4

COMPETITION LAW

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I INTRODUCTION

INTERPRETATION OF law, specially law that regulates the market to a large extend depends on the core ideology of the state which by and large is followed by all the organs of the state including judicial and quasi-judicial forums but the trend may be tempered by an individual judge, to an extent whose ideological orientation may be different. Since 2002, when the Act passed was passed, free-market ideology the Indian state has considerably hardened. This has successively resulted in dilution of the rigour of the Act through judicial and quasi-judicial interpretation. In many cases strict proof of meeting of mind for construing anti-competitive agreement was required ignoring the different definition of 'agreement' under the Act. Parallel behavior, not a result of normal commercial behavior was not interpreted as a case of agreement on ground of 'practice carried on'. For the purpose of imposing penalty 'average annual turn-over of the last preceding three years' was interpreted as turn-over of the relevant goods or services. Though occasionally, in some cases, scope of the Act was not restricted, but the general trend has been otherwise.

II TRENDS

This year we do not find a marked tendency of regressive interpretation. The most important contribution of the of the Supreme Court relates to restoring the original meaning of 'information provider' assigned by the Act in *Samir Agrawal* v. *CCI.*[1] The court rightly reversed the judgement of NCLAT in *Samir Agrawal* v. *Competition Commission of India*,[2] which imposed the requirement of *locus standi* on the 'information provider'. An information provider is not a complainant who in order to be a complainant must have suffered an injury. The provision in the Act that a case can be initiated by an information provider, that is even a person who has not suffered any injury, is compatible with the remedy provided in the Act. The Act does not provide remedy in personam but in rem. Another noteworthy case is *Competition Commission of India* v. *Grasim Industries,*[3] a case decided by the High Court of Delhi. In this case

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1 Civil appeal no. 3100/2020.

2 Competition appeal 11/2019, decided on May 29, 2020 per Bansi Lal Bhat J.

3 LPA 137/2014, decided on Sep. 12, 2019

liberal interpretation of section 26(1) was restored, setting aside a narrow interpretation of the section given by the single Bench of the same court. Liberal interpretation of the section is compatible with the spirit of the Act. *Suprabhat Roy of Suman Distributors of Murshidabad* v. *Saiful Islam Biswas*[4] is important to establish that proof of meeting of mind need not necessarily be dirsect.

III SUPREME COURT: LOCUS STANDI

Samir Agrawal[5] [civil appeal 3100/2020] is an important case on whether an IP must have *locus standi* to activate the jurisdiction of the Commission. It is an appeal against order of the National Company Law Tribunal (NCLAT) holding that the case fails as the IP in this case does not have any locus. But even after holding that the case fails because of locus NCLAT also decided the case on merit. As the case decided by the NCLAT is being discussed separately, where the opinions of the Commission and that of CLAT have been discussed, they are not being discussed here to avoid repetition. The Supreme Court does not agree with NCLAT on the finding on locus but substantially on merit.

The Supreme Court then proceeded to analyse the case. The appellant apart from discussing the case on merit, dwelt on the issue of merit. He referred to sections 19 and 35; referred to the amendment of 2007 replacing 'complainant' with 'information provider'; and section 53B and 53T where the word 'aggrieved person'has been used as at the time of making an appeal the IP becomes aggrieved person.

The Supreme Court on locus observed that substitution of the word 'receipt of complaint' with 'receipt of information from any person' is significant. The word 'person is very widely defined and it is different from 'consumer' which means a person who buys goods or service for a consideration. A complaint can be made by an aggrieved person, but information can be given by any person. Section 35 was also amended and the phrase 'complainant or defendant' was also substituted with 'person'. Section 45 is a remedy against a person who provides information malafide or recklessly. Hefty fines can be imposed on him. Thus the narrow construction given by NCLAT on section 19 on the *locus standi* is set aside. Information provider is not necessarily an aggrieved person. In response to the argument that reference to an 'aggrieved person' in sections 53B and 53T [who can appeal to the appellate tribunal] imply that only a person who has locus maycome to NCLAT and thus to the Commission, was rejected by the court that 'aggrieved person means any person who informs the Commission and is aggrieved by its order. The court also referred to the earlier Supreme Court precedent in in *Steel Authority of India* v. *CCI,*[6] the ratio of which was that any person can approach the competition forum.

Regarding the merits of the case the court did not see any reason to interfere with the concurrent judges of NCLAT and the Commission. Neither the provisions of section 3 (3) nor that of section 3(4) were violated by Ola and Uber and their drivers. The author of this survey would like to add that there is no reason to deprive the taxi

4 *Infra* note 23.

5 *Supra* note 2.

6 (2010) 10 SCC 744.

riders of the use of technology. Radio taxies confer immense benefit to the riders. Therefore, the use of radio taxiesis beneficial rather than adverse on competition. However, another question, not raised in this case, is important, whether the aggregators charge predatory price as they give huge discounts and monetary incentives to the drivers and thus adversely effect competition.

IV SUPREME COURT: ABUSE OF DOMINANT POSITION

Uber India Systems (p) Ltd. v. *Competition Commission of India*[7] is an appealby Uber India against the order of the CCI referring the case for investigation to the DG as there was a prima facie case of abuse of dominant position by the appellant. Uber India preferred an appeal to the Supreme Court on ground that there was no right to appeal under the Competition Act to NCLAT against an order of CCI, referring the case for investigation to the DG under section 26(1). Rohington F. Nariman and Surya Kant JJ., did not found any reason to interfere with the order of the Commission even after lengthy arguments of the lawyers. The Bench observed that the only reason for non-interference is the statement to the following effect.

"23. Uber's discount and incentive offered to consumer pale in comparison with the fidelity inducing discounts offered to drivers to keep them attached on its network to the exclusion of other market payers. Uber pays drivers/car owners attached on its network unreasonably high incentives over and above and in addition to the trip fare received from the passengers. A summary of the incentives provided to one fleet owner attached to Uber's network, having 4 cars, which were driven by 9 drivers is reproduced below.

1. Total trips from 1ST June to 28thJune -1135
2. Uber collections from the consumers- Rs.- 298307
3. Operator's earnings (owner of the cars)- Rs. 516343
4. Incentive paid to Drivers -Rs. 230446
5. Uber's net earnings (net loss)-Rs. 515 346
6. Per trip net loss to Uber- Rs. 204

On the basis of the prima facie fact that Uber suffers a loss of Rs. 204 per trip, there no reason to say that there is no *prima facie* case for the violation of section 4 of the Act. There are two important ingredients have for the application of section 4, namely that an enterprise is dominant and it has abused its dominance. 'Dominant position' is defined in Explanation (a) of section 4, which means that the enterprise has a position of strength in the relevant market and is able to act independent of competitive forces and can tilt competitors and consumers in its favour. Capacity to suffer a loss per trip would make Uber independent of competitors and tilt the competitors and consumers in its favour and would to charging unfair price per trip in violation of section 4(2) (a). The loss per trip amounts to predatory price which is defined in explanation (b) of section 4. This being the case there is no reason to interfere and the DG is requested to complete the investigation within six months.

7 Civil Appeal 641 of 2017.

V HIGH COURT

Competition Commission of India v. *Grasim Industries*[8].This is an appeal by CCI against the judgement of single judge of the High Court of Delhi. The Grasim Industries prayed for quashing the report of the DG, in which he found the appellant guilty of violating the provisions of section 4 of the Act though the Commission referred the case to the DG to investigate the caseunder section 3 (3) (a) (b) and (c) of the Act. The single judge held that the DG could not have investigated the violation of section 4 as the direction of the CCI related to the violation of section 3 only but clarified that the Commission can treat the report of the DG on section 4 as information under section 19 if it thinks that a prima facie case is established.

In the judgement that follows this(the divisional bench hearing this appeal) court reversed the judgement and held that the DG was within his powers under section 26(1) read with Regulations 18, 20 and 41 of CCI (General) Regulations 2009 to give report regarding violation of section 4 of the Act and the order of the CCI was restored.

The background of the case is that in 2011 CCI ordered the DG to investigate the violation of section 3 (3) by manufacturers of MMF (man-made fibre) including Grasim Industries Limited (GIL) but the DG did not find any such violation but that of the section 4. In pursuance of the report of the DG, the Commission sent the copies of the report to the IP and Grasim Industries as the DG was of the opinion that only GIL has abused its dominance. The application of GIL that the report of the DG is outside his jurisdiction was rejected by the CCI. The CCI further observed that direction to the DG is given only on the basis of prima facie opinion formed by the Commission without the advantage of having access to full facts, therefore the DG can give opinion outside the direction given by the CCI. The divisional bench observed that the scope of inquiry under section 3 and that under section 4 is different in as much as the scope under section 3 is to investigate conduct of two or more of the enterprises in relation to anti-competitive agreement whereas that under section 4 is on one enterprise with reference to dominance.

The Commission directed the DG, under section 26(1), to investigate the information given by the IP as there existed a prima facie case. The DG in his report apart from reporting on the violation of section 3 (3) (a), (b) and (c) framed a forth issue on abuse of dominant position. The DG observed that there is no proof of violation of section 3 (3) but there is proof of violation of section 4 (2) (a) and (b). On the basis of the report of the DG notice was sent only to GIL and its objection that DG cannot investigate the violation of section 4 was rejected. The Commission observed, on the basis of Regulation 18(1) and 20(4) CCI (General Regulations 2009), that at the initial stage the DG has to respond whether there is aprima facie case. The Commission initially forms only a prima facie opinion and the response of the DG may be contrary to the direction given by the Commission. The Commission further observed that the directions under section 26 (1) do not limit the scope of investigation.

8 LPA 137/2014, decided on Sep. 12,2019: Bench S. Murlidhar and Talwant Singh JJ.

The single judge bench of the high court observed that the investigation by the DG was based on information which the CCI did not consider while forming its opinion with respect to the existence of *prima facie* case. The action of the DG is contrary to the scheme of the Act. The Divisional Bench referred to the Supreme Court decision in *CCI* v. *Steel Authority of India*,[9] where the Supreme Court made distinction between section 26(1) and 26 (2). Section 26(1) refers to the cases, where finding a *prima facie* case, the CCI administratively asks one of its department to conduct investigation without affecting rights of the parties, whereas under section 26 (2) without finding any prima facie case the Commission closes the case, thus affecting the rights and obligations of the parties. Therefore order under section 26(2) is appealable. It is also held by the Supreme Court that it is not necessary to give a notice for hearing to the parties when case is being sent to the DG for investigation under section 26(1). The function of the CCI under section 26(1) is not adjudicatory, held the SC, whereas under section 26(2) it is and appealable. The SC also made distinction between inquiry and investigation. Inquiry by the Commission commences when the case is referred to the DG for investigation but the DG conducts only investigation. The DB concluded that the Supreme Court does not suggest that the investigation ordered by the Commission under section 26(1) shall restrict the formation of opinion by the DG.

The Bench also referred to *Excel Crop Corporation* v. *CCI*[10] in which case the Supreme Court held that the scope of section 26(1) is wide enough to include investigation by the DG even those transaction which occurred even before the commencement the Act (provided they continue to happen even after the commencement of the Act), or not mentioned in the complaint (information), or happened even after the complaint was made.

The Bench conceded that the DG can investigate only in accordance with the order of the Commission passed under section 26 (1). But the Commission has a duty, under section 18, to eliminate all practices which have appreciable adverse effect on competition. Therefor he can investigate even those transactions which happened after the complaint was made. According to Regulation 20(4) the DG's report shall contain finding on each of the allegations made in the information or reference as the case may be, along with all the evidence collected during investigation. Though the DG shall investigate according to the allegation in the information and the order of the Commission under section 26 (1), it does not mean he shall confine only to the events happened till the date of the information. It all depends on the language of the information and order of the Commission, how wide the language is and what its scope is. The Bench did not agree with the view taken by the Single Bench but preferred to agree with the views of the Commission and there has not been any violation of rules of natural justice.

9 (2010) 10 SCC 744.

10 Manu/SC/0588/2017.

VI NCLAT

Samir Agrawal v. *Competition Commission of India*[11] is an important case on whether an IP must have locus standi to activate the jurisdiction of the Commission. In this case the IP is an independent practitioner of law and alleges that ANI Technologies (Ola) and Uber India System, Uber BV and Uber Technologies (together Uber) have entered into price fixing agreement in violation of section3(3), resale price maintenance in violation of section 3(4)(e). Ola and Uber provide a platform to drivers and passengers to interact for the use of radio taxi. It was alleged that they use algorithm for the terms of travel depriving the drivers and passengers to negotiate competitively the price of travel. Cooperation among drivers to agree on algorithm terms of ride amounts to concerted action (This appears to be case of parallel action among drivers on invitation by algorithm) This contravenes sections 3(3)(a) and 3(4)(e).

The CCI decided the case as follows. There is no substance in the allegation that there is anti-competitive agreement among drivers of Ola and Uber through algorithm [section 3(3)(a)]. The Commission clarified that the case is not that there is agreement between Ola and Uber but separately the drivers of Ola and the drivers of Uber entered into agreement through algorithm, that is what generally happens in case of hub and spoke agreement. But the Commission held that the drivers have not entered into agreement through a platform (such as an association). Algorithm determines price of ride through personalized information of the riders, time of the day, traffic conditions, week end, festival or special events. There is no collusion between drivers in the ordinary sense which happens in case of an agreement through a platform. The allegation of vertical agreement, under section 3(4)(e) also fails. There has not been any agreement between the aggregator and the drivers in the ordinary sense. There is no fixed price, depending on the circumstances the price fluctuates and sometime it is lower than what an independent driver would demand. There is no fixed floor price that is demanded by the drivers and centralized price determination cannot be viewed as vertical agreement among drivers and aggregators.

In the opinion of the author of this survey the Commission did not discuss the fact that the terms of price determination are not fixed by the algorithm but by the aggregators, then, why price that is determined by the algorithm, be considered to be determined by the aggregators. There is another more plausible reason to hold that there is no violation of the provisions of the Act, that is the arrangement confers benefit to the consumers, taxi owners and the drivers.

The allegation of price discrimination also fails because this charge can be sustained only under section 4 but the IP does not allege that any of the OPs is dominant. The case is closed under section 26(2).

In the appeal before NCLAT, the tribunal dealt on the issue of locus and decided that the proceedings before the Commission can be initiated, under section 19(1), by a person, suo moto, on reference by government or a statutory authority. Reference to a person necessarily means a person who has suffered a legal injury. As the IP, an

11 Competition Appeal 11/2019, decided on May29, 2020 per Bansi Lal Bhat J.

independent law practitioner, did not give even a single instance of suffering any injury; therefore, the IP does not have any locus.

The tribunal even after deciding the case against the IP on grounds of locus, also decided the case on merit. There is no agreement among Ola and Uber. It rejected both the arguments of horizontal and vertical agreements among drivers through algorithm as the drivers do not communicate and agree through algorithm, as well as between drivers and aggregators. That is, there is also no agreement between hub and spoke as the riders as well as the drivers may switch to another aggregator.

VII COMPETITION COMMISSION

XYZ v. *Association of Man Made Fibre Industry of India (OP1), Grasim Industries Limited (OP2), Thai Rayon (OP3) Indo-Bharat Rayon Ltd. (OP4)*[12] is a case on alleged violation of section 4 of the Competition Act (the Act). OP1 is an association of man-made fibre industries, OP2 is the biggest manufacturer of viscose staple fibre (VSF), OP3 is a company promoted by OP2 in Thailand and OP4 is a company manufacturing VSF in Indonesia promoted by Aditya Birla group, which controls OP2 and OP3. It was alleged that OP2 is the sole producer of VSF and controls 100% of VSF market and OP3 and OP4 have joined hands with OP2 to exploit consumers who use VSF to manufacture textile products. It was alleged that OP2 using its dominant position charges discriminatory prices from different categories of consumers, charges different price from Indian and foreign consumers and from domestic customers who produce for domestic consumption and who produce for export. It was further stated that OP seeks monthly production data from consumers on the basis of which it gives rebate.

It was further alleged that OP2 was instrumental in getting anti-dumping duty imposed on imports from China without getting such duty imposed on import of VSF from its group companies OP3 and OP4. It was also alleged that it exports VSF at price lower than what it charges in domestic market thus market of finished textile becomes less competitive in international market. As OPs are dominant, they are violating provisions of section 4 of the Act. While referring the case for investigation to the DG the CCI distinguished VSF from other man-made fibres and defined RM as 'market for VSF in India'.

The DG in its report stated that the complaint of the IP is that (a) the OP2 is using its dominant position to sell VSF at discriminatory price thus influencing the textile supply market in its favour; (b) the OP also does not disclose sale price/policies; (c) the OP also invoices VSF at 13% of commercial weight rather than at actual weight; and (d) forcing the buyers to disclose their production and sale data thus interfering in their trade.

The DG found VSF to a distinct product because it is biodegradable, moisture absorbent and breathable. Most important characteristic of VSF is that in comparison to other man-made fibres it is nearest to cotton. In past its price was lower than that of cotton but now its price is higher. In terms the of the consumer preference the DG

12 Case No.62/2016(CCI).

concluded that its demand is distinct. In matters of in-house production it is classified as a different product in the industry. On the basis of this analysis the DG concluded that the RM is 'market of supply of VSF to spinners in India'. The DG then examined the dominance of OP2 in the RM and found its share to be 85% in the RM, its high resources which enables it to dictate terms to the buyers of VSF. These factors make the OP2 dominant in the RM.

Regarding abuse, the DG noted that (i) there are glaring cases of discrimination in sale price even among the buyers in the same segment, purchasing similar quantities at the same time; (ii) similar discrimination is practiced in the export segment as well; (iii) in giving discount to spinners, not only documentary proof of sale is insisted upon, but dissimilar discount is given in similar cases; (iv) Price- discrimination resulted in undue advantage and disadvantage to buyers belonging to different categories. There was also price discrimination between domestic exporter and foreign buyers; (v) price discrimination was disadvantageous to spinners of domestic category. These practice distorted competition and violative of section 4(2) (a) (ii) read with section 4(1) of the Act.

OP2 was also discriminated against the spinners, on the basis of monthly data provided by the spinners who are not converting VSF purchased from it into yarn thus controlling their production and imposing supplementary conditions not connected with the sale of VSF in violation of section 4(2) (d). OP2 or any of its group companies is not found to be in the production of textile or yarn production, therefore there is no case made out against them under section 4 (2)(e).

On the basis of the report of the DG, replies of the parties and other material, the Commission proceeded to analyse the allegations. As there was no specific allegation against OP3-4 the case is analysed only against OP2. After disposing of preliminary objections, the Commission proceeded to analyse the case on merit. Three issues were framed; (a) what is the RM? (b) Is OP2 dominant in the RM? And (c) If OP2 is dominant in the RM, has it abuse its dominance?

Issue I: - The DG defined the RM as 'the market for supply of VSF to spinners in India'. OP objected to such definition as VSF, polyester, cotton and other Manmade Fibres in terms of price and quality are in the same range and substitutable, therefore they are part of the same RM on the basis of physical characteristics and end-use. The RM should be 'the market for Man-Made Fibre and cotton in spinning of blended yarn, textile and apparel in India'. Fibres can be divided into three categories; (i) natural fibre such as cotton and jute (ii) animal fibre such as wool and silk and (iii) Mineral fibre such as made from asbestos (iv) Man-Made Fibre (MMF) such as VSF and polyester. MMF can be derived from wood pulp or petrochemicals.

Because of different characteristics MMF and natural fibres are two distinct categories. Similarly, the Commission observed that because of difference in characteristics VSF is different and not substitutable with other MMF. The Commission did not agree with the OP2 that cotton and VSF are substitutable. VSF is a distinct product when compared with other fibres in terms of origin, moisture retention, breathability, drape, colour retention, lustre and end-use. VSF is the most expensive if compared with cotton and other MMF. The Commission found VSF to be distinct in terms of consumers' preference. The Director General of Anti-Dumping and Allied Duties (Director General of Trade Remedies) also agreed that VSF is a distinct product. Even though PSF (Polyester fibre) and Cotton are blended with VSF, it is so done because they have different characteristics and not because they are substitutable. The Commission opined that VSF, PSF and cotton though are blended yet they are not substitutable.

OP2 has used two analytical tools, correlation and regression to delineate RM. In analyzing these two tools there are problems. In these tools, price of VSF, PSF and cotton are converted from INR to US dollar. Conversion rates keep on fluctuating and VSF has several varieties with different price tags. The Commission did not agree with the OP2 that on the basis of technical analysis through these tools VSF, PSF and cotton are substitutable.

The Commission noted that in the supply chain OP2 is in the upstream market whereas spinner, weaver, garment manufacturer and retailer are in the downstream market in that order. What type of yarn is demanded depends upon the end consumer. As the demand is determined by the consumers, spinners make difference between VSF and other fibres. Therefore the RPM is, 'the market for supply of VSF to the spinners', and the RGM is 'whole of India.'

Determination of dominance- The Commission proceeded to determine dominance in accordance with the provisions of explanation (a) of section 4. According to the DG, OP2 has market share of 87% and the rest is supplied by import. As on imported VSF the Government of India imposes anti-dumping duty OP2 is dominant according to the DG.

OP2 further contested the determination of RM as it effects determination of dominance. Its share in comparison to polyester and cotton continuously decreasing in comparison to cotton and PSF. DG failed to appreciate that there can be demand side and supply side substitutability. OP2 is facing stiff competition from PSF and cotton. As the commission already has defined VSF as a distinct product these arguments of OP2 do not carry weight. OP2 is the biggest producer of VSF and controls 87% of the market of VSF. It is the flagship company of Aditya Birla group and which operates in a large number of areas. It is vertically integrated in VSF production from plantations to fabric retails. It controls many fabric brands such as Peter England, Louis Phillippe and Van Heusen. It is present in many foreign countries. Records also show that total revenue of OP2 is increasing. As manufacturing VSF is capital intensive there are constrains for others to enter into this field. On the basis of these facts the Commission concluded that OP2 is dominant in the already defined RM.

Regarding abuse after establishing dominance in the RM, the Commission examined the alleged abuses. It was alleged that the OP2makes discrimination in the base rates of the same quality of VSF; the rates are communicated confidentially. There are cases of discrimination in discount as well. In some cases, the buyer who purchases larger quantity of VSF pays higher price. Further OP2 seeks details of production and export from the buyer. This violates section 4 (2) (a) and (d).

In order to examine these findings of the DG, the Commission stated the business model of the OP2 is that it sells VSF for export and to spinners for domestic consumption and for export of the yarn. In order to compute the alleged abuse, the DG first calculated the average net price paid by the spinner and compared it with the net average price paid by the next spinner, and then calculated notional loss to the seller. It was found that sometime a spinner who purchases less quantity pays less. OP2 justified price differentia as intelligent differentia because it depends on plant variety from which, VSF has been sourced, thickness of VSF and the grade grey or red. It was contended base rate is same for every category (on the basis of plant thickness, and grade of VSF and whether it is for domestic consumption or export).

On the basis of data, of the sale record, provided by OP2, the Commission found many instances where OP2 has not only charged different base rates for VSF of the same category sold to the same category of customer from the same plant; even OP2 charged higher rate from the customer who purchased larger quantity. Consequently, same category of customer does not know at what base rate its competitor has been sold VSF and what discount has been given to it. The conduct of OP2 also effects competition in the downstream market. OP2 in the upstream market because of its dominant position does not face any competition whereas the spinners in the immediate downstream market do face such a competition. The conduct of OP2 adversely effect competition in the downstream market. Even the discount policy is non-transparent, discretionary and discriminatory and adversely effects competition among the competitors. All this violates the provisions of section 4 (2) (a).

The DG further observed about the practice of OP2, requiring details of sale and export from the immediate downstream consumers, the spinners, which in the opinion of the Commission are in the nature of supplementary obligation unrelated to the main transaction, thus in violation of the provisions of section 4 (2) (d). The Commission disagreed with OP2, who stated production data is not a condition unrelated to main transaction of requiring data of the preceding three years' transactions, but integral part of the contract of sale for providing discount and held that the purpose of supplementary obligation was to prevent the spinner from reselling VSF.

The Commission found OP2 guilty of violating the provisions of section 4 (2) (a) (ii) and 4 (2) (d) of the Act. OP2 was ordered to refrain from practicing discriminatory conduct and seeking the details of production from the spinners and also asked to rationalize discount policy. In accordance with the ratio of *Excel Crop Care Limited* v. *CCI* imposed a penalty of Rs. 301.61 crore at the rate of 5% of the average of annual turn-over of relevant product of the preceding three years.

VIII CCI-CARTELISATION

Re: cartelisation in industrial and automotive bearings[13] is a case on anti-competitive agreement by a cartel. This case is a suo moto case against ABC Bearings Limited (now amalgamated with Timken Ltd.), OP1 (Timken); National Engineering Industries Ltd., OP2 (NEI); Schaeffler India Ltd. (previously known as FAG Bearings

13 Suo Motu Case No. 05 of 2017.

India Ltd.) OP3 (Schaeffler); SKF India Ltd., OP4 (SKF); Tata Steel Ltd. Bearing Division, OP5 (Tata Bearings).

This case was taken up *suo moto* on an application given by FAG India (Schaeffler India) under section 46 of the Act and Regulation 5 of Competition Commission of India (lesser penalty) Regulations of 2009 (LPR). It was stated in the application that FAG Bearings along with four other companies were involved in cartelisation indomestic industrial and automotive market of bearings between 2009 and 2014. When from 2009 onward steel prices started increasing there was a coordinated effort by the five companies to pass cost increase to industrial and automotive original equipment manufacturing companies. Normally a part of the increase in the raw material is accepted by the OEMs, but only when all bearing manufacturer make such demand. But in this case all five in a concerted manner shifted the price increase to the OEMs.

The DG in his report stated that two meetings took place, between NEI, Schaeffler, SKF and Tata Bearings, to discuss pricing strategies. It became apparent from e-mail records that in these meetings percentage of price increase to be charged from OEMs was decided. However it could not be established from record that any consensus was reached between them to increase price in the after-market. On the basis of these facts the matter was referred to the DG for investigation. Pending investigation by the DG, an application under LPR was given by NEI. On the basis of these facts the matter was given to the DG for investigation.

The DG concluded that the alleged meetings by four OPs (SKF, NEI, Schaeffler and Tata Bearings) took place in which there was agreement for seeking price revision from OEMs in the aftermarket and strategies for price revision by the OEMs in the after-market were discussed but it could not be established if there was concerted action for passing the cost increase to the OEMs and if actually there was concerted action for price revision except in a few cases and there was nothing to showthat price increase was in tandem. However, the DG was of the view as these four bearing manufacturers control 3/4th of the market; they shared confidential business information and they seek higher uncompetitive prices for bearings, it is likely to appreciable adversely effect competition resulting from collusion. As no evidence was found against Timken, the DG found SKF, NEI, Tata Bearings and Schaeffler guilty of cartelisation. 11 persons of these 4 enterprises were also found guilty of violating the provisions of section 48 of the Act. But allegation of cartelisation was not found substantial in the distribution/ aftermarket.

On the basis of the available record, report of the DG, replies of the parties and other material the CCI proceeded to analyse the case. The Commission first disposed of the preliminary procedural objections. Nosubstance was found in allegation by SKF of violation of rules of natural justice by the DG. On the merits of the case, the Commission agreed with the DG that there is no evidence against Timken of the violation of any provision of the Act and that in the distribution/aftermarket there is no contravention of the provisions of the Act.

As regards cartelisation in industrial and automotive sector of OEMs of bearings, DG placed reliance on three emails addressed by an officer of Schaeffler to another officer of Schaeffler regarding three-in person meeting of competitors. The DG ascertained on the basis of the emails whether such meetings took place, whether price sensitive information was exchanged, whether cartelisation created and whether AAEC in OEMs has been caused? On the basis of the emails it was established, that a decision was taken to write to 2-Wheeler OEM makers for price increase. On 3rd November 2009, representatives of Tata Bearings, NEI and Schaeffler personally and of SKF (the competitors) telephonically discussed sensitive price fixing strategies. In the meeting of January 31, 2011, the representatives of the 4 competitors decided to effect price increase of 4-5% in the OEM segment. In this meeting all the representatives of the competitors decided to write to OEM makers for price increase. But the records could not establish that if the meeting of April 22, 2011 took place. On the basis of these two meetings and various telephonic conversations the Commission concluded that there were meetings to discuss commercially price related matters with a view to determining price of bearings, being sold to OEMs manufacturers. As the fact of these meetings has not been denied by the OPs, the Commission hold all the four SKF, NEI, Schaeffler and Tata Bearings guilty of forming a cartel as defined under section 2 (c) of the Act between November 3, 2009 and January 31, 2011. Once the fact of a cartel is established AAEC on the market is presumed though it can be rebutted and the DG has found that the OPs have violated the provisions of section 3 (3) (a) read with section 3c (1) of the Act.

The contention of the OPs, in order to rebut the presumption of AAEC, that as there is no AAEC (because OEMs have countervailing power) there is no anti-competitive agreement. The Commission rejecting the argument stated, relying on *Rajasthan Cylinders and Containers* v. *Union of India*[14] that as there is anti-competitive agreement there is presumption of AAEC, it can be rebutted by adducing new evidence. Ratio of the case is according to the Supreme Court in this case is simple. The parameters to decide AAEC are given in section 19 (3) of the Act: However once the Commission decides that there is anti-competitive agreement covered under section 3 (3) parameters under section 19 (3) need not be resorted to and nothing further is to be proved by the Commission as there is presumption of AAEC and the burden shifts to the OPs who have to adduce evidence to disprove the presumption with reference to parameters given in section 19 (3). In this case none of the parties is able to rebut the presumption. Simply by saying the prices quoted by the parties to the OEMs are not what was decided by them in the two meetings, does not rebut the presumption.

Therefore the Commission found these four OPs violatingthe provision of section 3 (3) (a) of the Act and 4 office bearers of these enterprises guilty under section 48(1). In addition, 8 more officers of the OPs were found liable under section 48 (2) for their specific rolein violation committed by the OPs. Only cease and desist order was passedand ordered to end the cartel but no penalty was imposed.

14 18 (13) SCALE 493.

IX CCI-BID RIGGING

Chief Material manager South Eastern Railway v. *Hindustan Composites Limited* [15] is a bunch of several references made by several zones of Indian railways alleging violation of the provisions of section 3 of the Act. These references are Reference no. 3/2016, 5/2016, 1/2018, 4/2018 and 8/2018. In these reference cases there are 12 opposite parties in all. They are Hindustan Composites Limited (OP1), Industrial Laminates (India) Limited (OP2), BIC Auto Private Limited [now Masu Brakes private Ltd. (OP3), Escorts limited (Railway Equipment Division) (OP4), Rane Brake Lining Limited (OP5), Om Besco Super Friction (P) Limited (OP6), Cemcon Engineering Co. (P) Limited (OP7), Sundaram Brake Lining (OP8), Boney Polymer (P) Limited (OP9), Daulat Ram Brakes Mfg. Co. (OP10), Hindustan Fibre Glass Works (OP11) and Precision Industrial System (OP12)

The IP alleged in the first reference 3/2016 violation of section 3(3) against OP1-OP10 which manufacture and supply Brake Blocks, which are Research design and Standard Organisation (RDSO) approved. According to Railway policy Part-II suppliers can supply only 15-25% of equipment whereas Part I suppliers do not have any such restriction.

It was alleged that in Reference no. 3/2016 OP1-OP10 quoted identical prices in tender floated by the South Eastern Railway as well as in subsequent negotiations, identical and similar rates were quoted by these OPs before other railway zones despite geographical differences, notwithstanding the fact that this is highly unusual commercial practice. As there was *prima facie* evidence of violation of section 3 (3), the Commission referred the matter to the DG for investigation. In Reference 5/2016 the allegation was that OP2-OP5 and two part II suppliers quoted identical prices in violation of section 3(3), as well as during negotiations.Then the matter was referred to the DG. In reference no. 1/2018 similar allegations were against OP1, OP2, OP3, and OP5 for the supply of asbestos based K-type CBB used in EMU coaches though the suppliers were located at different places. In Reference 4/2018 similar allegations were against OP1, OP3, OP5, and OP7 for procuring L-type CBB for freight coaches in violation of the provisions of section 3 (3). In reference 8/2018, similar allegations of anti-competitive agreement were levelled against OP3 and OP5 for procurement of high friction CBB. All the cases were referred to the DG for investigation.

The DG in his report explained as to what is the nature of product being procured by the IPs. The Railways are replacing cast iron brake blocks with CBB, which is a rigid moulded friction material, having random fibre asbestos base containing metallic particles. CBB is manufactured only in the form of brake blocks and integrally moulded in a back plate. L-type CBB has low friction coefficient whereas K-type has high friction coefficient.Both can be further divided on the basis of application. When a vendor of CBB is approved for the first time it is placed in part II and when it has successfully supplied the material it is placed in Part I. In case of safety items 80% of material is procured from Part I vendors and remaining 20% from part II vendors. The

15 Reference no. 3/2016, 5/2016, 1/2018, 4/2018 and 8/2018.

bids of the Part II vendors should be lower than that of Part I, L-I vendor bid and those of unapproved vendors lower than those of Part II vendors.

The Railway Board, in November 2016 merged Part I and II venders and in June 2017 the Board reserved 20% of the procurement to the development vendors who were not approved vendors. The DG, on the basis of collected evidence, in his report concluded that OP1-OP10 during 2009 and 2017 formed a cartel in violation of section 3 (3). OP1- OP 10 concerted to supply specified quantities at specified price decided among them for collaborating in tenders invited by IPs. In order to ensure adherence to pre-decided rates for tenders, the DG found that, they exchanged screenshots of financial bids and OP1 maintained records of decided allotted quantities to each of them and they (OP1-OP10), used to meet to decide strategy. The DG also found that executives of all the OPs except those of OP2 and OP10 admitted that they formed a cartel for collaborating in tenders invited by IPs. Though executives of OP2 and OP10 did not admit cartelisation they admitted exchanging tender information. On the basis of these evidence the DG found that all the OPs and a number of their officials violated the provisions of section 3 (3) (a) (b) (c) and (d) read with section 3 (1) of the Act.

As the report of the DG in all the references was identical the Commission decided to club all the reports and after considering the report, replies of the parties and other material the Commission analysed the references. The Commission framed two issues

i. Whether the OPs in responding to the tenders floated by different zones of Indian Railways violated the provisions of section 3 (3) of the Act. (i) Whether the OPs have colluded in price determination in the tender process and violated the provisionsof section 3 (3) (a). (ii) Have the OPs in the supply of CBB limited the market? And thus violated the provisions of section 3(3) (b). (iii) Have they geographically divided the market in violation of section 3 (3) (c). (iv) Have the OPs resorted to collusive bid rigging in violation of the provisions of section 3 (3) (d).
ii. If answer to issue 1 is in affirmative then whoare the officers of the OPs who are liable under section 48.

Before analyzing the case on merit, the CCI disposed of some preliminary objections. Certain OPs express their desire to crossexamine certain witnesses but the permission was denied as they could not fulfil the requirements of regulation 41 (5) of General Regulations but the CCI permitted them to file affidavits to rebut the averment of the witnesses. However, instead of availing of the opportunity they are still agitating with demand to cross examine the witnesses. Hence the request is rejected.

OP1: Raja Sekar one of the executives of OP1 used his email to communicate with other OPs to rig the tender process. He had admitted to doing so and stated that he used telephone as well as met officers of other OPs to rig tender process. This averment was also corroborated by other officers of OP1. The Commission concluded that OP1 was part of the cartel.

OP2: From e-mail communications, WhatsApp messages, SMSs and statement of witnesses and from evasive answers of the representatives of OP2, the Commission concluded that OP2 was part of the cartel.

OP3: Mr. N.K. Bhattacharya, Vice President Marketing admitted that OP3 was part of the cartel. A Managing Director of OP3 corroborated the averment of Mr.Bhattacharya. From this the Commission concludedthat OP3 was part of the cartel arrangement.

OP4: On the basis of similar evidence collected by the DG the Commission concluded that OP4 was part of the cartel arrangement.

On the basis of similar evidence collected by the DG the Commission concluded that OP5, OP6, OP7,OP8, OP9 and OP10 were part of cartel arrangement. All of them discussed every detail of tender bids among themselves. They also discussed how they would be compensated if some of them do not win tenders.

OPs argued that on many occasions some of them did not quote prices arranged among them. But the argument was rightly rejected by the Commission. OPs also argued that there was no AAEC and that railways being monopsony controls the prices at which it can purchase. The arguments were rejectedon the ground that section 3(1) providesthat even if there is likelihood of AAEC the section shall apply. A better argument could have been that the burden of disproving AAEC is on the OPs which they could not discharge. This was further reaffirmed by the Supreme Court in *Rajasthan Cylinders* v. *Union of India*[16] that burden of disproving is on the OPs and simply saying that there is no AAEC is not sufficient. Other argument of the OPs is also rejected. Railways being a buyer have consumers' choice and can purchase from any vendor on any term is rejected because of the reality of overwhelming evidence of cartelisation. In the opinion of the author of this Survey the argument fails also because the railways are not the end-consumer. The end consumers are passengers. The Commission concluded that OP1 to OP10 and their representatives are guilty of cartelisation in the composite brake block market at least during 2009 to 2017 of determining prices, allocating markets, coordinating bid response and manipulating bidding process and are guilty of violating the provisions of section 3 (3) (a) (c) and (d) read with section 3 (1). As there was no evidence of cartelisation against OP11 and OP12 according to the DG the Commission agrees with the findings of the DG. The Commission also found 11 office bearers of OP1to OP10 guilty under section 48 (1) and 26 under section 48 (2). The Commission under section 27 (a) passed cease and desist order and as the parties have cooperateds with the DG in the investigation of the case no penalty is imposed on OPs and their officers on the condition that in future the guilty conduct shall not be repeated.

X CCI-ABUSE OF DOMINANT POSITION

In Re Harshita Chawla (IP) v.*WhatsApp Inc (OP1) and Facebook Inc (OP1)*[17] is a case on abuse of dominant position under section 4 of the Act against WhatsApp

16 Manu/1108/2018.

17 Case no. 15/2020.

and Facebook of California United States. Anti-competitive practices followed by platform through United Payment Interface (UPI). WhatsApp, launched in 2009, is a simple instant messaging application, allowing users to communicate with other WhatsApp users. Facebook is a socialnetworking platform. Facebook is one of the big five technology companies along with Google, Amazon, Apple. In February 2014 Facebook acquired WhatsApp. The allegation is that Facebook backed WhatsApp is bundling its messaging App with payment option (WhatsApp Pay) to penetrate into UPI enabled digital payment App. WhatsApp is using its vast user base to popularize WhatsApp Pay. UPI enabled digital payment market deals with sensitive customer data. Penetration in it by WhatsApp Pay will compromise customer and national security. The sensitive data helps understand volume of transactions, buying behavior of the customer and popularity of sectors. Facebook resorts targeted advertisement using its vast user base, where it has access to personal habit data of the users. IP further alleges that to replace revenue earned from targeted advertisement with ad-free service they have to charge current average revenue per user. The Facebook strategy has been to acquire its competitors; recently it acquired Instagram apart from WhatsApp. Itsproducts include WhatsApp, Messenger, Instagram and Oculus, resulting in driving out competitors and healthy competition. Using personal data of billions, it can customize advertisements to the needs of targeted customers. It isalleged that WhatsApp does not charge anything from users but shares the users' data with Facebook facilitating it to better use targeted advertisement. WhatsApp shares data with third partiesto interact with users; WhatsApp has also business applications programme interface withtheir product offerings.

United Payment Interface (UPI), developed by National Payment Corporation of India (NPCI) facilitates inter-banking transactions for realizing the idea of cash-less India. UPI is a unique product can be initiated by both sender and receiver at a mobile platform. UPI is based on 2/3/4 party system can facilitate even a non-banking entity provided no-banking entity partners with a banking entity. It is not necessary for users to use an App of bank they can use an App of non-banking technology company as well. But the Third-Party App (TPA) must comply with the procedural requirements of UPI. In the intense competitive market, the TPI develops strategies to attract customers to the TPA in the form of cash back discounts etc., which the TPA has to bear from its own pocket. As the digital payment is low margin game the profit depends on volumes.UPI has recorded a roaring increase in business year after year. The controlof this cashless UPI related TPA market in the hands of OPs (foreign entities) is not a happy situation. IP suggested there are competition concerns even though OPs offer services without any monetary considerations from the users.

IP suggested two RPMs, namely

i. Market for internet-based messaging applications through smartphones

ii. Market for UPI enabled digital payment applications

IP said that services provided by messaging Apps are distinct and cannot be substituted with traditional electronic services such as text messaging and voice calls. RGM for the first RM was proposed to be India as regulatory conditions are homogenous throughout India though they may differ in different countries.In case of the second RM, IP stated that UPI enabled services are unique in as much as even a non-banking third party can participate and is different from other fund transferring Apps such as NEFT (national electronic fund transfer). The RGM is India.

In the firstRM, IP maintains that WhatsApp is dominant on the basis of factors given in section 19(4). (i) Market share -500 hundred million in the first quarter of 2019. (ii) Size and resources-Facebook, the parent company is one of the biggest five technology providers. It has huge revenue through targeted advertisement. (iii) Size and resources of competitors- Competitors lag behind the strength of WhatsApp and Facebook. (iv) Dependence of consumers and countervailing power of competitors- Because of the wide coverage of WhatsApp users for instant messaging, users have no option but to depend upon WhatsApp. Even if a user uses another App the targeted user may not have the same App. (v) Vertical integration- Through Facebook integrated to Oculus and Instagram. (vi) Entry barriers- As it is a low margin game new commers are in no position to enter into this market. Therefore OPs enjoy dominant position in the first RM. According to the IP, WhatsApp and Facebook are undisputed leader in the RM of 'Internet based instant messaging App on smartphone in India.'

i. Allegation under section 4- It is alleged that users of WhatsApp automatically get pre-installed 'WhatsApp Pay' on their smartphones which amounts to violation of section 4(2)(a)(i) of the Act(unfair condition of sale or purchase).

ii. There existstwo RMs, one for WhatsApp Pay and the other for UPI enabled digital payment App. Both have independent markets, but the OPs bundle them and prevent the user from choosing between them, thus contravening section4(2)(d). A user who wants to install only messenger App and not the Payment App is coerced not to do so. Vice versa a user who wants to install only Payment App is forced to install messenger App also.

iii. This arrangement of bundling also contravenes section 4(2)(e). There are many UPI enabled payment Apps such as googlepayphonepe and payTM which have spent considerable time and money to establishing them, but OPs taking a shortcut resorting to bundling are successfully trying to enter into UPI enabled digital market. From 1 million user license they now got 10 million user licenses.

IP also alleges that OPs along with group companies Instagram and Oculus have huge personal data which they use to adversely affect competition and privacy. Competition forums in United States and European Union have taken action against then for the anti-competitive practices. The Commission sought reply from the OPs.

Facebook replied that it uses innovative methods to connect people to each other. Though Facebook is the parent company of WhatsApp, Instagram and Oculus but they are functionally separate. As there is no specific allegation against Facebook its name should be removed from the memorandum of parties. As regards locus standi OPs contended, relying on the order of *Samir Agrawal*[18] decided by NCLAT, that as the IP has not suffered any injury or loss, she does not have any locus. Facebook also denied the allegation of sharing data with WhatsApp for targeted advertisement.

18 *Supra* note 2.

Submissions by WhatsApp- Apart from raising the objection of locus, WhatsApp stated that allegation against WhatsApp Pay are speculative as the App has not been launched. It is still in beta version (at the testing stage) being used only by 1% of the WhatsApp users. WhatsApp further stated that RM has been wrongly defined by the IP. It is 'market for users' attention' and not 'marker for internet based instant messaging Apps in India' as the user base is wider which includes seeking users attention through innumerable devices such asocial networking, messaging, gaming, content sharing, photo and video sharing and music. Most of these services are free to garner user attention.WhatsApp is not dominant in the wider market defined by WhatsApp or in the narrower market defined by IP. In the narrower RM dominance was not proved by the IP as proof was not provided and its market strength was not compared with google Hangout, iMessage, Viber, Hike, Zoom, Spike, Telegram, Truecaller or SMS services. Market shares of these Apps are static and users prefer multi-homing which makes determination of market strength on the basis of share difficult. Regarding abuse it asserts that it has not forced WhatsApp Pay on the users of WhatsApp messaging App.Abuse under section 4(2) can also be not established for the act leveraging there must be some constraint imposed on the users of messaging App, which has not been done. Further it was stated for application of leveraging two markets should be associated markets which is not established. At the end WhatsApp has prayed that the information should be set aside and case be closed under section 26(2).

Analysis by the Commission

The Commission referred to the preliminary objection of locus, based on *Samir Agrawal*[19] that the IP is not only not an effected party but doing forum shopping as she did not disclose apetition filed by one of her associates against WhatsApp and Facebook. The Commission observed that objection of locus is misconceived as the Act imposes aduty on the Commission to promote fair competition in India and promote rights in rem rather than rights in personam and the scheme of inquiry is inquisitorial. Even if a case isfiled by an effected party the right under the Act continues to be a right in rem. The character of right under the Act is further supported by the use of the word 'information' rather than the word 'complaint'. (Ed.-The Commission under the Act can also direct investigation against the parties not mentioned in the information as well the transactions occurring even after the information is provided.)This conclusion is also supported by the Supreme Court in *CCI* v. *Steel Authority of India.*[20] Further in view of the Supreme Court decision of *Reliance Agency and Chemists and Druggist Association of Baroda,*[21] facts and truth of information are more important than locus as the proceedings are inquisitorial.In view of the decisions of the Supreme Court and other forums, the Commission cannot refuse to entertain the case on grounds of locus on the basis of *Samir Agrawal*. Other preliminary objection that one of the associates of the IP has already approached the Supreme Court against WhatsApp

19 *Ibid.*

20 (2010)10 SCC 744.

21 Case no.97/2013 decided in 2018.

and Facebook, the Commission observed that the objection does not have any substance. If the violation of the Act continues a fresh case can be filed. Further as the parties in this case are not the same the rule of unclean hands does not apply.

Commission after disposing of the preliminary objections proceeded to analyse the case on merit. Main allegation of the IP was the violation of sections 4 (2)(a) (i), 4 (2) (d) and 4 (2) (e) but also briefly alleged violation of 4(2)(a)(ii) and 4(2)(c). The main allegation of the IP is that WhatsApp has abused its dominant position in the RM 'market for internet-based messaging application through smart phone' to manipulate another RM 'market for UPI enabled digital payment applications' in its favour. But OP1 says that it competes in 'the market for user attention' and not in the 'market for internet-based messaging application through smart phone'. The Commission says that WhatsApp and Facebook are third party apps providing internet-based communication services to the consumers. Both the OPs provide different type of services to consumers voice mail, group chats and impersonal communications. WhatsApp is essentially a smartphone app.The smart phone apps have some common features but all features are not similar. It is necessary toidentify primary or dominant features of an app to define its RM. It is an over the top (OTT), linked to a smart phone and a mobile number, appto communicate personally both one to one and group. It uses internet to send or receive text messages, images audio and video contents unlike mobile text using mobile network. Facebook on the other hand is a social networking App to connect many users simultaneously. Whatever is sent is visible to all other usersIt is also OTT App.Therefore, even in OTT service one App may not be substitutable by other. However even SSNIP (small but significant Non-transitory increase in price) test, traditionally used to decide substitutability, cannot decide interchangeability. 'Market for 'users' attention', according to the Commission cannot be the relevant market as suggested by WhatsApp as the RMs for both WhatsApp and Facebook are different. 'Market for OTT messaging App through smart phone'is the RM for WhatsApp in the opinion of the Commission. It has the same set of players and competition dynamics though with different nomenclature as proposedby the IP. India is the RGM.

The IP alleged that WhatsApp is dominant in this RM and using its dominance to enter into the RM 'market for UPI enabled digital payment application in India'. UPI also acts as thirdparty App enabling instant payment to the users who subscribe the App on smart phone having access tointernet. The UPI enabled digital payment Apps such as PayTM, Google Pay and Phone Pe have several value-addedfeatures, rail tickets, air tickets and mobile payments, besides traditional fund transfer. The Commission agrees with the IP that UPI enabled Apps are not substitutable with other payment modes like debit and credit cards.

Facebook claims that it operated in a market different from that in which WhatsApp operates, but the Commission held that though it is correct but WhatsApp and Facebook being groupcompanies Facebook's strength may be attributed to WhatsApp. It is not easy to determine the dominating strength of WhatsApp as users use multiple messaging Apps such as Facebook messenger, WeChat, Snap Chat and WhatsApp. IP assessed the dominance of WhatsApp from 'Digital2020', 'We are social', GSMA, Statista, and Global Web Index *etc.* These sources give some indication of the strength of these apps. WhatsApp is the most used and Facebook Messenger stands second. As the latter complements the strength of the former there is no reason not to treat WhatsApp as a dominant messenger.

As alleged by the IP the abuse consists in pre-installation of WhatsApp Pay with WhatsApp results in contravention of the following- (i) Section 4(2)(a) of the Act as unfair conditions are imposed on the users: (ii) section4(2)(d)- as imposition of bundled WhatsApp Payamounts to supplementary obligation: (iii) Sction4(2)(e)- as dominance in one RM used to enter into another RM.

As per the Commission, the IP says that the conduct of the OP is exploitative as it imposes unsolicited WhatsApp Pay with WhatsApp. The conduct is also exclusionary as it distorts another market the 'market for UPI enabled digital payment application in India'

The Commission observes that there no substance in the allegation regarding violation of section 4(2)(a)(i) as the user in order to use WhatsApp Pay has to take addition steps to activate the payment App such as registering and providing additional information. Regarding section 4(2)(d), imposition of a supplementary obligation which amounts to abuse, the Commission observes that though the IP uses the word 'bundling' actually it is a case of tying a product or service. For the requirement of tying three conditions must be fulfilled. (i) Tying and tied products are two separate products (ii) the enterprise of is dominant in the market of tying product (iii) the consumer does not have a choice to obtain the tying product without the tied product (iv) tying results in foreclosing the market. WhatsApp says that none of the four conditions is met. WhatsApp Pay is not a separate product but only a value-added feature of WhatsApp. There is no compulsion on WhatsApp users to use WhatsApp Pay; the other features of rule against imposition of supplementary obligation are not fulfilled.

The commission did not agree with the submission of WhatsApp. WhatsApp messenger And WhatsApp Pay are two distinct products performing two distinct functions in two different RMs, fulfilling first two conditions. Prima facie WhatsApp is dominant in 'Market for OTT messaging apps through smartphones in India.'The third condition does not seem to be fulfilled as the users of WhatsApp are not required or compelled to use WhatsApp Pay, therefore the third condition is not fulfilled. Regarding the fourth condition as to the impact of the tied product on the RM, the Commission observed that there are many well established digital payments apps such as Google Pay, Phone Pe, PayTM and Amazon Pay. These Apps are vigorously competing in the market there is no possibility of market distortion. Inaddition to this WhatsApp Pay has recently received license to operate in beta version, its full potential has yet to unfold. The Commission concludes that the allegations fail. Commission also does not agree that the OP get a leveraging to enter into another market because OP is still in beta versioncontrolling only 1%of the users of WhatsApp messenger. The case isclosed under section 26(2) of the Act.

XI CCI-ABUSE OF DOMINANT POSITION: PRIMA FACIE CASE

Next Radio Ltd. Mumbai v. Prasar Bharti[22] and *Clear Media v. Prasar Bharti*[23] are a bunch of two case the facts of which are similar. Information is filed by both the IPs against Prasar Bharti (OP1) and ministry Information and Broadcasting (OP2) regarding FM radio licensing infrastructure. They alleged violation of sections 3 and 4. IP1 is Frequency Modulation (FM) broadcasting company in seven cities under name of 'Radio One'; it also manufactures televisions and radio transmitters. IP2 is a FM broadcaster in Delhi. OP1 is an autonomous statutory corporation engaged in public service radio and television broadcasting and owns broadcasting infrastructure. OP2 is nodal government ministry, formulates broadcasting policy.

In 2015, FM Phase III policy was amended and inter alia provided for migration from phase II to Phase III on payment of Non-refundable One Time Migration Fee (NOTMF) and signing of Grant of Permission Agreement (GOPA) between private operator and OP2.It was mandatory for the operators to co-locate facilities with towers of OPs or towers constructed by Broadcasting Engineering Consultants India Limited (BECIL) upon payment of license fee.It was mandatory to share transmitting infrastructure. As both the cases relate to licensing agreement of sharing of broadcasting infrastructure between IPs and OPs, order in one case for forming prima facie opinion was repeated in the second case.

In 2015 at the time of executing GOPA, IP1 objected to increase in the annual license fee upon migration from phase II to Phase III, and certain clauses in the draft agreement for payment of license fee, as it would increase financial burden on them. The OPs refused to consider their objection without giving them opportunity of hearing and that the clauses of agreement violate sections 3 and 4. Clause 3.2.3(i) increases fee 5% annually whereas earlier increase was 10% every two year. Clause 3.2.3.(ii) License fee for tower aperture is doubled to 5% annually. Clause 3.3: For default in payment the rate of interest has been increased from 18% to @SBI PLR +25 per annum. Clause 6.1.a. (ii) The licensee shall keep provisions for future requirements while creating Common Transmission Infrastructure (CTI) at no additional cost to the licensor.Clause 6. (m)Licensee is liable to pay taxes for infrastructure in the premises of OP1. Clause 7.4in the event of technical necessity, after giving prior notice if possible, the licensor may disallow the licensee the use of CTI for a period but the licensee shall pay license fee for the period of non-use.Clause 12.3The license can be terminated after giving 6 months' notice or after payment of six month of license fee in place of earlier three months. Clause 14 OP1 has the sole authority toappoint sole arbitrator in case of a dispute.On 4.7.16 the Commission in view of these provisions ordered the DG to investigate the case as there is a prima facie case. As there was no prima facie violation of section 3(3) and 3(4), the DG was required to investigate violation of section 4 only.

Though allegations by IP2 were similar to those alleged by IP1 but some of the allegations made by IP2 were different. They are as under-

22 Case No. 29/2016.

23 Case No.19/2017.

i. OP1 demanded license fee for CTI even after the collapse of the facility at Kingsway Camp.

ii. OP1 demanded license fee for use of infrastructure at Mall Road site not at the agreed rate of phase II but at the phase III rates

iii. OP1 coerced IP2 to sign agreement for phase III though the facility was not yet ready and operational.

The Commission *prima facie* found that OP2 only formulates policies and hence not an enterprise but OP1 is, as it provides FM facilities to broadcasters for a license fee hence it is an enterprise. Regarding abuse of dominant position by OP1 the Commission observed that the draft agreement for Phase III appears to be tilted in favour of OP1.

DG report

The DG framed five issues to investigate; whether OP1 and OP2 are enterprises; if so, are they a group;are OPs dominant; if dominant,have they abused dominance; are some officers also guilty?

Though the Commission was of the opinion that OP2 is not an enterprise but the DG thought otherwise. Though OP2 formulatespolicies, it also carries out economic activities, as in many cases, on the basis of records, it was found that OP2 takes final decisions even in economic and commercial matters. Therefore, OP1 and OP2 are group enterprises.

The DG defined the RPM as 'Market for infrastructure facilities for FM radio broadcasting,' same as defined by the CCI under section 26(1). RGMfor OP1 is Mumbai, Delhi, Kolkata, Chennai, Pune, Ahmedabad and Bengaluru, whereas for OP2 it is Delhi. Regarding dominance in the RM, so defined in phase-II the license holders were required to use transmitting facility of P1. In transmitting towers P1 was 100% dominant. In Phase III also the license holders are required to co-locate their facilities with the towers of Pasar Bharti, OP1. In the cities where OP1 does not have any infrastructure [city Transmitting infrastructure (CTI) or Land and Tower Infrastructure (LTI)] all the broadcasters will make consortium to make facility or they can use facility to be made by OP1. DG concluded that the Broadcasters were 100% dependent on OP1. Regarding size and resources, the DG concluded that OP1 is far bigger than the private broadcasters. The DG concluded that OPs (OP1 and OP2 as group) are dominant in the RPM 'Market for infrastructure facilities for FM radio broadcasting' in each of the geographical area.

Abuse of Dominant position

Issue I- Whether conduct of OPs anti-competitive, in not informing the IPs that until enhanced license fee and other charges payable by a broadcaster for migrating from Phase-II to Phase-III will not be complete, anduntil payment of Non-refundable One Time Migration Fee (NOTMF) is complete, migration will not be complete?The DG concluded that enhanced rates of license fee for migration to phase III was uploaded in the draft agreement after the payment of NOTMF, therefore IP1 did not have option of withdrawing from phase III.

Issue 2: Whether the license fee/rates for LTI, maintenance charges and miscellaneous charges levied by the OPs from the FM Radio broadcasters for the use of infrastructural facilities in Phase III are reasonable vis-à-vis the rates charged in Phase II? In phase III increase rate of license fee was 5% per annum as against 10% after every 2 years in phase II was considered to be abusive under section 4(2) (a)(ii).

Issue 3: What shall be the date from which the License Fee is chargeable at higher rate for Phase-III? IP2 was charged higher license fee for one site as against other sites in violation of section 4(2) (a)(ii).

Issue 4: Whether the liabilities cast upon the broadcasters *vide* clause 7.4 and clause 12.3 of the Phase III Agreement applicable under certain situations/ circumstances are one sided and asymmetric in favour of OP-1 and therefore, can be said to be anti- competitive? In accordance with provisions of clauses 7.4 and 10.3 the licensee shall be allowed peaceful use of infrastructure during the duration of agreement but the licensor may prohibit the use of infrastructure in emergencies and during technical problems with or without noticebut not liable topay any penalty and the licensee shall pay the fee during the period of non-use. The term is one sided and unfair thus violative of section 4(2)(a)(i).

Issue 5: Whether clause 14 of the Phase III Agreement regarding the power to nominate the sole arbitrator in case of disputes between the parties can be said to be anti-competitive? The clause violates section 4(2)(a)(i).

Issue 6: Unfair charging of rentals towards tower from IP-2. IP2 alleged that the rental being charged for the Mall Road facility is for 220 metres tower though the tower is of the height of 100 metres. Similarly placed broadcasters are charged differently for similar facility. DG did not find any contravention by OPs but by certain officers of OP1 under section 48(1) and (2).

Analysis by the Commission: The first question was whether OPs are enterprises and if so, do they constitute a group? The Supreme Court in *CCI* v. *Coordination Committee of Artists and Technicians of W.B. Film and Television,*[24] held that the test to determine if an entity is an enterprise depend upon functionality rather than on its form. The Commission after referring to many decisions of higher courts functionally decided that OP2 is economic beneficiary of commercial activities of OP1 therefore it is also an enterprise. As OP2 to an extent controls the activities of OP1 they are a group.

Regarding dominance and abuse-The Commission agreed with the finding of investigation that OPs are dominant in the RPM in the different geographical markets.

The Commission examined the following issues to determine whether the behavior of the OPs was abusive. (i) Whether mandatory use of the infrastructural facilities of OPs is abusive. (ii) Whether increase in License Fee and not informing about the same to private FM broadcasters amounts to abuse. (iii) The date from which the License Fee is chargeable at higher rate for Phase-III. (iv) Whether license fee/rates for LTI, maintenance charges and miscellaneous charges levied by the OPs

24 (2018) 144CLA 403 (SC).

from the FM Radio broadcasters are unreasonable. (v) Certain clauses in the infrastructure agreement between OP1 and IPs are abusive.

i. Mandatory use of infrastructural facilities of the OPs by IPs: Co-location of infrastructural facilities have been recommended by the sectoral regulator TRAI in the mandatory Recommended Co-location Offer (RCO) of the third phase. The Commission did not agree that policy decisions of the Government cannot be considered as non-competition issues. As all the broadcastersbroadcast from the same location, incur same cost, itis not abusive behavior as the co-location does not amount to discrimination and a level playing field is given to everyone.

ii. Increase in the license fee and not informing about the same to the licensees- There were certain discrepancies in the rate of license as pointed by OP2. At the relevant time communication was pending between OPs, therefore OP1 could not publish rates. Further there was no defined policy for publishing the rates. Therefore, OPs cannot be guilty of violation of section 4. The author of this survey is not willing to agree with this, as not informing the enhanced rates is violation of rules of natural justice which is unfair conduct. Simply because it was a policy decision of OP2 and cannot be controlled by OP1, and that the increase is miniscule, as asserted by the Commission, does not have any substance. An unfair conduct does not become fair simply because it is a policy decision.

iii. The date from which license fee is chargeable at higher rate for phase III- As there was error in calculating the amount chargeable, it cannot be considered as abuse.

iv. Whether license fee/rates for LTI, maintenance charges and miscellaneous charges levied by the OPs from the FM Radio broadcasters are unreasonable- The IPs have objected to chargesimposed for maintenance of LTI. As the change of rates from10% every two years to 5% every year would be a minimal increase and would not amount to be abusive according to the Commission.

v. Clauses in the infrastructure agreement between OP1 and IPs- Clause 7.4 provides that the licensor in emergency and technical difficulty may disallow the licensee from using the infrastructure with or without notice but the licensee shall continue to pay fee for period of non-use. Commission agrees that the provision is not abusive as though the licensee cannot use the infrastructure, they will have access to their infrastructure. The argument seems to be strange and far-fetched, to the author of this survey. What is the meaning of having access to the infrastructure by the licensee if it cannot be used for the purpose for which it ismeant?Clause 14 which provides that OP1 can appoint a sole arbitrator in case of dispute between the broadcasters and the OPs and his decision shall be final. The Commission did not find the clause to amount to abuse as the appointment can be suitably dealt with under the provisions of the Arbitration and Conciliation Act 1996. The author of this survey thinks that the Commission appears to wrong as the appointment of the arbitrator only by one party of the dispute is violative of the rules of natural justice. That the initialwrong can be subsequently corrected under the Arbitration and Conciliation Act, is no satisfactory solution. Why allow initial wrong to be committed?

vi. Other Clauses questioned by the IPs were not found by the DG to amount to abuse.

Only remedy provided to the IPs was that the Commission advised the OPs that they should make disclosures at the appropriate time.

XII CCI-ASSOCIATIONS

Suprabhat Roy of Suman Distributors of Murshidabad v. *Saiful Islam Biswas District Secretary of Murshidabad District Committee of Bengal Chemists and Druggist Association*[25] is a case on anti-competitive horizontal agreement. OPs raised two preliminary objections. Citing a High Court of Delhi decision in *Mahendra Electric,*[26] where the court ordered that every Bench must have a judicial member and as this Bench does not have a judicial member it cannot decide the case. However, in the *Cadd Systemand Services Private Ltd,* v. *CCI* [27] the court clarified that it does not mean that the Commission will stop functioning till adequate number of judicial members are appointed. The other objection was that though the investigation was carried on by the deputy director but it was signed by the joint director. The argument was rightly rejected as under the Act 'Director' includes all joint and deputies of the office of the DG.

After disposing of preliminary objections, the Commission proceeded to analyse the case on merit. The Commission analysed the importance of the definition of 'agreement' given in section 2(b) and emphasized that it need not be proved by any direct evidence: even a tacit understanding is sufficient to constitute 'agreement' and it can be on the basis of preponderance of probabilities: and this degree of evidence may be inferred from sequence of circumstances.

There were three specific allegations against BCDA and its General Secretary Subodh Kumar Ghosh (i) Necessity of procuring Stock Availability Information (SAI), which is in the nature of NOC, by the stockiest from BCDA before pharmaceutical can begin supply. (ii) Requirement of illegal payment in addition to circulation charges for issuance of SAI. (iii) Requiring illegal payment from PCD agents of pharmaceuticals for issuance of Product Availability Information (PAI) before product can be supplied to the stockists.

On the basis of evidence collected by the DG, the Commission found that there is sufficient evidence to conclude that BCDA charged SAI from the stockists. As it is horizontal agreement AAEC is presumed: however, the presumption could not be rebutted by BCDA and Subodh Kumar Ghosh. Therefore, BCDA and its District Committee has violated section 3(3)(b). Evidence was collected by the DG that PCD agents of pharmaceuticals gave donation of Rs. 30000/- for PAI. If it was rupees

25 Case No.36/2015, Case No.31/2016 and Case No. 58/2016.

26 2019 SCC on line Del 8032.

27 W.P.(C) 6661/2019.

thousand in each case it cannot be voluntary donation, that is what was concluded by the Commission. This non-voluntary donation was illegal payment and hence violates section 3(3)(b). Under section 48(1) and (2) Subodh Kumar Ghosh, Saiful Islam Biswas, Nikhilesh Mondal and Bajlur Rahaman were found guilty. Alkem and its officers- There is ample proof that Alkem began supply of products only when BCDA issued SAI. There was an agreement between Alkem and BCDA that product cannot be supplied unless BCDA gives approval. Alkem was guilty under section 3(1) of the Act. The Commission finds that scope of s. 3(1) is wider than those of sections 3(3) and 3(4), it can operate independent of two. The Commission also found certain officers of Alkem guilty under section 48(1). It is also significant to note that the Commission found that the allegation leveled by Alkem against IP2 that he acted with mala fide intention was irrelevant because he is only an information provider.

The Commission under section 27(a) ordered OPs, BCDA, their District Committees of Murshidabad and Burdwan, and their Office Bearers, Pharmaceutical companies Alkem and Macleods, their respective Officials, to cease and desist from activities prohibited under section 3. As BCDA has been able to show that post *Shantuka Associates* v. *AIOCD,*[28] steps were undertaken to stop prohibited practices, therefore because of these mitigating factors no penalty is imposed. On similar reasons no penalty is imposed on Alkem and Macleods. The commission also directed BCDA to organise competition advocacy event with district committees.

XIII PRIMA FACIE CASE

Xyz v. *Alphabet Inc. and Google LLC,*[29] is a case on abuse of dominant position by the OPs as they discriminate between Google Pay and other payment Apps through their play store as well as certain other allegations were also levelled.

The main allegation is that dominance consists in the fact that instant payment Apps are connected to banks through UPI enabled digital payment devices. A smart phone user accesses these payment Apps through google Play Store. But Play Store gives preference to pre-installed 'google pay' rather than other payment Apps; whenever search is made for 'pay' 'google pay' will appear before other Apps like 'PayZapp', 'Paytm' or 'Phonepe' Prima facie google is dominant and guilty of abusing dominance. The abuse consists in discrimination between payment Apps. The case referred to the DG for investigation. As the case has been sent to the DG for investigation under section 26(1) it will be discussed when final orders are made by the Commission.

XIV CONCLUSION

In this age of so-called liberalization, corporatization and globalization, a general and marked tendency throughout the world is to administer things in favour of the corporations rather than in favour of the ordinary citizen, in favour of development rather than for the poor. The cause of development has become more important than the welfare of the last wretched man in the society. Economy is becoming development

28 2013 Comp. LR 223 (CCI).

29 Case No 7/2020 CCI.

centric rather than human welfare centric. India is, now following this path to the hilt. Our development is also jobless and non-human centric and privatization of public property is taking place at a very fast pace. The competition law is being interpreted more in favour of corporations rather than for the consumer and general public. As the supply of capital, technology and skill is less than its demand, those who invest here demand certain concessions, which they do not get in developed world. Generally, the unspoken and unwritten demand is relaxation in the strict application of environmental laws and competition laws. It is quite possible that these pro-development factors might have influenced narrow interpretation of competition law. However, there are a few cases where the Competition forums have reversed this trend.This year, the Supreme Court negated an attempt made by NCLAT to superimpose 'locus standi' on 'information provider' and thereby prevented dilution of the Act.