



The Quarterly Newsletter of Competition Commission of India (CCI)

Fair Play

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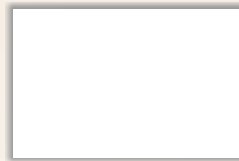
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FROM THE DESK OF THE CHAIRPERSON



Enforcement sanctions against erring enterprises and competition advocacy with stakeholders, are two complementary measures being pursued to achieve the objectives of the Competition Act. The Government has prime role to play in making all the sectors of the economy competitive through regulatory and policy mechanisms. Inadvertent deficiency in policy and regulatory mechanisms can sometimes create a hindrance for effective competition in the market. Therefore, the Commission needs to maintain constant dialogue with the stakeholders including State Governments to ensure a competitive ecosystem.

In the last quarter, the Commission and its officials sensitised the top Government functionaries in the States of Punjab, Haryana, Himachal Pradesh and Bihar about the importance of competition law and policy. During the remaining year we plan to reach out to many more States.

Cartelisation is the most pernicious form of anti-competitive behaviour and enforcement against anti-competitive agreements including cartels and bid-rigging remain our main focus. Cartelisation *inter alia* results in higher prices, inferior quality of goods and services and thwarts innovation. Many times the victims of cartelisation remain unaware. Over the years the jurisprudence on cartel enforcement has been steadily evolving in different sectors following the decisions of the Commission and the Appellate Authorities. The quarter saw the Commission imposing sanctions in the form of monetary penalties for bid-rigging in tenders floated by Western Coal Fields Ltd. In a reference filed by Cochin Port Trust, the Commission found the associations of container trailers transport services indulged in price fixing under the garb of 'Turn System'. Through this order, the Commission has unequivocally clarified that though forming an association for furthering the legitimate trade activities does not fall foul of the Act, transgressing the legitimate boundaries and indulging in anti-competitive activities does.

The "In focus" article in this issue elucidates the interplay between the Competition Law and Patents. In order to incentivise inventions and innovations which usually require sizeable investment for research and development in terms of time and money, temporary monopoly rights are awarded to the innovator for a specified period in the form of patent so that she can recover cost and earn profits. The competition law does not condemn the patents per se but, has to respond to the problems such as denial of Standard Essential Patents (SEPs) on fair, reasonable and non-discriminatory terms. The two Acts will then need to be interpreted harmoniously.

In March, 2018, India will be hosting the Annual International Competition Network (ICN) Conference, wherein we are expecting to participation from more than 120 countries and their competition agencies, lawyers, academics and other stakeholders of the competition ecosystem. The CCI is undertaking a special project on "Cartel Enforcement and Competition" in the country. Through this project, CCI is reaching out to various enterprises, public sector undertakings, associations and government departments to get their feedback and test the competition environment and concerns. We will showcase this project during the conference and we look forward to having intensive deliberations on important competition issues.

(Devender K. Sikri)

IN FOCUS

Competition Law & Patents

The intersection between competition and patent rights goes back in history. As recounted by Stobbs in his book titled *Software Patents*, "In 1326, the Crown established a new policy to encourage importation of new arts to England. It began granting monopolies to first individuals or guilds willing to undertake importing new products. When the Crown granted such monopolies, it was public event. The Crown publicized the grant by issuing proclamation or "open letters", the term "open" referring to the fact that official seal was applied and the letter was left open. In those days, another term for open letters was "letters patent". Therefore, back in the day in England, patents were granted to the first importer and not to the first inventor. The emphasis was on promoting commerce and not incentivising innovation. It was only in 1559 that an Italian, Giacompo Acontio, who invented new kind of furnace and wheel machine, was granted first letters patent. Subsequently, in 1624, both Houses of Parliament in England passed the Statute of Monopolies restricting the grant of monopoly but allowing, inter alia, patents only for invention. The enactment of the Statute of Monopolies acknowledged the fact that, theoretically, competition is preferred over monopoly because it provides equitable opportunity to everyone to compete and participate in the market.

Both competition and patents operate on the principles of efficiency, innovation, and performance. The simultaneous functioning of the Patents Act and the Competition Act is a testament to this coexistence. Section 3(5) of the Competition Act explicitly recognizes the intersection of competition and patent rights. In doing so, Section 3(5) of the Competition Act, specifically protects the rights under the IP regime including patent rights subject to reasonable conditions. However, the protection is available only under Section 3 and not under Section 4 which is related to abuse of dominant position. Moreover, even under the Patents Act, Section 140 declares certain conditions in an agreement relating to patents as void for being anti-competitive.

The conflict between patent rights and competition stems from the reward theory. Traditionally, intellectual property rights have been justified as an incentive or reward for the invention or innovation. Considering the investment in terms of time, resources and intellect, such invention or innovation needs to be protected. However, in some sense, the patent statutes grant rights which are exclusionary in nature. The patent protection (or any IPR protection) confers a negative right i.e. a right to stop others from making, using and selling the product, and/or process so patented. Most often conflict

between the two system of laws; competition laws and patent laws, arises in situations like imposition of royalty not reasonably related to the licensee's sales, fixing a minimum resale price or setting conditions in resale of the licensed goods, selling license only as package license, tying unpatented materials as condition for patent license etc. The economic behaviour of any enterprise arising out of the situations mentioned above are examined under the rule of reason doctrine of antitrust laws.

Patent right is both a grant of power to exclude and a limitation on that power defined by the claims made. Patent law, therefore, seeks to promote competition and check market failure by excluding free riders. Free riding on an innovator's efforts undermine the incentive to innovate. By encouraging innovation patents stimulate disclosure of invention and, in turn, incentivise further development and economic prosperity. At the same time, such economic stimulation has certain side effects. Patents create legal monopoly which results in market power making it amenable to anti-competitive effects. Encouraged to compete, successful entrepreneurs may achieve position of dominance where they are able to prevent others from competing and thereby frustrating the very purpose of the patent right. This is the point of interface between patent rights and competition law.

Competition law does not condemn patent *per se* rather it furthers patent. Competition law does two things: one it seeks to remedy some of the situations in which the market system breaks down. And two, it tries to ensure that patent under the rubric of free trade should not degenerate into unfair trade. Competition law has to respond to the problems created by exercise of patent right. These problems include denial of Standard Essential Patents (SEPs) on fair, reasonable and non-discriminatory terms (FRAND).

SEPs are necessary for the use of any technology and advanced technologies depends on them. Therefore, it follows that SEPs must be licensed. Moreover, since SEPs are so critical for the functioning of the technology we use e.g. smartphones, they must be priced at FRAND terms for all licensees.

Competition concerns relating to SEPs came before the Commission in a case involving Micromax and Ericsson. Ericsson was the holder of certain SEPs on mobile phone technologies, including 3G and EDGE. Ericsson alleged that Micromax's mobile phones infringe its SEPs and sued Micromax for the same. Besides Micromax, Ericsson also sued another mobile phone maker, Intex. Micromax and Intex both claimed, among other things, that Ericsson's royalty rates were excessive.

Ericsson challenged the jurisdiction of the Competition Commission of India (CCI/ the Commission) to

rule over patent disputed before the Delhi High Court. However, CCI's jurisdiction over the matter was upheld by the High Court.

In the instant case, prima facie it was found that Ericsson was dominant in the relevant market of SEP in GSM compliant mobile communication devices in India. Since Ericsson holds SEPs and there is no other alternate technology in the market, it enjoys complete dominance over its present and prospective licensees in the relevant market. Ericsson seemed to be acting contrary to the FRAND terms by imposing royalties linked with price of product of patentees.

Subsequently, in the case concerning Monsanto's licensing of its Bt cotton technology, it was found that Monsanto imposed certain restrictive conditions through the licensing agreements entered into by it with the seed manufacturers. One of the covenants required the manufacturer to intimate Monsanto within 30 days from the date of undertaking development of hybrid cotton planting seeds if it is being developed based on a trait obtained from a competitor of Monsanto. The covenant also provided for termination in case of breach of this clause. Moreover, upon termination, the seed manufacturer was required to seize selling and destroy all seeds already in existence.

In views of the aforementioned terms, the Commission held that

the 'agreements entered into by Monsanto with the sub-licensees appeared to be causing appreciable adverse effect on competition in the Bt cotton technology market' and the 'termination conditions are found to be excessively harsh and do not appear to be reasonable as may be necessary for protecting any of the IPR rights, as envisaged under Section 3(5) of the Act'.

In light of CCI's jurisprudence involving the interplay of competition and patent rights, it can be observed that competition law and patent rights together form a coherent whole. They are complementary to each other rather than being in conflict with each other for they seek to serve a common end, i.e., innovation, economic well-being and prosperity for all. If competition, facilitated by an effective competition law regime, is a necessary condition for driving innovation; intellectual property law is also an essential factor, protecting, within certain limits, the fruits of innovation and making investment successful. Patent law subjects intellectual assets to the exclusive control of the owners, whereas competition law seeks to curb anticompetitive behaviour in the market and encourage competition among players – therefore managing the interface between them is perceived to be challenging at times. It is important to strike a balance between over-protection and under-protection of an innovator's efforts.

SECTION 3 & 4 ORDERS

Coal and Sand transporters found to rig bids in tenders floated by Western Coal Fields Ltd.

In Case No. 34 of 2015, ten transporters viz. SSV Coal Carriers Private Limited, M/s Bimal Kumar Khandelwal, M/s Pravin Transport, M/s Khandelwal Transport, M/s Khandelwal Earth Movers, M/s Khanduja Coal Transport Co., M/s Puna Coal Road Lines, M/s B. Himmatlal Agrawal, M/s Punjab Transport Co. and Avaneesh Logistics Private Limited, were found responsible for bid-rigging in four tenders floated by Western Coal Fields Ltd. (WCL) for coal and sand transportation. WCL had approached CCI upon noticing identical price quoted by them in four tenders floated for coal and sand transportation. It was alleged that the conduct of submitting identical bids at higher rates amounted to an act of bid rigging.

After a detailed investigation by the DG and hearing the parties on the

investigation report, CCI found that the transporters were in an agreement to fix prices resulting in bid-rigging in the tenders floated by WCL. Identical price quotes given by the transporters upto the second decimal for different jobs in the same tender, social and business relationship, financial dealings and identical price quotes given in earlier tenders were considered as circumstances indicating bid-rigging. The said conduct was found to be in contravention of the provision of Section 3(3)(d) read with Section 3(1) of the Act. Further, the Commission has also found eight officials of the said parties to be liable under Section 48 of the Act as responsible for running the business or for being a part of the impugned conduct.

In its order, CCI noted that such

conduct in public procurement besides defeating the tendering process, has an adverse impact on the process of competition resulting in deprivation of efficient outcomes that would have followed otherwise. CCI also noted the reporting of such instance by WCL as a responsible and commendable effort to foster and promote the spirit of competition and prevent efforts for cartelisation in the future.

CCI directed the transporters to cease and desist from indulging in such conduct. A total penalty of Rs. 11,85,58,554/- (Eleven Crores Eighty Five Lacs Fifty Eight Thousand Five Hundred and Fifty Four only) was imposed on the ten transporters and the aforesaid individuals, calculated at the rate of 4 per cent of their average turnover or income during the last three financial years.

Container Trailer Owners Coordination Committee (CTOCC) and its four participating associations found to indulge in price fixing in contravention of Section 3(3)(a) read with Section 3(1) of the Act

The Commission has found CTOCC and its four participating associations, namely Cochin Container Carrier Owners Welfare Association (CCCOWA), Vallarpadam Trailer Owners Association (VTOA), Kerala Container Carrier Owners Association (KCCOA) and Island Container Carrier Owners Association (ICCOA), to be in contravention of the provisions of the Act. In a reference filed by Cochin Port Trust (CPT), it was brought to the notice of the Commission that

these associations, under the garb of 'Turn System', have indulged in unilateral fixation of prices. It was alleged that, during the Turn System, the users and container trailers were obliged to book services only through this centrally controlled system and that CTOCC was restraining outside transporters from lifting the containers which was impeding the ability of the users to hire trailers of their choice.

Following detailed investigation by the Director General ('DG'), the

Commission found that CTOCC, along with the participating associations (namely, CCCOWA, KCCOWA, ICCOA and VTOA), has resorted to price fixing under the garb of the Turn System. In terms of Section 3(3)(a) read with Section 3(1) of the Act, the presumption arose against the said arrangement leading to AAEC, which was not satisfactorily rebutted by these associations, despite being given ample opportunity. Thus, the Commission held them to be in contravention of the provisions of

Section 3(3)(a) read with Section 3(1) of the Act.

Through this order, the Commission has unequivocally clarified that though forming an association for furthering the legitimate trade activities does not fall foul of the Act, transgressing the legitimate boundaries and indulging in anti-competitive activities does. When the trade associations are used as a platform to promote anti-competitive ends, it becomes necessary for the Commission to intervene, for penalising the anti-competitive conduct. Further, the Commission

also mentioned in its order that though 'Turn System' may have efficiency justification in a particular trade, no such efficiency or redeeming virtue were shown by CTOCC or any of its sub-association in the present case.

The Commission, thus, held CTOCC, CCCOWA, KCCOWA, ICCOA and VTOA to be in contravention of the provisions of Section 3(3)(a) read with 3(1) of the Act. Further, the Commission has also found 10 of office bearers of CTOCC, CCCOWA, KCCOWA, ICCOA and VTOA, responsible under Section 48 of the

Act, on account of the positions of responsibility held by them in these associations during the period of contravention.

Accordingly, CTOCC, CCCOWA, KCCOWA, ICCOA and VTOA and their office bearers were directed to desist from indulging in the anti-competitive conduct found to be in contravention of the provisions of the Act. But keeping into consideration certain mitigating factors, the Commission decided not to impose any monetary penalty on any of the parties.

No contravention found in a case filed by Fast Track and Meru against Ola for alleged abuse of dominant position in the radio taxi service industry in the city of Bengaluru

The Commission found no contravention in a case filed by Fast Track Call Cabs Pvt. Ltd. and Meru Travel Solutions Private Limited (Meru) against M/s ANI Technologies Pvt. Ltd. for alleged abuse of dominant position by M/s ANI Technologies Pvt. Ltd. in the radio taxi service industry in the city of Bengaluru under the brand name 'Ola'. The allegations pertained to predatory pricing by M/s ANI Technologies Pvt. Ltd. for running its radio taxis under the brand name 'Ola' at abysmally low prices and for offering unrealistic discounts and incentives to consumers and drivers, respectively. The Commission had earlier, *prima facie*, found merit in the allegations and directed the Director General (DG) to carry out investigation in the matter.

After conducting a detailed investigation, the DG concluded that Ola is not dominant in the relevant market of '*market for services of radio taxi in Bengaluru*'. The DG assessed Ola's position of strength in this

relevant market based on three parameters, fleet size, active fleet size and number of trips, but found 'number of trips' to be the best indicator of market position. On that basis, the DG noted that the market position of various players, namely, Meru (Informant), Ola and Uber (third party radio Taxi Company) during the period of investigation kept changing and it did not reveal any definite trend or conclusion. Thus, Ola was held to be not holding a dominant position.

The Commission agreed with the findings of the DG. Given the nature of the market, the Commission considered it appropriate to adopt a nuanced approach. It observed that market share is but one of the indicators for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding. Though market share can be an important indicator for lack of competitive constraints, there cannot be any set guideline and criteria for determining uniform market share

thresholds and a standard time-period to apply in all cases. The variance across industries in terms of their inherent characteristics, such as nature of competition, technology and innovation dimensions, calls for a case-by-case assessment of market share and its implications for dominance with reference to the totality of the market dynamics and competitive strategies of firms. Based on collective consideration of the facts, the Commission noted that the competitive process in the relevant market is unfolding, market is growing rapidly, effective entry has taken place thereby leading to gradual decline in OP's market share, entry barriers are not insurmountable, there exist countervailing market forces that constrain the behaviour of Ola and the nature of competition in dynamic, innovation-driven markets, the Commission thus held that Ola's dominance in the relevant market was not established. The case was therefore closed under Section 26(6) of the Act.

SECTION 5 & 6 ORDERS

Commission approves combination between Dow Chemical Company ("Dow") and E.I du Pont de Nemours and Company ("DuPont"), subject to modification

A notice for merger of business of Dow and DuPont was filed under Section 6(2) of the Act (hereinafter, Dow and DuPont are collectively referred to as the "**Parties**").

The Parties are science, engineering and technology companies incorporated in USA and have global operations. They are, *inter-alia*, active in chemical, plastic, agriculture products (including crop protection products and seeds), health care and personal care, electronics and communications, nutrition and health, performance chemicals and performance materials.

During assessment of the combination, the Commission sought information from certain third parties. Further, considering complexity, technical and global nature of the combination, the Commission engaged in cooperation with other jurisdictions and an expert was also engaged to assist the Commission.

Based on materials available on record, the Commission was of the *prima facie* opinion that the combination is likely to cause appreciable adverse effect on competition in two relevant markets in India, viz; (a) Fungicide for grapes that target fungus 'Ascomycota'; and (b) MAH grafted polyethylene (low graft). Accordingly, Parties were directed to show cause as to why investigation in respect of combination should not be conducted ("**SCN**").

The Commission also invited comments/objections/suggestions, in terms of sub-section 3 of Section 29 of the Act.

The Commission, after considering responses received from third parties, response to SCN, and comments received from public, observed that adverse effect on competition in the above said markets can be eliminated by suitable modifications. The

modifications for the grape fungicide included furnishing undertakings not to enter commercialization of the concerned product for a specified time, and withdrawal of relevant registrations. In case of MAH grafted polyethylene it included transfer of Dow's business in India to an independent third party. Accordingly, the Commission proposed appropriate modifications and the same were unconditionally accepted by the Parties. On June 8, 2017, the Commission considered the unconditional acceptance by the Parties and approved the combination, subject to carry out of the said modifications by the Parties.

The Commission also noted that Parties had offered global divestiture relating to: (i) herbicides, (ii) insecticides and (iii) certain Research and Development in their submission to the European Commission.

Commission approves combination between Essilor International S.A and Delphin S.a.r.l.

The Commission received a notice, under Section 6(2) of the Act, from Essilor International S.A. (Essilor) and Delphin S.a.r.l. (Delphin) regarding: (i) acquisition of Luxottica's shares by Essilor from

Delphin and a mandatory exchange offer; and (ii) acquisition of newly issued shares of Essilor by Delphin in return for Luxottica shares that Delphin would sell to Essilor ("**Proposed Combination**").

Essilor, a France-based entity, is globally active in the business of ophthalmic (corrective) lens development (including designing, manufacturing and whole selling). It also manufactures and markets

machines, instruments and services for eye-care professionals and is also engaged in processing and wholesale of ophthalmic substrates lenses, which are further surfaced, coated or tinted before being finished and sold to end-consumers. In India, Essilor offers its products and services through its wholly owned subsidiaries and joint ventures.

Luxottica is engaged in designing, manufacturing, and distributing eyewear, i.e., prescription frames and sunglasses globally.

Delfin, a Luxembourg based entity, has investments in Luxottica Group S.p.A. It is present in India through

Luxottica.

From the information provided in the notice, the Commission observed that there is horizontal overlap in the market for wholesale sunglasses and prescription frames in India. The combined market share of the Parties, post-combination, would be in the range of 0-5 percent by volume and 10-15 percent by value with respect to sunglasses and in the range of 0-5 percent by volume and 0-5 percent by value for prescription frames. The Commission also noted that there is a presence of a number of competitors such as Titan Company Limited, Sterling Metaplast India Private Limited,

Ronak Optik India Private Limited, Safilo India Private Limited and Eternity Lifestyle Private Limited.

As regards vertical relationship, the Commission was of the opinion that a potential linkage among the Parties may arise in relation to complementary wholesale markets for ophthalmic lenses and prescription frames; however, the same is not likely to result in vertical foreclosure.

Accordingly, the Commission approved the combination on June 29, 2017 by passing an order under sub-section (1) of Section 31 of the Act.

Commission approves combination between MIH Internet eBay Singapore Services Private Limited and Flipkart Limited

The Commission received a notice, under Section 6(2) of the Act, from eBay Singapore Services Private Limited (eBay Singapore) and Flipkart Limited (Flipkart) regarding: (i) subscription by eBay Singapore of compulsorily convertible preference shares of Flipkart; and (ii) acquisition of 100 per cent equity share capital of eBay India Private Limited (eBay India) by Flipkart.

eBay Singapore is a private limited company incorporated in Singapore and is a wholly owned subsidiary of eBay International AG, which is an indirect wholly-owned subsidiary of eBay Inc., the ultimate parent company of eBay group. It operates a marketplace-based e-commerce platform in Singapore and provides various

services including administrative, marketing and customer support for eBay group companies. eBay India, a subsidiary of eBay Singapore, is engaged in the business of providing a marketplace-based e-commerce platform to facilitate trade between customers and sellers in India.

Flipkart, incorporated in Singapore, is engaged in the business of wholesale cash and carry of goods and providing marketplace-based e-commerce platforms to facilitate trade between customers and sellers in India.

The Commission observed that there is horizontal overlap in the marketplace-based e-commerce platforms to facilitate B2C transactions in India between eBay

Singapore (through eBay India) and Flipkart.

The Commission noted that in the overall B2C Market in India (including both offline and online segments), Flipkart and eBay India have a market share below 5 per cent each. Furthermore, at the sub-segment level i.e. the 'Online B2C Market' in India, Flipkart has a market share of about 15-20 per cent and eBay India has a market share of below 5 per cent. In view of the fact that the incremental market share is not significant either at overall B2C market or online B2C market, the Commission approved the combination on June 7, 2017 by passing an order under sub-section (1) of Section 31 of the Act.

Investigations Initiated

CCI orders investigation against Prasar Bharati

In Case No. 29 of 2016 and 19 of 2017, CCI ordered investigation against Prasar Bharti, a Government of India entity that *inter-alia* provides infrastructure facility to Frequency Modulation (FM) Radio Broadcasters. Both these cases were received from private radio broadcasters alleging abuse of dominance by Prasar Bharti on account of imposing unfair and discretionary conditions in providing infrastructure services.

As per the informants, the extant policy guidelines governing FM Radio Broadcasting Services, without exception, require private FM Broadcasters to co-locate their transmission facilities with existing infrastructure of Prasar Bharti. The grant of permission agreement under which FM Broadcasters are allowed to offer services also require compliance of the co-location mandate. It was alleged that the terms and conditions of the draft

agreement proposed by Prasar Bharti for use of common transmission infrastructure (CTI) were unfair and discriminatory. The alleged abusive clauses related to revision of licence fee, interest payable in case of default in payment of licence fee, termination of CTI agreement, Prasar Bharti's right to use CTI without sharing the cost towards the same, etc. Further, Prasar Bharti demanded rent for CTI despite the same having collapsed, which was also alleged as abuse of dominance.

Upon considering the information, CCI noted that the infrastructure services provided by Prasar Bharti to private FM radio broadcasters are unique and no other organisation can provide the same by virtue of regulatory requirements, which makes the transmission infrastructural services offered by Prasar Bharti non-substitutable. Further, since CTI and the

requirements of private FM radio broadcasters are city specific, CCI noted the relevant market to be provision of infrastructural facilities for FM radio broadcasting in the city where broadcasting services are to be provided. CCI also found Prasar Bharati to enjoy dominant position as private FM broadcasting operators have no option but to avail the services of Prasar Bharati to set up their transmission facilities.

CCI was *prima-facie* convinced that the terms and conditions stipulated by Prasar Bharti for use of CTI are arbitrary and unfair. In particular, the condition that private broadcasters need to bear the cost of operation of Radio FM Channels operated by Prasar Bharti was found to be discriminatory, in contravention of Section 4 (2)(a)(i) of the Act. Accordingly, the DG was directed to cause investigation into the matter and file a report.

IMPORTANT FORTHCOMING EVENTS

- Mr. S.L. Bunker, Member, CCI shall address the CII Western Regional Council Meeting on December 15, 2017 at Ahmedabad.
- Mr. S.L. Bunker, Member, CCI will judge the final round of the West Bengal National University of Juridical Sciences (WBNUJS) National Competition Law Moot on December 17, 2017 at Kolkata.
- Mr. Augustine Peter, Member, CCI shall Address the participants in the Inaugural Session in the ASSOCHAM 5th International Conference on Competition Law & Tech Sector in Bangalore on January 19, 2017.
- CCI-NLU Delhi Competition Law Moot 2018 shall be organised during February 16-18, 2018 at New Delhi.
- Annual Conference of International Competition Network (ICN) shall be hosted by CCI in New Delhi during March 18-21, 2018.

ADVOCACY ACTIVITIES

Major Advocacy Programmes of CCI

Advocacy Initiatives with Central Government, State Governments and PSUs

- Mr. D.K. Sikri, Chairperson, CCI and Mr. Sudhir Mital, Member, CCI had a meeting with Chief Secretary, State of Punjab on July 31, 2017. Sh. Sikri *inter alia*

highlighted the importance of competition law, issues of public procurement and bid-rigging and competition law compliance by enterprises in the state. A

presentation on competition law was also made before the Committee of Secretaries by Ms. Sibani Swain, Adviser, CCI and Mr. Rakesh Kumar, Director(Eco), CCI.



Shri D.K. Sikri, Chairperson and Shri Sudhir Mital, Member, CCI at the meeting with Sh. Karan Aotar Singh, Chief Secretary, Govt. of Punjab and other senior officers of the State on July 31, 2017 at Chandigarh

- Mr. D.K. Sikri, Chairperson, CCI and Mr. Sudhir Mital, Member, CCI had a Meeting with Chief Secretary, Govt. of Haryana and other senior officers of the State on issues relating to Competition Law on September 8, 2017 in Chandigarh. Sh. Sikri *inter alia* highlighted the importance of competition law, issues of public procurement and bid-rigging and competition law compliance by enterprises in the state. Ms. Sibani Swain, Adviser, CCI and Mr. Vipul Puri, Deputy Director, CCI gave presentation on competition law in the said meeting.

- Mr. S.L. Bunker, Member, CCI delivered lecture on Competition Law and Public Procurement at Ordnance Factory, Ambajhari, Nagpur on July 1, 2017. Mr. Vipul Puri, Dy. Director (FA) made presentation on Competition Law.
- Mr. S.L. Bunker, Member, CCI delivered lectures on Competition Law and Public Procurement at National Academy of Defence Production, Nagpur on July 3, 2017. Mr. Vipul Puri, Deputy Director (FA) made presentation on Competition Law.

- Ms. Sibani Swain, Adviser, CCI and Mr. Rakesh Kumar, Director (Eco), CCI delivered lectures on Competition Law before Committee of Secretaries and other senior officers of the Govt. at Shimla on August 1, 2017 as part of the State Advocacy initiatives with Govt. of Himachal Pradesh.
- Ms. Smita Jhingran, Secretary, CCI delivered the Inaugural Address at workshop on Competition Law and Public Procurement organised jointly by CCI and World Bank on August 11, 2017 at New Delhi. Mr. Manoj Pandey, Adviser (Law) and Ms. Neha Raj, Joint

Director (Law) delivered lectures in different sessions. Mr. Rakesh Bhanot, Adviser(FA), Mr. Nandan Kumar, Joint Director (Eco) and Mr. Yogesh Kumar Dubey, Dy. Director (Eco) also participated in the programme. The participants were procurement officers from various government departments and PSUs.

- Mr. K.D. Singh, Joint Director (Law), CCI delivered lecture on competition law at the workshop organised by Standing Conference of Public Enterprises (SCOPE) on August 8-9, 2017 at New Delhi.
- Ms. Payal Malik, Adviser, CCI and Ms. Bhawna Gulati, Deputy Director, CCI delivered lectures on Competition Law to Members of Bihar Industry Association at Patna on August 22, 2017 organised by Department of Industry, Govt. of Bihar.
- Mr. Sukesh Mishra, Director, CCI delivered lecture in 6th Advance global leadership program organised by Standing Conference of Public Enterprises (SCOPE) on August 28, 2017 at New Delhi.
- Mr. Rakesh Kumar, Director (Eco), CCI and Ms. Neha Raj, Joint Director (Law), CCI took sessions on competition law in Workshop for senior officers of Himachal Pradesh Govt. at Shimla on September 8, 2017.
- Mr. Manoj Pandey, Adviser(Law), CCI delivered Lecture on Competition Act in training course for District Judges and Addl. District Judges on September 15, 2017 at Himachal Pradesh Judicial Academy at Shimla.



Mr. S.L. Bunker, Member, CCI addressing the officers at the Ordnance Factory, Ambajhari, Nagpur on July 1, 2017



Ms. Smita Jhingran, Secretary, CCI, Mr. Manoj Pandey, Adviser, CCI and Mr. Rakesh Bhanot, Adviser, CCI at the workshop on Competition Law and Public Procurement organised jointly by CCI and World Bank on August 11, 2017 at New Delhi



Officers from various Ministries and PSUs at the workshop on Competition Law and Public Procurement organised jointly by CCI and World Bank on August 11, 2017 at New Delhi

Advocacy Initiatives with Trade Associations and Institutions

- Mr. D.K. Sikri, Chairperson, CCI was chief guest and delivered inaugural address at CII Annual Conference on Competition Law and Practices on August 4, 2017 at Mumbai organised by CII. Mr. Sudhir Mital, Mr. S.L. Bunker, Mr. Augustine Peter, and Mr. Justice G.P. Mittal, Members, CCI chaired and addressed panel discussions on Merger Control: what impacts industry, Unilateral Conduct and Innovation: Abuse of Dominance, Cartel Enforcement and Leniency and Appellate process and judicial review of competition decisions respectively. Ms. Jyoti Jindgar, Adviser; Ms. Sibani Swain, Adviser; Mr. Vipul Puri, Deputy Director and Mr. Ashutosh Kumar, Deputy Director, also participated in the event.



Mr. D.K. Sikri, Chairperson, CCI; Mr Augustine Peter, Member; Mr. S.L Bunker, Member; Mr. Sudhir Mital, Member and other dignitaries at the Conference on Competition Law and Practice held in Mumbai on August 4, 2017.

- Mr. D.K. Sikri, Chairperson, CCI addressed and had an interaction with the participants during 1st meeting of CII National Committee on Regulatory Affairs 2017-18 at Mumbai on August 4, 2017.



Ms. Smita Jhingran, Secretary, CCI at 14th Annual Capital Market Conference organized by FICCI at Mumbai on September 6, 2017

- Ms. Smita Jhingran, Secretary, CCI addressed the audience at 14th Capital Markets Summit (CAPAM) Conference organised by FICCI at Mumbai on September 6, 2017.
- Mr. Rakesh Kumar, Director (Eco), CCI delivered Special address in the Panel discussion titled Regulatory, Taxation, Finance and Technology Regimes at CII Mergers, Acquisitions and Restructuring Summit 2017 on July 14, 2017 at Hotel Taj Mahal, Colaba, Mumbai.
- Mr. Manish Mohan Govil, Adviser, CCI took interactive session on competition law in Meeting of CII Consumer

Electronics and Appliances Manufacturers' Association (CEAMA) Members at Gurugram on September 19, 2017. He was accompanied by Mr. Yogesh Kumar Dubey and Mr. Anand Vikas Mishra, Deputy Directors, CCI.

- Ms. Payal Malik, Adviser and Mr. Manish Mohan Govil, Adviser addressed the issue of cartelisation and cartel enforcement in the second meeting of CII National Committee on ICTE Manufacturing on September 20, 2017 at New Delhi.

- Mr. D.K Sikri, Chairperson delivered keynote address, Ms. Payal Malik, Adviser and Mr. Sachin Goyal, Deputy Director (FA) took sessions in Workshop on competition law and competition issues in pharmaceutical sector organised by Indian Drug Manufacturers' Association (IDMA) in Mumbai on September 22, 2017.

- Mr. Manoj Pandey, Adviser (Law) took interactive session on competition law in Meeting of Steel Committee organised by FICCI in New Delhi on September 25, 2017 at New Delhi.

Advocacy Initiatives with Universities/Institutes



Mr. D.K Sikri, Chairperson, CCI addressed an interactive session of Company Secretaries working as senior executives in various companies at Mumbai on August 3, 2017



Sh. P. K. Singh, Adviser, CCI (3rd from right) giving prizes to the winners and runners ups

- Sh. D.K. Sikri, Chairperson, CCI addressed and interacted with the Company Secretaries working as senior executives in various companies at Mumbai on August 3, 2017. Sh. Sikri highlighted the importance of competition law and its compliance by enterprises. Ms. Sibani Swain, Adviser and Mr. Ashutosh Kumar, Deputy Director also participated in the program.

- Ms Sibani Swain, Adviser, CCI delivered the Inaugural Address

at the 'Train the Trainer' workshop organised by Institute of Cost Accountants of India at Kolkata on August 31, 2017. Ms. Neha Raj, Joint Director (Law), Ms. Sayanti Chakrabarti, Joint Director (Eco) and Mr. Shekhar, Joint Director (FA) delivered lectures in different sessions.

- Mr. Pramod Kumar Singh, Adviser, CCI and Mr. Anand Vikas Mishra, Deputy Director, CCI were judges for Finals and Semi-final rounds respectively in the 5th KIIT University,

Bhubaneshwar National Moot Court Competition, 2017 on September 10, 2017.

- Mr. K.P. Anand, Deputy Director, CCI delivered lecture in Workshop on Competition Law and Cartel Enforcement organised by Institute of Cost Accountants of India on September 22, 2017 in Chennai.
- Mr. Yogesh Kumar Dubey and Mr. Mukul Sharma, Deputy Directors, CCI delivered lecture in Programme on Competition Law: Cartel Enforcement and Leniency organised by Institute of Cost Accountants of India on September 23, 2017 in Lucknow.

Other Major Advocacy Activities

- 26 students underwent internship during the period.

- To gauge the prevalence of cartels among various sectors of Indian economy, CCI is conducting surveys from enterprises, trade associations and government regarding cartel enforcement and competition. The findings of the survey will be used at aggregate level and the identity of individuals and companies is optional and will be kept confidential. We are encouraged by responses till now and look forward to even more enthusiastic participation by all the concerned stakeholders in this endeavour.

DEVELOPMENTS IN OTHER JURISDICTIONS

EUROPEAN UNION

1. European Commission fined Scania with € 880 million for participating in trucks cartel

In July 2016, EC reached at a settlement decision concerning the trucks cartel with MAN, DAF, Daimler, Iveco and Volvo/Renault. Scania decided not to settle this cartel case unlike the other five participants in the trucks cartel. As a result, EC's investigation against Scania was carried out under the standard cartel procedure.

EC revealed that Scania, as a producer of heavy trucks, had engaged in a cartel relating to coordinating prices at "gross list" level for medium and heavy trucks in the European Economic Area (EEA). Generally, these gross list prices are the basis for pricing in the trucks industry. The final price paid by buyers is based on further adjustments done at national and local level, to these gross list prices. Further, the cartel relates to the timings of introducing emission technologies for medium and heavy trucks comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI). Also, cartel relates to the passing on to customers of the costs for the emissions technologies required to comply with the said emissions standards (from Euro III).

The infringement covered the entire EEA and lasted 14 years, from 1997 until 2011, when EC 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 organised via the truck producers' German subsidiaries, with

participants generally exchanging information electronically.

As Scania chose not to cooperate with the Commission during the investigation, it does not benefit from a fine reduction according to the Commission's 2006 Leniency Notice or according to the 2008 Settlement Notice. EU imposed a fine of €880 523 000 on Scania on September 27, 2017

UNITED STATES OF AMERICA

2. Northern California Real Estate Investor Sentenced to Prison for Rigging Bids at Public Foreclosure Auctions

After being convicted at trial, a Northern California real estate investor was sentenced for his role in a conspiracy to rig bids at public real estate foreclosure auctions. Glenn Guillory was charged on Dec. 3, 2014, in an indictment returned by a federal grand jury in the Northern District of California. Guillory was convicted on April 17, 2017, of conspiring to rig bids at real estate foreclosure auctions in Contra Costa County. On September 6, 2017, Guillory was sentenced to serve 18 months in prison and to serve three years of supervised release. In addition to his term of imprisonment, Guillory was ordered to pay a criminal fine of \$20,000.

Between June 2008 and January 2011, Guillory conspired with others not to bid against one another for selected properties, instead designating a winning bidder to win the property at the auction. The members of the conspiracy then held second, private auctions to award the properties to members of the conspiracy and determine payoffs for those who had agreed not to bid against one another at the public auctions. The private auctions often took place at or near the courthouse steps where the public auctions were held.

The sentence is a result of an ongoing investigation into bid rigging at public real estate foreclosure auctions in California's San Francisco, San Mateo, Alameda and Contra Costa counties. These investigations are being conducted by the Antitrust Division's San Francisco Office and the FBI's San Francisco Office.

SOUTH AFRICA

3. Beef Supplier And Juice Maker Prosecuted For Dividing Markets

Beefcor (Pty) Ltd (Beefcor) and Cape Fruit Processors (Pty) Ltd (CFP) have been charged with division of markets by allocating customers in contravention of section 4(1)(b)(ii) of the Competition Act, 1998. The Commission's investigation revealed that Beefcor and CFP entered into two bilateral agreements, namely, the Use Agreement and Supply Agreement in terms of which they agreed not to compete with each other in the processing of wet peels and citrus peel pulp used to produce livestock feed (wet peels and citrus peel pulp are by-products in the production of fruit juice); CFP will not sell the wet peels and citrus peel pulp to any other entity without the express written permission of Beefcor; and, the agreement has been in existence from at least 2016 and is on-going.

This agreement constitutes market division by allocating customers in contravention of section 4(1)(b)(ii) of the Competition Act 1998, as amended.

4. Stuttaford Van Lines Charged With 649 Counts Of Tender Collusion

In November 2010 the Commissioner initiated a complaint into alleged collusive conduct in contravention of section 4(1)(b)(i), (ii) and (iii) of the Competition Act, in the market for the provision of furniture removal services. The Commissioner initiated

the complaint in terms of section 49B (1) of the Act.

The Commission found that in the furniture removal industry, a general requirement is that the removal of furniture of government employees requires at least two quotes in order to be financed by government. In this regard, the furniture removal companies had an arrangement that the company approached first would source the second quotation on behalf of the client from its competitor. The first company would stipulate the price at which its competitor should price the tender. The company that requested the quotation would also request its competitor to send its quote directly to the customer. This type of quotation is known as a cover quote. It is a price provided by a company that wishes to win a tender to another company that does not wish to do so.

Furniture removal company, Stuttaford Van Lines (Pty) Ltd (Stuttaford), has been charged with 649 counts of collusive tendering, in relation to hundreds of government tenders issued for furniture transportation. This includes tenders issued by the Presidency, Parliament, the SA Secret Service, the SA Police Service, the National Prosecuting Authority, SARS, the Reserve Bank, the Department of Justice, the Public Protector as well as SOEs and private companies. Stuttaford faces the largest number of charges, as one single company, in the history of anti-cartel enforcement by the Commission. The Commission is asking the Tribunal to fine the company 10 per cent of its annual turnover on each of the 649 charges.

5. South African court overturns merger clearance

The Competition Tribunal of South Africa has quashed the Competition

Commission's decision to approve a merger between two poultry suppliers, after finding the enforcer made factual errors in its assessment of the deal.

The judgment comes after poultry supplier Country Bird made an offer in July 2016 to buy a controlling stake in poultry supplier Sovereign Foods; Country Bird already held a 30 per cent stake. The Competition Commission investigated the deal on the basis that it would involve Country Bird ultimately owning more than 50 per cent of Sovereign Foods.

However, by the time the offer was set to expire, not enough shareholders had agreed to the sale to give Country Bird a controlling stake; it amended its offer, waiving the controlling stake condition - but leaving it with de facto control as it held 46.1 per cent of Sovereign Foods' shares.

The commission cleared the merger on condition that the merging companies would not make redundancies related to the deal; and that if Country Bird acquired a shareholding above 75 per cent, the company would transfer at least 4 per cent of shares to historically disadvantaged persons. But the Competition Tribunal ruled that there was "inherent uncertainty" about whether the commission had approved the merger on the basis that Country Bird would gain de jure or de facto control. The commission either made a material mistake of fact or acted irrationally by approving a merger in a form that differed from the final transaction.

SOUTH KOREA

6. KFTC imposes sanctions on international cartels of car shipping firms

The nine car shipping companies

including Japan's Nippon Yusen Kabushiki Kaisha (NYK) colluded between August 26, 2002 and September 5, 2012 in global biddings offered by car manufacturers such that they should let each other win the existing contracts by not participating in the bidding or submitting bids at high prices.

The execution of the conspiracy took place when the global tenders were placed by car manufacturers per shipping route and similar agreements have been carried out simultaneously globally across multiple routes in the form of respecting other companies existing contracts and requesting such respect for their own contracts.

The Korea Fair Trade Commission ('KFTC') decided to impose remedies on 10 automobile shipping companies for price rigging and collusion to divide the market, levy a total fine of 43 billion won on nine enterprises and refer eight of them to prosecutors.

7. KFTC sanctions a bid rigging case for purchasing electronic interlocking device

In five bids (for purchasing electronic interlocking device) offered by Korea Railroad Corporation during 2011 and 2013, Yookyung Control Co., Ltd. and Hyukshin Engineering Co. Ltd. agreed to decide upon-winners and bid amounts to prevent the fall of the bid prices and divide the winning bid amounts. In each of the five bids, the upon-winner decided the bid price and informed it to the false bidders and then the false bidders bid at the informed price. After winning the bid, they shared their profits through subcontracting some of the winning bids to false bidders. The KFTC decided to impose a fine of KRW 796 million and correction measures on the two companies involved in the collusion and refer them to the prosecution.

Capacity Building Events during July – September 2017

1. First Refresher Course Training Programme for professional officers: CCI organized First Refresher Course Training Programme for 30 professional officers of CCI at the India Habitat Centre, New Delhi during July 6-8, 2017. The course faculties included experts Mr. Patrick Hughes, Senior

Economist, Competition Bureau, Canada; Mr Dirk Van-Erps, Senior Expert, DG Competition, European Union and Mr P Abbott McCartney, Attorney, Anti-competitive Practices Division, US FTC Aalongwith Indian experts. Inaugural session was presided over by Sh. D.K. Sikri, Chairperson, CCI. Mr McCartney

made a presentation on the monopoly problem and spoke on the evolving jurisprudence in anti-competitive horizontal agreements which are not cartels followed by a case study on the subject. Mr. Anil Swarup spoke about the issues faced in the coal auctions and highlighted that the transparency in decision making is the key to good governance.



Sh. D.K. Sikri, Chairperson, CCI, Sh. Anil Swarup, erstwhile Secretary Coal and current Secretary Department of School Education & Literacy, to GOI, Mr P Abbott McCartney of Federal Trade Commission, USA and Smt. Smita Jhingran, Secretary, CCI during the Inaugural Session



Mr P K Pujari Ex-Secretary, Ministry of Power, GOI

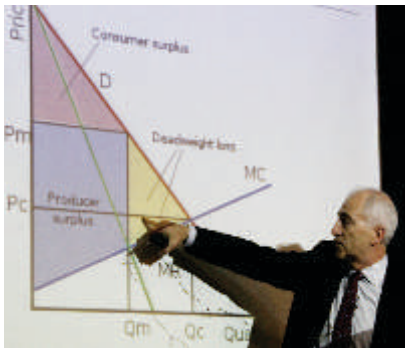
Mr Van-Erps presented on tools for cartel investigation and evidence to establish cartels with specific reference to cases in the EU. Mr P K Pujari Ex-Secretary, Ministry of Power spoke on the competition issues in the electricity sector and highlighted the challenges being faced in developing this sector in light of the regulatory issues.



Sh. U.C. Nahta, Sh. Augustine Peter, Sh. G.P. Mittal and Sh. S.L. Bunkar, Members, CCI alongwith CCI officers during the inaugural session of the programme.

Mr. Hughes spoke on the economic tools and analysis in Exclusivity Conduct followed up by his presentation on the assessment of AOD using analytical framework. Two

cases studies by Mr. Hughes (Credit Card Companies) and Mr. McCartney (McWane Pipe Fitting Case) were also discussed. EU Intel case was then taken up by Mr. Van-Erps where he



Mr. Patrick Hughes, Senior Economist, Competition Bureau, Canada



Mr P Abbott McCartney, Attorney, Anti-competitive Practices Division, US FTC



Mr Dirk Van-Erps, Senior Expert, DG Competition, European Union

discussed the rebate and conditional pricing followed by the Canadian and American perspectives. He discussed the various kinds of rebates and how some are abusive and some are not. He also discussed the legal test in the Irish Sugar case.

Mr. Hughes gave an analysis of the competitive efforts of the merger in the opening presentation. Mr Van-Erps presented on how to ensure that innovation is not harmed in a merger. Evolving jurisprudence in merger enforcement was spoken about by Mr. McCartney. In case studies on merger the officers were divided into 5 groups and asked to give their opinion. The programme ended with the valedictory session where Prof Aditya Bhattacharjea Head of Department of Economics, Delhi

School of Economics gave his valedictory speech and Sh. D. K. Sikri, Chairperson CCI gave his closing remarks. Mr. Rakesh Bhanot, Adviser, CCI summed up the proceedings and Ms Smita Jhingran, Secretary, CCI gave the vote of thanks.

2. CCI organized a lecture under Distinguished Visitors Knowledge Sharing Series (DVKS) by Mr. Manish Sabharwal, CEO & Founder, TeamLease Pvt. Ltd. on the topic 'Education, Employment and Employability: India's Challenges and Opportunities' on August 1, 2017.

3. Two officers participated in a training programme on 'Systematic Approach to Training' organized by PanditDeendayalUpadhyay National Academy of Social Security (PDUNASS) during August 2- 4, 2017

at their Janakpuri, New Delhi campus.

4. One-day In-house Induction Training Programme conducted by CCI on September 1, 2017 for sixteen newly recruited officers/ RAs of the Commission.

5. Two officers from F&A Division attended Training on 'Modules of Public Financial Management System (PFMS) for Center Sector Schemes' organized by Ministry of Finance on September 21, 2017.

6. Two officers from F&A Division and one officer from IT Division attended Training on 'Modules of Public Financial Management System (PFMS) for Central Sector Schemes' organized by Ministry of Finance on September 22, 2017.

HR CORNER

i) To promote use of Hindi in official works, Hindi Pakhwara was celebrated between September 14-28, 2017. During the Pakhwara various competitions such as Essay competition etc. were organised for CCI officers and employees.

ii) During the quarter (July-September 2017) two recruitment advertisements were issued for filling up a post of Adviser (FA) in CCI on deputation as well as for filling up of vacant posts in DG's

office on deputation basis.

iii) Nine officers [namely Sh. Gaurav Kumar, Dir. (Eco.), Sh. Apurv Agarwal, JD(Law), Sh. J. SriramMurty, DDG(CS), Sh. M. Rajagopalan, DDG, Sh. Suresh Kataria & Sh. Manish Kumar, ADGs (CS), Sh. Ranjan Kumar, Sh. Brij Kishore Upadhyay and Sh. AvneeshPratap Singh, OMs (CS)] joined CCI and DG's office on deputation basis.

iv) Four officers [namely Sh. Sunil

Kumar Bhadauria, Sh. Vijay Khanna, Sh. Brijesh Kumar Jha, OMs (CS) and Smt. Vibha Arora, PS] were permanently absorbed in CCI.

v) During the period six officers [namely Sh. Madhukar Kumar Bhagat, Addl. DG, Sh. B. Naveen Kumar, DD (Law), Sh. C.V. Joseph, AD(CS), Sh. Ashish Dutt, Sh. S. AbhiramaSekar and Sh. R. Ranganatha Rao, OMs (CS)] were relieved on completion of their deputation term.

ENGAGING WITH THE WORLD

- Mr. S.L.Bunker, Member participated in the Russian Competition Week during September 18–22, 2017 in Veliky Novgorod, Russia.
- Two officers participated in meeting of Intergovernmental Group of Experts (IGE) on Competition Law & Policy during July 5 -7, 2017 in Geneva, Switzerland.
- CCI delegation of four officers participated in training programme on The Intersection between Antitrust and Other Policy Areas during July 17-21, 2017 in Rome, Italy. The training is part of the India-EU Capacity Building Initiative for Trade and Development (CITD) foreign component.
- One officer participated in the ICN Agency Effectiveness Working Group Outreach Program on August 18, 2017 in Singapore.
- One officer participated in the International Fellowship Programme of the United States Federal Trade Commission (USFTC) during August 21, 2017 to September 25, 2017 in Washington. D.C, U.S.A.
- One officer participated in the OECD –KPC workshop on Going after Bid Rigging during September 13-15, 2017 in Ulaanbaatar, Mongolia.
- Two officers participated in the Antitrust Regional Seminar 2017 on Economics Analysis in Competition Enforcement during September 26-27, 2017 in Singapore



Sh. Manish Mohan Govil (second from left) and Sh. Rakesh Bhanot (fourth from left), Advisers, CCI alongwith other participants and faculty in training programme on The Intersection between Antitrust and Other Policy Areas in Rome, Italy

ECO WATCH FROM COMPETITION PERSPECTIVE

Antitrust issues in Big data

On August 24, 2017, the Supreme Court of India affirmed that the right to privacy is a fundamental right under the Constitution of India. This has a far reaching impact on data collection, data surveillance, data protection and regulation of artificial intelligence etc.

Organisations, both public and private now need to be wary of what data is collected and for what purposes that data is used. Concerns about market power and its possible abuse by the firms possessing private data of customers, especially in multi-sided

platform markets such as e-commerce platforms and social media platforms, have started to arise in the antitrust domain. Firms are able to store and analyse large volumes of data using unconventional big data technologies that are different from

the traditional way of storing and accessing data in row-column format.

Possession of large amount of data of unique nature by a single firm, by itself, may not lead to the inference about the firm's dominant position, but combining two or more sets of big data of different nature through vertical agreements or mergers along with the ability to use it with the help of avant-garde algorithms may raise antitrust concerns. A combination of big data with state-of-the-art algorithms have the potential to change the competition dynamics in the market. Even the not so cutting-edge applications like pricing algorithms allow room for

coordination among competitors. The role of consumers in exercising the choice of products and/or services may be eroded by targeted campaigns of the business entities. Yet, the reduction of search and transaction costs enjoyed by the consumer as a result of application of algorithms to big data, and the innovation in markets cannot be ignored.

There are arguments that organisations that hold big data have the ability to lock-in the customers, owing to network effects. However, with multi-homing and ever-changing technology at a rapid pace, new competitors may keep emerging only if the competitive

landscape is preserved.

To conclude, big data has the potential to affect consumers' choices by way of selective targeting of specific products to each narrow group of customers and also to exact the price which is almost close to maximum amount a consumer is willing to pay for a particular product or service, which may lead to antitrust concerns. Firms need to adhere to right to privacy in order to avoid antitrust concerns. However, a one-size fits all approach is not applicable in the antitrust enforcement and a case-by-case analysis is needed to arrive at a conclusion of anti competitive effects.

KNOW YOUR COMPETITION LAW

SCOPE OF DIRECTOR GENERAL'S INVESTIGATION

For the purpose of assisting the CCI in conducting investigation into contraventions of any of the provisions of the Act, the Director General ("DG") is appointed by the Central Government. Section 41 of the Act, empowers the DG to assist the Commission in investigating into any contravention of the provisions of the Act, Rules or Regulations. The DG is entrusted, for the purposes of discharging its functions under the Act, the same power as are vested in a Civil Court under Code of Civil Procedure, 1908 in respect of the matter named in Section 36(2) of the Act.

Once information is filed before CCI and it is of the view that there exists a *prima facie* case, it directs the DG u/s 26(1) of the Act to cause an investigation in the matter.

Hon'ble Supreme Court in CCI vs SAIL¹ has observed that the direction under Section 26(1) is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process.

Supreme Court vide its judgement in the matter of CCI vs. Excel Crop Care Ltd² has clarified and enlarged the scope of power exercised by DG while investigating the matters. It has been laid down that the investigation by DG is not confined only to the information provided to the Commission. The apex Court held that the entire purpose of DG investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the

persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed, the DG would be well within his powers to include those as well in his report.

Hon'ble Supreme Court observed that at the initial stage of forming *prima facie* opinion under Section 26(1) of the Act and directing the DG to conduct investigation, even CCI cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. It was opined that if the investigation process is to be restricted, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition.

¹ Civil Appeal 12247/2010

² Civil Appeal 2480/2014

JUDICIAL PRONOUNCEMENTS

1. Whether the Commission has Jurisdiction to Look into Contract Conditions/Policies of telecom Sector/Industry/ Market

A Division Bench of Hon'ble Bombay High Court recently quashed the *prima facie* order of the Commission that directed an investigation into allegations of cartelisation by Reliance Jio against Vodafone, Airtel, Idea and the Cellular Operators Association of India. Writ Petitions were filed by Vodafone India Limited, Idea Cellular Limited., the Cellular Operators Association of India and Bharti Airtel Limited challenging the CCI order dated April 21, 2017.

In this matter, information was filed before the Commission by Reliance Jio alleging that the telecom companies were denying the number of Points of Interconnect (POI), which was leading to congestion in its network. Pursuant to this a *prima facie* order was passed by the Commission. The Commission observed that since none of the areas covered under Section 3 are covered by TRAI in its

mandate as a sector regulator for Telecom Operators, it is within the mandate of the Commission to adjudicate on the issue of cartelization among enterprise/associations and arrive at a finding on the alleged cartelization. The Commission also emphasized that the nature of proceeding before TRAI involving Indian Telecom Operators are different and relate to whether interconnection norms and quality of service regulations are complied with or whether the contractual terms of interconnection agreement have been breached or not.

Writ petitions were filed against the aforesaid *prima facie* order of Commission and the letter from DG's Office dated June 19, 2017 inter alia on the ground of lack of Jurisdiction. Hon'ble Bombay High Court has disposed of the all the writ petitions vide its judgement dated September 21, 2017, setting

aside Commission's *prima facie* order dated April, 21, 2017 along with all consequent actions. Hon'ble Bombay High Court held that the Competition Act, 2002 governs the anti competitive agreements and its effects. It cannot be used to interpret such contract conditions/policies of the telecom sector or industry that arise out of the Telegraph Act, and the TRAI Act. CCI has no jurisdiction to decide upon, or deal with statutory agreements. Every aspect of the telecom sector is to be governed by the concerned department of the government keeping in mind the need and technology under the TRAI Act.

It was observed that CCI or Director General has no power to deal and decide the stated breaches including of "delay", "denial", and "congestion" of POIs unless settled finally by the TDSAT under the TRAI Act. Hence, no proceedings can be initiated under the Competition Act.

2. Whether the Principle of Res Judicata is Applicable to Commission's Proceedings

The Delhi High Court held that Uttarakhand Agricultural Produce Marketing Board (UAPMB) will fall within the definition of the term "enterprise" within the meaning of Section 2(h) of the Act.

Uttarakhand Government notified the Liquor Wholesale Order along with policy for procurement and distribution of liquor in UAPMB was made the wholesale licensee of foreign liquor along with Indian Made Foreign Liquor (IMFL).

Subsequent to this, two writ petitions were filed before Uttarakhand High Court (UHC) by United Spirits Ltd. (USL) and Pernod Recard India Pvt. Ltd. (Pernod) praying for detailed mechanism to be laid down for procurement of liquor at all levels to ensure that the concerned parties act in efficient, transparent, fair, reasonable and unbiased manner. The UHC agreed with the contention of arbitrariness raised by USL/Pernod and issued directions for fixing

minimum stocks (brand wise) of foreign liquor, to be maintained at all times by UAPMB. Subsequently, the Excise Department issued a notice laying down the criteria of placing orders.

Thereafter, International Spirits and Wines Association of India (ISWAI) filed an information under Section 19 (1) (a) alleging that UAPMB is violating Section 4 by not procuring, supplying and distributing IMFL from ISWAI's members in accordance

with consumer demand. The Commission passed its *prima facie* order under Section 26(1) of the Act. Thereafter, UAPMB and others filed an application under Section 36 and Section 38 before the Commission for recalling its *prima facie* order. However, that application was dismissed.

Thereafter, UAPMB & Others challenged the *prima facie* order passed by the Commission along with the order rejecting their application for recall/review of the impugned order before the Hon'ble High Court of Delhi *inter alia* on the ground that that the information examined by the Commission has already been adjudicated by the High Court of Uttarakhand in writ petitions filed by USL and Pernod and the Commission could not proceed with the information on the principles of *Res Judicata*. UAPMB also contended that since they are only administering the

liquor policy of the State of Uttarakhand they do not fall within the ambit of enterprises as defined under Section 2(h) of the Act.

The Delhi High Court observed that the parties in the two proceedings are not the same as the information in the case before the Commission was filed by ISWAI which is an association of manufacturers/dealers whereas the petitions before UHC were filed by USL and Pernod which are private companies. The Court further held that the scope of the aforementioned petitions filed before the UHC was materially different as the Court was not concerned with an abuse of dominant position in the aforesaid petitions by USL/Pernod whereas the scope of proceedings before the Commission relate to the alleged anti-competitive conduct of UAPMB contravening of the provisions of Section 4 of the Act.

The Delhi High Court also referred to Section 62 of the Act which lays down that the provisions of the Competition Act, 2002 shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. The Court held that the fact that multiple remedies arise from a set of facts does not prevent recourse to more than one proceeding and since the proceedings in the matters before the Commission and High Court of Uttarakhand are not mutually destructive, therefore recourse to multiple proceedings on the same set of facts is not barred.

The Court did not find any merit in the contention of UAPMB pertaining to *res judicata* and UAPMB not being "enterprise" within the meaning of Section 2(h) of the Act. In light of the apex court's judgement in CCI vs SAIL, the Court was not persuaded to interfere with the impugned order and accordingly dismissed the petition.

3. Whether the Commission had been Interdicted in any manner from Inquiring into alleged Contravention of section 4(1) of the Act by Grasim Industries Ltd. by virtue of orders of Hon'ble Delhi High Court in earlier related matter i.e. LPA No. 137/ 2014

Hon'ble Delhi High Court has disposed of the writ petition and held that the Commission is not interdicted to inquire into allegation of alleged contravention of Section 4 by orders of the Court in LPA No. 137/ 2014. The Court declined to interfere in the proceedings pending before the Commission.

The Commission received information under Section 19 against Grasim Industries Ltd.(GIL), alleging abuse of its dominant position as Viscose Staple Fibre (VSF) manufacturer. *Vide* its *prima facie* order, the Commission directed the DG to carry out investigation into the alleged contravention of Section 4 of the Act in CCI Case No. 62/2016. Against the

said *prima facie* order, a review/recall application was filed by GIL alleging violation of principles of natural justice. The Commission listed the aforesaid application for hearing on August 9, 2017 *vide* order dated July 27, 2017. Writ Petition was filed by GIL challenging the *prima facie* order of the Commission along with order dated July 27, 2017 and August 9, 2017, alleging that all the three impugned orders are in contravention of the orders of Hon'ble Delhi High Court in earlier related matter *i.e.* LPA No. 137/ 2014. In the aforesaid appeal, the subject matter pertains to *prima facie* order dated June 22, 2011 directing the DG to conduct investigation in alleged contravention

of Section 3 by GIL in CCI Case No. 28/2011.

In the *erstwhile* case no. 28/2011 filed against GIL, DG did not find any violation of Section 3, but found violation of Section 4 (2)(a) and 4 (2)(b) by GIL. Aggrieved by the same, GIL filed the application before the Commission to set aside the DG Report alleging that the same is beyond the scope of investigation ordered of the Commission *vide* its *prima facie* order. The Commission rejected the application of GIL and the said order of the Commission was challenged by GIL before Hon'ble Delhi High Court in WP (C) 4159/2013, wherein the learned single judge disposed of the writ petition

with the direction that, the DG Report to the extent it has reported contravention of the provisions of Section 4 of the Act by GIL, shall not be subjected to the procedure prescribed in Section 26 (8) of the Act, nor shall the Commission be entitled to pass order under Section 27 of the Act on the said report. However, the Commission shall be entitled to treat the aforesaid part of the DG Report as information under Section 19 of the Act and proceed accordingly. This order was challenged by the Commission before the Division Bench of Hon'ble Delhi High Court in

LPA No. 137/2014 wherein Learned Solicitor General of India, representing the Commission, gave an undertaking that, till the disposal of the appeal, the Commission is not going to proceed against GIL under Section 26(8) of the Act. The Division Bench, in view of the aforesaid observed that operation of the impugned judgment passed in W.P. (C) No.4159/2013 shall remain suspended.

The Hon'ble Court observed that GIL's challenge to the DG's report submitted in case No. 28/2011 must be understood in the context of overall

scheme laid down in Section 26 of the Act. The Court held that the undertaking of the Solicitor General as recorded in the order dated February 7, 2014 in LPA No. 137/2014 has to be understood in the context of the issue before the Division Bench and the contention of GIL that the said order provided a blanket stay and precluded the Commission from entertaining any information and conducting an inquiry under Section 19(1) and issuing orders under Section 26(1) of the Act is bereft of any merit.

4. When an Order is passed by COMPAT against one party, then the appeal filed by other party before NCLAT (Against The Same Order Of The Commission) would also be covered by the decision of the erstwhile COMPAT

NCLAT allowed the appeal filed by Karnataka Chemists & Druggists Association (KCDA) in view of the order passed by erstwhile COMPAT in the appeal filed by Lupin Ltd. Information was filed before the Commission alleging contravention of the provisions of Section 3 of the Act by KCDA, Lupin Ltd. and their office bearers. It was alleged that KCDA and its office-bearers, in collusion with the Lupin Ltd. and its office-bearers insisted upon obtaining an NOC from KCDA as a pre-condition for supply of drugs to be made to it. The Commission on October 3, 2013 passed its prima facie order and directed DG to cause an investigation into the matter. DG in its investigation report also concluded that the evidence on record established the Informant's allegations regarding non-supply of goods by Lupin Ltd. on account of the Informant's inability to obtain an NOC from KCDA. After hearing the parties, the Commission passed the impugned order dated July

28, 2016 under Section 27 of the Act and held that the practice of mandating NOC prior to the appointment of stockists amounted to an anti-competitive practice, in violation of the provisions of Section 3(1) read with 3(3) (b) of the Act. The Commission also held the office bearers of both KCDA as well as Lupin Ltd. guilty under Section 48 of the Act and also held each of them to have contravened the provisions of Section 3 of the Act. Resultantly, a penalty of Rs. 8, 60,321/- calculated at the rate of 10 per cent of the average income of KCDA, was imposed upon it. However, considering mitigating factors, the Commission imposed a penalty on Lupin's at the rate of 1 per cent of its average turnover, which amounted to Rs. 72.96 crore. In addition to the same penalties were imposed upon the office bearers of KCDA and officials of Lupin at the rate of 10 per cent and 1 per cent of their incomes, respectively. Aggrieved by the same, an appeal was

filed by KCDA before NCLAT which was allowed and the impugned order of the Commission was set aside in line of the earlier decision of the erstwhile COMPAT in an appeal wherein the said impugned order of the Commission was challenged by Lupin Limited and its two office-bearers. NCLAT observed that since the order of the Commission has already been set aside as a whole by the then COMPAT, the present appeal would also be covered by the decision aforesaid.

NCLAT, upon information that the aggrieved persons have already moved before the Hon'ble Supreme Court in appeal against the decision of the erstwhile COMPAT, held that if that be so, the appellants and respondents both sides will be governed by the decision of the Hon'ble Supreme Court, as may be rendered and that no further decision was required to be rendered in this appeal.



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