

CompBuzz

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CCI Orders on anti-competitive agreements and abuse of dominant position

Case: In Re: Rico Auto Industries Limited And GAIL (India) Limited With In Re: Omax Autos Limited And GAIL (India) Limited With In Re: Omax Autos Limited And GAIL (India) Limited With Rico Auto Industries Limited And GAIL (India) Limited With In Re: Rico Castings Limited And GAIL (India) Limited¹ :

Various automotive components manufacturers ("Informants") alleged that Gas Authority of India Ltd. ("GAIL") abused its position of dominance by imposing unfair and discriminatory clauses in the Gas Supply Agreement ("GSA") and by its subsequent conduct upon signing of the GSA. The allegations pertained to the discriminatory clauses with respect to the compensation/remedies payable by the buyers in case of failure to place order for the allotted gas vis a vis compensation/remedies payable to them by GAIL for its failure to supply gas. The Informants further alleged that GAIL indulged in unfair conduct such as by imposing 'Minimum Guaranteed off take' as a part of the Letter of Credit ("LOC"), which was not a part of the GSA. Informants also alleged that LOC were encashed on conditions which were not a part of the GSA.

In order to analyse the allegations of abuse of dominant position, the Competition Commission of India ("CCI") delineated the relevant market to be 'supply and distribution of natural gas to industrial consumers'. The relevant geographic market, based upon the pipelines laid down through which gas would be supplied to a particular buyer, was delineated as Gurgaon district and the Rewari district respectively. The CCI held that GAIL was a dominant player in the relevant markets, being a significant player in the business of supply of gas across India with relatively larger size, resources and expertise in comparison to other players in India.



With regard to the abuse, the CCI held that the clauses in the GSA cannot be a subject matter of scrutiny since they were entered into before the commencement of the Competition Act, 2002 ("Act"). However, the subsequent conduct of GAIL was prima facie held to be prima facie unfair as revealed by the mysterious silence on the part of GAIL in (a) not replying to the request of the Informants for reducing the contracted quantity; (b) not replying to the proposal of the Informant for amicable settlement of the alleged dispute; (c) doing away with the requirement of prior notice for suspension of gas; and (d) not divulging the reason for suspension of gas despite repeated attempts/requests of the Informant for amicable settlement of the alleged disputes. Accordingly, the CCI directed the DG to conduct an investigation in the matter.

¹Clubbed Cases No. 16, 17, 18, 19 and 20 of 2016; Decided on: 03/10/2016

Allegations of bid rigging on companies supplying "PVC Flooring (Vinyl)" in the tenders floated by North Western Railway were negated and dismissed by the CCI after an investigation by the Director General

Case: In Re: Shri Vijay Bishnoi And M/s Responsive Industries Ltd., M/s RMG Polyvinyl India Ltd And M/s Premier Polyfilms Ltd.² :

The Chief Materials Manager-I, North Western Railway, Jaipur ('Informant') had alleged cartelisation by the Opposite Parties as above, in the tenders floated by North Western Railway (NWR) for supply of "PVC Flooring (Vinyl)" of a particular specification. The Informant stated that, as per Railway policy, the Product is to be procured by the Indian Railways from RDSO approved suppliers only and that the OPs were the only three vendors approved by Research Designs and Standards Organization ('RDSO') for

supply of the Product. It was stated that all three RDSO approved firms had been quoting less than Rs.300 per sqm 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. On a prima facie view, the CCI directed the Director General ("DG") to conduct an investigation in the matter.

The DG observed from the trend in bidding of various bidders that the same depended on the Last Purchase Rate ("LPR") but



similar trend was not visible from the bids submitted. The bidders advanced economic reasons for placing the bid at a particular rate. The bidders were quoting lower than the cost in the previous bids and after 2014 onwards, they started bidding over their cost as the market leader, which was M/s Responsive Industries, decided to increase the bid rate and started bidding over the cost. The justification by other opposite parties for bidding lower than the cost in earlier tenders was to maintain their RDSO approval which would have been revoked had they not bid. However, once the market leader started bidding higher than the cost

as per its market decision, the other competitors also started bidding over their cost. In order to see whether the general increase in the prices by the bidders was on account of meeting of minds or not the DG analysed various factors such as the distribution of market (whether constantly proportionate or not), the geographic allocation (whether consistent or not) and whether any platform for interaction between the bidders is there or not. The DG observed that none of the above was true to indicate a cartel.

Based on the DG report and the submissions

of the parties, the CCI held that the Informant while making the allegations of collusive behaviour against the opposite parties in the Information did not examine the market conditions or the conduct of the opposite parties holistically and proceeded to deduce that the increase in rates was on account of collusion based on limited information available with it. The CCI observed that the conduct of the opposite parties was justified on account of the business and economic reasons presented. Accordingly, the case was closed under Section 26(6) of the Act.

²Reference Case No. 08 of 2014; Decided on: 21.09.2016

The Competition Appellate Tribunal dismissed the appeal filed by Financial Software and Systems Private Limited since it had also initiated a parallel writ proceedings at the High Court

Case: Financial Software and Systems Private Limited vs Competition Commission of India and others³

An appeal was filed against order dated 13.01.2015 passed by the CCI in Case No.52/2013, whereby majority of the CCI ruled that respondents are not in a dominant position in the relevant market and as such the question of abuse of dominant position and violation of Section 4 of the Competition Act, 2002 does not arise and further that they have not acted in violation of Section 3(4) read with Section 3(1) of the Act.

In the present case, the respondents No.2 to 4 were supplying software for electronic payment solutions (BASE-24) to several banks in India which enabled the said banks to process transactions at ATMs or at the point of sale terminals of different stores, since the software facilitates communication of transactions with the relevant bank's core banking network. The software was provided by the respondents No.2 to 4 to the banks under a license agreement according to which customization of the software may be done by the banks either by asking the respondents No.2 to 4 to do it or the bank itself could do it on its own. The banks were getting the customization of the said software done on their own by engaging the appellant on contractual basis with the

consent of the respondents No.2 to 4.

In 2011, the respondents No.2 to 4 objected to customization by the appellant and informed the banks that the professional services be taken either through the respondents No.2 to 4 or through their authorized third party provider excluding the appellant. The same led to the filing of complaint by the appellant before CCI. The CCI directed an investigation whereupon the DG found contravention of the Act.

However, upon final hearing, the CCI concluded that the parties are not in a dominant position and thereby closed the case under Section 26(6) of the Act.

Aggrieved by the aforesaid closure order, the Informant/Complainant filed a writ petition at the Delhi High Court. The Appellant also moved an application before the High Court to restrain the respondent from preventing the banks to hire the services of the appellant. A Single Judge of the High Court passed an interim order directing the respondents not to restrain the banks from hiring the services of the appellant. This order was later modified to the extent that it was limited only to a few selected banks which were stated by the

appellant itself. However, the application for grant of the interim relief was later dismissed by the Single Judge, pending the final adjudication of the Writ Petition. The order of the single bench was appealed before the Division Bench in a Letters Patent Appeal which was dismissed.

The matter was thereafter listed before the Single Judge for the Writ Petition, wherein it was observed that since no remedy of appeal is available, the present writ petition is maintainable. It was, however, stated that the scope for interference is extremely limited. It was then that the Appellant filed an appeal before the Competition Appellate Tribunal ("COMPAT") and prayed that the COMPAT be pleased to adjudicate the matter on principles of natural justice. The Single Judge took cognizance of the appeal before the COMPAT and stated that the appeal be filed before the COMPAT without prejudice to the writ petition. However, the COMPAT dismissed the appeal on the ground that the appellant cannot pursue two remedies simultaneously for quashing of the order passed by the Commission. The COMPAT held that the appellant may file fresh appeal once the petition is withdrawn from the High Court.

³Appeal No. 45/2016, I.A. No. 134_/2016, I.A. No. 135 /2016; Decided on: 17/10/2016

CCI approves Nirma Ltd. as the purchaser of the divested assets in the Holcim- Lafarge deal⁴

The CCI approved the combination, filed on 14.07.2014, of Lafarge S.A. (Lafarge) and Holcim Ltd. (Holcim) in India, by ordering divestiture of certain assets, vide its order dated 30.03.2015 ("Order"). Further, while considering the proposal of the parties regarding a proposed purchaser of the assets to be divested, the CCI deemed it fit to seek clarification from the parties regarding transfer of the mining leases. Thereafter, the parties submitted an alternative proposal in form of a share sale option which contemplated sale of 100 percent of the share capital of Lafarge India ("Alternative Proposal"), which the CCI approved by passing a Supplementary Order dated 03.02.2016 ("Supplementary Order"). The CCI also appointed Mazars LLP as the monitoring agency for supervision of the modification.

The CCI approved the parties' proposal regarding purchase of the divested assets by, Nirma Limited (Nirma). In this context, as observed by the CCI, the parties also submitted that they will incorporate a clause in their agreement with Nirma that the purchaser of the divested business will not transfer any of its shares to any third party within 18 months from the date of acquisition of such shares without prior approval.

While approving, the CCI considered as to whether the proposed purchaser was independent with no connection whatsoever with the parties or their affiliates; had the financial resources, expertise



and incentive to maintain and develop the divestment business as a viable and active competitor in the relevant market; did not have any structural or financial links (whether directly or indirectly) with any existing cement producer in the relevant market or an operational capacity (directly or indirectly) exceeding 5 percent of the total installed capacity in the relevant geographic market; was not likely to create prima facie competition concerns and was reasonably expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the divestment business.

CCI approves acquisition by FIH Mobile Limited of certain assets utilized in feature phone business from Microsoft Mobile Oy⁵

FIH Mobile Limited (FIH), a company headquartered in China as a wholly owned subsidiary of Hon Hai Precision Industry Co. Ltd. (Hon Hai) and HMD Global Oy (HMD), headquartered in Finland, as a newly created company to manufacture and sell new generation Nokia-branded smart phones and feature phones but presently not engaged in any business activity, filed notice on 17.06.2016, under Section 6 (2) of the Act regarding acquisition by FIH of certain assets utilized in feature phone business, from Microsoft Mobile Oy (Microsoft Oy) and other entities affiliated to Microsoft Oy (all of which being subsidiaries or affiliates of Microsoft Corporation (Microsoft)), and simultaneous acquisition by HMD of the IP rights pertaining to feature phone business from Microsoft.

FIH is a contract manufacturer for mobile handset and a provider of third-party electronic manufacturing services (EMS), which consists of products and services that an electronics OEM requires to produce and design its end products, both globally as well in India. Microsoft Oy, headquartered in Finland, is engaged in development, licensing and support of software products, technology services and hardware devices related to mobile phones, both globally as well in India.

The CCI observed that there exists horizontal overlap between Hon Hai and Microsoft in relation to the EMS business, in India. In this



context, the CCI also noted that EMS may be sub-segmented into EMS communications, EMS for computers, EMS for automotive sector etc. and that the activities of Hon Hai and Microsoft overlap in the EMS communications sub-segment in India. The CCI further

⁴C-2014/07/190

⁵C-2016/06/410

observed that as the market share of Hon Hai and Microsoft in both EMS segment and EMS communications sub-segment is insignificant in India and that HMD is not engaged in any business, therefore, delineation of relevant market could be left open. Further, competitors with sizeable market shares also continued to pose competitive constraint to the parties, post combination.

The CCI also observed that there existed vertical relationship between Hon Hai and Microsoft in India, as Microsoft had purchased certain components from Hon Hai for use in the manufacturing of feature phone. However, as the proportion of sales to Microsoft to total sales of Hon Hai was insignificant, the vertical relationship was

not likely to result in any vertical foreclosure in India. The CCI also observed that there was no vertical relationship between HMD and Microsoft in India, however, post combination, as FIH would manufacture and distribute feature phones for HMD, there was to be a potential vertical relationship between HMD and Hon Hai (through FIH). The CCI however, observed that pursuant to the proposed combination, as HMD will emerge as a new player in the feature phone business in India, the potential vertical relationship between HMD and Hon Hai was not capable of causing any appreciable adverse effect in India. The CCI approved the proposed combination on 30.08.2016.

RPG Life Sciences Limited (Acquirer/RPGLS), (a part of RPG Group), which manufactures and sells branded formulations, global generics formulations and active pharmaceutical ingredients acquired certain Assigned Brands and Assigned Products from Sun Pharmaceutical Industries Limited⁶

RPG Life Sciences Limited (Acquirer/RPGLS), (a part of RPG Group), which manufactures and sells branded formulations, global generics formulations and active pharmaceutical ingredients (APIs), gave notice to the CCI under Section 6 (2) of the Act envisaging acquisition of certain Assigned Brands and corresponding Assigned Products along with the associated trademarks, goodwill, etc. from Sun Pharmaceutical Industries Limited (SPIL), which is engaged in manufacture and sales of APIs and a variety of pharmaceutical formulations in India, U.S.A. and several other markets across the world and Sun Pharma Laboratories Limited (SPLL), a wholly owned subsidiary of SPIL, which along with its wholly owned subsidiary Universal Enterprises Private Limited, is engaged in manufacturing and marketing of pharmaceutical products in India. Further, under the proposed transaction, SPIL also proposes to grant an exclusive, perpetual, royalty-free license with a right to grant sublicenses to RPGLS, for the territory of India, for the SPIL licensed brand and corresponding licensed products. RPGLS does not have any subsidiaries or joint-venture(s).

The CCI noted that although there is a horizontal overlap between the activities of



the parties at the molecule level, in the market for Montelukast+Levocetirizine | R6A42 (delineated as the relevant market), the combined market shares of the parties is insignificant to raise any competition concerns. The CCI also noted that there are several entities like Cipla Limited, Lupin Limited, Mankind Pharmaceuticals Limited and Fourrts India Laboratories Private

Limited present in the relevant market that would continue to pose competition to RPGLS. The CCI noted that there were no vertical overlaps or vertical relationships between the products currently manufactured by RPGLS and the products being acquired from SPIL and SPLL. The proposed combination was accordingly, approved by the CCI on 05.10.2016.

⁶C-2016/08/419

Platinum Group acquires 85 percent interest and sole control of Emerson Network Power Business-engaged in businesses of power, thermal and infrastructure management and solutions products from Emerson Electric Co.⁷

Cortes NP Acquisition Corporation ("CNAC") filed a notice at the CCI pursuant to execution of a Transaction Agreement ("TA") on 29.07.2016 between Cortes NP Holdings, LLC, CNAC, ASCO Power GP, LLC ("ASCO"), Cortes NP JV Holdings, LLC and Emerson Electric Co. ("Emerson"). CNAC and ASCO, which belong to Platinum Equity Group ("Platinum") are special purpose vehicles set up to facilitate the proposed combination. Accordingly, the transaction involved acquisition by Platinum of an 85 percent interest and sole control of Emerson Network Power Business ("ENP Business" or "Target Business") from Emerson through CNAC and ASCO. The CCI observed that the Target Business is engaged in India in the businesses of power, thermal and infrastructure management and solutions products. None of Platinum's portfolio companies in India were neither found active in the markets serviced by the Target Business nor were found using products made for the specialized applications that ENP Business address. The CCI accordingly, approved the proposed combination on 05.10.2016.



⁷C-2016/08/426

Goldman Sachs increases its shareholdings of DEN Networks Limited - a multiple service operator, engaged in the business of distribution of television channels and provision of broadband services and e-commerce services⁸

A notice under Section 6 (2) of the Competition Act, 2002 was jointly given by Broad Street Investments (Singapore) Pte. Ltd (BSIPL) and MBD Bridge Street 2016 Investments (Singapore) Pte Ltd (MBD) (Acquirers), being the investment holding companies belonging to the Goldman Sachs Group, engaged in investment banking, securities and investment management business providing a wide range of financial services, (Goldman Sachs Group, Inc. and its group companies referred to as the GS Group), on 23.09.2016, regarding subscription by BSIPL and MBD of equity shares of DEN Networks Limited (Den), a multiple service operator (MSO), engaged in the business of distribution of television channels, apart from providing broadband services and e-commerce services through a television channel named Den-Snapdeal TV shop and website tvshop.in., leading to increase in shareholding of GS Group companies in Den from the existing 17.80 percent to 24.51 percent.

With reference to horizontal overlap, the CCI observed that business of one of the GS Group's portfolio companies, namely, Trend Sutra



Cayman Holdings operating as 'Pepperfry' overlaps with the e-commerce business of Den and as regards the vertical relationship, three portfolio companies of GS Group were operating in upstream/downstream markets related to e-commerce. Considering the nature and scale of operations and existing vertical relationships of Den with these portfolio companies, the CCI observed that the overlap was insignificant and not likely to raise any competition concern. The CCI approved the proposed combination on 14.10.2016.

⁸C-2016/09/435

Ultratech acquires cement plants from Jaiprakash Associates Limited and its subsidiary Jaypee Cement Corporation Limited in the States of Madhya Pradesh, Uttar Pradesh, Himachal Pradesh, Uttarakhand and Andhra Pradesh⁹

UltraTech Cement Limited (Ultratech), a subsidiary of Grasim Industries Limited belonging to Aditya Birla conglomerate, gave notice to CCI on 29.04.2016 regarding proposed acquisition of the identified cement plants having a total cement capacity of 21.2 MTPA situated in the States of Madhya Pradesh, Uttar Pradesh, Himachal Pradesh, Uttarakhand and Andhra Pradesh from Jaiprakash Associates Limited and its subsidiary, Jaypee Cement Corporation Limited (JCCL).

To define the relevant product market, the CCI considered the demand side substitutability between various types of cements and observed that white cement and grey cement differ in terms of their physical characteristics and intended uses and, therefore, constitute separate relevant product markets; however, as different varieties of grey cement are largely substitutable, the market for grey cement was considered as the relevant product market for the purpose of competition assessment of the proposed combination. With regards to the relevant geographic market, the CCI observed that there should be sufficient competitive constraint for inclusion of an additional state/area in the relevant geographic market. The inclusion of various states in one geographic market was done on the basis of actual pattern of inter-state trade flows. On that basis, the CCI delineated one of the relevant markets as Andhra Pradesh and included Karnataka and Maharashtra due to inter-state trade flows (the "AP Relevant Market"). Similarly, other relevant geographic markets delineated were – the states of Uttar Pradesh, Madhya Pradesh, Rajasthan, Haryana and Delhi (the "UP/MP Relevant Market"); the relevant geographic market for Uttarakhand was defined in terms of area comprising states of Uttarakhand, Uttar Pradesh, Madhya Pradesh, Rajasthan, Haryana and Delhi (the "UK Relevant Market"). As regards Himachal Pradesh, the CCI expanded the market



definition, with Himachal Pradesh as base, to include Punjab.

In all the above relevant markets, except HP Relevant Market, the CCI observed that the market was fragmented and post combination share of the combining parties is insignificant in the presence of other competitors to cause any appreciable adverse effect on competition ("AAEC"). However, in the HP Relevant Market, the market was found concentrated with presence of only 4 companies namely LafargeHolcim, Ultratech, JAL and Cement Corporation of India and JAL and Ultratech ranked as 2nd and 3rd in the relevant market in terms of installed capacity having market shares of around 20 percent and 10 percent respectively. With LafargeHolcim accounting for around 68 percent of the total installed capacity and being the market leader, the combination pertained to integration of the 2nd and 3rd players, with Ultratech having a market share of around 30 percent post combination. However, the CCI noted that the Baga plant of JAL was operating only at

substantially lower capacity utilisation due to absence of environmental clearances and that HHI was only a first filter to assess the state of competition. The CCI observed further that Ultratech would continue to be constrained by presence of LafargeHolcim and post combination might be in a position to compete better, thereby constraining LafargeHolcim in a more effective manner. The CCI also took into account fact that the proposed combination had been initiated at the instance of lenders of JAL given its mounting debt and that the Acquirer intended to utilise its processes and core competence to increase the capacity utilisation of target assets. The CCI observed further that the market could benefit from increase in overall economic efficiency in production and Ultratech, being in a better position to compete more effectively post combination, the proposed combination was not likely to result in an AAEC in the HP relevant market.

The CCI accordingly approved the proposed combination on 04.08.2016.

⁹C-2016/04/394

Coffee Day Enterprises Limited (“CDEL”), the holding company of Coffee Day Group amalgamates with Coffee Day Overseas Private Limited which is owned by Coffee Welfare Trust and is engaged in the business of cultivating and dealing with agricultural and horticultural products, dairy and farm produce¹⁰



Coffee Day Enterprises Limited (CDEL) and Coffee Day Overseas Private Limited (CDOPL) gave notice to the CCI under Section 6 (2) of the Competition Act, 2002 on 17.08.2016 relating to the amalgamation of CDOPL with CDEL. CDEL, the holding company of Coffee Day Group, in addition to various other businesses carried through its subsidiaries and affiliates, is engaged in the business of coffee and related business and through one of its subsidiaries, in retailing of coffee and other related products through a chain of Café and Xpress kiosks outlets, under the brand name ‘Café Coffee Day’. CDOPL, owned by Coffee Welfare Trust and envisaged to be in business of cultivating and dealing with agricultural and horticultural products, dairy and farm produce, is not actively engaged in any business activity currently except that in few instances, it acted as an agent for procurement of raw coffee beans on commission basis and generated an insignificant turnover in FY 2015-16. As noted by the CCI, none of the trustees of the Coffee Welfare Trust are connected, directly or indirectly, to the Coffee Day group and that CDOPL has not acted as an agent for CDEL or any of its subsidiaries for the sale of raw coffee beans. Further, Coffee Day Global Limited (CDGL) is a subsidiary of CDEL, in which CDOPL and other investors have

insignificant shareholdings who do not hold any affirmative and/or veto rights in CDGL. CDGL is engaged in the business of cultivating, processing, dealing as wholesaler, retailer and distributor of coffee seeds, coffee powder etc. The CCI noted that both CDEL and CDOPL are engaged in business related to coffee, but the businesses in which they are engaged in are neither identical nor substitutable. Further, neither CDOPL has any subsidiaries nor does it directly or indirectly hold shares and/or control over other enterprises which are engaged in the business carried out by CDEL. Thus, the CCI held that there is no horizontal overlap between the parties. It also observed that there is also no vertical relationship between the businesses of the parties and that the potential vertical relationship between CDOPL and CDEL wherein CDOPL may act as agent for procurement of raw coffee beans is not likely to raise any competition concern given the limited presence of CDOPL in the business of procurement of raw coffee. CCI approved the combination on 27.09.2016.

Disclaimer: The snippets are meant only for information and should not be construed as a legal advice or intended for solicitation or advertisement.

¹⁰Combination Registration No. - C-2016/08/422



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