



Monthly Newsletter

# State of Antitrust

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### **CCI fines Esaote S.p.A and Esaote Asia Pacific Diagnostic Pvt. Ltd, Rs. 9.33 lacs, for abuse of dominant position**

The Competition Commission of India ('Commission'), after investigation by Director General(DG), has held that the Esaote S.p.A and Esaote Asia Pacific Diagnostic Pvt. Ltd (collectively 'Esaote') abused their dominant position in the market for supply of dedicated standing/ tilting Magnetic Resonance Imaging ('MRI') machines. The information was filed by the House of Diagnostics LLP (HoD) against Esaote, alleging that Esaote has supplied defective G-Scan MRI machines to the HoD. Apart from this, the HoD alleged that Esaote charged unreasonable and hefty amount of money for supply of spare parts of the G-Scan MRI machines. It was further alleged that the vital terms of the Purchase Order (PO) and Comprehensive Maintenance Contract ('CMC') were changed by the Esaote, unilaterally, to the detriment to the HoD and Esaote further refused to perform their part of obligations under the CMC. It was also alleged that the Esaote, in collusion with the Star Imaging and Path Labs (P) Ltd. ('Third Party'), entered the 'MRI scan market in weight bearing position' of India and thus impeded the entry of new players. After forming prima facie opinion, on the basis of material presented before the Commission, the Commission had directed the Director General ('DG') to cause an investigation. DG, in his report, pointed out that the Esaote is the only supplier for standing/ tilting MRI machines in India. Therefore it, undoubtedly, enjoys the dominant position in the relevant product market of dedicated standing/ tilting MRI machines in India.

After considering the DG's report, the Commission observed that the Esaote misled HoD by supplying old G-Scan MRI machines, which were manufactured more than a year before the date of PO. Further, the Commission held that Esaote acted unfairly by disregarding the terms and conditions of the PO and CMC and abused its dominant position by refusing to provide 'Head Coils', and 'See through Perforated RF Cage' with the G-Scan MRI machines, which were part of the PO, to the HoD. The Commission also found that the Esaote charged arbitrarily from the HoD for CMC, in utter disregard of its contractual obligations. With respect to allegation of collusion between the Esaote and Third Party, the Commission did not find any relevant material supporting the allegations. The Commission also observed that Esaote has given exclusive distribution rights to its Indian subsidiary in respect of G-Scan MRI machines. Such exclusivity limited the provision of services in after sale market besides denying market access to other service providers. Accordingly, a penalty, of Rs. 9.33 lacs, was imposed for contravening the provisions of section 4 of the Competition Act, 2002('Act'). The chairperson recorded a dissenting note and expressed his differing opinion with respect to determination of relevant market and opined that the relevant market cannot be narrowed down to just standing/ tilting MRI machines alone as any market delineation would necessarily include all MRI machines irrespective of some additional features or functionalities. (*Case No. 9 of 2016*)

### **Cartels in school catering in Russia**

Federal Antimonopoly Service of Russia ('FAS') found two cartels, which rigged the bidding process for procurement of food supplies and hot catering services required in schools, situated in the city of St Petersburg and Voronezh. To crack the cartel, the FAS observed signs such as, same address of the companies, same IP address for filing bids in the auctions and filing of tender form by the same person. The modus operandi of both the cartels was to maintain the prices at tenders for food supplies and catering services. In order to gather the evidence, the FAS conducted unscheduled inspections, to arrive at the finding of the anticompetitive agreement between the cartel members.

The FAS found first cartel, in St Petersburg, which was formed by three companies viz. Floridan JSC, Voskresenie Ltd, and KSP Vasileostrovsky District JSC. These companies had the same address and traded from the same IP address, moreover the only shareholder of Floridan JSC was a close relative of the founder of Voskresenie Ltd. These were sufficient evidences, for FAS to establish that the 3 companies were part of a cartel. (*Press Release 10.10.2018*)

The other cartel, active in the city of Voronezh, had two companies i.e. Indicat Ltd. and Sphera Ltd as its members. Both the companies colluded to quote similar minimum reduction in 'initial maximum contract price' for the services of hot catering in the schools of Voronezh. In order to establish existence of cartel, the office of FAS found that the same physical person is the founder of both of the companies, same address of the companies, presence of same personnel, plus, filing of bids for the tender by the same person for these companies. These signs helped the FAS in exposing the existence of cartel formed by the companies. (*Press Release 09.10.2018*)

According to the global report of the World Food Project for 2013, India has the largest school feeding programme in the world, catering to over 114 million children. In India, the catering is awarded by floating of tenders by each state. A close scrutiny of the bids in these tenders might reveal existence of similar anticompetitive practices in India as well. The Indian Competition Agency can take cues from such cartels around the world. It may prove useful and, may be, the cost to the exchequer of these mid meal schemes can be brought down.



## Heard at the BAR

*Legal news from India and the world*

### **Dawn Raids by Portuguese Competition Authority suspecting collusive practices by associations:**

Portuguese Competition Authority ('AdC') conducted two dawn raids against three associations in the month of October. On 8<sup>th</sup> October 2018, the first raid was conducted on the premises of an association of retail food sector, following the suspicions that the association was engaged in concerted practice of price fixing.

The other raid was conducted on 10<sup>th</sup> October, 2018 on the premises of two associations of advertising companies, suspecting rigging of bids by the companies in procurement process launched by advertisers. The case handlers of the AdC, in pursuit of discovering, gathering and collecting the evidence, raided the premises.

As per the press release, the AdC has carried out a total of 18 dawn raids in 38 premises of 39 entities since 2017. These raids are in line with the priorities set out for the year 2018 and also forms part of its advocacy mission which focuses on guiding the business associations and their members, on decisions and behavior, required to avoid in order to ensure compliance with competition rules. (*Press Release of 08.10.2018 & 10.08.2018*)

**South African Competition Authorities uncover 2 cartels and one collusion case:** The South African Competition Commission ('SACC'), in the month of October 2018, exposed two cartels active in 2 different industries viz. oil and gas and meat industry.

In oil and gas industry, the SACC found 5 Liquefied Petroleum Gas ('LPG') companies viz. Totalgaz Southern Africa (Pty) Ltd, Oryx Oil South Africa (Pty) Ltd, KayaGas (Pty) Ltd, Easigas (Pty) Ltd and African Oxygen Limited ('Afrox'), engaged in a concerted practice of price fixing. The price was fixed with respect to the amount to be paid as a 'Deposit Fee' by the first time buyers of a LPG cylinder. This practice contravened the provisions of section 4(1) (b) (1) of Competition Act 89 of 1998. The SACC conducted search and seizure operations at the premises of these companies in order to seize copies

of documents and electronic data. The SACC held that, these 5 companies formed a cartel and fixed prices for gas cylinder. The SACC referred the case to the Competition Tribunal to impose administrative penalties on the abovementioned 4 companies except for on Afrox. (*Press Release 18.10.2018*)

With respect to the cartel in the meat industry, formed by 2 beef companies i.e. Irvin & Johnson ('I&J') and Karan Beef ('KB') (Pty) Ltd, the SACC found that the manufacturing agreement entered between the I&J and the KB, decided, as to when the KB had to stop producing certain processed beef products for itself and when the KB had to start producing the processed beef products for the I&J, to be not compatible with the competition law.

The manufacturing agreement, further imposed restriction on the KB, not to sell its processed beef products to certain customer of the I&J. This conduct amounted to dividing markets by allocating specific type of goods and customers. (*Press Release 29.10.2018*)

In the case of collusion, the SACC found three Japanese shipping companies and one Norwegian shipping company guilty of colluding with each other in respect of a tender floated by the Toyota South Africa Motors to transport Toyota Vehicle from South Africa to outside the country by sea route. Kawasaki Kisen Kaisha Ltd ('K-Line'), Mitsui O.S.K Lines Ltd ('MOL'), Wallenius Wilhelmsen Logistic AS ('WWL') and Nippon Yusen kabushiki Kaisha Ltd ('NYK') agreed on number of vessels that they were going to operate on the South Africa to Europe routes at agreed intervals. The abovementioned companies also fixed rates of the freight to be charged from the Toyota South Africa Motors. K-Line settled and undertook to pay R 98,928,170 as an administrative penalty in terms of settlement agreement entered between the SACC and the K-Line. With respect to the WWL and the NYK, as they had already admitted to colluding on the tender and paid R 95,695,529, R 103,977,927 in 2015 an

administrative penalty respectively. Therefore, they were not fined.

MOL also was not fined, as it was first to approach the SACC and cooperated. (*Press Release, 10.10.2018*)

**EU to carry in-depth investigation, suspecting possible collusion between BMW, Daimler and the VW Group:** European Commission ('EU') has opened an in depth investigation to check if there has been any sort of collusion among the car manufactures namely BMW, Daimler and the VW group for achieving a common goal, i.e. to restrict the development and roll out of an active emissions control technology system. This system is known as Selective Catalytic Reduction ('SCR'), which reduces harmful NO<sub>2</sub> emissions from petrol and diesel engines fitted in cars. The installation of this SCR system would cause less harm to the environment from the engine emissions. The EU is focusing on a particular lead which indicates that BMW, Daimler, Volkswagen, Audi and Porsche had a meeting where they discussed development and deployment of this new technology. As of now, the EU has nothing concrete to corroborate their suspicion. Thus, an in-depth investigation has been initiated. The aim of this in-depth investigation is to see violation of EU antitrust rules which prohibits any agreement to limit or control technical development. (*Press Release 18.09.2018*)

## Russian Federal Antimonopoly Service goes after road construction and repair cartels

In line with the National Competition Development Plan, approved by the President of Russian Federation, to decartelize the group of companies operating in road construction works, the Federal Antimonopoly Service of the Russian Federation ('FAS'), has gone after the road construction companies, where they suspected elements of anticompetitive agreements.

The FAS, suspected a bid rigging cartel formed by Chance Ltd, Kubanskoye Ltd, Karachaevskoye Ltd, Yugelectromontazh Ltd, Agrostroi Ltd, and Invest Ltd, and therefore, opened a case on 21<sup>st</sup> September, 2018, against abovementioned companies upon signs of violation of antimonopoly law. The FAS scrutinized 15 tender procedures amounting to 3.9 Billion RUB (INR 416 Crore approx.) and found therein the elements of anticompetitive agreements. On 1<sup>st</sup> October 2018, the FAS, revealed that the abovenamed companies formed a cartel and rigged the bids for road construction in Karachaevo-Cherkessia. (*Press Release 1.10.2018*)

Later, on 8<sup>th</sup> October, 2018, the FAS exposed another bid rigging cartel. The cartel was formed by M/s Samaratransstroi Ltd, Ulyanovsktransstroi Ltd, S.I.T.I for road repair work in the city of Samara and Ulyanovsk, the work contract amounted to 4 billion RUB (INR 426 Crore approx.). The FAS found companies guilty of entering into two anticompetitive agreements to maintain auction prices. (*Press Release 8.10.2018*)

The efforts of office of the FAS did not stop there as, after 3 days, i.e. on 11<sup>th</sup> October, 2018, OMSK FAS opened two more cases, suspecting violation of clauses of Federal Law on protection of competition'. In first case, the FAS suspected that the StroiTrust Ltd, Lev+ Ltd and Antares Ltd, were involved in bid rigging for the tender for repair of 22 Km segment of Omsk- Muromtsevo- Sedelnikovo highway. In second case, the FAS, suspected the companies viz. 'Transstroi', 'stroiTorg', and 'Allaince', have rigged the bids for reconstruction of the road approaching Kipo-Kulary village. In both the above cases, there were signs of submission of identical bidding behaviour by the bidders. (*Press Release 11.10.2018*)

The formation of cartels in road construction work is not new in the competition world as the same could be found in **Case No COMP/F/38.456 — Bitumen (NL)**, popularly known as Netherland Bitumen Cartel case which was exposed by the European Commission on 13.09.2006. In this case, a cartel was formed between the Shell, Total, Kuwait Petroleum BP, and 2 others, who were the Bitumen supplier and Ballast Nedam, Dura Vermeer, HBG, and 3 others, who were the bitumen purchasers, and largest road construction companies. The Commission imposed a fine of a total of €266.717 million for fixing price of road bitumen in the territory of Netherlands, on a total of 14 companies.

### The Competition Commission of India revises the combination regulations

The Competition Commission of India ('Commission'), in an attempt to smoothen the regulatory process of approving the mergers and acquisitions transactions, has revised the combination regulations. The changes aim at providing certainty & transparency plus expediting the disposal of combination cases before the Commission. Now the changes allow the parties to combination, to submit remedies voluntarily in response to the show cause notice issued under Section 29(1) of the Competition Act, 2002. Another major change, introduced by the amendment, is that when the notice filed with the Commission has some information gap, the parties to combination are granted a liberty to re-file the information. This will allow parties to make good the deficiencies with no extra fee to be charged on re-filing, if the same is re-filed, within a period of 3 months. (*Press Release 09.10.2018*)

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