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CCI DISMISSES TWO CASES OF ALLEGED COLLUSIVE BIDDING BY LPG CYLINDER MANUFACTURERS

31 August 2020

India's competition authority – the Competition Commission of India (CCI) has dismissed two cases of similar nature involving allegations of collusive bidding by several manufacturers of 14.2 kg LPG cylinders. In 2009 and 2010, LPG cylinder manufacturers had quoted identical or near identical prices in two tenders floated by the State-Owned Enterprise (SOE), Bharat Petroleum Corporation Limited (BPCL) for supply of 14.2 kg LPG cylinders[1] which had prompted the CCI to direct an investigation. However, considering the nature of the LPG cylinder market in India, confirmed by the Supreme Court of India (Supreme Court) in the *Rajasthan Cylinder case*,[2] the CCI closed both cases without delving into the individual conduct of the cylinder manufacturers.

Background and Facts

The CCI in 2014 had taken *suo motu* cognizance of the alleged collusive bidding by LPG cylinder manufacturers in two tenders floated by BPCL in 2009 and 2010 and had directed the Director General, CCI (DG) to conduct investigations. In the CCI's *prima facie* view, an analysis of price bids revealed bidding patterns indicating cover or complementary bids in certain cases.

The DG in its investigation found price parallelism in the bids of certain parties - which in DG's opinion was in the nature of a concerted practice in contravention of Section 3 of the Competition Act, 2002 (Competition Act). However, at the same time, the DG also confirmed that the market was inelastic and demand driven. By way of their procurement policies, SOEs / Oil Marketing Companies (OMCs) (including BPCL) issued public tenders for procurement of LPG cylinders after determining an indicative price at which the cylinders were to be procured. Further, even after the lowest bidder's price (L1 price) was declared, BPCL negotiated with manufacturers to reduce the quoted L1 prices.

Also, due to strict regulatory/licensing requirements, usually, there was less room for scope of innovation left with the cylinder manufacturers. Further the manufacturers could only sell the cylinders to three SOEs/OMCs – namely – BPCL, Hindustan

[1] Order dated 20 August 2020 in *In Re: Formation of cartel in the supply of 14.2 kg LPG cylinders fitted with S. C. valves procured by BPCL through e-Tender dated 17.11.2009* (Suo Motu Case No. 05/2014) and Order dated 26 August 2020 in *In Re: Formation of cartel in the supply of 14.2 kg LPG cylinders fitted with S. C. valves procured by BPCL through Tender dated 13.08.2010* (Suo Motu Case No. 09/ 2014) .

[2] *Rajasthan Cylinders and Containers Limited* v *Union of India* and other connected appeals in Civil Appeal No. 3546/2014.

Petroleum Corporation Limited and Indian Oil Corporation Limited and not to any other buyers in the open market.

The LPG cylinder manufacturers, among other arguments, contended that even if the manufacturers may have quoted the same price, the final price was decided by BPCL. Accordingly, there was no contravention of the Competition Act.

CCI's Findings

The CCI noted and held that while the price parallelism may have been a result of concerted action by the opposite parties, but as per the decision enunciated by the Supreme Court in the *Rajasthan Cylinder case,* the nature and characteristics of the market of manufactures of 14.2 Kg LPG cylinders can also be responsible for parallel behaviour. The CCI also emphasised that for finalising the financial bid, BPCL negotiated with the bidders and decided the final price at which the tender was to be closed and the order to suppliers was to be awarded. Having regard to these crucial factors, the CCI did not find contravention of the Competition Act. It is noteworthy that the Supreme Court in the *Rajasthan Cylinder case* has enunciated an interesting economic ratio i.e., "oligopsony" to conclude as to why the decision of the former Competition Appellate Tribunal (COMPAT) was to be distinguished. Oligopsony is a market where only a few buyers operate having the ability to decide the sale price of the suppliers. Such a market practice of the buyers cannot be held to be a concerted practice of the suppliers. These two cases directly come within the ambit and scope of the binding ratio of the Supreme Court judgment.

Comment:

The landmark judgment of the Supreme Court in the *Rajasthan Cylinder case* emphasises the need to assess market structures before returning a finding of contravention of the Competition Act, more particularly, if the market is in the nature of an oligopsony. In our view, the *Rajasthan Cylinder case* will remain key in future determinations of the CCI in relation to peculiar markets (such as in this case) where final prices were determined by the procurer. These judgements lay a strong foundation for India's cartel jurisprudence by drawing a line on the applicable criteria to assess a case of collusive bidding in markets of peculiar nature.

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