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Competition Law Chronicle

A Centre for Competition and Regulation Newsletter

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

Prof. (Dr.) R.Venkat Rao

Foreword by our Vice Chancellor

It delights me to note that the Centre for Competition and Regulation is coming out with the inaugural issue of its newsletter.

It is said that normally competition brings out the best in the product but has a tendency to bring the worst in the human beings. What is required is not only the best product but also the best human being. With the professed objective of fulfilling the larger mandate of National Law School of India University, i.e., “providing socially relevant legal education besides intellectually stimulating and professionally competent legal education”, the Center for Competition and Regulation is initiating a new order by releasing a newsletter where the focus will be on the judicious juxtaposition of Competition, Law and Ethics.

I congratulate Dr. Somashekar and his able team for this laudable initiative.

Prof.(Dr.) R.Venkata Rao

Vice Chancellor

Dr. Geeta Gouri*

SOME REFLECTIONS ON THE COMPETITION ACT, 2002

Three Sections of the Competition Act, 2002, Section 3 which pertains to horizontal and vertical agreements; Section 4 on abuse of dominance and Section 5 & 6 on combinations are continuously debated and analyzed. It is but natural as they are the enforcement sections with discussions enriched by Orders of the Competition Commission of India. In this maiden issue of the Newsletter it gives me great pleasure to involve my young readers to reflect on two other sections of the Act namely Section 49(3) and 19(1). These two Sections, may perhaps be relegated as procedural and innocuous but in my considered view captures the philosophical and conceptual framework of competition and functioning of competitive markets, the essence of economic liberalization and reforms that lead to the enactment of the Competition Act.

Section 49 (3) mandates advocacy by the Commission and reads:

"The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues."

A plain reading of the Section is that advocacy is important not only to create awareness of the Act but a way to solicit cases for the Commission. Responses however vary among different groups and naturally so, in line with the individual interest and stakes. Industry houses and Chambers of Commerce tend to focus on compliance programs as a measure of conformity with the Act. Government's preoccupied with matters of the fisc tend to be more concerned about public procurement. Involvement of the public is however, still academic. The idea of competition as the platform for economic reforms and its concomitant benefits to society suggests a wider and focused canvas for advocacy that encompasses the general public and at different levels of economic activity.

Interestingly 'Advocacy' as a separate Section is not there in any of the other reforms acts such as Electricity Act, 2003, or the Petroleum and Natural Gas Board Act, 2002. Two quick observations on this exclusivity. *Firstly,* as ex-ante regulators the preoccupation of sector regulators is on laying the foundations (largely technical) vide regulations and guidelines in their domain of natural monopoly such as transmission networks or pipelines grid. The way competition emerges as an ex-post phenomena is best left to the Commission. *Secondly,* sustenance of competition is the Commission's concern as can be discerned in the phrase '*to promote and sustain competition*' in the preamble of the Competition Act in contrast to say '*anti-competitive behavior*' stated in the preamble to PNGRB Act or '*to promote competition*' in passing in Section 21 of PNGRB Act and Section 23, Electricity Act) which are more limited in scope and intent.

We now turn to Section 19(1). The Section assumes significance in the larger context of liberalization and reads:

"The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on –

(a) receipt of any information in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association;

(b) a reference made to it by the Central Government or a State Government or a statutory authority."

Indian competition law clearly lays down a private right of action albeit limited by mandating the Competition Authority to act upon any information under Section 19(1) by any person. The Act is agnostic. This section again does not feature in other reforms Acts. Often private individuals have better information about market distortions for ultimately no matter how powerful an economic regulator is, it cannot possibly replicate the mélange of information accessible to individuals. Section 19(1) while limiting private right of action to file information without seeking redress has served well. Some of the high profile cases including *Surinder Bami* v. *BCCI* of the Commission were initiated upon information from a general member of the public. A case for modifying Section 19 (1) with a full blown private right of action as in other jurisdictions is not on the anvil as yet, but as of now as a young colleague pointed out a similar provision exists under Section 53N(4) and with COMPAT.

Nonetheless, Section 19(1) is of tremendous value for sustaining competitive markets. The Legislature in recognizing the pervasive facet of competition provides that an informant need not be the 'aggrieved party'. It could be anyone - government, general public or consumer and not necessarily a competitor. The wide connotation of 'aggrieved' not only raises the Competition Act above other Regulatory Acts but places emphasis on the crucial fact that efficient functioning of markets ought to and should be the concern of all, of consumers of the public. In fact competitors as aggrieved parties are more inclined to fire from the shoulders of the Commission rather than in stoking competition from the larger perspective of gains to society of competition and market reforms. Ensuring and sustaining competition as set forth in the preamble to the Act is on consumer welfare with emphasis on efficiency - a consumer perspective. Moreover, changing market structures and market dynamism are better fathomed by consumers and cross-section responses of society rather than from aggrieved parties. Section 49 (3) and Section 19(1) by complimenting each other ensures that market dynamism will never be lost sight by the Commission.

Agnosticism and advocacy incorporated in the Competition Act by legislative intent have granted legitimacy to a market oriented economy perhaps even foreclosing the need for further legislative interventions or policy documents. The success of economic reforms hinges on competition and efficient markets being everyone's concern. These two sections place a heavy responsibility on the Commission.

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PATENTS AND COMPETITION: THE CASE OF PHARMA

Prof. Subha Ghosh*

It is an honor to write for the first quarterly edition of the newsletter for The Center for Competition and Regulation at the National Law School of India. Thank you, Professor Somshekar, for including me in this invaluable venture. My contribution will focus on my area of specialization, the relationship between intellectual property and competition law.

Three propositions inform the debate over the relationship between intellectual property rights and competition policy. The first involves concerns over how the anticompetitive uses of intellectual property will increase as intellectual property rights become stronger. The second is that the uses of competition norms to loosen intellectual property rights will diminish the incentives for innovation. Finally, there is the belief that the tension between competition policy and intellectual property rights can be reconciled by recognizing how market competition is consistent with innovation and by acknowledging the competition norms that shape the scope of intellectual property rights. In this Essay, I examine these three propositions and their application to the preliminary report on the pharmaceutical industry released by the European Commission on November 28, 2008.[1]

The first proposition--that anticompetitive uses of intellectual property will increase as intellectual property rights become stronger--should not be read as an anti-intellectual property comment. The quantity of rhetoric that is critical of intellectual property rights is unfortunate, as is the view that competition law, particularly United States antitrust law, is antithetical to the goals of intellectual property. Nonetheless, as intellectual property rights grow stronger through legislative changes and judicial interpretations, the opportunity for abusing the right to exclude, through licensing and other practices, does increase. In addition, stronger intellectual property protections can lead to market concentration as firms become able to realize economies of scale and scope through the exercise of intellectual property rights. Increased market concentration invites increased scrutiny from competition policymakers.

The second proposition--that the uses of competition norms to loosen intellectual property rights will diminish the incentives for innovation--is a tautology that often follows from the arguments in favor of strong intellectual property rights. If one accepts the claim that intellectual property rights create incentives for innovation, then weaker intellectual property rights logically should reduce incentives to innovate. The problem, however, is that there is no simple linear relationship between intellectual property rights and innovation. Cumulative and serial innovation can be hampered by strong intellectual property rights. Furthermore, strong rights can create entrenched business models that are often difficult to displace through business and technological innovation.

Nonetheless, the second proposition is worth bearing in mind. First, it is an argument that needs to be confronted as competition policy more aggressively challenges intellectual property rights. Second, even without a simple linear relationship between the strength of intellectual property rights and innovation incentives, there is the concern that policymakers fixated on competition may be overly aggressive and lose sight of how competition policy affects innovation markets. The experience in the United States with IBM in the 1970s is an example of how competition policy can lose its focus in ensuring that markets remain dynamically competitive.

The third proposition--the idea that the tension between competition policy and intellectual property rights can be reconciled by recognizing how market competition is consistent with innovation and by acknowledging the competition norms that shape the scope of intellectual property rights-- synthesizes the tensions described in the first two. Reconciling intellectual property and competition policy requires recognizing that intellectual property law is a form of competition policy. The arguments for recognizing intellectual property as a type of competition policy extend beyond market competition and include rivalries between competing artists or between nonprofit entities, such as universities. However, if the focus is on the context of market competition, which is the primary concern of competition policy, then we see that intellectual property rights shape the structure of and conduct within markets based on exchange and price mechanisms in two ways.

First, intellectual property rights resolve market failures that arise in information-based transactions. In any market transaction requiring the transfer of information, either by itself or in addition to an exchange of a product or service, parties to the transaction face two types of potential market failures. The first type of failure is the appropriation problem, created by positive externalities that arise from the actual information itself. The second is the revelation problem, generated by the lack of incentives to reveal the information unless the party receiving the information will pay consideration for it. Intellectual property rights solve both of these problems by creating a right to exclude others from using or distributing the information. This right to exclude enables the owner of the intellectual property to appropriate enough return to develop and distribute the information. The exclusion right also allows the owner to reveal the information, with protections of legal recourse, should the information be misappropriated. By resolving these market failures, intellectual property rights protect owners in the context of competitive markets, which in turn promotes the dissemination of socially valuable information.

The second effect intellectual property rights have on market competition is also a by-product of the right to exclude. The right to exclude, in the context of a competitive market, can serve as a legal barrier to entry for new products, technologies, and business methods. Too broad a construction of intellectual property rights can hinder the very markets that are made possible by the rights.

Therefore, it is important to construe intellectual property rights narrowly so that they do not interfere with either dynamic entry into, or required exit from, the markets. This requires defining intellectual property rights in a way that is consistent with a dynamic market environment and necessary for healthy innovation.

Scrutinizing the three propositions closely yields an important conclusion: intellectual property is about competition policy. Innovation occurs through competition, and intellectual property rights ensure effective, dynamic competition. This is why intellectual property rights must be defined in a way that is consistent with dynamic market competition. If constructed too strongly, intellectual property rights can interfere with competition. If constructed too weakly, intellectual property rights may not adequately resolve the market failures that bedevil markets for information. The challenge is to design rules both within intellectual property law (the substantive law of patents, copyrights, trademarks, and trade secrets) and outside intellectual property law (substantive competition law) that promote dynamic competitive markets.

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References

1. European Commission, Pharmaceutical Sector Inquiry: Preliminary Report (2008), [*hereinafter* 'Preliminary Report'] *available at* http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_ report.pdf

2. *See* Suzanne Scotchmer, Innovation and Incentives 156-57 (MIT Press, 2004) (describing incentive structures for cumulative and serial innovation).

3. *See* Michael J. Madison, *Intellectual Property and Americana, or Why IP Gets the Blues*, 18 Fordham Intell. Prop. Media & Ent. L.J. 677, 708-10 (2008) (discussing intellectual property and the protection of business models).

4. *See* William H. Page & John E. Lopatka, The Microsoft Case: Antitrust, High Technology and Consumer Welfare 243-44 (University of Chicago Press, 2007).

5. *See* e.g., Shubha Ghosh, *Competitive Baselines for Intellectual Property Systems* in International Public Goods and Transfer of Technology Under a Globalized Intellectual Property 793, 795-802 (Keith E. Maskus & Jerome Reichman eds., Cambridge University Press, 2004) (arguing that intellectual property rights and competition policy are inseparable).

6. *Id.* at 795 (discussing the role of competition in intellectual property systems).

7. *See* Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention* in The Rate And Direction of Inventive Activity: Economic and Social Factors 609, 616-19 (Nat'l Bureau of Econ. Research ed. 1962) (explaining how the property rights system can address market failure for information).

8. *Id.* (arguing that property rights in information can also have anticompetitive effects).

Bid Rigging and Indian Competition Law: An Overview

Mr. John Handoll*

Introduction: Public spending on goods and services in India constitutes a significant percentage of GDP.[1] Its importance in the Indian economy is undeniable.[2]

Public contracts should be contested for and won on the basis of competitive bidding, since the procuring body should thereby get the lowest possible price or the best value for money. A properly designed and implemented procurement regime – with open, non-discriminatory and competitive tendering procedures and mechanisms to counter the twin scourges of corruption and bid rigging – is essential to achieving this objective.

This is "work in progress". A coherent and overarching legislative framework in India is needed. The 2012 Public Procurement Bill is an important step in the right direction,[3] but this lapsed with the 2014 change of government and its prognosis remains uncertain. This paper looks at one piece of the jigsaw - how bid rigging is addressed in Indian competition law and practice, with the focus on enforcement.[4]

Bid-Rigging and Indian Competition Law: The best-laid plans of procuring bodies can be thwarted by bid rigging (also known as "collusive tendering".[5] This skews the tendering process and, by denying the procuring body the benefits of competition, can result in significant financial (and even social) harm. Bid rigging appears in many forms, including identical pricing, cover bidding,[6] bid rotation, bid suppression, market allocation and collective boycotts.[7] Effective competition law and enforcement is a critical weapon in the public procurement armoury.[8] India has stepped up to the mark.[9] Section 3 of the Competition Act, 2002 prohibits agreements which cause or are likely to cause an appreciable adverse effect on competition ("AAEC"). Under Section 3(2), certain types of horizontal agreement – expressly including one that "directly or indirectly results in bid rigging or collusive bidding" - are presumed to have an AAEC. "Bid rigging" covers "any agreement … which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding".

At the time of writing (August 2014), the Competition Commission of India ("CCI") had established bid-rigging in eight cases,[10] covering identical pricing,[11] cover bidding,[12] market allocation,[13] and collective boycotts.[14] Appeals had been decided by the Competition Appellate Tribunal ("COMPAT") in five of these cases.[15]

A number of features of the legislation have facilitated enforcement. *First,* once bid rigging is established, an AAEC is presumed, with the burden of proving otherwise shifting to the parties. In a number of cases, the CCI has considered arguments seeking to rebut the presumption.[16] In other cases, however, the presumption has clearly applied, but the CCI has nevertheless conducted an AAEC analysis.[17]

Second, since penalties are administrative, rather than criminal, the CCI can apply a lower standard of proof than that of "beyond reasonable doubt" required in criminal cases. The description of the lower burden of proof has varied. The CCI at first stated that the standard was a "balance of probability" and "liaison of intention". [18] It later held that the test was a "preponderance of probabilities".[19] The COMPAT has held that the test of a "strong probability" would suffice, but that its application would differ from case to case, with unlikely or particularly serious events requiring more convincing proof. [20]

Third, the term "agreement" is broadly defined in Section 2(b) of the Competition Act to include "any agreement or understanding or action in concert", whether or not it is formal, in writing or legally enforceable. The CCI has endorsed the statement that "a nod or a wink will do".[21]

Finally, given the secrecy and the difficulty of obtaining direct evidence of wrongdoing, the CCI can rely on circumstantial evidence of bid rigging. [22]

Evidence of Breach: The evidence that may be used to arrive at a finding of breach will vary depending on the type of bid rigging.

In relation to *identical pricing*, identical pricing in itself cannot be conclusive evidence of collusion: however, collusion can be inferred where the different suppliers' costs differ, and there are no plausible reasons for identical pricing.[23] This differs from cases of conscious parallelism where "plus factors" are required,[24] but, in the absence of repeated identical pricing, a breach will be more readily inferred where there are supporting factors. These have included: meetings between bidders;[25] the existence of a trade association;[26] the appointment of common agents;[27] the filling of bids by the same person;[28] the same handwriting being used;[29] bidders using a similar format for covering letters;[30] bidders visiting the contracting agency together;[31] and the sharing of confidential documents. The earning of "huge margins" by bidders, and the quoting of rates far in excess of costs, has also led to an "irresistible inference" of collusion. [33]

In relation to *market allocation*, the CCI held that an intention to divide up supply was corroborated by the fact that the total quantity offered was very near to the quantity stated in the tender.[34] It also held that, where the parties had restricted the quantity to be supplied, the fact that they had capacity well in excess of this could, absent any valid explanation, only be the result of collusive action for market allocation.[35]

In establishing *cover bidding*, supporting factors include huge differences between bid rates,[36] bids containing common typographical and other errors;[37] bids containing identical technical deficiencies,[38] failure to submit the documents required or to accept required warranty clauses;[39] and mismatching dates given in bid and supporting documents.[40] The COMPAT held that putting in technically deficient bids cannot result in cover bidding where there were other qualified bidders.[41] It found as "irrelevant and illogical" a CCI finding that parties submitting bids at the same time showed some kind of understanding between them.[42]

In relation to *collective* boycotts, the CCI found that bidders had acted collectively, rather than independently, in boycotting an auction where two suppliers had written identical letters explaining their non-participation, and bidders later participated in a similar auction.[43] The COMPAT held that such parallel behaviour could not be coincidental given widespread opposition to the holding of the auction, and actions taken by the suppliers and their representative body.[44]

The CCI also held that the very fact of non-participation in a procurement procedure suggested a meeting of minds.[45] The COMPAT, linking this boycott to identical pricing, held that such pricing and such boycott "viewed on the backdrop of consistent practice of offering only identical bids" confirmed that it was made with a common design.[46]

The CCI in *LPG Cylinder Manufacturers* held that bid rigging was more likely to occur where particular features of the industry or of the product tended to collusion.[47] Such features were market conditions, the small number of suppliers, few new entrants, active trade associations, repetitive bidding, identical/similar products, few or no substitutes, and no significant technological changes. The COMPAT supported some of these findings on appeal.[48] No explicit reference to sectoral features has since been made.

Penalties: The CCI may take a variety of steps where it finds breach.[49] In most of the cases, it imposed "cease and desist"[50] orders. In all but two,[51] it imposed financial penalties, based on the "standard" maximum of 10% of average turnover for the last three preceding financial years, varying from 2% to 9% of average annual turnover;[52] perhaps because the illegal activity related to specific time-bound tenders, the CCI did not impose the tougher penalties available for cartel behaviour.

Although the CCI pointed to the serious nature of bid-rigging, it usually did not give reasons for its decisions on penalties, and did not consider aggravating and mitigating factors in detail, or indeed at all. The COMPAT criticized the CCI for its failure, as a quasi-judicial body, to give reasons[53] and to consider aggravating and mitigating circumstances.[54] It has seen bid rigging as reprehensible, and has treated holding the poor to ransom as an aggravating factor.[55] Nevertheless, there had to be proportionality in imposing penalties.[56] It found, as mitigating factors, the "nascent" state of competition law,[57] first-time offending,[58] the short-term nature of breach,[59] the absence of effect on supply,[60] the small size of the offender, and timely completion of the contract by the successful contractor![61] In three appeals, it substantially reduced the penalties imposed,[62] and in one appeal exceptionally referred the question of penalties back to the CCI.[63]

In a case involving multi-product companies, the COMPAT held that "relevant turnover" is that for the product/s covered by the infringement.[64] In considering "relevant turnover", the CCI must also consider factors including the general reputation of the company, mitigating factors such as first time breaches, and the company's "attitude".[65] Relevant turnover is not limited to domestic sales, or sales to the public sector or the contracting authority.[66]

Conclusion : In the space of two years, the CCI established bid-rigging in eight cases. On appeal, the COMPAT, in all but one case,[67] largely upheld the CCI's substantive findings.

The CCI has made an excellent start in fighting bid-rigging. Its success has, however, been marred by shortcomings in relation to penalties, where the COMPAT showed that it had much to learn in order properly to discharge its quasi-judicial functions.

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References:

[1] It is difficult to get up to date figures. However, a recent report by UNODC suggests that public procurement spending accounts for between 20% and 30% of GDP, and that it accounts for more than 50% of the spending of several Government ministries (see UNODC *India: Probity in Public Procurement* (2013) p. 11 (http://www.unodc.org/documents/southasia/publications/research-studies/India-PPPs.pdf).

[2] See OECD *India: Sustaining High and Inclusive Growth* (October 2012), p. 10. (http://www.oecd.org/about/publishing/IndiaBrochure2012.pdf.

[3] For the Bill, see http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/58_2012_LS_EN.pdf and *errata* (http://164.100.24.219/BillsTexts/LSBillTexts/Errata/Cor_EN_58_2012_LS.pdf).

[4] For information on the CCI's *advocacy* role, see CCI *Fair Play* Vol. 1 (April-June 2012) (http://cci.gov.in/Newsletter/CCI_NL_(1)2012.pdf) and Vol. 3 (October-December 2012) (http://cci.gov.in/Newsletter/Newsletter_Dec.pdf).

[5] Bid rigging is defined in the OECD *Glossary of Statistical Terms as* "a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts" (http://stats.oecd.org/glossary/detail.asp?ID=3334).

[6] Also called "complementary", "courtesy", "token" or "symbolic" bidding.

[7] See the 2009 OECD *Guidelines for Fighting Bid Rigging in Public Procurement* http://www.oecd.org/competition/cartels/42851044.pdf (http://www.oecd.org/competition/fightingbidrigginginpublicprocurement.htm).

[8] See, generally, the 2012 OECD *Recommendation on Fighting Bid Rigging in Public Procurement (http://www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm).*

[9] See the CCC Advocacy Booklet *Provisions relating to Bid Rigging ((*May 2011) (*http://cci.gov.in/May2011/Advocacy/Bid%20Rigging.pdf).*

[10] The CCI orders are, in chronological order: (1) *LPG Cylinder Manufacturers* (Case No. 3/2011: 24 February 2012) (http://cci.gov.in/May2011/Order of Commission/LPGMainfeb2.pdf) (See, also, dissenting order of R. Prasad (http://cci.gov.in/May2011/Order of Commission/LPGdissentingfeb12.pdf); (2) *Explosives* (Case No. 6/2011: 16 April 2012) (http://cci.gov.in/May2011/Order of Commission/062011.pdf and http://cci.gov.in/May2011/OrderOfCommission/06-2011.pdf); (3) *Safdarjung Hospital* (Case No. 43 of 2010: 16 April 2012) (http://cci.gov.in/May2011/Order of Commission/432010.pdf; (4) *Aluminium Phosphide* (Suo Moto Case No. 2/2011: 23 April 2012) ("") (http://cci.gov.in/May2011/Order of Commission/Case2of2011MainOrder.pdf (See, also, dissenting order of R. Prasad (http://cci.gov.in/May2011/Order of Commission/Case2of2011M(R) SupplementryOrder.pdf); (5) *Jai Prakash Narain* (Case No. 40/2010): 25 April 2012) (http://cci.gov.in/May2011/Order of Commission/CaseNo40of2010.pdf); (6) *South Eastern Railway* (Case No. 05 of 2011: 21 February 2013) (http://cci.gov.in/May2011/Order of Commission/REF-052011.pdf): (7) *Rubber Soles* (Case No 01 of 2012: 6 August 2013) (http://cci.gov.in/May2011/Order of Commission/REF-052011.pdf); and (8) *Fee Valves* (Suo Moto Case No. 3 of 2012, 5 February 2014) (http://cci.gov.in/May2011/OrderOfCommission/27/032012.pdf).

[11] *LPG Cylinder Manufacturers* (n. 10), *Aluminium Phosphide* (n. 10), *South Eastern Railways* (n. 10), *Rubber Soles* (n. 10), and *Feed Valves* (n. 10).

[12] *Safdarjung Hospital* (n. 10), *Jai Prakash Narain* (n. 10) and *Feed Valves* (n. 10).

[13] *LPG Cylinder Manufacturers* (n. 10), *South Eastern Railways* (n. 10), and *Rubber Soles* (n. 10).

[14] *Explosives* (n. 10) and *Aluminium Phosphide* (n. 10).

[15] The COMPAT orders are, in chronological order: (1) *Safdarjung Hospital Appeal* (Appeals Nos. 93-95 of 2012: 25 February 2013) (http://compat.nic.in/upload/PDFs/febordersApp2013/25_02_13.pdf); (2) *Jai Prakash Narain Appeal (*Appeals Nos. 98-100 of 2012: 14 March 2013)) (http://compat.nic.in/upload/PDFs marchordersApp2013/14_03_13.pdf); (3) *Explosives Appeal* (Appeals Nos. 82-90 of 2012: 18 April 2013) (http://compat.nic.in/upload/PDFs/aprilordersApp2013/18_04_13.pdf); (4) *Aluminium Phosphide Appeal* (Appeals Nos. 80 and 81 of 2012: 29 October 2013) (http://compat.nic.in/upload/PDFs/octordersApp2013/29_10_13.pdf) (this is on further appeal to the Supreme Court): and (5) *LPG Cylinder Manufacturers Appeal* (Appeals Nos. 21-44 and 46-65/2012: 20 December 2013) (http://compat.nic.in/upload/PDFs/decordersApp2013/20_12_13.pdf).

[16] *Rubber Soles* (n. 10, at para. 44) and *Feed Valves* (n. 10, at para. 52).

[17] See *LPG Cylinder Manufacturers* (n. 10, at paras. 14.5 and 14.66) (endorsed by the COMPAT in *LPG Cylinder Manufacturers Appeal* (n. 15, at paras. 44 and 38)), *Aluminium Phosphide* (n. 10, at paras. 7.32 -7.43) and *South Eastern Railways* (n. 10, at paras. 36-38).

[18] *LPG Cylinder Manufacturers* (n. 10, at para. 14.65).

[19] *Aluminium Phosphide* (n. 10, at para. 7.29), *South Eastern Railways* (n. 10, at para. 32), *Rubber Soles* (n. 10, at para. 25), and *Feed Valves* (n. 10, at para. 32).

[20] *LPG Cylinder Manufacturers Appeal* (n. 15, at paras. 30 and 31).

[21] *LPG Cylinder Manufacturers* (n. 10, at para. 14.9), referring to Lord Denning in *Registrar of Restrictive Trading Agreements v. W. H. Smith & Son Ltd.* [1969] I

[22] See *LPG Cylinder Manufacturers* (n. 10, at para. 14.12), *Safdarjung Hospital* (n. 10, at para. 6.2), *Safdarjung Hospital Appeal* (n. 15, at para. 18, *Aluminium Phosphide* (n. 10, at para. 7.29), *South Eastern Railways* (n. 10, at para. 33), *Rubber Soles* (n. 10, at para. 26), and *Feed Valves* (n. 10, at para. 33).

[23] *LPG Cylinder Manufacturers* (n. 10, at paras. 14.59.2 -4, 14.60-14.63) and the *LPG Cylinder Manufacturers Appeal* (n. 15, at para. 36), *South Eastern Railway* (n. 10, at paras. 12-13 and 16.17), *Aluminium Phosphide* (n. 10, at paras. 7.21-7.23) and the *Aluminium Phosphide Appeal* (n. 15, at para. 36), *Rubber Soles* (n. 10, at paras. 27-32), and *Feed Valves* (n. 10, at paras. 31, 41 -46).

[24] See *LPG Cylinder Manufacturers* (n. 10, at para. 14.75), *LPG Cylinder Manufacturers Appeal* (n. 15, at para. 40), *South Eastern Railways* (n. 10, at para. 39), and *Rubber Soles* (n. 10, at para. 46).

[25] *LPG Cylinder Manufacturers* (n. 10, at paras. 14.16-14.22.5, 14.23-14.25 and 14.68-14.69), and the *LPG Cylinder Manufacturers Appeal* (n. 15, at paras. 20 and 27).

[26] *LPG Cylinder Manufacturers Appeal* (n. 15, at para. 26). See, also, *Rubber Soles* (n. 10, at para. 33).

[27] *LPG Cylinder Manufacturers* (n. 10, at paras. 14.26-14.27 and 14.71), and the *LPG Cylinder Manufacturers Appeal* (n. 15, at paras. 22).

[28] *South Eastern Railway* (n. 10, at para. 15).

[29] *South Eastern Railway* (n. 10, at paras. 17-18).

[30] *South Eastern Railway* (n. 10, at paras 20-21 and 34).

[31] *Aluminium Phosphide* (n. 10, at paras. 7.24-7.28).

[32] *Rubber Soles* (n. 10, at para. 34).

[33] *Aluminium Phosphide* (n. 10, at paras. 7.44-7.45).

[34] *South Eastern Railway* (n. 10, at paras. 18 and 40).

[35] *Rubber Soles* (n. 10, at paras. 36-41).

[36] *Safdarjung Hospital* (n. 10, at para. 6.48), endorsed by the COMPAT in *Safdarjung Hospital Appeal* (n. 15, at para. 12).

[37] *Safdarjung Hospital* (n. 10, at paras. 6.28-6.47) and *Safdarjung Hospital Appeal* (n. 15, at para. 11).

[38] *Jai Prakash Narain* (n. 10, at para. 6.5)

[39] *Feed Valves* (n. 10, at paras. 35-37)

[40] *Safdarjung Hospital* (n. 10, at paras. 6.55-6.56), partly rejected by the COMPAT in *Safdarjung Hospital Appeal* (n. 15 at para. 14).

[41] *Jai Prakash Narain Appeal* (n. 15, at para. 19), referring to *Jai Prakash Narain* (n. 10, at para. 6.10).

[42] *Jai Prakash Narain Appeal* (n. 15, at para. 19), referring to *Jai Prakash Narain* (n. 10,at para. 6.10).

[43] *Explosives* (n. 10, at para. 8.27-8.32).

[44] *Explosives Appeal* (n. 15, at paras. 43-48).

[45] *Aluminium Phosphide* (n. 10, at paras. 7.36-7.39).

[46] *Aluminium Phosphide Appeal* (n. 15, at para. 36).

[47] *LPG Cylinder Manufacturers* (n. 10, at paras. 14.14 and 14.15), where the CCI endorsed the approach taken by its DG.

[48] *LPG Cylinder Manufacturers Appeal* (n. 15, at paras. 21, 26 and 31).

[49] Section 27 of the Competition Act sets out the types of order that may be passed by the CCI.

[50] *LPG Cylinder Manufacturers* (n. 10, at para. 15.5), *Explosives* (n. *, at para. 10.4), *Aluminium Phosphide* (n. 10, at para. 8.3), *South Eastern Railways* (n. 10, at para. 43), *Rubber Soles* (n. 10, at para. 48), *and Feed Valves* (n. 10, at para. 57).

[51] *Jai Prakash Narain* (n. 10, at paras. 7.2-7.3) and *South Eastern Railways* (n. 10, at paras. 44-45).

[52] In increasing order, *Feed Valves* (n. 10, at paras. 61 -62) (2%), *Explosives* (n. 10, at para. 10.2) (3%), *Safdarjung Hospital* (n. 10, at para. 7.1) (5%), *Rubber Soles* (n. 10, at para. 49) (5%), *LPG Cylinder Manufacturers* (n. 10, at para. 15.2) (7%), and *Aluminium Phosphide* (n. 10, at para. 8) (9%).

[53] *Safdarjung Hospital Appeal* (n. 15, at paras. 26-27), *Explosives Appeal* (n. 10, at para. 64), and *Aluminium Phosphide Appeal* (n. 15, at paras. 43, 60-61), *LPG Cylinder Manufacturers* Appeal, at paras. 57-58).

[54] *Safdarjung Hospital Appeal* (n. 15, at paras. 25-31).

[55] *Aluminium Phosphide Appeal* (n. 15, at para. 66).

[56] *Explosives Appeal* (n. 10, at para. 68), *Aluminium Phosphide Appeal* (n. 15, at para. 63).

[57] *Safdarjung Hospital Appeal* (n. 15, at para. 28).

[58] *Safdarjung Hospital Appeal* (n. 15, at para. 28) and *Explosives Appeal* (n. 15, at para. 66).

[59] *Explosives Appeal* (n. 15, at paras. 66-67).

[60] *Ibid.*

[61] *Safdarjung Hospital Appeal* (n. 15, at para. 30).

[62] *Explosives Appeal* (n. 15, at para. 69) (penalty reduced by 90%), *Safdarjung Hospital Appeal* (n. 15, at paras. 25-31) (from 5% to 3%), and *Aluminium Phosphide Appeal* (n. 15, at para. 69) (penalty on single product company reduced by 90%).

[63] *LPG Cylinder Manufacturers Appeal* (n. 15, at paras. 53-59).

[64] *Aluminium Phosphide Appeal* (n. 15, at paras. 62-63).

[65] *Ibid.*

[66] *Ibid.*

[67] *Jai Prakash Narain Appeal* (n. 15).

A Deferred Right of Sovereign Consumer

Mr. Praveen Tripathi*

With the finding of Competition Appellate Tribunal (COMPAT) upholding DLF Ltd. to be liable for the abuse of dominant position, rights of the Allottees/consumers to seek compensation also got matured. The Competition Act, 2002 which is viewed as consumer welfare legislation,[1] designs the mechanism to withhold consumer to claim compensation as a right. Section 53N of the Act creates an impediment on the rights of the consumer by allowing them to file an application for the compensation only after the finding of Competition Commission of India (CCI) or COMPAT has attained finality.

Consumer rights have travelled over a period of time through several transitions from *caveat emptor* to *caveat venditor* and then to '*consumer sovereignty*' under the new competition law regime. Consumer Sovereignty denotes the power of consumer to determine what goods and services are to be produced and supplied. Consumer sovereignty exists when two fundamental conditions are present *i.e.* the range of consumer options made possible through competition, and consumers must be able to choose effectively among these options.[2] Concept of consumer sovereignty is well founded in competition law as well as consumer protection law. Competition Law ensures that meaningful range of options are made available to consumers while consumer protection law safeguards the choice of consumers from among those options, unimpaired by violations such as deception or withholding of material information.

Under the new competition law regime in India, though consumer interest is taken as an objective of competition law, to substantiate the same, provisions of the Act are deficient. Under the present mechanism, an action to claim compensation under the competition law is designed as a *follow-on* action, which suspends the otherwise available right of the consumer till the CCI or COMPAT findings attains finality. Further, if the matter involves the issues of competition law, vide Sections 60 and 61 of the Act, neither consumer forum nor civil courts will have jurisdiction to decide an application for compensation, keeping in view the express bar. In this situation, a consumer suffering harm or loss due to anti-competitive activity has to wait for maturity of his right to claim compensation which would otherwise have been available at the first instance.

Unlike follow-on action, *stand-alone* action, which gives right to the consumer to bring a claim of compensation under antitrust law independent of the findings of competition authorities, is taken as mechanism to provide effective remedial process to consumer and also, an efficient enforcement of law. In U.S.A., private action to claim compensation, independent of Department of Justice/Federal Trade Commission, contributes to more than 90% of the antitrust enforcements.[3] Further, taking examples from U.S.A, European Commission has also recently made provisions to facilitate private action for compensation in national courts.

It is interesting to note that 'the original text' of Competition Act, 2002 incorporates the mechanism of *stand-alone* actions (under Section 33 to CCI). However by 2007 amendment, it was transplanted as

Section 53N to prevent CCI from exercising adjudicatory functions, which in fact they are still exercising, and bestowed the power to award compensation on COMPAT. With an amendment, the well founded mechanism of the *stand-alone* action was converted to less evolved and thwarting *follow-on* action.

It is need of the hour that we should think and act like a mature jurisdiction in developing our competition law, policy and culture. Segregating private action for compensation from the first level enforcement of competition law will harm consumer more due to this deferred restitutory provision. Private action for compensation, at first level, can provide an incentive to the consumers to bring information to CCI, as there will exist a direct remedy. Further, private person suffering harm due to anti-competitive activity in market is more proximate and privy to subject matter of the competition law, which will help CCI in the detection of anti-competitive activity. In addition to this, when private person pursues the claim, the responsibility of proving an anti-competitive activity and a consequential loss is on the claimant, which saves huge resources incurred in enforcement, and can thus minimise the enforcement cost.

Competition regulator is not merely required to adjudicate on the violations and penalise the wrongdoer as a part of their mandate but also to create an effective competition culture. Participation of the various stakeholders in the enforcement mechanism of the competition law is inevitable, but that can be realised only if competition law provides a mechanism for their participation through enhanced private actions. Consumer sovereignty should be given not merely in the substantive rights but has to be continued in enforcement as well.

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Anticompetitive Agreement

CCI made office bearers liable

CCI in its two orders dated February 5, 2014 and March 11, 2014 made its position clear with respect to liability of the office bearers of an association. In *Vipul R. Shah* v. *DG (Competition Commission of India)* 2012 CompLR 107 (Gujrat), Gujrat High court has ruled that Commission has power to decide on its jurisdiction to proceed against individual members of an association, if such an issue is raised. In *M/s Arora Medical Hall* v. *Chemist and Druggist Association,* a plea was raised by the office bearers in their common reply that provision of section 48 of the Act are not attracted, as those provision specifically deal with 'company'. Commission rejected the argument and held that, since the office bearers were party to the decisions of association, provision of Section 27 of the Act is itself sufficient to hold the office bearers liable for contraventions without an aid and assistance of the provision of Section 48 of the Act. Section 27(b) of the Act, provides penalty for each of such person or enterprises which are parties to such agreements or abuse. Again in *Re: Bengal Chemists and Druggists Association,* the plea was raised, that section 48 may not be applicable to the office bearers and executive members of BCDA as their liability is limited as per the Memorandum of Association of BCDA being a non-profit company registered under Section 25 of the Companies Act, 1956. CCI rejecting the plea stated that, *firstly* in Commission had already stated in *Arora Medical hall Case* that provision of Section 27 of the Act is sufficient to make office bearers liable; *secondly* Section 48 of the Act does not make any distinction with respect to Section 25 company *vis-à-vis* other forms of companies. Thus in both of the above case CCI ruled its jurisdiction to impose penalty on the individual members complacent in the anti-competitive activity.

Consumer welfare avowed in Stem-cell bank Case

CCI in its pronouncement in *Ramakant Kini* v. *Hiranandani Hospital* [Case no. 39 of 2012] has recognized that Commission has to control behaviour of enterprises in the market place in order to achieve consumer welfare. In doing so, commission has held that an agreement between Hiranandani Hospital and Cryobank was void being anticompetitive agreement under Section 3 (1). It was alleged that, Hiranandani Hospital and Cryobank has entered into an exclusive agreement. As per the terms of agreement, Hiranandani Hospital will offer exclusively Cryobank stem cell services on a fixed enrolment support fee for every stem-cell banked.

It was argued by Hiranandani Hospital that, Section 3(4) of the Act, will not applicable as its application is limited to those cases where the enterprises are operating at different level of production chain in different markets. And in the present case Hiranandani Hospital and Cryobank are not operating at different stages or levels of same production chain because the business activities of Hospital are not vertically or horizontally related to business activities of Cryobank. Commission considered this argument as misconceived, as Section 3(3) & (4) only cites instances of agreement where presumption of appreciable adverse effect has to be raised and where not. It cannot be concluded that Section 3(3) & (4) are exhaustive on the kinds of agreement, Section 3(1) prohibits 'any agreement' which causes or likely to cause appreciable adverse effect on competition in

India. Thus if an agreement does fall in one of the category as provided under Section 3(3) & (4), commission can still make an inquiry under section 3(1). Commission has therefore to consider in cases, whether an alleged agreement cause or likely to cause any appreciable adverse effect on competition. This can further be supported by Section 19 and Section 33 which refers 'subsection (1) of Section 3' in respect to initiation of proceedings and interim measures.

The exclusive contracts between Hospitals and stem cell bank has tendency of distorting market mechanism altogether. Stem cell banking services market is a small market with few players and at nascent stage in India. The development and competition in stem cell service industry is bound to be hindered because of such exclusive arrangement between hospital and stem Cell bank, as each player instead of competing with other players for efficiency and competitive price, would endeavour to pay commission to different hospitals and mop up clients. The adverse effect is much more telling in this particular market because of the total dependence of the expecting mothers on the maternity service providers to get access to stem cell from newly born children born in hospital. Consumer may further suffer in long run when the tied up stem cell banker, due to inefficiency *vis-à-vis* other competitors or otherwise, exits or level of services provided by him falls. In such scenario, exclusive arrangements would result in total failure of service to consumer who wanted stem cells of the child to be preserved for the future use. Given the peculiar nature of the service *viz* long term association resulting in tying in of the consumer for 21 years and the nascent stage of the market, such an arrangements foreclose competition in stem cell banking market and create entry barrier for competitors depriving the final consumers of not only quality or price of services offered but also the choice of which service provider they would like to contract with, which result in permanent moulding of consumer preference in the long run, and thereby distorting market mechanism completely.

Thus Commission declared the alleged agreement between Hiranandani Hospital and Cryobank as null and void and imposed penalty of 4% of the average turnover of the last three years. In imposing penalty commission took in consideration that, 'maternity a service being provided by the hospital was only a part of overall services and no similar arrangement is found in other services' as a mitigating factor in deciding penalty.

Cartelisation in Supply of Spares to Diesel Loco Modernisation Works (DLMW)

DLMW a unit of Indian Railways at Patiala, Punjab floated tender for the procurement of feed valves used in diesel locomotives. Accordingly three companies' viz. Stone India Limited, Faiveley Transport Rail Technologies India Limited and Escort Limited participated in bidding and quoted identical rates of Rs. 17, 147.54 for each piece. These rates were further found to be 33% higher than last purchase. Consequently suspecting a cartel, a *sou moto* case was registered on a letter from Manager of DLMW.

Bidders tried to justify the identical prices by raising an argument that, basic prices of all the three bidders were dissimilar and the final price worked up to identical by virtue of addition of taxes to the basic prices. Similarity can also be attributed to corporate espionage or coincidence. Such parallelism is argued as legal, due to oligopolistic competition and interdependence of competitors.

The Commission came to the conclusion that regardless of all the justifications put forth by the parties, the fact that the prices quoted by the parties are absolutely identical raises a strong presumption of a possible collusion among the parties. Relying on inferences deduced from a number of coincidences and indicia, which, if taken together, Commission observed that parties were able to quote identical final prices even after quoting different basic prices due to the fact that although Excise Duties and CST had to operate at uniform rates, the parties used differing CST rates to arrive at the same final price. Manufacturing units of the parties were situated in Haryana, West Bengal and Tamil Nadu and that being so, the cost of production of the parties are bound to vary from each other. That being the case, it is incomprehensible as to how the final prices of all the three parties worked out to the same figure.

As regards the issue of "corporate espionage", the Commission observed that it is anomalous that the similarity of prices were the result of the leaking of information from one company to the other, because if there was, at all, a leakage of information, the party getting such information would have quoted a lower price than its rival in order to bag the tender, which wasn't the case in the present case.

Taking all the above mentioned reasons into consideration, Commission concluded that parties by quoting identical rates, determined the prices in tenders and resorted to collusive bidding in contravention of the provisions of Section 3(3)(a) & (d) of the Act. Taking relevant turnover of the in the infringing product as mitigating factor penalty at the rate of 2% of the average of preceding three year turnover was imposed.

Cartelisation in Jute Gunny industry

Indian Sugar Mills Association ('ISMA'), National Federation of Co-operative Sugar Factories Ltd. ('NFCSF') and All India Flat Tape Manufacturers Association ('AIFTMA') alleged that Indian Jute Association ('IJMA') are Gunny Trade Association ('GTA') are raising the prices of jute bags in tandem, unreasonably, over the years, imposing unfair and excessive price and limiting the technical development of market which is anti-competitive as per the provisions of the Act. Members of IJMA and GTA have cartelized the market for packaging material for sugar and they are also abusing their dominant position. Further, MoT through its orders/policy decisions is restricting the packaging materials market for sugar industry only to the jute industry which is unfair, and also amounts abuse of dominant position.

CCI found that activities of IJMA and GTA will fall within the meaning of 'cartel' for controlling prices through a tacit agreement. CCI decision was based on consideration that, though there was a high demand, production of A-Twill bags had reduced. Prices had increased constantly in case of A-Twill bags while production had decreased, though sufficient production capacity was available. Moreover jute manufacturers were not utilizing their capacity to optimum as their capacity utilization for sacking was ranging from 60% to 70% despite soaring demand.

This clearly showed that production and supply of A-Twill jute bags had been restricted and controlled by jute manufacturers deliberately to affect price and fair competition in market. Thus, limiting and controlling production and supply in market in a concerted manner through understanding by members of IJMA and GTA was found to be in contravention of provisions of Section 3(3)(b) of Act.

Refusing the alleged abuse of dominant power, CCI held that no single enterprise of jute was in a position to dominate market within meaning of explanation to Section 4 of Act. Since no such position was found and there were no provisions for collective dominance, acts of members of IJMA and GTA cannot attract provisions of Section 4(2)(a) of Act. Further, MoT was not involved in dealing in respect of purchase/sales of jute bags (A-Twill) for sugar industry, nor was a player within relevant market, thus it was not an 'enterprise' for issue in question. Further, discharge of statutory functions by Ministry of Textiles under Jute Packaging Materials (Compulsory Use in Packaging Commodities) Act, 1987, could not be described as an exercise in abuse of dominance.

CCI imposed penalty on members of the Executive Committee of IJMA and the Executive Committee and the Daily Price Bulletin Sub-Committee of GTA at the rate of 5% of the average income of the last three financial years.

ABUSE OF DOMINANT POWER

ITPO held liable for abuse of dominant position

In *Indian Exhibition Industry Association* v. *Indian Trade Promotion Organisation* (ITPO) CCI imposed monetary penalty on ITPO for its role in abuse of dominant power in 'provisions of venue for organizing international and national trade fairs/ exhibitions in Delhi.'

ITPO a company registered under Section 25 of the Companies Act, 1956, is a wholly owned and under administrative control of Government of India. ITPO acts as of regulator for leasing space at Pragati Maidan to third parties, and also acts as event organisers at Pragati Maidan and competes with other event organizer. A competition concern arose due to this dual role of ITPO. It was alleged that as a regulator, ITPO has made a discriminatory 'time gap restriction policy', it required a time gap between two events of similar product/ profile/coverage of 15 days, and in case of ITPO and for third party fairs having similar product/profile/coverage, 90 days before and after the fair.

CCI considered the relevant market as 'provision of venue for organizing international and national trade fairs/exhibitions in Delhi'. In determining so, CCI took into account relevant product as 'provision of venue for organizing national and international trade fairs' by distinguishing it with venues of other kind of events in terms of parameters such as physical characteristics and consumer preferences. Venues which regularly hold exhibitions and trade fairs are ideally have large space to accommodate multiple exhibitions, are centrally located and are well known on the world map and are, therefore most preferred by the exhibitors particularly for organizing international and national exhibitions and trade fairs. While 'Delhi' was considered as relevant geographic market by CCI taking into account factors like, history of holding trade fairs and exhibitions in Pragati Maidan; better transport facility; centralized location nearby hotels; substantial large exhibition and open display space at its venue Pragati Maidan, location of central and state ministries as trade fairs and exhibition require approvals from government authorities; consumer preference; hence conditions of competition in the demand and supply of venues for national and international events in Delhi was deemed different from those prevailing outside.

CCI found ITPO in dominant position in a relevant market due to absence of any competitor which could match ITPO's in terms of size and importance; its dual role of ITPO, as regulator and competitor; government's authorisation to ITPO; controlling the largest venue (Pragati Maidan); lack of countervailing buyer power; entry barriers in terms of availability of adequate space.

With respect to 'time gap restriction' CCI held that it is evident that ITPO has stipulated favourable time gap restriction on its own events and unfair and discriminatory conditions on the third party events. Beside it also restricted the provisions of services in market. Increase in time gap restrictions for holding third party events before and after ITPO's event of similar profile, leads to denial of market access to third parties who compete with ITPO. Further, it was also held that ITPO being a venue provider abused its position in the market of venue provider to protect and enhance its position in the market of event organization.

Ministry of Commerce and Industries was also impleaded in this case as opposite party, however CCI considered that function of the Ministry do not qualify it to render an 'enterprise' within the meaning of Section 2(h) of the Act.

CCI in its order directed ITPO to cease and desist from indulging in such anti-competitive practices and imposed penalty of 2% of the average turnover of last three years. In imposing penalty immediate termination of contravention post filing of information was taken as mitigating factor.

Intel is dominant but not 'abusive'

ESYS Information Technologies Pvt. Ltd. ('ESYS') has alleged that Intel Corporation ('Intel') is abusing its dominant position by engaging price discrimination in the microprocessor market. It is also alleged that Intel is tying its low demand products with high demand products with a view to foreclose competition in market.

In analysing the above allegation CCI has relied on four relevant market as delineated by the DG as - (i) market of microprocessor for desktop PC's in India; (ii) the market for microprocessors of mobile/portable PC's such as laptops, notebooks, netbooks, etc. in India; (iii) the market of microprocessor for servers in India; (iv) the market of microprocessor for tablets in India. While defining relevant product market, commission took into account substitutability between the microprocessor based on the architecture i.e. X86architecture. Commission stated that given the nature of high-technology industry, substitutability across the evolving products may undergo a change and the relevant product definition itself may be dynamic, due to this changing technological paradigm, possibility of substitution is increased. Thus in given situation it is better to go with end product classification. With respect to substitutability in the end product, depending on their intended use, microprocessors are required to have distinct technical and physical characteristics and capabilities. Thus there is no substitutability or interchangeability of microprocessors across end product. Thus relevant product was categorised on the basis of end use. For the purpose of Relevant Geographic market, commission noticed that the distributor agreement limit the operation of distributors and Original Equipment Manufacturers (OEM) within India. Further, the conditions of supply of microprocessor in India can be distinguished from other parts of the world because of import duties and exchange rates. Prices of microprocessor also varied across different countries. Thus relevant geographic market was taken as India.

Commission has decided that Intel has economic strength and market power, which enables it to operate independently of competitive forces prevailing in the relevant market. Commission took into account following factors for the determined period under inquiry; Intel's market share in PC segment was around 85%, in portable PC segment 95 % and in server segment around 92%; Intel has negligible market share on Tablet segments; Cumulative market share of Intel was more than 80%; Revenue of Intel was much ahead than any of its competitors; Further factors like, there exist strong entry barriers in the high technology market due to significant intellectual property.

Commission decided that though Intel is in dominant position, but the condition in the agreement cannot be termed as unfair or discriminatory. Intel has not restricted any of its dealers to deal with its competitors. Further the price differentiation between the distributors and OEM's is justified on the ground that, OEM's are its business partners, but distributors are not. And the discount given to OEM's is on account volume and their nature of relationship. There is hardly any price difference between boxed microprocessors (purchased by the distributors) and tray microprocessor (purchased by OEM's). Further the agreement entered in with Intel and distributors provides for non-exclusive independent distributors and DG investigation shows that distributors are selling other product as well.

With respect to tying focus product (low demand product) along with base product (high demand products), it was observed by commission that Intel sets quarterly revenue target for distributors. Under these targets, Intel communicated a product mix ratio under four to five broad categories of microprocessors. This is an incentive programme which also links the incentive to the sales mix of focus and base product. However, it was not a pre-condition to purchase of any particular microprocessor on purchase of another microprocessor.

Schott Glass India Ltd. exonerated by COMPAT

Schott Glass India Ltd. (Schott) a manufacturer of Neutral USP-I Borosilicate Glass Tubes, which is used in downstream market by Convertors to make glass ampoules, vials, cartridges, syringes for liquid injectable. Schott manufactures the glass tubes in following variant viz. Fiolax Clear, Fiolax Amber, Neutral Glass Clear (NGC), Neutral Glass Amber (NGA) which vary in their properties and end use. Schott through its parent company has presence in downstream market in form of Joint Venture between Schott Packaging GmbH and Kaisha Manufacturer Pvt. Ltd. (Kaisha). Schott provided two types of discount to convertors viz. (i) functional discount, where convertor had to undertake and fulfil certain condition like promoting Schott tubing, not dealing with Chinese tubing and maintaining fair price, to avail receipt of certificate for sales and full payments of invoices raised in the relevant quarter. It was alleged that Schott is giving favourable discounts to Kaisha and discriminating other downstream convertors. CCI found Schott dominant in the relevant market, and consequently the discriminatory practices was decided as abusive in terms of section 4 of the Act. Schott challenged the findings of CCI in an appeal.

COMPAT stated that, target discount were given on slab basis and same rate of discount was applicable to transaction falling in the same quantity slab. Purchase of glass tube by Kaisha is amounts to 30% of Schott's production. This was maximum among convertors and falls in separate slab of discount policy. Unlawful discrimination entails establishment of (i) dissimilar treatment to equivalent transactions; and (ii) harm to competition or is likely harm to competition in the sense that the buyer suffers a competitive disadvantage against each other leading to competitive injury in the downstream market. Transactions of different volumes of tubes could not be inferred as equivalent transactions warranting equivalent treatment from the seller and therefore, the design of the discount, per se could not be deemed discriminatory. Further, cost differential in inputs caused due to target discount did not get translated into price differential in final products. Consequently, any change in structure of the market and market share composition could not be logically linked to the discounts received by the Convertors.

Functional discount was contingent on upon the converters signing the Trade Mark Licence Agreement (TMLA) and was applied uniformly. For availing functional discount convertors have to fulfil certain conditions like (i) promoting Schott tubing by purchasing agreed quantity; (ii) no use of inferior or Chinese tubing; (iii) maintaining fair pricing in downstream market. TMLA authorises converters to use logo of Schott. Functional discount was established to mitigate 'mixing risk' of inferior quality tubes as Schott tubes were far better as compared to any other glass tubes available in market. Trademark licensing is used to inform the purchaser about the actual origin of goods to assure the consumer predictable quality of goods and enhance the visibility of brand.

COMPAT held that being big is not bad, being big and abusive is bad in so far competition culture is concerned. Various kinds of discounts provided by Schott is only a trade practice not an abusive behaviour as it does not lead to discrimination or affect competition in downstream market.

COMPAT also finds DLF abusive, with a partial variation in CCI's order

In an appeal preferred by DLF against the decision of CCI, finding DLF liable for the contravention of section 4 of the Act, COMPAT decided against DLF confirming the penalty imposed by CCI. In its order, a variation to the findings related to 'abuse of dominant position' was recorded however the conclusion were same.

CCI on the basis of nature of the clauses in Apartment Buyers Agreement (ABA) and conduct of DLF, held it to blatantly unfair and even exploitative which was viewed as a result of the dominant position of DLF and consequently in contravention of Section 4 (2)(a)(i) of the Act.

COMPAT stated that, the approach by the CCI in examining these clauses is a serious error. CCI could not have examined all these clauses, which were valid at the time when the ABA was enacted in December 2006-07 and viewed the abuse on the part of the Appellant on that count alone. The question of the clauses being one sided, totally in favour of DLF and against the Allottees would fall for consideration only and only if agreement had actually been executed after 20th May, 2009. The agreement prior to coming into force of the new Act was, therefore, certainly valid, for it was not in breach of any law or affected any law then existing. However, if the parties want to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature will be opposed to the public policy.

Memorandum of Understanding does not constitute an 'Enterprise'

In a case against Common Law Admission Test (CLAT) Committee, it was alleged that CLAT Committee is abusing its dominant position by unfair practice of charginh very high registration fee of Rs. 4000 and exorbitant pre-admission advance deposit of Rs. 1,00,000/- from candidates aspiring to join the prestigious NLU's in India. Before going in to the merits of the CCI analysed whether CLAT committee can be understood as enterprise under the scheme of the Act. As per the direction of the Hon'ble Supreme Court of India in the case of *Varun Bhagat* v. *Union of India &Ors.,* W.P. (Civil) No. 68 of 2006, under a Memorandum of Understanding (MoU) between seven National Law Universities, at that time, an arrangement was made for the administration and conduct of Common Law Entrance Test. However participating NLUs have not constituted a separate body/ association for this purpose. The MoU stipulates that the NLUs shall conduct CLAT and also handle the counselling for the law programmes on a rotational basis each year. Thus, the MoU merely appears to be an 'agreement' and the same per se cannot be said to have created or constituted a person within the meaning of the term 'enterprise' under section 2 (h) of the Act, and no case of contravention of the provisions of section 4 of the Act is made out against.

Investigation initiated against one more realtor

This Jaiprakash Associates Ltd. (JPL) is under CCI Scanner for the alleged enforcement of one sided clauses in the "Standard Term and Condition or Provisional Allotment of Plot at Jaypee Greens, Noida ('Agreement'). Certain clauses of the agreement which are prima facie are found to be one sided and loaded in favour of JPL deals with power of JPL to alter the size of plots, notwithstanding Allottees right before or after possession; Denial of Allottees right to raise objection against such alteration; 18% per annum interest rate on Allottees outstanding amount; Power to dispose of the plot as per JPL's discretion and denial of Allottees right to object in such cases.

Prima facie the relevant market is considered as "the market for the services of development and sale of residential plot in Noida and Greater Noida". With respect to dominance the commission was of the view that though there are several players in in Noida and Greater Noida region like Amrapali, Supertech, Mahagun, however, the land bank available with Jaypee Group is much higher than that available with any other developer. The Commission is of the prima facie opinion that the Opposite Party appears to be in a dominant position in the relevant market.

Coal India Ltd. again found guilty by CCI

M/s Sai Wardha Power Company (Informant) operates a thermal power gener-

-ation plant in Maharashtra, has alleged that M/s Western Coal Fields and M/s Coal India Ltd. (Opposite Parties) has abused dominant position by enforcing one sided clause in Fuel Supply Agreement ('FSA') and acting in disregard of Linkage and Letter of Assurance ('LoA') on *cost plus basis.*

Commission in its analysis took into consideration the market for '*production and supply of non-coking coal to thermal power producers in India*'. There does not exist any substitute for non-coking coal which is made available to the thermal power producers. This product has no demand side substitutability, as no such other substitute product can be utilized as fuel for generation of electricity through thermal source for the thermal power plants. Further, relevant geographic market was taken as whole of India relying on Explanation to section 4 of the Act, wherein 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India,

The opposite parties has obtained the dominant position by virtue of the Indian Government creating Coal India Limited and vesting the ownership of coal mines within the territory in Coal India Limited. The opposite parties are not faced with competitive pressures or horizontal level challenges in the market. Therefore, the Commission concluded that the opposite parties enjoyed undisputed dominance in the relevant market stated above.

The Commission analysed the following practices to determine whether the opposite parties had abused their dominant position in the market and holding these clauses as anti-competitive. (i) Delay in the Execution of the FSA: (ii) Imposing Unfair Terms and Conditions in Supply of Non-Coking Coal (iii) Absence of Bilateral Negotiation Process for the Finalisation of the FSA: (iv) Performance Based Incentives (v) Revenue from E-Auction of Coal from Cost Plus Mines.

The Commission refrained from imposing any penalty upon the opposite parties as a penalty of Rs. 1773.05 crores was already imposed upon them in the previous case with respect to similar conduct .

Super Cassettes penalised by CCI

M/s. HT Media Limited (HTML) has alleged that M/s. Super Cassettes Industries Ltd. (SCIL) one of the leading media companies in India, is abusing its dominant position by - (i) charging excessive amount as license fees/royalty from the informant for grant of rights for the broadcast of the SCIL music content; (ii) imposing minimum commitment charges ('MCC') to be paid to the opposite party per month irrespective of actual needle hour of broadcast of the SCIL music content by HTML and (iii) making conclusion of licensing arrangements with the opposite party subject to the acceptance of license fees.

CCI in its determination with respect to Relevant market observed that since allegation of HTML pertained to certain conduct of SCIL in licensing its catalogue of songs to HTML, market for licensing of music content as a broad market for determination of relevant market. This then was narrowed down on the basis of medium of broadcasting, wherein it distinguished radio from other media of broadcasting. Under radio industry also CCI distinguished All India Radio and Private FM Channels, on the basis of technical distinctions between AM and FM frequencies as well as fact that private FM stations can only broadcast on FM and not on AM as per Government policy. Further, music content could not be considered as substitutable/interchangeable with non-music content. Under music content also, Bollywood music can be distinguished from possible alternatives comprising of non-Bollywood music by virtue of specific characteristics as a result of which Bollywood music was not inter–

-changeable with non-Bollywood music. Thus , the relevant product market in this case is 'market for licensing of Bollywood music to private FM radio stations for broadcast'. With respect to 'relevant geographic market' since any radio station operating in any city in India can purchase a license from SCIL or any of its competitors, geographical area should be entire territory of India. Hence 'relevant market' in this case is 'market for licensing of Bollywood music to private FM radio stations for broadcast in India'. While holding SCIL as dominant player in the relevant market, CCI reasoned that market share of SCIL in terms of revenue from FM Radio for last three years was over 50 per cent. Moreover it notes that superior financial strength in market coupled with superior resources was an important indicator of dominance of an enterprise. Also when compared to its competitors in terms of revenue, acquisition of movies, ownership of popular content, SCIL was definitively in a superior position as its revenue of was four-five times of its nearest competitors. Further, Air Check data changed daily and was only collected in eighteen cities, data gathered was a strong indicator, coupled with other factors that SCIL catalogue comprised of Bollywood music that was extremely popular with listener and resultantly popular with advertisers and that due to such popular content, SCIL commands a position of strength. Consequently due to ownership of popular content SCIL customers were heavily dependent on its content. There were also barriers to entry in market and Commission held that in this case there were substantial barriers to entry which made it impossible/more difficult for a firm to enter market.

Regarding abuse of dominant power CCI held that, with respect to excessive pricing in absence of cost data, it will not be possible to say, price being excessive solely on the basis that it is higher than other competitor. And with respect to issue of 'Licence Fee', CCI avoided to comment on as the matter 'whether a performance license fee is chargeable or not for underlying literary and musical works' is pending before Supreme Court.

However CCI observed that imposition of Minimum Commitment Charges/MCC by SCIL has an anti-competitive effect on market as it forecloses other competitors from a substantial share of market. As per MCC, minimum committed needle hours for playoff of the songs of the opposite party imposed by it are as high as 50%. This reveals the modus operandi of the opposite party is to ensure its business share in the relevant market. The other music companies will be left with only 50% of the total market share of the relevant market. Since the private radio stations are contractually bound to pay SCIL a minimum guarantee, they were likely to broadcast amount of music that they have already paid for. This results in SCIL competitors not being able to compete for and being foreclosed from broadcasting their music on this prefixed playout of 30-50 per cent reserved for SCIL.

Further, SCIL argued that computation of MCC was based on playout of radio station for previous year and therefore it reflected their actual demand. CCI rejected it, as demand of content of SCIL by a radio station last year did not mean similar or identical demand in next year also. Besides, playout number was manipulated by SCIL in its favour through incentive scheme. It was observed by CCI that SCIL could not justify MCC on grounds that MCC reduced uncertainty that content owners faced particularly since it was only player in market that was charging MCC.

A penalty at the rate of 8% of SCIL's average turnover of the last three years of the company amounting to Rs. 2,83,28,00 was imposed.

Adani Gas Ltd. abusive in City Gas Distribution

Faridabad Industries Association (FIA) alleged that M/s.Adani Gas Limited (AGL) is abusing its dominant position in the relevant market of supply and distribution of natural gas in Faridabad. AGL has put unconscionable terms and conditions in Gas Sales Agreement (GSA), which are unilateral and lopsided, besides being heavily tilted in favour of AGL.

In its determination, with respect to relevant market, CCI distinguished natural gas from other sources of energy, based on the composition, storage, efficiency, environmental pollution, etc. Further, as per the intended use and price of natural gas for consumers can be classified into categories of industrial, domestic and transportation. Since, parties involved in the present case are dealing in "Industrial gas" CCI was with the opinion that relevant product market in present case may be taken as market of supply and distribution of natural gas to industrial consumers. Further, relevant geographic was considered as Faridabad District as Government of Haryana have authorized only one service provider i.e. AGL to build and operate a City Gas Distribution (CGD) network in District Faridabad. Thus, relevant market in present case was market of supply and distribution of natural gas to industrial consumers in District Faridabad.

With respect to dominant position, CCI observed that AGL had 100% market share in relevant market being only entity authorized by Government of Haryana to set up and operate CGD network in relevant Market. Faridabad. Further, Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act) regulates the distribution of natural gas. As per provisions of PNGRB Act and Regulations framed there under, Board is empowered to register and authorize downstream market activities. Regulations, under said PNGRB Act contain provisions to grant 25 years infrastructure exclusivity to lay, expand or operate a CGD network. Moreover, Authorization Regulations provided up to three years marketing exclusivity from date of authorization to an existing CGD networks and five years from date of authorization to a new CGD network from purview of common or contract carrier, after which there was a provision for "open access", which allowed competition and choice to consumer. Based on above reasoning, CCI determined AGL as dominant position in defined relevant market.

AGL's abuse of dominant power lies in the one sided clauses in the GSA. CCI observed that in the alleged clause wherein in the event of any dispute regarding amount payable, if any amount eventually became payable or reimbursable by AGL to consumers, there was no obligation on part of AGL to pay interest on said amount, impose unfair conditions upon buyers in contravention of provisions of Section 4(2)(a)(i) of Act. Further, interest to be levied in event of delayed payment, be 'any such rates as may be communicated by Seller in future' also amounted to imposition of unfair conditions in contravention of Section 4 (2)(a)(i) of Act. AGL has reserved right at its sole discretion to accept or reject request of customers for force majeure amounted to imposition of unfair conditions in contravention of Section 4(2)(a)(i) of Act. Also, to extent that buyer was obliged to meet its Minimum Guarantee Off-take payment obligation even in event of emergency shutdown calling for complete or partial off-take of gas, amounted to imposition of unfair conditions in contravention of Section 4(2)(a)(i) of Act.

Based on above analysis, CCI held AGL in violation of Section and 4 and imposed penalty at the rate of 4 % of the average turnover amounting 25.67 crore .

Regulation of Combinations

Sun Pharma and Ranbaxy merged with modification at Stage II approval

Ranbaxy Laboratories Limited (Ranbaxy) and Sun Pharma merger was approved with modification by CCI. In the resultant combination, the existing shareholders of Ranbaxy will hold approximately 14 per cent of the shares of the Merged Entity. The promoter group of Sun Pharma will hold approximately 54.7 per cent of the shares. Sun Pharma will also gain control of Zenotech.

The CCI formed the *prima facie* opinion that the combination would have an appreciable adverse effect on the relevant markets in India and accordingly issued a show cause notice under Section 29(1) of the Act. The Parties were required to publish details of the proposed combination to bring it to the notice of the public and persons likely to be affected by it. It subsequently sought more detailed information regarding the structuring of the package, the transitional supply arrangements etc.

The parties are primarily generics manufacturers. Since the various generic brands of a given molecule are chemical equivalents and substitutable, the molecule level would be the most appropriate to define a relevant market. Thus it was observed that it was necessary to identify horizontal overlaps between the products of the two parties. Finally, the relevant geographic market was considered to be the territory of India. The Commission examined forty nine relevant markets and two markets where Sun Pharma is currently present in while Ranbaxy has pipeline products to be launched.

CCI found that in markets for Tamsulosin+Tolterodine; Rosuvastatin+ Ezetimibe; Leuprorelin; Terlipressin; Olanzapine+ Fluoxetine; Levosulpiride + Esomeprazole and Olmesartan + Amlodipine + Hydropclorthiazide the merger would have appreciable adverse effect on competition due to proposed combination. With respect to the remaining markets, the CCI analysed the change in the market share and found that it would only be incremental and that there would be competitors that would exercise competitive constraint over the Merged Entity.

With respect to vertical integration, the primary concern was the possibility that it will lead to input foreclosure or customer foreclosure. Since the parties are engaged in both the business of Active Pharmaceutical Ingredients

(APIs) and formulations it is possible that the APIs manufactured by one party may be used as raw material for the formulations produced by the other. The Commission noted that the revenue from APIs contributed to only 5 and 6 per cent of the revenue of the two parties. Further there are numerous other suppliers of the same APIs and it is hence unlikely to lead to vertical closure.

Once the Commission identified that markets in which there would be appreciable adverse competition, it proposed modification of the combination under Section 31 (1) of the Act. It thus proposed that Sun Pharma should divest in the two markets where Ranbaxy was the market leader and that Ranbaxy divests in the other five markets where Sun Pharma has a greater mar-

-ket share. The Commission further mentioned that the divestiture would not be given effect unless it approved the terms of the final and binding sale and purchase agreements.

These modifications were aimed to maintain the existing levels of competition in India by creating viable competitors for the divestment products and ensuring that the approved purchaser has all the necessary components to compete with the merged entity in the relevant markets. The parties were directed to take steps to ensure that they maintain the economic viability, marketability and competitiveness of the divestment products and prevent the destruction, removal, wasting, deterioration etc of the assets except as would occur in the ordinary course of business until the closing date. The purchaser in question is required to be independent, have the required financial resources, be a pharmaceutical company in India and not be likely to create completion concerns.

Business Transfer Agreement between Shree Cement and Jai Prakash Associates

Shree Cements Limited (SCL) executed a 'Business Transfer Agreement' (BTA) with Jaiprakash Associates Limited (JAL). The BTA involved the transfer of a 1.5 million tonnes per annum (MTPA) cement grinding unit (CGU) at Panipat, Haryana owned by JAL. SCL manufactures different categories of grey cement though its plant located in Rajasthan, Uttarakhand and Bihar with total cement production capacity of around 17.5 MPTA. JAL, through its various subsidiaries, manufactures and markets different varieties of grey cement. It currently operates in Uttar Pradesh, Haryana, Himachal Pradesh, Uttarakhand with an aggregate capacity of 28.75 MTPA.

The Commission defined the relevant product market in the proposed combination as the market for grey cement. It noted that varieties of grey cement are largely interchangeable though white cement constitutes a separate market. The necessity to define a geographic market was also noted. Cement has a low shelf life and cannot be transported over long distances. Further, consumption is usually centred around production clusters. In this case, a significant portion of the cement manufactured by the CGU in question was consumed in Haryana and 80% of the remaining was exported to Delhi and Rajasthan. The exports made to Punjab and Uttar Pradesh were considered insignificant. The Commission thus noted that the relevant market comprised the states of Haryana and Rajasthan.

It was noted that the market shares in terms of *installed* capacity in this market were 23% for SCL and 3% for the CGU. The combination share of SCL would thus increase to 26% after the acquisition. While the market is moderately concentrated it was concluded that the increment would not be significant. It also took into account the fact that the capacity utilisation of the CGU reduced over a period of time.

Kotak Acquired control of schemes of PinBridge

Kotak Mahindra Asset Management Company Ltd (Kotak AMC) and Kotak-Mahindra Trustee Company (Kotak Trustee) pursuant to an agreement the two companies entered into with PineBridge Investments Asset Management Company (PBI AMC) and PineBridge Investments Trustee Company (PBI Trustee) proposed to acquire control of schemes of

PineBridge Mutual Funds (PBI MF) by Kotak Mahindra Mutual Funds (Kotak MF) through a change in trusteeship, management and administration.

Kotak AMC is engaged in the management and administration of the schemes offered by Kotak MF. There were a total of 91 schemes with an average asset under management (AAUM) of Rs 35,884.80 crores. PBI AMC is similarly engaged in the management of PBI MF which has 9 schemes with AAUM of Rs 635.84 crores.

The Commission noted that mutual fund schemes may be categorised in the following manner – growth/equity oriented scheme; income/debt oriented scheme; balanced fund scheme; money market/ liquid fund scheme; gilt funds scheme; index funds scheme; and fund of funds scheme. Kotak MF's schemes can be categorised as equity schemes; debt oriented scheme; gilt funds scheme; exchange traded funds; balanced fund schemes; and fund of funds scheme. The PBI MF schemes on the other hand may be classified as equity schemes; debt schemes; and fund of fund schemes. It was noted that most funds in India, including those of larger players, offer similar schemes as the parties and an investor may thus switch from one fund to another offering similar schemes.

The total AAUM in the Indian mutual fund industry was Rs 9,93,232.40 crores. Based on the known AAUM of the parties it was clear that an incremental increase in the market share of Kotak MF due to the combination would be 0.06 per cent. The parties combined share in the overall market of mutual funds would be 3.67 per cent. The Commission noted that this is significantly lower than the share of large players in the mutual fund industry.

In light of the above facts and the relevant factors mentioned in Section 20(4) of the Act, the Commission concluded that the proposed combination was unlikely to have an appreciable adverse effect on competition in India.

Pune Infoport amalgamated in Indian Express

Pune Infoport Private Limited ('Pune Infoport') contemplated its merger into Indian Express Newspapers (Mumbai) Private Limited ('Indian Express') under a scheme of amalgamation. Indian Express is engaged in the business of leasing commercial and office spaces at Express Towers that is located at Nariman Point, Mumbai. Pune Infoport holds 97.322 per cent of the equity shares of Indian Express. The company is under the control of PanchshilTechpark Private Limited (PPTL) and Blackstone Group LP. PPTL is further controlled by Premsagar Infra Realty Private Limited and Blackstone. PPTL is engaged in the business of developing and leasing commercial and office spaces in IT Parks in Pune. Blackstone has investments in various sectors including real estate and Premsagar is engaged in various business verticals such as office space, hospitality and built to suit office premises. Pune Infoport is further engaged in the business of providing facility management services to PTPL in relation to the operation and maintenance of the latter's technology parks, special economic zones and other infrastructure projects.

The Competition Commission observed that the combination relates to the merger of Pune Infoport into Indian Express and that the former already holds 97.332% of the latter. Both companies are under the joint control of Premsagar and Blackstone. Indian Express will continue to be under the control of both companies post-combination. Further the two companies have separate businesses. While Indian Express engages in the leasing of commercial office spaces, Pune Infoport provides facility management services to PTPL.

For these reasons CCI approved the combination for not likely to have an appreciable adverse effect on competition.

Delay in filing notice condoned or ignored?

Essex, an investment company registered in Mauritius proposed to acquire 260 million equity shares constituting around 15.4 per cent of the equity share capital of Haldia Petrochemicals Limited (HPL). HPL is engaged in the business of manufacture and sale of petrochemical related products. The Parties have entered into the Share Purchase Agreement on 11 September, 2014. Essex is a part of Chatterjee Group (TCG), which through its affiliate/ associate companies namely Chaterjee Petrochem (Mauritius) Company (CPMC), India Trade (Mauritius) Limited and Winstar IndiaInvestment Company Limited, PCC holds 39.54 percent of equity share capital of HPL. Through proposed combination shareholding of TCG in HPL, post combination, would increase to around 55 per cent.

The Commission observed that the proposed combination would result in sole control of TCG over HPL (55% equity). Further, the Commission opined that TCG group had no other investment in the petrochemical industry apart from HPL. Consequently, the Commission declared that there is no horizontal overlap or vertical arrangement between HPL and CPMC, Essex or TCG. Therefore, the Commission opined that the proposed combination is not likely to have appreciable adverse effect on competition in India.

However, Section 6(2) of the Act requires the parties to file a notice with the Commission within 30 days of execution of any agreement for acquisition. In this case, the SPA is dated 11 September while the notice under section 6(2) is filed only on 13 October, 2014 i.e. after a delay of 2 days. While, it is admitted that the statutory penalty provided under section 43A of the Act for delayed notice under Section 6(2) of the Act is discretionary, however, the Commission has not provided any rationale as to why such penalty was not imposed.

Coco Cola acquired shares in Monster

The Coco Cola Company ('KO') proposed to acquire share less than 16.666 percent of the common stock of the New Laser Corporation (NewCo) a wholly owned subsidiary of Monster Beverage Corporation ('Monster') and re-organization of the energy drinks and non-energy drinks portfolio between KO and Monster.

The Commission observed that KO is primarily engaged in the non-energy drink beverage and has insignificant presence in the energy drink segment in India while Monster which is primarily engaged in the energy drinks segment worldwide and has minimal presence in the energy and non-energy drink segment in India. The Commission further opined that there are major competitors present in the energy drink segment in India. Furthermore, it is also observed that post combination, the vertical arrangements between the Parties was not likely to result in the foreclosure of competition in view of their insignificant presence in the energy drink segment in India. In this context, the Commission came to the conclusion that the proposed combination was not likely to have an appreciable adverse effect on competition in India.

Joint Venture of Panasonic and Minda

Panasonic Holdings B.V. (Panasonic) pro posed to combine with Minda Industries Ltd. (Minda) for a joint venture ("JV") to manufacture and sell lead acid storage batteries ("LASB") for automotive and industrial applications. In the proposed JV, Panasonic and Minda would have 60 per cent and 40 percent shareholding re spectively. PN, a company based in

Netherlands, is a wholly owned subsidiary of Panasonic Corporation Japan. In India, PJ is engaged in the sale and distribution LASB in four-wheeler and uninterrupted power supply segments. Minda, a listed company in India, is engaged in the manufacture and sale of LASBs for two wheelers only.

The Commission observed that MIL and Panasonic manufacture LSABs for different relevant markets i.e MIL for two-wheelers, while Panasonic for four-wheelers and UPS segments, in India. Even in their respective LASB markets, MIL and Panasonic have only small presence other significant players present in the LASB market. Furthermore, it was observed that the parties also have no vertical relationship in India. In this light the Commission came to the opinion that the proposed combination was not likely to have appreciable adverse effect on competition in India.

Competition Law and Judicial Pronouncements

CCI's order flogged as wanton exercise of power

CCI was chided by Delhi Court in *Rajkumar Dyeing and Printing* v. *CCI,* 2015 Comp L R 201(Delhi) for imposing penalty on small scale industries on account of non-compliance of its mere formal direction. Writ petitions were filed by two small scale industries (RSI and Rajkumar Dyeing) for quashing the order of CCI which imposed penalties under Section 42 for non-filing of undertakings to cease and desist from anti-competitive conduct within the time directed.

When the petitioners were found guilty of bid rigging and market allocation, CCI passed an order of cease and desist against them and asked them to file an undertaking in this behalf. Even before the CCI had directed the DG to investigate the matter at hand, RSI had been de-registered as a small scale industry with Directorate General of Supplies & Disposals (DGS&D) and had neither supplied any products under the Rate Contract in question nor could possibly participate in any other DGS&D tender on account of its de-registration. Also, Rajkumar Dyeing was blacklisted by DGS&D after CCI's order and was made incapable of entering into future tenders related to the product. When the petitioners appealed before COMPAT, their penalty was significantly reduced but the order was upheld. Thereafter CCI again passed an order penalizing the two petitioners for not filing the undertakings which declared that they will cease and desist from anti-competitive conduct. So the question before the court was whether the penalty imposed by CCI was arbitrary. The court highlighted the order of the COMPAT which recognized the need for encouraging small scale industries to grow and the submission that the appellants were facing hardships on account of blacklisting pursuant to the orders passed by CCI. In the case of RSI, COMPAT also noted that the manufacturer had not made any supplies under the Rate Contract and had further lost its registration with DGS&D.

In view of the above, the court commented that the penalties by their very nature are punitive measures and thus, have to be considered in light of the gravity of the offence in respect of which they are imposed. The court noted that the petitioners had defaulted in the mere formal dire-

-ction for not filing an undertaking, which direction was only in aid of the substantive 'cease and desist' order while the plain language of Regulation 36 of the CCI General Regulations, 2009 clearly supported the view that the direction to file an undertaking was, in substance, a direction seeking compliance of the substantive orders passed under Section 27 of the Act.

The court therefore opined that the penalty imposed by CCI was shockingly disproportionate, as it had been imposed only on account of non-filing of a document in aid of compliance of a substantive direction that was, undisputedly, complied with. Then the court went on to discuss the doctrine of proportionality while criticizing the punitive measure which had little corelation with the gravity of the offending acts and CCI'S failure to consider any element of public interest, warranting an imposition of such penalty. Thus, the Hon'ble court concluded that CCI's order was without application of mind and had been passed in wanton exercise of powers, ignoring the relevant factors and the constitutional principles because not only it overlooked the reasons of COMPAT for staying the penalty imposed by CCI and sought to justify the levy of penalty by misquoting the operative part of COMPAT's order but also unreasonably imposed penalty for non - compliance with a mere formal direction.

CCI has *locus standi* for Letter Patent Appeal

In *CCI* v. *JCB India,* 2014 (146) DRJ 531, JCB India was aggrieved by the manner in which the Director General conducted the search at its office premises and seized the records/files and other equipment. The allegations in the application included that the Director General conducted the search and seized the documents without making any prior attempt to require the petitioners to furnish the information and that the search was in complete contravention of the orders of the Court.

While recognizing the right of CCI to appeal against the order of a Single Judge of Delhi High Court, the Division bench sent the parties back to the Single Judge to urge their respective contentions. The case is an appeal by CCI aggrieved by the decision of the single Judge wherein the Hon'ble court passed an interim order that no final order/report shall be passed either by the Competition Commission of India or by its Director General and Director General shall file a personal affidavit indicating the material available along with the reasons that prompted him to conduct search of the premises and to seize the records/files available in the office premises. CCI contended that the Court should not interfere with the investigation or guide the manner in which such investigation should be conducted.

The respondent alleged that though it is open to the informant to prefer an appeal since he is aggrieved by the order staying investigation, no such appeal could be maintained by CCI which itself ordered investigation and CCI could not defend its own order directing investigation by the Director General.

The court went on to read the preamble to the Competition Act, 2002 while discussing Chapter IV which deals with CCI's power to order investigation under Section 19 if in its opinion, a *prima facie* case exists. Thereafter the court took aid of CCI v. SAIL to reiterate what the Apex Court had held. It said that the orders of CCI, being a regulator, are merely administrative orders akin to departmental proceedings, as a consequence of which the exercise of powers under Section 26(1) of the Act are not appealable by implication. So the court, in the present matter, based its decision on two reasons. For the first one, it resorted to the SC's judgment in *SAIL case* whereby Hon'ble court had proclaimed that CCI is an expert and a body corporate, absence of the CCI before the Tribunal will deprive it of presenting its views in the proceedings and it may not be able to effectively exercise its right to appeal in terms of Section 53 of the Act. Further, the assistance rendered by the Commission to the Tribunal could be useful in complete and effective adjudication of the issue before it.

The other reason given by it was that that since the investigation by the Director General forms part of the regulatory jurisdiction exercised by CCI, any order hampering the investigation process directly affects the statutory functioning of CCI. Under the circumstances, the right to assail an order staying the investigation could not be confined only to the informant, but the CCI also being an equally aggrieved party, was entitled to do so.

Writ petition not maintainable when statutory remedy available under Competition Act

In *Bela Rani Bhattacharya* v. *CCI,* 2014 Comp LR 262 (Delhi), Delhi High Court was confronted with a question of maintainability of a writ petition under Article 226 of the Constitution of India against the order of the COMPAT which is appealable to the Supreme Court under Section 53T of the Competition Act, 2002.

Relying on Union of India v. Aircel Ltd. of 2012, the court dismissed the appeal. The court observed that the writ petitions are not maintainable when statutory remedy available before Supreme Court and since the appellant is not enforcing any fundamental right and instead, the dispute is purely factual, if writ petitions on such grounds were to be entertained, the same would negate the provision of the statutory appeal.

Lottery not within CCI's Jurisdiction

In *State of Mizoram* v. *CCI,* 2014 (4) GLT 159, state of Mizoram challenged the initiation of inquiry by CCI, in alleged selection of lottery distributors by the Government of Mizoram, Guwahati High Court ruled out jurisdiction of CCI to inquire in the matter related to lottery.

The Government of Mizoram invited Expression of Interest (EOI) for appointment of Lottery Distributors and Selling Agents for the lotteries organized by the Government of Mizoram. Pursuant to the EOI four firms/companies were selected as distributors to operate lotteries as per the provisions of the Lotteries (Regulation) Act, 1998 and the Mizoram Lotteries (Regulation) Rules, 2011. An information to CCI was filed by M/s. Tamarai Technologies Private Ltd. alleging that the Government of Mizoram had violated the provisions of Section 4 of the Competition Act, 2002 and that M/s. Teesta Distributors, M/s. N.V. International and M/s. Summit Online Trades Solutions Private Ltd. are directly or indirectly associated with each other and have been involved in collusive bidding by quoting identical rates for Online and Paper Lotteries against EOI and thereby forming a cartel with regard to selection of distributors in lottery business of the State of Mizoram.

On receipt of the information, CCI formed an opinion that there was a prima facie case about the existence of a cartel amongst the bidders and the Director General was directed to cause an investigation. However, CCI opined that no case is made out for violation of the provision of Section 4 of the Competition Act of 2002

With respect to applicability of Act on Lottery, Guwahati High Court held that under the Lotteries Regulation Act of 1998, lottery has been defined as a scheme for distribution of prizes by lots or chance to those persons participating in the chances of a prize by purchasing tickets. Unlike any other trade and commerce, the business of lottery is being governed strictly in terms of there-under. Relying on *B.R. Enterprises* v. *State of U. P.,* (1999) 9 SCC 700, court held that that there is difference between gambling and trade, former inherently contains a chance with no skill, while trade contains skill with no chance and even in the State Lotteries the same element of chance remains with no skill and therefore it remains within the realm of gambling and the same would not be a trade in any case, would not qualify to be 'trade and commerce' as used in Article 301. No gambling could be *commercium.* Organising lottery by the State is tolerated being an economic activity on its part so as to enable it to raise revenue and that raising of revenue by the State, by itself cannot amount to rendition of any service. Further, the sale of lottery ticket does not necessarily involve the sale of goods and on purchasing a lottery ticket, the purchaser would have a right to claim to a conditional interest in the prize money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of 'goods' under the Sale of Goods Act and the sales tax statutes.

Considering the Act of 2002, Court opined that the same would be applicable to legitimate trade and goods to ensure competition in the market, to protect the interest of the consumers and freedom of trade in markets which are *res commercium.* The lottery business being gambling and falling within the purview of the doctrine of *res extra commercium* and not qualifying in the normal parlance of trade and commerce would not therefore come within the purview of the Act of 2002. This being the position CCI is not having jurisdiction

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