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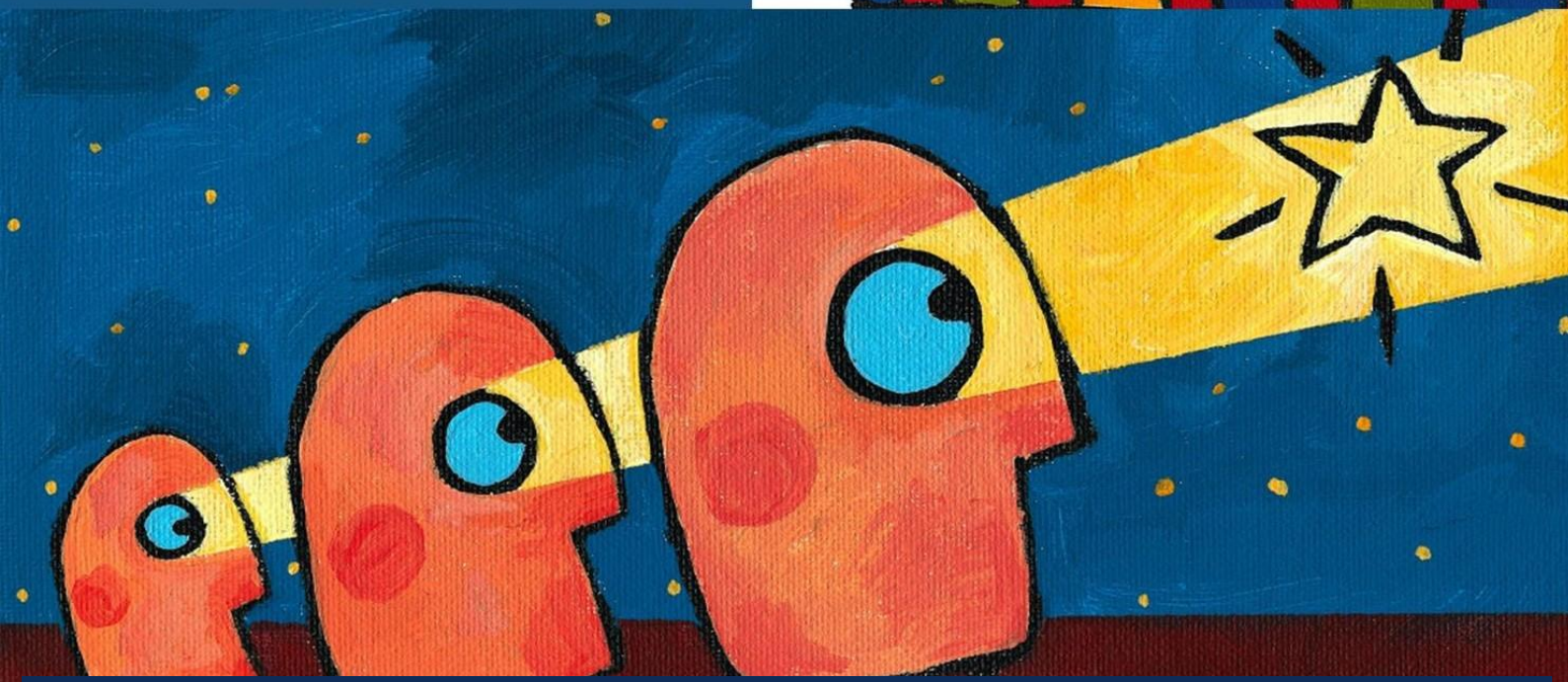
Monthly Newsletter

State of Antitrust

May 2022; Volume 9 Issue 5



Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

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CCI Penalizes 11 Enterprises Guilty of Cartelization in Railway Tenders

The Competition Commission of India **('CCI'/'Commission')** has penalised, 11 companies/firms, for cartelization in Indian Railways tenders. The investigation was initiated on a reference, made by North Western Railways **('Informant'),** against Moulded Fibreglass Products **('OP-1')** and Power Mould **('OP-2')(herein collectively referredto as 'Opposite Parties'/ 'OPs').** The informant alleged cartelisation in the tender process, for procuring High Performance Polyamide ('**HPPA**') Brake Bushes and/ or Self-Lubricating Polyester Resin ('**SLPR**') Brake Bushes, of the Indian Railways.

The OPs are in the business of manufacturing HPPA Bushes and SLPR Bushes (which are alternatives to each other) used in 'Bogie Mounted Brake Cylinder Coaches'. The informant noticed that the OPs had submitted identical bids in a re-tender despite them being located at different places, i.e. Kolkata and Daman respectively.

The Commission, on receiving the reference under Section 19(1)(b) of the Act, observed that there exists a *prima facie* violation of Section 3(3)(d) read with Section 3(1) of the Competition Act, 2002 **('the Act')**and,therefore, directed the Director General **('DG')** to cause an investigation in the alleged conduct and , further, directed the DG to look into any other entity that might also be associated with the alleged cartel.

During the DG's investigation four companies, Black Burn and Co. Pvt. Ltd. and connected individuals,OP-1 andtherelated persons, Jai PolypanPvt. Ltd. and persons involved, and Quadrant EPP Surlon India Ltd. (now MCAM Surlon India Ltd.) and other persons related, filed for leniency under Regulation 5 of Competition Commission of India (Lesser Penalty) Regulations, 2009 ('**LPR**') read with Section 46 of the Act.

After going through the evidences discovered, i.e. similar prices in tenders across various railway zones, commonality of IP addresses alongwith the common login dates and time of a bunch of parties, common directorship/ partnership of some groups of parties, and e-mail exchanges and WhatsApp communications between representatives of various parties, the DG concluded in its report that:**(1)** thereexisted an understanding between the parties as there was price fixation by the OPs;**(2)** there was an understanding to inflate the prices of HPPA/SLPR as parties discouraged each other to quote a lower rate;**(3) s**ince the OPs were the only approved suppliers of the brakes, they controlled and limited the supply of HPPA/SLPR;**(4)** the OPs were allocating market among themselves by allocation of geographical area based on different railway zones. Thus, the OPs violated Section 3(3)(a), (b), (c) and (d) of the Act. Further, the DG found 14 individuals, from the 11 OPs, during the investigation, who were responsible for the conduct of business of these OPs at the time of contravention, therefore, triggering section 48 of the Act, which provides for individual liability.

The Commission,after considering the DG's report and the submissions of the OPs, observed that:**(a)** OP-1 and OP-2 despite being located in different locations have submitted identical bids for different but substitutable products (HPPA/SLPR). Consistencies in the bids of OPs, based out of different geographical locations, were observed which left only one justification that is collusion between them. For example OPs*viz.* OP-4, OP-7, OP-10 and OP-5 are based out of different locations yet, on certain occasions, submitted identical bids despite being separated by geographical boundaries.However, at the same time, parties from the same State have submitted significantly different bids;**(b)** on looking closely, it was found that certain companies have common personnel at key positions. As an example, the OP-4, OP-5 and OP-2 were controlled by the same person. Similarly,the OP-3 and OP-1 were controlled by the same person. These companies not only submitted similar bids in the very same tender but the bids were submitted form the same IP address by a common user, at the same time;**(c)** while considering the impugned re-tender communication between OPs, about fixing of bids, it was found that OP-1 & OP-2 submitted bids with identical final value and moreover, the rates of Excise duty and CST were also identical;**(d)** the *Modus Operandi* was that an employee of OP-5 acted as the co-coordinator and kept track of the tenders being floated and then she allocated the tenders to members of this cartel based on the allotment value of each member. In case of differences, the members fixed the prices by mutual agreement.

Based on the submissions made by the parties and the individuals concerned, it can be said that almost all of the players admit to the existence of such a cartel or agreement. Therefore, it was held that there was a clear understanding amongst the parties OP-1 to OP-5 and OP-7 in determination of prices and allocation of market in regard to the impugned tender, which is in contravention of the provisions of Section 3(3)(a), 3(3)(c) and 3(3)(d) of the Act.

However, considering the nature of the cartel arrangement, the mitigating factors submitted by the OPs, and the fact that several of the OPs are Micro, Small and Medium Enterprises, the Commission decided to impose upon the OPs, a penalty of @5% of the average of their turnover, generated from the sale of HPPA Bushes/ SLPR Bushes, for the last three preceding financial years. Furthermore, a penalty of @5% of the average income of the last three preceding years is imposed on the individuals of these companies/firms.

(Order dated 04.04.2022)

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Heard at the BAR

Legal news from India and the world

Prince and Ferro to Sell Three Facilities amid FTC's Concern of Increased Concentration

The Federal Trade Commission **('FTC')**, US,to preserve competition in the North American market for porcelain enamel frit and in the world markets for forehearth colorants and glass enamel, has asked American Securities Partners VII, L.P. **('American Securities')**, parent company of Prince International Corp. **('Prince')**, to divest three facilities used to make porcelain enamel frit, glass enamel and forehearth colorant as a condition for acquiring Prince's competitor, Ferro Corp. **('Ferro')**, for $2.1 billion.

A complaint against the acquisition was made in April 2022 wherein it was averred that the acquisition would eliminate competition between Prince & Ferro in the market for porcelain enamel frit and the merged entity will become the largest player in North America thereby enabling it to raise the price of porcelain enamel frit unilaterally in North America. Further, the merger will harm the competition in highly concentrated world-wide markets for glass enamel and forehearth colorants, as both Prince and Ferro are among the top players in both these markets.

The Director of the FTC's Bureau of Competition said *"the two largest producers of porcelain enamel frit in North America, Prince and Ferro would control a dominant portion of the market absent a remedy"* further, "*The acquisition also would have harmed competition in the highly concentrated world-wide markets for glass enamel and forehearth colorants."*

Therefore, as a remedy, FTC has asked American Securities, parent company of Prince, to divest three Prince's facilities, a porcelain enamel frit and forehearth colorants plant in Leesburg, Alabama; a porcelain enamel frit and forehearth colorants plant and research centre in Bruges, Belgium; and a glass enamel plant in Cambiago, Italy, to KPS Capital Partners, LP **('KPS')**. As per the terms of the agreement American Securities, for ten years, require a prior approval of FTC before buying assets to manufacture and sell porcelain enamel frit, glass enamel, or forehearth colorants. Further, KPS is also required to take an approval,for ten years, before selling any of the divested assets to a buyer that manufactures and sells porcelain enamel frit, glass enamel, or forehearth colorants, and a prior approval, for three years, to transferring it to anyother buyer.

(Press Release dated 21.04.22)

GFL Agrees to Sell Seven Facilities as Remedy for the Acquisition of Terrapure

Green for Life Environmental Inc. **('GFL')** and the Competition Bureau of Canada **('Bureau')** has reached an agreement to resolve the litigation initiated by the Bureau against GFL for the acquisition of Terrapure Environmental Ltd. **('Terrapure')**.

In August 2021 GFL had acquired the solid waste and environmental solutions business of Terrapure and its subsidiaries. The Bureau was concerned that Terrapure was the biggest competitor of GFL in Industrial Waste Services **('IWS')** and Oil Recycling Services **('ORS')** in Western Canada and that the acquisition will lead to elimination of competition which in-turn would lead to increased prices and reduced service quality for customers. Therefore, the Bureau initiated a proceeding against the acquisition, for likely lessening of competition, in the Competition Tribunal.

However, during the initial stage of the proceeding, an agreement has been reached between GFL and the Bureau, ending the legal action, whereby GFL has agreed to sell seven of its IWS and ORS facilities to a buyer acceptable to the Commissioner. The agreement is reached due to the mediation process which is available in all the Tribunal proceedings. In the press release it was stated *"This agreement is necessary to preserve competition and Canadian businesses will benefit as a result."*

(Press Release dated 14.04.22)

Competition Commission of India Revises Long Form for Merger & Acquisitions

After amending the Form I, in August, 2019 the CCI has now amended the Form II. Form II is the long-form which is filed by parties to a combination, under section 6(2) of the Act, in cases where post-merger market share exceeds 15% in case of horizontal overlap and exceed 25% in case of vertical interface. This amendment is done to make Form II consistent with the recently amended Form I.

The template of the long form is based on the structure of short form so as to have modular formats of merger notifications. Further, it is intended to strike a balance between facilitation and enforcement functions and to create a culture of compliance.

The Commission in the press release said *"The amendment to the Form - II is aimed to remove duplicity and limit the information required so that they remain focused and relevant to the objective of assessment of a merger, suitably clustering the information on a common subject, streamlining the flow of information for better navigation and appreciation of material furnished in the notification,"*

This amendment has improved the structure of Form II and reduced the number of questions. Now, the questions are broadly grouped under seven heads which is in line with CCI's recent drive towards a more concise and consistent merger control regime.

(Press Release dated 04.04.22)

Aerospace Acquisition, of Meggitt by Parker, Approved by European Commission Conditionally

Parker Hannifin Corp.'s**('Parker')** acquisition of Meggitt PLC.**('Meggitt')** has been cleared by the European Commission **('EC')** subject to conditions. Parker and Meggitt both are leading aerospace component suppliers. The main competition amongstthem is in the field of design, manufacture and supply of aircraft wheels and brakes and aerospace pneumatic valves.

Pursuant to the Merger Regulations of the EU, and based on the leading position of the companies involved, the EC initiated an investigation, in the proposed acquisition, about the impact this acquisition will have on the market for *"the design, manufacturing and supply of aircraft wheels and brakes for certain types of aircraft."*

The investigation, by the EC, found that the competitors of the merging entities have a small presence in the supply of wheels and brakes for small general aviation aircraft, business jets, civil and military helicopters, and military fixed-wing drones and moreover, they often do not offer all types of brakes.

Further, it was also found that, the proposed acquisition would make, the merged entity the largest supplier in the aforesaid market impacting the price and innovation of these important components. However, the EC also found that the other aerospace component markets, in which these parties compete, have sufficient alternate suppliers therefore, the transaction, won't impede competition in those markets.

Parker, based on EC's findings, committed to divest its entire aircraft wheels and brakes division and also to offer a range of provisions so that the buyer, of the division, can operate the business independent of the merged entity.

The EC while clearing the acquisitionobserved that, in the markets identified for competition concerns, these remedies will ensure that the current level of competition in the markets will remain same and, further, these will also remove the overlaps in the design, manufacturing and supply of aircraft wheels and brakes ,between Parker and Meggitt, globally.

(Press Release dated 11.04.22)

Apple under European Commission's scanner for Abuse of Dominance

According to its preliminary view, the European Commission **('EC')** has informed Apple Inc. **('Apple')** that it has abused its dominant position, in markets for mobile wallets on iOS devices, by restricting the use of Near-Field Communication **('NFC')**, a standard technology used for contactless payments with mobile devices in stores.

NFC, widely accepted in Europe, enables communication between mobile phone and payment terminals in stores. It is a standardised technology which is available in almost all payment stores. It allows for the safest and most seamless mobile payments. NFC *'tap and go'* technology used for makingpayments in stores is also available on Apple devices. Apple Pay which is Apple's own mobile wallet for iPhones & iPads uses NFC technology to make payments at physical stores and online.

The EC has preliminarily considered that Apple has a significant market power in the market of smart mobile devices and a position of dominance in mobile wallet market. Further, Apple Pay is the only mobile wallet which is allowed to use necessary NFC input on iOS devices. This, in EC's preliminary view, is an exclusionary conduct for competitors and can lead to less innovation and lesser choice for the consumers of mobile wallets in Apple devices.

The Executive Vice-President Margrethe Vestager has stated *"Mobile payments play a rapidly growing role in our digital economy. It is important for the integration of European Payments markets that consumers benefit from a competitive and innovative payments landscape. We have indications that Apple restricted third-party access to key technology necessary to develop rival mobile wallet solutions on Apple's devices. In our Statement of Objections, we preliminarily found that Apple may have restricted competition, to the benefit of its own solution Apple Pay. If confirmed, such a conduct would be illegal under our competition rules."*

(Press Release dated 02.05.22)

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An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti TrustDivisions, Competition Commission of India, former Commissioner of Income Tax

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