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COMPETITION LAW

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I INTRODUCTION

SINCE 2009 the provisions of the Competition Act are being implemented. The policy of implementation continues to be in conformity with the overall objectives of free market economy, though different individuals manning the Commission may make deviations in the overall policy of the free market economy. The policy, if we analyse the trends of recent years, it becomes apparent that over the years the policy has markedly tilted in favour of corporates rather than for the consumers. But there is another side of narrative, corporates need level playing field. State being referee of the market game, the state must treat them equally. However, we do not mean to say that the interest of the consumers has not been protected. As the seat of the Commission is located only in Delhi would it not be desirable to have regional seats of the Commission at different places in India?

II TRENDS

State of Mizoram v. *CCI*[1] is a Supreme Court decision. It is important because the court observed that State of Mizoram, having no cause of action unnecessarily moved the high court in a case involving bid rigging. It, without any reason prolonged the case for a long time. The high court also should not have entertained the petition under Article 226 of the Constitution. *Amazon.com NV investment Holdings LLC, USA* v. *Competition Commission of India OP1, Future Coupons (P) Ltd., OP2, Confederation of All India Traders, OP3, All India Consumers Product Federation* v. *CCI, Amazon.com NV Investment Holdings LLC, Confederation of All India Traders* v. *CCI, Amazon.com NV Investment Holdings LLC and Confederation of All India Traders*[2] is important because it is an unusual case. The Commission imposed a penalty of Rs. 202 crore for making a false statement in a combination notice and approval of combination was put on hold.

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1 (2022) 7 SCC 73.

2 Competition Appeal 1/2022,2/2022 and 3/2022.

III SUPREME COURT

State of Mizoram v. *CCI and Tamarai Technologies (Pr.) Ltd. V. State of Mizoram*[3] is a case on conflict of jurisdiction, *res extra commercium* and whether *res extra commercium* can be service within the meaning of the Competition Act? The state of Mizoram issued an expression of interest through respondant-2, the Director Financial Institutions and State Lotteries for appointment of lottery distribution and selling agents to be organised by State of Mizoran under Mizoram Lottery Regulation rules 2011 framed under Lotteries Regulation Act 1998. EOI was for appointment of distributors/selling agents to promote, organise and market lotteries through paper type and on-line means. The complaint was made by the R-4 that 4 identical bids of Rs. 10000 per draw (three for paper type and one for on-line) and 1 of Rs. 5 lakhs for bumper draw were made. These amounts were minimum fixed under EOI and the bids were identical. R-4 filed the information to the CCI on May 16, 2012 under sections 3 and 4 of the Competition Act 2002. The allegation was that it was a case of collusive bidding and cartelisation prohibited under section 3 (3) (d)and that State of Mizoram abused its dominant position (section 4) by demanding exorbitant amount of security even before the lotteries were organised. State of Mizoram selected four companies for organising lotteries, three for on line and one for paper and bumper draw. They quoted identical bids of Rs. Ten thousand for paper and online and five lakhs for bumper draw.

The CCI on ground that all the parties only quoted minimum identical bid prices, three for on line, one for paper and only one bumper draw, thus formed a cartel. On this *prima facie* evidence inquiry was initiated under section 26 of the Act. However, no case of abuse of dominant position could be made against state of Mizoram as it was not an enterprise and only a regulator. The DG in its report found respondents including the Director Financial Institution and State Lotteries, but except state of Mizoram, guilty of cartelisation and of collusive bidding.

A writ petition was filed before the High Court of Guwahati by State of Mizoram, praying for quashing of proceedings before the CCI. The Supreme Court was surprised as to why Mizoram filed the petition as CCI did not issue any order against it. It appears that R-1 lent its shoulders to assist other respondents. The high court passed an interim order restraining the CCI from passing its final order. The high court examined the issue if the CCI has jurisdiction to try this case. The high court held that (a) lotteries cannot be considered trade and commerce within the meaning of Articles 301-303 of the Constitution. (b) that lottery tickets have no monetary value and hence actionable claim and are not goods within the meaning of Sale of Goods Act. (c) lotteries being akin to gambling and are *res extra* commercium, and the Competition Act is applicable only to legitimate trade and commerce, thus the Act is not applicable. The CCI does not have jurisdiction. The Supreme Court observed that the lis was not between CCI and state of Mizoram but between the private parties and CCI and whether CCI can inquire into their conduct. It was arguedby the CCI before the S.C. that CCI was not examining the

3 *Supra* note 1.

Regulation Act of Mizoram, but only the conduct of the parties, the bidding process and bid rigging. Attention was drawn to definition of service under section 2 (u) that service includes service of any description. Further the 'includes' does not restrict the width of 'means', therefore, service is service of any description. Had the Parliament intended to exclude *res extra commercium* from the jurisdiction of the CCI it would have provided it under the definition of enterprise, or the state could have done so as section 54 empowers the state to exclude any provision of the Act from operation. The present activity can hardly be called a 'sovereign' activity.

The doctrine of *res extra commercium* will apply only when regulation by the state is being considered. The question in this case is different, it relates to interplay between the competition Act and Regulation Act. Another argument is that the high court should not have entertained the petition under Article 226, as the proceedings before the DG were only administrative, not binding on CCI and also an appeal can be made to NCLAT against the order of the CCI. Additionally, the CCI made it clear that it does not intend to proceed against the State of Mizoram.

The argument on behalf of a private party, R-5, is that the CCI does not have any jurisdiction because lottery tickets are neither goods nor services. As held in *Sunrise Associates* v. *State (NCT Delhi)*[4] lottery is an actionable claim and hence, as per Sale of Goods Act, not goods. Lottery, being *res extra commercium*, the legislature did not intend to promote competition in *res extra commercium*. Therefore, it is also not service.

The Supreme Court concluded that State of Mizoram played a non-appreciable act. It has wasted 10 years in dragging the litigation. It was a victim of cartelisation; it should have cooperated with the Commission. The state in order to defend R-2, the Director of lotteries, whose conduct was not favourably commented by the DG, the State approached the high court. The high court played a premature role: it should have waited till the conclusion of the case by the CCI. The concern of the CCI was not with regulation of or prohibition of lotteries but with only with the role assigned to it under the Competition Act. Even if lotteries are *res extra commercium*, the possibility of anti-competitive activity cannot be denied. The selling agents renders a service to the potential user within the meaning of the Competition Act,therefor, the Commission has jurisdiction.

R-4 moved the Commission under section 19(1) alleging violation of sections 3 &4 of the Competition Act. Finding a prima facie case, the Commission referred the matter for investigation by the DG. DG in its report found the allegation of anti-competition true. The Commission issue notice to the parties to place their views on the report of the DG. Process should have been completed with a right of appeal available to the aggrieved parties.

The Supreme Court concluded that the judgement of the high court is set aside and proceedings before the high court stand closed. The Proceedings before the CCI will continue and State of Mizoram will cooperate with the CCI.

4 (2006) 5 SSC 603.

IV HIGH COURT

Intel Technologies India (p) Ltd (Appellant-1), Intel Corporation USA (Appellant-2) v. *Competition Commission of India (Respondent 1), Matric Info System (P) Ltd. (Appellant-2)*.[5] It is a review petition under article 226 before the High Court of Karnataka. It is alleged that there is violation of sections 3 and 4 of the Act as the Appellants were refusing to provide the warranty in India for boxed microprocessors which are imported from authorized sources abroad but not those sourced from the Intel authorized dealers in India. The case of the 2ndRespondent is that they are a company incorporated in India. They are in the business of import and sale of information technology products. They imported 4000 boxes of microprocessors from Intel in five instances and in three instances claim of warranty were raised in Dubai and were honoured. However, for warranty of those imported in India the first appellant informed them, in view of changed warranty policy they must contact the point of purchase. On this the second Respondent gave information to the Commission. The case was registered as *Matrix Info System (P) Ltd*. v. *Intel Corporation*. Finding *prima facie* case, the Commission ordered the DG to investigate the case. This order of the Commission is subject matter of challenged in this order. The interim order granted was challenged in S.L.P.(C) No.12643/2020, in which the Supreme Court ordered that writ petition should be disposed of within 6 weeks. However, on July 2, 21 another judge of this court to wait till the decision in *Flipkart Internet Pvt Ltd* v. *CCI.* However, the same writ petition was dismissed.

It is submitted by the petitioners that the impugned order of the Commission is in derogation of the earlier decision of the High Court of Delhi and earlier decision of the Commission. The Commission's order results in defeating legitimate expectations and normal commercial practice. This is not only violative of rules of natural justice but discriminatory as well. Modification of warranty policy consistent with observations made in similar cases is part of normal business practice and therefore, cannot be termed as abuse of dominance. Investigation by the DG will have serious consequences.

On the other hand, the respondent-commission submitted that arguments are misconceived and decisions relied on by the petitioners are not applicable here. Neither rules of natural justice violated nor legitimate expectations defeated. As order of investigation is not coercive action (non-binding), it does not require a review by the high court. The second Respondent submitted on similar grounds.

After hearing arguments and perusal of papers the high court declined to intervene on certain grounds. The MRTP Act was enacted in view of the Directive Principles to avoid concentration of wealth but liberalisation of economic policies in 1990's needed a new competition policy and law. In *Steel Authority of India* v. *CCI*[6] the Supreme Court observed that before ordering the DG to investigate the case the Commission is neither required to hear the IP nor the OP. Commission is

5 Writ Petition no.50727 of 2019 (GM-RES).

6 (2010) 10 SCC 744.

a specialised body performing different types of functions. Courts should avoid interfering with the functioning of the Commission, with certain exceptions.

The petitioners have argued that ordering investigation runs counter to what the Commission said in *Ashish Ahuja vs. Snapdeal. com*[7] and the High Court of Delhi decision in *Kapil Wadhwa* v. *Samsung Electronics co. Ltd.*[8] The petitioners assert that they have reframed their 'warranty' policy in accordance with the ratio of these cases.

Ashish Ahuja case- The 'informant' Ashish Ahuja had purchased certain products from the SanDisk in the open market and not from its authorized distributors and sold them on Snapdeal which had stopped sale of informant's products through its portal stating that it is only the authorized partners of SanDisk who could sell items through Snapdeal. The informant was asked to obtain an NOC from SanDisk for selling its products through Snapdeal which had circulated a letter representing that it would offer warranty services only on those products that are sourced from its four authorized distributors. The commission observed that insistence by SanDisk that the storage devices sold through the online portals should be bought from its authorized distributors by itself cannot be considered as abusive as it is within its rights to protect the sanctity of its distribution channel.It is necessary in a competition driven market to protect its image and goodwill. According to the high court there is substance in the arguments of the Respondent that Ashish Ahuja case, in which goods were purchased from unauthorised dealers, is different from this case, where goods were not purchased from unauthorised dealer but from the principal office of Intel, that is authorised source but from outside India.

Kapil Wadhwa v. *Samsung Electronics* also does not help the petitioners as it is pleaded that the respondents have no control pertaining to the sale, distribution and after sales services of its goods which are imported by the appellants and sold in India… With respect to after sales services, since the respondents do not warranty anything regarding their goods sold abroad, but imported into India and further sold, they not being responsible for the warranty of those goods. As poor service by the Appellant, Wadhwa, might adversely effect reputation of the respondent, the appellants must display prominently that the respondents do not give any warranty on goods sold here.

Resjudicata – the court in response to the plea that Ashish Ahuja and Kapil Wadhwa case constitute res judicata, cites Sir William De Grey in *The Duchess of Kingston case*[9] first, that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court; secondly that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming

7 Case no. 17/2014 decided on May 19, 2014.

8 (2012) SCC on line Del 5172.

9 (1776) 1 Leach 146.

incidentally in question in another court, for a different purpose. The high court says that these two cases were neither between the same parties nor on the same matter, therefore, they do not constitute *res judicata.*

Proceedings under the Competition Act *in rem* – It was argued by the petitioners that as the remedy under the Competition Act are *in rem*, therefore, the petitioners are entitled to benefit of these two cases. This is observed in *Samir Agrawal* v. *Competition Commission*[10] by the Supreme Court of India that remedy under the Act is in rem and effects public interest. Because of the reason of 'public interest' the petitioners are entitled to take the advantage the two cases (Ahuja and Wadhwa cases). The High Court says that it is difficult to agree with this logic. If a public policy effects a large number of people, the whole world becomes the party. That is what is meant by 'in rem.' That is even those who are not parties are res judicated. Even if a proceeding may be in rem its outcome does not necessarily results in res judicating the whole world. In case of an election petition though a large section of public is interested the case does not result in '*in rem'* or *res judicating* the whole world. In Samir Agrawal the court has used '*in rem'* in the context of explaining 'locus standi'. Additionally, a precedent is not a statute. Interpretative rules for both of them are different. In Samir Agrawal the Apex Court used the word r*em* to explain that the Commission, being under a duty to ensure fair competition must use information from whatever source, it possible to get it. Therefore, the ratio, regarding '*in rem'* in Samir Agrawal should not be applied in a case where parties and subject matter are different.

Whether section 26 damages he reputation of the petitioners? – The Commission under section26 has several alternatives; it can close the case under clause (2), or order investigation under clause (1) or order investigation or refuse to do so after a preliminary inquiry, but under clause (1) it cannot do complete inquiry. The argument that orders under section 26(1) may tarnish the image of the petitioners, may be true to some extent. The investigation may be intrusive as well. But similar contention in another case was repelled by the divisional bench of this high court.

However, the conferment of enormous powers to the DG is to prevent harm by the powerful market to competition, and competitors. These enormous powers may be countered by the Commission. The Act provides many safeguards.

Under the Act there are many checks and balances. Hearing opportunities, right to appeal at several levels, apart from corrective measures by the Commission if an illegality is committed by the DG. However, the investigation by the DG is in the nature of administrative function. The petitioners could not show if any wrong has been done to them. They approach the high court in haste without any real grievance. A cost of Rs. ten lakhs is imposed on them, which is payable to the Commission. The Commission permitted to complete long pending inquiry.

10 (2021) 3 SCC 136.

V NCLAT

Amazon.com NV investment Holdings LLC, USA v. *Competition Commission of India OP1, Future Coupons (P) Ltd., OP2, Confederation of All India Traders, OP3, All India Consumers Product Federation* v. *CCI, Amazon.com NV Investment Holdings LLC, Confederation of All India Traders* v. *CCI, Amazon.com NV Investment Holdings LLC and Confederation of All IndiaTraders*.[11] We are discussing only Appeal 1/2022. It is appeal against the order of the Commission under sections 43A, 44 and 45 of the Act, that is penalty may be imposed for making false statement or for not following the instructions of the Commission (imposition of a penalty of Rs. 202 crore and the approval accorded to Combination Registration 688 was kept in abeyance).

In stark contrast to the Internal Correspondence of Amazon, the disclosures made against Item 5.3 of Form I, summary filed pursuant to Regulation 13A of the Combination Regulations, query 2.13(c) of letter dated 9th October, 2019 and query 2.5 of the letter dated 24th October, 2019, did not indicate a possibility of the Combination being pursued by Amazon for having a 'foot-in-door' in the Indian retail sector, acquire strategic rights over FRL (Future Retail Limited of Future Group) or entering into any commercial partnership with FRL to expand the ability of Amazon in ultra-fast delivery services. Instead, the business potential of FCPL (Future Coupons (P) Ltd.) was shown as the driving factor for Amazon to pursue the Combination and FRL was merely shown as a factor of financial strength. The Internal Correspondence of Amazon makes it abundantly clear that Amazon was all along focussed/interested in FRL. The Internal Correspondence of Amazon does not speak about the business potential of FCPL, as has been claimed and projected in the Notice and in the responses to the letters of the Commission. Similarly, the Notice presents the rationale of indirect rights over FRL, as protection to investment in FCPL but the Situation update dated 10th July, 2018 identifies the same set of rights as answer to the following question 'What strategic rights do we get through this investment.'

In the Notice, Amazon had represented that its rationale behind the Combination was the business potential of FCPL to create long term value and provide return on the investment made by Amazon. However, the Internal Correspondence of Amazon clearly shows different purposes for envisaging the Combination (i.e., 'foot-in-door' in the Indian retail sector, secure rights over FRL that are considered as strategic by Amazon and Commercial Arrangements between the retail business of Future Group and Amazon). In its response to the letters dated 9th October, 2019 and 24th October, 2019 of the Commission, Amazon had continued with the suppression of actual purpose of the Combination. Amazon has not contested the genuineness of the Internal Correspondence or their contents. It is obvious that the purpose of Amazon to pursue the Combination was not the potential of the gift and loyalty card business of FCPL, as has been claimed in the Notice. Rather, FCPL was envisaged only as a vehicle in the

11 *Supra* note 2.

Combination to which no value or purpose is ascribed in the Internal Correspondence. Further, it is clear from the above discussed e-mail dated 19th July, 2019 that the entire consideration of the Combination has been arrived at on the basis of 25% premium to the regulatory price of FRL shares and that such premium was paid on account of the strategic rights and the call option provided to Amazon. Thus, the instant matter is a clear, conscious and wilful case of omission to state the actual purpose of the combination despite the disclosure requirement under Item 5.3 of Form I read with Regulation 5 of the Combination Regulations and section 6(2) of the Act. Further, Amazon has failed to provide any material or plausible explanation in its response to the SCN and in the subsequent submissions to demonstrate that its disclosures against Item 5.3 are correct and that the business potential of FCPL was a consideration for Amazon to pursue the Combination.

Given that the Combination is between players who are known in the online marketplace and offline retailing and they have contemplated strategic alignment between their businesses, the Commission considers it necessary to examine the combination afresh based on a notice to be given in Form II with true, correct and complete information, as required therein.

A penalty of Rupees two crore is imposed under sections 44 and 45 of the Act and penalty of two hundred crore for violation of section 43A read with section 6(2).

Before the NCLAT Appellant Amazon contends that Amazon is acquiring neither 'shares', nor 'voting rights' nor 'assets' of FRL (Future Retail Limited), therefore, section 5 is not attracted.

The Respondent CCI contends that penalty was imposed only after a show cause notice. The appellant Amazon had stated that it is not acquiring directly or indirectly any share of FRL but only of FCPL to protect its interest in FCPL.

The second Respondent, FCPL, contends that acquirer is required to notify all inter-connected steps and individual transactions that form part of the 'combination' to achieve the 'ultimate intended effect' of the 'combination'. The 3rd Respondent, Confederation of All India Traders contends that indirect investment by Amazon in FRL in contrary to 'Fema Regulations.'

On September 23, 2019 the Commission received notice of combination by Amazon accompanied by three transactions."Transaction I: The issue of Nine Million one Hundred and Eighty-Three Thousand Seven Hundred and Fifty-Four (9,183,754) Class A voting equity shares of FCPL to Future Coupons Resources Private Limited (FCRPL). Prior to, and immediately post issuance of such equity shares, FCPL will be a wholly owned subsidiary of FCRPL; and

Transaction II: The transfer of Thirteen Million Six Hundred and Sixty-Six Thousand Two Hundred and Eighty-Seven (13,666,287) shares of FRL held by FCRPL (representing Two decimal Five Two Percent (2.52%) of the issued, subscribed and paid-up equity share capital of Future Retail Limited (FRL), on a Fully Diluted Basis) to FCPL; and

Transaction III: The acquisition of the Subscription Shares representing Forty Nine percent (49%) of the total issued, subscribed and paid-up equity share capital of FCPL (on a Fully Diluted Basis) by Amazon, by way of a preferential allotment.*"*

The appellant in the notification stated the economic and strategic purpose as FCRPL*,* being the parent entity of FCPL and a part of the Promoter Group, has invited the Investor to invest in FCPL with a view to strengthen and augment the business of FCPL. FCRPL, FCPL and Amazon all three has stated that economic and strategic purpose is to strengthen FCPL. When CCI required response from the Appellant "As per the notice, Acquirer will get certain rights over the FRL. You are required to provide details of shareholding. TheAppellanthad mentioned that it does not have any direct or indirect shareholding in `FRL' and further it would not acquire directly any rights in `FRL' and also claimed that `Commercial Arrangements' were not entered into pursuant to the `Combination' and were not part of, or connected with the `Combination' in any manner whatsoever. On the basis of this clarification, the CCI had issued 'approval order' on 28.11.2019. FCPL. The real intention of Amazon was not to invest in FCPL but to create contractual rights so that FRL does not enter into any contractual relations with Amazon's rivals.

In the opinion of the Tribunal 'obligation' to file the 'notice' is binding, as per section 6(2) coupled with Combination Regulations 2011. In accordance with requirement of Form I Part V 'Description of the Combination the 'Acquirer is enjoined to make known 'any other transaction(s) that is/are inter-connected in terms of sub-Regulation (4) and/or (5) of Regulation 9 of Combination Regulations 2011.

Section 17 of the Indian contract Act 1872 defines 'Fraud' as 'any concealment of material fact'. In accordance with section 18 of the Contract Act, 1872 a 'misrepresentation is material if it influences the decision of a prudent decision maker. The difference between Fraud and Misrepresentation is that in the former the person making the suggestion believes that suggestion is not true but, in the latter, he believes it to be true but in both it misleads the person to whom it is suggested. However, the burden of proof (prima facie material) is on the person who makes the allegation. According to the 1st respondent internal e-mail of Amazon suggest that purpose of investing in FCPL is to become largest single shareholder on FRL. Amazon has pin pointedly asserted that its purpose to invest in FCPL is (i) the unique business model of FCPL; and (ii) to add credibility to its (FCPL's) financial position, it has invested in, and proposes to invest in FRL, which is a publicly traded company. This `Tribunal' pertinently points out that quite opposite to the internal communications/emails of the Appellant/Amazon had not shown a possibility of the `Combination' being pursued for having a foot-in-door in the Indian retail sector, acquire strategic rights over `FRL', etc.

According to NCLAT the 'Appellant/Amazon' had made only the limited disclosures with regard to 'FRL' only in the realm of 'FRL's Equity Warrants' held by the '2nd Respondent/FCPL' and had not spelt out the real combination of the Appellant/Amazon acquiring 'strategic rights' and interests over FRL as well as executing 'Commercial Contracts' between it and the 'FRL'.

The penalty has been imposed for violation of 'civil obligation'. Once it is established that

there was a failure to notify the 'Proposed Combination', as required under section 6 (2) of the Competition Act, 2002, the 'penalty' has to follow, and the likely AAEC can be evaluated again. In consequence the appeal of Amazon is dismissed.

VI ABUSE OF DOMINANT POSITION

XYZ v. Alphabet Inc, case no. 7/2020., Match Group Inc. v. *Alphabet Inc.case no.14/2021 and Alliance of India Digital Foundation v. Alphabet Inc.*[12] It is a case on violation of section 4 of the Act. Case no. 7 of 2020 was filed by xyz against Alphabet Inc., Google LLC, Google IrelandLimited ('Google Ireland'), Google India Private Limited ('Google India') and Google India Digital ServicesPrivate Limited ('Google Digital Services'). The Information in Case No. 14 of 2021 was filed by Match Group, Inc. ('Match Group') under Section 19(1)(a) of the Act against the Opposite Parties alleging contravention of the provisions of section 4. The Information in Case No. 35 of 2021 was filed by Alliance of Digital India Foundation ('ADIF'). The Informant is stated to be an alliance of individuals which aims at improving the start-up ecosystem in India and actively helps in identifying and dealing with the issues concerning the growth and functioning of start-ups in India.

Alphabet Inc. is a multinational technology conglomerate holding company. It was created through are structuring of Google on 02.10.2015 and became the parent company of Google and several former Google subsidiaries. Google LLC is a Delaware (US) based limited liability company and wholly owned subsidiary of Alphabet Inc. It has been submitted by the Opposite Parties that Google's core products and services including Google Play and Android OS; they are developed, provided, and administered by Google LLC. In addition, all policies relevant to the Google products are framed, developed, and enforced by Google LLC. It has been further submitted that Google's core products and platforms include Chrome, Gmail, Google Drive. The IP, under section 19(1)(a) of the Act, gives information against the Opposite Parties alleging contravention of the provisions of section 4 of the Act.

Google Ireland Limited is a legal entity formed under the laws of Ireland. It has been submitted by the Opposite Parties that Google Ireland generates its revenue primarily by delivering relevant, cost-effective, online advertising on Google properties and Google Network Members' properties. It is also stated to be responsible for providing most of Google's consumer services to users in the European Economic Area and Switzerland with effect from 22.0l.20l9.

12 Case no. 35/2021, (2022) on line CCI 63.

Google India Private Limited ("**Google India**") is a company incorporated in the year 2003 under the Companies Act. It has been submitted by the Opposite Parties that since 01.04.2016, Google India has been appointed by Google Asia Pacific Pte Ltd, Singapore ("Google Singapore") as a non-exclusive authorised reseller of online advertisement space in India provided by Google Asia Pacific Pte Ltd. through Google Ads program to advertisers in India (prior to that time it was the non-exclusive reseller of online advertising spacea ppointed by Google Ireland Limited). Google India also acts as a non-exclusive reseller of standardizedGoogle enterprise products (currently known as Google Workspace), to customers in India. In addition, it also provides a limited set of Information Technology Services ("IT services"), and Information Technology Enabled Services ("ITES") to other overseas group companies.

Google India Digital Services Private Limited ("**Google Digital**") is incorporated as a private limited company under the Companies Act. It has been submitted by the Opposite Parties Google Digital undertakes the commercial operation of the "Google Pay" (formerly known as "Tez") application in India.

Facts- According to the IP, Google's business model consists of offering on line product and services free of charge and revenue generating advertisements. Its other products are android, google search, google chrome, you tube, gmail, google map, play store, Unified payment interfaced based google pay, and google license to mobile phone manufacturers. IP gave account of android eco-system consisting of smart mobile phones and the role of google play store. all this amounts to abuse of dominant position in violation of section 4.

For the purpose of the present case the IP defined the RMs. a) market for licensable mobile OS (operating system) for smart mobile devices; b) market for app stores for Android OS; and c) market for apps facilitating payment through UPI.

There is difference between basic and feature mobile OS (operating system) functionality and that of smart phone functionality. To develop smart phone OS, require considerable time and resources. Also, there is no substitutability between smart mobile OS and desk top OS. Further licensable mobile OS and non-licensable mobile OS are not substitutable. Market for basic and feature mobiles and smart phones are not substitutable. IP further averred that Android App Store is a different RM as these App are not substitutable with any other App. Google Pay, a UPI enabled payment application is different from other digital modes of payments like internet banking, debit/credit cards etc. RGM for all these markets is India. The Informant also averred that Google enjoys a dominant position in the relevant market(s) for licensable mobile OS for smart mobile devices in India, and the market for app stores for Android mobile OS in India. It was also averred that Google enjoys a position of strength in both of these markets which enables it to operate independently of competitive forces and to affect its competitors/consumers as well as these markets in its favour. The Informant *inter alia* alleged that Google is abusing its dominant position in the markets for licensable mobile OS for smart mobile devices and app stores for Android OS by (a) mandating apps to use Play Store's payment system and Google Play In-App Billing for charging their users for purchase of apps on Play Store and In-App purchases (which privileges Google Pay over other apps facilitating payment through UPI and mobile wallets), if they want to be listed on the Play Store; (b) unfairly privileging Google Pay *inter alia* by pre-installing and prominently placing Google Pay on Android smart phones at the time of initial set-up resulting in a "*status-quo bias*" to the detriment of other apps facilitating payments through UPI as well as other methods of payment; *etc*.

The DG was directed to investigate the case. When the report was received, its copies were sent to the parties. In case no. 7/2020 the IP died because of the covid-19 complications and his spouse was substituted in his place in confidential capacity.

After defining the RM, RGM and RPM, and emphasising the importance of RM in which competition takes place and whether OPs are dominant in the RM and if so, are they abused their dominance, the DG has defined three RMs and found the OPs dominant in the first two of them. These two are a.) Market for licensable mobile OS for smart mobile devices in India,b.) Market for app stores for android OS in India, and c.) Market for apps facilitating payments through UPI in India.

Market for licensable mobile OS for smart mobile devices in India: **-** The Commission notes that Operating Systems (OSs) are complex software products that control the basic functions of the device on which it is installed and enable the users to make use of such device. The OS facilitates the users to use compatible Apps, provide a graphical user interface ('GUI'), application programming interfaces ('APIs'), and other ancillary functions.

RM: - The DG has delineated RM as 'market for licensable OS for smart mobile devices in India' as there is no substitutability between (a) basic feature mobile OS and smart phone OS, (b) smart mobile OS and desktop/computer OS and (c) licensable smart mobile OS and non-licensable smart mobile OS. This position was contested by parties. However, the Commission observed that OEM cannot use feature phone OS on a smart mobile device and vice versa because the former does not have touch screen, difference in OS and availability of many additional functionalities in the latter.

Substitutability between mobile smart phone device OS desk top/computer OS: - Commission decided (agreeing with the DG) that two OS are not substitutable because computer OS is not designed to operate on smart mobile devices. Smart phone devices need considerable investment on R&D. Google has also developed google Chrome for desktop/ computers for licensing the computer manufacturers and Android OS for smart phone manufacturers.

Smart mobile phone OSs are of two types licensable and non-licensable. Former OS can be used by third party smart phone sets manufacturers under license. Android is such an OS which is used by Samsung, Xiaomi, and Vivo etc. Non-licensable are not given on license such as iOS by Apple or Blackberry OS.

As from the demand side that is manufacturers of devices, non-licensable OSs are not available as both the Oss are different. As conditions of operation are homogenous across India, RGM is India.

Concentration: - As on January 2022 the share of licensable Android in the RM was 95% in comparison to iOS, Blackberry and others mobile OSs. Android has enjoyed consistent growth over several years. If iOS and Blackberry are excluded Android is almost a monopoly. The source code for the Android mobile OS is released by Google for free under an open-source license. While device manufacturers can freely use under Android Operating System Platform (AOSP), they need a compatibility certificate from an authorised Testing Facility (authorised by google) and a written approval if they want to use propriety google mobile service that include a number Apps. The trademark 'Android' can be used only under compatibility certificate. Free Android is actually controlled by google.

On the one hand users prefer that mobile OS which can offer largest number of APPs and on the other, App developers prefer to develop Apps for the OS that has the greatest circulation. Apps are written for specific platform. Consequently, popular platform becomes more popular. Large number of Apps available at google play store adds to popularity of Android OS. Developers of new OSs find entry barriers because of constraint of availability of Apps but other constraints as well. These factors further strengthen dominance of google mobile OS. Entry of a new OS is very difficult as development of a new operating system requires enormous amount of investment in terms of physical, financial and human capital along with overcoming the problem of ensuring wider acceptability of the new OS among the OEMs, app developers and specially users. OEMs do not have countervailing power because of Android immense popularity among users, App developers. The users without deep pockets are unable to switch over to iOS compatible handsets, as well as because of difficulty in transferring of data from one OS to another and switching from one system of to another. The Commission has no hesitation in concluding that Android OS and thereby, Google, enjoys a dominant position in the relevant market of licensable operating systems for smart mobile devices in India.

Market for App stores for Android in India: -Mobile app stores are digital marketplaces and are multisided platforms that connect app developers with device owners who are interested in those Apps. Like any other marketplace, the viability of an App store is characterized by its capacity to attract enough app developers and app users while maintaining the platform's trust and integrity. Number of users attract App developers to the OS and quality and number of Apps attract the users to OS. More Apps more users and more OEM are attracted to OS. App stores also offer tools and services to support developers to build Apps for the App store. google play store is Google's market place to be preinstalled by OEM under a license. Google play store has more than one billion active users.

Relevant Market: - The DG has defined RM for App Stores as 'market for App Store for Android OS in India.' It is a distinct market as there is no substitutability between (a) app stores of other non-licensable smart mobile OS and app stores for Android OS; (b) side loading and app stores for Android OS; (c) web apps and apps downloadable from app stores for Android OS; and (d) pre-installation of apps and downloading apps from app stores for Android OS. The Commission agrees with the DG.

Assessment of dominance: - The DG has concluded that the market for app stores for Android OS devices is characterized by a position of strength for Google given the fact the Google Play Store is largest app store in terms of users, availability of apps and developers compared to other app stores. Further, the DG noted that there are significant entry barriers in the market. Moreover, the DG found that the cumbersome process of side-loading of Apps and pre-installation not being a viable alternative also works in favour of Google Play Store. Thus, asper the DG, Google Play Store is dominant in the relevant market for App Store for Android OS in India. While agreeing with DG, the Commission finds that a number OEM using Android OS has largest circulation. Google App store has largest number of Apps. Google play store is pre-installed on all devices using Android OS, whereas others such as Samsung Galaxy App Store, OPPO App market, VIVO App Store, *etc.* are pre-installed only on the devices that are sold under their brand name. In terms of number of App developers google is far ahead of others; as of January 2017, google play store has 724000 developers, whereas Amazon has only has only 69000. Apart from this, there are a number of entry barriers, such as need of huge investment. Mobile OS is two-sided market number, for users of Apps and for App developers. Users also attract number of App developers; there is a network effect. Requirement of technical issues also add to entry barriers.

For installing certain Apps google gives monetary incentive to OEMs. Google also does not allow installation of any competing play store to be side loaded. Google play store is not substitutable with other play stores. There is no competition between Apple play store and google play store. Google play store is dominant.

Market for apps facilitating payments through UPI in India: -It is instructive to note here that the Payments and Settlement Systems Act, 2007('PSS Act') has been enacted for the regulation and supervision of payment systems in India. Under the PSSAct, the RBI is the designated authority for authorizing various payment systems. The RBI has authorized various Payment System Operators to operate payment systems in the country, including the National Payments Corporation of India ('NPCI'), which is the umbrella organization that operates retail payment andsettlement systems in India. Such entities who provide UPI services by partnering with banks, such as G-Pay, PhonePe, Amazon Pay, Paytm *etc.* are generally referred to as Third Party Application Providers ('TPAPs'). In UPI operated system money in digital form can be received and sent. The DG has examined substitutability between cash payment and digital payment as well as substitutability between UPI and other methods of digital payment (credit card, debit card, net banking, mobile wallet) for the delineation of relevant product market. Based on its examination, the DG has concluded that the relevant market in the instant case may be defined as 'market for apps facilitating payment through UPI in India', which is not substitutable.

Google contested this definition as too narrow; it should include all forms of payments. The Commission does not agree; cash payments being, manual, inefficient and risky are different from digital. Credit/debit cards are also not substitutable. UPI provides an enhanced, secure and seamless experience, as it does not require sharing of any payment details by the user. This is unlike card payments wherein the user is required to divulge details, such as card numbers/ Card Verification Value (CVV), and card expiry date which increases the potential security concerns. UPI enabled service neither charges any fee nor interest, nor any requirement of installing POS (point of sale) machine.

UPI-enabled digital payments, on the other hand, are distinct from net banking in that they do not offer a broad variety of banking services (issuing cheque book, lending facility etc,) and are largely limited to conducting financial transfers. National Electronic fund Transfer (NEFT) is unlike UPI enabled services, not available 365 days and 24 hours. The Commission decides that 'market for Apps facilitating payments through UPI' is a unique market and RGM is India.

The Commission decided that out of the three RMs, google is dominant in the first two. Three are as follow.(a) Market for licensable OS for smart mobile devices in India (b) Market for App store for Android smart mobile OS in India (c) Market for apps facilitating payment through UPI in India.

The Commission notes that if there is abuse of dominant position by google in its play store policies. The DG, on the basis of allegation, has three issues to determine whether there is abuse?

Issue 1: Whether making the use of Google Play's billing system (GPBS), exclusive and mandatory by Google for App developers/owners for processing of payments for App and in-app purchases and charging 15-30% commission is violative of Section 4(2) of the Act?

The IP alleges that the developers of Apps must adhere to google payment policy. This is 'take it or leave it' position. If developers do not agree they cannot target 90% of App users. Actually, google charges 30% commission from developers. The condition is unfair. IPs of case 7/2020 and 14/2021 both make this allegation. According to DG it is violative of sections 4 (2) (a) (i) & (ii), 4(2) (b), 4(2) (c) and 4(2) (e).

Before contributing to google play store the developers have to agree with 1. Developer Distribution Agreement (DDA): 2. Developer Program Policies (Payments within the heading Monetization and Ads): 3. Google Payments Terms of Service-Seller (IN) (GPTS).

In accordance with the Billing System the payment made by the users of Apps from google play store, google makes the payment to developers after deducting its service fee. It is mandatory to use the billing system. The billing system must be used not only for purchase of Apps but also for certain in-App purchases, that is, purchases made by users of Apps after they have downloaded/ purchased the App from the Play Store developers cannot use any other payment system. The Commission is of the view that App Store is the primary and, in most cases, only medium for the App developers to communicate with their users and as such, critical for app developers. The app developers should have freedom to choose their communication channel to interact with their users to promote and offer their services. Any restriction on app developers in this regard is an unfair imposition as it impedes the ability of app developers to increase their usage/ membership.

Google charges hosting (on-boarding) fee of $25 and service charge on all purchases of Apps and in-App products it is alleged that this service charge is unfair and discriminatory. Service fee is 15% up to 1 million US dollar and beyond this 30%.Several Apps by a developer are calculated in one account and all of them together attract the limit of 1 million. With certain conditions, after fulfilling eligibility conditions, the service charge may be reduced even to 10%. Google's payment policy is announced in various blogs. The investigation by DG has revealed that google is increasing the scope of mandatory requirement of payment policy.

The Commission notes that Google Play's Payments Policy which is a part of Google's mandatory Developer Program Policies, have to be agreed to by all App developers who want to list their app on the Play Store, without any scope for changes/negotiations. If these demands are not fulfilled developers are not permitted to list their Apps on google play store. Because of Google's (Android) popularity and market strength, developers, as well users, do not have any bargaining power. Google also make discrimination between developers already using its billing policy and those who are not. Google also discriminate by not using its billing policy for YouTube. YouTube is given liberty to use third party payment processing programme. Discriminatory practice adversely affects App developers. It is also revealed that google has access to personal data of the users.

Google also collects certain uses data from Play and Devices. The Commission notes that Google has access to a significant volume and category of granular data of the App users including complete personal as well as financial transaction information, by having access to the financial transaction data along with other data. Google is in a position to distort competition in the down streammarkets by setting rules for controlling the whole process of development and distributions of apps. The Investigation has also approached certain App developers in the music streaming which compete with Google's YouTube music streaming services. According to these independent music App developers, having access to personal data of users, they can be directly targeted by Google. Having control over personal data Google can put competitors in a disadvantageous position.

The Commission is of the view that google controls the data generated by Android OS and Play Store is controlled by google and to the App developers whole of this data is not accessible to them as developed by their own App fully, which should be accessible to then. Google can use this data for use in other verticals for creation of consumer profile and monetizing the same through search advertising services, other paid services offered by Google, identify and enter into new markets, *etc.* because selective availability of data, google has unfair advantage over its downstream competitors.

Settlement of payment to App developers: - What is the time period within which payment is made to the App developers after Google received the payment? Google has stated that the pay-out for Google Play developers is initiated on the 15^{th}day of each month for previous month's sales. Even after explanation by google that the practice among all competitors, App developers stated that Google takes longer time than others. The delay is detrimental to the App developers. According to RBI guidelines within 1-3 days receipt of payment, payment should be made. The conduct of Google is unfair.

Denial of market access: - Google imposes google payment service to App developers amounts to denial of market access to other payment options, which may be preferred by App developers. Payment service providers such as PayTM, Razorpay etc. corroborated the denial of market access. Further, App developers do not have any option to reach to Android users except through google play store, and additionally must use Google payment service to the exclusion of other payment options. In addition to making rival Apps less competitive (because Android users cannot access Apps except through Google play store), mandatory use of google payment service is a tied product. The Commission also concurs with the DG that Google's restrictions for mandatorily using GPBS also have significant negative effect on the improvements and innovative solutions that third party payment processors/aggregators would be able to bring to the market. Thus, the Commission is of the view that the practices followed by Google tantamount to limiting technical development in the market for in-app payment processing services inviolation of the provisions of Section 4(2)(b)(ii) of the Act. Thus, the Commission finds that the practices followed by Google results in denial of market access for payment aggregators as well as app developers, in violation of the provisions of Section 4(2)(c) of the Act. To summarize, the Commission finds that Google has violated the provisions of Section 4(2)(a)(i),Section 4(2)(a)(ii), Section 4(2)(b)(ii), Section 4(2)(c) and Section 4(2)(e) of the Act.

The DG observes that google charges15- 30%service charge through google payment service for processing payments, from paid Apps, which is exorbitant. The Commission notes India has one of the most robust digital and start-up ecosystems in the world. Any hindrance in it, by the gatekeepers such as google, would adversely effect competition. The Commission is of the view that in general any conditions (including price related conditions) imposed on business users, by the gatekeepers or platform operators, should be fair, reasonable and non-discriminatory. The pricing and other general conditions should not grant any benefit on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users.

Issue 2: Whether exclusion of other UPI Apps/mobile wallets as effective payment options on Play Store is unfair and/or discriminatory as per Section 4(2) of the Act? It is alleged that google through its play store is differentiating between google pay and other UPI enabled payment options. Commission finds that exclusion of other UPI enabled payment options is violation of section 4(2)(e). There, are two payment methodologies for payment on UPI enabled payment services, intent flow and collect flow. The former is more user friendly and simpler. it is noted that although Google Pay UPI app does not have largest market share in overall UPI payment market in India but so far as the UPI Payment on Play Store is concerned, the Google Pay UPI app has the largest market share. Thus, Google Pay UPI App have a clear competitive advantage on the Play Store through use of intent-flow methodology for its own App and using collect-flow methodology for other UPI Apps.

The Commission observes that under section 4 dominant position means a position of strength, that is ability to act independent of the market, the competitors and ability to turn competitors and consumers in its favour. Therefore, once dominance and abuse are proved it is not necessary to prove separately that it will have adverse effect on competition. Thus, the Investigation confirms the discriminatory treatment that is meted out by Google to its competing UPI Apps for making payments on Play Store and its distortionary implications for competition. In view of the foregoing discussions, the Commission holds Google to be in violation of Sections 4(2)(a)(ii), 4(2). (c) and 4(2)(e) of the Act.

Issue 3: Whether pre-installation and prominence of Google Pay UPI App (GPay) by Google is in violation of Section 4(2) of the Act?

The allegation is that using its dominance in Android OS google forces OEM to pre-instal Google pay under agreement. However, investigation by DG reveals that google give financial incentives to OEM to pre-instal Gpay but does not prohibit installation of other payment applications, such as Phonepe. Accordingly, the Investigation did not find sufficient evidence to indicate that Google has abused itsdominant position so far as the issue pertaining to pre-installation of Google Pay UPI App is concerned.

TheCommission is of the view that setting Goole Pay UPI app as the default payment application can outweigh, or even nullify, the benefits of having multiple payment applications pre-installed. Viewed in light of the remarkable growth in number of mobiles/tablets with GPay pre-installed in 2020, such incentivisation of default status through revenue sharing agreements appears to have the potential to interfere with competition on the merits. As this aspect has not been investigated the Commission does not express view on this.

Procedural bias: - Google alleged that the DG has ignored some of the crucial evidence submitted by google. The Commission rejected the allegation as misplaced.

Order: -In view of the foregoing analysis, the Commission delineates the following relevant market(s) in the present matter:

a. Market for licensable OS for smart mobile devices in India

b. Market for app stores for Android smart mobile OS in India

c. Marketfor Apps facilitating payment through UPI in India

The Commission holds Google to be dominant in in the first two relevant markets. Further,Google is also found to have abused its dominant position in contravention of the provisions of Section4(2)(a)(i), Section 4(2)(a)(ii), Section 4(2)(b)(ii), Section 4(2)(c) and Section 4 (2)(e) of the Act, as alreadydiscussed in the earlier part of this order. The Commission directs google to cease and desist order not to indulge in anti-competitive practices in violation of section 4. The Commission also imposes a penalty of Rs. 936crore 44 lac at 7% of average annual turnover of last preceding three financial years.

VII BID RIGGING: BID RIGGING

Suo moto case *In Re*: *Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India.*[13] Opposite Parties, Diamond Display Solutions Pvt. Ltd. (OP1), AGX Retail Solutions (P) Ltd. (OP2), Opal Signs Pvt. Ltd. (OP3), Avery Dennison Pvt Ltd (OP4), Amreesh Neon (OP5), Macromedia Digital Imagining Pvt Ltd (OP6), Hith Impact (p) Ltd. (OP7). The case is *suo moto* case. The CCI received an allegation of bid rigging and cartelisation in the tender floated by SBI Infra Management Solutions Pvt. Ltd. ('SBIIMS') for the supply and installation of new signages/ replacement of existing signages for branches/offices/ATMs of SBI located at specified metro centres of various circles of SBI across India. In the impugned tender certain tenderers collaborated to fix prices and allocated the market among themselves. Finding a prima facie case of bid rigging under section 3(3) of the Act the matter was sent for investigation to the DG. The DG was directed to add other bidders if the investigation shows their involvement as well involved person under section 48. During the investigation Avery Dennison (P), OP4 gave an application under section 46, read with Lesser Penalty Regulations 2009.

Investigation: - On the basis of investigation the DG found OPs guilty of violating section 3(3) (c) and (d), that is they not only resorted to bid rigging but apportioned the market between them. Certain individuals are guilty under section 48.

On 7.12.2017 an Expression of interest (EOI) was floated by the SBI: however, not finding adequate response the matter was entrusted to SBIIMS, a wholly owned subsidiary of SBI. Threre upon a new EOI was floated by SBIIM Son 8.2.2018, to install signage of SBI at certain branches and ATMs. In response to the EOI, 9 were shortlisted out of 44 applicants. These nine included OP1 to OP5 and were selected in technical qualification and on 18.3.2018 in response to a tender. Ultimately it was decided, on the failure of auctions, that for e-reverse auction, the bids would be invited circle wise. E-reverse auction was conducted for 12 out of 13 circles (except Ahmedabad) and the circles were given to these 5

13 *Suo moto* case no. 2/2020.

venders at L1, L2 and L3 positions at different rates. Work among them was distributed in proportion of 50:30:20 respectively, at L1 rates (the lowest rate). As the permission to P4, who wanted to sub-contract the work, was denied, P4 opted out of the contract and the security deposit was forfeited. Work of P4 was divided among others.

Analysis by the Commission: - There are two relevant emails, as part of the evidence collected by the DG. The first email was sent by an officer of OP6 to officers of OP1-5. In the email he reminds others of agreement relating to bidding, auction sequence of circles, opening bids and cut off prices by bidders. The email clearly shows that they discussed among themselves the bid prices, allocation of circles and other details of the tendering process. Similar is the second e-mail.

These e-mails reveal many aspects of agreements entered into between OPs, including OPs relationship in the tendering process, auction sequence for each circle with reference to manufacturing location and transport cost etc. E-mail of 4.6.18, sent by Dasari of OP6 to OP1-OP5 categorised circles into 4 categories. E-mail 2.6.18 revised the rates on receiving inputs from some source. These e-mails also make comparison of rates circle wise. The Commission observes that it is not necessary that the actual quoted rates must exactly match with those of given in the e-mails. However, most of the rates do match with final note sheet given in e-mail of 4.6.18.

It was emphasised by the Commission that projected outcome by the OPs and actual outcome of the tendering process cannot be so exact without concerted action by the parties. In the reverse auction only OP1-OP5 took part, it was because Dasari of OP6 and Manish Jodhawat organised it. A number of witnesses and officers of OPs verified the existence of cartelisation. Many witnesses deposed that in the meeting of 25.05.2018 rates to be quoted in the tender were discussed. Further the call data record of officers of OPs disclosed that they all were in conversation with each other. It was also found that Dasari of OP6 and OP1 formed a joint venture MMDD in 2017 and they collaborated in tendering process. Though OP6 did not participate in the tendering process, yet it was an active member of the cartel. A person who does not participate in the tendering process but is actively involved in vitiating the process is equally liable, under section 3(3)(d), along with those who participate in the process. According to the author of this survey that is the implication of 'bid rigging', and implications of 'bid rigging' are wider than that of 'collusive bidding.'

A number of e-mails were also formed part of the evidence. In the e-mails of 2.6.18 and 4.6.18, Dasari of OP6 stated that he got inputs from Manish Jodhawat of OP7as to how tenders have to be prepared, but Jodhawat denied this. However, OP1 and Manish Thakkar of OP5 in their depositions corroborated the fact that Jodhawat gave relevant inputs for tendering. The Commission, on the basis of these corroboration concluded that OP 7, who was a supplier of materials to other OPs, was guilty of violating the provisions of section 3(3)(d).

On the basis the evidence, CCI concluded that all the OPs are guilty of violating the provisions of section 3(3) (c) & (d) of the Act. There was tacit understanding among all the OPs to vitiate tendering process. Along with the OPs 16 of their officers were also found guilty under section 48 of the Act.

As all the OPs are MSMEs they were given the benefit of lesser penalty provisions. They all were imposed penalty of 1% of the average annual turnover of the last three preceding years.

Chief Materials Manager, North Western Railway Informant v. Moulded Fibreglass Products Opposite Party No. 1; Power Mould Opposite Party No. 2; Black Burn and Co. Pvt. Ltd. Opposite Party No. 3; Polyset Plastics Private Ltd. Opposite Party No. 4; M/s Anju Techno Industries Opposite Party No. 5, Calstar Steel Limited Opposite Party No. 6; Jai Polypan Pvt. Ltd. Opposite Party No. 7; Polymer Products of India Ltd. Opposite Party No. 8; M/s Micro Engineers Opposite Party No. 9; Quadrant EPP Surlon India Ltd. (Now MCAM Surlon India Ltd.) Opposite Party No. 10; Skylark Projects Pvt. Ltd.Opposite Party No.11.[14] This case began on information given by chief Material manager North Western Rly. The information was against OP1 and OP2. It was an information of cartelisation for the procurement of High-Performance Polyamide ('HPPA') Bushes and Self-Lubricating Polyester Resin ('SLPR') Bushes (which are alternatives to each other) used in Bogie Mounted Brake Cylinder Coaches. The allegation was that OP1 and OP2 have quoted identical rates. Finding prima facie case, the Commission directed the DG to investigate the case for alleged violation of section 3(3) (d)read with section 3(1). The Commission also clarified if any other enterprise is also part of the cartel, it may also be impleaded. In the course of investigation, the DG impleaded OP3 to OP11in the memorandum of the parties.

Petitions, under section 46 read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('LPR'), were received by the Commission on behalf of (i) Black Burn and Co. Pvt. Ltd. (OP3) and its 5 individuals, (ii) OP-1 and its 5 individuals, (iii) Jai Polypan Pvt. Ltd. (OP7) and its individuals, and (iv) Quadrant EPP Surlon India Ltd. (now MCAM Surlon India Ltd.) (OP10) and its 2 individuals. The same, vide separate orders, were forwarded by the Commission to the DG.

Analysis by the Commission- On the basis of the report of the DG, reply of the parties and other relevant material the commission proceeded to analyse the case.

The Railways issued tenders for procurement of HPPA Brake Bushes and SLPR Brake Bushes. Brake bushes are used for passenger coaches. Earlier Bronze Bushes were used, later they were made out of acetal, nylon and lastly phenolic Brake Bushes and 2004-5 railways started using SLPR Brake Bushes. Then for critical segment SLPR and for non-critical segment Phenolic. Ultimately SLPR bake Bushes were approved for all locations. Now SLPR are for critical locations and HPPA for non-critical.

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SLPR Brake Bushe are manufactured by three enterprises OP1,OP2 and OP11 and HPPA are by all OPs except OP11. RDSO (Research Design and Standard Organisation) the nodal organisation to maintain standard, maintain a lists, consisting of two parts, of suppliers of SLPR and HPPA Brake Bushes. Part I consists of vendorswho are eligible and can supply entire quantity, whereas part II vendors are developmental vendors who can supply only up to 25% of quantity.

According to DG Report, though OP1 and OP2 located respectively at Kolkatta and Daman supplying SLPA and HPPA at different stations quoted identical prices. From the records it was found by the DG that other OPs supplying at different zones also quoted identical prices. It was also noted that some OPs located at same location manufacturing same products, at times, quoted different rates for tenders without any justification. Certain groups were being controlled by the same directors. OP-4, OP-5 and OP-2, were controlled by Bhupesh Bafna as Partner/ Director while two other OPs *viz.,* OP-3 and OP-1, were controlled by Mr. Alok Somani as Partner/ authorised representative. In addition to this in case of three sister companies OP2, OP4 and OP5 from the login details including user ID, user name, IP address, login date and time, logout date and time and caller ID details, the Commission notes that all bids in respect of these three entities were filed from a common address in Mumbai by a common user, even though the entities displayed their registered offices in different states. Many other enterprises filed their quotations in close proximity of each other in terms of dates and time. In tender no. 04170921 of southern zone OP1, OP2, OP3, OP4, OP5 and OP10 all filed on the same date. This appears that not only OP1 and OP2 but six other OPs were part of the cartel.

In order to understand true nature of cartelisation the commission analysed e-mail communication, WhatsApp communication between representatives of OPs with regard to tender issued by the Railways for procuring SLPR/HPPA Brake Bushes. Tender no 30162151 issued by the North Western Railway for procurement of SPLR/HPPA, the rates of OP1 and OP2, Part I supplier, who are expected to supply the bulk, were higher than OP3, a Part 2 supplier, who can supply only 15% of the material (another Part II supplier OP4 also quotes higher rates), consequently for procuring 85% of material re-tendering was the alternative. During negotiations OP1, OP2 and OP4 did not lower rates. With reference to the revised tender the e-mail communications between OPs, who responded to tender were to the effect such as, “As discussed, allotment of Brake gear bushes is enclosed herewith.”Similar communications through e-mail show that there were communications between them. DG also found that there was similar collusion between OPs with reference to tenders issued by other zones of Railways. Communications exchanged between representatives clearly show that all the OPs continuously conspired to stifle competition while supplying material to different zones of Railways. They formed a cartel.

Shanta Sohoni kept record of Railways e-procurement tenders and allocated them to OPs in accordance with allocated value. She made a table for this purpose.

The existence of such arrangement was acknowledged by representatives of OPs. The plea of OP8 that it did not form part of the cartel because its address of office is different from other OPs, was not accepted by the Commission because it regularly participated in communications with other OPs, and was part of the cartel.

It was also argued by OPs that there is no AAEC as the cartel did not result in entry barriers to other suppliers. The argument was rejected by the Commission as under section 3 (3) there is presumption of AAEC though it can be rebutted. OPs can rebut the presumption of AAEC by showing positive effects emanating from the cartel activity like accrual of benefits to the consumers (in the instant case, the Indian Railways), improvement in production or distribution of goods or provision of services, or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. But no such thing is proved. It was argued that development of SLPR by OP1 and OP3 and entry of OP11 are positive contribution to the benefit to the consumers. However, the argument was rejected on ground that these developments have nothing to do with the existence of the cartel.

The evidence reveals that among the OPs, there was determination to vitiate the competition, in connection with procurement of Brake Bushes. (1) they determined andrevised prices in violation of section 3. (2) e-mails revealed that one OP prevents the other not to offer quotations or to withdraw, controlling supply, violating section 3(2)(b). (3) the balance sheet allocated tenders to OPs, thus dividing the market in violation of section 3 (3) (c). (4) the cartel also rigged bids in violation of section 3(3) (d). The Commission observes, though the OPs have also argued that they were forced to indulge into such pool arrangement and cartel activity due to the market structure, in order to avoid losses and get their fair share of business from the Indian Railways, the Commission is of the opinion that the same does not bestow a right upon the OPs i.e. the suppliers/vendors to collude together and fix prices, allocate quantities, and indulge into the illegal conduct of bid-rigging in violation of the provisions of the Act.

The Commission found following persons liable under section 48 of the Act: -

OP-1 Mr. Alok Somani 48(1)

OP2-Mr. Bhupesh Bafna, Director and Ms. Shanta Sohoni, Employee

OP3- Mr. Alok Somani, Director

OP4-Bhupesh Bafna and Shanta Sohoni

OP5- Mr. Bhupesh Bafna and Ms. Shanta Sohoni

OP6- Mr. Vikas Agrawal

OP7- Mr.Rajeev Dhudhani and Mr. Rajesh R and Mr. Vishal Baid

OP8- Mr.Vishnu N.M., Mr. Venkata Subramanyam and Mr. Harsha Gumballi

OP9- Mr. Salimuddin

OP10- Mr. LuvKumar and Mr. R.K. SINGH

Op11-Mr. Shirish Tapurya

Afore-mentioned 14 officers of OP1-OP11 were found guilty under section 48 and OP1-OP11 under sections n 3(3)(a), 3(3)(b), 3(3)(c) and 3(3)(d) read with 3(1) of the Act. The Commission imposes penalty at the rate of 5% on average annual turnover of last preceding three years on OPs, and a penalty of at the rate of 5% on average annual income of the last preceding three years on 14 officers of OPs. OP3 was given 80% reduction under Lesser Penalty Regulations, OP1 40%, OP7 30%, OP10 20%.

VIII INTELLECUAL PROPERT RIGHTS AND COMPETITION CONCERNS

Swapan De v. *Vifor International AG (OP1) and Vifor Pharma Management Ltd.*[15] *(OP2)* is a case closed by the Commission as no prima facie evidence is found. The information was of the violation of the provisions of sections 3 (4) and 4 of the Act. OP 1 is a big pharmaceutical company in Switzerland specialising in developing medicines against iron deficiency. They developed a molecule, Ferric Carboxymaltose ('FCM') which is the active pharmaceutical ingredient('API') used for manufacturing injectables for treatment of iron deficiency anaemia: Vifor got approval from Indian Regulatory Authority for the use of the molecule in India.Ironis a fundamental mineral needed to produce haemoglobin.

Women of reproductive age, and those who are pregnant or have recently given birth, are especially susceptible. In serious cases of anaemia injectable treatment is preferred over oral. FCM is an advance molecule with no or mild side effects and is preferred overIron Sucrose, another injectable molecule. Ministry of Health and Family Welfare has recommended use of Iron Sucrose in mild cases and FCM in serious cases. The IP has shown that FMC is a better injectable treatment. However, because of huge price difference for many consumers FMC is not a substitute of iron sucrose. Because price of FMC, it could not be included in the National List of Essential Medicines. Because of huge price difference, IP asserts that FMC and Iron Sucrose constitute different RM. RM is 'market for Injectables containing FCM for treatment of anaemia as hematinic injection in India'. Vifor is dominant in this RM and is abusing its dominance. Vifor maintains control over entire pharmaceutical market by executing a de facto exclusive licensing agreement with Emcure Pharmaceutical Ltd ('Emcure') for manufacturing injectables containing FCM molecule in India under the trade name 'Encicarb' in the year 2012; and de facto exclusive licensing agreement with Lupin Ltd. ('Lupin') for importation and distribution of the Ferric Carboxymaltose Injections named Ferinject (manufactured in Switzerland) in India in the year 2014 and this violated the provisions of Section 3(4) of the Act.Thus, Emcure was given license to manufacture FMC molecule under name 'Encicarb', Ferium' and 'Orofer' and Lupin imported FMC, manufactured in Switzerland, to distribute it under the name 'Ferinject, and

15 Case no. 5/2022.

'Rivofer','it was because Vifore wanted to take advantage of vast distribution network of Emcure and Lupin. But all these brands are under the control of Vifor International. Actually, there is no Interbrand competition. Vifor does not permit any manufacturer to manufacture FMC at affordable price, harming the interest of consumers. IP alleges violation of the Act: there is refusal to deal [S.3 (4) (d)] and abuse of dominant position [S.4(2) (b) (i)]. IP further alleges that the product, in Bangladesh is being sold for Taka 700 but in india it is more than 1700 rupees.

In the preliminary inquiry before the matter being submitted to the DG, Vifor International raised jurisdictional objections. As Vifor does not have any office in India, the Commission should have approached them through Diplomatic channels. Further as the matter relates to Patenting it should have been decided under Patent law. Section 3(5) of the Act exempt Patents from the jurisdiction of the Commission. Vifor claimed that there is no de facto agreement with its licensees. Emcure is the distributor of three brands and Lupin of two of Vifor. There is intense competition between Emcure and Lupin.

Vifor raised jurisdictional objection in the High Court of Delhi under A-226, which failed and were directed to raise these issues with the Commission. Vifor objected to the definition of RM by the IP. The RM does not include only FMC but there are drugs for Iron deficiency in the market. All of them, oral or injectable are part of the same RM. In this RM, Vifor is not dominant. The Author of this Survey has a different point of view. A drug on the basis of effectiveness and price may different from other drugs, though with the same therapeutic value. Thus, FMC may constitute a different RM.

Vifor did not agree FMC constitute a different RM, Iron Sucrose has equally similar safeguards. The price difference between the two is because of the margin appropriated by whole seller and others, Emcure, Lupin and Vifor do not have any control over them. They do not charge exorbitantly. The price difference is also because FMC price for 500 ml, whereas price of Iron Sucrose is for 100 ml. Iron Sucrose require higher number of doses in comparison to that of FMC. There were further arguments and counter arguments between the IP and Vifor.

There after the Commission proceeded to analyse the case. Vifor has raised two jurisdictional objections, first, certain documents are required by the Commission and if they are deposited penal action may be taken against Vifor under Article 271 of the Swiss criminal Code. Secondly, this case relates to Patent Law and cannot be decided by the Commission. As to the first objection, the fact is that, though Vifore does not have any office in India, but is participating in economic activities in India, the Commission has jurisdiction. Commission is a proactive organisation; it is under a duty to eliminate cases of unfair competition. Under section 32 if the activities of an enterprise are casting adverse effect on competition in India, the Commission has extra territorial jurisdiction. In contractual relations with third parties Vifor contracts arbitration under substantive laws of England and procedural laws of Singapore. If it has no problem of submitting to English and Singapore laws, then why does it cite the difficulty faced under Swiss laws?

After rejecting the first objection, the Commission proceeds to deal with second jurisdictional issue. Section3 (5) of the Act protects the IPRs, but does not oust the jurisdiction of the Commission. An anti-competitive agreement, if reasonably protects the monopoly only than it is valid. In other words, a holder of IPR may impose reasonable restriction, he is not given a blanket protection. Vifor's argument that CCI has jurisdiction only in case of SEPs (Standard Essential Patents) and in cases of other patents is not, is an unwarranted interpretation of section 3(5), which the language of the provision does not suggest.

Importance of section 3 (5) is explained in *Monsanto Holdings Private Ltd* v. *Competition Commission*[16] (W.P.(C) 1776/2016 and CM Nos. 7606/2016, 12396/2016 and 16685/2016). The Delhi High Court thus explained "As is apparent from the plain language of sub-section (5) of Section 3 that nothing contained in Section 3 of the Competition Act would restrict the right of a person to restrain any infringement of his IPR or to impose reasonable conditions for protecting them. It recognizes that a person has a right to restrain infringement of IPR granted under the specified statutes and any agreement entered for the aforesaid purpose would fall outside rigours of Section 3 of the Competition Act. However, such rights are not unqualified. Only such agreements that are "necessary for protecting any of his rights which have been or may be conferred upon him under" the specified statutes are provided the safe harbour under Sub-section (5) of Section 3 of the Competition Act and …. subsection (5) of section 3 of the Competition Act does not mean that a patentee would be free to include onerous conditions under the guise of protecting its rights." Thus, jurisdictional objections are without substance and are rejected.

Substance of IP's contention is that Vifor does not give licence to manufacture or sell to any one including IP except to Emcure and Lupin. Iron Sucrose or any other oral or injectable substitute is not as effective as FMC and also price of FMC is exorbitant. Vifor is dominant and abusing its dominance in not granting license to others and keeping the price high to the detriment of the consumers. On the other hand, the OP asserts that it has no control over pricing, they are controlled by Emcure and Lupin. Oral medicines are equally effective and as they have to be consumed in larger quantities, there is not much difference in price.

The Commission examined the licence agreement executed by Vifor with two Indian Companies, which have a wide distribution network in India, and don't find it necessary to define RM. These agreements do not seem to be one sided or unreasonable and from the perspective of section 3 (4) the agreement does not stifle competition. Vifor says that it has no control over these two companies regarding price of the injections. There is nothing that prevents Lupin and Emcure to compete with each other. The most important aspect that weighed with the Commission, is that the patent licence of Vifor will expire in April 2023; there after FCM would be freely available.

16 W.P. (C) 1776/2016 and CM nos. 7606/2016 12396/2016 & 16685/2016.

As far as price discrimination is concerned, simply because different categories of consumers are charged different price, it does not become discriminatory. The Commission does not consider it necessary to intervene if FCM is available in Bangladesh at a lower price. However, the author of this Survey thinks differently regarding lower price in Bangladesh in the interest of the Indian consumers. It is the duty of the Commission to ensure fair competition in the interest of consumers. At least this question should have been examined as to why Indian consumers have to pay more. As prima facie, there is no violation of the provisions of section 3 (4) and 4, the case is closed under section 26(2) of the Act.

IX CONCLUSION

This year, as usual a number of cases are decided by the Commission as well as other appellate and reviewing courts. Over the years since 2009 the jurisprudence of Indian competition law has attained a degree of maturity. No longer the Commission insists on direct proof of meeting of mind, in cases of anti-competitive agreements, as was the practice of the Commission during earlier years. In the category of horizontal anti-competitive agreement, a large number of cases are on bid rigging whereas on vertical anti-competitive, there are a few. Number of cases on e-commerce are increasing, for the simple reason our society is increasingly digital. However, passage of bill on digital competition law is awaited.