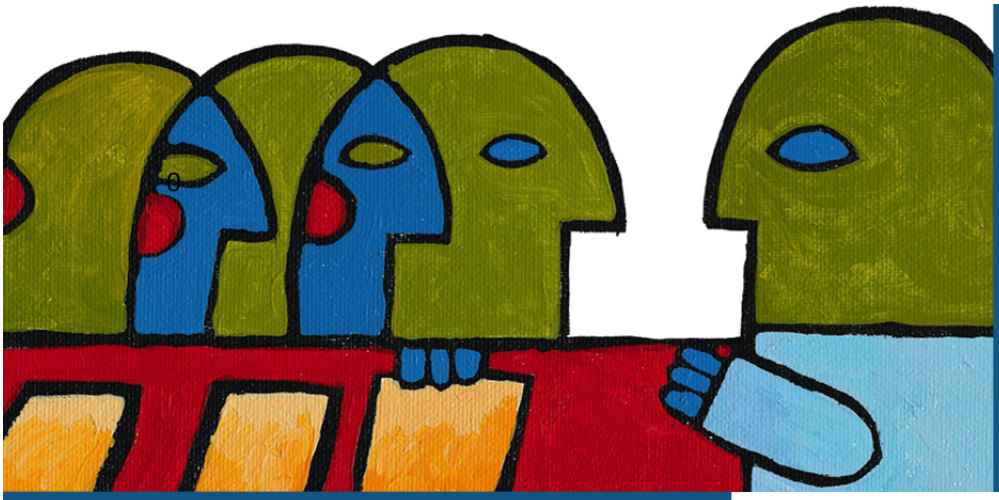

KK SHARMA
LAW OFFICES

Monthly Newsletter

State of Antitrust

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

BETWEEN THE LINES After having previously remitted the case on appeal to the CCI for reconsideration of its *prima facie* view in the alleged anticompetitive agreement between certain Hollywood Film Producers and on getting no directions for investigation by the CCI even in this reconsideration, the COMPAT, in the second appeal preferred before it by K Sera Sera Digital Cinema Pvt. Ltd., directly directed the DG to investigate. We analyze the Order of the COMPAT highlighting its salient features.

HEARD AT THE BAR - Russian Competition Authority investigates into abusive conduct of Microsoft Corp. in complaint brought forth by Kaspersky Lab...and more...

COMPAT allows appeal by Sanofi Pasteur and GlaxoSmithKline

COMPAT found the reasons provided by Sanofi Pasteur and GlaxoSmithKline for rendering of bids to be plausible and thereby set aside the order of the CCI levying penalty on the companies for indulging in bid rigging of tender.

COMPAT allows appeal by Pharmaceutical Giants against CCI Order indicting them of Cartelization and Bid Rigging

In an Order dated 08.11.2016 ("Order"), the Competition Appellate Tribunal (*hereinafter* "COMPAT") overturned an order of the Competition Commission of India ("CCI"/ "Commission"), dated 04.06.2015, which held pharmaceutical companies GlaxoSmithKline Pharmaceuticals Limited ("GSK") and M/s Sanofi Pasteur India Private Limited ("SPI") guilty of cartelisation and bid rigging in contravention of Section 3(3)(d) read with Section 3(1) of the Competition Act, 2002 (the "Act"). GSK and SPI are manufacturers of Quadrivalent Meningococcal Meningitis Vaccine (QMMV), a vaccine which protects against meningitis. In 2002, Ministry of Health and Family Welfare, Government of India (GOI) started inviting tenders for procurement of QMMV to be used for compulsory vaccination of HAJ and UMRAH pilgrims as this disease is widely prevalent in Sub-Saharan Africa. Bio-Med (P) Ltd. ("BML"), an Indian pharmaceutical company also engaged in manufacturing QMMV, had filed a writ petition in the High Court of Delhi challenging the eligibility criteria prescribed by the GOI for the said tender. The writ petition was rejected on the ground that the eligibility criterion was neither arbitrary nor unreasonable.

Subsequently, BML approached the CCI alleging that GSK and SPI had cartelized the market. In its Information before the CCI, BML made a special reference to the tender for the year 2011, whereby both the parties deviated from the practice of quoting full quantity and quoted about half quantity of the total demand. The prices quoted by GSK and SPI were similar and after negotiations with GOI, GSK and SPI agreed to supply the required demand at the same price. The Commission, being of the view that the conduct of GSK and SPI *prima facie* appeared to be in contravention of Section 3 (3) read with Section 3(1), directed the Director General (DG) to investigate the matter under Section 26(1) of the Act. The DG conducted an investigation and concluded that there had been a contravention of Section 3(3)(d) read with Section 3(1) of the Act on account of GSK and SPI engaging in bid rigging by sharing the tender quantity and quoting unusually high prices for the year 2011. Since there was no written agreement between the two companies, the DG's conclusions were mainly based on the conduct of both the companies which appeared to have been in concert. Thereafter, the Commission approved the DG's findings and held that GSK and SPI had contravened the provisions of the Act and imposed a combined penalty of over Rs. 90 crores on the two companies.

The Pharma companies preferred an appeal to the COMPAT. The COMPAT was of the view that the investigation conducted by the DG lacked objectivity and the findings recorded by him were *ex facie* erroneous and legally unsustainable and the Commission had committed a grave error by approving the conclusions of the DG and thereby holding the appellants guilty of collusive conduct in violation of Section 3(3)(d) read with Section 3(1) of the Act.

SPI had, in its reply to the DG, explained its conduct for the year 2011 stating that it did not tender a bid for the entire quantity because in the previous years, it had remained unsuccessful and had had to destroy large quantities of the vaccine thereby incurring huge losses. GSK had submitted that the decision to not tender a bid for the whole quantity was owing to the time period to meet the demand (11-12 days) being too short. The COMPAT was of the view that these explanations given by GSK and SPI were plausible and tenable but had been wholly disregarded by the DG who seemed to have pre-judged the issue. It further went on to add that mere existence of a scenario conducive to cartelization is not enough and cogent evidence is required to be collected in order to prove the existence of an anti-competitive agreement. Mere suspicion, no matter how strong, cannot be the basis for recording a finding of bid-rigging or collusive bidding. The COMPAT also noted that there was no direct or indirect evidence on record linking the meeting of GSK and SPI to the matching of quotations or tender quantities. The bids quoted by both the pharmaceutical companies were similar, though not identical, both in terms of quantity and in terms of price and could have been a mere coincidence. Accordingly, the COMPAT allowed the appeal thereby setting aside the impugned order and the penalty imposed by the CCI.

(**GlaxoSmithKline Pharmaceuticals Limited v. Competition Commission of India** *Appeal No. 85 of 2015)*;
M/s Sanofi Pasteur India Private Limited v. Competition Commission of India *(Appeal No. 86 of 2015)*

Heard at the BAR

Legal news from India and the world

Federal Anti-monopoly Service opens up an investigation against Microsoft for 'Abuse of dominant position'

Kaspersky Lab, an international anti-virus and cyber security provider headquartered in Moscow, Russia has accused Microsoft of allegedly abusing its dominant position in the anti-virus software market.

On 10.11.2016, the Russian Federal Anti-monopoly Service (FAS) opened an investigation against Microsoft on grounds of signs of abuse of its dominant position in the anti-virus software market. The deputy head of the FAS, Anatoly Golomolzin said, "*The Federal Antimonopoly Service initiated proceedings against Microsoft over signs of violation of Article 10 of the law on competition relating to abuse of dominant position on the market*".

The anti-virus company has *inter alia* alleged that the Redmond based giant Microsoft have significantly reduced the period given to third party software developers to adapt their software to the new Windows 10 operating system to just six days, compared to the two month period that had been allotted for earlier versions. Further, when a person installs the latest version of the Windows operating system, the anti-virus software program by the independent manufacturer is disabled automatically with Microsoft's Windows Defender taking over the security settings of the operating system.

Previously, in 2007, Microsoft had been held to be abusing its dominant position regarding server interoperability information and bundling of media player by the European Court of First Instance (Case T-201/04) which ended a decade old case. *(Source: FAS Press Release 10.11.2016)*

FCA imposes penalty for "gun-jumping"

On 8.11.2016, the French Competition Authority (FCA) imposed a penalty of €80 million Euros (USD 8,4468,000) on Altice Luxembourg and SFR Group jointly and severally for implementing transactions after filing for merger notification but before getting the clearance decision from the FCA. Such conduct is commonly known as "gun-jumping".

This is the highest sanctioned penalty by the competition authority on companies for "gun-jumping". Previously, FCA had imposed penalties for failing to notify the authority for proposed acquisition, but never for "gun-jumping" and such penalties were significantly less in comparison to penalty sanctioned in the present instance.

In March 2014, Altice Luxembourg made an offer to purchase SFR Group and later, in April 2014, the offer was accepted and the share agreement was executed in June 2014. After four months in October 2014, FCA cleared the transaction subject to commitments. FCA noted that during these four months, Altice had started exercising decisive control over SFR's management.

Further, significant and numerous amount of strategic information was exchanged between the two companies before the acquisition was cleared, some of the information being very confidential in nature. All of this combined had provided Altice with significant information regarding their competitors, including their future endeavors and thus giving them an edge in the telecommunication market.

(Source: FCA Press Release 8.11.2016)

Swiss Packaging Giant Tetra Pak Fined by Chinese Antitrust Regulators

China's State Administration for Industry and Commerce (SAIC) has levied a fine of USD 98.5 million on Swedish firm Tetra Pak. The packaging giant was found to have abused its dominant market position to force suppliers to use its services and restrict the competition in China from 2009-2013.

The Chinese regulatory authority found the Swiss company to be abusing its market dominance by bundling its packaging services with other materials.

Tetra Pak, on its official website has stated that it had "*consistently attached importance to operating in accordance with regulations*". The company further added that the current decision was "regrettable" but they would not be filing an appeal.

(*Source: China Law Insight Antitrust and International Trade)*

COMPAT sets aside CCI's order under Section 26 (2) and directs the DG to investigate into allegations levelled against Hollywood Producers

On 09.11.2016, the Competition Appellate Tribunal ("COMPAT") passed an order setting aside the order of the Competition Commission of India ("CCI"/ "Commission") denying investigation in pursuance to the information filed by M/s K Sera Sera Digital Cinema Pvt. Ltd ("KSS") against a consortium of Hollywood film producers and their joint venture known as Digital Cinema Initiatives ("DCI") and directed the Director General ("DG") to conduct an investigation. The COMPAT was of the view that the CCI committed a grave error by declining to order an investigation under Section 26(1) of the Competition Act, 2002 (the "Act"). KSS is a company engaged in the digital projection and screening of films in India through their branded technology called Sky Cinex technology. It had initially filed information against US-based Digital Cinema Initiatives, LLC, which is a joint venture, and its six stakeholder partners: the Walt Disney Company, Fox Star Studio, NBC Universal Media Distribution Services, Sony Pictures, Warner Brothers and Paramount Films India. These producers of Hollywood films had agreed among themselves to provide their cinema content only to exhibitors using the technology compliant with DCI, namely, D-cinema technology. Exhibitors using the non-compliant digital projection systems were thereby restrained from screening the movies produced by these Hollywood producers. KSS, in its Information before the CCI, had alleged that this conduct had the effect of foreclosing competition to market players such as the Appellant and amounted to a tying arrangement. The producers in question controlled more than 80% of Hollywood film industry and thereby enjoyed dominance in the market. Further, KSS alleged that they were abusing their dominant position by mandating the release of their movies only through DCI compliant technology. In response, the producers of Hollywood films claimed the protection of Section 3(5) of the Act which allows the owner of the intellectual property to impose reasonable conditions as deemed necessary in order to protect it against infringement. The CCI, pursuant to the Bombay High Court's order directing it to dispose the matter latest by 22.04.2015, closed it in a hasty manner without evaluating the need for a detailed investigation. The Informant sought an appeal to the COMPAT. Taking cognizance of the fact that such technical restrictions can potentially lead to foreclosure of competition and that it was difficult to ascertain the adverse effect on competition due to such standards unless a thorough investigation is carried out, the COMPAT, on 08.12.2015, had remitted the case back to CCI for reconsideration as to whether or not a case for directing investigation under Section 26(1) of the Act is made out. The CCI again declined to order an investigation into the matter and passed an order to that effect on 08.06.2016.

This was appealed before the COMPAT which was of the view that the producers of Hollywood films have complete right to protect their intellectual property but the conditions prescribed are required to be reasonable. However, the creation of potential entry barriers by releasing their films only to exhibitors whose projection system comply with DCI technology *prima facie* appears anti-competitive. It held that in the instant matter, in-depth examination and investigation was absolutely necessary to determine whether the conduct of the producers was truly restrictive and anti-competitive and, thus, ordered the DG to investigate into the matter.

(**K Sera Sera Digital Cinema Pvt. Ltd. vs. Digital Cinema Initiatives, LLC & Ors**, *Appeal No. 42/2016*)

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