

Competition News Bulletin

December 14, 2015



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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Appellate Tribunal sets aside the order of Competition Commission of India against cement cartel



The Competition Appellate Tribunal (COMPAT) vide its recent order dated December 11, 2015 while allowing the appeals of the 10 appellants has set aside the order of the Competition Commission of India (CCI) dated June 20, 2012 against 9 cement manufacturing companies (La Farge, ACC, Ambuja, Ultratech, India Cements, JK Cements, Madras cements, Binani cements, Jaiprakash Associates) and the Cement manufacturers Association (CMA) vide which a cumulative penalty of INR 6,316.59 Crores was imposed on all the

parties to the cartel, as held by CCI.

Interestingly, this order has been passed by COMPAT on a procedural violation and not on merits. The violation related to the signing of the impugned order dated June 20, 2012 of CCI by the Chairman, CCI though the Chairman was not present at the time of final hearings of the matter on the three dates (February 21, 22 and 23, 2012) on which arguments were advanced by the counsels of each party.

The Hon'ble COMPAT, after a lengthy analysis of the contentions of each side, the history of the enactment of the Competition Act, 2002 (the Act) and the judicial precedents on the core issues i.e. (1) *whether in exercise of its adjudicatory functions, the CCI acts as a quasi-judicial body and as such, bound to comply with the principles of natural justice and* (2) *whether non-compliance of an important facet of natural justice, namely, "only the one who hears should decide" has the effect of rendering the impugned order a nullity*", remitted the matter to CCI and directed the CCI to pass fresh orders within a period of three months from the date of receipt of this order.

Noticeably, the Hon'ble COMPAT, agreeing with the contention of the Appellants and particularly the moot issue of violation of natural justice, held, inter-alia, that "...the law on the issue can be summarized to the effect that the very person/ officer, who accords the hearing to the objector must also submit the report/ take decision on the objection and in case his successor decides the case without giving a fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice".

The Hon'ble COMPAT at the end also observed that "the time has come for the CCI to lay down guidelines for conducting the investigation/inquiry in consonance with the rules of natural justice".

(Source: COMPAT Order dated December 11, 2015. For full text see COMPAT website-www.compat.nic.in/)

Comment: *This order of the Hon'ble COMPAT is a landmark decision which, irrespective of (1) the merits of the case i.e. whether there was a cartel of the cement manufacturers or not, and (2) whether CCI decides to challenge it in the appeal to Supreme court or not, would be remembered as one of the most significant reversal of the decision of CCI on procedural issues i.e. violation of the principles of natural justice, which in our opinion, will pave way for the establishment of a well defined and fairer procedural regulatory structure in CCI in times to come.*

Competition Commission of India (CCI) imposes penalty on Airlines for cartelization.



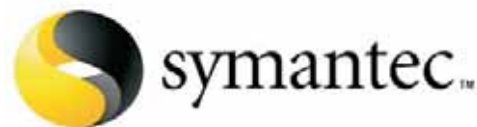
CCI by its order dated November 17, 2015 penalized three Airlines for the violation of Section 3(3)(a) read with section 3 (1) of the Competition Act, 2002 (Act). CCI imposed a penalty of 1% of the average turnover of preceding three years on Jet Airways (India) Ltd., InterGlobe Aviation Limited and Spice Jet Ltd., which amounted to INR 151.69 Crores, INR 63.74 Crores and INR 42.48 Crores respectively. A cease and desist order has also been issued.

CCI found that the airlines were acting in parallel conduct and colluded to fix the Fuel Surcharge (FSC) rates. It concluded that such conduct of airlines was resulting in indirectly determining the rates of air cargo transport and thereby contravening provisions of Section 3(3) (a) of the Act. The airlines had claimed that FSC is linked to Air Turbine Fuel (ATF) and any increase in ATF leads to increase in FSC. However, CCI noted that often the FSC used to increase despite decrease in ATF price as well the dollar exchange rate. The opposite parties charged FSC at the rate of INR 5/kg in 2008. However, no methodology was supplied for arriving at this conclusion. There was a parallel increase to INR 9/kg in April-June 2011. In November 2012 the same was increased to INR 15/kg by Jet, Inter Globe and Spice Jet.

No penalty was imposed on Air India Ltd. as its conduct was not parallel with other airlines. Similarly, Go Airlines (India) Ltd. was also exonerated as it gave its cargo space to third party vendors with no control on any part of commercial/economic aspects of cargo operations done by vendors, including imposition of FSC. The order is particularly notable as it is the first case where the DG Report finding no contravention has been rejected by the CCI and a finding of contravention has been given by the CCI.

(Source: Order dated November 17, 2015. For full text see CCI website-www.cci.gov.in)

CCI closes case against an American Technology Company



CCI vide its order dated November 17, 2015 closed the case filed by M/s Systweak Software, engaged in the development and distribution of computer software operating with Windows and Mac Operating Systems, against an American based company namely M/s Symantec Corporation (OP) engaged in the activities of development and marketing of anti-virus software.

It was alleged that the OP's anti-virus software alerts its users/customers about Informant's Applications as Potentially Unwanted Application ('PUA') on its website and products, preventing the potential customers from installing and using the product offered by the Informant. Such act of the OP is alleged for the breach of the provisions of Section 3 of the Act and denial of market access resulting in violation of the provisions of Section 4(2) (c) of the Act.

CCI after referring the available information delineated the relevant market as 'market for development and sale of computer security (anti-virus) software in India'. CCI examined the licensing agreement for security (anti-virus) between customer/ computer system user and the OP. CCI was of the view that such agreement with the end consumer is not envisaged under section 3 of the Act. Hence, prima facie violation of the provisions section 3 of the Act is ruled out in this case. The CCI further observed that as per the data provided by the Informant, the global market share of the OP is merely 7.1 % in January, 2015 and ranked 5th position amongst its competitors. Moreover, the users have many more options to purchase the security (anti-virus) software and as such the OP prima facie does not appear to be dominant in the relevant market. In the absence of dominance of the OP in the relevant market, it is not required to look into its alleged abusive conduct under the provisions of section 4 of the Act.

(Source: Order dated November 17, 2015. For full text see CCI website-www.cci.gov.in)

INTERNATIONAL

French Competition Authority(FCA) closes investigation against Adidas online sales policy



FCA stated in an opinion note in September 2012 that manufacturers are free to organise their distribution methods provided that they do not restrict competition in the market. A manufacturer cannot unjustifiably curb the development of e-commerce and cannot prohibit its approved distributors from selling its online.

Through, its selective distribution agreements, Adidas prohibited its authorised retailers from marketing its products on certain online websites. However, following the investigation, Adidas removed the prohibition and extended opportunity for its retailers to sell its products online.

The products are approved to be sold on online market places subject to certain quality-related criteria.

(Source: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2671)

German Federal Cartel Office (FCO) opens proceedings against Apple and Amazon audiobook units

The FCO through its press release dated November 16, 2015 has informed that it has opened an administrative proceeding against Audible (a subsidiary of Amazon) and Apple concerning an exclusive distribution agreement between Apple's iTunes Store and Audible.



The investigation is based on a long-term distribution agreement on the purchase of audiobooks by Audible for sale in Apple’s iTunes. Audible is the leading supplier of audiobooks in Germany and specialises in audiobook downloads which can be accessed both from Audible.de as well as from the Amazon trading platform. Further, Audible is recognised as one of the largest producers of audiobooks in Germany and Europe. Through iTunes, Apple operates the largest digital media distribution platform which offers

music, videos, apps, eBooks and audiobooks for download.

According to Mr. Andreas Mundt (President- FCO), both the companies hold a strong position for digital audiobooks in Germany. The audiobook publishers need to have sufficient alternative channels for the sale of their digital audiobooks.

The proceedings have been initiated following a complaint by the German Publishers and Booksellers Association regarding the practices of Audible, including its exclusive supply of Audiobooks to iTunes.

(Source: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_11_2015_Audible.html)

II. ABUSE OF DOMINANCE/MARKET POWER

INDIA

CCI initiates investigation against Max Super Specialty Hospitals for alleged abuse of dominance.



The CCI in its order dated November 17, 2015, has directed the Director General (DG) to conduct an investigation against Max Super Specialty Hospital (“Max”) and M/s Becton Dickinson India (P) Ltd. (“BDI”) for alleged abuse of dominance pursuant to an information The Information was filed by an individual. The informant has alleged that BDI in collusion with Max has been

printing higher MRP on its products to be sold in the hospitals of Max in order to increase the margins of both Max and BDI and to cheat the patients/consumer. Moreover, Max has given exclusive right to BDI to sell its product in the said hospital.

CCI, while forming the prima facie case for investigation observed that the relevant market would be the market for ‘provision of health care services by super speciality hospitals in Delhi’ and Max is in dominant position in the said market

(Source: CCI Order dated November 17, 2015. For full text see CCI website)

CCI dismisses allegation of anti-competitive practices against DLF Ltd.



The CCI by its order dated November 17, 2015 dismissed allegations against DLF Qutab Enclave Complex Educational Charitable Trust (the Trust) and DLF Ltd.. It was alleged by the Informant, Ms. Geeta Kapoor, that the Trust was imposing unfair terms, conditions and price in the lease agreement to establish and run a crèche facility in the residential colony; and that this was anti-competitive under Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act.

The CCI, stated that the relevant product market to be the market for 'lease/sale of plots/units for development and running of crèches/ play schools in Gurgaon, and rejected the allegations. The CCI noted that the potential developer of a crèche/ play school is not necessarily required to run the same within the residential colony. As the relevant product market could not be restricted to the plots earmarked for amenities in the residential colonies, The CCI concluded that the Trust or DLF Group were not dominant enterprises in the relevant market. Hence, no prima facie case of contravention of Section 4 was made out.

(Source: CCI: Order dated November 17, 2015. For full text see CCI website)

CCI dismisses allegations of abuse of dominant position against Coal India Ltd. (CIL) and directs CIL to examine the e-auction scheme afresh -



CCI in its order dated November 17, 2015 dismissed allegations of unfair business practices against the state owned miner, CIL. In a complaint filed by DB Power Ltd., under Section 19(1)(a), it was alleged that the scheme for e-auction of coal had a lack of reciprocity and mutuality in the terms and conditions thereof.

It was challenged that the grade and calorific value of the coal supplied to the winners of e-auction schemes was not specific. Even if the coal supplied is of sub-standard or poor quality, the buyers have no option to refuse it.

However, the CCI observed that the tender document clearly mentioned that the buyer should satisfy himself about the quality of coal before bidding. Further, it was observed that once the terms and conditions of sale had been put explicitly, the agreement had to be understood accordingly and not as per some perceived understanding of the buyer.

However, recognizing that the e-auction scheme had come up in challenge in various cases where buyers had alleged a lack of reciprocity and mutuality of obligations in the terms and conditions, the CCI ordered CIL to examine the entire scheme afresh after inviting suggestions from the stakeholders. The CCI also mentioned that such an act would inspire confidence amongst shareholders and at the same time remove any possible anti-competitive effects.

(Source: CCI: Order dated November 17, 2015. For full text see CCI website)

CCI dismisses allegations of abuse of dominant position against Delhi International Airport Ltd. (DIAL)



CCI by its order dated November 17, 2015 dismissed a case against DIAL for alleged abuse of its dominant position by charging high rentals for office space from some of the airlines. The case was filed by the Airline Operators Committee (AOC). DIAL is the company responsible for operation and management of India Gandhi International Airport, New Delhi. AOC is established for facilitating the movement and handling of passengers, baggage, cargo, mail, etc. for the airlines operating at Indira Gandhi International Airport, New Delhi.

AOC alleged the increase in the office rentals to be arbitrary, unreasonable, exorbitant and discriminatory without there being any consultation or discussion with the concerned stakeholders.

The CCI, considering the relevant market as 'the provision of office space to the airlines for non-aeronautical services at T3, IGIA, New Delhi', noted that DIAL was in a dominant position to provide services at Indira Gandhi International Airport. AOC had alleged that the increase of license fee to more than 100% was arbitrary and should have been to 7.5% as per the terms & conditions. However, the CCI noted that the increase of 7.5% was only during the subsistence of the agreement on annual basis.

The CCI stated that a mere increase in rental for the fresh term of the agreement cannot be viewed as per se unfair, particularly when license fee appeared to be rationalized in a uniform manner.

(Source: CCI Order dated November 17, 2015. For full text see CCI website)

CCI closes two cases against Reliance Industries Limited

CCI by its order dated November 17, 2015 ordered dismissed allegations of violation of Section 4 of the Act, in an information filed by AnjaniSut Fuel (Informant) against Reliance Industries Ltd.(RIL)

In order to obtain the dealership from RIL for operating a retail petroleum outlet in Jhumri-Telaiya, Koderma, Jharkhand, the Informant constructed a retail outlet in accordance with the designs and other



specifications provided by RIL and executed a dealership agreement in the year 2005. Later the retail outlet was suspended with a new dealership support scheme.

Aggrieved with the suspension of operation of the retail outlet by RIL, the Informant has alleged abuse of dominant position by RIL in violation of the provisions of Section 4 of the Act. The Informant has alleged that RIL, taking advantage of its dominant position in the petroleum refining and marketing sector, has distorted competition in the domestic market by exporting refined petroleum at international prices (which is higher than the prices prevalent in the domestic market).

The commission observed that the relevant market in the present case is the market for 'retail sale of petroleum products in India'. It was further observed that though RIL is the largest player in the private sector but holds only 27.9 % market share in terms of installed refining capacity in India, and hence RIL is not a dominant enterprise in the relevant market. Thus, there exists no case against RIL for violation of Section 4 of the Act.

(Source: CCI Order dated November 17, 2015. For full text see CCI website)

INTERNATIONAL

Greece: Athenian Brewery fined 31.5 million € over abuse of dominance



The Hellenic Republic Competition Commission (HRCC), Greece's competition agency by its decision dated December 01, 2015 found the Athenian Brewery S.A., a subsidiary Heineken N.V. for abuse of its dominant position.

The HRCC found that the Brewery, a dominant player in production and distribution of beer in Greece, had adopted a targeted policy to exclude its competitors from the on-trade consumption market (e.g. retail outlets) over the period of a decade.

To achieve the same, the Brewery, had employed various commercial practices such as payments conditional upon exclusive distribution agreements, foreclosure of competitive brands, loyalty and target rebates. Furthermore, the Brewery was found to have engaged in restrictive practices at the wholesale level, by providing wholesalers with significant economic motives that promote exclusivity and by exercising pressure on them not to trade or introduce competing products.

A fine of € 31.451.211 was imposed on the Brewery for the same. The company was also directed to cease the infringement and to introduce written contracts with amended terms, so as to avoid a repeat infringement.

(Source: HRCC Press Release dated December 1, 2015)

III. COMBINATION

INDIA

CCI orders detailed investigation in proposed combination between PVR and DLF



CCI has directed multiplex-major PVR to publish details of the proposed combination relating to acquisition of film exhibition business of DLF Utilities Limited (“DUL”) in the prescribed format within 10 working days of the direction, under Section 29(2) of the Act.

Shorn of details, the combination entails acquisition of 39 cinema screens (29 existing and 10 upcoming) of DUL by PVR along with infrastructure and operations associated with these cinema screens. Horizontal overlaps in the proposed combination involve cinema exhibition screens in multiplexes in Delhi NCR as well as Chandigarh regions.

Such publication is the only instance where CCI has expressed the apprehension that the proposed combination causes or is likely to cause appreciable affect on competition in the market. Upon publication of the details of the notice, the CCI may also invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).

After the combination between Holcim/ Lafarge and Sun-Pharma/Ranbaxy, this is the third combination which has been investigated in detail (popularly known as a “Phase-II” investigation) by the CCI.

INTERNATIONAL

European Commission approves Coca-Cola bottling concentration



The European Commission (EC) has announced its approval under Article 6(1)(b) of the EU Merger Regulation, the acquisition of joint control over Coca-Cola European Partners Plc. (“CCEP”) of the UK by The Coca-Cola Company (“TCCC”) of the US and Cobega, S.A. of Spain.

TCCC is a brand owner, trademark licensor and producer of soft drink concentrates, syrups, fountain soft drink syrup and finished beverages. It sells its products to bottlers. Cobega is active in bottling and distributing beverages.

CCEP will bring together four existing Coca-Cola bottlers active in Germany, Belgium, France, United Kingdom, Luxembourg, the Netherlands, Norway, Sweden, Spain, Portugal, Andorra and Iceland. TCCC already controls one of the four bottlers, Coca-Cola Erfrischungsgetränke AG. Cobega already controls two of the bottlers, Coca-Cola Iberian Partners S.A. and Vífilfell.

EC concluded that the proposed acquisition raises no competition concerns, as the activities of the bottlers do not overlap geographically and customers currently using the Coca-Cola bottlers would continue to have sufficient alternative choices.

After the combination the Coca-Cola Enterprises will hold a 48% stake in the new bottling company, Coca-Cola Iberian Partners will own 34%, and The Coca-Cola Company will hold the remaining 18%. TCCC is expected to enter into a 10 year bottling agreement with the merged entity, with the option to renew for a subsequent 10 years.

(Source: European Commission: Press release dated November 9, 2015))

IV. MISCELLANEOUS NEWS

INDIA

Competition Appellate Tribunal (COMPAT) pronounces decision on the scope of review

The COMPAT in its order dated 18.11.2015, has dismissed an application for review of COMPAT's decision dated September 1, 2015 through which it had dismissed the appeal preferred by the Informant against a dismissal of a case by CCI.

Hon'ble COMPAT delineated the difference between "power of review" and that of "appeal". In the case of TDI Fun Republic Shops Owners' Welfare Association v. E-City Property Management and Services & Ors., COMPAT dismissed the application for review of the order of COMPAT as there was no error apparent on the face of the record. The Hon'ble COMPAT, while dismissing the review application, observed that in order to place new material which could have been availed by the Informant after due diligence cannot lead to a conclusion that the order has an error apparent on the face of it. It was further observed that the power of review may be exercised on the discovery of new evidence which after the exercise of due diligence was not within the knowledge of the person seeking the review. An error of merits can only be corrected before a court of appeal.

(Source: Order dated November 18, 2015. For full text see COMPAT website-www.compat.nic.in/)

INTERNATIONAL

Canada: Stay on proceedings against Chocolate manufactures for price fixing



The Public Prosecution Service of Canada (PPSC) on November 17, 2015, ordered a stay on the proceedings against chocolate manufacturers, Nestlé Canada Inc. and Robert Leonidas (Former President of Nestle Canada), after the Canadian Competition Bureau referred the matter for investigation into price-fixing in the chocolate and confectionary products industry.

In 2007, the Informant, Cadbury Adams Canada Inc. provided information of alleged price-fixing. In June 2013, criminal charges were levied against three companies, Nestlé Canada Inc., Mars Canada Inc. and ITWAL Limited and their senior executives. These charges were of criminal conspiracy under the Canadian Competition Act for fixing the price of chocolate confectionery products in Canada between 2002 and 2008. A stay of proceedings against Mars Canada and ITWAL Ltd. was already given on September 8, 2015 by the PPSC.

(Source: Canadian Competition Bureau Press Release dated: November 18, 2015.)

Brazil: Dawn raid carried out to investigate cartel activities in orthotics market

With the help of Federal police, the Brazilian competition authority, CADE, carried out operation (titled “Merchant of Venice”) on December 01, 2015 wherein search and seizure operations were carried on in eight different municipalities in four states to investigate alleged cartel activities in the Brazilian market of orthotics and prosthetics.

There were suspicions that some manufacturers and distributors were acting in collusion to participate in public bids for the acquisition of implantable medical devices. The investigation relates to collusion of competitors in bid-tenders, market divisions and pricing policy.

(Source: CADE Press Release dated: December 2, 2015)



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