Inter alia…

AZB & PARTNERS
ADVOCATES & SOLICITORS

SEPTEMBER 2013 • SPECIAL EDITION • STRICTLY FOR PRIVATE CIRCULATION

In This Issue

PAGE

Inter alia… is a legal newsletter published by AZB & Partners for a select list of clients and colleagues. Published every quarter, it aims to provide a snapshot of recent legal developments in certain critical areas: infrastructure, foreign direct investment, securities law, exchange control regulations, corporate law, media and entertainment, intellectual property and banking. When a significant development demands it, *Inter alia…* is published as a Special Edition to provide an in depth analysis of that development. We hope you will find the content informative and useful. If you have any questions or comments, please email us at: editor.interalia@azbpartners.com or call AZB & Partners.

AZB & PARTNERS
ADVOCATES & SOLICITORS

MUMBAI : Express Towers | 24th floor | Nariman Point | Mumbai 400021 | India | TEL +91 22 66396880 | FAX +91 22 66396888 | E-MAIL mumbai@azbpartners.com

DELHI : AZB House | Plot No. A8 | Sector 4 | Noida 201301 | India | TEL +91 120 4179999 | FAX +91 120 4179900 | E-MAIL delhi@azbpartners.com

GURGAON : Unitech Cyber Park | 602 Tower-B | 6th floor | Sector 39 | Gurgaon 122001 | India | TEL +91 124 4200296 | FAX +91 124 4038310 | E-MAIL gurgaon@azbpartners.com

BANGALORE : AZB House | 67-4 4th Cross | Lavelle Road | Bangalore 560001 | India | TEL +91 80 42400500 | FAX +91 80 22213947 | E-MAIL bangalore@azbpartners.com

PUNE : Onyx Towers | 1101-B | 11th floor | North Main Road | Koregaon Park | Pune 411001 | India | TEL +91 20 67256666 | FAX +91 20 67256600 | E-MAIL pune@azbpartners.com

CHENNAI : Amble Side | 2nd floor | 8 Khader Nawaz Khan Road | Nungambakkam | Chennai 600006 | India | TEL +91 44 43561453 | FAX +91 44 43561853 | E-MAIL chennai@azbpartners.com

Behavioural Cases

CCI penalises 11 shoe manufacturers for bid-rigging

On August 6, 2013, the Competition Commission of India ('CCI') levied a cumulative penalty of ₹62.5 million (approximately US$0.9 million) on 11 rubber shoe manufacturers ('Opposite Parties') for bid-rigging in the supply of rubber shoe soles to the Directorate General of Supplies & Disposals ('Informant') under Section 3(3) of the Competition Act, 2002 ('Act').

The Informant had alleged that (i) the bids made by the Opposite Parties were in a very narrow range; (ii) most of the Opposite Parties had restricted the quantity to be supplied by them; and (iii) most of the Opposite Parties had also fixed the maximum quantity they would supply to a particular Direct Demanding Officer ('**DDO**'). The Informant contended that these three practices were inconsistent with Section 3(3) of the Act.

CCI examined the bidding pattern in light of (a) the near-identical prices, and (b) the limited range in terms of quantities, quoted by each of the Opposite Parties, despite differences in, *inter alia,* their operations, production capacities, costs, geographies and profits. For instance, the cost of raw materials (latex and rubber) was subject to significant fluctuations, yet the Opposite Parties generated near-identical estimations of the average cost of raw materials. Moreover, the Opposite Parties gave uniform reasons for near-identical bids to the Director General for Competition, whereas while making submissions before CCI, their explanations differed. The investigation identified a meeting of the Federation of Industries of India ('**Federation**') convened to discuss various problems with the Informant, and CCI inferred that the Federation gave the shoe-makers a platform to hold meetings. Finally, commercially sensitive performance statements in relation to the other Opposite Parties were found in the possession of one of the Opposite Parties, which led CCI to infer sharing and exchange of information amongst bidders prior to participating in the bid.

CCI stated that the standard of proof in determining the presence of such cartel-like agreements was one of "preponderance of probabilities'. Thus, on the basis of the aforementioned factors, CCI held that the Opposite Parties had entered into an agreement to determine prices and rig the bids, which was inconsistent with Sections 3(3)(a) and 3(3)(d) of the Act.

CCI noted that the Opposite Parties had restricted their production to less than half their installed capacity. CCI also noted that a majority of the Opposite Parties had restricted their supply-commitment to each DDO. The Opposite Parties were unable to give any valid justification for these actions. Based on these observations, CCI held that the Opposite Parties had agreed to limit/control the supply and also colluded for mutual allocation of markets, contravening Sections 3(3)(b) and 3(3)(c) of the Act.

The penalty of ₹62.5 million (approximately US$0.9 million) was a sum of the individual fines of 5% of turnover imposed on each Opposite Party.

Merger Control

CCI fines Temasek for delay in filing pre-merger notification

On August 1, 2013, CCI passed an order against Temasek Holdings Private Ltd ('**Temasek**')and its subsidiaries Zulia Investments ('**Zulia**') and Kinder Investments ('**Kinder**'), imposing a penalty of ₹5 million (approximately US$74,000) for delayed filing of the pre-merger notifications required under Section 6(2) of the Act. On June 6, 2013, Zulia and Kinder, both indirect wholly owned subsidiaries of Temasek, filed a notice under Section 6(2) of the Act (Zulia, Kinder and Temasek are together referred to as the '**Acquirers**'). The proposed transaction pertained to an acquisition of 439 million new ordinary shares in DBS Group Holdings Limited (**'DBSH'**).

This proposed acquisition was pursuant to a Share Purchase Agreement ('**SPA**') executed between Fullerton Financial Holdings (Private) Ltd. ('**Fullerton**') (an indirect wholly owned subsidiary of Temasek) and DBSH, on April 2, 2012, whereby Fullerton agreed to sell, and DBSH agreed to purchase, 100% of the issued share capital in Fullerton's direct wholly owned subsidiary, Asia Financial (Indonesia) Private Limited. The terms of the SPA also required DBSH to issue 439 million shares in DBSH to Fullerton or Temasek or any other wholly owned subsidiaries of Temasek. Accordingly, on May 13, 2013, an Undertaking Agreement was executed between Zulia, Kinder and Fullerton under which Zulia and Kinder were both to receive certain numbers of ordinary shares of DBSH. On the same date, Fullerton also issued a letter to DBSH, directing them to release the aforementioned shares to Zulia and Kinder, respectively, on the date of completion of the SPA.

The Acquirers, while filing the notice under Section 6(2) on June 6, 2013, also filed an application for condonation of delay of 399 days. While CCI admitted the delayed filing under Regulation 7 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, as amended up to April 4, 2013 (**'Combination Regulations'**), it also decided to initiate separate penalty proceedings under Section 43A of the Act and Regulation 48 of the CCI (General) Regulations, 2009, for the delay in filing.

The Acquirers' reason for the delay was the receipt of incorrect advice from their initial Indian counsel regarding the notification requirement. The Acquirers claimed to have learnt of the filing requirement only during the course of advice received later on an unrelated and separate matter. Upon learning the same, they immediately and voluntarily filed the notice. The Acquirers also submitted that the transaction had been abandoned and the SPA terminated. In such a case of non-consummation of the impugned transaction, they argued that no penalties ought to be imposed. Further, the transaction was entirely offshore in nature. Finally, they reiterated that they had not acted in any *mala fide* manner and that, if any penalty *were* to be imposed on them, it should be a symbolic, minimal penalty.

In deciding about the penalty under Section 43A of the Act, CCI made these observations– the Acquirers' plea of ignorance of filing requirements because of wrong legal advice given by counsel does not hold, as there is ample clarity in the provisions; (ii) the Acquirers' plea - *that when a combination is abandoned (as in this case), the very purpose and basis of the Commission's inquiry is extinguished* and an assessment of the likely competition concerns arising in such a case becomes a moot point – does not hold. According to CCI, regulatory compliance in terms of timely filing of the notice of the proposed combination and the ultimate fate of the transaction are two entirely different issues.

CCI considered the following aggravating factors when deciding the quantum of penalty: (i) no record of any mention of regulatory compliance with Indian competition laws *before* the execution of the SPA and no record of communication between the Acquirers and their counsel on Indian competition law compliance *even after* the execution of the SPA, (ii) no sense of urgency shown by the Acquirers, and there was a delay of 5 months even after being informed of the requirement to notify, (iii) both Temasek and DBSH have been operating in India for a long time and cannot plead ignorance, and (iv) there was a failure to notify an earlier transaction by Temasek (the acquisition of certain non-voting preference shares in DBSH by a wholly owned subsidiary of Temasek).Among the mitigating factors, CCI considered: (i) the Acquirers *voluntarily* gave notice under Section 6(2) of the Act before the consummation of the transaction, and (ii) the proposed combination was an offshore transaction.

Based on the above, CCI considered it appropriate to impose a penalty of ₹5 million on the Acquirers, payable within 60 days of the order. CCI did, however, mention in its order that the maximum penalty that may be imposed under Section 43A of the Act would be 1% of the total combined assets of the Acquirers and DBSH, which would amount to ₹310,000 million (approximately US$4700 million) .

CCI approves Mahindra-CIE combination

On July 12, 2013, CIE Group Companies (**'CIE'**) and certain Mahindra Group Companies (**'Mahindra'**) filed a notice under Section 6(2) of the Act with regards to a proposed combination. As a consequence of the combination, CIE would control approximately 45-52% in the post-combination resultant entity, Mahindra CIE Automotive Limited (**'Mahindra CIE'**). Mahindra & Mahindra (**'M&M'**) would also hold approximately 20% in Mahindra CIE. The transaction involved multiple agreements and stages but the trigger documents, i.e. documents whose execution triggers a Section 6(2) pre-merger notification requirement, were executed on June 15, 2013.

CCI examined the proposed combination in light of the criteria given in Section 20(4) of the Act and made the following observations – (i) CIE had no presence or investment in India, either directly or indirectly, and was not engaged in any activity that either competed with, or was vertically related to, the business proposed to be acquired by way of the proposed combination; (ii) the proposed combination is not between two existing players in the relevant market; (ii) post-combination, M&M would still hold 20% of the equity in Mahindra CIE and, (iii) technologies used by Mahindra would continue to be used by Mahindra CIE post-combination.

Based on the aforementioned observations, CCI found no likelihood of any appreciable adverse effect on competition within the relevant market in India and approved the proposed combination under Section 31(1) of the Act.

CCI's bid to curb bid-rigging cartels in India

In 2004, the Ministry of Health and Family Welfare ('**Ministry**'), Government of India invited bids for the supply of 8 million pieces of female contraceptives. In response, Hindustan Latex Limited ('**HLL**') and five competing private sector companies quoted the same price: ₹25 per piece. HLL offered to supply 0.7 million pieces (when it could produce 17.75 million pieces), and the others together bid for the remaining 7.3 million pieces. Despite what appeared to be fairly clear signs of a case of possible bid-rigging, in the absence of an effective competition law regime, the Ministry was limited to seeking an explanation from the contraceptive suppliers.

Public procurement accounts for nearly 12% of India's gross domestic product, but is plagued by practices such as collusion and bid rigging. Since the introduction of the Act in 2009, it seemed only natural for CCI to focus its efforts on bid-rigging cartels in public procurement. Though the competition concerns arising from bid-rigging tend to be similar, regardless of the type of industry, anti-competitive practices that undermine the process of public procurement have a far more pernicious outcome on account of the huge amount of public expenditure and taxpayers' money that is used to purchase goods and services. From cartridge explosives to medical equipment, CCI has cracked down on several cases of bid-rigging in quick succession. Only a month ago, CCI imposed a penalty of ₹62.5 million (approximately US$0.9 million) on 11 shoe manufacturers for engaging in collusive and restrictive bidding for a tender floated by a department of the Ministry of Commerce for the procurement of ankle boot soles.

Bid-rigging, prohibited under Section 3(3)(d) of the Act, typically involves competitors agreeing to artificially increase the price of goods and/or services offered in a bid to potential customers. Sometimes, bid-rigging occurs when two or more persons agree that, in a response to a call for bids or tenders, one or more of them will not submit a bid or withdraw their bids. However, given that cartel operators often work in secret, getting direct evidence of an agreement to manipulate bids can be difficult. Competition regulators often rely on circumstantial evidence to prove the existence of an agreement to rig bids. CCI follows a similar approach and in fact, in the recent cartel decision involving 11 shoe-makers, acknowledged that when faced with limited explicit evidence of unlawful conduct, "it is often necessary to reconstitute certain details by deduction".

In the case pertaining to bid-rigging by manufacturers of Aluminum Phosphide Tablet, all three companies participating in the tender process floated by the Food Corporation of India ('**FCI**') quoted an identical bid price. This was in spite of a marked difference in each company's cost of production. The entries in the visitors' register at the offices of FCI showed that all three participants entered the premises at the same time, with one signing in for the group. CCI inferred the bidders had the opportunity to discuss the prices, and when combined with the other factors listed above, was sufficient to prove the existence of an agreement to maintain prices at a certain level.

In another case, which concerned the supply and installation of medical equipment to Sports Injury Centre, Safdarjung Hospital, CCI identified a cartel on the basis of evidence from the bid documents themselves. Only three firms participated in the tender process and the contract was awarded to MDD Medical Systems Pvt. Ltd. ('**MDD**') as the lowest bidder. The initial estimated cost was ₹100 million (approximately US$1.5 million), but MDD was awarded the work for ₹160 million (approximately US$2.4 million). CCI discovered many common typographical errors in the separate bids submitted by PSE Installations Pvt. Ltd. ('**PSE**'), MDD, and Medical Products Services ('**MPS**'). The companies tried to explain the identical errors by claiming they all visited the same cyber café, and unsurprisingly, CCI did not accept this explanation. CCI also analysed the bidding patterns of these three companies and found that PSE won a contract for similar work at JPNA Hospital with MDD and MPS submitting complementary, i.e. higher bids. This indicated a typical case of rotating bids when all firms, except one, quote artificially inflated prices, and this process is repeated with different bidders winning each time. Under somewhat similar circumstances in the bid-rigging case filed by Coal India Limited ('**CIL**') against 10 explosives manufacturers, two manufacturers (Gulf Oil Corporation Limited and Blastec India Limited) wrote identical letters to CIL explaining their reasons for not taking part in the auction. To CCI, these were proof of a "meeting of minds".

The bid-rigging cases so far have been relatively simple, with CCI having the advantage of seemingly conclusive circumstantial evidence. However, as the competition law regime in India matures, cartel participants will resort to more sophisticated means, and CCI will be required to employ other tactical methods of investigation and enforcement. Internationally, dawn raids are a popular method for cartel discovery and enforcement. Thus far, CCI has yet to employ its dawn raid powers, but with the enhanced powers of search and seizure that may be conferred on the Director General under the Competition (Amendment) Bill, 2012, dawn raids may become a popular tool for CCI.

While CCI has been pro-active in its enforcement endeavours with respect to bid-rigging in public procurement, the question remains whether it has been able to do so without breaching the parameters set out in the Act. Section 3(3)(d) of the Act permits prosecution of a bid-rigging cartel only if there exists an "agreement" amongst the competitors to eliminate or reduce competition for bids, or adversely affect or manipulate the bid-process. These are early days of competition law jurisprudence in India, and any interpretation of these provisions by CCI is likely to have a lasting impact on the future implementation and enforcement. In spite of the underlying public policy concerns, CCI as a neutral competition regulator must establish objective criteria to make out a case of bid-rigging. Moreover, given the number of bid-rigging complaints CCI has already received, it will be interesting to see how the more complex cases are eventually dealt with.

For further information on this Special Edition, please contact:

❖

MUMBAI

Zia Mody zia.mody@azbpartners.com

Abhijit Joshi abhijit.joshi@azbpartners.com

Shuva Mandal shuva.mandal@azbpartners.com

❖

NEW DELHI

Samir Gandhi samir.gandhi@azbpartners.com

Percy Billimoria percy.billimoria@azbpartners.com

❖

BANGALORE

Aditya Bhat aditya.bhat@azbpartners.com

Honorable mention for Antitrust / Competition
by the Asian-Mena Counsel for the Year 2012

❖

Competition Law Firm of the Year, India
ACQ Law Awards, 2011

❖

Competition Law Firm of the Year in India
Corporate International Magazine Global Awards 2010

❖

Best Indian Law Firm Golden Award
The International Legal Alliance Summit & Awards, 2013

❖

Most Trusted Law Firm of the Year, India
M&A International Global Awards, 2013

❖

Excellence in Legal Practice and Law Firm of the Year, India
IAIR Legal Awards, 2013

❖

Law Firm of the Year, India for M&A and Litigation
Acquisition International's Legal Awards, 2013

❖

Best Private Equity Law Firm of the Year
Legal Era Awards, 2013

❖

Law Firm of the Year for Private Equity / Venture Capital
VCcircle Awards, 2013

❖

Law Firm of the Year, India for Corporate Governance and M&A
ACQ Global Awards, 2013

❖

Law Firm of the Year, India for M&A and Dispute Resolution
Corporate LiveWire Global Awards, 2013

❖

Law Firm of the Year, India for M&A and Litigation
Acquisition International's Legal Awards, 2013

❖

Law Firm of the Year, India for M&A and Entertainment Law
Corporate INTL Legal Awards, 2013

❖

Law Firm of the Year, India for Dispute Resolution
Indian Lawyer 250, 2013

❖

Ranked 1
In various league tables for Legal Advisors