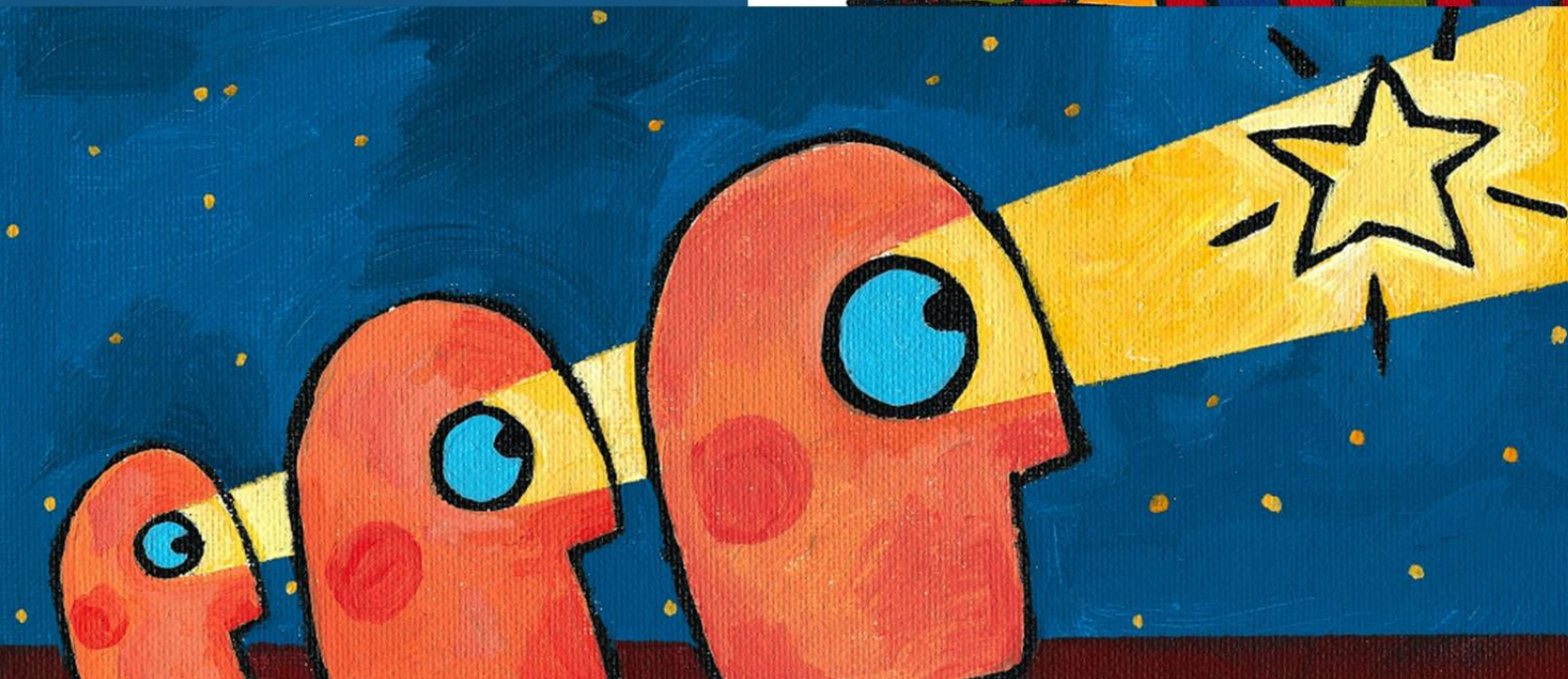




Monthly Newsletter

State of Antitrust

August 2018; Volume 5 Issue 8



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

Competition Commission of India orders probe against 4 liquor wholesalers in UP for alleged abuse of dominant position

SALPG fined with a penalty of 19.07 Cr. for abuse of dominant position in the terminalling services market

Between the Lines

Google escapes penalty: Platform owners should be allowed to self-regulate?

Heard At The Bar

- **Competition Commission of India fines All India Chess Federation, the national chess regulator, for anti-competitive practices**
- **EC fines Google with a record €4.34 billion fine in Android mobile devices case**

And more....

Competition Commission orders probe against 4 liquor wholesalers in UP for alleged abuse of dominant position

On 9th July, 2018, the Competition Commission of India ('CCI') had initiated a probe against 4 exclusive licensees in state of Uttar Pradesh dealing in the wholesale business of country liquor, viz. Flora and Fauna Housing & Land Developments Private Limited (**OP-1**), Patiala Kings Liquor Pvt. Ltd. (**OP-2**), Royal Beverages Pvt. Ltd. Ltd. (**OP-3**), Kiwi Wines And Beverages Pvt. Ltd. (**OP-4**) and their parent holding company, Chadha Holdings Pvt Ltd. (**OP-5**) after finding a *prima facie* case of imposition of discriminatory conditions in procurement of country liquor and denial of market access to manufacturers in contravention of Section 4 of the Competition Act, 2002 (the 'Act'). The *prima facie* opinion was based on the information wherein it was alleged that OP-5 had set up facilities for the manufacture of country liquor through its subsidiaries, viz. Lords Distilleries Ltd. and Wave Distilleries and Breweries Ltd., and the four wholesale license holders (OP-1 to OP-4), which are owned or controlled by OP-5, began procuring their requirements of country liquor predominantly from these entities. Further, it was averred that OP-5 as the holding company for the entire group, had exclusive control over purchase and supply of country liquor in wholesale market for the entire State of Uttar Pradesh. Thus, OP-1 to OP-5 as a 'group' enjoyed an absolute monopsony or dominant position with 100% market share in their respective zones. The Informant had alleged that OP-5 group has abused its dominant position by indulging in practices like buying only from certain manufacturers belonging to the same group or some favoured manufacturers, which were totally non-transparent, selective and discriminatory. As a consequence of this practice, the produce of only very few manufacturers/distillers was bought, which resulted in denial of market access to rest of the manufacturers without any transparent basis. Accordingly, the Commission ordered the Director General to investigate the same allegations under Section 26(1) of the Act vide its order dated 09.07.18.

SALPG fined with a penalty of 19.07 Cr. for abusing its dominant position in the terminalling services market

On 11.07.2018, the Competition Commission of India ('Commission'/ 'CCI') issued an order against South Asia LPG Company Pvt. Ltd. (SALPG) and imposed a penalty of Rs. 19.07 Crore for abusing its dominant position in the terminalling services which involves receipt, storage and dispatch of propane/butane/LPG to Oil Marketing Companies (OMC's), at Visakhapatnam Port. The case primarily concerned with access to upstream LPG terminalling infrastructure at Vishakhapatnam Port, which comprises several components viz. unloading arms at the jetty, blender, heat exchanger and cavern (storage facility). This infrastructure, being operated by SALPG, is used for handling imports of propane and butane and their blending into LPG.

East India Petroleum Pvt. Ltd. (EIPL) filed an information before CCI alleging that while allowing it to use the blender, SALPG has been insisting on mandatory use of storage facility (cavern) on the OMC's, not allowing EIPL to hook up, i.e. connect, its own blender to the pipelines of SALPG and SALPG is charging exorbitant bypass charges thereby making EIPL's services economically unviable for users. The conditions imposed by SALPG on EIPL in LPG terminalling have made similar services offered by EIPL economically unviable, due to this the OMC's were constrained to avail the terminalling services offered by SALPG only along with the restriction put by them. To address this, EIPL first proposed to use the blender of SALPG and, thereafter, take the output directly to the cross-country pipeline, by passing the cavern. Since this was not agreeable to SALPG which allowed bypass of cavern to the extent of 25 percent only, EIPL proposed to install its own blender, and sought a tap-out and tap-in from the propane and butane lines to discharge blended LPG, bypassing the cavern. This was also not acceptable to SALPG. Another proposal seeking tap-out from the propane and butane lines at jetty to EIPL's own blender and construction of its own infrastructure between the blender and storage facility, was also refused by SALPG.

After a detailed investigation by the Director General and a supplementary finding as well, CCI found SALPG enjoys dominant position in the *market for upstream terminalling services at Visakhapatnam Port*. SALPG sought to justify its conduct on the grounds of safety as well as efficiency and business justification. However, the Commission held the impugned conduct of SALPG to be in contravention of the provisions of Section 4 of the Act. Accordingly, CCI directed that:

- SALPG shall not insist mandatory use of its cavern and shall allow bypass of cavern for both pre-mixed and blended LPG, without any restrictions; and/or
- SALPG shall allow access to its competitors, potential as well as existing, to the terminalling infrastructure at Visakhapatnam Port, subject to compliance with all safety integrity and other requirements under applicable laws and regulations framed thereunder. Such an access should avoid additional cost burden on SALPG, and the entity seeking access shall bear the cost, if any, towards necessary changes to the existing infrastructure. Under this option also, SALPG shall not insist on mandatory use of cavern and it shall allow bypass of cavern, without any restriction. SALPG shall extend full cooperation for the study/audit undertaken by Visakhapatnam Port Trust in relation to the remedies ordered herein. Needless to say, SALPG shall not do anything raising rival's cost.

Vide aforementioned order dated 11.07.18, a penalty was imposed on SALPG @10 percent of their average annual turnover generated from the relevant market in the last three financial year amounting to INR 19.07 Crores.



Heard at the BAR

Legal news from India and the world

MCA provides additional three year extension to Vessel Sharing Agreements Exemption On 4th July, 2018, the Ministry of Corporate Affairs granted an additional three year exemption to Vessel Sharing Agreements (VSA) in the liner shipping industry from scrutiny under Section 3 of the Competition Act, 2002. The VSA exemption was first introduced on September 19, 2012 for a period of one year and has been continuously extended thereafter. The last extension was on June 20, 2017 which expired on June 19, 2018. This exemption applies to carriers of all nationalities, operating ships from any Indian port as long as such agreements do not include concerted practices involving fixing of prices, limitation of capacity or sales and the allocation of markets or customers. (*Gazette Notification, 04.07.18*)

German Competition watchdog imposes a penalty of 205 million Euros on special steel companies On 12.07.18, the Bundeskartellamt fined six steel companies, namely *Arcelor Mittal Commercial Long Deutschland GmbH, Cologne, Dörrenberg Edelstahl GmbH, Engelskirchen, Kind & Co. Edelstahlwerke GmbH & Co. KG, Wiehl, Saarstahl AG, Völklingen, Schmidt + Clemens GmbH + Co. KG, Lindlar, and ZappPrecision Metals GmbH, Schwert*, and a Trade association, *Edelstahl-Vereinigung* for concluding price-fixing agreements and exchanging competitively sensitive information in the market pertaining to special steel products. The price model of these products consisted essentially of base prices and surcharges for certain inputs, especially scrap and alloys, which formed a substantial part of the end price. The steel producers jointly agreed on and implemented a uniform method of calculation of these surcharges in addition to a basic agreement between the companies to pass the same to the customers on a 1:1 basis. The companies admitted to the accusations and agreed to a settlement amounting approx. 205 million Euros. (*Press release, 12.07.18*)

EC fines Google with a record €4.34 billion fine in Android mobile devices case On 18th July, 2018, the European Commission imposed a penalty of €4.34 billion on Google for imposing illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search market, the largest source of revenues for Google. The Commission noted that 80% of smart mobile devices in Europe, and worldwide, run on Android, which Google used to its advantage by imposing three types of restrictions, firstly, manufacturers were required to pre install the Google search app, as a condition for licensing Google's app store, secondly, it made payments to certain large manufacturers and mobile network operators to pre-install Google search app on their devices, thirdly, it prevented manufacturers wishing to pre-install Google apps, from selling mobile devices which were running on alternative versions of Android not approved by Google. The Commission further observed that Google is dominant in the markets for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system. Further, through its control over Android, Google is dominant in the worldwide market (excluding China) for licensable smart mobile operating systems, enjoying a market share of more than 95%. There were high entry barriers in the market due to network effects and the high capital intensive structure of the industry, which reduced the ability of rivals to compete effectively with Google. The Commission observed that Google's practices have not only denied rival search engines the possibility to compete on merits but has also harmed competition and further innovation in the wider mobile space. Thus, the Commission imposed a penalty on the basis of the value of Google's revenue from search advertising services on Android devices in the EEA. (*Press release, 18.07.18*)

CCI fines All India Chess Federation (AICF) the national chess regulator for anti-competitive practices On 12.07.18, the CCI imposed a penalty of Rs. 6,92,350 on AICF for violation of Section 3(4) and 4 of the Competition Act, 2002 (the 'Act') in the market for organization of professional chess tournaments in India and the market for services of chess players. The case pertains to unfair terms and conditions imposed by the AICF forbidding the players from participating in tournaments not authorized by AICF, and in case of contravention, a ban for a year from participating in the National Chess Championships and other events along with the surrender of 50% of the prize money from such unauthorised events and an unconditional apology and undertaking of no future repetition of such a conduct. This conduct also led to denial of market access for the competitors who were unable to get good players for their tournaments. The main issue considered by the Commission was whether AICF fell within the definition of an enterprise for the purposes of scrutiny under the Act, and observed that the collection of registration fee, provision of technical support to players, organising chess events and tournaments etc. are essentially revenue generating activities falling within the ambit of services covered by an enterprise. Taking into consideration, the regulatory powers enjoyed by AICF, the Commission concluded that AICF was in a dominant position and had abused the same. (*Case No. 79 of 2011*)

Google escapes penalty: Platform owners should be allowed to self-regulate?

The Competition Commission of India (CCI) recently passed an order dismissing the information filed against Google LLC for alleged abuse of dominant position in the relevant market for '*Online Search Advertising Services in India*'. However, in this case, the Chairperson recorded a dissenting opinion against the final order.

This Commission clubbed the information filed by Shri Vishal Gupta in Case No. 06/2014 and Albion Info Tel Limited in Case No. 46/2014 against Google LLC alleging violation of Section 4 of the Competition Act, 2002 (the 'Act') into a single case. It was alleged that in the relevant market there is an extremely opaque and non transparent bidding process of Google Adwords, more particularly in following the mechanism of fixing the 'Cost per click'. Further, the 'user safety policy' of Google was extremely ambiguous and using this the accounts of both the Informants along with those of several others were withdrawn from the internet for some so called violations, without any prior notice. These actions were unfair, discriminatory and anti-competitive, which led to denial of market access through the internet to the Informants, leading to restricting competition in the market and causing prejudice to the consumers. It was also alleged that all this was done in lieu of promotion of Google's own Remote Tech Support operation named 'Google Helpout', an alternative to the Informants' businesses. However, the Commission did not find termination of the accounts of the Informants to be unfair as the termination was prompted by legitimate concerns arising out of warnings from antitrust authorities, courts, monitoring systems established by Google, repeated violations by informants and consumer complaints. The Commission observed that Google's AdWords Policies clearly defined minimum standards of use for its advertising platform (AdWords) in order to protect the platform and the end-users. A platform, would thus be well within its rights to regulate itself to ensure that the advertisements conform with its quality and safety standards. Further, platforms and users are free to agree upon the terms and policies that will govern their relationship, including enforcement mechanisms. Termination of the relationship between a platform and user is a commonly used mechanism to legitimately enforce variety of policies. With regard to the allegations of opaqueness and lack of transparency in the bidding process, the Commission held that Google provides sufficient useful information to advertisers that allow it to fairly evaluate their campaigns. Thus, the elements of Section 4 of the Act are not met and no infringement was found against Google, leading the matter to be closed.

However, in the dissenting opinion, the Chairperson, though in agreement with the findings of the Commission pertaining to abuse, was not convinced with the observation that there was no plausible link between termination of such a large number of AdWords accounts and the launch of Google Helpouts. He also opined that it was not functionally substitutable with Remote Technical Support (RTS) services of the Informants. The dissent opinion records that the report of the Director General ('DG') is not comprehensive regarding the absence of link between termination of AdWords accounts and the launch of Google Helpouts. Dissent note further notes that *rather than passing a final order under Section 27 of the Act, the present cases ought to have been referred back to the DG by the Commission under Section 26 (7) of the Act for further investigation.*

This case can better be appreciated if looked in contrast with the order of the Commission against Google LLC, in Case No. 7 and 30 of 2012, wherein Google was alleged to be abusing its dominant position in the same market i.e. '*Online Search Advertising Services in India*', by creating an uneven playing field by favouring its own services and partners by manually manipulating its search results to the advantage of its vertical partners. (*Case 06/2014 & 46/2014, 12.07.2018*)

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
India

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

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