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CCI issues a cease and desist order to enterprises involved in bid-rigging

The Competition Commission of India (**'CCI'/'Commission'**) received a reference from Eastern Railway, Kolkata (**'Informant'**) alleging contravention of section 3 of the Competition Act, 2002 (**'the Act'**) by M/s Chandra Brothers, M/s Sriguru Melters & Engineers, M/s Rama Engineering Works and M/s Krishna Engineering Works (**collectively known as 'Opposite Parties'/'OPs'**) through bid-rigging.

The Commission after analyzing the bids relating to the said tenders submitted by the Informant observed that, there exists a *prima facie* reason to believe that there was an arrangement between the OPs to quote the same price in response to the tenders floated by the Informant. Accordingly, the Commission passed an order directing the Director General (**'DG'**) to cause an investigation in this matter.

Through its investigation, the DG found that, (a) the OPs were members of a cartel for supply of axle bearings to the railways, (b) these parties, through concerted efforts, were allocating and sharing tender quantities in the railway tenders, and (c) the OPs had colluded to rig bids in three tenders of the Informant. Hence, the DG concluded that the OPs were involved in determining the sale/bid prices quoted in the tenders floated by the Informant for the supply of axle bearings and, therefore, in the violation of section 3(3)(a) r/w section 3(3)(1) of the Act.

The arguments submitted by OPs before the Commission were something like (a) even if a cartel existed, there was no Appreciable Adverse Affect on Competition (**'AAEC'**) in the market of axle bearings in India; and (b) Indian railways is a monopolistic player, it controls the price and quantity supplied to them and, therefore, the OPs do not have any control over the price or quantity.

With regards to the above-mentioned arguments raised by OPs, the Commission stated that the pleas of the OPs are misdirected and, further, went on to give reasons for that as (a) the bare reading of section 3 of the Act clarifies that, once an agreement of the types specified under section 3(3) of the Act is established, the same is presumed to have an AAEC within India. Therefore, the Commission is right in presuming that the impugned conduct of the OPs had caused AAEC within India. Additionally, the Commission relied on the judgment of the Hon'ble Supreme Court of India (**'SC'**) in the matter of *Rajasthan Cylinders and Containers Ltd. v. Union of India and Others*, to further state that the OPs have the right to rebut this presumption by placing evidence on record but the OPs have failed to do the same; and (b) with regards to Indian railways being a monopolistic player with the power to determine prices /quantity, the Commission said that similar pleas were also advanced in previous cases against Indian Railways as well and the same were noted by the Commission as misconceived. It further stated that the OPs are merely putting emphasis on market conditions, in isolation, and are ignoring the actual anti-competitive conduct committed by them.

Finally, the CCI reached the conclusion that, the OPs were in contravention of the provisions of section 3(3)(d) r/w section 3(1) of the Act and issued a 'cease and desist' order against them. Regarding the issue of imposition of penalty, the CCI stated that the OPs are MSMEs and already under stress due to Covid-19 pandemic, furthermore, from the investigation of DG it is clear that the OPs were unaware of the provisions of competition law, therefore, considering the matter holistically, the CCI refrained from imposing any penalties. (**Case No. 02 of 2018, Order dated 12.10.21**)

CMA imposes penalty on Facebook for violation of its initial enforcement order

The Competition and Markets Authority (**'CMA'**), UK, has imposed a penalty on Facebook Inc. (**'Facebook'**) u/s 94A of the Enterprise Act 2002. The penalty was imposed for failures to comply, without reasonable excuse, with the requirements imposed on Facebook through the initial enforcement order (**'IEO'**) issued by the CMA, in June 2020, while investigating the acquisition of Giphy by Facebook.

While investigating a completed acquisition, it is a standard practice of CMA to issue an IEO. This IEO ensures that, the companies involved in the merger continue to compete with each other as they would have without the merger, and therefore, the IEO prevents the companies from integrating further while the investigation is ongoing.

Additionally, as per the process, Facebook is required to provide the CMA with regular updates outlining its compliance with the IEO. As per CMA, Facebook significantly limited the scope of those updates despite repeated warnings. Furthermore, in 2020, Facebook was criticized by the Competition Appeal Tribunal and Court of Appeal for its lack of cooperation with the CMA. The CMA went on to emphasize on the importance of compliance reports and how crucial they are to ensure that the behavior and action of the companies involved are not something that might prejudice the outcome of its investigation.

It needs to be noted that this is the first time when a company has been found by the CMA to have breached an IEO by consciously refusing to report all the required information. Even though multiple warnings were given to Facebook by the CMA but continuous failure to comply with the IEO was deliberate. As a result, the CMA issued a fine of £50 million for this major breach, which fundamentally undermined its ability to prevent, monitor and put right any issues. Separately, the CMA has fined Facebook £500,000 for changing its Chief Compliance Officer on two separate occasions without seeking consent from CMA first. (**Press release dated 20.10.21**)



CCI agrees with FCI on reference about bid-rigging

A reference was filed before the CCI by Food Corporation of India ('Informant'/ 'FCI') under section 19(1)(b) of the Act against Shivalik Agro Poly Products Ltd. ('OP-1'), Climax Synthetics Pvt. Ltd. ('OP-2'), Arun Manufacturing Services Pvt. Ltd. ('OP-3') and Bag Poly International Pvt. Ltd. ('OP-4') alleging, inter alia, cartelisation in the bidding process for procurement of Low Density Poly Ethylene covers (LDPE), during the period 2005 to 2017, as the OPs have been constantly involved in quoting of identical rates or cosmetically differing rates in these tenders. Therefore, the informant alleged that OPs were involved in the anti-competitive conduct of bid-rigging in violation of the provisions of Section 3 of the Act.

FCI, a statutory authority, implements different objectives of the National Food Policy under which one of its objectives is to maintain a satisfactory level of operational and buffer stocks of food grains. LDPE covers are required by the FCI for safeguarding food grains stored in the open.

The Commission, after examining the material on record, prima facie opined that there appeared to be a case of contravention of the provisions of Section 3(3)(d) r/w Section 3(1) of the Act, and accordingly, directed the DG to cause an investigation into the matter. During the investigation, involvement of two more parties viz. Shalimar Plastic Industries, ('OP-5') and Dhanshree Agro Poly Product ('OP-6') was noted by the DG.

The DG, through investigation, concluded that OPs were involved in fixing the price of LDPE covers, limiting/restricting the supply of LDPE covers, sharing tender quantities, and thereby rigged the bids of the tenders floated by FCI and other government agencies for procurement of LDPE covers. Therefore, the OPs were in contravention of the provisions of Section 3 (3) (a)/ (b)/ (c)/ (d) of the Act. The Commission after going through the DG report and other materials

available on record went on to conclude that the OPs had indulged in cartelization and bid rigging in respect of tenders floated by FCI and other government agencies for procurement of LDPE, by means of directly or indirectly determining prices, allocating markets, coordinating bid response, and manipulating the bidding process. The exchange of communication was found to be a direct evidence displaying the anti-competitive conduct of the OPs and it was sufficient to hold that OPs indulged in anti-competitive activities. Therefore, the Commission, found OPs to be in contravention of the provisions of Section 3(3)(d) r/w Section 3(1) of the Act.

The CCI directed the OPs and their respective officials, to 'cease and desist' from indulging in anti-competitive practices in future. Furthermore, with regards to imposition of monetary penalty, the CCI was of the view that, the OPs are small/ medium enterprises, and the MSME sector in India is already bearing the impact of the economic situation arising from the outbreak of the Covid-19 pandemic. Therefore, if in such situation any penalty is imposed on these firms, it may render these firms economically unviable and may even result in their exit from the market, which would further reduce competition in the market. Therefore, considering the matter holistically, the CCI decided not to impose any monetary penalty.

(Order dated 29.10.21)

Brazilian Competition authority fines cartel members with BRL 235 million

The Brazilian Competition authority, Administrative Council for Economic Defense ('CADE'), on 05.10.2021, held companies Parker Hannifin Indústria e Comércio ('Parker') and Mann + Hummel Brasil ('M&H'), in addition to five individuals, guilty of engaging in a cartel in the market of automotive filters for supplying the spare parts to the independent automotive



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aftermarket ('IAM') industry. A total fine of BRL 235 million was imposed by the CADE.

In 2017, an investigation was launched by CADE after they signed a leniency agreement with the firm Mahle Metal Leve and 18 individuals. After the agreement, evidence was submitted to the CADE by these applicants. According to the investigation, those involved in the collusion, were involved in combining prices, conditions and commercial advantages and used to frequently share competitively sensitive information, and thus, leading to harming the free competition of this segment in Brazil.

As per the investigation, the time frame for these anti-competitive conducts was at least from 2001-12.

The cartel was operationalized during meetings held by representatives of the companies. E-mails were exchanged between the competitors, through which percentages and dates for value adjustments were jointly agreed. Furthermore, they went on to decide "form of payment" that would be offered to customers and there was a prohibition on granting of discounts without prior consent of the members of the cartel, hence leading to severe impact on competition and direct impact on customers. For their involvement in the anti-competitive conduct, Parker, M&H and its individuals were fined by the CADE with BRL 90.7 million, BRL 140 million and BRL 3.6 million, respectively. *(Press release dated 21.10.21)*

The Indian Competition watchdog imposes symbolic penalties on firms for indulging in bid rigging in tender floated by GAIL

The Commission, through its final order, imposed a penalty on two firms, PMP Infratech Pvt. Ltd. ('PMPI') and Rati Engineering ('RE'), for indulging into anti-competitive practice of bid rigging of tender floated by GAIL India Ltd. ('GAIL') in 2017-18. The tender was for the restoration of well site locations in a GAIL operated block, in Ahmedabad and Anand, Gujarat, for disposals of drilling wastes from the various well sites.

The Informant, GAIL, approached the Commission alleging contravention of provisions of the Act by PMPI and RE as it was observed by GAIL that the bids submitted by the PMPI and RE (collectively referred as Opposite Parties 'OPs') were from the same IP address and the bids were submitted with the gap of one day only.

The Commission while going through the information, opined that there exists a *prima facie* case and, therefore, directed the DG to cause an investigation into the matter. The DG after investigation concluded that the OPs were in contravention of the provisions of Section 3(1) r/w Section 3(3) of the Act.

The OPs, in their objections and submissions ('O&S') on the DG report, denied the conclusion drawn by the DG. Furthermore, in relation with the main issue of the submission of bids being from the same IP address, the OPs submitted that it was done because RE was facing a few issues with its Java software and, as they are in close relation with PMPI, therefore, they were allowed to submit bid from PMPI's office.

Based on investigation and electronic/documentary evidence collected by the DG, as well as other evidence available on record, the CCI found that the two firms, through e-mails, were in regular touch with each other regarding the tender floated by GAIL and even after the submission of their bids. Furthermore, submission of bids from same IP address with a gap of one day also played a crucial role for the CCI to come to its conclusion.

Therefore, the Commission found such conduct to have contravened the provisions of Section 3(3)(d) r/w section 3(1) of the Act which prohibits anti-competitive agreements including bid rigging.

The Commission, besides passing a 'cease-and-desist' order, further went on to impose a symbolic monetary penalty of Rs. 25 lakh on PMPI, Rs. 2.5 lakh on RE, Rs. 1 lakh and Rs. 50 thousands on their respective individuals who managed and controlled the firms during the time of contravention.

(Case No. 41 of 2019, Order dated 11.10.21)

Bundeskartellamt published new guidelines on its leniency programme & setting of fines in cartel

The German Antitrust Authority, Bundeskartellamt, recently published new guidelines on its leniency programme and on the setting of fines in cartel proceedings. While discussing about the leniency programme, it was pointed out that the essential feature of leniency programmes is that they enable cartel participants to be granted immunity or a reduction of the fine if they contribute to uncovering a cartel between competitors. Furthermore, it was observed that leniency programmes have been used worldwide for decades to enforce competition law. They are of prime importance in combating cartels because when it comes to cartels it can usually be better uncovered with the help of an insider.

The Bundeskartellamt had already issued general administrative principles on leniency in 2000 and revised them in 2006. It is because of these leniency principles, that it was possible to uncover a large number of cartels in a wide variety of sectors with the assistance of key witnesses. In revising these guidelines, as in the case of the Leniency Programme, the Bundeskartellamt has provided specific details on how the proceeding is conducted, the exercise of its discretionary powers in determining the fine and on the amount of the reduction of the fine.

In the amendment, a number of criteria for setting the amount of the fine were also mentioned. For example, the turnover achieved with the products or services that were the subject of the anti-competitive agreement, i.e. the turnover linked to the infringement, has now been legally established as a criterion. In addition, precautionary measures taken by a company prior to and following the infringement to prevent and uncover further infringements can be taken into consideration under certain conditions. The amendments will create more flexibility in the individual case but no essential change in the level of fine are expected.

Andreas Mundt, President of the Bundeskartellamt while discussing about these new guidelines said, "*Key witnesses still play a crucial role in uncovering and prosecuting illegal cartels.*"

(Press release dated 11.10.21)

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