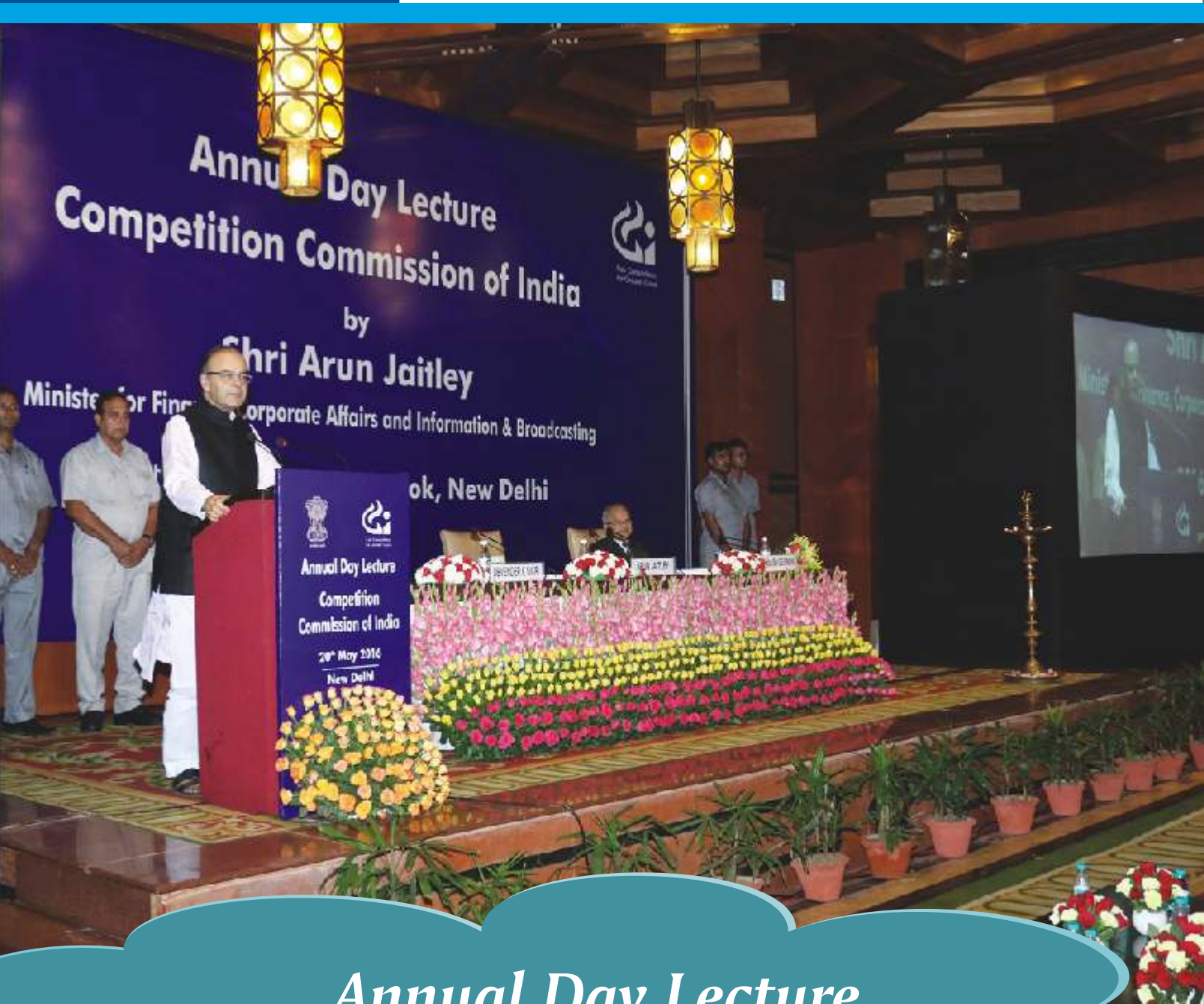




The Quarterly Newsletter of Competition Commission of India

Fair Play

VOLUME 17: APRIL - JUNE 2016



*Annual Day Lecture
Competition Commission of India*

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FROM THE DESK OF THE CHAIRPERSON



It is an established fact that free markets facilitate efficient resource allocation and growth in an economy. Market conditions and market players may cause asymmetries, which may lead to market distortions. To address these market distortions, the role of the market regulator or the Competition Authority becomes imperative. Competition law is an economic legislation that promotes free markets by regulating anti-competition conducts and increasing awareness about the benefits of competition.

In India, the law relating to competition has had a chequered history. The economic system, so designed immediately after independence, was a 'command and control economy'. Industrial activity was controlled through licences and quotas. There was an emphasis on domestic protectionism, import substitution, economic interventionism, a large government-run public sector and central planning. Businesses had little freedom, lacking even the basic autonomy to decide on their investments and the prices on which to sell. It was in this environment that the MRTP Act was enacted with an underlying principle that size is evil. Therefore, anything which was large in size and could have encouraged economies of scale and promoted efficiencies, was assumed to result in monopolies, and, thus discouraged. A protectionist regime, whose primary objective was to save some industries at the cost of efficiency and innovations, was the order of the day. But, as the economic landscape changed globally and specially in Asia, India realized that the highly interventionist model adopted so far had stifled growth and led to a sluggish economy. As a result, the reforms, popularly known as LPG (Liberalization, Privatization and Globalization), which were introduced in 1991, paved the way to a new economic order. The Competition Act, 2002, which established the Competition Commission of India, was a corollary to these reforms.

The Competition Commission of India, as a market regulator, has the responsibility to ensure well-functioning markets and competitiveness. Being a young jurisdiction, the Commission is going through an evolutionary phase in which we are facing a variety of challenges. We are constantly evaluating ourselves and improving our working in keeping with the evolving jurisprudence and the international best practices. It is the constant endeavour of the Commission to base its decisions on sound economics and hard evidence and ensure enforcement of the competition law in a fair, consistent, predictable and transparent manner.

But as we strive to achieve the excellence in ever changing markets, there are new challenges emerging. We live today in an increasingly interconnected, globalised world, where labour, capital, technology and ideas flow seamlessly across geographies; where relentless disruption caused by technology and digital world are transforming business and industry landscapes at an unprecedented pace and scale. Market leaders today, are not necessarily the old or big firms, but firms which are most dynamic and innovative. Many sectors have come under threat from disruptive innovations. But at the same time, they bring significant benefits to the consumers.

These new IT based business models are posing a challenge for both the legislative and the regulatory bodies who need to keep pace with the rapidly evolving models of businesses. One of the challenges is the absence of a level playing field. Traditional players are regulated whereas digital markets are less regulated and at times it is difficult to bring them in the fold of law which has been conceived at a time when these dynamic business models did not exist. The competition agencies world over are looking at a possible response to address this aspect. It is felt that regulatory and competition agencies should place more reliance on the market forces which play a significant role in correcting aberrations. However, competition law enforcement will continue to be tested in each country taking into account the political economy, the legal culture, stage of evolution of the market and tradeoff between the benefits emerging out of efficiencies vis-à-vis their anti-competitive effect.

We at CCI are working to equip ourselves to these changing market dynamics by aligning our processes and at the same time, by promoting competition awareness to build a competition culture.

(Devender K. Sikri)

'Competition, Regulator & Growth'*

Regulators have been in existence since long time in India¹. However, quite-a-few new regulatory bodies have been established in last twenty five years in various sectors pursuant to economic liberalization. The regulators have been, functionally autonomous and quite effective in their respective domain. A professional and efficient regulatory eco-system acts as a catalyst to sustained economic growth.

The Competition Act, 2002 (the 'Act') replaced the erstwhile MRTP Act, 1969. Establishment of the Competition Commission of India (the Commission or CCI) brought in the era of modern competition regulation in India. This was a logical step forward, commensurate with the liberalized 'Economic and Industrial Policy' that was adopted in 1991. The Commission has many significant achievements like framing of number of sub-ordinate legislations, investigation and decision on a large number of cases etc., in a short period of six-seven years, since the government notified some substantive enforcement provision of the Act. The competition jurisprudence in India has also evolved significantly. It has earned a well-deserved place in the community of competition regulators across the globe. Several prestigious publications also have been either

released or are in the process of releasing soon. A robust Competition bar has developed.

From Controlled Economy to Market-led Economy:

After the independence, India adopted the economic model of a controlled economy that is an inherently anti-competitive model of economy. The economic order of the day was dominated with the excessive licensing, permit-raj and inspector-raj system, leading to a sluggish economy in shackles and constrained consumers' choice. It was an era of shortages and wide discretions for allocation of available limited resources and led to so called low 'Hindu rate of growth'².

The reforms of 1991 changed the way the economy functioned, from a controlled economy to a market led economy. This necessitated the establishment of autonomous expert regulatory bodies and many sectoral regulators like Securities and Exchange Board of India (SEBI), Insurance and Regulatory Development Authority of India (IRDAI) etc. were established. A need for a modern competition or anti-trust law also became inevitable. However, the Competition Act, 2002 took many years to become functional. As soon as the government wanted to establish the Commission pursuant to the

enactment of the Act, a writ petition³ was filed before the Supreme Court challenging the constitution, power and functions of the Commission. The main issue raised, was the question as to how, somebody who is not a Judge, can become the Chairperson of the Competition Commission. After a great deal of arguments and consultations, the Act was duly amended and the Appellate Tribunal, which was not envisioned as part of the original Bill, was also recommended for setting-up. Thus, a robust and vibrant institutional mechanism in the form of Commission and Appellate Tribunal was established with the Supreme Court being at the top of the appellate system. This was a pioneering development and paved way for setting up of similar institutional mechanism for many sectoral regulators, which were created as expert bodies along with the respective Appellate Tribunals headed by Judges.

Rationale for establishment of autonomous Regulators:

For a long time since the independence the government operated in dual capacity. The government was doing business through its own instrumentalities. For instance, in the telecom sector - through the BSNL⁴ and the MTNL⁵, and in the insurance sector, through

*Excerpts of the Annual Day Lecture by Shri Arun Jaitely, Hon'ble Minister for Finance & Corporate Affairs delivered on 20 May, 2016.

¹For example, Reserve Bank of India was established prior to independence in 1935

²Economist Rak Krishna coined the expression 'Hindu Rate of Growth', as Indian economic growth hovered around 3.5% during the year 1950 to the year 1980.

³Brahma Dutt vs Union of India, (2005) 2 SCC 431

⁴Bharat Sanchar Nigam Limited - BSNL

⁵Mahanagar Sanchar Nigam Limited - MTNL

the four GIC⁶ companies and the LIC⁷, the Government was a player as well as the rule maker of the game. The Minister in-charge of the concerned ministry had a dual role i.e. to make the rules of game and also to ensure that the Government companies under him, who were also player of the same game, perform well. This lead to the possibilities of framing rules and policies that could have a natural bias towards the public sector. With the transformation from a 'command and control' based economy to a market driven economy, private investors started arguing that a regime wherein a competitor (viz. the government with its interest in well-being of the Public Sector company) is also a rule maker is inherently unfair. It was argued that most often than not, the Public Sector Enterprise, despite being one of the market player, also gets to influence the rules of the trade decisively. This natural logic showed that it was absolutely necessary to have autonomous regulators at an arm's length from the Government to make rules of the game and then to administer those rules fairly. In view of this, many regulators were created. They have also been delegated the sovereign function within the sector or function specific subordinate legislations enabling them to frame regulations subject to the periodical reporting to the legislature/ executive.

It was in this genesis that the, CCI was established as an essential part of the architecture of a market-led economy. It was necessary also because ordinarily people trusted the markets more. The market economy functions on a principle that the markets will find their own levels. But then, there are always dangers of aberrations in the market economy. Therefore the Competition

Commission was and is needed to correct the aberrations arising out of the abuse of market power-the anti-competitive agreements, the abuse of dominance and the elimination of competition by a process of amalgamation and mergers.

The essence of promoting competition is to facilitate an easy entry and permit and facilitate an easy exit. An entry restriction dissuades people from investing and they may choose a better destination and may invest elsewhere. An easy entry helps in improving the ease of doing business and therefore the entry restrictions must get eliminated to the extent possible. Similarly, easy exit was almost next to impossible for a very long time. Fortunately, the recent passage of the Bankruptcy and Insolvency Code is a much required step in the right direction and would go a long way in facilitating an easy exit.

However being pro-business alone is not enough. Being pro-competition is essential to be pro-business. Being pro-business without, being pro-competition is a very precarious proposition because without being pro-competition, being pro-business can encourage crony capitalism and oligarchs, which may lead to colossus market failures. So any pro-business policy per-se has also to be pro-competition.

Competition: Some Indian Success Stories

Competition is at the heart of the market economy. Socialism per-se is anti-competitive as it promotes and encourages state monopolies, which by their very character, can be anti-competitive and against consumers' interests. This contrast between the controlled and the market economies, brings out clearly, that it is utmost necessary to sustain and promote

competition. Competition promotes innovation, ensures efficiency, price competitiveness and increased choices to the consumers over a variety of quality products and services. In India, competition has done wonders in many sectors. Following are certain sectors which have responded very positively and actively to increased competition, in the wake of opening up of the economy since 1990s:

- a) **Telecom sector:** Due to state monopoly, the lines man till the mid 1990's used to be an important person. India had a 0.8% tele-density. However, the moment sector was opened, State monopoly ended and competition was brought in, with gradual flow of capital and best of technologies, Indian telecom sector transformed into one of the largest and cheapest service providers in the world. Tele-density has gone up phenomenally, from 0.8% in 1989 to more than 74.0% now and cost of mobile telephony has come down to around Rs.0.5 a minute from around Rs.17 a minute before mid-1990s.
- b) **Automobile sector:** India had one of the most obsolete automobile sector. Increased competition, technologies and capital have transformed the sector into one of the most competitive sector in India. Production of the four-wheelers has gone up from roughly around 5 lakh per annum in 2000 to around 34 lakh per annum in 2015. With the increase in competition, quality of products and services have also improved extraordinarily.
- c) **Insurance Sector:** India was one of the most under insured

⁶Public Sector GIC Companies before liberalization were 1. National Insurance Company; 2 New India Assurance; 3. The Oriental Insurance Company; and 4. United India Insurance Company

⁷ Life Insurance Corporation of India - LIC

societies in the world before the economic reforms. One of the great challenges of social security in India was to transform it to a reasonably insured society from a woefully uninsured society. Competition and opening up of the sector has led into cost effectiveness and explosion of choices available to consumers, in terms of new innovative products and thus social security net has widened.

- d) **Banking sector:** Today, in competition to the large public sector banks, banking licenses are available on tap. There are payment gateways, internet banking and various other forms of banking facilities. Banking sector and financial services are expanding by the day. The erstwhile major players are on their toes and are marching fast to match the pace of competition. Banking sector was one of the first sector to adopt IT and computers fully, which has made anywhere and anytime banking a reality.
- e) **E- Commerce:** A great turning point, from the view of competition, has been the advent of e-commerce. It has completely changed the nature of business, making many rules and sectoral limits completely redundant. There is global choice of products available, in the cosy comfort of homes, at the most competitive prices.

If we look at list of pre-1991 top business groups in India and compare it with the top business groups today we notice that many

unknown names have suddenly come to the center stage. These are the people who have developed new ideas, new technologies and have become great players. If we compare the lists of then and now, we find that only few names are common. That is the difference the competition has made.

The other difference that the competition has made is that ideas carry a lot more value. Technological applications and innovative ideas have made Uber, the largest transport company in the world without owning a single vehicle and Wal-Mart, the largest retailer, without owning a single store.

Competition has also changed the dimensions of international trade. In early 1990s, a developing economy like India feared from international competition, particularly the WTO rules, thinking them to be instruments devised by powerful and developed western nations to economically dominate the world. Competition changed the whole idea of international trade. The new meaning of international trade was that, one who can provide goods or services of better quality at the cheaper rates will dominate the market. Thus, developing economies like India, Bangladesh etc. started dominating the services sector because the cost at which, say, an Indian professional firm can provide its services is far more competitive than the cost at which a western economy provides its services, thus changing the very dimension of international trade, thereby reducing and limiting the power of the Governments.

However, all the sectors have not responded to competition equally and that has resulted in huge difference between those sectors. For example, civil aviation opened up for competition. Multiple airlines, multiple routes, different tariffs, have made the consumer a real winner. Contrary to this, the absence of competition in Railways has prevented the consumer from getting the same quality of service. One of the worst is the status of the State Transport Undertakings and Electricity utilities. City after city in the country and State after State lack an adequate transport service. It is, one of the last of the anti-competitive sectors, where licensing is the rule, corruption is the norm and inadequacy in services to consumers is the phenomenon. There is a great need for the infusion of competition in all these sectors to increase the consumers' welfare.

Concluding Remarks:

A competitive economy is an economy which allows fair investment and the best product and service to succeed, where the entry and the exit is easy and where the rules of business are fair. Such an economy carries credibility and becomes the attractive point for global investments, (which is) a starting point of all economic activity, generating revenue and creating jobs. Such an economy, thus enables the State to discharge its obligations, particularly towards the weaker sections of the society, ensuring increased consumers' welfare, inclusive growth and a buoyant economy.

SECTION 3 & 4 ORDERS

No case of cartelization found against M/s Ruchi Soya Industries Ltd. & M/s Betul Oils Ltd.

The Commission has absolved M/s Ruchi Soya Industries Ltd. (Ruchi Soya), M/s Betul Oils Ltd. (Betul) and M/s Ganganagar Commodity Ltd. from the allegation of cartel filed against them.

The Informant had alleged collusion amongst the Opposite Parties in the physical (spot) market in fixing the prices and creating artificial storage of Guar Gum and Guar Seed. Such conduct created conditions for manipulation of prices in the futures market during the period from October, 2011 to March, 2012 by indulging in self-trading, circular trading and physical hoarding of the products with a view to create artificial demand-supply gap to manipulate prices in the physical market.

After having investigated the matter, the Director General (DG) drew the conclusion that Ruchi Soya and Betul had colluded and limited and controlled the supplies of Guar Seeds and Guar Gum in the markets during the latter part of the Financial Year 2011-12. Their conduct through tacit agreement adversely affected the demand supply equilibrium of the market. The DG gathered that Ruchi Soya and Betul through various other entities being their

subsidiary/ group companies and other directly/ indirectly related entities acting at their behest, accumulated stocks of Guar Seeds and Guar Gum under a concerted plan thereby aggravating the already stressed demand supply scenario prevailing in markets. Taking advantage of the situation created under their concerted plan, Ruchi Soya and Betul consistently took long positions in futures markets through their various group companies and other directly/ indirectly related entities for influencing prices in the futures contracts and trading profitably on the commodity exchanges. The DG found that Ruchi Soya and Betul to have contravened sections 3(3)(a) and 3(3)(b) read with section 3(1) of the Competition Act, 2002 (the Act). There was no evidence that indicated the involvement of M/s Ganganagar Commodity Ltd. in the case.

The Commission, however, was of the view that mere coordination was not enough to hold the Parties in contravention of the provisions of the Act, unless such conduct determines the purchase or sale price or otherwise limits/ controls the supply. It was observed from the evidence/ information gathered and

submissions of the Parties that trading volumes of the Ruchi Soya and Betul in the futures market as well as physical market were not significant enough to enable those Parties alone to determine the prices of Guar Seeds and Guar Gum or to otherwise limit or control the supplies thereof. Further, a major chunk of the commodity is exported and, in these circumstances, the apprehension of causing any appreciable adverse effect on competition in Indian markets due to such conduct was considered to be misconceived. It was therefore, opined that the arrangement between them could not be said to have distorted the competition in the markets to the extent of causing or likely to cause appreciable adverse effect.

Thus, the Commission held that notwithstanding the arrangement between Ruchi Soya and Betul, no contravention of the provisions of Section 3(1) read with Section 3(3)(a) and 3(3)(b) of the Act was made out against them. Also, the allegations against M/s Ganganagar Commodity Ltd. could not be substantiated either by the Informant or during the investigation. The matter was closed accordingly.

SECTION 5 & 6 ORDERS

Commission approves the combination between DLF Utilities Limited and PVR Limited, subject to modification

On 8th July, 2015 PVR Limited ("PVR") filed a notice for acquisition of DLF Utilities Limited's ("DUL") film exhibition business i.e. DT Cinemas, comprising of 39 screens (including 29 existing and 10 upcoming screens) (hereinafter, PVR and DUL are collectively referred to as the "**Parties**").

During assessment of the said combination, the Commission requested information from certain third parties (including multiplex theatres, single screen theatres, film distributors and licensing authorities) under sub-regulation (3) of Regulation 19 Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (hereinafter referred to as "**Combination Regulations**"). Further, the Commission obtained information from competitors of the Parties and real estate developers seeking certain details and also invited comments/objections/ suggestions in writing, in terms of the provisions of sub-section (3) of Section 29 of the Act, from any person(s) adversely affected or likely to be affected by the proposed combination.

Considering the material available on record, the Commission was of the prima facie opinion that the proposed combination is likely to

cause an appreciable adverse effect on competition in the relevant markets for exhibition of films in multiplex theatres in a) New Gurgaon; b) South Delhi; c) North, West and Central Delhi; d) NOIDA; and e) Chandigarh. Accordingly, the Acquirer was asked to show cause ("**SCN**") under sub-section (1) of Section 29 of the Act as to why investigation in respect of the proposed combination should not be conducted.

The Commission observed that the Parties are engaged in the market for exhibition of films through theatres. Based on material available on record and duly considering the responses received from third parties, Acquirer's response to SCN, the Commission was of the view that the relevant product market for the purpose of the Proposed Combination should be exhibition of films through multiplexes. Further, the Commission observed that the relevant product market should include high-end single screen theatres in the geographic areas where such theatres are present.

The Commission, after duly considering the responses received from third parties, Acquirer's response to SCN, responses received from distributors and comments received from public during the course of inquiry, defined relevant

geographic markets as (a) Gurgaon; (b) South Delhi; (c) North, West and Central Delhi; (d) NOIDA; and (e) Chandigarh.

Based on the above, the Commission delineated the relevant market as (i) relevant market for exhibition of films in multiplex theatres in Gurgaon; (ii) relevant market for exhibition of films in multiplex theatres and high-end single screen theatres in South Delhi; (iii) relevant market for exhibition of films in multiplex theatres and high-end single screen theatres in North, West & Central Delhi; (iv) relevant market for exhibition of films in multiplex theatres in NOIDA; and (v) relevant market for exhibition of films in multiplex theatres in Chandigarh.

Based on assessment, the Commission decided that the proposed combination is not likely to result in appreciable adverse effect on the competition in India in: (i) relevant market for exhibition of films in multiplex theatres and high-end single screen theatres in North, West & Central Delhi; (ii) relevant market for exhibition of films in multiplex theatres in Chandigarh. However, it is likely to result in appreciable adverse effect on the competition in: (i) relevant market for exhibition of films in multiplex theatres in NOIDA; (ii) relevant

market for exhibition of films in multiplex theatres in Gurgaon, and (iii) relevant market for exhibition of films in multiplex theatres and high-end single screen theatres in South Delhi. The Commission further observed that such adverse effect can be eliminated by suitable modifications. In terms of Section 31(3) of the Act, the Commission proposed certain modifications to the Acquirer to address the

competition concerns arising out of the said combination. Thereafter, the Acquirer filed an alternate proposal under Section 31(6) of the Act.

The Commission, in its meeting held on 4th May 2016, considered the alternate proposal of the Acquirer and approved the proposed combination between PVR and DUL, under Section 31(7) of the Act, subject to the Parties complying with commitments in relation to (a)

relevant market for exhibition of films in multiplex theatres in NOIDA; (b) relevant market for exhibition of films in multiplex theatres in Gurgaon; (c) Co-operation Agreement; and (d) Non-Compete Agreement and modification to the proposed combination in relation to the relevant market for exhibition of films in multiplex theatres and high-end single screen theatres in South Delhi.

CCI approves Acquisition of Copper Fungicide business of DuPont by Mitsui and Kocide

Mitsui & Co. Ltd. ("**Mitsui**") and Kocide LLC ("**Kocide**") jointly filed a notice with the Competition Commission of India ("**Commission**") on 11th February 2016 relating to the acquisition of copper fungicide business ("**Target business**") of E.I Du Pont De Nemours and Company ("**DuPont**" / "**Seller**") by them. (Hereinafter, Mitsui and Kocide are together referred to as "**Acquirers**"). The notice was filed pursuant to an Asset Purchase and Sale Agreement ("**APSA**") entered into and between Certis Cu LLC ("**Certis**") and DuPont on 19th August 2014.

Mitsui, a company listed in Japan, is engaged in worldwide trade of commodities and other businesses, including the sale, distribution, purchase, marketing and supply of products relating to areas such as: iron and steel, non-ferrous metals,

machinery, electronics, chemicals, energy-related commodities, logistics, and investing in infrastructure projects.

Kocide, earlier known as Certis and established in July 2014 for the purpose of acquiring the copper fungicide business from DuPont, is a limited liability company created under the laws of State of Delaware, USA and is a subsidiary of Mitsui. As submitted, Kocide does not have any activities in India.

DuPont, a company incorporated in USA and listed at New York Stock exchange, is engaged globally in three segments: (i) agriculture & nutrition; (ii) speciality chemicals; and (iii) advanced materials and bio-based industrials products. It is also active globally in building materials, crop protection, electronics and communications, industrial biosciences, nutrition and health,

packaging and industrial polymers, performance polymers, agricultural products, protection technologies and sustainable solutions.

The Commission noted that while DuPont is present in the sale of copper fungicides, Mitsui is present in the manufacture and sale of bio-fungicides in India. It was observed, on the basis of information provided by the Acquirers that, the market shares of the Parties in their respective businesses i.e. copper fungicides and bio-fungicides are insignificant and unlikely to raise competition concerns. Apart from above, it was observed that there are a number of competitors such as Indore Biotech Inputs and Research, Varsha-bioscience Technology, Bayer Crop Science etc. active in bio-fungicides business in India. With regards to copper fungicides business, it was observed by the

Commission that big competitors such as Syngenta AG, Rallis India, DhanukaAgritech, Isagro agrochemicals etc., are also present.

With regard to vertical relationships, it was observed that there is no existing vertical relationship between the Parties.

The relationship emanating from the Supply and distribution agreement among the Parties, under which DuPont will continue to supply the copper fungicide products for a period of five years exclusively in Asia Pacific region, would not raise competition

concern as prior to the combination, Mitsui or Kocide were not present in manufacture and sale of copper fungicides in India.

Considering the facts on record and the details provided in the notice, the Commission approved the combination under sub-section (1) of Section 31 of the Act.

Commission approves the combination between Johnson Controls, Inc. and Tyco International Plc.

Johnson Controls, Inc. ("JCI") and Tyco International Plc ("Tyco") jointly filed a notice for the proposed merger of Tyco with JCI. (JCI and Tyco are collectively referred to as "Parties").

JCI is engaged in, *inter alia*, manufacturing of automotive parts such as automotive batteries, electronics and interior systems for automobile. It is present in India through Johnson Controls (I) Pvt Ltd, Johnson Controls Automotive Ltd. and others, which are engaged in the area of automotive experience, building efficiency and power solutions. Tyco, *inter alia*, offers installation and maintenance of fire detection and alarm system. It is present in India through Tyco Fire & Security India Private Limited, Tyco Safety Products (India) Private Limited and others in the area of security and fire protection.

The proposed combination is structured as a reverse triangular merger and contemplates following

steps: (i) Tyco's newly incorporated indirectly wholly-owned subsidiary, Jagara Merger Sub LLC ("Jagara" or "Merger Sub"), will merge with and into JCI with JCI surviving as an indirectly wholly-owned subsidiary of Tyco; (ii) Tyco will be renamed 'Johnson Controls plc' and its shares will be listed on the New York Stock Exchange ("NYSE") under JCI's current ticker symbol; (iii) Pursuant to the consummation of the aforementioned steps of the proposed combination, shareholders of JCI will own majority of the merged companies' shares (approximately 56%) and the remaining shares (approximately 44%) would be held by Tyco's shareholders.

The Commission, in its meeting held on 1st June 2016, observed that the structure of the proposed combination is such that it is a case of merger within the meaning of clause (c) of Section 5 of the Act.

The Commission noted that there is an insignificant overlap between the

activities of the Parties in terms of the business of manufacturing, installing, marketing and maintaining (i) Electronic security systems, and (ii) Fire detection and alarm systems in India. It was of the view that the incremental market share of the Parties in comparison to other competitive players in these segments is insignificant, with a market share of approximately less than 5 percent in all the segments.

The Commission also observed that although there is some degree of vertical integration in some of the segments at the global level, there is no vertical relationship between the businesses of the parties in India. It was of the view that there is a presence of competitors in the market who would provide competitive constraint to the Parties.

Considering the facts on record and the details provided in the notice, the Commission approved the combination under sub-section (1) of Section 31 of the Act.

INVESTIGATIONS INITIATED

Enquiry into alleged abusive conduct of ABB India Ltd.

Inphase Power Technologies Ltd. (IPTL) filed an information against ABB India Ltd. (ABB), alleging abuse of dominant position by forcing the customers/ suppliers to purchase the power quality products of ABB and not to deal with IPTL. It was submitted that since the product of IPTL was superior than other contemporary products in the market and gained the attention of customers/ suppliers, ABB warned its customers and suppliers against dealing with the product of IPTL, failing which it would stop the supply of all materials to them. The impugned conduct was alleged to be in contravention of the provisions of Section 4 of the Act.

The Commission noted that the products of both IPTL and ABB fall under the category of power quality compensators (based on comparison of brochures of their products). The main function of power quality compensators is to maintain the quality of power for the end user and to minimize wastage of reactive power. The power quality compensator is attached to the main device in such a manner that the reactive power consumption reduces to minimum and only active power is drawn from the source. Taking into consideration the characteristics of the product, intended use and



other relevant factors, the Commission defined the relevant market as "*manufacture and sale of Power Quality Compensators with IGBT technology for low voltage i.e. below 1000V in India*". On the basis of the research report filed by the Informant and other information available on record, ABB appeared to be dominant in the relevant market.

While examining the alleged conduct, the Commission took into account the fact that ABB had a diversified product portfolio and consumers procure several products other than power quality products from ABB. The Commission also noted that patent applications of both the companies were pending

and ABB had instituted a patent infringement suit against IPTL which was also pending. The Commission was of the *prima facie* view that the steps taken by ABB, during the pendency of these applications and litigations, to dissuade its suppliers and customers from dealing with IPTL resulted in limiting supply and scientific development in the market, in contravention of the provisions of Sections 4(2)(b)(ii) of the Act. Accordingly, the Commission, *vide* its order dated 9th June 2016 passed under Section 26(1) of the Act, directed the Director General to cause an investigation into the matter.

DEVELOPMENTS IN OTHER JURISDICTIONS

(i) BRICS Competition Authorities Sign Landmark Memorandum of Understanding

Memorandum of Understanding (MoU) between the competition authorities of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa was signed on 19th May 2016 during the International Legal Forum held in Saint Petersburg, Russia.

The five member bloc of BRICS countries is represented by seven competition authorities, namely:

- ◆ **For Brazil:** the Administrative Council for Economic Defense of the Federative Republic of Brazil (CADE)
- ◆ **For Russia:** the Federal Antimonopoly Service (Russian Federation) (FAS Russia)
- ◆ **For India:** the Competition Commission of India (CCI)
- ◆ **For China:** (i) the National Development and Reform Commission of the People's Republic of China (NDRC), (ii) the Ministry of Commerce of the People's Republic of China (MOFCOM), (iii) the State Administration for Industry and Commerce of the People's Republic of China (SAIC);
- ◆ **For South Africa:** the Competition Commission of South Africa.

The MoU was signed by Mr. Marcio de Oliveira Junior, Commissioner of

Administrative Council for Economic Defense, Mr. Igor Artemiev, Head of the Federal Antimonopoly Service of the Russian Federation, Mr. S.L. Bunker, Member of the Competition Commission of India, Mr. Tembinkosi Bonakele, Commissioner of the Competition Commission of the Republic of South Africa, and Mr. Jiangping Wang, Vice Minister of the State Administration for Industry and Commerce of the People's Republic of China.

(ii) Competition Commission of South Africa Publishes Final Public Interest Guidelines

The Competition Commission of South Africa has published the final guidelines for the assessment of public interest provisions in merger regulation under the Competition Act. The guidelines have been prepared in terms of section 79(1) of the South Africa Competition Act which provides that the Commission may adopt guidelines to indicate its policy approach on any matter falling within its jurisdiction. The guidelines seek to provide guidance on the Commission's approach to analyse mergers by indicating the approach that the Commission is likely to follow and the types of information that the Commission may require when evaluating public interest grounds in terms of section 12A(3) of the South Africa Competition Act. In preparing these guidelines, the Commission has followed a consultative process which entailed obtaining

input from various stakeholders including legal practitioners, business, civil society, and also holding workshops in order to discuss comments received and to get more input from stakeholders. The Guideline is available at: <http://www.compcom.co.za/wp-content/uploads/2016/01/Gov-Gazette-Public-Interest-Guidelines.pdf>

(iii) Mobile Advertising Network InMobi will pay \$950,000 to settle US FTC charges for tracking Consumers' Locations without Permission

Singapore-based mobile advertising company InMobi will pay \$950,000 civil penalties and implement a comprehensive privacy program to settle Federal Trade Commission (FTC) charges of deceptively tracking the locations of millions of consumers – including children – without their knowledge or consent to serve them geo-targeted advertising.

According to the complaint, InMobi was actually tracking consumers' locations whether or not the apps using InMobi's software asked for consumers' permission to do so, and even when consumers had denied permission to access their location information.

The complaint alleges that InMobi created a database built on information collected from consumers who allowed the company access to their geolocation information. InMobi then would use that database to infer the physical

location of consumers based on the networks they were near, even when consumers had turned off location collection on their device.

The FTC alleges that InMobi also violated the Children's Online Privacy Protection Act (COPPA) by collecting this information from apps that were clearly directed at children, in spite of promising that it did not do so.

Under the terms of its settlement with the FTC, InMobi will also be required to delete all information it collected from children, and will be prohibited from further violations of COPPA.

(iv) Google cleared of abuse of dominance case in Competition Bureau (CB) Canada

On April 19, 2016, the Commissioner of Competition announced that CB Canada has discontinued investigation into allegations that Google Inc. engaged in conduct

contrary to the abuse of dominance provisions of the Competition Act.

The Bureau opened an inquiry against Google in 2013 to investigate its conduct related to online search and search advertising. As a result of an in-depth investigation, the Bureau concluded that Google used anti-competitive clauses in its AdWords Application Programming Interface (API) Terms and Conditions. The Bureau concluded that these clauses were intended to exclude rivals and negatively affected advertisers. Google has removed these clauses and has provided a commitment to the Commissioner not to reintroduce them (or others which have the same effect) for a period of five years. With respect to the other allegations of anti-competitive conduct, the Bureau did not find sufficient evidence that Google engaged in these practices for an anti-competitive purpose, and/or that the practices resulted in a substantial lessening or prevention of

competition in any relevant market.

(v) Competition Commission of Singapore Imposes Penalties on Ball Bearings Manufacturers involved in International Cartel

The Competition Commission of Singapore (CCS) has fined Japanese bearings manufacturers, with their Singapore subsidiaries \$9.3 million for price fixing and information exchange.

CCS investigation revealed that the three Japanese companies and their Singapore subsidiaries were competitors and met regularly at meetings, where they exchanged information, discussed and agreed on sales prices for bearings sold to their respective aftermarket customers in Singapore, so as to maintain each participant's market share and protect their profits and sales. It is the highest combined fine for a single infringement of the Competition Act of Singapore.

HR CORNER

- i) An O.M. was issued on 29.04.2016 to invite applications for filling up of 26 posts (22 Professional Staff and 04 Support Staff) in CCI on deputation basis.
- ii) Final results of the 6th round of Direct Recruitment in CCI were declared on 06.05.2016. Of the 09 candidates qualified for appointment, 02 candidates joined CCI as Joint Director (Law) w.e.f. 27.05.2016 and 01 as Joint Director (Eco.) on

- 30.06.2016. Pre-appointment formalities in respect of other qualified candidates were also initiated during the above period.
- iii) Promotion order in the grade of Asstt. Director (CS) was issued in respect of an O.M. (CS) w.e.f. 27.06.2016.
- iv) An advertisement was issued on 09.05.2016 for engagement of 15 Research Associates/ Professionals to assist the

- Commission in the discharge of its functions under the Competition Act.
- v) 'Swachhta Pakhwada' was organized during the period from 16-31 May, 2016. As part of the Pakhwada, the Commission initiated various activities such as cleaning drive, essay competition and pledge ceremony, both at H.T. House and DG's office at Bhikaji Cama Place.

ADVOCACY INITIATIVES

Advocacy Initiatives with Central Government/State Governments/PSUs

- Session at the Institute of Secretariat Training and Management, New Delhi on 18th April, 2016. Dr. M. S. Sahoo, Member, shared his thoughts on competition assessment of five new legislative initiatives with CSS Officers.
- Advocacy engagement with the Department of Defence Production on 4th May, 2016. Dr. M. S. Sahoo, and Justice G. P. Mittal, Members, conducted the meeting which was attended by the Secretary and senior officers of the Department and MDs of Defence PSUs

Advocacy Initiatives with Trade Associations and Institutions

- Global Procurement Summit, 2016 organised jointly by All India Management Association and the World Bank on 22nd April, 2016 at New Delhi. Dr. M. S. Sahoo, Member, delivered the keynote address on Competition Issues in Public Procurements.
- 4th National Conference on Corporate Compliance Management organised by the ASSOCHAM on 29th April, 2016 at New Delhi. Dr. M. S. Sahoo, Member participated as Chief Guest and inaugurated the Conference.
- National Conference on 18th May, 2016 on Competition & IPR in ICT, Telecom and Mobile Sets at India International Centre, New Delhi. Mr. V. P. Mishra, Director (Law), delivered a talk on "Interface between Competition Law and Intellectual Property Rights".



Shri Augustine Peter, Member, CCI (Second from left) delivered Key Note Address at the inauguration of the 'BRICS Law Institute' at National Law University Jodhpur on 03.04.2016



Dr. M. S. Sahoo (second from right), Member, CCI delivered Key Note Address on "Competition Issues in Public Procurement at Global Procurement Summit- 2016 organized by All India Management Association and the World Bank on 22nd April, 2016

- A session on the provisions of the Competition Act at the Research Designs and Standards Organisation (RDSO)'s premises in Lucknow on 20th June 2016. Mr. Anil Kumar Bhardwaj, Adviser (Advocacy) made a Presentation on Competition Law and issues related to public procurement.
- A Workshop of the Forum of Indian Regulators (FOIR) on 24th June 2016 at Puducherry. Dr. M. S. Sahoo, Member, made a Presentation on "Facilitating Competition in Infrastructure Sector – Challenges and Way Forward" at the workshop.

Advocacy Initiatives with Universities/Institutes

- Inauguration of the Academic Forum and officially launching the NLU Jodhpur BRICS Law Institute on 8th April, 2016: Mr. Augustine Peter, Member, inaugurated and delivered the Keynote address on the occasion.
- Session on 'the Role of Competition Law in New Economy: Issues Challenges and Opportunities at Jagan Nath University, Bahadurgarh, Haryana, on 23rd April, 2016. Mr. Kuldeep Kumar, Dy Dir (Law) delivered a lecture.
- Session on 'Competition Act and its Provisions' during MDP on Public Procurement at NIFM, Faridabad, on 26th April, 2016. Dr. Kumkum Budgujar, Jt Dir (Law) delivered a lecture.
- ICSI International Round Table Conference held on 15th April, 2016 at Vigyan Bhawan Annexe, New Delhi. Mr. Anil Kumar Bhardwaj, Adviser, and Mr. Yogesh Kumar Dubey, DD (Advocacy) attended the conference.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 7th May, 2016. Mr. Nandan Kumar, Jt Dir (Eco) conducted the session.
- A Session on 'Monopoly & Abuse of Dominance, Compliance Manual & Merger Filings during National Conference organised by ICAI on 14th May, 2016, at Guwahati. Mr. Shivram Bairwa, Jt Dir (Law) conducted the session.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 14th May, 2016. Mr. Yogesh Kumar Dubey, Dy. Dir (Eco) conducted the session.
- Two sessions on 26th May, 2016 on 'Using MCA 21 Data in the context of Competition Law Investigation' during IICA training programme at India International Centre, New Delhi. Mr. Anil Kumar Bhardwaj, Adviser (Eco) participated.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 26th May, 2016. Mr. Anand Chandra Ojha, Jt Dir (Eco) conducted the session.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 1st June 2016. Ms. Neha Raj, JD (Law) conducted the session.
- A session on 'Competition Law and PSUs' at IIPA, New Delhi on 6th June 2016 during their Advanced Leadership Programme. Mr. Kaushal Kishore, Adviser (Eco) delivered a lecture on the topic.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 10th June 2016. Dr. K. D. Singh, JD (Law) conducted the session.
- "Capacity Development Programme for Corporate Laws" on 13th June 2016 at National Law University, Delhi. Dr. M. S. Sahoo, Member, delivered Key Note Speech in the inaugural session.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 17th June 2016. Mr. V. Sriraj, DD (Law) conducted the session.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 22nd June 2016. Mr. Nilotpal Bal, DD (Eco) conducted the session.
- A session on 'Competition Law & Public Procurement' during MDP on Public Procurement at NIFM, Faridabad on 28th June 2016. Mr. Yogesh Dubey, DD (Advocacy), conducted the session.

Annual Day 2016

Annual Day of CCI celebrated on 20th May 2016. Shri Arun Jaitley, Hon'ble Minister for Finance, Corporate Affairs and Information & Broadcasting, delivered the Annual Day Lecture on "Competition, Regulator and Growth", at New Delhi. Justice Shri G. S. Singhvi, Chairperson, COMPAT was the Guest of Honour in the event.

*Shri Arun Jaitley,
Hon'ble Minister for
Finance, Corporate
Affairs and I&B
delivering Annual
Day Lecture on 20th
May, 2016 in New
Delhi*



*Shri Arun Jaitley, Hon'ble Minister for Finance,
Corporate Affairs and I & B delivering Annual Day
Lecture on 20th May, 2016 in New Delhi*

*Hon'ble Mr. Justice G. S. Singhvi, Chairman,
COMPAT delivering speech at Annual Day Lecture
on 20th May, 2016 in New Delhi*



*Shri Arun Jaitley, Hon'ble Minister for Finance,
Corporate Affairs and I & B delivering Annual Day
Lecture on 20th May, 2016 in New Delhi*



ENGAGING WITH THE WORLD

Chairperson/Members of the Commission participated in various international meetings/conferences, some of which are as follows:

- (i) Mr. Devender K. Sikri, Chairperson, CCI; Ms. Smita Jhingran, Secretary and Mr. V. Sriraj, Deputy Director participated in ICN Annual Conference 2016 in Singapore during April 26-29, 2016. The delegation also participated in bilateral and multilateral meetings with the Heads of MOU partner agencies and other important Competition Authorities in side-line of ICN annual conference 2016 in Singapore.
- (ii) Mr. S.L. Bunker, Member and Dr. K.D. Singh, Deputy Director participated in 6th Saint Petersburg International Legal Forum during May 18-21, 2016 at Saint Petersburg, Russia. Memorandum of Understanding (MoU) between the competition authorities of BRICS countries was signed on 19th May 2016 during the International Legal Forum.



Shri S.L. Bunker (in middle), Member, CCI at St. Petersburg International Legal Forum 2016 held from 17-21st May, 2016 organized by the Federal Antimonopoly Service (FAS)

- (iii) Mr. Sudhir Mittal, Member participated in St. Gallen International Competition Law forum on May 19-20, 2016 St. Gallen, Switzerland.
- (iv) Mr. Devender K. Sikri, Chairperson, CCI participated in OECD Competition Committee Meetings during June 13-17, 2016 at Paris.
- (v) Mr. Augustine Peter, Member participated in Antitrust in Asia Pacific Summit on 23-24, June 2016 at Hong Kong.

CCI officials participated in various workshops/seminars meetings, some of which are as follows:

- (i) One officer participated in Kazan Study visit organised by FAS Russia on "Experience in Enforcement of Russian Competition Law" in Kazan Russia on 05-07 April, 2016.
- (ii) One officer participated in OECD/KPC workshop on "Abuse of Dominance and Unilateral conducts" in Bali, Indonesia May 11-13, 2016.
- (iii) Adviser-CCI attended ABA Antitrust in Asia Conference at Hong Kong on June 2-3, 2016.
- (iv) One officer participated in meeting of RCEP Working Group on Competition during 12-17 June 2016, at Auckland.
- (v) Two officers participated in OECD/KPC Competition Law Workshop on "Competition Rules and the Financial Sector" at Seoul, Korea on 22 to 24 June 2016.



Shri Devender K. Sikri, Chairperson (second from right), CCI at International Competition Annual Conference (ICN) 2016 in Singapore during 27-29th April, 2016.

ECO WATCH

Government defines e-commerce marketplace

The Department of Industrial Policy and Promotion (DIPP) issued Guidelines for Foreign Direct Investment in E-Commerce Sector ("**Guidelines**") vide Press Note No. 3 of 2016 on March 29, 2016.

The Guidelines attempt to distinguish between the *inventory based model and the marketplace model of e-commerce*, in addition to providing a definition of 'e-commerce' and 'e-commerce entity'.

Inventory based Model vs. Marketplace Model

The inventory based model of e-commerce has been defined as an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly as opposed to the marketplace model where an e-commerce entity provides an information technology platform on a digital and electronic network where the entity acts as a facilitator between buyer and seller.

As per the Guidelines 100% Foreign Direct Investment (FDI) under automatic route is permitted in marketplace model of e-commerce. However, keeping in line with the extant position under the FDI Policy, DIPP has specified that FDI is **not** permitted in the inventory based model of e-commerce.

While an e-commerce marketplace entity will be permitted to enter into transactions with sellers registered on its platform on Business to Business

("B2B") basis, the e-commerce entity providing the marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into an inventory based model in which FDI is not permitted.

Other Conditions

The Guidelines also enumerate certain other conditions applicable to the e-commerce sector, which includes the following :

- i) An e-commerce entity cannot permit more than 25% of the sale affected through its marketplace from one vendor or its group companies. This move of the DIPP is an attempt to level the playing field for vendors on marketplaces and to ensure that enough vendors are available on the marketplace to host the products.
- ii) E-Commerce entities providing marketplace will not directly or indirectly influence the sale price of goods and services and shall maintain level playing field. The origin of this condition perhaps lies in the ongoing feud between online and offline (brick and mortar) retailers, who have been alleging that the marketplace companies follow the practice of predatory pricing and influence prices of the goods by offering unsustainable discounts. With this condition, the onus of maintaining a level playing field seems to have been shifted to the marketplace.

JUDICIAL PRONOUNCEMENTS

Determination Against Enterprise Mandatory Before Proceeding Against Office Bearers

The COMPAT vide its order dated 10.05.2016 in Appeals no. 09/2016 and 05/2016 set aside the order of the Commission in Case No. 28/2014. The information alleged *interalia* contravention of the provisions of S. 3 of the Act by M/s Alkem Laboratories, its Divisional Sales Manager and All Kerala Chemists and Druggists Association (AKCDA). The Commission found that conduct of Alkem Labs, AKCDA and their office bearers amounts to contravention of S.3(1) read with S.3(3)(b) of the Act. It was also viewed that Mr. A. N. Mohana Kurup and Mr. Thomas Raju, President and

General Secretary of AKCDA are equally complicit with the practices carried on and decisions being taken by AKCDA and under S.48(1) of the Act are liable to be penalised.

The COMPAT set aside the order of the Commission and, *interalia*, held that in the absence of a determination by the Commission that the company has committed contravention of any of the provisions of the Act, the deeming clause contained in S. 48(1) cannot be invoked for punishing the person incharge of and responsible to the company for the conduct of its

business. Similarly, the deeming provision contain in S. 48(2) cannot be invoked for penalising any director, manager, secretary or other officer of the company whose consent or connivance or negligence may have resulted in contravention of the provisions of the Act or of any rule, regulation or order made or direction issued thereunder by the company unless a finding is recorded by the competent authority that the company has in fact contravened the provisions of the Act.

There Must be Some Cogent Evidence to Prove the Existence of an Agreement

In Appeal no. 60/2015, the COMPAT vide its order dated 18.04.2016, set aside the order of Commission in Case No. 61/2012. Indian Foundation of Transport Research & Training (IFTRT) filed an information against All India Motor Transport Congress (AIMTC) alleging that AIMTC had uniformly increased the truck freight by 15% across the country on account of diesel price hike of Rs. 5/- per litre w.e.f. 14.09.2012 and thereby contravening the provisions of S. 3 of the Act. The Commission held that AIMTC, through its impugned

act/conduct, has contravened the provisions of section 3(3)(a) read with section 3(1) of the Act. The Commission observed that various press reports had appeared in the media indicating that the President and the spokesperson of AIMTC gave statements suggesting the freight charges be increased if the hike in diesel prices was not rolled back by the Government. Commission opined that, unless there was meeting of minds amongst the members, similar statements containing identical issues would not have been issued.

The COMPAT held that there is no substantial evidence to show that there existed an agreement as defined under section 2(b) of the Act. COMPAT analysed the terms 'agreement', 'understanding' and 'acting in concert' with various citations and observed that for presumption of AAEC as envisaged in S.3(3)(a), there must be some cogent evidence to prove the existence of an agreement entered into. If such evidence is lacking then they cannot be held guilty of acting in contravention of S. 3(3)(a).

DG Exceeded Jurisdiction Conferred by CCI Order U/S 26(1)

The COMPAT, vide its order dated 10.05.2016 in Appeal no. 88/2015, set aside the order of the Commission in Suo Motu Case No 04/2013 wherein it had passed an order imposing penalty for contravention of the provisions of S. 3(3)(a) and 3(3)(d) read with S.3(1) of the Act, on the cartel manufacturing CN containers required for 81 mm bomb and procured by Ordnance Factories situated at Ammunition Factory, Khadki (Pune), Ordnance Factory, Dehu Road (Pune) and Ordnance Factory, Chandrapur.

The basis of information was the CAG Report of 2010-2011 where it was observed that there exists a cartel in the supply of CN Containers. The Commission in its direction under S. 26(1) opined that OP's appear to have acted in contravention of S.3(3)(d) and directed DG to investigate the matter. The DG concluded that the parties had contravened S.3(3)(d) and 3(3)(a). The COMPAT found that the Commission failed to consider the objection raised by the opposite parties that the DG had

exceeded his jurisdiction while concluding contravention under S. 3(3)(a). The COMPAT held that in view of S.41(1) of the Act, the DG was bound to confine his investigation to the mandate contained in the directive issued by the Commission, but he suo-motu expanded the scope of investigation and held that the opposite parties have acted in contravention of S. 3(3)(a) apart from S. 3(3)(d). COMPAT held that this exercise undertaken by the DG was per-se illegal.

Failure to Comply with Principles of Natural Justice

Vide order dated 18.04.2016 in Appeal nos. 07/2016, 08/2016 and 11/2016, the COMPAT set aside the order of the Commission in Case No. 30/2015. Express Industry Council of India filed information against Jet Airways (India) Ltd., IndiGo Airlines, SpiceJet Ltd., Air India Ltd. and Go Airlines (India) Ltd. alleging, *inter alia*, contravention of the provisions of S. 3 of the Act in the fixation of fuel surcharge. The DG concluded that there was no contravention; however, the Commission held that the opposite parties except Go Air have violated S.3 of the Act.

The COMPAT held that the

Commission has not complied with the principles of natural justice because till the passing of the impugned order, the Commission had, at no stage of the proceedings held after the receipt of investigation report, given any notice to the opposite parties indicating/incorporating the reasons for its disagreement with the findings /conclusions recorded by the DG that the appellants had not formed any cartel or acted in contravention of S. 3(1) and 3(3)(a) of the Act and no opportunity was given to them to show that the reasons recorded by the Commission for its disagreement with the findings and conclusion

recorded by the DG were untenable.

The impugned order was set aside and the Commission was directed to re-consider the DG report and take appropriate decision under Section 26(8) of the Act. If the Commission disagrees with the findings and conclusions recorded by the Jt. DG, then it should indicate the reasons for such disagreement and issue notice to the parties incorporating the reasons of disagreement and give them opportunity to file their replies / objections. After receiving the replies/ objections of the parties, the Commission should hear them and pass appropriate order in accordance with law.

Order of Debarment of Office Bearer Set Aside

In Case No. 16/2014, the Commission found that conduct of Kerala Film Exhibitors Federation (KFEF) amounts to contravention of S. 3(1) r/wS. 3(3)(b) of the Act. Further, President and General Secretary of KFEF were found to be the officers responsible for the conduct of business of KFEF under S. 48(1) and liable to be penalised. Since the office bearers were previously penalised in an earlier case (Case no. 45/2012), the Commission ordered that KFEF shall not associate the President and

General Secretary for its affairs for a period of 2 years. Aggrieved by the above order KFEF and its President and General Secretary filed an appeal before the COMPAT being Appeal no. 99/2015.

The COMPAT, vide order dated 19.04.2016 upheld that the finding of contravention against KFEF and the penalty imposed. However, the penalty imposed on office bearers and the directions of debarment were set aside. The COMPAT held that since the action was to be taken against office bearers and ultimately

they were debarred from holding office of KFEF, it is required to issue them show cause notice before taking such action against them. Non-issuance of such notice resulted in violation of principles of natural justice. Debarring/disqualifying an officer from holding elected office of an organization/company/ Association for a specific period of time may infringe upon his right to be elected to an Association, right to employment or work or to his fundamental right to life.

One who Hears Should Decide the Case

The COMPAT, through its order dated 17.05.2016 in Appeal no. 01/2014, 44-47/2014, 49/2014, 70/2014, 52/2015, set aside the order passed by the Commission in Case No. 03, 11 & 59/2012, 05, 07, 37, 44/2013 and 08/2014. The Commission vide these orders had penalised Coal India Ltd. and its

three subsidiaries for contravening the provisions of S.4(2)(a)(i) of the Act for imposing unfair/ discriminatory conduct in the matter of supply of non-coking coal to power producers. However, the COMPAT held that the Commission had violated the principles of natural justice because some of the Members who had

signed the order passed under S.27 had not been present in the hearing of the matter. The impugned orders were set aside and the matters were remitted to the Commission for deciding the issues.

Parties Can be Accompanied by Advocate when Summoned by the DG

The Single Judge of the Delhi High Court in W.P.(C) 11411/2015 & CM No.30075/2015 (*Oriental Rubber Industries Private Limited v. CCI & others*) held that the person summoned by the DG can be accompanied with an advocate. The

Court considered S. 30 of the Advocates Act, 1961 which confers on an advocate a right to practice *inter alia* before any person legally authorized to take evidence and the DG, by the Act, has been legally authorized to take evidence. Hence,

it was held that an advocate has a right to practice before DG; which right to practice would include accompanying a person who has been summoned before the DG for investigation.

TRAINING PROGRAMMES

1. Mr. Augustine Peter, Member, CCI inaugurated BRICS Law Institute and delivered Keynote address on the topic "Introduction to the idea of BRICS: Transcending the Developed-Developing dichotomy" at National Law University, Jodhpur on 8th April 2016.
2. 3rd Special Visitor Knowledge Sharing Series (SVKS) lecture by Dr. Shyam Khemani, Ex-Chief, Canadian Competition Bureau and Ex-advisor, Competition Policy, World Bank Group on the topic "Multi-sided Markets, Innovation and Competition: Some Analytical Issues and Policy Challenges" was organized on 29th April 2016.
3. Capacity Building Division (CBD) conducted an Exposure Programme for Direct Recruited Assistant Section Officers of MCA on May 2, 2016 at CCI.
4. 15th Distinguished Visitor Knowledge Sharing Series (DVKS) lecture by Mr. Bibek Debroy, Member, NITI Aayog on the subject 'Law Reforms' was organized on May 24, 2016.
5. Two officers participated in a training on the subject "Using MCA-21 Data in Context of Competition Law Proceedings" under plan scheme Corporate Data Management of Ministry of Corporate Affairs at India International Centre during May 26-27, 2016.
6. An officer from CCI attended one day Regional Seminar on 'Forensic Accounting & Fraud Prevention' at Hotel Le Meridian (Sovereign Hall) on May 28, 2016, organized by Committee of Information Technology of the ICAI, Hosted by Northern India Regional Council of ICAI (NIRC).
7. Half-day training on Understanding of Basic Economics through Economic Terminology organized by CBD for non-eco officers on 3rd June 2016 at CCI.
8. Three officers from CCI attended an event on 'Competition Aspects of Public Procurement - An analysis of General Financial Rules 2005, Draft Public procurement Bill and Competition Act, 2002' organized by National Public Procurement Observatory at World Bank office, HT House on 20th June 2016.

KNOW YOUR COMPETITION LAW

APPRECIABLE ADVERSE EFFECT ON COMPETITION

The term 'appreciable adverse effect on competition' ('AAEC') has not been defined in the Competition Act, 2002 ('Act'). However, it assumes importance while investigating anticompetitive agreements under Section 3 and regulating merger control under S. 5 and 6 of the Act. It is the benchmark against which an agreement is tested before it is held to be anticompetitive under the provisions of S.3 of the Act and a proposed combination is reviewed before it is approved by the Commission under S. 31 of the Act. S. 4, which deals with abuse of dominance, does not prescribe the test of AAEC due to conduct of the dominant entity.

AAEC under S. 3: S.3 pertains to anti-competitive agreements and holds that such agreements which cause or are likely to cause AAEC *within India* shall be void. S. 3(3) applies to agreements between enterprises, persons, associations, etc. engaged in identical or similar trade of goods or provision of services, and S.3(4) applies to agreements amongst enterprises or persons at different stages or levels of the production chain in different markets.

Though the term AAEC has not been defined in the Act, in case of alleged contravention of S.3 of the

Act, S.19 (3) of the Act has specified certain factors which should be considered before it is concluded that the agreement has AAEC. These factors are: (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Under S.3 (3) of the Act –an agreement amongst competitors is *presumed* to have AAEC. The burden of proof is on the parties to such an agreement/arrangement to show that no AAEC is caused. However, under S. 3(4) of the Act, the burden of proof is on the Commission to prove that there is AAEC.

AAEC under S.6: This section renders void any combination which causes or is likely to cause an AAEC within the *relevant market in India*. For the purpose of analysing AAEC under this section, relevant market-relevant product market and relevant geographic market, will have to be delineated.

S.20(4) of the Act prescribes the factors which have to be considered

while determining whether a combination will have AAEC in the relevant market. These factors are: (a) actual and potential level of competition through imports in the market; (b) extent of barriers to entry into the market; (c) level of combination in the market; (d) degree of countervailing power in the market; (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins; (f) extent of effective competition likely to sustain in a market; (g) extent to which substitutes are available or are likely to be available in the market; (h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination; (i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market; (j) nature and extent of vertical integration in the market; (k) possibility of a failing business; (l) nature and extent of innovation; (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition; (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

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For any query/comment/suggestion, please write to advocacy@cci.gov.in

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