Competition Matters

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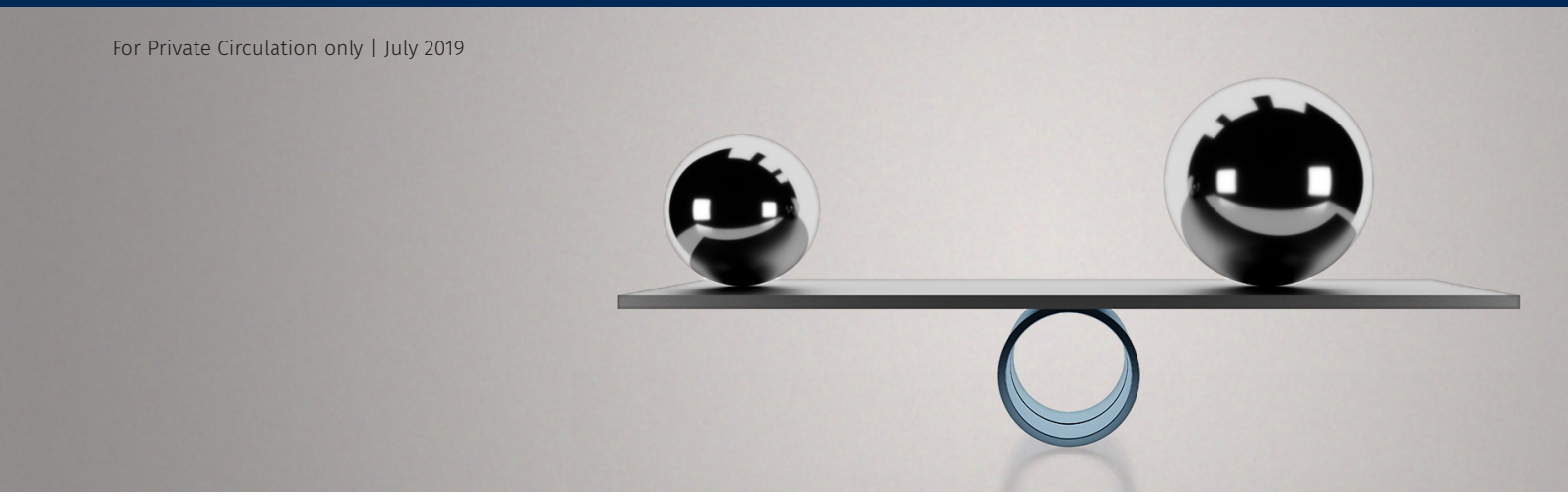

Indian Competition Law Roundup: July 2019

In this Roundup, we highlight the main developments in Indian competition law in July 2019.

Horizontal Agreements

No Collusion by Multiplex Cinema Operators

The CCI rejected at *prima facie* stage a complaint by *Unilazer Ventures* (*Unilazer*), a film content creation company, that a number of multiplex cinema operators and their association had colluded in relation to the imposition of a Virtual Print Fee (*VPF*), revenue sharing arrangements, delays in payment and the screening of advertisements/trailers.[1] In relation to the imposition of a VPF, a fee paid by a film producer/distributor to film exhibitors to recoup part of the cost of digital projection equipment, the CCI found no evidence of an anti-competitive agreement or understanding; in the absence of concerted activity it was not for the CCI to determine the appropriate fee or the period for which it should be paid. In relation to the revenue-sharing arrangements, the CCI noted that the arrangements had been agreed between the producers and multiplex operators in response to an earlier boycott by the film producers. Unilazer had not shown that there was an anti-competitive agreement. Absent collusion, the issues were contractual/commercial and did not cause concerns under the Competition Act. There was also no evidence of collusion in relation to delays in payment. As for the screening of advertisements and trailers, the CCI found that general allegations, including lack of transparency, did not fall within the ambit of the Competition Act.

Abuse of Dominance

No Dominance in Hotel Sector

In a case with important implications for the budget hotel sector, the CCI rejected at *prima facie* stage a complaint by *RKG Hospitality*, an hotelier, that *Oravel Stays* (*OYO*), which provides budget accommodation through online booking, had abused its dominant position by imposing one-sided, unfair and discriminatory terms in a marketing and operational consulting agreement.[2]

In considering the relevant market for the purposes of determining dominance, the CCI noted that the arrangement between OYO and the hotelier was akin to the franchise model. The CCI considered the relevant market to be the market for franchising services for budget hotels in India.

Even though OYO appeared to have the largest budget hotel network, and was a significant player in the market, the CCI felt it could not be "unambiguously concluded" that it was dominant. In reaching this conclusion, the CCI noted that franchising was only one of many business models for operating hotels, that franchising counted for only a small percentage of the total number of rooms in the budget segment and that franchisors were in contention with online travel agencies/ aggregators for on-boarding of partner hotels. There was also a large untapped number of hotels which could be accessed by existing and potential competitors of OYO.

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The CCI finally considered the conduct of OYO regardless of whether or not it was dominant. It considered that certain provisions in the agreement – the payment of commission on gross revenue and a prohibition on dealing with aggregators – were inherent to franchising arrangements and hence justified. The CCI also found justification for branding and benchmarking requirements, for the charging of taxation and platform fees and for the use of a quality evaluation tool. It could not therefore be concluded that the terms and conditions of the agreement were unfair.

CCI Rejects Allegations of Excessive Pricing by Reinsurer

The CCI rejected at *prima facie* stage a complaint by the *Indian Chemical Council* (*ICC*) that a leading reinsurer, the *General Insurance Corporation of India* (*GIC*), had abused its dominant position.[3] The ICC alleged that GIC was, with its very high market share, dominant in the overall reinsurance market in India and that abuses had occurred in the way it had issued a circular amending the method of calculating reinsurance premiums for the fire insurance segment with general insurance companies, leading to substantially increased premiums.

The CCI made a reference to the insurance regulator, the IRDAI, which considered that there was no breach of the relevant rules in the *insurance sector* and that it did not intervene in a reinsurer's pricing decisions. The IRDAI also cited a recent order of the Delhi High Court finding that it was for GIC to decide on the premium to be charged and to determine reinsurance rates.

The CCI stated that the circular could not be said to be anti-competitive merely because it led to an enhancement in premium. A pure pricing decision would cause no competition concern unless it showed an abuse of dominant position. The CCI also noted that the circular did not prevent an insurer from offering lower premiums or from opting for another reinsurer. The CCI therefore closed the case at *prima facie* stage. It should be noted that, unusually, the CCI did not consider the question of market definition or of dominance.

Due Process

Absence of Legal Member Does not Invalidate Final Orders

In April 2019, a Division Bench of the High Court of Delhi had declared two provisions of the Competition Act, 2002 unconstitutional and void.[4] All other provisions of the Competition Act were held to be valid subject to a number of orders including that "the Central Government shall take expeditious steps to fill all existing vacancies in the CCI, within 6 months" and that "the CCI shall ensure that at all times, during the final hearing, the judicial member … is present and participates in the hearing". At the time, the CCI had no judicial member. It had, after this judgment, invited applications for appointment as judicial member but, as of 31 July 2019, no judicial member had been appointed. This naturally begged the question of the legality of orders passed without the presence of a judicial member.

In disposing of a writ petition filed by CADD Systems and Services (*CADD*), Justice Vibhu Bakhru of the Delhi High Court held that orders made in the absence of a judicial member could not be called into question.[5] He gave a number of reasons for this conclusion. First, he noted that the Division Bench had issued no specific direction interdicting the functioning of the CCI pending appointment of a judicial member. Second, relying on Section 15 of the Competition Act, which provided that a vacancy, etc. was not to invalidate proceedings of the CCI, he held that orders passed by the CCI could not be called into question on account of any vacancy or any defect in its constitution. He referred to a judgment of the Supreme Court in relation to a similar provision in another Act where it was stated that the object of such provisions "was to put beyond challenge defects of constitution of statutory bodies and defects of procedure *which have not led to any substantial prejudice*".[6] It was not open to CADD to seek a rehearing after appointment of a judicial member since it had participated in proceedings before the CCI, and the CCI had reserved its orders after hearing the submissions of the parties. Third, stopping the CCI from making final orders would effectively bring its functioning to a standstill.

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Merger Control

GSK/Pfizer Joint Venture Cleared

The CCI cleared the proposal by *GlaxoSmithKline* and *Pfizer* to combine their global consumer healthcare businesses into a joint venture.[7] The CCI considered overlaps in three product segments; non-narcotics/anti-pyretics, antacids/anti-flatulents and calcium preparations. In all three segments the combined market shares of the parties were relatively low (in no case exceeding 30%) and there were competitors providing competitive constraints. The CCI noted that ayurvedic medicines and allopathic medicines might not be part of the same product market; if this were so, there would in fact be no overlap in the antacids/anti-flatulents segment. The CCI also found that there was no vertical relationship between the parties' Indian subsidiaries. The proposed transaction was therefore not likely to have an AAEC in India.

Acquisition of Minority Shareholding Notified because of Board Seat

The CCI cleared the acquisition by *Kedaara Capital Fund* (*Kedaara*), a private equity fund, of an approximately 7.98% stake in *Ajax Engineering* (*Ajax*), a manufacturer of concreting equipment.[8] Since there were no horizontal overlaps or vertical relationships, the CCI concluded that the proposed transaction was unlikely to have an AAEC in India. It should be noted that acquisitions of less than a 10% shareholding are generally exempted from notification as acquisitions made solely as an investment provided that, amongst other things, the acquirer is not a member of the target's board of directors or has a right or intention to nominate a director. In this case, Kedaara got the right of representation on Ajax's board, so had to notify. The CCI was able to clear the transaction within 16 calendar days of notification.

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1 Case No. 10 of 2019 *Unilazer Ventures v PVR and Others* (24 July 2019).

2 Case No. 3 of 2019 *RKG Hospitalities v Oravel Stays* (31 July 2019).

3 Case No. 12 of 2019 *Indian Chemical Council v General Insurance Corporation of India* (26 July 2019).

4 WPC(C) 6610/2014 *Mahindra & Mahindra v CCI and Other* (10 April 2019).

5 W.P.(C) 6661/2019 CADD *Systems and Services v CCI* (17 July 2019).

6 *B.K. Srinivasan and Others v State of Karnataka and Others* (1987) 1 SCC 658 (9 January 1987). Emphasis supplied.

7 Combination Reg. No. C-2019/03/654 *GlaxoSmithKline and Pfizer* (22 May 2019).

8 Combination Reg. No. C-2019/06/666 *Kedaara Capital Fund II* (20 June 2019).

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