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Monthly Newsletter

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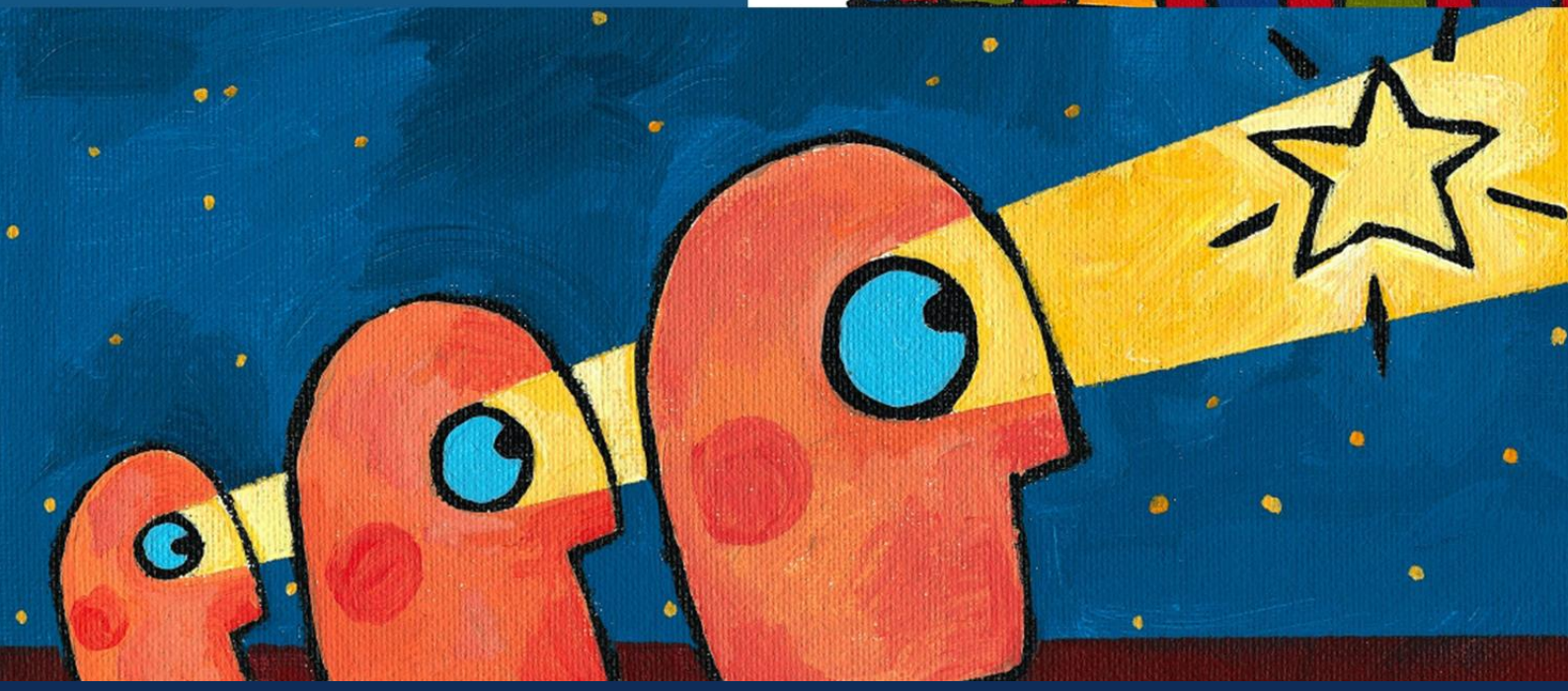

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- CCI directs a cartel in Railway Sector to 'cease and desist' from anti-competitive conduct; India

HEARD AT THE BAR

- CMA uncovers anti-competitive agreement between 3 pharma companies, imposes fines totalling £2.3m; UK
- CMA imposes £1.2m in fines for price-fixing in private Eye care; UK

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- EC seeks views of stakeholders for evaluating the Market Definition Notice; European Union
- EC adopts guidance for national courts when handling disclosure of confidential information; European Union

AND MORE....

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CCI directs a cartel in Railway Sector to 'cease and desist' from anti-competitive conduct; India

A cartel of 10 enterprises, engaged in manufacturing of various types of Composite Brake Blocks **('CBB')** used in the operations of trains, has been directed by the Competition Commission of India **('CCI'/'Commission')** to 'cease and desist' from indulging in anti-competitive practises of price fixing, market sharing and bid rigging.

The 'cease and desist' order of the CCI emerges from 5 separate References filed by Chief Material Managers of various Railways Zones between 2016 and 2018 alleging that the manufacturers of the CBB **('Opposite Parties'/'OPs')** were quoting identical bids, despite geographical differences, in the tenders floated by various railways zones. It was also alleged that the OPs during the course of negotiation reduced the rates identically which was highly unusual as negotiations with the OPs took place separately.

On the basis of the allegations, the CCI formed a *prima facie* opinion of contravention of the provision of the Competition Act, 2002 **(the 'Act')** and ,observing the similarity in the References filed by the Chief Material Managers, clubbed all 5 References for investigation by the Director General **('DG')**.

The DG, during the investigation collected various evidences which included exchange of e-mails, WhatsApp messages, SMSes, call detail records, screenshots of financial bids exchanged and statements of the officials of the OPs. The DG found that OP-1 to OP-10 used to decide the prices and quantities to be quoted by them in the tenders floated by Indian Railways. For this purpose an excel sheet was maintained by one of the officials of the OPs which contained details of quantities allotted to the OPs in the Tender floated by Indian Railways. The DG in his report stated that eight officials of the OPs admitted to have formed a cartel to rig the bids of different tenders of CBBs floated by the Indian Railways.

The CCI ,on receipt of the Investigation Report of the DG, forwarded the same to the OPs for their objections/suggestions. Apart from the OPs who filed the Leniency Application, the objections of most of the OPs were more or less similar and were based on the argument that there was no Appreciable Adverse Effect on Competition (AAEC); the Indian Railways was the price maker and held economic strength to aggressively negotiate/ make counter-offers to the OPs; the structure of the tender process was such that it automatically eliminated all possibility of any price fixation by the OPs and Indian Railways was a monopolistic buyer who controlled the price and quantity of the CBB to be supplied by the OPs to Indian Railways.

The CCI after perusing the material on record observed that some of the officials of the OPs, particularly those who filed Leniency Application, when confronted with the e-mails admitted to be part of a cartel. It was observed by the CCI that officials of all the OPs used to exchange price bids and quantities amongst themselves through common email id and WhatsApp group namely '*Kwality Blocks*'. The CCI opined that exchange of e-mails and WhatsApp messages were direct evidence of involvement of the OPs in a cartel. The CCI held that the officials of the OPs coordinated to rig the bid at every step and even discussed how they would compensate if they did not win the previous or earlier tenders.

With respect to the objections of the OPs that in absence of AAEC, there could not be any violation of the provisions of the Act, the CCI stated that the Act not only prohibits contravention of the provisions but it also prohibits conduct which can potentially cause AAEC. Further, while reiterating the ratio of the Supreme Court in the case of *Rajasthan Cylinders and Containers Ltd.* v. *Union of India and Others*, 2018 (13) SCALE 493, the CCI stated that the OPs were unable to rebut the presumption of AAEC by leading adequate evidence.

Under these circumstances, the CCI held that the conduct of the OPs was sufficient to hold them liable for contravention of the provisions of Section 3 (3) (a), 3 (3) (c) and 3 (3) (d) read with Section 3 (1) of the Act.

With regard to imposition of penalty, the CCI noted that the OPs not just cooperated but also admitted their respective role/ conduct and that some of the OPs were Micro Small and Medium Enterprises (MSMEs).

The CCI also took cognisance of the prevailing economic situation arising due to the outbreak of global pandemic (COVID-19) and the various measures undertaken by the Government of India to support the liquidity and credit needs of viable MSMEs to help them withstand the impact of the current shock. In this backdrop, considering the matter holistically and cumulatively, the CCI, in the interest of justice, refrained from imposing any monetary penalty and directed the OPs to 'cease and desist' from the cartel conduct in future.

(Reference Case Nos. 03 of 2016, 05 of 2016, 01 of 2018, 04 of 2018 and 08 of 2018)

Heard at the BAR

Legal news from India and the world

CMA uncovers anti-competitive agreement between 3 pharma companies, imposes fines totalling £2.3m; UK

The Competition and Market Authority (CMA) has uncovered an illegal anti-competitive agreement between 3 pharmaceutical companies viz. Amilco, Tiofarma & Aspen which limited the supply of Fludrocortisone tablets used primarily for treatment of primary or secondary adrenal insufficiency.

As per the illegal agreement, two pharmaceutical companies viz. Amilco and Tiofarma agreed to stay out of the fludrocortisone market so that Aspen could maintain its position as the sole supplier in the UK.

In exchange, Amilco received a 30% share of the increased prices that Aspen was able to charge, and Tiofarma was given the right to be the sole manufacturer of the drug for direct sale in the UK.

Due to this agreement, the price of fludrocortisone supplied to the National Health Service increased by up to 1800%.

The companies admitted to have taken part in the anti-competitive agreement. Resultantly, the CMA levied fines totaling £2.3 million for limiting the supply of fludrocortisone tablets in UK market.

(***Press Release of 9th July 2020***)

CMA imposes £1.2m in fines for price-fixing in private Eye care; UK

After the investigation by CMA, Spire Healthcare Group plc (Spire), has admitted that one of its hospitals instigated and facilitated an illegal arrangement with 7 ophthalmologists consultants who agreed to fix fees for initial consultation for self-pay patients.

Ophthalmology is a branch of medicine specializing in treatment of eye disorders like cataracts and glaucoma.

The price for private consultation is usually set by the consultants for self-pay patients, but by agreeing not to compete with each other on price, the consultants and Spire Healthcare denied the patients to choose between the consultants giving the best deal.

This arrangement between the consultants and Spire continued for almost 2 years. The arrangement started through a formal dinner organised by Spire where the topic of price fixing was raised and was agreed by the consultants.

Following the dinner, an email was sent to all 7 consultants to fix price for initial self-pay patients at £200. In response to the email 4 consultants confirmed that they would charge this fee and simultaneously raised their prices from £180 to £200. The remaining 3 were already charging £200 and continued to charge this amount.

CMA reduced the amount of fine by 20% as the consultants admitted to the illegal arrangement and agreed to cooperate with CMA.

One of the consultants was not charged as he was the one who informed the CMA about the illegal arrangement.

(Press Release 1st July , 2020)

EC launches sector inquiry into the Internet of Things (IoT); European Union

The European Commission ('EC') has launched an antitrust competition inquiry into the Internet of Things (IoT) sector for consumer related products and services in the European Union. The EC is concerned that certain company practices such as restrictions of data access and interoperability, as well as certain forms of self preferencing and practices linked to the use of proprietary standards may structurally distort competition in the sector.

The focus of the inquiry will be to gather market information to understand the nature, prevalence and effects of these potential competition issues, and to assess them in light of the EU antitrust rules.

The sector inquiry will cover products such as wearable devices (e.g. smart watches or fitness trackers) and connected consumer devices used in the smart home context, such as fridges, washing machines, smart TVs, smart speakers and lighting systems. The sector inquiry will also collect information about the services available via smart devices, such as music and video streaming services and about the voice assistants used to access them.

If, after analysing the results, the Commission identified specific competition concerns, it could open case investigations to ensure compliance with EU rules on restrictive business practices and abuse of dominant market positions (Articles 101 and 102 of the Treaty on the Functioning of the European Union - TFEU).

(Press Release 16th July 2020)

EC seeks views of stakeholders for evaluating the Market Definition Notice; European Union

The European Commission ('EC') has published a public consultation to evaluate if the Market Definition Notice used in EU competition law requires any revision in line with the fast changing and increasingly digital world.

The Market Definition Notice is a tool under EU competition rules which provides key information to companies and other stakeholders, helping them to understand the EC's approach on how the market works. It is important for the EC to ensure that the guidance it gives to the companies and stakeholders about the market definition is up to date and sets out a clear and consistent approach.

The current Market Definition Notice used by the EC dates back to 1997 and , therefore, as per the EC, may not address all pertinent questions arising today when defining the relevant product and geographic market.

The information which will be collected through the public consultation will provide part of the evidence to be used in the evaluation of the Market Definition Notice. The EC will also carry out research into best practices in market definition; exchange views with national competition authorities within and outside the EU; and proactively engage with experts and representatives from stakeholder groups.

The EC will also consult with stakeholders from the public and private sector, including undertakings and consumer associations, competition authorities and government bodies, academia, as well as legal and economic practitioners. Respondents will be invited to submit their views and to respond to the open public consultation until 9 October 2020 in any official EU language. The EC aims at publishing the results of the evaluation in 2021.

(Press Release 26th June, 2020)

EC adopts guidance for national courts when handling disclosure of confidential information; European Union

The EC has adopted a Communication on the protection of confidential information, in response to a public consultation launched on 29th July 2019 by European Commission ('EC') inviting comments for the need of guidance concerning the disclosure of confidential information in the form of evidence in proceedings for the private enforcement of EU competition law,

The Antitrust Damages Directive helps citizens and companies in claiming damages if they are victims of infringements of EU antitrust rules. The Antitrust Damages Directive obliges Member States to ensure that national courts have the power to order the disclosure of this evidence, provided that the damages claim is plausible, the evidence requested is relevant and the disclosure request is proportionate. If these conditions are fulfilled, and measures for the protection of confidential information are in place, national courts can order the disclosure of evidence. At the same time, according to the Antitrust Damages Directive, Member States need to ensure that national courts have at their disposal effective measures to protect such confidential information.

As national laws of member states differed largely as regards to access and protection of confidential information, a need for guidance was felt for the national courts to strike the right balance between the claimants' right to access relevant information and the right of a party to protect confidential information. To support national courts in this task, the EC has adopted a Communication seeking to provide practical guidance to national court.

The Communication is not binding for national courts and does not modify or bring about changes to the procedural rules applicable to civil proceedings in the different Member States. ***(Press Release 20th July, 2020)***

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