

MEDIA RELEASE

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Commission fines two suppliers of medical gases a total of Rs 3,59 million for having breached the prohibition against collusive agreements when supplying the Ministry of Health and Wellness between 2012 and March 2020

Summary

Following an investigation by the Executive Director, the Commissioners of the Competition Commission have determined that two suppliers of medical gases namely, Gaz Carbonique Ltee (“GCL”) and Les Gaz Industriels Ltd (“LGI”), have breached the Competition Act 2007 (the “Act”).

The parties’ breach relates to their participation, between 2012 to March 2020, in a collusive agreement involving the supply of medical gases to the Ministry of Health and Quality of Life (the “Ministry of Health”).

The Commission found such agreement to be prohibited and void and has imposed financial penalties on GCL and LGI totaling about Rs 3,59 million.

Between 2012 to March 2020, GCL and LGI were jointly supplying medical gases to the Ministry of Health through an unincorporated joint venture, referred to as ‘Medical Gases JV’. The Commission found that the parties’ interactions and joint commercial decision-making relating to their supply of medical gases, through the JV, to be collusive and involving –

- i. fixing of prices at which Medical Gases JV would supply medical gases,
- ii. sharing of markets by allocating the different hospitals between themselves, and
- iii. restricting the supply of medical gases to the Ministry of Health on two occasions.

The parties to the investigation have collaborated on the matter and, without admitting liability, have accepted the findings of the Commission and agreed to pay the fines imposed.

Background

Medical gases are critical and life-saving items used in hospital settings. Given their intended use, they require strict production and supply norms for quality and traceability purposes. Medical gases are distributed in different forms (gaseous or liquid) and via different distribution channels (bulk and cylinders).

The Ministry of Health procures its requirements for medical gases, either annually or every two years, by way of invitation to bid and exceptionally, by direct (emergency) procurement. The needs and requirements, by the Ministry of Health, of medical gases is meant for the totality of all public hospitals in Mauritius and Rodrigues and further covers different medical gases, namely oxygen, nitrous oxide, compressed air, carbon dioxide and nitrogen (in gaseous and liquid format as well as in cylinder and bulk format). When evaluating bids from participating suppliers, determining factors are price, product conformity to the Ministry of Health’s bid specifications (e.g., purity certification) and the bidder itself fulfilling stated specifications (e.g., manufacturing licence, technical capability, experienced workforce).

GCL and LGI respectively manufacture, import, and distribute a range of medical as well as industrial gases. The parties were individually participating in the Ministry of Health's medical gases tenders prior to 2012 and were its main suppliers of medical gases at the time. The parties also commercialise medical gases to private clinics.

The Investigation

The investigation related to firstly, an allegation of bid rigging between the parties believed to have been in place between 2009 and 2012 during which the parties had submitted individual bids to the Ministry of Health. The existence of agreement(s) between GCL and LGI on the price, terms, and conditions to be submitted by them (cover bidding and bid sharing) in response to the calls for bid was suspected. This allegation was investigated under *section 42 of the Act*, which prohibits bid rigging agreements.

Secondly, the investigation was also concerned with the parties' subsequent joint supply of medical gases, between 2012 to March 2020, to the Ministry by way of Medical Gases JV. This part of the investigation was carried out pursuant to *section 41 of the Act* which prohibits horizontal collusive agreements that significantly harm competition, namely agreements to fix selling or purchase prices, market sharing agreements, and agreements to restrict supply or acquisition of goods or services.

Breaches of sections 41 and 42 are amenable to financial penalties under the Act.

It is to be noted that both parties to the investigation applied for leniency and collaborated with the Competition Commission. This in turn facilitated the evidence-gathering process during investigation and helped expedite the completion of the investigation.

On 28 June 2021, the Executive Director completed his investigation and submitted his report to the Commissioners for their determination.

Main findings and recommendations

The Executive Director's Main Findings

In respect of the allegation of Horizontal collusive agreement (Section 41):

Medical Gases JV took the form of jointly controlled operations between GCL and LGI as regards the supply of medical gases to the Ministry of Health. This entailed joint preparation of bids and reaching a common consensus on prices to be quoted by the JV in bids. Pursuant to their JV agreement, supply to the Ministry's hospitals was further allocated between GCL and LGI; with GCL supplying 6 hospitals and LGI supplying 7 hospitals (including 1 in Rodrigues). The parties' representatives met periodically to review the JV's operations and revenue distribution between GCL and LGI. The investigation was also concerned with the parties' decisions taken on two known occasions intending to restrict supply to the Ministry pending contract award/extension of contract to Medical Gases JV.

Between 2012 and March 2020, Medical Gases JV had participated in 9 medical gas tenders. In 2015, the parties decided to entrench their collaboration and indefinitely extend the JV's lifespan.

On the facts before him, the Executive Director found that the agreement between GCL and LGI to set up Medical Gases JV, in its form and manner and through which they jointly supplied medical gases to the Ministry, alongside their decision to indefinitely entrench their collaboration was collusive and prohibited under section 41 of the Act.

The Executive Director further found such agreement to have the objects of price fixing, sharing the market between the parties for supply of medical gases to the Ministry of Health along geographical lines, and restricting supply on two known occasions. From the Executive Director's findings, the JV not only served to eliminate all actual competition between the parties at the time of the JV's creation but

effectively deprived the Ministry of the possibility of choosing between the only feasible and alternative sources of supply at that time and to benefit therefrom.

In respect of the allegation of Bid rigging (Section 42):

The Executive Director did not find information to prove the existence of bid rigging agreements between GCL and LGI and accordingly, made a finding of no-infringement under section 42 in favour of the parties.

The Executive Director's recommendations

In view of the above, the Executive Director recommended that directions be imposed upon both parties requiring them *inter alia* to cease their infringements. The Executive Director also recommended the imposition of reduced financial penalties, after leniency, upon each party. The parties have volunteered further cooperation during the investigation wherein they decided not to make any access to file request and not to challenge the findings of investigation, whilst not admitting guilt, in the spirit of expediting completion of proceedings. Such cooperation was also favourably considered by the Executive Director, pursuant to CC 6 Guidelines (Remedies and Fines), when making his recommendations on fines.

Decision of Commissioners

The Commissioners have issued their decision on the matter. In their determination, the Commissioners have agreed with the findings and recommendations of the Executive Director. The Commissioners have accordingly directed the parties to put an end to their infringing agreement/conducts.

The Commissioners have, considering the facts and circumstances of the case, the parties' respective leniency applications, and the collaboration volunteered by the parties, the Commissioners imposed reduced financial penalties to the tune of Rs 1,50 million for LGI and Rs 2,09 million for GCL.

The Decision of the Commissioners can be accessed on website of the Commission.

Executive Director's Statement

The Executive Director, Mr. Deshmuk Kowlessur, highlighted:

"This investigation alongside the Commission's Decision set the tone for demarcating legitimate competitor collaborations from anticompetitive ones, irrespective of their form or structure.

Markets stand to gain much from collaborations, including among actual or potential competitors, that yield lower prices, improved quality, or that bring new products to market faster without tainting the competitive process. However, competitor collaborations cannot become a façade for collusion. Nor should they reduce the ability or incentives of the partnering enterprises to compete independently and/or facilitate a collusive outcome on the market. Such collaborations are harmful to competition because they adversely affect competitively sensitive variables such as price, output, quality, service, innovation and/or enable the exchange or disclosure of commercially sensitive information.

The Competition Act should not be perceived as deterring the development of procompetitive or competitively neutral collaborations, especially as our economy recovers amidst the Covid-19 context. However, collaborating enterprises must be mindful of the need for effective competition to subsist between them and on the market and should ensure, at all times, that their collaboration and related interactions do not fall foul of the Act."

End of media release