



KK SHARMA  
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- ACCC imposes largest ever criminal fine on K-Line, amounting \$34.5 million

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AND MORE...



## **CCI imposes a penalty of ₹ 13.82 Crores on JAL for abuse of dominant position**

The origin of this case was an information filed under Section 19(1) (a) of the Competition Act, 2002 (hereinafter, the 'Act') by Mrs. Naveen Kataria (hereinafter, the 'Informant') against Jaiprakash Associates Limited ('JAL'/ 'Opposite Party'/ OP'), a company engaged in the business of real estate development, alleging contravention of the provisions of Section 4 of the Act.

The Informant bought a Villa developed by OP at Jaypee Greens, Greater Noida, Uttar Pradesh. The Informant alleged that OP failed to mention certain provisions, such as, complimentary golf membership, total area of the plot, and additional basement area of 500 sq. ft, in the Provisional Allotment Letter ('PAL'). The Informant stated that it was informed by OP that additional construction beyond the agreed area would be charged from the Informant, amounting to ₹ 25 lakhs. Further, it was alleged that Informant received the letter of possession after a delay of eight months and seventeen days. Thus, the Informant alleged the terms and conditions of the PAL to be unfair, one sided and loaded in favour of the OP.

The Competition Commission of India ('Commission'/'CCI') , after considering the entire material available on record, defined the relevant product market as *'the market for the provision of services of development and sale of residential units'* and directed the Director General ('DG') to cause an investigation into the matter and submit a report. However, the DG identified integrated township as a distinct product and delineated the relevant product market as *'market for provision of services for development and sale of residential properties (including flats, villas, plots) in integrated townships'* and conducted investigation accordingly. Not fully satisfied with the investigation and all the findings of DG in the report submitted ('Main Report'), the Commission directed the DG to submit a supplementary report in the matter.

After receipt of the reports of the DG and submissions of the OP, the CCI examined the allegation of abuse of dominant position. Before determining the relevant market, the CCI analysed the concept of integrated township and said that residential units in an integrated township are not substitutable with residential units in a cooperative society, or a group housing scheme or any other residential unit built in a standalone/housing project as such residential projects do not include all the facilities such as schools and colleges, hospitals, malls and other shopping areas, clubs, multiplexes, that an integrated township offers. With respect to the relevant geographic market, the CCI observed that conditions for supply of real estate development services in Noida and Greater Noida are clearly distinguishable from the conditions prevalent in other NCR regions such as Faridabad, Bhiwadi, Alwar, Manesar, Kundli, *etc.* Therefore, CCI agreed with the DG's delineation of geographic area of Noida and Greater Noida, as they have a brand image of their own, and held *'Noida and Greater Noida regions'* as the relevant geographic market. The CCI then looked into the factors given under section 19 (4) of the Act to determine dominant position of the OP. The CCI examined the market share, financial resources, land resources available at OP's disposal or through its group companies, vertical integration, total assets, net worth and total sales value in respect of independent residential units sold by OP. The CCI observed that the total number of independent residential units sold by the OP in its integrated township projects were 255 whereas none of its competitors in the relevant market namely Unitech Ltd. and Omaxe Ltd. sold any independent residential units during the aforesaid period. Thus, CCI agreed with the conclusions drawn by the DG that OP enjoys a dominant position in the defined relevant market during 2009 to 2012. Lastly, the CCI proceeded to look at the behaviour of the OP and found clauses in PAL relating to additional constructions and amending/ altering the layout plans; charging interest on delayed payments; miscellaneous obligations/ holding charges and, few more, and held that the entire *modus operandi* of OP, such as collecting money from the buyers without delivering the residential/dwelling unit on time, adding additional construction and amending /altering the layout plans, imposition of various charges, unfettered right to raise finance from any bank/financial institution/body corporate *etc.*, were nothing but an imposition of unfair conditions on the buyers by the OP and the same is a reflection of exercise of position of dominance by the OP in the relevant market. Thus, CCI imposed a fine at 5% of average turnover of the OP amounting to ₹ 13.82 crores/-. (**Case no. 99 of 2014**)



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- **CMA requires Tobii to divest Smartbox because of competition concerns**

On 20<sup>th</sup> August 2018, Tobii's largest business unit, Tobii Dynavox entered into an agreement to acquire 100% stake in UK based Smartbox Technology Ltd, with an aim to consolidate its market leading position and strengthen its sales channels in key geographical markets.

The Competition and Market Authority ('CMA') on 25<sup>th</sup> January, 2019 raised concerns with respect to the integration of Tobii and Smartbox's technology relating to augmentative and assistive communication solutions.

The CMA believed that the merged company would face little competition as Tobii and Smartbox were main competitors of each other. The CMA stated, if the companies fail to address concerns raised until 1<sup>st</sup> February 2019, an in-depth investigation would be launched.

On 8<sup>th</sup> February, 2019, the CMA launched an in-depth investigation. The CMA was not confident that the undertakings offered by the Tobii, would resolve competition concerns. Therefore, CMA formed a group of independent members supported by a case team of CMA staff ('Panel') for taking a decision on the merger.

In CMA's final report published on 15<sup>th</sup> August, 2019, the CMA concluded that the deal raises significant competition concerns in the supply of augmentative and assistive communication solutions, where Tobii and Smartbox are 2 of the UK's leading suppliers and compete closely. The Panel concluded that the loss of competition brought about by the deal could lead to reductions in the existing product range and quality, less new product development and higher prices.

Thus, the CMA decided that the only effective way of addressing the loss of competition resulting from the merger is for Tobii to sell Smartbox to a new owner, which must be approved by the CMA. (*Press release 15<sup>th</sup> August 2019*)

## **ACCC imposes largest ever criminal fine on K-Line, amounting to \$34.5 million**

Kawasaki Kisen Kaisha Ltd (K-Line) a Japanese shipping company, headquartered in Tokyo having controlling interest in a global group of companies with offices in Europe, Africa, Asia, America, the Middle East and Oceania (including Australia) has been convicted of criminal cartel conduct and ordered to pay a fine of \$34.5 million.

Following, an extensive criminal investigation by the Australian Competition & Consumer Commission ('ACCC') and the laying of charges by the Commonwealth Director of Public Prosecutions, K-Line pleaded guilty on 5 April 2018, for being a part of cartel with other shipping companies, in order to fix prices on the transportation of cars, trucks, and buses to Australia between 2009 and 2012.

Investigation revealed that the cartel operated from at least February 1997, and impacted the transportation prices of cars, trucks, and buses to Australia from the US, Asia and various European countries. K-Line, and other shipping lines transported these vehicles on behalf of major car manufacturers such as Nissan, Suzuki, Honda, Toyota and Isuzu and others.

K-Line's conduct was punishable by a maximum penalty of \$100 million, based on 10 per cent of K-Line's agreed annual turnover relating to Australian business activities, but the Federal Court of Australia allowed a discount of 28% for K-Line's early guilty plea, and for its level of assistance and cooperation, otherwise K-Line would have been fined \$48 million. (*Press release 2<sup>nd</sup> August 2019*)

## **'Green Channel' for combinations not causing AAEC, by a voluntary declaration, in India**

In recognition of the need to enable fast-tracked regulatory approval for majority of mergers and acquisitions that may have no major concerns regarding of AAEC, the CCI



## **Heard at the BAR**

*Legal news from India and the world*

amended the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulation, 2011 vide notification dated 13<sup>th</sup> August, 2019.

The aim of such amendment is to move to a 'file, smile and go' regime with strict consequences for not providing accurate or complete information.

The move is in parity with some of the intentional jurisdictions such as Italy, Mexico and Latvia, where pre-merger notifications do not impose a standstill obligations on the combination.

Green Channel for combination will address the widely reported sentiment of the global business that merger control increases transaction costs and potentially delays transaction.

With the introduction of Green Channel approval, parties to the combination may self-assess and may have pre-filing consultations with the CCI.

Wrong information/incomplete information or incorrect self assessment by the parties will render the automatic approval void *ab initio* and the parties shall be dealt in accordance with the provisions, relating to the combinations, as contained in the Competition Act, 2002.

The Green Channel route will also compliment the Insolvency and Bankruptcy Act, 2016 which give rise to possible combinations in the form of sale of distressed assets of the resolution applicants. (*Notification dated 13<sup>th</sup> August, 2019*)

## **LPG manufacturers fined ₹ 39 Crores for manipulating bids for procurement of LPG cylinders.**

A suo moto case was registered by the Competition Commission of India ('CCI'/'Commission') after the CCI received an anonymous letter ('letter') dated 25.04.2013, wherein, it was alleged that there was a cartel operating in 2 tenders namely e-tender No. 11000083-HD-12001 ('Tender 1') and e-tender No. 12000147-HD-12001 ('Tender 2') floated by Hindustan Petroleum Corporation Ltd. ("HPCL") on 28.10.2011 and 24.01.2013 respectively. In Tender 1, it was alleged that orders were placed on LPG manufacturers at prices higher than the procurement price received by other oil companies from the same LPG manufacturers during the same period. The CCI, before forming *prima facie* opinion, compared the price bids submitted by LPG manufacturers/bidders which showed a similarity of pattern in the price bids submitted by them. With regard to Tender 2, it was alleged that while technical evaluation was in progress, 51 bidders out of 66 bidders, withdrew their bids by submitting letters of withdrawal. The withdrawal by 51 bidders from Tender 2 led the CCI to suspect infringement of provisions of the Competition Act, 2002 (the 'Act'). Additionally, the CCI noted that many of the LPG manufacturers were found guilty of infringement of the provisions of Section 3(3) of the Act in *Suo Moto* Case of 3 of 2011 (*In Re: Suo-Motu case against LPG cylinder manufacturers*). On the basis of the same, the CCI passed an order under Section 26(1) of the Act directing the Director General ('DG') to cause an investigation.

The DG in his investigation found that the market conditions encompassing the tender process were conducive to cartelization. The investigation revealed that several entities/LPG manufacturers had common or related management. Though, the manufacturing unit of the bidders were located at different geographical locations of the country, still final quoted rates by the bidders were either identical or within a narrow range. The DG also found that the bidders were in contact with each other and exchanged vital and sensitive information. With regard to Tender 2, the DG found 46 bidders out of 51 bidders withdrew their bids on 04.03.2013. Most of the OPs either stated no reasons for withdrawal or stated a common reason i.e. "*Due to unavoidable circumstances*". Several OPs discussed amongst themselves, before withdrawing from Tender 2, which was evidenced by exchange of withdrawal letter format through e-mails between them. Several bidders had identical IP addresses and common agents for submission of documents to tenderer. Few selected existing bidders quoted identical rates. Hence, the DG concluded that the bidders rigged Tender 1 and 2.

The CCI considered the Investigation Report and suggestions/objections filed by the bidders and, firstly, dismissed the preliminary issues raised by the bidders, such as, hearings of the CCI cannot be conducted in the absence of a judicial member; the CCI cannot assume jurisdiction based on an anonymous complaint as the CCI cannot convert an anonymous complaint to *suo-motu* cognizance, as regulations provide different methodology to deal with *suo-motu* case and that the DG report is time barred.

With respect to Tender 1, the CCI, after referring to OECD Policy relating to Prosecuting Cartels without Direct Evidence and guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TEFU) to horizontal cooperation agreements, agreed with the submissions of the bidders that parallel pricing can only lead to a strong suspicion of existence of a cartel and cannot lead to positive conclusion regarding bid rigging. The investigation nowhere revealed that quotation of identical prices by the OPs was with the objective of sharing of market amongst each other. The CCI also noted the conduct of the bidders, in the light of the observation of the Apex Court in *Rajasthan Cylinders and Containers Ltd. v. Union of India and Another*, and held that HPCL is neither constrained nor dependent on the rates quoted by the bidders and acts independently regardless of the rates quoted by the bidders. Thus, CCI decided not to examine the conduct of bidders, except few, in Tender 1.

With respect to Tender 2, the CCI did not examine the conduct of the 4 existing bidders, who quoted identical bids, on the basis of its reasoning pertaining to Tender 1. Regarding the withdrawal of bids by 51 bidders, the CCI analysed the findings of the DG i.e. common reasons cited in withdrawal letters, exchange of common format of withdrawal letter, common IP addresses and agents of some bidders and held that reasons given for withdrawal are after thought and the bidders did not act independently but in concert with other OPs for manipulating the process of bidding in Tender No.2 and imposed a cumulative fine of ₹ 39 Crores and ₹ 45 lakhs (approx.) on bidders and office bearers respectively. (*Suo Moto 04/2014*)

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