Competition News Bulletin

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Inside...

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

CCI again fines Pharma Company for Anti-Competitive Activities

The Competition Commission of India ("CCI/ Commission") by way of its order dated 28.07.2016 has found the Karnataka Chemists and Druggist Association ("KCDA") , Lupin Ltd. ("Lupin") and their Office bearers to be in contravention of the provisions of the Competition Act, 2002 (the Act).

In a case filed by M/s Maruti & Co., a chemist, based in Bangalore, it was alleged that KCDA restraints pharmaceutical companies from appointing new stockists in the State of Karnataka unless a No Objection Certificate (NOC) is obtained from it. It was also alleged that Lupin refused to supply drugs to M/s Maruti & Co. for not having obtained NOC from KCDA.

Following a detailed investigation by the Director General (DG), the CCI found that KCDA was indulging in the anti-competitive practice of mandating NOC prior to the appointment of new stockists by pharmaceutical companies. The DG had found that Lupin denied supplies to the Informant/Maruti, for the period August 2013 to January, 2014 at the instance of KCDA, in spite of having appointed the Informant/ Maruti as its distributor. Such an arrangement/understanding between KCDA and Lupin has been found to be an anti-competitive agreement, which caused an appreciable adverse effect on competition ("AAEC") in the market, in contravention of the provisions of Section 3(1) of the Act.

Based on the evidence collected by the DG during investigation, the CCI concluded that KCDA has been indulging in the practice of NOC prior to the appointment of stockists by pharmaceutical companies, which has the effect of limiting and controlling of the supply of drugs in the market, in violation of the act. Further , it was observed that instead of desisting from such activity, these associations are mandating the NOC requirement, either verbally (in order to avoid any documentary evidence/proof) or under camouflaged congratulatory/intimation letters. The CCI also observed that the pharmaceutical companies, without any resistance, cooperate with such associations to implement their anti-competitive decisions, thereby becoming equally complicit in the anti-competitive effect of such practice. Instead of approaching the Commission, these pharmaceutical companies cooperate with the NOC requirement of the associations, thus becoming perpetrators of such anti-competitive practice. Thereby, the Commission held the pharmaceutical company, Lupin, to be in contravention of the provisions of the Act for its anti-competitive arrangement/understanding with KCDA, which led to a refusal to supply of drugs to M/s Maruti & Co.

Further, the Commission has also found three office bearers of KCDA, namely Mr. K. E. Prakash, Mr. D.S. Guddodgi and Mr. A.K. Jeevan, responsible under Section 48 of the Act, for their active involvement in the

anti-competitive practice of KCDA and also on account of the positions of responsibility held by them in KCDA during the period of contravention. Two officials of Lupin, namely Mr. Amit Kumar Dhiman and Mr. Nishant Ajmera, were found to be actively involved in the anti-competitive arrangement/understanding of Lupin with KCDA during the relevant period on the basis of Emails exchanged .

The CCI imposed a monetary penalty of ₹ 8, 60,321/-, calculated at the rate of 10 % of the average income of KCDA, under the provisions of Section 27 of the Act. While imposing penalty on Lupin, the Commission observed that the refusal to supply by it was for a brief period, after which Lupin resumed supplies to M/s Maruti & Co. considering this as a mitigating factor, the Commission imposed a penalty at the rate of 1% of Lupin's average turnover, amounting to ₹ 72.96 crores. In addition, monetary penalties were imposed on the office bearers of KCDA and officials of Lupin at the rate of 10% and 1% of their incomes, respectively. Furthermore, KCDA, Lupin and their office bearers/officials have been directed to cease and desist from indulging in the practice of mandating NOC prior to stockist appointment. This case highlights the obstinacy of chemists & druggist associations who, despite various orders by the Commission in similar cases in other parts of India with respect to this NOC practice, have not abstained from indulging in such anti-competitive conduct.

(Source: CCI order dated July 27, 2016. For full text see CCI website-www.cci.gov.in)

Comment: *This is the second order of CCI imposing penalty on a pharmaceutical company. The order assumes importance because the earlier order imposing penalty of ₹ 74.63 Crores on Alkem Laboratories Ltd, in December, 2015 was set aside by the Competition Appellate Tribunal (COMPAT) vide its Order dated May 10, 2016, after finding that the Chemists & Druggist Association, Kerala had coerced the pharmaceutical company to insist on production of NOC and the CCI was not right in holding that the pharmaceutical company itself was involved in any anti-competitive" agreement" with the Association as the element of coercion makes the possibility of such an agreement as impossible.*

COMPAT sets aside CCI order penalizing Jute Mills Association for alleged cartelization for packaging material for sugar, etc.

COMPAT by its order dated July 1, 2016 has over-ruled the order of CCI wherein the Indian Jute Mils Association (IJMA) and Gunny Trade Association (GTA) were penalized for alleged cartelization in pricing of jute bags.It was alleged that the jute manufacturers have acquired a monopoly position as a result of the circular of the Government under the Jute Price Maintenance Act, 1987 that 100% sugar to be produced by the sugar factories is to be mandatorily packaged in the jute bags(A-Twill type). Taking advantage of this monopoly, the jute mills have unreasonably hiked the prices of jute bags from INR 53.50/bag in April 2010 to INR 64.50/bag in February 2011. It was alleged that this increase was possible only because of an

agreement/understanding among all the members of the IJMA and GTA, who were quite conscious of the fact that they enjoy complete monopoly. Thus, it was alleged that, IJMA/GTA have cartelized the market for packaging material for sugar thereby infringing Section 3(3) of the Act by jointly deciding sale prices and limiting technical development of the industry. The CCI considered the same as prima-facie violation of Section 3(3)(a) of the Act and ordered an investigation into the same.

The DG Report submitted after detailed investigation found that IJMA and GTA are utilizing their platform to discuss the jute bags prices to be published to discuss the jute bags prices to be published in the GTA Daily Price Bulletin (DPB) clearly indicate the involvement of IJMA in fixation and publication of prices of jute bags.

The CCI agreed with the findings of the DG, primarily, based on the fact that a comparison of A-Twill jute bags with B-Twill had no correlation with each other despite the basic material and production cost remaining the same. In fact, the price of A-Twill bags on per gram basis was found higher by approximately 50% compared to that of B-Twill Bags. The actual transactions in the market were taking place almost near to the DPB price meaning thereby that the DPB prices were actually being followed. Such conduct of IJMA and GTA was held to be in violation of Section 3(3)(a) and Section 3(3)(b) of the Act. The CCI penalized IJMA and GTA at the rate of 5% of their average turnover for the past three years. The total amount of penalty payable by IJMA was indicated as INR 768527/- and on GTA as 35169/-. Similarly, the CCI also imposed a penalty on 25 members of IJMA and 19 members of GTA@ 5% of their average income of the last three financial years.

In the appeals, the COMPAT noted that the participation of Mr. U.C. Nahata, one of the members who joined the CCI more than three years after filing of the case, in the decision making of the CCI in the present case had vitiated the order due to violation of principles of natural justice as he was not part of earlier hearing in the CCI.On the merits of the order, the COMPAT noted that neither the DG nor the Informant could collect any evidence to show that there was an agreement between GTA and IJMA about fixation of price of A-Twill jute bags or that the price of such bags was fixed by GTA after discussion with IJMA. The CCI did not independently analyze the findings of DG and mechanically approved the findings. None of the correspondence referred to between IJMA and GTA show that they had entered into an agreement for increase in prices of A-Twill bags. Further, the comparison of A-Twill and B-Twill bags for faulty as the A-Twill bags were of 1190 gms. as compared to B-Twill bags of 665 gms. The COMPAT held that the finding of violation of Section 3(3)(a) and 3(3)(b) were unsustainable and deserved to be set aside.

Lastly, the COMPAT also held that the penalty imposed on IJMA and GTA (at the rate of 5% of the average turnover of the past three years) is disproportionate and without setting out cogent reasons. The COMPAT sets aside the order of the CCI and the penalty imposed on IJMA and GTA.

(Source: COMPAT order dated July 01, 2016)

CCI to investigate Monsanto Mahyco Monsanto Biotech (I) Limited & Ors.

The CCI, by way of its order dated June 9, 2016, directed the Director General ('DG') to investigate Mahyco Monsanto Biotech (I) Limited, Monsanto Holdings Private Ltd., Monsanto Inc., U.S.A. and Maharashtra Hybrid Seeds Company Ltd. (collectively called as "Opposite parties") pursuant to an information filed by Kaveri Seed Company ltd, Ankur Seeds Pvt Ltd and Ajeet Seeds Pvt ltd. for alleged contravention of Sections 3 and 4 of the Act.

It has been alleged that Opposite parties(OPs) were abusing the dominant position by imposing unfair and discriminatory conditions, charging unfair trait value; limiting scientific development and denied market access. Informants further alleged that the OPs have entered into exclusive supply agreement, refused to deal with Indian seed manufacturers and reserved the right to fix price of seeds in certain circumstances, in contravention of provisions of Section 3 (4) of the Act.

Noticeably, CCI earlier, vide majority order dated February 10, 2016, passed under Section 26 (1) of the Act in Reference Case No. 2 of 2015 and Case No. 107 of 2015, has also directed the Director General ('DG') to cause an investigation into the same matter.

(Source: Order dated June 9, 2016. For full text see CCI websitewww.cci.gov.in)

CCI: Mere collusion or coordination is not enough to hold the Parties in contravention of the provisions of the Competition Act

The CCI, by way of its order dated June 28, 2016 held that M/s Ruchi Soya Industries Ltd., M/s Betul Oils Ltd and M/s Ganganagar Commodity Ltd. were not in contravention of the provisions of sections 3 and 4 of the Act as alleged by Shri Nirmal Kumar Manshani (Informant). The Informant stated that the conduct of the Opposite Parties appeared to be that of a cartel with regard to trading of Guar Seeds and Guar Gum in various commodity exchanges in India. The Informant alleged that the OPs have inflated the prices of Guar Seeds and Guar Gum by artificially increasing the demand through self-trading, circular trading etc. which caused huge loss to traders, hedgers and farmers.

Investigation report by Director General ('DG'), concluded that OPs contravened the provisions of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act on the basis of various evidence collected like calculation sheet depicting distribution of profits, e-mail exchanged between M/s Ruchi Soya Industries Ltd. and M/s Betul Oils Ltd and, evidence of a common employee being entrusted to manage the guar related business activities of both the groups establishing meeting of minds between the two groups.

Allegations against M/s Ganganagar Commodity Ltd could not be substantiated by facts and evidence gathered during investigation.

The Commission observed that though there appeared to be an agreement indicating collusion or coordination between OPs that was not decisive of contravention of the provisions of the Competition Act unless such agreement or arrangement determines the prices of the commodity in question or otherwise controls/ limits the supplies thereof etc. The appreciable adverse effect arising or likely to arise out of such conduct needs to be shown in the markets in India particularly when the parties strenuously rebut the statutory presumption. The Commission noted that it was not the quantity but the quality of evidence that matters. It was a time-honored principle that evidence must be weighed and not counted. The test is whether the evidence is cogent, credible and trustworthy or otherwise. The Commission thus noted that mere collusion or coordination per se will not be sufficient to reach a finding of contravention of the provisions of Section 3(1) read with Section 3(3) of the Competition Act.

(Source: Order dated June 28, 2016. For full text see CCI website-www.cci.gov.in)

INTERNATIONAL

EU: Commission fines truck producers € 2.93 billion for participating in a cartel

The European Commission has found that MAN, Volvo/Renault, Daimler, Iveco, and DAF broke EU antitrust rules. These truck makers colluded for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules. The Commission has imposed a record fine of € 2 926 499 000. MAN was not fined as it revealed the existence of the cartel to the Commission. All companies acknowledged their involvement and agreed to settle the case. The Commission's investigation revealed that MAN, Volvo/Renault, Daimler, Iveco and DAF had engaged in a cartel relating to:

- Coordinating prices at "gross list" level for medium and heavy trucks in the European Economic Area (EEA). The "gross list" price level relates to the factory price of trucks, as set by each manufacturer. Generally, these gross list prices are the basis for pricing in the trucks industry. The final price paid by buyers is then based on further adjustments, done at national and local level, to these gross list prices;
- The timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI);
- Passing on to customers of the costs for the emissions technologies required to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).

The infringement covered the entire EEA and lasted 14 years, from 1997 until 2011, when the Commission carried out unannounced inspections of the firms. Between 1997 and 2004, meetings were held at senior manager level, sometimes at the margins of trade fairs or other events. This was complemented by phone conversations. From 2004 onwards, the cartel was organized via the truck producers' German subsidiaries, with participants generally exchanging information electronically. Over the 14 years the discussions between the companies covered the same topics, namely the respective "gross list" price increases, timing for the introduction of new emissions technologies and the passing on to customers of the costs for the emissions technologies.

The total fines imposed are as follows:

	Reduction under the Leniency Notice	**Reduction under the Settlement Notice**	**Fine (€)**
MAN	100%	10%	0
Volvo/Renault	40%	10%	670 448 000
Daimler	30%	10%	1 008 766 000
Iveco	10%	10%	494 606 000
DAF		10%	752 679 000
Total			2 926 499 000

(Source: EU Press Release dated July 19, 2016)

Norwegian Ocean Shipping Firm to Pay $98.9 Million Fine for Price-Fixing Conspiracy

On July 13, 2016, the DOJ announced that Norwegian ocean shipping firm Wallenius Wilhelmsen Logistics AS (WWL) has agreed to pay a $98.9 million criminal fine for its role in a price-fixing conspiracy in the market for international ocean shipping of "roll-on, roll-off" cargo, including cars, trucks and heavy equipment. According to the single-count criminal information filed in the U.S. District Court for the District of Maryland, the conspiracy spanned over a decade and involved price-fixing, bid-rigging, and allocation of customers and routes among WWL and its co-conspirators. WWL is the fourth company to agree to plead guilty in the DOJ's ongoing investigation, which also has yielded charges against eight individual executives and netted a total of $230 million in agreed-upon fines. WWL's plea agreement is subject to court approval.

(Source: http://www.wsj.com/articles/auto-shipping-company-pleads-guilty-to-price-fixing-1468451638)

UK: Resale Price Maintenance is just as Bad Online

On May 24, 2016, the UK Competition and Markets Authority (CMA) announced that a commercial refrigerator supplier had agreed to pay a fine for infringing EU and UK competition law by imposing Internet Minimum Advertised Price restrictions. It had also threatened its dealers with sanctions if they advertised below that minimum price .These are well-established illegal vertical restrictions amounting in effect to Resale Price Maintenance (RPM). Even earlier, on April 26, 2016, the CMA announced that a bathroom fittings supplier had agreed to pay a fine for online RPM .In that case, Ultra Finishing Limited had tried to dress up RPM as recommended resale prices (RRPs) to its retailers. RRPs are legal, but cannot cross the line into RPM. Ultra- had crossed the line in relation to online sales by its retailers because it threatened them with penalties for not pricing at or above the 'recommended' price, including: Charging them higher prices for products; withdrawing their rights to use Ultra's images online; and ceasing supply.

(Source: https://www.gov.uk/government/organisations/competition-and-markets-authority)

II. ABUSE OF DOMINANCE/MARKET POWER

INDIA

Competition Appellate Tribunal (COMPAT) sets aside penalty imposed on India Trade Promotion Organization for abuse of dominance

COMPAT by its order dated July 1, 2016 has set aside the penalty imposed by the Competition Commission of India (CCI) on India Trade Promotion Organization (ITPO) for allegedly adopting a discriminatory time-gap policy for holding exhibition/fairs at Pragati Maidan, New Delhi and the alleged discrimination practiced in allotment of spaces to private organizers. ITPO is a Government owned non-profit making company meant to promote, organize and participate in industrial trade and other fairs and exhibition show-rooms in India and abroad. Pragati Maidan, New Delhi is one of the assets placed under the disposal of ITPO by the Government of India. ITPO also manages and rents out spaces at Pragati Maidan, in consonance with guidelines/ instructions and circulars issued from time to time by the Government of India.

It was alleged that ITPO had been maintaining a time-gap of 15 days' between two "third party events? of similar profile before and after the event; whereas in case of ITPO's own organized events/exhibitions, the time gap restriction was 90 days before and 45 days after the event in case of ITPO events (which was amended to 90 days before and after the event in 2011).

During the detailed investigation by the Director General (DG), it was opined that the time-gap policy was not per-se unfair, yet the conduct of ITPO in implementing the same by stipulating difference in time gap between ITPO's own events as compared with those of 3rd parties was found abusive.

The CCI ,agreeing with the DG , held that by stipulating favorable time gap restrictions for its own events as compared to third party organized events, ITPO imposed unfair and discriminatory conditions on the third party event organizers at Pragati Maidan, in violation of Section 4(2)(a)(i) of the Competition Act, 2002(Act). Further, increase in the time gap restrictions for holding third party events, before and after ITPO's own events of similar profile, amounted to denial of market access to the third parties, who compete with ITPO for organizing events at Pragati Maidan, in violation of provisions of Section 4(2)(c) of the Act.The CCI also held that ITPO has used its dominant position in the relevant market of venue provider in Delhi for organizing events to protect and enhance its position in the market of event organization and thereby contravened the provisions of section 4(2)(e) of the Act. The CCI imposed a penalty of INR 6.75 Crores on ITPO at the rate of 2% of its average turnover for the preceding three years.

In Appeal, the COMPAT noted that although ITPO has informed the CCI during the preliminary hearing that it had drafted a competition friendly policy and it would be communicated to the stakeholders and the CCI in due course, the CCI nonetheless issued an investigation order. The COMPAT stated that the DG was obsessed with Pragati Maidan as the target for determination of the relevant market. DG made no attempt to compare Delhi with the other venues available not only in National Capital Region but places like Bangalore, Chennai, Mumbai and Hyderabad. According to COMPAT, the DG proceeded on the assumption that being the largest complex in Delhi, which is capital of the country, Pragati Maidan is the only venue which can be treated as the relevant market. The CCI also erroneously approved the finding of the DG with respect to the relevant market. The COMPAT accepted the economic rationale provided by ITPO that time-gap policy was meant to ensure that no confusing signals are given in case of time-overlap of similar exhibitions and events. Holding similar events concurrently leads to unhealthy competition and practices such as grabbing each other's exhibitors, visitors and also taking advantage of publicity efforts of one organizer. Such time-gap policy is also followed by leading venue owners worldwide.

The COMPAT held that both the DG and the Commission committed grave illegality by not considering the economic rationale submitted by the parties, especially since ITPO has a choice of utilizing its own asset to its advantage vis-à-vis third parties, though the rationale was admitted by the DG. Relying upon a landmark judgment of the European Court of Justice in Oscar Bronner GmbH Co. KG v. Mediaprint ECJ, [1998] ECR I-7791, COMPAT agreed that a person/entity cannot be compelled to part with, permanently or temporarily, his/its own assets for the benefit of others, which may, at times detrimental to his/its own interest, provided it can produce an objective justification for such refusal. As per COMPAT the economic rationale provided by the appellant ITPO, justified the difference in time gaps arrangements.

Lastly, the COMPAT also held that the penalty imposed on ITPO (at the rate of 2% of the average turnover of the past three years) is disproportionate and without setting out cogent reasons. The COMPAT sets aside the order of the CCI and the penalty imposed on ITPO.

(Source: COMPAT order dated July 1, 2016)

International

EU: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules

The European Commission (EC) has sent two Statements of Objections to Google and has reinforced, in a supplementary Statement of Objections, its preliminary conclusion that Google has abused its dominant position by systematically favouring its comparison shopping service in its search result pages. Separately, the EC has also informed Google in a Statement of Objections of its preliminary view that the company has abused its dominant position by artificially restricting the possibility of third party websites to display search advertisements from Google's competitors observing that "Google has come up with many innovative products that have made a difference to our lives. But that doesn't give Google the right to deny other companies the chance to compete and innovate. Google has unduly favoured its own comparison shopping service in its general search result pages. It means consumers may not see the most relevant results to their search queries. There are concerns that Google has hindered competition by limiting the ability of its competitors to place search adverts on third party websites, which stifles consumer choice and innovation. Google now has the opportunity to respond to aforesaid concerns. The supplementary Statement of Objections on comparison shopping follows a Statement of Objections issued in the same case in April 2015. Both Statements of Objections are addressed to Google and its parent company, Alphabet.

(Source: EU Press Release dated July 14, 2016)

EU: Commission opens formal investigation into AB InBev's practices on Belgian beer market

The European Commission (EC) has opened an investigation, suo moto , to assess whether Anheuser-Busch InBev SA (AB InBev) has abused its dominant position on the Belgian beer market by hindering imports of its beer from neighboring countries, in breach of EU antitrust rules. The EC will investigate further to establish whether its initial concerns are confirmed; its preliminary view is that AB InBev may be pursuing a deliberate strategy to restrict so-called 'parallel trade' of its beer from less expensive countries, such as

the Netherlands and France, to the more expensive Belgian market. In particular, the EC will investigate certain potentially anti-competitive practices by AB InBev such as:

- Possibly changing the packaging of beer cans/bottles to make it harder to sell them in other countries;
- Possibly limiting "non-Belgian" retailers' access to rebates and key products to prevent them from bringing less expensive beer products to Belgium.

If established, such behaviors would create anti-competitive obstacles to trade within the EU's Single Market and breach Article 102 of the Treaty on the Functioning of the European Union (TFEU).

(Source: EU Press Release dated June 30, 2016)

III. COMBINATION

INDIA

CCI approves Nestlé & PAI JV

CCI vide its order dated July 1, 2016 has approved JV entered between Nestlé and PAI (through Riviera Topco) which would be jointly controlled by Nestlé and PAI (through Riviera Topco) and would be principally active in the production, distribution and sale of ice cream products in certain geographical areas and to a limited extent in the production and sale of some other frozen food products in certain European Economic Area ("EEA") countries, as well as chilled dairy products in the Philippines, pursuant to execution of an Implementation Agreement entered into among, inter alia , Nestle and Riviera Topco.

The following businesses would be transferred to the JV by Nestlé and PAI respectively: i. Nestlé Contributed Business: This comprises of (i) Nestlé's ice cream business located in Europe, Middle East and North Africa (excluding Israel) and certain other geographical areas, including Argentina, Brazil, and the Philippines; (ii) some of Nestlé's frozen food businesses in certain EEA countries; (iii) Nestlé's chilled dairy business in the Philippines; and (iv) certain logistics services in Russia, Switzerland and Italy in relation to frozen pizza. The Nestlé Contributed Business would be transferred by Nestlé to the JV. ii. R&R Ice Cream plc ("R&R"): R&R, a subsidiary of PAI, is a public limited company headquartered in the UK, is engaged in the ice-cream business in the U.K., certain EEA countries, South Africa, and Australia. It does not have any business activity or operations in India. The entire business of R&R would be transferred by PAI to the JV.

The JV will be operational in India only through export sales of Nestlé's ice cream brand, Mövenpick of Switzerland ("MoS"). PAI, either directly or through its portfolio companies, is not present in the ice cream market in India. Accordingly, apart from MoS export sales, the JV will not be active in India.

(Source: CCI order dated July 1, 2016/http://www.cci.gov.in/sites/default/files/Notice_order_document/C-2016-05-401O.pdf)

CCI approves JSW Energy acquisition of JSPL's 1,000 MW power plant

CCI vide its order dated July 1, 2016 has given its approval to JSW Energy to acquire 1,000 MW power plant in Chhattisgarh from Jindal Steel and Power Ltd (JSPL).The JSPL board had approved divesting the unit of its subsidiary Jindal Power Ltd (JPL) into a special purpose vehicle for transferring it to JSW Energy pursuant to execution of a Securities Purchase Agreement ("SPA") between JSWEL, Jindal Power Limited "(JPL"), Everbest Steel and Mining Holdings Limited ("SPV") and Jindal Steel and Power Limited ("JSPL"). The proposed combination relates to transfer of a 1000 MW operational coal fired thermal power plant at Tamnar, Chhattisgarh ("Target Asset"), currently owned by JPL, to SPV on a going concern basis pursuant to a scheme of arrangement amongst JPL, JSPL and the SPV; and subsequent acquisition of 100 per cent stake in the SPV by JSWEL.

(Source: CCI order dated July 01, 2016/http://www.cci.gov.in/sites/default/files/Notice_order_document/C-2016-05-399O.pdf)

INTERNATIONAL

Companies needs to be careful with Non competes clauses in M&A Transactions

On June 28, 2016, the EU's second-highest court (the General Court, or GC) confirmed a European Commission (EC) decision to impose fines for an illegal non -compete provision agreed between PT (formerly Portugal Telecom) and Telefónica (see here). This arose out of the July 2010 acquisition by Telefónica of the Brazilian mobile operator Vivo, which was then jointly owned by Telefónica and PT. The companies inserted a clause in the contract providing that they would not compete with each other in Spain and Portugal as from the end of September 2010. The EC imposed fines of €67 million on Telefónica and €12 million on PT. The GC turned down several imaginative arguments by the parties, finding that: PT had failed to demonstrate that the provision was incidental to the option of purchasing its shares held by Telefónica (an option initially provided for and later eliminated from the agreement) and to the resignation of the members of its management board appointed by the Spanish company (a resignation provided for in the final version of the agreement).There was nothing to indicate that the clause contained a self-assessment obligation (an argument based on the use of the introductory wording, "to the extent permitted by law") on which the entry into force of the noncompetition obligation depended. (PT submitted that the clause contained two separate obligations — a main self-assessment obligation and a secondary noncompetition obligation — the second becoming binding only if its lawfulness was established during the exercise of the first. There was no evidence that the clause was imposed by the Portuguese government or that it was in any event necessary for it to refrain from blocking the agreement relating to the Vivo operation. There was no reason

why a clause providing for noncompetition on the Iberian market might be considered objectively essential for a transaction relating to the takeover of shares in a Brazilian operator. The GC held that the very existence of the clause was a strong indication of potential competition between PT and Telefónica on the unrelated Iberian market. The EC had therefore been correct to find that it amounted to a bald market-sharing agreement which justified significant fines.

(Source: http://ec.europa.eu/competition)

EU: Commission approves acquisition of Starwood Hotels & Resorts by Marriott

The European Commission (EC) has cleared the acquisition of Starwood Hotels & Resorts by Marriott International, both of the US. The Commission found that the takeover would not adversely affect competition in Europe. Both companies are mainly active as managers and franchisors of hotels worldwide. At global level, more than 4,500 hotels in 85 countries operate under a Marriott brand and about 1,300 hotels in nearly 100 countries under a Starwood one. The Commission assessed the impact of the proposed acquisition on competition in Europe in the market for hotel accommodation services and in the markets for hotel management and hotel franchising services.

For hotel accommodation services, the EC investigation focused on the markets for 4 and 5-star hotels, in which both companies have a significant presence. In particular, the Commission investigated the impact of the proposed acquisition in five cities, namely Barcelona, Milan, Venice, Vienna and Warsaw, where the combined market presence of Marriott and Starwood was strongest. In each of these cities, the merged entity will continue to face effective competition from chain hotels and independent hotels.

For hotel management and hotel franchising services, the EC investigated the impact of the proposed acquisition at the level of the European Economic Area. The Commission found that the merged entity would face effective competition in Europe from a number of competitors on all those markets, including Accor, Hyatt, Hilton and IHG.

The EC therefore concluded that the proposed acquisition would raise no competition concerns. The transaction was notified to the Commission on May 23, 2016.

(Source: EU Press Release dated June 27, 2016)

FTC dismisses Administrative Complaint Challenging West Virginia Hospital Merger

Federal Trade Commission (FTC) in its order dated July 6, 2016 unanimously ordered the dismissal, without prejudice, of an administrative complaint filed in November 2015 regarding the proposed merger of two West Virginia hospitals located approximately three miles away from each other. The complaint alleged that the proposed merger would give the

combined entity over 75 percent of the market for general acute-care inpatient hospital services in a four-county region surrounding Huntington, West Virginia. The FTC's decision to dismiss the complaint came after the March passage of West Virginia Senate Bill 597, which authorized certain "cooperative agreements" between hospitals within West Virginia, and the subsequent approval of such an arrangement between the proposed merger parties by the West Virginia Health Care Authority and the West Virginia Attorney General. However, the FTC voiced its concerns about such agreements, stating that "[t]his case presents another example of healthcare providers attempting to use state legislation to shield potentially anticompetitive combinations from antitrust enforcement." The FTC further emphasized that it "will continue to vigorously investigate and, where appropriate, challenge anticompetitive mergers in the courts and, if necessary, through state cooperative agreement processes."

(Source: https://www.ftc.gov/)

II. MISCELLANEOUS NEWS

India

COMPAT stays penalty imposed on Lupin Ltd.

COMPAT by way of its order dated August 22, 2016 has stayed the penalty imposed on Lupin Ltd imposed by Competition Commission of India on July 28,2016 until September 29,2016.

(Source : COMPAT order dated August 22, 2016)

COMPAT to hear and decide appeals only against order passed by the Commission under Section 53A (1) (a)

COMPAT by its order dated July 4, 2016 upheld order passed by the Competition Commission of India ("CCI/the Commission") wherein it refused to entertain an appeal challenging the order passed by the Director General (DG) to treat certain documents submitted by TPM Consultants Pvt. Ltd (Appellant) confidential for all times under Regulation 35(8) of the CCI (General) Regulations, 2009.

During an investigation ordered by the Commission in relation to the alleged cartelization of price by the domestic tyre manufacturing companies, the DG sent notice to the appellant under Section 41 of the Act, requiring it to furnish some information/ documents. In compliance, the appellant filed documents and requested them to be treated as confidential in terms of Regulation 35 of the Regulations. DG disposing the request took cognizance of Regulation 35(3) and 35(9) of the Regulations and granted confidentiality of documents till the completion of proceedings before the Commission. Hence, the Appellant requested the Commission to grant confidentiality to the aforesaid information/documents for all times to come.

The Commission found DG's observations just and reasonable and thus refused to grant confidentiality to documents for all times.

Thereafter, an appeal was filed in COMPAT challenging the order passed by the CCI. It was observed by COMPAT that the Tribunal has the jurisdiction to hear and decide appeals only against orders passed by the Commission under Section 53A(1)(a) and Regulation 35(8) or (10) do not find mention therein. In reply, appellant submitted that the impugned order should be treated as one made under Section 26.COMPAT considering all the material and facts of the case, and the laws laid down by the Supreme Court held that the appeal was not maintainable under Section 53A. COMPAT further ordered that the period of treatment of confidentiality shall be till completion of the proceedings before the CCI.

(Source: Order dated July 4, 2016. For full text see COMPAT website-www.compat.nic.in)

COMPAT upholds CCI order dismissing abuse of dominance allegation against Vodafone

COMPAT by its order dated August 16, 2016 has upheld order of CCI whereby it declined to order an investigation into the allegations of abuse of dominance by Vodafone India for levying exorbitant charges for international roaming plan. The information was filed in CCI by Mr. Vishwambhar Marutirao Doiphode alleging that Vodafone India was in a dominant position vis-à-vis the consumer and by taking advantage of that position, it has levied exorbitant charges @ ₹ 564/- per MB as against ₹ 30/- per MB payable for international roaming plan. The appellant further averred that in India the data usage charges are 0.04 per 10 KB, which comes to approximately ₹ 4/- per MB, but Respondent had charged ₹ 564/- per MB and, thereby, acted in contravention of Section 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act.

The CCI held that no prima-facie case was made out for directing an investigation into the allegation of abuse of dominant position by Respondent as besides Respondent, Airtel, Idea Reliance, Tata, Aircel and MTNL were providing wireless telecommunication services and offering international mobile data services too. Also, the Informant had not provided any statistics to show that Respondent had the largest share in the relevant market and held that in the absence of such material, Respondent cannot be said to be in a dominant position in the relevant market.

The COMPAT dismissing the appeal, held that the Commission did not commit any error by declining to order investigation into the allegation of abuse of dominant position levelled by the appellant because he did not produce any evidence to prima facie show that market share of Respondent is largest among the telecom service providers in the relevant market. In the absence of an affirmative finding that

Respondent was in a dominant position in the relevant market, there was no warrant for ordering an investigation into the allegation of abuse of dominant position by the said respondent and the Commission rightly declined to entertain the prayer made in the information.

(Source: Order dated August 16, 2016. For full text see COMPAT website-www.compat.nic.in)

COMPAT: Upheld CCI Order that onus to produce data to prove alleged dominant position lay upon the Informant

COMPAT by its order dated August 9, 2016 has upheld order of CCI whereby it declined to order an investigation into the allegations of abuse of dominance by DLF Universal Limited and others. The information was filed in CCI by Mrs Ravinder Kaur Sethi who made an application for allotment of a commercial space 'Prime Towers', Okhla being constructed by DLF Universal Limited and paid part of the price. Between March, 2013 and August, 2014, she was said to have paid various instalments of the price albeit with delay. Respondent issued notices and reminders about delay in the payment of instalments and also levied penalty. Respondent thereafter issued final notice indicating the quantum of the outstanding dues and subsequently cancelled the allotment vide letter dated 10.05.2014 and forfeited part of the amount already paid by her. After cancellation of the allotment, the appellant entered into an agreement with M/s. Fortune Health Care Services Pvt. Ltd. whereby she agreed to lease-out the disputed property to the lessee. After executing the lease deed, the appellant approached Respondent for grant of 'No Objection' for doing business in the space allotted to her and the latter granted the same. She then sent notice to the respondent for handing over possession of the shop by asserting full payment of outstanding dues including penalty but the possession was still not handed over. Thereafter, she filed information with CCI as to Respondent being in a dominant position in the relevant market had abused that position for cancellation of allotment of the shop on the pretext of non-payment of the installment of price etc.

The CCI held that the respondent was not holding a dominant position and referred to the order passed in Case No. 50/2012 titled - Kaushal K. Rana Vs. DLF Commercial Complexes Ltd., wherein it was held that Respondent was not in a dominant position in the relevant market and closed the matter by invoking Section 26(2) of the Act.

COMPAT dismissing the appeal filed held that for establishing that Respondent was in a dominant position, the onus lay upon the appellant to produce data/ statistics. Appellant's failure to produce any material before the Commission to demonstrate that Respondent had the largest share in the relevant market, disentitles the appellant from seeking a declaration that the Commission committed an error by refusing to determine the issue of dominant position of Respondent and abuse thereof.

(Source: Order dated August 9, 2016. For full text see COMPAT website-www.compat.nic.in)

International

Illegal Coordination between Competitors via an Online System

On May 3, 2016, the Lithuanian Supreme Administrative Court (LSAC) largely upheld fines originally imposed by the Lithuanian competition authority on travel agency users of an online booking system. The authority had fined several agencies for concerted practices related to a common online travel reservation system. The operator of the reservation platform had sent the travel agents participating in the system an electronic message capping the rebates that could be granted for products sold via the system and had technically adapted the system so as to implement this cap. The authority found this to constitute an illegal information exchange. The case ultimately went on appeal to the EU's highest court (the European Court of Justice) which held that travel agents which knew the content of the message could be presumed to have participated in an illegal concerted practice, unless they had distanced themselves from the message, challenged its imposition or adduced other evidence to rebut the presumption, such as systematically granting higher rebates than those set under the cap. The LSAC in its ruling was applying this judgment to the facts of the case. It dropped the charges against some agencies for lack of evidence that they that they were aware of the discount restrictions but upheld the fines against all of the other agencies (with some reductions). It is pertinent to note that the dissemination of any type of restriction, suggestion or recommendation in relation to pricing and other competitive issues, or indeed pure information exchange on competitive parameters, between competitors is dangerous under competition law in the EU.

(Source:http://www.freshfields.com/en/global/Global_Antitrust_TKT/5_Information_exchange)

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