6

COMPETITION LAW

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I INTRODUCTION

INDIA, AFTER 1990, is fast becoming a free market state. Though a huge majority of Indian population still live below poverty line, and even many more find it difficult to satisfy their basic needs, the welfare state is being systematically dismantled. All the organs of the state follow the core ideology of the state, though they may differ on peripheral issues. Competition commission and other forums implementing competition law are no exceptions. They also willingly or unwillingly promote the ideology of night-watchman state and give greater weightage to the concerns of corporates than to the concerns of the consumers.

In the year 2015 the Competition Commission of India (CCI) and other forums, by and large, followed the course set in the preceding years. Concerns of corporates were given more weightage than the concerns of the ordinary consumers. The forms continue to be very reluctant to apply the concept of captive market specially in the field of service provided by the real estate business. The commission is not willing to give relief to the consumers of real estate consumers, though they by and large renege on the promises made to the consumers. In *Sunil Bansal*,[1] case the CCI refused to apply the concept of captive market though it is a case where there is imbalance of power between two parties. This year the commission introduced the well known but highly controversial economic concepts of Elzina Hogarty test and catchment area analysis and Herfindal Hirschman index in defining Relevant Market (RM) and market power of an enterprise. The Competition Appellant Tribunal (CompAT), on the other hand made a distinction between close and distant substitute.

II ANTI-COMPETITIVE AGREEMENT: ASSOCIATIONS

In P.K. *Krishnan* v. *Paul Madavana*,[2] the Information Provider (IP) alleged the violation of sections 3 and 4 of the Competition Act, 2002 against Opposite Party

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1 *Sunil Bansal* v. *Jaiprakash Associates*, 2015 Comp L R 1009 (CCI).

1 Case No. 28 of 2014, decided on December 1, 2015 by CCI.

2 Case No.39/2012 decided on February 5, 2014.

(OP)s. IP is the sole proprietor of Vinayak Pharma engaged in distribution of pharmaceutical products of about 15 companies in the district of Palakkad. OP2 is a pharmaceutical company engaged in manufacture of generic and branded drugs, OP1 is divisional sales manager of OP2. OP3 is a registered society to maintain harmony among pharmaceutical producers and traders *etc*. and facilitate exchange of information among them.

On the basis of record, the Director General (DG) found that All Kerala Druggist and Chemists Association (AKCDA) and its office bearers insisted on obtaining No-Objection Certificate (NOC) for appointment as stockist of a pharmaceutical company, and hence violated the provisions of section 3(3) (b). But the DG also found that the IP did not disclose certain material facts. The IP suppressed the fact that he was appointed a stockist on March 19, 2y014 and the very next day he got first stock invoice.

The CCI framed two issues namely, (i) whether the suppression of some facts by the IP made the proceedings infructuous? And (ii) whether the conduct of OP2 and OP3 amounts to contravention of any provision of section 3 of the Act. In addition to these issues there was also an issue raised by OP3 that CCI lacked jurisdiction in as much as the Licensing Authority under the Drugs (Prices Control) Order, 2013 has exclusive jurisdiction in such matters and not the CCI. But CCI rightly did not agree as the jurisdiction of CCI is in addition to the jurisdiction conferred under the provisions of any other existing law.

Regarding the first issue, that the informant suppressed a material fact, the CCI pointed out that if chronology of events is examined, the OP2, before finally appointing the IP a stockist, refused to appoint him a stockist and allegedly telephonically informed him that refusal is for lack of NOC from the association. The CCI is concerned with the initial refusal by the OP3 to the IP for lack of NOC and not subsequent appointment as stockist. Though, finally IP was appointed a stockist, the real question which is being contested is the initial rejection and return of demand draft sent by the IP along with the application for appointment as a stockist, and not subsequent appointment. The issue of non disclosure of material facts by the IP, and imposition of penalty under section 45 (1) (b) for non disclosure shall be taken up later.

The second issue relates to contravention of section 3 by OP2 and OP3. On the basis of letters written by OP3 to certain pharmaceuticals regarding necessity of obtaining an NOC from the association before appointing some one as a stockist, and various excuses expressed by these pharmaceuticals for letters written by their officers to stockists for the need to obtain NOC from OP3, the CCI found OP3 guilty of anti-competitive activities under section 3 (3) (b). Certain specified officers of OP3 also indulged in anti-competitive activities under section 48(1). The fact of denial of supply by OP2 to IP, the stockist, is established through the letter written by OP1. The CCI further observed that 'Since OP3….was not itself engaged in supply and distribution of drugs and medicines in the market and OP2 is the manufacturer of drugs and medicines, as such, any agreement between OP2 and OP3 being not between entities engaged in identical or similar trade of goods or provision of services as envisage under section 3 (3) of the Act, does not fall within the ambit of the said sub section.'

The CCI also found that 'such an agreement between OP2 and OP3 cannot also be considered to be an agreement between entities at stages or levels of the production chain in different markets in term of provisions of section 3 (4) of the Act.'

It is difficult for us to agree with the CCI regarding non application of section 3 (4). The opening words of section 3(4) are 'Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services…' Obviously OP3 produces nothing, it also in itself did not distribute but it entered into agreement with OP2 which directly affected the distribution and supply of medicines and drugs. Therefore the agreement between OP2 and OP3 should fall within the ambit of section 3 (4), however the CCI did not think so.

But referring to a case *H.L. Hiranandani*,[3] decided by the CCI, such a case falls under section 3 (1) which reads as follows, 'No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.' But how it falls within the ambit of section 3 (1) has not been clarified by the CCI. Perhaps it is so because section 3 (1) uses the word 'association'. But section 3 (1) requires the proof of (AAEC) appreciable adverse effect on competition in India. The CCI summarily found the evidence of AAEC, 'Denial of supply to unauthorised companies like OP2 undoubtedly affects the competition in the market, adversely and appreciably.' The CCI also found certain officers of OP2 guilty of anti-competitive activities under section 48 (1).

Another case on anti-competitive agreements by a trade association is *Royal Agency* v. *Chemists and Druggists Association.*[4] The present information was filed by Royal Agency against Chemists and Druggist Association Goa, OP1, and M/s. Franco-Indian Pharmaceuticals Pvt. Ltd.,OP2. The IP is a distributor of drugs and medicines in Goa, OP2 appointed them as a distributor of their drugs and medicines. The allegation is that the OP2 initially supplied medicines to them but later stopped the supply under coercion of OP1 because IP is not a member of the OP1 and did not obtain an NOC from them.

The CCI in an earlier *MRTP* case[5] and a *suo moto* case,[6] found OP1 violating the provisions of section 3(3) (a) and (b). On the basis of examination of the proprietor of IP and a representative of OP2, the DG, in his report found that the supplies were stopped because the IP was supplying medicines to the same retailers to whom the existing distributor, a member of the OP1, was supplying and also it was due to coercion

3 Case no.63/2013 decided on October 27, 2015.

4 2015 Comp L R 212 (CCI).

5 *Re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.*, case no.5/2013 decided on October 27, 2014.

6 2014 Comp L R 184 (CompAT).

by OP1. The DG concluded that OP1 has contravened the provisions of section 3 (3) and OP2, acting under the suggestion of another distributor Drogaria Menezes and CIA, stopped supplies violating the provisions of section 3(4) and there was AAEC.

The CCI framed three issues namely, (i) whether the allegation levelled by the IP regarding stoppage of supplies by OP2 has been substantiated by the evidence, (ii) whether such stoppage of supplies by OP2 to the IP is on account of directions of OP1, and (iii) whether the conduct of OP2 is in violation of the provisions section 3 (4). The CCI, on the first issue concluded that there is no evidence to show that OP2 has stopped the supplies of medicines to IP. The CCI found the explanation of OP2, that the break in supply of medicines to IP was only for a short period for making due diligence. Regarding the second issue, the CCI accepted that the letter written by Drogaria Menezes and CIA to OP2 was only to inform them that additional orders cannot be placed because IP was also supplying medicines to the retailers of Drogaria Menezes and CIA, they did not ask OP2 to supply or not supply to any one. Drogaria Menezes and CIA did not influence OP2, not to supply medicines to the IP. The CCI concluded that regarding issues 1 and 2 there does not exist any competition issue. The CCI also disagreed with the DG on the third issue that there was a vertical anti-competition agreement between OP2 and Drogaria Menezes and CIA. "The facts of the case indicate that after OP2 has started supplying to the IP, other distributors had stopped placing orders with OP2 for 6-7 days may be because the IP was catering to their client. Therefore, a commercial business decision taken by OP2 to discontinue supplies for a short duration to inquire into the said situation cannot be brought within the purview of section 3 (4) of the Act." As there was no contravention of the provisions of the Act, the matter was closed.

But a dissenting opinion was given by Augustine Peter, one of the members of the CCI. The member framed three issues, namely, (a) Whether OP1 has controlled/ restricted the supply of medicines in Goa by insisting on obtaining NOC from it, (b) whether OP2 by entering into agreement with Drogaria Menezes and CIA, whose proprietor was the chairman of the wholesale wing of the OP1, violated the provisions of section 3 (4), and (c) whether the persons associated with OPs are guilty under section 48 of the Act?

It was emphasised that in the competition cases, if it is difficult to get direct evidence, circumstantial evidence should be relied upon, The dissenting member referred to the CompAT decision in *M/s International Cylinders (P) Ltd.* v. *CCI*,[7] in which it was observed that "a strong probability would be enough to come to the conclusion about the breach of the provisions of the Competition Act" and that "the appropriate standard is civil standard and the case is, therefore, required to be proved on the balance of probabilities."

The dissenting member referred to the sequence of evidence in detail. The present

7 *Supra* note 5.

8 *Supra* note 6.

case is the third case against the OP1. In the first case,[8] which was transferred to the CCI under section 66 of the Act, the CCI held that OP1 was guilty of violating section 3. The OP1 was required to withdraw the guideline requiring non appointment of non-members as stockists and wholesalers and requirement of NOC for appointment as stockists and wholesalers. The second case was a *suo moto* case[9] on a complaint that the OP1 has not followed the directions given by the CCI in the first case. In this case the OP1 was found guilty.

The IP had worked for Agostinho Menezes, the proprietor of Drogaria Menezes and CIA, the authorised distributor of OP2, for 30 years. There was obviously a conflict of interest between Menezes and the IP when he learned that that OP2 has also appointed the IP one of the distributors. OP2 had stopped supplies to the IP under threat of boycott from OP1 if it continued to supply medicines to the IP, a non member of the OP1. The majority found that no competition issue is involved as it relied on the statement of Menezes that he did not ask OP2 to stop supplies to the IP.

The dissenting member analyses the evidence from a different perspective. He assesses the evidence on the touch stone of 'balance of probabilities and not on 'beyond reasonable doubt'. If the circumstantial evidence points to 'strong possibility' the OPs must be damned. The erratic behaviour of the IP points to certain conclusion. First she files information with the CCI alleging that OP2 stopped supplies at the instance of OP1 as she was not a member of the OP1 and did not have NOC. Later she produces a letter to the CCI written by her to OP1, stating that she has become a member of the OP1 and has no grievance against OPs, and requests withdrawal of proceedings. The dissenting member points out that the CCI is not a platform for parties to negotiate settlement but its duty is to prevent anti-competitive practices.

The dissenting member after citing the chronology of events observed that supplies were resumed by OP2 only after the IP approached the Commission and after ensuring that IP becomes the member of OP1. The IP who approached the CCI on August 8, 2013 and for interim relief under section 33 on August 19, 2013 against being pressurised to take membership of OP1, finally withdrew the information on the basis of taking membership of OP1 and after resumption of supply of medicines. It appears that the withdrawal of the information was a part of the deal between IP, OP1 and OP2 (the withdrawal letter was undated). It appears that the entire matter revolves around IP taking the membership of OP1. The supplies, though honoured initially were stopped midway due to pressure of OP1 on OP2. They were resumed only after IP approached the CCI on August 8, 2013. There after the IP withdrew the information on July 17, 2014, when IP took the membership of OP1.

According to the dissenting member, there is sufficient indirect evidence (we will prefer to use the term circumstantial evidence) to prove the culpability of OP1. (i) Though the OP1 on June 7, 2013 issued an advisory that NOC is not mandatory but OP1 did not do anything when it came to know that the IP raised the issue of NOC before the CCI. The majority says that IP should have approached the OP1, but it is

9 2016 Comp L R 2 (CCI).

difficult to appreciate this as at the relevant time the IP was not a member of the OP1. (ii) As per the affidavit of the IP she was being forced to become the member of the OP1. (iii) The OP1, when it came to know that its conduct on NOC was being questioned by the IP it should have clarified to the IP that there is no mandatory requirement of NOC. Alternatively OP1 could have checked with the OP2 if they stopped the supply because of absence of NOC, but they did nothing of the sort.

It is clear from the record that the supplies resumed only after the IP approached the CCI and after ensuring that IP applies for the membership of the OP1 and would withdraw the information. Thus it is clear that entire issue revolves around the IP taking the membership of OP1. These facts points to the culpability of OP1, despite earlier orders of the CCI.

The next issue relates to the culpability of Agostinho Menezes, who simultaneously was a competitor of the IP, and an office bearer of the OP1. The facts points out that OP2 stopped supplies to IP after being influenced by Menezes. As Menezes was an office bearer of the OP1, it can safely be concluded that the act of Menezes was the act of OP1. Menezes, chairman of the whole sale division of the association, was in a position to influence the mind of other office bearers of OP1. In addition to this, Ashish Raiker, vice president (north) of the OP1 was also one of the four distributors of OP2. Thus the will of these two interested and affected persons might have influenced the mind of other members. The reply of the counsel of OP2, dated November 11, 2013, to the CCI shows that OP2's decision to stop the supply of medicines was influenced by the OP1 and its office bearers. "If the Commission issues a directive to our client ordering them to supply drugs to the informant, our client would be glad to honour such an order of the Commission….However our client does not wish to fuel misunderstanding with the CDAG." Thus it is clear from the foregoing that some kind of pressure was exerted on OP2 by OP1. OP2 is willing to resume supplies but does not want to create any misunderstanding with OP1. Not only OP2 but all the pharmaceuticals in Goa must be living under such threat. OP1 has coerced OP2 not to supply to the IP. The deposition of the president of OP1 points to this conclusion. "We understand that he (Mr. Menezes) may have informed the Company (OP2) that his sale is affected after the entry of the IP in the same market."

The basic difference between the majority and minority is that whereas the majority requires strict proof to establish the existence of anti-competition agreement, the minority on the other hand demands proof of strong probability. If the sequence of events point to a strong probability of anti-competition agreement, though individual events independently do not so point to such probability, the events in their entirety will be taken to prove anti competition agreement. Actually this is an extra-legal economic policy question. What is more important; autonomy of market players or fair competition? The majority and minority seem to have difference of opinion on

this economic policy issue.

III PARALLELISM: CARTELIZATION

Express Industry Council of India v. *Jet Airways (India) Ltd*.,[10] is a case decided by CCI on alleged cartelisation by OPs. IP is a non-profit organisation company registered under Companies Act to secure the interest of express industries, such as Blue Dart, FedEx, DHL, First Flight and UPS, in all aspects. The information is that OPs connived to introduce a Fuel Surcharge (FSC) for transporting cargo at a uniform rate of Rs. 5/- per Kg. *w.e.f.* May 15, 2008. The fact of levying FSC at uniform rate from the same date constitutes an act of cartelisation. It is also alleged that the FSC has nothing to do with the cost of fuel as when cost of fuel is reduced there is no corresponding decrease in FSC. Even when fuel price is decreased FSC is increased.

The DG reported that no evidence of collusion is found, yet the behaviour of the OPs with respect to the imposition of FSC was not in conformity with the market conditions in which the competitors are competing. After going through the replies of IP and OPs, the CCI framed the issue that, "whether the OPs have operated in concerted manner while fixing the FSC and thereby violated the provisions of section 3(3) read with section 3(1) of the Act.

The CCI first determined the question as to what are the factors that determine the price of FSC. ATF (aviation fuel) price is the main factor to determine the price of FSC. But there are other factors as well, such as market conditions, pricing by competitors, US dollar- Indian rupee exchange rate, operating cost, infrastructure, and manpower *etc*. However there are many cases where FSC price was increased despite fall in ATF prices. Though FSC is an important component of over all pricing of cargo, the explanation given by OPs that the pricing of FSC depends only on the price of ATF and exchange rate of USD-INR is not satisfactory.

The next issue examined by the CCI was whether OPs acted in a concerted manner? According to the DG though parallel action was exhibited by the airlines but the airlines do not show any concerted action regarding revision of FSC. But the IP does not agree with the DG. No specific reason for the parallel action in fixation of FSC at certain periods was given by the OPs. The IP submitted that air freight was but FSC was not commissionable. Many other factors were loaded into FSC to deny commission to the agents.

The CCI noted that 'agreement under section 2(b) includes arrangement, understanding and action in concert. "In most cases, the existence of anti-competitive arrangement or agreement must be inferred from a number of coincidences and indicia, which taken together, may, in the absence of any other plausible explanation, constitute evidence of existence of an agreement." Are there many coincidences and indicia to warrant existence of anti-competitive agreement? In 2008, OP1, OP2, OP3 and OP4 charged FSC at the rate of Rs. 5/- per Kg. at the same time. In 2011, OP1, OP2 and

10 See, V.K Dixit, "Competition Law", *ASIL* 150-159 (2011).

OP3 increased the rate to Rs. 9/-. In November 2012, OP1 and OP2 increased the FSC at the same date. Whenever the FSC of one airline has gone up the increase was followed by other airlines as well. As regards absolute change in the FSC, during 2008-2012, there is a high degree of positive pair wise correlation between different airlines indicating that FSC of the airlines moved in tandem during 2008-2012. As regards percentage change in FSC the direction is positive except in case of Air India and Spice Jet. CCI further stated that when a high degree of correlation was established, there was no reason to assess percentage variable.

The DG also observed that a change in the FSC rate did not affect the demand for cargo as the consumer did not have alternative options to air cargo. Therefore FSC plays a vital role in revenue generation. As DG noted that there no evidence of any contact or communication between the airlines, parallel conduct would be anti-competitive except only when adaptation to the market condition was done independently and not on the basis of information exchanged between competitors. Some of the officers of the OPs stated that information might have been exchanged through some employees of the OPs or through booking agents. It points to the fact that the OPs have a means of exchanging information indirectly. Thus the CCI found that the OPs have acted in a concerted manner through indirect means of consultations. However, as OP5 was never part of commercial/economic aspects of cargo operations (it was handed over to third party vendors), therefore OP5 is not a party to concerted action. As regards OP4 CCI noted that in September 2012 whereas other airlines raised FSC to Rs.12/- , OP4 raised it only to Rs.11/-. In November 2012, OP4 charged only Rs. 13/- whereas others Rs. 15/-. In the result OP1-3 are guilty of violation of section 3 (3) of the Act and appropriate penalty was imposed.

This case is important because it is case in which without any proof of overt exchange of information and without any direct proof of meeting of mind, circumstantial evidence of parallelism was found sufficient to draw the inference of meeting of mind. This has been discussed earlier at length that parallelism may, under certain circumstances be sufficient to draw the inference of meeting of mind, without any proof of meeting of mind. [11]

IV RELEVANT MARKET AND DOMINANT POSITION

Financial Systems (P) Ltd v. *ACI Worldwide Solutions (P) Ltd*,[12] is a case decided by CCI on relevant market and dominant position. The IP specialises in electronic payments, financial transactions processing solutions and services. It is technology partner, system integrator and co-inventor for several leading banks. IP has two business divisions FSS and FSSNeT. FSS offers technological services and system integration etc. FSSNeT offers payment processing services, ATM and Point of Sale (POS) services *etc*. OP1 is a subsidiary of OP2 and OP3 is a company incorporated in Singapore. OP1-OP3 (ACI) is group companies.

11 Case no.52/2013 decided on January 13, 2015.

12 *Supra* note 1.

OPs are engaged in the business of developing BASE24, transaction processing switch software (electronic fund transfer (EFT) switch), which enables the ATM, POS terminals to communicate with relevant bank's core banking system. The relationship between OPs and banks which use BASE24 software ('ACI banks') is governed by a licence granted by ACI. IP and OPs have a long standing relationship, IP providing value added service to ACI banks, beginning from 1991, when IP's FSS was authorised to re-sell BASE24 software. In 1998, however in a new arrangement, FSS became distributor and service provider for BASE24 software. In 2008, distribution arrangement was terminated with FSS, but ACI endorsed FSS as service provider to ACI banks. In 2011 ACI informed ACI banks that service would be provided by ACI or its authorised agents excluding FSS. But the ACI banks opposed the proposition as the ACI does not have the capability to provide support system. However in 2013 the ACI took the position that FSS would not be allowed to offer support system as ACI has enhanced support system (ACI ESP). Based on the above averment the IP alleged that the OPs have abused their dominant position in as much as they do not allow banks to use support system of their choice, imposing unfair conditions in sale and purchase of services through exclusive supply arrangement with ACI, directing banks not to use the service of FSS thereby restricting the provision of services, using its dominance in upstream market for entry into down stream market. IP also alleged violation of section 3 (4) as it is foreclosing competition in downstream market thereby causing AAEC in the downstream market. The CCI ordered investigation by the DG and granted interim relief under section 33 that the order of the ACI would not be implemented.

The CCI framed two issues for determination namely (i) whether the provisions of section 4 have been violated, (ii) whether the provisions of section 3(4) have been violated. Determination of the Issue (i) requires determination of three sub issues.

(i) Determination of RM.
(ii) The dominance of ACI in the RM.
(iii) Alleged abusive conduct of ACI.

Before proceeding further it is useful to understand the relevant card based technology. There are two types of card usage.

(i) On us: When card of bank A is used at an ATM of bank A, the EFT (*exchange traded fund*) switch of bank A authenticates it after routing through bank A's core banking business.
(ii) Off us: When card of bank A is used at an ATM of bank B, the EFT switch of bank B rout it to the EFT switch of bank A, the EFT switch of bank A authenticates it after routing it through bank A core banking business. Authentication then routed to the EFT switch of bank B. In Off us mode multiple EFT switches are used.

The DG defined two RMs in this case. The market of EFT switch software in India (upstream market) and the market for customised modification of EFT switch

software in India (downstream market). The CCI agreeing with the DG and rejecting the contention of the ACI observed that an EFT switch performs a distinct function, which cannot be performed by any other payment software, as suggested by ACI, as each of them performs a distinct function and are not interchangeable. Other payment software only supplements EFT switch software but cannot replace it. But CCI does not agree that EFT switch software alone is relevant in accessing bank's core banking. CCI also concluded that interchange switch and EFT switch are interchangeable and are part of the same RM. Similarly the DG, in considering dominance of ACI, considers only the competitors of ACI in providing EFT software service. The CCI observes that many banks use Arkansys switch in accessing core banking. Many non banking institutions also use EFT switch software. CCI observed that BASE24 is a sunset technology, as no further research in developing it is taking place. Its share in the market is continuously diminishing. Hence it is not dominant.

The next question is whether provisions of section 3 (4) are violated, whether the agreement between ACI and its consumer banks that FSS is to be excluded from providing value added service amounts to anti-competitive vertical agreement. The CCI found that there is no violation of clauses (a), (b), (d) of section 3 (4) as the banks are only consumers and not part of production chain. It is difficult to agree with the CCI as the banks in our opinion are part of the production chain in as much as they pass on the service provided by ACI to the bank's consumers. If we refer to section 3(4), it provides that 'any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services', it difficult to agree that the banks are not supplying or distributing the service to their consumers, and that they are not part of the production chain.

One of the members, S.L.Bunkar, gave a dissent but agreeing with the majority that the provisions of section 3 (4) have not been violated and disagreeing with them that provisions of section 4 are not violated. The majority found the ACI was not dominant because they accepted the contention of ACI that EFT switch and interchange switch are substitutable. The dissenting member disagreeing with this proposition, made a distinction between the functions of EFT switch and interchange switch. An interchange switch facilitates inter banking transactions. It comes into operation when acquiring bank and issuing bank are not the same. EFT switch, on the other hand facilitates authentication and authorisation of card based transactions including transactions routed by interchange. In view of the regulatory regime banks as users of EFT switch software constitute a market different from other users of EFT switch software? In this market ACI is dominant, because volume of number of transactions of devices connected to EFT switch is the true indicator of market power, on which the DG has based his conclusion. According to the dissenting member, behaviour of ACI is abusive as it did allow the ACI banks to choose a service provider of their own

choice. ACI imposed unfair and discriminatory conditions on the banks.

V ABUSE OF DOMINANT POSITION

Sunil Bansal v. *Jaiprakash Associates*,[13] are cases on abuse of dominant position. In all these cases the IPs alleged that OPs are guilty of abuse of dominant positioning in violation of section 4 of the Act. IPs in case no.16/2012 and 45/2013 are allottees of residential flats in Jaypee Sun Court and Jaypee Sea Court in Greater Noida. The allegation is that the OPs have imposed highly arbitrary, unfair and unreasonable conditions in allotment of residential apartments violating the provisions of sections 4 (2) (a) and 4 (2) (e) of the Act.

It was alleged by the IPs that many terms of buyers' agreement were one sided and highly unfair to the IPs. The agreement did not mention the name of the project, the consideration, the sale price, car parking and preferential location charges. At the time of the booking of the flats, the consumers were not informed of the clauses relating to maintenance deposit, maintenance charges. It was obligatory for the applicants to execute separately maintenance agreement; the allottees would not have any right in the common areas. The OPs can make unilateral changes in the original plan. In case of breach of contract by the consumers heavy penalties including cancellation of membership could be imposed by the OPs but for any delay in construction there were no penalties.

The DG in its report found the allegations of unfairness to be true but found that the OPs were not dominant in the RM, whereupon the IP in case no.72/2011 objected that the DG did not define the RM correctly. The DG in the original as well as in the supplementary report defined the RM as 'provision of services for the development of integrated township in the territory of Noida and Greater Noida.' However the DG in his supplementary report, on the basis of information provided by authorities, noted that in terms of size, scale, magnitude, amenities, facilities, usage and other features of integrated township cannot be compared with other developers' projects. Thus the DG noted that the OPs have the largest share in the relevant market. The DG opined that the OPs have violated the provisions of section 4 (2) (a) (i) of the Act.

After considering the information, the report of the DG, and submissions of the parties, the majority of the CCI framed two issues. (a) whether the CCI has jurisdiction in the present matter? (b) whether the Jaypee group has violated the provisions of section 4 of the Act. Regarding the first issue it was argued by Jaypee group that the CCI cannot order further investigation, in accordance with the provisions of section 26 (7), without inviting the comments of the parties on the report of the DG. Secondly while passing the orders for further investigation, the CCI should not have entered into the minute details of the case.

13 2014 Comp L R 285 (Del).

14 III (2016) CPJ 31 (TA).

The CCI did not agree with the contention of the Jaypee. They referred to High Court of Delhi case *South Asia Lpg Co.* v. *CCI*.[14] In this case the high court made a distinction between 'further investigation' and 'further inquiry' given in section 26(7), as the CCI may either order further investigation by the DG or itself may proceed with further inquiry. The court held that the commission may give directions for further investigation, if on the basis of material collected by the DG and after consideration of the objections it is neither able to close the case nor able to proceed from investigation to the inquiry stage and is of the opinion that there are lacuna or deficiencies in the report of the DG. No hearing is to be given in such a case. In case of further inquiry, as the commission has formed an opinion, hearing has to be given. Therefore, for further investigation there is no need for providing opportunity of hearing.

The next question before the CCI was whether Jaypee has violated the provisions of section 4? As section 4 applies only to a dominant enterprise in a RM, RM has to be defined. The DG, while defining RPM (relevant product market), observed that residential property is different from other commercial properties. A potential buyer takes many factors such as, brand value, number of project completed by the builder, delivery time, value for money, amenities, design, material, fixtures, location of the project and location of civic facilities (schools, hospitals *etc*.). RPM was defined as 'the provision of services for development and sale of residential apartments.' Jaypee agreed with this definition but IPs did not. However after further investigation the DG defined the RPM as 'the provision of services for the development and sale of residential apartments in integrated township' as the Jaypee claimed that it is developing integrated township. The DG opined that integrated township is different from the stand alone residential apartments. Integrated township means it must have schools, hospitals, shopping malls *etc*. As the Jaypee in advertisements promised to develop integrated township, the DG rightly defined the RPM with reference to integrated township. But Jaypee argued that they did not develop any integrated township but used the term 'integrated township' for marketing purposes. Strangely, the majority accepted the argument. We do not agree with this position. If translated into straight forward language it means that Jaypees did not intend to develop integrated market but claimed to develop such township to befool the gullible prospective buyers. In our opinion the majority has many options to bind the Jaypee group with their false claim. The CCI could invoke the doctrine of promissory estopple or equity's maxim 'one who comes to equity must come with clean hands' or the well known principle of common law that 'No one should be allowed to take advantage of one's own wrongs'. Alternatively the majority could have applied the concept of 'captive market' on grounds that the buyers were asked to sign the unfair buyers agreement after they made substantial payments to the builder as at that stage exit from the project would have been very costly to the IPs as the agreement contained penalty clauses for exiting the project. Regarding the RGM (relevant geographic market) the DG defined it as 'Noida and Greater Noida', which was accepted by the majority. They rejected the contention of Jaypee that RGM is the entire NCR. The commission defined RM as

'provision of services for development and sale of residential apartments in Noida and Greater Noida.'

After defining the RM the majority proceeded to assess dominant position of Jaypee group. It proceeded to assess the position of strength of Jaypee group with reference to the factors given in section 19 (4). Jaypee's market share was less than that of that of Amrapali in the RM. In financial resources and in land resources it was also not ahead of other players. In conclusion the commission did not find the Jaypee group to be dominant in the RM. Two of the members did not agree with the definition of RPM given by the majority but agreed with the definition of RPM given by the DG. OP1 and OP2 are Jaypee group and Deutsche Post Bank, a financial service provider is OP3. The minority framed three issues. (i)What is the RM? (ii) Is the Jaypee group dominant in the RM? (iii) Being dominant has the group abused its dominant position?

The minority then proceeded to define the RM. They agreed with the supplementary report of the DG in which it made a distinction between integrated township and stand alone apartments and that they are two distinct product markets. Integrated township is different from standalone apartments in as much as the integrated township provides a self contained entity consisting of educational, health care facilities, commercial space and recreational facilities to the advantage of the consumers. The minority did not agree with the contention of the OP that they advertised integrated township only for marketing purposes. On the basis of the advertisements and material provided by the DG the minority concluded that the OP actually constructed a full-fledged self contained integrated township.

In defining RGM there was no difference of opinion between the majority and the minority, the difference was only with regard to RPM. The minority agreed with the second definition given by the DG that the RPM was 'provision of service of development and sale of residential apartments in integrated township'. An integrated township consists of both the residential and the commercial spaces. Taking into consideration the factors mentioned, mentioned in section 19 (4), such as market share, land reserve and land share, financial resources *etc*., the minority found the Jaypee group to be dominant. In addition to these factors Jaypee group is also in the production of cement. They not only claimed they are making integrated township in advertisements but, on the basis of the report of the DG the minority found that they actually built integrated township. They developed hospital, technological educational institutes, public schools, commercial complexes, lakes and water bodies and clubs. Stand alone apartments are not substitutable by apartments in an integrated township, because they lack recreational, educational and commercial facilities. The RM according the minority was 'provision of services for the development and sale of apartments in integrated township in Noida and Greater Noida'.

The minority then proceeded to analyse the behaviour of the OP whether it was abusive or not? It was contended by the OP that in order to be guilty of abuse of dominant position it must be proved that OP imposed unfair or discriminatory conditions directly or indirectly. One of the parties with greater bargaining power forced unfair or discriminatory conditions. The IP argued that first they were asked to

fill one page form to book the apartment, then application for the form and only then asked sign on dotted lines on the 'standard' one sided buyers agreement. The agreement is unfair as the application form does not mention the name of the project, the amount of consideration and contained many similar unfair conditions. In addition to this many advertised features were not included in the building, such as central air conditioning. The behaviour of the OP was unfair. There was delay in delivery; and the original payment plan was not adhered to. On the basis of these and other unfair terms of the contract the minority found the Jaypee group to have abused the dominant position and imposed a penalty of Rs. 665.94 crore.

Sharad Kumar Jhunjhunwala v. *Union of India,*[15] is also a case on abuse of dominant position. The case consists of a number of information against Indian railways and Indian Railway Catering and Tourism Corporation Ltd. (IRCTC), both being part of 'Indian Railway group'. The IPs alleged that the Indian railway group is dominant in the RM and abused its dominant position. It has imposed unfair and discriminatory conditions and price in the sale of railway e-tickets.

The CCI framed three issues to determine the alleged abuse of dominant position. (i) what is the relevant market? (ii) whether the OPs are dominant in the RM? (iii) If OPs are dominant have they abused the dominant position? The function of the railway is to transport passengers from one station to another in India and no other mode of transport is comparable to this mode. Therefore the RM is 'the transportation of passengers through railways across India including ancillary segments like ticketing, catering on board, platform facilities *etc*. provided by Indian Railways.'

In this RM Indian Railways obviously is dominant. IRCTC is a group company. In order to determine if the Indian Railways abused its dominance, the CCI agreeing with the DG, identified these issues for purposes of investigation if there is abuse.

(i) Unfair/ discriminatory conditions in passenger reservation system,
(ii) Compulsory provision of food
(iii) Market barriers for IRCTC agents.
(iv) Monopoly of food courts at large railway stations.
(v) Restrictions on technical and scientific developments in Indian Railways.
(vi) Restrictions on private players providing meals through e-catering in trains with no pantry facilities.

'Unfair/ discriminatory conditions in passenger reservation system' was the first issue determined by the CCI. The first sub issue was service charge imposed on e-ticket. It was alleged that imposition of service charge on e-ticket was discriminatory. Tickets can be obtained either through internet or from manual counters of Indian railways. Those who do not want to pay service charge may get ticket from the manual counters. E-ticketing is an additional value added service. It is imposed to maintain IT hardware and software. Additional charges are imposed if e-ticket is booked through agent. As it is an additional and optional facility it is not discriminatory. Imposition

15 2015 Comp L R 0753 (CCI).

of gateway transactions charges is not discriminatory as they are imposed by banks for on line payments in accordance with RBI guidelines. It was alleged the e-wallet scheme is also discriminatory in as much as it does not provide for cash refund. The CCI did not find any substance in the allegation as bank transaction charges and the e-wallet scheme is voluntary. Imposition of service tax on e-ticket is not discriminatory as it is a value added service, that is services of booking a ticket, and providing a value added e-ticket. It was also alleged that tatkal, premium tatkal, dynamic pricing, issuing only e-tickets in some trains and no refund policy in these trains is abusive. These provisions are not abusive because they are part of the Parliamentary budgetary provisions and they are specially designed for emergency travellers.

Regarding levying of charges for cancellation of confirmed and unconfirmed tickets, the CCI did not find them to be abusive as these chares are levied under statutory rules. The CCI also did not find levying premium charges on calls made on 139 as it is a value added service. Compulsory food is provided only in very few premium trains such as Rajdhani, Shatabdi and Duranto as these trains are fast with few and short stoppage.

The argument that IRCTC has created market barriers for IRCTC agent was rejected. IRCTC appoints only IATA members, whose main income is from air tickets, imposing a one time entry fee of Rs. 20000/- of which Rs. 10000/- are refundable. IRCTC agents appoint sub agents, thus opening many ticket windows. For every sub agent a fee of Rs. 1000/- has to be paid. The arrangement is not unreasonable.

IRCTC creates monopoly when it grants long term licence to operate food courts at large stations. CCI rejecting this argument opined that licence is granted through open tender basis. It is long term because the licensee has to build the infrastructure at his own expense. Only a long time contract can give a legitimate return on expenses. The allegation that only 'railneer' packaged water can be sold in trains and railway premises is misconceived as there are approximately 100 other brands which can sell packaged water in railway premises. The allegation that the IR has not improved public address system and has not improved measures for public safety was rejected. The CCI dismissed the allegations on grounds that the allegations are vague and the IR elaborated the steps taken to improve the system. The CCI concluded that no case of violation of section 4 is made out.

One of the members, M.S.Sahoo, however disagreed with the majority, only with respect to levying of service charge on tickets sold though electronic mode. The majority justified the charge on ground that it imposed in view of value addition and to compensate the cost of maintaining hard and software, and other expenses. The member points out that in reality cost of issuing an e-ticket is less than the cost of issuing a ticket in manual mode. In manual mode additional expenses are incurred for building, air conditioning, electricity, furniture and staff *etc*. If the situation is looked from the point of view of the consumer, argument that electronic mode is optional and if the consumer does not want e-ticket she can opt for manual mode is not necessarily correct. Depending on various factors, including the location of the customer, having access to both the modes, one mode could be cheaper or costlier to the consumer. In conclusion the member ordered cease and desist order and asked the

OP to encourage use of technology. In conclusion it can be said that there is substance in what the dissenting member says.

VI ABUSE AND ANTI-COMPETITIVE AGREEMENT

Shamsher Kataria v. *Honda Siel Cars India Ltd.*,[16] is a sequel to the case *Shamsher Kataria* v. *Honda Seil India Ltd.*,[17] which is commented in the survey of 2014.[18] In the 2014 case the information was filed against three car manufacturing companies, but on the recommendation of the DG 14 more were included in the investigation. These 14 companies were found guilty of abuse of dominant position and anti competition agreement. The present case decides against the three remaining companies that is Hyundai, Reva and Premier. The principles of law that were applied in the 2014 case are also being applied in the present case. Therefore the principles are being briefly described here. The allegation was that the car manufacturing companies have monopolised the spare part market specific to the models of that company and thus abused dominant position. There are three different RMs, (i) primary market consisting of sale and manufacturing of vehicles. (ii) The after-market for repair and servicing of primary product consists of two markets. (i) Supply of spare parts including, technical manuals, and diagnostic tools *etc.* (ii) the provision of after sales service, including service of vehicles, repair and maintenance. Once the consumer has purchased a primary product his choice of after market is also limited to the after market of the spare parts and after sales service specific to the primary product. He cannot switch over to the spare parts and after sales service of other primary products, though some spares are not specific to any specific primary product, such as battery.

Regarding dominance, each original equipment manufacturer (OEM), either because of holding IPR or because original equipment suppliers (OES) are their subsidiary, the market for spare pars and service becomes monopolistic. Though reasonable restrictions can be imposed by the holders of IPR, but the restrictions must not be such as to create a monopoly. However, the restrictions placed by the OPs on OESs, authorised dealers of spare parts and diagnostic tools etc. amounts to denial of access to independent service stations.

Exclusive distribution arrangement to supply only to authorised dealers and refusal to deal with independent suppliers of spare parts and independent service providers violates section 3 (c) and (d) of the Act and amounts to vertical anti-competitive agreement. AAEC is proved with reference to parameters given in section 19 (3). The CCI found that all the three Hyundai, Reva and Premier are guilty under sections 3 and 4.

VII COMBINATION

16 2014 Comp LR 001 (CCI).

17 Vinod Dixit, 'Competition Law' XLX *ASIL* 190-193 (2014).

18 C.R.No. C-2014/07/190 decided on March 30, 2015.

19 2015 Comp L R 503 (CompAT).

In *Re: Holcim Ltd*.,[19] decided by CCI is a case on application by Holcim Ltd. and Lafarge for permission of combination between them. Holcim is a global giant in cement manufacturing. It is present in India through its subsidiaries ACC and Ambuja cement. Lafarge has also two subsidiaries in India, Laharge India and Lafarge Agraggate and Concrete India (P) Ltd. After combination Lafarge would become a subsidiary of Holcim and Holcim would have at least 2/3 share capital and voting rights of Lafarge. New entity would be called Lafarge Holcim and would be listed on Six Swiss Exchange and Euro Next Paris.

In order to determine likely AAEC, the commission defined the RM. White and grey cements have different characteristics and are not substitutable, but different varieties of grey cements are substitutable hence constitute same RPM. In order to determine RGM, the CCI does not rely on cost of transport but prefers to apply Elzina Hogarty Test and catchment area analysis. (Test, to determine RGM relies on 'last in first out and last out first in' which means that ratio between import and sales and the ratio between export and productivity is taken consideration). This test tends to narrow the RGM. There are two RGMs Eastern and North-Western markets. The CCI defined the RGM, differing from the definition given by the two parties. The Eastern region was defined as comprising of Chhattisgarh, West Bengal, Jharkhand, Bihar and Odisha.

To assess the market concentration of the combining enterprises, the CCI used Herfindal Hirschman index. It is an economic concept applied in competition law. It is defined as the sum of the squares of the market shares of the enterprises within the industry,where the market shares are expressed as fractions. The result is proportional to the average market share, weighted by the market share. As such it can range from 0 to 1.0 moving from a huge number of very small enterprises to single monopolistic producer. For instance, we consider two cases in which the six largest firms produce 90% of the goods in a market. In either case, we will assume that the remaining 10% of output is divided among 10 equally sized producers. For example it is explained thus: case 1: all six of the largest firms produce 15% each. case 2: The largest firm produces 80% and the next five largest firms produce 2% each. The six-firm concentration ratio would equal 90% for both case 1 and case 2. But the first case would promote significant competition, where the second case approaches monopoly. The Herfindahl index for these two situations makes the lack of competition in the second case strikingly clear. This behaviour rests in the fact that the market shares are squared prior to being summed, giving additional weight to firms with larger size.

On the basis of the analysis of the index, the CCI concluded that in eastern market the combination would have 37% of the market share, whereas the nearest competitor would have 17% of the market. Other competitors are minor players. Post combination the competitors of the combination would not have countervailing competitive power. The competition would become more difficult owing to many entry barriers in cement industry, such as high cost of installation of cement plant, logistics relating to the location of the plant, availability of lime stone, energy requirement, need for a distribution network and oligopolistic nature of cement industry. The CCI concluded that the combination is likely to have appreciable adverse effect on competition (AAEC) in India in industry of grey cement.

Regarding RMC the CCI observed that RMC is concrete used for construction. There are two varieties of concrete, Site mix concrete and RMC. Both differ in characteristics and constitute different RPMs. Geographic market is within 30-40 kms of the production site. Thus there are 13 RMs of RMC in which there is many competitors and therefore there arises no AAEC concerns. However, with regard to combination, as there are concerns relating to cement, the CCI preferred divesture route. With many safeguards the CCI ordered divesture of certain cement producing plants of the parties.

VIII COMPETITION APPELLATE TRIBUNAL

Relevant market

Global Tax Free Traders v. *William Grant & sons Ltd.*,[20] is an appeal against the order passed by CCI.[21] Respondents no. 1-3 are Scottish producer of certain famous and branded spirits. The appellant, informant was their exclusive importer and distributor in India except in the States of Maharashtra, Goa and Karnataka. The contract with the appellant which began in 2005 was renewed several times, but from 2013 onward the respondents did not renew the contract, instead started distributing and selling spirits through its own subsidiary and certain private companies. Thereupon the appellant moved the CCI under section19 of the Act, alleging abuse of dominant position that is unfair and discriminatory pricing in violation of the provisions of section 4 (2) (a) (ii). The appellant alleged that, after the termination of contract with the appellant, the respondents sold their spirits at a price higher to the appellants than the price charged from its subsidiary and private companies. The appellant, IP, also defined the RPM narrowly so as to make the OPs dominant. The argument was that the scotch is a product distinct from whisky. Among scotch single malt cannot be compared to single grain scotch and blended scotch. Thus, single malt is a distinct product in which the OPs are dominant. The appellant, IP, relied on Scotch whisky Regulations 2009 of the United Kingdom (UK) which makes distinction between single malt and single grain scotch because the raw material and process of making is different in both the cases, and it has a distinct character and its patrons will not substitute single malt with any other brand.

However, the CCI did not agree with the contention of the IP. They refused to define RPM so narrowly. In stead of defining the RPM on the basis of raw material and process as substitutability does not depend on raw material and process but on public perception and price. As the price of most of the IMFL (India Made Foreign Liquor) is below Rs 800 and the price of scotch and imported whisky is more than Rs 800, most of the people perceive imported whisky and scotch as substitutable. If the RPM is defined as 'scotch and imported whisky' OPs will not be dominant.

The OPs on the other hand argued that the sole purpose of the IP was to coerce

20 Case no.87/2013 decided on February 11, 2014.

21 Case no. 52/2012, decided on November 6, 2012.

the OPs to renew the contract after 2013. As long as the contract subsisted they did not make any complaint about the abuse or any other unfair practice. As during the subsistence of the exclusive supply contract with the appellant, IP, between 2005 and 2013, the OPs did not allow any other in India, except in the territories specifically excluded from the contract, to import single malt or any other whisky of the OPs. After the expiry of agreement with the IP, the IP has no locus to complain that the products of OPs are being sold at lower price. After 2013, the OPs have changed their business model. The relation of the OP with its Indian subsidiary is an intra group relation and governed by the concept of 'single economic entity'. The sale of alcohol at duty free shops is regulated differently from sale in India. Sale at duty free is not sale in India but should be treated as sale outside India.

In the rejoinder the appellant controverted the averment of the respondent that during the subsistence of the contract, the appellant has never raised the issue of discriminatory pricing. The appellant asserted that in 2009 and in 2012 they raised the issue of discriminatory pricing. The appellant asserted that the respondents imported alcohol at a lower price through their Indian subsidiary to avoid customs duty and not because of the concept of 'single economic entity'. This assertion of the appellant was denied by the respondent as a figment of imagination.

To decide whether the respondent has violated the provisions of section 4, the tribunal proceeded to define the meaning of 'dominant position'. Referring to the explanation of section 4 dominant position is the capacity to act 'independent of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in is favour'. The tribunal did not define the relevant market narrowly as demanded by the appellant. According to the appellant the single malt is a separate product not comparable to other imported whiskies. Single malt has several characteristics which distinguishes it from other whiskies. Its raw material, process of manufacturing, its price and its consumers have a preference for it. The tribunal was not impressed with these arguments; it preferred the opinion of the CCI. "No doubt the raw material used and the process for manufacturing single malt is different, but these are not the determinants enumerated in s. 19 (7)". But price, end use and consumer preference are relevant. The tribunal was not in favour of narrow definition of the RM. "It is the response of marginal consumer, not the average consumer which is important. Therefore a small but significant number of consumers (generally 5 to 10 %) switching to another product when there is price increase is considered a sufficient condition for both goods to be defined as forming part of the same relevant market."

Though, the wide definition of the RM may be acceptable, there are arguments in favour of narrow definition of the RM. The raw material and manufacturing process are not the factors mentioned in section 19 (7), yet these factors may become relevant if they affect the preference of the consumers. Though to the tribunal, a switch over to another product by a minority of 5% of the consumers, because price factor, may be sufficient reason to club both the products in the same RM, another forum may refuse to put both the products in the same RM if only 5% of the consumers switch over to another product because of price fluctuations.

The Tribunal cited a number of Indian and foreign decisions in support of its view that RM should not be defined narrowly. In *Exclusive Motors* v. *Automoboli Lamborghini*,[22] the CCI defined market broadly and its decision was approved by the tribunal. The European Commission in *AKZO*[23] and in *Tetra Pak International SA* v. *The Commission of European Communities, the Court of First Instance (second Chamber)*,[24] The Netherland Commission in *Netherlandsche Banden Industrie Michelin* v. *Commission*,[25] in US, in *US* v. *Pabst Brewing Co*.,[26] construed the RM broadly. However, there are a number of Indian and European cases where the RM was defined narrowly. R. Prasad, member giving a dissent, in *Unitech* case[27] developed the concept of captive market and defined the RM very narrowly and European Union commission in *United Brand*,[28] defined RM consisting only of bananas, and not of fresh fruit.

The appellant on the analogy of a *combination* case,[29] decided by the CCI pleaded for narrow definition of RM. The tribunal refused to define RM narrowly based on the observation of the CCI in this combination case. The CCI emphasised that two products can be differentiated on the basis of intrinsic or perceived quality and also made a distinction between a close and a distant substitute. The CCI in that case found close substitute, and not distant substitute, as a ground for refusing combination. If two combining enterprises are producing close substitutes, even if many other enterprises are producing distant substitutes, they would not be allowed to combine. In other words for visualising possible dominant position after combination, the CCI may refuse combination, only on ground of two enterprises producing close substitutes, that is for combination, the distant substitutes, being produced by other enterprises, would not be counted to negate the possibility of combined enterprises becoming dominant.

However, the tribunal did not agree with this contention. "It is important to bear in mind that while deciding the combination case, the commission has to foresee any competitive effect of approval granted…..Therefore the ratio of such approval cannot be directly relied upon in deciding abuse of dominant position". It is difficult to understand the logic of this observation of the tribunal. The plain meaning of 'competitive effect of approval granted to the request for combination' is as to between whom competition may take place. Whether it is combination or abuse of dominant position, in both the cases the RM has to be defined. One fails to understand why in one case the RM has to be narrowly defined whereas in the other it has to be broadly?

After analysing a few more cases relied by the appellant and rejecting the

22 4/30.698-ECS/AKZO.

23 [1994] ECR 00755.

24 [1983] ECR 3461.

25 384 US 546 (1966).

26 2011Comp LR 31 (CCI).

27 [1978] ECR 207.

28 Case no.C-2012/12/97 decided on February 26,2013 (CCI).

29 2015 Comp LR 0548 (CompAT).

contention of the appellant that the RM must be defined narrowly, the tribunal accepted the definition of RM given by the CCI and agreed that there is no case of abuse of dominant position by the respondent. The Tribunal also found that the conduct of the appellant was motivated.

IX RULES OF NATURAL JUSTICE

The Board of Control for Cricket in India v. *CCI*,[30] is an appeal against the order of the CCI in *Surinder Singh Barni* v. *BCCI*,[31] discussed in survey[32] of 2013. In the case decided by the CCI, the IP levelled allegations that the OP-appellant had committed irregularities in the grant of franchise, media rights and sponsorship rights in the 20-20 premier league. The CCI found that the BCCI has violated the provisions of section 4 (2) (c) and in addition to cease and desist order the CCI also imposed a penalty of Rs 52.24 Crore. This is an appeal preferred by the BCCI alleging violations of rules of natural justice, in as much as the appellant was not given opportunity to rebut some of the material relied by the majority in disposing of the case. The first allegation was that the DG and CCI both, not only defined RM differently, the material relied by the CCI was different from what was relied by the DG, in defining RM. The material relied by the CCI, in defining RM was not put to the Appellant-OP, for rebuttal. The CCI relied upon information/random newspapers articles to arrive at this new definition of the RM, which was neither part of the DG report nor was provided by the IP. It was further pointed out that the newspaper article relied by the CCI was published on August 4, 2012, two days after the oral hearing by the CCI. BCCI was not put to notice of the information/evidence relied upon by the CCI in defining RM and was therefore not provide an opportunity to effectively defend itself.

Another allegation was that the issues framed by the CCI were different from the issues framed by the DG and the material relied by the CCI in framing these issues were also not disclosed to the appellant-OP. As some of the materials relied by the CCI was downloaded from the net and is secondary evidence and therefore did not have any evidentiary value. Under these circumstances the tribunal set aside the order of the CCI and the matter is remitted to the CCI for fresh disposal according to law.

X ABUSE OF DOMINANT POSITION

Om Dutt Sharma v. *CCI*,[33] s an appeal against an order passed by the CCI,[34] in the case between the same parties. The appellant and his wife (partners of M/s Kalptaru) executed an agreement with the respondent no.4, on August 27, 2003, whereby the Kalpataru Emporium was appointed a franchise to operate a retail outlet in Noida for

30 2013 Comp LR 297 (CCI).

31 Vinod Dixit, "Competition Law", XLIX *ASIL* 177-178 (2013).

32 2015 Comp L R 0529 (CompAT).

33 Case No. 10/2014 decided on May 13, 2014.

34 Appeal no.49/2015 decided on Mar. 31, 2015.

three years. However, even after the expiry of the written agreement, the agreement continued on oral basis. The last supply was received on May 15, 2007 and the last sale is said to have been made in February 2009 and the operation was finally closed on March 16, 2009. On January 16, 2014, M/s Kalptaru sent a notice to the R-4, to lift the unsold stock within 14 days as the IP is incurring cost in storing the product of the R-4. After one month of this notice the IP filed the information with the CCI. According to the IP on March 27, 2006, R-4 executed a franchise agreement with M/s. Neelkanth Traders on terms different from the terms executed with IP. M/s Neelkanth operated the retail shop in the vicinity of the retail shop of the IP. The agreement with M/s. Neelkanth lasted till March 2011. R-4 also entered into an agreement with In Vogue Apparel in July 2008 which lasted till July 2012.

The IP alleged that R2-4 constitute a group as defined in section 5 of the Act. The group is dominant in the RM and abused its dominant position in as much as the terms of agreement R-4 offered to M/s. Neelkanth Traders are more favourable to Neelkath Traders and discriminatory against the IP. The CCI proceeded to examine the issue whether R2-4 constitute a group? As R-2 acquired 100% equity in R-3 and 93.15% shares of R-4 are acquired by Reebok (Mauritius) company Ltd., a subsidiary of R-2, therefore CCI held that R2-4 are group companies. The CCI defined RM as "the market of sport goods in Noida." Regarding dominance the CCI relied on the ICRIER study of June 2010 'on sport rating in India', which states that Reebok held 50% of the market whereas Adidas between 20 and 25%. In premium branded sport wear market, Nike and Puma are other operators. CCI concluded that R2-4 is dominant though for the RGM Noida it did not have any statistics; it was assumed that ICRIER data is also true of the RGM of Noida.

The next issue was whether the respondents have abused the dominant position. The CCI concluded that the respondents have not, because of the following reasons: (a) the agreement between the IP and R-4 was executed in 2003 for a period of three years but the agreement continued orally on same terms and conditions till 2009 when the last sale took place in February 2009. In 2005, the group came into existence when R-2 acquired R-3. In 2003, when the appellant entered into agreement, the group did not exist. The group was in existence when the second agreement that is with Neelkanth Traders was executed. The CCI rejected the allegation of abuse on several grounds namely; (i)There was a time gap of three years between these two agreements, with Kalpataru and with Neelkanth Traders. With passage of time commercial arrangements may undergo change. (ii) The margin between 28%, given to Kalpataru and 33%, given to Neelkanth Traders, is not so big as to be termed abusive. (iii) The allegation that the appellant suffered monetary loss in storing the unsold stock of R-4 from 2009 onward when the agreement expired was not found to be satisfactory. For five years, after the expiry of the agreement, the appellant kept silent and they gave notice to R-4 only in 20014 a month before filing the information. In any case monetary loss in storing the unsold stock does not raise any competition concern.

The appellants challenged the order of the CCI on several grounds but particularly on their findings on abuse of dominant position. They reiterated that discriminatory

commission of 28% and 33% in two agreements is abusive. Two agreements are also discriminatory in terms of the payment of rent for the retail property, minimum sale guarantee per month and operation of Neelkanth store in the vicinity of the store of the appellant.

As the CCI did not send notice of the averment of the appellant to the respondents, they filed detailed reply in response to the notice issued by the tribunal. The reply controverted (i) that the R2-4 are not a group company, (ii) the definition of RM by CCI, (iii) that R-4 is not dominant in the RM, (iv) that CCI did not have any jurisdiction to record findings adverse to their status that too without hearing them, (v) that the appellant did not have any locus to go to the CCI as the agreement with the Kalptaru was terminated before the coming into force of section 4, that is before May 20, 2009, (vi) the appellant are guilty of suppression of the fact that they initiated arbitration proceedings under clause 12 of the agreement of 2003, (vii) the appellant cannot rely on the agreement with M/s. In-Vogue Apparel as their outlet is in Ghaziabad, outside the RM.

After taking into consideration arguments and counter arguments, the tribunal did not find any merit in the appeal. The primary finding of the Tribunal was that the CCI did not have any jurisdiction in this case. The agreement between R-4 and the M/s Kalptaru expired in August/ September 2006, whereas section 4 of the Act came into existence in 2009. The CCI made a jurisdictional error in entertaining the information to find out if a prima facie case was made out. The argument of the appellant that anti-competitive conduct of R-4 continued till 2014 in as much as they did not lift the unsold stock in violation of the agreement, is misconceived according to the tribunal, because there is no proof that the unsold stock has been supplied at the instance of R-4. In view of this, R-4 is not bound to lift the stock. There is also no satisfactory explanation as to why the appellant did not notify R-4 to lift the stock in 2009 when according to the appellant the agreement expired.

M/s. Neelkanth Traders entered into agreement with R-4 in 2006. Neelkanth Traders operated in the RM in which the appellant also operated. It is difficult to believe that the appellant did not know the terms of agreement between R-4 and M/s Neelkanth Traders. They are too late in filing the information in 2014. As M/s. In Vogue Apparel operated in Ghaziabad and not in the RM in which the appellant operated, the appellant cannot raise the plea of abuse of dominant position. If the appellant availed the remedy of arbitration provided under the agreement, the appellant is not entitled to go to the CCI under section 19 and that too after suppressing the fact of availing the remedy of arbitration. In view of these findings the appeal is dismissed.

OHM Value Services v. *Janta Land Promoters*,[35] is an appeal against the order of CCI in the case,[36] between the same parties. In pursuance of industrial policy 2003, the Punjab Government allotted 500 acres of land to the respondent for establishing a

35 Case no. 45/2014 decided on October 27, 2014.
36 RTPE 20/2007.

mega industrial park. The appellant who wished to establish an industrial unit applied for allotment of a plot. The appellant paid a part of the price of the land but refused to pay the rest of the amount as the project was not sanctioned; the respondent had not cleared the dues of the government. The respondent cancelled the allotment after giving due notice to the appellant, on ground of non payment of dues and refunded the paid amount after deducting the penalty and allotted the plot to some one else. Against the cancellation of the allotment the appellant moved a civil court which declared that the cancellation of allotment and re-allotment are illegal but subject to the condition that if the appellant pays all the dues with interest and abide by all the relevant conditions, he may get the relief; but refused to grant permanent injunction.

After about one year the appellant filed information to CCI under section19 (1), asserting that the respondent was dominant in Mohali and they abused the dominance in as much as imposition of 18% of interest on late payment and cancellation of allotment was abusive for the reason that it was the failure of the respondent to pay the dues of the government that resulted in cancellation of the project. Therefore the appellant were wrong in demanding interest for late payment, they should not be allowed to take advantage of their own wrongs.

The CCI, in stead of defining RM as the 'industrial park to be developed by the respondent', defined it as 'industrial parks anywhere in Punjab', and therefore held that the respondents are not dominant in the RM. The definition of the RM was found to be satisfactory by the tribunal. The argument of the appellant that, had they known that the respondents have not paid government dues; they would not have applied for a plot, was also not appreciated by the tribunal on grounds that they have come to the CCI with unclean hands in as much as they have not disclosed the judgement of the civil court in totality.

We are of the opinion that the tribunal has not taken into consideration two important factors. One is that if the appellant's hands were unclean so was that of the respondent. It was legally and ethically wrong on the part of the respondent to start allotting the plots without getting the project approved by the government and the other is the definition of the RM is not satisfactory. The definition should have been narrowed down to industrial park developed by the respondents. The respondent began allotting the plot without entitlement. After paying a part of the price the appellants became captive, as the exit became costly: they had to forego 10% of the paid amount if they had decided to exit. Apart from the loss of money it is also a case of lost opportunities and time, which is of essence in any business activity. Any other industrial park might not be an easy option for the appellant.

XI PROOF OF MEETING OF MIND

The Director General (I&R) v. *Bharti Airtel Ltd.*,[37] is a case decided under section 33(1) (d) of the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act).

37 2015 Comp L R 0487 (CompAT).

This case though decided under the MRTP Act, is relevant even for the Competition Act. The case relates to prohibited unfair trade practice of anti-competitive concerted action between three telecom companies to the detriment of the consumers. The case is relevant to understand the scope of section 3 (3) of the Competition Act, which prohibits anti-competitive horizontal agreements.

On the basis of two articles published in the Times of India, the MRTP Commission ordered registration of a case against three telecom discoms, namely Bharti Airtel Ltd., R-1, Vodafone Essar Mobile Services, R-2, and Idea Cellular Limited, R-3. The MRTP commission directed the DG (investigation and Registration) to make preliminary investigation against the allegation of unfair and restrictive trade practices. The DG (investigation and registration) entrusted this investigation to the Assistant DG (investigation and registration) (ADG). The alleged unfair and restrictive trade practice related to raising telecom tariff by the discoms in a concerted and pre-planned manner. All the three networks are in the business of providing telecom network services.

The ADG in the report stated that the three respondents collectively constitute around 60% of the telecom market in Delhi. The report further stated that though all the respondents have different operational cost and different tariff collection, the tariff revision by the three respondents is identical and on the same date. That cannot be a mere coincidence. It appears that the action was concerted and pre-planned.

In response to the findings of the ADG, the respondents filed detailed replies. In addition to many justifications for raising tariff, the main argument of the respondents to similar increase was that all operators keep a close eye over all market development and always attempt to gain insights and anticipate market developments in effort to remain in race. The parallel conduct simply emphasises the liberty of a company to adapt itself intelligently to the existing and anticipated conduct of its rivals.

There are two important requirements of prohibited concerted action, namely there must be the fact of parallelism, and to affect the parallelism there must be proof of meeting of mind. The proof may either be direct or may be inferred from the conduct of the parties. There is no doubt that every rival in an RM attempts to keep itself abreast with the conduct of its rivals to remain in the race. But identical pricing and that too on the same date creates a reasonable inference that the action is concerted. Had the identical prices not promulgated on the same date, and had there been some variations in the prices the assumption would have been rebutted. The respondents emphasised that the price increase has been done in accordance with the law after giving due intimation to the concerned consumers. They denied cartelisation on grounds that (a) the parallel conduct denotes the liberty of an enterprise to adapt itself to the existing and anticipated conduct of its rivals, (b) there is no tangible proof of collusion or acting in concert of the respondents; there is no direct or circumstantial proof of meeting of mind.

The tribunal agreed with contention of the respondents. “I am convinced that the findings recorded in the preliminary investigation report prepared by the ADG that the respondents have formed cartel and their decision to revise the tariff amounted

to restrictive unfair trade practices are legally unsustainable and are liable to be rejected because the concerned officer neither made any independent investigation nor collected any evidence and recorded his findings on pure assumptions and conjunctions……He did not take cognizance of the fact that the tariff was revised by the respondents keeping in view the forbearance clause contained in TTO 1999; that they have given prior intimation to their subscribers through newspapers advertisements and by sending SMS." According to the tribunal there was no meeting of mind between the respondents or any tacit understanding. The proceedings initiated by the CCI against the respondents are dropped.

The decision may be convincing except on one point. The decision of the tribunal does not explain as to how the respondents were able to notify the tariff increase on the same date and that too at identical rates, without concerted action. The proof of meeting of mind should not be made so onerous that the proof of cartelisation becomes exceptionally difficult to the detriment of the consumers. Proof of meeting of mind in such cases should be inferred from the conduct of the parties.

XII CAPTIVE MARKET

Real estate is one of the areas where the approach of the competition forums is disappointing particularly in the sphere of the concept of 'captive market'. *A.K.Jain* v. *Dwarkadhish Projects (P) Ltd*.,[38] is a case on captive market and a case of missed opportunities to develop the concept of captive market by the tribunal. Real estate is an area which specialises in defrauding the gullible consumers. The relative strength of two opponents, the builder and the consumer is asymmetrical. Most of the real estate builders provide one sided agreements, unfair to the customers. These are some of the specificities of real estate builders in India; (i) As almost all of them have the similar one sided agreements, the consumers do not have any choice to go to another builder,(ii)the brochure, given initially to the potential consumers, and advertisements, contain terms and condition which on its face appear to be fair to the potential consumers. On the basis of these terms and conditions he joins the project as consumer and begins making payments. He is asked to sign one sided agreement when he has made substantial payments. Though he may realise the one sided nature of the agreement, he, even if he wants to do so he cannot exit the project as the exit entails forfeiture of substantial amount he already has paid. (iii) In a number of cases the builders starts registering for membership without obtaining necessary permissions and clearances from the government and local bodies. This amounts to speculative agreement to sell. The builder agrees to sell something which may not come into existence, (iv) in most of the cases the builders renege on the time they promise they will hand over the possession. If they promise to hand over the possession in three years they will delver in six years after paying a meagre amount of penalty to the consumers. The cheap money extracted from the consumers is invested elsewhere.

38 Appeal no 56/2014.

Unfortunately in this case the tribunal ignored all these facts, dismissing the dissent in CCI as speculative. Agreeing with the majority the tribunal dismissed the appeal primarily on ground that the appellant approached the tribunal with unclean hands. The tribunal was perfectly right that the appellant approached the tribunal with unclean hands, but the hands of the respondents were equally and perhaps even more unclean. Though the tribunal primarily dismissed the appeal on grounds of unclean hands, it agreed with the definition of the RM given by the majority, dismissing as speculative the minority finding that the RM was a captive market. It is difficult to understand as to why the opinion of the minority is speculative.

The majority of the CCI found that the respondent was not dominant in the RM as there were a large number of estate builders in the RM and the respondent's share was miniscule in the RM. However one of the members of CCI gave a dissent, who observed, "It is a case of abuse of dominance….when a buyer decides to buy a flat or property he has the choice of going to a large number of builders for this purpose and by and large there is competition in the market. But when a consumer makes a choice and enters into an agreement with a builder he falls into his trap and there is information asymmetry in this market and because all the elements of agreement are neither understood nor explained by the builder….As a result if a consumer wants to shift to another builder, he cannot as he has to pay a high switching cost."

In this case, as happens in most of the cases, the buyer's agreement is signed after substantial payment is made. The consumer makes the payment on the basis of the brochure, advertisement and the reputation of the builder. As the facts clearly show, the buyers agreement was sent to the appellant in 2012, along with the offer of possession and demand letter for remaining unpaid amount. The tribunal did not ask the obvious question as to why the buyer's agreement is being signed at such a late stage. In our opinion this was a fit case to ponder over seriously on the dissenting opinion of the minority. It should not have been dismissed as speculative. The tribunal might have remanded the case back to the CCI to further investigate (i) the circumstances responsible for non-signing of the buyers agreement simultaneously with the order of admission of the consumer to membership of the project, and (ii) whether the buyers agreements of other real estate builders are one sided 'if so they must be presumed to be collusive and points to the fact that despite of the presence of so many builders there is no real choice to the consumers.

Unfortunately there are two areas out of many where the competition law forums in India have failed to control anti-competitive practices, namely pre- payment penalty imposed by banks if a consumer wanted to exit from the higher interest charging dispensation into a low interest charging dispensation; and the real estate buyers agreement, in which sector the terms are almost parallel and the consumer is asked to sign buyers' agreement only after he has made substantial payments, resulting in costly exit route. In both these cases the consumer was trapped as exit became very costly, in one case he could exit only after paying pre-payment penalty and in the other after forfeiture of substantial payment. In the first case relief was provided against the anti-competitive practice by the RBI and in the other by the legislature but only partially, when the Real Estate Regulation and Development Act, 2016 was passed.

XIII ERROR APPARENT ON THE FACE OF THE RECORD

All India Organisation of Chemists and Druggists v. *CCI*,[39] an appeal against the order in the case of *Shantuka Associates Pvt Ltd. Cuttack* v. *All India Organisation of Chemists and Druggists Mumbai*, [40] is an appeal against error apparent on the face of the record pertaining to violation of rules of natural justice. There were two more cases involving almost similar issue in which the CCI passed similar orders. These other two cases were *M/s Praveera Medical Agency Palakkad, Kerala* v. *All India Organisation of Chemists and Druggists*,[41] and *Sandhya Drug Agency Barpeta (Assam)* v. *Assam Drug Dealers Association*.[42]

The DG, in case no. 30/2011, issued notice to the appellant under section 41 read with section 26(1) to furnish information on items enumerated in the notice. Thereupon the appellant furnished the required information. But when similar information was required from the appellant in case no. 20/2011, they failed to provide the information. When on repeated intimations the appellant did not provide the information, after giving an opportunity of being heard, which the appellant did not avail, the CCI imposed a fine of Rs. 25000/- per day till the information is supplied. However the DG on the basis of information provided by the respondent in case no. 30/2011 submitted the report in case no. 20/2011 as the information sought in both the cases was same. On the basis of these reports the CCI disposed of the case no. 20/2011. On grounds of non payment of Rs. 25000/- per day the penalty rose to Rs. 25, 75000/- and then to Rs. one crore.

The appellant contested the penalty on the following grounds. (i) As the information sought in case no 20/2011 has already been supplied in case no 30/2011 there is no need to give the information again, especially because the case no. 20/2011 has already been disposed of on the basis of information given in case no. 30/2011. (ii) Therefore there is no justification in continuing with the penalty after the DG submitted the report in case no. 20/201, on the basis of information supplied by the appellant in case no. 30/2011. (iii) The respondent also claimed that there is an error apparent on the face of the record. There is violation of rules of natural justice in as much as the chairperson and two of the members of the CCI who decided to impose the penalty were not present when the appellant presented oral submission to the CCI. That means they mechanically decided to impose penalty. The tribunal agreed with the submissions of the appellant and admitted the appeal. The imposition of penalty was declared illegal beyond the date when the DG submitted his report in case no. 20/2011.

39 2013 Comp LR 233 (CCI).
40 2014 Comp LR 0010 (CCI).
41 2014 Comp LR0061 (CCI).
42 2015 Comp LR 0420 (Mad).

XIV ABUSE OF DOMINANT POSITION: ASSOCIATIONS

Tamilnadu Film Exhibitors Association v. *CCI*,[43] is an appeal against the order of CCI in *M/s. Reliance Big Entertainment (P) Ltd.*,[44] discussed in survey[45] of 2013, holding that the appellant has abused dominant position in the RM and also violated the provisions of section 3 (3).

The facts of the case are as given here. The appellant is a registered society of film exhibitors and theatre owners in the State of Tamil Nadu. The respondent no.2 and Balaji Real Media entered into an agreement with Arbaz Khan Productions (P) Ltd. to purchase the rights for remaking of "Dabaang" as 'Osthe' in Tamil. Distribution rights of 'Osthe' were exclusively given to the R-2. R-2 sold theatrical rights to Kural TV and satellite rights to Sun TV network. The film was scheduled to be released in theatres on December 8, 2011. But seven days before the release of the film R-2 informed the CCI that the appellant has prevented the exhibition of the film and thereby contravened the provisions of sections 3 and 4. As some of the exhibitors members of the appellant owed some money from Sun TV, the appellant asked the exhibitor members not to exhibit 'Osthe' till the Sun TV makes the payment. R-2 averred that they simply sold satellite rights to Sun TV but Sun TV is in no way associated with the making of the film. The CCI found that the appellant was dominant in the territory of Tamil Nadu and by preventing the exhibition of 'Osthe' the appellant has abused its dominant position. Freedom to deal with the exhibitors has completely been restrained by the respondent in an unfair manner.

When investigation was conducted by the DG, the appellant asserted that the association never restricted the freedom of trade and profession of the exhibitors. The association only used to make necessary presentations of the grievances of the exhibitors and distributors before the members of the association. Regarding the letter written by the association to the PVR cinema the appellant stated that the Tamil Nadu government exempt entertainment tax to Tamil films if they fulfil certain conditions. The letter was written only with a view to ascertain tax status and not to restrict the exhibition of movie 'Osthe'. However the DG was not satisfied with representation of the appellant and the CCI agreeing with the DG, decided that the provisions of section 3 (3) were violated and consequently the association acted as a cartel, and abused its dominance. According to the CCI the OP (appellant) took a decision and directed its members not to exhibit a film. There is a case of anti-competitive agreement in as much as the recommendations made by the association are arrangement between the members of the association. Apart from other directions the CCI imposed a penalty of Rs.43393/- on the association.

Before the CCI, the IP relied on the press conference of Panneerselvam, the general secretary of the OP association in which he advised the members not to screen the movie 'Osthe'. The OP according to the CCI neither denied nor repudiated nor

43 2013 Comp LR 828(CCI).

44 See Vinod Dixit, "Competition Law", XLIX *ASIL* 187-188 (2013).

45 2015 Comp LR 0854 (Comp AT).

disputed the veracity of the press conference, notwithstanding the fact that ample opportunity was given to the OP.

Before the tribunal, the appellant argued that the decision of the CCI that the provisions of section 3 (3) has been violated is perverse because the CCI reached to these conclusions on the basis of non existent facts and omitted many relevant facts. The DG did not summon the documents relating to so called decision taken by the association that 'Osthe' shall not be released. Had the relevant document been called it would have become apparent that no such decision to restrict the screening of 'Osthe' was taken. The letter sent to PVR on November 24, 2011 was also not summoned by the DG. The letter did not give any direction not to screen the movie. Placing reliance on the oral statement of the secretary general in a press conference was a mistake. On the other hand the respondent supported the decision of the CCI, and asserted that the CCI was right in deciding the case on the basis of the oral statement of the secretary general and the letter written to the PVR.

The tribunal allowed the appeal and set aside the order of the CCI. In order to understand the logic of the argument of the tribunal, let us point out the sequence of events and the evidence supporting both the parties. As the Sun TV did not clear the dues of some of the exhibitors, there was a motive to force the Sun TV to make the payment by the association as it was duty bound under the Memorandum of Understanding (MOU) to assist each other. The difficulty was that R-2 was not responsible for the non payment, though it granted satellite right of 'Osthe' to Sun TV. Following are the proof on behalf of R-2: There was a motive to ban the film to coerce Sun TV to make payment and as a matter of fact the payment was made due possibly to coercion or for some reason; correspondence between Kural TV and R-2, immediately before the release of the film discussing the fact of the ban on 'Osthe"; the press conference of the general secretary of the association stating publicly that exhibitors must not cooperate with R-2, and the letters of November 24, 2011 sent to PVR not to show 'Osthe' till entertainment tax controversy is solved. However, Singhavi J did not find any substance in these arguments. He quoted the MOU in detail to point the facts that the association was formed to help the members and to uphold high standards of the profession and the secretary general was not but only the committee was authorised to take decisions on behalf of the association and the records of the minutes of the committee did not show any such proof of the ban. Therefore whatever statement was given by the general secretary in the press conference cannot be considered the views of the members. Singhvi J accepted the interpretation of the appellant that the views of the general secretary are his own views.

It is emphasised again and again that most of competition forums carry the weight of the Contract Act, 1872 while interpreting the meaning and implications of the 'agreement' under the Competition Act. The requirement of proof under these two Acts is bound to be of different. The emphasis under the Contract Act, 1872 is on legal agreements whereas under the competition it is on illegal agreement. Legal agreements are transparent whereas illegal agreements are opaque. Big corporations and associations assisted by competent legal brains take great care not leave proof of the illegal transactions. It is impractical for the tribunal to expect that the MU of the

association would state that the association can ban the exhibition of movies. More often than not such agreements are entered into without any overt action or spoken word, perhaps with unspoken nod or wink. It seems unrealistic on the part of the tribunal to demand direct evidence, particularly after in so many cases adverse action had been taken by the CCI against a number of associations. If we interpret the press conference of the general secretary along with the correspondence between Kural TV and R-2, The contents of the press conference cannot be termed as personal views of the general secretary, there was no personal interest of the general secretary in advising the members of the association to ban 'Osthe', the advice to ban 'Osthe' created an atmosphere of uncertainty in the minds of R-2 and Kural TV proves that General Secretary was not expressing his personal views.

Film Distributors Association (Kerala) v. *CCI,*[46] is an appeal against the order of the CCI in *P.V.Bashir Ahmad* v. *Film Distributors Association (Kerala)*.[47] The respondent -2 was a producer, distributor and exhibitor of films in Kerala. He informed the CCI under section 19(1) (a) of the Competition Act alleging that the appellant was guilty of violating section3(3) (b) of the Act as the ban imposed by them on exhibition of Malayalam films was illegal. In 2010 differences arose between the appellant, Kerala Film Distributors Association (KFDA), and Kerala Film Exhibitors Federation (KFEF) regarding revenue share between distributors and exhibitors. At the time when two Malayalam films directed by Kamal and Jayaraj were about to be released the exhibitors went on strike against the decision of the state government to impose service tax on exhibition of films. After the strike was over the appellant, KFDA, insisted on the exhibition of Tamil films before the Malayalam films, but the KFEF released the Malayalam films first. In 2013 the appellant suspended the membership of R-2 for six months, not being satisfied with the explanation of R-2, for releasing the Malayalam film 'celluloid' before the Tamil films.

The DG found that the appellant had violated the provisions of section 3 (3) (b) of the Act. The CCI also agreed with the findings of the DG. The important thing about this case is that none of the parties disputed the crucial facts of the case. Regarding the action taken by the appellant against those who disregarded the directions of the circular issued by the appellant, the appellant's defence was that (a) it was an internal disciplinary matter which every association is entitled to take and (b) the action was justified as it is protected under article 19 (1) (c) of the Constitution of India.

The CCI did not agree with the defence of the appellant and held that an association has the protection of article 19 (1) (c), but only as long as it does not violate any law. If the association indulges in any illegal act such as collectively taking an anti-competitive decision not to screen Malayalam films, there is no protection to

46 2015 Comp LR 179 (CCI).

47 Appeal no.25/2015 and I.A. no.43/2015.

the association. The tribunal did not agree with the contention of the appellant that they are protected under article 19 (1) (c) of the Act. Consequently the appeal was dismissed.

XV DEFINITION OF ENTERPRISE

The Malwa Industrial and Marketing Eerti-Chem v. *CCI*,[48] is important because in this case the Tribunal differed from the definition of enterprise given by the CCI. We prefer to agree with the Tribunal rather than with the CCI. This appeal is against the order of the CCI on November 18, 2014 refusing to treat the Registrar Cooperative Societies an enterprise and therefore refusing to investigate the allegation of the appellant that the Respondant-2 (the afore mentioned Registrar) has abused dominant position.

The appellant is a duly registered cooperative society but the R-2 had directed all cooperative agricultural societies to purchase only from the Punjab State Cooperative Supply and Marketing Federations. The appellant alleged that this conduct amounted to abuse of dominant position. The CCI refused to order investigation on grounds the Registrar is not an enterprise. The registrar is a statutory office performing regulatory and statutory functions. It does not perform economic and commercial activities. Hence it is not an enterprise. While commenting on *M/s Shantuka Associates* v. *All India Organisation of Chemists and Druggists*,[49] in the survey of competition law,[50] it is stated that an entity is enterprise if it controls the provision of services, even if it is a statutory body provided it does not perform sovereign functions and certain other specified functions.

The tribunal set aside the order of the CCI. The tribunal held that the registrar is required to discharge functions relating to supply and distribution of goods. The CCI failed to give due weight age to the words 'relating to the production storage, supply, distribution, acquisition or control of any article or goods'. As the monopoly created by the registrar has come to an end through a notification issued on August 5, 13 the tribunal did not order remitting the case to the CCI, but only set aside the order of the CCI.

Manjit Kaur Monga v. *K.L.Suneja ans Suneja Towers*,[51] is a case under the MRTP Act but we are discussing it because it has an important bearing on the usual practice employed by certain real estate builders. It is a case on unfair trade practices. R-2 was allotted a plot by the Ghaziabad Development Authority for developing a group Housing scheme. Five months before getting the possession of the plot, R-2 issued an advertisement inviting house seekers to book houses in the scheme, promising to deliver houses in 36 months with interest free easy mode of payment in instalments.

48 *Supra* note 40.

49 See Vinod Dixit, "Competition Law" XLIX *ASIL* 182 (2013).

50 Unfair Trade Practice Inquiry No. 90/2005 and Compensation Application No. 39/2009

51 Appeal no. 43/2014 decided on July 13, 2015.

In addition many more attractive features were promised. One Gursharan Kaur booked a flat in the scheme in 1989 and paid Rs.60,000/-. Second instalment of Rs. 91250/-, third instalment of Rs.75625/- was paid by Kaur before her death. Manjit Kaur her daughter in law replaced her in accordance with her will. Manjit Kaur deposited Rs.45625/- and Rs. 30,000/- as the fourth instalment. In all Rs. 7,56,250/- were paid for the flat, when she received a letter for the provisional allotment of the flat. The letter informed her that plan has yet to be sanctioned; the letter also included many more unfair terms. Thereafter fifth instalment of Rs.75,625/- was also paid. But when demand for the sixth instalment was made in 1993 Dr. Kaur did not pay it as it has already been paid by her. For the next eight years the complainant (Mrs Kaur) did not hear any thing from the respondent. In December 2001 a demand for the eighth and ninth instalment was made. In response to the notice the complainant accused the respondent of breach of faith and asked the exact date when the construction would be complete. The respondent did not give any reply to this query and after three years cancelled the allotment on grounds of non payment. The cancellation letter was accompanied by a pay order of Rs 4,53,750/-. The complainant filed a complaint under section 36 of the MRTP Act, praying for an enquiry into unfair trade practice, and that she should be treated as lawful allottee of the allotted flat or be allotted another flat.

The tribunal decided that it is clear that the respondents have made a false representation to the general public including the appellant about the time within which the flat shall be delivered. As the respondents did not complete the flat within the stipulated time, the complainant was justified in not paying further instalments and the respondents committed illegality in cancelling the allotment. However the Tribunal refused to order delivery of the flat on grounds that section 38D as interpreted by the Supreme Court does not allow doing so. The tribunal ordered that the respondents shall pay Rs.4,53,850/- retained by the respondents along with a compound interest of 15% per annum.

XVI COLLUSIVE BIDDING

Surendra Prasad v. *CCI and Maharashtra State Power Generation Co.*[52] is a case on collusive bidding and is an appeal against the order of CCI in *Surendra Prasad* v. *Maharashra State Power Generation Co.*[53] R-2 is a government company to generate electricity. It procures coal from some of the subsidiaries of Coal India Ltd through liasioning agents, who are appointed through open tender. The bid of M/s BSN Joshi and sons was rejected though its bid was the lowest. The Nagpur Bench of High Court of Bombay rejected the writ of BSN Joshi on grounds that it did not fulfil the eligibility criteria. But the decision of the high court was reversed by the *Supreme*

52 2014 CompLR0001 (CCI).
53 (2006)11 SSC 548.

Court,[54] holding that other bidders formed a cartel and therefore the Supreme Court ordered that the contract be awarded in favour of BSN Joshi. However, only on a contempt petition the contract was given to BSN Joshi on an ad hoc basis for a short period and thereafter the work was geographically distributed among the other bidders. Whenever the BSN Joshi offered the bid the tender was withdrawn on one pretext or the other and liaison work remained with other competitors on ad hoc basis.

The minority, (Dhingra J) decided that the three other bidders are guilty of collusive bidding in violation of section 3(3) (c) and (d). As R-2 is dominant in electricity generation in the State of Maharashtra it has abused its dominant position by limiting market access to collusive bidders. Dhingra J defined the RM as liasioning services relating to coal for thermal power stations in the state of Maharashtra. He also noted that cancelling bids time and again and allocating work to R 3-5 amounts to driving out the competitors out of the RM and abuse.

The majority however held that there was no violation either of sections 3 or 4 of the Act. The bids of three bidders were in a narrow band but not identical there was no collusion and there was no violation of section 4 as the respondent is a government company and hence CCI does not have a jurisdiction to hold it guilty of favouritism. It is a strange argument, not warranted by any provision of the Act. Only sovereign functions and certain other specified functions of the government are excluded. The definition of enterprise in section 2 (h) specifically provides, "but does not include any activity of the government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."

The appellant argued that the majority ignored the decision of the Supreme Court while refusing to order investigation into the allegation of cartelisation. The majority ignored the manipulations made by R3-5 in driving out competitors and quoting similar rates, which were strong indicators of cartel formation. R-2 was aware of the formation of cartel and yet it continued to award contract to the cartel disregarding public and national interest. The tribunal held the minority order, and not the majority order was legally correct and therefore appeal is allowed and ordered investigation by the DG.

XVII ASSOCIATIONS: RULES OF FAIRNESS AND EVIDENCE

Chemists and Druggist Association v. *CCI and M/s Arora Medical hall*,[55] is an appeal on whether practice allegedly followed by chemist and druggist association, making it mandatory for any one desirous of taking up distributor ship of medicines of any pharmaceutical company in Ferozpur to obtain a no objection certificate (NOC) and letter of credit on payment of Rs.2100/- per company from the association, is violative of section 3(3) (b) read with s. 3(1) of the Act.

54 Appeal no 21-28/2014 and IA no. 31-46/2014.

55 (2010) 10 SCC 744.

The Indian Drug Manufacturers association (IDMA) and organisation of Pharmaceuticals Producers of India (OPPI) are the pan Indian associations of drug manufacturers in India. The Pharmaceutical industry is regulated by the Drug Controller of India under the provisions of the Drugs and Cosmetics Act (DCA) and rules (DCR) made under it. The spread of various associations at different levels are essential to harmonise relationship between pharmaceuticals, the whole sellers and retailers. However those who are not members of these associations also do business.

Till June 2010 R-2 was a member of the Ferozpur Chemist and Druggist association. In 2005 the association initiated disciplinary proceeding against R-2 on grounds that it misused its monopoly position in the district against the retailers. In 2010 several retailers complained that R-2 was indulging in fraudulent billing, but R-2 did not respond to queries made by the association regarding these complaints. The association then, terminated the membership of R-2. As the action of the association was not challenged in any court, the decision to terminate became final. Notwithstanding the termination R-2 continued to abuse its dominance. On May 5, 2012 the association asked its members not to purchase medicines from R-2. Against this resolution R-2 initiated civil proceedings against the association. In response some of the members lodged FIR against R-2 on grounds of inflated fraudulent bills.

The suits of R-2 for defamation against the Association were dismissed by the court as the plaintiff could not prove defamation. Similarly the criminal complaints were dismissed for want of prosecution. While the civil suits and criminal complaints were pending, R-2 filed an information on September 20, 12 under section 19 (1) (a) of the Act alleging violation of section 3 (3).

The CCI decided that a prima facie case was established and hence the DG was ordered to investigate; the DG found that OP1 (the Association), was guilty of anti competitive agreement as it resolved, and issued a circular, directing members not to purchase medicines from the Informant, R-2. The CCI relying on the findings of the DG concluded that the OP1, the association by its conduct foreclosed the competition. The CCI imposed a penalty at the rate of 10% turn over on all the appellants, as well as on office bearers of the association.

The tribunal did not agree with the findings of the CCI on various grounds. (i) The report of the DG suffered from many infirmities. The DG did not properly consider and evaluated the evidence given by the R-2 and many pharmaceuticals; the Commission was not fair to the OPs. (ii) R-2 was unable to prove that NOC was made mandatory by the association and the association's evidence that NOC was not mandatory was ignored by the DG. (iii) The DG ignored the evidence that R-2 issued fraudulent and manipulated bills. (iv) The DG ignored the evidence of majority of pharmaceutical companies that NOC was not mandatory. (v) The DG ignored the assertion of the office bearers that they did not indulge in anti-competitive practices. (g) The DG is a fact finding body and not a decision maker, but the CCI mechanically approved the findings of the DG. The tribunal referring to *CCI* v. *Steel Authority of*

India,[56] and certain other cases decided by the Supreme Court and high courts found that the CCI has not followed the rules of natural justice. The CCI must have considered the report of the DG objectively along with the findings recorded by him and should have drawn its own conclusions, and pass orders under section 27 of the Act. The CCI must have objectively considered the information, replies received in response to notices sent under section 36(2) read with section 41(2), and documents and information collected by DG. The commission cannot abdicate its duty and simply approve the findings of the DG. The Commission blatantly disregarded the rules of natural justice and fairness. The commission has also not examined if the boycott adversely affected the business of R-2 and supply of medicines in the market due to alleged boycott order against R-2 by the association. The CCI, being a quasi judicial body, failed to give reasons for its decisions and did not pass speaking orders.

The tribunal, then considered the question if the requirement of NOC was mandatory for starting distributorship in Ferozpur? According to the tribunal, the fact that it was not mandatory is evident from the fact that the Association did not take any policy decision in this regard and that 80 stockists were working in Ferozpur without obtaining NOC from the association. As long as R-2 was a member of the association he was not refused NOC, when it ceased to be a member there was no necessity of obtaining it. In addition to it there is much evidence to show that NOC was not necessary to become a stockist. The DG and CCI overlooked these facts. The statements of office bearers of the association was also overlooked and not taken into consideration. The Tribunal concluded that the findings of the CCI that it was mandatory to obtain NOC to become stockist were not warranted by the evidence available with the DG.

The next question considered by the tribunal was whether the resolution of the Association of May 26, 12 which were circulated on May 26, 12 asking for the boycott of R-2 violated section 3 (3)? The CCI ignored the circumstances under which the circular was issued. R-2 was expelled from the membership of the association because it fraudulently manipulated the bill, and R-2 did not do anything to contest the decision of the association, which made the decision of the association final. Further R-2 was not able to produce any evidence that it suffered loss of revenue because of the circular.

The next question considered by the tribunal was whether imposition of penalty on the office bearers was legally sustainable? The tribunal found that the imposition of penalty on the office bearers unwarranted on two grounds; (a) notices to them were issued under section 48(2), which required that it must be proved that office bearers were responsible for the conduct of the business of the association, but when it was realised that the requirement of section 48(2) cannot be fulfilled the penalty was imposed under section 27(b), (b) R-2 simultaneously filed two civil actions but this fact was completely ignored by the DG and CCI. Though section 62 provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of

56. (2010) 10 SCC 744.

any other law, but it does not mean that R-2 can avail of two remedies simultaneously, which may result in two inconsistent decisions. In civil suits the court dismissed the claim of R-2 whereas the CCI imposed penalty in the same cause. In the result, the Tribunal set aside the order of the CCI and appeal was allowed.

XVIII CONCLUSION

This year notwithstanding pro-corporate bias of the night watchman state, which in turn influences the financial ideology of the dispute settlement institutions, some of the decisions of competition law forums have been happy though same cannot be said about others. On meeting of mind and the idea of captive market some progress have been made, yet more needs to be done. It must always be kept in mind that the Competition Act, is enacted primarily to protect the interest of the consumers, especially because there is asymmetry of power between the consumers and the corporates.