The Quarterly Newsletter of Competition Commission of India (CCI)

Fair competition
for greater good

Fair Play

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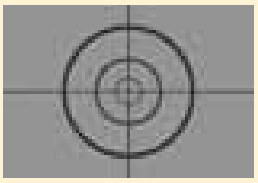

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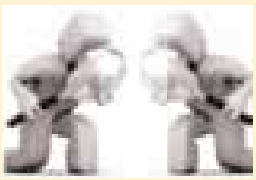

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KNOW YOUR COMPETITION ACT

EDITOR:
DR. SEEMA GAUR

SUB EDITOR:
DR. SANJAY PANDEY

FROM THE DESK OF THE CHAIRPERSON

From an acronym conceived about 10 years ago, BRICS countries have come a long way. The journey of the group started in 2009 with the avowed aim of recasting the global system to reflect the increasing weight of emerging economies in the global economic system. The group expanded to BRICS, when South Africa joined the group in 2011. Today BRICS has taken on a life of its own: as much a sign of economic dynamism as it is a symbol of the countries' political emergence. Earlier, it was visualised as a virtual organisation; now BRICS is a global reality.

The BRICS countries represent 3 billion people accounting for about 43 percent of the world population and 25 percent of the world's GDP (in PPP terms). They also represent a considerable force in terms of the world's finances. Trade within the group amounts to about 17 percent of global commerce. Though growth has declined around the world, China, India and Brazil are still major contributors to world growth.

BRICS is a bridge across three oceans. Through their cooperation, BRICS countries are promoting South-South cooperation and South-North dialogue. They represent a collective voice on the part of the developing countries aimed at democratisation of economic globalisation and international relations. They have reached broad consensus on jointly dealing with major global and regional issues, reforming the international monetary and financial systems, and promoting the cause of the global development.

The five BRICS summits held so far are witness to the continuous improvement of BRICS institutionally and formation of a cooperation structure at different levels in various areas. One of the areas identified for dialogue is meetings of the Competition Authorities: an extremely valuable field for emerging market economies. Two such meetings have been held – one in 2009, the other in 2011. We are now on the threshold of the 3rd meeting and international conference being organised in New Delhi between November 20-22, 2013.

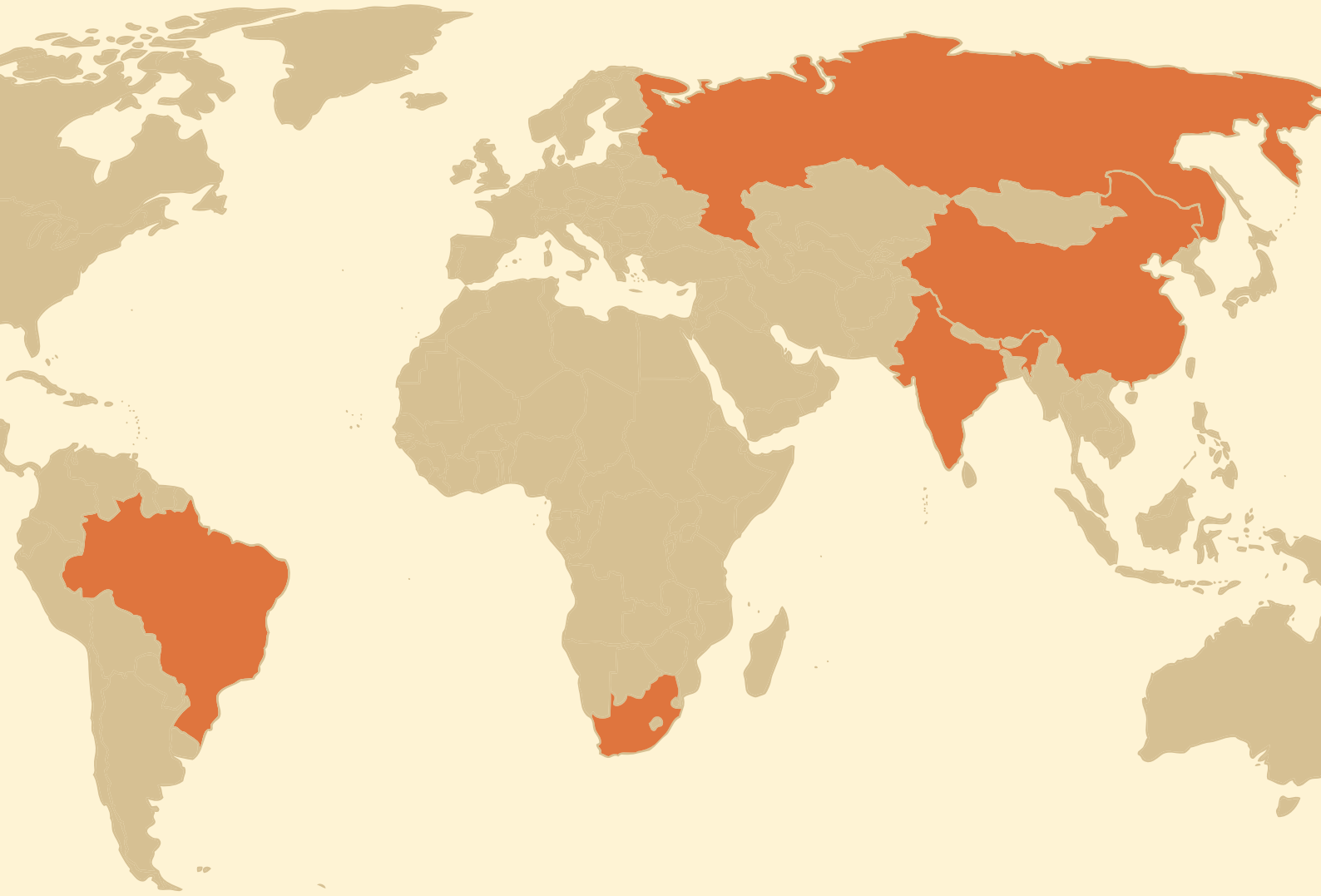
The Conference would provide opportunity to share notes on challenges faced by the BRICS competition authorities and act as catalyst towards taking agenda of cooperation further. It would also provide an opportunity for the five countries to open their windows and let in fresh air based on the good practices of the other competition authorities and the international community at large.

BRICS countries represent a fundamental change in international competition enforcement as it has become multipolar now. Corporates around the world have to be now aware of merger review and competition enforcement developments in BRICS jurisdictions also. All the BRICS countries have in place modern competition regimes. We bring you a brief update on their competition regimes as a backdrop for the third BRICS conference in November in Delhi. We also bring you a glimpse of key orders issued recently in Brasilia, Moscow, Beijing and Pretoria.

Talking of cooperation, importance of international cooperation in competition enforcement can not be overemphasised to detect international cartels as well as to bring consistency in merger review. In this issue, we bring to you the matter of international cartel on auto parts, in which recently action has been taken by the US Department of Justice with the help of several jurisdictions across the globe.

Ashok Chawla

BRICS - Competition Regimes & Cooperation



Introduction

The emerging market economies play an increasingly important role in global economic development and the global monetary and financial system. BRICS is a group of five major emerging economies of the world, viz, Brazil, Russia, India, China and South Africa. The acronym BRIC was coined by Goldman Sachs economist Jim O'Neill to describe the big emerging markets of Brazil, Russia, India and China in a report called *"Building Better Economic BRICs"*.

The group formally came into existence in the year 2009 with the first meeting of BRIC leaders in Yekaterinburg, Russia. The leaders issued a declaration calling for the establishment of an equitable, democratic and multipolar world order. The group became BRICS with the joining of South Africa in 2011 at Sanya summit.

Since then, BRICS leaders regularly meet in annual summits, which have been organised in Brasília in 2010, Sanya in 2011, New Delhi in 2012 and Durban in 2013. Summit in 2014 is scheduled to be organised in Brasilia, Brazil. International economic and financial issues have been core concerns in the BRICS summits. The on-going challenges and vulnerabilities in the global economy are also an important concern of BRICS leaders' meeting. During last few years, the BRICS countries, working actively to implement the action plan of the Sanya Declaration, have strengthened their cooperation in many spheres such as finance, trade, economic cooperation, industry, infrastructure, Intellectual property rights, healthcare,

agriculture, statistics, science and technology and competition. Among several areas of BRICS cooperation, cooperation amongst BRICS competition authorities is a key area. BRICS countries have constantly guided their economies on the path of competition and are consistently working on development of effective competition regime in their national jurisdictions.

BRICS Competition Cooperation

Genesis

BRICS International Competition Conference (ICC) has become one of the most prestigious conferences in the field of competition law and policy. The first BRIC competition conference was organised in Kazan, Russia in September, 2009 following the first BRICS Summit in June 2009 in Yekaterinburg, Russia. The conference is organised biennially by one of the BRICS competition authorities on behalf of the all the BRICS competition authorities. The Conference provides opportunity for wide ranging discussions among the heads and representatives of competition agencies from BRICS as well as other jurisdictions, globally eminent experts from relevant multilateral institutions, business, academia and civil society institutions.

First BRIC ICC

The first conference of BRIC competition authorities was organised by the Federal Antimonopoly Service (Russian Federation) in Kazan, Russia during August 31 - September 3, 2009 on the theme *"Challenges of Competition Policy Developments in the BRICs Countries"*. The conference discussed various challenges in competition policy development in the BRIC countries including formation of effective system of anti-cartel activity, interaction between competition authorities, law enforcement agencies and judicial authorities in anti-cartel activity, and competition advocacy as a factor to develop effective competition policy. The heads of the BRIC competition authorities signed a joint communique expressing their strong commitment to further exchange of opinions on different aspects of competition policy and enforcement and their willingness to organise the BRIC International Competition Conference on regular basis.

Second BRICS ICC

The second BRICS ICC was organised in Beijing, China during September 20-22, 2011 by the State Administration for Industry and Commerce (SAIC), China as per the mandate of second BRIC Leaders Summit in April, 2010 in Brasilia, Brazil. The theme was *"Competition Enforcement under Economic Globalisation"*. Various issues including experience of cartel control and criminalisation, large transnational mergers, IPR protection and anti-monopoly enforcement, trade barriers and antimonopoly enforcement, antimonopoly control over natural monopoly industry, coordination between competition policy and industrial policy, capacity building and competition advocacy, and international cooperation experience were discussed. The heads of BRICS competition authorities arrived at a '*Beijing Consensus*', which reiterated that the BRICS ICC is an important platform for dialogue and cooperation in competition policy amongst the BRICS competition authorities.

Third BRICS ICC

The third BRICS ICC is scheduled to be held in New Delhi during November 20-22, 2013. The conference is being organised by the Competition Commission of India (CCI) in pursuance of the Beijing Consensus and Action Plan of the Fourth BRICS Summit in New Delhi on March 29, 2012. The theme of the 3rd BRICS ICC is *"Competition Enforcement in BRICS Countries: Issues and Challenges"*. The conference would provide platform to discuss various issues and challenges in competition enforcement in BRICS countries and take the agenda of cooperation among the BRICS competition authorities forward from the earlier two conferences. It is also proposed to discuss how to transform BRICS competition cooperation ideas into action.

Starting from different backgrounds, they have made remarkable progress in putting in place effective competition regimes and are attempting to develop their own local competition culture.

BRICS Competition Regimes

BRICS countries do have several similarities in their trade practices and competition challenges in their domestic jurisdictions. Starting from different backgrounds, they have made remarkable progress in putting in place effective competition regimes and are attempting to develop their own local competition culture. India and China have relatively new competition law and are quite young jurisdictions. Brazil, Russia and South Africa have accomplished significant periodic legislative upgrades to their original enabling legislations. Broadly, now, all the BRICS countries have modern competition regimes. All of them have adopted tough anti-cartel measures within a short time and all have adopted leniency progarmmes. All of them are rigoursly enforcing merger control provisions. They all have unilateral conduct provisions. Origins and structures of BRICS competition authorities are briefly highlighted below:

Brazil

A competition law was enacted in Brazil in as early as 1962 (Law 4137/62), creating the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica – CADE). However, due to the pervasive control of the economy by the government, the law had little effect. The modern era in competition policy began in the mid-1990s, coincident with the country's transition to a market based economy. In 1994, a new law established a Brazilian Competition Policy System (BCPS)

consisting of three agencies: a re-configured Administrative Council for Economic Defence (CADE), the Economic Law Office (SDE) in the Ministry of Justice, and the Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance. The defects in the competition law system became apparent fairly quickly. In October 2011, the Brazilian Congress approved a new antitrust and unfair competition law, which came into effect on May 29, 2012.The Brazilian Competition System went through a major restructuring in 2012. , there has been major restructuring of Brazilian competition enforcement institutions. In line with international best practices, new competition architecture in Brazil has moved from an intricate three-agency structure to a single autonomous body to reduce overlapping functions, accelerate merger review, and to fortify legal certainty and contributed to modernisation of Brazil's competition law enforcement system.

The new CADE consists of three main bureaus – The Administrative Tribunal, Superintendence General and Department of Economic Studies:

a) **The Administrative Tribunal**: It remains the main decision making body in charge of rendering final and binding administrative decisions in both merger and conduct cases. The Tribunal consists of six commissioners and a President, who are appointed by the President of the Republic and approved by the national Senate for four years term.

b) **The Superintendence General :** This body headed by a Superintendent General is appointed for a two-year term with the possibility of reappointment is empowered to approve mergers that do not raise competitive concerns, to provide non-binding opinions in merger cases that could not be unconditionally cleared, and to conduct investigations of anti-competitive practices.

c) **The Department of Economic Studies:** It is now headed by CADE's Chief Economist, who is responsible for providing non-binding economic opinions and preparing economic studies for the Administrative Tribunal.

Russia

The earliest framework for Russian competition regime was set out in the RSFSR Law 948-1 '*On Competition and Restriction of Monopolistic Activity on Commodity Markets*' in 1991. However, the modern stage of development of the Russian competition legislation began with the law "On Protection of Competition", i.e. Federal Law 135-FZ of July, 2006. The Code of Administrative Offences provides for fines for violation of competition law. The law has been amended several times (so-called "antimonopoly packages" of amendments). The first anti-monopoly package of laws has been the new competition law and the amendments to the Code of Administrative Offences adopted in 2006-07. In 2009, the competition legislation was further reformed with the "second anti-

monopoly package" focusing on anti-cartel enforcement. The most recent amendments to the competition law known as "third anti-monopoly package" came into force in January 2012. The necessary amendments have been introduced into the Law on the Protection of Competition, the Criminal Code of the Russian Federation and the Code of the Russian Federation on Administrative Violations. These amendments have introduced the direct administrative liability in the form of turnover fines for cartel agreements, as well as a leniency programme.

Federal Antimonopoly Service (FAS) is the authorised federal executive body responsible for enforcement of the Russian Federal Law on Competition. There are five other Deputy Heads at FAS with various departments and divisions under them. FAS and its regional offices enforce cartel prohibition under the Competition Law and the Code of Administrative Offences. All criminal prosecutions are carried out by MIA and its divisions under the Criminal Code and the Code of Criminal Procedure. In practice, MIA will not initiate the case without the participation of FAS. As regards enforcement of provisions relating to abuse of dominant position, FAS has the jurisdiction to investigate the same. During the investigation, FAS has wide range of powers ranging from requesting information necessary for its investigation to inspection of premises of the undertakings. A decision of FAS as well as remedies imposed by FAS is subject to judicial review by the *arbitrazh* courts (branch of the state commercial courts in Russia). Merger control is done through competition law and most of the procedural issues are regulated by the decrees and guidelines of the FAS.

India

India was one of the first developing countries to have a competition law in the form of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. With the advent of economic reforms in 1991, the law was found inadequate for fostering competition in markets. Hence, the Competition Act, 2002 (the Act, hereinafter) was enacted by the Parliament of India to establish the new competition regime in India. The law was amended in 2007. Competition Commission of India (CCI) has been established as a statutory authority to enforce the provisions of the Act zin India and the Monopolies and Restrictive Trade Practices Act, 1969, was repealed. CCI comprises of chairperson and six members, who are appointed by the Government of India. The day-to-day affairs of CCI are coordinated by a secretariat headed by the Secretary. The investigation arm of CCI is called the office of Director General who investigates contravention of the provisions of the Act on direction of the Commission. organisational structure of CCI comprises of various divisions: Advocacy, Anti-trust, Capacity Building, Combination, Economic, Investigation, Legal and Administration and Coordination. The divisions are manned by highly qualified cadre of professionals.

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Under the Act, CCI is mandated to eliminate practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. CCI has powers to investigate and levy heavy penalties under the Act. Has set for itself a vision to promote and sustain an enabling competition culture through engagement and enforcement that would inspire businesses to be fair, competitive and innovative; enhance consumer welfare; and support economic growth.

China

China's Antimonopoly Law, or AML, came into effect in August, 2008. In order to ensure the effective implementation of the AML, the State Council established the Anti-Monopoly Commission, which is responsible for organising, coordinating and guiding anti-monopoly efforts in China. There are three main government players, who play roles in competition enforcement in China. These are: the Ministry of Commerce (MOFCOM), the State Administration of Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC). Each of these government bodies now houses an AML enforcement department.

a) **SAIC:** SAIC is an administration level organisation with several roles, including the companies' registry, trademark office, and regulator of market order. The SAIC administers the Anti-unfair Competition Law and the Consumer Protection Law, both of which came into existence in 1993.

b) **MOFCOM:** MOFCOM has responsibility for domestic and international commerce including approval of foreign investment in China. Together with SAIC, MOFCOM was responsible for handling antimonopoly filings under the 2006 provisions on the Acquisition of Domestic Enterprises by Foreign Investors. MOFCOM had established a Bureau of Anti-monopoly Investigation. MOFCOM handles merger reviews, assists Chinese companies with cases in other jurisdictions and international co-operation.

c) **NDRC:** NDRC has evolved from the State Planning Commission and, as the name suggests, has primary responsibility for state economic planning, including industrial policy. NDRC administers the pricing law, which includes provisions on price fixing, price discrimination, false or misleading pricing, etc. NDRC's Department of Price Supervision is responsible for dealing with monopoly agreements in abuse of dominance matters, which involve pricing. NDRC also deals with anti-cartel investigations.

South Africa

The origin of competition law in South Africa may be traced to the Regulation of Monopolistic Conditions Act, 1955. Later on, a new law, the Maintenance and Promotion of Competition Act, 1979 was enacted, which was administered by the Competition Board, Subsequently, a modern law, the Competition Act, 1998 came into effect in 1999. This law fundamentally reformed the country's competition legislation substantially strengthening the powers of the competition authorities as per best international practices. The power of decision making was taken away from the Minister and given to an independent Competition Tribunal. The Competition Act was amended in 2000, in part to clarify the relationship between general competition law and other regulatory bodies.

The Competition Act sets up three institutions, to be directly involved in its application:

a) **Competition Commission**: The Competition Commission of South Africa is the investigative and executive body with responsibility to investigate mergers and anti-competitive conduct. It has the power to disallow small and intermediate mergers, and makes recommendations on larger mergers to the Competition Tribunal.

competitioncommission
south africa

b) **Competition Tribunal**: The Competition Tribunal is the adjudicative body that rules on cases referred to it by the Competition Commission. The Tribunal is the first-instance decision-maker about larger mergers and complaints about restrictive practices and abuse of dominance. It also adjudicates appeals against Commission's decisions about smaller mergers and exemptions.

c) **Competition Appeal Court**: The Competition Appeal Court has the status of a High Court and has power of appeal and review.

The Department of Economic Development guides the work of the Competition Commission and the Competition Tribunal.

The Competition Law Amendment Act, 2009 introduced measures such as concurrent jurisdiction between the competition authorities and other sector specific regulators, market inquiries, personal (criminal) liability for cartel conduct, complex monopolies; and the Competition Commission's corporate leniency policy. Although the Act was signed into law by the President in 2009, only the market inquiries chapter of the Act has been made effective from 1 April 2013 (without any reference to the balance of the provisions contained in the Act).

BRICS Competition Authorities: Way Ahead

BRICS competition authorities play a very significant role in their jurisdictions in preventing and curbing anticompetitive practices, ensuring fair competition, protecting the interest of consumers, and promoting economic development of domestic economies. Given many factors of similarity amongst the BRICS economies, closer cooperative ties amongst the BRICS competition authorities would help build synergies in the area of competition law and policy. Further, BRICS competition authorities represent issues and concerns of competition authorities of the emerging economies. They may bridge the gap between mature competition authorities and the nascent ones in the world of competition enforcement.

The platform of biennial competition conference appears to be apt platform for cooperation amongst BRICS competition authorities and may be utilized effectively to derive benefits of BRICS cooperation. Time has come, when BRICS competition authorities need to identify mutually beneficial areas of cooperation, develop concrete action plan and work in time bound manner to benefit from this platform. In the Second conference, "the idea of a BRICS memorandum of understanding of the competition authorities was discussed. It is desirable that this idea is conceived, nurtured and delivered as part of future BRICS cooperation.

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SECTION 3 & 4 ORDERS

11 Shoe Companies Penalised for Bid Rigging

In the case of M/o Commerce, Govt. of India v. M/s Puja Enterprises & Ors., a reference was made to the CCI by the Director General-Supplies & Disposal (DGS&D), Ministry of Commerce and Industry, Government of India with respect to a tender enquiry dated June 14, 2011 for conclusion of new rate contracts for polyester blended duck ankle boots rubber sole. The reference alleged bid rigging and market allocation by the suppliers, while bidding against the above tender enquiry.

After a detailed investigation, CCI held that the bidder-suppliers by quoting identical/ near identical rates had indirectly determined prices/ rates in the Rate Contracts finalised by DG S&D and indulged in bid rigging/ collusive bidding in contravention of the provisions of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act. Further, CCI noted that the parties had also controlled/ limited the supply of the product in question and shared the market of the product amongst themselves under an agreement/ arrangement in contravention of the provisions of section 3(1) read with sections 3(3)(b), 3(3)(c) and 3(3)(d) of the Act. Accordingly, CCI imposed a penalty of INR 62.543 million against the eleven shoe companies @ 5 percent on the average of the gross turnover for financial years 2008-09, 2009-10, and 2010-11.

Ministry of Civil Aviation not Found Guilty

In Case No. 18/2013, Vineet Kumar v. Ministry of Civil Aviation, Government of India, the Informant alleged that the Ministry of Civil Aviation has been engaged in the formulation of national policies for the development/ regulation of civil aviation sector in the country. Thus, it is the only enterprise in India, which regulates conditions for providing the air transport services in accordance with the provisions of the Aircraft Act, 1934 and thereby enjoys monopoly position in the market of air transport services.

Informant further alleged that the Ministry vide its order dated October 31, 2012 constituted a committee named as 'the Aircraft Acquisition Committee (AAC)' to consider proposals for providing air transport services, permitting import/acquisition of aircraft and providing initial NOC for flying training institute etc. All the members of AAC are the officers of the units/divisions of the Ministry and there is no representation from the other stake holders, particularly

the private air transport service providers. Such a composition of the Committee is against fair play. Also, the Ministry being regulator as well as the provider of air transport services through AAI and Air India has framed guidelines imposing unfair terms thereby severely limiting and restricting the provisions of services and market.

CCI did not find a *prima facie* case and held that the Ministry is not an 'enterprise' within the meaning of the term as defined in section 2(h) of the Competition Act, 2002; therefore, the information is not maintainable against it. It was held that regulation of civil aviation sector by the Ministry per se cannot be considered as commercial activity as implied in the definition of the term 'enterprise' under section 2 (h) of the Act as the Ministry while framing the impugned guidelines is not engaged in any economic activity as envisaged under the Act. Therefore, formulation of policies is not an activity, which per se may be amenable to the jurisdiction of CCI.

Central Bureau of Narcotics and Narcotics Control Bureau are not 'Enterprises'

In the Om Prakashv. Central Bureau of Narcotics, Ministry of Finance & Ors., CCI held that Central Bureau of Narcotics (CBM) and Narcotics Control Bureau (NCB) are not 'enterprises' or group as defined under the Act and therefore, the provision of section 4

relating to abuse of dominant position is not applicable against them.

As per the information, the CBM and NCB, departments of the Government of India have been engaged in regulation of opium production, supply, export and import in India as per the United Nations Single Convention on Narcotic Drugs, 1961 (SCND). The Informant, a farmer is engaged italics in cultivation of opium and its by-products under the license granted by CBM. As per informant, excess demand for poppy seeds was being met through import from Turkey (through the registered importers) and through illegal smuggling from Turkey. The import ceiling was lifted in 2010, which gave a boost to the illegal import. Informant further stated that the policy for import of poppy seeds was framed, keeping the interest of the domestic farmers. The policy requires prior registration of contract from the importing country, which will give the certificate of the origin of the poppy seeds.

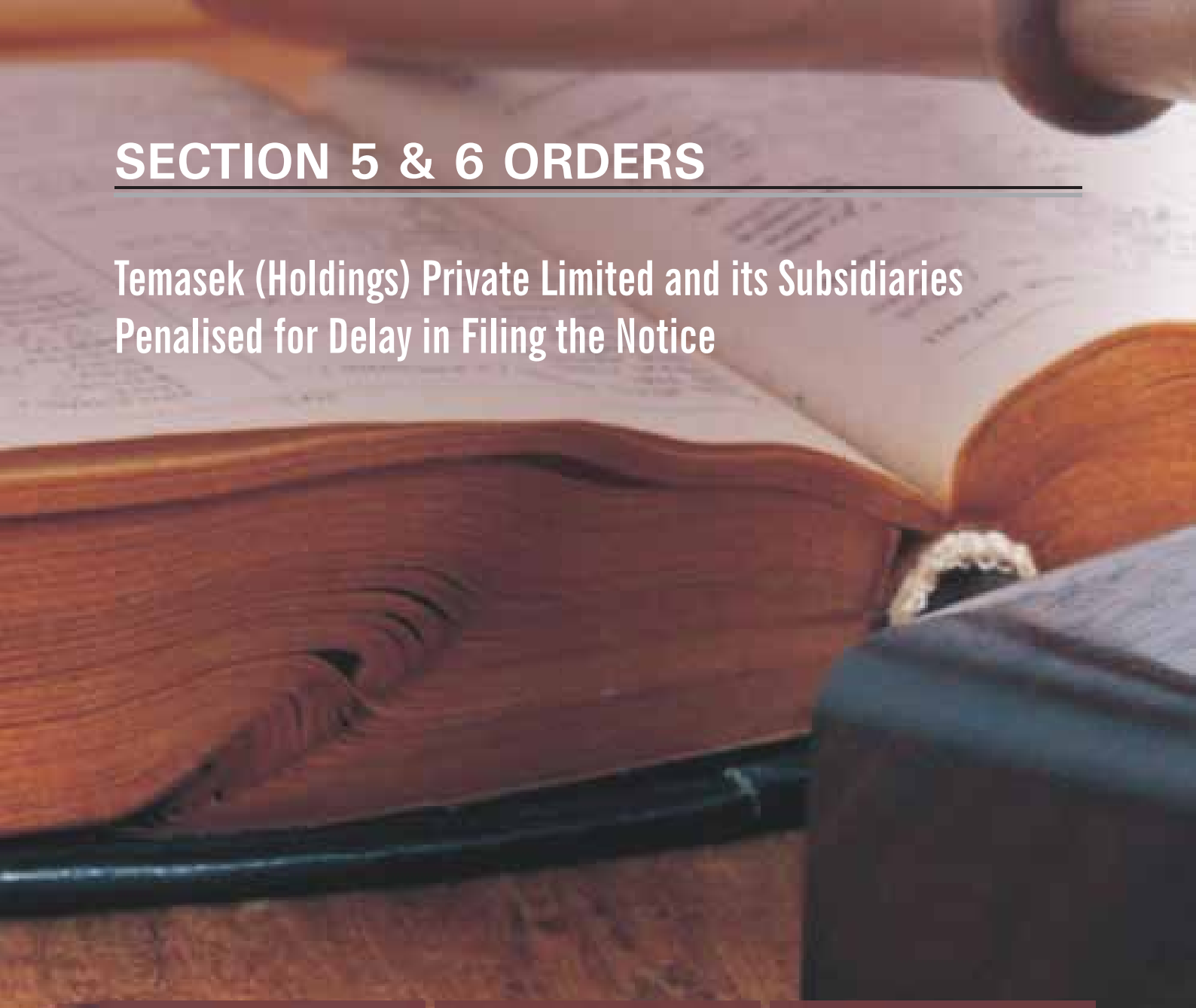
The informant alleged that the CBM is abusing its regulatory power/ dominant position by circumventing safeguards by not following the mandatory registration of contract by the importer with it and other norms of verification. Thus, the CBM violated policy objectives/provisions by imposing conditions for compulsory registration of poppy seeds in the Sales Contract, which are contradictory to the import policy as well as the National Policy on Narcotic Drug and Psychotropic substances.

CCI noted that the CBM and NCB are agencies appointed by the Government of India to regulate and control the import of poppy seeds into India to ensure that illegally cultivated poppy seeds are not smuggled into India. As such, owing to the nature of activities of CBM and NCB, they cannot be compared to a commercial organisation and do not qualify to be an enterprise within the meaning of section 2(h) of the Act. Moreover, import of poppy seeds is governed by EXIM policy of Ministry of Commerce.

Price of poppy seeds is also not decided/fixed by CBM and NCB; rather the same is discovered by parties through negotiations keeping in view the international market conditions. As *prima facie*, CBM and NCB were not enterprises or group as defined under the Act, CCI held that the provisions of section 4 relating to abuse of dominant position cannot be applied to the present information and closed the matter.

SECTION 5 & 6 ORDERS

Temasek (Holdings) Private Limited and its Subsidiaries Penalised for Delay in Filing the Notice



CCI imposed a penalty of INR Five million on Temasek (Holdings) Private Limited and its two subsidiaries namely Zulia Investments Pte. Limited and Kinder Investments Pte. Limited (collectively referred to as the Acquirers) for failure to give notice to CCI under section 6(2) of the Act.

In the instant case, the Acquirers gave the notice to CCI under section 6(2) of the Act on 6th June, 2013 with a delay of around 399 days. They submitted that the delay in giving the notice occurred due to incomplete and erroneous legal advice and not any mala fide intention. They had voluntarily filed the notice at the earliest after becoming aware of mandatory requirement to file notice under section 6(2) of the Act. They requested CCI to take a lenient view and condone the delay by not imposing any penalty under section 43A of the Act.

CCI observed that in deciding about the penalty under section 43A of the Act, the Commission had to consider the implications of violation of section 6(2) of the Act, read with the other relevant provisions of the Act. The Commission had also to consider the mitigating and/or aggravating factors, keeping in view its overall approach to regulation of combinations. CCI stressed that it considers the inorganic growth through combinations as a positive business strategy for the economy that deserves due support. The analysis at the *prima facie* stage aims to quickly sifting out few cases, where competition concerns may require a more in-depth inquiry in phase II. Due to high thresholds of assets/turnover, only a limited number of combinations are required to be notified under the Act and these cases involve big companies with substantial resources, including MNCs with multi-jurisdictional operations. CCI has also put in place an effective pre-notification consultation mechanism to assist the parties in clarifying any issues in case of any doubts.

CCI further stated that in the above backdrop, it was expected that the parties must demonstrate a high sense of responsibility in filing combination notifications within the prescribed time limit. This becomes even more important in view of the fact that section 20(1) of the Act prevents CCI from initiating any inquiry after the expiry of one year from the date on which a combination, which has not been notified, takes effect. Therefore, the possibility of a combination which may actually cause appreciable adverse effect on competition (AAEC), escaping the scrutiny of CCI, in case the parties do not file the mandatory notification, is real and can not be ruled out, notwithstanding any internal systems within the Commission to discover such cases within one year. Even in cases, which come to the notice of CCI before the expiry of this one year, there could be problems in case the combination has been consummated, since restoring the original position may be as difficult as unscrambling an omelette.

CCI also observed that the failure to file could not be treated as a routine compliance default, as it could potentially have the grave consequence of defeating the very purpose of providing for regulation of combinations. It is, therefore, imperative for the companies to understand and appreciate the full extent of their responsibility for complying with the requirement of timely filing of the notifications regarding proposed combinations under section 6(2) of the Act.

The documents on record indicate that the Acquirers did not show any sense of urgency or seriousness to comply with the Act and were slow in response to the advice of their counsels at different points of time. Therefore, having carefully considered all the relevant factors, CCI considered it appropriate to impose a penalty of INR 50,00,000/-(INR Five million only) on the Acquirers for failure to give notice to CCI in accordance with section 6(2) of the Act.

CCI Approves CIE's Acquisition of Majority Stake and Control in Mahindra Systech Companies

In July, 2012, CIE Group Companies and Mahindra Group Companies, jointly filed a notice for a proposed combination, which would result in CIE consolidating its European forgings businesses and the castings/forgings/ stampings /gears/ composites and magnetics businesses of the Mahindra Systech Companies namely (Mahindra Castings, Mahindra Composite Limited, Mahindra Forgings Ltd., MUSCO, Mahindra Gears International Ltd. and Mahindra Investments (India) Pvt. Ltd.) into one single merged entity, to be called Mahindra CIE Ltd.

The CIE Group companies are engaged in the business of manufacture and sale of auto-components and manufacture of more than 5000 different products world-wide in over 70 plants distributed across 4 continents and 12 countries. The Mahindra Group Companies, including the Mahindra Systech Companies and other companies belonging to the Mahindra Group, are engaged in various businesses including automotives and components.

The proposed combination related to the Indian auto components manufacturing industry, which comprises of both organised as well as unorganised players. The companies in this industry supply their products to different vehicle segments and are the key downstream linkages to the Indian automobile industry. The auto components manufacturing companies generally supply their products to the original equipment manufacturers (OEM's) and the replacement market. The auto-components manufacturers are generally organised in a tier structure in which some companies are involved in integrated systems and are key enablers to OEMs. Some companies supply auto components to the companies, which supply their products to the OEMs. There are also some companies which use traditional methods of manufacturing with negligible IT systems and are engaged in the supply of raw materials and single auto-components. It was also seen that in some cases, the OEMs themselves have their own integrated auto-components manufacturing facility, specifically where the criticality of the component capital investments are significant.

CCI observed that the proposed combination did not contemplate combination of two existing players in the Indian auto-component manufacturing business. The CIE Group companies neither have any presence in the auto-component business in India nor have any investments in Indian companies, which are present in the auto-component business. Moreover, it was also observed that, pursuant to the proposed combination coming into effect, Mahindra & Mahindra would continue to be shareholder of Mahindra CIE with 20.04 percent of the equity share capital. Additionally, technologies currently being used by the Mahindra Systech companies would also continue to be utilised in Mahindra CIE Limited after consolidation of the forgings business of CIE and the business of the Mahindra Systech Companies. CCI approved the proposed combination vide its order dated 21st August, 2013 under sub-section (1) of section 31 of the Act.

INVESTIGATIONS INITIATED

Coal India once again under CCI's Scanner for Alleged Abuse of Dominance

CCI has directed the Director General, CCI to investigate the information filed by the Sponge Iron Manufactures Association ('the Informant') against Coal India Limited(CIL) and its 6 subsidiaries for alleged abuse of dominance in the supply of coal to sponge iron manufacturers. Informant is an association of Sponge Iron Manufacturers formed to promote the interests of the Indian Sponge Iron Industry. The Opposite Parties are government controlled companies incorporated under the provisions of the Companies Act, 1956 and are engaged in the business of development of coal mines and sale of coal in India.

The main allegation against the Opposite Parties are that they enjoy a virtual monopoly over the production and supply of coal, producing over 80 percent of the coal in India. Being a monopoly, they force their consumers to enter into extremely one-sided, anti-competitive Fuel Supply Agreement (FSA) and the Memorandum of Understandings (MoUs) under which informants; their consumers have no bargaining power. Based on the above, the informant has alleged that the Opposite Parties have abused their dominant position in violation of the provision of section 4 of the Act.

CCI observed that it appears from information that the informant's member companies were totally dependent on Opposite Parties for supply of coal for running their sponge iron plants. Taking advantage of their dominant position, Opposite Parties were allegedly not adhering to the terms and conditions in the FSA/MOUs and conducting themselves in a manner detrimental to the interest of the informant. The terms and conditions of FSA also show it being heavily loaded in favour of Opposite Parties. Accordingly, CCI ordered the DG to investigate the conduct of the Opposite Parties for alleged contravention of the provisions of the Act.

It is pertinent to note that several cases against CIL are already under investigation for alleged abuse of dominance. CIL was earlier held to be *prima facie* dominant in the relevant market in Case No. 3/2012, Case No.11/2012 and Case No. 59/2012 and the Commission being of the opinion that there existed a *prima facie* case of abuse of dominance under section 4 of the Act had directed the DG to investigate the matter in these cases. The investigation report of DG in the above said cases is under consideration of the Commission. Similarly, in Case nos. 5/2013, 7/2013 and 37/2013 also the Commission had earlier directed DG to investigate the anti-competitive conduct of CIL.

CCI Orders another Investigation against Jai Prakash Associate for Alleged Abuse of Dominance

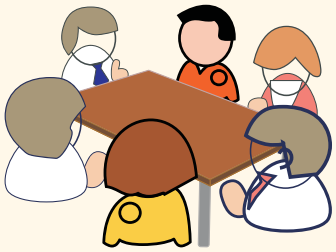
M/s Jai Prakash Associate Ltd. (JAL) is again under investigation by the DG, CCI for alleged abuse of dominant position by it. An information has been filed against JAL with respect to its housing project "Jaypee Greens AMAN" at Sector 151, Noida in case no 45/2013.

CCI in its order under section 26(1) noted that the Commission had occasion to consider the dominance in a *prima facie* manner in respect of JAL in earlier cases (Case No. 72 of 2011, Case No. 16 of 2012, Case No. 34 of 2012 and Case No. 53 of 2012), wherein the Commission formed a *prima facie* opinion that the JAL was in a dominant position in the relevant market of 'provision of services for development and sale of residential apartments in the geographic area of NOIDA and Greater NOIDA'. The Commission considered buyers' agreements in those earlier cases and found that *prima facie*, the terms of the agreement between the JAL and allottees were abusive. Accordingly, the Commission directed the DG to investigate the alleged abuse of dominant position under section 4 of the Act.

Keeping in view that the Commission in earlier cases had already formed a *prima facie* view under section 26(1) against JAL regarding abuse of dominant position by it in the relevant market for imposing unfair and one-sided conditions on buyers through the buyers' agreement, the Commission opined that the same *prima facie* view holds good for this case also as the facts are similar.

ADVOCACY INITIATIVES

CCI is legally mandated to create awareness of competition law and benefits of competition amongst various stakeholders such as government, trade associations, judiciary etc. In pursuance of this mandate, during this quarter, CCI organised the following advocacy events:



Advocacy with the Central Government

CCI organises meetings with policy makers of various ministries to sensitise them about competition concerns in their sectors and have competition friendly policies. During the present quarter, CCI held preliminary interactions with the Ministry of Petroleum and Natural Gas, Ministry of Civil Aviation and Ministry of Railways.

Advocacy with Trade Associations

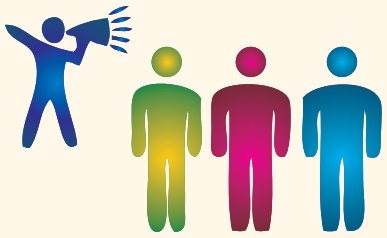
CCI participated in the interactive sessions with Trade Associations, viz., CII in Chennai, FICCI at Chandigarh and Bangalore, Bombay Chambers of Commerce and Industries in Mumbai and ASSOCHAM in Delhi to continue with its advocacy initiatives. These sessions were organised with a view to sensitise them about competition compliance and avoid falling on the wrong side of the law.

Advocacy meetings with Investigative Agencies

With a view to build synergy, CCI had organised an interactive meeting with Investigative agencies, viz., Directorate General of Income Tax (Investigation), Directorate General (Central Excise), Financial Intelligence Unit, Directorate General (International Taxation) and Directorate General (Serious Fraud Investigation).

Advocacy with State Governments

To generate competition awareness among key policy makers in the states, interactive meetings were held by the CCI with senior officers of State Governments of Kerala, Uttar Pradesh and Maharashtra. The aim is to work with State Governments in areas and sectors where competition concerns exist.



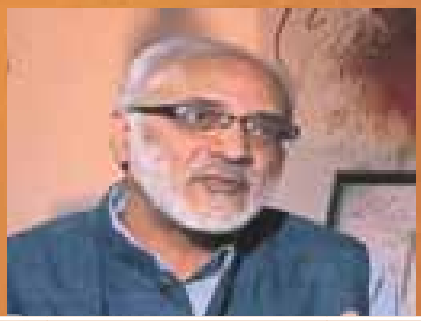
Advocacy programs in Academic institutions

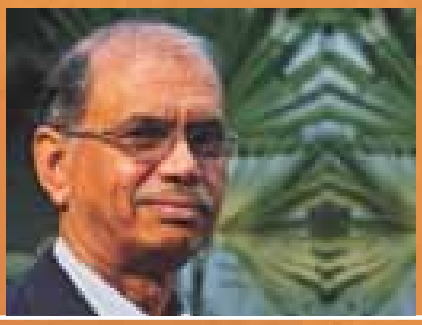
The Competition Law being a relatively new Law, advocacy programmes were conducted in various institution including judicial academies to create awareness about the Competition Act, role and functions of CCI.

EVENTS

Distinguished Visitor Knowledge Sharing Series

Dr. Ashok Gulati delivered the Eighth "Distinguished Visitor Knowledge Sharing Series" lecture on "Building Competitive Agriculture in India"on 26th July 2013 at CCI. Dr. Gulati is a globally distinguished agricultural economist and presently Chairman of the Commission for Agricultural Costs and Prices (CACP).





Mr. Nayan Chanda delivered the ninth "Distinguish Visitor Knowledge Sharing Series" lecture on "Globalisation: Riding the Wave of Competition" on 6th August 2013 at CCI.
Mr. Chanda is Director of Publications, Yale Center for the Study of Globalisation, Yale University.

Capacity Building Events

CCI organised a workshop on the pharmaceutical sector on 19th July 2013 for the officers of CCI with the objective to generate understanding of competition issues in the sectors with the help of experts in the area.

CCI organised a workshop at CCI on "Antitrust /Merger Issues" in collaboration with the US FTC during July 30 - August 1, 2013.

ENGAGING WITH THE WORLD

CCI Chairperson Mr. Ashok Chawla participated in the 2013 Fordham Competition Law Institute Annual Conference and Seventh Workshop for Heads of Competition Authorities during September 25-27, 2013 in New York, USA.

International Events

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

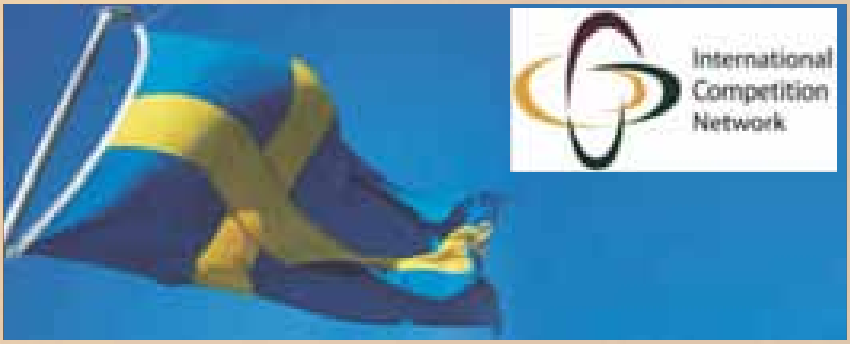
UNITED NATION CONFERENCE ON TRADE AND DEVELOPMENT
UNCTAD
PROSPERITY FOR ALL

13th Session of Intergovernmental Group of Experts (IGE) on "Competition Law and Policy" during July 8-10, 2013 in Geneva, Switzerland.

China Competition Policy Forum – "Transformation of Competition Policy" during July 31- August 2, 2013 in Beijing, China.

Workshop on "Use of Indirect Evidence in Cartel Investigation" organised by OECD Korea Policy Center during September 4-6, 2013 in Seoul, South Korea.

Regional ICN Unilateral Conduct Workshop on "Assessing Dominance/Substantial Market Power and Evaluating Unilateral Conduct" during September 17-18, 2013 in Stockholm, Sweden.



DEVELOPMENTS IN OTHER JURISDICTIONS

CADE Brazil Penalised Airlines for Air Cargo Cartel

Brazilian competition agency, CADE has fined four airlines 293 million Reais (€94 million) for their participation in an international air cargo cartel. The penalised airlines are VarigLog, ***Aerolineas Brasileiras*** (TAM Cargo), American Airlines and ***Alitalia-Linee Aeree Italiane S.P.A.*** In the present case, the investigation began in the year 2006 following the signing of a leniency agreement between CADE and Deutsche Lufthansa AG (LHA.XE), Lufthansa Cargo AG, Swiss International Airlines, and five individuals. In 2007, a dawn raid was held at the headquarters of the investigated companies. The evidence obtained confirmed the collusion. In February 2013, Societe Air France, KLM, and two individuals signed an agreement with CADE, where they confessed involvement in collusion and pledged to cease the practice and pay about BRL14 million of cash contribution.

15th Arbitration Appeal Court in Russia Legitimises Decision of Rostov Federal Antimonopoly Service for Abusing Market Dominance

In 2012, Power supply company, "MRSK South" OJSC was fined over 17.5 million Rubles by the Federal Antimonopoly Service in the Rostov region (Rostov OFAS Russia) for abusing its market dominance and violating the antimonopoly law. The company filed a claim against the decision of the antimonopoly body. Recently, the 15th Arbitration Appeal Court ruled actions of Rostov OFAS Russia legitimate.

NDRC China Fines LCD Panel Manufacturers' Cartel

National Development and Reform Commission ("NDRC") enforces price law in China, under which it provides remedies for price-fixing. In early 2013, NDRC levied RMB353 million (approximately US$56.8 million) in fines against six liquid crystal display (LCD) manufacturers (including two Korean companies and four Taiwanese companies) for colluding to manipulate the price of LCD panels in China during 2001-2006.

China's TV and computer makers are buyers of LCD panels and were the direct victims of the price fixing. This is the first time NDRC has investigated an international cartel following investigations in the United States and Europe. Although the penalties imposed by NDRC are significantly lower than those imposed by the competition authorities in other jurisdictions, the case has set a record for antitrust penalties in China. Further, although Samsung received full immunity from fines in the EU under its leniency programme, it received the second highest fine imposed in China. This decision sends a strong signal that NDRC has joined the global effort to prosecute large international cartels. This case suggests that it would be reasonable to expect international cartels to become a focus of NDRC's investigations in future.

Competition Commission, South Africa Penalised Construction Companies for Collusion

South Africa's competition authority fined 15 construction companies a combined 1.46 billion Rand after an investigation into collusion over contracts such as those to build stadiums for the 2010 Soccer World Cup. According to Minister of Economic Development Mr. Ebrahim Patel, it was the commission's single biggest collective settlement involving private companies. The settlement was reached in terms of the fast track settlement process launched in February 2011. The fast-track process incentivised firms to make full and truthful disclosure of bid-rigging in return for penalties lower than what the Commission would seek if it prosecuted these cases.

US Department of Justice Penalised International Auto Parts Cartel

There has been an ongoing US antitrust investigation of price fixing and bid rigging in the auto parts industry. Some of the price-fixing conspiracies lasted for a decade or longer, and many car models were fitted with multiple parts that were fixed by the auto parts suppliers. The multiple conspiracies harmed U.S. automobile plants in 14 states. To date, it has resulted in charges against 20 companies and 21 executives, and the companies have either pleaded guilty or have agreed to plead guilty and have agreed to pay more than $1.6 billion in criminal fines. Seventeen of the 21 executives have been sentenced to serve time in U.S. prisons or have entered into plea agreements calling for significant prison sentences.This includes nine Japan-based companies (Hitachi, Mitsubishi, Mitsuba, Jtek, NSK, T.RAD, Valeo, and Yamashita), who recently agreed to plead guilty and pay about $745 million in fines for their roles in long-running conspiracies to fix the prices of auto parts sold to U.S. car manufacturers.

This auto parts investigation is the largest criminal investigation, the Antitrust Division has ever pursued both in terms of its scope and the commerce affected by the alleged illegal conduct. Never before has the Department of Justice simultaneously announced the breakup of so many separate antitrust conspiracies. This case is an excellent example of international cooperation in enforcement against international cartels. The Antitrust Division and the FBI worked closely with international agencies including the Japan Fair Trade Commission, the European Commission, the Canadian Competition Bureau, the Korean Fair Trade Commission, the Mexican Federal Economic Competition Commission and the Australian Competition and Consumer Commission.

> “These international price-fixing conspiracies affected more than $5 billion in automobile parts sold to U.S. car manufacturers. In total, more than 25 million cars purchased by American consumers were affected by the illegal conduct.”
>
> **Attorney General Eric Holder**

KNOW YOUR COMPETITION ACT

In the previous issue, various aspects of the Anti-competitive Agreements under section 3 of the Act were discussed. The current issue focuses on basic aspects of abuse of dominant position under section 4 of the Act.

Abuse of Dominance

Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and its abuse. Market power is variously known in competition jurisdictions as dominant position, monopoly power and substantial market power. Section 4 of the Act prohibits abuse of dominance by an enterprise or the group. Mere possession of dominance is not considered bad per se, but its abuse is. When a dominant enterprise or the group exploits market power and distorts competition, such conduct becomes actionable under the Act.

Dominance

As per the provision of the Act, dominance refers to a) a position of strength; b) which enables an enterprise to operate independently of competitive forces or enables it to affect its competitors or consumers or the market in its favour. Dominance has significance for competition only, when the relevant market has been defined. Dominance of an enterprise or a group is required to be assessed in a relevant market determined in the context by CCI.

Relevant Market

The relevant market means "the market that may be determined by CCI with reference to the relevant product market or the relevant geographic market or with reference to both the markets". The Act lays down the factors any one or all of which shall be taken into account by the Commission, while defining the relevant market.

The relevant product market means "a market comprising all those products or services, which are regarded as inter-changeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use". It may be seen that relevant product market is defined in terms of substitutability and is the smallest set of products (both goods and services), which are substitutable among themselves as mentioned above. The market for cars, for example, may consist of separate 'relevant product markets' for small cars, mid-size cars, luxury cars etc. as these are not substitutable for each other on a small change in price.

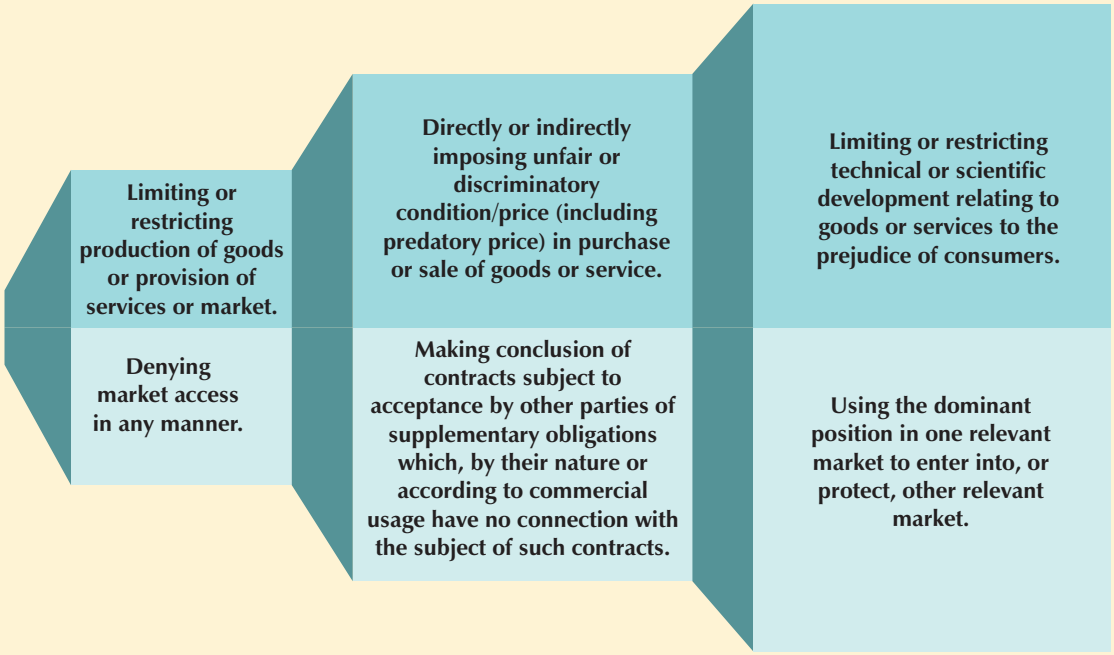
A relevant product in a relevant geographic market is what matters. Relevant geographic market is defined in terms of "the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas".

Determination of Dominant Position

Dominance has been traditionally defined in terms of market share of the enterprise. However, a number of other factors play a role in determining the influence of an enterprise or the group in the market. Section 19 (4) of the Act provides for factors for determining dominance, viz., market share, the size and resources of the enterprise; size and importance of competitors; economic power of the enterprise; vertical integration; dependence of consumers on the enterprise; extent of entry and exit barriers in the market; countervailing buying power; market structure and size of the market; source of dominant position viz. whether obtained due to statute etc.; social costs and obligations, or any other factor in order to determine dominant position of an enterprise. The Commission shall have due regard to all or any of these factors.

Abuse of Dominance

Abuse is stated to occur when an enterprise or the group uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner. The objective is to eliminate or discipline a existing competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened. Abuse of dominance is judged in terms of the specified types of acts engaged in by a dominant enterprise or the group, which are prohibited. As per section 4 (2) of the Act, the abuse of dominant position would arise, when an enterprise or the group engages in one or more of the following conducts:



Three Stages Process

CCI determines abuse of dominance of an enterprise or of a group through a three stage process. In the first stage, the relevant market is determined; in the second stage, dominance of the enterprise/group in the relevant market is ascertained; in the third and final stage, "abuse" by the dominant enterprise in the relevant market is determined. Abuse of dominant position by an enterprise or the group is a serious violation under the Act. CCI has vast powers in case of a dominant enterprise found abusing its dominance including imposing huge penalties and directing division of such enterprise into smaller groups, which may have serious consequences for the business and investors.

Competition Commission of India
The Hindustan Times House
18-20, Kasturba Gandhi Marg
New Delhi- 110001

Please visit www.cci.gov.in for more information about the Commission.
For any query/comment/suggestion, please write to capacitybuilding@cci.gov.in