FINAL REPORT

STUDY ON

COMPETITION CONCERNS IN CONCESSION AGREEMENTS IN INFRASTRUCTURE SECTORS

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By

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EXECUTIVE SUMMARY

Concession Agreement and Competition Act

This Report uses the term “concession agreement” and “concession” to refer to a legal document or any arrangement in which a non-government entity obtains, from the government, the right to provide a particular service or obtain the right to control access to one or more public infrastructure facilities.

The Competition Act, 2002 (“**The Competition Act**”) is not limited only to the regulation of commercial agreements between private entities, the scope of the provisions of the Competition Act brings within its ambit actions of any department of the government (both Central Government and State Governments) which is engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles of goods or the provision of services of any kind either directly or through one or more of its units or divisions or subsidiaries and only excludes such activity of the Government relatable to the sovereign functions of the Government (including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space).

A concession agreement will not be covered by the exception of sovereign function as it is a commercial agreement entered into by the government and will be therefore subject to the scrutiny under the Competition Act.

The Competition Act regulates, inter alia, activities that cause or are likely to cause an appreciable adverse effect on competition within India as well as with abuse of dominance by an enterprise in a relevant market.

Structuring and Process of Grant of Concession Agreements Also Covered

Since a concession agreement is vesting a state sanctioned dominant position to a particular entity – all the stages of structuring, granting and implementation of a concession agreement have clear competition law implications and will be subject to the jurisdiction of the Competition Commission of India.

This Report seeks to provide an introduction to the manner in which competition law would impact and govern a concession agreement and the ambit of the powers and authority of the Competition Commission in respect thereof. The report also seeks to give provide the overall Indian legal framework within which the jurisprudence relating to treatment of concession agreements under Indian competition law would need to evolve.

In light of its scope and nature, a concession agreement can be viewed as a device that can be used to create competition *for* the market and consequently, the process of grant of the concession agreement becomes the critical element of the competition for the market created by a concession agreement.

Furthermore, in its capacity as the contract governing the grant and exercise of the concession rights and obligations vested with the concessionaire, a concession agreement can also be used as a means to prevent abuse of dominance by providing a suitable detailed framework regulating the exercise of rights by the concessionaire. A well structured concession agreement will also prevent the concessionaire from indulging in anti-competitive practices.

The use of concession agreements is poised to increase in India as the Government of India is viewing public private partnership structure as an important mechanism to enable development of infrastructure in India.

The structuring of the concession agreement has a direct impact on the competition for the concession. For example, if in an infrastructure project, the state authority decides to bundle the concession right to undertake the development of an infrastructure facility with the right to develop real estate on large tracks of land, then depending on the real estate development potential of the land being offered as part of the concession, the nature of the concession shifts from being a concession for an infrastructure project to effectively a real estate development project. Such a change in the nature of the project, will immediately change the relevant market of the concession and also change the nature of competition for the concession. Furthermore, grant of land rights around the project facility or in proximity to the project facility for a period that is longer than the concession agreement, effectively locks the facility with the original concessionaire as possibility of the successor concessionaire being able to develop the facility or expand the facility or create new access to the facility become limited and thereby reduce or in some cases even eliminate competition in the process of finding successor concessionaires at the end of the term or on early termination of the concession agreement.

Competition Commission Can Review Structuring and Process of Grant of Concession Agreements

Under general law, the decisions relating to structuring of a project would fall under policy decisions by the state and would therefore not fall within the scope of judicial review by the courts.

However, with the enactment of the Competition Act, 2002 and the creation of the Competition Commission of India, decisions, whether in the nature of policy or administrative decisions, that would have adverse effect on competition or interests of consumers would fall under the scope of duty and the powers and functions of the Competition Commission of India.

The following are the possible manner in which concession agreements could be granted under Indian legal framework:

(i) Direct Negotiations between state agency and the proposed concessionaire

(ii) Competitive bidding process

(iii) Swiss challenge process

It should be noted that in light of the existing pronouncements of the Supreme Court of India in relation to the manner in which a Government can enter into contracts, before the Direct Negotiation route can be adopted, detailed rules/government orders that would govern the exercise of this discretion and the conduct of such negotiations have to be put in place. In the absence of such rules/government orders, any contract for an infrastructure projects entered into on the basis of direct negotiation would be open to challenge. Consequently, the competitive bidding route is the most preferred route for grant of concession agreements under Indian law.

The Government of India has circulated a model bid document. The Model Bid Document provides for a two stage process of competitive bidding. The first stage being the Request for Qualification (RFQ) or Expression of Interest (EOI) with the objective of short listing eligible bidders for stage two of the process. The second and final stage is the Request for Proposal (RFP) stage in which the technical and financial proposals are obtained and the preferred bidder selected based on the evaluation of the bids received.

The Model Bid Documents indicate that the Government of India has taken a policy decision to select bidders solely on their financial offer rather than giving due weightage to their overall technical experience, financial and technical standing as well as their financial proposal.

The Model Bid Document also imposed a limit of 5-7 bidders that could be allowed to submit financial proposals from among the bidders that may have qualified the technical evaluation. This limitation has generated a lot of controversy and has been revoked with prospective effect only for road projects while applications for exemption in respect of other sectors are presently pending with the Government. This is a critical competition issue as imposition of an arbitrary cut off number of 5-7 from among bidders that have otherwise qualified the technical criteria stipulated will result in skewing of the competition among what are otherwise qualified bidders.

Even though the Delhi High Court has not struck down this provision on grounds that it is a policy decision of the Government and that Courts will not interfere in policy decisions, it is a matter that has still not been settled and the issue continues unresolved because it has only been revoked with prospective effect in relation to only the national highways sector and continues to be applicable in relation to bid processes being sought to be undertaken in other sectors by the Government of India.

The manner in which the Concession Agreement is implemented can result in competition issues that can include abuse of dominant position, creation of combinations and entering into anti competitive agreements on the basis of the rights vested under the concession agreement. The Competition Commission can therefore, in relevant situations, look into the manner in which a concession agreement is being implemented by the Concessionaire. The Competition Commission would have the authority to investigate whether the concessionaire is exercising its rights or implementing the concession in a manner that is resulting in an abuse of dominance or in a manner that is resulting in a material adverse effect on the competition in a relevant market or any other violation of competition law.

Main Principles of Competition Law Applicable to Concession Agreements

Under general principles of competition law applicable in certain other jurisdictions, (particularly USA, EU, Australia), “infrastructure facilities” would generally, based on the relevant facts, be considered as “essential facilities” and be governed, under general competition law, by what is known as “the essential facilities doctrine”.

Simply stated, the “essential facilities doctrine” prevents an entity from being denied use of a facility that is critical or “essential” for it to undertake its business. According to the Hilmer Report (Australia), ‘essential facilities’ are facilities which exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically and access to such facilities is *essential* for effective competition in upstream or downstream markets.

In light of the importance being given to infrastructure development through private participating that is necessary for enabling India to meet its development targets and the promotion of the use of the concession agreement route being undertaken in India it will be important to institutionalize the “essential facilities doctrine” in order to provide for a suitable framework governing development of infrastructure by private developers.

In the absence of the institutionalization of the “essential facilities doctrine” its implementation would be dependant on judicial developments and actions and decisions taken by relevant regulators from time to time, which is not an effective means of regulating ongoing commercial relationships.

The “essential facilities doctrine” was developed through judicial pronouncements in USA and then in EU, Canada and Australia and forms part of the various principles developed under “abuse of market power” provisions of general competition law to deal with access issues.

Under the latest US case law, a limited and strict application of the “essential facilities” doctrine has been adopted. However such limited and strict application of the “essential facilities” doctrine would not be applicable in the Indian scenario. This is because under U.S. law the right to property is paramount and jealously guarded. Consequently, any principle that would restrict the right of the owner to exercise ownership rights and in fact compel the owner to assist its competitor will be looked at very skeptically and be limited to only very specific circumstances. Under the Indian scenario, the right to ownership of the infrastructure facilities that is developed by a private entity is usually limited to that of exclusive operation and thereafter transfer of the facility to the Government. Usually the structure adopted under most of the Indian concession arrangements is that of Build Operate Transfer (BOT), and the facility would be developed on land that is generally provided on a lease or license by a government authority for the specific purpose of development of the infrastructure facility in accordance with the terms of the relevant concession agreement and is co-terminus with the concession agreement. The private developer, therefore, never obtains the complete right, title, interest and unfettered property rights to the infrastructure facility that it develops. Furthermore, the right to property under Indian Constitutional law is that of a legal right only, which can be extinguished by authority of law.

There is a need to recognize and clearly incorporate under Indian law, the importance of access to certain key facilities in order to ensure and encourage competition in relation markets.

A concessionaire of an infrastructure facility would have the incentive to refuse or provide only restrictive access to others in order to: (i) restrict competition in upstream and/or downstream markets where the concessionaire or its group company is also a supplier in those markets; and (ii) charge monopoly prices for access. The "essential facilities doctrine" supplements the competition principles relating to vertical separation or regulatory control of the relevant infrastructure facilities.

Renegotiation of Concession Agreements

The reality that in long term infrastructure projects, renegotiation is a reality has to be recognized by regulators. the potential triggers for renegotiation of concession agreements, under the Indian framework are: (i) Government initiated; (ii) Concessionaire initiated, (iii) Force Majeure and (iv) by the lenders (in the event of the issuance of a notice of termination or of default). It should be noted that in each of these circumstances, the renegotiated concession agreement would require the consent of the lenders. A detailed concession agreement should usually provide an overall framework within which renegotiation of the terms of the concession agreement can occur in certain specified circumstances. In the event renegotiations result in violation of competition law principles, the Competition Commission would have jurisdiction to investigate the same.

The Competition Commission, therefore, has a critical role to play in relation to the structuring, grant, implementation as well as renegotiation of concession agreements in relation to infrastructure projects. The Competition Act, 2002 vests the Competition Commission with extensive and sufficient powers to investigate, prevent or stop violation of principles of competition law in any phase of the concession agreement. None of the sector specific regulators have the effective and decisive powers to act and prevent violations of competition law and penalize the perpetrators of any such violations. Even though a few laws constituting sector specific regulators cover and vest such regulators with the function to encourage competition and deal with competition issues, only the Competition Act, 2002 has the remedies and provision that would be effective in relation to violation of competition principles.

CHAPTER 1. INTRODUCTION

1.1 Concession Agreements

This Report uses the term "concession agreement" and "concession" in their broad sense to refer to a legal document or any arrangement in which a non-government entity obtains, from the government or a government agency, the right to either: (a) provide a particular infrastructure service or (b) control access to (whether linked to obligations to develop, construct, renovate, operate and/or maintain or otherwise) one or more infrastructure facilities, effectively on an exclusive or dominant basis [1].

The above description of "concession agreements" takes into account the common principles which can be applied to the definition of "concession agreements", under various Indian statutes, which are that: (i) it is an agreement between a non-government entity and a government authority or government agency, (ii) it relates to an infrastructure project and (iii) it regulates private participation in relation to the infrastructure project[2].

In relation to concession agreements, competition law concerns would arise in each of the following stages of the life cycle of a concession agreement: (i) first, at the stage of structuring of concession agreement by the government, (ii) Second at the stage of identifying the private entity with whom the concession agreement would be entered into, (iii) Third during the implementation of concession agreement and (iv) at the stage of renegotiation of the concession agreement at any time during its validity.

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[1] This has been determined through a review of literature and case studies and certain Indian laws. The Inter American Bank and the World Bank in a joint technical paper *"Concessions for Infrastructure: A guide to their design and award"* has defined "concessions" broadly to refer to "any arrangement in which a firm obtains from the government the right to provide a particular service under conditions of significant market power." In the context of this report and more generally the Indian scenario however, concessions have been granted not only to firms but to all types of legal entities and have not been limited to only right to provide a particular service but have also been provided for controlling access to an infrastructure facility (which may or may not have a service element to it).

[2] The *Andhra Pradesh Infrastructure Development Enabling Act, 2001*, under s. 2(h) , defines "concession agreement" to mean "a contract of the nature specified in Schedule I between the Developer and the State Government or Government Agency or the Local Authority relating to any Infrastructure Project or such other contract as may be prescribed from time to time by the government." Schedule I lists the types of structures such as BOT, BOO, BOOT, LROT etc. it should also be noted that this definition is linked to only "infrastructure projects" which is defined , under s. 2(s) of the Act, as being a project in the sectors notified by the state government under the Act. The term "developer" is defined under the s. 2(k) of the Act, as "any private sector participant who has entered into a contract for the Infrastructure Project with the Government or Government Agency or Local Authority under the Act." The term "private sector participant" is defined in s.2(gg) as "any person other than Central Government or State Government or Government Agency or any joint venture between Central Government or State Government Departments or any Statutory Body or Authority or Local Authority or any corporation or company in which the Central Government or State Government or Government Agency, Statutory Body or Authority or local body is holding not less than 51% paid up shares." Thus, under the said Act, the concession agreement can be with any type of legal entity, which is not a government entity. A similar definition of the term "concession agreement" is provided in the *Bihar Infrastructure Development Enabling Act, 2006* (under s. 2(o) of the said Act).

The Himachal Pradesh Infrastructure Development Act, 2001, under s. 2(o) defines "concession agreement" to "a contract of the nature specified in Schedule II between a developer and the Government or Government agency relating to any Infrastructure Project." The term "infrastructure project" is defined, under s. 2(j) to mean "facilities and services provided by a project specified in Schedule-I". The term "developer" is defined under s.(e) to mean "a person with whom a concession agreement or arrangement is entered into by the Government or Government agency."

The Punjab Infrastructure (Development & Regulation) Act, 2002, under s. 2 (6), as "any of the contracts executed for the purposes of private participation in an infrastructure project between a concessionaire and a public infrastructure agency in terms of this Act, or the rules or regulations made there under as per the model specified in Schedule II."

The abovesaid various stages of the life cycle of a concession agreement fall within the jurisdiction of the Competition Commission of India pursuant to section 18 of the Competition Act, which imposes a duty on the Competition Commission to, inter alia, eliminate practices having adverse effect on competition, promote and sustain competition and protect the interests of the consumers. On reading the definitions of “practice”[3], “trade”[4] and “enterprise”[5] as provided under the Competition Act, it becomes clear that the practices of a government department relating to the production, supply, distribution, storage or control of goods and provision of any services will fall within the ambit of the duty of the Competition Commission.

In relation to competition laws, a concession agreement has also been viewed as a device that can be used to create competition *for* the market, when competition in the market is not operating[6]. Under the principles enshrined in the Competition Act, 2002, the use of concession agreements, can now be easily extended from that of creating competition for the market to also a means of preventing abuse of dominance[7] since a well structured detailed concession agreement should provide the regulatory framework (including that of monitoring performance, regulating user charges levied by the user and allowing for termination and damages for defaults) subject to which a developer can exercise its rights. Furthermore, a well structured concession agreement will also prevent a developer from indulging in anti-competitive practices[8].

The most relevant anti competitive practices which a well structured concession agreement should seek to prevent are: (i) unfair or discriminatory conditions on which services are provided or (ii) unfair or discriminatory determination or revision of price, or (iii) limiting or restricting or denying, directly or indirectly, access or (iv) using the dominant position obtained under a concession agreement to enter into or protect its or a related entity’s position in another relevant market or (v) entering into anti competitive agreements.

In light of the Eleventh Five Year Plan it is clear that concession agreements are poised to see a growth in their usage and consequently their importance in India. The Eleventh Five Year Plan states that the total investment needed in infrastructure in India, defined to include electricity (including non-conventional energy), roads, bridges, railways (including mass rapid transit systems), ports, airports, telecommunications, irrigation (including watershed development), water supply and sanitation, storage and gas distribution will have to increase from an estimated 5.43% of GDP in 2006-07 to 9.34% by 2012. This would put the overall target of investment in infrastructure to be about USD 320

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[3] S. 2(m) Competition Act defines “practice” to include any practice relating to the carrying on of any trade by a person or an enterprise

[4] S. 2(x) Competition Act defines “trade” to mean “any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provisions of any service

[5] S. 2(h) Competition Act defines “enterprise” to mean “a…department of the Government..which is engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles of goods or the provision of services, of any kind, or in investment ….”

[6] See: “Concessions for Infrastructure: a Guide to their design and award”, Michael Kerf et al, World Bank Technical Paper No. 399, A joint production of the World Bank and Inter American Development Bank, 1998

[7] Explanation (a) to s. 4 of Competition Act, 2002 defines “dominant position” to mean a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to – (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.” A concession agreement vests a dominant position with the concessionaire in relation to the relevant market which the relevant infrastructure project (which is the subject matter of the concession agreement) pertains to. The role of the concession agreement is not only with respect to encouraging competition for the grant of the concession rights but also regulating, through suitable provisions, the exercise of that right in a manner so as to prevent abuse of dominance by the concessionaire.

[8] S. 3 of the Competition Act, 2002 provides the general legal framework relating to “anti competitive agreements” in India. The Competition Act, 2002, under s. 3(1), stipulates that 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. A concession agreement needs to be suitably structured and drafted to incorporate sufficient regulatory mechanisms to deter ant competitive practices by the concessionaire or the

billion or Rs 1,450,000 Crores (assuming an exchange rate of INR 45.30 to one USD)[9]. The Eleventh Five Year Plan stipulates that though public investment has to be a large part of the infrastructure investment, an increase of the required magnitude in investment cannot be achieved through public investment alone and therefore proposes a strategy for infrastructure development which involves a combined response – an increase in public sector investment in infrastructure as a percentage of GDP, and also an increase in private sector investment through some form of public private partnership (PPP) or directly, where feasible[10].

The Eleventh Five Year Plan states that where there is scope for private investment, the aim will be to attract private investment in a transparent manner in which the responsibilities of the private concessionaire are clearly defined and the choice of the concessionaire is determined by an open, competitive bidding process. However, it recognizes that attracting private investment on the scale envisaged will depend on the overall investment climate as also the credibility and legitimacy of the processes, which in turn, will be influenced by the transparency achieved in setting standards and allocating risks and the robustness of the competitive bidding process for awarding contracts.

The elements recognized by the Eleventh Five Year Plan as being critical for attracting private investment all relate to competition law principles which are examined in greater detail in this report.

The Report also examines the potential role of the Competition Commission of India in this regard.

1.2 Relevance of Competition Law To Infrastructure Projects

Infrastructure projects being developed on a public private partnership model need to balance various commercial and public interests. The growth of the use of public private partnership model is a recent phenomenon for the Indian legal framework. Prior to the Competition Act and the establishment of the Competition Commission of India, the scrutiny of the process of public private partnership was limited to judicial review by courts of law that apply existing principles of constitutional law, administrative law and contract law to any dispute relating to either the process of selection of a private party to implement a project on a public private partnership model or in relation to the scrutiny of the implementation of public private partnership arrangement.

The existing principles of constitution law, administrative law and contract law that presently regulate the review of the process as well as the very grant of concession agreements have limitations on the degree of fairness and scrutiny that they can subject the process of granting of concession agreements and the implementation of concession agreements to. This is not surprising as the adoption of the public private partnership model and the growth of the use of concession agreements as an instrument of growth of infrastructure in India are comparatively very recent developments and general law has not been able to be suitably modified to adapt to the levels of scrutiny and evolve new legal principles that are needed to enable a proper regulation of the same.

Existing legal principles of judicial review prevent scrutiny of executive decisions that fall under the category of “policy decisions”. However most of the critical decisions, under public private partnership models, that determine the actual contours of various commercial and technical aspects and characteristics of an infrastructure project being implemented through public private partnership model, under a concession agreement structure, are “policy decisions” that courts are limited by the principles of judicial review from scrutinizing.

It is the principles of competition law and the duty, functions and powers vested with the Competition Commission of India under the Competition Act, that would provide the statutory legal basis for review of the various stages of the life cycle of a concession agreement under Indian law.

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[9] See Table 1 of The Report of the Committee on Infrastructure Financing, May 2007 (also referred to as the “Deepak Parekh Committee Report on Infrastructure Financing”)

[10] See Chapter 1, Eleventh Five Year Plan (2007-2012), The Planning Commission of India

1.3 Terms of Reference

The focus of the Study will be on the following broad themes:

(a) *Analysis of Key Issues in relation to Granting of Concession Agreements*

(b) *Analysis of Concession Agreements to assess how they address Competition Concerns*

(c) *Experience of competition concerns that have arisen in other jurisdictions in relation to Concessions in the Infrastructure sector.*

(d) *Role of the Competition Commission of India*

1.4 Outline of Report

In order to address the Terms of Reference, the Report has been divided into eight (8) chapters.

Chapter 1 provides the Introduction to the report.

Chapter 2 examines the position of infrastructure facilities under competition law has been examined, particularly with reference to the "essential facilities" doctrine as it has emerged in other jurisdictions with developed competition law regimes, and its applicability under the Indian legal regime.

Chapter 3 deals with the issue relating to structuring of concession agreements in India and its impact on competition law principles, with specific reference to the potential role of the Competition Commission in this regard.

Chapter 4 examines the process of grant of concession agreement on competition issues, more particularly the position of grant through direct negotiations, the process of grant through competitive bidding and the 'Swiss challenge' process. The model RFP document that has been issued by the Government of India and the controversy relating to some of its provisions has also been discussed.

Chapter 5 examines the competition issues that arise in relation to the implementation of the concession agreement.

Chapter 6 deals with the competition issues relating to the renegotiation of concession agreements.

Chapter 7 deals with the potential overlap between the duties and functions of the Competition Commission of India and various sector specific regulators. This chapter discusses the legal principles that would have to be considered in resolving any such conflict with a specific discussion in relation to potential conflict with Electricity Regulatory Commissions and the Petroleum and Natural Gas Regulatory Board.

Chapter 8 provides conclusions and recommendations of the report.

Chapter 9 provides a few specific recommendations on the role of Competition Advocacy by the Competition Commission of India.

CHAPTER 2. INFRASTRUCTURE FACILITIES: "Essential Facilities"

2.1 Position of Infrastructure Facilities under General Competition Law

Under general principles of competition law applicable in certain other jurisdictions, (particularly USA, EU, Australia), "Infrastructure facilities" would generally, based on the relevant facts, be considered as "essential facilities" and be governed by what is known as "the essential facilities doctrine".

The origins, authority, boundaries, and desirability of the doctrine are all subjects of academic debate. However, in its broadest and simplified form, "the essential facilities doctrine" states that a person controlling an "essential" or "bottleneck" facility is mandated to provide access to that facility at a "reasonable" price[11].

The "essential facilities doctrine" was developed through judicial pronouncements in USA and then in EU, Canada and Australia[12] and forms part of the various principles developed under "abuse of market power" provisions of general competition law to deal with access issues.

There is a need to recognize and clearly incorporate under Indian law, the principles regarding access to certain key facilities in order to ensure and encourage competition in related markets[13]. For example, enabling access to infrastructure facilities such as electricity grids or gas pipelines is critical for encouraging or enabling competition in related markets such as electricity generation, electricity distribution or gas production/distribution.

A concessionaire of an infrastructure facility would have the incentive to refuse or provide only restrictive access to others in order to: (i) restrict competition in upstream and/or downstream markets where the concessionaire or its group company is also a supplier in those markets; and (ii) charge monopoly prices for access. The "essential facilities doctrine" supplements the competition principles relating to vertical separation or regulatory control of the relevant infrastructure facilities.

2.2 The Essential Facilities Doctrine

2.2.1 Position in United States of America

The essential facilities doctrine arose in the United States not so much as a separate and distinct doctrine, but as an outgrowth and specific application of the theory and policy underlying section 2

[11] See "OECD Roundtables on Competition Policy: The Essential Facilities Concept", OCDE/GD(96)113, Organisation for Economic Co-operation and Development Paris 1998.

[12] As per the OECD Commentary, the term "essential facilities doctrine" originated in commentary on United States antitrust case law and now has multiple meanings, each having to do with mandating access to something by those who do not otherwise get access. There have been various interpretations of the doctrine by various jurists under both US and EU; some see it as an appropriate instrument for liberalising markets, while others see it as an assault on the legitimate property rights of successful firms. However, it is only in Australia that this doctrine is statutorily recognized and has been incorporated under the provisions of the Trade Practices Act, 1974 following the enactment of the Competition Policy Reform Act, 1995. See OECD Roundtables on Competition Policy: The Essential Facilities Concept", OCDE/GD(96)113, Organisation for Economic Co-operation and Development Paris 1998.

[13] It should be noted that the concept of "related market" is different from the concept of "relevant market". "Related Market" refers to markets that are dependant or linked to a particular infrastructure facility in order to enable their growth or access. While, on the other hand, "relevant market" is defined under s. 2(r) of the Competition Act to mean "the market which may be determined by the Commission with reference to the relevant product market or the relevant geographical market or with reference to both the markets."

and to a limited extent section 1 of the Sherman Act. Section 2 of the Sherman Act[14] prohibits monopolization and attempted monopolization – the acquisition, attempted acquisition, or maintenance of monopoly power through anticompetitive means. An agreement between persons that has the effect of denying others access to an essential facility can be a basis for liability under section1 of the Sherman Act[15].

Section 2 of the Sherman Act, 15 U.S.C. 2, makes it unlawful for any firm to "monopolize, attempt to monopolize, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations." Although Section 2 does not specify the elements of monopolization and attempted monopolization, the U.S. Supreme Court concluded that Section 2 does not prohibit monopoly status as such. Instead, Section 2 makes it unlawful to acquire or maintain monopoly power through the use of predatory or exclusionary conduct[16]. The U.S. antitrust laws most often impose negative duties, requiring firms to *refrain* from anticompetitive conduct. Nonetheless, the U.S. Supreme Court and other lower U.S. federal courts have recognized some circumstances in which the Sherman Act imposes an *affirmative* duty to assist rivals[17].

The United States Supreme Court has never actually recognized a distinct "essential facilities" doctrine. However, lower federal courts in the United States have found that Supreme Court's opinions consistent with the view that the denial of an essential facility can, under certain circumstances, constitute an antitrust violation[18].

Under U.S. law "essential facilities" cases involve refusals to deal of a special type. In such cases, the defendant refuses to provide other firms with access to something that is vitally important to competitive viability in a particular market. A number of U.S. Supreme Court cases are commonly viewed as implicitly supporting liability based on the denial of access to an essential facility.

The first case in this regard was *United States v. Terminal R.R. Ass'n. of St. Louis*[19] , in which the U.S. Supreme Court approved an order requiring a group of railroads, which jointly controlled access and terminal facilities permitting traffic across the Mississippi river, to allow other railroads to join the combination or to use the facilities in a non-discriminatory manner[20]. The United States Supreme

[14] S. 2 of the Sherman Act, 1890 states: "**Section 2. Monopolizing trade a felony; penalty:** Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

[15] S. 1 of the Sherman Act, 1890 states: "**Section 1. Trusts, etc., in restraint of trade illegal; penalty:** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[16] See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985)

[17] See The Brief For The United States and the Federal Trade Commission as Amici Curiae submitted before the Supreme Court of United States in Case of Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP. Document No 02-682

[18] See "OECD Roundtables on Competition Policy: The Essential Facilities Concept", OCDE/GD(96)113, Organisation for Economic Co-operation and Development Paris 1998, pg. 87.

[19] 224 U.S. 383 (1912)

[20] The facts of the case that played a critical role in leading the Court to its decision were as follows: St. Louis, as a city, is divided by the Mississippi River at the two sides of which the city developed. For the initial 100 years of its existence the river commerce and ferry commute were dominant. With the advent of the railways, twenty four lines of railway converged at St. Louis, not one of them passing through. About half of these lines had their termini at one side of the river. The others had their terimini either in the city or on its northern edge. The river became the great obstacle to connection between the termini of the lines on opposite sides of the river and any entry into the city by lines coming in from the eastern side. The cost of construction and maintenance of railroad bridges over the large Mississippi river made it impracticable for every railway line desiring to enter or pass through the city to have its own bridge. The obvious solution of maintaining toll bridges open to the use of any and all lines upon identical terms was implemented. But, to use it, there had to be access over rails connecting the bridge and the railway. On the St. Louis side, the bridge terminated at the foot of the hills upon which the city is built; on the other side, it

Court after a detailed analysis of the relevant facts and the terms governing the Association came to the conclusion that the Association was anti-competitive in its nature and issued directions that required that a plan to restructure the Association be submitted within ninety days failing which the Court would order the dissolution of the Association and the breaking up of common control of the railway infrastructure. The Court instructed that the Association be restructured to cover the following:

First: provide for the admission of any and all existing or future railroad to joint ownership and control of the combined terminal/railway properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second: provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third: eliminating from the present agreement between the terminal company and the proprietary companies any provision which restricts any such company to the use of the facilities of the terminal company.

Fourth: providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

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ended in the low and wide valley of the Mississippi. This condition resulted in the organization of independent companies which undertook to connect the bridge on each side with the various railroad termini. On the Missouri side, it was necessary to tunnel the hills, that the valley of Mill Creek might be reached, where the railway lines from the west had their termini. Thus, though the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini. As traffic grew a second toll bridge for goods trains was opened. To prevent control of the second bridge by the same company that had control over the first bridge it was stipulated that there could be no common shareholders (to any extent) between the two bridge companies. However, even the second bridge had to rely on the several terminal companies operating lines connecting it with the other railway lines. It became evident that these companies that controlled the lines connecting railroad termini with the railroad bridges dominated the access to and from St. Louis. The Terminal Association of St. Louis was organized in 1889 by six of these intermediate terminal companies for the purposes of acquiring all existing terminal entities and eventually fourteen companies joined the Association. The terms of the Association "each of the proprietary companies . . . forever, a right of joint use with each other and such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties . . . now held or that may be hereafter acquired in St. Louis and East St. Louis, . . . it being understood that the right herein granted to each proprietary company is not transferable to any extent whatever, but is to remain as an appurtenant to the railroad now owned by each proprietary company."

That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to which stipulated that other railroad companies not named therein as proprietary companies might only be admitted "to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement," etc. Inasmuch as the directors of the terminal company consisted of one representative of each of the proprietary companies, selected by itself, it was plain that each of said companies had and still has a veto upon any joint use or control of terminals by any nonproprietary company.

Though the Association argued that other companies are permitted to use the facilities controlled by it upon paying the same charges paid by the proprietary companies seems to be conceded. There was no provision by which any such privilege is accorded.

The U.S. Supreme Court came to the conclusion that the railway infrastructure controlled by the Association is not under a common control and ownership of all the entities that may need to use it. Nor could this be said to be brought about unless the prohibition against the admission of other companies to such control is stricken out, and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies.

Fifth: providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth: providing that any disagreement between any company applying to become a joint owner or user, as herein provided for, and the terminal or proprietary companies, which shall arise after a final decree in this cause, may be submitted to the district court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh: avoid any possible misapprehension, the reorganization plan should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.

In *Associated Press v. United States*[21] the By-laws of the Associated Press, a cooperative association engaged in gathering and distributing news in interstate and foreign commerce, prohibited service of Associated Press news to nonmembers, prohibited members from furnishing spontaneous news to nonmembers, and empowered members to block membership applications of competitors and also imposed fines and penalties on members who breached its by-laws[22]. A contract between

[21] 326 U.S. 1 (1945)

[22] The main provisions of the bye-laws of Associated Press were stated in the judgment as follows:

"All members must consent to be bound by them. They impose upon members certain duties and restrictions in the conduct of their separate businesses. For a violation of the bylaws, severe disciplinary action may be taken by the Association. The Board of Directors may impose a fine of.$1,000.00 or suspend a member, and such "action . . . shall be final and conclusive. No member shall have any right to question the same. The offending member may also be expelled by the members of the corporation for any reason "which, in its absolute discretion, it shall deem of such a character as to be prejudicial to the welfare of the corporation and its members, or to justify such expulsion. The action of the regular members of the corporation in such regard shall be final, and there shall be no right of appeal against or review of such action." These bylaws, for a violation of which members may be thus fined, suspended, or expelled, require that each newspaper member publish the AP news regularly in whole or in part, and that each shall "promptly furnish to the corporation, through its agents or employees, all the news of such member's district, the area of which shall be determined by the Board of Directors. " All members are prohibited from selling or furnishing their spontaneous news to any agency or publisher except to AP. Other bylaws require each newspaper member to conduct his or its business in such manner that the news furnished by the corporations shall not be made available to any nonmember in advance of publication. The joint effect of these bylaws is to block all newspaper nonmembers from any opportunity to buy news from AP or any of its publisher members. Admission to membership in AP thereby becomes a prerequisite to obtaining AP news or buying news from any one of its more than twelve hundred publishers. The erection of obstacles to the acquisition of membership consequently can make it difficult, if not impossible, for nonmembers to get any of the news furnished by AP or any of the individual members of this combination of American newspaper publishers. The bylaws provide a very simple and nonburdensome road for admission of a noncompeting applicant. The Board of Directors in such case can elect the applicant without payment of money or the imposition of any other onerous terms. In striking contrast are the bylaws which govern admission of new members who do compete. Historically, as well as presently, applicants who would offer competition to old members have a hard road to travel. This appears from the following facts found by the District Court: "AP originally functioned as an Illinois corporation, and at that time an existing member of the Association had an absolute veto power over the applications of a publisher who was or would be in competition with the old member. The Supreme Court of Illinois held that AP, thus operated, was in restraint of trade. *Inter-Ocean Publishing Co. v. Associated Press,* 184 Ill. 438, 56 N.E. 822. As a result of this decision, the present Association was organized in New York. Under the new bylaws, the unqualified veto power of the Illinois AP members was changed into a "right of protest" which, when exercised, prevented the AP directors from electing the applicants as in other cases. The old member's protest against his competitor's application could then be overruled only by the affirmative vote of four-fifths of all the members of AP. In 1931, the bylaws were amended so as to extend the right of protest to all who had been members for more than 5 years and upon whom no right of protest had been conferred by the 1900 bylaws. In 1942, after complaints to the Department of Justice had brought about an investigation, the bylaws were again amended. These bylaws, presently involved, leave the Board of Directors free to elect new members unless the applicants would compete with old members, and, in that event, the Board cannot act at all in the absence of consent by the applicant's member competitor. Should the old member object to admission of his competitor, the application must be referred to a regular or special meeting of the Association. As a prerequisite to election, he must (a) pay to the Association 10% of the total amount of the regular assessments received by it from old members in the same competitive field during the entire period from October 1, 1900, to the first day of the month preceding the date of the election of the applicant, (b) relinquish any exclusive rights the applicant may have to any news or news picture services, and, when requested to do so by his member competitor in that field, must "require the said news or news picture services, or any of them, to be furnished to

Associated Press and a Canadian press association obligated both to furnish news exclusively to each other. Charging, *inter alia,* that the bylaws and the contract violated the Sherman Antitrust Act, the Government sought an injunction against Associated Press and member publishers. The Court held that: (i) that the bylaws of the defendant association, on their face, and without regard to their past effect, constitute restraints of trade and (ii) the defendant association could not discriminate against competitors in its admissions policy.

Both the Transit Association case and the Associated Press case were cases relating to restraint of trade covered under s. 1 of the Sherman Act.

In *Otter Tail Power Co. v. United States*[23] the principle relating to refusal to allow access to a competitor was applied under s. 2 of the Sherman Act. Otter Tail Power Company distributed electric power in 465 towns in Minnesota, North Dakota and South Dakota. In towns where Otter Tail distributes at retail, it operates under municipally granted franchises which are limited from 10 to 20 years. When the some of the franchises expired, the relevant towns wanted to replace Otter Tail with their own municipal electricity distribution system. Otter Tail attempted to prevent towns from replacing it with a municipal distribution system and for that purpose adopted the following means: (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say, to transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems. The Court held the actions of Otter Tail to be in violation of Section 2, and held that Otter Trail had used its monopoly power "to foreclose competition or gain competitive advantage, or to destroy a competitor[24]". The Court held that Otter Tail has "a strategic dominance in the transmission of power in most of its service area," and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply. Use of monopoly power "to destroy threatened competition" is a violation of the "attempt to monopolize" clause of § 2 of the Sherman Act[25]. The Court also held that agreements not to compete, with the aim of preserving or extending a monopoly is also a violation of

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such member or members, upon the same terms as they are made available to the applicant," and (c) receive a majority vote of the regular members who vote in person or by proxy. These obstacles to membership, and to the purchase of AP news, only existed where there was a competing old member in the same field.

[23] 410 U.S. 366 (1973)

[24] It should be noted that one of the anti competitive behavior that had been adopted by Otter Tail was that of filing of litigations against the municipalities that intended to develop their own municipal distribution systems. The Court held the use of judicial process for repetitive or "frivolous" litigation to be also a type of anti-competitive practice. The Court stated:

"It was found that Otter Tail instituted or sponsored litigation involving four towns in its service area which had the effect of halting or delaying efforts to establish municipal systems. Municipal power systems are financed by the sale of electric revenue bonds. Before such bonds can be sold, the town's attorney must submit an opinion which includes a statement that there is no pending or threatened litigation which might impair the value or legality of the bonds. The record amply bears out the District Court's holding that Otter Tail's use of litigation halted or appreciably slowed the efforts for municipal ownership….. The District Court, in discussing *Eastern Railroad Conference v. Noerr Motor Freight,* 365 U. S. 127, explained that it was applicable "only to efforts aimed at influencing the legislative and executive branches of the government." That was written before we decided *California Motor Transport Co. v. Trucking Unlimited,* 404 U. S. 508, 404 U. S. 513, where we held that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the "mere sham" exception announced in *Noerr.* 365 U.S. at 365 U. S. 144…"

[25] The Court cited *Lorain Journal v. United States,* 342 U. S. 143, 342 U. S. 154; *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359, 273 U. S. 375 to support this proposition.

the "attempt to monopolize" clause of § 2 of the Sherman Act even though the even though the transgressor may not have achieved a complete monopoly [26].

The Court, while determining the "relevant market" for the purposes of determining the dominant position held that:

> "Each town in Otter Tail's service area generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail. The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail. That competition is generally for the right to serve the entire retail market within the composite limits of a town, and that competition is generally between Otter Tail and a prospective or existing municipal system. These towns number 510 and of those Otter Tail serves 91%, or 465."

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*[27].Aspen Skiing Co. (Aspen) owned three mountains and Aspen Highlands Skiing Corp. (Highlands) owned one mountain in the Aspen area. The two companies had for several years offered skiers a four mountain ski ticket, allowing skiers access to all four mountains. In 1978, Aspen cancelled the collaboration with Highlands, with the result that Highlands attracted fewer skiers. Both the Court of Appeals and The Supreme Court held Aspen's cancellation to infringe Section 2 of the Sherman Act. The Court of Appeals relied on both the "essential facilities doctrine" as well as finding the action was an "ordinary refusal to deal of a type condemned by section 2 of the Sherman Act. The Supreme Court affirmed the liability solely on the basis whether "the challenged conduct is fairly characterized as 'exclusionary or anticompetitive'. The Supreme Court held that "The Ski Co.'s decision to refuse cooperation had required the sacrifice of immediate profits—the Ski Co. refused to sell its lift tickets to its rival at full price, "forgoing daily ticket sales" and the goodwill of its own customers, who were inconvenienced by that choice. The Ski Co. had "elected to forgo these short term benefits," the evidence showed, "because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor."

The lower courts in United States rely on the four pronged tests enunciated in *MCI Communications Corp. v. AT&T*[28] in which it was held that a monopolist may be required to assist rivals by sharing a facility if the monopolist can "extend monopoly power from one stage of production to another" and the following four elements are found: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Some decisions also have held that, in addition to the four elements from *MCI case*[29], a plaintiff must prove that the monopolist uses the facility to control a vertically-related market, and that the plaintiff is a potential competitor in either the upstream or the downstream market. For example, in *Alaska Airlines, Inc. v. United Airlines*[30]*, Inc.*, the Ninth Circuit, affirming a judgment for the defendants, stated that a facility is essential only if, among other things, control of the facility by an upstream monopolist entails the power permanently to eliminate competition in a downstream market. Similarly, the Federal Circuit court in *Intergraphic Corp. v. Intel Corp*[31]., while vacating a preliminary injunction in favor of the antitrust plaintiff, held that a plaintiff asserting an essential facilities claim must prove that it is in competition with the defendant, either in "the field of the facility itself or in a vertically related market that is controlled by the facility."

[26] The Court cited *Schine Chain Theatres v. United States,* 334 U. S. 110, 334 U. S. 119. *Associated Press v. United States,* 326 U. S. 1, to support this proposition

[27] 472 U.S. 585 (1985)

[28] 708 F. 2nd 1081 (7th Cir.)

[29] Ibid

[30] *Alaska Airlines*, 948 F.2d at 544;

[31] 195 F.3d 1346, 1357 (Fed. Cir. 1999).

In 2004 the United States Supreme Court in the case of *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* [32], though not dismissing the essential facilities doctrine, did cast a skeptical eye on efforts to impose s. 2 liability for unilateral refusals to deal and in the facts of the particular case held there to be no liability under s.2 of the Sherman Act[33]. In this case it was alleged that Verizon had refused to interconnect with one of its competitors.

The Supreme Court, in an opinion by Justice Scalia, dismissed the allegation and perceived several problems with imposing an antitrust-based duty to share. The judgment effectively stated: (i) it is settled law that s. 2 of the Sherman Act requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident and to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct[34]; (ii) compelling firms to share infrastructure that they have developed or established in order to place themselves in a unique position to serve their customers, may lessen the incentive to invest in such economically beneficial facilities and furthermore compelling firms to negotiate may itself facilitate collusion[35]; (iii) refusal to deal would result in a violation of s.2 of the Sherman Act only in very limited cases. The *Aspen Skiing case* is "at or near the outer boundary of s. 2 liability" and needs a clear indication of anticompetitive

[32] 540 U.S. 398 (2004)

[33] The facts of the Verizon case were as follows:

The Telecommunications Act of 1996 imposes upon an incumbent local exchange carrier (LEC) the obligation to share its telephone network with competitors, 47 U. S. C. §251(c), including the duty to provide access to individual network elements on an "unbundled" basis, see §251(c)(3). New entrants, so-called competitive LECs, combine and resell these unbundled network elements (UNEs). Petitioner Verizon Communications Inc., the incumbent LEC in New York State, has signed interconnection agreements with rivals such as AT&T, as §252 obliges it to do, detailing the terms on which it will make its network elements available. Part of Verizon's §251(c)(3) UNE obligation is the provision of access to operations support systems (OSS), without which a rival cannot fill its customers' orders. Verizon's interconnection agreement, approved by the New York Public Service Commission (PSC), and its authorization to provide long-distance service, approved by the Federal Communications Commission (FCC), each specified the mechanics by which its OSS obligation would be met. When competitive LECs complained that Verizon was violating that obligation, the PSC and FCC opened parallel investigations, which led to the imposition of financial penalties, remediation measures, and additional reporting requirements on Verizon. Respondent, a local telephone service customer of AT&T, then filed this class action alleging, *inter alia*, that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs in violation of §2 of the Sherman Act, 15 U. S. C. §2. The District Court dismissed the complaint, concluding that respondent's allegations of deficient assistance to rivals failed to satisfy §2's requirements. The Second Circuit reinstated the antitrust claim.

[34] Justice Scalia stated: "..“The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so under §2 of the Sherman Act, 15 U. S. C. §2, which declares that a firm shall not "monopolize" or "attempt to monopolize.".. It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.,* 384 U. S. 563, 570-571 (1966). The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."

[35] Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.,* 250 U. S. 300, 307 (1919).

However, "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U. S. 585, 601 (1985). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."

intention on part of the party in order to be attracted and prior and present conduct of the parties is important in such scenario[36], and (iv) the Court noted that the indispensible requirement for invoking the essential facilities doctrine is the unavailability of access to the “essential facilities”, where access exists, the doctrine serves no purpose and consequently, essential facility claims should be denied where a state of federal agency has effective powers to compel sharing and to regulate its scope and terms[37].

2.2.1.1 Main Difference Between US and Indian Scenario

The limited and strict application of the “essential facilities” doctrine that has been adopted by the Supreme Court of United States would not be applicable in the Indian scenario. This is because in the United States the ownership and control of such infrastructure facilities that are developed by private developers usually vests with the developer investing in and undertaking the development of such

[36] The leading case for s.2 liability based on refusal to cooperate with a rival, and the case upon which respondent understandably places greatest reliance, is *Aspen Skiing, supra…………. Aspen Skiing* is at or near the outer boundary of s. 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. See id., at 608, 610-611. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Ibid. Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent.

The refusal to deal alleged in the present case does not fit within the limited exception recognized in Aspen Skiing. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal--upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In Aspen Skiing, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under §251(c)(3) tells us nothing about dreams of monopoly.

The specific nature of what the 1996 Act compels makes this case different from Aspen Skiing in a more fundamental way. In Aspen Skiing, what the defendant refused to provide to its competitor was a product that it already sold at retail--to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in Otter Tail Power Co. v. United States, 410 U. S. 366 (1973), another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. Id., at 370-371, 377-378. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created "something brand new"--"the wholesale market for leasing network elements." Verizon Communications Inc. v. FCC, 535 U. S., at 528. The unbundled elements offered pursuant to §251(c)(3) exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible--indeed, it is the failure of one of those systems that prompted the present complaint.[3]

We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. See generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841 (1989). We have never recognized such a doctrine, see Aspen Skiing Co., 472 U. S., at 611, n. 44; AT&T Corp. v. Iowa Utilities Bd., 525 U. S., at 428 (opinion of Breyer, J.), and we find no need either to recognize it or to repudiate it here

[37] The Court stated: “We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. See generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841 (1989). We have never recognized such a doctrine, see Aspen Skiing Co., 472 U. S., at 611, n. 44; AT&T Corp. v. Iowa Utilities Bd., 525 U. S., at 428 (opinion of Breyer, J.), and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. *Thus, it is said that "essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.*" P. Areeda & H. Hovenkamp, Antitrust Law, p. 150, ¶ ;773e (2003 Supp.). Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general §2 argument, we reject it.”

facilities and under general U.S. law the right to property is paramount and jealously guarded. Consequently, any principle that would restrict the right of the owner to exercise ownership rights and in fact compel the owner to assist its competitor will be looked at very skeptically and be limited to only very specific circumstances.

Under the Indian scenario, the right to ownership of the infrastructure facilities that is developed by a private entity is usually limited to that of exclusive operation and thereafter transfer of the facility to the Government. Usually the structure adopted under most of the Indian concession arrangements is that of Build Operate Transfer (BOT), and the facility would be developed on land that is generally provided on a lease or license by a government authority for the specific purpose of development of the infrastructure facility in accordance with the terms of the relevant concession agreement and is co-terminus with the concession agreement. The private developer, therefore, never obtains the complete right, title, interest and unfettered property rights to the infrastructure facility that it develops. Furthermore, the right to property under Indian Constitutional law is that of a legal right only, which can be extinguished by authority of law[38]. Therefore, even if the infrastructure facility was developed as a completely private facility and not pursuant to a license or concession granted by a state authority, the ownership rights in respect to such facilities can, under the Indian legal regime, be curtailed by authority of law.

Consequently, the U.S. precedents that limit the applicability of the "essential facilities" doctrine to very limited circumstances would not be that relevant under Indian law.

It should be kept in mind that the Indian Supreme Court has clearly held in a number of cases that where a foreign precedents or legal principles from similar legal jurisdictions are sought to be applied, prime importance should always be given to the Indian conditions where it is to be applied and also to the circumstances and setting in which the related Indian law is enacted[39].

2.2.2 "Essential Facilities" Doctrine under EU Law

Under EU Law, the principles concerning duties to supply and to grant access to essential facilities have evolved mainly from Article 82[40] (formerly Article 86) of the EC Treaty cases involving an abuse of dominant position, to ensure that competition in the common market is not distorted.

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[38] Article 300A, Constitution of India states "No person shall be deprived of his property save by authority of law." The Supreme Court of India in the case of *Raghunathrao Ganpatrao v. Union of India* 1993(1)SCALE63 has held : "… By the….. Forty-fourth Amendment, the status of 'right to property' from that of a fundamental right is reduced to a legal right under Article 300A which reads "No person shall be deprived of his property save by authority of law". However, in order to allay the fears of the minorities in respect of that right guaranteed in the then Article 31, Article 30(1A) has been inserted by the Forty-fourth Amendment…. The right to property even as a fundamental right was not a part of the basic structure and even assuming that the right to privy purse is a property, it is a right capable of being extinguished by authority of law vide Article 300A."

[39] This principle has been derived from various Supreme Court judgments on use of foreign precedents such as *Kilpest Pvt. Ltd. v. Shekhar Mehra* , (1996)10SCC696, where the court stated "..it was apposite, having regard to the background, conditions and circumstances of present Indian society and the needs and requirements of the country that a somewhat different treatment be adopted. The courts would have to adjust and adapt, limit or extent principles derived from ..(English)…decisions, entitled, as they were to great respect, suiting the conditions of Indian society and the country in general…"; *American Home Products Corporation v. Mac Laboratories Pvt. Ltd. (1986)1SCC465; Forasol v. ONGC (1984)Supp. SCC 263*

[40] Article 82 of the EC Treaty states as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

The leading case on the operation of the essential facilities doctrine in the EU is now the ECJ judgment in *Oscar Bronner Gmbh v. Mediaprint Zeitungs Gmbh*[41], in which the European Court of Justice held that in the application of the essential facilities doctrine it is critical to show that access is being refused to a facility "that is indispensable to the carrying on of the business of the person requesting the service, inasmuch as there is no actual or potential substitute in existence for that..(facility)..". The ECJ effectively held that if there are alternatives to that facility, then it is not sufficient to only argue that the alternative method may be less advantageous and that there have to be technical, legal or even economic obstacles capable of making it impossible or even unreasonably difficult for the alternate method to be implemented. The ECJ also held that in order to demonstrate that the creation of the alternate to the facility under question is not a realistic potential alternative and that access to the facility is therefore indispensable, it is not enough to argue that it is not economically viable to develop the alternative[42].

The ECJ, in the Oscar case relied on the opinion given by Advocate General Jacobs delivered on 28th May 1998. The said opinion of the Advocate General succulently stated the position of the doctrine of essential facilities under EU Law as follows[43]:

> The Commission first referred to the essential facilities doctrine expressly in two interim measures decisions concerning the port of Holyhead, *B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*[44] and *Sea Containers v Stena Sealink*[45] In the second of those cases the

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

[41] Case C-7/97 [1999] 4 CMLR 112. The facts of the case were as follows: Oscar Bronner was the publisher of a daily newspaper whose share of the Austrian daily newspaper market was 3.6 per cent of circulation and around 6 per cent of advertising revenues. Mediaprint was the publisher of two daily newspapers and carried on the marketing and advertising business of those newspapers through wholly-owned subsidiaries. The combined market share of the two newspapers was 46.8 per cent of total circulation and 42 per cent of total advertising revenues. Oscar Bronner argued that under the doctrine of 'essential facilities' as established by the ECJ, Mediaprint was obliged to allow access to the home-delivery service by competing products and at market prices. The Court decided on 26 November 1998 that: "The refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute the abuse of a dominant position within the meaning of Article 86 of the EC Treaty. The Court suggested that refusal would constitute an abuse only if the home-delivery service was indispensable to the carrying on of the business of the person requesting the service. The Court explained as follows: "It would still be necessary not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme. That is certainly not the case. In the first place, it is undisputed that other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks, *even though they may be less advantageous* for the distribution of certain newspapers, exist and are used by the publishers of those daily newspapers. Moreover, *it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult,* for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers. *It should be emphasized in that respect that, in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed*."

[42] The decision is available at the website : http://curia.europa.eu/en/actu/activites/act98/9829en.htm

[43] Copy of the AG's Opinion is available at website: http://www.jus.uio.no/iri/om_iri/seminarer/dgt/advocate_general.doc

[44] Commission Decision of 11 June 1992, 2/5 CMLR 255

[45] Commission Decision 94/19/EC of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (Sea Containers v Stena Sealink - interim measures), OJ 1994 L 15, p. 8

Commission concluded that, by refusing access to the port of Holyhead on reasonable and non-discriminatory terms to a potential competitor in the market for ferry services Sealink, as port operator, had abused its dominant position on the market in port services. In the decision the Commission, repeating and expanding what it had said in the first decision, stated:

> 'An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i.e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favour of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitors, infringes Article 86.'[46]

The Commission based the above statement of the law on the Court's rulings in *Commercial Solvents Corp v. Commission*[47], *Telemarketing case*[48] and the judgment of the Court of First Instance in *Magill case*[49]. It then added: 'This principle applies when the competitor seeking access to the essential facilities is a new entrant into the relevant market.'

It is therefore clear that the Commission considers that refusal of access to an essential facility to a competitor can of itself be an abuse even in the absence of other factors, such as tying of sales, discrimination vis-a-vis another independent competitor, discontinuation of supplies to existing customers or deliberate action to damage a competitor (although it may be noted that in many of the cases with which it has dealt such additional factors are to a greater or lesser extent present). An essential facility can be a product such as a raw material or a service, including provision of access to a place such as a harbour or airport or to a distribution system such as a telecommunications network. In many cases the relationship is vertical in the sense that the dominant undertaking reserves the product or service to, or discriminates in favour of, its own downstream operation at the expense of competitors on the downstream market. It may however also be horizontal in the sense of tying sales of related but distinct products or services

In deciding whether a facility is essential the Commission seeks to estimate the extent of the handicap and whether it is permanent or merely temporary. The test to be applied has been described by one commentator as 'whether the handicap resulting from the denial of access is one that can reasonably be expected to make competitors' activities in the market in question either impossible or permanently, seriously and unavoidably uneconomic'. The test applied is an objective one, concerning competitors in general. Thus a particular competitor cannot plead that it is particularly vulnerable.

The Advocate General concluded as follows:

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[46] See Para 66 of the decision

[47] Joined Cases 6/73 and 7/73 [1974] CMLR 309

[48] *Centre Belge d'Etudes de Marche-Telemarketing SA v. Compagnie Luxembourgeiose de Teledisffusion SA* case 311/84 [1986] 2 CMLR 558

[49] *Magill TV Guide/ITP, BBC and RTE* 89205 [1989]OJ L78/43*; RTE v. Commission* case T-69/89 [1991] 4 CMLR 586*, case T-76/89 ITP Ltd v. Commission* [1991]4CMLR 745*; Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission* C241-242/91P[1995]4CMLR718

> "First, it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification
>
> Secondly, the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term.
>
> Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it
>
> Thirdly, in assessing this issue it is important not to lose sight of the fact that the primary purpose of Article 86 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter's market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power."

2.2.3 "Essential Facilities" under Australian Law

Unlike U.S. and EU the Australia has incorporated the "essential facilities doctrine" in one of its statutes namely the Trade Practices Act, 1974.

Initially, Section 46 of the *Trade Practices Act, 1974* had prohibited the taking advantage of a substantial degree of power in a market for the purpose of (a) eliminating or substantially damaging a competitor; (b) preventing the entry of a person into a market; or (c) deterring or preventing a person from engaging in competitive conduct in a market. Contravention of this provision can effectively result in the imposition of a duty to deal.[50]

The Hilmer Report[51] accepted the potential application of s 46 to essential facility situations. Commenting on the elements of the said section, the Report noted:

a. if a facility is truly essential, its owner will always have a substantial degree of market power within the meaning of s 46;

b. a refusal to grant access to an essential facility will usually constitute a 'taking advantage' of market power, given that, in the absence of such market power, access to the facility would probably be available; and

[50] This was the situation in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, where BHP's refusal to supply the product 'Y-bar' to QWI was held to infringe s 46. The parties then settled their dispute out of court in confidential negotiations.

[51] Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*', in honour of the Committee's chair, Professor Fred Hilmer).

c. the refusal to deal could conceivably occur for any of the proscribed purposes in s 46(a), (b) or (c).

Nevertheless, continued reliance upon s 46 in essential facilities cases was deemed problematic. The difficulties associated with proving a proscribed purpose under s 46 were considered the major impediment to the effective use of the section for resolving disputes over access to essential facilities. In addition, doubts were expressed about the appropriateness of the courts as a forum for determining terms and conditions of access.

To overcome the perceived limitations of s 46, in August 1993, the Hilmer Report recommended, as a key component of effective National Competition Policy, the establishment of a legislative regime to facilitate third party access to 'essential facilities'.

According to the Hilmer Report, 'essential facilities' are facilities which exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. Classic examples include electricity transmission grids, telecommunications networks, gas and water pipelines, railroad terminals and tracks, airports, ports and wharves. Access to such facilities is *essential* for effective competition in upstream or downstream markets, but can never be assured when the owner of the facility has monopoly power over whether, and at what price, access will be granted. Indeed, the tendency of facility owners to deny or inhibit access by would-be competitors represents the core of the 'access problem'[52].

The Hilmer Report identified a list of recommendations for ensuring access to essential facilities.

In 1995, the Commonwealth Parliament formalised its response to those recommendations by inserting a new Part IIIA, entitled 'Access to Services', into the *Trade Practices Act* 1974.

Part IIIA of the Trade Practices Act, 1974 attempts to balance the interests of service providers against the interests of service users and reduces an access provider's ability to refuse or restrict access. The access provisions apply to firms with natural monopoly characteristics that are sometimes vertically integrated and part of network industries. They extend to both privately and publicly owned firms. The regime is intended to be light-handed, and provides for commercial negotiation of access terms and conditions in the first instance. Where access disputes cannot be resolved by the parties themselves, the regime provides for arbitration by the Australian Competition and Consumer Commission (hereinafter "ACCC"). The regime includes provision for the enforcement of access determinations and prohibitions on hindering access to a service. Enforcement action is taken in the Federal Court.

The access provisions relate to a range of facilities of national importance. As a single facility may provide a number of services, only some of which may be relevant to the competition objectives, the legislation focuses on services rather than facilities.

Part IIIA provides for two mechanisms for the provision of third party access: (a) First, a compulsory process, whereby the service is "declared" by the designated Minister based on the recommendation of the National Competition Council ("the Council"). Declaration represents 'a right to negotiate' access backed by compulsory arbitration if the parties cannot agree to any aspect of access; and (b) second, a voluntary process whereby a service provider can offer the ACCC, an undertaking which sets out the terms and conditions on which it will offer third party access.

Any person can apply to the National Competition Council for a recommendation to the Minister that a service should be declared. Before it makes its recommendation to the designated Minister, the NCC must be satisfied that a service satisfies the following criteria:

a. That access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

b. That it would be uneconomical for anyone to develop another facility to provide the service;

[52] W Tye, 'Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine' (1987) 8 *Energy Law Journal* 337, 344.

c. That the facility is of national significance, having regard to the size of the facility or its importance to constitutional trade or commerce or to the national economy;

d. That access to the service can be provided without undue risk to human health or safety;

e. That access to the service is not already the subject of an effective access regime; and

f. That access (or increased access) to the service would not be contrary to the public interest.

It should be noted that declaration of a service/facility does not mean that there is an automatic right of access to the third parties. It represents a rights for third parties to negotiate terms of access backed by a compulsory ACCC arbitration if the parties cannot agree on any aspect of access. The parties may also refer matters that they cannot agree upon to private arbitration and if they cannot agree to refer the matters to private arbitration, an access dispute may be notified to ACCC.

Part IIIA also sets out broad criteria which the ACCC, in the event of an arbitration relating to a declared service, is required to take into account in determining terms and conditions of access (including pricing). These include:

i. The legitimate business interests of the provider, and the provider's investment in the facility;

ii. The public interest, including the public interest in having competition in markets (whether or not in Australia);

iii. The interests of all persons who have rights to use the service,

iv. The direct costs of providing access to the service;

v. The value to the provider of extensions whose cost is borne by someone else;

vi. The operational and technical requirements necessary for the safe and reliable operation of the facility; and

vii. The economically efficient operation of the facility.

The Commission may also take into account any other matters that it regards as relevant. There is a right to appeal against the ACCC decision to a tribunal within 21 days of the determination.

Since the enactment of Part IIIA, a number of sector-specific arrangements for access have also been developed. These regimes reflect the broad access regulation framework embodied in Part IIIA, but have been further refined to reflect the different technologies, market arrangements, ownership structures and historical regulatory experience of each sector.

2.3 Position of "essential facilities doctrine" under Competition Act, 2002

2.3.1 The Relevant Provisions of the Act

Under The Competition Act, 2002 the "essential facilities doctrine" can be covered under:

(i) s. 4(2)(c) of the Act which states that there shall be an abuse of dominant position if an enterprise or a group indulges in practice or practices resulting in denial of market access in any manner; and

(ii) s.3(4)(d) which prevents "refusal to deal" agreement and deems them to be anti competitive agreements holding them to agreements that cause an appreciable adverse effect on competition in India. Explanation (d) to s. 3(4) defines "refusal to deal" in an inclusive manner to include any agreement which restricts or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are to be bought. It should be noted that since the definition of “refusal to deal” is an inclusive one it is not limited to only sale and purchase of goods but would also cover access to services.

It should be noted that the elements that would need to be considered by the Competition Commission of India while acting on the “essential facilities doctrine” would be different under s. 4 and s. 3 of the Act.

s. 4 of the Act relates to abuse of dominant position and, pursuant to s. 19(4) of the Act, the Commission while inquiring whether an enterprise enjoys a dominant position or not under s. 4 shall have due regard to, inter alia, the following factors: (i) 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, (ii) vertical integration of the enterprises or sale or service network of such enterprises, (iii) economic power of the enterprise including commercial advantages over competitors, (iv) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economics of scale, high cost of substitutable goods or service for consumers, (v) social obligations and social costs and (vi) 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.

It should be noted that s. 19(4) of the Act is limited to only the determination of whether an enterprise enjoys a dominant position or not and does not relate to nor indicate whether the said factors would have a positive or negative implication on determination of whether there has been an abuse of dominant position by the relevant entity. Also s. 19(4) of the Act does not indicate whether the said factors would have a positive or negative impact on determination of dominant position and it vests the Competition Commission of India with the flexibility to determine their impact based on the facts and circumstances of the relevant case.

Consequently, the elements stated in s. 19(4) of the Act would not have a significant impact on an investigation relating to abuse of dominance allegation against a concessionaire as the dominant position.

A concessionaire, therefore, would not be able to seek protection against abuse of dominance on grounds that its dominant position is government sanctioned through the concession agreement or that the provisions of the concession agreement do not limit such behavior or that the development of the particular facility has provided relative advantages through contributing to the economic development of the region. The Competition Commission of India’s jurisdiction to investigate and review abuse of dominant position allegations against concessionaires is therefore not limited or in any manner prevented by the grant of the concession agreement by a government authority nor by the terms of the relevant concession agreement.

In relation to determining whether or not an agreement is an anti competitive agreement (i.e. whether it has an appreciable adverse effect), under s. 19(3) of the Act, that Competition Commission is required to have due regard to, inter alia, the following factors: (i) promotion of economic development by means of production or distribution of goods or provision of services, (ii) improvements in production or distribution of goods or provisions of services and (iii) accrual of benefits of consumers. It should be noted that s. 3(4) of the Act does not deem a “refusal to deal” to be an anti competitive agreement (unlike the circumstances under s. 3(3) of the Act which are presumed to be anti competitive agreements) and consequently, the Competition Commission of India will need to take into account the factors stated under s. 19(3) of the Act in determining whether a “refusal to deal” is an anti competitive agreement in the relevant circumstances. It should, however, be noted that s. 19(3) of the Act does not determine whether the stated factors would have a positive or negative impact on the particular case and that is left to the discretion of the Competitive Commission of India to determine in light of the facts and circumstances of the relevant case.

2.3.2 Existing Supreme Court Case Law That Impose Obligations similar to “Essential Facilities Doctrine”

The Supreme Court of India in *Binni Limited and Anr. v. V. Sadasivan and Ors*.[53] has held that there is a difference between public duties and contractual duties. It was held that a Writ of Mandamus can be issued even against a private authority, but only in respect of the public functions being discharged by the said authority. A writ court can by its decision direct a private authority to correct or enforce discharge of public functions. The Court held that *a body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.* The Supreme Court held that private bodies, exercise public function *when they intervene or participate in social or economic affairs of public interest* (emphasis added)[54]. Contractual rights, on the other hand, are private rights, which can be enforced through ordinary contractual remedies by filing a suit for damages, injunction, specific performance and declaration. High Courts while exercising jurisdiction under Article 226 of the Constitution of India do not issue a Writ of Mandamus in matters of private law because Writs are discretionary remedies normally issued to enforce public duties and secondly, not usually granted where alternative remedies are available.

In *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jyanti Mahotsav Smarak Trust v. V.R.Rudani & Othrs*[55]. a writ of mandamus was sought against a trust registered under Public Trust Act that undertook the management of a college. The writ jurisdiction of the courts was challenged on the grounds that a trust managing a college is not a "state entity" and therefore not subject to writ jurisdiction. The Supreme Court held as follows:

"If the rights are purely of a private character no mandamus can issue. If the management of the college is a purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and the party has no other equally convenient remedy, mandamus cannot be denied."

The Court then examined whether the trust was purely a private body and held as follows:

"it has to be appreciated that the appellant-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. Their activities are closely supervised by the University authorities."[56]

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[53] (2005) 6 SCC 657

[54] The Supreme Court stated: "However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. *A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.*"

[55] AIR 1989 SC 1607

[56] The same stand was reiterated by the Court in *K.Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering* (1997) 3 SCC 571 when it held: "In view of the long line of decisions of this Court holding that when there is an interest created by the Government in an Institution to impart education, which is a fundamental right of the citizens, the teachers who teach the education gets an element of public interest in the performance of their duties. As a consequence, the element of public interest requires to regulate the conditions of service of those employees on par with Government employees…. We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education. The private institutions cater to the needs of the educational opportunities. The teacher duly appointed to a post in the private institution also is entitled to seek enforcement of the orders issued by the Government…. When an element of public interest is created

The Court held that the power and scope of Article 226[57], is much wider than the English law relating to issuance of writs (which is limited to only authorities created by statute and whose powers and duties are defined by statute). Under Article 226 writs can be issued to a 'any person or authority". It can be issued "for the enforcement of any or the fundamental rights and for any other purpose". The Supreme Court held that:

“The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.”

The Court quoted with approval the commentary of Professor De Smith (in Judicial Review of Administrative Act, 4^{th} Ed, p. 540): "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract."

This makes it clear that if a private entity is receiving government aid and the entity discharges a public function, then it would be subject to writ jurisdiction under Article 226 and liable to have a writ of mandamus issued against it.

In *VST Industries Limited v. VST Industries Workers’ Union and Anr.*[58] it was held that:

> “it is noticed that not all the activities of the private bodies are subject to private law, e.g., the activities by private bodies may be governed by the standards of public when its decisions are subject to duties conferred by statute *or when by virtue of the function it is performing or possible its dominant position in the market, it is under an implied duty to act in the public interest* (emphasis added). By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarized the position with the following propositions:
>
> (1) The test of a whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.
>
> (2) The principles of judicial review prima facie govern the activities of bodies performing public functions.

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and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedy provided under Article 226; the jurisdiction part is very wide..”

[57] Article 226 reads: “226. Power of High Courts to issue certain writs (1) Notwithstanding anything in Article 32, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any Government, within those territories directions, order or writs, including (writs the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose.”

[58] (2001) 1 SCC 298

(3) However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will *not* normally be appropriate even though the body may be performing a public function

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."

Thus, in India presently, a private company that is controlling an infrastructure facility through a concession agreement granted by a government entity will be held to be performing a "public function" and not a completely "private function" and would, be under an implied duty to act in the public interest.

Consequently, if it refuses access or if it refuses to deal with any competitor or third party, such action would be open to judicial scrutiny not as a contractual matter between private parties, but as an arbitrary action of a body discharging public functions. This would make it very difficult for a concessionaire to attempt such unilateral actions.

The further implication of these rulings is that, affected parties can seek a writ remedy against a concessionaire and not only a competition remedy or a private dispute remedy.

2.3.4 Institutionalization of the "Essential Facilities Doctrine" in Indian law

In light of the importance being given to infrastructure development through private participating that is necessary for enabling India to meet its development targets and the promotion of the use of the concession agreement route being undertaken in India it will be important to institutionalize the "essential facilities doctrine" in order to provide for a suitable framework governing development of infrastructure by private developers. In the absence of the institutionalization of the "essential facilities doctrine" its implementation would be dependant on judicial developments and actions and decisions taken by relevant regulators from time to time, which is not an effective means of regulating ongoing commercial relationships.

It is recommended that the following measures be undertaken to institutionalize the "essential facilities doctrine": First, the Competition Commission of India should, pursuant to the provisions of s. 18[59] read with s. 64(1)[60] of the Act make regulations providing the framework for enabling access to infrastructure facilities based on the essential facilities doctrine. Secondly, as a long term measure the Act should be suitably amended to clearly institutionalize the regime regulating access to infrastructure facilities.

[59] S. 18 of the Act states as follows: "Subject to the provisions of this Act, it shall be the duty of the Commission to *eliminate practices having adverse effect on competition*, *promote and sustain competition*, *protect the interests of consumers* and *ensure freedom of trade carried on by other participants*, in markets in India:
Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country." (Note: all emphasis have been added)

[60] S.64(1) of the Act vests the Commission with the power to make regulations and states as follows: "The Commission may, by notification, make regulations consistent with this Act and the rules made thereunder *to carry out the purposes of this Act*." (Note: all emphasis have been added).

The proposed regulations that providing for the framework for enabling access to infrastructure facilities based on the essential facilities doctrine can be suitably adapted from the Australian model discussed above.

2.3.4.1 "Common Carrier" Regime Under PNGRB Act, 2006

The "common carrier" and "contract carrier" regime contemplated under the Petroleum and Natural gas Regulatory Board Act, 2006 ("PNGRB Act") in respect of pipelines carrying petroleum, petroleum products or natural gas is a reflection of the "essential facilities" concept into Indian law.

The PNGRB Act defines a "common carrier"[61] to mean such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity as the Board may declare or authorize from time to time on a non-discriminatory open access basis, but does not include pipelines laid to supply – (i) petroleum products or natural gas to a specific consumer, or (ii) crude oil.

A contract carrier is defined to mean[62] such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity pursuant to firm contracts for atleast one year as may be declared by the Board from time to time. The PNGRB Act stipulates that a contract carrier shall be treated as a common carrier if (i) such contract carrier has surplus capacity over and above the firm contracts entered into, or (ii) the firm contract period has expired[63].

The PNGRB Act vests the Petroleum and Natural Gas Board with the power to declare an existing pipeline for transportation of petroleum, petroleum products and natural gas or an existing city or local natural gas distribution network, as a common carrier or a contract carrier or to regulate or allow access to such pipeline or network[64]. The Board is vested with the powers to fix the terms and conditions subject to which the pipeline or network may be declared as a common carrier or contract carrier and pass such orders as it may deem fit having regard to the public interest, competitive transportation rates and right of first use[65]. In exercising its powers to declare an existing facility as a "common carrier" or "contract carrier" the PNGRB Act stipulates that the Board shall be guided by the objectives of promoting competition among entities, avoiding infructuous investment, maintaining or increasing supplies or for securing equitable distribution or ensuring adequate availability of petroleum, petroleum products and natural gas[66].

2.3.4.2 "Open Access" Regime Under Electricity Act, 2003

The Electricity Act, 2003 defines "open access" to mean "the non discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission."[67]

The Electricity Act, 2003, vide s. 9(2), specifies that every person who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use: *provided*

[61] See s. 2(j) PNGRB Act, 2006

[62] See s. 2(m) PNGRB Act, 2006

[63] See Explanation s. 2(j) PNGRB Act, 2006

[64] See s. 20(1) PNGRB Act, 2006

[65] See s. 20(2) PNGRB Act, 2006

[66] See s.20(5) PNGRB Act, 2006

[67] See s. 2(47) Electricity Act, 2003

that such open access shall be subject to availability of adequate transmission facility and such availability f transmission facility shall be determined by the Central Transmission Utility or State Transmission Utility as the case may be and any dispute relating to the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

The Electricity Act, 2003, vide s. 38(2)(d), imposes a duty on the Central Transmission Utility to provide non-discriminatory open access to its transmission system for use by : (i) any licensee or generating company on payment of transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under provisions of the Electricity Act, on payment of transmission charges and a surcharge thereon as may be specified by the Central Commission. The surcharge so levied is mandated to be used for the purposes of meeting the requirement of cross – subsidy which have to be progressively reduced in the manner as may be specified by the Central Electricity Regulatory Commission. However this surcharge is not leviable for open access to captive power plants for transmission of electricity to the destination of its own use.

The Electricity Act, 2003, vide s. 39(2)(d), imposes a duty on the State Transmission Utilities to provide non-discriminatory open access to its transmission system for use by : (i) any licensee or generating company on payment of transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under provisions of the Electricity Act, on payment of transmission charges and a surcharge thereon as may be specified by the Central Commission. The surcharge so levied is mandated to be used for the purposes of meeting the requirement of cross – subsidy which have to be progressively reduced in the manner as may be specified by the Central Electricity Regulatory Commission. However this surcharge is not leviable for open access to captive power plants for transmission of electricity to the destination of its own use

The Electricity Act, 2003, vide s. 40 (c), imposes a duty on every transmission licensee to provide non-discriminatory open access to its transmission system for use by : (i) any licensee or generating company on payment of transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under provisions of the Electricity Act, on payment of transmission charges and a surcharge thereon as may be specified by the Central Commission. The surcharge so levied is mandated to be used for the purposes of meeting the requirement of cross – subsidy which have to be progressively reduced in the manner as may be specified by the Central Electricity Regulatory Commission. However this surcharge is not leviable for open access to captive power plants for transmission of electricity to the destination of its own use.

In relation to distribution licensees, the Electricity Act, 2003 vide section 42 (2), vests the relevant State Electricity Regulatory Commissions, with the authority to introduce open access in such phases and subject to such conditions (including cross subsidies and other operational constraints) as may be specified within one year of the appointed date by it and specify the extent of open access in successive phases and in determine charges for wheeling. The Electricity Act, 2003 mandates that the relevant State Electricity Regulatory Commissions, in specifying the extent of open access shall have due regard to all relevant factors including cross subsidies and other operational constraints.

2.3.4.3 "Interconnection" Regime For Telecom Networks

The Telecom Regulatory Authority of India Act, 1997 specifies that one of the functions of the TRAI shall be to ensure effective inter-connection between different service providers, 'fix' the terms and conditions of inter-connectivity between the service providers and maintain a register of interconnect agreements. In discharge of these functions the TRAI has enacted Telecommunication Interconnection Regulations for Telecom service providers as well as Broadcasting and Cable Services providers. TRAI also regulates user charges for interconnection through Telecommunication Interconnection User Charges regulations.

The TRAI has enacted The Telecommunication Interconnection (Reference Interconnect Offer) Regulation 2002, which envisages the publication of a reference interconnect offer by the telecommunication service providers holding significant market power based on a Model Reference Interconnect Offer that is provided with the said regulations. The Reference Interconnect Offer will stipulate the relevant service providers terms and conditions on which it will agree to interconnect its network with the network of any other service provider seeking interconnection. The interconnection seeker may either accept this offer in full and enter into an interconnection agreement with the service provider on that basis or accept the offer pending execution of an individualized agreement after negotiations.

CHAPTER 3. STRUCTURING OF CONCESSION AGREEMENTS

3.1 Impact on Competition

The structuring of the concession agreement has a direct impact on the competition for the concession. For example, if in an infrastructure project, the state authority decides to bundle the concession right to undertake the development of an infrastructure facility with the right to develop real estate on large tracks of land, then depending on the real estate development potential of the land being offered as part of the concession, the nature of the concession shifts from being a concession for an infrastructure project to effectively a real estate development project. Such a change in the nature of the project, will immediately change the relevant market of the concession and also change the nature of competition for the concession. Such a concession where substantial real estate development rights are being granted upfront with the concession to develop an infrastructure facility and the vesting of such real estate development right is not being staggered or dependant upon the extent of implementation of the infrastructure facility, becomes effectively a larger real estate project as opposed to being only a project to develop, operate and maintain a specific type of infrastructure facility. Consequently, the entities that would compete for such a concession would change. Real estate developers would be prominently attracted to such projects and would submit bids with the view to primarily obtain the real estate rights as opposed to submitting bids that are balanced with the primary objective of ensuring the development of the infrastructure facility.

The state authority may find that the best bid is that of a real estate developer that may be offering lowest tariffs or lowest state grants for the development of the infrastructure facility. In such scenarios the primary objective of obtaining infrastructure companies with suitable and reliable experience in the development, operation, maintenance and management of that particular type of infrastructure facility may be lost.

The other fall out of such structuring decisions is that it goes against the interests of the consumers and end-users of the particular infrastructure facility. This is because the viability and continued development, operation and maintenance of the relevant infrastructure facility becomes dependant upon and intertwined with the developments of a separate and unrelated market (namely the real estate market). Real estate market fluctuations could immediately result in either increasing of end user tariff or a complete failure of the project leading to unavailability of the facility to the end users.

The Hyderabad Metro Rail Project

The Hyderabad Metro Rail Project illustrates this point[68]. In light of the upfront vesting of real estate development rights over 212 acres of land in Hyderabad along the route of the proposed Hyderabad Metro Railway, the project shifted from being a MRTS project to being a valuable real estate project. This resulted in the consortium led by a real estate developer Maytas Infrastructure emerging as the preferred bidder in light of its bid that did not require any state grant for the project whose initial projected project cost was about Rs. 12,000 crores. In light of the recent slowdown in the real estate market, the project is now facing problems achieving financial closure and it is likely that the State Government would have to step in to enable the initial financing and the project would have to be restructured.

The Delhi International Airport Project

The Delhi International Airport Project[69] was structured with an upfront real estate development component. This resulted in the bidders submitting bids based on their

[68] For a detailed discussion on Hyderabad Metro Rail Project, please see Case Study No. 1: Hyderabad Metro Rail Project.

[69] For a detailed discussion on the Delhi Airport Project, please see Case Study II: Delhi Airport Project

evaluation of the real estate potential of the concession. The final selected bidder and the financial plan of the selected bidder relied on the ability to raise about 2500 crores from real estate development. Consequently, the financing of the Delhi International Airport Project was carrying an inherent real estate risk in its financial structure. With the slowdown in the real estate market there have been no takers for the real estate portion of the project. The Concessionaire is now seeking to impose a Rs 350 passenger terminal charge on each passenger that uses the airport, even before the airport is completed. The consequence of such structuring was to adversely impact the end user of the airport. Furthermore, if the passenger terminal charge was a declared revenue stream at the time of structuring and bidding, the nature of bids would have been different.

Another example of structuring of the concession agreement resulting in change in competition for the concession as well as the impact on the consumers is that of project size. If the need to develop a facility or infrastructure related services of a particular size is either sub-divided into smaller project or expanded to include higher capacities and other additional services thereby making it a much larger project that what was planned, the nature of the bidders will drastically alter.

Under general law, the decisions relating to structuring of a project would fall under policy decisions by the state and would therefore not fall within the scope of judicial review by the courts.

However, with the enactment of the Competition Act, 2002 and the creation of the Competition Commission of India, decisions, whether in the nature of policy or administrative decisions, that would have adverse effect on competition or interests of consumers would fall under the scope of duty and the powers and functions of the Competition Commission of India.

The Competition Commission of India is not a general court of law that would be undertaking judicial review of administrative decisions, it is a specific regulatory authority constituted under a special law for the specific purpose of : (i) eliminating practices having adverse effect on competition in markets in India, (ii) promote and sustain competition in markets in India, (iii) protect the interests of consumers in markets in India and (iv) ensure freedom of trade carried on by other participants in markets in India[70].

Government authorities are not exempt from the applicability of the Competition Act, 2002. In fact the definition of "enterprise" under s. 2(h) of the Competition Act, 2002 specifically covers a "department of the Government" and only exempts "activity of the Government relatable to the sovereign functions of the Government including all activities carried out on by the departments of the Central Government dealing with atomic energy, currency, defense and space.

Furthermore, the applicable principle of statutory interpretation in India is that a "Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the

State from its operation."[71]. The same rules will apply to government bodies and corporations constituted under Special Acts[72].

[70] S. 18 of the Competition Act, 2002 : "s. 18 Duties of Commission: Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:
Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

[71] *State of West Bengal v. Corporation of Calcutta* AIR 1967 SC 997, *Union of India v. Jubbi* AIR 1968 360. In State of West Bengal v. Corporation of Calcutta AIR 1967 SC 997 the Supreme Court rejected the notion that the English rule that the Crown is not bound by the laws it enacts was applicable in India and held as follows: "There is, therefore, no justification for this Court to accept the English canon of construction, for it brings about diverse results and conflicting decisions. On the other hand, the normal construction, namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the said anomalies. It prima facie applies to all States and subjects alike, a construction consistent with the philosophy of equality enshrined in our Constitution. This natural approach avoids the archaic rule and moves with the modern trends. This will not cause any hardship to the State. The State can make an Act, if it chooses, providing for its exemption from its operation. Though the State is not expressly exempted from the operation of an Act, under certain circumstances such an exemption may necessarily be implied. Such an Act, provided it does not infringe fundamental rights, will give the necessary relief to the State. We, therefore, hold that the said canon of

It should also be noted that the Supreme Court of India has clearly held that if a fact finding authority comes to a conclusion honestly and bona fide, the fact that another authority be it the Supreme Court or the High Court may have a different perspective of that question is not ground to interfere with that finding[73]. In this context it should be noted that under the Competition Act, 2002, it is the Competition Commission of India which is the fact finding body in relation to allegations of anti-competitive behavior.

3.2 Review of Structuring of Concession Agreements under Competition Act, 2002

The provisions of the Competition Act, 2002 bring the review of the structuring as well as the terms and conditions of Concession Agreements within the jurisdiction of the Competition Commission of India. This would mean that the Competition Commission can review draft concession agreements that are intended to be entered into or awarded by a government department or government body prior to it being actually awarded.

This is clear from the review of the following provisions:

s.18 of the Competition Act specifies the duty of the Commission to, inter alia, (i) eliminate practices having adverse effect on competition in markets in India, (ii) promote and sustain competition in

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construction was not 'the law in force' within the meaning of Art. 372 of the Constitution and that in any event having regard to the foregoing reasons the said canon of construction should not be applied for construing statutes in India." In *Union of India v. Jubbi* the decision of State of West Bengal v. Corporation of Calcutta was reiterated and it was further elaborated as follows: "..The position now therefore is that a statute applies to State as much it does to a citizen unless it expressly or by necessary implication exempts the State from its operation….Broadly stated, if the legislature intended to exclude the applicability of the Act to the State it could have easily stated in section 11 itself or by a separate provision that the Act is not to be applied to the Union or to lands held by it. In the absence of such a provision, in a constitutional set up as the one we have in this country and of which the overriding basis is the broad concept of equality, free from any arbitrary discrimination, the presumption would be that a law of which the avowed object is to free the tenant of landlordism and to ensure to him security of tenure would bind all landlords irrespective of whether such a landlord is an ordinary individual or the Union."

[72] *Lucknow Development Authority v. M.K. Gupta* AIR 1994 SC 787. The Court held as follows: "…This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act….In our opinion, the entire argument found on being statutory does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service.."

[73] See: *Collector of Customs, Bombay v. Swastic Woollens (P) Ltd. and Ors*. (1988 Supp SCC 796) wherein this Court held while considering its statutory appellate power under Section 130-E(b) of the Customs Act, 1962:

"...We are, however, of the view that if a fact finding authority comes to a conclusion with in the above parameters honestly and bona fide, the fact that another authority be it the Supreme Court or the High Court may have a different perspective of that question, in our opinion, is no ground to interfere with that finding in an appeal from such a finding. In the new scheme of things, the Tribunals have been entrusted with the authority and the jurisdiction to decide the questions involving determination of the rate of duty of excise or to the value of goods for purposes of assessment. An appeal has bene provided to this Court to oversee that the subordinate tribunals act within the law. Merely because another view might be possible by a competent court of law is no ground for interference under Section 130-E of the Act though in relation to the rate of duty of customs or to the value of goods for purposes of assessment, the amplitude of appeal is unlimited. But because the jurisdiction is unlimited, there is inherent limitation imposed in such appeals. The Tribunal has not deviated from the path of correct principle and has considered all the relevant factors. If the Tribunal has acted bona fide with the natural justice by a speaking order, in our opinion, even if superior court feels that another view is possible, that is no ground for substitution of that view in exercise of power under Clause (b) of Section 130-E of the Act." Also see Reliance Silicon (I) Pvt. Ltd. v. Collector, Central Excise, Thane AIR 1997 SC 1617; West Bengal Electricity Regulatory Commission v. C.E.S.C. AIR 2002 SC 3588.

markets in India, (iii) protect the interests of consumers in markets in India and (iv) ensure freedom of trade carried on by other participants in markets in India[74].

s. 19 of the Competition Act specifically vests the Commission with the power to inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 of subsection (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; or (b) a reference made to it by the Central Government or a State Government or a statutory authority.

Section 3(1) of the Competition Act covers any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services. This would cover "concession agreements". Section 3(1) of the Competition Act stipulates that 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 in India.

Section 4 (1) of the Competition Act stipulates that no enterprise or group shall abuse its dominant position. The term "dominant position" is defined in Explanation (a) to s.4 of the Competition Act, 2002 as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to: (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour."

The term "enterprise" has been defined in s. 2(h) to include a department of the Government but excludes any activity of the government relatable to the "sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense and space."[75]

From this it is clear that the extent of exemption of government actions from being included within the scope of the term "enterprise" (and thereby from the prohibitions under s. 3 and s. 4 of the Competition Act) would depend on whether or not such action is relatable to the sovereign functions of the Government.

The Supreme Court of India, in the case of *Bangalore Water Supply & Sewerage Board v. A. Rajjappa*[76] (though a seven judge bench) has held that the exemption provided for "sovereign functions" from the definition of "industry" under the Industrial Disputes Act is limited to only "sovereign functions" as strictly understood and "not to welfare activities or economic adventures undertaken by the government or statutory bodies"[77]. It also held that the term 'sovereign' should be reserved, technically and more correctly, for the sphere of ultimate decisions. Sovereignty operates

[74] S. 18 of the Competition Act, 2002 : "s. 18 Duties of Commission: Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:
Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

[75] s. 2(h) of the Competition Act, 2002 defines "enterprise" as ""enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity
of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."

[76] AIR 1978SC696

[77] As per judgment delivered by Krishna Iyer J on his own behalf and on behalf of Bhagwati and Desai JJ in *Bangalore Water Supply & Sewerage Board v. A. Rajappa* AIR 1978 SC 696

on a sovereign plane of its own[78]. Thus, in light of the limited interpretation given to the term "sovereign functions" under Indian Constitutional law, very limited activities of the government would fall outside the scope of the definition of "enterprise" under s. 2(h) of the Competition Act, 2002.

In light of the above, it is therefore possible for the Competition Commission to review the structuring of Concession Agreements as well as the terms and conditions.

Any enquiry into the structuring or terms and conditions of a concession agreement by the Competition Commission would have to be undertaken in accordance with the provisions of s. 19 read with s. 26 of the Competition Act. 2002.

When the Competition Commission reviews the structuring or terms and conditions of a concession agreement that has been drafted by a government department the generally applicable orders that the Commission could issue pursuant to s. 27 of the Competition Act, 2002 would be pursuant to s. 27(d) namely "direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission."; s.27(e) "direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any."; s. 27(g) "pass such other order or issue such other directions as it may deem fit."

Exclusivity Provisions: One of the issues relating to structuring of concession agreements that could be required to be looked into by the Competition Commission of India is that of granting of exclusivity and other provisions relating to protection of the concessionaire from competition which may be provided under the terms of the Concession Agreement (such as a right of first refusal to develop the competing facility).

The Government of India in its model concession agreement for National Highways[79] and Major Ports[80] is offering protection from competing facilities for a specified period of time[81].

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[78] As per judgment delivered by Beg CJ in *Bangalore Water Supply & Sewerage Board v. A. Rajappa* AIR 1978 SC 696. Beg CJ stated: "sovereign" functions appears to be derived, seems to be a misfit in a Republic where the citizen shares the political sovereignty in which he has even a lead share, however small, inasmuch as he exercises the right to vote. What is meant by the use of the term "sovereign", in relation to the activities of the State, is more accurately brought out by using the term "governmental" functions although there are difficulties here also inasmuch as the Government has entered largely new fields of industry. Therefore, only those services which are governed by separate rules and constitutional provisions, such as Articles 310 and 311 should, strictly speaking, be excluded from the sphere of industry by necessary implication."

[79] For Model Concession Agreement for National Highway projects on BOT Projects of Rs 100 crores and above (MCA2) Please see website of Department of Road Transport & Highways, Ministry of Shipping, Road Transport and Highways http://www.morth.nic.in/index3.asp?sublink2id=207&langid=2

[80] For Model Concession Agreement for Major Ports please see http://shipping.gov.in/writereaddata/linkimages/mca%2021%2001%2008872751613.pdf

[81] Under the NHAI Model Concession Agreement provided on the website of MORTH (which is the concession agreement for the Jaipur-Kishangarh NH8 section states in Clause 8 as follows:

VIII. ADDITIONAL TOLLWAY

8.1 Notwithstanding anything to the contrary contained in this Agreement, any of NHAI, GOI or GOR may construct and operate either itself or have the same, inter alia, built and operated on BOT basis or otherwise any Expressway or other toll road, not being a bye-pass, between, inter alia, Jaipur and Ajmer (the "Additional Tollway") provided that such Additional Tollway shall not be opened to traffic before expiry of 8 (eight) years from the Appointed Date.

8.2 In the event of NHAI, GOI or GOR, as the case may be, constructing or permitting construction of any Additional Tollway as set forth in this Clause 8.2, and the Additional Tollway is commissioned at any time after 8 (eight) years from the Appointed Date, then the Concession Period shall be increased by half the number of years by which such commissioning precedes the expiry of the Concession Period. For example, if the commissioning of the Additional Tollway occurs after 10 (ten) years from the Appointed Date, the Concession Period shall be increased to 17.5 (Seventeen and a half) years.

8.3 Upon commissioning of the Additional Tollway, the Concessionaire shall continue to levy and collect the Fee under this Agreement and shall not offer any discounts or reductions in such Fee except with the prior written consent of

In the National Highways Concession Agreement in fact a three tier protection is being offered: First : there is a blanket assurance that no additional road between the relevant route would be opened before a specified period of time. This is assuring an exclusivity period to the concessionaire ; Second : if a competing facility is opened after the specified exclusivity period, the concession period of the relevant concession will be increased by half the number of years by which such commissioning precedes the expiry of the Concession Period; and Third: NHAI has agreed to ensure that the toll charged from vehicles using the competing facility shall always be 133% of the toll charged on the project highway governed by the relevant concession. This protection will be provided for the entire duration of the concession agreement.

In the Model Port concession the exclusivity offered comprises of a blanket prohibition from development of a competing facility within a specified area that is applicable for the earlier of either: (i) a specified period of time of five years or (ii) the average annual volume of cargo handled at the Project Facilities and Services reaches a level of 75% (seventy five percent) of Project Capacity for 2 (two) consecutive years[82].

The Planning Commission and NHAI have justified this provision as being necessary for attracting bidders to the national highway projects.

However, this justification does not really stand the test of reasonableness since this provision is being offered as a standard provision in the model concession agreement, thereby making it applicable to each and every project and creating a legitimate expectation among bidders and concessionaires that they will obtain this protection against competing facility as a matter of course, irrespective of the fact whether or not the economics or traffic demand relating to the particular section of the national highway requires or justifies such a right being granted. It is provided in the model concession agreement without any limitations on its applicability.

Under the Competition Act, 2002, these provisions in each of the concession agreements shall be presumed to have an appreciable adverse effect on competition as they would be , depending on the precise terms in the relevant Concession Agreement, covered by the provisions of either: (a) s. 3(3)(c) of the Competition Act, 2002 which stipulates that any agreement which shares the market by way of allocation of geographical area of market or any other similar way shall be presumed to have an appreciable adverse effect on competition or (b) s. 3(3)(a) of the Competition Act, 2002 which stipulates that any agreement which directly or indirectly determines purchase or sales prices shall be presumed to have an appreciable adverse effect on competition, or (c) s. 3(3)(b) of the Competition Act, 2002 which stipulates that any agreement which limits or controls production, supply, markets, investment or provision of services shall be presumed to have an appreciable adverse effect on competition. It should be noted that under the provisions of s. 3(3) of the Competition Act, 2002 there is a presumption that the agreements covered by the said provision are agreements that have an appreciable adverse effect on competition. Consequently, the provisions of s.19(3) of the Competition Act, 2002, which provide the factors that have to be considered by the

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NHAI. Provided, however, that any such discounts or reductions that the Concessionaire had offered to any general or special class of users or vehicles for a continuous period of three years prior to the commissioning of the Additional Tollway may continue in the same form and manner after the commissioning of such Additional Tollway.

8.4 NHAI shall ensure that the per kilometer fee to be levied and collected from any vehicle or class of vehicles using the Additional Tollway shall at no time be less than an amount which is 133% of the per kilometer Fee levied and collected from similar vehicles or class of vehicles using the Project Highway.

[82] The Model Port Concession Agreement exclusivity provision, Clause 12.2(c), states as follows:

"**Competing Facilities:** The Concessioning Authority shall not operationalise any additional facility within Port Limits for handling ___ *(specify cargo)* either on its own or through any other Person until the earlier of (i) 5 (five) years from the Scheduled Project Completion Date; or (ii) the average annual volume of cargo handled at the Project Facilities and Services reaches a level of 75% (seventy five percent) of Project Capacity for 2 (two) consecutive years ("**Exclusivity Period**"). Provided, this restriction shall not apply to the additional facility envisaged at [●]

Competition Commission in determining whether an agreement has an appreciable adverse effect on competition or not, will no longer be applicable.

Consequently, the burden of disproving the presumption created by s. 3(3) of the Competition Act, 2002 that such provisions of a Concession Agreement have an appreciable adverse effect on competition will be on the parties to the concession agreement. In light of s. 4 of the Indian Evidence Act[83] which defines the term 'shall presume', the Supreme Court has held[84] that in cases where the term "may presumed" is used the Court has an option to raise the presumption or not, but where the term "shall presumed" is used, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumption ceases and the fact is presumed, unless and until it is disproved[85]. It has been held that in order to rebut a statutory presumption, the burden of proof is not that of disproving the existence of the presumption beyond reasonable doubt as is expected in a criminal trail, but at the same time mere denial will not serve the purpose. To disprove the presumption, the other party should bring on record such facts and circumstances, upon consideration of which , the non-existence of the presumed circumstances should seem so probable that a prudent man would under the circumstances of the case, act upon the plea that the presumed facts did not exist[86]. Thus to rebut a statutory presumption the burden of proof is not that of beyond reasonable doubt but that of a prudent man under the circumstances of the case.

In order to protect an exclusivity provision from being held anti-competitive in light of the statutory presumption under s. 3(3) of the Competition Act, 2002, the Parties to the concession agreement would have to provide sufficient data and circumstances to reasonably disprove the material adverse impact on competition that is presumed to being caused by such provisions. It should be noted that unlike in the case of judicial review of a government's authority decision to vest such rights, it would not be sufficient for the government authority/concessionaire to show reasons requiring the vesting of such exclusivity rights or to state that it is a policy decision to vest such rights and therefore not subject to judicial review.

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[83] S. 4 Indian Evidence Act, inter alia, defines 'shall presume' as follows: "Shall presume".—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

This imposes a mandatory presumption than when the words used are 'may presume'. 'may presume' is defined under s. 4 of the Indian Evidence Act "`may presume' - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it."

[84] *Kumar Exports v. Sharma Carpets* 2008 (16) SCALE 342

[85] The Supreme Court in Kumar Exports case (Supra) stated "When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

[86] *Kumar Exports v. Sharma Carpets* 2008 (16) SCALE 342

CHAPTER 4. GRANT OF CONCESSION AGREEMENTS: COMPETITION ISSUES

The following are the possible manner in which concession agreements could be granted under Indian legal framework:

(iv) Direct Negotiations between state agency and the proposed concessionaire

(v) Competitive bidding process

(vi) Swiss challenge process

4.1 Direct Negotiations

Under the direct negotiation route, the government authority either receives an unsolicited proposal for the development of certain infrastructure facility or provision of certain utility services under a concession agreement or it suo moto enters into negotiations with an identified agency for the purposes of finalizing the terms and conditions of the concession agreement for the implementation of a project already identified by the government entity.

Some of the states have enacted specific infrastructure development statutes which provide an overall framework for implementation of infrastructure projects and for the creation of an infrastructure development authority to regulate the grant of concession agreements and implementation of infrastructure projects within the relevant state. Such infrastructure development statutes usually provide for the general framework in accordance to which direct negotiations can be undertaken. For example the states of Bihar and Andhra Pradesh have similar framework governing direct negotiations by government agencies and local authorities.

The Andhra Pradesh Infrastructure Development Enabling Act, 2001 and the Bihar Infrastructure Development Enabling Act, 2006 stipulate that Direct negotiations can be adopted by a government agency or a local authority only in respect of such infrastructure projects where : (a) the project meets all the following criteria (i) no fiscal incentives in the form of contingent liabilities or financial incentives are required; (ii) the project is viable even when land is granted at market rates; (iii) no exclusive rights are conferred on the developer and (iv) minimum inter-linkages with other infrastructure facilities is required[87]; or (b) the project involves proprietary technology or franchise which is exclusively available with the relevant entity globally[88]; or (c) the project where competitive bid process has earlier failed to identify a suitable developer[89]; or (d) the projects in prescribed social infrastructure sector where non-profit organizations seeks develop a project[90], or (e) a project seeking

[87] See s. 19(I)(i)(a) r.w. s. 2(h) r.w. Clause 1 Schedule II (Category I Projects) Bihar Infrastructure Development Enabling Act, 2006; See s. 19(I)(i)(a) r.w. s. 2(e) r.w. Clause 1 Schedule II (Category I Projects) Andhra Pradesh Infrastructure Development Enabling Act, 2001

[88] See s. 19(I)(i)(b) Bihar Infrastructure Development Enabling Act, 2006; s. 19(I)(i) (b) Andhra Pradesh Infrastructure Development Enabling Act, 2001

[89] See s. 19(I)(i)(c) Bihar Infrastructure Development Enabling Act, 2006; s.19(I)(i)(c) Andhra Pradesh Infrastructure Development Enabling Act, 2001

[90] See s. 19(I)(i)(d) Bihar Infrastructure Development Enabling Act, 2006; s. 19(I)(i)(d) Andhra Pradesh Infrastructure Development Enabling Act, 2001.

to link a mega infrastructure project[91] with other facilities or markets[92] (such as a roadlink to the nearest highway, rail link or water transmission link or sewerage link).

The Bihar Infrastructure Development Enabling Act, 2006, stipulates that in case a developer is selected through direct negotiations, the government agency or local authority may: (1) renegotiate the financial offer or (2) recommend that all subsequent procurement for the relevant project is made through competitive bidding with the cost of the project being determined after such competitive bidding procurement process has been completed and the financial offer be renegotiated based on the revised cost of project determined through the competitive bidding procurement process for the project.[93]

It should be noted that in light of the existing pronouncements of the Supreme Court of India in relation to the manner in which a Government can enter into contracts, before the Direct Negotiation route can be adopted, detailed rules/government orders that would govern the exercise of this discretion and the conduct of such negotiations have to be put in place. In the absence of such rules/government orders, any contract for an infrastructure projects entered into on the basis of direct negotiation would be open to challenge.

It is well settled law that : "..Unlike a private individual who can enter into contract with any person for any work in accordance with law, the State, as a public policy, does not enjoy an absolute freedom to act like a private individual. State is expected to prescribe norms and guidelines in conformity with its policy and constitutional mandate for entering into such contract particularly, while executing distribution of State largess or allotment of restricted items by entering into contract or otherwise. The rule of fairness in State action, it being in conformity with public policy and public good is applicable to every action of the State…the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere"[94].

The need for clear rules/government orders governing direct negotiations is important because under Indian law a Government contract is seen as a privilege or a largess, and unlike a private person who may choose with whom to contract, the Government or public body has to use its power of contracting

[91] S. 2(oo) Bihar Infrastructure Development Enabling Act, 2006 defines "mega infrastructure project" to mean any project implemented or undertaken through public private participation under the Act requiring an investment as may be prescribed by the Infrastructure Development Authority. Similarly s. 2 (x) Andhra Pradesh Infrastructure Development Enabling Act, 2001 defines "mega infrastructure project" in the same way.

[92] See s.19(I)(i)(e) r.w. s.2(nn) Bihar Infrastructure Development Enabling Act, 2006; s.19(I)(i)(e) r.w. s.2(w) Andhra Pradesh Infrastructure Development Enabling Act, 2001.

[93] See s. 19(I)(ii) Bihar Infrastructure Development Enabling Act, 2006; s. 19(I)(ii) Andhra Pradesh Infrastructure Development Enabling Act, 2001.

[94] "..the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution Of India which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover, a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere" See: Ramana Dayaram Shetty v. International Airport Authority of India, (SCR p. 1034 : SCC pp. 50506, para 12]; Kasturi Lal Lakshmi Reddy v. State of J & K (SCR p. 1355: SCC pp. 1112, para 11); Fasih Chaudhary v. Director General, Doordarshan, (SCR p. 286 : SCC p.92); Sterling Computers Ltd. v. M & N Publications Ltd.; Union of India v. Hindustan Development Corpn. (at p.513). Also See: Vijay Kumar Gupta v. State of Maharashtra (2008 (3) AllMR 240, 2008 INDLAW MUM 137). In this case a contract for supply of water awarded by the Government of Maharashtra on the basis of direct negotiation/sole source basis was struck down.

in public interest, as regards the person with whom it would contract, as well as the terms of contract[95].

In light of the fact that there is an urgent need for extensive infrastructure development in all sectors in India, it would be critical for the Competition Commission of India to exercise its duties and powers under the Competition Act and provide guidelines that could allow direct negotiation route to be adopted in certain specific circumstances, without being hindered by existing jurisprudence that has been developed to control only arbitrary state action in relation to award of contracts without evaluating the overall requirement for development of a particular large scale infrastructure facility.

Internationally, direct negotiations are allowed in relation to development of infrastructure facilities in very clearly defined and limited circumstances. For example The Guidelines issued by the United Kingdom Government for ministries concerning the tendering of privately financed projects recognized that " competition must keep its central place in public procurement. Its form however, will vary according to the value and complexity of individual cases…in the context of the private finance initiative the advantages in terms of stimulating innovation may in exceptional cases justify alternatives to a competitive bidding route." The said U.K. Guidelines allow direct negotaions with a single promoter if : (i) a private sector promoter identifies an entirely new project; (ii) a private sector promoter comes forward with a project in response to an invitation from a public sector body, based on the delivery of outputs that are not specifically defined but that fall within the broad functions, policies or initiatives; or (iii) a private sector promoter proposes to proceed with a project already identified by the public sector in a way that is genuinely innovative. Similarly, in Australia, the State of Victoria had issued guidelines to encourage private investment in infrastructure development which permitted direct negotiations in circumstances where the private sector proponent has offered the government a proposal which embodies a unique and proprietary concept as an essential component of the proposal and where the proposal is cost effective when measured against government benchmarks[96].

It could also be possible to combine elements of competitive bidding with direct negotiations to assuage concerns relating to transparency, while preserving the innovative or proprietary aspects of developers proposals. For example governments could initially use a competitive process to solicit proposals in response to broad output specifications and then negotiate directly with one or more developers in relation to their specific proposals. In this manner the competitive bid process would be used to narrow the number of potential developers and direct negotiations would be used to work out detailed terms and conditions of the concession agreement[97].

The World Bank has, in its ToolKits for Highway Development[98], has stated that A competitive selection through either competitive bidding should be the rule, leaving direct negotiations for very exceptional circumstances such as:

(a) when the public sector cannot keep pace with the preliminary preparation work for urgent projects: unsolicited proposals by private parties can then be taken into account and may lead either to competitive bidding with some kind of advantage for the initial candidates or to direct negotiations with them.

(b) When the project needs very little public participation or when unsolicited proposals submitted by private companies are genuinely innovative: direct negotiations with the candidates will then tend to maximize the public's interest. In such cases, policy makers in charge of the selection process can use various mechanisms to mitigate the potentially negative impact of unsolicited proposals:

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[95] Ibid.

[96] See Kerf, Michel, "Concessions for Infrastructure: A Guide TO their Design and Award", World Bank Publications, 1998

[97] See Kerf, Michel, "Concessions for Infrastructure: A Guide TO their Design and Award", World Bank Publications, 1998

[98] See http://rru.worldbank.org/Documents/Toolkits/Highways/5_imple/54/541.htm

- Order a detailed review of the project and contractual documents by experienced advisers (Toolkit for Procurement of Advisory Services in PPP).

- Introduce competition at a later stage, allowing new-comers to make proposals on the basis of the studies performed by the initial private firm. For the sake of fairness, some advantage should then be granted to this initial firm to compensate for the cost incurred during project identification. Alternatively, the initial firm would be compensated for the cost incurred during the initial studies.

The World Bank has also suggested[99] that the following three methods allow unsolicited bids/direct negotiations, while still holding a competition to select the operator:

(a) Purchase of the project concept by the contracting authority and award contract through competitive tendering

(b) A bonus system where the original proponent is awarded the contract, provided its bid is within an agreed margin (say 10-20%) of the best offer received, and

(c) The swiss challenge system, which allows third parties to put forward alternative proposals during a designated period and gives the original proponent the right to match any offer that undercuts its own.

4.2 Competitive Bidding

The competitive bidding route is the most preferred route for grant of concession agreements under Indian law. The choice of competitive bidding route is also stated as the preferred method for grant of government contracts by the Central Vigilance Commission, but more from the issue of mitigating the chances of corruption[100]. The Central Vigilance Commission, vide Office Order No. 23/7/07 No. 005/CRD/19 dated 5th July 2007, has stated that "…tendering process or public auction is a basic requirement for the award of contract by any government agency as any other method, especially award of contract on nomination basis, would amount to a breach of Article 14 of the Constitution guaranteeing right to equality, which implies right to equality of all interested parties." The Central Vigilance Commission has then extracted a judgment of the Supreme Court in the case of *Nagar Nigam, Meerut v. A 1 Faheem Meat Export Pvt. Ltd.*[101] which forms the main principle that the Central Vigilance Commission has expounded in the notification. The Supreme Court of India in the case of *Nagar Nigam, Meerut v. A1 Faheem Meat Export Pvt. Ltd.*, has held that contracts by the State and its instrumentalities must normally be granted through public auction or public tender, however, in rare and exception cases this normal rule may be departed from and such contracts may be awarded through 'private negotiations'[102]. Thus, competitive bidding is generally the preferred route for grant of

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[99] See "Approaches to Private Participation in Water Services: A toolkit" by Public Private Infrastructure Advisory Facility, The World Bank, The World Bank, 2006.

[100] The Central Vigilance Commission is a body established by the Government of India in 1964 in order to guide and advise the Government of India and government agencies in the field of vigilance in order to prevent corruption in government activities. The Central Vigilance Commission acquired a statutory status with the promulgation of an ordinance with effect from 25th August 2998 and began to be governed by its own statute, namely the Central Vigilance Commission Act, 2003, which was enacted and came into effect on September 11, 2003. Vide GOI Resolution on "Public Interest Disclosure and Protection of Informer" dated April 2004, the Government of India has authorized the Central Vigilance Commission as the "Designated Agency" to receive written complaints for disclosure on any allegation of corruption or misuse of office and recommend appropriate action

[101] Arising out of SLP(Civil) No. 10174 of 2006. This is available at the website: www.supremecourtofindia.nic.in

[102] The Supreme Court judgment states: "It is well settled that ordinarily the State or its instrumentalities should not give contracts by private negotiation but by open public auction/tender after wide publicity…We have no doubt that in rare and exceptional cases, having regard to the nature of the trade or largesse or for some other good reason, a contract may have to

concession agreements in India. However, the process of competitive bidding often result in lengthy litigation in relation to the manner in which a particular competitive bid process may have been undertaken.

Most of the major infrastructure projects that involve grant of a concession in some form or other have resulted in litigation in relation to the bid process undertaken to select the entity to be granted the concession.

For example, the process of grant of mobile telephone licenses that was one of the first infrastructure sectors to be opened for private participation in 1992 was challenged and decided by the Supreme Court in the case of *Tata Cellular v. Union of India*[103] in which the Supreme Court upheld the grant of the telecom licenses to Bharati Cellular for city of Delhi and BPL for city of Mumbai, that had been challenged by one of the bidders whose bid had not been accepted.

The opening of the oil exploration sector and the grant of the first Production Sharing Contract by the Government of India was challenged through a public interest litigation filed before the Delhi High Court and finally disposed of by the Supreme Court in the case of *Centre for Public Interest Litigation v. Union of India*[104]

The airport sector, when it was opened up for private participation, resulted in the award of the first two major airports , namely Delhi and Mumbai, being subject matters of protracted litigation that was finally settled by the Supreme Court in the case of *Reliance Airport Developers Pvt. Ltd. v. Airports Authority of India*[105] in which the Supreme Court upheld the grant of the concession agreements for Delhi airport to GMR Industries and of Mumbai airport to GVK Industries.

The first major trans harbor -link project in India that was sought to be implemented through a private developer on a concession agreement basis faced litigation in relation to its bidding process, which was disposed by the Supreme Court in the case of *Reliance Energy Limited v. MSRDC*[106]

4.2.1 Model Bid Documents

The Planning Commission of India[107] has drafted Model Bid documents for infrastructure projects and guidelines for pre-qualification of bidders in PPP Projects and another set of guidelines for inviting

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be granted by private negotiation, but normally that should not be done as it shakes the public confidence. The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'. (See Ram and Shyam Company vs. State of Haryana and Others, AIR 1985 SC 1147)."

[103] AIR 1996 SC 11

[104] (2000) 8 SCC 606

[105] (2006) 10 SCC 1

[106] (2007) 8 SCC 1.

[107] The Planning Commission was set up by a Resolution of the Government of India in March 1950 in pursuance of declared objectives of the Government to promote a rapid rise in the standard of living of the people by efficient exploitation of the resources of the country, increasing production and offering opportunities to all for employment in the service of the community. The Planning Commission was charged with the responsibility of making assessment of all resources of the country,

financial proposals from pre-qualified bidders in PPP Projects. These model documents have been made applicable *"to all Ministries and Departments of the Central Government, all statutory entities under the control of Central Government and all Central Public Sector Undertakings (CPSUs)"* through an Office Memorandum issued by the Ministry of Finance. The applicability of the model bid document is through administrative directions within the Central Government.

The Government of India has adopted a two stage process of competitive bidding. The first stage being the Request for Qualification (RFQ) or Expression of Interest (EOI) with the objective of short listing eligible bidders for stage two of the process. The second and final stage is the Request for Proposal (RFP) stage in which the technical and financial proposals are obtained and the preferred bidder selected based on the evaluation of the bids received.

The Model Bid Documents indicate that the Government of India has taken a policy decision to select bidders solely on their financial offer rather than giving due weightage to their overall technical experience, financial and technical standing as well as their financial proposal.

The Model Bid Document indicate that the technical experience has been determined by the Government to be of limited relevance and only during the RFQ stage of the bid process and not thereafter. Even though the model bid document stipulates that: (i) the consortium members whose technical or financial capacity was the basis for selection of the bidder will have to hold atleast 26% of the equity of the Concessionaire until the commercial operation date of the project is achieved, (ii) any such change in consortium partners would need prior approval of the government authority and (iii) any such change in the consortium without prior approval of the government authority would be treated as a material breach, these provisions are of little consequence once the Bidding process is over and the concession agreement signed because termination of the concession agreement merely on grounds of change of technical or financial partners[108] , once the concession has been awarded will not be a feasible option in light of the costs involved in termination, re-bidding, potential litigation risks, increase in project costs due to the delays so caused. It is only if a change in partners results in a complete failure to implement the Project or achieve financial closure would termination be a viable option for the Authority.

4.2.2 Model Bid Document's Limitation on Bidder's

When the Model Bid Document was made applicable vide Office Memorandum F.No. 24(1)/PF.II/07 dated 5th December 2007, they stipulated that the number of bidders that are pre-qualified in the RFQ

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augmenting deficient resources, formulating plans for the most effective and balanced utilisation of resources and determining priorities

[108] The relevant provisions of the Model RFP Document are: **2.3 Change in Ownership:** 2.3.1 By submitting the Bid, the Bidder shall be deemed to have acknowledged that it was prequalified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Consortium Members who will own at least 26% each of the equity of the Concessionaire. The Bidder further acknowledges and undertakes that each of such Consortium Members shall continue to hold at least 26% of the equity of the Concessionaire until the Commercial Operation Date of the Project is achieved under and in accordance with the provisions of the Concession Agreement. The Bidder further acknowledges and agrees that the aforesaid obligation shall be the minimum, and shall be in addition to such other obligations as may be contained in the Concession Agreement, and a breach hereof shall, notwithstanding anything to the contrary contained in the Concession Agreement, be deemed to be a breach of the Concession Agreement and dealt with as such thereunder. For the avoidance of doubt, the provisions of this Clause 2.3.1 shall apply only when the Bidder is a Consortium.
2.3.2 By submitting the Bid, the Bidder shall also be deemed to have acknowledged and agreed that in the event of a change in control of a Consortium Member or an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, the Bidder shall inform the Authority forthwith along with all relevant particulars about the same and the Authority may, in its sole discretion, disqualify the Bidder or withdraw the LOA from the Selected Bidder, as the case may be. In the event such change in control occurs after signing of the Concession Agreement but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the Concession Agreement, be deemed to be a breach thereof, and the Concession Agreement shall be liable to be terminated without the Authority being liable in any manner whatsoever to the Concessionaire. In such an event, notwithstanding anything to the contrary contained in the Concession Agreement, the Authority shall forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time, cost and effort of the Authority, without prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise.

state should be limited to five , which could be increased to 7 to 10 bidders in the event two or three projects are being bid out under the same bid process.

The reasoning provided for imposing this limitation was that a large number of short listed bidders "could dampen participation by serious bidders, thus diluting competition because credible investors are normally less inclined to spend the time and money necessary for making a competitive PPP bid, if the zone of consideration is unduly large." It was also stated that "Since PPP projects in infrastructure provide a critical service to the users at large, the quality and reliability of service assumes greater importance. Moreover, restricting the list to the best available bidders improves the chances of a successful PPP operation."[109]

This reasoning seems to suggest that the bid documents would not be structured in a manner so as to enable the shortlisting of only duly qualified bidders and thereby there is a necessity to impose another arbitrary cut off among the bidders who have been found to be qualified pursuant to the bid document's specifications.

Clause 3.5.2 of the Model RFQ Document stipulates:

> "3.5.2 The Applicants shall then be ranked on the basis of their respective Aggregate Experience Scores and short-listed for submission of Bids. The Authority expects to short-list upto [5 (five)] pre-qualified Applicants for participation in the Bid Stage. The Authority, however, reserves the right to increase the number of shortlisted pre-qualified Applicants ("Bidders") by adding an additional Applicant."

The imposition of an arbitrary limitation of only five bidders to be selected even among the bidders who have pre-qualified after meeting the stipulated qualification criteria is not only arbitrary but also has adverse impact on competition for the concession.

Furthermore, this provision is against the Supreme Court judgments that have held that Article 19(1)(g) of the Constitution which confers a fundamental right to carry on business also incorporates the doctrine of "level playing field" as the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest and further that decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g) of the Constitution[110]. It has been clearly held by the Supreme Court that Article 14 of the Constitution, which embodies the principle of "equity" and "rule of law", applies also to matters of government policy and if the policy or any action of the Government even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. It has also been held that when tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field"[111].

This particular provision of the Model RFQ Document became, as expected, highly contentious and reportedly as many as thirty five (35) public private partnership infrastructure projects involving around Rs 50,000 crores became stuck. The worst hit was the road sector where 26 RFQs issued since January 2008 involving about Rs 27,000 crores became embroiled in controversy and litigation[112]. The Rs 1,300 crore Ennore Port Mega Container Terminal Project in which six bidders were

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[109] Para 4, Office Memorandum F.No. 24(1)/PF.II/07 dated 5th December 2007

[110] See Supreme Court decisions Reliance Energy Limited v. Maharashtra State Road Development Corporation Ltd. , (2007) 8 SCC 1; I.R. Coelho v. State of Tamil Nadu AIR 2007 SC 861

[111] See Supreme Court decision in the case of Union of India v. International Trading Company (2003) 5 SCC 437

[112] See Nazir ,Zeenath, "Projects worth Rs 50,000 cr Hit a Roadblock Called RFQ", Indian Express, July 5, 2008. http://www.indianexpress.com/news/projects-worth-rs-50-000-cr-hit-a-roadblock-called-rfq/331704/0

shortlisted in July 2008 based on the Model RFP Document, became embroiled in various lawsuits challenging the validity of the shortlisting process[113].

In light of the adverse impact of Clause 3.5.2 on development of road projects and the consequent delays that it was causing to the implementation of the National Highways Development Plan, The Minister for Road Transport and Highways, Government of India vide his letter dated 7th April, 2008 requested the Finance Minister for deletion of Clause 3.5.2.

The Ministry of Finance, vide its letter dated 22nd September, 2008 on the basis of the recommendation of the Inter- ministerial Group decided to delete Clause 3.5.2 prospectively for road projects only.

But in sixty tenders where RFQ bids had already been received, evaluated and shortlisted by NHAI, the tender process was to be taken forward on the existing model RFQ document which includes Clause 3.5.2.

Consequently, the present status of imposition of cap on the number of pre-qualified bidders as specified in Clause 3.5.2 of the Model Bid Document has been deleted prospectively, from September 2008, in respect of road projects. Most of the other ministries including ports have also submitted requests for deletion of this provision from applicability to their sector.

This has resulted in further litigation in respect of even the sixty road projects for which the competitive bid process was allowed to continue based on the original Model Bid Document providing.

Out of the various High Courts that are hearing cases against Clause 3.5.2 of the Model Bid Document, the Delhi High Court in the case of *National Highways Builders Federation v. National Highways Authority of India*[114] has delivered its judgment on Clause 3.5.2 of the Model RFQ Document.

In course of the proceedings in the said case before the Delhi High Court, the Government of India in its affidavit [115]submitted to the Court stated that the Clause 3.5.2 in the model RFQ document be done away with as it reduces competition among eligible applicants and may be disadvantageous to the Government as well. This affidavit reflected the divide within the Government of India on this issue particularly between the Ministry of Surface Transport (which is the Ministry responsible for implementing the National Highway development plan) and NHAI on one hand and the Planning Commission and Ministry of Finance (which had pushed the provision) on the other. The relevant part of the affidavit stated as follows:

> "……this Department had taken up the matter with the Ministry of Finance that any restrictions on the shortlisting of applicants would lead to the possibility of cartelization among the new select bidders, and thereby deprive other small and medium eligible bidders. Further, restrictions would reduce competition among eligible applicants and may be disadvantageous to the concerned organisation as well as the Government. It was further indicated that the process should not turn out to be detrimental to Indian players and those who have had specific experience in the Highways sector and have executed projects successfully in the recent past. It was, therefore, strongly recommended that in the interest of promoting healthy competition, transparency and to encourage small and medium bidders who have requisite experience and capacity to execute these projects, and that the clause 3.5.2 in the model RFQ document which restricts the number of bidders who could have pre-qualified may be done away with. All the bidders who meet specified technical requirements above a threshold level may be permitted to be shortlisted. As such, it was at the initiative of this Department

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[113] See Singh, Jayant "Port Development Projects Too Run Into RFQ Barrier", Indian Express, October 10, 2008, http://www.indianexpress.com/news/port-development-projects-too-run-into-rfq-barrier/371507/

[114] W.P.(C) 566/2008, Date of Decision November 3, 2008. Judgment available at http://delhicourts.nic.in/Nov08/NATIONAL%20HIGHWAYS%20BUILDERS%20FEDERATION%20VS.pdf

[115] Affidavit of the Government of India filed on 17th October 2008

> that the deletion of clause 3.5.2 was sought from the Ministry of Finance in April 2008 when the bidding process was only in its initial stage in a few projects."

The Delhi High Court has taken the view that : (i) The Government has a right to enter into a contract with a particular class of companies/entities an although a citizen/company has a fundamental right to carry on trade or business, it has no fundamental right to insist upon the Government for doing business with it and with reference to the circumstances relating to the tenders in question, the restriction of shortlisting of bidders as initially introduced by inserting Clause 3.5.2 of the RFQ document, is a reasonable one and does not violate Article 19(1)(g) of the Constitution; (ii) the decision to shortlist is based on a policy decision of the Government which is neither capricious nor arbitrary or infringes any statute or provision of the Constitution. The Court was of the view that in fact the Government's policy decision was based on a valid principle which is informed by reason and consequently, shortlisting of six bidders by introducing Clause 3.5.2 does not in any manner violate equity or fair play as long as it is done in an honest and transparent manner; (iii) Clause 3.5.2 ensures that only the most suitable firm is chosen for the project delivery; (iv) Clause 3.5.2 does not create a monopoly and/or cartel as there is no material on record to show that it would lead to cartelization or that there is an intent to exclude competition among bidders. The Court further held that in its view the Government by introducing Clause 3.5.2 has attempted to ensure that there is real competition between the best qualified firms so that world class infrastructural services can be created in India.

It is submitted that the view taken by the Delhi High Court in the abovesaid case could be overruled by the Supreme Court or deviated from by the other High Courts for the following reasons:

First, the Delhi High Court judgment did not to analyze or address the fact that the Model RFP Document fails to provide any principle in accordance with which the five/six bidders would be shortlisted from among the pre-qualified bidders. Clause 3.5.2 specifically states that among the pre-qualified bidders only five will be shortlisted. The Court has not analyzed the impact of this provision in light of the various Supreme Court judgments on fair process, level playing field and equality

Second, the Delhi High Court judgment had decided on the principle of the right of the Government to enter into contracts and that there is no fundamental right with a citizen to insist on the Government doing business with it. However neither of these issues was ever in challenge as part of the issues raised. It can be argued that the judgment of the Court is on principles which were inapplicable to the case.

Thirdly, the Delhi High Court judgment has taken the view that Clause 3.5.2 is a policy decision of the Government and amounts to an economic policy decided by the Government which cannot be substituted by the Court. This is erroneous as the manner of conduction a competitive bid process cannot be considered and protected as a "policy decision". The manner of conduction a tender process is not a policy decision but an administrative process. There are enough case laws to indicate that the manner in which a bid process is conducted by an executive authority can be reviewed by the courts of law to ensure that the various principles under constitutional law and administrative law have been complied with.

Fourthly, the Delhi High Court judgment does not analyze the impact of the provision on the selection/shortlisting process but instead makes an assumption that the provision will lead to selection of most suitably qualified bidders. It also makes an assumption that the provision will lead to competition between the bidders best qualified to implement the project, while at the same time it does not deal with the issue that there is no process for determining how the bidders are shortlisted from among the duly pre-qualified bidders who have already passed the stated tests and criteria of determining the qualified bidders.

Fifth, the Delhi High Court judgment does not give due consideration to the affidavit of the Government of India that had presented the case of the Ministry that is implementing the infrastructure projects and actually undertaking the bid process. The judgment brushes aside the affidavit by stating that the averments do not constitute an admission and then confuses the issue to be a policy issue by stating that the Government is entitled to adopt "trial and error method" with regard to economic policies. This makes the judgment open to challenge on the ground of not taking into account material facts.

Sixth, the Delhi High Court judgment upholds only the prospective deletion of Clause 3.5.2 from the RFQ Document on grounds that retrospective application of the deletion of the said provision would lead to initiation of a new tender process for such projects causing a serious setback to the development programme and would be detrimental to public interest. This would seem to indicate that an error of law or due process committed on a larger scale is excusable in light of administrative inconvenience than one related to only one project. Furthermore, it fails to evaluate how adversely public interest will be effected by having an entity vested with rights to collect tolls for about 15 to 20 years based on a process that had eliminated competition and limited to only five bidders within a set of similarly qualified bidders.

4.2.3 State Laws

Most of the state infrastructure development laws provide for an overall framework that a competitive bidding process has to undertake in relation to grant of concession for projects covered by such laws.

For example, *The Gujarat Infrastructure Development Act, 1999*, vide sections 8 and 9, establishes a detailed framework for the competitive public bidding process for selection of a developer. The process so stipulated provides, inter alia,:

(i) for issuance of public notice inviting persons to participate in competitive public bidding for the project[116];

(ii) a process for pre-qualification of bidders and stipulates that a person who fulfills the criteria laid down by the relevant government agency for the relevant project, shall be a pre-qualified bidder,

(iii) that all pre-qualified persons shall be permitted to submit their proposals to undertake the project,

(iii) that bids will be first evaluated from technical aspect and if the proposals are in order form the technical aspect, they shall be evaluated from the financial aspect, (v) that the various criteria for different types of project structures that could be used as the financial criteria in a bid process for example, s.9(3)(a) of the Gujarat Infrastructure Development Act, 1999 provides that in relation to a BOT structure any one of the following criteria could be adopted: (a) lowest bid in terms of the present value of user charges, where the period of concession is fixed, (b) the highest revenue share to the government/government agency, (c) a bid in terms of the shortest concession period, where user charges are fixed, or (d) the lowest present value of the subsidy, where the period of the concession is fixed;

(iv) that where no proposal stands the scrutiny from the technical or financial aspect, the bid process shall stand cancelled.

The Andhra Pradesh Infrastructure Development Enabling Act, 2001, and *The Bihar State Infrastructure Development Enabling Act, 2006* provide a lesser detailed framework for competitive bidding than the Gujarat Infrastructure Development Act, 1999 and allows the government agencies/local authorities to adopt either a single stage bid process or a two stage bid process, depending upon the complexity of the Project[117].

4.2.4 Potential Competition Anomalies in Bidding Process

[116] s. 9 (a) Gujarat Infrastructure Development Act, 1999 stipulates that the public notice shall be published once in a week for two consecutive weeks in at least three newspapers, two in general circulation and one in circulation in the area in which the project is to be undertaken, and may be published by any other means of mass communication

[117] See s. 19(III), A.P. Infrastructure Development Enabling Act, 2001; s. 19(III) Bihar State Infrastructure Development Enabling Act, 2006

It cannot be assumed that a competitive bid process will produce the best competitive result. The limitations of a competitive bid process lie in the fact that the criteria determined for selection of the preferred bid is critical in determining the nature of the result of the bid process. If the competitive bid process is focused only on obtaining the best price and the competitive bid process is repeated for multiple projects in a particular market, it is very likely that one or two bidders may end up being selected as the preferred bidders for all the projects in the relevant market.

It is therefore important to ensure that if a bid process is being implemented for a group of projects in the same sector, some limitations on the maximum number of projects that a particular bidder can be awarded or be a part of the bidding consortium be imposed.

The case of the Ultra Mega Power Project is the best case to illustrate this limitation of a competitive bid process.

Ultra Mega Power Project Bidding Process

Ultra Mega Power Projects (UMPPs) are very large sized power projects approximately 4000MW each involving an estimated investment of about Rs 16,000 crore. These projects will use coal based thermal power projects and use super critical technology[118]. The Government of India has brought out an Ultra Mega Power Project Policy under which it was determined that these projects would be implemented on a Build Own Operate basis and Power Finance Corporation was identified as the nodal agency to manage the bidding process for selection of the private developer. Nine such projects have been identified – five at coastal locations and four at pithead location. The five coastal locations are : Mundra (Gujarat), Krishnapatnam (AP), Tadri (Karnataka), Girye (Maharashtra), Cheyyur (Tamil Nadu). The four pithead locations are: Sasan (Madhya Pradesh), Tilaiya (Jharkhand), Sundergarh (Orissa) and Akaltara (Chhattisgarh).

Till the time of writing of this report, competitive bidding process for four UMPPs had been concluded. The Mundra UMPP has been awarded to Tata Power Limited, while all the other three UMPPs of Sasan UMPP, Krishnapatnam UMPP and Tilaiya UMPP have been awarded to Reliance Power Limited. The determining criteria for the bidding process was the lowest tariff quoted by the Bidder. Reliance Power, for the UMPPs that it has been awarded has quoted a levilised tariff of: (i) Rs. 1.77 per unit (Tilaiya); (ii) Rs 1.196 per unit (Sasan) and (iii) Rs 2.33 per unit (Krishnapatnam). It should be noted that the average tariff rate at NTPCs existing coal based thermal power plants work out to be around Rs 1.4 -1.5 per unit.

It is interesting to note that the first UMPP that was competitively bid out was Mundra UMPP went to Tata's for a levilised tariff of Rs 2.26 per unit) (being a coastal UMPP it would run on imported coal supplies). Sasan UMPP, which was bid at the same time as Mundra UMPP, was initially awarded to a consortium of Lanco and Globaleq, for its low bid of Rs 1.196 per unit. The Lanco consortium was later disqualified after the award of LOI on grounds of misrepresentation of Globeleq's willingness to be part of the consortium[119]. Reliance Power Limited was the L2 with the second lowest bid[120] and was asked to match the bid that had been submitted by the now disqualified L1, which Reliance Power did. Sasan is a pithead

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[118] Conventional coal-fired power plants, which make water boil to generate steam that activates a turbine, have efficiency of about 32%. Supercritical (SC) and ultra-supercritical (USC) power plants operate at temperatures and pressures above the critical point of water, i.e. above the temperature and pressure at which the liquid and gas phases of water coexist in equilibrium, at which point there is no difference between water gas and liquid water. This results in higher efficiencies – above 45%. Supercritical (SC) and ultra -supercritical (USC) power plants require less coal per megawatt-hour, leading to lower emissions (including carbon dioxide and mercury), higher efficiency and lower fuel costs per megawatt.

[119] Lanco had earlier outbid REL with a tariff bid of Rs.1.196 per unit but the consortium later broke after Globeleq sold its stake to Lanco and Jindal Steel and Power Ltd which was declared invalid after it was alleged that Lanco misrepresented facts during the bidding process

[120] Reliance Power had submitted a levilised tariff of Rs 1.29 per unit

project. The Krishnapatnam UMPP was the third UMPP to be bid and it was awarded to Reliance Power Limited for its bid of Rs 2.33 per unit (being a coastal UMPP it would, like Mundra run on imported coal). The bid of Reliance was marginally higher than the price at which Tata Power won Mundra (a difference of Re 0.07/- only) the first coastal UMPP and Tata Power did not submit a bid in the Krishnapatnam bidding process. The Tilaiya UMPP was the fourth UMPP to be competitively bid and was awarded to Reliance at its price bid of Rs 1.77 per unit (which is more in the NTPC range of tariff, than the Lanco tariff that it matched in the revised bidding in order to secure the Sasan Project and was higher than its original bid in Sasan which was Rs 1.29 per unit).

It should also be noted that by the time the Tiaiya bidding occurred, Reliance Power had obtained approval from the Government of India to divert coal from the dedicated coal mine allocated for the Sasan UMPP to another of its projects as well. Thereby it had established the precedent of enabling the selected developer of a UMPP to also benefit from the captive coal blocks allocated for pithead UMPPs.

4.3 Swiss Challenge Method

The Swiss Challenge method is a hybrid mechanism between the direct negotiation route and the competitive bidding route. Under the Swiss Challenge Method, the party that had first submitted the proposal for the development of the project, based on which the project was conceived and developed, is given the first right of refusal to match the highest bid received in the competitive bid process for the said project.

A Swiss challenge method can be described in the following manner. Under this method, any person/firm/association/private developer can approach the authorities with an innovative proposal for development of the Government property/land. In the event the proposal is found to be technically and financially viable, the proposal is accepted and thereafter public tenders are invited by invoking the Swiss Challenge Method. In very simple terms this means that the person who has voluntarily submitted a proposal for development of the Government property/ lands (originator of the proposal for short) would be entitled to the joint venture contract even if he is not the highest tenderer, provided the originator of the proposal agrees to raise his bid to that of the highest tenderer. In other words, under the Swiss Challenge Method, the originator of the proposal has the right of first refusal or right of first choice to match the offer given by the highest tenderer and bag the joint venture contract even though he is not the highest tenderer. If the originator of the proposal declines the option, then the contract is awarded to the highest tenderer whose bid is found to be most competitive. If the highest tenderer backs out, then the earnest money deposited by the highest tenderer is forfeited[121].

The Swiss Challenge Approach is defined in The Andhra Pradesh Infrastructure Development Enabling Act, 2001 as follows:

> **"Swiss Challenge Approach"** means when a Private Sector Participant (Original Project Proponent) submits an Unsolicited or Suo-Motu proposal and draft contract principles for undertaking a category II Project, not already initiated by the Government Agency or the Local Authority and the Government Agency or the Local Authority then invites competitive counter proposals in such manner as may be Prescribed by the Government. The proposal and

[121] The Bombay High Court in the case of *Shree Ostwal Builders Ltd*. V. *State of Maharashtra Writ Petition (LODG.) No. 2714 of 2007 (decided on 27.3.2008)* has described the Swiss Challenge Method in the following manner:

"Swiss Challenge Method, which means that the person who has voluntarily submitted a proposal for development of the Government lands (originator of the proposal for short) would be entitled to the joint venture contract even if he is not the highest tenderer, provided the originator of the proposal agrees to raise his bid to that of the highest tenderer. In other words, under the Swiss Challenge Method, the originator of the proposal has the right of first refusal or right of first choice to match the offer given by the highest tenderer and bag the joint venture contract even though he is not the highest tenderer. If the originator of the proposal declines the option, then the contract is awarded to the highest tenderer whose bid is found to be most competitive. If the highest tenderer backs out, then the earnest money deposited by the highest tenderer is forfeited."

> contract principles of the Original Project Proponent would be made available to any interested applicants; however, proprietary information contained in the original proposal shall remain confidential and will not be disclosed. The applicants then will have an opportunity to better the Original Project Proponent's proposal. If the Government finds one of the competing counter proposals more attractive, then the Original Project Proponent will be given the opportunity to match the competing counter proposal and win the Project. In case the Original Project Proponent is not able to match the more attractive and competing counter proposal, the Project is awarded to the Private Sector Participant, submitting the more attractive competing counter proposal[122].

However, this method has been struck down by the Bombay High Court in the of case of *Shree Ostwal Builders Ltd. v. State of Maharashtra*[123], where a division bench of the High Court of Mumbai held that "… granting preferential treatment to the[original project proponent] merely because he has approached the Minister [Government Authority] would be opposed to rule of law. It cannot be said that the persons approaching the governmental authorities form a distinct class so as to avail preferential treatment'. Furthermore the Court held that the in granting of the preferential treatment to the original project proponent is nether in public interest nor fair or reasonable and it cannot be sustained. In fact, the Court also held that "…for development of the Government lands by invoking the Swiss Challenge Method, with a view to confer preferential treatment to the respondent No.7 [original project proponent] was wholly unfair, unreasonable, arbitrary, illegal and contrary to law."

Even though this decision has been delivered by the Bombay High Court, presently, unless other conflicting High Court judgments or a Supreme Court decision comes up , the Swiss Challenge Method is open to a challenge on the grounds of reasonableness, arbitrariness and public interests.

4.4 Scope of Intervention by Competition Commission

The process of grant of concessions has become one of the more contentious issues in Indian commercial laws. There are a catena of cases that clearly demarcate the boundaries of judicial review of exercise of the State's contractual powers. However, as discussed earlier in this paper, the powers of the Competition Commission would not be limited to only judicial review as it is not in the position of court but instead is a statutory agency created with the specific special purpose of eliminating practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants and for that purposes has been vested with the powers of undertaking inquiries[124], calling for evidence, books and records, receiving evidence, requisitioning public records, issuing commissions for the examination of witnesses[125].

However, the following judicial pronouncements would have a bearing on the review of process of grant of concessions.

In *Tata Cellular v. Union*[126] of India the Supreme Court laid out the broad parameters for judicial review of competitive bid processes holding that judicial review is concerned not with the decision,

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[122] S. 2(ss) A.P. Infrastructure Development Enabling Act, 2001

[123] *Writ Petition (LODG.) No. 2714 of 2007 (decided on 27.3.2008)*

[124] S. 19. S.20, s.26, s.29 of the Competition Act, 2002

[125] S. 36, s. 43, s. 43A, s. 44, s.45 of the Competition Act, 2002

[126] AIR 1996 SC 11. The Supreme Court in Tata Cellular case stated: "It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary

but with the decision making process. The specific principles relating to judicial review of competitive bid process specified by the Court were:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does no sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible[127].

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) hut must be free arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

In *Union of India v. International Trading Company*[128] The Supreme Court held that Article 14 of the Constitution applies also to matters of government policy and if the policy of any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be

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power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down… Judicial Review is concerned, not with the decision, but with the decision-making process…The duty of the court is to confine itself to the question of legality. Its concern should be: 1. Whether a decision-making authority exceeded its powers?; 2. committed an error of law; 3. committed a breach of the rules of natural justice; 4. reached a decision which no reasonable tribunal would have reached or , 5. abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case, shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under : (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.(ii) Irrationality, namely, Wednesbury unreasonableness, (iii) Procedural impropriety."

[127] Also see *Sterling Computers limited v. M & N Publications Limited* MANU/SC/0439/1993 this Court observed thus :

...In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contact be awarded and at what terms. It the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

[128] (2003) 5 SCC 437

unconstitutional. A change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria[129].

In *Reliance Energy Limited v. Maharashtra State Road Development Corporation Limited*[130] the Supreme Court has held that: (i) The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. The said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest ; (ii) when tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field"; (iii) Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional; (iv) Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. Article 21 refers to "right to life" and it includes "opportunity".

In *Reliance Airport Developers Pvt. Ltd. v. Airports Authority of India*[131] it was held:

(i) even though the tender documents may give the government authority the discretion to modify norms. The word "discretion' standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care: therefore, where the Legislature concedes discretion it also imposes a heavy responsibility;

(ii) The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously;

(iii) Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary;

[129] The Supreme Court has stated: "..Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. … While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness

[130] (2007) 8 SCC 1

[131] (2006) 10 SCC 1

(iv) While exercising power of judicial review courts should not proceed where if two views are possible and one view has been taken. In such a case, in the absence of mala fide taking one of the views cannot be a ground for judicial review

CHAPTER 5. IMPLEMENTATION OF CONCESSION AGREEMENTS: COMPETITION ISSUES

The manner in which the Concession Agreement is implemented can result in competition issues that can include abuse of dominant position, creation of combinations and entering into anti competitive agreements on the basis of the rights vested under the concession agreement.

In order to ensure due monitoring of the implementation of the Concession Agreement and prevent any abuse of the rights vested with the concessionaire during its implementation, generally Concession Agreements, depending on the size and nature of the Project, provide the following:

(i) Independent Engineer: An independent engineer is provided to undertake due monitoring and inspection of construction of the project facilities and thereafter their maintenance;

(ii) Independent Auditor: An independent auditor is provided to undertake the auditing of the accounts of the concessionaire in order to certify the revenue generated by the Project and the various expenses being incurred by the Concessionaire;

(iii) Reporting Requirements: The Concessionaire is imposed with the obligation to maintain specified project related accounts and submit regular reports to the government authority on various aspects of the Project

(iv) Project Implementation Committee: In some projects, depending on its particular nature and scope, the Concession Agreement may provide for the constitution of a committee comprising of members from the government authority, state/central government and the concessionaire that would meet at regular intervals to review the various aspects of the project and any issues that may have arisen and brought to its specific attention

Further, in most sectors such as highways, ports, electricity, telecommunications, a concessionaire would be working within a regulatory framework monitored by a sector specific regulator.

The Competition Commission of India, when looking into possible violations of competition laws by a concessionaire should call for and review the reports and findings of each of the possible review, inspection and regulatory mechanisms that are provided in the relevant concession agreement.

Some of the potential issues that could need to be reviewed by the Competition Commission in relation to implementation of Concession Agreement include the following:

5.1 Implementation of Exclusivity Provisions

In addition to having the power to ascertain the validity of exclusivity rights granted under a concession agreement in relation to a particular project (as discussed in section 2.2 above), the Competition Commission can monitor the implementation of the exclusivity provisions in order to ensure that the exclusivity rights are exercised only with the specific framework stipulated in the concession agreement.

For example: Under the NHAI Concession Agreement for the Delhi-Gurgaon Expressway Project, the NHAI Concession Agreement the exclusivity is linked to the achievement of a traffic volume of 1,70,000 PCUs per day (for a continuous period of 180 days). The provision does not stipulate the manner in which the volume of traffic would be monitored to enable verification of the achievement of volume of traffic. It is a well acknowledged fact that from the day of its commencement of commercial operations, the amount of traffic on the first day itself was equivalent to the amount that was projected at the end of the fifth year of operations. Added to it has been noticed by users that at certain points of time the toll booths are opened and traffic is allowed to pass without- being tolled. At the same time there is a need for further road linkages between Delhi and Gurgaon which may be objected to by the Concessionaire in light of the exclusivity provision. In the event there is a dispute regarding the implementation of a competing road linkage between Delhi and Gurgaon and the exclusivity provision of the Delhi-Gurgaon Expressway Concession Agreement, instead of going into a court litigation, aggrieved parties will be able to complain to the Competition Commission for appropriate orders in relation to the continued validity of the exclusivity provision, its scope or the determination of the achievement of the traffic volume trigger.

5.2 Whether Rights are being exercised in a manner so as to result in Abuse of Dominance

The Competition Commission would have the authority to investigate whether the concessionaire is exercising its rights or implementing the concession in a manner that is resulting in an abuse of dominance or in a manner that is resulting in a material adverse effect on the competition in a relevant market or any other violation of competition law. The framework governing interaction with sector regulators is discussed in Chapter 3 to this report.

Potential circumstances that would be an abuse of dominance by a concessionaire, but not related to tariff issues specifically, could include the following:

(i) a concessionaire having a concession to undertake city gas distribution bundles the provision of domestic gas supply with cable television services of a particular cable service provider or with the provision of telecom services by a particular telecom service provider;

(ii) a national highway concessionaire prevents development of an exit or link road needed to access a particular industrial area directly at the required feasible access point with the national highway but instead insists on allowing an exit point or link road access for the industrial area only at such point so as to ensure that all traffic bound for that area would necessarily have to cross its toll point, pay the toll and then be able to access the particular industrial area;

(iii) a concessionaire for an airport prevents airlines from developing their own ground handling services for their airplanes and instead mandates that all ground handling services be undertaken only through a contractor selected by it and on charges determined by it

(iv) a concessionaire for an airport prevents buses and taxis of other operators from operating near the airport and instead requires passengers to use only the bus or taxi services operated by it or a person authorized by it. This can be done by simply not allocating kiosks for such other taxi or bus service providers within the terminal facility so as to ensure that the only convenient option to the passengers is that of taking the taxi or bus services operated by the concessionaire or contractor authorized by the concessionaire.

(v) An electricity distribution licensee bundles the electricity supply services with provision of inverters/battery back up from a particular supplier, or with telecom services provided by only a particular operator.

(vi) An electricity distribution licensee, instead of manifestly bundling its electricity supply services with a particular telecom service provider, may refuse sharing the right of way occupied by it in order to access the end consumer for telecom service providers other than the telecom service provider with which it has an arrangement, thereby effectively preventing other telecom service providers from accessing a particular market.

CHAPTER 6. RENEGOTIATION OF CONCESSION AGREEMENTS: COMPETITION ISSUES

6.1 Reality of Renegotiations in Infrastructure Projects

It should be recognized that the requirement investment in infrastructure projects are often highly specific sunk costs – that is costs that cannot easily be recouped if the economic atmosphere deteriorates or if the operator discontinues operations and that the end product resulting from such costs cannot be used for any other activity. This aspect of infrastructure projects really increases the political and litigation risks associated with such investment. It is a typical scenario for a privately developed infrastructure facility to be faced with refusal of the government entity to honour tariff commitments or unilaterally insist on renegotiation of the existing concession under which the investment was undertaken with accompanying suspension of the existing concession or unilaterally terminate the existing concession agreement.

It should also be recognized that an infrastructure project, by its very nature, provides a critical and often irreplaceable service to the relevant area or market within which it is operating. This aspect of infrastructure projects can allow private entities to exert immense pressure on a government agency and seek to renegotiate various aspects of the concession agreement, that it could not have otherwise sought to deviate from at the sate of the grant of the concession. This is particularly so in situations where concession agreements are sought to be awarded through competitive bidding.

It should also be recognized that in light of the high debt requirements of infrastructure projects, lenders to the project – which are not signatories to the concession agreement have a critical role and interest in the project and project assets. The usual debt to equity ratio of infrastructure projects is 70: 30 with 70% of the project cost being financed by debt and 30% of the project cost being financed by equity investments. It is not unusual for large infrastructure projects to have a higher debt to equity ratio which at times could even be 90:10. Since the lenders are not party to the concession agreement – it is usual for a "Direct Agreement" or a "Step In Rights Agreement" or a "Substitution Agreement" to be entered into between the lenders, the government authority granting the concession and the concessionaire in order to provide a framework within which the lender's rights in relation to the project are recognized and can be enforced. Generally under the terms of the Direct Agreement/Substitution Agreement: (i) any amendment to or early termination of the concession agreement would, pursuant to the terms of the Direct Agreement, require the prior approval of the lenders and (ii) in the event a notice of termination is issued by NHAI, the Lenders will have the right to substitute the defaulting concessionaire with another entity ("selectee"). The Lenders are vested with the right to identify the selectee either through private negotiations or through a competitive bidding route and submit the agreed proposal submitted by the Selectee to NHAI for its approval. If NHAI approves the terms and conditions of the proposal submitted by the selectee, then NHAI shall either amend the existing concession agreement or enter into a new concession agreement with the identified selectee in order to make the selectee the new concessionaire.

At the same time it should also be recognized that because of the size, scope and long term nature of infrastructure projects, it is more likely that an infrastructure project would be significantly undermined by events and occurrences outside the control of either the government authority or the private entity. For example in light of high debt financing requirements of infrastructure projects, any external or internal economic changes could adversely impact the continued viability of the project under the framework that may be existing at a particular period of time.

In light of the above discussion the potential triggers for renegotiation of concession agreements, under the Indian framework are: (i) Government Initiated; (ii) Concessionaire initiated, (iii) Force Majeure and (iv) by the lenders, in the event of the issuance of a notice of termination. It should be noted that in each of these circumstances, the renegotiated concession agreement would require the consent of the lenders.

A detailed concession agreement would usually provide an overall framework within which renegotiation of the terms of the concession agreement can occur in certain specified circumstances.

Renegotiation Provisions Under Model NHAI Concession

The model NHAI Concession Agreement, provides for renegotiation of the Agreement under the following circumstances: (i) Force Majeure scenarios; (ii) Change in Law scenario and (iii) By Lenders exercising Substitution Rights upon issuance of Notice of Termination.

The NHAI Model Concession Agreement has a detailed provision governing "Change in Law"[132] which stipulates that if as a result of Change in Law, the Concessionaire suffers an increase in cost or reduction in net after tax return or other financial burden, the aggregate effect of which exceeds Rs 10 million in any accounting year, then the Concessionaire may notify NHAI and purpose amendments to the Concession Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law[133].

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[132] "Change in Law" is defined in the NHAI Model Concession Agreement as follows:

"Change in Law" means the occurrence of any of the following after the date of this Agreement: (i) the enactment of any new Indian law; ii) the repeal, modification or re-enactment of any existing Indian law; (iii). the commencement of any Indian law which has not entered into effect until the date of this Agreement; (iv) a change in the interpretation or application of any Indian law by a court of record as compared to such interpretation or application by a court of record prior to the date of this Agreement; or (v) any change in the rates of any of the Taxes.

[133] **XXXVI.CHANGE IN LAW**

36.1 If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after tax return or other financial burden, the aggregate financial effect of which exceeds Rs.10 million (Rupees ten million) in any Accounting Year, the Concessionaire may notify NHAI and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid.

Upon notification by the Concessionaire as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days and either agree on amendments to this Agreement or on alternative arrangements to implement the foregoing.

Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 36.1, the Concessionaire may by notice in writing require NHAI to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been so such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the Statutory Auditors of the Concessionaire. NHAI shall make payment of such compensation within 15 (fifteen) days of receiving such notice or with interest @ SBI PLR if the payment thereof is delayed beyond such 15 (fifteen) days. If NHAI shall dispute the quantum of such compensation claim of the Concessionaire, the same shall be finally settled in accordance with the Dispute Resolution Procedure.

36.2 If as a result of Change in Law, the Concessionaire enjoys a reduction in costs or increase in net after tax return or other financial benefit, the aggregate financial effect of which exceeds Rs.10 million (Rupees ten million) in any Accounting Year, NHAI may so notify the Concessionaire and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Upon notification by the NHAI as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days and either agree on such amendments to this Agreement or on alternative arrangements to implement the foregoing.

If as a result of the Change in Law, the Concessionaire enjoys a reduction in cost or increase in net after tax return or other financial benefit, the aggregate financial effect of which exceeds Rs 10 million in an Accounting Year, then NHAI may so notify the Concessionaire and notify to it proposed amendments that would put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law.

The provision provides a time frame of ninety days within which the parties should agree to the amendments, failing which: (i) in the event the circumstances that have led to the claim have resulted in additional costs above Rs 10 million, the Concessionaire can submit a claim for compensation for an amount that would put the Concessionaire "in the same financial position it would have occupied had there been no such Change in Law". NHAI has an obligation to make the required payment within 15 days or raise a dispute on the quantum of such compensation, which dispute would be settled in accordance with the dispute settlement procedure specified in the Concession Agreement and (ii) in the event the circumstances that have led to the claim have resulted in additional returns/financial benefits above Rs 10 million, NHAI can submit a claim for payment for an amount that would put the Concessionaire "in the same financial position it would have occupied had there been no such Change in Law". The Concessionaire has an obligation to make the required payment within 15 days or raise a dispute on the quantum of such compensation, which dispute would be settled in accordance with the dispute settlement procedure specified in the Concession Agreement.

The Model NHAI Concession Agreement classifies "Force Majeure Events" into three categories: (i) Non Political Force Majeure Event[134], (ii) Indirect Political Force Majeure Event[135] and (iii) Political Force Majeure Events[136]. The NHAI Model

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Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 36.2, NHAI may by notice in writing require the Concessionaire to pay an amount that would put the Jaipur-Kishangarh Section Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the NHAI Representative. The Concessionaire shall make such payment within 15 (fifteen) days of receiving such notice or with interest @ SBI PLR if the payment is delayed beyond such 15 (fifteen) days. If the Concessionaire shall dispute such claim of NHAI, the same shall be finally settled in accordance with the Dispute Resolution Procedure.

36.3 Notwithstanding anything to the contrary contained in this Agreement, NHAI shall not be liable to reimburse to the Concessionaire any sums on account of any Change in Taxes if the same are recoverable from the users of the Project Highway or if the aggregate financial effect of such changes in any Accounting Year is less than or equal to Rs.10 million (Rupees ten million).

[134] "Non Political Force Majeure" Event are defined : 29.2 Non Political Force Majeure Events: For purposes of Clause 29.1 Non-Political Events shall mean one or more of the following acts or events: (i) acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, exceptionally adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption or fire (to the extent originating from a source external to the Site or beyond design specifications for the Construction Works) or landslide; (ii) radioactive contamination or ionizing radiation; (iii) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/ representatives or attributable to any act or omission of any of them) interrupting supplies and services to the Project Highway for a period exceeding a continuous period of 7 (seven) days in an Accounting Year, and not being an Indirect Indian Political Event set forth in Clause 29.3 hereof; (iv) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; (v) Any judgement or order of any court of competent jurisdiction or statutory authority in India made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or enforcement of this Agreement or exercise of any of its rights under this Agreement by NHAI; or (vi) Any event or circumstance of a nature analogous to any of the foregoing.

[135] 29.3 Indirect Political Force Majeure Events: For purposes of Clause 29.1, Indirect Political Event shall mean one or more of the following acts or events: (i) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage which prevents collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year; (ii) industry wide or state wide or India wide strikes or industrial action which prevent collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year; or (iii) any public agitation

Concession Agreement governs force majeure events as follows: (i) it allows a party that is rendered wholly or partially unable to perform its obligations under the Agreement because of a Force Majeure Event, to be excused from performance of such of its obligations to the extent it is unable to perform the same on account of such Force Majeure Event [137]; (ii) If the Force Majeure Event has occurred before Financial Close then the Model NHAI Concession Agreement stipulates[138] that (a) the Concession Agreement cannot be terminated otherwise than in accordance with Clause 29.8 of the Concession Agreement; (b) the date for achieving Financial Close is extended by the period for which Force Majeure subsists and (c) and each Party is required to bear its own costs arising out of such Force Majeure Event; (iii) if the Force Majeure Event has occurred after Financial Close then the Model NHAI Concession Agreement stipulates that (a) the Concession Agreement cannot be terminated otherwise than in accordance with Clause 29.8 of the Concession Agreement; (b) the dates stipulated in the Concession Agreement for Project Completion, various milestones and the Concession Period shall be extended by the period of time for which the such Force Majeure subsists; (c) if collection of Fee is suspended due to the Force Majeure Event, then the Concession Period shall be extended by the period for which collection of Fees remained suspended on account of such Force Majeure and (d) costs arising out of or in concerning such Force Majeure are allocated as follows: (x) in case of Non Political Force Majeure Event, each Party bears its own respective cost; (y) in case of Indirect Political Force Majeure Event, the costs attributable to such events and directly relating to the Project shall be borne by the Concessionaire to the extent of the Insurance Claims and to the extent such costs exceed the insurance claims, then NHAI will reimburse half (50%) of the amount by which such costs exceed the insurance claims either in one lump sum payment or three equal annual installments with interest at the rate of SBI PLR plus 2%; and (z) in case of a Political Force Majeure Event, the costs attributable to such events and directly relating to the Project shall be reimbursed by NHAI to the Concessionaire in one lump sum payment or three equal annual installments with interest at the rate of SBI PLR plus 2%, but no such costs would be payable in the event of a Political Force Majeure Event, if the Concession Period is extended for the period of time for which such Force Majeure Event had subsisted. The termination of the Concession Agreement because of occurrence of a Force Majeure event is governed by a separate specific clause, Clause 29.9, and not the generally applicable termination provision. However, termination on account of Force Majeure Event is also governed by the Lender's rights under the Substitution Agreement.

The Model NHAI Concession Agreement recognizes that the Senior Lenders may exercise the rights of step-in or substitution as provided in the Substitution Agreement to be entered into among the Concessionaire[139]. The modalities of the exercise of the step-in/substitution right is detailed in the Substitution Agreement. The Substitution Agreement entered into between the Lenders, acting through their duly appointed agent, NHAI and the Concessionaire vests the Lenders with the right to select a

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which prevents collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year.

[136] 29.4 Political Force Majeure Events: For purposes of Clause 29.1, Political Event shall mean one or more of the following acts or events by or on account GOI, NHAI, GOR or any other Governmental Agency: (i) Change in Law, only when provisions of Article XXXVI cannot be applied; (ii) expropriation or compulsory acquisition by any Governmental Agency of any Project Assets or rights of the Concessionaire or of the Contractors; or (iii) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is Condition Precedent) provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits

[137] See Clause 29.13

[138] See Clause 29.5

[139] See Clause 35.4 of Model NHAI Concession Agreement

substitute entity either through private negotiations or public auction or process of tender. The Lenders then submit the proposal finalized with the selected entity and submit the same to NHAI for its approval. The Lenders are given a period of 120 days to compete the process of identification of the entity that would substitute the Concessionaire. The submitted proposal is required to provide the amendments that would be needed to reflect the proposal. The NHAI, subject to the entity selected by the lenders meeting the basic eligibility criteria and the entity obtaining any requisite Indian government approvals, shall proceed to substitute the Concessionaire by amendment or such other document as NHAI may reasonably require. NHAI can raise only reasoned objections to appointment of the entity selected by the Lenders and only after hearing the Lender's agent in that regard. IN the event of any objection being raised by NHAI, the Lenders can propose another entity to substitute the Concessionaire. If NHAI does not raise any objection to the entity that has been identified by the Lenders, within a period of 60 days from the date of submission of the proposal by the Lenders, then it shall be deemed to have accepted the entity and NHAI is required to appoint the entity as the new concessionaire within a period of 15 days thereafter.

The Commonwealth Games Village 2010, New Delhi

The Commonwealth Games Village 2010, is a landmark integrated residential project in Delhi, spread over 27 acres adjacent to the world-renowned Akshardham Temple. The project involves development of 1168 apartments spread across 34 towers, with almost four million square feet of constructed area. These apartments range from 2 to 5 bedroom units (ranging from 1400 sq ft to 3,500 sq ft), and will be used initially to house athletes and officials during the Commonwealth Games 2010. The apartments will have superior finishes, design and infrastructure like fine quality marble and wooden flooring, VRF-based technology for air-conditioning, world class sanitary fixtures and fittings, use of energy efficient material in construction, solar heated water and solar powered common area lighting, spacious living areas with balconies, dedicated utility room and balcony to keep service areas separated from the living areas. The Games Village complex will be an integrated community with facilities like state of the art security system, wi-fi / DTH enabled, 100% power back up and treated water supply. Additionally, they will have two level car parking and services in the basements, with minimal surface movement for vehicles. The entire surface area at the ground level will be landscaped greens, with gardens, walkways, and self contained leisure and recreational facilities[140]. The apartments shall be handed over to the buyers after the Games. Strategically located, the Commonwealth Games Village is minutes away from the Central Business District of Connaught Place.

A competitive bidding was undertaken by The Delhi Development Authority ("DDA") in 2007 and Emaar MGF was awarded the Project as it was the lone qualifying bid from among 11 builders that has been pre-qualified[141]. The Emaar MGF price bid was of Rs 321 crores against a reserve price of Rs. 300 crores (i.e. Emaar MGF offered to pay DDA upfront an amount of Rs 321 crores in consideration of being awarded the agreement to develop the Commonwealth Games Village)[142].

In 2009 due to the economic recession and the real estate downturn in India Emaar MGF's financial position was adversely effected and its ability to complete the

[140] http://emaarmgf.com/CGV/CWGV_Brochure.pdf

[141] http://www.delhicapital.com/commonwealth-games-2010/news/games-village-gets-going-as-dda-clears-lone-bid.html

[142] http://www.indianrealtynews.com/real-estate-india/emmar-mgf-wins-bid-for-commonwealth-games-village-project.html dated July 4, 2007

Commonwealth Games Village became questionable as the expected upfront sale of the flats comprising the Commonwealth Games Village did not occur and it resulted in cash flow shortage for the implementation of the Project. Of the total of 1,168 flats comprising the Commonwealth Village Emaar MGF was to originally sell 768 flats at market rates and the remaining 400 flats were to be sold by DDA at lower prices. However when bookings for the flats opened in 2008, and by 2009 Emaar MGF was able to sell only 260 of its 768 flats.

In 2009 Emaar MGF requested DDA for a Rs 1000 crore loan to enable it to raise the finances for completing the construction of the Commonwealth Games Village in time for the Commonwealth Games 2010. DDA made an ad hoc payment of Rs 100 crores to enable the work to continue at the Project Site initially as a loan. DDA, on May 10, 2009 decided to purchase 333 flats from Emaar MGF for around Rs 700 crores (at Rs 11,000/- per sq. ft. claiming that this was a discount from the rate of Rs 12,500/- per sq. ft. that was being charged by Emaar MGF from other buyers)[143]. The initial Rs 100 crore that had been given was to be adjusted against the price of the flats that DDA was acquiring.

The original agreement that was provided as part of the bid terms and entered into between DDA and Emaar MGF did not provide for any financial assistance from DDA for enabling construction of the Project. The contract provide for penalties and indemnification obligations on part of the private developer in the event of default in completing the Project in time. The obligation to secure and raise finances was that of the private developer.

The issues that arise in relation to this renegotiation of the Commonwealth Games 2010 contract between Emaar MGF and DDA include: (i) Why was there no penalties or additional financial obligations imposed on Emaar MGF?, (ii) Even assuming that in light of the importance of the Project to ensure its completion on time, why was no deferred financial implications imposed on Emaar MGF for its default in discharging its ability to raise financing for the Project? Why was no revenue share for DDA introduced for providing the financial assistance to Emaar MGF?; (iii) on what basis was the price of Rs 12, 500/- per sq. ft. treated as the prevailing market price and DDA then given a discount thereon and finally settled the price at Rs 11,000/- per sq. ft. thereby still enabling Emaar MGF to break even. Why was a defaulting contractor allowed to break even?; (iv) the four member committee appointed by DDA had recommended that the flats be valued in the range of Rs 8,000 – Rs 9,000 per sq. ft. as against Rs 13,800 per sq. ft. being asked for by Emaar MGF[144]. Why was the recommendation of the standing committee not adopted and a higher price agreed to?; (v) why was Emaar MGF's performance bank guarantees not invoked? Why was it not pressurized to sell other assets/land bank to fund the project?

The commercial effect of this renegotiation of the Commonwealth Games Village 2010 contract is that Emaar MGF by making a bid for an amount of Rs 321 crores (the exact extent of which has been paid till date is not in public domain) after being the sole eligible financial bidder in the bid process has, without suffering any penalties or damages or being made to sell assets to fund the implementation of the Project, received monies (without requiring to pay any interest thereon) from DDA of Rs 700 crores, and at the same time has managed to maintain a base price of the flats at Rs 11,000 per sq. ft.. Emaar MGF will still retain its original allocation of 768 flats (of which it had sold 260 flats) and after the sale of 333 flats to DDA will still retain 175 flats to sell in better market conditions. Effectively, under this renegotiation of the original contract, there is no real detriment or setback to the private developer for failing to discharge its obligations to ensure financing for the Project.

[143] http://www.livemint.com/2009/05/11232133/DDA-to-buy-333-flats-in-Games.html

[144] http://www.mydigitalfc.com/real-estate/dda-buy-333-units-games-village-rs-700-crore-850

The competitive impact of the renegotiation is that a completely new project with more favourable commercial conditions has been provided to Emaar MGF without any review or scrutiny of options to replace a defaulting contractor with another entity that could implement the same on better terms for DDA.

The role of the Competition Commission of India in relation to renegotiation of concession agreements would be limited to determining whether the renegotiation process or the renegotiated terms in any way violate the competition law. However, it can be argued that in light of in light of the provision of s. 18 of the Competition Act which imposes a duty on the Competition Commission to "protect the interests of consumers", The Competition Commission of India could, on basis of complaint from consumers, look into the renegotiated concession agreement. This is discussed in greater detail in Chapter 3.

6.2 Potential Violations of Competition Law in Renegotiation of Concession Agreements.

The potential violations of competition law in a renegotiation scenario could be as follows:

(i) *Clause Specific Renegotiation:* This would involve renegotiation on certain specific clauses which have clear competition law implications such as exclusivity provisions or extend the time frame for exclusivity provisions, extension of the term of the concession agreement, providing special support to compensate the project against competing facilities

(ii) *Overall Restructuring of Concession Agreement:* This would involve restructuring of the entire or majority or the most material provisions of the Concession Agreement in a manner so as to create either a materially new and more favourable framework, than what had been available to bidders and potentially interested parties at the time the project was awarded through a competitive bidding process.

It should be noted, however, that unless there is a major competition impact, or where the renegotiation has been undertaken without any justifiable triggers, the ability of the Competition Commission to review and order revisions to a renegotiated framework would be very limited. This is because usually renegotiation would be carried out or triggered under the framework of some materially justifiable circumstances such as an economic crises, occurrence of a force majeure event etc., which would justify the renegotiated provisions/agreement. In order to support the Competition Commission in the discharge of its statutory functions and also to protect the renegotiated provisions/agreement from being unduly questioned, it is advisable for the parties to maintain: (i) a clear causal trail and paperwork relating to the need/trigger for the renegotiations, (ii) data supporting the extent of renegotiation undertaken and (iii) the potential or intended impact of the renegotiated provisions on the project. Mitigating factors such as sunk investment of the concessionaire as well as the government's in the project and danger of debt funding to a project being declared a non-performing asset would also be useful in justification of renegotiation as these are factors that the Competition Commission would have to take into consideration in its inquiry into such renegotiated terms and conditions.

Renegotiations or provision of additional rights relating to a concession agreement: (i) without any immediate justifying/mitigating circumstances or (ii) without there having been any capital investment or debt financing that requires restructuring or (iii) without any major or discernable progress having been made in the implementation of project or (iv) such renegotiation being undertaken within a short period of time from the conclusion of a competitive bidding process that had been undertaken on materially different terms and conditions would be factors that could go against such renegotiated terms in the event of their review by the Competition Commission of India.

CHAPTER 7. COMPETITION COMMISSION OF INDIA & SECTOR SPECIFIC REGULATORS

7.1 The Competition Commission of India: Duties & Powers

The Competition Commission of India is a special expert body vested with fact finding powers that has been constituted under the Competition Act, 2002 for the specific purposes of: (i) preventing practices having adverse effect on competition, (ii) promote and sustain competition, (iii) protect interests of consumers[145] .

S. 18 of the Competition Act, 2002 stipulates that it shall be the duty of the Competition Commission to, in markets in India: (i) eliminate practices having adverse effect on competition, (ii) promote and sustain competition, (iii) protect the interests of consumers and (iv) ensure freedom of trade carried on by participants.

The Competition Commission has been vested with the powers to: undertake inquiries[146], summon and enforce the attendance of any person and examine him under oath[147]; require the discovery and production of documents[148], receive evidence on affidavit[149], issue commissions for the examination of witnesses or documents[150], requisition any public record or document (subject to the Evidence Act)[151]; call upon such experts from the field of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it[152]; direct any person[153], issue interim order[154], issue final orders[155], impose penalty[156] and has the power to regulate its own procedure[157].

The powers and duties of the Competition Commission are not limited to any specific sectors but cover all markets in India. The Competition Act, 2002 defines "relevant market"[158] to mean

[145] The Preamble, The Competition Act, 2002 states that "it is an act to provide for the establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India." The statement of objects and reasons of the Competition Act, 2002 indicates that the Monopolies and Restrictive Trade Practices Act, 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the country's focus from curbing the monopolies to promoting competition.

[146] See s.19, 20, 26, 29 of Competition Act, 2002

[147] See s. 36(2)(a) of Competition Act, 2002

[148] See s. 36(2)(b) of Competition Act, 2002

[149] See s. 36(2)(c) of Competition Act, 2002

[150] See s. 36(2)(d) of Competition Act, 2002

[151] See s. 36(2)(e) of Competition Act, 2002

[152] See s. 36(3) of Competition Act, 2002

[153] See s. 36(4) of Competition Act, 2002

[154] See s. 33 of Competition Act, 2002

[155] See s. 27,s. 28, s. 31, s.32, s. 38, s.39 of Competition Act, 2002

[156] See Chapter VI (s. 42 – 48) of Competition Act, 2002

[157] See s.36 of Competition Act, 2002

[158] See s. 2(r) of Competition Act, 2002

"the market which may be determined by the Commission with reference to the relevant product market[159] or the relevant geographical market[160] or with reference to both the markets." s. 32 of the Competition Act, 2002 stipulates that notwithstanding the fact that an agreement has been entered into outside India or a party to the agreement is outside India or an enterprise abusing dominant position is outside India or a combination has occurred outside India or a party to a combination may be located outside of India, or any other matter or practice or action arising out of an agreement or dominant position or combination is outside India, if it is or has or is likely to have *an appreciable adverse effect on competition in the relevant market in India,* then the Competition Commission has the authority to pass such orders as it deems fit.

It is therefore clear that the Competition Commission of India is not a body created for a specific sector, but is instead the special national level expert body that has been created to monitor and regulate competition across all markets in India and protect the interests of consumers in India.

7.2 Sector Specific Regulatory Agencies & Competition Commission of India

There are various laws that have been enacted to regulate specific sectors and which have provided for the creation of sector specific regulatory bodies. Many of these laws vest the relevant regulatory authority with the function of promoting competition in the relevant sector and protecting the interests of consumers. One of the main issues that will arise as the Competition Commission commences its functioning is that of jurisdiction of the Competition Commission over particular sectors where sector specific regulators have already been created and the extent of such jurisdiction, if any.

In relation to any potential conflict in jurisdiction between Competition Commission of India and any sector specific regulator in relation to competition issues the following would have to be noted: (i) Generally the laws creating sector specific regulators would not have any detailed legal framework governing competition issues. The sector specific laws may use terms such as "abuse of dominance", "competition", "combination" etc, but they would not have the specific framework that would enable a sector specific regulator to determine whether or not there has been violation of competition principles; (ii) generally the laws creating sector specific regulators would not have provisions empowering such regulators to issue orders that are needed to resolve competition issues such as orders mandating breaking up of a combination or orders directing transfer or property from one entity to another. Generally sector specific laws tend to create tariff determination mechanism and a framework for enabling interested entities to obtain the required license to commence undertaking the relevant activity; (iii) generally sector specific regulator's jurisdiction may be limited either territorially or with respect to nature of the projects and would not generally cover the entire relevant market in India, as the Competition Commission can. Therefore, in relation to competition issues, the Competition Commission would generally be the special specific law.

The general principles of interpretation of statutes that would be applicable in order to resolve any potential conflicts between sector specific regulators and the Competition Commission of India are based on the principle of harmonious construction which stipulates that in case of conflict between two provisions or two statutes, an attempt should first be made to harmonize the two. A familiar approach in such cases is to find out which of the two apparently conflicting provisions or statutes is more general and which is more specific and to construe the more general one as to exclude the more specific. This has to be determined with reference to the area and extent of their application either generally or specially in particular situations. The principle is expressed by the maxims

[159] "relevant product market" is defined in s. 2(t) of Competition Act, 2002 to mean "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 uses."

[160] "relevant geographical market" is defined in s.2(s) of Competition Act, 2002 to mean "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 neighboring areas."

Generalia specialibus non derogant (i.e. General things do not derogate from special things) and *Generalibus specialia derogant* (i.e. special things derogate from general things). A special law will prevail over the general one notwithstanding that the general one is later in time[161]. The same test is applied in the event two laws dealing with the same issue[162] are found to have *non obstante* clauses[163]. The object and policy of the laws will also have to be considered[164].

This section seeks to provide a discussion on some of such potential conflict scenarios in relation to certain major sectors and the legal principles that could be applied to resolving such disputes.

7.2.1. Electricity Sector

Under the Electricity Act, 2003: (i) a Central Electricity Regulatory Commission has been created at the national level that has jurisdiction over only certain categories of projects/entities and (ii) each state is required to either form its own state electricity regulatory commission[165] or enter into an arrangement with other states to have a joint electricity regulatory commission that would have jurisdiction over such states[166].

The Central Electricity Regulatory Commission has been given the function of advising the Central Government in relation to promotion of competition, efficiency and economy in activities of the electricity industry[167]. All other specific functions of the CERC relate to tariff or issuance of certain licenses or adjudication of disputes relating to tariff[168]. Similarly, The State Electricity Regulatory Commissions (including joint commissions) have been given the function of advising their respective state governments in relation to promotion of competition, efficiency and economic in activities of the electricity industry[169]. All other specific functions of the SERCs relate to tariff, issuing of certain licenses or adjudication of disputes relating to tariff[170].

The only specific power of the CERC and SERC that would directly conflict with the functions and powers of the Competition Commission is the power of the CERC and SERC, under s. 60 of the Electricity Act, 2003, to issue “such directions as it considers appropriate” to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an “adverse effect” on competition in electricity industry.

It should also be noted that under the Second Proviso to s. 62(1)(a) of the Electricity Act, 2003 the CERC/SERC (as the case may be) has been vested with the discretion to fix only maximum ceiling of tariff for retail sale of electricity in case of distribution of electricity in the same area by two or more

[161] See *Sanwarmal Kajriwal v. Vishwa Cooperative Housing Society Ltd.* AIR 1990 SC 1593; *Talchar Municipality v. Talchaer Regulated Market Committee* AIR 2004 SC 3954; *Jasbir Singh v. Vipin Kumar Jaggi* AIR 2001 SC 2734; *Jogendra Lal Saha v. State of Bihar* AIR 1991 SC 1148; *Allahabad Bank v. Canara Bank* AIR 2000 SC 1535.

[162] Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of India, 1993(2)SCC 144; Solidaire India Limited v. Fairgrowth Financial Services Ltd. AIR 2001 SC 258.

[163] A *non obstante* clause is one which states that its provisions will have effect ‘notwithstanding anything inconsistent therewith contained in any other law for the time being in force.’

[164] *Ashoka Marketing Ltd. v. Punjab National Bank* AIR 1991 SC 855

[165] See s.82 Electricity Act, 2003

[166] See s.83 Electricity Act, 2003

[167] See s. 79(2)(ii) Electricity Act, 2003

[168] See s. 79 Electricity Act, 2003

[169] See s.86 Electricity Act, 2003

[170] See s. 86 Electricity Act, 2003

distribution licensees, for the purposes of promoting competition between the distribution licensees. This function would not however be in conflict with the powers of the Competition Commission of India as it is specifically limited to exercise of tariff fixation powers in a manner so as to promote competition among multiple suppliers.

However it is submitted that in the event of an actual conflict of jurisdiction between Competition Commission of India and CERC or SERC in relation to an anti competitive agreement or abuse of dominant position or a combination would have to be determined in light of the following considerations:

(i) The CERC or the SERC is essentially a tariff determination authority and an authority issuing licenses in relation to certain activities

(ii) The jurisdiction of CERC or SERC is not related to market but is limited by the nature of the project and the geographical limitation of whether or not there is an inter-state transmission or sale of electricity. Thus neither the CERC nor the SERC are actually having jurisdiction to issue directions that would cut across the nature of the project or the geographical limitation of a particular state. It is only the Competition Commission that would have an overall jurisdiction over the electricity market in relation to competition law issues

(iii) The Electricity Act, 2003 provides no specific guidelines or framework for the CERC or SERC in relation to determining whether or not there is an abuse of dominant position or whether or not a combination has come into being or whether an agreement or combination or abuse of dominant position is causing or likely to cause an adverse effect on competition in the electricity industry.

(iv) There are no specific powers to issue the relevant orders that would prevent or put a stop to an anti competitive or abuse of dominance scenario. CERC/SERC do not have any specific powers to issue orders breaking up a combination. Such orders can be passed and enforced only under the framework provided by the Competition Act, 2002. The general provision of s. 60 of the Electricity Act, 2003 will have to be read within and be limited by the other provisions of the Electricity Act, 2003, which do not vest CERC/SERC with any power to direct changes in agreements, breaking up of assets, taking over of assets, ordering winding up of entities, creation, allotment, surrender or cancellation of any shares, transfer or vesting of property, rights, liabilities or obligations, distributions of assets, or otherwise impinge upon rights that would otherwise be covered by Article 19(1)(g) read with Article 21 of the Constitution of India and Article 300 of the Constitution of India. These are powers only vested specifically with the Competition Commission under the provisions of the Competition Act, 2002.

(v) There is therefore no real conflict in the provisions between the Electricity Act, 2003 and the Competition Act, 2002 as the Electricity Act, 2003 does not have the various provisions and detailed framework relating to regulating and enforcing competition in identified markets without being constrained by nature of the individual projects or the geographical boundaries of their operations. Consequently, the non-obstante clause of the Electricity Act, 2003[171] will not come into operation in relation to the Competition Act, 2002 and the powers and functions of the Competition Commission.

(vi) S. 175 of the Electricity Act, 2003, which states that the provisions of the Electricity Act, 2003 are in addition to and not in derogation of any other law for the time being in force will be applicable. Consequently, the function of CERC/SERC under s. 60 Electricity Act, 2003 will have to be read as not being in derogation of the provisions of the Competition Act, 2002 and consequently, in relation to competition issues relating to the electricity sector, the CERC/SERC would be able to exercise jurisdiction only if and only till such

[171] s. 174 Electricity Act, 2003 states "save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

time as the Competition Commission does not take up the relevant matter. The jurisdiction of CERC/SERC in relation to competition issue will be subordinate/secondary to the jurisdiction of the Competition Commission.

7.2.2. Petroleum and Natural Gas Sector

The Petroleum and Natural Gas Regulatory Board, 2006 creates the Petroleum and Natural Gas Regulatory Board to: (i) regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas *excluding* production of crude oil and natural gas; (ii) protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas; (iii) ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and (iv) to promote competitive markets.

The provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("PNGRB Act") that can potentially overlap with the functions of the Competition Commission are:

Section 11(a) PNGRB Act: provides that the Petroleum and Natural Gas Regulatory Board shall "protect the interest of consumers by fostering fair trade and competition amongst the entities".

Sections 11(e)(i) and (iii) PNGRB Act provide that the Board shall regulate, by regulations, access to common carrier or contract carrier so as to ensure fair trade and competition amongst entities and for that purpose specify pipeline access code, and shall also regulate access to city or local natural gas distribution network so as to ensure fair trade and competition amongst entities as per pipeline access code.

Sections 11(f)(iii) and 11(f)(vi) PNGRB Act provide that the Board shall also, in respect of notified petroleum, petroleum products and natural gas, monitor prices and take corrective measures, and monitor transportation rates and take corrective action, to prevent "*restrictive trade practice*" by the entities.

The term "*restrictive trade practice"* has been defined in s. 2(zi) of PNGRB Act to mean a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular: (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to petroleum, petroleum products or natural gas or services in such manner as to impose on the consumers unjustified costs or restrictions. It should be noted that this term and definition have been taken and adapted from the provisions of Monopolies and Restrictive Trade Practices Act, 1969[172], the legislation that the Competition Act, 2002 was enacted to replace. It should also be noted that the Competition Act, 2002 does not use the term "restrictive trade practice"

Section 20(5) of the Act also provides that while exercising its powers to declare an existing pipeline for transportation of petroleum, petroleum products or natural gas or an existing city or local gas distribution network , as a common carrier or a contract carrier or to regulate or allow access to such pipeline or network, the Board shall be guided by the objectives of promoting competition among entities, avoiding infructuous investment, maintaining or increasing supplies or for securing equitable distribution or ensuring adequate availability of petroleum, petroleum products and natural gas throughout the country and follow such principles as the Board may, by regulations, determine in carrying out its functions under the said section.

[172] S.2(o), Monopolies and Restrictive Trade Practices Act, 1969 defines "restrictive trade practice" to mean "a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular: (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions".

Section 21 PNGRB Act states that where a pipeline has been laid down, built, operated or expanded by one entity, that entity shall have the right to first use with respect to that pipeline. The remaining capacity of the pipeline shall be used by other entities as determined by the Board having regard to the needs of fair competition in marketing and availability of petroleum and petroleum products throughout the country.

Section 22(2)(a) PNGRB Act provides that for laying down, by regulations, the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs, the Board shall be guided by, *inter alia*, the factors which may encourage competition, efficiency, economic use of the resources, good performance and optimum investments.

Proviso to Section 28 PNGRB Act empowers the Board to impose civil penalty for, inter alia, restrictive trade practices, of an amount that may extend to five times the unfair gains made by the entity or ten crore rupees, whichever is higher.

CHAPTER 8. CONCLUSION AND RECOMMENDATIONS

The Competition Commission of India has been vested with the statutory powers to be the main statutory authority regulating and evaluating competition issues in infrastructure sectors and ensure that no practice develop that have adverse effect on competition in infrastructure sectors, including competition *for* obtaining concession agreements in respect thereof. The Competition Commission of India has also been vested with the statutory powers to ensure that it promotes and sustains competition in infrastructure sectors, including the entire life cycle of concession agreements, (i.e. the structuring, granting, implementation and any renegotiation of concession agreements). The Competition Commission of India has been vested with the statutory powers to ensure that the interests of the consumers are also protected during in relation to the structuring, grating, implementation and renegotiation of concession agreements.

A new jurisprudence in relation to regulation of the entire life cycle of a concession agreement would have to be developed in order to ensure efficient and effective implementation of concession agreements pursuant to the enactment and coming into effect of the Competition Act, 2002.

It is recommended that the Competition Commission of India, initially develop guidelines and regulations that provide a clear framework for various government departments on the main competition principles that should be adhered to and the various process in respect to the entire life cycle of a competition agreement.

It is also recommended that the Competition Commission of India establish a coordination mechanism with other infrastructure sector regulators in order to enable a coordinated approach to competition issues and enable building of capacity in other regulators in relation to competition issues as well as allow other sector regulators to refer matters to the Competition Commission.

CHAPTER 9. COMPETITION ADVOCACY

The following advocacy steps are suggested for being undertaken by the Competition Commission of India, in relation to providing for competition advocacy in respect of the competition issues relating to concession agreements in infrastructure projects:

1. CCI should commence a dialogue with the Planning Commission and each of the sector regulators as well as the various ministries of the Government of India and the State Governments that are actively granting concession agreements. The dialogue should focus on highlighting the competition concerns during the life cycle of the concession agreement and how to ensure that they are taken into account while structuring, granting and implementing the concession agreement, so as to mitigate any potential challenges against them. The various government departments must be made aware that addressing the competition concerns upfront will be in the interests of the project so as to reduce the scope for competition related challenges and enable CCI to facilitate the implementation of such projects. This can be achieved by letting the relevant departments and ministries know the documentation and decision making paper trail that should be maintained to enable rebuttal of competition law related allegations that may arise.

2. The important Central government agencies that the CCI should interact with in this regard are: (i) Planning Commission, (ii) Ministry of Finance, (iii) Ministry of Roads and Surface Transport, (iv) Ministry of Power, (v) Ministry of Petroleum and Natural Gas, (vi) Indian Railways, (vii) Ministry of Civil Aviation, (viii) NHAI, (ix) Ministry of Telecommunications and (x) Ministry of Urban Development.

3. The sector regulators with whom CCI should seek to have a dialogue are: (i) CERC, (ii) all SERCs, (iii) TRAI, (iv) PNGRB, (vi) TAMP (Tariff Authority for Major Ports), and (vi) all Major Port Trusts

4. CCI can produce specific guidelines that can be circulated to various government agencies and departments creating awareness about the critical competition issues relating the structuring, granting and implementation of concession agreements

5. CCI can publish certain handouts that could be circulated to all government agencies and departments in relation to the competition concerns related to concession agreements

6. CCI could organize certain workshops in major capital cities of important states so as to create greater awareness among state governments on various aspects of competition law issues relating to concession agreements

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