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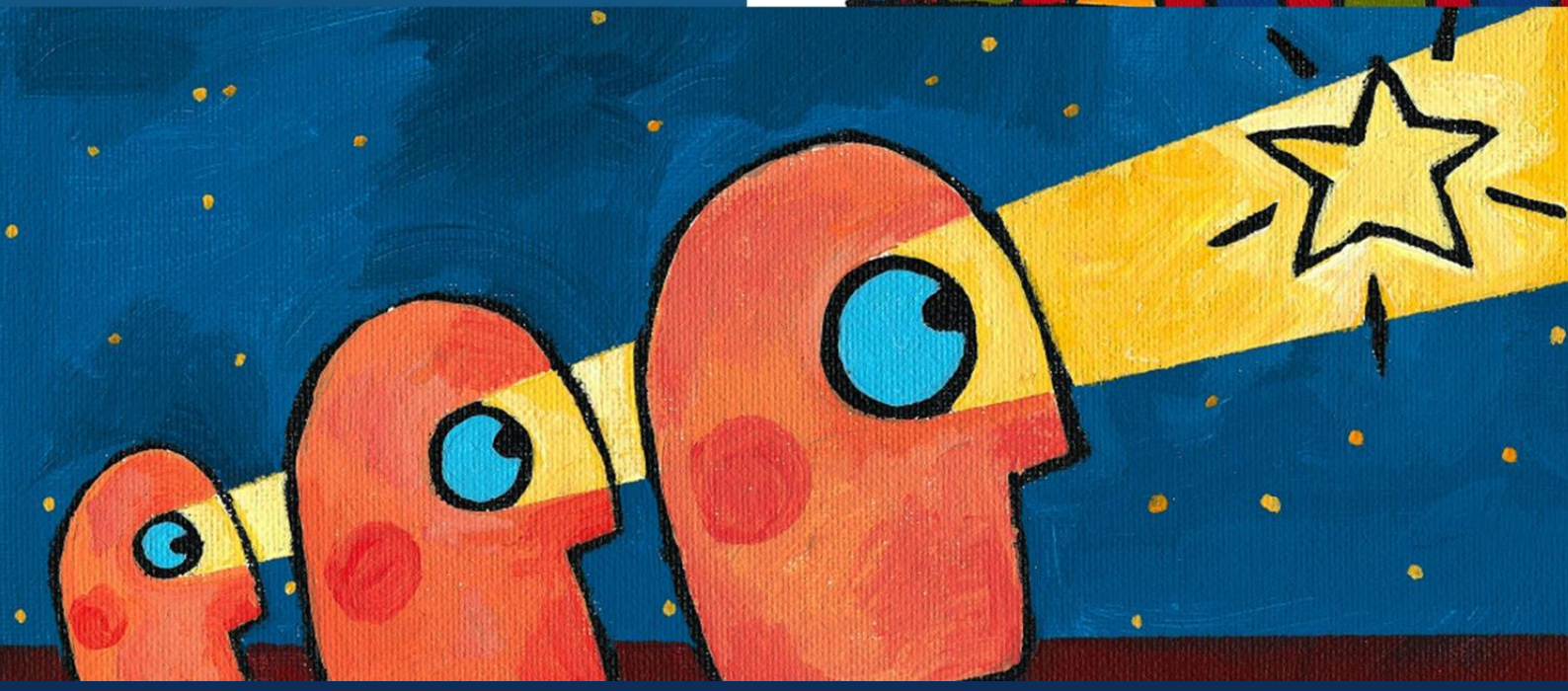

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Supreme Court holds conduct of Bengali association of cine artists and producers, aimed at preventing telecast of dubbed Bengali serials, as violation of Competition Act.

BETWEEN THE LINES

General Court annuls European Commission decision on proposed merger of UPS and TNT for non-observance of Right of Defence.

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Supreme Court holds the conduct of Bengali association of cine artists and producers, aimed at preventing the telecast of a dubbed Bengali serial, as violation of Competition Act.

The Supreme Court of India, in *Competition Commission of India v. Co-ordination Committee of Artists and Technicians of WB Film and Television and Ors*., through a judgment, dated March 07, 2017, has held that the conduct of the Respondent, with respect to activities undertaken to prevent the telecast of a dubbed television serial, has violated Section 3 of the Competition Act, 2002 (hereinafter, 'Act').

Magnum TV, a company based in West Bengal, appointed one Hart Video as the sub-assigner to dub theHindi version of the serial '*Mahabharat*' in Bangla language, which it did. For the purposes of telecastingthe said dubbed serial, an agreement was executed, on revenue sharing basis, with the owners of two Bengali channels, namely, 'Channel 10' and'CTVN+ Channel' respectively. Thus, these two channels were expected to telecast the dubbed version of the said serial in West Bengal as per the terms of the contract.

An association called the Eastern India Motion Picture Association (hereinafter 'EIMPA'), comprising of certain producers in Eastern India, and another association called the Committee of Artists and Technicians of West BengalFilm and Television Investors (hereinafter 'Coordination Committee'), comprising of some artists and technicians belonging to the film andtelevision industry in West Bengal, based on the apprehension that telecast of such serials may adversely impact the local industry, together, sent letters to the aforementioned TV channels, threatening to either stop the telecast of the said serial or face adversarial consequences in form of non-cooperation from the said bodies. Subsequently, the members of the Coordination Committee engaged in protests and boycott against the release of the said serial. Against these actions, an Information was filed, by the proprietor of Hart Video, before the Competition Commission of India (hereinafter, 'CCI').

The CCI, through its majority order, found the conduct of the Respondent anticompetitive in the relevant market of '*film and television industry of West Bengal.'* However, the minority, disagreeing with the majority, found the relevant market to be the market of '*telecasting of the dubbed serial on television in West Bengal',*and held that the conduct would not be anticompetitive. On appeal, preferred by the Coordination Committee, the Competition Appellate Tribunal (hereinafter, 'COMPAT') upheld the view taken by the minority. Against this decision of the COMPAT, the CCI filed an appeal before the Supreme Court.

The Supreme Court (hereinafter, 'The Court'), taking into account the relevant provisions of the law, agreed with the relevant market definition given by the CCI. The Court also rejected the argument that the Coordination Committee, being a trade union, would not come under the definition of an '*enterprise*' and hence cannot be said to have violated Sec. 3 of the Act. According to the Court, the Coordination Committee was in fact an association of enterprises wherein each constituent member of the Committee, by virtue of being in the same line of business, was an enterprise. The Court said, *"When some of the members are found to be in the production, distribution or exhibition line, the matter could not have been brushed aside by merely giving it a cloak of trade unionism."*The Court also clarified that the definition of the term '*agreement*', given in Sec. 2(b) of the Act, is of wide import and includes the term "*action in concert.*" Therefore, the Court opined, *"It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by legal proceedings."* In conclusion, allowing the appeal filed by the CCI, the Court held that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities and amounted to creation of barriers to the entry of new content and the same cannot be justified on the ground of protection of competition in the name of language.

Even in more than a century old jurisdictions, the general lament is that the awareness of competition law needs to grow amongst the judiciary. Going by the contours of the this litigation, orders of Minority and COMPAT wherein the definition of relevant market appears to be more rooted in reality, it appears that there is a huge scope for improvement in the understanding of competition law in India too.

-Supreme Court of India, Civil Appeal No. 6691 of 2014,Judgement dated March 07, 2017

Heard at the BAR

Legal news from India and the world

US Justice Department secures guilty plea against Kiekert AG for bid-rigging in the market of side-door latches and latch minimodules for the automobile industry.

In the case of *U.S. v. Kiekert AG*, between the US Justice Department and Kiekert AG, an automotive parts manufacturer based in Heiligenhaus, Germany, has agreed to plead guilty and to pay a $6.1 million criminal fine for its role in a conspiracy to rig bids of side-door latches and latch minimodules installed in cars sold in the US and elsewhere.

Kiekert AG supplied the latch parts to Ford Motor Company for installation in its vehicles. During September 2008 and May 2013, Kiekert AG allegedly agreed with competitors on bids and price quotations for side-door latches to be submitted to Ford. The plea is a part of a major ongoing investigation by the Justice Department involving some 48 companies and 65 executives concerning price fixing, bid rigging and other such anticompetitive conduct in the automotive parts industry. Apart from agreeing to pay the fines, the said company has also agreed to cooperate with theJustice Department in the said investigation. The plea is, however, subject to approval from the U.S. District Court for the Eastern District of Michigan.

-U.S. v. Kiekert AG, Press release, dated March 07, 2017

Canadian Competition Bureau successfully closes a 6 yearlong investigation against a cartel operating in the market of water and sewer system infrastructure.

Aquaréhab Eau Potable, a company based in Quebec, Canada, dealing in water and sewer system infrastructure**,** pleaded guilty to eight counts ofbid-rigging for municipal water services contracts. Under the plea arrangements, taken before the Quebec Superior Court, the said company has agreed to pay $160,000 as fine.

The company had participated in a bid‑rigging conspiracy for pneumatic excavation and cathodic protection contracts that were given between June 2006 and March 2011. The plea marked successful closure of a lengthy investigation undertaken by the Competition Bureau of Canada (hereinafter, 'CBC')against cartels. The said investigation began in 2011 after the CBC extracted relevant and credible information from the concerned parties through its immunity and leniency programs. In June 2015, Les Entreprises Paysagistes Gaspard Inc., another company operating in the same market, pleaded guilty to nine counts of bid‑rigging and was fined $117,000.

The plea highlights the significance of effective leniency programmes. It also reflects the determination of contemporary competition regulators towards neutralizing and penalizing cartels.

- Canadian Competition Bureau, Official Press Release, dated February 17, 2017

Competition Commission of Indiareiterates the difference between the scope of the Consumer Protection Act, 1986 and the Competition Act, 2002.

The Competition Commission of India (hereinafter, 'CCI') was once again faced with a case which fell squarely within the domain of consumer protection laws. In the instant case, the Informant, a practising advocate in the Supreme Court, alleged abuse of dominant position by one AMP Motors Private Limited (hereinafter, 'AMP') which was an authorized car dealer and workshop owner, dealing and maintaining Jaguar cars. TheInformation contained averments against an instance of deficiency in service at the hands of AMP.The allegation pertained to an alleged unjustified demand of Rs.9, 84, 201, as opposed to the original demand of Rs.75, 000, put across by AMP, forrepairing the Informant's car.TheCCI, in its *prima facie* opinion, held that, "[...] *the present dispute does not raise any competition concern*", and that the remedy for the same lies before the Consumer Forum. It must be noted that the CCI has highlighted the difference between the two (2) laws on multiple previous occasions as well. Thus, in *Sanjeev Pandey v. Mahindra & Mahindra* [Case no. 17 of 2012], the Commission stated, *"The Informant has misunderstood the Act and probably confused it with the Consumer Protection Act, 1986. The scope of the Act is primarily aimed to curb the anti-competitive practices having adverse effect on competition and to promote and sustain competition in the relevant markets in India. Whereas the Consumer Protection Act, 1986 is aimed to protect the interest of individual consumers against the unfair practices being widely prevalent in the market."*

In conclusion it shall suffice to say that, looking at the state of affairs, intensive sensitization and advocacy drives, pertaining to competition law and policy, for the general public, are really the need of the hour.

-Competition Commission of India, Case No. 101 of 2016, Order dated March 14, 2017

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Between The Lines...

Comments & Analysis

General Court annuls European Commission's decision on proposed merger of UPS and TNT for non-observance of Right of Defence.

In an important decision, reflecting the development of administrative law in Competition Policy in the EU, the General Court of the European Union, in the case of *United Parcel Service, Inc. v. Commission*, has annulled the decision of the European Commission (hereinafter, 'EC') concerning the proposed merger of US based United Parcel Service (hereinafter, 'UPS') and TNT Express NV (hereinafter, 'TNT'), a company based in Netherland.

Both the companies operated in the '*express small package delivery services sector*.' The other competitors in the same market included US based FedEx and Germany based DHL. In 2012, UPS notified the European Commission of its proposed acquisition of TNT. However, the EC, in Case COMP/M.6570 — UPS/TNT Express, through its decision dated January 30, 2013, declared the proposed concentration incompatible with the internal market and the functioning of the European Economic Area. According to the EC, the said concentration would have restricted competition in fifteen (15) Member States by reducing the number of competitors to three (3) or in extreme cases to one (1) or two (2). Such market concentration could have, in the opinion of the EC, led to price increase. Against this decision, UPS preferred an appeal before the General Court.

The two primary arguments put forth by UPS against the decision of the EC were based on infringement of its *rights of defence*, and, infringement of the *obligation to state reasons*. UPS argued that the final econometric model adopted by the EC to reach the conclusion it reached, in the decision dated January 30, 2013, was different from the model it exchanged with UPS during the course of administrative proceedings. The EC, therefore, denied UPS its rightful opportunity to make submissions and defend the proposed merger in the backdrop of the new model adopted by the EC. The changed econometric model was different with respect to four (4) integral considerations, which were - the likely effects of the merger on prices; the expected efficiency gains as a result of the merger; the future competitive position of FedEx; and; thetotal number of States which shall face *'significant impediment to effective competition.'*In response to these contentions, the EC argued that there was no obligation on it to share the different model with UPS since there was no substantial difference between the two models concerned.

At the merits stage, the General Court restated that, *"observance of the rights of defence is a general principle of EU law enshrined in the Charter of Fundamental Rights of the European Union which must be guaranteed in all proceedings, including merger proceedings before the Commission."*The Court negated the argument raised by the EC by relying on the '*Non-Negligible Changes*' test. The Court emphasised that the said changes to the model were not negligible, and hence, they should have been communicated to the Appellant. In effect, the Court annulled the decision of the EC on grounds of procedural impropriety.

The said judgement extends the evolution of due process jurisprudence in the EU. The judgement closely follows on the heels of judgements like *Case C 247/14 P, Heidelberg Cement v. Commission, Case C-267/14 P, Buzzi Unicem v. Commission, Case C-286/14 P, Italmobiliare v. Commission, Case C-248/14 P, Schwenk Zement v. Commission and C-588/13 P, Deutsche Bahn and Others v. Commission.*It almost echoes order dated 9.12.2016 of our own COMPAT in AIOCD case in Appeal nos. 21/2013,6/2014&7/2014. *-General Court of the EU, Judgment in Case T-194/13, United Parcel Service, Inc. v Commission, dated March 07, 2017*

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