

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 5th August, 2021
Date of decision: 10th September, 2021

+ **W.P.(C) 6797/2020 & CM APPL. 23544/200**

EATON POWER QUALITY PVT LTD Petitioner
Through: Mr. Harish N. Salve, Senior
Advocate, with Ms. Anuradha Dutt,
Mr. Vivek Agarwal, Mr. Haaris
Fazili, Mr. Kunal Dutt, Mr. Divyansh
Prasad, Mr. Bhushan Gokhale and
Mr. Chaitanya Pendse, Advocates.

versus

COMPETITION COMMISSION OF INDIA & ORS..... Respondents
Through: Mr. Avishkar Singhvi, Mr. Rahul
Arya and Mr. Nipun Katyal,
Advocates for R-1.
Mr. Somasekhar Sundaresan, Ms.
Nisha Kaur Uberoi, Mr. Gautam
Chawla, Mr. Sarthak Pande, Ms.
Yugandhara Khanwilkar, Ms.
Shivangi Chawla and Ms. Aditi
Khemani, Advocates for R-2.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUDGMENT

GLOSSARY OF TERMS:

<i>S. No.</i>	<i>Term</i>	<i>Abbreviation</i>
1.	The Competition Act, 2002	Act
2.	The Competition Commission of India (Procedure in Regard to the transaction of Business relating to	Combination Regulations

	Combinations) Regulations, 2011	
3.	Competition Commission of India	CCI
4.	Appreciable Adverse Effect on Competition	AAEC
5.	Eaton Power Quality Pvt. Ltd.	Eaton
6.	Electrical and Automation Business	E&A Business
7.	Larsen and Toubro Ltd.	L&T
8.	Schneider Electric India Pvt. Ltd.	Schneider
9.	Acquisition of the E&A Business of L&T by Schneider	Combination
10.	Monitoring Agency – M/s. Moore Singhi Advisors LLP	MA
11.	Approval Order dated 18 th April 2019, approving the Combination	Approval Order
12.	Expression of Interest	EOI
13.	Low Voltage Switchgear	LV Switchgear

Prathiba M. Singh, J.

1. This judgment has been pronounced through video conferencing.
2. The present writ petition has been filed by Eaton Power Quality Pvt. Ltd. (*hereinafter*, “Eaton”) challenging the impugned order dated 11th August, 2020, passed by Respondent No. 1/ Competition Commission of India (*hereinafter* ‘CCI’).

Brief Facts

3. The genesis of the present dispute is the acquisition of the electrical and automation business (*hereinafter*, “E&A Business”) of Larsen and

Toubro Ltd. (*hereinafter, L&T*) by Respondent No.2 - Schneider Electric India Pvt. Ltd. (*hereinafter, 'Schneider'*). This acquisition shall hereinafter be referred to as the "*Combination*".

4. A notice seeking approval of the Combination was filed before the CCI on 25th May 2018 by Schneider and MacRitchie Investments Private Limited, which were the acquirers in the proposed Combination. On this notice, considering the fact that Schneider and L&T were the topmost market shareholders in the E&A business, the CCI, came to a *prima facie* opinion that the said Combination was likely to have an Appreciable Adverse Effect on Competition (*hereinafter, "AAEC"*) in the LV Switchgear business. Thereafter, CCI conducted its market investigation and proposed various modifications to the Combination, after taking into account the proposals of the parties to the Combination. It passed the Approval Order under Section 31 of the Competition Act, 2002 (*hereinafter, "The Act"*), encompassing the said modifications, as also the timelines thereto, on 18th April 2019 (*hereinafter referred to as "Approval Order"*). Upon the said approval, it also appointed a Monitoring Agency- Moore Singhi Advisors LLP (Respondent No. 3) (*hereinafter, "MA"*), as per Regulation 27 of the Competition Commission of India (Procedure in Regard to the transaction of Business relating to Combinations) Regulations, 2011 (*hereinafter, "Combination Regulations"*) to monitor the implementation of the said modifications to the Combination, among other functions.

5. The present petition concerns the implementation of two of the said modifications or remedies that were proposed by the CCI in its Approval Order, being the remedy of '*White Labelling*', and the consequential '*Non-exclusive technology transfer*' licences which were to be given.

6. Pursuant to the Approval Order, invitation for Expression of Interest (*hereinafter*, “EOI”) was published, upon which various entities filed their registrations on a particular portal, provided for availing of the remedies. The Petitioner- Eaton is one of these entities, however due to the non-submission of required supporting documentation, Eaton was ousted by Schneider from availing of the White Labelling remedy. Aggrieved by the same, Eaton filed an application before the CCI for its inclusion in the said process, *qua* which, the CCI, in its decision dated 7th January 2020, as communicated on 13th January, 2020, directed Schneider to include Eaton in the White Labelling process, and the MA to take appropriate measures to ensure that all the applicants including Eaton are treated at par in a fair and transparent manner.

7. Schneider being aggrieved by this decision of the CCI, both on the ground that it was not heard prior to the decision being made, as also the fact that Eaton’s EOI was non-compliant/ non-responsive, sought Review of the said order before CCI. The application seeking Review of the order dated 7th January 2020, was filed by Schneider on 31st January 2020. The said Review application was heard by the CCI on 12th March, 2020. Post this, the matter was reserved for orders.

8. Thereafter, vide the impugned order dated 24th August, 2020, the direction to include Eaton in the White Labelling process has been recalled by the CCI.

9. It is this order passed by the CCI which is under challenge in the present writ petition.

10. The prayers in the present writ petition are as under:

“(a) call for the record of Respondent No.1, examine the same and issue a Writ of Certiorari and/or any other similar writ to quash the Impugned Order dated 11.08.2020 passed by Respondent No.1;

(b) issue a writ in the nature of Mandamus directing that the Petitioner to be considered in the WL process and be allowed a fair opportunity to negotiate a reasonable arrangement with Respondent No.2 to procure WL services;

(c) order costs; and”

(d) Pass such further and other reliefs, as this Hon'ble Court may deem fit, proper and appropriate in the nature and circumstances of this case.”

Submissions on behalf of the Petitioner-Eaton

11. Mr. Salve, Id. Senior Counsel appearing for Eaton, firstly submits that the manner in which the CCI withdrew its earlier directions to Schneider, dated 7th January 2020, is completely unfair and contrary to the purpose of the modifications granted in the Approval order dated 18th April 2019. He submits that the condition/ remedy of White Labelling was meant to ensure wider participation of various parties, and the same ought not to have been considered in a technical manner, as was reflected in the order of the CCI dated 7th January 2020. He submits, while not raising objections as to the reasons for which certain documents were not submitted by Eaton, that even presuming the same to be an inadvertent error, the candidature of Eaton would be liable to be considered and the withdrawal of the same by CCI, vide the impugned order, is not tenable. Mr. Salve further submits that the documents were merely concerned with the financial capabilities of Eaton, and as per Schneider itself, Eaton is a global sophisticated player which has the financial capability, as contained in Schneider's letter dated 19th

December 2019. Accordingly, he submits that such a technical approach should not have been adopted by the CCI as well as Schneider, given the Approval Order was to be interpreted purposively.

12. The further submission of Mr. Salve, Id. Senior Counsel, is that according to the impugned order, the reason due to which the CCI withdrew its earlier order was delay in finalizing the White Labelling Arrangements. The said reasoning, according to him, is itself completely baseless inasmuch as, though the Approval Order were granted in the year 2019, till date, not a single contract has been entered into by Schneider with any of the candidates who have been identified. Thus, he submits that the candidature of a credible player like Eaton ought not to be excluded in the spirit and tenor of the Approval Order passed by CCI on 18th April 2019.

13. Ms. Anuradha Dutt, Id. counsel for Eaton also submits that the manner in which the parties were excluded shows that the entire intention was merely to exclude Eaton, as parties which had submitted incomplete documentation were considered, however Eaton has yet been excluded. She further submits that though the first order of the CCI, in favour of inclusion of Eaton, was passed on 7th January, 2020, up till August, 2020 when the impugned order was passed, Schneider never even contacted Eaton. This conduct, according to her, itself shows that there was a specific intention to exclude Eaton right from inception.

Submissions on behalf of the Respondent No. 1- CCI

14. Mr. Avishkar Singhvi, Id. Counsel, submits that the CCI is the sector regulator and is supposed to ensure that there is no AAEC whenever any Combination is approved. In the present case, L&T, which is a company

having an enormous market share, was hiving off one of its units, and accordingly, in order to ensure that the Combination was not anti-competitive, vide the Approval Order dated 18 April 2019, some remedies were proposed by CCI to reduce the AAEC, including the remedy of entering into White Labelling Arrangements, while approving the said Combination and takeover of the said unit of L&T by Schneider

15. Mr. Singhvi, Id. Counsel, further submits that the MA appointed was continuously looking over the manner in which the Combination was being implemented, and parallelly was also supervising the White Labelling procedure. He submits that the MA, in fact, recommended that Eaton should be included in the White Labelling Arrangements. However, Eaton's representation, for whatever reason, was not accepted by Schneider. An application for directions was filed by Eaton before the CCI on 9th December 2019. In the said application, the prayer of Eaton was that it should be allowed to take part in the White Labelling Arrangements. He submits that it is in respect of this application, that the first order dated 7th January 2020 was passed by the CCI. After the passing of the said order by CCI, an application was filed on behalf of Schneider seeking Review/Recall of this order passed by the CCI. The impugned order in the said petition was passed in the said application filed by Schneider.

16. Mr. Singhvi further submits that CCI is a body which enjoys the power of Review and the same is the settled legal position which has been laid down in several judgments. He submits that, in the impugned order, the intention of CCI was only to ensure that the entire process of White Labelling and the implementation of the Combination does not get delayed.

17. He further submits that the impugned order looks at the certainty of

process and the power exercised by the CCI, and is not on merits. So long as the power exercised is *bona fide* in nature, this Court ought not to entertain the present writ petition.

18. Reliance is placed upon the following judgements to canvass the abovementioned submissions:

- 1) ***Competition Commission of India v. Bharti Airtel Limited and Ors. (2019) 2 SCC 521***
- 2) ***Silippi Construction Contractors v. Union of India and Anr. (2019) SCC Online SC 1133***
- 3) ***Competition Commission of India v. Grasim Industries Ltd. (2019) 265 DLT 535 (DB)***
- 4) ***Google Inc. and ors. v. Competition Commission of India and Anr. (2015) 150 DRJ 192 (DB)***
- 5) ***Competition Commission of India v. Steel Authority of India Ltd. and Anr. (2010) 10 SCC 744***

19. While placing reliance on the judgment in ***Cadila Healthcare Ltd. v. Competition Commission of India (2018) 252 DLT 647 (DB)***, he submits that the said judgment of the Division Bench of this court clearly lays down the principles and the conditions under which a Review of its own order can be entertained by the CCI. According to him, in paragraphs 46, 52 and 54 of the ***Cadila (supra)***, the Division Bench of this Court has laid down that under certain circumstances, despite the omission of Section 37 from the Act, Review/Recall orders can be passed. He submits that if there is fraud, or if there is no detailed hearing which was given to parties, a Review/Recall is maintainable. He further submits that the same is also maintainable in order to correct a mistake, as is stipulated under Section 38 of the Act. He submits that there is a difference in the nature of the disputes between Sections 3 & 4 of the Act on the one hand, and Sections 5 & 6 of the Act on

the other. According to him, while Sections 3 & 4 are *ex post* inquiries, Sections 5 & 6 are *ex ante* inquiries wherein certain broader powers can be conferred upon the CCI.

20. He finally submits that the allegations made by Eaton against the CCI, to the effect that CCI had an intention to prejudice Eaton in these proceedings, are completely baseless and in bad spirit. He also takes vehement objection to the language used by the Petitioner in its rejoinder to the counter affidavit filed by the CCI, where, according to him, completely baseless and unverified allegations have been levelled against the CCI, which is an independent authority. It is submitted that the Petitioner is taking an adversarial position against the CCI.

Submissions on behalf of Respondent No. 2- Schneider

21. Mr. Sunderesan, Id. Counsel for Respondent No. 2- Schneider, first submits that the writ jurisdiction ought not to be lightly invoked inasmuch as the power of judicial review, as is laid down in the judgment of ***Pravin Kumar v. Union of India, 2020 SCC Online SC 729***, is limited to situations where there are errors of law or procedural errors leading to manifest arbitrariness or violation of principle of natural justice. In the present case, he submits that the order dated 7th January 2020, that was passed by the CCI without hearing Schneider, was an *ex parte* order and the principles of natural justice were not followed. Thus, Schneider moved for Review of the said order before the CCI, which was then recalled after hearing all the parties concerned on 12th March 2020. He submits that the procedural error committed by the CCI was not giving a hearing to Schneider which was an affected party. Accordingly, he submits that only a manifest error has been

corrected by the impugned order, and therefore the same does not call for interference under writ jurisdiction.

22. Secondly, he submits that during the passing the original order dated 7th January 2020, the stand taken by Eaton was that there was a technical glitch. It was not clarified that the technical glitch was at the end of Eaton, and not at the end of Schneider. Thus, according to him, there was no justification for Eaton not submitting the supporting documents within the deadline, after having registered itself. The last date for submission of supporting documents was 5th October 2019, however it is only six weeks later, on 25th November 2019, that an email was written by Eaton stating that there was a technical glitch due to which the said documents were not sent, completely in ignorance of the fact that the documents were to be submitted to a specific email ID. The said documents were thereafter submitted only on 4th December 2019, which was clearly belated and by which time, various other parties had already submitted their documents. He submits that one of the other parties which had not submitted the documents in time, being Elmex, was also not considered for the White Labelling Arrangements, and thus there could not be any differentiation between Eaton and Elmex, both of which failed to adhere to the deadlines that were provided in the invitation of EOI.

23. Mr. Sunderesan, Id. Counsel, thirdly submits that it was under some misconception that CCI passed its original order dated 7th January 2020, vide which Eaton was allowed to participate in the White Labelling Arrangements. Eaton being a global competitor of Schneider, was using every method possible to become a part of the White Labelling Arrangements, which could clearly not have been agreed to by Schneider as

Eaton had violated the guidelines and terms of the invitation. He further submits that a perusal of the Approval Order itself shows that the said Arrangements are to continue for a period of five years from the closing date. Accordingly, he submits that the Petitioner cannot be given a march over other parties, who had completed the documentation within the deadlines, and the entire issue being reopened would create hurdles in the White Labelling Arrangements being finalized, which is contrary to the purpose expressed in the Approval Order. He also submits that the delay in filing the required documents was primarily the fault of Eaton, and those documents are of essence. He has relied upon the affidavit dated 26th July 2021, filed on behalf of Schneider to show that in the cases of various other applicants, the said documents were used to determine their links to entities like Siemens, which was prohibited as per the Approval Order. Accordingly, he submits that the submission of these documents was not merely a technical requirement but was important.

24. Fourthly, Mr. Sunderesan, extensively relies upon the said affidavit dated 26th July 2021, wherein details and the chronology of the various developments which have taken place in respect of the White Labelling Arrangements has been mentioned. It is specifically pointed out that after the Approval Order was passed by the CCI, which required the following of various timelines, most of the timelines in terms of advertisements for EOI etc., have all been complied with. The list of dates which is contained in the said Affidavit are pressed into service to show that since 2019, after the issuance of the advertisements for EOI, various parties had expressed interest and had submitted their responses. These applicants were divided into three categories - Category 1, Category 2 and Category 3. The online

portal for negotiations was also opened on 10th October 2019. Thereafter, continuous negotiations have been taking place with various parties, and one of the parties was even disqualified due to various reasons.

25. The crux of the submission of Mr. Sunderesan, Id. Counsel, on the basis of this timeline produced in the latest affidavit, is that the non-execution of such an Arrangement till date is primarily because of the various extensions sought by the entities who had submitted their responses, and not because of the conduct of Schneider. According to Mr. Sunderesan, the hearing dated 12th March 2020 before the CCI, was on the eve of the lockdown due to the COVID-19 pandemic, and the lockdown did create certain delays in the negotiation of White Labelling Arrangements. The impugned order of the CCI was passed only on 11th August 2020, and thereafter, sufficient steps have been taken by Schneider in order to proceed further with the White Labelling Arrangements.

26. He further submits that broadly, as per clause 109 of the Approval Order, while the Arrangements ought to have been concluded by February 2021, it is likely that the same would conclude by mid-September. He submits that considering the pandemic and the various extensions which were sought by the applicants, it is a reasonable time within which the first White Labelling Arrangement would conclude, and hence there is no apprehension in respect of the *bona fides* of Schneider, in concluding the Arrangement. In response to a query from the court, he further submits, on instructions, that the five-year period would therefore commence approximately from mid-September 2021 and shall go on till September 2026.

27. The next submission of Mr. Sunderesan, Id. Counsel, is that White

Labelling Arrangement is just one facet of the entire approval which has been granted by the Approval Order, although it is one of the essential measures that has been prescribed by the CCI for approving the Combination. In respect thereof, emphasis is laid on the exclusive technology transfer license agreement which has to be entered into in terms of paragraph 111 of the Approval Order, the publications relating to exports, the various conditions which have been imposed in respect of the distribution agreements, the pricing remedies which have to be followed, the investment in R&D, as also the embargo on non-rationalization of the switch-gear products. He submits that it is on the basis of all these remedies which have been imposed by the CCI, that it is expected that the approval of the Combination would not create any imbalance in the market or an AAEC.

28. Finally, Mr. Sunderesan, Id. Counsel, submits that the execution of the White Labelling Arrangements this year would not in any manner put Eaton in any disadvantageous position, inasmuch as Eaton would be free to respond to any EOI which is likely to be issued in the forthcoming year around September 2022. Further even *qua* the technology transfer license agreement, the conditions for execution of the said technology transfer license agreement could also be satisfied if Eaton submits its documents and is found to be successful in the subsequent EOI which is issued.

29. In conclusion, Mr. Sunderesan submits, on the basis of the said affidavit, that as on date, negotiations *qua* the White Labelling Agreements are at an advance stage with four parties. He therefore submits that the negotiations which have gone considerably far, ought not to be stopped in any manner, by allowing the Petitioner- Eaton to participate in the White Labelling Arrangements/ process, at this stage.

Rejoinder Submissions of on behalf of the Petitioner- Eaton

30. Mr. Salve, Id. Senior Counsel appearing on behalf of Eaton, in rejoinder, firstly submits that the CCI ought to conduct itself as a responsible regulator. The entire purpose of imposing conditions for approval of the Combination between Schneider and L&T was to improve competition and to ensure that the said Combination does not have an AAEC. He submits that in paragraph 80 of the Approval Order, the CCI clearly arrived at a conclusion that the Combination was likely to result in reduction of competitive/ economic choice to the consumers and in an increase in price and entry barriers. Thus, while being conscious of these consequences, the CCI imposed conditions of White Labelling and other remedies, as a trade-off to allowing the said Combination to take place.

31. Mr. Salve further submits that if the purpose is to increase competition in the market, then the impugned order refusing Eaton to participate is completely untenable, and it makes the concern of the CCI quite spurious. He further submits that the closing date of the Combination approval was 31st August 2020 and despite almost a year having gone by, White Labelling Arrangements have not been put in place. He submits that this entire delay, in fact, ought to have been noticed by CCI which should have asked questions from Schneider, which it did not. He further submits that the purpose of White Labelling was to ensure that competition simultaneously exists along with the Combination, which has been clearly defeated. Reliance is placed upon paragraphs 82 to 87 of the Approval Order to urge that it was Schneider which had suggested the White Labelling Arrangement, and having suggested the same to the CCI, after receiving approval in respect of its implementation, it is merely dragging its

feet.

32. Mr. Salve further submits that the first year of White Labelling Arrangements is quite crucial inasmuch as this would be the period during which the Combination would consolidate itself and eliminate competition. Moreover, on the date when the impugned order was passed, the date of closing was around the corner and, therefore, there was no major impediment in allowing Eaton's proposal. He submits that the White Labelling Arrangements were quite delayed by that time itself.

33. Mr. Salve, Id. Senior Counsel, further submits that the MA, which was appointed by the CCI, was clearly of the view that Eaton's proposal deserves consideration, after hearing the objections of Schneider to the same. However, the CCI, on false grounds of delay that may be caused to the White Labelling Arrangements, had refused Eaton's participation, and in fact reviewed its own earlier order of 7th January 2020, without having the power to do so. Further, on the basis of the comments which were provided by the MA in its communication to Schneider and CCI, it is submitted that various other parties which were also considered having filed invalid/incomplete applications, were permitted to participate in the White Labelling process, and Eaton was the sole entity which was completely excluded.

34. Mr Salve, submits that the order dated 7th January 2020 was in operation till 17th August 2020, and the same was not stayed. Despite the same, Eaton was excluded from all negotiations as is clear from the latest affidavit dated 26th July 2021, filed by Schneider.

35. Finally, it is submitted by Mr. Salve, Id. Senior Counsel, that the impugned order stands on only one footing that the White Labelling

Arrangements would be delayed. The ratio behind impugned order has been completely rendered meaningless, in light of the chronology of events placed in the latest affidavit filed by Schneider. He submits that if the Draft White Labelling Agreement which has been proposed to other players can also be proposed to Eaton, and negotiations are simultaneously conducted with Eaton along with the other players, no delay would be caused even today. He submits that Eaton is willing to take the White Labelling Agreements on the same terms as is being offered to the other players.

Sur-Rejoinder Submissions on behalf of Respondent No. 1- CCI

36. Mr. Avishkar Singhvi, Id. Counsel appearing for the CCI, submits that the stand of CCI is clear that it would not condone any deviation from the Approval Order. The MA has to obviously monitor the various steps set out in the order and if the CCI is told of any deviation, appropriate action would be taken. He further states, under instructions, that the date of closing is as per clause 6.1 of the Business Transfer agreement, and the White Labelling Arrangements also have come into force in terms of the Approval order.

37. He moreover submits that the allegations made against the CCI by Eaton, to the effect that CCI is colluding with Schneider, are completely baseless, and since it is admitted that Eaton itself *fudged up* in submitting the documents initially, it cannot raise allegations against the CCI. Once the deadline had passed for submitting documents, the stand taken by CCI in the impugned order which is fully reasoned, is justified.

Sur-Rejoinder Submissions on behalf of Respondent No. 2- Schneider

38. On a query from the Court, Mr. Sunderesan, Id. Counsel submits that since a Review application had already been filed to the order dated 7th

January 2020 passed by CCI, Schneider did not deem the inclusion of Eaton as being required, inspite of there being no stay of the previous order. Finally, Mr. Sunderesan, Id. Counsel submits that the delay which has been caused post the Approval Order, are due to events that transpired post the passing of the said order. He submits that such events cannot be considered for the purposes of deciding the tenability of the impugned order and so long as due process was followed by CCI, the jurisdiction of the writ court ought not to be exercised in such a case.

Analysis & findings:

39. The submissions made by the parties and the record raise several issues for consideration by this Court. For the sake of convenience, the same are divided into various heads as under:

- (i) *Scheme of the Competition Act, 2002 and the Combination Regulations, 2011;*
- (ii) *Approval Order dated 18th April 2019;*
- (iii) *White labelling remedies/ technology transfer and the impact of the same in the context of the present case;*
- (iv) *Eaton's submissions in response to the Expression of Interest;*
- (v) *Progress in White Labelling Arrangements on Schneider's part, post the grant of the Approval Order, leading to the CCI's impugned order;*
- (vi) *Power of Review of the CCI under the Act, post the amendments in 2007;*
- (vii) *Proceedings in this Writ Petition and the Affidavit of Schneider dated 26th July 2021;*
- (viii) *Relief.*

(i) **Scheme of the Competition Act, 2002 and the Combination Regulations, 2011**

40. The Competition Act of 2002 is a statute which was enacted by the Legislature, replacing the Monopolies and Restrictive Trade Practices Act, 1969, with an intent to promote fair competition in India. The fundamental object of this Act of 2002 is to ensure that there is free trade and fair competition, and the interest of consumers and the economy is safeguarded. The purpose of the Act is also to ensure that any practices, which have an Appreciable Adverse Effect on Competition in the markets in India, are strictly monitored and remedial measures are taken. With this avowed object, the Act regulates various relationships amongst businesses, including agreements which could have an AAEC, agreements which are towards creation of entities by means of mergers/ acquisitions/ Combinations, practices that amount to abuse of dominant position, etc. The CCI is the regulator in this sector, that has been established in terms of the Act.

41. Section 3 deals with Anti-Competitive agreements and prohibits parties from entering into agreements which cause or are likely to cause an AAEC within India. Section 4 deals with the abuse of dominant position and prohibits any entity from indulging in practices which constitute the same. Sections 5 and 6 of the Act regulate Combinations. and outlines the scope of what constitutes a Combination, as also prohibit any person/entity from entering into Combinations which cause or are likely to cause an AAEC within the relevant market in India.

42. Section 5 of the Act of 2002, lays down the conditions as to when an acquisition would become a Combination. In order for any Combination to be valid and legal it should not have any AAEC within the relevant market

in India. If any Combination is contrary to Section 6(1) of the Act, it would be held to be void. Section 6(1) reads as under:

“6. Regulation of combinations - (1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.”

43. In order to ensure that a process, by which a Combination is effected, is not interdicted in any manner, notice shall be given by the acquirer to the Commission for Approval under Section 6(2) of the Act. According to Section 6(2A), the Combination, would come into effect either after 210 days have lapsed since the date of notice, or upon an order being passed by the CCI under Section 31 of the Act, whichever is earlier.

44. Upon receiving notice of the Combination, the CCI conducts its investigation under Sections 29 and 30 of the Act. The various steps involved in approving a Combination are:

- a. The CCI first examines the matter and upon arriving at a *prima facie* conclusion that the Combination is likely to cause an AAEC within the relevant market in India, issues notice to show cause to the parties to the Combination as to why an investigation should not be conducted.
- b. Once a response is received from the parties, a report may be called for from the Director-General as per Section 29 (1A).
- c. Within seven days of receiving the response from parties or the report from the DG, whichever is later, the parties to the Combination may be directed by the CCI to publish the details of the Combination so as to receive information, knowledge and

comments etc., from the public.

- d. The CCI may call for additional information from any affected person or member of the public, as it deems fit, by asking them to file written objections.
- e. If the CCI is satisfied --
 - that there is no AAEC, it approves the Combination under Section 31 of the Act; or
 - if the commission is of the opinion that it has an AAEC, then it can direct that the Combination shall not take effect; or
 - It can also direct modification of the said Combination to reduce the AAEC.

45. Insofar as modification is concerned, parties can also suggest modifications in the Combination to ensure that AAEC is reduced, pursuant to the approval of the Combination. The CCI then reviews the Combination in terms of the modifications proposed, and after coming to the conclusion that there is no AAEC, it can approve the Combination. The entire process of approval of the Combination has strict timelines and has to take place as per the statute, within a period of 210 days. The final order is passed by the CCI under Section 31 of the Act. In the final order, the CCI can also prescribe proper timelines for implementation of the remedial measures as may be contained in the Approval Order.

46. In order to regulate the procedure relating to Combinations, detailed Regulations have also been enacted by the Central Government, being the '*Competition Commission of India (Procedure in Regard to the transaction of Business relating to Combinations) Regulations, 2011*'. As per the said Regulations, a Combination means and includes any Combination as

described in Section 5 of the Act. Combination includes one which is yet to come into existence as also one which has already taken effect. However, those Combinations or categories of transactions covered by Schedule I of the Combination Regulations of 2011, are ordinarily deemed to be not likely to have an AAEC. Such Combinations are also termed as '*Green Channel Combinations*'.

47. Under Reg. 27 of the Combination Regulations, the CCI can appoint an independent agency, usually known as the *Monitoring Agency*, to oversee the working of the combination, as also the implementation of any modifications which may be directed by it. The Agency appointed under Reg. 27 is required to submit its report to the CCI upon completion of the actions required for carrying out the modification.

48. A conjoint reading of the provisions of the Act of 2002, relating to the Combinations, as also the Combination Regulations of 2011, shows that all Combinations would require to be approved by the CCI, unless they fall in the exempted categories specified. In respect of a Combination, the CCI has three options, i.e.,

- (i) to approve the Combination;
- (ii) to reject the Combination; or
- (iii) to suggest modifications.

In respect to the third category, the CCI can appoint a Monitoring Agency to oversee the implementation of the modifications and, thereafter, pass appropriate orders/directions in terms of the provisions of the Act and the Combination Regulations.

49. The present petition is an offshoot of the approval of a Combination under section 5 of the Act of 2002, between two major players in the

Electrical & Automation industry, namely Schneider on the one hand and the E&A business of L&T on the other. Schneider decided to acquire the E&A business of L&T and sought approval of the CCI under Section 5, where CCI has granted approval to the same, subject to modifications. Thus, the Combination herein falls under category (iii) above.

(ii) Approval Order dated 18th April 2019

50. The background of the Approval Order granted in this case is that a notice seeking approval of the Combination was filed before the CCI on 25th May 2018 by Schneider and MacRitchie Investments Private Limited, which were the acquirers in the proposed Combination. The CCI found substantial defects and information gaps in the said notice in terms of the Combination Regulations. Accordingly, the acquirers were directed to file a fresh notice after rectifying the defects and information gaps, and a fresh notice was filed by the acquirers on 16th July, 2018. The CCI thereafter, in terms of the Combination Regulations, sought further information/ documents from the acquirers vide letter dated 27th July 2018, as also the various competitors and customers of the parties, vide letters dated 9th August 2018 and 27th August 2018. Considering that Schneider and L&T were the topmost market shareholders in the E&A business, the CCI formed a *prima facie* opinion, that the Combination is likely to have an AAEC in the LV Switchgear business. The said observation of the CCI reads:

“11. On a preliminary assessment of the market position of the Parties on the basis of their market share, concentration levels (HHI), entry conditions, nature of distribution network and innovation, etc., the Commission was of the prima facie view that the Proposed Combination is likely to result in

appreciable adverse effect on Competition. The Commission directed the Secretary to issue notice to the Acquirers under Section 29(1) of the Act. Accordingly, a notice dated 3rd October 2019 was issued to the Acquirers to show cause in writing as why investigation should not be conducted in the matter.”

51. Various solutions were then proposed by the parties in order to remedy the apprehensions raised by CCI. The details of the same were also published for public comments. The CCI, after analysing the comments and market investigation that was conducted, as also the various remedies proposed by the companies, directed that further modifications would have to be carried out in the Combination, for it to be approved, vide letter dated 16th January 2019. In response, amendments were filed by acquirers under section 31(6) of the Act of 2002, stating that the modifications proposed by the Commission are disproportionate and the potential concerns of competition could be addressed by alternative remedies.

52. On 18th April 2019, the CCI considered the alternative remedies proposed by the parties and allowed the said modification proposed by Schneider, in terms of their submissions, in order to address the AAEC. The CCI passed the Approval Order on the said date holding that:

“91. The Commission notes that the primary purpose of remedy is to preserve the present independent economic options/ choices available to the consumers that would be lost because of the Proposed Combination. In the facts and circumstances of the case, the Acquirers have demonstrated that the LV switchgear players are multi-product firms and carving out specified product business alone may lead to inefficient outcomes and the purpose of the remedies proposed by the Commission could be

achieved through alternative commitments. Given that white labelling is an industry practice with respect to several LV switchgear products, the Commission is of the opinion that the proposed white-labelling arrangement coupled with transfer of technology would strengthen competitor(s) availing such services. The distribution related remedies would further enable an easier access to the distribution network. Any player with a vision to expand its business in the five products as well as leverage such position in the overall LV switchgear business could achieve a commendable position in the industry and act as a viable competitor to the Combined Entity as well as other players. With quality products of L&T and access to wider distribution network, the beneficiaries of the white labelling arrangement could also establish their brand in the market. The modifications proposed by SEIPL would provide the competitors with an opportunity to strengthen their portfolio of products and increase the viability of their own brand in a sustainable manner without incurring significant capital investment and enable them to become a competitor as credible as L&T. Thus, the modifications are expected to maintain the existing level of competition in the relevant markets through creation of a viable, effective, independent and long-term competitor(s).

92. The Acquirers have further suggested that they would also adopt a pricing mechanism whereby the average selling price of the six high market share products would not exceed the average net selling price of L&T for the preceding year. While this would not act as a price capping arrangement in every sale conducted by SEIPL, it is required to ensure that the average selling price of the six high market share products does not exceed the limit prescribed. The Acquirers have further offered remedies in relation to R&D, minimum export commitment and non-

rationalisation of L&T products. The Acquirers have claimed that these remedies would supplement the objective and purpose of preserving effective competition in the relevant markets as was the case before the proposed combination. The details of the remedies and monitoring mechanism is enclosed as Annexure A.

93. It is observed that the Proposed Combination has been approved subject to the Compliance of the modifications offered by the Acquirers that are aimed at alleviating the appreciable adverse effects on competition discussed in the foregoing section. Thus, the remedial modifications offered and accepted are to be interpreted purposively to give effect to the objectives of offering them. Thus, SEIPL and /or its affiliates shall not make any commercial offer or engage in a dealing with respect to any or all of the LV switchgear products that has the effect of diluting the effect and /or objectives of the modifications offered by the Acquirers. Such conduct besides attracting proceedings for breach of modifications would also render the concerned person(s) liable to be proceeded against under the relevant provisions of the Act including Section 4 of the Act."

53. The remedies which were offered also required constant monitoring, and accordingly, in terms with Regulation 27 of the Combination Regulations, M/s. Moore Singhi Advisors LLP was appointed as the independent Monitoring Agency by the CCI. The obligations of the MA, according to the Approval Order, were to ensure that the responsibilities and modifications which were finalised by the CCI were carried out and complied with by the parties in order to neutralise the AAEC. Thus, the MA had to supervise the steps taken in compliance of the Approval Order.

54. The remedies which were accepted by the CCI in the Approval Order, and which were to be monitored by the MA, are as under:

- i. Sharing of books, accounts, management personnel, facilities, data, confidential information, etc., by Schneider with the MA, as stipulated in paragraph A of Annexure A to the Approval Order.
- ii. **White Labelling**, i.e, a process by which Schneider's competitors would be strengthened, in order to enable them to compete more effectively in the Indian market.
- iii. **Granting of non-exclusive technology transfer licence** for a period of 5 years from the expiry of the White Labelling period, to a single third-party.
- iv. Export obligations in relation to a percentage of the installed capacity of the products in question.
- v. Embargo on replacing or increasing the number of distributors, and amendments to Schneider's Distributorship Agreements and Commercial Policy to remove any barriers which encourage *de facto* exclusivity.
- vi. Pricing remedies under which, a cap was fixed on the net selling price of the products in question for 5 years from the date of closing.
- vii. Allocation of minimum Research and Development Funds for 5 years, to be spent in India in the last 3 years prior to Closing, and to maintain stable Research and Development headcount, in line with the existing headcount as on the date of Closing, of L&T in India.
- viii. Non-rationalisation of L&T's LV switchgear products for a period of 5 years from the date of Closing, in the Indian market.

55. The present petition, is concerned with two of the said remedies enumerated above i.e., White Labelling, and the consequential non-exclusive technology transfer licences which were to be given. The relevant paragraphs of the Approval Order relating to these obligations are set out below:

“B. WHITE LABELLING

104. SEIPL undertakes to allocate to third-party LV switchgear manufacturers, which in the Commission's opinion need to be strengthened to compete more effectively in the Indian market (excluding ABB and Siemens and their successors) white labelling product manufacturing services for the Five Products of L&T owned and manufactured by L&T solely for products to be sold in the Indian market, for product ranges existing as of the date of Closing.
105. SEIPL undertakes to allocate for a period of 5 years from the date of Closing up to *** of the installed capacity for each of the Five Products of L&T, for the product ranges existing as on the date of Closing, which are owned and manufactured at L&T's plants as on the date of Closing. Further, in the event SEIPL increases the installed capacity for the Five Products of L&T at L&T's plants, then SEIPL undertakes to proportionately allocate up to *** of the increased installed capacity towards the white labelling remedy (which includes proportionate export increase for the maximum extent of *** of the increased installed capacity), for a period of 5 years from the date of Closing.
106. If SEIPL exports up to *** of the installed capacity for each of the Five Products of L&T which are owned and manufactured at L&T's plants as on the date of Closing, then the annual installed capacity allocated for white labelling above will be reduced proportionately to the extent of such exports for such year on a set-off basis.
107. The white labelling remedy would also ensure that the

entity who is availing the white labelling product manufacturing services will also receive the benefit of the upgradation of the Five Products (if any, based on the continuous R&D efforts of SEIPL, post the Proposed Combination), during this period of 5 years.

108. *In the event that there is no demand for white labelling and/or export, whether partial or up to the full allocated ** installed capacity, despite the use of commercially reasonable efforts of SEIPL consistent with the obligations of the order of the Commission, for the Five Products of L&T from all L&T plants where such products are manufactured, SEIPL undertakes that it will intimate the Commission, along with the measures taken by SEIPL to export and offer white labelling product manufacturing services, of its intention to use such capacity for any other purpose, ** month prior to using this capacity for any other purpose.*

109. *In this regard, SEIPL shall:*

109.1. *Within a period of ** months from the date of the Order of the Commission, under the supervision and monitoring of the Monitoring Agency, the first EOI will be published in 4 major newspapers, host the EOI on SEIPLs website and send the EOI to

*****.*

109.2. *Within a period of ** months from the date of publication of the EOI, the interested third-party LV switchgear manufacturers are required to respond to the EOI.*

109.3. *Within a period of ** months from the date of the Closing, submit details of the installed capacity for each of the Five Products of L&T which are owned and manufactured at L&T's plants, to the Monitoring Agency along with requisite documents as may be required by the Monitoring Agency;*

109.4. *SEIPL shall, under the guidance and supervision of the Monitoring Agency, activate an online portal for the management of the EOI process and to facilitate*

*evaluation of the interests received from third-party LV switchgear manufacturers. The weblink to the online portal will be provided in the EOI. Interested third-party LV switchgear manufacturers shall have the option to submit their response to the EOI for the white labelling product manufacturing services at the online portal within a period of ** months from the date of publication of the EOI, Further, the Monitoring Agency shall be provided access to the online portal.*

- 109.5. The interested third-party LV switchgear manufacturers are required to respond to the EOI within a period of * months from the date of the EOI being published. Thereafter, SEIPL shall within a period of ** months from the expiry of the period provided to the third party LV switchgear manufacturers to respond to the EOI, negotiate the terms of the white labelling agreement with the interested third party LV switchgear manufacturers.*
- 109.6. Within *** month post the period of negotiation of the terms of the white labelling agreement (as set out 109.5 above) and prior to execution of the white labelling agreement, SEIPL shall submit to the Commission the draft of the white labelling agreement along with the details of interested third party LV switchgear manufacturers.*
- 109.7. SEIPL will provide a copy of such executed agreement to the Monitoring Agency within a period of ** days from the date of the execution.*
- 109.8. Submit details of receipt and fulfilment of orders for white labelling product manufacturing services received from third-party LV Switchgear manufacturers including returns, if any, on a ***** basis to the Monitoring Agency for a period of 5 years from Closing; and*
- 109.9. Provide the white labelled products to the third-party LV switchgear manufacturers with whom SEIPL has entered into a white labelling supply agreement at a price which is equivalent to ***** SEIPL shall submit a certification from a*

*cost accountant to the Monitoring Agency that the white labelling products are supplied at ***** on a ***** basis for a period of 5 years.*

110. In order to be eligible for the white labelling product manufacturing services, the third party LV switchgear manufacturers must fulfill the following criteria:

110.1. The third-party LV switchgear manufacturer shall not have any material financial links (i.e., financial links amounting to at least 5% of SEIPL's or MacRitchie's (as the case may be) revenue in a requisite financial year) or structural links in India (whether directly or indirectly) with the Parties;

110.2. The third-party LV switchgear manufacturer shall have the financial resources to avail the white labelling product manufacturing services to become a viable and active competitor to SEIPL;

110.3. Siemens and ABB and their successors shall be excluded from availing the white labelling remedy; and

110.4. The third-party LV switchgear manufacturer shall not have any Investment in/ by any entity in India (whether directly or indirectly) with any party that has been disqualified in paragraphs 110.1 to 110.3 above.

C. NON-EXCLUSIVE TECHNOLOGY LICENSE

111. SEIPL undertakes to provide a mutually acceptable, non-transferable, non-sub licensable, royalty bearing non-exclusive technology license for a period of 5 years from the expiry of the white labelling remedy period, to a single third-party that avails of white labelling for any of the Five Products owned and manufactured by L&T from SEIPL which:

111.1. Has white label offtake for at least 3 continuous years of the product for which it seeks the technology license; and

111.2. Has an average annual offtake of at least 10% of the installed capacity of such individual product for white labelling for the period of the white labelling

remedy.

112. SEIPL shall to provide a mutually acceptable, non-transferable, non-sub licensable, royalty bearing non-exclusive technology license solely for manufacture and sale in India for the relevant products. The technology license shall be for product applicable patents and copyrights. No technical assistance or manufacturing assistance will be provided by SEIPL throughout the duration of the technology license.

113. Such non-exclusive technology license will be provided for only those particular product ranges and SKU's for which the licensee had white labelled from SEIPL and provided that the licensee meets the stipulated conditions mentioned above. SEIPL, shall provide the non-exclusive technology license at a reasonable commercial royalty rate.

114. In this regard, SEIPL shall-

114.1. Include in the EOI that any single third-party will be eligible to be considered for a non-exclusive technology license at the end of the 5-year period provided for white labelling in accordance with the terms and conditions mentioned above;

114.2. At the expiry of the 5-year period provided for white labelling product manufacturing services, enter into a mutually acceptable, non-transferable, non-sublicensable, royalty bearing non-exclusive technology license agreement for a period of 5 years with a single third-party based on the eligibility requirements as set out above;

114.3. Submit the name of the single third-party who will be given the license and the draft of the non-exclusive technology license to the Commission for its approval; and

*114.4. Submit to the Monitoring Agency a copy of the executed nonexclusive technology license agreement within ** days from the date of execution.”*

56. The purpose of directing White Labelling and technology transfer as

two of the remedial measures was to remedy the fact that CCI found AAEC, upon its investigation of the Combination. The CCI found that the entity created upon this Combination would be a dominant player in the category of products being dealt in by the combined entity. The third player would have been a distant third player and the market share of the combined entity was expected to be more than 50-60%. Thus, the CCI accepted one of the remedial measures suggested by the acquirers, i.e., Schneider, for putting in place White Labelling Arrangements for a period of five years, followed by the technology transfer license to one party.

(iii) **White Labelling remedies/ technology transfer and the impact of the same in the context of the present case.**

57. Generally speaking, all products which are manufactured depict the brand and logo of the manufacturer, on the product. Any product which does not prominently depict the brand and the logo is usually termed as a 'plain packaging' product. However, 'White Labelling' on the other hand, is a unique arrangement wherein the products are manufactured by one manufacturer and are passed on to another manufacturer/distributor without a brand or a logo on it. The latter manufacturer/distributor, can then affix its own brand and logo and sell the said product, as its own. This mechanism ensures, purportedly, that the product of the same quality is being made available to the consumer from two different sources i.e., the manufacturer of the product and the second entity (latter manufacturer/ distributor), which is selling the product – so as to provide for the same level of competition.

58. White Labelling as a remedy in reducing the AAEC is expected to equalise the products from the dominant combined entity, with the products sold by various other entities in the relevant market. This is expected to

ensure that when a Combination results in an unequal market share position for the combined entity, the said entity is not able to control the market by completely eliminating the other competing manufacturers.

59. White Labelling (also termed as Brand Labelling) as a measure to reduce AAEC, found a mention, in the case involving **ABB / General Electric Industrial Solutions, Case: M.8678**, which was before the European Commission. The said case also involved a Combination of switchgear makers which included the companies involved in the present case, namely, Schneider, Eaton as also ABB and Siemens, which was excluded in the present case. The European Commission referred to Brand-Labelling arrangements, which are prevalent in the LV market, and observed as under:

“(34). It is indeed common industry practice for manufacturers of LV products to engage in brand label agreements to source certain specific products from other manufacturers in order to fill gaps in their portfolio and be able to offer the widest range of products to downstream customers under their own brand(s)”

.....

(104) However, the Notifying Party submits that the Proposed Transaction will not give rise to conglomerate concerns for the following reasons: (i) the majority of LV products offered by GEIS in the EEA are already part of ABB's product offering prior to the Proposed Transaction; (ii) the merged entity will continue to face competition from a large number of strong competitors, such as Schneider, Siemens and Eaton, who are able to offer a comparable, or even broader, range of products; (iii) other competitors can also enter into teaming arrangements, such as brand label agreements, in order to expand their product portfolio; and (iv) the merged entity

will have no "must-have" products that it could leverage to increase sales of other products in its portfolio.

.....

(108) Third, the responses to the market investigation supported the Notifying Party's view that it is common in the industry to enter into brand label agreements to complete ones product portfolio. The majority of competitors responding to the market investigation stated that they enter into brand label agreements, as buyers, sellers or both, in order to fill gaps in their product portfolio. In fact, GEIS is also itself active in a number of product markets by way of brand label agreements."

60. In the present case, the Approval Order considered White Labelling Arrangements, which were suggested by Schneider as one of the remedial measures to arrest the AAEC, as it was found that there were several Indian manufactures who could get eliminated due to the dominant position in which the combined entity could place itself. Thus, the CCI directed that the combined entity would manufacture five products of L&T for sale in the Indian market. The said products would be allocated for a period of 5 years from the date of closing and the allocation was to be based upon the installed capacity of L&T, for the said 5 products, as contained in the Approval Order.

61. To implement the White Labelling remedy, EOIs were to be called from various interested entities, in this case LV Switchgear manufacturers. A portal was to be activated for the purpose of management of the EOI process and to facilitate evaluation upon the third-party manufacturers submitting their responses, and upon the same being evaluated, negotiations would commence with the said manufacturers. A Draft White Labelling Agreement was to then be prepared along with the list of the interested third

party manufacturers. After execution of the White Labelling Agreements, the products manufactured would be supplied by Schneider to the third-party manufacturers, at a fixed price. As per the agreement, such supply would continue for a period of five years.

62. At the end of the five-year period, Schneider would have to enter into a non-transferable, non-sub-licensable, non-exclusive technology transfer license agreement for a period of five years from the date when the White Labelling remedy period comes to an end. Such a technology transfer license would be entered into with only one third party, who would have availed of the White Labelling remedy for any of the five products and would have implemented the White Labelling Arrangement for a period of three continuous years, in terms of paragraph 111 of the Approval Order. The said technology transfer license agreement is meant to enable the said third party to also acquire capabilities in respect of the latest technology and the implementation thereof, within its own manufacturing plant.

63. Thus, White Labelling Arrangements for a period of five years, coupled with a technology transfer license agreement with at least one party, are the initial remedial measures that were put in place vide the Approval Order, to neutralise the AAEC upon approving the Combination in question.

64. It is this process that Eaton seeks to be included in, as a part of its long-drawn battle with Schneider, and the order passed by the CCI in respect thereof, is the subject matter of the present petition.

(iv) Eaton's submissions in response to the Expression of Interest

65. Upon the passing of the Approval Order dated 18th April 2019, the

MA invited EOIs for availing of White Labelling services on 5th August 2019. The said invitation for submission of EOI was sent to the Petitioner-Eaton. As per the said invitation, those parties who were interested were to respond to the EOI by submitting their details on a specific portal link, within two Months from the date of publication i.e., by 5th October, 2019. The instructions given to the interested parties reads as under:

“Interested LV switchgear manufacturers are requested to respond to this invitation for expression of interest by submitting their details at <https://www.schneider-electric.co.in/en/about-us/whitelabelling/whitelabelling.jsp> by 5th October, 2019 i.e., 2 months from date of publication of EOI. Specific product ranges available for white labelling will be shared with interested parties post registration at the link set out above.

For further details please contact us at whitelabell.support@se.com”

66. On 7th August, 2019 the final EOI was attached and sent to Eaton. As per the EOI, the following steps were to be completed by those parties who wished to express their interest:

Step 1: Opening the SEIPL website homepage and clicking on the link of the advertisement inviting the expression of interest on this page, and registering there;

Step 2: Submitting the documents as mentioned on the portal via email to whitelabel.support@se.com.

67. The direction for submitting documents was specifically mentioned on the portal, which reads as under:

“Kindly email following documents to whitelabel.support@se.com:

1. Annual Audited financial statement (P&L and Balance Sheet, Cash flow, Schedules and Notes) for the preceding 3 (Three) years 2016, 2017 and 2018.
2. GST registration certificate
3. PAN number of the company
4. Solvency Certificate.

The above-mentioned documents should be sent latest by 5th Oct 2019 to successfully complete the registration process. Missing documents can result in incomplete applications and may result in disqualification. To submit the documents, kindly use the same email id as filled in the form by the applicant.

68. The Petitioner, in terms of the EOI, registered itself on the portal, however, the documents as required on the portal were not submitted. The deadline of 5th October, 2019 passed and Eaton did not even check as to whether its EOI was registered and was taken on record or not. Almost 50 days later, on 25th November 2019, an email was written by Eaton at the EOI support email address. The said email when perused, clearly, gives the impression that the EOI was fully completed and submitted on 26th August, 2019. The extract of the said email reads as under:

“My name is Rajesh Kumar responsible for Strategy and Marketing function for Eaton Electrical Sector. Apropos the snap shot below on white labelling for L& T LV Swgr, we are eager to hear next course of action against our request for White labelling which was submitted on 26th Aug 2019. Please do get in touch with the undersigned or let me know the right contact for further follow up. Thanks in advance.”

69. On 27th November, 2019, Schneider replied to the said email and stated that all applicants had to respond to the EOI, and after completing the

registration process on the portal, they had to supply all documents as mentioned in the portal by 5th October, 2019. However, Eaton had only responded to the advertisement for EOI by registering on the portal, and had failed to submit any documents. The relevant extracts from the said email dated 27th November 2019 sent by Schneider to Eaton are set out below:

“7. However, during this period, Eaton had only responded to the advertisement for invitation of expression of interest on the online portal for the registration process in terms of paragraph 1 (a) above. Further, Eaton did not submit any of the supporting documents to Schneider in terms of paragraph 1 (b) above within the 2-month period (i.e., from 5 August 2019 to 5 October 2019). As such, Eaton did not complete its registration process for availing the White Labelling Remedy from Schneider and cannot be considered as a valid Applicant.

8. Please note that the 2-month period (i.e., from 5 August 2019 to 5 October 2019) was provided on a parity basis to all interested Applicants to register their interest and complete the registration process (including the submission of supporting documents) for such interest to be treated as a valid and complete registration. Accordingly, in order to maintain a fair and transparent process in relation to the White Labelling Remedy and registration process, Applicants who failed to complete the registration process within the allotted time have been disqualified. In light of the above, and considering that Eaton did not submit any of the supporting documents required for completion of the registration process, Eaton cannot be considered as a valid Applicant and stands disqualified from availing the White Labelling Remedy from Schneider in terms of the Order.”

70. Thus, Eaton was informed by Schneider that it was disqualified as it

had not submitted all the relevant documents, in terms of the EOI and as required on the portal. It is not in dispute that the said documents had not been submitted, at that stage, at all.

71. On the same day i.e., 27th November, 2019 - Eaton sought to submit the required documents, now for the first time, by email. Interestingly, in the email dated 27th November, 2019 the reasons given by Eaton for not submitting the required documents are as under:

“This has reference to your response dated 27th Nov 2019 to our mail dated 25th Nov 2019 on EOI published on Schneider Electric Website for white labelling of L& T LV products. We regret due to technical issues the documents did not reach you within stipulated time.”

72. Thus, the impression sought to be created at this stage was that there were some ‘technical issues’ due to which the documents did not reach on time. Eaton further claimed that the documents sought on the portal were basic documents which any organisation would have, and it therefore requested that the documents be accepted. This email proves, beyond any doubt, that Eaton had failed to respond to the EOI in the terms specified therein, and had for whatever reasons, merely stopped after registering itself and not submitted a single document as required.

73. Again, on 2nd December, 2019 Eaton wrote to Schneider arguing that due to a technical problem the required documents could not reach Schneider within the prescribed time limit, and reiterated its contention that documents required were basic documents and that its EOI be considered. This was followed up by reminders to Schneider and to the MA on 3rd December, 2019 as well. The MA responded on 4th December 2019, that the

request was being reviewed and that they would revert back to Eaton.

74. However, vide a detailed email dated 5th December, 2019, Schneider informed Eaton that the White Labelling remedy had moved onto the next stage and no exception could have been made in respect of Eaton.

75. Since Schneider rejected Eaton's request, Eaton wrote to the CCI on 9th December 2019, seeking urgent directions and setting out the entire chronology of events. It again claimed that it was unable to *upload* the documents due to '*technical issues*', though registration had been completed. Accordingly, Eaton sought the intervention of CCI in this matter.

76. From the above chronology of events, the fact situation that emerges is as under:

- i) Eaton received the EOI in time.
- ii) Eaton registered itself on the portal for submitting the EOI.
- iii) None of the documents that were required to be submitted by email, were submitted by Eaton within the deadline. In late November, Eaton sought to submit the documents. The said request was not acceded to.
- iv) The reason given by Eaton for not submitting the said documents was that there was a technical glitch.

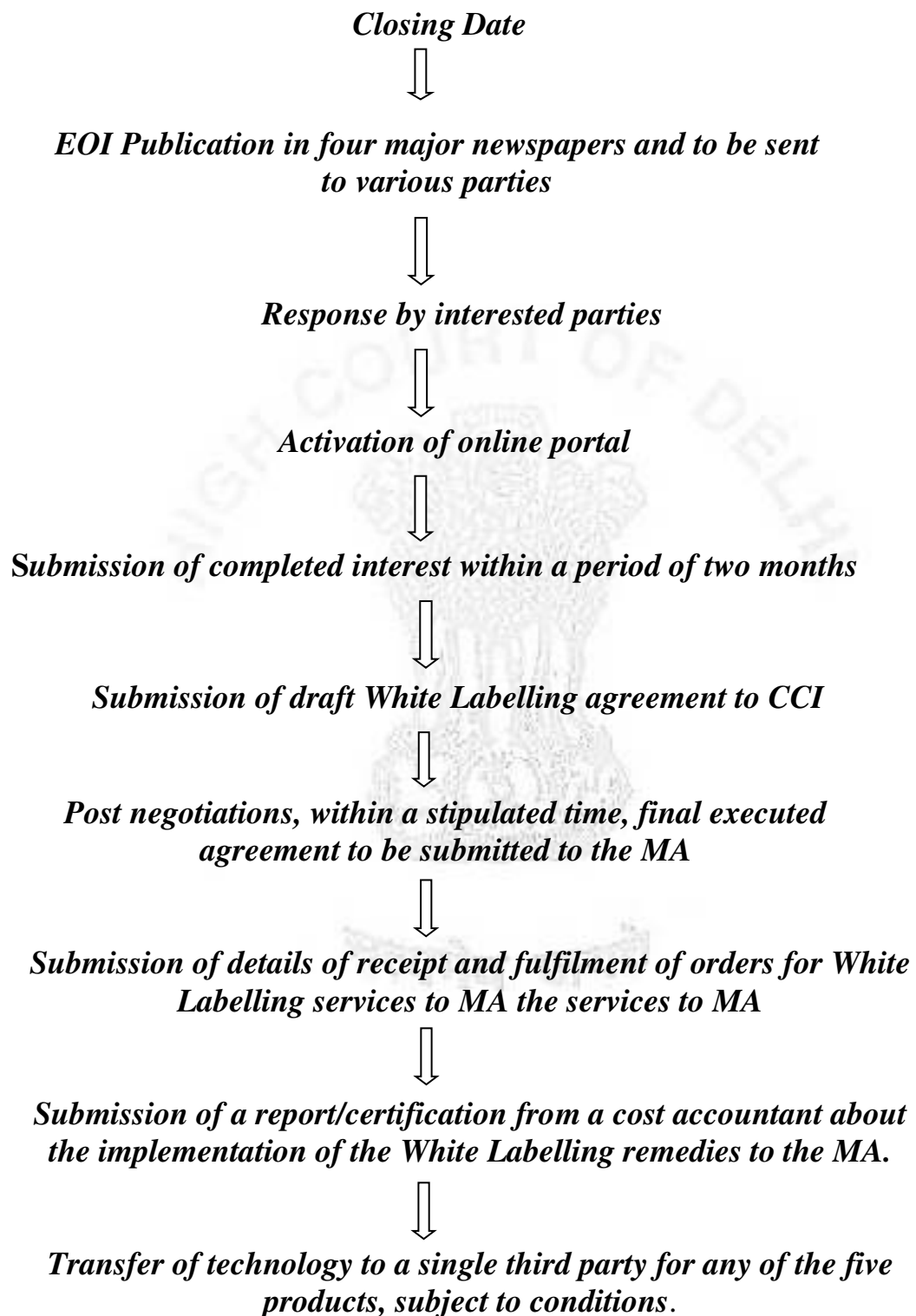
77. A reading of the emails and the correspondence shows that Eaton did not initially clarify on whose end the technical glitch was. However, as has become evident later, and as is now admitted by Id. Counsels appearing for the parties, the alleged technical lapse was also at Eaton's end and not on Schneider's portal. This fact was not candidly admitted by Eaton in its correspondence, and an impression was sought to be given that there was a

glitch in the portal, because in none of these emails and correspondences did Eaton clarify as to where the technical glitch was. The clear picture that has now emerged is that Eaton merely registered and did not submit the documents in time, for no justifiable cause. The effect of the non-submission of these documents would be considered later hereunder.

(v) **Progress in White Labelling Arrangements on Schneider's part, post the grant of Approval Order, leading to the CCI's impugned order**

78. Under the original Approval Order, specific timelines were provided in respect of the remedy of White Labelling. As discussed in issue no. (iii) above, White Labelling was one of the remedies that was approved by the CCI as a precondition for granting the approval for the Combination. The CCI was clearly of the opinion that third party LV Switchgear manufacturers needed to be strengthened in order to enable them to compete effectively against the Combination.

79. According to the Approval Order, in respect of the five products of L&T that were being manufactured by the LV Unit which was being merged into Schneider, the White Labelling remedy was to be implemented, for a period of 5 years. The quantities were clearly mentioned in paragraphs 105 & 106 of the Approval Order which has been extracted above. The benefit of upgradation of the five products was also to be given during the said period of five years. The stages of the said remedy, as stipulated in the Approval Order, are as under:



80. Thus, as per the Approval Order, the entire White Labelling process was to be concluded in a timely manner, however, for whatever reasons which are not the subject matter of the present petition, there has been a delay.

81. Vide letter dated 9th October, 2019, Schneider's counsels had updated the CCI and MA about the details of all the parties who had submitted their responses to the EOI. As per the said communication there were three categories of entities:

Category 1: Five entities who had registered and submitted all the supporting documents.

Category 2: Three entities, which had registered along with either incomplete, or missing documentation.

Category 3: Two entities which had merely registered, but not supplied any of the supporting documents whatsoever.

In terms of the said communication, the Petitioner- Eaton fell into the Category 3, as it had not submitted any supporting documents.

82. Vide letter dated 18th November, 2019 submitted by Schneider's counsels to the CCI, Schneider informed CCI that in respect of entities which are falling in Category 2, further documentation, etc. had been received. Thus, the said entities were to be included in the White Labelling negotiation process. An extension was accordingly sought by Schneider till 5th March 2020, in respect of the timelines prescribed in Paragraph 109 of the Approval Order, to conclude the negotiation process, and till 5th April 2020, to submit the Draft White Labelling Agreement.

83. This application for extension was considered by the CCI and was

forwarded by the CCI to the MA, vide email dated 6th December 2019, for observations and necessary guidance to the parties to the Combination. The MA then sought further clarifications from Schneider in respect of its extension application and the negotiations *qua* the White Labelling Arrangements, vide its email to Schneider dated 14th December 2021. Schneider, vide its email dated 19th December 2019, provided the said clarifications and also gave all the details in respect of the applications received *qua* the White Labelling arrangements. Schneider submitted to the MA that the negotiations for the White Labelling Arrangements were taking place in different phases. Overall, Schneider gave a deadline of 5th March, 2020 for finalising the eligible applicants, and of 5th April 2020, for signing of the Draft White Labelling Agreement.

84. In respect of the MA's specific query *qua* Eaton, Schneider submitted to the MA that Eaton had submitted only some documents on 4th December, 2019, and since it was grossly in violation of the timelines prescribed, the MA ought not to permit Eaton to participate in the White Labelling Arrangements. Schneider also argued that it had already proceeded to the next stage of the remedy of providing access to a tool called "ARIBA tool" to all the valid applicants, who were seven in number. Thus, since, Schneider had already moved on and had reached an advanced stage of negotiations with the eligible entities, which had submitted valid applications, it submitted to the MA that permitting Eaton at this stage would have been unfair and discriminatory, as Eaton was itself to blame for its non-submission of documents.

85. The MA, having considered Schneider's position and Eaton's position, recommended to the CCI, vide an email dated 26th December 2019, as

under:

“An extension upto 5th March 2020 may be given to SEIPL to comply with all stipulated actions. SEIPL should allow Eaton to participate in the process provided Eaton submits all necessary documents immediately”

86. Thus, the MA recommended that the extension ought to be granted to Schneider till 5th March 2020. Secondly it recommended that Eaton should also be allowed to participate in the process, provided the necessary documents were submitted by Eaton immediately. Therefore, the CCI now had to consider both, the request for extension by Schneider as also the representation of Eaton, in the light of the recommendations made by the MA.

87. After considering MA's recommendations, CCI, vide its first order dated 7th January 2020, was of the view that wider participation is desirable and thus, Schneider was directed to allow the participation of Eaton in the White Labelling process. The operative portion of this order of the CCI reads as under:

“6. The Commission notes that purpose of white labelling services ordered by the Commission vide Order dated 18th April, 2019 of the Commission passed under Section 31(7) is to address to the potential harm to competition and the same cannot be seen as mere commercial arrangement between Schneider and third parties. The Commission specifically noted that the remedial modifications offered and accepted are to be interpreted purposively to give effect to the objectives of offering them. It was further clarified to Schneider vide letter dated 6th November, 2019 of the Commission that “the Acquirers shall further coordinate with and seek the

guidance of the Monitoring Agency to take an objective view on the third parties disqualified for the purpose of white labelling. In this regard, it is clarified that the endeavour of the Acquirer shall be to develop a customer base for white labelling so as to utilize the capacities reserved for such purpose. Further, the Acquirer shall be at liberty to consider any eligible third parties for the purpose of white labelling outside the process/ arrangement stipulated in the order dated 18th April, 2019”.

7. Given the facts and circumstances of the case, the Commission is of the view that wider participation in the white labelling process is desirable as the same is likely to result in better outcome and serve the cause of competition. Thus, Schneider is directed to allow participation of Eaton in the white labelling process.

8. MA is directed to take appropriate measures to ensure that all the applicants including Eaton are treated at par in a fair and transparent manner to arrive at appropriate commercial arrangements between Schneider and successful buyers.

9. The Secretary is directed to inform Schneider, Eaton and the MA, accordingly.”

By this order the CCI permitted Eaton’s inclusion in the White labelling process on two broad grounds – (i) to enable wider participation and (ii) in the interest of competition. CCI had taken this decision merely on the written stand of the parties and the recommendation of the MA.

88. Schneider was clearly aggrieved by this order passed by the CCI and according to Schneider the said order was passed *ex parte* and it was not given a hearing. Accordingly, it preferred a Review of the said order before the CCI, vide its application dated 31st January, 2020. The prayer in the Review application was for seeking an oral hearing in respect of the time

schedule for the White Labelling remedy, as also in respect of Eaton's inclusion. According to Schneider, Eaton was guilty of misleading the CCI, and its EOI was clearly non-compliant/ non-responsive. It accordingly sought recall of the earlier direction.

89. The CCI entertained the Review application and directed the parties to appear for an oral hearing on 12th March, 2020. After hearing the parties, the CCI also directed the parties to file their written submissions by 20th March 2020. Post this, the matter was reserved for orders. The lock-down owing to the pandemic came into effect immediately thereafter. With some delay, may be owing to the lockdown, vide the impugned order dated 24th August, 2020, CCI decided to recall its earlier order and allowed Schneider to proceed with the White Labelling process, without Eaton. The operative portion of CCI's impugned order reads as under:

"14. The primary purpose of white labelling remedy is to strengthen some of the competitors, other than the large players viz. Siemens and ABB, with a better product portfolio and thereby make them exert the competitive constraints that would have prevailed on account of the independent existence of electric and automation business of L&T. The success of the modifications would be crucial in accomplishing the objective of addressing the competition harms that would have resulted otherwise from the combination. It is the responsibility of Schneider to take all bona-fide and best possible efforts to successfully implement the modifications subject to which the combination was approved.

15. The key contention of Schneider is that there was no technical glitch at its end to receive the documents that were required to be submitted as a part of the white-labelling registration process. The relevant

instruction in the online registration process read as “The above mentioned documents should be sent latest by 5th Oct 2019 to successfully complete the registration process. Missing documents can result in incomplete applications and may result in disqualification. To submit the documents, kindly use the same email id as filled in the form by the applicant”. Schneider has further contended that Eaton has misled the Commission and obtained the impugned direction dated 7th January, 2020. On the other hand, Eaton has submitted that it was never its case that there was a technical glitch on the part of Schneider that restricted them from submitting the relevant documents. It has further stated that neither Eaton nor the Commission have ever imputed the blame for the technical error to Schneider and it is Eaton's admitted position that the technical error was at its end.

16. The Commission notes that any issue in implementation of combination modifications cannot be viewed merely as adversarial, as the purpose of regulation of combinations and imposing remedies modifications to address harm to competition are with the larger objective of preserving competition and consumer welfare. Interpretation and interventions in implementation of modifications are to be necessarily guided by the purpose of imposing them. The Commission had observed this position in the Order itself and reiterated the same again in its directions dated 24th October, 2019 and 7th January, 2020 where Schneider was even allowed to consider any eligible third parties, for the purpose of white labelling, outside the process arrangement stipulated in the Order. It is clarified that the purpose of modifications is to preserve competition rather than specifically identifying player(s) who should succeed, which is an outcome of market forces.

17. Schneider has submitted that the white labelling

process is actively underway in terms of negotiations of terms with eligible participants and the various commercial issues are being ironed out with the oversight and under intimation to and /or supervision of the Monitoring Agency. Allowing Eaton at this stage would further delay the implementation of the white labelling arrangement. Considering the material on record including the Affidavit, the Commission allows Schneider to proceed further in the white-labelling process without considering Eaton, at this stage. However, it is clarified that Schneider and the Monitoring Agency shall closely monitor the supplies under the white labelling arrangement and take proactive measures to ensure that the capacities reserved for white-labelling process are utilised to the full extent and Schneider is in compliance with the Order. If the sales under the white labelling arrangement are not sufficient to utilize the capacities reserved for white labelling purpose or such a consequences is expected apprehended, Schneider shall again invite third parties to avail white labelling services. The procedure stipulated under paragraphs 104 to 109 of the Order shall mutatis mutandis govern the fresh invitation and the actions following thereto. Eaton shall be at liberty to participate in such process.”

90. A perusal of this order clearly shows that the primary reason given by the CCI for recalling its order dated 7th January 2020, was that the negotiations with the eligible participants were actively underway *qua* the White Labelling Arrangements. The same was being supervised by the MA, and allowing Eaton at that stage, would further delay the implementation of the White Labelling Arrangements. The CCI held that Schneider should proceed without Eaton at this stage, and if the capacity reserved for White Labelling process is not fully utilised, then third parties shall again be

invited, and Eaton would be at liberty to participate at that stage.

91. Accordingly, Eaton has filed the present writ petition challenging this act of the CCI recalling its previous order dated 7th January 2020, thereby setting aside its inclusion in the White Labelling Arrangements which was directed by the said order

(vi) **Power of Review of the CCI under the Act, post the Amendments in 2007**

92. The primary contention raised on behalf of the Petitioner- Eaton is that CCI does not have the statutory power of Review and hence the impugned order, which seeks to Review the earlier order dated 7th January, 2020, is bad in law.

93. The question as to whether the CCI has the power of Review or not, is no longer *res integra* and the same has been considered in various decisions of this Court. Before proceeding to these decisions, the provisions relating to the power of Review/Recall, in the Act of 2002, are relevant to be considered and are set out below:

“ Section 37 prior to the Competition (Amendment) Act, 2007:

Any person aggrieved by an order of the Commission from which an appeal is allowed by this Act but no appeal has been preferred, may, within thirty days from the date of the order, apply to the Commission for review of its order and the Commission may make such order thereon as it thinks fit:

Provided that the Commission may entertain a review application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time:

Provided further that no order shall be modified

or set aside without giving an opportunity of being heard to the person in whose favour the order is given and the Director General where he was a party to the proceedings.”

Further, Section 38 of the Act, which allows for the rectification of orders, reads as under:

“Section 38:

(1) With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act.

(2) Subject to the other provisions of this Act, the Commission may make—

(a) an amendment under sub-section (1) of its own motion;

(b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.”

Explanation.— For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

94. It is important to note that Section 37 of the Act of 2002, was, however, repealed by Competition (Amendment) Act of 2007, and the said provision no longer exists on the statute book. It is under the now repealed Section 37 that any aggrieved person, who did not avail of the remedy of an appeal, could have sought a Review of the CCI’s order before the CCI. The CCI had to, then, compulsorily provide a hearing and make such order as it makes fit. However, the said provision has been expressly repealed now and has no application to this case.

95. Insofar as Section 38 of the Act of 2002 is considered, the same provides for rectification of a mistake apparent from the record, in respect of which the CCI could pass an order rectifying the said mistake. Such a mistake can be rectified either *suo moto*, or upon an application of the party. There need not even be a written application as the words used are “*mistake...brought to its notice*”. The *explanation* to Section 38 makes it further abundantly clear that while rectifying a mistake, the substantive part of the order cannot be amended.

96. Coming to the judgments which have discussed the power of Review of the CCI, these two provisions were discussed in ***Google Inc. and ors. v. Competition Commission of India and Anr. (2015) 150 DRJ 192 (DB)***., by the Id. Division Bench of this Court.

97. In ***Google (supra)***, the Division Bench, framed a question as to whether at the stage of Section 26(1) of the Act of 2002, the CCI has the power to Recall/Review an order directing/causing investigation. The Division Bench, after considering in detail the submissions made on behalf of the parties, held that even though while making an order under Section 26(1), as held in ***Competition Commission of India v. Steel Authority of India Ltd. (2010) 10 SCC 744***, the CCI is not required to hear the person, there can be no inference that even if a party approaches the CCI for Recall or Review, such party is not to be heard. The observations on the power of Review/ Recall of an order read as under:

“(ZN) The fact that said judgment holds that CCI is not required to hear the person complained/referred against before ordering investigation cannot lead to an inference that such a person even if approaches the CCI for recall/review of such an order is not to be heard.

(ZQ) Just like it is in the discretion of the CCI to hear or not to hear the person/enterprise complained/referred against at the stage of Section 26(1) of the Act, CCI cannot be held to be without jurisdiction to recall/review the order.

(ZR) Notice in this regard may also be taken of Section 36 which empowers the CCI to in the discharge of its functions regulate its own procedure. The same also permits CCI, even if were to be held to be in spite of exercising administrative power under Section 26(1) having no inherent power of review/ recall, to if so deems it necessary, entertain an application for review/re call.

(ZT) In our view, a mere filing of an application for review/recall would not stall the investigation by the DG, CCI already ordered. Ordinarily, the said application should be disposed of on the very first date when it is taken up for consideration, without calling even for a reply and without elaborate hearing inasmuch as the grounds on which the application for recall/review is permissible as aforesaid are limited and have to be apparent on the face of the material before the CCI. Even if CCI is of the opinion that the application for recall/review requires reply/further hearing, it is for the CCI to, depending upon the facts order whether the investigation by the DG, CCI, is to in the interregnum proceed or not.”

98. The Division Bench, thereafter, went on to observe that though the power to Review/ Recall an administrative order exists with the CCI, such power has to be sparingly exercised and would have to be also exercised on the well-settled parameters available for Review/Recall.

99. In **Cadila Healthcare Ltd. v. Competition Commission of India (2018) 252 DLT 647 (DB)**, a 1d. Division Bench of this court again considered the power of Review/Recall of the CCI of an order passed under

Section 26(1) of the Act of 2002. The Division Bench also considered *Steel Authority of India Ltd. (supra)* of the Supreme Court and the decision in *Google (supra)* and observed as under:

“48. The distinction between a tribunal (which has powers circumscribed by statute) and a court (which has inherent powers) is well known. Where a specific procedural provision (which enabled the court to entertain and accept documents after the trial commenced) was deleted; the Supreme Court held that such legislative interdict did not affect the inherent powers. Sometimes, the court has adverted to other provisions of the Code of Civil Procedure being manifestations of the inherent power (Ref. *Budhia Swain v. Gopinath Deb*, (1999) 4 SCC 396). *Vinod Kumar (supra)* cited in *Google* was a case where the original power was exercised plainly and manifestly contrary to the rules (an adverse confidential report of which review was sought after over 9 years, was entertained by an officer incompetent to do so; the Government set it at naught). That was a case of nullity of the original order. Similarly, the cases cited in *Google (R.R. Verma v. Union of India, (1980) 3 SCC 402 and S. Nagaraj v. State of Karnataka, 1993 Supp (4) SCC 595)* cannot be read divorced from their context. In *RR Verma* the court had stated:

“We do not think that the principle that the power to review must be conferred by statute either specifically or by necessary implication is applicable to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would indeed lead to untoward and startling results.”

100. The Court in *Cadila (supra)* also went on to express concerns about the exercise of powers by the CCI for Reviewing/Recalling its own order. The relevant portion reads as under:

“52. In the Google decision, the court had relied on several other decisions which dealt with pure administrative power, or power which was statutory for which no specific power was conferred, to recall (or review). In the latter category, the Supreme Court had consistently ruled that Section 21 of the General Clauses Act 1897 applied. That provision specifically states that where a statute does not enable the recall of an order or notification, or bye law (note that all are legislative or quasi legislative statutory powers) the power to recall those exists, provided it is exercised in the same manner as in the case of the exercise of original power. This power is quasi legislative; for instance it was held in Kamla Prasad Khetan v. Union of India, [1957] SCR 1052, this Court considered the scope of Section 21 of the General Clause Act. At page 1068, the Court observed thus:

“The power to issue an order under any Central Act includes a power to amend the order; but this power is subject to a very important qualification and the qualification is contained in the words ‘exercisable in the like manner and subject to the like sanction and conditions (if any)’The true scope and effect of the expression ‘subject to the like conditions (if any)’ occurring in Section 21 of the General Clauses Act has been explained.”

53. The decisions relied on in Google in the context of exercise of power under Article 226 (of judicial review by the High Courts) or under Section 482 (inherent power of the High Court) in the opinion of this court again are inapt, because they talk of the power of High Courts and not of the same tribunal or forum which is divested of the power of substantive review or recall of its orders.

54. This court is of the opinion that though there are serious concerns which should caution exercise of

power by the CCI in terms of the Google Inc, it cannot be termed as per incurium. It would be sufficient to remember that these serious limitations exist with respect to exercise of a substantive power of recall, which can be justifiably used in rare circumstances where the fraud is egregious and does not involve a detailed hearing or where the mistake is of the kind covered by Section 38. The power of judicial review exists where the authority or tribunal acts in excess of its power (illegality) or transgresses procedural regulations, is unfair or tainted with mala fides. Therefore this court holds that the impugned order which held that Google has no application to the facts of this case because in Google the DG had not filed any report; the investigation was ongoing when the petitioner applied for recall and when this court was approached. Here, the recall application was filed after the DG's report to CCI. The finding in the impugned judgment therefore is unexceptionable; it was held by the Single Judge that the -

“conclusion of this Court in Google (supra) has to be read/understood to mean a recall/review application can be filed during investigation and not after the submission of the report by the DG. This I say so once report is submitted, then an action/procedure under Section 26(5) or 26(8) gets triggered, taking the case out of the realm of 26(1) or 26(2) of the Act, [which was the position in Google (supra)]. The only remedy for the parties is to argue the report before the Commission and not on the order u/s. 26(1) as was sought to be done in the case in hand. The same is impermissible in law, inasmuch as procedure as contemplated/provided must be allowed to be gone through.”

101. Thus, the conclusion of the Division Bench in **Cadila (supra)** was that in proceedings under Section 26 of the Act of 2002, which was held to be

administrative in nature, i.e., during the course of investigation, Review/Recall application can be filed, however, only if an egregious fraud or a mistake which is covered by Section 38 exists. Apart from these circumstances power to Review/Recall does not exist with the CCI.

102. Apart from the above two decisions cited by the parties, this Court also notes that in ***Mahindra Electricity Mobility Limited and Anr. v. Competition Commission of India and Anr. (WP(C) 11467/2018, decided on 10th April 2019***), the Id. Division Bench again noticed that CCI has no power to Review its own orders post the repeal of Section 37 of the Act of 2002. The Division Bench also held that the functions performed by the CCI are administrative functions, expert functions, *quasi-judicial* functions as also adjudicatory functions. The Division Bench, further, held that if the parties have been heard once, even at the stage of imposition of penalty, it is not necessary for a hearing to be given, so long as broadly the procedure is fit and fair. The relevant observations read as under:

“78.Significantly, CCI has no power to review its orders: previously, Section 37 permitted review; however, the 2007 amendment repealed that provision; it has limited rectification power, under Section 38.

xxx

84.CCI is also amenable to judicial review under Article 226 of the Constitution of India as regards the directions it makes procedurally. For instance, if it can be shown that investigation has been launched without a reasoned *prima facie* expression of its opinion, under Section 26 (2), the CCI's orders can be corrected in writ proceedings. Similarly, in regard to conduct of proceedings during investigation (i.e. the fact gathering exercise) the jurisdiction of the High Courts to ensure fair procedure and compliance with natural justice is assured [Ref. Competition

Commission of India and Anr. v Oriental Rubber Industries Pvt Ltd. 2018 (251) DLT 137 and Cadila Healthcare Ltd and Anr. v. Competition Commission of India and Ors. 2018 (252) DLT 647].

85. In view of the above discussion, it is held that CCI does not perform only or purely adjudicatory functions so as to be characterized as a tribunal solely discharging judicial powers of the state; it is rather, a body that is in parts administrative, expert (having regard to its advisory and advocacy roles) and quasi-judicial -when it proceeds to issue final orders, directions and (or) penalties.

xxx

141. This Court has already, for reasons elaborated in the preceding section of this judgement, held that the CCI does not perform purely adjudicatory functions like in the case of deciding a list between two competing parties. It is tasked with investigating into complaints received and information provided to it by individual entities and those aggrieved by patterns of behaviour perceived to be barriers in the course of trade and business, which would have the undesirable effect of injecting anti-competitive elements. Now, this task is not a straight forward adjudicatory one. The Commission has to, through an administrative process, sift the complaint or information and arrive at an opinion which the Supreme Court has characterized in SAIL (supra) to be of —administrative nature^{ll}. With that, the CCI directs investigation into the complaint or information, by the DG. In the course of this investigation and inquiry, again not an adjudicatory function, as no rights of any party are decided or determined, the representatives of the parties as well as the officials and employees of the concerned entities which are allegedly involved in the anti-competitive practices, are examined, and wherever necessary, depositions under oath are recorded. By virtue of decisions of the courts, in this fact-gathering exercise, wherever adverse evidence or deposition is collected,

the opportunity of cross-examination is provided. The DG then analyses the material and evidence and prepares a report, stating whether the complaint is made out fully or in part. It is thereafter that the adjudicatory mode is launched, as it were. Even at this stage, the CCI may not proceed further and close the matter after hearing the parties. Conversely, if the DG in a given case reports that no further action or order is warranted after hearing the individual or the applicant as well as the parties who are alleged to be involved in the objectionable behaviour, the CCI can direct a further enquiry and thereafter proceed further in the matter with the hearing. It is only at this stage after the culmination of the investigation that the CCI enters into an adjudicatory phase. Undoubtedly, at this final stage, it decides the rights and liabilities of the parties.

xxx

200. This Court is of the opinion that the Supreme Court felt compelled to say what it did, in each of those decisions, and the long line of successive authorities, because the action taken by the executive government or the public agency was not preceded by fair procedure, that encapsulated any opportunity of hearing. Here, however, the CCI followed all the steps indicated in the statute; the DG held an inquiry, during which the petitioners were permitted participation; the consequent report and documents were shared with them, or they were given access to the record. After these, each petitioner was given full hearing which included submissions on potential orders under Section 27. It is undeniable that the petitioners also furnished written submissions. The DG's report contains an elaborate analysis of the materials found and inquired into; the CCI's order analyses the report, in the light of the petitioners' submissions. The penalty order is reasoned. Having regard to these circumstances, it cannot be said that the CCI was compelled by the statute to adopt an unfair procedure (i.e. the absence of a second specific hearing before imposition of penalty)

exposing Section 27 to the vice of arbitrariness and unconstitutionality.”

Thus, the CCI dons both hats – administrative and adjudicatory. Depending upon the nature of power being exercised, the concomitant safeguards would also have to be followed.

103. All the three decisions discussed above are in the context of proceedings under Section 26 for launch of an Inquiry by the DG. In the context of approval of a Combination, Section 31 of the Act of 2002 is the relevant provision which provides for various stages in which a Combination is to be approved.

104. In the present case, the Combination itself having been approved, no modification is being sought in the Combination itself. The issue that has arisen is in the implementation of the various steps, subject to which the Combination was approved. It is in the course of implementation of the Combination that certain difficulties have arisen due to the exclusion of Eaton, as it had failed to submit the requisite documents as required in the EOI. In order to decide the validity of the impugned order, this Court would have to first consider the nature of the order dated 7th January 2020, passed by the CCI on the representation of Eaton for being included in the White Labelling arrangement. Secondly the question is as to whether the said order could have been passed by the CCI, without giving notice or hearing to Schneider. The third question is whether the first order could have been Reviewed/ Recalled by the CCI, vide the impugned order dated 24th August 2020, without the specific statutory power vesting with the CCI.

105. In relation to the first question, as per Section 53A of the Act of 2002, certain orders of the CCI are appealable to the NCLAT. Orders under

Section 31 and interim orders under Section 33 are also appealable orders. However, in order to adjudicate the nature of the orders passed in the present case, the parties would have to approach the NCLAT, which is currently not constituted. Thus, there is no equally efficacious remedy available to the Petitioner.

106. Secondly, the stage at which the present dispute has arisen is the stage of monitoring of the implementation of the Approval Order. The role of monitoring is primarily carried out by the MA under broad supervision of the CCI. The MA, in this case, had received submissions of both Schneider and Eaton in respect of Eaton's exclusion from the White Labelling process. On the basis of the same the MA had given a recommendation to the CCI. The CCI had before it, the documentation and the correspondence relating to the Eaton's representation, and was seized of the representations, along with the submissions made by the parties to the MA. However, the CCI did not inform either of the parties that it was considering the representation of Eaton and did not issue any notice to parties or call upon either parties to either file written submissions or afford any opportunity for oral hearing, at the first stage of its consideration. The CCI, after receiving the MA's recommendation, directed Eaton's inclusion in the White Labelling process, vide its order dated 7th January 2020. The inclusion of Eaton under such circumstances was not merely an administrative direction but also had an *adjudicatory* or *quasi-judicial* colour to it, as it was deciding the rights and liabilities of parties, as held in ***Mahindra (supra)***. The decision substantially affected the rights of both Schneider and Eaton. Such a decision would also have implications on the entire timelines and the process of negotiations in respect of the White Labelling remedy, which was underway with third

parties. Accordingly, the CCI, ideally, ought to have informed both parties, that it was considering the representation of Eaton. The CCI ought to have afforded an opportunity to the parties to make written or oral submissions. It, however, passed the order dated 7th January, 2020 without notice to either of the parties. This itself was procedurally faulty. In the present writ petition, though, there is no challenge to this order dated 7th January, 2020, the Court cannot but observe that it was this lack of opportunity to either of the parties, that led to the Review application filed by the Schneider, leading to the impugned order, which is under challenge in the present writ petition.

107. The CCI then exercised the Review power on the application filed by Schneider, and reviewed its order dated 7th January 2020, completely setting it at naught. The reasoning of the CCI i.e., delay in finalising the White Labelling arrangements, is in stark contrast with the earlier reasoning that wider participation fits with the spirit of the Approval Order. This order too was clearly without jurisdiction as the CCI lacked the statutory power of Review, which was expressly taken away by the Legislature vide the Competition (Amendment) Act of 2007. Further, its action could not have been termed as a rectification under Section 38 of the Act of 2002, as it substantively affected the rights of the parties concerned. The order was not merely administrative in nature, but an adjudicatory order, *qua* which the power of Review could have not been exercised as the said power under Section 37, no longer existed in the statute book. In effect, therefore the impugned order was the first occasion when the CCI got the opportunity to hear both the parties and evaluate the respective merits, though under a completely incorrect exercise of the power of Review, which it did not possess.

108. The CCI, therefore, clearly adopted the wrong course of action in respect of both its orders, i.e., the order dated 7th January 2020 as well as the impugned order dated 24th August 2020. Though the CCI need not give personal hearings at every stage as held in *Mahindra (supra)*, however, where the function being performed is adjudicatory in nature, or affects the substantive rights and liabilities of parties, notice to the parties and an opportunity to advance submissions, which are written and/or oral depending on the facts of the case, ought to be afforded by the CCI.

109. In light of the above findings, it is clear that both the order dated 7th January 2020, to the extent of inclusion of Eaton, and thereafter the order dated 24th August 2020, directing the exclusion of Eaton, are not sustainable in the eyes of law.

110. Under such circumstances, the Court is confounded with the vexed question as to what the relief ought to be, especially in the light of the subsequent events that have transpired, as also the initial non-responsive nature of Eaton's offer. Thus, the relief in the present writ petition would have to be moulded /modified accordingly.

(vii) **Proceedings in this Writ Petition and the Affidavit of Schneider dated 26th July 2021**

111. In the present writ petition, vide order dated 23rd September, 2020 this Court had issued notice and observed as under:

“In the meantime, any further action taken by the respondent no. 2 pursuant to the Impugned Order shall abide by the final adjudication of this petition. In case any third party rights are being created by the respondent no. 2, the respondent no. 2 shall bring this order to the notice of such third party as well.”

112. Thereafter, the matter was heard from time to time. The interim order granted vide order dated 23rd September 2020, was directed to continue till the final disposal of the petition, on 10th February, 2021.

113. At the conclusion of submissions on 15th July, 2021, there were queries which were raised by the Court as to the timelines within which the White Labelling Arrangements had to originally adhere, and the actual position in the relation to conclusion of the said Arrangements, specifically with reference to the Date of Closing. Accordingly, on 15th July, 2021 the following order was passed:

“2. This is a part-heard matter. Mr. Avishkar Singhvi, Id. Counsel has made further submissions on behalf of Respondent No. 1. Mr. Somasekhar Sundaresan, Id. Counsel has also concluded his submissions on behalf of Respondent No.2, except on the issue as to the closing date and the details of parties with whom white labelling arrangements are being currently negotiated.

3. As per the impugned order dated 11th August 2020, one of the grounds on which the Competition Commission of India (hereinafter as ‘CCI’) has refused permission to the Petitioner- Eaton Power Quality Pvt. Ltd. from participating in the white labelling arrangement, is that there would be a delay in the process of finalizing such arrangements, if they are permitted at a late stage. Accordingly, Respondent No.2 is directed to place on record an affidavit setting out the chronology, as also the details of the white labelling arrangements which are currently being negotiated, and the timeline in respect thereof.”

114. Pursuant to the said order, an affidavit has been placed on record by Schneider, on 26th July 2021, as per which, the following facts have emerged:

- i. After the Approval Order was passed, advertisements were issued in respect of the White Labelling Arrangements and applications were received from various parties. The same were categorised into three categories, as mentioned in paragraph 81 above. Eaton was excluded due to non-submission of supporting documents, and this exclusion was challenged.
- ii. Negotiations for the White Labelling Arrangements were conducted with four parties from March 2020 onwards, and extension of timelines were given repeatedly, to provide comments on the Draft White Labelling Agreement. The extensions were sought by the said parties for various reasons. Comments of the said parties, in respect of the Draft White Labelling Agreement, were finally closed on 25th August, 2020.
- iii. The date of Closing of the Combination, relating to the acquisition of the E&A business of L&T Schneider was 31st August, 2020.
- iv. Thereafter, internal deliberations and various rounds of comments on the Draft White Labelling Agreement were exchanged from September to December 2020.
- v. In January, 2021, negotiation discussions commenced in respect of the White Labelling Agreements, between Schneider and the four parties.
- vi. Negotiations and discussions have been held with the parties in seven rounds and comments on the Draft White Labelling Agreement have been received. Discussions and negotiation calls are still on-going.
- vii. The affidavit finally states that the negotiations and discussions are

likely to conclude and the first White Labelling Agreement would be executed in six weeks from date of affidavit i.e., six weeks from 26th July 2021. However, orally, Id. Counsel for Schneider submitted that the reasonable expectation would be that by mid-September, White Labelling Agreements would be executed.

115. From the timelines, which have been stated in the said affidavit and the submissions made, it is clear that inspite of the passing of the Approval Order on 18th April, 2019, the date of closing of the Combination was only achieved on 31st August 2020, and till date, the White Labelling Agreements have not been finalized. However, negotiations appear to be at an advanced stage.

116. In the Approval Order, the CCI, clearly noted in its *prima facie* findings that the Combination would have an '*Appreciable Adverse Effect on Competition*'. Thus, modifications were directed and specific timelines which were provided for entering into the White Labelling arrangements ought to have been honoured by Schneider. However, this Court is of the opinion that the order dated 7th January 2020 leading to filing of the Review and the hearings before the CCI, just prior to the national lockdown in late March 2020, until the final order dated 24th August 2020, would have cast a considerable cloud on the entire issue and derailed the negotiations and execution of Agreements, possibly due to reasons beyond control of parties.

117. From the facts stated in the affidavit, it is clear that the negotiations are at an advanced stage with some parties. The exchange of correspondence, mentioned in the Affidavit dated 26th July 2021, shows that there are continuous talks going on between Schneider, MA and the four parties, however the White Labelling Agreements have not yet been

finalized yet. Schneider claims that the applicants in the said Arrangements have repeatedly requested rescheduling and extensions. To the extent that it is relevant to the present writ petition, it is important to note is that while CCI sought to exclude Eaton vide the impugned order, on the ground of the delay in the conclusion of White Labelling Arrangements as in August, 2020, till date, i.e., after more than a year having passed since the date of closing, the said arrangements have not been concluded.

118. While, on the one hand, not ignoring the delay that has been caused in conclusion of the said Agreements, the Court also cannot ignore the advanced nature and stage of the negotiations today, and the complexities that are involved in entering into and executing such White Labelling Arrangements. Further, there is no doubt that the MA and the CCI ought to ensure that the negotiations do not carry on indefinitely, especially after the closure of the Combination having been achieved, however, some leeway would have to be provided owing to the COVID-19 pandemic. If Eaton is now permitted to enter into the first round of negotiations for entering into a White Labelling Arrangement, the same would further delay the implementation of the said remedy, and would clearly be contrary to the interest of the public, inasmuch, as the Appreciable Adverse Effect on Competition would continue in the interregnum.

119. Further, considering the fact that Eaton was itself responsible for having not submitted the documents in terms of the advertisement, and its offer to the EOI being non-responsive, as also the direction clearly provided in the portal, it ought not to be allowed to completely upset the negotiations which are currently underway and are at an advanced stage. Eaton being a well-established company was conscious of the fact that it had merely

registered on the portal and had not submitted the documents. It also sought to initially disguise its defaults as a vague *‘technical glitch’*, which later on was revealed to be an alleged technical glitch at its own end. There is, in effect, no clarity as to why Eaton failed to submit the documents in time, when the EOI, as also the instructions on the portal were categorical and brooked no ambiguity. However, Eaton cannot also be indefinitely excluded as the intention of the Approval order is to expand and enlarge the number of players in the market, so as to increase competition.

120. Accordingly, the relief to be granted in this petition would have to be balanced keeping in mind –

- the intent and spirit of the Approval Order dated 18th April 2019, of curbing Appreciable Adverse Effect on Competition due to the Combination;
- the modifications suggested to the Combination and the element of public interest therein;
- the defaults of Eaton in non-submission of documents and its characterisation of the same as being due to a *‘technical glitch’*;
- failure of CCI to issue notice prior to passing of order dated 7th January 2020;
- the lack of power of Review in the CCI;
- the uncertainty caused due to the order dated 7th January 2020 and the Review petition which was finally decided on 24th August 2020 – a span of eight months;
- the outbreak of the pandemic and the related lockdowns; and
- the current advanced stage of negotiations *qua* the White Labelling

Arrangements.

(viii) Relief

121. Since CCI does not enjoy the power of Review, the impugned order is not sustainable in law. Further, as observed in paragraph 106, even the order dated 7th January, 2020 passed by the CCI, is vitiated and is also not in accordance with law.

122. To put the clock back and to remand the entire matter to the CCI would not be in accordance with the spirit of the Approval Order itself, inasmuch as the Combination has already been concluded, and the Date of Closing has already passed.

123. Thus, this Court would have to balance the interests of all the parties concerned, including the parties who have entered into advanced negotiations with Schneider and who are not before this Court. Further the Appreciable Adverse Effect on Competition also ought to be minimized in the spirit of the Approval Order dated 18th April, 2019, and it ought to be interpreted purposively. The entire exercise being of a time-sensitive nature, considering that the Closing Date of the Combination has been in place for more than a year, strict timelines would have to be imposed for implementing the White Labelling Arrangements, in terms of the Approval Order.

124. Accordingly, in the peculiar facts and circumstances of this case, the following directions are issued:

- a) Schneider shall continue its negotiations with the parties currently underway, conclude the same, and execute the White Labelling Agreements, in terms of the Approval Order, on or before 30th September, 2021.

- b) Upon any of the White Labelling Agreements being concluded by 30th September 2021, the second round of issuance of EOI shall commence immediately thereafter, for the balance capacities, based upon the quantities in respect of which the first round of White Labelling Arrangements have been concluded. In such a second round, Eaton would be free to participate, in accordance with the terms and conditions therein stipulated.
- c) If the first round of the White Labelling Agreements is not concluded by 30th September, 2021, since all the supporting documents are now submitted by Eaton, it shall be given a copy of the Draft White Labelling Agreement, and shall be permitted to participate in the first round of the said negotiations. The negotiations shall then proceed with Eaton as one of the prospective companies involved in the execution of the White Labelling Arrangements, in accordance with the Approval Order of the CCI. Thereafter, the MA and the CCI shall ensure that the White Labelling Agreements are concluded on or before 31st December, 2021, to give effect to the Approval Order both in letter and in spirit.

125. The present petition, and all pending applications are disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 10, 2021

dj/Ak