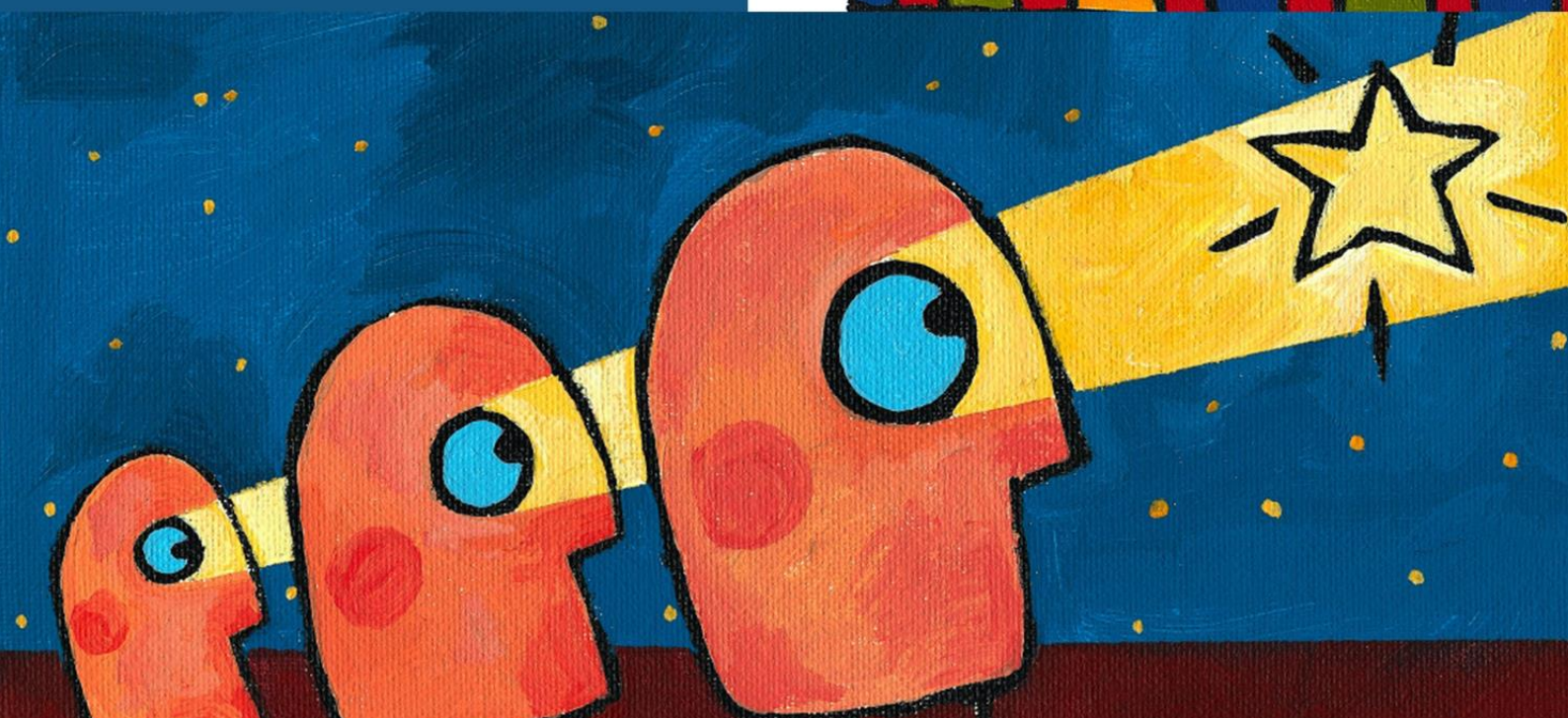




Monthly Newsletter

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CCI imposes penalty on Grasim, Aditya Birla Chemicals and Gujarat Alkalies and Chemicals for bid rigging Delhi Jal Board tenders

On October 5, 2017, the Competition Commission of India (CCI) passed an order in two reference cases filed by the Delhi Jal Board (DJB/Informant) against Grasim Industries Ltd. (GIL/OP 1), Aditya Birla Chemicals (India) Ltd. (ABCIL/ OP 2) and Gujarat Alkalies and Chemicals Limited (GACL/OP 3) for violation of Section 3(3)(d) of the Competition Act, 2002 (Act) for collusive bidding. DJB was procuring Poly Aluminium Chloride (PAC) and Liquid Chlorine (LC) from the said companies for purification of water, through press tendering and e-tendering, and alleged that there was collusive bidding for both the chemicals for several years. The CCI imposed a penalty equivalent to 8 percent of average relevant turnover for ABCIL and GIL for preceding three years and at 6 percent of average relevant turnover for GACL for preceding three years.

Going by the details provided in the order, the CCI, on January 16, 2014, after forming a *prima facie* opinion for both the references, ordered the Director General (the 'DG') to club both these cases and submit a combined report of its investigation. The DG submitted the investigation report in two parts, where Part I of the Report dealt with the allegation of bid rigging in procurement of liquid PAC and Part II dealt with the allegation of bid rigging in procurement of LC. In both the parts of the Report, the DG concluded that there was an understanding amongst the bidders (ABCIL, GIL and GACL in Part I) (ABCIL, GIL and Punjab Alkalies & Chemicals Limited (PACL) in Part II) for all the tenders floated by DJB from 2009-10 to 2014-15 and they acted in a collusive manner to artificially jack up the bid prices without offering any real competition and in contravention with the provisions of Section 3(1) read with Section 3(3)(d) of the Act.

The preliminary contention of GIL and ABCIL was that they together constituted a *single economic entity* and, therefore, there was no question of collusion between them. In order to establish this, GIL and ABCIL contended that they were both a part of the Aditya Birla Group. Further, they did not exercise any competitive constraints on each other. The CCI did not accept this argument of GIL and ABCIL, and said, "*Where two or more entities of the same group decide to separately submit bids in the same tender, they have consciously decided to represent themselves to the procurer that they are independent decision making centres and independent options for procurement.*"

Further, the CCI observed that GIL, ABCIL and GACL had formed a cartel in bidding for PAC tenders. According to the CCI, there were various factors that indicated the collusion between the bidders. Some of these indicators pointed out by the CCI were converging but simultaneously increasing prices, parallel pricing despite locational differences of the manufacturing facilities, lack of discernible pattern in freight charges and rates offered to DJB being generally higher than the rates offered to other customers. Furthermore, the CCI also found that there was a noticeable bidding pattern that could not be coincidental and was rather indicative of collusive behavior. The CCI found the bidding by GIL, ABCIL and GACL to be collusive. However, no contraventions were established against Kanoria Chemicals and Industries Ltd. (KCIL), one of the opposite parties and, therefore, the CCI absolved KCIL from the allegations.

With regard to the LC tenders, the CCI ruled against the allegations of cartelisation. While the CCI acknowledged that the prices quoted by GIL, PACL and ABCIL were in a close range and the timings of submission of the bids were also close to each other, but there were no other factors indicative of concerted action by the opposite parties.

The CCI has passed cease and desist order and imposed a penalty of Rs. 2.30 crore, Rs. 2.09 crore and Rs. 1.88 crore upon GIL, ABCIL and GACL respectively for the anti-competitive conduct. The penalty has been levied @ 8 % of the average relevant turnover of GIL and ABCIL of preceding three years. In case of GACL, penalty has been levied @ 6 % of the average relevant turnover of preceding three years. The conduct of GIL and ABCIL was noted by the Commission as '*egregious*' as these companies while apparently submitting separate bids, prepared and finalised the same through common channels creating a façade of competitive landscape. (Ref. Case Nos. 03 & 04 of 2013)



KK SHARMA
LAW OFFICES

Brazilian Competition Regulator (CADE) blocks JBJ-Mataboi deal

On October 19, 2017, Brazil's Administrative Council for Economic Defense (CADE) blocked the purchase of meat packing company, viz. Mataboi Alimentos SA by JBJ Agropecuária Ltda. (JBJ). JBJ is a company owned by José Batista Jr. (brother of José Batista Sobrinho, the founder of JBS S.A., a Brazilian company which is the largest meat processing company in the world).

The CADE, unanimously, voted to block the deal because it believed that the purchase would allow JBJ to exchange valuable information with JBS S.A. and coordinate strategic decisions to stifle competitors.

(Reuters press release, dated 19.10.17)

General Superintendence of CADE forwarded its opinion on the acquisition of Monsanto by Bayer to Administrative Tribunal for final analysis

Under the Brazilian merger control regime, the General Superintendent is the in-charge of merger investigations. They, at a preliminary level, have to classify the merger cases into following categories, fast-track, non-fast track or complex. The complex merger cases are analysed by CADE's Administrative Tribunal. In the present matter, the General Superintendent, on 4th October, 2017, forwarded its opinion on the acquisition of Monsanto Company by Bayer Aktiengesellschaft to the Administrative Tribunal for its final analysis. The General Superintendent opined that the

transaction would cause significant horizontal concentration and vertical integration in the markets of biotechnology as well as production/commercialization of soybean seeds and cotton, being merger of two of the main competitors in the world. After the merger, Bayer would become dominant in central links of the production which would raise competition concerns. *(CADE Press Release, dated 04.10.17)*

EC imposed on a fine of €28 million on Lithuanian Railways for hindering competition on rail freight market

On October 02, 2017, The European Commission ('EC') imposed a fine of €27 873 000 on Lithuanian Railways ('LR') (Lietuvos geležinkeliai), a state-owned rail company in Lithuania responsible for railway infrastructure and rail transport, for hindering competition on the rail freight market by dismantling a 19 km long section of rail track and connecting Lithuania and Latvia. The reason behind the removal of track was that a major customer of Lithuanian Railways, Orlen, considered redirecting its freight from Lithuania to Latvia by using the services of another rail operator. The EC, in its investigation, found that the conduct of LR hindered competition on the rail freight market and was in violation of Article 102 of TFEU. With regard to penalty, the EC took into account, the value of sales relating to the infringement, the gravity of the infringement and its duration. *(Press release 2.10.17)*



Heard at the BAR

Legal news from India and the world

South African competition authority fines automobile accessory manufacturers for collusion

On October 09, 2017, the Competition Commission of South Africa (CCSA) imposed a fine of R149 960 540 on automobile accessory manufacturers including, Autoliv Inc., one of the world's largest manufacturers of airbags, seatbelts and steering wheels, for price fixing, dividing markets and colluding for tenders issued by car manufacturers such as BMW Group and VW Group for the manufacture and supply of airbags, seatbelts and steering wheels. *(Press release, 09.10.17)*

Greece competition authority fines cosmetics wholesaler cartel

On October 4, 2017, the Hellenic Competition Commission ('HCC') imposed a fine on six wholesales of luxury cosmetics, viz. Notos Com, Estee Lauder Hellas S.A, P.N. Gerolymatos S.A, L'Oreal Produits De Luxe Hellas S.A, Gr. Sarantis S.A. and Parfums Christian Dior Hellas S.A. for indirect fixing of reselling prices to the retailers and fixing a uniform level of discounts. The HCC ordered the above mentioned companies to refrain from committing the same and threatened each of the companies with a per day penalty of 10,000 Euros for each day for non compliance with the HCC decision. *(Press Release 04.10.2017)*

The CCI has ordered a detailed probe against public broadcaster Prasar Bharati for alleged abuse of dominant position

Between The Lines...

*Comments
& Analysis*

On September 6, 2017, the Competition Commission of India (the 'CCI') passed a *prima facie* order under section 26(1) of the Competition Act, 2002 (the 'Act'), against Prasar Bharti ('OP-1') on the basis of information filed by Clear Media (India) Private Limited ('Informant'), who is engaged in the business of providing frequency modulation (FM) radio broadcasting services to public in various cities. OP-1 is a Government of India entity that provides infrastructure facility to FM radio broadcasters. OP-2 is the Ministry of Information and Broadcasting.

As per the policy guidelines of OP-2, on expansion of FM radio broadcasting services mandate, all private FM radio broadcasters have to co-locate their transmission facilities with existing infrastructure of OP-1. The Grant of Permission Agreement ('GOPA'), entered into between the Government of India and the FM radio broadcasters, allowing the latter to maintain and operate FM radio broadcasting channels also stipulates adherence to the said policy requirement. Accordingly, the Informant entered into an agreement with OP-1 on February 7, 2006 for use of its Common Transmission Infrastructure ('CTI'), co-financed by the Informant, located at HPT, Kingsway Camp, Delhi.

CTI having collapsed on May 30, 2014, the Informant vacated the Kingsway Camp premises and informed OP-1 and executed another agreement with OP-1, namely, Interim Transmission Infrastructure Agreement ('ITIA') for using Interim Transmission Infrastructure ('ITI') located at Mall Road, New Delhi, on an interim basis till the permanent CTI is erected and operationalized. In pursuance of the agreement dated February 7, 2006, OP-1 issued an invoice calling upon the Informant to pay the license fee for the period commencing from 21.08.2015 to 20.08.2016 for use of the CTI. The Informant objected the invoice as the agreement for use of CTI at Kingsway Camp was terminated on account of collapse of CTI and Informant vacated the premise. Thereafter, Informant and OP-2 entered into a GOPA on May 2, 2016 for migration of the Informant from Phase II to Phase-III FM radio broadcasting regime. However, OP-1 issued an invoice and repeatedly called upon the Informant to pay advance license fee for use of CTI, which was not constructed yet, for the period commencing from 10.06.2016 to 09.06.2017, which the Informant paid subsequently. The Informant has alleged that OP-1 sought to impose unfair terms and conditions in the draft agreement for use of new CTI. ('New CTI Agreement').

The CCI noted that OP-2 being a department of the Government, *inter-alia*, responsible for framing regulations, policies and guidelines for operation of FM radio broadcasters and not involved in any economic activity, no case of contravention was established against OP-2. Further, there being no suggestion of any bilateral or multilateral conduct, no *prima facie* case of contravention of section 3 of the Act was made out against OP-1.

The CCI, however, held that the infrastructure services provided by OP-1 to private FM radio channel operators being unique, no other organisation can provide the same, which makes the transmission infrastructural services offered by OP-1 non-substitutable. The CCI delineated the relevant market as the market for "*provision of infrastructural facilities for FM radio broadcasting in Delhi*".

The CCI held OP-1 to be in a dominant position since as per the extant policy and GOPA, all the private FM radio broadcasters have to co-locate their transmission infrastructure on the existing facilities of OP-1 and the former do not have any other option if OP-1 has land and transmission infrastructure in a given city. The CCI, while noting that OP-1 has asked for license fee for two years from the Informant for use of CTI located at Kingsway Camp despite the same having been collapsed on May 30, 2014, held that *prima facie*, such behaviour of OP-1, without providing any service, appears to be abuse of dominant position, in contravention of section 4(2)(a)(ii) of the Act. Further, the CCI held that under the New CTI Agreement, the terms and conditions were one-sided and heavily tilted in favour of OP-1. In addition to other conditions, the New CTI Agreement sought the licensee to bear some of the cost of operation of the Radio FM channels operated by the OP-1. Therefore, the impugned terms of the New CTI Agreement being discriminatory in so far as the same require the private FM radio broadcasters to bear the CTI cost of the radio channels operated by OP-1, where OP-1 itself will not contribute in any cost sharing, the CCI was *prima facie* convinced that the alleged terms and conditions of the New CTI Agreement are in contravention of the provisions of section 4(2)(a)(i) of the Act. (Case 19 of 2017)

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