

Competition Law Bulletin

Vol. I, No. 2, November-December, 2009



From the Editor's Desk...

Dear Reader,

We are happy to present our next issue.

The last two months have seen a spurt of activities in the growth of awareness about the new competition regime. The Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") has been finally repealed and the Monopolies and Restrictive Trade Practice Commission ("MRTPC") dissolved on October 14, 2009 which thankfully brings to an end the uncertainty prevailing in the minds of the litigants and legal practitioners as to the co-existence of two Acts on the same subject. The telecom and the banking sectors have been in the news for various reasons.

With the entry of new players in the telecom sector, competition is heating up and is resulting in steep reduction in tariffs. The nascent internet telephone services industry is also trying to enter this market which is further likely to reduce tariff. A complaint has been reportedly filed against BSNL before the Competition Commission of India ("CCI") alleging abuse of dominance.

The banking sector has been reportedly lobbying with the government, with the support of the RBI, to keep the sector outside the purview of the merger control provisions, yet to be notified. The shipping sector also wants a similar exemption although the block exemption available to the liner conferences, which operated like a cartel, have been withdrawn in the European Union from October, 2008. In our view, grant of any sector specific exemption even before the notification of the merger control provisions will be like opening a Pandora's Box and will be detrimental to the overall competitiveness of our domestic industries.

Yours truly,

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INDIAN PERSPECTIVE

Parliament passes the Competition (Amendment) Bill, 2009.

The Parliament has passed the Competition (Amendment) Bill, 2009 which is to replace the Competition (Amendment) Ordinance, 2009 and to amend Section 66 of the Competition Act, 2002.



The Lok Sabha passed it on December 14, 2009 and the Rajya Sabha passed it on December 16, 2009. With the passing of the Bill all the pending cases on which the MRTPC was to continue to exercise jurisdiction for two years after repeal of the MRTP Act will now be adjudicated by the Competition Appellate Tribunal ("CAT") in accordance with the provisions of the repealed MRTP Act as if the said Act had not been repealed. The CAT has already started hearing the pending cases from and has disposed of 54 cases till the date.

Conferences held on competition law awareness

A sudden spurt of advocacy activities in the form of conferences and seminars on competition law and policy has been witnessed in the last two



months. A list of these important events in which we had participated, either as a delegate or as a speaker, is given below.

1. FICCI organized an interactive session with Chairman, CCI – October 6, 2009.
2. International Conference on Competition law held by International Academy of Law held at Hotel Le Meridien in Delhi – November 6-7, 2009.
3. National Conference on Competition, Public Policy and Common Man at the India Habitat Center organized by CII and CCI - November 16, 2009.

4. Indian Institute of Corporate Affairs organized discussion on Regulatory Co-ordination for Competition - November 18, 2009.
5. International Conference on Interface between Competition Policy & Law and Business Strategy organized by CIRC-CUTS - release of "Competition Law Tool-Kit" at the India Habitat Center- November 25-26, 2009.

Competition reduces tariffs in telecom sector



Tata Teleservices Ltd., with the roll out of their per-second billing plans in June 2009, has triggered a tariff war amongst the mobile service providers forcing several players like Vodafone-Essar, Reliance, MTNL, etc. to follow suit. Low per second billing plans, per minute billing plans and many such plans have been offered to woo customers. In addition to this, there are many new entrants who are equally enthusiastic about participating in such tariff wars. This has unleashed a competitive war of sorts amongst the telecom giants to gain the biggest consumer base.

The Telecom Regulatory Authority of India ("TRAI") is attempting to create a competitive environment for the mobile operators and also protecting consumer interest.

Banking, telecom and shipping sectors lobbying for block exemption



Even before the notification of the merger related provisions in the Competition Act, 2002, discontentment seems to be widespread amongst the regulators against the alleged over-arching powers given to the CCI as far as mergers and acquisitions ("M&A") are concerned.

It has been widely reported in sections of Press that the Reserve Bank of India ("RBI") has suggested that the CCI keep out of the banking sector, reason being that the

banking sector due to its special nature does not require High Court's approval for an M&A and, therefore, should not be subjected to CCI's jurisdiction. Similar concerns have been raised by TRAI as well as the Ship Liners Association. These suggestions have been opposed by CCI, as reported in a section of Press.

In our view, though CCI is mandated to look into the macro picture of competition related issues across all the sectors in the economy, yet the existence of competition related provisions in the statutes governing the specific regulators such as TRAI, Central Electricity Regulatory Commission ("CERC") etc. are bound to raise concerns of overlapping jurisdiction. The challenge in India for CCI is tougher than in advanced capitalist economies because of many policy induced restrictions on competition which is different than abuse of market power by individual firms, be it in the public sector or in private sector. This is the crux of the difference in approach between say, the RBI and CCI. The sector regulators like RBI are used to be operating in a given policy domain which may not be competition friendly but CCI does not have the mandate to force the sector regulators or the Government to alter policies to suit competition. For instance, the public sector banks have an unfair advantage over the private sector banks even after 60 years of independence and this hampers the goal of a healthy competitive market but it does not follow that the public sector banks are abusing their dominance. Similarly, TRAI has merger guidelines giving a narrow definition of merger in terms of acquisition of equity and merging of licenses as opposed to the broader definition by the CCI which includes acquisition of control, shares, voting rights or assets. The structural imbalance between the capacities of the erstwhile state electricity boards and the few private players, whether in generation or transmission of electricity, still remains though the electricity sector was opened for private participation by the Electricity Act, 2003.

Hence, we feel that the gray areas in the banking, telecom, electricity and shipping sectors need serious debate amongst all stakeholders, including the Government before allowing the request of exemption to these sectors from competition law.

INTERNATIONAL NEWS

South African Commission to investigate tender process for construction of 2010 World Cup stadia



In light of the escalating costs of construction of the 2010 World Cup stadia and the findings of the South African Commission's preliminary investigation, the South African Commission has launched an investigation into the allocation of multibillion-rand tenders. The South African Commission has indicated that it intends to investigate possible anti-competitive conduct in the awarding of various stadia construction tenders to Murray & Roberts, Group Five, Grinaker-LTA, Wilson Bayly Holmes-Ovcon ("WBHO"), Basil Read, Stehanutti Stocks, BAM International and Bouygues Construction, as well as their sub-contractors. The South African Commission's preliminary inquiry had found that there seems to have been few competitive bids from major players.

(Source: ILO, October 08, 2009)

Intel to pay AMD \$1.25 billion towards settlement



On November 12, 2009, Intel Corp. agreed to pay its Silicon Valley rival Advanced Micro Devices Inc. (AMD), \$1.25 billion to squash a legal battle over Intel's sales tactics. The move comes after Intel filed an appeal against the European Commission decision of May 13, 2009 imposing heavy fines on it before Court of First Instance on grounds of failure of EC to meet required legal standards of proof in its analysis of evidence. The settlement was announced on November 12, 2009 between Intel and AMD. The biggest case is in Europe, where competition regulator fined Intel a record \$1.45 billion. EU spokesman, Jonathan Todd said that the European Commission "takes note" of Intel's settlement with AMD but that it does not change Intel's duty to comply with European antitrust law. Intel is also fighting an \$18.6 million fine in Korea and a federal lawsuit filed last week by New York Attorney General Andrew Cuomo, who accused Intel of abusing its dominance.

(Source: http://in.msn.com/iat/us_in.aspx)

Biggest cartel investigation – lands British Airways in trouble

British Airways PLC (“BA”) to pay \$4.5 million in fines for participating in a cartel fixing prices on Canadian air cargo in one of the biggest cartel investigations after pleading guilty. The airline admitted to fixing surcharges on certain international air cargo routes out of Canada between April 2002 and February 2006. The airline which made a record \$659m pre-tax loss this year has been warned that it could suffer an even bigger full-year loss this year. Previously Air France, KLM, Martinair and Qantas have all admitted to fixing cargo prices.



(Source: Manupatra's Competition Law Reports, October-December, 2009)

Building companies fined £129.5m

Some of the UK's leading building companies have been handed big fines by the Office of Fair Trading (“OFT”) for rigging bids for contracts. The OFT has fined a total of 103 firms pound sterling £129.5m for colluding with competitors on building contracts. The firms colluded among themselves during the bidding process, leading to customers having to pay excessively. The ruling comes at the end of a five-year investigation by the OFT. The fines were largely for the practice known as “cover pricing”. This is where building companies submit quotes for jobs that are not actually priced to win the contract, so the client gets a misleading idea about the real extent of competition. In 11 instances investigated by the OFT, the body found that the lowest bidder faced no competition because all other bids were cover bids. It also found six instances where successful bidders had paid an agreed sum of money to the unsuccessful bidder. The infringements affected building



projects across England in excess of £200m, including schools, universities and hospitals, between 2000 and 2006.

(Source: Manupatra's Competition Law Reports, October-December, 2009]

OFT fines recruitment agencies roughly £40m for price-fixing



Using the full force of its powers, the OFT made an example of the recruitment industry, slapping a £39.27m fine on six companies for engaging in anti-competitive behaviour.

There was a clear division of penalty among the six, with Hays bearing the brunt with a £30.36m fine. However, the collective fine would have been a much higher if whistle-blowers Beresford Blake Thomas (“BBT”) and Hill McGlynn & Associates had not received a 100 percent exemption for revealing the cartel in December 2005, and if the OFT had not granted leniency to the other companies for their subsequent co-operation. Had they not revealed the cartel, BBT and Hill McGlynn would have received the largest fine of the lot according to the OFT. The above mentioned firms had agreed to collectively boycott Parc UK, a company which entered the market to act as an intermediary between a construction company and recruitment agencies to supply possible candidates to that company, putting pressure on the margins of those within the cartel. In a second breach of the Competition Act 1998, the six recruitment firms engaged in price fixing, agreeing the fees they would charge to intermediaries and also to construction company clients. However, Hays has announced that it will appeal against a £30.36 million fine for price fixing and helping to organize a collective boycott in the UK's construction industry recruitment sector.

(Source: Manupatra's Competition Law Reports, October-December, 2009.)

EC fines producers of power transformers € 67.6 million for market sharing cartel

EC has imposed fines totaling € 67,644,000 on seven companies – ABB, AREVA T&D, ALSTOM, Fuji Electric, Hitachi and Toshiba – for violating the EC Treaty's ban on cartels and restrictive business practices (Article 81).

Siemens also participated but was not fined because it revealed the existence of the cartel in question to the Commission. Between 1999 and 2003, Japanese and European producers of power transformers operated an oral market sharing agreement, referred to as a "Gentlemen's Agreement", where they agreed that the Japanese members would not sell power transformers in Europe and that the European members would not sell power transformers in Japan. The power transformers in question are used to modify the voltage in electricity transmission networks. The fine for ABB was increased by 50% because it had previously taken part in a similar infringement.

Power transformers are major electrical components that reduce or increase the voltage in an electrical circuit. The transmission of electrical current through electricity grids requires a high level of tension to reduce energy losses. Power transformers are used by electricity suppliers in their electricity grids for the transmission and distribution of electric power to the customers. Through the "Gentlemen's Agreement", the cartelists therefore not only harmed their direct customers but also European electricity consumers.

At the time of the infringement, the parties' combined annual sales in the European Economic Area were estimated to be worth around €100 million.

(Source: Manupatra's Competition Law Reports, October-December, 2009]

Abuse of dominance

Regulator fines Portugal Telecom and ZON for abuse on broadband markets

Following an investigation which began in late 2003, prompted by complaints from several operators, the Competition Authority of Portugal recently concluded that between 2002 and 2003 various companies in the Portugal Telecom and ZON groups abused their dominant position in the national



broadband access markets. At the time of the alleged abuses, all of the undertakings were part of the Portugal Telecom group, which was the sole supplier of wholesale broadband access. Portugal Telecom also held a dominant position in the retail broadband market, as evidenced by its market shares of 70.7% in 2002 and 77.7% in 2003. Each of the practices related to the coordination - between May 22, 2002 and June 30, 2003 - of the wholesale pricing system for Portugal Telecom's Rede ADSL bitstream offer with the prices offered for certain retail broadband access schemes, specifically the SAPO and Netcabo tariff plans. The undertakings involved were fined €53 million in total - €45 million for the companies in the Portugal Telecom group and €8 million for the ZON group subsidiaries.

(Source: ILO November 12, 2009)

Competition Authority investigates Schiphol's dominance



As part of an evaluation of the Aviation Act, the minister of transport, public works and water management has requested that the Competition Authority investigate -whether Amsterdam Schiphol Airport is still dominant with regard to its aviation activities, including landing and take-off fees and tariffs for handling passengers and baggage? The authority has commissioned research agency by the name of German Airport Performance to identify the relevant markets in order to establish possible dominance. The authority will use the results of this investigation to determine the extent to which additional sector-specific legislation is required, if it is found that Schiphol is indeed dominant. The authority aims to publish its findings in early 2010.

(Source: ILO December 03, 2009)

Interchange Fee: Latest on EC scanner

Recently, the European Commission and the Italian Competition Authority have both examined the retail banking sector. In particular, four-party systems - also termed open card payment systems - have been analyzed and a debate is underway about whether the system of interchange fees should be rethought. A final decision in

the authority's proceedings is expected by July 2010, unless the period is extended.

Open payment systems provide benefits for both consumers and retailers. Customers benefit from easy access to money, in a more convenient form than cash, and their losses are limited if a card is stolen or lost. Moreover, they are normally granted an interest-free period before payment is due. Retailers can operate more effectively by reducing the costs of managing cash and the risk of theft, accounting errors and fraud. However, the commission and the authority have focused on anti-competitive concerns relating to multilateral interchange fees - that is, the transfer payments between two banks when a cardholder who is a customer of a bank makes a purchase from a retailer that is a customer of another bank.

(Source: ILO October 29, 2009)

Microsoft, EU settle antitrust dispute

On December 16, 2009 after a decade of complaints leading to £1.7 billion in fines against Microsoft Corp, European regulators have ended their last pending antitrust case against the US software maker as the company agreed to let European computer users choose from a menu of Web browsers that compete with its Internet Explorer. Microsoft said it will start sending updates in March 2010 to Windows computers in Europe so that when PC users logon, they will see a popup screen asking them to pick one or more of 12 Web browsers to download and install. People who buy new PCs will see the screen when they start up for the first time.



The top five browsers - Microsoft's Internet Explorer, Mozilla's Firefox, Google Inc's Chrome, Apple Inc's Safari and Opera - will be given more prominent placement on the screen. The selections will rotate from computer to computer, so none of those five browsers will always be first. This mechanism will be used for five years in the 27-nation European Union plus Norway, Iceland and Liechtenstein. Microsoft could be fined 10% of its annual revenue if it doesn't stick to its commitment. In return, EC agreed to drop charges it filed against Microsoft in January

2009 that said installing Internet Explorer as part of the Windows operating system gave Microsoft an unfair advantage.

Users in the US and elsewhere won't see a change; however, Brad Smith, Microsoft's general counsel, said that an older antitrust case in the US had already determined that Microsoft didn't need to separate its browser from the Windows operating system. And regulators in other regions, he said, might want a different approach.

(Source: AP- Financial Express, December 18, 2009)

EVENTS

Inaugural issue of Competition Law Bulletin released by the Chairman, CCI

Mr. Dhanendra Kumar, Hon'ble Chairman, CCI released the inaugural edition of our Competition Law Bulletin on October 7, 2009 in the presence of the Hon'ble Members, Secretary, Director General and other officers and staff of the CCI. Mr. O. P. Vaish, Senior Advocate, accompanied by a team represented the firm. Mr. Kumar, in his brief remarks, lauded the initiative taken by Vaish Associates in bringing out this timely publication.

(Photos overleaf)

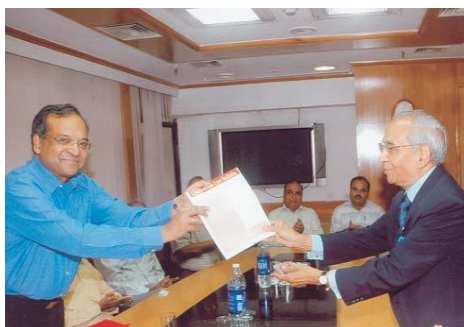
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Conferences/ Seminars addressed by Partners/ Associates

MM Sharma, addressed the session on "dealing with abuse of dominance under New Competition Regime in India: Guidance for Companies with large market shares" in International Conference on Interface between Competition Policy & Law and Business Strategy organized by CIRC-CUTS - release of Competition Law Tool Kit at the India Habitat Center- on November 25, 2009.

Articles on competition issues

- Article titled "No Fair Play in Pharma Industry" by Mr. MM Sharma was published in the **Economic Times** on November 3, 2009.
- Lex Witness, Magazine on legal and corporate affairs published an opinion by Mr. MM Sharma, on the "Economics of Competition in the Mobile Industry" in Volume-1 Issue 4 in November, 2009.



Mr. Dhanendra Kumar, Hon'ble Chairman, CCI, presenting a copy of the Competition Law Bulletin to Mr. O.P. Vaish, Senior Advocate, after its release.



Mr. M. M. Sharma, addressing the gathering.



Hon'ble Chairman and Members of CCI along with the firm's representatives.



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