Competition News Bulletin

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Highlights of the Edition..

Jurisdictions covered in this issue

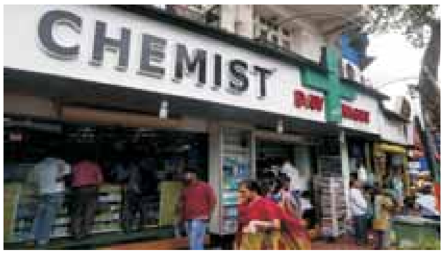
India

European Union

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India (”CCI”) imposes penalty on chemists’ asssociations in State of Gujarat and three pharma companies for indulging anti-competitive conduct appointment of stockists



CCI by way of an order dated July 12, 2018 has imposed penalty on the Federation of Gujarat State Chemists and Druggists Association, Amdavad Chemist Association, Surat Chemists and Druggists Association and the Chemists and Druggists Association of Baroda (collectively ‘chemists and druggists associations’) as well as three pharmaceutical companies namely Glenmark Pharmaceutical Limited (and its C & F agent), Hetero Healthcare Ltd and Divine Saviour (collectively ‘pharmaceutical companies’) for violating provisions of the Competition Act, 2002 (‘Act’). Penalties were also imposed on the individual office bearers of the chemists and druggists associations and managing directors and concerned employees of the three pharma companies.

The investigation by the CCI was directed on allegations made by the Informants viz. Alis Medical Agency, M/s Stockwell pharma, M/s Apna Dawa Bazaar and Reliance Medical Agency against , not only the chemists & druggists associations but also against a large number of leading pharma companies and their Carrying & Forwarding agents (C&F Agents) alleging that the pharmaceutical companies and their C&F agents were mandating the requirement of a non-objection certificate (NOC) from the chemists and druggists associations prior to the appointment of their stockists.

During the detailed investigation, the DG did not find any evidence against the majority of pharma companies and their C&F agents for indulging in the practice of obtaining NOC before appointing new stockists except for (Glenmark Pharmaceutical Ltd (“Glenmark”), Cadilla Healthcare Ltd. (“Cadilla”) (and their C&F agents) and Hetero Healthcare Ltd and Divine Saviour. The finding against the above named four companies was based on the documentary evidence found from their records and (in the case of Glenmark and its C&F agent) the transcript of tape recorded telephonic conversations, recorded by one of the Informant with the C&F agent of Glenmark. The explanation regarding the incriminating documentary evidence and the transcript of the tape recording, given by the four pharma companies and their C&F agents was not accepted by the DG .

The findings of the DG were challenged by the chemists & druggists associations and the four pharma companies and their C&F agents by detailed written objections before CCI as well as during oral arguments held before CCI. It was emphasized that multiple cases have been filed by the same set of persons, namely Shri Nayan Raval and Shri Dayabhai Patel, alleging the same facts, with ill-motives because of the political rivalry between competing factions of the chemists and druggists associations based in the State of Gujarat . It was stressed that the Informants had used the Information to settle scores with their political rivals and had fabricated evidence such as tape recording the telephonic conversations to rope in the pharma companies to put pressure on them to concede to their unjust demands and had tried to mislead the CCI .

One of the pharma companies, Cadilla, even challenged the initial prima facie order of the CCI under section 26(1) of the Act on the above grounds and also the summoning of the Managing Director of Cadilla by CCI after the DG investigation without adjudicating the role of the company under section 48(1) of the Act , before the Delhi High Court by way of a writ petition, which was dismissed by the Single Bench of the High Court but the letter patent appeal (LPA) filed by Cadilla before the Division Bench is pending before the High Court.

Following the conclusion of the oral hearings held during the inquiry, the CCI rejected the objections taken by the Opposite Parties including the pharma companies and held that the chemists and druggists associations, were indulging in the practice of NOC prior to the appointment of stockists, which has the effect of limiting and controlling of the supply of drugs in the market, in violation of Section 3(3) of the Act. Further, it was observed that instead of desisting from such activity, these associations are mandating the NOC requirement, either verbally (in order to avoid any documentary evidence/proof) or under camouflaged congratulatory/intimation letters.

The CCI also held that the three pharmaceutical companies and their C&F agents, without any resistance, cooperate with such associations to implement their anti-competitive decisions, thereby becoming equally complicit in the anti-competitive effect of such practice. Instead of approaching the CCI, these pharmaceutical companies cooperate with the NOC requirement of the associations, thus becoming perpetrators of such anti-competitive practice which is in violation of Section 3(1) of the Act. The order against Cadilla was reserved due to pendency of the LPA before the Delhi High Court.

The CCI imposed a monetary penalty of INR 9,68,651/- , INR 1,11,278/- , INR 1,09,413/- and INR 61,232/- calculated at the rate of 10 % of the average income of each of the chemists and druggists associations under the provisions of Section 27 of the Act.

Penalty on the pharmaceutical companies was imposed at the rate of 1% of the their average income based on their financial statements of the last three years which amounts to 4,500 Lakhs for Glenmark, INR 0.20 lakhs on Glenmark's C & F Agent, INR 228.92 lakhs on Hetero Healthcare Ltd and INR 5.61 lakhs on Divine Savior Pvt. Ltd.

In addition, monetary penalties were imposed on the office bearers of the chemists and druggists associations, and the officials of the pharmaceutical companies at the rate of 1% of their incomes, respectively. Furthermore, the chemists and druggists associations, the pharmaceutical companies and their office bearers/officials were directed to cease and desist from indulging in the practice of mandating NOC prior to stockiest appointment.

(Source: CCI decision dated July 12, 2018; for full text see CCI website)

VA Comment: *This case is important because, firstly, it was for the first time that a series of complaints were filed by some stockists against such large number of leading pharma companies pan India , secondly, the CCI has ignored the apparent ill- motive of the Informant to use the forum of the CCI to settle political scores with rival factions in the trade associations and thirdly , the CCI has arrived on its findings of violation of section 3(1) of the Act against the pharma companies , without going into the real issue whether the so called practice of NOC (whose existence was also not conclusively proved and was rather presumed by the DG on the basis of few isolated instances found in the internal records of the four pharma companies) was causing any appreciable adverse effect on competition or not .In our view , the CCI also did not visualize that the pharma companies are actually victims and cannot be perpetrators of the practice of NOC . The decision raises many substantive legal issues which will be settled only after the decisions in the appeals to be filed by all the Opposite Parties.*

CCI dismisses findings of cartelization against 37 suppliers of signaling cables to Indian Railways

The Competition Commission of India (CCI/Commission) by way of an order dated 12 July 2018 rejected the findings of the Director General (DG) and closed the case against 37 signaling cable manufactures in relation to allegations of bid-rigging in eight tenders floated by the North West Railway (NWR) in the FY 2012-13 for the procurement of Railway Signaling Cables.

The NWR in a reference case made to CCI , had alleged that the Opposite Parties- signaling cable manufacturers were involved in collusive bidding with respect to the 8 tenders which had been floated by NWR in the FY 2012-13(hereinafter referred to as "impugned tenders"), for procurement of 4 different types of Railway Signalling Cables. The Opposite Parties consist of both Part I and Part II suppliers approved by the Research Designs and Standard Organization (RDSO). Part I suppliers are eligible for supplying up to 100% of the procurable quantity whereas Part II suppliers are only eligible for developmental orders (i.e. up to 25%).

In the reference filed by NWR against the OP's it was alleged that these enterprises had a prior meeting of mind before the bidding process for the impugned tenders. As a result the quoted rates for Railway Signalling Cables were higher in comparison to the prevailing market rates. It was further alleged, that different OPs quoted higher prices simultaneously in response to the impugned tenders floated by NWR. Further, quotation of higher prices simultaneously by the Ops was in contravention of Section 3 of the Act, as it implied engagement of all the OP's in the practice of Collusive Bidding.

Findings of the DG

The DG after a prolonged Investigation found 11 of the OPs to be in contravention of Section 3(3)(d) read with Section 3(1) of the Act. The DG's finding of contravention was based on pattern of bidding, relationship of key persons, cross-shareholdings, representation in association meetings, frequent interaction between key persons, email exchanges, use of common IP address, inter-se job work, and comparison of rates quoted by Opposite Parties in tenders of other railway zones, etc.

Accordingly, the OPs found to be in violation of Section 3(3) read with Section 3(1) of the Act were classified into 5 sub-sets:

(i) Paramount Wires and Cables Ltd and Paramount Communications;

(ii) Tirupati PlastomaticsPvt. Ltd and Kanha Cables Pvt Ld;

(iii) Vindhya Telelinks Ltd and Birla Cable Ltd;

(iv) Myco Electricals (P) Ltd, Telecontinental Telepower Industries Ltd and Delhi Telecom Pvt. Ltd; and

(v) Incom Cables Pvt. Ltd and Incom Wires and Cables Ltd.

In the investigation report , the DG also identified fifteen individuals, who were officers of the offending OP's and responsible, under Section 48 of the Act, for the conduct of business of these OP's. The order passed by the Commission is confined with respect to these 11 OPs' only as the DG's report did not indicate any findings on contravention of Section 3 of the Act by the remaining 26 OP's.The categorization of these 11 OP's into the abovementioned sub-sets was based on various common denominators within each such sub-set:

- The Impugned Tenders the enterprises placed the bids on and the tenders from which they abstained.
- The relation between the enterprises- including factors such as common key persons, inter-related functioning between such enterprises etc.
- Price variation between the bids placed by the enterprises with respect to the Impugned Tenders and also with respect to other tenders issues during the relevant period by other Railway Zones.

The 11 OPs filed detailed objections to the findings in the DG report which were explained during the inquiry (oral hearing) held before the CCI .

CCI's findings

On consideration of the objections and the arguments advanced by the Counsels on behalf of each of the 11 OPs , CCI decided as under.

- It was concluded that he DG's report did not substantiate, through any evidence, that the OP's had quoted identical/similar rates with a view to achieve overall increase in rates of supply of the cables to the Informant. Furthermore, the DG did not present sufficient evidence to establish any collusion between the OP's achieving the above-mentioned objective.
- The Commission noted that although there were close quotations of bids by the Opposite parties of the 5 sub-sets, the DG's report had failed to substantiate existence of a prior agreement or 'meeting of minds' between theses 5 sub sets of the 11 OP's to engage in collusive bidding. It was also noted that the pattern in increase in rates was not just exhibited by the five sub-sets of OPs but by all OPs.

- The Commission observed that identical and similar pricing by bidders in tenders coupled with other factors such as common management, sharing of premises, common IP addresses, and frequent phone calls, common representative in the meetings of Association, etc. do raise suspicion of collusive behaviour between the bidders. However, the facts presented in the instant case were not suggestive of the same and hence the Commission did not rely on the presumption of collusion. The DG had failed to present any evidence for of anti-competitive agreement or arrangement amongst five sub-sets of bidders nor any circumstantial evidence to establish tacit collusion. Despite his findings of certain instances of identical/similar pricing, the Investigation does not bring out that the same was an outcome of collusion and on that basis it was concluded that the 11 OPs had not acted in contravention of the provisions of Section 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act.

- The Commission, however, advised the Railways to modify its procurement policies in accordance with the competition law principles, primarily by reassessing the rules with respect to participation of sister concerns in the tenders floated by Railways for procurement of products from various RDSO approved suppliers, to ensure efficiency, transparency and accountability of participants in tenders.

VA Comment: *The CCI order in this case assumes significance since the investigation based its finding on identical and similar pricing by bidders in tenders coupled with other factors such as common management, sharing of premises, common IP addresses, and frequent phone calls, common representative in the meetings of Association, etc. which do raise suspicion of collusive behaviour between the bidders yet during careful scrutiny in the inquiry it was found that there was no evidence of any anti-competitive agreement or arrangement amongst five sub-sets of bidders nor any circumstantial evidence to establish tacit collusion. Thus, CCI rejected the view that mere structural links or common directors was sufficient to constitute bid rigging /cartel in the absence of any direct or circumstantial evidence pointing towards any collusive behaviour.*

(VA represented the first sub set of the OPs (Paramount group) before CCI.)

CCI decides fourth case under the Leniency provisions

By way of an order dated July 11, 2018, the Competition Commission of India imposed a penalty of INR 22.36 Crore on Essel Shyam Communication (EsselSyam) for bid-rigging in tenders floated by sports broadcasters, including the Indian Premier League in 2012.

However, the quantum of fine on EsselSyam and its officials was reduced by the CCI under the lesser penalty provisions of the Act. The CCI's decision is the fourth order to be passed under the Leniency provisions.

The investigation by the CCI was initiated on the basis of disclosures by Globecast India Private Limited and Globecast Asia Private Limited (collectively referred to as 'Globecast') under Section 46 of the Competition Act, 2002 (Act) read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations'). Subsequently, during the course of the investigation by the DG, Essel Shyam Communication Limited (ESCL), now Planetcast Media Services Limited, also approached the CCI.

It was disclosed to the CCI that there was exchange of commercial and confidential price sensitive information between ESCL and Globecast through Mr. Bharat K. Prem, an employee of Globecast India Pvt. Ltd, which resulted in bid rigging of tenders for procurement of broadcasting services of various sporting events, especially during the year 2011-12. It was alleged that Mr. Bharat K. Prem had clandestinely entered into a Consultancy Agreement with ESCL, under which Mr. Bharat, used to work for ESCL for a fixed remuneration and a share in profits from the contracts obtained through bid rigging.

From the evidence collected by the DG, the CCI found that the ESCL and Globecast operated a cartel amongst them in the various sporting events (numbering fourteen) held during the years 2011-12 including IPL-2012. While submitting bids for the tenders floated by various broadcasters during the period July 2011-May 2012 for provision of end-to-end broadcasting services, they exchanged information and quoted bid prices as per the arrangements arrived at amongst them. Accordingly, it was held that they committed an infringement of the provisions of Section 3(3)(d) read with Section 3(1) of the Act during this period.

Considering contravention of provisions of the Act by Globecast and ESCL, an amount of INR 31. 94 Crores and INR 1.33 Crores was computed as leviable penalty on ESCL and Globecast, respectively, in terms of proviso to Section 27 (b) of the Act. While computing leviable penalty, CCI took into consideration all the relevant factors including duration of cartel, mitigating factors, etc. and decided to levy penalty at the rate of 1.5 times of their profit for the period July 2011 – May 2012. Additionally, considering the totality of facts and circumstances of the case, penalty leviable on individual officials of Globecast and ESCL was computed at the rate of 10 percent of the average of their income for preceding three years.

Keeping in view the stage at which the lesser penalty application was filed, co-operation extended in conjunction with the value addition provided by the evidences furnished by the lesser penalty applicants in establishing the existence of cartel, CCI granted Globecast and its individuals 100 percent reduction in the penalty and 30 percent reduction in penalty to ESCL and its individuals. Pursuant to reduction, penalty imposed on ESCL was INR 22.36 Crores (Rupees Twenty Two Crores and Thirty Six Lakhs).

(Source: CCI decision dated July 11, 2018; for full text see CCI website)

NCLAT upholds highest ever penalty imposed by CCI in a cartel case

The National Company Law Appellate Tribunal (NCLAT) by way of a judgement dated July 25, 2018 has upheld the penalty imposed by the Competition Commission of India (CCI) on 11 cement companies for cartelization. The CCI in its order dated August 31, 2016 had imposed a penalty of INR 6300 crores on 11 cement companies for cartelization. The appeals were filed by Ambuja Cements Limited, ACC Limited, Jaiprakash Associates Ltd., Cement Manufactures'

Association (CMA), Century Textiles & Industries Ltd., The Ramco Cements Limited, J.K. Cement Limited, The India Cements Limited, Ultra Tech Cement Limited, Nuvoco Vistas Corporation Limited and Binani Cement Limited

The NCLAT had upheld the CCI's decision on the following grounds:

Exchange of Data

The NCLAT observed that the cement companies were utilizing the platform of their trade association, the Cement Manufacturers Association (CMA) to discuss price and sensitive information relating to production, capacity, dispatch etc. The NCLAT while rejecting the parties' contention that the data was being collected at the behest of the government, held that even if the government had asked for this data, it could have been given in a sealed cover by individual companies.

It was observed that information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, i.e., if the data exchange is strategic. Based on the same, the NCLAT held that there was a meeting of minds between the cement companies with regard to fixation of sale price of cement and for regulating the supply and production of cement. Having held that exchange of information which has the effect of reducing strategic uncertainty in the market constitutes an agreement under the Competition Act, 2002 ('Act'), the NCLAT proceeded to examine whether such agreement attracts either Section 3(3)(a) or Section 3(3)(b) of the Act.

The NCLAT held that the provisions of Section 3(3)(a) and Section 3(3)(b) are attracted because of the following:

Price Parallelism

The NCLAT relying on price charts observed that there were several instances where the cement companies hiked the prices of cement in sharp departure to their normal trends over the previous years.

Dispatch & Production Coordination

While analysing the dispatch trends for the impugned period, the NCLAT observed that there was a simultaneous decrease in dispatches by the cement companies which was coupled with lower capacity utilization despite the absence of demand constraints.

The NCLAT held that production data, too, revealed coordinated behavior. It was noted that during the impugned period, production in absolute terms fell by 5.43 percent and 3.41 percent. Similarly, the dispatch during the same period actually fell by 6.33 percent and 4.90 percent; thus showing that in fact the dispatches fell even more than the fall in production.

It was further observed that production and dispatch of cement was reduced across all sectors in a period when the demand from the construction sector was positive.

Capacity Utilization

The NCLAT observed that capacity utilization of the cement companies fell from 83 percent to 73 percent during the impugned period.

Based on this evidence, the NCLAT upheld the INR 6,300 crore penalty imposed by CCI on the cartel members and dismissed the appeals filed by the cement companies.

(Source: NCLAT decision dated July 28, 2018; for full text see NCLAT website)

INTERNATIONAL

European Union: European Commission (EC) fines four electronics manufacturers for resale price

The EC vide recent decision dated July 24, 2018 has penalized electronic manufacturers Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices on their online retailers. Asus, Denon & Marantz, Philips and Pioneer engaged in so called "fixed or minimum resale price maintenance (RPM)" by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronic products such as kitchen appliances, notebooks and hi-fi products.

The four manufacturers intervened particularly with online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to that of the competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronic products.

Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decrease. The price interventions limited effective price competition between retailers and led to higher prices with an immediate effect on consumers.

Since all the four companies cooperated with the EC by providing evidence which significantly added value and expressly acknowledged the facts and the infringements of EU antitrust rules.

The EC, therefore, granted reductions to the fines depending on the extent of the cooperation ranging from 40% (for Asus, Denon & Marantz and Philips) to 50 % (for Pioneer).

(Source: European Union press release dated July 24,2018)

II. ABUSE OF DOMINANT POSITION

INDIA

CCI imposes penalty on South Asia LPG Company Ltd (SALPG) for denial of market access

By way of an order dated July 11, 2018, the CCI has imposed penalty on SALP, a joint venture between Total S.A and Hindustan Petroleum Corporation Ltd. ('HPCL') for abusing its dominant position in the 'market for upstream terminalling services at Vishakhapatnam Port'. The CCI held that SALP has denied market access to a private terminal operator , East India Petroleum Pvt. Ltd ('EIPL') at Visakhapatnam port ('Port').

Brief Background

The inquiry by the CCI was initiated on allegations that SALPG which operates the infrastructure at the Port viz. unloading arms at the jetty, blender, heat exchanger and cavern was not permitting the use of its blender facility on a standalone basis and insisted on the mandatory use of its cavern facility as well. This mandatory stipulation entailed payment of significant additional charges for EIPL. As a result, OMCs were constrained to avail the terminalling services offered by SALPG only.

Alternate arrangements proposed by EIPL

In order to avoid paying the additional charges to SALP, EIPL first proposed to use the blender of SALPG and thereafter, take the output directly to the HPCL cross-country pipeline, bypassing the cavern. This was not agreeable to SALPG which allowed bypass of cavern for use by EIPL customers to the extent of 25 percent only.

EIPL then proposed to install its own blender, for which it wanted a "tap-out and tap-in" from the propane and butane lines to discharge blended LPG, bypassing the cavern. Under this arrangement, EIPL proposed tap-out from propane and butane lines to take gases for mixing in its blender and thereafter, discharge the blended output back into the SALPG pipelines through a tap- in . This was also not acceptable to SALPG. Upon this, EIPL offered yet another proposal seeking tap-out from the propane and butane lines at jetty to its own blender and construction of its own infrastructure between its blender and storage facility. However, this was also not acceded to by SALPG.

DG Investigation

This case saw perhaps one of the longest drawn investigation by the Director General (DG), beginning from 2011 to 2016 . The DG in its main report of 2012 defined two relevant markets , upstream terminalling services market and downstream terminalling services market and found that though SALPG was a monopoly in the upstream market yet it was not "dominant" in the relevant market mainly due to the counter-vailing buying power of the customers, that is , the Public Sector OMCs. The DG also found that the Port had supply-side substitutability with the adjoining ports of Haldia and Ennore.

DG was of the view that SALPG has valid efficiency and business justification for denying the use of its blender facility, without using cavern, and not permitting hook up of EIPL's blender to the propane and butane from the jetty owned by SALPG. The investigation noted that, it is not known whether the cavern functions only as a storage unit or also plays a necessary role in mixing and providing an additional safety level. Further, the restriction that only 25% of the total volume of VLGC can bypass the cavern was also found to be based on a valid business justification as SALPG had made significant investment in the cavern. Thus, as per the main report, no contravention of the provisions of Section 4 was established.

In the supplemental investigation report submitted by DG in 2015, after allowing cross-examination of witnesses etc. to both parties (after a short litigation round in the Delhi High Court), the DG reiterated its earlier findings.

EIPL accordingly raised serious objections before the CCI against the findings of the DG reports referring to the noted cases on 'essential facility doctrine' from International jurisprudence.

CCI's findings

The CCI found that the bypass restrictions and stipulation for mandatory use of cavern, imposed by SALPG have priced out EIPL and reduced its business volume substantially. The proposals of EIPL to increase its economic viability were rejected by SALPG on unsubstantiated and unreasonable grounds.

The conduct of SALPG, being without reasonable grounds, was, therefore, held to be in contravention of Section 4 of the Act. The CCI also prescribed various behavioural remedies to check SALPG's abuse of dominant position which are as follows:

- SALPG shall not insist on mandatory use of its cavern and shall allow bypass of cavern for both pre-mixed and blended LPG, without any restrictions; and/or
- SALPG shall allow access to its competitors, potential as well as existing, to the terminalling infrastructure at Visakhapatnam Port, subject to compliance with all safety integrity and other requirements under applicable laws and regulations framed thereunder. Such an access should avoid additional cost burden on SALPG, and the entity seeking access shall bear the cost, if any, towards necessary changes to the existing infrastructure. Under this option also, SALPG shall not insist on mandatory use of cavern and it shall allow bypass of cavern, without any restrictions. SALPG shall extend full cooperation for the study/audit undertaken by Port in relation to the remedies ordered herein. Needless to say, SALPG shall not do anything raising rival's cost.

Penalty

On the question of penalty to be imposed, the CCI noted that denial of market access is one of the severe forms of abuse of dominant position. It was also observed that the abusive conduct of SALPG is primarily with a view to protect its commercial interest at the cost of competition. Accordingly, the CCI imposed the maximum statutorily prescribed penalty on SALPG at the rate of 10 percent of their average annual turnover generated from the relevant market for upstream terminalling services at Visakhapatnam Port amounting to INR 19,20,70,000/-.

(Source: CCI decision dated July 11, 2018; for full text see CCI website)

VA Comment: *This is a landmark case which illustrates the denial of an essential facility to a sole competitor by a super dominant enterprise without any objective justification. The SALPG was not able to prove that the restriction imposed by it on EIPL though efficiency enhancing was indispensable. SALPG was burdened with the highest penalty of ten percent of the average annual turnover of preceding three years .*

INTERNATIONAL

European Union: European Commission ('EC') fines Google €4.34 billion for imposition of restrictions on Android device manufacturers

The EC has imposed penalty on Google of €4,342,865,000 for abusing its dominant position in the market for *general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system.*

The EC found that Google has engaged in three separate types of practices, which all have the aim of cementing Google's dominant position in the general internet search. The abusive practices which were held to be in violation of Article 102 of the Treaty on Functioning of the European Union (TFEU) are as follows:

- **Illegal tying of the Google search app and browser app-** Requiring manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store). The EC held that pre-installation can create a *status quo* bias since users who find search and browser apps pre-installed on their devices are likely to stick to these apps. This has reduced the ability of rivals to compete effectively with Google.

- **Illegal payments conditional on exclusive pre-installation of Google search**-Granting significant incentives to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app across their enture portfolio of Android devices; and

- **Illegal obstruction of development and distribution of competing Android operating systems-** Preventing device manufacturers from using any alternative version of Android that was not approved by Google (Android forks). In order to be able to pre-install on their devices Google's proprietary apps, including the Play Store and Google Search, manufacturers had to commit not to develop or sell even a single device running on an Android fork.

The EC held that Google's practices denied rival search engines the possibility to compete on merits. The tying practices ensured the pre-installation of Google's search engine and browser on practically all Google Android devices and the exclusivity payments strongly reduced the incentive to pre-install competing search engines. Google also obstructed the development of Android forks, which could have provided a platform for rival search engines to gain traffic. Google's strategy also prevented rival search engines from collecting more data from smart mobile devices, including search and mobile location data, which helped Google to cement its dominance as a search engine.

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

III. COMBINATION

INDIA

CCI approves Walmart's acquisition of majority stake in Flipkart

The CCI vide its order dated August 8, 2018 approved Walmart International Holding's acquisition of 51% to 77% of the outstanding shares of Flipkart Private Limited.

The CCI noted that both the parties are engaged in B2B sales and thus there is a horizontal overlap between the parties in the relevant market of 'pan-India market for B2B sales'. The CCI concluded that Flipkart and Walmart "are neither close competitors in the B2B sales nor have a combined market share that raises competition concern". The CCI took note of the submission by the Walmart that the Indian retail market size is estimated at $672 billion out of which 30-40 percent is B2B sales. It was observed that the combined market share of the Flipkart and Walmart would remain less than 5 per cent. Since the market share of Walmart in B2B sales in India is less than half a percent, the CCI noted that the incremental changes on account of the proposed combination is insignificant.

The CCI further noted that even if the organised sector is considered separately, it looks competitive due to presence of players like Reliance Retail, Metro Cash and Carry, Amazon Wholesale etc. With respect to any vertical overlaps, the CCI noted that on account of regulatory restrictions, there is a vertical overlap between the B2B business of Walmart and the online marketplaces of Flipkart. Accordingly, the CCI approved the combination.

(Source: CCI decision dated August 8, 2018; for full text see CCI website)

INTERNATIONAL

European Union: EC approves Total Produce's acquisition of Dole, subject to conditions

The European Commission has approved the acquisition by Total Produce of joint control over Dole. Both companies supply bagged salads, bananas and other fresh fruits and vegetables. The approval is conditional on the divestment of Dole's bagged salad business in Sweden.

Total Produce is a leading fresh produce distributor in the EU. Dole is a producer, marketer and distributor of fresh fruits and vegetables with activities in the EU and worldwide. Both the companies own production facilities for bagged salads in Sweden.

The EC examined the effects of the proposed transaction on competition in the market for the supply of bagged salads, bananas, pineapples and other fresh fruits and vegetables.

On the basis of its preliminary investigation, the Commission was concerned that the transaction, as originally notified, would have significantly reduced competition in the market for the supply of bagged salads in Sweden. Only one other significant competitor, Salico, would have remained in this market post-transaction. As a result, the EC was concerned that the combined entity would not have faced sufficient competitive pressure from this remaining player. The Commission found that no competition concerns would arise with respect to all the other products where the companies' activities overlap, due to the presence of a sufficient number of alternative suppliers.

The proposed remedies

To address the Commission's competition concerns, the companies offered to divest Dole's bagged salads business in Sweden, Saba Fresh Cuts AB.

These commitments fully address the EC's concerns as they remove the entire overlap between the companies' activities in the supply of bagged salads in Sweden.

Therefore, the Commission concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns in the EU. The Commission's decision is conditional upon full compliance with the commitments.

(Source: European Union press release dated July 30, 2018)

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