

Competition Law Bulletin



Vol. III, No. 4, September-October, 2011

From the Editor's Desk...

Dear Reader,

We are happy to present this special issue on the recent policy developments related to competition law in India as well as other developments of consequence.

At the outset, we welcome the appointment of Shri **Ashok Chawla**, former Finance Secretary as the **new Chairman** of the Competition Commission of India (CCI) and that of Justice (Retd.) **S N Dhingra**, as the new Member, CCI.

The **National Competition Policy** unveiled by the Hon'ble Minister for Corporate Affairs invited a lot of attention and has generated some debate in the corporate world. Comments on the policy were sent by all the main Business Chambers, FICCI, ASSOCHAM and PHDCCI to the Committee on National Competition Policy set up for the purpose under the chairmanship of Shri Dhanendra Kumar. This is a timely and welcome step by the government in the right direction. We hope that the Policy is implemented in its true spirit and the impediments in the opening of certain sectors, like Coal, mining, ports and railways which are still under governmental control are reviewed under the "sunset" clause suggested in the Policy.

Similarly, the **Arun Maira Committee** report of the Planning Commission, recommending regulation of Foreign Direct Investment in the Brownfield category of pharmaceutical sector needs to be noticed. The suggestion in the report to utilize the services of the Competition Commission of India (CCI), instead of direct regulation of such investments through the Foreign Investment Promotion Board (FIPB), and to amend the Combination Regulations suitably to enable scrutiny by CCI in respect of smaller acquisitions in the Brownfield category, which will otherwise escape scrutiny in view of the thresholds for the "target" acquisitions of ₹ 750 Crores turnover or ₹ 250 Crores of assets, is an encouraging move towards promoting transparency. We have briefly covered both these policy developments in this issue and hope that our comments will generate interest and a healthy debate.

Further, India's ranking on Global Competitiveness for the year 2011-12 fell from 51 last year to 56 in this year whereas China rose in the same ranking by one notch to the 26th position, as reported in the financial media in September was something that needs to be debated upon.

We hope that our bulletin continues to keep your interest in the developments in competition law. We invite your views on the same and look forward for your continued support.

Yours truly,

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INDIAN PERSPECTIVE

SPECIAL FEATURE

National Competition Policy to be unveiled soon

The Government of India, recognizing the importance of the growing competition in all sectors of the economy, is all set to announce a National Competition Policy (NCP) within next 3 to 4 months.



The process of formulating the draft NCP began with the constitution of a Committee for framing of National Competition Policy and related matters, under the Chairmanship of Shri Dhanendra Kumar, former Chairperson of Competition Commission of India (CCI). The first draft of the NCP was announced through the Ministry of Corporate Affairs (MCA), Government of India on July 28, 2011 inviting comments thereon by August 22, 2011. Comments on the first draft policy were sent, amongst others, by the *International Economic and Legal Forum*, (a forum founded by Shri O. P. Vaish, Senior Advocate with some leading economists and lawyers both from India and abroad) on August 22, 2011.

The Hon'ble Union Minister for Corporate Affairs, Shri Veerappa Moily, while inaugurating the first consultation meeting on the policy at Indian Merchants Chamber at Mumbai on September 12, 2011, termed the NCP as "*India's biggest policy reform since the 1991 economic reforms*". (Source: *Mint*, September 13, 2011). After the first consultation meeting at Mumbai, comments were invited again from public and a second draft of the policy, the NCP version II was placed on the website of MCA. This was followed by another consultation meeting and after detailed discussion the second draft of the policy i.e. **NCP Version-II** is available for public view on the website of MCA at the following link:

http://www.mca.gov.in/Ministry/Draft_Policy.html

Comments on the NCP Version – II were also forwarded by the Competition Law sub Committee of the PHD Chamber of Commerce and Industry, chaired by Shri M M Sharma. .

Comments: *In spite of having a modern competition law in place since 2002, many sectors of our economy continue to be regulated*

by the Government besides archaic laws and state policies which impede competition unknowingly. This is because the Competition Act, 2002 (the Act) does not give any role to CCI to either recommend any policy initiative to the Government for promoting competition or for any suo moto review of the archaic laws and state policies. Noticeably, there are estimated to be more than 1100 Central Acts / Statutes and many more enacted by the State Governments. The number of Central and State policies will be much larger. The suggestion made in the draft NCP for a review of all these statutes and policies, to fine tune them in sync with modern competition law principles, such as competitive neutrality, third party / open access to essential facilities, "sun set" clause for limiting ex-ante regulation to few sectors that are natural monopolies or have networking effects is indeed a welcome step. But can such review be left to be made only by the State bureaucratic machinery without involving the private sector participation? A suggestion to this effect has been made by the Competition sub Committee of the PHD Chambers of Commerce and Industry (the PHD Committee) wherein it has been suggested that the proposed National Competition Policy Council (NCPC) at the Central Government level to facilitate the Competition Impact Assessment of policies, laws, regulations and even practices at all the three levels of the Government, needs to have a wider representation and must include an equal number of competition law and policy experts not only from the private sector but also from the eminent professionals in the legal and economic fields, outside the Government. It has also been recommended that the NCPC may encourage setting up of such Competition Policy Councils at the levels of the State Governments also, say, after five years. There is no doubt that the NCP, if implemented in its true spirit by the Government, will have a profound impact on the economy and will also improve our rate of growth. We wish all success to the Members of the Committee for framing the National Competition Policy in this challenging task.

Arun Maira Committee recommends scrutiny by CCI in FDI in pharmacy sector



The Arun Maira Committee report of the Planning Commission, ("Maira Committee Report") considered recently in a High Level meeting chaired by the Prime Minister to discuss the possible Regulation of the FDI Policy, in the pharmaceutical sector has stirred a hornet nest. Whereas, the Ministry of Health is recommending a control through the FIPB route for the Brown field investments instead of the CCI scrutiny, the

Maira Committee Report seems to be in favour of the later. The Maira Committee Report has recommended that there is a need to provide the “necessary enabling Regulations to make CCI effective for regulating the M&As in the Brown field category of foreign direct investments in pharmaceutical sector”. It has also been suggested by some sections in the media that for this purpose there is a need to amend ‘the Act’.

(Source: Mint and Financial Express October 12, 2011)

Comments: *In our view, instead of tinkering with the thresholds for the proposed M&As in this sector, which will unnecessarily, create fears in the minds of the prospective investors in the Greenfield category (thereby depriving India of the technological advancements in this sector), it would be prudent for the Ministry of Health to utilize the existing capability of CCI to investigate into the anticipated anti-competitive practices in the Brownfield category, under the existing provisions of section 3 and 4 of the Act, by making “References” to CCI to investigate in to such selective cases of anti competitive behavior, including cartels, under section 19(1)(b) of the Act, which does not require any change in the existing structure.*

CCI fines 3 travel agents associations for forming Cartel & collective boycott

Competition Commission of India (CCI) in Case No. 03/2009 i.e. *Uniglobe Mod Travels Pvt. Ltd. vs. Travel Agents Association of India & Ors.* vide an order dated October 4, 2011 imposed a symbolic penalty of ₹ 1 lakh (approx. US\$ 2100) after it found that the three largest travel agent associations of India formed a cartel and colluded against a single travel agent by collectively boycotting him from trade association. The full text of the decision is available on the website of CCI www.cci.gov.in. The information was filed by a travel agent Uniglobe Travels Pvt. Ltd. in October, 2009, following a dispute between travel agents and some international airlines, like SIA and Lufthansa, over payment of 'zero commission'. Globally, the airline industry had decided to do away with commissions to travel agents, while compensating them on the basis of the volume of tickets sold. The travel agent associations in India including Travel Agents Federation of India (TAFI) and Travel Agents Association of India (TAAI) and IATA Agents Association of India (IAAI) opted to boycott such



international airlines. But the Informant, Uniglobe Mod Travels Pvt. Ltd., on being expelled by the trade associations, approached CCI through the complaint, which was referred to the Director General (DG) for investigation. DG submitted the investigation report on December 16, 2009 and supplementary report as ordered by CCI on December 7, 2010 and concluded that the boycott call by the trade associations in the form of an “agreement” including boycott emails received by travel agents from trade associations, limited the supply of Singapore airline tickets to the consumers in India and this amounted to cartelization under section 3(3) (b) of the Act.

Order of CCI: CCI held that, if any actions taken by the trade association are consequences of an agreement which causes or are likely to cause an appreciable adverse effect on competition, the Commission is empowered to inquire into such acts. On the issue of contravention of section 3 of the Act, CCI held it has been fully established that the associations, namely TAFI, TAAI and IAAI by giving a call for boycott against Singapore Airline have contravened the provisions of section 3(3)(b) read with section 3(1) of the Act. Consequently, a penalty of ₹ 1.0 lakh was imposed on each of the three trade associations. CCI also directed the associations to ‘cease and desist’ from formulating and imposing such unfair conditions in future.

(Source: CCI website www.cci.gov.in)

CCI passes orders for closure of certain matters

CCI has passed orders for closure of 56 cases of Informations filed under the Act the full text of the said orders are available on its website www.cci.gov.in and 21 cases of investigations transferred from the Director General of Investigation & Registration (DGIR) and the COMPAT.

MEDIA UPDATES

CCI orders probe against Apple



CCI has ordered investigation into allegations that iPhone and iPad maker Apple is limiting the availability of its products to a few exclusive service providers thereby limiting the consumer choice and abusing its dominant position.

Apple does not own any stores in India but has exclusive reselling arrangements with chains of stores such as iStore

and Imagine. The matter has been referred to the Director General (DG) for investigation.

(Source: *The Financial Express*, September 8, 2011 and the *MINT*, September 6, 2011).

CCI investigating Saint Gobain India for predatory pricing

CCI has launched an investigation against Saint Gobain India after forming a prima facie view that the company's Indian unit is involved in predatory pricing to drive out competition. It is to be noted that Saint Gobain, the world's leading glassmaker, has approx. 38% of market share in float or sheet glass market.



(Source: *The Economic Times*, October 15, 2011).

DLF appeals to COMPAT against CCI order

DLF Ltd. has filed an appeal with the COMPAT against the order of the CCI imposing a fine of ₹ 630 Crore on the company for "abuse of dominant market position". The matter was listed for hearing on November 9, 2011.

(Source: *the Economic Times*, *the Financial Express* and *the Mint* dated October 11, 2011)

Highway developers approach CCI against NHAI:

Highway developers have approached the CCI against an NHAI move to restrict the number of bidders for EPC projects to be developed in Uttar Pradesh. The National Highways Authority of India (NHAI) has imposed a ceiling on the number of applicants eligible to bid for engineering, procurement and construction (EPC) projects.

(Source: *The Financial Express*, October 4, 2011).

CCI clears three 'Combinations' within 30 days

I. G&K Baby Care and Danone Asia Pacific/ Wockhardt Limited

The transaction related to the proposed acquisition by G&K Baby Care Private Limited and Danone Asia Pacific Holdings Pte Limited of the assets of (i) Wockhardt Limited (ii) Carol Info Services Limited and (iii) Wockhardt EU Operations (Swiss) AG. On August 24, 2011, CCI received a notice from G&K Baby care Pvt. Ltd under section 6(2) of the Act. The order accepted the classification of the market provided by the Acquirers into (i) baby food business

and (ii) medical nutrition business. Two further subcategories namely (a) weaning cereals (b) milk food was also suggested for the baby food business, which also seems to have been accepted by the CCI. CCI cleared the transaction vide its order dated September 15, 2011. The CCI concluded that the parties have less than 7% market share in both the sub-categories and that Nestle is the leading player in the baby food business.

II. AICA Kogyo Company Limited and AICA Laminates Indian Private Limited/ Bombay Burmah Trading Company Limited

The transaction related to the proposed acquisition by AICA Kogyo Company Limited through its wholly owned subsidiary AICA Laminates Indian Private Limited of the laminates division of Bombay Burmah Trading Company Limited ("BBTCL"). The transaction was notified on September 7, 2011. CCI cleared the transaction on September 30, 2011. The CCI order found that, AICA India was a new company created for the transaction, and thus had no business, whilst AICA Japan produced relevant products but did not export them to India. CCI concluded that AICA Japan is a potential competitor (horizontal relationship), and hence preferred to have Part II of Form 1 completed.

III. Alstom Holdings (India) Limited and Alstom Projects India Limited

The transaction related to the merger of Alstom Holdings (India) Limited into Alstom Projects India Limited pursuant to a scheme of amalgamation. AHIL is a wholly owned subsidiary of Alstom Holdings, the holding company of the Alstom Group of Companies incorporated in France. The transaction was notified on October 12, 2011 and CCI cleared the transaction in on October 19, 2011. The CCI by this decision considered that an intra-group transaction relating to a subsidiary wholly owned or majority owned (sole control) would not have to be notified if the transaction is an acquisition of shares or voting rights. *Notification would be required if the intra-group transaction is effected in any other way e.g. mergers or amalgamations.*

CCI in all the three transactions found that the 'Combinations' would not have an appreciable adverse effect on competition in the relevant markets in India which were intensely competitive.

(Source: CCI website- www.cci.gov.in).

US pursuing an antitrust cooperation agreement with India

The US is working on an agreement with India to improve international antitrust enforcement. The cooperation will be followed by a memorandum of understanding allowing the US and India to share information and expertise on anti-competitive practices.

(Source: The Bloomberg, September 7, 2011)

More complaints against Cement Companies

The Confederation of Real Estate Developers Association of India (CREDAI) has filed complaint against major cement companies and asked CCI to intervene against exorbitant price hike by leading cement manufacturers. In another event the Serious Fraud Investigation Office (SFIO), the investigation wing of the Ministry of Corporate Affairs, has submitted its report to the Ministry stating that UltraTech Cement, Ambuja Cement and ACC have been colluding to keep the price within a band.

(Source: The Economic Times, September 21, 2011).

Competition Appellate Tribunal stayed ₹ 55.5 Cr fined imposed by CCI on National Stock Exchange

The Competition Appellate Tribunal (COMPAT) recently stayed a ₹ 55.5 Crore penalty imposed by the CCI on the NSE for abuse of its dominant market position, but directed NSE to comply with the other directions. The COMPAT also issued notices to the CCI and MCX-SX seeking reply to the notices within four weeks. COMPAT also directed the NSE to give an undertaking that it would have to pay the full penalty, along with interest at the rate of 9 per cent per annum, if it loses the case.



(Source: The Financial Express, September 8, 2011).

CCI investigating T-Series on royalty payments

On a complaint by HT Media Ltd., which operates an FM radio station "Fever 104 FM" CCI has directed the DG to

investigate whether leading music company Super Cassettes Industries Ltd, which owns the T-Series, is abusing its alleged dominant position in the music industry by imposing unfair and arbitrary conditions on the radio stations, including demanding excessive rates of royalty. The case has been filed under section 4 of the Act relating to abuse of dominant position. It is to be noted that as per the media report, T-Series allegedly has an estimated 80% market share in music rights.

(Source: The Mint, October 31, 2011)

CUTS-CIRC proposes December 5 as "World Competition Day"

International Network of Civil Society Organisations on Competition (INCSOC) for which CUTS International is the Secretariat, is running a Campaign on celebrating December 5, as a 'World Competition Day (WCD)'. The suggested theme for this year is "Cartels and its harmful effects on the Consumers". To enhance the outreach, CUTS have also created a Facebook page and have requested every "friend of competition" to visit the said page and share it with relevant contacts. The link to the Facebook page is as under

<http://www.facebook.com/WorldCompetitionDay>

COMPAT decides pending MRTP matters

COMPAT continues to decide the pending cases under the repealed MRTP Act. As per information received from the COMPAT, it had disposed of 1404 cases till October 31, 2011 so far as per details below:

RTP cases	171
UTP cases	502
Compensation cases	731
MTP cases	0

INTERNATIONAL NEWS

European Union

Novartis and Johnson & Johnson under Investigation

EC has opened an antitrust investigation, on its own initiative, to assess whether contractual arrangements between US-based pharmaceutical company Johnson & Johnson and the generic branches of the Swiss-based company Novartis may have had the object or effect of

hindering the entry on to the market of generic versions of Fentanyl in The Netherlands.

(Source: European Commission Website, October 21, 2011)

EC fined producers of CRT glass € 128 million in fourth cartel settlement

EC has settled a cartel investigation with four producers of cathode ray tubes (CRT) glass used in televisions and computer screens. Japanese firms Asahi Glass (AGC) and Nippon Electric Glass (NEG) and Germany's Schott AG were fined a total of € 128,736,000 for operating a cartel that ultimately affected consumers in Europe. The fine on all three companies includes a reduction of 10% for acknowledging their participation in the cartel, thereby helping the Commission to conclude the case more rapidly. Samsung Corning Precision Materials (SCP) of Korea was granted full immunity for being the first to give information about the cartel.

(Source: European Commission Website, October 19, 2011)

EC clears proposed acquisition of Samsung's hard disk drive business by Seagate Technology

The European Commission has approved under the EU Merger Regulation, following an in-depth investigation, the acquisition of the hard disk drive (HDD) business of Samsung Electronics of Korea by Seagate Technology of the US. The Commission's examination showed that there are separate worldwide markets for hard disk drives based on their end use application (such as desktop computers, mobile computers, servers). The Commission also identified a separate market for external hard disk drives in the European Economic Area (EEA), which is downstream from hard disk drives.

(Source: European Commission Website, October 19, 2011)

EC imposes € 8.9 million fine in banana cartel

EC held that the Chiquita and Pacific Fruit groups have operated a price fixing cartel in Southern Europe from July 2004 to April 2005. The Commission imposed a fine of € 8,919,000 on Pacific Fruit. Chiquita received immunity



from fines for providing the Commission with information about the cartel.

(Source: European Commission Website, October 12, 2011)

EC approved acquisition of Skype by Microsoft

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of the Internet voice and video communication provider Skype by Microsoft Corporation since the deal would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. In the area of consumer communications, the investigation found that the parties' activities mainly overlap for video communications, where Microsoft is active through its Windows Live Messenger. However, the Commission considers that there are no competition concerns in this growing market where numerous players, including Google, are present.

(Source: European Commission Website, October 07, 2011)

EC sends Deutsche Boerse, NYSE objections to \$9 billion deal

EC has sent a formal statement of objections to the planned merger between German exchange operator Deutsche Börse AG and NYSE Euronext. The objections include concerns regarding how the deal would affect competition in areas such as products, market shares for securities listings and individual securities.

(Source: Wall Street Journal, October 06, 2011)

EC raided natural gas suppliers in Eastern Europe



EC conducted unannounced raids at the premises of companies active in the supply, transmission and storage of natural gas in several Member States. The Commission

has concerns that the companies concerned may have been engaged in anticompetitive practices in breach of EU antitrust rules or that they are in possession of information relating to such practices. Gazprom, the Russian energy giant, and several of its main European customers have been raided by competition authorities at the start of investigation into suspected market abuse.

(Source: The Reuters, September 27, 2011)

Others

United States

Bridgestone agrees to pay \$28 Million Fine

Bridgestone Corporation has agreed to plead guilty and to pay a \$28 million criminal fine for its role in conspiracies to rig bids and to make corrupt payments to foreign government officials in Latin America related to the sale of marine hose and other industrial products manufactured by the company and sold throughout the world.



(Source: Department of Justice Website, September 15, 2011)

Freight forwarding companies agree to pay \$46.8 million fine

Six Japanese freight forwarders have agreed to plead guilty and to pay criminal fines totaling \$46.8 million for their roles in a conspiracy to fix certain fees in connection with the provision of freight forwarding services for air cargo shipments from Japan to the United States.

(Source: Department of Justice Website, September 28, 2011)

Hitachi-LG venture to plead guilty to price-fixing

Hitachi-LG Data Storage Inc. has agreed to plead guilty and to pay a \$21.1 million criminal fine for its participation in a series of conspiracies to rig bids and fix prices for the sale of optical disk drives.

(Source: Department of Justice Website, September 30, 2011)

Auto parts firm to pay \$200M fine for price fixing

Furukawa Electric Co. Ltd., a supplier of automotive wire harnesses and related products, headquartered in Tokyo, has agreed to plead guilty and to pay a \$200 million fine for its role in a criminal price-fixing and bid-rigging conspiracy involving the sale of parts to automobile manufacturers. Three executives, who are Japanese nationals, have also agreed to plead guilty and to serve prison time in the United States ranging from a year and a day to 18 months. These are the department's first charges as a result of its ongoing international cartel investigation of price fixing and bid rigging in the auto parts industry.



(Source: Department of Justice Website, September 29, 2011)

Germany

German Competition Authority, Bundeskartellamt, imposes multi-million fines on manufacturers of chipboard, OSB panels and other wood-based products



The Bundeskartellamt has imposed fines totalling approx. € 42 million on four manufacturers of chipboard, oriented strand boards and other wood-based products and on ten individuals who were involved in illegal price agreements. The companies concerned are Glunz AG, Pfleiderer AG, Kronoply GmbH and Rauch Spanplattenwerk GmbH. Egger Holzwerkstoffe Brilon GmbH & Co. KG, which also participated in the price agreements, was granted immunity from fines in accordance with the authority's leniency programme.

(Source: Bundeskartellamt Website, September 20, 2011)

France

French Competition Authority fines Canal Plus Group for breach of merger commitments and requires unwinding or re-notifying merger:



In an unprecedented decision, on September 20, 2011, the French Competition Authority (Autorité de la concurrence) withdrew the authorization granted in 2006 for Canal Plus to merge with TPS, on the ground that Canal Plus Group subsequently breached some of the conditions of the merger authorization. Furthermore, the Authority imposed a € 30 million fine (about \$40 million) on Canal Plus and ordered it either to dismantle the merger or notify it afresh.

(Source: Autorité de la concurrence Website, September 20, 2011).

Korea

Insurers fined W365b for price-fixing

Twelve life insurance companies were fined a total of 365.3 billion won (\$315 million) by the antitrust regulator for engaging in price-fixing. The Fair Trade Commission (FTC) unveiled the list of the companies Friday - Samsung, Kyobo, Korea, Mirae Asset, Shinhan, Tongyang, KDB, Heungkuk, ING, AIA, Metlife and Allianz. According to the antitrust regulator, the companies had sought to raise the burden of

insurance premium charged on customers and slash insurance payments to the customers through collusion.

(Source: *The Korea Herald*, October 14, 2011)

Refiners receive \$213 million fines for retail price collusion

South Korea's antitrust watchdog, FTC, said it had sent formal notification to local oil refiners to pay Won 252.5 billion (\$212.7 million) in fines for colluding in the retail oil market by November 22. The formal measure comes more than four months after the FTC announced on May 26 that it would impose the fines on the refiners for colluding in the retail oil market to keep pump prices artificially inflated.

(Source: *The Platts*, October 10, 2011)

Norway

NCC faces €22 million cartel fine

The Norwegian Competition Authority (NCA) has told road building contractor NCC that it faces an SEK200 million (€22 million) fine for price fixing in the asphalt paving sector.

(Source: *The Construction Europe Magazines*, October 17, 2011)

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Publications/Interviews

- ✧ The Confederation of Real Estate Developers' Associations of India (CREDAI) on October 1, 2011 published an article by MM Sharma and Vaibhav Choukse titled **"Impact of Competition Law - An analysis of Order against DLF"**. The article focuses on the recent order by CCI imposing a ₹ 630 Cr penalty on DLF for abusing the dominant position.
- ✧ **MM Sharma** featured on the popular show **"The Firm"** on TV Channel **CNBC TV18** on October 14, 2011. The interview was in the backdrop of the **recent FDI Policy of the Government in Pharmaceutical Sector**. The interview can be viewed at:

http://thefirm.moneycontrol.com/video_page.php?autono=599954&video_flag=1



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