Competition News Bulletin

VAISH ASSOCIATES ADVOCATES
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Highlights of the Edition..

Jurisdictions covered in this issue
India
European Union
Unites States

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India ("CCI") grants first-ever 100 percent reduction in penalty

The CCI by its order dated April 19, 2018, has awarded a 100 (One Hundred) per cent reduction in penalty to the leniency applicant, Panasonic Energy India Co. Ltd (**'Panasonic'**) in a case involving cartelization in respect of zinc-carbon dry batteries in India, in its second decision on a leniency application.

Brief Background

The CCI investigation was initiated pursuant to a leniency application filed by Panasonic under the leniency regulations. Panasonic submitted that Eveready Industries India Limited (**'Eveready'**), Indo National Limited (**'Nippo'**) and Panasonic (collectively referred to as **'Manufacturers'**) had been operating a cartel in the manufacture and supply of zinc-carbon dry cell batteries since 2013, in violation of the provisions of Section 3(3) read with Section 3(1) of the Competition Act, 2002 (**'Act'**).On the basis of the information provided by Panasonic, the CCI vide its order dated 22 June 2016 directed the Director General (DG) to investigate the matter. Subsequently, Eveready and Nippo also filed leniency applications on 26 August 2016 and 13 September 2016 respectively.

***Modus operandi* of the cartel**

The cartel was set up by the Manufacturers in 2013 to raise the maximum retail price of the zinc-carbon dry cell batteries and thereby improve the realizations. In order to implement the cartel, the top management and employees of the manufacturers used to regularly meet and agree on the price increase, which was usually led by one manufacturer of zinc-carbon dry cell batteries and followed by others under the pretext of following the market leader. The Manufacturers also agreed not to aggressively push sales through their channel/ distribution partners in order to avoid price war amongst themselves.

Role of the Trade association

This case also highlights the active involvement of the Association of Indian Dry Cell Manufacturers (**'AIDCM'**) , which was used as a platform by dry cell battery manufacturers to coordinate their actions, *inter alia,* on pricing. There was evidence of coordination during the AIDCM meetings, which were reflected in the minutes of the meetings. Manufacturers also used to meet on the sidelines of the AIDCM meetings which was reflected in the hand-written notes and agenda points prepared by the individual members for the meeting.

AIDCM compiled information on production and sales of zinc-carbon batteries of the Manufacturers comprising company-wise detailed information for different battery sizes with further breakup on the basis of premium / popular types as well as the aggregate data of the industry. This data on volume of production and sales of member companies in respect of, inter alia, dry cell batteries (both zinc-carbon and alkaline) and flashlight / torches was formally shared on a monthly basis by AIDCM in a prescribed format.

CCI's evaluation of the Leniency applications

In the sequence in which the parties approached the CCI, Panasonic was accorded First Priority, Eveready was accorded Second Priority and Nippo was accorded Third Priority.

The CCI observed that the investigation was initiated on the information/evidence provided by Panasonic and that its cooperation was essential for establishing a contravention of Section 3 of the Act. Thus, the information provided by Panasonic was deemed to result in 'significant value addition'.

Since the information provided by Panasonic alone was deemed independently sufficient to establish a contravention of Section 3(3) of the Act, it was held that the information/evidence provided by Eveready and Nippo did not result in 'significant value addition'.

In Eveready's case, the CCI noted that although the documents/evidence furnished by it was already in the possession of the DG/CCI, the oral statements provided by Eveready corroborated the evidence already in possession. Thus a 30% reduction in penalty was granted to Eveready.

For Nippo, the CCI considered the continuous and expeditious co-operation extended by Nippo and thus, granted it 20% reduction in penalty.

(Source: CCI decision dated April 19, 2018; for full text see CCI website)

CCI passes its third leniency decision

The CCI by way of an order dated May 1, 2018 has issued its third leniency order in the case of *Nagrik Chetna Manch v. Fortified Security Solutions and Ors.* (Case 50 of 2015) in which it granted reduction in penalty to four out of the six leniency applicants. The allegations in the case pertains to rigging of five tenders floated by the Municipal Corporation of the City of Pune ('PMC') in 2014 for setting up of solid waste processing plants. The CCI found that they all the six opposite parties indulged in bid rigging/collusive bidding in contravention of the provisions of the Act. Incidentally, all the opposite parties had sought imposition of lesser penalty under the Leniency Regulations. Mahalaxmi, the first applicant was given a reduction in penalty of 50%, the second applicant 40% and Lahs Green, the third leniency applicant 50%. Ecoman, the fourth applicant was granted a 25% reduction in penal towing to the co-operation extended by it during investigation. As regards Raghunath and Fortified, the fifth and the

sixth leniency applicant respectively, the CCI held that the disclosure by these entities did not lead to any value addition in the investigation and accordingly no reduction in penalties was granted to them.

(Source: CCI decision dated May 1, 2018; for full text see CCI website)

CCI closes investigation against Kerala cement dealers' association and cement manufacturers

The CCI by its order dated May 24, 2018 has closed the investigation against Ramco Cements Ltd (**'Ramco'**) and the Kerala Cement Dealers' Association (**'KCDA'**). The investigation by the Director-General (**'DG'**) was initiated on the basis of three informations filed before the CCI i.e. Case No. 75/2012, Case No. 56/2013 and Case No. 106/2013. The gist of the allegations was that KCDA was interrupting/blocking supplies of cement to the Informants by Ramco following a refusal to follow instructions of KCDA to sell cement at an unjust price.

Findings of the DG investigation

The DG upon investigation observed that the allegations raised in the information were unsubstantiated since there was a huge variation in the prices of cement by the same dealer even on the same day. Further, it was noted that the market for the sale of cement in the State of Kerala was fiercely competitive and hence competition would not be curtailed by stopping supplies to one or two cement dealers by any cement manufacturer. However, the DG Report contained certain discrepancies on account of which the DG was directed to submit a supplementary investigation report which suggested the existence of an anti-competitive agreement between Ramco, Dalmia Bharat Limited (**'Dalmia'**) and KCDA to avoid the sale of cement below invoice price.

CCI findings

The CCI held that the material collected by the DG was insufficient to prove a contravention of Section 3(3) of the Act. The instance of anti-competitive conduct identified by the DG in his report pertained to a one-time urging of cement manufactures to the cement dealers to not sell below invoice price.

The cement manufacturers contended that they had merely warned the dealers that they would not bear any loss suffered by the dealers if the dealers were to sell cement below the invoice price.

The CCI noted that notwithstanding the advisory issued by the cement manufacturers, it was open for the dealers to compete by adopting any price between the respective invoice price and maximum retail price. Further, the CCI also held that a one-off instance of two competitors withdrawing post-sale discounts is not sufficient to establish an anti-competitive agreement between them, more so because of the rationale offered by them.

(Source: CCI decision dated May 24, 2018; for full text see CCI website)

International

United States: Japanese auto parts company pleads Guilty to Antitrust Conspiracy Involving Steel Tubes

Maruyasu Industries Co. Ltd. (**'Maruyasu'**) an automotive parts manufacturer headquartered in the Aichi Prefecture in Japan, pleaded guilty and was sentenced to pay a USD 12 million criminal fine for its role in a criminal conspiracy to fix prices, rig bids, and allocate customers for automotive steel tubes incorporated into vehicles sold in the United States and elsewhere.

Maruyasu pleaded guilty to a charge contained in an indictment returned by a grand jury on 15 June 2016, in the U.S. District Court for the Southern District of Ohio. According to the plea agreement, Maruyasu participated in a conspiracy to suppress and eliminate competition by agreeing to fix prices, allocate customers, and rig bids for automotive steel tubes sold to automobile manufacturers in Japan and incorporated into vehicles sold in the United States, in violation of the Sherman Act.

(Source: DOJ press release dated May 31, 2018).

II. ABUSE OF DOMINANCE

INDIA

CCI directs investigation against Oil and Natural Gas Limited ('ONGC') for abuse of dominant position

The CCI by way of an order dated June 12, 2018 has directed investigation under Section 26(1) of the Act against ONGC for abusing its dominant position in the relevant market for *"charter hire of Offshore Support Vehicles in the Indian EEZ"*. The investigation was directed on the allegations made by the Informant association, the Indian National Shipowners' Association, that ONGC has imposed one-sided and onerous terms in the Charter Hire Agreements executed with the suppliers of Offshore Support Vehicles (**'OSV's**). The CCI observed that the stipulation of a one-sided clause, which grants an unfettered right to a dominant party to use it in its favor, without giving any reciprocal right to the other party to the agreement, is *prima facie* abusive. It was accordingly held that Clause 14.2 of the Special Contract Conditions (**'SCC'**), which grants an exclusive right to ONGC to terminate the agreement, prima facie amounts to an abuse of dominant position in contravention of Section 4(2)(a)(i) of the Act.

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

CCI directs investigation against Grasim Industries Ltd. ('Grasim') for abuse of dominant position

The CCI vide an order dated May 16, 2018 directed investigation against Grasim for abusing its dominant position in the relevant market for the sale of Viscose Staple Fibre in India. The Informants were granted confidentiality by the CCI under Regulation 35(1) of the Competition Commission of India (General) Regulations, 2009. The investigation was directed in allegations that Grasim had indulged in unfair market practices including non-disclosure of discount policies, providing differential treatment to different customers vis-à-vis discounts, compelling customers to disclose confidential business information etc. Grasim's market practices were found to be prima facie in violation of Section 4(2)(a)(i), Section 4(2)(a)(ii), Section 4(2)(c) and Section 4(2)(d) read with Section 4(1) of the Act.

(Source: CCI decision dated May 16, 2018; for full text see CCI website)

INTERNATIONAL

European Union: European Commission ('EC') confirms unannounced inspections in the styrene monomer purchasing sector

On June 05, 2018, the EC carried out unannounced inspections in several member states of the European Union ('EU') at the premises of companies active in styrene monomer purchasing, in relation to a suspected violation of EU antitrust laws. Styrene monomer is a chemical product used as a base material for a number of chemical products such as plastics, resins, rubbers and latexes. These products are then used in a very wide range of applications (insulation, packaging, etc.).

In the EU, unannounced inspections are a preliminary step in investigations into suspected anticompetitive practices.

(Source: European Union press release dated June 8, 2018)

III. COMBINATION

INDIA

CCI approves the acquisition of Monsanto by Bayer AG subject to structural modifications

The CCI by its order dated June 14, 2018 has approved the proposed acquisition of Monsanto Company (Monsanto) by Bayer Aktiengesellschaft (Bayer). The CCI approved the proposed combination, subject to the following remedies to be implemented by the parties:

A. Divestment of the following businesses of Bayer to an independent third party:

- Glufosinateammonium;
- Crop traits of cotton and corn; and
- Hybrid seeds of vegetable.

B. Divestment of the shareholding of Monsanto in Maharashtra Hybrid Seed Company limited (26%) to an independent third party.

C. In addition to the aforesaid structural remedies, Bayer was also directed to undertake the following commitments for a period of 7 (seven) years from the date of closing of the proposed combination:

- The resultant entity of the combination (**'Combined Entity'**) would follow a policy of broad-based, non-exclusive licensing of Genetically Modified (GM) as well as nonGM traits currently commercialized in India or to be introduced in India in the future, on fair, reasonable and non-discriminatory terms (FRAND Terms);
- The Combined Entity would follow a policy of non-exclusive licensing of non-selective herbicides and / or their active ingredient(s) in case of launch of new GM / non-GM traits in India that restrict agricultural producers including farmers to use specific non-selective herbicide(s) being supplied only by the parties, on a fair, reasonable and non-discriminatory basis;
- Combined entity would allow Indian users / potential licensees to access the following on FRAND Terms: (a) existing Indian agro-climatic data owned and used by the Combined Entity for its digital applications commercialized in India; (b) commercialized digital farming platform(s) of the Combined Entity for supplying/selling agricultural inputs to agricultural producers in India; and (c) digital farming applications of the Combined Entity, commercialized in India, on subscription basis. This remedy shall operate for a period of 7 years from the commencement of commercialization of digital farming product(s) or digital farming platform(s), subject to a total period of 10 years from the closing of the combination.
- Combined Entity would also grant access to Indian agro-climatic data, free of charge to Government of India and its institution(s), to be used exclusively for creating a public good in India.
- Combined Entity is barred from offering its clients, farmers, distribution channels and/or its commercial partners, two or more products as a bundle which may potentially have the effect of exclusion of any competitor.
- Combined Entity is further barred from imposing, directly or indirectly, commercial dealings capable of causing exclusivity in the sales channel for supply of agricultural products.

- If the Combined Entity offers better commercial terms to a new licensee for any of the above licenses, then it would be bound to offer, within 60 days, such similar terms to all existing licensees.

In addition, to the said commitments, Bayer was also directed to disclose, on its Indian websites, all contact details to facilitate the implementation of remedies ordered by the CCI.

(Source: CCI press release dated June20, 2018)

INTERNATIONAL

European Union: EC clears acquisition of General Electric Industrial Solutions ('GEIS') by ABB

The EC has approved the acquisition of GEIS by ABB. Both GEIS and ABB are global suppliers of electrical products and systems. The EC concluded that the proposed transaction is not likely to raise any significant competition concerns since (a) the merged entity will continue facing effective competition from a number of large-scale rivals and specialized or local suppliers. (b)products in these markets are generally homogeneous and therefore interchangeable between competing brands. The EC also noted that the parties are active at different levels of the supply chain.

(Source: European Union press release dated June 1, 2018)

European Union: EC approves the acquisition of Dutch cable TV operator Ziggo by Liberty Global, subject to conditions

The EC has reapproved the acquisition of Ziggo by Liberty Global. The merger was initially approved in 2014 but was subsequently annulled by the General Court in October 2017.

The General Commission had annulled the EC's decision since the EC had failed to consider the vertical anti-competitive effects of the merger on the potential market for premium pay TV sports channels.

In its fresh assessment, the EC held that the transaction would have increased Liberty Global's negotiating power vis-à-vis TV channel broadcasters, hindering innovation in the delivery of audiovisual content over the internet. Thus, this renewal was subject to conditions.

To address the EC competition concerns, Liberty Global offered commitments similar to those offered in 2014, in particular:

- to terminate clauses in channel carriage agreements that limit broadcasters' ability to offer their channels and content over the internet, and
- not to include such clauses in future channel carriage agreements for eight years from today's decision;
- to maintain adequate interconnection capacity through at least three uncongested routes into its Internet network in the Netherlands, helping to ensure sufficient capacity for competing OTT services, also for eight years from today's decision;
- Not to re-acquire Film1 channel, to ensure that this divestment is a structural change to the market.

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

IV. MISCELLANEOUS

India:

Supreme Court limits NCLAT's appellate jurisdiction

National Company Law Appellate Tribunal

The Supreme Court of India in its judgement dated May 18, 2018 in *M/s B. Himmatlal Agrawal v. Competition Commission of India,* Civil Appeal No. 5029/2018 has set aside the NCLAT's order and restored the appeal dismissed by the NCLAT. The appeal before the Supreme Court was preferred against the NCLAT's order dated 21 December 2017dismissing the Appellant's appeal. Previously, vide its order dated 04 December 2017, the NCLAT had stayed the CCI's order imposing penalty on the Appellant. The stay order was granted subject to the Appellant depositing a sum equal to 10% of the total penalty. However, the Appellant was unable to comply with the stay order due to financial distress. It was on account of non-compliance of the stay order that the appeal was dismissed by the NCALT.

The Supreme Court , in this landmark ruling, while setting aside the NCLAT's order, held that the right to appeal envisaged under Section 53B of the Act cannot be restricted by the imposition of a condition of pre-deposit of a certain amount.

(Source: Supreme Court decision dated May 18, 2018; for full text see Supreme Court website)

Supreme Court clears air on definition of relevant market in Section 3 (anti-competitive agreement) cases

The Supreme Court by its order dated May 7, 2018 has clarified that the determination of a 'relevant market' is not a mandatory pre-condition for undertaking an assessment of an alleged violation of Section 3 of the Act. The Supreme Court in its judgement dated March 7, 2017 in *Competition Commission of India v. Co-ordinaion Committee of Artists and Ors.* had observed that 'the first and foremost aspect that needs

determination is: 'What is the relevant market in which competition is effect'? The CCI in its application had held that the Hon'ble Supreme Court's observation has given an impression that the question of relevant market has to be determined in all types of cases under Section 3 of the Act. However, the Supreme Court has now settled the air surrounding the market definition to hold that delineation of the relevant market is not mandatory in terms of the statutory scheme of the Act, particularly having regard to the statutory presumption contained in Section 3 of the Act.

(Source: Supreme Court decision dated May 7, 2018; for full text see Supreme Court website)

Delhi High Court upholds right to counsel during DG investigation

The division bench of the Delhi High Court by its judgement dated May 24, 2018 in *Competition Commission of India and Anr. v. Oriental Rubber Industries Pvt. Ltd.* has upheld the right of a person summoned by the Director General (DG) to be accompanied/ represented by an advocate. However, the High Court restricted the scope of the single bench and directed the DG to ensure that 'the counsel does not sit in front of the witness but is some distance away and the witness should be not able to confer or consult her or him'. The CCI had raised a concern that permitting the active participation of the counsel during depositions may not be conducive to larger public interest.

(Source: Delhi High Court decision dated May 24, 2018; for full text see Delhi High Court website)

INTERNATIONAL

European Union: ECJ provides clarity on stand-still obligations under the merger control regime

The ECJ in its ruling dated 31 May 2018 has held that Ernst and Young ('EY') did not jump the gun in the takeover of KPMG's Danish unit.

KPMG Denmark was a member of the international KPMG network. After signing a merger agreement with EY, KPMG Denmark terminated its cooperation agreement with KPMG International with formal cooperation to end within ten months. According to the Danish competition authority ('Danish authority'), this action infringed the EU's "merger standstill obligation" because

KPMG Denmark's termination of cooperation with KPMG International agreement was merger-specific, the decision was irreversible and had the potential to have an effect on the market.

EY appealed the Competition Council's decision before the Commercial Court, which, in turn, referred the matter to the ECJ for a preliminary ruling. The ECJ held that the termination of the cooperation agreement between KPMG Denmark and KPMG International is not subject to the prohibition of gun-jumping. The ECJ held that the termination does not contribute, as such, to the change of control over KPMG Denmark. It was held that no regard should be had to the effects which the termination is likely to have on the market, as long as the termination did not change the control over KPMG Denmark.

(Source: Judgement dated May 31, 2018 of the Court(Fifth Chamber)

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