Competition News Bulletin

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Dear Friends,

We are happy to present our Competition Law Bulletin in a new format by consolidating news relating to India and other major jurisdictions at one place. We value your continued support.

MM Sharma
Editor

Inside...

I. CARTELS AND ANTICOMPETITIVE AGREEMENTS

INDIA

No case relating to cartels and anti competitive agreements were reported in the month of May 2014 by the Competition Commission of India (CCI).

INTERNATIONAL

1. Australia: Federal Court fines ball bearing maker $2.8m for price-fixing

In proceedings brought by the Australian Competition and Consumer Commission (ACCC), an Australian federal court has imposed penalty of $3 million on a subsidiary of Japanese company NSK Ltd for allegedly indulging in cartelization in relation to the price of bearings in Australia. The Court held that from at least 2000 to May 2011, the senior Japanese executives of NSK Australia residing in Australia and three other bearings companies, Nachi (Australia) Pty Ltd (Nachi Australia) and Koyo Australia Pty Ltd (Koyo Australia), met over dinner as a group which they called the 'Southern Cross Association'. Meetings typically took place at Japanese restaurants in Sydney and Melbourne, where the participants discussed confidential information, including pricing plans. The case was brought to the ACCC's attention following investigations by European Commission & US Department of Justice's into auto-parts cartels.

(Source: ACCC Press Release, May 13, 2014)

2. European Union: EC fines steel abrasives producers € 30.7 million in cartel settlement

EC found Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth participating in a cartel to coordinate prices for steel abrasives in Europe for over six years and has imposed fines totalling € 30.7 million. Steel abrasives are loose steel particles used for cleaning or enhancing metal surfaces in the steel, automotive, metallurgy and petrochemical industries. Ervin was not fined as it benefited from immunity under Leniency Notice for revealing the existence of the cartel to the Commission. Since all four undertakings agreed to settle the case with EC, their fines were reduced by 10%.

(Source: European Commission: Press Release dated April 2, 2014)

3. South Korea: KFTC sanctions sewage plant bid rigging

The Korea Fair Trade Commission (KFTC) has imposed the penalty of 12.2 billion on six construction companies i.e. Hyundai, Hanjin Heavy Industries, Kolon Global, Daewoo, Kumho Industrial, SK for bid rigging for the turnkey construction for extension of Busan subway line 1 (Daedae section) in which they promised the contract to three parties while having another three to participate as Shills to call out the phantom bids for designs and prices of

extension turnkey construction of subway line 1.The bidding ring made the designated winner to be auctioned off at a high price, by design collusion and price fixing, in which they made the design score gap wide while pricing score gap narrow.

(Source: KFTC Press Release, April 10, 2014)

4. Singapore: CCS imposes penalties on Ball Bearings Manufacturers involved in International Cartel

The Competition Commission of Singapore (CCS) in its first international cartel investigation involving foreign-registered companies and their Singapore subsidiaries have imposed the fine of totalling S$9,306,977 against four Japanese bearings manufacturers for engaging in anti-competitive agreements and unlawful exchange of information in respect of the price and sale of ball and roller bearings sold to aftermarket customers in Singapore. Both the Japan parent and Singapore subsidiary companies were found to be jointly and severally liable for the infringement. Investigations in this case commenced in December 2011 after CCS received an application for immunity from Koyo under CCS's leniency program.

(Source: CCS Press Release, May 27, 2014)

5. United States: Japanese executive indicted for role in conspiracy to fix prices and for obstruction of justice

Detroit federal grand jury had passed indictment against an executive of a Japanese manufacturer of automotive parts for his participation in a conspiracy to fix prices of heater control panels and for obstruction of justice for ordering the destruction of evidence related to the conspiracy. 34 more individuals were charged in the ongoing investigation into price fixing and bid rigging in the auto parts industry, 24 of whom have pleaded guilty or agreed to plead guilty. Of those, 22 have been sentenced to serve prison terms ranging from a year and one day to two years. Additionally, 27 companies have pleaded guilty or agreed to plead guilty and have agreed to pay a total of more than $2.3 billion in fines.

(Source: Department of Justice Press Release, May 22, 2014).

6. United States: The US Department of Justice (DOJ) reached settlement with eBay on High-Tech Employee Recruiting Practices

On May 1, 2014, the Antitrust Division of the Department of Justice (DOJ) announced a settlement with eBay to resolve DOJ's challenge to the company's recruitment practices. DOJ filed the proposed settlement in the U.S. District Court for the Northern District of California in San Jose. If approved by the court, the settlement would resolve the DOJ competitive concerns and the original lawsuit filed. The proposed settlement would prohibit eBay from entering or maintaining anticompetitive

agreements relating to employee hiring and retention for five years. It would broadly prohibit eBay from entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, hiring or otherwise competing for employees. In September 2010, DOJ filed a civil antitrust lawsuit against six high tech firms– Adobe Systems Inc., Apple Inc., Google Inc., Intel Corporation, Intuit Inc. and Pixar–for antitrust violations arising from "no cold call" agreements. The eBay settlement marks the last in a series of DOJ cases filed since 2010 challenging no-poach agreements among high-tech companies. Adobe, Apple, Google, Pixar and Lucasfilm also settled with DOJ.

(Source: Department of Justice Website, May 1, 2014)

II. ABUSE OF DOMINANCE/MARKET POWER

INDIA

1. Mumbai Grahak Panchayat to approach CCI against marriage venues in Mumbai-

Mumbai Grahak Panchayat (**"MGP"**), a consumer organization, is contemplating filing a complaint with CCI against the managements of several marriage halls in Mumbai for alleged abuse of dominant position. MGP alleged that the marriage halls insist on employing their photographers, decorator, catering and even priests. Apart from imposing and dictating unfair terms, these marriage halls charges exorbitant price for availing these services.

(Source: Daily News & Analysis dated May 23, 2014).

2. COMPAT upholds landmark CCI order in DLF *Belaire Owners Association* Case

The Competition Appellate Tribunal (COMPAT) vide its much awaited judgment dated May 19, 2014 has upheld the CCI Order imposing a penalty of ₹ 630 Crores on DLF Ltd.

Background of the Case-On August 12, 2011[1], CCI held DLF guilty for abusing its dominant market position in the sale of flats/apartments to home buyers/consumers in contravention of Section 4 of the Act and imposed a penalty of INR 630 Crores (USD 140 million), at the rate of 7% of the average turnover of DLF besides, a 'cease and desist' order against DLF from imposing such unfair conditions in its Apartment Buyer's Agreement (**"ABA"**) with buyers for residential buildings to be constructed in Gurgaon. Subsequently, DLF moved COMPAT challenging the CCI order. During the course of Appeal, CCI in compliance with the COMPAT directions also modified the ABA.

Some of the prominent issues decided by the COMPAT are:

1 CCI Order dated August 12, 2011 in Case No. 19/2010.

Issue 1: *Application of Competition Act in the present case*-CCI was right in assuming the jurisdiction on the basis of the definition of the term 'service' in Section 2(u) of the Act. The term 'service' as contemplated in Section 4 of the Act has a direct relation to Section 2(u) of the Act, which provides for the 'service' of the nature which is being provided by DLF i.e. real estate & construction.

Issue 2: *Retrospective operation of the Act & applicability of Kingfisher judgment in present case*-Section 4(2) (a) of the Act will only attract if there is an imposition of unfair or discriminatory condition or price. When the allotters singed the ABA, Section 4 of the Act was not in force and hence, there was no imposition of any condition in the ABA by DLF.

Applicability of Kingfisher Judgment[2] - COMPAT rejected the approach by CCI in examining the clauses of ABA. COMPAT observed that all acts done in pursuance of the agreement before the Act came into force would be valid and cannot be questioned. But if the parties want to perform certain acts in pursuance of the agreement, which are now prohibited by law, would be illegal and hence, there was no justification on the part of the CCI to change the language of the agreement altogether. No provision in the Act permits the re-writing of the agreements. If the DLF was doing something in pursuance of ABA, which was contrary to the Act, then CCI could have taken an exception to those "acts", but not to the "clauses" of ABA, which were valid. The continuation of the agreement after May 20, 2009 by itself would not attract the mischief of the Act, unless there was some act in pursuance of those clauses, which were not contemplated in the agreement and would, therefore, amount to an imposition of condition.

Issue 3: *Relevant Market and Dominance of DLF*- on Relevant Market- CCI was right in defining the relevant market for services of developer / builder in respect of high-end residential accommodation in Gurgaon. On the issue of Geographic Market, it was observed that, the residential housing is not connected with investment. Ordinarily, *for a common man, basic need is food, other amenities of life and a property to reside, as that creates a sense of security in his mind. If that is so, it will be futile to examine the question only from the angle of investors.* On Dominance- CCI's reliance on the CMIE (Centre for Monitoring Indian Economy Private Limited) data over other data/ reports available while assessing market share (55%) of DLF was correct. DLF's market share was more than double of its next biggest competitor, Unitech. DLF is a market leader and enjoy a unique position as it lay down the rules of the game, which power/strength it exercises in its favor to the potential detriment of its competitors and consumers' interests.

Issue 4: *Abuse of Dominance by DLF*-COMPAT did not consider any ABAs executed after May 20, 2009 and restricted the inquiry only to the ABAs executed in 2006-2007 against which the information was filed with the CCI. COMPAT only focused on the actions taken by DLF pursuant to ABA, post May 20, 2009 and found that following conducts by DLF were abusive of its dominant position-

2 Kingfisher Airlines Limited v. Competition Commission of India; Order dated March 31, 2010 passed by Bombay High Court in WP No. 1785 of 2009.

- ABA authorizes DLF to increase the number of floors by constructing additional floors, but this imposition of additional construction by addition of floors on the apartments of the allottees of all the three residential societies without any intimation and consent amounts to abuse of dominant position by the DLF. DLF never had any approval from DTCP for constructing additional floor and such unauthorized construction amounts to abuse of dominant position.
- The offer by the DLF to the original allottees regarding moving to a higher floor is discriminatory vis-à-vis other allottees. It is against Article 14 of the Constitution of India and Section 4(2) (a) of the Act.
- Unilateral increase in the super area and holding charges by DLF was in breach of the ABA and amounted to abuse of dominant position as it was well aware to DLF that allottees had no other choice, but to accept the same. The only option left with the allottees was to exit the scheme, which was unimaginably costly.

Issue 5: *Role of DTCP* - COMPAT also severely criticized the Town & Country Planning Department, Haryana (DTCP) for remaining *blissfully ignorant* about the illegal conduct and for not taking any action against DLF. COMPAT further observed that the *Competition Law must be read in the light of the philosophy of the Constitution of India, which has concern for the consumers and the dominant player in the market has a special duty to be within the four corners of law.*

Issue 6: *Penalty*- On the issue of penalty, COMPAT observed that CCI has given sufficient reasons for imposing the penalty of INR 630 Crores on DLF. Based on a media report, the allottees are planning to move COMPAT to file compensation claims under Section 53-N of the Act.

The full text of the COMPAT judgment dated 19th May, 2014 may be read at

http://compat.nic.in/upload/PDFs/mayordersApp2014/19_05_14.pdf

3. CCI closes complaint against Adidas Group for market abuse

The Information was filed by Mr. Om Datt Sharma (**"Informant"**) against Adidas AG, Reebok International and Reebok India (**"Adidas Group"**) alleging abusing its dominant position with respect to sale of premium sports goods. Informant alleged that in 2003, Reebok India through a Franchisee Agreement (the **"Agreement"**) appointed the Informant as franchisee for sale of its manufactured and/or branded premium sports goods in Noida. The duration of the Agreement was three years, subject to renewal. Informant alleged that the terms and conditions in the Agreement are not only unfair but also discriminatory vis-a-vis other franchisees. The Informant further contended that though the Agreement was executed prior to the Act coming into force,

however, the Adidas AG Group become liable since the anti-competitive effects continued even after the enforcement of the relevant provisions of the Act. CCI observed that Adidas AG Group *prima facie* appears to be in a dominant position in the relevant market of premium sports-goods in Noida. However, on the issue of abusive conduct, CCI observed that, firstly, the Agreement which was termed as unfair and arbitrary was entered into in 2003 when the alleged dominant group had not even come into existence. Secondly, post the formation of group in 2005, the conduct of the Adidas Group *vis-à-vis* the Informant remained same (as the Agreement was said to be continued on same terms and conditions). Further, a manufacturer is not obligated to follow a single template agreement throughout its existence. With passage of time and operations, the commercial arrangements may undergo a change. On the issue of *continuance of agreement,* CCI held that the chronology of events took place from 2003 to February, 2009 and there are no evidence of any act continued post February, 2009.

CCI after taking the prima facie view, decided to close the case under Section 26(2) of the Act.

(Source: CCI Order dated May 13, 2014. May be viewed at the website www.cci.gov.in).

4. COMPAT sets aside CCI order against Fast Way Group

COMPAT by way of its order dated May 2, 2014 (**"Order"**) set aside the order passed and fine imposed by CCI in *Kansan News Pvt. Ltd. v. Fastway Transmission Pvt. Ltd. & Ors*[3]. On July 3, 2012, CCI imposed a penalty of INR 8.04 crore on Fast Way Group for abusing its dominant position in the cable TV service in the territory of Punjab and Chandigarh by denying Kansan News Pvt. Ltd (Informant), the opportunity for transmission of it channel on its network resulting in denial of market access under Section 4(2) (c) of the Competition Act, 2002 ("the Act"). Subsequently, Fast Way Group moved the COMPAT challenging the CCI order. COMPAT observed that the allegations pertaining to denial of market access is occasioned only to a competitor and such denial is occasioned by one competitor indulging in a practice or practices which result in such a denial. Relying on the CCI finding, COMPAT observed that both Kansan and Fast Way are operating in different level in the market and hence, the question of denial of market access to the Broadcaster (Kansan) by a Multiple System Operator (Fast Way Group) will not be covered under Section 4(2) (c) of the Act.

(Source: COMPAT Order dated May 2, 2014).

5. CCI orders third investigation against Google

The Information was filed by Mr. Vishal Gupta (**"Informant"**) against Google Inc., Google Ireland Limited and Google India private Limited (**"Google"**) for abusing its dominant position with respect to Google Adwords Services. In September 2012, Informant Company had resolved to set up a 'remote technology support' (RTS) business, approached Google India for opening a Google Adwords account. Following an

3 CCI Case No. 36/2011

agreement between Informant and Google, Adwords account was opened and activated in January 2013. Informant alleged that the bidding process of Google Adwords and its 'user safety policy' is extremely opaque and not transparent. Due to this Google suspended the Informant's account without issuing any notice or any prior information. Further, in November, 2013 Google launched a RTS operation in the name of 'Google Helpout' which is a clear alternative to the business setup of the Informant's Company. CCI while forming the prima facie view held that an investigation is required to determine the nature and extent of problems that have prompted Google to take actions against the RTS industry and whether the termination was legitimate action. CCI referred the matter for DG investigation.

(Source: CCI prima facie order dated April 14, 2014).

INTERNATIONAL

1. Chile: Unilever reaches settlement in abuse probe

The Court of Defense of Free Competition (TDLC) approved a settlement between National Economic Prosecutor's Office (FNE) and Unilever in the context of the judicial proceedings initiated by the FNE against Unilever Chile S.A. for having abused its dominant position through exclusionary practices in the laundry detergent market. Unilever undertook various obligations that constitute a significant change of its commercial practices, with the objective that third parties – detergent manufacturers and importers – improve their chances of exhibiting and distributing their products effectively, with the consequent benefit to consumers in having more brands to choose at the different stores. These commitments are not limited to the detergent market, but are extended to other categories of products of mass consumption.

(Source: FNE Press Release, April 30, 2014)

2. European Union: EC takes action against Motorola & Samsung on standard essential patent injunctions

On April 29, 2014, European Commission (EC) adopted a decision against Motorola Mobility LLC and entered into a settlement agreement with Samsung Electronics. These actions resolve allegations that Motorola and Samsung abused their dominant position by refusing to license their standard-essential patents (SEPs) to a competitor who implemented the standard. SEPs are patents essential to implement a specific industry standard. According to these commitments, Samsung will not seek injunctions in Europe on the basis of its standard essential patents (SEPs) for smartphones and tablets against licensees who sign up to a specified licensing framework. Under this framework, any dispute over what are fair, reasonable and non-discriminatory (so-called "FRAND") terms for the SEPs in question will be determined by a court, or if both parties agree, by an arbitrator. In case of Motorola, EC found that it was abusive for Motorola to both seek and enforce an injunction against Apple in Germany on the basis of an

SEP which it had committed to license on FRAND terms and where Apple had agreed to take a licence and be bound by a determination of the FRAND royalties by the relevant German court. The Commission also found it anticompetitive that Motorola insisted, under the threat of the enforcement of an injunction, that Apple give up its rights to challenge the validity or infringement by Apple's mobile devices of Motorola SEPs. EC decided not to impose a fine on Motorola in view of the fact that there is no case-law by the European Union Courts dealing with the legality under Article 102 TFEU of SEP-based injunctions and that national courts have so far reached diverging conclusions on this question.

(Source: European Commission: Press Release dated April 29, 2014)

3. United Kingdom: Ban on Eurotunnel ferry service provisionally confirmed by CMA

The newly formed, Competition & Markets Authority (CMA) has provisionally confirmed an earlier decision by the Competition Commission of UK (CC) that Eurotunnel should be barred from operating a ferry service from Dover. In June 2013, CC decided that by adding the ferries to its existing Channel Tunnel business Eurotunnel would increase its share of the market to over half – and was likely to end up as one of only two ferry operators on the route – leading to price rises for passengers and freight customers.

(Source: CMA Press Release, May 20, 2014)

III. MISCELLANEOUS NEWS

1. Competition Commission of India completes five years

The Competition Commission of India (CCI) completed five years of its enforcement of the Competition Act, 2002(the Act) on May 20, 2014. The event was celebrated by organizing an Annual Day Lecture by Dr. Raghuram Rajan, the Governor of the Reserve Bank of India (RBI). Dr. Raghuram Rajan spoke on Competition in the Banking Sector: Opportunities and Challenges..The text of the lecture of the RBI Governor can be accessed by clicking on

http://www.cci.gov.in/May2011/Advocacy/CCITCB0514SP.pdf.

In brief the RBI Governor observed that:

- If public sector banks become competitive, and especially if they do so by distancing themselves from the influence of the government without sacrificing their "public" character, they will be able to raise money much more easily from the markets. Indeed, the better performers will be able to raise more, unlike the current situation where the not so good performers have a greater call on the public purse. Competition will improve efficiency.
- Privatization is not necessary to improve the competitiveness of the public sector. But a change in governance, management, and operational and compensation flexibility are almost surely needed in India to improve the functioning of most PSBs.

- There can be increase in competition in the banking sector while, at the same time, strengthening banks by reducing the burden of obligations on them.

During these 5 years, CCI has emerged as a strong economic regulator. CCI has worked with various industry groups, trade associations, judiciary, consumer groups and other stakeholders to create awareness regarding Competition Law in India. Till date, CCI has passed final orders in more than 300 cases imposing a total penalty of more than ₹ 9000 Crores in more than 20 of these cases, which include cartel fines on Cement Manufacturers, Explosive Manufacturers, LPG Cylinder Manufacturers, Aluminum Phosphate Tablets Manufacturer & Cinema Producers and abuse fines on Coal India, BCCI, National Stock Exchange, DLF, India Trade Promotion Organization etc. Further, CCI has approved more than 150 Combinations within 30 days of notification.

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