CCI now cracking down hard on cartels

29 March 2022

The recent order of the Competition Commission of India (CCI) penalising a cartel has put the focus on implementing a robust competition compliance policy. The CCI held that four Japanese shipping companies, Nippon Yusen Kabushiki Kaisha (NYK Line), Kawasaki Kisen Kaisha (K-Line), Mitsui OSK Lines (MOL) and Nissan Motor Car Carrier Company (NMCC), had indulged in cartelisation while providing maritime motor vehicle transport services to automobile original equipment manufacturers (OEM).

The CCI found that the companies had followed the so-called respect rule where the parties agreed to avoid competing with each other. This could cause each such company to have an advantage in a particular contract. The companies colluded on freight rates and the frequency of ship sailings. They exchanged commercially sensitive information, including freight rates, electronically and during meetings and calls. The companies also colluded on pricing and resisting requests for price reductions from some OEMs.

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The CCI held that all four companies had contravened section 3 of the Competition Act, 2002 (act), that prohibits anti-competitive agreements. The commission accordingly imposed a penalty of INR630 million (USD8.3 million) on three parties except NYK Line which was allowed 100% reduction of its penalty under the Lesser Penalty Regulations, 2009 of the act, and made a cease-and-desist order.

Section 3 of the act prohibits anti-competitive arrangements. These include entering into any agreement in respect of the production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition (AAEC). Section 3 further provides that, except in certain specific situations, any agreement entered into by any person, including cartels, engaged in an identical or similar trade of goods or provision of services, which directly or indirectly determines purchase or sale prices; limits or controls the production, supply, markets, technical development, investment or provision of services; shares the market or source of production or provision of services by allocating the geographical area of the market, or type of goods or services, or the number of customers in the market or any other similar way; or directly or indirectly results in bid-rigging or collusive bidding, shall be presumed to cause AAEC.

Section 19(3) of the act lists factors for proving AAEC, which include creating barriers to new entrants to the market, driving existing competitors out of the market and foreclosing competition by hindering entry into the market.

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The act provides that, for a contravention of section 3, the CCI may levy a penalty at its discretion subject to a maximum of 10% of the average turnover of an entity for the preceding three nancial years. In the present case, the CCI concluded that the entities had engaged in practices that restricted competition and sought to maintain the status quo. This conduct was ongoing and did not occur intermittently or in isolation, and thus amounted to AAEC. Antitrust legislation is of recent enactment and the jurisprudence continues to evolve. However, cartels have long been on the CCI's radar. Penalties have been imposed and cease-and-desist orders issued. The CCI has also conducted dawn raids, unannounced search and seizure operations at the premises of companies suspected of activities contravening the act.

Given the complexities of global business, it is likely that CCI would now be closely examining cartel-like business arrangements. Japanese corporations must implement strong competition compliance policies at their local units. Companies should conduct periodic reviews of key agreements and processes involving licensing and distribution arrangements, joint ventures, collaborations and similar business relationships. They should evaluate their policies for bidding for new business or accepting bids from third parties. Attention should be paid to clauses in contracts dealing with competitors, such as exclusivity. The CCI need not restrict itself from examining formal agreements between parties but may also seize records including emails, internal memos and pricing documents. Executives should therefore avoid using red-flag phrases and words in emails and documents. On-ground personnel should be trained to handle the possible dawn raid.

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