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Monthly Newsletter

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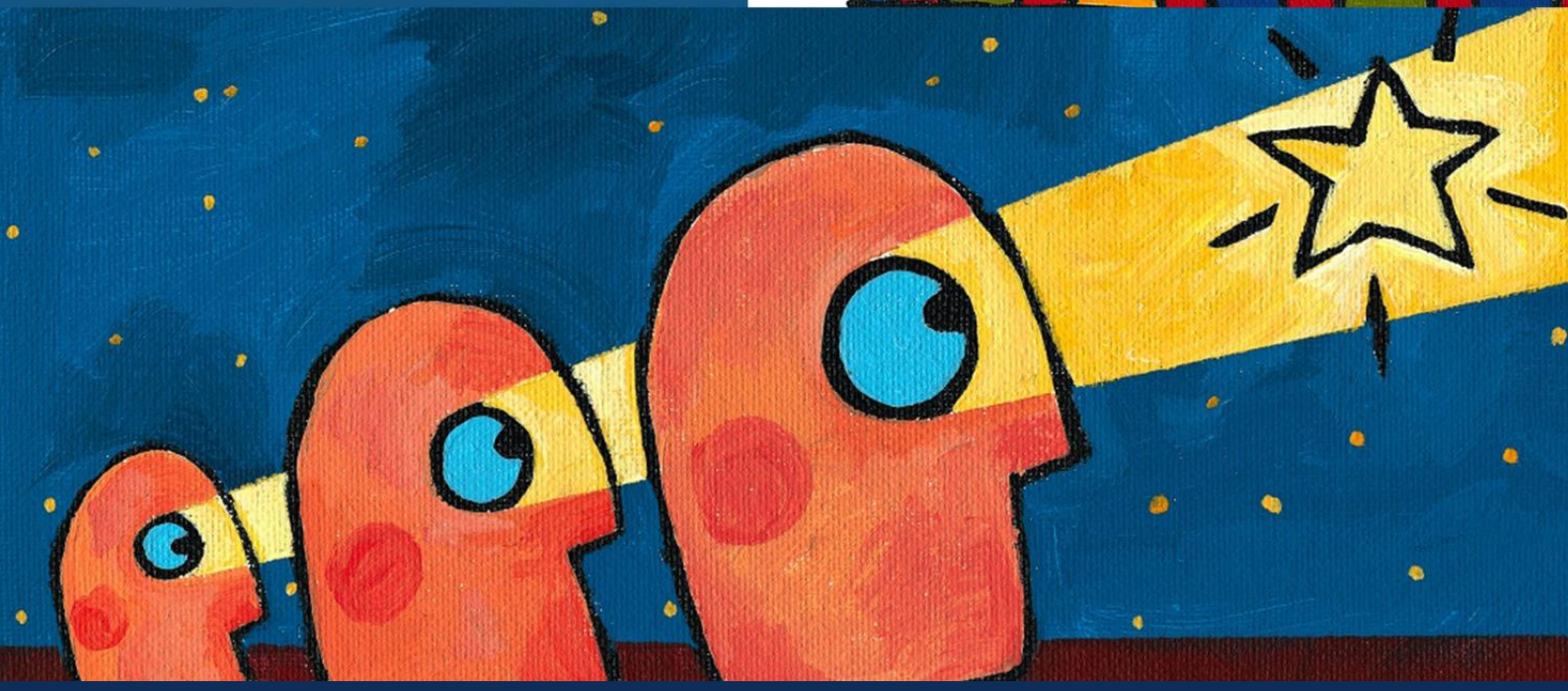

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AND MORE...

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CCI uncovers a cartel in domestic industrial and automotive bearings market

It was a leniency application, which resulted in a *suo-moto* action by the Competition Commission of India ('CCI') against ABC Bearings Limited (now amalgamated with Timken India Limited) ('Timken'), National Engineering Industries Ltd. ('NEI'), SKF India Ltd. ('SKF'), Schaeffler India Ltd. ('Leniency Applicant'/ 'Schaeffler') and Tata Steel Ltd., Bearing Division ('Tata Bearing'), for cartelising the domestic industrial and automotive bearings market in India.

The leniency application disclosed that, from 2009 onwards, there were co-ordinated actions amongst abovenamed companies to pass on the increase in steel prices to the automotive and industrial Original Equipment Manufacturer ('OEM') customers and in the distribution segment of the market. The OPs co-ordinated their actions by simultaneously sending out price increase letters to the OEMs and distributors in the aftermarket, specifying the percentage increase in steel prices along with a request to increase the existing supply prices. The CCI, on the basis of the disclosures made in the leniency application, directed the Director General ('DG') for causing an investigation into the matter.

The DG in its investigation found that the representatives of four companies namely NEI, Schaeffler, SKF and Tata Bearing (collectively 'OPs') attended two meetings in Delhi on 03.11.2009 and 31.01.2011, in which pricing strategies to be adopted for seeking price increase from the Industrial and Automotive OEMs and from the distributors, in the aftermarket, were discussed. Further, the DG found evidences of communications between the competitors from their Call Detail Records ('CDRs'). However, no evidence of cartelisation was found against Timken by the DG.

The DG in its investigation report stated that there was no indication of any actual concerted price increase and the price revisions by OPs did not show the prices of bearings, sold by OPs to the OEMs, moved in tandem with each other. However, as per the DG, it was highly unlikely that the conduct of OPs would not have resulted in appreciable adverse effects on competition ('AAEC') as OPs were controlling nearly 3/4th of the market and shared confidential information with a clear intent to achieve higher than competitive price of bearings sold by them to the OEMs. Hence, the DG concluded cartelisation amongst OPs and its 11 officials.

OPs challenged the DG report and argued that there were several methodological, procedural, analytical inconsistencies in the DG Report and the investigation was arbitrarily conducted by the DG in gross violation of the principles of natural justice. The CCI negated such claims of OPs for being without any merit.

Thereafter, the CCI on the basis of investigation report, the objections and suggestions to the DG Report, the written submissions of the parties and the material available on record, proceeded to ascertain whether meetings between OPs actually took place. If yes, whether price sensitive information was exchanged and anti-competitive decisions were reached by OPs.

The CCI examined e-mail trails which were disclosed in the leniency application that reflected that 2 meetings between OPs took place on different dates i.e. 03.11.2009 and 31.01.2011. The CCI observed that the officials of OPs who were confronted with the details of the emails either admitted to have attended/participated in the meetings or did not categorically refute about attending the meetings and some answered evasively. The emails conversation between OPs also established that the prices were indeed fixed and approved by OPs.

On the basis of the statements of the officials of OPs made before the DG, the CCI held that OPs attended the meetings and discussed the pricing strategies to be adopted for seeking price increase from the Industrial and Automotive OEMs and reached to an anti-competitive agreement. The CCI held that the conduct of OPs was in violation of Section 3(3)(a) of the Act.

Thus, the CCI directed OPs and their respective officials to 'cease and desist' from indulging in practices which in the present order have been found to be in contravention of the provisions of Section 3 of the Act.

Regarding penalty, the CCI opined that ends of justice would meet if the parties cease such cartel behaviour and desist from indulging in it in the future.

(Suo Motu Case No. 05 of 2017)

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Heard at the BAR

Legal news from India and the world

European Commission is consulting stakeholders for a new competition tool

The European Commission (Commission) is exploring a new competition tool to address structural competition problems in the market of digital platforms.

The Executive Vice-President Margrethe Vestager in this regard has said "*The world is changing fast and it is important that the competition rules are fit for that change. Our rules have an inbuilt flexibility which allows us to deal with a broad range of anti-competitive conduct across markets. We see, however, that there are certain structural risks for competition, such as tipping markets, which are not addressed by the current rules. We are seeking the views of stakeholders to explore the need for a possible new competition tool that would allow addressing such structural competition problems, in a timely and effective manner ensuring fair and competitive markets across the economy.*"

The Commission stated that the experience gained from enforcing the EU competition rules in digital and other markets helped the Commission in identifying certain structural competition problems that the current rules were inadequate to address in the most effective manner.

The Commission has invited views from the public and private sector, competition authorities, government bodies, academia, as well as legal and economic practitioners for the same.

The new tool will allow the Commission to impose behavioral and structural remedies in case there are structural competition problems in a market.

(*Press Release 2nd June, 2020*)

Commerce Commission fines Pharmacy and its director for engaging in price fixing arrangements; New Zealand

The Commerce Commission has imposed a fine of $344,000 and $50,000 on Prices Pharmacy 2011 Limited and its director respectively, for engaging in price fixing arrangement with competing pharmacies in the Nelson region from May 2016 to June 2016.

The anti-competitive arrangement arose during a meeting between the pharmacy owners based in Nelson region.

The price fixing resulted in substantial lessening of competition in the Nelson pharmacy market. As a result of the arrangement, the consumers had to pay $6, instead of $5 for their prescribed items.

The Commerce Commission stated that the competition between pharmacies was important as even a modest increase in patient charges could lead to some patients not collecting all or some of the medicines, which in return may put pressure on other aspects of health system such as hospitals.

The Commerce Commission believes that the penalty imposed in this case would send a timely reminder to all the health professionals of their obligations under the Commerce Act and the risks of discussing prices with their competitors.

(Press Release 8th June, 2020)

European Commission initiates a probe against Apple

A formal antitrust investigation has been opened against Apple by the European Commission ('Commission') to assess whether Apple's alleged refusal of access to Apple Pay, *inter alia*, violates the EU competition rules or not.

Apple Pay is Apple's proprietary mobile payments on iPhones and iPads, used to enable payments in merchant apps and website as well as in physical stores.

From the preliminary investigation, the Commission observed that Apple's terms, conditions and other measures related to the integration of Apple Pay for the purchase of goods and services on merchant apps and websites on iOS/iPadOS devices may distort competition and reduce choice and innovation. The Commission will investigate the possible impact of Apple's practices on competition in providing mobile payments solutions. Apple Pay is the only mobile payment solution that access the NFC "tap and go" technology embedded on iOS mobile devices for payments in stores.

If proven, the practices under investigation may breach Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

(Press Release 16th June 2020)

CMA busts a cartel of two UK roofing lead firms; United Kingdom

Following the investigation by Competition and Market Authority (CMA), two biggest players in the rolled lead market have admitted to be a part of a cartel which took place between October 2015 and March 2017.

The two firms entered into arrangements which included market sharing, price collusion and exchange of commercially sensitive information.

The firms have agreed to pay a total of £11 million as fines.

A third company is also under investigation in relation to one of the arrangements and has not made any admissions yet.

(Press Release 12th June, 2020)

Google's acquisition of Fitbit under ACCC Lens; Australia

On 18.06.2020, Australian Competition & Consumer Commission ('ACCC') expressed preliminary concerns with respect to Google's acquisition of Fitbit. Fitbit is a company that makes health and fitness wearable devices that collects user data such as users' daily step counts, heart rate and sleep data. The ACCC is concerned that Google's access to consumer health data will allow Google to build an even more comprehensive set of user data. This may raise entry barriers, further entrench Google's dominant position and adversely affect competition in several digital advertising and health markets. Thus, ACCC decided to thoroughly investigate the deal in order to examine any potential hindrance in the future competition. ***(Press Release 18th June 2020)***

NCLAT dismisses the appeal challenging CCI's order closing the case against Uber and Ola; India

The National Company Law Appellate Tribunal (NCLAT) has dismissed the appeal seeking probe against Uber and Ola, collectively referred to as 'Cab Aggregators', observing that the opinion of the Commission could not be faulted on any ground as there existed no *prima facie* case warranting investigation by the Director General (DG).

The Informant/Appellant filed the Appeal on being aggrieved by the following facts that the Commission, without seeking replies from the Cab Aggregators, concluded that the pricing model of Cab Aggregators was genuine and legal, the Commission erred in holding that there was no agreement amongst the drivers to fix prices by way of the acting as a hub and lastly, the Commission was not justified in ignoring the fact that Uber's business model was under investigation with identical allegations in USA.

Before examining the allegations on merit, the NCLAT deemed it fit to determine whether the Informant/Appellant had the *locus standi* in the present case. While interpreting the provisions of Section 19 of the Competition Act, 2002 (Act), the NCLAT held that reference to receipt of any information from any person in section 19(1) (a) of the Act was necessarily to be construed as a reference to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices. Any other interpretation would make room for unscrupulous people to rake issues of anti-competitive agreements or abuse of dominant position targeting some enterprises with oblique motives. On the basis of this reasoning, the NCLAT held that the Informant/Appellant had no *locus standi* in the present case. However, the NCLAT still proceeded to examine the case on merits.

With regard to pricing model of the Cab Aggregators, the NCLAT opined that the driver partners had the liberty to negotiate a lower fare and the fare charged by the Cab Aggregators was only recommendatory. Further, the NCLAT stated that the concept of hub and spoke cartel alleged to be applicable to the business model of Ola and Uber with their platforms acting as a hub for collusion *inter se* the spokes i.e. drivers has no application in the present case as the business model of Ola and Uber (as it operates in India) does not manifest in restricting price competition among drivers to the detriment of its riders. Further, the NCLAT stated that US Class Action Suit titled *"Spencer Meyer v. Travis Kalanick"* was related to a foreign antitrust jurisdiction with different connotation and could not be imported to operate within the ambit and scope of the mechanism dealing with redressal of competition concerns under the Act.

On the basis of above, the NCLAT held that there was no substance in the allegations emanating from the Informant/Appellant and there was no legal infirmity in the order of the Commission closing the case. Consequently, Appeal filed by the Informant/Appellant was dismissed.

(Competition Appeal (AT) No.11 OF 2019 dated 29th May, 2020)

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