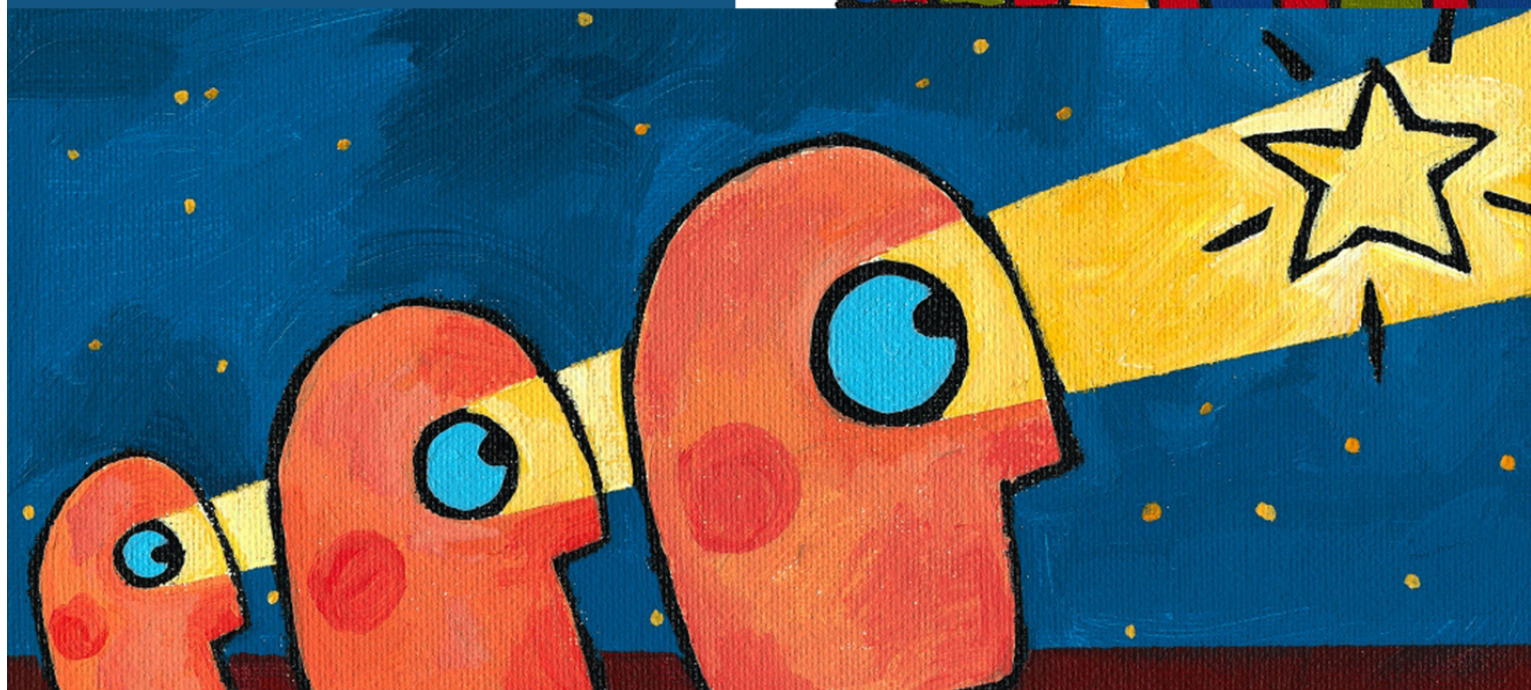


KK SHARMA
LAW OFFICES

Monthly Newsletter

State of Antitrust

May 2017; Volume 4 Issue 5



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

CCI Imposed Fine on Malayalam Film Industry Unions and Their Office Bearers for Anticompetitive Conduct.

Review of the order of CCI in the Malayalam Film Industry Unions Case.

BETWEEN THE LINES

Delhi High Court Upholds the Constitutionality of Confidentiality Regulations

Delhi High Court dismisses the two petitions challenging the constitutionality of confidentiality regulations.

HEARD AT THE BAR

European Commission Prohibits a Takeover as It Eliminated the Competition in Grey Cement Markets

Google Reached a Voluntary Settlement with Russian Regulator for Abuse of Dominant Position

And more....

CCI imposes a penalty on Malayalam film industry unions and their Office Bearers for anticompetitive practices

On March 3rd, 2017 the Competition Commission of India ('CCI'), in its 89 page order, imposed a penalty on four Malayalam film industry unions, namely, Association of Malayalam Movie Artists ('OP-1'), Film Employees Federation of Kerala ('OP-2'), FEFKA Director's Union ('OP-3'), FEFKA Production Executive's Union ('OP-4') (collectively referred to as 'OPs') for indulging in anticompetitive activities in violation of Section 3 of the Competition Act, 2002 ('the Act'). Further, their office bearers, namely, Shri Innocent (President, OP-1), Shri Edavela Babu (Secretary, OP-1), Shri Sibi Malayil (President, OP-2), Shri B. Unnikrishnan (General Secretary, OP-2) and Shri K. Mohanan (General Secretary, OP-4) (collectively referred to as 'Office Bearers') were also found to be liable for penal action under Section 48 of the Act for indulging in the anti-competitive conduct of their respective associations.

The information was filed by T. G. Vinayakumar, ('Informant'), a director and writer in the Malayalam film industry, alleging anti-competitive conduct by the OPs. On different occasions, the OPs allegedly tried to force various actors, technicians, producers, financiers, not to work or associate with the Informant in any of his projects. For achieving that purpose, the OPs allegedly imposed a ban on actors, technicians, producers, etc., who worked with the Informant, by issuing circulars and show cause notices. Such conduct was due to the Informant's efforts to streamline working conditions of artists and for the initiative 'Cinema Forum', which envisaged collaboration between film makers and distributors to make low budget movies with new actors. The CCI observed that the OPs, by way of imposing directions on its members and other non-members, were limiting and controlling the provision of services in the Malayalam film industry and their conduct was found to be in contravention of Section 3 of the Act. Thus, by forming a *prima facie* opinion, the CCI, passed an order u/s 26(1) of the Act, directing the Director General (the 'DG') to conduct an investigation into the matter.

The DG concluded that the members of OPs had a tacit understanding not to work with the Informant, thereby violating the provisions of Section 3(1) read with Section 3(3)(b) of the Act. CCI found that OP-2, as a mighty organization in the Malayalam film industry consisting of 17 sub-unions, engaged in different phases of filmmaking and due to the ban imposed by OP-1 and OP-2 on the Informant, many of the artists and technicians were not able to deal with the Informant or any other non-member. Such anti-competitive practice was held to have an appreciable adverse effect on competition in the Malayalam film industry. Accordingly, CCI found the conduct of OPs and their five responsible Office Bearers to be in contravention of Section 3(3) of the Act.

The CCI, after considering all the evidences and material on record, passed an order u/s 27 of the Act and directed the OPs to cease & desist from indulging in anti-competitive activities. Further, a penalty of Rs. 4,00,065/-, Rs. 85,594/-, Rs. 3,86,354/- and Rs. 56,661/- was imposed on OP-1, OP-2, OP-3 and OP-4 respectively, calculated at the rate of 5% of their average income. Furthermore, Rs. 51478/-, Rs. 19113/-, Rs. 66356/-, Rs. 32026/-, Rs. 27737/- was imposed as penalty upon Office Bearers respectively calculated at the rate of 3% of their average income. (*Case No.98 of 2014*)

European Commission prohibits a takeover as it eliminated the competition in grey cement markets.

On April 5th, 2017, the European Commission ('EC') has passed an order prohibiting the proposed takeover of Cemex Croatia ('Cemex') by Heidelberg Cement ('HC') and Schwenk. In 2016, HC and Schwenk, both construction material producer companies based in Germany, notified to the EC about their proposed deal. Through the deal, HC and Schwenk, would acquire the assets of Cemex in Croatia, a global construction material supplier, via their jointly controlled company Duna Dráva Cement ('DDC') based in Hungary. According to the investigation of EC, Cemex was the largest cement producer in Croatia, whereas DDC and HC were the largest cement importers in Croatia. EC assessed the overlaps in the Croatian cement markets and stated that the takeover would reduce or eliminate the competition between companies that are competing head to head in Croatian markets for grey cement. EC also observed that the remaining companies would not be able to compete effectively with the merged company after the takeover. EC, while assessing, also found evidence forecasting appreciable cement price increases after the proposed deal. Thereafter, the merging companies proposed certain remedies by providing a structural solution, but, EC concluded that the proposed remedies would not allow a supplier to compete effectively and would not be able to prevent the price increase of grey cement after the merger. Resultantly, EC prohibited the proposed transaction. (*European Commission Press Release, dated 5th April, 2017*)

Olympus reaches to a settlement with Danish Competition Authority for Resale Price Maintenance.

On April 18th, 2017 Olympus Danmark A/S, a digital imaging company, entered into a settlement with Danish Competition and Consumer Authority ('DCCA') for Resale Price Maintenance and accepted to pay a fine of DKK 3,600,000. Facts- Olympus was involved in anticompetitive agreements with the dealers and paid back a fixed amount if the dealers proved that the cameras had been sold at a minimum price. However, if the dealers sold the cameras at a lower price, they did not get the amount. The DCCA fined the company for entering into agreements with the dealers for Resale Price Maintenance, infringing Section 6 of the Danish Competition Act. (*DCCA Press Release, dated 18th April 2017*)

Google reached a voluntary settlement with Russian Regulator for Abuse of Dominant Position.

On April 17, 2017, the Federal Antimonopoly Service, Russia ('FAS') and Google ended a two year legal fight with a settlement in Moscow District Court of Arbitration. Facts- In September, 2015, FAS established that Google has abused its dominant position by prohibiting the pre-installation of other developers' competing applications on mobile phones. As a result, pre-installation of mobile applications was fully reserved by Google. FAS directed Google to remove anticompetitive restrictions from its agreements and imposed a fine amounting to 438,067,400 roubles. Thereafter, Google proposed to the FAS to reach a settlement. FAS agreed to sign the settlement and



Heard at the BAR

Legal news from India and the world

issued various necessary direction and modifications to restore the competition in market. (*FAS media report, dated 17.04.2017*)

European Commission gives no to the acquisition of Syngenta by ChemChina, subject to conditions.

The European Commission ('EC') has conditionally approved the acquisition of Syngenta, an agrochemical company operating in Switzerland, by ChemChina, an agrochemical company operating through China National Agrochemical Corporation (CNAC). Further, CNAC controls subsidiary, ADAMA Agricultural Solutions Ltd ('ADAMA'). EC has concerns that the transaction would reduce the competition in market for pesticides and plant growth regulators. Investigation shows that, ADAMA is a close competitor of Syngenta and the takeover will impede the effective competition. ChemChina offered a set of commitments, addressing EC's competition concerns, to divest. EC concluded that the divestment will ensure the effective competition. This transaction is notified before other competition authorities around the world and got clearance. It is also notified before the India regulator, and the transaction is still under review. (*EC Press Release, dated 05.04.17*)

Delhi High Court Upholds the Constitutionality of Confidentiality Regulations

Between The Lines...

*Comments
& Analysis*

On 11th April, 2017, Delhi High Court ('Delhi HC') adjudicated upon the constitutional validity of the Regulation 35 and the proviso to Regulation 37(1) of the Competition Commission of India (General) Regulations, 2009 as well as Regulation 6 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 under the Competition Act, 2002 ('the Act').

Going by the details provided in the order, two Writ petitions were filed before the Delhi HC to declare the aforementioned regulations as illegal and unconstitutional. The Competition Commission of India ('CCI') had passed an order dated 06.11.2013 under Section 26(1) of the Competition Act, 2002 recording a *prima facie* opinion that the acts and conduct of the Opposite Parties ('OP') mentioned therein were in contravention of Section 3 of the Act and thus directing the Director General ('DG') to make an investigation into the allegations. The Petitioner No. 1 & 2 were shown as OP-13 and OP-11 respectively in that order. The allegations against a number of manufacturers of conveyor belts was that they had indulged in bid-rigging and formed a cartel in the market for *Conveyor Belt Sector in India*. They indulged in exchange of the confidential price sensitive information among themselves prior to submission of bids. In the course of the investigation, OPs filed an application before the CCI for inspecting the information relied upon by the CCI for forming a *prima facie* opinion and obtain copies of this Information under Regulation 37 of General Regulations. The application was rejected by the CCI on the ground that the information is confidential and, accordingly, could not be disclosed to the OPs at this stage of the investigation. Aggrieved by the conduct of the CCI, the OPs filed the aforementioned Writ petitions before Delhi HC, contending that the action of the CCI in denying access to documents, evidence, information, etc., on the ground of confidentiality, is arbitrary, illegal and such regulations violate the fundamental rights provided under the Constitution of India. Further, it was also contended that the investigation by the DG is akin to trial/inquiry and the parties should be entitled to defend themselves and such denial of access to information restricts the ability of the accused parties to defend them. Thus, it was claimed to be a violation of the principles of natural justice.

The Delhi HC reiterated the findings of the Supreme Court of India in *Steel Authority of India v. Competition Commission of India*, that formation of a *prima facie* opinion does not amount to an adjudicatory function but is an administrative direction. Further, at the *prima facie* stage the CCI does not determine the rights of the parties. Additionally, the Delhi HC observed that Section 57 of the Act states that no information relating to any enterprise, which has been obtained by the CCI/COMPAT for the purposes of the Act, shall without the previous permission in writing of the enterprise, be disclosed, otherwise than in compliance with or for the purposes of the Act or any other law for the time being in force. Given that the Act is the principal legislation and the regulations form subordinate legislation, the Delhi HC observed that the constitutional validity of the subordinate legislation is presumed and cannot be struck down unless and it is "*manifestly arbitrary or if so unreasonable that the Parliament never intended to confer such power on the Regulator*". (Delhi HC judgment, dated 11.04.2017)

KK Sharma Law Offices

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

4th Floor, Sishan House,
119, ShahpurJat,
New Delhi – 110049

+91-11-41081137
+91-11-26491137

www.kkslawoffices.com
globalhq@kkslawoffices.com
operations@kkslawoffices.com