Competition News Bulletin

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Supreme Court allows appeal of Competition Commission of India against Co-ordination Committee of Artists and Technicians of West Bengal Film and Television

The Supreme Court vide its judgement dated March 7, 2017 has set aside the order of the Competition Appellate Tribunal (COMPAT) and held that the prohibition of dubbed serial on the television is a violation of Section 3(3)(b) of the Competition Act, 2002 ("the Act"). The Supreme Court upheld the original majority order of the Competition Commission of India (CCI) which was set aside by COMPAT through its order dated April 2, 2014.

The information before CCI was filed by Mr. Sajjan Kumar Khaitan as the proprietor of M/s Hart Video, Kolkata, a distributor of video cinematographic TV serials for telecasting regional serials in Eastern India, including West Bengal. Hart Video dubbed the television serial "Mahabharata" in Bangla and wanted to distribute it for telecast in West Bengal through "Channel 10" as well as Channel "CTVN+". However, certain producers of television serials in Eastern India under the banner of ""Eastern India Motion Picture Association"(EIMPA) as well as the "Committee of Artists and Technicians of West Bengal Film and Television Investors" (Coordination Committee), were opposed to the telecast of the said serial as they felt it may deter production of such serials in Bangla because of the entry of serials produced in other languages and shown to the public by dubbing the same in their language. Both EIMPA as well as Coordination Committee wrote letters to CTVN+ to stop the telecast of the dubbed serial. Threat was also extended to CTVN+ as well as Channel 10 that in case the telecast is not stopped, their channels would face non-cooperation from these two bodies, i.e., EIMPA and the Coordination Committee.

Against the threats, Mr. Sajjan Khaitan filed the Information in the CCI. The CCI referred the matter to its Director General (DG) for investigation.

During investigation, DG defined the relevant market as the market for "film and television industry of West Bengal". The DG found that the conduct of Coordination Committee and EIMPA threatening non-cooperation in case telecast of the serials was not stopped and holding demonstrations as well as organizing strike, which resulted in actually stopping the telecast of the serial by Channel 10 (though CTVN+ continued to telecast), amounted to restricting its commercial exploitation and was, therefore, unjustified. The DG found the conduct of EIMPA and Coordination Committee amounted to "limiting and restricting the market through an anti-competitive agreement" in violation of Section 3(3) (b) of the Act.

The CCI considered and agreed with the DG's findings. The CCI considered that the conduct of EIMPA and CTVN+ amounted to restriction of competition as Channel 10 has succumbed to its pressure. The activities of the Coordination Committee fell within the ambit of Section 3 of the Act and violated that provision since it had adverse effect on competition.

The Coordination Committee appealed the majority decision of CCI. The COMPAT disagreed with the CCI on the definition of 'relevant market' by holding that it was not the 'Film and Television Industry in the State of West Bengal', but the relevant market was the 'telecasting of the dubbed serial on television in West Bengal'. Thereafter, the COMPAT took note of the provisions of Section 3(3) of the Act and concluded that the Coordination Committee was not trading in any groups, or provisions of any services, much less by the persons engaged in identical or similar trade or provisions of services. Therefore, it could not be said that there was any 'agreement' as envisaged in Section 3 entered into. According to the COMPAT, Section 3(3)(b) of the Act applied to the competitors who would be in the same line of commercial activity and by their agreement tend to restrict the competition. No evidence to this effect was available in the instant case. It was merely a protest of the Coordination Committee voicing its grievance for the benefit of its members and even if such a move on the part of the Coordination Committee was wrong and even if its agitation was influenced by foul play in projecting that exhibiting dubbed TV serial would affect their prospects of getting further work, that by itself would not become a competition issue covered by the Act.

The Supreme Court after considering the appeal filed by CCI disagreed with the COMPAT on the definition of relevant market as the market was not limited to the broadcasting of the channel but entire film and television industry of West Bengal. Even in the perception of the Coordination Committee, telecast of Bengali dubbed version of 'Mahabharat' was going to affect the whole Television and Film Industry.

The Supreme Court held that the Coordination Committee was an "association of enterprises" and it joined together in giving call of boycott of competing members. The Supreme Court noted that the CCI rightly observed that the protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice. The acts of Coordination Committee definitely caused harm to the consumers by depriving them from watching the TV serial on TV channel. Such conduct amounts of violation of Section 3(3)(b) of the Act. The appeal was allowed and the order of COMPAT was set aside.

(Source: Supreme Court of India Order dated March 7, 2017; For details see COMPAT website: www.compat.nic.in)

Supreme Court upholds the concept of "relevant turnover" for imposition of penalty under Section 27 of the Act

The Supreme Court vide its landmark judgement dated May 08, 2017 has upheld the decision of COMPAT holding that penalty for anti-competitive practices found to be in violation of the Act should be on the basis of "relevant turnover" relating to the particular product , and not on the total turnover, particularly, on multi-product companies . The brief background is as under:

The CCI took suo-moto cognizance of the letter sent by the Food Corporation of India (FCI) alleging bid rigging in relation to tenders issued by FCI for supply of Aluminium Phosphide Tablets (for short, 'APT') of 3 gms between the years 2007 and 2009. The bid rigging was alleged by 3 suppliers who quoted in response to the tenders, namely, Excel Crop Care Limited, United Phosphorous Limitedand M/s. Sandhya Organics Chemicals (P) Ltd collectively the "Appellants") and Agrosynth Chemicals Limited. It was alleged that the Appellants have been quoting identical rates in the tenders invited by the FCI for the purchase of APT.

The DG after investigation confirmed the allegations of the FCI that the Appellants had entered into an anti-competitive agreement for bid rigging. The DG found that from the year 2002 up to the year 2009, all the above-named four parties used to quote identical rates, excepting for the year 2009. The Appellants had in their defense stated that rise in price was mostly attributed to increase in price by China during the Beijing Olympics, but it was noticed that even during the period when the Phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the appellants. The Appellants even had a differing cost structure. DG found that the appellants had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act.

The CCI after an inquiry agreed with all the findings in the DG Report. The CCI rejected the contention of the Appellants and concluded that they had entered into an agreement or understanding, and indulged in bid rigging while submitting their bids in response to the tenders issued by the FCI. The CCI imposed a penalty at the rate of 9% of the average of last three years annual turnover on each of the Appellants under Section 27 of the Act.

Upon appeal to COMPAT, all the contentions of the Appellants on merits were rejected. However, the COMPAT accepted the contention of the Appellants that the penalty should be restricted to the 'relevant turnover', i.e. the turnover or revenue derived by the appellants through the supplies of the relevant product i.e. APT and not on the total turnover derived from sale of all products Further, the COMPAT reduced the penalty imposed on Sandhya Organics to 1/10th of the penalty awarded by the CCI.

The Supreme Court, after a detailed examination of all contentions of the parties, upheld the order of COMPAT both on the merits of finding of bid rigging as well as on the extent of penalty . The Supreme Court ruled that the CCI was within its jurisdiction to investigate and penalize the tender of 2009. Even though the tender process was started before the enforcement of Section 3 of the Act on May, 20, 2009, the tender process continued even after May 20, 2009. Further, the continued identical pricing by the Appellants on repeated occasions without any plausible explanation was conclusive proof of anti-competitive agreement between them.

On the question of penalty, the Supreme Court noted that Section 27(b) of the Act neither uses the prefix "total" or "relevant" while prescribing the penalty. The Supreme Court noted that a situation may arise, like in the instant case, where an enterprise may be multi-product company. The concept of imposing penalty on "total turnover", as employed by CCI hitherto fore, may bring out very inequitable results. Thus, interpretation which may bring about inequitable or absurd results cannot be accepted. The Supreme Court also accepted the concept of "doctrine of proportionality" used by COMPAT in its order, to hold that the penalty cannot be disproportionate and it should not lead to shocking results. Thus, the Supreme Court dismissed the appeals.

Further, in separate but concurrent judgement, Justice N V Ramana of the Supreme Court held that the starting point for imposition of penalty would be the relevant turnover. It went on to hold that upon determining the relevant turnover, the CCI may take cognizance of aggravating and mitigating factors such as nature, gravity, extent of the contravention, role played by the infringer (ringleader or follower), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc. The final penalty should not be more than 10% of the entity's relevant turnover.

(Source: Supreme Court of India decision dated May 8, 2017; For full text see CCI website).

Comment: *This landmark judgement by the Apex Court sets at rest the long pending doubt on the extent of imposition of penalty in cases of proven violations of the Act ,such as hard core cartels etc. It is hoped that the judgment will also lead to the issue of guidelines for imposition of penalty by CCI in due course.*

COMPAT dismisses appeal of Karnataka Film Chamber of Commerce (KFCC) against finding of cartelization by CCI

COMPAT by its order dated April 10, 2017 has upheld the order dated July 27, 2015 of the CCI under Section 27 of the Act where the CCI found the conduct of KFCC (and other associations) resulted in limiting and restricting the market of dubbed films/serials in Kannada language and was in

contravention of Section 3(1) read with Section 3(3)(b) of the Act. The CCI also imposed a penalty of INR 16, 82, 204 on the Appellant.

In an Information filed by Kannada Grahakara Koota, it was alleged that the market of films and television shows within the State of Karnataka was restricted due to the collective action of these associations, prohibiting telecasting of dubbed content from any other language into Kannada, and banning making, releasing and exhibiting of dubbed films. Specific instances of alleged blocking of telecast of dubbed TV serials "Satyameva Jayate" and Rani Laxmibai of Jhansi and exhibition of film "Koffi Shop", were cited in this context. The CCI ordered a detailed investigation into the matter.

The DG reported that the KFCC and other association had indulged in anti-competitive conduct by putting restrictions on the production and exhibition of dubbed version of films/TV of non-Kannada language, in contravention of Section 3(1) read with 3(3)(b) of the Act.

The CCI considered the DG Report and took note of the fact that restrictions imposed on the dubbed version of TV serials had been declared anti-competitive in a similar case involving the West Bengal Film and Television Industry viz. CCI Case No. 16/2011. The CCI was of the view that, the decisions taken or practices carried on by such associations were individually covered within the scope of agreements falling under Section 3 (1) read with Section 3(3)(b) of the Act, which raises a presumption of appreciable adverse effect on competition. The CCI agreed with the DG and found a violation of Section 3(3)(b) read with Section 3(1) of the Act.

In the appeal filed by KFCC against the CCI order , the COMPAT was of the view that any action taken by the Appellant is a joint action of its members with the association, as also joint action inter-se members, constituting an agreement entered into, practice carried on or decision taken by which can be subjected to appraisal to ascertain as whether there is any contravention of Section 3 of the Act. The COMPAT cited the decision of the Supreme Court in Appeal No. 6691 of 2014 to hold that the issue as to whether agreement, practice or decision to restrain dubbed content is violative of Section 3 of the Act is not res-Integra. Similarly, once an agreement fell within the purview of Section 3(3) of the Act, appreciable adverse effect on competition is presumed. The appeal has been dismissed.

(Source: COMPAT decision dated April 10, 2017; For full text see CCI website)

CCI penalizes Malayalam Movie Artists Associations for boycotting a competitor

CCI by its order dated March 24, 2017 has penalized Association of Malayalam Movie Artists (AMMA) and Film Employees Federation of Kerala (FEFKA) for boycotting a competitor in violation of Section 3(3)(b)of the Act.

The information was filed by Shri T.G. Vinayakumar, a director and writer in the Malayalam Film Industry. The Informant has headed an initiative called the "Cinema Forum" for collaboration between film makers and distributors to make low budget movies with new actors. It was alleged that Association of Malayalam Movie Artists (AMMA) and Film Employees Federation of Kerala (FEFKA) are forcing various actors, technicians, producers, financers, not to work or associate with the Informant or any of his projects. It was alleged that such conduct of the opposite parties has affected fair competition in the market, the interests of consumers and freedom of trade carried on by other participants by limiting and restricting the market in contravention of the provisions of Section 3(3) of the Act.

Being prima facie satisfied with the allegations against the opposite parties, the CCI referred the matter for investigation. The DG reported that various actors were being removed from Malayalam films as they had acted in the projects of the Informant. The same was being done as per the directives of AMMA and FEFKA. Producers who had already given advance to Informant to direct movies were asked to cancel the projects on the insistence of AMMA and FEFKA. Thus, DG concluded that the members of AMMA had a tacit understanding not to work with the Informant. Members of AMMA also exerted pressure on non-members not to work with the Informant. The DG opined that this tacit understanding amongst the members of AMMA is likely to limit or control the provision of services in the market, thereby violating of the provisions of Section 3(1) read with Section 3(3)(b) of the Act. Similar conduct was also reported against FEFKA who had coerced actors and producers to disassociate themselves from the movies of Informant or to face boycott themselves. The practices of FEFKA were found to be in contravention of the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

The CCI considered the DG Report. The CCI took note of the minutes of general body meeting of AMMA and FEFKA to establish the allegation that there was a ban imposed by AMMA and FEFKA on its members not to work with the Informant. Further letter dated April 3, 2013 was sent by a producer (Shri P.A. Haris) to the Informant stating that he can't work with the Informant unless restrictions of AMMA and FEFKA were removed. AMMA and FEFKA not only imposed ban on the Informant but has also influenced actors and technicians, through their respective associations, who worked or started working with the Informant. It is also evident that the said influence led to many such actors dissociating with the Informant. The CCI also found the respective trade unions of AMMA and FEKA to be equally involved in the anti-competitive agreement between them. The CCI concluded that the AMMA and FEFKA along

with their trade unions have contravened the provisions of Section 3(1) read with Section 3(3)(b) of the Act. The CCI accordingly directed them to cease and desist from the anti-competitive practices. A penalty at the rate of 5% of average income for preceding three years was also imposed on each of the opposite parties.

(Source: CCI decision dated March 24, 2017; For full text see CCI website)

CCI closes case of alleged cartelization in sale of sugar mills in Uttar Pradesh

CCI by its order dated May 4, 2017 has closed the case of alleged cartelization by related companies in sale of sugar mills in Uttar Pradesh by Uttar Pradesh State Sugar Corporation Limited (UPSSCL) and the Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited (UPRCGVNL).

The case was taken up suo-moto by the CCI based on the finding in the 'Performance Audit Report of the Comptroller and Auditor General of India on Sale of Sugar Mills

of Uttar Pradesh State Sugar Corporation Limited for the year ended 31 March 2011' ('CAG report') which indicated cartelization/ concerted bid by a group of related companies in the sale of sugar mills by the UPSSCL and the UPRCEGVNL.The participating companies in the sale of sugar mills included M/s Wave Industries Private Limited (Wave), M/s PBS Foods Private Limited ('PBS Foods'), M/s Indian Potash Limited ('IPL'), M/s Nilgiri Food Product Private Limited ('Nilgiri'), M/s Trikal Food and Agro Private Limited ('Trikal'), M/s Giriasho Company Private Limited ('Giriasho'), M/s Namrata Marketing Private Limited ('Namrata'), M/s SR Buildcon Private Limited ('SR Buildcon'). It was noted that for the tender issued for sale of sugar mills by the Govt. of UP, only Wave, PBS Foods and IPL had bid. CAG Report noted that Wave and PBS had common directors. The CCI felt the lack of competition between the bidders and ordered an investigation for alleged violation of Section 3(3)(a) and Section 3(3)(d) read with 3(1) of the Act.

The DG examined the financial statements and other documents of Wave and PBS. It was observed that these companies had common directors or shareholders. It was noted that the demand drafts submitted by Wave and PBS for purchasing EOI-cum-RFQ had consecutive serial numbers and were drawn on the same date by debiting the bank account of Wave. Further, the bank guarantees submitted by Wave and PBS were also issued on the same date by the same bank and the covering letter of the bank guarantee had consecutive serial number. Additionally, the address of Wave was noted in the endorsement of the sale of stamp paper needed for the Power of Attorney submitted by both Wave and PBS Foods and also the stamp papers submitted by both the Companies for Performance Guarantee contained the same address. DG concluded that both the parties were acting together during the bidding process and had violated the provisions of Section 3(3)(a) and 3(3)(d) of the Act by acting in collusion in the bidding process of sale of operational sugar mills by UPSSCL. In absence of any evidence against IPL, the DG concluded that

IPL had not contravened the provision of Section 3(3)(d) of the Act. DG also found that there was an understanding among the bidders for all the sugar mills put for sale by UPRCGVNL and they acted in a collusive manner to grab all the sugar mills at much lower price without any real competition. There was found to be a clear violation of Section 3(3)(a) and 3(3)(d) of the Act by Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon as during the process of sale the prices of the mills were found to be directly/indirectly decided amongst the bidders by not bidding against each other which resulted in a collusive bidding.

The CCI considered the DG Report and noted that the bidding pattern for the sugar mills did not have a case of identical or similar pricing by the bidding firms. The CCI also noted that there were several litigations pending before the Hon'ble High Court of Allahabad and the Hon'ble Supreme Court which had made the sale of the sugar mills less attractive to the purchasers. The CCI also noted that the mills were hardly viable from economic point of view. The DG had found no such evidence of collusion amongst participating and non-participating companies or of prior knowledge of non-participation with the participating companies. Thus, the allegation of cover-bidding was also ruled out. Merely common shareholding cannot lead to a conclusive finding of collusion between PBS Foods and Wave. Thus, the CCI ordered to close the case on account of lack of evidence against the bidders.

(Source: CCI decision dated May 5, 2017; For full text see CCI website)

International

EU: Commission accepts commitments from Amazon on e-books

The European Commission has adopted a decision that renders legally binding the commitments offered by Amazon. The commitments address the Commission's preliminary competition concerns relating to a number of clauses in Amazon's distribution agreements with e-book publishers in Europe. With this decision Amazon will no longer enforce or introduce these clauses in agreements with publishers. These commitments will contribute to fair competition in the platform economy. The Commission opened an investigation in June 2015 because it had concerns about clauses included in Amazon's e-books distribution agreements that could have breached EU antitrust rules. These clauses, sometimes referred to as "most-favoured-nation" clauses, required publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon's competitors. The clauses covered not only price but many aspects that a competitor can use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion. The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative

distribution services. The clauses may have led to less choice, less innovation and higher prices for consumers due to less overall competition in the European Economic Area (EEA) in e-book distribution. Amazon has sought to address the Commission's concerns by offering not to enforce, introduce or to change the terms of its agreements with publishers. It amended its proposal following feedback received from interested parties on the suitability of Amazon's originally proposed commitments. The Commission has concluded that the amended final version of the commitments offers a timely, effective and comprehensive solution to the competition concerns it had identified. They will help ensure that innovation for e-books by publishers and other third parties can benefit companies other than Amazon and protect effective competition for e-books to the benefit of consumers. Amazon offered the following commitments:

- Not to enforce (i) relevant clauses requiring publishers to offer Amazon similar non-price and price terms and conditions as those offered to Amazon's competitors or (ii) any such clauses requiring publishers to inform Amazon about such terms and conditions. The commitments cover in particular provisions related to alternative/new business models, release date and catalogue of e-books, features of e-books, promotions, agency price, agency commission and wholesale price.
- To allow publishers to terminate e-book contracts that contain a clause linking discount possibilities for e-books to the retail price of a given e-book on a competing platform (so-called Discount Pool Provision). Publishers are allowed to terminate the contracts upon 120 days' advance written notice.
- Not to include, in any new e-book agreement with publishers, any of the clauses mentioned above, including Discount Pool Provisions.

(Source: EU press release dated May 4 , 2017)

Düsseldorf Higher Regional Court confirms Bundeskartellamt's decision on prohibition of use of price comparison engines

The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision of principle against the running shoes manufacturer Asics. According to the decision the general prohibition of the use of price comparison engines by retailers implemented through a selective distribution system violates competition law and is illegal. Price comparison engines in the Internet are an important means for consumers to gain transparent information about prices and to compare them. They are very useful in particular for smaller and medium-sized retailers who are difficult for customers to find. It is therefore important that manufacturers do not forbid their retailers from using price comparison engines. The Düsseldorf Higher Regional Court, therefore,

confirmed that the general prohibition of the use of price comparison engines is a restriction of competition by object. The prohibition deprived the retailers of an advertising and sales possibility. The appeal court stated that the prohibition could also not be justified on the grounds of protecting the company's brand image and pre-sale services because consumers of running shoes did not necessarily need or want such services or if so, could inform themselves via the Internet. The prohibition was a hardcore restriction which did not meet the requirements for exemption under European competition law.

(Source: EU press release dated April 06, 2017)

ABUSE OF DOMINANT POSITION/MARKET POWER

CCI closes allegation of abuse of dominance against WhatsApp

CCI vide its recent order dated June 1, 2017 has closed an allegation of abuse of dominant position against popular message service WhatsApp. The complaint against WhatsApp was filed by an individual Vinod Kumar Gupta on behalf of a NGO "Fight for Transparency Society".

As per the complainant, WhatsApp was acquired by Facebook Inc. ("Facebook") in February 2014 and thereafter WhatsApp introduced changes in its privacy policy in August 2016 whereby the users of WhatsApp have been forced to share their account details and other information with Facebook in order to continue availing the services of WhatsApp. As per the complaint, this enabled Facebook to use the customers' data for targeted advertisement in a highly deceptive manner. It was stated that almost the entire community of users of WhatsApp in India are not equipped to read or comprehend the consequences of the changed terms and conditions of privacy policy of WhatsApp and the use of the customers' mobile database and information including vital information of the user such as contacts etc. were used for commercial benefits by Facebook in violation of the Information Technology Act, 2000 besides being an unfair condition constituting an abuse of dominant position under section 4 of the Competition Act, 2002 ("the Act"). The complaint also alleged that by offering a free service since January 2016, WhatsApp was indulging in the practice of predatory pricing in violation of section 4 of the Act.

CCI heard both the complainant and the counsels for WhatsApp in a preliminary conference in order to arrive at a prima facie view.

CCI concluded, on the basis of various studies reports that WhatsApp was in a dominant position in the relevant market for *"instant messaging services using consumer communication apps through smartphones in India"* being the most popular messaging service with 97% of the smartphone users in India having been

installed on 96% of the devices and has more daily active users than any other communication app in India. As per the study report WhatsApp is installed in 2.3 times more devices than home grown messaging apps like Hike .

However regarding the allegation of abuse of dominance, CCI noted that WhatsApp provides the option to its users to "opt out" of sharing user information with Facebook within 30 days of agreeing to the updated terms of service and privacy policy. CCI also agreed with the submission made by WhatsApp that its uses safeguards by protecting WhatsApp calls by end to end encryption so that third parties and WhatsApp itself cannot read them and also that the message can only be decrypted only by the recipient. Further, CCI agreed with the submission of WhatsApp that nothing that a user shares on WhatsApp including his messages, photos and account information will be shared on to Facebook or any other apps of "Facebook family of companies" for any third party to use.

Regarding the allegation that the conduct of WhatsApp making its users sign its new private policy is in breach of the IT Act, 2000 and the right of privacy, the Commission noted that this issue was already sub-judice in an appeal pending before the Hon'ble Supreme Court arising out of a writ petition earlier filed in Delhi High Court (W.P.(C) 7663/2016) wherein similar allegations were raised by the petitioners, who were users of WhatsApp. This issue was therefore, outside the purview of the CCI being not a competition issue under the Act.

As regard the allegation that WhatsApp was indulging in predatory pricing by offering free services, CCI noted that there are several other applications available in the relevant market such as *Hike, Messenger and Viber,* which were also offering free services. It appears to be standard practice in the industry / business and therefore WhatsApp alone cannot be accused of indulging in predatory pricing since it was following the revenue model like that of other players in the market. Moreover, CCI noted that there are no significant cost preventing the users to switch from WhatsApp to other apps since all such communication apps are easily downloadable on smartphones and can co -exist on the same handset (also called "multi-homing").

Based on the above, CCI found that there was no prima facie case to investigate the alleged conduct of WhatsApp even though it was found to be in a dominant position.

(Source: CCI decision dated June 1, 2017; For full text see CCI website).

CCI closes case against Maharashtra State Electricity Distribution Company Limited and Others for alleged abuse of dominance

CCI by its order dated April 21, 2017 has closed the case of abuse of dominance against Maharashtra State Electricity Distribution Company Limited (MSEDCL), Maharashtra State Power Generation Company Limited (MSPGCL) and others for abuse of dominance in generation and distribution of electricity in the State of Maharashtra, except Mumbai.

In an information filed by Vidarbha Industries Association (VIA), it was alleged that MSPGCL and MSEDCL have entered into a long-term power purchase agreement through which the entire power of MSPGCL is purchased by MSEDCL at arbitrary and exorbitant rates. It was alleged that MSEDCL does not follow Merit Order Dispatch and purchases entire power of MSPGCL at exorbitant rates. The rates of MSPGCL are exorbitant as the power is generated by MSPGCL is in an inefficient manner.

It was further alleged that MSEDCL, through its decision to shut down four units of Koradi Thermal Power Plant during December, 2010 and January, 2011, has limited the electricity output in contravention of the provisions of Section 4(2)(b)(i) of the Act. Feeling prima-facie satisfied by the allegations, the CCI referred the matter for investigation.

The DG considered the market as the market for "provision of services for distribution of electricity in the state of Maharashtra except Mumbai". In the aforementioned market, MSEDCL is dominant enterprise as it is the sole distribution licensee. The DG Report noted that the PPAs executed under between MSPGCL and MSEDCL after 05.01.2011 have been examined by the MERC and detailed orders have been passed from time to time keeping in view the various parameters including the interest of the consumers. Further, as per DG Report, the tariff or purchase price of electricity by MSEDCL from power generating companies is determined by the Central/ State Electricity Regulatory Commission, as the case may be, for each year in accordance with the statutory power vested under the Electricity Act, 2003 and relevant Regulations. The DG has also reported that the tariff to be charged from the ultimate consumer is also determined by the MERC through the tariff orders issued from time to time.

The DG Reported that there were genuine operational issues about the provisions for grant of distribution of open access through Indian Energy Exchange (IEX) in the (MERC) Open Access Regulations of 2005. Thus, in view of the above, the DG has concluded that non-grant of open access permission by MSEDCL for sourcing power through IEX cannot be considered as a case of abuse of dominance under Section 4 of the Act.

The CCI considered the DG Report and agreed with findings of DG on relevant market and dominant position of MSEDCL. The CCI noted with regard to the allegation of shutting down of four units of Koradi Thermal Plant and consequent limitation of output by MSEDCL that the aforesaid four units of Koradi Thermal Plant had rendered service for more than 35 years and had become commercially unviable and harmful to the environment.

The CCI accepted the justification offered by MSEDCL that the long term PPA was entered when the market for competitive bidding was at a nascent stage and ensuring stable and continuous supply of

electricity was the top priority. The CCI also noted that the MSEDCL only purchases 41% of its requirement from MSPGCL and the remaining 59% are procured through other sources. Lastly, the purchase price of electricity of OP 4 from power generating companies is determined by the Central/ State Electricity Regulatory Commission, as the case may be, for each year in accordance with the statutory power vested in it under the Electricity Act, 2003 and relevant regulations thereunder. Therefore, MSEDCL cannot arbitrarily impose price on the consumers in violation of the provisions of Section 4(2)(a)(ii) of the Act.

As regards denial of open access to consumers, CCI observed that in the absence of explicit provision in the aforesaid Open Access Regulations of 2005, MSEDCL was unable to grant permission for open access through IEX. However, some open access applicants approached the MERC with petition on the issue of non-grant of open access through IEX and consequently, eight applicants have been given permission for open access during the period. In view of this, the CCI was of the view that the conduct of MSEDCL regarding open access through IEX is not violative of Section 4 (2)(c) of the Act.

Thus, no case of violation of Section 4 of the Act has been made against MSEDCL. The case has been closed forthwith.

(Source: CCI decision dated April 21, 2017; For full text see CCI website)

CCI finds Coal India Limited abusing its dominant position; imposes reduced fine.

CCI by its order dated April 21, 2017 has found Coal India Limited (CIL) in violation of Section 4 of the Act by abusing its dominant position in the supply of non-coking coal to thermal power plants in India.

It may be noted that COMPAT by its order dated May 17, 2016 had set aside the earlier penalty of INR 1773 Crore passed by CCI against CIL. The penalty was set aside for alleged violation of natural justice and the matter was remanded back to the CCI. The decision of COMPAT was in our earlier Bulletin and can be read at http://competitionlawyer.in/wp-content/uploads/2015/10/CLB-36.pdf

Through the present order, the CCI has again found CIL in violation of Section 4 of the Act on similar grounds. However, a reduced penalty at the rate of 1% of the turnover has been imposed on CIL. The penalty has been reduced on account of changes done the sampling of coal during the pendency of proceedings and investigation. Pursuant to modifications in the sampling procedure made in October 2013 i.e. before the passing of the order by the CCI, CIL appointed independent third parties through an open tendering procedure with a view to bring more transparency in the sampling process. A penalty of INR 591.01 Crore has been imposed on CIL with directions to cease and desist from abusive conduct in future.

(CCI decision dated April 21, 2017; For full text see CCI website)

COMBINATION

INDIA

CCI approves acquisition in Hindustan Steel Works Construction Limited by NBCC (India) Limited

CCI by its order dated March 31, 2017 has approved acquisition of 51% shareholding in Hindustan Steel Works Construction Limited (HSCL) by NBCC.

NBCC,a Central Public Sector Enterprise (CPSE), directly and through its subsidiaries is engaged in provision of construction services and operates in segments of project management consultancy (PMC), Engineering Procurement and Construction (EPC); and real estate. NBCC has pan-India presence and the company has also undertaken projects abroad.

HSCL was initially set up to mobilize indigenous capability of putting up integrated steel plants. HSCL has now diversified into other sectors like civil construction, construction of buildings, rods, railway projects, etc. It does not have presence in overseas market.

The CCI noted that NBCC and HSCL are competitors in segment of EPC and PMC. However, the parties do not have a significant presence in any of the markets likely to be affected by the Proposed Combination and the combined entity would continue to face competitive constraints from other significant players such as Larsen and Toubro, Reliance Infrastructure, NCC Limited, Gammon, Lanco etc. Therefore, the CCI was of the view that that the proposed combination is not likely to have any appreciable adverse effect on competition in any potential relevant market in India. The combination has been approved under Section 31(1) of the Act.

(CCI decision dated March 31, 2017; For full text see CCI website)

CCI again imposes penalty for Gun jumping

Competition Commission of India ("CCI") by way of its order dated April 13, 2017 has imposed a penalty of INR 5,00,000/- (INR five lakh only) on Cairnhill CIPEF Limited ("CCL") and Cairnhill CGPE Limited ("CGL"), (CCL and CGL are collectively referred to as the "Investors") for violation of Section 43A of the Act. The combination related to the acquisition of 11 per cent of equity shares in Mankind Pharma Limited ('Mankind' or the 'Target') by the Investors i.e. 10.77 per cent from Monet Limited and 0.23 per cent from Ms. DinazKaul. Two Share Purchase Agreements ('SPAs') i.e. (i) Share Purchase Agreement dated March 31, 2015 between CCL, CGL and Monet Limited ('SPA 1'); and (ii) Share Purchase

Agreement dated April 2, 2015 between CCL, CGL and Ms. DinazKaul ('SPA 2') were executed.

The Investors had submitted that the execution of the aforesaid two SPAs, on standalone basis, would not trigger Section 6 of the Act on account of specific exemption under Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations"). Subsequently, a Shareholders Agreement was entered into amongst the Investors, Mankind and the promoters of Mankind on 06.05.2015 ("SHA"). SHA conferred certain rights on the Investors which were stated to be in the form of minority shareholders' rights and did not result in the Investors acquiring control over Mankind. Accordingly, as per the investors, the combination was stated to be covered under Item 1 of Schedule I of the Combination Regulations. The Investors submitted that the combination notice was filed out of abundant caution and that the cause of action, if any, to file the notice under sub-section (2) of Section 6 of the Act arose only on May 6, 2015 i.e. on execution of the SHA.

However, CCI observed that the combination did not fall under any of the Items in Schedule I of the Combination Regulations, more so specifically Item 1. In relation to applicability of Item 1 to the proposed combination, the Commission observed that an acquisition may be considered to be made solely as an investment if the acquirer has no intention to directly or indirectly participate in the formulation and determination of the business decisions of the target. Since, SHA entitled the Investors to appoint one director on the board of directors of Mankind and also conferred certain affirmative rights to the Investors inter alia including commencement of a new lines of business, which confers control. Thus, CCI was of the view that the acquisition of 11 per cent of equity share capital of Mankind is would not be treated as solely as an investment and hence not covered under Item 1 of Schedule I of the Combination Regulations.

The Commission further observed that the Investors did not file the notice within 30 days of signing of binding document (SPA 1) for the purposes of the Act, and instead filed it after entering into SHA, i.e. after expiry of 30 days period prescribed under sub-section (2) of Section 6 of the Act. CCI observed that the notifiability of the combination arose from the execution of SPA 1 dated March 31, 2015 and not after execution of SHA dated 19.05.2015. As per the SPAs, the execution of the SHA was a condition precedent for the closing of the combination. Therefore, in terms of Regulation 9(4) of Combination Regulations, the execution of SPAs and SHA are interconnected steps in respect of the combination. Accordingly,

filing requirement was triggered with the execution of the SPA 1 and not the SHA; therefore, the notice should have been filed within 30 days of the execution of the SPA 1.

In view of the aforesaid and observations made by the Hon'ble Supreme Court in The Chairman, SEBI v Shriram Mutual Fund and Anr., "…the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not…", . In the Instant Case, since the Investors have failed to give notice to the Commission in accordance with the provision of sub-section (2) of Section 6, which attracts penalty under Section 43A of the Act. Accordingly, in terms of Section 43A of the Act, a maximum penalty of one per cent of the combined value of worldwide assets of the parties can be imposed. However, considering the totality of the facts of the case and the submissions made by the Investors, the Commission imposed a penalty of INR 5, 00,000/- on the Investors.

(Source: CCI order dated 13.04.2017/
http://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20under%20Section%2043A%20in%20C-2015-05-276.pdf)

INTERNATIONAL

EU: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover

The European Commission has fined Facebook €110 million for providing incorrect or misleading information during the Commission's 2014 investigation under the EU Merger Regulation which obliges companies in a merger investigation to provide correct information as this is essential for the Commission to review mergers and takeovers in a timely and effective manner. This obligation applies, regardless of whether the information has an impact on the ultimate outcome of the merger assessment.

When Facebook notified the acquisition of WhatsApp in 2014, it informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. It stated this both in the notification form and in a reply to a request of information from the Commission. However, in August 2016, WhatsApp announced updates to its terms of service and

privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.

The Commission found that, contrary to Facebook's statements in the 2014 merger review process, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014, and that Facebook staff were aware of such a possibility. The clearance decision was based on a number of elements going beyond automated user matching. The Commission at the time also carried out an 'even if' assessment that assumed user matching as a possibility. The Commission therefore considers that, albeit relevant, the incorrect or misleading information provided by Facebook did not have an impact on the outcome of the clearance decision. Since Facebook committed two separate infringements by providing incorrect and misleading information in the merger notification form and in the reply to a Commission request for information. The Commission considers that these infringements are serious because they prevented it from having all relevant information for the assessment of the transaction. Moreover, the Commission considers that Facebook staff were aware of the user matching possibility and that Facebook was aware of the relevance of user matching for the Commission's assessment, and of its obligations under the Merger Regulation.

Therefore, Facebook's breach of procedural obligations was at least negligent. The Commission has also considered the existence of mitigating circumstances, notably the fact that Facebook cooperated with the Commission during the procedural infringement proceedings. In particular, in its reply to the Commission's Statement of Objections, Facebook acknowledged its infringement of the rules and waived its procedural rights to have access to the file and to an oral hearing. This allowed the Commission to conduct the investigation more efficiently. The Commission has taken Facebook's cooperation into account in setting the level of the fine. On the basis of these factors, the Commission has concluded that an overall fine of €110 million is both proportionate and deterrent. (Source: EU press release dated May 18, 2017)

EU: Commission clears acquisition of smart card maker Morpho by Advent International, subject to conditions

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of identity and security solutions provider Morpho, based in France, by Advent International of the US. The approval is conditional on the divestiture of Morpho's payment smart card business in France. Morpho is the identity and security solutions business of the Safran group. Advent International, a private equity firm, controls smart card and digital security provider Oberthur. Both Oberthur and Morpho develop and supply identification and security solutions,

including smart cards for the banking sector, telecommunication sector and identity document sector. The Commission's investigation found that in France there are currently only three viable suppliers of payment smart cards holding the necessary national certifications and production sites to effectively supply French banks. The takeover would reduce that number to only two, which would significantly reduce competition.

The Commission's investigation focused in particular on the parties' overlapping activities in smart card markets. For SIM cards and electronic ID documents (e.g. e-passports, e-ID cards, e-health cards) the Commission concluded that the merged entity would continue to face a number of credible competitors. However, the investigation found that for payment smart cards, the proposed transaction, as initially notified, would have significantly reduced competition in the market for payment smart cards in France. This market is particularly difficult to enter, reducing the ability of suppliers not currently active in France to compete effectively. The Commission found that in order to supply payment smart cards in France, manufacturers need to obtain and maintain certification for the domestic debit card scheme Cartes Bancaires (CB), on top of the global EMV certification standard. In addition, to compete effectively, suppliers must run in France a CB-certified manufacturing site for the personalisation of CB-certified cards. Based on the results of its extensive market investigation, the Commission considered that the transaction, as notified, raised serious doubts as to its compatibility with the Single Market with regard to the market for payment smart cards in France. In order to address these concerns, the parties offered to divest Morpho's French subsidiary CPS, which supplies and personalises CB-certified payment smart cards to banking customers in France. In view of the remedies proposed, the Commission concluded that the proposed transaction, as modified, would not significantly reduce competition in the European Economic Area (EEA) or any substantial part of it, including France. The Commission's decision is conditional upon full compliance with the commitments.

(Source: EU press release dated April 19 , 2017)

EU: Commission clears acquisition of sole control of ITP by Rolls-Royce, subject to conditions

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of aircraft engine components maker ITP (Spain) by aircraft engine maker Rolls-Royce (UK). The decision is conditional on Rolls-Royce eliminating a conflict of interest concerning the EPI engine consortium. Rolls-Royce, together with ITP, MTU of Germany and Safran of France, is a member of the military engine consortium EPI (Europrop International GmbH). EPI designs and manufactures the engine powering the Airbus A400M, which

competes with the Lockheed Martin C-130J aircraft, powered by a Rolls-Royce engine. The Commission had concerns that the transaction, as originally notified, would have enabled Rolls-Royce, by acquiring ITP, to obtain additional influence on the decision-making process of the EPI consortium, on matters that affect its competitiveness against the Lockheed Martin C-130J.In order to remove these concerns, Rolls-Royce offered commitments in relation to the EPI governance rules that will eliminate the conflict of interest created by the merger and ensure that the EPI consortium remains competitive. The Commission also investigated whether the relationship between ITP and Rolls-Royce raised competition concerns. In particular, the Commission examined whether the merged entity would have the ability and incentive to shut out the supply of ITP's engine components to other manufacturers of aircraft engines competing with Rolls-Royce. However, the Commission concluded that, after the merger, Rolls-Royce would have neither the ability nor the incentive to do so. The Commission concluded that the transaction, as modified by the commitments, would no longer raise competition concerns. The decision is conditional upon full compliance by Rolls-Royce with its commitments.

(Source: EU press release dated April 19 , 2017)

EU: Commission clears 21st Century Fox's proposed acquisition of Sky under EU merger rules

The European Commission has approved unconditionally under the EU Merger Regulation the proposed acquisition of Sky by Twenty-First Century Fox, a US-based diversified global media company. The Commission concluded the transaction would raise no competition concerns in Europe. The proposed transaction would combine Sky plc (Sky), the leading pay-TV operator in Austria, Germany, Ireland, Italy and the UK and Twenty-First Century Fox, Inc (Fox), one of the six major Hollywood film studios (20th Century Fox), as well as a TV channel operator (Fox, National Geographic). Fox and Sky are mainly active in different markets in the Austria, Germany, Ireland, Italy and the UK. They compete with each other only to a limited extent, mainly in the acquisition of TV content and in the wholesale supply of basic pay-TV channels. The Commission found that the proposed transaction would lead to only a limited increase in Sky's existing share of the markets for the acquisition of TV content as well as in the market for the wholesale supply of TV channels in the relevant Member States. Given that the merging companies are mainly active at different levels of the market, the Commission's assessment focused on whether, as a result of the proposed transaction:

- Fox would be able to prevent or significantly limit access by Sky's competitors to its films and other TV content, as well as to its TV channels. The Commission concluded that these possible concerns were not founded. This is because the parties' audience shares remain limited and pay-TV distributors would continue to have access to content from Fox's competitors and alternative channels with comparable programming and audiences in the relevant Member States.
- Sky would have the incentive to cease purchasing content from Fox's competitors. The Commission found that this was unlikely as it would reduce the quality of Sky's product offering.
- Sky could prevent competing channels from accessing its platform. The investigation found that the merged companies' ability to shut out Fox's rivals was significantly mitigated by existing regulations in the UK, Germany and Austria. In addition, competitors that could have been targeted for exclusion are either contractually protected for a sufficient period of time or are not dependent on Sky's retail platform in the relevant Member States.

Based on the results of its market investigation, the Commission concluded that the proposed transaction would raise no competition concerns.

(Source: EU press release dated April 7, 2017)

IV. MISCELLANEOUS

International

EU: Commission publishes final report on e-commerce sector inquiry

The European Commission's final report on the e-commerce sector inquiry identifies business practices that may restrict competition. It allows the Commission to target its enforcement of EU antitrust rules in e-commerce markets and has already prompted companies to review their practices. One of the main goals of the Commission's Digital Single Market strategy is to ensure better access for consumers and businesses to goods and services. The report presents the Commission's definitive findings, taking account of comments received on the preliminary report of September 2016 and confirming to a large extent the preliminary report's conclusions. The insight gained from the sector inquiry will enable the Commission to target EU antitrust enforcement in European e-commerce markets, which will include opening further antitrust investigations. In February 2017, the Commission already opened three separate investigations into holiday accommodation, PC video games distribution and consumer electronics pricing practices that may limit competition. Furthermore, the sector inquiry has prompted companies

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to review their commercial practices on their own initiative. This can help consumers to purchase products more easily cross-border and benefit from lower prices and a wider choice of retailers. The Commission is aware and welcomes that companies in the clothing industry –'Mango' (belonging to Punto Fa), 'Oysho' and 'Pull & Bear' (both belonging to Inditex), and 'Dorothy Perkins' and 'Topman' (both belonging to Arcadia) – but also other retail sectors (the coffee machine producer 'De Longhi' and photo equipment manufacturer 'Manfrotto) have reviewed their practices. Consistent interpretation of EU competition rules on e-commerce related practices is essential for businesses when devising their distribution strategies in the EU. On the basis of the sector inquiry findings, the Commission will broaden the dialogue with national competition authorities within the 'European Competition Network' on e-commerce-related enforcement to achieve this. More enforcement by the Commission will also provide guidance to stakeholders on specific e-commerce related practices.

(Source: EU press release dated May 10, 2017)

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