



The Quarterly Newsletter of Competition Commission of India (CCI)

Fair Play

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Economics of Competition Law, 2017*

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Fair competition is central to the modern age market economies. Economic theories, theories of harm, evidence and analyses play a crucial role in competition regulation. Antitrust laws have evolved with the evolution of economic thinking and its theoretical underpinnings. Economic doctrines shape the approaches to antitrust laws world-wide. India, being a relatively younger jurisdiction in competition law, had the benefit of adopting and incorporating elements of relatively matured jurisdictions and the latest economic concepts to come up with a state of the art competition law.

Competition regulation under various provisions of the Competition Act, 2002 requires economic analyses suited to the features of the Indian economy. The factors such as minimum number of firms that can form a cartel, entry barriers, availability of substitutes, homogeneity of products and other economic factors play a key role in determining whether a market is prone to cartelisation or not. Economic tools such as price parallelism, barriers to the new entrants, concentration indices and a host of other economic factors help in the detection of cartels.

In view of the increasingly important role that economics play in enforcement of competition law, the Commission has instituted the 'National Conference on Economics of Competition Law' as an annual feature. The idea of hosting the Conference as an annual feature is to better integrate knowledge of economics and law in implementation of competition law. The Conference is organised every year on the first Thursday and Friday of March. The second edition of the Conference was organised on 2-3, March 2017. We had the privilege to have the Conference inaugurated by Smt. Nirjala Sitharaman, Hon'ble Minister of State (Independent Charge) for Commerce & Industry, Government of India. The Commission, she urged, must develop sectoral understanding from competition perspective and engage sector experts wherever necessary for this purpose. Dr. Arvind Subramanian, Chief Economic Adviser, Government of India delivered the Keynote Address. I am happy to note that more than 300 participants including economists, legal experts, government functionaries and experts from institutes of national and international repute were actively involved through the entire process of deliberation and made valuable contribution.

The focus of the Conference was on the need of cutting edge thinking and research into a larger framework of marriage between competition law and economics. With participation of senior officials from various ministries, leading international antitrust economists, government organisations, research institutes, economists from academia, competition law firms and consulting firms, the Conference proved to be a platform for exchange of ideas and views regarding the various facets of economics relevant to competition law enforcement. The objective of the Conclave was to apprise and update the leading economists of the country working in the field of regulatory economics/industrial organisation with the legal framework of the Act opportunities for researchers and economic research needs of the Commission.

The Commission has completed about 8 years of anti-trust enforcement and 6 years of review of combinations. In its efforts towards mainstreaming the competition regime, the Commission is undertaking advocacy programmes in collaboration with industry chambers, professional institutions, national law universities etc. During the financial year gone by, Commission has undertaken 129 such initiatives.

Passage of four GST Bills in the Lok Sabha on March 29, 2017 marks a new era in the economic reform process. The unifying tax structure of GST aiming at reducing the market heterogeneity and geographical entry barrier and encouraging free movement of goods, labour and capital within India is expected to provide impetus to fair competition and shift the production possibility frontier upwards. The Commission joins the stakeholders in looking forward to a seamless rollout of GST regime.

(Devender K. Sikri)

IN FOCUS

National Conference on Economics of Competition Law and Economists' Conclave, 2017

The Competition Commission of India (CCI/ the Commission) organised the second edition of the National Conference on Economics of Competition Law on March 2-3, 2017 at the India Habitat Centre, New Delhi. In view of the increasingly important role that economics play in competition law enforcement all the world over, the Commission has institutionalised the Conference as an

of the Conference. Dr. Arvind Subramanian, Chief Economic Adviser, Ministry of Finance, Government of India delivered the Keynote Address. Mr. Ashok Chawla, Chairman, TERI and Mr. Rajeev Kher, Hon'ble Member, Competition Appellate Tribunal (COMPAT) were the Chief Guest and the Guest of Honour respectively at the Valedictory Session.

competition with the other socio-economic requirements of the nation. Highlighting the importance of fair competition in public procurement, the Hon'ble Minister complimented the CCI for its recent orders in cases of bid-rigging in public procurement of cement and mentioned that the Commission's orders should have a preventive effect, which should deter infringements by the enterprises.



Dr. Arvind Subramanian, Chief Economic Adviser, GOI addressing the inaugural session of the National Conference on Economics of Competition Law

annual feature to be organised every year on the first Thursday and Friday of March. Delhi School of Economics (DSE), Indian Statistical Institute (ISI) and The Energy and Resource Institute (TERI) were the Knowledge Partners for the Conference.

The Conference was inaugurated by Smt. Nirmala Sitharaman, Hon'ble Minister of State (Independent Charge) for Commerce & Industry, Government of India, who was the Chief Guest at the Inaugural Session

In her inaugural address, Smt. Nirmala Sitharaman stated that the CCI needed to continue as a dynamic regulatory institution, nuancing its position keeping in view the stage of economic development of the country and the diversity of the economy. The Commission, she urged, must develop sectoral understanding and engage sector experts wherever necessary for this purpose. She stressed the importance of balancing the needs of opening up the economy to international

Dr. Arvind Subramanian, in his keynote address, highlighted the distinction between pro-business and pro-competition policies, complementarity between trade policy and competition policy, importance of ease of exit for competition and the need for effective regulatory mechanisms in the wake of rapid digitalisation and advancement of technologies.

In his introductory remarks, Mr. D.K. Sikri, Chairperson, CCI highlighted that the idea of hosting the



Sh. Augustine Peter, Member, CCI alongwith Prof. John. M. Connor, Prof. Yannis Katsoulacos, Dr. R. Shyam Khemani and Dr. Geeta Gauri, at CCI Economists' Conclave 2017

Conference as an annual feature is to better integrate knowledge of economics and law in implementation of competition law. He stated that economic analyses play a key role in *inter alia* providing conceptual underpinnings, understanding competitive dynamics in various markets, identifying theories of harm and in evaluating efficiency. The welcome address was delivered by Mr. Augustine Peter, Member, CCI. He emphasised on the interface between trade policy and competition policy, particularly in the areas of IPR, anti-dumping policy, regional and multilateral trade liberalization etc. and underlined the importance of trade liberalisation for competitive domestic markets.

The conference was organised in five technical sessions and two panel discussions over the span of two days. Twelve papers were presented over five technical sessions. Two panel discussions were also held where eminent experts from India and abroad shared their viewpoints on 'Role of Economics and Economists in Competition Law Enforcement' and 'Frontiers of

Antitrust Economics: Digital Markets and Data-driven Innovation'. Some of the key points that emerged from the deliberations are presented below:

Panel Discussion: Role of Economics and Economists in Competition Law Enforcement

Economic analysis has a twin role in enforcing competition law. It provides the analytical tools and models for understanding potentially illegal conduct and assessing its welfare implications. It also has an increasingly important role in the evaluation and choice of legal standards as well as the shaping of other enforcement tools such as sanctions, leniency programs etc.

Panel Discussion: Frontiers of Antitrust Economics: Digital Markets and Data -Driven Innovation

The expansion of internet access globally has spurred the advent of digital markets. On the one hand, the use of data has allowed companies to better understand and target individual consumer needs and consumers have benefitted from customised offerings and rapid innovation. At the same time, it has

triggered a debate about what 'Big Data' means for competition and whether access to data can be a potential source of market power. The views that came up at the Conference were split into two schools of thought: one suggesting that antitrust intervention in Big Data may be premature, considering the numerous pro-competitive benefits offered by Big Data, the other indicating potential harm to competition caused by Big Data and therefore the need for a more proactive antitrust enforcement in this realm.

Technical Session I: Economic Tools for Market Definition

The process of defining the relevant market is in essence a process of determining closely substitutable products or services and the geographical scope within which they compete. Delineating the boundaries of relevant market is primarily an economic exercise, which is echoed in case-law precedents world over. Three papers were presented in this session. The first paper illustrated how Household Consumption



Sh. D.K. Sikri, Chairperson, CCI addressing the valedictory session of Economists' Conclave 2017 also seen are Ms. Anita Kapur, Member, COMPAT and Sh. Augustine Peter, Member, CCI

Expenditure ("HCE") Survey, conducted every five years by the National Sample Survey Office ("NSSO") in India, could be used to implement the SSNIP Test (small but significant and non-transitory increase in price). The second paper assessed the applicability of consumer surveys in representing consumer preferences using Stated Preference Techniques and the third paper discussed India's experience with adoption of economic tools for relevant market definition.

Availability of data at the right level of granularity is essential for estimating demand elasticities, which help determine substitutability and relevant market. However, in view of the data challenges, well-designed consumer surveys were suggested as an alternative. On a cautionary note, it was mentioned that consumer surveys must not include biased and noisy data and hence the need for careful design of the surveys. Another suggestion that came up was to abandon hard market boundaries and follow effect-based approach with consumer welfare as the main focus.

Technical Session II: Collusion and

Cartel Behaviour: Detection and Prosecution

Cartels are the most egregious form of anti-competitive conduct. Detection and investigation of cartels pose challenges to the competition authorities since cartels are often conceived and perpetrated in secrecy. Economic tools play an important role in screening of markets to identify markets, which are prone to collusion. Two papers presented in this session attempted to contribute methodologically towards identification of the sectors in India, which are exposed to higher possibilities of collusion and on estimating cartel-induced overcharges in the cement industry in India.

Technical Session III: Mergers and Acquisitions

Mergers and Acquisitions (M&A) can have varied effects on the financial performance of the enterprises involved as well as on the competitive landscape of the industry. The first paper presented in this session examined the effects of Indian M&A's on industrial concentration, firm's price and profitability, with special reference to

the Drugs and Pharmaceuticals (D&P) industry. The second paper examined how combinations affected firms' financial performance in major industries in the Indian manufacturing sector.

Technical Session IV: Policy and Regulation: Implications for Competition

A competitive market allows new firms to challenge incumbents, efficient firms to grow and inefficient ones to exit, thereby enhancing overall efficiency and economic growth. Competitive markets can be ensured when besides the enforcement of competition law, state policies and regulatory interventions in markets are designed in a manner that do not restrict competition or distort level playing field. One of the papers presented in the session examined the interplay between regulation in the pharmaceutical sector in India and competition outcomes on innovation, supply and pricing of drugs. The other paper assessed whether the Maximum Retail Price (MRP) policy of India is pro-competitive and consistent with sound economic principles.

Technical Session V: Assessing

Competition: Case Studies from India

For the assessment of the level of competition in different industries, in-depth studies on various industries prove to be a good source of several useful insights. In this session three papers covering competitive aspects of three different sectors were presented.

The Conference greatly benefitted from the extremely valuable contributions made by internationally acclaimed competition economists - Dr. John. M. Connor, Professor Emeritus, Purdue University, Dr. Yannis Katsoulacos, Professor of Economics, Department of Economic Science, Athens University of Economics and Business and Dr. R. Shyam Khemani, Former Chief Economist, Canadian

Competition Bureau. Their practical experience relating to economics of competition law and their vast knowledge on the international developments in this field added enormous value to the deliberations in this year's Conference.

The Conference was attended by more than 300 participants on both the days. With participation of senior officials from various ministries, government organisations, research institutes, economists from academia, law firms and consulting firms, the Conference proved to be an important platform for exchange of ideas and views regarding the various facets of economics relevant to competition law enforcement.

Economists' Conclave

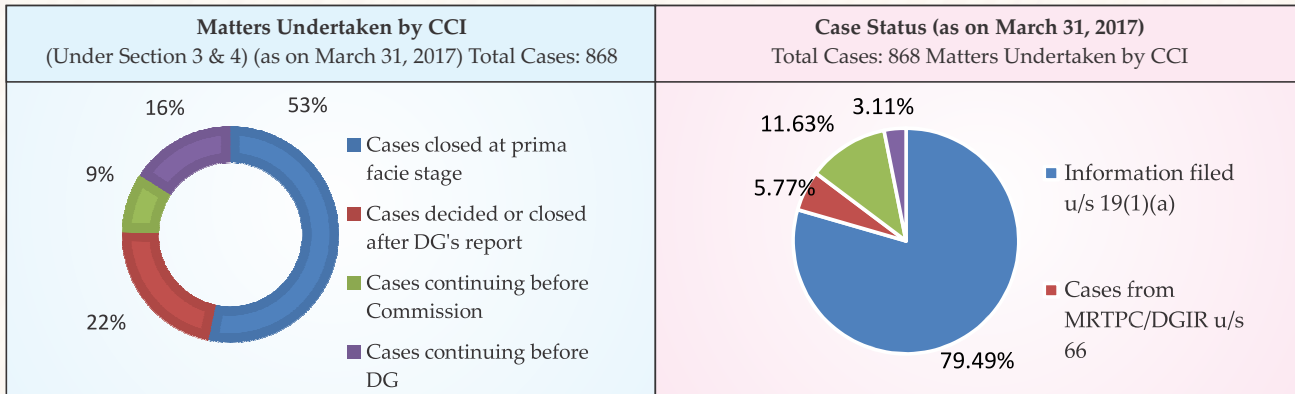
After the conclusion of the conference, the Commission

organised an Economists' Conclave on March 4, 2017 at the India Habitat Centre, New Delhi. The objective of the Conclave was to apprise and update the leading economists of the country working in the field of regulatory economics / industrial organisation of the legal framework of the Act and the economic research needs of the Commission. Economists working in antitrust and related areas of economics from across the country attended the Conclave.

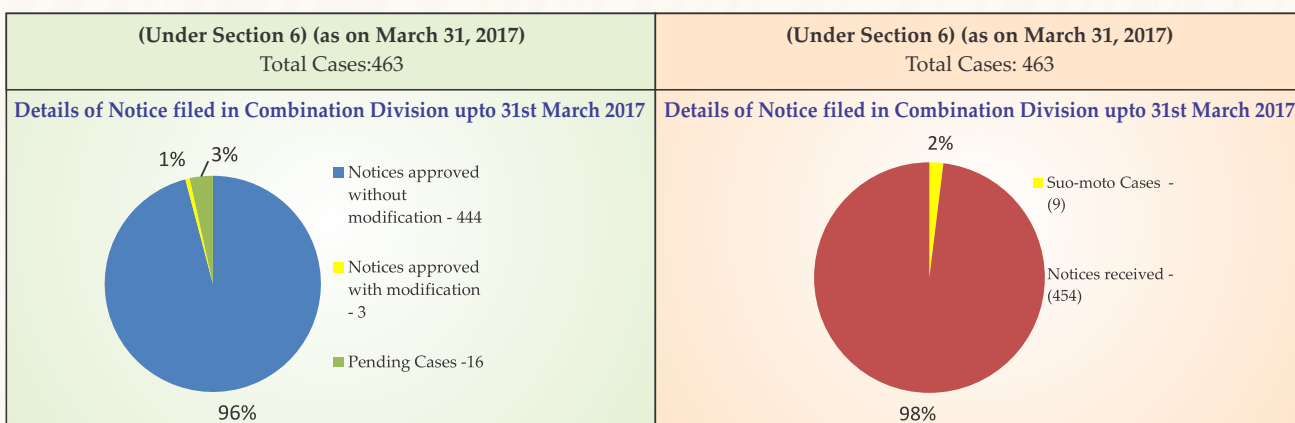
The Conclave was organised in two Sessions. Foreign experts and prominent lawyers presented their viewpoints on the "Role and use of economic evidence in competition law enforcement" and on "Presenting complex economic theories to the judiciary: challenges and the way forward".

FIGURES SPEAK

FIGURES SPEAK



COMBINATION CASES



SECTION 3 & 4 ORDERS

CCI Imposes Penalties on Cement Companies for Bid-rigging

The CCI has imposed penalties on seven cement companies for bid-rigging in response to a tender floated by the Director, Supplies & Disposals, Haryana, in the year 2012 for procurement of cement to be supplied to Government Departments/ Boards/ Corporations in the State of Haryana. A final order has been passed by CCI on January 19, 2017 pursuant to a reference filed under Section 19(1)(b) of the Act by the Director, Supplies & Disposals, Haryana.

CCI has held that the cement companies, through their impugned conduct, have engaged in bid-rigging, in contravention of the provisions of Section 3(3) (d) read with Section 3(1) of the Act which eliminated and lessened competition and manipulated the bidding process in respect of the impugned tender. The bid-rigging has been established from quoting of unusually higher rates (than rates

quoted in tenders of previous years), determining different basic prices for supply of cement at the same destination through reverse calculation, quoting of quantities such that the total bid quantity almost equalled the total tendered quantity, quoting of rates for the districts in a manner that all cement companies acquired L1 status at some of the destination(s) etc. The anti-competitive conduct was re-affirmed through SMSes exchanged and calls made amongst the officials of the cement companies.

Accordingly, penalty of Rs. 18.44 crore, Rs. 68.30 crore, Rs. 38.02 crore, Rs. 9.26 crore, Rs. 29.84 crore, Rs. 35.32 crore and Rs. 6.55 crore has been imposed upon Shree Cement Limited, UltraTech Cement Limited, Jaiprakash Associates Limited, J.K. Cement Limited, Ambuja Cements Limited, ACC Limited and J.K. Lakshmi Cement Limited. The

penalty has been levied @ 0.3 per cent of the average turnover of the cement companies of preceding three years. While imposing penalties, Commission took note of potential delay which would have occurred in the execution of public infrastructure projects due to cancellation of the impugned tender. At the same time, due consideration was given to the factors such as peculiarity of the tender process which created uncertainty in procurement, total size of the impugned tender and competition compliance programs put in place by some companies while determining the quantum of penalty.

The cement companies have been directed to cease and desist from indulging in the acts/ conduct which have been held to be in contravention of the provisions of the Act.

CCI imposes Penalty on CIL and its Subsidiaries for Abusing Dominant Position

The CCI has found Coal India Limited (CIL) and its subsidiaries to be in contravention of the provisions of Section 4(2)(a) (If the Act for imposing unfair/ discriminatory conditions in Fuel Supply Agreements (FSAs) with the power producers for supply of non-coking coal.

The final order has been passed March 24, 2017 on a batch of

information filed by Maharashtra State Power Generation Company Ltd. and Gujarat State Electricity Corporation Limited against Coal India Ltd. and its subsidiaries (Mahanadi Coalfields Ltd., Western Coalfields Ltd. and South Eastern Coalfields Ltd.).

The order has been passed by CCI pursuant to the directions issued by Competition Appellate Tribunal

(COMPAT) remanding the matter back while setting aside the original order of CCI in which a penalty of Rs. 1773.05 crore had been imposed upon CIL. After hearing the parties afresh in terms of the directions issued by COMPAT. CCI held that CIL through its subsidiaries operates independently of market forces and enjoys dominance in the relevant market of production and supply of

non-coking coal in India. CCI noted in the order that CIL did not evolve/ draft/ finalize the terms and conditions of FSAs through a bilateral process and the same were imposed upon the buyers through a unilateral conduct. CCI found CIL and its subsidiaries to be in contravention of the provisions of Section 4(2)(a)(i) of the Act for imposing unfair/ discriminatory conditions in FSAs with the power producers for supply of non-coking coal.

Apart from issuing a cease and desist order against CIL and its subsidiaries, CCI has directed

modification of FSAs in light of the findings and observations recorded in the order. The impugned clauses related to sampling and testing procedure, charging transportation and other expenses for supply of ungraded coal from the buyers, capping compensation for supply of stones etc. For effecting the modifications in FSAs, CIL has been ordered to consult all the stakeholders. CIL has also been directed to ensure uniformity between old and new power producers as well as between private and PSU power producers.

Further, CCI has imposed a penalty

of Rs. 591.01 crore upon CIL for the aforesaid abusive conduct. While reducing penalty, CCI noted the steps taken by CIL to improve the sampling procedure even post-passing of the original order by CCI. However, while holding the *extant* sampling procedure as unfair, CIL has been directed to incorporate suitable modifications in FSAs to provide for a fair and equitable sampling and testing procedure besides considering the feasibility of sampling at the unloading-end in consultation with power producers and adopting international best practices.

CCI Imposed Penalty on M/s Pyramid Electronics and two Ors. For Bid Rigging

This matter was taken up by the Commission *suo moto* based on the information received from the Central Bureau of Investigation, New Delhi. On investigation, it was found that three firms had shared the market by way of allocation of tenders floated by Indian Railways for Brushless DC fans in the month of February and March 2013 amongst themselves under an agreement/ arrangement and indulged in bid rigging/ collusive bidding. The anti-competitive conduct of the firms was established based on e-mail exchange amongst the firms, numerous calls amongst the key persons of these firms before and during the period of the tenders and admission by one of the firms

under the lesser penalty provisions of the Act, which confirmed and revealed the existence and *modus operandi* of the cartel.

Considering the evidence, the Commission in its order passed on 18.01.2017 held that the three firms had contravened the provisions of Section 3(1) read with Section 3(3)(c) and 3(3)(d) of the Act. A penalty was imposed under Section 27(b) of the Act on M/s Pyramid Electronics and M/s Western Electric and Trading Company calculated at 1.0 times of their profit respectively in the year 2012-13 and on M/s R. Kanwar Electricals at the rate of 3 per cent of its turnover for the year 2012-13 after taking into consideration all the relevant factors including the

duration of the cartel, the volume and value of the tender affected by the cartel. Additionally, penalty was also imposed on persons-in-charge of the three firms at the rate of 10 percent of the average of their income for the last three preceding financial years. Further, considering the co-operation extended by M/s Pyramid Electronics and the value addition provided by it in establishing the existence of cartel and the stage at which it had approached CCI under lesser penalty provisions of the Act, the firm as well the person-in-charge of the firm was granted 75 percent reduction in the penalty. For the first time, the Commission imposed lesser penalty in this matter.

SECTION 5 & 6 ORDERS

Combination between Future Retail Limited Heritage Foods Limited

On December 2, 2016, the Commission received a notice given by Future Retail Limited ("FRL"). The proposed combination relates to the acquisition by FRL of Heritage Food Limited's (HFL): (a) Small store retail business formats under the format name "Heritage Fresh" and "Heritage Mart" in the supermarket segment ("Retail Business"); (b) sourcing, processing and marketing fresh fruits and vegetables ("Agri Business"); and (c) Manufacture and supply of bakery products ("Bakery Business").

FRL, a public listed company incorporated under the Companies Act, 1956 is engaged in the business of retail trading across India under different brand names, including Big Bazaar, FBB, Food Bazaar, Foodhall, Home Town, Easyday, and Ezone etc. HFL, a public listed company

incorporated under the Companies Act, 1956, is engaged in the business of retail trading and operating retail stores across India. HFL's business includes Retail Business, Agri-Business, Bakery Business, dairy business, VetCa Undertaking and Renewable Energy.

The Commission observed that the activities of the parties overlap in the retail sector in the cities of Bengaluru, Chennai and Hyderabad. However, the exact delineation of relevant market in the case of proposed combination was left open.

The Commission observed that Parties have overlaps in respect of several stores within the catchment area of 5 kms in the three cities namely - Bengaluru, Chennai and Hyderabad. The Parties have submitted that there is presence of a number of: (i) brick and mortar

stores (e.g. Greens Store, Nature Basket, More Mega Store, Spencer's Stores etc); (ii) local mom and pop stores; and (iii) online players like Grofers, Big Basket, ZopNow etc. which are providing competitive constraint to Parties. As regards the vertical relationships between the Parties, the Commission noted that there are insignificant vertical arrangements that do not give rise to any competition concerns. In view of the above, the Commission was of the opinion that the proposed combination is not likely to have an appreciable adverse effect on competition (AAEC) in India.

Accordingly, the Commission approved the combination under sub-section (1) of Section 31 of the Act.

Combination between MIH Internet SEA Pte Ltd and Makemytrip Limited

The Commission received a notice from MIH Internet SEA Pte Ltd (MIH Internet) regarding acquisition of 100 per cent of Ibibo Group Holdings (Singapore) Pte Ltd. (Ibibo) by Makemytrip Limited (MMT) from MIH Internet and subsequent acquisition of 40 per cent stake in MMT by MIH Internet.

MIH Internet, an indirect subsidiary of Naspers Limited, is engaged in the business of investment holding and provision of administrative

services to group / related companies. Ibibo is engaged primarily in e-commerce, web application solutions and internet related services and operates electronic platforms such as Goibibo.com, redbus.in, etc. MMT is primarily engaged in the business of selling travel products and solution in India, USA, Singapore, Malaysia, Thailand and the UAE through electronic platforms as well as physical stores.

The Commission observed that activities of the parties overlap in the provision of travel services in India, which can be availed through three alternative channels viz; (i) travel agencies; (ii) direct suppliers; and (iii) online travel aggregators (OTAs) and that most of these channels operate on a 'hybrid model' wherein a particular channel has both online as well as offline presence to cater to consumer preferences. Further, characteristics

of products and services available with different travel channels are similar and therefore, substitutable from consumer's point of view. In view of the same, the Commission identified the relevant product market as the market of 'sale of travel and travel related services'.

The Commission noted that the combined market share of MMT and Ibibo is less than 11 per cent in the overall travel market as well as in narrower sub-segments of air, hotel and bus and car bookings in India.

Further, there is presence of significant competitors not only in the overall market for travel products and services but also in sub-segments of air, hotel, bus and car bookings who would continue to pose significant competitive constraint, post-combination.

The Commission also observed that there exists a vertical relationship between businesses of the parties as Naspers Group has a majority investment in PayU Global B.V. (PayU), an online payment service provider. From submission of the

parties, the Commission noted that PayU has a market share in the range of 15 to 20 per cent in the market for payment gateway services for online travel agencies and airlines and faces competition from players such as CCAvenue, Billdesk, Techprocess, ICIC, HDFC, Citi, etc. As a result, the said vertical relationship did not appear to cause any adverse effect on competition.

Accordingly, the Commission approved the combination under sub-section (1) of Section 31 of the Act.

Acquisition of four brands of GlaxoSmithKline by Corona Remedies Private Limited

On January 27, 2017, the Commission received a notice from Corona Remedies Private Limited (Corona) for acquisition of trademark and associated goodwill related to: (i) Stelbid and Vitneurin from Glaxo Group Limited (GGL); (ii) Dilo-BM and Dilo-DX from GlaxoSmithKline Pharmaceuticals Limited (GSKPL) (Corona, GGL and GSKPL collectively referred to as Parties).

Corona, a private limited company, is engaged in the business of manufacturing, trading and distributing pharmaceutical products. It does not have any subsidiary or affiliates in India. GSKPL, a listed public limited company, is engaged in the business of manufacturing, distributing and trading of pharmaceuticals. GSKPL product portfolio includes prescription medicines and a range of vaccines for prevention of life-threatening diseases. GGL,

incorporated in United Kingdom, is the holding company of GSKPL. In India, it operates through its subsidiaries, which produces pharmaceuticals and other similar products.

The Commission noted that there is no overlap among the Parties, on the basis of therapeutic groups at broader level and on the basis of APIs at the narrower level, except in respect of one of the target product i.e. 'Dilo BM' of GSKPL with 'Respicure Syp' of Corona. However, the exact delineation of relevant market in the case of proposed combination was left open.

The Commission noted that both 'Dilo BM' and 'Respicure Syp' are expectorants covered under respiratory group and used in case of indications for the symptomatic relief of bronchospasm in bronchial asthma. The APIs used in Dilo BM Expectorant and Respicure Syp are ambroxol, guaiphenesin and

terbutaline. The Commission noted that the market share of the Corona and GSKPL in value terms, in the market of expectorants using ambroxol, guaiphenesin and terbutaline was about 1 per cent and 3 per cent during 2015. Further, the Commission observed that the market is characterised by presence of other well established players like Centaur Pharmaceuticals, Blue Cross Laboratories, Zuventus Healthcare Ltd., Alembic Ltd. and Micro Labs Ltd. having significant market shares.

In view of above, the Commission did not find the horizontal overlap in the market to raise any appreciable adverse effect on competition. The Commission also observed that no vertical relationship exists among the parties. Accordingly, the Commission approved the acquisition under Section 31(1) of the Act.

INVESTIGATIONS INITIATED

Investigation Initiated against Public Works (B&R) Department, Government of Haryana and Ors.

In this case, the Commission initiated an inquiry against Public Works (B&R) Department, Government of Haryana based on information received under Section 19 (1) of the Act alleging contravention of the provisions of Section 4 of the Act. It is alleged in the information that the Public Works (B&R) Department, Government of Haryana has abused its dominant position by incorporating unfair clauses in the bid document for inviting online bids for "Construction of Approaches to 2 Lane Rail Over Bridge (ROB) at Level X-ing No. 78-AB in Km 139 on Delhi Ambala Railway line crossing Nilokheri-Karsa-Dhand road in Karnal District".

Earlier, the Commission, through a majority order, held that the Public Works (B&R) Department,

Government of Haryana is not covered under the definition of 'enterprise' within the meaning of Section 2(h) of the Act and therefore, closed the case under Section 26(2) of the Act. However, in an appeal filed against the order of the Commission, the COMPAT held that the Public Works Department (PWD), Government of Haryana fall within the definition of the term 'enterprise' and that the same would be the position qua PWDs of the other States as also the Central PWD. Accordingly, the matter was remitted to the Commission to consider whether the allegations contained in the information made out a *prima facie* case of abuse of dominant position warranting an order of investigation or not.

Pursuant to remand of the matter, the

Commission considered the matter again. The Commission observed that in the relevant market of "procurement for construction and repair of roads and bridges through tendering in the State of Haryana", the PWD is the only procurer of such services in the State of Haryana and is dominant in this relevant market. On considering the clauses of the bid document, the Commission observed that some of the clauses *prima facie* appear to be in contravention of the provisions of Section 4 of the Act and that the same along with the conduct of the Opposite Parties in consequence thereof needed to be investigated. Accordingly, the Commission under Section 26(1) of the Act directed the Director General (DG) to conduct an investigation into the matter.

Investigation Initiated against Ghaziabad Development Authority for Abuse of Dominant Position

Based on the information filed by Mr Satyendra Singh, the Commission initiated an inquiry against Ghaziabad Development Authority ('GDA') for abuse of its dominant position. It is alleged in the information that GDA, *vide* its letter dated November 27, 2015, has compelled the allottees of flats of its Pratap Vihar residential housing scheme for the Economically Weaker Sections (EWS) to pay Rs. 7,00,000/- as sale price of the flats as compared with the price of Rs. 2,00,000/- as declared in the scheme's initial

brochure. As per the Informant, OP has arbitrarily increased the sale price of the said flat to Rs. 7,00,000/- from Rs. 2,00,000/- without any enabling provision in the scheme's brochure. It is alleged that the OP has indulged in unfair and arbitrary practices and has misused its dominant position.

The Commission *prima facie* holds that in the relevant market of "provision of services for development and sale of low cost residential flats under affordable housing schemes for

economically weaker sections in Ghaziabad" the OP is in a dominant position and the alleged conduct of the OP amounts to imposition of unfair price on the Informant and other allottees of flats under the aforesaid scheme which is anti-competitive in terms of Section 4(2)(a)(ii) of the Act. Accordingly, the Commission directed the DG to cause an investigation into the matter under the provisions of Section 26(1) of the Act.

DEVELOPMENTS IN OTHER JURISDICTIONS

UNITED KINGDOM

The Competition and Markets Authority (CMA) has imposed a fine totaling £1,533,500 on five modeling agencies (FM Models, Models 1, Premier, Storm and Viva), as the agencies had exchanged sensitive information, including future pricing information. The agencies had also sometimes agreed to a common approach to pricing.

The Association of Model Agents Limited (AMA) was also found to be facilitating the exchange of sensitive information in the form of email 'Alerts' sent to its members.

The investigation by the CMA revealed frequent contact between the competitors regarding prices for modeling services. The discussion between the parties related to:

- Fees charged for the use of model images in online content involving 'click to buy';
- Fees at which online retailers booked models for online content;
- Fees for use of model images in online advertising.

Apart from the levy of penalties, the parties were directed to cease the infringement, and not to enter into same or similar arrangements in the future. CMA was informed, that AMA had already discontinued the sending of Alerts..

GERMANY

Germany is set to reform its competition law regime, after approval of amendments by its Parliament and the Federal States Council. The areas covered are:

- New transaction value threshold for mergers requiring clearance by the German Federal Cartel Office (FCO) (Bundeskartellamt), aimed at covering

acquisition of start-ups, which do not have significant turnover in Germany. Approval is required if the:

- The transaction's size exceeds €400 million and
- The target has significant activities in Germany.

The approvals have to be sought if the parties meet the combined worldwide turnover threshold (> €500 million), one party meets the domestic turnover threshold (>€25 million), but neither the target nor any other party meets the second domestic turnover threshold (>€5 million).

- For assessing a company's market power, particularly in two-sided platform markets, the law clarifies that the following aspects are relevant:
 - I Direct and indirect network effects,
 - ii. Extent of users parallel use of several services (multi-homing) and switching costs,
 - iii. Economies of scale in combination with network effects, and
 - iv. Access to competitively relevant data as well as innovation-driven competitive pressure.
- Clarifies that no cash flow between supply and demand sides is required for a "market" to exist. The same has been done to explicitly cover 'free' online services such as search engines, comparison websites, information services, entertainment websites etc.

- It supports establishment of damages by the plaintiff, by introducing a statutory presumption of harm in cartel cases. The defendant is to bear

the burden of proof when using the passing-on defense;

- Grants parties access to the other side's internal documents when arguing as to quantum of damages and pass-on issues;
- Statutory limitation is increased from three to five years;
- Small and medium enterprises (SMEs) and leniency applicants are exempted from joint and several liability for cartel damages. Thus they are only liable to their own (direct or indirect) customers.
- Fixes loop holes by which companies could avoid monetary fines from cartel investigations by restructuring the affected corporate entities. The legal successor of an enterprise will also be liable for the fines. A parent company can now be held liable for fines that were only imposed on its subsidiary, even where the parent was itself not involved in the competition law infringement or where it did not violate any supervision duties in relation to the subsidiary. Previously, a parent company could only be sanctioned if it failed to prevent its subsidiary's infringement and did not fulfill its own supervisory duty;
- Enhances the Bundeskartellamt's of powers relating to exchange information with other regulatory agencies;
- It exempts certain cooperation among newspaper and magazine publishers from (German) antitrust scrutiny;

EUROPEAN UNION

The European Commission has approved the merger between US-based chemical companies Dow and

DuPont. The approval is granted, conditional to the fulfillment of specific obligations. The conditional approval deals particularly on the divestiture of major parts of DuPont's global pesticide business, including its global R&D organization. The decision has been made after an in-depth review. The deal pertained to the agrochemical market.

Dow is headquartered in the United States. Its group companies are active in plastics and chemicals, agrochemicals, and hydrocarbon and energy products and services. DuPont is also headquartered in USA. It is active in the markets for plastics and chemicals, agrochemicals, paints, seeds, and other materials.

The Commission had three main areas of concern:

- Significant reduction of competition in markets for existing pesticides;
- Significant reduction in innovation competition for pesticides;
- Significantly reducing competition for certain petrochemical products.

In order to gauge the effect of the deal, the impact of the deal on the market for different types of pesticides- herbicides(targeting weeds), insecticides(targeting insects) and fungicides (targeting diseases) was considered.

As regards herbicides, the transaction would have significantly reduced competition for certain types of selective herbicides for cereals, oilseed rape, sunflower, rice and pasture in a number of EU States. For insecticides, the transaction would have significantly reduced competition for products for controlling chewing insect and

sucking insect in fruits and vegetables and some other crops, particularly in the South of Europe. For fungicides, the transaction would have reduced competition for rice blast fungicides in some EU States.

On the issue of innovation in pesticides, the Commission found that only 5 companies including the merging parties are globally active throughout the entire R&D process. The transaction was found to have a significant impact on innovation by

- Removing the parties' incentives to continue to pursue ongoing parallel innovation efforts;
- Removing the parties' incentives to develop and bring to market new pesticides.

Additionally, Dow and DuPont's activities also overlap in petrochemical products, particularly the market for 'acid co-polymer', 'ionomer' and 'nematicides' and seeds.

The Commission had three major concerns regarding reducing competition for petrochemicals and pesticides and reducing innovation. Therefore, the conditions for which the approval for the merger was granted, was on the basis of the certain commitments such as divestiture, which the merging parties had to adhere to get a green signal.

In view of the Commission's concerns

discussed above, the following commitments were required to be fulfilled by the merging parties for the conditional approval for the merger:

- Divestiture of major parts of DuPont's global pesticide business, including its global R&D organisation;
- Divestiture of DuPont's global R&D organisation;
- Divesting the exclusive license to DuPont's product, for rice cultivation in the European Economic Area;
- Divest relevant assets in Dow's petrochemical business;
- Divest Dow's two manufacturing facilities for acid co-polymers in Spain and in the US, as well as the contract with a third party through which it sources ionomers that it sells to its customers

The merging parties are to also divest all tangible and intangible assets underpinning the divested products including the facilities where the products are manufactured.

The merger being on a global scale, the European competition agency had regular exchanges with the US DoJ and the competition authorities of Australia, Brazil, Canada, Chile, China and South Africa during the case's timeline.

HR CORNER

- Six Dy. Directors were promoted to the grade of Jt. Director and one PPS to the grade of Sr. PPs.
- Seven officers joined CCI (two on direct recruitment basis and five on deputation basis) during the above mentioned period.
- Consequent upon their selection, offers of appointment on deputation basis in respect of one post each of Director (Law), Jt. Director (Eco.) and Dy. Director (CS) were issued.

ADVOCACY INITIATIVES

Advocacy Initiatives with Central Government, State Governments and PSUs

- Mr Devender K. Sikri, Chairperson, Mr S. L. Bunker, Member and Justice G P Mittal, Member, CCI, attended the inaugural function on January 10, 2017 during the 8th Vibrant Gujarat Global Summit held at Gandhinagar, Gujarat during January 10-13, 2017. Chairperson, CCI, also chaired theme seminar on “Ease of Doing Business – Regulators as Facilitators” at the Global Summit on January 11, 2017.
- Mr. V. P. Mishra, Director (Law) and Mr B. Naveen Kumar, DD (Law), conducted the training sessions during the Two One-day Training Programmes on “Nuances of the Principles of Competition” for the newly recruited Judicial Officers and District Judges respectively, at Odisha Judicial Academy during



Chairperson speaking on “Ease of doing business- Regulators as facilitators” at the Vibrant Gujarat Global Summit 2017

- January 6-7, 2017 at Cuttack.
- Regular sessions on ‘Competition Law & Public Procurement’ during MDP on Public Procurement at NIFM, Faridabad were taken by officers from CCI. During January 2017, Mr. Kuldeep Kumar, DD (Law) and Ms Prachi Mishra, DD (Law) conducted the sessions on January 13, 2017 and January 19, 2017 respectively Ms Jyotsna Yadav, DD (FA) on March 2, 2017 and by Mr Mukul Sharma, DD (Eco) on March 9, 2017.

Advocacy Initiatives with Trade Associations and Institutions



Mr. Augustine Peter, Member, CCI addressing the CUTS event, others (from left to right) – Sh Pradeep S Mehta, Sh Arvind Mayaram, Prof Allan Fels, Prof Frederic Jenny, Sh Rajeev Kher

- Mr. Augustine Peter, Member, participated in the Panel Discussion on 'Politics of Competition Reforms in India' in the event organised by CUTS International, at New Delhi on January 12, 2017.
- Mr Augustine Peter, Member, CCI, participated as a panellist in the "International Roundtable on Issues in Indian Competition Law: Reflections & Perspectives" organised by Shaping Tomorrow on February 11, 2017 at New Delhi.

- Ms. Neha Raj, Joint Director (Law), conducted two sessions on (i) Competition Act: An Overview and (ii) Bid Rigging and Competition Compliance at National CPWD Academy, Ghaziabad on January 12, 2017.
- The fourth Focused Group Discussion (FGD) was held at

Institute of Cost Accountants of India, Eastern India Regional Council, CMA Bhawan, 84 Harish Mukherjee Road, Kolkata on March 16, 2017. The said FGD was facilitated by Mr. Pratap Kumar Chakravarty. Mr. Yogesh Dubey, Dy. Director (Eco.), represented CCI as an observer.

- Mr. Nilotpal Bal, Dy. Director (Eco.) took a session in the 24 Hours Seminar on “Companies Act 2013, Insolvency & Bankruptcy Code, Competition Act, 2002 etc.” organised by the Institute of Cost Accountants of India on February 24, 2017 at New Delhi.

Advocacy Initiatives with Universities/Institutes

- Mr. Devender K. Sikri, Chairperson, CCI delivered inaugural address and Mr S.L. Bunker, Member, Ms. Jyoti Jindgar, Adviser and Mr Manoj Pandey, Advisers, were panellists in the 4th International Conference on “Competition Regulation & Competitiveness” organised by IIM, Kashipurin

collaboration with CCI on 10th February, 2017 at New Delhi.

- Ms. Smita Jhingran, Secretary, CCI, inaugurated the Conference and Mr Manoj Pandey, Adviser, was a panellist in the panel discussion on “Evaluation of Jurisprudence of Competition

Law in India” in the National Conference on Competition Law and Policy organised by Indian Law Institute, New Delhi, in collaboration with CCI during 18th – 19th March, 2017. Of the six Technical sessions, five sessions were chaired by the officers of CCI. One CCI officer Sh. Yogesh K. Dubey, Dy.



Ms. Smita Jhingran at the the National Conference on Competition Law and Policy at ILI



Justice GP Mittal, Member CCI participating as a Judge in the final of 8th NLU Antitrust Law Moot Court Competition 2017 organised by NLU, Jodhpur on 5.3.17

Director (Eco.) also presented a paper on 'Competition Concerns in Unsolicited Bidding Process'.

- Mr. Rakesh Kumar, Director (Economics) and Mr. Nandan Kumar, Joint Director (Economics) were panellists at "2nd NLIU-Trilegal Mergers & Acquisitions Summit, 2017" on February 25-26, 2017 at NLIU, Bhopal.
- Mr. Manoj Kumar Pandey,

Adviser, CCI, participated as a Judge in the final round of the 3rd edition of Damodaram Sanjivayya National Moot Court Competition organised by Damodaram Sanjivayya National Law University, Visakhapatnam on February 26, 2017.

- Mr. Manoj Kumar Pandey, Adviser (Law), Mr. Ved Prakash Mishra, Director (Law), and Dr. K. D. Singh, Joint Director (Law) were on the panel of Judges in

the Moot Competition on Competition Law organised by the G.D. Goenka School of Law on March 4, 2017.

- Justice G.P. Mittal, Member, CCI, participated as a Judge in the Eighth NLU Antitrust Law Moot Court Competition 2017 organised by NLU, Jodhpur on March 5, 2017.

- Mr. Nandan Kumar, JD (Eco), participated and delivered the Inaugural address on "Overview of Competition Law" in the National Workshop on "Intrinsic Competition of Indian Market" organised by the Department of Economics of Sri Parasakthi College for Women, Courtallam, Tamil Nadu, on March 7, 2017.

ENGAGING WITH THE WORLD

- Two officers each were seconded to the CMA, UK and Directorate General for Competition, European Union. An officer was seconded to the Competition Bureau, Canada.
- Four officers attended the workshop organised under the Capacity Building Initiative for Trade and Development at Rome in the month of February, 2017
- Two officers attended the ICN Merger Workshop, 2017 at Washington DC, USA during the month of February 2017.
- Two officers participated in George Mason University's Global Antitrust Institute - Economics Institute for Competition Enforcement Officials, at Dubai, UAE in the month of March, 2017
- Three officers attended a Weekend Seminar at King's College London towards the P.G Diploma Course in the month of March 2017.
- An officer participated in the '10th Session of International Working Group for Research of Competition Issues in Pharmaceutical market' at Moscow, Russia in March 2017.

Goods and Services Tax

On March 29, 2017, the Lok Sabha passed four Goods and Services Tax (GST) Bills. The bills include The Central GST 2017 (CGST), The Integrated GST Bill (IGST), The Union Territory GST Bill (UTGST) and The GST (Compensation to States) Bill. The introduction of GST is perceived as a game-changing reform in the indirect tax regime in India.

Currently, multiple indirect taxes are levied on transactions between buyers and sellers in different states. Some taxes are collected by the central government, while others are collected by the state governments. Different indirect taxes collected by the state governments including the value added tax, sales tax, purchase tax, tax collected on works contract, the entry tax, octroy, local body tax, the taxes on luxuries, including taxes on entertainments, amusements, betting and gambling, the taxes on advertisement etc. are subsumed into GST. The GST shall also subsume various central indirect taxes such as central excise duty, service tax, central surcharges and cesses relating to supply of goods and services etc. Because of the consolidation of multiple complex indirect taxes into a harmonised single tax, the GST is an important step in the ease of doing business.

The GST will also help in assessing the tax liability in the online marketplace platforms. Due to the dynamic and complex nature of e-commerce market, the current indirect tax structure has created complexity in the treatment of various transactions under indirect taxes. For example, the seller and buyer are in different states when the transaction completes and some items are returned either as a whole or in part increasing the burden on the parties to claim the Value Added Tax (VAT) that is already paid. This uncertainty in tax liability and treatment is eliminated under the GST regime because of the single tax structure, thus reducing the efforts of tax compliance by the firms in online marketplaces. This will foster entry into the markets providing impetus to competition.

Different tax structures in different states in addition to entry taxes such as octroy may create heterogeneous conditions in different states. The definition of relevant geographic market according to the Act, *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 homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.* The unifying tax

structure of GST will reduce the heterogeneity and reduce the geographical entry barriers widening the geographic markets. The markets will be more integrated due to free movement of goods, labour and capital reducing the cost of production and increasing competitiveness.

To conclude, the GST regime, by subsuming multiple indirect taxes collected by central and state governments into a single tax reduces tax compliance burden, simplifies the tax structure, and integrates the hitherto fragmented markets across states. These factors will reduce the transaction costs, increase competitiveness and will spur competition in the markets.

The passage of four GST Bills in the Lok Sabha on March 29, 2017, marks a new era in the economic reforms process. The unifying tax structure of GST aiming at reducing the market heterogeneity and geographical entry barrier and encouraging the free movement of goods, labour and capital within India is expected to provide impetus to fair competition and shift the production possibility frontier upward. The Commission joins the stakeholders in looking forward to a seamless rollout of GST regime.

JUDICIAL PRONOUNCEMENTS

1. WHETHER DELINEATION OF THE “RELEVANT MARKET” IS REQUIRED WHILE EXAMINING ANTI-COMPETITIVE AGREEMENTS U/S 3 OF THE ACT

Hon'ble Supreme Court (SC) vide its judgment dated March 07, 2017 has upheld the final order passed by the CCI in *case no. 16/2011*. The informant dubbed the Hindi version of the serial “Mahabharata” in Bengali language, which was telecasted on 'Channel 10' and 'CTVN Plus Channel'. Letters were received by both the channels from Eastern Motion Picture Association (EIMPA) and Committee of Artists and Technicians of West Bengal Film and Television Investors (Coordination Committee), to stop the telecast of dubbed Mahabharata serial on the pretext of healthy growth of Bangla film and television industry, failing which it will have to face non-cooperation. The informant approached CCI alleging violation of provisions of the Act by EIMPA and Coordination Committee.

EIMPA is a regional association of the film producers, distributors and exhibitors operating mainly in the state of West Bengal. Coordination Committee is the joint platform of 'Federation of Cine Technicians and Workers of Eastern India' and 'West Bengal Motion Pictures Artistes Forum' to coordinate amongst various stake holders including producers' associations and affiliated bodies. The Commission observed that the Trade Unions are not exempted from the purview of the Act and held that since the conduct of EIMPA and Coordination Committee limit and control the distribution and

exhibition of dubbed TV serials in their areas of operations, their act is violative of Section 3(3)(b) read with Section 3 (1) of the Act.

An appeal was filed before COMPAT by the Coordination Committee, wherein the order of the Commission was set aside. COMPAT did not find any violation and approved the minority view of the Commission.

Aggrieved by the order of COMPAT, an appeal was preferred by CCI before Supreme Court of India (SC). SC observed that in order to find contravention, it is first necessary to find agreement. It was held that the definition of the term '*agreement*' under Section 2(b) is very widely worded. Not only it is inclusive, as the word 'includes' therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as '*agreement*'. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral or written. It is inconsequential that whether it is intended to be enforceable by legal proceedings or not. However, what is important is that such an '*agreement*', referred to in Section 3 of the Act has to relate to an economic activity since it is central to the concept of Competition law.

The SC in its judgement also laid down the definition of the term '*enterprise*'. It was held that any entity, regardless of its form,

constitutes an '*enterprise*' within the meaning of Section 3 of the Act, when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade.

Another important observation made by SC is that EIMPA and Coordination Committee cannot be treated narrowly as trade unions, as is backing the cause of those which are '*enterprise*'. SC held that, since the constituent members of these trade union bodies, take decision relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business, their decision reflects collective intent of their members. In the view of the same the matter could not be brushed aside by merely giving it a cloak of trade unionism.

SC also held that while inquiring into any alleged contravention and determining whether any agreement has an appreciable adverse effect on the competition (AAEC)u/s 3, factors under Section 19(3) are to be examined. It is also laid down that the term '*market*' referred to in Section 19(3), has reference to relevant market. Since it is the notion of '*power over the market*' which is the key to analysing many competitive issues, the first and foremost aspect that needs determination is: '*What is the relevant market in which competition is effected?*'

2. WHETHER THE COMMISSION IS REQUIRED TO NOTIFY THE PARTIES WHEN TAKING A VIEW CONTRARY TO THE DG REPORT

Information was filed alleging that Jaiprakash Associates Ltd (“JAL”) have abused their dominant position in contravention of Section 4 of the Act. Commission passed *prima facie* order. Thereafter, DG submitted its investigation report concluding the relevant market as “the provision of services for development and sale of residential apartments in the territory of Noida and Greater Noida”. The Commission found the report incomplete and asked DG to submit a supplementary investigation report (“supplementary report”).

DG submitted the supplementary report identifying a different segment in the nature of Integrated Township having unique features such as education, health and recreation facilities. Consequently, DG found the relevant market to be “Provision of services for development of Integrated Township in the territory of Noida and Greater Noida.” DG found JAL dominant in the newly delineated relevant market and also found the terms and conditions imposed by the JAL to be exploitative and unfair, contravening the provisions of Section 4(2)(a)(i) of the Act.

The Commission passed its final order, after considering the replies and objections of parties to the DG report. The Commission in its

majority order disagreed with the findings of DG on the issue of relevant product market and held that the integrated township cannot be treated as a separate product market merely because it offers more services than those provided by those selling residential plots. The majority opinion of the Commission was that all residential apartments constitute a separate product market, hence the Commission resorted to the initial relevant product market definition provided by the DG i.e. the provision of services for development and sale of residential apartments in Noida and Greater Noida”.

CCI in its final order noted that, since the relevant market is a fragmented one it cannot be said that JAL is enjoying dominant position in the said relevant market, hence no question of abuse of dominance arise. However, two members of the Commission gave dissent opinion noting that integrated townships are a separate product market and JAL has contravened Section 4(2)(a)(i) of the Act.

Appeal was preferred by Sunil Bansal and five others before the COMPAT, against the majority order of CCI. COMPAT held that the impugned order passed by the Commission is legally unsustainable as the Commission did not record its

reasons for disagreeing with the findings of the DG that JAL was dominant in the relevant market of Integrated Township and it had abused its dominant position in violation of Section 4 of the Act. COMPAT also noted that minority order traces out cogent reasons for regarding integrated townships developed by JAL as a separate relevant product market.

COMPAT also opined that the impugned order stands vitiated due to violation of fundamental principles of natural justice as the Commission did not record reasons indicating its disagreement with the findings and conclusions recorded by the DG in the supplementary report on the issues of dominant position of JAL and abuse thereof. The parties had no opportunity to dispel the doubt raised by the majority of the Commission on the correctness of the findings and conclusions recorded by the DG resulting in violation of the principles of natural justice, which are required to be followed by the Commission in the discharge of its functions.

Finally, COMPAT allowed the appeal and set aside the order of CCI. The matter was remanded back to the Commission for fresh consideration and passing of a fresh order in the light of the observations made.

3. OVERLAPPING JURISDICTION OF CCI AND ELECTRICITY REGULATOR

Informant alleged contravention u/s. 4 by Dakshin Haryana Bijli Vitran Nigam (DHBVN). Informant claimed that DHBVN, being the sole supplier of electricity in a certain area, was imposing an unfair and discriminatory price upon consumers by charging Fuel and Power Purchase Cost Surcharge Adjustment (FSA) and cross subsidizing the FSA

cost by charging higher FSA from consumers having higher consumption, admittedly with the approval of Haryana Electricity Regulatory Commission (HERC).

The Commission although agreed with the informant about the dominance of DHBVN in the relevant market but disagreed on the aspect of differential pricing. It was observed

that classification of consumers and corresponding FSA charged followed a rationale having economic justification based on market segmentation and did not amount to discriminatory conduct. Hence, the Commission closed the case u/s 26 (2) as no contravention u/s 4 was found. While closing the case, the Commission also observed that the

present case essentially relates to the functions discharged by DHBVN and HERC in respect of fixation of FSA; and no competition issue is discernible from the facts presented in the information.

Against this order, an appeal was filed before COMPAT but the same was dismissed holding that FSA is a part of tariff. Section 62 (3) of the Electricity Act, 2003 allows segmentation of consumers for determining tariff, which includes FSA, according to the consumer's load factor, power factor, voltage and total consumption of electricity during any specified period.

COMPAT also held that Electricity Act has its own system of addressing the issues of abuse of dominance and other grievances of its consumers. In terms of Section 60 of the Electricity

Act, HERC is authorized to issue such directions as it considers appropriate to a licensee, if it abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry and contravention of directions of HERC is liable for punishment u/s 146 of the Electricity Act. Therefore, HERC can address the issue of abuse of dominance.

It was also held that in case of a conflict between provisions of the Electricity Act and the Competition Act, the former will override. The Electricity Act is admittedly a later special statute and in the event of irreconcilable inconsistency between the Electricity Act and the Competition Act, the former would override even though the

Competition Act contains the *non-obstante* clause in Section 60.

In its order, COMPAT observed that, there is an implied immunity from Competition law in matters of electricity tariff approved by the Appropriate Commission in terms of the Electricity Act and therefore, the Appellant cannot seek any relief under the Competition Act. It was also held that the Commission lacks jurisdiction in this case; hence, the issue, whether the Appellant was able to establish a *prima facie* case of contravention u/s 4, is only academic in nature. Assuming that the Commission had jurisdiction, COMPAT agreed its finding that the Appellant had failed to establish a *prima facie* case of contravention of Section 4 and dismissed the appeal.

TRAINING PROGRAMMES

CAPACITY BUILDING EVENTS DURING JANUARY-MARCH 2017

1. An officer attended a workshop for 'Liaison Officers for SCs & STs' organized by Institute of Secretariat Training and Management (ISTM) during January 9-10, 2017.
2. Three officers from F&A Division attended a Training on 'Modules of Public Financial Management System (PFMS) for Center Sector Schemes' organized by Ministry of Finance during January 16-17, 2017.
3. CCI organized an offsite workshop on Team Building & Decision Making for Professional officers of CCI at Udaipur during February 10-12, 2017.
4. CCI organized an offsite workshop on Team Building & Decision Making for Support officers of CCI at Udaipur during February 17-19, 2017.
5. CCI officers attended three-days Appreciation Course on "Parliamentary Processes and Procedures" organized by Bureau of Parliamentary Studies and Training (BPST) during March 21-23, 2017.
6. CBD organized 17th Distinguished Visitor Knowledge Sharing Series (DVKS) lecture by Sh. ArunMaira, Ex-member, Planning Commission on the topic "Better Governance to Improve the World for Everyone" at CCI on March 23, 2017.
7. One officer attended one day seminar on 'Right to Information Act, 2005', organized by Institute of Secretariat Training and Management (ISTM) on March 27, 2017.



DVKS Lecture of Sh. Arun Maira speaking

8. CBD organized 1st& 2nd sessions of 20-hrs introductory training in 'R' Software.
9. CBD organized half-day workshop on 'Understanding of Basic Law' by Dr. K. D. Singh, Joint Director (Law) on March 30, 2017 for professional officers/ RAs from Eco & FA streams.

KNOW YOUR COMPETITION LAW

TRADE UNION AND COMPETITION ACT

According to the Trade Unions Act, 1926, 'Trade Union' means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions.

Article 19(1)© of the Constitution of India guarantees to all its citizens the right 'to form associations and unions'. Under Article 19(4), the state may by law impose reasonable restrictions on this right in the interest of public order or the sovereignty or morality and integrity of India. The right to form associations or unions envisages in itself all sorts of associations' viz., trade unions, political parties, clubs, societies, companies, organizations, entrepreneurships, etc. In one of its judgements¹ the Hon'ble Supreme Court of India has held that:

"The right guaranteed under sub-clause (c) of clause (1) of Article 19 extends to the formation of an association and insofar as the

activities of the association are concerned or as regards the steps which the union might take to achieve the purpose of its creation, they are subject to such laws as might be framed and the validity of such laws is to be tested by reference to the criteria to be found in clause (4) of Article 19 of the Constitution".

Vide Section 3 of Monopolistic and Restrictive Trade Practices Act, 1969, exclusion was provided to the Trade Unions from the purview of the MRTP Act. However no such exclusion is granted to Trade Unions under the Act, which clarifies the intent of the legislators to include them within the purview of the Competition Law.

In CCI case no. 16/2011², the Commission, while considering the allegations against Eastern Motion Picture Association (EIMPA) and Committee of Artists and Technicians of West Bengal Film and Television Investors (Coordination Committee), observed that Trade Unions are not exempted from the purview of the Act.

EIMPA is an association of film producers, distributors and exhibitors and operates mainly in State of West Bengal. Coordination Committee is the

joint platform of Federation of Cine Technicians and Workers of Eastern India and West Bengal Motion Pictures Artistes Forum. Both the organisations are registered under Trade Unions Act, 1926. When EIMPA and Coordination Committee learnt that two channels are broadcasting dubbed TV serial 'Mahabharata', it issued letters to both the channels requesting them to stop the telecast of the dubbed serial in the interest of producers, artists, technicians and workers of West Bengal film and television industry. EIMPA and Coordination Committee were of the view that serials produced in other languages and shown on the TV channels after dubbing them in Bangla would affect the producers of Bengali origin and would affect the artists and technicians working in West Bengal.

The Commission, in its final order dated 09.08.2012, passed u/s 27 of the Act, held that the aforesaid two associations are in fact association of enterprises (constituent members) who in turn are engaged in production, distribution and exhibition of films. Any decision taken by them reflects collective intent of the members. The acts and

¹ In All-India Bank Employees Association v. National Industrial Tribunal (Bank Disputes), Bombay AIR (1962) SC 17

² Mr. Sajjan Khaitan v. Eastern India Motion Picture Association and others

conduct of a Trade Union are liable for examination under the provisions of the Act. The Coordination Committee takes measures in consultation with other organizations like WATP, ATA and EIMPA in extraordinary circumstances to safeguard the interest and development of the West Bengal Film and TV industry. Therefore, the Coordination Committee for the purposes of the present matter comprises of five organizations which in turn consist of various professionals associated with the film and television industry. The constituent members of these bodies take decisions relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business. Since the decision of these two trade associations reflected the collective intent of the members, their conduct is liable for examination under Section 3(3) of the Act.

However according to the

minority view of Justice S.N. Dhingra, a trade union does not fall within the purview of Competition Act, 2002. The minority observed that the conduct of the parties was kind of a trade union pressure, where by they resorted to boycott, strike, non-cooperation etc. and the same cannot be construed as an agreement between the enterprises. It was observed that Trade Union's right of expression guaranteed under Article 19(1)(a) of the Constitution of India cannot be taken away by the Act.

An appeal was preferred by the Coordination Committee before COMPAT against the order of the Commission. COMPAT relying upon the minority view held that Coordination Committee is a Trade Union and that they were legitimately protesting and voicing their grievance for the benefit of their members.

Aggrieved by COMPAT's order, the Commission preferred an appeal before Supreme Court of India. The apex Court held that if a trade union acts as on behalf of

its members in collective bargaining and is not engaged in economic activity it will be exempted from the purview of the Act. However in the present case while applying the aforesaid principle of the activity of the trade union, it is pertinent to note that the Coordination Committee and EIMPA are, in fact, association of enterprises (constituent members) and these members are engaged in production, distribution and exhibition of films. Both Coordination Committee and EIMPA colluded and joined together in giving call of boycott and, therefore, matter cannot be viewed narrowly by treating the Coordination Committee as a trade union, ignoring the fact that it is backing the cause of those which are 'enterprises'. When constituent members of these bodies are found to be in the production, distribution or exhibition line, the matter could not be brushed aside by merely giving it a cloak of trade unionism.

FORTHCOMING EVENTS

- CCI Annual Day Lecture 2017 by Mr. Justice J. S. Khehar, Chief Justice of India on May 20, 2017, 5:00 PM at the Ashok.
- In association with World Bank, CCI is organising an event on Public Procurement, in New Delhi on June 7, 2017.



(Left to Right) Sh. U. C. Nahta, Member, CCI, Sh. S. L. Bunker, Member, CCI, Sh. Sudhir Mital, Member, CCI, Sh. Devender K. Sikri, Chairperson, CCI, Sh. Ashok Chawla, Chairman, TERI, Sh. Rajeev Kher, Member, COMPAT and Sh. Augustine Peter, Member, CCI participating in the Valedictory Session of the National Conference on Economics of Competition Law 2017

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

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