

COMPETITION LAW UPDATES

Quarter 3 (July 2016 – September 2016)

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HSA provides comprehensive legal services in Competition Law including advisory and training on compliance related issues, merger control and litigation involving anti-competitive conduct. HSA regularly advises its clients on business contracts, arrangements and business strategies involving Competition Law issues. HSA team members have advised corporates on cartel investigations and abuse of dominance before the CCI. HSA's vast experience in economic and regulatory laws provides an added depth to its lawyers in understanding business and market impact of anti-competitive practices.

AWARDS AND RECOGNITIONS

Chambers Asia Pacific 2016

- Leading law firm - 'Projects, Infrastructure & Energy: India', 'Banking and Finance', 'Corporate/M&A' and 'TMT'
- Noted for – 'Dispute Resolution'

Chambers Global 2016

- Leading law firm - 'Projects, Infrastructure & Energy: India', 'Corporate/M&A', Noted for 'Dispute Resolution'

ACQ Global Awards 2016

- India - Full Service Law Firm of the Year
- Projects Infrastructure and Energy Law Firm of the Year

Legal 500 – Asia Pacific 2017

- Consistently ranked as a Tier 1 law firm - 'Projects & Energy' and as a leading law firm - 'Banking, Finance and Capital Markets, Corporate M&A, Dispute Resolution, Tax and TMT'.

IBLJ 2015 India Law Firm Awards

- Best Energy, Infrastructure and Projects Law Firm of the Year

Lawyer Monthly 2015

- PPP Law Firm of the Year – India

Intercontinental Finance Magazine 2015

- One of ICFM 500 Leading Lawyers

Acquisition International 2015

- Tax Awards 2015 - 'Best Tax Law Firm - India'

Asialaw Profiles 2017

- Highly Recommended Law Firm - 'Banking & Finance, Energy & Natural Resources, IT, Telco & Media and Tax'

International Tax Review 2015

- Highly recommended as a leading law firm - 'Tax'

Who's Who Legal 2015

- Partners ranked for 'Project Finance'

IFLR 1000 2015

- Ranked for 'Banking and Finance' and 'Energy and Infrastructure'

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**QUARTERLY UPDATES ON THE DEVELOPMENTS IN THE COMPETITION LAW
DOMAIN**

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I. GLOSSARY OF TERMS

AAEC	Appreciable Adverse Effect on Competition
ACCC	Australian Competition and Consumer Commission
Act	Competition Act, 2002
Anr	Another
AOD	Abuse of Dominance
CCI	Competition Commission of India
CIL/Commission	Coal India Limited
CMA	Cement Manufacturers Association
COMPAT	Competition Appellate Tribunal
DG	Director General
HSCC	Hospital Services Consultancy Corporation India Limited
IMFL	Indian Made Foreign Liquor
INR	Indian Rupee
Jt. DG	Joint Director General
Ltd.	Limited
NOC	No Objection Certificate
OP	Opposite Party
Ors.	Others
(P)/Pvt.	Private
USD	United States Dollar
u/s	Under Section
Vs.	Versus

II. Investigations initiated under Section 26 (1) of the Act

1. CCI initiates investigation against exclusive wholesale licensee of alcoholic beverages in Uttarakhand

International Spirits and Wines Association of India Vs. Uttarakhand Agricultural Produce Marketing Board & Others

CCI has initiated an investigation against Uttarakhand Agricultural Produce Marketing Board & Others (OP) on allegations of resorting to exclusionary practices against certain Indian manufactured foreign liquor (IMFL) brands and trying to restrict and manipulate consumer preferences w.r.t. IMFL brands. Informant has alleged that the OPs who are primarily concerned with distribution and retail sale of IMFL, have abused their dominant position by not procuring IMFL brands in accordance with consumer demand and imposing onerous conditions in agreements with IMFL manufacturers. The Informant has pointed out [in their submission/information with the CCI] that OPs are placing orders with alcoholic beverage manufacturers for supply of IMFL in an arbitrary and discriminatory manner without any nexus to consumer demand. It is further alleged that OPs are discriminating against certain IMFL alcoholic beverage manufacturers despite demonstrably high demand for their brands, leading to an adverse effect on competition since it manipulates and distorts consumer choice. CCI on examining the materials on record and submissions of the Informant, has taken a prima facie view that the conduct of OPs has limited and restricted production of IMFL and resulted in denial of market access contravening Section 4 of the Competition Act, and, thus, directed the DG to investigate the matter.

2. CCI initiates investigation against a leading real estate company

a) *Shri Vivek Chandra Vs. Jaiprakash Associates Limited*

Jaiprakash Associates Limited (JAL) is a leading national real estate company and is constructing a multi-storied project named KUBE, Jaypee Greens in Noida. The Informant had booked an apartment with JAL in 2011 and has paid the entire sale consideration of the booked apartment to JAL, but has not yet received possession of the apartment. Informant wanted to sell his allotted flat to a third party and requested JAL to grant him NOC. Informant has alleged that JAL has imposed unfair/discriminatory conditions in the NOC granted to him whereby JAL is trying to avoid any liability for delay in delivering possession of the apartment. Informant has invoked Section 4 of the Competition Act alleging abuse of dominance by JAL. CCI has observed that such conditions imposition by JAL in the NOC appears to be a unilateral imposition affecting original delivery schedule and saleability of the apartment in question, prima facie contravening Section 4 of the Act. CCI has directed the DG to initiate an investigation in the matter.

b) *Shri Dharam Vir and Shri Aditya Umang Vir Vs. Jaiprakash Associates Limited*

The Informants had jointly applied for an apartment at 'Crescent Court' at Jaypee Greens, which is a project of JAL and the possession of the flat was to be delivered by December 8, 2009. It is stated in the information that the sale consideration of the flat was revised in August 2008 and 95% of the total revised consideration was demanded by the OP in advance. The Informants have specified that in 2013 they were offered to take possession of the flat, however, they found that the flat was far from completion and it continued till April 2014. It is alleged that certain clauses in the allotment agreement are unfair, one-sided and do not contain a proportionate liability on JAL for breach in discharge of its obligations. CCI has directed the DG to investigate the matter.

[HSA Note: There have been a large number of cases before the CCI complaining of unfair terms imposed by real estate developers. It is relevant to highlight here that Section 4 of the Competition Act is applicable only in cases where the concerned enterprise enjoys a dominant position in the particular geographical and product market related to the complaint. However, it may be observed that with reference to deficiency of services in real estate sector, the domain usually lies with the consumer courts and not with CCI. Unlike some other jurisdictions e.g. Australia, the scope of the consumer courts in India is distinct and different

from CCI. The Government of India has also passed the Real Estate (Regulation and Development) Act, 2016 Act wherein real estate regulators would be constituted to deal with such complaints.]

3. CCI initiates investigation against one of the world's leading producers of medical diagnostic systems

M/s House of Diagnostics LLP Vs. M/s Esaote S.p.A & Others

Informant runs three diagnostic centers in Delhi and Faridabad. Esaote is the first and only company to have developed a dedicated standing/tilting MRI machine. Esaote has its subsidiary in India and together, they hold the patent and know-how for the said technology. Informant purchased three dedicated MRI scanners manufactured by Esaote for a total consideration of Rs. 6,15,00,000/-, which included installation and commissioning charges. It is alleged that Esaote has given the exclusive right for servicing the machines and providing after-sales support services to its subsidiary and has created monopoly in providing services for upkeep of machines and consumers are being compelled to spend huge amount for spares and services. The Informant states that the price for the technology is already built into the price of the machine and the same cannot be re-charged in the name of supply of spares. It is also alleged that OPs are exploiting and extorting huge sum of money for annual contracts and demanding payment for services and supply of spares.

It is further stated that after selling the machines to the Informant, Esaote has entered into an arrangement with M/s Star Imaging and Path Labs (P) Ltd (another diagnostic center in New Delhi) to supply the same machines with 'free of cost' and 'free of maintenance cost' which is anti-competitive. It is averred that after selling the machines to the Informant for full price, Esaote entered into the same market through M/s Star Imaging and Path Labs (P) Ltd., as a competitor and it has made it difficult for the Informant to compete with OPs as they can provide the same services to the consumers at lower prices. CCI has directed the DG to investigate contravention of Section 4 of the Act in the present case.

III. Investigations closed by the CCI under Section 26 (2) of the Act

S. No.	Name of the parties	Relevant Sector	Relevant Market	CCI's Decision/ Reasoning
1	<i>Case No. 13/2016 In Re: Shri Vinay Kala and Smt. Mina Kala Vs. DLF Ltd (OP)</i>	Real estate	The market for the provision of services for development and sale of residential plots in Lucknow.	The Informants had applied for a residential plot in OP's township project. It is stated that OP imposed unfair terms and conditions in the allotment letter and did not deliver the possession of plot timely to the Informants. CCI observed that OP only has one other project in Lucknow and many other real estate developers offer similar kind of services in the same geographic area and, thus, the buyers have option to choose residential plots from other developers. CCI stated that there was no record to prove that OP's conduct fell under Section 3 or 4 of the Act and closed the matter.
2	<i>Case No. 40/2016 In Re: Shri Kailash Chander Sharma Vs. Coal India Ltd & Ors</i>	Fuel Energy	Provision of services relating to collection, preparation and transportation of coal samples in India.	The Informant was empaneled as a third party sampler for CIL and alleged contravention of Section 4 of the Act by all the OPs. Informant stated that CIL is dominant as it had complete control over production, supply, distribution, storage, acquisition and control of coal. CIL used to issue Global Tender Notice for scientific and technical services in collection, preparation and transportation of coal samples for

S. No.	Name of the parties	Relevant Sector	Relevant Market	CCI's Decision/ Reasoning
				<p>loading/unloading sites of different collieries of the subsidiaries of CIL. OP3 was authorized by CIL to float the tender, however, OP3 did not specify in the tender document certain criterion relating to annualized value of work and it was further alleged that OP3 fixed a minimum amount to be deposited along with the tender document which was not a pre-condition and which was never instructed by the Ministry of Coal & Power. Informant alleged that such condition was put to favour a certain firm that was not a specialist as the Informant.</p> <p>CCI stated that a consumer of services must be allowed to exercise his consumer choice freely and select between competing products or services and that the pre-qualification conditions and earnest money deposit issue raised by the Informant was completely misconceived and, hence, closed the matter.</p> <p><i>[HSA Note: The issue of appointment of third party sampler for collection, preparation and transportation of coal samples for loading/unloading sites of different collieries is inter-connected with the issue of supply of quality coal by CIL to its consumers, which had been investigated by CCI in M/s. Maharashtra State Power Generation Company Ltd. Vs. M/s. Mahanadi Coalfields Ltd. & Anr¹. The present complaint may be made out as a case of refusal to deal where CIL, by adopting certain specific parameters that are suitable to certain sampling agencies, has resorted to exclusion of other third party samplers thereby manipulating the third party sampling process.]</i></p>
3	<p>Case No. 33/2016 <i>In Re: M/s Rex Propbuild Pvt. Ltd Vs. M/s Parsvnath Developers Ltd</i></p>	Real Estate	Provision of services relating to development and sale of residential flats in Gurgaon.	<p>Informant had booked a residential flat in OP's "Parsvnath Exotica" in Gurgaon. As per the Flat Buyer agreement the OP was to deliver possession of the flat within 36 months, i.e. by December 29, 2010. However, till-date the OP has delayed delivery of possession and it is alleged by the Informant that the terms of the agreement are unreasonable and arbitrary. CCI neither found OP enjoying a position of strength nor found the terms of the agreement anti-competitive, hence, the matter was closed.</p>

¹ Case Nos. 03, 11 and 59 of 2012

S. No.	Name of the parties	Relevant Sector	Relevant Market	CCI's Decision/ Reasoning
4	Case No. 34/2016 <i>In Re: Mr. Deepak Verma Vs. Clues Network Pvt. Ltd & Ors.</i>	e-commerce	Not determined	The Informant was purchasing various items through OPs since December 2013 and experienced deficiencies in the goods and services. It was alleged that the OPs are illegally trying to increase their businesses and using unfair trade practices. CCI observed that the allegations were mainly in the nature of deficiencies and did not bring out any competition issue and disposed the matter.
5	Case No. 15/2016 <i>In Re: Mr. Gajinder Singh Kohli Vs. Genius Propbuild Private Limited</i>	Real Estate	Provision of services for development and sale of residential apartments/flats in Bhiwadi and its nearby areas.	Informant has alleged that OP has contravened Section 4 of the Act by delaying delivery of possession and imposing unfair and discriminatory conditions in the Apartment Buyer's agreement. CCI observed the presence of several real estate developers in the relevant market and opined that OP does not enjoy a dominant position and the case was, accordingly closed.
6	Case No. 44/2016 <i>In Re: XYZ Vs. Hospital Services Consultancy Corporation (India) Ltd, Vardhaman Mahavir Medical College & Safdarjung Hospital</i>	Hospital consultancy services	Not determined	The information alleges contravention of Section 4 of the Act by HSCC, VMCC and Safdarjung Hospital, in view of the tender floated by OP2, through its consultant OP1, the terms of which aimed to keep Stereotactic Radiosurgery System (SRS) / Masep Medical Science Technology Development Schenzhen Co. Ltd. (Masep) out of competition. Masep manufactures SRS, which is commonly known as Gamma Knife and Gamma Knife is a registered trademark of Elekta AB (Elekta). It is also alleged that Elekta, a competitor of Masep, had influenced the OPs to specify such terms in the tender and, thereby, abused its dominance. CCI observed that Elekta is not even a party to the proceeding and the Informant has not adduced any evidence in support of such influence. CCI closed this matter as no case was made out under the Act.
7	Case No. 60 of 2016 <i>In Re: M/s Oberoi Cars Pvt. Ltd Vs. M/s Imperial Housing Ventures Pvt. Ltd</i>	Real estate	Provision of services for development and sale of residential apartments/flats in Noida and Greater Noida	Informant has alleged that OP made false, baseless, concocted offers and fake assurances to Informant to book apartments in its housing project 'Paras Tierra'. It is further alleged that the terms in the allotment letter were unfair and arbitrary and instead of completing the construction of the project, OP was taking benefit of the one-sided terms to cancel the allotment of the Informant. CCI held that there was not enough evidence to show that OP had abused its dominance as substitutes existed in the relevant market and

S. No.	Name of the parties	Relevant Sector	Relevant Market	CCI's Decision/ Reasoning
				multiple options were available for the consumers, hence, disposed the information. ²
8	<i>Case No. 21 of 2016 In Re: Mr. Vilakshan Kumar Yadav & Ors. Vs. M/s ANI Technologies Private Limited</i>	Para transit services	i) Provision of radio taxi services in Delhi ii) Provision of auto rickshaw services in Delhi	The Informants have alleged that OP is abusing its dominant position by paying more money to the drivers than it collects from the passengers, thus, contravening Section 4 of the Act. It is further alleged that this tactic of OP is driving out existing players and preventing new players from entering the market. CCI observed that it had analyzed the competitive landscape in the radio taxi services market in Delhi in two previous cases and concluded that there exists stiff competition between Ola and Uber and also noted that various other players were operating in the relevant market. CCI did not find any additional fact in the present information and held that at present none of the players can be said to be dominant and closed the matter.

IV. Penalties imposed by CCI under Section 27 of the Act

1. CCI rules against Karnataka Chemists and Druggists Association

M/s Maruti and Company versus Karnataka Chemists and Druggists Association & Others

It was alleged by the Informant that Karnataka Chemists and Druggists Association (OP 1) was indulging in anti-competitive practice of mandating a NOC prior to the appointment of new stockists by pharmaceutical companies, thereby, contravening Section 3 of the Act. As per the evidence obtained by CCI, it was found that OP 1 had been actually indulging in the aforesaid practice which led to creating entry barriers for stockist and thereby limiting and controlling of the supply of drugs in the market, which was in contravention of the Act. It was also observed by the DG that OP1 was carrying on the practice of insisting for NOC prior to a pharmaceutical company supplying drugs to its newly appointed stockist, thereby, becoming equally complicit in the anti-competitive effect of such practice. CCI also found OP4 (Lupin Ltd.) guilty of anti-competitive arrangement with OP1 which led to a refusal to supply of drugs to the Informant.

Further, CCI also found some office bearers of the OPs responsible under Section 48³ of the Act for their active involvement in OP1's anti-competitive practice. Accordingly, CCI passed a cease and desist order against OP1 and OP4 from indulging in the practice of demanding mandatory NOC prior to stockist appointment and imposed a monetary penalty of Rs. 8,60,321 on Karnataka Chemists and Druggists Association. In the process of imposing penalty on Lupin Ltd., CCI observed that the refusal to supply (which was for a mandatory obtaining of NOC) was for a brief period after which supplies were resumed to the Informant. Considering this as a mitigating factor, CCI imposed a penalty of 1% of OP4's average

² [HSA Note: There have been several instances where genuine concerns raised by consumers regarding deficient services / onerous contracts before the CCI could not have been dealt by the CCI since the requirements of section 4 namely, the dominant status and market power of the OP, could not be established. In this regard, to address genuine concerns, the CCI may consider having regular interactions with consumer redressal forums, Ministry of Consumer Affairs and other relevant bodies to discuss such issues and adopt an unified approach to address such consumer concerns.]

³ Section 48 of the Act specifically refers to contravention by companies.

turnover, amounting to Rs. 72.96 crores. Additionally, monetary penalties were imposed on the officials of OP1 and OP4 at the rate of 10% and 1% of their incomes, respectively.

2. CCI imposes penalty on cement companies for cartelisation

Builders Association of India Vs. Cement Manufacturers' Association & Others

An information was filed under S. 19(1)(a) of the Act by the Builder's Association of India against Cement Manufacturers Association (CMA) and 11 cement manufacturing companies, for an alleged violation of the Competition Act. In June, 2012 the CCI had found the parties to be acting in concert to manipulate the volume of production and price of cement, contravening Section 3 of the Act and imposed penalty along with directions to cease and desist from indulging in any anticompetitive activity. It further prohibited CMA to engage and associate itself from collecting and circulating information about wholesale and retail prices and details on production and dispatch of cement companies to its members.

Aggrieved by CCI's orders, the Respondents had appealed before the Competition Appellate Tribunal ("COMPAT") on grounds of violation of principles of natural justice. One of the pertinent question before COMPAT was whether CCI's Chairperson who did not participate in the hearing of arguments of the Respondents could become a party to the final order dated June 20, 2012. COMPAT noted that thorough consideration was not given to the DG report, parties' submissions and interlocutory orders. COMPAT observed that procedural defect in nature of non-observance of principles of natural justice cannot be cured in appeal. COMPAT observed that no party can be compelled to satisfy an unjust trial and accordingly the CCI orders were set aside, and the matter was remitted back to CCI for fresh adjudication. All the opposite parties contested the information on violation of principles of natural justice and that DG failed to provide the documents collected/studies conducted which formed an integral part of the DG report, which impaired the opposite parties' right to put forth a proper defence.

The matter was re-heard by CCI on remand. Relying on statistical information on price, production, supply in cement industry, minutes and reports of CMA, facility utilization reports, party testimonies, the CCI held that the OPs had operated as a cartel to cause AAEC in competition in cement industry from May 2009 to March 2011. CCI observed that:

- (i) the definition of "agreement" in S. 2(b) (any arrangement or understanding or action in concert, whether or not the same is in formal or in writing or intended to be enforceable by legal proceedings), is wide and would include tacit agreement. It further noted that given the clandestine nature of cartels, circumstantial evidence is of no less value than direct evidence to prove cartelization.
- (ii) CMA, through its meetings, and reports provided a platform for sharing of price, production, supply related information between the cement manufacturing companies. CCI observed that, in an oligopolistic market (like cement industry) the exchange of sensitive information that increase the predictability of market operations between competitors lead to restricted scope for competition.
- (iii) Cement industry being seasonal, homogenous market is subject to volatile prices, higher variable costs and is susceptible to parallel price pattern. However, CCI noted that even though price parallelism is not conclusive evidence, the same in conjunct with other "plus factors", such as easy access to competition information, product and dispatch parallelism, and capacity under-utilization will suffice to prove cartel.
- (iv) Cement manufacturing companies had deliberately reduced their production and produced much less than the installed capacity to create an artificial scarcity and raise the prices of cements in order to earn abnormal profits.

Based on this, CCI held that the Respondents were in breach of relevant provisions of the Act and a penalty of Rs. 6700 crores⁴ has been imposed imposed.⁵

V. Decisions by Competition Appellate Tribunal

1. COMPAT reduces penalty imposed on Kerala Film Distributors

Film Distributors Association, Kerala v. Competition Commission of India and Ors.

In the original case before CCI, the OPs alleged that the Film Distributors Association of Kerala formed a cartel along with theaters in the State and prevented exhibition of new films, which were otherwise eligible for release in the theaters owned by the Association members'. An investigation was carried out by the DG on the workings of the Association, however, the Association was never cooperative of the investigation being held and on no occasion supported the same. There was regular non-compliance of orders issued by the DG, who after thorough investigation, submitted a report to the CCI. Acting upon the report submitted by the DG, CCI penalized the accused with a fine of Rs. 25,000 per day for non-compliance or directions given by the DG during the investigation.

COMPAT partly allowed the appeal reducing the fine from Rs. 25,000 / day to Rs. 1,000 / day while also reducing the period for default stating that such heavy penalty cannot be imposed where the efforts made by the party were of a bona-fide nature. Also, COMPAT observed that period for non-compliance has to be calculated after giving reasonable time to the parties to adhere the directions.

2. COMPAT interprets “shall impose” u/s 43A⁶ of the Act

SCM Soilfert Limited and Anr. v. Competition Commission of India and Ors.

The appeal was directed against a CCI order penalizing the Appellants for failure to notify the CCI of a combination u/s 6(2) of the Act. SCM Soilfert Limited acquired 24.46% shares of Mangalore Chemicals and Fertilizers Ltd., and had not furnished information to CCI as mandated by the combination filing notification. The Appellants stated that the transaction did not adversely affect competition in India, as held by the CCI and, thus, are not liable to be penalized under Section 43A of the Act. COMPAT strictly interpreted the language of the relevant provision and noted that the words “shall impose” u/s 43A have a significant bearing on the powers granted to the CCI by it. It was held that the non-furnishing of information as mandated by Section 6(2) was a sine-qua-non for imposing a penalty by the Commission and that mens-rea was not required to be established for such penalties and the appeal was accordingly dismissed.

3. COMPAT dismisses alleged dominance appeal against Orissa Mining Corporation

All Odisha Steel Federation v. Orissa Mining Corporation Ltd. And Anr.

The original information was filed by Odisha Steel Federation before CCI. It stated that Orissa Mining Corporation Ltd. (“OMC”) was in a dominant position as it has the sole authority for sale of Chrome Ore, which is a rare natural resource. The Price Setting Tender (PST) followed by OMC was alleged to be unfair

⁴ USD 983 million

⁵ [HSA Note: It is worth debating whether the plus factors that were pressed upon by the CCI to support its finding of cartel having regard to price parallelism, were based on factual findings or presumptions made on the basis of certain underlying facts. While the test is one of preponderance of probability in such cases relying on circumstantial evidence since on many occasions, the meeting of minds beyond closed doors or in secret chambers cannot be unearthed by the CCI, it is nonetheless desirable that at least some reasonable level of evidence is presented to support a theory of cartel. The preponderance test has to be applied based on evidence that clearly suggests to a prudent mind the probability of certain outcome based on such evidence. In the judgment however, it appears that the CCI has proceeded to draw assumptions of cartel on certain loosely related facts without creating a clear unmistakable correlation within such facts and the presumptions drawn by CCI.]

⁶ Section 43A of the Act deals with CCI’s power to impose penalty for non-furnishing of information on combinations

which resulted in excessive pricing as only a negligible quantity was tendered for sale. OMC, in some instances even did not accept the highest bid and fixed an even higher price with no consideration for prevailing market dynamics. DG concluded in his report that though OMC was dominant, yet it was not abusing its dominance and this was re-affirmed by CCI. The pricing strategies adopted by OMC were to protect its business interests and moreover, the price of a rare non-renewable product could not be left to be determined by market forces.

On appeal, COMPAT observed that the intention to float price tenders by OMC was to discover prevailing prices and accordingly the price offered could be modified as per prevailing market conditions. COMPAT agreeing with CCI observed that making profits from Chrome Ore sale cannot be held against OMC because there is no conclusive evidence of OMC's endeavor to manipulate the market. It was opined that not all actions of "excessive pricing" are unfair. The appeal was accordingly dismissed as the prices were held to be fair regardless of the dominant position in the market.

4. COMPAT dismisses appeal against DLF

Ravinder Kaur Sethi v. DLF Universal Ltd. And Ors.

The appeal was filed against an order of CCI whereby it refused to direct an investigation into allegations of abuse of dominant position levelled against DLF Universal Limited (OP1). CCI observed that the relevant market consisted of other players (builders) and that OP1 had competitive constraints on it. This put an end to the Appellant's arguments that DLF had a dominant position in the relevant market. COMPAT put the onus of producing data / statistics of similar spaces built by other builders in Delhi and market share of different builders on the Appellant, however the Appellant was unable to produce the same before CCI to demonstrate DLF's dominance. Accordingly, COMPAT dismissed the appeal and further advised the Appellant to approach the competent consumer forum for alleged breach of contractual obligations by DLF.

VI. Combinations filed with CCI during July 2016 - September 2016

Combinations filed between July – September'16	21
Combinations orders between July – September'16	4

*As on 30th September 2016

VII. International updates

Australia

a) Australia's first criminal cartel charge laid against NYK⁷

Pursuant to an investigation by the Australian Competition and Consumer Commission (ACCC), Nippon Yusen Kabushiki Kaisha (NYK), a global shipping company based in Japan, pleaded guilty to criminal cartel conduct in the Federal Court. This is the first "*criminal charge laid against a corporation under the criminal cartel provisions of the Competition and Consumer Act, 2010*" ACCC Chairman Rod Sims said.⁸ NYK is one of the world's largest shipping companies, with offices in Europe East & South Asia, China, Oceania (including Australia) and North and South America and also operates an Australian subsidiary, NYK Line (Australia) Pty Ltd. "*This matter relates to alleged cartel conduct in connection with the transportation of vehicles, including cars, trucks, and buses, to Australia between July 2009 and September 2012.*" Mr. Sims said.

⁷ The media release is available at <http://www.accc.gov.au/media-release/australia's-first-criminal-cartel-charge-laid-against-nyk>

⁸ *Ibid*

b) ACCC review banks' application for authorization to collectively bargain with Apple⁹

Commonwealth Bank of Australia, Westpac Banking Corporation, National Australia Bank, and Bendigo and Adelaide Bank banks wished to collectively negotiate and boycott activities with Apple relating to its e-commerce Apple Pay platform and with other third party wallet providers in Australia. ACCC continues to assess the applications for authorizations after deciding not to grant the banks' request for interim authorization at an early stage of its assessment process. *"The ACCC requires additional time to consider the views of industry, consumers, and other interested parties," ACCC Chairman Rod Sims said.* In deciding not to grant interim authorization, the ACCC took into account the potential for continuing effects on competition in the market, the extent of urgency for the request, any possible harm to the applicants or other parties if interim authorization is granted or denied, and possible public benefits and detriments.

The banks, together with other participating card issuers, are seeking an authorization to collectively negotiate and boycott on numerous issues, one of them being the banks' ability to utilize Near Field Communication hardware on Apple devices to enable contactless payments to be made through the banks' own digital wallets¹⁰.

Brazil

CADE condemns shopping malls for imposing radius clauses in contracts¹¹

The Tribunal of the Administrative Council for Economic Defense (CADE) condemned shopping malls: *Iguatemi, Rua da Praia, Praia de Belas, Moinhos Shopping, Shopping Bourbon Country, Shopping Bourbon Assis Brasil and Shopping Bourbon Ipiranga*, for imposing distance-restriction clauses in contracts with retailers in Porto Alegre and imposed fines of more than BRL 15 million¹². The radius clause is a contractual instrument that compels the tenant of a commercial spot in a shopping mall not to offer the same activities, products in other stores within a predetermined distance. Although this type of provision is not considered illegal in all contracts, it however has the potential to cause anticompetitive effects, depending on how the conditions are established. In a vote pronounced at the judgment session, the Reporting Commissioner of the case, Márcio de Oliveira Júnior, stated that the radius clauses imposed in the analyzed contracts had the potential to close the market, both unilaterally and indefinitely. In the judgement Commissioner João Paulo de Resende concluded that such clauses had the potential to harm competition.

[HSA Note: Such no-compete conditions imposed by the shopping malls effectively restrict the ability of retailers to create competing outlets within a specific area to allow consumers wider choice of outlets. The conditions imposed by the malls effectively result in a fragmentation of markets, where retailers operating in a particular mall are restrained from providing similar goods/ services in nearby location.]

Singapore

a) Aircraft Maintenance: CCS Approves Proposed Joint Venture Between Airbus Services Asia Pacific and SIA Engineering Company Limited¹³

The Competition Commission of Singapore ("CCS") has cleared the proposed joint venture between Airbus Services Asia Pacific Pte. Ltd. ("ASAP") and SIA Engineering Company Limited ("SIAEC"). CCS has concluded that the proposed JV is unlikely to substantially lessen competition for the global supply of

⁹ <http://www.accc.gov.au/media-release/accc-continues-its-review-of-banks'-application-for-authorisation-to-collectively-bargain-with-apple>

¹⁰ A digital wallet is an application that can allow consumers to tap and pay using their phone and can store other information, such as loyalty or membership cards. Other issues for collective negotiations include appropriate industry standards for digital wallets and the banks' ability to pass on any fees charged by a third party digital wallet provider.

¹¹ <http://en.cade.gov.br/press-releases/cade-condemns-shopping-malls-for-imposing-radius-clauses-in-contracts>

¹² Around USD 4 million

¹³ <https://www.ccs.gov.sg/media-and-publications/media-releases/aircraft-maintenance-ccs-approves-joint-venture-airbus-siaec>

heavy maintenance services to commercial aircraft in Singapore. Although the parties' activities overlap in maintenance, repair and overhaul services, the scope of the proposed JV is limited to heavy maintenance services. CCS also noted that the supply is global as customers are flexible in terms of the location of heavy maintenance service providers. After reviewing the parties' submissions and feedback from customers and competitors, CCS concluded that the proposed JV would not infringe section 54 of Singapore's Competition Act, 2004. In clearing the proposed JV, CCS found that there are sufficient alternative providers of heavy maintenance services to Singapore customers globally; barriers to entry and expansion were not hindered as there had been several recent new entrants as well as expansions by current players. Customers such as the major airlines have strong bargaining power, and the proposed JV was unlikely to be able to take advantage of Airbus Group's status as the aircraft manufacturer to prevent competition in heavy maintenance services, as customers (i.e. airlines) are in possession of the repair manuals.

b) Beer Merger: CCS Clears the Acquisition of GAPL Pte. Ltd. by Heineken International B.V.¹⁴

CCS has cleared the acquisition by Heineken International B.V. ("HIBV") of the entire issued and outstanding ordinary share capital of GAPL Pte. Ltd. ("GAPL") which HIBV owned (through its subsidiary, Heineken Asia Pacific Pte. Ltd.) CCS has assessed that the transaction does not substantially lessen competition in the supply of beer in Singapore, which includes ale, lager and stouts (the "Relevant Market").

The supply chain of beers can be divided into three functional levels, namely: (i) brand ownership; (ii) brand usage rights; and (iii) production and distribution of beer brands. The transaction only results in a change in level (ii), from joint control between the vendor and the acquirer (the Heineken Group) pre-transaction, to sole control by the acquirer post-transaction. Levels (i) and (iii) are unchanged. After reviewing the HIBV's submissions and the feedback from customers and competitors following a public consultation, CCS concluded that the transaction has not led to a substantial lessening of competition in the relevant market. As such, the transaction has not resulted in an addition of beer brands to the Heineken Group's portfolio in Singapore. It has not changed the relative bargaining power between the Heineken Group and its customers that would increase the ability of the former to raise prices or impose exclusivities that might impair competition.

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¹⁴ <https://www.ccs.gov.sg/media-and-publications/media-releases/beer-merger-clearance-by-heineken-of-gapl>