



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Case Comment: How CCI Penalised A Shipping Cartel

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Received 16 February 2022; *Accepted* 02 March 2022; *Published* 05 March 2022

INTRODUCTION

Competition Commission of India (Suo-Moto Case)

Opposing Parties: Nippon Yusen Kabushiki Kaisha (NYK-Line)

Kawasaki Kaisen Kaisha Ltd. (K-Line)

Mitsui O.S.K. Lines Ltd. (MOS)

Nissan Motor Car Carrier Company (NMCC)

Coram: Mr. Ashok Kumar Gupta (Chairperson); Ms. Sangeeta Verma (Member); Mr. Bhagwant Singh Bishnoi (Member)

This *Suo-Moto case* by the Competition Commission of India (Hereinafter referred to as CCI or the Commission) arises from a Leniency Application filed under Section 46 of the Competition Act, 2002¹(Hereinafter referred to as Act) by NYK-Line, one of the Opposing parties. All four

¹ Competition Act, 2000, s 46

Opposing Maritime Transport Companies were alleged to be a part of the Anti-Competitive Agreement (Defined under Section 3² of the Act) which was causing an Appreciable Adverse Effect on Competition (AAEC). The CCI after an Inquiry by the Director General (DG), passed an order against the Transport Companies for Cartelisation Concerning Maritime Motor Vehicle Transport Services provided to Automobile Original Equipment Manufacturers (OMEs) for Various Trade Routes and Imposed Fine on the parties (Subject to Lesser penalty provisions).

FACTUAL MATRIX

The basis of the *Prima facie* Case was the Lesser Penalty Application by NYK-line(OPs-1) which mentioned that the NYK-Line, K-Line, MOS, NMCC colluded and formed an Understanding concerning the supply of Maritime Motor Vehicle Transport Services to certain Automobile Original Equipment Manufacturers for certain specific Trade Routes.

The facts for the Collusion of Opposing Parties are mentioned below:

- The NYK-line and K-Line consulted and discussed various sensitive information like Freight Rates (the charges per unit of cargo by a carrier for transportation) that they would quote. They also exchanged important information about new Tenders concerning competition among them. For example, quoted Freight rates, Positions, Schedules of the transportations, etc. The MOL was also complicit in this collusive bidding or Bid Rigging.
- The K-Line and NYK-Line also shared the information regarding Shipment Schedules for controlling the Frequency of Shipments per month. Further discussions took place between these said OPs concerning BAF(Bunker Adjustment Factors which is an additional charge/cost levied upon the shippers as compensation for the fluctuations in the price of the ship's Fuel)

² Competition Act, 2000, s 3

- Meetings took place between NMCC and NYK-Line to act in concert concerning Bid Prices. It was decided that NYK-Line will bid at a higher price than NMCC's indicated rates, NYK-Lines was also requested by NMCC to provide Provisional Freight Rates.
- NYK-Line and MOL also connived in Collusive bidding for some specific trade routes.

Relying upon the above-stated Facts and Evidence of the application, the CCI noted that the Maritime Transport Companies were sharing and co-ordinating on commercially sensitive information through which it formed a *Prima Facie* case under section 3 of the Act which deals with anti-competitive agreements and passed an order (Under section 26(1)³ of the Act) Directing the DG (Director General) to start an inquiry against the OPs and submit the report on the same. The Commission also directed the DG to start an inquiry for investigating the roles of the important dignitaries/Officers of the OPs under section 46⁴ of the act.

RELEVANT PROVISION OF THE COMPETITION ACT OF INDIA, 2002

The OPs were found to be in contravention of the following sections of the Act:

Section 3(1) -Anti-competitive agreements – (1) *No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of 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 within India.*

Section 3(3)⁵ - (3) *Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –*

(a) directly or indirectly determines purchase or sale prices⁶;

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³ Competition Act, 2000, s 26(1)

⁴ Competition Act, 2000, s 46

⁵ Competition Act, 2000, s 3(3)

⁶ Competition Act, 2000, s 3(3) (a)

(c) shares the market or source of production or provision of services by way of allocation of the geographical area of the market, or type of goods or services, or number of customers in the market or any other similar way⁷;

(d) directly or indirectly results in bid-rigging or collusive bidding⁸

THE INVESTIGATION BY THE DIRECTOR-GENERAL

The Director-General, first of all, took an industry overview and narrowed down two issues for the investigation. The Questions and Findings of the DG on these issues are as follows:

1. The first issue for the DG to find out was that, If the Transport Companies had formed a Cartel to provide transport services to the Original Equipment Manufacturers? And if yes, then whether that Cartel was having an adverse effect on competition. The DG after the investigation found out that the OPs indulged in anti-competitive activities. The Evidence on which DG relied were a set of E-mails, Memos, Affidavits and depositions, Calls, Meetings, etc, which proved the Connections and interactions among the OPs.
2. After investigation, it was found that NYK-Line and K-Line through initial negotiation agreed to follow the “respect rule” with MOL, where it was decided that MOL will allow NYK-Line and K-Line to retain their stronghold on specific OEMs in return they will not interfere in the MOL’s business thereby reducing the competition in the shipping transport market.
3. It was also found that NYK-Line and K-Line indulged in anti-competitive agreements through various Meetings and Calls from 2008 to 2012. Freight rates were also discussed between the OPs.
4. The Director-General also found anti-competitive activities/conduct among all four Ops (NYK-Line, K-Line, MOL, NMCC) based on the above said evidence. Therefore, DG found all four OPs to be engaged in Anti-Competitive Agreements from 2008 to at least 2012 forming a

⁷ Competition Act, 2000, s 3(3) (c)

⁸ Competition Act, 2000, s 3(3) (d)

Cartel thereby having an adverse effect on competition (AAEC). Accordingly, all four OPs were found to be in contravention of section 3(3)⁹ read with section 3(1)¹⁰ of the Act.

5. Another question in front of DG was, who are the Individuals/Officers of the OPs responsible for this Cartelisation of these shipping companies?

The DG after the investigation has found out:

- 14 Individual of NYK-Line.
- 10 Individuals of K-Line.
- 9 Individuals of MOL.
- 3 Individuals of NMCC.

Liable under section 48¹¹ of the Act for Colluding in Anti-Competitive agreements for their respective shipping companies and forming a Cartel.

PRELIMINARY ISSUES IN FRONT OF CCI

The preliminary objections (raised by some of the OPs in the Investigation report of DG) and their Answers by CCI are as follows:

K-Line: K-Line objected to the Territorial jurisdiction of the Commission, it argued that the routes and the Ultimate Consumers of the goods are outbound, which are investigated by DG and therefore if there would be an AAEC that would have occurred in a foreign jurisdiction and the CCI under section 32¹² of the Act, can exercise its extra-territorial Jurisdiction only in the cases where the said anti-competitive activity has caused AAEC in a Relevant Market in India. The K-Line also argued that Presently OPs are supplying outbound services to global OEMs. Hence, the present case pertains to the Export market which according to them is exempted by section 3(5) (2)¹³ of the Act. Additionally, K-Line said that pertaining to the

⁹ Competition Act, 2000, s 3(3)

¹⁰ Competition Act, 2000, s 3(1)

¹¹ Competition Act, 2000, s 48

¹² Competition Act, 2000, s 32A

¹³ Competition Act, 2000, s 3(5) (2)

routes investigated by DG, appropriate orders have been passed by other affected jurisdictions. Therefore, it would be correct on the commission's part to conclude the present Investigation and Case.

COMMISSION'S VIEW ON THE ABOVE-MENTIONED OBJECTIONS:

CCI at the outset rejected the claim of the K-Line which sought exemption under section 3(5)(2) of the Act.

Section 3(5)(2) - *“Nothing contained in this section shall restrict –*

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.”

CCI noted that the above-mentioned section does not cast away the applicability of Section 3 of the Act it merely says that nothing contained in Section 3 shall restrict the right of an exporter of goods from India which deals with certain specific activities like production, supply Etc. Additionally, this section gives the special right to an “Exporter of goods” only but the OPs, in this case, are not fulfilling the requirements for being an exporter instead they merely are providing shipping services to the OEMs. Hence, the claim of K-Line for exemption under section 3(5)(2) was outrightly rejected.

- CCI while rejecting the claim (1) of the K-Line regarding the territorial jurisdiction of the commission for outbound Ultimate consumers and routes noted that the definition of Consumer under section 2(f)(2)¹⁴ does not distinguish between “Ultimate Consumer” or “Intermediate Consumer”. Thus, the present claim of K-Lines is not valid as the OEMs (Original Equipment Manufacturers) have their manufacturing plants in India from where they availed the services of OPs for shipments. Therefore, the OMEs whose plants are based in India would come under the definition of Consumer as per section 2(f)(2) of the Act.

¹⁴ Competition Act, 2000, s 2(f) (2)

- After analyzing the objection, the CCI said that, even if the alleged anti-competitive conduct is examined by other competition authorities, that would not refrain the CCI to examine the issue as per the Indian Competition Act and pass order according to the statutory framework. Hence, this objection of the OP stood rejected.

ANALYSIS OF THE PRINCIPAL ISSUE BY CCI

After dealing with the preliminary issues, the Commission examined the primary issue of the case which is, whether the OPs have indulged in an alleged Anti-competitive agreement and violated the provisions of section 3¹⁵ of the Act by forming a Cartel. The Commission after analyzing the Comprehensive evidence/findings of the DG, Facts above mentioned of the case, and after examining the depositions, noted that all four OPs/PCCs(Pure Car Carriers which are kind of Roll-On-Roll-Off ships that transports only Cars), *namely*, NYK-Line, K-Line, MOL & NMCC have colluded in contracts of OEM, and in the process, reached various agreements, wherein they tried to determine the freight prices, shared the market/OEM customers amongst each other and indulged in collusive bidding. Such conduct on the part of the OPs is presumed to have an AAEC within India. It is also noted that NYK Line, MOL, and NMCC have not objected to such AAEC and K-Line has not been able to rebut the same. Thus, the Commission found all the four OPs NYK Line, K-Line, MOL, and NMCC, to have contravened the provisions of Section 3(3)(a)¹⁶, 3(3)(c)¹⁷, and 3(3)(d)¹⁸ read with Section 3(1)¹⁹ of the Act with respect to these Anti-Competitive contract.

LIABILITY OF THE INDIVIDUAL/OFFICER OF THE RESPECTIVE OPS

After examining the liability of the OPs under the provisions of Section 3 of the Act, the commission proceeded to examine the liability and the roles of the individual/officer of the respective OPs under section 48²⁰ of the Act:-

¹⁵ Competition Act, 2000, s 3

¹⁶ Competition Act, 2000, s 3(3) (a)

¹⁷ Competition Act, 2000, s 3(3) (c)

¹⁸ Competition Act, 2000, s 3(3) (d)

¹⁹ Competition Act, 2000, s 3(1)

²⁰ Competition Act, 2000, s 48

“Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, an order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.”

As stated above the DG through his investigation found 14 Individuals from NYK-Line, 10 from K-Line, 9 from MOL & 3 from NMCC liable as per section 48 of the Act. CCI after examination of the charges on merit and allowing the OPs for their defense held the Individuals Liable for their involvement in the Cartelization. (Names of the Individuals/officers cannot be disclosed due to the Confidentiality Regulation contained in the Competition Commission of India (General) Regulations, 2009).

ORDERS OF THE CCI

After the examination of the available evidence supporting that there was an Anti-Competitive agreement between NYK-Line, K-Line, MOL, NMCC with the objective of “Respect Rule” which implies avoiding the competition between the competitors and protecting the stronghold/business of incumbent PCCs(Pure Car Carriers) Companies with their respective OMEs. To achieve the said objective, the OPs resorted to multi-lateral as well as bilateral contacts/ meetings/ e-mails with each other to share commercially sensitive information which, *inter alia*, includes freight rate. The OPs engaged in such practices with the aim of restricting competition and protecting their business for certain customers and certain trade routes. The above-proven conduct of the OPs can be classified as an agreement that is presumed to have an Appreciable Adverse Effect on the Competition in India under section 3(3) of the Act. It also needs to be noted that NYK Line, MOL, and NMCC have not objected to such AAEC and K-Line has not been able to rebut the same. Therefore, the CCI holds all the

four OPs *i.e.*, NYK Line, K-Line, MOL, and NMCC, guilty of contravention of the provisions of Section 3(3)(a), 3(3)(c), and 3(3)(d) read with Section 3(1) of the Act from 2009 to 2012.

PENALTY ASSESSMENT AND RELEVANT PROVISIONS

Once the provision of the Act has been violated, the Commission determines the Penalty (if any) to be imposed on the violater under section 27(b)²¹ of the Act. In the present case, the OPs argued that any penalty, if to be imposed should be determined on the basis of the principle of Proportionality laid down by the Hon'ble Supreme Court("SC") of India in the case of *Excel Crop Care Limited v Competition Commission of India and Another*²² (2017) 8 SCC 47 (*Excel Crop Care Judgment*). The principle is based on Equality and Rationality, the SC in the case said that the courts while determining the penalty to be imposed should take "Relevant Turnover" (Entity's turnover pertaining to products and services that have been affected by such contravention) of the Enterprise into consideration and not the "Total Turnover". The Commission, at the outset, rejected this claim of the OPs regarding the determination of penalty based on Excel Corp Care Judgement noting that the principle of proportionately is applicable to a multi-product company only. In the cited judgment it is nowhere held or otherwise declared that relevant turnover should be limited to the turnover earned from the specific customer/tender/route, wherein the effect of the anti-competitive conduct takes place. Therefore, the relevant turnover/profit would be the turnover/profit gained by the OPs by providing maritime shipment services in relation to India during the Cartel period (from 2009 to 2012)

The Proviso of Section 27(b) of the Act provides for the imposition of penalty up to three times of its profit for each year of the continuance of the cartel or 10% of its turnover for each year of the continuance of the cartel, whichever is higher. Based on the Turnover and Profit details of all four OPs and considering the mitigation information submitted by the OPs, the commission decided to impose a penalty on the OPs @ 1.5 times the profit earned by the companies during the cartel period or 5% of the Turnover for each year of the continuance of the cartel,

²¹ Competition Act, 2000, s 27(b)

²² *Excel Crop Care Limited v Competition Commission of India and Another* (2017) 8 SCC 47

whichever is higher. Penalties imposed (@ 5% of the turnover of the companies as it was higher than the profit @1.5 times) on respective OPs are as follows:

- OP-1 (NYK-Line) – Rs.38,10,52,508.
- OP-2 (K-Line) – Rs.24,23,22,075.
- OP-3 (MOL) – Rs.20,25,94,486.
- OP-4 (NMCC) – Rs.40,99,20,191.

LESSER PENALTY

All the three OPs except K-Line pleaded for the lesser penalty provision under section 46²³ of the Act through their Leniency application which they submitted to the commission disclosing the information regarding the Cartel. For the availing the benefit of leniency provision under section 46 of the Act, the Opposing parties who filed the lesser penalty application are required to meet certain conditions which are elaborated in Regulation 3(1) of The Competition Commission of India (Lesser Penalty) Regulations, 2009²⁴ (Hereinafter referred as, “Regulations”). After getting satisfied with the conditions to be met by the three OPs(NYK-Line, MOL, NMCC) mentioned in Regulation 3(1), The commission proceeded to decide the “priority status” (defined under Clause 2(h) of the Regulations), which means the position of the applicants marked for giving the benefit of lesser penalty in the queue of the applicants.

The Priority Status is as follows:

- NYK-Line.
- MOL.
- NMCC

Relying upon Clause 4(a) of the Regulations²⁵, CCI granted 100% reduction in the penalty amount to the NYK-Line which was the First Lesser penalty applicant and its concerned individuals liable under section 48 of the Act, as it made “Vital Disclosure” (defined under

²³ Competition Act, 2000, s 46

²⁴ Competition Commission of India (Lesser Penalty) Regulations, 2009, r 3(1)

²⁵ Competition Commission of India (Lesser Penalty) Regulations, 2009, r 3(4) (a)

Clause 2(i) of the Regulations²⁶), which helped the commission to make a *prima facie* opinion about the existence of the Anti-Competitive Agreements and formation of the said shipping cartel. Additionally, based upon Clause 4(C)(1)&(2) of the Regulations²⁷, the Commission granted the benefit of reduction in the penalty to the subsequent applicants, namely MOL & NMCC, of 50% and 30% respectively, because, under Regulation 4(b)²⁸, the said two OPs submitted additional evidence which in the opinion of the commission added the value(Regulation 4(b)) and Enhanced the ability of the Commission or the Director-General to establish the contravention under the provisions of the Act.

Penalty payable after reduction:

- NYK-Line – Rs.0 (100% reduction)
- MOL – Rs.10,12,97,243 (50% reduction)
- NMCC- Rs.28,69,44,134 (30% reduction)
- K-Line – Rs.24,23,22,075 (0% reduction)

ANALYSIS: CONCLUDING REMARKS

The jurisprudence developed on anti-competitive practices like Cartelisation is not new in markets like US and EU, unlike India where the anti-trust regime is at a nascent stage compared to the developed regimes/markets. Therefore, the conduct of cartelization is difficult to catch not only because of the complexities it carries along with it but also because of the changing approach of the violators. Still the CCI, by taking Suo Moto cognizance of a Leniency application, very judiciously in the present case, rejected the objections of some OPs which would render the provisions legislated for the protection of competition worthless and using tools like leniency provision which not only helps CCI to detect the violations but also provides a recourse to the members of the cartel to rectify their Anti-competitive conduct, Broke and Penalised a Shipping Cartel upholding the Competition in the Market along with Consumer welfare, which are the two main objectives of the Act.

²⁶ Competition Commission of India (Lesser Penalty) Regulations, 2009, r 2(i)

²⁷ Competition Commission of India (Lesser Penalty) Regulations, 2009, r 4(c) (1)-(2)

²⁸ Competition Commission of India (Lesser Penalty) Regulations, 2009, r 4(b)