



Monthly Newsletter

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CCI penalises Godrej for anti competitive conduct in the Dry-Cell Batteries market

The Competition Commission of India ('Commission' or 'CCI') initiated a suo moto case against three companies viz. Panasonic Corporation, Japan ('Panasonic Japan'), Panasonic Energy India Co. Limited (Panasonic India) and Godrej & Boyce Manufacturing Co. Limited ('Godrej') pursuant to a Leniency Application ('LA') filed by Panasonic Japan for itself and on behalf of Panasonic India and its officials.

In the LA, it was disclosed by Panasonic Japan that there existed a bi-lateral ancillary cartel between Panasonic India and Godrej in the institutional sales of dry cell batteries (hereinafter "DCB") from at least 2012 till November 2014. On the basis of the information and evidences provided in the LA, the Commission formed a *prima facie* opinion of there being a cartelisation between Panasonic India and Godrej in the DCB market and directed the Director General ('DG') to cause an investigation into the matter.

The DG in its investigation found that clause 8.2 of the Product Supply Agreement ('PSA') executed between Panasonic India and Godrej imposed a mutual obligation to not take any steps which were detrimental to the market prices of the DCB and the market interests of both the companies i.e. Panasonic India and Godrej. Further, the DG examined the email communications between the officials of Panasonic India and Godrej, which revealed that the officials of Panasonic India and Godrej exchanged their commercially sensitive pricing strategies to maintain price parity of the DCB in the market. As the information about the cartel was disclosed by Panasonic Japan, therefore, it did not object or dispute the findings and conclusions of the DG. While, on the other hand, Godrej took the plea of being victimised by Panasonic India. Further, Godrej submitted that Panasonic India and itself were in a vertical agreement with each other and they were not 'two independent competitors'. On this, the CCI noted, that as per clause 17 of the PSA, Panasonic India and Godrej had mutually agreed to be in a relationship, which was not a joint venture, partnership or agency and that the Godrej was selling DCB under its own brand name and not as a distributor of Panasonic India. Hence, the distribution arm of Panasonic India was horizontally, and not vertically, related to the Godrej.

With respect to existence of clause 8.2 of the PSA, the Godrej argued that the DG has drawn wrong inference about the said clause, as the same is a general mutual comfort clause and the existence of the clause cannot be taken as violation of the section 3 of the Competition Act, 2002 ('Act'). In response to this submission, the Commission took support from the DG's report, wherein the DG concluded that clause 8.2 of the PSA exhibits the existence of concurrence of intention between Panasonic India and Godrej and was inserted with an object to protect each other's interest. Further, the Commission stated that when the conclusion of the DG's investigation report is read in light with the email communications exchanged between Panasonic India and Godrej, it clearly shows that the said clause was not a dead letter clause but was a deliberate clause inserted, so that Panasonic India and Godrej do not take detrimental steps which may affect the market prices of the DCB.

The CCI after analysing the materials in hand, submissions of the parties and the DG report held that Panasonic India and Godrej have contravened the provisions of Section 3 (3) (a) read with Section 3 (1) of the Act by indulging in cartelisation. While imposing the penalty, the CCI took note of the LA filed by Panasonic Japan for itself and on behalf of Panasonic India and its officials and therefore decided to grant 100% reduction in the penalty resulting in a relief of ₹ 31,75,63,152/- to these parties. With regard to the penalty on Godrej, the CCI kept in mind, the market share and bargaining/negotiating position of the Godrej *vis-à-vis* Panasonic India and the fact that after cessation of cartel with Panasonic India, the Godrej had complained to the Directorate General of Anti-Dumping and Allied Duties about the possibility of a cartel in DCB market vide letter dated 25.11.2015 and hence decided to impose penalty at 4% of the turnover for each year of the continuance of the cartel which amounted to ₹ 85,01,364/-. (**Suo Moto Case No. 03 of 2017**).

MasterCard slapped with €570 million fine for violating EU anti-trust rules

The European Commission ('EC') has fined MasterCard for indulging in an unfair conduct as it limited the possibility for merchants, to take benefit of better conditions offered by banks established elsewhere in the European Economic Area ('EEA' / 'Single Market'). As per the MasterCard's cross-border rules ('Rules'), interchange fees was charged, on the acquiring banks by the issuing bank, whenever a MasterCard is swiped by the card holder or a consumer at a retail store. The interchange fees varied from country to country situated within EEA and were applied on acquiring banks on the basis of the location of the retailer. As a result, retailers in high-interchange fee countries could not benefit from lower interchange fees offered by an acquiring bank located in another member state.

In April, 2013, the EC opened the investigation against MasterCard to assess the Rules. The EC found that because of the Rules, retailers had to pay more for receiving card payments compared to what they would have paid, if they were free to shop around, anywhere in the EEA. The Rules restricted competition between cross border banks and led to rise in prices for the consumers, thereby harming them. Hence, the EC sanctioned the penalty of €570 million on MasterCard. (**Press Release 22.01.2019**)



Heard at the BAR

Legal news from India and the world

Portuguese Competition Authority (AdC) imposes €12 million fine on insurance companies for cartel

The Portuguese Competition Authority ('AdC') has imposed a fine of €12 million on two insurance companies namely Fidelidade - Companhia de Seguros ('Fidelidade') and Multicare – Seguros de Saude ('Multicare') after both the insurance companies acknowledged their involvement in a cartel.

The anticompetitive practices among 5 insurance companies along with their managers and directors, began in 2010 but the investigation by the AdC initiated only after it received a leniency application from the cartel members in May 2017, disclosing the cartel agreement. Following this disclosure, the AdC carried dawn raids in the premises of the companies, in June and July of 2017. The agreement amongst the cartel members was for price fixing and market sharing of insurance contracts purchased by large corporate clients, in the segments of occupational, health and car accident insurances.

On 21st August, 2018, the AdC issued Statement of Objections against all the 5 insurance companies. The Fidelidade and Multicare agreed for settlement, while the proceedings against the remaining 3 insurance companies are ongoing. (*Press Release 28.12.2018*)

Romanian Competition Council penalises 13 tourism agencies for coordinating behaviour

Anonymous information from a whistleblower, led the Romanian Competition Council/Authority ('Competition Council') to uncover coordinated and concerted behaviour among 13 tourism agencies ('Agencies') and the National Associations of Tourism Agencies (NATA) who indulged in anticompetitive practices in the tourism market of Romania. After receiving the information, the Competition Council initiated an investigation and found that, between June, 2013 – September, 2016, the Agencies coordinated their commercial policies by exchanging their competitively

sensitive information with each other. This was done to maintain and fix the prices of tourism products and services in the tourism market.

The Competition Council in the investigation also noted the NATA's anticompetitive conduct of banning those members, who were operating as resellers of tourist packages and tourist services and who were offering discounts to the customers.

The vital facts and evidences of the existence of cartel was provided by Christian'76 Tour S.R.L, a tourism agency, other than the 13 Agencies, in a leniency application. Therefore, it got exempted from the penalty.

After holding the conduct of the 13 Agencies anticompetitive, the Competition Council imposed a fine of 11.419.539.35 Lei (€2.45/- million approx) and 53.304.02 Lei (€11,439/- approx) on the 13 Agencies and on the NATA respectively. A reduction of 20% in penalty was granted to NATA as it admitted its anticompetitive act before the Competition Council. (*Press Release January 2019*).

Romanian Competition Council fines Orange Romania, €14 million for abusing its dominant position

Orange Romania ('Orange'), a subsidiary of French multinational telecommunications company i.e. Orange S.A, has been sanctioned with a fine of 64.915.183 Lei (€14 million approx.) by Romanian Competition Council/Authority ('Competition Council') for abusing its dominant position.

Investigation by the Competition Council revealed that Orange, during the year 2011-2015 indulged in a practice of not granting/limiting the access of its mobile phone network to Simplus Invest SRL ('Simplus') which resulted in denial of infrastructure, without which, the Simplus could not market its products. Orange also blocked the transmission of commercial messages activity to and from Orange's clients, making it difficult for Simplus to operate. Simplus, as an integrator, is a

company which intermediates the transmission of messages through short numbers between certain beneficiary companies and the clients of the mobile phone operators.

The beneficiaries of Simplus wanted to have access to mobile phone network of Orange as Orange had the highest no. of users within the mobile phone market. Therefore, it was indispensable for Simplus to gain access to Orange's mobile phone network.

The Competition Council after the investigation concluded that Orange abused its dominant position by limiting the access to its network and by refusing to open new commercial services for Simplus and thus imposed the fine of €14 million. (*Press Release January 2019*)

UK Competition Authority wary of a tech merger

Competition and Markets Authority ('CMA') is skeptic about the Tobii's 100% acquisition of Smartbox Assistive Technology Ltd. The companies are the industry leaders in augmentative and assistive communication technology.

The CMA has found that the merger may lead to less choice, higher prices and reduced innovation to the customers, since both the companies are each other's main competitors, the merged company, hence, would face little competition. CMA has initiated in-depth investigation in to the matter on not being satisfied with the submissions of the parties. (*Press Release 25.01.2019 and later events*)

**Engineering executive sentenced for 12 months after pleading guilty
of bid-rigging in Gatineau, Canada**

On 17th January 2019, Mr. Dave Boulay, a former Director and Assistant Vice-President of an engineering firm Dessau, has been sentenced for 12 months, which includes first 6 months under house arrest and the remaining 6 months under curfew, after Mr. Boulay pleaded guilty and admitted that he participated in a bid-rigging scheme from 2006 to 2008 for infrastructure contracts for the city of Gatineau.

Following the investigation by Competition Bureau, criminal charges were framed against Mr. Boulay and three other executives of different firms, as they conspired to divide the City of Gatineau for infrastructure contracts, awarded between 2004 and 2008.

As Mr. Boulay was cooperative during the investigation and also had no role in the instigation of the bid rigging scheme therefore leniency was shown by the Court of Québec while passing the sentencing order. (*Press Release 17.01.2019*)

CCI imposes penalty on Chemists and Druggists Association of Baroda again, after considering the case afresh

The Competition Commission of India ('CCI/ Commission') has fined Chemists and Druggists Association of Baroda ('CDAB/ OP') an amount of ₹ 32,724/- for imposing unfair conditions in sale of pharmaceutical products of different companies by mandating the compulsory requirement of NOC, fixation of trade margins and PIS approvals.

The information was filed in the year 2009 by M/s Vedanta Bio Sciences, Baroda ('Informant') before the Director General (Investigation & Registration) of the erstwhile Monopolies and Restrictive Trade Practices Commission ('MRTPC'). However, after enactment of Competition Act, 2002 ('Act'), the case was transferred to the Commission under Section 66(6) of the Act. The Commission undertook a preliminary investigation into the allegation and after forming the *prima facie* opinion, directed the Director General ('DG') to cause investigation into the matter.

The DG in November 2010 submitted his investigation report ('Main investigation report') and concluded that the CDAB issued various circulars and their practices were restrictive and anti-competitive. However, the Commission was of the view that further investigation is required and directed the DG to collect evidence regarding agreement/decision/practice among members of the alleged cartel, data/evidence to show that the alleged cartel led to determination of prices, nexus between All India Organisation of Chemists and Druggists (AIOCD), CDAB and its member in order arrive at a proper conclusion.

The DG in November, 2011 submitted his Supplementary Investigation Report and reiterated the findings of the earlier report, with more conclusive evidence. The Commission in September, 2012 passed a majority order relying upon the DG's report and imposed a penalty of ₹ 53,837 and directed CDAB to cease and desist its anticompetitive practices. The aforesaid order was challenged before the erstwhile Competition Appellate Tribunal (COMPAT/'Appellate Tribunal') and was set aside by the Appellate Tribunal on account of procedural flaw and the violation of principles of natural justice. The COMPAT directed the matter back to the Commission. The matter was taken up by the Commission again in July, 2017. The OP requested for cross examining the witnesses which was allowed by the Commission. The Commission further directed the DG to facilitate cross-examination of the persons and then submit a report on the same. The DG submitted the report and the Commission then went on with the final hearing and heard both the counsels at length; the major point for debate was the interpretation of the word *manjuri* appearing in the circular issued by the CDAB. The counsel for the Informant argued that it signifies NOC whereas the counsel for the OP was of the opinion that it merely signifies permission which is taken by all the pharmaceutical companies voluntarily.

However, the Commission concluded that the facts and the circumstances of this case make it evident that it refers to mandatory permission and is of the nature of a NOC. Thus, the Commission held that the OP indulged in unfair practices and concluded that the CDAB has acted in contravention of Section 3(3) (a) and Section 3(3) (b) of the Act and imposed a penalty of ₹ 32,724 under Section 27 of the Act. (*Case No. C-87/2009/DGIR*)

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