Competition News Bulletin

VAISH ASSOCIATES ADVOCATES
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Highlights of the Edition..

Jurisdictions covered in this issue

India
European Union
United Kingdom
Unites States
Singapore
Australia

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India ("CCI") imposes penalty on Jet Airways, IndiGo Airlines and Spicejet for fixing fuel surcharge rates

By way of an order dated March 7, 2018, the CCI has imposed a cumulative penalty of approx. INR 54 Crores on Jet Airways (India) Ltd ('Jet Airways'), InterGlobe Aviation Limited ('IndiGo Airlines') and SpiceJet Limited ('SpiceJet') ("OPs")for fixing fuel surcharge rates for cargo transportation.

Background of the case- Previously vide order dated November 17, 2015 in the same case and over the same allegation, the CCIhad imposed a cumulative penalty of INR 257.91 Crores on the OPs. However, on appeal, the Competition Appellate Tribunal ("COMPAT") vide common order dated April 18, 2016 had overturned the CCI's decision and remanded the matter back for reconsideration on the technical ground that the CCI while disagreeing with the DG Report, had not notified the parties and afforded an opportunity to the OPs to file their replies/objections.

Subsequently, the DG Report was reconsidered by the CCI and the OPs directed vide order dated February 8, 2017 to give reasons as to why they should not be held in contravention of Section 3(1) read with Section 3(3) (a) of the Act.

Brief of allegations- The crux of the allegations were that the OPs connived to introduce a 'Fuel Surcharge' (FSC) w.e.f May 15, 2008 for transporting cargo for the period 2008-2013. It was further alleged that FSC has been increased by almost the same rate and from almost the same date and that the increase did not correspond with an increase in the fuel prices. It was alleged that even when fuel prices declined substantially, the Airlines acting in concert have uniformly increased the FSC.

CCI's findings - It was observed that in the year 2008, Jet Airways, Indigo Airlines and Spicejet had implemented FSC on the same date at a uniform rate of INR 5 per kg. Further, for the time period April-June 2011, the OPs increased the FSC rate by the same amount i.e. INR 9 per kg. It was also noted that Indigo and Spicejet had effected the increase in FSC on the very same date. Likewise, in June 2012 and September 2012, time lag of just few days was observed in the dates of implementation of revised FSC. Again, in November 2012, it was noted that Jet Airways and Indigo had increased FSC rate on the very same date.

The CCI reasoned that the increment of FSC rates by the OPs on the same date or a nearby date was reflective of some sort of understanding amongst OPs. Since the fixing of the FSC rate indirectly

determined the rates of air cargo transport, the parties were held to bein violation of Section 3 (3) (a) of the Act.However, in a departure from its previous order in the same case, the CCI imposed penalty only on the 'relevant turnover' which was considered as the revenue generated from air cargo transport services.

(Source: CCI decision dated March 7, 2018; for full text see CCI website)

For further details please see http://competitionlawyer.in/861-2/

2. CCI directs investigation against Honda Motorcycle and Scooter Private Ltd (Honda) for imposition of vertical restraints on its dealers and for abuse of dominant position

The CCI by its order dated March 14, 2018 has directed the Director General ("DG") to investigate allegations of imposition of vertical restraints by Honda and abuse of dominant position in the market for manufacture and sale of scooters in India. The DG was directed to conduct a detailed investigation after the CCI arrived at a prima facie finding that the condition imposed by CCI of(i) mandatory purchase of accessories and merchandise items (ii) forceful billing of slow movies vehicles (iii) compulsory deduction of advertising expenses (iv) restriction on insurance and finance options (v) making purchase of Annual Maintenance Contract (AMC), Extended Warranty (EW), Road Side Warranties (RSA) contingent upon purchase of booklets from Corporate India Warranties (I) private Ltd. and (vi) termination of dealership without prior notice and refusal for stock was in violation of Section 4 (2)(a)(i), Section 4(2)(a)(ii) and Section 4(2)(d) of the Act. The CCI further held that mandatory requirement imposed on its dealers by Honda to procure certain items like oil and consumables from designated sources, Honda's implementation of a resale price maintenance including monitoring of maximum permissible discount level through discount control mechanism, levy of penalty for non-compliance amounts to unreasonable imposition of vertical restraints in violation of Section 3(4) of the Act.

(Source: CCI decision dated 14 March, 2018; for full text see CCI website)

INTERNATIONAL

1. European Union: European Commission ("EC") imposes penalty of €395 million on maritime car carriers for cartelization

On February 21, 2018, the EC announced that it has adopted a decision under the cartel settlement procedure and fined maritime car carriers a total of € 395 million. The companies involved in the cartel , namely, CSAV (Chile), 'K" Line, MOL and NYK (Japan) and WWL-EUKOR (Norway/Sweden), participated in a cartel between October 2006 and September 2012 in the market for deep sea transport of new cars, trucks and

other large vehicles on various routes between Europe and other continents. The carriers agreed to maintain the status quo in the market and to respect each other's traditional business on certain routes or with certain customers, by quoting artificially high prices or not quoting at all in tenders issued by vehicle manufacturers. The cartel affected both European car importers and final customers, as imported vehicles were sold within the European Economic Area (EEA), and European vehicle manufacturers, as their vehicles were exported outside the EEA. The EC investigation was initiated on an immunity (leniency) application submitted by MOL. In determining the fines, the EC took into account the sales value on the intercontinental routes to and from the EEA achieved by the cartel participants for the transport services. While MOL received full immunity under the EC's 2006 leniency notice, CSAV (25% reduction), "K" Line (50% reduction), NYK (20% reduction) and WWL-EUKOR (20% reduction) benefited from reductions of their fines for their cooperation with the EC.

(Source: European Commission press release dated February 21, 2018)

2. European Union: EC imposes penalty of € 76 million on spark plug manufacturers in cartel settlement

On February 21, 2018, the EC announced that it had imposed a combined penalty of € 76 million on Bosch, Denso and NGK for participating in a cartel concerning the supplies of spark plugs to car manufacturers in the EEA from 2000 to 2011. The EC adopted its decision under the cartel settlement procedure. The EC found that the three companies participated in a cartel between 2000 and 2011 in the supply of spark plugs to car manufacturers in the European Economic Area (EEA), which was aimed at maintaining the existing status quo in the spark plugs industry in the EEA.

According to the EC, the three companies exchanged commercially sensitive information and in some instances agreed on the prices to be quoted to certain customers, the share of supplies to specific customers and the respect of historical supply rights. This coordination took place through bilateral contacts between Bosch and NGK, and between Denso and NGK.

The EC investigation was initiated on an immunity (leniency) application filed by Denso, which received full immunity from fines under the Leniency Notice. NGK and Bosch received a reduction of 42% and 28% on the fines imposed on them The Commission imposed fines of over € 45.8 million on Bosch and € 30.2 million on NGK. In determining the fines, the EC took into account the companies' sales generated in the EEA from the supply of spark plugs to car manufacturers with production facilities in the EEA.

(Source: European Commission press release dated 21 February 2018)

3. United Kingdom: The Competition and Markets Authority (CMA) imposes penalty of £3.4m on household coal and BBQ supplier cartel

The CMA has imposed penalty on CPL and Fuel Express (suppliers of bagged household fuels, including coal and fire log, and charcoal for barbecues) for rigging supply tenders floated by Tesco and Sainsbury's. Under the bid-rigging arrangement, it was agreed that one of the customers would submit a higher bid that was designed to lose – so that the existing supplier could retain 'its' customer. While implementing the arrangement, the parties also exchanged competitively-sensitive pricing information.

(Source: CMA press release dated March 02, 2018)

4. United States: BNP Paribas USA Inc. pleads guilty to antitrust conspiracy

Following an investigation by the antitrust division of the Department of Justice (DOJ), BNP Paribas USA Inc. pleaded guilty to conspiracy involving manipulation of prices on an electronic FX trading platform. The conspiracy involved creation of non-bona fide trades, coordination of bids and offers on that platform and agreements on currency prices to quote specific customers, among other conduct. BNPP USA is the sixth major bank to plead guilty as a result of the department's ongoing investigation into antitrust and fraud crimes in the FX market. On May 20, 2015, four major banks – Citicorp, JP Morgan Chase & Co., Barclays PLC and The Royal Bank of Scotland plc – pleaded guilty at the parent level and agreed to pay collectively more than $2.5 billion in criminal fines for their participation in an antitrust conspiracy to manipulate the price of U.S. dollars and euros exchanged in the FX market. A fifth bank, UBS AG, pleaded guilty to manipulating the London Interbank Offered Rate (LIBOR) and other benchmark interest rates and agreed to pay a $203 million criminal penalty, after breaching its December 2012 non-prosecution agreement resolving the LIBOR investigation.

(Source: Department of Justice press release dated 26 January 2018)

II. ABUSE OF DOMINANCE

INDIA

CCI imposes penalty on Ghaziabad Development Authority ('GDA') for abuse of dominant position in Ghaziabad

By way of an order dated February 28, 2018, the CCI imposed penalty on GDA for abusing its dominant position in the relevant market of *"provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections in the district of Ghaziabad"*. The CCI held that the GDA had in violation of Section 4(2)(a)(i) of the Act by raising the cost of flats, meant for the Economically Weaker Sections (EWS), from INR 2.0 Lakhs in 2008 to INR 7.5 lakhs in 2015 without any enabling provision either in the Brochure of the Scheme or allotment letter. While imposing a penalty of INR 1,00,60,794/- on GDA, the CCI also directing GDA to cease and desist from indulging in the abusive conduct in future.

(Source: CCI decision dated 28 February, 2018; for full text see CCI website)

For further details please see http://competitionlawyer.in/cci-imposes-penalty-of-rs-1-crore-plus-on-gda-for-abuse-of-dominant-position/

III. COMBINATION

INDIA

CCI approves initial transactions notified under the Insolvency and Bankruptcy Code, 2016

The CCI vide its order on March 7, 2018, unconditionally approved the proposed acquisition of Binani Cement Ltd by Rajputana Properties, subsidiary of Dalmia Bharat Cement Ltd. This is the first transaction to be notified to the CCI involving the acquisition of a corporate debtor under the Insolvency and Bankruptcy Code, 2016. The transaction has been cleared by the CCI within 13 working days after it was filed. The race for Binani Cement saw Dalmia Bharat Cement Ltd and UltraTech Cement Ltd as the top two contenders, submitting nearly identical bids of around INR 6,500 Crores.

(Source: Livemint edition dated 7 March 2018)

Meanwhile, Ultra Tech, which had also filed a detailed notice (Form II) before the CCI has also obtained CCI clearance as on date of publication of this newsletter.

(Source: Business Standard edition dated March 28, 2018)

INTERNATIONAL

1. European Union: EC clears Bayer's acquisition of Monsanto, subject to conditions

Following an in-depth review involving assessment of more than 2000 different product markets and 2.7 million internal documents, the EC has cleared Bayer's proposed acquisition of Monsanto as per its Press Release dated 21 March 2018. The merger is conditional on the divestiture of an extensive remedy package. Bayer offered commitments that addressed the concerns raised by the EC in the following markets:

a) Vegetable seeds

Divestiture of the entire vegetable seed business, including the R&D organisation to a suitable buyer currently not active in vegetable seeds. This would allow the buyer to replicate the competitive constraint previously exercise by Bayer on Monsanto and ensure that the number of global vegetable seeds R&D players remained the same.

b) Broadacre seeds and traits

Divest to BASF (Bayer's competitor) almost the entirety of its global broadacre seeds and trait business, including its R&D organisation. The divestiture would include Bayer's seed activities, not only in oilseed rape and cotton where Bayer's activities overlap with Monsanto in Europe, but also in soybean and wheat, which are important globally and will ensure the viability and competitiveness of the divested business. It would also include Bayer's entire trait business, including its R&D on GM and non-GM traits. This would remove all the horizontal overlaps between the parties and ensure that the current number of global integrated traits players remained the same at four players (with DowDuPont and Syngenta) and that the current number of global broadacre seeds players remained at six (with DowDuPont, Syngenta, KWS and Limagrain).

c) Pesticides

Divest to BASF its glufosinate assets and three important lines of research for non-selective herbicides. This research forms part of the race to find challenger products for glyphosate. The divested assets would enable BASF, which is currently not selling non-selective herbicides, to replicate the competitive constraint previously exercised by Bayer on Monsanto both in herbicides and in herbicide systems.

To address the Commission's concerns in seed treatments to protect against nematode worms, the parties committed to divest to BASF Monsanto's nematode seed treatment assets (Nemastrike). This would enable BASF to replicate the competitive constraint, which Monsanto would have exerted on Bayer absent the merger.

d) Digital agriculture

Commitment by Bayer to license a copy of its worldwide current offering and pipeline on digital agriculture to BASF, maintaining competition by allowing BASF to replicate Bayer's position in digital agriculture in the European Economic Area (EEA). This will ensure that the race to become a leading supplier in Europe in this emerging field remains open.

While clearing the merger, the EC has cooperated very closely with a number of competition authorities including inter alia the US Department of Justice as well as the Australian, Brazilian, Canadian, Chinese, Indian and South African competition authorities.

(Source: European Commission press release dated March 21, 2018)

For the analysis of this merger in India by CCI , Please read- https://blogs.economictimes.indiatimes.com/et-commentary/bayer-monsanto-merger-cci-please-stop-this-merger-save-indian-farmers-suicides/

2. European Union: EC clears merger between Essilor and Luxottica

The EC had cleared the proposed merger between Essilor (the largest supplier of ophthalmic lenses in the world) with Luxottica (the largest supplier of eyewear in the world which own popular brands such as Ray-Ban and Oakley). The EC's investigation had assessed whether the merged entity might leverage Luxottica's brands to make opticians buy Essilor lenses and exclude other lens suppliers from the market through practices such as tying and bundling. The EC found that the merged company would have limited incentives to engage in practices such as bundling and tying because of the risk of losing customers, and that the merged company would not be able to exclude rival eyewear suppliers from the market, since Essilor has insufficient market power and incentives to shut out Luxottica's competitors.

(Source: European Commission Press Release dated March 01, 2018)

3. United States: Ultra Electronics abandons proposed acquisition of Sparton Corp. after DOJ expresses concerns

Ultra- Electronics Holdings plc. has abandoned its proposed acquisition of Sparton Corp valued at $234 million after the DOJ raised antitrust concerns. The transaction had proposed to permanently combine the only two qualified suppliers of sonobuoys to the U.S. Navy. Sonobuoys are used for detection, classification, and localization of adversary submarines during peacetime and combat operations. Ultra-Electronics and Sparton Corporation have in recent years supplied this critical equipment to the U.S. Navy through their joint venture, ERAPSCO.

(Source: Department of Justice press release dated 5 March 2018)

4. United Kingdom: CMA clears Derby and Burton hospital trust merger

The Competition and Markets Authority (CMA) has cleared the merger between Derby Teaching Hospitals Foundation Trust and Burton Hospitals Foundation Trust. The two trusts provide services predominantly in the Derbyshire and East Staffordshire area and the hospitals they operate overlap across a number of healthcare services. Although the merger raised preliminary concerns that it may lead to reduction in choice for patients, the assessment revealed that the merger is expected to result in substantial patient benefits that outweigh any potential competition concerns arising out of the merger. In reaching its decision, the CMA placed significant weight on the advice of NHS Improvement, the regulator of NHS trusts, which strongly supported the merger. This is the second time the CMA has cleared an NHS hospital merger on the basis of patient benefits at the 'Phase 1' stage, following its clearance of the merger of 2 Birmingham hospital trusts.

(Source: CMA press release dated March 15, 2018)

IV. MISCELLANEOUS

INDIA

1. Delhi High Court refuses to interfere with prima facie order passed by CCI post submission of DG Investigation Report

The High Court of Delhi in a recent judgement dated March 9, 2018 has refused to interfere in a pending inquiry after the submission of the Director General's (DG) investigation report. In a writ petition filed by Cadila Health Care, the High Court has held that the stage of challenging the *prima facie* order stands closed once the DG report has been filed before the CCI. It was held that the CCI is not under an obligation to record a prima facie case against every aspect involved in the matter, as it cannot foresee and predict whether any violation of the Act would be found upon by investigation by the DG. The High Court said that an interpretation to the contrary would defeat the very purpose of the Competition Act which is to prevent practices having appreciable adverse effect on competition.

(Source: Delhi High Court decision dated March 09, 2018; for full text see Delhi High Court website)

For further details please see http://competitionlawyer.in/871-2/

Note: This decision is presently under challenge before the division bench of the Delhi High Court

2. Supreme Court upholds CCI's interpretation of Section 4(2)(c) of the Act

The Supreme Court vide its judgement dated January 24, 2018 has set aside the COMPAT decision dated May 2, 2014 in which, the COMPAT while dismissing the CCI's order has held that a denial of market access as envisaged under Section 4(2) (c) of the Act can only be occasioned to a competitor. Previously by way of an order dated July 3, 2014, the CCI held that M/s Fastway Transmission Pvt. Ltd and its group entities ("Respondents") (who are Multiple System Operators) had denied market access to M/s Kansan

News Pvt Ltd ('Kansan') (a news channel broadcaster) by terminating the channel placement agreement mid-stream.

The Supreme Court while rejecting the narrow interpretation of Section 4(2) (c) of the Act held that the CCI has a positive duty to eliminate all practices which have an adverse effect on competition. It was held that the inclusion of the words "in any manner" in Section 4(2)(c) of the Act implies a wide import and that the words must be given their natural meaning. Thus, the question as to whether Kansan being a broadcaster is in competition with MSOs is a factor which is irrelevant for the purpose of application of Section 4(2)(c) of the Act.

(Source: Supreme Court decision dated January 24, 2018; for full text see Supreme Court website)

INTERNATIONAL

Australia: Federal Court dismisses cartel appeal

The Full Federal Court of Australia has dismissed an appeal by electric cable manufacturer, Prysmian Cavi E Sistemi S.R.L. (Prysmian) against a ruling that it engaged in cartel conduct in the supply of high voltage land cables. Prysmian's cartel conduct related to the supply of high voltage land cables and accessories to a Snowy Mountains Hydro Electric Scheme project in 2003. The Federal Court found in 2016 that Prysmian entered into and gave effect to agreements involving price guidance to competitors and project allocation. The Court ordered a penalty of $3.5 million.

(Source: ACCC press release dated March 13, 2018)

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