6

COMPETITION LAW

*Vinod Dixit**

I INTRODUCTION

IN THE CONTEXT of protection policies adopted by European and United States Courts to shield their home-grown markets, whether heavy-handed enforcement, divorced from market effects, should be discouraged or not, if India has to capture opportunities in the global world. Should we adopt 'Effect-based standards' to meet the global challenge? But the bigger question is 'effect' on whom? Is it on the opposite parties or the big corporations, or on smaller enterprises, start-ups or the competitors of the opposite parties? Obviously, on the competitors, competition and the market and ultimately on the consumers, even if also on other stakeholders. In the absence of fair competition, it is the smaller enterprise which suffers the most. Successively, over the years, the control of the fair competition enforcement forums hasbecome less stringent. Insistent on strict proof for construing 'agreement' and penalty on 'relevant' turnover rather than on 'turnover' made things easier for the big enterprise, and the latest is 'effect-based standards.'

II TRENDS

This year, there are two new changes in the interpretation of the competition law are observed. It is insisted upon that in construing 'abuse', not only dominance in the relevant market and abusive behaviour have to be proved, but also a significant effect on the market as well. In the '*Travel Agents Association of Indi*av. *CCI'*[1]case, an established doctrine, a partial reservation of the market in favour of government travel agents is not a monopoly, was applied. It is significant that in this case, the government was an 'end consumer' and not an intermediary consumer in construing the concept of 'consumer's choice.' In *JCB* v. *CCI,*[2]it was held that a mediation- settlement between litigating parties affecting rights in personam trumps competition concerns which effect rights in rem.

III COMPETITION CONCERNS AND REVERSE PAYMENT AGREEMENT SETTLEMENT

JCB India v. *Competition Commission of India*[3] was decided by the High Court of Delhi, by the Bench of Pratibha M. Singh and Amit Sharma, JJ. (Per

* Former Professor of Law, University Delhi.

1 C.A. no. 4550-51 of 1989.

2 WP (c) 2244/2014 and CM appeal 31397/2021.

3 WP (c) 2244/2014 and CM appeal 31397/2021.

Justice Pratibha Singh). This is a case on face-off between competition concerns, on the one hand and a mediation settlement between the IP and the OP, on the other. That is, if there is a settlement between the OP and IP, affecting rights in personam, the settlement trumps rights in rem under competition law.

There are two cross writ petitions between JCB India Limited (JCB) and JC Bamford Excavators Limited (BMPL), and both are manufacturers of 'backhoe loaders,' JCB of 3DXBHL and BMPL of 'Bull Smart.' The genesis of the dispute between the parties is that JCB seeks an injunction against BMPL restraining infringement of copyright, piracy of registered design and passing off, etc.,to restrain BMPL.A suit, CS, (OS) 2934/2011, was filed in the original side of the High Court of Delhi, and an ex parte injunction was granted in favour of JCB. Subsequent progress of the case was a labyrinth of cases in different jurisdictions, ultimately culminating in the present review before a DV of the high court.

In December 2013, BMPL filed an information under section 19 of the Competition Act, 2002 alleging abuse of dominant position. According to the IP, it was a case of 'predatory litigation'; the purpose of JCB was to prevent the timely launching of 'Bull Smart' byBMPL. Bad faith litigation is abuse of dominance, JCB, being the dominant producer of 'backhoe loaders,' the Commission, finding prima facie case referred the case for investigation by the DG under section 26 (1). JCB, opposed the reference to DG on ground that till the High Court disposes of the case on original side, there cannot be investigation by the DG. JCB filed a writ petition before the DV of the high court for quashing the order of the Commission to DGfor investigation. The high court granted temporary injunction to the extent that the DG can call any person of JCB only with the permission of the high court and cannot pass any final order. The high court in 2014 stayed the proceeding before the CCI and ordered the Commission to put all material, collected during search in the premises of JCB, as ordered by a JMM Patiala House Court, be placed in a sealed cover.

On December 9, 2019, the Supreme Court, in a case titled *Bull Machines Pvt. Limited* v. *JCB limited*[4] referred the matter between the two parties to mediation. The dispute between the parties resolved before the Mediation Centre of the High Court of Delhi on August 26, 2021. The Supreme Court ordered the consequential disposal of civil suit relating to 'allegation of 'piracy of design of 'backhoe loaders' as well other related cases. The parties submitted that the writ petitions relating to information with Commission be disposed of at earliest.

The high court took on record the mediation settlement. Both the parties JCB and BMPL jointly prayed for termination of proceedings before the DG under section 26 (1). The important issue to be decided by the DV of the high court was whether in view of the settlement between JCB and BMPL, the investigation ordered by the Commission should be quashed or not? Or would the settlement make the order under section 26(1) infructuous? JCB and BMPL argued for quashing

4 SLP no. 7518/7519/2018.

of the order under section 26 and the Commission for continuation of the investigation. The court ultimately decided to quash the order for investigation. Following are the arguments for quashing the Competition Act proceedings:

i. Citing *Telefonaktiebolaget LM Ericsson* v. *Competition Commission*[5], decided by the High Court of Delhi, which held that once a settlement is arrived at, the proceeding under Competition Act cannot continue, it was prayed that proceedings under section 26 cannot continue.

ii. As the information filed by the IP, BMPL to the Commission did not involve any public issue (in rem remedy) the settlement between two parties would make Competition remedy infructuous. However, in our opinion, the high court, which is neither a trial forum nor an appellate one cannot decide whether the information involve a public issue. 'whether the information involve public issue is a question of merit and cannot be decided by the High Court under article 226.

iii. Jurisdiction of the Commission was invoked, on grounds of 'predatory litigation', based ona design infringement suit, filed in the original side of the high court. If the suit is withdrawn, the legal basis of information wouldhave ceased to exist.

iv. The question that litigation is a sham arises only atthe final stage of the litigation. At the initial stage, it cannot be presumed that the litigation is a sham. That would amount to prejudicing the case in the superior court. For us, there is not much substance in the argument. No one is saying that there is sham litigation. That the litigation is a sham is only a tentative (prima facie) argument, a necessary condition to begin an investigation. At the final stage, it may or may not be a sham litigation. This can be decided only by the Commission and not the High Court. If at this stage the high court prevents the Commission from determining the validity of 'predatory litigation', the high court is preventing the Commission from performing its duty.

The following are the arguments advanced by the Commission:

i. In the Ericsson case, *Telefonaktiebolaget LM Ericsson* v. *Competition Commission,*[6] the High Court, after fully analysing the face-off between Patent Act and Competition Act, concluded that the Commission did not have jurisdiction of subject matter. In this case, the impact of the settlement on competition has not been analysed. It is not known whether JCB is dominant, and if so, has it abused its dominance. Whether the terms of the agreement amount to an anti-competitive agreement or are abusive has not been analysed. Therefore, the reverse paymentsettlement cannot trump the jurisdiction of the Commission and may involve anti-competitive concerns.

5 2023 DHC 4783 DB.

6 2023 DHC 4783 DB.

ii. Through a reverse payment settlement, a patentee may seek to perpetuate a monopoly, stifling competition.

iii. The scope of a settlement is different from that of the Competition Act. The former gives an *in personam* remedy, whereas the latter gives an in rem. Therefore, it is not 'either settlement or competition remedy'.

iv. The jurisdiction of CCI is not limited to the facts stated in the information. New facts may be discovered in the investigation by the DG and may lead to the existence or absence of competition concerns.

v. The origin of the dispute begins with the filing of a suit by JCB alleging infringement of design against BMPL. BMPL informed the Commission of predatory litigation, which, under the circumstances, was an abuse of dominance.

When the parties were persuaded to arrive at a settlement, the DV of the high court decided not to adjudicate the issue raised in the petitions. Consequently, all proceedings relating to the dispute between the parties were disposed of. The parties also proposed to dispose of the proceedings before the DG. However, the Commission contested the closure on grounds advocated by the Commission (discussed supra).

The high court was not inclined to agree with the contention of the Commission. The court decided in favour of the closure of proceedings before the DG, as settlement must prevail over the competition concerns because settlement brings finality to litigation. However, they dismissed the argument that a settlement, if it is a reverse payment agreement, may cause competition concerns, on debatable ground that the suite before the original side of the high court, unless decided to be vexatious by the high court, the basis of information to the Commission collapses: The high court has not yet decided the suit to be vexatious. We contend that the high court can decide the suit to be vexatious, but it cannot decide whether the behaviour is abusive.

The high court preferred to give priority to the settlement on two grounds. Mediation is a new and important form of access to justice, and it is a means to bring finality to litigation. The argument of the Commission that it dispenses a public remedy rather than a private one was not appreciated because the core of information regarding sham litigation was based on a suit by JCB on the original side of the high court, and the high court has not yet decided the litigation to be vexatious. At the end, the high court quashed the order of the Competition Commission of India (CCI) under Section 26 (1) of the Competition Act.

IV HIGH COURT OF GAUHATI: PRIMA FACIE CASE: NO EVIDENCE

Star Cement Limited v. *Competition Commission of India,*[7] is a review petition before the High Court of Gauhati for quashing the order of the Commission under section26 (1) on the ground that the case was referred to the DG without there being a prima facie case and imposition of a fine of Rs. five lakhs by the Commission

7 WP (C) 6343/2018 and WP (C) 6362/2018, decided in 2024.

under section 43, that is, non-compliance of the order of the DG is not imposable as the information without a prima facie case should have been closed.

On 8.2.16, R.2, the Assam Real Estate Association informed the Commission that certain cement manufacturing companies in Assam have formed a cartel to manipulate the price of cement and are abusing their dominance. The State of Assam was also informed in reference to the same allegation. The Commission, finding a *prima facie* case, referred the matter for investigation to the DG under section 26 (1). The ADG (Additional Director General) issued a notice under section36 (2), and on the non-compliance, a fine of Rs. five lakhs were imposed. After committing the matter for investigation, the writ petitions were filed before the High Court of Gauhati.

The petitioner contended that the Commission, after inquiry, can refer the case to the DG for investigation only if there is *prima facie* evidence that there is an agreement between persons or associations or persons and associations and the agreement is anti-competitive. The petitioner contended there was no evidence of any agreement between the cement manufacturing companies and hence no anti-competitive agreement. As there was no prima facie case, referring the case for investigation to the DG was without jurisdiction. Hence, the order of the Commission should be set aside, and the imposition of the fine should be quashed.On the other hand, R1, R2 and R4 contended that the writs are not maintainable. The function of the Commission at the initial stage is to form an opinion that there is a prima facie case and send the case for investigation to the DG. The whole exercise is administrative as the opinion of the DG is not binding, and the parties will get enough opportunity to rebut the findings of the DG. And if not satisfied with the order of the Commission, can appeal to the NCLAT. The respondents rely on *CCI* v. *State of Mizoram.*[8] The respondents further submitted, citing *CCI* v. *Grasim Industries*[9], that the investigation at the threshold must not be stopped or interfered with. Relying on *CCI* v. *Bharti Airtel*[10],the respondents further submitted that the order being administrative must not be interfered with.It was also submitted that the issues raised are on merit; therefore, the high court does not have jurisdiction under article 226.

The high court began with the observation that the Commission sent the matter for investigation as the respondent no.2 alleged cartelisation, which allegation was reinforced by the Government of Assam, on ground that parties to the alleged cartel not only inflated the price of cement in Assam, but werealso selling cement in neighbouring states at a lower price. Thereupon, the matter was referred to the DG for investigation. Then the court discussed the history and provisions of the Competition Act. The high court, for analysing the case, first referred the letter of information submitted to the CCI. Information was given by an association of real estate builders and the government of Assam. The substance

8 (2002) 7 SCC 73.

9 (2019) SCC OnLine Del 10017.

10 AIR 2019 SC 113.

of the allegation was that afterthe government's concessions,such as income tax exemption, excise exemption, transport subsidy, power subsidy, *etc.*, which considerably reduce the cost of production, and therefore, benefit accrued from the government must be transferred to the consumers. As a matter of fact, the subsidy amounted to Rs. 150/- per bag of cement, yet the companies in neighbouring states were selling cement in Assam at a marginally higher cost.

i. These companies were selling cement in other states at a lower price than in Assam.

ii. The respondent no. 2 was willing to give more relevant information.

iii. Though there was no increase in the cost of input, and no supply demand mismatch, Dalmia brand, Star brand and Topcem brand increased their price by Rs. 10/- per bag to Rs. 40/- on the same date, that is on 16.08.2016.However, they sold the same brands in Siliguri (West Bengal) at much lower prices. Though these three brands increased the price by different amounts, the date of the increase was the same. Though the price of these three brands was increased in Assam, in Siliguri, they remained almost the same in August 2016. Immediately thereafter, three Assam companies increased the price by about Rs. 40/-.

iv. These three brands are Maga brands and are given several incentives (the result is that the cost of production is reduced). These brands sold their products at a lower price in Siliguri (West Bengal) than in Gauhati.

The data shown above clearly shows, according to the author of this survey, that there was cartelisation for many reasons. Though they were given many incentives, their prices were not lower than the price of cement they sold outside Assam. Though the amount of increase was not uniform, the date of increase was the same. The increase was not the same because these brands had different goodwill in the market. And it is strange that they were able to sell the cement at a lower price in West Bengal. However, strangely, the high court reached a different conclusion.

It was argued by the respondents that the conditions were favourable to cement companies in Assam. (i) Raw material was locally available, market is in proximity to the manufacturing companies, (ii) No change in demand supply ratio. (iii)The cost of labour is static. (iv) Last but not least, a large number of incentives and tax concessions considerably reduced the cost of production. Then, it is incomprehensible as to why the people of Assam are paying a price higher than what is paid by the consumers in the neighbouring states. Under these circumstances, according to the author of this survey, the only plausible explanation for the behaviour of the cement companies is that they are in a concerted action, stifling the market.

It was further argued by the respondents that the cement companies, to inflate prices, are under-utilising their installed capacity in violation of the provisions of section 3 (3) (b). Convinced by this information and arguments, the

Commission sent the matter to the DG for investigation.The argument in support of the allegation of cartelisation is summarised as follows:

i. Simultaneous raising of prices by Assam cement companies, even though they are given a large number of incentives.

ii. However, they did not raise the prices in the neighbouring state.

iii. Other popular brands located in other parts of the country are selling cement in Assam at marginally higher prices in north east states, though they incur higher transport costs.

iv. All the OPs, according to the Commission, simultaneously raised prices on 17.08.2016, but again they all reduced the prices on August 22, 2016. There seems to be a concerted movement.

v. The Commission observed that in August, 2016 price of cement in the north east was higher than in other states.

The high court observes that at the time of exercising powers under section 26 (1), the Commission is required to apply its mind if there is a *prima facie* case. Though the Commission is not required to conduct adetailed inquiry, it is not required to exercise the power without applying its mind; the Commission must record reasons on the basis of records as to how there is a *prima facie* case. If there is a *prima facie* case, only then would the Commission have jurisdiction. This is a jurisdictional question; it can be decided by the high court under Article 226.

The court under writ jurisdiction cannot decide the case on merit, but it can intervene if the case is sent for investigation without a prima facie case. The writ court can intervene on jurisdictional matter. The question to be decided by the court is whether the information discloses any 'agreement' or 'understanding' among the cement manufacturing companies of the petitioners. According to the Commission, the substance of information is:

i. The cement manufacturing companies of Assam simultaneously increased the price of cement in Assam.

ii. Without there being any escalation in input cost or any mismatch between supply and demand price was increased simultaneously.

iii. These companies also reduced the amount of discount, with the result that the price further escalated.

iv. On 16/17 August 2016, three cement companies increased the price per bag to Rs. 375/, 375/- and Rs. 385/-

v. Market study shows the cement of three companies was sold in West Bengal at a much lower price despite an increase in transport cost.

vi. All these facts point to cartelisation.

The high court refused to constitute a *prima facie* case of anti-competitive agreement (ACA) because three companies increased the price by different amounts. That the incentive given to cement companies has not been passed to

consumers is not a ground for ACA. Because of these reasons, the high court concluded, there is no reason to construethe ACA. The author of this survey finds it difficult to agree with the high court. Simply because the increased price is not identical, it does not mean there cannot be any ACA. Three companies have different brand goodwillvalues. When they decide to stifle the market, they decide to increase the prices for common profit, but not by the same amount. The suspicion that there is ACA is reinforced as, at a longer distance in Siliguri, the same cement is sold at a lower price. Not passing the incentive to the consumers in Assam, but partially passing it to consumers in West Bengal, further reinforces the doubt that there is ACA. There is nothing wrong with not passing the incentive to the consumers under the Act, but doing it in a concerted manner is. How are they able to pass the incentive even if partially in Siliguri? Had the investigation been allowed to take place, full investigation have clarified everything?

V ANTI-COMPETITIVE AGREEMENT: COVER BIDS AND NIL RELEVANT TURN-OVER

Delicacy Continental Pvt. Limited v. *Competition Commission*[11], is a case on cover bidding/bid rigging and collusive bidding and on explanation of 'relevant turnover' when it is nil relating to an enterprise which is a member of a cartel but has not been successful in winning any tender. The appellant was found guilty of violation of the provisions of sections 3 (3) (c) and 3 (3) (d) read with section 3 (1) of the Competition Act. Certain officers were also found guilty under section 48 by the Commission. The NCLAT agreed with the findings and order of the Commission but reduced the amount of penalty imposed under section 48.

The Commission received general information that a cartel is engaging in bid rigging in the tender invited by the agriculture department of Uttar Pradesh for soil sample testing. The complaint pertains to two e-tenders for the Moradabad and Bareilly divisions. There were many red flags in the documents submitted by these parties, but tender inviting authorities preferred to ignore them. However, Yash Solutions emerged as the winner in these tenders in the year 2018-19. In the year 2017-18,Yash Solutions was a successful bidder in the Moradabad and Bareilly regions, and Austere Solutions in Jhansi, Saharanpur and Meerut regions. Allegation was that the parties were guilty of cover bidding, bid rigging and collusive bidding.

Finding a *prima facie* case of violation of section 3 (3) of the Act, the Commission sent the case for investigation to the DG. The DG was authorised to include any other entity if it is found to be involved. The DG in due course submitted the report to the Commission. The findings were as follows:

i. The investigation covered nine tenders. For year 2017 and 2018 for Moradabad, Meerut and Bareilly divisions, the year 2017 for Jhansi division, and 2018 for Saharanpur and Aligarh divisions were covered.

11 2024 SCC OnLine NCLAT 682.

ii. For the year 2017-18, the contract for soil testing was given to Yash Solutions at the L1 position and to Austere Systems for the Meerut and Jhansi divisions

iii. The report concluded that Yash Solutions, Siddhi Vinayak, Satish Kumar, Sarasvati Sales and Austere Systems (the OPs), as well as Delicacy Continental, Fimo Info Solutions and Chaitanya Business Outsourcing, have participated in cartelisation in 2017and 2018.

iv. Austere Systems, in association with Yash Solutions, Delicacy Continental, Fimo Info Solutions and Toyfort rigged bidding and emerged L1, in Meerut and Jhansi divisions in 2017 and in Saharanpur and Meerut divisions in 2018.

v. Delicacy Continental, a rice dealer, without having any experience of soil testing work, gave a cover bid to Austere System and consequently, the latter emerged at the L1 position in Saharanpur and Meerut divisions.

vi. The aforementioned enterprises have violated the provisions of sections 3 (3) (c) and 3 (3)(d). The officers namely, Naresh Kumar Sharma of Sarasvati Sales, Satish Kumar Agrawal of M/s Satish Kumar and defacto owner of Siddhi Vinayak, Pravin Kumar Agrawal of Yash Solutions, Nitish Agrawal of Chaitanya Business Outsourcing, Ankur Kumar of Delicacy Continental, Jai Kumar Gupta of Fimo Info Solutions, Suresh Kumar Gupta of Toyfort and Rahul GunjanTeni of Austere Systems are in contravention of section 48.

The commission framed two issues to decide the appeal:

i. Whether the opposite parties directly or indirectly manipulated/rigged the tenders for the years 2017 and 2018 in contravention of sections 3(3)(c) and 3 (3) (d)?

ii. If the OPs are in contravention of section 3(3), who are the officers in contravention of the provisions of section 48?

The DG, on the basis of the evidence, concluded that Austere Systems, Fimo Info Solutions and Toyfort have inter relationship and before tendering, they had business relations. Austere Systems had subcontracted soil testing work to Delicacy Continental without prior approval of the Department of Agriculture. The latter two parties, Austere Systems and Delicacy Continental, stand in contravention of the Act. However, both Austere Systems and Delicacy Continental asserted that they did not fix prices or in any way manipulate tenders; simply because they have business relations before tendering does not amount to manipulating. However, the Commission noted that Delicacy Continental, before tendering, had no experience of soil testing, and it was engaged in the business of rice. In the name of soil testing, Delicacy Continental was given a certificate of experience by Austere Systems, and in cross-examination, its officers stated that the entire work of soil testing was done under the supervision of Austere Systems. Delicacy Continental could not convincinglyexplain why its lab operated from the premises

of the office of the Assistant Director of Soil Testing in Saharanpur. In addition to this, two fabricated MOUs of previous business relations were made just before tendering to prove business relations. It was admitted by Delicacy Continental that in 2018, in the Saharanpur division, soil was tested in consultation with Austere Systems. In view of this analysis, the Commission concluded that both Austere Systems and Delicacy Continental colluded to rig the tender for the Saharanpur and Meerut divisions. As there were only two bidders, Austere Systems and Yash Solutions, for the Meerut and Saharanpur divisions, Delicacy Continental provided a cover bid (to make three bidders). There was also a geographical division between them so as not bid in each other's territory.

It was also found by the Commission, based on examination of witnesses, that Austere Systems sub-contracted soil testing work to Delicacy Continental and fabricated an MOU to prove pre-existing business relations. Finally, the Commission concluded that the OPs contravened the provisions of sections 3 (3) (c) and 3 (3) (d) and the officers of the OPs section 48. Therefore, the Commission decided to impose penalties under section 27 (b). However, penalties can be imposed only on 'relevant' turnover in accordance with the law laid down in *Excel Crop Limited* v. *CCI*.[12] Relevant turnover is the turnover with reference to which the party is in contravention of the provisions of the Act. However, *in Re Alleged Anti-Competitive Conduct by Bidders in Supplying and Installation of Signage*,[13] the point emphasised is that if a member of a cartel is not allotted any position in a tender, his relevant turnover would be nil, should his penalty be zero, though his role is confined only to provide cover bid. According to this order penalty will be imposed on his total turnover. The Commission imposed a penalty at the rate 5% of the average annual relevant turnover, which, in the case of non-allottees, is the total turnover of the last preceding three years, and at 5% in the case of officers of OPs. However, the officers who are the sole proprietors (individual business) of the enterprise are not awarded any separate penalty, as a penalty is imposed on their individual business.

Analysis by NCLAT: There are two players in this case, namely Austere Systems and Delicacy Continental. The deposition of the officers of the latter enterprise clearly shows that they were unaware of the terms of tender, the names of other bidders and how the testing of soil is done. They were also not aware of the certificate of work experience issued to them by Austere Systems. They were also unaware of the MOU between the two enterprises showing business relations between them (allegation was MOU was fabricated). The officers were aware of the lab established by Delicacy Continental in Saharanpur, but never visited the site (actually, the soil testing was done by Austere Systems and not by Delicacy Continental). The officers of Austere Systems admitted before the DG that they subcontractedthe work of soil testing to Delicacy Continental for financial reasons, though actually they did not have any work experience and because the work was

12 (2017) 8 SCC 47.

13 *Suo Moto* case no. 2 of 2020 by CCI.

being done under the supervision of Austere Systems. Delicacy Continental was only an investor and did not have any soil testing experience. Though Delicacy Continental did not have any experience with soil testing, the work experience certificate was falsely given.

NCLAT agreed with the Commission that both the enterprises have contravened the provisions of sections 3 (3) (c) and 3 (3) (d), and the officershave contravened the provisions of section 48. However, NCLAT reduced the rate of penalty from 5% to 3%.

VI NCLAT: VERTICAL ANTI-COMPETITIVE AGREEMENT- RES JUDICATA

Travel Agents Association v. *Competition Commission of India*[14], decided in 2024, is a case on vertical anti-competitive agreement, but the appeal was dismissed on ground that in 2010,on the same issue between the same parties, the case had already been closed by the Commission under section 26 (2) of the Act. The present appeal is by the appellant against the closure of the case under section 26 (2) by the Commission against the Department of Expenditure, Government of India, (R2), Balmer Lawrie (R3) and Ashok Travels (R4). The information to the Commission was given for the contravention of the provisions of section 3 (4).

The appellant, Travel Agents Association, is an incorporated company representing the interests of travel agents. R2, Department of Expenditure is a department of the Finance Ministry, R3, Balmer Lawrie is a government company under the Ministry of Petroleum and R4, Ashoka Travels is a division of India Tourism Development Corporation under the Government of India. R3 and R4 are exclusive travel agents for government and statutory corporations, as approved by R2.

The appellant informed the Commission that the exclusionary market practices adopted by R2 in giving travel agency rights through R3 and R4 had limited the market for the last 14 years, stifling the competition.The allegation is that in March 2006, an office memorandum (OM 1) was issued directing government officers to utilise the services of either R3 or R4 for booking airline tickets. OM1 resulted in limiting the market and stifling the competition. The Appellant,earlier,in 2010, informed the Commission of an anti-competitive agreement (horizontal), but it was closed under section 26 (2) because R2 isnot an enterprise and R 2, being a consumer, has a consumer's choice. Again, in July 2019, R2 issued an OM 2 directing the employees to avail of the services only of R3 or R 4. The appellant alleges that after the lapse of a considerable period, the dynamics of the market have changed, and it is necessary to look into the matter again. The appellant alleged the contravention of Section 3 (4) of the Act. Subsequent OMs reiterated the substance of OM 1.However, the Commission closed the case under section 26 (2). Hence, the present appeal.

R3 in reply stated that the appellant has alleged that the information and appeal are not maintainable as the appellant has not come with clean hands, he is

14 Competition Appeal No. 20/2020; Manu/NL/ 0746/2024.

bringing the same issue again, which was finally decided in 2010, it is barred by res judicata and is no longer res integra. It is the same subject matter between the same parties. The present case is an abuse of the process of law.

Analysis by NCLAT: In analysing the appeal, the tribunal stated that it is undisputed that the matter was closed in 2010 by the Commission. The appellant alleged contravention of sections 3 (1) and 3 (4) as both provide for 'anti-competitive agreement but agreement can be only among 'enterprises.' When an entity's activity relates to production, storage, supply, distribution, acquisition, control of articles or goods or provision of services, it can be called an enterprise. R 2 does not participate in any of these activities. In 2010, on the information of the appellant, the Commission had already decided that neither R 2 is an enterprise nor OM1 is an agreement between R2, R3 and R 4. The main objective of OM 1 is to ensure that civil servants can purchase tickets of any airline, but only through R3 and R4, if they want to avail the services of a travel agent. In addition to it, the government, being a consumer, has a consumer's choice. The Department of Expenditure is not engaged in any activity relating to production, etc. or provision of services; therefore, it is not an enterprise. There is no evidence of the application of section 4 either. Therefore, the Commission closed the case in 2010, and Competition Appellate Tribunal (CompAT) dismissed the appeal in 2012.

In the present case, the Commission referred to the case of 2010, in which all these issues were invoked and attained finality. The substantive matters in 2010 were abuse of dominant position (no dominance), section 3 (no anti-competitive agreement) and consumer's choice. In 2010, the Commission closed the matter under section 26 (2), and on appeal, the CompAT confirmed the order of the Commission. The Commission, in 2010, decided that: -

i. R2 is not an enterprise. DOE (Department of Expenditure) oversees the financial management of the Government of India. It is concerned with making policy and is not engaged in production, etc.

ii. The second issue is whether there is any vertical anti-competitive agreement in contravention of section 3 (4)? Are DOE (R2). R3 and R4 stand in any vertical relation in the production chain? The answer is 'no,' as DOE does not have production relations with R3 and R4.

iii. Regarding the provisions of section3 (1), there is no agreement between R2, R3 and R4 as envisaged by section 3 (1).

iv. In *Pharmaceuticals* v. *Punjab Drug Manufacturers Association*[15], it was held by the Supreme Court that reserving a portion of the market in favour of a certain manufacturer does not amount to creating a monopoly within the meaning of Article 19 of the Constitution. Thus, a partial restriction on the business of a travel agent does not amount to the creation of a monopoly in violation of Article 19 of the Constitution.

15 C.A. No. 4550-51 of 1989.

The NCLAT concludes, after discussing the order of the Commission,that the present litigation is between the same parties and the same set of facts as was the case in 2010. In view of the principle of res judicata and no one can be vexed twice for the same facts, between the same parties, in accordance with the maxim *nemo debetlisvexari pro una et eadem causa*. Appeal is dismissed and a cost of Rs. five lakhs imposed on the appellant to be deposited in the Prime Minister's relief fund.

VII ABUSE OF DOMINANT POSITION

Prachi Kohli (IP1), Internet Freedom Foundation (IP2) v. *WhatsApp LCC (OP1),Meta Platforms Inc.(OP2)*[16] is a case on abuse of dominant position. Based on newspaper reports, a *suo motu* case was registered, and later two similar cases of information were clubbed with it. The first IP, Prachi Kohli, did not pursue the case, but the second IP, Internet Freedom Foundation (IFF), did. The opposite parties were WhatsApp LCC, OP1 and Facebook Inc., OP2, the sole owner of OP1, later on substituted by Meta Platforms Inc.Since early January, the users of WhatsApp Messenger started receiving notices from the OPs.

According to August 25, 2016 and December 19. In 2021, policies the users have option to share their data with Facebook or not but later this option was withdrawn. Based on the available material, the Commission formed a prima facie view that the provisions of section 4 have been violated, and the matter was sent to the DG for investigation. The OPs filed a writ petition before a single Bench of the High Court of Delhi against the order of the Commission for investigation, which was dismissed. Letter Patent appeal to a Divisional Bench and a special leave to appeal met the same fate.

Investigation by the DG: the DG delineated two RMs, namely,

i. Market of over-the-top (OTT) messaging apps through smartphones in India

ii. Market for online display advertisements in India

It was also revealed that Meta operating through WhatsApp and Messenger is way ahead of others in OTT messaging Apps in India. Because of financial resources, the number of active users, absence of countervailing power in the competitors, network effect and strong lock-in effect make Meta dominant in the first RM. Meta has also abused the dominant position and has violated the provisions of sections 4 (2) (a) (i), 4 (2) (c) and 4 (2) (e) of the Act.

Analysis by the Commission: the Commission stated that with all its subsidiary companies, Meta is operating as a group (within the meaning of section 5). The Commission allowed certain data of the OPs to be protected by confidentiality. IFF is a registered trust to protect the interests of internet users. Meta was established in 2004, but its name was changed in 2016 from Facebook Inc. to Meta Platform Inc. Primary products offered by Meta include Facebook, Instagram, WhatsApp, Messenger, *etc.,* Meta is also in the advertising business,

16 Case No. 1 of 2021 decided in 2024.

especially in display advertising, which is more revenue-generating than search advertising. WhatsApp is an encrypted messenger, suitable for group chats, text and video messages. WhatsApp also caters to the needs of the business community. It also has WhatsApp Business and WhatsApp Business API. The former was launched in 2018 and is easy to download to facilitate small business ownersin contacting customers. WhatsApp API is a paid service to enable the business community to programmatically contact customers. Both have to abide by Meta's confidentiality policy of sharing the data. WhatsApp is also a UPI-based payment service, WhatsApp Pay. Facebook, a social network subsidiary of Meta, does display advertisements of Meta.

Preliminary objections by Meta: Meta has preliminary objections about the report of the DG. (1) The DG has examined issues other than competition concerns. They should not have examined whether the data obtained in the 2021 update was obtained with proper consent or not, or whether it was excessive or not, as these issues are regulated by the Digital Personal Protection Act, 2023 and Information Technology Act, 2000 and not by the Competition Act 2002. Therefore, WhatsApp asserted that the report of the DG is pre-emptive.

These 'data-driven' enterprises can provide service at no cost in consideration of users' data. With the data, they are able to improve the quality of their service and products. However, control of data gives these enterprises competitive strength and market power. Possession of data gives these enterprises the capacity to create entry barriers and the ability to stifle competition. The Commission, under a legal duty to ensure fair competition, must prevent misuse of data. Data protection and privacy law focus on transparency and protection of individual rights, whereas competition law focuses on the prevention of the use of data to gain and abuse market power. Therefore, data analysis is necessary for the DG. Data protection laws apply to all data-driven enterprises, but the commission analyses data only in cases of dominant enterprises' abusive behaviour. In the present matter, when the OPs went to the High Court of Delhi against an investigation by the DG, the high court observed, in [LPA 264/2021], that a parallel inquiry by two authorities in their respective fields is not uncommon.

Facebook submitted that, though it has been added in the memorandum of parties, there is no specific allegation against it. Though it is a subsidiary of the Meta group of companies, its personality is independent of WhatsApp. WhatsApp's management is independent of that of Facebook. The Commission agreed to delete the name of Facebook from the array of parties.

Relevant Market and dominance: Relevant Market consists of Relevant Product Market and Relevant Geographic market defined respectively in sections 2 (t), 2(s) and 19(6) and 19(7) of the Act. The DG has defined two RMs:

i. Market for OTT messagingapps through smartphones in India

ii. Market for display advertising in India

The DG found Meta dominant in the first RM.OTT services (in this case, WhatsApp) need a mobile smartphone number and an internet connection to be

operated by third parties without the need for traditional mobile data. The DG observed that the OTT messaging service has unique features, such as sending multimedia content, sending and receiving messages, voice and video mails and group chats, *etc.* Because of these unique features, the OTT messaging service is a distinct market not substitutable by any other. As some messaging Apps are available only on i-phones they are not part of the 'market for OTT messaging Apps through smartphones in India,'as not dependent on mobile data, it is a cost-effective and distinct market.

On the other hand, WhatsApp contested this definition and the uniqueness of the RM of OTT messaging Apps. The competitive market is a market for 'users' attention', which includes social networking, video messaging, etc. These services are substitutable from the point of view of the user; they form part of the same relevant market. The market is 'consumer communication services' in the context of multi-homing practices of consumers. RGM is not India, but the whole world, as digital operators act globally and WhatsApp products are made for a universal audience.

The Commission rejected the submission of the OPs. The RM suggested by the OPs is not acceptable to the Commission. From the perspective of the users,they have different needs which can be satisfied by different products. Though all products compete for users' attention, it does not mean that they are substitutable. Users' attention does not constitute a market, but the products do. During the time of outage of a particular product, users may shift to another; however, that does not mean that they are substitutable. 'market for users' attention' is a marker akin to saying all things a user can purchase are substitutable. Users' attention in itself does not constitute a market; goods and services which are interchangeable do. It is true that in an advertising market,advertisers want users' attention, but users' demand is different. The users' demand is communication or content sharing. The competition law assesses the demand from both sides (advertiser and the user), the demand side and the supply side. The demand from these sides is not substitutable. During the outage periods, the users may shift to another product, but it is transitory; for substitutability, the shift must be non-transitory.

The cost of OTT messaging Apps is either zero or negligible in comparison to the cost of traditional SMS/MMS services. Therefore, traditional messaging devices and OTT messaging devices are not substitutable. E-mail and OTT are also not substitutable; the former is formal, the latter is not. There is a difference between WhatsApp and OTT proprietary Apps like iPhone's messaging service. According to OPs Apps like X (Twitter) should not be excluded. But according to the Commission, they are social networking and microblogging sites and not comparable to WhatsApp. WhatsApp is also different, as unlike so many other Apps it cannot be used on desktops. Instant messaging feature on smartphones and the absence of a strong competitor have made it possible for WhatsApp to penetrate the Indian market. Though WhatsApp has video features, it does not have advanced facilities similar to those of Cisco Webex and Zoom, Google Meet and Microsoft Teams. As the conditions of competition are homogeneous in India,

India is RGM and not the world.Ultimately, it is based onthe comprehensive functionalities possessed by OTT messaging Apps that make them a distinct market.

WhatsApp, among the OTT messaging Apps is way ahead of its competitors. Added strength to it is given by my Meta, which controls Instagram, WhatsApp,Facebook and Messenger and the vast resources of Meta. WhatsApp's dominance may also be assessed on the basis of its daily active users (DAU) and monthly active users (MAU), which give it an edge over others. Direct network effect and strong lock-in effect, absence of countervailing buying power and control over a huge database acting as entry barriers to competitors. The DG found WhatsApp dominant in the RM of OTT messaging Apps through smartphones in India. The DG assessed WhatsApp's dominance on the basis of several factors. Though share is not a conclusive consideration, it is an important factor to assess the importance of WhatsApp. An increase in the number of users create indirect network effect, attracting more content developers and advertisers. Direct network effect is dependent on an increase in the number of users. DAU indicates Apps popularity, and MAU the size of users. On both counts of DAU and MAU, WhatsApp is far ahead of others. The OPs stated that in the context of developing technology, no App can be designated as dominant. Many Apps including Signal and Telegram, have increased their user base rapidly. The Commission asserted that the fast-developing strength of these Apps has been measured on the basis of downloads. A user may download an App, but may not use it. The correct measure to assess the strength is DAU and MAU. Another measure to assess strength is the ratio between DAU (popularity) and MAU (size of users), which is very high in the case of WhatsApp. According to Statista Global Consumer Survey, out of the 10 most popular messenger Apps WhatsApp and Facebook Messenger are number 1 and 2.

Network effect: In the OTT messenger market, direct and indirect network effect plays an important role in dominance. With the increase in the number of users, Messenger becomes more effective and competitors less effective. Users prefer an App which is mostly used by their acquaintances. Despite the 2021 update, the user base of WhatsApp not only did not suffer any decline but kept on increasing due to the network effect.Apart from the direct network effect, there is also an indirect effect. The combined effect of Instagram, Facebook and Messenger further consolidates the position of WhatsApp. The indirect network attracts more third-party developers, content creators and advertisers. Business features on WhatsApp are due to the network effect, as Facebook will attract more advertisers,since it has the advantage of data collection by WhatsApp.

The OPs have submitted that the assessment of the DG of dominance is wrong, as there are hardly any entry barriers. Entry into the market does not require any big capital. The fact is that the strong entry barrier is not capital, but a strong network effect.The most important entry barrier is users' dependence on WhatsApp due to the scale of users. Other competitors do not have any countervailing power.

Regarding multi-homing, the Commission thought that the impact of multi-homing on dominance depends on its extent and efficacy. However, multi-homing does not mean that the competitor of WhatsApp is being used as much as WhatsApp. (Telegram, a rival of WhatsApp, has MAU far less than that of WhatsApp.) Multi-homing does not appear to be efficacious, as users prefer to stay with the OTT messenger App on which their contacts are.

Size and economic power: in terms of size, Meta's assets in 2021 were US 165,987 million dollars and revenue US 46753 million dollars. All the competitors of Meta are behind it and are weak in comparison to Meta.

Vertical integration: -vertical integration with Instagram, Facebook and Messenger, with whom it shares its data, enables it to have economies of scale.

The OPs have further submitted that the DG has ignored the fact that dominance in zero price markets has to be assessed through traditional methods. The test to determine dominance has not been clarified by the DG. The Commission asserted that the DG has correctly used the test given in sections 4 and 19 to determine dominance. Additionally, the App is not zero-priced; the users have to give consideration in the form of supplying personal data.

Market for online display advertising in India: Meta generates revenue throughdisplay advertising. There are two markets for advertising, online and offline. The latter is search, brand awareness, and advertising, whereas the former is to create a direct consumer response. Online and offline advertising are not substitutable. Google and Bing generally provide search advertisements, whereas Facebook, Instagram and YouTube provide display. Regulatory conditions in India are uniform throughout India, but different from those in other countries. Therefore, RGM is India.

Meta submits that DG is wrong in concluding that search and display markets are not substitutable. From the demand side, they are. Submissions to the DG from third parties show they consider them to be substitutable.Further, it was submitted by the OPs that digital markets are global. WhatsApp is global. The Commission rejected both the objections against the delineation of RM by the DG. The Commission declared that offline advertisement such as those in newspapers and billboards is search advertisements as it leads to brand popularity, whereas digital ads,precise,data-driven, and addressed to the targeted consumers leads to sales. This was supported by a number of expert digital corporations and foreign forums, such as the European and Australian Commissions. Because of different regulatory conditions, RGM is a nation-state and in this case, India.The Commission concludes that there are two RMs

i. Market for OTT messaging Apps through smartphones in India

ii. Market for online display advertisement in India

Meta Group is dominant in the first market. The next question,after determining dominance, is whether there is abuse or not. The subject matter of investigation was the privacy policy of Meta Group, data collection and sharing of data with other group companies.

'Take-it-or-leave-it' 2021 privacy policy update by Meta through WhatsApp: - *In prima facie* order, the Commission concluded that the 2021 update required the users to accept or reject the privacy policy in its entirety, including sharing of data with other companies of Meta based on 'take-it-or-leave-it'. The users were not given any choice either to object or reject the sharing of data in terms of the 2021 update, which, according to the Commission, was unfair. The DG, in a detailed analysis, observed that unlike the 2016 and 2019 policies, the 2021 update did not give the users the option to reject the sharing of data within 30 days.The 2021 policy was take-it-or-leave-it.Without exercising 'take-it-or-leave-it,' the service was not available to the users of WhatsApp. In the exercise of the option, only the 'accept' button was visible to the users. Due to the network effect and high technological cost of switching over to other messaging apps, users effectively had no option but to reject the terms of sharing data with other Meta companies. The users were forced to accept the 2021 update, and the OPs have violated the provisions of section 4 (2) (a) (i). The option available to users not willing to accept the new policy was to delete their account. The date for acceptance of the new terms was extended later, but they did not have the option to not accept the terms and continue with the account. However, on May 7, 21, the users were informed that their accounts would not be closed even if they did not accept the new terms. However, there was nothing in the 2021 update that the opt-outs of 2016 would be honoured. The 2021 update mandated all users, including opt-outs of the 2016 policy, to accept the new policy. According to the Commission 2021 update,it imposed' a new condition of sharing of data with all the Meta companies. It is the imposition of unfair terms. With a massive user base, network effect users found it difficult to switch over to another messenger App; therefore, Meta can impose new conditions. The data sharing policy of 2021 is an anti-competitive policy and against the welfare of the users. On January 5, 21, the new policy was imposed on the users, which did not give any option to the users to reject the scheme. But only on May 7, 2021, Meta announced that those who did not accept the new policy, their account shall not be closed. During the period January 5, 21 to May 7, 2021, many users accepted the policy as they did not have the option to reject it: the acceptance was out of coercion.

WhatsApp submitted that only an insignificant number of users have accepted the 2021 update among registered users. However, when the Commission used DAU (active users), the number of users who had accepted the 2021 update was not found to be insignificant. Between January 5, 2021 and May 7, 2021, the period of 'take-it-or-leave-it', a significant number of active users accepted the scheme. WhatsApp also avers that switching to other messaging Apps isa zero-cost exercise; the users were not locked in. However, the Commission said that the cost was in terms of losing contact with their acquaintances. The Commission concludes that the 'take-it-or-leave-it' policy effectively was a coercive practice forcing the users to accept the policy against their wishes.

Data collection and sharing of data: It is alleged that, in consideration of the messaging service provided to the users, the broad collection of data under

the scheme of 2021 sharing with sister companies is unfair. Many other messaging services do not collect excessive data. WhatsApp collects information of mobile number, profile picture, log information such as users' activity, time, frequency and duration of activity, cookies such as users' behaviour, choices and language, and information about the user from third parties. Meta also launched WhatsApp Business and WhatsApp Business API in January 2018, and in February 2018, WhatsApp Pay. Certain basic data is necessary to provide a messaging service. Collection and sharing of cookies data and data through third parties, as well as from business WhatsApp services, is excessive. WhatsApp business API requires opening a Facebook account as well, whichresults in excessive data in the form of cookies. The excessive data collection violates the provisions of section 4(2) (a) (i).The 2021 update collects excessive information, not necessary to provide the messaging service. Information given to users about the collection of data is vague and ambiguous. Such vague, ambiguous and unfair 2021 policies were forced on the users who had no option but to accept these terms. There is marked asymmetry of information and market power between the users and Meta and other digital messengers. The DG has categorically asserted that business and third-party data are not needed to improve messenger service; it is excessive.

IFF, the IP, has submitted that though Meta claims that all the collected information is not shared by it with other Meta companies, no restriction is visible in the policy statement regarding restrictions on the use of data. Aggregation of data collected from various sources is used for interconnected products and services, to gain market power, and to create entry barriers. User data from one activity may be used for another activity within the Meta ecosystem. A significant number of users have accepted the 2021 privacy policy before Meta announced that the accounts of those who have not accepted the 21' policy would not be deleted. But the 2021 policy has not been withdrawn. They are being encouraged to accept it if they subscribe WhatsApp Business API. This continuous intrusion into users' autonomy and privacy is a matter of concern. This has been recognised by various competition forums in Europe and Australia. In conclusion, the Commission thinksthe 2021 policy of 'take-it-or-leave-it' is an unfair imposition on the privacy and autonomy of users.

The ability to collect a large volume of personal data from various sources gives Meta a competitive advantage over other competitors which they cannot replicate. This ability gives leverage to Meta to enter into other markets, such as display advertising; thus, Meta acquires exclusionary power in the market. The DG has concluded that the capacity to collect huge data and share it with other sister companies creates entry barriers for other competitors [violation of section 4(2) (c)] as well as gives Meta leverage to enter into other markets [violation of section 4 (2) (e)]. Third parties such as Snap, Affle, Ally Digital, Collectcent, Google and Inuxu, in various degrees, have averred that digital Apps acquire leverage in the market through the personal data of the users.Aggregation of Facebook data with that of WhatsApp gives it leverage in other markets as well as exclusionary power to dominate the display advertisement market. Openx Technologies, Magnite

Inc., and Smile Internet Technologies have averred that the biggest entry barrier for competitors is the scale of personal data. Tyro, SVG Media, Twitter, Xandr Inc., Xapads, Taboola, LinkedIn, Amazon Services Pvt. Ltd. and many others have averred that aggregation of data gives leverage and creates entry barriers.Before the SEBI, Meta has submitted that if they are not allowed to collect and share data, they would not be able to provide services efficiently.

The purpose of an advertisement is to create awareness and to convert the awareness into a purchase or download. The search and display advertisements, as discussed earlier, are not substitutable. Display ads are addressed to the targeted audience. With a large amount of personal aggregated data of users, Meta can target subjects more precisely. The larger the amount of data, the more preciselysubjects can be targeted. Those who have a WhatsApp business API accountare likely to have a WhatsApp Business account(WABA), a Facebook account, Meta Business Suite and Meta Business Manager. This aggregation provides more precision. Many of these accounts require the users to contractually share the data with sister companies of Meta. These specialised business Apps require the users to give much additional information. Mandatory requirement, under the policy of the 2021 update, for users of WhatsApp to share data with other companies of Meta, enhancing the efficiency of service, according to Meta, but alsoadding to the ability of Meta to target advertisements more precisely.

Meta in display advertisement: Meta display advertisement through Facebook and Instagram. Its presence is measured with reference to impressions, which means how many times an ad is served to the user. Meta holds a leading position compared to its competitors. Meta's position is unassailable in the digital display market. Meta asserts that in the digital market share of competitors in the digital market is increasing; the Commission counters thatthe number of impressions of competitors is still insignificant in comparison to that of Meta. Even in terms of revenue,Meta is far ahead of its competitors.

Command over data is the key to successfully targeting the customer in the display market. The more data an enterprise has better the chances to target the consumer more precisely. The 2021 privacy policy would give Meta a competitive advantage over its competitors. It is extremely difficult to replicate the position of Meta by its competitors. With WhatsApp Business, the position of Meta is further reinforced. After the introduction of the 2016 privacy policy, the number of advertisers rapidly increased. The Commission concludes that the sharing of data by a dominant enterprise with group companies, with users having no choice but to accept, causes harm to smaller competitors.

The strength of Meta, according to the Commission, lies in its ability to aggregate data from different sources; this is unmatched by its rivals. This ability creates entry barriers to competitors: it also gives an unfair advantage to Meta. The massive strength of Meta creates a 'lock-in effect' for the users, with no option to exit WhatsApp. Switching to competitors for the users is enormous as almost all/most of acquaintances are on WhatsApp. The strength of Meta forces

advertisers to access Meta display advertisements rather than those of the competitors of Meta. Competition law requires the dominant enterprise to be more responsible and fairto its competitors. In conclusion, the practice of sharing data with sister companies gives a competitive advantage in leveraging into the display advertisement market and creating entry barriers to competitors in the display advertisement market. Meta has violated the provisions of sections 4 (2) (a) (i) and 4 (2) (c).

Anti-Competitive Effect: Relying on the NCLAT order in *Google LCC* v. *Competition Commission of India*[17] and the observation ofthe Court of Justice of the EU in *Konkurrensverket* v. *Telia Sonera Sverige AB*[18] (TeliaSonera case) that, in acase of abuse, it is necessary to show its anti-competitive effect. The Commission observes that it is sufficient to show a likely anti-competitive effect on competition. It is not necessary to show the effect which has already materialised. The commission shall take into consideration acts which took place outside India but which have an anti-competitive 'effect' in India (section 32). The Commission is also under a duty to take into consideration the anti-competitive acts which are 'about to be committed' (section 33). The 2021 privacy policy mandated that users accept the policy; they did not have any option to reject it. The imposition disregarded legitimate expectations of the users as to how the data shall be used.

Order: The Commission delineate two RMs, namely, the market of messenger apps through smartphones in India and the market for online display advertisement in India. The Commission holds Meta to be dominant in the first RM. Meta has violated section 4 of the Act. (1) Meta imposed acceptance of the 2021 privacy policy on users of WhatsApp in violation of section 4(2)(a) (i); (2) By sharing the data among meta companies Meta created entry barriers for the competitors and thus denied access to advertise the second RM; (3) Meta leveraged its dominant position in the first market to protect its position in the second RM, in violation of the provisions of section 4(2)(e). The Commission, in accordance with the provisions of section 27, provided the following remedies:

i. Passed a cease and desist order asking Meta to stop anti-competitive practices immediately.

ii. Implement the following directions:

WhatsApp will not share its data with other sister companies for five years. After the expiry of five years, (i) sharing of user data collected on WhatsApp with other Meta companies or Meta company products for purposes other than providing WhatsApp services shall not be made a condition for users to access WhatsApp services in India. (ii) In respect of sharing of WhatsApp user data for purposes other than for providing WhatsApp Services, all users in India (including users who have accepted 2021 update) will be provided with: a) the choice to manage such data sharing by way of an opt-out option prominently through an in-appnotification; andb) the option to review and modify their choice with respect

17 Competition Appeal No.1/2023.

18 (2011) ECR I-527.

to such sharing of data through a prominent tab in settings of WhatsApp application. All future policy updates shall also comply with these requirements. These orders are to be implemented within 3 months.

Penalties: Control over data by digital enterprises has assumed a huge proportion as it facilitates the enterprise to impose unfair conditions, create entry barriers and use leverage to enter into another market. The Competition Amendment Act 2023 added an explanation to section 27 to the effect that 'turnover' means global turnover derived from all the products and services. It was averred by the OPs that the substantive law of penalties applies prospectively and not retrospectively. However, the Commission did not agree as explanations are held, in many cases, as clarificatory; they neither narrow down nor expand the scope of the original text.

Quantum of turn over is to be determined according to the provisions of section 27, Competition Commission (Determination of turnover and income) regulations 2024 [Turnover Regulations] and Competition Commission of India (Determination of Monetary penalty) guidelines, 2024 [Penalty Guidelines]after determination of global penalty, 30% of it would be taken for imposition of penalty, with adjustment for mitigating and aggravating circumstances. As the relevant turnover means turnover of products or services directly connected to a violation of the Act. According to the Commission, contrary to the claim of the OPs penalty cannot be imposed on the messaging service of WhatsApp alone, but also onthe display advertisement of Meta. However, accepting the submission of the OPs, the Commission agreed that relevant turnover is the turnover of WhatsApp from the messaging service in India and that of Meta from display advertising inIndia. The Commission decided to impose a penalty at the rate 4% of the average turnover of the last preceding 3 years, which comes to Rs.——(undisclosed amount). The amount was reduced by Rs. ————(undisclosed amount). A penalty of Rs. 213.14 crore was imposed.

VIII INTEGRITY OF SPORTS

TT Friendly Super League Association v. *the Suburban Table Tennis Association, OP1,the Maharashtra Table Tennis Association, OP2, the Table Tennis Federation of India, OP3, Gujrat State Table Tennis Association, OP4.*[19] The Informant alleged violation of sections 3 and 4 of the Act. Originally, OP1-OP3 were the OPs, but during the course of the investigation, OP4 also joined as an OP. The informant is an NGO formed to promote table tennis. OP1-OP3 are respectively the district, state and India associations, officially recognised by the government of India as such. OP3 is authorised to select platters to represent India in international games, Olympic Games, and Commonwealth Games and is recognised by the International Federation of Table Tennis. Instead of appreciating the effort of the IP, OP1 issued a notice on the WhatsApp group informing the players, veterans, coaches, etc., not to participate in any event organised by any unsanctioned organisation; failing to do so would result in debarring them to

19 Case No. 19/2021, decided in 2024.

participate in any event organised by the District Association. As a result, many players refrained from joining the IP. The IP also contends that many rules made by the OP3 are anti-competitive since they prohibit players' coaches, etc., from participating in any event organised by the IP.

Finding a *prima facie* case, the matter was given to the DG for investigation. The DG formulated two issues, namely (i) what is the RM? 'Market for organising table tennis league/events/tournaments in India' was the RM, according to the DG. (ii) Are the OPs dominant in the RM? Was the second issue. OP3, according to the DG, had a unique position of dominance because this position was given to it by Government of India, the International TT Federation (ITTF) and the Indian Olympic Association (IOA), and also due to its pyramidical organisation, represented by OP1,OP2 and OP3.

(iii) Issue 3: whether OPs have abused their dominant position in violation of sections 4 (2) (a) (i), 4 (2) (b) (i) and 4 (2) (c).DG found OPs in violation of sections 4 (2) (a) (i), 4 (2) (b) (i), as it was necessary for IP to get affiliated to OP1, to organise a tournament in the district. This is restrictive. Not only could the OP2 prohibit the organisation of a tournament, but it couldalso actagainst a player who participates in the tournament organised by an unauthorised entity. This violates the provisions of section 4 (2) (c). The Memorandum of Association (MOA) is anti-competitive inasmuch as OP1 prohibits participation in any tournament organised by any unauthorised entity. According to DG clauses (a), (b) and (c) of section 4 (2) are violated.

(iv) Issue (4): - Whether OPs were involved in violation of section 3 (3)? As the TT organisation stands in a pyramidical structure, according to the DG, there cannot be any horizontal anti-competitive agreement between OP1 or OP2 and the clubs because they are in different RMs. However, the author of this survey differs from the opinion of the DG and the Commission. There is a horizontal anti-competitive agreement between the clubs under OP1 as they all obey the orders of OP1 [agreement by invitation of OP1 by all clubs], which results inlimiting the supply of players and organisation of the game, [section 3 (3) (b)].

Vertical anti-competitive agreement: the DG found the existence of a vertical anti-competitive agreement in violation of section 3 (4), OPs created barriers to new entrants, drove out existing competitors and foreclosed competition.

Table Tennis Federation of India (TTFI), OP3, made a written submission that on September 10, 2024, it convened a special meeting, and passed a special resolution to the effect that the following clauses have been modified as stated:

i. To prohibit the holding of unauthorised tournaments
ii. To act against any affiliated association which did any act detrimental to the promotion of the game as it thinks fit. 'As it thinks fit' has been amended to 'according to rules'.
iii. 'To take any action against any affiliated association which acted to the detriment of the game as it thinks fit' has been amended. 'As it thinks fit has been amended according to rules.

iv. After amendment,penalties, the impositionof which was discretionary, after amendment,it became‘according to rules.’

v. The rule that a tournament can be organised only by a district association is omitted.

vi. The rule that prohibited players from participating in an unauthorised tournament has been omitted.

OP3 has also submitted that DG has wrongly concluded that it is an enterprise, its financial position is so weak that no penalty should be imposed, it is cooperating with the investigation, and it has amended the offending rules. Similarly, OP4submitted that it has also amended the rules on similar lines.

Analysis: after taking into consideration all the material, the Commission proceeded to analyse the case. The preliminary objection was that the associations are not ‘enterprises’ as they are regulatory bodies and are not engaged in ‘economic’ activities. The Commission did not agree. Even non-commercial economic activities are included in the definition. The definition of ‘service’ (section 2 (u)) includes every kind of service. Organising tournaments, awarding prizes, giving advertisement and generating revenue are economic activities. The Commission has jurisdiction. In a number of cases of sports, the Commission held the sports bodies to be ‘enterprise’.

The Commission then proceeded to delineate RMs. The Commission agreed with the definition of RMs as defined by the DG:

i. The market for organising Table Tennis tournaments/events/leagues in India

ii. Market for the provision of services by players of Table Tennis leagues/ events/tournaments in India.

Factors responsible for the dominance of OPs in both the RMs are similar. Regarding dominance, the Commission notes that OPs are district, state and national level organisations, regulating the game of Table Tennis in India. OPs are recognised by the government of India as a body regulating the sport of Table Tennis; they select teams to represent India in International matches. Every player who wants to distinguish himself must join the OPs’ organisation. The regulatory power and monopoly in regulating the TT sport in India give the OPs dominance.

In Issue 5: whether they (OPs) have abused their dominance? WhatsApp advisory of October 30, 2020 warned coaches, players, etc., notto join any unauthorised event; if they do so, it will result in suspension and non-entry in OPs’ events. After posting this message on WhatsApp, OPs persisted in exclusionary practices for a long time. The DG found that the rules of the OPs reinforced the exclusionary practice. Anybody interested in conducting any TT event must get affiliated with OP1 after depositing the prescribed fee. Referees, etc., for these events shall be appointed by OPs, and the expenses shall be borne by the organisers.

The Commission concluded that the rules relating to affiliation with OP1, appointment of referees, etc., by OP1 are necessary to maintain the integrity of the sport, and there is no violation of the provisions of sections 4(2)(a)(i) and 4(2)(b)(i).

However, clauses 22(d) and 22(e) empowering the managing committee to prohibit unauthorised events, violates section 4(2)(c). Clause 22(e) empowers the managing committee to prohibit any act of a member /player etc., which in the opinion of the committee is detrimental to the game. The Commission does not find this clause to be restrictive as it is necessary to do so to maintain integrity of the sport. The author of this Survey disagrees. It is restrictive as the discretion given to the Committee is too wide and unchanneled, without any guideline.The author of this Survey finds it strange that in a number of casesthe Commission insists that in order to construe abuse, under section 4, it is necessary to do 'effect' analysis (the preceding WhatsApp case), then why is it not necessary to do the 'effect' analysis, when an enterprise is absolved of abusive behaviour? In many cases (specially *DhanrajPilley*[20] and *Surinder Singh Barmi* v. *BCCI*[21]cases of 2011), the consequence has been nipping in the bud the attempt of competitive organisations to organise a parallel tournament.

Conduct of OP3 (TTFI Table Tennis Federation of India): Certain clauses under MOA (Memorandum of Association) are anti-competitive. The clause which prohibits the organisation of a tournament/event without authorisation and in which registered players cannot participate is anti-competitive. The Commission observes that the regulator has dual capacity, that of rule making and protector of integrity of sport and a conflicting capacity of protector of its commercial interest of revenue generation. According to the Commission these clausesare inherently restrictive and violative of the provisions of sections 4 (2) (a) (i), 4 (2) (b) (i) and 4 (2) (c).

Public notice on WhatsApp of June 21, 2022: according to the Commission, the notice was not merely clarificatory that GSL was an unauthorised event, but also warned the players not to participate in it. Therefore, sections 4 (2) (a) (i), 4 (2) (b) (i) and 4 (2) (c) are violated.

Anti-competitive practices of OP4: Gujarat State Table Tennis Association (GSTTA) bye-laws (clause 25) prohibit players, referees, etc.,from participating in unauthorised events. Hence, OP4 violates provisions of section 4. OP4 submits that clause 25 has been modelled on the analogy of the rules of TTFI, but no action has been taken against anyone. However, the Commission concludes that the bye-law is inherently restrictive. The restrictive character is reinforced by a circular of GSTTA, declaring that Gujrat State Masters Game is unauthorised. The Commission concludes that OP4 has violated the provisions of sections 4(2) (a) (i), 4 (2) (b) (i) and 4 (2) (c). However, the Commission notes that clause 25 has since been withdrawn.

20 Case No. 73/ 2011.

21 Case No. 61 of 2010.

Have OPs contravened the provisions of section 3 (4)?According to the DG, there is a vertical relation between OP1, OP2 and OP3, the district, the State and the Indian Regulators. OP1 and TT clubs, academiesstand in a pyramidal relation. The WhatsApp circular of 30.10.2020 created entry barriers for the organisers of the unauthorised events. The Commission disagrees with the view that the relationship is not vertical between clubs/academies and OP1but rather that of competitors. However, the Commission agrees with the DG on the vertical relationship of players with OP1; the former are the suppliers of service and the latter the receiver of service. As the WhatsApp circular creates entry barriers, the provisions of section 3 (4) clauses (c) and (d) are applicable. AAEC is also appreciable in terms of section 19 (3).

Order: - the Commission holds that OPs have contravened the provisions of sections 4 (2) (a) (i), 4 (2) (b), 4 (2) (c), 3 (4) (c) (d). A cease and desist order was passed with the direction not to repeat the prohibited practices again. Monetary penalty was not imposed as the OPs, during the investigation, have withdrawn the offending circulars and amended their bye-laws.

IX ANTI-COMPETITIVE AGREEMENTS

India Glycoles Limited v. *Indian Sugar Mills Association*[22] [case no. 21/213, decided in 2024,is a case on an anti-competitive agreement, which was found to be proved by the DG, but the Commission thought otherwise and concluded that there is no plausible reason to construe an anti-competitive agreement. The difference of opinion is caused by a difference in appreciating evidence. It is a well-known fact that it is very difficult to get evidence of an anti-competitive agreement. In most of the cases, the evidence is indirect, suggestive and circumstantial. If there areseveral circumstantial evidences, which independently may be considered coincidental, may cumulatively be considered credible evidence as there cannot be so many coincidences.The CCI examined the evidence independently, but the DG cumulatively. The approach of the DG is pro-competition, and that of the CCI is pro-enterprise.

In the captioned matters, in 2013, separate information, under Section 19(1)(a) of the Competition Act, 2002 (the 'Act'), were filed by India Glycols Ltd., Ester India Chemicals Ltd., Jubilant Life Sciences Ltd., AB Sugars Ltd., Wave Distilleries and Breweries Ltd. and Lords Distillery Ltd., against (i) three sugar mills' associations *namely* Indian Sugar Mills Association ('ISMA'), National Federation of Co-operative Sugar Factories ('NFCSF') and Ethanol Manufacturers Association ('EMA'), (ii) three Public Sector Undertakings ('PSUs') Oil Marketing Companies ('OMCs') *namely* Indian Oil Corporation Ltd. ('IOCL'), Bharat Petroleum Corporation Ltd. ('BPCL') and Hindustan Petroleum Corporation Ltd. ('HPCL'), and (iii) 14 sugar mills of the State of Uttar Pradesh. Under a government notification of January 2, 2013, OMCs (Oil Marketing Companies) were mandated to mix 5% of ethanol with patrol. In response, three OMCs issued a joint tender to procure ethanol.

22 Case No.21 of 2013 decided in 2024.

OMCs alleged that the sugar mills and their associations have fixed prices and resorted to bid rigging in violation of section 3 (3). Separate information was filed against three OMCs, as in issuing a joint tender, they violated the provisions of section 3 (3).

The CCI in a preliminary inquiry, under section 26 (1), found that there was a prima facie case in all three information. The DG reported that: -

i. The OMCs did not violate provisions of section 3
ii. ISMA (Indian Sugar Mills Association) has violated the provisions of Section 3
iii. EMA (Ethanol Manufacturers Association) and its President are guilty under sections 3 and 48
iv. Allegation of anti-competitive practice could not be proved against NFCSF (National Federation of Cooperative Sugar Factories)
v. 13 sugar Mills out of 14, except Kisan Sahkari Chini Mills, of U.P., as well as 6 other sugar mills of other states, are guilty of violating section 3
vi. 12 officers of OPs were also found guilty under section 48.

The Commission ordered the DG to cause further investigation of the depots of OMCs in Maharashtra. In the supplementary report under section 26 (6), the DG found that the depots in Maharashtra have not violated section 3 in the bidding process. After considering the reports of DG, replies of the parties on both the reports and other material, the Commission passed the final order. Against the final report, several OPs filed appeal to NCLAT, which quashed the order and required the CCI to give a fresh hearing and then pass a final order. On 18.09. 2018, the Commission passed final order again, finding 20 OPs guilty of violating section 3 of the Act (ISMA, EMA and 12 sugar Mills of UP, 4 sugar mills of Gujrat and 2 of Andhra Pradesh). Against this final order several OPs appealed to NCLAT, which again quashed the order and required a fresh hearing and final order. On 3rd 18th and 19th April 2024 fresh hearing was given, thereafter the Commission proceeded to analyse the case.

Analysis: - In this case, the purpose of the analysis by the Commission was to find the contravention of the Act by 6IPs and 25 OPs. After ordering mandatory mixing of 5% of ethanol with petrol, the central government decided that the price of ethanol shall be negotiated between OMCs and ethanol suppliers. On January 2, 2013, a joint tender was issued by the OMCs for different depots of OMCs in India. The main conditions of the tender were as follows, Bidders will bid location-wise. BP (basic price) is the ex-factory price, and NDC (net delivered cost) is BP+ taxes and fees + transport cost. The bidder giving the lowest NDC will be L1,who will be allowed the quantity it can supply,and the rest to L 2, who will be asked to match L1's price. If any quantity remains unfulfilled, it will go to L3 and so on.

The allegations in the various information were as follows: -

i. Joint tender by OMCs was an anti-competitive agreement as they were different legal persons, though owned by the same legal person (the central government)

ii. The bidders of sugar mills of UP resorted to cartelisation in bidding in response to the tender

iii. The industry associations ISMA, EMA and NFSCF facilitated the cartelisation.

The DG relied on the following evidence in the investigation against ISMA and sugar mills of UP:

i. The meeting of ISMA was rescheduled to December 6, 12 and December 27, 2012 from 27.12.12, when the annual general meeting was already fixed for 17.12.12. In the special meeting, bidding sugar mills and OP13, a non-member of ISMA, were present.

ii. Previously fixed BP of ethanol was Rs. 27/litre (l), whereas prevailing price of similar products, such as rectified spirit and special denatured spirit wasRs. 26-28/l, and that of neutral spirit was Rs. 31/l.

iii. CDRs of G.K. Thakur, director ISMA, establish that during December 2012 and January 2013, the representatives of sugar mills of UP, the bidders for the tender, were in regular communication with Shree Thakur.

iv. Mobile conversation between representatives of OP11 and OP12 during the tendering period

v. Without any plausible reason, GK Thakur attended a pre-bid meeting organised by OMCs

vi. E-mail account of GK Thakur reveals that there was an exchange of production and sale data among sugar mills

vii. Quoting of NDC and BP, though the cost of production was not the same, in a narrow range by many bidders of UP.

viii. Quoting of identical data by some bidders of UP for the same location, though the distance to be covered was not the same.

ix. Private players at the L1 position, unlike OP15, a state cooperative, did not lower the NDC during negotiations, as the benchmark NDC of OMCs was lower than the bid rates of private players

x. The parties of UP quoted the quantity equal to the required quantity (also location-wise), though the capacity of bidders was almost three times the offered quantity.

xi. Many players in proximity to specific locations did not bid, though they offered to supply at distant locations.

Against mills of Gujarat and Andhra Pradesh: the evidence was that many mills quoted identical NDC to the last decimal point.

Against EMA:

i. Statement of Mr VM Patil, President EMA, published in 'Business Standard' on December 7, 2012 in relation to the price of ethanol.

ii. Press release of VM Patil to the effect that bidders will quote the price of ethanol in the range of Rs. 38/l

iii. All members of EMA in Gujarat and Maharashtra quoted above the market rate, that is, more than Rs.40/l.

iv. Two meetings of EMA on January 9, 13 and January 27, 2013 attended by bidding members.

After considering the report of the DG, rebuttal /appreciation of the report and other material, the Commission broadly disagreed with the opinion of the DG and decided against the allegation that there is an anti-competitive agreement. Why this difference of opinion? It was because there was a difference of approach, which may either be pro-competition or pro-corporate. In other words, inconstruing 'agreement', different approaches may be followed, and strict or indirect proof may be found sufficient. There is a well-established rule of appreciation of evidence. If enterprises follow an identical approach, it may be a coincidence; if there are many, it may be the result of a design. In this case, the Commission agreed with the explanation given by the entities accused of cartelising in individual instances, but did not ask why there are so many coincidences.

The Commission concluded that there wereno anti-competitive agreements as per the grounds given as follows: -

i. The Commission concluded that there were meetings of ISMA on December 6, 2012 and on December 27, 2012that might have been convened, but records of the meetings are not available. But it is proven that several representatives (however, only some out of 40 UP sugar mills). These representatives maintain they were in Delhi for some other purposes (not clear as to what the other purpose was, and why they were present at ISMA without any purpose). Even if it is not proved that they discussed the price of ethanol, there is such a probability. The Commission concluded that no adverse finding can be drawn as only some of the 40 mills were present, and the tender was yet to be issued, and its terms were not known. However, it is asserted that even without knowing the terms of the tender, there can be discussion on BP, NDC and transport cost,and such a probability cannot be denied, especially when no clear explanation was forthcoming as to why the representatives were present at ISMA. Though the Supreme Court in the *Rajasthan Cylinders* case[23] observed that an anti-competitive agreement cannot be concluded from a sparsely attended meeting, the court did not say that it cannot be part of a series of probabilities. Under the Act required proof is a preponderance of probabilities.

ii. The CDRs of GK Thakur shows that there were frequent conversations between the representatives of 10 sugar mills of UP and Mr. Thakur. It was

23 AIR OnLine 2018 SC 736.

explained as usual practice. The Commission accepted the explanation. The Commission observed that in order to prove that the conversation was unusual during the tendering period, the DG should have compared it with post tender period conversation. Our argument is as to why in order to clarify this point, the Commission did not order a supplementary investigation, especially because it is the duty of the Commission to ensure fair competition in the market and because on oath Mr. Thakur denied that conversation between him and representatives of the mills was not on regular basis and also because during the tender bidding period conversations were not satisfactorily explained. The explanation given by OP11 and OP12, regarding conversation with each other for substantial period were of no consequence because they did not bid for same location and their bids were not identical. The explanation should not have been accepted as an anti-competitive agreement may be for the geographical division of bids and for non-identical bids.

iii. As to why Thakur attended the pre-bid meeting organised by OMCs, the explanation that Thakur, of ISMA, the biggest union of ethanol manufacturers, attended as it was a new sort of tendering process, was found plausible.

iv. One officer of OP1,on January 22, 2013, sending email to Thakur informing another officer of OP12 about the distance between the Depot of OMC and the distillery of OP12, as at the relevant time, the officer of OP12 was present in the office of ISMA. The Commission found the explanation sufficiently plausible. But to the author of this survey, it could be for anti-competitive purposes, as there is no sufficient explanation as to what the officer of OP12 was doing in the office of ISMA. Independent emails during the tendering period, though not conclusive evidence, create doubt of stifling of competition.

v. Regarding other emails, they were post-bidding period mails and hence are of no consequence

vi. NDCs of many mills were found to be identical. It was satisfactorily explained that the cost of production in the same state may almost be the same. However, what is intriguing, according to the author of this survey, is the unasked question as to why NDC by all the private Millswas higher than the benchmark price determined by OMCs,except a government cooperative Mill, whose bid was lower than the benchmark price.

vii. During the tender period, OP11 and OP19 exchanged substantial calls with Thakur, and NDC quoted by OPs in UP was in a narrow range of Rs. 41.8 / L and Rs.44.7/L. The conduct creates the probability of an anti-competitive agreement. However, the Commission was not prepared to draw any anti-competitive inference on the ground that in the same state cost of ingredients, such as raw material, conversion charges, taxes, and cost of labour, are likely to be the same. The investigation report also confirms

that the sugar mills of other states also quoted NDC in a narrow range. However, in our opinion, ex-factory in the same state would not be the same because of certain variables such as efficiency in management (cost cutting), margin of profit policy, use of technology (old or new technology; old or new machines). It is strange that despite so many variables, the rage is so narrow. It is also not unusual that there may be an anti-competitive agreement at the inter-state level.

viii. Freight charge in UP: - It has been noted that freight charges for supply to the same depot, despite a difference in the distance of the mill from the depot, are identical. This was explained by the OPs on untenable grounds that the transport cost is what has been quoted by the transporter. However, the explanation was accepted by the Commission. This can be possible only if there is cartelisation between the transporters with or without the connivance ofmills.

ix. BP of certain mills of U.P.: - Certain mills of UP quoted an identical BP (ex-factory price) of Rs. 34600/- for certain depots. The Commission, not agreeing with the DG, concludes that as the price of raw material, taxes and other conditions are the same, the BP is also likely to be the same. We do not agree with the Commission but with the DG. As stated earlier efficiency, policy of profit margin and quantity of sugar in sugar cane are not necessarily the same, the BP cannot be the same.

x. Another allegation, which was agreed to by the DG was that private mills, unlike OP15, a state cooperative, did not reduce NDC during negotiations though the rates quoted at L1 position were higher than MNC bench mark. The Commission did not agree with this argument on ground that in a number of cases the private mills reduced NDC below L1 rates at negotiations.

xi. Previous conduct of ISMA and its member bidders: -In 2006-7, bidders for depots of Rajasthan and Haryana quoted identical prices, and in 2009, the bidders for UP, except a subsidiary of India Glycol limited did the same. In a meeting of ISMA on 14.10.2009, the minutes declared that before finalising the tender by the OMCs, most of the members, before submitting the tenders, stated the quotation at Rs.25/L.The action was repeated in 2011. The OPs defended their action as a pressure tactic against the government for revising the prices of ethanol. The Commission considered it a trade union activity. Even if it was a trade union activity, according to us, when the members of ISMA agreed that they would not quote the price less than Rs. 25/L for tenders by OMCs, it was clearly an anti-competitive agreement.

xii. Another circumstance suggesting anti-competitive agreement (ACA) was the fact, taken into consideration by the DG to construe ACA, that the OPs offered to supply 2.08 kl of ethanol, whereas the required quantity by the OMCs was 2.01 kl, though the capacity of the OPs was 3 times more. The depots wise also the quantity required and offered was almost the

same. It seems it was a case of market allocation quantity-wise. The Commission rejected the conclusion of the DG because there is no evidence of quantity allocation by the OPs, and the OPs offered only 1/3rd of the ethanol produced by them as they had to supply in other states. The author of this survey does not agree with the argument of the Commission. Unless there is agreement among the OPs, how come the cumulative quantity offered by the OPs was almost equal to the quantity required (in totality and depot-wise) without concerted action?

The Commission concluded that there was no credible evidence of ACA among the OPs. The Commission rightly observes that parallelism alone cannot construe ACA without some 'plus factors.' These 'plus factors' are pointed out by the author of this survey in 12 discussed points, which were ignored by the Commission. The Commission also did not take into consideration the circumstances suggesting ACA cumulatively, but all the factors were explained in isolation from each other.

X CONCLUSION

The cases decided this year clearly depict that the direction of interpretation of the Competition Act points only to make the application of the Act against the competition stifling enterprise more difficult. In case of anti-competitive agreement competition forums are reluctant to construe anti-competitive agreement specially in case of parallel behaviour. The tendency is to interpret the circumstances individually and not cumulatively with the result that every instance is explained away as coincidence and even if the justification is not plausible it is accepted. With the required proof of 'abuse of dominance,' in 2023,super added requirement was 'effect' of 'abuse.' This year again the requirement of 'effect' was reiterated.

However, there is an interesting development in the case of 'nil relevant turnover.' An enterprise participating in cartelisation, if not allotted any work in response to a tender, will have nil relevant turnover. In such a case, the imposed fine shall not be nil but on the total turnover of the enterprise.

As liberal interpretation, in favour of erring enterprises,tends to favour the 'big' as the 'big' (enterprise) has more market power, in consequence, competition stifling capacity of the 'big' wins as against the 'small,' and the market is distorted. In these circumstances, the 'small' with its weak economic power may give way to the 'big.' This approach conforms with the ideology of the 'so-called' free trade economy, which is 'big is beautiful.'