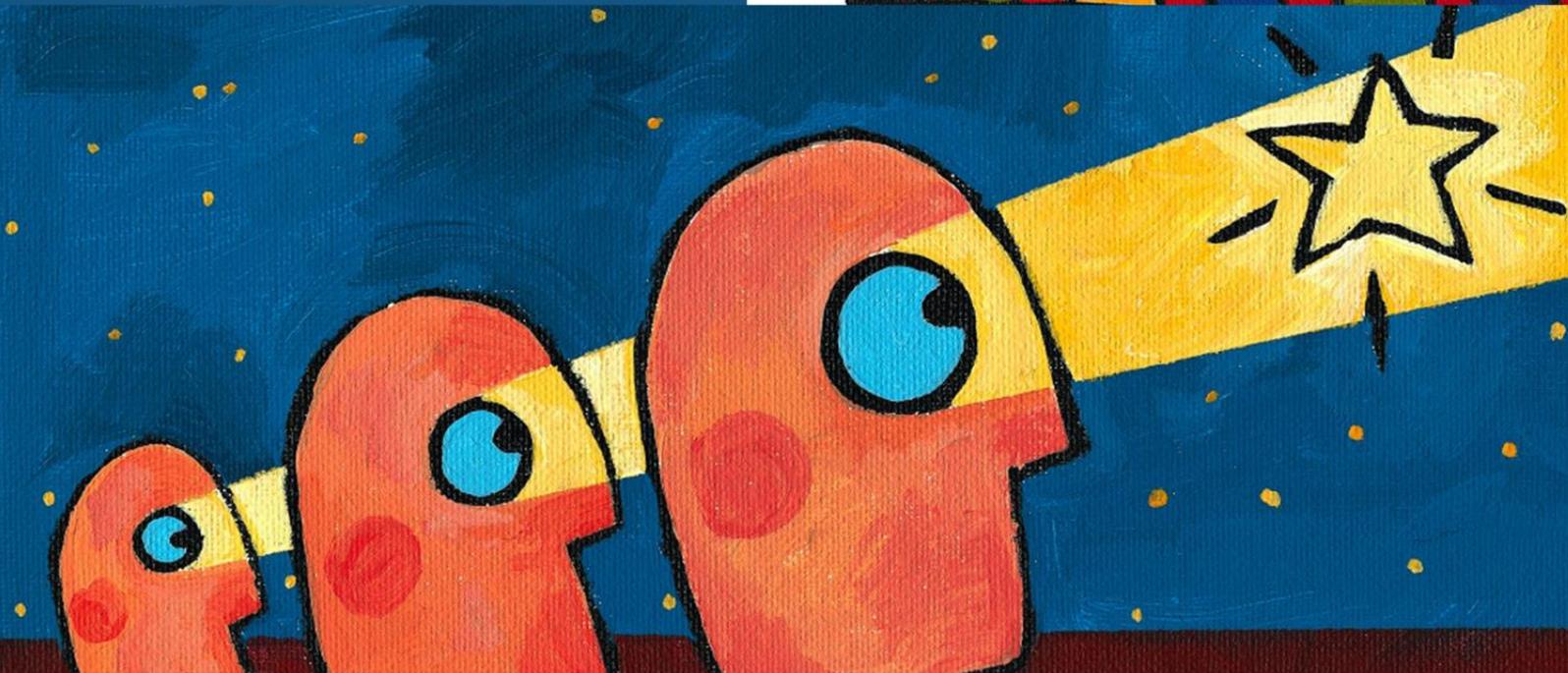




Monthly Newsletter

State of Antitrust

September 2017; Volume 4 Issue 9



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CCI orders the Container Trailer Owners Coordination Commission and its four participating associations to desist from indulging in anticompetitive conduct

On August 01, 2017, the Competition Commission of India ('CCI'), through its order, directed the Container Trailer Owners Coordination Committee ('OP-1') and some of its office bearers/executives (collectively 'OPs') to desist from indulging in the anti-competitive conduct in future. CCI did not find it appropriate to impose any monetary penalty because there were certain mitigating circumstances which existed in favour of the OPs.

Going by the details provided in the order, a reference was made to the CCI by the Cochin Port Trust ('Informant Port'), under Section 19(1)(b) of the Competition Act, 2002 ('the Act') against the OPs. It was alleged that the OPs have contravened the provisions of Section 3 of the Act by imposing a 'Turn System' on coastal operations.

Informant Port had a container terminal viz. Rajiv Gandhi Container Terminal ('RGCT'). In 2005, Informant Port licensed its space on Vallarpadam Island to M/s India Gateway Terminals Pvt. Ltd. ('IGTPL'), owned by DP World. IGTPL provided the services of export-import (EXIM) trade of hinterland in south India by providing transshipment services. To provide such transshipment services at the Informant Port, IGTPL seeks services of container trailers that were owned and operated by several transporters which, in some cases, were driver owned.

It was alleged that OPs had used these associations to exert undue influence on the pattern of deployment / allotment of trailers to compel users of these trailer services to hire them at an exorbitant high rates unilaterally fixed by them. The main allegation was the imposition of a 'Turn System' by OP-1. During the 'Turn System', the users and container trailers were obliged to book services only through this centrally controlled system and that OP-1 was restraining outside transporters from lifting the containers which was impeding the ability of the users to hire trailers of their choice. The Informant Port had highlighted certain similar complaints before CCI that were allegedly received from some users of container trailers, after the imposition of 'Turn System'. The Informant Port further alleged that the transporters, who were registered with the 'Turn System', were not allowed to operate for EXIM containers and if they did so, they were not allowed to get back into the 'Turn System'.

CCI observed that the 'Turn System' fixed the price to be paid by every user of the container transporter service which took away the competitive process of price negotiation that should ideally take place between hirer of transport and the container transport owner thus was, prima facie, in contravention of Section 3(3)(a) read with Section 3(1) of the Act. CCI further observed that the alleged restriction on the transporters not to take orders directly from the importers/exporters is restrictive of supply of services in the market, in contravention of Section 3(3)(b) of the Act. CCI, by passing order under Section 26(1) of the Act, directed the Director General ('DG') to conduct an investigation.

The DG, in its investigation report, found OP-1 and its four participating associations in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act, as they determined and fixed the charges for Container Trailer transportation under the Turn System. With regard to the other allegation, the DG found Turn System to have resulted in limiting the provision of services as the users were locked in with specifically assigned trailers lined up in queue with no option to engage trailers of their choice, thereby contravening the provisions of Section 3(3)(b) read with Section 3(1) of the Act. Furthermore, the DG has found some of the office bearers/executives to be responsible under Section 48 of the Act for indulging in the anti-competitive conduct of the association to which they belonged.

CCI held that OP-1, along with the participating associations has indulged in price fixing under the garb of the 'Turn System' and is in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. With regard to the second allegation of Section 3(3)(b) of the Act, CCI observed that there was no evidence in the investigation report which showed the trailers were denied any opportunity to operate on the Informant Port by OP-1. Further, there were no evidence to suggest that membership was denied to any of the transport operator. Thus CCI, due to lack of evidence, did not held OPs in contravention of Section 3(3)(b) read with Section 3(1) of the Act. As the OPs already ceased the anti-competitive conduct, the CCI directed the erring OPs to desist from indulging in the anti-competitive conduct in future. With regard to imposition of penalty, CCI observed that the 'Turn System' was discontinued even before the investigation was ordered and the contravention was discontinued long-back and the parties were not indulging in such behaviour any more, thus, CCI did not found it appropriate to impose any monetary penalty in this case. (*Ref. Case No. 06 of 2014, order dated 01/08/2017*)



Heard at the BAR

Legal news from India and the world

German competition enforcer imposes fine of 9.6 million Euros on automotive spare part manufacturers

On July 13, 2017, German competition authority, Bundeskartellamt ('BDK') imposed fines amounting to 9.6 million Euros on three manufacturers of heat shields, viz. *Elring Klinger Abschirmtechnik (Schweiz) AG, Sevelen (Switzerland), Estamp S.A.U., Terrassa (Spain) and Lydall Gerhardi GmbH & Co. KG, Meinerzhagen (Germany)* and their representatives. One company, viz. *Carcoustics International GmbH, Leverkusen (Germany)* was excluded from being fined because it cooperated with the BDK to uncover and provide evidence of the cartel. The companies were alleged of agreeing to pass on increased material costs to their customers. Through this conduct, the companies wanted to strengthen their negotiating position with their customers. For this anticompetitive conduct the BDK imposed a fine of 9.6 million Euros on three companies and for determining the quantum of fine the BDK also took into consideration that two companies viz. *Lydall Gerhardi and Elring Klinger* had cooperated with the authority during the proceedings. (*Press release, dated 13.07.2017*)

Competition and Markets Authority imposed a fine of 1.45m Pounds on Ping Europe Ltd for banning online sales

On August 24, 2017, Competition and Markets Authority ('CMA') fined a golf club manufacturer, viz. *Ping Europe Ltd. ('Ping')*, of 1.45m Pounds, for banning UK retailers from selling its golf clubs online. The CMA observed that *Ping* contravened the provisions of competition law by restricting 2 UK retailers from selling its golf clubs on their websites. CMA, by imposing the fine, directed *Ping* to cease and desist from doing such activities and bring the ban on online sales to an end. (*Press release, CMA, dated 24.07.17*)

Greek competition enforcer imposed fines totaling € 80.7 million on fifteen construction sector companies for bid rigging

On August 3, 2017, the Hellenic Competition Commission (HCC), found that fifteen undertakings in construction sector in Greece, participated in at least one of several collusion schemes (first spanning from 2005-2012, second from 1989-2000 and five individual tenders in the years 1981-1988 and 2001-2002) regarding tenders for public works of infrastructure. One of the group companies, viz., *Technical Olympic group of companies*, contributed significantly in the substantiation of the infringements and received full immunity from HCC under leniency programme. While determining the quantum of penalties, the HCC applied a reduction of 10% to the fines imposed in view of the parties' acknowledgement of their participation in the collusion scheme and of their respective liability in this respect. Out of fifteen undertakings, two have invoked their inability to pay the fine. The HCC, after assessing the financial records of both the undertakings, accepted the applications invoking inability to pay. After considering and taking into account all the aggravating and mitigating circumstances, the HCC imposed fines totalling to € 80.7 million on all the infringing undertakings depending on their individual participation in bid rigging. (*Press release, dated 03.08.2017*)

Australian Federal Court imposed a fine of \$3.5 million against Prysmian for engaging in cartel conduct On 31.07.2017, the Australian Federal Court, imposed a pecuniary penalty of \$3.5 million against *Prysmian Cavi E Sistemi*

S.R.L. ('Prysmian'), an Italian corporation, for engaging in cartel conduct in relation to the supply of high voltage land cables in Australia. The proceedings were brought by the Australian Competition and Consumer Commission ('ACCC') against *Nexans SA, Prysmian and Viscas Corporation* in relation to the price fixing and exclusionary arrangement. It was alleged that *Prysmian* had entered into and given effect to agreements involving price guidance to competitors and project allocation. *Prysmian* was a party to an agreement with cable manufacturers and suppliers. *Prysmian*, to 'allocate' the tender and give an effect to that agreement, provided pricing guidance to its competitors so that they could submit higher amounts in an attempt to ensure that *Prysmian* won the tender. During the proceedings, the Federal Court stated that "*Cartels not only cheat consumers and businesses, they distort competition and restrict healthy economic growth*". Thus, finding the conduct anti-competitive, the Federal Court imposed a pecuniary penalty of \$3.5 million on *Prysmian* for engaging in cartel. (*Press release 31.07.2017*)

NCLAT passes its first order by modifying and setting aside the directions given by CCI in its order

On August 2, 2017, the National Company Law Appellate Tribunal ('NCLAT'), in the appeal filed by Karnataka State Road Transport Corporation ('KSRT'/ 'Appellant'), passed an order by setting aside the last paragraph of the order, passed by the Competition Commission of India ('CCI'), dated February 27, 2017, ('Impugned Order' or 'IO'), under section 26(2) of the Competition Act, 2002 ('Act'). CCI in the IO was, *prima facie*, of the opinion that *though the appellant (KSRT) is in a 'dominant position', it has not abused that position*. Nonetheless, CCI went ahead to pass certain directions to the State Government of Karnataka in the larger public interest.

Going through the details provided in the order, Information was filed by Sree Gajanana Motor Transport Company Limited ('SGMT'), a public limited company engaged in the business of operating buses for passenger transport in various routes in state of Karnataka, against KSRT and North West Karnataka Road Transport Corporation ('NWKRTC') alleging both to abuse their dominant position by not allowing the private bus operators to operate their buses on specific routes ('monopoly routes') and only the buses that belong to KSRT and NWKRTC can operate. Further, it was alleged that certain routes were tagged as 'non-monopoly' routes where KSRT, with a view to curb competition, through its 'Flexi Rate' Scheme, was charging less fare from the commuters.

The CCI, in its IO, specifically concluded that KSRT is dominant in the relevant market but NWKRTC cannot be said to be 'dominant'. However, it was of the opinion that conduct of 'classification of routes' as monopoly and non-monopoly from operational point of view and application of 'flexi rates scheme' was not unfair and anti-competitive and therefore, not in violation of section 4 of the Act.

Going ahead, CCI, directed that notwithstanding the fact that contravention of any of the provisions of the Act has not been recorded, in the view of larger public interest, Government of Karnataka should take a fresh view regarding the matter of 'classification of routes' and application of 'flexi rates scheme', after inviting suggestions from various stakeholders.

Not bearing with the jurisdiction assumed by the CCI, the NCLAT held that in absence of any specific evidence and findings, CCI has no authority to express its view and to issue any direction as to what the State Government is required to do in the larger public interest. The last part of the order, dated February 27, 2017, passed by the CCI was set aside by the NCLAT. (*Transfer Appeal (AT) (Competition) No. 06 of 2017*)

Competition Commission of India amends lesser penalty regulations

On August 22, 2017, an amendment to the Competition Commission of India ('Lesser Penalty') Regulations, 2009 ('Amended Regulations') was notified. This amendment to the existing leniency regime in India provided incentives to companies and individuals to pro-actively assist the Competition Commission of India ('CCI') in cartel enforcement.

In the Amended Regulations, there is no limitation on number of applicants, i.e., now there can be more than three applicants who can apply for leniency. The Amended Regulations allows the inspection and grants access to the file not only to the leniency applicants but also to non-leniency applicants, including third parties who have been impleaded in leniency proceedings. Further, the Amended Regulations provide clarification to confidentiality provisions as now it allows the Director General ('DG') to disclose information, documents and evidence submitted by a leniency applicant, to a party to the proceedings, if the DG deems that such disclosure is necessary for the purpose of investigation. The Amended Regulations apply to an *enterprise* as well as the *individual* involved in a cartel on behalf of such enterprise. The Amended Regulations clarify that enterprises that are leniency applicants, must also specify the names of individuals who have been involved in the cartel. Furthermore, the Amended Regulations provide more time to the leniency applicant to file the leniency application with the CCI, as leniency applicants now have a 15 day window from the date of communication of direction by the CCI (*No. L-3(4)/Reg-L.P./2017-18/CCI*)

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