.*, order dated October 25, 2022.

<sup>4</sup> Competition Appeal (AT) – 1 / 2023, *Google LLC & Anr. v. Competition Commission of India & Ors.*, order dated January 04, 2023.

<sup>5</sup> Civil Appeal No. 229 of 2023, *Google LLC & Anr. v. Competition Commission of India & Ors.*, order dated January 19, 2023.

refusing to deal with various hotels / chain hotels.<sup>6</sup> Additionally, the CCI also directed MMT-Go to suitably modify its agreements with hotel chains and provide transparent disclosures on its platform.

In December, the NCLAT admitted the appeal filed by MMT-Go subject to the deposit of 10% penalty amount but refused to grant an interim relief to MMT-Go.<sup>7</sup> The NCLAT order was challenged by way of a writ petition in the Delhi High Court (“DHC”), wherein the DHC directed that subject to the deposit of 10% of the total penalty amount, as directed by the NCLAT, no recovery shall be effected in respect of the remaining 90% of the penalty amount.<sup>8</sup> The NCLAT refused to grant an interim stay in regard to the behavioral remedies directed by the CCI. The matter is currently pending adjudication before the NCLAT.

## 2.2 Investigations ordered by the CCI into exclusivity agreements of online platforms:

- C. Food delivery platforms: In April, the CCI ordered an investigation against online food delivery platforms Zomato Limited (“Zomato”) and Bundl Technologies Private Limited (“Swiggy”)<sup>9</sup> for: (i) giving preferential treatment to their own cloud kitchen brands and restaurant partners; (ii) imposing exclusivity on certain partners; and (iii) imposing price parity obligations, in violation of the provisions of the Act.
- D. Online intermediation platform for movie tickets: In June, the CCI ordered an investigation against Big Tree Entertainment Private Limited (“BookMyShow”)<sup>10</sup> for: (i) entering into exclusive agreement / arrangement(s) with certain cinema theatres in the city of Hyderabad, Telangana; and (ii) charging a high convenience fee from the cine-goers for the online booking of movie tickets. Further, the CCI also observed that in its agreements with single screen cinemas, BookMyShow has reserved the right of data collection, ownership, and storage without the cinemas having the right, title, interest to such data and such a practice of exclusive ownership of and access to data by a dominant intermediary merit an investigation.

## 2.3 Appeals / writs involving big-tech companies for abuse of dominance:

- E. NCLAT upheld CCI’s order dismissing the case against Ola: In January, the NCLAT<sup>11</sup> upheld the CCI’s 2017 dismissal order and held that ANI Technologies Private Limited (“Ola”) had not abused its dominant position in the radio-taxi services market in Bengaluru. With respect to dominance, the NCLAT noted that in the relevant market, Ola is facing stiff competition from companies such as Meru, Fast Track, and Uber. Additionally, the NCLAT noted that Ola did not involve itself in predatory pricing nor did it enter into any anti-competitive agreements with its drivers. The NCLAT further held that the presence of Uber around the same time has forced Ola to change its market strategy, including its pricing to deal with competition.
- F. NCLAT upheld CCI order dismissing the case against WhatsApp: In August, the NCLAT upheld the CCI’s 2017 dismissal order whereunder the CCI held that WhatsApp LLC (“WhatsApp”) was not abusing its market dominance in India through its new privacy policy as it provided the users the

<sup>6</sup> Case No. 14 of 2019, *Federation of Hotel & Restaurant Associations of India (FHRAI) and Anr. v. MakeMyTrip India Pvt. Ltd. (MMT) and Ors. with Rubtub Solutions Pvt. Ltd. v. MakeMyTrip India Pvt. Ltd and Ors.*, order dated June 16, 2022.

<sup>7</sup> Competition Appeal (AT) – 57 / 2022, *MakeMyTrip Private Limited & Ors. v. Competition Commission of India & Ors.*, order dated December 06, 2022.

<sup>8</sup> W.P.(C)-16963 / 2022, *MakeMyTrip India Private Limited MMT & Anr. v. Competition Commission of India & Ors.*, order dated December 14, 2022.

<sup>9</sup> Case No. 16 of 2021, *National Restaurants Association of India v. Zomato and Swiggy*, order dated April 4, 2022.

<sup>10</sup> Case No. 46 of 2021, *Vijay Gopal v. Big Tree Entertainment Private Limited (BookMyShow) and Ors.*, order dated June 16, 2022.

<sup>11</sup> Competition Appeal (AT) No. 19 of 2017, *Meru Travel Solutions Private Limited v. Competition Commission of India and Anr.*, order dated January 07, 2022.

option to ‘opt-out’ from it.<sup>12</sup> The NCLAT primarily (while reiterating the decision of CCI) held that the appellant was unsuccessful in establishing abuse of the dominant position by WhatsApp. Further, with regards to the allegation of predatory pricing, the NCLAT held that there are no significant costs preventing the users to switch from one consumer communication app to another as almost all consumer communication apps are offered free of cost and are available normally by simple user interfaces.

However, in the year 2021, WhatsApp introduced its updated privacy policy wherein the option of ‘opt-out’ was not provided to the users. Based on this, the CCI had initiated a *suo moto* case and ordered an investigation against WhatsApp (“**2021 Investigation Order**”). In August, the DHC dismissed the writ petition filed by WhatsApp and Facebook against the CCI’s 2021 Investigation Order. Further, in October, the SC also dismissed a petition for special leave to appeal filed by Meta,<sup>13</sup> challenging the order of the DHC.<sup>14</sup> The SC held that the CCI cannot be restrained from proceeding further with the investigation since the CCI has jurisdiction to take cognizance of any alleged violation of the Act.

2.4 **Penalties imposed by the CCI in cartel cases:** In the year 2022, the CCI passed final orders in ten cartel cases and imposed a cumulative penalty of approx. INR 410 million (i.e., approx. USD 4.9 million). Interestingly, the CCI imposed a penalty in only five out of ten cases. Further, in the majority of these cases, the metric used by the CCI for computing penalty was 5% of the average turnover for the last three financial years.<sup>15</sup> In the remaining five cases, the CCI did not impose any monetary penalty on the cartel participants due to various factors such as the: (i) nature of business; (ii) financial hardships of MSMEs; (iii) economic impact due to the pandemic, etc.

Given that in six out of the ten cartel cases decided by the CCI in 2022, leniency applications were filed by the cartel participants and all of them received a reduction in penalty (subject to their priority status and quality of evidence furnished), bears testimony to the success of leniency regime in India.

2.5 **NCLAT orders regarding cartel cases:**

G. **NCLAT directs CCI to take lenient approach regarding penalty levied on MSMEs:** In November, the NCLAT upheld CCI’s 2019 order imposing a penalty of INR 390 million (i.e., approx. USD 4.7 million) on manufacturers of liquified petroleum gas cylinders.<sup>16</sup> It reiterated the verdict of the CCI while holding the manufacturers liable for cartelization in so far as the withdrawal of the bid is considered pursuant to a concerted agreement, in violation of the provisions of the Act. However, as several of the manufacturers were MSMEs, it called on the CCI to take a lenient view on penalties.

H. **NCLAT holds that leniency application is an admission of guilt in the beer cartel:** In December, the NCLAT upheld CCI’s 2021 order imposing a penalty of INR 8.73 billion (i.e., approx. USD 107 million) on participants of the beer cartel. It held that the appellants had already admitted their participation in the beer cartel by filing a leniency application before the CCI, and hence, the appellants were not

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<sup>12</sup> Competition Appeal (AT) No. 13 of 2017, *Vinod Kumar Gupta v. Competition Commission of India and WhatsApp LLC*, order dated August 02, 2022.

<sup>13</sup> Meta is the parent company of Facebook and WhatsApp.

<sup>14</sup> SLP(C) No.-017121 / 2022, *Meta Platforms Inc v. Competition Commission of India and Anr.*, order dated October 14, 2022.

<sup>15</sup> Out of the five penalty orders, in three cases the CCI imposed penalty @5% of the average turnover in the last three financial years from the date of the penalty order. However, in one case, the CCI imposed penalty @1% of the average turnover in the last three financial years from the date of the complaint. Further, in one case, the CCI imposed penalty @5% of the average turnover of the three financial years of the cartel period.

<sup>16</sup> Competition Appeal (AT) No. 38 of 2019, *Sahuwala Cylinders Private Limited and Anr. v. Competition Commission of India*, order dated November 10, 2022.

justified to argue the CCI's penalty order on merits. The NCLAT further held that the appellants are not entitled to question the imposition of penalty where a leniency application has been filed.<sup>17</sup>

- I. NCLAT finds gaping errors in the findings of the Director General / CCI in the tyre cartel: In December, the NCLAT directed the CCI to re-examine its 2018 penalty order in the tyre cartel.<sup>18</sup> As such, the CCI found the cartel participants to be acting in concert to increase the prices of tyre variants sold in the replacement market for the truck / bus segment and to limit and control the production and supply of such tyres. The NCLAT observed that there were some arithmetical errors with respect to the findings of the Director General. It also observed that the corrected arithmetical data apparently reveals the non-existence of price parallelism. Further, it noted that since the cartel has been found for the year 2011-2012 and the same is surrounded by arithmetical errors, it may be leading to wrong conclusions. Therefore, the NCLAT directed the matter to be remitted back to the CCI to re-examine the calculation of arithmetical errors and the penalty imposed.

### 3. PART II - OVERVIEW OF MERGER CONTROL CASES

- 3.1 In the year 2022, the CCI approved more than 85 combinations. After a brief pandemic induced hiatus, the CCI also issued 11 orders relating to gun-jumping.

- 3.2 Gun-Jumping Orders: The Indian merger control regime is mandatory and suspensory in nature, i.e., combinations are notifiable unless they are specifically exempted, and cannot be consummated, either entirely or in part, prior to receiving an approval of the CCI. The act of the parties to consummate a notifiable transaction without prior approval of the CCI is popularly referred to as 'gun-jumping'. As such, the CCI can impose a penalty of up to 1% of the combined asset value or turnover of 'combination' (whichever is higher) on the acquirer, for gun-jumping / failure to notify a notifiable combination. The CCI, in 2022, took cognizance of different forms of gun-jumping conduct and came down hard on the erring companies.

- J. CCI penalizes Adani Green, clarifies acquirer inputs pending CCI approval to be part-consummation: In March, the CCI imposed a nominal penalty of INR 0.5 million (i.e., approx. USD 6,100) on Adani Green Energy Limited ("AGEL") in relation to its acquisition of the entire equity stake of S.B. Energy Holding Limited ("SBEHL"), pursuant to the execution of a share purchase agreement ("SPA") with Softbank Group Capital Limited ("Softbank").<sup>19</sup> During its review of the combination, the CCI observed that the SPA contained a clause that: (i) allowed AGEL and Softbank to discuss the ongoing business and operations of SBEHL and its subsidiaries; (ii) allowed AGEL to provide inputs on the business of SBEHL; and (iii) obliged SBEHL to take such inputs in the best interest of itself and its subsidiaries ("**Impugned Clause**"). Thus, the CCI held that the Impugned Clause, by itself, amounts to part consummation of the combination prior to receiving the CCI's approval and hence, violates the standstill obligation under the Act.

- K. CCI hits SABIC International Holdings with twin penalties: In July, the CCI, by way of two separate orders, imposed a total penalty of INR 4.5 million (i.e., approx. USD 55,000) on SABIC International Holdings B.V ("SABIC") for: (i) failing to notify its acquisition of 24.99% shareholding of Clariant AG ("Clariant") ("**First Acquisition**");<sup>20</sup> and (ii) consummating its acquisition of 6.51% additional shareholding of Clariant in part, by transferring the shares in an escrow account, prior to a notification

<sup>17</sup> Competition Appeal (AT) No. 16 of 2021, *Pawan Jagetia v. Competition Commission of India and Ors.*, order dated December 23, 2022.

<sup>18</sup> Competition Appeal (AT) No. 05 of 2022, *CEAT Limited v. Competition Commission of India*, order dated December 1, 2022.

<sup>19</sup> Combination Registration No. C-2021/05/837, *Adani Green Energy Limited*, order dated March 09, 2022.

<sup>20</sup> Combination Registration No. C-2020/05/746, *SABIC International Holdings B.V.*, order dated July 15, 2022. A penalty of INR 4 million was imposed on SABIC *vide* this order.

to the CCI ("**Second Acquisition**").<sup>21</sup> In relation to the First Acquisition, the CCI observed that the parties had, *inter alia*, executed a Governance Agreement ("**GA**") by way of which SABIC was vested with the right to nominate up to four persons for election as directors on Clariant's board. As such, the CCI held that SABIC intended to participate in the affairs and management of Clariant and should have approached the CCI before the implementation of the GA. In relation to the Second Acquisition, the CCI observed that SABIC was vested with the legal and beneficial ownership of the escrow shares and as such should have obtained approval of the CCI prior to acquiring the shares *via* escrow mechanism.

L. CCI clarifies 'substance will prevail over form' for Item 1 exemption: In September, by way of two separate orders, the CCI, imposed a penalty of INR 2 million (i.e., approx. USD 25,000) each on: (i) Trian Partners AM Holdco, Ltd. ("**Trian Holdco**") and Trian Fund Management, L.P. ("**Trian Fund**") (Trian Holdco and Trian Fund are collectively referred to as "**Trian**"), in relation to their acquisition of 9.9% shareholding in Invesco Limited ("**Invesco**");<sup>22</sup> and (ii) PI Opportunities Fund - I ("**PIOF - I**") and Pioneer Investment Fund ("**PIF**") (PIOF - I and PIF are collectively referred to as "**Premji Invest**") in relation to their acquisition of 6.03% shareholding in Future Retail Limited ("**FRL**"),<sup>23</sup> for failing to notify the CCI prior to accepting board seat(s) in Invesco and FRL, respectively (Invesco and FRL are collectively referred to as "**Target Companies**"). The CCI observed that subsequent to their respective combinations, Trian and Premji Invest appointed director(s) in Invesco and FRL, respectively. Therefore, the CCI concluded that Trian and Premji Invest had the intention to participate in the affairs and management of their respective Target Companies, though Trian and Premji Invest did not have a contractual right to appoint director(s) on the board of their respective Target Companies. Thus, the combination in both the cases cannot be said to be 'solely as an investment'. Further, the CCI observed that the combination in both the cases cannot be said to be in the 'ordinary course of business', since these are capital transactions. Accordingly, both the combinations could not benefit from the Item I exemption and Trian and Premji Invest should have filed a merger notification with the CCI before accepting a position on the board of their respective Target Companies.

3.3 Approval of combinations subject to modifications: The CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, allows the parties to a combination to offer voluntary modifications to address the competition concerns arising from a combination. The year 2022 witnessed the CCI being more inclined towards approving combinations with competition concerns subject to voluntary behavioral remedies offered by the parties and insisted on divestment in only one case.

M. Google offers behavioral remedies to alleviate concerns regarding the potential flow of competitively sensitive information: In June, the CCI conditionally approved the acquisition of approx. 1.28% of the equity share capital of Bharti Airtel Limited ("**BAL**") by Google International LLC ("**Google International**").<sup>24</sup> While reviewing the combination, the CCI observed that Google International also has a minority, non-controlling stake in Jio Platforms Ltd. ("**Jio**") that is engaged in a business similar to BAL. To address possible competition concerns raised by the CCI, such as the possibility of the flow of competitively sensitive information ("**CSI**") between BAL and Jio, Google International offered certain voluntary behavioral remedies including maintaining an appropriate firewall to prevent the flow of CSI.

<sup>21</sup> Combination Registration No. C-2020/05/746, *SABIC International Holdings B.V.*, order dated July 19, 2022. A penalty of INR 0.5 million was imposed on SABIC *vide* this order.

<sup>22</sup> Ref. No. C-2021/01/810, *Trian Partners AM Holdco, Ltd. and Trian Fund Management, L.P.*, order dated September 30, 2022.

<sup>23</sup> M&A/Q1/2018/18, *PI Opportunities Fund - I and Pioneer Investment Fund*, order dated September 20, 2022.

<sup>24</sup> Combination Registration No. C-2022/03/913, *Google International / Bharti Airtel*, order dated June 30, 2022.

- N. CCI clears Umang Commercial / Aditya Marketing merger subject to voluntary behavioral remedies: In August, the CCI approved merger of the Aditya Marketing & Manufacturing Private Limited (“**Aditya Marketing**”) with and into Umang Commercial Company Private Limited (“**Umang**”) subject to certain voluntary behavioral remedies.<sup>25</sup> While reviewing the combination, the CCI observed that the market share of the parties (including their affiliates) in certain markets exceeded 30% and the same would raise competition concerns. Accordingly, to address the competition concerns, Umang offered certain voluntary remedies including not to acquire any special rights or exercise material influence over certain affiliate entities of Aditya Marketing.
- O. Sony, ZEE agree to divest three Hindi channels to address competition concerns: In October, the CCI approved the amalgamation of Zee Entertainment Enterprises Limited and Bangla Entertainment Private Limited with and into Culver Max Entertainment Private Limited, subject to certain voluntary structural remedies offered by the parties.<sup>26</sup> While reviewing the transaction, the CCI observed that the combination is likely to result in an appreciable adverse effect on competition given that the: (i) transaction is a typical horizontal combination between two competing broadcasting houses; (ii) combined entity would be the largest broadcasting house in India likely to enjoy un-paralleled dominant position. As such, to address the competition concerns, the parties offered to divest three TV channels engaged in the Hindi general entertainment and Hindi film segments.
- 3.4 NCLAT dismisses Amazon’s appeal: In June, the NCLAT dismissed three separate appeals<sup>27</sup> against the CCI’s order imposing a penalty, on Amazon.com NV Investment Holdings LLC (“**Amazon**”), of: (i) INR 20 million (i.e., approx. USD 0.24 million) for misrepresentation and suppression of material facts in its merger notification to the CCI for its acquisition of 49% of the equity share capital of Future Coupons Private Limited (“**FCPL**”); and (ii) INR 2 billion (i.e., approx. USD 24.5 million) for failure to notify certain steps deemed to be inter-connected as a part of the aforementioned transaction in the merger notification.<sup>28</sup> The NCLAT, in agreement with the CCI, observed that Amazon intentionally did not disclose the ‘real ambit and purpose’ of the combination. However, the NCLAT observed that the imposition of a maximum penalty of INR 20 million (i.e., approx. USD 0.24 million) for misrepresentation and suppression of material facts is slightly excessive and reduced the penalty to INR 10 million (i.e., approx. USD 0.12 million). The appeal against the NCLAT order is currently pending adjudication before the SC.

#### 4. PART III - REGULATORY DEVELOPMENTS

- 4.1 The year 2022 saw some major regulatory developments in competition law in India. The existing competition law framework is set to undergo a major overhaul to ensure the provisions of the Act are in line with the current market realities and international best practices.
- 4.2 Competition Act 2.0: In August, the Central Government introduced the Competition Amendment Bill, 2022 (“**Bill**”) in the lower house of the Parliament i.e., the Lok Sabha to introduce new as well as amend existing provisions of the Act.<sup>29</sup> The Bill proposes key changes to the Act including, *inter alia*: (i) introduction of a new criterion for notifying a merger or acquisition to the CCI, i.e., a ‘deal value’

<sup>25</sup> Combination Registration No. C-2022/07/952, *Umang Commercial / Aditya Marketing*, order dated August 30, 2022.

<sup>26</sup> Combination Registration No. C-2022/04/923, *Zee Entertainment / Culver Max Entertainment*, order dated October 04, 2022.

<sup>27</sup> Competition Appeal (AT) No. 01, 02, and 03 of 2022, *Amazon.com N.V. Investment Holdings LLC v. Competition Commission of India and Ors.*, order dated June 13, 2022.

<sup>28</sup> Combination Registration No. C-2019/09/688, *Amazon.com NV Investment Holdings LLC*, order dated December 17, 2021.

<sup>29</sup> Available at: [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185\\_2022\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf).

threshold (“DVT”)<sup>30</sup>; (ii) codification of the CCI’s expansive interpretation of ‘control’, which includes the lowest standard of ‘control’, i.e., the exercise of ‘material influence’; (iii) explicit recognition of hybrid anti-competitive agreements (such as hub and spoke cartels) by bringing them within the ambit of the Act; and (iv) introduction of a mechanism for commitments and settlements, enabling the parties to apply to the CCI to propose commitments or settlements in anti-trust cases (except in cartel cases).<sup>31</sup>

The Bill was referred to the Parliamentary Standing Committee on Finance (“**Committee**”) for its review in August. As such, in December, the Committee tabled its report before the Lok Sabha<sup>32</sup> proposing key recommendations including, inter alia: (i) limiting the applicability of the local nexus test to the ‘target’ enterprise; (ii) explicitly defining ‘material influence’ by way of regulations; (iii) bringing cartels under the scope of settlements; (iv) introduction of an ‘effects-based’ test in relation to abuse of dominance cases; and (v) extending the intellectual property rights exemption to abuse of dominance cases.<sup>33</sup> It is likely that the Bill will come up for discussion in the Parliament during the budget session in 2023 where it may undergo tweaks before becoming law.

- 4.3 **Ex-ante law for digital market:** In December, the Committee presented another report titled ‘*Anti-competitive practices by big tech companies*’, before the Lok Sabha.<sup>34</sup> Given that the anti-competitive practices of big tech companies are increasingly coming under the radar of the competition regulators across the globe, including the CCI, the Committee identified certain anti-competitive practices in the digital sector and proposed: (i) enactment of a *sui generis* law, namely the Digital Competition Act (“DCA”) to *ex-ante* regulate the digital market; and (ii) establishment of a Digital Markets Unit within the CCI to *inter alia* monitor the conduct of leading digital companies
- 4.4 **Extension of de-minimis exemption till March 29, 2027:** In March, the Government of India (“GOI”) extended the applicability of the de-minimis exemption for an additional period of five years (i.e., till March 29, 2027).<sup>35</sup> Previously, the GOI, by way of a notification dated March 27, 2017, exempted a ‘combination’ from the notification requirement, if the target enterprise has either assets not exceeding INR 3.5 billion (i.e., approx. USD 43 million) in India or turnover not exceeding INR 10 billion (i.e., approx. USD 123 million) in India for a period of five years from the date of the publication of the notification (i.e., till March 29, 2022).<sup>36</sup>
- 4.5 **Extension of exemption from requirement to notify the CCI within 30 days of the trigger event:** The Act requires that a combination be notified to the CCI within 30 days of the trigger event (hereinafter referred to as the “**Notification Requirement**”). However, the GOI, by way of a notification dated June 29, 2017, suspended the Notification Requirement for five years. (i.e., till June 28, 2022).<sup>37</sup> In March, the GOI further extended the suspension for an additional period of five years (i.e., till June 28, 2027).<sup>38</sup>

<sup>30</sup> Transactions where: (i) the global deal value is in excess of INR 2 billion (i.e., approx. USD 250 million); and (ii) either party has ‘substantial business operations in India’.

<sup>31</sup> Our detailed analysis of the Bill is available at: <https://induslaw.com/publications/pdf/alerts-2022/Infocex-Alert-Competition-Amendment-Bill-August-2022.pdf>.

<sup>32</sup> Available at: [https://164.100.47.193/lssccommittee/Finance/17\\_Finance\\_52.pdf](https://164.100.47.193/lssccommittee/Finance/17_Finance_52.pdf).

<sup>33</sup> Our detailed analysis of the Committee’s recommendations to the Bill is available at: <https://induslaw.com/publications/pdf/alerts-2022/Infocex-Alert-Competition-Amendment-Bill-Standing-Committee-Suggestions-December-2022.pdf>.

<sup>34</sup> Available at: [https://164.100.47.193/lssccommittee/Finance/17\\_Finance\\_53.pdf](https://164.100.47.193/lssccommittee/Finance/17_Finance_53.pdf).

<sup>35</sup> Available at: <https://www.cci.gov.in/combination/legal-framework/notifications/details/15/0>.

<sup>36</sup> Available at: <https://www.cci.gov.in/combination/legal-framework/notifications/details/9/0>.

<sup>37</sup> Available at: <https://www.cci.gov.in/combination/legal-framework/notifications/details/10/0>.

<sup>38</sup> Available at: <https://www.cci.gov.in/combination/legal-framework/notifications/details/14/0>.



4.6 ***Revision to Form II:*** In March, the CCI, revised and simplified the format of Form II,<sup>39</sup> the long form required to be filed by the parties to a combination having a combined market share of: (i) 15% in horizontally overlapping markets; or (ii) 25% in vertically / complementary overlapping markets. The revised Form II has not only reduced the number of queries to seven but has also improved the overall structure of Form II. Additionally, multiple similar questions have been clubbed under a common head, in line with the simplified nature of Form I.

## 5. PART IV – COMPETITION ADVOCACY

5.1 In pursuance of its advocacy mandate under the Act, the CCI published two market studies in 2022 and made meaningful suggestions to address prevalent competition law related issues in the: (i) taxi and cab aggregator industry; and (ii) film industry.

5.2 ***Market study on the cab aggregator industry:*** In September, the CCI published the findings of its market study on competition and regulatory issues in the taxi and cab aggregator (“CA”) industry with special reference to surge pricing.<sup>40</sup> The CCI observed that: (i) CAs engage in practices such as personalized pricing and surge pricing; and (ii) there is information asymmetry between various stakeholders involved. Accordingly, the CCI proposed key recommendations and self-regulatory measures, such as: (a) greater transparency in defining the constituents of “base fare” and “total fares”; (b) regulating surge pricing; (c) setting out a clear and transparent policy on data collection and sharing of data with third parties; and (d) avoiding self-preferencing practices.

5.3 ***Market study on the film distribution chain in India:*** In October, the CCI published the findings of its market study on the film distribution chain in India.<sup>41</sup> The CCI noted several competition concerns such as: (i) bargaining power imbalance between multiplexes and producers; (ii) lack of transparency in box office revenue collections; (iii) imposition of an exorbitant fee on producers / distributors in the form of virtual print fee;<sup>42</sup> and (iv) theatres dealing exclusively with digital cinema equipment service providers, leading to tying and bundling of services. However, the CCI opined that industry stakeholders may be better placed to resolve the issues related to competition in the film distribution value chain, as there are multiple dynamics at play. Conclusively, the CCI recommended that exclusive agreements: (a) should not block entry of new entities; (b) should not include onerous conditions; and (c) should have scope for negotiations.

## 6. PART V – INSTITUTIONAL DEVELOPMENTS

6.1 While the CCI received a significant boost in terms of capacity building at the start of the year, it ran amok administrative challenges by the end of the year.

6.2 ***New regional offices for the CCI:*** In May and October, the Union Minister of Finance and Corporate Affairs, Mrs. Nirmala Sitharaman inaugurated the regional office of the CCI in Kolkata (East)<sup>43</sup> and Mumbai (West),<sup>44</sup> respectively. The CCI now has three regional offices (the regional office in Chennai (South) inaugurated in February 2021) which has proved to be a key step towards competition

<sup>39</sup> Available at: <https://www.cci.gov.in/images/legalframeworkregulation/en/cci-amendment-regulations-20221652516946.pdf>.

<sup>40</sup> Available at: <https://www.cci.gov.in/economics-research/market-studies/details/40/1>.

<sup>41</sup> Available at: <https://www.cci.gov.in/economics-research/market-studies/details/41/0>.

<sup>42</sup> Virtual print fee is the subsidy that producers / distributors pay to enable exhibitors to cover the cost of converting their analog projectors into digital ones.

<sup>43</sup> Available at: <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1826988>.

<sup>44</sup> Available at: <https://cci.gov.in/antitrust/press-release/details/253>.

enforcement and will provide ease of accessibility to numerous stakeholders. However, the regional offices will not have benches and the bench will remain in New Delhi.

- 6.3 ***The CCI invokes 'doctrine of necessity' to deal with lack of quorum:*** In October, Mr. Ashok Kumar Gupta retired as the CCI chairperson after a tenure of four years following which Dr. Sangeeta Verma, one of the remaining two whole time members of the CCI, was appointed as the acting chairperson of the CCI. Given that the Act prescribes that the quorum for CCI's meetings is three members, the CCI was rendered defunct owing to the lack of quorum. As the CCI was unable to approve the combinations (which severely impacted various stakeholders), the Ministry of Law and Justice, on February 02, 2023, authorized the CCI to take decisions on the pending combinations without full quorum<sup>45</sup> by invoking the doctrine of necessity.<sup>46</sup> Thus, much to relief of industry, after a hiatus of more than three months, the CCI started approving combinations in February 2023.
- 6.4 ***The CCI now has a new wing:*** In November, the Central Government empowered the CCI to handle anti-profiteering cases under the CGST Act, 2017, w.e.f. December 01, 2022.<sup>47</sup> Thus, it remains to be seen how the already understaffed CCI braces itself with the additional responsibility of interpreting a new statute.

## 7. PART VI - CONCLUSION

- 7.1 The year 2022 was a pivotal year for competition law in India as it established that correcting anti-competitive practices in the digital market is a regulatory priority. In line with this objective, not only did the CCI (in line with its global counterparts) initiate investigations against many technology companies but also imposed hefty penalties. Further, the Government is also doing its part by expanding the scope of the current Act as well as deliberating passing a new law to adequately address the challenges posed by technology companies. These developments clearly suggest that the Government and the CCI no longer consider the Indian digital market to be at a nascent stage and are of the view that external intervention is required to ensure that digital markets remain competitive. However, it remains to be seen whether India will enact the DCA in 2023 itself or wait to benefit from the learning externalities of other jurisdictions.

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<sup>45</sup> Available at: [https://www.business-standard.com/article/companies/law-ministry-allows-cci-to-clear-pending-mergers-without-full-quorum-123020201510\\_1.html#:~:text=At%20present%2C%20applications%20for%2016,there%20are%20only%20two%20member s.](https://www.business-standard.com/article/companies/law-ministry-allows-cci-to-clear-pending-mergers-without-full-quorum-123020201510_1.html#:~:text=At%20present%2C%20applications%20for%2016,there%20are%20only%20two%20member s.)

<sup>46</sup> The doctrine of necessity enables legal authorities to take certain actions at a particular moment, which would otherwise not be regarded within the scope of the law in a general legal situation.

<sup>47</sup> Available at: <https://egazette.nic.in/WriteReadData/2022/240506.pdf>.

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