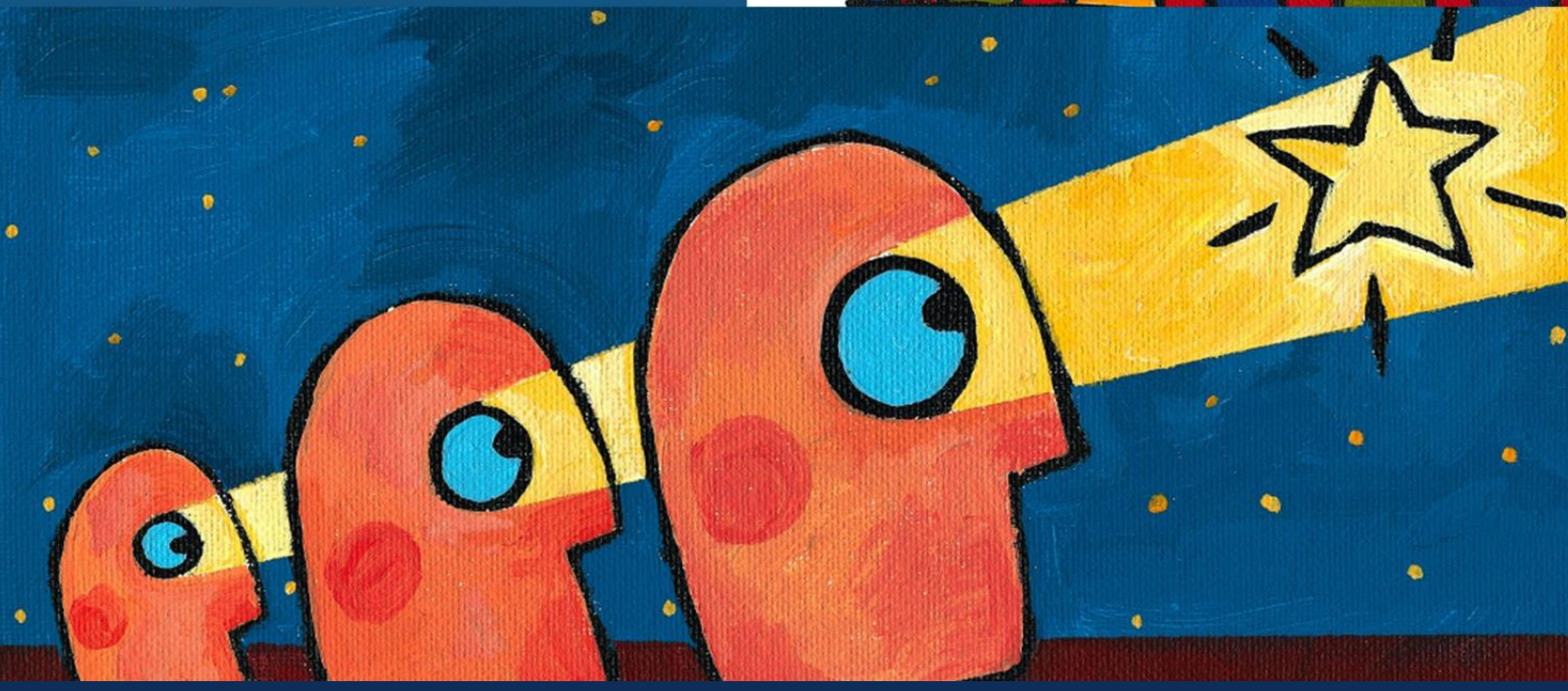
KK SHARMA
LAW OFFICES

Monthly Newsletter

State of Antitrust

June 2017; Volume 4 Issue 6



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

BETWEEN THE LINES

Supreme Court approves levying of penalty under competition law to be calculated on *'relevant turnover'* and not on '*total turnover'*

Judgment passed by the Supreme Court on 8th May, 2017 in case of Excel Corp Vs. CCI& Ors.

CCI orders investigation against F. Hoffmann-La Roche AG for abuse of dominant position

HEARD AT THE BAR

European Commission imposes a fine of 110 million Euros on Facebook for providing misleading information in WhatsApp takeover

Portuguese Competition Authority imposes a fine of 38.3 million Euros on five companies for entering into anticompetitive agreements

And more....

KK SHARMA
LAW OFFICES

Supreme Court approves levying of penalty under competition law to be calculated on *'relevant turnover'* and not on *'total turnover'*

On 8thMay, 2017, Hon'ble Supreme Court, in a bench consisting of Hon'ble Mr. Justice A.K. Sikri and Hon'ble Mr. Justice N.V. Ramana, passed a landmark judgment by upholding the principle of 'relevant turnover' for the determination of penalties under Section 27(b) of the Competition Act, 2002 (the 'Act'). Hon'ble Mr. Justice N.V. Ramana wrote a separate but concurring judgment detailing the steps to determine the 'relevant turnover'.

These proceedings have their origin in a letter written by the Food Corporation of India ('FCI') to the Competition Commission of India ('CCI' or 'Commission') intimating CCI aboutan apparent case of bid rigging amongst the manufacturing companies of Aluminum Phosphide Tablets ('APTs'), viz. M/s. Excel Crop Care Ltd. ('Excel'), M/s. United Phosphorous Ltd. ('UPL'), M/s. Sandhya Organics Chemicals (P) Ltd. ('Sandhya') (together 'Appellants') and M/s Agrosynth Chemicals Limited ('Agrosynth') in the tenders floated by the FCI for APTsfrom years 2007 to 2009. After receiving the investigation report of DG,theCCI found a violation of Section 3(3) of the Act and imposed a penalty at the rate of 9% of the average total turnoverfor last three years of the four APTs manufacturing companies. Aggrieved by the order of the CCI, out of four manufacturing companies, Excel, UPL and Sandhya filed appeals before the Competition Appellate Tribunal ('COMPAT'). The COMPAT,in its order , rejected all the contentions of the appellants except the issue of quantum of penalty. On quantum of penalty, the COMPAT held that the penalty cannot be on the *'total turnover'* of the enterpriseand has to be restricted to the turnover in the business involved in anti-competitive conduct. Aggrieved by the order of COMPAT, the Appellants filed three separate appeals before Hon'ble Supreme Court ('SC'). On the other hand, the CCI also preferred an appeal against the order of COMPAT challenging the determination of penalty imposed on the basis of *'relevant turnover'* instead of *'totalturnover'*.

The SC framed four issues- the first two were jurisdictional issues. These pertain to the attempt of the Appellants to show that CCI was not having jurisdiction on the matter. The third one was challenging the merits of the order of COMPAT and last one was whether the penalty under Section 27(b) of the Act has to be on total turnover of the enterprise or it can be based only on "relevant turnover" as held by COMPAT?

The SC rejected all the contentions of the Appellants on jurisdiction by providing proper reasoning and held that the CCI was within its jurisdiction to hold an enquiry against violation of Section 3 of the Act. The SC held that restricting the investigation procedure, in the manner projected by the appellants, would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on competition. For the third issue, the SC again rejected the contentions of the Appellants since collusion between them was proved by their conduct and agreed with the findings and conclusions of the COMPAT.

On the fourth issue the SC gave serious thoughts and emphasized upon the doctrine of proportionality. Since, section 2(y) of the Act defining *'turnover'* does not provide any clarity to the issue, the SC considered the guidelines of the European Union as well as the Office of Fair Trading in the United Kingdom on the subject as they take into consideration the '*relevant turnover*'. The SC also relied on the judgment of the Competition Appeal Court of South Africa in the case of *Southern PipelineContractors Conrite Walls (Pty) Ltd.* v. *The Competition Commission.*Inthat case, the Court had held that the appropriate amount of penalty had to be determined keeping into consideration the damage caused and the profits which accrue from the cartel activity. The Appeal Court used the words *'affected turnover'*.Furthermore, the SC held that *"in the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties".* The SC in consideration with the doctrine of proportionality stated that "*it cannot be said that purpose of the Act is to 'finish' those industries altogether by imposing those kinds of penalties which are beyond their means. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted."*In a separate concurring judgment, Hon'ble Mr. Justice N.V. Ramana stated "*excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act.*" The Lordship further provided the steps to determine the relevant turnover of an entity and to determine the appropriate percentage of penalty based on aggravating and mitigating circumstances.The SC disposed off all the appeals and upheld the order of COMPAT. *(SC, C.A. No.2480 of 2014)*

KK SHARMA
LAW OFFICES

Heard at the BAR

Legal news from India and the world

European Commission imposes a fine on Facebook for providing misleading information in WhatsApp takeover

European Commission ('EC'), on 18th May, 2017, imposed a fine of €110 million on Facebook, Inc ('FB') for providing misleading information in WhatsApp, Inc. ('WA') takeover. It is the first time that the EC decided to impose fines on a company for providing incorrect or misleading information since the enforcement of the 2004 Merger Regulations. In August, 2014 FB, the social networking giant, notified the EC to acquire the consumer communications services provider,WA. The EC, after carrying out a competitive assessment of its impact on the internal market, cleared the transaction in October, 2014. During the assessment, FB,explicitly, declared to the EC that*it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts*. However, in August, 2016 WA,in itsupdate to the terms of service policy, included the possibility of linking WA users' phone numbers with FB users' identities. In December, 2016 the EC found that the conduct was contrary to the statement of FBrecorded in the year 2014 as the technical possibility of automatically matching FB and WA users' identities already existed in 2014. Since, at the time of assessment, the decision of EC was based on various factors including*'even if'* assessment that assumed user matching as a possibility, thus, the misleading information provided by FB did not have an impact on the outcome of the clearance decision. On imposition of fine, the EC considered the act of FB as serious infringement of Merger Regulations and in accordance with the Regulations the EC imposed overall fine of €110 million on FB *(EC Press Release 18.05.2017)*

Mitsubishi Electric fined by Ontario Superior Court of Justice for bid rigging On 25th April,2017, Ontario Superior Court of Justice imposed a fine of $13.4 million on a car parts manufacturing company, Mitsubishi Electric Corporation ('MEC') for bid rigging and for participating in an international conspiracy. During the investigation it was determined that ,between the years 2003 and 2006,MEC entered into anticompetitive agreementswith a competing Japanese car parts manufacturer for fixing thecalls for the bids issued by Honda and Ford for the supply of alternatorsand by General Motors for the supply of ignition coils. *(News Release Govt. of Canada, dated 25.04.2017)*

Portuguese Competition Authority imposes a fine of 38.3 million Euros on five companies for entering into anticompetitive agreements On 5th May, 2017 the Portuguese Competition Authority ('Adc') imposed a fine of 38.3 million Euros on five companies, namely, EDP – Energias de Portugal, S.A., EDP Comercial – Comercialização de Energia, S.A., SonaeInvestimentos, SGPS, S.A., Sonae MC – ModeloContinente SGPS, S.A. and ModeloContinenteHipermercados, S.A. for entering into anti-competitive agreements within the partnership created for the commercial campaign*"Plano EDP Continente"*, in 2012. According to the terms of the agreement Sonae and EDP agreed not to compete on the sector for distribution of electricity in mainland Portugal for a period of 2 years.The Portuguese Competition Act ('PCA') explicitly forbids such agreements between companies as they affect the competitiveness and the economy as a whole. Further for determining the fines, Adc considered the criteria given under article 69 of the PCA. Adc imposed thefine of 38.3 million Euros, determined according to the companies' business turnovers. (*Press Release, dated 05.05.2017)*

European Commission settles the antitrust case by accepting the commitments of Amazon on e-books On 4th May, 2017 the European Commission ('EC') had accepted commitments offered by Amazon, Inc. ('Amazon') for settlement of antitrust case. In June, 2015 the EC conducted an investigation on Amazon with a preliminary view that Amazon may have abused its dominant position on the markets for *the retail distribution of English and German language ebooks toconsumers by requesting parity conditions in its ebooksagreements with publishers.* The EC had concerns about clauses included in Amazon's e-books distributionagreements,as such clauses could make it more difficult for other e-book platforms to compete with Amazon. Amazon addressed the concerns of the EC by offering not to enforce, introduce or to change the terms of its agreements with publishers. The EC accepted the commitments as they protect effective competition for e-books to the benefit of consumers. (EU *Press Release, 04.05.2017)*

CCI orders investigation against F. Hoffmann-La Roche AG for abuse of dominant position

On 21st April, 2017, the CCI ordered a detailed investigation against the pharmaceutical giant F. Hoffman- La Roche (OP-1) and two of its group companies viz. Genentech, Inc. (OP-2) and Roche Products (India) Pvt. Ltd. (OP-3) (collectively called 'Roche Group') for the alleged contravention of the provisions of Section 4 of the Act.

F. Hoffman-La Roche ,OP-1, is stated to be the second largest pharmaceutical company worldwide and OP-2 and OP-3 are wholly owned subsidiaries of OP-1, engaged in the business of developing, manufacturing and commercialising medicines for treating patients with serious medical conditions. In the year 1990, OP-2 developed a monoclonal antibody, named Trastuzumab, which is used in the therapy to treat breast cancer. In the year 1998, OP-2 signed an agreement with OP-1 for the exclusive marketing rights to sell Trastuzumabunder the brand name HERCEPTIN. HERCEPTIN was introduced in India in the year 2002 and it was priced at Rs. 1, 20,000 per vial. Due to high prices, the OP-1 withdrew HERCEPTIN from the Indian market and rather introduced two lower cost versions of Trastuzumab, known as BICELTIS and HERCLON,both were priced at Rs. 75000/- per 440 mg vial.

Biocon Ltd. ('IP-1') a company engaged in the business of manufacturing generic active pharmaceutical ingredients and Mylan Pharmaceuticals Pvt. Ltd. ('IP-2') a company engaged in the business of development and sale of pharmaceutical products in India (collectively 'Informants') initiated the development of a bio similar drug for Trastuzumab, in joint collaboration and launched two biosimilarsunder the brand names, CANMAb and HERTRAZ, priced at Rs. 19,500/-per vial of 150 mg and 440 mg priced at Rs. 57,500/- per vial respectively which were 25% lower than HERCLON and BICELTIS and 50% lower than HERCEPTIN. The Roche Group, with the intention of preventing the entry of new players in the market of Trastuzumab, started indulging into frivolous litigations against the Informants and writing frivolous communications to various authorities. Further, it was alleged that the Roche Group indulged in a series of abusive practices to evade the entry of the Informants' products and/or to hamper their growth. Thus, the Informants filed Information before CCIfor the abusive conduct of the Roche Group that was in contravention of Section 4 of the Act.

The CCI decided to call the Informants as well as the Roche Group for a preliminary conference. It was contended by the Roche Group that there is a pending Civil Suit before the Hon'ble Delhi High Court and, thus, the Informants should not be permitted to raise similar issues before the CCI. The CCI while relying on ***'Ericsson case'*** stated that both the reliefs soughtwere distinct thus the CCI hadjurisdiction to look into the Roche Group's anti-competitive conduct. For delineating the relevant product market, the CCI gave due regard to its opinions considered in combination matters for pharmaceutical cases and defined the relevant product market at the molecular level while considering the biosimilar drug as a part of the same market. The CCI delineated relevant market as "*market for biological drugs based on Trastuzumab, including its biosimilars in India*". Furtherfor examining the dominant position,the CCI considered the market share of the Roche Group and stated even after the entry of biosimilarsin the relevant market the reduction in Roche Group's market share was not very substantial, thus it was in a dominant position in the relevant market. While examining the abuses, the CCI observed that the right to bring civil litigation is a legal right and the mere fact that litigation was ultimately unsuccessful does not render it vexatious. Further for the allegation of sending frivolous communication/letters, the CCI formed a *prima facie* opinionthat the Roche Group had tried to influence regulatory authorities, by sending letters/communications, and adversely affected the penetration of biosimilars in the market by denying them the market access. CCI stated in its order*"denial of market access within the meaning of Section 4(2)(c) of the Act, need not be complete and absolute in nature. Even a partial denial of market access that takes away the freedom of a substitute to compete effectively and on merits in the relevant market, may amount to a contravention of Section 4(2)(c) of the Act."*.Resultantly, the CCI formed a *prima facie* opinion thatthe Roche Group has contravened the Section 4(2)(c) of the Act and directed the Director General to conduct a detailed investigation into the matter. (*Case 68 of 2016)*