Competition News Bulletin

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

A. INDIA

CCI finds cartel in the domestic industrial and automotive bearings market but refrains from imposing penalty

By way of an order dated 05 June 2020, the Competition Commission of India (**"CCI/Commission"**) found FAG Bearings India Ltd. (now, Schaeffler India Ltd.). (**"Schaeffler**), National Engineering Industries Ltd. (**"NEI"**), SKF India Ltd. (**"SKF"**) and Tata Steel Ltd., Bearing Division (**"Tata Bearing"**) to have indulged in cartelisation in the domestic industrial and automotive bearings market from 2009 to 2014. However, the CCI refrained from imposing penalty due to the peculiar facts and circumstances of the case.

The case was initiated *suo motu* pursuant to leniency application (**"Application"**) filed by Schaeffler which disclosed the existence of the cartel to the Commission. The Application disclosed that when the steel prices started increasing from the year 2009 onwards, there was co-ordinated action amongst the five companies to pass on such increase to the automotive and industrial Original Equipment Manufacturer (**"OEM"**) customers and in the distribution segment of the market. The Application further revealed that the five companies agreed on the percentage increase in steel price that each of them would represent to the OEMs, to seek a price increase from them.

The Commission noted that the above-mentioned companies had attended two meetings dated 03 November 2009 and 31 January 2011 regarding commercially sensitive price related information and, had several telephonic discussions with the view to mutually determine the prices of bearings sold by them to the OEM customers during the period from at least November 2009 to January 2011. It was found that the cartel stood established amongst the 4 parties viz. NEI, Schaeffler, SKF and Tata Bearing, by way of meetings held on two occasions i.e. 03 November 2009 and 31 January 2011 wherein price revision along with minimum percentage of price increase to be quoted to the OEMs were discussed.

The CCI, however, decided not to impose any monetary penalty on any of the four companies or their respective office bearers found in contravention of Section 48 of the Act considering that the cartel did not have a significant impact on the market as ascertained by the price analysis report of the Director General. CCI directed the parties to cease and desist from such cartel like activities in future.

(Source: CCI order dated 05.06.2020; for full text see CCI website)

VA Comment: *This is a peculiar case of a cartel forced by buyers, which was considered as a strong mitigating factor by CCI to avoid imposition of any financial penalty on the parties. Admittedly, it was a buyers' market in which each OEM was unwilling to increase the prices of the automotive bearings on being approached individually by any of the parties, which, forced them to coordinate to send price increase letters to OEMs. Interestingly, none of the customer/buyer-OEMs had any complaint against the parties to the alleged cartel.*

CCI finds Alkem and Macleods guilty of anticompetitive conduct in limiting supplies to stockists

By way of an order dated 12 March 2020, the CCI in three separate cases, found that the Bengal Chemist and Druggist Association (BCDA), and its District Committees/units of Murshidabad and Burdwan, along with two pharmaceutical companies viz. Alkem Laboratories Ltd (**"Alkem"**) and Macleods Pharmaceuticals Ltd (**"Macleods"**) had contravened Section 3 of the Competition Act, 2002 (**"Act"**). The CCI found that by mandating the stockists to obtain ''necessary clearance' in the form of Product Availability Information (**"PAI"**) and Stock Availability Information (**"SAI"**)/"No Objection Certificate" from BCDA and its District units, the pharmaceutical companies had restricted supplies to new stockists in contravention of the provisions of the Act.

However, only a cease and desist order was passed and no penalty was imposed on any party. The Commission observed that BCDA had taken several steps in the direction of ending the practice of requiring NOC/ SAI post the decision of the Commission in *Santuka Associates Pvt. Ltd. v. AIOCD and Others*[1]. As regards Alkem and Macleods, the Commission acknowledged the submission that they were indulging in the impugned conduct under threat/duress/ directions from BCDA and decided not to impose any monetary penalty.

(Source: CCI order dated 12.03.2020; for full text see CCI website)

No Hub and Spoke cartel with drivers -NCLAT dismisses appeal against CCI order exonerating Ola and Uber on allegations of hub and spoke cartel with drivers

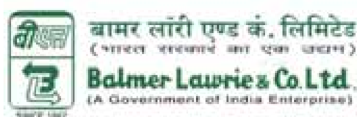
The National Company Law Appellate Tribunal (**"NCLAT"**) vide its judgement dated 29 May 2020 has dismissed an appeal filed against the CCI's order exonerating taxi aggregators Ola and Uber from allegations of facilitating price fixing through their drivers under a "hub and spoke' cartel arrangement. The appeal was inter alia dismissed on the ground of lack of locus standi. The NCLAT held that an Informant before the CCI has to be a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices.

1 2013 Comp.L.R. 223 (CCI)

However, after holding that the Informant did not have the locus, the NCLAT also dismissed the appeal on the merits. NCLAT noted that the business model of Ola and Uber does not support the allegation of the Informant as regards price discrimination. It was observed that there was no allegation of collusion between the Cab Aggregators (Ola and Uber) through their algorithms, which in turn implied an admission on the part of Informant that the two taxi service providers are operating independent of each other. Further, the NCLAT made an observation that the information filed before the CCI was not substantiated with evidence. Instead, the case heavily rested upon a United States Class Action Suit titled *Spencer Mayer v Travis Kalanick* against Uber and Ola. The NLCAT noted that the above stated matter relates to a foreign jurisdiction. Therefore it cannot be imported to operate within the ambit and scope of the mechanism dealing with redressal of competition concerns under the Act.

(Source: NCLAT judgement dated 29.05.2020l; for full text see NCLAT website)

CCI dismisses allegations that the exclusivity granted to public sector travel agents contravened for travel bookings by government employees contravened competition law



The CCI by way of an order dated 08 May 2020, has dismissed allegations that the exclusivity granted by the Department of Expenditure, Ministry of Finance (**"MOF"**) in favour of public sector travel agents, Balmer Lawrie & Co. Ltd (**"Balmer Lawrie"**) and Ashok Travels and Tours (**"Ashok Travels"**) for booking of air tickets by government and PSU employees throughout India contravened competition law.

At the outset, the Commission observed that MOF's principal activities appear to be in realm of policy making and interface with various ministries and not commercial in nature. Accordingly, it was held that MOF could not be regarded as an 'enterprise' in terms of Section 2(h) of the Act especially in relation to circulars which were impugned, which is nothing but a manifestation of the government's policy in relation to its availing of particular services as a consumer. With respect to the allegation of an anti-competitive vertical arrangement between the MOF and the two travel agents, the CCI observed that there did not seem to be any vertical relationship between them as MOF cannot be said to be part of the production chain in a market. Lastly, the Commission noted that the decision of the MOF to grant exclusivity to Balmer Lawrie and Ashok Travels is an internal administrative decision of the Government to deal with a particular agency in the matter of securing air tickets and such policy decisions of the Government emanating through circulars cannot be termed as an agreement under Section 2(b) of the Act. Accordingly, the CCI held that such a decision by the MOF cannot be brought under the purview of Section 3(1) of the Act. Interestingly, it was the second time that the informant- Travel Agents Association of India (**"TAAI"**) had approached CCI with the grievance that the alleged exclusivity has foreclosed the private travel agents from a substantial portion of the travel bookings market i.e., market for government bookings.

(Source: CCI order dated 08.05.2020; for full text see CCI website)

VA Comment: *The Commission seems to have adopted a "form based" approach while deciding this case since the allegation that the exclusive arrangement made by the Government of India in favour of only two public sector travel agents to the exclusion of all private travel booking agents, which , despite the opposition by the actual users of their services, the government employees, was going on for last 14 years, could have been sent for investigation to ascertain the harm caused to competition that is the degree of market foreclosure to ascertain where this was causing appreciable adverse effect on competition under section 3(4) of the Act read with Section 3(1) of the Act or not.*

CCI finds cartelisation in tenders floated by Indian Railways for procurement of Composite Brake Blocks during 2009-2017, however, refrains from imposing monetary penalty

By way of an order dated 10 July 2020, the CCI has found Hindustan Composites Limited, Industrial Laminates (India) Private Limited, BIC Auto Private Limited, Escorts Limited (Railway Equipment Division), Rane Brake Lining Limited, Om Besco Super Friction Private Limited, Cemcon Engineering Co. Private Limited, Sundaram Brake Lining Limited, Bony Polymer Private Limited and Daulat Ram Brakes Mfg. Co. to be in contravention of Section 3(3) (a), 3(3) (c) and 3(3) (d) read with Section 3(1) of the Act. It was found that the aforesaid enterprises had engaged in cartelization in the tenders floated by the various divisions/ zones of the Indian Railways and other procuring entities for procuring of different types of Composite Brake Blocks (CBBs) during 2009-2017 by means of directly or indirectly determining prices, allocating markets, co-ordinating bid response and manipulating the bidding process, which had an AAEC within India.

However, the CCI refrained from imposing any monetary penalty on any of the aforesaid enterprises or their respective office bearers considering various mitigating factors such as cooperation and admission of their respective roles by the enterprises, some enterprises being Micro Small and Medium Enterprises (MSMEs), small annual turnovers of the enterprises and the prevailing economic situation arising due to the outbreak of global pandemic (COVID-19).

(Source: CCI order dated 10.07.2020; for full text see CCI website)

B. INTERNATIONAL

EC directs investigation into Apple's App store rules

The European Commission (EC) has directed investigation into whether Apple's rules for app developers on the distribution of apps via the App Store violate EU competition law. The investigations were initiated following complaints by Spotify and by an e-book/audiobook distributor on the impact of the App Store rules on competition in music streaming and e-books/audiobooks.

The EC will investigate in particular two restrictions imposed by Apple in its agreements with companies that wish to distribute apps to users of Apple devices:

i. The mandatory use of Apple's own proprietary in-app purchase system "IAP" for the distribution of paid digital content. Apple charges app developers a 30% commission on all subscription fees through IAP.

ii. Restrictions on the ability of developers to inform users of alternative purchasing possibilities outside of apps. While Apple allows users to consume content such as music, e-books and audiobooks purchased elsewhere, its rules prevent developers from informing users about such purchasing possibilities, which are usually cheaper.

The preliminary investigations by the EC raised concerns that Apple's restrictions may distort competition for music streaming services on Apple's devices. The investigation revealed that Apple's competitors have either decided to disable the in-app subscription possibility altogether or have raised their subscription prices in the app and passed on Apple's fee to consumers. In both cases they were not allowed to inform users about alternative subscription possibilities outside of the app. The IAP obligation also appears to give Apple full control over the relationship with customers of its competitors subscribing in the app, this dis-intermediating its competitors from important customer data while Apple may obtain valuable data about the activities and offers of its competitors.

(Source: EC press release dated 16.05.2020)

EC directs investigation into Apple's practices regarding Apple Pay

The EC has opened a formal investigation to assess whether Apple's conduct in connection with Apple Pay violates EU competition rules.

The investigation concerns Apple's terms, conditions and other measures for integrating Apple Pay in merchant apps and websites on iPhones and iPads, Apple's limitation of access to the Near Field Communication (NFC) functionality ("tap and go") on iPhones for payments in stores, and alleged refusals of access to Apple Pay. Apple Pay is Apple's proprietary mobile payment solution on iPhones and iPads, used to enable payments in merchant apps and websites as well as in physical stores.

Following a preliminary investigation, the EC had concerns that Apple's terms, conditions, and other measures related to the integration of Apple Pay for the purchase of goods and services on merchant apps and websites on iOS/iPadOS devices may distort competition and reduce choice and innovation.

In addition, Apple Pay is the only mobile payment solution that may access the NFC "tap and go" technology embedded on iOS mobile devices for payments in stores. The investigation will also focus on alleged restrictions of access to Apple Pay for specific products of rivals on iOS and iPadOS smart mobile devices.

The Commission will investigate the possible impact of Apple's practices on competition in providing mobile payments solutions.

(Source: EC press release dated 16.05.2020)

II. ABUSE OF DOMINANT POSITION

A. INDIA

CCI exonerates food aggregator Swiggy from allegations of imposing unfair prices on customers -sans market definition

Vide its order dated 19 June 2020, the CCI has dismissed allegations of abuse of dominant position by Bundl Technologies Pvt. Ltd (**"Swiggy"**).

It was alleged that Swiggy was charging customers prices which were higher than the prices charged by the respective partner restaurants for their walk-in customers, without the knowledge of the customers. It was alleged that the customers ordering food online via the app/website of Swiggy end up paying higher prices than they would have paid by walking-in or ordering directly through phone from the restaurant.

However, CCI observed that Swiggy's role is limited to providing access to communication system over which information made available by third parties is transmitted or temporarily hosted. Commission also acknowledged Swiggy's contention that it does not select or modify the information contained in the transmission made through the platform, and therefore, any discrepancy in the rates is solely attributable to restaurant partners. The Commission further acknowledged that Swiggy takes up the complaints of price discrepancies received by it with the concerned partner restaurants and therefore the allegations against Swiggy does not appear to be substantiated.

At the same time, the Commission observed that it would be apposite for Swiggy to give sufficient disclosures that it is not involved in fixation of price of the products of the restaurants on its platform.

(Source: CCI order dated 19.06.2020; for full text see CCI website)

CCI fines Grasim abusing its dominant position in the market for supply of VSF to spinners in India

By way of an order dated 16 March 2020, the CCI has imposed a fine of INR 301.6 Crores on Grasim Industries Ltd (**"Grasim"**) for abusing its dominant position in the market for supply of Viscose Staple Fibre (**"VSF"**). The CCI held that Grasim has abused its dominant position by (i) following a discriminatory pricing and non-transparent and discriminatory discount policy within domestic customers and also between domestic and international customers, and (ii) imposing

supplementary obligations as condition precedent to conclusion of contracts for supply of VSF to its customers such as seeking production details and poof of export from the spinners for becoming eligible to discounts .

Commission observed that Grasim was a dominant player in the relevant market for supply of VSF to spinners in India with over 85% market share.

It was found that a plethora of discount parameters, frequent changes effected to pricing and discount policy coupled with non-transparency of the same to its buyers indicated the unilateral and abusive behaviour of Grasim in violation of Section 4(2)(a)(ii) of the Act. Further, Commission found that Grasim was seeking details of VSF bought, and used for production of VSF yarn from its customers in the garb of offering discounts. This was found as imposition of supplementary obligations upon the spinners which have no connection with the subject matter of the contract and therefore was in contravention of Section 4(2)(d) of the Act.

(Source: CCI order dated 16.03.2020; for full text see CCI website)

NCLAT dismissed appeal by Adani Gas -upholds CCI's finding on Abuse of Dominant Position

The NCLAT vide judgement dated 05 March 2020, has upheld the order dated 03 July 2014 passed by the CCI penalizing M/s Adani Gas Limited (**"Adani'**) for abusing its dominant position in the relevant market of supply and distribution of natural gas in Faridabad. However, the NCLAT has reduced the quantum of penalty from the originally imposed 4% to 1% of the average of the turnover for the preceding three years considering the mitigating factors.

The NCLAT, agreeing with the findings of the CCI, held that Clauses 11.2.1, 13.5, 13.7, 16.3 and 17.2 and 17.4 were abusive in nature on the same lines as observed by the CCI in its order. The NCLAT acknowledged that even Adani was conscious of such conditions in the Gas Supply Agreement **("GSA"**) to be unfair which was inferable from its conduct in substituting the original GSA with the revised one modifying the contravening terms and conditions. Moreover, Clause 17.4 was completely removed and not incorporated in the new GSA. Accordingly, the NCLAT confirmed the finding of the CCI with respect to abuse of dominant position.

An important question of law considered by NCLAT was 'whether the Commission can pass orders singularly or with any other directions or pass all order under Section 27 of the Act', as in the present case the CCI had imposed a fine and also a direction to amend the GSA. The NCLAT observed that a plain reading of the provision provides that the Commission is empowered to pass all or any of the orders envisaged under Clauses (a) to (g). The NCLAT emphasized that the term 'any' is all-encompassing and

empowers the CCI to pass orders either singularly or coupled with any other discretion or pass all orders under Section 27 of the Act.

The NCLAT noted that the GSA was revised by Adani during the course of investigation and enquiry before the Commission. The GSA was made more consumer friendly and protected the interests of the industrial consumers by removing disparities as regards revision of gas prices, payment obligation in case of shutdown of supply and for complete or partial off take of gas etc. The NCLAT acknowledged that such modifications eliminated the discrimination qua the industrial consumers. The NCLAT also acknowledged that Adani voluntarily revised the GSAs even before conclusion of enquiry by CCI and was responsive to the advice of the erstwhile COMPAT. These were considered as mitigating factors in favor of Adani.

Accordingly, the NCLAT reduced the quantum of penalty imposed on Adani from 4% of the average annual turnover of the relevant three years to 1%.

(Source: NCLAT judgement dated 05.03.2020; for full text see NCLAT website)

III. COMBINATIONS

A. INDIA

CCI approves acquisition of Emani Cement Limited by Nuvoco Vistas Corporation Limited

The CCI by way of an order dated 20 May 2020 has approved Nuvoco Vistas Corporation Limited's (**"NVCL"**) acquisition of 100% of the total issued and paid up share capital of Emani Cement Limited (**"ECL"**), on a fully diluted basis.

The Commission noted that the acquirer and the target had vertical overlaps, however it was clarified that vertical integration is fundamental to the grey cement industry and is imperative for its operations. Certain cement manufacturers tend to engage in the sale of surplus clinker to other cement manufacturers in order to effectively utilize their clinker production that was not used for captive consumption. Further, it was stated that it is standard practice for ready-mix concrete manufacturers to source grey cement as input both from in-house facilities and third-party manufacturers and similarly NVCL sources grey cement from ECL for its production of ready-mix concrete. It was submitted that that ECL supplied NVCL negligible amount of grey cement of the total volume of grey cement sold by ECL in FY 2018-19.

It is observed that the post-combination HHI and change in HHI is insignificant to raise any concerns of AAEC and there are other players present such as Shree Cement, Holcim, Ultratech and Dalmia operating in each state to pose competitive constraints on the combined entity. Based on the aforesaid analysis, the Commission decided that the Proposed Combination is not likely to result in an AAEC.

(Source: CCI order dated 20.05.2020; for full text see CCI website)

CCI approves acquisition of GMR Energy Limited, GMR Kamalanga Energy Limited by JSW Energy Limited

By way of order dated 07 April 2020, the CCI has approved the acquisition of 100% share capital of GMR Energy Limited, GMR Kamalanga Energy Limited by JSW Energy Limited.

Commission noted that the acquirer and the targets exhibit horizontal overlaps at the broader level of total power generation in India and at a narrow level in thermal power generation sector in India. Further, although there did not exist any vertical overlaps, however there were certain potential vertical overlaps between the Acquirer's subsidiaries and the Target.

However, considering the miniscule market share of the parties and the low level of combined market share, the Commission held that the proposed transaction is unlikely to cause any AAEC.

(Source: CCI order dated 07.04.2020; for full text see CCI website)

CCI approves acquisition of 80.1% of ABB Management Holding AG by Hitachi

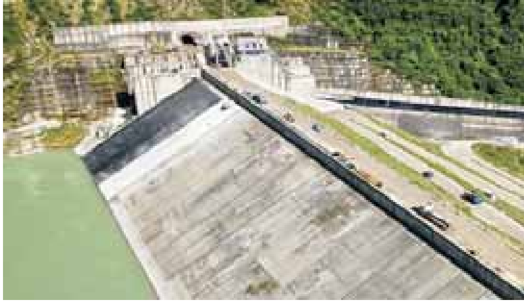
The CCI by way of an order dated 07 April 2020, has approved the acquisition of 80.1% of the issued share capital of ABB Management Holding AG (ABB Management) by Hitachi. Pertinently, in terms of the Share Purchase Agreement executed between the parties, Hitachi will also have an option to acquire the remaining 19.9% of the share capital of ABB Management, within three years after closing.

It was noted that the activities of Hitachi and the Target Business, in India, are similar in respect of: (a) power semiconductors (including high power Semiconductors) and more specifically, discretes and insulated gate-bipolar transistor modules; and (b) LV (low voltage) RPC (Reactive Power Compensation) product and more specifically, LV capacitors. However, in December 2019, Hitachi had agreed to sell its entire shareholding in Hitachi Chemical to Showa Denko K.K. following which it will no longer have control over the LV capacitors business of Hitachi Chemical and thus, the overlap in LV RPC products will come to an end.

Moreover, it was noted that the combined market share of the parties and incremental markets share as a result of the proposed combination in both the overlapping business segments are not significant to cause any AAEC.

(Source: CCI order dated 07.04.2020; for full text see CCI website)

CCI approves acquisition of 35% share capital of Teesta Urja Limited by Greenko



By way of order dated 11 March 2020, the CCI has approved acquisition of approximately 35% of the issued up equity share capital of Teesta Urja Limited (**"TUL"**) (directly or indirectly), by way of secondary purchase of shares held by existing shareholders of TUL i.e. (i) Asian Genco Pte. Limited, (ii) Indus Clean Energy (India) Private Limited, (iii) Athena Projects Private Limited, and (iv) APPL Power Private Limited.

As regards overlaps, the Commission noted that the parties exhibited horizontal overlaps at the broader level of total power generation in India and at a narrow level in (i) all sources of power generation except Renewable Energy Sources ("RES") and (ii) hydro power generation. However, the Commission noted that the combined market shares and the incremental market share in each of the segments in terms of installed capacity as well as actual generation was insignificant.

(Source: CCI order dated 11.03.2020; for full text see CCI website)

IV. MISCELLANEOUS

NCLAT sets aside CCI order imposing penalty on Eli Lilly for Gun Jumping

The NCLAT vide judgment dated 12 March 2020, has set aside the CCI order dated 14 July 2016 imposing a fine of INR 1 crore on M/s Eli Lilly and Company (**"Eli"**) for gun jumping i.e. for not notifying its acquisition of Novartis Animal Health in India (**"NAH"**) within the prescribed limit.

Eli- a company based in the United States agreed to acquire the global animal health business of Novartis AG pursuant to a Stock and Asset Purchase Agreement (**"SAPA"**) dated 22 April 2014 covering the global portion of the transaction. The transaction was publicly announced and notified under the merger control laws in several jurisdictions around the world including the United States and the European Union and the transaction was cleared in each jurisdiction and closed on 01 January 2015.

With respect to India, the acquisition of NAH was handled separately by a separate Slump Sale Agreement dated 03 December 2014 between the parties' Indian subsidiaries. The transaction was notified to the Indian Foreign Investment Promotion Board ("FIBP") on 10 November2014. However, the transaction was not notified to the CCI as the parties believed it to be covered under the then applicable *de Minimis* Exemption which applied to acquisitions of enterprises whose sales in India were not more than INR 750 Crores or whose Indian assets valued not more than INR 250 Crores.

However, the Commission, about 1.5 years after the global transaction was announced, on 08.04.2015 issued a letter asking why the transaction was not notified to which the Eli responded that the transaction was exempt under the *de Minimis* Exemption as the target business only had turnover of INR 93 Crores and assets worth INR 36.2 Crores. However, the parties also decided voluntarily to notify the transaction to CCI.

The Commission vide letter dated 06.08.2015 concluded without citing any reasons that the transaction was reportable. Four months later, the CCI approved the transaction on 03 December2015. However, the Commission then issued a show cause notice to Eli on 14 December2015 to show cause why it should not be penalized for not notifying the transaction in India. Eli again responded that the transaction was exempt under the *de Minimis* Exemption. Hearing was also granted to Eli. On 14 July2016, the CCI imposed a penalty of INR 1 Crore by asserting that the thresholds of the *de Minimis* Exemption did not apply to the business being acquired i.e. NAH but rather to the target's parent i.e. Novartis India Ltd., which was not covered by the *de mimimis* exemption. This decision was based solely on the ground that the parent was incorporated and NAH was not.

NCLAT held that the CCI failed to appreciate that the Notification dated 04 March2011 giving effect to the de Minimis Exemption was applicable to the present transaction on the basis of an erroneous interpretation which is contrary to the intention of the exemption. The intention behind the notification was to exempt certain transactions due to their small size and this intention was made clear by the government by a press release dated 30 March2017 wherein it was stated that:

"Combinations falling within the threshold limits would not require to be filed before the Competition Commission of India. The reform is in pursuance of the Government's objective of promoting Ease of Doing Business in the country and is expected to make India a more attractive destination for Foreign Direct Investment. The notification is expected to enable greater freedom to industry in taking legitimate business decisions towards further accelerating India's economic growth."

The NCLAT held that it was clear that the Central Government did not wish CCI interference in the acquisition of an enterprise that was *de minimis* or acquisition of assets that were *de minimis.*

(Source: NCLAT judgement dated 12.03.2020; for full text see NCLAT website)

NCLAT rejects appeal of Confederation of All India Traders against CCI decision approving acquisition of Flipkart by Walmart

The National Company Law Appellate Tribunal (**"NCLAT"**) vide judgment dated 12 March2020, has upheld the order dated 08 August2018 passed by the Competition Commission of India (**"CCI/Commission"**) approving Wal-Mart International Holdings' (**"Walmart"**) acquisition of between 51% and 77% of the outstanding shares of Flipkart Pvt. Ltd (**"Flipkart"**).

The appeal against the CCI order was preferred by Confederation of All India Traders (**"Appellant"**) – one of the various stakeholders which raised objections before the Commission with respect to the above-mentioned transaction.

The Appellant argued that pursuant to the approval of the combination, Walmart will have effective control over the e-commerce platform and the web of preferential sellers and in such a situation it will sell its inventory on the platform of Flipkart or through a web of associated preferred sellers and preference will be given to the inventory of Walmart. It was further argued that the alleged practice of Flipkart denying market access to non-preferential sellers will be magnified post the transaction. The Appellant also brought on record Flipkart's alleged anti-competitive activities such as deep discounts, exclusive tie-ups, and preferential listings which might magnify post the transaction.

NCLAT acknowledged that from a plain reading of the CCI order it was apparent that the Commission had considered the business activities of Flipkart and Walmart and analysed the horizontal and vertical overlaps which existed between the parties. NCLAT noted that the CCI had observed that both the parties are engaged in B2B sales and there existed a horizontal overlap in the relevant market for 'Pan-India market for B2B sales' which was characterized by intense competition among a very large number of competitors- online and offline. Further, the Commission had also observed that both the Flipkart and Walmart were entities with foreign investments and therefore are governed by the FDI Policy which laid the boundaries of B2B sales within which the parties can operate.

The NCLAT held that CCI was right in approving the combination in absence of any evidence on record that the proposed combination is resulting in elimination of any major players in the relevant market. The NCLAT observed that the appellant failed to show that any major player in the relevant market will be eliminated due to the proposed combination. On the other hand, NCLAT noted that Flipkart will remain under the operation of Walmart which will not only preserve a successful e-commerce platform but will also enhance its financial strength.

(Source: NCLAT judgment dated 12.03.2020; for full text see NCLAT website)

NCLAT adopts a strict interpretation of limitation period for appeals under the Act - holds time spent in pursuing litigation in Courts not sufficient cause for condoning delay

The NCLAT vide judgement dated 29 May 2020 has dismissed an appeal against an order of the CCI in *Maj. Pankaj Raj v. NIIT Ltd and Ors.,* Case No. 47, 48 and 49 of 2019. The order was initially challenged by the Informant before the Hon'ble High Court of Telangana. The petition filed by the Informant was inter alia dismissed on the ground that an alternate statutory

remedy was available to the Informant before the NCLAT. This High Court decision was subsequently challenged by the Informant before the Hon'ble Supreme Court of India.

It was however withdrawn by the Informant, who then approached the NCLAT after a delay of more than 708 days. The Act provides a limitation period of 60 days for preferring an appeal to the NCLAT against a CCI order.

The appeal was dismissed by the NCLAT as being time-barred, with the observation that pursuing litigation for 693 days is not sufficient cause for condoning the delay for the purposes of the Competition Act. It was held that if a statutory remedy of appeal is provided under the Act, the Informant cannot circumvent it and approach the High Court.

The NCLAT observed that the conduct of the appellant was akin to forum shopping and in detriment to the 'expeditious disposal duty' of the NCLAT enshrined under the Competition Act, 2002 which directs the NCLAT to dispose of appeals within 6 months of filing. The NCLAT also held that since the Act calls for expeditious disposal of appeals, therefore, Section 5 of the Limitation Act, 1963 which provides for extension of prescribed period in certain cases stands excluded by implication.

(Source: NCLAT judgement dated 29.05.2020; for full text see NCLAT website)

European Commission consults stakeholders on the Market Definition Notice

On 26 June 2020, the European Commission published a public consultation on the market definition used in EU competition law. The need to evaluate the Market Definition Notice was felt in view of changing market realities brought about by increasingly digitalization and integration of the common market. It was felt that the existing Market Definition Notice which dates from the year 1997 not sufficiently address new challenges while defining relevant products and geographic market. The EC also seeks to update the Market Definition on the basis of the judicial experience gained in defining relevant markets since 1997.

(Source: ECpress release dated 26.05.2020)

U.S Department of Justice (DOJ) and the Federal Trade Commission (FTC) issue guidelines for evaluating vertical mergers

On 30 June 2020, the DOJ and FTC issued new guidelines for governing vertical mergers and acquisitions. The Guidelines replace and supersede the DOJ's 1984 Non-Horizontal merger guidelines.

The new Vertical Merger Guidelines evaluate the likely competitive impact of vertical mergers and whether those mergers comply with U.S antitrust law. The Vertical Merger Guidelines detail the

techniques and main types of evidence that the agencies typically use to predict whether vertical mergers may substantially lessen competition. The Guidelines will help businesses, antitrust practitioners, and other interested persons by increasing transparency into the agencies' principal analytical techniques, practices, and enforcement policies for evaluating vertical transactions.

(Source: FTC press release dated 30.05.2020)

EC consults stakeholders on a possible new competition tool

On 02 June 2020, the EC launched a public consultation to seek views and feedback from the public regarding the possible adoption of regulation that would introduce a new market investigation tool. The new tool would enable the Commission to investigate and impose behavioural and/or structural remedies on businesses with significant market power, whether dominant or not – and without any prior finding of a competition law infringement. As such, this new tool could present a significant risk and potential burden for companies with market power. On the other hand, it offers potential benefits to market participants, such as new entrants, who might otherwise see their access to markets foreclosed.

(Source: EC press release dated 02.05.2020)

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