

Competition News Bulletin

September, 2015



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I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India(CCI) closes case against disc brake suppliers to Indian Railways on allegation of bid-rigging



CCI by its order dated September 8, 2015 dismissed allegations of bid-rigging against manufacturers of axle mounted disc brake system (AMDBS) used in coaches and power cars of the Indian Railways. The allegations were made by Rail Coach Factory, Kapurthala against Faiveley Transport India Limited and Knorr Bremse India Pvt. Ltd. It was alleged that the Faiveley and Knorr Bremse are only two firms competent to supply the AMDBS brakes to Indian Railways. The two firms had submitted identical bids against tenders for procurement by the Informant. The tenders were equally divided between the two firms as their rates were identical.

CCI noted that despite the fact that identical prices were being quoted on three separate tenders in quick succession the Tender Committee of the Informant did not raise any objections, but instead placed the tenders on the two firms.

CCI did note that the policy of Indian Railways did not incentivize competition between the suppliers. Further, the bids are subject to approval by the Tender Committee. The bidders have to many a time refund the money already received as the price for supplies made, if the Tender Committee decides that the prices are lesser than the quoted price. Further, as a rule, the supply is divided between two firms and hence there is very little incentive to compete since the entire quantity cannot be placed on a single firm.

CCI noted that the Railways exercises an option of increasing supply orders by 30% on any awarded tender. Such a condition is onerous and results in bidders quoting rates to cover prospective losses. The Tender Committee never recorded any adverse remark or suspicion on identical bids by the two firms, but in fact found the rates reasonable.

Sometime the tender conditions in railway tender are onerous in so far as they incorporate unfair conditions in the tender regarding experience of the bidders. CCI also noted that the present case was filed by the Railways as a retaliatory action against the two firms since they refused to submit the cost-breakup as sought by the Railways. Cost details are commercially sensitive and supplying the same to the Railways could harm the business interests of the two firms.

CCI concluded that the evidence available to substantiate the allegations of bid-rigging is insufficient to find a violation under the Act. Although, CCI did recommend that the procurement policies of Railways may be fine-tuned further to bring them in harmony with competition law.

(Source: CCI: Order dated September 8, 2015. For full text see CCI website: www.cci.gov.in)

Comment: This is rather an unusual order in as much as in spite of quotation of similar rates in three successive emergency purchase tenders for disc brakes by the two firms, the only approved suppliers, CCI has exonerated on the basis of faulty anti-cartel enforcement in the Railways i.e. on policy considerations. CCI also accepted the defiance of the parties against non-disclosure of cost breakup in the post tender scrutiny. The order is likely to be debated as one of the parties i.e. Faiveley Transport, was penalized with a penalty of ₹ 5.70 Crores in a similar allegation of matching of rates with two other bidders in just one regular tender for supply of spare parts (feed valves) to the Diesel Loco Modernization Works, of Indian Railways. Further due to a legal lacunae, no appeal can be filed against this order by the Railways.

CCI penalises Kerala Film Exhibitors Federation



CCI by its order dated September 8, 2015 has found Kerala Film Exhibitors Federation (KFEF) violating section 3(3) (b) of the Competition Act, 2002 (Act). CCI found that the trade association, engaged in the business of exhibition of film in Kerala- had not allowed release of Tamil and Malayalam movies to the theatre of Informant, as the Informant has not participated in a strike called by KFEF and resigned from the membership of KFEF. Those distributors who did not comply with the instructions of KFEF were also boycotted and were not allowed to distribute their movies in Kerala. CCI held that the activities of the KFEF amounted to limiting and controlling supply of Malayalam and Tamil films in the State of Kerala, in contravention of section 3(1) read with 3(3)(b) of the Act. CCI imposed a penalty of 10% of the average turnover/ income of the preceding three years on KFEF and its office bearers responsible for its conduct.

(Source: Order dated September 8, 2015. For full text see CCI website: www.cci.gov.in)

INTERNATIONAL

United Kingdom: Competition and Markets Authority (CMA) imposes fines on medical professional' trade association for anti-competitive conduct



UK's competition regulator CMA has imposed a fine of £382,500 on Consultant Eye Surgeons Partnership (CESP) Ltd. for a number of competition law infringements September, 2008 to May, 2015. Such infringements included recommending its members refusal to accept lower fees offered by an insurer, and that they charge insured patients higher self-pay fees, circulation of price-list for ophthalmic procedures, facilitating collusion and price-sharing.

It should be noted that the initial fine imposed was £500,000. A discount of 10% was applied for adoption of a comprehensive compliance programme by CESP and another 15% for co-operation and settlement agreed to by the CESP.

(Source: CMA: Press Release dated August 05, 2015. Available at: <https://www.gov.uk/government/news/cma-confirms-fine-as-it-completes-eye-surgeons-investigation>)

II. ABUSE OF DOMINANCE/MARKET POWER

INDIA

CCI dismisses allegation of abuse of dominance against various States' Department of Information and Public Relations



CCI by its order dated August 5, 2015 dismissed allegations against Departments of Information and Public Relations of various State Governments. It was alleged that the concerned Govt. Departments had withheld publication of Govt. advertisements and communication from those newspapers and publishing houses which have published articles critical of policies and practices of the government in power in the respective state. The suspension of publication of advertisement by the Departments does not make business sense as the publishers have extensive reach and had offered competitive rates. CCI noted that in the market for procurement of advertising space in print media in respective States, the Govt. Depts. are not dominant enterprises as they do not feature in the top six spenders on advertising. Govt. Depts. contribute only INR 24bn out of INR 163bn of print media advertisement revenues. Hence, the question of abuse of dominance does not arise.

(Source: CCI: Order dated August05, 2015. For full text see CCI website)

CCI dismisses case against agent of global academic journal publishers in India



CCI by its order dated August 25, 2015 has dismissed a case against Global Information Systems Technology Pvt. Ltd. (GIST) for alleged abuse of dominance. It was alleged that the All India Council for Technical Education (AICTE), apex body constituted for regulating technical education in India has subscribed mandatory subscription of journals by technical educational institutions which were available with GIST only. As such, it was alleged that GIST enjoy a dominant position and is abusing the same by pricing the journals exorbitantly. CCI noted that the subscription of the academic journals can be done either directly from the publishers or through their agents like GIST. However, it could not be established if the AICTE has

granted exclusivity to GIST. In fact, the data in public domain reveals that there are other publishers in the market from whom such subscription can be done. Hence, GIST does not appear to be dominant in the relevant market and, consequently, the question of abuse of dominance does not arise.

(Source: CCI: Order dated August 25, 2015. For full text see CCI website)

CCI dismissed case against sanitary ware-maker Jaquar



CCI by its order dated August 20, 2015 dismissed case against Jaquar & Co. Pvt. Ltd. for alleged abuse of its dominant position and entering into anti-competitive agreements with its dealers in Jaipur. The Informant alleged that since he refused to pay illegal gratification to Jaquar's representative in Rajasthan for appointment as Jaquar's dealer in Jaipur, the Informant was not appointed Jaquar's dealer in Jaipur. It was also alleged that the representative of Jaquar also instructed other dealer in Jaipur not to supply goods to the Informant.

CCI noted that in the market of supply of branded sanitaryware and bathroom fittings in India, there were large number of players such as Jaquar, HSIL, Cera, Roca, etc. and consumer has a wide variety of choices. Jaquar neither has a position of strength, which gives it the power to operate independently of the market forces not has the ability to affect its competitors/consumers in the relevant market. Thus, Jaquar does not enjoy a dominant position in the relevant market and its conduct need not be examined under Section 4 of the Act. CCI closed the case under Section 3 (anti-competitive agreement) also as the Informant did not supply requisite material to support the allegations.

(Source: CCI Order dated August 20, 2015. For full text see CCI website)

INTERNATIONAL

Latvia: Appellate Court confirms fines imposed on national gas supplier



The Latvian Administrative Regional Court by its decision dated September 2, 2015 confirmed the Competition Council's (CC) decision to impose fines and remedies on the only natural gas supplier in Latvia for abusing its dominant position.

CC had found that the supplier had abused its dominant position by refusing to conclude natural gas vendor contracts with new clients before debts accumulated by previous clients were paid. During the investigation, CC received complaints for such infringement from consumers and enterprises on more than 500 occasions. Without recovering debts from consumers, who have caused the debt, the supplier shifted to new consumers not only the debt

itself, but also the costs of debt recovery. Further, the Court pointed out that despite the fact that the supplier operates in a regulated industry, CC had jurisdiction to examine the operation of the gas supplier in accordance with the Competition Law.

(Source: KonkurencesPadome: Press Release dated September 8, 2015)

Australia: Visa to pay A\$ 20mn for abusing its dominance in currency conversion services



The Australian Federal Court by its decision dated September 4, 2015 found that Visa abused its dominant position by preventing the expansion of currency conversion services suppliers in Australia by rival suppliers of Visa. The competition agency alleged that Visa earned less revenue when a cardholder selected the “dynamic currency conversion (DCC) services” option than when the cardholder used Visa’s own currency system. Visa implemented a system that prohibited the expansion of the supply of DCC services on point-of-sale transactions on the Visa network by its rivals DCC suppliers. The Court found that the conduct of Visa effectively froze the pool of merchants that could offer DCC during the period of the prohibition, which in turn prevented the further expansion of DCC during that period.

(Source: <http://www.smartcompany.com.au/legal/48294-visa-slapped-with-18-million-penalty-for-anti-competitive-conduct-in-clarion-call-to-multinationals.html>)

III. COMBINATION

Competition Appellate Tribunal sets aside penalty imposed on Thomas Cook & others for non-notification of an otherwise exempted transaction



In its first decision on substantive aspects of merger control, the Competition Appellate Tribunal (COMPAT) by its order dated August 26, 2015 has set aside the penalty of INR 1 Crore imposed on Thomas Cook (India) Limited & others.

In its scheme of acquisition and amalgamation as it is notified to the CCI, the CCI noticed that certain market purchases which were disclosed in the notice filed by the parties had already been consummated. The parties submitted that the market purchases were an unrelated transaction from the proposed combination and were exempted from notification by the CCI vide the de-minimis exemption granted by the Central Government.

The De Minimis Exemption exempts an enterprise, whose control, shares, voting rights or assets are being acquired, which has either assets of the value of not more than INR 250 Crore in India or turnover of not

more than INR 750 Crores in India, from the provision of Section 5 of the Act. Accordingly, such transaction do not qualify as combination within the meaning of Section 5 of the Act and hence not require notification to the CCI before consummation. The notifying parties submitted that since the turnover of the target enterprise, Sterling Holiday Resorts (India) Limited, in the financial year ended March 31, 2013 in INR 116.67 crores, the market purchase is exempt from the notification requirement.

CCI considered that even though transactions qualifying for de-minimis exemption are not required to be notified to the CCI, the market purchases in the present case were part of a 'composite combination' (along with other transactions in the proposed combination) and hence could not be consummated before approval by the CCI. CCI imposed a penalty by observing that the scheme of combination and market-purchases are interconnected and interdependent and the parties were under an obligation to file separate application in respect of market purchases, which they failed to do.

Although the resolutions authorizing the market purchases were passed by the Board of Directors of Thomas Cook on the same day, the same is not sufficient to deny the benefit of the exemption to the parties in so far as the market purchases were concerned.

COMPAT noted that transactions in a series, or transactions which are inter-related and inter-dependent, shall be considered as a composite whole, if the ultimate objective can be achieved on successful completion of all such transaction in a series of transactions which are inter-related or interdependent. The market purchases are separate from the proposed combination is so far as the notified transaction would still have taken place irrespective of the market purchase. The violation, even if one is assumed, would only be technical. Even if the parties had filed a notification for the market purchases the same would, in all probability, have been approved by the CCI.

COMPAT concluded that the penalty imposed under Section 43A by CCI is legally unsustainable and liable to be set-aside.

(Source: COMPAT: Order dated August 26, 2015. For full text see COMPAT website)

CCI approves the acquisition of transmission and telecommunication tower business by Agarwal Steel Structures (India) Limited



CCI by its order dated August 19, 2015 approved the proposed combination relating to acquisition of transmission and telecommunication tower business of Sujana Towers Limited by Agarwal Steel Structures (India) Limited on a slump sale basis.

Agarwal Steel is engaged in the tower business. Sujana Towers is engaged in tower business as well as manufacturing and trading of iron and steel products and steel re-rolling which can serve as a raw material for towers, tower parts and substation structures.

The CCI noted that the post-combination market share of the acquirer in the tower business in India is not significant. Further, there are a number of players in the tower business in India including BS Ltd., Adhunik Alloys, etc.

(Source: CCI: Order dated August 19, 2015. For full text see CCI website)

INTERNATIONAL

EUROPEAN UNION (EU): European Commission grants conditional approval to acquisition of Hospira, Inc. by Pfizer



The European Commission (EC) by its order dated August 04 2015 has approved the acquisition of Hospira, a US-based competitor of pharmaceutical major Pfizer. Pfizer agreed to a number of divestments to eliminate competition concerns for the approval of the merger.

Hospira has horizontal overlap with Pfizer for the manufacture of biosimilar including Infiximab- used in treatment of rheumatoid arthritis and Chron's disease, which is one of top-three selling pharmaceuticals in the world. Currently, Hospira is one of two companies with the right to co-market an infiximab biosimilar in the European Economic Area, and Pfizer is one of two companies that have infiximab biosimilars in advanced stages of development.

The competition arose in so far as the EC considered that post-transaction Pfizer would discontinue the development of its own infiximab biosimilar or stop marketing Hospira's infiximab biosimilar in Europe.

Pfizer agreed to divest the development, manufacturing and marketing rights in Europe associated with its own infiximab biosimilar currently under development.

The post-transaction market share of Pfizer would be extremely high as well as limited number of competitors in certain countries for sterile injectibles used as chemotherapy drugs for cancer patients. Pfizer agreed to divest the marketing authorisations and associated rights of Pfizer or Hospira in relation to such molecules.

It may be noted that the said combination was already approved by Competition Commission of India through its order dated June 11, 2015.

(Source: European Commission: Press Release dated August 4, 2015)

IV. MISCELLANEOUS NEWS

INDIA

CCI not to enforce the INR 420 Crore fine against Hyundai



As reported in the August, 2015 edition of our Competition News Bulletin, the CCI passed a final order dated July 17, 2015 against Hyundai Motor India Limited (HMIL) for abusing its dominant position in supply of its spare parts and maintenance services.

HMIL had appealed an earlier decision of the Madras High Court which had held that the CCI had jurisdiction to expand the scope of the case against car manufacturers to include Hyundai. Through its order dated April 13, 2015, the Court had directed CCI to continue the inquiry but not to issue the final decision.

However, upon the final decision being given by the CCI imposing the penalty, HMIL filed a contempt petition in the High Court against CCI. As reported, CCI has given an undertaking in the High Court that the final order was passed as a result of a penalty gap and would not be enforced

(Source: The Hindu Business Line. Available at: <http://www.thehindubusinessline.com/companies/cci-passed-hyundai-order-unaware-of-court-ruling/article7526982.ece>)

INTERNATIONAL

France: Constitutional Council blocks entry into force of new provisions increasing French Competition Authority's powers



French Constitutional Council by its decision of August 05, 2015 upheld most of the provisions of the law on growth, economic activity and equality of economic opportunities (the so called "Macron law") adopted by the French Parliament on 10 July 2015. However, two significant provisions introducing changes to the French competition law regime were found to be unconstitutional.

First, the new procedure on structural injunctions in the retail sector was found to be in breach of both the right of property and the freedom to pursue commercial activities. Under this procedure, the French Competition Authority (FCA) was given the power to impose structural measures on an undertaking (or a group of undertakings) which operates one or several retail businesses and holds a dominant position if the FCA finds that this situation leads to

excessive market concentration. According to the Constitutional Council, this new power granted to the FCA was not proportionate to the objectives of consumer protection and the safeguard of economic public order.

Second, the provision meant to increase the FCA agents' powers by granting them access to any data processed and stored by telecommunication operators, including telephone bills, was found in breach of the French Constitution. In particular, the Constitutional Council ruled that the provision did not include sufficient guarantees to protect the right to privacy.

(Source: France Constitutional Council Decision No 2015 715 DC. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-715-dc/decision-n-2015-715-dc-du-05-aout-2015.144229.html>)



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