



Monthly Newsletter

# State of Antitrust

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

**CCI orders DG to cause an investigation into abuse of dominant position by Prasar Bharti** The regulatory body has directed an investigation against Prasar Bharti for imposing unfair conditions in the agreement for FM Radio Policy.

### BETWEEN THE LINES

**CCI rejects the claims of abuse of dominant position and predatory pricing against Ola Cabs** The competition agency agrees with the findings of DG and does not find Ola cabs to be in a dominant position in the relevant market.

### HEARD AT THE BAR

**Greek Court of Appeal imposes fine of €26.7m on Heineken for abuse of dominant position**

**German Competition Regulator fines automotive car manufacturers €9.6 million on evidence of cartel activities**

And more....

## **CCI orders investigation against Prasar Bharti for imposing unfair conditions in the agreement for FM Radio Policy**

On 4<sup>th</sup> July, 2017, the Competition Commission of India ('Commission') passed an order under Section 26(1) of the Competition Act, 2002 (the 'Act') and directed the Director General ('DG') to cause an investigation against Prasar Bharti (OP-1), for contravention of provisions of Section 4 of the Act. The Information was filed by Next Radio Ltd. ('Informant'), which is engaged in the business of Frequency Modulation (FM) Radio broadcasting services in various cities across India. As per Information provided by the Informant to the Commission, a license agreement was executed between the Informant and OP-1 on 20.02.2006 for sharing of the infrastructure facilities of OP-1 for various stations of the Informant, on payment of a license fee. Thereafter, Ministry of Information and Broadcasting (OP-2) issued a Letter of Intent ('LOI'), dated 24.09.2015, providing an offer to the Informant for migrating its existing licenses in six major cities from FM Radio Policy for Phase II to Phase III, for a period of 15 years, with an option to execute agreements with OP-1 and other agencies on requirement basis and mandatory execution of grant of permission agreement with OP-2.

OP-1 made available a draft agreement on the website of OP- 2 for the license fee payable by the licensed FM Radio broadcasters to OP 1 for the use of licensed infrastructure annually upon migration from FM Radio Policy Phase II to Phase III. The Informant raised concerns with OP-1 and OP-2 over the 300% increase in license fee and other issues but to no avail. It was alleged by the Informant that OP-1 and OP-2 are abusing their dominant position, and are attempting to thrust upon the Informant an increased financial burden in the form of revised license fee for sharing and use of licensed infrastructure through the aforesaid draft agreement in contravention of the provisions of Section 4 of the Act. The Informant also enumerated certain clauses of draft agreement which were alleged as anti-competitive under Section 3 of the Act. The Commission, in dismissing contentions under Section 3(3) of the Act, held that for horizontal agreements, it is an imperative for the parties to be in similar or identical trade of goods or services. In the present matter, OP-1 was held to be a service provider, and OP-2 as a nodal ministry of the Government of India. Therefore, the two parties cannot be said to be operating at a horizontal level. The Commission also dismissed allegations pertaining to Section 3(4) of the Act, since OP-2 cannot be considered as an *enterprise*.

The Commission, at the outset, observed that OP-1 could be considered as an *enterprise* under Section 2(h) of the Act, but not OP-2 as it is a nodal ministry of the Government of India for Information and Broadcasting, and its activities cannot be said to be commercial in nature and , hence, OP-2 does not fall under the definition of '*enterprise*' as defined under Section 2(h) of the Act. The Commission held that there is no *prime facie* case of contravention of any of the provisions of Section 3(3) or 3(4) of the Act that can be made out against OP-1 and OP-2 in the instant matter as neither the OPs are at horizontal level nor OP-2 is an *enterprise* under the provisions of the Act. The Commission then delineated the relevant market as "*market for provision of infrastructure facilities for FM radio broadcasting in each of the six cities where the Informant has been offered to operate FM broadcasting services*", after taking into consideration the relevant product market and relevant geographic market. The Commission also opined that OP-1 has a dominant position in the relevant market as it has infrastructure facilities in most given cities, the private FM broadcasters offering services therein have no option but to co-locate their transmission facilities on the existing infrastructure of OP-1.

The case of *Reliance Broadcast Network Limited against the Prasar Bharti and Anr* (Writ Petition (Civil) No. 1074/2016) was brought to the attention of the Commission. The High Court of Delhi has disposed of the writ petition in this case. However, the Commission was unequivocal in stating that the order of the High Court of Delhi in the aforesaid matter would have no bearing in the instant case.

The Commission then perused the draft agreement between the Informant and OP-1 and opined that even though these kinds of terms and conditions are standard term of contracts that are provided to the counterpart, a dominant player should be more careful with such terms of the contract to see that such conditions remain fair, reasonable and justified. The Commission thus directed the DG under Section 26(1) to cause an investigation into the matter and submit an investigation report within a period of 60 days from the date of receipt of this order. (*Case 29 of 2016*)



## South African Competition Commission imposes fine of R37 Million for cartelisation

On 13<sup>th</sup> July, 2017, the Competition Commission of South Africa (CompComSA) imposed a penalty of R37M on two companies i.e. Investchem (Pty) Ltd (Investchem) and Akulu Marchon (Pty) Ltd (Akulu). Both the companies were engaged in the manufacture and supply of key chemicals, used by cosmetics and toiletries manufacturers, *inter alia*. Investigations were on since December 2013 regarding concerted action by the two parties. The CompComSA found them guilty on two counts; first, the two had agreed to fix the price between 2003 and 2013. Surfactants, which is a component in detergent, cosmetics, and toiletries, was sold at pre-fixed rate for a decade. Second, Investchem and Akulu were found to have entered into a horizontal agreement regarding not pursuing each other's customers. Consequently, the two parties had divided the market amongst themselves. The two agreements were found to be in contravention of Section 491(b)(i) and (ii) of the Competition Act, 1998. Investchem's fine totals R23,423,155, while Akulu has been fined R13,905,600. The two have agreed to not pursue the cartel in future, and present fair conditions to their customers. (*CompComSA Press release, dated 13.07.2017*)

## Greek Court records a fine of €26.7m on Heineken for abuse of dominant position

On 18<sup>th</sup> July, 2017, a Greek court imposed a fine of €26.7 m on Heineken for abusing its dominant position. The fine brings to end more than two decade long illegal conduct of the beer producing giant. Investigations into Heineken's subsidiary, Athenian Brewery, had begun back in 2004 by the Hellenic

Competition Commission (HCC), causing a ten-year legal battle that had shocked the local market. The HCC had passed its order in 2015, which came as a relief to the local producers. The Greek beer market is largely polarised by two multinational players- Heineken and Carlsberg, who together control 85% of the Greek beer market. On account of their large market share, the two companies have been consistently selling at premium rates, with local brewers relegated to the remaining 15%. In its judgement, the Court noted that Athenian Brewery had applied a dedicated exclusionary policy to stunt the growth potential of the competitors, and also excluded them from distribution channels. The fine is not the first one to be imposed against Heineken, which was previously charged by the European Commission for price fixing and cartelisation. (*Euractiv Report, dated 18.07.2017*)

## Apple Rus Ltd. fined by FAC for price

On 23<sup>rd</sup> July 2017, the Federal Antimonopoly Service of the Russian Federation (FAS) held Apple Rus Ltd. guilty of price fixing. The case was brought to the notice of the FAC by a citizen who noticed a coincidental similarity in the prices of 6 flagship iPhones by 16 resellers. On investigation, the FAS found that the resellers were maintaining the same price for particular iPhone models for the initial three months. It was revealed that the coordinated pricing was orchestrated by Apple Rus Ltd. Noting down the many counts of violation, the FAS held the acts violative of Part 5 Article 11 of the Federal Law "On Protection of Competition". A fine approximating 1-5 million roubles has been imposed on Apple Rus Ltd. (*FAS press release, dated 23.06.2017*)



## Heard at the BAR

*Legal news from India and the world*

## German Bundeskartellamt fines automotive car manufacturers €9.6 million on evidence of cartel activities

On 13<sup>th</sup> June, 2017, the German Competition Authority imposed fines on Elring Klinger Abschirmtechnik (Schweiz) AG, Sevelen (Switzerland), Estamp S.A.U., Terrassa (Spain) and Lydall Gerhardt GmbH & Co. KG, Meinerzhagen (Germany) amounting to 9.6 million Euros. The companies are involved in the manufacture of automotive parts, such as heat shields, and were accused of agreeing in 2011 to pass on increased material costs to their customer, Volkswagen. The accused were investigated for suspicion of a cartel. Heat sheets are aluminum plates, are initially bought as semi-finished products in the form of coils, and are subsequently designed to fit the required shape. In the instant case, the market power and behavior of the other companies in the market were taken into consideration, which favoured the accused. The Bundeskartellamt calculates the fines by keeping the duration and significance of the competition law violation. Interestingly, no fine was imposed on three companies that were parties to the illegal agreements due to their compliance in uncovering the evidence. The guilty parties can approach the Dusseldorf Higher Regional Court for lowering the fines. (*Bundeskartellamt Press Release, 13.07.2017*)

## **CCI in the case against Ola Cabs rejects the claims of abuse of dominant position and predatory pricing**

In an order dated 19<sup>th</sup> July, 2017, the Competition Commission of India ('CCI') categorically refuted claims of abuse of dominant position against ANI Technologies ('Ola', 'OP') by Meru Cabs and Fast Track Call Cabs ('Informants'). In a detailed judgment, the CCI discussed many emerging concerns of the digital economy, especially regarding network effects and its impact on barriers to entry.

A major contention in the information concerned the definition of the relevant market. The OP was in disagreement with the relevant market delineated in the DG's report as '*market for radio taxi services in Bengaluru*'. The OP maintained that it was a technology software service provider, engaged in providing services for a taxi hailing platform. The OP, in categorizing itself as an 'aggregator', replied that it could not be pitted in the same market as radio taxi service. Based on the DG's report, the CCI took a well-reasoned approach, stating that the advent of internet technology had made way for newer business models in the same industry. In the instant matter, the OP was, in effect, controlling the entire taxi operations, which went beyond the role of an intermediary. The CCI specifically pointed out that the money made from each ride was labeled in OP's account as 'revenue' and not 'commission'. Therefore, a variation in the business model was held to be of no relevance in delineating the relevant market in the instant matter. The Informants pressed for the market share of the OP to be considered as a definitive marker of OP's dominant power. While the CCI agreed that substantive market share can be an indicator of dominant position, it cannot be the sole determiner. The CCI referred Section 19(4) of the Competition Act, 2002 ('Act') to substantiate that a holistic view of the section needs to be taken to establish dominant position. Even a 50% market share is not sufficient to prove dominant position, and in the absence of any quantitative threshold in the Act, the decision has to be on a case-to-case basis.

Furthermore, the CCI stressed on the competitive constraints posed on OP by Uber, a rival concern, operating in the same market. The DG's data analysis was sufficient to establish that there had been a decline the OP's market owing to Uber's entry. The CCI also refuted claims of OP enjoying the first-mover advantage and a better access to high quality funds. It held that in a networks market any enterprise can gain foothold, backed by a strong marketing strategy, while the avenues for venture funding are endless. Expanding its verdict on network externalities, the CCI pointed at the concept of 'multi-homing', which is prevalent in the network industry. Consumers as well as the drivers keep applications of multiple competing enterprises since the switching costs are negligible, if not entirely absent.

The order also ruled out the concept of joint dominance in the Indian regulatory scenario. It admonished the Informants for taking a narrow interpretation of the term "enterprises" in Section 27 (b) of the Act, which is a penalty provision, in seeking a joint investigation of Uber and Ola for predatory pricing. The CCI relied on the wording of Section 4 of the Act, which is applicable only on a single "enterprise". In its concluding remarks, CCI found it difficult to determine with certainty the long-term impact of the pricing strategy as the market of radio taxi services is yet to mature. Further, the order states that the charges of abuse of dominant power on the OP remain unsubstantiated, and any adverse order of the Commission would likely to disturb the market dynamics of a market that is on its nascent stage. (*Case 6 & 74 of 2015*)

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### **KK Sharma Law Offices**

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