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Competition Law Chronicle

A Centre for Competition and Regulation Newsletter

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The National Law School Centre for Competition and Regulation (CCR) has been instituted with the intention of providing research, training and consultation in the area of competition law and economic regulation. It aims to bring together various stakeholders such as regulators, academicians, practitioners and industry to provide for better understanding and critical thinking of current law and policy. Efficient and timely law, policy and its enforcement is a crucial driver of economic growth and the centre is driven by these concerns.

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Foreword by Our Vice Chancellor

Prof. (Dr.) R. Venkata Rao

Enthused by the rave reviews of the first volume, the Editorial team has come now come out with the impressive second volume keeping focus on what has been stated in *United States* v. *Topco Associates Inc*, *"Anti-trust laws are the Magna Carta of Free Enterprise. They are as important to the preservation of economic freedoms and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."*

The Editorial team has done ENCORE with the Mossaic of the qualitative articles and I congratulate the team for the commendable effort.

Editorial Note

It is my pleasure to release the second volume of the 'Competition Law Chronicle'. The Chronicle is an attempt to provide analytical commentaries on the latest trends in competition law enforcement in India along with guest write up from alternate jurisdictions. It also contains short summaries of notable competition cases to update the reader on the happenings over the last year. Through this process we hope to provide a ready reckoner for anyone who may be interested in the enforcement of competition law in India.

In our opening we have Prof. Rogers in "*A Current Look at Foreign Cartels and the United States Foreign Trade Antitrust Improvements Act*" discussing the lack of clarity in both the statute as well as court interpretations of the extraterritorial reach of the Sherman Act with respect to foreign Cartels. He takes us through the evolving jurisprudence which called for 'direct, substantial and reasonably forseeable effect' in *Hoffman-LaRoche* and the subsequent interpretations of 'direct effect' particularly with respect to foreign components cartels as in Motorola I and Motorola II.

The present issue's dominant focus is on 'High Technology', (HT) and 'Internet Based Ventures' (IBV'S). This focus has been guided by the spate of recent cases which the Competition Commission of India (CCI) is now either grappling with or has passed decisions on. These are not easy decisions to make. How has the CCI acquitted itself so far? What does it need to pay attention to as it gears up for many more similar complex situations? The CCI is not alone in this as other jurisdictions have dealt with or are at present engaged with similar situations. Is there learning from the other jurisdictions or will CCI chart its own course as it goes ahead with and gives it decisions on many cases involving large innovative companies like Google? These are some of the issues that the newsletter seeks to address – not as a final word but to set the ball rolling and create a wider debate.

Markets characterized by HT and IBV's have their special characteristics which may require the Competition Commission of India (CCI) to pay more attention to 'competition-for-the-market' and dynamic efficiencies that may arise. The article "*High Technology, Internet Based Start-Ups and Competition Law Enforcement in India*" attempts to deal with the economics of such markets. It explains how network effects in two sided markets could create a 'winner-take-all' situation but not necessarily so. Strength of network effects, multi-homing, switching costs etc. all play a crucial role. Is the Competition Act equipped to allow the CCI to address special concerns of dynamic markets where innovation is the driver of competition? In "*Ola at the CCI: Is there are "free ride" problem?*", Verma, analyses the Ola case which is essentially about an IBV. He gives a clear overview of the legal provisions and processes at play in deciding 'dominance' and 'predatory pricing'. The article questions the use of 'market share' in deciding dominance and points the potential role of vertical agreements. Irrespective of size he stresses that switching costs and entry barriers are crucial to market power. Will this case provide better jurisprudence for establishing predatory pricing? Ravichandran takes up yet another IBV case relating to ecommerce in "*E-commerce Companies - Is there a case of Competition Regulation?*". CCI, in cases involving online retailers like Snapdeal and Flipkart, calls ecommerce as merely an alternate distribution channel having very low market share in the relevant market which included brick and mortar retail companies too. With low market shares these companies were not dominant and there was no question predatory pricing. She discusses the issues of exclusive agreements and discrimination between sellers by ecommerce firms.

In the concluding article, "*Analysing the CCI's use of Economic, Circumstantial and Direct Evidence*", Leong presents an interesting analysis of CCI's use of direct , circumstantial and economic evidence in establishing bid rigging in the LPG and Vaccine cases. CCI's interpretation appears to be weighted in favour of finding and establishing the presence of bid rigging. But the same evidence could have been used to establish absence of bid rigging too – a more balanced use of evidence is necessary in the authors perspective.

~Dr. T. S. Somashekar

A Current Look at Foreign Cartels and the United States Foreign Trade Antitrust Improvements Act

Prof. C. Paul Rogers III#

The United States' Foreign Trade Antitrust Improvement Act (FTAIA), enacted in 1982, is designed to set the framework for determining if and when U.S. antitrust laws have jurisdiction over anticompetitive conduct involving commerce foreign to the United States.[1] While excluding U.S. import commerce from its reach, it seeks to both clarify and limit the extraterritorial application of U.S. antitrust laws, perhaps in partial deference to foreign concerns about the reach of those laws to competitive conduct abroad. It is far, however, from an example of clarity in drafting.[2] The U.S. Court of Appeals for the Ninth Circuit has described it as a "web of words"[3] while the Third Circuit noted that it was "inelegantly phrased."[4]

The U.S. Supreme Court has considered the applicability of the FTAIA only in its 2004 *F. Hoffman-LaRoche Ltd. v. Empagran S.A.* decision.[5] The case involved a world-wide vitamin price fixing scheme which, it was alleged, caused higher vitamin prices in the U.S. as well as other countries such as Ecuador. The Court ruled that U.S. purchasers could bring a Sherman Act claim under the FTAIA but that buyers in other countries could not since their harm was foreign to the United States. In interpreting the statute, the Court held that the act sets forth a general rule placing all non-import activity involving foreign commerce outside of the reach of the Sherman Act. But, the Court noted, the act "brings such conduct back within the Sherman Act's reach if the restraint at issue has a "direct, substantial, and reasonably foreseeable" anticompetitive impact on U.S. commerce.[6]

Litigation involving the FTAIA has spiked in the last decade or so as the U.S. Department of Justice (DOJ) has increasingly prosecuted foreign-based cartels, spurring many coattail civil lawsuits in addition. In a number of investigations, the DOJ has targeted foreign suppliers of component parts that were incorporated by other companies into finished products assembled overseas but later imported for sale to U.S. customers. Leading examples include TFT-LCD panels for finished products such as televisions,

[1] 15 U.S.C. §6a.

[2] *See e.g.* C. Paul Rogers III, *Cross-Border Mergers and Antitrust: Jurisdiction, Enforcement and Cooperation Issues*, in Cross-Border Mergers and Acquisitions and the Law (Norbert Horn, ed. 2001), 361, n.10.

[3] *United States v. Hui Hsiung,* No. 12-10492, 2015 WL 400550, at *9 (9th Cir. Jan. 30, 2015), *amending* 758 F.3d 1074 (9th Cir. 2014).

[4] *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000).

[5] 542 U.S. 155 (2004).

[6] *Id.* at 162.

notebook computers, and cell phones and various parts assemblies used to make automobiles.

Often at issue is whether the foreign component cartel had the required "direct, substantial, and reasonably foreseeable effect" on US commerce.[7] The DOJ's position in those cases is typically that U.S. consumers were harmed because inflated cartel prices for the components paid for abroad were incorporated into higher prices for the finished products that were sold in the United States.[8] It is concerned, however, that interpretations of the FTAIA that preclude the Sherman Act from reaching foreign component part cartels unduly limit its ability to protect U.S. consumers from competitive harm.[9]

Although lower courts have been mindful of the Supreme Court's admonition that Congress intended that the FTAIA "clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce,"[10] they have applied the statute inconsistently. For example, the Ninth Circuit has held that "direct" under the statute means "as an immediate consequence" with no "intervening developments."[11] In contrast, the Second and Seventh Circuits have rejected the Ninth Circuit's test, instead defining direct as having a "reasonable proximate cause nexus."[12]

The nexus test has proven difficult to apply and one group of commentators has argued that in practice it often devolves "into subjective metaphysical analysis."[13] But with respect to component part cartels, there is always the argument that effects on U.S. Commerce are not direct where a price fixed component is incorporated overseas into a finished product that is eventually imported into the United States. Thus, under either test, a U.S. plaintiff suing a foreign component part cartel cannot be assured that it can meet FTAIA requirements.

The FTAIA's seemingly intractability is perhaps best illustrated by the recent *Motorola* litigation before the Seventh Circuit. It involved claims based on foreign sales of price-fixed LCD panels incorporated into cellphones that were then imported into the United States. In earlier litigation the DOJ had alleged that the overcharges on

[7] Other frequently recurring issues arising under the FTAIA include (1) whether, assuming a direct effect on U.S. commerce, that effect "gives rise to" the plaintiff's Sherman Act claim (*Empagran,* 542 U.S. at 162), and (2) whether the foreign cartel conduct directly involves U.S. import commerce and thus is excluded from the requirements of the statute by its express terms. *See Minn-Chem, Inc. v. Agrium Inc.,* 683 F.3d 845, 855-56 (7th Cir. 2012).

[8] Leon B. Greenfield, Steven F. Cherry, Perry A. Lange, and Jacquelyn L. Stanley, *Foreign Component Cartels and the U.S. Antitrust* Laws: *A First Principle Approach*, Antitrust (Spring 2015), 18.

[9] Brief for the United States and the FTC as Amicus Curiae in Support of Panel Reh'g or Reh'g En Banc at 10, *Motorola Mobility LLC v. AU Optronics Corp*., No. 14-8003 (7th Cir. Apr. 24, 2014), 2014 WL 1878995, at *10.83 F.3d 845, 856-57 (7th Cir. 2012).

[10] *Id.* at 169.

[11] *Huising,* No 12-10514, slip op. at 40; *United States v. LSL Biotechnologies,* 379 F.3d 672, 680-81 (9th Cir. 2004).

[12] *See Lotes Co. v. Hon Hai Precision Indus. Co.,* 753 F.3d 395, 410 (2d Cir. 2014) and *Minn-Chem,* at 856-57.

[13] Greenfield, et. al, at 21.

those panels entering the U.S. exceeded $500 million.[14]

In *Motorola I* the court first held that the targeted conduct did not have a direct effect on U.S. commerce, but subsequently vacated the opinion.[15] Then in *Motorola II* the same panel reversed itself on the direct effect test, holding that if prices of the components were fixed, the effect on U.S. commerce would meet the test for purposes of the FTAIA.[16] But it focused additionally on the second domestic effects question under the statute – whether, assuming a direct effect on U.S. commerce, those effects give rise "to an antitrust cause of action under the Sherman Act."[17] In doing so, it held that the FTAIA precluded plaintiff's claims because the domestic effect of a conspiracy to fix component part prices did not "give rise" to a Sherman Act claim. The court reasoned that although the domestic effect of the conspiracy was increased cell phone prices in the U.S., that is not what harmed the plaintiff, which was a wholly owned foreign subsidiary of the American parent company.[18] It had purchased the price fixed components directly from the conspirators abroad. According to the court, its harm was suffered abroad when it purchased the price-fixed panels abroad, but that harm was not dependent on the domestic effect of increased cell phone prices.[19]

In support of its holding, the *Motorola II* court referenced the Supreme Court's concern expressed in *Empagran* about the risk of excessive extraterritorial application of U.S. law interfering "with a foreign nation's ability independently to regulate its own affairs."[20] Of course, that concern for international comity is a prime motivation for the FTAIA itself.[21] The proof is in the pudding, however. That is, it is the American courts which are left with the task of interpreting and applying an admittedly poorly drafted and confusing statute. As such, it seems that they are the ultimate purveyors of comity.

Part of the judicial function of course is to provide guidance and predictability. But with the circuit split after *Motorola II*, there is currently little of

[14] *See* Brief for the United States at 22, *United States v. AU OptronicsCorp.,* No. 12-10492 (9th Cir. Apr. 5, 2013).

[15] *Motorola Mobility LLC. v. AU Optronics Corp. (Motorola I),* 746 F.3d 842, 844-45 (7th Cir. Mar. 27, 2014) (Posner, J.), *vacated and rehearing granted,* 2014 U.S. App. LEXIS 120704 (7th Cir. July 1, 2014).

[16] *Motorola Mobility LLC v. AU Optronics Corp. (Motorola II)*, 775 F.3d 816, 819 (7th Cir. 2015).

[17] *Id.* at 820.

[18] Motorola argued that it functioned with its subsidiaries as a single enterprise, but the court ruled them legally distinct and that it could not pretend that its foreign subsidiaries were divisions rather than subsidiaries. *Id.* at 822.

[19] *Id.* at 820. The court also held that Motorola's claims did not fall within the import trade exception to the FTAIA, since Motorola, not the defendants, were the importers of the price-fixed goods. *Id.* at 818. This holding conflicts with the Ninth Circuit, which held that the fact that the defendants were not themselves "importers" was immaterial. *Huising*, 2015 WL 400550, at *14.

[20] *Motorola II,* 775 F.3d at 824 (quoting *Empagran*, 542 U.S. at 165).

[21] Ellen Meriwether, *Motorola Mobility and the FTAIA: If Not Here, Then Where?,* Antitrust, Spring 2015, 13. [21] Further, *Motorola II*'s restriction of the reach of the FTAIA's import exception adds another potential layer of defense for foreign cartels. *See* note 19, *supra*, and *Motorola II*, 775 F.3d at 818.

either for cases involving component part price-fixing abroad. *Motorola II* certainly restricts the reach of U.S. antitrust laws to those conspiracies and adds additional hurdles for the DOJ and private plaintiffs seeking relief for domestic harms. In addition to the direct and substantial effects requirement, plaintiffs must be prepared to meet a narrow, restrictive "domestic effects" test to satisfy the FTAIA.[22]

But before one asserts that *Motorola II* has effectively swept away all U.S. antitrust claims against foreign component part price-fixers, it is important to remember the Supreme Court's admonition in *Empagran* that it matters who the plaintiff is.[23] For example, if Motorola had made its purchase decisions and executed purchase orders in the U.S. rather than abroad through a foreign subsidiary, the result might have been different.[24] Further, the DOJ, while is concerned about the effect of cases like *Motorola II* on its ability to criminally prosecute foreign based component part cartels, has typically asserted jurisdiction through the FTAIA's import commerce exception.[25]

Nonetheless *Motorola II* has limited the reach of Sherman Act claims to foreign component part cartels. But that case may have created a circuit split and it is far from clear how other circuits might handle the same type of claim. On June 15, 2015, the Supreme Court denied certiorari in both *Motorola II and* the Ninth Circuit's *Hsiung* case, so we are not going to get a definitive answer anytime soon.

Motorola II may have shifted the focus to the domestic effects analysis and away from the direct effects requirement, which could perhaps soften the supposed circuit spit since the FTAIA requires both. As a result, it may be that in declining to hear the case, the Supreme Court did not see a circuit split.[26]

In any event, judicial application of the FTAIA seems to have produced more questions than answers. While ideally the law should create certainty, the combination of an unartfully drafted statute, differing judicial interpretations of that statute, and the somewhat amorphous concept of comity all combine to produce a great deal of uncertainty about the application of the FTAIA to foreign component part cartels.

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[22] 542 U.S. at 170-71.

[23] In that instance, the goods would have been import commerce and thus presumably within the FTAIA's import exception but whether the "gives rise to" domestic effect standard under *Motorola II* would be satisfied is still questionable.

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[25] *Hsiung*, No. 12-10514, slip op. 35-36.

[26] The U.S. Supreme Court does not give its reasons for denying a petition for certiorari.

HIGH TECHNOLOGY, INTERNET BASED START-UPS AND COMPETITION LAW ENFORCEMENT IN INDIA

Dr. T. S . Somashekar#

India is seeing a spate of internet based start-ups which are challenging the traditional mode of delivery for goods and services. With the internet user base in India touching 190 million in 2014 and expected to expand rapidly to touch 500 million by 2018[1] the opportunity is enormous. Final consumers stand to benefit through increased choices and reduced costs. Further as the Indian economy seeks to achieve sustainable growth in the coming years, the role of technology becomes crucial. Sectors which involve 'high technology' (HT) become drivers of modern economic growth.[2] Several studies have shown the significance of technology for economic growth. At the same these two pose unique challenges for competition law enforcement, not just in India but in other jurisdictions as well. To understand this, a quick look at what HT and 'internet based ventures' mean would be useful.

Sectors or services are classified as HT on the basis of research and development (R&D) expenditure as a percentage of sales or value added in the European Union (EU) or on the basis of the percentage of labour force engaged in technology oriented occupations in the United States (US).[3] Combining these factors, those which could be broadly classified as HT sectors/services/patents in EU would

[1] Alpesh Shah, Nimisha Jain & Shweta Bajpai, *India@Digital.Bharat: Creating a $200 Bn Internet Economy*, BCG (2015) *available at* http://www.bcgindia.com/documents/file180687.pdf (Last accessed on December 20, 2015)

[2] One of the earliest to point out the role of technology in economic growth was Solow. See Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REVIEW OF ECONOMICS AND STATISTICS 312-20 (August 1957). Among the later studies include Martin Falk, *R&D Spending in the High Tech Sector and Economic Growth*, 61 RESEARCH IN ECONOMICS, 140 (2007)

[3] The European Union uses 'technology intensity' - a method developed by OECD. Sectors are classified as HT on the basis of *R&D expenditure/value added ratio* , services are classified as tech intensive using *R&D expenditure/total sales* and similar approaches are used to classify patent as HT . See OECD Directorate for Science, Technology and Industry, *Isic Rev. 3 Technology Intensity Definition*, (2011) *available at* http://www.oecd.org/sti/ind/48350231.pdf ; OECD Science, Technology and Industry Scoreboard (OECD Publishing, 2003); *See also,* Annex I , *Classification of Manufacturing Industries Based on Technology, available at* http://www.oecd.org/sti/ind/48350231.pdf, EUROSTAT, Glossary: High-tech, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:High-tech, Aggregation of products by SITC Rev.4, Eurostat indicators on High-tech industry and Knowledge - intensive service. Available at: http://ec.europa.eu/eurostat/cache/metadata/Annexes/htec_esms_an4.pdf (Last accessed on December 10, 2015). In the US the Bureau of Labour Statistics uses the method proposed by Daniel Hecker. An industry is considered to be HT if "employment in technology-oriented occupations accounted for a proportion of that industry's total employment that was at least twice the 4.9-percent average for all industries". Daniel Hecker, High-technology Employment: A NAICS-based Update," MONTHLY LABOR REVIEW, 57-72 (July 2005) available at http://www.bls.gov/opub/mlr/2005/07/art6full.pdf ; Cynthia Gillham et al, High-tech Industries in Massachusetts: Employment and Wage Trends during the 2001–2009 Period, BUREAU OF LABOUR STATISTICS (2011) available at http://www.bls.gov/opub/regional_reports/mass_hightech/201111_mass_hightech.htm (Last accessed on December 11, 2015).

include aerospace, computers - office machines, electronics – telecommunications, pharmacy , scientific instruments , electrical and non- electrical machinery , chemistry and armaments including aviation, communication technology, computer and automated business equipment, lasers, micro-organism and genetic engineering and, semiconductors.[4] In the US they would include Petroleum Refineries, Manufacturing of Pharmaceutical and Medicine, Agriculture, Construction, and Mining Machinery, Industrial Machinery, Computer and Peripheral Equipment, Communications Equipment, Electrical Equipment , Aerospace Product and Parts, Medical Equipment and Supplies, Software Publishers and Computer and, Office Machine Repair and Maintenance.[5] Internet based companies are innovations that use the web for facilitating the delivery of services or goods. Taxi services (Ola and Uber), online retail sales (Flipkart, Amazon and Snapdeal), Social media (Facebook) etc are a few examples of numerous internet based services that have invaded our daily lives. These ventures use tech 'platforms' to connect end users with service providers. Both HT and internet based companies have certain economic features that warrant a change in the usual approach of competition authorities.

Competition in the HT sectors is dynamic, driven by the success of R&D and innovation. Rapid technological changes can displace industry leaders very quickly making potential competition or 'competition-for-the-market' very important. Eastman Kodak, Yahoo, Lotus 1-2-3, Word Perfect all once dominant in their spheres, were quickly displaced by new technologies ir entrants. Such 'contestable markets' force incumbents with large market shares to constantly innovate. In establishing dominance the role of potential competition is therefore, crucial. But at the same time these sectors are also inclined towards higher concentration. Network effects (demand side economies) and IPR protection can lead to a 'winner-take-all' situation.[6] There are two types of network effects that are of interest – direct and indirect. Direct network effects exist when an increase in the user base makes the product more valuable for new users. Telephone networks are an example. An increase in the number of telephone users increases the value of owning a telephone for a new user. There can also be indirect network ef-

[4] Aggregation of products by SITC Rev.4, Eurostat indicators on High-tech industry and Knowledge - intensive service , Available at: http://ec.europa.eu/eurostat/cache/metadata/Annexes/htec_esms_an4.pdf (Last accessed on December 10, 2015)

[5] Chapter 8, *Technical Note: Defining High-Technology Industries* in NATIONAL SCIENCE FOUNDATION, SCIENCE AND ENGINEERING INDICATORS 2012 *available at* http://www.nsf.gov/statistics/seind06/c8/c8.cfm?opt=9 (Last accessed on December 11 , 2015)

[6] For a good discussion on the economic features of high tech markets see David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, NBER WORKING PAPER NO. 8268 *available at* http://www.nber.org/chapters/c10784.pdf (Last accessed on December 18, 2015)

fects when users on one side of the platform derive more value as users on the other side of the platform increase. When the number of viewers of a television channel increase, the value for advertisers increase or when the users of a particular operating system (OS) increase the benefit of developing 'apps' specific to it also increases. These network effects with a 'positive feedback effect' can lead to a first mover's advantage and market concentration. A positive feedback effect can serve to lock-in small changes in a market. For instance a new OS say, 'X', for mobile phones has found a critical mass of users rather quickly. Phone manufacturers may then want to start producing phones for X. As phone manufacturers start using X, 'app' developers too want to develop apps for the same. This increases the value to users of X and more compatible phones are produced adding more value to developers of apps specific to X and so on. Internet based companies can also be HT based ventures, example Google search engine. Therefore they share the attributes of HT. But even if they are not HT such ventures that use technology platforms (maybe not 'high' technology) are also characterized by network effects and positive feedback effects. For instance, Flipkart as an early starter catches the attention of retail buyers. As more buyers start using the platform, more sellers would want to join too - indirect network effects. A positive feedback loop is created. Hence, the race for gaining market share in India's retail ecommerce. Such markets are also called 'two-sided markets'[7] where an increase in users on one side of the market generates an increase in value for an alternate set of users on the other side of the market. What is interesting in such markets is that one side of the market could be charged less than cost or even 'zero' prices as it actually a profit maximizing strategy.

In analyzing dominance and merger issues pertaining to these types of markets the competition law enforcement agency would have to consider the role of 'competition for the market' more seriously and place less emphasis on existing markets shares. The Indian Competition Act (henceforth 'The Act') defines dominance as "a position of strength which allows a firm to - operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favor".[8] Even a firm with a large market share may not be able to exercise such market power due potential threats. This was noted by the EU competition commission in the Microsoft/Skype merger case.[9] The

[7] Rochet and Tirole , define markets as two sided if "… the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board. J. Rochet, and J. Tirole, *Two-Sided Markets: A Progress Report*. 37(3) RAND JOURNAL OF ECONOMICS 645-667 (2006)

[8] Competition Act, 2002, §4 Explanation (a)

rate of product 'churn-out' or new innovations turned out annually may be an indicator of such pressures on a market leader. Market shares can be quite volatile. It could be tempting to state that network effects create entry barriers for potential entrants but this may not always be the case. In the same Microsoft/Skype merger case the EU noted that "—the network effects are mitigated by the fact that most consumers of communications services make the majority of their voice and video calls to the small number of family and friends that make up their so called "inner circle"… consumers multi-home to a certain degree among various providers of consumer communications services".[10] Network effects can be overcome particularly when the marginal benefits of an increase in the size of a network is rapidly diminishing and when the switching costs are minimal. It is precisely this reason why HT and internet based companies try to create or increase switching costs through various methods. For instance Google and Microsoft both link various services to one mail account. This could increase loss of switching to an alternate platform. Also when considering allegations of predatory pricing in two sided markets what would be a clearer variable is the overall profits and not if one side of the market, say for instance – buyers on an ecommerce platform, are charged below cost through discount sales. As mentioned earlier such a strategy is profit maximizing. A predatory price strategy, on the other hand, involves incurring *losses* in the short run for long term monopoly profits.

Hence what may be important here is the existence of entry barriers or/and barriers to expansion. Such barriers can enforce network effects and prevent new competitors from emerging even if the existing player is not the most efficient. For instance, predatory pricing with entry barriers can lead to a winner-take-all situation as network effects kick-in. What the Competition Commission of India (CCI) may also place less emphasis on 'market shares' for establishing dominance. If players with small market shares can rapidly benefit from lock-in effects and eliminate competitors through predatory pricing, the need to *a priori* establish dominance may lead to a false negative. In analyzing merger/combinations cases, apart from considering the above factors the dynamic benefits that can emerge in HT sectors also need to be factored in. This is not easy as future benefits due to efficiency gains are not easy to establish but methodologies are being steadily developed.[11] The Act, while examining a merger proposal checks

[9] The Commission noted that "...consumer communications services are a nascent and dynamic sector and market shares can change quickly within a short period of time". Case No COMP/M.6281 - Microsoft/ Skype , para 78

[10] *Supra* note 8 at para 33 and 92

[11] For instance see Volker Nocke, Michael D. Whinston, Dynamic Merger Review, NBER working paper 14526 (2008), available at http://www.nber.org/papers/w14526.pdf.

for 'appreciable adverse effect on competition' (AAEC).[12] Among the relevant factors that the Commission has to consider in deciding "whether there would AAEC includes an analysis of whether the benefits of the combination outweigh the adverse impact of the combination, if any".[13] Hence clearly dynamic efficiencies can be a factor in deciding combinations.

In conclusion the CCI will have to give more emphasis on potential competition and entry barriers while considering abuse of dominance cases. Using market share as a screening instrument to establish dominance may be limiting and could lead to improper conclusions. In deciding combinations and their impact on competition dynamic efficiencies would need to be given weightage given the role of such technological progress in economic growth.

[12] Competition Act, 2002 §§ 6(1) & 20(1)

[13] Competition Act, 2002 §20 (4) (n)

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OLA AT THE CCI: IS THERE ARE "FREE RIDE" PROBLEM?

Mr. Yaman Verma#

The app-based taxi aggregator revolution has significantly improved the lives of millions of people across the world, including in Indian metropolises like Bengaluru. As anyone who has ever dealt with an auto-driver in Bengaluru will testify, radio taxis provide a relatively hassle free and (currently) inexpensive mode of travel for those who don't have their own vehicles. Indian companies like Ola compete with international aggregators like Uber for market share in these cities; and the markets, for the most part, appear fairly competitive. However, in an ongoing case before the Competition Commission of India (***CCI***), it has been alleged that all is not well on the competition front.

The CCI issued a prima facie order on 24 April 2015 directing its investigation wing, the Office of the Director General (***DG***), to conduct an investigation against ANI Technologies Pvt. Ltd. (***Ola***) for a potential violation of Section 4 (Abuse of a Dominant Position) of the Competition Act, 2002 (***Competition Act***).

In this case, the informant, a radio taxi service provider in South India, has argued that Ola is dominant in the market for provision of radio taxi services in Bangalore, and has abused its dominant position by imposing restrictions on taxi drivers, and offering incentives and royalty rebates as well as predatory discounts to customers.

Under Section 4 of the Competition Act, "predatory pricing", or pricing below cost (as determined by Cost of Production Regulations, 2009), with a view to reduce competition or eliminate competitors, is prohibited if it is carried out by a dominant enterprise, except when carried out with a view to meet competition (Section 4(2) of the Competition Act).

The CCI came to the conclusion that, *prima facie*, Ola cabs was dominant in the market for provision of radio taxi services in Bengaluru. It also concluded that, *prima facie*, Ola's pricing strategy was predatory, and accordingly an investigation was ordered into the allegations in the complaint through the CCI's prima facie order dated 24 April 2015.

In passing its *prima facie* order, the CCI did not call for submissions, either in writing or orally, from Ola. The Supreme Court has held, in *Competition Commission of India v. Steel Authority of India Limited and Another*, (2010) 10 SCC 744, that the CCI needn't conduct a hearing at all before passing a *prima facie* order, though in this case the CCI did hear from the Informant.

The *prima facie* order required the DG to investigate allegations of violation of Section 4.. While Section 4 deals with abuse of dominance, Section 3 of the Competition Act prohibits agreements that have an appreciable adverse effect on competition, and the Informant also alleged that this had been violated. It appears likely that any investigation in this case would be to look at *vertical* agreements that Ola may have (with drivers) rather than *horizontal* agreements that it has with competitors. However, in order to find that an agreement violates Section 3 of the Competition Act, all parties to the agreement have to be parties to the case before the CCI. Also, in the absence of a *prima facie* order directing the investigation of a violation of Section 3, the DG cannot investigate such an allegation. If, during the course of the investigation, it finds that it needs to widen the scope of the investigation and investigate the potential violation of Section 3, it will have to go back to the CCI and the CCI will have to pass a fresh order if it wants the DG to investigate into the violation of Section 3 of the Competition Act.

Interim Relief

The Informant also filed an application under Section 33 for interim relief, and prayed for an injunction against Ola continuing with its existing pricing strategy till the CCI case was completed. The CCI, through its order dated 3 September 2015, declined to pass interim orders, though this was accompanied by a dissent note which stated that there was enough evidence to support an order for interim relief. Before passing its order denying the Informant interim relief, the CCI did hear both parties.

An order for interim relief can be passed by the CCI if (a) it satisfied that the Competition Act has been contravened and this contravention continues, (b) it is necessary to issue an order of restraint, and (c) there will be irreparable harm to a party if an order is not passed. The CCI, in this case, held that, since the Informant had provided revised figures for estimated losses per trip for Ola, the figures needed to be investigated by the DG before any final determination could be made. Further, the CCI held that, while the Informant had proved that its business had suffered, it had failed to prove that it suffered *as a result of Ola's conduct*. It also held that, since the loss was entirely monetary, it could be compensated monetarily as well.

Dominance

The CCI's *prima facie* view specifically recognized Ola as dominant in the relevant market, on the basis of market share figures. Ola's acquisition of Taxi For Sure gives it an approximately 69% market share (it isn't clear whether this is on the basis of number of taxis or number of rides, as the informant provided data for Ola alone on both these bases).

The Informant provided a large amount of data regarding the size and market share of Ola in Bengaluru, in order to establish dominance. It argued that taxi operators that had contracts with it have now entered into exclusive contracts with Ola, due to various inducements offered by Ola.

While such exclusive agreements could create dominance, it is important to see whether (a) these contracts are long term, (b) whether they can be terminated easily by the taxi operators, and (c) whether there is competition when these contracts are being entered into or renewed. Since it appears that the taxi operators were able to quickly switch over to Ola without any restrictions, unless there is some restriction on the reverse movement, it may not be appropriate to determine dominance based purely on number of taxis available at a particular point of time. A slightly longer time-scape should ideally be considered, instead of a snap-shot.

Abuse

Specific cost and price data was also analyzed, and the CCI found that, on the basis of the data presented to it by the Informant, Ola was earning significantly less than it was paying out to drivers, as incentives as well as payment for each ride.

The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 (***Cost Regulations***), require that the CCI refer to average variable cost as "cost", for the purposes of determining whether a particular price is "below cost", or predatory, and the CCI (or the DG) must only deviate from this position if they give reasons for such deviation in writing. Since Ola does not own any of the taxis, all these costs may be considered variable costs of doing business.

The CCI was previously faced with the question of whether a price was predatory in *MCX Stock Exchange* v. *National Stock Exchange of India Limited and Others* (Case No. 11/2009). The CCI didn't decide the question of predatory pricing in that case, and instead found that NSE was guilty of selling at an "unfairly low" price, primarily on the basis that NSE's competitor, MCX-SX, was making losses trying to compete at the same price level.

As mentioned previously, the order refusing interim relief was accompanied by a dissent note, which records that there is irreparable harm caused and the Informant may go out of business as a result of Ola's conduct, and also makes several other interesting observations. The dissent makes an oblique reference to the European position on predatory pricing, saying that pricing below average total cost may be predatory if intent to eliminate competition can be additionally proven, while there is usually no reason for pricing below average variable cost, except to eliminate competition. It lists some situations where pricing below average variable cost may be justified (when there is low market demand or recession like conditions, as a promotional measure when introducing a new product in the market, or to face competition for a short period of time, which is also a statutory defence). It separately identifies the requirement in the Competition Act to prove intent to eliminate competition. It also recognizes the signaling effect such predation can have in other markets, and how other potential competitors may stay away if they believe that Ola will follow a similar strategy elsewhere.

Whilst the DG's investigation will look in to all the data on the cost of operations for Ola, one important question to consider is the potential competition in the market, as well as the extent of barriers to entry in the market. To put it another way, will Ola be able to benefit monetarily by forcing a competitor out of the market, or will someone else enter the market as soon as Ola attempts to make monopoly profits? If there is no possibility of recouping the losses caused by predatory pricing, then does it make economic sense for a business to carry out the act of predatory pricing in the first place?

In the US, there is a specific requirement to show recoupment in order to make a case for an antitrust violation based on predatory pricing. The same requirement does not exist under the Competition Act in India, so as long as below cost pricing can be proved, and an intent to eliminate competition can be shown, the CCI could find Ola guilty of an abuse of dominant position.

In fact, the specific circumstances where pricing below average variable cost may be considered legitimate that are listed in the dissent note, do not all find a place as defenses to an abuse of dominance claim under the Competition Act. Therefore, except insofar as they help establish that the intent of the dominant company was not to eliminate competition, these defenses may prove to be futile.

For example, Ola could argue that its prices are purely introductory, or aimed at expanding a nascent market. Radio taxis and application based taxi aggregators have not been in business for nearly as long as several other modes of transport and there may be some initial hesitation on the part of customers to sign on. Therefore, Ola finds it necessary to discount in order to attract customers and to get them to enter the market as a whole. However, this would only be relevant insofar as it went to prove that Ola's pricing strategy wasn't carried out *with a view to eliminate competition*.

Finally, this case appears to boil down to the fact that Ola allegedly has venture capital money to burn, which it is using to subsidize its activities, and the Informant alleges that it has been excluded as a consequence. The CCI also correctly held that the fact of competitors being excluded is in itself irrelevant as they may be inefficient. The true standard is whether competition in the market is affected by Ola's conduct. Would an equally efficient competitor be able to survive Ola's pricing strategy? If Ola can squeeze competitors out of the market, and then exploit the resultant monopoly, then the CCI will need to step in to ensure this doesn't happen, because then the effect is not on a competitor, but on competition in the market.

The fact that the CCI decided not to intervene at the interim stage suggests that they do not believe that exit from the market is imminent. The question that remains to be answered is whether exiting the market will deprive the informant or other competitors of the ability to compete with Ola upon reentry. If the investigation by the CCI reveals that the nature of the market is such that Ola will be able to charge monopoly prices if it can squeeze its competitors out of the market using these predatory prices, then the CCI will likely find it necessary to restrict Ola from acting in this manner.

In coming to its final decision, the CCI will have to look at whether Ola is truly dominant, or if low barriers to entry and contestable driver contracts mean that the markets are competitive.

The CCI will also have to determine if there are sufficient barriers to entry to keep the Informant and other competitors out of the market once the allegedly below-cost pricing stops, and Ola tries to make money. Therefore, in one way, the possibility of recoupment could be read in to the determination of dominance itself. The CCI will have to consider whether the exclusion of competitors gives Ola an advantage that will be difficult for the same competitors to overcome if they are to come back to the market. There is a lot riding on this decision in terms of the development of competition law in India and specifically in terms of jurisprudence on predatory pricing. This case will give us an indication of whether the CCI will consider the economic incentives that underpin conduct like below-cost pricing in coming to its decision and, therefore, the out-

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E-COMMERCE COMPANIES - IS THERE A CASE FOR COMPETITION REGULATION?

Nayantara Ravichandran #

Issues relating to online retailers' business practices have been the subject of much debate in India. E-commerce companies like Flipkart and Amazon have come under the scrutiny of state tax authorities for the alleged evasion of payment of value added taxes. Questions have been raised regarding the application of FDI Policy and the permissibility of foreign investment in such companies. Recently, there have been several allegations of anti-competitive behaviours, of which some have been dealt with by the Competition Commission of India. This article analyses the various competition law concerns arising out of the business practices of e-commerce companies. It looks at matters that have been dealt with by the CCI as well as potential concerns that may arise.

Relevant Market

The definition of the 'relevant market' is essential for the analysis of any allegedly anti-competitive behaviour. For the analysis of the business practices of e-commerce companies, the biggest challenge is to determine whether online and offline retailers form separate relevant markets. Most e-commerce companies follow similar business models and have similar channels of distribution - very different from brick and mortar retailers. E-commerce companies also invariable utilise different payment methods such as cash-on-delivery or net banking.

Despite these differences, there is little difference in the actual products sold by both types of retailers. In *Snapdeal*, the CCI noted that the online and offline markets differ in terms of discounts and shopping experiences but if the price increases in one, the consumer will shift to the other market. It was emphasised that the two do not constitute distinct relevant markets but merely provide different channels of distribution of the same products.[1] This becomes relevant when we consider that the traditional retail industry is valued at $500 billion while online retailers have *combined* sales of $3 billion.[2] It would be impossible to conclude that any e-commerce company is a dominant player in the *Indian retail market* if it has such a small market share.

Predatory Pricing

Brick and mortar retailers and manufacturers frequently allege that they are affected by the predatory pricing of e-commerce companies. Predatory pricing is the sale of goods below cost with a view to reduce or eliminate competition[3] and is a form of abuse of dominant position. As stated above, no e-commerce company can be considered a dominant player in the Indian retail market as a whole. Even if only the online retail market is considered, the CCI has noted that there are several competitors such as Snapdeal, Flipkart, Amazon, eBay, ShopClues, Yebhi and none of them cannot be singled out as a dominant player.[4]

The pricing practices of all these firms involve offering discounts with the view to attract customers from offline retailers and competing e-commerce businesses. The CCI has observed that the "*e-commerce market thrives on special discounts and deals*".[5] In *Flipkart* it was alleged that the OPs indulge in predatory pricing in abuse of their dominant position but the Commission reiterated the *Snapdeal* view and did not go into the question since it held that none of the players were in a dominant position.[6]

Exclusivity Agreements

In 2014 information was filed under Section 19(1)(a) of the Competition Act, 2002 against several individual

[1] Asish Ahuja and Snapdeal.com, (Case No. 17 of 2014) *available at* http://www.cci.gov.in/May2011/OrderOfCommission/262/172014.pdf.

[2] Aarati Krishnan, *The real issue with Flipkart,* BUSINESS LINE, (October 10, 2014).

[3] Explanation (b), Section 4, Competition Act, 2002.

[4] Asish Ahuja and Snapdeal.com, (Case No. 17 of 2014) *available at* http://www.cci.gov.in/May2011/OrderOfCommission/262/172014.pdf.

[5] *Ibid.*

[6] Mohit Manglani v Flipkart (Case No. 80 of 2014) *available at* http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf.

commerce companies, including Flipkart and Amazon. The informant alleged that these companies indulged in anti-competitive practices such as exclusive arrangements with sellers, limiting the options of consumers. The informant alleged that e-commerce companies entered into exclusive agreements to sell certain products to the exclusion of other portals, thus impacting consumers who face non-negotiable prices, terms of payment, delivery period etc. An example provided was the sale of Chetan Bhagat's book which was available online only on Flipkart. It was contended that each of the OPs had 100% market share for the products for which they had exclusivity agreements and were thus dominant players in each of those markets. It was further alleged that their conduct in setting the sale terms was violative of Sections 3(1), (4)(b) & (c) and sections 4(a)(i), (b)(i) and (b)(ii) and had an appreciable adverse effect on competition.

The OPs argued that that market for each of the products cannot be considered a relevant product market. Such a market should instead be delineated on the basis of interchangeable products. For example books should be categorised based on genre, not each title and smartphones form a whole market, each phone does not constitute a separate market. Further, any exclusivity that exists is limited to excluding other e-commerce companies and does not affect brick and mortar stores. They emphasised that e-commerce companies cannot be considered independent of retail outlets since they are fundamentally the same with only a difference in mode of distribution and account for less than 1% of the total retail market in India. There was thus no appreciable adverse effect on competition since no single e-commerce company had the market share to cause competition concerns.

An arrangement under Section 3(4) is considered anti-competitive only when it is proved that it has an appreciable adverse effect on competition. The CCI was thus required to consider factors laid down under Section 19(3) such as barriers to entry, foreclosure of competition, benefits to consumers, improvement in production or distribution of goods etc. The Commission noted that there was no *prima facie* suggestion of AAEC since the goods in question - smartphones, books etc - do not seem to be trodden by monopoly or dominance. Rather than foreclosing competition, there seem to be an increase in competition with an increase in the number of e-commerce companies in the market. The Commission also emphasised the convenience of e-commerce companies for consumers - increased transparency, competitive prices and ease of delivery.

Discriminatory Treatment of Sellers

Most e-commerce companies operate on a marketplace model, providing various sellers with a platform to sell their goods. During Flipkart's "Big Billion Sale" last October, there were various allegations that some sellers were unfairly disadvantaged. Some sellers' listings were deactivated during the sale and others were informed a few days in advance that they could not take part in the sale unless they granted the stated discounts. This delisting appears to have been to promote the products of one retailer – WS Retail. WS Retail was the logistical arm of Flipkart that was split into another company because of FDI regulations.[7]

Other sellers on the Flipkart marketplace alleged collusion between Flipkart and WS Retail regarding distribution, going as far as to argue that it was a violation of Section 3. However, no formal complaint was lodged before the CCI. Even if such a complaint were to be filed in similar circumstances in future, it is unlikely that the disadvantaged sellers could show that such practices have an appreciable adverse effect on competition". It would be easier to show that there was a violation of contractual obligations.

Conclusion

E-commerce companies have a number of regulatory hurdles to clear. In a meeting conducted by the Commerce and Industry Ministry on July 16, 2015 it was emphasised that there is a need to reduce the disparity between offline and online retailers. The increase in the number of online retailers presents a threat to offline retailers. It is likely that such retailers will continue to file complaints alleging anti-competitive practices. Given the CCI's current stand on defining the 'relevant market', e-commerce companies cannot be said to be in a dominant position and will thus not be liable under Section 4 of the Competition Act. With respect to exclusivity agreements, the order in *Flipkart* appears to reflect the correct position of law. However, it is possible to envisage that a situation where an online retailer has rights over a product to the exclusion of even offline retailers and will have an appreciable adverse effect on competition. Thus e-commerce companies could potentially be held to be in violation of Section 3 of the Competition Act.

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[7] *See Big Billion Bungle: 3 Things Flipkart Could Have Done Better,* (October 9, 2014) *available at* http://www.confianzys.com/blog/3-things-flipkart-could-have-done-better/ (Last visited on October 9, 2014).

Analyzing the CCI's use of Economic, Circumstantial, and Direct Evidence

Victor Leong S. #

The use of economic, circumstantial, and direct evidence to establish liability in competition law cases is not new. In the LPG[1] and Vaccine[2] cases, the CCI relied on the whole plethora of such evidence to establish the presence of a bid-rigging agreement. In this short article, I argue that the CCI's analysis is incomplete for two reasons. First, the use of economic, circumstantial, and direct evidence itself leaves much to be desired because the interpretation of this evidence is just one of several permissible interpretations, and the CCI did not explain why the other permissible interpretations should not apply. Second, while there is use of the evidence mentioned above, there is a notable absence of analysis relating to enforcing the alleged bid-rigging agreement, which is significant.

Incomplete use of economic, circumstantial, and direct evidence

Economic evidence

The CCI used economic evidence in three ways: to set the backdrop because certain market conditions make bid-rigging more likely,[3] as direct evidence that there is agreement,[4] and to eliminate economically rational explanations for parties' behaviour.[5]

The first method—market conditions—is legitimate because small and concentrated markets[6] which potential competitors are reluctant to enter,[7] and which deal in standardized products with regular demand[8] are more susceptible to bid-rigging. But the manner which the CCI analyzes these market conditions is not sufficiently rigorous. As the CCI itself noted, these same factors can be used to support the opposing argument that there is no bid-rigging.[9] For example, the fact of few firms which are concentrated could mean that firms are more susceptible to parallel pricing given that they would naturally be independent on each other's pricing strategies. Hence it would take *more* evidence,

[1] Case No. 3/2011 [LPG].

[2] Case No. 26 of 2013 [Vaccine].

[3] LPG at [14.14].

[4] Vaccine at [67].

[5] LPG at [14.61]; Vaccine at [49].

[6] LPG at [14.14.2]; Hay and Kelley, "An Empirical Survey of Price Fixing Conspiracies" (1974) 17 Journal of Law and Economics 13-38; Fraas and Greer, "Market Structure and Price Collusion: An Empirical Analysis" (1977) 26(1) Journal of Industrial Economics 26-44; but cf Asch and Seneca, "Characteristics of Collusive Firms" (1975) 23 Journal of Industrial Economics 223-237.

[7] LPG at [14.14.3].

[8] LPG at [14.14.1], [14.14.5]-[14.14.8]; Fraas and Greer (1977) (supra).

[9] LPG at [14.14.2].

and not less, to establish that there is bid-rigging. In terming this contention as merely "interesting,"[10] the CCI has not addressed how it is preferable to interpret the market conditions as supporting their case rather than the parties', given that both interpretations are permissible economic analyses.[11]

Second, economic evidence is also used as direct evidence, most notably using past data to show that parties have changed their pricing patterns, and therefore must have entered into an agreement.[12] But correlation is not causation. Simply because a third firm is no longer present and parties now raise their prices significantly does not mean that they rigging bids—they could be passing on the costs of expanding capacity constraints to the consumers. Unfortunately, the CCI only requires evidence which "tends" to exclude the possibility of independent action,[13] a very low threshold.[14]

Third, this evidence rules out economically rational explanations for parties' actions, establishing agreement by implication.[15] For instance, where parties charge identical prices despite having differing transport[16] or manufacturing costs,[17] this suggests that the prices charged cannot be because of passing on costs. The same reasoning applies where parties are shown to have sufficient capacity to produce the whole tendered amount but only bid for part of that amount[18] —this is contrary to the behaviour expected of a profit-maximising firm.[19] But because this reasoning is only negative, in the sense that it can only rule out explanations and not positively establish reasons,[20] there must still be some further evidence to establish that there is bid-rigging.

Circumstantial evidence

Circumstantial evidence refers to the presence of symptoms in the market which are usually outcomes of bid-rigging agreements but which do not

[10] LPG at [14.14.2].

[11] The most that can be said is that the market conditions may make certain explanations more credible and others less credible, such as in the U.S. Supreme Court decision in Matsushita Electric Industrial Co. Ltd v Zenith Radio Corporation (1986) 106 S. Ct. 1348, where the alleged predatory pricing for 20 years was not credible given the market conditions.

[12] Vaccine at [67].

[13] LPG at [14.12].

[14] This is also the threshold adopted by the U.S. Supreme Court in Monsanto Co. v Spray-Rite Service Corp. (1984) 465 U.S. 752 at p. 768.

[15] LPG at [14.61]; Vaccine at [49].

[16] LPG at [14.32] and [14.59.5].

[17] Vaccine at [66].

[18] Vaccine at [53].

[19] Similar reasoning to the Areeda and Turner (1975) test, although that was in the context of predatory pricing: a firm never chooses to operate below short-run marginal cost unless motivated by strategic concerns. Similarly here, a profit-maximising firm would not choose to produce below its capacity constraints unless it was motivated by other strategic considerations.

[20] *See* for e.g. the reasoning in Carlton and Perloff, "Modern Industrial Organization" (4th Ed, Foresman & Co., 2005) at p. 360 that while theories on behaviour can be criticized, but it cannot be logically proven "wrong" because it rests on a postulated set of beliefs. Similarly here, there can be any number of reasons why parties choose to act in a certain manner; negatively disproving economic rationales for it does not establish bid-rigging.

themselves show agreement. The best example of such evidence is parallel pricing, although the CCI specifically eschews exclusive reliance on parallel pricing to establish liability.[21] But the CCI has used other circumstantial evidence such as appointing common agents for parties which are ostensible competitors[22] and parties' changing behaviour in accordance with whether their partners are also bidding[23] as circumstantial evidence which can establish liability—"plus" factors.[24] The difference is likely to be that parallel pricing is also possible, and in fact very likely, even where there is no bid-rigging. But appointing common agents[25] and adjusting one's bidded quantity based on the presence of other competitors, and not based on one's own capacity constraints, are unlikely to occur in markets without bid-rigging.[26] Hence, this demands a further explanation from the parties as to their economic objectives.[27]

But not all circumstantial evidence is created equal. The CCI's analysis is incomplete because while it *does* list out and rely on circumstantial evidence as seen against market conditions, it does not explain the interaction between them—for instance, whether a certain amount of direct evidence is first necessary, or how exactly the market conditions affect the circumstantial evidence necessary, or the interaction between the various types of circumstantial evidence and which is stronger.[28]

Direct evidence

Direct evidence is used by the CCI in two ways: to establish that there is a meeting of minds between parties,[29] or in a negativing way to find that certain parties are not part of the agreement because there was no evidence that they were part of either trade associations or physical meetings.[30] The second use is legitimate because in the absence of any direct evidence at *all*, there should be no liability because

[21] LPG at [14.74].

[22] LPG at [14.27].

[23] Vaccine at [64].

[24] ABA Section of Antitrust Law, Antitrust Law Developments (6th Ed., 2007) 11-16; Kovacic, Marshall, Marx, and White, "Plus Factors and Agreement in Antitrust Law" (2011) 110 Michigan Law Review 393 at p. 396.

[25] *See* for e.g. Dick (2005) (supra) at p. 154, that nearly 60% of all cartels employ common sales agents.

[26] See for e.g. Carlton and Perloff (supra) at p. 371, where the authors theorize that a firm may limit its own production to raise its rivals' costs. But in the Vaccine case, the CCI correctly found that this is not the case, because OP2 did not bid in the instances where OP3 bid the full amount, and where both OP2 and OP3 bid for a quantity which totalled the tendered amount, the bids were submitted simultaneously; that is, OP3 could not have been limiting its own production as a form of competition to raise OP2's costs.

[27] This must be a "plausible" and "legitimate" business rationale: see for e.g. Andrew Gavil, "Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy" (2nd Ed., 2008) at p. 310-311.

[28] Kovacic (2011) (supra) at p. 406: courts have failed to present a hierarchy of such factors and to establish an analytical framework that explains why specific plus factors have stronger or weaker evidentiary value.

[29] LPG at [14.18].

[30] LPG at [14.84].

circumstantial and economic evidence can only buttress and not replace direct evidence.

But the first use is suspect because the level of direct evidence needed by the CCI in the cases is far too low to be convincing. The CCI has held that because parties were members of a trade association, and because they admitted to meeting at a conference the day before the bid to discuss bidding issues, this is enough direct evidence to be propped up by circumstantial and economic evidence.[31] This ignores the fact that not all parties involved are parties to the trade association and the meetings.[32] This is suspect because not all direct evidence is enough to support an infringement.[33] The direct evidence should be of better quality—for instance, whether those 19 members identified to be present are *also* the members party to the trade association and later the similar bids. If there is any divergence, then this might suggest that these trade associations or meetings may be for purposes other than bid-rigging.

Significant absence of analysis relating to the costs of colluding

What is absent in the cases is as important as what is "conspicuously present."[34] This is especially so for bid-rigging where circumstantial evidence is key—parties must be willing and able to enforce the agreement or punish non-compliant behaviour.[35] This is because a firm's decision to engage in bid-rigging is a *balance* of both the benefits and the costs. Hence, it is only by "examining the factors which bear on [both] the private benefits and costs of colluding"[36] that it is possible to identify the likely conditions under which bid-rigging is likely to occur. But none of this is discussed by the CCI in both the LPG and Vaccine cases.

Conclusion

The CCI relied heavily on the confluence between identical bids, trade association membership, and prior meetings to establish liability in the LPG case, and comparative analysis in the Vaccine case. In the former, the CCI needed to explain, and not merely

[31] LPG at [14.18].

[32] The CCI found that these objections were "devoid of merit" because non-parties to the trade association could still collude with members, and that just because only 19 of 50 impugned parties were identified did not mean that the other parties were not present. This reasoning is suspect because the burden at this stage is on the CCI, not the parties.

[33] A similar line of reasoning is employed in Bell Atlantic Corp. v Twombly (2007) 550 U.S. 544 at p. 570: the plaintiff must plead enough facts to state a claim which is plausible on its face.

[34] LPG at [14.15].

[35] See for e.g. the loss from punishment as the theoretical basis for analyzing when firms are likely to engage in bid-rigging in Andrew R. Dick, "If Cartels Were Legal, When Would Firms Fix Prices?" (2005) in Grossman, P. (Ed.), How Cartels Endure and How They Fail, Cheltenham, 144-173 at p. 147-148.

[36] Posner, Richard A, "Antitrust Law: An Economic Perspective" (1976) Chicago: University of Chicago Press at p. 47: a firm's decision to collude is presumably made by balancing the costs of collusion against the potential gains of collusion.

state, how this interaction leads to the conclusion of a bid-rigging agreement. In the latter, while the logic is arguably more compelling, it could be buttressed by analyzing the market conditions as was done in the LPG case. In both cases, however, the CCI should have balanced the possibility of bid-rigging with the costs of doing so to achieve a more well-rounded view.

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ANTICOMPETITIVE AGREEMENT

KFEF interference in distribution was Anti-Competitive

The Crown Theatre ("Crown") is a theatre established in Calicut, Kerala. It was converted from a single screen to a double screen theatre and started screening Tamil and Malayalam movies subsequently. The Kerela Film Exhibitors Federation ("KFEF") is an association representing film theatres in Kerala. The allegations of the Crown are that the KFEF is abusing its dominant position by preventing the screening of Malayalam and Tamil films in theatres in Kerala. Due to differences with the KFEF, the Informant resigned from membership in November 2012. Around May 2013 the KFEF started directing distributors to abstain from giving the films to Crown.

Issues which arose in this case to determined was "Whether the KFEF interfered with the distribution of Malayalam and Tamil films to the theatre of the Informant in contravention of the provisions of Section 3(3) of the Act?"

The Commission considered the evidence relied on by the DG which largely consisted of statements furnished during the course of investigation in the form of letters from distributors, their statements on oath, the affidavit of the Informant and submissions and affidavits of third parties. It stated that the above statements showed the strength that the KFEF possesses in the firm industry in Kerala. Since most of the theatres are members of the KFEF, every distributor had inhibitions about releasing its films in the Informant's theatre since it was experiencing differences with KFEF. Dealing with any theatre boycotted or banned by KFEF would entail financial repercussions.

The Commission also referred to Case No 45/2012 which had been recorded by the DG to show that the KFEF has previously been held liable for anticompetitive behaviour. It held that the findings of the DG, as well as the supporting evidence, made it clear that KFEF had been indulging in and perpetuating anti-competitive practices. It therefore concluded that the conduct amounted to a violation of Section 3(1) read with Section 3(3)(b) of the Act. The Commission also noted that Mr Basheer Ahmed and Mr MC Bobby, the President and General Secretary of KFEF were responsible for its conduct since they were in charge of the key decisions made and were thus liable under Section 48.

The Commission ordered KFEF and its office bearers to cease and desist from indulging in practices that were in violation of Section 3 read with Section 3(3)(b). The office bearers were ordered to cease their association with the KFEF, including administration, management and governance for a period of two years. It further directed the KFEF to organise at least five competition awareness and compliance programmes over the next six months.

The Commission ordered that the OP shall pay penalty of Rs 82,414 calculated on the basis of 10% of its average income and was required to submit the same within 60 days. Similarly Mr PV Basheer and Mr MC Bobby were required to pay penalties of Rs 56,397 and Rs 47,778 each.

Cartelisation by Public Sector Insurance Companies

CCI found cartelization by public sector insurance companies (National Insurance Co., New India Assurance Co., Oriental Insurance Co. and United India Insurance Co. Ltd.) in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna. In the instant case Government of Kerala floated a tender for selecting insurance service provider for implementation of the 'Rashtriya Swasthya Bima Yojna' ('RSBY') for the year 2010-11. Based on the prices and activities during the tender, and the minutes of the Inter Company Co-ordination Committee (ICCC) meeting, it was alleged that the public sector insurance companies had formed a cartel and quoted higher premium rates in response to the tender, thus being guilty of bid rigging and collusive tendering. Two pressing question which arose in the instant case were: (1) Whether the public sector insurance companies constitute a single economic entity?; and If the finding on the issue No.1 is in negative, whether the conduct of insurance companies have resulted in contravention of any of the provisions of the Act?

In light of the history of regulatory changes which occurred in the insurance sector, and the ending of control of the government over the 4 public companies so that they can act independently and foster competition in the market, they are not a single economic entity. Even though they may be under supervision of the government, they submitted independent bids and hence were supposed to act as independent players in the market. The Commission relied on minutes of the meeting before the tenders to conclude that there had been blatant market sharing and price fixing, which was strengthened when corroborated with the actual bids submitted to the government in response to the tender. It was found that the evasive responses of the officials who gave depositions, the obvious ploys to enforce exit clauses to force issuance of new tenders and raising premium prices were further evidence of collusion and bid rigging.

CCI held four companies liable for anti-competitive agreement in form of cartelization under Section 3(1) and Section 3(3) (d) of the Competition Act, 2002 and order insurance Companies and its office bearers to cease and desist from indulging in anti-competitive practices. As the bid rigging was carried out in public procurement for social welfare schemes the beneficiaries of which are BPL families, it was considered an aggravating factor for imposition of penalty. Accordingly CCI ordered the amount of Rs. 162.80 crore for on M/s National Insurance Co. Ltd.; New India Assurance Co. Ltd. Rs. 251.07 crore; Oriental Insurance Co. Ltd. Rs. 100.56 crore; United India Insurance Co. Ltd. Rs. 156.62 crore.

FMCG Distributors Association found indulging in anti-competitive activity.

In Shri Ghanshyam Dass v. M/s Bajaj Corp. Ltd. Mumbai and Ors. Case No. 68 of 2013 CCI hold Sonipat Distributor (FMCG) Association liable for violation of Section 3. One Mr. Ghanshyam Dass (Informant), the sole proprietor of M/s Durga Drugs & General Stores, is engaged in sales and distribution of ayurvedic and general health products of various companies, and has been a stickiest/ distributor of Bajaj Corp. Ltd. ('Bajaj') since 1986 for products including hair oil. The Informant placed an order for 36 cartons of hair oil, and made the payment of Rs. 50,000 through NEFT. But no supply was made, despite reminders being sent, after which the Bajaj refused to supply products to

Informant. Bajaj wanted to appoint another distributor in place of the Informant, and asked him to sign a No Objection Certificate under the rules of the Sonipat Distributor (FMCG) Association ('Association'), which is an association of distributors/ stockists of drugs/ products of various drugs and pharmaceutical manufacturing companies. The Informant agreed to do so if he was allowed to continue being in business too, But Bajaj refused and forced him to resign for the association, and then refused to deal with him as he was not a part of the association. It is alleged that this caused appreciable adverse impact on competition, it is violative of s. 3 (4)(c) as there is an exclusive distributor in the Sonipat area. It was also argued that certain by-laws of the association are anti-competitive.

It was found that the Association obliged the FMCG companies and the dealers to seek its approval before taking up any business of distribution, and this created a barrier to entry in the market for new dealers as well as new companies. The prerequisite of NOC by the association, thus, foreclosed the competition by hindering entry of new players in the market and was anti-competitive.

On abuse of dominant position CCI did not agree with the DG. It did not find that the DG had relied on enough evidence, and had not studied other players in the market. Although the Association imposed vertical restrained, adverse effect on market was not shown. Further, in the hair oil markets, the Bajaj do not have particularly major presence, and hence their agreement was not harmful to competition as a whole.

CCI held that there is no contravention by Bajaj, however the Association rules were found anti-competitive and violative of section 3(1) read along with 3(3)(b) and 3(3)(c) of the Competition Act, 2002. The CCI ordered that Association shall modify its byelaws in light of the contraventions found and observations made by the Commission and asked to institute a Competition Compliance Manual which will serve to educate its members about the basic tenets of Competition Law Principles. No monetary penalty was imposed as Association had already stopped the anti-competitive practices at the time of the order.

GSK and Sanofi found Guilty of Bid Rigging

CCI found GSK and Sanofi guilty of bid rigging in Case No. 26/2013._The Informant is an indigenous manufacturer of the Ouadrivalent Meningococcal Meningitis vaccine ["QMV"], which provides protection against Meningitis. Since 2002, the Indian

Government has been floating annual tenders for the purchase of the QMV vaccine, which is required to be administered upon pilgrims who wish to go on the annual pilgrimage of Hajj. In this regard, the Informant alleged that the Government had been altering the terms of the tender arbitrarily, requiring bidders to meet higher thresholds of turnover and market experience in subsequent years, thus abusing its dominant position in violation of s. 4 of the Act. Additionally, the Informant alleged that M/s GlaxoSmithKline Pharmaceutical Ltd. ["GSK"] and M/s Sanofi, Mumbai ["Sanofi"] had been engaged in cartelization thorugh bid rotations and international geographical allocations, in violation of s. 3(3)(d) of the Act.

The Indian Government had been increasing the minimum turnover requirement for bidders from Rs. 10 crores in 2005-06 to Rs. 20 crores in 2008 and Rs. 50 crores in 2011. During 2008-10, the Informant had been the primary supplier of the QMV vaccine to the Government. However, on account of the increase in the turnover requirement in 2011, it was unable to participate in the first tender issue. In the first round, neither GSK nor Sanofi placed a bid for the entire volume of vaccines required. Further, the prices at which the bid offers were made were significantly higher than the previous years. As a result, the Indian Government cancelled the first tender, and invited a short term limited tender. In this second round, however, GSK expressed an inability to supply on account of non-availability of stocks, and the Informant failed to clear on technical grounds. As a result, the tender had to be cancelled again and a third tender was invited wherein GSK refused to participate, and the Informant was awarded the tender along with Sanofi, with latter having quoted a bid price that was much lower than the prices quoted by it in the two earlier tenders.

As per the findings of the the Director General, and the Commission, no investigations could be initiated against the Indian Government as it does not constitute an 'enterprise' under the Act. In any case, the Delhi High Court has already held that the changes in the terms and conditions of the tender, in subsequent years, were not arbitrary or unreasonable. Therefore, the only question left for the determination of the Commission was whether GSK and Sanofi had been acting in contravention of s. 3(3)(d) of the Act.

The Commission noted that in the first tender issued by the Indian Government, on June 25, 2011, neither GSK nor Sanofi had offered to supply the total tendered quantity. In fact, the bids were quoted in a manner such that the entire tendered quantity was almost equally distributed between them. Further, the prices quoted by both companies were similar, and substantially higher than the prices quoted in the previous year. This increase in prices was not in line with any increase in cost of production due to inflation, changes in exchange rates or any other substantial changes in market conditions. Further, it was observed that the reasons quoted by GSK for it's non-participation in the second and third rounds of tender were entirely baseless and unjustified. The Company had quoted non-availability of stock, scheduled delivery timelines and inability to comply with certain technical requirements as reasons for not being able to supply the QMV vaccine. However, the documentary evidence, in the form of internal communications in the Company, available on record showed its explanations to be incorrect and mutually contradictory, hence rendering them unreliable. Lastly, the Commission noted that the prices quoted by Sanofi in the third round of tender were substantially lower as compared with the prices quoted by it in the two earlier rounds, in which the Informant had been unable to participate. This clearly indicated that GSK and Sanofi had decided to increase prices and divide the tendered quantity between them as soon as the Informant had become ineligible to participate .

Thus, the Commission concluded that the conduct of GSK and Sanofi showed parallelism and concerted action. It held that the two companies had colluded to earn super natural profits by through market sharing, thus violation s. 3 of the Competition Act.

Both GSK and Sanofi were directed to cease and desist from indulging in the practices which were found to be anti-competitive under s. 3 of the Act. The Commission imposed upon GSK and Sanofi a penalty of 3% of their turnover based on the financial statements filed by them for the three financial years immediately preceding the tender. This amounted to a penalty of Rs. 60,48,90,469/- for GSK, and a penalty of Rs. 3,04,34,200/- for Sanofi.

Motor Transport Cartel

CCI found cartelisation in Motor Transport Sector in In Re: Indian Foundation of Transport Research and Training & Bal Malkait Singh and Ors., Case No. 61/2012. The All India Motor Transport Congress ["AIMTC"] was alleged to have been engaged in anti-competitve behaviour, in violation of s. 3(3)(a) of the Act as it had commanded an increase in truck freight by 15% across the country on account of a diesel price hike of Rs. 5 per liters, with effect from September 14, 2012. As per the Informant, the Association had a track record of instructing its members to increase freight charges on account of increase in input costs, such as cost of diesel, and had, consequently, been at the receiving end of a cease and desist order issued by the MRTP Commission in this regards.

The Commission noted the AIMTC had been opposed to any increase in diesel price. Subsequently, upon a declaration of a 5% increase in diesel prices by the Indian Government, it was observed that the President and Spokesperson of the Association had made statements in the press directing members and member associations to increase freight charges by 15%. These announcements were made at the same time, from different locations – which would not have been possible in the absence of any communication between the two members of the executive body of the association. Since the term agreement has been defined broadly under the Act, such that it includes '*any* understanding or action in concert', these statements were found by the Commission to be sufficient proof of collusion.

Subsequent to these statements, several reports appeared in the media indicating that the President and the Spokesperson of the AIMTC had called for a 15% hike in freight charges. None of these reports were objected to by any member or executive member of the association. The Commission also found proof of the persuasive value of these statements, with state transport associations having admitted that they are accustomed to acting in accordance with the directions and decisions of the AIMTC. This was clearly indicative of the adverse effect that such an announcement could have on competition, by resulting in the determination of freight prices. Thus, the Commission found the association guilty of having contravened s. 3(3)(a) of the Act.

The Commission directed AIMTC to cease and desist from indulging in the practices which were found to be anti-competitive under s. 3 of the Act. The Commission imposed upon AIMTC a penalty of 10% of its turnover based on the financial statements filed by it for the three financial years immediately preceding the order. This amounted to a penalty of Rs. 14,24,521/- for the association.

CN Containers Manufacturer Cartel

CCI found cartelization in CN Containers manufacturers in re, M/s Seth & Co., Suo Moto Case No. 03 of 2013 The case involves an instance of alleged bid rigging and cartelization by the 13 manufacturer of "CN containers" that are required for the manufacture of 81mm bombs. The CCI initiated *suo-moto* cognizance of the matter under S. 19(1) of the Act based on a report by the Comptroller and Auditor General on the defense sector that indicated strong price parallelism in the bids submitted by the opposite parties to three industries that manufacture the bombs which were identical or near identical.

The Commission out rightly rejected the challenge to its jurisdiction stating that the conduct of the parties continued even after the relevant provisions came into force and hence the commission had the jurisdiction to examine the conduct and pass an order. It noted that the parties had very different cost structures given the fact that the main raw material from which the CN containers were made and accounted for 50-80% of the cost was sold to all the opposite parties at very different prices by a common seller making it impossible for them to have similar cost structures and therefore similar prices. It further observed that direct evidence of bid-rigging was almost impossible to detect and circumstantial evidence of concerted action was sufficient to meet the definition of "agreement" under S. 2(b) of the Act. In the present case, given that price parallelism was accompanied by several instances of cross ownership and common directors was evidence enough to meet the requirement of "plus factors". It noted that the typical market conditions *i.e.*, small number of manufacturers, geographical proximity, absence of new entrants, predictable and stable demand, standardized product, non-availability of substitutes etc. strongly indicates that the market is very conducive to collusion. Further, given the fact that Product is stringently standardized, there is hardly any opportunity for manufacturers to innovate on quality of the Product or offer better prices to compete for higher market shares.

Further it held that admittedly the presumption of appreciable adverse effect on competition was rebuttable under S. 3(3) of the Act, in this case there was clear evidence that the conduct of the opposite parties had in fact adversely impacted competition in the market. There was evidence of atleast one firm being ousted from the market clearly indicating market foreclosure. Further by agreeing on inflated prices, the opposite parties ensured that none of the competitors would undercut and quote competitive prices which would have brought down the market prices. Further given the structure of the market new entrant could not enter even at these inflated prices due to the large size of investments required. The prices therefore, although stable were much higher than the competitive prices which adversely affected the competitive conditions in the market. No evidence of quantitative restrictions was found and therefore the conduct of the parties was not found to be violative of S. 3(3)(b) of the Act.

The Commission passed an order to cease and desist under S. 27 of the Act. It further imposed a penalty of the annual turnover from the financial year 2010-2011 to the financial year 2012- 2013 on the opposite parties to be paid within 60 days.

Abuse of Dominant Power

Abuse in Point of Sale Devices

In *M/s Three D Integrated Solutions Ltd.* v. *M/s VeriFone India Sales Pvt. Ltd.* (Case No. 13/2013) an interesting issue arose with respect to the Point of Sale Terminals. A brief facts of case are that, Three D Integrated Solutions Ltd. ("TDIS") engaged in the business of video broadcasting, audio broadcasting etc. had placed a purchase order with the Verifone India Sales Pvt. Ltd. ("Verifone") for the supply of 275 Nos. of mobile Electronice Ticketing Machines ("ETM"). Verifone is engaged in the business of manufacturing, development and selling of hardware and software solutions such as mobile Electronic Ticketing Machines ("ETMs"), Point of Sale ("POS") terminals, and related services and expertise that enable electronic payment transactions at POS terminals. TDIS is required to load independent application software and operate from its infrastructure over this ETM. The TDIS alleged that at the time of the order Verifone does not inform TDIS that he will be required to also purchase a Software Development Kit ("SDK") to achieve full functionality of ETMs. Furthermore, the SDK agreement was very restrictive in nature. The informant further avers that even after signing this agreement, the informant's use of SDK was restricted by File Signing Tools ("FST"), a security key.

For analysing Section 4 violation first issue was determination of relevant market. In_determination of the relevant market, the issue was whether an ETM machine and a POS terminal are substitutable so as to form part of a single relevant product market. The Commission observed that though separate bids were called for ETMs and POS terminals, the specifications required for ETMs were such that only a POS terminal could fulfil those requirements. Also, the TDISs' purchase order required a payment device with features of a POS terminal. Thus the Commission concluded that the relevant market would be 'market for POS terminals in India'.

For dominance in the said relevant market Commission relies on data from RBI to state that till the end of the alleged infringement period, the Verifone had 70-80% market share of the POS terminals. Furthermore, the Commission found the Verifone to the vertically integrated entity unlike its closest competitor and having commercial advantage in terms of size, resource and economic power. Therefore, the Commission concurred with the DG and held that Verifone is dominant in the relevant market.

The abuse was alleded to be linked with the SDK License, in analysing that CCI perused the clauses of the SDK license agreement and observed that no other POS terminal vendor but for the Verifone had imposed similar restrictive conditions.

The CCI observed that the "purpose clause" relating to allowing licensee to develop the value added software and using the same on only those of the licensor's products that licensee has purchased directly from the licensor of the agreement is restrictive and anti-competitive. It also observed that the agreement does not allow third parties to write a payment application in India which is contrary to the practice followed by Verifone elsewhere in the world. Thus, the Commission opined, limits/controls the provision of Value added Service and limits/ restricts the technical and scientific development of Value added Services used in POS Terminals in India.

The CCI also observed that Verifone is alongside being a POS terminal manufacturer, also engaged in the development of Value Added Services applications in direct competition to the TDIS. The agreement has extensive disclosure requirements, by way of which Verifone was trying to get access to confidential commercial information from the VAS providers and to exploit the lucrative value added service market.

Based on the above, the CCI came to a conclusion that Verifone had violated Section 4(2)(a)(i) of the Act (unfair conditions), Section 4(2)(b)(i) and (ii) of the Act (restriction in production and technical development of VAS services), and Section 4(2)(e) of the Act (abuse of dominance to enter the market of VAS services).

Penalty imposed under section 27(2) of the Act was calculated to be 5% of the average annual turnover; Rs. 4,48,40,236. OP1 did not plead any mitigating factors.

DLF Again Found Guilty

In Pankaj Aggarwal v. DLF Gurgaon Home Developers Private Limited (Case No. 55 of 2012) CCI found DLF again abusing its dominant position. The Mr. Pankaj Agarwal and others were lured to book an apartment in the pre-launch scheme of DLF New Town Heights by DLF Home Developers. The brokers kept demanding large sums of money periodically, even though no construction had begun. When it was obvious that the building complex was not going to be constructed/had been stalled, the Mr. Pankaj Agarwal wrote to initiate process of cancellation and refund of amounts they had paid, but were informed that the applications they had signed to become buyers (where they had been instructed to leave the date blank), was irrevocable. The only option was to sell the property in open market. After 2 years of booking, the brokers informed the Mr. Pankaj Agarwal that foundation work was complete and they had to pay as per plans. Troubled by this conduct the Informants alleged abuse of dominant position under section 4(2)(a)(i) of the Competition Act, 2002.

The CCI accepted the relevant product market to be 'the provision of services for development/sale of residential apartments' and the relevant geographical market to be Gurgaon. The CCI agreed with the DG regarding the conclusion that the DLF Homes have a dominant position in the market. The lack of statistical or precise numeric data was considered a peculiarity of the real estate market, and lack of evidence was not accepted as a defence.

The CCI after taking cognizance of the unfairness of the buyers agreement, unfair financial pressure on the apartment buyers, unfair additional demands on account of increase in super area, unfair cancellation policy and forfeiture of booking amount and arbitrary increase in number of floors, among other such actions.

The DLF homes were found guilty of abuse of dominance as defined under s. 4 of the Competition Act, 2002. The CCI ordered that the Opposite Parties shall cease and desist from indulging in the conduct which is found to be unfair and abusive. As a penalty of Rs. 630 crores had already been imposed in the case of *Belaire,* regarding the same issue, no fresh monetary penalty was imposed.

Tuck Operators Society indulged in Abuse of Dominant Position

CCI found abuse of dominant position in Truck operators Society in In Re: M/s Shivam Enterprises & Kirtarpur Sahib Truck Operators and Members, Case No. 43/2013. M/s Shivam Enterprises (Informant) was prevented by the Kirtarpur Sahib Truck Operators Co-operative Transport Society Limited ["KSTOC"] in fulfilling its contract with M/s Ambuja Cements Ltd., for the transport of cement from its warehouses in Kirtarpur regin for distribution in Punjab. This contract had been obtained by the Informant by quoting prices that were considerably lower than the rates fixed by KSTOC for the provision of freight services in the region, which caused the Co-operative to forcibly obstruct the Informant from executing the contracts.

As per the regulations of the KSTOC members (i.e. truck owners) were prohibited from negotiating freight rates directly with any customer. All orders had to be routed through the Co-operative, which would assign orders to its members on a first-come-first-serve basis. The prices for freight services were fixed by the Co-operative, and were inflexible and non-negotiable. Non-members were prevented by KSOTC from operating within the area covering 50 villages, which fell within the control of the Co-operative.

In light of these facts, the Informant alleged that the Co-operative was abusing its dominance in vilation of s. 4 of the Act, and engaging in anti-competitve practices, in violation of s. 3 of the Act. Commission noted that, under s. 4(1) of the Act, a person 'engaged in any activity' relating to, *inter alia*, the provision of services is considered an 'enterprise'. The Commission noted that KSOTC was a co-operative registered under the Punjab Co-operative Societies Act, 1961. Hence, it was a 'person' within the meaning of the term as defined under s. 2(1) of the Act. Further, unlike most associations of a similar nature, KSOTC was also engaged in economic activity, namely that of provision of services by freight transport as all freight contracts were entered into in the name of the Co-operative and, subsequently executed by its members. In this course, members were governed by the Regulations of the Co-operative, which charged a commission on each contract. Thus, KSOTC was held to be an 'enterprise' as defined under s. 2(h) of the Act.

The Commission delineated the 'relevant market' geographically as the area in and around Kirtarpur in Punjab comprised of 50 villages in all which KSOTC offered services. This was done in light of the inherently local nature of transport services, as consumer demand was concentrated in certain areas. Further, the 'product market' was limited to truck operators as rail transport was found to be inadequate substitute in light of the various factors enlisted under s. 19(7) of the Act.

The Commission noted that KSOTC was the *only* enterprise operational in the Kirtarpur region, which had foreclosed all competition *entirely*. Attempts by other truck owners to operate and engage in business of freight transport within the Kirtarpur region had resulted in failures. Investigations revealed that the Co-operative had been imposing unfair prices for transportation services in contravention of the provisions of s. 4(2)(a)(ii) of the Act. It had also been engaged in limiting and restricting the provision of services for freight transport in Kirtarpur area in contravention of the provisions of s. 4(2)(b) of the Act. Thus, the Commission held that KSOTC had been abusing its dominant position, in violation of s. 4 of the Act.

The Commission observed that members of the Co-operative had been using the platform provided by KSOTC to foreclose competition and prevent new entrants in the market. Consequently, by preventing independent transporters from operating in the market they had limited the supply of services of freight transport by trucks in the Kirtarpur region, thus violation s. 3(3)(b) of the Act. Additionally, the Commission also held that the members of KSOTC had violated s. 3(3)(a) of the Act as they had voluntary fixed prices of freight services, in spite of being competing enterprises, under the garb of Co-operative society.

The Commission directed KSOTC to cease and desist from indulging in the practices which were found to in contravention of the provisions of the Act. The Commission imposed upon KSOTC a penalty of 10% of its turnover based on the financial statements filed by it for the three financial years immediately preceding the order. This amounted to a penalty of Rs. 2,28,540/- (approximately two lakh and thirty thousand ruprees) for the Co-operative society. Penalties were also imposed on persons-in-charge of the Co-operative society, in accordance with s. 48 of the Act.

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