L&S UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

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Competition & Antitrust

Lakshmikumaran & Sridharan attorneys

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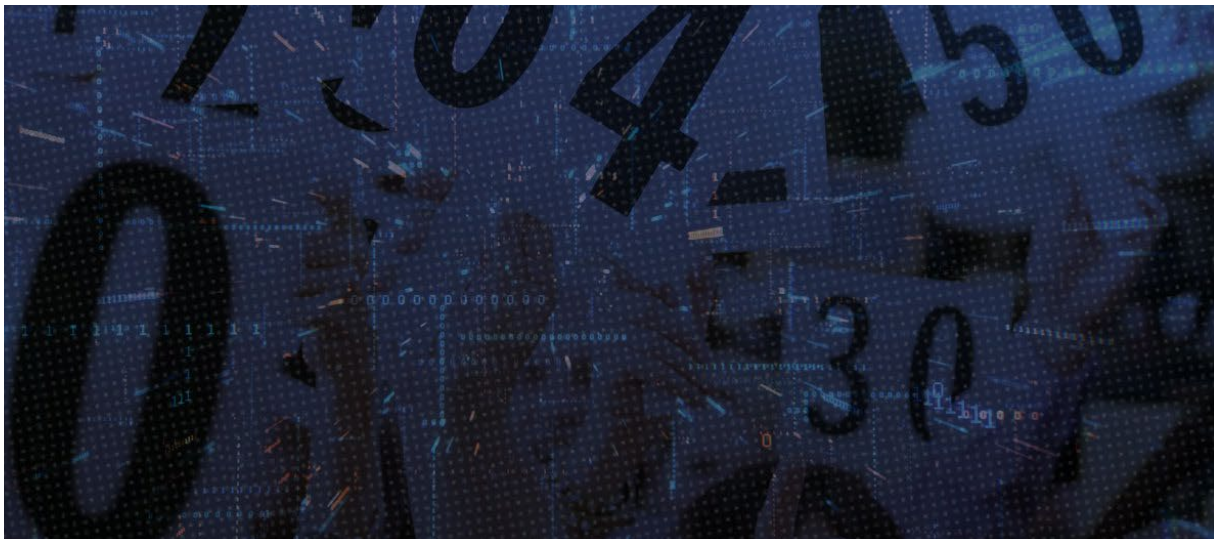
This newsletter is authored by the Competition & Antitrust team at Lakshmikumaran & Sridharan. It includes original articles and research pieces on competition law. It also reviews recent case laws and details regulatory as well as news updates on the subject.

ARTICLE



Bid-rigging in public procurement

An Indian Perspective

The Competition Commission of India ("**CCI**") has been executing commendable strides in regulating the procurement system of various public sector undertakings ("**PSUs**") and governmental agencies in India. While identifying and penalizing various bid rigging practices, the CCI has investigated traditional sectors such as the railways, agriculture, defence and certain distinct sectors pertaining to supply of signages for banks. Interestingly, on one end of the spectrum, the CCI, exemplarily penalized PSUs for INR 671 crores for bid rigging in a tender floated for selection of insurance service providers for Rashtriya Swasthya Bima Yojna, Kerala and on the other end, it ordered a cease and desist over monetary penalties for bid rigging in a tender for the supply of composite brake blocks in various railway zones, in 2016.

In this article, **Neelambera Sandeepan** (Joint Partner) elucidates the types of bid rigging, associated statutory provisions, red flags, and available safeguards related to bid rigging in public procurements in India.

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RATIO DECIDENDI

1. Bid-rigging cartel of 11 suppliers of Bushes of Brake Cylinder Coaches to Indian Railways penalised by the CCI

BRIEF FACTS

The Chief Materials Manager, North Western Railway ("**Informant**") approached the Competition Commission of India ("**CCI**") over identical price quotes in tenders for procurement of High-Performance Polyamide ("**HPPA**") and Self Lubricating Polyester Resin ("**SLPR**") Bushes (collectively referred to as "**Bushes**") used in Brake Cylinder Coaches by Indian Railways. The CCI formed a prima facie view of bid rigging in contravention of Section 3(3)(d) of the Competition Act, 2002 ("**the Act**") and directed an investigation.

Upon completion of the investigation, the Director General ("**DG**") identified 11 parties (collectively referred to as "**OPs**") engaged in the trade of similar bushes to have formed a cartel. During the investigation, e-mail and WhatsApp communication was discovered which indicated collusion by the OPs to rig the bids. The bid-rigging occurred by way of collective price decisions, discouraging each other from quoting prices less than the agreed price, controlling the supply of Bushes, and geographical allocation of the market amongst the OPs.

OBSERVATIONS OF THE CCI

Whether the OPs engaged in cartelisation with respect to tenders for procurement of Bushes by the Indian Railways?

The CCI noted that all 11 OPs are in the approved list of vendors by Indian Railways. Out of the 11 OPs, two OPs despite being in different geographical locations had, during multiple instances submitted quotes with the same prices. Evidence of price parallelism between all 11 OPs in tenders by various zones of Indian Railways was also observed.

Additionally, presence of common directors / partners was also found among 5 OPs. In addition to price parallelism, there was overwhelming circumstantial evidence to establish cartelization amongst the OPs. The DG in the investigation found around 34 tenders by various zones of the Indian Railways, where the OPs had submitted the bids from a common IP address. Out of the 11 OPs, 3 sister concerns even shared a common username, user ID and logged in and submitted tenders on the same day / time.

Additionally, the OPs maintained a database wherein the tenders of the Indian Railways were allocated amongst the OPs and the winner in each was pre-determined. To facilitate this arrangement, the OPs mutually agreed at a price before filing the bids and the dummy bidders in each of the tenders would deliberately submit prices 8-10% higher than the agreed price.

Finally, the evidence collected by the DG was corroborated by the statements made by the representatives of the OPs who admitted to the existence of a formal / informal price setting mechanism.

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CONCLUSION

The CCI found all 11 OPs guilty of collusive pricing, controlling the supply of Bushes to the Indian Railways, market allocation as well as bid-rigging and penalized the OPs as well as individuals in-charge of the OPs. The benefit of CCI (Lesser Penalty) Regulations, 2009 was extended to the OPs as well as the individuals.

LKS INPUT

In cases of monopsony, given that the procurement procedures, quantity requirements of the buyer are available with the pool of sellers, there is high affinity in such markets to indulge in price fixing, allocation of geographical areas and bid-rigging. This allows an equilibrium to be maintained in the market for all the suppliers who cater to a single buyer.

[*Chief Materials Manager, North Western Railway* v. *Moulded Fibreglass Products*, Reference Case No. 03/2018, CCI Order dated 04.04.2022]

2. CCI finds evidence of cartelization in tenders for soil testing in Uttar Pradesh

BRIEF FACTS

The Department of Agriculture, Uttar Pradesh ("**DoA**") invited tenders electronically for soil sample testing. Soil sample testing is the analysis of a soil sample to determine its nutrient content, composition, and other characteristics such as acidity and pH level. A complaint was received by the CCI, alleging bid-rigging in two such tenders, by DoA. The investigation by the DG revealed that a total of 9 entities (collectively referred to as "**OPs**") indulged in cartelisation and bid-rigging (in the form of cover bidding) in 2017-2018 in tenders issued by various divisions of DoA. The DG found that certain OPs were sister concerns, some of the OPs had no prior experience and had no soil testing machines. Certain OPs submitted fake documents only to support the other OPs.

OBSERVATIONS OF THE CCI

Whether the OPs engaged in cartelisation and bid-rigging with respect to tenders issued by various divisions of DoA?

From the investigation report of the DG, CCI grouped the OPs into three sets, Set 1 comprising of 5 OPs, Set 2 comprising of 4 OPs and Set 3 comprising of 2 OPs (bid winners from Set 1 and Set 2).

It was found that the 5 OPs in Set 1 were inter-connected and none of them had prior experience in soil testing, Yash Solutions ("**OP-1**") won the tenders. Moreover, during the investigation, the concerned individuals of the OPs admitted to submitting fake documents to ensure that tenders do not get cancelled due to lack of competition. Fake experience certificates issued by rival entities were placed on record to prove experience in soil testing. It was also recorded that 2 of the OPs were also blacklisted by the Uttar Pradesh government for submitting manipulated documents.

In Set 2, the OPs were found to be connected through family and business relationships. Also, none of these parties had prior soil testing experience but still submitted cover bids to ensure that amongst the OPs in Set 2, Austere Systems ("**OP-5**") wins the bid.

The CCI further observed that OP-1 and OP-5 together constitute Set 3. These two parties had geographically allocated soil testing tenders issued by DoA. They supported each other by either not bidding or by submitting cover bids in non-allocated regions.

CONCLUSION

The CCI found all 9 OPs guilty of cartelisation, including bid rigging in contravention of the provisions of the Act and imposed penalty @5% of the average of their turnovers for 3 consecutive years. Further, 5 individuals (directors / employees) of the OPs were also penalized for the role they played in the cartel. A penalty of approximately INR 2.2 crore was imposed on the OPs and their individuals found liable under the Act.

LKS INPUT

The CCI in the instant case rejected the contention of non-successful OPs that they derived no income from the tenders in question. The CCI held that a narrow interpretation of relevant turnover cannot be taken. Collusive conduct established in the instant case through circumstantial evidence was considered satisfactory evidence to uphold the existence of a cartel and to penalise all OPs.

[In Re: *Alleged Bid-Rigging in E-Tenders invited by the Department of Agriculture, Government of Uttar Pradesh for Soil Sample Testing, Suo Moto* Case No. 01 of 2020].

3. CCI passed a cease-and-desist order against Amateur Baseball Federation of India for abusing its dominance.

BRIEF FACTS

The Confederation of Professional Baseball Softball Clubs ("**the Informant**") was scheduled to organize a baseball championship ("**Championship**") in 2021. The Amateur Baseball Federation of India ("**ABFI**") is a society recognized by the National Sports Federation by Ministry of Youth Affairs and Sports, Government of India and primarily works for the general promotion of baseball and its players. It is the responsibility of ABFI to conduct Zonal, National and International Baseball Tournaments in India and it is affiliated to Baseball Federation of Asia and to World Baseball and Softball. ABFI released a letter ("**the Letter**") prohibiting the State Associations from dealing with bodies and leagues not recognized by ABFI and threated disciplinary action against players who participate in leagues and tournaments not recognized by it.

Under the fear of getting banned, a few clubs, who had paid registration fee to the Informant, started withdrawing from the Championship. This caused financial distress to the Informant as it had to cancel the logistics arrangements it had made for the Championship. Subsequently, the Informant announced the revised schedule for the Championship.

Thereafter, ABFI released a communication, informing the State Associations that it was organising the 34th Senior National Baseball Championship. This event was scheduled to commence and close one day prior to the commencement and closing of the Championship. ABFI also mentioned in its communication that the teams would not be allowed to leave before the final closing of the tournament and selections for upcoming international events would take place during this championship. The Informant alleged that ABFI deliberately decided such dates in order to sabotage the event that the Informant was organizing and has abused its dominant position.

OBSERVATIONS OF THE CCI

Whether ABFI is an enterprise as defined under the Act?

CCI observed that, ABFI is an enterprise under the provisions of the Act. It iterated that the definition of the term 'enterprise' is based on the economic nature of the activities discharged by the entities. It is immaterial whether such economic activities were undertaken for profit-making / commercial purpose or for philanthropic purposes. This implies that even non-commercial economic activities would fall within the scope of the Act.

Whether ABFI holds a position of dominance in the relevant market?

The CCI noted that ABFI is an apex institution for nurturing the baseball talent in India for National and International events. It is involved in various activities such as organising National Championships, training programs, selection in the National, International, Asian & Olympic, etc. in various age categories. It also engages in supervision and assistance to the state units in their activities and also sets up coaching camps for the grass root level. Accordingly, it was held to be dominant in the market for organization of baseball leagues / events / tournaments in India.

Whether ABFI has abused its dominance in violation of the Act?

While addressing the issue of abuse of the dominant position, the CCI noted that ABFI's conduct through the Letter has resulted in denial of market access to the Informant and other such associations who wished to organize similar tournaments. Further, its conduct also resulted in limiting and restricting the provision of services and market and imposing an unfair condition on its players under the Act. The same amounts to an abuse of dominant position and as such, a violation of the Act.

CONCLUSION

Given that ABFI's conduct amounted to abuse of dominance, in the instant case, the CCI passed a cease-and-desist order. However, no monetary penalty was imposed as ABFI volunteered to withdraw the directions given through the Letter.

LKS INPUTS

CCI held that ABFI has abused its dominant position by imposing unfair conditions upon the players. By prohibiting the State Associations from dealing with bodies and leagues that were not recognized by ABFI, it has denied the market access to other associations who wish to conduct such tournaments. Thus, the CCI held that the ABFI has acted in contravention of the Act.

[*Confederation of Professional Baseball Softball Clubs* v. *Amateur Baseball Federation of India*, Case No. 03 of 2021; Order dated 03.06.2022]

4. CCI dismissed allegations raised against Atos India Private Limited

BRIEF FACTS

In the instant case, the Informant is engaged in the business of hardware and software products, including telecommunication devices and related support services. On the other hand, the opposite party ("**OP**") is an original equipment manufacturer that specializes in hi-tech transactional services, unified communications, cloud, big data, and cyber security services.

According to the Informant, the OP enjoyed a position of strength in the relevant market of Internet Protocol Communication platforms such as HiPath and Openscape. Further, the Informant alleged that the OP, in concert with its authorized channel partners, had indulged in anti-competitive practices and had foreclosed competition in the market for complimentary goods and/or provision of maintenance and repair services ("**secondary market**") by using its dominance in the market of supply of spare parts ("**primary markets**"). The Informant alleged that the genuine spares and support services in relation to the products HiPath and Openscape were not made freely available to consumers in the open market. It was also alleged that the Informant was not authorized to sell, install, and support any "Unify" products (manufactured by the OP). Moreover, through various communications to the consumers, the OP restricted the market access of the Informant in the secondary market. Due to these communications, the offers submitted by the Informant in response to several tenders were rejected by customers. Various organizations were apprehensive regarding the quality of services, which the Informant provided. Further, the Informant alleged that the Opposite Party has imposed unfair prices on the sale of spare parts along with stringent warranty conditions on the consumers. Under these conditions, the consumers were required to get their Atos-Unify Systems serviced only through authorized channel partners or otherwise the warranty for such products would be invalidated. All these practices, dissuaded the consumers to avail services from the Informant.

OBSERVATIONS OF THE CCI

Whether the OP was dominant in the given relevant market and has abused its dominance?

The CCI noted that the OP was not a dominant entity as there was enough competition in the market for *"organization of Baseball leagues/events/ tournaments in India"* and OP occupied an insignificant market share. Thus, no case of violation of abuse of dominance could be made against the OP under the Act.

Whether the OP has acted in contravention of the Act by entering into anti-competitive vertical agreements?

The CCI elucidated that a manufacturer has no legal obligation to warrant the genuineness of products (spares) / services (after-sales) offered outside its distribution channel. Further, any insistence that such products and services should be bought from its authorized distributors / partners in itself cannot *prima facie* be considered abusive or exclusionary.

The CCI upheld the rights available to a manufacturer to protect the sanctity of its distribution channel and its goodwill in relation to the goods / services offered under its brand name.

Moreover, the CCI observed that the OP has not restricted the sales of the spare parts to independent service providers and any independent service provider can source genuine spare parts from the authorized distributor of the OP. With respect to the after-sales services and warranty, the CCI noted that subsequent to the initial warranty period, the consumer is free to take services from any third party.

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CONCLUSION

The CCI, in the present case, held that the OP enjoyed an insignificant market share and could not operate independently of the market forces. Accordingly, it was held not to be a dominant entity. Further, its conduct was not in contravention of the Act because it has not restricted the sales of the spare parts to the independent service providers who could source genuine spare parts from its authorized distributor. The alleged anti-competitive conduct was well within the rights of the manufacturer to protect the goodwill of its brand.

LKS INPUTS

The CCI upheld the rights of a manufacturer to take measures to protect the sanctity of its distribution channel. The manufacturer has no legal obligation to warrant the spare parts or after-sale services, which have been offered outside its distribution channel. The same does not amount to violation of the Act.

[*Hexa Communications Private Limited* v. *Atos India Private Limited*, Case No. 07/2022; Order dated 03.06.2022]

5. The CCI penalized vendors of protective tubes for bid rigging and cartelization in the tenders issued by the Indian Railways

BRIEF FACTS OF THE CASE

The CCI initiated a *suo moto* enquiry pursuant to the receipt of an application against a few vendors of protective tubes used by the Indian Railways. It appeared that the opposite parties ("**OPs**") quoted mutually agreed prices and allocated tenders issued by the Indian Railways for procurement of protective tubes amongst themselves. Accordingly, the CCI observed that there existed a *prima facie* case of collusion among **OPs** and directed an investigation.

OBSERVATIONS OF THE CCI

Whether the parties had entered into a horizontal agreement?

The CCI took various e-mail communications between the OPs and the fact that bids were quoted from a common IP address by three OPs, which were sister concern entities, into consideration.

After perusal of the above evidence, the CCI noted that there appeared to be a collusion between the OPs. The communication between them indicated that the OPs had coordinated in the form of a cartel by allotment of tenders amongst themselves. They colluded by revising the sharing patterns, calculating methods to arrive at the price to be quoted, discussing the rates to be quoted, etc. Such arrangement between the OPs led to the manipulation of the Indian Railways' bidding process. Further, the OPs have indulged in cartelization in the supply of protective tubes to the Indian Railways by means of directly or indirectly determining prices, allocating tenders, controlling supply and market. Hence, the CCI found the OPs to be guilty of bid rigging and cartelization.

Whether the parties were able to rebut the presumption of appreciable adverse effect on Competition ("AAEC")?

The OPs were unable to show any positive effects emanating from their cartel activity. Due to this, the CCI concluded that the OPs have been unable to dislodge the statutory presumption of AAEC. Thus, it held that the OPs have manipulated the bidding process by forming a pool and hence, have violated the provisions of the Act.

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CONCLUSION

As all the OPs were engaged in identical or similar trade of goods, their conduct was analysed by the CCI in light of the provisions dealing with horizontal agreements under the Act. The CCI imposed individual penalties on certain employees of the OPs as well. Lastly, the CCI granted a 100% reduction in the penalty imposed on one of the OPs in view of its lesser penalty application. The same was because the OP had made relevant disclosures in its application.

The CCI held that the evidence showed an active engagement and participation of the OPs in discussing the bids and controlling the supply and allocation of the market for polyacetal protective tubes in various Railway tenders. This amounted to the manipulation of the bidding process of the Indian Railways and cartelization. Hence, the conduct of the OPs was in contravention of the Act.

LKS INPUTS

Exchange of confidential commercial information in the form of allotment of tenders amongst the parties, revision of the sharing patterns, and predetermination of the price to be quoted amounts to the manipulation of the bidding process. The same is in contravention of the provisions of the Act.

[In Re: *Cartelisation in the supply of Protective Tubes to Indian Railways, Suo Moto* 06/2020; Order dated 09.06.2022]

MERGER CONTROL

1. *CCI imposes penalty on Allcargo for its failure to notify its acquisition in GATI*

Allcargo Logistics Limited ("**Allcargo**") is a publicly listed company incorporated in India. The principal activity of Allcargo along with its subsidiaries is to provide integrated logistics solutions. It offers specialized logistics services across four business segments: multimodal transport operations, container freight station operations, project and engineering solutions, and warehousing & logistics park.

GATI is a public listed company incorporated in India, primarily engaged, directly or indirectly through its subsidiaries, in the business of express distribution (surface, air and rail parcel), supply chain management solutions, value-added transportation solutions, e-commerce logistics, and operation of fuel stations. In the express business, it involves the transport of goods for domestic requirements between two locations within India.

The CCI observed from information available in the public domain that Allcargo had acquired 46.86% of the equity share capital of GATI without giving a notice to the CCI.

Allcargo submitted that the concerned transaction was not notified as the transaction was exempt from the notification requirement, it could avail the *de minimis* exemption under the notification by the Ministry of Corporate Affairs.

The CCI observed that Allcargo had incorrectly considered the value of assets and turnover or the assessment of the *de minimis* exemption. While the Act requires the value to be considered on a consolidated basis, Allcargo only took into account the financials of the direct target on a standalone basis and not the target group, as required under the Act.

In view of the above, the Commission opined that the*de minimis* exemption was not applicable to the present acquisition and Allcargo ought to have given a notice and sought an approval from the CCI prior to consummation.

The CCI reiterated that the requirement of notifying a proposed combination, in instances where the Target Exemption is not applicable, is mandatory under the Act, irrespective of whether the combination caused any AAEC in India or not.

As Allcargo failed to comply with such a requirement prior to the acquisition, it has contravened the provisions of the Act. Hence, it is liable to a penalty under the Act.

In the instant case, the CCI took mitigating factors, such as Allcargo's extended cooperation during the inquiry, into consideration while imposing the penalty. After taking a lenient view, CCI imposed a penalty of INR 20 Lakhs on Allcargo.

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LKS INPUTS

It is imperative that parties entering into acquisitions, mergers and amalgamation seek an opinion on the notifiability of the proposed transaction from a competition law professional. Given that penalties for gun-jumping or non-notification can be extremely onerous - upto 1% of the global turnover of the companies, this will be a classic example for when a stitch in time can save nine.

2. *CCI imposes a penalty on Veolia for gun-jumping in its hostile takeover of Suez*

[Combination Registration No: C-2021/03/818]

Veolia Environnement S.A ("**Veolia**") is a listed company headquartered in France and listed on the Euronext Stock Exchange in Paris. Veolia is stated to be active in optimized resource management and provides water, waste, and energy management solutions to both industrial and municipal clients. In India, Veolia operates through its subsidiary, Veolia India Private Limited ("**Veolia India**").

Suez S.A. ("**Suez**") is a company headquartered in France and is listed on the Euronext Stock Exchange in Paris. It provides water and waste management solutions to industrial and municipal clients. Suez has been active in India for over 30 years and has been helping local authorities and industries develop resource management solutions, particularly through contracts to build and operate facilities, improve drinking water distribution services, and develop alternative resources, such as by reusing wastewater.

The CCI received an application from Suez in relation to the proposed global takeover of Suez by Veolia. Veolia proposed to carry out the proposed takeover in two steps: (i) Veolia acquiring 29.9% shareholding in Suez from Engie S.A

("**Engie**"), which is an existing shareholder ("**Engie Block Transaction**"); and (ii) Veolia launching a public bid for the remaining Suez shares

In its application, Suez submitted that the proposed takeover would exceed the threshold specified under the *de minimis* provided by the Ministry of Corporate Affairs. Additionally, it submitted that the concerned takeover may give rise to competition law concerns such as heavy market concentration and substantial lessening of competitive constraints in the markets where the two entities operate.

The CCI sought a response from Veola in this regard and Veolia argued that it has acted in a reasonable and a *bona fide* manner and made all reasonable attempts to ascertain the assets and turnover of Suez in India for the purposes of assessing the applicability of the *de minimis* exemption to the proposed transaction. Given the hostile nature of the acquisition, Veolia did not have access to and cooperation from Suez for the purposes of determining its assets and turnover in India, Veolia had to rely upon the publicly available sources such as Suez's disclosures to the Ministry of Corporate Affairs to make this assessment. Further, based upon the publicly available resources, the *de minimis* exemption would be available to the proposed transaction and accordingly, Veolia had not filed a notice with the CCI.

However, based on the information and financial statements submitted by Suez to the CCI, it was observed that Veolia had failed to meet the minimum standards of due diligence and had not considered the presence of Suez in India besides the Suez India Private Limited ("**Suez India**")

CCI observed that the conduct of Veolia showed that they did not make all reasonable efforts to ascertain the total assets and turnover of Suez in India, which exceeded the jurisdictional threshold prescribed under the *de minimis* exemption. In view of the above, Veolia could not avail the exemption from notification for the proposed transaction, and it was required to seek prior approval from the CCI under the provisions of the Act. Accordingly, the conduct of non-notification and consummation on the part of Veolia resulted in gun-jumping which was a violation subject to penalties under the Act.

The CCI reiterated that there is no requirement of *mens rea* or intentional breach as an essential element for levy of penalty. The breach of the provision is punishable. It noted that in India, the merger control regime is mandatory and suspensory in nature.

The CCI took mitigating factors, such as no *mala fide* on the part of Veolia, continuous cooperation with the CCI during the inquiry, no previous violations of the Act, etc, into consideration. However, the CCI opined that none of the factors absolved Veolia of its obligation to file a notice prior to the consummation of the Engie Block Transaction.

The CCI imposed a penalty of INR 1,00,00,000/- (Rupees One Crore Only) on Veolia.

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LKS INPUTS

This is a first of its kind case wherein a hostile target has voluntarily made disclosures to the CCI in order to bring a violation of the merger control provisions of the Act before the CCI and subject the acquirer to penalties. Further, this order makes it clear that there is no room for an acquirer to dispel its obligation to notify a combination to the CCI, even in the case of a hostile takeover and a non-cooperating target. Moreover, the CCI recapitulates that mitigating circumstances can only assist with lowering penalties, but nothing absolves the acquiring enterprise of its duty.

3. *NCLAT upholds CCI's order imposing INR 200 crore penalty on Amazon in relation to its investment in-Future Coupons*

BRIEF FACTS

In 2019, Amazon N.V. Investment Holding LLC ("**Amazon**") filed a notice for notifying three interrelated transactions, (i) issue of 9.18 million Class-A voting equity shares of Future Coupons Private Limited ("**FCPL**") to its wholly owned subsidiary Future Coupons Resources Private Limited ("**FCRPL**"); (ii) transfer of 2.52% shares of Future Retail Limited' ("**FRL**") held by FCRPL to FCPL; and (iii)acquisition of 49% shareholding in FCPL by Amazon through preferential allotment. Further, the parties to the combination also entered into: (a) Share Subscription Agreement ("**SSA**") for issuance of shares by FCPL to Amazon; and (b) a Shareholders Agreement ("**SHA**") to determine Amazon's respective rights and obligations as shareholders of FCPL. CCI opined that the proposed combination was not likely to have an AAEC in India and thus approved the same through its order dated 28.11.2019.

However, subsequently the said approval was revoked by the CCI through its order dated 17.12.2021, for failure by Amazon to make all material disclosures relating to its SHA and Business Commercial Agreements ("**Commercial Agreements**") as part of its investment in Future Coupons. Amazon also failed to disclose that pursuant to the proposed combination it would acquire preferential rights over the assets of FRL, which would prevent FRL from selling its assets to

any of Amazon's competitors, and certain other rights in FCPL that would require it to take Amazon's prior written consent to decide on or implement any matter under the shareholders agreement with FRL. CCI further observed that Amazon didn't disclose that the said transactions were part of its strategy to align the businesses of Amazon and Future group to build and accelerate `ultra-fast delivery' across top – 20 Cities in India leveraging FRL's national store footprint as a `Copperfield seller'.

Thus, the CCI held that Amazon made misrepresentations and suppressed the actual purpose and particulars of the combination and directed the parties to file a fresh notice and in the meanwhile the proposed combination was kept in abeyance. CCI also imposed a penalty of INR 202 crore for non-furnishing of material information, making false statements under the provisions of Competition Act. Amazon appealed the CCI's order before the National Company Law Appellate Tribunal ("**Tribunal**")..

OBSERVATION OF THE NCLAT

Whether Amazon had fulfilled its notification obligation under the Competition Act?

Amazon submitted before the Tribunal that, it was not acquiring any shares, voting rights, assets or control in FRL by way of the proposed combination and that these Commercial Agreements were neither inter-connected with, nor part of or related to the proposed combination whatsoever, and hence were not required to be notified to the CCI under the Competition Act.

However, upon perusal of information brought on record (including Amazon's internal e-mail communications), it was observed that, instead of directly acquiring 9.9% shareholding in FRL, Amazon acquired 49% shareholding in FCPL which, in turn would hold 8 – 10% shareholding in FRL. Further, Amazon pursued this transaction for strategic alignment between the business activities of Amazon group and FRL / its affiliates. Amazon also entered into commercial agreements and SHA with FRL with a view to position Amazon as the single largest shareholder of FRL. Therefore, it was the its investment in FCPL was a strategic move and was inter-connected with the resulted rights in and engagement with FR: and therefore should have been notified as the part of the impugned combination.

Thus, the tribunal held that Amazon had not fulfilled its obligation under S. 6 (2) of the Act, to identify and notify the FRL SHA thereby attracting penalty for gun-jumping by way of non-notification of an inter-connected transaction.

Whether there was any `misstatement' or `misrepresentation' or `false information' amounting to fraud on part of Amazon?

The Tribunal noted that Amazon had claimed it does not have any direct or indirect shareholding in FRL and further it would not acquire directly any rights in FRL, and based on the said claim CCI, opined that the combination is not likely to cause any AAEC in India and thus issued the approval order on 28.11.2019. However, later it was found that contradictory stands were taken by Amazon in the arbitration proceedings and before constitutional courts with respect to its investments in FCPL, as compared to the representations and submissions made before the CCI. These contradictions establish false representation and suppression of material facts on part of Amazon, with an intent to gain unfair advantage and deceive the regulator, thus amounting to fraud.

Thus, the Tribunal held that there was misstatement of fact / misrepresentation on the part of Amazon, in not submitting relevant information which would clarify the real ambit and purpose of the notified transactions, thereby misleading the CCI to approve the proposed transaction.

Whether CCI was barred by limitation period under the Act from enquiring into a consummated transaction after over an year had passed since its approval?

Amazon contended that CCI has no power to keep the Approval Order in abeyance, on account of a violation of Section 43 A of the Act as it would be totally contrary to the rule of *ex ante analysis* and it is barred by the one-year period of limitation, as per the proviso to Section 20(1) of the Act. It was submitted that the limitation period to enquire into the transaction had lapsed on 26.12.2020. Since the CCI's approval was dated 28.11.2019, it did not have the ability to revoke or keep the approval in abeyance.

The Tribunal held that the approval of the said combination was obtained by Amazon based on misstatement of facts, misrepresentation and fraud, thus Amazon had technically not notified the proposed combination as a `whole' and in an omnibus manner. Therefore, period of limitation of one year, as under Section 20 (1) of the Act, is inapplicable, in lieu of 'absence of notification' and there being no approval of the combination. Moreover, it was observed that an authority vested under the Statute / Act, has an inbuilt and implied residual power to annul, modify, vary or to keep the earlier order passed by it in abeyance or putting it on hold.

CONCLUSION

Upholding the order of penalty passed by CCI, the Tribunal held that the impugned Commercial Agreements and SHA entered by Amazon with FRL were strategic in nature and amounted to an inter-connected transaction which should have been notified as the part of the said combination. Therefore, by not giving all the relevant disclosures for the proposed combination as a `whole' and in an omnibus manner, Amazon failed to provide `Notice' as required under Section 6(2) of the Act. Thus, the Tribunal held that Amazon had intentionally concealed the real ambit & purpose behind the combination in order to gain unfair advantage and deceive the regulator, thus their conduct amounted to fraud. However, the Tribunal opined that the imposition of maximum penalty of Rs.1 Crore each, as per Sec. 44 and 45 of the Act, is slightly excessive and thus, reduced it to Rs.50 Lacs each. Further, it directed Amazon to file a fresh notice to CCI in `Form II' within 45 days and CCI's earlier approval shall be `kept on hold' till the disposal of such notice by CCI.

LKS INPUTS

By upholding the CCI order in its entirety the Tribunal has effectively created deterrence among the enterprises and thus businesses would be more vigilant in filing notices and evaluating the degree of disclosures to be made. This order has also reaffirmed the wide scope of CCI's power which can transcend even to suspension of an approved combination or keeping it in abeyance, until a comprehensive approval has been obtained.

[Amazon.com NV Investment Holdings LLC v. CCI, Competition Appeal (AT) No. 01 of 2022, decided on 13-06-2022]

NEWS NUGGETS

1. European Commission Adopts Revised Vertical Block Exemption Regulation & Vertical Guidelines

The European Commission ("**EC**") adopted the new Vertical Block Exemption Regulation ("**VBER**") accompanied by the new Vertical Guidelines ("**Guidelines**") on 10th May 2022. They would enable the businesses to assess the compatibility of their supply and distribution agreements with the European Union ("**EU**") competition law. The VBER exempts certain agreements between the companies, that are active at different levels of production or distribution chains, from the prohibitions specified under the provisions of Treaty on the Functioning of the European Union ("**TFEU**"). Thus, the VBER provides for a safe harbour where certain agreements are block exempted. The revised VBER and Guidelines have widened the scope of the safe harbour with respect to certain practices pertaining to online sales. At the same time, some aspects of dual distribution and few types of parity obligations will no longer be exempted under the TFEU. They would be assessed on a case-by-case basis. While keeping the growth of e-commerce in mind, these changes have mainly been brought in respect to the assessment of online restrictions and vertical agreements in the platform economy. Further, the revised Guidelines provide a detailed guidance on a number of topics such as agency agreements and selective and exclusive distribution. The revised VBER and Vertical Guidelines have entered into force from 1 June 2022.

2. EU competition regulator raids companies in the fashion industry

Under the apprehension of cartelization, the EC, on 17 May 2022, claimed that it had conducted raids at premises of multiple undisclosed companies in the fashion industry in various EU countries. The European Union did not disclose the names or the type of fashion companies under scrutiny. However, in a Statement, it mentioned that the concerned companies "may" have contravened the provisions dealing with cartels and other restrictive business practices.

3. EU files an antitrust complaint against Apple over the alleged mobile wallet abuse

On 3 May 2022, the EU files an antitrust complaint against Apple, alleging that the company is curbing competition in the mobile wallet market by abusing its dominant position. The EU's Executive Vice President (in charge of competition

policy) stated that they have indications that Apple has restricted the access of third parties to key technologies, which is required to make rivalling mobile wallet solutions of Apple Pay, the in-house solution that Apple provides to its users.

4. Canon loses the EU gun-jumping fine case

Japanese camera and printer maker Canon lost its challenge against a €28 million fine for not obtaining regulatory clearance before starting the transaction of buying Toshiba Corporation's (6502.T) medical systems unit. Companies that close a deal without first securing regulatory approval from the competition authority in the EU, can be subjected to penalty that may extendup to 10% of their total turnover under EU Merger Rules. The European Commission, in its decision in 2019, said that Canon breached the EU Merger Rules by using a "warehousing" structure where an interim buyer completed the transaction before the regulatory go-ahead. Recently, the Luxembourg-based General Court backed the EU competition enforcer's finding and ruled against Canon.

5. ACCC takes Mastercard to court for alleged misuse of market power

The Australian Competition and Consumer Commission ("**ACCC**") has begun proceedings in the Federal Court against Mastercard, alleging anti-competitive behaviour. ACCC alleges that the company got into an agreement with over 20 retail businesses including supermarkets and fast-food chains, providing discounted rates for Mastercard credit card transactions if they commit to process the inter-card transactions through Mastercard instead of the competitors. The ACCC Chair warned the financial service providers that ACCC will not hesitate to take action against them if concerns about anti-competitive conduct are raised.

TEAM PROFILE

L BADRI NARAYANAN

PARTNER
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Badri specialises in Corporate, Competition and Regulatory matters. He is qualified to practice as a lawyer in India and New York. He advises on various issues involving consortiums and joint ventures such as contract manufacturing scenarios, valuation, secondment, royalties and license fee arrangements. He has represented parties before various fora in tax and commercial disputes. He practiced as a patent attorney in the United States before moving to LKS.

CHARANYA LAKSHMIKUMARAN

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Charanya has over a decade of experience working in the fields of intellectual property, taxation and regulatory litigation. She is an Advocate-on-Record designated by the Supreme Court and was a former associate in the chambers of the Attorney General of India. Charanya regularly appears before the Supreme Court and focuses on competition and regulatory litigation before the NCLT and the NCLAT.

NEELAMBERA SANDEEPAN

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Neelambera advises on the full range of competition law matters including cartel enforcement, abuse of dominance, leniency applications, merger control, audits and compliance. She appears before the CCI, NCLAT and various High Courts. Neelambera has represented clients in high-profile, precedent setting behavioral cases (Cement Cartel case) and advised on complex M&A transactions. She has previously worked at the WTO in Geneva.

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Legal Era Awards 2020

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ALB's Super 50 Dispute Lawyers in Asia 2021 *Charanya Lakshmikumaran*
Asian Legal Business

Lakshmikumaran & Sridharan recognised as a Leading Law Firm in 2021 in the Competition & Antitrust category **Legal 500**

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