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COMPETITION LAW

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I INTRODUCTION

THERE ARE two contradictory though reconcilable economic policies. According to the first view, there is need to regulate competition but priority must to given to the liberty of the entrepreneur to expand his enterprise because entrepreneur is the vehicle of development and without his development neither the free market nor the consumer would survive. Hence, liberty of the entrepreneur must have priority over regulation. Regulation must not be at the cost of development. However, according to the second point of view, right of the state to regulate market is a prioritized need as the right of the consumers (specially the end use consumers) trumps the liberty of the entrepreneur to unrestricted or almost unrestricted development.

II TRENDS DURING 2012

Competition Commission of India (CCI) appears to function in accordance with the first view point. Overall approach of CCI during the year 2012, with certain exceptions appears to be leaning in favour of neo-economic individualism. For some of the members of CCI, technicalities of law appear to be more important than need to promote the objectives of the Act. In a large number of cases the interpretation of the Act is literal at the cost of the objective of the Act.

Cases decided during the year 2012 also clearly illustrate the dynamism of definition of 'relevant market. Differently defined relevant market virtually effects the substantive outcome whether an activity is anti-competitive or not. Another differently defined definition of 'group' also impacts substantive outcome of the proceedings. Cases decided this year also illustrate the dynamism of 'group'. Most of the cases decided this year, as expected, are on anti competition agreements and abuse of dominant position. However, as was the cast last year majority of the CCI are reluctant to construe anti-competition agreement unless there is clear proof of meeting of mind in entering into anti competition agreement. They are not prepared to give due importance to "practiced carried on' to include those case, where without any direct evidence of meeting of mind, there is proof that a leader is followed by others to continue with anti-competitive practices.

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III ANTI COMPETITION AGREEMENT

Vedant Bio-Sciences v. *Chemists and Druggist Association of Baroda (CDAB)*[1] is an important case on section 3 and 4. The informant, a distributor of a few pharmaceutical companies alleged that CDA, an unregistered body of stockiest, distributors and manufactures of pharmaceutical products in the district of Baroda, indulged in anti-competitive and unfair practices. CDA, according to the informant, indulged in many unfair and anti-competitive practices, some of them are as follows:

(i) A member, who wants to become a stockiest of a particular pharmaceutical product of a particular pharmaceutical company, must obtain a no objection certificate from CDA before becoming the stockiest of a particular product.
(ii) CDA insists that a new stockiest cannot sell a new product unless he obtains an NOC from the existing stockiest of that product in the district.
(iii) Before a pharmaceutical company launches a new product it must obtain an NOC from the CDA.
(iv) CDA also fixes the margins of profit for a product.
(v) CDA charges Rs. 2000/- per product from the pharmaceutical company for the purpose of advertisement in the CDA magazine.

There was ample proof of the aforesaid practices in the form of circulars, rules, advertisements *etc*. CCI emphasized that when anti competitive practices, prohibited under section 3(3) are established AAEC is presumed and there is no need to prove it separately, though the Opposite Parties (OPS) have a right to rebut the existence of presumed AAEC.

According to CCI, there is no substance in CDA defense that it was not an enterprise. Section 2(h) defines enterprise, thus 'enterprise means … any activity relating to production, supply, distributions, acquisition or control of articles or goods or provision of services'. CDA is an association of whole sellers and retailers in Baroda. CDA has an apex body at national and state levels. As they are engaged in supply and distribution of pharmaceutical products they are an enterprise. CDA takes decisions with regard to supply and distributions of pharmaceutical products.CDAB follow the norms of its national association through the state association. The norms and guidelines are restrictive and anti competitive since they have the effect of limiting and controlling supply and are anti competitive.

CCI discussed in detail that there is nexus between the national, the state associations and CDAB. Pharmaceutical companies appoint stockiest and distributors only after taking clearance from the state and district associations. There is ample proof that no objection certificate from CDAB is needed (a) to launch a new product, (b) for appointing whole sellers and retailers. All this has the effect of limiting the supply of drug in the market. The CCI found violation of sections 3(3)(b), read with section 3(1) of the Act.

1 (2012) III *CLA* 446 (NULL).

CDAB is also involved in fixing the margins of whole sellers and retailers to the extent of 10% and 20% respectively. According to CCI, it amounts to determination of sale or purchase price which is prohibited under section 3(3) (a) read with section 3(1).

CCI imposed a penalty of Rs.53,837 at the rate of 10% of the annual average of the receipts of the preceding three years. According to CCI, the anti-competition agreement was between the national, state and district association, but penalty was imposed only on the district association as it alone, in this case, practiced anti-competitive practices. There are certain aspects of the case which were not considered by the CCI. Looked from another point of view, there was also an anti competitive agreement between the members of the CDAB as all of them followed the rules and norms enforced by the national and district associations. In this case actually anti competition agreement was also between the members of CDAB. The case should also have been brought under section 3(4) in as much as there was an anti competition agreement at different levels of production and provision of service. The stockiest and retailers limited the market of the pharmaceuticals in violation of sections 3(4) (b) (c) and (d) in as much as without an NOC a pharmaceutical company was not permitted to launch its product in the district of Baroda.

One of the members of CCI, R. Prasad in a separate opinion decided the case not under section 3 but under section 4. Prasad relies on the definition of 'enterprise' given under section 2(h) which defines enterprise 'as a person…..' and on section 2 (l) (v) which defines a person as 'an association of persons or a body of individuals, whether incorporated or not, in India or outside India'. According to him, CDAB is an enterprise because it is an unincorporated association of persons or body of individuals and is dominant in the product market of medicines in the geographic market of Baroda. The collective strength of CDAB is such that it can act independent of its competitors in Baroda in violation section 4 (2) (c) in as much as its discriminatory practices resulted in denial of market access to its rivals. As CDAB is a dominant enterprise in the geographic market of Baroda, its constituents cannot enter into anti competition agreements among themselves. Consequently, the case cannot be covered under section 3(3).

In the opinion of the author, Prasad while deciding CDAB as a single enterprise did not take into consideration the definition of 'group' given in section 5, which definition also applies to section 4. Applying the requirement of clause (b) of explanation of section 5, a group means two or more enterprises, which directly or indirectly are in a position to (a) exercise 26% or more of voting rights in the other enterprise (b) appoint more than 50% of the directors or (c) control the management or affairs of the other enterprise. Neither CDAB, nor its members in our opinion, are in a position to control or manage the affairs of the other enterprise. It is one thing to impose guidelines but quite different to manage or control the affairs of another enterprise. If one enterprise cannot be in the group of another enterprise unless it controls or manages the affairs of another, how is it possible for an association of two or more entities to be an enterprise if none of them manages or controls the affairs of another? As a matter of fact each member of the association can manage the affairs of his enterprise independently of others. Prasad's interpretation of enterprise is too literal to be compatible with the realities of the

economic entities. Perhaps drafting of the Act is not happy. However, Prasad concludes that CDAB is dominant in the relevant market and abuses its dominant position.

Another member Geeta Gauri, in a separate opinion emphasizes that positive activities, in accordance with section 19 must be taken into consideration. Gauri emphasises that PIS (Public Information Service) charge of Rs. 2,000 per product for giving coverage in the journal of the association plays a very important role in lending transparency for the benefit of the stockiest, retailers, medical practitioners and patients on the medical properties of a particular drug. However, barring this, other activities of the association were considered to be anti competitive by Geeta Gauri.

In *Reliance Big Entertainment* v. *Karnataka Firm Chambers of Commerce,*[2] a number of informations were filed before the CCI, with similar grounds of complaints. However, in this survey only the information filed by Reliance Big Entertainment relating to Karnataka Film Chamber of commerce is being discussed.

The informant in this case is a producer, distributor and exhibitor of films and is a company incorporated under the Companies Act; other Information Parties (IPs) are also in the similar business. Most of the opposite parties are associations of producers, distributors and exhibitors. These associations which operated in different territories of India made almost similar rules to regulate the conduct of their members. Some of the rules made by Karnataka Film Chamber of Commerce (KFCC) were as follows:

(i) A film distributor can distribute his film in Karnataka only if he registers his film with the KFCC and becomes a member of the KFCC.
(ii) An exhibitor is penalized by the KFCC if he exhibits a film of a non-member distributor or a film not registered with the KFCC.
(iii) If an exhibitor exhibits the film of a non-member distributor, the revenue share of the non-members distributor is put on hold.

The informant gave ample evidence in the form of rules of KFCC, directions issued by KFCC and minutes of the proceedings of KFCC to prove that (a) KFCC enjoys a position of strength in the relevant market, and (b) abuses dominance as it resorts to unfair and discriminatory practices and (c) members of the association entered into anti-competitive agreements. Thus the provisions of sections 3 and 4 have been violated.

The matter was referred to the Director General (DG), whose findings briefly are as follows:

(i) The associations, being non-commercial organizations, are not enterprises though the members of the associations are commercial organization.
(ii) The members of the associations are not part of a group and therefore section 4 is not applicable in this case.

However, it is difficult to agree with the DG that the associations are not engaged in commercial activities in as much as the associations are directly engaged in

2 2012 COMPLR 0269 (CCI).

activities relating to control of the provisions of commercial services. However, in our opinion the associations are not, though their members are, enterprises for the purposes of section 4 as the members of the association are not a group for the reasons stated while discussing *Vedant Bio-science* v. *Chemists and Druggists Associations of Baroda*.[3]

According to the DG the relevant market in KFCC case is 'services rendered by the exhibitors in the exhibition of films in the territory under the control of KFCC'. Anti competitive practices which attract the provisions of section 3(3) are as follows:

(i) Members of KFCC not to deal with non-members.
(ii) Mandatory registration of each film to be shown in the territory of KFCC.
(iii) Restriction on dubbing of non-kannada films in Kannada.
(iv) Penalty on or boycott of the producers, distributors and exhibitors who violate the rules of KFCC.
(v) With holding of share of revenue of the producers and distributors who do not obey the rules of KFCC.

CCI framed certain issues and held that associations are not enterprises in as much as they are neither producers, nor distributors nor exhibitors and are not engaged in any commercial activity. Significantly, CCI is silent that though the associations themselves are not producers, distributors and exhibitors, at the same time they control production, distribution and exhibition of films. But we agree that associations are not enterprises as the individual members' affairs are neither controlled nor managed by the associations. The associations cannot be considered to be enterprises if they cannot satisfy the group test given in section 5. An association cannot become an enterprise simply because it controls distribution *etc.,* unless it is able to control the affairs of the members. According to CCI, the KFCC is not a commercial enterprise hence section 4 is not applicable to it as well as because the Competition Act, 2002 does not provide for the concept of collective dominance. CCI also held that there was no vertical agreement as the associations are not at any level of production.

It is difficult to agree with CCI that there is no vertical agreement. Producers, distributors and exhibitors are at different levels of provisions of services. When the association takes a decision not to distribute or exhibit the film of a particular non-member producer, it is a case of vertical agreement also. It is refusal to deal.

However, CCI was of the view that KFCC violated the provisions of section 3(3) when it decided that (a) a film not registered with KFCC cannot be exhibited, (b) priority for exhibition is given to Kannada films (c) The association fixes number of release and number of prints (d) A film will not be released to TV or video for a particular duration *etc.* All this amounted to horizontal anti-competitive agreement. Referring to section 19(3), CCI held that the activities of KFCC are not beneficial to the consumer in as much as they limit or control production, supply, market or provision of services in violation of section 3(3)(b). Apart from passing a cease

3 *Supra* note 1.

and desist order, CCI imposed a fine at the rate of 10% of the annual average of revenue earned during the last three years.

R. Prasad, in a dissenting opinion, differs from the majority. According to him, the case falls under section 4 and not under section 3. However, he asserts that film making is a risky business. It is difficult to get credit from financial institution except at exorbitant rates. Hence there is a close cooperation between producers, distributors and exhibitors in as much as distributors and exhibitors invest in production of films in a number of cases. Hence interests of all of them are connected with each other. The author is of the opinion that the fact that there is close cooperation between producers, distributors and exhibitors does not help us to reach the conclusion that the associations are enterprises.

Referring to sections 2(h) and 2(l) (v) he comes to the conclusion that the association is an enterprises. His logic of such an opinion that the associations are enterprises and our disagreement with this opinion has already been discussed in *Vedanat Bio sciences* v. *CDAB*.[4]

As Prasad held that KFCC is an enterprise, section 3 does not apply as KFCC cannot enter into agreement with itself. KFCC is capable of acting independent of the competitive forces in the relevant market and is dominant, and KFCC is guilty of denial of market access in violation of section 4(2) (c), restricting provision of services in violation of section 4(2) (b) (1) and of unfair and discriminatory practices in violation of section 4(2) (a) (i).

IV TIE IN ARRANGEMENT

Ram Niwas Gupta v. *Omaxe Ltd New Delhi*[5] is a case on tie in arrangement which is prohibited under section 3(4) (a). In this case the CCI took a very strict view of the application of section 3(4) (a) almost forgetting that CCI's primary duty is to interpret the provisions of the Act in a way as not to frustrate the objectives of the Act.

Opposite Party (OP) in this case is a construction company, in the business of construction of residential houses. The informant is a consumer of the provision of residential units for a price. As usual the construction company made the informant to sign a standardized contract, in which the terms for all practical purposes are dictated by the party, with greater bargaining power. In spite of the protest by the informant the agreement between the OP and the informant provided that the maintenance work shall be done by an agency of the choice of the OP for the next five years or till the Residents Welfare Agency decides to appoint another agency.

The informant's grievance is that imposition of a maintenance agency by the OP is a tie in arrangement in as much as maintenance is a tied product with the residential unit.CCI held that, there is no tie in arrangement in this case for two reasons. (a) section 3(4) provides that tie in arrangement is between different stages or levels of production and consumer is not a stage or level of production and (b) there is no tie in arrangement in this case as clause (a) of the explanation of section 3(4) defines tie in arrangement to include any agreement requiring the purchaser of

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4 *Ibid.*

5 2012 COMPLR 1132.

goods, as a condition of such purchase, to purchase some other goods, and maintenance service is not a goods.

The decision of the CCI against holding the agreement between the OP and informant, as a tie in arrangement, in our opinion, is not a correct interpretation of section 3(4) and is not warranted by the language of section 3(4). It is inconceivable that the consumer is not a stage or level of provision of service.Without the consumer no production of goods or provision of service can exist. If a consumer goes to purchase potatoes from a green grocer, the green grocer cannot impose a condition that the consumer will have to purchase onions as well as potatoes, would it not be tie in arrangement? (It would be a different matter that it is from the point of view of the consumer, a case under the Consumer Protection Act) In this case the consumer is a necessary level of provision of the service and hence section 3(4) (a) would be applied to avoid tying in at mass scale.

It is strange that CCI while defining tie in arrangement ignored the opening sentences of section 3(4) which provides that 'any agreement among enterprises or persons at different stages or levels…. in respect of ….. provision of services". CCI should have taken into consideration these opening words of section 3(4) while interpreting tie in arrangement. The opening words control the inclusive definition given in clause (a) of the explanation of section 3(4). The interpretation of tie in arrangement must include provision of services as envisaged by the controlling of words of section 3(4). The 'individual' consumer according to section 2(l) (i) is a person and hence is covered by the opening words of section 3(4).

However, R. Prasad gave a dissent in this case. Instead of section 3(4), he applies section 4 in this case. Prasad also applied the concept of captive consumers in this case. Prasad said that (a) at the time of booking of the membership for the ownership of the house, the OP did not disclose the terms of the contract as well as the terms of the contract for maintenance. (b) Long after when almost all the payments were made, the consumers were asked to sign the contract including the contract for maintenance. (c) At this state it was very costly for the consumers to exit, the consumers become captive.[6]

In view of the fact that the consumers are captive, the relevant market would be 'this particular building project of Omaxe' in which Omaxe is dominant. Many of the terms of the contract are unfair and, therefore, amount to abuse of dominant position. These unfair terms are (a) buyers are not involved in the selection and appointment of maintenance agency, (b) the term of the contract of maintenance, which provided that the consumer has to pay maintenance charges for one year in advance, that is the payment for service not yet rendered, (c) the insistence of OP that the IP must get an NOC from the maintenance agency before the registration of the flat purchased by the IP. However, Prasad has not discussed the applicability of section 3(4) in this case for obvious reasons.

V DOMINANT POSITION

A number of cases were decided by CCI on violation of section 4. One of such cases is *Kansan News (P) Ltd. through Pradeep Bakshi, R.S. Bakshi and Co.* v.

6 For details see, V.K. Dixit, "*Competition Law*". XLVII ASIL 147 (2011).

Fastway Transmission (P) Limited.[7] IP is a broadcaster of news and current affairs through its channel Day and Night News and operates primarily in Punjab, Haryana and Chandigarh. OP1, Fastway Transmission, is in the business of transmission. OP2 Hathway Sukhamrit Cable and OP3, Creative Cable Network are cable operators. OP4 operates through OP3 in Punjab, Haryana and Chandigarh. OP5 Mr. Gurdeep Singh is the managing Director of OP1 and also manages the affairs of OP2 and OP3.

OP1, OP2 and OP3 control over 95% of business in Punjab and Chandigarh. In Punjab and Chandigarh there are approximately 43 lakh TV viewers out of which about 35 lakh are served by OP1 – OP4. Any broadcaster who wishes to broadcast in Punjab and Chandigarh is heavily dependent on OP1-OP5 and OP1 holds majority shares of OP1-OP4.

The informant alleged as follows: (a) OP1-OP5 formed a cartel. (b) They are dominant in the relevant market. (c) OPs abused their dominant position. IP alleged that they entered into an agreement with OP1 for transmission of their news channel. Pursuant to the agreement OP1 began transmitting the channel in August 2010. For the next two months the sailing was smooth. IP made all stipulated payments in time. But from October, 2010 onward OP1 began disrupting and distorting the transmission. In December, 2010 when the channel broadcasted the road show of the Indian National Congress, OP1 blocked the road show and muted the audio. Since then audio continued to remain muted. When IP served a legal notice to them, OP1 unilaterally terminated the agreement.

The IP charged the OPs (a) of violating sections 3 and 4, (b) of forming a cartel, (c) of limiting access to the relevant market and denying service and (d) of unilaterally terminating the agreement in violation of section 3(4) (d), *i.e.,* refusal to deal.

The DG in his report first clarified the functioning of the system. (a) The Broadcaster uplinks the contents. (b) The Aggregator distributes the channels for one or more broadcasters. (c) The multi-system operator (MSO) downlinks, decrypts or encrypts and feed bundle to last mile cable operator (LCO). (d) LCO transmits to the subscribers.

According to DG, DTH or IPTV are not substitutes of cable TV especially because of the price difference to the subscribers between two services *i.e*., DTH and cable. Therefore, cable constitutes the product market and Punjab and Chandigarh geographic market because of cultural and language requirements.

DG concluded that OP1, OP2 and OP3 constitute a group as OP5 controls more than 50% of the shares of OP1 and OP2, and 99% of OP3. As OP5 does not control 26% of the shares of OP4 and cannot appoint 50% of its directors, OP4 is not part of this group within the meaning of ss.4 or 5. The Fast way group consisting of OP1, OP2 and OP3, controlled by OP5, controls 85% of the relevant market in Punjab and Chandigarh. The Fastway group is dominant in this market and can create entry barriers for the IP.

DG also concluded that (i) there was not any valid reason for terminating the contract. The defense given by the OP that the agreement was terminated because

7 2012 Ind law CCI 18.

of the unpopularity of the channel is not a valid ground for the termination of the agreement (ii). The contention of the OP that disruption in transmission occurred because of technical reasons,was rejected by the DG on grounds that in the transmission of other channels there was no disruption.

The CCI first decided as to what is the relevant market. According to the CCI, cable TV is a distinct product. It is not a substitute for DTH for several reasons. DTH gives a better picture quality, and offers more channels and has a facility of recording the programme. Unlike cable TV the reach of DTH is not limited. But people with limited budget prefer cable TV and because of local preference for local content the geographic market is limited to Punjab and Chandigarh.

CCI next considered the question whether P1, P2 and P3 constitute a group for the purposes of section 4. CCI agreed with DG that P1, P2 and P3 constitute a group as their affairs are controlled and managed by OP5 but P4 is not part of this group as neither 26% of voting power is not with OP5 nor can OP5 appoint 50% of the directors of OP4.

CCI considered whether the Fastway group consisting of OP1, OP2 and OP3 is dominant within the relevant market. CCI agreed with DG that the group can act independently of the rivals but held that OP4 is not dominant as it cannot act independently of its competitors.

Regarding abuse of dominant position CCI disagreed with DG that the provisions of sections 4(2) (a) (1) or 4(2) (b) (1) have been violated. CCI held that section 4(2)(a)(1) is not applicable as unfair or discriminatory condition in the placement fee (for transmitting) has not been imposed by OP, because it was not proved as to what fair placement fees is. Section 4(2)(b)(1) is also not violated as OP did not put any limit on production by the IP on ground that IP was not a participant in the relevant market in which OP group operated. It is difficult to appreciate the opinion of the CCI that OP did not put any limit on production by IP because IP was not a participant in the relevant market in which OP operates, for the simple reason that without transmission IP would not be able to produce. Though the IP did not operate in the product market of cable TV, IP operated only in the broadcast of news, yet IP's production would be seriously limited if IP does not get access to the relevant market in which OP group is dominant. At least CCI should have concluded that it was a case of refusal to deal under section 3(4) (d). However, CCI agreed that the provisions of section 4(2) (c) have been violated in as much as the termination of agreement resulted in denial of market access to IP.

CCI apart from cease and distinct order, imposed a penalty at the rate of 6% of the average annual receipts for the last three years amounting to Rs.80,401, 141/-. CCI came to the conclusion that there cannot be any anti-competition agreement between OP1, OP2, OP3 and OP5 as they are all part of a group. However, CCI did not say anything about OP4 against which IP alleged indulging in anti-competitive agreement with OP1-OP2-OP3, especially when CCI held that OP4 was not a part of Fast Way Group.

Another case on abuse of dominant position is *Magnolia Flat Owners Association* v. *DLF Universal Ltd.*[8] The facts and decision of this case are similar

8 2012 COMP LR 0504.

to that of *Belaire's* case.[9] In this case also terms of the agreement between the builder and the consumers were one sided and heavily tilted in favour of the builder. As a matter of fact, the consumer was asked to sign the agreement when almost all the payments were made by the consumers. In this case also the CCI held that the relevant market was 'high end residential apartments in Gurgaon' in which OP was dominant. All the terms of the agreement were similar to those of the agreement between DLF and the consumers in *Belaire* case.[10] These terms have been discussed in the Annual survey of 2011 and therefore need not be repeated again. CCI after finding DLF dominant in the relevant market found it guilty of abuse of dominant position, but ordered that as a penalty in *Belaire's* case[11] has already been imposed no further penalty is needed to be imposed.

Another case in which *Belaire* decision[12] was applied is *Haravatar Singh* v. *DLF Ltd. and DLF Centre*[13] Haravatar Singh and his wife booked two flats in housing complex Belaire build by building major DLF. Haravatar and his wife paid earnest money but refused to make further payments on the ground that there was unreasonable delay in the construction work and payment was not related to progress in construction. DLF confiscated the earnest money and cancelled the allotment of the flats without given any notice to Haravatar Singh and his wife. Applying *Belaire's*[14] decision CCI found DLF guilty of abuse of dominant position and gave cease and desist order but did not impose any further penalty as the penalty has already been imposed in *Belaire's* case.[15]

VI VERTICAL AGREEMENTS: EXCLUSIVE DEALERSHIP

Automobile Dealers Association v. *Global Automobiles Ltd.*[16] is a case on exclusive dealership. IP alleged violation of section 3(4) (c). IP entered into an agreement of dealership with the OP who were manufacturers of two wheeler scooters. In consequence of the agreement the IP made huge investment but later on, IP alleged, that OP reneged. In consequence IP suffered losses.

CCI defined relevant market as the market of two wheelers in the range of 100-150 CC in India. The important issue was whether OP or dealers were dominant in the relevant market and was there any significant AAEC. CCI concluded as the manufacturer and dealers has insignificant presence in the relevant market, there was no AAEC and no case was made out.

It seems, the CCI considered this case, though without saying so, to be a case of breach of contract and the appropriate remedy should have been sought in a civil suit. There is another significant aspect of the case. Because of specialized need of

9 2011 Comp LR 0239(CCI) ILI: Also see *supra* note 6 at 150-152.
10 *Ibid.*
11 *Ibid.*
12 *Supra* note1.
13 2012 COMPLR 0384 (CCI).
14 *Supra* note 8.
15 *Ibid.*
16 2012 COMP LR 0827.

an effective after market in the case of two wheelers exclusive dealership may be justified under the provisions of section 19(3) especially under sub-clause (e) of section 19(3). The concept of captive market could also have been applied in this case as the IP's exit from the after market, which was promised but not materealised, was difficult and costly because of huge investment made by him.

VII DOMINANT POSITION: DYNAMISM OF RELEVANT MARKET

Arshia Rail Infrastructive v. *Ministry of Railways*[17] Three separate information were filed in this case. (i) Arshia Rail Infrastructure is a railway service provider (ii) Krisbhco Infrastructure Railway Container Service is an infrastructure provider (iii) Container Corporation of India (CONCOR) is a public sector company and handles container service of the Indian Railways (IR).

As the container service was in great demand the, Ministry of Railways (MOR) decided to invite private operators to operate container trains on the same network on which Concor operates. In consequence of this policy decision MOR issued a policy document that private container train operator (PCTO) were assured a non-discriminatory access to operate container trains.

IP alleged that MOR indulged in a number of anti-competitive practices and made the following submissions – (1) In 2006 MOR issued a letter denying transport of ores, minerals, coke and coal to PCTO, amounting to denial of market access (2) Concor and MOR are enterprises as IR does not perform sovereign functions and hence MOR in relation to IR is an enterprise within the meaning of section 2(h), (3) MOR and Concor are both enterprises as well as group enterprises within the meaning of sections 4 and 5 (4) Relevant market is rail services for whole of India in which IR is a monopoly and is dominant.

Some of the abuses according to IP were as follows (1) IR increased haulage charges for PCTO thereby creating different price structure for Concor and PCTO. This violates provisions of sections 4(2) (a) (i) and 4(2) (c). (2) The IR also discriminates between Concor and PCTO in as much as land is allotted at favourable terms to Concor (3) IR has made the cost of operation for PCTO high as railway terminals and sidings are given to Concor but not to PCTO. This amounts to denial of market access to PCTO (4) Dominance in rail services including tracks, and terminals, is used to enter into other relevant market in as much as IR (a) prohibits specific commodities such as ores etc. to PCTO (b) deny land to PCTO on terms similar to those for Concor (c) denies access to terminals and sidings to PCTO (d) denies competition in derivative after market of maintenance of service in as much as the rolling stock of PCTO is maintained by IR.

DG, in his report came to conclusion that MOR and Concor are enterprises and also form a group for the purposes of section 4. DG defined relevant market as 'transportation of goods /freight either through wagons or containers on railway network in India". He found wagon and containers as substitutes but transportation by road was not a substitute of transportation by rail.

DG found IR a monopoly and a dominant player in the relevant market for

17 *Id.* at 0937.

several reasons. (a) It has huge economic power. (b) In comparison to IR the share and importance of its competitors is negligible. (c) IR has also an advantage in as much as it is vertically integrated with locomotives sheds, signaling, wiring *etc.* (d) Competitors of IR face financial and regulatory entry barriers. However, IR is also beneficial to consumers, within the meaning of section 19, in as much as it discharges social obligations. After balancing negative and positive aspects of IR's impact on market. DG decided that IR is a dominant enterprise.

DG also found IR guilty of abusing its dominant position due to the following reasons (a) IR foreclosed the market to its competitors when it debarred them from transporting iron ore *etc*. (b) when it increased haulage charge for PTCOs, it imposed a discriminatory condition, (c) IR's refused to give rebate to PTCO for delay caused by IR in haulage, (d) denial of private sidings to PTCO, (e) discrimination in land grant, and (f) increase in stabling charges.

CCI did not agree with many of the findings of DG. But before taking substantive issues it decided jurisdictional issues, CCI rightly decided that carriage of goods by IR cannot be treated as sovereign function, it is purely and simply a commercial activity. It was argued on behalf of MOR that MOR functions in accordance with statutory provisions and therefore it performs statutory and sovereign functions.

It is difficult to understand as to how CCI reached to the conclusion that Concor and MOR are not group enterprises for the purposes of section 4:

(i) Government of India owns 63% shares of Concor and Concor is a government company within the meaning of section 617 of the Companies Act;

(ii) 5 directions of Concor are appointed by government of India; and

(iii) Member Traffic Railway Board who directs the policies of container traffic is the Chairman of Concor. In spite of this fact that for the purposes clause (b) of explanation of section 5 two enterprises are groups if one controls 26% of votes or appoint 50% directions or manages or controls the affairs of the other enterprise, CCI decided that MOR and Concor are not a group, on the ground that MOR and Concor are not a collective entity, relying on two EU decisions[18] CCI held that MOR and Concor are not a group as MOR exercises neither *de facto* nor *de jure* control over Concor. It is difficult to appreciate this argument of CCI as with GOI appointed directors and chairman, with more than 26% of voting right, and with member traffic railway board acting as chairman of Concor, it is inconceivable that MOR and Concor are not collective entities. As a matter of fact discriminatory practices carried on by IR in favour of Concor are enough proof that MOR had a bias towards Concor. In support of its argument CCI relies on the fact that directors are appointed by GOI on the recommendations of PESB, which is an independent body, but how it is an independent body CCI did not explain. That GOI appoints majority of directors was of no consequence to CCI. The fact that neither MOR nor IR has a separate legal personality, apart from that of GOI, was not taken into consideration by CCI. Thus GOI exercises *de jure* as well de facto control over Concor, contrary to the opinion of CCI that there is neither *de jure* nor *de facto* control of MOR over Concor. Legally everything done on behalf of GOI including

18 *France* v. *Commission Sciete Commerciale*, ECR-1375 (1998) 4C MLR 829; *Compagine Maritime Beige Transport SA* v. *Commission* (2000) ECR1365.

anything done for MOR and IR is done in the name of the President of India.

CCI rightly rejected a jurisdictional objection raised by MOR that agreement was made before the commencement of the Competition Act and therefore it cannot be construed as anti competitive under the provisions of the Competition Act on grounds that acts done in pursuance of the agreement after the commencement of the Act would be invalid if they violate the provisions of the Act.

CCI thereafter discussed the competition issues. CCI did not agree with the definition of relevant market as defined by the DG. According to CCI, wagons are used for bulk freight whereas containers for high value goods and therefore, they are not substitutable. CCI further held that container service was started to compete with road container transport, and therefore transport of containers by road is substitutable with transport of containers by rail. Relevant market, therefore, is 'transportation of containers within the boundaries of India by rail or road.'

CCI next considered the question whether in the relevant market Concor is dominant. CCI concluded that Concor is not dominant for two reasons. (a) MOR and Concor are not a group and hence Concor does not have the economic strength of IR. (b) The bulk of container freight is transported by road, which consists of a large number of road transport operators. In the container transport segment, neither IR nor Concor is dominant.

It has already been discussed that CCI is not very convincing when it held that IR and Concor are not a group. Even if bulk of container freight is transported through road it does not mean that Concor is not dominant. It is not necessary for a dominant player that it must transport bulk or more than 50% of container freight. In order to determine dominance, the relevant factors are (a) the gap in the market share of Concor and its nearest rival (b) the relative economic strength of Concor and its nearest rivals and (c) whether Concor can act independent of market forces. CCI is absolutely silent on these points.

CCI also decided against the application of section 3(4) and that there was no tie in arrangement when IR insisted that rolling stock of PCTO's must be maintained by IR. CCI did not give any convincing arguments to reach to this conclusion. As a matter of fact, the argument on behalf of CCI should have been that it was necessary to do so in the interest of safety.

MC Tayal in a separate but concurring opinion disagreed with the majority on the definition of relevant market. For him container transport by train and road are not substitutable. As rail container transport is less costly and suitable for long haul, unlike road transport which is more costly and suitable for short haul, they are not substitutable. He further concluded agreeing with the majority that wagon transport and container transport are also not substitutable. Relevant market is 'Transportation of containers by rail in India'. In this relevant market Concor is dominant but as MOR and Concor are not a group, and allegations of abuse of dominance have not been proved against Concor, no action against Concor can be taken. As MOR is not in the business of container transport, the so called allegation of abuses by MOR are not abuses of dominant position.

R. Prasad gave a dissenting minority opinion. On the definition of 'relevant market' and 'group' he differed from the majority. But, on jurisdictional questions he agreed with them. As railway's activities do not come under sovereign function

of the government of India and IR performs commercial function, it is an enterprise within the meaning of section 2(h). The argument of MOR that they function under delegated legislation rules and statutory provisions and hence perform sovereign function, was rejected on ground, that section 2(h) categorically makes distinction between sovereign and non-sovereign functions and commercial function of MOR, even if performed under statutory provisions would remain commercial and therefore it is an enterprise.

The argument of MOR that CCI not being a court cannot declare a legal provision, under which IR derives its authority, ultra virus on ground that the provision is violative of the provisions of the Competition Act, was rightly rejected by the CCI. CCI, a body consisting of economic experts, is under a duty to enforce the provisions of the Act. Prasad, agreeing with the DG, also held that Concor and IR are a group. He defined the relevant market differently. According to him, transport by container trains is substitutable with transport by wagon but not with container service by road. The relevant market is 'freight service by rail in India'. As IR has a monopoly in freight transport by rail, it has an economic strength to act independently of competitive forces. IR is dominant in transport of freight by rail.

After holding MOR dominant R. Prasad, proceeded to decide if MOR abused its dominant position. R. Prasad, primarily relied on doctrine of legitimate expectations to decide if MOR has abused its dominant position. IR, when invited private parties to participate in container transport promised that they should be treated at par with Concor, but later on reneged. Some of the abuses were as follows: (a) PCTOs are charged higher running rates by IR, in comparison to Concor. The running cost being higher the rakes of PCTOs are lying vacant. (b) The increase in haulage charges levied on PCTOs has no scientific basis and therefore it results in exit of PCTO from the market. (c) Denial of transport of bulk goods to PCTO, IR has foreclosed the market. (d) At the time of advertisement to invite PCTO to participate in container transport by rail, there was no restrictions on use of private sidings by PCTO, but later PCTO were denied this facility whereas Concor was not (e) contrary to legitimate expectation, land at concessional rates is given to Concor for making terminals but not to PCTOs. Terminals build by Concor are also not allowed to be used by PCTOs (f) Maintenance of rakes of PCTOs by IR are often delayed resulting in loss of revenue to PCTOs. R. Prasad, decided to impose a penalty of 5% of average annual receipts of three years and advises establishment of a separate regulatory body to regulate relations between MOR and PCTOs.

VIII PARALLELISM – SECTION 3(3)

All India Tyre Dealers Federation v. *Tyre Manufacturers*[19] is an important case on parallelism covered under section 3(3). As the dissent of R. Prasad, though non-operative, appears to be more important than the majority opinion, the dissent is being discussed first.

IP are the association of tyre dealers. Originally information is provided to the monopolies and restriction trade practice commission under the MRTP Act. After

19 2013 COMP LR 0092 (CCI).

the repeal of the Act the case was transferred to CCI.

IP made certain allegations against certain tyre manufacturers in India. IP alleged certain anti competitive practices by certain tyre manufactures that they are indulging in collusive pricing, cartelisation, strangulating supply. They do not pass excise duty concessions to the consumers. They indulge in these practices since 1947. IP cited many reports supporting the claim of IP that tyre manufacturers indulge in anti competitive practices. In this connection the Report of Tariff Commission on Fair Prices of Rubber Tyres and Tubes 1952, cease and desist order of MRTP Commission issued against the tyre manufacturers in 1974 among others were cited.

The DG in his report stated that tyre market consists of four segments (a) original equipment (b) replacement (c) export segment and (d) state transport. DG found that five manufactures of tyres have formed a cartel and were indulging in anti competitive practices especially through Automotive Tyre Manufactures Association (ATMA). The five majors, who formed a cartel, were Apollo, MRF, Birla, Ceat and JK. DG reported that Goodyear, Dunlop, Bridge Stone, Michelin and Modi did not violate section 3(3).

On jurisdictional issues DG concluded that an agreement made before the commencement of the Act but acted upon after the commencement of the Act falls within the purview of the Act and the cases transferred from the MRTP commission would be proceeded in accordance with the provisions of Competition Act.

R. Prasad after analyzing the facts, report of the DG and submissions of the IP and OPs found that there is presumption of anti competitive agreement on the basis of the following.

(a) There exists a parallelism in the behaviour of the five tyre manufactures, Prasad emphasized that parallelism does not necessary lead to presumption that it is the result of an agreement but to arrive at such a presumption something more must be proved. The DG has reported that it is apparent from the behaviour of the parties that there was an agreement among them though it was not in writing.
(b) The fact that these five tyre manufactures not only did not use full capacity but actually under utilized the capacity, though they did not fully satisfy their commitments to OEM (Original equipment manufacture) who pay for tyres at a lesser rate but exported their products at the same time.
(c) The five tyre manufactures also divided the export market.
(d) Through ATMA (Automotive Tyre Manufactures Association), they pressurised the government to impose anti-dumping duty on Chinese imports and pressurized the government for BIS standardization of tyres.
(e) They also exchanged information through ATMA.
(f) All of them did not pass excise duty cuts to consumers.
(g) In 2009-2010 price of rubber gone down but they did not reduce the cost of the tyre.

Prasad, therefore, concluded that OPs entered into anti-competitive agreement and violated the provisions of sections 3(3)(a) and 3(3)(b)(i) and gave a cease and desist order and imposed penalty.

There appears to be a contradiction between the opinion of Prasad in this case

and his earlier decisions. In *Neeraj Malhotra*[20] he insisted that in order to apply the provisions of section 3(3) there must be a proof of meeting of mind. He reiterated this interpretation of the application of section 3(3) in 2011.[21] The author of the survey gave reasons as to why meeting of mind need not be proved separately but should be inferred if subsequent players follow the leader in imitating anti-competitive practices as opposed to normal market friendly business practices. In the present case Prasad tones down his earlier opinion that meeting of mind must be separately proved. He says in the present case, that parallelism in itself cannot lead to presumption, but something more must be proved. Instead of meeting of mind, now in this case it becomes something more. But what is this something more? Prasad seems to support presumption of anti-competitive agreement with something more in the nature of other anti-competitive practice such as non-utilization of capacity, consultation through ATMA, division of export market, lock outs *etc.*

However, it must be emphasized that if parallelism in itself is not sufficient to infer anti-competition agreement, parallel activity cannot become anti-competitive agreement with the help of another parallel practices such as under utilization of capacity. One assumption not proved beyond reasonable doubt cannot prove another assumption not proved beyond reasonable doubt.

However, in our opinion, there is an inference of anti-competitive agreement because an anti-competitive practice was carried on and followed by another. On the other hand the majority not only did not find any evidence of meeting of mind of anti competitive agreement but also refused to infer anti competition agreement from the circumstances of the case. However, they refused to agree with the OPs that CCI lacked jurisdiction in this case.

The first jurisdictional objection was that the IP made allegations before the MRTP commission on 28.12.2007 and therefore DG cannot extend investigation beyond 28.12.2007, OP also pleaded lack of jurisdiction on ground that the alleged agreement was made before the commencement of the Competition Act, CCI does not have any jurisdiction. CCI rejected both the arguments on the ground that section 26(1) does not limit investigation by DG to any specific period and that the CCI cannot proceed with the repealed procedure of MRTP Act and must proceed with the procedure of the Competition Act and also that if the agreement is acted after the commencement of the Act, CCI has jurisdiction.

On the competition issues the majority disagreed with the minority. There is oligopoly in the tyre manufacturing industry. Five manufactures control 95% of the market. There is inter-dependence on price and input decisions. Each rival takes into consideration strategic decisions of the other rivals.

CCI agreed that there is a likelihood of parallelism in the oligopoly market but parallelism is not necessarily anti competitive. There is difference between rational parallelism which is not uncommon in homogeneous oligopolistic market. Rational parallelism is necessary to prevent price war. By rational parallelism, CCI perhaps

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20 *Neeraj Malhotra* v. *Deustche Post Bank Home Finance Ltd.:* (2011) 102 CLA 181, 2010 Ind law CCJ 28 2.12.2010.

21 *Supra* note 6 at 150-153.

meant normal business practices, which is followed by all the rational players. But, what CCI, means when they say that rational parallelism is necessary to prevent price war. Price war is not against the interest the consumers as long as it is not predatory price war. According to CCI, that price parallelism is not anti-competitive *per se*, unless there are some additional factors to support the view that price parallelism is result of cartelisation. CCI seems to have agreed with the submission of the OPs that price parallelism is justified because (a) products are homogeneous (b) sources of inputs are similar and (c) prices are highly visible.

CCI, one by one, negated that the additional factors which could have led to the conclusion that parallelism was due to anti competitive collusion. The charge of the IP that tyre manufacturers colluded to under utilize their capacity, in order to prop up prices artificially, was not acceptable to the CCI. CCI made a distinction between available capacity and installed capacity. Utilization depends on demand, technical constraints and on lock outs. CCI did not find any definite pattern in capacity utilization sometimes it increased but at others decreased. Willful decreasing capacity utilization does not make any economic sense especially when imports were increasing. CCI decided that there was no willful under utilization of capacity.

CCI did not find any merit in the findings of DG that margins of the manufactures are continuously rising. CCI observed that there was no uniformity in the margins of the five leading tyre manufactures. Similarly, CCI observed that though the margins of dealers were increased but there was no uniformity in this increase and in any case margins were not excessive. All the five, according to CCI, did not improve their market shares uniformally. Apollo, Ceat, Goodyear and JK lost but Birla gained market share. There cannot be a cartel in this case as loosing market share to a rival does not make any sense.

Lastly, the majority examined the allegation that it was through ATMA (Automotive Tyre Manufacturers Association) that the members as a close knit family participated in certain courses of action to defend their market and entered into anti-competitive agreements. This allegation was rejected by the CCI. Acting unitedly for the welfares of the domestic market, for imposition of anti-dumping duty, for lowering of excise duty, or against un-remunerative price paid by OEM is not anti competitive behaviour. Making of low cost tyres to compete import from China is also not anti competitive. Collective effort to blacklist unscrupulous importers who under value or under invoice imports is not anti competitive. The so called division of territory was actually to keep a check on under invoicing or under valuation. Collective decisions of ATMA were to ensure fair play in the market. On the basis of all these considerations CCI concluded the five major tyre manufactures are not guilty of anti competitive behaviour, in violation of section 3(3).

IX CAPTIVE MARKET

Deepa Narula v. *Taneja Developers*[22] is a case on the concept of captive market, though the case was not admitted by the majority at the preliminary stage but R. Prasad, in a dissent, found it to be prima facie a case of abuse of dominant position

22 2012, 2012 Ind law CCI 47.

and referred the case to DG for investigation.

IP booked a plot of land for residential accommodation with the OP on 12.4.2006 and by May 2008 paid total amount of money. Even after six years of booking the land was neither developed not the plot allotted though initially OP promised to allot the plot in 3 years. It started the booking even before getting approval from the concerned authorities of the Punjab Government, which was given by the government in January 2008. IP was made to sign the one sided agreement, tilted in favour of OP, long after he made substantial payments.

In this dissent R. Prasad reiterated the concept of captive market; he referred to U.S. Supreme Court decision in *Eastman Kodak.*[23] The Supreme Court of the United States made distinction in the primary market, where there exist many competitors and the after market, where the opposite party becomes dominant.

R. Prasad says, IP made payment on the basis of misleading promises made in the advertisements and become captive, as at this stage exit for her would have been very costly. When, at the later stage, she was asked to sign the agreement, the captive consumer did not have any option but to sign the agreement.

Majority of CCI did not agree with the opinion of Prasad and the concept of captive market, interestingly without discussing the concept of captive market. The majority found relevant market to be 'all interchangeable products in the district of Mohali in Punjab'. According to the majority, IP had many choices in this market. OP was not in the opinion of the majority dominant in this market. Referring to section 19 of the Act, dominant position of the OP was assessed with reference to its market share, economic strength *vis- a- vis* its rivals in the relevant market and found not to be dominant.

The decision of the majority is disappointing for many reasons and has several infirmities. The majority did not discuss the distinction between the primary and the after market. If such distinction did not exist, in their opinion, they should have given reasons. The majority discussed that OP was not dominant in the primary market but was he not in the after market? The opinion of the majority that position of strength of a market player in assessed with reference to its rivals and not with reference to the consumers, may be literally correct but the economic strength of the player is assessed with reference to the rivals not for the sake of the rivals but to protect the interest of the consumers. All the provisions of the Act must be interpreted keeping in view the welfare of the consumers. The majority decided the concept of economic strength *vis-a-vis* the rivals as if the consumer is an outsider. The fact that the consumer was placed in a situation where recourse to the competitors was impossible was ignored by the majority.

Supreme Court: Section 66(3)

Girish Chandra Gupta and another v. *UP Industrial Development Corporation Ltd. and another*[24] is an appeal against the decision of Compact. Under section 66 (3) of the Competition Act all cases pending before the Monopolies and Restrictive Trade Practices Commission of India, shall on the Commencement of the

23 504 US 451 (1992).

24 AIR 2013 SC 352, 2012 (12) SCALE 65.

Competition (Amendment) Ordinance 2009, stand transferred to the competition appellate tribunal, constituted under the Competition Act, 2002 and shall be adjudicated by the competition appellate tribunal in accordance with the provisions of the Monopolies and Restrictive Trade Practices Act as if the Monopolies and Restrictive Trade Practices Act has not been repealed. As the case, though decided by the Competition Appellate Tribunal, relates only to the provisions of the Monopolies and Restrictive Trade Practices Act, the details of the case are not being discussed.

X COMPETITION APPELLATE TRIBUNAL: IMPLEADMENT

National Stock Exchange v. *CCI and MCX Stock Exchange Ltd.*[25] is an appeal against the decision of CCI and the unanimous decision of the Tribunal was delivered by Sirpurkar J. It is an application for impleadment filed by Financial Technologies (India) Ltd. (FTIL). FTIL challenged the order of 23.01.2011, wherein the CCI held that the appellant NSE has engaged itself in exclusionary conduct in the after market for exchange related programme in the currency derivative (CD) segment.

NSE also adopted a zero pricing policy for competing software NEAT on the web (NOW) owned by Omneysis Technologies Ltd. in which NSE has 28% share holding through its wholly owned subsidiary Dot Ex. NSE also put FTIL product ODIN on watch list.

FTIL contended that as the case decided by the CCI has a direct bearing on the business of FTIL it must be impleaded. FTIL contended that in order to eliminate ODIN, NSE started giving NOW free to its trading partners. NSE and FTIL entered into consent decree which provided that NSE would remove FTIL products from watch list.

FTIL argued denial of natural justice in order to be impleaded. FTIL contended that it was not aware of the report of the DG, and as the report has a bearing on the reputation of FTIL it must be impleaded. Compact decided not to implead FTIL as it was aware of the proceeding when the DG called FTIL for investigation.

XI COMPACT: ABUSE OF DOMINANT POSITION

The compact dismissed the appeal in *Singhania and Partners* v. *Microsoft Corporation Ltd. & CCI.*[26] The appellant a law firm made an allegation of abuse of dominant position against Microsoft Corporation. The appellant alleged that three different licenses are offered by Microsoft at different prices, though all three are the same products. Instead of less expensive license, the respondent forced them to purchase the costlier one. This amounted to abuse of the dominant position of Microsoft Corporation. The majority of the CCI held that they are different products because the IP did not produce any material to show that the products are identical on the basis of intended use to the customer. According to the majority as no case was made out, the case was closed. But minority took the view that a *prima facie* case was made out and the matter should be investigated by the DG. The dissenting

25 2011 COMPLR 0129.
26 2012 COMPLR 1107.

member gave weight age to the allegation that the respondent no. 1 was putting artificial restriction on the consumer to purchase the costlier license.

Compact held that Microsoft did not sell software of 'Microsoft Office' or 'Microsoft Word' but three different licenses to use them. Different IP rights bear different prices. As all the three licenses have different obligations, the appellant is wrong in asserting that it should have been given a choice to purchase any of three licenses.

There is difference between three licenses. In case of license for OEM, support to the end user has to be provided by OEM, where as in case of volume licensing channel, Microsoft has to incur substantial cost in providing support. Hence difference in prices. Appeal was dismissed. There was no contravention of sections 3 and 4 or any other provision of the Act.

Compact: Bid Rigging

M/s. International Cylinder (P) Ltd. v. *CCI and others*[27] is an appeal against *suo moto* action taken by CCI against 50 LPG Cylinder manufacturers against bid rigging by them. In *M/s. Pankaj Gas Cylinders Ltd.* v *Indian Oil Corporation*,[28] DG reported that there was similarity of pattern in bids submitted by all the 50 bidders. The bids of large number of parties were identical or near identical, though the rates were quoted for supply in different states. CCI imposed a penalty at the rate of 7% of the average annual turnover of the last three years. The appellant sought a blanket stay on the orders of CCI.

In the lengthy arguments the appellant submitted that there was no bid rigging and no meeting of mind. If there was a common pattern of bids it was because of several factors. (a) Similar material for making cylinders was used by all the manufacturers. (b) All the manufacturers were not members of Cylinder Manufacturers Association. (c) All the members of the association did not attend the meeting of the association on 2nd and 3rd March 2010.

Compact was not prepared to grant blanket stay as there was rampant bid rigging in the supply of LPG cylinders, though, without expressing any opinion on the case, Compact seems not to favour imposition of same penalty on all. Compact ordered them to deposit only 10% of the penalty and provide security for the rest of 90% within four weeks of the order. The case was posted for hearing in December 2012.

Compact: Exclusionary behaviour

M/s. Pitambra Books (P) Ltd. v. *Andhra Pradesh Open School Society*[29] is an appeal against the order of CCI. The Appellant are a printer and publishers of books. The respondent, an autonomous organization of Government of Andhra Pradesh, invited tenders only from firms located in four south Indian states of Andhra Pradesh, Karnataka, Tamil Nadu and Kerala. The appellant though capable of publishing in south Indian language became ineligible to participate in tender process. The appellant claimed violation of sections 3(3), 3(4) and 4 of the Act.

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27 2012 COMPLR 1116.

28 2011 Ind law CCI 27.

29 2013 COMPLR 0006.

CCI by a majority decision concluded that no provision of the Act was violated on the following grounds:

(a) Respondent 1 was not engaged in any commercial activity, it was not an enterprise
(b) Respondent 1 being an end user of the books was only a consumer and not part of the production or provision of service chain
(c) Respondent 1 is not a dominant player.

The compact refused to pass any order since the appeal has become in fructuous as the said impugned invitation to tender was withdrawn by the Respondent along with the limiting condition. However, it must be added here that section 2 (h) of the Act makes distinction between sovereign and non-sovereign functions and that relations between respondent no.1 and the bidders were commercial.

Compact: anti-competitive agreement

Compact dismissed the appeal against the order of CCI in *Travel Agents Association of India* v. *Lufthansa German Airlines*.[30] Before the CCI, the IP alleged violation of sections 3 and 4 by a number of foreign airlines. The informant alleged that Lufthansa, Air Canada, Australian Airlines, Continental Airlines, Air France acted as a Cartel and in a concerted action reduced the commission of the travel agents. IP also alleged abuse of dominant position. According to IP every one of these airlines is dominant on particular route on which the airline operates.

However, the DG did not agree that there was a violation of sections 3 and 4. DG defined the relevant market as international flights provided by foreign airlines in India and not the particular routes operated by the particular airline. DG found that there was no cartelisation and no violation of section 3(3) by the airlines as (a) these airlines operating on different routes are not competitors (b) there was no evidence of meeting of mind and (c) reduction in commission paid to the agent is done everywhere (and is a normal business practice). CCI agreed with the findings of DG and compact also agreed with the decision of CCI.

However, it is difficult to agree with some the opinions expressed by Compact in this case (actually the compact in this case did nothing other than agreeing with the opinion of the DG of the Competition Commission of India). In spite of the fact that theoretically all the routes, operated by foreign airlines, as Compact found, are substitutable, hence relevant market is all international flights operated by foreign airlines in India. However, in practice, they are not substitutable. An airline operates only on an assigned route. Without obtaining permission from a number of agencies and without doing considerable home work and arranging resources, an airline cannot operate on a new route. At a given point of time consumers' choice is limited to only those airlines serving the destination. It would have been better if the Compact would have redefined the relevant market rather than agreeing with the CCI and DG.

30 2012 COMPLR 0038.

As pointed out in the survey of 2011,[31] it is difficult to agree with the compact, that there was no evidence of meeting of mind. In this case one airline followed the decision of the other airline. It is a case of follow the leader, a practice carried on. In case of 'follow the leader' the important question to be decided is if the followed practice is anti competitive practice and comes within the mischief of section 3(3) or is a normal business practice.

The argument of the appellant, relying on the report of Auditor and Comptroller General that the share of individual airlines is very high on the route of operation was rejected by Compact on a misconceived ground. According to Auditor and Comptroller General the share of Lufthansa was 87%, Air France 73%, KLM 76%, Swiss Airlines 63%, and Singapore Airlines 49%. According to the Compact this cannot be relied upon as total comes to 434%. Therefore, it was not possible for the Compact to rely on this data. There was actually no reason for the Compact to add the seat share of these airlines. Actually the share was with respect only to the destination and route served by a particular airline. The appellant appears to be right in maintaining that each airline was dominant on the route it served.

XII CONCLUSION

The performance of the CCI during the year 2012 has been, as was the case during 2011, disappointing. The author of this survey is of considered opinion that whenever two or more interpretations are possible, the interpretation that promotes the objective of the Act should be preferred, even at the cost of literal interpretation. The essence of the objective of the Act can be summarised in a single sentence, thus, a competitive activity which is heavily tilted in favour of the actor, and is designed to cause loss to the consumers, must be construed to be prohibited under the Act. The disappointing performance of the CCI is most apparent in cases relating to construction of buildings for residential purposes. This is one of the few sectors where demand always exceeds the supply. When all the builders impose similar one sided terms favourable to the builder, it is difficult to understand as to how the CCI is able to maintain that the consumers have choice. CCI either should follow the interpretation of Prasad and define the relevant market as captive market or better still the interpretation given by the author of this survey for the year 2011 that if parallelism is following of the anti competitive practices which cannot be considered to be activities in the normal course of business, should be accepted. As pointed out earlier, R.Prasad has partially modified his opinion on parallelism in 2012. Hardly any significant contribution to the advancement of law was made by the Competition Appellate Tribunal. Compact either agreed with the majority of the CCI or passed orders on procedural matters.

31 *Supra* note 8 at 157-159.