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## IMPORTANT DECISIONS BY INDIAN COURTS

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30<sup>th</sup> November 2017



### **INDIA CCI IMPOSES A PENALTY OF INR 522 MILLION ON THE BOARD OF CONTROL FOR CRICKET IN INDIA FOR ABUSE OF DOMINANT POSITION**

Abuse of dominant position; Broadcasting; Cricket; India; Sporting events; Sports governing bodies.

2011 suspended the limitation period also in respect of those claims resulting from truck purchases prior to July 2005 (the date on which s.33(3) GWB entered into force).

However, the court considered the claim founded only in respect of seven out of the 13 trucks. The reason for this was that the city of Göttingen had merely sued MAN Truck & Bus GmbH, which—according to the (binding) findings by the EU Commission—had only participated in the truck cartel between 2004 and mid-2010 so that MAN Truck & Bus GmbH could not be held liable for truck purchases outside this time-frame. Hence, the court would have considered the claims to be fully meritorious if the city of Göttingen had not only sued MAN Bus & Truck GmbH but also other cartelists as co-defendants.

Overall, the judgment of the regional court of Hannover of 18 December 2018 represents a major success for the city of Göttingen as well as for all other victims of the truck cartel that seek justice before Germany courts. The judgment underscores once more that Germany is one of the most claimant-friendly forums for competition litigation in Europe in that in follow-on cases favourable judgments can be obtained in less than a year.

On 29 November 2017 the Competition Commission of India (the CCI) passed an order in which it found the Board of Control for Cricket in India (BCCI) in contravention of s.4 of the Competition Act 2002, i.e. abuse of dominant position



and has imposed a penalty of INR 522 million on the BCCI. The CCI had come to a similar conclusion in the year 2013 of the abuse of dominant position by the BCCI and had imposed a penalty of the same amount. The CCI had concluded back then that the BCCI was in a dominant position in the market for organisation of private professional cricket leagues/events in India and the restriction imposed under cl.9.1(c)(i) of the BCCI's IPL Media Rights Agreement entered into with the broadcasters of Indian Premier League (IPL), restricting the BCCI not to organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league ("Impugned Clause") was found to be in contravention of s.4 of the Act. Aggrieved by the decision of the CCI, the BCCI had preferred an appeal before the erstwhile Competition Appellate Tribunal ("CompAT") which had set aside CCI's order on the ground of violation of principles of natural justice and ordered CCI to dispose of the matter a fresh after giving an effective opportunity to the BCCI to controvert.

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In accordance with the directions of the CompAT, the CCI directed the Director General (DG) to conduct further investigations into the matter. The CCI perused the supplementary investigation report of the DG, the suggestions/objections filed by the BCCI and other material available on record and concluded that the BCCI is an "enterprise" within the definition provided in s.2(h) of the Act as in terms of its Memorandum of Association, BCCI has been, inter alia, established to control the game of cricket in India and give its decision on all matters including women's cricket. In addition to being the custodian of cricket in India, the BCCI also organises different formats of cricket matches/tournaments by which it generates income running into hundreds of millions of rupees. The CCI observed that though the income of the BCCI may be ploughed back into cricket and allied activities, it does not imply that said activities of the BCCI are not economic in nature. It further observed that the enterprise status of an entity does not depend upon profit motive and the defining feature of the concept "enterprise" is that it engages in an economic activity covered within the ambit of s.2(h) of the Act. If a person is engaged in any such activity, with or without profit motive, it would be considered an enterprise as it interfaces with the market and hence, with other alternatives for the products or services. The CCI also concluded that professional domestic cricket league like IPL is distinct from other formats of cricket and therefore the relevant market in the instant case was found by the CCI to be the market for organisation of professional domestic cricket leagues/events in India. On the issue of the BCCI enjoying a dominant position in the above-defined relevant market, it was held by the CCI that the BCCI being engaged in organisation of tournaments/leagues, is put to advantage because they also possess the authority to grant approval for organisation of similar events by others and set conditions for such organisation. Therefore, the BCCI enjoys a dominant position in the relevant market for organisation of professional domestic cricket leagues/events in India. The CCI concluded that the BCCI has abused its dominant position in the market by denying market access to other organisations for conducting domestic cricket leagues, and the impugned clause in the IPL Media Rights Agreement has been pursued by the BCCI consciously to protect the commercial interest of the bidders of broadcasting rights as well as the economic interest of the BCCI. Based on its findings, the CCI imposed a penalty of INR 522 million on the BCCI. Although, the average of the relevant turnover for the last three financial years was slightly higher than the one which was considered by the CCI while passing the earlier order, the CCI preferred to maintain the penalty of INR 522 million, which comes to nearly 4.48 per cent of the BCCI's average of the relevant turnover during the last three financial years.

**Suchitra Chitale**



## THE CCI DISMISSES ALLEGATION MADE BY TATA OF NTPC LTD'S ABUSING ITS DOMINANT POSITION

Abuse of dominant position; Anti-competitive practices; Electricity generation; India; Long-term contracts; Power purchase agreements

The CCI by its order dated 12 October 2017, has rejected allegations made by Tata Power Delhi Distribution Ltd against National Thermal Power Corp Ltd (NTPC) alleging contravention of the provisions relating to abuse of dominant position and anti-competitive agreements under the Competition Act 2002. Tata is a distribution company (DISCOM) and has been procuring electricity from NTPC which is a generating company, *vide* a composite Power Purchase Agreement (PPA) entered into between Tata and NTPC on 8 May 2008 for the purpose of distribution in the National Capital Territory of Delhi. Tata alleged that NTPC has been abusing its dominant position by imposing unfair conditions through PPAs and not providing an exit clause to Tata in the PPAs. It was alleged that NTPC has been inordinately delaying the commercial operation of its plants for which PPAs had already been signed and forcing Tata to procure power from its old plants resulting in an increase in power purchase cost. The CCI observed that even if it is assumed that NTPC was in a dominant position in the relevant market as alleged by Tata, a *prima facie* case of abuse of dominant position was not made out in the instant case because Tata had entered into the PPAs with NTPC being fully aware of the terms including the long term obligation stipulated there-under. Further, there was a rational basis for binding Tata and other procurers in the long-term PPAs as the generating companies invest in establishing the generating stations based on allocation and the PPAs entered into with the parties (which are to be served through the period agreed upon). Also, Central Electricity Regulatory Commission (CERC), *vide* its orders dated 31 March, 2017 and 18 April, 2017 respectively, had granted liberty to Tata and other procurers to approach the Central Government for reallocation of the power allocated to them.

Apart from alleging contravention of abuse of dominant position under s.4 of the Act, Tata had also alleged violation of provision relating to anti-competitive agreements. Tata had alleged that the PPAs of NTPC have an appreciable adverse effect on competition as NTPC is creating barriers for the new players to enter into the power generation market. Further, NTPC is foreclosing the market as Tata is not allowed to procure electricity from other generating companies. The CCI observed that these allegations have been made by Tata without substantiating the same with adequate information or data. Accordingly, no case of contravention of the provisions of anti-competitive agreements under s.3 of the Act was found against NTPC.

**Suchitra Chitale**



## **INDIA THE DELHI HIGH COURT REJECTS CONTENTIONS OF INOX LEISURE LTD AGAINST PVR LTD AND THE CCI**

Breach; Cinemas; Commitments; India; Mergers

In November 2017, the Delhi High Court found no infirmity with the order dated 2 May 2017 (“Impugned Order”), passed by the CCI and thereby rejected the contentions of Inox Leisure Ltd that M/s PVR Ltd had violated its commitment which formed part of the order dated 4 May 2016 given by the CCI.

PVR entered into an agreement dated 9 June 2015 (“Proposed Combination”) to acquire the “film exhibition business” of M/s DLF Utilities Ltd (hereinafter PVR and DLF together are referred to as “parties”) . After receipt of the aforementioned notice, the CCI conducted an enquiry, which also entailed seeking responses from other entities (including Inox) engaged in said business.

The CCI, after conducting an investigation, concluded that the Proposed Combination is likely to have an appreciable adverse effect on competition in the relevant markets for (i) exhibition of films in multiplex theatres in Noida; (ii) exhibition of films in multiplex theatres in Gurgaon; and (iii) exhibition of films in multiplex theatres in high end single screen theatres in South Delhi and considering the same, the CCI, in its order dated 4 May, 2016, approved the Proposed Combination subject to certain modifications being carried to the Proposed Combination. The CCI, inter-alia, also recorded commitments of PVR not to expand its business of exhibition of films through multiplexes in Noida and Gurgaon cities which commitment was required to be fulfilled by PVR.

Following execution of letters of intent (LOIs) by PVR in respect of properties located in Noida and Gurgaon for acquiring further screens in those areas, Inox filed an application dated 9 November 2016 before the CCI alleging that PVR had violated its commitment. which formed part of the CCI’s order dated 4 May, 2016. Inox further alleged that through the acquisition of further multiplexes in Noida and Gurgaon, the market concentration of PVR would increase, and requested the CCI to carry out a thorough investigation. Inox also prayed before the CCI to pass such directions whereby PVR is required to terminate the LOIs entered into for acquisition of additional screens in Noida and Gurgaon. However, the CCI rejected allegations of Inox. Subsequently, Inox approached the court, challenging the Impugned order. The court found no ambiguity in CCI’s order. The court observed that PVR had not violated any of its commitments because PVR only agreed to furnish a certificate by its statutory auditor to the effect that it had not “expanded its presence in business of exhibition of films through multiplex theatres in Noida and Gurgaon, i.e., it did not open through organic expansion or takeover through inorganic acquisition, any new screens (either single screens or multiplex)”.

**Suchitra Chitale**