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COMPETITION LAW

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I INTRODUCTION

THOUGH THE Competition Act, 2002 is successor to the Monopolies and Restrictive Trade Practices Act (MRTP Act), the scope of both the Acts are completely different. The change in economic policies reflects change in legal regime. After 1990's onward India changed her economy from protection, insulation and regulation to free market economy. This change finds reflection in the objectives of the MRTP Act and the Competition Act, 2002. When, after economic liberalization, the control of market economy shifted from government and shopkeepers to national, multinational and transnational corporations, it became necessary to regulate competition, lest the big fish may devour the small, resulting in stifling the competition at the cost of the consumer. In the changed context, the Competition Act was passed in 2002, but the Competition Commission of India (CCI) began functioning in 2009.

II THE COMPETITION ACT, 2002

As this is the first annual survey on the competition law, it would be desirable to discuss the objectives and provisions of the Act very briefly. Regulatory provisions of the Act can be divided into three areas.

1. (a) The Act prohibits horizontal anti competitive agreements between enterprises, engaged in similar or identical trade of goods or provision of services. The very existence of such a horizontal agreement is presumed to have an appreciably adverse effect on competition (AAEC) which presumption of course is rebuttable, (b) the Act also prohibits vertical anti-competition agreement, between enterprises at different stages or levels of production chain, only if such agreement results in AAEC, that means in case of vertical agreement AAEC must be proved and there would not be any presumption of AAEC, and (c) the Act carves out a qualified exception in favour of intellectual property rights regime. Prohibition on anti competition agreements, would not restrict the right of any person to restrain any infringement or to impose reasonable conditions, for protecting any of his rights under intellectual property rights regime, (d) the meaning of 'agreement' for purposes of this Act is substantially different from the meaning assigned to the term under the Indian Contract Act for obvious reasons. The corporations, assisted by best legal experts, would take

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care not to leave even a trace of evidence when they decide to enter into any anti competitive agreement. More often than not such agreements are entered into without any overt action or spoken word, perhaps with an unspoken wink or a nod. In a number of cases this is done even without a wink or a nod; they simply follow the leader. The definition under section 2 (b) is inclusive and not exhaustive and includes an arrangement, an understanding or action in concert. In addition to the agreement defined under section 2 (b), for the purposes of horizontal agreement a practice carried on, or a decision taken by enterprises may also result in horizontal agreements.

(2) The Act also prohibits abuse of dominant position by an enterprise. However, what is prohibited under the Act is not dominance but abuse of dominance. But dominance can be determined only in a relevant market, in which competition takes place and an enterprise can be dominant. Competition takes place among the interchangeable products and services (product market) and that too within certain geographical area (geographic market). Dominance of an enterprise, that is capacity to act independent of competitive forces, depends on how a relevant market is defined. An enterprise tends to become dominant if the relevant market is narrowly defined and it ceases to be so if it is defined widely. Abuse consists in behaving unfairly or discriminatorily.

(3) The Act also regulates combinations, that are acquisitions and mergers, for certain purposes. Though, the global market encourages combinations because the bigger size is in a better position to compete as well as is more economically viable, the Act seeks to ensure that the combined enterprise should not be too big to be the capable of stifling competition. The Act provides two safeguards. If the enterprises seeking combination cross a certain monetary threshold, they must apply to seek the permission of CCI for such a combination. CCI grants the permission provided the combined entity, in the opinion of CCI does not cause or is not likely to cause an AAEC. If the proposed combination falls within the rule against competition, the combination shall be void.

III COMPETITION COMMISSION OF INDIA

On the side of the implementation of the provisions of the Act, the most important body is the CCI, which primarily is responsible for implementing the Act. It performs executive, legislative as well as adjudicatory functions. CCI is assisted by a Director General (DG), who helps the CCI in investigating the violation of the provisions of the Act. Competition Appellate Tribunal (CMPAT) primarily hears appeals of the cases decided by CCI.

The CCI started functioning with effect from 2009 and decided a number of cases in 2009 as well as in 2010. As this survey relates to the analysis of cases in the year 2011, we are constrained to limit ourselves only to the cases decided during the year 2011. Before analyzing the cases of the year 2011, it would be desirable to highlight important trends and features of the cases decided in the year 2011.

IV TRENDS AND FEATURES

It can be observed that the fidelity of the CCI to the concept of 'agreement' under the Contract Act is basic and all the members of the CCI consider themselves

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bound to the idea of agreement as given in the Contract Act. For more than a century, we have internalized the idea of agreement as given under the law of contract, meeting of mind of all parties to an agreement on the same thing in the same sense is the essence of an agreement under the law of contract, and this must be proved by unambiguous evidence. If we are able to get rid of the baggage of the law of contract, essence of agreement under the law of competition consists in inference of agreement from arrangement, understanding or action in concert, meeting of mind, under the law of competition, need not be separately proved but should be inferred from such arrangement, understanding or action in concert. A close analysis of the provisions of section 3 (3) relating to horizontal agreements reveals that the words 'practice carried on' and 'decision taken' are used independent of and in addition to the word 'agreement'. 'Or' separates 'agreement', 'practice carried on' and 'decision taken'. 'Practices carried on', also refer to those competition stifling practices which are initiated by the leader and others follow them, without ever entering into any direct or indirect agreement, that is without even a wink or a nod. This point will be further elaborated in the later part of the survey. The cases falling under the category 'follow the leader' are not treated by the CCI horizontal anti-competitive agreements, even if they fall under the prohibition of clauses (a) to (d) of section 3(3).

Most of the members of the commission would not construe competition-stifling activities, as horizontal anti competition agreement unless there is some sort of clear evidence of meeting of mind. Even R Prasad in the CCI, who generally gives dissent, would not consider aforesaid activities as horizontally anti competitive unless there is some evidence of meeting of mind even if it is only suggestive. Consequently, the CCI, the majority as well minority, in most of the cases, refused to accept the allegation of the existence of horizontal anti competition agreements particularly the cases relating to 'follow the leader'.

The majority of the members define 'relevant market' vary widely. This tendency has two important consequences. First, if a relevant market is defined too widely, AAEC ceases to be appreciable, which must be proved for establishing a vertical anti competition agreement, as well as it becomes easier to rebut the inference of AAEC in case of horizontal agreements. Second, if the relevant market is defined too widely, an enterprise, alleged to have abused dominance, does not remain dominant.

If R Prasad is reluctant to construe horizontal anti competition agreement unless there is some proof of meeting of mind, he compensates this reluctance with defining relevant market very narrowly to give relief to the 'captured' consumers, specially in cases relating to builders of apartments. The builders of apartments make one-sided unfair terms of contract and all the builders without any agreement, follow these terms. The consumer has no real choice of preferring one builder to the other. R. Prasad, in his dissent, often tries to give relief to the trapped consumer by defining the relevant market as the particular building project and declaring the builder to be dominant.

In the housing sector, all the builders are able to follow the leader in incorporating one-sided terms in the standardized contract because in the housing sector demand for houses exceeds supply. In spite of the fact that this peculiar

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situation, that is absence of competition in the housing sector, is known to the majority of the CCI, they failed to give an appropriate legal response to the peculiarity of the housing sector, which lacks competition.

V PARALLELISM: HOUSING

Builders of residential houses stand in a unique position in India for two reasons. Firstly, housing stands apart from other services in as much as it is a part of basic necessity, unlike other goods and services, which may be part of comfort or even luxuries. Secondly, in house building sector, demand exceeds the supply resulting in absence of competition for all practical purpose. The CCI in a number of cases highlighted this peculiar economic anomaly of Indian market but failed to give an appropriate and unique legal response to this unique economic situation. One of the members of the commission, R. Prasad, rose to the occasion and gave a unique solution by developing the concept of after market in building industry, which makes every builder, who uses market-stifling terms, dominant.

The first important case in this regard is *Belaire Owner's Association* v. *DLF Ltd.*[1] The Information Provider (IP) is an association of owners of a multi story high end apartments, 'Belaire' in Gurgaon, Haryana, which was built by construction major DLF, OP1. Haryana Urban Development Authority OP2 and Town and Country Planning Haryana OP3 are statutory housing regulators in the state of Haryana.

IP alleged that OP1 was guilty of entering into anti competition agreement and abused its dominant position in violation of sections 3 and 4. IP alleged that on the basis of promises made in the brochure they became members of the housing complex 'Belaire'. After considerable payments were made by them they were asked to sign an agreement, the terms of which were one sided, highly biased in favour of the DLF. They had to sign the agreement as exiting was very costly and substantial sum of money paid by them would have become forfeit. Some of the terms were as follows (a) the terms of the agreement were different from the promises made in the brochure. (b) DLF promised to deliver the possession of the apartment within 36 months but actually there was a delay of 2 to 3 years. (c) Payment by members was time bound and not related to progress in construction. (d) For delay in payment by members the rate of interest for the period of delay in payment was up to 18% p.a. and after a delay in payment of 90 days, the membership was liable to be cancelled with the forfeiture of substantial sum of payment. (e) For delay in delivery of possession the DLF had to give only a paltry penalty, (f) the builder could change the plan as well as the number of stories and actually the number of stories was raised from 19 to 29. (g) The terms of the contract could have been changed unilaterally by DLF, and there were many similar one-sided terms.

After investigation the DG did not find any evidence of anti-competitive agreement but found DLF guilty of abuse of dominant position. DLF raised several objections against the report of the DG. DLF contended that the impugned transaction

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1 *Belaire Owner's Association* v. *DLF Ltd. and Haryana Urban Development Authority, Department of Town and Country Planning, State of Haryana*, 2011 CompLR 0239 (CCI).

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was sale of apartments and not a sale of a service or goods. The agreement with the consumers was made before the commencement of the competition Act. Hence CCI lacked jurisdiction. CCI rejected both the contentions on ground that the definition of service under section 2 (u) is very wide to include service of any description including service relating to real estate, and also on ground that though the agreements were entered before the commencement of the Act but were acted upon after its commencement.

In order to decide the abuse of dominant position, the CCI defined the relevant market as 'high end multi story apartments in Gurgaon', rejecting the contention of OP1 that 'high end' is an uncertain term and the relevant geographic market is north India as many members purchase apartments only for investment, on grounds that an apartment costing 2-3 crore with many facilities not available in ordinary apartments must be a high end apartment and that the purpose of residence and investment cannot be separated, often one purchases an apartment for both the purposes.

The CCI found DLF dominant in this relevant market. According to the CCI, the position of strength is not decided only on the basis of the market share of the enterprise, which actually was very high in comparison to the market share of rivals of DLF, if the position of strength of many subsidiaries of DLF is taken into account. The position of strength is determined on the basis of factors given in section 19. The position of strength was determined on the basis of several factors. Its profit was very high. It had the advantage of being an early entrant (It began in 1946). It has a huge land bank consisting of 13000 acres and is vertically integrated with such services as schools, shopping malls and recreation centers in DLF complexes, and last but not the least the brand value of DLF.

Regarding abuses, i.e., most of the terms of the agreement enumerated earlier, the commission rejected the contention of DLF that (a) they are, part of the terms of the agreement willingly signed by the members and that (b) the terms are part of usual commercial practices resorted by DLF and other builders, on grounds that an unfair term cannot be used by a dominant enterprise. The commission held that OP2 and OP3 being statutory regulators, neither produce any goods nor provide any service and consequently are outside the purview of the Act. The commission passed a cease and desist order against DLF, asked it to suitably modify their terms of agreement and imposed a penalty of Rs: 630 crore.

R Prasad in his separate concurring opinion, in order to establish dominance defined two relevant markets: Viz, (a) the market when members entered into an agreement with DLF, and (b) the after market consisting only of 'Belaire' after the payments were made and DLF proceeded with the signing of the agreement. In the after market the members became captive as the cost of exit was very high. He held that the agreement between DLF and the consumer, in the context of the after market, is violative of section 3 (1) and 3 (2) is as much as the after market forecloses the entry of new building entrants (cost of exit being high) and the foreclosure causes or is likely to cause AAEC.

The impact of the opinion of the majority is that the unfair terms in the agreement cannot be used by DLF but other builders, not being dominant can use them. The impact of the opinion of R Prasad is wider in two senses. As every builder, weather

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initially dominant or not, would become dominant in the after market and (b) the terms of agreement, which are likely to cause or cause AAEC, in the context of the after market, would be void under section 3 (2) in as much as the foreclosure of new entrants stifles competition.

The facts and decision in *Mili Marketing Pvt. Ltd*. v. *DLF*[2] are similar to the preceding case *Belaire*. This case was clubbed with *Belaire* and the CCI similarly disposed of this case.

Allegation of anti competition agreement and abuse of dominant position was leveled against builders who were not found to be dominant by the majority of the CCI in the preceding cases. *Jagmohan Chhabra and Shalini Chhabra* v. *Unitech Ltd.*[3] is a case in which CCI did not find Unitech to be dominant. IP, the husband and wife, entered into an agreement with builder Unitech Pvt. Ltd. for purchase of two apartments in a multi story apartment project 'Escape' after having already paid 72% and 42% respectively of the cost of the two apartments. The terms of the agreement were almost similar to those made by DLF and discussed in *Belaire*. The terms need not be repeated here. IP alleged as there was no significant progress in the construction, though the project was supposed to be completed within 36 months; IP stopped making further payment on grounds that payment should be linked to progress in construction. OP, cancelled the membership of the purchasers of the flats on ground of nonpayment of dues.

IP alleged abuse of dominant position and also violation of section 3 of the Act. IP alleged that one-sided terms of the contract were biased in favour of OP and amounted to abuse. The majority defined the relevant market as 'high-end multistory flats in Gurgaon. As in the geographic market of Gurgaon, DLF has already been declared to be dominant, the commission refused to accept Unitech as dominant. CCI held that the consumer has many choices, as there are a number of similar builders. It is difficult to appreciate the observation of CCI that the consumer has alternative choices. In a relevant market, where supply falls short of demand and every builder follows the leader in making the terms of the agreement, it is strange that CCI is stating that there exist choices. Unfortunately even R Prasad, who generally gives dissent, did not address the peculiar economic situation in the housing sector. He, however, tried to provide remedy to the IP, through an alternate route already discussed in *Belaire*. He held that relevant market is 'Escape' in which Unitech is dominant, because the captured consumer finds it difficult to make costly exit. The unfair conditions imposed by Unitech amounts to abuse. He also held that there was violation of section 3 (4) also. One of the terms of the agreement was that the maintenance would be done by an agency selected by the builders and at the time of possession maintenance charges for three years will have to be paid by the purchaser of the flat in advance. He found this provision to be a tie in arrangement.

While agreeing with the opinion of R Prasad, a disturbing activity on the part of the builders may be noted. Almost all the builders promise to give possession in 36 months but actually make a delay of 2 to 3 years. As the penalty for delay in giving possession is miniscule, there are reasons to believe that less expensive

2 MANU/CO/0087/2011: Case No. 53/2010, decided on 14.11.2011.

3 2011 CompLR 31 (CCI).

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money of the buyers of flats is used elsewhere by the builders. This point should have been examined by the CCI. Unfortunately neither the majority nor the minority addressed the disturbing problem of parallelism in the terms of agreement in housing industry. It is strongly suggested that parallelism in laying down terms of the agreement, if has the effect of stifling the competition is not a practice in the ordinary course of business and therefore should be construed as 'practice carried on'. 'Practice carried on' may be construed as circumstantial evidence of horizontal anti competition agreement. This point will be elaborated further later in this survey.

The majority of CCI and R Prasad gave similar decision in *Jagmohan Chhabra and Shalini Chhabra* v. *Unitech*[4] the facts of which case were also similar except that this case related to housing project 'FRESCO'. However, in *Rajarhat Welfare Association* v. *DLF Commercial Complex Ltd.*[5] the DLF, being a new entrant in the construction of residential houses in Calcutta, where other competing builders were already present, was not considered to be dominant. DLF and other competing construction enterprises used the similar format of agreement, used by DLF at Gurgaon.

VI PRE-PAYMENT CHARGES ON CONSUMPTION LOANS

In a large number of cases IPs have alleged imposition of pre payment charges (PPC) by banks and financial institutions to stifle the choice of the borrower that is to select a more attractive product floated by other banks. The pre-payment charge (a) stifles the borrower's choice (b) prevents the entry of new entrants with more attractive products (c) prevents innovation of new products and (d) stifles competition by trapping the borrower. The difficulty with a borrower is that almost all the banks and financial institutions have almost similar terms especially in case of home loans. The terms of the agreement often are one sided, biased against the borrower of home and other consumption loans.

Surinder Bhakoo v. *HDFC Bank Ltd.*[6] is a case on PPC. One of the members of CCI, quoted in this case Lord Denning: "People who combine to keep up prices, do not shout it from the house tops. They keep it quiet; they make their own arrangement in cellars, where no one can see. They will not put anything in writing not even into words. A nod or wink will do". This actually is the difficulty in proving an anti competition agreement. Perhaps in order to avoid this difficulty the frames of this Act, under section 3 (3) have used the words 'any agreement entered into… or practice carried on or decision taken by …' It is significant that there is 'or' between 'agreement' and 'practice carried on'. It appears that the scheme under the Act is 'practice carried on' independently of agreement, may prove anti competition agreement in appropriate cases. However, the majority of the CCI demanded strict proof of meeting of mind. Unless the requirement of meeting of mind (insisted upon by the Contract Act), is proved strictly, clearly and beyond reasonable doubts, CCI is unwilling to construe anti competition agreement. It is strongly emphasised

4 *Ibid*.
5 MANU/CO/0022/2011: Case No. 10/2011, decided on 25.05.2011.
6 MANU/CO/0008/2011: Case No. 15/2009, decided on 22.08.2011.

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that the meeting of mind should be inferred from the nature of practice carried on. Often it is insisted by the parties who carry on the practice of parallelism of unfair terms that parallelism is not concerted but a normal commercial practice. This contention should not be accepted at face value but the nature of this so called commercial practice should be examined. If the terms of the so called commercial practice tend to stifle competition or are unfair, meeting of mind should be inferred from the practice carried on. Competition stifling practices should never be part of ordinary course of business. It is also important to remember that technicalities of law should never trump demands of justice.

The informant borrowed Rs. 95 lakhs from HDFC bank for the purchase of a car. When the IP pre paid the loan, the bank imposed a PPC. IP alleged violation of section 3 and 4 of the Act. However, the majority did not find any proof of agreement between HDFC and other banks and also held that HDFC is not a dominant player.

In the dissent, the minority first looked into the history of PPC. For the first time HDFC introduced car loan in 1978. At that time there was no requirement in the contract for the payment of PPC. When in 1993 LIC Housing Finance introduced housing loan, HDFC introduced PPC. In quick succession other banks and financial institutions also followed suit. It was a clear cut case of follow the leader. According to the minority, PPC have the following consequences: (a) Reduce consumer choice (b) new and other banks do not get customers, and (c) there is no accrual of benefit to the consumers.

The minority further maintained that section 3 (3) uses the phrases 'practice carried on' and 'decision taken' in addition to agreement. But a practice or decision must have an element of agreement. A practice or decision without an agreement cannot attract section 3 (3). Such an agreement, in this case, was discovered by the minority in a 2003 resolution of Indian Banking Association, which approved the levying of PPC. The minority concluded that the resolution of IBA must have been passed after consultation in the IBA meeting. This suggestion of agreement was found sufficient by the minority to hold that there was an anti competition agreement.

It is reasonable to agree with the decision of the minority but not with the grounds of such decision. Even without the proof of the resolution of IBA, there was an anti-competition agreement for the following reasons. (a) Any carrying out the terms of agreements which tend to stifle the competition amounts to horizontal anti competition agreement, (b) the use of the word 'or' between agreement' and 'practice carried on' means that a practice carried on by enterprises which is not part of normal course of business can construe anti-competition agreement independent of agreement (c) competition stifling nature of practice infers meeting of minds (d) title of chapter II 'prohibition of certain agreements' and the heading of section 3 'anti competition agreement' cannot impute the element of meeting of mind as a separate requirement attached to 'practice carried on' because title of a chapter and heading of a section are internal aids of interpretation, which can be used only if there is an ambiguity in the meaning of a section. As the meaning of 'or' between 'agreement' and 'practice carried on' is unambiguously clear, there is no need to use an internal aid to interpretation. (e) If the requirement of separate proof of agreement between the leader and the follower is super imposed on the 'practice carried on' the purpose of the Act in preventing stifling of competition

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will suffer. (f) It is preferable not to superimpose independent proof of meeting of minds on 'practice carried on' as such superimposition would frustrate the objective of the Act in preventing anti –competitive activities. Practice of following the leader in anti competitive activities and prevention of such activities is one of the objectives of the Act. R Prasad also held that in this case there was violation of section 4 as well because PPC made the borrower captive.

Yashoda Hospital v. *India Bulls Financial Services Ltd.*[7] is another case on PPC. IP took a loan of 30 crore and 18 lakhs against mortgage of a property. IP foreclosed the loan because of high interest rate but IFSL imposed a PPC on the foreclosure of loan. IP leveled two charges against the OP. (1) PPC is an abuse of dominant position by IFSL as it prevents switching over to another creditor. It is detrimental to competition. (2) As the practice is common to other Financial Institutions as well it amounts to horizontal anti competition agreement.

DG reported that (a) the practice of imposing PPC on foreclosure of loan is prevalent among other banks and financial institutions; (b) PPC is anti competitive because (i) it hinders free movement of borrower and (ii) it prevents entry of new lenders; (c) violates section 3 (3) (b); (d) the relevant market is defined, as market of mortgage/home loan in India and (e) IFSL is not a dominant player as its share in the relevant market is only 4.88%. The majority of the CCI held (a) there is no evidence of anti competition agreement between OP and other banks and Financial Institutions (b) OP is not a dominant player.

However, in the dissent, R. Prasad reached to a different conclusion by defining relevant market differently. Instead of one, there are two relevant markets (a) the relevant market of loan (b) the relevant market of recovery of loan. It is an after market. In the after market, because of PPC, the borrower becomes captive, his exit become very costly because of PPC. In this captive market OP is dominant and PPC is an abuse. PPC is a power of OP over the borrower (b) it amounts to entry barrier and (c) discourages product innovation. PPC is unreasonable and unfair, for another reason also. In the calculation of equated monthly installment (EMI), during the initial period, the component of interest is high and the component of principal low. Gradually, the ratio of interest becomes low, that is, if the rate of interest is x%, the component of the interest shall remain x% of the remaining principal. In the EMI the first priority is given to the payment of interest. As per the dissenting judgment, if interest has already been paid, PPC is abuse in the captive relevant market. The basic purpose of PPC is anti competitive as it is used to prevent the exit of the borrower.

He again in the dissent refused to apply section 3 (3) to cases of parallelism in imposing PPC by almost all banks and financial institutions. If parallelism stifles competition, that is if the terms of agreement falls within section 3 (3) (a) to (d), meeting of mind must be proved because section 3 (1) uses the word 'agreement' and is a covering provision. Therefore, the requirement of meeting of minds incorporated in section 3(1) must be applicable to section3 (3), which is covered by section 3(1). But meeting of mind can be circumstantial and the circumstance is the resolution of IBA of 2003 discussed in the preceding case.

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7 2011 CompLR 324 (CCI).

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It is difficult to agree with the opinion of R Prasad. Competition stifling parallelism does not require any independent proof of meeting of mind. Following are the reasons. (i) Though section 3 (1) may be a covering provision of section 3 (3), it is not a trumping provision. Section 3(1) may be a generic provision but a generic provision does not trump a specific provision, that is section 3 (3) (ii) If agreement as defined under section 2 (b) trumps 'practice carried on' and decision taken, in the sense of separately requiring proof of meeting of mind, both the phrases 'practice carried on' and 'decision taken' would become redundant, or at least would become mere adjunct to agreement under section 2 (b) (iii) Superimposing the requirement of meeting of mind, to be proved separately, would frustrate the objective of the Act to a certain extent. There is no reason that an anti competitive practice or decision taken through the route of follow the leader, should be kept out of the purview of the Act. (iv) The very fact of following the anti competitive practice or decision should infer meeting of mind without any necessity of proving it separately.

Savitri Leasing and Finance Ltd v. *The Punjab National Bank*[8] is also a case on PPC. IP is in the real estate business, who availed a term loan of Rs: 8 crore and 70 lakhs from the PNB with an EMI, which later, on the request of IP, was converted into overdraft facility. The rate of interest for term loan was Benchmark primary landing rate (BLR) + 0.05% premium % 2.50%, i.e., 8.7%. For the overdraft it was rated to 10.50%. The agreement provided for pre-payment charge. The rate of interest was also subject to change by the bank.

IP alleged that because of PPC exit becomes costly. The bank charged different rates of interest from old and new borrowers. After some time the bank raised the rate of interest to 13% for IP but for the new borrowers it charged lower rate. IP alleged violation of section 3 and 4 of the Act. The majority refused to give any relief on predictable ground that there was no evidence of any anti competition agreement and that the Punjab National Bank was not dominant.

The minority (R. Prasad), again on predictable grounds, found the IP as a captive borrower. The relevant market in the after market was recovery of loan by PNB. PNB being dominant prima facie was guilty of two abuses (a) PPC and (b) discriminatory rate of interest. The minority did not find any evidence of violation of section 3.

Pravahan Mohanty v. *HDFC Bank*[9] is also a case on 'follow the leader' in the service of credit cards. IP alleged anti competition agreement and abuse of dominant position, on ground that before the issue of the credit card OP did not give him the full details of the complex terms of the credit card agreement. The copy of 'card member's agreement' was supplied with ready to use credit card with the condition that the use of the card would mean acceptance of the terms of the agreement. The terms were lengthy, complex and in small font, and the terms were unfair to the credit card holder and heavily biased in favour of the bank. IP alleged an anti competition agreement as all banks provided similar conditions; the fact was also corroborated by the DG. The unfair conditions were alleged to be abuse of dominant position.

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8 MANU/CO/0057/2011: Case No. 45/2011, decided on 12.10.2011.
9 MANU/CO/0020/2011: Case No. 17/2010 decided on 23.05.2011.

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The majority held that there was no evidence of anti competition agreement and the HDFC bank was not dominant. But R. Prasad gave a dissent and defined the existence of three different relevant markets, (a) banking (b) credit card and (c) servicing of credit cards.

HDFC is dominant in the servicing of credit card, as the consumer is captive in this market. Unlike the majority, which held that by using the card the consumer accepts all the conditions, the minority, however, did not agree with the majority on this point. He held that the agreement with the card holder, was opaque, and the one sided unfair terms in the captive market amounted to abuse.

Unlike the majority, which did not consider 30-40% of interest charged on credit cards illegal because the Usurious Act of 1918, which limits the interest to 30%, is not applicable to banks. The minority was of the opinion that Usurious Act is applicable to credit card transactions as credit cards can be issued by a non-banking company as well.

The minority explained the meaning of dominant position with reference to clause (a) of the second explanation of section 4 (2). The dominant position is position of strength enjoyed by an enterprise which enables it do any of the following in the relevant market (a) operates independently of competitive forces (b) effects its competitors in its favour (c) effect consumers in its favour or (d) effect the relevant market in its favour.

It is difficult to understand the observation of the majority, that the consumer has a choice to opt for any other credit card issuing company when the DG report clearly indicates that terms of the agreement of all the card issuing companies are more or less similar. This case strengthens the argument given in the earlier part of the survey that parallel competition stifling practices, in the sense of follow the leader, should be treated as a case of horizontal anti competition agreement.

The majority and the minority gave opinions on expected lines in *M/s. Metalrod Ltd.* v. *M/s. Relegare Finvest Ltd.*[10] The majority found PPC neither anti competitive nor abuse of dominant position, whereas the minority found it to be abuse of dominant position. Again the minority refused to infer anti competition agreement in the practice of competition stifling practice of PPC. In conclusion it can be said that CCI failed to give relief against PPC. What CCI could not do was ultimately done by the Reserve Bank of India.

VII PARALLELISM IN AIRLINES

M.P. Mehrotra v. *Jet Airways and Kingfisher Airlines*[11] is an important case decided by CCI on parallelism, abuse of dominant position and anti competition agreement.

IP alleged that OP1 and OP2 entered into an anti competition agreement relating to (i) code sharing (ii) interline and prorate agreement (iii) cross utilization of crew (iv) joint ground handling (v) cross selling of inventories (vi) imposing ATF surcharge and (vii) joint network rationalization. This agreement has resulted in

10 MANU/CO/0080/2011: Case No. 28/2010, decided on 23.05.2011.

11 MANU/CO/0060/2011: Case No. 4/2009, decided on 11.08.2011.

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limiting production and supply, sharing the market, and exclusive supply. IP alleged that provisions of sections 3 and 4 have been violated. This happened because on 13.10.2008 two airlines entered into an alliance and made a joint statement regarding the alleged agreement. The DG found no evidence of dominance. None of the two airlines was dominant in the relevant market. But, on the basis of the aforesaid alliance, DG concluded existence of an anti competition agreement between the two airlines.

However, the majority did not found alliance to be anti-competitive on the following grounds (a) such agreements among airlines are normal throughout the world and part of common trade practice (b) the agreements were made to tide over the slowdown in the market and (c) the agreements were never implemented in totality. Regarding the ground (b), one may fail to understand if the competition Act permits an enterprise to tide over economic difficulties at the cost of consumer and competition concerns.

However, the minority in its dissenting opinion, agreed with the DG that the alliance between the two airlines amounted to anti competition agreement. The minority did not accept the plea that the alliance was done with a view to tiding over the downturn in the industry to save cost and increase efficiency. The cost could have been saved even if the airlines acted independently. The minority opinion took note of price parallelism, concerted action in charging Rs. 400/- as ATF charge irrespective of distance travelled and concerted action in not rolling back this charge when the price of ATF was reduced. Route rationalization amounted to limiting supply and sharing the market. Thus the alliance violated the provisions of section 3 (3). However, it can be seen that all the terms of alliance were not anti competitive. Code sharing and interline prorate agreements are commercial practices, which facilitate the consumers and are practiced throughout the world.

However, the minority also attempted to uphold the allegation of abuse of dominant position in an ingenious but questionable way. The minority argued that, under section 2 (h) of the Act an enterprise has been defined to include a person. Section 2 (l) defines a person to include an association of persons or body of individuals whether incorporated or not in India or outside India. Agreement has been defined under section 2 (b) to include an understanding, an arrangement or an action in concert. In this case the alliance amounts to an agreement. When one person enters into an agreement with another person with some objective, it can be termed as an association of persons (AOP) or a body of individuals (BOI), whether the AOP or BOI is incorporated or not. Thus an association of two persons or the body of two individuals would become an enterprise. What the minority means is that, reading section 2 (h) and 2 (l) together, two airlines, because of common objectives expressed in alliance would become an enterprise. As the combined market share of the two airlines make them dominant and some of the objective of alliance abuse.

This argument of the minority is ingenious but a close analyse revels that the whole argument is based on the meaning of the words 'association' and 'body'. If two persons, companies or individuals carry on trade, business or commercial activity independently, without controlling each other, but pursue some common objective for limited purpose, can they be called an association of persons or a body of

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individuals? It is extremely doubtful that such association or body for limited purpose can be called an enterprise. The very words in section 2 (h) that "enterprise means a person… engaged in any activity relating to production…" would imply unity of purpose and objective in totality only then an AOP or BOI may be called an enterprise. It is extremely doubtful if these two airlines, which are independent of each other, pursuing different objectives, may be called one enterprise merely because they pursue some common objectives together. The biggest infirmity of this argument is that, whenever there is an anti competition agreement between two companies, they being one enterprise, may also become dominant.

Travel Agent Association of India v. *Lufthansa German Airlines*[12] is a sequel to the preceding case in as much as in this case the TAFI alleged cartel like behaviour by foreign airlines operating in India. IP alleged that in a concerted action Lufthansa, Air Canada, Australian Airlines, Continental Airlines, Air France, North West Airlines, KLM and Royal Dutch Airlines have begun paying transaction fee instead of commission to travel agents.

The DG defined the relevant market as international flights provided by foreign carriers in India. The DG found that there was no violation of section 3 (3) by the airlines on the following grounds (i) cartels are formed by competitors and these airlines are not competitors because they serve different destinations (ii) there was no evidence of meeting of mind as they stopped paying commission on different dates (iii) reduction in travel agents commission was done everywhere and in accordance with a resolution of International Air Travel Association (IATA).

The first argument of the DG does not appear to be plausible for the reason that in many cases the destinations are overlapping either directly or through connecting flights and the payment of commission effect the competitive profitability of the airlines. In the second argument different dates for reducing the commission may be due to the practice of follow the leader.

The argument of the DG, in rejecting the allegation that these airlines controlling 90% of the relevant market are a group, seems to be plausible not withstanding the minority opinion in *M.P. Mehrotra* v. *Jet Airlines,*[13] According to the commission, the grievance of the IP is centered on the fact that the airlines have abolished/ reduced the commission. The commission agreed with the relevant market as defined by the DG. On the violation of the provisions of sections 3 (3) and 4, the CCI agreed with the findings of the DG.

VIII COLLECTIVE BOYCOTT

Uniglobe Mod Travels Pvt. Ltd. v. *Travel Agents Federation of India*[14] is a case on collective boycott by the travel agents of an airline resulting in limiting supply of tickets to the consumers. IP was a travel agent and a member of Travel Agent Federation of India (TAFI). Because of financial reasons many foreign airlines switched over from commission system to transaction and productively based fee

12 MANU/CO/0092/2011: Case No. 14/2009, decided on 31.10.2011.

13 MANU/CO/0060/2011: Case No. 04/2009 decided on 11.08.2011.

14 2011 CompLR 0400 (CCI).

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system. Many federations of travel Agents including TAFI gave call to travel agents to return unsold tickets of Singapore Airlines and not to sell its tickets. IP refused to do so. It informed the CCI that boycott of Singapore Airline was an anti competition agreement.

DG found that 90% of the tickets in India are sold through the agents and the rest directly by the airlines. There was enough proof of boycott call given by TAFI. There were internet communications and advertisements in the newspapers. Boycott resulted in reduction in number of tickets in the market. There was AAEC due to boycott call.

The CCI rejected all the arguments given by TAFI in its defense and came to the following conclusions : (a) It was a concerted action by TAFI against Singapore Airlines resulting in reduction in supply of tickets (b) TAFI was an enterprise as much as it supplies services (c) the boycott call was not a collective bargaining as bargaining is done between an employer and an employee, Singapore Airlines was not the employer of TAFI. It was a collective boycott; (d) Boycott did not confer any benefit on the consumer. It, on the other hand, limited the supply of tickets in the market. (e) Tickets sold by an Agent are not interchangeable with ticket on internet because a number of consumers do not have access to internet.

During the pendency of the case in June 2010, the boycott call was lifted. CCI held that the boycott call violated provisions of section 3 (3) (b) but imposed a fine of Rs: one lakh on each of the OPs because OPs lifted the boycott during the pendency of the case.

IX MONOPSONY AND CONSUMER'S CHOICE

Pendrol Rahee v. *Delhi Metro Rail Corporation*[15] is an important case decided by CCI. In this case the majority dismissed the allegation of abuse of dominant position and anti competition agreement primarily on ground of consumers' choice in procurement of certain equipment for the metro railways. The only difficulty in accepting the logic of the majority is that the buyer in this case happens to be a monopsony.

IP was a manufacturer of rail fastening system to bind ballast less rail tracks. IP alleged that DMRC consistently made efforts to oust them and preferred only fasteners produced by M/s Patel Vossloh Rail Systems. In phase I, DMRC did bidding in such a way as to qualify only fasteners by Vossloh. DMRC is also consultant in other metro systems in India. Under the influence of DMRC they prescribe such conditions as to suit only Vossloh. IP alleged violation of the provisions of sections 3 and 4.

The DG defined relevant market as 'fastening system for ballast less track in Metro System in India'. DG held that every metro system is a dominant system. Phase I was experimental but in later phases, the suitability of other products could have been tested. According to DG, (a) refusal to deal with Pandrol Rahee amounted to exclusive supply arrangement prohibited under section 3 (4) and (b) imposition

15 2011 CompLR 0561 (CCI).

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of discriminatory conditions in purchase of fastners amounted to abuse of dominant position.

The majority agreed neither with the IP nor the DG. They decided that (a) the use of Vossloh in phase I was with the approval of the Ministry of Railways, consultants and other expert on experimental basis. When these fasteners were found suitable, they continued to use them for the sake of cost, convenience and non-availability of time for further experiment. A consumer must be allowed his choice. The fact that DMRC and other metro systems were not ordinary consumer but monopsony was not taken into account. The purchaser's status as a monopsony which alone could deal with a supplier was completely ignored by the majority.

The minority agreeing with the report of DG, observed that eight years have passed since phase I was completed and it was sufficient period for the DMRC to test the suitability of the fasteners produced by the IP. But DMRC did not do so. The minority held that DMRC imposed discriminatory conditions in purchase of fasteners. This amounted to abuse of dominant position and violation of section 3 in as much as there was exclusive supply arrangement prohibited under section 3(4) as IP and OP stood at different levels of same chain of production. The exclusive supply arrangement also resulted in AAEC.

Flyington Frieghters Pvt. Ltd. v. *Airbus S.A.S.*[16] is a case of anti competition agreement and abuse of dominant position. IP planned to begin cargo airline business. At initial stage, it preferred to use used aircrafts on lease and subsequently would shift to new aircrafts. The IP entered into an agreement with Boeing for supply of aircraft. Boeing also facilitated an agreement with Avion for acquiring pre owned aircrafts. Thereafter, Airbus made a lucrative offer to IP for supply of aircraft with substantial discounts and subsidies. IP then cancelled the agreement with Boeing and entered into an agreement with OP for purchase of six aircraft.

While giving its consent for financing, the OP imposed discriminatory and onerous conditions and thereby created a default condition for IP. IP alleged that later on OP forced many alterations in the terms of the agreement, which resulted in the postponement of delivery of aircraft.

IP alleged that purchase agreement was barrier for the informant to enter in the Indian market. It is also alleged that OP tied its product 'type certification' of the pre owned aircraft, necessary for successful launch of business. OP being dominant in the Indian market abused its dominant position by imposing hurdles in acquiring pre-owned aircraft and by not cooperating in pre delivery finance.

The CCI held that IP voluntarily cancelled Boeing agreement and entered into a purchase agreement with Airbus for obtaining discounts and subsidies. The fact that IP could not get these discounts and subsidies does not raise any competition issue. There was nothing to show that it resulted in foreclosure of competition. The IP, according to the records, voluntarily, entered into agreement for 'type certification' it was not a tied product. If there was no abuse, then dominant position is not prohibited.

16 MANU/CO/0014/2011: Case No. 66/2010, decided on 28.04. 2011.

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X RELEVANT MARKET; DOMINANCE IN ONE MARKET TO ENTER INTO ANOTHER MARKET

Association of Third Party Administrators v. *General Insurers (Public Sector) Association of India*[17] is a case that proves that substantive outcome of a case to a great extent depends on how relevant market is defined, specially when the question relates to abuse of dominant position. In this case the majority and minority reached to different conclusions because they defined relevant markets differently.

In this case IP was an association of Third Party Administrator (TPA) for processing medical claims of the policy holders, insured by public sector General Insurance Corporation for a fee paid by the corporation. OP was an association of four insurance companies of public sector General Insurance Corporation of India.

IP alleged that the OP floated an expression of interest in forming a joint stock company of TPA providing medical claim management services. The qualifications were such as no existing individual TPA could fulfill them. The qualifications required net capital worth of 25 crore and experience of working in foreign countries. Consequently all the existing TPA would be eliminated. Two allegations were made: (a) Discriminatory pre-qualifications are abuse of dominant position as it limits the production of service and (b) it is an anti competition agreement between four companies of General Insurance Corporation.

CCI rejected both the contentions of the IP. "Service provided by TPA to various insurers (non-life) in health care insurance in India" is the relevant market. There are more than 27 TPA in India. According to IRDA regulations an insurer can appoint even a company, TPA.

As per regulations all four can appoint any TPA. The consumer has no role in appointing TPA's. TPA's recover fee from the insurance company hence the insured has no role in appointing TPA as the insurer is consumer of TPA service. Hence concern of anti competition agreement does not arise. It is difficult to agree with the CCI. (a) simply because IRDA regulations permit the insurers to appoint TPA of their choice, competitions concerns specially of cartelization and dominance cannot be bye passed. IRDA regulations do not trump the Competition Act (b) simply because the fee to the TPA is paid by the insurer the insured does not cease to be a consumer. Under section 2(b) (ii) any beneficiary of such services other than the person who hires or avails of the services for consideration is also a consumer. The service of TPA not only benefits the insurers but insured also. As the pre-qualifications stipulate foreign experience, the existing TPA's are likely to suffer. A joint stock company performing the functions of TPA may stifle the competition as it would effect the competition and the existing TPA's specially because the four insurance companies who appoint TPA to a specific case would be biased as the joint stock company would be a joint venture with four insurance companies. This would be unfair.

However, the CCI thought otherwise, they thought that joint venture would enhance efficiency. Regarding abuse of dominance CCI said that the GIC is dominant but there is no abuse.

17 2011 CompLR 0371 (CCI).

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Minority dissent was represented by P.N. Parashar and R. Prasad. They held that TPA provide service to the insured (contra-majority). For them there were two relevant markets (a) insurers provide health care insurance in India (b) TPA processing insurance claim is another market. In the insurance of health care market four companies are dominant. There is nothing wrong in the objective of joint venture that they will increase profitability, improve service to insured but denying market access to the existing TPA's is an abuse by four dominant companies. In this case dominance in the market of health care insurance is being used to enter into TPA market.

Neeraj Malhotra v. *North Delhi Power Ltd*.[18] is a case on parallelism and the dynamism of definition of relevant market. The IP alleged that the conduct of (a) North Delhi Power Ltd., (b) BSES Rajdhani Power Ltd. and (c) BSES Yamuna Power Ltd. is anti competitive in violation of section 3 and amounted to abuse of dominant position in violation of section 4.

The discoms are in the business of supply and distribution of electricity through meters. The consumer has a choice either to purchase a meter from the market get it tested and sealed by the discom before being installed or take the meter on rent from the discom. An erroneous impression was given to the consumers by the discoms, IP alleged, that they could purchase meters only from the penal approved by the discom. IP also alleged that most of the meters functioned on the plus side of permissible limit of error. Unfair conditions such as afore mentioned were alleged to be abuse of dominant position and as the practice was followed by all the discoms, it was also an anti-competitive agreement.

However, the CCI did not find any evidence of anti-competitive agreement between the discoms. The majority as discussed earlier needed a clear proof of meeting of minds and as already discussed in the survey in analysing other cases the importance of 'practice carried on' and 'decision taken' in addition to 'agreement' as defined in section 2(b) was not taken into consideration.

The majority found that there was only one relevant market of supply and distribution of electricity in the discom area. In the relevant market every discom was dominant. There was no separate market of meters as the discoms did not manufacture them. It is asserted that though the meters are not manufactured by the discom, they gave the impression that they alone can supply them or the consumer must purchase out of the panel decided by the discom. Consequently the discoms are the supplier of meters.

The majority upheld the panel made by discoms on grounds that every meter manufacturer with BIS mark was given an opportunity to participate in bidding. The discom being consumers of meters have a consumers' choice. This choice should not adversely effect the welfare of the consumers because in accordance with section 2(f)(ii) the consumers being beneficiaries of meters are also consumers of meters. The majority also rejected that there was any abuse of dominant position. They held that the sample was too small to warrant the conclusion that meters were running on the positive side of the permissible limits of error. There was dominance,

18 2011 CompLR 0128 (CCI).

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but no abuse according to the majority. According to the majority, there was also no evidence of any anti-competition agreement.

Geeta Gauri, in her separate and concurring opinion differed from the majority in as much as there existed two separate markets for meters, whole sale and retail. All discoms are dominant in the retail market but there was no abuse of this dominant position in as much as it makes economic sense for the consumers to get meters installed by the discom.

On the other hand, P.N. Parashar gave a dissent, with whom R. Prasad broadly agreed. He identified three relevant markets : (a) Distribution and supply of electricity, (b) supply of meters and (c) billing. In all these three markets discoms are dominant. The discoms did not make the consumers aware that they had the option to purchase their own meters with BIS mark. The discoms prepared their own panel of meters, which legally they were not authorised to do. They are guilty of abuse of dominant position.

P.N. Parashar did not agree with the finding of the majority that the data was too small to lead to the conclusion that meters were running on the positive side of the limits of permissible error. He said that even a small data must be relied if it points to a definite conclusion. The data points to the fact that the consumers paid for the electricity they did not consume. This amounts to abuse of dominant position in the relevant market of supply of meters.

XI DOMINANT POSITION IN ONE MARKET TO ENTER INTO ANOTHER

MCX Stock exchange v. *National Stock Exchange Ltd.*[19] is an important case decided by CCI on abuse of dominance but specially on dominance in one market to enter into another market.

The IP alleged that NSE, aimed at (a) eliminating competition from currency derivatives (CD) segment, (b) discouraging new entrants from entering into stock exchange services and (c) achieving foreclosure of all competition in stock exchange services. This, IP alleged, is because NSE has resorted to (a) transaction fee waiver in CD segment, charges no admission fee in this segment but does so in other segments (b) it charges no annual subscription in CD segment it does not charge for providing data feed in this segment. IP alleged that NSE is able to do this because (i) it has economy of scales and (ii) cross-subsidises CD from other segments. All this according to IP amounts to abuse of dominant position.

DG in his report, first, defined the relevant market as all exchange services, including equity, F&O, WDM and CD but excluding OTC in India. According to DG report the combined share of NSE in this market in 2008-09 was 92.5% compared to 5.09% in 1993-94. NSE is a dominant player and the abuse consists in waiver of different fee, referred to above, in CD segment.

On the other hand, in its response on the report of DG, NSE argued that fee waiver was possible because it does not incur any cost in CD segment. But DG was of the opinion that the cost was not zero, as fixed cost has to be incurred in CD

19 2011 CompLR 0129 (CCI).

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segment. NSE further stated that the logic of fee waiver was that CD sector was in a nascent stage and fee was waived to encourage this segment. But DG said, it was wrong as at the initial stage NSE charged transaction fee in CD segment but later it was waived.

The CCI differed from DG in defining the relevant market. CD segment, according to CCI, was a distinct market in as much as CD services are similar to other exchange services but are not inter changeable. The report of RBI-SEBI standing committee on Exchange Trade Currency Future of 2008 makes a clear distinction between CD and other segments. CD is distinct for another reason also. Till 2007 exchanges did not have currency-traded system.

According to CCI, NSE was dominant because it had a position of strength due to the following factors (a) in F&O, WDM, CD segment NSE had 92% share (b) NSE deposits were at Rs: 9.17 billion and profit before tax Rs: 6.89 billion (c) NSE is present in 1486 centers in India and (d) NSE has a high degree of vertical integration. On the other hand, the Bombay Stock Exchange (BSE) is present in Maharashtra and Gujrat only. MCX-SX is present only in 450 centers and deposit is lower in comparison to that of NSE. CCI observed that without this strength fee waiver would not have been possible.

CCI observed that because of this position of strength in other segments it was possible for NSE to waive transaction fee in CD segment. It is important to note NSE waived fee only in CD and MCX-SX operates only in CD segment. It was a case, according to CCI, of abusing dominance in one market to enter into another market. The CCI did not agree with the dissent of two of its members that in order to apply section 4(2) (e), which provides that an enterprise uses its dominant position in one relevant market to enter into or protect other relevant market, two relevant market should be associated market. The CCI passed a cease and desist order and imposed a penalty of Rs: 55.5 core.

Geeta Gauri and Anurag Goe passed a dissenting opinion. They assessed the position of strength only in CD segment and found that NSE did not have a position of strength in this segment. They did not consider zero pricing in CD segment charged by NSE as predatory. According to them, CD market operates on non-price parameters. Revenue in this segment is generated from value added services. To apply, section 4(2) (e), according to minority both the markets should be linked or associated and as CD is not linked to other exchange services, section 4 (2) (e) cannot be applied. It may be noted that the concept of linked or associated market is a foreign concept, which the framers of Indian law have deliberately avoided and therefore, it need not be applied in India.

XII ADVERTISING AGENCY – ACCREDITION

Kshitij Ranjan v. *Indian Newspaper Society*[20] is a case on definition of relevant market and meaning of practice carried on.

IP runs an advertisement service. OP is a registered society of newspapers with almost all dailies, weekly and monthly newspapers and periodicals its members.

20 2011 CompLR 549 (CCI).

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The society gives accredition to advertisement agencies in accordance with its rules. Accredited advertisement agencies are given certain benefits of credit and the governments book advertisements only through accredited agencies.

The IP who sought accredition was asked to give a bank guarantee of Rs: 25 lakhs and was also asked to give a personal guarantee in the form of immovable property. Movable property was not acceptable. On failure of IP to give personal guarantee OP asked for a further bank guarantee of Rs: 25 lakhs.

The rules of OP provided for personal guarantee only from those who failed in making timely payment to member newspapers, but IP was not a defaulter. IP alleged violation of (a) section 3(3) as OP was acting as a cartel of member newspapers and entered into an anti competition agreement in as much as the OP made a demand not warranted by its rules and (b) section 4 as OP abused its dominant position by its discriminatory action in demanding personal guarantee not warranted by the rules.

The majority of the CCI rejected the allegations of IP in totality on the following grounds (a) there was no evidence of any anti competitive agreement (b) giving certain benefits to accredited agencies is not violative of section 3(3) and (c) the relevant market was 'the market of advertisement in the print media in India'. IP could not advance any argument as to how OP has abused its dominant position.

A dissent was given by P.N. Parashar. In order to apply the provisions of section 3(3) he relied on 'practice carried on'. Demanding a personal guarantee of Rs: 25 lakhs in violations of the rules, was an anti competitive demand and amounted to practice carried on. The demand of personal guarantee of Rs: 25 lakhs, amounts to fore closure of competition and entry barrier is created for the new entrants. This 'practice carried on' brings the case within section 3(3). P.N. Parashar defined relevant market as 'the market of accredition of advertising agencies in the print media in India". This definition is narrower than the definition of majority which is the market of advertisement in print media in India. The anti competitive practice of discrimination between IP and others in demanding personal security was an abuse.

XIII COMBINATIONS

The Act provides that a combination if croses the prescribed monetary threshold, must seek the permission of the CCI, which shall assess if the combination causes or is likely to cause an AAEC within the relevant market in India.

In some cases the CCI granted permission to the combination and no important law point was laid down by the CCI. In all these cases the commission did not find any AAEC.

In *CCI* v. *Bombay Burmah Trading Corporation Ltd.*,[21] CCI received a notice of proposed acquisition of BCL Spring Division of Bombay Burmah Trading Company by NHK Automobile Components India Pvt. Ltd., a wholly owned subsidiary of NHK Japan, which does not have any business in India. NHK Japan

21 MANU/CO/0062/2011: Combination Registration No.C-2011/10/05, decided on 04.11.2011.

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is present in India through NHK Spring India Ltd., a joint venture with two other companies.

CCI found that neither the acquirer nor the acquired manufactured identical components. CCI also defined relevant market. According to CCI there are two relevant markets (a) market of original equipment for automobile manufacturer, (b) market of original replacement parts. The first market was highly competitive.

The acquirer and the acquired both manufacture springs but they are differently processed and the use of springs manufactured by them is also different. There are many competitors for both the types of springs. The proposed combination does not and is not likely to cause any AAEC. The proposed combination was approved.

ALSTOM Holding (India) Ltd. v. *ALSTOM Project India Ltd.*[22] is also a case on combinations. Alstom Holding (India) Ltd. (AHIL) and Alstom project India Ltd. (APIL) both carried on different business and were ultimate subsidiaries of Alstom Holdings France. CCI held that the proposed combination does not cause or is not likely to cause AAEC in India.

XIV NO COMPETITION CONCERNS

In a number of cases IP gave information, which did not involve any competition concerns. These cases either involved breach of contract, a civil wrong or an individual dispute between the parties. In *Rajni Kanta Minj* v. *Munna Munda,*[23] the I.P. alleged that she made an agreement of sale of property with OP and already paid him Rs: 2 lakh 50 thousand, but the draft sale deed did not mention many of the conditions agreed between the parties. It was alleged to be a case of abuse of dominance. The CCI came to the conclusion that the case does not involve any competition concerns.

In *Re Chief Secretary, Government of Haryana*[24] is also such a case. The government of Haryana floated a tender for the supply of diesel generators. One of the prequalification for tender was that tender can be given only by (a) original equipment manufacturer or original equipment assembler or (b) by an authorised dealer if the manufacturer or assembler, as the case may, does not directly supply the equipment. Abuse of dominant position was alleged. CCI held that the case does not involve any competition concern.

In Achintya Mukherjee v. *Loop Telephone Pvt. Ltd, Vodaphone and Bharti Airtel*[25] an allegation of violation of sections 3 and 4 was made. IP, the Secretary of Bombay Telephone users association, alleged that during roaming, service of only one service provider is available. IP alleged that this is a manipulation which restricts consumer choice. It is an abuse of dominant position.

CCI decided that the case does not involve any competition concern as one of the rules of TRAI provides that one of the conditions of grant of license to the

22 MANU/CO/00611/2011: Combination registration C-2011/10/06, decided on 19.10.2011.

23 Case No. 42/2011, decided on 12.9.2011.

24 2011 CompLR 34 (CCI).

25 2011 CompLR 56 (CCI).

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service provider is that the service provider is free to enter into agreement with any service provider for the purposes of roaming.

XV COMPETITION APPELLATE TRIBUNAL

The CMPAT has decided only 7 cases in 2011. Most of them are on procedural matters.

DLF Ltd. v. *Belaire Owners Association*[26] involves appeals against CCI's order dated 20.09.2010, under section 33, restraining appellants from cancelling the allotment to the allottees and from creating third party rights in respect of any cancelled allotment. The IP alleged abuse of dominant position by the appellant before the CCI.

The appellant appealed against the said interim order passed by CCI. The appellant challenged the maintainability of interim order primarily on the ground of jurisdiction. The agreement between DLF and the allotees was made in 2007, well before the commencement of the Act, and as the Act does not operate with retrospective effect, terms and conditions of the agreement cannot amount to abuses. Before the commencement of the Act neither dominance nor abuses existed. The appellant stated that without deciding the jurisdictional issue under section 26(1), CCI should not have given interim order under section 33.

Citing a number of Supreme Court cases, the Tribunal observed that jurisdictional question should be first decided. Issue of an interim order depends on three factors (a) prima facie case (b) balance of convenience or inconvenience and (c) irreparable injury. An interim order does not effect the merit of the case.

The tribunal observed that a cursory reading of the CCI's order, does give an impression that final opinion has been expressed, but this has to be taken as tentative. A detailed examination of the merit of the case shall be taken at the final hearing. As the matter has already been fixed for final hearing on merits, the CCI will hear and decide all the legal and factual issues raised by the respondents.

Gaurav Gupta v. *Chief Secretary,*[27] was an appeal from CCI to the CMPAT. In the opinion of both CCI and CMPAT, this case does not involve any competition concerns. This case seems to involve an individual dispute.

The appellant engaged respondent no. 1 who was in the business of production and marketing of paints and providing home solution to its costumers, on the basis of an advertisement. The appellant, being dissatisfied with the painting job, moved the CCI on grounds that there is violation of sections 3(3) and 3(4) and also abuse of dominant position.

CCI did not prima facie find violation of sections 3 and 4 and the case was closed under section 26(2). Hence this appeal against the order of the CCI.

The relevant market was defined as 'providing home solution services for painting homes in geographical area of Kolkata'. Providing painting solutions to homes is unorganised and un-structured market. Unspecified number of small

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26 [2011] 106 SCL 419 (NULL).

27 MANU/TA/0045/2011: Appeal No. 02/2011 and Appeal No. 16/2011, decided on 20.10.2011.

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entrepreneurs are engaged in this business. Regarding tie in arrangement (of painting service and paints), the competition appellate tribunal said that appellant was well aware of the product being offered to him and it was not mandatory to accept the offer, and there was nothing to show that there was any tie in arrangement between the Asian Paints, whose paints were used by the respondent.

The CMPAT also did not find any evidence of any horizontal agreement and abuse of dominant position.

DLF v. *CCI,*[28] is a case for interim stay of the CCI order imposing a penalty of Rs: 630 crore on DLF and caveat that nothing shall be done without notice to the appellant. The tribunal rejected application for caveat on grounds that section 148A of the CPC is not applicable to appeals under the Competition Act (section 53-0 of the Competition Act). The tribunal granted interim stay to the penalty and the order that within three months suitable modifications shall be made to the terms of the agreement. But the appeal was withdrawn and appeal stands disposed of accordingly.

In *Motion Pictures Association* v. *Sunshine Pictures Pvt. Ltd.,*[29] the interim order of the CCI that OP are restrained from refusing registration of the 'action replay' to PVR Pictures Pvt. Ltd. The tribunal refused to grant stay on grounds the argument before the CCI are complete and very soon the CCI will pass order.

Internet Service Provider Association of India v. *Department of Telecommunications*[30] involves consideration of delay beyond 60 days, in filing the appeal. The application was rejected as in the opinion of the tribunal, the ground that the members of appellant association were afraid to antagonise the department of telecommunication, was not found to be satisfactory reason for delay.

In *Anuj Kumar Bhati* v. *Sony Entertainment TV (SET)*[31] the CMPAT dismissed the appeal as it did not find any infirmity in the order of CCI. The appellant alleged abuse of dominant position and unfair trade practices in the telecast of quiz show, *Kaun Banega Crorepati* (KBC). The CCI defined the relevant market as viewer ship of different shows in Hindi during prime time in India as these shows are substitutable'. The share of viewers of KBC-4 was not so much as on the basis of that KBC-4 can be said to dominate all shows. The CMPAT observed that it was a factual situation and the correctness of the same has not been questioned. Compact agreed that CCI was right in declining to interfere in the matter.

In *Lodestar Slotted Angles Ltd.* v. *CCI,*[32] the CMPAT dismissed the appeal against the order of CCI. CCI declined to interfere with an allegation of bid rigging on the ground that bid rigging took place before section 3 came into force and the bid rigging is not a continuing action.

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28 MANU/TA/0044/2011: I.A. No. 19/2011 & Appeal No. 20/2011 and Caveat No. 2/2011, I.A. No. 20/2011 & Appeal No. 22/2011 and Caveat No. 3/2011, I.A. No. 21/2011 & Appeal No. 23/2011 and I.A. No. 22/2011 in Appeal No. 2/2011, decided on 09.11.2011.

29 2011 CompLR 0389 (CompAT).

30 2011 CompLR 0397 (CompAT).

31 2011 CompLR 0364 (CompAT).

32 2011 CompLR 0393 (CompAT).

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XVI CONCLUSION

The survey of the cases decided by the CMPAT may be concluded with a simple observation that CMPAT during the year 2011 has not made any significant advancement to legal knowledge relating to competition issues. Most of the cases were against interim orders of the CCI and in two cases involving substantial matters CMPAT fully agreed with the order of CCI without adding anything substantive.

About the overall performance of CCI, it is encouraging as well as disappointing. The views of almost all the members of CCI are heavily coloured by the idea of agreement under the Contract Act. They all demand strict or some clear proof of meeting of minds. They failed to appreciate the significance of 'practice carried on' and 'decision taken,' used independently of 'agreement' in section 3(3). 'Follow the leader' is widely used practice among the Indian corporates. "Follow the leader" in carrying out the anti competition practice, or in taken decision does not require meeting of mind under section 3(3)or even imperceptible consent. Follow the leader may at best be termed as a silent agreement. This is what is happening with impunity in home building industry, where demand exceeds supply and in other sectors as well. If this silent agreement is not brought within the prohibition of section 3(3), more and more corporates will keep on acting against the interest of the consumers. However, the idea of 'captive consumers' is a good idea to give relief to the consumers, but unfortunately the majority of the members of CCI continue to refuse to appreciate the idea in spite of weighty arguments in its favour.

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