Competition Law Bulletin

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VAISH ASSOCIATES ADVOCATES
Delhi • Mumbai • Gurgaon • Bengaluru

From the Editor's Desk...

Dear Reader,

Greetings for CHRISTMAS AND NEW YEAR.

Continuing with our efforts to update you with the latest developments in competition law, we are happy to present the last edition of 2010.

Competition Commission of India (CCI) has reported its first decision on "Bank pre–payment penalties"on December 2, 2010. As a special feature of this issue, we present a write-up highlighting the majority and dissenting views in this judgment.

It has further been reported in various newspapers (see our media section) that the Government is considering a likely exemption for the banks from the merger guidelines. If accepted by the Government, it may not be a healthy trend and may open demands for similar treatment from other sectors, like shipping etc.

In another development and in an attempt to rein cartelization in the aviation sector, the CCI has ordered a *suo motu* investigation (ostensibly on a reference from the Ministry of Civil Aviation) into the increase in airline fares.

I hope that our bulletin continues to invoke your interest in developments on competition law. We invite your views on the same and look forward for your continued support.

Yours truly,

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Inside...

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INDIAN PERSPECTIVE

SPECIAL FEATURE

CCI decides its first case: Banks within rights to levy foreclosure penalty

Competition Commission of India (CCI), in its first reported decision, on December 2, 2010 in *Neeraj Malhotra Vs Deustche Post Bank Home Finance Ltd. & Ors. (Case no. 5/2009),* has, *inter alia,* held that the system of imposition of penalty for pre-closure of home loans by banks and financial companies does not violate any provision of Competition Act, 2002 (Act). By a 4:2 majority decision, CCI set aside the findings of the Director General (DG) that such clauses were anti-competitive in nature and contravene section 3 of the Act. The full text of the decision is available on the website of CCI: www.cci.gov.in.

Issue involved - The issue involved is regarding banks and some non-banking financial companies (NBFC) charging penalty on pre-payment of housing loans by the customers. The informant alleged that all the home loan providers formed a cartel by levying a uniform 1–4 per cent prepayment penalty if borrowers were to prepay the loans by themselves or if they were re-financing their loans from another bank/NBFC at cheaper rate of interest. This practice, according to the informant, was anti-competitive and amounted to abuse of dominance by them since it restricts the choice of the customers.

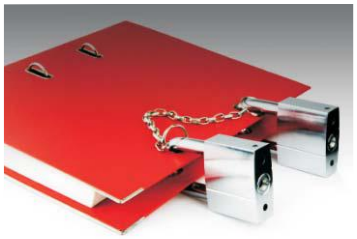
DG Investigation - CCI ordered investigation by the DG into the matter on September 10, 2009 and DG's investigation report was submitted to the CCI on December 16, 2009. The DG s found that the agreements were in violation of Section 3(3) (b) of the Act. The DG also found that the group of banks have come together and taken a collective decision under the auspices of the Indian Banking Association to limit market competition and to generate fee based income. In his finding DG noted that the said collective decision of banks is beneficial to banks and on the contrary is anti-consumer and anti-competitive. DG, therefore, concluded that, levying pre-payment charges by banks violates provision of Section 19(3)(a), (c) and (d) of the Act.

Majority View - By a majority decision the validity of the prepayment charges was upheld and the bench observed that "*borrowers have a lot of choice about the banks from which they would take the home loan, with terms and condition of each are known to them and included in their agreement/contract for taking the loan.*" The bench held that *"we find there are no facts that point toward dominant position of any of the banks / HFCs investigated*". They also held that since none of the banks or HFCs (Housing finance Companies) investigated "individually" had any dominant position in the market of retail home loans, hence provisions of section 4 (abuse of dominant position) of the Act were not attracted to the facts of the present case. On the issue of cartel like behavior, the majority view noted that the reference to Indian Banks' Association meetings held in July and August, 2003 as starting point of concerted move by bank to levy pre-payment penalties was misplaced. While noting that some of the banks such as HDFC Bank were not even members of IBA, and others like LIC had been imposing pre-payment penalty since 1995. The majority held that, "*The lack of imperative voice and intent is evident from the language and content of the said circular of IBA. It would be patently unjust to use it as an evidence of either action in concert or process of combined decision making by banks. This rules out any element of contravention of sub section (1) of section 3 (prohibition on agreements having appreciable adverse effect of competition)".* It was also held by the majority that "*It is equally clear that there is no agreement amongst the various service providers i.e. the banks/HFCs, nor is there any uniform practice being followed by them.*" The majority accordingly, held in favor of banks both in terms of absence of dominant position and lack of any agreement having an anti-competitive effect, and found that there was no violation of competition law in the present instance.

Dissenting views - Two CCI Members i.e. Hon'ble Mr. P. N. Parashar and Hon'ble Mr. R. Prasad in their dissenting orders found the practice of levying pre-payment penalty

by Banks and NBFC's as anti-competitive and amounting to cartelization, in view of the 2003 Indian Banks Association meeting. As per the dissenting view it was held that *"The analysis of the follow up actions by banks/HFCs demonstrates that out of fifteen opposite parties, twelve opposite parties started adopting the practice of charging PPP (Pre-payment Penalty) at a rate of 2%. The other three opposite parties namely Indian Overseas Bank, Corporation Bank and Punjab & Sind Bank which were not earlier charging any PPP started charging the same at a rate of 1 to 2% after 2003. This practice as adopted by the opposite parties is in the nature of a cartel like behavior and anti-competitive practice."* The practice was held as "*seriously jeopardizing the interests of consumers*". According to Hon'ble Member Mr. Parashar, though the banks were not be penalized but directions were to be issued to restrict them from levying prepayment penalty any further. Hon'ble Member Mr. Prasad in his order not only recommended stoppage of the practice of imposing pre-payment penalty but also wanted the Banks to refund the amounts levied as pre-payment penalty to all customers who repaid the loans after May 20, 2009, being the date of enforcement of the provisions related with 'anti-competitive practices' and 'abuse of dominant position'.

CCI passes orders for closure of certain matters



CCI has displayed on its website the full text of its orders on closure of 19 cases of Information's filed under the Act and 17 cases of pending investigations transferred from the Director General of Investigation & Registration (DGIR) and the COMPAT.

MEDIA UPDATES

CCI imposes Rs. 1 crore fine on Kingfisher Airlines for not providing facts; subsequently stayed by COMPAT

On November 21, 2010, CCI under section 43 of the Act imposed a Rs. 1 crore ($220,000) fine on Kingfisher Airlines for not providing sufficient information in the CCI's

investigation of the airline's alliance with Jet Airways. Subsequently on December 1, 2010, Competition Appellate Tribunal (COMPAT) stayed the CCI order imposing Rs. 1 crore fine on Kingfisher airlines. COMPAT ruled against the imposition of a fine after it was convinced on the facts that Kingfisher had indeed furnished the information sought by the CCI in time. The COMPAT order is confined to the question of the fine alone with a decisive hearing scheduled to take place on January 20, 2011.

(Source: The Business Standard, November 22 & December 2, 2010)

CCI investigating 11 complaints against real-estate developer

CCI on November 30, 2010 disclosed that it is examining 11 complaints of anti-competitive practices received against real estate companies, some of which were being probed by the CBI in connection with the housing finance scam. CCI's Hon'ble Chairman Shri Dhanendra Kumar said that out of the 137 cases that had been filed with it, 11 pertained to the real estate sector. According to him the charges pertained to sections 3 and 4 of the Act, dealing with anti-competitive agreement and abuse of dominant position.

(Source: The Business Standard, November 30, 2010)

Banks mergers sealed in times of crisis may go out of CCI purview

A Government panel has favored exempting crisis mergers between banks from the CCI supervision, a decision that could boost the corporate affairs ministry's efforts to get speedy Cabinet approval for the proposed merger norms. As mentioned in our last edition of 'Competition Law Bulletin' the committee of

secretaries set up to clear the regulatory logjam over bank mergers, however, could not agree on the Reserve Bank of India's view that all mergers between the country's lenders should be kept outside the purview of the competition regulator. In a recent meeting, committee resolved to grant conditional exemption to bank mergers effected under emergency circumstances. The move is in conformity with the internationally accepted practice of exempting crisis mergers from the purview of competition regulators. The Act which does not provide any sectoral exemption for vetting mergers beyond a certain threshold, has taken RBI's plea as an exception due to various reasons including CCI's lack of domain knowledge on the sector. CCI stated that it had distanced itself from the dispute, saying it is for policy makers to make a final call.

(Source: Economic Times, December 9, 2010)

Director General of CCI finds DLF abusing its dominant position

DG in its investigation report held that India's largest property developer DLF Ltd has been violating norms and imposing unfair conditions on home buyers in Gurgaon, and sought action against the company. In his report to the CCI, DG Investigations has sought the initiation of action against DLF under sections 3 & 4 of the Act. The report was also critical of the non-cooperation by authorities like Secretary, Haryana Urban Development Authority and Director, Town Planning Board and also sought a penal action against these two authoritiest for not responding to its queries. DG has also suggested forming model real estate regulations to safeguard customers from discriminatory treatment. It had cited examples of building regulations from at least eight developed nations to point out how the absence of proper regulations are helping the real estate industry to frame clauses that are against consumer interest.

(Source: Economic Times, December 19, 2010 & Business Standard, December 15 & 16, 2010)

CCI orders formal probe into possible airfare cartel

Taking action on its own initiative, CCI on December 23, 2010 asked its investigation wing i.e. DG to initiate an investigation into the possible cartel-like behavior in increase of airfares by airlines. CCI has sought data from the civil aviation ministry to investigation whether airlines have formed cartel to increase fares. CCI has also asked the Ministry of Civil Aviation to share information about the fare increase. Section 26 of the Act empowers the CCI to order an inquiry by the Director General if it felt a prime facie case existed for the violation of the Act. DG has been given 60 days time to complete the investigation.

(Source: Economic Times, December 24, 2010)

Director General of CCI finds Kingfisher-Jet agreement anti-competitive

The DG has found the two-year-old code share agreement between Jet Airways and Kingfisher Airlines anti-competitive in nature. DG has dismissed the airlines claim that the agreement was entered into for improving the overall efficiency of the two companies and save costs. The DG report has found the code share agreement is in breach of sections 3 & 4 of the Act. It has also been reported that several clauses of the agreement between airlines would hurt consumers, since they enjoy over 60% of the aviation market. It is to be noted that CCI ordered an investigation into the matter in July, 2009 after it received a complaint from a consumer.

(Source: The Financial Express, December 27, 2010)

COMPAT decides pending MRTP matters

COMPAT continues to decide the pending cases under the repealed MRTP Act. As per information received from the record keeping office of COMPAT, it had disposed of **755** cases so far as per details below:

RTP cases	**121**
UTP cases	**355**
Compensation cases	**279**
MTP cases	**0**

INTERNATIONAL NEWS

EUROPEAN UNION:

EC launches antitrust investigation against Google

The EC started an antitrust investigation into allegations that Google Inc. has abused a dominant position in online search market, in violation of European Union rules (Article 102 TFEU). The opening of formal proceedings follows complaints by search service providers about unfavorable treatment of their services in Google's unpaid and sponsored search results coupled with an alleged preferential placement of Google's own services. The EC will investigate whether Google has abused a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as price comparisons (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in order to shut out competing services. The Commission will also look into allegations that Google lowered the 'Quality Score' for sponsored links of competing vertical search services. The Quality Score is one of the factors that determine the price paid to Google by advertisers.

(Source: European Commission website, November 30, 2010- http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en

EC fined 11 air cargo carriers €799 million in price fixing cartel

The EC had fined 11 air cargo carriers a total of €799,445,000 for operating a worldwide cartel which affected cargo services within the European Economic area (EEA). Several known airlines are among the 11 undertakings fined, namely Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas. The carriers coordinated their action on surcharges for fuel and security without discounts over a six year period. Lufthansa (and its subsidiary Swiss) received full immunity from fines under the Commission's leniency programme, as it was the first to provide information about the cartel.

(Source: European Commission website, November 9, 2010- http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=0&language=EN&guiLanguage=en)

EC adopted revised competition rules on horizontal co-operation agreements

On December 14, 2010, EC released revised Guidelines for the Assessment of Horizontal Cooperation Agreements (New Guidelines). The European Commission also released a draft Regulation on the application of Article 101(3) of the Treaty to Certain categories of Research and Development Agreements (New R&D Block Exemption) and a draft Regulation on the Application of Article 101(3) of the Treaty to certain categories of Specialization Agreements (New Specialization Block Exemption) (together the New

Bock Exemptions). Both the New Guidelines and the New Block Exemptions are the result of a two year review process. The New Guidelines replace the 2001 Guidelines for the Assessment of Horizontal Cooperation Agreements (Old Guidelines), and the New Block Exemptions replace the 2000 Block Exemptions, which were expected to expire on December 31, 2010. The New Block Exemptions will come into force on January 1, 2011, and expire on December 31, 2022. The New Guidelines attempt to provide more clarity and greater detail to enable companies to determine for themselves whether any cooperation agreement with their competitors is legal. In this respect, the New Guidelines are substantially longer than the Old Guidelines. The new analytical framework laid out by the European Commission to assess horizontal cooperation agreements encompasses two "key features," i.e., the adoption of an entire section dedicated to information exchanges between competitors, and a substantially revised section on standard-setting.

(Source: European Commission website, December 14, 2010- http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1702)

EU court upholds €38m fine for seal breaking in competition investigation

Eon, the German energy group, has failed to overturn a €38m fine imposed by EC for tampering with sealed offices in the course of a dawn raid. The Commission conducted an investigation into energy companies in Germany in 2006 on suspicion that anti-competitive practices were being used. Investigators carried out an inspection at EON's Munich offices in May 2006. Documents were placed in a locked room overnight and this was sealed with special stickers on which the word 'void' became visible if they were removed. It later turned out that 20 other keys to open the room were in circulation. Inspectors found that the seal had been broken when they returned the next day. The EC fined EON €38m for the breaking of the seal. EON appealed to the General Court of the European Union, arguing that the fine should be reduced or wiped out. The Court backed the Commission's decision. The fine is the first for the breaking of a seal, the Commission said, noting that it could fine companies up to 1% of their turnover for breaking a seal.

(Source: European Commission website, December 15, 2010- http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/686&format=HTML&aged=0&language=EN&guiLanguage=en)

EC approves Nokia-Siemens' takeover of Motorola mobile systems

EC had cleared under EU Merger Regulation the acquisition of Motorola Network Business of the US by Nokia Siemens Networks B.V. of The Netherlands. After examining the operation, the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. The EC investigation revealed that the parties' product portfolios are largely complementary and that MNB has a limited presence in the EEA. Furthermore, the Commission found that the combined entity would continue to face a number of large and effective competitors. As, the markets for mobile network equipment are bidding markets with sophisticated buyers, the Commission therefore concluded that the concentration will not give rise to any competition concerns. It is to be noted that, the transaction did not meet the thresholds of the Merger Regulation, but was referred to the Commission for review following a request from the merging parties.

(Source: European Commission website, December 15, 2010- http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1725&format=HTML&aged=0&language=EN&guiLanguage=en)

European Commission fined six LCD panel producers €648 million for price fixing cartel

The EC had fined six LCD panel producers a total of €648,925,000 for operating a cartel between October 2001 and February 2006 which harmed European buyers of

television sets, computers and other products that use the key Liquid Crystal Display component. The six are Samsung Electronics and LG Display of Korea and Taiwanese firms AU Optronics, Chimei InnoLux Corporation, Chunghwa Picture Tubes and HannStar Display Corporation. Samsung Electronics received full immunity from fines under the Commission's leniency programme, as it was the first to provide information about the cartel. Article 101 of the EU Treaty prohibits price-fixing and other practices restrictive of competition. During the four years, the companies agreed prices, including price ranges and minimum prices, exchanged information on future production planning, capacity utilisation, pricing and other commercial conditions. The cartel members held monthly multilateral meetings and further bilateral meetings. In total they met around 60 times mainly in hotels in Taiwan for what they called "the Crystal meetings".

(Source: European Commission website, December 8, 2010- http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1685)

Intel's McAfee acquisition facing EU antitrust investigation

Intel Corp. $7.68 billion deal to buy security-software specialist McAfee Inc. is running into close scrutiny by European Commission that could at least delay completing the high-profile transaction. The deal announced in August 2010 to buy McAfee is the largest in Intel's 42-year history. Intel had formally notified the European Commission of the deal on November 30, 2010. The EC had sent multiple questionnaires soliciting opinions about the deal from other security-software companies. The questions focus, on how Intel could embed security functions into its chips and whether any of them could be reserved to work only with McAfee software. It is to be noted that, Intel controls about 80% of the microprocessors used in the world's PCs, and had already tangled with EU antitrust authorities. Intel is appealing a $1.45 billion fine levied in 2009 by the European Commission, which found the company abused its dominant position in the market.

(Source: The Wall Street Journal, December 17, 2010- http://online.wsj.com/article/SB10001424052748703395904576025973738473148.html?KEYWORDS=Intel%2527s+McAfee)

UNITED STATES

Intel's McAfee acquisition approved by FTC

On December 21, 2010, Intel Corp. won the approval from the FTC for its proposed $7.68 billion acquisition of security specialist McAfee Inc. It is to be noted that the same deal is still running into close scrutiny by European Commission that could at least delay completing the high-profile transaction. Intel said it is cooperating with the European Commission's review of the deal.

(Source- The Reuters, December 21, 2010- http://www.reuters.com/article/idUSTRE6BK6F220101221)

UNITED KINGDOM

Companies cannot recover fines for breach of competition law from their former director or employees

On December 21, 2010, the Court of Appeal (UK) handed down a key judgment in *Safeway Stores Limited v Twigger*, finding that Safeway is not permitted to recover its penalty for breach of the Competition Act 1998 from those employees it considers being responsible for the infringing conduct. Court held that the corporate competition law fines imposed under the Act are “personal” to the fined entity. The case arose out of Safeway's (a British supermarket chain) settlement with the UK Office of Fair Trading (OFT) in December 2007, under which it agreed to pay a fine of GBP11 million for alleged price fixing concerning dairy products. Safeway subsequently sought an indemnity from certain directors and former employees whom it considered to have been responsible for the infringing conduct. It commenced proceedings in the High Court to recover the penalty, variously claiming that the employees and directors had broken the terms of their employment contracts, breached their fiduciary duties to Safeway and was negligent in their conduct. Having lost an

application to strike out the claim, the defendants appealed to the Court of Appeal. The judgment removes one area of potential competition law-related liability for UK directors/employees, although it remains the case that the OFT is increasingly seeking to ensure that UK directors focus on competition law compliance.

(Source: British and Irish Legal Information Institute, http://www.bailii.org/ew/cases/EWCA/Civ/2010/1472.html)

CYPRUS

Telecommunications Authority fined for abuse of dominant position

ThunderWorx Limited filed a complaint with the Commission for the Protection of Competition against the Cyprus Telecommunications Authority for its apparent refusal to grant ThunderWorx, as an individual distributor of premium short messaging service (SMS) mobile termination services, the ability to provide such services to the authority's mobile users. After conducting a proper investigation, the commission found that the authority was in breach of Section 6(1) of the Protection of Competition Law 2008. Section 6(1) prohibits the abuse by one or more undertakings of their dominant position within the internal market or in a substantial part of it in respect of products. The commission held that the authority had abused its dominant position by limiting production, distribution or technical development to the prejudice of consumers. It had also applied dissimilar conditions to equivalent transactions, thereby placing ThunderWorx at a competitive disadvantage. Commission on November 2, 2010, unanimously decided to impose on the authority an administrative fine of €1,968,745 for abusing its dominant position and consequently breaching Section 6 of the law.

(Source: International Law Office Competition Newsletter –December 16, 2010 available at www.internationallawoffice.com)

VAISH ACCOLADES

Conferences/ Seminars addressed by Partners/ Associates

MM Sharma was invited as a faculty during the month long *"Certificate Course on Competition Law for Professional/Business Executives/ Law Practitioners/ Regulatory Experts"* organised by the Indian Institute of Corporate Affairs, Ministry of Corporate affairs, on November 23, 24 & 26, 2010 at CGO Complex, New Delhi where he addressed three sessions on *"Economics of Competition Law"* and *"Abuse of Dominance"*.

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