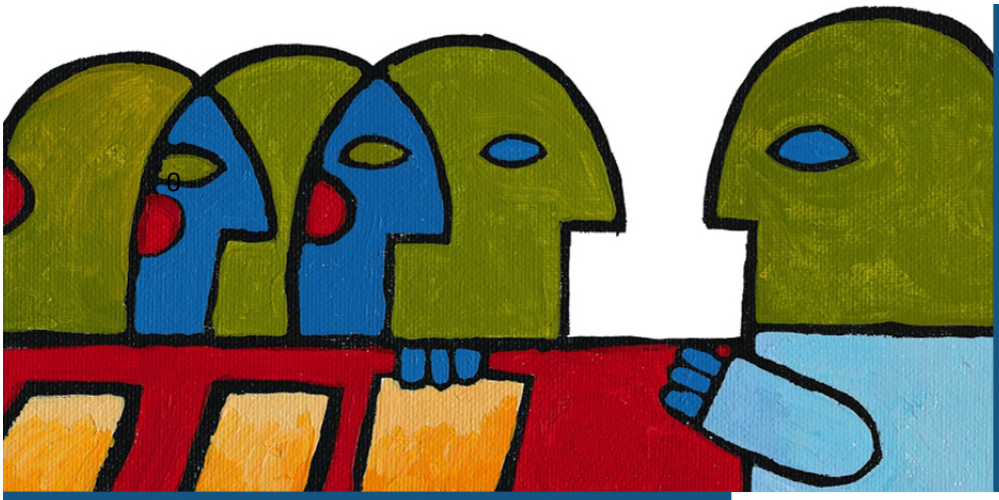

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Monthly Newsletter

State of Antitrust

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

COMPAT reduces penalty on Public Sector Insurance Companies by more than 99%

We analyse the recent order of COMPAT, where penalty imposed by CCI was reduced from Rs 671.05 Crores to just Rs 2 Crores.

BETWEEN THE LINES

COMPAT modifies order of Commission and reduces the penalty in automobile manufacturers' case

We analyse Tribunal's order, where it modifies the order of CCI and reduces the penalty imposed on automobile companies.

HEARD AT THE BAR

Australian Federal Court imposes multimillion dollar penalties on ANZ and Macquarie Bank for attempted cartel conduct

Top pharmaceutical executives charged with price fixing, bid rigging and customer allocation conspiracies

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COMPAT reduces penalty on Public Sector Insurance Companies by more than 99%

On 10th August, 2015, the Competition Commission of India ("**Commission**"/"**CCI**") had imposed a cumulative penalty of Rs. 671.05 Crores on four General Public Sector Insurance Companies, *viz*., United India Insurance Company Limited ("**United"**), Oriental Insurance Company Limited ("**Oriental**"), New India Assurance Company Limited ("**New India**"), National Insurance Company Limited ("**National**") (collectively referred to as "**GPSICs**") for bid rigging. Going by the details given in the order, an anonymous letter was received by the **CCI** intimating about a meeting of the executives of the **GPSICs**. This letter indicated that these executives met in Kochi for a discussion on the bids to be submitted for Rashtriya Swasthaya Bima Yojna ("**RSBY**") of the Government of Kerala. The **Commission**, after preliminary enquiry, deemed it appropriate to pass an order under Section 26(1) of the Competition Act, 2002 ("**Act**") and refer the matter to Director General ("**DG**") for investigation. The **DG**, after going into details recorded in his report, concluded that the conduct of the **GPSICs** was anti-competitive. The **DG** even doubted the conduct of the nodal agency, Comprehensive Health Insurance Agency of Kerala (**CHIAK**) which was responsible for inviting bids. However, the **DG** recommended action for violation of the Act only against **GPSICs**. The **CCI**, after considering the report of the **DG** and hearing the parties, reached a conclusion that the **GPSICs** were indeed guilty of bid rigging and imposed a collective penalty of Rs 671.05 Crores; **Rs. 156.62 Crores on United, Rs 100.56 Crores on Oriental, Rs 251.07 Crores on New India, Rs 162.80 Crores on National.**

Aggrieved by the aforementioned order, the **GPSICs** preferred an Appeal before the Competition Appellate Tribunal (**COMPAT**). The principal argument raised by the **GPSICs** included the concept of "Single Economic Entity" which had an acceptance in mature jurisdictions overseas. Supported by precedents from mature jurisdictions, the **GPSICs** claimed that it was not an attempt to rig the bidding process or cartelise but the purpose of meeting was to consider co-insurance and capacity building.The **GPSICs**, while disagreeing with the report of the **DG**, raised the argument that no bid rigging or cartelisation attempt can succeed unless all the players meet- in this case there were 7 bidders in total and out of them only 4 were alleged to have met in the meeting to discuss bids. **GPSICs** also argued that the transfers in senior echelons of the insurance hierarchy were affected by the Central Government through Department of Financial Services ("**DFS**"). Furthermore, **GPSICs** also submitted that players from the private sector are not keen to bid in such socialistic schemes, emanating from the mandate given in the directive principles of state policy of the constitution, wherein the risks are still unknown and high. It was stated that once the potential claim ratios are discovered through the process of market discovery, things become easier and various other private market players also evince interest in such bids. Other defences given by these **GPSICs** included the provisions of **General Insurance Business (Nationalisation) Act, 1972** (**GIBNA**)and the instructions issued by **DFS** from time to time on how to conduct business and intent in **GIBNA** for the Government to promote competition to the desirable extent in this sector. Thus, in totality, insurance companies wanted that **DFS** should be treated as an enterprise, as all four **GPSICs** are a part of **DFS** and their entire share holding is with the Central Government.

COMPAT, after detailed analysis and hearing all the arguments from both parties, did not agree with the claim of Single Economic Entity and held that, despite there being an additional obligation on the **GPSICs** to shoulder social responsibilities, the meeting in Kochi amounted to influencing the outcome of the bid which was a violation of the Act. However, following **COMPAT**'s earlier stand that the basis for computing penalties should not be the whole turnover but be affected turn over (called **"Relevant Turnover"**), the basis of charge of penalty was changed to "**relevant turnover**" by **COMPAT**.

Holding thus, **COMPAT** worked out the quantum of the cumulative penalty totalling to figure of Rs. 2 Crores. What requires to be seen is how both the parties- **CCI** and the **GPSICs** accept the order and decide the next course of the action after above order is served on them. **(Appeal No. 94/2015, 95/2015, 96/2015, 97/2015, Decided on 09.12.2016)**

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Heard at the BAR

Legal news from India and the world

Australian Federal Court (AFC) imposes multimillion dollar penalties on ANZ and Macquarie Bank for attempted cartel conduct

On 14th December 2016, the AFC has imposed multimillion dollar penalties on Australia and New Zealand Banking Group Limited (**ANZ**) and Macquarie Bank Ltd (**Macquarie**) for attempted cartel conduct after action by the Australian Competition and Consumer Commission (**ACCC**). Background of the case was that the traders employed by a number of banks in Singapore communicated via online chat rooms about daily submissions to be made to the Association of Banks in Singapore (**ABS**) in relation to the benchmark rate for the Malaysian ringgit (**ABS MYR Fixing Rate**). During 2011, ANZ and Macquarie traders attempted to make arrangements with other banks to make high or low submissions to the ABS MYR Fixing Rate as the rate would ultimately affect settlement payments for MYR denominated non deliverable forward contracts (**NDFs**). Australian ANZ was a submitting bank for the ABS MYR Fixing Rate. Macquarie initiated discussions between traders and acted as a hub or coordinator between submitting banks. The AFC imposed penalties on both banks for cartel conduct. (ACCC Media Release dated 15.12.2016)

Fines for unlawful collusion on waste collection in Västerbotten

The Swedish Competition Authority has found that the companies Ragn-Sells AB and Bilfrakt Bothnia AB breached the competition rules when they agreed not to compete in municipal tenders for waste collection in the Västerbotten region. The companies have accepted the administrative fine and must now pay fines totalling SEK 4.5 million. (Sweden Competition Authority, Press Release 25.11.2016)

Top Pharmaceutical Executives charged with price fixing, bid rigging and customer allocation conspiracies

On 14th December 2016 two former pharmaceutical company executives were charged for conspiracies to fix prices, rig bids and allocate customers for certain generic drugs. First charges were brought by Antitrust Division, DOJ, USA involving generic drugs. Separate two felony charges were unsealed in the US District Court. According to the Information, the former CEO & former president of a pharmaceutical company conspired to fix prices, rig bids and allocate customers for an antibiotic. Additionally, the two were alleged to have conspired to fix prices and allocate customers for glyburide, a medicine used to treat diabetes. An executive of FBI stated "Conspiring to fix prices on widely used generic medications skews the market, flouts common decency – and very clearly breaks the law" (Press Release Department of Justice, Office of Public Affairs, 14.12.2016)

CCI orders investigation against Grasim Industries Ltd.

On 10.11.2016, Competition Commission of India ("CCI") formed a prima facie view that Grasim Industries Ltd. (GIL) was imposing unfair and discriminatory pricing on textile manufacturers thereby abusing its dominant position in the relevant market of "Viscose Staple Fibre in India". The CCI directed the DG to investigate the matter u/s 26(1) of the Competition Act. Viscose Staple Fibre (VSF) is used as a raw material for manufacturing viscose yarn. According to the information filed by an anonymous informant **GIL** is the largest producer and seller of VSF in India. (Case 62/2016)

European Commission (EC) fines Crédit Agricole, HSBC and JPMorgan Chase € 485 million for participating in a cartel in euro interest rate derivatives.

On 7th December 2016, the investigation by EC found that there was a cartel in place, between September 2005 and May 2008, involving a total of seven banks. The participating traders of the banks were in contact through corporate chat-rooms or instant messaging services. The traders' aim was to distort the normal course of pricing components for euro interest rate derivatives. EC reached a settlement concerning the same cartel in December 2013, Crédit Agricole, HSBC and JPMorgan Chase chose not to settle this cartel case with the EC, unlike Barclays, Deutsche Bank, RBS and Société Générale. EC decision fines Crédit Agricole, HSBC and JPMorgan Chase for their participation in this cartel. In setting the level of fines, the EC took into account the banks' value of sales for the products concerned within the European Economic Area. (EC Press Release, Dated 07.12.2016)

COMPAT modifies the order of the Commission and reduces the penalty in Automobile Manufacturers' case

On 9th December 2016, Competition Appellate Tribunal ("**COMPAT**") passed an order with respect to the appeals filed by Toyota, Nissan and Ford against the order of the Competition Commission of India ("**CCI**") in the case of Shamsher Kataria V. Honda Siel Cars Pvt Ltd. Readers may recall that in month of August 2014, the **CCI**, had found 14 international automobile manufacturers (**OEMs**) including Ford, Toyota, Hyundai, Honda, Nissan, Maruti etc. guilty of contravening Section 3 and Section 4 of the Competition Act, 2002 (**"Act"**). According to **CCI** these manufacturers were involved in a number of anti-competitive practices including:

- Restricting authorised services providers from selling spare parts to independent services providers;
- Restricting Original Equipment Suppliers (**OESs**) from selling spare parts directly in the market;
- Cancellation of warranty in case the vehicle is repaired by an independent mechanic;
- Restricting availability of diagnostic tools in the open market; and
- Increasing prices of spare parts in an unfair manner.

The **CCI** concluded that "OEMs are the sole supplier of genuine spare parts and diagnostic tools in the aftermarket. Therefore, for each make of an automobile the OEM is in a monopolistic position with respect to the supply of spare parts and repair and maintenance services." The **CCI** also concluded that the prices and profit margins on the spare parts were unfairly high and reflected the abusive conduct of the **OEMs**. Hence, a penalty of 2% on the average annual turnover of the **OEMs** in pursuance of Section 27(b) of the Act was imposed. The automobile manufacturers filed appeals before the **COMPAT**.

In its order dated 9th December 2016, the **COMPAT** has provided detailed explanations on evolution of the automobile sector in India and examined the lack of regulatory control of the after-sale services market and spare parts market in the auto-mobile sector in India. The **COMPAT** in its order discussed that dominant enterprises have a special responsibility for keeping and maintaining a competitive environment in market, in relation to the case the **COMPAT** held "OEM accountable for creating and maintaining a competitive environment conducive to the consumer's interest recognising the importance of safety on roads and development of skills and investments in automobile repair sector." Accordingly, the **COMPAT** was of opinion that to deal with such malpractices, the directions provided by the **CCI** require 'reconsideration or review'. The **COMPAT** has provided modifications to the order of the **CCI**. Some of them are reproduced below:

- **OEMs** to remove all restrictions imposed through agreements for selling spare parts including diagnostic tools in the aftermarket.
- Intellectual Property Rights belong to **OESs**; **OEMs** shall not restrict the **OESs** from selling spare parts in the aftermarket.
- **OEMs** to open additional distribution network for sale of spare parts in open markets;
- **OEMs** to remove all restrictions on **OESs** for sale of spare parts to independent repairers;
- **OEMs** to modify their warranty conditions and cancel the warranty only to the extent that damage has been caused because of faulty repair work outside their authorized network;
- **OEMs** to make available in the public domain the information regarding spare parts, their MRPs, etc.

Thus, the **COMPAT** reduced the penalty imposed by the **CCI** by directing the **OEMs** to pay 2% on the average annual turnover and not the total turnover as the **CCI** had previously imposed. **(Appeal No. 60/2014, 61/2014, 62/2014, 97/ 2014, Decided on 09.12.2016)**

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