



COMPETITION LAW NEWSLETTER

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It was a busy October on the enforcement side with six significant enforcement orders by the Competition Commission of India (CCI) and a raid conducted on alcohol manufacturers. This newsletter brings you all the highlights.

CCI finds suppliers of axle bearings to Indian Railways guilty of bid rigging

The CCI *vide* [order dated 12.10.2021](#) found eight suppliers of axle bearings to Indian Railways guilty of bid rigging under Section 3(3)(b) of the Competition Act, 2002 (**Act**).

The case was initiated on receipt of a reference from Eastern Railway zone of Indian Railways against five Research Designs and Standards Organisation (RDSO) approved vendors (collectively **OPs**) engaged in the manufacturing and supply of axle bearings to Indian Railways. During a vigilance investigation conducted by the Railways, it was found that the OPs had quoted identical rates in response to three tenders floated between August 2012 to August 2014. Suspecting a case of cartelisation and bid rigging, a reference was made to the CCI.

The Director General (**DG**) noted that Indian Railways was the only buyer for axle bearings in India. Further, the Railway Board mandated the procurement of these items only from RDSO-approved vendors. On account of the approval process, there were limited sellers of the product, which resulted in high market concentration.

The DG then analysed the e-mails and call records of the OPs and found that they were in regular contact with one another and exchanged information pertaining to allocation of axle bearings amongst themselves in relation to tenders issued by the Railways. Further, records of tender quantities were diligently maintained, updated and shared amongst the OPs.

Two of the parties decided to break ranks and cooperate with the investigation, with one even filing a leniency application (which was revoked). Considering the e-mails and call records, statements made by the representatives of the OPs and other material on record, the CCI concluded that there was an agreement between the OPs to share quantities offered in railway tenders. Pursuant to this agreement, bids were rigged for three tenders between August 2012 to August 2014.

The CCI also refuted the contention of the OPs that as Indian Railways was a monopolistic buyer controlling the price and quantity of axle bearings, their conduct did not cause an appreciable adverse effect on competition (**AAEC**). The CCI dismissed the reliance placed on the Supreme Court's 2018 decision in [Rajasthan Cylinders](#), noting that “*merely putting emphasis on market conditions in isolation ignoring the actual conduct*” cannot be accepted.

On the issue of penalty, the CCI observed that all the OPs in this case were medium and small scale enterprises having limited staff and a small turnover. Further, there was a complete lack of awareness regarding provisions of competition law amongst the OPs. The CCI also took note of the cooperative and non-adversarial approach adopted by the OPs during the course of investigation.

It referenced its earlier decision in the [Cartelisation in Industrial and Automotive Bearings](#) case and observed that the MSME sector in India is already under stress and bearing the impact of the economic situation arising from the outbreak of the COVID-19 pandemic. Thus, imposition of any penalty on the OPs may render them economically unviable and further reduce competition in the market. Accordingly, in light of these considerations, the CCI did not impose any monetary penalty on the OPs and ordered them not to indulge in such behaviour in the future.

CCI dismisses allegations of abuse of dominance against Kerala State Beverages Corporation

Vide [order dated 21.10.2021](#), the CCI dismissed a complaint filed by two associations of alcoholic beverage companies/distillers against the nodal body controlling alcohol supply in Kerala, Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd. (**KSBCL**), and Travancore Sugar and Chemicals (**Travancore Sugar**), a government owned and controlled distillery, alleging abuse of dominance by KSBCL in the ‘*market for procurement and distribution of branded alcoholic beverages in the State of Kerala*’ by way of *inter alia*: (i) unilateral determination of rate contract prices at which alcohol (Indian Made Foreign Liquor, wine, beer, etc.) is procured from members of the informant associations and other private manufacturers; and (ii) procurement of liquor from Travancore Sugar and other government brands at more favourable terms than those offered to private manufacturers.

The CCI in its analysis noted that while KSBCL was dominant in the ‘*market for wholesale procurement and distribution of branded alcoholic beverages*’, and that “*Ideally, competitive price fixation should be inter alia an outcome of economic factors of demand and supply, ...the same does not prevent the State or its instrumentality from exercising such powers of price determination when done within the framework of law and a stated policy.*”

On the issue of preferential treatment granted to Travancore Sugar’s product, it was observed that “*Ex facie, grant of preference to one brand over the other is discriminatory and not in consonance with the principles of competition law. However, in the present case, the same has been*

stated to be done under a policy declared upfront and that certain clauses of Tender permit such preferences in public interest.”

As no evidence that KSBCL was acting in derogation of the State excise policy or distorting supply of alcoholic beverages was placed on record, no case of abuse could be made out against them.

CCI holds engineering services firms to be bid rigging in contravention of the Act

The CCI vide [order dated 11.10.2021](#) held PMP Infratech Private Ltd. (**OP-1**) and Rati Engineering (**OP-2**) (**collectively, OPs**) to be engaged in anti-competitive bid rigging in contravention of the Act.

The informant, GAIL (India) Limited, alleged that it had initiated various tendering process, and some such tenders raised concerns of collusion between the OPs. Amongst others, these concerns stemmed from seemingly the same device or network connection being used to place bids of both OPs considering the bids were placed from the same IP address.

Upon completion of the investigation, the CCI observed that it was evident that the OPs had reached an understanding by and between them, which was used to coordinate their conduct in submitting the bids.

Firstly, the CCI noted that the OPs had submitted their bids from the same IP address with a gap of one day. The CCI rejected OP-1’s contention that both bids were placed from OP-1’s premises because OP-2 was facing technical glitches in submitting their bid to the informant. The CCI stated that it finds it egregious for competitors to use the same office premises

and systems to submit their bids for which they are competing.

Secondly, the CCI noted that the OPs were regularly communicating about the tender. These were in the form of OP-1 forwarding an email to OP-2, originally from the informant, which contained details about the tender relevant for prospective bidders and was circulated by the informant for wider publicity. Further, the informant had sought certain clarifications/ confirmations from OP-2. It was observed that OP-2 had forwarded emails from the informant in such regard to OP-1.

The Tendering Executive of OP-1, in their statement on oath, admitted that such emails were sent for formulating appropriate responses on behalf of OP-2. Further, it was also admitted that this process involved the exchange of confidential information relating to the bid submitted by OP-2. Accordingly, the CCI held that the OPs were in contravention of the prohibition on anti-competitive horizontal agreements.

CCI finds no contravention by bearings manufacturers after investigation

The CCI *vide* [order dated 21.10.2021](#) found no contravention of the Act by manufacturers of automotive and industrial bearings in proceedings that involved two leniency applications (out of three parties), and the DG concluding a contravention had been established.

The CCI's examination focused on two Requests for Information/ Requests for Quotes (**RFI/RFQ**) that NSK, JTEKT and NTN Corporation were participants in.

With respect to the first RFI examined regarding front and rear wheel bearings, the statements of officials from NSK and JTEKT regarding discussions on the Indian market were observed to be contradictory. While

the official from NSK stated that price discussions, including with NTN, did take place in respect of the Indian market, the JTEKT official took the opposite position. NSK and JTEKT, both, put forth documents to evidence their claims.

In addition to the contradictions in the statements, the CCI observed that neither of the documents were supported by an affidavit under Section 65B of the Indian Evidence Act, 1872 certifying the document. Thus, the CCI was of the view that reliance could not be placed on either document without such an affidavit.

Therefore, the CCI observed that the sole evidence to the fact that discussions with respect to the prices for the Indian market took place between NSK, JTEKT and NTN was the statement of the official from NSK. The CCI concluded that the sole oral evidence given by a single individual is not sufficient considering the facts and circumstances to establish a case of anti-competitive coordination.

With respect to the RFQ for the hub bearings, similarly, there were contradictions in the statements of officials from NSK, JTEKT and NTN. It was observed that the details of meetings with competitors provided by each did not corroborate the other. Further, the material brought on record was found to be insufficient to establish not only when these meetings took place but also what discussions took place. Again, the material in the form of internal memorandums submitted were not certified in terms of Section 65B of the Indian Evidence Act, 1872. Accordingly, such documents could not be relied upon.

Therefore, the CCI found no anti-competitive conduct which could be established in respect of either the RFI or RFQ.

While concluding, in response to a submission made, the CCI observed that it does have the jurisdiction to examine RFQs

which stood finalized before 20.05.2009 (the date on which the prohibition on anti-competitive horizontal agreements contained in the Competition Act came into force) if the effect of such conduct continues post 20.05.2009.

Thus, the CCI held that it has the jurisdiction to investigate and apply the provision of the Act to a cartelized tender finalized prior to 20.05.2009, if supplies of the product/service by the winning bidder continued post 2009.

CCI finds six low density polyethylene cover manufacturers guilty of cartelisation

The CCI [vide order dated 29.10.2021](#) arrived at a finding of cartelisation against six Low Density Polyethylene (LDPE) cover manufacturers, Shivalik Agro Poly Products Limited, Climax Synthetics, Arun Manufacturing Services, Bag Poly International, Shalimar Plastics and Dhanshree Agro (collectively **OPs**) in various tenders floated by Food Corporation of India (**FCI**).

Pursuant to receipt of a reference from FCI, an order under Section 26(1) was passed on 07.03.2019 directing an investigation into the alleged cartel. During the course of the investigation, four OPs filed lesser penalty applications disclosing various instances of cartelisation in respect of the impugned tenders.

During the course of the investigation, the DG found evidence in the nature of financial

transactions, e-mails, WhatsApp messages and an agreement entered into by the OPs to share LDPE quantities for various tenders floated by FCI, amongst others, which shed light on the *modus operandi* of the cartel arrangement.

Agreeing with the DG's findings, the CCI noted that the OPs had engaged in discussions before submission of bid documents for the impugned tenders floated by FCI for procurement of LDPE covers in the period 2005 – 2017, in contravention of Section 3(3)(d) read with Section 3(1) of the Act. However, in light of the vital disclosures made by the OPs through their lesser penalty applications and the cooperation extended throughout the investigation and taking into account the strain on the MSME sector in India owing to the pandemic, the CCI let them off with a warning and refrained from imposing any penalty in the matter.

DG conducts dawn raids on alcohol manufacturers

The [Office of the DG conducted raids](#) on manufacturers of low-priced locally made alcohol on 27.10.2021. This comes on the heels of another important action by the CCI in the alcobev sector after imposing penalties of over INR 8.7 billion / 870 crores on beer manufacturers held to be in contravention of Section 3(3) of the Act, as covered in our [October 2021 Newsletter](#). The raid also follows on the heels of the [one conducted at the premises of BASF India and other vegetable seeds manufacturers](#) in September 2021.

This newsletter is only for general informational purposes, and nothing in this newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or competition law in general), please feel free to contact the Competition Law Team at competitionlaw@luthra.com or any of the contacts listed below. © L&L Partners 2021. All rights reserved.

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