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NCLAT holds that principle of ‘one who hears must decide’ must be adhered in proceedings before CCI

The National Company Law Appellate Tribunal (“NCLAT”) has set aside an order, dated 18.09.2018, (“**Impugned Order**”) of the Competition Commission of India (“**Commission**”/“**CCI**”), imposing penalty on certain Sugar Mills (“**Ethanol Producers**”) for cartelization through bid-rigging in ethanol procurement, on the ground that the said order failed to comply with the principles of natural justice, given under Section 36(1) of the Competition Act, 2002 (“**Act**”). The contention of the Ethanol Producers was that the Impugned Order was infructuous because of non-adherence to the principle – ‘*one who hears must decide*’ & also due to CCI’s failure to grant an opportunity of oral hearing subsequent to submission of Supplementary Investigation Report by the Director General (“**DG**”).

In the present case, the matter before CCI was heard on various occasions by 6 members of the CCI, but the final judgment was signed & pronounced by only 3 members. Out of the 6 members, 2 members had retired from the office before the pronouncement of judgment & another member, although was still in the office during that period, had only partly heard the matter & thus, did not participate in decision making or signed the Impugned Order. Therefore, the Ethanol Producers contended that the Impugned Order is perverse since, although, the matter was heard by 6 members it was signed by only 3 members. Further, the Ethanol Producers contended that the Commission during the course of hearings directed the DG to furnish a Supplementary Investigation Report. However, when the same was submitted the CCI did not grant oral hearing to the Ethanol Producers, which according to them resulted in denial of natural justice. The NCLAT, in its decision, noted that under Section 36 of the Act, the CCI is empowered to regulate its own procedure which should be guided by the principles of natural justice. Further, Section 22 of the Act lays down that all questions which come up for hearing before the Commission shall be decided by a majority of members present and voting. Additionally, the NCLAT observed that Regulation(s) 3(5)(c) & 3(5)(e) of the Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009 allows the CCI to grant oral hearing to the parties and allow the members to participate in the meetings through video conferencing, respectively. According to the NCLAT these regulations are imbued with the requirement to adhere with the principles of natural justice ingrained in Section 36 of the Act. Therefore, the NCLAT held that a conjoint reading of Sections 36 & 22 of the Act implies that members hearing a matter must adhere to principle of natural justice.

Thereafter, the NCLAT relied on judgment of *Lafarge India Limited, Crescenzo Bldg v. Competition Commission of India and Another* [2015 SCC Online Comp AT 1120], which held that the principle of ‘*one who hears must decide*’ is not only relevant, but it also impacts the spirit of natural justice to the order. Further, the NCLAT observed that the Supreme Court, in *Competition Commission of India v. Steel Authority of India Ltd & Anr.* [(2010) 10 SC 744], has held that non-adherence to the principle of natural justice must emanate from some legal, compelling reason or public interest.

The NCLAT noted that, in the present case, the non-compliance to the principle of natural justice was not due to some legal or compelling reason, but rather was solely due to a faulty and irrational procedure followed by the CCI. Further, the final order of the CCI was delivered after a lapse of 13 months of the conclusion of final argument which according to the NCLAT was completely overlooking the desirability of pronouncing final judgment. It also observed that the members who did not sign the judgment may have held a different view and if they participated in collective deliberation, the final order might have gone in a different direction. Moreover, there is also a possibility that members who signed the Impugned Order may have suffered from some loss of memory, given the long-time gap, which could have a bearing on the final outcome of the case.

Therefore, the NCLAT held that there is a necessity that the same set of members hearing the final argument must also take part in the decision making and sign the judgment. The Impugned Order is vitiated because of violation of principle of natural justice, since the “quorum” of the Commission that heard the final arguments did not pass the necessary orders within reasonable period of time. Further, the delay in pronouncing the Impugned Order also resulted in the principle ‘*one who hears must decide*’ not being followed in letter and spirit. Thus, based on the aforementioned reasoning that the Impugned Order failed to satisfy the basic tenet of adherence to the principle of natural justice, ingrained in Section 36 of the Act, the NCLAT set aside the Impugned Order & remitted the matter back to CCI for fresh hearing of the case after constitution of an appropriate “quorum”.

(Order dated 10.10.23 in Competition Appeal (AT) No. 86 of 2018)



Autorité de la concurrence makes its recommendations on competition landscape in Meal Vouchers market in France

Autorité de la concurrence (“ALC”), the French Competition Authority, has provided its opinion to the French government, which had referred to it the matter regarding the level of competition existing in the meal vouchers market. The ALC has recommended seeking a structural solution to address the balance of power in the market that currently is heavily tilted towards the voucher issuing companies.

Meal vouchers are special payment instruments & its market in France is a “two-sided” market. The Meal Voucher Issuers (“Voucher Issuers”) on the “issuing-side” offer their vouchers, by charging commission, from the companies to be utilized for meal payments by their employees. On the “acceptance-side”, Voucher Issuers receive back their meal vouchers for reimbursement from the merchant restaurants, approved under the extant law, and further charge commission on the same. Generally, there is “single-homing” on the *issuing side* between employers & Voucher Issuers. However, on the *acceptance-side*, in order to maximise their sales, merchant restaurants accept meal vouchers issued by several Voucher Issuers – “multi-homing”. The ALC noted that, because the commission paid by approved merchants to Voucher Issuers is significantly higher than the commission paid by the employers to Voucher Issuers, there is significant imbalance of power in the *acceptance-side*.

The ALC, in its report, highlighted the adverse effects of current level of competition in the meal voucher market in France. Despite the presence of 15 companies in the meal voucher market in France, the market is highly concentrated amongst four players – *Edenred France, Bimply-Swile, Sodexo Pass France & Up Coop*, controlling 99% of the relevant market. The report further, noted that the new

entrants are unable to effectively compete with these incumbent Voucher Issuers since there exist high barriers to entry accruing due to network effects & economies of scale, giving competitive advantage to Voucher Issuers having certain size, consumer preference & brand recognition. Moreover, the meal vouchers issued by one Voucher Issuer is not inter-operable with those issued by other Voucher Issuers owing to voucher issuer’s exclusive rights over their issued vouchers since they are the only one to be able to receive those back from the merchants. There has been a gradual increase in commissions charged by the Voucher Issuers from the merchants on the acceptance-side, which according to the ALC is a result of low bargaining power of the merchants, who cannot afford to lose sales from the widely distributed meal vouchers sales channel.

Unlike the French government’s proposal of introduction a price cap in acceptance-side of the meal vouchers market, the ALC is of the opinion that introducing the same will likely to result in commission rates converging towards the regulatory cap range meaning thereby, that even those Voucher Issuers whose commission rates on the acceptance-side were usually set below the regulatory cap, will tend to align its rates with those regulatory rates. Rather, since there is imbalance of power between each issuer, which holds a monopoly over the vouchers it has issued and a fragmented demand for these vouchers on the acceptance-side, ALC proposes to remove each Voucher Issuer’s exclusive right to accept the vouchers it issues by severing the issuing-side & acceptance-side of the business.

Further, in order to foster competition by increasing competition from new entrants, ALC also proposes to make computerisation of vouchers mandatory and for more transparent & easier to understand pricing mechanism.

[\(Press release dated 17.10.23\)](#)



Heard at the BAR

Legal news from India and the world

Pharmaceutical companies fined €13.4 Million by the European Commission

The European Commission (“EC”), the competition watchdog of European Union (“EU”), in a cartel settlement has fined 5 pharmaceutical companies €13.4 Million for forming a cartel in relation to an important pharmaceutical ingredient.

The EC during its investigation found that the cartel was formed in relation to N-Butylbromide Scopolamine/Hyoscine (“SNBB”), a crucial input for the production of abdominal antispasmodic drug ‘Buscopan’ and its generic versions. Further, the investigation revealed that the cartel existed in the European Economic Area (“EEA”) from November 2005 to September 2019. The EC found that the companies manipulated and fixed the minimum selling price of SNBB for their distributors and generic drug manufacturers. In addition to this the companies also exchanged sensitive information amongst them.

The fine of €13.4 Million was imposed as part of a cartel settlement agreement. However, only five of the six companies involved in the cartel were fined as one company was given 100% deduction in fine as it revealed the cartel to the EC under the Leniency Notice, 2006. Further, all companies were given 10% reduction in fine as part of the settlement agreement.

[\(Press release dated 19.10.23\)](#)

CCI issues draft Competition Commission of India (Lesser Penalty) Regulations, 2023

On October 16, 2023, the Competition Commission of India released the draft Competition Commission of India (Lesser Penalty) Regulations, 2023, (“**Regulations**”) seeking public feedback until 6.11.2023. The Regulations are in response to the Competition (Amendment) Act, 2023, which introduced the ‘leniency plus’ provisions. These provisions have not yet been enacted and are awaiting supporting regulations for its implementation. When enacted, the new Regulations will replace the existing Competition Commission of India (Lesser Penalty) Regulations, 2009.

The ‘leniency plus’ regime allows individuals or entities involved in one cartel to disclose a separate, previously unknown, cartel and receive an additional reduction in the penalty for the first cartel they disclosed. The Regulations outline the application process, the procedure for granting ‘lesser penalty plus’ and the conditions for withdrawal of ‘lesser penalty’ and ‘lesser penalty plus’ applications.

Key Features of the Regulations:

Grant of Lesser Penalty Plus: The Regulations allow an applicant, already involved in one cartel, to make complete and vital disclosures about a second, previously unknown, cartel. If the CCI can establish the existence of this second cartel based on the applicant’s disclosures, the applicant can receive an additional reduction of up to 30% of the penalty imposed for the first cartel and a penalty reduction of up to 100% for the second cartel.

Procedure for Grant of Lesser Penalty Plus: An applicant can apply for ‘lesser penalty plus’ in writing, to the Commission, before the receipt of the DG’s investigation report for the first cartel. After receiving the application, the designated authority will bring it to the Commission’s attention within 5 working days. The CCI will then grant ‘lesser penalty plus’ status to the applicant for the first cartel and assign priority status for the second cartel. In the case of multiple ‘lesser penalty plus’ applications for the second cartel, only the first applicant’s application will be considered unless rejected.

Factors considered by the Commission: The factors include the likelihood of detecting the second cartel without the ‘lesser penalty plus’ application and any other relevant factors that distinguish the second cartel from the first. Further, the CCI has the discretion to decide whether to grant a reduction in monetary penalties under the ‘lesser penalty plus’ regime.

Contents of the Application for Lesser Penalty Plus: The application should include information about the applicant or its representative, details of the first cartel, disclosures about the second cartel, similarities between the two cartels, and justification for considering them as separate cartel.

Forfeiture of Leniency Application: The Regulations introduced a provision for forfeiting the benefits of ‘lesser penalty’ or ‘lesser penalty plus’ if the applicant fails to comply with the conditions on which the benefit was granted, submits false evidence, or fails to make a vital disclosure.

Withdrawal of Leniency Application: Applicants can withdraw their ‘lesser penalty’ and ‘lesser penalty plus’ applications at any time before receiving the DG’s report. However, the DG or the Commission can use the information, evidence, or documents submitted by the applicant, in the leniency application, except for admissions.


Expanding the Scope of Leniency to Cartel Facilitators: The Regulations extend the scope of applicants to include cartel facilitators. This includes participants in hub-and-spoke cartels, hybrid anti-competitive agreements, and non-participants who intended to participate in the cartel.

Confidentiality: While the Regulations maintain confidentiality regarding the identity of the applicant, they allow the Commission to disclose information, documents, or evidence provided by the applicant after receiving the DG report.

(Press release dated 16.10.23)

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