



KK SHARMA  
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# State of Antitrust

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### **NCLAT Upholds CCI's Order Imposing a Penalty of Rs. 873 Crores on AIBA**

The Hon'ble National Company Law Appellate Tribunal ('NCLAT') dismissed the appeal filed, by beer manufacturers and the All India Brewers Association ('AIBA'), against the order of the Competition Commission of India ('Commission'/'CCI') imposing a combined penalty of Rs. 873 Crores for cartelisation in the market for "production, marketing, distribution and sale of beer in India."

The CCI had initiated an inquiry into the alleged cartelisation based on a leniency application filed, under Section 46 of the Competition Act, 2002 ('the Act') r/w Regulation 5 of the CCI (Lesser Penalty) Regulations, 2009, by SABMiller India Limited (now renamed as Anheuser Busch InBev India Ltd.). During the investigation, the other members of the cartel also filed leniency applications. The Commission, based on the leniency applications and the Director General's ('DG') investigation, found that the all beer manufacturers and the AIBA were in violation of 3(3)(a), (b) and (c) r/w 3(1) of the Act. Therefore, the CCI ordered them to 'cease and desist' from the anti-competitive conduct and imposed a combined penalty of Rs. 873 Crores. Further, the Commission granted the benefit of full 100% lesser penalty to SABMiller India Pvt. Ltd. as it was the very first leniency applicant and had provided information regarding the cartelization based on which the Commission had initiated the inquiry.

The NCLAT, in the present case, observed the following: **i)** On the issue of presence of judicial member in CCI's proceedings, referring to Section 8 and 9 of the Act, it was opined that there is no requirement to appoint a judicial member, to be a part of the bench, in a CCI proceeding. There is no mention, under the Act, of the presence of any judicial member in CCI proceedings, which is why it is not a prerequisite for a valid CCI order; **ii)** On the issue of challenging the order on merits, it was held that the appellants had already filed leniency applications before the CCI, which means they had already confessed and admitted to their guilt and involvement in the cartel. Therefore, now they are not justified to challenge that very same order before an appellate authority on merits. The only scope for challenge, in such a scenario, is with respect to the amount of penalty imposed; **iii)** Cartelization is a form of collusion and conspiracy and the investigative authorities can infer the presence and participation of enterprises in a cartel through their conduct, based on different oral and documentary evidences. Whatever information the 1st leniency applicant, in the present matter, has provided has been further substantiated by subsequent leniency applications, as well as the investigation by the DG; **iv)** Filing of a lesser penalty application amounts to admitting to one's guilt as to its involvement in a cartel. Furthermore, granting the benefit of a lesser penalty is the discretionary power that is vested in the CCI, and cannot be claimed as a matter of right; **v)** The CCI has jurisdiction to pass a Section 26(1) order on the basis of a leniency application, so long as such application provides vital disclosures as to the alleged cartelization and cartel participants. Therefore, the CCI was well within its right to initiate a suo moto investigation based on a leniency application; **vi)** The CCI has also been lenient in the present matter, in the imposition of penalties on all the enterprises, and has decided to only impose of 0.5 times of the profit earned in each year of the cartel, or 2% of turnover of each cartel year.

Therefore, based on the above observations, the NCLAT upheld the order of the CCI imposing a combined penalty of Rs.873 Crores and dismissed the appeals.

*(Order dated 23.12.22)*

### **Poultry Deal Raises Competition Concerns: CMA**

The Competition Markets Authority ('CMA'), United Kingdom ('UK'), in its phase 1 investigation found the proposed joint venture between ForFarmers N.V. ('ForFramers') and Boparan Private Office Limited ('Boparan'), the leading manufacturers and suppliers of chicken and poultry feed in the UK, to raise competition concerns in four local areas across East Anglia, North-Western England and North Wales.

The CMA in its investigation concluded that this deal could result in lower quality of poultry feed and increase in prices for the same. Further, the joint venture could unfairly favour Boparan's chicken farming and processing businesses, resulting in less choice for smaller chicken farmers and processors.

The CMA noted that these two players currently face good competition from each other and are competing for customers in the market. However, if this deal is completed the competition in the relevant market would be dead. Further, during the investigation, the CMA received various complaints from poultry farmers and other stake holders regarding the impact this joint venture could have on the prices and quality of poultry feed.

Sorcha O'Carroll, Senior Director of Mergers at the CMA, said: *"Feed is the biggest expense faced by farmers when rearing chicken. With food prices already increasing and the wider cost of living crisis, it is vital that we don't allow a reduction in competition between poultry feed suppliers, which could make this situation worse - both for farmers and shoppers at the check-out"*

The CMA has given both the parties 5 days' time to submit proposals addressing concerns raised by the investigation. However, if the proposals are not submitted, within time, the CMA will start a deeper phase 2 investigation in the deal.

*(Press release dated 21.12.22)*

## Statement of Objections sent by the European Commission to Deutsche Bank and Rabobank

The European Commission ('EC') has sent a statement of objections to the Deutsche Bank AG and Coöperatieve Rabobank U.A. ('Rabobank') alleging their involvement in a trade cartel during the trade of Euro-Denominated bonds in the secondary market.

A 'Statement of Objections' is an official step in EC investigation into suspected violations of European Union's ('EU') antitrust rules. Primary market is where the bonds are directly put for sale through auctions or syndicates and when such bonds are traded between banks, broker, investors etc. it is referred as the Secondary market.

The EC in its preliminary opinion said that, the two banks have breached EU antitrust rules by colluding with each other while trading Euro-Denominated Sovereign, Covered and Government Guaranteed bonds. The EC stated that it had concerns on this issue for a long time and that *"between 2005 and 2016 the two banks, through some of their traders, exchanged commercially sensitive information and coordinated their pricing and trading strategies, while trading the bonds in the secondary market in European Economic Area ('EEA')"*. The EC is of the opinion that the exchange of sensitive information could have been possibly through emails and online chat rooms.

If the EC's preliminary view is confirmed, it would prove that the actions of these two banks, such as collusion of prices and other anti-competitive trade practices, would be in violation of Article 101 on anti-competitive agreements of the Treaty of the Functioning of the European Union ('TFEU').

Moreover, the EC earlier was open to explore the option of settlement but discontinued the idea, due to lack of progress during the settlement procedure, and decided to go back to the normal antitrust procedure.

[\(Press Release dated 06.12.22\)](#)

## European Commission Approves Commitments made by Amazon on use of Non-Public Seller Data, Buy Box and Prime Programme

The EC has accepted the commitments made by Amazon.com, Inc. ('Amazon') for the concerns raised in the investigation started against Amazon in July 2019 and November 2020. The first investigation mainly focused on the use of non-public seller data by Amazon and the second investigation was opened *"to assess whether the criteria that Amazon sets to select the winner of the Buy Box and to enable sellers to offer products under its Prime Programme, lead to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery services."*

The EC in the statement of objection of the first investigation observed that Amazon abused its dominance, in the French, German and Spanish markets, for the provision of online marketplace services to third-party sellers. Further, in the second investigation, the EC concluded that the criteria set by Amazon's rules and criterion in relation to Buy Box and Prime Programme leads to preferential treatment in their retail business.

The Amazon, to address the aforesaid issues, initially committed the following changes: **a)** For the issue on data use, it proposed to stop using non-public data of independent sellers for the purposes of their own retail business, selling branded products and selling private label products; **b)** For the Buy Box issue, Amazon committed to treat all sellers equally, while selecting Buy Box winner, and displaying a competing second offer to the consumers; **c)** For addressing the Prime concerns, it proposed to allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate the terms directly with the carrier of their choice. Further, that Amazon will not use the information obtained through Prime about third party carriers for its own delivery and logistics services.



## Heard at the BAR

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The EC consulted all third parties on these commitments to know if these commitments will remove the competition concerns. Amazon, in view of the outcome of this market test, amended the initial proposal on various aspects and, *inter alia*, committed to: **i)** Improve the way in which the second competing Buy Box offer is presented; **ii)** Enhance the transparency and flow of information to sellers about the commitments made by Amazon and the rights acquired by the sellers as a result of it; **iii)** Provide the means to independent carriers to contact customers of Amazon directly; **iv)** Introduce a centralized complaint mechanism available for both sellers and carriers to report non compliance of commitments; **v)** Increased the duration of commitments to seven years.

The EC is of the opinion that these commitments would remedy the issues raised in the investigations of 2019 and 2020 and made them legally binding. Further, the EC has also decided that all of these commitments will be binding in all places that can be Amazon's future market place in the European Economic Area.

In case of breach of the said commitments, by Amazon, the EC *"could impose a fine of up to 10% of Amazon's total annual turnover, without having to find an infringement of EU antitrust rules or a periodic penalty payment of 5% per day of Amazon's daily turnover for every day of non-compliance."*

[\(Press Release dated 20.12.22\)](#)

### **FTC and MasterCard reach Settlement to Stop MasterCard's Anti-Competitive Conduct**

The Federal Trade Commission ('FTC') is putting a stop to the illegal business tactics that the MasterCard Incorporation ('MasterCard') has been using to force merchants to route debit card payments through its payment network. The FTC is forcing MasterCard to stop blocking the use of other competing debit payment networks.

This matter was brought to the FTC by a complaint alleging that *"MasterCard's token policy for card-not-present e-wallet transactions inhibits merchants' ability to route debit transactions for processing over any available payment card network in violation of the Durbin Amendment and Regulation II. MasterCard's policy does not allow card-not-present transactions using e-wallet tokens (i.e., debit cards) to be routed to competing debit networks. A merchant thus has only one option: MasterCard's network. MasterCard's policy thereby inhibits the merchant's ability to direct the routing of card-not-present transactions using e-wallet tokens over the available network of its choosing"*

The FTC also believed that MasterCard's activities are anti-competitive and started an investigation in furtherance of this complaint. Thereafter, a settlement cum consent order was agreed upon between MasterCard and the FTC.

The consent order, agreed between the parties, was duly accepted by the FTC without any admission of guilt by the MasterCard. The terms of the consent order prohibited the MasterCard from routing payment to the Payment Card Network through the Debit card without a Primary Account Number ('PAN') and further stipulated the same for e-commerce as well. Further, the FTC prohibited MasterCard from preventing any person's effort to serve as a token service provider for MasterCard's debit cards.

It further ordered that *"MasterCard shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any Person that accepts or honors debit cards for payments to direct the routing of Electronic Debit Transactions for processing over any Payment Card Network that may process such transactions."*

The terms of the consent order also mandated publication of the consent order within 60 days of the order through the MasterCard's bulletin. Moreover, the FTC ordered MasterCard for filing of written compliance reports. It mandated that an interim compliance report be filed within 60 days after this order is passed and thereafter file a report every 3 months in the first year. It further ordered for filing annual compliance reports every year for the next 9 years. MasterCard also has to notify the FTC of any merger, dissolutions, acquisitions or consolidation of the MasterCard or its subsidiaries. Finally it stated that this order shall terminate after 10 years from the date on which it was issued.

[\(Press release dated 23.12.22\)](#)

### **EC sends Statement of Objections to Meta for Abuse of Dominance**

The EC, after its preliminary investigation, has issued statement of objections against Meta Inc. ('Meta') for breach of EU antitrust rules in the market for *"online classified ads"*. The EC's main concerns are that: **a)** Meta is tying its online classified ads service, Facebook Marketplace, to its personal social network, Facebook; **b)** Meta is imposing unfair trading conditions on Facebook Marketplace's competitors.

The EC in its preliminary investigation found the following: **i)** that Meta is a dominant player in markets for 'personal social networks' and 'online display advertising on social media' all across Europe; **ii)** the tying of Facebook Marketplace with its dominant personal social network Facebook Meta may foreclose the competition as it gives Facebook Marketplace a substantial distribution advantage that the competitors cannot match; **iii)** that the use of ads-related data derived from competitors for the benefit of Facebook Marketplace, are unjustified, disproportionate and not necessary for the provision of online display advertising services on Meta's platforms.

If the EC's preliminary view is confirmed, it would be in violation of Article 102 on abuse of dominant market position of the TFEU.

[\(Press release dated 19.12.2022\)](#)

### **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**



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