



DEVELOPMENTS IN INDIAN COMPETITION LAW, 2017

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Supreme court of India orders penalty under the competition act to be calculated based on the relevant turnover and not on the total turnover

Abuse of dominant position; Cartels; Fines; India; Motor dealers; Pharmaceutical industry; Resale price maintenance
In a landmark judgment, the Supreme Court of India, vide its order dated 8 May, 2017 passed in the matter of Excel Crop Care Ltd v Competition Commission of India, decided an issue of prime importance regarding the interpretation of the word “turnover” for the purpose of imposition of penalty under the Competition Act 2002 on an entity contravening the provisions relating to anti-competitive agreements (s.3 of the Competition Act) or abuse of dominant position (s.4 of the Competition Act). The issue of whether the imposition of penalty on an entity should be based on its relevant turnover or total turnover has been finally settled by this order of the apex court. The question arose when the Competition Commission of India (CCI) passed an order on 23 April 2012 against M/s Excel Crop Care Ltd (ECC”), M/s United Phosphorous Ltd (UPL), M/s Sandhya Organics Chemicals Private Ltd(SOCPL) and Agrosynth Chemicals Ltd (ACL) for forming



a cartel in relation to tenders issued by the informant, Food Corp of India (FCI) for the supply of Aluminium Phosphide Tablet (APT). The CCI had concluded after carrying out a detailed investigation that ECCL, UPL, SOCPL and ACL had entered into a cartel for the supply of APT to FCI and therefore imposed a penalty of nine per cent of the average total turnover of the previous three years of the respective entities. Aggrieved by the CCI's order, appeals were filed by these entities before the Competition Appellate Tribunal (COMPAT), inter-alia, challenging the findings of the CCI and the imposition of penalty. The COMPAT, vide its order dated 29 October, 2013 upheld the findings of CCI on the existence of a cartel but on the question of quantum of penalty held that while imposition of penalty of nine per cent of the average turnover of the previous three years was reasonable, the penalty could not be imposed on the "total turnover" and had to be restricted to the "relevant turnover", i.e. the turnover in respect of the quantum of supplies made qua the product for which cartel was formed. The COMPAT further observed that the entities were multi-product companies and therefore products other than APT could not have been included in calculating the turnover for the purpose of imposition of penalty.

ECCL and the other entities filed an appeal before the Supreme Court of India challenging the part of the order of COMPAT wherein it was observed that the entities had formed a cartel in contravention of the provisions of s.3 of the Competition Act. On the other hand, a cross-appeal was also filed by the CCI challenging the part of the order of COMPAT whereby the penalty imposed on the entities was restricted to relevant turnover, i.e. turnover with respect to APT alone instead of total turnover. Dismissing the appeals filed by the entities as well as CCI, the Supreme Court upheld the order of COMPAT with respect to the imposition of the penalty on the relevant turnover of the entities and not the total turnover.

CCI imposes a penalty of INR 8.7 billion on Hyundai Motors

The CCI, vide its order dated 14 June 2017, has imposed a penalty on Hyundai Motor India Limited (HMIL) of INR 8.7 billion for anticompetitive conduct. CCI started its investigation based on the information received by the dealers of HMIL viz Fx Enterprise Solution India Pvt Ltd and St Antony's Car Pvt Ltd. CCI, after investigating into the matter, found HMIL to be imposing arrangements upon its dealers which resulted into resale price maintenance in the sale of passenger cars manufactured by it. Such an arrangement also included monitoring the maximum permissible discount level through a discount control mechanism. Further, HMIL was mandating its dealers to use recommended lubricants/oils and HMIL used to penalise its dealers for using non-recommended lubricants and oils. As such, CCI after investigating found HMIL to be in contravention of s.3(4) of the Competition Act dealing with vertical anti-competitive agreements and s.3(1) of the Competition Act which prohibits any person from entering into any anti-competitive agreement which causes or may cause an appreciable adverse effect on competition within India. CCI observed in its order that for the purpose of determining the relevant turnover for the impugned infringement, revenue from the sale of motor vehicles alone has been taken into account. After a detailed reasoning in its order CCI imposed a penalty of 0.3 per cent of the average relevant turnover of HMIL of the preceding three years which amounts to INR 8.7 billion and further issued a cease and desist order against HMIL.

CCI orders investigation against Roche

The CCI has formed a prima facie view that F. Hoffmann-La Roche AG, Genentech, Inc and Roche Products (India) P Ltd (collectively referred to as the "Roche Group") have abused their dominant position and have ordered the Director General to carry out an investigation vide an interim order dated 21 April 2017. The order was passed by the CCI following a complaint filed by Biocon Ltd and Mylan Pharmaceuticals Pvt Ltd (informants) in July 2016, inter alia, alleging anti-competitive conduct by the Roche Group to protect and maintain monopoly of its Trastuzumab drug used in the treatment for early breast cancer and metastatic gastric cancer. It was alleged that the Roche Group misused its dominant position to put into operation a series of actions such as writing to the Drugs Controller General of India, the National Pharmaceutical Pricing Authority and various other doctors regarding the safety and clinical testing of the informant's biosimilars with the intention to obstruct entry and development of the informant's biosimilars. CCI observed in its order that the Roche Group is dominant and independent in the market based on its share, size, first-mover advantage, dependence on consumers, absence of countervailing buying power



and high entry barriers. CCI further observed that the relevant market, which is the pharmaceutical sector, is governed by the decision of doctors and therefore influencing doctors by raising concerns on the safety of a drug will affect any company which does not have a strong marketing channel which will thereby result in killing the competition in the relevant market. CCI relied on the European Court of Justice's decision in AstraZeneca to rule that Roche Group's acts of influencing regulatory authorities, indulging into negative advertisements vide misrepresentation to tender authorities has created a negative approach with respect to approvals granted to the informants' biosimilars and has adversely affected the Informants' penetration in the relevant market.

The CCI thereby concluded that the Roche Group may have prima facie abused its dominant position in the market and therefore may be in violation of s.4 (2) of the Competition Act

COMPAT scrapped. NCLAT to hear appeals against orders of CCI

The Government of India, vide its notification dated 26 May, 2017 has scrapped the COMPAT and has transferred all pending cases to the newly formed National Company Law Appellate Tribunal (NCLAT).

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