Competition News Bulletin

VAISH ASSOCIATES ADVOCATES
Delhi • Mumbai • Bengaluru
Celebrating over 45 years of professional excellence

January, 2018

Inside...

For Private Circulation - Educational & Information purpose only

Vaish Associates Advocates ...Distinct. By Experience.

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India finds Grasim Industries and others indulging in anti-competitive practices

The Competition Commission of India ("CCI") vide its order dated 05.10.2017 has found Aditya Birla Chemicals (India) Limited (ABCIL), Grasim Industries Limited (GIL) and Gujarat Alkalis and Chemicals Limited (GACL) (collectively called as "opposite parties') guilty of bid rigging/ collusive bidding in terms of provisions contained in Section 3(3)(d) of the Competition Act, 2002 ("The Act") and has imposed penalty totaling INR 6.27 Crores. The brief facts are as under.

For production of potable water three chemicals, namely, Poly Aluminum Chloride (PAC), Alum (coagulant) and Liquid Chlorine (LC) (disinfectant) are widely used, but PAC is mostly used as it is easy to handle. Delhi Jal Board (the Informant) has been procuring PAC and LC from the Opposite Parties for purification of water through tendering process. The Informant alleged that in case of negotiations over the bid price of PAC/LC, the Opposite Parties used to negotiate/ decrease the prices, to an equal extent. The Informant has further alleged that in negotiation over the bid price all the Opposite Parties used to decide as to how much amount is to be decreased or negotiated from bid/ quoted price. The Informant has also alleged that the Opposite Parties were bidding collusively by quoting similar prices with a difference of INR 200-400 for certain quantity of the said chemicals from the year 2006-07 till the year 2012. The same is alleged to be done to vitiate the whole purpose of tenders as the Informant had no other option but to accept the prices as determined by the Opposite Parties themselves.

References made by DJB to CCI

In the context of the above allegations, two separate references (akin to complaint by statutory authorities) under Section 19(1) (b) of the Act made by Delhi Jal Board (DJB/ Informant) to the CCI.In Ref. Case No. 03/2013, the Informant had alleged that Grasim Industries Limited (GIL), Aditya Birla Chemicals (India) Limited (ABCIL), Gujarat Alkalies and Chemicals Limited (GACL) and Kanoria Chemicals and Industries Limited (KCIL) had indulged in collusive tendering /bid-rigging of the tenders floated by it for the procurement of Poly Aluminium Chloride (PAC) pertaining to the period from 2006-07 till the year 2012.

In Ref. Case No. 04/2013 the Informant alleged bid-rigging/collusive tendering by the same companies as in Ref. Case No. 03/2013 (except that in place of GACL , Punjab Alkalis & Chemicals Ltd. (PACL) was bidding) with respect to tenders for the procurement of liquid chlorine (LC) floated by the Informant for the period from 2006-07 till 2012.

DG Investigation

The DG in his investigation concluded that the OPs did act in a collusive manner raising the bid prices and contravened the provisions of Section 3(1) read with Section 3(3) (d) of the Act. The DG, however, noted that no contravention was established against KCIL.

CCI Observations

The Commission on examination of the rates for PAC offered by the companies in response to the tenders for the period from 2009-10 to 2014-15, observed that the rates besides simultaneously increasing every year were converging on a narrow band. Further, it was noted that despite the fact that the plants are located in different geographical areas (and the subsequent reflection on the logistical costs), the rates quoted by all the bidders remained substantially similar. It was also observed that in normal market conditions, the freight rate/km should decrease with the increase in the distance covered. However, contrary to the same, the freight rate of GACL which was farthest from DJB had the highest freight rate. On examination of the cost of production of the product by the respective companies, the CCI observed that the cost of production of GACL has been nearly constant whereas the cost of production of GIL and BACIL has been increasing, which was contrary to explanations of narrow band pricing offered by the parties, which attributed the same to PAC being a homogenous product. The examination of the rates offered by the parties to other customers also revealed that the parties have been charging DJB higher rates than the rest of their customers, which could not be sufficiently explained by the ABCIL, GIL or GACL. With respect to the conduct of GIL and ABCIL, it was noted that they have been continuously and throughout the tender process exchanging vital information with each other, be it sharing of the bid documents, prices to be quoted or even the negotiated prices to be offered.

With regard to tendering of LC it was noted that the product features of LC distinguished it from PAC, such as LC is a by-product and it's hazardous and toxic nature and hence its market conditions was different from that of PAC. It was also noted that in case of LC, apart from the timing of bid submissions there were no other factors indicative of a concerted action. The Commission noted that for LC, no analysis has been made by the DG with respect to basic price, transportation cost, taxes and policy of profit margin and in the absence of any analysis in this regard, no finding of contravention can be recorded against the bidders based on the conclusions drawn by the DG.

Findings of the CCI

ABCIL and GIL had raised the preliminary objection that were subsidiaries of the same parent company and therefore being part of the same 'group', any agreement between cannot be termed as an anti-competitive agreement under Section 3 of the Act. However, the Commission noted that at every stage of the bidding process, suppliers including ABCIL and GIL were treated as opponents and their bids were

assessed individually, and not collectively, and therefore they should be treated as competitors irrespective of the fact that they are related to each other.

The Commission also noted that the concept of 'group' is applicable only in the context of regulation of combinations under Sections 5 and 6 of the Act and has no application, whatsoever, to the proceedings under Section 3 of the Act. With regard to the allegations of collusive bidding, the Commission observed that despite all the OPs having huge variation in variable cost of production, fixed cost of production, transportation cost, taxes as well as policy on profit margin, there was close margin in bid prices quoted for PAC by them in DJB's tenders year after year. It was also noted that similar behavioral patterns are discernable in tenders of other municipal corporations (other than DJB) as well. It was noted that the employees responsible for the tender proposals of the OPs coordinated with each other at every stage of the tender process. Accordingly, in the absence of an economic rationale behind the behaviour of quoting similar rates by the bidders together with the prolonged supra-competitive pricing by GACL, the bid rotation, the tenders floated by other municipal corporations and the exchange of vital information taken in totality were sufficient enough as 'plus factors' and established concerted action and meeting of minds.

Consequently, the bidders i.e. ABCIL, GIL and GACL were found to have acted in a concerted manner in respect of the tenders floated by DJB (for supply of PAC) during 2009-10 to 2014-15 in contravention of the provisions of Section 3(1) read with Section 3(3)(d) of the Act. Regarding the quantum of penalty to be imposed, the Commission noted that PAC is used in the purification of water. Therefore, the criticality of the procured product for public health was considered as an aggravating circumstance. Therefore the Commission ordered a penalty on ABCIL and GIL at the rate of 8% on their average relevant turnover and at 6% on GACL for their first three financial years, being INR 2.09 Crore, INR 2.30 Crore and INR 1.88 Crore respectively.

(Source: CCI decision dated October 5, 2017; for full text see CCI website:

http://www.cci.gov.in/sites/default/files/Ref.C.%20Nos.%2003%20%26%2004%20of%202013%20%5BMajority%20Order%20%28p.1%20to%20p.90%29%2C%20Dissent%20Note%20by%20Member%20Sudhir%20Mital%20%28p.91%20to%20p.105%29%5D.pdf

Comment:

The present order marks a positive and significant development of the concept of Single Economic Entity (SEE) in India, in line with the practice in mature competition law jurisdictions. Previously, the preliminary step adopted by the CCI to examine whether entities are a SEE in the market, was an examination of the structural links between the entities in question. For example in the case of Exclusive Motors, the CCI held that so long as two enterprises form part of the same group, any internal agreement between them is not considered an agreement for the purpose of Section 3. This approach was also followed by the CCI in the Association of Third Party Contractor case. The methodology adopted by the CCI earlier was such that in order to be considered a SEE, the entities first have to qualify the "group test" as envisaged under Section 5 of the Act. In this case, ABCIL and GIL had taken the plea that there cannot be a collusion between them in terms of Section 3 of the Act as they constitute a 'group' within the meaning of

Explanation (b) of Section 5 of the Act. It is interesting to note that in an order dated August 31, 2015 (which pertained to the merger of ABCIL and GIL), the CCI had itself held ABCIL and GIL as part of the same group. However, the CCI refused to admit the plea of SEE since, pursuant to the tender, the parties had submitted independent bids, thereby creating a façade of fair competition to the procurer. It was held that when two or more entities even if part of the same group decide to submit separate bids in the same tender, they consciously represent themselves to the procurer that they are independent decision making centers. Therefore, they cannot avoid responsibility under Section 3(3) of the Act merely on the said ground)

CCI exonerates 9 supplier from bid rigging in railway tenders

The Competition Commission of India ('CCI') vide its order dated November 28, 2017 has exonerated nine RDSO approved suppliers ("Opposite Parties") , including four sister companies, of allegations of bid-rigging in supply of roof mounted ac package unit for AC coaches to the Rail Coach Factory, Kapurthala , citing insufficient evidence, despite there being instances of identical bidding by the parties. The CCI held that, in the absence of cogent evidence, the collective increase or decrease in rates during the years 2011 to 2014 and the increase in rates in or after June 2013 by itself do not establish a case for contravention of the provisions of Section 3(3) (a) and 3(3) (d) read with Section 3(1) of the Competition Act, 2002 (the Act). The CCI in the present case reiterated its ratio decidendi in two earlier decided cases of Shri B. P. Khare, Principal Chief Engineer, South Eastern Railway v. M/s Orissa Concrete and Allied Industries Ltd & Ors, Ref. Case 05/2011 and the Competition Appellate Tribunal's decision in Escorts Limited v Competition Commission of India & Anr, (Appeal no.13 of 2014 decided on December 18, 2015) that mere identical pricing is not sufficient to establish a case of cartel formation. Further, the CCI has also widened the scope of "bid-rigging" to include collusion between subsets of bidders that is closely held or sister companies having common management/promoters and has held that even if a subset of bidders collude amongst themselves, it would be a violation of Section 3(3) (d) of the Act, if such conduct inter alia reduces competition. This case is also significant in that, the CCI relied on its recent decision on single economic entity in re Delhi Jal Board V. Grasim Industries Ltd. & Ors, Ref. Case No. 03 & 04/2013 to distinguish procurement markets, holding that where two or more entities of the same group decide to separately submit bids in the same tender, they have consciously decided to represent themselves to the procurer that they are independent decision making centers and independent options for procurement. Accordingly, the defense if 'single economic entity' expounded by the four related Opposite parties was rejected.

Facts

The proceedings before the CCI were initiated on a reference filed by the Chief Material Manager, Rail Coach Factory, Kapurthala ('RCF') under Section 19(b) of the Competition Act, 2002 (Act) that post July

2013, there was an abnormal increase in the rates vis-à-vis LPR (Last Price Quoted) by the Opposite Parties (OPs) namely M/s Daulat Ram Engg & Services P. Ltd., Madhya Pradesh (OP-1); M/s Daulat Ram Industries (OP-2); M/s Amit Engineers (OP-3), M/s Fedders Lloyd Corporation (OP-4), M/s Intec Corporation (OP-5), M/s Lloyd Electric and Engg. Ltd. (OP-6), M/s Sidwal Refrigeration Industries Ltd. (OP-7), M/s Stesalit Ltd. (OP-8) and M/s EssEss Kay Engg. Co. P. Ltd. (OP-9) in the tenders floated by the RCF for procurement of roof mounted ac packaging units. The OPs were manufacturers of roof mounted ac package unit ('RMPU') for Hoffman Busch coaches and conventional AC coaches. The DG on investigation of the allegations levelled by RCF exonerated OP-1, OP-2, OP-8 and OP-9 but concluded a violation of Section 3(3)(a) read with Section 3(3)(d) of the Act against OP-3, OP-4, OP-5, OP-6 and OP-7. The DG examined total 89 tenders for supply of RMPU for four categories of railways AC coaches during the period 2011 to 2014.

Noticeably, OP 4/OP 6 and OP 5/OP 7 were "sister concerns" / part of the same group headed by the same Chairman and Managing Director/ same family group sharing certain basic facilities and their bids submitted , that is, under common managements and their rates were identical in some tenders .

Summary of findings

The CCI in addition to examining the conduct of all the OPs collectively, also examined the conduct of a "subset" of bidders i.e. OP-6 & OP-7, OP-4 & OP-6, OP-5 & OP-7 and OP-3, OP-5 & OP-7, where instances of identical pricing was observed. It was observed by the CCI, that the concept of "bid rigging" envisaged under the Explanation to Section 3(3) of the Act, even includes an agreement which has the effect of reducing competition for bids or adversely affecting or manipulating the process of bidding. Therefore, even if a subset of bidders collude amongst themselves, it would be a violation of Section 3(3)(d) of the Act, if such conduct inter alia reduces competition. Accordingly, the CCI emphasized on the "intent" as "outcome" of any such alleged collusion. The DG in his investigation report, arrived at a finding of collusion between OP- 6 and OP- 7, on the basis of identical prices quoted by them in one tender dated July 30, 2009. The CCI, however, rejected this finding on the ground of insufficient evidence by noting that no plus factors have been identified to support the finding of collusive behavior, and that DG's proposed theory of how OP-6 and OP-7 should have ideally behaved cannot be considered as a plus factor.

Similarly, there was one instance of identical pricing by OP-4 and OP-6 in the tender dated May 12, 2011 and the DG supported his finding of meeting of minds on the fact that they are sister companies headed by the same Chairman and Managing Director and run by the same management. However, the CCI again concluded that this was insufficient evidence to conclude a contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act.

With respect to OP-5 and OP-7, the DG found two instances of identical pricing. However, the CCI

observed that sporadic instances of identical/ similar pricing of homogenous product coupled with the bidders' knowledge of prices quoted in previous tenders, cannot be an evidence of 'meeting of minds'. As a result, neither the intention behind nor the consequence of the collusive behavior can be ascertained.

The CCI further observed that parallel behaviour of competitors can be a result of intelligent market adaptation in an oligopolistic market and that it is illegal only when such conduct was on the basis of information exchanged between the competitors, the object of which is to influence the market. Accordingly, instances of identical pricing reveal is indicative of collusion, only when it is the only plausible explanation to the conduct of the OPs.

The CCI also cautioned against arriving at a finding of contravention based merely on suspicion emanating from identical or similar pricing coupled with evidence of possibility of exchange of information. Accordingly, in the present case, it was held that although the DG has found few instances of identical / similar pricing by different sets of these OPs, the investigation report falls short of providing clarity as to how such pricing was an outcome of collusion. In the instant case, although identical and similar pricing by different sets amongst OP-3 to OP-7 in some tenders out of the eighty nine (89) tenders floated by the Informant and other production units or Zonal Railways of the Indian Railways during the years 2011 to 2014, coupled with the collective increase/ decrease in rates and other factors such as the common management of OP-4 and OP-6 and same partners and directors in OP-5 and OP-7 raise suspicion of collusion, in the absence of sufficient cogent evidence, it cannot be conclusively said that OP-3, OP-4, OP-5, OP-6 and OP-7 have contravened the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act to the exclusion of all OPs.

(Source: CCI decision dated November 28th, 2017; for full text see CCI website)

Comment

The present order has further widened the scope of "bid-rigging" within group companies to also include instances where subsets of bidders collude amongst themselves. The CCI has held that such instances reduce competition for bids and therefore constitute bid-rigging in terms of the Explanation to Section 3(3) of the Act. However, it appears that in order to establish collusion between such subsets of bidders, the 'intent" and 'outcome' behind such collusion need also be established, since such collusion may not necessarily result in such bidders emerging as the L1 bidder. Therefore, an investigation into the benefit accrued to such OPs should also be examined to prove "meeting of minds".

Competition Commission finds All India Film Employee Confederation and other parties in contravention of Section 3 of the Competition Act, 2002.

The Competition Commission of India (CCI) vide its recent order dated October 31, 2017 has directed 25 trade unions and associations and their All India and Regional Confederations of the various categories of junior artists, cameramen, dancers, art directors etc. of the Bollywood Film Industry to " cease and desist"

from their existing practices of disrupting competition and fair-play in the market through their anti-competitive conducts, such as, suspension of work, boycott etc. of such film directors who engage junior artists etc. outside the said trade unions / associations. The order is significant because it has reiterated that the trade unions and associations of these junior artists etc. cannot claim immunity from the provisions of the Competition Act, 2002 ("the Act") simply because their trade unions etc. are registered under the relevant statute i.e. the Trade Unions Act, 1926 because, unlike, in the erstwhile Monopolies and Restrictive Trade Practice Act, 1969, there is no exemption to trade unions under the Act. The order establishes the importance of maintaining competition in the markets even in matters of the rights of the workmen and labour which are otherwise protected under the respective labour statutes.

Brief facts

Film and television content production require engagement of skilled professionals such as spot boys, junior artists, lightmen, cameramen, models, fighters, dancers, sound engineers/designers, art directors, artists etc. (collectively referred to as "craftsmen"). Initially, film producers directly engaged with the Craftsmen. With the passage of time, however, the Craftsmen have organized themselves into their respective federations, associations and trade unions. The Informant, Mr. Vipul A. Shah who is an independent film producer and director has alleged that the federations/associations/ trade unions formed by these craftsmen do not allow producers to engage craftsmen who are not members of the respective associations and also boycott producers who appoint crafts persons outside of the associations. Since the services of craftsmen are imperative for film and television producers, a Memorandum of Association (MOU) was executed on 01.10.2015 between the film and television content producers and the associations of the respective Craftsmen. The MOU in addition to fixing the work shift, timings, wages, rates etc. also provided that film producers shall exclusively deal with only craftsmen who are members of the Opposite Party Federations/ Associations and that the producers cannot engage craftsmen who are not part of the Opposite Party Federations/ Associations.It was alleged that the clauses of the MOU constitute an anti-competitive agreement within the provisions of Section 3(3) of the Act. On a prima facie contravention of the provisions of the Act, the DG was directed to investigate the allegations against the OP Federations.

DG's findings

The DG on investigation observed that the MoU as well as conduct of the OPs was in violation of Section 3 (3) (a), 3 (3) (b) and 3 (3) (c) read with Section 3 (1) of the Act.

CCI's findings

Issue 1

The preliminary issue which was decided by the CCI was whether the provisions of the Act are ipso facto applicable to the Opposite Parties, who are registered trade unions under the Trade Unions Act, 1926. It was argued that Section 3 of the Act (which deals with anti-competitive agreements) do not cover coercive actions taken by non-players, labour unions or worker unions.

Findings

The CCI on perusal of the provisions of the Trade Unions Act, 1926 observed that immunity is granted only against proceedings relating to certain limited actions and under specified statutes. The Act does not state that it will not apply to any trade union or other association of workmen or employees formed for their own reasonable protection. The immunity to trade unions provided for under Section 18 of the Act available only to proceedings in a civil court and is inapplicable to the proceedings before the CCI which is only an expert body.

The CCI further observed that, although trade unions are permitted to undertake activities which protect and secure the rights of its members, such activities should not be intended to restrain competition or harm consumers, or be used for facilitating collusion between competitors. When these trade unions transgress their legal contours and facilitate collusive or collective decision making, with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or provision of services by its members, it amounts to violation of the provisions of the Act. Therefore, if the impugned conduct of a trade union falls foul of the Act, the same needs to be examined under the relevant provisions thereof. Competition law is not an impediment to appropriate trade union activities and members of such unions should be fully aware of the types of conduct such law proscribes when carrying out the union's programs and activities.

Issue 2

The second issue raised by the OPs was that since the OP associations were not enterprises as defined under the Act, Section 3 will not be applicable.

Findings

The CCI relied on the decision of the Supreme Court in Competition Commission of India v. Coordination Committee of Artists and Technicians of W.B. Film and Television and Others and held that an entity, regardless of its form is an 'enterprise' if it engages in an economic activity. It was also clarified that where the members of a trade union take decision relating to production or distribution or exhibition of films on behalf of the members who are engaged in the similar or identical business of production, distribution or

exhibition of the films, the decision of these associations reflected collective intent of the members. In such circumstances, the actions of the trade union can be examined under the provisions of the Act.

In the present case, the CCI observed that the Craftsmen offer their respective services to the movie/film industry in return for a certain amount of remuneration. Since they assume financial risks pursuant to the services that they offer, they are engaged in an economic activity and can therefore be considered as an enterprise. It was also held that even if the OPs are not associations of enterprises, they will still be 'associations of persons' and will fall within the purview of Section 3 of the Act.

Issue 3

The third issue decided by the CCI was whether the MOU dated 01.10.2010 between the OP Associations are violative of Section 3(3) of the Act

Findings

The CCI noted that Clause 6 of the MOU restricted the freedom of the producers to acquire services of any non-member artist/ worker of their choice and also restrict persons who is not part of the Opposite Party Associations. The CCI also observed that the OP Association formed a Vigilance Committee under Clause 18 of the MOU who inspected shooting sites to ensure strict compliance with Clause 6 of the MOU.

It was held that such clauses deprive the opportunity of fair and free competition in the market and has the effect of limiting or controlling the market or provision of services.

The CCI relied on its decisions in Reliance Big Entertainment Limited and UTV Software Communications Limited to hold that imposition of member to member working conditions through memorandum of understanding or articles of association by an association reflects collective behavior of all its members and that the effect of such conditions is that non-members, who are competitors of the members of such associations, are prevented from competing effectively in the market. Such agreements in effect, limit the supply and distribution of films in the territories under the control of various associations and was therefore held to be violative of Section 3 (3) (b) of the Act.

With respect to the MOU clause providing for fixation of minimum wages and increase in wages on a yearly basis, it was observed that such clauses may have the effect of fixation of prices especially when coupled with Clause 6. However, wages and increment being also a condition of labour/ term of employment, can fall within the realm of legitimate trade union activity when negotiated by a registered trade union and was therefore not in contravention of Section 3(1) read with Section 3(3) of the Act.

Penalty

On the issue of penalty, the CCI observed that the practice observed that the practice adopted in the MOU dated 01.10.2016 was in existence since 1966 and was contemplated as a mechanism to resolve disputes between the producers on one side and the craftsmen employed by them on the other. Considering the antiquity of the understanding and the fact that the OPs are ultimately associations/ trade unions of daily-wage earners, the CCI refrained from imposing any monetary penalty and only issued a cease and desist order.

(Source: CCI decision dated October 31, 2017; for full text see CCI website http://www.cci.gov.in/sites/default/files/19%20of%202014.pdf)

Comment

The present order is the latest of a series of orders by the CCI against trade associations/unions. The CCI in this case has reiterated its earlier position that a decision taken by a trade association constitutes an agreement within the meaning of Section 3(3) of the Act. As a result, trade unions which have earlier enjoyed an explicit immunity under the Monopolies and Restrictive Trade Practices Act, 1969 have increasingly found their decisions scrutinized by the CCI under the Competition Act, 2002. Resultantly, many associations inter alia the Chemists and Druggist Associations, Film Exhibitors Association, Cement Manufacturers' Association etc. have been penalized by the CCI under Section 27 of the Act. Therefore, it is advisable that trade association/union members sensitive themselves as to what conduct is caught by the provisions of the Act while undertaking the activities and functions of the association/union.

The Competition Commission of India dismisses allegations anti-competitive conduct

The CCI vide its order dated October 9, 2017,dismissed allegations of anti-competitive conduct against Maharashtra Industrial Development Corporation (OP 1) and Royal Power Trunkey Implements Private Limited (OP 2). Maharashtra Electrical Engineers Association ('the Informant'), is a registered association of electrical contractors under the Labor Association Act, 1926. It is stated to be established to safeguard the interests of its members who provide infrastructural facilities in the layout of Special Economic Zones by providing, erecting and commissioning of transformers, sub-stations etc. The Informant alleged that in a bid invited by OP-1 on April 3, 2017 with respect to the tender pertaining to installation, erection, commissioning and operation of lift in Aurangabad Industrial Area (for construction of Class I, II & Class III & IV quarters and for providing internal & external electrification, lifts, firefighting arrangement and other miscellaneous works), OP-1 granted the tender arbitrarily to OP-2 who did not even hold a valid license issued by the concerned authorities to be able to perform the contract/ tender.

CCI observed that the Informant has not placed any material before the Commission which can be examined under Section 3 of the Act. Similarly, no term of any tender has been pointed out which can be examined under Section 4 of the Act. The grievance of the Informant emanates out of the alleged non-adherence to tender conditions and circulars by OP-1.Therefore, the Commission was of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

(Source: CCI decision dated October 9, 2017; for full text see CCI website: http://www.cci.gov.in/sites/default/files/52%20of%202017.pdf)

The Competition Commission dismisses allegations of anti-competitive conduct against the Kerala Film Producers Association

The CCI vide its order dated October 3, 2017 dismissed allegations of contravention of Sections 3 and 4 of the Act.The Informant, P. V. Basheer, exhibits movies in his theatres viz. Liberty Paradise, Liberty Movie House, Liberty Little Paradise and Liberty Suite, all located at Thalassery, Kannur District, Kerala. The Informant is also an office bearer of Kerala Film Exhibitors Federation (hereinafter, 'KFEF'), which is one of the associations of exhibitors in Kerala. He alleged that M/s Film Distributors Association (OP-1) and M/s Kerala Film Producers Association (OP- 2) (OP-1 and OP-2 together referred to as "Opposite Parties") contravention of Sections 3 and 4 of the Act.

The information was filed pursuant to an unofficial ban imposed by the Opposite Parties as a retaliation to the Informant organizing protests against the OPs for their decision to unilaterally alter the terms of the revenue sharing agreement between exhibitors and distributors. The Informant claimed that the Opposite Parties are conspiring to terminate the Informant financially and oust him from the Malayalam film industry. The Informant has alleged that such ban amounts to a cartel and abuse of dominant position, in contravention of the provisions of Sections 3 and 4 of the Act. However , the Commission was of the opinion that no sufficient material on record to suggest that the Opposite Parties have put a ban upon the Informant which led to movies not being given to him for exhibition in his theatres. Thus there was no case of contravention of Section 3 (3) of the Act or any other provision of the Act made out against the Opposite Parties.

(Source: CCI decision dated October 3, 2017; for full text see CCI website)http://www.cci.gov.in/sites/default/files/7%20of%202017_0.pdf)

International

EU: International Skating Union's restrictive penalties on athletes breach EU competition rules:

The European Commission has decided that International Skating Union (ISU) rules imposing severe penalties on athletes participating in speed skating competitions that are not authorized by the ISU are in breach of EU antitrust law. The ISU is the sole body recognised by the International Olympic Committee (IOC) to administer the sports of figure skating and speed skating on ice. Its members are national ice skating associations. The ISU and its members organise and generate revenues from speed skating competitions, including from major international competitions such as the Winter Olympic Games, World and European championships. The Commission opened proceedings in relation to the ISU's eligibility rules on 5 October 2015 following a complaint by two Dutch professional speed skaters, Mark Tuitert and Niels Kerstholt. The Commission sent a Statement of Objections to the ISU on 27 September 2016.

The Commission's investigation found that:

- Under the ISU eligibility rules, in place since 1998, speed skaters participating in competitions that are not approved by the ISU face severe penalties up to a lifetime ban from all major international speed skating events. The ISU can impose these penalties at its own discretion, even if the independent competitions pose no risk to legitimate sports objectives, such as the protection of the integrity and proper conduct of sport, or the health and safety of athletes.
- By imposing such restrictions, the ISU eligibility rules restrict competition and enable the ISU to pursue its own commercial interests to the detriment of athletes and organisers of competing events. In particular, the Commission considers that the ISU eligibility rules restrict the commercial freedom of athletes who are prevented from participating in independent skating events. As a result of the ISU eligibility rules, athletes are not allowed to offer their services to organisers of competing skating events and may be deprived of additional sources of income during their relatively short speed skating careers.
- The ISU eligibility rules prevent independent organisers from putting together their own speed skating competitions because they are unable to attract top athletes. This has limited the development of alternative and innovative speed skating competitions, and deprived ice-skating fans from following other events.

The ISU introduced certain changes to its eligibility rules in June 2016. Despite these, the Commission found that the system of penalties set out by the eligibility rules remains disproportionately punitive and prevents the emergence of independent international speed skating competitions. Therefore, the

Commission concluded that the ISU eligibility rules are anti-competitive and breach Article 101 of the Treaty on the Functioning of the European Union (TFEU). The Commission decision requires the ISU to stop its illegal conduct within 90 days and to refrain from any measure that has the same or an equivalent object or effect. In order to comply, the ISU can abolish or modify its eligibility rules so that they are based only on legitimate objectives (explicitly excluding the ISU's own economic interests) and that they are inherent and proportionate to achieve those objectives. In particular, the ISU should not impose or threaten to impose unjustified penalties on athletes who participate in competitions that pose no risk to legitimate sports objectives. If the ISU maintains its rules for the authorization of third party events, they have to be based on objective, transparent and non-discriminatory criteria and not be intended simply to exclude competing independent event organisers. While the Commission did not consider it necessary or appropriate to impose a fine in this case, if the ISU fails to comply with the Commission's decision, it would be liable for non-compliance payments of up to 5% of its average daily worldwide turnover.

(Source: EU press Release dated December 08, 2017)

EU: Commission fines five car safety equipment suppliers € 34 million in cartel settlement

The European Commission has fined Tokai Rika, Takata, Autoliv, Toyoda Gosei and Marutaka a total of € 34 million for breaching EU antitrust rules. The companies took part in one or more of four cartels for the supply of car seatbelts, airbags and steering wheels to Japanese car manufacturers in the EEA. All five suppliers acknowledged their involvement in the cartels and agreed to settle the case. Takata was not fined for three of the cartels as it revealed their existence to the Commission. Tokai Rika was not fined for one of the cartels as it revealed its existence to the Commission. The five car component suppliers coordinated prices or markets, and exchanged sensitive information for the supply of seatbelts, airbags and steering wheels to Japanese car manufacturers Toyota, Suzuki and Honda in the European Economic Area (EEA). The coordination to form and run the cartel took place outside the EEA, notably in Japan, mainly through meetings at the suppliers' business premises but also in restaurants and hotels, as well as through e-mail exchanges. Collusion between the car safety equipment suppliers generally intensified when specific requests for quotations were launched by the car manufacturers concerned.

The cartel may have had a significant effect on European customers, since around one out of every eleven cars sold in Europe is produced by a Japanese company. Furthermore, all the Japanese car companies affected by the cartel have manufacturing plants in the EEA. The Commission's investigation revealed the existence of four separate infringements.

The following table details the participation and the duration of each company's involvement in each of the four infringements:

	Supplier (group)	Scope	Start	End
1	Tokai Rika Takata Autoliv Marutaka	Sales of seatbelts to Toyota	6/07/2004 - Tokai Rika, Takata, Marutaka 18/12/2006 - Autoliv	15/04/2009- Marutaka 11/02/2010- Tokai Rika 25/03/2010- Takata, Autoliv
2	Takata Autoliv Toyoda Gosei	Sales of airbags to Toyota	14/06/2005- Takata, Toyoda Gosei 18/07/2006 - Autoliv	15/07/2009- Toyoda Gosei 26/07/2010- Takata, Autoliv
3	Takata Tokai Rika	Sales of seatbelts to Suzuki	14/02/2008	18/03/2010
4	Takata Autoliv	Sales of seatbelts, airbags and steering wheels to Honda	28/03/2006	22/05/2010

Fines

The fines were set on the basis of the Commission's 2006 Guidelines on fines . Tokai Rika, Takata, Autoliv and Toyoda Gosei benefitted from reductions of their fines for their cooperation with the Commission investigation. The reductions reflect the timing of their cooperation and the extent to which the evidence they provided helped the Commission to prove the existence of the cartels in which they were involved.

In addition, under the Commission's 2008 Settlement Notice, the Commission applied a reduction of 10% to the fines imposed on the companies in view of their acknowledgment of the participation in the cartel and of the liability in this respect.

The breakdown of the fines imposed on each company is as follows:

	Supplier (group)	Reduction under Leniency Notice	Reduction under Settlement Notice	Fine (€)
1	Tokai Rika	100%	10%	0
	Takata	50%	10%	12 724 000
	Autoliv	30%	10%	265 000
	Marutaka	0%	10%	156 000

2	Takata Autoliv Toyoda Gosei	100% 50% 28%	10% 10% 10%	0 4 957 000 11 262 000
3	Takata Tokai Rika	100% 46%	10% 10%	0 1 818 000
4	Takata Autoliv	100% 50%	10% 10%	0 2 829 000

(Source: EU press Release dated November 22, 2017)

UK- Competition and Markets Authority issues strong warning as information sharing fine is upheld

The Competition Appeal Tribunal has ruled in favor of the CMA, upholding its fine on Balmoral Tanks Ltd for illegally exchanging price information: In December, the UK Competition and Markets Authority (CMA) found that Balmoral, a supplier of galvanised steel water tanks, along with 3 other businesses, had breached competition law by taking part in an exchange of competitively-sensitive information on prices and pricing intentions. Balmoral was fined £130,000 for taking part in this unlawful information exchange. The exchange took place at a single meeting in July 2012 at which Balmoral was invited to join a long-running price-fixing cartel. Balmoral refused to take part in the price-fixing cartel, but exchanged competitively-sensitive information with its competitors. This meeting was secretly recorded by the CMA. Balmoral was not a party to the main price-fixing cartel formed by other competitors, which was the subject of a separate infringement decision by the CMA. The case highlights an important point for companies and individuals who are invited to take part in anti-competitive collusion. Specifically:

- Exchanging competitively-sensitive confidential information with competitors (for example, about prices or pricing strategy), even at a single meeting, can be a breach of competition law with serious consequences for the businesses involved.
- Any business that is approached to join a cartel, or become involved in anti-competitive arrangements – for instance, to coordinate pricing or to share out markets between them - must immediately reject the approach, and must do so clearly and unequivocally. It is not enough to refrain from price-fixing or market-sharing. The business (and its representatives) must leave the meeting, and make clear and explicit its refusal to take part.
- The business must also decline to take part in any discussions that involve the sharing of confidential and competitively- sensitive pricing information. The CMA brought this case to send a strong signal

to companies about these critical compliance obligations, which are needed to protect customers from the higher prices which result when competing businesses collude on price or business strategy, including through the exchange of competitively-sensitive information. The CMA is aware that Balmoral did not participate in the main price-fixing cartel, and this is reflected in the relatively low fine imposed on it. But exchanging competitively-sensitive confidential information, even at just one meeting, is itself a breach of competition law.

The CMA is cracking down on cartels across all sectors. Any company that is approached to join a cartel or other anti-competitive arrangement should immediately and unequivocally reject the approach and avoid taking part in any exchange of commercially sensitive information, or risk breaking the law

(Source: Competition and Markets Authority press Release dated October 6, 2017)

France- Floor covering cartel: The French Competition Authority issued a penalty of €302 million following a settlement

On October 18, 2017, the French Competition Authority penalized the three main producers of PVC and linoleum floor covering and their professional trade union (SFEC) with up to €302 million for the organization of a cartel whose severity, duration and degree of sophistication are remarkable. The French Competition Authority recognized several anti-competitive practices between the three manufacturers relating to many aspects of the trade policy, including pricing. During secret meetings, the competitors discussed minimum price increases per floor covering category as well as dates for when such increases would take place. For 23 years, and through the use of dedicated telephone lines, these secret meetings also included the exchange of very sensitive and varied information (including exchanges on the salaries and bonuses of their employees). With the help of their professional trade union, these companies also signed a non-competition agreement according to which they were entitled to communicate the individual environmental performance of their products only through the use of collective records established by the trade union. A lot of sensitive trade information was also exchanged through the trade union.

Issues related to the settlement procedure: Given that the sanctions were imposed following the settlement procedure, the French Competition Authority is exempt from justifying these sanctions in light of the methodology defined in its Sanctions press release. The lack of transparency of the sanctions in this matter is strengthened by the presence of two leniency applications submitted after inspections and of seizures, of which the Authority gives no information (not even concerning the rank of the applicants) aside from the fact that the companies benefitted from "substantial" sanction reductions. Despite the accumulation of the transaction and leniency procedure, the sanctions seem nonetheless

high: One of them represented half the company's annual sales in France. The effective benefit of leniency applications after a seizure is therefore questionable. Furthermore, more transparency on the way in which a sanction is calculated and on the amount of the reduction actually obtained would be desirable in order to help companies wondering about effecting a compromise as well as to appreciate the profit more easily. Finally, this decision was the opportunity for the French Competition Authority to announce the withdrawal, in particular in terms of cartel cases, of compliance programs as a factor for penalty reduction when the parties choose to effect a compromise, therefore bringing it in line with the practice of the European Commission. As such, the implementation of a compliance program becomes a prerequisite for the French Competition Authority, in particular when it concerns large companies.

(Source http://www.mondaq.com/france/x/651974/Antitrust+Competition/Competition+News+November+2017

Abuse of Dominant Position

India

CCI opens investigation against Star India Pvt. Ltd. for alleged abuse of dominance / price discrimination

The Competition Commission of India (CCI) vide order dated December 29, 2017 has initiated an investigation against Star India Pvt. Ltd ("Star India/ Opposite Party") for alleged violation of Section 4 (2) (a) (ii) of the Act, following an information filed by a private company engaged in business of Cable television distribution, a Multi System Operator ("MSO") in the state of Kerala.

The Informant, Thiruvananthapuram Entertainment Network (P) Ltd., has alleged anti-competitive behaviour and abuse of dominant position by the Opposite Party in charging excessive license fee from the Informant as compared to the fee charged from the Informant's competitors /other MSOs , who are allegedly big players in the State of Kerala such as Kerala Communicators Cable Limited ("KCCL"), Asianet Cable Vision ("ACV") and DEN Networks Limited ("DEN") etc. The informant has on evidence provided that when it had entered into an agreement with the Opposite Party on July 1, 2014 for subscription of its 19 channels out of a bouquet of 39 channels offered by the Opposite Party, the license fee agreed was INR 1,11,248.12/- for around 22,000 connections (approx. INR 5.06/- per connection). In comparison, it is submitted that KCCL which has around 25 lac connections, was apparently paying approx. INR 4.40/- in terms of rate per connection during the same period. Thereafter, when on December 28, 2015, the Informant executed two subscription agreements for six months each with the Opposite Party for subscription of 20 channels, the license fee got raised to INR 1,15,063/- (approx. INR 5.23/- per connection) for the period July 1, 2015 to December 31, 2015 and then INR 1,47,510 (approx. INR

6.70/- per connection) for the period January 1, 2016 to June 30, 2016. However, in comparison, KCCL was paying approx. INR 5/- in terms of rate per connection during the same period. Further, it is submitted on expiration of the agreements dated December 28, 2015, the Opposite Party forced the Informant to execute the next agreement on December 15, 2016 at an even higher rate of INR 1,77,000/- per month (approx. INR 8 per connection) for the period July 1, 2016 to December 12, 2016 and for INR 3,12,500/- per month (approx. INR 14.20 per connection) for the period January 1, 2017 to June 30, 2017, for subscription to 20 channels out of a bouquet of 35 channels, by threatening to discontinue the major sports and regional channels, if such rate was not paid. Hence, the Informant, having no other option, was coerced to enter into the agreements at such high rates for further twelve months.

Noticeably, by the time the CCI concluded its prima facie view, the Informant requested to withdraw its information/ complaint since its disputes with the Star India got resolved as Star India agreed to re consider the tariff rates. CCI , however, vide its Order dated August 17, 2017 rejected the request since inquiry before CCI is not always driven by the informant and decided to proceed with the matter under its suomotu powers of inquiry.

Star India's Stand

In its response, filed pursuant to CCI's rejection of the request of allowing withdrawal of the complaint, Star India submitted that under the Regulations prescribed by the Telecom regulator, the Telecom Regulatory Authority of India (TRAI), it was obliged to distribute signals of its TV channels to all Distribution Platform Operators, including the MSOs, on a "must provide" and "non-discriminatory" basis on request of a receipt from them. Star India stated, with the help of evidences, that it has not discriminated against the Informant since the Informant cannot cite the examples of the other MSOs, who are not similarly placed and thus justified the different price packages offered to the Informant, who was confined to only a particular district of Kerala.

CCI's observation:

CCI, rejected the stand taken by Star India and while directing the Director General of the Competition Commission of India ("DG ") to open an investigation against opposite party, observed the following:

CCI, while directing the office of Director General of the Competition Commission of India ("DG") to open an investigation against opposite party observed the following:

(i) The relevant market in the present case is the market for provision of broadcasting services in the State of Kerala.

(ii) The Opposite Party appears to be in a position of strength in the relevant market. Further, the price discrimination between different MSOs as brought out in the information needs to be investigated under section 4(2) (a) (ii) of the Act.

(iii) If during the course of the investigation, the DG comes across any other conduct of the Opposite Party in addition to that mentioned in the information, which it finds to be in contravention of the provisions of the Act, the DG shall investigate the same as well without restricting and confining itself to the duration mentioned in the information.

(iv) The DG is also directed to investigate the role, if any, of any individuals/ officials of the Opposite Party who might have been in-charge of and responsible for the conduct of the business of the Opposite Party, at the time of alleged contravention.

(v) Further, the commission's jurisdiction is complementary with that of the TRAI. The powers of the Commission are in addition to and not in derogation of the TRAI's mandate to regulate the practices of the broadcasters in the concerned sector. The scope of powers and functions of the Commission under the Act and that of TRAI under the TRAI Act, 1997 appear to be distinct in terms of process of investigation and inquiry as also the remedies that may arise from contravention of the provisions of the respective Acts.

(Source : CCI order dated December 29, 2017. for full text see the CCI website - http://www.cci.gov.in/sites/default/files/13%20of%202017.pdf

CCI re- imposes penalty of INR 52.24 crores on BCCI for abuse of dominance

The Competition Commission of India ("Commission/CCI") vide its Order dated November 29, 2017 has re-imposed the penalty of INR 52.24 Crores on the Board of Control for Cricket in India ("BCCI") after fresh inquiry that concluded in July, 2017. In this recent order, CCI has reiterated all of its findings against BCCI as were found in its earlier order dated February 8, 2013 , which was set aside by the Competition Appellate Tribunal (COMPAT) vide its order dated February23, 2015 in appeal filed by BCCI on grounds of ,inter alia, violation of principles of natural justice. COMPAT, vide its said order had remitted the case to CCI for getting fresh investigation conducted through the Director General (DG) and inquiry post investigation by it. Thereafter, upon considering the matter, CCI, vide its order dated 5th May, 2015, directed the DG to conduct further investigation into the matter in accordance with the directions contained in the above order of COMPAT. On the said directions, the DG filed the supplementary investigation report on March 28, 2016.

The penalty of INR 52.24 Crores, on BCCI, which is nearly 4.48% of the average of the relevant turnover of revenue of BCCI from organization of professional domestic cricket leagues in India during the last three preceding financial years, is for abusing of its dominant position by restricting competition while conducting Indian Premier League (IPL) tournaments and also for grant of exclusive media rights for broadcast of the IPL matches to a particular TV channel (SONY TV) for a period of 10 years.

The original complaint filed by an individual, Delhi based, "cricket fan" Mr. Surinder Singh Barmi, in 2010, had alleged irregularities with the BCCI's grant of franchise rights, media rights and sponsorship rights in the context of the IPL matches.

Issues involved

1. Whether the BCCI is an "enterprise" within the meaning given by S 2(h) of the Act?

BCCI' arguments:

The BCCI argued that the BCCI is a not-for-profit society, established to promote the sport in the country and does not engage in any kind of commercial activity with the objective of earning profits. Therefore, it cannot be considered to be an "enterprise", and consequently cannot be held guilty of abuse of a dominant position. (Reliance was placed on the SC decision in Cricket Association of Bengal Case and the commission's decision in Arun Kumar Tyagi).

Commission's decision:

The Commission was of the view that despite there being no profit motive, BCCI should be considered an enterprise. The commission observed that the definition of enterprise was wide enough to include within its purview any entity performing an economic activity. Since the definition did not require such entity to necessarily have a profit-motive, no such condition could be read into it. The Commission pointed out various economic activities undertaken by the Board, along with the fact that the ICC itself acknowledges such economic activities, to prove that BCCI is in fact an entity performing economic activities. Lastly the Commission backed its conclusion with a decision of the European Union in the case of (MOTOE) v. Elliniko Dimosio to conclude that BCCI should be considered as an "enterprise".

2. What should be the relevant market?

DG's findings –

The DG defined the relevant market as the market for "organization of professional domestic cricket leagues/ events in India". Interestingly, in the 2013 case, the DG had defined the market differently. However, the CCI had assailed the definition of the DG and held the relevant market to be "organization of professional cricket leagues/events in India". Taking queue from the same, the DG in the present matter provided a similar definition, with a similar reasoning. The DG concluded that "professional domestic cricket leagues/ events are neither substitutable with general entertainment programmes nor with other sports nor even with other formats of cricket itself.

BCCI's arguments –

The BCCI alleged that the DG had defined the market narrowly, and only considered the supply side and substitutability of the IPL. As per the BCCI, the DG was wrong in excluding other forms of entertainment programmes or other forms of sports from the relevant market. They argued that "cricket" faced serious competition with other sports and entertainment programmes for viewers" and pointed out some other entertainment shows and sports events having a higher TRP than IPL. Additionally, it was argued that IPL had been promoted, and viewed as an entertainment programme, and therefore it was telecasted on a

general entertainment channel and not specific sports channel (the CCI failed to point out the fact that IPL is also telecasted on a specific sports channel –Sony SIX). It also contended that a particular format of cricket is only a way of conducting competition and does not denote a separate relevant market. In light of these facts, BCCI argued that the consumers view IPL and other entertainment programs and sport events (including other formats of cricket) as substitutable and hence, should form a single relevant market.

Commission's Decision-

Differentiating cricket from other sports: The Commission started the discussion with correctly noting the fact that 'each sport has its own fan-following' and followed this by quoting the Lodha committee report, to emphasize upon the strong consumer preference towards the game. Based on this, the commission concluded that the consumers in India would generally not substitute cricket with any other sport.

Differentiating professional T20 leagues from other formats of cricket: The CCI then moved on to differentiate International cricket or other domestic cricket with the professional leagues, such as the IPL. The CCI noted that in international/domestic cricket, the players represented the nation or the concerned state. However in profession leagues, even foreign players were involved and the main motive of everyone involved was that of earning profit. Further, due to the method of selecting players (by auction) and the sheer amount of commercial considerations involved, the Commission found IPL (and such professional leagues) to be starkly different from international/domestic cricket. Further, another point of differentiation that was pointed out was that watching a 3 hour IPL match is more convenient as opposed to International cricket matches which are generally much longer.

Differentiating IPL from other entertainment programmes: At last, the Commission set out to differentiate IPL from other entertainment programmes in order to refute BCCI's argument "that all the entertainment programs form a single relevant market". The CCI opined that the BCCI's conclusion was based upon a mechanical application of the substitutability test. It pointed out that in contrast to other entertainment programmes, IPL could be followed from different modes, such as the radio, internet, newspaper or even the stadium itself. The SSNIP test was also used to conclude that "it was unlikely that the consumer would substitute IPL with other forms of entertainment programmes. Lastly, the CCI also pointed to the BCCI's representation in the IPL media rights agreement to reason that even the BCCI felt that only other professional leagues could compete with the IPL.

3. Is BCCI dominant in the defined relevant market?

Based on BCCI's ICC membership, the BCCI rules, the pyramid structure of the cricket in India, and the financial prowess of the BCCI, the CCI concluded that BCCI was dominant in the relevant market. (Even the BCCI did not object to the same).

4. Has the BCCI abused its dominant position?

The CCI, while recognizing the need for regulating cricket in the country in order to maintain the "integrity of the sport", still held that the impugned restrictive representation given by the BCCI as an abuse as it "resulted in denial of market access" for the competitors of the IPL.

The CCI observed as per the BCCI rules (Rule 28B) of the BCCI Rules, no affiliated member, player or umpire could participate/ support a league unapproved by the BCCI. In such a case, no one would be able to conduct a meaningful league without the BCCI's approval. Since BCCI has given a representation that it would approve no professional league for "10 years", it would mean that the market is foreclosed and the competitors are denied access. Further, the BCCI could not provide any reasoning as to why the impugned representation could help in the healthy regulation of the game in the country. Therefore, the BCCI was held guilty of abuse of dominance.

CCI 's Finding

Apart from imposing the penalty, of INR 52.24 Crores, CCI has directed BCCI to cease and desist from any practice in future denying market access to potential competitors, including inclusion of similar clauses in any agreement. CCI has also asked BCCI to desist from using its regulatory powers in any way while considering and deciding on any matters relating to its commercial activities. CCI has further directed that BCCI will set up an effective internal control system to its own satisfaction, in good faith and after due diligence. BCCI shall not place blanket restriction on organization of professional domestic cricket league/ events by non-members. Having done the above, BCCI shall issue appropriate clarification regarding the rules applicable for organization of professional domestic cricket leagues/ events in India, either by members of BCCI or by third parties, as well as the parameters based on which applications can be made and would be considered. Besides, BCCI shall take all possible measure(s) to ensure that competition is not impeded while preserving the objective of development of cricket in the country; and BCCI shall file a report to the Commission on the compliance of the aforesaid directions within a period of 60 days from the receipt of this order.

(Source: CCI decision dated November 29th, 2017; for full text see CCI website)

CCI finds a prima facie case of abuse of dominance against HUDA

The CCI vide its order dated October 31, 2017 found a prima facie case of abuse of dominant position by Haryana Urban Development Authority "HUDA" (Opposite Party). The informant, Gurgaon Institutional Welfare Association, is a registered association of individual allottees/ purchasers of institutional plots in Gurgaon from the Opposite Party. The Opposite Party is a statutory body under Haryana Urban Development Authority Act, 1977 (hereinafter, 'HUDA Act'), responsible for planned development of urban estates in the State of Haryana and stated to be an

exclusive supplier of institutional plots situated in the sectors of urban estates developed by it. The Informant alleged that the OP is in contravention of Section 4 of the Act. Before going into the merits of the case, the Commission was of the opinion that it does have jurisdiction to try the matter as the provisions of Section 60 and 62 of the Competition Act, 2002 shall have an effect and shall be read in addition to the provisions of any other law for the time being in force. Thus, the Commission held that despite there being a governing law - HUDA Act and Regulations- in the present case, it (Commission) can examine the matter, to check if there is any anti-competitive conduct or practice as covered by the provisions of the Act. Further, the OP is an enterprise which does not perform any sovereign functions of the Government and therefore falls under Section 2(h) of the Act. The relevant product market for the purpose of determining abuse of dominance is 'market for development and sale of institutional plots'. The relevant geographical market would be the State of Haryana. Therefore, the relevant market would be the market of 'market for development and sale of institutional plots in the State of Haryana'. The OP is the only supplier of institutional plots in urban areas in the relevant market and the consumers/allottees do not have any other option to buy similar plots in urban areas of Gurgaon, except from the Opposite Party. The Opposite Party is in a dominant position in the relevant market as it has a statutory power to acquire land for developments throughout the State of Haryana. The Informant claimed that upon payment of the full consideration amount, the allottees are entitled to transfer of all right, interest and title of the plots in their favor as is the case with transfer on free-hold basis. However, when the allottees approached the Opposite Party for execution of conveyance deed, the Opposite Party imposed ex-facie illegal and void conditions, manipulating the terms and conditions of allotment which were contrary to the statutory provisions. The Opposite Party, despite having received the entire consideration amount from the allottees, illegally restricted the right of the allottees to further sell, mortgage, transfer, lease out the plots purchased and buildings constructed by them and; also, imposed additional liability on the allottees to pay undetermined consideration amount towards additional cost of the plot in future. It was also alleged that the OP created an artificial scarcity in the market by offering smaller numbers of plots at a time, thereby affecting its supply.

The Commission further, clarified that its jurisdiction will not be affected even though the allotment letters were executed prior to 20th May, 2009. It placed reliance on Kingfisher Airline Ltd. & Anr vs. CCI and Ors, wherein the Commission held that "The moment the Act comes into force, it brings into its sweep, all existing agreements. The Commission found a prima facie case of abuse of dominance within the meaning of Section 4(2) (a) (i) and the case has been sent for investigation to the Director General for further investigation.

(Source: CCI decision dated October 31, 2017; for full text see CCI website http://www.cci.gov.in/sites/default/files/94%20of%202016.pdf)

INTERNATIONAL

Germany: Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive

Germany's Federal Cartel Office, the Bundeskartellamt has informed the Facebook of its preliminary legal assessment in the abuse of dominance proceeding which the authority is conducting against Facebook. Based on the current stage of the proceedings, the authority assumes that Facebook is dominant on the German market for social networks. The authority in its preliminary view is of the opinion that Facebook is abusing this dominant position by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user's Facebook account. These third-party sites include, firstly, the services owned by Facebook such as WhatsApp or Instagram, and secondly, websites and apps of other operators with embedded Facebook Application Programming Interfaces (APIs).

The most important concerns are about the collection of data outside Facebook's social network and the merging of this data into a user's Facebook account. Via APIs, data are transmitted to Facebook and are collected and processed by Facebook even when a Facebook user visits other websites. This even happens when, for example, a user does not press a "like button" but has called up a site into which such a button is embedded. Users are unaware of this. The extent and form of data collection violate mandatory European data protection principles. According to the preliminary assessment, when operating this business model Facebook, as a dominant company, must consider that its users cannot switch to other social networks. Participation in Facebook's network is conditional on registration and unrestricted approval of its terms of service. Users are given the choice of either accepting the "whole package" or doing without the service. According to the Bundeskartellamt's preliminary assessment, Facebook's terms of service are at least in this aspect inappropriate and violate data protection provisions to the disadvantage of its users. In view of the company's dominant position, it can also not be assumed that users effectively consent to this form of data collection and processing.

In this proceeding the Bundeskartellamt focuses on the collection and use of user data from third party sources. The proceeding does not concern the collection and use of data on the Facebook network itself. The Bundeskartellamt leaves explicitly open whether this also constitutes a violation of data protection provisions and the abuse of a dominant position. Users cannot expect data which is generated when they use services other than Facebook to be added to their Facebook account to this extent. Data are already transmitted from websites and apps to Facebook when a user calls them up or installs them, provided they have an embedded API. There are millions of such APIs embedded in German websites and apps. In the authority's assessment, consumers must be given more control over these processes and Facebook needs to provide them with suitable options to effectively limit this collection of data.

The Bundeskartellamt is closely cooperating with data protection authorities as regards the data protection aspects of the case.

With the preliminary assessment notice, the Bundeskartellamt offers the company a chance to comment on the allegations and provide justification for its conduct or offer possible solutions. The proceeding against Facebook is an administrative proceeding. Possible outcomes are the termination of the case, the offer of commitments by the company or a prohibition by the competition authority. A final decision on the matter is not expected before early summer 2018.

(Source : Bundeskartellamt press release dated December 19, 2017/

http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/19_12_2017_Facebook.pdf?__blob=publicationFile&v=3)

EU : Commission fines Lithuanian Railways €28 million for hindering competition on rail freight market:

The European Commission has fined Lithuanian Railways (Lietuvosgeležinkeliai) an amount of €27 873 000 for hindering competition on the rail freight market, in breach of EU antitrust rules, by removing a rail track connecting Lithuania and Latvia. Lithuanian Railways is the incumbent state-owned rail company in Lithuania. The company is vertically integrated, meaning that it is responsible for both railway infrastructure and rail transport. In 2008, Orlen, a major commercial customer of Lithuanian Railways, considered redirecting its freight from Lithuania to Latvia by using the services of another rail operator. In October 2008, Lithuanian Railways dismantled a 19km long section of track connecting Lithuania and Latvia, close to Orlen's refinery. The removal of the track meant that Orlen would need to use a much longer route to reach Latvia. Since then the dismantled track has not been rebuilt. The Commission's investigation found that these actions hindered competition on the rail freight market by preventing a major customer of Lithuanian Railways from using the services of another rail operator. Lithuanian Railways failed to show any objective justification for the removal of the track. Such behaviour is in breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU) which prohibits the abuse of a dominant market position. Regarding the level of the fine, the Commission took into account, in particular, the value of sales relating to the infringement, the gravity of the infringement and its duration. In addition to imposing a fine, the Commission's Decision requires Lithuanian Railways to bring the infringement to an end and refrain from any measure that has the same or an equivalent object or effect.

(Source: European Commission Press Release dated 2.10.2017 http://europa.eu/rapid/press-release_IP-17-3622_en.htm)

COMBINATION

INDIA

CCI approves Airtel-Tata Teleservices Deal

CCI vide its order dated November 16, 2017 has approved the acquisition of consumer mobile business or retail mobile telephony business of Tata companies by Airtel. The deal comes at a time when the telecom sector, bruised by tariff war and mounting losses, is in a consolidation mode as major players seek to cement their position. The proposed combination envisages acquisition of 100 percent of the consumer mobile business currently run by Tata Teleservices Limited ("TTSL") and Tata Teleservices (Maharashtra) Limited ("TTML") ("Tata CMB") by Airtel ("Proposed Combination"). The Notice was filed with the Commission pursuant to execution of a binding term sheet, by and between Airtel, TTSL, TTML and Tata Sons Limited on October 12, 2017 ("Acquisition Agreement"). While approving the deal, the Commission observed that the Proposed Combination is not likely to result in substantial change in competition dynamics in retail mobile telephony services in any of the overlapping telecom circles and accordingly does not raise unilateral or coordinated effects concerns. Considering the facts on record and assessment of the Proposed Combination on the basis of factors stated in Section 20(4) of the Competition Act 2002, the CCI held that the Proposed Combination is not likely to have an appreciable adverse effect on competition in India. The deal will also require the approval of Securities and Exchange Board of India (SEBI), stock exchanges, National Company Law Tribunal (NCLT), and Telecom Department among others For Airtel, the deal would be the seventh acquisition in five years. With the transaction, the country's largest telecom operator will take over 4 crore customers of Tata Teleservices Ltd (TTSL) and Tata Teleservices Maharashtra Ltd (TTML) in 19 telecom circles or zones on "a debt-free cash-free basis".As part of the agreement, TTSL and TTML employees in the 19 circles, managing the consumer mobile business, along with 178.5 MHz of spectrum across 800, 1800, 2100 Mhz (3G, 4G) bands would be transferred to Airtel. This order is, however, issued without prejudice to the proceedings under Section 43A of the Act.

(Source: CCI order dated 16.11.2017/http://cci.gov.in/sites/default/files/Notice_order_document/C-2017-10-531_NC.pdf)

INTERNATIONAL

EU: Commission approves acquisition by Lufthansa of Air Berlin subsidiary LGW, subject to conditions

The European Commission has approved under the EU Merger Regulation Lufthansa's proposed acquisition of certain Air Berlin assets, through the entity Luftfahrtgesellschaft Walter GmbH ('LGW').

The decision is conditional on Lufthansa's compliance with commitments to avoid competition distortions.

The Commission decision only concerns Lufthansa's proposed acquisition of LGW. This is because Lufthansa decided to drop the rest of the initially proposed transaction, i.e. its acquisition of NIKI Luftfahrt GmbH ('NIKI'), during the course of the Commission's merger review process. Following several years of financial difficulties, Air Berlin, Germany's second largest airline, filed for insolvency in August 2017. Air Berlin's insolvency administrator then launched a sale of Air Berlin assets through a bidding process, with a deadline to submit binding bids by 15 September 2017.Air Berlin's insolvency administrator received a number of bids for various parts of Air Berlin. On 25 September 2017, the insolvency administrator announced their decision to continue negotiations exclusively with Lufthansa, Germany's largest airline, for most of Air Berlin's assets, including LGW and NIKI. They thereby rejected the other bids (except for easy Jet's, where negotiations continued separately for Air Berlin's Berlin Tegel operations). On October 12, 2017 Air Berlin entered into a sale and purchase agreement with Lufthansa to acquire:

- leisure air carrier NIKI with its aircraft, crew and slots (i.e. the permission to land and take-off at a specific date and time at an airport);
- regional air carrier LGW, which (prior to Air Berlin's insolvency proceedings) was primarily providing feeder traffic for Air Berlin's short- and long-haul operations at Berlin and Düsseldorf airports; and
- a collection of additional Air Berlin aircraft, crew and slots at several EU airports, in particular in Austria, Germany and Switzerland. These assets were transferred to LGW.

This sale and purchase agreement also gave Lufthansa the option to drop NIKI from the scope of the acquisition. Lufthansa chose to exercise that option on 13 December 2017, leading to NIKI filing for insolvency on the same day. The insolvency administrator has since launched a sales process for NIKI, which is ongoing. The Commission's investigation found that the increase in Lufthansa's slot portfolio at Düsseldorf airport, through the acquisition of LGW, was likely to adversely affect passengers in terms of fares and/or choice of services. The Commission, therefore, concluded that the acquisition of LGW by Lufthansa would raise competition concerns at Düsseldorf airport. However, no concerns were identified at the other airports where Lufthansa acquired slots because either these airports were not as highly congested, or the size of Lufthansa's slot portfolio after the acquisition did not create competition issues, or the increment brought about by the transaction was low.

To address the competition concerns identified by the Commission with regard to the acquisition of LGW, Lufthansa offered a set of commitments. The Commission consulted with market participants on the commitments to allow them to submit their views. Taking into account these market views, Lufthansa then submitted an improved set of commitments. In this final set of commitments, Lufthansa committed to amend its sale and purchase agreement with Air Berlin to reduce its acquisition of slots at Düsseldorf airport. More precisely, Lufthansa would limit the transfer of slots at Düsseldorf airport for the summer season to the number of slots used by two aircraft.

After the commitments, Lufthansa's slot holding at Düsseldorf airport would only increase by 1%, compared to a scenario without the transaction. 50% of slots at Düsseldorf airport will be held by Lufthansa's competitors. This means that the effects of Lufthansa's acquisition of LGW would be limited.

The final commitments address the competition concerns identified by the Commission regarding Lufthansa's acquisition of LGW. The Commission, therefore, concluded that the proposed transaction, as modified by the final commitments, would no longer raise competition concerns. This decision is conditional upon full compliance with the commitments.

(Source: European Commission Press Release dated December 21, 2017)

EU: Commission approves proposed acquisition of parts of Air Berlin by easyJet:

The European Commission has approved unconditionally under the EU Merger Regulation the proposed acquisition of certain assets of Air Berlin by easyJet. The Commission concluded that the transaction would not adversely affect competition in the EU Single Market. Following several years of financial difficulties, Air Berlin, Germany's second largest airline, filed for insolvency in August 2017, resulting in the sale of its assets. In the following weeks, Air Berlin grounded its operations, and left the market. EasyJet proposed to acquire certain assets and rights held by Air Berlin as part of its passenger transport operations at Berlin Tegel airport, including slots at Berlin Tegel airport and at some destination airports. Slots are the permission to land and take-off at a specific date and time at an airport. The Commission examined the impact of the proposed transaction, looking in particular at whether the slot portfolio to be acquired by easyJet in Berlin Tegel, and at destination airports, would allow easyJet to shut out competitors from the market for passenger air travel to and from Berlin. Indeed, control over slot portfolios at congested airports can result in higher barriers to entry for airlines wanting to operate to and from those airports, which in turn could result in higher fares for passengers.

The Commission's investigation found that:

- the increase in the slot portfolio of easyJet at the congested airports, and in Berlin in particular, was unlikely to have a negative effect on passengers, and

- easyJet will continue to face strong competition from large carriers like Lufthansa and Ryanair on routes from and to Berlin.

EasyJet is an airline based in the United Kingdom that operates in the European short-haul aviation market and is focused primarily in Western and Northern Europe. It operates domestic and international scheduled services over 800 routes in more than 30 countries to and from 132 airports. It also operates three licensed airlines within the EU and Switzerland.

The Air Berlin assets that easyJet proposes to acquire consist of assets and rights held by Air Berlin for part of its airline operations at Berlin Tegel airport, including slots at Berlin Tegel airport and at some destination airports, overnight parking stands associated with the acquired slots, Air Berlin's customer bookings in respect of the relevant operations, historic data relating to those assets, and certain aircraft furnishings and related equipment. The Commission, therefore, concluded that the proposed acquisition would raise no competition concerns in any of the relevant markets.

(Source: European Commission Press Release dated December 12.2017)

EU: Commission approves acquisition of Bard by BD, subject to conditions

The European Commission has approved, under the EU Merger Regulation, the acquisition of Bard by BD. Both companies supply medical devices. The decision is conditional on the divestment of BD's core needle biopsy devices business, and tissue marker product that is currently under development. C. R. Bard, Inc. ("Bard") and Becton, Dickinson and Company ("BD") are both US companies active globally in the supply of medical devices, including devices used in biopsies.

The Commission's competition concerns are:

1. The companies' activities are largely complementary but overlap in the markets for core needle biopsy devices and tissue markers, which are both used for the diagnosis of medical conditions such as breast cancer. The Commission examined the competitive effects of the proposed acquisition on these two markets:

2. Core needle biopsy devices are used in procedures involving the removal of tissue samples for further analysis. Bard and BD are close competitors facing limited competitive pressure in this market. The Commission had concerns that the transaction, as initially notified, would have removed one of the few credible competitors of Bard and reduced choice and innovation in the area of core needle biopsy devices.

In order to address these concerns, BD committed to divest its:

1. worldwide core needle biopsy business, including manufacturing equipment, finished goods inventory, and intangible assets required to produce the core needle biopsy products;
2. development projects related to core needle biopsy products and tissue markers.

The Commission found that the proposed transaction, as modified by the commitments, would not raise competition concerns. This decision is conditional upon full compliance with the commitments.

(Source: European Commission Press Release dated October 18, 2017 http://europa.eu/rapid/press-release_IP-17-4024_en.html

EU: Commission approves proposed acquisition of Abertis by Atlantia

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of Abertis by Atlantia, both leading companies in toll road and infrastructure management. The Commission concluded that the merged entity would continue to face effective competition in the relevant markets. The Commission examined the impact of the proposed transaction on the markets where the activities of Atlantia and Abertis overlap, mainly:

- The management of toll motorway concessions;
- The provision of electronic toll services, in which Atlantia's Telepass system is a strong player; and;
- The provision of equipment and services for intelligent transport systems.

The Commission found that the proposed transaction would raise no competition concerns on the aforesaid markets. This is due to the presence of other significant competitors, the limited geographic overlaps between Atlantia's and Abertis' motorway networks, and the fact that the market for toll motorway concessions is a highly regulated bidding market. Additionally, the investigation looked at the effect of the transaction on a number of related markets, in particular food services on motorway service areas given that Atlantia's largest shareholder Edizione is also the majority shareholder of food services provider Autogrill. In this regard, the Commission found that the merged entity would not be able to weaken competition on the market for food services, notably because strong competitors to Autogrill will be able to continue bidding for food services concessions. Therefore, the Commission concluded that the proposed acquisition would not endanger competition in any of the markets concerned.

(Source: European Commission Press Release dated 13.10.2017http://europa.eu/rapid/press-release_IP-17-3941_en.htm)

MISCELLANEOUS

India:

Central Govt. further dilutes competitive neutrality: exempts Oil and Gas PSU's from Merger Control by CCI

In continuation of its slew of exemptions, the Government of India, Ministry of Corporate Affairs (MCA) , vide its recent Gazette notification dated November 22, 2017 has exempted all Central Public Sector Enterprises (CPSEs) in the Oil & Gas sectors (created under the Petroleum Act, 1934) from the pre- merger scrutiny by the Competition Commission of India (CCI) under sections 5 & 6 of the Competition Act,2002. The benefit of this exemption has also been extended to all wholly or partly owned subsidiaries of such enterprises .This exemption will be valid for a period of five years from the date of publication of the notification i.e. till November 22, 2022.This notification has been issued in sync with the current government's policy of consolidation and stake purchases among state-owned oil and gas companies, particularly , in the context of the contemplated merger of two public sector energy majors, Hindustan Petroleum Corporation (HPCL) and Oil and Natural Gas Corporation Limited (ONGC). MCA has previously exempted (i) Banking Company in respect of which Central Government has issued notification under Section 45 of the Banking Regulation Act, 1945 (Sick Banking Company); (ii) Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976; and (iii) all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980.

(Source: Gazette notification dated November 22, 2017)

INTERNATIONAL

Hotel Comparison Websites Under Investigation

On October 27, 2017,the UK's Competition and Markets Authority (CMA) announced that it had launched investigations into several hotel booking websites on the grounds that they were potentially misleading consumers. Specifically, the CMA had concerns regarding:

- the manipulation of search results once a consumer had entered their hotel search criteria, particularly hotels who paid more commission to the website being ranked higher;

- creating false impressions as to room availability to rush consumer decision making;
- advertising misleading discounts that may not be based on like for like criteria; and
- hidden taxes and booking fees not disclosed with the initial advertised price.

The investigation follows a yearlong market study by the CMA into online comparison tools. That study educated the CMA in industry practices and led to ground rules in presenting information to consumers.

The current investigations are being brought under the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Rights Act 2015. Both the statutes create offences for misleading consumers and stipulate transparency and fairness in contractual terms. The CMA has for four years or more had an intense interest in the hotel booking industry and comparison websites in general. Previous investigations and enforcement actions focused on price parity clauses where the hotels were not able to offer lower prices than those found on the comparison sites, which had led to a lack of competition in the market and higher prices for consumers. Although price parity clauses have been investigated and enforcement action taken in hotel booking and car insurance, the CMA now seems to feel that there is more to do and consumers are still getting a raw deal. The move by the CMA has largely been welcomed by the hotel industry which is critical of the market power of the comparison websites. Hotels often lose 15% of the booking price through the commission fee of the comparison site, and some pay more for more prominent online placement, the very practice mentioned above that the CMA wish to eradicate. The CMA has called for input from both accommodation providers and consumers.

(Source: Competition and Markets Authority Press Release dated October 27, 2017/ https://www.gov.uk/government/news/cma-launches-consumer-law-investigation-into-hotel-booking-sites

Disclaimer:

While every care has been taken in the preparation of this Bulletin to ensure its accuracy at the time of publication, Vaish Associates, Advocates assumes no responsibility for any errors which despite all precautions, may be found therein. Neither this bulletin nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/substitute professional advice that may be required before acting on any matter. All logos and trade marks appearing in the newsletter are property of their respective owners.

We may be contacted at: **www.vaishlaw.com**

NEW DELHI
1st, 9th & 11th Floor, Mohan Dev Bldg.
13 Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-23320484
delhi@vaishlaw.com

MUMBAI
106, Peninsula Centre
Dr. S. S. Rao Road, Parel
Mumbai - 400012, India
Phone: +91-22-4213 4101
Fax: +91-22-4213 4102
mumbai@vaishlaw.com

BENGALURU
565/B, 7th Main HAL
2nd Stage, Indiranagar,
Bengaluru - 560038, India
Phone: +91-80-40903588 /89
Fax: +91-80-40903584
bangalore@vaishlaw.com

Editor: M M Sharma
Editorial Team: Vinay Vaish, Deepika Rajpal, Anand Sree

© Vaish Associates, 2018, India. All rights reserved with Vaish Associates, 1st, 9th & 11th Floor, 13, Tolstoy Marg, New Delhi-110001, India.