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Monthly Newsletter

State of Antitrust

May 2018; Volume 5 Issue 5

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Supreme Court affirms the penalty of Rs. 1 Crore imposed by Competition Commission of India on Thomas Cook (India) Limited for Gun Jumping

On April 17, 2018, the order of *erstwhile* Competition Appellate Tribunal ('**COMPAT')** has been set aside by the Hon'ble Supreme Court of India (the '**Supreme Court**') and the order of Competition Commission of India (**'CCI'**) has been affirmed by upholding the penalty of Rs. 1 Crore imposed on the three entities, Thomas Cook (India) Limited ('**TCIL'**), Thomas Cook Insurance Services (India) Limited **('TCISIL')** and Sterling Holiday Resorts (India) Limited (**'Sterling'**) for violation of sections 5 and 6 of the Act. The Supreme Court thereby accorded a strict interpretation to the requirement of notifying the CCI prior to consummation of a combination under the Competition Act, 2002 **("Act")**.

Going by the details provided in the order, an appeal was preferred by CCI before the Supreme Court challenging the decision of erstwhile COMPAT that set aside the order of CCI. The grounds for setting aside the order of CCI by erstwhile COMPAT were that (a) passing of resolutions to approve the demerger/amalgamation as well as the market purchases by the boards of directors of the parties on the same day does not make the actions interdependent, (b) the mere fact that various transactions were executed in close proximity of the market purchases was not sufficient to deny the benefit of an exemption to the market purchases when seen individually and, (c) there was no valid ground or justification for sustaining the penalty because the violation, if any, was purely technical.

Brief facts of the case are that a show cause notice to all the three entities was issued by CCI stating that market purchases, being part of the composite combination under (The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations), Regulations, 2011) (as amended) ('**Combination Regulations'**), were consummated before giving notice to the CCI and as such invited penalty under section 43 A of the Act and thereby imposed a penalty of Rs. 1 Crore on the three entities. Aggrieved by the order of CCI, all the three entities preferred an appeal before erstwhile COMPAT. COMPAT steered away from the 'clear objective test' on the meaning of "composite combination", and observed that regulation 9(4) of the combination regulations is merely an enabling tool that allows parties to file a single notice (and avoid multiple notices) in case of a series of steps or smaller individual transactions which are interconnected or interdependent on each other.

Aggrieved by the order of COMPAT, the Supreme Court was approached by the CCI, challenging the decision of the COMPAT on the grounds that the COMPAT erred in holding that (a) the said transactions were not interdependent, (b) that market purchases fell within the ambit of exemption notification and, (c) that the combination was clearly a composite one. Even if the market purchases could be said to be exempted, if taken in isolation, the entire composite combination could never be stated to be exempted, as the whole of it had to be notified in terms of section 6(2) of the Act. It was further urged by CCI that the order of the COMPAT be set aside as the violations were not purely technical.

The Supreme Court, observed that "*while it is open for the parties to structure their transactions in a particular way the substance of the transactions is more relevant to assess the effect on competition irrespective of whether such transactions are pursued through one or more steps/ transactions"*. On the issue of the effect of regulation 9(4) of the Combination Regulations, the Supreme Court observed that regulation 9(4) cannot be interpreted to enable consummation by a composite combination before giving notice to the CCI. That would be defeating the intent and purpose of the Act and in particular section 5 and 6 thereof. Further on the contention that there was no *malafide* attributable to the three entities, the Supreme Court ruled that the imposition of penalty under section 43A of the Act is on account of breach of a civil obligation, and the proceedings do not have a criminal bearing; thus the penalty has to be followed. The discretion under section 43A can be exercised only with respect to the quantum of penalty.

Going further, the Supreme Court observed that the order passed by the CCI was just and proper and a nominal penalty of Rs. 1 crore was imposed keeping in mind the facts and circumstances of the case. The Supreme Court went on to state that erstwhile COMPAT erred in setting aside the order of CCI and that that Supreme Court finds no grounds for interference in the order of CCI and the penalty of Rs. 1 Crore on the three entities TCIL, TCISIL and Sterling was affirmed. *(Order dated* 17.04.2018)

Heard at the BAR

Legal news from India and the world

Approval for rightsizing the Competition Commission of India by the Cabinet

On 04.04.2018, the Union Cabinet of Government of India approved rightsizing of the Competition Commission of India(CCI) from One Chairperson and Six Members (totaling seven) to One Chairperson and three Members (totaling four) by not filling up the existing vacancies of two Members and the additional vacancy likely to arise in future. Highlighting the background of this downsizing, the Ministry of Corporate Affairs said that as part of the objective of easing the mergers and amalgamation process in the country, it had "revised *de minimis* levels in 2017, which has led to reduction in the notices that enterprises are mandated to submit while entering into combinations, thereby, reducing the load on the Commission" Press Release further goes on to say that this proposal has been extended in the light of Governmental objective of "Minimum Government- Maximum Governance." In the light of this policy of Govt. of India, it has been argued that after downsizing CCI compares well with the size of competition regulators in countries like UK, the United States, Australia and Japan. The Ministry of corporate affairs maintains that this move will help in ease of doing business by reducing regulatory burden on them. In continuation, this move will lead to speedier approvals with respect to business of the corporate and greater employment opportunities. (*Press Release by Ministry of Corporate Affairs dated 04.04.2018*)

The European Commission opens in-depth investigation into Apple's proposed acquisition of Shazam

On 23.04.2018, the European Commission **(**EC) started investigating deeply(Phase-II) into the proposed transaction. Initially the proposed transaction was notified to Austria but the transaction failed to meet the regulatory clearance as it did not satisfy the minimum threshold criteria of the EU Regulations. Consequently, on 21.12.2017, a referral request was sent by Austria to the EC pursuant to the EU Merger Regulations. On 06.02.2018, EC accepted the request for assessment of the acquisition of Shazam by Apple under EU's Merger Regulation Regime forwarded by Austria. The proposed transaction involving acquisition of Shazam by apple would combine the two renowned players in the digital music industry, active in complementary business areas. EC apprehends that, the proposed transaction would lead to Apple obtaining access to the customers' data of its competitors putting competing music streaming services at a disadvantage. The transaction was notified to the EC on 14.03.2018 allowing it 90 working days, until 04.09.2018, to come to a decision.

European Commission fines Altice €125 million for gun jumping under EU Merger Rules

On 24.05.2018, EC slapped a fine of €125 million pursuant to a breach of "notification requirement" and "standstill obligation" by Altice which is a MNC telecom giant. In light of the notification requirement, the merging entities must notify planned mergers for review by EC and according to the standstill obligation, they cannot implement them until the same is cleared by EC. In May 2017, EC released a Statement of Objections to Altice objecting Altice's implementation of its acquisition of PT Portugal before obtaining the EC's final clearance .The objections of EC centered on certain provisions of the purchase Agreement, whereby Altice ended up acquiring the right to exercise decisive control over PT Portugal and in certain cases, Altice in fact implemented decisive control over PT Portugal's business affairs, for example by instructing PT Portugal about how to carry out a marketing campaign and by seeking and receiving commercially sensitive information about PT Portugal. Background of the transaction is that on 09.12.2014, Altice had entered into a transaction agreement with Oi, the Brazilian telecommunications operator which controlled PT Portugal to acquire sole control of PT Portugal. This transaction was duly notified to EC in February 2015 and approved, subject to conditions. At the time of the notification, Altice's Portuguese subsidiaries Cabovisão and ONI were competitors of PT Portugal for telecommunications services in Portugal and thus the decision was conditional upon Altice's divestment of ONI and Cabovisão. The Condition was imposed as EC feared that the merged entity would face inadequate competitive restraint from the remaining players in the market. *(Press Release by EC dated 24.04.2018)*

The FAS Russia approved the Bayer/Monsanto deal On 20.04.2018, Russia's Federal Antimonopoly Service (FAS) granted approval for the merger of German chemical company Bayer and US producer of genetically modified seeds and herbicides Monsanto Company. As a result of this approval, Bayer shall offer "*technological transfer of molecular selection tools and germplasm of the selected crops"* to create highly productive seeds. Additionally, Bayer will offer non-discriminatory access to digital platforms of precise farming, historical data referred to the Russian Federation, and the data that will be collected by Bayer post commercialization of its products in Russia. Unrestricted access to such data will prove highly beneficial to Russian companies for technologically improving precise farming. *(Press Release by FAS dated 23.04.2018)*

Competition Commission of India imposes a penalty of Rs. 171.55 Crore on Eveready and Rs. 42.26 Crore on Nippo for engaging in Cartelization

On 19.04.2018, the Competition Commission of India (the 'Commission' or 'CCI') passed an order imposing a penalty of Rs. 171.55 Crore on Eveready Industries India Ltd. ('Eveready'), and Rs. 42.26 Crore on Indo National Ltd. ('Nippo'), while giving 100% reduction in penalty to Panasonic Energy India Co. Ltd. ('Panasonic') for cartelization by way of sharing price sensitive information amongst each other. This was held to be in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Competition Act 2002 ('Act') .

As per the details, CCI took up this case *suo moto* after an application was filed by Panasonic, a subsidiary of Panasonic Corporation Japan, under Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 **('Lesser Penalty Regulations')** read with Section 46 of Act on 25.05.2016. Panasonic, in its Lesser Penalty Application, submitted that there existed a cartel amongst Eveready, Nippo, Panasonic and, their association, Association of Indian Dry Cell Manufacturers (AIDCM) for colluding to fix prices of zinc-carbon dry cell battery in India. The Commission thereafter directed the Director General (the 'DG') to conduct an investigation into the matter.

On 23.07.2016, the DG, in exercise of the powers vested with him/her under Section 41(3) of the Act, carried out concurrent search and seizure at the premises of Eveready, Nippo and Panasonic and seized incriminating material which showed continuous communications amongst the three entities. During the pendency of report, Eveready and Nippo, approached CCI as lesser penalty applicants. The DG found that the Eveready, Nippo and Panasonic had an arrangement worked out amongst themselves whereby they exchanged commercially sensitive information for price-coordination. It was further found out that such an arrangement was existing since 2008 which was prior to 20.05.2009, the date on which Section 3 of the Act became enforceable, and continued uptil 23.08.2016 i.e. the date of search and seizure was conducted by the DG. On the examination of evidence it was revealed that top management maintained contact and shared pricing and other confidential commercial information to mutually agree on the price increases in Maximum Retail Price (**MRP**). In order to effectuate the decided price increase in the market, Eveready announced an increase in MRP through press releases. Such price increase by Eveready was immediately caught on by Nippo and Panasonic. In this way MRP was increased by them at least on six occasions by Rs 0.50 (fifty paisa) each, resulting in 60% increase in price of the concerned product since January, 2010. The DG concluded that the three entities had indulged in anti-competitive conduct, in the domestic dry cell battery market of zinc carbon batteries, during the period 20 May 2009 to 23 August, 2016 and thus contravened the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act.

CCI observed that the three entities indulged in anticompetitive conduct of price coordination, limiting production/ supply as well as market allocation. The price coordination also included exclusion of 'price competition' to ensure implementation of the agreement to increase price. It was further observed by CCI that the three entities controlled supply to establish higher prices and allocated market by requesting each other to withdraw their products from the market. CCI stated that, "*this practice by AIDCM of compiling and disseminating commercially sensitive data was greatly helpful to the Manufacturers to monitor the outcome of overall 'agreement/ understanding' reached at amongst them with regard to pricing, output, sale/ supply, allocation of market, etc."*CCI kept in view the sequence in which the three entities approached CCI under Regulation 5 of Lesser Penalty Regulations read with Section 46 of the Act and granted First Priority Status to Panasonic, Second Priority Status to Eveready and Third Priority Status to Nippo. CCI levied a penalty at the rate of 1.25 times of the profits of the three entities for each year for the duration of the cartel. Penalty leviable on individual officials/ office bearers of the three entities and AIDCM was computed at the rate of 10 percent of the average of their income for preceding three years. Due to the co-operation extended by Panasonic, it was granted 100 percent reduction in penalty. *(Order dated 19.04.2018)*

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