Case No. 39 of 2012

In Re:

Shri Ramakant Kini	Informant

And

Hiranandani Hospital	Opposite Party

CORAM:

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. Justice (Retd.) S. N. Dhingra
Member

Mr. S. L. Bunker
Member

Present:
Mr Ramji Srinivasan, Senior Advocate along with Mr Ram Kumar, Mr Abhishek Parasheera, Ms Mansi Tewari, Advocates and Ms Nandita Jain (Economist) for the Informant.

Mrs Pallavi Shroff, Mrs Shweta Shroff Chopra, Ms Manika Brar, Ms Dinoo Muthappa and Ms Sreemoyee Deb, Advocates for the Opposite Party.

ORDER [Member (GG)]

I have had the opportunity to go through the majority Order that has found contravention of the provisions of the Act by the OP. As I do not agree with the Order, I shall record my findings in the case.

1. Vide an information dated 10.07.2012, the Informant has approached the Competition Commission of India (hereinafter "Commission") to highlight certain anti-competitive practices and abuse of dominant position by Dr L H Hiranandani Hospital (hereinafter "OP" or "Hiranandani Hospital") in violation of Section 3(4) and Section 4 of the Competition Act (hereinafter "Act"), thereby causing an appreciable adverse effect on competition (hereinafter "AAEC").

Information

2. As submitted by the Informant, the OP is a frontline provider of comprehensive health care in the country. With significant investments in the most innovative technology, it is in the same league as the best hospitals in the world. It is home to some of the leading specialists in contemporary medicine, as well as a committed nurse workforce with an up-to-date knowledge base. All medical equipments of the Hospital are sourced from world's best vendors and are pivotal in maintaining cutting-edge technological excellence.

3. Bereft of details, fact of the case is that one Mrs. Jain, an expecting mother, seeking maternity services from the OP, entered into an agreement with LifeCell India for umbilical cord stem-cell

banking services. Prior to the delivery, when her husband sought OP's support for getting the stem cell banking procedure done at the OP's premises, he was informed that the OP has an arrangement with Cryobanks India according to which no other stem cell banker would be allowed in the OP's premises. In the event of the informant still being desirous of opting for any other stem cell banking services other than the one with which the OP had an arrangement, he was told that he should seek maternity services from elsewhere. Consequently, the patient opted for another high-end multi-specialty hospital for maternity services.

4. The Informant also submits that the OP not only denied the patient to avail services of LifeCell India, but also directed the latter not to enroll any of its patients for stem cell banking services as Cryobanks was their cord stem cell Banker with effect from 01/09/2011.

Allegations

5. As submitted, violations / contraventions brought out in the information relate to a new and emerging area of medical services, which is currently at the nascent stage of development in India. It is submitted that the target consumers for stem cell banking services in India would constitute less than 2% of the total population. It is also submitted that cord blood has to be collected immediately after baby's birth, preferably within 10 minutes after which it would not be suitable for collection and processing of stem cells. The collection of cord blood can be done either by customers' obstetrician or the hospital staff. If the customer desires, collection can also be done by a paramedic of the service provider in assistance with the hospital. As submitted, business of

stem cell banking is not regulated by any statutory authority in India.

6. It is alleged that the OP has indulged in anti-competitive practices and abused its dominant position in the market for maternity services in high-end multi-specialty hospitals in the wards S, L, N, K/E of Mumbai and leveraging its dominant position to gain advantage in a related market for providing umbilical cord stem cell banking services to high-end multi-specialty hospitals in the wards S, L, N, K/E of Mumbai, where it is not present itself, thereby, causing an appreciable adverse effect on competition in violation of sections 3(4) and 4 of the Act.

7. Specifically, the Informant has cited following abusive practices of the OP:
    i. Indulgence in practices resulting in denial of market access.
    ii. Imposition of unfair condition by way of termination of an existing supply relationship without objective commercial justification.
    iii. Exploitation of consumers.

8. The Informant has also referred to the refusal to deal arising out of the exclusive supply agreement between OP and Cryobanks and submitted that competitors of Cryobanks are not allowed to approach prospective consumers who are taking maternity services from the OP. Further, the Informant has submitted that although the present case is not of tying, facts do not suggest that denying access to entities other than Cryobanks would lead to improved patient care so as to outweigh any anti-competitive consequences arising out of the exclusive supply agreement.

Analysis of the Case

9. The case deals with two new concepts; (a) '*super specialty hospital*' for maternity services; and (b) '*stem-cell banking services*'. As per the allegations, both are linked. Before analyzing the veracity of the allegation, a background on these two new concepts will help to place the allegations in their appropriate context.

Market structure and Economics of Health care Industry

10. Emergence of commercial health care services, 'for profit' hospitals as against the conventional 'not-for-profit' hospitals and the expansion of these hospitals raise issues on the form and nature of market transactions. Hospitals, especially modern private hospitals such as Hiranandani Hospital, are business firms organized to provide comprehensive medical services, involving various third party health care service providers. Provision of medical services involves complicated combinations of physical facilities, advanced technology and specialized human capital. Diversification within a hospital is on the basis of distinct verticals where each vertical focuses on a single branch of medicine such as oncology, sports medicine, highlighting the expansion of health care facilities to cover a wide range of medical treatment and significantly the verticals also include facilities such as imaging and even insurance.

11. As highlighted in the literature on anti-trust cases in the US and subsequent framework with conceptual issues,[1] market

[1]Clement, J. (1988). *Vertical Integration and Diversification of Acute Care Hospitals: Conceptual Definitions.* Hospital & Health Services Administration, 33(1):99-110; Evans, R. (1983). *Incomplete Vertical*

transactions in the health care industry are organized somewhat differently from the conventional market transactions

12. From an economic perspective, the modern hospital can be seen as organizing the provision of medical services, using physician labour as both a supply input and a distribution network for patients in terms of various verticals. In the new paradigm, a hospital gets transformed as a platform to facilitate exchange of services between health care specialists and consumers. These services (including consultant doctors) are provided on commercial terms that are often packaged and offered to consumers (patients) by the hospital in different combinations; and if required, tailor-made to suit their requirements. Consequently, majority transactions in the health care industry are multilateral, involving various health care service providers, patients and hospital itself - managerial and entrepreneurial functions are shared among firms supplying different types of health care service / products. The benefit of such packaged services under one roof reduces the transaction cost to all related market participants, including patients and diversity of package enables patients to exercise their choice.

13. A platform typically intermediates transactions between two distinct groups of consumers who need each other in some way, but require a medium to facilitate exchange. The platform generates revenues by charging fees from the consumer who joins the platform for exchange of goods or services. A two-sided platform provides goods or services simultaneously to these two groups. We can identify multiple two-sided relationships that are

Integration in the Health care Industry: Pseudomarkets and Pseudopolicies. Annals of the American Academy of Political and Social Science, Vol. 468, Health Care Policy in America, pp. 60-87.

intermediated through a hospital - two of these pertinent to the case are between obstetrician and maternity patients and the other one is between umbilical cord stem cell bank and maternity patients. It is important to appreciate the fact that in a platform, pricing decisions are not on conventional lines as observed in the ***MCX-SX* v *NSEIL***;[2] rather it is dynamic, depending on number of users on different side of the platform, number of transactions, frequency of transactions, contractual arrangement, if any, between platform-owner and platform-users etc.

14. There are other notable features of the health care industries that need to be noted. Firstly, arrangements and contracts in the health care market give rise to vertical relations. A hospital platform is organized along different verticals (treatment areas) and transactions between a hospital and health care in each vertical consists of several layers of contracts which are vertical arrangements, a departure from earlier expansion in hospital services that were horizontal in their arrangement. The vertical relation in health care is not necessarily unidirectional or sequential; unlike in a conventional manufacturing sector, where a vertical relation gets established when output of each successive firm is utilized by a downstream firm that adds value to it for consumption by the final user.

15. Secondly, in this vertical arrangement, given the nature of relationships between the two-sides of the platform, there is an element of vertical incompleteness. A hospital acts as a coordinator of transactions towards a common objective - this alters the nature of transactions and incentives in the healthcare

[2] Dissent Order in Case no. 13/2009, Competition Commission of India

industry from normal market exchanges. In the health care industry there are five basic classes of transactors. The patient or consumer of health care services is the first transactor, followed by first-line providers - the doctors, specialist consultants whom the patients contact directly. The second-line providers include imaging facilities, scanning, blood bank, stem-cell bank etc. whose output is either used by patients under the direction of first-line providers or supplied as intermediate products to first-line or patients. Insurers who assume risk by selling health insurance policies are the next line of service providers followed lastly by the government which regulates the health care market. These interactions are vertical in form and breadth, but do not display the standard continuous vertical linkage to the end consumer as in the manufacturing sector. As a result of the pattern of incomplete integration, health care market transactions are dominated on one side of the transaction platform. Importantly, second-line providers (drug companies, equipment manufacturers etc.) exert greater control than other players in the health care sector and adopt different marketing techniques to promote their product.

16. Unlike standard market economic transactions wherein each side of the transaction seeks to maximize his benefits by taking independent decision, transactions in the health care industry are often multilateral and not an outcome of independent decision - patients purchase medicines that are prescribed by doctors, physicians refer patients to hospitals / diagnostic centers that are not owned / operated by them, health care equipment manufacturers sell to hospitals who serve patients. In other words, the ultimate user of service does not generally make the utilization decision. Thus, although each entity in a health care industry is related to the other, the integration is not complete in as much as

there is a lack of independence while making decision for utilization of a particular service. Maternity and stem cell banking services constitute one such incomplete integration.

17. Thus, health care industry displays some sort of vertical integration, although different from conventional vertical relation. Further, this vertical integration is incomplete as objectives of the transactors partly overlap and partly conflict with power to influence each other's behavior.

18. In the present case, a hospital acts as a platform to facilitate exchange of services between health care specialists (for provision of stem cell banking services) and consumers (seekers of stem cell services), apart from rendering maternity services to its patients. This aspect of multitude relations between obstetricians and patients and between umbilical cord stem cell bank and patients mediated through the platform of Hiranandani Hospital at the time of delivery lends these market transactions an analytical framework of multisided markets, and in this framework the allegations will be examined.

19. As the violations pertain to Sec 4(2)(a)(i) and 4(2)(c) and Sec 3(4), the case revolves around the dominance of Hiranandani in the provision of maternity services and maternity services with stem-cell banking facility in wards S,L,N,K/E of Mumbai. The contractual agreement between Hiranandani Hospital and Cryobanks also raises the issue as to whether Cryobanks, a provider of stem-cell banking facility, is dominant in that area.

20. To summarize, the Order will examine the following critical issue:

(i) Does the consumer have choices regards: (a) maternity

services (b) packages in maternity services?

(ii) Even if consumer choice is restricted, is the conduct of the OP anti-competitive?

Analysis of Section 4 Violation

21. The informant has alleged that the OP, Hiranandani Hospital, has indulged in anti-competitive practices and abused its dominant position for maternity services in high-end multi-specialty wards S, L, N, K/E of Mumbai. To assess and evaluate the allegations pertaining to Sec 4(2)(a)(i) and 4(2)(c), it is necessary to define the relevant market and the dominance of Hiranandani in this market.

Relevant Market

22. What constitutes a relevant market has been provided for under section 2(r) of the Act, according to which *"relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets*.

23. In terms of Section 2(s), *"relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas*.

24. Further, as per Section 2(t), *"relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices*

and intended use.

25. The Informant has placed reliance on several cases viz; ***PPR/Gucci***[3] , ***Wanadoo Interactive***[4], to underscore that there exists a separate product market for luxury products having a low degree of substitutability with other products falling within other segments of the same sector. In the information filed, the Informant has identified two distinct relevant markets for the purpose of the present case:

    (i) 'Maternity services in high-end multi-specialty hospitals in the words S, L, N, K/E of Mumbai';
    (ii) 'Umbilical cord stem-cell banking services in high-end multi-specialty hospitals in the wards of S, L, N and K/E of Mumbai'

26. On the other hand, while arriving at the relevant market, DG has submitted that factors such as economic and social strata of the patient, peer pressure, social perceptions, brand value of the hospital, complication attached with maternity, other health issues, relation with the doctors etc become critical in deciding a hospital. Further, DG has ruled out the possibility of including all hospitals / clinics within one single market. Reliance has also been placed on Commission's Order in *Diageo case*[5] to highlight 'premiumisation' of certain differentiated products. Considering the fact that the cost of availing maternity services is considerably lower at other establishments, than what it is at the high-end multi-specialty hospital, DG has determined the relevant product market

[3] Case IV/M. 1534

[4] COMP/38.233 dated 16/07/2003

[5] Case No *C-2012/12/97*

as '*provision of maternity services by Super Specialty Hospitals*'.

27. While defining the relevant product market, the DG, in its supplementary report, has cited the Guidelines of National Accreditation Board for Hospitals & Health care Providers (NABH) on the basis of which the DG concludes that super-specialty centers are those which provide the following services: *Cardiology, Clinical Haematology, Clinical Pharmacology, Endocrinology, Immunology, Medical Gastroenterology, Medical Genetics, Medical Oncology, Neonatology, Nephrology, Neurology, Neuro-radiology, Rheumatology, Cardiac Anaesthesia, Child & adolescent psychiatry, Paediatrics, Gastroenterology, Paediatrics Cardiology, Hepatology, Cardio-vascular & Thoracic Surgery, Paediatric Cardio-Thoracic Vascular Surgery, Urology, Neuro-surgery, Paediatric Surgery, Plastic & Reconstructive Surgery, Surgical Gastroenterology, Surgical Oncology, Gynaecological Oncology, Endocrine Surgery, Vascular Surgery, Hepato-Pancreato-Biliary Surgery.*

28. On the issue of relevant geographic market, DG has used catchment area analysis on a sample data of 252 patients who have availed both maternity services and stem cell banking services at Hiranandani Hospital to conclude that 82% of the patients of OP reside within a distance of 0-12 km. DG has also found that about 71% of the patients who availed both services at Hiranandani Hospital come from S, L, N, K/E wards of Greater Mumbai. Using these results, DG has determined the relevant geographic market as the '*area within a distance of 0-12 km from the Hiranandani Hospital covering S, L, N , K/E, T & P/S wards of Municipal Corporation of Greater Mumbai*'.

29. To sum up, according to the DG, the relevant market is '*provision of maternity services by Super Specialty Hospitals within a distance of 0-12 km from the Hiranandani Hospital covering S, L, N , K/E, T & P/S wards of Municipal Corporation of Greater Mumbai*'.

30. The OP has contested both the relevant product market as well as the relevant geographic determined by the DG on the grounds that the latter has made conceptual or / and methodological error leading to erroneous determination of the relevant market. Citing ***Gordon*** v. ***Lewistown Hospital***[6] and ***FTC* v. *Tenet Health care***[7], the OP has submitted that health care decisions are based on factors other than price and that lower price hospitals do exert competitive pressure on higher-priced hospitals. It is submitted that DG has: (a) failed to identify as to what constitutes super-specialty hospitals; (b) made subjective statements while stating that all hospitals / clinics cannot be included within a single market; and (c) pre-supposed that super-specialty hospitals are a separate class of hospitals without an assessment of whether they are considered inter-changeable / substitutable for other medical establishments by a consumer. The OP has objected to the relevant product market definition proposed by the DG, and has submitted that the DG has only examined what he believes are "Super Specialty Hospitals" without an assessment of whether they are considered inter-changeable / substitutable for other medical establishments by a consumer. It is also submitted that Super Specialty Hospitals are not a separate class of health care establishments and that the DG has failed-to recognize the extent to which other hospitals, maternity specialist hospitals, nursing

[6] 272 F Supp 2d 393 (2003)

[7] 186 F3d 1045 (1999)

homes, maternity homes, etc., are demand-side substitutes and the extent to which they compete with and constrain the OP. On price based competition, the OP has submitted a list of 87 hospitals / maternity centers which, according to it, compete with the OP in maternity services. According to the OP, the correct product market definition is '*market for maternity services at hospitals, specialist maternity hospitals / clinics, nursing homes, birthing centers etc.*'

31. The OP has also disputed DG's definition of the relevant geographic market on the grounds that he has relied on wrong data set and has erred in identifying OP's catchment area. Moreover, according to the OP the DG failed to identify competitive constraint in and outside its catchment area and also failed to consider whether a chain of substitution exists for all hospitals within the Municipal Corporation of Greater Mumbai. Taking recourse to the Economist's Report, the OP has proposed that the relevant geographic market based on catchment area of OP should include 16-20 km on travel distance basis or roughly 12 km on a straight line basis and therefore, the relevant market should include all super specialty hospitals in Mumbai.

32. Having gone through the submissions made by the parties as also the DG Report, I am of the view that for determining the boundary of relevant market in the present case, both dimensions – product and as well as geography play an important role and competitive constraints ought to be evaluated accordingly.

Relevant Product Market

33. The standard approach to defining the relevant market is the

Hypothetical Monopolist Test or SSNIP (small but significant and non-transitory increase in price) Test. I am of the view that use of SSNIP test in case of differentiated products, as in the present case, that has both price as well as non-price dimensions may be inappropriate to the extent that SSNIP would capture only price-related aspects.

34. For defining the relevant market, it is important to identify those substitute products / services which provide an effective constraint on the competitive behavior of the products or services being offered in the market by the parties under investigation. It is sometimes argued that two products cannot be reasonably substitutable if they have substantially different prices. Price differences have therefore been used to distinguish between products which may be 'functionally substitutable', but are not 'substitutable' from competition assessment perspective. Therefore, defining relevant market solely on the basis of differences in price will be flawed if price differences reflect quality differences (actual or perceived). When such quality differences appear, defining relevant market merely on the basis of absolute price levels will ignore the possibility of consumers making a trade-off between price and quality.

35. While accepting that the present case centers on maternity services (having both price and non-price consideration), what is being disputed is whether there is a need to categorize these service providers to analyze state of competition. In this regard, it is important to note the role of medical insurance policies. In the absence of health policies, a patient would certainly weigh the cost of maternity services while revealing her preference for a particular hospital. To that extent, theoretically, some sort of

segmentation could be possible on price consideration alone. However, if there are serious non-price considerations such as the choice of the gynecologist, family traditions, peer pressures etc. then it is likely that a lower priced medical establishment may well constrain a high-end competitor in maternity services. On the other hand, a person having a health policy would consider non-price factors to be the determining factor as her expenses is taken care of in designated hospitals – in this case all such empanelled hospitals could be deemed competitors but may just fall short of comprising the relevant market.

36. The DG has overlooked these nuances of the health care industry, especially in the maternity services segment, which generally is not considered an intensive medical condition. Although not stated upfront, even if we were to assume super-specialty hospitals to be synonymous with high-end hospitals, no reasons has been given to exclude single-specialty hospital / neighborhood maternity centers that provide maternity services at comparable rates. Secondly, the dividing line in terms of price range has not been investigated upon; to that extent high-end hospitals for 'upwardly mobile' customers remains subjective.

37. In the present case, there is a trade-off between price and quality as the hospitals offer a variety of rooms with different prices based on the category of the room with different facilities. Thus, every individual hospital also has a price range. Any kind of price segmentation is arbitrary. The price range of one health care establishment that provides maternity services might overlap the price range of others. The rates of highest priced room at a nursing home might be comparable with the lowest priced room at a super-specialty hospital. In other words, there is a continuous price

spectrum for maternity services across different types of health care establishments, such that no one price bracket or type of medical establishments can be viewed in isolation.

38. On the other hand, if super-specialty hospitals are those that include various verticals (as in NABH classification, referred to by DG and brought earlier in the Order), then it would be wrong to consider only the private high-end establishments; various government run, charitable / trust hospitals etc. might as well get included in the relevant market definition. It is to be noted that NABH classifies the hospitals into super-specialty and specialty on the basis of professional qualification of doctors rather than on the basis of different verticals as cited by the DG. To that extent, a super-specialty or a specialty medical establishment could be single or multi-disciplinary. Most importantly, perusal of NABH guidelines highlights the fact that maternity service is not included in the list of verticals that are considered 'super-specialty'.

39. While a hospital that provides an array of services across different verticals as discussed above, it may be true that each vertical may not be a super-specialty on NABH guidelines. Often the assessment as a super-specialty hospital is done as a marketing tool to promote / build their brand equity in the market.

40. It is noted that DG has relied upon the *Diageo Case (M&A Case)* to highlight high-end products being a part of a separate anti-trust relevant market. On this aspect, it is opined that Diageo Case is premised on premiumisation of a product. As discussed above, facts of the case do not enable the present case to be placed in the same league as that of Diageo mainly on account of two reasons: (i) maternity services are not considered as 'specialty treatment'

i.e. patients generally prefer a hospital that gives best value in terms of services for their money since treatment is given priority over 'luxury' in health care; and (ii) specialty cannot be equated with 'high-end' – reference is made to NABH guidelines that differentiates a super-specialty / specialty / other health establishments on the basis of requirement of doctor of particular qualification. Thus, in health care, specialty and high-end may not go together.

41. It may also be pointed that definition of relevant market in merger cases need not be on the same lines as a case pertaining to abuse of dominance as economics of merger is different from economics of abuse of dominant position (AoD). Unlike in a merger case wherein competition authorities, ex-ante, predict the outcome of a proposed merger for any change possible in competitive environment; in analyzing AoD case, dominance is investigated on the basis of market leadership in an oligopolistic market and thereafter the alleged abusive conduct of OP is evaluated ex-post. Further, assessment of entry conditions is essential to judge the ability of the firm to harm the consumer[8]. Not the least, the focus of AoD analysis is more on a particular relevant market, unlike the M&A analysis where overall competition in different markets is evaluated.

42. In view of the above and the fact that there exists a continuum of price in maternity services, the relevant product market ought to be "***Market for maternity services***."

[8] Federico Etro, Ioannis Kokkoris: WP Series, Dept of Economics, University of Milan

Relevant Geographic Market

43. In respect of maternity services, it is important to draw a distinction between a planned delivery and an emergency delivery. In the absence of supporting data, I strongly believe that majority of delivery cases are planned. So, travel distance or time is likely to be a factor in deciding a particular hospital, but it would certainly not be the only determining factor that patients consider before choosing a hospital for availing maternity services.

44. On the relevant geographic market, the DG has used the catchment area analysis to fix the boundaries of geographic market. The catchment area of a firm is defined as an area in which its maximum (usually 80%, as taken in some matured jurisdiction) customers would be located. To define the boundary of the relevant geographic market, it is important to analyze the extent of competition in the catchment area. On mapping customer sample data of all such maternity patients who also availed stem cell banking services from Cryobanks at the OP's premises, the DG has concluded that nearly 82% of the OP's patients come from within 12 km of the OP's location. As against this, the OP has submitted analysis of all its 3602 maternity patients' data to suggest that nearly 76% of its maternity patients come from a distance up to 15 kms and further 83% patients come from a distance up to 20 km. Further, the OP has also cited para 4.45 on pp 25 of the DG Report that says nearly 76% of maternity patients are coming from a distance between 0-15 km.

45. In my opinion, while the DG has used an appropriate tool to define the relevant geographic market, he has used an incorrect sample for analysis. Since the product under consideration is the provision

of maternity services (the relevant product market identified by the DG himself), the sample data set should reflect only such patients that have availed maternity services and not such patients who have availed both maternity and stem cell banking services at Hiranandani Hospital. To that extent the sample characteristic does not correctly represent the population characteristic and hence the sample is biased. Further, it has not been established whether the sample is statistically significant. Most importantly, selecting and analyzing the data of only such patients that have availed both maternity and stem cell banking services makes the DG's analysis a 'census' analysis as opposed to a 'sample' analysis of maternity patients that could possibly include those who availed stem cell banking service. On account of the aforementioned, the result of analysis is doubtful.

46. In my opinion, the DG has chosen a method for doing a sample analysis which is inappropriate. While choosing a sample of 252 patients, the DG has inadvertently conducted unrelated 'census' analysis of only such patients who have availed the package service (maternity and stem cell banking) as against a purported sample analysis of all maternity patients, including those who availed stem cell banking services. Given the fact that there were 3602 maternity patients enrolled by the OP, an appropriate technique would have been to conduct a 'census' analysis of all such patients as the relevant product has been identified as maternity services, if he preferred to do a census.

47. It is also important to note that the catchment area analysis would give erroneous results when competitor firms are located in such a manner that the catchment area of two firms overlaps each other i.e. contestability / substitutability would be more if the overlap of

catchment area is greater. The OP has submitted that the DG has not considered the fact that defining a rigid catchment area may lead to the exclusion of certain health care establishments that may lie just outside the area but do offer sufficient competition to the establishment being considered and to that extent, applying a precise distance measure is likely to lead to incorrect results. It is also submitted that the DG has not considered competitive constraint offered by Lilavati Hospital and Hinduja Hospital that are located at 12.2 Km and 12.4 Km, respectively from the OP. In its response to the DG report, the OP has submitted that there is a significant overlap between its catchment area and that of 8 super-specialty hospitals in Mumbai and has accordingly proposed that the relevant geographic market is much broader than as defined by the DG.

48. Having noted the arguments of OP and submissions of DG on catchment area and analysis of data set to define the boundary of geographic market, I am of the opinion that the relevant geographic market for the present case would certainly be broader than suggested by the DG. Defining particular wards of Mumbai as the relevant geographic market would shrink the market on the assumption that consumers in these wards do not consider availing maternity services from a health care establishment located outside of these named wards. Also, given that the product market has been defined as market for maternity services, it is believed that a metropolitan city such as Mumbai, with more than 1,60,000 live births every year would have maternity centers spread all around the city so as to cater to each locality of the city. Further, since there is no data on the catchment area of all such centers that provide maternity services, in my view, the relevant geographic market in the present case is the **City of Mumbai**.

49. In view of the foregoing, the relevant market would be '***Market for maternity services in the city of Mumbai***.'

Is OP dominant in the relevant market?

50. The first step for determining dominance is to find the stable / long run market share of the firm under investigation in the relevant market. For doing that, we need to estimate the size of the relevant market.

51. It is noted that the DG has calculated market share of the OP as about 62% within his definition of relevant market. On the other hand, the OP has contested the very definition of the DG's relevant market and accordingly submitted that it is not a dominant enterprise in maternity service market.

52. Since, relevant market has been defined in a different manner, I now attempt to estimate the market share of OP in the revised relevant market. In the present case, it has been submitted that 3602 maternity patients have enrolled for maternity services at OP during 2009-12. For assessing total market size, reliance is placed on an internet article[9], according to which there were at least 1,61,500 live births in Mumbai in the year 2009. From these two figures, the market share of the OP in the relevant market is calculated to be less than 1%.

53. Furthermore, since there is an upper limit on the number of

[9]'*25% Mumbai women have caesarean births',* Chittaranjan Tembhekar, (November 6, 2009), accessed from //http://articles.timesofindia.indiatimes.com/2009-11-06/mumbai/28063040_1_ undp-report-private-hospitals-caesarean), accessed on January 31. 2014.

patients that can be enrolled at any hospital (as number of beds are fixed and cannot be increased in a short span of time to accommodate more patients); I am of the view that there is no further need to analyze other Section 19(4) conditions for dominance. Accordingly, the OP is not a considered dominant enterprise in the relevant market.

Issue: If the OP was dominant in the relevant market, has it abused its dominance in the relevant market?

54. Having concluded that OP is not dominant in the relevant market, it would be futile to enquire OP's alleged abusive conduct under the provisions of Competition Act, 2002.

Analysis of Section 3 Violation

55. The Informant has alleged that consumers of the OP are exploited because: (i) OP has an exclusive supply agreement with a particular stem cell bank that results in denial of market access to other stem cell banks; and (ii) there is a tie-in of stem cell banking service with maternity services at the premises of OP due to which consumer choice is restricted.

56. In its investigation, the DG has concluded that tie-in arrangement between Hiranandani Hospital and M/s Cryobanks is an agreement in violation of Section 3(4) of the Act, thus creating appreciable adverse effect on competition in India.

57. The OP has rejected the conclusion of the DG in this regard and submitted that maternity patients of the OP are not necessarily required to purchase stem cell banking services. Accordingly,

there is no tie-in for maternity patients. Further, the OP has quoted Commission's Order in ***Sonam Sharma* v. *Apple & Anr.*** [10] to highlight conditions of tying to conclude that the same are not present case.

On the basis of submissions made, I shall record my views on section 3(4) violation in the ensuing paragraphs.

58. According to Section 3 of the Act, "*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India*".

59. Further, Section 3(4) of the Act highlights anti-competitive agreements between vertically related enterprise as "*Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including:*

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India".

[10] Case no.24/2011

60. The DG, in his investigation report, has annexed four agreements signed by OP on yearly basis. First two of these are with Life Cell and latter two with Cryobanks. It is noticed that the fourth agreement (signed with Cryobanks for the period wef 01.09.2012 to 31.08.2013) states that Cryobanks has exclusive tie-up with other hospitals as well. It has also been submitted by the OP that all agreements signed by the OP with different stem cell banks are for a period of one year only and that these are terminable on notice by either party. Further, there is a process of objective evaluation in selecting the preferred stem cell bank. The OP has also submitted that Cryobanks has been selected objectively on account of its superior technology and in consumer's interest despite the fact that it was offered greater remuneration by competitor stem cell banks.

Issue: Is there is a vertical relationship between the OP and Cryobanks?

61. In the present case, while it is true that a hospital rendering maternity services does not require stem cell banks, the stem cell banks do require the services of the hospital to the extent that stem cell of the umbilical cord has to be collected within 10 minutes of delivery of a baby if the baby is delivered in a hospital. However, it is important to note that collection of stem cell from the umbilical cord can be done at home by a paramedic staff if delivery happens at home. It is important to note that hospital on its own does not produce anything that is used by stem cell banks; rather, hospital comes into the picture vis-a-vis stem cell value chain because delivery happens within the premises of hospital. Therefore, a hospital, apart from providing maternity services, becomes a platform where the patients deliver the baby and the

stem cell banks collect the umbilical cord cell. To that extent and as discussed earlier in the Order (under economics of health care industry), a hospital and a stem cell bank may be said to be vertically related but this falls short of being in a vertical relation in a conventional sense. The definition of vertical integration requires a reference point with respect to which a firm is vertically integrated. That reference is a final consumable product. The hospital's inpatient and outpatient care are considered to be the final consumable output. Each consists of a package of services produced when a patient visits the hospital.

62. To refine the vertical integration definition, four dimensions have been proposed by Harrigan[11]: stages, breadth, degree and form. The "degree" of vertical integration is the production of total input or output of required resources transferred to a later in-house production stage. In this case, hospital services are used only at the time of the collection of the sample and later the banking services are provided independently by the umbilical cord stem cell bank.

63. Further, as stated above, a patient demands maternity services and collection and banking of the umbilical cord stem cells, there are two outputs for final consumption. When the baby is delivered, a sample of umbilical cord stem cells is collected within 10 minutes from the placenta. Both the outputs are produced sequentially, at the same production stage and in a short time gap. This shows that the hospital is in a vertical relationship not only with obstetricians and other specialists for the provision of maternity services, but also with umbilical stem cell bank for collection of umbilical cord stem cells.

[11]Harrigan, R. (1985). *Vertical Integration and Corporate Strategy.* Academy of Management Journal, Vol. 28, pp. 397-425.

Issue: Can the agreement between OP and Cryobanks be termed as a tie-in agreement?

64. Explanation (a) to Section 3(4) of the Act defines tie-in as including any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. In line with this, the agreement between OP and Cryobanks shall be tested for tie-in arrangement.

65. The Commission, in its Order ***Sonam Sharma* v. *Apple & Anr***.[12] had discussed the intricacies of tying and bundling:

> "*A tying arrangement occurs when, through a contractual or technological requirement, a seller conditions the sale or lease of one product or service on the customer's agreement to take a second product or service. In other words, a firm selling products X and Y makes the purchase of product X conditional to the purchase of product Y. Product Y can be purchased freely on the market, but product X can only be purchased together with product Y. The product that a buyer is required to purchase in order to get the product the buyer actually wants is called the tied product. The product that the buyer wants to purchase is called the tying product.'*
>
> *'More often, tying is a sales strategy usually adopted by the companies to promote / introduce a slow-selling or unknown brand when it has in its portfolio a fast-selling or well known product, over which it has certain market power*.'

[12] *Supra* 10

66. Referring to ***Van Den Bergh Foods Limited* v *Commission***[13], DG has submitted that vertical agreements of short duration terminable with a short notice by either party may be anti-competitive if effect of the agreement results in foreclosure.

67. It is evident from the submissions of the parties and the DG Report that OP provides maternity services to all those who seek its service. It is also submitted that it refuses all stem cell banks other than Cryobanks in its premises for stem cell banking services. The DG has submitted that during 2009-12, a total of 3602 patients enrolled at OP for maternity services, out of which only 252 availed stem cell banking services from its premises. It is evident that 3350 patients availed only maternity services during the period under reference and that these patients were not compelled to avail stem cell banking services from its premises. In view of this, it cannot be concluded that the agreement between OP and Cryobanks is a tie-in agreement since more than 93% of the patient had the choice of availing only maternity services.

Issue: Whether the agreement between OP and Cryobanks is an exclusive supply agreement?

68. As per explanation (b) to Section 3(4) of the Act, "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

[13] Case T -65/98, (2003) ECR II – 4653

69. The OP has quoted ***Balaklaw* v. *Lovell***[14] to highlight that "*...it is the nature of competition that at some point there are winners and losers, and the losers are excluded...*" It is evident from above that the tenet of exclusive supply agreement, generally observed between manufacturers and suppliers or between manufacturers and dealers, is that a seller restricts a trader (re-seller) from dealing with his competitor seller in order to stifle competition. While exclusive contracts can benefit competition in the market by ensuring supply sources or sales outlets, reducing contracting costs, or creating dealer loyalty, they become anti-competitive when a firm uses exclusive contracts to impede efforts of new firms to break into the market or of smaller existing firms to expand their presence. In other words, it has to be established that there has been injury to competition by way of foreclosure.

70. In the present case, conditions of exclusive supply agreement do not appear to hold true for the reason that OP does not stop Cryobanks from enrolling patients from other hospitals. This is supported from the fact that Cryobanks has exclusive tie-up with various hospitals across the country. In view of the aforesaid, it is opined that there is no foreclosure and accordingly no violation of Section 3(4) of the Act.

Issue: Can the conduct of OP be said to be in the nature of refusal to deal?

71. According to explanation (d) of Section 3(4) of the Act, "refusal to deal" includes any agreement, which restricts, or is likely to restrict, by any method the persons or classes of persons to whom

[14] 14 F3d 793 (2d Cir 1994)

goods are sold or from whom goods are bought.

72. From the above, it emerges that allegation pertaining to refusal to deal will operate only if (a) parties have an agreement between them; and (b) parties to the agreement (buyer or seller) are restricted or likely to be restricted from selling or purchasing goods. In the present case, OP being the seller of hospital space to Cryobanks, parties to agreement are: OP and Cryobanks. It has been alleged that on account of the agreement between OP and Cryobanks, other stem cell banks have been refused to deal by the OP.

73. Every exclusive deal or requirements contract with one supplier (or distributor or other customer) could potentially be characterized as a refusal to deal with the supplier's competitors. In fact, any contract could be characterized as a refusal to deal with other suppliers to the extent of the business covered by the contract. Antitrust does not impinge on most companies' choices to deal, or not to deal, with other companies. However, antitrust laws frown upon such refusals that have a foreclosure effect on substantial amount of a market i.e. whether the contravening entity has a substantial market power so as to adversely affect competition in its favour.

74. Importantly, any allegation of refusal to deal has to be analyzed under the '*rule of reason*' approach rather than '*per se*' approach that condemns it for being anti-competitive. While doing so, it has to be seen whether there has been / likely to have anti-competitive effect in the market. In ***NYNEX Corp.*** v. ***Discon Inc.***, the US Supreme Court reversed a decision by the Second Circuit that had suggested that a single contract between a single buyer and a

single seller might be illegal *per se*.[15]

75. If we adopt a *per se* approach, the agreement between Hiranandani Hospital and Cryobanks for the provision of umbilical stem cell banking services to the maternity patients restricts other stem cell banks to provide its services to the patients at the Hiranandani Hospital. The agreement also limits the choice of those patients who want to avail maternity services and umbilical cord stem cell banking services at Hiranandani Hospital, but desire to obtain cord stem cell banking services from a different umbilical cord stem cell bank.

76. In the present case, following are to be noted: (i) Impugned agreement of OP with Cryobanks was initially for one year only; (ii) the OP is able to influence less than 1% maternity patients in the area of Mumbai, if at all it does so; (iii) The effect of so called tie-in is cast on less than 7% of its customers; and (iv) As submitted by OP, the practice of having an arrangement exists in other hospitals also. As regards contention of the Informant that other stem cell banks are restricted from doing business with the patients of OP, it would be appropriate to say that OP is within its right to choose its business partners in accordance with its commercial interests.

[15]The Supreme Court decided to hear NYNEX v. Discon after the Second Circuit issued a remarkable decision that suggested that a simple agreement by one firm to use the services of another firm could amount to a "boycott" of the second firm's competitors, and thus could be condemned *per se.* The plaintiff in the antitrust case, Discon, was in the business of removing obsolete telephone equipment. NYNEX owned New York Telephone, a leading local telephone company in New York and parts of Connecticut. NYNEX at one time used Discon's removal services, but switched all of its business to a rival removal service, AT&T Technologies. The Court recognized that the Second Circuit's broad application of the per se rule would discourage firms from changing suppliers even where the competitive process suffered no harm. In reversing the Second Circuit decision, the Court made clear that an agreement by a single buyer to purchase goods and services from a single supplier could not be condemned per se even if the buyer could not prove a legitimate business justification for its choice. Thus, after Discon, the law governing refusals to deal once again requires a plaintiff challenging a single buyer's selection of suppliers to prove harm, not only to a single competitor, but to the competitive process as a whole.

Issue: Is there AAEC arising out of the agreement OP and Cryobanks?

77. Under AoD analysis, it has been shown that OP has less than 1% market share in terms of maternity services in Mumbai. Keeping this in mind, analysis of AAEC would be done.

78. In the present case, allegations pertain to: (a) tie-in arrangement; (b) exclusive supply agreement and; (c) refusal to deal. As discussed above the agreements are not in the nature of either tie in or exclusive supply agreement.

79. Furthermore, as discussed while the agreement may be in the nature of a "refusal to deal", however, a rule of reason approach has to be adopted in the analysis of this restraint. It needs to be established, whether such an agreement has an appreciable adverse effect on competition, with regard to all or any of the factors stated in section 19(3) of the Act.

80. As per section 19(3) of the Competition Act, 2002, *the Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:-*

a. Creation of barriers to new entrants in the market;

b. Driving existing competitors out of the market;

c. Foreclosure of competition by hindering entry into the market;

d. Accrual of benefits to consumers;

e. Improvements in production or distribution of goods or provision of services;

f. Promotion of technical, scientific and economic

development by means of production or distribution of goods or provision of services.

Creation of barriers to new entrants in the market

81. While it is true that OP has placed restriction on other stem cell banks in its premises, it is definitely not correct to say that it has created barriers to new entrants – no evidence has been adduced by DG in this regard. The DG, in his supplementary report, has submitted that there were atleast 13 stem cell banks and that market share of Cryobanks in Mumbai was 34.54% (2011-12).

Driving existing competitors out of the market

82. Citing exclusive tie-in arrangement between OP and Cryobanks, DG has observed that other competitors in the market of stem cell banking services are not allowed to cater to the maternity patients of OP. It is also submitted that having exclusive tie-up arrangement with a particular service provider and not allowing others to utilize its infrastructure, OP has effectively driven out all the existing competitors of Cryobanks out of the market.

83. Reliance is placed on an internet article,[16] wherein it has been reported that about 500 samples are collected by stem cell banks on a monthly basis and that the market, witnessing entry of more players since starting of cord cell banking service in 2004, is growing by about 45-50%. Further, there is no evidence to show that any of the existing stem cell bank has been driven out of the 'market' that may be relatable to the agreement signed between the

[16] '*Stem cell banks rake in the moolah with a promise to secure future's (sic.) health for the new born'*, Mohini Mishra (April 7, 2013), accessed from (http://articles.economictimes.indiatimes.com/2013-04-07/news/38346234_1_stem-cells-mayur-abhaya-cord-blood) accessed on January31, 2014.

OP and Cryobanks.

Foreclosure of competition by hindering entry into the market

84. Citing market share of OP in the relevant market, the DG has submitted that the OP has foreclosed 62.27% of the market. Earlier in the order, it has been shown that the DG has taken an incorrect relevant market into account. Accordingly, this market share is incorrect. Furthermore, for the purpose of Section 3, foreclosure effect has to be assessed from 'market' perspective, for which 'relevant market' need not be taken into account. Also, as discussed earlier, there is no evidence of any sort of foreclosure of competition by hindering entry into the market – the market here is that of stem cell banking and not stem cell banking at the premises of the OP.

In view of the foregoing, I am of the view that there is no AAEC and accordingly no case for Section 3(4) violation.

Conclusion

85. The allegation in the case revolves around the dominance of Hiranandani Hospital as regards maternity services in violation of Sec 4 or Sec 3(4). Having examined the entire aspect on the allegation stemming from the dominance of Hiranandani Hospital in maternity services, as part of high-end super-specialty hospital, I am of the considered view that maternity services do not fall in the category of super-specialty, as supported from the data of NABH. Further, there is no link between high-end and super-specialty. In this case, non-price factors tend to out-weigh high-end hospitals for maternity services. Against this background, I note that the

patient has a choice as regards the hospital she wishes to seek for maternity service in Mumbai and the OP offered a choice to her between stand-alone maternity services and maternity packaged with stem cell banking from Cryobanks. Since the OP is not dominant in the maternity services market in Mumbai, neither Section 3(4) nor Section 4 applies in the present case.

ORDER

No case of violation either of Section 3(4) or of Section 4 is established against the OP. Secretary, Competition Commission of India is directed to convey the same to the parties in accordance with provisions of the Act.

Sd/-
(Dr. Geeta Gouri)
Member

Place: New Delhi
Date: 05-02-2014