Competition News Bulletin

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Inside...

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

CCI finds Container Trailer Owners Coordination Commission and its four participating associations guilty of anticompetitive conduct

The Competition Commission of India ("CCI") vide dated 01.08.2017 has found Container Trailer Owners Coordination Committee ('Committee') and its four participating associations , namely Cochin Container Carrier Owners Welfare Association, Vallarpadam Trailer Owners Association, Kerala Container Carrier Owners Association and Island Container Carrier Owners Association (collectively 'OPs') guilty of anti-competitive conduct and has directed the erring OPs to desist from indulging in anti-competitive conduct in the future.

Cochin Port Trust in a reference made to the CCI had primarily alleged that the imposition of a 'Turn System' by the Committee from January, 2014 till September, 2014 led to the unilateral fixation of prices. It was alleged that during the Turn System, the users and container trailers were obliged to book services only through this centrally controlled system and that the Committee was restraining outside transporters from lifting the containers which was impeding the ability of the users to hire trailers of their choice. Reliance in this regard was placed on the circular dated January 13, 2014 which was issued by OP-1 to all the members of the transporters' association. On finding a prima facie case, the CCI directed investigation by the Director General ("DG").

The DG upon investigation found that the 'Turn System' imposed by the OPs not only unilaterally fixed the prices for coastal container services, but also led to limiting and controlling of such services at the Informant port in contravention of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Competition Act ('Act').

During the inquiry CCI noted that the OPs had not denied the existence of "Turn System" And rather it was sought to be justified on the basis that Firstly, it was not coercive or mandatory in nature. However, the CCI rejected the arguments holding that a mutually agreed upon collusive agreement is as much a contravention, if not more, as a coercive diktat imposed by a trade association.

Secondly, the OPs stated that the prevailing conditions during the period such as (i) under-quotation by certain container trailer owners. (ii) delay in payment by users of the container trailer transport services justified the imposition of the Turn System.

The CCI held that the first issue i.e. under quotation by certain container trailer owners is rather an outcome of a competitive market and that the said justification is rather antithetic to the basic principles of a competitive market. The second issue/justification given by the OPs that some of the users/consumers were delaying payments to the container trailer transporters and thus, to ensure timely payments, Turn System was adopted was also rejected being insufficient to justify the solution devised by the OPs. It was held that fixing prices under the newly introduced Turn System to ensure timely payment of transportation charges was, to say the least, an excessively restrictive remedy to meet the objective stated by the OPs.

Accordingly, the OPs were found to have indulged in price fixing in terms of Section 3(3)(a) read with Section 3(1) of the Act.

With regard to the allegation of limiting and controlling the services in contravention of Section 3(3)(b) of the Act, it was found that the total number of container trailers to which the users had access to was 900 (approx.) out of which 800 were owned by the OPs. However, the CCI noted that there was insufficient evidence to show that the remaining 100 trailers were denied an opportunity to operate in the Informant port. Further, there was no evidence to suggest that membership was denied to any of the transport operator or that the non-members were restricted to provide services to the users willing to avail the services of the independent trailers. Thus, the CCI noted that there was insufficient evidence to hold a contravention of Section 3(3)(b) read with Section 3(1) of the Act.

With regard to the imposition of penalty, the CCI was of the view that certain mitigating circumstances existed in favour of OPs in the present case namely that the Turn System, was in operation for a very limited time period, i.e. from January 2014 to September 2014 and the Turn System was discontinued even before the investigation was ordered in this case. Therefore, the CCI did not impose any penalty on the OPs and merely issued a direction to OPs to cease and desist from indulging in such anti-competitive conduct in future.

(Source: CCI decision dated August 1, 2017; for full text see CCI website)

CCI penalizes Hyundai for resale price maintenance and tie-in

The CCI vide its order dated June 14, 2017 imposed a penalty of INR 87 Crore (Rupees Eighty Seven Crores) on Hyundai Motor India Limited ('HMIL') for contravention of Section 3(4) read with Section 3(1) of the Act.

The Information before the CCI was filed by Fx Enterprise Solutions India Pvt. Ltd and St. Antony's Cars Pvt. Ltd., both dealers of HMIL in Case No. 36 of 2014 and Case No. 82 of 2014 respectively. It was inter alia alleged that the HMIL enters into exclusive dealership arrangements with its dealers and that HMIL also imposes a "Discount Control Mechanism". It was further alleged that HMIL has control over the sources of supply for the dealer's products and ties the purchase of desired cars to the sale of high-priced and unwanted cars to its dealers and that HMIL designates sources of supply for complementary goods for dealers as well which constitute a "tie-in" arrangement within the meaning of Section 3(3) of the Act. The case was referred by CCI to the DG for detailed investigation after CCI found a prima facie case for inquiry.

During the investigation, the DG identified 3 segments of automobile market, viz. : (a) the primary market consisting of manufacturing and sale of passenger cars, (b) the secondary market or aftermarket for each brand of spare parts and (c) an aftermarket for each brand of repair services and defined it as "after sales services of Hyundai brand of cars" . The DG found that HMIL was dominant with 100% market share in the aftermarket for after sales services of Hyundai brand of cars. DG then identified the following three types of anti-competitive vertical agreements. The findings of DG on each and the decision of CCI thereupon are explained below:

i) Exclusive Supply Agreement and Refusal to Deal:

DG findings - DG found that that Clause 5(iii) of the Dealership Agreement providing for permission to be obtained from HMIL before investing in new business amounted to an 'exclusive supply arrangement" in contravention of section 3(4)(b) and also as "refusal to deal' in contravention of section 3(4)(d) of the Act.

CCI decision – CCI held that the clause 5(iii) of the Dealership Agreement does not result in imposition of de facto exclusivity since HMIL does not, in practice, refuse such permission to its dealers to operate competing dealerships or other businesses. It was found that neither of the informants in both the cases ever asked for such a permission under this clause. Moreover, HMIL submitted a list of over 100 Hyundai dealerships that operate dealerships of competing brands. Hence, it was concluded that HMIL does not impose an exclusive supply obligation or refusal to deal on its dealers. It was held that Clause 5(iii) of the Agreement did not mandate exclusivity but only required the prior permission of the OP in order for dealers to operate competing dealerships and therefore it does not contravene section 3(4)(b) or section 3(4)(d) of the Act.

ii) Resale Price Maintenance [Section 3(4)(e)]

DG findings – DG found that HMIL has established and admitted "Discount Control Mechanism" by which the maximum discount which a dealer can offer to its end customers is maintained. DG found that HMIL itself maintains certain scheme through which various discounts are offered to the customers such as Diwali discounts or schemes for teachers. It was found that the maximum discount which can be offered by a dealer under the schemes launched by HMIL itself was also fixed by HMIL. Further during investigation, HMIL also admitted to have engage various mystery shopping agencies for policing its dealers and monitoring the abovementioned arrangements and where a dealer was found to be debiting from the discount control mechanism, HMIL imposes a penalty per violation of INR 2.0 lakhs upto a maximum of INR 80 Lakhs for the 6th violations. These penalties were to be deposited by the violating dealers in the name of its advertising agency (VIBGYOR). DG, therefore, found that through its discount control mechanism, HMIL maintained the resale price of Hyundai cars and these arrangements perpetuated the OP restricting intra-brand competition amongst Hyundai Dealers. This does not result in accrual of any consumer benefits and at the same time impairs the ability of dealers to compete in price competition. Therefore, DG concluded that HMIL contravene section 3(4)(e) of the Act for resale price maintenance.

CCI decision – CCI agreeing with the findings to the DG held that such arrangements resulted in denial of due benefits to the consumers as they were made to pay high prices. Further, they were not resulting into any improvements in production or distribution of goods or provision of services. The arrangements perpetuated by HMIL resulted in creation of barriers to new entrants in the market and restricted the ability of the dealers toengage in intra-brand price competition. Accordingly, the CCI held that HMIL has imposed an arrangement that results in Resale Price Maintenance, which includes monitoring of the maximum permissible discount level through a “Discount Control Mechanism” and a penalty punishment mechanism upon non-compliance of the discount scheme. It was accordingly held that HMIL contravened the provisions of section 3(4)(e) read with section 3(1) of the Act.

iii) Tie-in arrangement [Section 3(4)(a)]

DG findings – DG found that HMIL tied the sale of its cars to its dealers with the purchase of (a) CNG kits, (b) Lubricants and Oils, and (c) Car Insurance which result in “Tie-in” arrangement in violation of section 3(4) (a) read with section 3(1) of the Act.

Regarding (a)-DG concluded that dealers of HMIL and its customers are coerced in to purchasing CNG kits from its nominated CEV Engineering Pvt Ltd. (“CEV”). Dealers found selling Hyundai cars which are not fitted with CEV provided CNG kits were penalized and customers not obtaining a CNG kit from CEV were not provided with a warranty. Such an arrangement falls within the definition of “tie-in” arrangement and violated section 3(4) (a) of the Act.

Regarding (b)- DG found that HMIL has designated vendors for engines of its vehicles and mandates its dealers to purchase engine oil only from 2 designated vendors i.e. Indian Oil Corporation Limited (IOCL) and Shell Oil Company (Shell) and it recommended engine oil; of certain specification to be only used for its cars as “Hyundai genuine oil”. DG found that this practice followed by HMIL to get lubricants supplied by IOCL and Shell only and that too at a pre fixed price resulted in price discrimination which did not accrue any benefit to the dealers as well as to the customers and that this practice was causing hindrance in the improvement of production or distribution of goods and provision of services in relation to supply and use of lubricants in the cars particularly, when other oil companies are also manufacturing and marketing same grade of lubricants. Such an arrangement falls within the definition of “tie-in” arrangement and violated section 3(4)(a) of the Act.

Regarding (c)- DG found that HMIL has entered into memorandum of understanding with an insurance broker, ABIBL, which in turn has an agreement with 6 insurance companies namely ICICI Lombard, HDFC Ergo, New India, Future Generali, Bharti Axa and Bajaj Allianz for selling insurance policies and restricted its dealers by issuing bulletins and circulars to offer insurance services of only these 6 selected companies to its customers. DG found that this resulted in the dealers and the end consumers getting "locked in" with the OP for fear of termination of agency. Such an arrangement falls within the definition of "tie-in" arrangement and violated section 3(4)(a) of the Act.

DG however, did not find any contravention of tie-in with respect to the allegation of selling non-premium segment cars with premium segment cars.

CCI decision - Regarding (a)- CCI did not agree with the DG findings and held that HMIL may have a legitimate interest in ensuring that alternative brands of CNG kits are not used as the OP would be bearing the cost of warranty. Accordingly, it was held that cancellation of warranty upon use of non- CEV CNG kits does not as a general rule amounted to contravention of section 3(4) (a) read with section 3(1) of the Act.

Regarding (b) - CCI agreed with the finding of the DG and held that the practice followed by the OP resulted in to creation of entry barriers for new entrants in the market with regard to the supply and marketing of lubricants for use in the cars manufactured by HMIL. Such arrangement are also against consumer welfare as the consumer are made to comparably a higher prices and are also denied freedom to make fair choices. Accordingly, it was held that this practice of HMIL mandating its dealers to use a particular brands of oil / lubricants and penalizing the dealers where non-recommended oils are used amounted to "tie-in" arrangement in contravention of section 3(4)(a) read with section 3(1) of the Act.

Regarding (c) –CCI did not agree with the DG findings as it noted that there was no clause in the dealership agreement that dictated that the informant could take up dealership only on the condition of that the deal with only the list of empaneled insurance companies. Further, there was no record to show that any dealership has been cancelled only because the dealer failed to get the customers to take up insurance of the listed companies only. According to CCI, mere recommendation that dealers consider / suggest the insurance companies partnered with OP does not amount to tie-in arrangement and held that this practice did not amount to contravention of section 3(4) (a) read with section 3(1) of the Act.

Further, with to the allegation of selling non-premium segment cars with premium segment cars, CCI agreed with DG findings.

The CCI while imposing penalty followed the decision of the Hon'ble Supreme Court in the Excel Corp caseand therefore penalty was imposed on the "relevant turnover". Accordingly, a penalty of 0.3% of the "Relevant Turnover" was imposed on HMIL amounting to INR 87 Crores.

(Source: CCI decision dated June 14, 2017; for full text see CCI website)

CCI closes case against the producers and presenters of 'Kahaani-2' with respect to alleged anti-competitive agreement

CCI vide its order dated June 21, 2017dismissed allegations of contravention of Section 3 and 4 of the Act against Pen India Ltd., Bound Script Motion Pictures Pvt. Ltd., UFO Moviez India Ltd. and Real Image Media Technologies Pvt. Ltd ('OPs').

Pen India Ltd. and Bound Script Motion Pictures Pvt. Ltd. are the producers and presenters of the movie 'Kahaani-2' and UFO Moviez India Ltd. and Real Image Media Technologies Pvt. Ltd. are digital cinema service providers (DCSPs) in India. The Informant is engaged in the business of digital cinema exhibition services involving digital projection and screening of films in India.

The Informant had alleged that the producers of 'Kahaani-2' and DCSPs had entered into an anti-competitive agreement to limit/ control the release of the movie and has denied the access of the movie to other DCSPs operating in the market. It was alleged that the aforesaid conduct of the OPs resulted in a tie-in arrangement, exclusive supply agreement and refusal to deal in contravention of the provisions of the Act.

In addition to the legal defences available regarding the inapplicability of Section 3(3) of the Act, the OPs also relied on a news article which reported that an FIR had been registered by the film producer (Viacom18) of the movie 'Force 2' against the Informant for online piracy.

The CCI observed that the Informant had not refuted the abovementioned allegations and it would have been counterintuitive for the producers to provide the content of 'Kahaani-2' to the complainant which was released within two weeks after the incident of piracy. The CCI further observed that the producers of the movie have a copyright over the content created by them and in view of the law laid down under Section 3(5)(i)(a) of the Act, had a right to take suitable measures to protect their property from being exploited illegally in the market. Further, the producers, availing the services of DCSP as a consumer, had the right to decide the digital cinema service providers of their choice to distribute their movies.

Thus, the CCI observed that the conduct of the opposite parties did not appear to be unreasonable and anti-competitive and thus closed the case against them.

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

INTERNATIONAL

EU: Car lighting system producers fined €27 million in cartel settlement

The European Commission ("Commission") imposed penalty totaling €26.744 million on Automotive Lighting and Hella for participating in an automotive lighting cartel.

The investigation initiated by the Commission concerned the aftermarket segment for the supply of spare parts to the original equipment manufacturer or their authorized service networks for passenger and commercial vehicles in relation to the supply of these spare parts to manufacturers of passenger and commercial vehicles after the end of mass production of a car model.

The Commission's investigation revealed that for more than three years, Automotive Lighting, Hella and Valeo coordinated prices and other trading conditions for the supply of vehicle lighting systems, across the European Economic Area.

The three companies met, mainly bilaterally, at trade fairs, on the margins of supplier days organized by customers, during customer visits, but also independently of such events where the companies discussed quotes for tenders and negotiation strategies and exchanged information on the status of negotiations with customers regarding price increases, as well as other information. Moreover, it was agreed between the parties that they should aim for a price increase on spare parts after the end of mass production of specific car models, and coordinated the duration by which they would end contractual availability of the spare parts in question.

The Commission took into account the companies' sales generated in the EEA from the supply of spare automotive lighting systems to the manufacturers of passenger and commercial vehicles after the end of mass production of a car model for imposition of penalty.

Veleo received full immunity for revealing the existence of the cartel, thereby avoiding a fine of more than €30.5 million while Automotive Lighting and Hella benefitted from reductions of their fines for their cooperation with the investigation. Additionally, in view of the Commission's 2008 Settlement notice, the Commission applied a reduction of 10% of the fines imposed in view of the parties' acknowledgement of their participation in the cartel and their liability to that respect.

(Source: EU press release dated 21 June, 2017)

ABUSE OF DOMINANT POSITION/MARKET POWER

INDIA

CCI closes case of alleged abuse of dominance by ANI Technologies Pvt. Ltd. (OLA)

The CCI vide order dated July 19, 2017 closed the case of alleged abuse of dominant position by OLA.

The complaint against OLA was filed by Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd. under Section 19(1) (a) of the Competition Act, 2002 in Case No. 06 of 2015 and Case No. 74 of 2015 respectively . Since the allegations were similar in both the cases, the CCI decided to club the matters for the purposes of investigation and final disposal.

The main allegation of the Informants in both the cases was that OP has abused its dominant position in the relevant market by offering heavy discounts to the passengers and incentives to the cab drivers associated with it, amounting to predatory pricing under Section 4(2)(a)(ii) of the Act. The CCI, based on the high market share of OP, was prima facie of the view that OP held a dominant position in the market for 'radio taxi services in the city of Bengaluru' and that it was abusing its dominant position. Vide order dated April 24, 2015, the CCI directed the Director General (DG) to conduct detailed investigation into the matter.

The DG upon investigation concluded that OP is not in a dominant position in the relevant market and that in the absence of a dominant position, the question of abuse would not arise.

The Informants, however, challenged the findings of the DG inter alia on the grounds that OLA held a high market share in the relevant market throughout the period of investigation. It was contented that a market share of more than 50% of an entity creates a presumption of dominance. The CCI, however, held that market share is merely one of the indicators of dominance enshrined in Section 19(4) of the Act and that the same cannot be seen in isolation. It was observed that high market shares particularly in the case of new-economy/hi-tech markets may turn out to be temporary, particularly in the early years of introduction of a new technology. Moreover, the concept of dominance being linked to the ability of a firm to be able to behave independent of competition was not found here due to the entry of Uber in the said market, which, provided enough competitive constraint on OLA.The CCI held that the emphasis of Section 19(4) of the Act is on the size and importance of the competitors, rather than the market share of the competitors.

With regard to network effects, the CCI observed that the absence of switching costs between different networks in the relevant market limits the constraints exerted by the established networks on newer entrants. Thus, in the present case, network effects do not seem to affect entry or expansion by the players equipped with strategies capable of attracting drivers/riders to new networks. It was also alleged by the informant that both Uber and OLA can held to be dominant in the relevant market, to which, the CCI held that there is no scope in the present scheme of the Act, either expressly or by implication, to contemplate the presence of two independent entities as dominant at the same time in the relevant market.

On the issue of high barriers to entry posed by network effects in the platform-based business model of OLA, the CCI acknowledged the fact that in two-sided markets, network effects may enable a large platform/network to become dominant and insulate itself from potential competition on account of potential new entrants finding it difficult to challenge the entrenched incumbent.

However, in the present case, the CCI observed that both Uber and OLA were found to be aggressively competing with each other to attract participants' i.e. drivers and riders on either side. It was observed that despite OLA having the largest network, the network effect was not strong enough to deter entry and rapid expansion of Uber. Further, it was observed that there are no significant costs preventing consumers from switching between different radio taxi apps due to "multi homing" capabilities in any smart phone. As per the CCI, the absence of switching costs between different networks in the relevant market limits the constraints exerted by the established network on new entrants.

Significantly, the CCI noted that competition in the relevant market is still unfolding and the market still has not "tipped" in favor of the OLA as claimed by the Informants. The CCI also differentiated the present platform based model in the radio taxi market and observed that as opposed to the erstwhile asset/ownership based models , platform based players find it easier to enter the market than traditional entrants given the reduced upfront costs of starting a business.

With respect to the contention that conduct of predatory pricing itself is an evidence of dominance, the CCI observed that new entrants to a market commonly engage in practices such as below cost pricing, loyalty discounts etc. to gain a toehold in the market and holding them dominant based on simple observation of conduct may have the undesirable result of chilling competition.

The CCI also analyzed the pricing strategies adopted by different players in the market and held that the pricing strategy adopted by OLA seems to be a reactive strategy to Uber's aggressive pricing. Additionally, the financial losses incurred by Uber in the market remained substantially higher than OLA's which as per the CCI was indicative of the competitive constraint put by Uber on the OP in the relevant market.

Further, the CCI disagreed with the Informants' allegation that the low prices of OP was not because of cost efficiency, but because of the funding received from private equity players on the ground of insufficient evidence. The CCI held that there is no evidence that the access to such funding was inequitable and that the market for financing was not competitive.

Lastly, the CCI marked its reluctance to intervene in a market which had yet to evolve fully. It was noted that the premature interference of the competition regulator in a nascent market situation may be counter-productive.

(Source: CCI decision dated July 19, 2017; for full text see CCI website).

Comments: *This order is significant as it revives the debate between traditional taxi services and the App based taxi service providers. Admittedly radio taxi market in India, like in other parts of the world, is a dynamic market under going through a phase of "disruptive innovation" .This order denotes evolving use of economic analysis and better understanding of market realities by CCI while analyzing the growing complaints against innovative business models such as those used by the online taxi aggregators. The final outcome is, however, debatable since an earlier order of CCI closing a similar complaint filed by Meru Travels against Uber was set aside by COMPAT vide its order dated December 07, 2016 and investigation was ordered to be conducted against the alleged dominant position held by Uber. However, the COMPAT decision has been challenged by Uber in the Supreme Court where the matter is still pending.*

CCI closes allegation of abuse of dominance against Sanofi

SANOFI

CCI vide its order dated July 19, 2017 has closed an allegation of abuse of dominant position against Sanofi India Limited (Sanofi). The Informant in the case sought confidentiality of his identity and hence was not named.

The Informant had alleged abuse of dominant position by Sanofi due to its practices of inter alia making irregular supply of medicine under the garb of various formalities and documents, demanding documents, such as, Third Party Due Diligence (TPDD) carried out by independent agency etc.

The Informant had stated that TPDD was not followed by any similar global companies and therefore the process of TPDD was unfair and in contravention on the Act. Sanofi stated that it had a comprehensive evaluation process for the appointment of distributors involving verification of retail coverage, financial strength, cold chain infrastructure and TPDD which are necessary formalities required before appointing a distributor.

In order to examine the allegation of abuse of dominant position by Sanofi, the CCI first examined the market data provided by Industrial Outlook, CMIE to determine whether Sanofi was dominant in the relevant market. Without defining the relevant market CCI observed that there were more than 200 companies in India in the business of drugs & pharmaceutical products and in terms of market share Sanofi was at the 18th place with 1.08 percent market share. Further the CCI stated that apart from Sanofi there were a number of reputed firms having greater market share and goodwill in the market, such as, Cipla Ltd., Dr. Reddy's Laboratories Ltd., Sun Pharmaceutical Inds. Ltd., Glenmark Pharmaceuticals Ltd., Torrent Pharmaceuticals Ltd., Sun Pharma Laboratories Ltd., etc.

Since it was found prima facie that Sanofi did not enjoy a dominant position it was held that there was no prima facie case to investigate the alleged abusive conduct of Sanofi. Accordingly, CCI closed this case under section 26(2) of the Act.

(Source: CCI decision dated July 19, 2017; for full text see CCI website).

CCI closes allegations of abuse of dominance against Reliance Jio

CCI vide its orders dated June 9, 2017 and June 15, 2017 closed allegations of abuse of dominant position against Reliance Jio Infocomm Limited (RJIL). The Informant in the first case was Bharti Airtel Limited (Airtel) and the Informants in the second case were two individuals C. Shanmugam and Manish Gandhi.

It was alleged that the free services being offered by RJIL since the inception of its business under one offer or the other amounted to predatory pricing. It was also alleged that Reliance (RIL) used its financial strength in other markets to enter into the telecom market through RJIL in contravention of the provisions of Section 4(2)(a)(ii) of the Act.

In order to examine the allegations, the CCI deemed it appropriate to first determine whether RJIL was dominant in the relevant market i.e. the market for 'provision of wireless telecommunication services to end users in each of the 22 circles in India'.

The CCI in this respect observed that the market is characterized by the presence of several players resulting in sufficient choice to consumers who can shift from one service provider to another and that too with ease and hence the dependence of consumers on any single telecom operator is not of any significant extent. Against this background, it is difficult to construe dominant position being possessed by Jio with 6.4% market share.

It was also alleged that RJIL has unfettered access to the funds of RIL and hence the huge amount of investments put them in a dominant position. The CCI in this respect noted that financial strength is a relevant factor but not the sole factor to determine dominant position of an enterprise, especially considering the comparable investments and financial strengths of its competitors. Also, the short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature and as such cannot be a subject matter of investigation under the Act.

With respect to the second allegation the CCI observed that the Informant did not give any plausible explanation as to how the impugned free services were an outcome of unilateral conduct of RIL. Further, mere investments cannot be regarded as leverage of dominant position, particularly when RIL itself is not engaged in business of providing telecom services. If one were to construe such investment as anti-competitive, the same would deter entry and/or expansion and limit the growth of markets.

Based on the above, CCI found that RJIL did not enjoy a dominant position and that there was no prima facie case to investigate the alleged conduct of RJIL.

(Source: CCI decisions dated June 9, 2017 and June 15, 2017; For full text see CCI website).

CCI closes allegation of abuse of dominance against the Bureau of Indian Standards

CCI vide its recent order dated June 29, 2017 has closed an allegation of abuse of dominant position against the Bureau of Indian Standards (BIS)and the Department of Consumer Affairs, Food and Public Distribution. The complaint was filed by an individual Shree Prem Prakash who is the Proprietor of Venus Testing and Research Laboratory in Madhya Pradesh.

The Informant stated that BIS had imposed a condition through its scheme called Laboratory Recognition Scheme (LRS) that a laboratory seeking recognition should have an accreditation to IS/ISO/IEC-17025 or ISO-IEC-17025 in the respective field of testing and also that the accreditation body should be a full member of Asia Pacific Laboratory Accreditation Corporation (APLAC) and/or International Laboratory Accreditation Corporation (ILAC).

The Informant had alleged that the imposition of such a condition amounted to abuse of dominant position by BIS and it was an unfair condition as it excluded other laboratories from providing their services to BIS.

In order to examine whether the conduct of BIS amounted to abuse of dominant position, the CCI first determined whether BIS fell within the definition of the term "enterprise" in terms of Section 2(h) of the Act. In this regard, the nature of the activity undertaken by BIS was examined and it was held that the activity under consideration did not seem to be an economic activity as envisaged under the Act. The CCI also noted that no specific allegation of abuse of dominant position was made against Department of Consumer Affairs, Food and Public Distribution.

It was also noted that BIS was a statutory body established under the BIS Act with the objective of harmonious development of the activities of standardization, marking and quality certification of goods and that BIS prescribed the condition in the scheme in order to ensure quality in laboratory testing services by outside laboratories and hence carried out the activity under the mandate vested in it under the BIS Act. The CCI further stated that the fact that whether BIS acted within the scope of the BIS Act or not is not an issue for the CCI to determine.

With respect to the issue of exclusion of other the commission noted that mere exclusion of some laboratories due to the criteria prescribed by BIS does not make the condition anticompetitive as the purpose was to maintain a particular level of quality in services to the end consumers.

Based on the above, CCI found that there was no prima facie case to investigate the alleged conduct of BIS and hence it closed the case against it.

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

CCI closes allegation of abuse of dominance against Singareni Collieries Company Ltd.

The CCI vide its order dated June 12, 2017 has closed an allegation of abuse of dominant position against Singareni Collieries Company Limited (SCCL) in an information filed by Karnataka Power Corporation Limited (KPCL).

Singareni Collieries Company Limited is a coal producing company engaged in mining and distribution of coal and is jointly controlled and managed by the Government of Telangana and the Government of India. KPCL is a Government Company owned and controlled by the Government of Karnataka and is engaged in the business of generating electrical power in Karnataka and it requires non-coking coal every day for power generation.

It was alleged by KPCL that that there was a vast difference in the gross calorific value (GCV) of coal received as compared to the billing grade supplied by SCCL and that it also received boulders, shale and other foreign materials in the rakes delivered to it which caused damage to the machinery of KPCL which was alleged as an abuse of dominant position by SCCL.

The CCI delineated the relevant market in the present case as the "market for production and sale of non-coking coal to thermal power generators in India".

In order to determine the issue in the present case, the CCI referred to its decisions in (i.e. Case Nos.03, 11 & 59 of 2012) decided on March 24, 2017 where it had dealt with a similar set of facts wherein it was held that Coal India Limited (CIL) through its subsidiaries operate independently of market forces and enjoys a dominant position in the market. It was also held that SCCL produces a meagre amount of non-coking coal in the relevant market as defined by it and is therefore not dominant in the relevant market. It was accordingly held that the question of abuse of dominant position does not arise. It was also observed that the dispute in the case appeared to be a commercial in nature and therefore the remedies of the Informant lay elsewhere.

Since SCCL did not enjoy a dominant position in the relevant market, the CCI closed the matter as there was no prima facie case to investigate the alleged conduct of SCCL.

(Source: CCI decision dated June 12, 2017; for full text see CCI website).

INTERNATIONAL

EU: Commission fines Google €2.42 billion for abusing its dominant position as a search engine

The European Commission has fined Google €2.42 billion for abusing its dominant position as a search engine, by giving an illegal advantage to another Google product, its comparison shopping service.

Google's flagship product is the Google search engine, which provides search results to consumers, who pay for the service with their data. Almost 90% of Google's revenues stem from advertisements such as those which are showed to consumers in response to a search query.

In the year 2004, Google entered the market of comparison shopping in Europe, with a product called "Froogle" which was re-named "Google Product Search" in 2008. Since 2013, it has been called "Google Shopping". It allows consumers to compare products and prices online and find preferable deals from online retailers, platforms (including Amazon and eBay) and other re-sellers.

When Google entered the comparison shopping market through Froogle, there were already a number of established players. Evidence gathered from Google reveals that it was aware that Froogle's market performance was relatively poor. Comparison shopping services rely extensively on traffic to be competitive. More traffic leads to more clicks which in turn generates revenue. More traffic also attract retailers who want to list their products with a comparison shopping service. Since Google is dominant in the general internet search, its search engine is an important source of traffic for comparison shopping services.

From the year 2008 onwards, rather than competing on merits in the comparison shopping market, Google began to implement a strategy in European markets to push its comparison shopping service, by relying on Google's dominance in general internet search.

The strategy involved:

- **Systematically giving placement to its own comparison shopping service:**

  Upon a consumer entering a query into the Google search engine in relation to which Google's comparison shopping service wants to show results, these are displayed at or near the top of the search results.

- **Demoting rival comparison shopping services in its search results:**

  Google's search results are shown on the basis of Google's generic search algorithms which were favorably modified by Google to demote rival comparison shopping services. Even the most highly ranked rival appears on an average only on page four of Google's search results and others appear even further down. However, Google's own shopping service was not subject to Google's generic search algorithms, including such demotions.

As a result of the strategy adopted by Google, its comparison shopping service became far more visible to consumers in Google's search result compared to rival comparison shopping services. The evidence gathered by the European Commission revealed that consumers click far more often on results that are more visible. Consequently, by giving prominent placement to its own comparison shopping service and by demoting competitors, Google gave its own comparison shopping service a significant advantage compared to its rivals.

As a result of Google's illegal practice, rivals suffered substantial losses of traffic on a lasting basis while Google's comparison shopping service increased its traffic multifold. Google's practices stifled competition on merits in the comparison shopping markets, thereby depriving European consumers of genuine choice and innovation.

The fine of €2,424,495,000 imposed on Google has been calculated on the basis of the value of Google's revenue from the 13 EEA countries concerned. Further, the Commission ordered Google to comply with the principle of giving equal treatment to rival comparison shopping services and its own service.

(Source: EU press release dated 27 June, 2017)

III. COMBINATION

INDIA

India: CCI approves combination of Bharti Airtel and Telenor

The CCI vide its order dated 30 May, 2017 has approved the amalgamation of Telenor India along with its assets, liabilities, interests and obligations with Airtel through a court driven scheme of merger.

Airtel, a part of the Bharti Enterprises Group is a publicly traded global telecommunications corporation with operations in 17 countries across Asia and Africa. It is engaged in the provision of various B2B and B2C telecommunication services. Airtel provides mobile telephony services in all telecom services in India.

Telenor India provides telecommunication services in seven telecom circles in India.

The CCI on the basis of the product overlaps between the parties in India identified three product segments (i) retail mobile telephony services (ii) NLD (National Long Distance Services) and (iii) ILD (International Long Distance Services) and undertook a competition analysis of each of the sectors.

The CCI noted that although there are eight telecom operators in all the overlapping circles including the parties, the retail mobile telephony services market is concentrated. As regards the specific impact of the Proposed Combination on the level of concentration, the CCI observed that the incremental market shares range from 3.80 percent in Andhra Pradesh to 9.70 percent in Uttar Pradesh (West) and incremental HHIs range from 243 in Gujarat to 770 in Bihar which may be considered as significant. The combined market sharesof the Parties range from around 24 percent in Gujarat to around 57 percent in Bihar. The CCI noted that the combined market shares are also on a higher side in the markets of Andhra Pradesh (46 percent), Uttar Pradesh East (39 percent) and Uttar Pradesh (West) (31 percent).

The CCI noted that the issue of market shares is also dealt by the guidelines for transfer/merger of service licences on compromises, arrangement and amalgamation of companies, issued by Ministry of Communications and Information Technology, Government of India in 2014 ("DoT Merger Guidelines"). As per the DoT Merger Guidelines, in case of merger or acquisition or amalgamation proposals that result in market share in any service area exceeding 50 percent, the resultant entity should reduce its market shares to the limit of 50 percent within a period of one year from the date of approval of merger or acquisition or amalgamation. If the resultant entry fails to reduce its market share to the limit of 50 percent within the specified one year, then suitable action shall be taken by the licensor. The CCI observed that the market share in Bihar telecom circle would be impacted by the DoT Merger Guidelines and that an undertaking has been submitted by Airtel regarding its compliance with the prescribed market shares as per the said guidelines.

An assessment of the proposed combinations on the basis of the factors contained in Section 20(4) of the Act was also undertaken by the CCI.

The CCI in this regard analysed the product offering, range of products and financial strength of Telenor and concluded that Telenor is neither a close competitor nor an effective competitor of Airtel. Accordingly, the CCI held that that the combination is not likely to result in substantial change in competition dynamics in retail mobile telephony services in any of the overlapping telecom circles and accordingly does not raise unilateral or coordinated effects concerns.

With regard to NLD and ILD services, it was observed that on account of the presence of other players, Airtel is not likely to have the ability and incentive to restrict the supply services and cause any competition concern.

Further, it was observed that Telenor India is not active in the market for provision of passive infrastructure services and wholesale data services.

Thus, the CCI opined that the proposed combination was not likely to cause an appreciable adverse effect on competition in India and approved the same under Section 31(1) of the Act.

(Source: CCI decision dated May 30, 2017; for full text see CCI website).

INTERNATIONAL

EU: Commission approves acquisition of Opel by Peugeot

The Commission approved the acquisition of the assets and shareholdings of Opel by Peugeot S.A following which Peugeot S.A acquired sole control over the whole of Opel.

Peugeot makes and sells passenger vehicles and light commercial vehicles worldwide under the brand names Peugeot, Citroen and DS. Opel presently controlled by General Motors, makes passenger vehicles and light commercial vehicles under the brand names Opel and Vauxhall.

Both the parties to the concentration are active in the market for manufacture of passenger vehicles and light commercial vehicles. The Commission looked at the impact of the transaction on the automobile markets at both the European and national level particularly in the market for manufacture and sale of motor vehicles and the wholesale and retail distribution markets.

It was observed by the Commission that the combined market share of the two companies were relatively small in the relevant markets, crossing 40% market share in only two national markets (Estonia and Portugal) for small commercial vehicles, but with an increase of less than 5% in both these markets. In other affected markets, the market shares of the entities remain small. The investigation also revealed that the merged entity shall still face strong competition from manufacturers such as Renault, Volkswagen, Daimler, Ford, Fiat and various Asian competitors.

With respect to the wholesale and distribution markets, the Commission ruled out the possibility of the transaction having a detrimental effect because of the different distribution channels used by PSA and Opel and the presence of independent distributors, importers and retailers.

(Source: EU press release dated 21 June, 2017)

EU Mergers: Commission opens in-depth investigation into Qualcomm's proposed acquisition of NXP

The proposed transaction involves the acquisition of the whole of NXP by Qualcomm, who are presently the two leading players in the semiconductor industry.

Qualcomm is a leading semiconductor company, which develops and supplies integrated circuits for mobile devices, notably cellular baseband chips. NXP Semiconductors manufactures and sells different categories of semiconductors, including semiconductors for the automotive sector and semiconductors for the mobile device sector, notably NFC solutions.

The Commission's initial market investigation raised several issues particularly in relation to semiconductors used in mobile devices, such as smartphones and in the automotive industry. The Commission was concerned that:

a) The merged entity would hold strong market positions within both baseband chipsets and NFC/SE chips, and would have the ability and incentive to exclude their rival suppliers from these markets through practices such as bundling or tying.

b) The merged entity would have the ability and incentive to modify NXP's current intellectual property licensing practices, in particular in relation to NFC technology, including by bundling the acquired NFC intellectual property to Qualcomm's patent portfolio. The conduct could lead to anticompetitive effects, such as increased royalties for customers and/or exclusion of competitors.

c) The merger would eliminate competition between companies active in the market for semiconductors used in the automotive sector and, in particular, in the emerging vehicle-to-everything technology which will play a role in the future development of "connected cars".

In view of the said concerns, a detailed investigation was ordered by the Commission. The transaction was notified to the Commission on 28 April, 2017. The Commission now has 90 working days, until 17 October 2017 to arrive at a decision.

(Source: EU press release dated June 9, 2017)

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