



# State of Antitrust

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

- CCI closes a case of cartelisation in the airlines sector of India

## HEARD AT THE BAR

- ACCC concludes investigation into global cartel of 3 shipping companies; Australia
- Pre-merger notification threshold decreased from \$96M to \$93M by the Competition Bureau; Canada

- CMA asks viagogo to divest StubHub's international business over competition concerns; U.K

## BETWEEN THE LINES

- A price-fixing cartel among the hotel groups detected; Hong Kong

AND MORE...

### **CCI closes a case of cartelisation in the airlines sector of India**

The Competition Commission of India (the 'Commission') has recently closed a case of alleged cartelisation in the airlines sector. The investigation began when a letter requesting examination of the airline companies for evidence of cartelisation was received from Lok Sabha Secretariat by the Commission.

In response to the said letter, the Commission sought information relating to four major routes *viz. Delhi-Bombay-Delhi, Delhi-Bangalore-Delhi, Delhi-Hyderabad-Delhi and Delhi-Pune-Delhi* from various airlines and Directorate General of Civil Aviation (DGCA). The information collected by the Commission included costs of operations, flights operations and number of passengers carried throughout the year on these four routes from April 2012 to March 2014 ('sample reference period').

On the basis of the information collected, the Commission found that airlines were maintaining some degree of stability in their market shares during the sample reference period. The Commission also observed that, despite differences in base fares and airlines fuel surcharge, the end fares charged by all the airlines for tickets, were almost similar. These observations of the Commission indicated that the airlines *viz. Jet Airways* (including Jet Lite), *Indigo, Spice Jet, Go Air and Air India* were exhibiting characteristics of anti-competitive conduct contravening provisions of Section 3(1) of the Competition Act, 2002 (the 'Competition Act').

On 26<sup>th</sup> March, 2015, the Commission directed the Director General (the 'DG') to cause investigation into the matter.

For examining the market share of the airlines under investigation, the DG collected the relevant data regarding number of passengers travelled on each of the four major routes, every month, from April 2010 to March 2016. From this data, the DG analysed monthly and annual market share of the airlines under investigation on four major routes. The DG found that there were significant variations in the market shares and market positions of airlines during 2010-2016 and the market shares did not show any kind of stability or parallelism.

With respect to pricing of tickets, the DG found that airlines were following a dynamic pricing mechanism by using software such as 'Navitaire' and 'airRM' *etc.* These software were used by the airlines under investigation to update the airfares dynamically by taking into consideration factors such as prevailing/ expected demand conditions, actual booking, price of competitors, seasonality *etc.*

Because the DG did not analyse the algorithms running into these software, the Commission directed the DG to cause further investigation into few other aspects such as dynamic pricing, role of algorithms in the software used by the airlines and the impact of capacity on pricing of ticket.

Consequently, the DG examined the algorithms employed in the software used by the airlines and found that the algorithm as well as the final price of the ticket was determined by the personnel working in the revenue management team of each airline.

The airline revenue management team used to provide the parameters/factors to the software company who used to design/ programme the algorithms to suggest/predict the ticket prices. These software were not programmed to include any unforeseen event that might affect the demand and competition. Also, certain events like IPL matches, some international conferences, cultural events *etc.* have to be taken into account for determination of ticket price. The role of the software was limited to the extent of helping the revenue management team to arrive at a price that will optimize revenue.

The Commission, after perusing the DG report, agreed with the investigation report of the DG and passed the order under section 26(6) of the Competition Act closing the case against the airlines under investigation.

This is not the first time that the Commission has examined the violations of provisions of the Competition Act in the airlines sector. Previously, the Commission not only inquired into but also had fined Jet Airways, IndiGo Airlines & SpiceJet a ₹39.81, ₹9.45 & ₹5.10 crores respectively for colluding to fix the rate of 'Fuel Surcharge' which had the effect on final price of cargo rates. Initially, on the earlier occasion, the penalty imposed on Jet Airways, IndiGo Airlines & SpiceJet was ₹151.69, ₹63.74 & ₹42.48 Crores respectively. The airlines challenged the order before Competition Appellate Tribunal which remanded back the case to the Commission because of procedural defects. In the meanwhile, the Supreme Court of India passed an order in the case of *Excel Crop Care Limited v. Competition Commission of India & Another* (2017) 8 SCC 47 concurring with the concept of 'relevant turnover' for the purpose of imposition of penalty under the Competition Act. Subsequently, the Commission re-examined the case and reaffirmed its decision of contravention of provisions of the Competition Act by Jet Airways, IndiGo Airlines & SpiceJet. However, this time, while determining the penalty, the Commission considered the relevant turnover of the airlines and reduced the penalties from ₹151.69, ₹63.74 & ₹42.48 Crores to ₹39.81, ₹9.45 & ₹5.10 crores on Jet Airways, IndiGo Airlines & SpiceJet, respectively. (*Case No. 30 of 2013 and Suo Moto 03 of 2015*)



## **ACCC concludes investigation into global cartel of 3 shipping companies; Australia**

A fine of \$24 million on Wallenius Wilhelmsen Ocean AS (WWO), a Norwegian-based global shipping company, has been imposed by the Federal Court of Australia for engaging in a global cartel with the other international shipping companies.

The cartel between these shipping companies operated in relation to the transportation of vehicles such as cars, trucks and buses to Australia between June 2011 and July 2012.

WWO along with two other shipping companies namely Nippon Yusen Kabushiki Kaisha (NYK) and K-Line allocated major vehicle manufacturing customers between themselves including on certain shipping routes to Australia.

The Federal Court found that the practice of allocation of customers had the capacity to limit or distort the competitive setting of freight rates and was likely or at least had the potential to impact on the prices paid by Australian consumers.

The fine of \$24 million on Wallenius Wilhelmsen Ocean AS marks the end of an extensive investigation by the Australian Competition & Consumer Commission (ACCC) into an international cartel involving several international shipping companies in relation to the shipping of vehicles to Australia from Asia, Europe and the US on behalf of major car manufacturers.

In relation to this cartel, the Federal Court had already imposed fines amounting to \$25M and \$34.5M on NYK and K-Line in 2017 and 2019, respectively.

*(Press Release 5<sup>th</sup> February 2021)*

## **Pre-merger notification threshold decreased from \$96M to \$93M by the Competition Bureau; Canada**

Perhaps, as a COVID response, the Canadian Competition Bureau has announced that the pre-merger notification threshold relating to transaction-size for the year 2021 will decrease to \$93M from \$96M in 2020.

Under the Competition Act of

In Canada, mergers of all sizes and all sectors of the economy are subject to review by the Commissioner of Competition.

But in cases where the target's assets in Canada or revenues from sales in or from Canada generated from those assets exceed \$93(earlier 96) million, and when the combined Canadian assets or revenues of the parties and their respective affiliates in, from or into Canada exceed \$400 million then, the parties to the transaction must give advance notice to the Competition Bureau about the proposed transactions.

*(Press Release on February 11, 2021)*

## **CMA asks viagogo to divest StubHub's international business over competition concerns; U.K**

In the month of February 2020, an online platform viz. Viagogo acquired another online platform viz. StubHub which raised eyebrows of the Competition and Market Authority ('CMA') over competition concerns.

Both of these online platforms were engaged in providing secondary ticketing marketplace to consumers for sale of tickets of various live sport, music and entertainment events.

The CMA was concerned that the merger between two global online platforms might lead to a substantial reduction in competition in the secondary ticketing market in the UK.

As a result, the CMA initiated an in-depth investigation and collected evidence from customers, competitors and other stakeholders, including consumer groups.

The evidence showed that before merger viagogo and StubHub were the number 1 and number 2 players in the UK and also competing closely with each other in the UK's secondary ticketing market.

Whereas, after acquisition, the combined market share of the merged entity was more than 90% in the UK. The CMA was of the view that the acquisition could lead to customers paying higher fees or poorer service in future.



# **Heard at the BAR**

*Legal news from India and the world*

To address this concern, the CMA has asked viagogo to sell StubHub's business outside North America. This means that StubHub international business – including in the UK – will be independently owned and run by a separate company, with no input from viagogo.

As per the CMA, by creating a fully independent StubHub international business, competition in the UK will be maintained. This will also ensure that the users of these ticketing platforms would not face higher prices or poorer quality of service.

*(Press Release 2<sup>nd</sup> February 2021)*

## **CCI conducts a Market Study on the Pharmaceutical Sector in India; India**

Recently, the Competition Commission of India has undertaken a 'Market Study on the Pharmaceutical Sector in India' with an objective to assess the level of competition in the pharmaceutical sector. The Commission has decided to consult various stakeholders from the sector comprising pharmaceutical companies, stockists, chemists, trade associations, doctors, sector experts and regulators.

Such consultations will enable the Commission to have a holistic look into the issues influencing competition in the pharmaceutical market in India.

*(Press Release dated 19.02.2021)*

## **The European Commission opens formal investigation into possible trade restrictions by Mondelēz; European Union**

As a part of its ‘own-initiative investigation’ of suspected anti-competitive practices covering the EU, the European Commission (the ‘Commission’) carried out unannounced inspections at the premises of Mondelēz in November 2019. Thereafter, the Commission published a study on *territorial supply constraints in retail sector* in the EU, which suggested that certain suppliers implemented a number of practices that restricted the parallel trade of groceries, to the disadvantage of European consumers.

Now, the Commission has opened a formal antitrust investigation against Mondelēz to assess whether it restricted competition in a range of national markets for chocolate, biscuits and coffee by hindering the cross-border trade of these products between EU Member States, which would be in breach of EU antitrust rules.

Mondelēz is one of the largest producers of chocolate, biscuits and coffee in the European Union. The markets for the sales of these products are worth tens of billions of Euros every year.

The Commission is concerned that Mondelēz may have restricted the so-called ‘parallel trade’ of its chocolates, biscuits and coffee between EU Member States through agreements and unilateral practices.

The Commission will now carry out its in-depth investigation as a matter of priority. The Commission has informed Mondelēz and the competition authorities of the Member States concerned that it has opened proceedings in this case. The opening of a formal investigation does not prejudice its outcome.

*(Press Release 28<sup>th</sup> January 2021)*

## **A price-fixing cartel among the hotel groups detected; Hong Kong**

The Hong Kong Competition Commission (the ‘HK Commission’) has issued infringement notices to seven entities, including six hotel groups and a tour counter operator for facilitating a cartel arrangement between two competing travel service providers, namely *Gray Line Tours of Hong Kong Limited* (Gray Line) and *Tink Labs Limited* (Tink Labs), to fix and/or control prices of tourist attractions and transportation tickets sold at the premises of certain hotels in Hong Kong.

The HK Commission found in its investigation that between March 2016 and May 2017, Gray Line and Tink Labs agreed to fix the prices at which tourist attractions and transportation tickets were sold at various hotels in Hong Kong, including those operated by the six hotel groups. These six hotel groups acted as facilitators by passing on pricing information between Gray Line and Tink Labs.

The HK Commission had a reasonable cause to believe that the above arrangement among the hotel groups and tour operator had the object of harming competition in Hong Kong. Even the parties in the infringement notices admitted that they had contravened First Conduct Rule of the HK Competition Ordinance and committed to take concrete measures to effectively enhance competition compliance within their respective businesses.

This is the first time the HK Commission had pursued the facilitators of cartel conduct, driving home the message that not only cartelists, but third parties who facilitate anti-competitive conduct between competing businesses may also be subject to the HK Commission’s enforcement action.

*(Press Release 17<sup>th</sup> February, 2021)*

### **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



4<sup>th</sup> Floor, Sishan House,  
119, ShahpurJat,  
New Delhi – 110049  
India

+91-11-41081137  
+91-11-49053075

www.kkslawoffices.com  
globalhq@kkslawoffices.com  
operations@kkslawoffices.com  
legal@kkslawoffices.com