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COMPETITION LAW

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I INTRODUCTION

WITH THE strengthening of capital and gradual weakening of extensive government and emergence of the ideology that welfare should be minimised as much as possible, competition law is increasingly being interpreted in favour of the capital. We are also moving towards super specialisation: a new regulatory space is also being created for other regulators at the cost of Competition Commission, which is likely to result in fragmented market jurisprudence. The market operates as a holistic entity and every segment of the market is related to every other segment, yet it will be regulated by different regulators. Not only this new jurisprudence will create confusion but will also result in more litigation and delayed justice.

II TREND

In one of the cases, the High Court of Delhi has transferred some of the regulatory jurisdiction relating to patents from the Commission to Patent Regulator. It is certainly likely to create jurisprudential confusion in the market. The combination between Air India and Vistara tells another story. For long time successively, a number of airlines are exiting the aviation market. Sahara, Jet Airlines, Kingfisher, Go First are some of the air lines that exited the market. It is an oligopolistic market segment where minor airlines find it difficult to survive. With the merger of Vistara with Air India, this tendency is likely to increase.

III EXEMPTION FROM APPLICATION OF COMPETITION ACT

Coal India v. *Competition Commission of India,*[1] is a case on the application of the Competition Act to the appellant and its subsidiaries or not. Whether the appellants are exempt from the application of Act or not. The Bench consists of K.M. Joseph J., B.V. Nagarathna J., and Ahsanuddin Amanullah J.Unanimous judgement was delivered by Joseph J.the appeal is against the order of Competition Appellate Tribunal (CAT), which affirmed the order of Competition Commission, holding that the appellants are guilty of abusive behaviour. Order holding the appellant guilty of abuse of dominant position was given on the information provided by the second respondent. The appellants filed interlocutory application seeking permission to take some new grounds. The permission was granted. Before

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1 Civil appeal no 2845/2017, decided in 2023.

the three judges Bench, the first and second Appellant submitted that they are a monopoly to implement the objectives under Article 39 (b) of the Constitution and therefore the Act (the Competition Act) is not applicable to them.The contention was that coal monopoly created to sub serve the common good, to implement the policy enshrined under Article 39 (b). Imposing the Act on the Appellants, (CIL) would stultify the goal under Article 39(b) as well as the Coal Nationalisation Acts. As the question relates to the applicability of the Act, all the pending cases were transferred to this court, but the court would confine itself only to this question and not the merits of the cases. It was argued by the appellants that monopoly was created under the Coal Nationalisation Act 1973 (the Nationalisation Act/ NA). The Nationalisation Act was given protection of Article 31B and was placed under Ninth Schedule. However the protection is not afforded to NA now as it no longer is essential commodity and not now under Ninth Schedule. However, the impugned transactions relate to the period when such protection was available. As there is contradiction between the Act and NA, the central government and CIL (transferee of the Central Government to implement 'Common Good') would not be able to implement the desired objectives. The objective of the Act is to ensure freedom of trade but that of the NA is to ensure distribution of an essential commodity to ensure common good. Under NA differential pricing policy is necessary to ensure common good whereas under section 4 of the Act fair and non-discriminatory pricing is the goal. In addition to all these, the section 28 of NA, a non-obstante clause, stands in contrast with section 60, which is also a non- obstante clause. Which of the non-obstante clause should have precedent? Appellant's claim is that Nationalisation Act is constitutionally mandated welfare measure for common good, therefore it must be given precedence. On the otherhand the Respondents claim that the policy of the government has changed. In the context of globalised economy, fair competition, level playing field to both private and public enterprise is a necessity. Had law makers desired otherwise, an exception in favour of the coal monopoly would have been created and NA would not have been pulled out of Ninth Schedule. The appellants claim that if anybody has any grievance he can get redressal from the coal controller, and access to the Act is not needed.

An expert committee, Raghavan Committee, examined the role of state monopolies and stated that in the changed economic scenario inefficient state monopolies cannot be allowed not to compete with private enterprises. Even the definition of 'enterprise' given in section 2 (h) of the Act includes government departmental enterprises in the competitive net. As the virus of the Act has not been challenged, the Act cannot be read down to exclude the Appellants from the operation of the Act.

The Commission consists of experts. There are a number of safeguards under section 4 ofthe Act. It must be proved that the concerned entity is an enterprise, then, there are provisions of investigation, the enterprise must be found to be dominant within the meaning of section 19 (4) and lastly it must have abused.It was also contended by the Respondents that in the changed outlook of the state, competitive economy better leads to common good. The second respondent claimed that bulk of the coal is used by power companies. If coal of good quality at reasonable rates is supplied, it will lead to common good of consumers of electricity.It was further contended that unlike the predecessor MRTP Act, which exempted government agencies under section 3, the Act does not only not exempt but rather includes them under section 2 (h). If the appellants want to get out of the sweep of the Act, they could have applied to the government for exemption, under section 54 of the Act. But they did not do so.

The appellants argued that there is difference between an ordinary monopoly and a monopoly to implement the mandate of article 39(b). In order to peruse a constitutional goal, they have operate under certain constraints, they have to operate even loss making mines. However, the first appellant (CIL) did not claim that they perform sovereign functions. As to Presidential Directives and government policies, to be followed by CIL, the respondents responded that these points should have been raised before the CCI: CCI would have decided on the basis of factual situation.

Analysis:- the Bench proceeded to analyse the case as to the non-applicability or otherwise of the Act, however, it was clarified by the Bench that they are not deciding the appeals on merit. In order to contrast MRTP Act with the Act, the Bench highlighted the provisions of sections 2 (v) and 3 to mark non inclusion of government enterprises in the definition of 'undertaking', thus, making it clear that MRTP Act did not apply to government companies: in contrast, the Act does not make such exemption. The Bench discussed the details of passing of the Nationalisation Act, its goal to promote constitutional mandate of 'common good', it inclusion under Ninth Schedule and protection from inconsistency with Fundamental Rights (Article 31B and Article 31C).

A high level committee was appointed to suggest the making of a new law in place of MRTP Act, in the context of changed economic environment and policy. The Committee suggested that the Competition Law aims at promoting efficiency and welfare.Raghavan Committee further states that in view of change in economic policy from 1991 onward, state monopolies were made to compete with private sector and loss making industries were to be privatised. (however, now a days a number of private loss making enterprises are given loans by public sector banks which become bad debts and are written off. It means profits are private but losses are public. Loss making public sector industries are privatised but loss making private sector is not nationalised).

It was recognised that even state monopolies may abuse their dominance because of government patronage. State monopolies follow administered prices rather than competitive prices. In other words, the Raghavan Committee was not in favour of exempting state monopolies from the operation of the Act. That is why section 2 (h) does not exempt government companies from the operation of the Act. It specifically includes government departmental enterprises in the definition of enterprises. Only sovereign functions and sensitive industries are exempt. The width of the power given to the Commission amply indicates that CCI plays an important role in a developing economy. Scheme of the Act clearly shows that CIL, which is not performing sovereign functions, is not exempt from the operation of the Act. In addition to these comprehensive provisions, the Commission may exempt any enterprise from the operation of this Act. However, there is also a non-obstante clause (section 60).

The concerns expressed by the appellants regarding the performance of constitutional obligations were already taken care of by the framers of the Act. Section 19(4) provides that all the enumerated factors will have cumulative effect and two of the factors are 'social obligation' and 'contribution to economic development'.The Commission being an expert body, consisting of persons of ability from different fields, specialised in understanding the market, is well equipped to address the concerns of the appellants. There are also provision of appeal to CompAT (now NCLAT) and the Supreme Court.

One of the argument is that the appellants, being government companies, under full control of government, are state within the meaning of article 12 and it is mandatory for them to implement the objectives of article 39 (b). But, there may be conflict between mandate of article 39 (b) and section 4 (2) of the Act. CIL may have to charge differential prices, which is prohibited under section 4(2).The respondents submitted that the question of conflict is being raised in abstract, without any factual foundation. Genuine implementation of Presidential Directions is likely to pass the test, on the basis of doctrines of public trust and intergenerational equity. As far as section 4(2) (b) is concerned for intergenerational equity, a cap on production has to imposed. In the changed scenario of switch over from welfare economy to free market, the Act will take care of constitutional mandate. In the ultimate analysis the idea of 'common good' is a dynamic concept. In the present-day economic scenario, common good can be realised in a competitive society, which now India is. Biased state interference does not lead to common good. The legislature was aware of the Nationalisation Act, yet it decided to keep all enterprises, public as well as private, under the umbrella of the Commission.

Even if, there are other forums to settle complaints against CIL, the fact is that a complainant cannot be prevented rom having access to the Commission. The appellants can justify differential pricing or limiting the production on valid grounds even before the Commission. But the appellants cannot resist the standard of fairness insisted upon under section 4 of the Act.

Under section 28 of the Act the Commission in appropriate cases can make a division of an enterprise. Section 5 of the Nationalisation Act vest all mining to the Central Government or public companies. If division is ordered it would be inconsistent with the Nationalisation Act. As virus of neither of the Acts is challenged, it is not open for the court to comment on the virus of section 28 of the Act.

It would be safe to conclude that this power under section 4 of the Act, may be exercised. If necessary the Central Government may exempt the CIL from the operation of the Act under section 54. The court did not decide appeals on merit.

On merit appeals would be heard be other Benches of the Supreme Court and other forums.

IV CONFLICT OF REGULATIRY JURISDICTION

Telefonaktiebolaget LM Ericsson v. *Competition Commission of India*[2], is a case on conflict of jurisdiction and decided by the High Court of Delhi. It was decided in this case that in relation to patents the primary jurisdiction belongs to authorities under the Patent Act and not to CCI. This case is a bunch of case with a common question relating to the conflict of jurisdiction. The judgement was delivered by Najmi Waziri J., on behalf of Vikas Mahajan J., and himself. The common question raised in these four writ petitions is- when a patent is issued in India, and the patentee asserts such rights, can the CCI inquire into the actions of such patentee in exercise of its powers under the Competition Act, 2002?

In 2016 the High Court of Delhi in *Telefonaktiebolaget LM Ericsson* v. *CCI,*[3] held in the context of Standard Essential Patents with reference to the rights of a patentee, that the Commission has jurisdiction to decide competition concerns, but only after the Patent forum has decided the conditions of grant of license, and there is bar for the Commission to exercise jurisdiction for violation of sections 3 and 4. In a writ petition, WP(C) 5604/2015[4], filed by Ericsson against CCI and iBall, the proceedings before the CCI were quashed, on ground that there was a settlement between Ericsson and iBall and therefore, iBall withdrew its information. But the Commission can start the case suo moto and revive investigation. In *'Monsanto'* case,[5] relied heavily in 2016 Ericsson case decided that CCI has jurisdiction to decide cases of competition concerns and dismissed the writ petition.

In writ petition[6] Ericsson received notice from the Commission for alleged violation of sections 3/4 Competition Act in response to the information by Micromax (the sequel of 2016 case).It was argued that patentees' rights cannot be decided by the CCI as (i) The licensing of patents is neither a sale nor a purchase of goods/services because by mere license or use of a patent, no property, right or title in a patent gets transferred. Licensing of patents only make an action legal which would otherwise have been unlawful. (ii) If licensing is neither goods nor service, the Commission cannot have jurisdiction. (iii) Section 51 (1) of the patents Act 1970 provides three modes of dealing with the patents, *viz.* sale, lease and license. (iv) In this case the information relates only to licensing of SEP (standard essential patents) and under section 84(7) (c) read with section 140(1)(iii)(c) of the Patents Act power to deal with the matter is with either the Regulator or the civil courts. For licensing of SEP and deciding the abuse of dominance, FRAND terms have to be decided which cannot be done by the CCI as it does not have the expertise. (v) Allegation of anti-competitive practices are to be analysed under

2 (2023) 3 HCC Del 284: 2023 SCC OnLine Del 4078.
3 LPA/246/2016 and LPA/247/2016.
4 WP(C) 5604/2015.
5 LPA/150/2020.
6 WP(C) 8379/2015.

sections 84(6) and 91 (1) (ix); the Commission has no role to play in this regard. (vi) Anti-competitive practices under the Competition Act are analysed with reference to 'relevant market', but RM exists only if there is sale or purchase of goods/ services.*CCI* v. *Bharti Airtel* [7], has impliedly overruled 2016 case, as it was decided by the Supreme Court that the jurisdiction of CCI begins only after TRAI has exercised its jurisdiction. (vii) Chapter IX of the Patents Act covers the field anti-competitive activities of licensing of patents, therefore there is no role for the CCI.

On the other hand, the CCI argued as follows- (i) simply because there is overlap between Patents Act and the Competition Act, it does not mean that the power of the Commission is detracted. (ii) Any person can approach the Commission, whereas the Patents Act assists only a patentee. (iii) Mechanism of Competition Act is better equipped to enquire into anti-competitive behaviour than that of Patents Act. (iv) section 60 of the Competition Act gives primacy to the Commission to hear cases of competition concerns. (v) the Commission is regulator of the market whereas Patents Act facilitates only a patentee. (vi) According to the ratio of Bharti Airtel it is only the Commission which can look into questions of anti-competitive behaviour. (vii) there are many cases, involving the abusive behaviour of patentees against the licensees, which can only be tackled by the Commission. (viii) Private settlement between the IP and the OP (the patentee) (which creates rights in personam cannot be a substitute of rights in rem created by Competition Act).

The high court refused to decide the case in detail. The Court decided the case on issues relating the petitions. The court allowed the writ petitions.[8] These petitions allowed on a finding in law that the CCI cannot exercise jurisdiction over actions of an enterprise that are in exercise of their rights as a patentee. (emphasis supplied).

The petitioners Ericsson and Monsanto assert that a patentee has been given exclusive right under Patents Act to prevent third parties from using his process or product and CCI does not have jurisdiction in this matter. The Patents Act adequately provides safeguard against anti-competitive activities and abuse of dominant position. On the other hand, the CCI contends that they are not claiming exclusive jurisdiction, in accordance with section 62, but impact of a patent on the market. The jurisdiction is in addition to those of other market regulators. The CCI cannot be prevented from exercise jurisdiction relating to competition.

After extensively quoting relevant provisions of both the Acts the court concludes that both the Competition Act and Patents Act are special laws (comment of the author of this survey- both cannot be. Compitition Act regulates whole of the market whereas Patents Act only one segment of the market). The Amendment of the Patents Act in 2003 may override the provisions of Compitition Act, enacted in 2002 as later overrides the former. But the court further discusses the law of repugnancy. On the basis of Supreme decision in *Ashoka Marketing Ltd* v. *PNB,*[9]

7 (2019) 2 SCC 521.

8 WP (C) 464/2014, 1006/2014, 1776/2016 and 8379/2015.

(1990) 4 SCC 406, the law of removal of repugnancy is (1) In case of two laws of the same legislature later prevails, with the exception that special law prevails over the general law. (2) For determining whether the Act is general or special the focus must be on the principal subject matter plus the particular perspective. For certain purposes an Act may be general for others may be special. The same principle of focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act was reiterated in *Gobind Sugar Mills Ltd.* v. *State of Bihar.*[10] The court should not alwaysprefer later Act over the earlier one but decide the repugnancy on the basis of (i) the subject matter in question, (ii) the intendment of the statutes in respect thereof, as well as (iii) whether the scheme and relevant provisions of the two statutes have any indication apropos which, the legislature felt must override the other.

The Competition Act provides anti-competitive agreements, abuse of dominant position combinations, powers of the authority, punitive provisions etc. and procedure. On the other hand, the Patents Act, the chapter XVI of which was introduced by amendment of 2003 provides for working of patents, compulsory licenses and revocation. Sections 84(1) and 84(4) empowers the controller to provide for compulsory licenses for public services.

The Patents Act is a special law dealing specifically with patents, and issues of imposition of conditions for licensing patents. It also specifically provides for anti-competitive agreements and abuse of dominant position. It can also be said about the Competition Act that apart from providing for anti-competitive agreements and abuse of dominant position, its section 3 (5) also protect IPRs and provide for imposition of reasonable conditions. 2016 judgement clarifies that though conditions of grant of license must be decided by the Controller under Patents Act, but competition concerns only by CCI. The high court observes that the factors to be considered for determining anti-competitive agreements and abuses and dominance are almost similar under both the CA and Patents Act.

The question, the high court observes, of whether an agreement under which a patent is licensed will cause an appreciable adverse effect on competition within India or will amount to an abuse of dominant position is not one that is reserved for the CCI. To the contrary, the factors that the CCI is required to consider under Sections 19(3) and 19(4) when assessing a potential violation of Sections 3 or 4 of the Competition Act are not very different from those that the Controller has to take into consideration under sections 84(6) and 84(7) read with sections 83 and 89 of the Patent Act.

In the view of the Bench of the high court, the inquiry that the CCI proposes to conduct in respect of an assertion of patent rights is nearly identical to that which the Controller will conduct under Chapter XVI of the Patents Act. The legislative intent is apparent in as much as the Patents Act—especially as amended by the 2003 Amendment that introduced Chapter XVI, after the Competition Act

9 (1990) 4 SCC 406.

10 (1999) 7 SCC 76.

was enacted, is more appropriate to decide the cases of licensing of patents. Relatively CA is a general Act and Patents Act is special therefor the Patents Act must prevail. Such cases must be governed by the Patents Act.

The author of this survey of Competition Law has an opinion different from that of the high court. It is a well-known fact that all rules of interpretation have, more often than not, more exceptions to the rule than the rule. In other words, the application of the rules of interpretation is situational. The application of the rule that 'special law prevails over the general law' along with its many exceptions, is situational. Therefore, the debate that whether genal law or special law should prevail will lead us nowhere. There are a number of cases decided by the Supreme Court, including, a recently decided Supreme Court case, section 125 Cr. P.C., a general law was allowed to prevail over the Muslim personal law of maintenance. The legislative intention on which the Bench of the high court relies is after all an external aid of interpretation, which relatively is a weaker aid. In my view the simple fact is the both the laws, the Competition Act as well as the Patents Act are market regulators, the former only that of a market segment and later that of the whole of the market. The patents and their licensing not merely effect a segment of the market but as a matter of the fact the whole of the market, not merely patentee.In addition to this how a person, who does not have any cause of action will able to approach the Controller under the Patents Act if licensing of a patent causes abuse or in any manner distort the market as a spread effect. The high court is absolutely silent about the fact that the Patent Act gives remedy in personam unlike the Competition Act.

V COMBINATION APPEAL ON VALIDITY OF PENALTY

ITC v. *Competition Commission of India,*[11] is a combination appeal against the order of the Commission under section 53E. The Commission had imposed a penalty of Rs. Five Lacs under section 43-A after finding the Appellant in violation of the provisions of section 6 (2). The appellant entered into an agreement with Johnson & Johnson (seller no. 1) for the purchase of trade mark 'Savlon' and 'know-how' and other promotional material (Transaction no1) on February 12, 2015. On the same date, the appellant entered into an agreement with the same seller (seller 2) for the purchase brand name 'shower to shower', know-how and promotional material' (transaction 2).

The appellant asserted that on March 4, 2011 the Ministry of Corporate affairs issued a notification, which is known as 'De Minimis' notification to the effect that an enterprise whose assets do not exceed Rs. 250 crore and annual turnover not Rs. 750 crore, if it transfers its shares, voting rights or its control to another enterprise, section 5 of this Act would not apply. This limit was revised to Rs. 350 crore and Rs.1000 crore respectively on March 4, 2016. On March 27, 2017 a clarification was issued by the Ministry that in calculating the assets and turnover, the value of relevant product which is being transferred, and not the value of entire assets or turn over shall be taken into account. According to the Appellant

11 Competition Appeal (AT) 11/2018 decided on July 12, 2023.

this clarification has retrospective effect. On February 11, 2016 in response to information sought by the Commission, the Appellant stated as the value of the assets and turnover of the transaction 1 and 2 either individually or together do not exceed the threshold limit for combination prescribed under section 5, in accordance with de minimis rule: the transactions are not combinations for the purposes of the Act.

The Appellant argues that as both the transactions do not exceed the threshold limit prescribed under section 5, they are not combinations under section 6. Additionally, the Commission has already held under section 31 (2) that there is no AAEC caused by these transactions. Therefore, there was no need to give notice under section 6. Thereafter receiving direction from the Commission, the Appellant filed Form-I for purchase of 'Savlon' and 'Shower to Shower,' without giving up the position that these Transactions are not combinations. The Commission, then issued, under section 43A, a show cause notice as to why notice of the Transactions was not given under section 6 (2). After sending the reply, a fine of Rs. Five lakh was imposed by the Commission. Before this tribunal it was argued that once it was held by the Commission that there was no AAEC involved in the Transactions the CCI is debarred from holding that it is a case of combination.

The appellant further argued that section6 (2) is applicable only if there is AAEC under section 6 (1). If the Commission has already declared that theassets of combined entity do not cause AAEC, clause (2) of section 6 does not apply.He has further argued that the Form-I filed before the CCI under section 6(2) by the Appellant on 16.2.2017 related to the relevant markets of the (i) sale of antiseptic liquid in India, (ii) sale of antibacterial hand wash/soap in India, and (iii) sale of prickly heat powder in India. He has further argued that in relation to Transaction-I and Transaction-II, the Appellant was not present in any of the relevant markets in the financial year 2013–14 and therefore, the CCI unconditionally approved Transaction-I and Transaction-II vide order passed dated March 22, 2017 after holding that the said transactions were not anti-competitive in nature and did not cause 'appreciable adverse effect on competition. The Appellant further argues that the notification dated March 27, 2017 is clarificatory and therefore, is retrospective.

The Counsel for CCI has argued regarding the contention of the Appellant/ Acquirer that the transactions fall within the scope and ambit of item 3 of Schedule I of Combination Regulations, by submitting that the purchase of intellectual property of a competitor by a business enterprise cannot be construed as being a transaction in the ordinary course of its business, and moreover, the acquirer ITC is engaged in the business of selling personal care products and is not in the business of selling/purchasing intellectual property rights related to these products which means that the said Transactions I and II were not done in the ordinary course of business. On this basis, he has claimed that the benefit of item 3 of Schedule I of Combination Regulations will not be available to the acquirer ITC in the present matter." Ordinary course of business is confined only to addition in the business already being conducted. Selling personal care product is different from acquisition of IPR of these products. Acquisition IPR cannot be considered to be business in the ordinary course of business.

On the issue of the notification dated March 27, 2017 being clarificatory in nature and therefore having retrospective effect, the Learned Counsel for CCI has argued that the De Minimis Exemption Notification issued on March 4, 2011 only had a life span of five years and, therefore, the subsequent clarificatory notification dated March 27, 2017 cannot be held to apply to a notification whose life span has elapsed when the clarificatory notification had been issued. He further argued that de minimis rule issued by the Ministry of corporate affairs on March 17, 2017 has statutory effect but not the Press Release of March 30, 2017. as the latter cannot be treated as notification under section 54 of the Competition Act.

"Regarding the issue of relevant assets and relevant turnover, the Learned Counsel for CCI has pointed out that the Explanation (c) of section 5 of the Act provides that the valuation of assets shall be determined by taking the book value of assets as shown in the audited books of account of the enterprise and the value of assets shall include the brand value, value of goodwill, value of copy right, patent, permitted use, collective mark etc., and seen from this basis, the acquisition of trademarks is also the acquisition of total business."

Analysis by NCLAT: - the main issue before the tribunal was whether the De Minimis Notification of March 04, 2016 as clarified by Notification dated March 27, 2017 keeps the acquisition by the acquirer out of the monetary ceiling under section 5 and the acquirer is not under any obligation to give notice of combination to the Commission and consequently a penalty of Rs five lakh, for not complying with the requirement of section 6 (2), was wrongly imposed on the appellant? The only question before the NCLAT was to determine the legality of imposition of penalty of Rs. Five lakhs. Whether transactions I and II relating to 'Savlon' and 'shower to shower' respectively and the acquisition of the related trademarks and inventory, knowhow and moulds *etc.,* were required to be notified under section 6(2) of the Act? The NCLAT maintains that the appellant states that it is not required to give notice under section 6 (2) because it was held that the transactions do not cause AAEC under section 6 (1). However, the tribunal will consider only the legality of imposition of penalty.

Section 5 provides jurisdictional threshold relating to assets and turnover applicable to acquirer and acquired enterprise. In addition to the requirement of section 5, the tribunal has also to enquire whether the transactions are exempt under latest De Minimis programme dated March 4, 2016 as clarified by the notification of March 27, 2017? 2017 notification and press release 30. 3. 2017 is reproduced.

"2017 Notification

"In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the enterprises being parties to -

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, reffered to in clause (b) of section 5 of the Competition Act; and

(c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act, where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

Where a portion of an enterprise or division or business is being acquired, taken control of merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company."

[emphasis supplied]

"Press Release

..It was, however, noted by the Government that the said notification was being applied to Combinations which resulted only from acquisition but was not extended to Merger/Amalgamation and Acquiring of Control Cases. It was also noted that where only a segment/portion/business of an enterprise was being combined with another enterprise, the relevant assets and turnovers attributable to the target segment/portion business were not being considered and instead the transferor's total assets and turnover were being considered for determining the applicability of the exemption

Stakeholders had been voicing their concerns over the issue and in keeping with the Government's principle of Minimum Government and Maximum

Governance, the Ministry has issued fresh notifications No. S.O. 988 (E) and No. S.O. 989(E) dated 27.03.2017 wherein, the Central Government intends to provide:

i (i) Clarity on the applicability of the threshold exemption limits to all forms of combinations as referred under Section 5 of the Act.

ii (ii) Clarity on the methodology to he adopted for calculating the relevant assets and turnover of the target when only a portion or segment or business of one enterprise is being combined with another.

With the issue of these notifications, combinations falling within the threshold limits would not require to be filed before the CCI. The reform is in pursuance of the Government's objective of promoting Ease of Doing Business in the country and is expected to make India a more attractive destination for Foreign Direct Investment. The notification is expected to enable greater freedom to industry in taking legitimate business decisions towards further accelerating India's economic growth.

The purpose of De Minimis notification according *to Eli Lilly and company* v. *CCI. TA (AT), Appeal no 3/2017* is to exempt certain small combinations from the interference of the Commission. Therefore, it is relevant to discuss the ratio of the case, Eli Lilly. NCLAT held that (1) the intention behind the Notification dated March 4, 2011 issued by the Central Government under Section 54 of the Act was to exempt certain transactions due to their small size. (2) The reform is in pursuance of the Government's objective of promoting ease of doing business in the country and is expected to make India a more attractive destination for Foreign Direct Investment. The notification is expected to enable greater freedom to industry in taking legitimate business decisions towards further accelerating India's economic growth.

(iii) This makes it clear that the Central Government did not wish that the CCI interfere in acquisition of an enterprise that was de minimis or acquisition of assets that were de minimis.

(iv) For the purpose of the calculation of assets and turnover what is being acquired is relevant, as the assets/turnover of what is left over with the sellers after the acquisition will have no role to play in the context of the business conducted by the purchaser post-acquisition.

It is clear that the clarificatory notice of March 27, 2017 makes it clear, if a part of an enterprise is being combined, then only the assets or turn-over attributable to the part alone shall be taken into account for the purposes of section 5. The press notification of March 30, 2017, made it clear as to how assets or turn-over shall be calculated. The clarificatory notification operates retrospectively, because it was meant to remove confusion. Eli Lilly case, *Commissioner of Income Tax* v. *Gold Coin Health Foods Pvt. Ltd.*[12], and *Commissioner of Income Tax (Central)-I, New Delhi* v. *Vatika Township Private Limited*[13], establish the principle, specially

12 (2008) 9 SCC 622.

13 (2015) 1SCC 1.

the later two cases of the Supreme Court, that the clarification notification apply retrospectively."If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect."

The relevant turnover attributable to the two trademarks 'Savlon' and 'Shower to Shower', which are being transferred from Johnson and Johnson Pvt. Ltd. and Johnson and Johnson Pte. Ltd. respectively to ITC are worth Rs.68.37 crores, as is stated by the appellant. This figure is quite clearly less than the threshold limit of Rs. 750 cores for total turnover that would be exempted in view of the De Minimis Notification. The clarification notification must be held to give retrospective effect to *De Minimis* notification. As the appeal was only on imposition of penalty. The tribunal holds that the issue of 'combination' was not the subject matter of this appeal, the tribunal does not decide the issue of 'combination. In conclusion it was held that the appellants are not required to pay any penalty. Appeal is allowed to this extent.

VI ABUSE OF DOMINANT POSITION

Google LLC v. *Competition Commission*,(R1), Umar Javeed (R2), Sukarma Thapar (R3), Aquib Javeed (R4)[14] is an appeal against the order of the Commission. This is an appeal against the order of the Commission.In *Umar Javeed* v. *Google LLC,* Google LLC was guilty of abuse of dominant position under sections 4(2) (i), 4 (2) (b) (ii), 4 (2) (c), 4 (2) (d) and 4 (2) (e).In 2008 google featured Android OS as open licensable smart mobile phone. With OEMs Original Equipment Makers) Google signed MADA (Mobile Application Distribution Agreement), enabling the OEMs to get a suite of applications. OEMs as well have to sign AFA (Anti-Fragmentation Agreement) to be observed by OEMs as baseline compatibility standards and RSA (Revenue Sharing Agreement) for sharing revenue.

In 2015 European Commission found Google having abused its dominant position. In 2018 R 2-4 filed information with CCI alleging abuse of dominant position. The Commission found them guilty of having abused, appeal against the order was filed by two appellants (Google USA and Google India, who were Ops in proceeding before the commission). Adverting to the abusive conduct, theInformants have alleged that Google has engaged in different kinds ofanti-competitive practices, either in the market in which they are dominant or inseparate markets, with the aim of cementing Google's dominant position such as Online General Web Search Services and Online Video Hosting Platform (through YouTube). In this regard, the Informants essentially made the following allegations:

(i) Google mandates pre-installing of googles applications, hindering installation of rival applications

(ii) Google bundles certain of its Applications, You Tube, Google Chrome and Google Search and pre-install them, hindering the loading of rival Applications.

14 Competition Appeal 1/2023 decided in 2023.

3. Google prevents OEMs from developing competing versions of android on other devises (Android Fork).
4. Mandatory pre-installation of entire GMS suite on OEMs as a part of MADA is an unfair condition.

The DG found the appellants in contravention of sections 4 (2) (a) (i), 4(2) (b) (ii), 4(2) (c), 4 (2) (d) and 4 (2) (e). on the basis of the report of the DG, reply of the parties and other material, the Commission concluded: -

(i) Google's mandatory pre-installation of entire GMS suite as part of MADA is unfair condition under section 4 (2) (i) and imposition of supplementary condition unrelated with the main transaction violates section 4 (2) (c).

(ii) Google has leveraged its dominant position in the app store market in the Android OS to protect its position in the in on-line general search in contravention of section 4 (2) (e),

(iii) (i) as well as in the non-Android specific market through google chrome app,

(iv) (ii) as well as in on-line video hosting platforms (OVHS) through you tube.

(v) Conditional upon signing AFC/ACC, pre-installing App Play Store, google has reduced the capacity of OEMs to develop devices operating on Android Fork in violation of section 4 (2) (b) (ii).

The Commission found google dominant in these five markets: -

(i) Market for licensable OS for smart mobile devices in India

(ii) Market for app stores for Android smart mobile OS in India

(iii) Market for general web search services in India

(iv) Market for non-OS specific mobile browsers in India

(v) Market for on-line video hosting platforms (OVHP)

The Commission also under the heading 'remedies' gave certain directions to the Appellants which were also challenged. A penalty of Rs.1337.76 crore was imposed on Google to be paid within 60 days

The appellants as well respondent argued for and against the order of the Commission. Apart from other grounds of objection against the order of the Commission,the main thrust of the Appellant was that under section 4, not only the abusebut its impact on the market must as well be proved, which was accepted by the appellate tribunal, but which was contested by the respondents.

However, the author of this survey does not agree with NCLAT. The Act provides three types of approaches in proving and interpreting AAEC. In case of vertical agreements, in addition of proving the agreement, its effect has to be proved separately. In case of horizontal agreements, the Commission has to prove only the existence of agreement, AAEC is presumed, that means, as interpreted by the Evidence Act, the Opposite party may rebut it. But in case of dominant enterprises the framers of the Act desired to caste greater responsibility on the dominant enterprise, it should be more responsible than the smaller ones: per se rule was applied in rigorous sense, and irrespective of 'effect on the market', the abuse in itself is prohibited. Wherever the effect has to be taken into consideration section 4 has specifically provided. To read, the consideration of 'effect' into section 4 is uncalled for. There, a serious difficulty was faced. By whatever name you call it, 'effect,' 'impact' or 'AAEC' (interestingly NCLAT has used the word 'effect') it means what stifles the competition in the market. NCLAT has not clarified which AAEC it refers to. One AAEC is for anti-competitive agreement, 6 parameters of which are given in section 19 (3): the other one relates to combinations, 14 parameters of which are given in section 20 (4). Which AAEC NCLAT will use for assessing 'effect' is not clear.

The Tribunal proceeds to analyse the case and the issues are framed. The most important issue is(1) in case of abusive behaviour of an enterprise whether 'effect analysis' is required? If so, what is the test of this analysis. (2) Whether the order of the Commission is replete with conformation bias? (3) Whether pre-installation of entire GMS suite is an unfair condition? Does it amount to breach of the provisions of sections 4 (2) (a) (i) and 4 (2) (d). whether under these provisions effect analysis was not done by the Commission? Whether pre-installation of GMS suite was conditioned upon signing of AFC/ACC, which curtailed the innovative capacity of developers of Android Fork. Thereby, they breached the provisions of section 4 (2) (b) (ii)? Whether effect analysis was done by the Commission before returning the verdict of breach of section 4(2) (b) (ii)?

Whether the Appellants perpetuated its dominance in on-line search market resulting in denial of market access to rival search apps? In returning the verdict of breach of section 4 (2) (c) whether the Commission analysed the effect? Whether the appellants leveraged their dominance in play storein protecting their on-line general search in breach of section 4 (2)?Has the Commission assessed effect on the market in giving this verdict? Whether tying up google chrome with play store violated the provisions of section 4 (2) (e) and whether effect assessment has been done? Similar issues were framed in case of tying in of you tube with play store. Has the investigation been vitiated because of violation of rules of natural justice and DG asking leading questions? What is the impact of absence of a judicial member in the Bench on its validity?Have the penalties been imposed according to law? Thereafter the tribunal proceeded to analyse the objective and scheme of the Act.

The appellants argued that it is the duty of the Commission to prevent the practices, which cause AAEC. Therefore, even in case of abuses it is incumbent upon the Commission to analyse 'effect' (contrary opinion of the author has already been discussed). On the other hand, the respondents asserted that even if the Commission ha analysed the effect, it isnot the requirement of section 4. In support of their respective position, a number of precedents were cited by the parties. It was further argued by the appellants that 'dominant position' as explained under section 4 means something that affect the competitors and market in its favour. Effect analysis, therefore, is necessary to find out if they are tilted in favour of the dominant enterprise. (The Author of this survey, on the other hand asserts that tilting in favour of the dominant is an inherent consequence. It need not be proved. If the dominant enterprise abuses, the competitors and the market is bound to be tilted in favour of the dominant.)

The appellants have also relied on the 'Explanation under section 4, which provides that a discriminatory practice undertaken to meet the competition is not abuse, therefore effect analysis is necessary. The author of this survey asserts thatan exception given under section 4 does not change the rule. The tribunal concludes, "for proving dominance under section 4, effect analysis is required to be done and the test to be employed in the effect analysis is whether the abusive conduct is anti-competitive or not." The survey asks the question, how the 'test to be employed' would be conducted? The only method, under the Act is, to find out anti-competitive activity is to determine AAEC. But what parameters we shall use under section 19 (3) or under 20 (4)? The Tribunal has failed to clarify, because 'abuse' is neither 'anti-competitive agreement' nor 'combination.'

Confirming bias: - confirming bias, against the Appellants, was also alleged by the Appellants, as on April 16, 2019, the Commission prima facie finds the Appellant having violated provisions of section 4, on grounds that pre-installation of google Apps, under MADA, amounts to abuse of dominance. The allegation of confirmation bias (prima facie finding, before investigation by the DG, is likely to influence the investigation) was rejected by the Tribunal, as the proceedings do not reveal such a bias.

The argument of the Appellants was that MADA is optional and pre-installation is voluntary. There is no element of compulsion in the arrangement. There are other agreements also. ACC (Android Compatibility agreement) and AFA (Android Fragmentation Agreement) should be read with MADA. Each applicable version ofAndroid must comply with Android Fragmentation Document. All manufactured devices shall be AFA compatible. It was found by the DG that OEM cannot bargain with google on the basis of non-existent alternatives. It is because google is dominant in all 5 markets delineated earlier.One of the requirements of AFA/ACC is that all devices, hardware and software shall be designed to run on Android compatible devises. As over the time almost all the rivals of google have exited the market without there being any new entrant. This has left OEM dependent on google. Without google apps covered in GSM, a customer does not find a smart device attractive. The terms of MADA foreclose competition, particularly in the context of all the five identifiable RMs, being dominated by google. MADA is also optional and voluntary, but Revenue Sharing agreement (RSA) also imposes many restraints on OEMs.

The argument that no OEM has complained that google abuses its dominance was rebutted by the Tribunal on ground that the Competition Act is a public law and information of anti-competitive activity can be given by any person without any cause of action. It was contended by the Appellants that it is asserted by the Commission that MADA incorporates 'must have Apps', and that is not correct as MADA does not define 'must have Apps'. What the Commission meant by this was the play stores and 11 Apps of google.

The share of the market of Android OS in 2018 was 98.47%, which indicates its dominant position. As the Tribunal concluded that not only abuse but effect has also to be demonstrated. The Commission has as a matter of fact shown not only abuse but its anti-competitive effect as well. Many terms of MADA require the OEMs to seek the approval of Google before launching devices. This is because OEMs have neither countervailing nor bargaining power. This clearly shows anti-competitive effect.Many of the terms of MADA, along with AFA/ACC/RSA are anti-competitive. Pre-installation of entire GMS suite is also in the nature of supplementary obligation (section 4 (2) (c)). These practices also foreclose the market.

In conclusion NCLAT agrees that pre-installation of entire GMS suite violates section 4 (2) (a) (i) and clause (d) as well. Ability of developers of Android Fork (modified version of Android based on Android source) is also reduced,in association of MADA, AFA, ACC/RSA, is violative of section 4 (2) (b) (ii). Google has also perpetuated its dominant in on-line search market, resulting in denial of market access to competing search engines, violating section 4 (2) (c).

There are many terms in MADA along with AFA/ACC/RSA, which stifle competition and make it difficult for competitors to compete, such as competing search engines: pre-loading or otherwise installing Apps on qualified devices. The submission of the Appellants that MADA and RSA should not be read together was not acceptable to NCLAT as reading together leads to conclusion that pre-loading of competing search Apps makes competition difficult. As the stifling of competition becomes apparent only after reading all the agreement together, therefore they should not be read separately. When all the agreements form part of one transaction they ought to be read together, particularly because of the objective of the Act. The objective of the Competition Act is to ensure fair competition, economic efficiency, and consumer welfare. In achieving the objective of the Act it is necessary to read all the agreements together, that must be done. In conclusion perpetual dominance of google, vitiates competition in search engines.

Issues 6, 6a, 7,7a, 8, 8a relate to the use of dominance in one market to enter into another market. Google has used its position as the only supplier of play store to exercise leverage in search services (through google Chrome). Because of monopoly in play store, chrome is pre-installed and the rivals cannot compete with pre-installation advantage of the chrome. Similarly, you tube is pre-installed with play store, it also gives pre-eminence to google in OVHPs market. In conclusion google, referring to issues 6, 6a, 7, 7a, 8, 8a, violates section 4 (2) (e).

Rules of natural justice: - rules of natural justice have been violated, asserted the Appellants, in as much the DG has put leading questions to third parties. The tribunal concluded that the DG carries out the orders of the Commission and find out the truth and relevant material. Therefore, in carrying out this responsibility, the DG has not violated the rules of natural justice. The leading questions asked by the DG do not imply that he has pre-decided the case particularly because his investigation does not affect the rights of the parties. NCLAT concludes that there is nothing to show any bias in the DG. NCLAT conclude that the DG neither violated the rules of natural justice nor any wrong was committed in asking leading questions.

Judicial member - relying on *Mahindra electric Mobility Limited* v. *Competition Commission,*[15] the Appellants submitted that in the absence of a Judicial member, the proceedings of the Bench of the Commission are vitiated. One of the findings of the high court was that every Bench should have a judicial member and the government shall take necessary actions to appoint sufficient number of judicial members. It logically implies that till the judicial members are appointed work cannot be allowed to stand still. (It appears that NCLAT treated this direction of the high court directory, because of certain other provisions. Commission's appeal before the Supreme Court is pending. NCLAT, relying on section 15, argues that absence of a judicial member is not fatal. NCLAT concluded that the proceedings are not vitiated because of the absence of a judicial member.

Section 27 of the Act: - The Appellants submit that 10 directions issued by the Commissions are so drastic that they cannot be justified under the provisions of section 27 of the Act.

i. Google shall allow developers of App stores to develop their Apps and distribute them through play store of google. It was argued that CCI cannot issue such a direction to prevent abuse. But NCLAT sets aside this direction because the Commission in its order has not found google abusive in play store market.

ii. The Commission has directed that google shall not prevent App developers from sideloading Apps. As the Commission did not give any finding that google prevented side loading, the direction is set aside.

iii. The Appellants challenged the direction of the Commission that 'Google shall not deny access to its play Services APIs to disadvantage OEMs, its existing or potential competitors.' It is because the Commission has not returned any finding that google has a duty tosupply play Services APIs to OEMs. The respondents refuted the submission of the appellants stating that section 27 (1) sufficiently empowers the Commission to provide any remedial action. The tribunal concludes that play services and APIs are proprietary items of google and scientifically and regularly updated proprietary items cannot be given to the competitors and App developers. Therefore, this direction is unnecessary and set aside.

iv. Next direction is -google shall no restrict users from un-installing its pre-installed apps, which is challenged by the appellants. The commission has already found that users find it difficult to un-install pre-installed Apps, therefore, they continue to use pre-installed Apps, and not alternatives. This amounts to fore-closure. As OEMs are not obliged to pre-install all the suites of google Apps, the direction is unnecessary and set aside.

15 (2019) SCC OnLine Dell 8032.

As all other directions are legitimately issued, no exception can be found with them.

The Appellants questioned imposition of monetary penalty on grounds that it is not on 'relevant turn over' as is mandated by the Supreme Court in *Excel Crop Care Limited* v. *Competition Commission.*[16] however, NCLAT concluded that the relevant turnover has been rightly determined. In this way the appeal has been disposed of by NCLAT.

VII COMBINATION BETWEEN AIR INDIA AND VISTARA

In April 2023 four parties gave combination notice under section 6 (2) of the Competition Act for combination between Air India and Vistara. The parties were Tata Sons Private Limited(TSPL), Singapore Airlines Limited (SAL), Air India Limited (AIL) and Tata SIA Limited (Vistara). Subsequently, Talace Private Limited (Talace) also joined as a party. An implementation agreement and a Shareholders Agreement was signed between the parties on 29th Noember 2022. After removing the defects of the notice as required by the CCI, the notice was resubmitted by the parties on 11th and 29th May 2023.

TSPL (Tata Sons Pvt. Limited) is a holding company. It is present in many sectors. In aviation sector it owns Air India including Air India Express Ltd (AIXL) and AIX Connect Pvt. Ltd. Along with SAI, it has share in Vistara. It also has shares in Taj Satsand Taj Charter Service.Air India, acentral government enterprise, after being sold, is a wholly owned enterprise of TSPL. AISATS and ACPL are subsidiaries of TSPL.Vistara is a joint venture between TSPL and SIA. Talace, is a wholly owned subsidiary of TSPL; it has 100% equity of AI. SIA is the parent company of SIA business in India, and has shares in Vistara. Temasek Holdings Prt. Ltd. controls 55% shares of SIA, but being a listed company operates independently.

Proposed combination involves four steps as follows: -

i. Reorganisation of shares of Air India
ii. Merger of Talace with Air India and the remaining identity shall be Air India
iii. Merger of Air India with Vistara and the surviving entity will be Air India
iv. Air India will pay fully paid up shares to SAI

All these steps are interdependent. Parties have also mentioned in the notice their overlapping activities. Merger will involve overlapping between Vistara, SAI, and AIL and its associated companies. They also delineated RM. In aviation industry, most important factor is delineating RM on the basis of origin and destination pair (O and D) factor, though there is also difference between full airlines and low cost airlines (LCC).

There is horizontal overlap between Air India and its subsidiaries on the one hand and Vistara on the other (a) in passenger traffic; (b) cargo traffic (c) charter

16 (2019) 8 SCC 47.

flights, (d) ground handling service and(e) in-flight catering. RM has to be delineated with reference to O and D and FSC and LCC. Business class long and short haul may be other considerations. In the network driven industry, aviation consolidation is very important. However, one O and D is not substitutable by the other.

Regarding overlapping between AIL and Vistara, 48 domestic routes overlap, and 24 international. There are many cargo service providers in the market. In ground handling segment apart from AISATS, a TSPL venture, there are many competent and strong competitors. In in-flight service segment, TAJSATS, a TSPL venture provides in flight catering service. In-flight catering is up stream market, whereas air transport of passengers is downstream market. RGM, on the basis of food preference is India.

Preliminary observations of the Commission: - The civil aviation industry is oligopolistic. There are few players, tough competition and high operational cost. In international aviation, every nation allots seats and slots to airlines.

The Commission notes that it is a combination between two big airlines. Which is likely to lead to concentration at some O and D routes and near monopoly at others, and very high on Singapore route. In 22 out of 48 domestic routes merged entity would have 40% share and in terms of number of seats more than 40% on 15 routes. In 6 domestic routes50% share and between 40% to % 50% on 15. However, the parties have shown the presence of one strong airline that can counter the adverse effect to the market. Both Vistara and Air India are FSC but Indigo is LCC. However, they can be substitutable. But not in business class. Similar position exists on some international routes where the merged entity would have a high presence.

The Commission concludes that after merger only about 30% of the market would remain contestable. In an oligopolistic market such a situation would cause AAEC. It may limit not only seats, number of flights but may increase prices as well. The likely effectmay also be concentration in cargo and charter flights. However, ground handling and in-flight catering are not likely to be affected as these facilities can be arranged from alternative sources.In substance the assessment of the Commission was that on certain domestic and international O&D routes there may be AAEC.The Commission issued a show cause notice under section 29 of the Act.In response to show cause notice (SCN) the parties gave a 'voluntarycommitment' with certain clarifications, issued subsequently.

According to the parties the merged entity would be better able to compete in domestic and international sector, because of economy of scales. But according to the author of this Survey, the two larger entities, the market leaders (Air India and Indigo), would present a daunting challenge before the smaller airlines. Would the smaller entities successfully be able to withstand the challenge? There may be a possibility that, at a later stage, in the market, there would remain only two entities, a duopoly. Would there be fair competition between two entities of the duopoly? In recent past a number of airlines have exited the market. It has been admitted by the Commission that in spite of the fact India is a growing aviation market, only one airline has been able to grow consistently. The merged entity would be better able to rationalize domestic flights with better connectivity and directly connect non-metro station to international destinations from its Delhi and Mumbai hubs. Even if the merged entity becomes bigger, Indigo is an effective competitor.It was submitted that due to economy of scales, better network connection and frequency of flights, Indigo's cost per seat per kilometre is significantly lower than other LCC airlines. Because of economy of scales merged entity is likely to compete more efficiently in domestic market, but will pose a challenge to other LCC.

Slots:- availability of slots at the airports is a constraint to new airlines. The constraint will ease with the upcoming airports at Jewer and Navi Mumbai. However, slots allotted to an airline are not transferable in India. The Commission emphasises that there are many competitors in the market, though they may be smaller ones. The objection is that high concentration on certain O and D routes will cause AAEC. The parties objected to the static HHI to assess concentration, as it is not suitable for a dynamic industry like aviation. (HH Index magnifies the distance between the competitors). Only 7 out of 36 routes have a concentration of more that 50%. In Europe it was held that even 70% concentration does not deter competition.HHI should also be not used as the industry is dynamic because of :-

i. Introduction of new technology and new customer demand
ii. Creation of additional capacity
iii. Seasonal change in allotted slots
iv. Recovery after COVID-19
v. Fluctuating ticket and operational cost

There are 18 domestic O and D routes where bulk of the passengers travel, and in all these routes there is competition between 5-6 carriers. In Etihad/Jet case it was observed that if there is even one competitor there can be check on the behaviour of the merged entity.

Additionally, the merged entity has made a voluntary commitment that they will maintain capacity of seats and flights on certain overlapping O and D routes. Similar commitments are given on international O and D routes.

Business class-the Commission was of the view that business class constitutes less 5% of the over all seats and number of passengers. Increasingly the ratio of business class is reducing: Indian aviation is economy driven sector. Therefore, the Commission does not prefer to treat business class as a separate market. In terms of add on services, FSC offered a number of add on services to their passengers, such as in-flight meals, priority check in, extra baggage allowance. These facilities are now offered by LCC on payment. Therefore, FSC and LCC may be treated as substitutable. Charter services are different from scheduled airlines in as much as the scheduled airlines have to operate according to published schedule. Scheduled airlines are competitors of charter flights but charter flights do not compete with scheduled flights, because schedule flights may also operate as charter flights. As the traffic in charter flights is miniscule, and the share of Air India and Vistara is not more than 2% of over all revenue, parties prefer this charter sector as non-competitive.

In the matter of cargo, the parties suggested that RGM should be India not O and D as the customer is interested in timely delivery ant not in the route taken. However, the parties are only marginal players in cargo service. The Commission seems to agree with the submission of the Parties. In international scheduled flights, the Commission delineated 15 O and D pairs. The parties submit that in 7 pairs their share is less than 40% and in the rest, there are many strong foreign and Indian competitors. However, the parties have made a voluntary commitment to maintain seat/capacity on eight international routes.

Observation and analysis by the Commission: - in the analysis it seems the Commission almost agreed with the voluntary commitments of the parties. In case of business class segment, the commission was satisfied that no separate assessment is needed, as it is a miniscule segment and add-on facilities can be provided by LCC for a price. In charter segment there is no AAEC as the merged entity's share is very small and most of the business in charter segment is generated through government auction, in which every airline takes part. In the domestic air cargo segment, there is no AAEC as the merged entity does not have a dedicated space for cargo. Only left-over space is used for cargo: its share is small. As AIL has already completed the acquisition ofAXPL, no assessment of AAEC is needed. Discontinuation of flights on certain routes is an independent decision after COVID-19 and rationalisation was done because of commercial reasons. During FY21 and FY22, both Vistara and AIL had ad hoc flight arrangements which had to be rationalised.

The Commission identified 36 O and D routes on which in terms of number of passengers, the merged entity would have high concentration: on 7 of these routes,the level of concentration would be more than 50%. The parties have given voluntary commitment to maintain the status quo. Of the 9 routes where concentration is 40%, the parties stands first only on one route. However, on several of these routesAkasa has entered, in addition to the presence of Indigo and Spice Jet.

The Commission also observed that mitigating circumstances against concentration are, presence of strong competitor, existence of an indirect flight, possibility of expansion of airport (Combination Registration Number 2021/12/883).

Out of the 15 overlapping routes, in some of them merged entity's share is less than 40% and in some less than 30% with strong competitors in both. On Mumbai-San Francisco and Bangalore-San-Francisco routes Emirates are a strong competitor. Competitors on international routes are strong enough to negate the possibility of AAEC.

Entry Barriers: - entry barriers in airline industry are in the form of capital cost, regulatory approvals and slots at the airport. Despite these obstacles, working on negative capital (sale of tickets is working capital), a number of airlines have enteredinto the market, giving competition to existing players. The parties propose to enlarge domestic and international, short and long-haul network, adding new O and D destinations and thereby improve contestability. The merged entity will be better able to create more hub and spoke (H and S) alternatives, thus non-time sensitive consumers may treat indirect fights as substitute of direct flights. H and S arrangement may result in cost cutting as lesser destination in H and S arrangement may be served with lesser cost, using smaller aircrafts.

Supply side substitutability: - one of the important factors of contestability is allocation for O and D pairs. Contestability will not be adversely affected by the merged entity as the market leader (Indigo) will have more slots on these O and D destinations. Possibility of unilateral price increase is negligible as the merged entity will have to compete with LCC. The apprehension that two airlines after merger may reduce capacity. The Commission thinks that capacity commitment is a sufficient safeguard.

Voluntary commitments: - the parties in voluntary commitment emphasised that presence of the strong competitors negates the possibility of AAEC. On the 7 overlapping routes the seat capacity would not be reduced for a period of 4 years. Similar commitment to maintain capacity was given for international overlapping routes for four years. On Singapore route similar commitment for 4 years was given by AIL and SAI. Supervision on commitment will be done by an independent Auditor approved by the Commission.

On the basis of the voluntary commitments, the Commission decided not to proceed further with the investigation and has come to the conclusion that the proposed combination is not likely to cause AAEC. However, in case the parties do not fulfil their voluntary commitment, it shall be deemed as if there is AAEC.

VIII CONCLUSION

There is a continuous trend in the interpretation of the Competition law to tilt it in favour of the capital and the market rather than the consumers. In earlier orders of the Commission there was a tendency not to construe anti-competitive agreement without a proof of meeting of mind. However, when it was realised that such a proof of this magnitude was difficult to find, circumstantial proof was found to be sufficient. Later the Supreme Court converted the legislative mandate of imposing fine on turn over into relevant turn over on grounds that the object is to restraint the entrepreneurs and not to destroy them. Thereafter, the forums resorted to ultra-specialisation of the market, imposing regulatory function of different segments of the market to different regulators, resulting in confused and prolonged litigation to the advantage of big brothers of the market.