

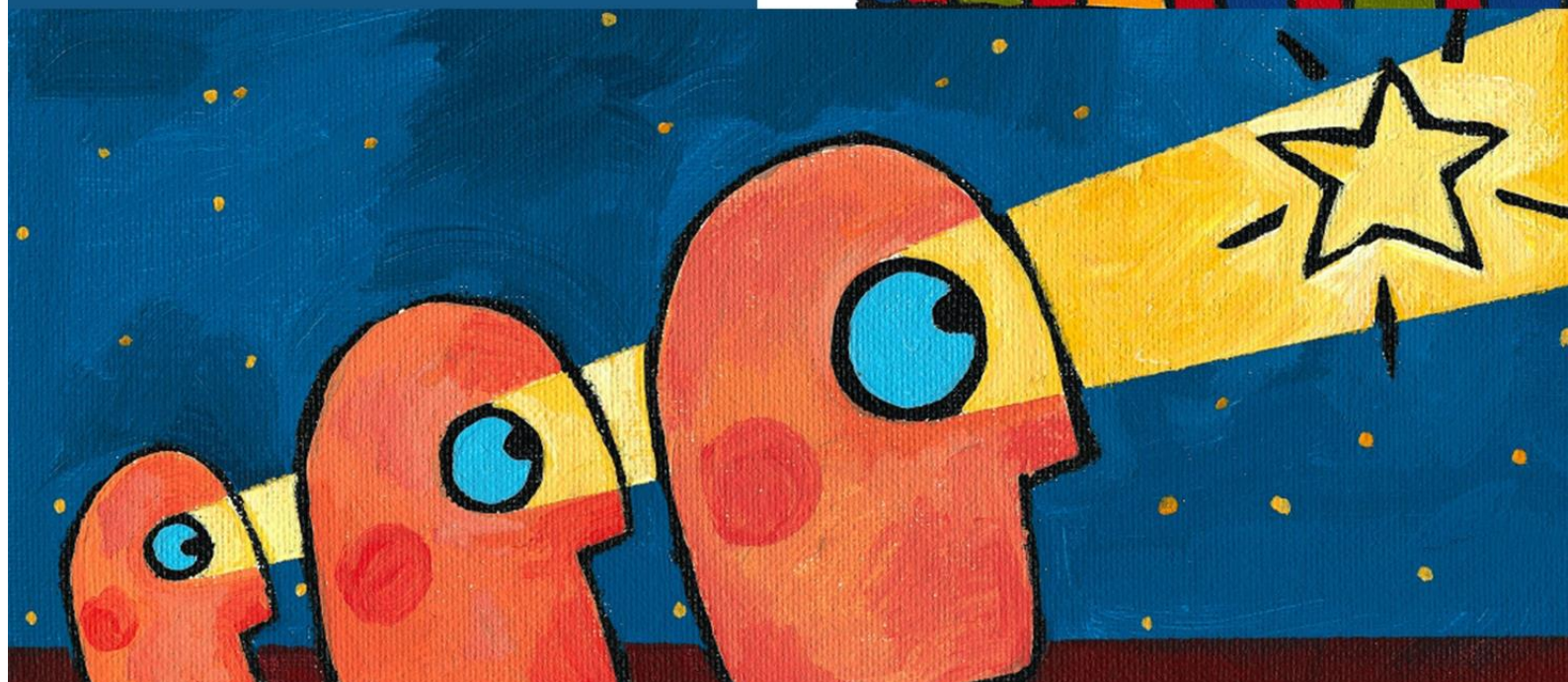


KK SHARMA
LAW OFFICES

Monthly Newsletter

State of Antitrust

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Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

CCI imposes fine totalling Rs. 135 crores on companies bidding for tenders by MAHAGENCO

We analyse the recent order of CCI, wherein CCI imposed penalty of approximately Rs. 135 crores on three companies bidding since 2005 for the tenders for liasoning agent in coal procurement.

BETWEEN THE LINES

CCI passes a prima facie order for investigation against Star India Pvt. Ltd. for contravention of sections 4(2)(a)(ii)

We analyse CCI's order, where it has passed the *prima facie* order under section 26(1) of the Act against Star India Pvt. Ltd. .

HEARD AT THE BAR

European Commission approves acquisition of Air Berlin assets by Lufthansa

The German Competition Authority holds Facebook's collection and use of data from third-party sources as abusive

And more....

The Competition Commission of India imposes fine totalling to Rs. 135 crores on companies bidding for tenders by MAHAGENCO

On January 10, 2018, the Competition Commission of India ('CCI') passed its final order under section 27 of the Competition Act, 2002 (the 'Act') imposing penalty of Rs. 135 crore on Nair Coal Services Pvt. Ltd. ('OP-2'), Karam Chand Thapar & Bros. (CS) Ltd. ('OP-3') and Naresh Kumar & Co. Pvt. Ltd. ('OP-4'), bidding for the tenders for liasoning agent in coal procurement. The case was initially closed by the Commission *vide* order dated 11.12.2013 passed under section 26(2) of the Act. On Appeal, the Hon'ble Competition Appellate Tribunal, set aside the said order while directing the DG to cause an investigation.

As a background, Maharashtra State Power Generation Co. Ltd. ('OP-1 or MAHAGENCO') runs 7 Thermal Power Stations ('TPSs'), for which it obtains raw coal from three subsidiaries of Coal India Limited and Singareni Coal Company Limited. OP-1 engages services of liasoning agents, through tenders, to supervise the quality and quantity of the raw coal supplied to its TPSs. B.S.N. Joshi & Sons Ltd. ('BSN') and OP-2 to OP-4 submitted their bids to the said tender process. In spite of being the L1 bidder, BSN was not awarded the work because of litigations started by its competitors against the decision of OP-1 to award the contract to BSN, after which work order was finally issued to BSN in 2009 only to be terminated on various counts relating to quality of services. Subsequently, contracts were awarded by MAHAGENCO to OP-2 to OP-4 on area-wise basis. The information was filed by Shri Surendra Prasad (the 'Informant') against OP-1, OP-2, OP-3 and OP-4, alleging that MAHAGENCO has been awarding contracts regularly in favour of OP-2 to OP-4 only in the geographically distributed market, which was actually agreed between them by means of entering into a cartel, dividing amongst them 7 TPSs, thwarting any newcomer or any other existing company from participating in the tender process and violating section 3(3)(d) of the Act. The Informant alleged that MAHAGENCO was favouring formation of such cartel and thus violating section 4(2)(c) of the Act.

As a result of the directions of the Appellate Tribunal to cause an investigation, the DG concluded in his report that while conduct of these OPs in directly determining the bid price was a violation of section 3(3)(a) of the Act, sharing of tenders, geographically, contravened the provisions of section 3(3)(c) of the Act. In addition, the conduct of OP-2 to OP-4, in bid rigging, was in violation of section 3(3)(d) of the Act. In response to the preliminary objections, the Commission did not agree with the findings of DG in relation to finding of cartel against OP-2 to OP-4 in respect of the tenders floated by other power generating companies and held it to be purely speculative and conjectural in nature. On the issue of the conduct of MAHAGENCO not been investigated by the DG, the Commission held that, according to Appellate Tribunal, the DG was not to proceed against MAHAGENCO upon the premise that it was part of the cartel because a cartel can be formed only by players who are engaged in the similar activities.

After examining the sequence of events, the Commission found that in the tender floated by MAHAGENCO on 03.03.2005, OP-2 to OP-4 quoted identical rates for which OPs could not give any justification. The Commission further found that in tenders floated in 2009, OP-2 to OP-4 had divided the TPSs amongst themselves by quoting rates in response to the tenders floated by MAHAGENCO in a manner that each of these OPs got the TPSs of their choice. For example, OP-2 had quoted lower rates for Chandrapur and Nasik TPSs as compared to OP-3 and OP-4; OP-3 had quoted lower rate for Parli, Koradi and Khaperkheda TPSs as compared to OP-2 and OP-4; and OP-4 had quoted lower rates for Bhusawal and Paras TPSs as compared to OP-2 and OP-3. The Commission also observed that market allocation arrangement amongst OP-2 to OP-4 continued even when MAHAGENCO floated the tender colliery-wise instead of TPS-wise in the year 2013. Further, the OPs went to purchase the tender documents on the same date and engaged into discussions with each other at every stage of tendering process before the submission of the price bid by way of exchanging e-mails and letters.

In its conclusion, the Commission held that the OPs were liable for not only allocating the market but also rigging the bids and thus contravening sections 3(3)(c) and 3(3)(d) of the Act. Accordingly, the Commission directed OP-2 to OP-4 to cease and desist from indulging in anti-competitive activities. While imposing the penalty, the Commission was of the opinion that it is a case of hard core cartels and, therefore, is a fit case for invoking the proviso to section 27 of the Act and impose a penalty at the rate of 2 times of their total profits earned from provision of coal liasoning services to all power generators, and not limited to the profits generated from MAHAGENCO alone, for continuance of the cartel for 2010-11 to 2012-13 years only based on the financial statements filed by them. Accordingly, a penalty of INR 7.16 crore is imposed on NCSL; a penalty of INR 111.60 crore is imposed on KCT and a penalty of INR 16.92 crore is imposed on NKC respectively [(*Case No. 61 of 2013*) , *Decided on 10.01.2018*]



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European Commission approves Lufthansa's acquisition of Air Berlin assets

On 21 December, 2017, the European Commission approved Lufthansa's deal to purchase assets of insolvent Air Berlin's subsidiary Luftfahrtgesellschaft Walter GmbH ('LGW'). The decision was conditional on Lufthansa's compliance with its commitment to amend its sale and purchase agreement, with Air Berlin, to reduce its number of slots at Düsseldorf airport, in order to avoid competition concern. (EC Press Release dated December 21, 2017)

French Competition Authority (Autorité) imposes fine of 30 million Euros on Brenntag SA and Brenntag AG

On 21 December 2017, the French Competition Authority imposed a fine of 30 million Euros on two companies for hindering the investigation into a case regarding anticompetitive practices, by disclosing incomplete or defaced documents or giving imprecise and delayed information before refusing to provide information and material elements. Autorité is authorised to impose monetary penalty of 1% of the company's global turnover in such matters. (Autorité de la concurrence Press Release dated December 21, 2017)

Autorité imposes a fine of 25 million euros on Janssen-Cilag laboratory and its parent company Johnson & Johnson

The fine of Euros 25 million was imposed on Janssen-Cilag laboratory and Johnson & Johnson for having delayed the arrival of a generic version of Durogesic, a powerful opioid analgesic, to the market and for then blocking the development of this generic medicinal product. (Autorité de la concurrence Press Release dated December 20, 2017)

The German Competition Authority holds Facebook's collection and use of data from third-party sources as abusive

On 19 December 2017, the German Competition Authority, in the preliminary legal assessment against Facebook, assuming Facebook to be dominant on the German market for social networks, held the view that Facebook was abusing this position by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites, such as WhatsApp or Instagram, and merge it with the user's Facebook account. Facebook's terms of service are at least in this aspect inappropriate and violate data protection provisions to the disadvantage of its users. In view of the company's dominant position, it can also not be assumed that users effectively consent to this form of data collection and processing. (Bundeskartellamt Press release dated December 19, 2017)

CCI penalizes Dumpers Owners Association (DOA) under Section 42 of Competition Act, 2002

The CCI held DOA and its office bearers liable for contraventions of orders of Commission, passed under the Act, thus attracting the provisions contained in section 42(2) of the Act and imposed a fine of Rs. 20,000/- upon DOA for each day of non-compliance of the order of the Commission for a period starting from the date of the main order passed by the Commission on 21.01.2015 to 30.08.2016 i.e. the date of completion of investigation by the DG. Accordingly, DOA was directed to deposit a sum of Rs. 1,17,40,000. (Case no. 42 of 2012 decided on January 4, 2018)



Heard at the BAR

Legal news from India and the world

The Competition Commission of Pakistan (CCP) imposes penalties of PKR 2.5 million each on three companies

On 2 January, 2018, the CCP passed three orders imposing penalties of PKR 2.5 million each on Eden Builders (Pvt.) Limited and Green Field Developers (Pvt.) Limited and PKR 10 million on Vision Developers (Pvt.) Limited for their respective housing schemes that were in violation of Section 10 of the Competition Act, 2010 which prohibits deceptive market practices including misleading information. (CCP Press Release dated January 2, 2018)

Poland Competition Authority (UOKiK) dismantles a cartel

On 28 December 2017, the Poland Competition Authority quashed an arrangement between manufacturers of wood-based panels. Cartelists were fixing prices and exchanging confidential information over the period of nearly four years. The Authority had imposed fines exceeding, in total, PLN 135 million. However, one of the companies escaped the financial penalty after it decided to cooperate with the Authority under the leniency program. (UOKiK Press Release dated December 28, 2017)

CCI passes a *prima facie* order against Star India Pvt. Ltd. abusing its dominant position

On December 29, 2017, the Commission directed the Director General ('DG') to cause an investigation into an information filed by Thiruvananthapuram Entertainment Network (P) Ltd. (the '**Informant**'), engaged in the business of cable television distribution and establishment of digital head end, distribution of T.V. channels in the State of Kerala, against Star India Pvt. Ltd. (the '**OP**'), a broadcaster of satellite based T.V. Channels in India having multiple channels including Star Plus, Star Sports, Star Gold, Channel V, Star World, Star Movies, Star Utsav, etc.

The Informant has alleged that for supplying the channels of the OP to its customers, the Informant has to enter into agreements with the OP from time to time whereby the OP gives its bouquet of channels to the Informant for monetary consideration, which is periodically enhanced. Subsequent to 2014, OP started showing price discrimination and started charging a hefty license fee from the Informant for subscription of its channels which were being provided for lesser prices to Informant's competitors with the intention of eliminating small-scale broadcasters from the State of Kerala and creating monopoly of only big players like Kerala Communicators Cable Limited ('KCCL'), Asianet Cable Vision ('ACV') and DEN Networks Limited ('DEN'). Additionally, OP has been giving carriage fee to KCCL and ACV to have their channels in all categories as number 1 on the broadcasting list. Further, the OP enters into agreements for a period of 2 years with KCCL and ACV while only for 6 months with the Informant. Accordingly, the Informant has alleged anticompetitive behaviour and abuse of dominant position by the Opposite Party under sections 3 and 4 of the Competition Act, 2002 (the '**Act**').

The Commission held that since the subscription agreement is between broadcaster and distributors who are not engaged in identical or similar trade of goods or provision of services, contravention of section 3(3) of the Act is not made out. Similarly, said agreements do not even fall within either of the sub-clauses of section 3(4) of the Act. Further, delineating the relevant market to be 'market for provision of broadcasting services in the State of Kerala', the Commission held that Opposite Party seems to be in a position of dominance in the view that amongst the 50 channels in the OP's portfolio, Asianet is apparently a leading player enjoying approximately 40-50% share of viewership and SUN TV and Malayalam Manorama Group's channels appeared to be the next closest competitors of Asianet, with their share of viewership being around 20% and 10%, respectively. In order to determine the abuse of dominant position, the Commission sought certain information from the Informant and the OP. However, the Informant, in response, communicated that it would like to withdraw the information filed before the Commission since the parties have reached a settlement. However, the Commission rejected the request while observing that under the scheme of the Act, a settlement between the parties cannot be the basis for termination of any proceedings before the Commission.

On issue of abuse of dominant position, the Commission found that the price discrimination between different Multiple System Operators, coupled with the OP's speedy settlement with Informant followed by an evasive reply to the Commission, *prima facie*, indicates that the OP is acting in contravention of the provisions of the Act. While holding that Commission's jurisdiction is in addition to and not in derogation of the TRAI's mandate to regulate the practices of the broadcasters in the concerned sector, the Commission directed the DG to cause investigation into whether the OP indulged in contravention of the provisions of Section 4(2)(a)(ii) of the Act. Additionally, DG was also directed to look into other contravention of the provisions of the Act in addition to that mentioned in the information, if any. Further, the DG was directed to conduct a detailed investigation without restricting and confining itself to the duration mentioned in the information. (**Case No. 13 of 2017, Decided on 29.12.2017**)

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