Competition News Bulletin

VAISH ASSOCIATES ADVOCATES
Delhi • Mumbai • Bengaluru
Celebrating over 40 years of professional excellence

March, 2017

Inside...

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

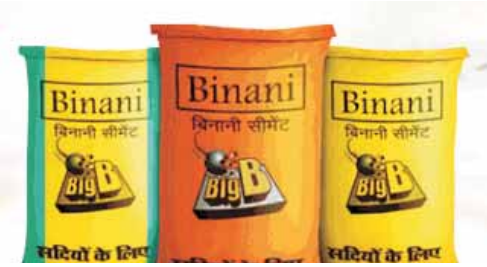
II. ABUSE OF DOMINANT POSITION/MARKET POWER

III. COMBINATIONS

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Appellate Tribunal (COMPAT) rejects the application of Binani Cement for complete stay of penalty in Cement Cartel appeals



COMPAT by its order dated January 9, 2017 has rejected the application of Binani Cement for complete stay of penalty while its appeal against the penalty imposed by Competition Commission of India (CCI) in cement cartel case are being heard in COMPAT. Through its order dated August 31, 2016, the CCI had imposed a penalty of INR 167.32 Crores on Binani Cement for cartelization in manufacture and sale of cement in violation of Section 3(3) of the Competition Act, 2002 (the Act).

While admitting the appeal, the COMPAT vide its earlier interim order dated 28 November 2016 stayed the operation of the CCI order subject to Binani Cement depositing 10% of the penalty in the Registry of the Tribunal. Though the latest application, Binani Cement sought a review of the said interim order seeking waiver of the 10% of the penalty amount primarily on the ground that Binani Cement is facing severe financial hardship through the action of Rajasthan VAT Authorities, penalties imposed by the Commercial Tax Department of Rajasthan, and collection of Entry Tax by the State and additional liability imposed by Rajasthan Electricity Regulatory Commission. Binani Cement stated its inability to get any loans from the bank as more than 50% of its earlier loans had already been sold by the banks to an Asset Reconstruction Company. Binani Cements pleaded that such imposition of penalty would adversely affect the business of Binani Cement's plant and may directly affect the employment of more than 1000 permanent workers and also lead to loss of employment in the dependent sectors.

However, the COMPAT rejected the application primarily on the ground that no circumstance existed for review of the aforesaid decision dated 28 November 2016. In the opinion of COMPAT, *"The Applicant has neither presented any fresh compelling or significant circumstances to justify review of our Order nor pointed out any error manifest on the face of the record, resulting in miscarriage of justice. The adverse financial consequences were cited in paragraphs 5, 6 and 7 of the earlier stay application and have been extracted in paragraph 2 of this Order. These and the claim of the Applicant of existence of prima facie case in its favour, were considered while passing the Order dated 28.11.2016. Re-appreciation of the same evidence cannot be sought through review and reiterations of same pleas cannot be the grounds to justify exercise of power of review in terms of Section 53O(2)(f) of the Act."*

(Source: COMPAT Order dated January 9, 2017; For details see COMPAT website: www.compat.nic.in)

Competition Commission of India (CCI) decides its first application for leniency in Cartels

CCI by its order dated January 18, 2017 decided its first leniency application in favour of the applicant by reducing the fine imposed by 75%.

The application was filed on 10 March 2015 by one of the cartel members in a bid-rigging case in relation to allegation of bid-rigging in supply of brush-less DC fans and other electrical items to the Railways. During the investigation, Shri Sandeep Goyal, partner of one of the opposite parties (M/s Pyramid Electronics) in the investigation, confessed to bid-rigging and collusive bidding with the other opposite parties. Through his statements before the Director General(DG), Shri Goyal admitted that he had consulted some of the other opposite parties before quoting the bid in all the railway tenders and that approximately the same rates were also quoted by the others in those tenders. Based on the revelations of Shri Goyal in the DG Report, it was requested that full immunity should be granted by the CCI to the said opposite party as well as Sri Goyal against any fine.

While deciding the leniency application, the CCI considered that although the leniency applicant was the first and only party to accept the existence of a cartel/bid rigging in the tenders for supply of BLDC Fans and that the evidence submitted by Pyramid Electronics played a significant role in revealing the modus operandi of the cartel, yet the CCI denied complete immunity or 100% waiver of fine to the applicant because Pyramid Electronics did not offer its co-operation/admission at the earliest possible stage, rather Pyramid Electronics/Shri Goyal made a disclosure in this case only after the CCI had initiated the investigation and was in possession of critical evidence in the form of an important E-Mail. Therefore, CCI granted a 75% reduction in the penalty to the applicants than would otherwise have been imposed on it had it not cooperated with the CCI.

(Source: CCI decision dated January 18, 2017; For full text see CCI website)

LENIENCY: WHY, WHEN AND HOW TO FILE

The Act provides for a maximum penalty of up to three time the profit or up to 10% of the turnover on each of the cartel members for the entire duration of the cartel, whichever is higher.

Given the stringent fines, it makes sense for cartel members to seek immunity and reduction in fines by acting as a "whistleblower" before CCI or turn as an "Approver" before or during the investigation by co-operating with the DG/ CCI by submitting evidence to assist prosecution of other cartel members.

It is to be noted that the seeking immunity or reduction from fines is not a matter of right, but instead based on the discretion of the CCI, subject to satisfaction of the criteria mentioned in Section 46 of the Act as well as the Competition Commission of India (Lesser Penalty) Regulations, 2009.

The application seeking reduction in fines should be filed at the first available opportunity. A leniency application cannot be entertained by the CCI if the DG Report has already been submitted to the CCI for consideration. CCI follows a "marker system" whereby the first applicant who approaches the CCI gets Marker -1 and becomes eligible to reduction of fine up to 100%, the second applicant gets Marker-2 and becomes eligible to reduction of fine up to 50% and the third and last applicant gets Marker-3 and becomes eligible to reduction of fine up to 30%. Further, CCI, is required to maintain confidentiality of the identity of the whistle-blower. As the latest order of the CCI demonstrates, CCI is extending the leniency program even to the officials/person-in-charge of the enterprises under investigation.

CCI finds Karnataka Chemist and Druggists Association (KCDA) in violation of Section 3(3) of the Act

CCI by its order dated March 2, 2017 has found that KCDA violated Section 3(3) of the Act.

Being prima-facie satisfied by the information filed, the CCI ordered investigation into the matter. It was revealed during the investigation that the Pharma manufacturers such as M/s Elder Pharma as well as M/s Eli Lilly and Company were denying supplies to chemists for want of No Objection Certificate (NOC) from KCDA. The investigation further revealed that there has been an understanding between All India Organisation for Chemists and Druggists(AIOCD), Indian Drug Manufacturers' Association (IDMA) and Organisation of Pharmaceutical Producers of India (OPPI), which shows that: (a) the appointment of stockists by pharmaceutical companies is controlled by Associations under the overall control of AIOCD; (b) trade margins of stockists and retailers have been fixed; and (c) a system of product information service has been introduced for which a charge is collected by the Associations from the pharmaceutical companies who want to introduce new medicines in any territory The DG found that KCDA is also an affiliated body of AIOCD like other State Associations and it also follows the restrictive and anti-competitive norms and guidelines formulated by AIOCD.

The CCI noted from a copy of the web page of KCDA that it has adopted a policy for appointment of stockists whereby new pharmaceutical companies are normally not allowed to appoint two stockists in one revenue district. This appointment could also be done only after obtaining cooperation/consent letter from KCDA. CCI thus concluded that KCDA had mandated its NOC as a necessary pre-requisite for appointment of stockist by any pharma company in the territory of the State of Karnataka. In various

orders, the CCI has held that such practice is violative of Section 3(1) read with 3(3)(b) of the Act. Similarly, the CCI held that determination of trade margins for wholesalers and retailers by KCDA is in contravention of the provisions of Section 3(1)read with Section 3(3)(a) of the Act.

As regards the penalty, the CCI noted that penalty has already been imposed on KCDA by the CCI for similar conduct. Hence, the CCI restrained itself from imposing the penalty in this case.

(Source: CCI decision dated March 2, 2017; For full text see CCI website)

CCI imposes penalty of INR 205 Crores on 7 cement manufacturers for bid-rigging in supply of cement to Director General (Supplies and Disposal), Haryana

CCI by its order dated January 19, 2017 has imposed a penalty for bid-riggingon 7 cement manufacturers,

viz. Shree Cement Limited, Ultratech Cement Limited, Jaiprakash Associates Limited, J.K. Cement Limited, Ambuja Cements Limited, ACC Limited, and J.K. Lakshmi Cement Limited (collectively referred to as "Opposite Parties"/"OPs").

In the reference made by the DGS&D, it was alleged that in the tender floated in 2012 for supply of 4 Lakh Metric Ton cement at 30 different destinations to the Government Departments & Boards/Corporations of State of Haryana, the rates quoted by the bidders were 35-42% higher than existing rate contracts. The last rate contract was negotiated/finalized which was not justified in light of the Price Index for Cement. The CCI considered a prima-facie case of bid-rigging, and directed a detailed investigation by the DG.

The DG concluded that the OPs had colluded with each other in bidding for the said tender and the conduct of OPs was in violation of Section 3(3)(d) of the Act.

An analysis of the data collected by the DG showed that the average bid prices of cement quoted by the OPs between 2009 and 2012were significantly higher than the corresponding increase in wholesale price index for grey cement thus indicating price parallelism and collusive bidding. The OPs did not offer any satisfactory justification for such increase in prices.

The CCI also noted the contention of OPs that they first arrived at the final price to be quoted and then work backwards to arrive at the basic price. The CCI considered this "paradoxical" and stated that it "defies logic that without determination of ex-factory/ basic price based on the cost of production and then adding various components like freight, VAT etc.., the companies would arrive at the final price".

The CCI also noted that the for the year 2010 and 2011, the cumulative quantity quoted by the OPs for each of these years was significantly higher than the total tender quantity of 4200000 MT offered in 2012 tender, which was very near to the tendered quantity of 400000 MT. The OPs did not offer any satisfactory

justification for quotation of quantities. The CCI noted that in the present tender of 2012, all OPs have acquired L1 status in some or the other destination and none of the OPs have failed to obtain a bid. Such conduct is unprecedented. While OPs had bid for lower prices in certain destinations to emerge L1, they have quoted much higher prices in adjoining destinations. The CCI also noted through the call data records that various officials of the OPs had been making a number of calls and exchanging SMSs with each other in the month preceding the tender. The frequency and duration of calls had increased as the date of tender i.e. 16.08.2012 was approaching. Thus, the CCI concluded that the conduct of OPs is in contravention of Section 3(1) read with Section 3(3)(d) of the Act.

The CCI passed a cease and desist order against the OPs and imposed penalty at the rate of 0.3% of the average turnover of the preceding three years.

(Source: CCI decision dated January 19, 2017; For full text see CCI website)

COMPAT rejects appeal of AKMN against initiation of proceedings under Section 43

COMPAT by its order dated February 13, 2017 has rejected the appeal of AKMN Cylinder against initiation of proceedings under Section 43 of the Act by CCI. The CCI by its order dated October 13, 2016 and the consequent show cause notice dated December 1, 2016 issued by the CCI.

According to the DG, Shri N. Ravindran (Managing Director, AKMN Cylinders), had "deliberately and willfully" not complied with the summons issued over two years ago by the DG office. The CCI, after considering the request from DG, decided to issue show cause notice against Shri N. Ravidran. An appeal was filed against the said show cause notice.

The COMPAT considered that the direction to issue show cause notice is an internal procedure. The show cause notice by itself cannot be said to be a 'direction' or 'order' indicating any finality of a decision in respect to the alleged violation. Therefore, it cannot be said that issuance of a show cause notice or an internal order of the CCI to the Secretary for issuing a show cause notice could be categorized as a direction or order under Section 43 of the Act. As such, no right exists to appeal the show cause notice. The appeal has accordingly been dismissed.

(Source: COMPAT Order dated February 13, 2017; For details see COMPAT website: www.compat.nic.in)

International

EU: EC fines six car air conditioning and engine cooling suppliers € 155 million in cartel settlement

The European Commission (EC) has fined Behr, Calsonic, Denso, Panasonic, Sanden and Valeo a total of € 155 million for taking part in one or more of four cartels concerning supplies of air conditioning and engine cooling components to car manufacturers in the European Economic Area (EEA). All six suppliers acknowledged their involvement in the cartels and agreed to settle the case. Denso was not fined for three

of the cartels as it revealed their existence to the EC. Panasonic was not fined for one of the cartels as it revealed its existence to the EC. The six car component suppliers coordinated prices or markets, and exchanged sensitive information, for the supply of climate control components and engine cooling components to certain car manufacturers in the EEA. These suppliers are Behr (Germany), Calsonic (Japan), Denso (Japan), Panasonic (Japan), Sanden (Japan) and Valeo (France). The coordination took place at meetings, notably through trilateral meetings in Europe in one of the cartels, and through other collusive contacts in Europe and Japan through bilateral meetings, by email or phone. The EC's investigation revealed the existence of four separate infringements.

Denso received full immunity for revealing three of the cartels (thereby avoiding an aggregate fine of ca. € 287 million).Panasonic received full immunity for revealing one of the cartels (thereby avoiding an aggregate fine of ca. € 200 000).Behr, Calsonic, Denso, Sanden and Valeo benefited from reductions of their fines for their cooperation with the EC investigation. The reductions reflect the timing of their cooperation and the extent to which the evidence they provided helped the EC to prove the existence of the cartels in which they were involved. In addition, under the EC's 2008 Settlement Notice, the EC 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.

(Source: EU Press Release dated 8, March 2017)

The General Court dismisses the actions of Philips and Infineon in the smart card chip market cartel

On 15 December 2016, the General Court ("GC") handed down its judgment in appeals relating to a cartel in smart card chips. The four members of the cartel had been fined a total of around EUR138 million in 2014 by the EC. The cartel functioned through a network of bilateral contacts and exchanges of commercially sensitive information relating in particular to prices. Two of the parties appealed the EC's decision, arguing that these activities did not amount to a cartel.

In an important judgment confirming the very wide scope of EU competition law when it comes to exchange of confidential business information, GC agreed with the EC and therefore rejected the appeals. GC upheld the fines imposed on Infineon and Philips by the EC and observed that the EC was correct to find that Philips and Infineon had participated in anticompetitive practices. In Infineon's case, even if it is not liable for the infringement as a whole, it must be held liable for the infringement to the extent that it

engaged in unlawful contacts with Samsung and Renesas. The GC confirmed past case law which has held that certain types of coordination between companies give rise to a presumption of an infringement of competition law. This was the case in the smart card chips cartel. The information exchange on prices was aimed, in essence, at slowing down the price decreases on the smart card chip market. This gave rise to a cartel and there was no need for the EC to analyze the effects (if any) of the practices in question on the market

(Source: http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160136en.pdf)

UK fines Model Agencies and Trade Association for information exchange

On 16 December 2016, the Competition and Markets Authority (CMA) imposed fines in the model agencies sector. The CMA found that five agencies — FM Models, Models 1, Premier, Storm and Viva — and their trade association, the Association of Model Agents (AMA), colluded instead of competing on prices for modelling services. Total fines of GBP1.5 million were imposed (the relatively low level reflecting the small size of the companies involved). The case a shows that small companies are not immune from competition law enforcement and that the activities of trade associations must be monitored with care. The parties regularly and systematically exchanged information and discussed prices in the context of negotiations with particular customers. In some cases (but not all), the agencies agreed to fix minimum prices or agreed on a common approach to pricing. In addition, the AMA and the agencies sought to influence other AMA members by regularly issuing email circulars, known as "AMA Alerts," urging AMA members to resist the prices offered by customers on the grounds they were too low. The conduct occurred in the context of negotiations with a range of customers, including well-known high-street chains, online fashion retailers and consumer goods brands. However, it's not clear what prompted the CMA to start this investigation. There was no whistleblower, so it seems likely that there was a complaint or the CMA decided to investigate of its own accord based, for example, on market monitoring.

(Source: https://www.gov.uk/government/news/model-agencies-fined-15-million-for-price-collusion)

EU: Commission fines three companies €68 million for car battery recycling cartel

The EC has fined Campine, Eco-Bat Technologies and Recylex a total of €68 million for fixing prices for purchasing scrap automotive batteries, in breach of EU antitrust rules. A fourth company, Johnson Controls, was not fined because it revealed the existence of the cartel to the EC.

From 2009 to 2012, four recycling companies took part in a cartel to fix the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany, and the Netherlands. The companies are Campine (Belgium), Eco-

Bat Technologies (UK), Johnson Controls (US) and Recylex (France). Recycling companies purchase used automotive batteries (from cars, vans or trucks) from scrap dealers or scrap collectors. The used batteries are obtained from collection points such as garages, maintenance and repair workshops, battery distributors, scrap yards and other waste disposal sites. Recycling companies carry out the treatment and recovery of scrap batteries and then sell recycled lead, mostly to battery manufacturers, who use it to make new car batteries. Unlike in most cartels where companies conspire to increase their sales prices, the four recycling companies colluded to reduce the purchase price paid to scrap dealers and collectors for used car batteries. By coordinating to lower the prices they paid for scrap batteries, the four companies disrupted the normal functioning of the market and prevented competition on price. This behavior was intended to lower the value of used batteries sold for scrap, to the detriment of used battery sellers. The companies affected by the cartel were mainly small and medium-sized battery collectors and scrap dealers. The majority of the anti-competitive contacts between the four recycling companies took place on a bilateral basis, mainly through telephone calls, emails, or text messages. Some contacts also took place in person, either in bilateral meetings or, less frequently, in multilateral meetings. The parties were well aware of the illegal character of their contacts and sometimes tried to disguise them by using coded language, for example referring to weather conditions to signal different price levels. The EC reduced Campine's fine by 5% as it played a more minor role than the other cartel participants. Furthermore, under the EC's 2006 Leniency Notice: Johnson Controls received full immunity for revealing the existence of the cartel to the EC, thereby avoiding a fine of € 38 481 300;Eco-Bat and Recylex benefited from reductions of their fines for their cooperation with the EC's investigation; Campine's leniency application was rejected as the EC found that the company had not disclosed its participation in the infringement.

(Source : EU press release dated 8, February 2017)

EU: EC opens three investigations into suspected anticompetitive practices in e-commerce:

The EC has launched three separate investigations to assess if certain online sales practices prevent, in breach of EU antitrust rules, consumers from enjoying cross-border choice and being able to buy consumer electronics, video games and hotel accommodation at competitive prices. Although more and more goods and services are traded over the internet worldwide, cross-border online sales within the EU are only growing slowly. The Commission's Digital Single Market Strategy identifies a number of regulatory barriers that hinder cross-border e-commerce and proposes different initiatives to address these.

However, there are also indications that businesses may themselves establish barriers to cross-border online trade, with a view to fragmenting the EU's Single Market along national borders and preventing

competition. The EC has therefore launched an inquiry to gather market information in order to better understand the nature, prevalence and effects of these barriers and to assess them in light of EU antitrust rules.

The three investigations aim to tackle the specific issues of retail price restrictions, discrimination on the basis of location and geo-blocking. The preliminary results of the EC's competition sector inquiry on e-commerce show that the use of these restrictions is widespread throughout the EU. Under certain circumstances, these practices may make cross-border shopping or online shopping in general more difficult and ultimately harm consumers by preventing them from benefiting from greater choice and lower prices in e-commerce. Such behavior may breach EU competition rules that prohibit anti-competitive agreements between companies (Article 101 of the Treaty on the Functioning of the European Union - TFEU). The three investigations initiated by the European Commission (EC) are described briefly as under:

(i) Consumer electronics manufacturers

The EC is investigating whether Asus, Denon & Marantz, Philips and Pioneer have breached EU competition rules by restricting the ability of online retailers to set their own prices for widely used consumer electronics products such as household appliances, notebooks and hi-fi products. The effect of these suspected price restrictions may be aggravated due to the use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors. As a result, the alleged behaviour may have had a broader impact on overall online prices for the respective consumer electronics products. The Commission is carrying out this in-depth investigation on its own initiative.

(ii) Video games

The EC is investigating bilateral agreements concluded between Valve Corporation, owner of the Steam game distribution platform, and five PC video game publishers, Bandai Namco, Capcom, Focus Home, Koch Media and Zeni Max. The investigation concerns geo-blocking practices, where companies prevent consumers from purchasing digital content, in this case PC video games, because of the consumer's location or country of residence. After the purchase of certain PC video games users need to confirm that their copy of the game is not pirated to be able to play it. This is done with an "activation key" on Valve's game distribution platform, Steam. This system is applied for a wide range of games, including sports, simulation and action games. The investigation focuses on whether the agreements in question require or have required the use of activation keys for the purpose of geo-blocking. In particular, an "activation key" can grant access to a purchased game only to consumers in a particular EU Member State (for example the Czech Republic or Poland). This may amount to a breach of EU competition rules by reducing cross-border competition as a result of restricting so-called "parallel trade" within the Single Market and preventing consumers from buying

cheaper games that may be available in other Member States. The EC is carrying out in-depth investigation on its own initiative.

(iii) Hotel price discrimination

Following complaints from customers, the EC is investigating agreements regarding hotel accommodation concluded between the largest European tour operators on the one hand (Kuoni, REWE, Thomas Cook, TUI) and hotels on the other hand (Meliá Hotels). The EC welcomes hotels developing and introducing innovative pricing mechanisms to maximize room usage but hotels and tour operators cannot discriminate customers on the basis of their location. The agreements in question may contain clauses that discriminate between customers, based on their nationality or country of residence – as a result customers would not be able to see the full hotel availability or book hotel rooms at the best prices. This may breach EU competition rules by preventing consumers from booking hotel accommodation at better conditions offered by tour operators in other Member States simply because of the consumer's nationality or place of residence. This would lead to the partitioning of the Single Market.

(Source: EU Press Release dated 2 February, 2017)

II. ABUSE OF DOMINANT POSITION/MARKET POWER

CCI initiates investigation against Delhi Development Authority (DDA)

CCI by its order dated January 12, 2017 has initiated an investigation against the Delhi Development Authority ("DDA") for abuse of dominant position in relation to delayed allotment of flats in the Middle Income Group category under the Rohini Residential Plot Scheme, 1981.

In a case filed by the Mr. Sudarshan Kumar Kapur, it was alleged that even though the residential allotment scheme of DDA was floated in 1981, the draw of lots were held only in the year 2012 and the Allotment Letter was issued again after a delay of 2 years in 2014.

The CCI considered that the DDA is a government department constituted under the Delhi Development Act, 1957 with an objective to promote and secure the development of Delhi according to plan. Even though the DDA is a statutory authority, its functions are neither sovereign nor are identical with inalienable functions of State. Thus, DDA falls within the definition of "enterprise" and its conduct can be scrutinized for abuse of dominance under Section 4 of the Competition Act, 2002(the Act).

The CCI noted that in the market for provision of services of development and sale of residential plots in the National Capital Territory of Delhi, DDA is the biggest real estate developer in Delhi and no other developer can match/reach the size and structure of the DDA. There are no comparable alternatives

available in Delhi for a buyer of residential plot in Delhi and as such the DDA was prima-facie considered dominant in the market.

The CCI took cognizance of the inordinate delay of 31 years by DDA qua the Informant and his wife in the instant case. Given the dependence of buyers on the DDA in the relevant market, they have little choice but to abide by the terms and conditions stipulated by the latter. The CCI also took note of the unfair clauses in the agreement, such as the penalty for buyer/allottees for delay in payment, but no corresponding penalty on DDA for delay in allotment/delivery of possession. The Allotment Letter itself stated that electricity, street lights and domestic connection were not available as on that date. Yet, the DDA made it mandatory for the recipient to pay around 80% of the total consideration amount failing which the allotment would stand cancelled. Further, DDA revised the price of the plots from INR 200 sq. mtr. in 1981 to INR 23252 per sq. mtr. in 2014.

The CCI is of the view that the conduct of DDA is prima-facie an abuse of its dominant position in violation of Section 4 of the Act. The Director General has been asked to investigate the conduct and submit his report within 60 days of the receipt of the CCI order.

(Source: CCI Order dated 12 January, 2017. For details, see CCI websitewww.cci.gov.in)

Comment: *The present order is the third investigation by CCI into alleged abuse of dominance by the DDA in the market for residential plots and/or apartments in Delhi. This follows the earlier investigations in the case of Sunrise Resident Welfare Association vs DDA (CCI Case 88/2014) and Dr. AdlaSatya Narayan Rao. vs DDA(06/2013). Final orders in all cases are awaited.*

CCI initiates investigation against Ghaziabad Development Authority (GDA)

CCI by its order dated February 2, 2017 has initiated investigation against GDA for abuse of dominant position in relation to arbitrarily increasing price for sale of residential flats for economically weaker section in Ghaziabad, Uttar Pradesh(UP).

In an information filed by an individual, Mr. Satyendra Singh, it was alleged that GDA allotted a flat under the Pratap Vihar residential housing scheme for Economically Weaker Section on 04.05.2009 for a consideration of INR 2,00,000/-. However, on November 27, 2015, GDA issued a letter to all the allottees of such scheme asking them to pay INR 7, 00,000/- as sale price of flats allotted to them failing which their allotment would stand cancelled. It was alleged that GDA has indulged in has indulged in unfair and arbitrary practices and has misused its dominant position in the market.

The CCI considered that in the market for "provision of services for development and sale of low cost residential flats under affordable housing schemes for economically weaker sections in Ghaziabad",

GDA was prima-facie dominant as there are very few other players are there in the relevant market who are developing and selling low cost residential flats targeted for economically weaker sections of the society. Further, the size and resources of GDA are huge and it being a statutory authority as per the Urban Planning and Development Act, 1973 of Uttar Pradesh, the buyers/allottees are completely dependent on it.

The CCI considered that the unilateral conduct of GDA increasing the sale price of its flats from INR 2,00,000 to INR 7,00,000/- is prima-facie unfair on the Informant and amounts to imposition of unfair price on the Informant and other allottees of the flats under the scheme in violation of Section 4(2)(a)(ii) of the Act. Consequently, the DG has been directed to conduct an investigation against GDA and submit within 60 days of receipt of the order.

(Source: CCI Order dated 02February, 2017. For details, see CCI websitewww.cci.gov.in)

CCI initiates investigation against Public Works Department (PWD), Government of Haryana

CCI by its order dated 27 February 2017 has initiated investigation against PWR, Govt. of Haryana for abuse of dominance in relation to inviting of bids for construction of rail over bridge in Karnal district in Haryana.

The Informant, Shri Rajat Verma, is a director of a company M/s Dwarika Projects Ltd. and PWD

Is the department of the Government of Haryana responsible for the construction of roads, buildings, bridges and other civil construction works in the State of Haryana. It was alleged that the PWD had abused its dominant position by incorporating unfair clauses in the bid document of the said tender.

The matter was initially dismissed by the CCI under Section 26(2) of the Act as it held that the PWD was not an "enterprise" because it is not directly engaged in any economic and commercial activities. Upon appeal, the COMPAT allowed the appeal accepting the contention that the PWD was an "enterprise" under Section 4 of the Act, holding that "if a department of the Government is engaged in any activity relating to construction or repair, then it will fall within the definition of the term 'enterprise'. We may add that there is nothing in Section 2(h) and (u) from which it can be inferred that the definitions of 'enterprise' and 'service' are confined to any particular economic or commercial activity."

Pursuant to the remand to the CCI, it was held that the relevant market should be the market for procurement for construction and repair of roads and bridges through tendering in the State of Haryana". CCI noted that PWD is the only procurer of such services in the State of Haryana, and hence is dominant int his relevant market.

As far as abuse is concerned, the CCI considered that the Clause 30(a) of the tender document provided that payment is to be made to the contractor as per the lowest amount worked out from

three criteria prescribed therein. The CCI was of the prima- facie the possibility of the contractor

being paid less than the agreed amount in an arbitrary manner by PWD by virtue of this clause cannot be ruled out. Similarly, Clause 30 of the Technical Specification does not prescribe a time limit on the PWD for modification/finalization of the drawings nor does it make them liable for delay. Thus, the CCI was of the prima facie view that certain clauses of the agreement are unfair, discriminatory and therefore violative of Section 4 of the Act. Accordingly, the DG has been directed to investigate the matter and submit the report within 60 days of the receipt of the order.

(Source: CCI: Order dated February 27, 2017. For full text see CCI website)

CCI again finds DLF abusing its dominant position

CCI by its order dated January 04, 2017 has found DLF and its group entities abusing its dominant position by imposing unfair and discriminatory conditions /prices on Informants in violation of Section 4 of the Act.

The case was filed by Shri Asutosh Bhardwaj and Shri Lalit Babu, individual purchasers of apartments in the New Town Heights project of DLF in New Gurgaon.

The CCI found a prima facie case for violation of Section 4 of the Act against DLF and directed investigation by the DG. The DG defined the relevant market according to the classification of building licenses by the Directorate of Town and Country Planning (DTCP), i.e. market for "the provision of services for development/sale of residential units (apartments/ flats/independent floors/ villas) under the licensed categoryof Residential Group Housing (RGH) and Residential Plotted Colony (RPL) in Gurgaon".

The DG notedthat the total assets of the OP Group in 2009-10 was almost three times that of Unitech and its reserve and surplus was more than two times that of Unitech which was found to be at 2ndpositionon both parameters. Accordingly, the DG held that DLF was dominant in the relevant market. The DG considered that the DLF was abusing its dominant position on account of unfair condition relating to mandatory purchase of parking slots, no requirement to send any notice for non-compliance under the agreement, no penalty on DLF for delay in possession, and heavy penalty on allottee for delay in payments, unfair forfeiture of earnest money deposit, etc. Thus, the DG recommended that the DLF was abusing its dominant position in violation of Section 4(2)(a)(i) of the Act.

The CCI agreed with the findings of the DG. The CCI noted that the conclusions of the DG were similar in nature to the facts of the earlier decisions against DLF. According these case, provision of services for development/sale of residential apartments. The CCI found that DLF was abusing its dominant position on account of the findings of the DG. As regards the penalty, the CCI noted that penalty has already been imposed on DLF by the CCI for similar conduct. Hence, the CCI restrained itself from imposing the penalty in this case.

(Source: CCI decision dated January 4, 2017; For full text see CCI website)

INTERNATIONAL

EU: Commission confirms unannounced inspections in the electricity sector in Greece

The Commission confirmed that it has carried out unannounced inspections at the premises of companies engaged in the generation, transmission, and supply of electricity in Greece. The inspections were made because the Commission has concerns that these companies have abused their dominant position, in violation of Article 102 TFEU. Alternatively, the Commission believes that the companies have information relating to said violation. The inspections were carried out together with the Hellenic Competition Commission.

(Source: EU Press Release dated February 15, 2017)

III. COMBINATION

CCI approves combination of Koch Industries and Guardian Industries under sub- section (1) of section 31 of the Act

CCI by its order dated January 4, 2017, has given the approval to the acquisition of 55.50 percent shares of Guardian Industries Corp. ("Guardian") by Koch Industries Inc. (KII).

KII currently owns 44.50% of Guardian through KII's affiliates. After the proposed combination acquisition of remaining 55.50 percent shares of Guardian by KGIC Merger Corporation, a wholly owned subsidiary of KII, KII would acquire the sole ownership of Guardian

KII, a privately held USA corporation, is engaged in business of refining and chemicals and biofuels and other diverse businesses. Guardian, a privately held USA corporation, is into manufacturing of float glass and fabricated glass products. CCI observed that there is no horizontal/vertical relationship between the parties in India.

Accordingly, the CCI noted that the transfer from joint to sole control of KII in Guardian is not likely to result in change in competition dynamics in any market in India. Thus, CCI was of the opinion

that the proposed combination is not likely to have appreciable adverse effect on competition in India, and approved the same under sub-section (1) of Section 31 of the Act.

(Source: CCI: Order datedJanuary 4, 2017. For full text see CCI website)

CCI penalizes Schulke and Mayr GmBH (Schulke) for delayed filing in relation to the acquisition of Healthcare Antisepsis Solutions (HAS) business of Johnson & Johnson Private Limited (JJPL)

CCI, by its order dated January 13, 2017 has imposed a penalty of INR 25,00,000 on Schulke on account of their failure to notify the commission about its global acquisition of Ethicon Inc.'s Healthcare antisepsis (HAS) business.

On April 23, 2015, Schulke has entered into a Global Asset Purchase Agreement (GAPA) for acquisition of the Advanced Sterilization Products ("ASP") Division of Ethicon, Inc. ("Ethicon"), a wholly owned subsidiary of Johnson & Johnson, USA (J&J). The Global APA provides for the global acquisition of the HAS business of Ethicon by Schulke, in the territories of Australia, Japan, India, New Zealand and certain other jurisdictions. It was observed that information regarding global acquisition of Ethicon's HAS business by Schulke was not provided in the notice. On account of lack of information on Air Liquide Group and ASP Division of Ethicon, their role and objectives in the combination, details of their business activities, globally and in India, could not be assessed.

The CCI considered that the GAPA is the binding agreement for the purposes of the present combination and that Schulke ought to have filed a notice for the global acquisition of the HAS business of Ethicon with the CCI within 30 days of the execution of the GAPA, i.e., by April 24, 2015.

Schulke submitted that the Country Transfer Agreement (CTA) dated September 11, 2015 between John and Johnson Private Limited (JJPL) and Schulke India Private Limited (Schulke India) was the trigger document as the GAPA did not cause the Indian assets to be transferred, and the precise and final scope of the assets transfer in India was defined in the CTA.

The CCI noted that the Act does not mandate that the "agreement" must be India-specific. It is also noted that even if the parties to the combination did not enter into CTA, the acquisition of HAS Business of Ethicon by Schulke would have still been notifiable to the CCI, in terms of sub-section (2) of Section 6 of the Act on the execution of GAPA, as the parties to the combination meet the jurisdictional thresholds prescribed under Section 5 of the Act. A bare reading of the CTA brings out the fact that the CTA was never intended to be the primary document based on which Schulke Germany or Schulke India acquired the HAS business.

Accordingly, the purpose of the CTA was only to specify the mechanics and scope of the business to be transferred in India. The GAPA was the basis of the CTA and the GAPA itself created an obligation on the parties for the transfer of target business worldwide (including India).

Further, the value of assets and turnover of JJPL is to be considered for the purpose of determining the applicability of De Minimis Exemption. The value of assets and turnover of JJPL for the year ending on March 31, 2014 were INR 2702.89 crore and INR 4454.43 crore, respectively, which exceed the thresholds provided by De Minimis Exemption both in terms of value of assets and turnover. Thus, the exemption provided by the De Minimis Exemption was not available to Sculke in respect of the proposed combination.

Accordingly, the CCI imposed a penalty of INR 25,00,000/- on Schulke for failure to give notice in accordance with Section 6(2) of the Act.

(Source: CCI: Order dated January 13, 2017. For full text see CCI website)

INTERNATIONAL

General Court annuls the Commission's decision to prohibit the merger between UPS and TNT on procedural grounds

The GC annulled the EC's decision to prohibit the merger between United Parcel Service ("UPS") and TNT Express ("TNT"). The companies are active in specialist transport and logistics services. In 2012, UPS notified the Commission of the proposed merger. However, the Commission prohibited the merger, stating in essence that it would have restricted competition in 15 member states concerning the express delivery of small packages to other European countries. The number of significant players in the market would have been reduced to three, or sometimes even two, leaving DHL as the only alternative. UPS appealed the decision.

The GC has now delivered its judgment, ruling in favor of UPS. The GC concludes that the Commission breached UPS' rights of defense by basing its decision on an econometric model different from that contemplated during the administrative procedure. The changes to the analysis were non-negligible and should thus have been communicated to UPS before the adoption of the decision. UPS might have been better able to defend itself if it had access to the final version of the model before the decision was adopted. Therefore, the GC annulled the Commission's decision.

(Source: http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170023en.pdfEuropean Commission Press Release: Commission blocks proposed acquisition of TNT Express by UPS :http://europa.eu/rapid/press-release_IP-13-68_en.htm)

EU: Commission clears acquisition of Gamesa by Siemens

The European Commission has cleared unconditionally under the EU Merger Regulation the proposed acquisition of wind turbine manufacturer Gamesa by Siemens. The Commission found that the transaction raises no competition concerns, because a number of credible competitors would remain in the market. The Commission has investigated the impact of the proposed transaction on the onshore and offshore wind turbine markets, where the activities of Siemens and Gamesa overlap: The onshore wind turbine market is rather fragmented with several large competitors even after the merger. The offshore wind turbine market is more concentrated with Siemens and MHI Vestas being the main competitors. Gamesa is also active in the market through its subsidiary Adwen. However, as the investigation confirmed that Adwen is not a competitive constraint on Siemens, it is unlikely that the transaction will appreciably change the competitive situation. The Commission therefore concluded that the proposed transaction would raise no competition concerns.

(Source: EU Press Release dated 13, March 2017)

EU: Commission clears acquisition of ABB's High Voltage Cable and Cable Accessories Businesses by NKT

European Commission has cleared unconditionally under the EU Merger Regulation the proposed acquisition of ABB's high voltage cable business and power cable accessories business by NKT. The Commission concluded that the merged entity would continue to face effective competition in Europe. Both NKT and ABB's high voltage cable businesses develop and supply power cables and cable accessories. In its investigation, the Commission looked at the effects on competition of the removal of one competitor, and whether the transaction would make it more likely that the remaining players could co-ordinate their competitive behavior. This assessment was important given the history of collusion in the industry. In 2014 the Commission found that the main producers of high voltage power cables, including NKT and ABB, were involved in a cartel aimed at restricting competition for high voltage underground and submarine power cable projects. The producers had agreed on market and customer allocation. The cartel included Japanese and Korean producers refraining from competing for projects in the EEA, thus staying out of the European companies' home territory.

The Commission's investigation focused on the parties' overlapping activities for high voltage power cables, in particular, on AC submarine power cables and DC submarine power cables. These cables are

used to connect transmission grids separated by water and to bring onshore the energy generated by wind farms at sea. NKT is a potential entrant in the market for DC submarine power cables. Based on the results of its extensive market investigation, the Commission found that the proposed acquisition would not result in a significant reduction in competition and that a number of strong competitors will remain post-transaction. Significantly, the Commission's investigation revealed the recent and successful entry of competitors from Asia, such as LS Cables and Sumitomo. These companies are now helping to drive and ensure competition in the high voltage cable and power cable accessories markets.

(Source: EU Press Release dated 27, February 2017

EU: EC approves acquisition of Alere by Abbott Laboratories, subject to conditions

The EC has approved under the EU Merger Regulation the acquisition of Alere by Abbott, both suppliers of clinical test systems. The decision is conditional on the divestment of Alere's Epoc and Triage tests, as well as Alere's BNP reagents business. Abbott Laboratories and Alere Inc. are both US-based companies active in In-Vitro diagnostics (IVD) systems. These systems perform clinical tests outside the body using blood, urine or other samples. There are two broad categories of IVD systems:

- Laboratory systems: used in hospitals and laboratories, with samples brought to the systems in both cases, and
- Point of care systems: used in emergency rooms, hospital wards, ambulances and other near-patient settings, with samples assessed at the same location.

The companies' activities are largely complementary, as Abbott has a broader portfolio of laboratory systems and Alere a focus on point of care. However, overlaps exist in particular for point of care analysers used in the testing of blood gases and cardiac markers.

- Blood gases are vital parameters monitored for patients admitted into critical care, undergoing prolonged anesthesia or when a patient is on oxygen. Abbott and Alere produce the only handheld point of care systems for blood gases (the iSTAT and the Epoc, respectively). The two systems compete closely and the proposed merger would have led to a monopoly in this market.
- Cardiac markers are biomarkers measured to evaluate heart functions. Both Abbott's iSTAT system and Alere's Triage system measure cardiac markers. These two instruments compete closely with each other, both in functionality and in use within hospitals.

Moreover, the EC found that the proposed merger would risk affecting the ability of Danaher, another supplier of IVD systems, to compete for laboratory systems running B-type natriuretic peptide (BNP) tests. These tests are used to check for heart failure. For the manufacturing and sale of the BNP test used

on its laboratory machines, Danaher relies on Alere. As Abbott competes with Danaher in laboratory systems, it could have stopped selling BNP tests for Danaher's machines following the proposed merger. This would have made Danaher's systems less attractive and decreased competition for certain laboratory systems. In order to address the competition concerns identified by the Commission, Abbott offered to:

- fully divest Alere's global Epoc business, including its manufacturing site in Ottawa, Canada,
- fully divest Alere's global Triage business, including its manufacturing site in San Diego, US. This business also manufactures essential inputs for the production of BNP reagents for Danaher laboratory devices, which are included in the divestment, and
- fully divest the Alere BNP reagents business that commercializes a BNP test with Danaher.

The commitments fully address the EC's competition concerns. The EC therefore concluded that the proposed merger, as modified by the commitments, would no longer raise competition concerns. The decision is conditional upon full compliance with the commitments. Given the global nature of the transaction and the commitments, the Commission cooperated closely with other competition agencies, including in particular the US Federal Trade Commission and the Canadian Competition Bureau.

(Source: EU Press Release dated 25, January 2017)

EU: EC clears acquisition of Morpho Detection by Smiths, subject to conditions

The EC has cleared under the EU Merger Regulation the proposed acquisition of Morpho Detection, the threat detection equipment business of Safran of France, by Smiths of the UK. The clearance is conditional on the divestiture of Morpho Detection's explosive trace detection business. Both Smiths and Morpho Detection develop and manufacture threat detection equipment, in particular explosive trace detectors. Explosive trace detectors are used in: airports for the screening of baggage and passengers: within the EU such detectors have to comply with technical specifications and minimum performance requirements determined by European legislation. The number of certified or approved suppliers is thus limited, other facilities, such as at ports and borders, critical infrastructure, and by the military and emergency response services: although the use of explosive trace detectors outside the aviation industry is generally not subject to European regulation, the number of suppliers competing globally with Smiths and Morpho Detection is also limited. The Commission had concerns that the merged entity would have faced insufficient competitive pressure from the remaining players in the European market for the supply of explosive trace detectors to airports and in the worldwide market for the supply of explosive trace detectors to other end-users. Following the takeover there was a risk of price rises and less innovation for explosive trace detectors. Smiths and Morpho Detection also develop and

manufacture hold baggage explosive detection systems, which are used mostly in airports to screen baggage checked in to be carried in the hold of the aircraft. However, the Commission considers that the merged entity would still face competitive pressure from a sufficient number of players active in this market in the European Economic Area. The Commission also found that there will be sufficient competition for cabin baggage explosive detection systems, which both Smiths and Morpho Detection, as well as several other competitors, are currently developing. New developments in these detection systems aim to speed up airport checkpoints for passengers. To address the Commission's competition concerns, Smiths offered to divest Morpho Detection's global explosive trace detectors business. The divestment will fully remove the overlap for explosive trace detectors resulting from the merger as initially notified. The purchaser of the divested explosive trace detector business will be able to replace Morpho Detection on the market. It will exert the same level of competitive constraint on Smiths with regard to both the supply of explosive trace detectors to airports in Europe and to the supply of non-aviation customers worldwide. These commitments address all competition concerns identified by the Commission. The Commission's decision to approve the transaction is conditional upon full implementation of the commitments.

(Source : EU Press Release dated 19, January 2017)

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, Danish Khan