

Making Markets Work Effectively in India Experience of the Competition Commission

by

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It gives me great pleasure to be here amidst all of you and to share the efforts of the Competition Commission of India in making markets work effectively in my country. India an economy in transition poses several challenges for the Commission, apart from having to contend with the legacy of industrial policies from its' socialist past that shaped the market structures of critical industries.. The possibility of market failures were historically hedged by direct modes of intervention with government more often taking on the entrepreneurial role. Market regulation by an independent Commission to make markets work effectively, is new in India and perhaps is true of some of the BRICS countries present at this symposium.

Undoubtedly, the extent of market penetration and market orientation varies between countries lending distinct flavours to anti-trust interventions. In this lecture I will concentrate on a few cases and the subsequent Orders of the Commission that have not only raised several dimensions of market functioning but also revealed divergent perceptions inevitable in comprehending the dynamics of markets in a transition economy. The few cases in my opinion posed challenges to the Commission in demanding innovative approaches than traditional economic analysis would suggest. The cases mainly relate to dominance and its abuse with one exception namely the cement cartel case.

2. I take this opportunity to thank our hosts CPRC for giving me the opportunity to share the experiences of Competition Commission of India. The strides made by Japan see many admirers in my country and

¹ Views expressed are personal and not of the Commission.

we have some excellent collaboration ventures in several important areas especially in the automotive sector. Hitotubashi University the academic collaborators of this symposium enjoys a high reputation in the field of economics. I feel honoured and privileged to be part of this exclusive group.

I

BACKGROUND

3. India adopted a mixed economy framework (public and private enterprises) after independence. Capacity control and licensing constituted the major planks of our industrial policy. Many areas of production were reserved for the public sector or for small-scale enterprises. As a corollary, the market structures that emerged in most industries were largely an outcome of government policy, not a consequence of free competitive firm interactions. The multitude of controls led to fragmented capacity and muted competition. Another corollary was tight leash on what the private sector could do and where it could do. Basically, the model of economic development was reliance on capital goods production, import substitution for laying the foundations of an emerging India.

4. The year 1991 marked the crucial turning point when a clear and comprehensive shift was made in the policy stance towards economic liberalisation. Marking a radical departure from the regime of ‘command and control’, the new industrial policy placed reliance on market forces. The so-called “license raj” ended; the protective tariff barriers were brought down. Economic liberalization shifted the divide between private and public in favour of a greater role for the private sector through removal of entry barriers erected by the mechanism of licensing. Markets as the mechanism for resource allocation replaced licensing. Guided by the objective of improving efficiency, the new policy recognised the need for subjecting Indian industry to the forces of competition.

5. It was only apposite that the competition law regime in the country also underwent a paradigm shift in order to embrace the needs and

challenges of the new economic order. The *structuralist* Monopolies and Restrictive Trade Practices (MRTP) Act gave way to the *conduct oriented* new competition law, the Competition Act 2002 which was enacted in 2003, amended in 2007, where under the Competition Commission of India (CCI) has been set up.

6. As in most international competition laws, the Indian Act seeks to:

- (a) prohibit anti-competitive agreements, including cartels (S.3);
- (b) prevent abuse of dominant position (S.4); and
- (c) regulate mergers and acquisition above the specified threshold (S.5 and 6)

During the last three years, the CCI has received over 300 matters alleging violations of Sections 3 and 4 of the Act relating to anti-competitive agreements and abuse of dominance in diverse sectors such as stock exchanges, infrastructure, travel, automobile manufacture, real estate, pharmaceuticals, financial sector, publishing, manufacturing, mining and entertainment. With regard to mergers and acquisitions the century mark has been crossed. The Commission has passed final orders pertaining to Section 3 & 4 in more than 250 cases. Penalties have been imposed where warranted.

7. For new competition agencies such as ours, a critical challenge lies in applying the law learning from the international best practices but at the same time not losing sight of the specificities and needs of our economies. Many of our sectors are in very different stages of market maturity and therefore a straightforward replication of case analysis from developed economies may influence the industry outcomes adversely. Cognizant of such complexities, the Commission at this juncture is according utmost importance to the principles, rules and criteria that should underpin the application of the various provisions of the law in the Indian context. Interestingly, the Commission has received a good number of abuse of dominance or unilateral conduct cases. Unlike cartel, assessment of anti-competitive effects of unilateral conduct does not have a unified theory and therefore the decision making in such cases

is complex. The unilateral conduct cases that we have handled so far have brought us face to face with many intriguing issues and questions that shall be vital in deciding our future course in evaluating such cases. The following discussion outlines some of those issues and the ways in which they have been or could be dealt with.

II

ABUSE OF DOMINANCE: ISSUES FACING THE COMMISSION

Overarching framework: Between per se and rule of reason:

8. Competition laws have constantly been evolving in response to the needs and thinking of the times. The primacy of ‘market structure’ dominated the thinking on the subject during the 1950’s, shifted to the ‘conduct of firms’ and more recently, to their ‘strategic behaviour’. The shift of focus from market structure ‘per se’ to firm behaviour and conduct is now well-established in the implementation of competition law worldwide. The Act is not rigidly ‘per se’ even with regard to cartels and other horizontal agreements (Section 3). There is always the right for rebuttal both within the Commission and referral to Compat (tribunal) and the Supreme Court.²

9. More often evidences in many countries tend to be inferences rather than specific and precise quantitative analysis. In the case of section 3 circumstantial evidence is considered equally weighty as against the initial approach of the competition authority’s emphasis on definite evidence. In India since cartel is not a criminal offence, I personally feel, circumstantial evidence should suffice (as it was in the case of Cement). But necessarily should be backed with more robust and rigorous economic analysis.

10. Importance, however, needs to be given to how the behaviour of enterprises affects competition and consumer interest and it is more complex than structural analysis. Against this backdrop, I would like to first raise the broad issue of what should be the overarching framework for analysing conduct of dominant enterprises.

² Appellate bodies in India

11. As the international experience suggests, there are multiple ways to devise rules or criteria for the evaluation of unilateral behaviour of firms. At one end of the spectrum lies the per se or form-based approach that determine, ex-ante and anti-competition practices. At the other end stands the rule of reason approach or an ex-post case-by-case effect based analysis which focuses on whether consumer harm has ensued.

12. The new developments in economic theory have made it apparent that a presumption based approach widens the scope of Type I error (false positives). While the simplicity of per se rules may provide certain degree of legal certainty, it may deter desirable conduct and adversely affect consumer welfare. The European Commission, we have seen, therefore have taken a relook at the implementation of Article 82 in light of the teachings of economic theory in the area of strategic behaviour by dominant firms.

13. At the Commission, we believe, that as a matter of principle a particular conduct under investigation has to be tested against the touchstone of ‘consumer harm or harm to competition.’ However, the practical implementation of this approach is not without its own complexities either. The key challenge stems from the fact that the theories of harm for foreclosure and/or softening of competition are often not robust and wherever they are, empirical validation or quantification gets severely constrained due to a host of factors. At this early phase of our journey, identification of data requirement, availability of data and validation of the theory of harm pose a number of problems. Taking into account all these considerations, the Commission has given due consideration to inference-based qualitative assessment ingrained in a clear understanding of the markets, the facts of the case, expected or stated efficiencies and a plausible theory of harm. This may fall short of the rigour that a full blown effect based approach warrants; nonetheless it provides a theoretically consistent framework and strives to strike the right balance between legal certainty and sound principles. Let me now turn to each of the key steps of unilateral conduct assessment and illustrate the Commission’s approach citing a few case examples.

Market definition

14. Delineation of relevant market is to specify the product and geographic scope within which the competitive effects of a particular business conduct are to be assessed for antitrust purposes. The process of defining the relevant market is in essence a process of determining closely substitutable commodities, and the geographical scope within which such commodities compete. Because real world product and geographic markets are multidimensional and complex, the definition more often than not involves blurred or shaded edges with close substitutes on the inside and varying degrees of partial substitutes on the outside. However, the complexities notwithstanding, assessment of market power critically hinges on the scope of relevant market. An overly narrow market definition overstates market power; an overly broad definition understates market power. Imminent criticism has questioned whether there is even the necessity of defining the relevant market for in defining itself there could be tendency towards arbitrariness. Notwithstanding the apprehensions for establishing abuse of market power' it is important to establish consistently reliable empirical criteria for determining the degree of substitutability among products/services.

15. The Competition Act 2002 defines the Relevant Market and lays down the criteria/factors which are to be looked into while delineating the relevant product and geographic markets.

Article 2 (r), (s) and (t) of the Competition Act, 2002, define "relevant market" as:

"Relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

"Relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

"Relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

16. The widely accepted test for delineating the boundaries of a product market is the application of what is known as the "hypothetical monopolist" test, otherwise commonly referred to as the "SSNIP" test (which refers to a small but significant non-transitory increase in price). In the Indian context, the quantitative data needed to carry out the test are often not available. In the past cases the Commission accordingly delineated the market boundaries based on qualitative analyses of characteristics, price and intended use depending on information available. As illustration, I shall discuss three cases briefly, one pertaining to differentiated product industry, one in the transportation sector and one from the real estate sector.

*i. GKB-Differentiated Product*³

17. This case was filed by M/s GKB Hi Tech Pvt. Ltd. against M/s Transitions Optical India Pvt. Ltd. The Informant viz. GKB is engaged in the business of manufacturing glass and plastic ophthalmic lenses. The Opposite Party, Transitions India, is a joint venture in India between Transitions Optical Holdings B.V., The Netherlands and Transitions Optical Inc., USA. The core business model of Transition India is to purchase substrate (semi -finished lens) from its caster partners, process the substrate (i.e. apply the Photochromic coating), and to sell the finished goods back to the lens casters. The case of the informant was premised on the proposition that Transitions India was a dominant enterprise in the business of Plastic Photochromic Lenses (PPL) in India and that it was abusing its dominant position by indulging in a number of anti-competitive practices.

18. Ophthalmic lenses are available in various types in terms of material such as glass, plastic, polycarbonates etc, value addition in terms of

³ Case No.1/2010- GKB Hi Tech Lenses Private Limited vs Transitions Optical India Private Limited available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

colouring so as to reduce glare and prevent UV Rays and different coatings such as anti-reflective, hydrophobic and anti-resistant. Therefore, it was crucial to understand which varieties belong to the relevant market in the context of the case. Primarily, the question boiled down to whether all the photochromic lenses form part of relevant market or the differences in material and consequent differences in characteristics and price lead to delineation of glass photochromic lenses (GPL) and plastic photochromic lenses (PPL) as distinct markets.

19. The Commission found that each of the two products i.e. GPL and PPL, have certain advantages as well as disadvantages vis-a-vis the other and prima facie appeared to be distinct products. However, the decision on delineation of relevant market required assessment of consumer behaviour and the underlying preferences.

20. Ideally a market survey would have been a useful instrument for this purpose, but in the absence of a formal survey, the Commission could only note, without making it a determining factor, that generally there appeared to be a preference for lighter and unbreakable lenses. What was even more important was the fact that the speed of transition from light to dark and vice versa was faster in case of PPL. Since the primary purpose of buying a Photochromic lens is protection from UV rays and reducing the glare, the higher effectiveness of PPL in this important characteristic would naturally contribute substantially to the consumer preference in favour of PPL.

21. Further, apart from technical characteristics, price differences between the two products, as a factor in consumer choice, was also examined. In fact, price considerations took precedence in defining the relevant market, on the appreciation of the fact that Indian consumers are acknowledged as being generally very price sensitive. According to the submission of the informant, the price of GPL starts from as low as US\$1.25 and PPL starts from around US\$20. While no doubt the growing Indian middle class tends to suggest the possibility of a market continuum, but in highly differentiated product markets and consequent high differences in prices, the Commission concluded that the continuum exists on an intra-product basis and not inter-product basis and

exclusivity prevails. Behavioural economics also seem to suggest that price differences do not act as a competitive constraint, as the perception of higher quality of PPL may not be in proportion to the differences in prices. So, it is possible that the consumers may not switch to GPL even if the prices of PPL increase further.

22. In view of the foregoing analysis of characteristics of the products, factors relevant to demand decisions, importantly price and the lack of competitive constraints reflected by price differences between PPL and GPL, the Commission concluded that the market for Plastic Photochromic Lenses in India was the relevant product market in this case.

ii. *DLF – Real Estate Sector*⁴

23. The informant in this case alleged unfair conditions meted out by a real estate player. It was alleged that by abusing its dominant position, DLF Limited imposed arbitrary, unfair and unreasonable conditions on the apartment - allottees of the Housing Complex 'the Belaire', being constructed by it. The informant in this case was Belaire Owners' Association, an association formed by the apartment allottees of a Building Complex, 'Belaire' situated in DLF City, Phase-V, Gurgaon, being constructed by the Opposite Party (OP).

24. While defining the relevant market in the current case, first it was established that that the Opposite Party DLF Ltd. was providing services of a developer/builder within the meaning of "service" given under section 2(u) of the Act. The next point to be determined was whether these services, provided by DLF Ltd. to the informant, are of a distinct nature "by reason of characteristics ... their prices and intended use" as stipulated in section 2(t) of the Act.

25. The Commission noted from the investigation report that the nature of service being provided by DLF Ltd. in the context of the instant case was described as services of developer / builder in respect of "high-end" residential building in Gurgaon. Thus, there were two important components of service definition with regard to characteristics of the

⁴ Case No.19/2010- Belaire Owners' Association vs DLF Limited, HUDA & Ors available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

underlying physical asset that required interpretation, viz. “high-end” and “residential”. The third component, viz. “Gurgaon” related to “geographic market”.

26. Terms like “high-end” or “affordable” are relatively subjective and therefore it was felt necessary to establish a clear and logical interpretation of the term “high-end”.

27. The Commission noted that “high-end” is not a function of size alone. It is a complex mix of factors such as size, reputation of the location, characteristics of neighbourhood, quality of construction etc. that go into considering a dwelling unit as “high-end” or otherwise. However, the most significant characteristic of a “high-end” has to be the characteristics of its actual customers and amongst all objective differentiators of a customer’s characteristics is his or her capacity to pay because in economics, demand is desire backed by the ability to pay. Apart from the physical attributes, these categorizations also take into account the income or expenditure levels of the customer base. Together, these factors create a distinctly identifiable residential unit that is not substitutable in an economic sense.

28. Users / buyers of ‘high-end’ accommodation demand quality and ambience of a distinctly higher level, and are willing to pay significantly higher prices to meet their requirements. Taking into account the current prices of High Income Group accommodation provided by the development authorities in India, as also the ‘demands and paying capacity of the growing upper middle and rich classes in the society, from the cost perspective the Commission found it quite logical to accept an apartment costing Rs. 2 – 2.5 crores (\$20 – 25 million) as “high-end” in the Indian socio-economic reality.

29. Having settled the question on categorization of “high-end” residential buildings, the Commission examined the relevant geographic market.

30. Based on the facts of the case, Gurgaon was seen to be the relevant geographic market. A decision to purchase a high-end apartment in Gurgaon is not easily substitutable by a decision to purchase a similar

apartment in any other geographical location. Gurgaon is known to possess certain unique geographical characteristics such as its proximity to Delhi, proximity to Airports and a distinct brand image as a destination for upwardly mobile families.

31. The decision to take residence, however temporarily or permanently, depends on several factors such as occupation, children's education or location, family, friends, surroundings, amenities, quality of life and affordability, amongst others. Since a residential property is by nature immovable, its geographical location is amongst the foremost factors for consideration.

32. In the end, the "investment" or "own residence" decision centres on locational preference of the purchaser and this preference is generally not interchangeable or substitutable. A better apartment for lesser price may be available in, say, Surat in Gujarat but that apartment would have no value for the average purchaser who has decided to buy a house in Gurgaon given his preferences for whatever reason. A small, 5 % increase in the price of an apartment in Gurgaon would not make the person shift his preference to Ghaziabad, Bahadurgarh or Faridabad on the peripheries of Delhi or even to Delhi in a vast majority of cases. Based on this qualitative perception analysis and taking note of various reports of real estate consulting firms, the Commission concluded that the geographic market in this case was Gurgaon.

*iii. Arshiya- Transportation Logistics Industry*⁵

33. To give an insight into the case, it is worth mentioning that railway services and railway infrastructure in India is a legal monopoly, owned by the central government. Of late, in line with the policy of selective privatization of railway operations through PPP arrangement, Indian Railways have stopped running containers trains, a function given to the container train operators (CTO) while it still hauls passenger and goods train as a monopolist.

⁵ Case Nos. 64/2010, 12/2011 & 02/2011- Arshiya Rail Infrastructure Ltd. (ARIL) vs Ministry of Railway (MoR) & Ors available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

34. The informants were private container train operators who have alleged that Indian Railways along with CONCOR, one of the CTO which is also partly government-owned have abused their dominant position individually and also have entered into anti-competitive agreement to the detriment of other CTOs. Among other things, the informants argued that Indian Railways and CONCOR are a group entity (a claim not accepted by the Commission) and that the relevant market for the purpose of competition assessment is 'market for rail services in India'

35. The case was a bit complex in as much as it involved settling numerous issues, including juridical and competition. There was intensive debate within the Commission as to what constituted relevant market – is it the market for railway infrastructure, movement of goods through railway network or movement of containers etc?

36. During deliberations, it was argued that road and rail, as a medium of transportation, had limited substitutability depending upon the various factors like type of goods to be transported, distance, time etc, but data available in the public domain suggested that overall market share of roads was far in excess of rail. Another point to be noted was that Indian Railways had stopped operating the container trains and it was also suggested that general wagon trains were altogether functionally different from the container trains. An overarching point in determination of the relevant market is the fact that a container can be placed over any vehicle, independent of the medium of transportation. In view of these facts, the relevant market was defined as movement of containers in India. Consequently assessment of competition was required to be conducted in containers since only that mode has been opened to container train operators.

37. Before I move on to the next step of assessment of dominance and abuse, I would like to raise before you some unresolved issues which may not necessarily be germane to the Indian context regarding the correct test and methodology for defining relevant market. What is noticeable in the 3 cases cited the Commission has not applied the SNNIP test on account of

- Firstly, characteristics of certain sectors will not always permit the application of the SSNIP test, (e.g., where quality of service, and not price, exerts the greater influence on customer choice) as in the case of DLF;
- Second, typically the interviews concentrate on the largest customers, competitors, and suppliers. So even in the best case where authorities try to conduct market delineation with the SSNIP-test ideology, if many of the customers interviewed by the authorities happen to be infra-marginal, the authorities will be biased to conclude that the markets are narrow. This might be an erroneous conclusion, as the sample of the customers not only biased but wrong.
- Thirdly, often we are faced with situations where the standard well known methods of determining substitutability are rendered ineffective for reasons such as non-availability of data, irrelevance of price as a competitive parameter, or contradictory empirical findings etc. For example, in stock markets, we noted, since the exchange trading fees are such a small part of the overall cost of acquiring securities that a 5-10% change in trading fees would result in the relative cost of instruments changing by a far smaller proportion. Hence, a rise in transaction fee (5-10%) in one segment will not incentivize the players to shift to another segment. The cross elasticity of demand will be very less (close to zero) in this case. Thus, using the traditional SSNIP test to identify demand side substitutability is of little significance in this particular case. Or let us take the example of high technology Industries. The ability of customers to utilize specific high technology products in their businesses is often based on whether that product satisfies technical and economic criteria, rendering even qualitative analysis of the substitution possibilities difficult. With highly differentiated products, price and performance variations can be very substantial and markets may appear to be fragmented, with

many customized products tailored to specific users and/or applications. Another problem associated with attempts to apply the SSNIP test to high technology industries involves identifying the magnitude of "small, but significant" that could be used in this context. In high technology industries, where non-price competition is often far more important than price competition, the appropriate price change for antitrust analysis will certainly be larger than five per cent.

38. Vague delineation of market boundaries however in a case can have profound implications on the subsequent cases that the agencies may receive from the same sector leading to rejection of cases which otherwise would have warranted competition scrutiny. This expands the scope of Type II error. Therefore, under such circumstances a holistic and fool proof relevant market analysis is not possible and decision making in unilateral conduct cases becomes exceedingly difficult and will be prone to value judgements. In the three cases that we have cited the factors for defining the market have been innovative, original and rigorous within the framework of economic logic in order to capture the specificities of the market.

Assessment of dominance and abuse

39. The Competition Act, 2002 conforms closely to the principles of modern antitrust economics. Designed for the new economic environment, the Act does not target size or dominance of a firm as such. The emphasis has shifted from size to behaviour and effect on the market concerned. Section 4 of the Act prohibits abuse of dominant position by an enterprise or group, as defined in the Act. The important issue is whether the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably.

40. Under the Act, dominance refers to a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to :
(i) operate independently of competitive forces prevailing in the

relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. Section 19(4) of the Act lists out a set of factors that the Commission while inquiring whether an enterprise enjoys a dominant position or not should consider including market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, economic power including commercial advantages of the firm over competitors, vertical integration, market structure, entry conditions etc. The Act provides the flexibility to the Commission to focus on any or all of these factors in view of the requirements of the case in hand. It further allows to take cognizance of any other factor that the Commission may deem appropriate for assessing the market power or dominance of the enterprise under scrutiny. In particular, the provisions in the Act relating to abuse of dominance contain in-built checks and balances to ensure a thorough evaluation of the market conditions prior to the assessment of the impugned actions.

41. The prohibitions or the abusive conducts including both 'exclusionary' and 'exploitative' practices are set out in Section 4(2) (a), (b), (c), (d) and (e) of the Act. As discussed in the context of overarching framework, the Commission's attempt has been to base its decision on abuse on a holistic understanding of market structure and the harm to competition or consumer welfare by the impugned conduct, if any. In complex markets, such analysis has not been straightforward and I shall discuss cases where the members of the Commission had divergent views and accordingly a minority order was also issued along with the main order.

1. MCX Stock Exchange v/s National Stock Exchange⁶

42. A controversial but interesting case of 'Abuse of Dominance' that came up early in the Commissions' establishment in terms of predatory pricing and leveraging involved two major stock exchanges in India. MCX Stock Exchange Ltd. (MCX-SX), a public limited company and a recognized stock exchange for trading in Currency Derivatives

⁶ Case No.13/2009 - MCX Stock Exchange Ltd. & Ors. vs National Stock Exchange of India Ltd. & Ors available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

(CD) segment filed the case against the National Stock Exchange India Ltd. (NSE), DotEx International Ltd. (DotEx) and Omnesys Technologies Pvt. Ltd. (Omnesys), alleged abuse of dominant position in the market for stock exchange services in India under section 4 of the Act.

43. It was alleged that transaction fees, principal source of revenue for stock exchanges, was waived off by NSE in its Currency Derivatives segment. Further, NSE kept membership deposits unjustifiably low and waived the admission fee entirely. Since NSE is not charging transaction fee for CD segment, MCX-SX is unable to levy such fee in its only segment i.e. CD segment leading to significant losses. It was also alleged that NSE was subsidizing their losses in CD segment from their revenues in Cash Segment, F&O and WDM Segments, thus leveraging its dominant position to protect its position in the CD Segment, in violation of Section 4(2) (e) of the Act. As per the allegations levelled by the Informant, various fee waiver and other concessions in CD segment have been adopted by the NSE as an exclusionary device to kill competition and competitors and NSE has, therefore, used its dominant position in the relevant market to eliminate competition and competitors.

The conclusions of the main order were

- NSE was dominant in Other Segments of Stock Exchange and had the financial resources to sustain zero pricing policy in CD Segment long enough to outlive the competition and thus was in a position to leverage its dominance in other segments to protect the CD Segment.
- NSE was not able to substantiate Zero Variable Cost in CD Segment.
- The markets are not nascent and in fact sufficiently matured therefore Zero Pricing as a tool to develop nascent market cannot be justified.

- NSE was found guilty of contravention of Section 4 of the Competition Act, 2002.

44. The dissent order was premised on the fact that in dynamic markets, anticipating or adjudicating on anti-competitive behaviour carries the risk of being arbitrary defeating the purpose of intervention. The direction of the order was set by the distinct features of network industry and the arguments were based on the principles of network economics. It may be worthwhile to digress a bit into network economics and the effects of network effects which in recent years brought to attention the difficulty in developing standardised business strategies based on uniform behavioural analysis. To illustrate a few of these traits as they present the emergent challenge to anti-trust authorities include:⁷

- An inverted “U” demand curve that permits multiple equilibria allowing for sudden and significant expansion of network size. A constant or low marginal cost can see a new entrant expand his market with the introduction of new to better technology which further decreases his cost.
- The pace of market expansion is much faster in network industries as compared to non-network industries, more on account of the explosive nature of network effects.
- Market structure in a network industry is characterized by high inequalities of market shares and profits. Strong network effects normally tends to create natural oligopolies. This is why in spite of entry not being restricted, it has been observed that more than three-four firms would generally not operate in a network industry. Various studies have assigned a relatively high HHI index suggesting fewer numbers of players in these industries. While the firms incur substantial initial cost, it recovers the same by offering unique value added services or by diversifying the product offerings. Various business strategies to reap quick benefits

⁷ Op cit., Order (dissent) Case No.13/2009

include inter-alia fixed cost recovery through value added schemes, flexible pricing policies etc.

45. In such fluid and dynamic framework, anticipating or adjudicating on anti-competitive behaviour carries the risk of being arbitrary defeating the purpose of intervention. With this perspective the minority Order examined the allegation of predatory pricing and the inevitable leveraging associated with the pricing policy.

46. Stock exchanges' (including the CD segment) displays the characteristics of a network industry. The platform of the exchange can have within in it several instruments for trading or single instrument. Network effects (externalities) for exchanges implies that value to users on both sides of the platform (traders and investors) increase as the number of players grow i.e. as exchanges get deeper. Preference for markets with depth and liquidity reduces bid-ask spread and the related risk and uncertainty inherent in such markets.

47. Network economics with inverted "U" demand curve applied to stock exchange defines a strategy of low introductory prices. The issue therefore, before the minority Order was whether zero pricing under such conditions could be labelled as predatory? ; as against the majority Order that premised on the perspective that 'winners takes all' where entry of other players is deterred by zero pricing. Leveraging in the majority Order framework was an inevitable part of zero pricing with possible recoupment of losses at a later stage. Predatory and leveraging were linked, both consequences of the deterministic approach.

48. Based on a detailed analysis of the market structure, it was observed in the minority Order that there did not appear to be much possibility of recoupment of stated current losses. Even if competitors were to leave the market due to alleged predatory pricing, NSE was likely to be able to charge only reasonable prices. As demonstrated by easy entry of USE and MCX-SX, higher prices to recoup would lead to supernormal profits and attract new players, which would again force

NSE to lower the prices. Therefore, in the face of low entry barriers, recoupment is not very probable. As such, zero pricing cannot be part of a predatory business strategy. Instead when network externalities are present, a profit maximizing firm might initially price a product below cost in order to establish a large installed base of users, and thereby increase demand for its product. Alternatively, a firm may initially charge a low or zero price since its marginal cost is zero allowing for minimum liquidity before shifting to higher price as part of legitimate business model.

49. Evidence of market share of the three players showed that MCX-SX had a slight edge over NSE and the fact that MCX-SX and USE have been able to take away original market share from NSE at same price, i.e. zero price, indicates that enterprises are competing on non-price parameters such as, liquidity and depth did not gain credence countered by the concern that large players sustained through leveraging from an established market into the new market and in this case the CD market.

50. The CD market has been competitive from almost the beginning, and zero price has in no way deterred entry and continued operations. The free services provided by “google” as a search engine, and by gmail, yahoo etc. for e-mails, are well known examples of network industry providing service globally to the primary users at zero price. If a particular price is being maintained by all the competitors, there is no logic in competition regulation to find one of the competitors as violating the competition law, on the ground that this price is unfair or predatory. Even in this case, it could as well be argued that NSE had meant to keep the price at zero for a limited period, but the fact of zero pricing by later entrants left it with no option but to continue with this price.

51. Therefore, it was concluded that the network industry characteristics of a stock exchange provide a robust business model with initial zero pricing. This was bolstered by the fact that two more competitors entered the market subsequently with zero pricing. Both the competitors entered the market fully knowing that the prevailing

price in the market was zero. More significantly it was difficult to apprehend consumer harm under zero pricing ,in anticipation of future recoupment.

52. MCXv/NSE case represented the classic response of where the majority decision rested on the assumption that NSE a large stock exchange would but use its strength i) to leverage into another market; ii) to set zero prices to capture all consumers and iii) prevent any new entrant. To some extent the case provided insights into how dominance is rendered redundant when externalities of network facilitated by innovation and technology in the fast growing digitalised world. A concern of great significance in cases of ‘mergers and acquisitions’.

II. *Kapoor Glass v/s Schott Glass India Pvt Ltd*⁸

53. Very briefly I would like to touch upon another case that poses a challenge to competition authorities and revolved around the issue of discounts.

54. The issue of price discrimination and its alleged impact on competition is often a difficult issue for competition authorities to assess especially when a dominant international player is involved. Kapoor Glass v/s Schott India was one such challenge posed before the Commission. Schott Glass India Private Ltd a subsidiary of Schott Glaswerke Beteiligungs GmbH of Germany is an internationally acclaimed manufacturer of Borosilicate tube glass. Schott India entered into a joint venture with Kasiha Manufacturing company a downstream ampoule manufacturer and thereby created a downstream link. Glass tubes were also sold to other ampule manufacturers for use as injection vials. FDA approved glass vials is an important factor. The discounts provided by Schott was the subject of inquiry before the Commission on the aspect of whether price discrimination is anti-competitive.

⁸ Case No.22/2010 - Kapoor Glass Private Limited vs Schott Glass India Private Limited available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

55. The allegation pertaining to imposition of unfair/discriminatory price in sale of glass tubes was directed at the two kinds of discounts offered by Schott India: i) volume/target discount; ii) loyalty discount. Price discrimination was therefore directed to both the upstream and downstream markets. The Competition Act, 2002 prohibits discriminatory pricing by a dominant enterprise. However, the criteria for assessment of discriminatory pricing have not been laid down in the Act. International jurisprudence has veered towards 'rule of reason' 'effects' doctrine. The Robinson Patman Act in the US condemn discrimination where the effect of such discrimination maybe to lessen competition. Article 82(c) of the EC Treaty considers "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at competitive disadvantage".

56. In this case the OP was an upstream player also having downstream presence in the form of a Joint venture. The case was premised on the alleged discriminatory discount policy followed by OP in favour of its JV vis a vis other players. The Commission majority Order considered the financials of the aggrieved parties to establish whether there has been any financial injury caused due to the discount policy of the OP and based on EBIDTA concluded that the policies of the OP in being discriminatory created conditions that constrained the competitive ability of competitors.

57. The minority Order on the economic basis of discriminatory or non-discriminatory found no discrimination and more significantly noted that competition downstream was not affected by discounts. The Order applied the criteria of 'anonymous' and 'non-anonymous' to characterize discounts as the first step towards assessing price discrimination. On the criteria of 'anonymity' the minority view went on the economic basis of discriminatory or non-discriminatory where discounts were concerned and found no discrimination. Even with regards to loyalty the variations in discount depended entirely on the willingness of the downstream manufacturers whether to mix Chinese imported glass or not. Since competition downstream was not affected and since performance was not related to the extent of

discount no Abuse of Dominance could be established. Moreover the EBIDTA had no correlation to discounts.

58. The financial analysis based on EBIDTA margins revealed that the operating profits of all the companies were very different hinting at the differences in efficiencies in operations and in fact were representing an increasing trend and most importantly the sales also revealed increasing trend. Based on this analysis the minority Order concluded that the policies of the opposite may be discriminatory, but the same have not lead to any loss in competitive ability as reflected in increasing sales and financial injury as reflected in growing EBIDTA margins.

59. Reflecting on the two cases of dominance and its possible abuse raises several issues that need pondering. As a starter, in assessing abuse of dominance the cases cited above posed the question: When is it that a company is ever able to act entirely independently of its competitors strategy existing or potential ? Is size the determinative factor for ensuring abuse ? The minority Order of NSE which focussed on the new frontiers of business namely, network economics where business strategies and pricing decisions do not follow a straight linear path, will confront competition authorities more as business and transactions go ' virtual' .

60. A second set of concerns that emerge from actions where firms often offer discounts, reducing prices etc., on grounds of sustaining in the market and when do these pricing strategies signify anti-competitive. Does mere dominance preclude a firm from offering discounts that benefit consumers? The minority Order on the Kapoor Glass case took the view that pricing discrimination *per se* is not anti-competitive. It is only when the discrimination is 'non-anonymous' that there are competition concerns

III

CARTELS AND EVIDENCE

61. Section 3 of the Act deals with cartels - both horizontal and vertical. In the case of horizontal cartels (Sec 3(3)) the judgment is *per se* which would suggest that if there is a cartel there is no requirement of assessing whether the cartel has market power or not and more significantly whether market power is exercised or not. On the face of it, the approach is appropriate as even in economic theory cartels are the most pernicious. Moreover if cartels are known to exist it is best to act quickly. But let me leave with you the grey area that can arise for although the decision is *per se* it is a rebuttal decision even if the rebuttal is from the respondent.

62. The definition of cartel in Sec. 2 (c) has the phrase “...*limit, control or attempt to control the production, distribution, sale or price of or, trade in goods or provision of services*”. Section 3(3)(b) the phrase “attempt to control” does not figure. Market power is taken as given. As an economist the concern is with establishing how ‘attempt to’ translates into actual reality or successful action namely, assertion of market power. This is where economics and data analysis becomes critical.

63. Market studies on cartel normally start with the measurement of concentration using the HHI Index. But the index reflecting concentration can pose a concern regarding the formation of a cartel for without defining market power concentration itself as a feature of a cartel can be misleading. Price parallelism is then necessary to establish but eludes measurement either on account of i) paucity of data; ii) it (the cartel) is a temporary phenomenon and iii) spontaneous market response of prices falling in line. Concrete evidence of an ‘agreement’ to fix prices/quantities is critical. Proving the existence of a cartel is often not a simple exercise.

64. As mentioned earlier under the Act proof of cartels as a ‘*per se*’ clause but with rebuttal on the opposite evidence continues to be a critical factor in proving dominance. Legal interpretation must carry the

weight of economic analysis and it is in this blending that when we look at the initial years of the Competition Act in US where the emphasis was on cartels and breaking of cartels. Cartels as of now in India are the forte of old business houses in products with low innovation and even demand. In a very broad sweep the first strand relates to industries which grew under the umbrella of protection and licenses granted under the Industries Development and Regulation Act and of course tariff barriers. Some of these industries remained in the exclusive privilege of the public sector such as steel (with a few exceptions) while others saw both public and private sector investment with many in the private sector that grew to be giants such as cement, tyres, fertilizers. These industries display the expected features of cartels in terms standardized technology, consistent demand and markets dominated by a few large players.

65. The cement industry had been investigated twice earlier by the erstwhile MRTP for cartelization and unfair pricing practices resulting in 'cease and desist' orders without having any impact. An ongoing investigation of MRTP regarding cartels in the cement industry was taken up by the Commission on the annulment of MRTP Commission⁹. The Commission in its investigation noted that the cement industry clearly displayed all the features of oligopoly. Economic analysis strengthened the understanding. Parallel behavior was noticed, not only in terms of prices but also in terms of production and dispatch. Price correlations confirmed price parallelism. Another exercise was carried out to bring out the correlation between the cement production index and cement price index over the last 15 years. A clear change in pattern was observed in the year 2002-03 onwards. While the cement production was growing at the same CAGR, the CAGR of cement price increase saw a great increase. Interestingly 2002-03 was the year which saw a decline in cement prices. Proof for a cartel had to be sought elsewhere.

66. The Commission noted that the Cement Manufacturers Association (CMA) had a system of collecting the information regarding prices from

⁹ Case No.29/2010 – Builders Association of India Vs. Cement manufacturers of India available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

the various companies for submission to a different department of government. The Commission felt that this platform can be used to discuss and fix future prices also. This was corroborated with the fact that the cement prices increased after every meeting of CMA.

67. The price and dispatches parallelism was also taken as an evidence of collusion among the market players. The excess capacity maintained by the cement firms also hinted towards collusive practices.

68. Based on these evidences and other evidences in form of minutes of meetings and oral submissions of the parties, CCI concluded the presence of cement cartel in India. The case was based on circumstantial evidences. Circumstantial evidence to establish cartels is perhaps path-breaking where anti-trust cases are concerned. The 'cement case' also brought to the forefront the role of trade associations for it was in the activities of CMA, that circumstantial evidence was found.

69. The problem is more complex as is so where trade associations are concerned. Trade associations that are created by businesses involved in a specific industry to join together for furthering their common interest and naturally can be classified as a cartel. The potential of trade associations to be useful to consumers and industry with overtones of a trade union is in as much as their potential to be in conflict with the competition law has several grey areas.

70. Trade Associations, per se, are not cartels as defined under Section 2(c) of the Competition Act 2002. Trade associations consist of individuals and firms with common interests in trade, which join together to further their common commercial or professional goals. The activities of a trade association usually span across a variety of issues, many of which may fall outside the ambit of competition law entirely, or be fully compatible with the competition rules, provided cooperation between members' remains within certain defined boundaries. However, because these activities involve a degree of horizontal cooperation between firms, organizations of this nature remain vulnerable to stepping outside the boundaries placed by competition law.

71. Several questions need to be examined while attempting to evaluate the market power inherent in the ‘attempt to control’ (Sec. 2(c)) and the ‘actual limit or control’ of Sec. 3(3)(b).

- What are the conditions/circumstances when a Trade Association is presumed as likely to indulge in anti-competitive practices?
- How to distinguish between the legitimate role of an association and an association acting as a cartel?
- Is absence of profit motive a sufficient defense mechanism for claiming exemption as a cartel?

72. Cartels will always be a concern for anti-trust authorities. The major concern is to find the required evidence. This is so as business invariably are more oriented towards oligopolistic structure with strategies of price leadership inherent in them

IV

CONCLUSIONS

I have attempted in this lecture with the help of a few cases to highlight a very major fact namely, markets are dynamic and anti-trust authorities can often miss out the dynamics as our perceptions are shaped by experience. While experience is invaluable but in a fast changing world where technological developments are breaking the glass ceiling of traditional economic theory of firms and strategic behaviour analysis the assessment of possible unilateral conduct of dominance and its likely abuse is beset with tendencies to : fix prices even if they are benchmark prices as the closest approximation to competitive prices; to confuse between competition and competitors; to expect cartels in oligopolistic markets.

The Competition Commission of India adds to knowledge building capacity through the diversity of views expressed. In the cases mentioned above the standard definitions of defining the relevant market required further fine tuning to be able to capture the inherent

dynamics of the markets analysed. Similarly, size in terms of dominance in terms of market share remained a sterile and at most a bland approach when it came to assessing the abuse of dominance. The early explorations have widened our analytical tool kits and sharpened efforts to make markets work effectively.

The reliance on circumstantial evidence for establishing cartels was significant in its reliance on the meetings of the Cement Manufacturers. The timing of the meetings, the price increases and consistency in approach on capacity utilisation provided a good blend of economic analysis with ground evidence. What factors need to be looked into while determining whether a particular activity of a trade association as having stepped beyond the limits placed by competition Law? What are the indicators to quantify interest of consumers and trade freedom by the market participants while looking at the impact of structure and behavior of trade associations?

The Supreme Court of India in its judgement on the role of CCI in a sense was a pointer to the envisaged role. The judgement is path breaking in that it not only defines the role of the Commission but in that it anticipates implementation of the competition law in a dynamic framework of innovation and growth as it dwells on the benefits of competition in a stamp of approval on market oriented economic development. To quote:

The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted al over the world as the guiding principles for effective implementation of competition law. (CCI v/s SAIL & Anr., No. 7779 of 2010)

Taking a leaf out of the Supreme Court judgement the concerns of the Commission as regards emergent business houses suggests that the lens of competition is very different. It looks at competition not merely in terms of the number of players but more often in a

Schumpeterian framework of 'creative destruction'. Benefits of competition are not merely of productive and allocative efficiency but also of static and dynamic efficiency. It makes the task of the Commission not only difficult but in a sense prescient especially in sectors and industry where the cycle of innovation and change is often a year or a couple of months. And space must be provided for innovation and change which a linear approach to competition and monopoly may not comprehend, a marked approach in line with economic liberalization and market orientation. The nagging doubt as before all competition authorities is "Did we get it right" and whether the dynamism of the market is not sapped of its competitive vigour on account of over enthusiasm.