

Competition Law Bulletin



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From the Editor's Desk...

Dear Reader,

The momentous efforts being undertaken by both the Ministry of Corporate Affairs and the Competition Commission of India (CCI) to address to the concerns of India Inc. on the draft merger regulations under the Competition Act, 2002 are required to be noticed. As a part of the CCI initiated consultative process, public meetings and seminars have been organized with Industry Chambers in all parts of India. A good precedent in development of competition legislation has been established, which needs to be commended.

Noticeably, competition law practitioners are also involved in this consultative process. The Competition team of Vaish Associates, Advocates has been actively involved in the process, as a part of the "Law Firms Working Group", comprising of India's leading Law Firms with a dedicated competition law practice, constituted at CCI on April 8, 2011 to suggest clause by clause amendments in the draft merger regulations. We hope that the final regulations are notified early and that they satisfy the concerns of stakeholders.

Interestingly, globally, there has been a spurt in M&A activities and as per PTI news of April 13, 2011, M&A volume has touched \$934.3 Billion till March, 2011, the highest volume since 2007. Telecom was the most targeted sector, according to the report.

Slowly, realization is growing in the Government and other stakeholders towards competition law in general. For instance, the draft New Telecom Policy, 2011 announced by the Government on April 14, 2011 has promised to give a "level playing field" to all service providers, which must be welcomed. There was also PTI news dated March 22, 2011 on the need to review the Agriculture Produce Marketing Committee (APMC) Act to curb cartelization, as a part of measures suggested by the Inter Ministerial Group set up by the Government to control spiraling prices. Competitive bidding norms introduced in power sector trading has also reportedly brought down power costs from ₹ 4.5 -5.8 crores per MW to ₹ 3.5-4.5 Crores per MW, as per a recent study report published in the Financial Express on April 5, 2011.

I hope that our bulletin continues to invoke your interest in developments on competition law. I look forward to receiving your views.

Yours truly,

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INDIAN PERSPECTIVE

SPECIAL FEATURE

CCI passes order in DTH Set-top box case

(Case no. 2/2009)

CCI, on March 23, 2011 in *Consumer Online Foundation Vs Tata Sky Ltd. & Ors.* has, by a 6:1 majority decision *inter alia*, held that DTH Service providers have not indulged in unfair trade practices by denying nearly 20 million users an option to change operator under the Competition Act, 2002 (Act). The full text of the decision is available on the website of CCI www.cci.gov.in.



Issues Involved: In 2009, Consumer Online Foundation ('the informant') filed an Information against DTH service providers i.e. Tata Sky Limited, Dish TV India Limited, Reliance Big TV Limited and Sun Direct TV Pvt. Limited ('the opposite parties') under section 19(1)(a) of the Act. According to the Informant, if a consumer has a Set-Top Box ("STB"), he should be able to access the services of different DTH service providers, without being required to buy a new STB. At the same time, different manufacturers should be able to provide hardware directly to the subscribers irrespective of the service provider of the content. By preventing interoperability the DTH service providers are creating a barrier to entry for the enterprises which manufacture only STBs. The market for the independent STB manufacturers is, therefore,

completely blocked only because the DTH service providers do not allow the interoperability of the STBs and the DTH signals.

DG investigation: CCI was of the opinion that there exists a *prima facie* case and accordingly, directed the DG vide its order dated June 30, 2009 to conduct an investigation. Pursuant to the aforesaid order of the CCI, the DG investigated into the matter and submitted three Investigation reports (IR) on:

- i. **September 24, 2009** - DG submits the Initial IR. The CCI considered the IR and found that the investigation were not complete and directed DG for further investigation.
- ii. **December 3, 2009** - Second supplementary report
- iii. **January 25, 2010** - Third supplementary report



After analyzing the TRAI & Bureau of Indian Standards (BIS) recommendations on DTH services & interoperability DG held that, the six DTH service operators

control nearly 100% of the market for DTH services. Therefore, from the investigation, it emerges that the practices followed by different DTH service operator has resulted in adverse effect on competition under section 3(3) of the Act and accordingly issued recommendations in IR. DG also held that the DTH service providers have indulged in tie-in arrangement under section 3(4) (a) of the Act.

Majority view:

After analyzing the TRA I & BIS recommendations on DTH services & interoperability and detailed response



from the opposite parties, CCI rejected the findings by the DG and by a 6:1 Majority view found that there was no evidence on concerted action by DTH service providers and hence they cannot be said to be in infringement of the provisions of section 3 of the Act. When a business practice in any industry emerges due to technical constraints, it is not appropriate to treat it as “action in concert” as envisaged in competition laws. A manufacturer / service provider and the consumer cannot ever be said to be part of any “production chain” or even operating in “different markets” because a consumer does not participate in production and at the same time, the market for any good or service must include the producer and the consumer. There cannot be any market that only has the producer or the consumer. Therefore, both are, by definition, part of the same relevant market. Any “agreement” between the producer / service provider and consumer occurs after inter-brand or intra-brand competition has already played out and therefore such agreements with the end consumers do not have any competition aspect. CCI noted that there are techno-economic issues involved in making set-top boxes inter-operable. The price of a CAM card, which is very scarce in the market, is much higher than the price of a set-top box. Therefore, it is fair for DTH operators to continue with the practice until a technological solution is found to make these boxes

inter-operable. Further, none of the DTH operators were found to hold a dominant position in terms of section 4 of the Act.



Dissenting view: Member Mr. R. Prasad in his dissenting order held that DTH operators followed a tied-in business model which did not allow the growth industry for DTH

hardware and also defeated the concept of interoperability. This practice also creates barrier to the new entrants in the market and forecloses competition by hindering entry into the market. Hence agreements between the consumers and the DTH operators create an adverse effect on competition in India. Mr. Prasad also found the view that there cannot be any market that only has the producer or the consumer as erroneous because “person” mentioned in the Section includes both the service provider and the service taker in accordance with Section 2(l) of the Act.

CCI passes orders for closure of certain matters



CCI has displayed on its website www.cci.gov.in the full text of its orders on closure of 32 cases of Information's filed under the Act and 18

cases of investigations transferred from the Director General of Investigation & Registration (DGIR) and the COMPAT.

MEDIA UPDATES

Citing uniformity, SEBI asks CCI to adopt Takeover Code

Taking note of the conflict between the Competition Act and SEBI Takeover Code; the Capital markets watchdog SEBI has sought alignment. SEBI has reportedly written to both the Ministry of Corporate Affairs and the CCI to address the issues and prevent confusion in stakeholders. For instance, SEBI takeover norms for listed companies make it mandatory for an acquirer, who has triggered an open offer under SEBI Rules, to inform the regulator within four days. On the other hand, under the Act, the acquirer has up to 30 days to inform CCI about the details of the proposed acquisition. SEBI is hopeful of suitable changes taking place in the merger regulations before they come in to effect.

(Source: *The Economic Times*, April 26, 2011)

Arshiya International accuses Railways for abusing dominant position

Arshiya International, the container train operator, has filed a case in CCI against Indian Railways for not disclosing certain clauses while signing concessionary agreement and raising haulage charges. According to the Informant the Railway Ministry move was perceived by the operators to be 'anti competitive' as it discouraged



domestic movement of heavy commodities. The CCI is expected to announce its observations in April 2011.

(Source: *Hindustan Times*, March 18, 2011)

CCI investigates International car makers



The CCI has asked the Director General (DG) to investigate a complaint against International car makers, Honda, Hyundai and Volkswagen, for abusing their dominant market position by selling auto parts to customers at high prices and only making it available through their authorized dealers. According to the Informant, normally, auto spare parts from Indian car makers are available with any retailer, not necessarily authorized but it is not so with international car makers. Consumers are stuck after having bought a car from these companies. The matter is under investigation with the DG and notices have been reportedly issued to the car manufacturers.

(Source: *Economic Times*, March 14, 2011)

Supreme Court rejects film traders' application against CCI



The Supreme Court of India has declined to admit a plea by the Central Circuit Cine Association, challenging investigations against it by CCI. The association moved the court after it failed to get relief from COMPAT on the point that they don't fall under the purview of the Act. The dispute started during the release of a movie i.e. Anjaana Anjaani, as the

association had threatened to stop its release, alleging that Eros had not cleared dues of some of its members in Bihar, Jharkhand, Kerala and Madhya Pradesh for its previous film 'London Dreams'.

(Source: *The Business Standard*, April 12, 2011)

COMPAT decides pending MRTP matters

COMPAT continues to decide the pending cases under the repealed MRTP Act. As per information received from the record keeping office of COMPAT, it had disposed of 939 till April, 2011 cases so far as per details below:

RTP cases	132
UTP cases	406
Compensation cases	401
MTP cases	0

INTERNATIONAL NEWS

European Union

Microsoft filed an antitrust complaint against Google

Microsoft filed a complaint with the EC against Google, joining others who have said the search behemoth engaged in anti-competitive practices. It is to be noted that the EC has an ongoing investigation into Google's search practices. Microsoft alleges that these anti-competitive practices include stopping its search engine, called Bing, from indexing content on Google-owned YouTube; blocking Microsoft Windows smart phones from "operating properly" with YouTube; blocking access to content owned by book publishers; and limiting the flow of ad campaign information back to



advertisers, making it more expensive to run ads with rivals.

(Source: *BBC News*, March 31, 2011, <http://www.bbc.co.uk/news/technology-12918059>)

EC investigates 16 biggest banks over credit default swaps collusion



EC has opened two antitrust investigations concerning the Credit Default Swaps market. In the first case, the Commission will examine whether 16 investment banks and Markit, the leading provider of financial information in the CDS market, have colluded and/or may hold and abuse a dominant position in order to control the financial information on CDS. In the second case, the Commission opened proceedings against 9 of the banks and ICE Clear Europe, the leading clearing house for CDS. Here, the Commission will investigate in particular whether the preferential tariffs granted by ICE to the 9 banks have the effect of locking them in the ICE system to the detriment of competitors. The U.S. Justice Department in 2009 launched a similar inquiry into anti-competitive practices in the trading, clearing and pricing of CDS in the United States.

(Source: *European Commission website*, April 29, 2011 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/509&format=HTML&aged=0&language=EN&guiLanguage=en>)

EC fines producers of washing powder € 315.2 million in cartel settlement case



EC fined Procter & Gamble and Unilever a total of € 315.2 million for operating a cartel together with Henkel in the

market for household laundry powder detergents in eight European Union countries. Henkel got immunity for revealing the cartel to the Commission. The cartel lasted some three years and aimed at stabilizing market positions and at coordinating. This is the third cartel settlement in a year.

(Source: European Commission website, April 13, 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/473&format=HTML&aged=0&language=EN&guiLanguage=en>)

EU begins infringement procedure against Bulgaria and Czech Republic

EC on April 6, 2011 launched infringement procedures against Bulgaria and the Czech Republic over their bilateral air service agreements with Russia. EC concerned that the agreements may hinder equal treatment of EU airlines and competition between European airlines and provide the basis for Siberian over flight charges that may be illegal under EU anti-trust rules. It is to be noted that on March 14, 2011, EC also launched infringement procedures against Estonia and five other EU countries i.e Greece, Lithuania, Malta, Slovenia and Hungary for their bilateral aviation agreements with Russia, which regulators said may hinder competition.

(Source: European Commission website, April 06, 2011 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/424&type=HTML>)

EC to investigate ISPs on net-neutrality concerns

EC is planning to launch an investigation on internet service providers (ISPs) as to whether they are providing fair access to online services. It may lead to



new rules banning ISPs from restricting access to data-heavy services during peak periods. The investigation will cover both mobile and fixed providers and will be published by the end of the year.

(Source: BBC News, April 19, 2011, <http://www.bbc.co.uk/news/technology-13134494>)

Others

United States - DoJ clears Google's \$700 Million ITA Deal

DoJ approved \$700 million purchase of ITA Software Inc. by Google on the condition that it makes travel data available to search-engine. Google agreed to license ITA's travel information software to third parties, put up firewalls protecting client data and set up an arbitration process for disputes over fees. DoJ reached the consent decree after an eight-month review.

(Source: Department of Justice Website, April 08, 2011, <http://www.justice.gov/opa/pr/2011/April/11-at-445.html>)

United Kingdom: UK Lawmakers call for OFT investigation of 'Big Four' Auditors



The House of Lords Select Committee on Economic Affairs has called on the Office of Fair Trading ('OFT') to investigate the UK audit market. Their specific concern relates to the domination of the audit market for large companies by the four biggest players, namely Deloitte, Ernst & Young, KPMG and PwC. The report states that the 'clear oligopoly' of the Big Four creates issues regarding

competition and choice in the audit market. Of the FTSE 100 companies only one is not audited by the Big Four and, on average, an auditor remains in place at one of these companies for 48 years. Furthermore, of the FTSE 250 companies, 240 are audited by one of the Big Four.

(Source: *The Reuters*, March 30, 2011, <http://www.reuters.com/article/2011/03/30/britain-auditors-idUSLDE72S24O20110330>)

United Kingdom: Government proposes radical changes to UK competition regime

On March 16, 2011, the Department for Business, Innovation and Skills published the UK government's much-anticipated consultation paper on proposed reform of the UK competition regime. Some of the proposed changes include:



- Merger of the Office of Fair Trading and the Competition Commission to create a single Competition & Markets Authority.
- Competition Appeal Tribunal (CAT) being merged into the general Tribunals Service.
- Transfer of the OFT's powers in relation to the criminal cartel offence under the Enterprise Act 2002 to a new Economic Crime Agency, which would also take on white-collar crime powers from bodies such as the Serious Fraud Office and the Financial Services Authority.

(Source: *The Reuters*, March 16, 2011, <http://fr.reuters.com/article/idUKLDE72F0YJ20110316>)

Mexico: America Movil faces 12 Billion-Peso fine for abusing its dominance



Mexico's Federal Competition Commission (CFC) levied a fine of 12 billion pesos (\$1.03 billion) against the Mexico unit of America

Movil i.e Telcel for anti-competitive practices. It is to be noted that America Movil SAB, is largest mobile-telephone company in Latin America & its unit Telcel is Mexico's largest mobile-phone operator, with about 70% of the country's mobile subscribers. The fine is related to a probe begun in November 2006 over alleged monopoly practices associated with mobile call termination on its network. The fine is the largest ever handed-out by CFC. Telcel is owned by Carlos Slim, the richest man in the world by Fortune magazine.

(Source: *The Bloomberg*, April 16, 2011, <http://www.bloomberg.com/news/2011-04-16/america-movil-faces-12-billion-peso-antitrust-agency-fine-1-.html>)

Belgium Post faces allegation on mail handling

The College of Competition Prosecutors of the Belgian Competition Council found that bpost (formerly called De Post/La Poste) a state-controlled postal company abuse its dominant position on the market of postal intermediaries (the market of mail handling). An investigation showed De Post imposed discriminatory conditions between its own customers and the mail handlers as well as between the mail handlers themselves including a refusal to sell and the reinforcement of barriers to market access, existed as early as 2003.



(Source: *The Belgian Competition Authority*, April 07, 2011, http://economie.fgov.be/en/binaries/Pressrelease07042011_tcm327-121501.pdf)

Germany: German Competition Authority imposes €38m fine on Kraft, Unilever, Dr. Oetker

German Federal Cartel Office (FCO) on March 17, 2011, imposed a total fine of €38m on three major manufacturers of consumer goods - Kraft Foods, Unilever and Dr. Oetker for exchanging commercially sensitive information. The companies had participated over several years in meetings in which high-ranking sales executives consulted each other over the status of their negotiations with retailers and exchanged information on planned price increases to retailers for some of their products. Mars Inc., German division of snack and beverage maker blows the whistle and got full leniency. The companies agreed to the fines as part of a settlement.

(Source: *The Bloomberg*, March 17, 2011, <http://www.bloomberg.com/news/2011-03-17/kraft-unilever-oetker-get-38-million-euro-fine-by-regulator.html>)



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Conferences/ Seminars addressed by Partners/ Associates

- **M M Sharma** delivered a lecture on “Impact of recent merger regulations under competition law” at the Northern India Regional Council of Institute of Company Secretaries of India on March 21, 2011.
- **M M Sharma** delivered lectures on
 - “Competition Law and Policy” and
 - “Offences and Penalties under Competition Act, 2002” at the Indian Law Institute on March, 22, 2011.
- **M M Sharma** has been appointed as the Chairman of the PHD-CCI Sub Committee on Competition Law on April 8, 2011.

Disclaimer:

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