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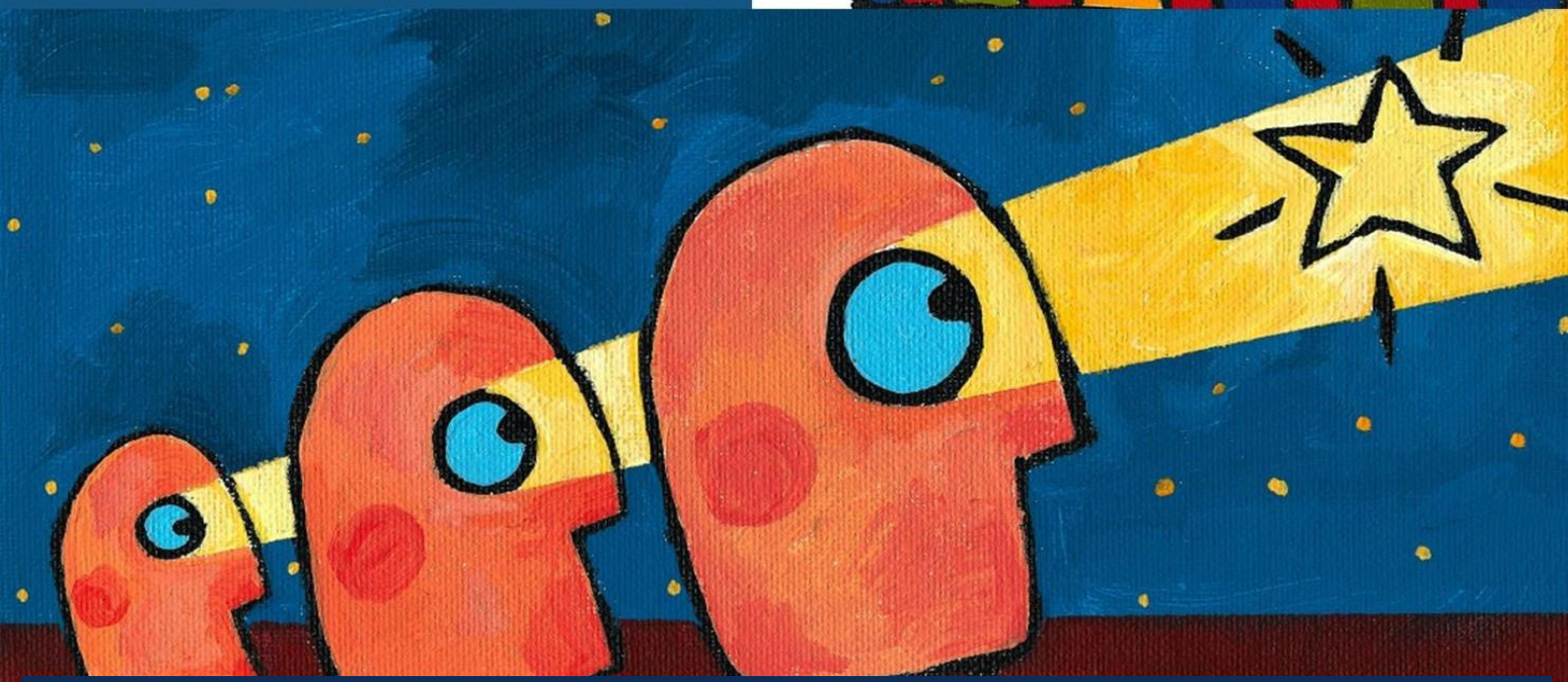
Monthly Newsletter

State of Antitrust

August 2022; Volume 9 Issue 8



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

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CCI Issues a 'Cease and Desist' Order against Trailer Owners Association

The Competition Commission of India **('CCI/Commission')** issued a 'cease and desist' order against the Opposite Parties **('OPs'),** OP-1 to OP-12, all being trailer associations, in a case initiated by the filing of an Information, by the National Association of Container Freight Stations, Chennai Chapter ('**the Informant'**), under section 19(1) of the Competition Act, 2002 **('the Act')** alleging that the OPs had contravened section 3 of the Act.

The members of the Informant are operators of either Inland Container Depots or Container Freight Stations (collectively, **'CFS'**). The CFS is an extended arm of the port that acts as a hub in the logistics chain. It is the point where consignments are cleared for domestic consumption by importers and the export cargo is aggregated, examined and stuffed in containers for exports. The movement of goods from port to CFS for imports and from CFS to port for exports is done through trailers, either CFS's own trailers or through hired trailers. The OPs are various associations under which these trailer owners, trailer drivers, and other personnel are organised.

The Informant alleged that the OPs indulged in conduct that is in violation of section 3 of the Act during their meetings where they: **i)** limited the number of trailers belonging to the members of the Informant that could be plied for moving containers; **ii)** raised the rate for the OPs' trailer services; **iii)** issued letters restricting the Informant's members from increasing their existing fleet; **iv)** stated that they would not cooperate with any export/import delivery transport system if the Informant's members tried to negotiate the price decided by the OPs in the meeting; **v)** conveyed that they would increase the prices by 20% due to increase in prices of diesel, spares, etc.; **vi)** threatened indefinite strike if their demands were not met. The members of the Informant and the Chennai Port Trust also participated during the meetings where the OPs decided to limit the number of the Informant's trailers and fix prices for their services.

The CCI directed the Director General **('DG')** to conduct an investigation under section 26(1) of the Act. The DG's Investigation Report concluded that OP-1 to OP-10 contravened section 3(3)(a) and 3(3)(b), read with section 3(1) of the Act, by fixing prices and controlling the provision of transportation services by the Informant members at the Chennai Port. However, no contravention was found against OP-11 and OP-12.

The OP-2 to OP-10 did not file any objections/suggestions within the time prescribed. Only OP-1 submitted justifications for its conduct: **a)** The increase in price was reasonable as it accounts for the increase in price of fuel, insurance, spares, tyres, repair, labour charges, etc. and the inflation factor; **b)** There were financial considerations on part of the OPs since the CFS were making late payments and entering the transportation business themselves, thereby, side-lining the business of the transport owner association which was their only means of survival; **c)** The decisions to increase price for OPs services and limit the number of trailers belonging to the Informant's members were mutual, and not unilateral, as the Informant's members were actively involved in the meeting when the decisions were taken. Further, the meetings were organised on the premises of the Chennai Port Trust with its knowledge.

Based on the above, the CCI observed that the existence of an agreement is not under challenge as OP-1 has admitted to the meetings. The OP-1 has, rather, tried to justify the meetings by stating that they were mutual. There is ample evidence to ascertain that OP-1 to OP-10 increased prices and imposed certain restrictions through their association meetings. It was noted that there is a presumption that these decisions have resulted in an Appreciable Adverse Effect on Competition **('AAEC')** as per section 3(3) of the Act.

With regard to the justifications put forth by OP-1, the CCI commented that the OPs cannot fix prices and restrict the provision of services under the aegis of the trade association as these are not legitimate activities of a trade association. Financial troubles of the OPs cannot be used to justify a blanket collusive increase in prices. These practices are considered to be of the most pernicious nature and, therefore, raise the presumption that the conduct results in an AAEC. To justify such conduct, the OPs must provide evidence that the conduct resulted in benefits of the nature enlisted under section 19 of the Act. However, the justifications offered by OP-1 do not rebut the presumption in any manner, whatsoever.

Further, the participation of the Informant's members in the meetings of the OPs also does not change the character of the conduct or dilute the responsibility of the OPs. The OPs were threatening the Informant's members with strikes and lock-outs to get them to agree to their demands. The CCI also noted that the Chennai Port only issued passes for the entry of trailers and drivers if they are endorsed by the trailers associations (OPs). Due to this, the members of the Informant would find it very difficult to hire outside trailers and the OPs would also be able to limit the trailers belonging to the members of the Informant. The third justification was also rejected as members of the Informant did not give free consent regarding the demands of the OPs.

The CCI, therefore, concluded that the OPs have not been able to rebut the presumption of AAEC and discharge the burden of proof that shifted to them under section 3(3) of the Act. The OPs were found to be in contravention of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act. Considering the submissions of OP-1, with regard to their financial plight, the OP-1 to OP-10 were directed to 'cease and desist' in respect to their anti-competitive conduct. However, no penalties were imposed on them for the conduct. ***(Order dated 20.07.2022)***

Heard at the BAR

Legal news from India and the world

Amazon Considered to be of Paramount Significance to Competition under German Competition Laws

The competition authority of Germany, Bundestartellamt, declared Amazon.com, Inc. **('Amazon')** to be an undertaking of paramount significance for competition across markets and subjected Amazon and its subsidiaries to the stricter abuse control laws as per section 19a of the German Competition Act, 1958 **('GWB').**

Section 19a was included into the GWB in January 2021 to empower the Bundeskartellamt to effectively tackle anti-competitive practices of large digital corporations through early intervention.

It was noted that Amazon is a key e-commerce player that acts as a seller, marketplace, provides streaming and cloud services, *inter alia*, and combines the range of its services to form a digital ecosystem. It is also one of the largest companies worldwide in terms of revenue. The Bundeskartellamt considered that Amazon's position grants the company power where its actions across markets are not sufficiently checked by market competition.

Amazon's position in the online retail sector allows it to set rules and influence the business activities and success of other companies through its dual role of a seller and a marketplace. Further, its integrated digital ecosystem facilitates retention of users, and the company has considerable sources like a high degree of financial power and access to competitively relevant data.

Considering this, the Bundeskartellamt decided that Amazon is of paramount significance for competition across markets and subjected it to special abuse control rules set out in section 19a(2) of the GWB. This decision is valid for a period of five years.

The President of the Bundeskartellamt stated that, "*We have determined that the company is an undertaking of paramount significance for competition across markets, also within the meaning of competition law. Specifically, this step enables us to intervene and prohibit potential anticompetitive practices of Amazon more effectively. We consider Amazon to be dominant in regard to its marketplace services for third-party sellers. The Bundeskartellamt can therefore also engage in parallel traditional oversight over abuse of dominance, on the basis of which we are already conducting proceedings against Amazon.*"

(Press release dated 06.07.2022)

Pharmaceutical Companies, Pfizer and Flynn, Fined by the CMA for Charging Exorbitant Price for the Lifesaving Anti-Epilepsy Drug

A fine of 70 million Euros has been imposed, by Competition Markets Authority **('CMA')**, on the two major pharmaceutical companies, Pfizer Inc. **('Pfizer')** and Flynn Pharma Limited **('Flynn'),** for abusing their dominant positions in the supply of anti-epilepsy medicine (Phenytoin sodium capsules) in the United Kingdom **('UK')** by charging excessive prices for the drug from the National Health Service **('NHS')**.

The CMA had originally commenced an investigation into the matter in 2016 and had issued an infringement decision against the companies – "*finding that the companies' behaviour broke competition law.*" Pfizer and Flynn challenged this decision in the Competition Appellate Tribunal **('CAT')** and the matter was sent back to the CMA for further consideration. Both, CMA and Flynn, filed an appeal to the Court of Appeal. The Court dismissed Flynn's appeal in 2020, however, upheld certain aspects of the appeal filed by the CMA.

In pursuance of this decision, the CMA decided to re-investigate this matter, after the appeal was disposed 2020. After gathering and analysing new evidence, the CMA noted that the cost incurred by the NHS for this drug increased from 2 million Euros in 2012 to 50 million Euros in 2013. The NHS was forced to pay the inflated prices charged by the two companies due to the importance attached to the medicine as a lifesaving drug. The CMA found that Pfizer and Flynn abused their dominant positions and charged unfairly high prices for the lifesaving anti-epilepsy drug (Phenytoin sodium capsules). The Chief Executive of the CMA stated that, "*Phenytoin is an essential drug relied on daily by thousands of people throughout the UK to prevent life-threatening epileptic seizures. These firms illegally exploited their dominant positions to charge the NHS excessive prices and make more money for themselves – meaning patients and taxpayers lost out.*"

(Press release dated 21.07.2022)

The Planned Acquisition of MBCC Group by Sika AG Raises Competition Concerns: CMA

The CMA, in the UK, after conducting the Phase 1 investigation, was concerned that the acquisition of MBCC Group by Sika AG could potentially result in a Substantial Lessening of Competition **('SLC')** in the market of chemical admixtures in the UK. Sika AG, a speciality chemical company operating across the construction sector and motor vehicle industry, planned on acquiring MBCC Group, another supplier of construction chemicals and solutions, for 4.5 billion Great Britain Pounds **('GBP')**.

Chemical admixtures, an essential input for concrete and cement, improve the strength and controls the setting time of the concrete. They are vital to the construction industry and are important in reducing cost and the environmental impact caused by the production of concrete.

(Continued on the next page)

The CMA was concerned about the acquisition deal since Sika AG and MBCC Group: **i)** are two of the largest suppliers of chemical admixtures in the UK; **ii)** are close competitors; **iii)** are two of the few companies that are capable of product development and innovation as per the customer requirements; **iv)** together, post-acquisition, will account for half of the total supply of admixtures in the UK and; **v)** face limited competition. The Senior Director of Mergers, Colin Raftery, commented that, "*the loss of competition that this deal could bring about could lead to higher prices and poorer quality products for customers, increasing the costs of these projects.*"

The parties are given 5 working days to submit their proposals to address these concerns. If the proposals are not accepted by the CMA, it will refer the deal for an in-depth Phase 2 investigation. ***(Press release dated 27.07.2022)***

Antitrust Lawsuit and Consent Decrees Filed to End Conspiracy to Suppress Worker Pay of the Poultry Growers in the US

The Department of Justice **('DoJ'),** in the United States **('US'),** filed a civil antitrust lawsuit against a data consulting firm, Webber, Meng, Sahl and Company, Inc. **('MWS'),** its president**,** and three poultry processors for violation of the Sherman Act, 1890, alleging a long-running conspiracy to share information with each other regarding the wages and benefits for the workers at the poultry processing plants and collusively decide workers' compensation. The consent decrees between the DoJ and MWS, and the other defendants, were filed along with the lawsuit.

The Antitrust Division of the DoJ stated that the poultry processors have stifled competition and harmed a generation of plant workers through brazenly exchanging wages and benefits information regarding the plant workers.

If the consent decree with MWS proposed by the DoJ, is approved by the Court, MWS will be unable to provide surveys or any service facilitating the sharing of competitively sensitive information in any industry. MWS's President will also be subject to the same prohibition in his individual capacity. For the three poultry processors, the consent decree proposes prohibiting them from sharing competitively sensitive information about the compensation of the poultry processing plant workers. The consent decree also includes a monitoring mechanism to ensure their compliance with the terms of the decree and with the federal antitrust law in the US.

A 60-day comment period is given to the general public after which the Court may pass the final judgement.

(Press release dated 25.07.2022)

Equans' Acquisition by Bouygues Raises Competition Concerns in the UK

The CMA, in the UK, after its Phase 1 investigation, found that the acquisition of Equans S.A.S ('**Equans'**) by Bouygues S.A. ('**Bouygues'**), for 6 billion GBP, raised competition concerns.

Both, Bouygues and Equans, are involved and close competitors in the business of supply of catenary systems for high-speed railways. Catenary systems are overhead power cables that are used to supply electricity to trains.

The CMA noted that the future contracts for installation and maintenance of high speed catenary systems will have a sufficient number of competitors. However, it is concerned about the current, High Speed 2 ('**HS2'**) contract which is at an advanced stage and the merging parties are two of the very few bidders. The CMA is concerned that the acquisition will make the tender process less competitive and lead to a higher cost for the final contract.

The Senior Director of Mergers, Colin Raftery, stated that, "*Competitive tenders help make sure that taxpayers get the best possible deal when large public works, like HS2, are undertaken. The HS2 tender for overhead catenary systems is at an advanced stage, but the remaining bidders are continuing to compete on the final aspects of the contract. It's important to ensure that this process isn't undermined, as this could result in unnecessary additional costs, ultimately leaving taxpayers worse off.*"

The parties to the deal are given a period of 5 days to submit proposals to address the concerns raised by the CMA.

(Press release dated 19.07.2022)

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