KK SHARMA
LAW OFFICES

Monthly Newsletter

State of Antitrust

October 2017; Volume 4 Issue 10

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

CCI imposes fine totalling Rs. 12 crores on companies bidding for tenders by Coal India Limited

We analyse the recent order of CCI, wherein CCI imposed penalty of approximately Rs. 12 crores on ten companies and their representatives.

BETWEEN THE LINES

Bombay HC sets aside the prima facie order of the CCI against the three telecom giants

We analyse HC's order, where it has set aside the *prima facie* order of the CCI against three telecom giants.

HEARD AT THE BAR

South Korean Giant LG Electronics lost its final Appeal against fine of Euro 541 million for price fixing

Thirty Day timeline for merger filings ceases to exist in Indian Merger Control Regime

And more....

KK SHARMA

The Competition Commission of India imposes fine totalling to Rs. 12 crores on companies bidding for tenders by Coal India Limited

On September 14, 2017, the Competition Commission of India ('Commission') passed an order under section 27 of the Competition Act, 2002 ('Act'), against SSV Coal Carriers Private Limited and nine other parties ('OP-1 to OP-10' and together referred to as 'OPs'), on the information under Section 19(1)(a) of the Act, filed by Western Coalfields Limited ('Informant'), alleging contravention of the provisions of Section 3 of the Act.The Informant, a mining company and subsidiary of Coal India Limited, bearing 'Miniratna' status, is a major supplier of coal to industries and large number of power houses in various states. The OPs are engaged in the business of providing ancillary services in colliery areas including that of sand and coal transportation in the areas of operation of the Informant.

The Informant has alleged OPs of quoting identical rates, exponentially higher than the justified and estimated cost in four tenders floated by the Informant for coal and sand transportation. The first two tenders were for transportation of sand while the other two were for coal transportation and were separately dealt with by the Commission. The Commission, in its *prima facie* order dated July 2, 2015, under section 26(1) of the Act, held that since in some tender notices, all the OPs, have quoted identical rates and in others with marginal difference, there was a case of bid-rigging and contravention of section 3(3)(d) read with section 3(1) of the Act.

The Director general ('DG') in its investigation report, dated January 17, 2016, found that the conduct of the OPs in the four impugned tenders amounted to bid-rigging and in contravention of the provisions of section 3(3)(d) read with section 3(1) of the Act. Further, the DG identified eight individuals who were the officers of the OPs, found to be responsible under section 48 of the Act, for the conduct of business of the OPs. As per the DG Report, the OPs could not justify their conduct of quoting identical rates, submitted the price bid on the last date near the closing time, used to talk to each other on phone and in various social gatherings, had business and financial dealings with each other, concealed the fact of trade association being in place, kept on exchanging important information regarding the instant case and its investigation.

The Commission rejected various contentions raised by the OPs in the light of the judgment in *Excel Corp* and held that it is well within the powers of the DG to investigate and report all the relevant facts and violations that the Commission could not foresee at the time of ordering investigation. Also, in relation to tenders floated by Informant prior to 2009, taken into consideration by the DG, the Commission ruled that though it cannot be said that there was any violation of law by the OPs, however, prior practice definitely threw light on the formation of cartel by the OPs in the present case. Further, since proceedings under the Act in context of anti-competitive agreements, including bid-rigging, do not involve criminal punishments but only monetary penalties, the standard of proof of 'beyond reasonable doubt' is not applicable to the proceedings before the Commission. In case of cartelisation, the Commission opined that direct evidence is hardly available and identical prices in tenders is, in itself, a strong evidence of bid-rigging and the same cannot be taken as a mere coincidence unless a plausible explanation is given in a clear and cogent manner.

According to the Commission, it is not a case of mere price parallelism when the OPs quoted identical prices to the last decimal point, not for just one job but for all the different jobs under each tender, though the cost data provided by each OP was different from others.

Therefore, the Commission, in the light of the facts of apparently last minute filling of price bids after meeting in the Informant's office, existence of earlier financial dealings amongst the OPs and long standing social relationships, as well as identical price quotes even in previous tenders floated by the Informant, held that identical quotes are not a mere co-incidence but the result of clear understanding amongst OPs to fix prices, resulting in rigging the bids in the impugned tenders. Thus, the agreements, amongst OP-1 to OP-4 to rig the bids in the tenders floated by the Informant for sand transportation and amongst OP-5 to OP-10 to rig the bids in the tenders floated for coal transportation, were held to be in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.

Noting that bid rigging is one of the pernicious form of anti-competitive conduct and taking the fact that the Informant is catering to an important sector such as electricity, as an aggravating factor, and that OP-3, OP-4, OP-7, OP-8 and OP- 10 having cooperated in the proceedings as mitigating factor, the Commission imposed the penalty at the rate of 4% of its average relevant turnover for the last three financial years on each of the OPs and their representatives under section 48 of the Act.[***(Case No. 34 of 2015) , Decided on 14.09.2017***]

KK SHARMA
LAW OFFICES

Heard at the BAR

Legal news from India and the world

Nationalized Banks exempted from the application of sections 5 and 6 of the Competition Act, 2002

As per the notification, bearing no. F. No. Comp-07/4/2017-Comp-MCA, dated August 30, 2017, Central Government has exempted, all cases of reconstitution, transfer of the whole or any part and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, from the application of provisions of sections 5 and 6 of the Competition Act, 2002 for a period of ten years. (Central Government of India Notification dated 30.08.2017)

Thirty Day timeline for merger filings ceases to exist in Indian Merger Control Regime

In terms of notification bearing no. F. No. 5/9/2017-CS, dated June 29, 2017, Ministry of Corporate Affairs, has done away with the mandatory 30 day deadline for filing merger notifications, post the triggerring event. The Central Government has exempted every person or enterprise who is a party to a combination as stated in section 5 of the Competition Act, 2002 from giving notice within 30 days as mentioned in section 6 (2) of the Act for a period of five years. However, the exemption is subject to the provisions of section 6 (2A) and section 43A of the Act, which means prohibition on transacting parties from consummating a notifiable transaction until the CCI grants its approval or until 210 days have passed from the date of filing the notice, will continue to apply. (Central Government of India Notification dated 29.06.2017)

South Korean Giant LG Electronics lost its final Appeal against a fine of Euro 541 mn for price fixing

On September 9, 2017 the European Court of Justice ('ECJ') dismissed the appeal,stating *inter alia* that the European Commission ('EU') imposed a fine on it that far exceeds the EU's aim of deterrence, by LG Electronics ('LGE') against the fine of EUR 541,112,808 imposed on it in 2012, when the Commission spotted seven top television and computer screen makers, including LGE and Phillips, for running a decade long price fixing cartel for cathode ray tubes and imposed a fine totalling Euro 1.5 billion, with biggest penalty applied to LGE at the rate of 5.47% of its assets. The ECJ was of the opinion that the Commission set the fines imposed on the applicant, in view of the gravity and the duration of the infringements at issue.LGE is required to pay the penalty including accumulated interest within a week. (Judgement European Court of Justice, dated 09.09.2017)

Norwegian Competition Authority ('NCA') imposed fines of EUR 2 million for colluding on a tender for school buildings

The NCA imposed fines on five undertakings for bid rigging and illegally cooperating on a tender, for the maintenance and repair of electrical installations in school buildings in Oslo. The five competitors quoted identical prices and exchanged other competitively-sensitive information and did not try to conceal their cooperation from the procuring authority. (NCA Press Release from dated 04.09.2017)

The Competition and Markets Authority imposed a fine of £370,084 on 5 estate agents colluding to fix their minimum commission.

Once again the CMA, committed to tackling cartels regardless of the size of the businesses involved, has taken enforcement action against 5 estate agents, who agreed to fixtheir minimum commission rates at 1.5%, thus, colluding not to compete with each other, and checking and warning each other, on mail, if anyone breached the agreement.(UK Press Release, Dated 18.09.2017)

The Korea Fair Trade Commission ('KFTC'), impose a fine of KRW 796 million for the collusion against Korea Railroad Corporation

On August 10, 2017, KFTC fined and passed cease and desist order against two bidding companies involved in collusion for purchasing electronic interlocking device offered by Korea Railroad Corporation. In each of the five bids, the 'decided winner' fixed the bid price which the false bidders, subsequently quoted in its bid and they shared their profits through subcontracting some ofthe winning bids to the falsebidder. (KFTC order dated 10.08.2017)

Bombay High Court sets aside the *prima facie* order of the Competition Commission of India against the three telecom giants

On September 21, 2017, Justice Anoop V. Mohta and Justice Bharati H. Dangre, judges, Bombay High Court, in the matters of *Vodafone India vs. The Competition Commission of India*, *Idea Cellular Ltd. vs. CCI*, *Cellur Operator Association of India vs. CCI* and *Bharati Airtel Limited and Anr. vs. CCI*, while admitting the writs against the impugned order of the Competition Commission of India ('Commission') dated April 21, 2017, under section 26(1) of the Competition Act, 2002 ('Competition Act'), in case nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions and notices of the DG under section 41 of the Act, quashed and set aside the same, in exercise of power under Article 226 of the Constitution of India.

According to the judgment, the telecommunication industry is governed by the authorities under the Telegraph Act, 1885 and the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act') and all the parties, stakeholders, and service providers, are bound by the statutory agreements of telecom industry market, arising out of the Telegraph Act and the TRAI Act. Therefore, the question of interpretation or clarification of any contract clauses or unified license or interconnection agreements or quality of service regulations are to be settled by the Telecom Disputes Settlement and Appellate Tribunal ('TDSAT') under TRAI Act and not by the Commission, under the Competition Act, they being two independent statutes. The Competition Act governs the anti-competitive agreements and its effect-, along with abuse of dominant position and combinations, which cannot be used and utilized to interpret the contract of telecom industry market.

The High Court held that the impugned order passed by the Commission and all the consequential actions of the DG under section 41 of the Competition Act proceeded on wrong presumption of law and jurisdiction and there was no question to initiating any proceedings under the Competition Act as contracts go to the root of the alleged controversy, even under the Competition Act. The Commission and the DG, has no power to deal and decide the stated breaches unless settled finally by the TDSAT under the TRAI Act. Therefore, there was no question to initiate any inquiry and investigations under section 26(1) of the Competition Act.

The High Court further held that the information being vague, it is not sufficient to initiate inquiry or investigation under the Competition Act and in view of the fact that the Commission took into consideration irrelevant material and ignored the relevant material and the law, the impugned order and all the consequential actions or notices of the DG under the Competition Act, are not mere "administrative directions" and are therefore, illegal and perverse. For the same reason, even the service providers and Cellur Operator Association of India, have not committed any breach of any provisions of the Competition Act. (***Writ No. 8594/2017, 8596 /2017, 7164 /2017, 7172 /2017, and 7173/2017, Decided on 21.09.2017***)

KK Sharma Law Offices

An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax

4th Floor, Sishan House,
119, ShahpurJat,
New Delhi – 110049
India

+91-11-41081137
+91-11-26491137

www.kkslawoffices.com
globalhq@kkslawoffices.com
operations@kkslawoffices.com
legal@kkslawoffices.com