Competition Law Bulletin

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VAISH ASSOCIATES ADVOCATES
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From the Editor's Desk...

Dear Reader,

Greetings .

In this issue we continue our efforts to update our readers with the latest developments on competition related issues in India and abroad.

On the domestic front, the passing of the Competition (Amendment) Act, 2009 at the close of last year, has brought about noticeable changes in the existing provisions of section 66 of the Competition Act, 2002 (**"Act"**). The conclusion of investigations into complaints relating to multiplex owners, DTH operators and pre-payment charges by banks by the Director General ("DG") thereby leading to the Competition Commission of India ("CCI") initiating inquiries in these cases is a positive sign. CCI is also getting ready with the new draft combination regulations for Mergers & Acquisitions and is likely to generate debate on this important issue in times to come. Some recent orders and the pace of disposal of pending cases by the Competition Appellate Tribunal are also noticeable.

The past six months have been exciting and have laid the foundation for growth of competition law jurisprudence in India. The entire legal community has large expectations from the CCI.

We also hope that you would continue giving your feedback which has been encouraging so far.

Yours truly,

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Inside...

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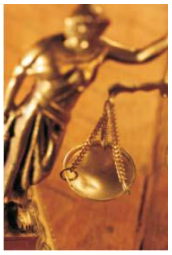
INDIAN PERSPECTIVE

Competition (Amendment) Act, 2009 passed

The Competition (Amendment) Act, 2009 ("Amendment Act") which was passed by the Parliament on December 16, 2009 received the assent of the President of India on December 22, 2009. The amendment Act was notified in the Gazette of India on December 23, 2009 as Act no. 39 of 2009 and it comes into effect from October 14, 2009 i.e. the date of issue of the Competition (Amendment) Ordinance, 2009. The effect of the Amendment Act is that The Competition Appellate Tribunal ("CAT")will now have to adjudicate upon not only all the pending Unfair Trade Practices ("UTP") cases including those filed under clause (x) of sub-section (1) of section 36A of MRTP Act but also all pending applications for compensation filed under section 12B of the MRTP Act and shall have to dispose of all pending investigations or proceedings relating to UTP by ordering the Office of Director General of Investigation and Registration {DG (I&R)} to conduct fresh investigations. The DG(I&R) has accordingly revived all such pending UTP complaints and has started issuing fresh notices.

Incidentally, no change has been made in sub section (8) of section 66 of the Act according to which all investigations or proceedings relating to UTP referred to in clause (x) of sub-section (1) of section 36A of MRTP Act, relating to "giving false or misleading facts disparaging the goods, services or trade of another person", stand transferred to CCI and CCI is free to conduct or order for conduct of such investigations in the manner as it deems fit. Similarly, in terms of sub section (6) of section 66 of the Act all investigations or proceedings, other than those relating to UTP i.e. relating to Monopolistic Trade Practices or Restrictive Trade Practices, also stand transferred to CCI and CCI is free to conduct or order for conduct of such investigations in the manner as it deems fit.

CAT undertakes fast track disposal of pending MRTP cases



The fast track disposal of pending cases of MRTP Act by CAT is noticeable. As per information received from the CAT, it had disposed of 241 cases till February 28, 2010 as under:

RTP cases	79
UTP cases	88
Compensation cases	74
MTP cases	NIL

We understand that over 2000 cases are still pending under the repealed MRTP Act, most of which now stand transferred to CAT for disposal as per the recent amendment Act.

CCI for pre -merger talks to fast track M&A deals

At the sixth Indo-US Economic Summit held on February 16, 2010 in New Delhi, Chairman, CCI said that CCI is considering having pre-merger consultations clause for

vetting mergers under sections 5 and 6 of the Act and that it is reasonable to expect that most M&A cases will be cleared within 40 days. CCI is also expected to soon release the draft merger regulations for public comments. The draft regulations will try to remove uncertainties and unnecessary delays for clearance of transactions that do not have any material impact on competition. CCI is expected to list all such possible innocuous transactions in the draft regulations.

(Source: The Economic Times and Financial Express, February, 17, 2010).

INTERNATIONAL NEWS

CHINA - Three Merger Clearances Offer Guidance on Remedies

In the space of five weeks in 2009 the Chinese Ministry of Commerce (MOFCOM) conditionally approved **three** transactions. Its conditional clearances in General Motors/Delphi, Pfizer/Wyeth and Panasonic/Sanyo provide significant indications of its approach to remedies, and the last of the decisions is its most detailed and comprehensive to date.

General Motors/Delphi - On September 27, 2009, MOFCOM conditionally approved General Motors' ("GM") re-acquisition of bankrupt auto parts supplier Delphi, which has a major presence in China, while imposing a variety of restrictions intended to prevent Delphi from favoring GM over its competitors. It is reported that GM plans to invest US$1.75 billion in Delphi and provide loans to help Delphi, the auto parts manufacturer GM once owned, emerge from bankruptcy. The proposed transaction was submitted for MOFCOM's approval on August 18, 2009. After consulting with relevant government agencies, automobile associations and domestic carmakers as well as GM and Delphi, MOFCOM preliminarily concluded that the concentration would have an adverse impact on vertical competition in the automobile industry. MOFCOM was also concerned that Delphi, the exclusive provider of parts to several Chinese automakers, might disclose sensitive customer information to GM. GM, Delphi and MOFCOM discussed possible ways to reduce the potential negative effects of a merger before GM and Delphi proposed a solution that was, after assessment, finally accepted by MOFCOM. The merger-control regulator subsequently published the Notice of Decision on the Approval with Conditions of General Motors' Acquisition of Delphi on September 27, 2009.

MOFCOM approved the concentration with the following restrictive conditions:

1. Delphi, its subsidiaries and affiliates must continue to supply Chinese automobile manufacturers on a non discriminatory basis, providing high-quality parts at negotiated market price.

2. GM must not illegally solicit Delphi to disclose, and Delphi must not disclose to GM, any trade secrets or other proprietary information belonging to domestic automobile manufacturers that is in Delphi's possession. Both parties are also forbidden to formally or informally exchange competition-related trade secrets of any third party.

3. Delphi, its subsidiaries and affiliates must continue to assist customers, per reasonable request, to change suppliers smoothly and must not delay or impose other restrictive conditions that have the effect of increasing transition costs and thereby restricting competition.

4. GM must continue to procure automobile parts from multiple sources and on a non-discriminatory basis, and must not impose unreasonable conditions that favor Delphi over its competitors.

Pfizer/Wyeth - The Anti-Monopoly Bureau of China's Ministry of Commerce (MOFCOM) has given its conditional approval to the merger between Pfizer and Wyeth. The MOFCOM concluded that the acquisition would not result in a substantial change of competitive conditions in the pharmaceuticals market generally, but may nevertheless reduce competition in certain sectors of the animal health market. Those included, in particular, swine mycoplasmal pneumonia vaccine, for which the parties have a combined 49.4% market share. MOFCOM therefore decided to clear the transaction subject to conditions. The decision was reached after conditional clearance by the European Commission (EC), but before the US Federal Trade Commission, Canada's Competition Bureau, or the Australian Competition and Consumer Commission acted. The conditions generally require that Pfizer divest its swine mycoplasmal pneumonia vaccine business to an independent third party purchaser within a prescribed period. The conditions include the following :

1. Pfizer must divest its swine mycoplasmal pneumonia vaccine business under the brands "Respisure" and "Respisure One" in mainland China;

2. The divestiture must cover both tangible and intangible assets necessary for the business to be viable and competitive;

3. The purchaser for the divested business must be found within six months after MOFCOM's clearance, i.e., by late March;

4. The purchaser must be independent from the parties and satisfy the qualification standards set by MOFCOM;

5. If Pfizer cannot find a purchaser within six months, MOFCOM may appoint a trustee to dispose of the divested business without a floor price;

6. During the six-month period, Pfizer must appoint an interim manager responsible for the business to be divested. During the interim period, the divested business must be managed in a way to maximize its commercial interest and to provide certainty that the divested business will, post-divesture, remain viable, marketable, competitive and independent of the parties; and

7. During the first three years after divesture, Pfizer will be obligated to provide reasonable technical support to the purchaser upon request, assist the purchaser in procuring raw materials for the production of swine mycoplasmal pneumonia vaccine, and provide technical training and consulting services to the purchaser's relevant personnel.

Panasonic Sanyo Merger - In November 2008, Panasonic and Sanyo jointly announced that Panasonic would acquire Sanyo at a price of approximately USD 8.87 billion. The proposed deal triggered pre-merger filings in the major jurisdictions around the globe, and required the parities to obtain clearances from various antitrust agencies before consummating the deal. On October 30, 2009, the PRC Ministry of Commerce ("MOFCOM"), the Chinese regulator responsible for merger control review under the Chinese Anti- Monopoly Law ("AML"), cleared an offshore transaction subject to restrictive conditions: the proposed acquisition of Sanyo Electric Co., Ltd. ("Sanyo") by Panasonic Corporation ("Panasonic"), both of which are Japanese companies.

The main issue-MOFCOM justified its conclusion of permitting a conditional merger on various grounds. MOFCOM's review identified competition concerns in three primary product markets where the merged entity could potentially eliminate or restrict competition: rechargeable coin-shaped lithium batteries, nickel-hydrogen batteries for general use, and nickel-hydrogen batteries for vehicles. Most importantly, the above three relevant markets are already highly concentrated. Panasonic and Sanyo jointly have a high market share and a dominant position in these markets. For instance, MOFCOM stated in the decision that in the market for rechargeable coin-shaped lithium batteries, Panasonic and Sanyo represent the largest and second-largest producers in this market respectively; once merged, Panasonic will account for 61.6 percent of the market, a share which will restrict downstream users' product choices. In addition, MOFCOM found that several other factors may deepen the possible anticompetitive effect of the acquisition. For example, end users familiar with the well-known Panasonic and Sanyo brands may pressure producers to use only Panasonic and Sanyo batteries in products they produce, refusing products utilizing other brands of batteries. According to MOFCOM, such brand designation would restrain competition by squeezing out other brands, and the potential merger would intensify this adverse effect. Further, MOFCOM found that development of the nickel-hydrogen battery market has been quite slow, making entry into the market by new business operators less attractive, which in turn fails to mitigate the competitive impact of the proposed transaction.

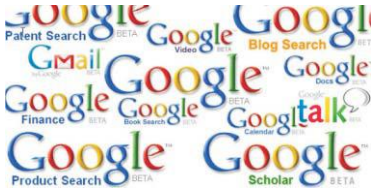
Remedies suggested by MOFCOM-MOFCOM and the parties reached consensus regarding remedies to be enacted by the parties so as to alleviate the possible anticompetitive effects of the transaction.

1. Panasonic or Sanyo must divest a significant portion of their existing businesses related to the three relevant markets and find independent buyers for the businesses to be divested. They must find qualified purchasers for these assets within six months of MOFCOM's approval, with the deadline extendable for another six months with MOFCOM's prior approval.

2. Furthermore, Panasonic will reduce its ownership in the Panasonic-Toyota joint venture ("Panasonic EV Energy Co") to 19.5 percent from 40 percent, relinquish its right to appoint directors to the joint venture's board, abandon voting rights at shareholder meetings, and etc.

(Source: - ILO January 21, 2010).

EU initiates anti-trust inquiry against Google



According to Google Inc., European antitrust authorities have initiated a preliminary inquiry into complaints about its tactics made by three European Internet companies. The inquiry, disclosed on February 23, 2010 appears to focus largely on complaints that Google unfairly ranks the sites of Internet competitors, in effect lowering their rank in search listings on Google sites. Google denied violating European law or taking any action to stifle competition. The European Commission (EC) inquiry is at an early, fact-finding stage and may not result in any action.

(Source: Wall Street Journal reported in www.livemint.com February 25, 2010 and http://Ozablog.com)

FRANCE - France Telecom punished for anti-competitive practices on mobile markets

Five years after the interim measures against Orange Carriage aimed to put an end to exclusivity deals, loyalty-inducing practices and price discrimination liable to fall foul of an Article of the Commercial Code and Article 102 of the EC Treaty, the Competition Authority in France has imposed a substantial fine on the France Telecom group. The Competition authority held that the exclusionary practices committed by the France Telecom group reduced competition to the detriment of consumers in the Caribbean and gave rise to the imposition of a €52.5 million fine for Orange Carriage's practices, for which Orange Carriage and France Telecom are jointly and severally liable, and a €10.5 million fine for France Telecom's practices.

(Source: - ILO January 28, 2010)

GERMANY - Dawn raids: Federal Cartel Office scrutinizes market for consumer products

On January 14, 2010 the Federal Cartel Office (FCO), Germany, carried out large-scale dawn raids in the consumer products sector. It inspected a total of 15 undertakings – 11 large retailers of food, drugstore products and pet food, and four brand manufacturers of consumer products. The FCO also initiated written procedures against another nine companies. The FCO suspects the undertakings of having engaged in anti-competitive vertical agreements or practices with regard to end-consumer retail price maintenance. The allegations focus on three product categories: sweets, coffee and pet food. Apparently, the FCO received information which indicated that retailers and brand manufacturers agreed on the prices that retailers would charge end consumers for products in these categories. It is alleged that the coordination took place as part of annual negotiations between retailers and brand manufacturers.

(Source: - ILO 4th Feb 2010).

GERMANY - Selective distribution: can a manufacturer prohibit the sale of its goods on eBay?

Internet sales raise a number of legal questions, in particular when they involve auction platforms such as eBay. One widely debated question concerns competition law: must a brand manufacturer accept that its products are sold on eBay because to prevent this would be anti-competitive. On November 25, 2009 the German court decided that a brand manufacturer is permitted to forbid authorized dealers in a selective distribution system to sell its high-quality products on internet auction platforms. The court held that such prohibition does not

infringe competition law if it aims to maintain the brand image and the quality of the distribution network. In the event of a dealer refusing to comply, the manufacturer may suspend delivery. The court held that the defendant's selective distribution system did not restrain competition. Reference was made to the established case law of the European Court of Justice according to which a selective distribution system that uses qualitative and not quantitative criteria can, in certain circumstances, constitute an acceptable element of competition. The court considered the defendant's school bags and satchels to be special up market products.

(Source: - ILO February 25 2010).

NETHERLANDS - Competition Authority holds customer- sharing system of the nature of cartel

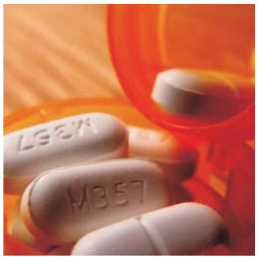
The Competition Authority in the Netherlands has imposed a total fine of more than €3 million on five swimming pool chemical distributors for market sharing.

The distributors entered into a customer-sharing system for the sale of swimming pool chlorine to disinfect pool water. The cartel had a market share of 90% and existed long before 1998, when the Competition Act came into force. The length of existence of the cartel proved to be the salvation of one undertaking as it sold its cartel-participating subsidiary in 2001. Similar to the European Commission, the Dutch Competition Authority is subject to a limitation period of five years for the imposition of penalties.

(Source: -ILO January 21 2010)

SWITZERLAND - Competition Commission fines Pfizer, Eli Lilly and Bayer for resale price maintenance

On December 8, 2009, the Swedish Competition Commission found that resale price-fixing agreements



between manufacturers and distributors of three medical drugs (not reimbursed by the compulsory health insurance scheme) were unlawful. It imposed a fine of Sfr 5.7 million on the pharmaceutical companies concerned – Pfizer AG, Eli Lilly (Suisse) and Bayer (Schweiz). The Commission's press release states that the three producers fixed resale prices by establishing recommended public prices for their erectile dysfunction products (Viagra, Cialis and Levitra). These prices were integrated into the computer systems of the industry branch or directly transmitted by wholesalers to pharmacies and physicians who, in most cases, adhered to them when charging their patients. The Commission decided that these practices constituted unlawful resale price maintenance agreements within the meaning of Article 5(4) of the Competition Act.

(Source: - ILO February 25 2010)

EVENTS

Vaish Associates opens office in Bangalore

We are happy to announce the commencement of operations at our new office in Bangalore with effect from February 2, 2010. The office at Bangalore, located in Koramangala Industrial Area is headed by Mr. K. R. Vasudevan who is a lawyer and cost accountant besides having additional qualification of MBA in finance and done professional course in banking. He has served in the Indian Revenue Service for a period of 13 years in addition to his corporate and banking experience. Mr. Vasudevan is well versed with Direct tax laws including transfer pricing, indirect tax laws including VAT, sales tax, and excise. Mr. Vasudevan can be contacted at the following e-mail: krvasudevan@vaishlaw.com.

Publications and Seminars

- MM Sharma participated in a "Conference on Consumer Connect for Revitalizing Businesses" organized by FICCI on February 25, 2010.

- Article titled ***"Role of Economics in Competition"*** by MM Sharma was published in **THE ECONOMIC TIMES** on January 14, 2010.

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