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CCI PASSES YET ANOTHER CEASE AND DESIST ORDER IN A CASE OF BID RIGGING

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On the basis of clinching evidence such as emails and WhatsApp communications, the Competition Commission of India (CCI) found ten manufacturers and suppliers of brake blocks to Indian Railways (Railways) guilty of collusive bidding. However, given the economic downturn due to the pandemic faced by Micro Small and Medium Enterprises (MSMEs) in India, and other public interest considerations, the CCI imposed no penalty and directed the parties to cease and desist from indulging in such activities in the future.

Background & Facts

The complaint was filed by various departments of the Railways claiming that the manufacturers and suppliers of auto-components and composite brake blocks (CBBs) indulged in bid rigging. The Railways claimed that in the procurement of CBBs, the manufacturers who were opposite parties one to ten in the case (Opposite Parties), quoted identical bids and offered identical reductions during negotiations with the Railways. The Railways also claimed that the rates quoted in different railway divisions were also the same in spite of geographical differences.

Investigation

The Director General (DG), investigative wing of the CCI, found clinching evidence in terms of email exchanges, WhatsApp communications, SMSs, call detail records of the individuals, statements and admissions by parties to conclude that the manufacturers and suppliers indulged in bid rigging during the period 2009 to 2017. The DG found that all the Opposite Parties, collectively decided prices to be quoted by them in the various tenders floated by the Railways for the procurement of CBBs.

The DG found detailed evidence in terms of how the quantity allocation of tenders between various Opposite Parties used to take place by maintaining excel sheets. Evidence of meetings between the Opposite Parties at different locations to decide the *modus operandi* and strategy of the cartel arrangement, further fructified the DG's investigation.

CCI's Findings

The CCI acknowledging the existence of direct evidence in the case as noted above, observed that "*nothing can be more incriminating than these*" and held that the Opposite Parties were indeed involved in bid rigging of Railway tenders.

No AAEC: Some of the Opposite Parties argued that even though they had cartelised, there was no appreciable adverse effect on competition (AAEC) since there was no effect on prices due to the cartelisation. Another argument raised which failed to impress the CCI, was that the Railways is a monopolistic buyer. Therefore, the manufacturers have no control over the prices given the control of the Railways over the prices and quantities to be supplied to it.

In disagreeing with the argument, the CCI reckoned the legislative intent behind relevant provision prohibiting cartelisation as wide enough to not only proscribe those agreements which cause an AAEC but also those which are likely to cause an AAEC. The fact that parties decided prices, convinced the CCI that the conduct was certainly likely to cause an AAEC since once an agreement between independent competitors had been established to fix prices, it was presumed to have caused an AAEC within India.

Further, the CCI observed that the parties had not been able to rebut the presumption of an AAEC as they failed to show how the bid rigging arrangement led to any procompetitive impact on the market.

Final Order and Penalty Imposed

Despite the above, the CCI issued a "cease and desist" order i.e., directed the parties to immediately discontinue the conduct of cartel and not to indulge in such conduct in the future. It is noteworthy that with such clinching evidence and eight of the Opposite Parties admitting to the guilt of cartelisation, the CCI did not impose any penalty on the parties.

The CCI relied upon irrebuttable evidence e.g., exchange of prohibited commercial information via WhatsApp, SMSs, e-mail exchanges, call detail records, etc. However, the order does not make any whisper about how these pieces of evidence were collected by the DG. In normal cartel investigations arising out of Section 19 of the Competition Act, 2002, the opposite parties rarely submit such clinching pieces of evidence voluntarily due to the risk of high penalties. Be that as it may – the final decision echoes the "cease & desist" era of the repealed MRTP Act, 1969.

Click here to access the [order](#) in reference case nos. 03/05 of 2016, 01/04/08 of 2018

(The team representing Hindustan Composite Limited - Opposite Party No.1, from Khaitan & Co comprised Manas Kumar Chaudhuri, Pranjal Prateek, Radhika Seth, Ebaad Nawaz Khan, Mayuka Sah)

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