4

COMPETITION LAW

*Vinod Dixit**

I INTRODUCTION

OVER THE years, the Commission has been able consolidate competition jurisprudence, particularly competition concepts have attained a degree of clarity. In the early years of functioning the Commission, in order to conceptualise 'agreement' was acting under the hang over of the agreement as defined under the Contract Act. They demanded a clear proof of meeting of mind, which in most of the cases was an impossibility. There was a marked reluctance to construe circumstantial 'agreement.' However now such a reluctance is rare. Concept of 'after-market' has also attained a degree of maturity but many a concepts have not yet attained maturity such as 'anti-competitive practices, distinct from anti-competitive agreements, which have all the ingredients of agreement except the proof of agreement.'

II TRENDS

After priority was accorded to other regulators over Competition Commission in cases of conflict of jurisdiction by the Supreme Court of India, more often than not High Court gave priority of other regulators, but this year the High Court refused to prioritise Electricity Regulator.

III HIGHCOURT: SECTION 26(1)

Flipkart Internet (P) Ltd. V. Competition Commission of India,[1] this is an appeal to set aside the order of a single Bench of the Karnataka High Court. These are two appeals are against the order of a single Bench passed on June 11, 21. in which the single judge dismissed the writ petition. The facts of the case are as follows. Delhi Vyapar Mahasangh gave an information to the CCI alleging anti-competitive practices and conduct, such as deep discounting, preferential listing, sale of private label brands through preferential sellers and exclusive tie-ups, alleged to be in violation of section 3 (4) read with s. 3(1) of the Act. The Commission passed an order directing the DG to investigate the case (40/2019) on 13.1. 2020. The order under section 26(1) is challenged before the single Bench which was dismissed These are appeals against the dismissal. The Appellants relying on *CCI* v. *Steel Authority of India,*[2] asserted

* Visiting Professor National Law Institute University Bhopal, Former Professor of Law, University of Delhi.

1 Writ Appeal 562/2021 and 63/2021; MANU/KA/3124/2021.

2 (2010) 10 SCC 744.

that the order of the single Bench is contrary to the ratio of the authority, which is that the Commission while passing the order under section 26(1) must express its mind in no uncertain terms that there is a prima facie case. It was contended that the order to investigate is speculative and no finding is given that provisions of the Act have been violated. The single Bench erred when it upheld the order of the Commission on ground that 'some reasons' are given, which are sufficient for review.The appellant asserts that the order of CCI is bad for three reasons.(1) The CCI has not expressed its mind in no uncertain terms that *prima facie* case exists. (2) It in not stated clearly that s. 3(4) is violated and (3) Existence of AAEC, according to parameters, given in section 19, has not been established. (4) It was further asserted that the facts contravening allegation were not taken into account. (5) Additionally, it was contended that for establishing the requirements of section 3(4) the Appellant must be part of production chain which it is not. It is neither producer nor seller nor buyer. (6) Further s. 19(3) was not considered at the inquiry stage.Thus, threshold jurisdictional to order investigation have not been fulfilled. It was contended by the appellants the test under section 26(1) is not 'prima facie case for investigation' but 'prima facie case for contravention of the provisions of the Act'. CCI failed to apply the correct test that is the later test.

In response to these allegations the CCI submitted the following reasons. (1) the order under section 26(1) is administrative and not adjudicatory. CCI under this section required to form only a preliminary/tentative opinion. (3) The order entails no civil consequences. (4) The CCI is required to give only 'some reasons. (5) Detailed reasons may influence the DG. In response the Appellants stated that order under section 26(1) must confirm to what the Supreme Court has stated in *CCI* v. *SAIL*[3] [(2010) 10 SCC 744] and such submission of the CCI also completely ignores the judgment of the Hon'ble Supreme Court in *Bharti Airtel Ltd* v. *CCI.*, [(2019) 2 SCC 521 and *Barium Chemicals Ltd* v. *Company Law Board*, [AIR 1967 SC]. The ratio of Barium case, according to the Appellant is, if the authority, which is required to form an opinion has actually not formed an opinion, its order can successfully be challenged. In the Barium case the Supreme Court was also examining an administrative order, therefore the argument that section 26 (1) is not reviewable does not stand. According to the appellant the single bench was wrong in accepting the position that order under section 26(1) is merely tentative/preliminary order.

The appellant also contended that an order under section 26(1) effects the rights of the parties. These rights are (1) loss of goodwill (2) Managerial time in giving information to the DG is spent (3) legal and other cost.Therefore, the opinion under section 26(1) should be formed in no uncertain terms. (4) powers of the DG are more sweeping than that of police under Cr.P.C (5) It is wrong to say that investigation does not have any civil consequences. As distinction between administrative action and judicial action has practically evaporated, rules of natural justice, opportunity of hearing to the OPs, and reasons of decision must be given. For allegation of violation of section 3(4), it is necessary to establish the fact of 'agreement': the enterprises are at

3 *Infra* note 2.

different stages of production and the agreement causes AAEC. The single bench has failed to appreciate that CCI has not established the existence of these factors. Instead of proving these facts the CCI only referred to exclusive launch of mobile sets, preferred seller on the marketplace and preferred listing.

The appellant further argued that the appellant is not a stage of production chain, but only a platform. It was also contested by the appellants that on line platform may not be substitutable by off line malls for supply side, but for the consumers they are. Regarding AAEC it must have been analysed with reference to section 19(3). The high court proceeded to analyse the case. Proceedings before the DG are inquisitorial. The constitutional Bench of Delhi High Court in *Krishna Swami* v. *Union of India*[4] explained the expression "inquisitorial". This administrative power is neither civil nor criminal, it is sui generis. Commissions power under section 26(1) are not adjudicatory but only administrative. Forming prima facie opinion is not adjudicatory. Therefore, right of notice or hearing is not contemplated under section 26(1). Formation of opinion under section 26(1) is tentative. A detailed examination of the case may prejudice the interest of one of the parties. However, the DG is required to give opportunity of hearing to the effected parties.The Supreme Court in the case of *CCI* v. *Bharti Airtel Ltd*.,[5] has held as under. Once we hold that the order under section 26(1) of the Competition Act is administrative in nature and further that it was merely a prima facie opinion directing the Director General to carry the investigation, the high court would not be competent to adjudge the validity of such an order on merits. The observations of the high court giving findings on merits, therefore, may not be appropriate."Thus, the High Court under Article 226 cannot decide the review petition on merit. Proceedings under section 26 are only beginning of the process and the Appellants want to crush it at the threshold.

The appellants have raised many points such as (1) the IP is not an aggrieved person, but the Act contemplates that any person can be IP. The position was confirmed in *Samir Agrawal* v. *CCI,*[6](2) the Supreme Court in *CCI* v. *SAIL*[7] has held that under section 26(1) the threshold to begin the investigation is low, therefore, only some proof is needed to initiate the proceedings. Prima facie case is defined in*Management of the Bangalore Woollen Cotton and Silk Mills* v. *B. Dasappa,*[8]"..... A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed."

The Bench observed that the detailed inquiry of deep discounting, preferential listing and exclusive tie-ups will be done by the DG and the single Bench was right in observing that the inquiry under section 26(1) was administrative in nature and not to be interfered. Rules of natural justice do not require the OPs should be afforded opportunity at the initial stage theOPs can rebut it before the Commission. During the inquiry under section 26(1) to formulate prima facie opinion the Commission may or

4 (1992) 4 SSC 605.
5 (2019) 2 SCC 521, in para 121.
6 (2021) 3 SCC 136.
7 *Infra* note 2.
8 AIR 1960 SC 1352.

may not give notice to the OPs. In the considered opinion of the court, by no stretch of imagination, the process of enquiry can be crushed at this stage.The writ appeals were dismissed.

IV HIGH COURT: COMPETION CONCERNS AND ELECTRICITY ACT

Tamilnadu Generation and Distribution Corporation Ltd. v. *Competition Commission of India*[9] [decided on 22.12.21: High Court of Madras)] Southern India Engineering Manufacturers Association (third respondent) informed that the appellant (TANGEDCO) is charging discriminatory price in the sale of electricity. The Commission finding *prima facie* case referred the case to the DG for investigation. Appellant filed a writ petition under Article 226 maintaining that the Commission does not have jurisdiction as the case must be decided under Electricity Act 2003. Section 23 of this Act Tamil Nadu Electricity Regulatory Commission is empowered to issue 'directions to the licensees' for efficient supply of electricity. The Petitioner relied on *CCI* v. *Bharti Airtel*[10] where the Supreme Court. observed that the Competition Act confers jurisdiction to the Commission on the three issues *viz.*, anti-competitive agreements causing AAEC, abuse of dominant position and combinations. Unless preliminary conditions of licence are not decided by TRAI the Commission cannot exercise its jurisdiction. The advocate general appearing for the petitioner TANGEDCO submitted that when the Special Act provides a redressal mechanism, which is effective and efficient, parallel proceedings under the general law (Competition Act) are barred and thus, the impugned notice is untenable.

On the other hand, the Additional Solicitor General appearing on behalf of the respondents 1and 2 submitted the power under section 26(1) is administrative and the investigation by the DG does not affect the rights of the parties. He further stated that Electricity Regulatory Commission is not an investigating body and type of the investigation done by the DG cannot be done by it. Under section 23 of the Electricity Act, the Regulatory Commission neither can investigate nor impose penalty, it can merely lay down policy. "No doubt, the Electricity Act will prevail over the Competition Act in respect of the subjects dealtwith under the provisions of the Electricity Act. However, the Competition Act provides Power of investigation by the Director General. Certaincircumstances as contemplated under section 4 of the Competition Act, which are not comparable to the powers conferred on the Tamil Nadu Electricity Regulatory Commission either under section 23 or under any other provisions of the Electricity Act", jurisdiction of the Commission cannot be barred. It was contended that there is no provision in the Electricity Act parallel to section 4 of the Competition Act, therefore writ petition should be dismissed.

Additional Solicitor General on behalf of CCI relying on *CCI* v. *Bharti Airtel*[11] observed that the Supreme Court held that first TDSAT, being a specialised forum, would decide the aspects of the case which are within the exclusive jurisdiction of TRAI and then the Commission may proceed to decide competition concerns.

9 (2022) 1MLJ337.
10 (2019) 2 SCC 521.
11 *Infra* note 10.

In rebuttal the Additional Advocate General relied on *Monsanto Holdings Pvt. Ltd., v. Competition Commission of India,*[12] and in the case of *WhatsApp LLC Vs. Competition Commission of India.,*[13] the high court interpreting the ratio of *Bharti Airtel*[14] observed the investigation by the DG has to wait till obligations under TRAI Act are decided by the TDSAT: only then Commission can exercise its jurisdiction.It was also submitted by a third-party Respondent that section 21-A of the Competition Act provides for reference by the CCI to another regulatory body if clarification is needed from another regulatory body: this can be done, if after investigation by the DG there is such a need.

It was also brought to notice of the Court that TANGEDCO also discriminates between industrial consumers in Chennai and outside Chennai in terms of rate of the electricity and duration of supply of electricity. The RM is 'generation/distribution/ sale of electricity in Tamil Nadu'. Tamil Nadu has two corporations TANTRANSCO, for transmission of electricity and TANGEDCO for generation and distribution of electricity. In the afore mentioned RM TANGEDCO is dominant and also vertically integrated with TANTRANSCO. Regarding abuse there is allegation of discrimination between consumers in Chennai and outside Chennai. On these *prima facie* grounds the Commission referred the investigation to the DG.

The only question before the high court was if the Electricity Regulatory Commission has any power similar to that is given to the Competition Commission in section 4 of the Competition Act. No doubt the Electricity Regulatory Commission under section 23 of the Electricity Act pass orders for efficient supply/distribution of electricity. But the Electricity Regulatory Commission does not have any power to order investigation and impose penalty. In the Electricity Act there is no provision akin to that given in section 4 of the Competition Act. As regard *CCI* v. *Bharti Airtel*[15] the Supreme Court held that the Competition Commission did not have jurisdiction. However, if after the matter is disposed of by TDSAT and if Commission finds that any anti-competitive activity is committed, it can take cognisance.

The high court is not inclined to pass any judgement on the merits of the case as well as if the Commission need to avail of the route provided in section 21-A. The writ petition stands dismissed.

V NATIONAL COMPANY LAW APPELLATE TRIBUNAL: ENTERPRISE

Thupili Raveendra Babu v. *Competition Commission of India.,*[16] It is an appeal by an 'affected person' in case no. 50/2020, filed by the Appellant, against closure of the case under section 26(2) of the Competition Act. The allegation was that the Legal Education Rules of Bar Council of India 2008 barred the entry of general candidates, who attained the age of 30 years, into legal education as the rules violate the provisions of section 4 of the Act.

12 (2020) SCC OnLine Delhi 598.
13 Writ petition 4378/2021 and CM13336/2021.
14 *Infra* note 10.
15 *Ibid*.
16 Manu/Nl/0485/2021.

"The informant states that he learnt about Clause 28 of Schedule III, Rule 11 toPart IV - Rules of Legal Education, 2008, a part of Bar Council of India Rules enactedunder the Advocates Act, 1961 (hereinafter, 'Clause 28'), according to which thecandidates belongings to General category who have attained the age of more than 30years, are barred from pursuing legal education. The BCI has allegedly imposedmaximum age restriction upon the new entrants to enter into the legal education andthus, created indirect barriers to the new entrants in the profession of legal service.The impugned Clause 28 has been incorporated by the BCI in contravention ofSection 4 of the Act by 'misusing its dominant position'. By having done so, the BCIhas also allegedly indulged in colourable exercise of power. The IP further alleges that the Bar council by reducing the upper age limit have created entry barriers to the legal profession. The IP has prayed the Commission to declare clause 28 void as violative of section 4.

In order to decide the case, the preliminary question is whether BCI is an enterprise? In *Dilip Modwil* v. *Insurance Regulatory and Development Authority,*[17] the Commission decided that an entity would bean enterprise only if it perform commercial activity with economic contents and held that Insurance Regulatory and Development Authority (IRDA) is only a regulatory authority and is not an enterprise. The BCI is in the present case is only performing its regulatoryfunctions and is not an enterprise. CCI, hence, has no jurisdiction. The case was closed under section 26(2) of the Act.

The appellant states that the first duty of the Commission is to ensure fair competition. Rule 28 violates section 4 in as much as the rule bars the entry of new comers in the legal profession. The appellant wants to pursue LL.B. three-year course but cannot do so as the Rule bars his entry into education. Bar Council of India, a body of advocates, also controls legal education.

The appellant cites cases decided by the NCLAT in which it was held that public and private both entities can be enterprises. Mere fact that an entity exercises regulatory functions does not prevent it from being an enterprise if it also controls supply *etc.* of goods or services. As the Bar Council controls access to legal education, it is barring the entry of the Appellant to education and consequently it is abusing its dominant position in violation of section 4 of the Act. The appellant prays that clause 8 the Rules of Legal Education 2008 be declared invalid as it violates section 4.

The Commission referred to section 16 of the Advocate Act, promoting legal education is one of the functions of the Bar Council. Section 49 of the Advocates Act 1961 provides that the Bar Councils can make rules for legal education. Though the definition of 'enterprise is very wide but the activity must be economic and commercial.The 'Bar Council of India' is not an enterprise as it does not perform any economic or commercial activity. Hence the appeal is dismissed by NCLAT.

17 Case No. 39/2014.

VI NCLAT: NO COMPEITION CONCERN

Venkateswara Agencies v. *Competition commission of India*[18] is an appeal against the orders of CCI passed under section 26(2). The delay in filing appeal is condoned by NCLAT as the delay was because of COVID-19 .The Appellant entered into an agreement with Kerala Agriculture Company Limited (KAMCO) for dealership for sale of agricultural products in a specific region of Karela.The agreement was entered into in 2006 and continued till 2018, when KAMCO gave dealership to others also in the region where the appellant had dealership. It is claimed that KAMCO being dominant in the RM is abusing its dominant position. The Commission finding no competition concerns in the case closed the case under section 26(2). The NCLAT cited the relevant order of the Commission as to why the case was closed.

"The Commission at the outset observed that though the dealership agreement between Informant and KAMCO was first signed on September 28, 2006 (prior to commencement of the Act), such agreement appears to be continuing till March 31, 2018. The allegations made by the Informant are twofold. Firstly, that KAMCO opted to give authorized dealerships to other dealers for Guntur, Vijayawada and Srikakulam, in-spite of the fact that Informant continues to hold the authorised dealership. In regard to this allegation, upon perusal of the information and additional submissions made by KAMCO, the Commission is ofthe view that no competition concern is involved in the appointing of new dealers in the areas where the Informant has dealership. This has also been made explicit by KAMCO in its dealership agreement under clause 7(a)(ii) that new dealers may be appointed as and when it deems necessary in the interestof the sales of the products. Clause 7(a) (ii) of the dealership agreement isreproduced below:

> An adequate and properly trained staff and workshop facilities forsatisfactory sale and after-sale-services of the product as required bythe Manufacturer and to the Manufacturer's sole and entire satisfactionas advised from time to time. The Manufacturer reserves the right toappoint its dealers for the Product in the Territory as and when itdeems necessary in the interest of the sales of the Products.

In fact, the Commission is of the view that the Appellant did not suffer any financial loss and there is no competition issue is involved in this case. This case is a case of contractual obligations. In view of these observations, the appeal is dismissed.

VII COMPETITION COMMISSION: COMPETITION CONCERNS

Federation of Hotels and Restaurants Association of India v. *Make My Trip (OP1), IbiboGroup (OP2) and Oravel Stays*[19] *(OP3)* is a case of direction for investigation. OP1 and OP2 combined and became MMT-GO. The allegation is that OPs have violated section 3 and 4 of the Act. IP is a company registered under Company Act and a representative body of hospitality industry in India. The OP1 and OP2 are on line travel agencies (OTA). OP3 books rooms under trade mark 'OYO Rooms'.

18 MANU/NL/410/2020.
19 Case no.14/2019.

The allegation was predatory pricing, exorbitant commission and illegal booking of rooms by and breakfast and fair business relationship. After many exchanges of mails and meetings differences could not be resolved. Therefore, this information was sent to the Commission. The substance of allegations are as follows:

I. after merger between MMT and Ibibo, MMT-GO act independent of competitive forces of the market.

II. OYO ROOMS is market leader in booking budget hotels; it books 28% of rooms in the category of less than Rs 2000/- and 67% in the category of less than Rs.1000/-. OYO has competitive advantage in the relevant market.

III. OPs charge excessive commission and give deep discount to guests

IV. MMT-GO charge performance linked bonus that is, they pay for only 9 out of 10 booked rooms to the hoteliers. Thus, they charge 22-40% which is very high in violation of s. 4

V. MMT-GO also make price parity agreement, which means the hotel cannot offer rooms at any price below the price offered to MMT-GO. There is also room parity agreement, that is, rooms cannot be refused to MMT-GO if rooms are offered at other platforms. This is violation of s.4.

VI. It is the practice of the industry that 'average room cost' is the cost of a room, but MMT-GO offer the rooms also at price less than average room cost, thus offering at predatory price in violation of s.4. They also acquired a number of OTAs thus lessening competition.

VII. OYO is resorting to predatory pricing and offer deep discount to consumers to fulfil targeted rental of rooms. OYO. Because of deep pocket rather efficiency, offer rooms at predatory price forcing non-members to join OYO.

VIII. Chain hotels/hotel aggregators Treebo and Fab hotels are denied membership as they do not agree to deep discounts.

IX. MMT-GO and OYO enter into secret agreement to give OYO preferential listing in violation of ss.3&4.

X. Service charge charged from consumers in the name of the hotels is discriminatory and not passed to the hotel.

XI. When a hotel severe its partnership the OTA show 'no room available' instead of delisting it.

XII. In order to reduce gap between demand and supply they OTAs resort to fake booking(unbooked rooms shown as booked.)

XIII. There is also allegation of anti-competitive agreement between MMT-GO and OYO. Rate of commission charged by them is similar between the range of 40-45% and both simultaneously give discount which shows meeting of mind.

The Commission decided to give the parties hearing before deciding whether the matter should be investigated or not. Both the Ops stated that in India there no concept of joint dominance in India. MMT-GO is an OTA whereas OYO works on

franchise model, therefore, there cannot be any horizontal anti-competitive agreement between them.

MMT-GO maintained that relevant market (RM) in wider, that is, in travel and travel related services.The share of MMT-GO, according to report of India Brand Equity Foundation, is less 5%. And in narrower sense, sale of hotel rooms in India, is also less than 5%. Therefore, it does not enjoy dominant position. MMT-GO further averred that they charge only upto 25% commission which is not excessive. The allegation of predatory pricing is false. MMT-GO further contended that OP1 may offer Best Available Rate (BAR) and can offer discount as well. Hotels receive BAR less Commission from the platform.

OYO denied all the allegations and claimed that it is not an OTA but itself provide hospitality and compete with other hotels and its market share is less than 10%. Relying on case no.3/2019 it provides franchising service and it was found not to be dominant. All the disputes with the IP are contractual disputes outside the jurisdiction of the Commission. They also have an option to terminate contract with OYO. Making collective demand from OYO amounts to anti-competitive agreement and are against competitive market (section 3(3)). The demand of the IP for charging fixed commission is anti-competitive. The net margin of OYO after deducting cost is only 15-20%.

OYO maintains that the allegation of fake bookings is false as OYO does not earn anything on fake bookings. On the other hand, many hotels book guest without the knowledge of OYO. Regarding delisting on OYO website, it may take up to six days to do so. Regarding horizontal agreement between OPs OYO says that is not possible as they operate in different RMs. Only possible agreement may be vertical agreement, but no evidence of existence of such an agreement is shown.

Both the OPs prayed that the information be closed under section 26 (2).

Analysis by the commission

Regarding collective dominance by both the OPs the allegation fails as under Indian law such a concept does not exist per *Fast Calls Cabs* v. *ANI Technologies Private Ltd*.,[20] regarding dominance by each OP separately the respective RM need to be defined. In both the cases of OPs the RPM has two aspects supply and demand sides. These platforms cater to the needs of the consumers who need rooms and the hotels who need consumers. As the issue raised in this case relates to the hoteliers, the RM should be defined with reference to the hoteliers, that all alternatives available them for room renting.

The IP maintained that both parties are OTA. But the Commission in *R.K.G. Hospitalities* v. *Oravel Stays,*[21] after detailed discussion, decided that MMT-GO is an OTA and OYO works on franchise model., Later many other players entered the market on franchise model, such as Fabhotel, Treebo, Vista Rooms and Rooms On Call. OYO and other similar players operate for two customers, the hotels and the guests.

20 Case no. 6&74/2015.
21 MANU/CO/0030/2019.

As the RM is being defined from the point of view of hotels, RM needs to be defined from the point of booking options available to the hotels.

OYO operates on franchise model, that is, the partner hotel can use OYO brand, maintain certain business standards, and gets assured number of guests, but every hotel is an independent business entity. In return OYO charge a percentage in entire revenue of the hotel. As OYO operates throughout India, the RM is'Market for franchising for budget hotels in India.'OYO as a franchise gives partner hotel brand recognition, a compelling customer base and independent business providing service and maintain certain standard.In return OYO takes a commission and a share in the revenue. Therefore, the RPM is 'Market for franchise service for budget hotels'. AsOYO operates throughout India RGM is India.

In *combination application for combination between MMT and IBIBO.,*[22] the Commission defined RM in broader connotation of 'over all travel market' and in narrower connotation of 'on line and off line hotel bookings'. MMT-GO prefers to define the RM in wider connotation. However, two and half year after the combination, on line bookings, because of use of big data, has become more popular and,on-line bookings as opposed to off line booking are treated as a distinct mode of hotel reservations. The RM is 'Market for intermediation service of on-line hotel bookings in India'.

In these two RMs dominance will be determined. The IP states that, according to their own investor presentation, MMT-GO has a share of 63% in the on line segment of the market and are expecting a growth of 39% in the yar 2021. In 2016 they registered a growth of 14%, in 2017 24% and in 2018 40%. 40% of growth was registered after combination of MMT and *Go Ibibo*. This growth rate is abnormal. But this was countered by MMT-GO. Relying on combination *application for combination between MMT and IBIBO*[23], MMT-GO maintain that their share in overall travel segment is 11% and in the narrower segment of hotel bookings they are not dominant.

As the Commission has already delineated the RM as 'market for on line intermediation for hotel bookings' wider definition of RM has lost significance. In the RM, MMT-GO, which has a share of 63% of the market, according to its own investor presentation, prima facie appears to be dominant. The Commission did not find any merit in the argument of MMT-GO that there are many substitutable suppliers other that OTAs and that Paytm, Happy Easy Go and Thomas Cook impose competitive constraint on OTAs: and therefore, RM should be defined widely.

Regarding OYO, the Commission relied on *R.K.G. Hospitality* v. *Oravel Travels*[24] concluded that RM is 'Market for franchising services for budget hotels in India' but OYO 'is a significant player in the relevant market, presently it cannot be unambiguously concluded that it holds a dominant position in the relevant market.'

As regard the conduct of the OPs, there are three allegations, which are being discussed prima facie. (i) anti-competitive conduct of MMT-GO. (ii) Anti-competitive

22 C-2016/10/451.
23 *Ibid.*
24 Case no. 3/2019.

conduct in some cases by OYO and (3) ant-competitive agreement between MMT-GO and OYO.

Room and price parity imposition- (1) there is a term in the contract that a client hotel cannot offer room at a price below at which it is offered to MMT-GO: in industry it is popularly known as 'Retail Most Favoured Clause.'. Additionally, there is a room parity arrangement also, that is more rooms cannot be offered to others than they are to MMT-GO.Through price parity cause OTAs offer'Best Available Price' to guests. Does this lead to concentration or entry barrier? Foreign jurisdictions have depicted them either narrow or wide restrictions. 'Under *narrow* restrictions, suppliers agree not to set lower prices or offer better terms through their own websites compared to prices/terms offered on the platform imposing the restriction.'

'*Wide* restrictions, on the other hand, restrict a supplier from charging lower prices or providing better terms on their website, as well as through any other sales channel, including other OTAs. Further, such clauses are generally imposed as a vertical restraint by a platform on the sellers/service-providers selling through the platform. Further, if the platform is dominant, it may also amount to imposition of an unfair pricing condition'.

Hoteliers and MMT-GO are in vertical relation as MMT-GO act as a distributing platform for the former clause 1.3 of the agreement entered between hoteliers and MMT-Go, "[t]he Hotel shall maintain rate parity, and room availability parity between Facilitators and other travel agents, other sales channels of third parties and the Hotel itself".Obviously, the clause imposes wide restrictions in as much as price and room parity by a third party, the hotel itself and other OTAs. This will result in removal of competition between third parties, and OTAs with reference to the Commission which is given to them by the hotels, though it will depend on the market power of the platform. In the present case MMT-GO prima facie enjoys market power and the impact of market power needs to be investigated with reference to ss. 3(4) and 4 of the Act.

Denial of market access- The IP has made the allegation that (1) Treebo and Fabhotel are not listed on MMT-GO website as they refused to give hefty commission demanded by MMT-GO and (2) MMT-GO have an arrangement to prioritise OYO hotels which amounts to denial of market access to other hotels.

If it is correct that Treebo and Fabhotels, competitors of OYO, which earlier appeared on MMT-GO portal are not listed now, it is a contravention of section 3(4). This may be a case of exclusive dealing with considerable adverse effect on competition, especially because. 'While MMT has been *prima facie* held to be dominant in the 'market for intermediation services for booking of hotels in India', OYO has been prima facie found to be a significant player in the 'market for franchising services for budget hotels in India'.

Predatory prising-OPs are charging predatory price, alleges the IP, and are giving deep discount and charging less than average room rate, thus distorting the market. AS prima facie, MMT-GO is dominant and in business for a long time, the

pricing is neither introductory (beta stage) nor aimed at building network. Investigation will also find the whether the pricing is predatory.

Exorbitant commission- The IP alleges that MMT-GO charges commission in the range of 22-40% with additional charge in the form of volume discount incentive and performance link bonus *etc*. As the term'excessive' is ambiguous, the Commission leaves the matter for investigation.

Delayed delisting and market manipulation- It is alleged that MMT-GO, even when a hotel severs its ties, the portal shows 'rooms not available', which is a misleading information and raises concern. This misleading information will prevent the consumer to approach the hotel or any other portal.

The IP also alleges that the OP artificially creates supply and demand gap, thus manipulating the price of the rooms. If it is so it is abuse. As MMT-GO is found to be dominant, discriminatory charging of service charge (from ordinary hotels but not from high end hotels), from the consumers in the name of hotel, which is pocketed by the OTA itself, is abusive. Case is sent to the DG for investigation with the direction that they need not be influenced by the observations of the Commission.

Together We Fight v. *Apple Inc. OP1 and Apple Distribution International Ltd. OP2,*[25] [case24/2021] is a case to determine prima facie case under section 26(1) of the Act. Together We Fight is a non-governmental organisation alleges violation of section 4 of the Act against the OPs. As the case has been analysed in detail before being sent to the DG it is being discussed. According to OP1, AIPL (Apple India (p) Limited) is a member of Apple group, responsible for marketing and sale of Apple products in India and OP2 provides Apple owned Apps and contents to consumers on its own account. As such Apple Inc. and ADI are the relevant entities but AIPL is not. Consequently, in the array of parties APIL is substituted by ADI in accordance with Regulation 24, Competition Commission of India (General Regulations) 2009. "OP-1 is stated to be engaged in designing, marketing and selling smartphones (including the iPhone), personal computers (including iMacs), tablets (including the iPad), wearables and accessories, and selling a variety of related services. Further, Apple is stated to own and operate the Apple's App Store (the 'App Store') to distribute applications (apps) through the App Store. As already stated, ADI is the Apple entity which is responsible for Apple's proprietary App Store."

The allegation is that Apple uses a number of anti-competitive practices and abuses its dominance in distribution of Applications (Apps) in smart mobile phones and for processing consumers payments, for digital contents used in iOS mobile phones. (i) Apple imposes unlawful and unreasonable restraints on developers of Applications in reaching out to its mobile devises (i- phones and i- pads) unless they go through App stores. (ii) Further Apple insist on one window payment option requiring 30% commission from App developers who wish to sell digital content to users of Apple mobile phones. (iii) In contrast Apps developers can sell their product to users of Apple personal computers in open market through various stores at competitive processing fee of 2-5%. These practices are in violation of section 4 of the Act.

25 Case no. 24/2021.

For the purpose of the present matter, the Informant has submitted that there are three relevant markets *namely*, market for non-licensable smart mobile operating system, market for app store for apple smart mobile operating system in India and market for apps facilitating payment through Unified Payment Interface (UPI). According to IP Apple is dominant in the first two RMs, that is, Apple enjoys a dominant position in the market for non-licensable mobile iOS for smart mobile devices as well as in the relevant market for app store for apple smart mobile iOS in India. Apple store comes pre-installed in all Apple iOS mobiles and devices and other competing Apps are neither allowed to be pre-installed or be downloaded. Apple has monopoly in App distribution market. Neither pre-installed App store can be removed nor Competing Apps can be installed on Apple iOS mobiles and the competing Apps cannot be installed except through Apple App store. In various jurisdictions of the world, litigations are pending against Apple for its anti-trust activities as given below.

In the afore mentioned two RMs Apple is abusing its dominance in the following ways. App store Review guidelines: - These guidelines are arbitrary and one sided and cause disruption of the business of App developers to run their business properly. They have no choice but to concede to sign on dotted lines in violation of section 4(2) (a) (i) and amounts to denial of market access in violation of section 4(2) (c) of the Act.

i. Excessive Commission of 30%: App developers have to use Apple's 'In App Purchase' (IAP) for distribution of paid digital content and pay 30% commission to Apple as 'payment processing fee' which is excessive in violation of section 4(2)(a)(i). High fee would also effect the competitiveness of Apple's competitors as they would have to bear the burden of Apple's verticals that is processing fee in violation section of section 4(2)(c), that is, denial of market access.

ii. The Informant has further averred that Apple's imposition of 30% commission may also amount to a form of 'margin squeeze' in breach of the provisions of Section 4 of the Act. A margin squeeze may occur where, as in the present case, a vertically-integrated company sells a product or service to competitors on an upstream market where it is dominant (*i.e*., the App Store) and competes with those companies in a downstream market for which the product or service is an input.

iii. When a purchase is made through IAP, Apple usurps crucial customer relationship, resulting in poor users' experience.

iv. It has been alleged that the mandatory use of Apple's in-app purchases for paid apps & in-app purchases restrict the choice available to the app developers to select a payment processing system of their choice, especially because Apple charges a commission of 30% (in some cases 15%).

v. As Apple has monopoly of iOS Apps, App developers have no choice but to agree to the anti-competitive tie in arrangement in violation of section 4(2) (c) and (d).

Analysis by the Commission

After considering reply of Apple and rejoinder of the IP, the Commission analysed the case.The Commission found the submission of Apple without any substance that the IP is acting in concert with the parties in commercial dispute with Apple as the case is being analysed on merit.

In order to determine the validity of the allegations of abuse of dominant position it is necessary to define RM. There are two mobile ecosystems, iOS of Apple and android of google. Former is not licensable whereas the latter is.Apple's ecosystem if exclusively and vertically integrated, it offers Apps, App stores and smart devices. App stores are crucial components of each ecosystem from where the users download Apps. App stores have become a necessary medium for App developers', developers are dependent on App stores to reach App users. App stores are specific to each ecosystem, that is iOS or Android. App developers cannot distribute Apps through non-iOS stores to iOS ecosystem users. Users generally do not do multi-homing to both ecosystems due to involved cost. App developers do not confine only to one ecosystem and prefer to access both. Prima facie the RM would be 'market for App stores for iOS in India'.

AppStore are the only means from which App developers can distribute their Apps to the users and users can download only from App Stores. Users of Apple i-mobile phones, functioning on iOS ecosystem cannot download Apps except from Apple's App Store. App developers can reach to Apple smart mobile users only through Apple Stores. Prima facie Apple holds a monopoly position in the RM of 'market for App Stores for iOS in India.' The Commission rejected the contention of Apple that in the market of smart phones its share is not more than 5%, therefore, it cannot be dominant, on grounds that the Commission is defining RM from the point of view of the App developers.

Apple also contended that, defining narrow market for a segment of customers, a single brand mobile, is illogical. However, the Commission opined that the single brand is capable of connecting with different brands andthe Commission cannot overlook to define RM from the perspective of the App developers.

Analysis of abuse

Apart from charging annual fee of $99, Apple makes it mandatory to use Apple's proprietary in-app purchase system (IAP) for distribution of paid digital content and it charges app developers commission up to 30% on subscriptions bought through the mandatory IAP. It is mandatory for App developers to access Apple users only through IAP. However, on October 22, 2021, article 3.1.3 provided that "Apps in this section cannot, within the app, encourage users to use a purchasing method other than in-app purchase. Developers can send communications outside of the app to their user base about purchasing methods other than in-app purchase**.**" In this article the earlier provision was toned down. It appears that the policy was relaxed in favour of App developers. This requires detailed investigation. However, the Commission is of the *prima facie* view that users of iOS ecosystem can be accessed by App developers only through in-App purchase system (IAP). It appears that Apple controls significant

volume payments processed in this market. This results in disadvantage to App developers as they have to pay a significant higher commission to access iOS systems in comparison to alternative route.

Third party App stores in order to compete with Apple will have increase their commission and it would ultimately increase the cost to users. Additionally, Apple would be able to collect the data of its downstream competitors whereas the competitors would not be able to collect data. The Commission is of prima facie opinion that Apple's conduct would violate the provisions of section 4(2)(a) of the Act. Using its dominant position in the App store market Apple is entering into downstream verticals (such as music Apps) in violation of section 4(2)(e).

Apple's behaviour also amounts to tying up between App-in-Purchase Payment with App Store, forcing App developers to agree to use IAP in order to distribute their Apps through App Store in violation of section 4(2)(e). Apple also allows purchase method other than through IAP, which includes 'Reader' Apps, Multiplatform Services, Person-to-Person Services, *etc.* It was also alleged that often Apple applies its guidelines in capricious, uncertain and discriminatory ways in violation of section 4(2)(a)(i). This results in denial of market access in violation of section 4(2)(c). Third party Apps are not allowed on Apple Store. It also results in restricting technology, violating section 4(2)(b).

In conclusion the Commission *prima facie* finds Apple guilty of violating section 4(2)(a) (b) (c) (d) and (e). The case was referred to the DG for investigation with the rider that the DG shall complete investigation without being influenced by the prima facie opinion of the Commission.

VIII CARTELISATION: BID RIGGING

RizwanulHaq,Dy Chief Material Manager, Southern Railway,I P v. *Mersen (India) Prt. OP1, Assam Carbon Products Ltd.*,[26]*OP2* is a reference made by Southern Railway alleging violation of sections 3 and 4 of the Act. OP1 is a subsidiary of Mersen SA of France specialising in manufacturing of brushes and brush holders for electric motors. OP2 is engaged in supply of carbon brushes for Hitachi Traction Motor Type HS 15250A to Indian Railways. OPs are suppliers of carbon brushes for Hitachi Traction Motor Type HS 15250A and are the only Research Design and Standard Organisation approved vendors. The IP has no option but to procure these products only from these two vendors. The allegation is that these suppliers are increasing the rates of these products in tandem for the last five years without any justification. They are guilty of cartelisation and collusive bidding. They raised the rates by 18% in 2015 in comparison to the rates of 2014.As the *prima facie* case was under section 3(3)(d), it was referred to the DG.

During the investigation OP1 gave an application under Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations 2009 and immediately thereafter similar application was given by OP2.

26 Reference 2/2016, decided on Nov.1, 2021.
27 (2017) 8 SCC 47 .

Analysis by the Commission

The Commission ordered the OPs to submit audited balance sheets and profit and loss account and tax returns of two officers of OPs who were responsible under section 48 of the Act. The IP broadly supported the Report of the DG but replies were submitted by the OPs. On the basis of the record the Commission framed two issues for the decision of the case.

i. Whether the Opposite Parties had acted in a manner in contravention of the provisions of Section 3(3) of the Act in the tenders floated for procuring Hitachi Carbon Brushes by collusive biding/bid rigging in terms of Section 3(3)(d) of the Act.

ii. In case the answer of issue number 1 is yes who are the officers of OPs who are liable under section 48?

In order to dispose of the preliminary objection, the Commission noted that the DG has divided the period of investigation into two periods (i) from 2010 to November 2014 (ii) from November 2014 to 2019.With respect to first time period the conclusion was drawn on the basis of five e-mails exchanged between employees of OP1 and employees of OP2. On the basis of these internal communications the DG concluded that there was no collusive behaviour during the first period but in the second period there was collusive bidding. The objection raised by OP1 is that investigation during the 2015 onward was outside the scope of the order of the Commission given to the DG. The investigation beyond 2015 was *suo moto* by the DG and not authorised by the Commission. The Commission rejected the argument on ground that the Commission neither fixed the period of investigation nor it is feasible. The issue raised by OP1 has already been disposed by the Supreme Court in *Excel Crop Care Limited* v. *Competition Commission of India.*[27] The court unambiguously held that the period of investigation cannot be limited to the period informed by IP.The afore said judgment was further reinforced and reiterated in *Cadila Healthcare Limited* v. *Competition Commission of India*[28] and *Competition Commission of India* v. *Steel Authority of India Limited*.[29]

Having disposed of the preliminary objection, the Commission proceeded to analyse the case on merit. The DG did not find any evidence of cartelisation in the first period, that is up to November 2014 but there was evidence in the post November 2014 period. Hitachi carbon Brushes are used by Indian Railways. OP1 asserted that there is distinction between Hitachi Carbon Brushes of Imported Grade and Indigenous Grade, but the IP informed that in their tender Indian Railways does not make any distinction between Indigenous and Imported Grade. However, OP1 neither refuted the assertion of IP nor gave any evidence that there was any distinction between two varieties.

To construe concerted and collusive bidding, the Commission has to define the meaning of 'agreement' which under section 2(b) may be arrangement, understanding

28 (2018) SCC OnLine DEL 11229.
29 *Infra* note 2.

or action in concert. As the definition is inclusive, it may be wide one and can even be tacit.

In the WhatsApp messages Mr. V.I. Perumal MD of OP1 and Rakesh Himatsingka, Chairman of OP2 were often referred to respectively as 'Perumal' and 'HK' and Hitachi carbon Brushes as 'Tender for Brushes' or 'Hitachi'

Message exchanged on July 1, 2016 by OP-2

Dear Perumal. A quick message. Please WhatsApp me as to what was our final understanding as regards the present DMW tender, especially which are the items where we wrongly quoted as a result of which we became L2. I'm presently in South Africa n very difficult to connect. Tried to call u earlier but your no, was no reply. Thanks and Regards. RH.

Message replied on July 1, 2016 by OP-1

Dear Himatsingka, what value we got excess, we allow you to take in Hitachi and 253 BX. When u r back, we can share the numbers. Regards, Perumal

Sorry, what excess we get, as we still not got.

Message sent on July 1, 2016 by OP-2

Dear Perumal, I don't think I was able to clarify to you. What I'm talking about is the tender from DMW, Patiala for which you'd recall that our guys quoted wrongly. What was our final understanding for that, Thanks RH

Message replied on July 1, 2016 by OP-1

Dear Mr Himatsingka, I am talking about same. Let us talk when you are back.

Regards, Perumal

Message exchanged on March 28, 2017 by OP-2

Hello Perumal, it's been ages since we corresponded or met. Expect alls well at your end

As you'd have observed for the last Hitachi tender last week we quoted 2 prices, one for 17-18 n the other for 18 -19, whereas you quoted just one price?

Trow is tender for 55121 Hitachi. What do you propose. We are very short n wud like this.

Message replied on March 29, 2017 by OP-I

Dear Himatsinka, sorry for late response. We are having a holiday in Bangalore to day. Our Marketing Manager is not in India. We quoted similar to earlier for this tender. Will revert to you before next tender. Regards, Perumal.

Message exchanged on April 23, 2018 by OP-2

You may be aware that DMW has called us for negotiations tomorrow 24th.Their proposal is to accept last year's price, in which case they shall divide the Tender 50: 50. We are ok with this. Await your confirmation n

Message replied on April 23, 2018 by OP-1

It is okay. We agree to maintain last tender prices

Apart from text messages there are a number of WhatsApp messages exchanged between here officers regarding tenders floated by the IP. The WhatsApp messages exchanged between CEO of OP1 and Chairman of OP2 from July 1,16 to November 8, 18 points to the conclusion that there was 'meeting of mind' between OPs with reference to these tenders. Apart from WhatsApp messages the officers of OPs also exchanged e-mails. One of them is as follows

"Subject: Fwd: Proposal DMW Tender No 011820420 Due 23.05.2017 (10.05.201 7).xlsx

Dear Mr. Perumal,

As discussed please find attached the proposed distribution. As regards CB 21 RF, where we have proposed to be L I this year. We shall offer only 60 % of the quantity, so there is no confusion.

Regards, RH."

These mails clearly establish that they discussed price to be quoted in tenders. In addition, OP1 has admitted to the DG that he discussed tender rates with OP2. Similarly, there was exchange of e-mails between the employees, Rakesh Himatsingka and Jayant Kumar of OP2 regarding collusive bidding between OP1 and OP2. There was agreement of collusive bidding between OP1 and OP2 and this was informed by the Chairman of OP2 to its employee. To the similar effect there was exchange of mails between employees of OP1. Various officers of OPs admitted before the DG that there was consultation between OPs regarding tenders floated by the IP.

The Commission is of the view that WhatsApp chats, e-mails, communications and the statements of individuals are direct evidence of the involvement of the Opposite Parties, and nothing can be more incriminating than these. OP-1 and OP-2 had discussed every detail of the tenders and the process to rig the bid. They had even discussed how they would be compensated if they did not win the previous or earlier tenders. Further, the Commission examined the statements given by the officials of OP-1 on 04.07.2019. In the opinion of the Commission, such admissions are sufficient to hold the Opposite Parties liable for contravention of the provisions of the Act. The Commission found OPs guilty of violating section 3(3)(d) of the Act. The Commission also rejected the plea of the OPs thatthere is no AAEC as Indian Railways being a monopsony decides the condition of sale. The conduct causes AAEC because there is potential of likelihood of causing AAEC. V.I. Perumal and Rakesh Himatsingka were found guilty under section 48(1) and (2) of the Act.

The Commission only imposed cease and desist order, monetary penalty was not imposed on OPs and their respective officers as both the enterprises were medium scale enterprise, suffered financial losses, applied for lesser penalty and suffered losses during covid.

Food Corporation of India v. *Shivalik Agro Poly Products*[30] [7/2018, decided October 2021] The present Reference was filed by Food Corporation of India

30 Case no. 7/2018 decided Oct. 2021.

('Informant/ FCI') under Section19(1)(b) of the Competition Act, 2002 ('the Act') against Shivalik Agro Poly Products Ltd. OP1Climax Synthetics Pvt. Ltd. (OP2) Arun Manufacturing Services Pvt. Ltd. (OP3') and Bag Poly International Ltd. (OP4).The IP alleged that the OPs cartelised to collusive bidding in the procurement of Low Density Poly Ethelene cover (LDPE). LDPE are required to safeguard stocks of food grains.

Between 2007 and 2017 seven tenders were floated for the procurement of LDPE, OPs quoted identical rates in tenders as well during negotiation and all the procurement orders were allotted to L1. However, from 2012 onward the Informant was not able to negotiate. Finding *prima facie* case, the Commission refereed the case for investigation to the DG under section 26(1). The DG, during investigation found the involvement of two other enterprises in cartelisation. They were Shalimar Plastic Industries, (OP5) and Dhanshree Agro Poly Products (OP6). During investigation, OP1 to OP4 applied under Regulation 5 of Competition Commission of India (Lesser Penalty) Regulation 2009. The DG found OP1-OP6 guilty of violating section 3(3) (a),(b),(c) and (d) of the Act and the DG also identified the persons responsible under section 48.

Analysis by the Commission

On the basis of the Report of the DG, replies of the OPs and individual officers identified under section 48 and other available material the Commission proceeded to analyse the case. The Commission noted that OP1-OP4 have fully cooperated in the investigation and did not dispute the findings of the DG. The issue was, whether the OPs entered into agreement to rig the process of tenders? The Commission further noted that 'agreement' may even be tacit and degree of needed proof only be 'preponderance of probabilities.'

On the basis of documentary evidence collected by the DG, in 2005 OP1, OP2 andOP3 entered into an agreement to supply only specified quantities and in case of violation of agreement there was provision to refer the matter for arbitration. OP1 to OP4 and their officers have admitted before the DG that actually such an agreement was entered into. It was also admitted that even after 2009 when the Act came into force, they continued to negotiate price among themselves.On the basisof the evidence, it is clearly established that OP1-OP4 have entered into agreement to rig the bidding process.

Regarding OP5 and OP6, in 2005 and 2009, the tenders on behalf of both were in same hand writing. The explanation was that Vinu Mehta, partner of OP5 did not understand English, therefore the tender of OP5 was filled in by another bidder. J.P. Paneri, of OP5, gave evasive reply to a number of incriminating e-mails and WhatsApp messages and Mr. Anil Patel, of OP6 admitted that he filled in the tender papers of OP5 and quoted identical rates in the documents of OP5 and OP6. There were other similar evidence including those in WhatsApp group 'super six'.

On the basis of evidence collected by the DG, Commission concluded that all the OPs have violated the provisions of section 3(3)(d) of the Act.OPs and their officers were given cease and desist order, but no penalty was imposed for the reasons given

by the Commission.The enterprises are small/medium scale industries,suffering from after effects of covid. In addition, four of the OPs have applied for lesser penalty and have made full disclosure.

Eastern Railway Kolkata v. *Chandra Brothers OP1, Chandra Udyog OP2, Sriguru Melters and Engineers OP3, Rama Engineering Works OP4, Krishna Engineering Works OP5, Janardhan Engineering Industries OP6, V.K. Engineering Industries OP7, and Jai Bharat Industries*[31] *OP8,* []is a case on Bid rigging. IP is Eastern Railways Kolkata, OPs are Research Design and Standard Organisation (RDSO) approved venders of Axle Bearings, more specifically, Plain Sleeve Bearing - Top and Bottom Halves as per RDSO drawing no.RDSO/PE/SK/EMU/0052-2003. STR No. RDSO/PE/STR/EMU/0006 (Rev. '1') / KPA DRG. NoER -KPA-EL-TM.1HE.020C to the Indian Railways ('Axle Bearings'). Between August 2012 and August 2014 OPs have quoted the same price in three tenders. This is the substance of the information. For tender number 20125122 there were 8 OPs. Two-part II venders, OP1 and OP4, and three Part I venders OP2, OP3 and OP5 quoted the same price. All of them received orders for supply. In tender no. 20131138 seven venders including OPs quoted the same price and OP1, OP2 OP4 and OP5 received order for supply of bearings. In tender no. 201 41116, the venders again quoted the same price. The matter was referred to the DG for investigation. Upon investigation the DG found that there was cartelisation among the OPs. In addition, certain officers of OPs were found guilty under section 48. On the report of the DG all the OPs filed their replies.

Analysis

On the basis of the report of the DG, reference made by the Eastern Railway, reply of the parties and oral submissions, the Commission proceeded to analyse the case. The case is being analysed party wise.

OP1 and OP2: Affairs of both of them are managed by Sushanta Chandra and after his death by his son, Kaustav Chandra. The deposition of Sushanta Chandra are contradictory regarding his knowledge of similarity of bids by OP1 and OP2, though their affairs are separately controlled. A number of e-mails were sent to him by his competitors regarding the details of the tenders, but he refused to divulge as to why these mails were sent. He was also evasive when he could not explain as to why rates increased by 26% in tenders of Southern and Central railways within a span of two days.

On the basis of preponderance of evidence, e-mails, other documentary proofs and unsatisfactory/evading replies of the witnesses, the Commission concluded that OP1-OP8 were all guilty to form a cartel in supply of axils to the Indian Railways. They also failed to rebut the presumption of Appreciable Adverse Effect on Competition (AAEC). Certain officers of the OP1-OP8 were found guilty under section 48 of the Act. All these enterprises are MSMEs and imposing penalty would make them economically unviable. No economic penalty was imposed on OPs and their officers. Only cease and desist order was issued.

31 Case no. 2/2018, decided Oct. 12, 2021.

IX ABUSE OF DOMINANT POSITION: CLOSURE OF CASE

Confederation of Indian Alcoholic Beverage Companies (IP1), Association of Distillers, Brewers and Vintners of India, (IP2) v. *Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd. (KSBC) (OP1), Travancore Sugar & Chemicals Ltd.*[32]*, (OP2)*Information in this case is filed by two IPs against two OPs alleging violation of section 4 of the Act. IP1 is an association of alcohol distilleries in India and IP2 is an association of alcoholic distilleries in Kerala. OP1, a statutory authority entrusted with control over whole sale and retail distribution of alcohol in the state of Kerala. OP1 floats tenders to procure liquors from private distilleries and also fixes rates. OP1 was created in pursuance of a judicial commission of inquiry. OP1 also procure liquors from a government distillery, OP2 but on different terms.

It was also alleged by the IPs that OP1 discriminates between private and public sector distilleries in procurement policies. As OP1 procures all brands of liquors including foreign ones therefore RM is 'the market forprocurement and distribution of branded alcoholic beverages in the state of Kerala.' In *Xavier Residency v. State of Kerala,*[33] the Supreme Court observed that it is a monopoly as it alone can distribute alcoholic liquors in Kerala. But OPs stated that monopoly relates only to whole sale procurement but not for retail sale as it isdone by a large number of operators (retailers). Thus, monopoly in retail does not exist. IPs also allege that OPs have statutory monopoly not only in whole sale distribution but indirectly in retail also as distilleries cannot directly sell to the retailers. There are about 311 retail stores in Kerala, they are State Operating Enterprises (SOE) and 275 out of them are directly controlled by OP1 and the rest (36) are operated by state cooperative consumer forum Limited. Abuse of dominance, as alleged, are as follows:

i. Unilateral and Unfair fixation of Rate Contract Price by OP1. Tenders are floated arbitrarily and not every year. Once a new brand is offered its basic price alone can be offered by the manufacturer and in subsequent tenders it cannot be revised.

ii. While fixing the terms of the tenders the manufacturers are never consulted.

iii. Because of undue pressure by OP1, often private manufacturers are forced to sell at loss and many have exited the market.

iv. Though clause 9(a) provides for negotiations after offer in tender is made, but is never implemented in practice.

v. Clause 11(c) gives complete control over pricing to OP1. During last 10 years only on three occasions the private manufacturers were allowed to raise the price but not always when the cost of factors of production has increased.

Consequently because of abusive behaviour, OPs have violated the provisions of section 4 (2) (a) (i) and (ii) of the Act.

32 Case no. 10/2021 decided on October 21, 2021.
33 W.P. (c) 22195/2014.

In response to the allegations OP1 stated as follows:

i. OP1 controls only whole sale rates and not retail prices. The rates are fixed scientifically on the basis of market conditions and they are revised on the basis of cost related factors but not every year necessarily. The purpose of the tender is not competitive to put them at L1 and L2 positions but to fix the rate of each brand. The tenders are rate contract tenders.

ii. Every distillery, in the tender, is required to give cost sheet of every brand, including profit margin. All these factors are taken into consideration. Rates are not fixed arbitrarily.

iii. OP1 also averred that as a consumer they have a choice to determine price and since 1984 the system is functioning smoothly without any complaint. To the author of this Survey, there appears to be contradiction. A consumer has a choice to purchase at any terms even if the terms, the seller may also have the liberty to refuse to sell. In this case the consumer is insisting that the seller sell only to the specific consumers (retailers and through them to the end consumers) at a price determined by another specific consumer (OP1). But in the opinion of the author the concept of consumer choice is applicable to end consumer provided the end consumer is not a monopsony. In the instant case OP1 is not merely a consumer but also a regulator, who controls the whole sale supply of liquor in the State of Kerala. Therefore, not being an end consumer, being a regulator and being a monopsony, the concept of consumer's choice should not be applicable to them.

iv. No coercion is used against distilleries. They prepare their own cost sheet and are objecting because they want to earn huge profit.

v. Alcohol is not a necessity of life and competition need not be encouraged for these products. Perhaps OP1 meant to say that alcohol is extra commercium goods and not entitled to legal protection.

vi. Tenders are not invited for competition but to control rates, that is why Clause 11(c) provide for Rate Contract.

IPs gaverejoinder as follows:

i. Exclusive control of OP1 on pricing has cascading effect on vertical market. Distillers are given a margin of 8% where as to the retailers the product is given at a margin of 20%.

ii. Suppliers do not demand price increase periodically; they demand price increase should be related to variations in production cost. Over the last 10 years the increase in price has not been commensurate with rise in cost of production.

iii. OP1 has not adduced any data to show that free pricing would lead to excessive profiteering.

iv. OP1 gives priority to government brands in terms of price, price increase, unloading and sale.

IPs and OPs further strengthened their arguments in details. After taking into consideration all these arguments and assertions, the Commission proceeded to analyse the *prima facie* case. Both the OPs are government companies engaged in economic activities, therefore, are enterprises. The allegations of IPs are that OP1, has monopoly in the whole sale procurement of alcohol in the State of Kerala. Therefore, according to the Commission RM is 'market for wholesale procurement and distribution of branded alcoholic beverages in the State of Kerala.'According to the Author of this Survey, as the distilleries can neither sell directly to the retailers, nor can they appoint their own whole sellers or retailers, OP1 effectively controls distribution in retail market as well, notwithstanding the fact that there are private retailers apart from government venders.

In view of statutory monopsony of OP1, it has dominance in the defined RM. In tenders the distillers quote their basic price which may be accepted or rejected by OP1. Provision of Clause 9(a), permitting negotiation has rarely been used.OP1 has clarified that along with tender the distillers are also required to provide cost sheet which may beaccepted by OP1. The cost sheet consists of Prime Cost, Factory Cost, Administrative overheads, Cost of Production, Selling and Distribution Overheads, Cost of Sales, Profit and Selling Cost. About the allegation that price revision is not done every year, causing loss to distilleries, OP1 stated that the IPs have not given any proof of loss incurred by them. As regard preference to government distilleries, OP1 has accepted the allegation but stated that this is a policy decision. The author of this survey wonders if a policy decision of a state government creates an exception to the provisions of Competition Act, which is a Parliamentary law. The Commission stated that according to OP1 the discrimination in favour of OP2 is in public interest. OP2 produces only one product, Jawan Rum of 1000 ml, where as many manufacturers supply a large number of brands. Supply of this brand cannot vitiate the market; it has not been proved by the IPs.

IPs have alleged that cash discount of 7% to 5% is given to supplier on whole sale prices. Supplier prefer lower cash discount. OP1 justified the discriminatory practice on grounds that lower cash discount is given to fast moving brands whereas higher discount to slow moving brands so that distribution cost may be covered.

In view of this discussion the Commission concluded that no *prima facie* case, violation of the provisions of section 4 of the Act, is made out against the OPs and, hence the case is closed under section 26(2) of the Act.The author of this survey has only one substantive criticism against the order of the Commission: how policy decision of the state government can create an exception to the provisions of the Act.

X INTEGRITY OF SPORT: INTERIM INJUNCTION

TT Friendly Super League Association v. *The Suburban Table Tennis Association (OP1), Maharashtra Table Tennis Association (OP2) and Table Tennis Federation of India*[34] *(OP3)* is a case of grant of interim injunction at initial stage. In an order on November 17, 21 the Commission referred the case to the DG for investigation under

34 Case 19/2021 decided on Dec. 21, 2021.

section 26(1) against OP1, OP2 and OP3 for violation of sections 3 and 4. IP is a company registered under section 8 of the Companies Act and is an NGO for the purpose of promoting Table Tennis and organising matches between teams in and around Mumbai as per convenience of the players and availability of venue without any concept of ranking, price or medals etc. OP1 is a district body headquartered in Mumbai affiliated to the state body responsible for conducting district ranking tournaments. OP2 is the Maharashtra State Body affiliated to National Body, Headquartered in Pune, responsible for promotion of TT in the state and organising tournaments for rankingand selecting state players. OP3 is the national Sport Federation for table tennis headquartered in Delhi, recognised as such by Ministry of Youth Affairs and Sports, responsible for national ranking and selection of teams for international tournaments.

The General Secretary of OP-1 *i.e.* Sameer Bhate, posted a circular/ notice on October 30, 2020 on a "Notices Only Masters Veterans" WhatsApp group addressed to players/parents/coaches/clubs, not to join any unaffiliated organisations and not to play any unaffiliated organisation's matches, and it further stated that if any member club or academy enters into any arrangement with any other unaffiliated TT body, their club/academy would not be allowed to participate in any of the tournaments that the district body or state body organizes and will result in suspension/non-acceptance of their entries in TT tournaments. As a consequence of the OP-l's notice, many suburban players refused to register as members of the informant and the players who had earlier registered with the informant, did not join the Informant by paying the one-time lifetime membership fee of Rs. 500/-.

It is further stated by the Informant that to get complete clarity regarding the illegal notice issued by OP-1, the Informant sent objection letters to OP-1, OP-2 and OP-3 on their respective official e-mail addresses, asking OP-2 and OP-3 to intervene in the matter. However, no reply was received by the Informant from the OPs. In addition, the Informant has alleged certain clauses of OP-3's Memorandum of Association (MOA) related to the definition of tournament, sanction for open tournament, restriction of players from participating in any unrecognised tournament and right to prohibit unauthorised tournaments by the Executive Committee of OP-3, as anti-competitive. IP also alleges that there is nexus between OPs members of one OP hold position in the other OP. On the notice given by the Commission only OP-1 and IP have filed their rejoinders: OP2 and OP3 have not.

OP-1 in its reply has stated that (i) it is not an enterprise under section 2(h) (ii) The IP is not a consumer as defined under section 2(f) and (iii) The IP has no locus no challenge its Memorandum of Association. (iv) The IP is neither a club or a sport organisation and cannot be allowed to run a parallel association. (v) for the integrity of sport, the players cannot be allowed to participate in unrecognised sports. (vi) The IP organises sport on commercial lines and as only unseeded players participated,the information has been filed, in order to include seeded players. The IP in its rejoinder has emphasised that if in the Memorandum of Association there are any illegal rules Commission has jurisdiction.The Informant also stated that OP-1 conducts district and state ranking/selection tournaments is in its jurisdiction, distributes prize money,

trophies, medals and certificates to TT players, and selects players to represent their respective districts besides receiving sponsorships, donations, royalty *etc*. and also collects yearly subscription fees from players in its jurisdiction as well as club fees and therefore, is an enterprise.The IP asserts that it neither gives medals nor prizes nor distinguish between seeded and unseeded players. The OP restricts all players seeded and unseeded.

The grievance of the IP is that it is denied access to utilise the services of TT players. The preliminary objection of OP1 is that it is not an enterprise as its activities do not have an economic content. But the Commission emphasises the under section 2(h) the services of any kind are included and under section 2(u) definition of service is very wide. Enterprise must have an economic content and OP1 asserts its activities do not include economic content. The Commission decides to analyse the issue on functional basis. As per the information district/state/country associations receive sponsorships and donations, royalty and advertising revenue, besides collecting yearly subscription fees. OPs also receive sponsorships and revenue from advertisements, royalty and media, receive equipment support from equipment companies. The Commission prima facie hold the OPs enterprise.

The Commission defines the RM as 'market for organization of table tennis leagues/events/ tournaments in India.' OPs hold a dominant position in the RM as OPs stand in a pyramidical structure and linked to each other. They select the players to represent district, states and country in international sport. WhatsApp message posted by the General Secretary of OP-1 on October 30, 2020, addressed to players/ coaches/clubs/academies, appeared to restrict them from joining/playing the non-affiliated clubs/organizations and further stated consequences flowing from non-adherence thereof by way of suspension/non-acceptance of their entries in TT Tournament. Such conduct was *prima facie* violates the provisions of section 4(2)(c) of the Act. The MOU prima facie appear to be restrictive of TT players from providing their services in violation of section 4(2) (b)(i). WhatsApp message also amounts to violate section 3(3) of the Act. Therefore, the matter was referred to the DG for investigation.

The IP makes a prayer that an interim relief may be granted to IP and a direction to OPs from acting in any manner which may adversely affect the conduct of any of the Informant's friendly TT events and also a direction to TT players that they are free and at liberty to join and play the Informant's friendly TT events without any fear of restriction or ban by the OPs. The power to issue interim relief is given to the Commission under section 33 of the Act. The Supreme Court of India in CCI v.*Steel Authority of India*[35] has laid down the conditions of granting such relief. It must be granted sparingly under compelling circumstances and only if a prima facie case exists.

The Commission is satisfied that OP-1 is indulging in anti-competitive behaviour in a manner which frustrates the cause of promoting the sport of table tennis. Such conduct of OP-1, if allowed to continue, may hamper the objectives of the Act. OP-1 is hereby restrained from issuing any communication to players/parents/coaches/clubs,

35 *Infra* note no. 2.

restricting or dissuading them, in any manner whatsoever, from joining or participating in tournaments organised by associations/ federations/ confederations which are not purportedly 'recognised' by OP-1. OP-1 is further directed not to threaten players who want to participate in such events. This arrangement shall continue till further orders or passing of the final order in the matter, whichever is earlier.

XI VERTICAL ANTI COMPETITIVE AGREEMENT

In Re: Alleged anti-competitive conduct by Maruti Suzuki India Limited in implementing discount control policy vis-à-vis dealers.[36] Cognizance of the case was taken by the CCI on an anonymous letter written by a dealer of Maruti Suzuki India Limited (MSIL) alleging that under 'discount control policy' MSIL does not allow certain dealers to give discount beyond a limit, consequently a cartel is formed by the dealers of MSIL (on invitation by MSIL- comment by author of this survey). In case of violation of the policy, MSIL would impose a penalty on erring dealer. The DG was asked to investigate the case under section 3(4) (e).

The DG reported that MSIL operates in the upstream market whereas the dealers in the downstream market. Market share of MSIL is 51.22% whereas that of the second one, Hyundai Motors is 16.14%.The DG framed issues and concluded as follows.

Has there been an agreement between enterprises at different levels of production in different markets? On the basis of e-mails, it was concluded that there was an agreement. The DG rightly emphasised that agreement under the Competition Act is different from that under the Contract Act. It may be even informal and tacit. On the basis of these e-mails, it is established that there is an agreement prohibitingdealers from giving free bees and discount beyond a limit. On the basis of these e-mails the Commission concluded that there exits an 'agreement between Hyundai and the dealers. MSIL has argued that the discount control policy, even if found to be existing in certain regions, was only a form of policing amongst the dealers themselves inter se, and MSIL had no role in formulating such a policy, except to enforce the same on behalf of the dealers as an independent third-party.However, the Commission did not agree with this defence as in every case of discount over and above theset-out limit, permission of MSIL had to be obtained. MSIL has also threatened to impose penalty. MSIL is not a passive third-party. The Manager of MSIL has written to dealers that 'any violation in future will attract penal action and also the suspension of Swift and Dzire supplies, on the basis of so many such e-mails it is established that 'Discount Control Policy' was controlled by MSIL. MSIL also resorted to mystery shopping and mystery audit to enforce price control policy effectively. Similarly, there were limitations on giving freebees. Cheques of penalties were issued in the name of Swati Kale wife of Vinod Kale, President of Wonder Cars, a dealer in Pune regional manager of MSIL and she admitted that against the amount deposited she would make cheques as per instructions.

As per the Commission 'price control policy' that limits the discount amounts to resale price maintenance in violation of section 3(4)(e). Resale price maintenance

36 *Suo Moto* case no. 1/2019, decided on Aug. 23, 2021.

can vitiate competition both at Interbrand and intra-brand level. Dealers, in the backdrop of retail price maintenance (RPM), cannot effectively compete with each other. If all the dealers not allowed to give discount at will, there cannot be intra-brand competition. This also amount denial of benefit to the consumers. When a leading brand like MSIL imposes RPM, price pressure on competing brands also decreases, leading to not only stifling of inter-brand competition but also denial of benefit to the consumers.

On the basis of the above analysis Commission concludes that section 3 (4) (e) has been violated by MSIL. The Commission taking a lenient view in post covid period imposes only a penalty of Rs 200 crores on MSIL, in addition to cease-and-desist order. (Recently NCLAT had stayed the order of the Commission).