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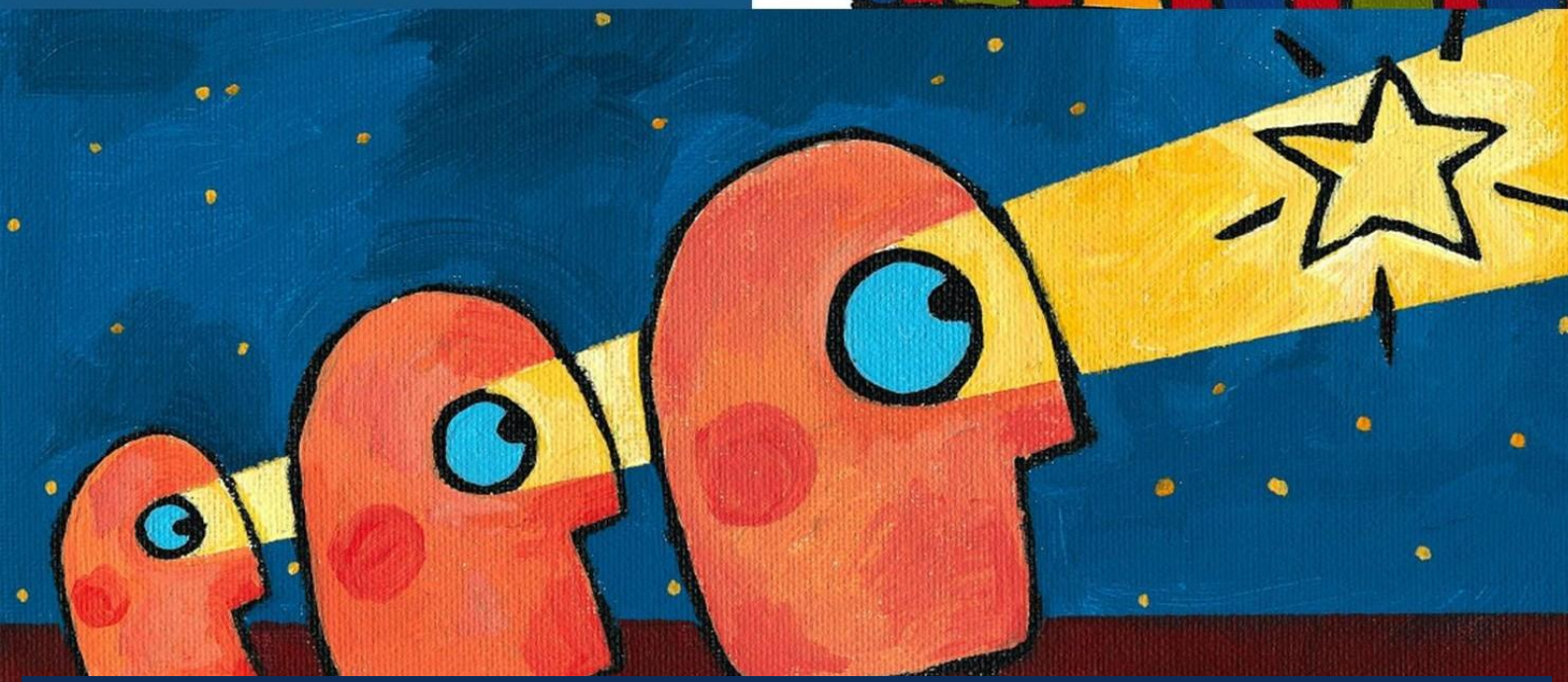

Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

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CCI Penalises Adani Green Energy Limited for Gun Jumping

The Competition Commission of India **('CCI'/ 'Commission')** recently passed an order, under Section 43A of the Competition Act 2002 **('the Act'),** imposing a penalty of Rs. 5 lakhs on Adani Green Energy Limited **('AGEL'/ 'Acquirer'**), for gun jumping , in relation to its acquisition of the entire shareholding of S.B. Energy Holding Limited **('Target')**. Any violation of the obligation of the parties to a combination to notify the Commission in respect of their proposed combination in terms of Section 6 of the Act is also known as 'gun jumping'.

The major issue in this case surrounded the scope of a clause in the Share Purchase Agreement **('SPA')**, between the Acquirer and the Target, which was held to have been broader than what was expressed by AGEL, in their notice to the CCI. It was a case where the subject matter of the agreement, broadly, relates to exchange of information on the on-going business and operations of the parties, allowing the acquirer to provide inputs on various elements of the target business; and agreeing that the target will act, taking into account, the best interests of the target, after the execution of agreements. The CCI observed that the phrase *"taking into account"*, in the clause, necessarily implies that information is shared with the management of the Acquirer, as the Target cannot act on the inputs, without such exchange of information, in the first place.

AGEL contended that the prime consideration for such exchange of information was to monitor and preserve the economic value of the Target and , accordingly, requested the CCI to strike a balance between prohibiting gun-jumping and the legitimate reasons for sharing of information. In relation to this, the Commission observed that the exchange of information between the parties , at any stage, before the transaction has been assessed and approved, can have the effect of leading a combination to "come into effect", if parties to a combination get involved in an exchange of commercially sensitive information.

The Commission has been cognizant of such a possibility and, to that effect, the Compliance Manual for Enterprises **('Manual')** makes specific reference to this point. The Manual notes that any action in furtherance of the transaction, including sharing of commercially sensitive information, before the approval is granted by the Commission, is likely to be seen as an instance of gun-jumping. However, situations may arise where such sharing of information can have both the aspects, i.e., to achieve the legitimate objectives of the parties and at the same time raise concerns of gun-jumping. In this relation, the Commission noted that such agreements need to be examined in terms of the *'inherence-proportionality framework'*. The framework involves a balancing exercise between the likelihood of any agreement of having the potential of causing competition distortions weighed against the efficacy of safeguards put in place to avoid any adverse effect of the agreement on the competition.

In the instant case, the Commission observed that AGEL failed to submit as to why the clause in SPA had to be worded in such broad terms, when specific clauses to preserve economic valuation were already included. As regards the safeguards in form of clean teams put in place, the Commission agreed that clean team protocols have the potential to safeguard the exchange of information, but for such safeguards to be effective, various aspects of clean teams, ranging from constitution to rules of engagement, are required to be expressly laid down and complied with, in letter and spirit. AGEL, however, failed to make any submissions on the 'Clean Team' composition, apart from a mere acknowledgement of existence of such clean teams. Hence, making the provision of clean teams disconnected with the aim of safeguarding the aspect of standstill obligations. The Commission also observed that even a possibility of an arrangement leading to competition distortions is enough to invoke infringement of standalone obligations under Section 6(2A) of the Act.

Ending on a cautionary note, the CCI observed that: "*Wherever it is felt that certain restrictions are required to be imposed or certain information is required to be exchanged/discussed to ensure preservation of economic value of assets or any other such legitimate objective, the parties ought to strive to make the arrangement as objective and precise as possible to avoid any likelihood of inference on interference with ordinary course activities of the target or causing any competition distortions in contravention of standstill obligations. Likewise, wherever applicable, the safeguards should be commensurate with the scope and effect of the conduct/arrangement in letter and applied similarly in spirit*." ***(Order dated 01.04.2022)***

CADE fines maritime vehicle shipping providers for participation in cartel

The Brazilian Competition Authority, Administrative Council for Economic Defense **('CADE')**, found the company Hoegh Autoliners Holdings AS and an individual guilty for their participation in an international cartel, having its effects in Brazil, in the market for maritime transportation of automobiles. The CADE fined the company with Brazilian Real **('BRL')** 26.4 million. It was found that the automobile shipping companies that operate Roll-on/roll-off **('RORO')**/Cargo ships, designed to carry wheeled cargo *inter alia* cars, trucks, which are driven on and off the ship, were indulging in collusive conduct by way of market allocation to keep each shipping company with its main customer. This allowed the shipping companies to maintain or increase prices and resist consumer demand for price

Heard at the BAR

Legal news from India and the world

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cuts.

According to the Commissioner Luiz Braido, rapporteur of the case, *"The conduct was externalized through market division and pricing and commercial conditions. When vehicle manufacturers began the process of contracting or renewing contracts through competition between carriers, the latter, through the exchange of sensitive information, set prices and divided the market. This practice influenced private bids by vehicle manufacturers, who sought to hire maritime transport on routes in which Brazil was the origin, destination or stopover".*

The other participants to this international cartel were Mitsui OSK Lines, Nissan Motor Car Carriers, Nippon Yusen Kabushiki Kaisha, Compañia Sud Americana de Vapores, Kawasaki Kisen Kaisha, Wallenius Wilhelmsen Logistics, Eukor Car Carriers and 54 individuals. The Tribunal of CADE unanimously agreed to dismiss the case against companies and individuals that executed agreements with the authority. As per the cease and desist agreement, the investigated parties have to refrain from participating in the anticompetitive practices and to pay over BRL 29 million in financial contributions to the Ministry of Justices' Fund for De Facto Joint Rights.

(Press release dated 28.03.2022)

ACCC Fines Peters Ice Cream to Pay $12 Million Penalty for Exclusive Dealing

In the proceedings brought by Australian Competition and Consumer Commission **('ACCC')**, the Federal Court of Australia has ordered the Australasian Food Group- Peter's Ice Cream **('PIC')**, to pay a penalty of $12 million for its anti-competitive conduct relating to distribution of ice creams sold in petrol stations and convenience stores.

PIC owns a number of ice cream brands, including Connoisseur, Drumstick, Maxibon and Frosty Fruits. It is one of two major manufacturers of single serve ice cream products sold in Australian petrol stations and convenience stores.

In an admission by PIC, it came to light that during the period of November 2014- December 2019, it acquired distribution services from PFD Food Services **('PFD')**. PFD is the largest distributor of single serve ice creams in Australia, offering distribution to at least 90 per cent of Australian postcodes.

These distribution services were acquired by PIC subject to the condition that PFD, without prior written consent of PIC, would not sell or distribute competitors' single serve ice cream products in various geographic locations within Australia.

PIC further admitted that in doing so it engaged in exclusive dealing, which had the effect of substantially lessening competition in the market for supply by manufacturers of single serve ice cream and frozen confectionary products.

PFD was approached by potential competitors of PIC to distribute new single serve ice cream products to some national petrol and convenience retailers. However, due to the exclusive arrangement between PIC & PFD, it could not distribute those products.

The ACCC Chair Gina Cass-Gottlieb said, *"Peters Ice Cream admitted, that if PFD had not been restricted from distributing other manufacturers' ice cream products, it was likely that one or more potential competitors would have entered or expanded in this market."*

In addition to the penalty, PIC had also been ordered to establish a compliance program or a period of three years and pay a contribution to ACCC legal costs.

(Press release dated 25.03.2022)

EC Opens Investigation into anti-competitive conduct of Google and Meta in Online Display Advertising

An agreement, code named 'Jedi Blue', signed between Google LLC **('Google')** & Meta Platforms, Inc. (formerly Facebook) **('Meta')** for online display advertising services came under scrutiny by European Commission **('EC')** for possible breach of European Union Competition Rules.

The Jedi Blue agreement was a *quid pro quo* agreement, wherein Google gave Meta preferential rates and priority choice in prime ad placements, and in return Meta supported its ad system and did not proceed with building competing ad technologies or using the publisher rival system, header bidding. The EC is concerned that the Jedi Blue agreement allowed Google and Meta to disrupt the online advertising technology **('Ad tech')** market through their anti-competitive conduct. The EC alleges that Meta participates in auctions for publishers' ad space using Google's advertisement services, and the close association between these enterprises raises competition concerns like- the exclusion of rival companies competing in Google's 'Open Bidding programme'. The EC also mentioned that they would initiate a formal in-depth investigation into the matter, in consonance with UK's Competition Market Authority **('CMA')**, concerning the same parties. The CMA and EC will work in coherence and cooperate in the investigation according to applicable rules and procedures. Showing concerns related to competition in Digital Advertisement Market, Executive Vice-President Margrethe Vestager, in charge of competition policy, said: *"Via the so-called 'Jedi Blue' agreement between*

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Google and Meta, a competing technology to Google's Open Bidding may have been targeted with the aim to weaken it and exclude it from the market for displaying ads on publisher websites and apps. If confirmed by our investigation, this would restrict and distort competition in the already concentrated ad tech market, to the detriment of rival ad serving technologies, publishers and ultimately consumers." ***(Press release dated 25.03.2022)***

CCI Initiates Probe Against Zomato and Swiggy

An information was filed, under Section 19(1)(a) of the Act, by National Restaurant Association of India **('Informant'/'NRAI')** against Zomato Limited **('Zomato')** and Bundl Technologies Private Limited **('Swiggy') (collectively OPs)** alleging that the practices of Zomato and Swiggy are in violation of Section 3(4) read with Section 3(1) of the Act.

The allegations raised by the Informant are as follows: *(a)* The OPs are bundling the delivery of food with online food ordering, thereby not allowing the Restaurant Partners **('RPs')** to use their own delivery services. *(b)* The OPs play a dual role of intermediary as well as participants, by listing their cloud kitchens akin to private labels, thereby causing an inherent conflict of interest, as it can lead to preferencing of platform's own entities. *(c)* The price parity agreement between the OPs and RPs reduced the inter-platform competition, as they do not allow RPs to create their own competing platforms by offering lower rates or a higher discount, or offer the same on any other platform.

The Informant had delineated the relevant market as *'market for restaurant marketplace for delivery services in various hyperlocal areas across India'* where the total share of the OPs is alleged to be 90-95%. However, the CCI emphasised on the allegations being under Section 3(4), wherein it is not necessary in *stircto sensu* to delineate the relevant market. Therefore, in this relation, the CCI stated *"Suffice to say that Zomato and Swiggy are prominent online food delivery platforms and operate as online intermediaries for food ordering and delivery"*.

After going through the material available on record and arguments made by the parties in their respective written submissions, the CCI observed that all the parties have filed elaborate and extensive pleadings and thus, there exists sufficient material on record to form a *prima facie* view without a requirement of holding any preliminary conference in the matter, despite specific request having been made by Swiggy.

Following observations were made by the CCI: *(a)* With respect to the allegation of bundling delivery services with online food ordering the CCI observed that bundling *per se* is not anti-competitive and, therefore, rule of reason has to be applied. Accordingly, the CCI averred that delivery of food is an essential feature of online food ordering and delivery partners are treated as an extension of the food ordering platform. Further, the food ordered is used for immediate consumption, thus, time of delivery is an important factor for the customers while deciding to order food. It is this 'delivery time' within which the platforms compete among themselves to gain customers. Therefore, based on this, the CCI observed that bundling does seem to raise competition concern. *(b)* On the dual role of the OPs, the CCI observed that *prima facie* a situation of conflict of interest has arisen with respect to both the OPs, as Swiggy admits to operating its own private labels and cloud kitchen. Further, Zomato has a minimum business obligation with some of the RPs which also incentivises it to divert traffic to such RPs, thereby creating a commercial interest in the downstream market, which may come in the way of the platforms neutrality. Therefore, this concern of platform neutrality requires detailed examination. *(c)* In relation to the price parity clauses in the agreement, the CCI observed that the clauses imposed a wide restriction on the RPs, and restricts them to offer lower price or higher discount to any other aggregator. Further, it may discourage the platforms to work on commission basis, as the RPs are required to maintain a similar price on all platforms.

In view of the above-mentioned analysis, the CCI formed a *prima facie* opinion that the conduct of the OPs requires to be examined for any contravention of Section 3(4) read with Section 3(1) of the Act. The CCI directed the Director General, under Section 26(1), to determine whether the conduct of the OPs have resulted in contravention of the provision of the Act, and submit a report to the CCI in the conduct of the OPs. ***(Order dated 04.04.22)***

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