PRICE PARALLELISM IN AN OLIGOPSONY DOES NOT AMOUNT TO A CONCERTED PRACTICE: SUPREME COURT

1. INTRODUCTION

The Supreme Court of India (the "**Supreme Court**") in its order dated October 1, 2018[1] (the "**Order**") has set aside the orders passed by the Competition Commission of India (the "**Commission**") and the former Competition Appellate Tribunal (the "**COMPAT**") which had found suppliers of liquefied petroleum gas ("**LPG**") cylinders to be in violation of Section 3(3)(d) (*bid rigging*) of the Competition Act, 2002 (the "**Act**") for rigging their bids in the tender floated by Indian Oil Corporation Limited (the "**IOCL**") in relation to the supply of 10.5 million LPG cylinders between 2010 and 2011.

2. KEY TAKEAWAYS

2.1. Circumstantial evidence: Smoking gun

The findings of the Commission in its order[2] dated February 24, 2012, as upheld by the COMPAT were based on economic evidence of collusion that was circumstantial in nature. This evidence included but was not limited to identical or near-identical bids by all fifty empaneled LPG suppliers despite varying costs, the existence of active trade associations, price parallelism, meeting of the bidders prior to the submission of the bids, market sharing arrangements and territorial allocation of the market amongst the suppliers of the LPG cylinders. Forty-four of the forty-five LPG cylinder suppliers that were held to have contravened Section 3(3)(d) of the Act, went on to challenge the COMPAT's order[3] dated December 20, 2013 before the Supreme Court.

The Commission while passing the order, laid down certain *plus factors* which, in its opinion, corroborated the evidence before it, in order to arrive at a finding of collusion among the suppliers. These *plus factors* included indicators such as market conditions, presence of a small number of players, entry of few new players, no significant technological changes, availability of few or no substitutes, appointment of common agents by the bidders and submission of identical bids despite varying costs. This analogy was affirmed by the COMPAT.

After reconsideration of this evidence and the *plus factors*, the Supreme Court stated that this was just one side of the coin and needed to be analysed keeping in mind the prevailing ground realities. In the present case, there were only *three* buyers and the suppliers of the LPG cylinder had no alternative market. Also,

[1] *Rajasthan Cylinders and Containers Limited v. Union of India and Another*, (Civil Appeal No. 3546 OF 2014)

[2] *In Re: suo-motu case against LPG cylinder manufacturers*, (Case No. 3/2011)

[3] *M/s. International Cylinder (P) Ltd. and Ors. v. Competition Commission of India and Ors.*, (Appeal No. 21/2012)

the presence of *limited* buyers in the market was likely to deter potential players to enter into the market. The Commission, in the present case, failed to properly appreciate these prevailing market conditions to substantiate the circumstantial evidence available before it.

2.2. Price parallelism

Price parallelism by way of submission of *identical* bids was the main ground on which the suppliers of the LPG cylinders were held to be in contravention of Section 3(3)(d) of the Act. The Supreme Court pointed out that price parallelism is not necessarily the result of *concerted* action and that such conduct needs to be examined from the standpoint of the market economy. In the present case, it was observed that in an *oligopsonic* market (a market characterised by just a *few* buyers) price parallelism is inevitable because:

(i) the prices are set by the buyers;

(ii) the conditions are such that sellers can predict the demand;

(iii) there is a repetitive bidding process; and

(iv) the products are identical and specialised.

After analysing the prevailing market conditions, the Supreme Court held that price parallelism in an *oligopsony* does not, by itself, amount to a *concerted* practice and will not be sufficient to conclude bid rigging.

3. INDUSLAW VIEW

An integral problem with cases concerning *cartelisation* is that direct evidence is difficult to unearth because parties generally enter into such arrangements behind closed doors and in an informal manner. Moreover, the Indian law on perjury, obstruction of justice and destruction of evidence is weak in terms of enforcement when compared to more advanced jurisdictions, hampering the evidence that may have otherwise been available. As a result, the decisional practice of the Commission has been to penalise enterprises involved in a *cartel* or *bid rigging* on the basis of circumstantial evidence.[4]

The Supreme Court, however, in its order has unequivocally laid down that, while circumstantial evidence may hold good for *inferring* the presumption of *cartelisation* or *bid-rigging*, it is required to be analysed by taking into consideration various other relevant factors and indicators prevailing in the concerned market.

While the Supreme Court order might seem to be correct in its assessment of the market situation, given the facts and circumstances of the case, it remains to be seen to what extent bidders in general may take advantage of the higher burden of proof necessary to successfully demonstrate anti-competitive

[4] *Western Coalfields Limited Coal Estate v. SSV Coal Carriers Private Limited and Ors* (Case No. 34 of 2015), *India Glycols Limited v. Indian Sugar Mills Association and Ors.* (Case No. 21 of 2013)

behaviour. It is also likely that this order will be taken as a basis for appealing *other* orders, where the competition authorities relied on circumstantial evidence for imposing significant penalties on players *presumed* to have been indulging in bid-rigging.

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