

**COMPETITION COMMISSION OF INDIA**

14<sup>th</sup> August , 2012

**Case No. 64 of 2010**

*In re:*

Arshiya Rail Infrastructure Limited      Informant  
v.  
1. Ministry of Railways      Opposite Party No.1  
2. Container Corporation of India      Opposite Party No.2

with

**Case No. 12 of 2011**

*In re:*

Arshiya Rail Infrastructure Limited      Informant  
v.  
1. Ministry of Railways      Opposite Party No.1  
2. Container Corporation of India      Opposite Party No.2

with

**Case No. 02 of 2011**

*In re:*

Kribhco Infrastructure Limited      Informant  
v.  
Ministry of Railways      Opposite Party

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## ORDER

### Per M.L. Tayal, Member

I have had the advantage of reading the draft order prepared by my learned brethren. I am in respectful agreement with the conclusion drawn in the draft order that no violation of either section 3 or section 4 of the Act is made out. However, on certain issues *viz.* the determination of the relevant market and the power of the Commission to test the *vires* of a subordinate legislation, I am unable to lend concurrence therewith. Hence, this brief order on these issues.

2. The Commission in all the above three matters *vide* its separate orders dated 24.01.2011, 13.04.2011 and 27.01.2011 respectively directed the Director General('the DG') to cause an investigation to be made into the matters and to submit report(s) within the period specified. After conducting the investigations, the DG submitted the reports to the Commission on 31.10.2011, 23.11.2011 and 11.11.2011 respectively.

3. The Commission after considering the reports in its ordinary meetings decided to forward the same to the parties for filing their respective replies/comments to the reports. The parties have since submitted their respective responses and the matters were heard on various dates. On April 11, 2012 after conclusion of arguments, the orders were reserved.





4. In the main order, the relevant market in the present case has been defined as *the market for provision of transportation services in respect of containers in India*. Further, as the order did not find any of the opposite parties viz. IR and CONCOR dominant in the relevant market, the allegations of abuse of dominant position were held not to be sustainable.

5. The term relevant market has been defined in section 2(r) of the Act as 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. Further, 'relevant geographic market' has been defined in section 2(s) of the Act as a market comprising the area in which the condition 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 area. Section 2(t) of the Act defines 'relevant product market' as 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.

6. By virtue of section 19(5) of the Act for determining whether a market constitutes a 'relevant market' for the purposes of this Act, the Commission shall have due regard to the 'relevant geographic market' and 'relevant product market.'



7. To determine the 'relevant product market', the Commission shall, in terms of provisions of section 19(7) of the Act, have due regard to all or any of the following factors: physical characteristics or end-use of goods; price of goods or service; consumer preferences; exclusion of in-house production and existence of specialized producers; classification of industrial products.

8. The transportation of goods can be carried out either by sea, land, air and road. Hence, the issue of substitutability amongst these various means of transportation needs to be examined.

9. In this regard, it may be noted that though there is functional substitutability to some extent among these modes of transport, the same is drastically limited on account of the fact that there is a different underlying medium in each case. Each mode offers distinct advantages over others on the basis of volume, nature of commodity, cost of transportation and customer preference *etc.* Hence, there appears to be only partial substitutability between the different modes of transport and each mode may possibly constitute distinct product market in terms of the provisions of the Act.

10. Now, the substitutability between the available modes for surface transportation may be examined. The surface transportation of goods can be carried out by either using the roads or the railway network. Transportation through roads is generally considered more suitable for shorter





distance. On the other hand, movement on railway network is generally more appropriate for long distance. The underlying infrastructure and logistics requirement for the two mediums are very different. Rail network is a prerequisite for moving goods in trains. Movement of goods in trucks *etc.* requires availability of motorable roads.

11. It may be noted that even if the same goods can be transported either through rail container or wagons or through road it does not mean that for the overall purpose these are substitutable. Most of the customers choose different modes according to their specific needs which include situation of their plants, transported volumes, distance and time constraints. The decisive factor for the choice of mode for the individual transport would also be related to the price competitiveness of the offer. Moreover, as rail transport involves significant fixed costs, while costs related to road transport are largely variable, the attractiveness of rail vis-a-vis road transport may be higher for big volumes and long distances.

12. In this context, it is instructing to notice the approach of the European Commission on the subject. The European Commission found that not all modes of transport can be considered as generally substitutable in view of the geographic situation of the customer as well as the specific characteristics of the goods to be transported [Case No. COMP/M.4294, Arcelor/SNCF/CFL Cargo; Case No. COMP/M.3150 SNCF/Trenitalia].



13. In *Deutsche Bahn* case [Case No COMP/M.4746. Deutsche Bahn/English Welsh Scottish Railway Holdings (EWS)], the European Commission while discussing different modes of transport with regard to a further subdivision of the market for transport of goods according to the different means of transport (air, sea, land; within land: rail, road, barge, pipeline) held that market investigation showed that this division cannot be drawn for all possible circumstances but has to be assessed case-by-case. On the one hand, the vast majority of customers consider these markets (in particular air and sea) as separate in view of their different characteristics and the notifying party itself acknowledges that the different modes of transport have different characteristics in relation to prices and cost structures, timing and geographic availability. Whether goods are transported by air, sea, road, rail, inland waterway or pipeline appears in fact to be a complex function of many variables, depending on the customer's location, the type of good (weight, size, value and other qualities) and quantities to be shipped, destination of the goods, timing and any other requirement. There are indications that rail presents certain characteristics which may make it most suitable/economically feasible for the transport of goods under certain conditions *i.e.* in particular for bulk and heavy goods (coal, iron, oil), larger amounts and longer distances and customers with rail access. The level of substitutability depends on a combination of the factors mentioned above including the suitability of other





modes (like barge or pipeline) and the availability for the individual customer (*e.g.* access to inland waterway or short sea shipment). Moreover, the substitutability between rail and other modes of transport may be only seemingly where rail freight services are overpriced in view of market power on a certain geographic market. The fact that most customers consider the different modes of transport as separate markets while they are at the same time prepared to switch to and from rail in case of a 5-10% price increase of their current mode of transport may indicate that the service provided by another rail company is a closer substitute than other modes like road transport services.

14. Keeping in mind the various parameters provided in the Act for assessing the relevant product market and in line with the European Commission decisions, there are strong indications that, depending on the geographic and other circumstances, a separate market for rail freight services may be segmented.

15. Now, the various options available for movement of goods on rail network and the extent of substitutability between them may be examined.

16. At the outset, it may be noticed that transportation of goods through rail network can be undertaken either through containers or wagons. As far as transportation of goods through wagons is concerned, Indian Railways is the sole provider of the service. Further, the movement of goods through containers is presently being carried out by



CONCOR and the other private CTOs who have signed the concession agreements for the purpose with MoR. Hence, there are two options available for movement of goods on rail network *i.e.* in IR run wagons and containers operated by CTOs.

17. For the purpose of defining the relevant market it is pertinent to examine whether there exists substitutability between containers and wagons for transportation of goods on Railway Network in terms of the factors noted above. For this purpose, the DG conducted an assessment of substitutability between containers and wagons for movement of goods on railway network and concluded that technically all goods can be carried in wagons and containers on rail network and hence found *inter se* substitutability between the two modes.

18. In my view the aforesaid finding of the DG does not correctly address and reflect the issue of substitutability and interchangeability between the wagons and containers for movement of goods on rail network.

19. In my opinion, there are distinguishing factors between wagons and containers which establishes that these are not substitutable or interchangeable. A goods train is a group of freight cars or goods wagons hauled by one or more locomotives on a railway network, ultimately transporting cargo between two points as part of the logistics chain. Containerization (specifically Railway containers) is a system of intermodal freight transport cargo using standard





shipping containers (also known as 'ISO containers') that can be loaded and sealed intact onto rail cars. In wagons, all cargo had to be manually loaded and unloaded into the wagons whereas containerization allows for automated handling and transfer between modes, and the standardized sizes allow for gains in economy of scale in vehicle operation. There are separate terminals and goods sheds for handling the containers and wagons respectively. Besides, certain goods are suited only for movement in containers like glass, polished goods and electronic goods. Container movements also provide a better alternative to wagons in respect of safety and security in addition to being a product which can offer door to door service.

20. This view is also strengthened by the replies given by CTOs to the DG during the course of the investigation. The DG, in order to assess the substitutability between containers and wagons for movement of goods on railway network, elicited the comments of CTOs. From a perusal of the replies of CTOs on the issue of substitutability between containers and wagons for movement of goods on Railway network, it may be noted that it has come in the evidence that there are some fragile products such as glass, electronic goods, polished goods which are not suited for movement on wagons. It is also on record that due to the inherent nature of the cargo, containers provide a better alternative to wagons from the perspectives of safety and security in addition to being a product which can offer door to door service. Moreover, technical and financial



consideration would also play an important role in choosing a particular mode of transportation viz. wagons or containers.

21. In this regard, it is instructing to note that the movement through wagons is not open for any other player and is still being handled only by the Indian Railways. Since wagons are still not open to any other player, there is no question of assessment of competition in that sector. The assessment of competition is required to be conducted in containers since only that mode has been opened to private players by the Government.

22. Thus, it is evident that there is no substitutability and interchangeability between the wagons and containers for movement of goods on the railway network. Resultantly, *transportation of goods on railway network through containers* is held to be the relevant product market.

23. Now, I may proceed to determine the relevant geographic market. As per provisions of section 19(6) of the Act, the Commission shall, while determining the 'relevant geographic market', have due regard to all or any of the following factors, namely: regulatory trade barriers; local specification requirements; national procurement policies; adequate distribution facilities; transport costs; language; consumer preferences and need for secure or regular supplies or rapid after-sales services. In this connection, the DG examined the scope of operation of CTOs as well as IR run wagons in terms of permissible geographic boundaries.





It was noted that in terms of the concession agreements, the area of operation of CTOs was defined as per the license obtained by them under different category.

24. The licenses of CTOs under various categories are granted in relation to the accessibility to the Rail Network. The Rail Network has been defined in the concession agreements as the entire broad-gauge network of the Government Railways and shall include such railway network where the railway administration has a right to operate.

25. Thus, the area of operation of the CTOs and the movement of wagons is confined to the rail network where the railway administration has a right to operate. Accordingly, the relevant geographic market in the instant case may be determined as the Rail Network (as defined in the concession agreement).

26. In view of the above analysis, *transportation of goods in containers on the Rail Network in India* is held as the relevant market in the present case.

### Dominance

27. 'Dominant position' has been defined under the Act as a position of strength enjoyed by an enterprise or group in the relevant market which enables it to operate independently of its competitive forces prevailing in the market or affect its competitors or consumers or the relevant market in its favour.



28. To determine whether an enterprise enjoys a dominant position or not under section 4 of the Act, the Commission has to give full regard to all or any of the factors enumerated in section 19(4) of the Act *viz.* Market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition and any other factor which the Commission may consider relevant for the inquiry.

29. The DG in the report has noted that in the market of movement through containers, CONCOR has a market share of more than 75%. Besides, the DG also analysed the factors enumerated in section 19(4) of the Act to determine the dominance of the opposite parties.





30. On a careful consideration of the factors enumerated in section 19(4) of the Act and in the light of the findings of the DG thereon, in particular, looking at the market share of CONCOR in the relevant market, it may be concluded that CONCOR is enjoying dominant position in the relevant market, as defined *supra*.

31. Now, the allegations relating to abuse of dominance in the relevant market by the opposite parties may be examined. For the felicity of reference, the allegations may be catalogued under the following heads and be analysed accordingly:

- a. Prohibitions imposed on movement of coal, coke, minerals and ores
- b. Changes in applicable haulage charges (Rate Circulars)
- c. Restrictions imposed on CTOs in accessing private sidings
- d. Policy for allocation of Land by MoR to CTOs vis-à-vis CONCOR
- e. Access to CTOs to CRTs of MoR
- f. Maintenance of Wagons
- g. Increase in stabling charges by MoR

32. From a bare perusal of the allegations, it is evident that the same are directed at against conduct and actions of MoR. As CONCOR has been held to be in a dominant position in the relevant market, no case is made out against it based on any alleged abusive conduct attributable to MoR.



33. The other aspect which I wish to advert to in the present order is the finding recorded in the main order that the Commission has the power to test the *vires* of subordinate legislation and hence, it can adjudicate the same. As it has been held that the opposite parties are not found to be in contravention of the provisions of the Act, it is unnecessary to record any finding on this point. The same may be decided by the Commission in an appropriate case. Accordingly, without expressing my views on this aspect, I regret my inability to lend concurrence to the legal proposition propounded in the main order.

34. With the aforesaid observations and clarifications, I agree with the conclusions reached in the main order.

Sd/-  
Member (T)

Certified True



*S. P. Gahlaut*  
24/08/2012

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