NATIONAL

In Re: Cartelisation in the supply of bearings (Automotive and Industrial).

The Competition Commission of India ["**CCI**"] had launched a probe based on a leniency application filed by NSK. Initially the report of the investigation suggested contravention of the Competition Act by NSK, JTKET and NTN.

It was observed by CCI that in the initial investigation by Director General of CCI ["**DG**"], various bearings manufactures were under the microscope however it concluded a contravention of the Competition Act only against NSK, JTKET, and NTN and pertinently only on two instances.

For the first Request for Information ["**RFI**"] relating to front and rear wheel bearings, the CCI noted obvious telephone interactions between workers of NSK, JTKET, and NTN. However, the CCI noticed a discrepancy in the cross-examination of NSK and JTKET personnel. Further, NSK and JTKET did not provide a certificate under Section 65B of the Indian Evidence Act, 1872 ["**Evidence Act**"]. In the lack of such a certificate and established legal norms, the CCI could not rely on secondary evidence. The only evidence left was one individual's oral testimony, which was insufficient to show NSK, JTKET, and NTN cooperation in Indian markets.

In the second RFQ for hub bearings CCI found that the workers of NSK, JTKET, and NTN did not agree with each other. Thus, the available evidence did not support the existence of meetings or pricing talks. The certificate required by Section 65B of the Evidence Act was likewise unavailable, as was the date and time of the document. As a result, no violation of the Competition Act could be shown.

The CCI determined that the DG and the leniency applicants' evidence was insufficient and that no case could be formed against the bearing manufacturers, and ordered the inquiry closed.

Source: CCI Concludes No Contravention Against Bearings Manufacturers - Anti-trust/Competition Law - India

CCI issues 'cease and desist' order against firms for bid rigging & cartelization in fci tenders.

On October 29, 2021, the Competition Commission of India ["**CCI**"] issued a final order against six companies that were deemed to have violated Section 3(1) and Section 3(3)(d) of the Competition Act, 2002, which prohibit anti-competitive agreements.

The CCI issued a cease-and-desist order against these companies that were found to be guilty of engaging in cartelization in the supply of Low

Density Poly Ethylene covers ["**LDPE**"] to Food Corporation of India ["**FCI**"] by directly or indirectly determining prices, allocating tenders, coordinating bid prices, and manipulating the bidding process. Four out of six firms fully cooperated with the CCI by confessing their modus operandi because of which the CCI is yet to impose any penalty on these firms.

It is also to be noted that these firms were MSMEs with limited staff/turnover, and MSME sector was majorly hit by the current economic situation resulting from the outbreak of COVID-19.

Source: CCI issues 'cease and desist' order against firms found guilty of bid ...

Paper manufacturers penalized by CCI for indulging in cartelization.

Ten companies and an association were found to have violated Section 3(1) read with Section 3(3)(a) of the Competition Act, 2002 ["**Act**"] by the Competition Commission of India ["**CCI**"]. CCI launched the case on its own initiative, based on evidence discovered during the ongoing investigations of two other cases. It was determined that these companies that manufacture paper from agricultural waste and recycled wastepaper were engaged in cartelisation in fixing the prices of writing and printing paper. On 17th November, 2021, the CCI issued a final order and fined the ten companies Rs.5 Lakhs each and the association was fined Rs. 2.5 lakh for allowing anticompetitive acts to take place on its platform. The paper manufacturers, the associating and also their corresponding officials who have been held accountable under Section 48 of the Act, are to refrain from engaging in anti-competitive behaviour in the future.

Source: CCI imposes a penalty on paper manufacturers for indulging in …

Bundling

Bundling is identified with the idea of tied selling. A vehicle maker might offer a total package, including programmed transmission, radio and air conditioner since customers on normal need them and in light of the fact that the last cost to the purchaser is lower than in case every one of the various items were provided or then again purchased independently. Notwithstanding, bundling might be anticompetitive assuming that it makes it hard for another firm to enter any of these diverse item advertises. For instance, a radio company may not be capable to enter on the off chance that current vehicle makers have long haul contracts with existing radio companies. The contest ramifications of bundling, including that of tied selling for the most part, are complex and should be assessed dependent upon the situation taking on a standard of reason approach.

A four tier test for the same has been laid in the case of *Microsoft v Commission* wherein the finding of anti-competitive bundling practices requires showing that (i) the concerned undertaking must have a dominant position in the tying market or the market of one of the bundled products, (ii) the undertaking must be tying or bundling two separate products (iii) customers are coerced into obtaining the tied and tying products or the bundled products together (iv) the tie has a foreclosure effect and (v) there is no objective justification for the practice.

CCI gives approval to Fedex India for acquiring a minority stake in Delhivery.

The Competition Commission of India ["**CCI**"] has approved FedEx Express Transportation and Supply Chain Services (India) Private Limited ["**FedEx India**"] acquiring a minority stake in Delhivery Limited ["**Delhivery**"]. The watchdog has also expressed its consent towards TNT India Private Limited ["**TNT**"] acquiring certain operating assets of FedEx India and TNT.

The regulator tweeted that "*Commission approves acquisition of a minority stake of Delhivery by FedEx India and acquisition of certain operating assets of FedEx India and TNT India by Delhivery.*"

FedEx India, under the FedEx brand and Delhivery, are involved in providing logistics services.

According to a combination notice filed with the regulator, FedEx India will acquire a minority investment in Delhivery on a fully diluted basis, as well as certain minority investor rights. Furthermore, Delhivery would acquire some operating assets related to FedEx India's domestic operations. In addition to the above, the parties also intend to enter into certain interconnected and ancillary transactions.

Some of FedEx India's customers and employees will also be transferred to Delhivery, after seeking their approval. The notice further stated that "*The proposed combination will have no impact on the competitive landscape in any potential relevant market in India, in any manner*".

Source: CCI approves FedEx India's minority stake-buy in Delhivery

The CCI imposes fines on two entities for Bid Rigging.

The Competition Commission of India ["**CCI"**] on October 4, 2021 fined PMP Infratech Pvt. Ltd. and Rati Engineering for bid rigging in a tender floated by Gas Authority of India Limited ["**GAIL"**] for the restoration of well sites in the Ahmedabad and Anand areas of Gujarat in 2017-18. Electronic and documentary evidence collected by the CCI's director-general, and other records available were included in the CCI's investigation report, clearly pointed towards the fact that the two businesses spoke often about the tender and even after their bids were submitted.

It was also found out that bids of the entities were submitted from the same IP address with a one-day interval, from the premises of PMP Infratech's Ahmedabad office. By such actions the two businesses violated Section 3 of the Competition Act of 2002 (Act), which prohibits anti-competitive agreements. In addition to passing a cease-and-desist order, the watchdog imposed a monetary penalty of Rs. 25 lakhs on PMP Infratech Pvt. Ltd., Rs. 2.5 lakhs on Rati Engineering, and Rs. I lakh and Rs. 50,000 on the people who managed and controlled the firms.

Source: Competition Commission of India penalizes two entities for bid rigging

NCLAT stays Rs 200 crore penalty imposed by CCI on Maruti Suzuki.

On August 23, the Competition Commission of India ["**CCI**"] had imposed a penalty of Rs. 200 crores on Maruti Suzuki India Limited ["**Maruti**"] for restricting discounts offered by its dealers. It was noted that Maruti had a discount control policy and dealers who wanted to offer additional discounts were required to compulsorily seek the company's prior approval. The CCI then directed the automobile company to cease and desist from indulging in unfair business practices. This correctness, validity and

legality of this order had been questioned on the fact that the CCI's impugned order did not define the relevant market.

The case was then taken to the National Company Law Appellate Tribunal ["**NCLAT**"] where the three-member bench stayed the order and in place subjected the company to the deposition of 10 percent of the amount relayed as penalty by way of fixed deposit within three weeks from the date of passing of this order. Furthermore, passing an order, the appellate tribunal has also directed to list the petition filed by Maruti against the regulator "for admission" on December 15.

Source: NCLAT stays Rs 200 crore penalty imposed by CCI on Maruti Suzuki.

The CCI releases findings on the pharmaceutical sector in India.

The Competition Commission of India ["**CCI**"] conducted a study on India's pharma sector where they recently released their findings. The main concerns identified with respect to online pharmacies were the discounts offered by online pharmacies and concentration of personal health data with few platforms. The CCI suggested the introduction of self-regulatory measures, to tackle the concern of patient privacy and protection of sensitive personal medical data, for which it believed that regulations were needed until the enforcement of a Data Protection Law in India.

The study then spoke about the growth of online pharmacies despite their nascency with the present pandemic acting as a driving force for its development. The study then proceeded to suggest that while the online mode was only going to grow and move on to help with medicines needed for chronic symptoms, with regard to medicines needed for acute care, the share of the offline mode of distribution would continue to outnumber its counterpart.

Source: CCI releases key findings on market study of India's pharma sector.

Google warns CCI of legal action for the report leak.

Delhi High Court has reprimanded the tech-giant Google for directly warning the chairman of Competition Commission of India ["**CCI**"] of a legal action for the leak of investigation report and also refused to halt the CCI probe into Google's smartphone agreements.

This unprecedented report leak was from the office of Director General ["**DG**"] regarding a probe against Google for its alleged anti-competitive practices in mobile operating system and related markets. It was of a high magnitude and has affected the confidence of businesses in CCI. Undoubtedly, this calls for serious inquiries, however Google's move was unwarranted and allegedly draped with immoral intentions. The chairman of CCI cannot be logically blamed for a leak of a report from the DG office which is a separate body under CCI.

Apart from the smartphone agreements inquiries, Google is facing a penalty of Rs. 136 crores for abuse of dominance in online market, and probes for unfair practices in market online payment applications from the CCI. Thus, it is being claimed that Google wants to escape the impending investigations by dragging CCI into a lengthy lawsuit.

Source: Google threatens CCI with legal action for media leak -Who is to be blamed??

INTERNATIONAL

The Probe cycle resumes once again!

The European Union ["**EU**"] antitrust regulator has once again resumed the probe into the USD 1.8 billion bid of Hyundai Heavy Industries Holdings for the acquisition of Daewoo Shipbuilding & Marine ["**DSME**"]. This is the third time the EU has resumed this investigation. The last investigation was stopped on July 13, 2020 due to lack of data related to the combination.

The acquisition will result in the creation of the world's largest shipbuilder with a 21% market share. The acquisition requires regulatory approval from six countries viz. South Korea, China, Kazakhstan, Japan, the European Union and Singapore. Out of the six, China, Kazakhstan and Singapore have given green light to the acquisition as of November. The EU's antitrust watchdog has set a deadline of January 20, 2022 to finalize the probe which dates back to December, 2019.

Source: EU regulators set new Jan. 20 decision deadline for Hyundai, Daewoo tie-up

ADIF files for interim relief from Google's upcoming Play Store policy.

The Alliance of Digital India Foundation ["**ADIF**"], an industry body representing 422 Indian start-ups, has petitioned the Competition Commission of India ["**CCI**"] for interim relief from Google's new Play Store policy, which takes effect in March.

Google's new policy will require some categories of apps to process payments solely through the Google Billing System ["**GBS**"]. This would be a problem for app developers because GBS charges 30% commission on all Google Play Store transactions, compared to 2% charged by other payment processing companies. ADIF stated that the new policy will have a "*destructive effect on the operating margins of a large number of startups and make their business models infeasible.*"

The development comes after CCI launched an investigation into Google in November on complaints that it was exploiting its dominant position to push app developers to use its billing system exclusively. ADIF in its petition has asked for maintaining status-quo until the completion of the ongoing inquiry.

Source: Industry body ADIF moves CCI against Google's upcoming PlayStore policy for in-app purchases

Amazon and Apple handed $225 million in Italian antitrust fines.

Italy's antitrust authority has fined U.S. tech giants Amazon and Apple a total of more than 200 million euros ($225 million) for alleged anti-competitive cooperation in the sale of Apple and Beats products.

Contractual provisions of a 2018 agreement between the companies meant only selected resellers were allowed to sell Apple and Beats products on Amazon.com, the watchdog said, adding that this was in violation of European Union rules and affected competition on prices, it also ordered them to end the restrictions and give resellers access in a "non-discriminatory manner." Both Apple and Amazon said they would appeal. "*The proposed fine is disproportionate and unjustified*," Amazon said. They further went on to say that "*We reject the ICA's suggestion that Amazon benefits by excluding sellers from our store, since our business model relies on their success.*" Apple stated that it respects the Italian Competition Authority "*but believe we have done nothing wrong.*" It also

pointed out the fact that teaming up with selected resellers helps customer safety because it ensures products are genuine. "*Non-genuine products deli-ver an inferior experience and can often be dangerous,*" Apple said.

Source: Amazon and Apple handed $225 million Italian fine for alleged collusion

Sun Pharma must face Ranbaxy antitrust class actions.

Sun Pharmaceutical Industries Ltd. ["**Sun**"] must face a multidistrict lawsuit over its alleged scheme to corner the market for generic versions of three major drugs, as held by the Boston Federal Court in the United States.

The proposed class action alleges racketeering and violations of antitrust and consumer laws by Sun, the world's largest specialty pharmacy, and its subsidiary Ranbaxy Inc. It accuses them of fraudulently submitting bogus or missing data in applications to market generic versions of the reflux drug Nexium, the blood pressure drug Diavan, and the antibiotic Valcyte.

The move's purpose was allegedly to game the Hatch-Waxman Act, which awards six months of market exclusivity to the first-filing generic maker. The Food and Drug Administration initially approved the applications, then allowed Ranbaxy Inc. to keep its first-filing status while it tried to amend its submissions, according to the complaint.

Although the agency ultimately revoked two of its three approvals, Sun and Ranbaxy Inc. allegedly did enjoy six months as the sole maker of generic Nexium. The whole scheme bottlenecked other makers of proposed generics behind them while they sorted out their data problems, according to the suit consolidated in the U.S. District Court for the District of Massachusetts. The Court rejected the argument that the Noerr-Pennington doctrine, which shields legitimate litigation and petitioning activity from antitrust liability, covered Ranbaxy Inc.'s regulatory filings. If the suit's allegations are true, the drugmaker's conduct falls squarely into the "sham exception," according to the Court.

Source: In re Ranbaxy Generic Drug Application Antitrust Litig., D. Mass., No. 19-cv-10357, 11/27/19.

Germany's Federal Cartel Office adopts a new approach to setting fines by accepting compliance as a mitigating factor.

Following the legislative changes made to the German Competition Act with the 10th GWB amendment, the Federal Cartel Office has published its new Fining Guidelines with an intention to put an end to any extreme discrepancies. Such discrepancies included significant risk while filing an appeal and being worse off than before. Several court decisions even increased the amount of the fines a company had to pay for any infringement of competition law. This stood to be extremely problematic according to German constitutional law.

President Andreas Mundt of the Federal Cartel Office has commented on the changes as "*The method of calculation, in particular, has been changed and adapted more closely to court practice. However, the turnover achieved from the infringement of competition law still remains the key factor. All in all, the level of fines will therefore not change significantly*".

The major changes brought on by these Fining Guidelines is that instead of the total turnover, the gravity of the infringement holds more significance while the court determines the fine and the reference value of the said fine also

depends on the turnover generated by the company from such infringement.

The new Fining Guidelines further allows the effective compliance systems to mitigate the fines for the infringer, thus working in favor of the infringer. Under the old guidelines, if a company had breached the then working competition law rules, it was seen as proof that any or every present compliance measure taken by such company did not function properly.

Whereas, through the guidelines, it is assumed that compliance of an individual/infringer is effective if it has helped discover and report an incident/infringement even if the said compliance system did not prevent the infringement due to intentional malpractice being committed by individual employees even after the company had officially trained the employees about the compliance measures.

Source: New guidelines on the setting of fines published: Germany's Federal Cartel Office ("FCO") adopts new approach to setting fines, accepting compliance as a mitigating factor

American and JetBlue Airlines seek dismissal of antitrust lawsuit tied to partnership.

A lawsuit was filed against the partnership of American and JetBlue airlines in September in the Federal court of Massachusetts. The lawsuit presented that this Northeast Partnership of the airlines violates antitrust law as it would reduce competition in the region and could drive up airfares and lower service quality, thus directly attacking the aim of providing an equal playing field for similar businesses.

This lawsuit was filed by the Department of Justice and six other states to block this alliance. The reason was further detailed that this partnership lets American and JetBlue sell each other's flights to and from the Northeast U.S., which usually included congested airports in Boston and the New York City area.

American and JetBlue on the other hand are seeking dismissal on the grounds that the partnership which had been approved at the end of the Donald Trump administration, would allow them to better compete against Delta Air Lines and United Airlines in the region rather than reducing competition. The case is still underway.

Source: American, JetBlue seek dismissal of antitrust lawsuit tied to partnership

ECJ allows downward liability of subsidiaries for cartel damages in Sumal case.

The European Court of Justice ["**ECJ**"] has, in a landmark decision, ruled that even a subsidiary can be held liable for damages that are caused due to cartel formation by the parent company. In the case, a roll containers' company, Sumal, had bought two trucks from Mercedes Benz Trucks Espana SL, a subsidiary of Daimler AG ["**Daimler**"]. ECJ had ruled against the parent company in the Truck-cartel case, however instead of Dailmer, Sumal went against the subsidiary to claim damages.

The established jurisprudence till now was that parent companies are liable for actions of subsidiaries since they form part of a single economic unit and the subsidiaries follow the commands of the parent company. However, the ECJ observed that a parent company can be part of several economic units and if the concerned subsidiary formed part of the unit that indulged into anti-competitive behaviour, then it can be held liable for the parent company as well. To

establish an economic unit, it will be necessary to show economic, organizational and legal links as well as a specific link between economic activities of the parent company and the concerned subsidiary.

ECJ's decision emerges from the aim to uphold the efficacy of Article 101 of Treaty on the Functioning of the European Union as well as the right of a person to claim damages for loss caused by anti-competitive conducts and the ruling will have far reaching implications as per experts.

Source: The Sumal-judgement: reshaping the notion of 'undertaking' in EU competition law

China fines Alibaba, Baidu and Tencent.

The Chinese market regulator, the State Administration for Market Regulation, has fined the Alibaba Group, Baidu Inc and Tencent Holdings Ltd. due to their violation of the Anti-Monopoly law.

The companies didn't declare the concentration of business operators as per the law which led to the market regulator fining them 500,000 yuan. The market regulator, however, did note that none of the deals had the effect of eliminating or restricting competition. It is also worth noting that an Anti-Monopoly bureau was introduced by the government on Thursday. Gan Lin, currently vice-minister of the market regulation authority, was appointed to head the bureau.

There have been various experts who have stated their views on the same. Ang Jian, an expert at the advisory group of the Anti-Monopoly Commission of the State Council, has stated that the idea behind such stringent measures is to draw a clear demarcation for companies in China about the rules and their bounds with regard to the Antitrust law of the nation.

Zhong Gang, executive director of the Competition Law Research Institute stated that the point of asking companies to declare the concentration of business operators helps in the maintenance of a fair competitive environment, which helps in the protection of consumer interests. Liu Xu, stated that this stringent control was a reflection of the country (China) strengthening its in-house capabilities so as to allow for increased enforcement and independence in antitrust cases. After the announcement of the fine, the share price then proceeded to fall 2.1%, 0.3% and 1.6% respectively for Baidu, Tencent and Alibaba. Alibaba and Meituan were also seen to be fined $2.8 billion and $533 million respectively in the recent past due to the violation of anti-monopoly legislation.

Source: China levies fines from Alibaba, Tencent, Baidu fined for antitrust violations.

The Minderoo Foundation helps Australian publishing companies strike a deal with major tech giants.

The owner of the Minderoo Foundation ["**Minderoo**"], a modern philanthropic organization, Andrew Forrest has stated that his organization would help in arranging a collective bargaining arrangement for 18 small publishers, who were identified by Minderoo to interact with audiences of various cultures and address issues on the local level. This would be done by applying to the Australian Competition and Consumer Commission ["**ACCC**"] so that the publishers can negotiate together without breaching competition laws.

Publishers like the Star Observer were seen to be happy with the same, as while they had managed to secure a deal with Google, they weren't able to do the same with Facebook.

Facebook has been seen to be criticized, due to them rejecting multiple small publishers due to their reluctance to even respond to calls.

TV broadcaster SBS and the Conversation are two publications that have managed deals with Google but not with Facebook. Even the ACCC Chair Rod Sims has questioned Facebook's approach towards the law.

While the law does allow for the Australian government to set fees if discussions between internet giants and news providers fail, but rejected firms now have little recourse while they wait for the government to review the law in March, as intended.

It is worth nothing that the ACCC allowed a body representing 261 radio stations to negotiate a content deal in the month of October.

Source: Australian tycoon to help small publishers strike deals with Google, Facebook.