



DEVELOPMENTS IN COMPETITION LAW

IN NOVEMBER

2018

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers led by Souvik Ganguly and Gautam Narayan, who have deep and diverse experiences in their chosen areas of practice. We have advised Indian and multinational companies, funds, banks and financial institutions, founders of companies, management teams, international law firms, domestic and international investment banks, financial advisors and government agencies in various transactions in and outside India.

Acuity Law takes pride in rendering incisive legal advice taking into consideration commercial realities. Our areas of practice are divided into two departments.

The Corporate practice is led by Souvik Ganguly and the Disputes practice is led by Gautam Narayan.

As part of the Corporate practice, Acuity Law advises on:

- Mergers and acquisitions;
- Distressed mergers and acquisitions;
- Insolvency Law;
- Private Equity and Venture Funding;
- Employment and labour laws
- Commercial and trading arrangements; and
- Corporate Advisory

As part of the Disputes practice, Acuity Law under the leadership of Gautam Narayan advises and represents clients on domestic and cross - border:

- Civil disputes;
- Criminal law matters; and
- Arbitration matters

Acuity Law actively follows legislative and policy developments in its chosen areas of practice and shares such developments with clients and friends on a regular basis.

If you want to know more about Acuity Law, please visit our website www.acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

This newsletter covers developments under the Competition Act, 2002 during the month of November 2018. We have covered two orders passed by the Competition Commission of India, under section 3, i.e., provisions related to anti-competitive agreements and under section 4, i.e., provisions related to abuse of dominant position. Please see below a summary of these orders.

ABBREVIATIONS

Competition Act, 2002	Act
Competition Commission of India	CCI
Director General	DG

1. SAMIR AGRAWAL vs. ANI TECHNOLOGIES PRIVATE LIMITED, UBER INDIA SYSTEMS PRIVATE LIMITED

Order dated: 06 November 2018

Background:

CCI held that ANI Technologies Private Limited, Uber India Systems Private Limited, and Uber B.V., Amsterdam, Netherlands and Uber Technologies Inc., San Francisco, U.S.A (collectively referred to as “OPs”) cannot be considered to be doing business in violation of the provisions of section 3 of the Act, i.e., provisions related to anti-competitive agreements.

Facts:

Samir Agrawal, the informant, had alleged that individual drivers are unable to negotiate the price with their customers due to the algorithmic pricing mechanism used by the OPs. Therefore, they cannot compete with their counterparts leading to price fixation. Since, the drivers are not employed by the OPs but are independent third party service providers, it was alleged that the OPs act as a ‘Hub’ and the drivers being ‘Spokes’ collude on prices. It was also alleged that OPs manipulate the prices using personalized data of the drivers which leads to artificially high fares. The OPs have a vertical relationship with the drivers and, therefore, imposing a minimum price level on the drivers is in contravention to the Resale Price Maintenance under section 3(4)(e) of the Act.

Held:

1. Hub and Spoke Model: CCI observed that in a hub and spoke arrangement, the spoke uses a hub to get sensitive information in order to fix prices. Since, collusion is sine qua non in such an arrangement, the same cannot be applied in this matter, as because there does not exist any agreement between all drivers to set prices through the OPs;
2. Resale Price Maintenance: CCI observed resale is sine qua non in a scenario of resale price maintenance. However, since the drivers do not sell anything to the consumers that they have bought from the OPs, they cannot be held in contravention of section 3(4)(e) of the Act. The fares charged by the OPs are dynamic in nature determined on real-time market and traffic conditions. Resale price maintenance on the other hand is setting of a floor price on resale. Since there is no fixed floor price that is maintained by the OPs for all the drivers, the algorithmic price determining system cannot be considered as price-fixing cartel among the drivers;
3. Cartelization: CCI observed that since the drivers do not co-ordinate their actions with other drivers and OPs being separate entities from their respective drivers, it cannot be said that cartelization has occurred among the OPs and their drivers; and
4. Market segregation: The rides offered by individual drivers are homogenous in nature where drivers are indifferent towards various other registered drivers. Furthermore, the consumers have no information about the drivers available in their respective areas. Such an activity cannot be considered to be anti-competitive in nature.

Based on the above reasoning, CCI held that the allegations hold no basis and the OPs cannot be considered to be contravening the provisions of section 3 of the Act as there is no arrangement between the OPs and the

2. RICO AUTO INDUSTRIES LIMITED AND ORS. vs. GAIL INDIA LIMITED

drivers regarding price fixation.

Order dated: 08 November 2018

Background:

CCI passed an order after investigation by the DG on information submitted by a number of companies against GAIL (India) Limited (“GAIL”) accusing them of abuse of their dominant position under section 4 of the Act. The order dismissed all ten cases against GAIL on all issues.

Facts:

Various cases were filed by different companies alleging contravention of the provisions of section 4 of the Act by GAIL under gas sale agreements entered into between these parties and GAIL for the production, transmission and distribution of natural gas across India. CCI, on finding a prima facie case against the respondent party, directed the DG to conduct an investigation into the matter. After the common investigation report of DG was filed, CCI invited replies from the parties and then after due consideration of the statements of the parties and the investigation report of the DG, CCI passed its final order.

Held:

CCI determined the issues in question and the following major points of law were laid down:

1. A long-term contract shall not always be said to be anti-competitive, and exceptions can be made based on the dynamic and evolving structure of the market. The dominant party while entering into a long-term contract shall clearly reveal the available options to any other party so that they can make an informed choice at the time of inception;
2. An infraction of a contractual provision by one party and a counter-measure taken by another party to such contract, within the confines of the contract, to mitigate its losses cannot be said to be anti-competitive and need to be examined while considering the surrounding facts and circumstances irrespective of one party being in a dominant position vis-à-vis the other;
3. Mere technical non-compliance of certain terms and conditions of an agreement cannot be subject matter under section 4 of the Act, if the conduct arising out of the agreement is not to be considered to be an abuse of the dominant power; and
4. The circumstances that were prevalent when the contract was entered into and the way the terms of the contract were observed by the parties, during the operation of the contract, should be considered when the contract is sought to be impugned by a party mentioning abuse of dominant position by the other, if such objection is taken much later in time.

On all other points of contention, CCI found that the dominant party had not acted in contravention of the general agreement or that the investigation by the DG did not find any evidence of abuse by the dominant party. CCI also held that since the dominant party was not found to be in contravention of

section 4 of the Act, no liability was fastened on its officers under section 48 of the Act.