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CCI passes *cease-and-desist* order against Film Industry Trade Associations for entering into anti-competitive agreements

On October 31, 2017, the Competition Commission of India ('CCI') passed an order in the information filed by Mr. Vipul Shah, an independent film producer and director, against All India Film Employees Confederation, Federation of Western India Cine Employees ('FWICE') and affiliated associations, as well as Producers Associations comprising of Indian Motion Picture Producers Association, Film and Television Producers Guild of India and Indian Film and Television Producers Council (Artists Association and Producers Association) (*collectively* 'OPs') for the violation of Section 3 of the Competition Act, 2002 ('Act'). FWICE had entered into a Memorandum of Understanding (MOU) with the Producers Association whose terms were alleged to be anti-competitive, for which the CCI passed a *cease-and-desist* order.

The MOU restricted the producers to only engage those artists who were members of the Artists Association and imposed requirement of a Non-Objection Certificate to employ non-members. It also fixed wages of the members of the Artists Association and dictated the facilities to be provided to them. There was an appointment of a Vigilance Committee which ensured compliance with the provisions of the MOU by levying penalties. Resolutions assigning proportions of hiring of artists based on area at the rate 70:30 were also passed. The CCI on June 23, 2014, after forming a *prima facie* opinion, directed the DG to submit a report on his findings. The DG concluded in his investigation report that the terms and conditions of the MOU containing provisions relating member-to-member working, fixation of wages, mandating engagement with members and fixation of hiring proportion of workers, and the conduct enforcing these provisions were violative of Section 3(3)(a), 3(3)(b) and 3(3)(c) of the Act.

The OPs' preliminary contention was that they enjoyed exemption as a trade union from any suit or proceeding in any civil court and hence they challenged the jurisdiction of the CCI to hear their matter. The CCI rejected their submission and relied on the Hon'ble Supreme Court's decision in the case of *CCI v. Co-ordination Committee of Artists and Technicians of W.B. Film and Television and Ors.* which held that, "*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 CCI also observed that as the matter in hand concerned the affected supply of services to the market rather than conditions of labour, it could not be termed as an industrial dispute. While commenting on the merits of the case, the CCI held that the Clause 6 of the MOU which mandated the producers to engage with the members of the FWICE and its affiliates (Artists Association) was restrictive in nature and hindered the producer's free choice to employ/hire any person who is not a member. Also, though the nature of Clause 18 regarding the appointment of the Vigilance Committee was not violative *per se*, however when it operated as a restraint, it disrupted the opportunity of fair and free competition and amounted to limiting and controlling the market. The CCI also observed that the clauses relating to the fixation of wages and payment for extra-shifts related to the conditions of labour, hence falling in the realm of legitimate trade union activity and was outside the purview of Act.

While referring to the resolutions passed to decide the proportion of artists, the CCI observed that OPs limited and controlled the provision of services, and led to geographical allocation of services, thus violating the provisions of the Act. It also concluded that the conduct of the OPs to execute the clauses of the MOU was also anti- competitive and violated Section 3(3)(a) and 3(3)(b) of the Act.

While holding the OPs guilty of contravening Section 3(3)(a) and 3(3)(b) of the Act, the CCI ordered immediate *cease-and-desist* of the anti-competitive activity and ordered non-inclusion of Clause 6 or 18 in any future extension of MOU. Considering the fact that the MOU had been in existence since 1966 and majority of the members were daily wage workers, and only two of the clauses were found anti-competitive, the CCI refused to levy any monetary penalty on the OPs. (*Case No. 19 of 2014*)

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Heard at the BAR

Legal news from India and the world

European Commission imposed a fine of € 34 million on five car safety equipment suppliers for cartelizing

On 22.11.2017, the European Commission ('EC') imposed a fine of € 34 million on five companies, *viz.* Tokai Rika, Takata, Autoliv, Toyoda Gosei and Marutaka, for participating in, total of four, cartels for the supply of car seatbelts, airbags and steering wheels to Japanese car manufacturers in the European Economic Area (EEA). The companies, collectively fixed prices/markets, and exchanged sensitive information for the supply of seatbelts, airbags and steering wheels to Japanese car manufacturers, Toyota, Suzuki and Honda, in the EEA. For the determination of the level of penalty, the EC considered the following factors: the sales value in the EEA achieved by the cartel participants for the products in question, the serious nature of the infringement, its geographic scope and its duration. The EC, in respect to Marutaka, considered its role as the facilitator in one of the cartels. Takata and Tokai Rika received full immunity for revealing the cartels and whereas, Autoliv and Toyoda Gosei benefited from reductions in their fines for their cooperation with the EC. (EC *press release, 22.11.2017)*

Italy's competition authority imposed a fine totalling to 23 million Euros on 'big four' accounting firms On 07.11.2017, the competition authority of Italy found that the four accounting firms, *viz.* KPMG, Deloitte, PwC and E&Y, agreed to allocate between them the different lots in two tenders floated by COONSIP.

The Italian competition enforcer imposed fines on E&Y, KPMG Deloitte and PwC of €8.56m, €7.66m, €5.96m and €1.52m respectively. *(Press release 17.11.2017)*

Korean competition authority (KFTC) imposed penalty on Japanese auto supplier for collusion

On 07.11.2017, the KFTC imposed a combined fine of 37.2 billion Won (US$1.5 million) on three international auto parts suppliers for price-fixing allegations. The three companies, *viz.* Denso Korea Automotive, Hyunda m Industries and Delphi Powertrain, colluded on a bid to supply fuel pumps to Hyundai Motor Group between August 2007 and July 2009. The companies allegedly exchanged information on their bids to make sure they remained above a certain level to prevent the price from dropping too low. During the investigation, KFTC observed that from 2009 till 2012, Denso Korea and Delphi Powertrain colluded to prevent other suppliers from winning contracts on variable valve timing parts. KFTC imposed a fine of 16.9 billion Won on Denso, 16.8 billion Won on Hyundam Industrial of Japan's Aisan Industry, and 3.4 billion Won on Delphi Powertrain. *(Press release 07.11.2017)*

Lithuanian competition council (LCC) imposed a fine on a supplier and distributor of bone regeneration products for resale price maintenance

On 31.10.2017, LCC found an Italian-based supplier, *Tecnoss Dental* and its Lithuanian distributor, *UAB Implamedica,* engaged in fixing of minimum resale prices of bone regeneration products used in implant dentistry. LCC imposed a total fine of EUR 175,500 on both the companies. Since, *Implamedica* admitted the infringement, LCC imposed lower fine of EUR 61,200 on *Implamedica*, while *Tecnoss Dental* was fined for EUR 114,300. (*Press release 07.11.17)*

Russian competition authority (FAS) clears the merger of Bayer/Monsanto with remedies

On 08.11.2017, the FAS Russia concluded the review of the merger between "Bayer AG" (Germany) and "Monsanto Company" (USA). FAS stated that both Bayer and Monsanto were vertically integrated full-cycle agro-technology companies active in agro-technology research and development as well as in the distribution and marketing of their products to agricultural producers. Further, FAS, after assessing the impact of the transaction on competition in the Russian market, stated that the merger can cause the following anticompetitive effects: firstly, it can create new and increase the already existing entry barriers in relevant market of seeds. Further, it can enhance the incentives for anticompetitive agreements and it can also increase the possibility of abuse of market power. Thus, the FAS concluded that the merger creates substantial risks of restriction of competition, and those risks should be leveled in the course of the merger review. For reaching a balanced solution and meeting the objectives of competition protection it was chosen by FAS to establish behavioral remedies aimed at creating conditions for the development of potential competition from the side of the Russian companies by providing them with an effective transfer of technology available for and specific to agro-climatic conditions in Russia. *(Press release 8.11.17)*

CCI orders a probe against Haryana Urban Development Authority (HUDA) for alleged abuse of dominant position

On October 31, 2017, on forming a *prima facie* opinon, the Competition Commission of India (the 'CCI') passed an order under section 26(1) of the Competition Act, 2002 (the 'Act'), against Haryana Urban Development Authority (HUDA/ 'OP') directing the Director General ('DG') to submit an investigation report on the alleged contravention of Section 4(2)(a) of the Act.

Going by the details provided in the order, Information was filed by Gurgaon Institutional Welfare Association ('Informant'), a registered association of individual allottees/purchasers, against the OP, a statutory body established under the HUDA Act, 1977 ('HUDA Act'), an exclusive supplier of institutional plots in sectors of urban estates in Gurgaon. The allottees of the Informant had approached the OP for allotment of institutional plots in Sector 32 and 44 of Gurgaon, based on the brochures issued by OP offering the same. The allottees paid the agreed consideration amount and were supposed to have the title of the properties transferred to them. However, when they approached the OP for the execution of the conveyance deed, the OP imposed void and illegal conditions that restricted the rights of alienation of the allottees. The OP also, allegedly, imposed an extra liability on allotees to pay undetermined consideration amount towards the additional cost of the plot in future. Further, the Informant alleged that such conduct of the OP was in contravention of the provisions of Transfer of Property Act, 1882 and Indian Contract Act, 1872. It was also alleged that the various provisions of the HUDA Act, resultantly, gave the OP a dominant position and the same was being abused by creating artificial scarcity of institutional plots by offering smaller number of plots and affecting the supply, thus violating Section 4 of the Act.

The primary objection of the OP was related to jurisdiction of the CCI as the HUDA Act was the governing law in Gurgaon and CCI did not have any jurisdiction to hear the matter. Further, the OP defended by relying on the combined reading of Section 15 of HUDA Act and HUDA Regulations, 1978 ('HUDA Regulations') to submit that the allottees only have a 'restricted' right of transfer/alienation and not the complete right. Even the HUDA Policy, 2009 also allowed that only 49% share of the institutional plot could be transferred only with the prior approval of the Chairman, HUDA.

While addressing the preliminary objection to the jurisdiction, the CCI held that despite HUDA Act being the governing law, the CCI had the power to examine any matter stipulating any anti-competitive conduct. CCI also held that the though the OP was not performing any sovereign function, it was engaged in a commercial function and thus, was an *'enterprise'* under Section 2(h) of the Act. Thereafter, the CCI delineated the relevant market in the case as the '*market for development and sale of institutional plots in the state of Haryana*'.

Thereafter, the CCI determined that as per the statutory provision, the OP appeared to be in a position of strength and could operate independently of competitive forces. As the only supplier of institutional plots in urban areas, the consumers in the relevant market had no other alternative than the OP. The CCI noted that restricting the right to transfer of title of plot even after complete payment of consideration was not justified as the complete ownership vested with the allottees. The CCI also held that the conditions of the conveyance deeds were inconsistent with the HUDA Regulations. The requirement of the prior permission of the Chairman of HUDA, even after payment of sale consideration, was also held '*apparently unfair'*. The defence submitted by the OP that the Informant had prior knowledge of the allegedly unfair terms and had voluntarily entered into such conveyance deeds, was rejected as the CCI held that the allottees of the Informant did not possess any sufficient bargaining power. The CCI also rejected the submission of the OP that the conveyance deeds were executed before 20th May 2009 as the position of this law was already clarified by Bombay High Court in *Kingfisher Airline Ltd. & Anr. v. CCI & Others.*

The CCI, after finding a *prima facie* contravention of Section 4(2)(a) of the Act, directed the Director General (DG) to carry out a detailed investigation into the matter and submit the report within 60 days. (*Case No. 94 of 2016*)

384, Asiad Village
New Delhi – 110049
India

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

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