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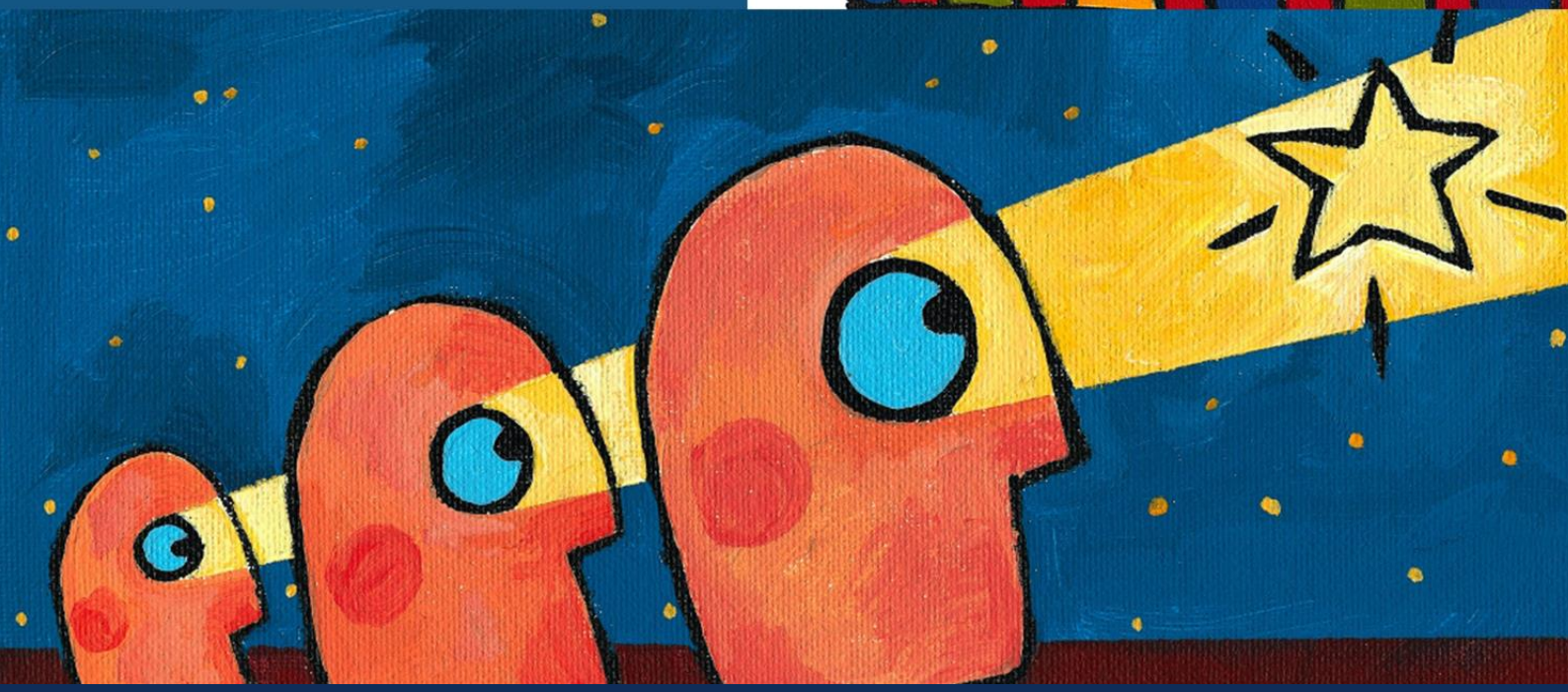

Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

CCI Rejects Monsanto's Challenge to its Investigation Orders

In a common order, the CCI rejected six applications made by Monsanto which challenged CCI's investigation into the role of Monsanto's officials vis-a-vis the company's alleged abuse of dominant position in the Indian seed market.

BETWEEN THE LINES

COMPAT criticizes CCI's mechanical application of DG's findings without stating its own reasons and held it to be in contradiction to CCI's previous stance as well.

HEARD AT THE BAR

- Australian Banks seek ACCC's permission to negotiation with Apple Pay as a block
- CMA, European Commission and 9 Member States launch monitoring project into Online Hotel Bookings

And more...

CCI rejects Monsanto's pleas challenging its Orders directing investigations into the Indian Seeds Market

The Competition Commission of India (**"CCI/Commission"**), in a common order dated 26.07.2016, disposed of six applications, filed by various entities of the US-based biotechnology major, Monsanto, challenging CCI's directions to investigate into the roles of various persons-in-charge at a stage wherein a contravention under Section 27 of the Competition Act, 2002 (the **"Act"**) has not yet been found.

Earlier this year, CCI had ordered a detailed probe against Monsanto on a *prima facie* finding of alleged anticompetitive business practices in the Indian seeds market. After ordering the probe in February, the competition regulator clubbed three more complaints against the company in June.

While referring to the Hon'ble Supreme Court's Judgment in *Aneeta Hada vs. M/s Godfather Travels and Tours Private Limited (2012) 5 SCC 661 (Second Case)* wherein the apex Court clarified the position of law on prosecution against companies and vicarious liability of director(s)/official(s)/person(s)-in-charge and opined that it had not been laid down that, *"in cases of commission of an offence by a company, the prosecution has to be in two stages i.e. first against the company and thereafter, in case the company is held guilty, against the officer in-charge of and responsible for conduct of business of the company."* Moreover, on a perusal of other judgments of the Supreme Court and various High Courts on statutes wherein provisions were in *pari materia* to Section 48 of the Act, the Commission found various instances wherein the company and its officials had been simultaneously prosecuted against.

The Commission clarified that *"when an inquiry is held under Section 26 of the Act, the finding of contravention has to be first recorded against the company and if the company is held liable, then the question of who was the officer in-charge of and responsible for the conduct of the business of the company at the relevant time and his liability will be gone into; however, in the same order."* Thus, it is not necessary to first return a finding of contravention of Section 27 before directing the DG to cause an investigation into the officials of a company. Hence, the Order of the Hon'ble Appellate Tribunal in *Alkem Laboratories Limited vs. Competition Commission of India and Another (Appeal No. 09/ 2016)*, relied upon by the applicants, could not be held to apply as a precedent to the current matter.

The Commission also shed light on the jurisprudence of competition law in India explaining that the Act is a "rule reasoned law" requiring a thorough understanding and application of the facts and circumstances of each individual case. It stated that, *"A particular conduct could be appreciated under one circumstance and deprecated under another, and two opposite conducts could invite the same outcome. For example, the competition authorities do not consider an unfair or discriminatory price by an enterprise illegal if it is adopted to meet competition. Such deep understanding is possible only if the persons, who were in-charge of the enterprise or who had a role in the conduct of a company at the relevant time, are allowed to explain that particular conduct at the appropriate stage so that the proceeding does not result in a false, negative for want of adequate reasoning outcome."*Moreover, as per the principles of natural justice, every person who can be condemned at a later stage, needs to be able to defend itself at appropriate stages of hearing.

Furthermore, it was held that the relevant section provides for investigation of the 'matter' in one go and not in phases. The Commission delved into the terminology of the Act and opined that since the term 'matter' would include both, the issue of abuse of dominant position by the opposite party as well as the identification of and role of officials responsible for these acts of contravention, hence, the entire matter would form part and parcel of the DG's scope of investigation.

Thus, the CCI deemed it fit to dismiss all six applications and let the DG's investigation proceed unhindered.

(*Ministry of Agriculture and Farmers Welfare, Nuziveedu Seeds Limited, All India Kisan Sabha (AIKS), Department of Agriculture and Cooperation, State of Telangana, National Seeds Association of India (NSAI) Vs M/s Mahyco Monsanto Biotech (India) Limited & Others*. Ref. 02/2015, 107/2015, 03/2016, Ref. 01/2016 & 10/2016)

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Heard at the BAR

Legal news from India and the world

Australian Banks Seek Permission to Jointly Negotiate with Apple Pay

Commonwealth Bank of Australia, National Australia Bank, Westpac Banking Corp and Bendigo and Adelaide Bank, the 4 largest banks in Australia have moved the country's competition regulator (**"ACCC"**) to allow them to negotiate with Apple Inc.'s digital wallet jointly. The banks are aggrieved by Apple Pay's practice of locking the iPhone platform with third party providers of digital wallets resulting in losses to the banks on interchange fees. As opposed to apps running on Android platforms, these banks' own apps on iPhones have been restricted only to internet banking functions. This hope of the banks to be able to collectively negotiate with Apple Inc. as a block is a first instance of financial institutions seeking such permission in the world. It has been reported that the applicants also seek authorisation to enter into a limited form of collective boycott in relation to a third party mobile wallet provider while collective negotiations with that provider are ongoing.

CMA launches Monitoring Project in Online Hotel Bookings

The Competition and Markets Authority (**CMA**), UK, launched a monitoring project into the ongoings of online hotel bookings sector. It has sent questionnaires to hotels all across the country as part of the project. This project is being conducted in partnership with the European Commission and the national competition agencies of 9 EU States. From the press release of the CMA, it appears that this project found cause because in July 2015, online travel agents Expedia and Booking.com changed their terms and conditions to remove certain 'rate parity' or 'most favoured nation' requirements, which prevented hotels from offering cheaper room rates on competing online travel agents sites than are offered on Expedia and Booking.com.

(*Source:* CMA Press Release dated 13.07.2016)

European Commission's Investigation against Google progresses

Following a Statement of Objections sent to Google in April 2015, the European Commission (**EC**) reinforced its preliminary finding of abuse of dominant position against Google by sending it a supplementary Statement of Objections on comparison shopping and Adsense, Google's online search platform, based on additional data and evidence uncovered during investigation. This second Statement of Objections following EC's concerns since as far back as November 2010, probes further into Google's, and now its parent company's, Alphabet, which was not in existence in 2010, conduct of providing favourable treatment in its general search results of other specialised search services, copying of rivals' web content (known as 'scraping'), advertising exclusivity and undue restrictions on advertisers. A separate investigation has also been launched into Google's and Alphabet's conduct in Android mobile operating system. (*Source*: IP/16/2532)

European General Court revises its decision in the Marine Hose Cartel Case

The European General Court (**EGC**), on 14.07.2016, revised its decision in the Marine Hose Cartel case and reduced the quantum of fine imposed on Parket Manufacturing Hannifin (Parker ITR) and Parker Hannifin Corp. However, it maintained that the EC had rightly relied on the principle of economic continuity rather than the principle of personal liability while assessing Parker ITR's liability. Parker ITR and Parker Hannifin Corp had contended that the change in management on account of acquisition would also result in a change in the liability of Parker ITR for its role in the cartel which should now be limited to 2002-2007. Liability prior to that period should be attached to only ITR, owned by Saiag Group. EGC opined that ITR Rubber (which later became Parker ITR) was correctly held liable for the participation of its economic predecessor ITR in the infringement with regard to the period from 1 April 1986 to 31 December 2001 and for its own participation in the infringement with regard to the period from 1 January 2002 to 2 May 2007. Similarly, Parker-Hannifin was correctly held jointly and severally liable, as the parent company of Parker ITR, with regard to the period from 31 January 2002 to 2 May 2007. However, the EGC deemed it fit to reduce the fine for which Parker-Hannifin is jointly and severally liable since its participation in the infringement, as the parent company of Parker ITR, began only when it acquired Parker ITR in 2002, when Parker ITR was no longer playing the role of leader in the cartel. (*Source:* Case T-146/09 RENV)

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Between The Lines...

Comments & Analysis

COMPAT sets aside CCI's Order u/s 27 against Indian Trade Promotion Organisation

On 1.07.2016, the Hon'ble Competition Appellate Tribunal (**"COMPAT"**), in a detailed Order (Final Order in Appeal No. 36 of 2014), set aside the liability and penalty imposed by CCI on Indian Trade Promotion Organisation (**"ITPO"**), a 100% government owned organisation, on account of being in contravention of the well settled principles of natural justice. It had been averred in the Information filed before the CCI by Indian Exhibition Industry Association (**"IEIA"**) that ITPO, by imposing a time-gap policy for holding exhibitions/fairs and other events at Pragati Maidan, New Delhi and by practicing discrimination in the allotment of spaces to private organisers, was violating the provisions of Sections 4 of the Competition Act, 2002 (the **"Act"**).

The COMPAT heavily criticised CCI's order dated 03.04.2014 for having mechanically endorsed the finding of the DG without adverting to detailed reasoning put before it by the Appellant clarifying how the policy was neither arbitrary nor abusive in nature and erroneously imposed a penalty amounting to Rs. 6.75 crores on a not for profit-making company. COMPAT opined that the DG, unfortunately, did not make any attempts to inquire into the nature of the market, proceeded on mere assumptions and, hence, incorrectly delineated the same while the CCI accepted the said definition. The same error crept into the Order of the CCI when it endorsed the DG's finding without making any requisite queries. Moreover, the DG's finding as well as the Commission's Order found the Appellant's policy to be arbitrary despite agreeing that there was an economic rationale behind it and the fact that a new, competition-friendly policy was being formulated in 2013 itself which had been brought on record. COMPAT stated that, *"The DG and the Commission were legally bound to take into consideration the explanation furnished by the appellant about the justification of the time gap policy and the terms and conditions for allocation of space for exhibitions/ fairs organised by the appellant, but both proceeded to decide the issue as if the appellant was a private organiser and it had no choice in utilising its own asset to its advantage viz-a-viz third parties. At least, the Commission was expected to have given due consideration to the detailed explanation given twice over by the appellant to justify the time gap policy and restriction but it simply brushed aside the same without assigning any tangible and cogent reasons."*

Hence, the COMPAT concluded that the entire matter deserved to be considered from another angle. More so because CCI's Order had been passed in ignorance of its own previous order in the case of *Arshiya Rail Infrastructure Ltd. (ARIL) Vs. Ministry of Railways (MoR)* which unmistakably shows that even though the Railways was in a preferential position viz. a viz. private parties, due to the requirement of movement of certain commodities on priority basis, the allegation of abuse of dominance was not sustained. On the issue of quantum of penalty, it was found that CCI unreasonably imposed penalty @2% of average turnover of past 3 years, it had found that the time gap policy was not resulting in an appreciable adverse effect on competition. COMPAT stated that, *"It is most unfortunate that while imposing the penalty, the Commission has ignored the law laid down by the Supreme Court, the High Courts and this Tribunal. In this case, penalty portion of the impugned order can appropriately be described as 'inscrutable face of a sphinx'"*. Hence, the impugned Order was set aside.

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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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