Monthly Newsletter

State of Antitrust

April 2023; Volume 10 Issue 4

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

- NCLAT Reaffirms CCI's Order Imposing a Penalty of Rs. 1337.76 Crores on Google
- CMA Penalizes Ten Construction Companies for Bid Rigging

HEARD AT THE BAR

- CADE finds Cartelization in Procurement for Public Works in Juazeiro do Norte
- DoJ Antitrust Division Objects to JetBlue-Spirit Acquisition

BETWEEN THE LINES

- CMA Objects to the Acquisition of Arthur Foodstores Ltd. by Asda Stores Ltd.

NCLAT Reaffirms CCI's Order Imposing a Penalty of Rs. 1337.76 Crores on Google

The National Company Law Appellate Tribunal ("**NCLAT**") partly upheld the order of the Competition Commission of India ("**CCI**") dated 20.10.2022, imposing a penalty of Rs. 1337.76 Crores on Google LLC ("**Appellant/Google**") for abusing its dominant position in the market for licensable Operating Systems ("**OS**") for smart mobile devices in India. While affirming the finding of violation of Section 4 of the Competition Act, 2002 ("**Act**"), the NCLAT set aside certain directions issued by the CCI to Google for altering its anti-competitive behaviour.

The Appellant raised several issues including – **(i)** whether an effects-based analysis is required to be conducted for determining violation of Section 4 of the Act; **(ii)** whether CCI's order was replete with confirmation bias; **(iii)** whether the Appellant's conduct amounted to abuse of dominant position and whether an effect analysis was conducted by the CCI to arrive at the decision; **(iv)** whether the investigation violated the Principles of Natural Justice; **(v)** whether the directions and penalty imposed on the Appellant are disproportionate and excessive?

Issue (i) - The NCLAT determined, on the basis of the text of Section 4 of the Act, the decisional practice of the CCI and the approach of the competition regimes in different jurisdictions, that it is necessary to conduct an effects-based analysis for abuse of dominance cases as well "*and the test to be employed in the effect analysis is whether the abusive conduct is anti-competitive or not*."

Issue (ii) - The NCLAT dismissed the second issue raised by the Appellant and observed that the CCI recorded its own findings after analysing the materials on record before it and, therefore, the order was not replete with confirmation bias.

Issue (iii) - The NCLAT assessing the evidence on record and the assessment of the CCI upheld CCI's finding that Google was, in fact, abusing its dominant position. It noted that the Mobile Application Distribution Agreement ("**MADA**") imposes an obligation on Original Equipment Manufacturers ("**OEMs**") to accept the bundling of Google's proprietary apps, the Google Mobile Services ("**GMS**") Suite, and to distribute them in a tying arrangement and display them on the Home Screen of the devices, if they wish to install even one of Google's apps. The effect of the conduct was also examined by the CCI – lack of negotiation between the Appellant and OEMs, reduction in potential choice for users, and various supplementary obligations that reflected the anti-competitive nature of the practice. Noting this, the NCLAT upheld the CCI's finding that the pre-installation of entire GMS Suite was imposition of unfair conditions on the OEM's in violation of Section 4(2)(a)(i) and 4(2)(d) of the Act.

It was also observed that the CCI's analysis was correct regarding the anti-competitive effect of Anti-Fragmentation Agreement ("**AFA**"). It noted that, "*the Appellant by making pre-installation of GMS suite conditional to signing of AFA/ACC for all Android devices manufacturers, has reduced the ability and incentive of devices manufacturers to develop and sell self-device operating or alternative version of Android and Android Forks and thereby limited technical and scientific development, which is breach of provisions of Section 4(2)(b)(ii) of the Act*."

Further, the NCLAT agreed with the observations of the CCI that the Appellant: **(i)** leveraged its dominant position in the Online Search Market to deny market access to competing Search Apps; **(ii)** leveraged its dominant position in Play Store to protect its dominant position in Online General Search market and; **(iii)** abused its dominant position by tying Google Chrome App and the YouTube App with Play Store, in violation of Section 4(2)(c) and 4(2)(e) of the Act. It noted that the observations of CCI was based on the analysis of the material on record and that sufficient effect analysis was done to ascertain whether the conduct was, in fact, anti-competitive.

Issue (iv) – The NCLAT rejected the Appellant's contention, that the Director General ("**DG**") violated the principles of natural justice and asked leading questions during the investigation, by noting that the DG is entitled to *'illicit information'*. His function is only inquisitorial in nature and he only collects information for purposes under the Act. It cannot be asserted that the DG had pre-decided the issue since his Report was based on the evidence collected by him.

Issue (v) – After considering the submissions of the parties, the NCLAT set aside certain directions that had been issued by the CCI under Section 27 of the Act. These include the direction to Google to: **(i)** allow the developers of app stores to distribute their app stores through Play Store; **(ii)** not restrict the ability of app developers, in any manner, to distribute their apps through side loading; **(iii)** not deny access to its Play Services APIs (Application Programming Interface) to the disadvantage of OEMs, app developers and its competitors; **(iv)** not restrict un-installing of its pre-installed apps by the users. The NCLAT noted that these directions: **a)** were not in consonance with the findings of abuse by the CCI or the other directions issues by the CCI; **b)** were unnecessary; and **c)** discouraged technological development.

Further, the NCLAT concluded that the Appellant's contention that the penalty should be based on 'relevant turnover' which is limited to Google's revenue from Google Search and YouTube was erroneous. Due to the nature of the product and the vast network-effects associated with it, it is not possible to pin-point only an app or a device from which revenue is derived. The source for the Appellant's revenue is the entire ecosystem of Android OS in the mobile device and, therefore, the total revenue from all the apps and services in the device becomes the 'relevant turnover'. It held that the CCI was correct in imposing the penalty of Rs. 1337.76 Crores based on the entire Android OS mobile devices based business operations of Google in India.

(Order dated 29.03.2023)

Legal news from India and the world

CADE finds Cartelization in Procurement for Public Works in Juazeiro do Norte

The Administrative Council for Economic Defence ("**CADE**"), competition authority of Brazil, imposed a fine on five construction companies and seven associated individuals for collusive behaviour in the government procurement process for engineering services for State schools in the State of Ceara, Brazil.

An administrative proceeding was launched against the companies and the associated individuals in October 2019 to assess whether there was cartelization in the procurement processes conducted in 2009. Upon investigation, CADE found that: **(i)** the documents submitted by the companies contained standardized wordings; **(ii)** the documents had the same misspellings; **(iii)** the prices quoted for several items were the same and; **(iv)** the individuals in the different companies had close and familial ties between themselves.

The investigation also revealed that the individuals from the construction companies met to adjust the prices and benefits before the procurement processes; to limit competition, fake the existence of free competition and increase their profits.

The CADE, while imposing a penalty amounting to BRL R$ 1.1 million on the companies, also prohibited the cartel participants from contracting with official financial institutions or from being involved in any government procurements for a period of five years.

(Press release dated 17.03.2023)

DoJ Antitrust Division Objects to JetBlue-Spirit Acquisition

The Department of Justice ("**DoJ**"), Antitrust Division, in the United States ("**US**"), has filed a civil antitrust suit against the proposed acquisition by JetBlue Airways Corporation ("**JetBlue**") of the largest Ultra-Low-Cost Carrier ("**ULCC**") – Spirit Airlines, Inc. ("**Spirit**"), alleging violation of Section 7 of the Clayton Act, 1914.

JetBlue and Spirit are two of the most significant rivals in the low-cost carrier airline segment in the US. JetBlue began as a low-cost carrier focused on leisure travelers. JetBlue tried to distinguish itself from legacy carriers and other low-cost carriers by attracting consumers with lower fares along with in-flight television and other amenities. It has focused its footprint on six major cities in the US which constitutes 97% of its operations. However, it has closely aligned its interests with the Big Four (American Airlines, United Airlines, Delta Airlines, Southwest Airlines) in the recent years through its alliance with American Airlines. As a result, JetBlue coordinates its capacity decisions and revenue sharing with American Airlines and no longer competes with the same.

The target, Spirit, is the largest ULCC in the US, offering some of the lowest fares in the airline industry. Spirit's business model allows it to offer low fares to consumers, especially focused on cost-conscious travellers. Unlike traditional airlines which sold all-inclusive price fares that bundled together options such as advance seat assignment and carry-on luggage; Spirit's business model unbundled the same by allowing the cost-conscious consumers the option to choose the features from the overall price of a ticket (also known as the "Spirit Option"). Spirit allowed consumers to decide the amenities they value the most and pay only for those services in addition to the low basic fares. Unlike the Big Four and JetBlue that focuses on routes connecting through the hubs and major cities, Spirit does not heavily rely on these routes and acts independently of the other airlines.

DoJ has apprehensions that if the acquisition is approved, JetBlue will likely abandon Spirit's existing modular business model. The proposed acquisition will significantly increase concentration in more than 150 routes. DoJ feared the following anti-competitive concerns post acquisition – **(i)** elimination of vigorous direct competition between the parties resulting in harm to cost-conscious travellers; **(ii)** JetBlue has planned to abandon Spirit's business model, and this will result in the loss of the largest ULCC in the US. Elimination of Spirit as an independent competitor would increase the risk of co-ordination among existing airlines, resulting in increase in prices or reduction in capacity on routes in which Spirit currently operates and; **(iii)** acquisition will result in depriving cost-conscious consumers of the option to choose Spirit and its low and unbundled fare prices. Therefore, with the consolidation of two largest low-cost carriers in the US and the resulting denial of exercising the "Spirit Option" for leisure travellers, there is likelihood that JetBlue will increase prices on every route where Spirit flies today.

The DoJ also stated that, "*In the last 10 years, Spirit has doubled its network in size and, before this deal, expected to continue expanding at a quick pace. The acquisition stops this future competition before it starts*."

(Press release dated 07.03.2023)

CMA Penalizes Ten Construction Companies for Bid Rigging

The Competition Markets Authority ("**CMA**") in the United Kingdom ("**UK**") has issued an infringement decision against ten construction companies and imposed a penalty of 60 million GBP on them for the violation of competition law.

The CMA commenced an investigation into the bidding process for demolition and asbestos removal contracts in 2019. Based on the findings of the investigation, the CMA observed that the companies were involved in the practice of "cover bidding" while

(Continued on the next page)

bidding for major projects over a period of five years. The companies submitted overpriced bids, intending to lose the tender, to ensure that the pre-determined company amongst them won the tender. The 'losers' of the tender contract were then compensated by the company that won the tender. The CMA noted that conduct of this kind can result in higher prices or lower quality of services for the customers.

The CMA, while imposing a penalty on the companies for their involvement in the collusion of prices for bids, also disqualified 3 directors of the companies that participated in the cartel. The Executive Director for Enforcement at the CMA stated that, "*Company directors must understand that they have personal responsibility for ensuring that their companies comply with competition law, and that disqualification may follow if they fail to do so*."

(Press release dated 23.03.2023)

CMA Objects to the Acquisition of Arthur Foodstores Ltd. by Asda Stores Ltd.

The CMA commenced a phase 1 investigation into an effectuated transaction wherein Asda Stores Limited ("**Asda**") acquired Arthur Foodstores Ltd. ("**Arthur**"). After the investigation, the CMA concluded that the acquisition could raise competition concerns in: **i)** the retail supply of road fuel in 11 local stores; **ii)** the retail supply of groceries at mid-sized stores in 3 local areas.

Asda operates a supermarket chain and is a wholly owned subsidiary of Asda Group Limited., indirectly controlled by the Issa brothers and TDR Capital LLP ("**TDR**"). The Issa brothers and TDR also jointly own EG Group Limited which operates petrol filling stations across several locations in the UK. Arthur is a special purpose vehicle created by the Co-operative Group Ltd. ("**Co-op**") to sell its 132 petrol filling stations with attached grocery stores.

The CMA in the phase-1 investigation considered: **(i)** the number of competing petrol filling stations and grocery brands in each local area; **(ii)** the local market share of the merged entity; **(iii)** the competitive constraint that Asda has over Arthur and; **(iv)** whether Asda gives consideration to Co-op's prices when setting its own price in local areas. In the investigation, the CMA found that the parties' operations overlap in the retail supply of: **a)** road fuel; **b)** groceries (both at mid-sized stores & convenience stores); **c)** auto-LPG in the UK. Therefore, it concluded that the transaction is likely to result in Substantial Lessening of Competition **("SLC")** in the UK.

Asda, in its response, submitted that the transaction would result in rivalry-enhancing efficiencies because Asda's consistent lower fuel and grocery prices, in comparison to the prices at Arthur sites, will be passed on to Arthur's sites, post-acquisition. However, shift in Arthur's grocery and petrol filling stations sites to Asda's pricing policy cannot be considered as raising efficiency based on the CMA's established guidelines. According to the CMA, "*rivalry-enhancing efficiencies arise where a merger strengthens the ability and incentive of the merged entity to respond to market forces in a pro-competitive manner*." The purported efficiencies are not transaction-specific because this acquisition is not required to lower the prices.

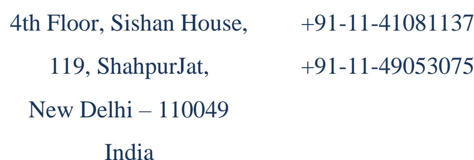
Therefore, the purported efficiencies will not outweigh the prospect of SLC in the relevant locations. The entity, post-acquisition, will face insufficient competition in the relevant local areas and this could lead to consumers facing higher prices or lower quality services when buying fuel or shopping at Asda's convenience stores.

The entities involved in the acquisition were given a week to offer undertakings, to the CMA, to resolve its competition concerns, failing which, the acquisition will be referred for a phase 2 investigation by the CMA.

(Decision summary dated 14.03.2023)

KK Sharma Law Offices

An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax



4th Floor, Sishan House,
119, ShahpurJat,
New Delhi – 110049
India

+91-11-41081137
+91-11-49053075

www.kkslawoffices.com
globalhq@kkslawoffices.com
operations@kkslawoffices.com
legal@kkslawoffices.com