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CCI to investigate abuse of dominant position by GMR; India

The Competition Commission of India ('CCI') has ordered an investigation against GMR Hyderabad International Airport Limited ('GMR') after it found that GMR, by not extending the License Agreement, inter alia, indulged in practices which resulted in denial of market access to the Air Works India (Engineering) Private Limited ('Informant') that, consequently, limited the Line Maintenance Services at the Rajiv Gandhi International Airport, Hyderabad ('RGIA').

The Informant is in the business of providing maintenance repair and overhaul ('MRO') services of aircrafts, which includes Line Maintenance Services and Base Maintenance Services. The Line Maintenance Services are provided between the landing and take-off of an aircraft to declare it airworthy and make it fit for departure whereas, Base Maintenance Services includes heavy periodic maintenance on the aircrafts for airline operators.

Since, GMR entered into a Concessionaire Agreement on 20.12.2004 with Ministry of Civil Aviation for development, construction, operation and maintenance of RGIA for a period of 30 years, therefore, it was essential for the Informant to enter into a license agreement with GMR as the nature of Line Maintenance Services makes it necessary for the Informant to be located within the airport premises. Hence, the Informant entered into a Licence Agreement, for 3 years, on 20.12.2011 with GMR. Since, the License Agreement was to end on 19.12.2014, the Informant requested for an extension of the Agreement from GMR, pursuant to which the Agreement was extended for a further period till 22.03.2019.

Before the expiry of the extended agreement, the Informant approached GMR for further extension which was apparently denied by GMR stating that it needs the space allocated to the Informant for their on-going expansion work at RGIA.

Aggrieved by the same, the Informant filed an information before the CCI and alleged that GMR is denying the market access by abusing its dominant position by not extending the License Agreement, in order to protect one of its own entity *i.e.*, GMR Aero Technic Limited (GAT), which is in direct competition with the Informant in MRO services. The Informant further alleged that GMR is leveraging its dominant position in the upstream market by exclusionary practices and restricting provision of services in the downstream market.

After perusing the Information, CCI noted that the case relates to denial of market access and leveraging of dominant position in one market to protect an entity in another market. Therefore, the CCI delineated two markets: first, upstream market in which the erring entity was alleged to be dominant and second, downstream market in which the said entity was protecting its position, directly or indirectly, by exercising abuse in the upstream market. The CCI was of the view that '*provisioning of Line Maintenance Services*' should be the downstream market where the alleged abuse has been occasioned and the upstream market should be '*market for provision of access to airport facilities/premises*' where the dominant position of GMR was to be analysed.

The relevant geographic market was taken as RGIA as the competition dynamics were homogenous and distinct from those prevailing outside RGIA and the provision of services at one airport could not be substituted with other airports. Thus, the CCI delineated the relevant market as '*market for provision of access to airport facilities/premises at the RGIA*'.

After delineating the relevant market, the CCI proceeded to analyse the allegations and observed that after execution of Concessionaire Agreement, GMR inevitably became a dominant player as it got the exclusive right to develop, design, finance, construct, commission, maintain, operate and manage RGIA for a period of 30 years. The CCI, thereafter, looked into the abuse of dominant position by GMR and examined as to whether refusal of extension of the Licence Agreement resulted in violation of provisions of Section 4 of the Competition Act, 2002 ('Act').

The CCI opined that though refusal to deal is not *per se* sufficient to conclude contravention of the provisions of the Act but emphasised on the doctrine of 'essential facility' to analyse, if the refusal to extend the Licence Agreement by GMR has led to exclusion of Informant from the downstream market. The CCI took note of the fact that to provide Line Maintenance Service, it is necessary that the Informant get access to the premises in the RGIA and observed that the airport premises were the 'essential facility', which was under the control of GMR. Further, the Commission noted that refusal by GMR was likely to eliminate competition in the downstream market as the GAT, owned by GMR, was in direct competition with the Informant.

In the end, the CCI held that the conduct of GMR had the potential to limit and restrict the provision of Line Maintenance Services; GMR was denying the Informant access to the market and leveraged its dominant position in the upstream market to protect GAT in the downstream market. Consequently, the CCI formed a prima facie opinion of violation of Section 4 of the Act and directed Director General to cause an investigation into the matter.

(Case No. 30 of 2019)



ACCC frames criminal charges against the ex-Blue Scope Manager under the Australian Criminal Code Act, 1955

Mr. Jason Ellis, the former general manager of sales and marketing department at BlueScope Steel Limited ('BlueScope'), has been charged under the Criminal Code Act, 1995 by the Commonwealth Director of Public Prosecution (CDPP) for obstructing officials in performing their functions during Australian Competition & Consumer Commission's ('ACCC') cartel investigation against BlueScope. The said offences can carry a two years' imprisonment.

This will be the first time that an individual is going to be charged for creating obstruction in the process of ACCC's investigation.

(Press Release 08.10.2019)

BRICS presents a report on 'new approaches to competition protection in the digital economy'

BRICS Antimonopoly Centre on 18th September, 2019 published a report on new approaches to competition protection in the digital economy at the 6th BRICS Competition Conference held in Russia.

The Report gives a detailed analysis of competition dynamics under large-scale digitalization of the world economy. The Report focusses on the problems and interests of developing markets, primarily of BRICS counties.

The study in the Report is designed to stimulate expansion of the expert community and, somewhat, to review the current model of competition regulation, which has paved way for unprecedented growth of digital giants and economic inequality in the world.

(Press Release 03.10.2019)

European Commission opens in-depth investigation into joint venture proposed by Boeing and Embraer

The European Commission ('EC') has started an in-depth investigation *i.e.*, Phase II investigation, to assess the proposed creation of two joint ventures between Boeing and Embraer which may significantly reduce competition in

the market of commercial aircrafts.

The transaction consists of two joint ventures *i.e.* first venture to be solely controlled by Boeing which would take over Embraer's global commercial aircraft business; second venture to be jointly controlled by both the companies which would be in-charge of the marketing of Embraer's KC 390 military aircraft.

The EC is concerned that the proposed transaction may remove Embraer as the third largest global competitor in the already highly concentrated commercial aircraft market. Potential entrants from China, Japan and Russia seems to face high barriers to entry and expansion and may be unable to replicate competitive constraints currently exerted by Embraer within the next five or even ten years.

The EC was of the view that the transaction may therefore results in higher prices and less choice for customers.

(Press Release 04.10.2019)

Bromic Pty Ltd, admits before Australian Competition Authority that it carried out resale price maintenance

Bromic Pty Ltd ('Bromic'), the national distributor of outdoor heating products, has admitted before Australian Competition & Consumer Commission ('ACCC') that it was engaged in resale price maintenance by introducing a 'minimum advertised pricing' policy. Bromic came up with this policy in late January 2018 requiring the retailers not to advertise Bromic branded heating products for sale at a price lower than the price determined by Bromic and contained potential sanctions for retailers who did not comply with its policies.

Bromic stopped enforcing the policy after April 2018 but failed to communicate the same to its retail distributor. As a result of which even when Bromic stopped using the advertised pricing policy, its retailer kept on following it and as a result the consumers were getting affected as they were paying more than they should.



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Legal news from India and the world

Bromic has undertaken to advise retailers that its minimum advertised policy is no longer applicable and ensures that executives and staff of Bromic receive practical legal training on the requirements of the Competition and Consumer Act 2010, including resale price maintenance.

(Press Release 16.10.2019)

CCI receives the first green channel combination under Section 6(2) of the Competition Act

The first green channel combination has been filed before the Competition Commission of India under Section 6(2) of the Competition Act 2002 read with Regulations 5 and 5A of the Competition Commission of India (Combination) Regulations 2011 on 03.10.2019.

The combination relates to acquisition of Essel Mutual Fund, registered under the SEBI (Mutual Funds) Regulations 1996, by an entity forming a part of the Sachin Bansal Group.

The proposed combination raised no risk of any adverse effect on competition, and hence was submitted under the 'green channel' route as the parties to the combination do not have any horizontal overlaps, vertical overlaps, or complementary businesses. Since the proposed combination has been filed under green channel route, it is deemed to have been approved upon filing. *(Press Release 07.10.2019)*



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Bombay High Court sets aside CCI order directing investigation against Star and Sony

**Between
The Lines...**

*Comments
& Analysis*

The Hon'ble Bombay High Court ('BHC'), in exercise of its power under Article 226 of the Constitution of India, quashed the order of the Competition Commission of India ('CCI') directing investigation. The BHC followed the ratio laid down by the Hon'ble Supreme Court of India (SC), in *CCI v. Bharti Airtel (Civil Appeal No. 11843 of 2018)*, wherein, the SC held that unless Telecom Regulatory Authority of India ('TRAI') finds fault in the conduct of a service provider, the CCI cannot order investigation.

The issue began when Noida Software Technology Park Ltd ('Informant') filed information against Star India Pvt. Ltd (OP-1), Sony Pictures Network India Pvt. Ltd (OP-2) and Indian Broadcasting Foundation (OP-3) alleging denial of market access, refusal to deal and cartelisation among OP-1, OP-2 and OP-3. The CCI did not entertain the allegations of denial of market access in the view of the Competition Act, 2002 not having the concept of collective dominance. In absence of evidence, allegations of cartelisation also fell through. It examined the allegations pertaining to refusal to deal stemming out from price discrimination by OP-1 and OP-2 in supply of television content to it in comparison to "similarly situated" MSOs/ distributors/ operators.

While examining the allegation of refusal to deal, the CCI relied on the order dated 7th December 2015 ('Order') passed by Telecom Dispute Settlement and Appellate Tribunal ('TDSAT') and noted that the observations of TDSAT which indicated that offer of Reference Interconnect Offer ('RIO') terms by the broadcasters could be a mechanism for refusal to deal. The CCI further noted that the order of TDSAT showed that the broadcasters, despite regulatory oversight, had the ability to discriminate amongst distributors and use RIO based agreements as a mechanism of refusal to deal. Based on the above, the CCI formed the prima facie opinion and directed the Director General to investigate the matter.

Aggrieved by the same, OP-1 and OP-2 approached the BHC challenging the order of the CCI on the ground that the CCI had no jurisdiction to deal with the issues.

With an intent to adjudicate on the issue of jurisdiction overlap, BHC examined if the necessary jurisdiction facts, essential for giving jurisdiction to the CCI for passing of an order for investigation, were dealt with in the TDSAT Order.

The BHC looked into the issues framed by the TDSAT and observed that the key issue in the dispute between Star and the Informant was whether Informant is "similarly situated" with other distributors of Star and whether it is entitled to parity in rates and incentives as such similarly situated entities.

The burden of proof to prove the same was on Informant before TDSAT. Further, the Informant has admittedly raised allegations of price discrimination in the Second TDSAT Petition, which was pending at the time of passing of the order of investigation by the CCI.

Furthermore, in the TDSAT Order, the TDSAT specifically stated that issue of reconciliation of accounts, which included adjudication of the fact like whether the Informant was entitled to the same price, bouquets and incentives as "similarly situated distributors", which would be decided in Second TDSAT Petition.

The BHC opined that the allegation of price discrimination before the CCI will not succeed, if the Informant does not establish that it is "similarly situated" before the TDSAT in Second Petition. The BHC held that these are jurisdictional aspects and facts, which must be decided by the TDSAT before the CCI could have ordered investigation.

Additionally, the BHC was of the view that absence of recording of *prima facie* opinion on 'Appreciable Adverse Effect on Competition' alone makes the order of the CCI not sustainable. Replying on the above reasoning, the BHC set aside the order of the CCI for directing investigation. (*Writ Petition No. 9175 OF 2018*).

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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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