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NEWSALERT

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NCLAT SETS ASIDE COMPETITION COMMISSION'S FINE FOR ANTI-COMPETITIVE PRACTICES

1. BACKGROUND

On September 19, 2018, the National Company Law Appellate Tribunal (the "**NCLAT**") set aside the Competition Commission of India's (the "**Commission**") order dated June 14, 2017[1] which held Hyundai Motor India Limited ("**Hyundai**") to be indulging in anti-competitive practices in violation of the provisions of the Competition Act, 2002 (the "**Act**").

The Commission previously held that Hyundai was guilty of two contraventions, first, resale price maintenance by monitoring the maximum permissible discount through a discount control mechanism and second, tie-in arrangements, by mandating its dealers to use recommended lubricants and oils and penalising them for using non-recommended lubricants and oils.

The NCLAT set aside the Commission's order stating that it was not based on any specific evidence and had been passed merely on the basis of the opinion of the Director-General (the "**DG**"). In addition, the NCLAT ruled that the DG and the Commission failed to determinecorrectly the '*relevant geographic market*' or the '*relevant product market*' as required by the provisions of the Act.

2. KEY TAKEAWAYS

2.1. Delineation of the Relevant Market

The Commission in its order, divided the relevant market into an upstream and a downstream market in the relevant geography rather than delineating the relevant product market in the manner as is traditionally done by the Commission. It is to be noted that the agreements in question were between players operating at different levels of the supply chain and delineating the relevant market in this way (departing from the traditional way of delineation) to suit the interests of the parties involved is arguably in line with the principle enshrined in the Supreme Court case of *Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal Film and Television and Ors*[2], which was also cited by the NCLAT in its order.

In this case, the Supreme Court laid down that delineation of the *relevant market* should be on the basis of the circumstances of each case and that the Commission should determine the *relevant market* from the perspective of the parties involved and their position in the supply chain.

[1] *Fx Enterprise Solutions India Pvt. Ltd. and Ors. vs. Hyundai Motor India Limited,* (Case Nos. 36 and 82 of 2014)

[2] *Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal Film and Television and Ors.,* ((2017) 5 SCC 17)

2.2. Perceived contradiction in the Commission's order

In reaching its decision, the Commission held that Hyundai's tie-in arrangements for lubricants and oils was not in contravention of Section 3 (4) (a) (tie-in arrangements) of the Act.[3] However, in the concluding section of the order, the Commission held that Hyundai had contravened Section 3(4) (a) of the Act.[4]

It is to be noted that while the NCLAT perceived a discrepancy here, there is no apparent discrepancy in the Commission's order. The Commission clearly held that cancellation of the warranty upon use of non-recommended oils and lubricants did not amount to contravention of the provisions of the Act *but* Hyundai's alleged practice of mandating its dealers to use only recommended lubricants and oils and penalising them in case of *non-use* of the recommended lubricants and oils (resulting in price discrimination and non-accrual of benefits to dealers and consumers) *did* lead to a violation of the provisions of the Act.

2.3. Reliance on the DG's investigation report

In its decision, the NCLAT concluded that the Commission had relied on the DG report, in the absence of corroborating factual evidence. It is partly correct to state that the Commission, had in places,relied on the DG report without question or further examination. For instance, in relation to the contravention relating to tie-in arrangements for lubricants and oils, the NCLAT has correctly pointed out that the Commission's conclusion was not based on any evidence, since no instances of Hyundai penalising its dealers for non-use of recommended lubricants and oils was brought on record by the DG or the Commission.

However, in determining contravention in relation to resale price maintenance, the Commission did rely upon the admission made by Hyundai of the alleged conduct. In fact, the Commission even rejected the other allegations and contraventions highlighted by the DG in its report, after providing well-reasoned analyses. Moreover, with regard to delineation of the *relevant market*, the Commission did apply its mind and delineated the relevant market *differently* from what was proposed in the DG report. Thus, it cannot be said that there has been blind reliance placed upon the DG report.

3. INDUSLAW VIEW

While the NCLAT's order raises certain interesting questions in relation to the Commission's inquiry into the agreements in this case, it cannot go unnoticed that the NCLAT has not attempted to reconcile the Commission's order with the Supreme Court order cited by it.

In relation to the delineation of the relevant market, the NCLAT cited the Supreme Court order in *Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal Film and*

[3]Paragraph 108 of *Fx Enterprise Solutions India Pvt. Ltd. and Ors. vs. Hyundai Motor India Limited,* (Case Nos. 36 and 82 of 2014)

[4]Paragraph 116 of *Fx Enterprise Solutions India Pvt. Ltd. and Ors. vs. Hyundai Motor India Limited,* (Case Nos. 36 and 82 of 2014)

Television and Ors.'[5] to highlight the importance of identifying the *relevant market* correctly for assessing the impact of contravention under the Act.

However, the NCLAT did not discuss the other principles laid down by the Supreme Court in this case. The Supreme Court in its order precisely laid down that delineation of the relevant market should be on the basis of the circumstances of each case and that the *relevant market* should be determined by the Commission from the perspective of the parties involved and their position in the supply chain. This is also in line with the Commission's 'decisional practice' as oppose to the binding precedents.

Having said that, it does appear that the Commission's order was based ona bit of an oversight. Whilethe norm has always been to treat the DG's report as the cornerstone for the Commission's final order, the NCLAT order makes it clear that mere reliance on the DG's report by the Commission, without evidence to suggesta close examination of its findings,is not enough for passing a conclusive order.

The orderis undoubtedly beneficial for Hyundai and upstream manufacturers. However, it may have been appropriate for the NCLAT to referthe case back to the Commission for fresh consideration, instead of passing an order in favour of Hyundai.

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[5] *Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal Film and Television and Ors.*, ((2017) 5 SCC 17)