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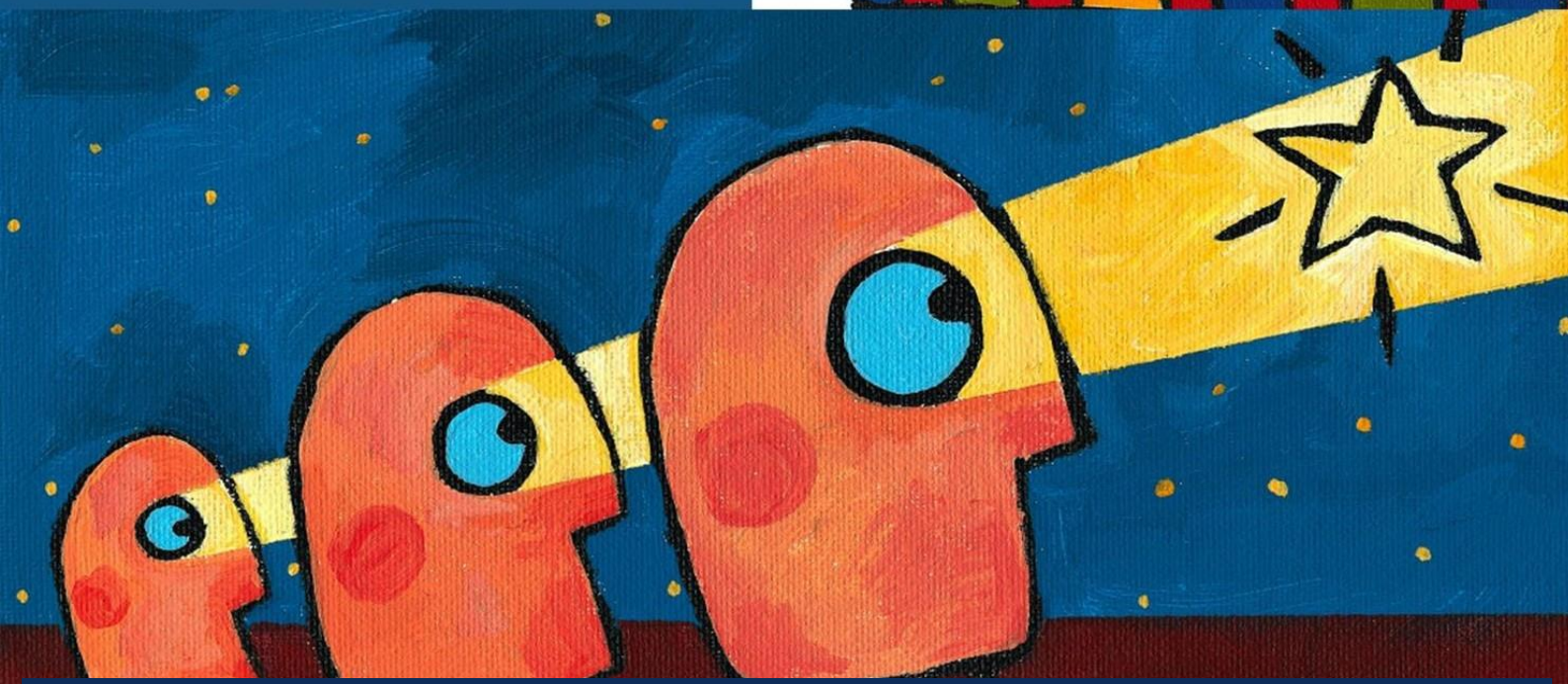

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CCI imposes penalty of Rs. 880 Crores on Beer companies

An application u/s 46 of Competition Act, 2002 **('the Act')** read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 **('LPR')** was filed before the Competition Commission of India **('CCI'/ 'Commission')** by Crown Beers India Private Limited **('CBIL')** and SABMiller India Limited **('SIL')**, both ultimately owned by Anheuser Busch InBev SA/NV **('AnBI')**. The application contained material information regarding the involvement of different parties including the application, in cartelization in the production, marketing, distribution and sale of Beer in India. After going through the application, the CCI decided to take suo motu cognizance in this matter.

From the disclosures made in the application, it was evident to the Commission that United Breweries Limited **('UBL')** and Carlsberg India Private Limited **('CIPL')** had indulged in coordinated behavior by way of a series of multilateral and bilateral meetings and e-mail exchanges amongst themselves as well as through the common platform of the All India Brewers' Association **('AIBA').** Feeling satisfied, the Commission passed an order u/s 26(1) of the Act, forming a *prima facie* opinion that the conduct of the above-mentioned parties was in contravention of the provisions of section 3(1) read with section 3(3)(a) of the Act. Therefore, the Commission directed the Director General **('DG')** to cause an investigation into the matter and submit a report.

The DG submitted the report and concluded that the Opposite Parties **('OPs')** were indulging in anti-competitive conducts through exchange of information about price and other business-sensitive information. In the report, the DG specifically pointed out certain conducts a few of them are : (a) The OPs ,through their coordinated actions, approached the State Governments collectively through common platform AIBA to get the price revised to the agreed levels so as to avoid price competition amongst themselves. (b) The OPs were also involved in cartel-like conduct , through their *"understanding",* with regards to purchase of second-hand bottles. It was submitted that the OPs decided upon the rate at which they would buy such bottles from the market. They had colluded amongst themselves regarding the number of truckloads of second-hand bottles each would buy for reuse in its bottling plants. (c) It was evident ,from the email exchanges between top managerial personnel of the OPs, that they were aware of the existence of competition law and how they were in contravention of the same. Therefore, in furtherance of the above, the DG found OPs to have contravened the provisions of section 3(3)(a) r/w section 3(1) of the Act.

The arguments submitted by the OPs, in their defence , were : (a) Beer industry is a highly regulated industry, therefore, in view of such regulations and control, the role of beer manufacturers in the market is very limited, (b) the exchange of information between the parties was done to counter the arbitrary actions of the State Government or State Corporations for protecting legitimate interests, and (c) disruption of supply of beers in a few states was due to the abrupt and arbitrary changes in excise duties by certain state authorities and the same was discontinued when the concerned state authorities agreed to reduction in the excise duty.

In regards with the above-mentioned (b) and (c) point, the Commission observed the following: *"although the OPs have tried to justify their cartel conduct by blaming the State government, they have not been able to explain as to how is the State government responsible for their coordinated action. It seems that only to have a strengthened bargaining power against the State, the OPs came hand-in-gloves with each other and shared their commercially sensitive information such as cost data etc. with each other. As such, in the view of the Commission, the State cannot be held responsible for OPs' coordinated conduct."*

Therefore, the Commission found that the conduct of UBL, AnBI and CIPL was in contravention of the provisions of section 3(3)(a), 3(3)(b) and 3(3)(c) r/w section 3(1) of the Act. Furthermore, AIBA was found to be guilty of contravention of the provisions of section 3(3)(a) and 3(3)(b) r/w section 3(1) of the Act. However, the Commission did not find CBIL to be in contravention of provisions of the Act.

After establishing the contravention of provisions of the Act, the Commission, proceeded towards determination of penalty to be imposed on the contravening parties. The Commission pointed out certain mitigating factors that were put forth by the parties with respect to determination of penalty to be imposed, if any. Those mitigating factors were: (a) there has been no AAEC and no harm to consumers due to the acts of the parties, (b) acts of the parties were limited to a few states only, (c) Non-implementation of the discussion regarding premium institutions and buyback prices of second-hand bottles, (d) true driver of price was State Government/Corporations and not the brewers, (e) parties were first time offenders, and (f) the beer industry is severely impacted due to the Covid-19 pandemic.

Considering the above-mentioned mitigating factors and the revenue details of the parties arising from the sale of beer in India, the Commission went on to determine the quantum of penalty to be imposed on the parties. After considering the lesser penalty application of different parties, the Commission, in terms of section 27(b) of the Act, imposed a total penalty of Rs. 880 Crores, out of which the maximum penalties were imposed on UBL and CIPL i.e. Rs. 751 Crores (approx.) and Rs. 120 Crores (approx.) respectively. AnBI received a 100% reduction in penalty as it was the first lesser penalty applicant to approach the Commission. It also provided the Commission with full information regarding the anti-competitive conduct of the parties. ***(Order dated 24.09.21 Suo Motu Case No. 06 of 2017)***

Heard at the BAR

Legal news from India and the world

Google alleges intentional leak of DG report by the Commission

Google LLC **('Google')** approached the Delhi High Court **('DHC')** through writ petition seeking directions restraining the Commission from directly or indirectly making public the information submitted by Google to the DG during the investigation being carried out u/s 26 of the Act.

The petitioner claimed that the DG report has been intentionally leaked by the CCI and this leak has caused irreparable damage to the reputation of Google. On the other hand, it was submitted on behalf of the CCI that the presumption by the petitioner that it is the CCI which has leaked any information to the Media houses and others, is wholly misplaced. It was further stated that the Commission is aware of the settled legal provisions u/s 57 of the Act, which discusses *"restriction on disclosure of information"*, and therefore, the CCI is well aware of its responsibility regarding protection of confidential information obtained by it. Furthermore, it was submitted that after the petitioner made complaint in this regard, the Commission held a meeting and directed that a fact-finding inquiry panel be constituted at the earliest.

Although, the CCI stands by its claim of not breaching the confidentiality but, in order to expedite the proceedings before itself, agreed to accept the request of Google for maintaining confidentiality in respect of all claims of the petitioners that were earlier declined by the DG.

In light of the aforesaid stand taken by the CCI, Hon'ble Justice Rekha Palli stated that nothing further survives for adjudication in the present petition, and therefore, the petition stands disposed of. ***[W.P.(C) 10824/2021 & CM APPL. 33403/2021]***

CCI approves acquisition of ONGC Tripura by GAIL

The Commission has approved the acquisition of Oil & Natural Gas Corporation Tripura Power Company Limited **('ONGC'/ 'Target')** by GAIL (India) Limited **('GAIL'/ 'Acquirer')** u/s 31(1) of the Act. The combination relates to acquisition of 26% equity share capital of the Target by the Acquirer from Infrastructure Leasing & Financial Services Limited Group entities ('**IL&FS'**). The combination falls u/s 5(a) of the Act.

The details of the combinations were disclosed in the notice given to the Commission by the Acquirer. In the notice, it was stated that GAIL participated in the open bidding process through which it emerged as the highest bidder and hence the proposed combination. Furthermore, the purpose of the combination was stated to be the financial difficulties being faced by IL&FS. Stakes of IL&FS in various group of companies are liquidated so as to service its debts. Additionally, it was also submitted that the relevant market for the proposed transaction will be *"the market for power generation in India"* and therefore, the parties to combination have insignificant market share in this relevant market to have any impact on the competition landscape.

(Press release dated 09.09.21)

FTC publishes study of Non-HSR reported acquisition by five large technology firms in a decade

In February 2020, the Federal Trade Commission **('FTC')** issued special orders to five large technology firms, u/s 6(b) of the FTC Act, which authorizes the FTC to conduct wide-ranging studies that do not have a specific law enforcement purpose.

The orders were issued to five firms that have made numerous acquisitions in recent years, requiring them to provide information about prior acquisitions not reported to the federal U.S. antitrust agencies under Hart-Scott-Rodino Antitrust Improvements Act, 1976 **('HSR').** These firms were Alphabet Inc. **('Google')**, Amazon.com Inc. **('Amazon')**, Apple Inc. **('Apple')**, Facebook Inc. **('Facebook')**, and Microsoft Corp. **('Microsoft')**. The order required these firms to provide information and documents on the terms, scope, structure, and purpose of the transaction that each company consummated between the years 2010-2019 for which the company did not file an HSR notification form.

FTC published its report, in which it identified 616 non-HSR reportable transactions above U.S. $1 Million, in addition to 101 Hiring Events and 91 Patent acquisitions.

It was also found that Asset and Control transactions (including Voting Security Control and Non-Corporate Interest Control transactions) were the most common in each transaction range, moreover, higher value transactions **('HVTs')** were more likely to be Control acquisitions. In addition to this, majority of the transactions included domestic firms. Furthermore, HVTs mostly included a non-compete clause.

The study was conducted by FTC with the intention to provide information for the ongoing discussions among various policymakers, academics, and other stakeholders.

Chair Lina M. Khan said, *"While the Commission's enforcement actions have already focused on how digital platforms can buy their way out of competing, this study highlights the systemic nature of their acquisition strategies. It captures the extent to which these firms have devoted tremendous resources to acquiring start-ups, patent portfolios, and entire teams of technologists—and how they were able to do so largely outside of our purview."*

(FTC report dated 15.09.21)

Nero admits to ACCC for anti-competitive conduct through RPM

Nero Bathrooms International Pty Ltd **('Nero')** admitted to have likely indulged in anti-competitive conduct through its resale price maintenance **('RPM')** in contravention of section 48 of the Competition and Consumer Act, 2010 **('CCA')**. Nero, trading under the business name 'Nero Tapware' is a supplier of bathroom products including tapware, showerheads, towel rails and bathroom fixtures. Nero distributes these via a network of over 1,000 retailers across Australia. In March 2020, Nero became aware of one retailer who provided its product online at a lower price as compared to other retailers. Responding to this knowledge, Nero directed the retailer to amend its price, as the price should not be lower than 15% of the recommended retail price. As the retailer refused to amend its online price , as per the direction, therefore, Nero ceased supply of their products to the retailer.

The Australian Competition and Consumer Commission **('ACCC')** raised concern that this practice of Nero is anti-competitive and is in contravention of Section 48 of the CCA. Nero, to make amends for its conduct, provided the ACCC with a court-enforceable undertaking u/s 87B of CCA in which it undertakes that *"it will not, in trade or commerce, for a period of three years, engage in RPM as per section 96(3) of the CCA"*. In addition to this, it also stated that they will conduct regular training to educate its employees about the conduct that can lead to contravention of provisions of CCA, with a special focus on section 48 and 96 of the CCA.

Regarding consumer harm, Deputy Chair Mick Keogh said, *"In this case, the conduct was limited to a single retailer, and there was no direct consumer harm because that retailer did not comply with Nero's pricing directions"*.

(Press release dated 08.09.21)

The French Competition Authority imposed a penalty of 500,000 Euros on several players in the road freight transport sector

The French Competition Authority, Autorité de la concurrence **('Autorité'),** fined several road freight transport stakeholders for hindering the entrance and development of new digital stakeholders through boycotts. The Autorité opened an investigation in 2018 after a referral was received by them from the French Ministry of Economy and Finance. Through the investigation it was found that there were continuous anti-competitive attempts made by several stakeholders, which included, Bourse Premium Professionnel **('B2Pweb'),** Holding Premium Professionnel **('H2P'),** Evolutrans, Association des Transporteurs Européens, France Lots Organisation, Tred Union, Groupement d'Achats et de Services des Transports Routiers, Union Nationale des Organisations Syndicales des Transporteurs Routiers, and Organisation des Transporteurs Routiers Européens, hereinafter collectively referred as **'Players'**. The investigation was concerned with the practices carried out by above-mentioned players between July 2016 and February 2018.

In 2016, new stakeholders alongside traditional stakeholders appeared in France, in form of digital intermediation platforms. These platforms aim to connect shipper customers directly to carriers through an online interface, using immediate geolocation methods. The three main intermediation platforms active in France at the time of the practices were Chronotruck, Fretlink and Everoad. At the same time, there were several new stakeholders that entered the market; one of them being Shippeo. Shippeo uses automation and artificial intelligence to provide technological solutions for monitoring and managing truck fleets without intervening in trade relations.

The players were involved in formulating a strategy to block the entry and development of Shippeo in the market. Therefore, these players conveyed their strategies to their members, who were asked to not entertain the customers' request to use Shippeo platform, instead the use of Gedmouv product was insisted, which is a product of B2Pweb. Therefore, their practices led to hampering of growth in the market share of Shippeo.

The Autorité decided that this practice led to hindering of competition and innovation in the market. It further stated that these practices of the players harmed the economy by limiting the efficiency gains associated with the development of digital intermediation platforms and tracking software. Furthermore, the new digital stakeholders in road freight transport sector were not able to experience market growth to its full extent due to the anti-competitive practices of the players. Therefore, the Autorité imposed a total penalty of 500,000 Euros on all players in which B2Pweb and H2P were jointly penalized with 350,000 Euros.

(Press release dated 09.09.21)

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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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