

Competition News Bulletin

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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INTERNATIONAL

European Commission (EC) fines ethylene purchasers 260 million Euros in cartel settlement



The EC has imposed a penalty amounting to € 260 million on Orbia (Mexico), Clariant (Switzerland), and Celanese (USA) for engaging in a cartel concerning purchases on the ethylene merchant market. It was found that the parties colluded to buy ethylene for the lowest possible price. Another company i.e., Westlake was not fined as it revealed the existence of the cartel to the EC.

EC's investigation revealed that from December 2011 to March 2017 during the process of establishing the Monthly Contract Price ("MCP"), the four ethylene purchasers coordinated their price negotiation strategy vis-à-vis the ethylene sellers to influence the MCP to their advantage.

Interestingly, unlike in most cartels where companies conspire to increase their sales prices, the four companies colluded to lower the value of ethylene, to the detriment of ethylene sellers. In particular, the companies coordinated their price negotiation strategies before and during the bilateral MCP 'settlement' negotiations with ethylene sellers to push the MCP down to their advantage. They also exchanged price-related information.

All parties accepted their part in the cartel and agreed to settle the case. While Westlake received full immunity for revealing the cartel, the other three players benefited from reductions of their fines for their cooperation with the EC investigation

(Source: EU press release dated 14.07.2020)

II. ABUSE OF DOMINANT POSITION

A. INDIA

CCI dismisses allegations of abuse of dominant position by WhatsApp and Facebook in the digital payments market



By way of an order dated 18 July 2020, the Competition Commission of India ("CCI/Commission") has dismissed allegations on WhatsApp Inc ("WhatsApp") and Facebook Inc ("Facebook") of leveraging their dominant position in the market for internet-based messaging application through smartphones to foreclose competition in the market for UPI enabled digital payment applications with its new feature of UPI based transfer of funds.

Commission observed that Facebook and WhatsApp are group entities and though they may operate in separate relevant markets, their strengths can be attributed to each-others' positioning in the respective markets in which they operate.

CCI noted that the data provided by the Informant demonstrated that WhatsApp messenger is the most widely used app for social messaging, followed by Facebook Messenger, in the relevant market delineated by the Commission. Further, the market share of WhatsApp is much higher than other messaging apps like Snapchat, WeChat etc. showing its relative strength. The CCI also noted that WhatsApp messenger and Facebook Messenger are owned by the same group and therefore do not seem to be constrained by each other, rather adding on to their combined strength as a group. Accordingly, owing to its popularity and wide usage, for one-to-one as well as group communications and its distinct and unique features, WhatsApp was found to be dominant.

The allegation levelled by the informant were in the nature of both exploitative as well as exclusionary abuses flowing from the same conduct. On the exploitative side, the Informant was aggrieved that the users of WhatsApp Messenger have been imposed with another App 'WhatsApp Pay' to which they did not subscribe or download [Section 4(2)(a)(i)] and since these two apps operate in two different markets, the tying of the latter with the former is anticompetitive [Section 4(2)(d)]. On the exclusionary side, it was alleged that this conduct forecloses competition in another market i.e. 'market for UPI enabled digital payment applications in India.'

As regards the allegations with respect to Section 4(2)(a)(i), the CCI did not find merit in the allegation as the mere existence of an app on the smart phone does not necessarily convert into transaction/usage. The CCI also considered WhatsApp's submission that in order to enable WhatsApp payment, the user has to separately register for it which necessarily requires the users to accept terms of the service agreement and privacy policy and therefore no action cannot be completed without voluntary steps. Further, the users will have full discretion whether to use WhatsApp Pay app or not, which implies that the users will have an option to use any other payment apps which might already have been downloaded on their smartphones.

As regards bundling/tying, the Commission observed that certain conditions which need to be fulfilled to conclude a case of tying are (i) the tying and tied products are two separate products; (ii) the entity concerned is dominant in the market for the tying product; (iii) the customers or consumer does not have a choice to only obtain the tying product without the tied product; and (iv) the tying is capable of restricting/foreclosing competition in the market. CCI noted that the first two conditions are met since (i) WhatsApp Messenger and WhatsApp Pay are two distinct products with different functionalities; and (ii) WhatsApp is dominant in the 'market for OTT messaging apps through smartphones in India'.

On the third condition, CCI observed that WhatsApp had submitted that WhatsApp users do not “automatically” or “mandatorily” have to use the WhatsApp Pay feature, but rather retain full discretion on whether or not to use WhatsApp and the WhatsApp Pay feature’. It was prima facie found that installation of the WhatsApp messenger does not appear to explicitly mandate/coerce the user to use WhatsApp Pay exclusively or to influence the consumer choice implicitly in any other manner, at present. Accordingly, the third condition does not seem to have been established.

As regards the fourth condition i.e., the actual or likely impact of installation on competition in the market for tied product, the CC Iobserved that at present, the UPI digital payments market consists of various established players e.g. Google Pay, PayTM, Phone Pe, Amazon Pay etc. which are backed by big companies/investors, and in an evolving market the players seem to be vigorously competing which is evident from offers/discounts/incentives offered by them to their users. It was concluded that in such a market, in order to perceive that WhatsApp Pay will automatically get a considerable market share only on the basis of its pre-installation, seems implausible. Further, the Commission also observed that WhatsApp Pay had got approvals to act as a payment app in India in February 2020 in beta version, and only recently, it seems to have complied with the data localisation norms stipulated by NPCI to operate fully. Therefore its actual conduct is yet to manifest in the market. Accordingly, the Commission observed that this allegation was premature in nature and closed the case under Section 26(2) of the Act.

(Source: CCI order dated 18.07.2020; for full text see CCI website)

CCI dismisses allegations of abuse of dominance and exclusive distribution on Bajaj Auto Ltd



By way of an order dated 6 August 2020, CCI has dismissed allegation of abuse of dominant position and imposition of vertical restraints on Bajaj Auto Ltd (“Bajaj”) for allotting a dealership in favour of M/s S.K. Automobiles. The Informant was aggrieved of the fact that the Bajaj allotted dealership to a party who did not meet the eligibility criteria provided in the advertisement.

However, the Commission noted that mere submission of an application form in response to an advertisement is a mere invitation to offer and unless accepted by the other party, does not result in an agreement/contract, and in absence of any evidence that the Informant’s application has been accepted by Bajaj, no right is conferred on the informant.

Further, lack of significant market power on part of Bajaj also led to dismissal of allegations of abuse of dominance and exclusive distribution agreement, if any. It was noted that Bajaj had a market share of 12%, and there existed well entrenched inter-brand competition in the form of players like Hero MotoCorp Ltd., Honda Motorcycles & Scooters India Private Limited, TVS Motor Company, Royal Enfield, India Yamaha Motor Pvt. Ltd. and Suzuki Motorcycle India Private Ltd in the two wheelers’ market in India.

Lastly, the CCI made an observation that a mere willingness on the part of the Informant to commence a particular type of business relationship Bajaj, for a particular location, if does not fructify, cannot be said to give rise to any competition concern, warranting an intervention by the Commission.

(Source: CCI order dated 06.08.2020; for full text see CCI website)

CCI dismisses allegations of abuse of dominance by Ashiana Housing Ltd



By way of an order dated 26 August 2020, the CCI has dismissed allegations that Ashiana Housing Ltd. abused its dominant position by imposing unfair terms and conditions in the sub-lease agreement and a tripartite agreement, in relation to retirement home resorts built in Lavasa Hill City.

The Commission noted that the market for provision of services of development and sale of retirement homes in the form of residential flats in Pune district was highly competitive and there are various other competitors/ players operating in the said relevant market such as Paranjape Schemes Ltd. (Athashri Project); Vascon Engineers Pvt. Ltd. & Manisha Constructions (Golden Nest Project); Gagan Properties (Nulife Project) etc. which showed that the consumers are not solely dependent on Ashiana Housing for the provision of real estate services under consideration.

Accordingly, the case was closed under Section 26(2) of the Competition Act, 2002.

(Source: CCI order dated 26.08.2020; for full text see CCI website)

CCI dismisses allegation of abuse of dominance by Delhi Metro in the market for parking lots in Delhi



By way of an order dated 26 August 2020, the CCI dismissed allegations that Delhi Metro Rail Corporation (“DMRC”) abused its dominant position in the market for ‘procurement of services for provision of parking lot management in Delhi’ by not implementing the General Terms and Conditions of the Contract awarded by DMRC. DMRC had invited bids for licensing of parking rights at Kashmere Gate, Kanhaiya Nagar and Shastri Nagar metro stations falling under line 1 vide tender notification DMRC/Tender(O&M)/OPR-417/2019/455/1334 dated 1 February 2019. The informant had bid for the same and was awarded the parking rights for operation of the aforesaid site, however, the parking lots allotted at Kashmere Gate were open parking lots with no fences as against the terms of the contract.

However, the Commission observed that DMRC was not in a dominant position in the market for procurement of services for provision of parking lot management in Delhi. It was observed that DMRC has 84 parking lots while North Delhi Municipal Corporation has 210 parking lots; South Delhi Municipal Corporation has 96 parking lots; East Delhi Municipal Corporation has 39 parking lots; New Delhi Municipal Council has 106 parking lots. In addition to this, there are various parking lots which are operated at Railway Stations, Courts, Hospitals, Shopping Malls etc. Accordingly, it was observed that DMRC is not in a dominant position amidst such market construct.

Therefore, the case was closed under Section 26(2) of the Competition Act, 2002.

(Source: CCI order dated 26 August 2020; for full text see CCI website)

B. INTERNATIONAL

EC invites comments on commitments submitted by Aspen to address the Commission's concerns over excessive pricing



The European Commission (EC) has invited comments from all interested parties on commitments submitted by Aspen to address the Commission's concerns over excessive pricing with respect to six off-patent cancer medicines. Aspen has proposed to reduce its prices in Europe for these medicines by 73% on average.

The commitments cover six off-patent prescription medicines that are used in the treatment of certain types of cancer and mainly haematological cancers, such as multiple myeloma, chronic lymphocytic leukaemia or acute lymphocytic leukaemia. The proposed commitments aim at bringing to an end Aspen's suspected excessive pricing conduct with respect to its six off-patent cancer medicines, which the Commission suspects to constitute an abuse of a dominant position.

(Source: EU press release dated 14.07.2020)

III. COMBINATIONS

INTERNATIONAL

EC approves acquisition of the of Nets' account-to-account payment business by Mastercard; subject to conditions



The EC vide order dated 17 August 2020 has approved Mastercard's acquisition of the of Nets' account-to-account payment business. However, the approval is conditional on the transfer of a license for Nets' "Realtime 24/7" technology for account-to-account core infrastructure services as well as the relevant personnel and other assets.

The EC's investigation focused on the markets for the provision of account-to-account core infrastructure services (A2A CIS) and account-to-account payment services (A2A payment services), where the activities of the Mastercard and the target business mainly overlap in the European Economic Area.

It was found that the transaction as originally notified would have raised competition concerns in the EEA market for A2A CIS in relation to managed solutions, as both companies had strong positions, and the transaction would have led to the strengthening of the leading player, Mastercard. Moreover, it was noticed that Mastercard and Net were close competitors and were faced with limited number of credible competitors in the provision of A2A CIS managed services, whereas the market for the provision of A2A CIS software-only solutions was found to be more competitive. Accordingly, EC was of the opinion that the proposed acquisition would harm competition and lead to higher prices and less choice in the market for the provision of A2A CIS as managed services.

In order to address the concerns of the EC, Mastercard and Nets offered to transfer to a suitable purchaser a global license to distribute, supply, sell, develop, modify, upgrade or otherwise use Nets' Realtime 24/7 technology, with which the target business currently competes in A2A CIS tenders.

(Source: EU press release dated 17.08.2020)

EC opens in-depth investigation into the proposed acquisition of Fitbit by Google



The EC has opened an in-depth investigation into Google's proposed acquisition of Fitbit due to concerns that the proposed transaction would further entrench Google's market position in the online advertising markets, by increasing the already vast amount of data that Google could use for personalisation of the ads it serves and displays.

The EC's first phase of investigation revealed concerns about the impact of the transaction on the supply of online search and display advertising services (the sale of advertising space on, respectively, the result page of an internet search engine or other internet pages), as well as on the supply of 'ad tech' services (analytics and digital tools used to facilitate the programmatic sale and purchase of digital advertising). It was found that on Fitbit's acquisition, Google would acquire: (i) the database maintained by Fitbit about its users' health and fitness; and (ii) the technology to develop a database similar to Fitbit's one. By increasing the data advantage of Google in the personalisation of the ads it serves via its search engine and displays on other internet pages, it would be more difficult for rivals to match Google's online advertising services. Thus, the transaction would raise barriers to entry and expansion for Google's competitors for these services, to the ultimate detriment of advertisers and publishers that would face higher prices and have less choice. In addition to an in-depth investigation

into the effects of the transaction to determine whether its initial competition concerns regarding the online advertising markets are confirmed, the EC will also examine: (i) the effects of the combination of Fitbit's and Google's databases and capabilities in the digital healthcare sector, which is still at a nascent stage in Europe; and (ii) whether Google would have the ability and incentive to degrade the interoperability of rivals' wearables with Google's Android operating system for smartphones once it owns Fitbit.

(Source: EU press release dated 04.08.2020)

EC approves Alstoms' acquisition of Bombardier with conditions



EC has approved the acquisition of Bombardier Transportation by Alstom (both global leaders in rail transportation) subject to full compliance with a commitments package offered by Alstom.

It was found that both companies have a wide product portfolio and compete in the manufacture and supply of: (i) Very high speed, mainline and urban rolling stock (trains) and (ii) Mainline and urban signalling solutions.

EC's initial investigation revealed the competition concerns in the following areas: (i) Very high-speed rolling stock where the merged entity would have become the undisputed market leader with a significant market position; Mainline rolling stock where the merged entity would have strengthened the Parties' already large combined position in particular in France and Germany, and; (iii) Mainline signalling where the merged entity would have had the ability and the incentive to make it more difficult for other suppliers of ETCS OBUs to interface with its many already installed signalling systems (legacy OBUs) and its already operating fleet of trains (the largest in the EEA). Furthermore, the merger risked making the merged an unavoidable supplier of legacy OBUs in the Netherlands.

In order to address these concerns, Alstom offered the following set of commitments: (i) The divestment of Bombardier's assets currently contributing to its joint very high-speed platform with Hitachi, the "Zefiro V300". Alstom also committed to a series of measures aimed at preserving the joint bid offered in consortium by Bombardier and Hitachi to HS2, the current largest opportunity for the production of very high-speed rolling stock in Europe; (ii) The divestment of (a) Alstom's mainline Coradia Polyvalent platform, (b) Alstom's production facility located in Reichshoffen in France, (c) Bombardier's mainline Talent 3 platform, and (d) part of Bombardier's production facility located in Hennigsdorf in Germany; (iii) The supply of legacy OBUs and necessary interfacing information and support, in favour of signalling competitors; and (iv) The supply of legacy OBUs to the Dutch infrastructure manager, ProRail, in favour of all interested operators.

(EU press release dated 31.07.2020)

IV. MISCELLANEOUS

EC launches sector inquiry into the consumer Internet of Things (IoT)



EC has launched an antitrust inquiry into the sector of Internet of Things (IoT) for consumer-related products and services in the European Union. The inquiry will focus on consumer-related products and services that are connected to a network and can be controlled at a distance, for example via a voice assistant or mobile device which includes smart home appliances and wearable devices.

As per the EC, despite the relatively early stage of development of the sector for IoT for consumer-related products and services in the European Union, there are indications that certain company practices may structurally distort competition. In particular, there are indications relating to restrictions of data access and interoperability, as well as certain forms of self-preferencing and practices linked to the use of proprietary standards.

If, after analysing the results, the EC identifies specific competition concerns, it could open case investigations to ensure compliance with EU rules on restrictive business practices and abuse of dominant market positions.

(Source: EU press release dated 16.07.2020)

EC adopts guidelines for national courts when handling disclosure of confidential information



EC has adopted a Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law. This is a result of a targeted public consultation that the Commission launched on 29 July 2019 inviting comments from stakeholders on the draft communication.

The Communication presents a number of measures (e.g. redactions, confidentiality rings, use of experts, closed hearings) national courts may, depending on their procedural framework, order to protect confidential information in the context of disclosure requests throughout and after the closing of the proceedings, and it describes how and when such measures could be effective. The Communication is not binding for national courts and does not modify or bring about changes to the procedural rules applicable to civil proceedings in the different Member States.

National laws may differ largely as regards access to and protection of confidential information. It is very important that national courts strike the right balance between the claimants' right to access relevant information and the right of a party to protect confidential information. To support national courts in this task, the Commission has adopted a Communication seeking to provide practical guidance to national courts in selecting effective protective measures, considering among others the specific circumstances of the case, the type of information requested, the extent of the disclosure, the parties and relationships concerned as well as any administrative burdens and cost implications.

(Source: EU press release dated 20.07.2020)



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