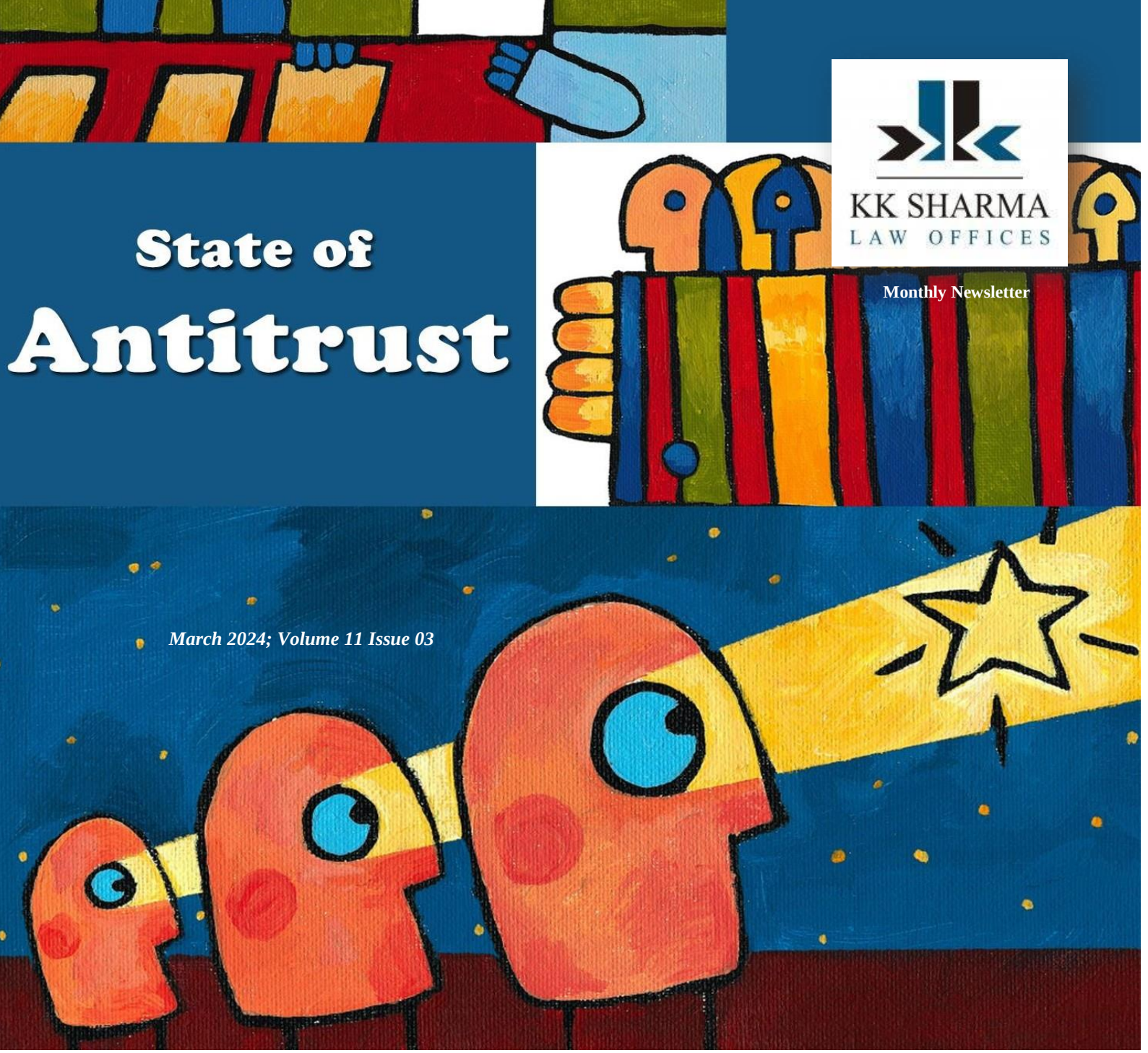

State of Antitrust

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Monthly Newsletter

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CJEU upholds EC's "*Trucks*" cartel decision against Scania

The Court of Justice of European Union **('CJEU')** has dismissed an appeal filed by Scania AB, Scania CV AB and Scania Deutschland GmbH **(together as 'Scania')** against the judgment of the General Court **('GC'),** dismissing the Scania's Appeal for annulment of the decision of the European Commission **('EC')** or reduction in fine, on the ground that the "*pleas in law*" raised by Scania remained unfounded. The appeal relates to a case of cartel amongst truck manufacturers – Scania AB, MAN SE, AB Volvo (publ), Daimler AG, Iveco S.p.A & DAF Trucks Deutschland GmbH **('manufacturers')**, also known as "*Trucks*" case, wherein a "*cartel of truck manufacturers*" **('Cartel')** was found, through which these manufacturers were engaged in collusive arrangements on prices and gross price increases & on the timing and passing on of costs for the introduction of Euro 3 to Euro 6 emission technologies in relation to Medium & Heavy Trucks **('MHT')** sold in the European Union **('E.U.')**.

Before the EC, all other truck manufacturers, except Scania, i.e., MAN SE, AB Volvo (publ), Daimler AG, Iveco S.p.A & DAF Trucks Deutschland GmbH **('settling parties')** sent requests to settle the matter, as per Art.10a of the Commission Regulation No. 773/2004. Thus, the EC proceeded with settlement procedure, wherein vide a decision of 2016, it imposed a record fine of €2.93 billion upon the settling parties. However, since Scania was not one of the settling parties, EC proceeded as per its normal procedure in which the EC concluded that, between 1997 & 2011, Scania participated in collusive arrangement with other settling parties in relation to MHTs sold in E.U.

The EC took note of the fact that there is high level of transparency among manufacturers due to regular discussions & information exchanges amongst them through their involvement in Industry Associations and Trade Fairs & further, there is high concentration in the market as the manufacturers constitute 90% market share in the E.U. The EC had noted that the structure of MHTs market in E.U. is multi-level, wherein, prices were set at four different levels.

Scania & other settling parties, through its headquarters first sold their MHTs through their own subsidiaries operating in key Member States as its "*Distributors*" by setting an "*initial gross price*", which in turn, sells these MHTs to the "*Dealers*" which are either wholly owned by the manufacturers themselves or are Independent Companies. These dealers finally sell the MHTs to the end consumers in the EU. Thus, according to EC, these "*initial gross price*" acted as a 'common and fundamental component' having an effect on the calculation of the prices applicable at each stage of the distribution channel resulting in a pre-determined increase in the gross price of MHT. It was found that the exchange of this competitively sensitive information between manufacturers took place at different levels of the supply chain – '*Top Management Level*', '*Lower Headquarters Level*', '*German Level Meetings*'. Thus, the EC held that Scania violated Art. 101 of the Treaty on Functioning of the European Union **('TFEU')** through a single and continuous infringement from 1997-2011 & vide its decision dated 27.09.2017 imposed a fine of €880 million being imposed on Scania.

Thereafter, Scania appealed before the GC for annulment or partial annulment with reduction of fines. Scania, *inter alia*, raised competition issues that the EC has erred in computing the geographical scope of the infringement, relating to German level meetings, to E.U. level. Further, misapplication of Article 25 of Council Regulation (EC) No. 1/2003 while imposing penalty on the ground conduct was not continuous and thereby penalty imposed was barred by limitation. However, the GC dismissed the appeal.

Before the CJEU, the substantive issues raised by Scania were dealt in the following manner:

1. <u>*Regarding geographical scope of German level meetings extending to E.U. level*</u> – Scania contended that GC erred by solely relying on the content and nature of the information exchanged between German subsidiaries to characterize the geographic scope of the infringement, while failing to take into account the Scania DE – German subsidiary's intentions to obtain such information. However, CJEU noted that infringement of Art. 101 not only takes place from an isolated act, but also from a series of acts, among which party may have directly participated in some forms of the conduct. In those cases, if the party was aware of all unlawful conduct planned in pursuit of the same objective and has been part of the same, without manifestly opposing the conduct or indicating a different intention of participation to other competitors, it can be said that the party was part of the conduct. Thus, CJEU, while noting that the scope of information obtained by Scania DE through German level meetings went beyond the German market, held that both the EC and GC have not erred in its findings regarding geographical scope of infringement.

2. *Regarding classification of conduct as 'single infringement'* – Scania contended that the GC erred in law by classifying, without providing any factual basis to justify its classification, that the conduct amounted to a 'single infringement'. The CJEU noted that the GC had rejected Scania's argument that EC ought to have considered three levels of contacts as separate, by noting existence of links and absence of separate & independent actions by those three levels. However, the CJEU noted that in order to establish a single & continuous infringement it is sufficient for the EC to show that the various forms of conduct undertaken by the cartel members form part of a single overall plan without it being necessary that each individual conduct was capable of separate infringement of Art. 101 of TFEU. Thus, the CJEU rejected this argument of Scania.
3. *Regarding imposition of penalty that was barred by limitation* – Scania contended that the GC erred in its judgment by upholding a fine in respect of a conduct that was time-barred. Scania contended that conduct at the top managerial level ended in 2004, thus, according to Art. 25(1)(b) of Regulation No 1/2003, limitation period of 5 years had already expired on the date on which the EC first took cognizance of the matter i.e., in 2010, thus, no fine in relation to the conduct at top managerial level could have been imposed on Scania. However, the CJEU, noting that the conduct in the present case relates to a single & continuous infringement and not three individual infringement, which continued till 2011, held that the EC's power to impose fine was not time-barred.

(Order dated 01.02.2024)

CCI approves acquisition of Electricity Generation Company undergoing insolvency

The Competition Commission of India **('CCI')**, on 13.02.2024, granted approval of acquisition 100% shareholding **('proposed transaction')** in Coastal Energen Private Limited **('CEPL')** by Adani Power Limited **('APL')** and Dickey Alternative Investment Trust **('DAIT')**. The target – CEPL is engaged in the business of generation and sale of electricity through its imported coal based thermal power plant situated at Tuticorin, Tamil Nadu. Further, at present, CEPL is currently undergoing Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016. Whereas, APL is part of the conglomerate – Adani group and is a leading private sector thermal power generation company in India with plants located across multiple states including – Maharastra, Gujarat, Karnataka etc. DAIT is a Securities and Exchange Board of India's registered category II Alternative Investment Fund, having investments across various sectors including real estate, energy generation etc. As per CCI, there are broader level horizontal overlaps in the "*market for generation of power in India*" linked to this proposed transaction, but not to an extent that could result in an appreciable adverse effect on competition in India, thus allowing the proposed transaction to go through.

(Order dated 13.02.2024)

CCI dismisses allegations of abuse of dominant position against New Okhla Industrial Development Authority

The CCI has dismissed a case filed by an individual **('Informant')**, against New Okhla Industrial Development Authority **('NOIDA')** for abusing its dominant position by directing allotment of disputed plot of land situated in NOIDA city to the Informant.

As per the Information, NOIDA is the sole authority entrusted with the "*responsibility of allotment and maintenance of land in Noida*". The Informant alleged that, in 2019, NOIDA invited general public to apply for auction sale of residential plots of land situated in different sectors of NOIDA. The Informant participated in one of those auctions and accordingly, he purchased a plot of land situated in Sector – 122, NOIDA, U.P. for Rs.1.29 crores. However, when the Informant visited the actual site, he found the land to be under encroachment and was being used for agriculture by some farmers. The Informant made several attempts by raising his grievance before NODIA but, no remedy was provided to him. Subsequently, the Informant filed a writ petition before the Allahabad High Court, wherein NOIDA offered to return back the amount deposited by the Informant.

On perusal of the Information, the CCI made the observation that the allegations appears to be in the nature of *inter se* dispute, rather than a case of abuse of dominant position. Therefore, the CCI found no reason to examine the conduct of NOIDA in present case and thus, *prima facie* dismissed the case under Section 26(2) of the Competition Act, 2002.

(Order dated 08.02.2024)

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Heard at the BAR

Examining the latest developments brought forth by the Competition Commission of India (Lesser Penalty) Regulations, 2024

The Competition Commission of India **('Commission'/'CCI')** on February 20, 2024 published the Competition Commission of India (Lesser Penalty) Regulations, 2024 **('Lesser Penalty Regulations')** in furtherance of the leniency programme enshrined in Section 43 of the Competition Act, 2022, **('the Act')**.

The major changes brought forth by the Lesser Penalty Regulations may be summarized as follows:

1. *Participants of hub and spoke cartels included in the meaning of "Applicant"*: Regulation 2(c) defines "Applicant" to henceforth include an enterprise and/or person and/or their association who may not be engaged in identical or similar trade, but who participates or intends to participate in furtherance of a cartel are also allowed to submit an application for lesser penalty and/or lesser penalty plus to the CCI. This new definition is in line with the recognition of 'hub and spoke' cartels under the Act.
2. *Strengthening the conditions for lesser penalty or Lesser Penalty Plus*: The conditions for applicability of Lesser Penalty or Lesser Penalty Plus have been laid down under Regulation 3. Regulation 3(1)(f) has been added requiring the Applicant *"to not give any false evidence or omit to submit any material information knowing it to be material"*. Further, through Regulation 3(3), CCI has made it clear that the leniency application may be rejected, Applicant fails to provide full and true disclosure of the information and evidence required under Schedule I or Schedule II at the time of filing of application. However, such rejection cannot be allowed, without providing an opportunity of being heard to the Applicant. Such rejection can also entail an inquiry for contravention with the directions of the CCI.
3. *Introducing the scheme of Lesser Penalty Plus*: Regulation 5 introduces the scheme of *Lesser Penalty Plus* regime, under which, an Applicant who has already made a disclosure in respect of one cartel, can further disclose information regarding the existence of another cartel enabling CCI to form a *prima facie* opinion regarding its existence, then in such cases, the Applicant may be granted an additional reduction in monetary penalty equal or up to 30% of the penalty imposed for the first cartel, in addition to a reduction in penalty equal or up to 100% in respect of newly disclosed cartel. Further, this quantum in reduction of monetary penalty for the newly disclosed cartel will be dependent on the likelihood of such cartel being detected by the CCI or the Director General. Further, in consonance with the proviso to Regulation 7, such application can be filed at any before the receipt of the DG Report in relation to the first cartel.
4. *Option to withdraw Lesser Penalty or Lesser Penalty Plus application*: Under Regulation 10, the Applicant is permitted to withdraw its application made under Regulation 6 and/or Regulation 7, at any time before the receipt of the report of investigation under Section 26 of the Act. Such withdrawal does not preclude the CCI or DG to use, for the purposes of the Act, any information or evidence or document submitted by the applicant except its admission.
5. *Additional information to be furnished in application made for Lesser Penalty*: Schedule I now requires an application under Reg. 6, for lesser penalty, to also include the role of the Applicant in the cartel and admission in terms of Regulation 2(1)(b), and details of any previous contravention of the provisions of the Act by the Applicant or any proceeding pending against the Applicant before the CCI for alleged violation of provisions of the Act.
6. *Information to be furnished for application of Lesser Penalty Plus*: Further, contents of an application under Regulation 7 for the grant of Lesser Penalty Plus under Schedule II shall include
   a. Name, email, contact number and address of the applicant or its authorized representative;
   b. Details of the ongoing matter or case(s) in which the applicant has already obtained any priority status;
   c. Disclosures pertaining to newly disclosed cartel as per the details sought in schedule I;
   d. Whether there exists any similarity between the conduct or product or service or parties or matter referred to in (b) and (c) above, along with details thereof;
   e. Justification to differentiate between the newly disclosed cartel as a new or separate cartel arrangement from the first cartel; and any other material information.

(Gazette Notification dated 20.02.2024)

CCI issues draft amendment(s) in regulations related to Confidentiality Ring regime

The CCI, on 26.02.2024, has issued draft amendments to the Competition Commission of India (General) Regulations, 2009 **('Draft Amendments')** with proposed changes to the Confidentiality Ring regime. Earlier, the CCI vide its Competition Commission of India (General) Amendment Regulations, 2022 introduced the scheme of creation of Confidentiality Ring(s) to allow access of confidential information and document(s) of other parties before the CCI's proceedings. As per the CCI, significant time is being taken by parties for creation of Confidentiality Ring(s), for carrying out inspection of the confidential information and to obtain the certified copies of the same, thus, in order to streamline the process and to prevent undue delays, CCI has proposed the following changes which inter alia, includes –

1. That a party seeking access to confidential information shall make a request for setting up of Confidentiality Ring within a period of 7 days from the date of receipt of non-confidential version of the investigation report filed by the Director General in the case;
2. Access to the confidential version of the information/document(s) shall be given on filing of Undertakings in the form of Affidavit by the parties seeking access to such confidential information;
3. After formation of the Confidentiality Ring, the parties seeking access to confidential information may file for inspection of the confidential version of the information/document(s) within 7 days from the date of submission of Undertakings which shall be completed within 3 weeks from the date of approval for inspection by the CCI;
4. After inspection of the confidential version, the parties can apply for obtaining the certified copies of confidential information/document(s) from the CCI within one week, which shall be supplied by the CCI within two weeks from thereafter;

The CCI has invited for stakeholders' comment on the proposed changes to be filed till 27.03.2024.

(Press Release dated 26.02.2024)

CCI dismisses abuse of dominant position case against Talk Charge Technologies Pvt. Ltd.

The CCI has dismissed a case, filed by Ayudha Foundation through its President **('Ayudha'/'Informant')**, against Talk Charge Technologies Pvt. Ltd. **('Talk Charge')** for imposing extra fees on the digital wallet and cashback services provided by Talk Charge. Talk Charge provides online recharge for DTH and cellular connection, utility bills payments and also runs a digital wallet service. As per the information, Talk Charge provides discounts, cashback, and promotional offers to users in the form of "TC Cashback" that can be used by the consumer for further transactions as 'real money'. It was alleged by the Informant that since September 2023, Talk Charge started imposing 20% additional charges on using the deposited amount stored in Talk Charge's digital wallet. Further, cashback received can be used for all services available in the Talk Charge App, however, owing to limit on paying bills through the app, consumers are prevented to spend the additional amount available in their wallets. Upon perusal, the CCI decided the case as a subject matter of abuse of dominance. In the present case, the CCI delineated the relevant market as the "*market for digital payment platforms in India*". However, taking note of presence of several domestic and global players operating in the market, the CCI was of the opinion that the Informant does not seem to be dependent upon Talk Charge for the underlying digital payment services. Thus, according to the Commission, Talk Charge does not seem to be dominant in the market, and therefore, closed the matter under Section 26(2) of the Competition Act, 2002.

(Order dated 23.02.2024)

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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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