Competition News Bulletin

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Inside...

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

CCI imposes penalty for bid-rigging in coal transportation auctions

The Competition Commission of India ('CCI') vide order dated September 14, 2017 has imposed penalty of almost INR 12 Crore on 10 entities namely SSV Coal Carriers Pvt. Ltd (OP-1), Bimal Kumar Khandelwal (OP-2), Pravin Transport (OP-3), Khandelwal Transport (OP-4), Khandelwal Earth Movers (OP-5), Khanduja Coal Transport Co. (OP-6), Punya Coal Road Lines (Op-7), B. Himmatlal Agrawal (OP-8), Punjab Transport Co. (OP-9) and Avaneesh Logistics Pvt. Ltd (OP-10) for rigging bids in coal and sand transportation tenders.

The Informant, Western Coalfields Ltd., filed the information before the CCI pursuant to quoting of identical bids by the OPs in four tenders floated by the Informant for coal and sand transportation namely Tender No. 34/2013 dated April 16, 2014 (Tender No. 1), Tender No. 37/2013-14 dated May 2, 2014 (Tender No. 2) for coal transportation and Tender No. 03/2014-15 dated June 3, 2014 (Tender No. 3) and Tender No. 06/2014-15 dated June 6, 2014 (Tender No. 4) for sand transportation. Out of the four tenders, OP-1 to OP-4 were alleged to have colluded with respect to sand transportation tenders and OP-5 to OP-10 were alleged to have colluded with respect to coal transportation tenders.

The CCI noted that in Tender No. 1, OP-1, OP-2 and OP-4 quoted identical prices, not for just one job but for all the four different jobs. Similarly, in Tender No. 2, OP-2, OP-3 and OP-4 quoted identical prices for each of the three different jobs. The CCI observed that it is highly unlikely that in normal market conditions, prices quoted by different bidders in two tenders for several jobs would be identical to this extent. The identical price quoted in both the said tenders, not for one job, but for four different jobs in Tender No. 1 and three different jobs in Tender No. 2 was treated as strong evidence to show that the same are not a co-incidence but more an outcome of understanding amongst OP-1, OP-2, OP-3 and OP-4.

Further the CCI also relied on several "plus factors" such as the financial dealings between the parties, and that the partners/proprietors of the OPs have social relationships and frequently meet/interact with each other. It was also noted that OP-1 and OP-4 had quoted identical prices in two earlier tenders namely Tender No. CH3 150-Min-0018/2013-14 and Tender No. HLC-1/SAND/42/2008-09, which was also taken as one of the relevant circumstances indicating bid-rigging. The CCI also found that the infrastructural conditions at the Informant's office was conducive for the possibility of last minute exchange of price information. The fact that the OPs formed a trade association and that the association demanded higher prices in the tenders floated by the Informant pursuant to the quoting of identical prices by the OPs was also considered as a plus factor.

Therefore on the basis of the identical pricing despite different cost structures, apparently last minute filling of price bids; existence of earlier financial dealings amongst the OPs as well as identical price quotes even in previous tenders floated by the Informant, the CCI concluded that quoting of identical prices by OP-1, OP-2 and OP-4 for each of the four different jobs in Tender No. 1 and by OP-2, OP-3 and OP-4 for each of the three different jobs in Tender No. 2 along with OP-1 quoting higher prices with uniform and exact price difference of Rs. 4/- for each of the three different jobs, was not a mere co-incidence but the result of clear understanding amongst OP-1, OP-2, OP-3 and OP-4 to fix prices in the tenders floated by the Informant, resulting in rigging the bids in the impugned tenders for sand transportation.

Having held that an agreement of the nature envisaged under Section 3(3)(d) of the Competition Act, 2002 ('Act') existed, the CCI held that agreements mentioned in Section 3(3) of the Act, would be treated as ipso facto causing an appreciable adverse effect on competition. It was held that once the existence of an agreement for anti-competitive object is established, the burden is on the alleged contravener to prove that the said agreement does not have any appreciable adverse effect on competition.

Similarly, the CCI also held that quoting of identical prices by OP-5, OP-7, OP-9 and OP-10 in Tender No. 3, not only for one job but for all five different jobs and by OP-5, OP-6 and OP-7 in Tender No. 4, for each of the three different jobs, up to the last decimal points is a result of clear consensus/ understanding amongst OP-5 to OP-10. The CCI also considered additional plus factors like quoting of identical prices despite having different cost structures; last minute filling of price schedule in the office of the Informant; existence of financial dealings amongst the OPs; identity of price quotes even in previous tenders floated by the Informant; and the efforts of CIMTA for upward revision of rates offered by the Informant as evidence of an anti-competitive agreement between the parties.

Accordingly, the CCI imposed a penalty amounting to 4% of the average turnover of the parties under Section 27 of the Act. The CCI also imposed penalty on the office bearers of the OPs under Section 48(1) of the Act.

(Source: CCI order dated September 14, 2017;for full text see CCI website)

Competition Commission of India (CCI) dismisses allegations of anti-competitive conduct against Harman International (India) Pvt. Ltd

The CCI vide order dated September 6, 2017 has dismissed allegations of anti-competitive conduct against M/s. Harman International (India) Pvt. Ltd ('OP') for alleged contravention of Section 3 of the Act. The allegations were with respect to a sound system manufactured by the OP which was installed at Thyagraj Sports Complex, New Delhi by Hi-Tech Audio Systems Pvt. Ltd.

For the operation and maintenance of the said sound system, the Public Works Department, Government of National Capital Territory of Delhi (Informant) floated a tender calling for bids from the OEMs or authorised distributor agents of the OP. The said tender had to be cancelled four times, either on the ground of not meeting the tender conditions or because of quotation of higher rates by the bidders.

In the third tender, two firms i.e. Hi-Tech Audio Systems Pvt. Ltd. and M/s Pragati Engineers had participated as authorised agents of the OP wherein M/s Pragati Engineers was selected. However, the OP informed the Informant that only Hi-Tech Audio Systems Pvt. Ltd. was its authorised agent and the authorisation letter of M/s Pragati Engineers stands nullified. Thereafter, in the fourth tender, only Hi-Tech Audio Systems Pvt. Ltd. participated. However, the tender had to be yet again cancelled on account of high rate quoted by Hi-Tech Audio Systems Pvt. Ltd. vis-à-vis the rate quoted by M/sPragati Engineers in the third tender.

The Informant has raised doubts on the intention of the OP and alleged that it is favoring only one firm and forcing the Informant to get its system maintained by only the said agency, thus, affecting competition in the market.

The CCI observed that vide its letter dated August 21, 2013, the OP had asked the Informant to consider the bid of only one firm i.e. Hi-Tech Audio Systems Pvt. Ltd. primarily on the ground that the other firms are not getting their manpower/ engineers trained or certified from the OP which is essential for the aforesaid service.

The CCI held that the reason cited by the OP vide its letter dated August 21, 2013 for not giving authorization letters to other bidders cannot be said to be unreasonable considering the fact that only trained professionals can execute the operation and maintenance of the complex and sophisticated digital audio systems manufactured by the OP. It is pertinent to note that it is only the OP who knows as to how its products are to be maintained and operated upon appropriately. Further, it is important that brand name, quality and goodwill in the market be maintained by providing efficient services by trained personnel.

Thus, CCI held that the aforesaid conduct of the OP cannot be said to be anti-competitive in terms of any of the provisions of the Act and closed the matter.

(Source: CCI decision dated September 6, 2017; for full text see CCI website)

CCI dismisses allegations of cartelization against the Reserve Bank of India and 19 other banks

The CCI vide order dated August 23,2017 dismissed allegations of cartelization against RBI and 19 other banks. ("Opposite Party banks")

It was alleged that the Opposite Party banks do not undertake any responsibility/liability for any loss of articles/valuables/content kept in their safety lockers by customers availing safe deposit locker facility from the Opposite Party banks and a clause to this effect is being included in the agreement entered into

between respective banks providing the locker facility and the customer availing the same at the time of opening the locker. In order to substantiate the allegations, the Informant enclosed various replies obtained by him under the RTI Act, 2005 evidencing that the banks were not undertaking any responsibility for loss of valuables kept in their safety lockers.

The CCI, however, noted that although the Informant raised the suspicion of a cartel amongst the OPs, there is no evidence as such given by him in this regard. There is no such material to suggest any understanding /consensus /arrangement amongst the Opposite Parties to have pursued any of the aforesaid prohibited activities. Further the CCI noted that the RTI replies of some of the Opposite Parties suggest that they are not completely absolved for loss of valuables kept in their locker and, therefore, in the absence of any material suggesting collusion amongst the Opposite Parties, it cannot be said that a uniform practice is followed by all the Opposite Parties to avoid responsibility/ liability for loss of valuables kept by customers availing their safety deposit locker facility.

The CCI also observed that the mere common practice by all the market players emanating from their independent decision making at most indicates an industry practice and not collusion amongst them. Such common practice cannot be a subject-matter of intervention by the Commission unless there is material that shows that prima facie, the impugned conduct arises out of an agreement amongst competitors for pursuing any of the activities prohibited under Section 3(3) of the Act. The case was accordingly closed under Section 26(2) of the Act.

(Source: CCI decision dated August 23, 2017; for full text see CCI website)

ABUSE OF DOMINANT POSITION/MARKET POWER

INDIA

CCI dismisses allegations of anti-competitive conduct against Uttar Pradesh State Road Transport Corporation

The CCI vide its order dated September 7, 2017 dismissed allegations of contravention of Section 3 and 4 by Uttar Pradesh State Road Transport Corporation (UPSRTC) (OP) by VE Commercial Vehicles Ltd (Informant).

It was alleged that the OP has been procuring bus chassis through open tenders for 5 years and in all the tenders the eligibility conditions were made favorable to Tata Motors and Ashok Leyland and therefore the conduct of the

OP in procuring the said product was unfair and discriminatory. It was also alleged that the preferential treatment extended by the OP towards Tata Motors and Ashok Leyland is on account of a tacit agreement amongst Tata, Ashok Leyland and the OP.

For examining the allegations under Section 4 of the Act, the CCI defined the relevant market as the "market for procurement of bus chassis in India". It was noted by the CCI that the OP's share in the relevant market was less than 6.7 percent and, therefore, as a buyer, it was not in a position of strength in the market. Additionally, it was observed that there are many private bus transport operators who are buying 'bus chassis'. Therefore OP was held not to be dominant in the relevant market. Since the OP was held not to be dominant in the relevant market, the CCI did not assess abuse of dominant position under Section 4 of the Act.

Further the CCI also noted that the OP is neither horizontally or vertically related to Tata Motors or Ashok Leyland. Therefore it was observed that there can neither be a violation of Section 3(3) or Section 3(4) of the Act.

(Source: CCI decision dated September 7, 2017; for full text see CCI website)

Comment: *This was the second information filed by the same informant on same facts. In the first case also CCI closed the case on similar grounds but there was a dissenting order of two members, who found that it could be a case of a tacit understanding between UPSRTC and Tata Motors and Ashok Leyland to restrict the competition. However, the same members though present during the hearing /consideration of the second information did not give any dissent order.*

INTERNATIONAL

EU: The European Court of Justice (ECJ) sets aside judgement of General Court upholding fine of €1.06 billion imposed on Intel for abuse of dominant position

The case pertained to the imposition of €1.06 billion on Intel Inc. by the European Commission ('Commission') in 2009 vide order dated 13.5.2009 for having abused its dominant position in the market for x86 central processing units.

The Commission had held that Intel which held roughly 70% of the market share in the relevant market implemented a strategy from October 2002 to December 2007 aimed at foreclosing its competitor, Advanced Micro Devices Inc. (AMD) from the market. It was observed that Intel granted rebates to four major computer manufacturers i.e.Dell, Lenovo, HP and NEC on the condition that they purchase from Intel all, or almost all, of their x86 CPU's. Similarly, Intel awarded payments to Media-Saturn, which were conditioned on the latter selling exclusively computers containing Intel's x86 CPUs. The Commission held that those rebates and payments induced loyalty of the above listed manufacturers and of Media-Saturn,

thus significantly diminishing the ability of Intel's competitors to compete on the merits of their x86 CPUs, which subsequently resulted in a reduction of consumer choice and in lower incentives to innovate.

The Commission's decision was appealed in the General Court by Intel, however the General Court vide judgement dated 12 June 2014, dismissed Intel's action in its entirety.

Intel appealed against the judgement of the General Court inter alia on the ground that the General Court erred in law by failing to examine the rebates at issue in light of all the circumstances of the case.

The ECJ noted that the General Court confirmed the Commission's line of argument that loyalty rebates granted by an undertaking in a dominant position were, by their very nature, capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an as efficient competitor test ('AEC test') were not necessary. Nevertheless, the Commission carried outan in-depth examination of the circumstances of the case in its decision, which led it to conclude that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of foreclosing such a competitor. The AEC test therefore played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.

Accordingly, the ECJ held that the General Court was required to examine all of Intel's arguments concerning that test (such as, inter alia, the errors allegedly committed by the Commission as regards that test), which the General Court failed to do. The judgment of the General Court was therefore set aside on account of its failure to analyse whether the rebates at issue were capable of restricting competition.

The case was therefore remitted back to the General Court to examine in light of the arguments put forward by Intel to examine whether the rebates at issue are capable of restricting competition.

(Source: ECJ press release dated September 6, 2017)

III. COMBINATION

INTERNATIONAL

EU: Commission opens in-depth investigation into proposed acquisition of Monsanto by Bayer

EU Commission has opened an in-depth investigation to assess the proposed acquisition of Monsanto by Bayer under the EU Merger Regulation. The Commission has concerns that the merger may reduce competition in areas such as pesticides, seeds and traits. The proposed acquisition of Monsanto (US) by Bayer (Germany) would create the world's largest integrated pesticides and Seeds Company. It would combine two competitors with leading

portfolios in non-selective herbicides, seeds and traits, and digital agriculture. Both companies are active in developing new products in these areas. Moreover, the transaction would take place in industries that are already globally concentrated. The Commission has preliminary concerns that the proposed acquisition could reduce competition in a number of different markets resulting in higher prices, lower quality, less choice and less innovation. In particular, the initial market investigation identified preliminary concerns in the following three areas:

- Pesticides

  Monsanto's pesticide product glyphosate is the most sold non-selective herbicide in Europe. Bayer produces glufosinate ammonium, also a non-selective herbicide and one of the very few alternatives to glyphosate. According to the Commission's preliminary investigation, Monsanto and Bayer are two of a limited number of competitors in this field capable of discovering new active ingredients and developing new formulations, including addressing the growing problem of weed resistance to existing products.

- In addition, the Commission will further assess both Monsanto's activities in biological pesticide products that would compete with Bayer's existing portfolio of chemical pesticide products, and the parties' overlapping activities in products that tackle varroa mites, a parasite affecting bee colonies in Europe.

- Seeds

  Bayer and Monsanto are both active in the breeding of vegetable seeds. The Commission's initial investigation shows that the parties have high combined market shares in a number of these vegetable seeds markets, and that some of their products compete directly with each other. Bayer and Monsanto are also active in the breeding and licensing of seeds for several field crops. Monsanto has the highest market share in oilseed rape seeds in Europe. Bayer, with the highest market share in oilseed rape seeds at global level, is one of the few players with the means to compete intensively in this market. Furthermore, both parties are important licensors of cotton seeds to their competitors in Europe, and both are investing in research and innovation programs for wheat.

- Traits

  A trait is a characteristic of a plant, such as height, herbicide tolerance and insect or disease resistance, and can be developed in laboratories and introduced in certain plant varieties.

The Commission's preliminary investigation indicates that Monsanto has a dominant position in several traits markets worldwide. Bayer is one of the few competitors to Monsanto in certain traits markets, and has notably developed alternative herbicide tolerance traits to Monsanto's. The Commission will investigate in particular whether the transaction could lead to a reduction of competition in these markets,

taking into account the existing links between the few worldwide competitors through cross-licensing and through research and development cooperation.

Finally, the merged entity would hold both the largest portfolio of pesticides products and the strongest global market positions in seeds and traits, making it the largest integrated company in the industry. The Commission will further investigate whether competitors' access to distributors and farmers could become more difficult if Bayer and Monsanto were to bundle or tie their sales of pesticide products and seeds, notably with the advent of digital agriculture. Digital agriculture consists in the collection of data and information about farms with the aim of providing tailored advice or aggregated data to farmers. Both Bayer and Monsanto are currently investing in this emerging technology.

On 31 July 2017, Bayer and Monsanto submitted commitments to address some of the Commission's preliminary concerns. However, the Commission considered these commitments insufficient to clearly dismiss its serious doubts as to the transaction's compatibility with the EU Merger Regulation. The Commission therefore did not test them with market participants. Given the worldwide scope of Bayer and Monsanto's activities, the Commission is cooperating closely with other competition authorities, notably with the Department of Justice in the US and the antitrust authorities of Australia, Brazil, Canada and South Africa.

(Source: EU press release dated August 22, 2017)

EU: Commission approves acquisition of Momondo by Priceline

The EU Commission has unconditionally approved the acquisition of Momondo Group by Priceline Group. Both parties are active in the online travel sector.

Priceline operates online travel agents and travel comparison metasearch sites, under several brand names including booking.com, priceline.com, agoda.com, KAYAK Rentalcars.com and Opentable. Momondo Group is primarily active in the operation of metasearch sites, under the brands Cheapflights and Momondo.

The Commission assessed the impact of the proposed transaction on markets for the operation of metasearch sites in the European Economic Area (EEA).

Metasearch sites are multi-sided in that on the one hand they allow travelers to search for and compare travel products. On the other hand, they offer advertising services to online travel agents and travel service providers, such as airlines, hotel operators, and car rental companies. The Commission also

examined a number of vertical relationships arising from the merging companies' activities in the operation of metasearch sites and their activities in operating online travel agents downstream.

The Commission's investigation found that the companies' metasearch activities are largely geographically complementary in the European Economic Area (EEA), as Priceline has limited activities in the Nordic countries, where Momondo has a strong market position. Conversely, in countries like Germany and Austria, Priceline's brands have a stronger market position and Momondo is weaker. Therefore, the strengthening of the merged entity's market position in EEA markets will be limited.

It was also observed that the merged entity will be competing with several other global meta search operators, such as Skyscanner, Trivago, TripAdvisor, Google (through Google Hotels and Google flights), as well as by operators of smaller, regional or national, meta search sites.

It was therefore concluded that the proposed transaction would not raise any competition concerns on any of the markets examined.

(Source: EU press release dated July 17, 2017)

EU: Commission approves acquisition of Banco Popular Español S.A. by Banco Santander

The European Commission has approved Banco Santander's proposed acquisition of Banco Popular Español, S.A.

Banco Santander is the parent company of an international group of banking and financial companies, operating mainly in Spain, other European countries including Portugal and the United Kingdom, Latin America and the United States.

Banco Popular is a Spanish financial entity listed on the Madrid, Barcelona, Bilbao and Valencia stock exchanges.), operating mainly in Spain and Portugal. The resolution of Banco Popular was approved under EU bank recovery and resolution rules. It involved the sale of Banco Popular to Banco Santander.

The Commission investigated the transaction's impact on the markets for retail and corporate banking, leasing, factoring and the provision of ATM services in the Portuguese and Spanish national and regional markets.

It was concluded that the transaction would not raise competition concerns as the parties' combined market shares are generally limited (below 25%) and strong competitors will remain in all affected markets.

(Source: EU press release dated August 8, 2017)

IV. MISCELLANEOUS

Regional Rural Banks mergers gets exemption from CCI

The Ministry of Corporate Affairs (MCA) has exempted Regional Rural Banks (RRBs) from the applicability of the merger control regime. The MCA vide a notification dated August 10, 2017 (Notification), stipulates that Sections 5 and 6 of the Competition Act, 2002 (Act), which relate to regulation of combinations, will not apply to amalgamations of RRBs for which the Central Government has issued a notification under Section 23A(1) of the Regional Rural Banks Act, 1976 (RRB Act). This exemption is applicable for a period of five years, i.e., until August 9, 2022.

As per Section 23A of the RRB Act, the Central Government is empowered to order the amalgamation of two or more RRBs, if it is in public interest or in the interest of the development of the area served by such RRBs or in the interest of the RRBs themselves. Prior to the Notification, such amalgamations, while undertaken pursuant to orders issued by the Central Government and not on the volition of the RRBs, triggered the requirement to file a notification under the Act, to seek the Competition Commission of India's (CCI) prior approval.

In fact, the CCI in two earlier instances in 2017 (being Rajasthan Marudhara Gramin Bank/ State Bank of Bikaner and Jaipur, (Combination Registration No. C-2016/02/377) and Sarva Haryana Gramin Bank/Punjab National Bank (Combination Registration No. C-2015/12/344)), imposed a penalty of INR 100,000 (Indian Rupees One Hundred Thousand) on the RRB and sponsor bank under Section 43A of the Act, for consummating the amalgamation without seeking its approval.

While the CCI noted the unique structure of such amalgamations, including the fact that it was effected immediately subsequent to the issuance of the Central Government's notification, the CCI observed that the amalgamations under Section 23A of the RRB Act were not exempt from the applicability of Section 5 of the Act. Therefore, the CCI in Rajasthan Marudhara Gramin Bank/State Bank of Bikaner and Jaipur (Combination Registration No. C-2016/02/377) held that the fact that the amalgamation was being undertaken at the instance of the Central Government did not eliminate the responsibility of the transacting parties to notify the CCI of the amalgamation.

(Source: http://www.mca.gov.in/Ministry/pdf/Notification2561(E) _21082017.pdf)

CCI amends leniency regulations

The CCI vide notification dated August 22, 2017 has for the first time in eight years since its introduction, amended the Competition Commission of India (Lesser Penalty) Regulations, 2009 ("Leniency Regulations"). The amendments come a few months since the CCI first granted leniency in a cartel case. A detailed Alert dated August 24, 2017 was issued by VA capturing the key amendments and the same may be accessed at: http://www.vaishlaw.com/homeimage/Competition%20News%20Alert%20-%2024%20August%202017.pdf.

Nationalized Banks Exempted From CCI Approval for Mergers

The Ministry of Corporate Affairs ("MCA") has exempted Nationalized Banks from the applicability of the merger control regime under the Act. The MCA vide a notification dated August 30, 2017 , stipulates that in exercise of the powers conferred by clause (a) of Section 54 of the Act , the Central Government in the public interest exempts, all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), from the application of provisions of Sections 5 and 6 of the Act for a period of next ten years , i.e. up to August 30, 2027 .

(Source: http://www.mca.gov.in/Ministry/pdf/Notification_31082017.pdf)

Comment: *The banks, through RBI, had been lobbying with the Central Government for an exemption from merger filing requirement under the Act since 2009. The previous regime had rejected the request. The present government seems to have agreed with this long pending demand pursuant its current policy of consolidation of public sector banks. Though it does not exempt merger control for private banks still, in our view, this may lead to concentration and distortion of competition through unilateral effects on some select products markets for banking services and for next 10 years consumers will have to resort to seeking remedies under antitrust provisions of section 3 and 4 of the Act.*

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