

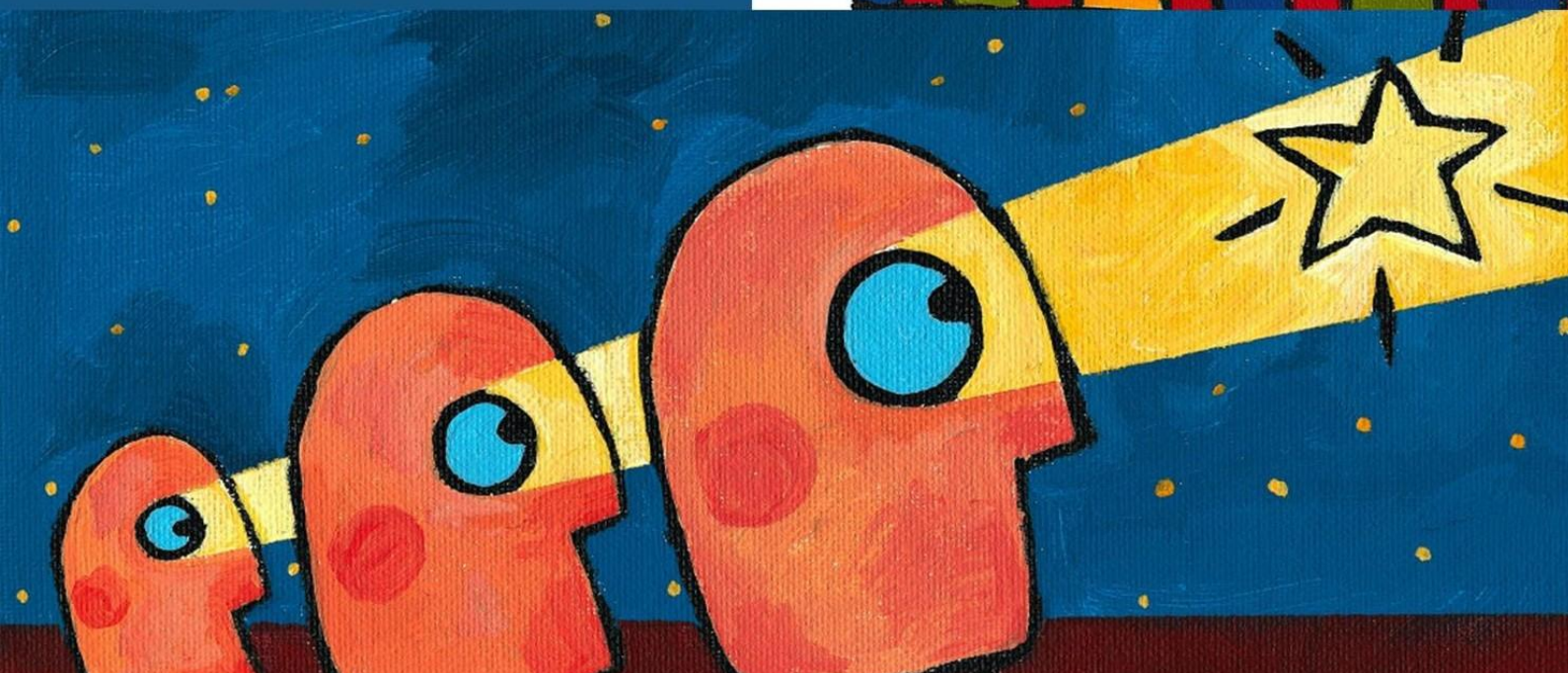


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Monthly Newsletter

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CCI Issues Cease & Desist Order to Truck Union for Anti-Competitive Conduct

An information, under Section 19(1)(a) of the Competition Act, 2002 (**'the Act'**), was filed before the Competition Commission of India (**'CCI'**/ **'Commission'**) alleging contravention of the provision of Section 3 and Section 4 of the Act by Dumper and Dumper Truck Union Lime Stone (**'OP-1'**) and All Members of Dumper and Dumper Truck Union Lime Stone (**'OP-2'**), (collectively referred to as **'Opposite Parties'**/ **'OPs'**).

The CJ Darcl Logistics Ltd. (**'Informant'**) participated in the tender floated by JSW Energy (Barmer) Limited (**'JSW'**) for the transportation of limestone from Sanu Mines, Jaisalmer, to the plant site of JSW at Bhadresh. Thereafter, the Informant was awarded the transportation contract by JSW @ Rs.460/MT with Rs. 15,18,48,000/- as an estimated consideration. In the area of Sanu Mines, Jaisalmer, Rajasthan, the OP-1 is the only union of truckers and transporters. The Informant submitted that: (a) The OPs do not allow any other transporter or logistics company to ply their vehicles. (b) The OPs also make it mandatory to take drivers and vehicles from them, and that too, at a higher rate of @ Rs. 500/MT. (c) The OPs caused hindrances by not allowing the Informant's vehicles to execute the work, and even threatened their drivers and personnel with bodily harm in case they tried to execute the contract. After some time, in absence of any help from state authorities regarding the unlawful behaviour of the OPs, and due to the fear of termination of contract with JSW, the Informant entered into an interim agreement with the OPs for providing transportation services at the rate of Rs. 500/MT.

On the basis of the above, the Informant alleged that: (a) The acts of OPs to not allow the Informant to carry out its contractual obligations, through its own vehicles at a lesser rate than those offered by OPs, are in contravention of Section 3(3)(b) r/w Section 3(1) of the Act; and (b) The fixing of arbitrary rates for the transportation of goods by the OP-1 is in violation of Section 4(2)(a)(ii) r/w Section 4(1) of the Act; and (c) The arbitrary condition imposed by OP-1, to transfer limestone through their own trucks & drivers, is violative of Section 4(2)(a)(i) of the Act.

In view of the above allegations, the Commission passed an order under Section 26(1) of the Act directing the Director General (**'DG'**) to cause an investigation into the matter. Investigation by DG found that: (a) The arrangement between the Informant and the OPs is *'per se'* anti-competitive, as the rate of Rs. 500/MT was decided by union on behalf of its members. Further, the OPs have limited or controlled the provision of services by not allowing the Informant to carry the transportation of limestone through its own vehicles; and (b) An agreement/understanding exists between the OPs to limit/control the provision of transportation services and fix the transportation rate and not follow the commercially viable rate arrived at by an open tendering process; and (c) The DG, due to the non-cooperation of the OPs, was not able to find any conclusive proof of OP-1 being an 'enterprise'. With regards to the OP-1 being an enterprise, the DG found that the OP-1 is satisfying two of the four criteria set by the Commission in the case of [Shivam Enterprises case \(Case No. 43 of 2013\)](#), and then the DG went ahead to assume that OP-1 is an enterprise. (d) OP-1 has directly imposed unfair conditions on the Informant to hire the trucks of members of Union only and not allowing the Informant to ply its own vehicles. (e) Further, the OP-1 has also dictated its transportation rates, which were unreasonably high leading to losses being incurred by the Informant. Therefore, the OP-1, if found to be an enterprise, had contravened Sections 4(2)(a), 4(2)(b)(i) and 4(2)(c) r/w Section 4(1) of the Act.

The Commission made the following observations: (a) The Commission agreed with the DG that the allegation of the Informant regarding directly or indirectly determining the sale price and/or limiting or controlling provision of services are well substantiated by the complaints made before the state authorities. (b) There was no transportation of limestone from date of beginning of contract till the time an interim arrangement was resorted to by Informant by taking vehicles from OPs, and consequential losses were incurred by the Informant in the transportation of limestone by compulsorily availing the services @ Rs.40/MT of OP-1. (c) The interim arrangement shows that there was consensus between the OPs to prevent the Informant from carrying out its contractual obligation, and forcing the Informant to enter into an interim agreement with the OP-1, that too at a higher price. (d) That the contract between Informant and JSW was short closed. The Commission also noted that due to the pressure of OP-1, subsequent tenders/contracts by JSW permitted the use of the vehicles of OP-1. (e) The understanding between the OPs resulted in limiting/controlling the provision of transportation services and to fix the transportation rate at a rate higher than that determined through open tendering process. Further, the members of OP-1 whose trucks were being used charged a uniform price rather than competing with each other. Therefore, the OP-1 was held to be in contravention of the provisions of Section 3(3)(a) and Section 3(3)(b) read with Section 3(1) of the Act. (f) In absence of any information available on record regarding OP-1 being an enterprise, the Commission did not proceed with the violation under Section 4 of the Act.

The Commission held that OP-1 had contravened Section 3(3)(a) and Section 3(3)(b) read with Section 3(1) of the Act, and directed the OP-1 to cease and desist in the future from indulging in above-mentioned anti-competitive practices. In absence of any Financial Statement/ IT Returns, the Commission would consider passing a separate order with regards to imposition of penalties, once such requisite information has been received. [\(Order Dated 07.02.2022\)](#)



CMA Fines JD Sports and Footasylum for Breach of Order

The Competition and Markets Authority ('CMA') [fined JD Sports and Footasylum](#) (collectively referred as 'the Companies') for breaching the rules around a merger blocked by the CMA. The CMA order prohibited the companies from, directly or indirectly, exchanging business secrets, know-how, and commercially-sensitive information without prior consent of CMA. Further, in case of any such information being shared between the companies, leading to breach of CMA order, the companies are required to immediately inform the CMA. The order also mandated to put in place 'robust measures' to ensure the compliance with the order and prevent such breaches. Recently, the CMA found out that the companies had deficient safeguards, where an environment for easy exchange of commercially sensitive information was created. Further, the CEO of both companies had two meetings, where they shared commercially sensitive information and then failed to alert CMA regarding the same. During these two meetings the following things were discussed: "(a) Footasylum's issues with stock allocations from key brands (b) information about Footasylum's financial performance (c) the planned closure of 6 Footasylum stores, with the locations of at least 2 being revealed (d) Footasylum's contract negotiations with its transport and delivery provider (e) contract negotiations for the renewal of Footasylum's head office space."

The sharing of such information had the potential to impact the competition in the market. Further, the failure to alert the CMA regarding this breach impacted the CMA's ability to stop the sharing of information, and increased the risk of influencing the future business related decisions of the companies. While investigating into these meetings, the CMA requested the companies to share the details about the topics discussed & information shared during these meetings or any other meeting that was held after the CMA

order. The companies, even after being legally required to respond to CMA's request, failed to provide the CMA with the information sought by it. Additionally, the companies also lied regarding the non-sharing of information during a meeting of December 2020. This also impacted the ability of CMA to conduct investigation, for which the companies had been fined £20,000.

Regarding the lack of safeguards and non-cooperation of the companies, the Chair of the inquiry group investigating the merger, Kip Meek, said: *"There is a black hole when it comes to the meetings held between Footasylum and JD Sports. Both CEOs cannot recall crucial details about these meetings. On top of this, neither CEO nor JD Sports' General Counsel can provide any documentation around the meetings – no notes, no agendas, no emails and poor phone records, some of which were deleted before they could be given to the CMA."*

Therefore, for failure to have proper safeguards in place, sharing of commercially sensitive information, and failure to alert CMA about the breach, the companies were fined with nearly £4.7 million by CMA.

[\(Press release dated 14.02.2022\)](#)

Netherlands Competition Watchdog finds Apple's Revised Conditions 'Unreasonable'

The Authority for Consumers and Markets ('ACM'), [during December 2021](#), found Apple to be abusing its dominant position and imposing unreasonable conditions in its App Store applying to dating-app providers ('DAPs'). The ACM then ordered Apple to amend & adjust these unreasonable conditions in its App store. Recently, Apple revised its conditions, which according to the ACM are "unreasonable, and create an unnecessary barrier" for DAPs. One of the major concerns for ACM in the revised conditions is the mandate by Apple on DAPs to 'develop a completely new app if they wish to use an alternative payment system'. Thereafter, the DAPs are required to



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submit that new app to the Apple App Store. Therefore, this will lead to increase in additional costs being incurred by the DAPs looking to switch to an alternative payment system. Further, the consumers currently using the apps will be required to switch to a new app (of the same provider) before being able to use the alternative method of payment. This will add on to the burden of DAPs, as they have to inform the consumers regarding deletion of the old app and installation of the new app.

As per ACM, compelling the DAPs to create a separate new app, rather than providing them with the opportunity to adjust their existing apps, is an unreasonable and odd condition. Therefore, in addition to the previous penalties, Apple had been fined with another €5 million, as it was unable to comply with ACM's requirements.

[\(Press release dated 14.02.2022\)](#)

Meta's Acquisition of Kustomer Approved by Bundeskartellamt

The Meta-Kustomer deal ('deal'), which [received conditional approval](#) from the European Commission ('EC') in January 2022, had now been approved by the German Competition Authority, Bundeskartellamt.

Meta Platforms Inc., USA (formerly Facebook, Inc.) ('Meta') announced its intention to acquire Kustomer Inc. ('Kustomer'), a US based company offering its business customers a cloud-based customer relationship management platform. This deal was referred by the Austrian Competition

(Continued from the previous page)

Authority to the EC for examination of its anti-competitive impact on the market. However, the Bundeskartellamt refrained from joining the referral application to the EC, due to its own general practice, as a referral requires the merger to be subject to notification under the national competition law. Therefore, separate proceedings were initiated by the Bundeskartellamt, as the deal reached the 'so-called transaction value threshold' under the German merger control. Merger involving the acquisition of a company whose turnover achieved in Germany is low, but whose operations in Germany are substantial are subject to merger control by the Bundeskartellamt where the overall value of the purchase price exceeds €400 million. This provision gives power to the Bundeskartellamt to examine mergers intended to establish or strengthen the market dominance of large companies by acquiring young, innovative companies with a high economic value.

The Bundeskartellamt, after completing its investigation, and taking into consideration the findings of EC, cleared the deal. The President of the Bundeskartellamt, Andreas Mundt, said: *"In examining this merger we concentrated on the significance of the acquisition for Meta's overall strategy. Customer may become a relevant element of this in future. However, it is with unease that we ultimately had to acknowledge that the effects of the acquisition would not have warranted a prohibition under existing competition law. We took account of the findings of the EU Commission's proceeding in our assessment"*

[\(Press release dated 11.02.2022\)](#)

The Supreme Court upholds the earlier imposed penalty on tyre manufacturers in 2018 by CCI

The CCI, in 2018, passed a final order against five tyre manufacturers namely Apollo Tyres Ltd., MRF Ltd., CEAT Ltd., JK Tyre and Industries Ltd., Birla Tyres Ltd. and their association i.e. Automotive Tyre Manufacturers Association ('ATMA') (collectively referred to as 'Opposite Parties'/ 'OPs') for indulging in cartelisation. The conduct of acting in concert to increase the prices of cross ply/bias tyres variants sold by each of them in the replacement market, and to limit and control production and supply in the said market, led to contravention of the provisions of Section 3(3)(a) and 3(3)(b) r/w Section 3(1) of the Act according to the CCI. Aggrieved by the order of the Commission, MRF Ltd preferred a writ appeal before the Hon'ble High Court of Madras ('MHC'). The MHC issued directions to the Commission to keep the order in a sealed cover. The division bench of the MHC later dismissed the writ appeal. Thereafter, the aggrieved tyre companies preferred a special leave petition ('SLP') before the Hon'ble Supreme Court of India ('SC'). The case was initiated after the representation made by All India Tyre Dealers Federation ('AITDF') before the Ministry of Corporate Affairs ('MCA'). The MCA, based on the representation of AITDF, made a reference to the CCI under Section 19(1)(b) of the Act. As per the said reference, it was alleged that OP-1 to OP-5 controlled over 90% of the tyre production in India, and were engaged in price parallelism under the garb of ATMA.


The Commission noted the following: (a) the tyre manufactures had exchanged price-sensitive data amongst them through the ATMA, and had taken collective decisions on the prices of tyres. (b) ATMA collected and compiled information relating to company-wise and segment-wise data (both monthly and cumulative) on production, domestic sales and export of tyres on a real-time basis. Therefore, the Commission found that the sharing of such sensitive information made the coordination amongst the tyre manufacturers easier.

The Commission, through its order, held that the actions of OPs, for the period of 2011-2012, are in contravention of the provisions of Section 3 of the Act. The Commission, besides passing a cease and desist order, imposed penalties of Rs. 425.53 crore on Apollo Tyres, Rs. 622.09 crore on MRF Ltd., Rs. 252.16 crore on CEAT Ltd., Rs. 309.95 crore on JK Tyre and Rs. 178.33 crore on Birla Tyres. In addition, a penalty of Rs. 0.084 crore was also imposed on ATMA. Further, the Commission also directed ATMA to disengage and disassociate itself from collecting wholesale and retail prices through the member tyre companies or otherwise. In addition to this, certain individuals of the OPs were also held liable for the anti-competitive conduct of their respective companies/association in terms of the provisions of Section 48 of the Act. It is this order which now has reached finality.

[\(Press release dated 02.02.2022\)](#)

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