

Competition Law Bulletin



Vol. II, No. 4, September-October, 2010

From the Editor's Desk...

Dear Reader,

Greetings for DIWALI.

Continuing with our efforts to update you with the latest developments in competition law, we are happy to present this annual edition of our bulletin on completing the first year of its publication.

Competition law jurisprudence is slowly evolving in India with the foundation being laid over the past year by the Supreme Court through its judgment in the case of *Competition Commission of India (CCI) Vs. SAIL* along with some important "closure" decisions displayed on the CCI website (www.cci.gov.in). A synopsis of this judgment is a special feature of this anniversary edition.

Merger control regulations under the Competition Act, 2002 ("Act"), are still awaited and have been reportedly referred to the Committee of Secretaries under the Cabinet Secretary for reconsideration. Details are included in the media reports section.

I hope that our bulletin has been a source of information and knowledge. We welcome your views on the same and look forward for your continued support.

Yours truly,

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INDIAN PERSPECTIVE

SPECIAL FEATURE

Landmark judgment of the Supreme Court in *CCI vs. SAIL & Anr.*

The Supreme Court of India, on September 9, 2010 in its verdict in *Competition Commission of India v. Steel Authority of India Ltd, inter alia*, has effectively defined the limits of exercise of power by both the Competition Commission of India (CCI) and the Competition Appellate Tribunal ("COMPAT").



In this matter, information was filed by Jindal Steel and Power Ltd. before CCI alleging anti-competitive practices and abuse of dominant position by SAIL while entering into an exclusive supply agreement with Indian Railways for supply of rails. CCI, after finding that a prima facie case existed but without giving an opportunity to SAIL to file a detailed reply, referred the matter for investigation by the Director General (DG), which order was challenged by SAIL before COMPAT. COMPAT vide its order dated February 15, 2010 stayed the investigation proceedings by the DG and refused to implead CCI as a party before it. Aggrieved by this order of the COMPAT, the CCI approached the Supreme Court which while giving its judgment framed six broad issues.

First issue that was framed was whether a direction passed by the Commission u/s. 26(1) of the Act while forming prima facie opinion would be appealable u/s 53A(1) of the Act. The Court concluded in negative and held that Section 53A (1) of the Act expressly provides decisions or orders or directions may be appealed before COMPAT, and this does not include a direction of CCI under Section 26(1) of the Act. The Court noted that right to appeal is a statutory right and if the statute does not provide for an appeal, the Court cannot presume such right.

Second issue that was framed was whether the opposite parties are entitled to notice at the stage of formation of prima facie opinion and whether it is obligatory for the CCI

to record reasons while forming prima facie opinion. The Court held that no statutory duty is cast on CCI to issue notice or grant hearing to the affected parties before issuing direction to DG to initiate investigation on a complaint under section 26(1) of the Act, yet CCI may hold preliminary conference with the concerned parties to seek assistance before forming a prima facie opinion under section 26(1) of the Act, in terms of the General Regulations. However, no party can claim it as a matter of right;

Third issue that was framed was whether the CCI would be necessary or at least a proper party in proceedings before COMPAT. It was held that in cases where the CCI initiates a proceedings *suo moto*, CCI shall be the *dominus litis*, i.e. the master of the proceedings or the necessary party while in all other proceedings; it shall be a proper party.

Fourth issue that was framed was with regard to the stage and manner in which CCI can issue interim orders under section 33 of the Act. It upheld the power of the CCI to issue an interim order temporarily restraining the other parties from carrying on such act until the conclusion of the inquiry, without giving notice to such party but such power has to be exercise sparingly and under compelling and exceptional circumstances.

Fifth issue that was framed was whether it is obligatory for the Commission to record reasons while forming prima facie opinion? The court held that CCI must record minimum reasons to substantiate the prima facie view in no uncertain terms.

Sixth and the last issue that framed was with respect to the directions, if any, which the court had to issue for ensuring proper compliance of the procedural requirements while keeping in mind the scheme and object of the Act. The Court directed that (i) all proceedings, including investigation and inquiry be completed by CCI/ DG most expeditiously and wherever during a course of an enquiry the CCI passes an interim order, It should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days; and (ii) DG should submit the report in terms of section 26(2) of the Act within the time as directed by CCI, but in all cases not later than 45 days from the date of the directions issued under section 26(1) of the Act.

Bombay High Court dismisses writ petition filed by Aamir Khan Productions

The Bombay High Court by its judgment dated August 18, 2010 has dismissed the writ petition filed by Aamir Khan Productions Pvt. Ltd. against the show cause notice issued by CCI under section 26(8) of the Act for conducting final inquiry into the allegation found to be correct in the investigation report of the DG (for forming a cartel of film producers against the multiplex owners and taking a decision of not screening movies at multiplexes) on the ground that CCI did not have jurisdiction to initiate proceedings under the Act in respect of films for which provisions of the Copyright Act, 1957 contain exhaustive provision. The Court held that there is nothing in the Act to indicate that CCI is not vested with the jurisdiction and CCI has the jurisdiction to decide the question whether or not it has jurisdiction in respect of films under the Copyright Act, 1957, particularly, when the matter is still at the stage of further inquiry with decision yet to be taken by CCI. Mere issuance of a show cause notice under section 26(8) of the Act cannot be treated as pre-judging the issue.



CCI passes orders for closure of certain matters

CCI has displayed on its website the full text of the orders on closure of 11 cases of Informations filed under the Act and 14 cases of pending investigations transferred from the Director General of Investigation & Registration (DGIR) and the COMPAT; We publish excerpts from one important decision hereunder:



CCI dismisses petition filed against the Balmer Lawrie & Co. Ltd. by the Travel Agents Association of India

Vide an order dated September 15, 2010, CCI dismissed Information filed by Travel Agents Association of India ("Informant") against the Balmer Lawrie & Co ("opposite parties"). Informant alleged that the opposite parties



entered into an agreement with the Government of India and in pursuance of which an Office Memorandum (OM) was issued by the Ministry of Finance, to all government departments with directions to purchase all travel tickets from opposite parties only. It was alleged by Informant that the above action and conduct of the Government of India involving opposite parties is also an abuse of dominant position and has resulted in denial of market access to travel agents fraternity at large. CCI after considering all the allegations noted that Central Government officials were free to procure air ticket directly from any airline or through Internet for official (domestic) visits. It is only when an official wanted to utilize the services of travel agents it was limited to the opposite parties, who were also required to ensure that the procurement of the ticket should be on the best bargain across all airlines. Furthermore, the CCI also held that the Government of India was not an enterprise and dismissed the case.

(Case No. 39/2010 - Travel Agents Association of India vs. Balmer Lawrie & Co. Ltd. & Anr, New Delhi)

Media updates

PSU insurers face cartelization charge



Individual Third party administrators (TPAs) complained to CCI against public sector insurance companies for allegedly forming a cartel and abusing their dominant market position in planning to form a TPA unit of their own. Generally TPAs are the only point of contact between the patient and insurance firms. They carry out administrative tasks on behalf of insurance companies and settle claims for patients who present a valid health insurance card. The four government-owned insurance companies i.e. National Insurance Company, New India Assurance, Oriental Insurance and United India Insurance had invited proposals from companies to form a joint venture for their proposed TPA units. According to some

Independent TPAs, “such move by the PSU insurers sounds like the death knell for the fledgling industry, which was mid-wifed by Insurance Regulatory Development Authority (IRDA) for efficient intermediation of claims”. It is to be noted that the private insurance companies such as ICICI Lombard, Bajaj Allianz, Star Health and Max Bupa had already set up their own TPAs.

(Source: Hindustan Times, September 7, 2010)

As per later media reports, the matter was fixed for hearing of the complaint by the CCI on October 13th, 2010 and is still pending.

(Source: The Economic Times, October 7, 2010)

Indian Law Firm moves CCI against Microsoft

Singhania & Partners, an Indian law firm has filed a complaint against Microsoft Corporation before the CCI alleging abuse of dominant position under section 4 of the Act. The complaint relates to an order for purchase of Windows 7 MS operating systems and MS Office by the Firm under the original equipment manufacturing (OEM) category through a dealer Embee. As per the complaint, Microsoft refused to supply the original software and insisted that the Firm had to either buy new computers to get the products under the OEM category or pay double the price for buying the same under the volume license category. Prices vary when products are ordered or bought under different categories such as a pull package, volume license or OEM. The Firm alleged that Microsoft first signed an agreement to sell software at a certain price, but later raised the price intending not to sell it. It also alleged that Microsoft was doing discriminatory pricing, as they were suggesting prices according to the size of the company. The Firm had paid 50% advance for original equipment manufacturer (OEM) licenses, but at the time of delivery Microsoft said that they would give them volume license, which would cost the firm double the price.

(Source: The Live MINT, September 18, 2010).



Interim order passed by CCI against DLF



CCI has restrained DLF from cancelling allotments in its two upcoming projects in Gurgaon. In an interim order under section 33 of the Act, the CCI held that, DLF had been abusing its dominant position in the market. CCI has restricted DLF, for the time being, from cancelling any allotment of apartments in the two residential complexes in Gurgaon that were the subject of the petition in question before it. DLF has also been restrained from “creating third party rights” by selling, alienating or transferring the apartments and common area and facilities without CCI's permission.

(Source: The Financial Express, September 22, 2010).

SC rejected Kingfisher appeal to stay CCI investigation



Supreme Court of India vide an order dated September 24, 2010 refused to stay an investigation by CCI into alleged anti-competitive practices by Kingfisher Airlines Ltd ("Kingfisher") by forcing it to withdraw its appeal challenging the investigation. Kingfisher had moved the SC against an investigation by CCI in May 2010 after losing a petition filed in the Bombay High Court. The Court refused to entertain Kingfisher's appeal, stating that “CCI was entitled to investigate the carrier and director general of CCI (DG) is entitled to ask you for any paperwork.” It further stated that "We are saying you a very simple thing, reply the show-cause notices issued by the DG and submit all the account details ". The SC stand elucidated the powers, functions and jurisdiction of CCI and allowed CCI to look into an agreement between Kingfisher Pvt. Ltd and Jet Airways though made before the enforcement of the Act.

(Source: The Live MINT, September 25, 2010)

Merger notification delayed again



Ministry of Finance has reportedly put a spar in the Ministry of Corporate Affairs proposal that seeks to notify sections 5 & 6 of the

Act relating to mergers and acquisitions, as the proposal has now been referred to a Committee of Secretaries (CoS). According to a government source "The Reserve Bank of India (RBI), is not comfortable with inclusion of the banking sector under the purview of the CCI. Therefore, the Ministry of Finance opposed the Cabinet note prepared by Ministry of Corporate Affairs. The CoS has been asked to level out the differences". The CoS would be chaired by cabinet secretary and will include secretaries of the finance, commerce and corporate affairs ministries. According to the Ministry of Corporate Affairs, it is not convinced of the reasons behind the dissent. Ministry said "If we exempt banking sector, other regulators will raise similar demands. We cannot keep exempting each one of them".

(Source: Indian Express, October 14, 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 686 cases so far as per details below:

RTP cases	115
UTP cases	319
Compensation cases	252
MTP cases	0

INTERNATIONAL NEWS

EUROPEAN UNION

Landmark European Court of Justice Judgment on Legal Professional Privilege

The European Court of Justice (ECJ) vide judgment dated September 14, 2010 confirmed the judgment of the Court of First Instance in the case involving Akzo Nobel by holding that written communications between a company-client and its employed in-house lawyer do not benefit from legal professional privilege ("LPP") and are thus not protected against disclosure in the context of EU competition law investigations. Crucially, the Court found that this holds true even where the employed lawyer is a member of a national Bar and where both applicable Bar rules and the

in-house lawyer's employment agreement aim to guarantee independence from the employer. The judgment maintains the Court's long-standing view in the 1982 AM&S case which reserved LPP to outside legal counsel who are members of a Bar. The judgment comes as a disappointment to much of industry, including the European Company Lawyers' Association ("ECLA," represented pro bono by Cleary Gottlieb), which have long advocated extending LPP to in-house counsel in EU competition law investigations.

(Source- European Court Of Justice Website, September 14, 2010-<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:301:0002:0002:EN:PDF>)

EC Commission carries out unannounced inspections in paper envelope industry



The European Commission had confirmed on September 14, 2010 that Commission officials carried out unannounced inspections at the premises of several European manufacturers

of paper envelopes in France, Denmark, Spain and Sweden. The Commission has reasons to believe that the manufacturers concerned may have, amongst others, coordinated price increases and allocated customers on several European markets. The Commission officials were accompanied by their counterparts from the respective national competition authorities. Unannounced inspections are a preliminary step in investigations into suspected cartels. The fact that the Commission carries out such inspections does not mean that the companies are guilty of anti-competitive behavior nor does it prejudice the outcome of the investigation. The Commission respects the rights of defense, in particular the right of companies to be heard in antitrust proceedings.

(Source: European Commission website, September 23, 2010-<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1043&format=HTML&aged=0&language=EN&guiLanguage=en>)

EC Commission clears proposed acquisition of US consultancy firm Hewitt by rival Aon

European Commission (EC) has approved under the EU Merger Regulation the proposed acquisition of the consultancy firm Hewitt Associates by the consultancy and brokerage firm Aon Corporation, both of the US. EC concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. Both Hewitt and Aon provide services in the fields of retirement benefits consulting, pension administration, investment consulting, human capital services, insurance and financial services consulting and insurance intermediation. The Commission investigated a number of national and EEA-wide markets, where the parties have overlapping activities, in particular in the areas of retirement benefits consulting and investment consulting services to pension funds. The Commission found that competition concerns could be excluded in these markets, since the market shares of the combined firm would be modest post-transaction, and a sufficient number of credible competitors would remain after the proposed transaction.



(Source: European Commission website, September 28, 2010-<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1190&format=HTML&aged=0&language=EN&guiLanguage=en>)

EC Commission fines prestressing steel producers € 458 million for two-decades long price-fixing and market-sharing cartel

The EC has fined 17 producers of prestressing steel a total of € 458,410,750 for operating a cartel that lasted 18 years until 2002 and covered all but three of the then European Union Member States. EC decision concludes that the producers violated the European Union's ban on cartels and restrictive business practices. Prestressing steel comprises long, curled steel wires used with concrete in construction sites to make foundations, balconies or bridges. This is the fourth cartel decision since the beginning of February this year bringing



the total amount of antitrust fines imposed so far in 2010 to € 1,433 million. During 18 years, the companies fixed individual quotas and prices, allocated clients and exchanged sensitive commercial information. In addition, they monitored price, client and quota arrangements through a system of national co-ordinators and bilateral contacts. This is in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU). In addition, the EC granted reductions of fines for cooperation under the 2002 Leniency Notice to Italcables/Antonini (50%), Nedri (25%), Emesa and Galycas (5%), ArcelorMittal and its subsidiaries (20%) and WDI/Pampus (5%). The fine for ArcelorMittal España was reduced by 15% for its co-operation outside the Leniency Notice. Redaelli and SLM did not meet the requirements for co-operation and therefore received no reduction of the fine.

(Source: European Commission website, October 6, 2010-<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1297&format=HTML&aged=0&language=EN&guiLanguage=en>)

UNITED STATES

FTC puts conditions on Coca-Cola's \$12.3 Billion acquisition of its largest North American bottler



The Federal Trade Commission (FTC) announced that it will require The Coca-Cola Company to restrict its access to confidential competitive business information of rival Dr Pepper Snapple Group as a condition for completing Coca-Cola's proposed \$12.3 billion acquisition of its largest North American bottler, which also distributes Dr Pepper Snapple carbonated soft drinks. Under a settlement with the FTC, Coca-Cola will set up a "firewall" to ensure that its ownership of the bottling company does not give certain Coca-Cola employees access to commercially sensitive confidential Dr Pepper Snapple marketing information and brand plans. In a complaint filed with the settlement, the FTC held that access to this information likely would have harmed competition in the U.S. markets for carbonated soft drinks.

(Source- Federal Trade Commission's Website, September 29, 2010-<http://www.ftc.gov/opa/2010/09/coke.shtml>)

The U.S. Justice Department (DoJ) sued American Express Co, Visa Inc and MasterCard Inc, latter two settle

DoJ on October 4, 2010, filed a civil antitrust lawsuit in U.S. District Court challenging rules that American Express, MasterCard and Visa have in place that prevent merchants from offering consumers discounts, rewards and information about card costs, ultimately resulting in consumers paying more for their purchases. At the same time, the DoJ had reached a proposed settlement with Visa and MasterCard that, if approved by the court, would require the two companies to allow merchants to offer discounts, incentives, and information to consumers to encourage the use of payment methods that are less costly. According to the complaint, American Express, MasterCard and Visa maintain rules that prohibit merchants from encouraging consumers to use lower-cost payment methods when making purchases. The proposed settlement reached only with MasterCard and Visa requires them to allow their merchants to:



- Offer consumers an immediate discount or rebate or a free or discounted product or service for using a particular credit card network, low-cost card within that network or other form of payment;
- Express a preference for the use of a particular credit card network, low-cost card within that network or other form of payment;
- Promote a particular credit card network, low-cost card within that network or other form of payment through posted information or other communications to consumers; and
- Communicate to consumers the cost incurred by the merchant when a consumer uses a particular credit card network, type of card within that network, or other form of payment.

Understandably, the American Express has not agreed to the proposed settlement and the antitrust law suit is pending against it.

(Source-US Department of Justice Website, October 4, 2010, <http://www.justice.gov/opa/pr/2010/October/10-at-1115.html>)

OTHERS

South Africa: South African body accuses Apollo Tyres of cartelization



The Competition Commission of South Africa has referred a complaint of price fixing against the South African Tyre Manufacturers Conference (Pty) Ltd ("SATMC") and four tyre manufactures and suppliers

namely, Apollo Tyres South Africa (Pty) Ltd, Goodyear South Africa (Pty) Ltd, Continental Tyre South Africa (Pty) Ltd and Bridgestone South Africa (Pty) Ltd to the Competition Tribunal for adjudication. The complaint alleged anti-competitive conduct by tyre manufacturers, including Apollo Tyres South Africa. Apollo Tyres entered the South African market in 2006 after acquiring Dunlop Tyres (Pty) Ltd. An investigation was prompted by a complaint alleging that some tyre makers simultaneously adjusted prices around the same time and within the same parameters. The tyre makers have been charged with collusive trading, price fixing, and information exchange and market allocation.

(Source- The Live Mint, September 7, 2010-
<http://www.livemint.com/articles/2010/09/06211337/South-African-body-accuses--Ap.html?atype=tp>)

Czech Republic: Highest-ever fine for a vertical agreement

The Office for the Protection of Competition (the Office) of the Czech Republic, vide an order dated September 15, 2010 imposed a fine of CZK 17.283 million on the coal producing company Sokolovská uhelná, právní nástupce, a.s. for entering into anti-competitive agreements with its customers whereby the customers of Sokolovská uhelná committed not to export brown coal and brown coal briquettes outside the Czech Republic or to trade in it so as to enable such export. The agreements on export prohibition are perceived as significant distortion of competition by both Czech and European law. The aim of these agreements was distortion of competition, thus there was no need in proving the negative impact on competition. By means of agreements on export prohibition the supplier could have divided the common market and thus contributed to closing of a market for competitive goods in the framework of the same brand.

Thus the agreements under consideration led to decrease in the number of customers which could have exported the goods bought from the party to the proceedings. On the basis of the agreements on export prohibition the customers were limited in their choice of the end customer which could have led to decrease in the offer for customers. In its decision, the Office stated that the infringement of both the Czech Act on the Protection of Competition and Article 81 of the EC Treaty (now Article 101 of the TFEU), because of the mentioned agreements could have influenced trade among the EU Member States.

(Source- Czech Republic Office of Competition Website, September 15, 2010 <http://www.compet.cz/en/competition/news-competition/chairman-rafaj-confirmed-fine-for-sokolovska-uhelna-company/>)

Norway: State-owned Post Office fined for abuse of dominance

Following a complaint from Schenker Privpak, a subsidiary of Deutsche Bahn, the European Free Trade Association Surveillance Authority has fined Posten Norge AS (the Norwegian Post Office) €12.89 million for abuse of its dominant position. Posten Norge established a post-in-store concept, whereby consumers could pick up their parcels in local shops. Its



exclusive agreements with these outlets made it difficult for competitors to establish a competing national network for parcel delivery. The authority found that Posten Norge, through this network of exclusive agreements, had abused its dominant position in the market for the distribution of parcels from mail order and e-trade companies to Norwegian consumers. Without these exclusive agreements, the authority found that competing providers of delivery services would have been able to compete more effectively and the prices for parcel delivery services could have been lower, to the benefit of both mail order and e-trade businesses and, ultimately, Norwegian consumers.

(Source: International Law Office Competition Newsletter – September 23, 2010 available at www.internationallawoffice.com)

VAISH ACCOLADES

Conferences/ Seminars addressed by Partners/ Associates

MM Sharma addressed three sessions on “Economics of Competition Law ” and “Abuse of Dominance” during the week long seminar on “Basic Course on Competition Law for Central Government Officials” organized by the Indian Institute of Corporate Affairs, Ministry of Corporate affairs, Government of India on October 25, 26 & 27, 2010 at CGO Complex, New Delhi.



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