

# Competition Law Bulletin

## From the Editor's Desk...

Dear Reader,

The Competition Commission of India (CCI), continues with its trend of coming down heavily against cartels.

During the last quarter CCI vide its Orders has imposed heavy penalties on various industry segments. Penalty of ₹ 165.58 crores against 48 LPG Cylinder Manufacturers located throughout India for allegedly fixing prices for supplying the domestic cylinders to Indian Oil Corporation Limited (vide order dated February 24, 2012). Again, heavy penalties imposed against some enterprises operating in key infrastructure sectors of economy, such as Coal (vide order dated April 16, 2012 - ₹ 60 crores in total against 10 major explosive manufacturers supplying explosives to Coal India Ltd.), food storage (vide order dated April 23, 2012 - ₹ 317.91 crores in total against 3 major Aluminum Phosphide Tablet Manufacturers supplying the tablets for preservation of food grains to Food Corporation of India), health services (vide orders dated April 16 & 25, 2012 - ₹ 2.99 crores in total against 3 medical equipment suppliers to AIIMS and Safdarjung Hospital).

The recent order of CCI dated June 20, 2012 imposing the heaviest ever penalty of ₹ 6,306.59 crores (INR 63.06 Billion) in all against the 11 large cement manufacturing companies as well as against the Cement Manufacturers Association, has further reinforced the commitment of CCI towards its mandate of uprooting anti-competitive practices prevailing in the markets in India. This order has once again raised the credibility of CCI as an effective regulator sending the right signals against silently operating cartels in Indian markets.

The emerging trend of levying heavy penalties against cartels in India is in sync with the similar trend in European Union and other jurisdictions. In European Union and other jurisdiction the successful prosecution of cartels has been possible with the help of insider evidence from a member of cartel, and competition authorities depend heavily on the Leniency provisions. This, however, is yet to start in India. In absence of any evidence from an insider with CCI so far, whether the orders of CCI will stand to judicial scrutiny before the Competition Appellate Tribunal (COMPAT) and the Supreme Court thereafter, remains to be seen.

Nevertheless, the orders by CCI have initiated the process of developing valuable jurisprudence on this important aspect of antitrust law. Moreover, with such exemplary penalties, the chances of the "dissenting" members of such cartels being encouraged to come forward to avail the benefits of the Leniency scheme, under which CCI is obliged to grant, up to 100% waiver of penalty on such members of cartels who provide material help in busting the cartels, on a "first come first served" basis, have certainly increased.

We have for the benefit of our readers, covered the order against Cement cartel as a **special feature** in this issue. The other three major decisions are also discussed in brief, in the Indian perspective section. We invite your views and look forward for your continued support.

Yours truly,

  
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## INDIAN-PERSPECTIVE

### SPECIAL FEATURE

#### CCI imposes heaviest penalty against Cement cartel

##### Introduction :

Competition Commission of India ("CCI") vide its order dated June 20, 2012 in Builders Association of India Vs Cement Manufactures (case no.



29/2010) has, *inter alia*, imposed a penalty @ 0.5 % times of their profit for the year 2009-10 and 2010-11 on 11 cement manufacturers. The penalty amounting to ₹ 6,306.59 crores (INR 63.06 Billion) has been imposed for their alleged limiting and controlling supplies in the market and determining prices through an anti competitive agreement. The full text of the decision is available on the website of CCI ([www.cci.gov.in](http://www.cci.gov.in)).

We present herein a brief synopsis of the order dated June 20, 2012 by CCI, as under:

**Main Allegations against Cement Manufactures:** It was alleged by the informant i.e. Builders Association of India that the major 11 cements manufacturers all over India, under the aegis of Cement Manufacturers Association have:

- (1) in spite of the fact that the cement manufacturing units are geographically dispersed throughout India, having different cost of production and transportation, the cement manufacturing companies, have simultaneously increased their prices at the same time in all the five zones, i.e. North, East, West, South and Central, which also showed allocation of the markets;
- (2) collectively decided to reduce their capacity utilization/production capacity from 88% in March 2009 to 82.46 % in March 2010, in spite of increase in their installed capacities from 219 million tons to 246 million tons during the same period, in order to artificially increase the demand, which showed limiting and controlling the supplies in the market;

- (3) despite various concessions and stimulus packages announced by the government in 2008, collectively increased the unit sales price of the cement from 2008 to 2010, which showed collectively determining sale price;
- (4) in spite of slow down in the growth of construction and real estate sector during 2007-08 to 2009-10, the Operating Profit Margin (OPM) of the cement manufacturers increased during the same period; Similarly, the OPM within the cement industry of the six dominant players was 27.33% as against that of 17.68% of the Industry as a whole;
- (5) The cement industry failed to pass on the price benefit enjoyed by the cement industry in the form of "fly ash", (which constitutes 15-20% of the raw material to produce cement and is provided free to the Cement Industry by the Thermal Power Plants, owned mostly by government or semi government undertakings) to its customers and consumers.

**Initial Order by CCI:** CCI after considering the Information formed an opinion that a *prima facie* case existed under Section 26(1) of the Competition Act, 2002 (the Act) and directed the Director General ("DG") to investigate the matter.

**Directors General's (Investigation) Report:** The DG after conducting an in-depth investigation of various allegations made in the information held that, in the guise of the meetings of the High power Committee, the cement manufacturers are exploiting the inelasticity of demand of cement by entering into some mutual arrangements and understanding to manipulate the price and supply of cement in violation of the Act. Further, DG has concluded that cement manufactures are controlling the supply of cement in the market by way of some tacit agreement and also by indulging in collusive price fixing and that the Cement Manufacture Association provided a platform for the member cement manufacturers to act in coordinated manner to decide the pricing and production strategies. According to DG, the act and conduct of the cement manufacturers are anti-competitive and are in contravention of Section 3(1), 3(3) (a), 3(3) (b) of the Act.

## Inquiry by CCI-

Issues involved and findings of the CCI:

**Issue 1:** Whether cement manufacturers violated section 4 of the Act relating to abuse of dominant position?

**CCI Decision:** CCI observed that, since the market structure suggests that no single firm or group is dominant, therefore, no contravention of the provisions of the section 4 by any single cement firm or a group is made out.

**Issue 2:** Whether the cement manufacturers violated section 3(3) of the Act?

**CCI Decision:** The Commission observed that the cement manufacturers used to meet at the platform of the Cement Manufacturers Association (CMA) and the CMA to collect both retail and wholesale prices and circulate details of capacity utilization and production among all its members, thereby establishing coordinated act on the part of the cement companies to restrict production and supplies in the market in contravention of provisions of section 3(3) (b) of the Act.

Further, the Commission held that, *price parallelism* among the cement manufacturers was rampant which was supported and corroborated by factors such as limiting and controlling supply by underutilizing capacity, maintaining similar and parallel behavior in production and dispatch of cements with a view to maintain high prices in the market, which is further established by circumstantial evidence, that the cement companies have acted in concert under an “agreement”. The Commission overruled the objection raised by all respondents that there was no written agreement or direct evidence from which the existence of a cartel could be inferred. The Commission observed that written agreement is not necessary to establish common understanding or concerted behavior under the definition of “Agreement” under section 2(b) of the Act.

The Commission also relied upon the settled jurisprudence in other jurisdictions as well as on the guidelines of international agencies such as the OECD in support of its decision that cartels can be prosecuted without direct evidence of agreement and on the basis of circumstantial

evidence alone. Further, the Commission also relied upon earlier precedent in the form of past decisions of the MRTP Commission in case no. RTPE 99/1990 and case no. RTPE 21/2001 in which CMA and some cement manufacturers were found to be engaged in restrictive trade practices as well as that some cement manufacturers had been penalized in other jurisdictions.

**Final order by CCI:** CCI vide its order dated June 20, 2012 under section 27 of the Act has directed the cement manufacturers to “cease and desist” from indulging in any activity relating to agreement, understanding or arrangement on prices, production and supply of cement in the market. The CMA has also been directed to disengage and disassociate itself from collecting wholesale and retail price through the member cement companies and also from circulating the details on production and dispatches of cement companies to its members. Besides these directions, heavy monetary penalties have also been imposed on all the 11 major cement manufacturers as well as on the CMA.

**Penalty imposed:** CCI has imposed penalty on the 11 cement manufacturers @ 0.5 times of their annual profits for the years 2009-10 and 2010-11. CCI has also imposed penalty of ₹ 73 lakhs on the CMA @ of 10% of its average turnover for the last 3 preceding years. The total penalty amount works out to ₹ 6,306.59 crores (INR 63.06 billion). Individually heavy fines have been imposed on (i) ACC Ltd. (₹ 1147.59 crores), (ii) Ambuja Cement Ltd. (₹ 1163.95 crores), (iii) Binani Cement Ltd. (₹ 167.32 Crores), (iv) Century Textiles Ltd. (₹ 274.02 crores); (v) India Cement Ltd. (₹ 187.48 crores), (vi) J K Cement Ltd. (₹ 128.54 crores); (vii) Lafarge India Ltd. (₹ 480.01 crores), (viii) Madras Cement Ltd. (₹ 258.63 crores) (ix) Ultra Tech Cement Ltd. (₹ 1175.49 crores), (x) Jai Prakash Associates Ltd. (₹ 1323.60 crores), (xi) Cement Manufacturers Association Ltd. (₹ 73 lakhs).

The press release dated June 21, 2012 issued by CCI on the above order can be seen at:

<http://www.cci.gov.in/May2011/Home/PressReleaseCementJune2012.pdf>



**Comment:** This decision of CCI assumes significance because, firstly, it is based primarily on circumstantial evidence which, according to CCI, has provided the “plus factor” to corroborate the “price parallelism”, i.e. which indicated the limiting and controlling of the market by the major cement manufacturers by under utilization of their installed capacities to create artificial demand and allocating the market on geographical basis to CCI; secondly, cognizance has been taken of the institutionalized interactions facilitating exchange of sensitive commercial information such as prices, installed capacity, capacity utilization, production and dispatch through the Cement Manufacturers’ Association; thirdly, CCI also noticed that the coordinated behavior of the major cement manufacturers only increased the profits of the large cement companies and the benefits of several exemptions granted by the government to the cement industry through excise duty reductions etc. were not passed on to the customers and consumers.

## **CCI imposes penalty against explosive manufacturers on complaint of Coal India Ltd.**

CCI vide its order dated April 16, 2012 has imposed a total fine of ₹ 58.83 crores on 10 explosive manufacturing companies on charges of



collectively boycotting the reverse e-auction process for supply of explosives to state owned Coal India Limited (CIL), thereby limiting the market and manipulating the bidding process for supply of explosives to CIL, in violation of section 3(3) (b) and section 3(3) (d) of the Act.

The 10 top explosive manufacturers included Gulf India Corp. Ltd. (fined for ₹ 28.94 crores), Solar Industries India Ltd. (₹ 11.34 crores) and Indian Explosives Ltd. (₹ 10.84 crores). CIL had moved CCI against explosive manufacturers, alleging that the firms were forming a cartel while quoting bids floated by the coal PSU, thereby killing its right to procure the product at a fair price. Other suppliers which have been fined are Ideal Industrial Explosives Ltd. (₹ 1.65 crores), Blastec India Pvt. Ltd. (₹

84.90 Lakh), Emul Tek (P) Ltd. (₹ 28,576), Regenesi Industries (P) Ltd. (₹ 96.04 Lakh), Black Diamond Explosives Pvt. Ltd. (₹ 93.09 Lakh), Techno Blasts India Ltd. (₹ 17.79 Lakh) and Keltech Energies Ltd. (₹ 3.11 crores).

All the above companies have filed appeals against the order before the Competition Appellate Tribunal (COMPAT).

The full text of the decision is available on the website of CCI ([www.cci.gov.in](http://www.cci.gov.in)).

## **CCI imposes penalty against suppliers of food preservatives to FCI**



CCI, taking suo motu cognizance from a letter sent by the Chairman of Food Corporation of India (FCI), vide its order dated April 23, 2012, has imposed a total penalty of ₹ 317 crores on three companies supplying aluminium phosphide

tablets (used for storing food grains) to the Food Corporation of India (FCI) for limiting the supply of the said product in the relevant market under Section 3(3)(b) and for manipulating the bidding process under Section 3(3)(d) of the Act. Of the three, the highest penalty of ₹ 252.44 crores has been imposed on United Phosphorous Ltd., followed by a penalty of ₹ 63.90 crores on Excel Crop Care Ltd. and ₹ 1.57 crores on Sandhya Organics Chemicals Pvt. Ltd. for the same charges. The penalty represents 9% of the average annual turnover of these companies in the last three years.

All the above companies have filed appeals against the order before the Competition Appellate Tribunal (COMPAT).

The full text of the decision is available on the website of CCI [www.cci.gov.in](http://www.cci.gov.in)

## CCI imposes penalty against hospital equipment suppliers in two separate cases

In the first case, CCI, taking cognizance of an information filed by NGO, A Foundation for Common Cause and People Awareness, New Delhi vide its order dated April 16, 2012 has



imposed a total fine of ₹ 3.01 crores on three medical equipment and medical systems supplying companies for bid rigging and manipulating the process of tender for supply of Modular Operation Theatre (MOT) and Medical Gas Manifold System (MGMS) to Sports Injury Centre of the Safdarjung Hospital, New Delhi. CCI fined the three companies, namely, PES Installation Pvt. Ltd, MDD Medical Systems (India) Pvt. Ltd. and Medical Product Services (MPS) in contravention of section 3(3)(d) of the Act. The amount of penalty imposed was at the rate of 5% of the average turnover for the last 3 years.

In the second case, CCI, vide its order dated April 25, 2012, acting on an information filed by another Medical Equipment Supplier, (who did not succeed in the tender) for supply of pre-fabricated MOT along with preparation, scrub and dirty linen rooms to Jai Prakash Narain Apex (JPNA) Trauma Center of the All India Institute of Medical Sciences (AIIMS) again found the above named three companies guilty for manipulating process of bidding in the said tender in violation of section 3(3)(d) of the Act. However, in view of penalty imposed in the earlier case, as mentioned above, CCI did not impose any monetary penalty again on them.

The full text of the decisions is available on the website of CCI [www.cci.gov.in](http://www.cci.gov.in)

## CCI passes orders on closure of certain matters

CCI has passed orders for closing certain information filed under the Act as well as the pending cases of investigations transferred from the Director General of Investigation &



Registration (DGIR) and the COMPAT. In all, CCI has closed 163 cases of Information's filed under the Act and 33 cases of investigations referred to it by DGIR and the COMPAT.

The details of the orders are available on the website of CCI [www.cci.gov.in](http://www.cci.gov.in)

## CCI approves 17 more 'Combinations' within 30 days



Keeping its promise of fast track disposal of merger regulations, CCI approved, 17 more Combinations during this quarter, within 30 days from the date of filing of Notice under the Combination Regulations, 2011

holding in each case that the proposed 'combination' was not likely to cause an appreciable adverse effect on competition in the relevant markets in India.

Full Text of the Orders can be viewed on the CCI website [www.cci.gov.in](http://www.cci.gov.in).

## Media Updates

### COMPAT rejects NSE plea for relief on segment reporting



The Competition Appellate Tribunal (COMPAT) has rejected an appeal by the National Stock Exchange (NSE) for an interim relief from maintaining separate accounts for each segment of the bourse. The tribunal's decision would come as a

body blow to India's largest stock exchange that was looking for some last-minute respite after CCI found it guilty of "abusive behavior" in the currency derivatives segment. In its appeal, NSE contended that maintaining separate segment account would entail cost and would be time consuming to implement. It also said that it is not required under accounting standards. In June 2011, CCI ruled in favour of MCX-SX, directing NSE to cease and desist from abusing its dominant position, levy a fee on all

currency derivatives trade apart from imposing a penalty of ₹ 55.50 crores.

(Source: *The Financial Express*, March 31, 2012)

## Competition Commission of India rejects petition of Manappuram Jewellers

CCI rejected a complaint filed by Thrissur-based Manappuram Jewellers Pvt Ltd against the Kerala Gold and Silver Dealers Association (KGSDA) of Thrissur and five other local jewelers in and around Chalakudy, claiming that they were abusing their dominance in the gold market. It was also alleged that members of KGSDA were fixing prices and prohibiting the entry of the informant in the market for gold and silver business in the state of Kerala. KGSDA was also alleged to be spreading rumors about the informant that product quality of the informant was inferior to the quality of the members of KGSDA, which will have a detrimental effect to the business of the informant in the state of Kerala. The opposite party was thus alleged of violating both section 3(3) and section 4 of the Act.



CCI after finding a prima facie case had referred the matter for investigation to the Director General (DG) but the DG did not find any evidence to support the claims made by the informant. Based on DG's findings, CCI held that none of the members of KGSDA had any agreement to fix the prices or had collectively refused to deal with the jewelry purchased from the Informant. Further, none of the members of KGSDA had a market share more than that of the informant. CCI, therefore, closed the case under section 26(6) of the Act holding that there was no abuse of dominant position in the market and nor there was any evidence of collusion or concerted action by members of KGSDA to constitute violation of section 3 and 4 of the Act.

(Source: *Times of India*, April 27, 2012)

## Group of Ministers (GoM) to decide on CCI filter for FDI in pharmacy sector



As to how the Competition Act can be amended to empower the Competition Commission of India (CCI) to vet Brownfield FDI proposals in the pharmacy sector the matter has been referred to a Group of

Ministers. This was the result of competition watchdog's information that it cannot take up the task of clearing pharmacy deals until the law is modified to expand its mandate. The government has decided to make an exception for the pharmacy sector by introducing a distinction between Greenfield and Brownfield ventures. Till the CCI braces up for its new role, the PMO said that the Brownfield proposals would have to get a FIPB nod. This issue of regulating FDI in pharmacy remains a bone of contention between ministries.

(Source: *The Financial Express*, May 17, 2012)

## CCI orders probe in Google's Ad Words programme



CCI has started investigation to probe the alleged discriminatory practices by global search engine Google

relating to its Ad Words. The investigation was ordered after the CCI found "prima facie evidence" that Google has abused its dominant market position by being discriminatory in allotting keywords to matrimonial site Bharatmatrimony.com.

In February, Bharat Matrimony had filed a complaint against Google alleging that the multinational company has abused its dominance by engaging in discriminatory and retaliatory practices relating to Ad Words. The Ad Words programme, in which Google sells keywords to advertisers and displays them in the form of short ads online, is a big money spinner for the company in 2011, the advertising segment comprised 96 per cent of Google's \$38 billion revenue.

(Source: *PTI* May 6, 2012)



## India's Competition Commission to co-chair merger working group of ICN news

CCI from India has been invited to co-chair the merger working group of the International Competition Network (ICN) for the next year, the other co-chairs being competition authorities of the European Commission and Italy. The co-chair ship of the group would provide India an opportunity for participating in developing a harmonised global framework for merger review and learning from the experiences of other jurisdictions.

(Source: domain-b.com, April 24, 2012 available at [http://www.domain-b.com/economy/general/20120424\\_competition\\_commission.html](http://www.domain-b.com/economy/general/20120424_competition_commission.html))

## Coordination in fuel prices amongst OMCs grabs CCI attention

According to the CCI, the three state Oil Marketing Companies (OMCs) i.e. IOCL, BPCL and HPCL have an understanding among them when it comes to pricing petrol, which is in violation of the Act. The agreements between market players (including those which are not formal or in-writing or intended to be enforced in law) which have "appreciable adverse effect on competition," are considered anti-competitive and void under the Act. Therefore, CCI has asked the government to look into the disparity in the free-floating pricing of petrol and the administered price of diesel that has created a distortion in the fuel and automobile markets.

(Source: The Financial Express, June 6, 2012)

## CCI to find bad clauses in DLF flat pact

In the ongoing appeal filed by DLF Ltd. against the CCI order imposing ₹ 630 crore penalty on DLF over alleged abuse of dominant position, the Competition Appellate Tribunal (COMPAT) has



asked CCI to specify the clauses in the agreement between DLF and the Flat Buyers' Association that allow the company to abuse its dominant position. The CCI has also been asked to prepare a draft agreement that is compliant with the Act. COMPAT has also asked CCI to seek inputs from the company and the buyer's association. CCI had imposed the penalty following an inquiry based on complaints filed by the flat buyer associations of two DLF projects in Gurgaon — DLF Park Place and The Belaire. These associations had complained to CCI about delays and increase in the number of floors from what was initially planned, among other issues.

(Source: The Financial Express June 7, 2012)

**Comment:** We had presented a special feature on the DLF case in the Competition Law Bulletin, Volume -III No. 2 & 3, May-August, 2011.

## CCI takes suo motu action against milk retailers



CCI has initiated a suo motu inquiry against milk retailers for frequent price rise. This was confirmed by The Chairman, CCI, Mr. Ashok Chawla in his inaugural address on the lecture series

"Competition Economic Policy and Common Man" held at the Sardar Patel Institute of Public Administration (SPIPA), Ahmadabad in association with FICCI-Gujarat State Council on June 22, 2012.

(Source : Business Standard, June 24, 2012)

## Compat decides pending appeals and MRTTP matters

COMPAT continues to decide the pending cases under the repealed MRTTP Act. As per information received from the COMPAT, it had disposed of 1869 cases till May, 2012 as per details below:

RTP cases	276
UTP cases	824
Compensation cases	760
MTP cases	09

Further, as per information received from the Registry of COMPAT, the status of the disposal of appeals filed before the COMPAT under the Act, till May, 2012 is as under:

No. of appeals filed	No. of appeals disposed	Balance
March 2012- 05	NIL	34
April 2012- NIL	NIL	34
May, 2012- 60	05	89

## INTERNATIONAL NEWS

### European Union

#### EU court rejects Microsoft antitrust appeal, but reduces its fine

The second highest Court of the European Union (EU) i.e. the European General Court (EGC) has rejected Microsoft's appeal against a 2008 European Commission antitrust ruling, but has reduced the fine by 4 %.



Microsoft is now required to pay the fine of € 860 Million (\$1.07 billion) as against the original fine of € 899 Million imposed by the European Commission. The European Commission had imposed the record-breaking fine because of Microsoft's failure to respect an earlier antitrust ruling that it disclose information about APIs used in its workgroup server products to enable competitors to develop interoperable products. However, the court did reduce the amount of the penalty by just over 4% to take account of a 2005 letter that the Commission sent to Microsoft allowing it to continue restrictions on the distribution of some rival 'open source' products pending a ruling on an open case. The fine was based on a daily rate for the 488 days that the computer giant failed to hand over the interoperability information and came on top of earlier penalties for anti-competitive behavior. Microsoft is the only company to be fined by the European Commission's antitrust regulators for failing to comply with an order.

The non-compliance penalty imposed on Microsoft by the European Commission is almost double the original

penalty of € 497 million, which was imposed by the Commission on Microsoft for abusing its dominant position to shut out its competitors. It was not immediately clear whether Microsoft would appeal against this decision of the EGC to the highest Court i.e. the European Court of Justice (ECJ).

(Source: *The Live Mint*, quoting *WSJ* on technology dated June 28, 2012, *The Economic Times* quoting the *Reuters* dated June 28, 2012 and [http://www.computerworld.com/s/article/9228558/Update\\_EU\\_court\\_rejects\\_Microsoft\\_antitrust\\_appeal\\_but\\_shaves\\_4\\_off\\_its\\_fine](http://www.computerworld.com/s/article/9228558/Update_EU_court_rejects_Microsoft_antitrust_appeal_but_shaves_4_off_its_fine))

#### EU Commission re-imposes fines on Mitsubishi and Toshiba for gas insulated switchgear cartel following Court judgment



The European Commission has re-adopted a decision fining Mitsubishi Electric Corporation and Toshiba Corporation for their participation in a cartel on the markets for gas insulated switchgears, after part of the original decision (see IP/07/80) was annulled by the European General Court (EGC) for a breach of equal treatment in the setting of the two companies' fines (cases T-113/07 and T-133/07). The EGC entirely upheld the Commission's findings that the two companies had infringed EU antitrust rules that prohibit cartels and restrictive business practices and their liability for it. Today's decision ensures that Mitsubishi and Toshiba receive an appropriate fine for their participation in the cartel. In 2007, the Commission imposed fines of over €750 million on 20 companies for their participation in a cartel on the market for gas insulated switchgear (see IP/07/80). Gas insulated switchgear (GIS) is heavy electrical equipment used to control energy flows in electricity grids. Mitsubishi and Toshiba brought actions for annulment of the Commission's decision before the EGC. The EGC fully upheld the Commission's finding that Mitsubishi and Toshiba had infringed Article 101 of the Treaty on the Functioning of the EU - TFEU), but annulled their fines because in setting these fines the Commission had used sales figures for a different reference year than for other cartelists. The EGC acknowledged the legitimate aim of the different treatment, i.e. to reflect the fact that contrary to



other participants Mitsubishi and Toshiba participated in the infringement via a joint venture in the last two years of the cartel. However the Court ruled that the use of different reference years violated the principle of equal treatment and annulled the fines for the two companies. In this decision the Commission re-imposed fines on Mitsubishi and Toshiba for their participation in the GIS cartel, taking full account of the EGC judgments. The newly imposed fines are calculated on the basis of the same parameters as in the 2007 decision with the exception of the reference year. The decision ensures that companies that have infringed EU competition law do not escape sanctions due to procedural shortcomings.

*(Source: European Commission: Press Release dated June 27, 2012).*

## **EU Commission fines producers of water management products €13 million in sixth cartel settlement**

The European Commission has fined a number of producers of water management products, used in heating, cooling and sanitation systems for breaching EU antitrust rules that outlaw cartels and restrictive business practices. However, the Commission reduced the fines imposed by 10% as the companies concerned acknowledged their participation in the cartel and their liability in this respect. Flamco and Reflex were fined a total of € 13 661 000 for operating together with Pneumatex, a cartel on the German market from June 2006 until May 2008. In addition, in autumn 2006, Reflex and Pneumatex expanded their anti-competitive behaviour to 13 other EU Member States for a limited period of three months. Pneumatex was not fined as it benefited from immunity under the Commission's 2006 Leniency Notice for revealing the existence of the cartel to the Commission. For almost two years, Flamco, Reflex and Pneumatex coordinated the prices for water management products on the biggest market in Europe, namely Germany. For a short period of three months, Pneumatex and Reflex also coordinated their prices in France, Belgium, Spain, Portugal, Luxembourg, Italy, Finland, Sweden, Hungary,



the United Kingdom, Greece, The Netherlands and Denmark. The cartel members informed each other through bilateral contacts of the amount and date of planned price increases and exchanged sensitive market information. Water management products include expansion vessels, pressure maintenance systems, water make-up systems, degassers, air vents, separators and safety valves. The fines take into account the companies' sales of water management products in the markets concerned by the cartel and the very serious nature of the infringement. The fines were set on the basis of the EU 2006 Guidelines on fines. Pneumatex received full immunity from fines.

*(Source: European Commission: Press Release dated June 27, 2012).*

## **EU Commission opens formal proceedings against Deutsche Bahn**



The European Commission has opened formal antitrust proceedings to investigate whether the German railway incumbent Deutsche Bahn AG and several of its subsidiaries operate an anti-competitive pricing system for traction current in Germany, in breach of EU antitrust rules. Traction current is a type of electricity used by trains on the railway network. The Commission will investigate whether the discounts applied by Deutsche Bahn lead to higher prices for its competitors, placing them at a disadvantage on the rail freight and passenger markets. Following complaints, the Commission carried out inspections at the premises of Deutsche Bahn in 2011. The Commission's investigation will focus on the pricing of traction current in Germany. Traction current is a particular type of electricity needed to move electric locomotives and trains on the railway network. In Germany, traction current is supplied at a specific frequency distinct from the frequency of the general electricity network. DB Energie GmbH, a subsidiary of Deutsche Bahn AG, is the only supplier of traction current on the German market. The Commission will investigate in particular whether discounts on the price of traction current applied by DB Energie GmbH to railway

undertakings active in Germany lead to higher prices for competitors of Deutsche Bahn and place them at a competitive disadvantage on the rail freight and passenger markets. Such behavior, if established, would violate Article 102 of the Treaty on the Functioning of the EU (TFEU) that prohibits the abuse of a dominant market position.

*(Source: European Commission: Press Release dated June 13, 2012).*

## **EU Commission opens in-depth investigation into the creation of a mobile commerce joint venture by UK mobile operators Telefónica, Vodafone and Everything Everywhere**

The European Commission has opened an in-depth investigation under the EU Merger Regulation into the proposed creation of a joint venture in the UK between Vodafone, Telefónica and Everything Everywhere in the field of mobile commerce. The Commission's preliminary investigation indicated potential competition concerns in the nascent markets of mobile payment applications supply (so-called "mobile wallets"), mobile advertising and related data analytics services, where the joint venture may have very high market shares.

*(Source: European Commission: Press Release dated April 13, 2012).*

## **EU Commission opens proceedings against Motorola**

The European Commission has opened two formal antitrust investigations against Motorola Mobility Inc. The Commission will assess whether Motorola has abusively, and in contravention of commitments it gave to standard setting organizations, used certain of its standard essential patents to distort competition in the Internal Market in breach of EU antitrust rules. The opening of proceedings means that the Commission will examine the cases as a matter of priority. The Commission will examine whether Motorola's behavior amounts to an abuse of a dominant



market position prohibited by Article 102 of the Treaty on the Functioning of the EU (TFEU).

*(Source: European Commission: Press Release dated April 03, 2012).*

## **EU Commission imposes € 169 million fine on freight forwarders for operating four price fixing cartels**



The European Commission has fined 14 international groups of companies a total of € 169 million for participating in the period 2002-2007 in

four distinct cartels aimed at fixing prices and other trading conditions for international air freight forwarding services, in breach of EU antitrust rules. The freight forwarders colluded on surcharges and charging mechanisms concerning important trade lanes, in particular the Europe-USA and the China/Hong Kong-Europe lanes. Participants and duration varied in each of the four cartels. Deutsche Post (including its subsidiaries DHL and Exel) received full immunity from fines under the Commission's 2006 leniency notice for all four cartels, as it was the first to reveal their existence the Commission.

*(Source: European Commission: Press Release dated March 28, 2012).*

## **United States**

### **FTC approves final order settling charges that Star Pipe Products, Ltd. acted anti-competitive in market**



The Federal Trade Commission has approved a final order settling charges that Star Pipe Products, Ltd. Engaged in illegal anticompetitive practices to protect its share of the market for ductile iron pipe fittings used in municipal water systems nationwide. In settling the FTC's charges, Star has agreed not to use similar anti-competitive tactics in the future.

*(Source: Federal Trade Commission: Press Release dated May 11, 2012)*

## Others

### United Kingdom

#### Competition Commission to investigate metal packaging coatings merger

The Competition Commission (CC) is to investigate Akzo Nobel NV's (Akzo Nobel) proposed acquisition of Metlac Holding S.r.l. (Metlac Holding). The Office of Fair Trading (OFT) has referred the case to the CC, which will decide whether the acquisition may be expected to result in a substantial lessening of competition in any market or markets for goods or services in the UK. Akzo Nobel's subsidiary (Akzo Nobel Coatings International B.V. (ANCI)) and Metlac Holding's subsidiary (Metlac S.p.A. (Metlac)) both manufacture and supply metal packaging coatings. These are used, for example, in the production of beverage and food cans. Between them, the parties supply around 40 to 50 per cent of the European Economic Area market. The OFT received a number of third party concerns relating to the loss of Metlac as a competitor in the supply of metal packaging coatings.



(Source: UK Competition Commission: May 22, 2012)

#### OFT refers private healthcare market to the Competition Commission

The OFT has referred the market for privately funded healthcare services in the UK to the Competition Commission for further investigation. This follows the OFT's provisional decision to make a market investigation reference when it published its private healthcare market study in December 2011. The OFT then undertook a public consultation on its findings which closed in January 2012. Having considered the responses



submitted during the consultation process, the OFT continues to hold the view that the private healthcare market could work better for patients, and that there are reasonable grounds for suspecting that there are features of the market that prevent, restrict or distort competition.

(Source: Office of Fair Trading Press release: April 4, 2012)

#### Mercedes-Benz and truck dealers being probed in U.K. over cartel



Daimler AG (DAI)'s Mercedes-Benz unit in Britain and five dealers of its vans and trucks are being probed by the competition regulator for

allegedly coordinating prices and sharing commercially sensitive information. The group is suspected of five violations of competition law from 2007 to 2010, with each including two or three dealers. The OFT dropped a separate civil probe into the Mercedes unit and companies including Fiat SpA (F)'s Iveco subsidiary to let the European Union focus on the case, which involves a suspected cartel of truck makers.

(Source: Bloomberg News: June 28, 2012)

## Brazil

#### The New Brazilian Competition Law brought into force

On December 1, 2011, Brazil's new competition law was published in its final form, having been approved by President Dilma Rousseff. The new law goes into effect on May 29, 2012. The new law transforms merger review in Brazil by requiring parties to reportable mergers (and other qualifying transactions) to notify and obtain antitrust approval prior to consummating the transaction. This alert highlights key features of the new law (as amended by President Rousseff's vetoes) and its impact on the antitrust review of mergers and other "acts of concentration" in Brazil. Key aspects include merger control, anti competitive behavior and the new Competition Authority, CADE.

(Source:

<http://www.mondaq.com/x/158614/Antitrust+Competition/The+New+Brazilian+Competition+Law+Approved+But+Subject+to+Significant+Vetoes>)



## Russia

### Competition in the sky over Italy is restricted

Rosaviatsia prevents developing competition in the market of international transportation. On April 16, 2012, the Commission of the Federal Antimonopoly



Service (FAS Russia) found that the Federal Air Transport Agency (Rosaviatsia) violated Part 1 Article 15 of the Federal Law "On Protection of Competition". Rosaviatsia grants permits to air carriers with valid air operator certificates and licenses to transport passengers and / or cargo by air transport. However, Rosaviatsia failed to consider applications of "TRANSAERO" Air Carrier" OJSC. According to FAS Commission, such actions of Rosaviatsia restrict competition on the market of international transportation on the Moscow- Rome, Moscow -Milano and Moscow - Venice routes, and deprive customers of their right to choose the air carrier, which results in fixing excessive airfare.

(Source: Russia Competition Federation: April 18, 2012)

### Federal Antimonopoly Service imposed a record fine for cartel

On April 23, 2012, the Federal Antimonopoly Service (FAS Russia) fined "United Trading Company" OJSC over 912 million Rubles (912,033,361 Rubles). On December 15, 2011, FAS found that 23 participants of the market of liquid caustic violated Clauses 1, 3 and 4 Part 1 Article 11 of the Federal Law "On Protection of Competition" (prohibiting competition-restricting agreements and concerted actions). "ETK" concluded and took part in the agreement that resulted in maintaining prices on the market of wholesale supplies of liquid caustic market, dividing the market by the volume of sales, categories of sellers, buyers and a geographic principle, as well as economically and technologically unjustified refusals to conclude contracts with buyers of liquid caustic. FAS already found that "ETK" had organized a cartel that had existed for a long period of time and its participants had gained income on an especially large scale", said the Head of FAS Cartel Department Alexander Kinyov. The case file is forwarded

to the Ministry of Interior to initiate a criminal case under Article 178 of the Criminal Code of the Russian Federation.

(Source: Russia Competition Federation: April 28, 2012)

## Pakistan

### CCP issues show cause notices to 1-link (guarantee) limited and its member banks for alleged price fixing of ATM charges

The Competition Commission of Pakistan (CCP) has issued show cause notices to 1-Link Guarantee Limited (1-Link) and its member banks for, prima facie, fixing the charges of ATM cash withdrawal services, utility bills payment services (UBPS) and inter-bank fund transfer (IBFT) services, thereby violating Section 4 of the Competition Act, 2010 (the "Act"). CCP on its own took notice of the uniform rates implemented by the most of banks in Pakistan for ATM cash withdrawal transactions.

(Source: Competition Commission of Pakistan, Press Release dated March 15, 2012)

### CCP'S Landmark decision - Leniency granted to Siemens to break cartels in switchgear and transformer markets



CCP announces its decision in its first leniency application filed by Siemens (Pakistan) Engineering Co. Limited (Siemens) to seek leniency in respect of Show Cause Notice No. 27 dated September, 2011 issued for, prima facie, bid rigging/collusive activities

in the tenders called by electric power distribution companies (DISCOs) to procure switchgear and transformers from the members of Pakistan Electrical Power Equipments Manufacturers Association (PEMA). The Chairperson emphasized that one must recognize the importance of leniency program as cartel is the virus and leniency is the anti-virus to detect and prevent the harm. This is a landmark and historical decision which is most likely to be pivotal in shaping the landscape as to how cartel players may react and will serve as an incentive to insiders to come forward thus strengthening CCP to break the cartel which is beneficial for the economy.

(Source: Competition Commission of Pakistan, Press Release dated April 03, 2012)

## Publications

1. An article titled – *“Impact of Competition Law on Indian Real-estate Sector: An Analysis of Order against DLF”* was published in the Articles section of **Competition Law Reports** Volume 1: Part-3, March, 2012 published by Manupatra with the synopsis. [The article covers the analysis of CCI order and its impact on the real-estate industry along with the ambiguities in the order. The article also covers the best international practice adopted by various competition authorities in real-estate sector and the role of builders associations, as they can play a vital role in sensitizing their member builders on the benefits of competition compliance. In many jurisdictions, even if a breach occurs, the degree to which an enterprise can demonstrate a genuine commitment to compliance with competition laws may be an important factor for consideration by the competition regulator while
- determining the severity of any penalties to be imposed.]
2. An article titled – *“Economics of Exemptions from Competition Law”* was published in the Articles section of **Competition Law Reports** Volume 1: Part-4, April, 2012 published by Manupatra with the synopsis. [The article is in the backdrop of the growing demand of sectors like Banking, Railways and now Telecom, seeking exemption from the scrutiny by the CCI under the Act. The author discusses the economics behind such exemptions in the light of International experience and draws lessons, which may be useful for Apex government policy makers. The article also comments briefly on the manner in which this important policy issue has been dealt with in the final draft National Competition Policy to be unveiled by the Government of India soon].



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