Competition News Bulletin

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European Union

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

CCI holds no violation in exclusive selling beverages of Coca-Cola by INOX Theatres at higher rates than the retail price

The Competition Commission of India ("CCI/ Commission") by way of order dated 28.02.2019 exonerated INOX Leisure Ltd ("INOX") and Hindustan Coca-Cola Beverages Private Ltd ("Coca-Cola") against allegations of entering into vertical agreements to exclusively sell only the products of Coca-Cola in the multiplexes of INOX at prices higher than their normal MRP .

The information also revealed the difference of price between Diet Coke and Minute Maid sold at multiplexes and other retails which turned out to be of Rs. 22/- and Rs. 34/- respectively. Also noted in the information was the practice of introducing a slight difference in quantity/volume of the said beverage sold at the multiplexes, as compared to other retail stores, in order to get around the Packaged Commodity Rules 2011, which provides that identical goods cannot be prices differently by resorting to 'Unfair Trade Practices' or 'Restrictive Trade Practices'. In addition, the fact that INOX and other multiplexes do not permit consumers to carry their own eatables or drinking water inside its movie halls and the consumers are , therefore, forced to purchase them at higher prices was also brought before the Commission. Also put before the Commission's notice was the practice of multiplexes of purchasing and selling only one brand of products i.e. either Coca-Cola or of PepsiCo in their establishments

The Commission during its analysis observed that the facts of this case were similar to an earlier case i.e. Case No. RTPE 16/2009 and moved with the analysis based on the findings of that case. In the earlier case, the Commission had noted that the agreement between Coca-Cola and INOX was for a short period of four months and could be terminated by either party by giving 30 days of notice and therefore could not be said to have resulted in denial of market access to the competitors. CCI observed that the agreements in the present case were signed initially for a period of three years and thereafter fresh agreements have been signed between the same parties upon expiry of the earlier agreements totaling to a total period of 11 years from 2008-2019. It was observed by CCI that the parties have chosen to continue with business relationships based on their commercial interest and requirement, which they are well within their rights to do so. The Commission also observed that in relation to the agreement between INOX and Coca-Cola, Coca-Cola cannot be said to have a significant market power and INOX can switch to sell the brands of competitors, if it gets better commercial terms and conditions. Further, CCI acknowledged the presence of other brands in the open retail market as well as inside other multiplexes which made the market highly contestable and concluded that there cannot be an appreciable adverse effect on competition due to the agreement between INOX and Coca-Cola.

With respect to the tie-in allegation the Commission held that there is no explicit condition that the consumers have to necessarily buy the goods to watch the movie and therefore it cannot be said that there existed a tie-in arrangement because the provision of movie screening is independent of the provision of sale of beverages and the sale of beverages are incidental and not the main driving force to visit the multiplexes.

(Source: CCI order dated 28.02.2019; for full text see CCI website)

CCI imposes penalty on chemists and druggist associations in Madhya Pradesh and two pharmaceutical companies

By way of order dated 03.06.2019, CCI imposed penalty on Madhya Pradesh Chemists and Druggist Association ("MPCDA") and Indore Chemists Association ("ICA") (collectively 'chemists and druggist associations'), as well as two pharmaceutical companies, namely, the Himalaya Drug Company and Intas Pharmaceuticals.

The CCI directed investigation by the Director General ("DG") on allegations made by the Informant i.e. Madhya Pradesh Chemists and Distributors Federation that pharmaceutical companies through their Carrying & Forwarding agents ("C&F Agents") are mandating the requirement of a No-objection certificate ("NOC") from the chemists and druggist associations prior to the appointment of their stockists.

During the detailed investigation, the DG, did not find any evidence against majority of pharma companies and their C&F agents indulging in the practice of obtaining NOC before appointing new stockists. However, DG found certain communications (in the form of e-mails, letters etc.) between the chemist and druggists associations and three pharma companies viz. Torrent, Intas and Himalaya, which were not originally arraigned in the information. Accordingly, the CCI directed "further inquiry" vide order dated 07.12.2016 under Section 26(8) of the Act to carry out further investigation for ascertaining the role of these pharmaceutical companies in perpetrating the anti-competitive conduct of seeking NOC mandatorily prior to appointment of stockists. The DG vide supplementary investigation report dated 27.11.2017 found inter alia documentary evidence against the three pharma companies in perpetrating the requirement of NOC by these chemists and druggists association.

DG also found evidence of mandating the requirement of obtaining "no objection"/clearance" before appointment of new stockiest ,resuming supplies to existing stockists ,limiting supplies to only those stockists who reported sales exceeding Rs. 50000/- etc. against the chemists and druggists' associations in the form of several emails sent by these three pharma companies seeking their approval .

With respect to the order dated 07.12.2016 under Section 26(8) of the Act, it was contented that in terms of Section 26(8) of the Act, the CCI ought to have made an inquiry on its own. It was contented that the CCI does not have any powers to direct further investigation by the DG under Section 26(8) of the Act and, therefore, the order stands vitiated, since the CCI referred the matter to the DG to carry out the investigation rather than inquiring the matter on its own.

The CCI held that 'inquiry', as appearing under Section 26(8) of the Act, necessarily includes all possible modes through which the CCI can consummate its inquiry. Reliance was also placed on Reg. 18(2) of the Competition Commission of India (General) Regulations, 2009 to state that investigation is a subset of inquiry and remanding of the matter to the DG for further investigation is within the scope of inquiry by the CCI. Thus, the Commission may remit the matter back to the DG for carrying out further investigation where the CCI finds that such further investigation is warranted.

With respect to the allegations levelled by the Informant against the pharmaceutical companies, the CCI noted that the DG has found evidence of anti-competitive conduct only against Himalaya, Torrent and Intas. However, Torrent was exonerated by the CCI since it was able to lead evidence to demonstrate that it communicated with the chemists and druggist association only to resolve disputes with stockists. Moreover, there was no evidence to demonstrate that Torrent insisted on NOC from the chemists and druggist associations for appointment of stockists.

Himalaya and Intas were, however, found guilty of anti-competitive conduct by the CCI since they cooperated with the chemists and druggist associations, instead of approaching the CCI. The CCI in line with its previous decisions reiterated that the pharmaceutical companies by cooperating with the NOC requirement of the associations, are also perpetrators of such anti-competitive practice, in violation of Section 3(1) of the Act.

(Source: CCI order dated 03.06.2019; for full text see CCI website)

B. INTERNATIONAL

EC imposes fines on Nike for banning traders from selling licensed merchandise to other countries with the European Economic Area

The European Commission ("EC/Commission") has imposed a fine of 12.5 Million Euros on Nike for its non-exclusive licensing and distribution agreements which illegally restricted traders from selling licensed merchandise cross border and online within the EU single market.

Through a licensing agreement, the licensor allows the licensee to use one or more of its Intellectual Property Rights in a certain product.

Nike's core business is the design and sale of athletic footwear and apparel, including for football clubs and federations which generally feature Nike's registered trademarks. Other products i.e. the licensed merchandise only feature the brands of a football club or a federation and not Nike's trademark. For the latter category, Nike acts as a licensor of IPRs that grants licenses to third parties who in turn become entitled to manufacture and distribute these products. It is in this role of licensor in which Nike was found to be imposing a number of direct as well as indirect measures viz. explicitly prohibiting the sales, threatening termination of contract with the licensees etc. for restricting out of territory sales by the licensees.

According to the Commission, Nike's illegal practices which were in force for 13 years i.e. from 01.07.2004 to 27.10.2017 had partitioned the single market and prevented licensees in Europe from selling products cross-border, to the ultimate detriment of European Consumers. These practices were found to affect the licensed merchandise products bearing the brands of major football clubs like FC Barcelona, Manchester United, Juventus, Inter Milan and AS Roma, as well as national federations like the French Football Federation.

(Source: EU press release dated 25.03.2019)

TAKATA escapes penalty in EU Antitrust Decision on car safety equipment suppliers cartel

EC, in its 29th settlement case since the introduction of the settlement procedure for cartels in June 2008, has imposed a total fine of 368,277,000 Euros on Autoliv and TRW for participating in two cartels for the supply of car seatbelts, airbags and steering wheels to European car producers. However, the third member of the cartels viz 'Takata' was granted full immunity under the 2006 Leniency Notice for revealing the two cartels and thereby avoiding an aggregate fine of 195 million Euros.

Interestingly, the Commission's investigation was initiated with a leniency application filed by Takata and eventually all the suppliers acknowledged their involvement in the cartels and agreed to settle the case. It was found that the three car equipment suppliers exchanged commercially sensitive information and coordinated their market behaviour through meetings at the supplier's business premises, restaurants, hotels and as well as phone calls and e-mail exchanges.

The Commission's investigation revealed the existence of two infringements- (i) sales of seatbelts, airbags and steering wheels to the Volkswagen Group and (ii) sales of seatbelts, airbags and steering wheels to the BMW Group. It was found that the cartel pertaining to the sales to Volkswagen began on 04.01.2007 and lasted till 30.03.2011, with TRW leaving the cartel 2 days prior to the other two members. As regards the cartel pertaining to sales to BMW, it was found that Autoliv and Takata were members of the cartel since 28.02.2008 and later TRW joined on 05.06.2008, and this cartel lasted till 17.02.2011 between Takata and TRW as Autoliv had ceased to be part of it on 16.09.2010. The Cartel was likely to have a significant impact on European Customers as the Volkswagen Group and BMW Group were found to be selling around three of every ten cars bought in Europe.

While imposing fines, Autoliv and TRW, in addition to 50% and 30% reduction respectively under the 2006 Leniency Note for cooperating the Commission, were granted a 10% reduction to the original fines imposed under the Commission's 2008 Settlement Notice.

(Source: EU Press release dated 05.03.2019)

EC fines Barclays, RBS, Citigroup, JPMorgan and MUFG for participating in foreign exchange spot trading cartel

In two settlement decisions named as the "Forex- Three way Banana Split" cartel and "Forex-Essex Express" cartel, the EC has imposed fines amounting to 1.07 Billion Euros on five banks for taking part in cartel activity in the Spot Foreign Exchange market for 11 currencies – Euro, British pound, Japanese Yen, Swiss Franc, US, Canadian, New Zealand and Australian Dollars and Danish, Swedish and Norwegian crowns. The decision in "Forex-Three-way Banana Split" imposed a total fine of 811,197,000 Euros on Barclays, The Royal Bank of Scotland, Citigroup and JP Morgan while the decision in the "Forex-Essex Express" cartel imposed a total fine of 257,682,000 Euros on Barclays, RBS and MUFG Bank. In both the cases, UBS was granted 100% immunity as it revealed the existence of the cartels to the EC.

EC found that some individual traders in charge of Forex spot trading of the above-mentioned currencies on behalf of the relevant banks exchanged sensitive information and trading plans and occasionally coordinated their trading strategies through various online professional chatrooms which enabled them to make informed market decisions on whether to sell or buy the currencies they had in their portfolios and when. These information exchanges also allowed the traders to identify opportunities for coordination, for example through a process called 'standing down' whereby some traders would temporarily refrain from trading activity to avoid interfering with another trader within the chatroom.

Traders who were direct competitors, typically logged in to multilateral chatrooms on Bloomberg terminals for the whole working day and had extensive conversations about a variety of subjects including recurring updates on their trading activities. The 'three-way banana cartel' encompassed communications in three different consecutive chatrooms: "three-way banana split/ Two and a half men/ Only Marge" and the Essex Express cartel encompassed communications in two chatroom: "Essex Express n the Jimmy" and "Semi Grumpy Old men".

(Source: EU press release dated 16.05.2019)

2. ABUSE OF DOMINANCE

A. INTERNATIONAL

EC fines Google for abusing its dominant position in the market for the brokering of online search adverts

EC, after reviewing hundreds of agreements with third party websites/ publishers of adverts, has found that Google had imposed exclusive supply obligation on the publishers which prevented its competitors from placing search adverts on these websites since 2006.

Google was found out to be the strongest player in the online search advertising intermediation in the European Economic Area ("EEA") with a market share above 70% from 2006-2016. In 2016, Google also held market shares above 90% in the national markets for general search and above 75% in most of the national markets for online search advertising, where it is present with its flagship product: the Google Search Engine. Since it is not possible for competitors such as Microsoft or Yahoo to sell advertising space in Google's own search engine result pages, third party websites represented an important entry point for these other suppliers of online search advertising intermediation services to grow their business and compete with Google. The Commission found that, since 2006 Google had included exclusivity clauses in its contracts with third party websites which prohibited these websites from placing any adverts of the competitors and, subsequently in 2009, Google replaced the exclusivity clauses with "premium placement" clauses which required the publishers to reserve the most profitable space on their result pages for Google adverts only. Another clause introduced in 2009 required the publishers to seek written approval from Google before making changes to the way in which any rival adverts were displayed.

The Commission concluded that Google first imposed an exclusive supply obligation, which prevented the publishers from placing any search adverts of the competitors and subsequently introduced what may be called "relaxed exclusivity" strategy aimed at reserving for its own search adverts the most valuable positions and controlling the competing adverts' performance. Such conduct was concluded to be a misuse of dominant position and a fine of 1,494,459,000 Euros was imposed on Google.

(Source: EU press release dated 20.03.2019)

EC penalizes AB InBev for restricting cross-border sales of beer

The EC has penalized AB InBev with a fine of 200,409,000 Euros for abusing its dominant position on the Belgian Beer Market by hindering cheaper imports of its Jupiler beer from Netherlands into Belgium.

Anheuser-Busch InBev NV/SA ("AB InBev") is the world's biggest beer brewer with it its most popular beer brand in Belgium as Jupiler which represent approximately 40% of the total Belgium beer market in terms of sales volume. It also sells Jupiler beer in other EU Member States including Netherlands and France. It was noted by the EU that in Netherlands, Jupiler was sold at a cheaper price to retailers and wholesalers than at which it was sold in Belgium due to increased competition. Determination of AB InBev's dominance in the Belgium beer market was based on its constantly high market shares, its ability to increase prices independently from other beer manufacturers, the existence of barriers to significant entry and expansion, and the limited countervailing buyer power of retailers given the essential nature of some beer brands sold by AB InBev.

EC held that AN InBev abused its dominant position in Belgium by pursuing a deliberate strategy to restrict possibility for supermarkets and wholesalers to buy Jupiler at lower prices in the Netherlands and to import into Belgium. The ways in which AN InBev achieved this was:

(i) Changing the packaging of some of its Jupiler beer products supplied to retailers and wholesalers in the Netherlands to make these products harder to sell in Belgium, notably by removing the French version of mandatory information from the label, as well as changing the design and size of beer cans.

(ii) Limiting the volumes of Jupiler beer supplied to a wholesaler in the Netherlands, to restrict imports of these products into Belgium.

(iii) A number of AB InBev's products are very important for retailers in Belgium as customers expect to find them on their shelves. AB InBev refused to sell these products to one retailer unless the retailer agreed to limit its imports of less expensive Jupiler beer from the Netherlands to Belgium.

(iv) Customer promotions for beer offered to a retailer in the Netherlands conditional upon the retailer not offering the same promotions to its customers in Belgium.

However, while imposing the fines, EC granted a 15% reduction due to the cooperation extended by AB InBev and the remedy proposed pursuant to which AB InBev will provide mandatory food information in both French and Dutch on the packaging of its products.

(Source: EU press release dated 13.05.2019)

3. COMBINATIONS

A. INDIA

CCI approves amalgamation of GlaxoSmithKline into Hindustan Unilever Limited

The Commission, by way of order dated 23.01.2019, has approved the amalgamation of GlaxoSmithKline Consumer Healthcare Limited ("GSKCH") into Hindustan Unilever Limited ("HUL") and subsequently cleared HUL to enter into a non-exclusive consignment selling agency agreement with the entities of GSKCH group to promote, market, distribute and sell certain over-the-counter medical ("OTC") products and oral healthcare products in India, Bhutan and Nepal for a period of five years.

The Commission identified product overlaps/potential overlaps in two broad categories: (i) instant noodles and (ii) breakfast cereal. In the instant noodles market, both GSKCH and HUL were found not to have significant presence and the market was characterized with the presence of players such as Nestle, ITC, Nissin etc. As regards breakfast cereals, HUL was found to have negligible presence having launched the breakfast mixes in 2018 only and the products produced by GSKCH and HUL were also found to be differing in nature i.e. rolled oats and breakfast mixes respectively. While considering the non-exclusive consignment selling agency agreement between HUL and GSKCH, the Commission noted that the combined market share of HUL and GSKCH was less than 20% with increment of (0-5) % in the oral healthcare market and the combined entity would continue to be constrained by players like Colgate, Patanjali, and Dabur etc.

(Source: CCI order dated 23.01.2019; for full text see CCI website)

CCI partly approves acquisition of shareholding in Delhivery Private Ltd by SVF Doorbell

By way of order dated 21.02.2019, the Commission has approved the acquisition of 22.44% shares, as compulsory convertible preference shares, of the total share capital of Delhivery Private Ltd ("DPL") by SVF Doorbell (Cayman) Limited ("SVF").

DPL is engaged in the provision of third-party logistics services in India and provides transportation, warehousing, freight services etc. SVF on the other hand, is a financial investor which makes long term investments in companies in order to produce financial returns for its investors and is not engaged in the provision of any services or sale of goods.

The proposed combination originally related to the acquisition of approximately 37.87% of the shareholding of the total share capital in DPL. The originally proposed combination involved two steps: (i) subscription, by SVF, to compulsorily convertible preference shares amounting to 22.44% of the total share capital of DPL, pursuant to a share subscription agreement, and (ii) on completion of the subscription, a potential subsequent acquisition of additional equity securities by SVF from the existing security holders of DPL at a price and on such terms agreed between SVF and the selling shareholder. However, CCI noted that although the two steps are interconnected, SVF and DPL were yet to finalize the terms of the second transaction and the share subscription agreement was executed only in relation to the first transaction and no agreement or binding agreement was signed in relation to the second transaction. Therefore, after undertaking the competition assessment for the first transaction and reaching at a conclusion that the transaction would not have any adverse effect on competition due to the minimal presence of DPL [market share of (0-5) %] in the logistics market and several new entrants such as E-Kart, Expressbees, Gati etc. in the said market, approved the first transaction and directed the parties to re-file a fresh combination notice with respect to the second transaction.

(Source: CCI order dated 21.02.2019; for full text see CCI website)

CCI approves acquisition of REC Ltd by Power Finance Corporation Ltd

By way of order dated 31.01.2019, CCI has approved the acquisition of around 52.63% equity stake along with management control in REC Ltd ("REC") by Power Finance Corporation Ltd ("PFC"). The acquisition is the aftermath of the decision of the Cabinet Committee on Economic Affairs dated 06.12.2018 granting in-principle approval for strategic sale of the Government of India's 52.63% shareholding in REC to PFC along with a resolution dated 20.12.2018 passed by the Board of Directors of PFC granting an in-principle approval to the acquisition.

During the competition assessment, CCI noted that PFC and REC had common shareholding in certain entities i.e. Energy Efficiency Services Limited ("EESL"), Shree Maheshwar Hydel Power Corporation Limited ("SMHPCL") and NHPC Limited ("NHPC"). However, such common shareholding did not raise any concern for the CCI as there were no overlaps in the activities of EESL and PFC/REC and SMHPCL is currently classified as a non-performing asset having limited capacity.

CCI undertook the competition assessment in two product segments (i) provision of credit for power sector in India and (ii) provision of consultancy services in the power sector in India, leaving the relevant market as open in both. The Commission, in the credit segment observed that the combined market share did not appear to be significant and also acknowledged the presence of constraints from other players in power finance sector, especially banks. In consultancy segment as well, the combined market share was estimated to be less than 10% and the market was found to be characterized by presence of significant competitors viz. WAPCOS, Tata Consulting Engineers Ltd and others.

(Source: CCI order dated 31.01.2019: for full text see CCI website)

Commission approves acquisition of Global Power Solutions Business of Johnson Control by Brookfield

CCI, by way of order dated 14.02.2019, has approved the acquisition of the Global Power Solutions business("GPS") of Johnson Controls International plc ("JCI") by Brookfield Assets Management Inc. ("Brookfield") and Caisse de depot et placement du Quebee ("CDPQ"). As per the transaction, Brookfield will hold 70% of the acquisition and the remaining 30% will be held by CDPQ.

GPS is a business unit of JCI which is engaged in the business of researching, developing, marketing, manufacturing, licensing, distributing, selling and recycling low voltage energy storage products using lead-acid and lithium-ion technologies primarily for the use with passenger vehicles, trucks and other motive applications. On the other hand, Brookfield is an alternative asset manager having investments in sectors such as real estate, infrastructure, renewable power etc. and CDPQ is a Canadian institutional investor that manages funds primarily for public and Para public pensions and insurance plans.

The Commission observed that Brookfield did not have portfolio investments in India in any entity engaged in the same business as that of GPS or in any business which may have potential vertical linkages with the business of GPS in India. As regards CDPQ, the Commission noted that although it holds investments in certain entities engaged in manufacturing and sale of lead acid batteries in India and may have potential vertical linkages with the business of GPS, they were insignificant as the investments in each of the enterprises was found to be less than 5% of the total equity share capital without any special veto/governance rights.

(Source: CCI order dated 14.02.2019; for full text see CCI website)

B. INTERNATIONAL

EC approves joint control over Virgin Atlantic by Air-France-KLM, Delta and Virgin Group

The European Commission has approved the acquisition by Air-France-KLM of a 31% joint-controlling interest in Virgin Atlantic Limited, which in turn has led to joint control over Virgin Atlantic by Air-France-KLM, Delta Airlines Inc. and Virgin Group. The Commission had previously approved the acquisition of joint control of Virgin Atlantic by Delta and Virgin Group in June 2013.

EC investigated the impacts of the transaction on the market for (i) air transport of passengers (ii) cargo air transport services (iii) maintenance, repair and overhaul services. As regards the cargo services and maintenance markets, EC believed the transaction is unlikely to cause any adverse impact due to presence of strong competition.

As regards the market for air transport of passengers, EC found that the transaction gave rise to overlaps on direct/indirect (one company provides a direct flight from one city to another while the other provides a one-stop flight over the same route) and indirect/indirect flights (companies provide one-step flights between two cities). However, as per the EC, the overlaps did not raise any competition concerns despite a small number of routes with high combined market share because the overlapping routes were direct/indirect overlaps, and in addition, Virgin Atlantic, Delta and Air-France-KLM were not found to be close competitors and continued to face tough competition from other carriers on the routes where the activities overlapped. The Commission also noted that the combined slot holdings at the Manchester and London Heathrow airports i.e. the airports where the portfolios overlapped, were unlikely to have a negative impact on the passengers at the said airports. The Commission, therefore, approved the acquisition unconditionally.

(Source: EU Press release dated 12.02.2019)

EC rejects merger between Tata Steel and ThyssenKrupp

EC prohibited the creation of a joint venture by Tata Steel and ThyssenKrupp reasoning that the proposed combination would have let to reduced competition and higher prices for different types of steel and the subsequent remedies proposed by the parties were not sufficient to address these concerns.

The proposed joint venture would have combined the flat carbon steel and electrical steel activities of ThyssenKrupp and Tata Steel in the EEA, in which, ThyssenKrupp is the second largest producer of flat carbon steel while Tata Steel is the third largest. The EC noted that both the companies are significant producers of metallic coated and laminated steel for packaging applications and of galvanized flat carbon steel for the automotive industry. While acknowledging the significance of the European steel sector across EEA, the EC observed that its decision will preserve effective competition in the industry and will also ensure that the key customer industries such as the European automotive industry and the packaging industry will continue to enjoy access to key inputs at competitive prices.

EC had serious concerns that if the proposed joint venture would have resulted in reduced choice in suppliers and higher prices for European customers of (1) metallic coated and laminated steel products for packaging and (2) automotive hot dip galvanized steel products. EC noted that in both the markets, the competitive pressure from the remaining players and even from imports from third countries would not have been sufficient to ensure effective competition.

In order to address these concerns, the parties offered certain structural remedies in the form of divestments, however, the remedies were inadequate to address the competition concerns. Amongst other factors, in both the markets the remedy proposal included no assets for the production of the necessary steel input to manufacture the very product. The dissatisfaction of EC with respect to the remedies proposed by the parties was also seconded by the feedback sought from the market participants.

(Source: EU press release dated 11.06.2019)

EC allows acquisition of Embraco by Nidec subject to divestments by Nidec

EC has approved the acquisition by Nidec of Embraco, whirlpool's refrigeration compressor business which combined two leading global producers of refrigeration compressors used in household and light commercial appliances.

Refrigerator compressors are used for both household and light commercial applications and can run at a fixed speed or variable speed. In its in-depth market investigation, EC expressed concerns that the transaction can reduce competition and result in higher prices and less choice in the market for: (i) Fixed speed refrigeration compressors for light commercial application; where Nidec and Emraco were the two leading players in Europe and worldwide. (ii) Variable speed refrigeration compressors for light commercial applications; where Nidec and Embraco were the only two players active at both European and worldwide level. (iii)Variable speed refrigeration compressors for household products; where Embarco is the leading global player and acquisition of Nidec would have led to the strengthening of Embarco's dominant position in the EEA.

In order to address the EC's competition concers, Nidec offered to divest its refrigeration compressor business for both household and light commercial applications which includes plants in Austria, Slovakia and China which removes the entire overlap between Nidec and Embraco in the markets where the EC had identified competition concerns. Nidec also committed to make available to the purchasers of the divestment business significant funding for future investments in the facilities.

(Source: EU press release dated 12.04.2019)

IV. MISCELLANEOUS

Supreme Court allows CCI appeal against JCB - permits material seized during dawn raid to be used as evidence

The Supreme Court vide order dated 15.01.2019 has allowed an appeal preferred by CCI challenging the order dated 02.06.2016 of the Delhi High Court (”DHC”) which restrained the DG from acting on the evidence seized during the first ever “dawn raid” conducted by the DG on 19.09.2014 as the part of the investigation into an alleged abuse of dominant position by JCB India Limited (”JCB”).

The Supreme Court, while allowing the appeal observed that *“provisions of Section 240A of the Companies Act, 1956 do not merely relate to an authorization for a search but extend to the authorization of a seizure as well. Unless the seizure were to be authorized, a mere search by itself will not be sufficient for the purposes of investigation. Having due regard to the provisions of Section 240A and the underlying purpose of Section 41(3) of the Act, the blanket restraint which has been imposed by the DHC on the DG from acting on the seized material for any purpose whatsoever was not warranted. The DHC has blocked the investigation on an erroneous construction of the powers of the DG.*

CCI had passed an order dated 11.03.2014 under Section 26(1) of the Act directing the DG to initiate investigation into an alleged abuse of dominant position by JCB. However, JCB filed a writ petition before the DHC against the aforesaid order of the CCI. DHC passed an interim order dated 04.04.2014 on the said writ petition directing that the DG may require JCB to furnish the information called by the DG but, no final order/report shall be passed by the CCI. During the pendency of the writ petition, the DG filed an application before the Chief Metropolitan Magistrate (“CMM”) under Section 41(3) of the Act read with Section 240A of the Companies Act, 1956 seeking authorization to conduct a search in the premises of JCB for recovering incriminating documents and papers related with the case. CMM allowed the application of the DG on 17.09.2014. Accordingly, an unannounced search operation/dawn raid was carried out by the DG for the first time in India , on 19 09.2014 in the JCB premises and all incriminating documents, hard drives and laptops found by the inspecting team during the course of the “dawn raid” were seized. Thereupon, an interim application was filed by JCB before the DHC in the pending writ petition for quashing the search and seizure and for return of all documents, hard drives and laptops seized during the search and seizure operation and for a stay on the investigation. The DHC vide its order dated 26.9.2014 stayed further proceedings before the DG.

In the appeal by CCI , the Division Bench of DHC vide order dated 2.12.2014 directed that the parties would be at liberty to raise their contentions before the learned Single judge and left it open to the CCI or, as the case may be, the DG to apply for vacating the order for a stay on the investigation. Pursuant to the above direction, CCI filed an application for vacating the interim order before the learned Single Judge. In the meanwhile, JCB filed another writ petition before the DHC praying for setting aside of the search and seizure. It is in that writ petition that the impugned order dated 2.6.2016 was passed by the learned Single Judge of DHC restraining DG from acting on the seized material for any purpose whatsoever till the next date of hearing. The CCI then filed the present Special Leave Petition before the Supreme Court against this interim order of the Single Judge Bench of DHC.

The Supreme Court after hearing both sides observed that the provisions of the Companies Act, 1956 read with Section 41(3) of the Act, which enabled the DG to conduct investigation were designed to authorize the DG to conduct both searches and seizures. It was further observed that unless a seizure was authorized, a mere search would not be sufficient for the purposes of investigation in terms of the Act. Therefore, any interpretation imposing a restraint on seizure where the CMM had already granted a warrant for searches would be inappropriate. Accordingly, Supreme Court vacated the impugned order of injunction and remitted back the pending writ petitions to the DHC to determine whether and if so to what extent a reference to the seized material should be permitted to be made for the purposes of testing the issue of jurisdiction.

(Source: Supreme Court decision dated 25.01.2019)

Delhi High Court settles constitutional challenges to the Competition Act, 2002- refuses to grant substantive relief to Car makers -sends them back to NCLAT for deciding on merits

The High Court of Delhi by its common judgement dated 10.04.2019, has disposed of 12 Writ petitions filed by 10 noted car manufacturers (BMW, MERCEDES BENZ, FIAT, SKODA, VOLKSWAGON, HONDA, GENERAL MOTORS, TATA MOTORS, HINDUSTAN MOTORS, MAHINDRA & MAHINDRA) and India's largest Music Label & Movie Studio Co. (T-Series – Super Cassettes Industries Pvt Ltd.) challenging the main provisions of the Act against orders passed by the CCI. The writ petitions were filed, inter alia, by the 10 car makers against a common order dated 25.8.2014 passed by CCI imposing penalties on 14 car makers[1] ("Shamsher Kataria Case"), holding that each of the car makers , including the 10 named above, being dominant in their respective brands of cars , had abused their dominant positions by not allowing the aftermarkets of spare parts and repair services to open and develop in India due to vertical restraints imposed on their authorized dealers.

1 Case No 03/2011

The specific provisions of the Act , challenged by the petitioners , before the High Court, related to Section 22(3): Meetings of the Commission, Section 27(b): Orders by the Commission, Section 53A: Establishment of Appellate Tribunal, Section 53B: Appeal to Appellate Tribunal, Section 53C: Composition of Appellate Tribunal, Section 53D: Qualifications for appointment of Chairperson and Member of Appellate Tribunal, Section 53E: Selection Committee, Section 53F:Terms of office of Chairperson and Members of Appellate Tribunal and Section 61: Exclusion of jurisdiction of Civil Courts.

Summary of the decision of the High Court on each issue:

- **Is the CCI a tribunal exercising judicial functions, or is it performing administrative and investigative functions and also adjudicating issues before it?**

The DHC, while making reference to the SAIL judgment[2] of the Supreme Court, held that when the information or complaint which triggers an inquiry is received by the CCI, the initial steps it takes are not always towards or in aid of adjudication but is to discern whether such investigation and further steps towards adjudication are necessary or not. This function of the Commission was considered to be relevant by the High Court, which observed that a court/ tribunal is seized of the lis or the dispute, when the litigator approaches it. DHC observed that the issuance of notice or summons by the court in exercise of its jurisdiction is a judicial act however the stage at which CCI entertains and directs an enquiry, its function in merely administrative. It was also observed that in the discharge of its investigative functions too, the bodies constituted i.e. the DG and CCI are not concerned with any lis, in the sense of a dispute between two parties over a legal relationship, status or private property and rather have regard to the peculiar emit of the Act.

The High Court, in view of the specific functions performed by the CCI (advisory, investigative, administrative, advocacy), held that it does not perform exclusive adjudicatory functions to be called a tribunal. The High Court however, apprised that the finding that CCI is not a tribunal shall not be interpreted to mean that the orders of CCI are any less quasi-judicial at the stage when they attain finality. In this regard, the court observed these orders are subject to appeal to a tribunal i.e. the appellate tribunal. Moreover, they are amenable to judicial review under Articles 226 of the Constitution of India as regards any procedural flaw.

Based on these findings, the High Court held that the CCI does not perform only or purely adjudicatory functions so as to be characterized as a tribunal solely discharging judicial powers of the state and is rather, a body that is in parts- administrative, expert (advisory and advocacy roles) and quasi-judicial (final order, directions, penalties)

2 Competition Commission of India v Steel Authority of India Ltd (2010) 10 SCC 744

- **Does CCI violate the Doctrine of Separation of Powers and is, therefore, unconstitutional?**

While reiterating its finding as made in issue No.1, DHC noted that CCI cannot be called a tribunal in its strict sense and is a mixture of administrative, expert and quasi-judicial as it progresses with its functions. When the CCI considers a complaint or information and records a prima facie opinion, it acts administratively. During the investigation by the DG also, it does not decide the lis and it is only after the DG report is submitted and a hearing given, that an order (Quasi-judicial one) is made. The High Court observed that the ultimate test to apply in considering a complaint that a law violates the separation of power is to check whether the executive or any other branch "takes over an essential function" and the fact that some powers under an enactment which clothe the authorities with a broad range of power such as administrative, quasi legislative and quasi-judicial per se would not make that body a judicial or purely administrative one. While referring to the multiple tasks that the Act requires CCI to discharge (advisory, advocacy, investigation and adjudication), DHC held that the argument that CCI must necessarily comprise of lawyers or those possessing judicial experience or those entitled to hold office as judges does not hold merit.

As regards the CCI's membership, the DHC relied on the Supreme Court decision of Utility User's Welfare Association[3] while dealing with Section 113 of the Electricity Act, 2003 whereby appointment of a judicial member was not mandated, the relevant extract of which is – "We are, thus of the unequivocal view that for all adjudicatory functions, the Bench must necessarily have at least one member, who is or has been holding a judicial office or is a person possessing professional qualification with substantial experience in the practice of law and who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

Accordingly, the High Court held that when adjudicatory orders (especially final order) are made by CCI, the presence and participation of the judicial member is necessary.

As regards the qualification for appointment for Chairperson and Members of the Appellate Tribunal under Section 53D, the High Court observed that it performs judicial functions in hearing and deciding appeals from the orders of the CCI. However, the mandate that the Chairman should have been a Supreme Court Judge or a Chief Justice of a High Court and the personnel chosen is with the approval of the Chief Justice and at least a judge of the Supreme Court is sufficient guarantee of the application of a judicial mind.

Coming to the question of Section 53E, which was challenged on the ground that the selection committee which appoints the Chairperson and members of the Appellate Tribunal is dominated by the executive, the DHC while referring to the dicta in Madras Bar Association v Union of India[4] held that the personnel chosen for the task assigned to the COMPAT shall be with the approval of the Chief Justice, and at least a

3 State of Gujarat v Utility User's Welfare Association 2018 (6) SCC 21

judge of the Supreme Court and consequently Section 53E, as it stood prior to the amendment of 2007, was declared unconstitutional.

- **Section 22(3) – double voting by chairperson unconstitutional?**

Section 22(3) of the Act provides that all questions which come up for consideration in a meeting of the Commission would be decided by majority of members present and voting and that in the event of equality of votes, the Chairperson or the Member presiding would have a second or casting vote. The proviso stipulates a minimum quorum of at least three members for any meeting. The Petitioners argued that this power of the Chairperson/Presiding Member to vote twice, that is, have a casting vote is anathema to judicial functioning and was relatable to board meetings in a corporate structure. Associating the proviso, it was further urged that having regard to the minimum quorum of 3, whenever the quorum is an even number (4 or 6), the Chairperson/Member presiding would have his say because he will vote twice.

The High Court observed that the concept of a casting vote is better confined to the realm of meetings where decision to run a body or selection of personnel are decided and not while undertaking an adjudicatory function which presupposes a fair procedure whereby the tribunal comprised of impartial members render their decisions objectively. The High Court noted that a strong element of collegiality is necessary either in all stages of functioning and at least at the stage of decision making and this collegiality is vulnerable to be compromised if the Chairperson/Presiding Member is conferred a second vote. Considering the potential mischief of the casting vote by which the Chairperson may tip the balance the other way by his second vote, the DHC declared Section 22(3) void in entirety, while keeping the proviso intact which mandates a quorum of minimum three members, which would stand on its own and act as a norm.

- **Does the – revolving door practice vitiate any provision of the Act or the decisions rendered by the CCI?**

Another serious objection to Section 22(3) (proviso) was the 'revolving door' policy which enables the members to participate in one or the other proceedings or desist from participating at their will which destroys the guarantee of fair hearing and violates the basic principle of one who hears must decide. The revolving door allegation was based on the premise that certain members who heard the final arguments of the Shamsher Kataria Case before the CCI, chose not to sign the final order dated 25.08.2014.

Mr Sanjay Jain, on behalf of the CCI refuted this allegation and stated that apart from the three members who signed the order, all the other members who heard the final arguments had retired and the newly appointed members did not sign the final order since they did not hear the final arguments and thus complied with the principle of one who hears must decide.

4 Madras Bar Association v Union of India &Anr. 2014 10 SCC 1

The DHC was of the opinion that the question whether principles of natural justice was violated depends on the facts and circumstances of each case. DHC noted that in the present case, the three members, who finally decided the matter were present throughout all the dates of final hearing. Apart from these three members, as time passed, the four original members had retired and the mere fact that one of the members had participated in two intervening dates of hearings but was not party to the final decision per se does not amount to violation of principles of natural justice. In addition, only three parties i.e. Nissan Motors, BMW and Mahindra & Mahindra had raised the issue with regard to the varying composition of the members who were satisfied that no prejudice would be caused to them in view of the order dated 24.07.2013 by which the CCI had declared that only those members who heard the matter and were present at the time of arguments shall decide the matter.

In view of the above analysis, the DHC held that the possibility of the 'revolving door' does not result in Section 22(3)'s invalidity. The DHC supplemented this view with the decision of the Supreme Court in State of Rajasthan v Union of India[5] and Sushil Kumar Sharma v Union of India[6] in which it was observed that "mere possibility of abuse of provision of law does not per se invalidate a legislation. It must be presumed, unless contrary is proved, that administration and application of a particular law would be done "not with an evil eye and an unequal hand".

However, keeping in mind the undesirability of a decision by a smaller number of members when the hearing is undertaken by a larger body, the DHC issued certain directions which will guide functioning of the Commission in its hearings and final decision. The High Court directed that when all evidence is completed, CCI should set down the case for final hearing. At the next stage, when the final hearing commences, the membership of the CCI should be constant and the same number of members should write the final order. It was further directed that 'no member should take a recess individually during the course of the proceedings to rejoin the proceeding later, since such walk-out and walk-in practice is deleterious to the principles of natural justice.

Apart from this, the Court also opined that CCI should be manned fully with all nine members which will enable the Chairman to ensure that substantial members are present at every important hearing and final hearing. Commenting on the technical members' appointment, DHC stated that the Central Government should seriously consider recruiting legal practitioners who regularly practice in the field of company law, competition, and securities and other related fields with sufficient experience.

5 State of Rajasthan v Union of India (1978) 1 SCR 1

6 Sushil Kumar Sharma v Union of India and Ors (2005) 6 SCC 281

- **Was the power exercised by CCI to expand the scope of inquiry under Section 26(1) in an illegal and overboard manner?**

The information filed before the CCI in the Shamsher Kataria Case was only against three car manufacturers M/s Honda Siel Cars India Ltd, Volkswagen India Pvt. Ltd and Fiat India Automobiles Ltd alleging that they are abusing dominant position by opening the aftermarket for spare parts to the independent dealers. CCI after forming a prima facie opinion directed the DG to investigate vide order under Section 26(1) dated 24.02.2011. The DG while conducting investigation requested for permission to expand the scope of its investigation to include other car manufacturers. CCI, accepting the permission of the DG, expanded the scope of the investigation by a second order under 26(1) order dated 26.04.2011. This second order under Section 26(1) dated 26.04.2011 was challenged before the DHC.

DHC, while referring to the Excel Crop Case[7] judgment of the Supreme Court observed that at the stage when CCI decides to act on a complaint and directs investigation, it doesn't always have all the information or material in respect of the general pattern or method adopted by parties that affect the marketplace. It only has the information filed before it based on which the DG is tasked to look into the matter, and it is during this inquiry, the facts leading to pervasive practices on part of one or more entities maybe possible unearthed. At this stage, the investigation is quasi inquisitorial to the extent that the report given is inconclusive of the rights of the parties; however, to the extent that evidence is gathered, the material can be final. The DHC noted that the Excel Crop judgment had already specifically dealt with the question of 'subject matter' expansion and the Supreme Court clarified that the subject matter can be expanded by the DG in his investigation which not only is limited to the one alleged but the other allied ones, involving others i.e. third parties. Accordingly, DHC was not convinced with the plea of the petitioners that CCI had acted in an illegal manner.

(Source: Delhi High Court decision dated 10.04.2019)

Delhi High Court rejects Monsanto's plea – allows CCI to reopen simultaneous proceedings against Directors/Officers for alleged violation of anti-trust laws.

The Division Bench ("DB") of the Delhi High Court, by way of judgement dated 18.12.2018, reiterated its earlier decision in the Cadila case[8] that simultaneous inquiry can be held against Monsanto and its Directors/officers for alleged violation of the Act. The Court has also clarified that penalties can be imposed against individuals on the basis of their income derived from the company in terms of Section 27 of the Act.

On the issue of whether a simultaneous proceeding against the Managing Director and other officials of Monsanto can continue , the Court reiterated its earlier judgment in the case of Cadila , wherein the DB of

7 Excel Crop Care India v Competition Commission of India 2017 (8) SCC 47

8 LPA 160/2018 & CM APPL. Nos. 11741-44/2018 decided on 12.09.2018

the Court, relying upon the judgement of the Delhi High Court in Pran Mehra v. Competition Commission of India and Anr[9] wherein, the court observed that "there cannot be two separate proceedings in respect of the company and the key-persons, as the scheme of the Act does not contemplate such a procedure. In the course of the proceedings qua a company, it would be open to the key-persons to contend that the contravention, if any, was not committed by them, and that, they had in any event employed due diligence to prevent the contravention. These arguments can easily be advanced by key- persons without prejudice to the main issue, as to whether or not the company had contravened, in the first place, the provisions of the Act, as alleged by the Director General , in a given case." Accordingly, the Court held that, Appellant's grievance with regard to issuance of notice to its Managing Director and other officials under Section-48 of the Act is without substance.

DB held that Officers or Directors can be proceeded against, along with the Company, in case of an alleged violation of the Act. If the Company is found to be indulging in an anti-competitive act, a penalty can also be imposed upon the Officers/Directors in charge pursuant to Section 27 and Section 48 of the Act. On the intent of Sections 27(b) and 48, the Court held that penalty can be imposed on Officers/ Directors even if they are found to be violating Sections 3 and 4 observing that "On a perusal of Section 27 of the Act, it is clear that if there is a contravention of Section 3 or Section 4, the Commission can pass orders against an 'enterprise' and a 'person' i.e. individual, who has been proceeded against, imposing penalty.

(Source: Delhi High Court decision dated 18.12.2018)

9 W.P (C) 6258/2014 decided on 26.02.2015

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