

Competition Law Bulletin



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From the Editor's Desk...

Dear Reader,

We are happy to present the first issue of 2012.

Last few months have been the season for Seminars and Conferences. The Inter Pacific Bar Association-2012 (IPBA-2012) held at New Delhi during February 28 to March 03, 2012, attended by over 900 Lawyers from across the World, deserves to be mentioned. During one of the Sessions at the IPBA-2012 on "Recent Development in Merger Control in the Asia Pacific Region", Mr. Ashok Chawla, Chairman, Competition Commission of India (CCI) addressed the delegates and explained the recent amendment dated February 23, 2012, made in the Combination Regulations, 2011 with some major changes. We are covering all the major changes made in our special feature in this issue.

Noticeably, after the Banking Sector demand for exemption from the purview of the Competition Act, 2002 (the Act) a demand for similar exemption has now been made by the Department of Telecommunication as well as by the Ministry of Railways. We hope that the Government will weigh all pros and cons before considering such demands in the light of International experience.

As another special feature in this issue, we have discussed a recent Delhi High Court judgement wherein the Hon'ble court has declared Indian Railway as an "enterprise" under the Act.

Your views to improve the contents and style of presentation of news in the Bulletin are welcome.

Yours truly,

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INDIAN PERSPECTIVE

SPECIAL FEATURE

CCI further amends Combination Regulations

The Competition Commission of India ('CCI') vide a Notification (published in the Gazette of India) on February 23, 2012, published the *"The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2012"*, amending the existing Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (*"Combination Regulations"*). After gaining experience in the implementation of the Combination Regulations for almost eight months, CCI has amended the Combination Regulations with a view to provide further relief to the corporate world from making filings for combinations which are unlikely to raise adverse competition concerns, reduce their compliance requirements, make filings simpler and moves towards more clarity and certainty in the application of the Competition Act, 2002 (the Act) and the Combination Regulations.



The highlights of the major changes made by the present amendments in the Combination Regulations are as under:

1. **Aligning with SEBI Takeover Code:** The Combination Regulations now do not require a notice to be filed for acquisitions that are less than 25% of the shares or voting rights of a company on cumulative basis, as compared to the earlier position of only 15% of the shares or voting rights on a cumulative basis. The change is in sync with SEBI New Takeover Code, which raised the open offer trigger from 15 to 25 % of the shares acquired. **[Schedule I, Category 1]**
2. **Intra-Group Transactions Exempted:** To reduce the compliance burden to the companies that are looking for intra-group restructuring, CCI has included a new category 8A in Schedule I. The Combination Regulations have now dispensed with the requirement of filing a notice in respect of intra-group mergers or amalgamations involving wholly owned subsidiaries of holding companies within the same group etc. **[Schedule I, Category 8A]**
3. **Expensive filing fee:** Considering the resources deployed in the assessment of the notice, and keeping

in view the fees charged by other regulatory authorities abroad, it has been decided to bring the filing fees to a more realistic level, by increasing the fee from INR 50,000 to INR 10, 00,000 in respect of Form I and from INR 10, 00,000 to INR 40, 00,000 in respect of Form II. It is expected that the number of filings will be reduced substantially after the amendments that have removed the requirement for companies to file a notice in several instances that are not likely to adversely affect competition. **[Regulation 11]**

4. The acquisitions of shares or voting rights pursuant to a bonus issue or stock splits or buy backs and acquisition of shares or voting rights pursuant to subscription of rights issue (without the restriction of their 'entitled proportion'), not leading to acquisition of control, are now included in the list of transactions in Schedule I, that normally would not require a filing with the Commission. **[Schedule I, Category 6]**
5. The Company Secretary of the company, duly authorised by the Board, has been authorised to sign the Form I or Form II, in addition to those persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009 (i.e. the Managing Director or the Director authorized by the Board). **[Regulation 9, sub-regulation (1) and (3) proviso]**
6. In order to provide certainty about transactions involving asset transfers (slump sale) and calculation of value of assets and turnover for the purposes of Section 5 of the Act, a new provision has been introduced for inclusion of the value of assets and turnover of a transferor company to the transferee company where assets are transferred to the transferee company for the purpose of effecting a combination. **[Regulation 5, sub-regulation 9]**
7. Since Form III has to be filed within a relatively short time period of seven days, a provision has been made for admission of belated filing of Form III in respect of transactions covered under Section 6(5) of the Act. Further, Form III would now be filed along with a copy of the loan or investment agreement. **[Regulation 6]**
8. In Form I, the distinction for filling up Part I for certain types of transactions and Part II for the remaining transactions has been removed, leading to clarity and uniformity. To make it more relevant, Form I has been amended and a provision has been introduced for

parties to provide details of value of the assets and turnovers for the purpose of Section 5 and to provide a copy of the agreement, board resolution etc. as mentioned in Section 6(2). Form I remains the default form, wherein some simplifications have been introduced. Parties retain the option of filing Form II, especially in those cases where there may be significant horizontal overlap (>15%) and/or significant vertical relationship (>25%) between the parties. **[Regulation 5, sub-regulation (2) and (3)]**

9. In order to facilitate a quick and efficient review of the notice, the parties are required to file a brief summary of the combination, in not less than 2000 words, when filing the notice. **[Regulation 13, sub-regulation 1A]**

Special feature:

Indian Railways held to be "enterprise" under the Act -

The Delhi High Court vide its Order dated February 23, 2012, in a Writ Petition filed by the Ministry of Railways through Union of India,



challenging the Order of the CCI holding that Indian Railways is an enterprise and hence amenable to the jurisdiction of the Commission, has rejected the Petition of the Government and has held that the Indian Railways is indeed an 'enterprise' under the Competition Act and the CCI is empowered to hear complaints against it for alleged abuse of its dominant position in goods transport sector. It was urged in the Petition that operating the Indian Railways was a "sovereign function" of the State under the Industrial Policy, 1991 and hence it should get the benefit of exclusion from being called as an "enterprise" under the Competition act. Rejecting the contention it has been held that there is a "commercial angle" to the services rendered by the Indian Railways and it is not an inalienable function of the state, which is capable of being performed by private enterprises, like in other developed Countries. The Court also noted that though in 2010, the Railway Ministry had moved to Central Government seeking exemption from the ambit of Competition Act under the relevant provisions of the said Act¹, yet the Government had not issued any notification so far.

1. Section 54 of Competition Act, 2002

Comment: Indian Railways have since challenged this decision of the Single Bench and have filed the letter patent appeal challenging the order of a single judge of High Court before the Division Bench of Delhi High Court.

CCI passes orders for closure of certain matters

CCI has passed orders in certain matter and the said orders are duly displayed on its website giving the full text of its orders on closure of 90 cases of Information's filed under the Act and 22 cases of investigations transferred from the Director General of Investigation & Registration (DGIR) and the COMPAT.

Media Updates

Department of Telecom seeks exemption from Competition Act



Telecom Department is planning to move to Union Cabinet seeking the exemption of communication sector from the ambit of Competition Act' 2002. The move is triggered after the CCI raised concern

over the telecom ministry's plans to allow M & A, if the combined market share of merged mobile phone companies was less than 60%. It is to be noted that the Telecom Commission in December 2011 cleared the proposal of TRAI allowing under the automatic route if the combined market share was less than 35% and market share of the combined entity is between 35-60% be cleared on a case-by-case basis.

(Source: The Economic Times, March 19, 2012)

CCI fined Kingfisher ₹ 72.5 Lakhs for non-furnishing of information

CCI vide its Order dated January 9, 2012, has reduced the fine of ₹ 1.0 Crore earlier imposed against Kingfisher airlines to ₹ 72.5 Lakh, after finding that the airline had not provided sufficient information to the CCI. The CCI found that Kingfisher had no "reasonable cause" in not supplying information to the CCI for 145 days between May and September 2010, in respect of its alleged anti-competitive agreement with Jet Airways. In November 2010, the CCI had fined Kingfisher the maximum of ₹ 1 Crore permitted under the law for not providing requested information in time. The Competition Appeals Tribunal (COMAPT) stayed this fine in December 2010.

(Source: The Competition Commission of India Website)

Bharat Matrimony files complaint against Google with CCI

Bharat Matrimony has filed a complaint against Google in CCI, citing discriminatory trade practices related to its AdWords program. Informant alleged that Google has abused its dominance by engaging in discriminatory and retaliatory practices relating to AdWords. Complainant further alleged that the keywords relating to its websites being sold to rival parties such as Shaadi.com, and Jeevansaathi.com.



(Source: The Economic Times, February 03, 2012)

CCI to investigate Air India over level playing field

CCI may investigate the Air India's proposed restructuring by examining the specific aspects of the issue from the point of view of whether it vitiated level playing field concerns. Of Air India's ₹ 18,000 Crore of debt, about ₹ 11,000 Crore is sought to be converted into long-term bonds. In a statement Mr. Ashok Chawla stated that "If the government decides to guarantee Air India's loans and this allows banks to restructure the loans, the issue before the competition commission would be whether this gives Air India an unfair advantage. After all, if the government were to give the same guarantee for Kingfisher's loans, its loans could also be easily restructured."

(Source: The Financial Express, February 08, 2012)

BCCI abused its dominant position, says Director General, CCI

In a matter referred by Ministry of Sports and Youth Affairs, the DG have found Competition law violations in the way BCCI handed out media rights to World Sports Group and MSM for its cash-rich India Premier League (IPL) event. After conducting the investigation for 8 months, DG in its report concluded that BCCI had abused its dominant market position by allowing "single bidding" of media and television rights for IPL matches.



(Source: The Economic Times, February 12, 2012)

Coal India again under CCI scanner

Maharashtra State Power Generation Co has filed a complaint before CCI alleging that Coal India & its subsidiaries are abusing its dominant position by supplying it with low-



grade coal at inflated prices and failing to meet coal supply obligations.

(Source: The Economic Times, February 02, 2012)

CCI rejects complaints of cartelisation against private airlines

In a reference made by Ministry of Corporate Affairs to CCI against airlines, CCI vide its Order dated January 11, 2012, held that airlines did not indulge in anti-competitive practices by raising fares after Air India pilots went on strike in April-May last year. CCI observed that like in any peak season, during April and May 2011 load factor on airlines had increased and in line with this trend, the percentage of tickets sold in the higher buckets of all the airlines had also gone up.

(Source: The Competition Commission of India Website)

CCI approves twenty four 'Combinations' within 30 days

Keeping its promise of fast track disposal of merger regulations, CCI approved, 25 Combinations, 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

COMPAT decides pending 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 1448 cases till February 28, 2012 as per details below:

RTP cases	179
UTP cases	535
Compensation cases	732
MTP cases	2

INTERNATIONAL NEWS

European Union

Top telecom companies questioned by European Commission

EC is questioning five of Europe's biggest telecoms companies to see if a series of meetings they held since 2010 on strategy and technical co-operation constituted collusion. A questionnaire, which represents an information-gathering process and is not an official probe, has been sent to Vodafone, France Telecom, Telecom Italia,

Deutsche Telekom, and Telefonica, as well as to the telecom operators' trade group the GSMA.

(Source: The Reuters, March 14, 2012)

Songwriters filed a complaint against broadcaster with EC Commission

The European Composer and Songwriter Alliance (ECSA) filed a formal complaint filed with EC Commission and asked to investigate broadcasters, including the British Broadcasting Corporation, Mediaset and British Sky Broadcasting, for allegedly making unfair music publishing deals. ECSA alleged that the terms of publishing agreements into which composers are coerced by some of Europe's largest and most prominent broadcasters are far less fair than what could be secured in a truly free and open market. ECSA further alleged that the composers were frequently forced to assign the copyrights to their music to a publishing company owned by the Production Company or broadcaster as a pre-condition prior to being given a commission.

(Source: The Reuters, February 28, 2012)



EC Commission raids power exchange operators in cartel case

EC undertook unannounced inspections at the premises of companies active in managing power exchanges in several Member States. Power exchanges provide services that facilitate electricity trading at wholesale level. The Commission has concerns that the companies concerned may have violated European antitrust rules that prohibit cartels and restrictive business practices.

(Source: European Commission: Press Release dated February 07, 2012)

EC Commission blocks proposed merger between Deutsche Börse and NYSE Euronext

EC has prohibited, on the basis of the EU Merger Regulation, the proposed merger between Deutsche Börse and NYSE Euronext, as it would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges. The Commission's investigation showed that new competitors would be unlikely to enter the market successfully enough to pose a credible competitive threat to the merged company.

(Source: European Commission: Press Release dated February 01, 2012).



EC Commission investigating Samsung over Mobile Patents and Air France/Delta transatlantic JV

EC has opened an investigation to assess whether a transatlantic joint venture between Air France-KLM, Alitalia and Delta, all members of the SkyTeam airline alliance, breaches EU antitrust rules. The Commission will investigate whether the partnership may harm passengers on certain EU-U.S. routes where, in the absence of the joint venture, the parties would be providing competing services. In another case, EC has opened a formal investigation to assess whether Samsung Electronics has abusively, and in contravention of a commitment it gave to the European Telecommunications Standards Institute (ETSI), used certain of its standard essential patent rights to distort competition in European mobile device markets, in breach of EU antitrust rules.

(Source: European Commission: Press Release dated January 27 & 31, 2012).

United States

FTC sues to block Omnicare's bid to buy PharMerica



The Federal Trade Commission issued a complaint to block Omnicare, Inc.'s hostile acquisition of rival long-term care pharmacy provider PharMerica

Corporation, alleging that the combination of the two largest U.S. long-term care pharmacies would harm competition and enable Omnicare to raise the price of drugs for Medicare Part D consumers and others. Due to its substantial market share, the FTC alleges that the combined firm likely would be a "must have" for Medicare Part D prescription drug plans, which are responsible for providing subsidized prescription drug benefit coverage for most SNF residents and other Medicare beneficiaries.

(Source: The Federal Trade Commission: Press Release dated January 27, 2012).

DoJ fined Japanese Auto Suppliers with \$548 million for price fixing

Two Japanese suppliers of automotive electrical components—Yazaki Corporation and DENSO Corporation—have agreed to plead guilty and to pay a total of \$548 million in criminal fines for their involvement in multiple price-fixing and bid-rigging conspiracies in the sale of parts to automobile manufacturers in the United States, the Department of Justice today announced. Four executives, all Japanese nationals, have also agreed to plead guilty and to serve prison time in the United States.

(Source: Department of Justice: Press Release dated January 30, 2012)

Intel settles NY antitrust case for \$6.5 million

Intel Corp agreed to pay \$6.5 million to resolve an antitrust lawsuit in which New York's attorney general accused Intel of threatening computer makers and paying billions of dollars of kickbacks to maintain its market dominance. The settlement ends a November 2009 Delaware case brought by Andrew Cuomo, then New York's attorney general.



(Source: The Reuters, February 09, 2012)

Others

Common Investigation : EU, UK, US, Swiss, Canadian Competition Authorities investigating Collusion over Libor Derivatives; UBS turned whistleblower

Competition Authorities worldwide are investigating world largest banks for conspiring to manipulate interbank lending rates used to set interest rates on hundreds of trillions of dollars of securities. Authorities are investigating whether there is a possible collusion between derivatives traders concerning London Interbank Offered Rate (LIBOR) and Tokyo Interbank Offered Rate (TIBOR) and whether banks understated interbank rates to reduce borrowing costs and downplay investor panic during the banking crisis. Some of the banks under investigation are Bank of Tokyo-Mitsubishi UFJ, Citigroup, Credit Suisse, Deutsche Bank, HSBC Holdings, JP Morgan Chase & Co., Mizuho Financial Group Inc., Rabobank Groep N.V., Royal Bank of Scotland Plc Societe Generale, Sumitomo Mitsui Banking Corporation, RBS and UBS etc. It is to be noted that UBS has turned out to be a whistleblower in the investigation as the bank is seeking to insulate itself from biggest possible fines from the investigation by turning itself in to regulators before its competitors to gain leniency.

(Source: The Bloomberg, February 03, 2012).

United Kingdom: Lafarge, Anglo Venture ruled Anti-Competitive

The Competition Commission (CC) has decided provisionally that the proposed UK joint venture between Anglo American PLC (Anglo American) and Lafarge S.A. (Lafarge) could damage competition in certain markets for construction materials. In a summary of its provisional findings report published today, the CC has concluded that the joint venture could lead to a substantial lessening of competition (SLC) in the markets for the supply of bulk cement, the supply of rail ballast, the supply of high purity limestone, when used for flue gas desulphurization (the

abatement of acid gas emissions from coal-fired power stations), the supply of primary aggregates for construction applications in 23 local markets.

(Source: The Competition Commission of UK: Press Release dated February 21, 2011)

Greece: Tasty Foods-PepsiCo fined with 16.2 Million Euros for abusing dominant position



The Hellenic Competition Commission found that TASTY FOODS i.e. a group company of PepsiCo under the brand name Lats Chips infringed Articles 2 of Greek Law 703/77 and 102 TFEU (abuse of dominance), as well as Articles 1 of Greek Law 703/77 and 101 TFEU (restrictive agreements). Fines totalling € 16.177.514 million were imposed on the company for the above said infringements. TASTY FOODS employed various abusive practices throughout the period from 2000 until at least 2008, some of which exhibited extraordinary intensity, including Exclusivity agreements, illegal rebates etc.

(Source: Hellenic Competition Commission: Press Release dated February 08, 2012)

South Korea: Google accused for obstructing investigation



Google has been accused of methodically interfering with an anti-competition investigation into Android by South Korea's Fair Trade Commission. According to the Competition Commissioner Google deleted files and made its employees work from home in an attempt to frustrate the investigation. The Commission is considering imposing its maximum fine for non-compliance.

(Source: The Registrar, January 09, 2012)

Canada: Polyurethane foam manufacturer fined with C\$12.5 million for Price Fixing

The Competition Bureau imposed a fine of \$12.5 million on Domfoam International Inc. and Valle Foam Industries (1995) Inc. for participating in a price-fixing cartel for polyurethane foam. Domfoam and its affiliate, Valle Foam, admitted before the Ontario Superior Court in Ottawa that they had agreed with competitors to fix the price of polyurethane foam products manufactured at their plants in Brampton, Ontario, Delta, British Columbia, and Montreal, Quebec, over a period of 11 years.

(Source: Competition Bureau, Canada: Press Release dated January 06, 2012)

Romania: Oil companies fined Euro 200 million for price fixing

The Competition Council has sanctioned six oil companies with lei 900 million (almost Euro 200 million) for anti-competitive agreements. The competition authority found that six companies have agreed to withdraw from the market the range of Eco Premium gasoline, thus the companies infringed both the Competition Law and the Treaty on the Functioning of the European Union (TFEU). The sanctioned companies are the following: SC OMV Petrom SA, SC OMV Petrom Marketing SRL, SC Lukoil România SRL, SC Rompetrol Downstream SRL, SC Mol Petroleum Products SRL, SC ENI Romania.

(Source: Romania Competition Commission: Press Release dated January, 2012)

France: French competition authority fined heavily on cartel & abuse cases

- ✧ A French commercial court has found Google guilty of abusing the dominant position of its Google Maps application and ordered it to pay 500,000 Euros in damages and interest to the plaintiff and a 15,000 euro fine.
- ✧ Paris court has upheld 11 French banks' appeal against a 384.9 million-euro (\$512 million) fine imposed by France's antitrust authority for alleged collusion on cheque fees.
- ✧ Competition Authority fined French and German flour millers about 242 million euros (\$317 million) for price fixing cartel in the retail market.
- ✧ Competition Authority fines Nestlé, Mars Incorporated, Colgate-Palmolive Groups and their specialist subsidiaries €35.3 million for having limited competition in the wholesale distribution of their products.

(Source: The Reuters, February 28, 2012)

South Africa: Shell, Apollo Tyre, Lafarge fined by Competition Authority

- ✧ The Commission fined two major oil companies Engen and Shell for price fixing. Engen has agreed to pay a penalty of R28,800,000 and Shell has agreed to pay R26,259,480.
- ✧ The Commission imposed a fine on Apollo Tyres of R45 million as penalty for indulging in cartelisation in South African Tyre Market.
- ✧ The Commission imposed a fine of R 149 million on

cement giant Lafarge for cartelization in South African cement market.

(Source: Competition Commission of South Africa: Press Release)

Pakistan: Commission raided offices of Cement and Bank Associations



The Competition Commission of Pakistan (CCP) in two different investigations has conducted search and inspection of Pakistan Banks' Association and All Pakistan Cement Manufacturers

Association (APCMA) to impound proofs of the association's suspected role in providing a platform to banks for collusively determining uniform ATM charges and suspected cartelization in cement sector respectively. CCP had obtained information from an informant that contained copies of certain e-mails which were sent by the Secretary of APCMA to cement manufacturers.

(Source: Competition Commission of Pakistan: Press Release dated February 14, 2012)

Mexico: CEMEX fined 10.2 million pesos for abusing dominant position



Mexico Competition Commission imposed fined on Cement giant Cemex 10.2 million pesos (\$800,000) for

trying to keep a small importer out of its market, capping an 8-year. The Federal Competition Commission ruled that Cemex tried to persuade a Mexican port official not to let a ship full of Russian cement dock at a Gulf coast port in 2004. It is to be noted that the Mexican cement market is dominated by Cemex, which owns about half the cement plants in the country, with enough capacity to produce about 80 percent of domestic demand.

(Source: The Bloomberg, February 20, 2012).

Spain: Competition Authority fined companies for abusing dominant position and forming cartel:

- ✧ The National Competition Commission (CNC) of Spain fined Abertis Telecom €13,755,000 for abuse of a dominant position. Abertis has abused its dominant position in the market for DTT signal transport and distribution services by preventing competitors from entering the market for digital terrestrial television (DTT) signal transport and distribution services.

- ✧ CNC has imposed two fines of €14,967,960 and €8,158,000 on Endesa Distribución Eléctrica S.A. for abuse of its dominant position as electricity distributor. In the case the Endesa was found to have taken advantage of its position in the distribution market to distort competition in the related market for electrical installations and by charging customers for carrying out linking and connection work for the installation. The rule provides that such work must be done by the distributor at its own cost. However, over a specific period the distributor charged customers for this work, which has been considered exploitative abuse.
- ✧ CNC has imposed fines totalling more than 54 million euros on the companies Trasmediterránea, Balearia, Isleña Marítima de Contenedores, Sercomisa and Mediterránea Pitiusa for having participated in a cartel on the maritime passenger transport lines for cargo and passengers that connects the Spanish mainland with the Balearic Islands and the Balearic Islands with one another.

(Source: National Competition Commission, Spain: Press Release dated February, 2012)



PUBLICATIONS

1. The Financial Express on February 08, 2012 published an article titled *"Should online markets be immune from CCI scrutiny?"* The article focuses on the Competition issues relating to Online Markets. The article can be viewed at:
<http://www.financialexpress.com/news/should-online-markets-be-immune-from-cci-scrutiny/909117/>
2. International Journal "Global Antitrust Review" in its 4th edition on February 28, 2012 published an article titled *"Calculation of Fines in India - In search for some guidance"*. The article focuses on the International guidance on antitrust fines and need of fining guidelines in India. The article can be viewed at:
<http://www.icc.qmul.ac.uk/GAR/GAR2011/GAR%20-journal%202011.pdf>

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