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Monthly Newsletter

State of Antitrust

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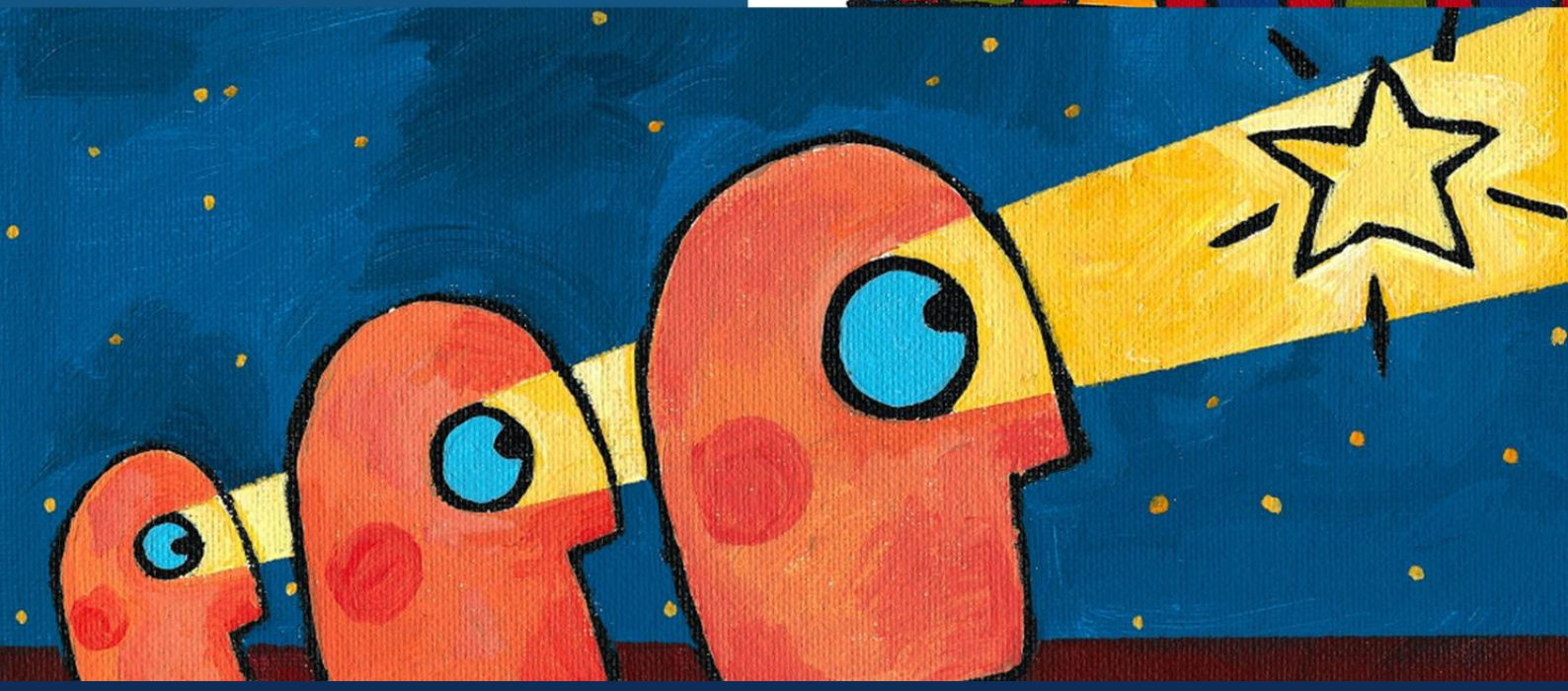

Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

- **Australian Competition Commission penalizes Indonesian Airlines**

HEARD AT THE BAR

- **Canon and Toshiba to pay $5 million to settle antitrust lawsuit, DOJ**
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BETWEEN THE LINES

- **CCI imposes a penalty of ₹ 74.2 crores on pharma companies and drug associations**

AND MORE...

South African Competition Commission fined newspaper Mail and Guardian for fixing prices and trading conditions

The South African Competition Commission ('SACC') has entered into a consent settlement agreement with Mail & Guardian (Pty) Ltd (M&G) and has referred the same to the SA Competition Tribunal for confirmation. M&G was found guilty for fixing price and trading conditions along with other media companies which were members of Media Credit Coordinators ('MCC'). During the investigation, started in November 2011, it was found that several media companies, through MCC, agreed to offer similar discounts and payment terms to advertising agencies that place advertisements with MCC members.

M&G entered into a settlement agreement with the SACC after 28 media companies and their subsidiaries were referred to the SA Competition Tribunal for prosecution. M&G, in the settlement agreement, has agreed to contribute Rand 103,264 to the Economic Development Fund for three years, to give 25% bonus in advertising space to qualifying small agencies, to fully cooperate with the SACC in the collusion case until all litigation is finalised and develop, implement and monitor a competition law compliance programme. ***(Press Release 05.06.2019)***

CCI approves acquisition of 'electrical and automation business' of Larsen & Toubro Ltd. by Schneider Electric India Pvt. Ltd. and MacRitchie Investment Pvt. Ltd.

The Competition Commission of India ('CCI') has approved acquisition of electrical and automation ('EA') business of Larsen & Toubro Limited (L&T) by Schneider Electric India Pvt. Ltd. (Schneider) and MacRitchie Investment Pvt. Ltd. (MacRitchie) (collectively referred to as 'Acquirers') with some modifications.

Before approving the acquisition, the CCI undertook an in-depth inquiry and discovered that Schneider and L&T are the two leading players in terms of sale and distribution of Low Voltage ('LV') switchgear products in India. Hence, the CCI was of the view that the combined entity would lock a large portion of LV switchgear distributors, thereby, making it difficult for the new players to enter the market. Thus, CCI had concerns that acquisition of EA business of L&T by Schneider would reduce competition.

In order to eliminate the above-mentioned concerns, the CCI ordered the acquirers to reserve a part of L&T's installed capacity in order to offer white labeling service to third party competitors. Under the white labeling service, the third party competitors can take L&T products on a reasonable price to sell the same under their own brand, for a period of five years. Subsequently, they can also get access to technology of white labeled products to manufacture the products by themselves, for the next five years. Additionally, Schneider would revise its commercial policies and remove *de facto* exclusivity in distribution agreements to open up their distribution network to competitors.

Moreover, Schneider has also been asked not to discontinue L&T products and not to increase their average selling price, for a period of five years. The CCI expects that the remedies would allow business expansion of competitors in the white-labelled products. This would also allow the competitors to increase their brand position in the overall LV switchgear business, providing them opportunity to strengthen their portfolio of products and increase the viability of their own brand in a sustainable manner and become competitors. ***(Press Release No. 3/2019-20 dated 06.06.2019)***

Australian Competition Commission penalizes Indonesian Airlines

The Federal Court of Australia ('FCA') has ordered PT Garuda Indonesia Ltd. ('Garuda') to pay penalties to the tune of $19 million dollars for colluding on fees and surcharges for air freight services. This order follows the action of Australian Competition & Consumer Commission's (ACCC) against a global air cargo cartel, which has, so far, resulted in penalties of $132.5 million against 14 airlines, including Air New Zealand, Qantas, Singapore Airlines and Cathay Pacific.

The FCA found that from 2003 to 2006, the airlines made and gave effect to the agreements that fixed the price of the security, fuel surcharges and customs fee from Indonesia and also agreed on fuel surcharges from Hong Kong. The Australian High Court has also assented to the penalty imposed by the ACCC and dismissed the appeals filed by Garuda and Air New Zealand against the decision of ACCC.

In order to deal with the international cartels, the ACCC has recently entered into formal agreements with the FBI to increase the information sharing and to enhance cooperation among various competition agencies.

The ACCC's chairman Rod Sims said *"Price fixing is a serious matter because it unfairly reduces competition in the market for Australian businesses and consumers, and this international cartel is one of the worst examples we have seen,"* ***(Press Release 30.05.2019)***

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Legal news from India and the world

American Pharma company , guilty of price fixing, agrees to pay more than $7 million in criminal penalty and civil damages

Heritage Pharmaceuticals Inc. ('Heritage'), a generic pharmaceutical company, agreed to pay more than $7 million in criminal penalty and civil damages for involvement in an anti-trust conspiracy with its competitors.

As per the charges framed, from about April 2014 until at least December 2015, Heritage participated in a criminal antitrust conspiracy with other companies and individuals (engaged in the production and sale of generic pharmaceuticals) to fix prices, rig bids, and allocate customers for glyburide, a medicine used to treat diabetes.

As per the settlement agreement terms, Heritage will pay a $225,000 criminal penalty and cooperate fully with the ongoing criminal investigation.

In a separate civil resolution, Heritage has agreed to pay $7.1 million to resolve allegations under the False Claims Act related to the price-fixing conspiracy. ***(Press Release 31.05.2019)***

Canon and Toshiba to pay $5 million to settle antitrust lawsuit

Two Japanese companies viz. Canon and Toshiba have agreed to pay $5 million fine for violating premerger notification and waiting period requirements of the Hart-Scott-Rodino Act ('HSR Act'). In 2016, Canon acquired Toshiba Medical Systems Corporation ('TMSC') for $6.1 Billion.

In the complaint filed by the Department of Justice ('DOJ') based on a referral by the Federal Trade Commission, it was alleged that Canon and Toshiba devised a scheme to avoid the waiting period requirement of the HSR.

Further, it was alleged that the acquisition scheme devised by Canon and Toshiba "had no purpose" other than to complete the sale of TMSC prior to March 31, 2016, and avoid the HSR Act's waiting period requirements.

According to the complaint, Toshiba wanted to recognize the sale proceeds of TMSC business by the end of its 2015 fiscal year in order to make its financial statements look healthy.

The complaint also alleged that, by Canon's and Toshiba's own admission, Canon could not acquire TMSC outright because it was not possible to complete a significant acquisition of TMSC voting securities before the end of Toshiba's fiscal year due to the review periods under various merger control laws.

The companies agreed to pay $2.5 million each to settle the charges. Under the settlement, both the companies need to implement HSR compliance programs and comply with inspection and reporting requirements of the HSR Act. ***(Press Release 10th June 2019)***

Merger between Tata Steel and ThyssenKrupp prohibited by European Commission

After completing an in-depth investigation, the European Commission ('EC') has blocked the merger between ThyssenKrupp AG and Tata Steel Ltd as the EC had concerns that the merger would lead to higher prices and lower choices of the steel products to the consumers.

Tata Steel is an Indian steel manufacturer whereas, ThyssenKrupp is a German steel manufacturer. ThyssenKrupp is the second largest producer of flat carbon steel in the European Economic Area (EEA) while Tata Steel is the third largest. Both companies are significant producers of metallic coated and laminated steel for packaging applications and of galvanised flat carbon steel for the automotive industry.

The EC's concern was with respect to the markets for 'metallic coated and laminated steel products for packaging' and 'automotive hot dip galvanised steel products'. The EC observed that in the market for metallic coated and laminated steel products for packaging, the merged entity were likely to become market leader in a highly concentrated industry, particularly in tinplate, which is the most important packaging steel product in the EEA by volume. Whereas, in the market for automotive hot dip galvanised steel products, the EC was concerned that the proposed merger was likely to eliminate an important competitor in a market, where only a few suppliers can offer significant volumes of this steel.

The EC also carefully investigated the effect of imports from third countries. It found that customers of the relevant products would not be able to resort to imports to offset the potential increase in price which would be caused by the proposed merger.

During the investigation, the EC received feedback from a large number of customers active in the packaging and automotive industries.

To address the concerns of the EC, merging companies proposed structural remedies.

The EC sought the views of market participants about the proposed remedies and received negative feedbacks for both market areas.

The EC was finally of the view that the remedies offered by Tata Steel and ThyssenKrupp were not sufficient to address the serious competition concerns and would not prevent likelihood of increase in prices and less choice for steel customers.

As a result, the EC prohibited the proposed transaction. ***(Press Release 11.06.2019)***

CCI imposes a penalty of ₹ 74.2 crore on pharma companies and drug associations

The Competition Commission of India ('CCI') has levied a cumulative fine of ₹ 74.2 Crore (Approx.) on Intas Pharmaceuticals Limited (OP-14), Himalaya Drug Company (OP-12), Madhya Pradesh Chemists and Druggist Association ('OP-1') and Indore Chemists Association after the CCI found their conduct to be in violation of the provisions of Competition Act, 2002 ('Act').

The information was filed by Madhya Pradesh Chemists and Distributors Federation ('Informant'), under Section 19(1) (a) of the Act, alleging contravention of Section 3 of the Act by OP-1 and other 9 OPs.

OP-1 is a registered state level association of wholesalers and retailers of pharmaceutical companies in Madhya Pradesh. OP-2, 3, 11 & 15 are district level associations of chemists and druggists, affiliated with OP-1 carrying out activities in Bhopal, Gwalior, Indore and Jabalpur districts, respectively. Whereas, OP-4 to 10 are pharmaceutical companies against which information was filed and OP-12 to 14 are the pharmaceutical companies subsequently impleaded by the CCI. These pharmaceutical companies carry on their business through their appointed Clearing & Forwarding ('C&F') agents or distributors in Madhya Pradesh ('MP').

The Informant alleged that it approached various C&F agents of OP-4 to 10 seeking supply of their products. Despite having made payment for the order, the supply was cancelled as the Informant had not obtained 'No Objection Certificate' (NOC)/ 'Letter of Consent' (LOC) by OP-1 to 3, a mandatory condition imposed by the OPs for appointment of stockist. It was further alleged by the Informant that such practise was stifling competition, limiting access of drugs and supply in the market as only those who got NOC/LOC were favoured by OP-1 to 3 to do business with them. OP-4 to 10 are active participants in this anti-competitive practice as they willingly adhere to this arrangement which resulted in limited supply of drugs to consumers. Based on the material available on record and oral submissions made by the Informant, the CCI, prima facie, found merit in the allegations of the Informant and directed the Director General ('DG') to cause an investigation into the matter. The DG in its investigation report observed that despite the appointment of stockists being the prerogative of pharmaceutical companies and there being a circular dated 03.05.2013 issued by OP-1, prohibiting the practice of seeking and providing NOC/LOC in stockist appointment, OP-1 continued with the practice of NOC/LOC for appointment of the stockists. The DG also found that OP-11 was acting in connivance with OP-1.

OPs- 12, 13 and 14 were impleaded by CCI after observing the evidence collected by the DG which indicated their involvement in impugned anti-competitive practices. The DG observed that the understanding between associations (OP-1 and 11) and Pharmaceutical companies (OP-12, 13 and 14) had restricted appointment of stockists that led to limiting and controlling supply of drugs in MP. The DG concluded that the act of indulging in the said practices amounted to limiting and controlling supplies of pharmaceutical products in MP.

The CCI studied the DG report and found that there was no evidence of any anti-competitive conduct on the part of OPs-4 to 10, 13 & 15 and they were not held liable. With respect of OPs-1, 11, 12 & 14, the CCI examined the exchange of emails and found ample evidence to hold that OP- 12 & 14 acted in connivance with OP-1 & 11 for appointment of stockists. Therefore, the CCI concluded that OP-12 & 14 had an agreement/arrangement/understanding with OP-1 and OP-11 to carry on the practice of NOC/LOC despite being in violation of Section 3(3) of the Act. Thus, the CCI directed OP-1, 11, 12 & 14 including their officials, to cease and desist from indulging in practice of mandatory issuance of NOC/LOC.

Pursuant to Section 27(g) of the Act, CCI directed OP-1 to organise, at least five competition awareness and compliance programmes over a period of six months in MP for its members. Similarly, OP-11 is directed to organize one competition awareness programme in district of Indore. Pharmaceutical companies (OP-12 & 14) were directed to foster a culture of competition compliance within their respective organisations and sensitize their employees, by bringing into place a Competition Compliance Programme. The CCI observed that since no mitigating factor(s) have been pointed out by OP-1 and 11 and unrelenting anti-competitive conduct on part of associations and their office bearers, it deemed appropriate to impose penalty on OP-1 and 11 at the rate of 10% of average of their respective incomes. OP- 1 was directed to pay Rs. 4,18,404 and OP-11 was directed to pay Rs. 39,812. Due to the mitigating factors demonstrated by OP-12 & 14, the CCI imposed penalties at the rate of 1% of the average of the revenue/turnover of the three years, which came out to be Rs. 1,859.58 lakhs for OP-12 and Rs. 5559.68 lakhs for OP-14. ***(Case No. 64 of 2014 dated 03.06.2019)***

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