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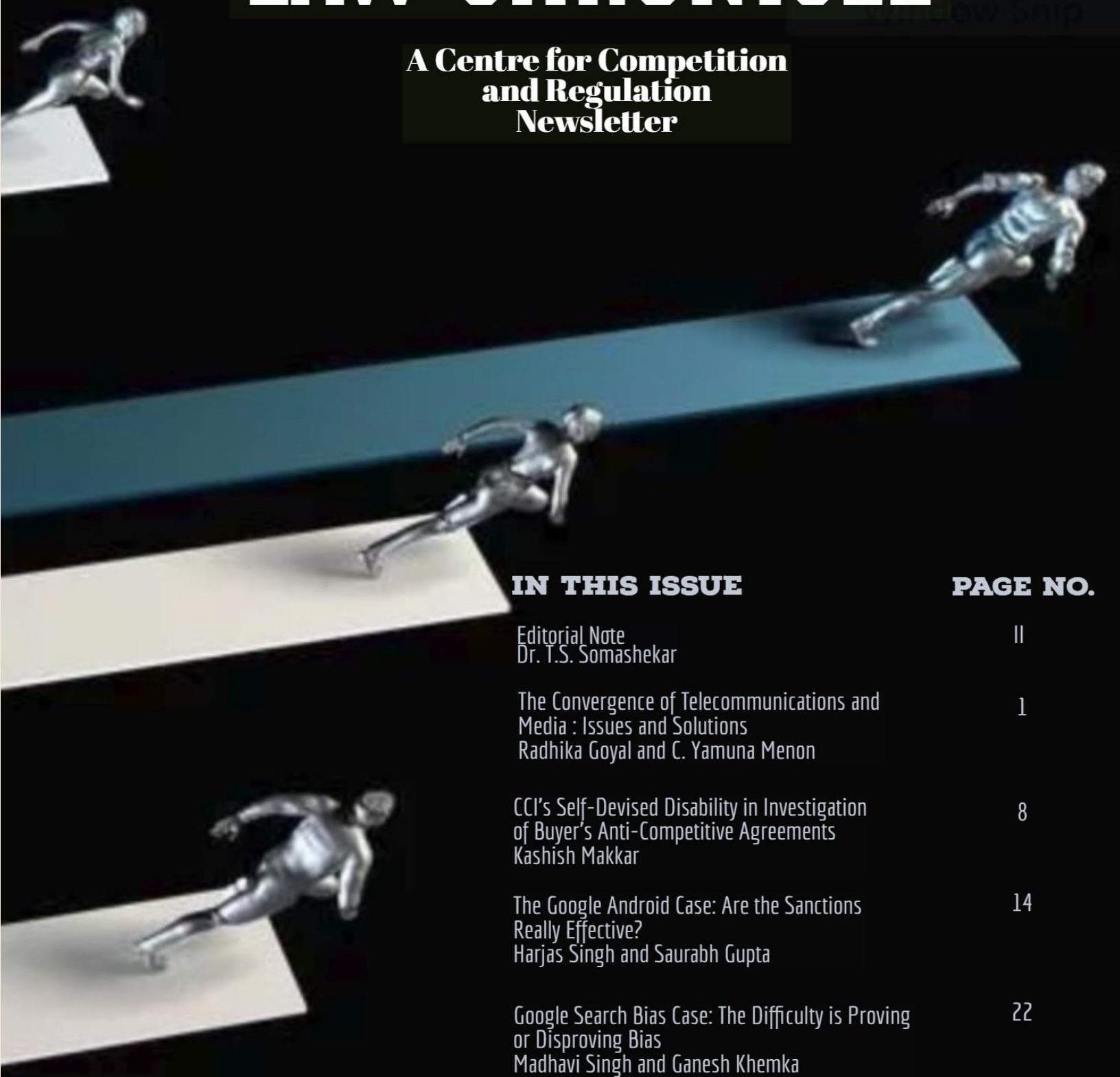

IN THIS ISSUE

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.

Queries & suggestions for improvement may be addressed to:

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Editorial Note by Prof. (Dr.) T.S. Somashekar, Chief Editor

We are proud to present the third volume of our newsletter. The objective is to both inform as well as create a debate about current issues that competition authorities face across the globe. In a continuing effort to inform, this volume provides readers with a compendium of reviews of cases decided by the CCI from November 2016. It is a treasure trove of material for teachers, researchers and students alike. In its article section we see a renewed focus on challenges thrown up by the current tech companies. This section asks probing questions with respect to enforcement of competition law and finds hard-to-ignore limitations in the present approach. A reader should be able to get a good understanding of the facts and challenges involved, enabling them to contribute to the evolution of the debate.

To begin with, Goyal and Menon deal with issues arising from vertical mergers in the telecom arena in the light of technological convergence. They reason that the Jio/Network 18 merger has led to serious competition concerns and implications for public interest by reducing choice of content. The failure of TRAI in foreseeing this and the limitation of The Competition Act are both found to be the root causes. As a solution they prefer that the sector specific regulator, TRAI, should handle such cases as it is better equipped to understand the long run implications.

Makkar finds the CCI to have limited itself by wrongly focusing on consumer protection rather than consumer welfare which involves preserving the 'competitive' market structure. This approach, as well as its erroneous interpretation of sections 3 and 19(3) have led to situation wherein 'buyer cartels' are presumed to have no AAEC. The author calls for the CCI to consider wider market efficiency objectives for a more inclusive approach.

Singh and Gupta deal with the necessity for fines and remedies which are 'effective' deterrents. While the fine on Google was substantially large in the Android case the

authors feel that it is unlikely to have much deterrence given that it has derived the benefits of network effects and thereby creating substantial entry to earn substantial 'future' profits. Basing fines on past turnover fail to capture the long run implication of the anticompetitive act. They also feel that deterrence would be better served by considering 'total profits' as the base for fines rather than turnover when profit margins are high.

Singh and Khemka examine the difficulties in establishing bias in Google's search engine. They deconstruct Google's defence that it would lose its market share if it engaged in bias by showing its basis on faulty notions of user behaviour. They believe specific search parameters would be a helpful approach to test for biases.

Continuing with tech based companies Dhawan looks at the role of big data in ensuring dominance of the big tech companies. Big data is found to contribute to dominance and the ability to engage in predatory pricing thereby undermining competition. The article calls for reorienting competition law to consider social costs and obligations in an effort to re-establish a 'level playing field'.

My sincere thanks to all the contributors and the members of the editorial board.

- Dr. T.S. Somashekar

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Research Articles

THE CONVERGENCE OF TELECOMMUNICATIONS AND MEDIA : ISSUES AND SOLUTIONS

- *Radhika Goyal and C. Yamuna Menon**

All over the world we are seeing an attempt to consolidate Telecommunication and Media. In the US both AT&T and Comcast have entered the media space.[1] AT&T recently merged with Time Warner. Telecom players in the EU including BT, Altice, Verizon and Telefonica have made big bets for content.[2] In India too, in the year 2014, Reliance India Limited (RIL) announced that it was taking over Network 18 and its smorgasbord of interests including ventures in News Broadcasting, Magazines, Film, E-Commerce etc. While there were many concerns raised about a big corporation owning big media, what did not receive enough attention were the reasons Reliance was incidentally justifying the takeover- that of the synergies it hoped to achieve by owning sometime in the future both, a telecommunication giant and a news and media empire. It was forgotten that RIL also intended to play a "major role in the fourth-generation (4G) high-speed data transfer business."[3] About five years later when Reliance Jio has ended up as the second largest telecom firm in terms of revenue,[4] it is time to look at how markets are impacted in such convergence of telecommunications and media.

Mergers in the light of tech convergence and end-user behavior attract significance especially since the way we are consuming media has tremendously changed with the accessibility of content on non-conventional platforms like smartphones, tablets etc. In the

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1 R. Molla and P. Kafka, 'Here's Who Owns Everything in Big Media Today' (*Recode*, 26 April 2018)<https://www.recode.net/2018/1/23/16905844/media-landscape-verizon-amazon-comcast-disney-fox-relationships-chart> accessed 21 March 2019.

2 Lee and Kang, 'U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger' *The New York Times* (26 February 2019) < https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html> accessed 3 May 2019; N. Filds, 'Big Bet by Telecom Companies on Exclusive Content Comes at a Cost' *Financial Times* (10 January 2018) <https://www.ft.com/content/fc17626e-cee5-11e7-9dbb-291a884dd8c6> accessed 21 March 2019.

3 P.G. Thakurta, 'What Future for the Media in India' (2014) 49(24) EPW<https://www.epw.in/journal/2014/24/web-exclusives/what-future-media-india.html> accessed 21 March 2019.

4 M. Philipose, 'Reliance Jio Continues to Get an Outsized Share of Data' *Live Mint* (27 March 2018) <https://www.livemint.com/Money/0QreVOi4taSmXUKaEuhQMK/Reliance-Jio-continues-to-get-an-outsized-share-of-data-traf.html> accessed 21 March 2019; 'Reliance Jio beats Airtel to become India's 2nd largest telecom company' *Business Today* (25 April 2019) < https://www.businesstoday.in/current/corporate/reliance-jio-airtel-india-2nd-largest-telecom-company/story/340292.html> accessed 3 May 2019.

US an average person spends up to 300 minutes per day on their phone, while in India the number is 200 minutes per day.[5] A part of the credit goes to Reliance Jio itself, which lured over 100 million subscribers by offering one GB of free 4G a day.[6] Thus telecom is increasingly challenging the traditional distributors such as Cable TV/ DTH operators as the new 'pipes' for content delivery. In view of this change, industry experts have long advocated for this convergence between telecom and media stating "operators have relationships with their subscribers and content providers have a treasure trove of compelling assets (music, games, video, etc.), but have no direct relationship to the customer".[7] For instance telecom companies could enter into agreements for "preferential access to the programming and digital content of all the broadcasting channels"[8] to reduce costs and benefit out of economies of scale and scope. However, the vertical integration and the factors that can aggravate negative competition effects surrounding such convergence cannot go unnoticed.

According to scholars, vertical integration can have pro-competitive result by *one*, elimination of double marginalization and thus leading to lower final prices and *two*, reduction of variety which might be welfare improving if there is elimination of excess variety.[9] However, examples in the market have displayed contrary results or outcomes. Distributors that control popular programming "have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition".[10] This has already resulted in antitrust action in other jurisdictions. For instance, according to the complaint against the combination of AT&T/DirecTV and Time Warner,[11] owning Time Warner's popular and valuable TV network and studio including CNN, HBO, and Warner Bro will allow the merged company to charge its distributor competitors

[5]Omidyar Network, Innovating for the Next Half Billion (2017)<http://omidyar.com/sites/default/files/file_archive/Next%20Half%20Billion/Innovating%20for%20Next%20Half%20Billion.pdf> accessed 21 March 2019.

[6] A. Bhattacharya, 'Internet Use in India Proves Desktops are Only for Westerners' (*Quartz*, 29 March 2017)<https://qz.com/945127/internet-use-in-india-proves-desktops-are-only-for-westerners/> accessed 21 March 2019.

[7] EMC Corporation, 'Content Services in Telecommunications' (2005) <https://www.emc.com/collateral/.../h2120-content-services-telecommunications.pdf> accessed 22 March 2019.

[8] *RIL Group/Network 18 Media and Investments Ltd*., C-2012/03/47 (Competition Commission of India).

[9] Massimo Motta, *Competition Policy: Theory and Practice* (2003) 433.

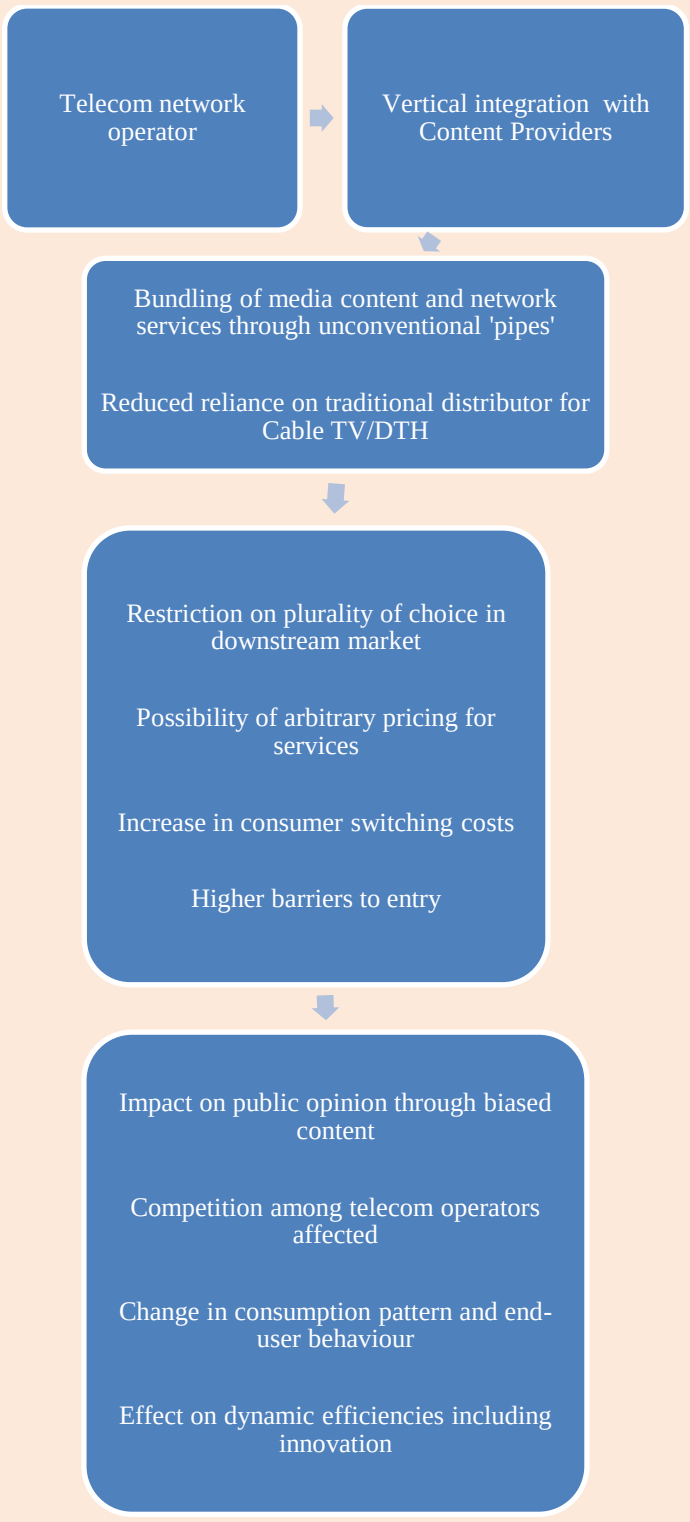
[10] *United States of America v AT&T Inc. &Ors*., Case 1:17-cv-02511 (USDC District of Columbia).

[11] *United States of America v AT&T Inc. &Ors*., Case 1:17-cv-02511 (USDC District of Columbia).

a higher rate for popular content. Where earlier if Time Warner charged arbitrary or high prices it would risk a black out by distributors, it can now rely on AT&T distribution networks and backing to ensure access to a customer base. This could mean the merged Time Warner/AT&T will have greater bargaining power with distributors allowing them to charge higher rents for content. Having exclusive distribution rights over popular content could even result in customers switching from their networks to AT&T.

Similarly, Network 18, a player in the content market, could with Jio's backing, charge higher prices from other distributors. This could increase entry barriers for Jio's competitors, further increase costs for their consumers, and could additionally increase Jio's market share. This vertical integration by causing restrictions on the availability of Network 18's content on other distribution networks can adversely affect this plurality of content for many consumers.

The effect on competition on account of convergence between telecommunications and media can be looked upon in the following manner:



Impact on competition in media market consequent to integration between telecom and media

There are already alarming signs. Reliance Jio "generates far more data traffic on its network than all of the other large telecom players combined"[12] and further that its share in the wireless broadband segment has reached an all time high of 51.6%.[13] This vertical integration could allow for Reliance to create an ecosystem where content from sources it chooses could be made more accessible without violating net neutrality.[14] If for instance Jio decides to provide a news aggregator app (with information from Network 18 owned organizations) as a default app on its networks,[15] it is possible for Jio users to could become wholly reliant on that app as a news source solely out of convenience, which can impact plurality of information for a Jio user,[16] also leading to higher market shares for Network 18, and thus negatively affecting competition in the media sphere. Moreover preferential access to such content could in turn increase market shares for Jio with anti-competitive effects in the telecom markets. This is one of the ways in which convergence of telecommunication and media creates a loop of increased market share for both players that speeds up the road to market dominance.

It is in the context of this issue that we also encounter a major regulatory gap. Statutory body concerned with the regulation of broadcast content is Telecom Regulatory Authority of India (TRAI). Under TRAI's jurisdiction, distributors are only defined in terms of traditional distribution network operators, with no express recognition of telecom networks operators as distributors. This is despite recognizing that "the telecom networks can provide access to internet and broadcast content in addition to telecommunication services,"[17] and "the convergence taking place between broadcasting and telecommunication."[18]Consequently, while TRAI recommends a variety of tools to prevent convergence of traditional distributors and content providers, when it

[12]Philipose(n 4).

[13] 'Reliance Jio amasses over 51% market share in broadband services' *Business Standard* (25 October 2018) <https://www.business-standard.com/article/companies/reliance-jio-amasses-over-51-market-share-in-broadband-services-118102500007_1.html> accessed 3 May 2019.

[14] Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016.

[15]Jio users are already encouraged to download applications like Jio Newspaper (Your digital newsstand).

[16] This analysis will be further complicated by issues of platform neutrality.

[17] Telecom Regulatory Authority of India, 'Consultation Paper on Issues Relating to Media Ownership' (2013) <http://www.trai.gov.in/consultation-paper-issues-relating-media-ownership> accessed 22 March 2019.

[18] Administrative Staff College of India, 'Study on Cross Media Ownership in India' (2009) <http://cablequest.org/pdfs/i_b/ASCI%20Cross%20Media%20ownership%20in%20India%202009.pdf> accessed 22 March 2019.

comes to Telecom and Media, TRAI did not recommend any cross ownership restrictions at the time.[19] Almost six years since, no attempt has been made to introduce the same. At the same time no regulations exist which prescribe non-discrimination between Telecom network providers or expand the scope of distribution network operators to include Telecom network providers to ensure fair use.

Furthermore, the Competition Act is not a sufficient safeguard against the harms of vertical integration. In 2012, when RIL bought majority shares in Network 18, the CCI had the chance to consider the harms of vertical integration. Infotel (a precursor of Jio), which was set to enter the broadband services using 4G technologies, had entered into a non-exclusive preferential access agreement for Network 18's digital content. The commission felt that this did not cause any "appreciable adverse effect on competition." This was centered around the "the intrinsic open access characteristic of an ISP and the fact that players on other platforms will not lag behind".[20] Which meant that there exist, "other content providers, either existing or potential, who in time will be able to provide content through other ISPs".[21] Here, CCI failed to appreciate the harms that come with reduction in the plurality of content, even if there is no long-term economic harm befitting the appreciable adverse effect standard. For instance, according to the order, it would not be a competition law issue as long as consumers are getting some content through some distributor, without necessarily ensuring all consumers should get access to all information regardless of the distributor. The same issue may arise even under Sec. 3(4),[22] which prohibits companies from entering into an "exclusive distribution agreement" only provided that it results in an AAEC. While this standard may work in other markets, given the inherent public interest aspect of accessing media, including films, news and other such content, competition law may not be adequately equipped to address these issues. [23]

Thus there is a clear need for regulation to control the consolidation of Telecom and Broadcasting of media. Can TRAI deal with

[19] TRAI (n 17); This was subject to review in two years.
[20] *RIL Group/Network 18 Media and Investments Ltd.*, C-2012/03/47 (Competition Commission of India).
[21] *RIL Group/Network 18 Media and Investments Ltd.*, C-2012/03/47 (Competition Commission of India).
[22] The Competition Act 2002, s 3(4).
[23] S. Kumar, 'Big Media has become Bigger: Media Diversity and Reliance's Takeover of Network 18' (*Alternative Law Forum)* <http://altlawforum.org/publications/big-media-has-become-bigger-media-diversity-and-reliances-takeover-of-network-18/> accessed 22 March 2019.

the competition law matters that arise in such convergence? Or should such matters be dealt with entirely under the domain of CCI? Or should TRAI and CCI address them together? Primarily, we need to recognize that the harms arising out of the consolidation of Telecom and Media are akin to those arising out of vertical integration between traditional distributors and content providers and act accordingly. We must keep in mind that multiplicity of governing agencies may impact the efficiency of dealing with the matter and reaching an informed decision. Instead a better solution may be to allow sector specific regulators like TRAI to adopt regulations that specifically empowers it to regulate competition law matters arising out of the convergence of telecommunication and media.

Having a sector specific regulator like TRAI to govern the competition law matters in its respective sector is crucial to ensure welfare of consumers. For instance, Jio priced its services at low rates distorting the consumer base of other competitors. From the perspective of CCI, Jio will not have the requisite market dominance to impose liability. However, when the same matter is before TRAI, the low pricing can be considered as unfair and therefore will be anti-competitive in nature.[24] Further, TRAI could simultaneously deal with public interest aspects issues as well as consult CCI on relevant competition aspects for expert opinion.

However, this would require regulations governing the competition aspects of the telecom industry, with guidelines for assessment and decision-making in the case of anti-competitive practices that go beyond the overarching Competition Act, 2002. Such regulations would have to take into account sector specific standards for harms arising out of vertical integration, that not only includes long-term economic harm but also ensures plurality and access to content based on public interest standards. This would mean a lower tolerance for any negative effect on prices and choices than is currently accepted under competition law. This would also mean removing the requirement of market dominance to penalize anti-competitive behaviour.

Armed with such sector specific regulations, TRAI will be able to use its specialized knowledge about the sector to provide a more effective remedy to any competition law

[24]VikasKathuria, 'TRAI and CCI: no turf wars, please' *Live Mint* (3 August 2017) <https://www.livemint.com/Opinion/S6dpsQJ8m86O6Acsrl6DRO/Trai-and-CCI-no-turf-wars-please.html> accessed 22 March 2019.

issues that arise in the telecom sector. This will also ensure that there is certainty and clarity in the law that will govern the players in the market leading to better choices, efficiency and consumer welfare based on standards and considerations that are suited to this sector.

CCI'S SELF-DEVISED DISABILITY IN INVESTIGATION OF BUYER'S ANTI-COMPETITIVE AGREEMENTS

*-Kashish Makkar**

Competition Law must promote Consumer Welfare & not Consumer Protection.

The Competition Act of 2002 was enacted as a policy measure to promote efficiency in the market. The Raghavan Committee Report, which served as the roadmap for the Act, envisaged it as an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. However, it prescribed 'consumer welfare' as the ultimate motive for ensuring effective competition. Therefore, the stated aim of the law was to ensure market efficiency in order to ensure consumer welfare. However, the Competition Commission of India (CCI) in its operations has assumed an altogether different prescription of Consumer Welfare.

The CCI has conflated the notion of consumer protection with consumer welfare in its approach towards investigating anti-competitive conduct. While, ensuring consumer welfare entails prevention of concentration of market power, maintaining allocative efficiency in the conduct of all the stakeholders when they operate in the market;[1] consumer protection is a movement to impose the burden of the efficient conduct of the market on the supply side.[2] Simply, consumer welfare is a long term approach where the market forces (both demand & supply) are regulated in a manner that leads to maximisation of welfare for the consumers. While, consumer protection involves granting immunity to consumer's conduct in order preserve their interests.

In this article, I will discuss how the CCI has assumed to itself a mandate of Consumer Protection. I will analyse how in the assumption of this mandate, the CCI has refused to take cognisance of buying arrangements that clearly amount to cartelisation. In my analysis, I will highlight how the assumption of such a mandate is not envisaged under the Act, and in fact runs contrary to the mandate of Consumer Welfare. As a result, in conclusion, I will recommend a course-correction for the CCI in order both fulfil its legislative mandate and its policy mandate of promoting market efficiency which together lead to the achievement of consumer welfare.

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[1] Raghavan Committee Report, ¶2.1.1.

[2] Planning Commission, 'Consumer Protection & Competition Policy', Chapter 11, 11th Five Year Plan (2007-12).

Withdrawal of Presumption of AAEC from Buyer's Agreements

A statute is an edict of the Legislature and in construing a statute, it is necessary to seek the intention of its maker.[3] The primary source for inferring this legislative intent rests in the bare text of the statute, as the Supreme Court has quite categorically held in *M/S. HiralalRatanlal v. State of UP*:

> *"In construing a statutory provision, the first and foremost rule of interpretation is the literal construction. All that the court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision legislative intent is clear, the court need not call into aid the other rules of construction of statutes."*[4]

§3(3)(a) of the Act prescribes that an agreement entered between persons which directly or indirectly determines purchase or sale prices shall be presumed to cause an Appreciable Adverse Effects on Competition (AAEC) in the market.[5] It is quite clear from the text that the legislature intended to include anti-competitive agreements which could be entered into by the buyers. There cannot be an argument on the contrary as, had this not been the case, there would have been no reason to include specific term 'purchase' price in§3(3)(a).

The above argument is also supported by §3(3)(d) of the Act, which provides that in cases of collusive bidding, AAEC is presumed.[6] It is writ large that a bidding process would manifestly involve buyers participating in a competition to purchase commodities. The legislature clearly wanted to promote healthy competition among the buyers, and as a result outlawed any agreement which the buyers might enter to impair the bidding process.

The mischief rule of interpretation of statutes, which was laid down in *Heydon*, lays down that the true interpretation of statute is the one that complies with the mischief that the act aimed to prevent.[7] The same has been upheld in India in *RMDC v. Union of India*.[8]§3(3)(d) of the 2002 Act clearly reflects that an existence of buyer's cartels is one of the mischiefs that the Act wanted to prevent.

Therefore, both by virtue of literal rule of interpretation and the mischief rule of

[3]Suganthi Suresh Kumar v. Jagdeeshan, (2002) 2 SCC 420, ¶12 (SC).
[4]M/s. HiralalRatanlal v. State of UP, 1973 AIR 1034.
[5]The Competition Act §3(3)(a), No. 12, Acts of Parliament, 2003 (India).
[6]The Competition Act §3(3)(d), No. 12, Acts of Parliament, 2003 (India).
[7]Heydon's case, (1584) 76 ER 637, Pasch 26 Eliz, (England).
[8] RMDC v. Union of India, 1957 AIR 628.

interpretation it is clear that the Act sought to prevent cartelisation among the buyers. However, CCI's jurisprudence with respect to the same indicates otherwise.

For instance, in *PandrolRahee Technologies v. M/s. DMRC Ltd*,[9] where the informant alleged that the DMRC ltd. as a consultant to Kolkata Metro and Bengaluru Metro had been colluding to get their preferred supplier for a proprietary product. The CCI in this case observed:

> *"Section 3(3) concerns agreements between persons etc. 'engaged in identical or similar trade.' The word 'trade' has been defined in section 2(x) as "any trade, business industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes provision of any services." The word 'acquisition' mentioned in definition of an 'enterprise' in section 2 (h) is not included here. As can be seen, purchasing activity of a consumer does not qualify as 'trade'. Therefore, section 3 (3) is not applicable to a consumer."*

The CCI by such an observation ruled out the applicability of S. 3(3), which presumes the AAEC on the consumers. The CCI came to this conclusion by referring to the part of the provision which restricts its application only to entities who are engaged in trade. Thereafter, by reading the definition of trade as not inclusive of acquisition, they ruled that the section is not applicable to the consumers. However, such an interpretation is clearly not sustainable.

The definition of trade in S. 2(x) includes trade in relation to the production of goods or provision of services.[10]The primary meaning of the word "trade", as defined by the Supreme Court in the five-judge bench judgment of*Khoday Distilleries Ltd. v. State of Karnataka*,[11] is the exchange of goods for goods or goods for money. Applying the above definition of trade to the definition given in s. 2(x) would lead to a construction in the following terms: "exchange of goods for money in relation to production of goods" or "exchange of goods for money in relation to provision of services". An exchange of goods for money in relation to production of goods

[9]PandrolRahee Technologies v. M/s. DMRC Ltd., Case no. 3 of 2010, Dt.7 October, 2011.

[10]The Competition Act §2(x), No. 12, Acts of Parliament, 2003 (India).

[11]Khoday Distilleries Ltd. v. State of Karnataka, (1995) 1 SCC 574.

or provision of services have to necessarily be in the form of acquisition of raw materials. As a result, the reasoning employed by the CCI in *PandrolRahee* stands fragile in light of the above analysis.[12]

Yet, as it stands, *PandrolRahee* is the law of the land and as a result the applicability of S. 3(3) has been ruled out over the consumers/buyers. Therefore, even if the buyers' enter into an anti-competitive agreement, prescribed under one of the 4 conditions of S.3(3), they will be held to not have AAEC presumptively. As a result, if buyer's are to be held accountable for their anti-competitive agreements, they need to prove AAEC separately as is prescribed under S. 3(1) of the Competition Act.

However, in the next section we will analyse how such a route to hold consumer's accountable has also been foreclosed by the CCI by self-presuming a consumer welfare mandate.

Foreclosure of Consumer's Potential to cause AAEC

Under the scheme of the Competition Act, 2002 an agreement between parties is termed anti-competitive if and only if it causes or is likely to cause AAEC. While, the agreements prescribed under S.3(3) have a presumption of AAEC, therefore, the regulator need not prove it; all other agreements must prove AAEC or the likelihood of it. As explained in the previous section, the CCI has ruled out the applicability of the presumption by exempting consumers or buyers from S. 3(3). However, there was still a scope to regulate anti-competitive agreements and sanction the buyers under S.3(1) of the competition Act. It entailed a two-fold process, *first*, proving the existence of the agreement, and *second,* proving AAEC. To determine if an agreement under S.3 causes AAEC, the CCI has to rely on factors prescribed in S. 19(3) of the Act.[13] Only if the two requirements would be fulfilled the CCI would sanction such conduct.

However, in the same decision in *PandrolRahee*the CCI observed that:

> *"It is noteworthy that for determining appreciable adverse effect on competition for the purpose parameters given in section 19(3) all indicate*

[12] Arguably, it may be said that such foreign interpretations of the word 'trade' must not be employed, however, it must be pointed out that the definition of trade under s. 2(x) of the Competition Act defines trade to include trade. As a result, a widely accepted &recognised definition maybe used to define the term.

[13]The Competition Act §19(3), No. 12, Acts of Parliament, 2003 (India).

> *harm to competitors. It is not envisaged that a consumer can cause appreciable adverse effects on competition."*[14]

As a result, the CCI foreclosed any inquiry on buyers/consumers once again by taking the second limb of the two-fold process of the inquiry out of the scope of application to consumers. Under S. 3(1) of the 2002 Act, the term "agreements in respect of acquisition" has been clearly provided, as a result, the CCI couldn't have foreclosed this limb of the process. Therefore, it attacked the second requirement. However, there are two principled inconsistencies with such an approach.

First, if S. 19(3) was not to be applicable on the consumers, why in the first place the term 'acquisition' has been prescribed in S.3(1) as one of the forms of agreement that is likely to cause AAEC. If s. 19(3) is to be interpreted in the way the CCI has interpreted it, it obliterates the purpose of the term 'acquisition' under S. 3(1). Such interpretation goes against the established rule of statutory interpretation, i.e., Construction to avoid invalidity. This principle holds that, "an interpretation which would defeat the purpose of the statutory provision and, in effect obliterate it from the statute book should be eschewed."[15] Therefore, such an interpretation of S. 19(3) stands against the principles of statutory interpretation recognised by the Supreme Court.[16]

Second, S.19(3) doesn't warrant an interpretation that the CCI has provided to it. Clearly, the factors under S. 19(3) prescribe harm to the competitors, however, nowhere is it indicated that the consumers/buyers cannot be competitors. The CCI's interpretation makes the two categories of buyers/consumers and competitors to be mutually exclusive. However, given that it is prescribed that an agreement can be formed for acquisition of goods,[17] clearly there has to be competition in such an acquisition, thus, incentivising parties to form agreements. As a result, the above interpretation is inherently contradictory and inconsistent.

However, despite these inconsistencies, the foreclosure of an enquiry into a consumer/buyer's anti-competitive agreements is the law of the land.

Conclusion

[14] PandrolRahee Technologies v. M/s. DMRC Ltd., Case no. 3 of 2010, Dt.7 October, 2011.

[15] Justice A.K. Shrivastava, Interpretation of Statutes, JUDICIAL TRAINING & RESEARCH INSTITUTE'S JOURNAL, July-September, 1995.

[16] State of Punjab v. PremSukhdas, AIR 1977 SC 1640.

[17] The Competition Act §3(1), No. 12, Acts of Parliament, 2003 (India).

Both by withdrawing the presumption of AAEC and foreclosing the applicability of the factors that determine AAEC from the consumers, the CCI has systematically disabled itself from any inquiry into consumer's anti-competitive agreements. However, as pointed out above such an approach is both jurisprudentially flawed and inherently inconsistent. It is simply the assumption of a consumer protection mandate on part of the CCI that explains the law it has laid down in the recent past. This assumption of mandate is now no longer limited to enquiries on cartelisation, but it has started impacting inquiries under S.4 relating to Abuse of Dominant Position as well. In the well-documented and discussed cases of *K.N. Chaudhary v. DMRC Limited*and *Suntec Energy v. National Dairy Development Board*, the CCI refused a S. 4 inquiry in order to 'protect' free exercise of consumer's choice.

Such an assumption of the consumer protection mandate not only leads to the reduction in the net welfare of the upstream market by disabling them from receiving the most efficient prices for their output. But, it also causes loss in welfare for the downstream market by disabling the most efficient producer to enter the market and offer a choice to the consumer. As a result, ensuring the allocative efficiency, which ensures consumer welfare gets lost in the assumption of this mandate.

The aim of the Anti-Trust Law is not to ensure consumer protection but to preserve the structure and integrity of the market, which in longer run ensures consumer welfare. However, this goal of Anti-Trust Law seems to have been forgotten by regulators across the world. Anti-competitive agreements facilitate Monopolistic and oligopolistic market structures. These in turn enable dominant actors to coordinate with greater ease and subtlety, facilitating conduct like price-fixing, market division, and tacit collusion; and also block new entrants.

Therefore, it is clear that preservation of market structures is a value that must be preserved by regulators. It ensures efficiency, effectiveness, choice and in turn ensures the largest welfare for firms, consumers, and economy in the long run. In light of the analysis presented in this article, it is clear that the CCI needs a course-correction, both to comply with its original mandate and the correct position of law; and to ensure market efficiency in the longer run. This course correction shall necessarily involve restoring the mandate of consumer protection to consumer courts, and following the policy of consumer welfare in both letter & spirit.

THE GOOGLE ANDROID CASE: ARE THE SANCTIONS REALLY EFFECTIVE?

*-Harjas Singh & Saurabh Gupta**

Android is the most popular mobile operating system in the world. For developers, android is a part open-source, part propriety core software that provides a reliable framework for them to use and develop their apps. For regular consumers, it is a convenient operating system, offering the best of apps – Maps, Gmail, Youtube, etc. These free-for-all apps are at the core of the Google Android Antitrust dispute, which shall be discussed in the paper. But first, this paper shall aim to summarise the *Google Android*[1] case, and then proceed to critically analyse the penalties awarded in the case for their effectiveness, before suggesting alternative sanctions that may be more effective in such cases.

The *Google Android* Case – A Summary

In April 2015, the European Competition Commission initiated a formal investigation to examine whether Google had entered into anti-competitive agreements or abused its dominance by tying its apps to the Android software.[2] The investigation sought to identify whether Google had illegally hindered the development and market access of rival mobile applications or services.

The Commission identified two markets – the upstream market for the licensing of Android to device manufacturers and the downstream market for end users. It then discussed that there were high barriers to entry in the licensable operating systems market. This was mainly due to network effects in the sense that the more users use a smart mobile operating system, the more developers write apps for that system. This in turn attracts more users. Further, competition in the downstream market did not sufficiently constrain Google's position in the upstream market. It considered factors like high switching costs between Apple iOS and Google Android, higher price for Apple products, and consumers' preference for Google services (like Google search) even after switching to Apple iOS to come to this conclusion. The Commission, through its market research, also concluded that Google, which had a market share of more than 95%, held a dominant position in the worldwide market (excluding China) for licensable smart

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[1] Case AT.40099 – Google Android.

[2] Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android (2015) <http://europa.eu/rapid/press-release_IP-15-4780_en.htm> accessed 24 May 2019.

mobile operating systems.[3] Further, it was also held that Google had a dominant position in the search engine market as well, with a market share of around 90%. This market too faced high barriers to entry.

The Commission also looked at the market for app stores for Android mobile operating system. It discussed that this market was also characterised by high barriers to entry and lack of competition, and held that Google held a dominant position in the worldwide market (excluding China) for app stores for the Android mobile operating system.

Having identified the markets, the Commission now examined three aspects of Google's conduct that may amount to abuse of dominance:

(i) Illegal tying of Google's own applications or services

Google bundled its apps and services with Android software, which made it mandatory for the manufacturers to pre-install all its apps. Since pre-installation creates a status quo bias, the Commission held that this practice reduced the incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps. This bundling arrangement, therefore, reduced the ability of rivals to compete effectively with Google.

This was similar to a situation seen in case of Microsoft's antitrust violations. Microsoft had abused monopoly power by bundling its web browser (Internet Explorer) as well as the Windows Media Player along with the Windows Operating System. It was held that such bundling restricted the market for the competing web browsers, and was violative of competition law principles.

(ii) Illegal payments conditional on exclusive pre-installation of Google Search

Google granted significant financial incentives to some of the largest device manufacturers as well as mobile network operators on condition that they exclusively pre-installed Google Search across their entire portfolio of Android devices. While this practice was discontinued in 2014, the Commission still held this to be anti-competitive since Google's competitors in the search engine business could not possibly compensate the device manufacturer across all devices for loss of revenue share from Google.

(iii) Illegal obstruction of development and distribution of competing Android operating systems

[3] Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (2018) <http://europa.eu/rapid/press-release_IP-18-4581_en.htm> accessed 24 May 2019.

Google, in order to be able to pre-install on their devices Google's proprietary apps, manufacturers had to commit not to develop or sell even a single device running on an any alternative version of Android that was not approved by Google (commonly referred to as 'Android fork'). This, as per the Commission, reduced the opportunity for devices running on Android forks to be developed and sold. Therefore, the Commission held that Google denied the users access to further innovation and smart mobile devices based on Android Fork. This also gave Google the power to determine which operating systems could prosper. This was held to be anti-competitive.

Taking all this into account, Commissioner MargretheVestager, in charge of competition policy, concluded: "…[Google's] *practices have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits of effective competition in the important mobile sphere. This is illegal under EU antitrust rules*."[4]The Commission thus imposed a fine of €4,342,865,000 on Google, which is around 5% of the average turnover of the last three years of Google's parent company, Alphabet. Further, it threatened to impose a penalty of up to 5% of average worldwide turnover of Alphabet for non-compliance with this decision.

Problems with the Sanctions Imposed

While the fine imposed by the Commission is the largest it has ever imposed on a company, this section will discuss whether this fine is the appropriate remedy or not in light of the goal of enforcement mechanisms.[5]

(i) Google Already Derived Substantial Benefits from Android

The Commission looked at Google's dominance for the past seven years. This meant that the Google had been allowed to derive illegal benefits from its dominant position in the market for seven years. Indeed, Google earned a revenue of €5.25 billion from the Android Play Store in 2017 alone. In comparison, the fine of €4.3 billion is hence, too little too late. The Commission must be proactive to ensure that enterprises are not allowed to derive huge profits by abusing their dominance for years. As things stand, a simple cost-benefit analysis would show that an enterprise stands to benefit from abusing its dominance, even if it is penalised for it later, in the long run. The kind of dominance that

[4]*ibid.*

[5]George Stigler, 'The Optimum Enforcement of Laws', *Essays in Economics of Crime and Punishment* 56 (William H Lande& Gary S. Becker (Ed. UMI,1974) <http://www.nber.org/chapters/c3626.pdf>.

Google enjoys in the markets identified initially in the paper, are characteristic of the network effects that have already impacted the markets permanently. The penalty imposed may not lead to a reversal of the damage already done.[6]

In 2004, a similar situation of bundling had arisen in the Microsoft Case. EC then had forced Microsoft to release a version of Windows without Windows Media Player and later offer a browser choice screen, which allowed users to select a web browser other than the previously default Internet Explorer. However, it was later discovered that the this version of the Windows had no buyers.[7] Microsoft had already reaped the benefits of the network effects of their antitrust activities. In this case as well, consumers are unlikely to buy a version of Android without Google's services. Thus, it can be argued that the EU decision has come 5-8 years too late. While the fine and the instruction for discontinuation of antitrust activity may lead to better competition in the long run, Original Equipment Manufacturers (OEMs) will have to offer Google services in the short run in order to satisfy the consumer demand and to be competitive.

Moreover, the consumer demand has been manipulated to a level where even if OEMs do not provide Google Services as part of the handset, consumers are likely to download these from the app stores in order to satisfy their needs.[8] All of this adds toward the gravity of the infringement committed, which is a relevant factor in deciding the amount of fine under the European Union policy.[9]

(ii) The fine is miniscule compared to Google's economic power

Alphabet generated a turnover of €96.3 billion in 2017.[10] It also earned a net profit of €10.5 billion, despite incurring a fine of €2.42 billion in the *Google Shopping* case.[11] Before 2017, it had witnessed a rise of €2-3 billion a year in its profits.[12] This year, Google generated a profit of over €8 billion each in the third

[6]Google's Android fine is not enough to change its behaviour THE ECONOMIST (19 July 2018) <https://www.economist.com/leaders/2018/07/19/googles-android-fine-is-not-enough-to-change-its-behaviour> accessed 24 May 2019.

[7]The EU fining Google over Android is too little, too late, say experts THE GUARDIAN (18 July 2018) <https://www.theguardian.com/technology/2018/jul/18/eu-fine-google-android-anti-competitive-behaviour-consumers> accessed 24 May 2019.

[8]*ibid.*

[9]Guidelines on the method of setting fines imposed pursuant to Article 23(3)(a) of Regulation No. 1/2003 (2006) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN>.

[10]Google posts its first $100 billion year CNN BUSINESS (1 February 2018) <https://money.cnn.com/2018/02/01/technology/google-earnings/index.html> accessed 24 May 2019.

[11]*ibid.*

[12] CNN Business (n 10).

quarter alone.[13] Thus, Google will continue to be among the top 10 companies of the world in terms of profit, despite the fine.[14]

Economic theorists and Behavioural analysts suggest that businesses today are becoming more and more risk averse.[15] This is due to increased professionalism, increased scale of operations, social factors like education and other means of social conditioning as a part of the modernized word today. Research suggests that the fines can be a great deterring factor for such risk averse management.[16] However, the way fines are calculated needs assessment.

Under the European Union policy, there is first a calculation of a basic amount of fine, which may be adjusted depending on various mitigating or aggravating factors.[17] The calculation of the basic fine is based entirely on the value of sales, with consideration given to the gravity and duration of the infringement. Thus, as stated earlier, the fine calculated in the Google Android Case too, is one that is based on Google's sales.

It is important to note that while the amount of fine is unprecedented and may look massive *prima facie*, but for a company as big as Google, whether such a fine entails deterrence needs to be asked. There can be different ways of computing fines. One way can be to levy a fine on the basis of the company's turnover, as done in this case. However, for a company like Google, where the profit margin is high,[18] such a fine may not be an effective deterrent.[19] An alternative to this approach can be seen in the form of a fine which is calculated on the basis of profits. Such a fine is better placed to be a deterrent as it can provide a constant impact which a sales or assets approach cannot.[20] More importantly, attacking the profits of a firm is a

[13]Google's Parent, Alphabet, Misses on Q3 Revenue But Rakes in $9.2 Billion Net Profit (25 October 2018) <https://variety.com/2018/digital/news/google-alphabet-q3-2018-earnings-1202994554/> accessed 24 May 2019.

[14] The Fortune 500's 10 Most Profitable Companies THE FORTUNE (7 June 2017) <http://fortune.com/2017/06/07/fortune-500-companies-profit-apple-berkshire-hathaway/> accessed 24 May 2019.

[15]William Breit and Kenneth G. Elizinga, 'Antitrust Penalties and Attitudes towards Risk: An Economic Analysis' 86 HARVARD LAW REVIEW (1973) 693, 704.

[16]*ibid* 706.

[17]Guidelines on the method of setting fines imposed pursuant to Article 23(3)(a) of Regulation No. 1/2003 (2006) < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN>.

[18]Alphabet Net Income 2006-2019 | GOOG <https://www.macrotrends.net/stocks/charts/GOOG/alphabet/net-income>; Google's 5 Key Financial Ratios (GOOG) <https://www.investopedia.com/articles/markets/021316/googles-5-key-financial-ratios-goog.asp>; Earnings Estimates <https://markets.businessinsider.com/stocks/googl/financials> accessed 24 May 2019.

[19]Kenneth G. Elzinga& William Breit, *The Antitrust Penalties: A Study in Law and Economics* 134 (Yale University Press, London, 1977).

[20]*ibid* 134.

better measure especially for firms having a multidivisional structure, one like Google. While only one division may have committed the antitrust violation, a fine that attacks the profits generated cumulatively by all the divisions builds pressure on the company to restrict any such violation in the future.[21]

(iii) Aggravating Factor

This antitrust violation is the second offence by Google, after the *Google Shopping Case*. According to the EU policy, a basic fine may be adjusted according to various aggravating and mitigating factors. Repeat offence is an aggravating factor according to the policy,[22] and thus the fine should have been set taking this into consideration.

(iv) Specific Increase for deterrence

The European Union policy on setting of fines also provides for situations where the fine may be increased in order to increase deterrence.[23] In such instances, the fine imposed on undertakings which have a particularly large turnover may be enhanced in order to ensure greater deterrence. Moreover, the Commission shall also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement. In the instant case, the network effects which have massively impacted the consumer behaviour and preferences need to be considered as improper gains accruing to Google due to its violations. This should lead to an increase in the amount of fine, which would result in the deterrence required.

(v) Historic Perspective

Microsoft Case[24]

Twenty years ago, Microsoft lost the antitrust case against the government of the United States. The case revolved around the monopolization of the internet browser market by Microsoft, which was the world leader in the operating system market. Microsoft was selling its operating system and internet browser as a bundle, and this meant there was little to no opportunity for any other internet browser to have an impact on the market. At that time, the argument furthered by Bill Gates and a few others was that such antitrust regulations impede technological development. Little did they know, the regulations in fact proved to be a

[21] Breit and Elzinga (n 15) 712.

[22] Guidelines on the method of setting fines imposed pursuant to Article 23(3)(a) of Regulation No. 1/2003 (2006) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN>.

[23] Guidelines on the method of setting fines imposed pursuant to Article 23(3)(a) of Regulation No. 1/2003 (2006) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN>.

[24] *Microsoft Corp v Commission* (2007) T-201/04.

boon for innovation. Had this monopolization been allowed, competition would've been restricted in not only the browser market, but surely other markets as well. Who knows maybe Google as we know it today would've been a company not half as big as Bing, while today it surely leads the search engine market and is making antitrust headlines of its own.

Google's case is indeed similar to the Microsoft antitrust case as mentioned above, especially in relation to bundling. Some believe that the two cases are very different, however that debate is for another time. The point of contention here is whether the fine is an effective remedy in itself to limit behaviour that impeded competition. The two cases illustrate different remedies. In the Microsoft Case, the European Commission made sure that other options of browsers are provided to the consumers, thus making sure that the desired objective of more competition was realised. So, a direct instruction was given with regard to the steps needed for ensuring better competition in the market. In the Google Android Case however, such steps have not been taken and a mere instruction for discontinuation of the violative conduct has been made. This alone cannot be an effective deterrent.

Google Shopping Case[25]

In this case, there was an allegation that google misused its dominant position in the general search engine market to gain competitive advantage by placing its own comparison shopping service more prominently. Google was thus fined €2.42 billion by the European Commission. The fine however, has not been as effective as it was thought to be. The end has not been achieved as effectively as it was hoped, which was to allow greater competition in the comparison shopping market and to protect the interest of smaller competitors. This is significant from the fact that still, only 6% of the slots available on the European version of Google's search engine are taken by the rivals to Google's comparison shopping service.

A remedy that could've solved the problem here was to create a clear distinction in the comparison shopping services, by dividing the visible space into two parts – one showing Google's shopping service and the other showing the alternatives. However, this was rejected. Due to no particular prescription of a remedy, Google now auctions the space for these shopping service providers to appear alongside the merchant websites, which leads

[25]CASE AT.39740 Google Search (Shopping) <http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099>.

to more and more revenue for Google. The rejected seems to be the fairest of all here. However, all of this leads to the conclusion that a fine alone may not be an effective deterrent, and there is a need for an equitable remedy to be prescribed in clear terms.

Conclusion

The culmination of all this analysis is that there has to be something which disincentivizes Google from undertaking any such activities in the future where competition is hampered, and thus acts as a deterrent. The European Commission could do this in a number of ways. A few things that have been suggested in this regard can be - compelling Google to allow competing app stores to distribute its apps, which would make it easier for other firms to launch competing app stores. Another option would be to give consumers a choice, when they first boot up their phone, over which apps they want to use in default. All of this, along with an assessment of fines based on aforementioned recommendations, can go a long way in ensuring better competition in the market.

GOOGLE SEARCH BIAS CASE: THE DIFFICULTY IS PROVING OR DISPROVING BIAS

*-Madhavi Singh & Ganesh Khemka**

In Google's "search bias" cases[1]involving allegations of abuse of dominant position the first question which arises (assuming Google's dominance) is whether there can exist an objective definition of "relevance" or are ranking algorithms merely one of the many ways to rank results- a reflection of the uniqueness of various search algorithms and a legitimate and necessary mechanism of differentiating competitors.[2] If there were a single definition of "relevance"[3] or one correct way of ranking results according to their relevance then the subsequent question would be whether it is possible to assess if Google's results have been ranked according to such relevance. **This issue is analysed here and the essay looks at the difficulty in establishing either that results have not been ranked on the basis of relevance (by antitrust regulators) or vice versa, that results have been ranked on the basis of relevance (by Google).**In other words, this essay attempts to analyse the difficulty of both proving and disproving bias.

The difficulty in proving bias in Google's ranking arises due to the confidential nature of its algorithm. Google claims that it does not purposefully elevate its own vertical search engines and the reason why its own verticals frequently appear at the top of the results page is because they meet the objective criteria of "relevance" and are in fact, more relevant than the other results.[4] This is a problem of evidence where demotion of supposedly more relevant content cannot be proven[5]using any objectively verifiable evidence. The evidence often relied upon to prove bias is through comparison to other search engine results pages[6] which do not display Google's own verticals as one of the top results. Such deviation from other search engines however, could be attributed to the difference in search algorithms employed by these engines to distinguish themselves from their competitors,[7] that is it could be a

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[1]In re: Matrimony.com v. Google 2018 SCC OnLine CCI 1; Case at. 39740, Google Search (Shopping) [There are similar cases in other jurisdictions but these two are of particular relevance here].

[2] Joshua D. Wright, *Defining and Measuring Search Bias: Some Preliminary Evidence*, 3 (2011).

[3]Adam Raff, *Search, But You May Not Find*, N.Y. TIMES, (27 December 2009), <https://www.nytimes.com/2009/12/28/opinion/28raff.html> accessed 24 May 2019.

[4] In re: Matrimony.com v. Google 2018 SCC OnLine CCI 1, ¶ 178.

[5] Wright (n 2) 10-11.

[6] Benjamin Edelman & Benjamin Lockwood, *Measuring Bias in "Organic" Web Search* (19 Jan. 2011) <http://www.benedelman.org/searchbias/> accessed 24 May 2019.

[7] Lisa Mays, *The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies*

consequence of either a different understanding of "relevance"[8] by competing search engines or just a different way to assess the same relevance depending on the data they possess and the criteria they adopt.Therefore, for antitrust regulators to prove bias in Google's ranking is extremely difficult.

Notwithstanding the arguments made above if competition authorities were to consider evidence from other search engines in ascertaining whether Google ranks results on the basis of relevance then for Google to rebut these arguments by proving the relevance of its results is an equally uphill task.[9]While the overwhelming number of times Google's own verticals appear at the top of the results might indicate some bias,[10]such evidence is definitely not conclusive.[11] Given the confidential and complex nature of Google's algorithm which renders it difficult for it to establish non-biased functioning, the only substantive argument made by Google to prove relevance of its search results is the argument that it would not rank its content on any basis other than relevance lest it lose consumers.[12]This is a tautological argument whose essential import is: if Google were to degrade its results then it wouldn't be able to retain customers and remain dominant and therefore, the fact of its dominance shows that its results are relevant.[13]

This assertion is based on three assumptions: (i) users would be able to assess relevance; (ii) switching costs between search engines are zero or lesser than the harm suffered due to irrelevant results; and (iii) there are other search engines which users can switch to without appreciable depreciation in quality. These three assumptions are disproved in turn.

Assumption 1: Users of search engines would be able to assess whether the results are relevant.

According to Google relevance of results in both the absolute and relative sense can be

Google's Unrestricted Monopoly on Search in the United States and Europe, 83 GEO. WASH. L. REV. 721, 738-740 (2015).

[8] Wright (n 2) 3.

[9] This assessment is notwithstanding arguments on burden of proof, that is, whether the burden of proving bias initially is on the party alleging bias or Google (being the sole party in possession of information relating to its own algorithm that other parties do not have access to and hence, being in the unique position to disprove such bias). Further, even if the burden of proving bias is initially on the party alleging bias then at what stage does the burden shift to Google to rebut such allegations by actively producing evidence to prove relevance.

[10] Benjamin Edelman (n 6).

[11] Chris Sherman,Study: *Bing More Biased than Google; Google not Behaving Anti-Competitively*, SEARCH ENGINE LAND (3 November 2011) <https://searchengineland.com/study-bing-more-biased-than-google-google-not-behaving-anti-competitively-99774> accessed 24 May 2019.

[12] Robert H. Bork & J. Gregory Sidak, *What does Chicago School teach about Internet Search and the Antitrust Treatment of Google?* 8(4) J. COMP. L. &EC 663, 664 (2012).

[13] Maurice E. Stucke & Ariel Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 YALE J.L. & TECH. 70, 98-99 (2016).

assessed. In the absolute sense consumers would become aware if they feel dissatisfied with the results and in the relative sense if there exist better search verticals, consumers would know about them through advertisements.[14] Therefore, Google has constant pressure to provide relevant results to prevent users from shifting to competitors.[15]

Such arguments seem to be ignorant of the nature of Google's search functionality. The inability of users to assess relevance is because of two reasons: (i) difficulty in objectively measuring relevance;[16] and (ii) branding effect. If a search engine shows completely irrelevant results or in response to direct factual questions gives wrong answers then it would be possible to notice the degradation in quality.[17] However, in other cases the degradation in quality would not be noticeable.[18] The quality of the search results are dependent on: time, quantity of results available on a topic etc.[19] Therefore, it is mostly not possible to measure relevance objectively in absolute terms.[20] Even in relative terms often times it is not possible to inform consumers about the existence of alternative search engines due to high information costs[21] and status quo bias.[22] Further, Google through years of successful branding has ensured that consumers trust it[23] making it even more difficult to detect irrelevance of results shown on Google.

Assumption 2: Switching costs for consumers are zero or lesser than the cost incurred due to use of irrelevant results.

Google has argued that since all search engines are freeswitching costs are zero.[24]Such a simplistic understanding of switching costs does not take into account the rarity of multi-homing[25](that is, studies show that not many consumers tend to switch from one search engine to another even when search engine services are free) and network effects[26] (a phenomenon discussed later in the article)

[14] James D. Ratliff & Daniel L Rubinfield, *Is there a Market for Organic Search Engine Results and can their Manipulation give rise to Antitrust Liability?*, 10(3) J. COMP. L. & ECON. 517, 522-524 (2014).
[15]Geoffrey A. Manne& Joshua D. Wright, *Google and the Limits of Antitrust: The Case against the Case against Google*, 34 HARV. J. L. & PUB. POL'Y 171, 244 (2011).
[16] Mark R. Patterson, *Google and Search-Engine Market Power*, HARV. J. L. & TECH. OCCASIONAL PAPER SERIES, 12-13 (July, 2013).
[17]Stucke (n 13) 98-99 (2016).
[18] Patterson (n 16) 12-13.
[19]Stucke (n 13) 98.
[20]Stucke (n 13) 98.
[21] Patterson (n 16) 24.
[22]Stucke (n 13) 104.
[23] Amy Gesenhues, *Study: Top Reason a User Would Block a Site From a Search? Too Many Ads,* SEARCH ENGINE LAND (April 15, 2013) <https://perma.cc/6P59-GF56> accessed 24 May 2019.
[24] Aaron S. Edlin; Robert G. Harris, The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google, 15 YALE J.L. & TECH. 169, 212 (2012).
[25] Case at. 39740, Google Search (Shopping) ¶ 221.
[26] In re: Matrimony.com v. Google 2018 SCC OnLine CCI 1, ¶ 199.

which are both relevant to the calculation of switching costs.

Assumption 3: There exist alternatives to Google which can be switched to without appreciable depreciation in quality.

This assumption is fallacious because of high entry barriers in the form of network effects and positive feedback loops. Network effects exist where the utility of a service increases when more people subscribe to it.[27] Google being dominant attracts many users and collects their data. Such data collection allows it to improve its services through data localisation and customised results.[28] Thus, Google's dominance perpetuates itself. Another manifestation of network effects is positive feedback loop which refers to the phenomenon in multi-sided markets where success on one side of the market also promotes success on the other side.[29]An increase in consumer base makes Google more attractive for advertisers who are now guaranteed both a wider audience and more targeted marketing using the large amounts of data collected from the customer base.[30] The additional revenue which such positive feedback loops generate increase funds for Google, allowing it to offer more free services, attract more consumers and collect more data.[31] Therefore, the existence of high entry barriers means that there aren't alternatives which users can switch to.

Since, all the three assumptions above are false the tautological argument of Google's dominance indicating its relevance cannot be accepted. Hence, both proving as well as disproving the statement that Google ranks its results on the basis of relevance is fraught with practical difficulties.

Given this difficulty of proof, perhaps the best way forward to evaluate existence of bias is the approach adopted by the European Commission of referring to specific search parameters within search algorithms. Reference may be made to the EC's evaluation of "Panda" (Google's search algorithm). It was shown that having "original content" (and demoting websites with copied content) as a primary parameter for Panda's functioning meant that most competitor comparison shopping services would not be considered relevant.[32] In light of this, using Product Universal for Google Comparison

[27] Stan J. Liebowitz& Stephen E. Margolis, *Network Externality: An Uncommon Tragedy,* 8 J. ECON. PERSP. 133, 135 (1994).

[28]Andrew Langford, *gMonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention*, 88 IND. L.J. 1559, 1574 (2013).

[29] Kristine Laudadio Devine, *Preserving Competition in Multi-Sided Innovative Markets: How Do You Solve a Problem Like Google*, 10 N.C. J.L. & TECH. 59, 63 (2008).

[30]*ibid.*

[31]Devine (n 29).

[32] Case at. 39740, Google Search (Shopping) ¶ 358-359.

Shopping would in effect exempt Google's own vertical from the operation of Panda and the requirement of "original content" thereby biasing the search.[33] Given the problems associated with leading evidence to prove or disprove bias, competition authorities across the world while determining this question should look at the specific search parameters which an algorithm adopts to see whether their adoption and the weightage given to them in itself is indicative of bias.

[33] Case at. 39740, Google Search (Shopping) ¶ 408.

THE DATA MONOPOLY CHALLENGE FOR INDIAN COMPETITION LAW

- *Prannv Dhawan**

The Indian economy is undergoing a unique transformation with the advent of the fourth industrial revolution. The role of digital technology and information-tools is considered paramount even as data is being portrayed as the new oil. It is imperative for an emerging economy to ensure that the overall processes of business transformation do not adversely impact the fundamentals of a market economy- free competition. It is considered one of the most significant indicator of a well-functioning market as characterized by Adam Smith. This essential feature of a vibrant market economy is under new-age challenges due to the limitations of anti-trust regimes to regulate data monopolies.[1] This had led to a global debate on rethinking and strengthening anti-trust regimes in order to safeguard the cardinal principles of a laissez faire economy. This article would contextualize the broader anti-trust challenges relating to data-driven economy and consequently, analyse the Indian scenario in light of recent legal and policy developments.

The principles of free competition wherein new businesses can enter the market without barriers are under serious challenge as internet and technology based corporations like Google, Facebook, Microsoft, Amazon and Apple have emerged as predominant economic entities.[2]The scholarly literature and policy discourse in the western world is undergoing an intense debate on the efficaciousness of the anti-trust regimes.[3] Scholars like Lina Khan have argued that the existing competition law regimes are unequipped to understand and regulate the form and substance of market power in modern economy due to its myopic characterization of consumer welfare explained in terms of short-term price

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[1]Lina Khan, 'Amazon's Antitrust Paradox' (2019) 126 Yale Law Journal; David Streitfeld, 'Amazon'S Antitrust Antagonist Has A Breakthrough Idea' (*Nytimes.com*, 2019) <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html> accessed 24 March 2019.

[2]Terry Gross, 'NPR Choice Page' (*Npr.org*, 2019) <https://www.npr.org/2017/10/26/560136311/how-5-tech-giants-have-become-more-like-governments-than-companies> accessed 24 March 2019.

[3]Elizabeth Warren (2019): 'Here's How We Can Break Up Big Tech' (*Medium*, 8 March), <https://medium.com/@team- warren/heres-how-we-can-break-up-big-tech- 9ad9e0da324c> accessed on 19 March 2019; Makena Kelly, 'Facebook Proves Elizabeth Warren's Point by Deleting Her Ads about Breaking Up Facebook,' (Verge, 11 March 2019) <https://www.theverge.com/2019/3/11/18260857/facebook-senator-elizabe- th-warren-campaign-ads-removal-tech-break- up-regulation> accessed on 19 March 2019.

effects.[4] Khan has also pointed out how the limited approach of current regime fails to cognize affects of dominance by corporations like Amazon whose impact on the level playing field cannot be understood in terms of price and output.

Tim Wu, in his celebrated book *The Curse of Bigness* has analysed the evolution of legal and regulatory frameworks that have enabled these corporations to emerge into predominant economic entities.[5] Both Wu and Khan advocate for the traditional understanding of anti-trust as proposed by Louis Brandeis in the Roosevolt era in the United States. This approach was centred on the belief that government should limit concentration of economic power and *"punish those who used abusive, oppressive, or unconscionable business methods to succeed"*. This approach let to the breaking-up of many large infrastructure-sector behemoths like Standard Oil. The Brandeisian idea highlighted the importance of real freedom in the market so that new entrepreneurs can emerge without any structural and existential risks. This '*suppression of industrial liberty'* was seen as fundamental affront to the very premise of a liberal economy from giant corporations.

These scholars advocate that national and global anti-trust regimes should move beyond Chicago School consensus on emphasizing consumer welfare as central to anti-trust philosophy. This dominant schooldoes not recognize oligopolistic corporate hegemony as a challenge as long as *consumer welfare*is not violated. Even as antitrust become technocratic and weak, proponents of this 'modern' approach like Peter Thiel, author of *Competition Is for Losers*, consider the competitive economy to be a *"relic of history"* and a *"trap"*. Thiel even proclaimed that *"only one thing can allow a business to transcend the daily brute struggle for survival: monopoly profits."*[6] The limitations of this approach become even more significant because of the prevalence of huge data-driven corporations which provide unmatched customer satisfaction and price economy like Amazon or Facebook .Hence, this school of thought[7]fails to consider the larger implications of monopoly profits beyond the short-term positive impact on consumers.

In the specific context of these data-driven businesses, these concerns are even more

[4]Lina Khan (n 1).

[5]Tim Wu and others, 'How Google And Amazon Got So Big Without Being Regulated' (*WIRED*, 2019) <https://www.wired.com/story/book-excerpt-curse-of-bigness/> accessed 21 March 2019.

[6]RanaForoohar, 'The Curse Of Bigness By Timothy Wu — Why Size Matters | Financial Times' (*Ft.com*, 2019) <https://www.ft.com/content/3c99583e-e27b-11e8-a6e5-792428919cee> accessed 21 March 2019.

[7] Robert Bork, The Antitrust Paradox (Free Press 1978).

important for two reasons. *Firstly*, the existing investor behaviour that privileges growth over profits has incentivised technology companies to practice predatory pricing.[8] *Secondly*, these online platforms control the basic infrastructure on which their competitors rely, because of the fact that they are critical intermediaries.[9] This impact is even more pronounced in cases wherein these platforms have been found to prefer certain search results over other.[10] This dual role equips their platform to exploit data collected on business competitors using its services.[11] In other words

Policy expert AlokPrasanna Kumar has highlighted the huge relative advantage these internet platform companies exploit to undercut or crowd out their existing or potential competitors. Kumar writes, "*Even when a competitor comes along with a better product, their accumulated capital allows competitors to be acquired swiftly, with little regulatory disapproval. Even if a competitor were to arise, they would be unable to compete on one key feature: data. Internet platforms probably know their customers better than they themselves do. The vast ecosystem of apps and devices which go along with the internet plat- forms means that incumbents will be virtually unassailable by entrants in the kind of service that they can provide their consumers.*"[12]

This can be analysed from the *Reliance Jio case*[13] wherein Jio started providing 4G LTE services for free for a year using the funds of Reliance Industries Limited.[14] This led to a complaint of predatory pricing[15] filed by Airtel.

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[8]Alok Kumar, 'Breaking Up Tech Giants Data Monopolies And Antitrust Laws' (2019) 56 Economic and Political Weekly.

[9]Nirmal John 'CCI Leaves Google Search- ing for Answers,' *(Economic Times*, 12 February 2018), <https://economic-times.indiatimes.com/articleshow/62903105.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed on 19 March 2019.

[10]'Explained: Why CCI Found Google Guilty Of Search Bias' (*The Quint*, 2019) <https://www.thequint.com/news/business/explained-why-cci-found-google-guilty-of-search-bias> accessed 3 April 2019.

[11]AlokPrasanna Kumar, 'Taming the Giants—A Call to Arms for Policymakers and Regulators,' (Factor Daily, 12 February 2019) <https://factordaily.com/tim-wu-the-curse-of-bigness-taming-of-the- giants-a-call-to-arms-for-policymakers-and- regulators/> accessed on 19 March 2019.

[12]Badri Narayanan and GunmeherJuneja 'New FDI Policy on e-Commerce: Key Factors Amazon, Flipkart, Others Must Consider in Future Strategy' (*Business Today*, 19 February 2019),<https://www.businesstoday.in/top-story/new-fdi-policy-on- e-commerce-key-factors-amazon-flipkart-oth- ers-must-consider-in-future-strategy/story/32-0153.html> accessed on 19 March 2019.

[13]*In Re: Bharti Airtel Limited* v. *Reliance Industries Limited and Reliance JioIncomm Limited*, Case No. 03 of 2017, https://www.cci.gov.in/sites/default/files/3%20of%202017.pdf.

[14]'Jio Is Going To Pinch MukeshAmbani's Deep Pocket Really Hard' (*The Economic Times*, 2019) <https://economictimes.indiatimes.com/industry/telecom/telecom-news/jio-is-going-to-pinch-mukesh-ambanis-deep-pocket-really-hard/articleshow/68165869.cms> accessed 3 April 2019.

[15] Predatory Pricing means pricing so low that competitors quit rather than compete, permitting the predator to raise prices in the long run;

The issue pertained to whether the subsidiary's (Infocomm renamed as Jio) use of financial resources of the parent corporation (Reliance Industries Limited). Airtel alleged that because the subsidiary had sufficient capital, it was able to manipulate and predate the prices having *adverse effect* on the competition. The merger was not found to be anti-competitive because there was no express agreement to the same effect and the facts in the information filed by Reliance were not clear. Nevertheless, it shows the limitations of the cost of production parameter to adjudge predatory pricing that is used in India.

Moreover, it is also important to emphasize the economic incentives behind abuse of data and how they translate into absolute market power.[16] The costing structure of the numerous stages of data processing makes it extremely difficult for firms entering a market to extract commercial value on par with an dominant market player.[17]

In this context, it is important to understand the recent developments in data privacy law in India.[18]Apart from it, sections 43A and 72A of the Information Technology Act, 2000 provide for the compensation in cases of non-implementation and non-maintenance of reasonable standards of security in dealing with sensitive personal data of individuals and about the punishment in cases of disclosure of personal information as a breach of contract or without consent. However, these sections do not impose sufficient liability and does not employ adequate penal measures so as to prevent abuse of big data and thereby hampering of the competition in market. The role of Indian Competition Law statute is very critical in this regard. The Section 4 of the Competition Act, 2002 needs to be constructively interpreted to analyse the abuse of dominant position by the internet platform

http://www.oecd.org/competition/abuse/2375661.pdf.

[16]PrannvDhawan and Shubham Kumar, 'The Privacy Challenge for Fair Competition in Emerging Digital Economy' in Decoding Corporate and Commercial Laws in 21st Century (EBC Publication, 2018).

[17]VirajAnanth, 'Thinking BIG: Reimagining The Indian Antitrust Landscape For Digital Economy Markets' (*The Boardroom Lawyer*, 2019) <https://theboardroomlawyer.com/2018/10/07/thinking-big-reimagining-the-indian-antitrust-landscape-for-digital-economy-markets/> accessed 24 March 2019.

[18] The Supreme Court's *Justice K. S. Puttaswamy v. Union of India*judgement had made it clear that right to privacy is a fundamentally protected right under Article 21 of the Indian Constitution. The right to privacy encapsulates informational privacy, that is, extent of access to personal information which can be decided by the data subject because the information belongs to him. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The Union Government had set-up the Justice BN Srikrishna Committee to formulate a Data Protection Framework for India and in 2018, the committee proposed a draft Data Protection Act to the government.

corporations. The undercutting of competitors for chasing higher growth and equity investment should be interpreted as 'predatory pricing' through the purposive interpretation of the terms in Section 4 which signify that the pricing decisions that aim to *reduce competition or eliminate the competition* are regulated.[19] This would require considerable reform in the regulatory approach on predatory pricing that focusses solely on the cost of production. This is very important because these emerging businesses rely on factors like their huge financial resources to provide additional rebates and discounts.

In the analysis of dominant position being enjoyed by these corporations, the *social obligations and social costs* clause in the Section 19(4) of the Competition Act, 2002 should be constructively interpreted to prevent the negative social implications of monopolistic dominance and undercutting of new enterprises.[20] Moreover, as signified in the Jio case, it is important to emphasize the deep pocket i.e. financial and economic power of these corporations and reorient the regulation towards constraining this power. Existing provisions in the Competition Act, 2002 like Section 4(e) that constrain leveraging of dominant position in one market to enter another by using subsidiary. This has come into question even as concerns were raised about Walmart-Flipmart acquisition deal.[21] The recent draft E-Commerce Policy also highlights few of these concerns.[22]Hence, a return to the interpretation of *economic power of the enterprise* is required to strengthen the anti-trust framework so that the corporations that enjoy commercial advantages over competitors are effectively deterred.[23]

Conclusion: Towards an Effective Anti-Trust Approach

The concentration of economic power in context of new age data-driven business is a cause of concern for global and national regulators. In this context, a serious rethinking of the anti-trust framework is required to ensure that level playing field in a truly free market economy can be ensured. In this context, it is important to reform and transform the existing regulatory approaches to make them more robust towards

[19] Section 4, Competition Act, 2002.

[20] Section 19 (4) (k), Competition Act, 2002.

[21]'Walmart's Acquisition Of Flipkart: The Elephant In The Room - Anti-Trust/Competition Law - India' (*Mondaq.com*, 2019) <http://www.mondaq.com/india/x/729670/Antitrust+Competition/Walmarts+Acquisition+Of+Flipkart+The+Elephant+In+The+Room> accessed 3 April 2019.

[22]'Draft National E-Commerce Policy For Stakeholder Comments | Department For Promotion Of Industry And Internal Trade | Moci | Goi' (*Dipp.gov.in*, 2019) <https://dipp.gov.in/whats-new/draft-national-e-commerce-policy-stakeholder-comments> accessed 3 April 2019.

[23] Section 19 (4) (d), Competition Act, 2002.

contemporary challenges in context of emerging business models.

A possible resolve can be to take measures to alter how dominance is determined. Such measures may include, *first*, using rate of increase in the market share as a metric. Amazon posts a market share growth rate of around 5% for e-retail and 2% for overall retail market.[24] This manifestation of monopoly power needs to be analysed in specific context of investment-chasing corporations. *Secondly*, dominance in a given part of an industry should be enough to bring the firm's presence in other parts of the industry under scanner. This is important because of the great scope of leveraging that a dominant market can undertake to gain further economic power in other markets. Hence, the possibility of the abuse of dominance need to be checked. Like, Google uses its dominance in search engine and operating systems to help its maps business and app development business respectively.[25]*Lastly*, attempts to establish an international antitrust regime must be undertaken. Today's firms are not limited to any one country and use their incomes in one country to fund loss-making expansions and acquisitions elsewhere. As such anti-trust activities in one nation have consequences elsewhere. For instance, while Flipkarthas been acquired by Walmart in Singapore, there would be consequences in many parts of the world.

Additionally, it is expected that once robust data privacy regulations like Data Protection Bill, 2018 are swiftly implemented, the scope of unconsented use of user data to create market advantage would significantly reduce. This would happen because principles like data minimization within the data protection framework would limit the ability of corporation to gain addition economic leverage by using it across various sectors that a corporation can be a part of. This would, however, not be the ultimate accomplishment for advocates for free competition. The competition regulators like CCI need to upscale and update their regulatory processes, human resources, investigative abilities and technical expertise in line with the changes that are happening in the larger economic context.

It needs to be recognized by the Indian regulatory authorities that any data protection law targeted at foreign data companies including social media giants or cloud service providers, should provide for sound framework for anti-trust regulation. Indian consumers and upstart competitors must be safeguarded with guaranteed rights protecting

[24]Lina Khan (n 1).
[25]Tim Wu (n 5).

their data, which they can efficaciously enforce in India.[26] Hence, while the existing regulators need to step up their capabilities and new regulators like a potential Data Protection Authority need to assume autonomy, there is need to redefine the institutional interaction. There is a need of a co-regulatory approach which entails active participation of the government, industry and academia in the drafting and enforcement of a robust anti-trust and data protection law.[27]

[26]Prashant Reddy, 'Does India Need Only One Data Protection Law And Regulator To Rule Them All?' (*The Wire*, 2019) <https://thewire.in/tech/data-protection-law-regulator-india> accessed 23 March 2019.

[27]Amber Sinha, 'India's Data Protection Regime Must Be Built Through An Inclusive And Truly Co-Regulatory Approach' (*The Wire*, 2019) <https://thewire.in/business/inclusive-co-regulatory-approach-possible-building-indias-data-protection-regime> accessed 23 March 2019.

SELECT CCI ORDERS FOR 2016-2018

This section consists of case analysis of forty selected decisions rendered by the Competition Commission of India from November 2016 onwards including decisions on antitrust as well as combination. A process of filtering was applied on the decisions given by the CCI in the concerned time period to select the following cases as they offered economic analysis of the issue at hand and therefore had the potential to attract discussions and deliberations on these areas. Moreover, they also clarified or even modified the approaches to competition law issues in certain emerging industrial sectors. Therefore, these case analyses are prepared as an attempt to understand the convergence of legal and economic language used by the authorities in approaching competition law issues and consequently, attract potential scholarly discussions on these issues.

LIST OF CASES

1. **Suntec energy v. National Dairy Development Board&ors. (Case No. 69 of 2016)**

Decision Date: 10.11.2016

Keywords:*Technical Specification*;*Tender Document*;*Bid Rigging*; *Collusive Bidding*

Issue: Whether stipulation of certain specification or thebrand name in the tender be deemed anti-competitive?

Rule: Sec. 3(3)(d) of the Competition Act, 2002 concerning Anti-Competitive Agreements & Collusive Bidding

Under the aegis of OP 1, OP 2 floated a tender dated 12.5.2016 inviting offer for 'design, manufacturing, supply,erection, testing, and commissioning of 28.5 TPH @ F & A 100 degreeCentigrade FO/NG Fired Boiler PLC operated with duel fuel economiser'. It is averred that in response to the said tender notice the Informant wasinterested in supplying the burners being manufactured by it. However, the offer document provided a 'List of Preferred make of bought out items' inSection V of Technical Specification in the tender document. Under theproduct name 'Burner' only one manufacturer was specified namely 'Weishaupt only'. It is alleged that there are other manufactures of burnerswith the same technical specifications available in India, including the burnermanufactured by the Informant.

It is alleged that this condition shows that there is an arrangement/ understanding between the parties to disqualify all othermanufacturers/ distributors of burners which amounts to bid rigging andcollusive bidding in contravention of Section 3(3)(d) of the Act.

The Commission observed that a procurer, as a consumer, can stipulate certain technical specifications/ conditions/ clauses inthe tender document as per its requirements which by themselves cannot bedeemed anti-competitive. It was noted that the party floating the tender is aconsumer and it has the right to decide on the appropriate eligibility conditionsbased on its requirements. The Commission also observed that in a market economy, consumers' choice is considered as sacrosanct and in such aneconomy, a consumer must be allowed to exercise its choice freely whilepurchasing goods and services in the market. It is expected that a consumercan decide what is the best for it and will exercise its choice in a mannerwhich would maximise its utility that is derived from the consumption of agood/ service.

The Commission found that no case ofcontravention of the provisions of the Act is made out against the Ops. The matter was closed under the provisions ofSection 26(2) of the Act.

2. **Ashutosh Bhardwaj v. DLF Limited (Case No. 01 of 2014 & 93 of 2015)**

Decision Date:04.01.2017

Keywords:*abuse of dominant position; real estate*

Issue: Whether the OPs engaged in abuse of dominant position by imposing discriminatory prices and other conditions on its consumers?

Rule: Sec. 4of the Competition Act, 2002

The informant (Ashutosh Bhardwaj in 01 of 2014, and LalitBabu& others 93 of 2015) filed under 19(1)(a) against DLF and others, alleging abuse of dominant position by imposing unfair/discriminatory prices/conditions in contravention of Sec 4.

The informants booked an apartment in a housing project of OP-1 whose primary objective is development and sale of residential, commercial and retail properties. It was alleged that the OP Group abused its dominant position by imposing highly arbitrary, unfair and unreasonable conditions, as shown through various non-negotiable clauses framed in favour of the OPs, as contravening 4(2)(a)(i) and 4(2)(d). Accordingly, directions were sought praying for modifications of clauses in the Agreement and compensation for delay in delivery of possession.

The relevant market u/s 2 (r) of the Act was defined by the DG as the market for "the provision of services for development/sale of residential units (apartments/flats/ independent floors/villas) under the licensed category of RGH and RPL in Gurgaon".

a. Relevant product market to be for "the provision of services for development/ sale of residential units(apartments/ flats/ independent floors/ villas) under the licensed category of RGH and RPL".

b. OPs plea of delineating entire NCR and not just Gurgaon as relevant geographic market was denied by DG on grounds the conditions prevailing in Gurgaon
in terms of these attributes being different and distinguishable from that of Delhi and Noida or

other areas of NCR and hence in terms of the provisions of Section 19(6)(b) "local specification requirements" , Gurgaon was found to be different from other areas of NCR.

The CCI however de-emphasised the need to determine relevant market given that dominance would remain the same even in the alternative relevant market definition, and slightly widened the relevant market to "*provision of services for development/ sale of residential apartments in Gurgaon"*.

Relevant period/scope of investigation was restricted to a period three years from 2007-08 to 2009-10, being the period during which the project was launched and the apartment purchased by the informants.

Upon analysis of market share of OP group, the following factors were considered: land licensed for residential purposes, residential units launched, number of residential units sold, value of residential units sold and inventory; finding the OP group to be either foremost or second on all parameters, with assets being almost three times that of nearest competitor. The CCI noted that the OP group had an early lead in Gurgaon, having been there since 1946 giving it a distinct reputational and economies of scale first mover advantage due to which it could operate independently of other players in the relevant market.

Upon examination, some allegations, such as of mandatory payment of electricity and club facility charges, were found to be misconceived. The CCI found the following to be "asymmetric agreement heavily tilted in favour of the OPs, amongst others to establish violation of 4(2)(a)(i):

(i) Mandatory purchase of parking space not warranted by statute.

(ii) No need for notice or reminder by OP with no corresponding leeway for allottees.

(iii) Time period for delivery, with ample scope to modify same on OP discretion.

(iv) Procedure for taking possession, and lack of interest in case of failure by OP.

(v) Levy of undetermined external/infrastructure development charge.

The CCI opined that given imposition of penalty in the similar Belaire's case on the OP

Group for acts committed in the same time period, and given the totality and peculiarity of the facts, no financial penalty under Sec 27 was required to be imposed.

3. **Sudarshan Kumar Kapurv. Delhi Development Authority (Case No. 78 of 2016)**

Decision Date:12.01.2017

Keywords:*abuse of dominant position; residential flats; prima facie case*

Issue: Whether the OP's conduct amounts to abuse of dominant position?

Rule: Sec. 4, Sec. 26(1)of the Competition Act, 2002

The informant (Sudarshan Kumar Kapur) alleged the DDA, a statutory authority engaged in the development and sale of land and residential units in Delhi, contravened Sec 4 by:

a) asking for arbitrary price for the allotted plot which is 116 times higher than the price given in the Brochure. Further, the OP has charged at the prevailing 2014 rates instead of 2012 rates when the draw of lots were held;

b) Even after full payment and completion of all requisite formalities by the Informant and his wife, the OP has not given possession of the developed plot till date;

c) Clause 6 of the Brochure prescribes imposing penalty upon the buyer for delayed payment irrespective of any delay on the part of the OP; and

d) Serving wrongful show cause notice to the Informant's wife.

Although the scheme was launched in1981, draw of lots were held only in 2012 and allotment in 2014; hence the abuse occurred post enforcement of Sec 4 and accordingly the CCI has jurisdiction.

The informant alleged during a preliminary conference called by the CCI that no reply has been received from the OP to notice served by informant's wife, and not delivered possession for over 15 years now, resulting in abuse of dominant position.

Tasked with the preliminary step of determining whether the OP was an enterprise for application of Sec 4, the CCI interpreted Sec 2(h) to exclude any activities of the Government

relatable to its sovereign functions. Relying on various supreme court, and high court decisions along with its own orders in the BCCI case, the CCI held that the OP fell within the definition of 'enterprise', for even though it was a statutory authority created under an Act the objective of which included, *interalia*, to promote and secure the development of Delhi according to the plan and for those purposes had been invested with certain exclusive powers. However, the same were held to be neither sovereign or inalienable functions of the State.

The CCI noted that a residential plot is a distinct product which may not be substitutable or interchangeable with residential flats or any other residential units. While in case of purchase of a residential plot, buyers have a freedom to decide the floor plan, number of floors, structure and other specifications at their own discretion, in case of a residential flat the design and construction is formulated and completed by the builder without providing much opportunity to buyers. Further, it distinguished a plot from a flat by amenities available.

the Commission noted that the conditions of competition in the National Capital Territory of Delhi remains homogenous and distinct and can be easily distinguished, from the buyer's point of view, from the neighbouring areas such as NOIDA, Ghaziabad, Gurugram and Faridabad in terms of the difference in land prices, state laws and regulations, taxes, availability of public transportation system, *etc.* In addition, relying on consumer preferences as a result of differing urbanisation, infrastructure, health and educational facilities.

The relevant market was hence defined as "market for provision of services of development and sale of residential plots in the National Capital Territory of Delhi".

CCI held the OP to be in a dominant position for it was a statutory authority as a result of which no comparable alternatives were available to consumers in the relevant market, and the biggest real estate developer in Delhi with no other developer coming even close in size and structure of the OP.

(i) The CCI noted that there had been an inordinate delay of 31 years, which too was resolved only after intervention of the Delhi High Court. Choosing to not delve into the merits of the case of the informant's wife, the Commission observed that given the dependence of buyers on the OP in the relevant market, they have little choice but to abide by

the terms and conditions stipulated by the latter

(ii) Although there was penalty imposed on allottees in case of delayed payment, there was no corresponding clause providing penalty on the OP for delay in allotment or possession. Effectively, allottees are required to make payments, as and when demanded by the OP irrespective of the fact whether the promised action on the part of OP has been completed or not.

(iii) Despite the allotment letter itself admitting that construction was incomplete, the OP made payment of 80% consideration mandatory, failing which allotment would stand cancelled. Such a condition implies substantial financial commitment on the part of the buyer without any corresponding commitment on the part of OP.

(iv) the Commission observes that the OP had revised the price of the plots by 116 times, which was initially Rs. 200/- per sq. mt. in 1981 as per the Brochure to Rs. 23,252/- per sq. at time of allotment. Interest paid by OP was only two times of principal over the same period. There was no parity in rate of price escalation between parties.

The CCI further noted many instances of abuse in procedure and inordinate delay by the OP, reflecting its high handed approach and apathy with general public in exercise of position of dominance. Rendering the buyers in such helpless situation, causing such an exceptional delay, imposing one-sided conditions, OPs overall behaviour in dealing with the buyers are *all* evidence of unfair conduct of the OP *qua* its customers; and accordingly the CCI determined that the conduct of the OP *prima facie* amounts to abuse of dominant position by the OP in terms of the provisions of Section 4 of the Act.

Therefore, considering the information in totality, oral submissions made by the parties and all other material available on record, the Commission was of the view that there exists a *prima facie* case of contravention of the provisions of Section 4 of the Act by the OP and it is a fit case for investigation by the Director General (hereinafter the **'DG'**). Accordingly, under the provisions of Section 26 (1) of the

Act, the Commission directs the DG to cause an investigation into the matter and file an investigation report within a period of 60 days from date of receipt of this order.

4. **Brushless DC Fans: (SuoMotuCase No 03 of 2014)**

Decision Date:18.01.2017

Keywords:*bid rigging; leniency petition*

Issue: Whether the OPs' conduct amounts to bid rigging? What should be the extent of leniency granted to OP1?

Rule: Sec. 3 and 45of the Competition Act, 2002

The present case involved allegations of Bid rigging case (Explanation to 3(3)), and was taken up by Commission suo moto on the basis of information from Superintendent of Police.

Allegation that 3 firms (OP 1-3) had cartelized tenders floated by Indian Railways and BEL, for supply of BLDC Fans. After analysing email, call data records and statements of OPs, DG concluded that there had been collusion for rigging the bids pertaining to tenders. Consequently, OP1 had moved leniency petition under Sec 45, read with Reg 5 of Lesser Penalty Regulations.

The Commission notes that the most clinching evidence of understanding/ arrangement amongst the OPs in the instant case is the e-mail trail from OP 1 to OP 2 and then to OP 3 which contained a suggestion of rates to be quoted and quantities to be shared amongst the three Part I bidders in the three tenders by Indian Railways and one tender by BEML for procurement of BLDC fans. This e-mail was not forwarded to any of the other OPs i.e., OP 4, OP 5, OP 6 or OP 7, who were Part II bidders.

In terms of evidence, it is observed that in the present matter, the exchange of e-mail along with its attachment amongst OP 1, OP 2 and OP 3 is the direct evidence of agreement/ arrangement/ understanding amongst OP 1, OP 2 and OP 3 to rig the bids in the tenders of Indian Railways and BEML. This e-mail has not been forwarded to any other OP participating in these four tenders. The fact that the parties quoted identical/similar rates to those shown to be agreed in the e-mail in two out of four tenders, establishes collusive agreement amongst them. The exchange of numerous calls amongst OP 1, OP 2 and OP 3, which began much before the first tender and continued during the period of the tenders, lends further credence to the subsistence of an arrangement as depicted in the e-mail. Lastly, the fact that one of OPs i.e.,

OP 1 has admitted to being part of the cartel amongst the three OPs and brought out the purpose and modus operandi of the cartel which is corroborated by other evidence as well, adds strength to the finding that there existed an agreement amongst the parties to allocate tenders and rotate the bids. Resultantly, based on the aforesaid facts and evidence, the Commission is of the view that the OP 1, OP 2 and OP 3 entered into an agreement/ arrangement to rig the bids and to share the market by mutual allocation of the tenders amongst themselves in contravention of the provisions of Section 3(1) read with Section 3(3) (c) and 3(3)(d) of the Act.

Additionally, OP 3 has also raised certain other contentions such as (a) conclusion of alleged cartel is against economic theory as it was for a short duration of one month and not for making profit- In this regard, it is observed that (a) under the provisions of Section 3(3)(d) of the Act, bid rigging shall be presumed to have adverse effect on competition independent of duration or purpose and, also, it is immaterial whether benefit was actually derived or not from the cartel.

In the present case, the OPs have not been able to rebut the said presumption. Further, it has also not been shown by the OPs how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question.

It is noted that, at the time, when the application was made by OP 1, the Commission was already in possession of the e-mail evidence furnished by CBI which enabled the Commission to form a prima facie view regarding the existence of a cartel in contravention of the provisions of Section 3 of the Act. Suo Moto Case No. 03 of 2014 Page 50 of 57 The evidence and submission of OP 1 further substantiated the evidence in the possession of the Commission and also completed the chain of events.

The Commission notes that although OP 1 is the first to make a disclosure in this case, however, the Commission is also cognizant of the stage at which the Applicant approached the Commission i.e., not at the very beginning but at a later stage in the investigation, and of the evidence already in possession of the Commission at that stage. Considering the co-operation extended by the OP 1, in conjunction with the value addition provided by OP 1 in establishing the existence of cartel, the Commission decides to grant a 75 percent reduction in the penalty to the Applicant than would otherwise have been imposed on it had it not cooperated with the Commission.

So far as the individual liability of the office-bearers of OPs in terms of the provisions of Section 48 of the Act is concerned, it may be noted that the Commission vide its order dated 23.06.2014 had directed that, in case the DG finds the OPs in violation, the DG should investigate the role of persons who at the time of such contravention were in charge of and responsible for the conduct of business of the OPs so as to fix responsibilities of such persons under Section 48 of the Act.

Resultantly, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on Shri Sandeep Goyal for OP 1, Shri Ashish Jain for OP 2 and Shri Ramesh Parchani of OP 3. The penalty on these persons-in-charge imposed in terms of Section 27(b) of the Act calculated at the rate of 10 percent of the average of their income for the last three preceding financial years.

Considering that the Commission has decided to grant a 75 percent reduction in penalty to OP 1 under Section 46 of the Act, as recorded hereinabove, the Commission, also decides to allow the same reduction in penalty to Shri Sandeep Goyal for OP 1 under Section 46 of the Act.

5. **Director, Supplies & Disposals, Haryana v. Shree Cement &Ors.(Ref Case No. 05 of 2013)**

Decision Date:19.01.2017

Keywords:*Cartel; bid rigging*

Issue: Whether the OPs had been involved in cartelisation and bid rigging?

Rule: Sec. 3of the Competition Act, 2002

Reference under 19(1)(b) by DS&D, Haryana ("Informant") against Shree Cement Limited and others, alleging contravention of Sec 3 (anti-competitive agreements).

Informant is procurement agency for Haryana government supplies, and issued a tender notice for 4 lakh MT of cement. Allegation was that OPs have colluded with each other and attempted to rig the big in the impugned tender for supply of cement to the government.

(i) That OPs had formed a cartel and quoted considerably higher rates than existing contract rates.

(ii) OPs, acting in concert, collectively and deliberatelyquoted bids for substantially lower quantities as compared to the quantitiesthey had been quoting in the past.

(iii) Furthermore, the total tendered quantityquoted by the OPs had eventually been divided amongst them, so that eachbidder could get the rate contract for the quoted quantity.

(iv) The OPs evenquoted different basic prices for supply of cement at the same destinationfor different categories, with or without VAT C3 form. The OPs had alsoquoted the rates in such a manner that they all acquire the lowest bidder status (L1 status) for supply of cement in at least some of the destinations.

The last rate contract was negotiated/ finalised by HPPC in the meetingheld in August, 2011. It was noted by HPPC that the increase in bid pricesof cement was not justified in light of the Price Index for Cement asreported by the Office of Economic Adviser, Ministry of Commerce andIndustry, Government of India which had risen from 151.7 to merely 169.3since the finalisation of the last rate contract. Thus, HPPC observed thatthere was no justification for the bidders to quote rates that were higher by35-42% over the existing rate contract rates. Onbeing asked by HPPC, therepresentatives of the bidders could not offer any justification for theincrease in quoted rates with reference to the escalation in costs of inputs.

(i) Whether the bid prices quoted by OPs in the 2012 tender were unusually higher than the bid prices quoted in the previous tenders? Whether such bid prices were arrived at independently by OPs based on business/ commercial consideration(s)?

the DG concluded that in the years 2009 and2012, there was a substantial increase in the average L1 price for thedifferent categories of cement *vis-a-vis*the corresponding increase in theWPI values for grey cement, showing that this pattern was indicative ofprice parallelism and collusive bidding.

The CCI notes an unexplained consistency in price difference, and observes that cumulatively all the details portray behaviour of Ops not consistent with conduct of players in a free and competitive market.

(ii) Whether the lower quantities quoted by OPs in the impugned tender than the bid quantities quoted in the previous tenders, was due to an arrangement to divide the total quantity amongst Ops to allocate markets? Whether the bid quantities were arrived at independently by OPs

based on business/ commercial consideration(s)?

In the absence of verifiable data provided by the parties, the CCI notices that the present reason given, i.e. uncertainity in allocation in previous years, stands negated for it was unequivocally demonstrated that uncertainty in theallocations in the previous tenders did not result in quoting of lowerquantities by the bidders in the subsequent tenders in the past.

(iii) Whether OPs have bid for the impugned tender so as to divide the market in order to secure L1 status inter se?

The DG presented evidence of behaviour of Ops wherein they did not bid in accordance with competitive locational advantage in some districts. Ops gave only unsubstantiated statements for differences in prices, which the CCI held to be insufficient to explain divergences in tender prices in adjacent districts. Based on this, it is observed that this isindicative of the fact that the OPs have tried to accommodate each otherto emerge as L1 in these neighbouring destinations

(iv) Whether Call Detail Records point towards prior arrangement amongst OPs in submitting their respective bids?

The CCI negates a plea contending violation of principles of natural justice by the DG, decided that there was no substance in the plea raise by some that the call detail records relied upon by the DG are not supported by a certificate in accordance with the Evidence and IT Acts, by virtue of any lack of denial of the contents or raising the same at the time of investigation before the DG.

The Commission was of opinion that theimpugned act/ conduct of the OPs is found to be in contravention of theprovisions of Section 3(1) of the Act read with Section 3(3)(d) thereof due to the anti-competitive conduct of OPs, the impugnedtender had to be cancelled forcing the State to start the process of procurement- a critical input for infrastructure, afresh, resulting in possibledelay in timely supply for the execution of public infrastructure projectswhich may result in time and cost overrun

Thoughcompetition law frowns upon even the agreements which are 'likely' tocause appreciable adverse effect on competition, while quantifyingpenalties, a distinction has to be made between the agreements whichactually cause appreciable adverse effect on competition and theagreements which are likely to cause such effects.

the Commission finds it appropriate toimpose a penalty on OP-1 to OP-7 at the rate of 0.3

% of their averageturnover of the last three financial years based on the financial statementsfiled by them. Accordingly, a penalty of Rs. 18.44 crore, Rs. 68.30 crore, Rs. 38.02crore,Rs. 9.26 crore, Rs. 29.84 crore, Rs. 35.32 crore and Rs. 6.55 crore isimposed upon OP-1 to OP-7 respectively.

6. **Debabrat Mishra v. Daimler Financial Services India Private Limited and Ors(MANU/CO/0007/2017)**

Decision Date: 02.02.2017

Key Words: *abuse of dominant position; vertical agreement; anti competitive agreement*

Issue: Whether there was abuse of dominant position by a lease financing company for luxury cars and whether clauses in the lease requiring certain parties to repair the luxury car amounted to an agreement causing AAEC?

Rule: Sec. 3(4)(a) and (b) and Sec. 4(2)(a)(b)(c) and (e) of the Competition Act, 2002

The Informant in the present case alleged that the Opposing Parties had (i) abused their dominant position under Sec. 4(2)(a)(b)(c) and (e) of the Competition Act, 2002 (Act) that the vertical agreement entered into between OP-2 and OP-3 violate Sec. 3(4)(a) and (b) read with Sec. 3(1) of the Act.

In the present case, OP-2 and OP-3 through OP-1 provide the service of lease/financing for the vehicles manufactured by OP-2 to customers. The informant alleged that certain clauses of the lease agreement entered into with OP-1 are abusive by virtue of the dominant position enjoyed by the OP's.

In order to analyze whether OP-1 had a dominant position in the market, the Commission determined that the relevant market for the same would be provision of lease financing services for luxury cars in India. Further based on this delineation and the information available in the public domain, the commission determined that there are numerous players in the relevant market, thus making it improbable that OP-1 could have operated independently of the market forces in the relevant market. Thus it held that since OP-1 does not have a dominant position, the question for abuse under the same does not arise.

Further, the informant claimed that OP-2 and OP-3 form a part of a vertical chain and the agreement entered with them, has deprived the Informant of availing the services of independent repairers, thereby falling foul of

Sec. 3(4) of the Act. The informant alleges that since he had "no other alternative but send the vehicle to the workshop of the OP's and buy the spare parts form the OP's" he incurred higher repair costs and thus is causing AAEC. Sec. 3(4) deals with *"any agreement amongst enterprises or persons at different stages or levels of the production chain in different market… shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India."*

In response to this the Commission notes that the car, being a luxury car, was highly expensive. Further since the lessee was not the owner of the car, it was only fair to impose such a condition to safeguard the commercial interest of the lessor who also owns the car. Thus holding that there was no violation of Sec. 3 either.

In conclusion, the Commission ordered closure of the case under Sec. 26(2) of the Act.

7. **Onicra Credit Agency of India Limited v. Indiabulls Housing Finance Limited(2017 SCC OnLine CCI 6)**

Decision Date: 03.02.2017

Key Words: *anti-competitive agreement; pre-payment penalty; abuse of dominance*

Issue: Whether the imposition of the prepayment penalty amounts to an anti competitive agreement?

Rule: Sec. 3(1) of the Competition Act, 2002

In the present case the Informant has alleged that the Opposite Party has entered into an anti-competitive agreement in violation of Sec. 3(1) of the Act. This allegation is with respect to the imposition of prepayment penalty by the OP for pre-mature foreclosure of the mortgage loan. Pursuant to the Loan Agreement entered into between the informant and the OP the Informant has to pay a pre-payment/foreclosure charge in case of pre mature closure of the loan facility. The informant has alleged that the same to be illegal, unjustified and an unfair trade practice. According to the informant, a pre-payment penalty increases the cost of borrowers and results in increased market power to the banks/financial institutions, which in-turn restricts competitors and new entrants who might be offering better terms or interest rates.

In response to this the Commission noted that the market for loan against property is competitive and fragmented with the presence

of several players including prominent players, the Commission therefore does not see any appreciable adverse effect on competition caused by the pre-payment penalty clause.

In addition to the same there was some mention of the imposition of pre-payment penalty clause amounting to aftermarket abuse and abuse of dominance position under Sec. 4. The Commission defines an aftermarket as a "special antitrust market consisting of unique replacement parts, post warranty service or other consumables specific to some primary product. The term therefore refers to markets for complementary goods and services such as maintenance, upgrades and replacement parts that may be needed after the consumer has purchased a durable good. The Commission holds that there is no aftermarket in the present case since none of the factors mentioned above are present in the current scenario.

Further even under Sec 4, the Commission defines the relevant market as provision of loan against property in India and holds that given the presence of a large number of banks, non-banking financial institutions and finance companies, it cannot be said that the OP enjoys any market power thus failing to attract the requisite of dominant position for a Sec. 4 violation.

In conclusion, the Commission ordered closure of the case under Sec. 26(2) of the Act.

8. SaurabhTripathy v. Great Eastern Energy Corporation Ltd.(MANU/CO/0013/2017)

Decision Date: 16.02.2017

Key words: *Locus standi; abuse of dominance*

Issue: Whether there is abuse of dominant position through unconscionable terms and conditions in sale and purchase agreements?

Rule: Sec. 4(2)(a)(i) read with Sec. 4(1) of the Competition Act, 2002

The Opposite Party is engaged in exploration, development, distribution and sale of Coal Bed Methane (CBM) in India. It is alleged by the informant (an employee of SRMB Srijan Ltd.) that OP is in a dominant position in the market of supply and distribution of CBM gas in Asansol-Raniganj- Durgapur belt and further that the OP is abusing this dominant position by putting unconscionable terms and conditions in its Gas Sale and Purchase Agreement (GSPA) executed with buyers such as SRMB Srijan Ltd. Further the OP is also allegedly charging unfair and discriminatory prices.

According to the investigation conducted by the DG pursuant to Sec. 26(1), it was submitted that certain clauses appeared to be unfair/ discriminatory and one-sided in favour of the OP in contravention of sec. 4(2)(a)(i) read with Sec. 4(1) of the Act. These include power of OP to unilaterally revise the terms and conditions, lack of liability on OP, powering OP to terminate GSPA etc.

However the DG found no evidence regarding the allegation of discriminatory pricing.

Before discussing the merits of the case, the Commission notes that the DG in investigating the case has considered SRMB and the informant as interchangeable and relied on the Informant for information regarding proceedings between SRMB and the OP, when the same would not have had the complete information. Further in the present case SRMB has not authorized the informant to file the present case nor have they raised any complaint against the OP subsequently.

The Commission further discusses the issue of locus of the informant to file the present case. In this case, the informant is not alleging the OP generally imposes abusive terms in the market, instead has raised a purely private grievance qua a single private party which he has no locus to raise. Further the Commission quotes COMPAT in the case of *Hiranandani Hospital* v. *CCI*, where it is noted that "the Commission is expected to act with caution where the Informant is a busy bosy, who may be espousing the cause of someone else with ulterior motive." However given the advanced stage of the proceedings, the Commission decided to consider the merits of the case.

The relevant market in the present case was delineated as market for supply of CBM to industrial customers in Asansol-Raniganj-Durgapur Area. According to the DGs report, the OP enjoyed a dominant position in the same. However, this was challenged by the OP who argued that the DG failed to satisfy the definition of 'dominance' under the Act since the OP is not able to act independently of its customers as evidenced by the fact that even smaller customers are able to negotiate terms and conditions with the OP.

However the Commission, agreed with the DG's report holding that given the high market share of the OP (almost monopoly position) and other factors such as size and resources of the enterprise, economic power of the enterprise etc, the OP enjoyed a dominant position in the relevant market.

Finally the analysis turned towards whether the identified clauses in the agreement amounted to abuse of dominant position.

However, the Commission disagreed with the DG on the fact that the clauses in the agreement were abusive. For instance, with respect to power of OP to facilitate unilateral change in the contract, the Commission held that the DG had misread the contract since there was another specific clause, which clarified that both parties had to mutually agree to any amendment in the clause. In another instance, the DG found the clause to be discriminatory for it gave the OP the exclusive right to appoint a third party inspector in case of suspected tampering. However the commission disagreed with this analysis for the OP could only appoint a third party inspector accredited by the relevant body. Thus ensuring that the inspector would be independent and competent.

Similarly, after perusing the various clauses the Commission to the conclusion that there was no unfairness and thus no violation under Sec. 4 of the Act.

9. **Mr. Ashish Dandona v.Dhanklaxmi Bank Limited(2017 SCC OnLine CCI 18)**

Decision Date: 21.02.2017

Key Words: *pre-payment charges; abuse of dominance*

Issue: Whether imposition of pre-payment charges amount to abuse of dominant position?

Rule: Sec. 4 of the Competition Act, 2002

In the present case the Informant has alleged abuse of dominance position under Sec. 4 against the OP for imposing pre-payment charges and non-reduction of interest rate due to the decrease in the repo rate. The Commission defines the relevant market as the market for provision of loan against property in Delhi. Further given the small presence of the OP and the presence of various competitors, the Commission is of the opinion that OP does not enjoy a dominant position and thus holds that no case can be made out under Sec. 4 against the OP. In conclusion the case is closed under Sec. 26(2) of the Act.

10. **Shree Gajanana Motor Transport Company Limited v. Karnataka State Road Transport Corporation and Ors. (MANU/CO/0016/2017)**

Decision Date: 27.02.2017

Key Words: *abuse of dominance*

Issue: Whether the actions of state operated transport services amounts to abuse of dominant position.

Rule: Sec. 4(2)(a)(i) and Sec. 4(2)(b)(i) of the Competition Act 2002

In the present case the Informant has alleged abuse of dominant position under Sec. 4 against the OP's. OP1 and OP2 are State run – Road Transport Corporations. As per the existing scheme, the various routes in Karnataka are divided into monopoly and non-monopoly routs. In the former only the buses of the OP's can operate while in the latter even private operators like the informant are able to operate. The informant averred that the OP's by using a flexi rate scheme are charging lesser on the non-monopoly routes to undercut competition and are compensating by charging higher on the monopoly routes. Furthermore given that the Government has increased road taxes for private operators and have exempted the STC's of the same, the STC's are being given an unfair advantage. Thus it is alleged that there is a violation of Sec. 4(2)(a)(i) and Sec. 4(2)(b)(i) of the Act.

In light of the same the Commission delineated the relevant market as the market for provision of passenger road transportation services in Karnataka. At this point the Commission noted that the allegation of abuse of dominance are directed against both the OP's and given that the Act does not provide for collective dominance, the Commission decided to assess dominance of each of the OP's independently. Based on this the Commission came to the conclusion that OP-1 enjoyed a dominant position however OP-2 was not dominant.

However when it came deciding whether the flexi-rate scheme of OP-1 was abusive, the commission noted that the notification of the Government only stipulates maximum rates for fares and freights and there is no bar on operators to charge fares less than maximum fares stipulated. Therefore, in view of this there is nothing unfair about charging fares through a flexi rate scheme. The Commission goes on to observe that the informant is required to match the price/rates charged by OP 1 and other players to operate in the market and given its small size it is not being able to do so. And given that the scale of operation and efficiency of OP 1 is high and hence it is able to offer its services for a less fare, the same cannot be considered as an anti-thesis of competition. Thus the commission held that there is not violation of Sec. 4 since it is not based on sound business/economic rationale.

Further it also held that there is noting unfair about giving tax exemptions to OP 1 since the Government is duty bound to provide transportation to the people of the state.

In conclusion the Commission closed the case under Sec. 26(2) of the Act. However on a parting note, the Commission expressed its view that it would be appropriate in the larger public interest that the Government of Karnataka takes a fresh view regarding the aforesaid schemes/ decisions after inviting suggestions from various stakeholders.

11. **Shri RajatVerma v. Public Works (B&R) Department Government of Haryana and Ors (2017 SCC OnLine CCI 19)**

Decision Date: 27.02.2017

Key Words: *enterprise; abuse of dominance*

Issue: Whether a contractor abused its dominant position by incorporating unfair clauses in the bid document?

Rule: Sec. 2(h) and (u) and Sec. 4 of the Competition Act, 2002

In the present case, the Informant alleged that OP-1 enjoys a dominant position in execution of works of roads, buildings, bridges and civil construction works in the State of Haryana and it abused its dominant position by incorporating unfair clauses in the bid document.

This case had earlier been closed under sec. 26(2) for the Commission held that OP-1 was not covered under the definition of 'enterprise' within the meaning of the Act because it is not directly engaged in any economic and commercial activities.

However an appeal with filed with COMPAT which allowed the appeal holding that OP-1 is an enterprise. The COMPAT held that it is clear that the legislature has designedly included Government departments in relation to any activity relating to storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. Further that there is noting in Sec. 2(h) and (u) from which it can be inferred that the definitions of enterprise and service are confined to any particular economic or commercial activity. The only exception to the definition of the term enterprise relates to those which are relatable to the sovereign functions of the Government. In view of this OP-1 was held to be an enterprise and the matter was remitted back to the Commission.

Subsequently the commission defined the relevant market as the market for procurement for construction and repair of roads and bridges through tendering in the

State of Haryana. Given the OP-1 is the only procurer of such services in the State of Haryana it is obvious that it is dominant in the relevant market.

The Commission then engages in a prima facie analysis of the clauses and reaches the conclusion that the allegation of the informant that certain clauses of the agreement are unfair, discriminatory and violative of Sec 4 does have some merit. It observes that many of the clauses pointed out by the informant prima facie appear to tilt in favour of the OP's and prejudicial to the contractors. The commission then notes that the OP's have tried to justify the clauses relying on efficiency and other arguments; however the defence taken cannot be ascertained until the matter is investigated.

In conclusion, the Commission directs the DG under Sec. 26(1) to investigate the matter within a period of 60 days.

12. Rajeev Nohwar v. Lodha Group (2017CompLR429(CCI))

Decision Date: 08.03.2017

Key Words: *abuse of dominance*

Issue: Whether the Agreement to Sell had provisions that amounted to abuse of dominant position?

Rule: Sec. 2(s) and (t) and Sec. 4 of the Competition Act, 2002

In the present case the Informant alleged that the OP, developers of residential housing, had contravened the provisions of Sec. 4 of the Act on grounds that the Agreement to Sell (Agreement) had clauses that were one-sided, abusive, illegal and unreasonable. This included clauses, which waived the rights of buyers over amenities, which were part of the sales brochures, which are also in violation the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1973 (MOF Act). Further there were no clauses for penalty against OP in case of delay of transfer, and the refund clause in the Agreement was stringent and unreasonable. The informant alleged that given the dominant position of the OP, this amounted to abuse of dominant position.

The Commission under Sec. 2(t) considered the relevant product market to be the "market for the provision of services relating to development and sale of residential flats" distinguishing the same from a mere plot of land in light of the additional amenities available. Further under Sec. 2(s) the relevant geographical area is said to be Pune City, despite the same being only on the outskirts of Pune. Since the market of Pune in

development and sale of residential flats is extremely competitive with numerous players, OP was not held to have a dominant position. Thus the commission directed the closure of the case under Sec. 26(2) of the Act.

13. **South Gujarat Warp Knitters Association v. Prafful Overseas Private Limited and Ors (2017 SCC OnLine CCI 15)**

Decision Date: 09.03.2017

Key Words: *cartel; abuse of dominance*

Issue: Whether there was a cartel in existence and whether there was abuse of dominance?

Rule: Sec. 3 and 4 of the Competition Act, 2002

In the present case the Informant alleged that OP-1 and OP-2 have formed a cartel with respect to Nylon Fully Drawn Yarn (relevant product), a raw material for knitting. The informant supplied the CCI with information relating to sale prices of OP's and international prices. They argued that 1) the OP's were the only producers of this product, 2) that sale prices of Ops were not moving in tandem with international prices but were higher than that and 3) sale prices of the product were not moving in tandem with prices of Nylon Chips which is the raw material for the product.

First, the Commission rejected the allegations of cartel under Sec. 3, of the Act. It held that there are substitutes of the relevant product in the market thus the OP's are not the only producers. It held that comparison with international prices does not give any clear indication of a cartel when there is an anti-dumping duty on the relevant product. Furthermore it held that sale prices of the final product does not solely depend on the price of the raw material which is thus no indication for cartel behavior and finally that the sale prices of the OPs were also not following a pattern. For these reasons the CCI rejected the allegations of cartel formation against the OP's.

Further the informant also alleged at the OP-1 had a dominant position in the relevant market, which it abused by charging high prices. However the commission held that since there are numerous other players in the relevant market, OP-1 does not enjoy a dominant position thus no case under Sec. 4 can be made out.

In conclusion, the commission ordered the closure of the case under Sec. 26(2) of the Act.

14. **JusticketsPvt. Ltd. v. Big Tree Entertainment Pvt. Ltd. and Ors (2017 SCC OnLine CCI 14)**

Decision Date: 10.03.2017

Key Word: *anti-competitive agreement; abuse of dominance*

Issue: Whether there was abuse of dominance in the online movie ticketing movie portal?

Rule: Sec. 3 and Sec. 4 of the Competition Act, 2002

In the present case the Informant alleged that OP-1 and OP-2 were acting in contravention to Sec. 3 and Sec. 4 of the Act. It is alleged that OP-1 is dominant in the market for online movie ticketing portals in India and OP-2 is dominant in the market for box office ticketing solutions in India (through a software known as Vista). Furthermore since OP-1 is the exclusive distributor for Vista in India, OP-1 is also dominant in the market for box office ticketing solutions in India. It is alleged that OP-1 is abusing its dominant position by denying other online movie ticketing portals such as the informant from getting access to the Vista software by creating barriers. Further OP-2's policy of not grating Vista to other online movie ticketing portals is also challenged. The informant therefore alleges violations of Sec. 4(2)(c) and Sec, 4(2)(e) of the Act. Further the conduct of OP-1 and OP-2 in not providing Vista to informant or providing the same on a case-to-case basis amounts to refusal to deal and is in violation of Sec. 3(4)(d) of the Act.

The commission notes that the primary issue for the informant arises from the difficulty with which the informant is getting access to Vista for its operations. It has been argued by the informant that access is granted only after much delay and high handedness on the part of OP-1. However the commission also notes that as per the date of the decision, access to vista has been granted to the informant and in some cases the delay in doing so is attributable to the informants themselves. In the present case the Commission also accepted the rationale for delay by OP-1 being that, they need to enter into a non-disclosure agreement before providing access to Vista which is time consuming and causes delay.

Thus the Commission is of the view that there was no abuse by the OP's and in light of the same no contravention of either Sec. 3 or Sec. 4. In conclusion, the commission ordered the closure of the case under Sec. 26(2) of the Act.

15. **Mr. Sunil Kumar Jain v. Jaguar Land Rover Automotive PLC and Ors (2017 SCC OnLine CCI 16)**

Decision Date: 14.03.2017

Key Words: *abuse of dominance, consumer dispute*

Issue: Whether an exclusive repairer for certain cars was abusing its dominant position?

Rule: Sec. 4 of the Competition Act, 2002

In the present case the Informant has alleged that OP-2 who is the exclusive repairer for cars manufactured by OP-1 is abusing its dominant position by charging exorbitant prices for repair, in violation of Sec 4, of the Act.

The Commission is of the view that the present case the dispute between the informants and OP's is dealing with deficiency in service and is thus a consumer complaint and does not raise competition law issues. The commission thus held that the same dispute falls outside the purview of competition law and accordingly ordered the closure of the case under Sec. 26(2) of the Act.

16. **Biswanath Prasad Singh v. Director General of Health Services (DGHS), Ministry of Health and Family Welfare and Ors. (MANU/CO/0027/2017)**

Decision Date: 14.03.2017

Key Words: *abuse of dominance; anti-competitive agreement*

Issue: Whether differential rate of reimbursement based on accreditation amounts to an anti competitive agreement and whether there is an abuse of dominant position?

Rule: Sec. 3(1) and (3) and Sec. 4 of the Competition Act, 2002

In the present case the Informant, filed a case against OP-1 (DG of Health services) OP-2, OP-3 and OP-4 (National Accreditation Board for Hospitals and Healthcare Providers) alleging contravention of Sec. 3, of the Act. As per the allegation OP-1 has prescribed differential rate of reimbursement to private hospitals under a government scheme for medical services for army men, based on their accreditation or non-accreditation by OP-4, which is unfair and done in collusion with other OP's to give benefit to a select few hospitals.

Further since the COMPAT held OP-1 and OP-2 to be an enterprise within the meaning

of the Act, the informant also alleges abuse of dominant position under Sec. 4.

The commission defines the relevant market as the "market for provision of medical and healthcare services, by private hospitals, in Delhi-NCR". The commission then holds that since the number of the health scheme is miniscule compared to the population of Delhi there is no dominant position of OP-1 as a procurer of health services and thus no violation under Sec 4 is possible.

Further the issue of differential rates of reimbursement is held to be justified by the CCI on the grounds that NABH is an objective body, which certifies that the accredited hospitals have a higher standard of quality. Furthermore the accreditation did not mean that non-accredited hospitals would not be part of the health scheme but merely that they would get a lower reimbursement. Thus the same was not held to be anti competitive.

Further the commission also rejects the allegation of collusion under Sec. 3(3), of the Act on the ground that under the Act the OP's must be engaged in similar services for the same to be held as collusion. Since in the present case OP-1 and OP-2 are procurers of health services and OP-3 and OP-4 are certifying bodies, they are not engaged in similar services either horizontally or vertically thus no collusion under Sec. 3(3) is possible.

In conclusion, the Commission directed the closure of the case under Sec. 26(2).

17. Prem Prakash v. The Principal Secretary, Madhya Pradesh Public Works Department and Ors(MANU/CO/0025/2017)

Decision Date: 17.03.2017

Key Words: *enterprise; abuse of dominance*

Issue: Whether requiring accreditation is imposing and arbitrary standard?

Rule: Sec. 3 and Sec. 4(2)(a)(1) of the Competition Act, 2002

In the present case the Informant alleged that the OP-1 and OP-2 (Haryana Public Works Dept. and Central Public Works Dept.) were imposing an unfair and arbitrary standard on the informant's laboratory by requiring accreditation from National Accreditation Board for Testing and Calibration Laboratories (NABL). According to the informant, his laboratory is accredited to meet international standards and requiring accreditation from a specific body is unfair and arbitrary and in violation of Sec. 3 and Sec. 4(2)(a)(1).

The Commission had earlier rejected the allegation of abuse of dominant position on grounds that OP-1 and 2 are not enterprises within the meaning of the Act. However based on a contrary decision by the COMPAT, the commission reconsidered the same. In light of this the relevant product market was held as the "market for procurement of services for construction of roads and bridges etc, through tendering" and the relevant geographical markets as Haryana for OP-1 and India for OP-2. Given that the OP's have a monopoly in their relevant markets, they are held to have a dominant position.

Further the commission notes that the purpose of competition law is promotion and "protection of competitive process and ensuring a level-playing field for all market players that will help markets be competitive." Thus accordingly when a department of the Government requires certificates in their tender condition, the terms must not specify any single accrediting entity rather the terms should specify the standards. This would ensure that laboratories, which have been accredited as per the international standards, would not be discriminated based on the accreditation body that certifies them. Thus the Commission held the standard imposed by the OP's to be in violation of Sec. 4(2)(a)(i) of the Act.

However during the pendency of the complaint, certain modifications were made by the OP-2 as per which accreditation by NABL is no longer mandatory instead only compliance with international testing standards is required which is held by the CCI to be in compliance with principles of Competition Law.

The Commission also notes that giving preference to OP owned Laboratories is also not a violation of the Act. In light of these recent modifications the Commission directed the case to be closed under Sec. 26(2) of the Act.

18. Biocon Limited and Anr. v. F. Hoffmann-La Roche AG and others (Case No 68 of 2016)

Decision date: 21.04.2017

Keywords: *abuse of dominant position; patents; biological drugs*

Issue: WhetherRoche Group is a dominant player in the Trastuzumab market and has indulged in a series of abusive practices?

Rule: Sec. 4 of the Competition Act, 2002

The case involves the alleged abuse of dominance by Roche Group. In 1990, Roche Group developed a monoclonal antibody, which is used in the targeted therapy to treat breast cancer that over expresses the HER-2 (human epidermal growth factor receptor 2) protein. The International Non-Proprietary Name for this monoclonal antibody is Trastuzumab. This drug was exclusively sold by a subsidiary of Roche Group under the brand name HERCEPTIN, outside the USA. HERCEPTIN was introduced in India in 2002. Roche Group also obtained registration of its trademark HERCEPTIN on 23rd April, 2005 (valid up to 09th

October, 2018) and patent for its API 'Trastuzumab' on 05th April, 2007, in India. Its patent was, however, challenged by Glenmark Pharmaceuticals Limited in a post-grant opposition on 12th December, 2008. Before a decision could be reached on this opposition, the Roche Group stopped paying annuities in May, 2013 and consequently, the patent lapsed.

The informant launched biosimilarTrastuzumab under the brand names, CANMAb and HERTRAZ, respectively. The price of the 440 mg vial of Trastuzumab manufactured by the Informants is claimed to be 25% lower than HERCLON and BICELTIS and 50% lower than HERCEPTIN. It is alleged by the Informants that Roche Group, with the intention of preventing the entry of new players in its market of 'Trastuzumab', started indulging into

frivolous litigations against the Informants and writing frivolous communications to various authorities thereby attempting to impede the entry of the Informants. The Informants have claimed that Roche Group is a dominant player in the Trastuzumab market and has indulged in a series of abusive practices to evade entry of the Informants' products and/or to hamper their growth.

The Commission considered the relevant market to be the market for a biological drug and its bio-similars. Hence, in the present case, the relevant market was held as the "*market for biological drugs based on Trastuzumab, including its biosimilars in India*."

With regards to dominance, the Commission decided that Roche Group enjoyed a market share of 70.9% in terms of value and 61% in terms of volume of sales, which didn't reduce substantially despite the introduction of cheaper bio-similar products; and a first-mover advantage in the industry. This shows a dependence of consumers on the product and an absence of countervailing market power. Further, the market was characterised by high

entry barriers. All these factors led the Commission to conclude *prima facie* that Roche Group enjoyed a dominant position in the relevant market.

The Commission then observed that Roche Group left no stone unturned to evade their entry and/or penetration in the relevant market. Various strategies were adopted by Roche Group to influence regulatory and other authorities in its favour. When they were not successful in evading entry, Roche Group approached doctors, hospitals, tender authorities, *etc.,* to influence their perception about the efficacy and safety of the Informants' products. Thus,

the practices adopted by Roche Group to create an impression about the propriety of the approvals granted, the safety and efficacy of biosimilars, the risk associated and the outcome of the on-going court proceedings in the medical fraternity, including doctors, hospitals, tender authorities, institutes *etc.*, when seen collectively, *prima facie* appear to be aimed at adversely affecting the penetration of biosimilars in the market.

Based on the foregoing analysis, the Commission was of the considered view that *prima facie,* the contravention with regard to Section 4(2)(c) of the Act was made out against Roche Group, which warranted detailed investigation into the matter. It thus directed the DG to carry out a detailed investigation into the matter, in terms of Section 26(1) of the Act, and submit a report to the Commission.

19. Vidharbha Industries Association v. MSEB Holding Company Ltd. and others (Case No 12 of 2014)

Decision date: 21.04.2017

Keywords: *Abuse of dominant position; power supply; electricity distribution; electricity generation; electricity tariff*

Issue: Whether the Opposite parties abused their dominant position and denied market access to other efficient power generating companies in Maharashtra?

Rule: Sec. 4 of the Competition Act, 2002

The informants, Vidharbha Industries Association, alleged that MSEB Holding Company Limited ('OP 1'), Maharashtra State Power Generation Company ('OP 2'), Maharashtra State Transmission Company Limited ('OP 3') and Maharashtra State Electricity Distribution Company Limited ('OP 4') have abused their dominant position by deliberately generating and distributing electricity in an extremely inefficient manner and denying market access to other efficient

power generating companies for generating and distributing electricity in the State of Maharashtra. It was averred that irrespective of the price charged by OP 2, OP 4 purchases all the electricity/ power generated by OP 2. It was stated that OP 4 has arbitrarily entered into long-term Power Purchase Agreement (PPA) with OP 2 and the tariff of power purchased by OP 4 is decided by Maharashtra Electricity Regulatory Commission (MERC) as per PPA entered into between OP 2 and OP 4. As per the Informant, since the electricity tariff was decided by MERC as per the cost structure and revenue forecast submitted by OP 4, MERC is determining higher electricity tariff as compared to allother states in India because of the fact that OP 4 is procuring electricity from OP 2 at a higher rate. It was alleged that due to inefficiency and high price charged by OP 2, the cost structure of OP 4 remains very high. Resultantly, MERC is determining higher electricity tariff which is against the interest of the consumers.

The Commission defined the relevant market in the present matter to be the marketfor the '*provision of services for distribution of electricity in the State of Maharashtra except Mumbai*'. The Commission then observed that OP 4 has a market share of 100% in the relevant market. Therefore, it concluded that OP 4 enjoyed a position of strength unchallenged by any competitor in the relevant market which enables it to operate independently of competitive forces and affect its consumers and relevant market in its favour. Therefore, OP 4 had a dominant position.

However, the Commission concluded that OP 4 did not abuse its dominant position in the market since it did not deny market access to other power generating companies, it did not purchase power from OP 2 at a higher cost that resulted in unfair price on the consumers, and it did not deny open access to the consumers.

Based on the above analysis, the Commission concluded that OP 4 did not abuse its dominant market position in contravention of Section 4 of the Act.

20. <u>Bharti Airtel Limited v. Reliance Industries Limited & Other(Ref. Case Nos. 03/2017)</u>

Decision Date: 09.06.2017

Keywords: *Bid rigging in Public Procurement Process; collusion; single economic entity*

Issue: Whether there was collusive bidding in the public procurement process?

Rule:Sec. 3(4) or Sec. 4, Sec. 19 (1) (a)of Competition Act, 2002 concerning Anti-

Competitive Agreements and collusive bidding

Bharti Airtel Limited (hereinafter 'informant') had filed information in this case under section 19 (1) (a) of the Competition Act, 2002 (hereinafter 'Act') against Reliance Industries Limited (RIL) and Reliance JioInfocomm Limited (RJIL) alleging violation of section 3 and 4 of the Act. While RIL is a multi-sectoral conglomerate of high-value businesses, being the largest private company in India, the informant is a global telecommunication company that is the first operator to roll out 4G Long Term Evolution (LTE) wireless services in India.[1] The primary contention relates with RIL's huge investment of 96% in Infotel Broadband Services Private Limited (IBSL) after the latter had won the spectrum auction in 2300 MHz band category on pan India basis in 2010 and its subsequent renaming into RJIL. RIL holds 99.44 % stake in RJIL and has invested Rs. 1,60,000 crore in RJIL, enabling it to roll out 4G services in all 22 service areas in India after setting up necessary infrastructure.[2]

This financial ability had enabled RJIL to offer free services since its inception and continue to do so after repeated extensions from Telecom Regulatory Authority of India (TRAI) for over an year.[3]It had provided *Jio Welcome Offer* from 5 September 2016 and *Happy New Year Offer* continuing from 1st January 2017 till 31 March 2017 in addition to providing *Jioi Phone Offer* for one year for iPhone users. Informants claimed that this invokes charges of predatory pricing under Section 4(2)(a)(ii) of the Act. It characterizes *"providing 4G LTE services of telecommunication in India"*as the relevant market[4] and claims that RJIL is in the dominant position in the same on account of being the top carrier in India by mobile user base which was 72.4 million as on 31st December 2016.[5] It claims that this violates the regulatory requirement of 'calling party pays'.[6]

The counsel for informants placed importance on precedent of the Commission and the Competition Appellate Tribunal in the case filed by MCX Stock Exchange Limited alleging predatory pricing by National Stock Exchange of India Limited (Case No. 13/2009), judgment of the High Court of Ontario, Canada in Regina v. Hoffmann-La Roche Limited (30 O.R. (2d) 461), decision of the European Court of Justice in the matter of

[1]Para 4 and 5.
[2] Para 5.
[3] Para 6.3.
[4] Para 6.1.
[5] Para 6.2.
[6] Para 6.4.

France Telecom SA v. Commission of the European Communities (Case C- 202/07 P).[7]

The counsel for RIL stated that the Informant's submissions regarding leverage of dominant positon and anti- competitive agreement were implausible since mere investment into a telecom start-up could neither be construed as abuse of dominant position nor an anti-competitive agreement. [8]

It submitted that the unique characteristics of 4G LTE technology, advanced infrastructure requirement and the need for customers to have 4G compatible mobile instruments, distinguish it from 2G/3G services.[9] It relied on the decisions of the Commission in Shree Gajanana Motor Transport Company Limited v. Karnataka State Road Transport Corporation (Case No. 85 of 2016), Exclusive Motors Private Limited v. Automobili Lamborghini S. P. A. (Case No. 52 of 2012), Jeetender Gupta v. BMW India Limited (Case No. 104 of 2013) and Ravi Beriwala v. Lexus Motors Limited and Another (Case no. 79 of 2016).[10]

The CCIconcluded that these precedentswere specific to the facts and circumstances of the cases and were irrelevant to the wireless telecommunication services impugned herein.Since relevant market is an economic reality determined based on facts and circumstances of each case,it decided that the relevant product market in the present case is the market for 'provision of wireless telecommunication services to end users in each of the 22 circles in India'.[11]

The CCI concluded that the Informant's submissions were contradictory as it alleged RIL/RJIL of providing free services due to an unfair dominant position as well as an outcome of anti-competitive agreement between them. The CCI noted that no such agreement prohibited under Section 3 of the Act was discernible from the facts. It also found the conduct of RJIL not contravening the provisions of the Act prohibiting unfair pricing including predatory pricing. With regard to RIL, it held that it wasn't in contravention of Section 4(2)(e) of the Act just because it has made huge investments in RJIL especially when RIL itself was not engaged in business of providing telecom services. Such interpretation that makes RIL liable for mere investments, would deter entry and/or expansion and hinder the growth of markets. Thus, no prima facie case of contravention of Section 3(1) or Section

[7] Para 7.
[8] Para 10.
[9] Para 11.
[10] Para 11.
[11] Para 18.

4(2)(e) of the Act is made out against RIL/RJIL.[12]

21. Vinod Kumar Gupta v. Whatsapp Inc. (Case no. 99 of 2016)

Decision Date: 01.06.2017

Keywords: *abuse of dominant position; relevant market*

Issue: Whether Whatsapp Inc. has contravened the provisions of the Competition Act, 2002 through abuse of dominant position?

Rule: Sec. 4 ofthe Competition Act, 2002

Shri Vinod Kumar Gupta (hereinafter 'informant') approached CCI under Section 19(1)(a) of the Competition Act, 2002 (hereinafter 'Act') against Whatsapp Inc. (WI) alleging violation of section 4 of the Act. The informant, as a concerned crusader for transparent society filed this complaint against WI which is a cross-platform communication application for messaging services. The primary contention was the predatory pricing by abuse of dominant position by WI which was acquired by Facebook Inc.(Facebook) on 19th February 2014.[13] Under the privacy policy modification by WI, users have been forced to share account details with Facebook.[14]The Informant has submitted that the relevant product market in the instant matter would be 'free messaging app available for various smartphones' and the relevant geographical market would be 'Global' as WI has 55.5 % global market share and is installed in 95% smartphones in India.

As per the Informant, by removing subscription fees, the OP has enlarged its consumer base substantially from 450 million to over 1 billion and it is providing the services by sourcing funds from its parent company *i.e.* 'Facebook'. Thus, the Informant has alleged that by indulging in the practice of predatory pricing, the OP is abusing its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act. [15] prohibit the OP from sharing users' data with 'Facebook' and direct the OP not to discontinue its services to those users who have not agreed to 'opt in' the change in its privacy policy.[16]

The CCI, interpreting Section 2(r) of the Act stated that, 'relevant market' means the market which may be determined by CCI with reference to the 'relevant product market' or the 'relevant geographic market' or both. In

[12] Para 23.
[13] Para 3.
[14] *Id.*
[15] Para 5.
[16] Para 7.

regard to the relevant product market, itheld that 'WhatsApp', is a platform for instantaneous communication which cannot be compared with the traditional electronic communication services due difference in service, suitability of devices, pricing etc.[17]With regard to the relevant geographic market, the CCI held that since the functionality provided by consumer communication apps through smartphones is inherently cross-border, the geographic scope for either demand or supply of consumer communication apps is not limited to any particular area and consumer communication functions are uniformacross regions, countries, platforms or operating system. As the allegations of the Informant pertain to the alleged anti-competitive conduct of 'Whatsapp' within India and the conditions of competition in the market is homogeneous throughout India, the CCI is decided that the relevant geographic market be '*India*'.[18]Hence, the relevant market in this case was considered as '*the market for instant messaging services using consumer communication apps through smartphones in India*'.

The informant also alleged that Whatsapp's act was in contravention of the IT Act, 2000 and the commission analysed the verdict of Hon'ble High Court of Delhi in W.P. (C) 7663/2016 in the matter of *Karmanya Singh Sareen and Others Vs. Union of India and Others* based on the same facts. The commission held that since Whatsapp had filed an appeal before the Supreme Court in this case and that the ruling on privacy rights being affected was not made due to lack of constitutional determination of the right by Supreme Court at the time of order, the allegations of breach of the IT Act, 2000 do not fall within the purview of examination under the provisions of the Act.[19]

The CCI also held that the scrapping of previously charged subscription fees by WI may be due to the presence of many other service providers who are offering the services for free of cost. CCI gave credence to WI's submission that its revenue model is like other players in the industry/ business and it is evaluating the various modes to earn revenue while providing value to users.[20] Hence, the CCI held WI prima facie not liable for predatory pricing. With regard to dominant position, CCI held that the expansion of *Hike Messenger* to nearly 100 million user base within three years of launch into the market reflects that there are no significant barriers to entry and that its consumers were price

[17] Para 11.
[18] Para 12.
[19] Para 17.
[20] Para 18.

sensitive. Hence, the CCI held that even though 'WhatsApp' appears to be dominant in the relevant market, the allegations of predatory pricing could not be substantiated and WI had not contravened any of the provisions of Section 4 of the Act.[21]

22. Kush Kalra v.Reserve Bank of India and Ors. (Case No. 23 of 2017)

Decision Date: 23.08.2017

Keywords: *cartel; anti-competitive agreement; bailment; collusion*

Issue: Whether the banks have cartelized to limit and control the safe deposit locker services, thereby acting in contravention of Section 3 of the Competition Act?

Rule: Sec. 3 the Competition Act, 2002; Indian Contract Act, 1872

Mr. Kush Kalra (Informant), while applying for bank locker services came to know that the banks charge rent for the service. He also came to know that the banks get the consumers to sign an agreement absolving the banks of liability in case of loss or damage to the consumers' property. The informant claims that banks in India have no mechanism of compensation in such cases, and have in fact cartelized. It is also alleged that the cartelization is emanating from disregard towards the bailment principle as in the Indian Contract Act, by the banks. This allegation is made with regard to the RBI guidelines (vide its Circular DBOD No. Leg. BC. 78/09.07.2002/2006-07) that requires banks to act in accordance with the Indian Contract Act and certain other legislations while providing the safety locker services.

The informant contended that the agreement that the banks make consumers sign which absolves the banks of any liability in case of damage or loss of consumers' property in bank lockers is anti-competitive. It is also admitted by the informant that there is no documentary evidence of cartelization amongst the opposite parties. The allegation however, is that the banks have formed an association so as to limit the improvement of services, which is directly affecting competition in the market and interests of consumers. It is for these reasons that the informant believes that the banks have been acting in contravention to Section 3 of the Competition Act.In support of the allegations made by him, the informant has enclosed various replies/responses obtained by him under the RTI Act to suggest that the Opposite Parties are not undertaking any

[21] Para 19.

responsibility for loss of valuables kept in their safety lockers.

The Commission has prescribed that contravention of Section 3(3) of the Act by competitors requires establishment of the following elements:

(i) the competitors have entered into an agreement as defined under Section 2(b) of the Act inclusively as any arrangement or understanding or action in concert, whether or not, such arrangement, understanding or action is formal or in writing; or whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings; and

(ii) the object of such agreement is covered under Section 3(3) of the Act i.e.,

(a) to directly or indirectly determine purchase or sale prices;

(b) to limit or control the production, supply, markets, technical development, investment or provision of services;

(c) to share the market or source of production or provision of services by way of allocation of geographical area of market, ortype of goods or services, or number of customers in the market or any other similar way; or (d) to directly or indirectly result in bid rigging or collusive bidding.

It was held by the commission that there was no such material to suggest any understanding/consensus/arrangement amongst the Opposite Parties to have pursued any of the aforesaid prohibited activities. The RTI replies of some of the Opposite Parties suggest that they are not completely absolved for loss of valuables kept in their locker. For instance, the reply dated 7th October, 2015 of Bank of Baroda inter alia states that in case of loss suffered by the lessee due to theft or burglary etc. of safe custody locker, the liability of the bank will depend upon the facts and circumstances surrounding the burglary. There were similarly other banks whose replies did not indicate an absolute refusal to compensate in case of damage or loss to the consumers' property lying in their lockers.

The commission also noted thatmere common practice by all the market players emanating from their independent decision making at most indicates an industry practice and not collusion amongst them.

The commission opined that there was no

prima facie case of contravention of the provisions of the Act. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

23. **Public Works Department v. Harman International (India) Pvt. Ltd.(Ref. Case No. 01of 2017)**

Decision Date: 06.09.2017

Keywords: *Anti-Competitive agreement; undue advantage; bidding*

Issue: Whether the OP gave an undue advantage to one of the bidders, thus making the bidding process anti-competitive?

Rule: Sec. 3 of the Competition Act, 2002 concerning Anti-Competitive Agreements

The Public Works Department, Government of NationalCapital Territory, Delhi, (Informant)invited bids from the manufacturers/authorised distributors of M/s. Harman International (India) Pvt. Ltd. (OP) for the operation and maintenance of a highlysophisticated sound system manufactured by the OP was installed at Thyagraj Sports Complex, New Delhi by Hi-Tech Audio Systems Pvt. Ltd. (HASPL) at the cost ofaround Rs.1.90 crores. The allegations were against the OP for favouring one of firms and thereby acting in contravention of the Section 3 of the Competition Act (The Act).

Five tenders were floated by the informant in total. The first tender floated saw bids from four firms, namely, M/s PragatiEngineers, Pan Intellecom Ltd., Hi-tech Audio Systems Pvt. Ltd. and M/s AmbicaElectricals. The tender was cancelled on the ground that all the four bidders were not theOriginal Equipment Manufacturers (OEMs) or authorised distributors of the OP, and so weren't qualified to bid.The second tender saw bids only from two firms, namely, HASPL and M/s Pragati Engineers. Considering that HASPL was eligible to bid, the price bid of HASPL was opened. However, the Superintending Engineer cancelled this bid on the pretext that the rate quoted was too high.

The third tender saw participation from the same two firms, along with authorisation letters issued by the OP in favour of the bidding firms. M/s Pragati Engineers was found to be the lowest bidder. However, according to a letter from the OP addressed to the Superintending Engineer, HASPL was the only authorised agent of the OP. The Executive Engineer, on receiving the information from the Superintending Engineer, then asked the OP for clarification regarding its contradictory stance on issuing

the authorisation letters and then saying that only HASPL was authorised. The OP stated that the authorisation letters were issued in good faith provided that these firms adheredtocertain conditions such as involvement in installation/commissioning of projects in Stadiums, Airports and large Public Facilities in India and having trained and certified personnel. It was further stated by the OP that only HASPL met the aforesaid conditions, and therefore the authorisation to M/s Pragati Engineers should be treated as null and void. As a result, the third tender too was cancelled.

Subsequently, the fourth tender was floated, which was cancelled by the Superintending Engineer

citing the reason that the rate quoted by Hi-tech Audio Systems Pvt. Ltd. wasmore than the rate quoted by M/s Pragati Engineers in response to the third tender. Resultantly, a fifth tender had to be floated. The Executive Engineer then asked the OP for a clarification regarding the withdrawal of authorisation letters. The OP stated that despiterepeated calls and reminders, except Hi-tech Audio Systems Pvt. Ltd., they allfailed to get their personnel/engineers certified from the OP.

Based on the submissions, the Informant has alleged that, by withdrawingthe authorisation letters issued to other firms to participate in the tenders floatedby the Informant and giving undue advantage to Hi-tech Audio Systems Pvt.Ltd.,the OP has contravened the provisions of Section 3 of the Act.

The commission observed that the withdrawal of authorisation letters wasn't made in contravention of Section 3 of the Act. These withdrawals were rather made since only one firm i.e. HASPL sent its engineers and professionals for training and theother firms, despite repeated calls and reminders, failed to get their personnelcertified from the OP. The commission observed that the withdrawals were made in the interest of public safety and to maintain the OP's goodwill. Thus, the Commission is of the view that the aforesaid conduct of the OP cannotbe said to be anti-competitive in terms of any of the provisions of the Act.

Therefore, the Commission maintained that there no prima facie case ofcontravention of the provisions of Section 3 of the Act. Accordingly, the matter was closed under the provisions ofSection 26(2) of the Act.

24. Delhi Jal Board v. Grasim Industries Ltd. & others (Ref. Case Nos. 03 & 04/2013)

Decision Date: 05.10.2017

Keywords: *Bid rigging in Public Procurement Process; collusion; single economic entity*

Issue: Whether there was collusive bidding in the public procurement process?

Rule: Sec. 3(3)(d) and Sec. 3(1) of the Competition Act, 2002 concerning Anti-Competitive Agreements and collusive bidding

Delhi Jal Board (DJB), a statutory body, issued tenders for procuring Poly Aluminium Chloride (PAL) and Liquid Chlorine (LC), utilized for purification of water. DJB alleged bid rigging for several years by bidders. The allegations were against Grasim Industries Ltd. (GIL), Aditya Birla Chemicals (India) Ltd. (ABCIL) and Gujarat Alkalis and Chemicals Limited (GACL) among other companies. The investigation by the Director General (DG) found the above named companies to be guilty of collusive bidding.

In the matter regarding PAL, ABCIL and GIL made an interesting contention on the basis 'single economic entity' principle. They argued that both the entities constituted a single economic entity as they belonged to the same group company, Aditya Birla Group with same management personnel. Consequently, it was argued that the agreements between these entities to be *internal agreements* and emphasized the impossibility of collusion within the single economic entity.[22] However, the Commission rejected this argument and pointed out the inapplicability of concept of 'group' to Sec. 3 of the Competition Act, 2002.[23] The Commission noted that both ABCIL and GIL were acting as two separate entities throughout the bidding process. This is supported by the fact that the entities bid separately and acted as competitors in the process.[24]

The Commission scrutinized the report by the DG and analysed economic evidence before concluding on the issue. Based on the investigation by the DG, price parallelism was observed in the bids despite differences in location of the entities. The bids were simultaneously increasing and converging in a narrow range.[25] The freight rates per kilometer, which should decrease with increase in distance, was in fact highest for the bidder with farthest location and thereby contrary to normal market conditions.[26] Apart from all these factors which affected the cost of production substantially, the bidders

[22] Para 114-116.
[23] Paras 126, 129.
[24] Paras 124, 125.
[25] Para 147.
[26] Paras 147-152.

charged DJB differently and higher than other customers.[27]

Cumulatively, these factors indicated collusion and the actions of the bidders to be in concerted manner. Commission held all the three entities guilty under Sec. 3(3)(d) read with Sec. 3(1) of the Act and imposed penalties in the form of fine in the matter of PAL.[28] With respect to the case on LC bidding, the Commission did not hold the bidders guilty due to lack of analysis to prove the liability from the available evidence.[29] This case clarifies the Indian jurisprudence on single economic entity in the context of anti-competitive agreements.

One of the members dissented in his opinion with respect to the alleged violations by GACL.[30] The dissent note mentions the lack of evidence to prove meeting of minds for collusion between GACL and other entities. "*However in the absence of direct evidence, which would be the case in most cartel matters, an agreement can still be inferred from parallel pricing, in conjunction with a number of other plus factors, but only in the absence of any plausible justification*".[31] PAC being a homogenous commodity tends to display similarity in prices among the bidders.[32] The dissent note also challenges the adverse inferences to GACL, based on transportation cost and various other factors influencing the cost of production.

25. Surinder Singh Barmi v. The Board of Control for Cricket in India (Case No. 61 of 2010)

Decision Date: 29.11.2017

Keywords: *abuse of dominant position; relevant market*

Issue: Whether BCCI has contravened the provisions of the Competition Act, 2002 through abuse of dominant position?

Rule: Sec. 4(2)(c) ofthe Competition Act, 2002

BCCI for the conduct of IPL series entered into IPL Media Rights agreement with broadcasters. This agreement stated that "*it [BCCI] shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league*".[33] This was alleged to be abuse of dominant position under Sec. 4(2)(c) of the Competition Act, 2002.

[27] Para 154.
[28] Para 164.
[29] Para 204.
[30] Pg 91.
[31] Pg 92.
[32] Pg 94-95.
[33] Para 1.

The primary contention of BCCI was that it is not an 'enterprise' within the meaning of Sec. 2(h) and thereby not governed by Sec.4. The basis for this was that BCCI it is not profit motivated and is not carrying on a business.[34] However, the Commission rejected this argument identifying BCCI to be a person that carries on economic activity and thereby falling under the definition of 'enterprise'.[35]

The DG in its investigation had identified the relevant market to be 'organization of professional domestic cricket leagues/events in India'.[36] BCCI tried to define this market as broad as possible by placing reliance on the substitutability of cricket with other entertainment programs.[37] This is to deny its dominant position in the broad relevant market. Commission without reliance on proper empirical data on consumer preferences, concluded that cricket is non-substitutable with other sports.[38] The Commission agreed with the DG's conclusion on relevant market citing the lack of evidence by BCCI to rebut this finding.[39]

In the pyramidal structure of sport governance, BCCI enjoy substantial regulatory powers[40] with economic power.[41] No relevance is to be placed on the source of this power, a mere existence is sufficient to prove the dominance.[42] Therefore, BCCI enjoyed such dominance in the relevant market. The Commission having regard to the high governing control of BCCI over the sport and various restrictive provisions in its rules, held the clause in the IPL Media Agreement to be one that "*forecloses the market for organization of professional domestic cricket leagues/events in India*".[43] Even though BCCI argued the protection of commercial interest of media company,[44] it failed to establish the protection of greater interest of cricket as a sport and the consumers. The Commission noted that the action was to further the monopoly that it enjoys.[45]

BCCI was guilty of abusing its dominant position in the market under Sec. 4(2)(c) read with Sec. 4(1), and imposed a penalty of Rs 52.24 Cr.[46] However, perusal through the order shows that BCCI failed to put up a strong case for itself and glaringly avoided the efficiency defence to support its claim.

[34] Para 16.
[35] Paras 16, 17.
[36] Para 19.
[37] Para 19.
[38] Para 20.
[39] Para 34.
[40] Para 37.
[41] Para 38.
[42] Para 39.
[43] Para 44.
[44] Para 48.
[45] Para 48.
[46] Para 58.

26. In re: Surendra Prasad v. Maharashtra State Power Generation Co (Case No 61 of 2013)

Decision Date: 10.01.2018

Keywords: *bid rigging*

Issue: Whether the OPs had engaged in the practice of bid rigging?

Rule: Sec. 3 of the Competition Act, 2002

MAHAGENCO has been incorporated by the Government of Maharashtra for generation of power in the State of Maharashtra. For thepurpose of running its 7 Thermal Power Stations ('TPSs'), it obtains raw coal from the subsidiaries of Coal India Limited ('CIL'). In order to procure quality coal and to makeproper supervision of the said supply through rail and other modes oftransportation, MAHAGENCO engages services of liasoning agents. The Informantavers that in March, 2005, MAHAGENCO had invited tenders for coal liasoning, to supervise the quality and quantity of coalsupplied to its TPSs from the subsidiaries of CIL. Four companiessubmitted their bids to the said tender process *i.e.* B.S.N. Joshi &SonsLtd. ('BSN') and OP-2 to OP-4. The rate quoted by BSN was the lowest.However, the said company was not awarded the work in spite of beingthe L1 bidder due to commencement of litigation before the Hon'bleBombay High Court. After prolonged litigation before the Nagpur Benchof the Hon'ble Bombay High Court in Writ Petition Nos. 2444 and 4514 of 2005 and thereafter before the Hon'ble Supreme Court in Civil AppealNo. 4613 of 2006, work order was finally issued to BSN in 2009.However, the same, after a while (9 months) was terminated. Thetermination of work order was stated to be pending arbitral proceedingsunder the Arbitration and Conciliation Act, 1996. Post-termination, thecontracts were awarded by MAHAGENCO to OP-2 to OP-4 on area-wisebasis and the Informant has alleged that since then, MAHAGENCOhas been awarding contracts regularly in favour of OP-2 to OP-4 only inthe geographically distributed market, which was actually agreed between them by means of entering into a cartel.

It is also stated by the Informant that OP-2 to OP-4 have violated clause (d) of Sub-Section (3) of Section 3 of the Act as they have engaged incollusive bidding for projects with MAHAGENCO thereby scuttling anycompetition between themselves and raising unnecessary dispute withregard to qualification of any other competitor in the

market.Lastly, it is submitted that there is also violation of clause (c) of Sub-Section (2) of Section 4 of the Act as together with MAHAGENCO,three of the leading players in the market of coal liaison/ quality/supervision work, have all colluded to deny access to other players in the market and thereby were preventing new players, if any, from participating in the bidding process. Hence, it was alleged that there wasa clear violation of Section 4 of the Act also by OP-1 alongwith OP-2 toOP-4.

It was pointed out that the canvas of Section 3(1) of the Act is pan-India and DG has not brought out any evidence of appreciable adverse effect on competition on such basis. Alternatively, it was argued that as per the decision of the Hon'ble Supreme Court of India in *CompetitionCommission of India* v. *Coordination Committee of Artists and Technicians of West Bengal Film and Television and others,* (2017) 5SCC 17 (para 36), the Commission is required to determine the relevantmarket in terms of the provisions of Section 2(r) of the Act.Next, the alleged distinct pattern of quoting by OP-2 to OP-4 is merely amathematical consequence of costing methods adopted by OP-2 to OP-4in determining the appropriate bid for the impugned tenders. As has beenstated on record by the representatives of OP-2 to OP-4, the costingmethod applied by them is largely based on internal assessment. Suchinternal assessment coupled with the largely similar nature of work andsimilar economic parameters applied by OP-2 to OP-4 leads to aninevitable conclusion that bids, especially amongst the market leadersengaged in coal liasoning in the State of Maharashtra, would fall within a narrow band, while falling well short of being identical.

The geographical spread of OP-2 to OP-4's respective primary areas of operation - which was alleged to be due to collusive activity - was in fact,a consequence of each party's well-established infrastructure. The centralfeature of establishing an infrastructure catering to the work of coalliasoning is that of developing human resources. This entails training ofall personnel, which is mandated by law *i.e.* the Mines VocationalTraining Rules, 1966. Employing personnel for the purpose of coalliasoning entails extensive technical training and supervisory staff, whichtakes time as well as financial expenditure to be incurred by the contractor. Furthermore, the finding of the DG that exchange of pre-bid queries and account statements between OP-2 to OP-4 bring out understandingbetween them was denied as being devoid of any basis. Queries sharedbetween the parties concerned were nothing but technical queries relatingto

penalty clauses, linkage materialisation, loading and unloadingrequirements *etc.* in order to have a better grasp of the requirements of the prospective tender in order to ensure that the parties met the technicaleligibility criteria with the underlying aim to simplify the entire process.

Further, since the parties concerned have been in the field of coal liasoning for a considerable period of time, they also have in theiremployment, technically trained staff in various niche areas of coalliasoning due to which it was a common practice amongst the partiesconcerned to take limited assistance of other parties in some areas oftheir job. Moreover, such assistance is also sought in emergentcircumstances such as non-availability of trained manpower. Accountstatements were shared simply for financial clarity amongst the parties

On perusal of their testimonies, the Commission is of the opinion thattheir depositions did not reveal any justification for quotation of suchidentical rates, OP-2 to OP-4 could not give any basis of working of thecosting carried out by them before quoting such identical rates. It isinstructing to note that such identity of rates was not found to be present when these OPs bid for selected TPSs and decided to become L1 for thechosen TPSs by allocating market amongst themselves.

From the perusal of the statements of the representatives of these OPs, it emerges that the justification given by them for quoting lower rates forthe selected TPSs and higher for the others where other two bidders hadquoted lower rates, was essentially that they had existing infrastructure atthose TPSs only. Thus, it is apparent that OP-2 to OP-4 did not competein securing business as would have been expected as prudent businessbehaviour in a competitive market. Rather, OP-2 to OP-4 seem to be comfortable in continuing with their existing businesses under anarrangement to divide the market.

In view of the above, the Commission is of the considered opinion thatOP-2 to OP-4 have not been able to give any valid justification forquoting lower rates for the chosen TPSs as compared to other TPSswhere the other two respective bidders had quoted higher rates and *viceversa*in a consistent manner over a long period of time. The Commission notes that such conduct of OP-2 to OP-4 goes a long way in pointing towards a concerted action in geographically sharing the markets.

Moreover, the DG also examined the representatives of OP-2 to OP-4 toseek their response in respect of such pattern followed by them inpurchasing tender documents whereupon it emerged that the representatives of these OPs have admitted that purchasing of tender documents on the same day in sequential serial number is possible due to the fact that this was done by their local officials. In fact, it also came tolight that sometimes, these OPs also gave their authorization to eachother for purchasing of tender documents. This clearly reflects aconcerted practice being resorted to by these OPs. The Commission alsofinds no merit in the plea of OP-4 that procurement of tender documentsis a mere secretarial task which involves no discussion or meeting ofminds. The Commission notes that such behaviour coupled with other factors in no uncertain terms reflects the close coordination amongstthese OPs when they were expected to compete to secure maximum business for their firms. The Commission notes that it is not even thecase of these OPs that the same was done to increase efficiency inproviding services.

Thus**,** the DG noted that the said fact of exchange of pre-bid queries between these OPs for Tender No. T-16/2013 of MAHAGENCO showedthat their agreement for geographically sharing the tenders and bid pricefixing was continuing in 2013 also.

The DG conducted an elaborate analysis of the books of OP-2 to OP-4during the period 2005-06 to 2014-15 and concluded that these OPs hadvarious transactions on their books which were done to share profits ormake payments for cover bids in respect of varioustenders. It is not necessary to reproduce in detail the analysis conducted by the DG as OP-2 to OP-4 have not seriously disputed the entries and the billsanalysed by the DG. Rather, the thrust of the response of these OPs inthis regard is that they were working as sub-contractors for each other incontracts, where a particular party did not have adequate infrastructural facilities. The Commission finds the response quite revealing. In fact, it has clearly been admitted that these OPs were working as sub-contractors for eachother and such clear admission seen in the light of several plus factorsjoined together by the DG unerringly indicates a deliberate andintentional arrangement agreed amongst these OPs. The Commissionalso finds it quite amazing that these OPs acted in a transparent manner in executing their understanding to such an extent that they even sharedtheir ledgers *inter se.*

Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that OP-2, OP-3 and OP-4, through their impugned conduct, have contravened the provisions ofSection 3(3)(c) and Section 3(3)(d) read with Section 3(1) of the Act, byacting in a collusive and concerted manner which has eliminated andlessened the competition besides manipulating the bidding process inrespect of the tenders floated by MAHAGENCO.

27. In re: Matrimony.com v. Google (Case Nos. 07 and 30 of 2012)

Decision Date: 31.01.2018

Keywords: *abuse of dominant position; search bias; digital market*

Issue: Whether Google's conduct in giving preferential treatment to its own vertical search engines amounts to abuse of dominant position?

Rule: Sec. 4 of the Competition Act, 2002

It was alleged that some of Google's search results features namely, Universal Results, OneBoxes and Commercial Units were being used by Google in a biased manner which amounted to abuse of dominant position. On February 2, 2018 the CCI gave its decision in favour of Google on all but one count. It found that Google had abused its dominant position under Sec 4(2)(a)(i) through prominent placement of its Flights Unit which displayed results only from Google Flights, Google's own vertical search engine.

For determination of "search bias" the CCI was required to examine three features of the Search Engine Results Page (SERP) namely, Universal Results, Oneboxes and Commercial Unit. Universal results are groups of search results for a specific category of information such as, news, images or local businesses. OneBoxes provide factual answers to users' queries such as mathematical questions, time, currency conversion, etc. Commercial Units are the boxes which Google sets apart in ad space and distinguishes from search results with a "sponsored" label. It was alleged that Google through the use of these three features had ranked results on parameters other than merits thereby misleading consumers about the relevance of these results and also favouring its own vertical search engines and increasing its ad revenue.

For Universal Results two things were alleged: *first*, that Universal Results as a category itself was prominently displayed irrespective of its overall relevance in the SERP and; *second*, that within the Universal Results it was only Google's own vertical search engines which

were used. Some examples of Universal Results would be segregated prominent display of videos or news on Google's general search engine where the content within the Universal Results category is displayed from YouTube and Google News respectively. In response to these Google argued that Universal Results were not always preferentially positioned but were subject to the same ranking mechanism as the other results. The positioning of Universal Results was dependant on its overall relevance and subject to the same parameters as the other results.

The CCI noted the arguments made by both sides and reached the following conclusion. The prominent positioning of Universal Results overall in the SERP is not biased but is in fact in consonance with Google's objective of displaying the most relevant results since Universal Results by identifying unique categories provide the most relevant results for the users.

It was alleged that Google selected the content to appear in the OneBoxes at random and therefore, these were not necessarily the most relevant results. The manner in which a website or a result is selected to be shown in the OneBox is completely unknown. Hence, Google's conduct of selecting any one website to appear in the OneBox amounts to an abuse of dominant position. In response Google argued that OneBoxes appear only in response to factual questions which have just one correct answer therefore the question of favouring a less relevant website does not arise. Moreover, for OneBoxes where there can be different possible answers *e.g.*, weather forecasts, Google selects the content providers based on evaluation of relevance, quality, and business terms. Google is not paid by content providers and has, thus, no incentive to select an inferior content provider. There exists no evidence that Google has ever actually selected an inferior provider for its OneBoxes. Google also argued that OneBoxes amounted to an improvement in the quality of the product and therefore, displaying them on the SERP was for the purpose of promoting competition by providing better quality services. The CCI held that there was no evidence to suggest that the most relevant result had not been chosen for the OneBoxes. Mere possibility that it may not select the most relevant provider, is not a substitute for actual evidence of bias.

Google has Commercial Unit for two things in India: products and flights. While Google reserves this ad space which can technically be accessed by anybody and is labelled with the word "Sponsored", it was alleged that it was

used by Google only to promote its own products or Google Flights vertical as the case may be. It was alleged that Google treats Commercial Units in a "preferential" manner because they are based on mechanisms that do not apply in an equivalent manner to links to non-Google websites. Google admitted that ranking in the Commercial Units was not based on the same considerations as the other parts of the SERP but this did not mislead consumers as Google specifically labelled these parts as "sponsored." This according to Google was sufficient notice to users that these results were not based on the same relevance standards but also depended on the bidding amount by the advertisers. In this context the CCI reached the following concluded that by using the Flights Commercial Unit to display results solely from Google Flights page, Google gives its own search vertical prominent placement and successfully drives traffic from its general search page to its own vertical and generates revenue. Furthermore, the Flights Commercial Unit contains a link to "Search Flights" and clinking on this link takes the user to Google flights and not any third party's search vertical for flights. Further the CCI held that Google Search being the primary gateway to search for flights forces third party travel verticals to bid for space on Flights Unit to increase visibility and traffic.

28. <u>Shri Satyendra Singh v. Ghaziabad Development Authority (Case No. 86 of 2016)</u>

Decision date: 28.02.2018

Keywords:*Jurisdiction; sovereign functions; abuse of dominant position*

Issue: Whether GDA by increasing the price of flats allotted to Economically Weaker Sections (EWS) had abused its dominant position?

Rule: Sec. 4(2)(a) of the Competition Act, 2002

The Informant was stated to be an allottee of a low cost residential flat by the OP in 2008 for the Economically Weaker Sections (EWS) [hereinafter, 'Scheme'] in Ghaziabad, Uttar Pradesh. The OP is a statutory body. It is averred that, *vide* its letter dated 27.11.2015, the OP intimated to all the allottees that at the time of registration for flats under the Scheme, the estimated price of each flat was informed to be Rs. 2,00,000/-; however, based on the real construction cost of the project, the price of each flat is now estimated as Rs. 7,00,000/- approximately. *Vide* the said letter, the OP asked all the allottees of the Scheme to give their consent in writing to the increased price of the flat within fifteen days from the sending of the letter, failing which

their allotment would stand cancelled. The Informant alleged that the OP arbitrarily increased the sale price of the flat from Rs. 2,00,000/- to Rs. 7,00,000/- without any enabling provision to that effect in the Brochure of the Scheme or in the allotment letter dated 04.05.2009 issued by the OP. It was averred that the OP, by raising the sale price of the flat, has indulged in unfair and arbitrary practices and has misused its dominant position even after knowing that the allottees of the Scheme belong to EWS of the society and they were not in a position to challenge the OP for its unfair and arbitrary conduct.

It was submitted that the provisions of Section 4 of the Act were notified on 20th May, 2009 and the same do not indicate any retrospective application. Since the EWS flats under the PratapVihar Scheme were allotted in 2008 *i.e.* prior to notification of the provisions of Section 4 of the Act, any condition forming part of the allotment of said flats would fall outside the purview of the Act and hence, may not be subjected to investigation. It was also contended that the allegations of the Informant are not maintainable as GDA is not a profit making organization. It is further submitted that GDA is not an 'enterprise' in terms of the provisions of Section 2(h) of the Act and announcement of the Scheme for allotment of EWS flats in the year 2008 was a glaring example of sovereign function. Any activity of the Government relatable to sovereign functions is not included under the definition of 'enterprise' as per the provisions of the Act. On the relevant market, the OP submitted that its PratapVihar Residential Scheme is not the sole housing scheme launched during 2008 and 2009. UPAVP had also launched an EWS scheme at SiddharthVihar. Several other options were available to the potential allottees in Delhi/ National Capital Region (NCR) which may be considered as interchangeable and substitutable with the Scheme. It has also been submitted that the district of Ghaziabad should not be considered as the relevant geographic market as any resident of NCR is eligible to apply for the housing schemes announced by GDA on fulfilling the conditions set out in the Brochure of the Scheme. Arguing on the imposition of unfair conditions on the allottees, the OP stated that unlike the matter of *'Belaire Owners' Association v. DLF Limited and Others (2011) Comp LR 239 (CCI)* where the allottees did not have an exit option and had to pay interest in the event of delay in payment of instalments failing which DLF could unilaterally terminate the agreement, in this matter, the allottees had the option to withdraw from the Scheme if they

were unwilling or unable to bear the increased price of the allotted flats and get refund of the deposited amount along with interest. Thus, it was submitted that no unfair conditions had been imposed on the allottees.

It was also contended that the DG has failed to appreciate the fact that price of Rs. 2,00,000/- as mentioned in the Brochure of the Scheme was on approximation and it was estimated at the initial stage and the same was not the final price. The final price of flats always depends upon the actual cost incurred on the project which can be ascertained only after completion of the project. It was stated that the State Government of Uttar Pradesh in its Guidelines for costing of properties by the development authorities and UPAVP has provided that if the cost of a house increases more than 10% of its preliminary estimation and in case the allottee does not agree to pay the increased price, then an option would be available to him/ her to get back the money deposited along with 9% simple interest per annum. Further, it was pointed out that considering the hike in price of flats from Rs. 2,00,000/- to Rs. 7,00,000/-, the OP has revised and extended the period of repayment to 20 years so that the allottees can conveniently pay the increased price. It was also pointed out that to mislead the Commission, the Informant has concealed material facts and documents while filing the information *i.e.* his consent letter dated 17.12.2015 and the revised payment plan allowing additional period for depositing the increased amount.

The Commission referred to the judgment the Hon'ble Bombay High Court in the matter of '*Kingfisher Airlines Limited and Another v. Competition Commission of India and Others', (2010) 4 Comp LJ 557 (Bom)* and Hon'ble erstwhile COMPAT in the matter of '*DLF Limited v. Competition Commission of India and Others,* (2014) Comp LR 1 (COMPAT). In the backdrop of the ratio propounded in the above-referred cases the Commission noted that in the instant matter the Scheme was announced by the OP in May, 2008 and the impugned allotment letter was issued to the Informant on 04.05.2009. Subsequently, the OP issued another letter on 27.11.2015 to all. It is observed that the trigger point for the Informant in agitating this matter before the Commission was the letter dated 27.11.2015. This was issued much after the provisions of Sections 3 and 4 the Act came into effect on 20th May, 2009. In the view of the Commission, this action amounts to fresh imposition of a condition which was not contemplated in the earlier allotment order or the Brochure. Further, it may be noted that the letter dated 27.11.2015 issued by the OP

to the allottees of the Scheme intimating the increased price of the flats is in continuation of the allotment letter dated 04.05.2009 wherein the allottees were intimated the initial price of the flats along with other terms and conditions of allotment. Hence, the conduct of the OP in issuing the allotment letter dated 04.05.2009 and letter dated 27.11.2015, is to be seen in continuum and cannot be considered in isolation. Furthermore, even though the Scheme was announced by the OP in May, 2008, the unfairness embedded in the alleged abusive term and condition as set out in the Brochure of the Scheme and the allotment letter issued by the OP, is still subsisting as possession of the flats is yet to be given to the allottees and they are not being compensated for the said delay. Based on the above, the Commission is of the view that it has jurisdiction over the matter and the alleged abusive conduct of the OP fall well within the ambit of Section 4 the Act.

Further, the Hon'ble erstwhile COMPAT in its order dated 01.07.2016 in the matter of '*India Trade Promotion Organization v. Competition Commission of India and Others',* Appeal No. 36 of 2014, has observed that the functions which are integral part of the Government and which are inalienable, are 'sovereign functions' and commercial actions/ trading activities and actions, which can either be delegated or performed by the third parties, are alienable and are not 'sovereign functions'. The Commission observes that thefunctions of GDA are neither akin to any sovereign function of the Government nor are they inalienable functions of the Government. Further, it is not the contention of the OP that it is not engaged in an activity relating to provision of services. The activities of the OP to acquire land, construct buildings, sell properties, execute work in relation to supply of water, electricity *etc.* are commercial activities.

The Commission, in consonance with the DG's investigation report, is of the view that '*the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for the economically weaker sections in the district of Ghaziabad*' is the relevant market in this case.

As stated earlier, OP had the highest market share in the relevant market in 2008 and 2009 and between 2008 to 2015. It has ample resources and the Urban Planning and Development Act, 1973 of Uttar Pradesh gives it market power and an edge over its competitors. Not only that, consumers are largely dependent on the OP for EWS flats. The Commission observes that OP has not given any material to the contrary to refute the findings of the DG on dominance. As the

OP has ability to influence the conditions of competition in the relevant market and has the strength to operate independently of the competitive forces, the Commission holds that the OP is in a dominant position

It is noteworthy that the Scheme which was announced earlier, has remained the same for eight long years with nothing added to it or its surroundings. In such a situation, compelling the consumers to pay a far higher price after a gap of more than seven years of launching the Scheme and, specially, when they belong to EWS and have limited capacity to pay is unfair and abusive under the Act. It may also be noted that the consumers of the Scheme are in a disadvantageous position as they do not have choice to shift to other any developer in case of increase in the price of the flats by the OP. Bereft of choices, they have to either succumb to the demand of the OP or withdraw from the Scheme. The decision to raise the price of the flats under the Scheme substantially *viz.* 3.5 time that of the original price without any justifiable reason, shows that the OP has the ability to operate in the market without any constraint.

The Commission observes that there has been an inordinate delay of more than eight years in the delivery of flats to the allottees of the Scheme. It is observed that the OP has not been able to provide a reasonable explanation for the delay in giving possession of the flats. The Commission observes that for the allottees there is no provision for compensation by the OP for the delay in delivery of possession of the flats. Thus, the said conduct of the OP is not only unfair but extremely arbitrary.

Although the Commission has found the aforesaid conduct of the OP whereby the cost of EWS flats was increased without any valid justification as an abuse of GDA's dominant position, the Commission differs from the conclusion drawn by the DG that it also amounts to imposition of unfair price in violation of Section 4(2)(a)(ii) of the Act. The Commission is of the view that the conduct of the OP in raising the price of the EWS flats from the initial price without any enabling provision (either in the Brochure of the Scheme or allotment letter) on the pretext of miscalculation of cost of the project and increase in the cost of the project over the years by the contractor, can only be explained as a case of abuse of dominant position by the OP in the relevant market. The Commission observes that the consumers who belong to EWS have been made to suffer because of such abusive conduct of GDA. That conduct tantamounts to unilateral modification of the terms of the allotment of the flat as well as imposition of unfair condition in the sale of

services provided by the OP in the relevant market in contravention of the provisions of Section 4(2)(a)(i) and not Section 4(2)(a)(ii) of the Act.

29. In Re: Anti-Competitive Practices Prevailing in Banking Sector (Suo-Moto Case No 01/2015)

Decision date: 24.04.2018

Keywords: *cartel; collusion; banks; RBI*

Issue: Whether banks had a collusive arrangement in fixing the Savings Bank Interest Rates and charges for ATM usage?

Rule: Sec. 3(3)(a) read with Sec. 3(1) of the Competition Act, 2002

This case dealt with the Savings Bank Interest Rates ('interest rates') and service charges on Automated Teller Machines ('ATMs') transactions, offered/ charged by banks. Most of the Scheduled Commercial Banks ('Banks') were offering similar interest rates which suggested cartelization by banks. It was noted that despite deregulation interest rates were at four (4) percent, the last rate prescribed by RBI before deregulation for most of the banks. There were also certain ATM charges levied by banks in a uniform manner.

Investigation was conducted by placing reliance on the meetings of the banks. It was found that there was no discussion about the interest rates in meetings which was of an incriminating nature. The interest rates were held to be a result of independent assessment of market conditions by each bank. With respect to decrease in interest rates years after deregulation, the main determining factor was found to be excess liquidity post demonetisation and not any kind of collusive arrangement between the banks.

As similarity of service charges across banks was also not observed, it was held that there is no collusion amongst the banks for determining service charges as well. Banks decide their interest rates having due regard to their costs and other relevant factors.

Accordingly, it was concluded that there is no case of contravention of the provisions of Section 3(3) of the Act.

30. In re: NagrikChetnaManch v. Fortified Security Solutions (Case No 50 of 2015)

Decision Date: 01.05.2018

Keywords: *cartelization; bid rigging; collusion; public interest; lesser penalty regulations*

Issue: Whether CCI's Lesser Penalty Regulations would be applicable in case of collusive bidding in public procurement?

Rule: Sec. 3 and Sec. 46 of the Competition Act, 2002

The CCI by way of an order dated May 1, 2018 has issued its third leniency order in the case of *NagrikChetnaManch v. Fortified Security Solutions* (Case 50 of 2015) in which it granted reduction in penalty to four out of the six leniency applicants. The allegations in the case pertains to rigging of five tenders floated by the Municipal Corporation of the City of Pune ('PMC') in 2014 for setting up of solid waste processing plants. The CCI found that they all the six opposite parties indulged in bid rigging/collusive bidding in contravention of the provisions of the Act. Incidentally, all the opposite parties had sought imposition of lesser penalty under the Leniency Regulations. Mahalaxmi, the first applicant was given a reduction in penalty of 50%, the second applicant 40% and Lahs Green, the third leniency applicant 50%. Ecoman, the fourth applicant was granted a 25% reduction in penal towing to the co-operation extended by it during investigation. As regards Raghunath and Fortified, the fifth and the sixth leniency applicant respectively, the CCI held that the disclosure by these entities did not lead to any value addition in the investigation and accordingly no reduction in penalties was granted to them.

The complaints were filed by NagrikChetnaManch and it pertained to the nexus between the municipal officials and contractors. It showed the contractors and officers had telephonic conversations on multiple occasions and tender documents were uploaded through a computer belonging to the municipal corporation.The investigative report said there is prima facie evidence that there was a meeting of minds among Fortified Security Solutions, EcomanEnviro Solutions Pvt. Ltd., Lahs Green India Pvt Ltd, Sanjay Agencies, Mahalaxmi Steels and Raghunath Industry Private Limited in response to tender numbers 34, 35, 44, 62 and 63 of 2014 floated by PMC during December, 2014 to March, 2015 *"for inviting the turnkey contract for 'Design, supply, installation, commissioning, operation and maintenance of municipal organic and inorganic solid waste processing plant(s)'."*

The commission has fined contractors but because of limited mandate, it could not act against PMC officials. After perusing the information, the CCI was of the prima facie view that the case involved "big rigging" or "collusive bidding" in violation of section 3(3) read with section 3(1) of the Competition Act, 2002. The CCI in its report observed that there was understanding among the firms who participated in the bidding to ensure that the tender went to EcomanEnviro Solutions Pvt

Limited. The same company, noted CCI, has borne the cost of demand draft for the other participants.

The CCI while hearing petition reduced the penalty on four firms under provisions of section 46 of the Competition Act (Lesser Penalty Regulation). Eventually, CCI imposed penalty of Rs 13,07,240 against Fortified Security Solutions, Rs 33,90,500 against EcomanEnviro Solutions Pvt. Ltd, Rs 21,00,258 against Lahs Green India Pvt Ltd, Rs 90,63,874 against Sanjay Agencies, Rs. 1,68,10166 against Mahalaxmi Steels and Rs 30,54,943 against Raghunath Industry Private Limited. The Commission has also imposed penalty of Rs 361368 against five individual holding key positions in the six firms. Ultimately, under lesser penalty regulations, the Commission reduced the penalty within the range of 25% to 50% bringing down the total fine from Rs 6,18,10,154 to Rs3,57,26,981.[47]

31. In re: Express Industry Council of India v. Jet Airways (Case No. 30 of 2013)

Decision Date: 07.05.2018

Keywords: *cartelization; information exchange;bid rigging; collusion; lesser penalty regulations*

Issue: Whether collusion in revision of fuel surcharge was anti-competitive practice?

Rule: Sec. 3 and Sec. 46 of the Competition Act, 2002

The Competition Commission of India (CCI) has imposed a total penalty of more than Rs 54 crore on three airlines — Jet Airways, InterGlobe Aviation and SpiceJet — for unfair business practices with respect to fixing fuel surcharge on cargo transport. This pertains to exploitative and collusive pricing practices in gross violation of consumer interest and legal regulations.

Express Industry Council of India hadcomplained that the aforementioned airlines along with Air India Limited and Go Airlines (India) Limited were involved in an act of cartelization by colluding to introduce and subsequently revise a fuel surcharge on cargo being transported through these airlines. Informant claimed that FSC had been increased by the airlines by almost the same rate and from almost the same date on numerous occasions since 2008, and this was indicative of Opposite Parties.

DG concluded that collusive actions by Opposite Parties cannot be established. However, Informant challenged conclusion

[47]'*Six Pune Municipal Corporation Contractors fines 3.57 Crore for Rigging bids'*, Hindustan Times, *available at*: <https://www.hindustantimes.com/pune-news/six-pune-municipal-corporation-contractors-fined-3-57-crore-for-rigging-bids/story-eE1daYc1vlbcofcqtW5VPL.html>

ultimately arrived at by the DG that while there was a positive correlation between the fixing and revision of FSC, there was "no plausible explanation" for this concerted behaviour. Informant also challenged DG's conclusion that while there was concerted action there was no 'concerted practice'. Informant contended that the Act did not require concerted practice and if there was concerted action, it was sufficient for holding a party guilty of contravening provisions of the Competition Act.

It was the common submission of the airlines that mere price parallelism as a result of intelligent market adaptation did not amount to cartelization and was a natural occurrence in an oligopolistic market. They also emphasized that there was no direct evidence of action in concert and that Informant was selectively reading parts of the Report. Jet Airways submitted that it had hiked the FSC rates due to increase in ATF price coupled with currency fluctuations.

It was argued by the airlines that the air cargo transport industry was a competitive market, free from collusion and cartels and this was evidenced by the fact that the market share of all the players was in a state of fluctuation. SpiceJet further submitted that there were other competitors apart from the airlines like Blue Dart Aviation Limited which controlled about 24% of the market so there could be no cartelization by the Opposite Parties in the present case. SpiceJet also took the defence that there was a time gap between the hike of FSC rates by the other airlines and SpiceJet.

CCI noted that FSC played a vital role in generating revenue for the airlines. ATF rate was the main factor and the only consistent factor among all airlines. Thus, the fact that FSC was hiked by airlines despite no upwards movement in ATF was a clear indication of concerted action. CCI came to a conclusion that even though companies are free to revise prices depending on behaviour of competitors and this would itself not be indicative of cooperation among entities in the market, coordinated action by parties was suggestive of prior information exchange and such actions cause inefficiencies in the market.

CCI imposed a penalty equal to 1% of the average turnover of Jet Airways, IndiGo and SpiceJet for the years 2010-11 to 2012-13 and ordered them to cease and desist from engaging in such anti-competitive activity.CCI accepted the objections raised by Air India and Go Air and did not hold them guilty of anti-competitive behavior.The conclusion that Opposite Parties violated the Competition Act is premised more on the failure of Opposite Parties to rebut claims of concerted

action than unimpeachable evidence from the DG or the Informant.[48]

While the penalty does appear modest (1% of turnover), it appears that penalty has been imposed on total turnover rather than relevant turnover. The Competition Appellate Tribunal has observed in the past that penalty should be imposed taking into consideration relevant turnover.[49]The complaint was filed in 2013 and the CCI has passed a fresh order in the matter after the first ruling was set aside by the then Competition Appellate Tribunal. The CCI has also directed the airlines to "cease and desist" from anti-competitive practices through an authoritative order.

Pursuant to the setting aside by Competition Appellate Tribunal, the CCI, under the leniency provisions reduced penalties to mere 10 % of the original imposition.[50]

32. <u>India Glycols Ltd. v. Indian Sugar Mills Association & others (Case No 94 of 2014)</u>

Decision date: 11.05.2018

Keywords: *Abuse of dominant position; collusion; artificial pricing*

Issue: 1. Whether the process of mandatory Ethanol Blending Programme notified by Ministry of Petroleum and Natural Gas as well as procurement of ethanol by the Oil Manufacturing companies at fixed notified prices contravene any provision of the Act?

2. Whether Indian Sugar Mills Association (ISMA) has abused its dominant position in the market for supply of ethanol to the PSU Oil Manufacturing companies?

3. Whether ISMA and National Federation of Cooperative Sugar Factories Ltd (NFCSF), acted in collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol to force the PSU Oil Manufacturing Companies to purchase ethanol at an artificially higher price?

Rule: Sec. 4 and Sec. 3(3)(a) of the Competition Act, 2002

[48]Section 3(3)(a) deals with the entering into agreements by cartels to fix prices and read as "Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-
(a) directly or indirectly determines purchase or sale prices;"

[49]*Excel Crop Care Limited v. Competition Commission of India &Ors.* Appeal No. 79 of 2012.

[50]'CCI Order against Jet Airways, Indigo, Spicejet show entities get away by Flouting Competition Norms' Financial Express, *available at*: <https://www.financialexpress.com/industry/cci-order-against-jet-airways-indigo-spicejet-show-entities-cannot-get-away-by-flouting-competition-norms/1091853/>

India Glycols manufactures and markets ethanol based chemicals and is dependent on sugar industry in order to procure ethanol from molasses. There were numerous allegations made against sugar mills and factories along with challenges to some governmental policies as it potentially adversely impacted competition in the market.

One of the prayers sought by India Glycols was to declare the notification on Ethanol Blending Programme (EBP) issued by the Ministry of Petroleum and Natural Gas to be void as it was alleged to be anti-competitive. Commission in addressing this issue held that policy formulation is an executive prerogative and Commission is not the requisite forum to address its validity.

To address ISMA's abuse of dominant positions, the primary requirement was to check if it is an enterprise for this purpose at all. Primary activities of ISMA are to provide "*a platform to its constituent members to discuss matters of common interest relating to the sugar industry besides making representations to the government authorities and agencies to espouse the cause of its members in respect of the matters of policy and procedures governing the sugar industry*". It was held that ISMA is not involved in any economic or commercial activity, and hence does not satisfy the definition of enterprise. Consequently, the question of abuse of dominant position does not arise.

In order to understand if there was collusion to increase prices of ethanol artificially, the factors affecting ethanol production were focused upon. It was accepted that production of sugarcane is inconsistent in the nation and, therefore, supply of molasses in the country is limited. This has a decisive impact on the production and supply of ethanol. Since the decisions on ethanol production are largely market driven, it was held that there is no collusion between ISMA and NFCSF.

33. Shri RajatVerma v. Public Works (B&R) Department, Government of Haryana & others (Case No 84 of 2014)

Decision date: 09.07.2018

Keywords: *Abuse of dominant position; bid; public works*

Issue: Whether Public Works (Building and Road) Department, Government of Haryana (PWD) enjoyed a dominant position and whether there was an abuse of this position?

Rule: Sec. 4 of the Competition Act, 2002

It was alleged that PWD enjoyed a dominant position in the execution of roads, buildings,

bridges and other civil construction works in the state of Haryana. It was also alleged that PWD abused this position by incorporating unfair terms in the bid documents for construction of approaches to lane rail over bridge. The informant in the instant case was a bidder in the process.

Even though PWD is a government department, Competition Appellate Tribunal held that it comes under the purview of the Act as it is covered under enterprise (Sec. 2(h)). Being procurer of construction services, PWD was under scrutiny of abusing buyer's power. DG placed reliance of two other decisions in *Adcept Technologies Pvt. Ltd. v Bharat Coking Coal Limited* and *V.E. Commercial Vehicles Limited v UPSRTC* to reach a conclusion. Following the approach adopted in these cases, DG applied the concept of 'demand side substitutability' inversely *i.e. "by assessing the availability of substitutes for suppliers and their ability to switch to alternative sales opportunities both in terms of products as well as geographies*".

After an analysis of the different kinds of roads and bridges and the associated services, relevant product market was identified. Moreover, there was an expansion of relevant geographic market to states other than Haryana since contractors have the ability to supply their services to various parts of the nation. The relevant market was held to be '*the market for procurement of construction services for construction/ repair/ maintenance of roads and bridges (other than 'railway bridges for railway traffic in the territories of the States of Haryana, Himachal, Rajasthan, Punjab, Bihar, Madhya Pradesh, Uttar Pradesh, Uttrakhand and Delhi'*.

Taking into account factors such as PWD's size and resources, size and importance of its competitors, dependency of contractors on PWD for supplying their services for construction of roads and bridges and entry barriers, it was held that PWD did not enjoy a dominant position in the relevant market. Since there is lack of a dominant position primarily, the issue of abuse of this position loses significance.

34. <u>In re: Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing (SuoMotu Case No. 03 of 2016); In re: Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing (SuoMotu Case No. 04 of 2016)</u>

Decision Date: 11.07.2018

Keywords: *cartelization; collusion; lesser penalty regulations*

Issue: Whether CCI's Lesser Penalty Regulations would be applicable in case of cartelisation in public procurement?

Rule: Sec. 3 and Sec. 46 of the Competition Act, 2002

The CCI has passed final order in two cases involving anti-trust violations pertaining to collusion and bid-rigging in three tenders floated by Pune Municipal Corporation for Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s). These cases were taken up by CCI *suomotu* under Section 19 of the Act based on the disclosure by firms under Section 46 of the Competition Act, 2002 ('the Act') read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations'). All firms in these cases had approached CCI as lesser penalty applicants.CCI, based on its investigations, observed that there was bid rigging in the Tender Nos. 21 and 29 of 2013 and Tender No. 59 of 2014 floated by Pune Municipal Corporation for Solid Waste Processing Plant(s), in contravention of Section 3(3)(d) read with Section 3(1) of the Act by way of submitting proxy/ cover bids.

In case involving tender floated in Financial Year 2013-14 penalty was imposed on four firms in terms of Section 27(b) of the Act at the rate of 10 percent of their average turnover for the years 2011-12, 2012-13 and 2013-14 *i.e.* three years preceding the year in which collusion took place. The penalty was imposed on firms as well as their individual officials. Further, in view of penalty already levied in Case No. 50 of 2015 for infringement during the period 2014-15, no penalty was levied in case involving tender floated in financial year 2014-15.

CCI granted 50 percent reduction in penalty to Saara and its individuals than otherwise leviable. The lesser penalty application was considered in light of the proofs gathered by the DG independent of lesser penalty application and co-operation extended in conjunction with the value addition provided in establishing the existence of cartel, Pursuant to reduction, penalty imposed on Saara was INR 23.22 Lakh and INR 74,513 on its individual.[51]

35. <u>In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters. (SuoMotu Case No. 02 of 2013)</u>

[51]In re, Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing, SuoMotu Cases Nos. 03 and 04 of 2016, decided on 31.5.2018

Decision Date: 11.07.2018

Keywords: *Bid rigging in Public Procurement Process; collusion; lesser penalty regulations*

Issue: Whether CCI's Lesser Penalty Regulations would be applicable in case of cartelisation by broadcasting service providers?

Rule: Sec. 3 and Sec. 46 of the Competition Act, 2002

Through an order dated 11 July 2018, the Competition Commission of India (CCI) imposed a penalty of INR 22.36 Crore on EsselShyam Communication (EsselShyam) for bid-rigging in tenders floated by sports broadcasters, including for the Indian Premier League in 2012.However, the CCI utilized the Leniency provisions to substantially reduce the fine imposed on EsselShyam.

The investigation by the CCI was initiated on the basis of disclosures by Globecast India Private Limited and Globecast Asia Private Limited (collectively referred to as 'Globecast') under Section 46 of the Competition Act, 2002 (Ac) read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations').

Globecastdisclosed to the CCI that there was an exchange of confidential price sensitive information between ESCL and Globecast through Mr. Bharat K. Prem, an employee of Globecast India Pvt. Ltd, which resulted in bid rigging of tenders for procurement broadcasting services of various sporting events, especially during the year 2011-12. It was alleged that Mr. Bharat K.Prem had secretly entered into a Consultancy Agreement with ESCL, under which Bharat, used to draw salaries and benefits as a share of profits from rigging.

As per the DG's investigation, the CCI observed that the ESCL and Globecast operated a cartel amongst them in the various sporting events (numbering fourteen) held during the years 2011-12 including IPL-2012. While submitting bids for the tender floated by various broadcasters during the period July 2011- May 2012 for provision of end-to-end broadcasting services, they exchanged information and quoted bid prices as per the arrangements arrived at amongst them. Accordingly, it was held that they had infringed the provisions of Section 3(3)(d) read with Section 3(1) of the Act during this period.

Considering violation of provisions of the Act by Globecast and ESCL, an amount of INR 31. 94 Crores and INR 1.33 Crores was

computed as leviable penalty on ESCL and Globecast, respectively, in terms of proviso to Section 27 (b) of the Act. While computing leviable penalty, CCI took into consideration all relevant factors including duration of cartel, mitigating factors, *etc.* and decided to levy penalty at the rate of 1.5 times of their profit for the period July 2011 – May 2012. Additionally, considering totality of facts and circumstances of the case, penalty leviable on individual officials of Globecast and ESCL was computed at the rate of 10 percent of the average of their income for preceding three years. This was done in keeping with the principle of lesser penalty disclosure by Globecast. This is the third case of leniency by the anti-trust regulator. This indicates an important development in regulatory behaviour and approach.

36. In re: Mr G Krishnamurthy v. Karnataka Film Chamber of Commerce (Case No 42 of 2017)

Decision Date: 30.08.2018

Keywords: *anti-competitive conduct; recidivism; restricting the market*

Issue: Whether there has been acontravention of the provisions of Section 3(1) and Section 3(3)(b) of the Act?

Rule: Sec. 27 of the Competition Act, 2002

This case had arisen from the information filed by Mr. G. Krishna Murthy (Informant) under *Section 19(1)(a)* of the Competition Act, 2002 against M/s Karnataka Film Chamber of Commerce (KFCC or OP-1), M/s Kannada Okkuta (OP-2), Mr. Jaggesh (OP-3), Mr. VatalNagraj (OP-4) and Mr. Sa. Ra. Govindu, President, KFCC, (OP-5), alleging contravention of the provisions of *Section 3* of the Act.

The case revolves around the film '*Sathyadev IPS*', which was being dubbed from Tamil to Kannada by the informant. He alleged that the OPs set up numerous roadblocks and hindrances for him besides threatening his technical workers and dubbing artists.

The Informant averred that the Ops were involved in acts of banning or interdicting production and release of dubbed content, and that such acts by the OPs were anti-competitive acts in contravention of the provisions of *Section 3* of the Act. The Informant, aggrieved by the anti-competitive activities of the OPs, approached the Commission to initiate inquiry against the OPs under the provisions of the Act. Besides, the Informant also sought interim relief in terms of restraining the OPs from hindering the release of another Tamil film '*Araambham*', which the Informant got dubbed into Kannada language and titled '*Dheera*'.

Based on all the material available on record and the oral submissions made by the parties, the Commission *prima facie* found merit in the allegations of the Informant and accordingly, passed an order under *Section 26(1)* of the Act, directed the Director General (hereinafter, the 'DG') to cause an investigation into the matter and submit a report.

Further, the Commission was also convinced that the Informant was able to make out a case for grant of interim relief under *Section 33* of the Act in his favour.

On a perusal of the Investigation Report and the replies/objections filed by the parties, the submissions made by them during the oral hearings and the other material on record, the Commission opined that the three issues required determination in this matter which will be analysed below.

Issue No. 1: Whether the OPs have acted in concert and created barriers against screening of dubbed cinema in the State of Karnataka and whether such actions on the part of the OPs amount to contravention of the provisions of Section 3(1) and Section 3(3)(b) of the Act?

The Commission was convinced that it was the collective action by all the OPs, that led to severe impact on the Informant's film and each of the OPs played their part in thwarting the screening of dubbed movies in the State of Karnataka, much to the detriment of the principles of competition.This could be understood as an agreement between the OPs.

The Commission found that the aforesaid agreement resulted in appreciable adverse effect on competition (AAEC) in terms of *Section 19(3)(a)* and *Section 19(3)(c)* of the Act as it created barriers for new entrants in the market, as well as foreclosure of competition in the market.

The Commission observed that all the OPs collectively indulged in conduct/practices, that led to restriction on the exhibition of dubbed Kannada movies/content in the State of Karnataka which amounts to contravention of the provisions of *Section 3(1)* of the Act, in as much as the concerted acts of the OPs have resulted in AAEC in respect of the market for dubbed movies in the State of Karnataka. The examination of the factors under *Section 19(3)* of the Act brings out strong presence of AAEC.

The Commission, hence, finds that the agreement between the OPs, the practices adopted and decisions taken by them, in furtherance of such agreement, amply demonstrate the anti-competitive nature of such conducts, which are violative of the provisions of *Section 3(1)* of the Act. Further

these acts are also in contravention of *Section 3(3)(b)* of the Act, in as much as they have resulted in limiting and restricting the market for dubbed cinemas in the state of Karnataka, to the detriment of producers of dubbed cinema, dubbing artists and also the consumers, who have been deprived of viewing such cinema, in their local language.

Issue No. 2: If Issue No.1 is answered in affirmative against OP-1 (KFCC), whether OP-1 indulged in recidivism by continuing to violate the provisions of Section 3 of the Act in spite of previous order of the Commission passed in Case No. 58 of 2012?

The Commission held OP-1 guilty for recidivism for continuing the anti-competitive conduct, despite strict and unambiguous order of the Commission to cease and desist from such anti-competitive conduct thereby making itself liable for action under *Section 42* of the Act.

Issue No. 3: If Issue No.1 is answered in affirmative, whether the persons, who at the time of such contravention, were in-charge of and responsible for the conduct of OP-1 and OP-2 are liable in terms of provisions of Section 48 of the Act?

The Commission foundOP-5 and OP-4 liable under *Section 48(1)* as well as *Section 48(2)* of the Act, for the contravention of *Section 3* of the Act by OP-1, notwithstanding that theywas also liable under *Section 27* of the Act, for their conduct.

In view of the aforesaid findings, the Commission directedthe OPs, and members of OP-1 and OP-2 to cease and desist from indulging in practices which were found to be anti-competitive in terms of the provisions of *Section 3(1)* and Section *3(3)(b)* of the Act.

Resultantly, penalty of Rs.9,72,943/-calculated @ 10% of the average income of OP-1 was imposed on it. Further, penalty of Rs.15,121/- and Rs.2,71,286/- calculated @ 10% of the average income of OP-5 and OP-3, respectively, was imposed on them.

Due to unavailability of bank information, the Commission stated that a separate order regarding penalty would have to be passed in respect of these OPs in due course.

37. Vijay Kapoor v. DLF Limited & Other (Case No 84 of 2014)

Decision date: 31.08.2018

Keywords: *Abuse of dominant position; construction of residential units; real estate*

Issue: Whether DLF Limited and DLF New Gurgaon Home Developers Pvt. Ltd. (DLF) enjoyed a dominant position?

Rule: Sec. 4 of the Competition Act, 2002

It was alleged that DLF imposed one-sided terms and conditions in the Agreement to Sell an apartment being developed by them in Gurgaon through abuse of their dominant position. Initially, the relevant market was identified as "*provision of services for development and sale of residential units inGurgaon"*. However, later distinguishing residential units like villas from apartments and flats based on their utility, relevant market was revised to '*provision of services for development and sale of residential apartments/ flats in Gurgaon*'.

DG conducted an extensive empirical research to conclude on the dominant positions of DLF in the relevant market. The data pertaining to the relevant years for DLF and other players in the real estate market was analysed by DG. Some of the factors that were relied upon are market shares of DLF and other developers, size and resources of the enterprise, economic power of the enterprise including commercial advantage over other competitors, dependence of consumers on the enterprise, *etc.*

Commission relied upon the report of the DG and looked at the extensive research conducted in reaching a conclusion. It held that DLF lacked the ability to affect the: *(i)* competitors; *(ii)* consumers; or *(iii)* relevant market, in its favour as it did not enjoy a dominant position. The market in the concerned case is highly fragmented and competitive with the presence of strong players. This also means that consumers had the choice among different competitors which ensures substitutability and interchangeability.

Apart from empirical data, the crucial aspects in determining the dominant position of an entity in any case are restriction of the market to the relevant location (here, Gurgaon alone) and the relevant time period that the allegations pertain to (period of assessment). This is significant especially in light of the market dynamics including entrance of new players into the market.

It was held that DLF does not have the ability to operate independently in the market. Hence, Commission was of the view that the DLF does not have a dominant position in the relevant market in terms of Section 4 of the Act. Since there is lack of a dominant position primarily, the issue of abuse of this position loses significance.

38. In re: Amit Mittal v. DLF Ltd (Case No 73 of 2014)

Decision Date: 31.08.2018

Keywords: *abusive conduct; market dominance; period of assessment*

Issue: Whether there was a contravention of the provision of Sec. 4 of the Competition Act, 2002?

Rule: Sec. 26(6) of the Competition Act, 2002

The present information was filed under *Section 19(1)(a)* of the Competition Act, 2002 by Shri Amit Mittal (Informant) against DLF Limited (OP-1) and DLF New Gurgaon Home Developers Pvt. Ltd. (OP-2), alleging contravention of the provisions of *Section 4* of the Act.

The dispute resolves around the OP group's residential township called 'Regal Gardens'. The Informant applied for the allotment of an apartment in the said project.It was alleged by the informant that the Agreement was non-negotiable and had to be executed by the Informant within 30 days, failing which the booking amount was liable to be forfeited without any notice to the Informant. Apart from this, several clauses of the 'Agreement' were violative of provisions of *Section 4(2)(a)(i)* of the Act, being highly unfair and discriminatory towards the allottee and heavily biased towards OP-2.

Upon consideration of the facts and circumstances of the case, the Commission found the OP group to be dominant in the relevant market of "provision of services for development and sale of residential units in Gurgaon" and observed that prima facie the conduct of the OP group was abusive and in contravention of provisions of *Section 4* of the Act. Thus, the matter was referred to Director General (DG).

Upon consideration of the investigation report and the supplementary investigation report prepared by the DG as well as the reply filed by the OP, the Commission decided on the issue for determination in the instant case to be:

"Whether the OP group has contravened the provisions of Section 4 of the Act?"Section 4 of the Act proscribes abusive conduct by a dominant enterprise. Since the conduct of the OP group needs to be analysed under Section 4 of the Act, the existence of a position of dominance in terms of the Act needs to be determined first as there can be no abuse of dominance in the absence of dominance. The position of dominance of an enterprise is, usually, with context to a relevant market within which such an enterprise is alleged to be abusing its position.

The Commission had considered the Investigation Report of the DG and observed that while defining the relevant market the DG had not confined itself to the property that was the subject matter of the case i.e. an

apartment/ flat. Accordingly, the Commission had defined the relevant market as the market for the 'provision of services for development and sale of residential apartments/ flats in Gurgaon'. It was also observed that even if the factors provided under Section 19 (7) of the Act are considered, then in terms of physical characteristics and end use, price and consumer preferences, the market for "the provision of services for development and sale of residential apartments/ flats" can be considered to be the relevant product market in the present case.

The panel analysed data on the market share, size & resources of different players, and the land bank in credit of each player in the relevant market to determine the question of dominance.

After assessing the facts of the present case in terms of the factors in the Act, the Commission decided that the OP group did not have a dominant position in the relevant market in terms of *Section 4* of the Act.

The commission also considered certain precedents which had held there to be a dominant position in similar factual scenarios. These cases were distinguished by the commission on the basis of *period of assessment*.

The commission held that since the OP group did not appear to be in a dominant position in the relevant period, there remains no requirement to examine the allegations of abuse of dominance, since in the absence of dominance there can be no case of abuse of dominance in terms of *Section 4* of the Act.

Therefore, the Commission concluded that the contravention of the provisions of *Section 4* of the Act was not established in the instant matter. Hence, the case was ordered to be closed under *Section 26(6)* of the Act.

39. In re: India Glycols Ltd v. Indian Sugar Mills Association (Case No 21 of 2013)

Decision Date: 18.09.2018

Keywords: *Bid rigging;collusion; price fixation*

Issue: Whether there has been acontravention of the provisions of Section 3of the Act?

Rule: Sec. 27 of the Competition Act, 2002

India Glycols Limited (Informant) submitted information before the Commission under *Section 19(1)(a)* of the Competition Act, 2002 impugning the joint tender floated by Public Sector Oil Marketing Companies (PSU OMCs/ OMCsfor procurement of anhydrous alcohol ('ethanol') being in contravention of the provisions of *Section 3* of the Act. Besides,

it was also alleged that suppliers of ethanol - which mainly comprise sugar mills - have contravened the provisions of *Section 3* of the Act by rigging bids submitted pursuant to the said tender, by quoting an exorbitant price for supply of ethanol to OMCs.

The Commission opined that *prima facie* there existed collective decision making to fix the price of ethanol for supply to OMCs by sugar mills and the said price fixation was *prima facie* found to have violated the provisions of *Section 3(3)(a)* read with *Section 3(1)* of the Act. It was also noted that since the sugar mills had been shown to have participated in the bidding while colluding with each other, as such, *Section 3(3)(d)* read with *Section 3(1)* of the Act also appeared to have been violated.

26 parties (20 sugar mills, 3 public sector OMCs and 3 trade associations of sugar mills/ factories/ ethanol manufacturers) constitute the array of Opposite Parties in the present batch of cases.

The following two issues require determination in the present cases:

1. Whether the joint tender floated by OMCs is in violation of provisions of Section 3(1) read with Section 3(3) of the Act?
2. Whether the tender floated on 02.01.2013 by PSU OMCs was rigged by sugar mills/ ISMA/ EMAI/ NFSCF in contravention of the provisions of Section 3 of the Act?

Issue No. I

The Commission noted that if separate tenders were issued, it would undeniably amount to multiplying the very same tendering exercise leading to wastage of time, money and resources of the stakeholders. This would have resulted in huge cost to the national exchequer. Issuance of independent tenders would have led to inefficiencies in the market.

The Commission also noted that since the terms of the tender are same for all the OMCs, floating a joint tender is not only a more efficient option, but is also more cost-effective, since it eliminates cost, time and effort in floating multiple tenders with the same terms and conditions.

In view of the above noted operational and commercial considerations, the Commission heldthat floating of joint tender by OMCs for procurement of ethanol *per se* could not be construed as anti-competitive particularly when such process had evident efficiency benefits.

Issue No. II

After consideration of all the relevant factual circumstances, the Commission was of the considered opinion that similarities upto decimal figures could not be an outcome of a price discovered through a competitive bidding process but has to be the result of collusive and concerted behavior of the parties.

The Commission held that the bidders who participated in respect of the depots located in UP/ Gujarat/ Andhra Pradesh in response to the tender floated by OMCs had colluded in submitting the bids by quoting collusive prices and sharing quantities using the platform of ISMA and signals provided by EMAI.

The Commission decided that the sugar millswho participated in the bidding process in respect of the depots located in UP/ Gujarat/ Andhra Pradesh in response to the joint tender floated by OMCs had colluded in submitting the bids by quoting collusive prices and sharing quantities and thereby contravened the provisions of *Section 3(3)(d)* read with *Section 3(1)* of the Act. Further, the impugned conduct of ISMA was found to have violated the provisions of *Section 3(3)(a)/(b)* read with *Section 3(1)* of the Act. Also, the conduct of EMAI was held to be in violation of the provisions of *Section 3(3)(a)* read with *Section 3(1)* of the Act by providing their platforms to sugar mills in facilitating rigging of impugned tender. Accordingly, the sugar mills and ISMA/ EMAI were directed to cease and desist from indulging in conduct that was found to be in contravention of the provisions of the Act.

Therefore, the Commission imposed monetary penalties upon the partiesfor contravention of the provisions of *Section 3(1)* read with *Section 3(3)* of the Act as under *Section 27* of the Competition Act, 2002.

40. In re: House of Diagnostics LLP v. EsaoteS.p.a (Case No 09 of 2016)

Decision Date: 27.09.2018

Keywords: *Dominant position; abuse of dominant position; monopoly*

Issue: Whether there has been acontravention of the provisions of Sections 3 and 4 of the Act?

Rule: Sec. 27 of the Competition Act, 2002

The information was filed by M/s House of Diagnostics LLP (Informant) under *Section 19(1)(a)* of the Competition Act, 2002 against EsaoteS.p.A. (OP-1) and Esaote Asia Pacific Diagnostic Pvt. Ltd. (OP-2) [collectively, Esaote] alleging contravention of the provisions of *Sections 3 and 4* of the Act.

The allegations of the Informant related to the purchase of three 'Dedicated Standing/ Tilting MRI machine' ('G-Scan machines') manufactured by OP-1 for its diagnostics centres. The total consideration of the said machines was agreed to be Rs. 6,15,00,000/-.

It was alleged that the OPs are abusing their dominant position by charging huge sum of money for supplying spare parts and by refusing to perform their obligations under the contract even though substantial sum of money from the contract had already been paid. It was also stated that since OPs are the only seller and service provider of 'Dedicated Standing/ Tilting MRI machines' in India, it has 100% market share and by virtue of this, they are able to extract huge amounts from the consumers and could unilaterally alter the terms and conditions of comprehensive maintenance contract to the detriment of the Informant and other consumers.

The Informant further stated that after selling 'Dedicated Standing/ Tilting MRI machines' to the Informant, OPs entered into an arrangement with another diagnostic centre in New Delhi i.e. Star Imaging and Path Labs (P) Ltd. to supply the same machines 'free of cost' and 'free of maintenance cost'. It was alleged that the said machines were running on a revenue sharing basis between OPs and Star Imaging and Path Labs (P) Ltd. As per the Informant, once the manufacturer of the said machines enters the market of providing MRI scans in weight bearing positions to the patients, it becomes difficult for the Informant to compete in this market with the OPs, as the latter, in collusion with third party, can provide the same services to the patients at lower prices.

Based on the above averments and allegations, the Informant filed the instant information against OPs alleging contravention of the provisions of *Section 3 and 4* of the Act.

Based on scientific evidence, claim of the OP Group, statement of doctors, radiologists, diagnostic centres who are the consumers in this case, the relevant market as 'market for standing/ tilting MRI machines in India'.

The Commission concluded that the OP Group commands a virtual monopoly i.e. 100% market share in the market for dedicated standing/ tilting MRI Machines in India.

The Commission opined that the OP Group abused its dominant position in the relevant market by refusing to supply 'See through Perforated RF Cage' despite the same being part of the project. Further, instead of supplying perforated cage, the OP Group

supplied lesser priced opaque cage and thereby imposed unfair prices also upon the Informant. Such conduct was held to be clearly an unfair business behavior and one that fell foul of the provisions of Section *4(2)(a)(i) & (ii)* of the Act.

Further, the Commission held that the OP Group acted unfairly and thereby abused its dominant position by refusing to provide Head Coils with the machines to the Informant in contravention of the provisions of Section *4(2)(a)(i)* of the Act.

Therefore, the Commission concluded that OP Group violated the provisions of Section *4(2)(a)(i), 4(2)(a)(ii), 4(2)(b) and 4(2)(c)* of the Act, by abusing its dominant position in the relevant market. Accordingly, OP Group was directed to cease and desist from indulging inconduct found to be in contravention of the provisions of the Act.

The Commission imposed a penalty of Rs. 9.33 lac on the OPs for the impugned conduct which was found to be in contravention of the provisions of *Section 4* of the Act, under *Section 27* of the Competition Act, 2002.

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