

Aluminium Phosphide Order: CCI Again Shows Its Might

Background

The Competition Commission of India (“**CCI or Commission**”) has been in constant news for the last one year or so. On one hand, it stepped into new regulatory role regarding M&A transactions under the CCI Combination Regulations, 2011 and on the other, it has been imposing hefty penalties for anti-competitive practices. Under the Competition Act (“**Act**”), CCI has been authorised to impose heavy fines on entities engaging in price manipulation, cartel formation or misuse of their dominance, which can go as high as 10% of their turnover or three times their annual profits.

In the last 12 months, the Commission first imposed a penalty of INR 555 million (*USD 11.1 million*¹) on the National Stock Exchange in June, 2011 for abusing its dominance and attempting to “eliminate competitors” in the currency derivatives market. Then, in August 2011, it imposed a penalty of INR 6,300 million (*USD 126 million*) on one of the biggest real estate developer, DLF, for imposing one-sided clauses on flat buyers. Recently on April 23, 2012, the Commission through its order in *In re: Aluminium Phosphide Manufacturers*² has reinforced its “no-toleration stand” with respect to issues pertaining to cartelization, price determination and bid-rigging. This newsletter analyzes the order and its significance in the competition policy framework of India, especially in the context of government contracts.

1. Brief Facts of the Case

On February 2011, the Food Corporation of India (“**FCI**”) wrote to the CCI about a possible anti-competitive arrangement among the manufacturers of aluminum phosphide in the context of certain tenders it had floated since 2002. The letter alleged that four known manufacturers *namely*, United Phosphorous Limited, Sandhya Organic Chemicals Private Limited, Excel Crop Care Limited and Agrosynth Chemicals Limited (“**Opposite Parties**”), have formed a “cartel”³ to control sale prices of aluminum phosphide tablets. FCI had further alleged that the manufacturers have quoted identical price rates under an agreement resulting in a twofold increase in prices during the period of 2007 to 2009. Based on the contents of the letter, the CCI issued directions to its Director General to carry out an enquiry into the alleged contravention by the manufacturers.

2. Finding of the Director General

After examining the records of tender documents from 2002 to 2009, the following key finds were laid down by the Director General:

¹ 1 USD = 50 INR (*approx.*)

²Suo-Moto Case no. 02/2011 dated April 23, 2012 available on <http://cci.gov.in/May2011/OrderOfCommission/Case2of2011MainOrder.pdf> last accessed on May 16, 2012 at 2220 IST

³ Section 2(c) of the Act defines “cartel” as an association of producers, sellers, distributors, traders or service providers who limit, control or attempt to control production by virtue of an agreement among themselves

- a) The records of the tender showed that all the four manufacturers have been quoting identical rates since 2002 in unrounded figures;
- b) There was no similarity in the various elements of costing of each company;
- c) The tenders floated in the year 2005, 2008 and 2011 were jointly boycotted by all the four manufacturers.

3. Issues

- a) Cause of action: Whether the letter sent by the Chairman and Managing Director of FCI alleging bid-rigging/collusive bidding by Opposite Parties is a valid cause of action for the CCI to take cognizance of the matter?
- b) Can the Commission factor the conduct of four manufacturers prior to 2007, for determining violation of the Act, considering that the provision on anti-competitive arrangements/agreements (*section 3*) was notified only on May 20, 2009? Moreover, even the 2009 tender was floated before the said notification. Whether the Commission is justified in imposing a penalty on the basis of anti-competitive behavior based on the 2009 tender?
- c) Whether there was an “agreement” between the Opposite Parties at the first place, to determine the anti-competitiveness thereof, under section 3 of the Act?
- d) Whether identical pricing of the tenders amounted to collusive action or agreement among the bidders?

4. CCI Observation & Analysis

4.1 *Valid Cause of Action*

The manufacturers contended that most of the tenders for which contravention has been alleged are dated prior to the notification of section 3 i.e. May 20, 2009. It is an established principle that competition law has only prospective application, and thus, the acts conducted prior to notification of a particular provision cannot be used to adjudge its contravention. However, to determine the present anti-competitive behavior pattern and the contravention thereof, the behavior of the past is necessary and permitted to be taken into consideration. This view was taken by the Bombay High Court in its ruling of March 31, 2010, dismissing the petition of Kingfisher Airlines, wherein a stay was sought on the CCI inquiry. The Commission had ordered an inquiry sometime in August 2009, in the alliance of Kingfisher with Jet Airways and its probable impact of creating a “monopoly” in the market. Kingfisher argued that the relevant provisions of the Act were notified after the formation of its alliance and is thus inapplicable. The court rejected this argument and gave a go ahead to the CCI inquiry.

In the present case, the records of 2009 tender reveal that even though the tender enquiry was issued in March 2009, events leading to the finalization of contracts awarded to all the three participants continued till July 21, 2009. The CCI, refuting the contention of Opposite

Parties, rightly held that the subject matter of enquiry was the conduct of the parties and not the terms and conditions of the tender. If a *prima facie* case exists against the opposite parties in a given matter, there is no provision in the Act restricting the scope of an inquiry and the jurisdiction of the Commission.

4.2 *Existence of an “Agreement”*

The contravention of section 3 of the Act is based upon existence of an “agreement”. The Act provides an inclusive definition of “agreement” with three main elements of (i) arrangement (ii) understanding and (iii) action in concert. It is not necessary that a formal agreement is reached by the parties to determine contravention of the Act. According to the Monopolies and Restrictive Trade Practices Commission (*predecessor of CCI*), competitive agreements are determined on the basis of “preponderance of probability”.⁴ In the instant case, action in concert or concerted action can be established on the basis of the behavioral pattern of the manufacturers over the years, which shows an arrangement between them to quote the same price in tenders and then identically reduce it following negotiations. This led to a situation where the tender was equally divided among the bidders at all times. Moreover, the Opposite Parties also boycotted the tenders in the year 2005, 2008 and 2011, all acting together, further corroborating the fact of concerted action. Thus, though there was no direct evidence, an agreement based upon the behavioral pattern is clearly established.

4.3 *Collusive action of bidders*

Having established the existence of an “agreement” between the parties, there is a clear evidence of a collusive action. The Opposite Parties based on mutual understanding quoted “identical prices” which is highly improbable among competitors having different production and transportation costs, especially in a tender process. They acted in furtherance of a common intention, so that the prices are higher and benefits are reaped by each manufacturer equally. The collusive action by the bidders and fixing of identical prices thereof destroys the whole purpose of a tender process. The manufacturers made an attempt to determine the sale price. The collective boycott of the tender as well as the coordinated manner in which the tenders of 2009 were submitted signifies an attempt to limit or control the supply of aluminum phosphide tablets in violation of section 3(3)(b)⁵ of the Act.

In a similar case of 2011,⁶ the Commission had held the manufacturers of LPG cylinders guilty of bid-rigging for quoting identical prices in the tender issued by Indian Oil Corporation Limited. All LPG manufacturers were penalized at the rate of 7% of their average turnover.

All the above factors clearly indicate that the manufacturers have eliminated competition among themselves by indulging in “collusive bidding” in the tender of 2009 and collective boycott of e-tender floated in 2011. Thus, they were involved in bid rigging as per

⁴ Ghai Enterprises Private Limited and Quality Ice Creams, RTPE 18 of 1983

⁵ Section 3(3)(b) of the Act prohibits agreement that limits or controls production, supply, markets, technical development, investment or provision of services.

⁶ In re: Suo Motu Case against LPG Cylinder Manufacturers, Suo-motu Case no. 3/2011

section 3(3)(d)⁷ of the Act. In case of bid rigging there is a presumption of appreciable adverse effect on competition in India, which the manufacturers were not able to rebut.

On comparison of the present order with the previous ones by the CCI in the matter of cartelization and bid-rigging, a remarkable shift in the trend is observed. The most prominent being the *Sugar Mills Cartel Case*⁸ wherein it was observed by the CCI that unilateral pricing decisions based on competitors' pricing strategy results in similar or parallel pricing. The manufacturers even relied on the aforementioned decision, while contending that the similarity in pricing is a result of the price quoted in the previous bid and not because of an agreement among the manufacturers. However, the CCI found cogent evidence supporting the existence of agreement and dismissed the contentions of the Opposite Parties.

Conclusion

The Commission imposed a penalty of INR 2,524.4 million (USD 50.48 million) on United Phosphorous Limited, INR 15.7 million (USD 314,000) on Sandhya Organics Chemicals Private Limited and INR 639 million (USD 12.78 million) on Excel Crop Care Limited. The quantum of penalty in this case clearly suggests that the FCI was deprived from the benefit of choosing from competitive bid rates in procurement of aluminum phosphide tablets.

It is debatable whether such hefty fines will serve as a deterrent or scare the investor in the long run. The CCI has proved all this while that it has the necessary enforcement mechanism in place to ensure fair competitive market. It can be safely said that CCI is better equipped than its predecessor in tackling issues related to cartelization. Keeping government contracts in mind, it is a good thing that there is stiff penalty for distorting competition, as public procurement is a major part of the GDP. Furthermore, the tendering and bidding process in these contracts is often doubted, and in most cases there is ample scope for collusion, corruption and bid rigging. To conclude, CCI has proved time and again that it has the necessary tooth to ensure compliance with competition laws, something which not many regulators in India can vouch of.

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⁷ Section 3(3)(d) of the Act prohibits agreement that directly or indirectly results in bid-rigging or collusive bidding

⁸ *Suo Moto Case No. 01/2011*