

Competition News Bulletin

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

A. INDIA

NCLAT sets aside CCI order and directs investigation into alleged abuse of dominant position by Flipkart



By way of judgment dated 04.03.2020, the National Company Law Appellate Tribunal (NCLAT) has set aside the order dated 06.11.2018, passed by the Competition Commission of India (CCI) dismissing allegations of abuse of dominant position by Flipkart India Pvt. Ltd and Flipkart Internet Pvt. Ltd.

The information before the CCI was filed by All India Online Vendors Association (“AIOVA/ informant”) which is a group of more than 2000 sellers selling on e-commerce marketplace such as Flipkart, Amazon, and Snapdeal etc. The primary allegation was that Flipkart India sells goods to companies like WS Retail Services Private Limited (“WS Retail Service”), which was owned by the founders of Flipkart internet till 2012, at a discounted price and thereafter, these goods are sold on the platform operated by Flipkart Internet. As per the informant, this practice amounted to *preferential treatment* to certain sellers. In other words, the information revealed an alleged strategy of Flipkart India to acquire goods from various persons and to immediately sell them to WS Retail Services at a discount, which would, in turn, sell these goods as sellers on the internet platform Flipkart.com of Flipkart Internet. This was alleged to be anti-competitive since it forecloses the market for online sale of goods by members of AIOVA.

The CCI in its order dated 6.11.2018 held that Flipkart is not in a dominant position in the relevant market due to the presence of Amazon (its closest competitor having a valuation of around \$700 billion) and other competitors such as Paytm Mall, SnapDeal, and Shopclues etc. In addition, new entrants such as Paytm Mall revealed the low entry barriers in the relevant market and ,therefore , no case of abuse of dominant position was made out against Flipkart. AIOVA challenged this CCI order dated 6.11.2018 (*prima facie* order) in an appeal before NCLAT.

Incidentally, AIOVA had referred to the decision in a case before the Income Tax Appellate Tribunal (ITAT) namely *Flipkart India Pvt. Ltd v Assistant Commissioner of Income Tax* (ITA No. 202/Bang/2018) before CCI, which was ignored by the CCI in its *prima facie* order .This decision was ,however, noticed by NCLAT and played a major role in the NCLAT decision in the appeal filed . The NCLAT noticed the observations of the Assessing Officer in the above-mentioned case under the Income Tax Act, 1961 , which revealed the manner in which Flipkart India Pvt. Ltd was operating in the market by resorting to predatory pricing and

claimed these losses suffered on account of such predatory pricing as business expenditure and claimed credit for the same before the Assessing Officer. NCLAT observed that although the conclusion drawn to impose tax was set aside by the ITAT, however, the above observations of the Assessing Officer remained a crucial fact on record which do make out a *prima facie* case for predatory pricing against Flipkart and merits an investigation by the DG under the Competition Act, 2002. The ITAT had observed that selling at a price below the cost price by Flipkart was not an irrational economic behavior but a clearly thought out strategy to establish a monopoly in the market by brand building, thereby generating consumer goodwill. Accordingly, NCLAT being satisfied that there is a *prima facie* case which merits an investigation, directed the CCI to direct the DG for investigation into the matter.

(Source: NCLAT order dated 04.03.2020; for full text see NCLAT website)

CCI directs investigation against Amazon and Flipkart for alleged exclusive tie ups and preferential terms with their respective preferred sellers



The CCI vide order dated 13.01.2020, directed investigation against Amazon and Flipkart for alleged exclusive agreements, deep-discounting and preferential listing of sellers by Amazon and Flipkart on their respective platforms on *prima facie* concerns that it may lead to market foreclosure.

The investigation was initiated on an information filed by Delhi Vyapar Mahasangh (the Informant) which made the following allegations with respect to the market for the online sale of smartphones in India:

- **Deep Discounting:** It was alleged that Amazon and Flipkart, on their respective platforms, provide deep discounts to a select few preferred sellers which adversely impacts non-preferred sellers. Amazon's preferred sellers included its own joint ventures, which apparently uses the same contact details as of Amazon.
- **Preferential listing:** Amazon and Flipkart, use the word "Fulfilled" and "Assured Seller" respectively on their platforms for the products sold by its preferred sellers to the detriment of other sellers. Such preferred sellers also receive preferential listing on the respective platforms as a result of which the non-preferred sellers are pushed down the search list.
- **Exclusive Tie-Ups and Private Labels:** Both Amazon and Flipkart have several tie-ups and private labels which get preference in terms of sales.

The CCI noted that the primary issue to be examined was the exclusive launch of mobile phones on Amazon and Flipkart. CCI acknowledged that the evidence in the form of text message put forward by the Informant, indicated that due to partnerships between certain mobile manufacturers and platforms, the

offline retailers are forced to purchase smartphones either from the manufacturer's e-stores or from the platforms e-portals. The CCI also noted several reports in media and the advertisements regarding exclusive launches of smartphones on these platforms. CCI observed that companies like OnePlus, OPPO, and Samsung exclusively launched several models on Amazon. On the other hand, Vivo, Realme, Xiaomi etc. exclusively launched several of their models on Flipkart. In 2018, Amazon had launched 45 mobile phones and Flipkart launched 67 mobile phones exclusively on its platform. The CCI observed that it *prima facie* appears that the mobile manufacturers' partner with e-commerce platforms and their brands are sold by the platforms' exclusive sellers.

CCI acknowledged the e-mails furnished by the Informant which revealed communications allegedly sent by Flipkart and Amazon to their sellers for incurring a part of the discounts offered during the big sale events such as 'Big Billion Days' of Flipkart and the "Great Indian Festival of Amazon". CCI noted that the question of whether funding discounts is an element of exclusive tie-ups, merits investigation.

According to CCI, competition on the platforms may get influenced in favor of the exclusive brands and sellers through higher discounts and preferential listing, which may cause appreciable adverse effect on competition in the market for online sale of smartphones in India.

(Source: CCI order dated 13.01.2020; for full text see CCI website)

Karnataka High Court stays CCI order directing investigation against Amazon and Flipkart

The Hon'ble High Court of Karnataka vide order dated 14.02.2020, has, stayed the above order dated 13.01.2020 passed by the CCI directing investigation against Amazon and Flipkart for alleged market foreclosure.

The stay order was issued by the High Court after the Court felt that the impugned CCI order was not based on cogent evidence and was unreasonable. Amazon brought to the notice of the HC, that the earlier writ petitions were filed before the Hon'ble Delhi High Court¹ ("DHC") and the Hon'ble Jodhpur High Court² ("JHC") by the Confederation of All India Traders ("CAIT") making similar allegations against it, were dismissed by both the High Courts. Amazon also challenged the bona fides of the Informant before CCI and submitted that it was the CAIT which got the Informant to file the information. In support, Amazon placed reliance on the Demand Draft deposited in the CCI along with the information and pointed out that the demand draft had been purchased by CAIT and stressed that the petitioner before the two High Courts (CAIT) and the informant before the CCI are one and the same. Amazon also challenged the jurisdiction of CCI to entertain the matter by placing reliance on the counter affidavit filed by Union of India before the High Court of Delhi in a Writ Petition³ filed by the Telecom Regulatory Authority of India

1 W.P (C) No. 9332/2018
2 W.P (C) No. 14400/2019
3 W.P (C) No. 7907/2018

("TRAI") which was disposed of after the DHC recorded Union of India's submission that investigation under the FEMA, 1999 was in progress against Amazon and Flipkart.

Flipkart submitted that the order of the CCI does not disclose jurisdictional facts and satisfaction of CCI with regard to a *prima facie* case was not made out on facts and unless a *prima facie* case is made out, the CCI could not have directed investigation.

The Karnataka High Court acknowledged that investigation under the provision of the FEMA Act, 1999 is in progress against both Amazon and Flipkart and in view of the the undertaking given by Union of India before the Delhi High Court. It was held that the ratio laid down by the Hon'ble Supreme Court in *Bharti Airtel Limited v Competition Commission of India* applies to this case. The Supreme Court in the *Bharti Airtel* case had held that until the jurisdictional facts (the "technical issues" pertaining to contentious point of connection, interconnection charges, point of interconnection etc. between existing telecom players and reliance Jio) are decided by TRAI, CCI cannot proceed to investigate any possible coordination between the existing telecom players.

Moreover, the High Court also took note that it was not disputed that the demand draft submitted by the Informant was purchased by CIAT which leads to inference that they have joined hands.

The HC also noted the submission of Amazon that the CCI has imagined the agreement between the mobile phone brands and the e-commerce platforms had merit since the CCI in its order recorded that there 'appears' to be exclusive partnership between the brands and the e-commerce platforms, although, the agreements were on record before the CCI. The HC held that CCI should have formed a *prima facie* opinion that there exists an agreement, however, in this case the CCI has recorded an inference that there 'appears' to exist an agreement without there being any material on record.

(Source: Karnataka High Court order dated 14.02.2020)

Bombay High Court sets aside CCI order directing investigation against Sony and Star



The Bombay High Court vide judgement dated 16.10.2019, has set aside the *prima facie* orders of the CCI directing DG to investigate whether Star India Pvt. Ltd ("Star") and Sony Pictures Network India Pvt. Ltd ("Sony") had engaged in refusal to deal with Noida Software Technology Park Limited ("NSTPL"). The judgment was primarily based on the following grounds: (i) CCI did not have the jurisdiction to pass such an order as in personam disputes were pending before the Telecom Disputes Settlement and Appellate

Tribunal ("TDSAT"); (ii) CCI did not adhere to the procedure laid down under Competition Act, 2002 before passing an order for investigation under Section 26(1) of the Act.

NSTPL had filed the information before the CCI on 07.06.2017 alleging that Star and Sony have adopted anti-competitive market practices by imposing unfair terms and limiting their services to Distribution Platform Operators such as NSTPL in violation of Section 3 and 4 of the Act. When the information was filed before the CCI and NSTPL, Sony and Star were engaged in a string of litigations before the TDSAT with respect to the Rate Interconnect Offer (“RIO”) agreements entered into by the parties.

The Bombay High Court observed that inter-party disputes between NSTPL and Star were yet to be decided by the TDSAT and, therefore, the CCI was not in a position to interfere in the matter as per the ratio decidendi of the Hon’ble Supreme Court’s judgment in the *Bharti Airtel Case*. [*Competition Commission of India v Bharti Airtel* ((2019) 2 SCC 521)]. Moreover, the High Court also noted that CCI did not provide any reasons for why after determining that Star and Sony are in a dominant position in the relevant market, no analysis of the likelihood of Appreciable Adverse Effect on Competition (AAEC) was carried out based on the factors set out under Section 19(3) while passing the impugned order for investigation of conduct of refusal to deal under Section 3(4) of the Act.

(Source: Bombay High Court judgement dated 16.10.2019)

CCI refuses to order investigation on allegations of bid rigging despite information revealing identical bids in tenders floated by Directorate General Ordinance Service



By way of order dated 21.02.2020, CCI has dismissed allegations of bid rigging by M/s AVR Enterprises (“AVR”) and M/s Shiva Industries (“Shiva”) in two tenders floated by Directorate General Ordinance Service for procurement of cotton cloth for Pagri and Mattress respectively.

Although the information brought on record that the prices quoted by AVR and Shiva in both the tenders were identical, the Commission observed that it is unable to find such conduct to be in contravention of the Competition Act, 2002 due to absence of any material having been brought on record suggesting/indicating concert among the parties to submit such bids.

(Source: CCI order dated 21.02.2020; for full text visit CCI website)

CCI dismisses allegations of cartelization after directing investigation pursuant to a leniency application



CCI, by way of order dated 26.02.2020, has dismissed allegations of cartelization amongst certain parties in relation to Requests for Quotations (“RFQ”) issued by certain Automobile Original Equipment Manufacturers (“OEMs”) for supply of (i) Anti-vibration Rubber Products (AVR) and (ii) Automotive Hoses.

The case commenced on a leniency application which disclosed that two or more companies exchanged information and/or reached agreements amongst themselves as to who would supply AVR products and Hoses in response to RFQs issued by certain automobile OEMs. The information also revealed that companies had exchanged information through in person contacts, phone calls, e-mail etc. The Commission, being prima facie satisfied that a case of cartelization is made out directed investigation by the DG.

However, the CCI, after considering the investigation report of the DG, observed that although the parties had exchanged information amongst each other for some of the RFQs issued by the OEMs, however, no AAEC was caused in India. This conclusion was drawn primarily on the grounds that the supplies were not made in the Indian market and some of the parties had not operated in India for about 10 years. In one of the RFQ's, the parties admitted exchanging sensitive information, however, submitted that such exchange had taken place before the enforcement of Section 3 of the Competition Act, 2002. Most of the parties investigated were Japanese companies. Accordingly, the CCI closed the case under Section 26(6) of the Act.

(Source: CCI order dated 26.02.2020; for full text see CCI website)

B. INTERNATIONAL

EC opens investigation into possible collusion by Casino and Intermarche in a purchasing alliance



The European Commission ("EC") has opened investigation to assess whether two of the largest chains of groceries retail shops in France- Casino Guichard Perrachon ("Casino") and Les Mousquetaries ("Intermarche") have coordinated on the development of their shop networks and their pricing policy towards consumers.

Casino and Intermarche had set up a joint venture for joint procurement alliance of their branded products, INCA in November 2014. The primary concern of EC is whether Casino and Intermarche went beyond the purpose of their alliance and engaged in anticompetitive conduct. EC had carried out unannounced inspections at the premises of Casino and Intermarche in February 2017 and May 2019.

(Source: EU press release dated 04.11.2019)

EC fines NBC Universal for restricting sales of film merchandise products



EC has fined NBC Universal (one of the several film companies belonging to the Comcast Corporation) for restricting traders from selling licensed merchandise within the European Economic Area (EEA) to territories and customers beyond those allocated to them. The restrictions were with respect to merchandised

products featuring the Minions, Jurassic World and other images and characters from NBC Universal's films.

EC found that NBC Universal's non-exclusive licensing agreements imposed:

- Direct measures restricting out of territory sales by licensees: clauses explicitly prohibiting, obligations to notify out of territory sales, limitations to language used on merchandise, obligations to pay to NBC Universal revenues generated from out of territory sales;
- Direct measures restricting sales beyond allocated customers/customer groups: clauses expressly prohibiting these sales, obligations to pay to NBC Universal revenues generated from sales to on-allocated customer groups;
- Direct measures restricting online sales: clauses prohibiting online sales, clause prohibiting out of territory online sales, clauses allowing online sales on the websites of specific retailers;
- Obligations on licensees to pass on these sale restrictions to their customers: clauses restricting licensees to not supply products to customers who could be selling those outside the licensee's allocated territories or customer group;
- Indirect ways to encourage compliance with the sales restrictions: carrying out audits and termination or non-renewal of contracts if licensees did not respect the sales restrictions.

EC found that these restrictions were in force for more than 6.5 years (01.01.2013- 25.09.2019). Accordingly, a fine of 1,432,700 Euros was imposed by the EC after granting a 30% reduction for cooperation during investigation.

(EU press release dated 30.01.2020)

EC fines hotel group Meila for discriminating between customers



EC has imposed a fine of 6,678,000 Euros on Meila for including restrictive clauses in its agreements with tour operators which discriminated between customers within the European Economic Area ("EEA") based on their place of residence. The EC found that Meila's standard terms and conditions for contracts with tour operators contained a clause according to which these contracts were valid only for reservations of consumers who were resident in specified countries. EC observed

that these agreements restricted the ability of tour operators to sell freely the hotel accommodation in all EEA countries and to respond to direct requests from customers who were residents outside the defined countries, as a result of which the consumers were not able to see the full hotel availability or book hotel rooms at best prices with tour operators in other Member States. Meila was granted 30% reduction in fine for cooperating with the EC in the investigation.

(Source: EU press release dated 21.02.2020)

II. ABUSE OF DOMINANT POSITION

A. INDIA

CCI directs investigation into probable abuse of dominance by GMR at Rajiv Gandhi International Airport of Hyderabad



Creating tomorrow today

By way of order dated 03.10.2019, the CCI has directed the Director General (“DG”) to conduct an investigation to ascertain whether GMR Hyderabad International Airport Ltd (“GMR”) has abused its dominant position by not renewing the License Agreement of Air Works India (Engineering) Pvt. Ltd (“Informant”) for providing maintenance, repair and overhaul (“MRO”) services of aircraft to airlines and general aviation services at the Rajiv Gandhi International Airport of Hyderabad (RGIA).

Noticeably, GMR also has its group entity, the GMR Aero Technic Limited (“GAT”), which also provides third party Airframe MRO facility at RGIA. GAT is located inside RGIA and provides MRO services to the airlines which are similar to that of the Informant, i.e. both Line Maintenance Services and Base Maintenance services. GAT was arraigned as Opposite Party No.2 in the Case.

For providing Line Maintenance Services, the service provider needs to be located at the airport. The Line Maintenance Services are rendered during the intermittent interval between arrival of an aircraft and its next take-off, requiring the service provider to be physically present at the airport to attend to such aircraft on an immediate basis. Further, the service providers of Line Maintenance Services primarily compete on the prices as well as on reducing the turnaround time (TAT) which is their most critical key performance indicator.

CCI defined the two relevant markets asunder:

- i) Upstream Market: ‘market for provision of access to airport facilities/ premises at the RGIA’
- ii) Downstream Market: ‘market for provision of Line Maintenance Services at the RGIA.’

RGIA is operated by the GMR Hyderabad International Airport Limited (GHIAL) which signed a Concession Agreement with the Government of India on 20.12.2004 for a period of 30 years (hereinafter, the ‘Concession Agreement’), further extendable by 30 more years at the option of GHIAL. The inauguration of the airport was done in March 2008. GHIAL is a joint venture formed as a consortium between GMR Group (63%), Government of India (13%), Government of Telangana (13%) and Malaysia Airports Holding Bhd (11%). The model of PPP for RGIA is based on a Build-Own-Operate-Transfer (BOOT) basis. During the period of concession, the consortium was incorporated to design, finance, build and maintain the green field RGIA, which has the flexibility to increase capacity to handle over 40 million international and domestic travelers per annum.

CCI noted that in a consortium bid project, competition is at the time of bidding and is known as '*competition for the market*'. Once the project is awarded, the awardee inevitably becomes a dominant player, rather a monopolist, regarding developing, controlling, operating and maintaining the airport as it can operate independent of the market forces. Such monopoly or dominant position is attributable to the concession agreement whereby the Government of India has granted GMR/GHIAL the exclusive right and privilege to carry out the development, design, financing, construction, commissioning, maintenance, operation and management of the Airport for a period of 30 years. This necessarily implies dominance in terms of providing access to the facilities/premises at RGIA to various third-party service providers who wish to provide their services at the airport. Thus, CCI found that GMR/ GHIAL is dominant in the 'market for provision of access to airport facilities/premises at the RGIA'.

CCI also noted that at the time of filing of the information, the Informant and GAT were directly competing with each other in the downstream market, having respective market shares of 53% and 27%. Counterfactual would be a single dedicated service provider in the downstream market. Thus, if the Informant is excluded from this market, its existing as well as potential customers (i.e. the airlines) would be required to either have their inhouse arrangement for their line maintenance, which may increase their cost and impact revenue; or avail services from an alternative service provider operating in the downstream market, which as alleged by the Informant will be GAT. In such a situation, the entity providing Line Maintenance Services in downstream market would virtually be the same as the one dominant in the upstream market, being part of the group. Thus, there would neither be any effective competitive constraint nor any regulatory constraint to put a check on such entity in respect of either price or quality of services in the downstream market. This can potentially result in overcharging from the airlines (which is the intermediate consumer) and may also have an adverse impact on the end consumer in the long run.

CCI found that the facts of the case prima facie suggested denial of market access to the Informant coupled with exclusionary motive by GMR to favour its own group entity (i.e. GAT). Owing to its dominance in the upstream market and its presence in the downstream market, GMR seems to have distorted the level playing field. Though the excluded player/buyer could be only a customer [as was held by the Hon'ble Supreme Court in CCI v M/s Fast Way Transmission Private Limited &Ors., Civil Appeal 7215 of 2014 (Judgement dated 24.01.2018)], this case seems to pose a greater competition concern given the presence of competitive relationship between GMR (through GAT) and the Informant in the downstream market.

Thus, prima facie a contravention of the provisions of Section 4(2)(b) of the Act has also been made out. Based on the foregoing analysis, the CCI found that prima facie a case for contravention of Section

4(2)(b), Section 4(2)(c) and Section 4(2)(e) of the Act was made out against GMR and directed the e DG to carry out detailed investigation into the matter, in terms of Section 26(1) of the Act, and submit a report within 60 days.

(Source: CCI order dated 03.10.2019-; for full text see CCI website)

CCI directs investigation into alleged abuse of dominance and imposition of vertical restrictions by Asian Paints



CCI, by way of order dated 14.01.2020, has directed investigation into the alleged abuse of dominant position and refusal to deal by Asian Paints in the relevant market for manufacture and sale of decorative paints by the organized sector in India. Information was filed by JSW Paints which launched its decorative paints in May 2019.

It was alleged in the information that Asian Paints, owing to its market power and dominance in the relevant market, has denied access to JSW Paints by threatening dealers to not deal with JSW Paints. Instances in Karnataka, Chennai and Telangana were provided in the information which included threatening the dealers to remove signage and promotional material relating to JSW Paints, punitive measures against dealers dealing with JSW Paints, refusing to supply Asian Paints products to dealers dealing with JSW Paints etc. Allegedly, due to the market power of Asian Paints and sheer volume of potential loss of revenue of the dealers, the dealers refrained from doing business with JSW Paints.

CCI observed that there are top 4 market players in the relevant market for manufacture and sale of decorative paints by the organized sector in India- Asian Paints, Berger Paints, Kansai Nerolac and Akzo Nobel which occupy 80% of the market share with Asian Paints consistently sustaining the highest market share over the years.

The Commission held that the alleged conduct of Asian Paints of threatening and pressuring dealers *prima facie* shows that Asian Paints has attempted to prevent JSW Paints in establishing a presence in the relevant market as the decorative paint market is based on a direct distributorship model and highly depends on access to dealers.

Accordingly, the Commission has directed the DG to investigate whether Asian Paints has violated Section 4 by denying market access to JSW Paints and Section 3(4) (b) and 3(4) (d) by imposing restriction on the dealers.

(Source: CCI order dated 14.01.2020; for full text see CCI Website)

NCLAT upholds CCI order imposing penalty on South Asia LPG Co. Pvt. Ltd for abusing its dominant position in upstream terminalling services for LPG import at Vishakhapatnam port



NCLAT, by way of a judgment dated 18.12.2019, has upheld the decision of the CCI dated 11.07.2018 imposing penalty on South Asia LPG Co. Pvt. Ltd (“SALPG”) for abusing its dominant position in the upstream terminalling services for LPG import at Vishakhapatnam port by imposing bypass restrictions and stipulations for mandatory use of its cavern. The information before the CCI was filed back in 2011 by East India Petroleum Pvt. Ltd (“EIPL”), a competitor of SALPG, alleging denial of LPG blending facility by SALPG. It

was alleged that Oil Manufacturing Companies had to pay additional sum if they wished to avail the service of EIPL because they had to pay storage service twice- to EIPL and also to SALPG. Therefore, it did not make any sense for the OEMs to avail the services of EIPL when the same service can be availed at a cheaper price from SALPG. This conduct of SALPG had almost taken EIPL out of business.

The primary contention of SALPG for imposing these restrictions was that any structural changes to its infrastructure may affect the safety integrity levels and may result into accidental release of refrigerated cargo into cross-country pipeline leading to disastrous consequences. Further, SALPG insisted on mandatory use of cavern on the ground that the upstream terminalling infrastructure is an integrated system and piece-meal access is not envisaged.

The NCLAT acknowledged that efficiency at the Vishakhapatnam port will increase if EIPL is allowed to compete with SALPG and the restrictions imposed by SALPG only serves to generate monopolistic profits for SALPG. NCLAT agreed with the finding of CCI that protection of commercial interest by a dominant enterprise, at the cost of competition, is contrary to its responsibility cast under the Competition Act, 2002. NCLAT held that the restriction imposed by SALPG was primarily with a view to protect its commercial interest and the pleas taken before the CCI were an afterthought. Further, NCLAT also held that SALPG requiring users to necessarily use the cavern and pay higher charges is an unfair imposition in provision of terminalling services, discourages imports which restrict the service provided by EIPL.

(Source: CCI order dated 18.12.2019; for full text see CCI website)

NCLAT upholds CCI order dismissing allegations of Abuse of Dominance by BMW



NCLAT, vide judgement dated 25.11.2019, has dismissed the appeal filed by Parsoli Motors Works Pvt. Ltd. (“Informant”) against the order dated 30.05.2018 passed by the CCI in favor of BMW India Pvt. Ltd (“BMW”).

The informant had alleged that BMW had abused its dominant position by not renewing the dealership agreement of the informant. The informant

was a dealer for selling BMW cars in the state of Gujarat since 2007 and the dealership subsisted till 31.12.2017. BMW, vide letter dated, 07.12.2017 intimated the informant about its decision of not renewing the dealership agreement. The contention put forward by the informant was that it was not given sufficient time to exit from the business and the effect of termination of its dealership had the effect of allowing dealers outside Gujarat to sell BMW cars to customers in Gujarat resulting in loss to the Gujarat Exchequer besides causing financial loss to the Informant.

The NCLAT agreed with the findings of the Commission that BMW is not dominant in the market for passenger cars in India with the presence of big players such as 'Maruti', 'Hyundai', 'TATA', etc. who hold a significant market share.

Further, the NCLAT took notice of the fact that the informant had obtained financing facilities from BMW India Financial Services Pvt. Ltd (a group company of BMW financially supporting the sales) for running its business and the default of debt was an amount exceeding INR 54 Crores. The NCLAT, considering that an insolvency proceeding with respect to the above issue was pending before the National Company Law Tribunal ("NCLT") Ahmedabad, observed that the allegations levelled by the informant before the CCI could be a possible counterblast of the same.

(Source: NCLAT order dated 25.11.2019; for full text see NCLAT website)

III. COMBINATIONS

A. INDIA

CCI approves acquisition of Kwality Ltd. by Haldiram and Pioneer Securties Pvt. Ltd.



By way of order dated 24.10.2019, CCI has approved the acquisition of 100% of the total issued and paid up equity share capital of Kwality Limited by Haldiram Snacks Pvt. Ltd ("Haldiram") and Pioneer Securities Pvt. Ltd. Kwality Limited was undergoing insolvency proceedings under the Insolvency and Bankruptcy Code, 2016.

CCI observed that Haldiram is engaged in the business of manufacturing and marketing snack products and Pioneer Securities renders services pertaining to stock and non-banking financial services. On the other hand, Kwality Limited processes milk and related dairy products. CCI noted that the acquirers and Kwality Limited are not engaged in any business activities relating to similar or identical or substitutable products or services. Though CCI observed that Haldiram purchases Ghee from Kwality Limited, however, the quantity of Ghee purchased in 2018-19 was less than 5% of the total value and volume of ghee purchased. Accordingly, Commission was of the view that the proposed acquisition is not likely to cause any competition concerns.

(Source: CCI order dated 24.10.2019; for full text see CCI website)

CCI approves acquisition of 37.40% of the paid up share capital and joint control of Adani Gas Ltd by Total Holdings



By way of order dated 28.11.2019, CCI approved the acquisition of 37.40% of the paid-up share capital and joint control of Adani Gas Ltd ("AGL") by Total Holdings ("Total"). Both Total Group and AGL are engaged in wholesale supply of natural gas in India, as Total Group exports natural gas to India and AGL is also engaged in the wholesale supply of natural gas in India.

CCI observed that although there are no existing vertical arrangements between AGL and Total Group, however, since they are present at different segments of overall supply chain of natural gas in India there exists a potential for vertical relationship between them. However, due to the insignificant presence of both the parties in the upstream (wholesale supply of natural gas in India- Total Group and AGL) and downstream (retail supply of natural gas in India- only AGL) market, the proposed combination, in the opinion of the Commission, is not likely to raise any competition concerns. Moreover, the combined market share of AGL and Total Group in the upstream market (in which both are active) was also not found to be significant. CCI also acknowledged the competitive constraints by other players such as GAIL and IOCL.

(Source: CCI order dated 28.11.2019; for full text see CCI website)

CCI approves acquisition of 23.5% equity shares of Mumbai International Airport Ltd by Adani Properties



By way of order dated 14.11.2019, the CCI has approved the acquisition of 23.5% equity shares of Mumbai International Airport Ltd ("MIAL") by Adani Properties Pvt. Ltd ("APPL"). CCI noted that both APPL and MIAL are directly or indirectly engaged in the business of development, operation and maintenance of airport or provision of access to airport premises.

One of the entities of the Adani Group i.e. Adani Enterprises Ltd ("AEL") has won bids conducted by the Government of India to operate, maintain and develop six airports- Ahmedabad, Lucknow, Mangalore, Jaipur, Guwahati and Thiruvananthapuram. Moreover, other entities of Adani Group and MIAL are engaged in the business of development, operation and maintenance of airports.

However, CCI observed that the presence of parties in the same line of business- provision of access to airport facilities/ premises at the airport or the development, operation and maintenance of airports is not likely to raise any competition concerns as presently no other airport is present within the vicinity of

MIAL in which Adani Group has stakes. The relevant geographic market was taken to be 'each airport' as the provision of services at one airport cannot be substituted with other airport.

(Source: CCI order dated 14.11.2019; for full text see CCI website)

B. INTERNATIONAL

EC approves Varta AG's acquisition of Energizer's divestment business subject to conditions



Varta AG was approved as the suitable purchaser of assets divested by Energizer in order to acquire Spectrum Brands batteries and portable lighting business. In December 2018, the EC had approved the acquisition of Spectrum Brand's batteries and portable lighting business by Energizer subject to the condition that Energizer is required to sell its business of Varta-branded and unbranded household and specialty batteries to a suitable purchaser.

EC had *prima facie* concerns with respect to the proposed acquisition of Varta AG with respect to the hearing aid batteries sold in the mass retail channel, as Varta AG is active on the upstream market for the manufacturing and wholesale supply of hearing aid batteries to battery the brands, while the divested Varta business is a leading downstream supplier of branded hearing aid batteries to the mass retail channel. In order to address this concern, Varta AG has proposed to globally supply hearing aid batteries to any company currently or potentially active in the wholesale supply of hearing aid batteries under their own brand under certain conditions for a set period.

(Source: EU press release dated 03.12.2019)

EC opens in depth investigation into proposed acquisition of Metallo by Aurubis



EC has opened an in depth investigation into the proposed acquisition of Metallo by Airbus after *prima facie* concerns that the acquisition may reduce competition in the purchasing of copper scrap for refining. The merger would bring together the two largest purchasers and refiners of copper scrap in Europe and the EC is concerned that the merged entity could hold a dominant position in the procurement of copper scrap for refining. Preliminary investigation revealed that the two companies are

each other's closest competitors and the companies supplying the copper scrap to these two companies will have negligible countervailing power pursuant to the proposed merger. Aurubis and Metallo have decided not to submit commitments during the initial investigation to address the EC's preliminary concerns.

(Source: EU press release dated 19.11.2019)

EC approves acquisition of Allergan by AbbVie subject to conditions



The EC has approved AbbVie's acquisition of Allergan subject to the condition that Allergan divests brazikumab (a product under development for treating inflammatory bowel diseases). The investigation by the EC primarily focused on biological treatments for inflammatory bowel diseases, where the activities of Allergan and AbbVie overlap.

AbbVie's products include several drugs for inflammatory bowel diseases viz. (i) Risankizumab- a pipeline drug which belongs to a class of biologics called IL-23 inhibitors; (ii) Humira – a marketed drug which belongs to a class of biologics called anti-TNFs. Allergan is under development of an IL-23 inhibitor- brazikumab. EC was concerned that the proposed acquisition as notified would lead to a loss of innovation for inflammatory bowel disease treatments, as AbbVie would not continue developing Allergan's IL-23 inhibitor.

In order to address the EC's concern, AbbVie offered to divest brazikumab including the development, manufacturing and marketing rights at worldwide level to a purchaser that will continue the drug development.

(Source: EU press release dated 10.01.2020)

EC approves acquisition of GE Healthcare Life Science's Biopharma business by Danaher subject to conditions



EC has approved General Electric's Healthcare Life Science's Biopharma business ("GE Biopharma") by Danaher Corporation ("Danaher") subject to the condition that Danaher divests five of its businesses. Both- GE Biopharma and Danaher- are active in the manufacturing of products and services used in the bioprocessing industries and are also competitors in other life sciences areas such as

molecular characterization, microscopy, high content screening and laboratory filtration. EC had concerns that the proposed acquisition as notified would lead to reduced competition, higher prices, less innovation and risk of discontinuation of certain products in the following markets: (i) Microcarriers; (ii) Bioprocess filtration; (iii) Chromatography; (iv) Molecular characterization.

In order to address the EC's concerns, Danaher has committed to divest five of its businesses: (i) The MolDevForteBio molecular characterization business; (ii) The Pall Biotech SoloHill microcarriers and particle validation standards business; (iii) The Pall Biotech chromatography resins business; (iv) The Pall Biotech chromatography hardware business; (v) The Pall Biotech Single-Use Tangential Flow Filtration systems.

(Source: EU press release dated 18.12.2019)

EC opens in depth investigation into proposed acquisition of DSME by HHIH



The EC has opened an in depth investigation to assess the proposed acquisition of Daewoo Shipbuilding & Marine Engineering Co. Ltd (“DSME”) by Hyundai Heavy Industries Holdings (“HHIH”). The EC’s preliminary investigation revealed concerns that the proposed acquisition may remove DSME as a competitive force in the following markets: (i) large containerships; (ii) oil tanker; (iii) Liquefied Natural Gas (LNG); (iv) Liquefied Petroleum Gas (LPG).

EC expressed concerns that the remaining shipbuilders would not exert sufficient competitive constraint on the merged entity in the above-mentioned markets and the customer would not have sufficient bargaining power as well. EC also acknowledged the high barrier to entry in these markets and concluded that it is unlikely that a timely and credible entry from any other shipbuilder would act as a counter to the possible negative effects of the proposed merger.

DSME and HHIH have decided not to submit commitments during the initial investigation to address the EC’s preliminary concerns.

(EU press release dated 17.12.2019)

EC opens in depth investigation into proposed acquisition of GrandVision by EssilorLuxottica



EC, concerned that the proposed acquisition may reduce competition for the wholesale supply of ophthalmic lenses and eyewear and retail supply of optical products, has opened an in-depth investigation into the acquisition of GrandVision by EssilorLuxottica. EC noted that the proposed merger would combine two leaders in the optical industry given that EssilorLuxottica is the largest supplier of ophthalmic lenses and eyewear in Europe and GrandVision is a globally active retailer. EssilorLuxottica sells

its products to optical retailers including GrandVision which resells them to final customers.

The EC’s investigation will assess: (i) Whether EssilorLuxottica will use its strong market presence in lenses and eyewear to raise prices or degrade conditions of supply to competing retailers of GrandVision; (ii) impact of the combination of the activities of EssilorLuxottica and GrandVision in retail, particularly in those countries and areas where they currently compete; (iii) whether the merged entity could limit access of competing suppliers of lenses or eyewear to GrandVision stores, which constitute the largest optical products distribution network in Europe and a key outlet for competing suppliers.

EssilorLuxottica and GrandVision had not submitted commitments during the initial investigation to address EC's preliminary concerns.

(EU press release dated 06.02.2020)

MISCELLANEOUS

Supreme Court upholds initiation of criminal proceedings under Section 42(3) for non-payment of penalty under Section 43



The Hon'ble Supreme Court, vide order dated 19.11.2019, has upheld the decision of the High Court of Delhi dated 29.03.2019 holding that criminal proceedings under Section 42(3) can be initiated against a person/enterprise in case of default of payment of penalty imposed under Section 43 by the CCI.

The appeal was filed by Rajasthan Cylinders and Container Ltd. ("RCCL") and Mr. Jose C Mundadan both of whom had failed to comply with the directions of the Director General, CCI to produce the relevant information/ documents. The CCI, after asking the parties to show-cause, imposed penalties which were not adhered to by the appellants leading to criminal proceedings under Section 42(3).

The appellants challenged the said proceedings on the ground that criminal proceedings under Section 42(3) can only be initiated for non-compliance with orders/ directions of the CCI under Section 42(2) of the Act. The DHC had held that the presence of the word 'or' in Section 42(3) makes the provision wide enough to cover order of the CCI listed in Section 42(2) as well as other directions/orders in the wider provision of Section 42(1).

The Hon'ble Supreme Court in its order dated 19.11.2019 held that it did not find any ground for interfering with the decision of the Delhi High Court.

(Source: Supreme Court Order dated 19.11.2019)

Delhi High Court holds CCI not bound by investigation report of DG



By way of judgement dated 10.10.2019, the Hon'ble High Court of Delhi dismissed an appeal filed by Mr. Saurabh Tripathy ("Petitioner") against an order passed by CCI dated 16.02.2017 holding that the Director General's Investigation Report ("DG Report") is not binding on the CCI and the Commission can differ with the findings of the DG Report, including taking a decision to close the case.

The primary question before the High Court was to determine whether the CCI was required to pass an order directing further inquiry under Section 26(8) of the Act in the event it did not agree with the finding of the DG. The Court observed that in the event CCI is of the view that no further inquiry is required, it is not necessary for the CCI to conduct any further inquiry or issue any such directions for the DG to conduct the same. The Court noted that there is no provision in the Act which mandates that the CCI must accept the DG Report recommending that there are contraventions of the provisions of the Act. In other words, the DG Report is not binding on the CCI and it can differ with the findings of the DG. If the opposite is accepted, that would mean that CCI can never disagree with the report of the DG, which is not the scheme of Section 26 and 27 of the Act. The High Court noted that the DG Report is merely recommendatory in nature and the CCI is required to examine the same and take a view after hearing the parties, and, provisions of further inquiry / investigation (sub-section (7) and (8) of Section 26 of the Act) are only enabling provisions which enable the Commission to direct further investigation or conduct further inquiry if it is of the opinion that such further inquiry is necessary.

(Source: Delhi High Court order dated 10.10.2019)



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