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## KEY DECISIONS IN COMPETITION LAW

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30<sup>th</sup> June 2017



### **INDIA** BOMBAY HIGH COURT SETS ASIDE THE ORDER OF CCI AGAINST CELLULAR OPERATORS

Cartels; India; Investigations; Jurisdiction; National competition authorities; Telecommunications operators

The Bombay High Court in its order dated 21 September, 2017, has quashed and set aside an order of the Competition Commission of India (CCI) dated 21 April, 2017 and all the consequential actions/notices of the Director General (DG) regarding the same. The order was passed by the court in a writ jointly filed by Bharti Airtel Ltd, Vodafone India Ltd, Idea Cellular Ltd and Cellular Operator Association of India (hereinafter collectively referred to as “petitioners”), challenging the order of CCI directing the DG to investigate on complaints made by Reliance Jio against the petitioners regarding allegations of cartelisation.

The court observed that questions of interpretation or clarification of, inter alia, any “contract clauses”, “unified license” “interconnection agreements”, “quality of service regulations” are required to be settled by the authorities constituted under the Indian Telegraph Act, 1885 and the Telecom Regulatory Authority of India (TRAI) Act, 1997 (TRAI Act) and not by the authority under the Competition Act. According to the court, the concepts of “subscriber”, “test period”, “reasonable demand”, “test phase and commercial phase rights and obligations”, “reciprocal obligations of service providers” or “breaches of any contract and/or practice”, arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the TRAI/ TDSAT under the TRAI Act only.



Further the court observed that unless TRAI/ TDSAT settles the contractual breaches including “delay”, “denial” and “congestion”, the Commission and/or the DG has no power to deal and decide on the concerned issues.

### **INDIA CCI DISMISSES COMPLAINT AGAINST UPSRTC**

Abuse of dominant position; Anti-competitive practices; Discrimination; India; Motor industry; Tenders

The CCI vide its order dated 7 September, 2017, has rejected allegations of anti competitive agreement and abuse of dominant position made against Uttar Pradesh State Road Transport Corp (UPSRTC) by VE Commercial Vehicles Ltd (VE Vehicles), a joint venture between Eicher Motor Ltd, India and Volvo Group, Sweden, inter alia, engaged in the production of heavy commercial vehicles.

VE Vehicles was aggrieved of the discriminatory terms in the tender documents issued by UPSRTC for purchase of bus chassis in the State of Uttar Pradesh. The tenders, inter-alia, provided that any new supplier could be awarded a maximum of 20 per cent of the tendered quantity, if it quotes the lowest bid and for remaining quantity, VE Vehicles or any new tenderer had to quote the price along with annual maintenance contract (AMC) which will be compared with the bids (i.e. without AMC) quoted by Tata Motors Ltd (TML) and Ashok Leyland Ltd (ALL), two of the biggest manufacturers of heavy commercial vehicles in India. VE Vehicle alleged that due to an understanding amongst UPSRTC, TML and ALL, UPSRTC was favouring TML and ALL in contravention of s.3(3) and 3(4) of the Competition Act.

Further, VE Vehicle claimed that 50 per cent of the total buses in the State of UP are owned by the UPSRTC and therefore UPSRTC is in a dominant position and due to favourable terms and conditions for TML and ALL in the aforesaid tenders, UPSRTC has abused its dominant position and has therefore contravened the provisions of s.4 of the Competition Act.

The CCI noted that the same issues were raised in a previous complaint filed by VE Vehicles against UPSRTC in the year 2015 (Case No. 80 of 2015) and therefore the CCI relied on its order in the said matter, inter alia, for the purposes of market delineation and market share of UPSRTC. With respect to the allegation of anti-competitive agreement under s.3 of the Competition Act, the CCI held that that UPSRTC, TML and ALL are not engaged in identical or similar trade of goods or provision of services, which is an essential condition for applicability of provisions relating to horizontal anti-competitive agreements. Further, the CCI concluded that UPSRTC, TML and ALL were also not placed at different stages of the production or supply chain in different markets. As applicability of s.3(4) of the Competition Act requires the parties to be placed vertically at different stages of the production chain, which is lacking in the present matter, the discriminatory terms and conditions in the tender documents cannot be said to be in contravention of s.3(4) read with s.3(1). With respect to the allegation of abuse of dominance under s.4 of the Competition Act, the CCI held that UPSRTC is not dominant in the relevant market due to its low market share, considering the number of buses owned by it and the numerous private operators present in the market. Therefore, in the absence of dominance in the relevant market, assessment of abuse of dominant position was not required under the provisions of s.4 of the Act.

**Suchitra Chitale**



## Cartels; Fines; India; Leniency programmes

The CCI has amended The Competition Commission of India (Lesser Penalty) Regulations 2009 (the "Lesser Penalty Regulations"), inter-alia, to permit individuals, who are or were involved in a cartel on behalf of an enterprise to seek leniency for themselves. Previously, only enterprises could apply for lesser penalty. The amendments also provide for grant of reduction in penalty to applicants who approach the CCI after the first three applicants. Earlier, the Lesser Penalty Regulations allowed for reduction of penalty only to the first three applicants based on their priority markers. Pursuant to the amendment, subsequent applicants can also be granted reduction in the penalty up to 30 per cent provided they submit evidence with significant added value to the CCI. The amendments were notified in the *Gazette of India* No. L-3(4)/Reg-L.P./2017-18/CCI dated 8 August, 2017. 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**