

The Excel Crop Case: Turnover vs. Relevant Turnover

Introduction

Industrial manufacturing has grown with the rapid expansion of India's production market over the past twenty years. Some manufacturing companies, especially in the chemical industry, derived a significant portion of their revenue from governmental bids. These bids are often called for from one of several government agencies, and are received from only a handful of companies. With so few participants, collusive behavior has occurred on occasion with negative market effects. Recently, the Supreme Court ("SC") in *Excel Crop. Care Limited vs. Competition Commission of India and Ors.*¹ confirmed a Competition Commission of India ("CCI") ruling that three Aluminum Phosphide Tablets ("APT") producers had participated in "bid rigging"² in violation of Section 3³ of the Competition Act, 2002 ("Act").

This newsletter aims to analyze the rulings of the CCI, Competition Appellate Tribunal ("COMPAT"), and SC, and what further issues companies must consider in response to this case.

1. Facts and CCI Ruling

The Food Corporation of India ("FCI") complained to CCI on February 4, 2011 that Excel Crop Care Limited ("Excel"), United Phosphorous Limited ("United"), and Sandhya Organics Chemicals ("Sandhya")⁴ had formed a cartel and agreed to raise bid prices between 2007 and 2009 for APT. FCI also claimed the companies had submitted identical rates in the tenders for the purchase of APT since 2002. This potentially illegal behavior was ominous for FCI because its demand for APT had doubled in the previous 3 years and was expected to continue rising. From the complaint, the CCI instructed the Director General ("DG") to investigate the matter.⁵

The DG found that majority buyers of APT were government entities and only four companies manufactured APT in India. Although government tenders for APT were issued globally, no bids typically came from outside India. The DG also found that from 2002 to 2009 all the companies quoted identical rates at each tender invited by FCI, except in 2007. Further, at least two of the three suppliers had offered identical quotes at least 13 times to several government agencies between 2007 and 2011, including twice after FCI's complaint was filed. Finally, the companies had uniformly boycotted a tender offer made by FCI in 2011. The DG concluded that these facts overcame the possibility of coincidence and concluded an agreement to limit competition must have been formed.

1 2017(6) SCALE241

2 Section 3 defines "bid rigging" as any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

3 Section 3 prohibits any type of agreement between enterprises that has an appreciable anti-competitive affect in India. Bid rigging or collusive bidding qualify as anti-competitive.

4 There was a fourth company included in the complaint, Agrosynth Chemicals Limited, which was exonerated by the CCI and not discussed by the COMPAT or SC.

5 Section 26 equips the CCI to order the DG to investigate a matter once it has a prima facie belief a violation of the Act has occurred.

In response to the DG's findings, the companies gave largely similar arguments. Firstly, they argued any agreement for a May 2009 tender could not be considered since Section 3 was notified after the tender closed. They also claimed the 2011 boycott was out of the purview of the complaint and could not be considered. Secondly, they claimed a change in price was a result of a rise in cost of a raw ingredient of APT imported from China. Thirdly, there was no further evidence of an agreement occurring, no phone call, or document, or otherwise. The identical prices could be attributed to the companies basing their quotes on past tender offers. They claimed no agreements were made between them regarding their bid prices.

Considering the arguments and findings, the CCI ruled the companies had violated the provisions of Section 3 by their actions between 2009 and 2011. In regard to the applicability of the law and ability of DG to investigate the boycott, the CCI ruled the DG was responsible for investigating if any illegal conduct had occurred at any time. He should not make a fact specific or narrow investigation and could investigate the 2011 boycott and signs of agreement in 2009 after Section 3 was notified, even if those acts arose from an agreement made previously. Next, the CCI held the "coincidence" of identical price quoting had a zero percent chance of happening without some type of agreement. Despite no "physical" evidence, the circumstantial evidence was enough. The companies had varying cost structures and geographical locations that would, in normal circumstances, assume different bid prices.

The CCI awarded penalties of approximately USD 9.8 million for Excel, USD 241,538 for Sandhya, and USD 39 million for United.⁶ The penalties were calculated as 9% of the companies' average turnover from the previous 3 years as allowed under Section 27(b).⁷

2. COMPAT's Findings

Unhappy with both the ruling and the penalties, all three companies preferred an appeal before the COMPAT and raised the same arguments with the additional complaint that the penalties were too high. They argued that only *relevant turnover* should have been considered as a basis for penalty. Relevant turnover is not defined or mentioned in the Act, but is generally turnover related to the product in question.⁸ The companies believed they had been penalized too high for the harm they might have caused and should have been penalized only on turnover related to the production of APT.

The COMPAT rejected all appeals except the amount of penalty imposed by the CCI. Considering the arguments, COMPAT first chided the CCI for not giving any justification for the 9% penalty. Then, it acknowledged the penalty at 9% of total turnover was not unreasonable since the APT was used for food-grains in the public distribution system and the companies' behavior amounted to taking from the lowest members of society. Despite this, COMPAT ruled that the penalty must be calculated on "relevant turnover." This penalty better aligned with the doctrine of proportionality and pronounced the need for the CCI to explain its rationale when handing out harsh penalties. Penalties were reduced to approximately USD 450,000 for Excel and USD 1 million for United. For Sandhya, COMPAT separately considered a reduction because its only product was APT and it was much smaller than the

⁶ USD 1 = about INR 65.

⁷ Section 27 equips the CCI to impose penalties up to ten percent of the average of the turnover for the three preceding years for violations of Section 3 or 4 which prohibits abuse of a dominant market position.

⁸ 2013 Comp LR 799, page no. 822

other companies. As a result, both these factors were sufficient to reduce its penalty by 1/10th for a total of USD 24, 154.

3. The Supreme Court

Again faced with fines, the companies appealed COMPAT's decision to the SC and the CCI also appealed the COMPAT's lowering of penalties to the apex court. The SC combined the appeals into one case and evaluated four, main issues: (i) whether the CCI appropriately considered the May 2009 tender, (ii) whether the CCI could investigate behavior occurring after the complaint was made, specifically the 2011 boycott, (iii) whether the purported violations under Section 3 were justified, and (iv) whether a penalty levied under Section 27 had to be on total turnover, or if it could be assessed only from a company's "relevant turnover."

3.1 Pre-Enactment Actions: The appellants again argued that an alleged violation from the May 2009 tender amounted to a retrospective enforcement of the law.⁹ In response, the SC ruled that the companies were penalized for acts taken not only in March 2009 but also for actions taken in later 2009, 2010, and 2011 when the Act was in force. Further, the agreement for anti-competitive behavior in relation to the March 2009 tender did not stop in effect after the initial offer. There were rounds of negotiation in June 2009 where actions were reflective of previous agreements, taken before the law went into effect, but acted upon after and, therefore, still fell under the scope of the law and worthy of investigation. Thus, the SC upheld the CCI and COMPAT rulings regarding the March 2009 tender.

3.2 Behavior outside of complaint made: On this issue, the SC entirely agreed with the COMPAT ruling affirming the CCI order that the DG's ability to investigate in Section 26 was large enough to include evaluating acts taken after an original complaint is made. Further, the general complaint made by FCI was not in respect of one particular tender or action, but the overall anti-competitive behavior through a cartel. The SC asserted the DG is empowered to look at all necessary facts in the investigation, which can only begin after the CCI forms a prime facie opinion that a violation has occurred. At that point, they do not have sufficient information to determine when or where the violation occurred. Therefore, the DG has the power to look at all circumstances for where a violation may have occurred before making recommendation to the CCI.

3.3 Violations Justified: The companies offered a new explanation for their identical pricing before the SC. They claimed that because there are only a couple buyers and sellers, identical pricing was a natural occurrence. They also claimed the 2011 tender was boycotted because its payment for placing a bid was too high. They also pointed out that no companies had submitted a bid then. The court rejected these arguments. First, identical pricing was incredibly strange given the differences in the companies' production cost and geographic location. Regardless of location all bids were the same. Second, the sheer volume of identically priced bids was also strange. Third, the probability that some type of anti-competitive agreement could occur was enhanced with only four suppliers in India. Fourth, the companies offered varying prices for different bids, but identical prices at each bid. This was enough circumstantial

⁹ They argued this would be a retrospective enforcement of the Act, which was against the Act's intention of being a prospective legislation.

evidence to prove an agreement existed without a proper rebuttal from the companies. The SC concluded that the CCI's ruling was entirely justified.

3.4 Appropriate Penalty: The final issue arose from the CCI's unhappiness with the COMPAT's reduction in penalties by only considering relevant turnover. The CCI argued Section 27 only uses the word "turnover" and, therefore, considering only relevant turnover would amount to adding "relevant" into the statute unjustifiably. They also believed that the penalties are primarily used as a deterrent for future behavior, and, therefore, were justified if slightly out of proportion. However, the SC confirmed the COMPAT's view that only relevant turnover should be considered on the basis that these violations typically arise from only particular products or circumstances and imposing fines that draw from resources unrelated to those particular products or circumstances would lead to unfair and punitive outcomes. The SC also emphasized the importance of proportionality in punishment, and stated that the deterrent as well as punishing intent of the penalty would be adequately served when considering only relevant turnover.

Conclusion

The SC's judgment reinforcing a proportional approach to calculating penalties under the Act will be welcomed by companies. It potentially removes more punitive calculations going forward, and overall lowers the risk companies take when they engage in behavior that could be investigated under sections 3 and 4. This approach aligns India's practices with the approach taken in other developed competition law regimes, such as Europe or America. However, given the SC's support for a robust investigatory process, companies should be cautious in all bidding processes, more so, when a complaint has been filed against them with the CCI. Rather, they should pay close attention to regulations and SC rulings, and amendments to the Act to be better prepared as to what kind of behavior will be tolerated. With this ruling, the SC seems to have cut CCI's penal powers and it may be possible other companies who were fined on overall turnover, may set the appeal process in motion.

This E-Newsline is prepared by James Thomas Cox, a first year J.D. student at The University of Georgia School of Law, Athens (under the guidance of Priti Suri, Founder - Partner) who is pursuing his internship at PSA