

Competition News Bulletin

November 7, 2016



Inside...

- I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS
- II. ABUSE OF DOMINANT POSITION/MARKET POWER
- III. COMBINATIONS

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India (CCI) dismisses allegations of bid-rigging against in supply of PVC Vinyl flooring to railways



CCI by its order dated September 21, 2016 has dismissed allegation against manufacturers of PVC Vinyl flooring in relation to supply of “PVC Flooring (Vinyl) width 1620/mm minimum length 14 meters thickness 2/mm roll to RDSO specification no. RDSO/2006/CG-12 Rev. 1. Sample code NAC FLG-02 along with PVC welding electrode. The quantity of welding electrode to be three times the length of PVC sheet.’ (“the product”) ,to the North Western Railway, Jaipur in violation of Section 3(3)(d) of the Competition Act, 2002 (Act).

The reference was filed by the Chief Materials Manager-I, North Western Railway, Jaipur (Informant) against M/s Responsive Industries Ltd., M/s RMG Polyvinyl India Ltd., M/s Premier Polyfilms Ltd. Alleging bid-rigging in the supply of the product in tenders by North Western Railway (NWR) and other Railway Zones. It was stated that all three RDSO approved firms had been quoting less than Rs 300 per sq. m in the tenders floated by NWR and other railway zones before and in the calendar year 2013. However, from June 2014 onwards the rates were increased by all three firms substantially.

In the investigation report, the DG noted that the OPs are the only three RDSO approved vendors for the supply of PVC flooring (CG-12) for use in AC and non-AC coaches of Indian Railways. The Product is essentially the same for both AC and Non-AC coaches, with only difference being the colour.

From the cost-break-up and the statements of the OPs, the DG found that the pricing of the Product to the Indian Railways was not based on costing and expected profit margins. The Product was being supplied to the Railways by the OP at a loss. DG during the investigation compared the bid price quoted across various railway zones in the corresponding period and found that during the same period, the OPs had quoted in similar price range in other railway zones (other than NWR) and tender bids were in similar price band across all zones.

From the statement of the Informant and based on the data of various zonal railways, the DG found that the Informant had chosen only selected tenders for comparing the rates quoted by the OPs in the tenders in question. Further, the DG found that the justification given by the OPs regarding quantity, number of rolls, size of rolls, distance, etc., was reasonable in view of business dynamics. Taking into account various factors during the course of investigation, DG concluded that during the course of the investigation, no evidence was found which could substantiate the allegation of anti-competitive conduct of the OPs in violation of Section 3(3)(a) or Section 3(3) (d) of the Act.

The CCI noted that the Responsive Industries Ltd. has not denied that it has been quoting below cost. Rather it has stated that it has been quoting low cost to maintain the prestigious RDSO certification. Thus, any loss incurred in supply to Indian Railways is recouped by it from the orders executed for other parties.

The CCI noted that in the market for supply of the Product, Responsive is found to be a dominant player which is continuously quoting prices below cost, a fact which has apparently deterred other two players in the market, i.e., OP-2 and OP-3 from competing in the market. Such market dynamics may be indicative of abuse of dominance by Responsive way of predatory pricing. However, this was neither the allegation of the Informant nor an issue that was referred to the DG for investigation. The CCI agreed with the finding of the DG that only select tenders had been chosen by the Informant for assessing the rates quoted by the OPs. Further, the Informant also did not take into consideration the costing of the Product. While there is no direct evidence to show meeting of minds, there is also no circumstantial evidence that indicates collusion amongst the three OPs. The CCI concluded that the allegation of violation of Section 3(3)(d) of the Act could not be proved.

(Source: CCI Order dated September 21, 2016. For full text see COMPAT website)

INTERNATIONAL

EU: Commission sends Statement of Objections to Brussels Airlines and TAP Portugal on code-sharing on Brussels-Lisbon route



The European Commission has informed Brussels Airlines and TAP Portugal of its preliminary view that their codeshare cooperation on passenger services between Brussels and Lisbon restricted competition between the two airlines, in breach of EU antitrust rules. The Statement of Objections sent by the Commission concerns a codeshare agreement signed between Brussels Airlines and TAP Portugal in 2009. The Commission's objections relate to the first three years of the agreement.

Under this codeshare agreement, the two airlines granted each other the right to sell an unlimited number of seats of almost all categories (Business, Economy) on each other's flights on the Brussels-Lisbon route. Prior to the agreement, Brussels Airlines and TAP Portugal had operated competing services on the route and were in fact the only two airlines flying this route. The Commission has concerns that the two airlines pursued an anti-competitive strategy on the Brussels-Lisbon route by:

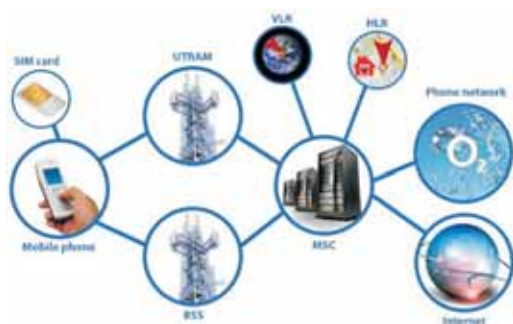
- discussing a capacity reduction (number of seats) and an alignment of their pricing policy on the route;

- granting each other unlimited rights to sell seats on each other's flights on the route (where they had previously competed), and
- Implementing these arrangements by actually reducing capacity, completely aligning their fare structures as well as their ticket prices on the route.

The Commission takes the preliminary view that this combination of practices breaches EU rules that prohibit anti-competitive agreements (Article 101 of the Treaty on the Functioning of the EU). The Commission's preliminary conclusion is that these practices eliminated competition on prices and capacity between the two airlines on the Brussels-Lisbon route and led to higher prices and less choice for consumers.

Source: (EU Press Release dated 27.10.2016/http://europa.eu/rapid/press-release_IP-16-3563_en.htm)

EU: Commission opens formal investigation into mobile telephone network sharing in Czech Republic



The European Commission has opened an investigation into a network sharing agreement between two Czech operators of mobile telephony, O2 CZ / CETIN and T-Mobile CZ. The Commission will examine whether the cooperation restricts competition, thereby, harms innovation in breach of EU antitrust rules. O2 CZ and T-Mobile CZ are both major telecoms operators in the Czech Republic. Together, they serve approximately three

quarters of the Czech retail mobile telecommunications market. O2 CZ's mobile infrastructure and wholesale business has been transferred to CETIN, a new network infrastructure company belonging to the same corporate group. The network sharing cooperation between O2 CZ/CETIN and T-Mobile CZ started in 2011 and has been increasing in scope. Currently, it covers all mobile technologies (i.e. 2G, 3G and 4G) and the entire territory of the Czech Republic with the exception of Prague and Brno (thus covering the other cities and all rural areas, amounting to around 85% of the population). The Commission will now investigate in particular whether the cooperation between O2 CZ/CETIN and T-Mobile CZ risks slowing down quality improvements in existing infrastructure, and delaying or hindering the deployment of new technologies, such as 4G/LTE and future technologies, and new services based on them, in particular in densely populated areas. If this were the case, the cooperation would be contrary to EU Treaty rules that prohibit anticompetitive business practices (Article 101 of the Treaty on the Functioning of the EU) to the extent that it concerns behaviors that restrict competition. The Commission will also investigate the impact of potential efficiencies that could be brought about by the network sharing.

(EU Press Release dated October 25, 2016/http://europa.eu/rapid/press-release_IP-16-3539_en.htm)

Finnish Competition and Consumer Authority closes its investigation into SOK's loyal customer card scheme



The Finnish Competition and Consumer Authority ("FCCA") has closed its investigation into the Finnish retailing cooperative organization, Suomen Osuuskauppojen Keskuskunta ("SOK") concerning SOK's loyal customer card scheme. According to the FCCA, there are no grounds to continue the investigation. The FCCA started the investigation in 2014 under Section 4a which concerns dominant positions in the daily consumer goods trade, according to which an undertaking or an association of undertakings with a minimum of 30 percent market share is deemed to be in a dominant position.

SOK's market share in the Finnish daily consumer goods retail trade exceeds 30 percent. Since 1994 SOK has used a national discount system ("S-Group bonus system") linked to the usage of its loyal customer cards. According to this system, customers receive bonuses if they centralize their purchases within companies belonging to the S-Group. Based on the overall assessment of the market and SOK's discount system, the FCCA found that the S-Group bonus system does not limit competition in the relevant market. Accordingly, the FCCA closed the investigation.

(Source: Finnish Competition and Consumer Authority Press Release dated October 11, 2016)

II. ABUSE OF DOMINANCE/MARKET POWER

INDIA

Competition Appellate Tribunal (COMPAT) set-aside CCI decision exonerating Jaypee Group for abuse of dominance and remands the matter back for re-consideration



COMPAT by its order dated September 28, 2016 has set-aside the order of CCI in which the CCI exonerated Jaypee Group from allegations abuse of dominance in relation to provision of services of development and sale of high-end residential apartments in Greater Noida.

In the multiple Informations filed by Sunil Bansal and others, it was alleged that Jaypee Group abused its dominant position and made false promises about amenities to be made available to the purchaser of apartments and thereby abuse their dominant position in the relevant market. The CCI, after considering the main investigation report and supplementary investigation report, disagreed with the DG and the Informant and held that Jaypee Group was not dominant in the relevant market and hence no abuse of dominant position was possible.

The CCI order was covered in detail in our Competition News Bulletin dated November 9, 2015 and can be read at <http://competitionlawyer.in/wp-content/uploads/2015/10/CLB-November.pdf>

It is pertinent to note that in the Main DG Report, the DG found that the Jaypee Group was not in a dominant position with respect to “the provisions of services for development and sale of residential apartments in NOIDA and Greater NOIDA”. However, in the subsequent supplementary DG Report, it was opined that there exists an integrated township within the broad category of real estate market. In the narrower market of integrated township, the DG found Jaypee Group dominant. Further, the DG Report found Jaypee violating Section 4(2) (a) (i) of the Act on account of imposing exploitative and unfair conditions on customers.

However, the CCI disagreed with the DG Report on the issue of the relevant market and concluded that the “integrated townships” do not constitute a separate product. Eventually, the CCI concluded that Jaypee Group does not enjoy a position of dominance in the market for provision of services for the development and sale of residential apartments in Noida and Greater Noida in accordance with the provisions of section 4 of the Act. Hence the question of examining the alleged abusive conduct does not arise.

The Appellant argued that the impugned order is liable to be set aside because the CCI did not give effective opportunity of hearing to the Appellants. If the CCI had recorded reasons for disagreement with the findings and conclusions recoded by the DG in the supplementary report and communicated the same to the appellants then they would have availed the opportunity of filing objections and demonstrated that the findings in DG Report were legally correct and justified.

The COMPAT agreed the contention of the Appellant, holding that the impugned order passed by the majority of the CCI is legally unsustainable and is liable to be set aside because till the passing of the final order, the CCI did not record its disagreement with the findings and conclusions recorded by the DG that Respondent No. 1 was dominant in the relevant market of integrated township and it had abused that position, which resulted in violation of Section 4 of the Act. The matter has been remanded back to the CCI with a direction to pass a fresh order as early as possible but within a maximum period of six months.

(Source: COMPAT Order dated September 28, 2016. For full text see COMPAT website)

CCI initiates investigation against Gas Authority of India Limited (GAIL) for alleged abuse of dominance



CCI by its order dated October 3, 2016 has directed investigation against GAIL for alleged abuse of dominant position in relation to gas supply agreements (GSAs) with its customers.

The Information was filed by multiple customers of GAIL who are engaged in auto components manufacturing. Under Art. 14 of the GSA, the buyer is obliged to pay for the quantities of gas not taken but

agreed to be taken. It has been alleged that the buyer is required to pay even for the quantities of gas which the Seller was unable to supply due to force majeure. On the other hand, though the Seller is liable to pay liquidated damages if it is unable to deliver the agreed quantity of gas; however, such liability arises only in cases where the Informants procure 'alternate gas'. It has been averred that the term 'alternate gas' has been very narrowly defined and does not encompass all forms of alternate fuel.

The CCI found that GAIL has imposed take or pay liability and encashed letter of credit furnished by the complainants always. Such acts, coupled with acts such as suspension of gas supplies without any notice, denial of dispute resolution when the buyer contests the legality of take or pay liability, arbitrarily advancing due-dates, etc. is prima-facie exploitative. Such conduct of GAIL prima-facie amounts to abuse of dominance under Section 4(2) (a) (i) and Section 4(2) (b)(i) of the Act.

(Source: Order dated October 03, 2016. For full text see CCI website-www.cci.gov.in)

III. COMBINATION

CCI approves acquisition of sole interest Emerson Network Power Business (ENP) by Platinum Equity Group



CCI by its order dated October 5, 2016 has approved the aforementioned combination. The proposed combination relates to acquisition by Platinum Equity Group (Platinum) of 85% equity interest and sole control of Emerson Network Power Business from Emerson Electric Co. (Emerson). Cortes NP Acquisition Corporation (CNAC) and ASCO Power GP, LLC (ASCO) are special purpose vehicles set up by Platinum to facilitate the proposed combination.

Platinum, an American private equity group headquartered in Los Angeles, California, specializes in the merger, acquisition and operation of companies that provide services and solutions to customers in a broad range of businesses, including information technology, telecommunications, logistics, metal services, manufacturing and distribution.

Emerson is incorporated in the United States and listed on New York Stock Exchange. It is stated to be inter-alia engaged in business of providing automation solutions and commercial and residential solutions to various industries.

The business proposed to be acquired is related to power management products, thermal management products, and infrastructure management and solutions. None of Platinum's portfolio companies having presence in India are active in the markets serviced by the Target Business. As regards any vertical relationship between the Acquirers and the target business, it has CCI noted that Platinum also does not control any company that has or uses products made for the specialized applications that ENP

Business address. Thus, there are no horizontal overlaps or vertical relationships between Platinum and target business. Thus, the CCI was of the opinion that the proposed combination does not cause appreciable adverse effect on competition (AAEC) in India. The proposed combination has been approved under Section 31 of the Act.

(Source: Order dated October 05, 2016. For full text see CCI website-www.cci.gov.in)

INTERNATIONAL

EU: Commission approves acquisition of lasers supplier Rofin-Sinar by Coherent, subject to conditions



The European Commission has cleared under the EU Merger Regulation the proposed acquisition of US and German-based Rofin-Sinar by Coherent of the US. Both are global suppliers of lasers. The approval is conditional on the divestment of Rofin-Sinar's Hull (UK) business producing low power CO2 lasers. Rofin-Sinar and Coherent are both global suppliers of lasers with broad product portfolios and global sales

and service capabilities. The Commission had concerns that the proposed transaction, as initially notified, would lead to high combined market shares in low power CO2 lasers. The Commission's preliminary investigation showed that the proposed transaction would combine the two largest suppliers of low power CO2 lasers. With a market share above 50% in this sector, the combined Rofin-Sinar and Coherent would have been the clear market leader. The investigation regarding low power CO2 lasers showed that:

- Rofin-Sinar and Coherent had been competing closely before the transaction;
- the remaining considerably smaller alternative suppliers, including Asian manufacturers, would have been unable to maintain sufficient competition to avoid price increases and reduced product choice;
- other laser and non-laser technologies were not exercising sufficient competitive constraint on this market.

Moreover, numerous customers raised concerns about the risk of potential price increases, reduction of choice and deterioration of service in low power CO2 lasers following the transaction. No competition concerns were identified in any of the other markets where the activities of Rofin-Sinar and Coherent overlap due to the presence of strong alternative suppliers. To address the Commission's competition concerns, Coherent offered to sell Rofin-Sinar's Hull (UK) business manufacturing low power CO2 lasers. The divestment entirely removes the overlap between the activities of the two companies in low power CO2 lasers at the global level. It fully addresses the identified competition concerns. Therefore, the Commission concluded that the transaction, as modified by the commitments, would raise no competition concerns. The Commission's approval is conditional upon full compliance with the commitments.

(Source: EU Press Release dated October 26, 2016/http://europa.eu/rapid/press-release_IP-16-3548_en.htm)

EU: Commission approves acquisition of Faiveley by Wabtec, subject to conditions



After an in-depth investigation under the EU Merger Regulation, the European Commission has cleared the proposed acquisition of Faiveley Transport of France by US-based Wabtec. The approval is subject to the implementation of commitments. Both companies are significant suppliers of train equipment. The Commission had concerns that, by eliminating one of only three strong suppliers of sintered friction materials for train brakes, the transaction as initially notified would have led to reduced competition and price increases for these

products. To address this concern, the parties will sell Faiveley's friction materials business Faiveley Transport Gennevilliers. Sintered train friction materials are materials transformed from powder into a strong substance capable of withstanding high temperatures and pressure. They are key components of many modern train brake systems. As they are subject to constant wear and tear when the brakes are applied, train operators need to replace them regularly. The Commission had concerns that the transaction, as initially notified, would have reduced competition in the aftermarket for sintered train friction brake materials, where train operators purchase them for their existing train fleets. This is because the merger would eliminate one of only three strong suppliers in this market. The presence of a single remaining competitor would have been insufficient to maintain adequate competition. The Commission initially had additional concerns, relating to a number of other types of train equipment, including friction brake systems and pantographs. However, following its in-depth investigation, the Commission concluded that those concerns were not substantiated. To address the Commission's competition concerns, the parties offered to sell in its entirety Faiveley Transport's sintered friction material business, Faiveley Transport Gennevilliers. The company specialises in the development and production of sintered friction materials for various purposes, including train brakes. The divestment will remove all overlap between Faiveley and Wabtec in sintered train friction brake materials. The Commission's decision to approve the transaction is conditional upon full compliance with the commitments.

(Source: EU Press Release dated October 4, 2016/http://europa.eu/rapid/press-release_IP-16-3305_en.htm)

EU: Finnish Competition and Consumer Authority abolishes commitments concerning Tuko Logistics Cooperative in merger between RuokakeskoOy and LähikauppaOy



The Finnish Competition and Consumer Authority ("FCCA") has decided to abolish the commitments relating to Tuko Logistics Cooperative ("Tuko Logistics"), which were part of the conditional approval decision of the merger between Ruokakesko ("Ruokakesko") Oy and SuomenLähikauppaOy

("SuomenLähikauppa"). On April 11, 2016, the FCCA conditionally approved Ruokakesko's acquisition of SuomenLähikauppa. During its investigation, the FCCA identified competition concerns in the Finnish daily consumer goods retail market. In order to address the FCCA's competition concerns, Ruokakesko offered a commitment package, including both structural and behavioral commitments. Firstly, Ruokakesko committed to divest a SuomenLähikauppa store in each of the 60 problematical markets to existing or potential competitors. Secondly, Ruokakesko committed to continue purchasing from Tuko Logistics for a fixed period of 18 months. Further, SuomenLähikauppa committed to complete its Tuko Logistics membership during the transitional period. In addition, the FCCA restricted the possibilities of SuomenLähikauppa and Ruokakesko to participate in decision making in TukoLogistics. The FCCA has concluded that Tuko Logistics and Ruokakesko have agreed on delivery and supply relations between SuomenLähikauppa and Tuko Logistics. According to the FCCA, the commitments relating to Tuko Logistics have therefore become unnecessary. Consequently, the FCCA has on application of Ruokakesko decided to abolish the commitments. The FCCA's decision does not affect Ruokakesko's commitment to divest a SuomenLähikauppa store in each of the 60 problematical markets.

(Source: Finnish Competition and Consumer Authority Press Release October 5, 2016)



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