Competition News Bulletin

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Highlights of the Edition..

Jurisdictions covered in this issue

India

European Union

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

CCI holds that mere information exchange by itself is not anti-competitive, in spite of leniency applications filed

The Competition Commission of India (**"CCI"**) by way of an order dated November 6, 2018 has exonerated Eveready Industries India Limited (**"Eveready"**), Panasonic Energy India Co. Ltd. (**"Panasonic"**), Indo National Ltd (**"Indo National"**) and Geep Industries (India) Pvt. Ltd. (**"Geep"**), along with Association of Indian Dry Cell Manufacturers (**"AIDCM"**) ("Opposite Parties/ OPs") despite applications filed by the parties under the Competition Commission of India (Lesser Penalty) Regulations, 2009.

The CCI initiated *suo moto* proceedings in the present case pursuant to a lesser penalty application filed by Eveready. It was submitted by Eveready that there was an exchange of information pertaining to sales and production of flashlights through the AIDCM. Subsequently, another Lesser Penalty application was filed by Panasonic disclosing the evidence of information exchange in relation to sale of flashlights between Eveready, Panasonic and Indo National through AIDCM.

Upon investigation, the Director General, CCI (**'DG'**), relying on (i) evidence of sharing of data of flashlights, (ii) evidence of draft press release and (iii) evidence of exchange of commercially sensitive information concluded that Eveready, Panasonic and Indo National have indulged in anticompetitive agreement/ conduct and concerted practices, in the domestic dry cell battery market of zinc carbon batteries, during the period March 20, 2009 to July 31, 2016 and thereby contravened the provisions of Section 3(3) (a) read with Section 3(1) of the Act.

The CCI upon examination of the evidence collected by the DG, observed that evidence on record does not establish that the office bearers of the battery manufacturers agreed upon the actual terms of increasing or determining prices. Further, the evidence of price discussion amongst Eveready and Indo National does not categorically establish that they fixed prices. The evidence of e-mail exchange between the parties merely indicate that they were monitoring market of flashlights for entry, but does not establish contravention of the provisions of the Act.

Thus, the Commission concluded that although there is evidence of exchange of production/ sales data, draft press release and price information amongst OPs indicating possibility of collusion, there is hardly any evidence to show that such activities of the battery manufacturers did in fact result in determining the prices of flashlights. The CCI observed that there was no evidence on record to establish that the parties implemented the understanding reached between them.

(Source: CCI decision dated November 6, 2018 - for full text see CCI website)

COMMENT: *This is the first case in which the Commission has exonerated parties from allegations of cartelization in spite of majority of the parties admitting coordination through leniency applications. This shown maturity of mindset in the Commission based on market realities . The case is also first among the series of three recent similar orders passed by the CCI closing the allegations of anticompetitive behavior despite contrary findings by the DG during investigations.*

CCI closes allegation of cartelization between taxi aggregators

By way of an order dated November 6, 2018, the CCI dismissed allegations of concerted action against Ola and Uber Group (OPs). Allegations were levelled against the pricing algorithm adopted by the OPs which allegedly manipulated supply and demand artificially. This guaranteed higher fares to drivers who would otherwise compete against one another and would not be able to command such high prices. Secondly, it was also alleged that Ola/ Uber and its drivers are in a vertical relationship wherein Ola/ Uber imposes a minimum price level on the drivers, resulting in a contravention of Resale Price Maintenance under Section 3(4) (e) of the Act.

The CCI while dealing with the allegation of hub and spoke arrangement amongst the taxi aggregators, observed that for a cartel to operate (as hub and spoke), there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber) which cannot be said to be a collusion between the drivers. In the case of ride-sourcing and ride-sharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. On the allegation of minimum resale price maintenance agreement between cab aggregators and their drivers, the CCI observed that since there was no resale of services, the allegation of resale price maintenance is not tenable.

(Source: CCI decision dated November 6, 2018; for full text see CCI website)

CCI exonerates RDCA of anti-competitive conduct in pharmaceutical market- disagrees with findings of the DG

The CCI, by way of an order dated November 8, 2018 exonerated Retail and Dispensing Chemists Association, located in Mumbai (**"RDCA"**) on allegations of limiting and controlling free supply of products by charging Product information service ("PIS") from the manufacturers of pharmaceutical products.

During the investigation by the DG, it was found that the RDCA was levying and collecting PIS charges in Mumbai. The DG held that the evidence on record proved that the collection of PIS was purpose of charging PIS was not for the purpose of any advertisement as contented by the RDCA. Instead, it was for securing the goodwill of the association and ultimately getting prior permission of RDCA to launch new drugs in the market. The DG, thus concluded that collection of PIS charges was in contravention of Section 3(1) read with Section 3(3) (b) of the Act, as the levy of such charges limited and controlled free supply of products in the pharmaceutical market.

The CCI relied upon the order passed by it in *Santuka Associates Pvt. Ltd.* which laid down that the decisive factor of whether the practice of charging PIS is anti-competitive or not is in the nature of the charges i.e. whether they are mandatory or voluntary. The voluntary payment of PIS charges would not amount to violation of the provisions of the Act. Therefore, the primary question before the CCI was to determine whether the payment of PIS charges by the companies to RDCA was mandatory in nature or not. In addition to the admission of pharmaceutical companies that the PIS charges are paid voluntarily, CCI also observed that some pharmaceutical companies have sold certain products in the territory of Mumbai without paying PIS charges and the evidence on record does not reveal even a single instance of refusing publication of any information for want of PIS.

Thus, in the absence of any corroborative evidence and the statements given by the pharmaceutical companies that the PIS charges were not mandatory, the CCI disagreed with the findings of the DG and found the conclusions based on mere conjectures and surmises and exonerated RDCA of the charges.

(Source: CCI decision dated November 8, 2018; for full text see CCI website).

COMMENT: *This is the second case in which CCI has closed the matter despite DG findings recommending violation . Under the scheme of the Act , there is no remedy of appeal available against such closure orders passed by DG where , after hearing the charged parties during the inquiry , conducted under section 26(8) of the Act, CCI closes the allegations disagreeing with the findings during investigations. CCI simply passes "order" in such cases without mentioning the section of the Act under which it is passed.*

B. INTERNATIONAL

UK awards follow -on damages for the first time in a cartel case

In a first such case, a UK court by way of an order dated October 9, 2018 awarded damages in a follow-on private cartel damages claim. .The Court directed Swiss engineering company ABB to pay Anglo-Dutch power-grid joint venture BritNed just over EUR11.5 million in damages. The case stems from a 2014 decision by the European Commission("EC") which found that, between 1999 and 2009, ABB and ten other companies had been involved in a global cartel in the underground and submarine high-voltage power cable sector. The EC found that the cartelists, 11 producers of underground and submarine high-voltage power cables, had shared markets and allocated customers among themselves on an almost worldwide scale. Part of this plan was to allocate important projects in the European Economic Area (which encompasses the EU), including large infrastructure and renewable energy projects such as offshore wind farms. BritNed was a customer of one of the cartelists during the cartel period, having procured a contract for the construction of the BritNed Interconnector (an electricity submarine cable system connecting the UK with mainland Europe).

BritNed sued for damages for an alleged overcharge resulting from the cartel. The court largely accepted the defendant cartelist's position that the cartel had not resulted in an overcharge in relation to the BritNed Interconnector. The damages were awarded based on two specific issues resulting from the operation of the cartel. The defendant's cable design included "baked-in inefficiencies" and it had benefited from cost savings, which inflated the common costs included in the price charged to BritNed.

(Source: News Article dated October 11, 2018 on The Global Legal Post; for full visit globallegalpost.com)

European Commission ('EC') opens investigation into airline ticket distribution services

In a recent press release dated November 23, 2018, the European Commission (EC) has opened a formal investigation to assess whether agreements between booking system providers- Amadeus and Sabre on the one hand, and airlines and travel agents on the other, may restrict competition in breach of EU antitrust rules. Investigation into Amadeus and Sabre focuses on possible restrictions in competition in the market for airline ticket distribution services, since such restrictions could create barriers to innovation and raise ticket distribution costs, ultimately raising ticket prices for travelers.

Amadeus and Sabre are leading worldwide suppliers of Computerized Reservation Systems, also known as Global Distribution Systems. These systems aggregate information about flight schedules, seat availability and ticket prices from multiple airlines. They enable travel agents and travel management companies (both online and brick-and-mortar) to compare airline services and reserve and issue tickets on behalf of travelers. EC will investigate whether certain terms in Amadeus' and Sabre's agreements with airlines and travel agents may restrict the ability of airlines and travel agents to use alternative suppliers of ticket distribution services. This may make it harder for suppliers of new ticket distribution services to enter the market, as well as increase distribution costs for airlines, which are ultimately passed on in the ticket prices paid by consumers.

(Source : EU press release dated November 23, 2018)

II. ABUSE OF DOMINANT POSITION

A. INDIA

CCI finds no abuse of dominance by GAIL in enforcing one-sided clauses in long-term supply contracts in the natural gas market

The CCI by way of order dated November 8, 2018 exonerated GAIL (India) Ltd (of allegations of abusing its dominant position in the Re-gasified Liquified Natural Gas (RLNG) market by imposing unfair and one sided conditions in the Gas Supply Agreements (GSA) signed with seven different companies.

The main allegations pertained to the imposition of the 'take or pay liability' (ToP) clause and terms of the 'Letter of Credit' (LC) in the GSA agreement which were allegedly one sided and biased.

The relevant product market as defined by the DG was the market for "*supply and distribution of natural gas to industrial consumers*". As the case was a clubbed one, due to the fact that separate informations pertaining to the same issue was filed before the CCI, the DG delineated 4 different geographic markets viz. Gurgaon, Rewari, Ghaziabad and Alwar.

While considering the position of GAIL, the DG found that:

- The market share of GAIL in relevant markets i.e. Rewari, Alwar, Ghaziabad and Gurgaon was significant, in fact, no other supplier were present in the stated locations.
- GAIL had 72% of the market share in gas transportation in the country and 70% market share in overall natural gas transmission pipeline network in India (i.e. (overall 15,800 kilometers as of 2016, out of which 11000 kilometers was of OP)
- GAIL has the largest pipeline network, having presence in 22 states. It has access to both industrial and domestic consumers.
- GAIL functions through long term, midterm and small term contracts and through sale in 'spot markets'.

DG's investigation concluded abuse of dominance on the part of GAIL in enforcing the 'take or pay' liability and ensuring maintenance of 'letter of credit' in order to ensure the amount of minimum guarantee offtake (MGO), by using the GSA as a one sided tool.

The Commission while analyzing the nature of the LTRNG (Long Term Regassified Liquid Natural Gas) contracts stated that Long-term 'Take or pay' liability are common in energy sector including the natural gas markets, therefore, LTRNG contracts are not inherently anti-competitive or entails foreclosure of competition. Moreover, the buyers had the choice to enter into a short-term contract of 3 years, 5 years and other periods less than 20 years. Notwithstanding the above, the buyers intentionally opted for a long-term contract foreseeing the commercial advantage like assured and steady supply, elimination of price volatility etc. attached to the contract.

As per the 'take or pay' liability, the Commission observed that for a period of time, the buyers were not making nominations of the required level and GAIL had to sell the remaining product in spot markets, in order to complete the desired sale. However, GAIL started suffering losses on account of a drop in the prices in the spot market. It is in order to recoup its losses that GAIL invoked the 'take or pay liability' clause against the contracted buyers. Therefore, such conduct cannot amount to an abuse of dominant position. The Commission observed that *"conduct of OP appears to be rational and not arbitrary in view of the fact that the amount demanded by OP was substantially lower than the actual liability. Safeguarding commercial interest or invoking contractual cases which are not unfair per se cannot be termed as unfair just because they are invoked by one of the parties to the contract"*

As regards the Letter of Credit, the CCI noted that, neither did GAIL invoke the LC on the ground of 'MGO', nor has any loss been occasioned to the buyers. The term remained as a surplus in the LC and was never acted upon. Thus it was in the nature of a mistake and cannot be construed as an abuse, which caused any serious prejudice to the Informants.

(Source: CCI decision dated November 8, 2018; for full text see CCI website)

COMMENT: *This case the third recent case decided by CCI by passing an "order" without mentioning the section under which the order is passed . This case is also included in the category of "Grey area " cases since , under the scheme of the Act, no appeal lies against such order where CCI closes the case in spite of DG findings of violation of the Act .*

CCI , though disagreed with the DG findings of abuse of dominance by GAIL in the long term supply contracts for RNLG , on merits, has recommended unbundling of gas transmission and gas distribution segments of the gas supply market to avoid monopolistic behavior by lone suppliers . CCI has absolved GAIL from allegations of ,apparently, one sided and unfair conditions in the GSA , considering the unique market structure of such long terms gas supply contracts for supply of imported RNLG ,finding ,of instance, objective justifications , for lop sided condition such as ToP liability or MGO etc.

CCI directs investigation on allegation of abuse of dominance by IRCTC

By way of order dated November 9, 2018 under Section 26(1) of the Act, CCI directed the DG to investigate the Ministry of Railways, Indian Railway Catering and Tourism Corporation Ltd (the Opposite Parties), for alleged abuse of dominant position in the *"market for sale of tickets by railways in India."* The information filed before the CCI disclosed that Opposite Parties round off the actual base fare to the nearest higher multiple of Rs. 5 to arrive at the total base fare. A large number of e-tickets are booked everyday by passengers through the Official Website and charging the amount by rounding off to the next multiple of Rs.5 is an unfair condition/price in the sale of e-tickets resulting in unfair income to Indian Railways every day.

Further, even if more than one e-ticket is booked from the same account for the same journey in the same train, the actual base fare would be rounded off to the next multiple of Rs. 5 per passenger. For instance, if the actual base fare for a journey is Rs. 7 per passenger and four tickets are to be booked then the actual base fare would be Rs. 28 (Rs. 7 *4), which after rounding off ought to be Rs. 30. However, the OPs rounds off the actual base fare for each passenger separately with the result that each individual ticket is rounded off to Rs. 10 making the Opposite Parties to charge Rs. 40 instead of Rs. 30. OPs could not convince the Commission that why the policy of rounding off of actual base fares to the next higher multiple of Rs. 5 is applicable to the sale of online tickets, when it may be possible for the Opposite Parties to transfer even one paisa electronically. Further, OP was not able to explain why rounding off is done separately for each passenger even when more than one tickets are booked through one account of the same time for a journey. CCI made prima-facie view that imposition of unfair condition in the market for sale of rail tickets in India, particularly for online booking of rail tickets, is in contravention of provisions of Section 4 (2)(a)(i) of the Act and passed order under Section 26(1).

(Source: CCI decision dated November 9, 2018; for full text see CCI website)

CCI directs investigation against Intel for abuse of dominant position

The CCI by way of order dated November 9, 2018 under section 26(1) of the Act, directed the DG to investigate Intel Corporation (the Opposite Party/ OP/Intel) for alleged abuse of dominant position in the market for *'processors for server in India''*. The investigation was directed on the basis of an information filed by Velankani Electronics Pvt. Ltd ("Velankani") which is a manufacturer of 'servers' in addition to other products. In order to manufacture a server, certain sub- assemblies (components) are required such as Processor, Server-Board, Chassis, Memory Disc, etc.

Two sub-assemblies of the server, namely the Server-Board and the Chassis have to be designed in such a manner that they interface with the Processor. There cannot be an effective/ marketable Server unless the Server-Board and the Chassis interface with the Processor. Hence, to manufacture Server-Boards on its own, the Informant needed access to the reference designs from the Processor manufacturer i.e. Intel, so as to incorporate the same in the design of its Server-Board. In the absence of such reference designs from Intel, the Informant cannot develop its Server-Board which would interface or be compatible with Intel's Processor.

The Informant stated that Intel was sharing the complete reference design files with the Informant's competitors in the Server market such as Dell, HPE, etc. (Original Design Manufacturers/Original Equipment Manufacturers or ODMs/ OEMs) thus, enabling them to manufacture their own Server-Boards, but not with the Informant. Therefore, the Informant alleged that OP (i) by denying access to the reference designs files had prevented the Informant from manufacturing its own Server-Boards. (ii) placed restrictions on production of Servers (iii) is abusing its dominant position in the market for Server processor to protect its market of servers.

The Commission in its prima facie analysis noted that there are two categories in which the manufacturers of Intel based Servers and Server-Boards are categorized i.e. (i) ODMs/ OEMs who are well established IT companies who manufacture and design their own customized Servers and Server-Boards; and (ii) Licensed Manufacturers who enter into Licensing Agreements with the OP and are provided detailed documentation including standard reference designs to make Server-Boards based on such designs. Intel contended that the Informant falls in the second category and therefore a Manufacturing Enablement Agreement was entered between the OP and the Informant, by virtue of which the Informant was enabled to manufacture Intel Server-Boards based on the Intel's design. But the OP is under no obligation to treat the Informant at par with the ODMs/ OEMs. On this submission of the OP, the Commission pointed out that the OP did not explain as to why the informant was not included in the former category as of the OEMs. The only justification that the OP made is that the Informant lacked the financial, human resource and technical expertise. The Commission noted that the OP did not specify any threshold in monetary terms or the number of personnel etc. which the Informant was required to meet. Also, the OP was not required to incur costs to provide the requisite files to the Informant and therefore it cannot decline to provide the same just because it thinks that Informant is not capable enough to do such designing. Accordingly, the Commission noted that that there exists a prima directed the DG to investigate the matter.

(Source: CCI decision dated November 9, 2018; for full text see CCI website)

CCI dismisses allegations of abuse of dominant position by Flipkart

By way of an order dated November 6, 2018 under Section 26(2) of the Act, the (OP 2) dismissing allegations of abuse of dominant position by Flipkart India Pvt. Ltd. (OP1) and Flipkart Internet Pvt. Ltd. It was alleged that Flipkart was abusing its dominant position by engaging in preferential treatment of certain sellers as compared to others.

The information filed before the CCI alleged that Flipkart sells goods to companies like WS Retail Services Private Limited (rather than selling directly to consumers through the online ecommerce marketplace sites), which was owned by founders of Flipkart till 2012, at a discounted price and thereafter, these are sold on the platform operated by Flipkart. Such practices amounted to preferential treatment to certain sellers. Further OPs, sell goods at discounted price as they have access to Venture Capital funds ("VC funds") and are financially backed by big investors and such acts by OPs of selling goods below cost price also result in denial of market access to the individual sellers who are not backed by VC funds and investors.

CCI while determining the position of Flipkart defined the relevant market as *"Services provided by online marketplace platforms for selling goods in India"*. CCI held that Flipkart India is not in a dominant position in the relevant market due to the presence of Amazon as its closest competitor which has a global presence having a valuation of over 700 billion dollars, in addition to other players like Paytm Mall, SnapDeal, and Shopclues etc. Since Flipkart is not in a dominant position, thus, there cannot be a question of abuse, hence the matter was closed under Section 26(2) of the Act.

(Source: CCI decision dated November 6, 2018; for full text see CCI website)

III COMBINATION

A. INDIA

CCI approves acquisition of sole control of Alstom by Siemens

CCI by way of its order dated November 1, 2018 has approved the acquisition of Alstom S.A ("Alstom") by the mobility business of Siemens Aktiengesellschaf ("Siemens"). The parties had entered into a Business Combination Agreement ("BCA") for the above said transaction/Combination.

The Commission noted that the businesses of the parties relating to the proposed Combination broadly concerns the mobility business engaged in products, services and solutions relating to railway transportation and compete in tenders for the manufacture and supply of-

- Signaling solutions
- Rail electrification
- Rolling Stock

In all the three categories, there was no or negligible overlap between the parties and neither did the combined market share cross 30%, maximum being 25%-30% in urban rail electrification segment. As a result of which, the Commission was of the opinion that the Combination is not likely to have any appreciable adverse effect on competition in India and, therefore, approved the Combination.

(Source: CCI order dated November 1, 2018; for full text see CCI website)

CCI seeks public comments on acquisition of Larsen & Toubro's electrical and automation business by Schneider Electric deal

CCI has sought for public comments and views on Schneider Electric's proposed acquisition of certain businesses of Larsen & Toubro after forming a *prima facie* view that the proposed Combination would adversely affect competition in India.

As per the notice issued by the Commission, the stakeholders have to submit their comments within 15 working days (last date being December 12, 2018) along with supporting documents on how the merger can adversely impact any person or entity.

In May, Larsen & Toubro had entered into an agreement with Schneider Electric to sell its electrical and automation business for an all-cash consideration of Rs. 14,000 crores. CCI seeks for comments/ objections/ suggestion in writing from any person(s) adversely affected or likely to be affected by the Combination, as per the notice, to determine whether the Combination has or is likely to have an appreciable adverse effect on competition in the relevant market in India.

(Source: CCI Notice; for full text see CCI website)

CCI approves indirect acquisition of less than 10% share capital of ANI Technologies

CCI, by way of order dated November 11, 2018 approved the indirect acquisition of less than 10% of the share capital of ANI Technologies Pvt. Ltd by Mr, Ankit Bhati, Mr. Bhavish Aggarwal and Mac Ritchie Investments Pte. Ltd through Lazarus Holding Pte. Ltd (A Special Purpose Vehicle used as an investment holding company).

Mr. Aggarwal and Mr. Bhati are individuals who jointly set up ANI, which is a technology software service provider primarily engaged in providing internet and mobile technology platforms for taxi and auto rickshaw aggregation services for taxi-hailing by commuters under the brand name Ola. The Commission noted that the Combination does not result in any appreciable adverse effect on competition in any market in India and did not find it necessary to define the relevant market. However, for the purpose of assessment, the relevant market was defined as the market for 'digital payment services in India' or in the alternative, at a narrower level, 'm-wallet services in India'.

(Source: CCI order dated November 11, 2018; for full text see CCI website)

B. INTERNATIONAL

EU: EC approves acquisition of Europac by DS Smith, subject to conditions

The EC has approved the acquisition of Europac by DS Smith, both engaged in the business of manufacturing paper and packaging products. The decision is conditional on the divestment of a number of production plants in Portugal and France.DS Smith and Europac are both manufacturers of a wide range of paper and packaging products, in particular corrugated packaging such as corrugate cases used to transport industrial and consumer goods. DS Smith is active across the European Economic Area (EEA) and Europac has activities in France, Spain and Portugal. EC's investigation focused on the markets for corrugated case materials, sheets and cases. Corrugated case material is used to manufacture corrugated sheets, which in turn are converted into corrugated cases for sale to end-customers.

The EC was concerned that the proposed acquisition would significantly reduce the level of competition in: (i)the market for corrugated sheets, and consequently corrugated cases, in Portugal, as the merged entity would have had a strong market position on the sheet market and face limited constraints from competitors.(ii) the market for corrugated cases in Western France, in view of the strong combined market position of DS Smith and Europac and the reduction of competitive constraint that the transaction would cause. To address the competition concerns, DS Smith offered to divest the following activities:

- Europac's box plant in Ovar, Portugal, for the manufacture and supply of corrugated sheets and cases in Portugal; and
- Two DS Smith plants in France: "DSS Normandie" and "DSS Normandie (Cabourg)", which produce corrugated sheets and cases for supply in Western France, in particular in Brittany.

DS Smith and Europac also committed to transfer or assign the applicable customer contracts along with the divested plants. These commitments fully remove the overlap between DS Smith and Europac with regard to corrugated cases in Western France. The commitments also largely eliminate the overlap as regards the supply of corrugated sheets in Portugal and as such any foreclosure concerns with regard to corrugated cases, so that the transaction will only result in a limited increment in market share of less than 5%.EC, therefore concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns in the EEA. The decision is conditional upon full compliance with the commitments.

(Source: EU press release dated November 14, 2018).

EC clears the creation of six joint ventures by Daimler and BMW, subject to conditions

EC has approved the creation of six joint ventures by Daimler and BMW, subject to conditions. Daimler and BMW, both active in car manufacturing, will establish six joint ventures, bringing together the two companies' mobility services in five business fields: (i) free-floating car sharing services, via DriveNow (BMW) and car2go (Daimler), (ii) ride hailing services, (iii) parking services, (iv) charging services, and (v) other on-demand mobility services. The sixth joint venture will (vi) manage the brands and license them out to the other five joint ventures. The activities of Daimler and BMW overlap significantly with respect to free-floating car sharing services. Free-floating car sharing allows customers to pick up and drop off the car anywhere within a certain delimited area in a given city, using authorised parking spaces such as public parking spots. The car can then be picked up by the next user in the location where the previous user parked it. EC found that the proposed transaction would raise competition concerns for car sharing in six cities, namely Berlin, Cologne, Düsseldorf, Hamburg, Munich and Vienna.

EC examined the effects of the proposed transaction, taking into account the competitive restraints exerted by other means of transportation, such as station-based car sharing (where cars can only be dropped off at specific "stations") or public transport. The market investigation found that many players, such as original equipment manufacturers (OEMs), rental firms and pure car sharing players have plans or intentions to start operating in the six cities concerned. In addition, EC examined a number of vertical relationships arising from the merging companies' activities. In particular, providers of integrator apps could be shut-out after the merger. Integrator apps are mobile applications that aggregate several different transport options including free-floating car sharing and therefore want to display the services of DriveNow and car2go.EC found that, after the transaction, Daimler and BMW would have the ability and incentive to shut out: (a) rival providers of integrator apps, to the benefit of Daimler's own integrator app "moovel"; and (b) rival car sharing providers, to the benefit of their own car sharing services. To address the competition concerns, Daimler and BMW offered, in the six relevant cities, a two-fold remedy package, granting:

- Application programming interface ("API") access to third party aggregator platforms for mobility solutions, so that they can also re-direct users to Daimler and BMW's car sharing services; and
- Access to Daimler "moovel" integrator app to interested car sharing providers.

The commitments fully addresses the Commission's concerns as they will reduce the barriers to entry for competing free-floating car sharing providers by (a) ensuring that smaller competitors can enter the market in any of the cities concerned and be immediately visible on "moovel"; and (b) allowing integrator apps to also display DriveNow and car2go to customers seeking a mobility solution. Therefore, the EC concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns. The decision is conditional upon full compliance with the commitments.

(EU press release dated November 7, 2018)

European Commission approves Disney's acquisition of parts of Fox, subject to conditions

EC has approved the proposed acquisition of parts of Fox by Disney, both US based global media companies. The decision is conditional on full compliance with commitments offered by Disney. Disney and Fox are two of the six major Hollywood film studios. Both companies are also providers of TV channels such as the Disney Channel, the Fox channels, the National Geographic channels and the History channels. In the European Economic Area (EEA), Disney and Fox are active as providers of audio-visual content and TV channels to TV broadcasters and distributors. The proposed transaction would combine Disney and parts of Fox, including its film and television studios and its cable and international television businesses. The Fox Broadcasting network and stations, Fox News Channel, Fox Business Network, FS1, FS2 and Big Ten Network are not part of the transaction. EC examined the effects of the proposed transaction on the markets where the activities of the two companies overlap. In relation to (i) production and distribution of films for release in movie theatres and (ii) distribution of content for home entertainment and licensing of films and other TV content, EC found that the combination of Disney's and Fox's activities would raise no competition concerns because the merged entity would continue to face significant competition from other players, such as Sony, Universal and Warner Bros. In relation to the (iii) wholesale supply of TV channels, the Commission found that the proposed transaction would have eliminated competition between two strong suppliers of "factual channels" in several EEA Member States. Factual channels are channels which mainly broadcast documentaries, drama and scientific-themed entertainment programs, such as the National Geographic channels and the History channels.

To address the competition concerns, Disney committed to divest its interest in all factual channels it controls in the EEA, namely: History, H2, Crime & Investigation, Blaze and Lifetime channels. These channels are currently controlled by A+E Television Networks, which is a joint venture between Disney and Hearst.The commitments fully remove the overlap between Disney's and Fox's activities in the wholesale supply of factual channels in the EEA.Therefore, EC concluded that the proposed transaction, as modifiedby the commitments, would no longer raise competition concerns. The decision is conditional upon full compliance with the commitments.

(Source: EU press release dated November 6, 2018)

IV MISCELLANEOUS NEWS

NCLAT quashes CCI order punishing Hyundai for Resale Price Maintenance and Tying-in.

The National Company Appellate Tribunal (“NCLAT/ Tribunal ”) by way of an order dated August 19, 2018 , has set aside the CCI Order dated June 14, 2017 against Hyundai Motors India Ltd. (“Hyundai”) which penalized Hyundai for imposing anti-competitive vertical restraints of indulging in resale price maintenance (RPM) and tying -in , on two of its dealers , based in Faridabad, Delhi NCR ((Fx Enterprise Solutions India Pvt. Ltd) and in Trivandrum , Kerala (St. Antony’s Cars Pvt. Ltd.) (Collectively “Informants”), primarily on technical grounds of alleged non-appreciation of evidence independently by the CCI and relying completely on the findings given in the DG’s investigation report.

In its impugned Order dated June 14, 2017, the CCI, after a detailed analysis of the findings arrived at by the DG in the investigation report and the objections taken by Hyundai against the findings , had held that Hyundai , had imposed the vertical restraints of RPM and Tying -In , with its two dealers in Delhi - NCR and Kerala. CCI vide its said order also imposed a penalty of 87 crores on Hyundai.

The thrust of the CCI order for arriving at the violation of Tie-in arrangements and Resale Price Maintenance against Hyundai was based on the findings in the DG investigation report , which was in turn based on evidence of Hyundai mandating its dealers to use lubricants and oils from a particular brand and using a Discount Control Mechanism (DCM) by hiring “mystery shopping agencies” to keep surprise checks on the dealers (Informants) to see if anyone was giving discounts beyond the prescribed range to the end customers or not . For enforcing RPM, the dealer found to have deviated from the prescribed discount by giving extra discount to any customer was penalized by Hyundai with a minimum of Rs. 2 lakhs for one violation and maximum of Rs. 80 lakhs for the sixth violation. Moreover, these penalties on dealers for violating the "discount code" were to be deposited not with the Hyundai Company but with an advertisement agency to obfuscate the allegation of the company indulging in RPM. The CCI found that this policy of Hyundai amounted to imposition of vertical restraint in the form of resale price maintenance and that such policy had the direct 'object" of fixing minimum resale price on which the car could be resold by the dealer and hence restricted competition.

However, NCLAT set aside the impugned CCI order on the following grounds. Firstly, as regards the violation of RPM, the Hon'ble Tribunal, while noticing that the CCI , had arrived on the finding of Hyundai committing the violation of RPM , mainly on account of Hyundai having admitted the same before the DG regarding hiring various mystery shopping agencies to monitor its policy of DCM for "policing its dealers" and monitoring the arrangement in question, however, held that this was not correct since "CCI has not cited any evidence for coming to such conclusion" . In addition to this, NCLAT also observed that "mere reference of one or other provisions such as Explanation (e) to Section 3(4) of the Act, 2002 will not constitute any offence, till it is proved by the Commission with the help of any evidence".

Secondly, as regards the violation of "tying-in ", according to Hon'ble Tribunal, the order of CCI was not based on any specific evidence and was merely based on the opinion of the DG and the finding of CCI with respect to the tie-in arrangement of lubricant and oils by Hyundai Motors was termed as being not based on any evidence and nothing was brought on record by the DG or the Commission to suggest that Hyundai Motors penalized a dealer for not using the recommended lubricants and oils. NCLAT in its order held that *"Commission of its own has not discussed any evidence, much less the dealership agreement including the date of agreement to reach conclusion about violation of one or other provisions of the Act, 2002."* NCLAT held that the finding of CCI on this issue was not based on any evidence. Also, as per the Hon'ble Tribunal, CCI had failed to consider that normally car dealers of all companies recommend use of particular quality of lubricant.

Further, in support of its above finding on merits, the Hon'ble Tribunal, while discussing the relevance of the DG report, sent a strong message to CCI by reiterating that *"DG report is merely an opinion primarily to assist the Commission for appreciation of evidence in arriving at a final conclusion during the inquiry and the DG report is not binding on the Commission"*. Explaining the role of the Commission, NCLAT has further held that the *"Commission is expected to analyse the evidence and the report and required to read it in conjunction with other evidence on record and then to form its final opinion as to whether such report is worthy of reliance or not."* and that it cannot merely depend on the finding on the DG to hold alleged violation of Section 3 and 4 of the Act.

Thirdly, NCLAT observed that the DG as well as the Commission has failed to decide the relevant geographic market as also the relevant product and has also failed to inquire into the agreement in the light of Sub-Section 3 of Section 19 of the Act, It was also observed the relevant geographic market and relevant product market having not been taken into consideration, the inquiry is incomplete being in violation of Section 19(6). NCLAT held that Section 26 of the Act prescribes 'procedure for inquiry under Section 19' but in the present case no such inquiry has been made in terms of Section 19 and the procedure for inquiry under Section 19 is not a mere formality.

(Source : NCLAT order dated August 19, 2018)

Supreme Court clears the jurisdictional conflict between CCI & TRAI- dismisses CCI and Jio appeals

The Hon'ble Supreme Court by way of its judgement dated 05.12.2018 has finally cleared the uncertainty surrounding the jurisdiction of CCI and TRAI (Telecom Regulatory Authority of India). The Hon'ble Supreme Court, by invoking the doctrine of harmonious construction has balanced the stand by giving TRAI the power to determine the rights and obligations of the parties first, and then if it apprehends the existence of an anti-competitive act, the jurisdiction of CCI can be invoked. The Supreme Court by way of the present judgement upheld the decision of the Bombay High Court dated September 21, 2017.

Writ Petitions were filed before the Bombay High Court ("the High Court") against the order passed by CCI under Section 26(1) of the Act, after forming a prima facie view of alleged cartelization between Bharti Airtel Ltd. ("Airtel"), Idea Cellular Ltd. ("Idea") and Vodafone India Ltd. ("Vodafone") [collectively referred as Incumbent Dominant Operators- IDOs]. In a nutshell, the judgement of the High Court held that, insofar as contracts, license issues, quality of services, interconnection agreements etc. which are regulated by the TRAI Act,1997 are concerned, as the first instance, it is the authority of TRAI to decide these questions. Once there is a determination of the respective rights and obligations under these licenses by the authority under the TRAI Act, 1997, only thereafter, the CCI gets jurisdiction to go into the questions of anti-competitive practices.

The Hon'ble Supreme Court observed that, in the instant case, dispute raised by Reliance Jio is that the IDOs have not given POIs as per the license conditions resulting into non-compliance and have failed to ensure inter alia technical compatibility thereby. TRAI being a specialized sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the current issue. The Hon'ble Supreme Court, therefore, agreed with the findings of the High Court that till the jurisdictional issues are straightened and answered by the TRAI, the CCI is ill equipped to proceed in the matter.

However, it is pertinent to note that the Hon'ble Supreme Court did not totally oust the jurisdiction of CCI and held that since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are finding returned by TRAI which lead to the prima facie conclusion that IDOs have indulged in anti-competitive practices, CCI can be activated to investigate the matter. Therefore the Hon'ble Supreme Court in its decision, does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place.

(Source: Supreme Court decision dated December 5, 2018; for full text visit Supreme Court Website)

Comment: *This is undoubtedly another landmark judgment from the Apex Court. This judgment assumes significance because, the Hon'ble Supreme Court has finally shown a middle path to resolve the long-debated issue of jurisdictional conflict between the CCI and sector regulators . The Hon'ble Supreme Court, by invoking the doctrine of harmonious construction has balanced the stand by giving TRAI the power to determine the rights and obligations of the parties first, and then if it apprehends the existence of anti-competitive act, invokes the jurisdiction of CCI.*

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