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COMPETITION LAW

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I INTRODUCTION

THERE IS a dominant economic ideology in relation to market. Healthy competition is the rey to economic development. But, for all practical purposes a dubious variant of this ideology exists in third world, developing countries. Competition issues and interest of consumers may be compromised if they are likely to thwart development. On the face of it, there is substance in this thinking. Among developing countries there is competition for technology, talent and capital, they flow to the country which provide best environment from the point of view of the provider of capital, talent and technology. These providers logically insist that they will go to the country which is prepared to compromise environmental, safety, labour and competition issues. Therefore in some cases we find the dilution of competition issues, through innovative interpretation.What cannot be done directly may be done indirectly. Though legislature, executive and judiciary may have many differences of opinion but when it comes to the core interests and ideology of the state all the three organs act as one unit. It is what we prefer to call unity of the state power.[1]For boosting economic development most of the Indian judicial and tribunal decision, with certain exception, display preference for development at the cost of consumers' interest competition concerns.

II TRENDS

A number of cases have been decided by the Supreme Court on competition law. All these cases are not so important but one of them creates new competition jurisprudence. It re-interprets section 60 of the Act. *CCI* v. *Bharti Airtel Ltd.,*[2] is a case on the relative jurisdiction of Competition Commission of India (CCI) and Telecom regulatory Authority of India (TRAI). The Supreme Court that CCI cannot take up the matter till TRAI concludes certain matters, within the exclusive jurisdiction, CCI cannot decide the this case because the scope of jurisdiction of both of them are different. This case is likely to lead to a lot of litigation as to whether certain matters must be decided by the sectoral regulator before the matter can be taken by the CCI.

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1 Vinod dixit, "Role of Non-Legal Facts in Judicial Process" 60 (1) *Journal of Indian Law Institute* at 32-57(2018).

2 AIR 2019 SC 113.

In CCI v. *Coordination Committee of Artists and Technicians of West Bengal Film and Television Industry*[3] the Supreme Court ruled that it is not necessary to define relevant market in case of anti-competitive agreement as there is presumption of AAEC in cases of horizontal agreements. But AAEC is rebuttable. How the OP will rebut the presumption if RM is not defined? *CCI* v. *Fast Way Transmission Pvt. Ltd.,*[4] is important for explaining the definition of consumer that a service provider is also a consumer if it consume a service provided by another enterprise, though the service it seeks may be in course of and for the purpose of provision of service to the end consumer. Another important case is *Express Industry Council of India* v. *Jet Airways (India) Ltd.,*[5] where without saying so the idea of anti-competition practice was adopted. If there is an arrangement between enterprises which falls short of agreement or where there is not sufficient proof of agreement but circumstances point to the existence of anti-competitive arrangement, it should be treated as anti-competitive practice which is prohibited under section 3 (3), that is the arrangement amounts to 'practice carried on' or 'decision taken'.

III SUPREME COURT

CCI v. *Bharti Airtel Ltd*.,[6] is a case on the relative jurisdiction of CCI and TRAI. The Supreme Court agreed with the High Court of Bombay that CCI cannot take up the matter till TRAI concludes the matter before it because before the matter decided by the TRAI CCI cannot decide the this case and because the scope of jurisdiction of both of them are different.

Reliance Jio Infocomm Ltd. filed information against Bharti Airtel, Vodafone India and Idea Cellular (three incumbent dominant operators) under section19 alleging existence of anti-competitive agreement among them. Apart from these three, certain allegations were also made against Cellular Operators Association of India (COAT). The CCI passed an order directing the DG to investigate the matter under section 26 as in its opinion there existed a prima facie case. All the four opposite parties (OP) files writ petitions against CCI in High Court of Bombay praying for quashing of the afore said order of CCI on ground that CCI did not have jurisdiction as the matter should be decided by TRAI. The High Court of Bombay quashed the order of the CCI and held that unless the matter before the TRAI attains finality CCI cannot exercise its jurisdiction, consequently the order of CCI directing the DG to investigate under section 26 was also quashed. Hence an appeal before the Supreme Court was preferred by the CCI. The Supreme Court agreed with the high court and dismissed the appeal.

On a closer look the Supreme did not deny the relevance of sections 60 and 62 of the Competition Act which gives the Competition Act overriding effect but stated that unless TRAI first decide the issues which exclusively fall within its jurisdiction and which is independent of competition concerns but without which competition issues cannot be decided, CCI cannot decide competition issues. At the

3 [2018]144 CLA 403(SC).

4 Manu/SC/0088/2018.

5 Manu/CO/0013/2018.

6 *Supra* note 2.

same time the court emphasized that in the era of globalization regulatory aspects oftelecom regulator are not less important than competition concerns.

The Competition Act was passed in the context of globalized market which needs regulation of competition. Whereas TRAI is important as a regulator of telecom industry. It is essential that the regulator must perform its duties assigned to it under the Act. It is necessary to ensure that a regulator must fulfil its obligations under the Act. The functions which were assigned to TRAI among others include ensuring technical compatibility and effective interrelationship between different service providers; ensuring compliance with conditions of license by all service providers; and settlement of disputes between them.In the instance case before the CCI, RJIL grievance touched upon non-compliance of license conditions by IDOs. As TRAI is the expert body, in the first instance it must decide these issues. The High Court of Bombay observed, "The question of interpretation of clarification of any "contract clauses", "unified license", "interconnection agreements", "quality of service regulations", "rights and obligations of TSP between and related to the above provisions", are to be settled by the authorities/TDSAT and not by the authorities under the Competition Act. The concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the authority/TDSAT under the TRAI Act only. The Competition Act and the TRAI Act are independent statutes. The statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the object, for which they are established. There is no conflict of the jurisdiction to be exercised by them. But the Competition Act itself is not sufficient to decide and deal with the issues, arising out of the provisions of the TRAI Act and the contract conditions, under the regulations. The Competition Act governs the anti-competitive agreements and its effect - the issues about "abuse of dominant position and combinations". It cannot be used and utilized to interpret the contract conditions/policies of telecom sector/industry/market, arising out of the Telegraph Act and the TRAI Act. The authority under the Competition Act has no jurisdiction to decide and deal with the various statutory agreements, contracts, including the rival rights/obligations, of its own. Every aspects of development of telecommunication market are to be regulated and controlled by the concerned department/government, based upon the policy so declared from time to time, keeping in mind the need and the technology, under the TRAI Act."

The Supreme Court substantially agreed with the high court. In conclusion the Supreme Court observed as follows:

> The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI

which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.

We, thus, do not agree with the Appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the Respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by the CCI to investigate an alleged cartel does not impinge upon TRAI's jurisdiction to regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to 'regulatory capture' and, therefore, the CCI is competent to exercise its jurisdiction from the stand point of the Competition Act. However, having taken note of the skillful exercise which the TRAI is supposed to carry out, such a comment vis-a-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February, 2007, a sectoral regulator, may not have an overall view of the economy as a whole, which the CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out.

The case clearly indicates that certain matters, which can be clarified and interpreted by the TRAI must first be decided by the TRAI only then CCI can exercise its jurisdiction. Unless certain matters, within the exclusive jurisdiction of TRAI are interpreted CCI cannot exercise its jurisdiction because without the interpretation of these matters CCI would not be able to effectively exercise its jurisdiction. However in future this interpretation by the Supreme Court will cause a lot of litigation. Whenever a regulatory body is involved the question relating to conflict of jurisdiction will arise and courts will have to further clarify this case.

CCI v. *Coordination Committee of Artists and Technicians of West Bengal Film and Television Industry*[7] In this case the Supreme Court clarified that it is not necessary for the CCI to define relevant marketfor an anti-competitive agreement under section 3(3) of the Act as there is presumption of appreciable adverse effect on competition and Competition Appellate Tribunal (CompAT) was wrong in suggesting otherwise. But it is difficult to agree with the Supreme Court as AAEC under section 3(3) is

7 [2018]144 CLA 403(SC).

rebuttable. How the OP would rebut this presumption if the RM is not defined? Adverse effect on completion is not appreciable can be proved only in the context of RM.

B. Himmatlal Agrawal v. *CCI* [8] is a case on the scope of section 53B of the Act. In this case NCLAT admitted an appeal under section 53B but on the stay is granted on the order of CCI on the condition that 10% of the penalty imposed by the CCI is deposited. When this amount was not deposited NCLAT dismissed the appeal. The Supreme Court held (per Arjun Sikri and Ashok Bhan JJ.) that right to be heard on merits in appeal is a statutory right and it cannot be dismissed without decision on merit but stay can be vacated as the condition has not been complied with.

CCI v. *Fast Way Transmission Pvt. Ltd.,*[9] [Bench consisted of Rohington Nariman and Navin Sinha JJ., Per Nariman J.]is a case on abuse of dominant position.An agreement was entered into between respondent no. 5, who was the broadcaster of a News Channel called "Day & Night News" and respondent no. 1 to 4 who are Multi System Operators (hereinafter referred to as "MSOs") who carried the aforesaid channel to persons who watch cable television a channel placement agreement was entered into between them. All the four MSOs belonged to Fast Away Group. Taking advantage of a clause in the agreement MSOs terminated the agreement after giving 31 days' notice to the respondent 5.Respondent 5 gave information to CCI for violation of sections 3 and 4 of the Act. The DG in his report found substance in the information and concluded that MSOs had in the RGM of Punjab and Chandigarh had 85% of the RPM.Therefore MSOs can act independent of the market. The DG also found that the MSOs had never terminated such an agreement earlier and it was also not because of low TRP rating.The CCI noted that day and night news was dependent on MSOs for market access. The CCI found MSOs guilty of violation section 4 (2) (c), and imposed a penalty of Rs 8,40,011,41/-

On appeal the tribunal set aside the order of the Commission on grounds of non-applicability of section 4. As the IP and MSOs provide different services and operate in different RMs they are not competitors and hence section 4 does not apply.

It was also brought to the notice of the Supreme Court by MSOs that TDSAT has decided that the termination of agreement by MSOs was violative of Regulation 4.2 of the Telecommunication (Broadcasting and Cable Services) as the reasons for termination were not given which must be given according to this Regulation. The TRP of respondent 5 was the lowest that is the reason because of which agreement was terminated. There are more channels than that could be accommodated by the MSOs therefore the agreement with respondent 5 has to be terminated.

The court observed that that there was no doubt that MSOs were dominant and CompAT did not deny this fact. According to section 2 (f) (ii) 'one who hires or avails a service for consideration is a consumer. The court further observed that denial of market access to respondent 5 by MSOs is abuse. That MSOs are not in competition with respondent 5 the ground on which CompAT decided the case is irrelevant. But

8 Manu/SC/0595/ 2018.

9 Manu/SC/0088/2018.

TRP rating of respondent was so low that CCI should not have imposed any penalty. In conclusion the order of CompAT and penalty imposed by the CCI set aside.

The case is important for explaining the definition of consumer that a service provider is also a consumer if it consume a service provided by another enterprise, though the service it seeks may be in course of and for the purpose provision of service to the end consumer. There can be more consumers than one in a supply chain, intermediary consumers and end consumers.

CCI v. *Thomas Cook (India) Ltd.,*[10] is a case on combination and dealing with section 43A of the Act under which penalty was imposed for violating the conditions attached to requirement of combination. On February 7, 2014 the Board of Directors of Thomas Cook (India) Ltd., Thomas Cook Insurance India Ltd, a subsidiary of Thomas Cook, and Sterling Holiday and Resort India Ltd. entered into a merger cooperation agreement. On the same day they also entered into an additional agreement of share purchase, subscription and market purchase agreement of each other. On February 14, 2014 they applied for combination under section 6 of the Act but these additional agreement were not disclosed and they were disclosed later during inquiry. The CCI approved the combination but in a separate proceeding a penalty of Rs.one crore was imposed for non-disclosure of the additional agreement. The CompAT in appeal set aside the order of the CCI. This appeal under article 136 is against the order of the CompAT. The Supreme Court set aside the order of CompAT and restored the orderof the CCI. The Supreme Court held that as both the transactions merger agreement and additional agreements are inter connected, technical interpretation (by the CompAT) to isolate two different steps of transactions of a composite combination would be against spirit and provision of Act. Market purchases were not independent and could not be used in isolation for purpose of any exemption.

IV SUPREME COURT-BID RIGGING

Rajasthan Cylinders v. *Union of India*,[11] [A.K.Sikri and Ashok Bhushan JJ. (Per Sikri J) is a case on bid rigging and price fixing that is violation of sections 3 (3) (a) (i) and 3 (3) (d) of the Act. This is an appeal against the order of theCompAT. The CCI found the appellants, who supplies LPG gas cylinders of capacity of 14.2 kg., to public sector oil companies, guilty of bid rigging under section 3 (3) (d) and imposed a penalty on them. On appeal the CompAT found them guilty not only of violation of section 3(3) (d) but also of section 3 (3) (a) (i) but reduced the amount of penalty. The bunch of appeals in this case includes appeal by CCI against reduction of the amount of penalty. There is no consumer of these cylinders other than these public sector oil companies, Indian Oil Corporation being the the biggest consumeramong them having a market share of 48%. Initially CCI inquired against 47 Cylinder manufacturing companies but two of them were exonerated. 45 were found guilty of bid rigging, only 44 appealed to CompAT.

10 Manu/SC/0405/2018.

11 Manu/1108/2018.

The Supreme Court relied on the facts as stated in the order of the CompAT. Bids of 50 cylinder manufacturing companieswere accepted by IOC. The CCI *suomoto* took the cognizance of the case and the DG in his report found that in all bids quoted rates were identical or near identical not only among group companies but even among unrelated companies. Strong possibility was shown that collusive bidding might be the result of two meetings, a few days prior to the submission of bids, of Indian Cylinders Manufacturers Association, of which cylinder manufacturers were members. 19 members attended the meetings and not only price were fixed but markets were also divided. DG further reported that since 2011 the manufacturers were colluding.

After recording the famous observation by Lord Denning in case of *RRTA* v. *W.H. Smith & Sons Limited.,*[12] regarding the quiet and secret nature of the agreement between the parties as cited by us in the Annual Survey of 2011.[13]The CCI then went on to record its inference holding that there was element of agreement and considered the following factors in coming to the conclusion. They are as follows: market conditions, small number of suppliers, few new entrants, active trade association, repetitive bidding, identical products, few or no substitutes, no significant technological changes, appointment of common agents and identical bids despite varying cost. It is one of the few cases where CCI concluded anti-competitive agreement/practice even when there was no direct proof of meeting of mind.The argument that the market was oligopolistic as asserted by the appellant was not found convincing by the CCI.

The CompAT accepted the findingsof the CCI that there was violation of section 3 (3). According to the CompAT, the CCI was right in concluding that it had appreciable adverse effect on competition as the conduct of the LPG cylinder manufacturers in coming together on a common platform and fixing the bid prices ensures that no new player could enter the relevant market and quote the prices independently. Thus, these manufacturers would make entry of a new player into the relevant market difficult, because such new player would necessarily have to first negotiate with the existing players to get the business profitably. Other factors were driving existing competitors out of the market and foreclosure of competition by hindering entry into the market. The CompAT also rejected the rebuttal that there was no AAEC on the market.

However, unfortunately the Supreme Court did not find any evidence of meeting of mind and consequently appeals were allowed. The step taken by the CCI and CompAT, in construing anti-competitive practice as distinct from anti-competitive agreement were nipped in the bud. It is our considered opinion that Supreme Court also imposed on the competition law the requirements of agreement under Contract Act, 1872. Logically the order of CompAT is more convincing than that of the Supreme Court.

In this case, according to the Supreme Court, concentration is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers

12 L.R.3 RP122.

13 See V.K Dixit, " Competion Law" XLVII *ASIL* 153 (2011).

and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain period. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concentration. This seems to be too farfetched an argument by the Supreme Court. The Supreme Court. in this case has treated the sequence of events as separate and found explanation for each of the event in isolated manner. Had the court diverted its attention to the sequence as a whole the result would have been different? Exactly a similar approach adopted by the by the CCI in *In re cartelization in sale of sugar Mills by the Uttar Pradesh sugar Corporation Ltd. and the Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Ltd.*[14]

Not only the Supreme Court failed to take all the events as a whole, the Supreme Court did not properly responded to the tribunal's finding that why there was similarity inbids though cost of production was not the same in case of thesemanufacturers, why there were common agents andwhy a meeting of association a few days before the bid submission and why there were so many coincidences? As a matter of fact the factors which were taken cumulatively by CompAT, were taken by Sikri J. separately in isolation. In isolation they were explained by the parties as if they are result of market forces. Had the court consider the question how they are related to each other and what is their combined effect, the finding of the court might have been different.

V SUPREME COURT ON COMBINATION

SCM solifert Ltd. v. *CCI*[15] is a case on relation between sections 6(2) and 43 A of the Act. Section 6 envisages that two or more combining enterprises before combination must seek the permission of the CCI. No combination can come into effect until 210 days have passed from the day when notice of combination is given to the CCI or the Commission has passed order section 31. In case of violation of the requirement a penalty to the extent of 1% of the annual turnover or of assets may be imposed.The case relates to combination between the appellant and Mangalore Chemicals and Fertilisers Limited. The first transaction of the acquisition of the shares was by way of the purchase of shares conducted through bulk and block deals on July 3, 2013. On the second acquisition of the shares on April 23, 2014 the Appellants made a purchase order in the open market for the purchase of up to 20 lacs equity shares. The appellants gave notice on April 22, 2014 and also disclosed the transactions

As the shares were purchased before the expiry of 210 days of the order u/s.31 a penalty Rs 2 crore under section 43A substantially less than 1% of the turnover or of assets was imposed by the CCI. The court has rightly approved the orders of CCI and CompAT. And appeal was dismissed.

14 2017 Comp LR 613 (CCI).

15 Manu/SC/0407/2018.

Uber India System Ltd. v. *CCI*[16] Rohington Nariman and Surya Kant JJ. Per RohingtonNariman] is an appeal by Uber alleging that CCI ordered investigation by DG though there was no *prima facie* case of violation of section 4 of the Act. The Supreme Court did not agree that there was no *prima facie* case and dismissed the appeal. The incentives given to the passengers pale into insignificance in comparison to incentives given to the drivers. This is done so as to prevent drivers from going to the competitors of Uber. Uber is dominant in the relevant market, NCR, which is because Uber can act independent of competitive forces in the RM and can also affect its competitors in its favour. Dominance also makes it possible to offer predatory prices that it offers so high monetary incentives per trip to drivers that the fare charged becomes predatory. As these facts were *prima facie* evidence there is no need to interfere with order of the CCI.

VI NCLAT- ANTI-COMPETITIVE AGREEMENT

Ambuja Cement Ltd. v. *Competition Commission of India*[17] is a case on anti-competitive agreement between the members of cement manufacturers association of India (CMA), OP1 and 11 cement manufacturing companies, the appellants in this appeal. This is allegation made by the Builders Association of India, the Information Provider(IP). There being prima facie case the CCI referred the case to the DG for investigation who found that there was anti-competitive agreement case against Cement Manufacturers Association and 11 cement manufacturing companies. After the report of the DG was submitted, the CCI on June 2012, imposed a penalty on and passed cease and desist order against CMA and cement manufacturing companies after finding them violating the provisions of section 3 (3) (a) and (b) of the Act.

On appeal the CompAT, in December 2015 set aside the order of the CCI and remanded back the case to the CCI with the following observations- (i) the CCI after hearing all the parties will pass fresh orders within three months in accordance with law. The parties shall be free to advance all legally permissible arguments and can rely on documents submitted before February 21, 2012. After the remand the parties were heard again and CCI passed fresh order on August 31 2016 to the effect that the OPs have contravened the provisions of section 3 (3) (a) and (b) of the Act.

The main argument advanced by Ambuja Cement, which was also the argument of other appellants, before NCLAT that CCI has failed to establish 'agreement' between the cement manufacturing companies and no evidence of such agreement is given. The CCI has not been able to prove meeting of mind as well as that the cement manufacturing companies did not act according to normal market practice. The CCI should have evaluated the arguments that there can be other plausible reasons for the behaviour of the cement manufacturing companies, such as market transparency: in case of product like cement, fluctuation in demand and tendency of smaller producers to intelligently follow the price pattern of big producers. These are reasons for parallel behaviour and parallel behaviour is not caused by competition stifling parallel

16 2019 (12) SCALE 818.

17 2018 Tax Pub (CL) 0785 (NCLAT-Del).

behaviour. Appellants alleged that the DG and CCI instead of making conclusions from entire data between January 2007 and March 2011, made conclusions only from two meetings of CMA of January 3 and February 24. The CCI simply presumed that Ambuja Cement entered into agreement because prices increased in January and February 2011. The CCI cannot single out only 11 members of CMA without involving other members of CMA if price parallelism is conducted through CMA. It was further alleged by the appellants that 11 companies were found guilty of forming a cartel only because they controlled 75% of the market, it is illogical. Additionally it was stated that not only the CCI could not establish cartelisation it could not even establish parallelism because the data relied by the CCI is scattered and inconsistent. Different prices were compared incases of different companies, such as monthly average price, gross price, beginning of month average price, gross depot price, ex-depot price. According to the appellants' price parallelism alone cannot determine the existence of a cartel because price parallelism is a consequence of competition. Economic theory postulates that prices are dependent on ratio of supply and demand. Cement being a commodity, the need of which is volatile, therefore its price depend on immediate need of the consumer. But DG and CCI treated price of cement constant throughout India. Based on fluctuating demand, production also fluctuates. November being lean month its production was also reduced in the month of November. Prices increase during January-February as demand increase.

It was argued by the CCI that cement industries are one of the most profitable industries. And many of them have often violate competition rules. La farge has been penalized by various jurisdictions of the world. The CMA and some of its members were found guilty of restrictive trade practices by the MRTP Commission. The CCI found the appellant in the instant case guilty of anti-competitive agreement by way of 'arrangement' under section 3(3) (a) and (b) of the Act. 'Agreement' has been defined under section 2(b) and 'cartel' under section 2(c), andsection 3(3) defines anti-competitive horizontal agreement.

The tribunal significantly observed, 'The competition law seeks to protect competition process not individual competitor. Violation, if alleged must be based on demonstrable economic effect, rather than on formalistic lines. The main issue to be seen as to whether the agreement is unilateral (exclusionary) conduct or done by to cartel enhance or facilitate power. Market power is the ability to control prices or exclude competition, but not all market power is bad. Market power can be shown through direct or indirect evidence.' The tribunal's observation implies that (a) the competition law neither protects an individual consumer nor individual competitor, but the emphasis is to protect the competition as a whole, though both the individual competitor and the individual consumer are also protected in the process. (b) interpretation of competition law should not be based on formalistic lines, such as, why a particular period is taken or not taken into account to infer cartelization, but on the impact of actions on competition process. (c) the evidence may be direct, establishing anti-competition agreement or the evidence may be indirect, leading to inference of anti-competition agreement, or anti-competitive practice though the

tribunal did not use the term practice. (d) All market power is not bad, it may be beneficial for consumers and or the competition.

Behaviour of the appellant leading to inference of cartelization emerges from the following factors (a) use of CMA platform to regularly meet and exchange data, price, production and supply *etc*. A number of instances are given by the tribunal where platform of CMA was used for such purposes. In *Technic SA* v. *SMS Holdings (P) Ltd.,*[18] the Supreme Court observed "If having regard to their relations *etc.*, their conduct and their common interest, that it may be inferred that they must be acting together: the evidence of actual concerted acting is actually difficult to obtain, and is not insisted upon." This is what we mean by anti-competitive practice, but the Court has not use this term. A practice which falls short of agreement butconcerted action canbe inferred from the circumstances is anti-competitive practice. There can be concerted action even if there is no evidence of meeting of mind. But meeting of mind can be inferred from the attendant circumstances though there may not be any overt action leading to the evidence of meeting of mind. There may be concerted action even if there is informal understanding or arrangement without a proof of meeting of mind. In *International Cylinders (p) Ltd.*v.*CCI*[19] the held that burden of proof in competition cases cannot be equated with the burden of proof in criminal cases; preponderance of probabilities is the test and not beyond reasonable doubt.

Between March 2007, when the Act did not come into force, and August 2010 the members of CMA openly discussed and circulated price among them as well other data and desisted from doing so only when a notice under section 42 (2) was sent to them by the CCI. When government authority wanted any information they sent them without a sealed cover that is without any need of secrecy. Though the CCI sought data from March 2007 to February 2011, CMA supplied only that data which suited them. Increase of prices region wise strongly suggest uniform increase in prices. Capacity utilization also shows a uniform pattern.

Market definition is a toolto define competition boundaries. The most important factor is the referent of power over market. For the purpose of power over market, RM has to be defined. The CCI rightly considered all the five regions, northern, western, eastern, southern and central to determine power over market. In the conclusion NCLAT agreed with the order of the CCI in finding the appellants guilty of violating section 3 (3) (a) and (b) of the Act.

Another case decided by NCLAT on anti-competitive agreement is *Hyundai Motors* v. *Competition Commission of India*.[20] It is an appeal against the order of CCI wherein the appellant was found guilty of violating the provisions of section 3 (4) (a) and (e) of the Act in *Ex Enterprise Solutions India Pvt. Ltd.* v. *Hyundai Motors Ltd*.[21] Brief facts of the case are as follows: 'Fx Enterprise Solutions India Pvt. Ltd.' had a Hyundai dealership for sale and service of Hyundai cars. 'Fx Enterprise Solutions

18 (2005) 5 SCC.

19 Suo Moto case no. 3 of 2011.

20 Manu/NL/0224/2018.

21 [2017 SCC OnLine CCI 26, commented by V.K Dixit, "Competition Law" XLIII *ASIL*106-110(2017).

India Pvt. Ltd.' purchased a plot in Faridabad to meet the standards required by 'Hyundai Motor' and commenced a dealership for sales and services of spare parts of Hyundai cars from May 2006. Dealers were required to seek permission of the Hyundai Motors before accepting the dealership of another car manufacturer. Dealers are also forced to source spare parts only from Hyundai or venders approved by it. Hyundai also resorts to price collusion through 'hub and spoke arrangement (Such a conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes.) Fx Enterprises alleged vertical agreement between supplier and dealer and horizontal between dealers through role played by the common supplier which results in price collusion and supply of unwanted cars. The supplier also encourages dealers to tie in arrangement for complementary goods [section 3(4) (a) of the Act]. St. Anthony Cars (p) Ltd. OP2 made similar allegations. The dealers of the 'Hyundai Motor' could not take dealerships of competitors of the 'Hyundai', even if the dealership was a completely separate entity from the dealership of the 'Hyundai Motor' (refusal to deal section 3 (4) (d) of the Act).

In both the cases the DG defined RM generally as 'sale of passenger cars in India' but further elaborated the RM for different provisions. (1) For refusal to deal, "Inter-Brand Sale of Passenger cars in India" (2) For resale price maintenance "Inter-Brand Sale of Passenger cars in India" (3) For tie inarrangement, (a) For CNG kit, "Sale of CNG Kits for Hyundai Brand of Cars in Delhi and NCR" (b) For lubricants, "Sale of Lubricants for Hyundai Brand of Cars in India"; and (c) For insurance, as "Insurance for Hyundai Brand of Cars in India". The DG further relying on *Shamsher Kataria* v. *Honda Siel* (3/2011) divided RM into three markets namely, primary, secondary after market for spare parts and secondary after market for servicing.

The 'DG' held that the 'Hyundai Motor' is 100% dominant in the aftermarket for after sale services of Hyundai brand of cars. The 'DG' also held that the 'Hyundai Motor' has 'entered into tie-in arrangements' with regard to sale of cars and: (i) supply and retrofitting of CNG kits; (ii) sale and supply of lube oils; and (iii) sale of insurance policies and services incidental thereto. The 'DG' held that the aforesaid tie-in arrangements amount to exclusive supply agreement and refusal to deal and therefore, it found the 'Hyundai Motor' to have violated the provisions of sections 3(4)(b) and 3(4)(d), respectively, read with section 3(1) of the Act, 2002. With regard to CNG kit, lubricants and insurance the OP is guilty of violating section 4 of the Act.

The Commission, however did not fully agree with the report of the DG. As neither CCI mandated the DG to cause investigation into the violation of section 4 nor did the IP made such an allegation, the findings of the DG on section 4 are void. Regarding RM the CCI divided the RM into upstream, market of production of cars and downstream, the market of sale of cars. As generally dealers deal only in one brand the downstream market is 'supply of Hundayi cars in India '. We did not agree with this definition relating to RPM and RGM.

There after the CCI analysed the case on five counts as done by the DG. (i) Exclusive supply agreement and refusal to deal- The CCI did not agree with the DG as not in a single case permission was sought and denied, therefore there is no violation on this count. Again we did not agree or disagree witheither the DG or the CCI. One applied the law at normative level and the other at behavioural level[22] (ii) Resale price maintenance- The CCI found the OP guilty of violating section 3 (4) (e). However the CCI did not find OP guilty of tie in arrangement in cases of CNG kit and lubricants as it was necessary to do so in the interest of warranty. CCI also concluded that OP only recommended insurance companies but did not impose them on the consumer. The OP was only guilty of violating section 3 (4) (e) of the Act.

However for some reasons the tribunal decided to set aside the order of the CCI on two grounds namely that the 'Commission' has failed to appreciate the evidence and the impugned order is not based on any specific evidence and has been passed merely on the basis of opinion of 'DG'. The 'DG' as well as the 'Commission' also failed to decide 'relevant geographic market' or a 'relevant product market' as required under section 19 (6) and (7) of the Act, 2002. The author of this survey has not been able to understand the logic of the argument of the tribunal. No clear instance has been given by the tribunal as to which evidence they were referring to. Is dealership agreement is not evidence sufficient to reach a conclusion. Is admission of 'Discount Control Mechanism' not sufficient evidence of resale price maintenance? Other ground for setting aside is failure to define RM. Again it is difficult to appreciate the logic of the tribunal. The tribunal opined that factors promoting and hindering competition under section 19 have not been analysed properly by the CCI. But which factors that promote or hinder competition have not been taken into account was not clarified by the tribunal. This is not a happy and reasoned decision of the tribunal.

VII COMPETITION COMMISSION OF INDIA: ABUSE OF DOMINANT POSITION

Confederation of Real Estate Developers Association of India-NCR (CREDAI-NCR) v. *Department of Town and Country Planning, Government of Haryana*[23] is a case on whether there is a prima facie case for ordering investigation by the DG. The information is filed by the Confederation of Real Estate Developers (IP) against Department of Town and Country Planning, Government of Haryana (hereinafter, OP-1/DTCP) and Haryana Urban Development Authority, (hereinafter, OP-2/ HUDA). IP is an NCR chapter of all India organization of real estate developers. OP1 regulates urban development in Haryana and also advises corporations and boards such as OP2. OP2 is responsible for planned development in Haryana. OP2 also acquires land and also give land to developers. OP2 is empowered to grant licenses to real estate developers. This power was delegated by OP2 to OP1 which grants licenses to real estate developers. It is alleged by IP that in some cases the terms and condition of the grant of licenses are unfair and as the OP1 and OP2 are dominant in RM this amounts to violation of section 4 of the Act. It is alleged by the IP that OPs in the Letter of

22 See V.K Dixit, "Competition Law" XLIII *ASIL* 109(2017).

23 Manu/CO/0017/2018.

Intent for Sohna (LOI), imposed unfair conditions on real estate developers in terms of time and development work. Also alleges that OPs have imposed payment schedule unilaterally without providing any basis of calculation for these charges and payment schedule. The developers are also under an obligation to carry out additional development work at later stages. The basis of charges for additional work has not been disclosed.

In counter affidavit OPs allege that they are not enterprises within the meaning of the section 2(h) of the Act as they are not engaged in the production, storage, supply, distribution, acquisition or control of articles or goods or the provision of services of any kind. OPs also argued that they are not consumers within the meaning of section 2 (u) of the Act as they neither buy nor sell any goods or services. It was further contended by the OPs that as the matter about the payment of external development charge(EDC) is pending before the Supreme Court, the CCI cannot decide the matter. Regarding the allegation of the requirement of disproportionate payment of EDC by the developers, OPs maintained that EDC payments are based on area of development and not on the basis of license fee. Interest is reasonably charged for delayed payments. Nothing unfair about it.

The CCI noted that the definition of enterprise under the Act is very wide covers OPs, they do not fall within the exceptions provided for sovereign enterprises. The CCI further rejected the allegation that developers are not consumers as the definition covers not only end consumers but also the intermediary consumers. CCI further observed that pendency before the Supreme Court does not oust the jurisdiction of the CCI to examine competition concernsin view of sections 60, and 61.

The CCI then began defining RM which according to them is,' 'market for issue of licenses and development of infrastructure for residential plotted/group housing/commercial colonies in Haryana'. RGM according to the CCI cannot be restricted to Sohna as the activities of OPs extend to whole of Haryana. As no one except OPs can grant license for construction, OPs are dominant in the RM. Regarding abuse, no development work has progressed even though substantial amount has been deposited by the developers with the OPs. In view of these findings of the CCI, objections raised by the OPs stood rejected and the DG is directed to complete investigation within 60 days without being influenced by the findings of the CCI regarding the establishment of *prima facie* case.

East India Petroleum Pvt. Ltd. v. *South Asia LPG Company Pvt. Ltd. (SALPG)*[24] is a case on abuse of dominamt position. The information was filed by East India Petroleum Pvt. Ltd (EIPL) alleging violation of sections 3 and 4 of the Act by South Asia LPG Company Pvt. Ltd. (SLAPG) .The allegation is regarding denial of access to IP by SLAPG of its terminal ling service at Vishakhapatnam port.. EIPL is engaged in the business of providing terminal ling services to oil marketing companies (OMCs) *viz.* Indian Oil Corporation Limited (IOCL), Bharat Petroleum Corporation Limited (BPCL) and Hindustan Petroleum Corporation Limited (HPCL) for import and export

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of bulk liquid petroleum products at the Visakhapatnam port. SALPG was incorporated in 1999 as a joint venture between HPCL and Total Gas and Power India Private Limited ("TGPI"). The Opposite party (OP) SALPG is engaged in the business of providing terminalling services that involves receipt, storage and dispatch of petroleum products to OMCs at the Visakhapatnam Port. SLAPG constructed an underground cavern with a storage capacity of 60,000 MT at Visakhapatnam Port. SLAPG became very important as all products could be unloaded through the new unloading arms installed by SALPG. EIPL cannot operate independentlywithout taking unloading facility of SLAPG, and SLAPG does not permit mixing of Propane and Butane without mixing which LPG cannot be transported to the hinterland. SLAPG denied bypass to EIPL and insists using cavern which is costly. Therefore EIPL has not been able to receive cargoes that contain propane and butane imported separately, to be blended thereafter. This has resulted in limiting and restricting the provision of services by EIPL as well as the market for such services

The CCI rightly defined RM narrowly as "terminal ling services at Vishakhapatnam port" and did not agree with the report of the DG on the definition of RM, dominance and abuse of dominance. The terminal ling services offered at the ports of Haldia and Ennore did not have the services (facility of blending propane and butane) offered by Vishakhapatnam Port. And therefore are not substitutable. As there is no competitor of SLAPG at Vishakhapatnam it is dominant. The dominance of SLAPG is further aggravated because of other factors as well. SLAPG's monopoly in operating terminal ling infrastructure, absence of any alternative for OMCs, existence of significant entry barriers (high cost and long gestation period of creating alternative to terminal ling service of SLAPG), high degree of consumer dependence and other factors, SALPG enjoyed an undoubted dominant position in terms of section4 in the context of factors given in section 19 (4). "Efficiency justifications advanced by SALPG ignored inefficiencies/ losses resulting from prohibition of bypass of cavern and denial of tap-out to EIPL and resultant foreclosure of competition and consequent loss of efficiencies. Moreover, claims of SALPG with respect to capacity of jetty, possibility of simultaneous discharge and necessity of further blending were disputed. In absence of holistic approach to efficiency and claims of SALPG not being supported by clear and cogent material, these were not considered plausible and sufficient to justify restraint on competition. SALPG had ability to deny market access to competitors given its monopoly position in operating terminal ling infrastructure at Visakhapatnam Port.

Further, given its commercial interest in insisting on use of cavern, SALPG had incentive to foreclose use of EIPL's storage and proposed blending services. Its reluctance to undertake an independent study on safety concerns could be construed as a ploy to refuse sharing its terminal ling infrastructure. Such a conduct amounted to denial of market access as well as a limitation and/or restriction on services otherwise being provided by informant, in contravention of section 4(1) read with section 4(2)(b)(i) and section 4(2)(c) of Act. Further, bypass restriction imposed by SALPG appeared to be primarily with view to protect its commercial interest at cost of competition. SALPG requiring users to necessarily use cavern and pay higher charges

was an unfair imposition in provision of terminal ling services; and was likely to discourage imports and restrict services otherwise offered by informant. Thus, impugned restrictions on bypass of cavern facility were in contravention of Section 4(1) read with section 4(2) (a) (i), section 4(2)(a)(ii) and section 4(2)(b)(i) of Act."

Hemant Sharma v. *All India Chess Federation (AICF)*[25] is a case on abuse of dominant position. The IPs in this case are Hemant Sharma, IP 1, Devendra Bajpai, IP 2 , Gurpreet Pal Singh, IP 3 and Karun Duggal, IP4 against AICF, the OP, alleging violation of sections 3 and 4 of the Act. IPs are the chess players, registered with AICF on annual basis. AICF is a society registered under the Tamil Nadu Societies Registration Act, 1975 as the National Sports Federation ('NSF') for the sport of chess. AICF is also recognised by and affiliated to, Federation Internationale des Echecs ('FIDE'), which is the apex international body governing the sport of chess.

It was contented by the IPs that for registration with AICF it is a condition that a player will not participate in any event not authorized by the AICF else they cannot be considered for national and international events. If a player participates in any unauthorized event he would be debarred for one year from playing in any national or international event, would have to surrender 50% of the prize won in unauthorized event and have to tender apology that he would not do so in future. It was further averred that ELO (measurement of strength against an opponent) is rated by FIDE but AICF reduced the rating if a player played in unauthorized event. All this amount to violation of sections 3 and 4 of the Act. There being *prima facie* evidence, DG was directed to investigate. DG gave the following findings, that AICF is an enterprise, the RM is "conducting and governing domestic and international chess activities for both men and women and the underlying economic activities in India" as from demand side the players cannot shift to any other body conducting similar game nor chess is substitutable by any other game. AICF is affiliated to FIDE and it alone can organize sport of the magnitude, it is dominant in sport of chess. AICF abused its dominant position in many ways, restriction on playing unauthorized games, making organizing of tournaments un-remunerative for competitors, removal of ILO/FIDE ratings for playing in unathorised sports, sharing of non-refundable earnest money by AICF from tournament organizing bodies, shares entry fee from those players who contest under special/donor/entry fee category, misuse of discretion by the secretary in nominating players.

As regards section 3 the DG found that the Constitution and Bye Laws of AICF have caused appreciable adverse effect on competition in the country because they have harmed competition, in terms of various factors enumerated under section 19(3) of the Act, such as creation of entry barriers, driving existing competitors out of the market and foreclosure of competition. These have the effect of limiting and/or controlling supply, market, technical development and provisions of services in violation of section 3(3) (b), but strangely the DG concluded that vertical relation does not exists between AICF and players, therefore section 3(4) does not apply. In our opinion there is vertical relation both from demand and supply side as AICF and

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players are organisers/regulator of the game and players are contributors of the sport and hence relationship is vertical.

The CCI concluded that AICF is an enterprise as its activities have an economic aspect, even if it does not have a profit motive. Thereafter it proceeded to define RM. The DG defined the RM, 'conducting and governing domestic and international chess activities for both men and women and the underlying economic activities in India'. But the CCI defined it as consisting of two RMs, 'market for organization of professional chess tournaments/events in India' and 'market for services of chess players' keeping in mind the impugned restrictions on the chess players and on the organisers of chess events/tournaments, and the effects flowing therefrom in India.

CCI also found AICF to be dominant in both the RMs as AICF enjoys dominant position in both the relevant markets on account of the regulatory powers enjoyed by it under the pyramid structure of sports governance. Extent of AICF's dominance can be appreciated from the provisions of Code of Conduct, which is as follows:

(x) Players desirous of participating in any official FIDE/Asian/Commonwealth Championships should have participated in the last year's respective age group, open National Championships. However, the Federation shall have the right to accept or reject any such requests.

(y) Players shall strictly abide by the Constitution, Rules, Regulations and Orders/ Instructions of the Federation in force from time to time and also abide by the Instructions of Arbiters and AICF office bearers.

(z) No player shall participate in any tournament not authorised by All India Chess Federation or its affiliate members or District Association and units affiliated to them. The above violation shall attract disciplinary proceedings including cash penalties apart from debarring from participating in any tournaments in future.

The dominance is also evident from the rules regulating the organization of tournaments and national championship such as "(j) Players registered with AICF alone will be eligible to participate in the Championships." Regulatory powers of a sport body are also a source of market power for professional sport.

Then CCI proceeded to examine the question of abuse of dominance. The CCI was alive to conflict between regulatory power (for integrity of the sport) and competition issues. The system of approval for participation in sport is a recognized phenomenon. However if regulations impede competition without any justification that would violate the Competition Act. That is the ratio of *Dhanraj Pilay* v. *Hockey India.*[26] There were many abusive provisions, such as the declaration a player has to give an undertaking that he will not play in any unauthorized tournament. The restriction is absolute and does not leave any scope of participation in an unauthorized sport. Playing in an unauthorized sport attract harsh penalties. Such player shall attract disciplinary proceedings including cash penalties apart from debarring from

26 2013 CompLR 0543.

participating in any tournaments in future. As a matter of fact these harsh provisions were actually implemented by AICF. Players' ELO ratings were reduced and 50% of the prize money was appropriated by AICF. . The Commission notes that due to the impugned restrictions, chess players cannot participate in tournaments not recognised by AICF. Accordingly, the Commission concludes that the impugned restrictions are in contravention of the provisions of section 4(2)(b)(i) and section 4(2)(c) of the Act. Consequently apart from cease and desist order penalty was also imposed on AICF.

House of Diagnostics LLP v. *Esaote S.P.A*[27] is a case on abuse of dominant position. House of Diognastics LLP, the IP, alleged violation of ss. 3 and 4 of the Act against Asaote S.P.A. (OP1) and Asaote Asia Diagnostic Pvt. Ltd. (OP2). Both the OPs are group companies as held by the majority of CCI, because OP2 is 100%owned subsidiary of OP1. The allegation was that being dominant the group companies should be fair and should not abuse dominance. The majority defined the RM as, "market for dedicated Standing/Tilting MRI machines in India". This was so defined because dedicated standing/tilting MRI machines are distinct medical product and cannot be substituted by conventional MRI machines and OP1 and OP2 alone supply these machines in India. Other two manufacturers, Paramed Ltd. and Fonar Ltd. do not operate in India. OPs command 100% market of the relevant product in India. The OPs abused dominance in as much as they (A) contracted to supply new machines but supplies one year old machines, contravening provisions of section 4 (2) (a) (i). (B) Exclusive rights had been given to OP2 for supply of spare parts and for providing after sales services to consumers of G-Scan MRI machines in India. Such exclusivity not only limited provision of services in after sale market but also denied market access to third party service providers. Hence, such conduct also contravened provision of sections 4(2)(b) and (c) of Act. Therefore, OPs had violated provisions of section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b) and 4(2)(c) of Act, by abusing its dominant position in relevant market. Accordingly, OP Group (OPs) was directed to cease and desist from indulging in such conduct. Penalty was imposed on OP at rate of 10 per cent of their average relevant turnover of preceding three financial years.

One of the members, Sudhir Mittal, gave a dissent on grounds that dedicated standing/tilting MRI machines are substitutable with conventional MRI machines and hence RM is 'Market for MRI machines in India'. In this RM the OPs are not dominant and cannot abuse their dominance. Weight bearing facility not unique to dedicated standing/tilting MRI machines. All MRI machines could have weight bearing functionality with aid of a compression device, which could be added at a fraction of cost of a dedicated tilting MRI machine. Regardless of functionalities, ultimate purpose of scans undertaken by an MRI machine was to provide a clear image for purpose of diagnosing problem suffered by a patient. It also could not be disputed that customers of MRI machines were sophisticated/knowledgeable hospitals and diagnostic centers who consider a number of factors (with 'weight bearing' functionality being one such factor among many) when making purchasing decision of an MRI machines. Further, there was low frequency of demand of standing/ tilting MRI machines. Small size of

27 Manu/CO/0074/2018.

market indicated substitutability between dedicated standing/tilting MRI machines and other MRI machines. In such a scenario, it was difficult to construct a relevant market merely on basis of some additional technical characteristics.

However it is difficult to agree with the minority. Undoubtedly the technologically advance devises are preferred in the modern world. To argue that by installing another devise in the conventional MRI machines would make the conventional machines equivalent to specialised machine amounts to promote 'jugad' technology. Small market is also a market if it is distinct. Small does not cease to be distinct.

Rico Auto Industry Ltd. v. *GAIL (India) Ltd.,*[28] is a case on abuse of dominant position. In this case there are ten substantially similar information, all of them are disposed of in this order. In this survey we shall concentrate only on the first. Rico Auto Industries is an auto components manufacturing industry in Gurgaon, alleged violation of section 4 of the Act, against GAIL a public sector undertaking which supplies re-gasified liquefied natural gas (RLNG) under gas sale agreement (GSA). Apart from Rico Auto Industries other Informants are Omax Auto Ltd. (Omax Autos) and Rico Castings Ltd. (Rico Castings), Rathi Steel, Mohan Meakin Ltd. (Mohan Meakin), KLRathi Steel Ltd. (KLRSL), Rathi Special Steel Ltd. (RSSL) and Rathi Bars Ltd. (RBL). They shall be collectively referred to as the 'Informants' or 'Buyers'.

In all these information there were two allegations, namely, (a) imposition of unfair terms and conditions, by the OP under the GSA entered into with the informants; and (b) alleged unfair conduct of the OP. Alleged unfair terms were as follows. (i) If the buyer does not lift stipulated quantity of gas he will have to lift it during the period of agreement. If he does not do so he will have to pay for the unlifted quantity. (ii) If due to force majeure a quantity could not be lifted by the buyer he would make such request to the seller that the unlifted quantity be added to annual contracted quantity (ACQ). The provision is unfair because there is no such reciprocity if the seller fails to deliver stipulated quantity due to force majeure. (iii) According to the Informants, one of the clauses does not envisage any liability upon the seller, if it fails to deliver the Recovery Period Gas, despite request made by the buyer. On the contrary, if the seller tenders for delivery of the Recovery Period Gas, the buyer must take it and pay for such gas or incur 'Take or Pay' (ToP) liability. (iv) According to one of the clauses of GSA if the RLNG is not up to specification the buyer shall give notice to the seller but there is no provision for compensating the buyer and no specified test procedure has been provided for certifying the required quality of gas. (v) Take or Pay clause is most abusive, even if the buyer gives a termination of gas supply order he has to pay for the agreed quantity of gas. Take or pay policy requires the buyer to pay for the adjusted annual contract quantity even if the supplied quantity is less than such quantity. But there is no such reciprocal liability on the seller if it withdraws from the GSA. (vi) Force majeure has been defines unevenly for buyers and seller. Many more events have taken as constituting force majeure for seller than for buyers. (vii) Both buyers and seller can terminate the GSA by giving 30 days' prior notice if

28 Manu/CO/0086/2018.

buyers/seller fail to take/deliver 50 percent or more of the contracted gas quantity during a period of 180 consecutive days.

Apart from abusive terms contained in the GSA the IP alleged that certain conduct of the OP were also abusive that is unfair or discriminatory. (i) Stoppage of supply of gas without notice in some cases, (ii) Denial of dispute resolution mechanism envisaged in GSA in some cases. (iii) Arbitrarily and unilaterally doing away with the requirement of seven banking days envisaged under the GSA, after buyer's due date, for issuance of notice for suspension of gas. (iv) The OP has arbitrarily and unilaterally substituted the term 'disconnection' for 'suspension' of gas supplies in its invoices raised on Informants thereby avoiding the compliance requirements for suspension of gas. (v) Informants have been forced to make payments against incomprehensible invoices. (vi) Invocation of Letter of Credit by the OP in respect of amounts beyond time limits prescribed under the GSA. (7) Imposition of new condition of arbitrary 'pay for if not taken' obligation on the OP, computed on a basis not contemplated in the GSA.

All the allegations either pertain to unfair terms of GSA or that the seller has not acted strictly in accordance with the clauses of the GSA. In the preliminary conference the Commission asked for certain additional information from the IPs. The OP was asked to give reasons for take or pay liability for gas and for decline to settle the case according to GSA. After taking into consideration the report of the DG, replies of parties and material on record the Commission proceeded to decide the case. First the Commission defined RM. Natural gas is used by two types of consumers, domestic and industrial: OP deals with industrial consumers and IPs are industrial consumers. The industrial consumers of RLNG barring one consumer in Alwar were not willing to shift to alternate source of fuel for many reasons (1) shifting to alternate source is costly (2) In NCR furnace oil and pet coke cannot be used according to law. Therefore the RPM is according to the DG "supply and distribution of natural gas to industrial consumers". But RGM according to the DG is respective districts of the IPs that is Gurgaon, Rewari, Alwer and Ghaziabad. The DG concluded that OP is dominant in the RM because its market share compared to its competitors was very high in some cases even 100% but always more than 58%. The dominance was further reinforced by the following factors according to the DG. It is integrated upstream with foreign suppliers apart from downstream integration. GAIL is also a maharatna enterprise of the Central Government. The report of the DG also states that OP has contributed to the economic development of the country [here the DG is relying on section 19 (4) clauses (k) and (l), factors relating to fulfilment of social obligation and contribution to economic development]. Prices of gas after taking into consideration various factors are fixed by a mechanism provided by the Government of India. OP sells gas to industrial consumers through long term, mid-term and spot market contracts, charging different prices, spot market price being highest. As the entire project entails high cost and upstream suppliers make fixed quantity contracts the downstream industrial consumers also have to take entire maximum contracted volume, that is the logic of take or pay policy. Annual 'take or par' scheme is an

advance payment which facilitate the buyer to get make-up gas at any time during the contract period. Advance payment is adjusted towards make up gas.

India is energy deficient. Gas has to be imported. It is better to enter into long term contract with the upstream suppliers as long term contracts give better price. 10 year contract is better than one or two year contract as longer term contract has the advantage of flexibility of supply during a particular year. Various quantities can be demanded in different years. Take or pay is only to neutralize the losses that the OP may suffer because of not taking the contracted quantity. The investigation concluded that the OP is charging uniform 'Take or Pay' liability from all its industrial customers and demanding it solely to compensate the loss incurred due to not off-taking of RLNG by industrial customers. The investigation concluded that the OP is charging uniform 'TOP' liability from all its industrial customers and demanding it solely to compensate the loss incurred due to not off-taking of RLNG by industrial customers. As the sale from spot market is not significant loss cannot be compensated through this route, therefore the option of take or pay.

There after the DG directed his attention towards the allegation of unfair conduct of OP. The DG investigated them. (i) The allegation was that forcing the Informants to make payments against incomprehensible invoices without indicating the details required in GSA. The DG observed that all the information on PNDCQ, DCQ, Allocated Quantity of Gas, Net Heating Value, *etc.* was either provided in the Joint Ticket or in the invoices and as such both were to be read simultaneously. (ii) Computation of 'TOP' liability in such a manner not contemplated in GSA. "Nomination or determination of the various quantities envisaged under the GSAs were dependent upon the actions of both the OP and Informants, being the seller and buyers respectively. In terms of article 8.1 of GSA, the OP's responsibility was to provide Annual Programme of gas delivery which would show the Annual Contract Quantity (ACQ), Adjusted Annual Contracted Quantity (AACQ), Monthly Quantities, Daily Contracted Quantity (DCQ) and Properly Nominated Daily Contracted Quantity (PNDCQ). In response to Annual Program by seller (the OP), the buyers *i.e.,* the Informant's responsibilities were to nominate Quarterly Contracted Quantities (QCQ), Upward Flexibility Quantity (UFQ), Downward Flexibility Quantity (DFQ), Restoration Quantities, Make Up Gas and Make Good Gas. Time schedule of making these nominations were also mentioned in the GSA." DG reported that both the parties failed to provide evidence of compliance or noncompliance of the terms of GSA. The DG notes that annual consolidated information was provided in the month of December. The allegation that quarterly information was not provided is without substance as this information can be obtained from the monthly information. Similarly other allegations were also negative by the DG. In some cases the OP gave assurance to the Commission.Consequently the Commission found the OP not guilty of abusing its dominance.

The case is one of the few cases where the conduct was found not to be abusive primarily because of section, 19 (4) (k) and (l) that is on ground of 'social obligation' and 'contribution to economic development'.

VIII CCI: ANTI COMPETITIVE AGREEMENT

Express Industry Council of India v. *Jet Airways (India) Ltd.,*[29]is a case on anti-competitive agreement. IP alleged that some of the airlines have entered into anti-competitive agreement to very fuel surcharge (FSC) in uniform manner. The DG reported that based on the analysis of the information and evidences gathered during the course of investigation, there was no proof of the allegations leveled by the IP that the domestic airlines had indulged in anti-competitive conduct during the period 2008-2013 with respect to fixing of FSC rates for cargo transportation. However the CCI decided that there is sufficient material on the record to conclude that OPs acted in concerted manner to fix FSC.[30] Here I have discussed the sequence of events to warrant concerted behaviour] On appeal the CompAT ordered the CCI to reconsider the report of the Jt.DG. On reconsideration of the report CCI came to the same conclusion that there is sufficient material in the report to conclude existence of anti-competitive agreement. Then the CCI gave the aforementioned order.

The CCI in this case rejected the contention of the OPs that CCI lacked jurisdiction as the agreement was entered before the commencement of the Act in May 20, 2009. Though it has been held in many earlier cases but was reiterated again that if an agreement was made before commencement of the Act but acted upon even after the commencement of the Act, CCI has jurisdiction. In order to have aholistic view the CCI may take even pre-commencement of the Act transactions into account.The parties cannot apply to the CCI for appearance of the DG though DG can appear before the CCI either personally or through officers subordinate to him.

The case revolves around the definition and quantum of proof needed to establish the fact of anti-competitive agreement. There is rarely a direct evidence of action in concert and in such a situation, Commission had to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In the light of definition of term 'agreement', Commission had to find sufficiency of evidence on basis of benchmark of preponderance of probabilities.OPs had acted in parallel and only plausible reason for increment of FSC rates by airlines was collusion amongst them. Such a conduct had, in turn, resulted into indirectly determining rates of air cargo transport. Parallelism itself is not a ground of anti-competitive behaviour except when there are some reasons to reach to a contrary conclusion. As no other plausible reason could be given and only explanation is concerted behaviour. In case of agreements as listed in section 3(3)(a) to (d) of the Act, once it was established that, such an agreement existed, it would be presumed that, agreement had an appreciable adverse effect on competition in India; and onus to rebut presumption would lie upon parties. In the present case, OP-1, OP-2 and OP-3 could not rebut said presumption. Further, they had not been able to show how their impugned conduct resulted in accrual of benefits to consumers or made improvements in production or distribution of goods in question *etc.* Accordingly, Commission

29 MANU/CO/0013/2018.

30 See the details in V.K Dixit, "Competition Law" LI *ASIL* 181-182 (2015) and XLVII *ASIL* 150-159 (2011).

imposes a sum of Rs. 39.81 crore on OP-1, Rs. 9.45 crore on OP-2, Rs. 5.10 crore on OP-3 as penalties for their impugned conduct.

The case is importantbecause it is one the better reasoned case where the CCI demonstrated that there can be concerted anti-competitive agreement without any proof of meeting of mind on the basis ofholistic assessment of a number of coincidences which do not imply normal commercial parallelism. We have elaborately discussed the point in our earlier comments.[31]

G. Krishnamurthy v. *Karnataka Film Chamber of Commerce*[32] [Manu/CO/0067/2018] is another case on anti-competitive agreement. It is an information filed by G. Krishna Murthy (the "Informant", or IP) under section 19(1)(a) of the Competition Act, 2002 against Karnataka Film Chamber of Commerce ("KFCC" or OP-1"), Kannada Okkuta ("OP-2"), Mr. Jaggesh ("OP-3"), VatalNagraj ("OP-4") and Sa. Ra. Govindu, President, KFCC, ("OP-5"), (all of them OPs). The IP alleged contravention of the provisions of section 3 of the Act.

The informant, a former member of OP-1, is a producer of films and is involved in the business of movie production, distribution and related activities. OP-1 is stated to be a society registered under the Societies Registration Act and is an apex body of producers, directors, technical staff, distributors and exhibitors of films in the State of Karnataka. OP-5 is stated to be the President of OP-1 at the relevant time. OP-2 is stated to be an unregistered organization formed for protection of Kannada language and culture. OP-4 is stated to be a leading politician and Convener/President of OP-2. OP-3 is stated to be a politician, actor and producer in the State of Karnataka, purportedly having an influential position.

The IP got the right to dub a Tamil film into Kannada but from the very beginning roadblocks were created by OPs into his work. However he was able to complete the dubbed film 'Sathyadev IPS' and got certificate from the Central Board of Film Certification. He proposed to release the film on March 3, 2017 after advertising it and receiving good reviews of the film and booking the studios. In the meantime OP3 published in newspapers in veiled language that release of film will receive violence. OP3, OP4 along with members of OP2 gave interviews to the press that they would burn the theatres and if necessary go to jail. Consequentlythe revenue of the film suffered huge loss. Based on a news report, the Informant cited the example of blockbuster Telugu movie 'Bahubali', which got dubbed in Hindi, Tamil and Malayalam, but not in Kannada language, as OP-1 did not permit the same. Based on these and other similar information the CCI granted interim injunction for the release of IP's dubbed film 'Dheera' and sent the case to the DG.

After taking intoconsideration the report of the DG, replies of IP and OPs the CCI concluded that there was violation of section3(3) read with section 3(1) of the Act. Statements by OP-3, in a press conference, organized at the behest of OPs were also factors in concluding anti-competitive behaviour. The press meet was organized with the collective intention of OPs to protest against the screening of a dubbed film.

31 For detail discussion see, V.K Dixit, " Competition Law" XLVII *ASIL* 150-159 (2011).

32 Manu/CO/ 0060/2018.

There was tacit understanding among all the OPs. It is noted from the sequence of events, that the OPs launched the Tweets, Press Meet protests *etc*. around the release of the movie of the Informant *i.e.,* March 3, 2017. As brought out by the DG, these were targeted specifically towards Sathyadev IPS and generally against dubbed cinema. Such conduct amounts to creating barriers for the new entrants. The important question is whether OPs acted in concert? The DG found that a few days before the date of release of the Informant's movie, OP-3 posted certain tweets, appealing to the masses to agitate against the dubbed cinema. The tweets continued for a long time. The tweets of OP 3 were also specifically targeted against Sathyadev IPS. On March 1, 2017, OP-1 to OP-5 participated in tweets. It is clear that OP3 and OP4 raised their voice against dubbed cinema. Independent witnesses also testified thatpress meet was organized by OP2 and OP4. While defending their actions they sought to justify it in the name of advancement and protection of Kannada. But protection of Kannada does not authorize OPs to oppose other language movies dubbed in Kannada. Apart from OP2 and OP4, OP3 in his deposition also admitted having participated in the press conference. There was also evidence of negative impact of activities of OPs on the screening of dubbed movies. OP1- OP5 all have a tacit anti-competitive agreement to stifle the competition of films and their screening.CCI also finds OP1 guilty of recidivism (repeat violation of law). OP1 has also acted against competition law through its President OP5.

In view of the aforesaid findings, the Commission directs OP-1, OP-2, OP-3, OP-4 and OP-5, and members of OP-1 and OP-2 to cease and desist from indulging in practices which have been found to be anti-competitive in terms of the provisions of section 3(1) and section 3(3)(b) of the Act. Penalty was imposed on OP1, OP3, OP5, but on OP2 and OP4 would be imposed later when they submit proof of their income. OP-1 was, *inter alia*, directed to bring in place a Competition Compliance Manual to educate its members about the basic tenets of competition law principles.

IX COMBINATION

In Re: Wal-Mart International Holdings, Inc.[33] is a case on combination. A notice was given by Wal-Mart International Holdings, Inc. (Walmart), a subsidiary of Walmart Inc. under s. 6 (2) of the Act for acquisition between 51% to 77% of the outstanding shares of Flipkart Private Limited (Flipkart) and matters incidental thereto. Under Regulation 14 the CCI sought certain information from Walmart which were provided after some delay. Further information were provided under Regulations 6 and 19. This informationrelated to purchase of ordinary and preference share by Walmart. After purchase Walmart will have between 51-77% shares of Flipkart. Thereafter an agreement would be made between Walmart and shareholders of Flipkart for the governance and ownership of Flipkart. The notice was given pursuant to the execution of a Share Purchase Agreement on May 9, 2018 by and among Walmart and certain shareholders of Flipkart (SPA); and a Share Issuance and Acquisition Agreement on the same day by and among Walmart and Flipkart (SIAA). Because of government restrictions under foreign direct Investment policy, Walmart India cannot engage in

33 Manu/CO/0060/2018.

direct sales to consumers (B2C Sales, business to consumers). B2B (business to business) Sales of Walmart India are carried on through the following two channels: Through Best Price stores, wholly owned by Walmart India, and operates on a member only model and to purchase from Best Price Stores it is mandatory to become a member. Walmart India cannot engage in direct sales to consumers (B2C Sales, which means sale to wholesalers, retailers but not to consumers).

The CCI observed that if combinations do not alter the competition both in the horizontal and vertical markets based on the parameters as spelt out in section 20(4) of the Act, then the combination does not pose any competition harm. As in the instant case, Flipkart the acquired company, is also involved in B2B sale therefore the impact of the combination must be examined, there may be a horizontal lap between the two. CCI observed that out of the total retail trade 93% of the retail trade is unorganized, (traditional) and the size of B2B trade is only 30-40% of the total retail trade. 5% of B2B sale is through this combination. Impact of combination on trade is negligible.

The business of Flipkart was very strong in mobile and electronicswhereas that of Walmart is negligible in this field. Both the parties do have some horizontal overlap in lifestyle products, which includes skincare, haircare, oral care, baby and feminine hygiene, personal wash, apparel and shoes and accessories. But again, the combined value of sales of the parties in this segment is low and relatively insignificant to the size of the markets for the said products. The parties have not differentiated between organized and unorganized sector. Even if they are treated as separate in the organized sectors there are other players like Reliance Retail, Metro Cash and Carry, Amazon wholesale etc., to make the organized market competitive. Based on the above there is no likelihood of AAEC whether organized or unorganized horizontal sectors are taken together or separately.

Vertical sale

Walmart has submitted that the FDI Policy restricts the parties from engaging in business to consumer sales and thus, they are not engaged in the said segment. However, there is no restraint on the parties to offer an online marketplace platform to facilitate sales between retailers and consumers. Only Flipkart provide market place to retailers for e-commerce, Walmart does not. Considering the facts on record and the foregoing assessment, the Commission is of the opinion that the proposed combination is not likely to have an appreciable adverse effect on competition in India and therefore, the same is hereby approved in terms of section 31(1) of the Act.

X CCI-CONFLICT OF JURISDICTION BETWEEN CCI AND A REGULATOR

XYZ v. *Indian Oil Corporation*[34] is a case on conflict of jurisdiction between CCI and a regulator. In this case the information was filed by XYZ (Confidential IP), the IP, against Indian Oil Corporation Ltd. (OP-1), Bharat Petroleum Corporation Ltd. (OP-2), and Hindustan Petroleum Corporation Ltd. (OP-3) ,collectively referred to as OPs, alleging contravention of the provisions of sections 3 and 4 of the Act. The IPs are bulk transporters of LPG for the OPs. The IPs have alleged violation of the

34 2018CompLR747 (CCI).

provisions of the Act in laying down the conditions in tenders floated by OPs for road transport of bulk LPG by tank trucks. The allegation is that all the three OPs have floated identical, parallel tenders in all the states for bulk transportation of LPG by tanker trucks. All the OPs havemonopoly in LPG market in India. The OPs have compromised the competition in the LPG market.

The tanker truck owners have to quote within the identical price band in tenders floated by the OPs. The OPs are competitors but they have shared information.On the basis of shared information they floated tenders.As per the terms and conditions in the tenders, a bidder cannot quote a price above the price ceiling or below the price floor (that is upper and lower limits of tender bids were fixed. Further, the tender documents clearly state that preference shall be given to bidders quoting the floor price, which is a clear indication that the bids must be at the floor rate. Further the price bands are for two categories of tanker trucks 18 MT and 21 MT. Logically the floor price for 21 MT trucks should be higher but the floor price of 18 MT trucks is much higher than that for the 21MT trucks. The Informants have alleged that the said determination of the price band along with the fact that the bidders have to bid within the pre-defined range is *per se* illegal and restricts competitive bidding contrary to the provisions of the Act.

Further under the payment terms payment has tied forty percent of the total income earned by the successful bidder (TT owner) to be paid into the fleet/loyalty card which can only be used at the petrol pump of the concerned Opposite Party. This violates provisions of sections 3 (4) and 4 (2) of the Act.Under the impugned tenders, one tank truck can be used to bid in only one tender, in a State in which it is registered. First preference has been given in every category to the tank trucks registered in the state where the bottling plant is located. Against this allegation OP1 has stated that this was done to encourage local transporters and to promote new entrepreneurs. The IP responded by saying that geographical division into states of the RM is against the spirit of the Act. It has been alleged by the Informants that the aforesaid conduct of the OP have, *inter-alia,* led to the contravention of sections 3(3)(a), 3(3)(d), 3(4)(a), 4(2)(a)(i) and (ii) and 4(2)(d) of the Act.

The OPs challenged the jurisdiction of the CCI on ground that the matter falls solely within the jurisdiction of the Petroleum and Natural Gas Regulatory Board (PNGRB). In response to this the IPs stated that the High Court of Bombay in in *Jitesh Wadhwa* v. *Indian Oil Corporation Limited.,* (WP-C- 634/2018), justified preferential treatment being given to local TT (tanker truck) over other TT registered in other states. The OPs argued that the case does not merit any consideration in view of the high court decision.

The OPs further argued that the price bands have been fixed by the Regulator after taking into consideration all the factors including cost incurred by the TT owners. Regarding different price bands that is higher floor cast for 18 MT trucks the OPs maintained rationale of difference on ground that running cost of 18 MT trucks is higher. As the government reimburses at the lowest rates the OPs have no interest in inflating the transportation cost. With regard to fleet/loyalty card as part of the payment,

the OP clarified that issuance of such card by the OP to the transporters assures advance payment, centralised billing and vehicle tracking.

The Commission proceeded to decide the case but before deciding the case on merit it decided the jurisdictional issues. The OPs raising the jurisdictional issue submitted that the PNGRB Act 2006 gives jurisdiction to PNGRB to decide all the cases relating to petroleum and natural gas including competition issues. Hence CCI does not have jurisdiction. It was argued by the OPs that PNGRB Act is a complete code in itself and it seeks to deal with all issues relating to petroleum products and natural gas. It was also contended that these provisions of the PNGRB Act abundantly show the intention of the legislature to empower/enable PNGRB to deal with every issue arising in the sector, including those pertaining to anti-competitive conduct.The Act specifically makes exception in favour of only Consumer Protection Act, which alone can curtail the jurisdiction of the PNGRB. In support OPs cited *Ashok Organic Industries Ltd.* v. *Asset Reconstruction Company (India) Limited*[35] wherein it is laid down that the, "existence of two sets of legal provision, one a complete code and the other not, by itself and without more leads to an inference of mutual irreconcilability or fatal inconsistency. The complete code then impliedly repeals the other statute. This result follows even without there being a non-obstante clause..."

After considering the contention of the OPs the Commission observed, "In the case of In Re: HPCL- Mittal Pipelines Limited and Gujarat Energy Transmission Corporation Limited (Case No. 39 of 2017, decided on January 31, 2018) (Hereinafter, the 'HPCL case'), the Commission dealt with a similar issue in the electricity sector, in detail. The Commission relied upon the decision of Supreme Court in *Ashoka Marketing Limited* v. *Punjab National Bank*[36] wherein it was held that in case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein. Based on such ruling, the Commission observed that both the Electricity Act, 2003 and the Competition Act are special statutes with their designated spheres of operation. The former aims at regulating activities in the electricity industry and the latter aims at promoting competition in every sphere and sector of the economy." Thus sectoral expertise of a regulator cannot exclude the jurisdiction of the Commission. It was further observed that the OPs have maintained relying on the dictum of Member Justice S.N. Dhingra in *Case No. 50 of 2011 and Ref. Case No. 02 of 2011*, to argue that the exclusive jurisdiction of PNGRB has been accepted by the Commission in the said matter, but ignored the contrary opinion of the majority. It was further observed that though the powers of PNGRB are wider than those of other regulators, it cannot oust the jurisdiction of the Commission. The author of this survey agrees with the opinion of the Commission additionally on grounds that there must not be two regulators in one sector: two regulators (of

35 (2007) SCC Online Bom 85

36 MANU/SC/0198/1991 : (1990) 4 SCC 406.

competition concerns) are likely to create jurisdictional confusion. The Commission further cited the special and overriding provision under section 60 of the Act.

The Supreme Court in *Competition Commission of India* v. *Fast Way Transmission Pvt. Ltd.*, [37] while examining the role entrusted upon the Commission, the Supreme Court observed as follows: "The Preamble of the Act, read with the aforesaid provisions, would show that the Commission set up by the Competition Act certainly has a positive role to play. A perusal of Sections 18 and 19 would show that it is a positive duty of the Commission to eliminate all practices which have an adverse effect on competition. Further the Commission should promote and sustain competition, apart from protecting the interest of consumers, so as to ensure freedom of trade carried on by all participants in markets all over India. Also, a positive role is given to the Commission to inquire, *suo moto*, into the dominant position of enterprises, and to prohibit anti-competitive agreements. Section 60 then gives the Act overriding effect over other statutes in case of a clash between the Act and such statues to effectuate the policy of the Act, keeping in view the economic development of the country as a whole."

After deciding that the CCI has jurisdiction to decide the competition issues, the CCI declined to accept the allegation of collective dominance as the Act does not include the concept of collective dominance but it is difficult to understand why it was not examined if the OPs are group companies. Thereafter the CCI proceeded to examine the alleged violation of the provision of section 3.

At the outset the CCI observed that though section 3 covers both sellers' and buyers' cartels but buyers cartel stands on a different footing as generally sellers form cartels and analyses the theories of harm that can be inflicted by buyers cartels. The OPs have not refuted floating of joint NITs by them or prescription of price bands or issuance of fleet/loyalty cards. Rather they have provided justifications for their conduct. The OPs insisted that they have not fixed price but only price band, taking into consideration the cost of transport and profit margins, within which tender price can be quoted. The bidders get a window of around ten percent to give their quotations. The OPs clarified that they suggest a price floor to ensure that the bidders do not unnecessarily quote an unviable quotation which may lead to delay or irregular services in future. Further, the OPs have clarified that the rates in the price bands for 18MT TT and 21 MT TT are based on their pay out on a km/MT basis. Since the 21 MT TT carries larger quantity of bulk LPG, *i.e.* 1.17 times that of an 18 MT TT, the yield generation is higher in case of 21 MT TT. The CCI finds the justification plausible.

Regarding loyalty fuel fleet cards, the CCI concluded that they are beneficial both to OPs and TT truck owners. The cards carry many benefits, come with various benefits *e.g.,* secured parking, cooking facilities, rest room and accommodation facilities, laundry and drying facilities, health check-ups including eye check-ups, loyalty rewards, accident insurance etc. Such cards also deal with the problem of the substantial lapse of time between the fuel cost incurred by transporter and the final

37 Civil Appeal No. 7215 of 2014 (decided on Jan 24, 2018)

receipt of reimbursement. The Commission finds no merit in the allegation regarding a preference given to tank trucks registered in a particular State for participating in tenders in that state. Under the impugned tenders, there is no bar on quoting bids for TTs that are registered in a state other than the state for which tender is floated, i.e. the location of the bottling plant. It only states that TTs registered in the state where the tender is floated will be given preference provided bids are in the lower rate of price band for that state. Such condition does not appear to be arbitrary as long as registration in one State does not restrict from participation in the tender process in other states. The OPs have clarified that no such restriction has been placed on the bidders. The Commission does not find any violation of section 3 (4) and section 4 of the Act. But, is it not a discrimination when preference is given to a truck registered in the bottling state over a truck which is not when they quote the same rate?

XI CCI: CARTELISATION

Surendra Prasad v. *Maharashtra State Power Generation Co. Ltd*.,[38] is a case on cartelization. The present information has been filed by Surendra Prasad,IP, against Maharashtra State Power Generation Co. Ltd., OP1, Nair Coal Services (P) Ltd.,OP2, Karam Chandra Thapar and Brothers(CS) Ltd, OP3 and Naresh Kumar and Co. (p) Ltd., OP4 alleging contravention of sections 3 and 4. OP1 is a power generation company in the State of Maharashtra and runs coal based 7 power generation stations. In 2005 in response to tender for liaisoning work four parties submitted bids, the bid of BSN Joshi being the lowest, yet the work was not awarded to him. On court's intervention the work was awarded to them but after nine months the contract with BSN Joshi was terminated and thereafter on one pretext or the other as stop gap arrangement the liaisoning work was awarded to OP2-OP4 on geographically divided basis. The Informant has stated that OP nos. 2 to 4 being in collusion with OP-1 have conveniently divided amongst themselves seven TPSs for doing liaison work by effectively thwarting any newcomer or any other existing company from participating in the tender process. OP2-OP4 have formed a cartel. Frequently after floating tenders OP1 has cancelled it resulting in continuance of stop gap arrangement. It was alleged that there was violation of sections 3 (3) (d) [bid rigging] and 4 (2) (c) [denial of market access] of the Act.

The present case is a sequel to the earlier order of the Commission, *Surendra Prasad* v. *Maharashtra State Power Generation Co.*[39] which was discussed. There was difference between the majority and minority. There were sequences of anti-competitive events, given in detain in the said Survey, if considered in isolation they appear to be coincidences but taken together they point to anti-competitive arrangement. The sequence of events are as follows:

1. Cancellation of tender process on four occasions and award of liaisoning to OP2-OP4 on all these four occasions as stop gap arrangement

38 2018CompLR236(CCI).

39 2014 CompLR 0001 (CCI), see V.K Dixit "Competition Law" XLIX *ASIL* 188-190 (2013).

2. Challenge of qualifications of new entrants by OP2-OP4 when the rates of other bidders were lowe than those of OP2-OP4 and onevery occasion award of liaisoning work was given to OP2-OP4 as stop gap arrangement.
3. The opinion of the Supreme Court that OP2-OP4 are cartels.
4. Finding of Director Finance that OP2-OP4 are cartel.
5. OP1 gave liaisoning work to BSN Joshi only on contempt petition.
6. Termination of work of BSN Joshi in 9 months on ground of poor performance and award of work to OP2-OP4 as stop gap arrangement.
7. Award of liaisoning work to OP2-OP4 on same station every time.
8. Narrow range of rates quoted by OP2-OP4.
9. On the one hand OP1 was not able to finalise contract with OP2-OP4 as their bids were not lowest, on the other OP1 always awarded work to OP2-OP4 as stop gap arrangement and allowed them to divide the market geographically.

The majority considered them in isolation and did not find any evidence of anti-competitive agreement: on the other hand the minority read them as a sequence and construed anti-competitive agreement. However in an appeal no. 43 of 2014 filed before the erstwhile Competition Appellate Tribunal, the said order of the Commission was set aside and DG was directed to investigate the case and submit its report to the Commission.

In pursuance to the order of the CompAT the DG investigated the matter and gave the following findings. There existed a distinct pattern of quoting by OP-2 to OP-4 in respect of the tenders floated by OP1 during 2001 to 2013. During this period OP2-OP4 acted as a cartel. It was also observed that tenders of 2005 and 2013 reflected that thermal power stations were also geographically distributed in tenders. The conduct of OPs in geographically dividing the power stations amounts to violation of the provisions of section 3 (3). The OPs determined bid price, first they divided the power stations geographically and then fixed the bid price and violated section 3 (3) (a). Because they divided the market geographically they also violated section 3(3) (c). For bid rigging they are guilty under section 3 (3) (d).

After taking into consideration the report of the DG, replies of the parties and material on record the Commission proceeded to analyse the case. OP1 operates 7 power station located at different places in Maharashtra and they are provided coal as raw material by different subsidiaries of the Coal India. In 2005 the OP1 floated tenders for power stations for a period of two years and the quantity of coal was approximately 27 million metric tons. Lowest tender was that of BSN Joshi and OP1 sought to award the work to BSN but OP2-Op4 went to the High Court of Bombay on ground that BSN was not qualified. Petition was dismissed same process was repeated but ultimately a DV of the High Court of Bombay quashed the tender and OP1 was asked to float it again. Against the order of the DV, BSN appealed to the Supreme Court which allowed the appeal and liasoning work was allotted to BSN but on grounds of poor performance the work was terminated. As stop gap arrangement though the

work was offered to OP2-OP4 and two other agents but only OP2-OP4 responded and work was allotted to them on geographically divided basis.

The instant information was given by the IP that since termination of work from BSN in 2009, the work has been divided between OP2-OP4 on geographically divided market. Work was given to OP2-OP4 from 2009 to 2013, on the basis of the tender of 2005. During this period tenders were invited on four occasions but were withdrawn for various reasons. It has also been alleged that whenever a new entrant tried to participate in the tenders and became L1, these OPs challenged the credibility and qualifications before courts making the entire process *sub-judice* resulting in cancellation of tenders.

Many frivolous objections were raised by the OPs which were rightly rejected by the Commission. The Commission, then proceeded to define RM as 'coal liasoning services as underlying subject matter of the investigation within the geographic boundaries of the State of Maharashtra.' It is essentially the case of the IP that (1) OP-2 to OP-4 had distributed the tenders of MAHAGENCO by dividing amongst themselves, the work of coal liasoning for different TPSs since September 25, 2009 *i.e.,* when the TPSs were allotted to these OPs after termination of work order of BSN for Tender No. 03/2005.(2) As a result of this division different power stations were geographically distributed among OP2-OP4. (3) OP1 floated tenders on four occasions but withdrawn for various reasons, OP2-OP4 being beneficiary of stop gap arrangement.

Though the period examined by the DG to analyse anti-competitivebehaviour of OP2-OP4 was from 2005 to 2013 but in accordance with the judgement of the Supreme Court in *Excel Crop Care Limited* v. *Competition Commission of India*[40] period before the commencement of the Act can be taken into account as a backdrop but finding shall be confined only to post commencement of the Act.

In the tender of 2005 OP2-OP4 quoted identical rates which fact was examined by the DG. There was no plausible explanationof this similarity of rates and collusive behaviour was the starting point of later collusive behaviour when in geographically divided market for L1 the same behaviour was repeated. On the basis of the details furnished by MAHAGENCO, it appears that OP-2 to OP-4 had divided the TPSs amongst themselves by quoting rates in response to the tendersfloated by MAHAGENCO in a manner that each of these OPs got the TPSs of their choice. This trend is apparent in almost all the tenders from 2005 onward, including that of 2012. The trend continued even in 2013 when instead of power station wise the liasoning work was allotted colliery wise. OP2-OP4 quoted the bids in such a way that each one of them stood at L1 position for different stations to be served by a specific colliery. It must be noted here that specificpower stations were served by specific collieries. It is apparent that OP-2 to OP-4 did not compete in securing business as would have been expected as prudent business behaviour in a competitive market.

40 (2017) 8 SCC 47.

The argument of the OPs 2-4 that their rates for specific power stations and collieries were lower than others because they already had infrastructure at these sites and consequently they do not have to make further investment is not borne out by facts revealed by the chief engineer of OP1, that investment for infrastructure is miniscule and primarily it is man power based. In view of these facts, the Commission is of the considered opinion that OP-2 to OP-4 have not been able to give any valid justification for quoting lower rates for the chosen TPSs as compared to other TPSs where the other two respective bidders had quoted higher rates and vice versa in a consistent manner over a long period of time, OP2-OP4 have acted in a concerted manner.

Concerted action of OP2-OP4 is further supported by certain other facts as well. From the details provided by OP1, it was observed that OP-2 to OP-4 have purchased the tender documents on the same day in a sequence for the year 2005. In the tender of 2008 a similar pattern was observed. Further there were exchange of e-mails between the officers of the OPs regarding liasoning tenders. There was also evidence of financial transactions between OPs which is highly unusual between competitors. OPs had various transactions on their books which were done to share profits or make payments for cover bids in respect of various tenders. It emerged that commission/money was exchanged on account of profit sharing between these OPs for different tenders. There was also evidence of sharing advocates' fee by OPs.

In conclusion the Commission found that there was an agreement between OP2-OP4 in terms of section 2(b) and anti-competitive agreement according to provisions of section 3(3). As the anti-competitive practices are prohibited and punishable under law, documentary and other direct evidence is difficult to come: the Commission has to rely on circumstantial evidence. On the basis of the circumstantial evidence OP2-OP4 are guilty of violating sections 3 (3) (c) and (d) read with section 3 (1).

Regarding penalty the Commission observed that penalty may be upto 10% of the average turnover of the preceding three years but in case of cartel participants it may be, a penalty of up to three times of its profit for each year of continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher [section 27 (b)]. OPs argued that they are first time offenders, cooperated in investigation and caused no loss to OP1, therefore entitled to leniency. The Commission citing the case of *Excel Crop Care Limited* v. *CCI*[41] the Supreme Court preferred the test of relevant turnover. But the contention of the parties that only the revenue generated from the impugned tender alone would constitute relevant turnover, is not tenable. It is the total revenue generated from all coal liasoning services that is relevant for the present purposes. a penalty on OP-2, OP-3 and OP-4 at the rate of 2 times of their total profits earned from provision of coal liasoning services to all power generators, and not limited to the profits generated from OP1 alone, for continuance of the cartel for 2010-11 to 2012-13 years in addition to cease and desist order.

41 Manu/SC/0588/2017.