Competition News Bulletin

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Highlights of the Edition..

I. CARTELS AND ANTICOMPETITIVE AGREEMENTS

CCI imposes penalty on Geep Industries for being a member of bilateral "ancillary" cartel (Page 2 - 3)

CCI imposes penalty on Karnataka Film Chamber of Commerce (KFCC) and its office bearers for limiting production and supply of dubbed movies within Karnataka (Page 3 - 4)

CCI imposes penalty on Sugar mill manufacturers and Trade Associations (ISMA and EMAI) for collusive bidding in Government tender under Ethanol Blending Programme (Page 4 - 6)

European Commission (EC) initiates investigation into possible collusion between BMW, Daimler and VW Group on clean emission technology (Page 6 -7)

II. ABUSE OF DOMINANT POSITION/MARKET POWER

CCI imposes penalty on Esaote SPA and its Indian subsidiary for abusing its dominant position in the sale of specialized MRI machines (Page 7 - 8)

CCI dismisses allegation of abuse of dominant position against the DLF group (Page 8 - 10)

CCI orders further investigation by DG in alleged abuse of dominance by Max Super Specialty Hospital (Page 10 - 10)

III. COMBINATIONS

CCI approves Tata Steel's acquisition of Bhushan Power and Steel limited (Page 11 - 11)

CCI approves acquisition of the cement assets of Century Textiles and Industries Limited by Ultratech (Page 12 - 12)

EC clears merger between Praxair and Linde, subject to commitments (Page 12 - 13)

EC approves acquisition of Shazam by Apple (Page 13 - 14)

IV. MISCELLANEOUS NEWS

Delhi High Court Division Bench clears procedural and jurisdictional issues in antitrust enquiry by the CCI (Page 14 - 17)

Jurisdictions covered in this issue

India

European Union

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India (CCI) imposes penalty on Geep Industries for being a member of bilateral "ancillary" cartel

By way of order dated August 30, 2018, the CCI imposed a penalty of INR 9,64 06,682 (Nine crores sixty-four lakh six thousand six hundred and eight two) on Geep Industries (India) Private limited ('Geep') for being in a bilateral ancillary cartel with Panasonic (India). Panasonic was a member of a larger primary cartel.

The investigation by the CCI was initiated on the basis of a lesser penalty application ('Leniency Application') filed by Panasonic Corporation, Japan on behalf of itself, Panasonic Energy India Co. Limited, and their respective directors, officers and employees on September 7, 2016. The Leniency Application filed by Panasonic disclosed the existence of a "bilateral ancillary cartel" between Panasonic (India) and Geep industries in the institutional sales of dry cell batteries.

It was further disclosed by the Leniency Application that Panasonic (India) had a primary cartel with Everyday Industries India (Everyday) and Indo National Limited (Nippo), where they coordinated the market prices of zinc-carbon dry-cell batteries. Utilizing its fore knowledge about the timing of price increase, Panasonic used to negotiate and increase the basic price of the batteries being sold by it to Geep. It was further disclosed in the Leniency Application that Panasonic and Geep used to agree on the market price of the batteries being sold by them in order to maintain price parity. Such price parity was in consonance with the prices determined by the Primary cartel, which comprised of Panasonic, Eveready and Nippo.

It was noted by the CCI that initially, the supply of batteries by Panasonic to Geep was on a quotation basis based on the required quantities. Subsequently, however, a Product Supply Agreement was executed between Panasonic and Geep, which obliged Geep to maintain the market prices proposed by Panasonic. As regards the defense taken by Panasonic that the particular clause which obliged Geep to not act in detriment to Panasonic's interest was merely to ensure discipline in trade. The CCI however rejected the defence, holding that the "the Product Supply Agreement was an agreement in normal commercial trade on 'principal-to-principal' basis between two independent parties, who are otherwise competitors. As such, it was held that the agreement impeded competition and cannot be justified.

It was further observed that when two independent competitors agree to protect each other's interest in the market, by no stretch of imagination can such agreement be considered pro-competitive. It was held that the very objective of the clause is to restrict or even eliminate fair competition in the market, and, therefore, no justifications offered are acceptable.

The penalty on Geep was calculated at the rate of 4% of its turnover from FY 2010-11 to 2016-17. However, Panasonic Energy India Co. Limited was granted a 100% reduction in the penalty amount since its representatives had provided genuine, full, continuous and expeditious cooperation during the entire course of investigation which not only enabled the CCI to order investigation but also helped in establishing a contravention of Section 3 of the Competition Act, 2002 ('Act').

The CCI also imposed penalty under Section 48 of the Act on Geep officials, Mr. Pushpa M (In-charge of accounts and finance), Mr. Joeb Thanawala (exchanged emails containing sensitive information), and Mr. Jainuddin Thanawala (Director).

(Source: CCI decision dated August 30, 2018; for full text see CCI website)

VA Comment: *This case shows hardening of stance on cartels in India because, this is the first case in which a party which was not a member of the original/Primary cartel was held liable on the ground that it is in a "Bilateral ancillary cartel" with one of the members of the Primary cartel.*

CCI imposes penalty on Karnataka Film Chamber of Commerce (KFCC) and its office bearers for limiting production and supply of dubbed movies within Karnataka

By way of an order dated August 30, 2018, the CCI imposed a penalty of INR. 9,72 ,943/- (Nine lakh seventy-two thousand nine hundred and forty-three) on KFFC for limiting production and supply in the market for dubbed movies within Karnataka.

The CCI began investigation into the present case based on an information that KFCC is hindering the release of the Tamil movie originally titled as "Yennai Arindhal" (now titled "Satyadev IPS")in Karnataka.

While finding a contravention of the provisions of the Act, the CCI relied on the video recording of a press meet available on YouTube which was attended by all the opposite parties. The video clip clearly evidenced a meeting of minds to prevent the release of the dubbed movie.

In addition to the Press Meet specifically targeting the release of dubbed films in the State of Karnataka, Jaggesh, a renowned Kannada film star and politician also took to twitter and issued multiple tweets, whereby he tried to charge the emotions of Kannada speaking people and instigated them to agitate against the dubbed cinema by specifically calling for protests at theatres where "Sathyadev IPS" belonging to Informant was scheduled to be screened.

The office bearers of the association, Mr. N.M Suresh (Honorary Secretary of KFFC) and Mr. H. Shivram (Honorary Secretary of Kannada Okkuta) were also found to be individually liable by the CCI.

As regards the role played by Jaggesh, the CCI noted that he was able to mobilise the masses emotionally to counter the release of dubbed content in general and the Informant's film in particular. It was further noted that the tenor of his tweets coupled with his stardom, was instrumental in mobilizing the sentiments of the masses against dubbed movies.

(Source: CCI decision dated August 30, 2018; for full text see CCI website)

VA Comments: *This is a case of repeated violation by KFCC i.e. blatantly restricting the exhibition of dubbed movies in the State of Karnataka on grounds of protecting "cultural identity", which the Commission found to have a shade of recidivism.*

CCI imposes penalty on Sugar mill manufacturers and Trade Associations (ISMA and EMAI) for collusive bidding in Government tender under the Ethanol Blending Programme.

The Competition Commission of India (CCI/Commission) vide order dated September 18, 2018 has imposed heavy monetary penalties at 7% of their average relevant turnover on sugar mills in Uttar Pradesh (UP), Gujarat and Andhra Pradesh (AP) and at 10% of the average receipts of the last three years on their trade associations (Indian Sugar Mills Association (ISMA) and Ethanol Manufactures Association of India (EMAI) for indulging in cartelization in supply of ethanol in response to a joint tender issued by three Oil Marketing Companies (OMCs) i.e. IOCL, HPCL & BPCL for procurement of ethanol for the ambitious Ethanol Blending Programme (EBP) of the Government of India , Ministry of Petroleum and Natural Gas (Mo PNG) for contravention of Section-3(1) read with Section 3 (3) of the Act. A brief background of the case is as under.

The Indian Government introduced an ambitious Ethanol Blended Program (EBP), primarily to reduce its heavy crude oil import bill and keeping in mind the beneficial effects it would have for the agriculture sector and country's environmental footprint. Ethanol is produced in India from sugar molasses. From molasses, Rectified Spirit (RS) is produced having a strength of 95%. RS is then further distilled to produce ethanol having strength of 99.80% alcohol which can be blended with petrol.

In the year 2010-11 and 2011-12, OMCs floated tenders on 'Expression of Interest' (EOI) basis for supply of ethanol. The Cabinet Committee on Economic Affairs (CCEA) used to determine the base price for procurement of ethanol i.e. Rs. 27 per litre as an ad hoc interim price. Meanwhile a Committee headed by Sh. Soumitra Chowdhary was formed to examine the various issues pertaining to the pricing of ethanol for EBP Program. The said Committee, considering the pale response from the sugar mills for supply of ethanol against the fixed base price determined by CCEA at the rate of Rs. 27/- per litre recommended to

introduce competitive bidding in the procurement to attract the sugar mills to supply ethanol on market driven prices. CCEA considered the Committee's report and issued a Press Release on 22.11.2012 which mentioned inter alia that "the procurement price of ethanol will be decided henceforth between OMCs and suppliers of ethanol ". Accordingly, the first joint tender for procurement of ethanol on competitive market prices was issued by Oil Marketing companies (OMCs), through BPCL, the coordinated Agency nominated for the purpose, on 02 January 2013. The tender process required quotations of basic price of ethanol and Net Delivered Cost (NDC).

The two main issues before the CCI were-

Firstly, whether the joint tenders floated by the OMCs violate Section 3(1) and Section 3(3) of the Act as being an anti-competitive agreement?

Secondly, whether the tender floated by the OMCs rigged by sugar mills and trade associations?

As regards the first issue, the CCI observed that there existed a limited availability of ethanol and in such a situation, if separate tenders would have been issued, the OMC which issued the first tender would have probably procured all or most of the quantity and thereby limiting procurement by the other OEMs. Moreover, since the terms of the tenders were same for all the OMCs, floating a joint tender is the most efficient option (Cost effectiveness, availability of equitable blending ethanol, non-exclusion of any OMC). Therefore, it was concluded that the joint tender did not violate the provisions of the Act.

With respect to the second issue, the CCI found that the bidders located in depots of Uttar Pradesh, Gujarat, Andhra Pradesh acted in a concerted and collusive manner in submitting their bids as indicated by their trade associations i.e. EMAI and ISMA. The collusive behavior was evident in the fact that the total quantity offered by the bidders matched the total required quantity and the absence of any plausible explanations by the bidders as to such happening. In addition to mere price parallelism, the CCI also took notice of the exact matching of freight charges by the bidders despite substantial variance in distance between the distilleries of the bidders and the depots for which they participated in the bidding process. However, for Maharashtra, the CCI noted that the bids for NDCs were not similar and bids for basic price matched only for a few bidders and hence there was no collusive bidding.

On the basis of its findings, the CCI imposed a penalty of 7% of the average relevant turnover of the preceding three financial years arising out of the sale of ethanol on the sugar mills. Further, the CCI imposed a penalty of 10% of the average receipts of preceding three financial years on the trade associations (EMAI and ISMA).

(Source: CCI decisions dated September 18, 2018; for full text see CCI website)

VA Comment: *This case amply demonstrates the hardening of stance of the CCI in punishing any apparent coordination between competitors, mainly on legal grounds and ignoring the market realties. The case also illustrates how the trade associations facilitate coordination between competitors.*

The ambitious EBP of the Government of India was a nonstarter from the beginning due to the non-remunerative price for the procurement of ethanol fixed by the CCEA i.e. at Rs. 27 per litre whereas the sugar mills / ethanol manufacturers were able to sell the same to other private buyers i.e. distilleries and pharma companies at much higher rates. The informations filed were clearly motivated with vested interest of the distilleries which were themselves procuring ethanol at higher rates from the same sugar mills in UP, for instance, which was mentioned to the CCI during the initial hearings. Thus, the basic price of Rs.35 to Rs. 36 per litre quoted by the sugar mills in UP apparently reflected the competitive market price, which fact was ignored by the CCI. The concept of demand-supply gap plays a major role in market-driven pricing mechanism which seems to have been ignored. The fact that the price of a product is determined based on the demand available of a product in the market cannot be ignored. It is disappointing to observe that the Commission has failed to appreciate the economics factors which has led the sugar mills to quote higher price.

Secondly, it is also surprising how the sugar mills in Maharashtra, which, in furtherance to the diktat given by the President of EMAI had all quoted basic price above Rs. 40/- per litre have been exonerated even when the EMAI itself was penalized.

Finally, it is necessary to question whether the sugar mills were really operating in a cartel, because nearly every OP made party to the instant case made a submission that the price quoted was realized on the basis of demand available in the market.

B. INTERNATIONAL

European Commission (EC) initiates investigation into possible collusion between BMW, Daimler and VW Group on clean emission technology

The EC has recently opened an in-depth investigation to assess whether BMW, Daimler and VW (Volkswagen, Audi, Porsche) colluded, in breach of EU antitrust rules, to avoid competition on the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars.

The EC's in-depth investigation was initiated on information which revealed that BMW, Daimler, Volkswagen, Audi and Porsche, also called the "circle of five", participated in meetings where they discussed inter alia the development and deployment of technologies to limit harmful car exhaust emissions.

In particular, the EC is assessing whether the companies colluded to limit the development and roll-out of certain emissions control systems for cars sold in the European Economic Area, namely:

- **selective catalytic reduction ('SCR') systems** to reduce harmful nitrogen oxides emissions from passenger cars with diesel engines; and
- **'Otto' particulate filters ('OPF')** to reduce harmful particulate matter emissions from passenger cars with petrol engines.

The in-depth investigation will aim to establish whether the conduct of BMW, Daimler and VW may have violated EU antitrust rules that prohibit cartels and restrictive business practices, including agreements to limit or control technical development.

(Source: European Union press release dated September 18, 2018)

II. ABUSE OF DOMINANT POSITION

A. INDIA

CCI imposes penalty on Esaote SPA and its Indian subsidiary for abusing its dominant position in the sale of specialized MRI machines

The CCI vide its order dated September 27, 2018 has imposed a penalty of INR 9.33 lakhs on Esaote S.p.A and its Indian subsidiary, Esaote Asia Pacific Diagnostic Pvt. Ltd. (collectively 'OPs') for abusing its dominant position in the sale of "Dedicated Standing/ Tilting MRI machines" under the G-Scan brand name. The order was passed by a 2:1 majority with the dissent penned by the Chairman, Mr Sudhir Mital, who disagreed on the definition of relevant market in the majority order.

The investigation by the CCI was initiated on allegations made by the Informant, House of Diagnosis that the OPs had indulged in anti-competitive conduct in violation of Section 4 of the Act.

For examining a violation of Section 4 of the Act, the CCI defined the relevant product market as the market of G-Scan/ dedicated standing/ tilting MRI machine which can scan the body of a person in weight bearing position. The CCI observed that the device is unique as it meant for some specific portion of the body. The relevant geographic market was defined as India.

On the issue of dominant position, the CCI found that the OPs are the sole manufacturers of standing/tilting MRI machines in India. Accordingly, the OPs as a group were found to be in a dominant position.

With respect to the abuse of dominant position, the CCI held that the OPs had abused their dominant position by:

(a) Supplying old G-scan MRI machines to the Informant; and

(b) Unilaterally changing the agreed terms of the sale contract;

Accordingly, the CCI imposed a penalty of INR 9.33 Lakhs on the OPs calculated at the rate of 10% of the relevant turnover of the OPs for the FY 2015-16 to 2017-18.

Chairman's Dissent: The Chairman, CCI (Mr. Sudhir Mittal), however, did not agree with the majority view of the Commission and findings of DG on delineating the relevant market as *"market for standing/tilting MRI machines in India."* While disagreeing with the majority view, the Chairman considered the market realities and technicalities associated with acquisition of diagnostic imaging equipment by the diagnostic centers and hospitals and held that the market cannot be narrowed to standing/ tilting MRI machines alone as any market delineation would have to necessarily include all MRI machines irrespective of some additional features or functionalities.

Therefore, according to the Chairman, OP Group cannot be said to enjoy any market power in the market for MRI machines in India and in the absence of dominance, the question of abuse of market power does not arise. Accordingly, the Chairman disagreed with the Majority Order and dismissed the information.

(Source: CCI decision dated September 27, 2018; for full text see CCI website)

VA Comment: *This case stands out because of total contrast in market definition between the majority and minority view of the Commission. Whereas, the majority has determined the market "narrow" by considering the unique features of the dedicated Standing/ Tilting MRI machines as constituting a separate market by itself, the Chairman in his minority view defined the market as just opposite i.e. the market for MRI machines, disregarding the unique features of the machines supplied by the OP group. However, it is surprising to note that neither the DG, nor the Commission considered the necessity of using economic tools such as SSNIP Test to determine the relevant product market, which could have avoided the contrary orders within the Commission.*

Further, noticeably, during the inquiry proceedings, apparently, some settlement was reached between the Informant and the OPs, and therefore, none of the counsels appeared on behalf of the Informant, yet the CCI continued with the inquiry proceedings. This reiterates the message that antitrust inquiries are non-withdrawable on the request of the parties since anti-competitive conduct affects the entire market and not just the specific market players.

CCI dismisses allegation of abuse of dominant position against the DLF group

By way of an order dated August 31, 2018, the CCI has dismissed allegations of abuse of dominant position by DLF group. The case was closed since DLF was not found to be in a dominant position Gurgaon during the 'relevant period'. The CCI in the present case deviated from its observation in Case No. 19 of 2010

Belaire Owner's Association V DLF Limited and other subsequent cases that the DLF Group was in a dominant position in the *market for sale of residential apartments in Gurgaon.*

The investigation was initiated on the basis of information filed by two individual allotees of apartments in the townships i.e. Regal Gardens and Skycourt launched by the DLF group. In both the cases, the main allegation was that the DLF group had abused its dominant position by imposing extremely harsh and one-sided terms and conditions in the sale agreement.

It was the contention of the Informants that certain clauses in the agreement are highly unfair and discriminatory towards the allotees and heavily biased towards the DLF group.

The DG upon consideration into factors such as the market share of the DLF group and other developers, size and resources of the enterprise, economic power of the enterprise including commercial advantage over other competitors, dependence of consumers etc. observed that the extent to which DLG group could operate independently of the competitive forces or affect its competitors or consumers in the 'relevant period' was insignificant.

The CCI observed that the 'relevant period' for determination in the case "Regal Garden" township was the year 2011-12 and for "Skycourt" it was 2012-13.

It was observed that during the period when the allotees applied for allotment, DLF group was not in a dominant position in a fragmented market where 90% of the residential apartments/flats were launched by other developers, out of which approximately 50% was by top developers.

As regards the dependence of consumers and entry barriers, it was observed that there were several established real estate players which were operating in the market, thereby providing choices to the consumer intending to purchase residential apartment/flat. The CCI held that the consumers were not dependent on the DLF group, given the options available in the relevant market at the time the Informant decided to purchase the residential apartment/flat.

The CCI further observed that markets by their very nature are dynamic and keep changing with time and while analyzing dominance, an important factor that needs to be taken in consideration is the time-period during which the contravention is alleged.

(Source: CCI decisions dated August 31, 2018; for full text see CCI website)

VA Comment: *This case is unique because it is the first time the Commission has introduced the concept of "relevant period" while determining the market position of an enterprise which was earlier held to be dominant in the same relevant market. The Commission categorically laid down that the markets are by nature dynamic and the most vital factor in determining any abuse of dominance is the time-period during which the alleged contravention has taken place i.e. whether the enterprise was still in a dominant position when the alleged contravention took place?*

CCI orders further investigation by DG in alleged abuse of dominance by Max Super Specialty Hospital

The Commission by way of order dated August 31, 2018 directed the DG to conduct further investigations/analysis with emphasis on the relevant market in a case pertaining to an alleged abuse of dominant position by Max Super Speciality hospital, Patparganj.

The DG in its first investigation report had considered the market for *"provision of healthcare service/facilities by private super-speciality hospitals within a distance of 12 kms from Max Super Speciality Hospital, Patparganj"* as the relevant market. Thereafter, Max Super Speciality Hospital was found to be in a dominant position.

While assessing the dominant position, DG considered factors such as the number of beds, number of on-roll specialized doctors with DM/M.Ch degree, number of in-patients and out-patients, financial strength, brand name etc. with respect to its competitors. It was noted by the DG that Max Super Speciality Hospital had earned huge profit margins ranging from 269.84% to 527% in the financial year 2014-15 and ranging from 276.96% to 527% in the financial year 2015-16 by sale of different syringes. It was further observed that they have been compelling its in-patients to purchase products only from its in-house pharmacy once they are admitted.

The CCI observed that while there is a reference of such a conduct as being akin to 'aftermarket abuse', the DG has not investigated/ analysed the same in greater detail. Therefore, the CCI directed the DG hold a re-investigation with the specific directions to consider Delhi as the relevant market.

Further, the CCI directed the DG to broaden the scope of the investigation by covering all aftermarket healthcare products and services provided by super speciality hospitals across Delhi to their in-patients. It was directed that the investigation may specially focus on the products sold by the super speciality hospitals to their in-patients which are not required on an urgent basis for any medical procedure/interventions, or which do not involve any high degree of quality issue from the medical procedure point of view, and for the purchase of which the patients have the time and scope to exercise their rational choice to purchase such products from open market as well where such products may be available at lower rates.

(Source: CCI decision dated August 31, 2018 for full text see CCI website)

III COMBINATION

A. INDIA

CCI approves Tata Steel's acquisition of Bhushan Power and Steel limited

The CCI by way of order dated August 6, 2018 approved the acquisition of up to 100% of the issued and paid up share capital of Bhushan Power and Steel Limited ('Target') by Tata Steel Limited. The Target is currently undergoing insolvency resolution proceedings under the Insolvency and Bankruptcy Code, 2016. Both parties are engaged in the manufacture and sale of finished flat carbon steel products in India.

With respect to the horizontal overlaps, the CCI observed that the parties overlap primarily in the manufacture and sale of various finished flat carbon steel products in India. Apart from these, the business operations overlap in respect of alloy billets, sponge iron and pig iron. It was noted by the CCI that there are various stages in the production process of flat carbon steel products i.e. hot rolling, cold rolling etc. and the finished product may be sold at each of these stages or be utilized for further processing in the next stage.

The CCI after considering the individual and combined market share in each of the segments and the presence of other competitors such as JSW, Essar, SAIL etc. and their position in the market was of the view that the horizontal overlaps resulting from the proposed combination are not likely to result in any appreciable adverse effect on competition in any of the above-mentioned segments.

As regards the potential vertical overlaps, the CCI again observed that both the parties are large integrated steel producers and are active across the value chain in the flat steel products. It was further noticed by the CCI that at the end of each of the stage in the production process of flat carbon steel products i.e. hot rolling, cold rolling and coating, may be sold either in the open market or utilized for further processing in the next stage.

The CCI observed that each of the markets is characterized by presence of significant competitors such as JSW, Essar, SAIL, etc. and post combination, TSL would not have the ability to foreclose the market for other competitors.

(Source: CCI order dated August 6, 2018; for full text see CCI website)

CCI approves acquisition of the cement assets of Century Textiles and Industries Limited by Ultratech

Vide its order dated August 21, 2018, the CCI approved the acquisition of the cement assets of Century Textiles and Industries Limited (Target) by Ultratech, The Target had a total cement capacity of 14.60 million tonnes per annum, with cement plants situated in the states of Madhya Pradesh, Maharashtra, Chattisgarh and West Bengal.

The CCI observed that the target assets are not involved in the manufacture of white cement. It was also observed that there are different variants of grey cements such as OPC, PPC, PSC etc. which are considered to be largely interchangeable and the white cement constitutes a different market. Accordingly, the relevant product market was determined as the market for grey cement.

Upon examination of the market structure, the CCI observed that each of the market is fragmented with the presence of more than 15 companies each (Madhya Pradesh and West Bengal) and 30 companies (Maharashtra). Moreover, the combined market share post combination would be 28% (Madhya Pradesh), 22 % (West Bengal & Chattisgarh) and 20% (Maharashtra) and the change in HHI would also be insignificant.

Accordingly, the Commission observed that the proposed combination is not likely to have appreciable adverse effect on competition.

(Source: CCI order dated August 21, 2018; for full text see CCI website)

B. INTERNATIONAL

EC clears merger between Praxair and Linde, subject to commitments

The EC has cleared the merger between Praxair and Linde subject to the commitments undertaken by the parties.

During the investigation into the proposed combination, the EC identified the following markets where there could be a potential competition concern:

- Industrial gases
- Medical gases and related services
- Speciality gases

- Helium, both in the worldwide market for the sourcing of helium and in the national markets for the retail supply of this gas.

The concern was that the proposed combination would reduce the number of significant gas players in the European Economic Area from four to three, resulting in the creation of a new market leader in the European gas industry, potentially resulting in a price increase.

In order to address the concerns, the parties offered the following commitments:

1. The divestment to a suitable purchaser of Praxair's entire gas business in the European Economic Area, including all relevant legal entities, assets and personnel. The divestment covers industrial, medical, specialty gases and helium. It also includes the helium sourcing contracts required to satisfy the demand in the European Economic Area.
2. The transfer of Praxair's stake in the SIAD, an Italian joint venture active in Central and Eastern Europe and in Italy, to Praxair's current joint venture partner Flow Fin, which will become the sole owner of SIAD
3. The divestment of additional helium sourcing contracts, beyond those needed to satisfy demand in the European Economic Area, to one or more suitable buyers. This will ensure that the overall helium sourcing volume divested will address competitive concerns at the worldwide level.

The EC observed that the commitments fully remove the overlap between the activities of Praxair and Linde, including all the markets in which the transaction would have otherwise led to a significant reduction in competition. It was further noted that these commitments ensures that competition is maintained through the divestment of further sourcing contracts in the market for sourcing of helium, which is global.

(Source: European Union press release dated August, 20, 2018)

EC approves acquisition of Shazam by Apple

The EC while approving the proposed acquisition, held that the combination will not reduce competition in the digital music streaming market. The EC initiated an in-depth investigation into the proposed acquisition despite the fact that Apple and Shazam are not competitors and mainly offer complementary services. The investigation was initiated to assess the following two issues:

Firstly, Whether Apple would obtain access to commercially sensitive data about customers, which would allow Apple to directly target its competitors' customers and encourage them to switch to Apple Music?

Secondly, considering Shazam's strong position in the market for music recognition apps, whether Apple Music's competitors would be harmed if Apple, after the transaction, were to discontinue referrals from the Shazam app to them?

The EC held that the merged entity would not be able to shut out competing providers of digital music streaming services by accessing commercially sensitive information about their customers. In particular, access to Shazam's data would not materially increase Apple's ability to target music enthusiasts and any conduct aimed at making customers switch would only have a negligible impact. As a result, competing providers of digital music streaming services would not be shut out of the market;

Further, the merged entity would not be able to shut out competing providers of digital music streaming services by restricting access to the Shazam app. This reflects the fact the app has a limited importance as an entry point to the music streaming services of Apple Music's competitors.

It was also found that the integration of Shazam's and Apple's datasets on user data would not confer a unique advantage to the merged entity in the markets on which it operates. Any concerns in that respect were dismissed because Shazam's data is not unique and Apple's competitors would still have the opportunity to access and use similar databases.

Therefore, the EC concluded that the transaction would raise no competition concerns in the EEA or any substantial part of it.

(Source: European Union press release dated September 6, 2018)

IV MISCELLANEOUS NEWS

Delhi High Court Division Bench clears procedural and jurisdictional issues in antitrust enquiry by the CCI

In a landmark judgement dated September 12, 2018, on a LPA filed by Cadila Healthcare Limited ("Cadila"), the division bench of the Delhi High Court, comprising of Justice S. Ravindra Bhatt and Justice A K Chawla, has cleared some important procedural ambiguities surrounding the inquiry by the CCI under the Act.

Cadila had initially filed a writ petition under Article-226 of the Constitution of India before Delhi High Court alleging that DG's findings against Cadila was a nullity without a separate order under Section-26(1) of the Act finding a *prima facie* case against Cadila and that since DG had proceeded with the investigation against

Cadila without being authorized by CCI vis-à-vis Cadila, the CCI's order under section 26(1) of the Act was required to be recalled. The single bench of the High Court (Justice V Kameshwar Rao) dismissed the writ petition on all the grounds filed by Cadila vide Judgment dated March 9, 2018.

In the LPA filed by Cadila against the Judgment of the Single Bench of the Delhi High Court dated 09 March 2018, the Hon'ble DB of the Delhi High Court framed the following issues for adjudication:

1. Whether the DG's investigation in the absence of a specific order under Section 26(1) by CCI having formed a prima facie opinion, is vitiated
2. Whether CCI was right in rejecting the recall application filed by Cadila (based on grounds of fraud, res judicata and/or no cause of action)?
3. Whether CCI was right in rejecting Cadila's application for permission to cross examine three witnesses who had deposed before the DG.
4. Whether simultaneous proceedings against the Company and its Managing Director and other officials can be initiated under section 48 of the Act?

The analysis and decision on these issues by the High Court are as follows:

Firstly, DG's investigation in the absence of a specific order under Section 26(1) by CCI having formed a prima facie opinion, is vitiated, the Court has said that DG's power is not limited by a remand or restricted to the matters that fall within the complaint. The Court rejected the reliance placed by Cadila upon the Judgment of the Single Bench in the case of *Grasim Industries*[1] where it was held that without an order by CCI into the matter with respect to a party for a particular violation, it is not competent for the DG to investigate in to allegations. The Court relied on the judgement passed by the Hon'ble Supreme Court of India where the power of DG has been explained power of DG in the broader term i.e. *Excel Crop Care Limited v. Competition Commission of India & Anr.*[2]:

"if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report….If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition."

The Court stated that cognizance of a case is taken by CCI on the basis of the information received and

1 206 (2014) DLT-42-Grasim Industries Limited Vs. CCI.
2 (2017) 8 SCC 47

which further requires investigation. On the stage of information, it is not necessary that CCI has the complete information about the conducts that contaminate the entire market and it is during the inquiry only the whole picture with regard to the conduct of the persons becomes clear. Therefore, the Court held that investigation done by DG without CCI's recording prima facie opinion against Cadila is acceptable.

Secondly, Cadila raised the issue that its review/recall application was not entertained by the CCI based on fraud, res judicata etc. However, the High Court held that the power of judicial review only exists where the authority or tribunal acts in excess of its power or transgresses procedural regulations. The Court has distinguished from the case of *Google Inc v Competition Commission of India*[3] ("Google order") by holding that Google order doesn't have a bearing on the present case because in the Google order the recall application was filed before the DG had submitted the investigation report before the CCI , while in the present matter , the recall application was filed after the submission of the DG investigation report. Therefore, CCI and the single bench didn't err on rejecting the recall application.The High Court accordingly held that once the report is submitted, then an action under Section 26(5) or 26(8) gets triggered, taking the case out of the realm of 26(1) or 26(2) of the Act. The only remedy then, is to argue the report before the CCI.

Thirdly, it was contented that the CCI had incorrectly rejected Cadila's application for permission to cross examine three witness who had deposed before the DG. The Court accepted Cadila's contention and observed that, though there is a discretion vested with the CCI with regard to accept or refuse the plea of cross-examine of a person within the ambit of Regulation 41(5)[4] of The Competition Commission of India (General) Regulations, 2009, ("General Regulations") but the reason given by CCI for not accepting the request of cross-examination i.e. "dissatisfaction" does not imply judicious exercise of discretion. Therefore, CCI erred in rejecting Cadila's plea of cross-examination of the witness.

Fourthly, Cadila raised the issue that the CCI cannot proceed against the Directors etc. of an enterprise unless it has first found the Company guilty of an offence under the Act. This contention was rejected by the Court and it was laid down that during the proceedings against a company, it is always open for the persons involved to contend that the said contravention was not committed by them or had exercised due diligence to prevent the contravention.

(Source: Delhi High Court order dated September 12, 2018; for full text visit the Delhi High Court website)

VA Comment: *This judgement is significant because Firstly, the Court has clarified the issue with regard to period*

3 2015 (150) DRJ 192.

4 If the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross examine the person giving the evidence.

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when the recall application can be filed. Secondly, the Court has stated that while exercising the discretion vested with CCI with regard to permitting cross examination, as per Regulation 41(5) of the General Regulation, the Commission should act judicially. Thirdly, though the Commission has already cleared the air with regard to simultaneous proceeding initiated against company and its key personnel. The Court while dealing with the specific issue that proceedings against the office bearers cannot be initiated under Section- 48 of the Act unless the "enterprise" or "person" is found guilty of anti-competitive conduct has reinforced its earlier stand i.e. notice and proceedings in composite manner against the Managing Director and officials of a company is in accordance with the law.

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