**COMPETITION NEW ALERT**

**November 28, 2013 VAISH ASSOCIATES, ADVOCATES**

**COMPAT confirms the concept of ‘relevant turnover’ for calculation of penalties for cartelization by multi product companies**

Competition Appellate Tribunal (“**COMPAT**”) by way of its order dated October 29, 2013 (“**Order**”), rejected the appeals filed by three Aluminium Phosphide Tablets (“**ALP**”) manufacturers i.e. United Phosphorous Limited, Sandhya Organics Chemicals Private Limited and Excel Crop Care Limited (collectively referred as ‘the **Appellants**’), against the order of the CCI in *Suo-Moto Case no. 02/2011 (In Re: Aluminium Phosphide Tablets Manufacturers)*. The COMPAT, however, substantially reduced the fine imposed by CCI from Rs. 317.91 Crores to Rs. 10.01 Crores. In April 2012, CCI found the Appellants guilty of bid rigging and collusive tendering in the supply of ALP to Food Corporation of India (“**FCI**”) and imposed a combined penalty of Rs. 317.91 Crores.

The Order holds significance in many ways including the observations made by COMPAT in relation to retrospective operation of the Act in case of bid rigging, Jurisdiction and Power of Director General (“**DG**”), method of calculation of penalty and the interpretation of the term ‘appreciable adverse effect on competition (“**AAEC**”)’.Some of the key observations made by COMPAT are as under:

* **Retrospective Operation of the Act:** Appellants argued that the alleged tender was issued on May 08, 2009 (before the notification of Section 3 of the Act) and hence, CCI has no jurisdiction to look into the alleged tender. COMPAT, however, observed that the bidding process continued till June 17, 2009 and the term “process for bidding” used in the explanation in Section 3(3) of the Act would cover every stage from notice inviting tender till the award of the contract and would also include all the intermediate stages such as pre-bid clarification and bid notifications also. Even if the price offered by the parties stood rejected, that does not absolve the parties, if it is found that they were guilty of manipulating the process for bidding.
* **Jurisdiction and Power of DG:** Appellants argued that the DG has the power to investigate only on the basis of the order passed by the CCI under Section 26(1) of the Act (*prima facie* order) and DG cannot look into the conduct of the Appellants in other tenders issued by FCI. COMPAT observed that the language of the *prima facie* order would determine the scope of DG investigation and language of the *prima facie* order was broad enough to allow the DG to conduct comprehensive investigation including investigating other tenders floated by FCI.
* **Reasoned Penalties and Relevant Turnover:** Appellants argued that the CCI has not given any reason while inflicting harsh penalties and the penalty, if any, should only be on the ‘relevant turnover’ of the Appellants. COMPAT observed that the CCI should give reasons while inflicting the penalties, especially in case of harsh penalties. On the issue of ‘relevant turnover’ COMPAT after relying on the EU & OFT fining guidelines and the order of the Competition Appeal Court of South Africa in *Southern Pipeline Contractors & anr. v The Competition Commission* held that the EU & OFT guidelines cannot be treated as be all and end all in the matter and would have to be considered in the light of the facts of each case but in case of multi-product company, the ‘relevant turnover’ should be considered i.e. only the turnover relating to the ALP tablets and not the entire turnover of the Appellants. In relation to the concept of ‘relevant turnover’, COMPAT observed that:

*“While arriving at a conclusion about the relevant turn over it would be open to the authorities like CCI to rely on the general principles expressed in those guidelines regarding the method of calculation etc. it should be an endeavour of the authorities to apply those principles not mechanically or blindly but after carefully considering the factual aspects. Such factual aspects could include the financial health of the company, the necessity of the product, the likelihood of the company being closed down on account of unreasonable harsh penalty etc. At the same time the authorities would be well advised in considering the general reputation and the other mitigating factors like the first time breaches as also the attitude of the company. This list is certainly not exhaustive and the authority can and should consider all the relevant factors while considering the relevant turn over as also considering the extent of penalty on that basis. It should also be reiterated at this stage that there should be proportionality in the award of penalty, which principle has been enshrined in several judgments of the Apex Court. It cannot be forgotten that Supreme Court has time and again relied on the doctrine of proportionality while at the same time emphasizing on the aspect of deterrence. Generally the award of penalty should be in proportion to the wrong done. While considering the wrong done, of course the authority would be justified in taking into consideration all the aspects including mitigating and aggravating circumstances.”*

* **Appreciable adverse effect on competition (AAEC):** The term AAEC has to be interpreted with the aid of the words that it contains. The appreciable adverse effect should be on the aspect of ‘competition’ itself and not restricted to the ‘competitors’ or rates. It is trite that with the healthy and higher competition ultimate consumer would be benefitted.

The COMPAT after evaluating mitigating and aggravating factors held that, the penalty @ 9% imposed by CCI was reasonable, but should be on the ‘relevant turnover’ and ‘relevant turnover’ should include sale in domestic market and exports. The penalty on Excel Corp Limited was reduced from Rs. 63.90 Crores to Rs.2.91 Crores; and from Rs 252.44 Crores to Rs. 6.94 Crores in case of United Phosphorus Limited i.e. on the ‘relevant turnover’. In case of Sandhya Organics, the COMPAT took into account the size of the company and its production capacity. Given its relatively small size, the COMPAT reduced the penalty to 1/10th of the penalty imposed by the CCI.

*According to a Media Report[[1]](#footnote-2) CCI is contemplating an appeal against the order of the COMPAT before the Supreme Court of India*.

1. <http://articles.economictimes.indiatimes.com/2013-11-18/news/44202368_1_competition-appellate-tribunal-three-year-average-turnover-competition-act> [↑](#footnote-ref-2)