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Fair competition
for greater good

Fair Play

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"Review of Legislation/Policies: A Competition Perspective"

In This Issue...

FROM THE DESK OF THE CHAIRPERSON

Recently, the World Bank released its report "Doing Business 2017: Equal Opportunity for All"evaluating the regulations that enhance business activity and those that constrain it. It ranks 190 economies across space and over time. Although measures have been and are being taken, there is more distance to be covered in this area, since India's ranking in the annual Ease of Doing Business survey improved by just one notch to 130 in 2017 from 131 last year.

Increase in competitiveness in the economy would not only improve country's economic performance but would also open business opportunities and facilitate more capital inflows. The economy is governed by numerous laws and regulations which at times inadvertently restrict competition in the marketplace by creating avoidable barriers and thus having negative impact on the ease of doing business.

One of the major factors behind lower ranking in ease of doing business are the regulatory and administrative barriers and time consuming procedures inbuilt in laws, regulations, rules and administrative orders. In view of this and in synchronisation with the increasing emphasis of the government on facilitating business in India, the Competition Commission of India has initiated an exercise on developing capacity for Competition Assessment of Legislations/Policies. Competition assessment is a tool to evaluate existing and impending legislations and policies with a view to identify provisions which may inadvertently distort or obstruct competition in markets so as to redesign them in such a way that rather than inhibiting they promote competition.

Competition Assessment is not a new concept. There are other countries who have successfully undertaken such an exercise. Australia carried out assessment of its economic legislations and policies in a comprehensive manner during mid-1990s and was able to identify impediments to competition in about 1800 laws. Removal of such identified distortions significantly boosted its GDP by 2.5% above levels that would have otherwise prevailed. Greece with the help of OECD reviewed four sectors, namely, retail, food processing, tourism and building materials, and identified 555 problematic regulations. They made 329 specific recommendations on provisions which had competition concerns. This resulted in substantial improvement in its economic performance estimated at around EUR 5.2 billion annually, which comes to roughly 2.5% of GDP. The Mexican government has launched a project in collaboration with the OECD to improve its competitiveness by reforming and modifying the regulatory and institutional framework on the same pattern.

The objective of the Commission is to explore the possibility of replicating such efforts in the case of India. At the initial stage, the Commission has empanelled seven academic institutions on a pilot basis in pursuit of this. An initial competition assessment of seven economic legislations/policies has been prepared by these institutions together with the officers of CCI. These assessments have been subjected to extensive peer reviews, discussions and comments from external agencies like OECD and industry experts. The results of the assessments would be informally shared with the concerned stakeholders. The objective of this exercise is to develop Indian expertise in this area and to undertake a comprehensive competition assessment of legislations, rules, regulations and administrative orders at the central, state and municipal level so that ease of doing business is facilitated and simultaneously the process of competition in Indian markets is made smooth, insulated from unnecessary and unintended obstructions arising from legislations and policies.

(Devender K. Sikri)

Review of Legislations/Policies: A Competition Perspective

The father of economics Adam Smith in his famous book *"An Inquiry into the Nature and Causes of the Wealth of Nations"* emphasizes that self-interest is the driving force behind economic activity. Though, self-interest *per se* has negative connotations, these forces are balanced by the competitive forces arising out of the market. Therefore, while self-interest is the motivator behind economic activity, competition is the *de-facto* driver of the economy. These forces of self-interest and competition are defined by Adam Smith as the invisible hands which guide the resources towards their most efficient use. When India adopted the new economic order in the early 1990s, it empowered the invisible hands of the market and ensured economic freedom for enterprises.

It is also true that markets are capable of generating their own rules which may ultimately lead to market failures. Moreover, freedom of choice and human rationality doesn't always result in behaviour consistent with what was advocated by the free market theorists. One of such behaviours is that the economic enterprises themselves can impede upon the freedom of others. Such anti-competitive practices have a negative impact on GDP and a severe impact on consumer welfare.

The problem of market failure provides the theoretical justification for laying down the legal foundations of a free market economy. A regulated free market aims to fulfil not only the utilitarian concept of economic efficiencies but also the moral concept of natural law and even the broader economic concept of freedom. The state usually intervenes to address these concerns in the form of:

(a) Enacting legislations and subordinate legislations that define the contour of the freedom of economic agents and their rights and obligations, and

(b) Formulating economic policies relating to trade, commerce, industry, business, investment, disinvestment, fiscal measures, taxation, IPR, procurement, etc.

These interventions usually strengthen the competition, market forces and promote competitive neutrality. However, many times, it has been observed that these legislations/policies inadvertently carry certain provisions which may restrict or hamper competition in the market. These provisions may inadvertently include impediments which may (OECD, 2011):

- Put restrictions on entry or flow of goods and services across regions;
- Facilitate coordination of prices and production among competitors;
- Impose higher costs on entrants and small businesses as opposed to incumbents or larger firms; and
- Partially or completely shelter firms from national competition laws.

Hence, it becomes essential to examine these legislations/policies from the competition perspective in order to promote competition in the economy.

Competition Assessment and International Jurisdictions

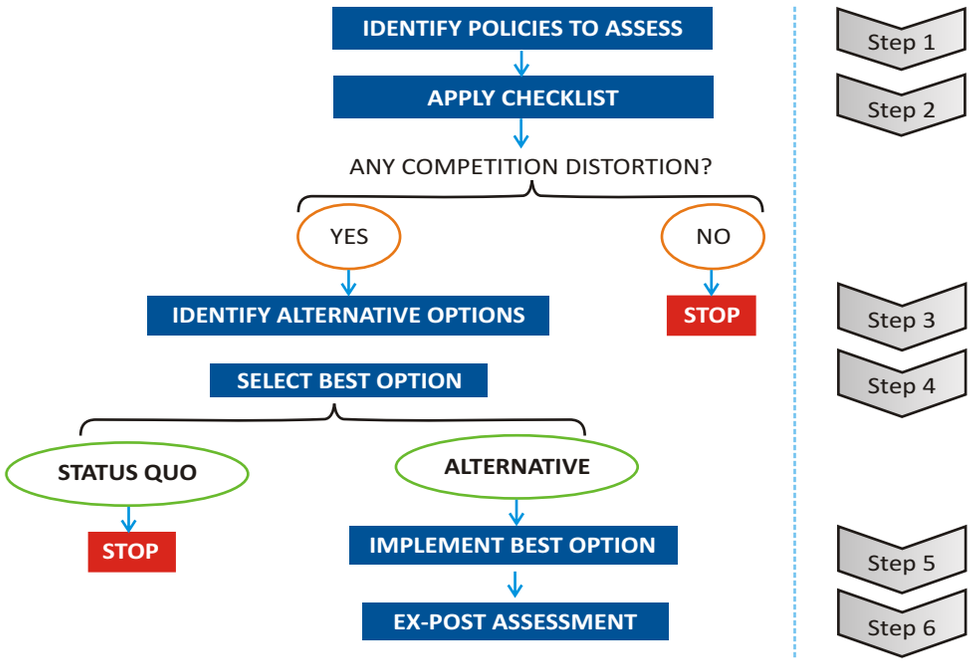
OECD (2011) defines competition assessment as a process of evaluating government regulations, rules and/or laws to:

- Identify those that may unnecessarily impede competition; and
- Redesign the identified ones so that competition is not unduly inhibited.

Competition assessment is basically a tool that would help in eliminating not only the restraints to competition but in developing alternatives in the form of less restrictive measures that would still achieve the objective of the public policy.

Given the nature of the competition assessment exercise and for developing expertise amongst jurisdictions in the area of competition assessment, the OECD has developed a competition assessment toolkit[1] .

[1]Available at: http://www.oecd.org/daf/competition/46193173.pdf.



Source: OECD Competition Assessment Toolkit

The toolkit gives guidance on how to carry out the competition assessment. This is not country specific. The process of carrying out the competition assessment is explained in the figure. The OECD toolkit recommends that after the legislation/policy has been identified for carrying out the competition assessment, the same is put to initial screening as per the competition checklist. As per the toolkit, competition assessment should be conducted if the proposal has any or all of the following effects:

- Limits the number or range of suppliers;
- Limits the ability of suppliers to compete;
- Reduces the incentive of suppliers to compete; and
- Limits the choices and information available to customers.

After initial screening, if there exists any competition concerns, then to address such concerns, alternatives have to be suggested. Amongst the alternatives, the best alternative has to be chosen for implementation. After it has been implemented, OECD recommends that ex-post analysis should be carried out to assess the effect on competition.

There are many competition regimes around the world which have started programs and developed toolkits to carry out the assessment of their legislations and policies from the competition perspective. Competition assessment is necessary for all kind of policies whether new or existing or whether enacted at the union level, state level or the local level. But such an exercise requires resources in terms of skills, time, manpower, money and a lot of political will. However, it is the most effective way of creating a competitive atmosphere. In some countries[2] the exercise is carried out by the competition agency whereas in other countries[3] another government body/ regulator carries out the exercise. Carrying out competition assessment stems from specific legal basis for conducting assessment (ex-post and ex-ante) or/and from the advocacy mandate of the competition agency. In some jurisdictions, the competition agency is indirectly or informally involved in the competition assessment process. The competition agencies by adopting this approach are able to raise awareness among policymakers about the importance of competition and elevate it as an important element alongside other public policy goals.

Australia is one of the most successful examples of a country which carried out the assessment of its economic policies on a large scale during the mid 1990s and was able to identify competition impediments in 1800 laws. Identification and removal of these distortions eventually allowed the Australian economy to grow faster and also benefitted its consumers substantially. It raised the Australian economy from a mid-level performer to a top performer among the OECD economies. The Australian

[2]France, Mexico, United Kingdom (ex-post)

[3]Japan, EU, United Kingdom (ex-ante)

government reviewed legislations at the national, state and territorial level. The national government offered funding to the state and territorial government to carry out the exercise. It has also established a separate body known as National Competition Council for reviewing national laws and regulations.

The 2005 report by the then Better Regulation Task Force in UK articulated the five principles for better regulation which are: proportionality; accountability; consistency; transparency; and necessity. In the UK, every new law has to carry a Regulatory Impact Assessment on the lines of the principles highlighted by the task force. The CMA provides help and guidance to departments with their competition assessments. It is responsible for carrying out ex-post competition assessment and conducts market studies and investigations for this purpose.

In 2008, Mexico launched a multi-year project in cooperation with the OECD to review the existing regulations and policies and improve the competitiveness of the Mexican economy. New regulations were subject to review by Comisión Federal de Mejora Regulatoria (COFEMER), the regulatory review body, which was to consult the competition authority. The government bodies framing new regulation had to complete the checklist of competition concerns. If there existed some competition concerns, the body that framed the new regulation had to identify the impacted checklist item, describe how the provision may affect competition, justify the need for the rule, suggest an alternative and explain why it is the best alternative.

Competition Assessment in India

The 11th Five Year Plan(2007-2012) document recognizes that there are many legislations, policies and statutes existing in India that require review from the competition perspective, so that remedial action can be taken to remove or minimize the effect of the competition concerns. The erstwhile Planning Commission recommended that competition assessment must be included in the Regulatory Impact Analysis which involves cost-benefit analysis of regulations. The draft National Competition Policy also recommends Competition Impact Assessment (CIA). CIA is designed to assess how regulations have an impact on the conduct of market participants and to forecast the regulation's longer-term benefits and costs.

In sync with the mandate of the CCI and the role of competition in economic development, the Commission has started the exercise of assessing select legislation and policies (Acts, Bills, Rules, Regulations and Policies) from a competition perspective and sharing the assessment with the associated stakeholders. As per section 49 (1) of the Act, the Commission can receive reference from central and state government on a policy for its opinion on the likely effect of such policy on competition. In this regard, on receipt of reference from the Tamil Nadu Government, the Commission has examined The *Tamil Nadu Transparency in Tenders Act, 1998* from a competition perspective and highlighted the competition concerns to the State Government.

Recently, the Procurement Policy Division of Ministry of Finance came out with the revised draft Manual on Policies and Procedures for Procurement of Goods, 2016 (Procurement Manual) and made the same available in the public domain for comments. The Manual not only streamlines the procurement process but also recognizes competition concerns by highlighting the different forms of bid rigging in section 7.6.9. It acknowledges the jurisdiction of CCI in such matters. The manual also recognizes that the procurement process may vary across different department of the government depending on industry and thus advises departments to develop their own manual by taking this manual as generic guidelines. The Commission on its assessment of the manual has made certain recommendations to the Procurement Policy Division, Ministry of Finance like removing the preferential treatment given to Central Public Sector Enterprises (CPSEs) or Government Organizations; inclusion of provision regarding educational orders to facilitate new entry; doing away with the preferential treatment given to government air-carrier in the airlifting of goods; inclusion of the salient features of the Competition Act, 2002 in the manual etc.

The Commission has framed the Competition Assessment Guidelines[4] (under section 49 (1) and (3) of the Act) and based on evaluation of the samples of competition assessment submitted by interested institutions[5], has empanelled following seven institutions:

1. Indian Institute of Management, Ahmedabad
2. Indian Institute of Management, Lucknow
3. Indira Gandhi Institute of Development Research, Mumbai

[4] Available at http://www.cci.gov.in/competition-commission-india-competition-assessment-economic-legislations-and-policies-guidelines
[5] http://cci.gov.in/empanelment-of-institutions

4. National Institute of Public Finance and Policy, Delhi
5. CUTS International, Jaipur
6. National Law University, Delhi
7. The National Law Institute University, Bhopal

The Commission has taken up seven legislations/ regulations from different sectors which can have a likely potential to distort competition in the Indian market. These seven legislations were given to the empanelled institutions and the CCI officers for carrying out an initial competition assessment. The seven legislations are as follows:

1. The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016
2. The Agriculture Produce and Marketing Committee Model Act, 2003
3. Public Procurement Bill, 2012
4. National Civil Aviation Policy, 2016
5. Payment and Settlement Systems Act, 2007 and RBI regulations there under
6. The Patents Act, including Intellectual Property Policy
7. Drug Pricing Control Order (DPCO) list, 2013 (under the Essential Commodities Act)

In order to build capacity of the institutes and CCI officers for carrying out competition assessment, the Commission organized capacity building exercise for them in two stages. In Stage II the OECD toolkit on competition assessment was discussed. Further, as part of this exercise, the initial competition assessment on the select legislations prepared by the institutions and officers were put across for brainstorming and discussion in order to evaluate and improve upon them. The second stage exercise also had representatives from OECD who shared their experience with other countries in this area and also gave feedback on the initial competition assessment carried out by the participants.

Criteria for Competition Assessment

The competition assessment needs to address if the legislation /policy has any provision which could:

i) Cause Appreciable adverse effect on competition;

ii) Distort any of the salient features of a competitive market;

iii) Restrict freedom of players; and

iv) Disharmony with the objectives of the Competition Act, 2002.

The Commission has also developed a format for carrying out competition assessment which includes questions that address the above concerns. The said format not only makes the assessor highlight the competition concerns but also asks him/her to provide the modification he/she wants in the provision to address those concerns.

Apart from the select legislation and policies, the Commission would consider continuing to identify legislations which require competition assessment. The identified legislation would then be shared with the empanelled institute on the basis of its expertise in the respective field. Once the Commission receives the final assessment, it would form its views at the earliest and, if it considers necessary, would suggest modifications in the respective legislation / policy with the concerned stakeholders(Parliament / State Legislature and its Committees concerned, the Administrative Ministry or the Department of the Government which has piloted the legislation / formulated the policy, and the Statutory Authority).

Conclusion

Competition assessment in India is certainly a step forward in achieving faster economic growth. A sound competition assessment programme enables identification of anti-competitive behaviours, development of alternative approaches to curtail these concerns and implementation of the best alternatives. By scrutinizing regulations, the competition agency is able to target competition via the grassroots. However, the whole exercise becomes futile if there is failure to establish the importance of competition. Therefore, emphasizing on the significance and role of competition in achieving high economic growth and development is a *sine quo non* for having a sound competition assessment programme. Engaging with other institutions for competition assessment is thus an opportunity for the Commission to promote advocacy with respective governments (local, regional or central) through training, public conferences, seminars etc.

SECTION 5 & 6 ORDERS

Combination between Power and Energy International (Mauritius) Ltd and GMR Energy Limited

The Commission received a notice from Power and Energy International (Mauritius) Ltd (PIL) regarding acquisition of 30 per cent of equity shares of GMR Energy Limited, a subsidiary of GMR Infrastructure Limited (GIL).

PIL, a wholly owned subsidiary of Tenaga Nasional Berhad (TNB), is incorporated in Mauritius and has certain investment holding activities in Mauritius. TNB is the largest electricity utility in Malaysia, and is primarily engaged in business of generation, transmission and distribution of power. GEL, in India, is engaged in the development, operation and maintenance of power projects, power generation, transmission, and captive coal mining for its plant in Chhattisgarh, both directly and indirectly, through its subsidiaries and has a portfolio of five operational power assets.

As PIL and TNB neither have any business presence nor any direct or indirect investments in India, there is no likelihood of appreciable adverse effect on competition due to absence of any horizontal overlap. Accordingly, the Commission approved the combination under sub-section (1) of Section 31 of the Act.

The Commission further observed that the Shareholding Agreement (SHA) contains non-compete covenant which provides that all shareholders of GEL, PIL and TNB, and their respective affiliates (as defined in the SHA) shall not, whilst remaining a shareholder of GEL, either alone or in conjunction with or on behalf of any other person: (a) establish, engage or be directly or indirectly interested in carrying on any business in India which is a 'Relevant Business' other than through GEL or an entity controlled by GEL; and (b) assist any other person in relation to the above activities. The *'Relevant Business' has been defined in the SHA as "development, ownership and operation of power projects; power generation, transmission, distribution and trading of electricity in India; power generation for sale to off-takers in India; and captive mining for power plants in India".* The Commission noted that the aforesaid non-compete covenant, to the extent it relates to the scope of products/ services of the proposed combination, is beyond what is necessary for the implementation of the proposed combination and therefore not ancillary to the proposed combination.

CCI approves Acquisition of VCDs business of St. Jude's Medical, Inc. by Abbott Laboratories

Abbott Laboratories **("Abbott")** filed a notice with the Commission on 1st August, 2016 relating to its acquisition of the Vascular Closure Devices **("VCDs")** business of St. Jude Medical, Inc. **("SJM")**. (Hereinafter, Abbott and SJM are collectively referred to as "Parties".) The notice was filed pursuant to execution of an Agreement and Plan of Merger entered into between the Parties on 27th April 2016.

Abbott, a company incorporated and listed in the USA, is a global health care company and is engaged in research, development, manufacture and sale of a range of health care products on a global basis. Abbott's products and services relate to paediatric and adult nutrition, medical devices comprising vascular and diabetes care, optical products, diagnostic systems and branded generic pharmaceuticals. Of relevance to the proposed combination is VCDs which Abbott sells in India. VCDs are medical devices used to close holes in the artery that occurs due to catheterization during medical and diagnostic procedures to treat cardiovascular diseases. Abbott's VCDs are indicated for both 'small hole' and 'large hole' closure.

SJM, a company incorporated and listed in the USA, is a global medical device company that researches, develops, manufactures, and sells cardiovascular medical devices. It provides products and services, inter-alia, relating to cardiac rhythm management, heart failure, cardiovascular products, vascular closure devices and a trial fibrillation. SJM's VCDs are

indicated for 'small hole' closure.

The Commission noted that the Parties' activities overlap in 'small hole' VCDs in India and that the combined market share of the Parties in India in 2015 in the 'small hole' VCDs as well as the individual hole sizes within 'small hole' VCDs were of the order of 90-100 percent . The other competitor i.e. Cardinal Health had an insignificant market share. Therefore, the proposed combination would enhance the merged entity's market power in the already highly concentrated market for 'small hole' VCDs in India.

In order to address the concerns emanating from the proposed combination, Parties have submitted a modification in the form of a plan of divestiture of the entire 'small hole' VCDs segment of SJM on a worldwide basis under Regulation 19(2) of the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011. The proposed modification would remove the only overlap between Abbott and SJM in India, i.e. in 'small hole' VCDs and eliminate the competition concerns identified by the Commission.

The Commission approved the proposed combination subject to subject to carrying out of the proposed modification.

Commission approves combination between NLC India Ltd. and Damodar Valley Corporation

NLC India Ltd. **("NLC")** and Damodar Valley Corporation **("DVC")** jointly filed a combination notice for: (i) Incorporation of a joint venture company, namely, NLC DVC Energy Limited **("JVC")** in which NLC would hold 74% shares and DVC would hold 26% shares; and (ii) Transfer of 2 x 600 MW power plant situated at Raghunathpur, West Bengal **("RTPS Plant")** to the JVC by DVC on slump sale as a going concern basis.

NLC, a Navaratna enterprise of the Government of India, was established in 1956 in Neyveli, Tamil Nadu and is engaged in mining of lignite coal and generation of power through lignite coal based thermal power plants. NLC has also commissioned a solar power plant and a wind power plant. DVC, headquartered in Kolkata, is a statutory corporation set up pursuant to the Damodar Valley Corporation Act, 1948 and operates several power stations in the Damodar valley of West Bengal and Jharkhand. DVC operates both thermal power stations and hydel power stations.

The Commission observed that since the activities of the parties overlap in the generation of power (through coal) in India, the relevant product market may be taken as the business of power generation, although there exists a possibility of further segmenting the relevant product market into generation of power through various fuel-types. With respect to the relevant geographic market, the Commission noted that the same may be country wide as power generation companies supply power to entities across various states. However, since the proposed combination is unlikely to cause any appreciable adverse effect on competition in India, the Commission observed that the exact delineation of the relevant market, in terms of product and geography, may be left open.

The Commission observed that the combined market share (on the basis of installed capacity) of NLC and DVC in power generation business in India is less than 5 percent and there is presence of significant competitors in the market, which would continue to provide competitive constraint to the parties, post combination.

The Commission also observed that there is no existing vertical relationship between the businesses of the parties in Indian or any of the party proposes to enter into any vertical arrangements in future in the market of generation of power with the other party or RTPS Plant.

In view of the above, the Commission approved the combination under sub-Section (1) of Section 31 of the Act.

INVESTIGATIONS INITIATED

Case No. 62 of 2016In Re: XYZ and Grasim Industries Ltd & Others

The Commission vide its order 10th November, 2016 directed investigation against Association of Man-Made Fibre Industry of India ('OP 1'), Grasim Industries Ltd. ('OP 2'), and Group Companies of Aditya Birla and Grasim Industries Ltd. Group: (i) Thai Rayon, Thailand ('OP 3') and (ii) Indo Bharat Rayon, Indonesia ('OP 4') [collectively referred to as the 'Opposite Parties' in an information received from the Informant alleging abuse of dominant position by the Opposite Party.]

The Informant alleged that OP 2 has been indulging in the practice of price discrimination and was instrumental in imposing anti-dumping duties on Viscose Stable Fibre (VSF) products imported from foreign countries. Further, the Informant also alleged that OP 2 was forcing its domestic customers to submit their monthly production data before deciding the discount rate applicable to them. The Commission noted that every type of man-made fibre has its own unique physical and chemical properties and different characteristics. Further, the Commission noted that with respect to the market of VSF, the territory of India exhibits homogenous and distinct market conditions. Thus, the relevant product was defined as the market for the *market of Viscose Staple Fibre in India'*.

With regard to abuse, the Commission was of the view that there were no other domestic manufacture producing/ marketing VSF in India. Therefore, the domestic buyers were essentially dependent upon OP 2 for their requirements of VSF. The Commission further notes that OP 2 and its subsidiaries are present throughout the entire value chain of textile products made out of viscose fibre and market those readymade garments/ apparels through their own brands such as *Peter England, Van Heusen, Louis Phillipe, Allen Solly* and also sells them through their own retail outlets such as *Planet Fashion and Pantaloons.* Thus, the Commission was, *prima facie,* satisfied that the conduct of the Opposite Parties contravened Section 4(2)(a)(ii) and Section 4(2)(e) of the Act, i.e. imposition of discriminatory pricing policy and leveraging its strength derived from the manufacture of VSF in the downstream markets of manufacture and sale of textile products in India.

Accordingly, the Director General was directed to cause investigation into the matter.

DEVELOPMENTS IN OTHER JURISDICTIONS

UK

The Competition and Markets Authority (CMA) has imposed a record fine totaling £89.2 million fine on the pharmaceutical company Pfizer, and Flynn Pharma, its distributor.

The fine has been levied on the grounds that the companies charged excessive and unfair prices for the sale of phenytoin sodium capsules, an anti-epilepsy drug. The drug is used for preventing and controlling seizures. Patients taking the medicine cannot be easily switched to other products due to risk of loss of seizure control and can have adverse health consequences.

The prices of the drug increased by nearly 2,600% after the de-branding of the drugs. This lead to an increase in expenditure on the procurement of the drugs by the National Health Services (public health service of UK). The price was also substantially higher than the price that was charged by Pfizer in other European markets.

In September 2012, Pfizer sold the UK distribution rights for Epanutin (the brand name for the drug) to Flynn Pharma, which de-branded (or 'genericised') the drug. Earlier, Pfizer was selling the drug to wholesalers and pharmacies under a regulated price. Subsequent, to the de-branding, it was no longer subject to price regulation.

After 2012, while the drug continued to be manufactured by Pfizer, it was supplied to Flynn Pharma at a higher price. In turn, Flynn Pharma would sell the same to wholesalers and pharmacies at prices between 2,300% and 2,600% higher than those previously paid.

The investigation by CMA showed that both the companies held and abused their dominant positions in their respective markets for the manufacture and supply of phenytoin sodium capsules.

CMA granted Pfizer and Flynn between 30 working days and 4 months to reduce their respective prices. This was directed to ensure that there was no disruption in the supply of the drug. The companies were directed to charge prices which are profitable, but must not be excessive and unfair.

Flynn Pharma's appeal for interim relief has been rejected by the Competition Appeals Tribunal.

USA

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) have jointly issued a guidance on anti-trust implication of HR practices.

The practices identified by the guidance include practices such as 'wage-fixing' and 'no-poaching' agreements between competing employers. The guidance notes that that such no-poaching and wage-fixing agreements are *per se* illegal. The guidance also raises concern with respect to sharing of information amongst employers, concerning the terms and conditions of employment, such as wage surveys.

The guidance emphasizes, that adopting such practices, makes the violators liable to both civil and criminal proceedings.

HONG KONG

The Hong Kong Competition Commission (HKCC) has issued an Advisory Bulletin (28 November 2016) regarding the conduct of the Hong Kong Institute of Architects and the Hong Kong Institute of Planners.

While both the bodies are statutory bodies and exempted under the legal regime, members of these bodies are within the ambit. The Advisory Bulletin highlights the clauses and practices that may fall foul, and advises removal of the provisions without delay. The identified clauses pertain to the 'code of conduct' issued by the bodies. The restrictions relate to revision of fees, taking part in design competition, competing with other architects for clients and taking on of clients.

The Advisory Bulletin highlights how the clauses restrict and distort competition in the relevant markets, and could be akin to price fixing.

The HKCC has undertaken a review of the published practices of more than 350 Associations.

FRANCE

The French Competition Authority has fined the Altice Group and its subsidiary SFR 80 million for gun jumping. This is the highest fine imposed for gun jumping.

Altice Group is a major French telecommunications operator. The fine was levied as the Commission found that Altice had interfered with the management of SFR prior to both the notification and clearance of the deal.

The offer for the deal had been accepted in April, 2014 and the share purchase agreement signed in June, 2014. The approval for the deal had been given in October, 2014 by the Authority.

The Authority found that the parties had shared an excessive amount of strategic information in the period prior to receipt of approval from the authority. The Commission found that the interference related to:

- pricing and promotional policy including the launching broadband services by SFR;
- SFR's participation in a tender relating to the development of fiber optic internet network;
- Exchange of confidential information between the parties;
- Creation of a weekly reporting system;
- Altice's involvement regarding the renegotiation of an agreement related to mobile sharing network

ECO WATCH

Consolidation of Public Sector Banks

The Central Board of the State Bank of India (SBI), at its meeting held on 18.08.2016, approved acquisition of five SBI associated banks and BhartiyaMahila Bank Limited ("BMB") under Section 35 of SBI Act, 1955 ("SBI Act"), subject to approval of the Reserve Bank of India and the Government of India. The proposed acquisition, inter alia, is expected to improve financial health of the ailing banks. The biggest problem the Public Sector Banks (PSBs) are facing today is that of non-performing assets (NPA). The scale of the problem can be judged from the fact that gross NPAs of nationalised banks increased from Rs. 20, 49,595 million in March 2015 to Rs. 41, 79,878 million in March 2016[##].

In this background, stakeholders are mooting the idea of "consolidation" as the solution to the problem. However, PSBs will have to do a lot more to tackle the problem of degradation of asset quality. While big size indeed offers some advantages, there are some vital issues which merit attention. Firstly, there are enhanced risks and costs if big banks fail. Secondly, the impact that these bigger players would have on service delivery and customers is not clear.

In future, technology is expected to redefine the way people do their financial transactions. Largely, the main tool will be the mobile handset with powerful database inside that would cater to niche needs. Therefore, PSBs need to use and leverage technology to bring out products and services to enhance their profitability and survival. Consolidation along with changes in the way the banking business is conducted, is expected to prepare the PSBs for meeting new challenges and create a technology-driven, consumer-centric banking landscape in India.

[##] https://dbie.rbi.org.in/BOE/OpenDocument/1608101729/OpenDocument/opendoc/openDocument.faces?logonSuccessful=true&shareId=2

ADVOCACY INITIATIVES

Advocacy initiatives with Central Government/State Governments/PSUs

- Half-a-Day Workshop organised by the Dept. of Chemicals and Petrochemicals for the Govt and PSU officials on 24th October, 2016 at New Delhi. Mr Kaushal Kishore, Adviser and Dr. Bidyadhar Majhi, Director (Economics) delivered lectures on Competition Law / Public Procurement/ Compliance.
- A National Seminar hosted by Central Vigilance Commission to mark the end of the Vigilance Awareness Week on 7th November, 2016 at New Delhi. Mr. Augustine Peter, Member, participated in the panel discussion.
- National Level Seminar on "Best Practices in Tendering, Contracts Management and Disputes Resolution" organised by NLC India Limited formerly Neyveli Lignite Corporation Limited 16-17th December, 2016 Neyveli Complex, Tamil Nadu. Mr. Anil Kumar Bhardwaj, Adviser (Economics), delivered a lecture on Competition Law.
- An Advocacy programme on Public Procurement at Sena Bhawan for the benefit of Officers of Master General of Ordnance Branch IHQ, Ministry of Defence (Army) 27th December, 2016 at New Delhi. Mr. Manoj Pandey, Adviser (Law) delivered a lecture on Competition Law.

Shri D.K. Sikri, Chairperson, CCI addressing the Conference on Competition Law and Practice organised by CII in Mumbai on 7th October, 2016

Shri Augustine Peter, Member, CCI (in middle) at the Panel Discussion on "Trade Secrets" of at 4th International Conference on Intellectual Property Rights "Creative India on 21st October, 2016.

Advocacy Initiatives with Trade Associations and Professional Institutes

- A Conference organised by CII on Cartels and Leniency on 7.10.16 at Mumbai. Mr. Devender K. Sikri, Chairperson, CCI, addressed the Conference as the Chief Guest. Panel discussion on 'Cartels and Leniency' was chaired by Mr. S. L. Bunker, Member. Second panel discussion on 'Merger Control' was chaired by Ms. Smita Jhingran, Secretary.
- A programme organised by

Ghaziabad chapter of NIRC of ICSI for CS Students and professionals on Competition Law / Competition Compliance on 15th October, 2016 at Ghaziabad. Mr. Rakesh Bhanot, Director (FA) and Ms. Prachi Mishra, Deputy Director (Law), conducted the technical sessions.

- 4th International Conference organised by ASSOCHAM on Intellectual Property Rights "Creative India: Innovative India" on 21st October, 2016 at New Delhi. Mr. S. L. Bunker, Member, and Mr. Augustine Peter, Member, chaired the Panel discussions on "Standards, Standard Essential Patents & Brand" and "Trade Secrets" respectively, during the Conference.
- A programme organised by the Bengaluru chapter of ICSI for CS Students and professionals on Competition Law / Competition Compliance on 22st October, 2016 at Bengaluru. Dr K. D. Singh, Joint Director (Law) and Mr. Sachin Goyal, Deputy Director (FA), conducted the technical sessions.
- International Conference organised by ICAI for the members of ICAI on 23rd October, 2016 at New Delhi. Mr. Anil Kumar Bhardwaj, Adviser, made a presentation on "Emergence of Competition Culture in India"
- 3rd International Law Conference organised by the Competition Law Bar Association at NDMC Convention Centre, 12th November, 2016 at New Delhi. Mr. Devender K. Sikri, Chairperson, inaugurated the Conference and gave a special address. All Members, Secretary and Director General of CCI participated in the event.

Shri Augustine Peter, Member, CCI (second from right) at National Seminar hosted by the Central Vigilance Commission on 7th November, 2016.

- A Programme on Competition Law organised by ICSI at its Southern India Regional Office, Chennai, for Company Secretaries on 29th November, 2016 at Chennai. Mr. Anil Kumar Bhardwaj, Adviser, delivered a lecture on 'Competition Law and Competition Compliance'.
- A Winter School on Role of Economics in Competition Law organised by CUTS Institute for Regulation & Competition (CIRC) and NERA Consulting on 30th November 2016 at New Delhi. Mr. Augustine Peter, Member, chaired the panel discussion on "Challenges in applying economics to Competition Law in India".
- 1st Regional Conference for Women organized by ICSI on 3rd December, 2016 at New Delhi. Ms. Jyoti Jindgar, Adviser, participated as a Guest in the inaugural session of the Conference.
- 1st Global Congruence to promulgate International Corporate Governance Day organised by ICSI on 8th – 9th December, 2016 at Hyderabad. Mr. S.L. Bunker, Member, delivered 'Key-Note' Address at the inaugural session of the Congruence attended by hundreds of delegates from around the world.

Shri Augustine Peter, Member, CCI (in the middle) in the Winter School on "Role of Economics in Competition Law", at the India Habitat Centre, New Delhi on 28-30th November, 2016.

Advocacy Initiatives with Universities/Institutes

- A Workshop on Competition Law and Assessment organised in National Law University, Odisha on 18th October, 2016 at Cuttack. Mr. Anil Kumar Bhardwaj, Advisor and Mr. Yogesh Dubey, Deputy Director, delivered lectures on 'Overview of Competition Law' and 'Competition Assessment of Legislations'
- A programme organised by Vivekananda Law School / Vivekananda Institute of Professional Studies, GGSIP University, for the faculty and students of Law on 19th October, 2016 at New Delhi. Mr. Kuldeep Kumar, Deputy Director (Law) delivered lecture on the role of CCI in Development of Jurisprudence.
- A panel discussion on IP and Competition Law organised by Institute for Studies in Industrial Development (ISID) on 25th October, 2016. Mr. Sachin Goyal, Deputy Director (FA), participated in the discussion.
- A session on Competition Law and PSUs organised by IIPA for Middle level executives from State owned Enterprises on 11th November, 2016 at New Delhi. Mr. Kaushal Kishore, Adviser (Economics) conducted the session.
- 10th Annual NLSIR Symposium on Regulating E-Commerce in India organised by National Law School of India University, Bangalore on 27th November, 2016. Mr. Rakesh Bhanot, Director (FA), participated in the panel discussion on "Interplay between E-Commerce and Competition Law".
- Workshop organised by Jindal Initiative on Research in IP and Competition (JIRICO) on 'Standard Essential Patents and existing debates in India: Busting myths or accepting reality through evidence on 18th December, 2016, New Delhi. Mr. Anil Kumar Bhardwaj, Adviser (Economics), delivered a lecture.

Justice G. P. Mittal, Member, CCI (First from left) at the 3rd International Competition Conference 2016 organised by Competition Law Bar Association at New Delhi

Chairperson, CCI (Second from the right) at 3rd International Competition Conference 2016 at New Delhi.

Advocacy with Training Academies & Institutes

- A programme on Competition Law organised by Delhi Judicial Academy for District Judges and Higher Judiciary Officers on 21st October, 2016 at New Delhi. Justice G. P. Mittal, Member and Ms. JyotiJindgar, Adviser, conducted the sessions.

Shri Sudhir Mital, Member, CCI (Third from left) at the 3rd International Competition Conference 2016 at New Delhi

Secretary, CCI and DG, CCI (Third & Second from the left respectively) at the 3rd International Competition Conference 2016 at New Delhi

- One week course on Regulation and Dispute Settlement organised by NTIPRIT – National Telecommunications Institute for Policy Research, Innovation and Training, D/Telecommunications, Ministry of Communication and IT, for ITS 2014 batch during 19 - 23 Dec 2016 21st December, 2016 at Ghaziabad. Mr. A. C. Ojha, Joint Director (Law) conducted a session.
- Regular sessions, on weekly basis, on "Competition Law Public Procurement" were conducted during Management Development Programme (MDP) of NIFM Faridabad. Mr. Nandan Kumar, JD(Economics), Mr. A.C. Ojha, JD(Economics), Dr. K.D. Singh, JD(Law),Mr. Arvind Kumar Anand, DD(Economics), Mr. Anil, DD(Economics), Mr. Anand Vikas Mishra, DD(Law), Ms. Savitri Baburao Kore, DD(Economics), Mr. B. Naveen Kumar, DD(Law), Mr. Mohan Rao Ronanki, DD(Economics), conducted the sessions.

Competition Assessment Workshop (Stage-II)

- The CCI organized the Stage II of the Capacity Building Workshop on Competition Assessment of seven select legislations/polices with the empanelled institutions and CCI officers in collaboration with OECD representatives. The workshop was held during 8th-9th, December, 2016 at IICA, Manesar, Gurugram. It was inaugurated by Mr. Devender K. Sikri, Chairperson, CCI. Dr. S. Machendranathan, Chairman, Airports Economic Regulatory Authority (AERA) also graced the occasion. Ex-Chairperson, CCI Mr. Dhanendra Kumar chaired the discussion on Model Agriculture Produce and Marketing Committee (APMC) Act. Mr. Augustine Peter, Member CCI delivered the introductory address, Mr. Sudhir Mital, Member, Mr. Anil Kumar Bhardwaj and Mr. Kaushal Kishore, Advisers, chaired different sessions in the workshop. Ms. Smita Jhingran, Secretary, Mr. Nitin Gupta, Director General, also participated. Concluding remarks were

Shri D.K. Sikri, Chairperson, CCI and Shri S.L. Bunker, Member, CCI (Third & First from left respectively) at the Conference on Competition Law and Practice organised by CII in Mumbai on 7th October, 2016

Competition Assessment Workshop , IICA Manesar, 8-9th December, 2016.

provided by Mr. Augustine Peter, Member and Mr. Anil Kumar, Bhardwaj, Adviser. The OECD representatives – Mr. Sean Ennis, Senior Economist and Ms. Lynn Robertson, Global Relations Co-coordinator, played a crucial role in advising and providing feedbacks on these Assessments done by the seven empanelled institutions namely (a) National Institute of Public Finance and Policy (b) CUTS International, Jaipur (C) The Indira Gandhi Institute for Development Research, Mumbai (d) National Law Institute University, Bhopal (e) Indian Institute of Management, Ahmedabad (f) Indian Institute of Management, Lucknow & (g) National Law University, Delhi and fourteen CCI officials.

ENGAGING WITH THE WORLD

- Chairperson along with one officer of CCI participated in UNCTAD's 'Meeting of Intergovernmental Group of Experts on Competition Law and Policy' which commenced from 19th October, 2016 in Geneva, Switzerland. For this event CCI also submitted a written contribution on "Strengthening Private Sector Capacity for Competition Compliance".
- CCI delegation comprising of Chairperson, Secretary and two Joint Directors participated in OECD's 'Competition Committee Meeting and Global Forum on Competition' which commenced from 28th November 2016 at Paris, France. CCI also submitted written contributions on "Sanctions in Competition Cases" and the 'Annual Report on Competition Policy 2015'.
- Mr. U.C Nahta, Member attended the 'Annual Conference on Competition Law, Economics and Policy' which commenced from 5th October, 2016 in Cape Town, South Africa.
- An officer participated in 'ICN Cartel Workshop' which commenced from 3rd October, 2016 at Madrid, Spain and ICN Advocacy Workshop which commenced from 3rd November, 2016 at Mexico City.
- An officer attended, two RCEP Intercessional Meetings, the first commenced from 17th October, 2016 in Tianjin, China, and the second commenced from 5th December, 2016 in Tangreng, Indonesia.
- An officer was seconded to the USFTC. The Secondment commenced from 24th October, 2016 in Washington DC, USA.
- Two officers attended a Weekend Seminar at King's College London towards the P.G Diploma Course. The seminar commenced on 19th November, 2016.
- An officer attended OECD/KPC Workshop on 'Information Exchange: Efficiency Enhancing or Cartel in Disguise' which commenced from 6th December, 2016 in Seoul, South Korea.

JUDICIAL PRONOUNCEMENTS

CONTRAVENTION BY INSURANCE COMPANIES UPHELD

The COMPAT vide its order dated 09.12.2016 upheld the Commission's order imposing penalty on four nationalised insurance companies for bid rigging. The Commission had held that National Insurance Company Ltd., New India Assurance Company Ltd., Oriental Insurance Company Ltd., United India Insurance Company Ltd. (collectively 'Appellants') had manipulated the bidding process initiated by the Government of Kerala in regard to the Rashtriya Swasthya Bima Yojna (RSBY)/Comprehensive Health Insurance Scheme (CHIS), in contravention of the provision of Section 3(1) read with Section 3(3)(d) of the Act. The Commission directed the Appellants to cease and desist from indulging in the practices found anti-competitive and also imposed a penalty on each of the Appellant at the rate of 2% of its average turnover of the last three financial years.

The COMPAT did not agree that the Appellants are a 'single economic entity' or that Department of Financial Services ('DFS') was an 'enterprise' in terms of Section 2 (h) of the Act, engaged in providing general insurance services through its subsidiaries i.e. the Appellants. DFS is not engaged in the business of insurance. The COMPAT observed that the reason for creating four companies by the process of mergers was to encourage competition. They are not under each other's influence and do not hold any management or shareholder position in each other. The Appellants, therefore, cannot economically form a single entity with DFS, which is not engaged in any commercial activity.

COMPAT agreed with the conclusion of the Commission that the Appellants did enter into an agreement as defined in Section 2(b) of the Act, in contravention of Section 3 of the Act, which resulted in bid rigging. The bid rigging arrangement executed by the Appellants was in the nature of cover bidding whereby three of them agreed to submit bids which were higher than the bid of United India Insurance Co. Ltd. The Appellants, through their separate bids created an impression of genuine competition. This misleading facade resulted in United India Insurance not ending up as a lone qualifying bidder.

According to the COMPAT, penalty has to be calculated with reference to the gross premium received by United India Insurance as insurance provider under RSBY/CHIS scheme and penalty for each of the Appellants will be a proportion of their share in such premium. As per COMPAT, the aggravating circumstance identified by the Commission does not apply to the facts of this case and that the burden of penalty will ultimately be transferred to public, as the Appellants are owned by the Government. COMPAT, therefore considered it appropriate that penalty be restricted to 1% of the relevant turnover.

COMMISSION NOT TO ADJUDICATE ON MERITS & DEMERITS AT SECTION 26(1) STAGE

In its order in Appeal No. 03/2016, the COMPAT set aside the order passed by the Commission under Section26(2) and directed investigation by the DG. Informants, M/s Gujarat Industries Power Company Ltd and M/s Gujarat State Fertilizers and Chemicals Limited, Baroda, alleged that M/s GAIL (India) Ltd. ('OP') had misused its dominant position and imposed arbitrary and one-sided conditions on its consumers through gas sales and purchase agreement. Commission perused the material placed on record in both the cases and heard the counsel of informants and OP and viewed that *prima facie* OP appears to be dominant in the relevant market of 'supply and distribution of natural gas to industrial consumers in Vadodara'. However, from the material/letter/emails action between the informants and OP, Commission was unable to construe abusive conduct of OP.

As per COMPAT, at the stage of forming an opinion whether there exists a prima facie case which requires investigation or not, the Commission is required to consider the contents of the reference made by the Central Government or the State Government or the statutory authority or an information filed under Section 19(1)(a) and the documents, if any, received with the

reference or information. This exercise constitutes a condition precedent for issue of a direction to the Director General to cause an investigation to be made into the matter necessarily implies that while exercising power under Section 26(1), the Commission cannot adjudicate upon the merits and de-merits of the reference made by the Central Government or the State Government or the statutory authority or the averments/allegations contained in the information.

COMPAT ISSUES DIRECTIONS TO AUTOMOBILE SECTOR

The COMPAT vide its order dated 09.12.2016 has disposed off the appeals filed against the Commission's order in *Shamsher Kataria v. Honda & others* (Case 03/2011). Mr. Shamsher Kataria filed information before the Commission requesting an investigation into alleged abuse of dominant position and anti-competitive agreement/practices adopted by the respondents – car companies. After conducting investigation, DG found all the opposite parties in violation of the provisions of Section 3(4) and Section 4 of the Act. The Commission finally held that the opposite parties' distributions/sales agreements and practices are violative of Section 3 (4) & Section 4 of the Act. This order was appealed before the COMPAT by Toyota, Ford and Nissan.

COMPAT approved the Commission's action and stated that they did not see the Commission exceeding its authority in ordering expansion in the scope of investigation. COMPAT upheld the Commission's definition of relevant market as *'manufacture and sale of cars and the sale of spare parts and repair services in respect of the automobile market in the entire territory of India'* as also assessment of dominance of the appellant in the relevant market. The COMPAT stated that while it might be desirable to have information symmetry and whole life costing available at the outset, in practice, it was not that simple. There are several factors which determine the choice of a consumer and they are not necessarily data based information elements but could very often be clearly driven by advertisements, peer group selection, budget, past experience, etc. At this moment of the development of Indian automobile sector, it is hard to say that consumer would necessarily make his choice driven entirely by whole life costing. The COMPAT thus upheld CCI's definition of relevant market. By virtue of a network of agreements and practices, the original equipment manufacturer (OEM) becomes a sole supplier in the aftermarket for supply of spare parts and diagnostic tools for its own brand of automobiles. In the absence of the availability of genuine spare parts and diagnostic tools that are compatible to carry out effective repair work on various models of automobiles manufactured by the OEMs, the independent repairers are foreclosed to compete effectively with the authorized dealers of the OEMs. COMPAT concluded that each OEM has a 100% share of the aftermarket for each of its model, therefore, is entirely a dominant entity.

COMPAT was in agreement with the Commission's conclusion that the conduct of the car manufacturers had resulted in denial of market access, unfair price in sale of spare parts which was substantiated by the considerable mark up in prices, leveraging their position in one market to facilitate protection of the services market for their authorized dealers. With respect to vertical agreement, the COMPAT considered (a) overseas agreements of original equipment manufacturer (OEMs) for sourcing spare parts for the aftermarket from their parent companies abroad, (b) the OEM-OES (Original Equipment Suppliers') agreement – where the OEM procures spare parts for both assembly line and aftermarket requirements from the local OES and (c) agreement between OEM and the authorized dealers for non sale of spare parts over the counter to independent repairers/individual customers and agreed with the conclusions drawn by the Commission. COMPAT further modified the recommendations made by the Commission to the car manufacturers and directed inter alia that all restrictions imposed through agreements and practices on OESs for selling spare parts including diagnostic tools etc., in the aftermarket be removed and additional distribution channels to the open market for spare parts on a country wide basis be opened. Further, the Ministry of Road Transport and Highways in the Central Government has been directed to develop voluntary standards under Motor Vehicles Act, 1988/Central Motor Vehicles Rules, 1989 with support from Quality Council of India, BIS, IARI etc. for certification of garages/independent repairers.

LUPIN NOT IN CONTRAVENTION OF THE ACT

The appeal arose from the Commission's order whereby an order under Section 27 was passed against Karnataka Chemist and Druggist Association (KCDA) for contravening the provisions of Section 3(1) read with Section 3(3)(b) of the Act, against Lupin and KCDA for having entered into an anti-competitive understanding in violation of the prohibition contained in Section 3(1) and against the officials of Lupin and KCDA under Section 48(2) of the Act.

The COMPAT has observed that the Informant, a registered pharmaceutical stockiest and dealer in Bangalore, was unreliable. The COMPAT observed that the conclusion that Lupin has acted in violation of Section 3(1) read with Section 3(3)(b) is ex facie erroneous and that Section could not have been invoked because there was no evidence direct or circumstantial to show that the Appellants and KCDA were engaged in identical or similar trade of goods or provisions of services. Lupin is a manufacturer of pharmaceutical products and Appellant Nos. 2 and 3 are engaged in the supply and distribution of those medicines. KCDA is an association of chemists and druggist engaged in the business of selling medicines in the State of Karnataka. Even if any tangible evidence had been collected during investigation to show that Lupin had acted under the pressure of KCDA, the Commission could not have held that there was an arrangement or understanding between them which violated Section 3(1) of the Act.

The finding of contravention against the office bearers of Lupin was set aside because according to the COMPAT, the deeming provisions contained in Section 48 can be invoked only after it is found that the company has contravened the provisions of the Act or any rule, regulation, order made and direction issued there under. Further, the COMPAT also observed that the Commission did issue notice to the office bearers and called upon them to furnish their income tax returns, but no notice was given to them proposing to impose penalty after recording a finding that Lupin was guilty of having acted in violation of Section 3(1) and/ or read with Section 3(3)(b) of the Act.

COGENT EVIDENCE NECESSARY TO PROVE ANTICOMPETITIVE AGREEMENT

COMPAT vide its orders dated 08.11.2016 set aside the final order passed by the Commission in Case no. 26/2013. COMPAT has set aside the finding recorded by the Commission that Glaxo SmithKline ('GSK') and Sanofi are guilty of collusive conduct. The CCI held that GSK and Sanofi were colluding with each other to divide the entire tendered quantity to Ministry of Health and Family Welfare and had failed to establish independent business decision-making contravening the provisions of Section 3(3)(d) read with Section 3(1) of the Act.

COMPAT held that the existence of a scenario conducive to cartelization is not enough and cogent evidence must be adduced or collected to prove anti competitive agreement. Mere suspicion, howsoever strong it may be cannot be made basis for recording a finding of collusive bidding or bid rigging. Further, COMPAT held that there is no evidence to show that the GSK's non-participation in the re-tender bidding process was a part of the arrangement between the two Appellants or GSK had colluded with Sanofi to ensure that it could get the contract for supply of the tendered quantity.

TRAINING PROGRAMMES

1. Two officers participated in the 5th Annual Lex Witness Pharma Legal & Compliance Summit 2016 organised by LexisNexis on 7th October 2016 at Mumbai.
2. An officer attended a training on "Using RTI-MIS" organised by DoPT on 20th October 2016 at Ministry of Corporate Affairs.
3. CBD organized an In-house training on 'Understanding Basic Finance through Finance Terminology' on 26th October 2016 for Law & Eco professional officers/ RAs of CCI.
4. 2nd One-day In-house Induction Training Programme organised by CBD on 15th November 2016 for fifteen newly recruited officers/ RAs of CCI.
5. Two officers attended Winter School on 'Role of Economics in Competition Law' organized by CUTS Institute of Regulation & Competition (CIRC) and NERA Economic Consulting during 28th- 30th November 2016 at India Habitat Centre, New Delhi.

HR CORNER

1. Three officers joined CCI (two on deputation basis and one on permanent basis) during the above mentioned period.
2. At the same time association of two officers with the Commission came to an end on completion on their deputation tenure.
3. Research Associates joined the Commission during the above mentioned period.

KNOW YOUR COMPETITION LAW

SINGLE ECONOMIC ENTITY

This doctrine states that there cannot be an agreement between two or more legal persons that form a single economic entity because collectively they comprise a single undertaking. The important factor considered is whether parties to an agreement are independent in their decision making or whether one is able to exercise decisive influence over the other with the result that the latter does not enjoy 'real autonomy' in determining the commercial policy on the market. Factors such as shareholding of the parent company in the subsidiary, the composition of the board of directors, the extent to which the parent influences the policy of or issues instructions to the subsidiary and similar matters are considered to ascertain this.

According to the jurisprudence in the EU, Article 101(1) of Treaty on the Functioning of the European Union does not apply to agreements between two or more legal persons that form a single economic entity; collectively they comprise a single undertaking and so there is no agreement between undertakings. This provision is not available in the law, but has evolved through decisional practice. A crucial question considered is whether parties to the agreement are independent in their decision-making or whether one is able to exercise decisive influence over the other with the result that the latter does not enjoy 'real autonomy' in determining its commercial policy on the market.

In the US, previously the Courts accepted the doctrine of intra-enterprise conspiracy. But in *Copperweld Corp. v. Independence Tube Corp.*[6] , the United States Supreme Court held that a parent corporation is incapable of conspiring, within the meaning of Section 1 of the Sherman Antitrust Act, with its wholly owned subsidiary. This holding reversed the previous decisions of the Supreme Court which relied on the intra-enterprise conspiracy doctrine to treat commonly owned or controlled corporations as separate legal entities to hold them liable under the Sherman Act.

In *Suo Moto Case No. 02 of 2014,* the Commission considered the allegations of manipulation of the bidding process initiated by the Government of Kerala in regard to the Rashtriya Swasthya Bima Yojna (RSBY)/Comprehensive Health Insurance Scheme (CHIS) by National Insurance Company Limited, New India Assurance Company Limited, Oriental Insurance Company Limited and United India Insurance Company Limited. One of the arguments of the insurance companies was that the Government of India holds 100% shares of each of them and their management and affairs are controlled by the Government of India through Department of Financial Services (Insurance Division), Ministry of Finance. Therefore they constituted a single economic entity. The Commission noted that although the public sector insurance companies are presently under the overall supervision of the Central Government, each of them placed a separate bid in response to the tenders issued by the Government of Kerala for implementation of RSBY/ CHIS schemes. Further, parties themselves had admitted before the DG that all decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally at company level without any ex ante approval/ directions from Ministry of Finance. Even the decisions taken by the companies were not notified ex post to the Ministry. Thus, it was apparent that the insurance companies participated in the impugned tenders independent of Ministry of Finance. On this basis, the

[6]467 U.S. 752 (1984).

Commission held that the Ministry of Finance did not exercise any *de facto* or *de jure* control over opposite parties' the business decisions in submitting bids for impugned tenders. Hence they cannot be said to constitute a single economic unit.

The insurance companies raised the same argument before the COMPAT in appeal. The COMPAT observed that in terms of Section 18(1) of General Insurance Business (Nationalization) Act, 1972 ('GIBNA'), the Central Government and the insurance companies are distinct and separate entities. Central Government can independently do insurance business and the insurance companies have a separate right to do insurance business. Therefore, Department of Financial Services ('DFS') which is the part of the Ministry of Finance discharging functions of the Central Government is separated by a statutory wall from the insurance companies. The reason for creating four companies was to encourage competition.

COMPAT further observed that DFS is not engaged in the business of insurance. The insurance companies, therefore, cannot economically form a single entity with DFS, which is not engaged in any commercial activity. They are not under each other's influence and do not hold any management or shareholder position in each other. The influence, if any, of the DFS does not detract from the independent, commercially and economically separate status of each of the insurance companies, who as per GIBNA owe their separate existence to the need to compete in the interest of efficiency.

Further, the COMPAT observed that subsidiary status is available only to companies or body corporates. A department of the Government is neither a company nor a body corporate, and by its very nature cannot have subsidiaries. Any extended or altered meaning of the term subsidiary will mean a departure from the clear language of law under Section 2(h) read with Section 2(z) of the Act. On the basis of these reasons, the COMPAT did not agree that the insurance companies are a 'single economic entity' or that DFS was an 'enterprise' in terms of Section 2(h) of the Act, engaged in providing general insurance services through its subsidiaries i.e four nationalised public sector insurance companies.

FORTHCOMING EVENTS

- 2nd National Conference on Economics of Competition Law, 2017 on 2-3 March, 2017
- 1st Economists' Conclave on 4th March, 2017
- National Conference on Competition Law and Policy: Problems and Prospects during 18-19 March 2017 organised by Indian Law Institute, New Delhi

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