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COMPETITION LAW

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I INTRODUCTION

AFTER 1990 onwards India is increasingly adopting free market economic policies. The sphere of corporate activities is increasing at a very fast pace. A number of activities which hitherto were performed by the state are now being performed by the private sector. Private sector is affecting our lives more intimately and intensely in all the spheres of social activities. It is also a well known fact that the private enterprise works primarily with the motive of private profit. In this new social milieu, the task of competition commission, to protect the ordinary citizens from their greed, becomes more onerous. The important issue is: are they discharging the duty diligently and faithfully? The answer to this question is debatable. It depends on the ideology one champions. Whether it is more important to protect the interest of consumer or that of the corporate or we ought to make a proper balance between the two is a question, the answer to which is not easy to find. The people will have to make their own judgement.

II THE COMPETITION COMMISSION OF INDIA-TRENDS

This year reaction to the working of the Competition Commission (CCI) has been mixed. Though unlike previous years, especially unlike the year 2011, the Commission in a number of cases realised that the concept of captive market is not an irrelevant concept. In some cases they have applied the concept satisfactorily. But in the cases of builders of residential colonies they continue to refuse to apply it.

Because of the insistence of the Commission that in order to constitute an anti-competition agreement it is necessary that there must be a proof of meeting of minds, in a number of cases, only trade and professional associations are proved to be guilty of anti-competitive agreements whereas crafty enterprises, who are careful not to leave any proof of meeting of mind or who without meeting each other act in a concerted manner are never caught, to the detriment of the consumers. If the Commission refuses to carry the overload of the Indian Contract Act, 1872

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and constence independently, without the baggage of the Indian Contract Act, 1872 the meaning of 'practice carried on' and 'decision taken' the consumers would be benefited. However, this year, unlike in previous years, in some cases the Commission has found government companies guilty of abuse of dominant position

III ANTI-COMPETITIVE AGREEMENTS: ASSOCIATIONS

P.V. Bashir Ahmad v. *Film Distributors Association*[1] is a case on anti-competitive agreements. Information Provider (IP) is a producer, distributor and exhibitor of films. He is the President of Kerala Film Exhibitors Federation (KFEF), and also a member of opposite party (OP) for 25 years. OP is an association of film distributors of Kerala.

According to IP in 2010 differences arose between OP (distributors) and KFEF (exhibitors) on revenue sharing. During this period of differences, KFEF released two Malyalam films produced and directed by Mr. Kamal and Mr. Jayaraj, against the wishes of OP. In 2011, during the release of these two films but before the completion of the run of them, KFEF went on strike against the policies of then government. The strike was also joined by the OP. When the strike was called off, OP insisted that the exhibitors first release pending Tamil films, and not the two Malyalam films.This action generated a dispute between Mr. Kamal and Mr. Jayaraja on the one hand and OP on the other. In consequence OP decided to ban the films of Kamal and Jayaraj and issued a circular to this effect to its members on 1.12.2011.

A film co-produced by Madhavan Nair and Kamal named 'Celluloid' was to be exhibited by the IP. The OP sought an explanation from IP as to why he is exhibiting the film during the period of the ban. Not satisfied by the explanation given by the IP, the membership of the IP of the OP was suspended for six months. IP moved CCI against OP alleging violation of sections 3 and 4 of the Competition Act, 2002 (hereinafter 'Act'). CCI found that *prima facie* there is violation of section 3 and the matter was referred to Director General (DG) for investigation. The DG after investigation found;

(a) the impugned circular of 01.12.2011 was actually circulated by OP. The DG established the fact of the issuing of the circular on the basis of the circular, the records of OP and depositions of witnesses.

(b) The circular actually suspended the IP for six months was also established. The DG found that OP violated the provisions of section 3(3) (b) read with section 3 (1) of the Act.

The CCI found that there was an anti-competitive agreement among the members of OP. There was an anti-competitive agreement not to exhibit the films directed by Kamal and Jayaraja on the basis of (a) the circular of 01.12.2011 (b) the minutes of the governing body of OP of 30.11.11 and the statement of witnesses recorded by the DG.

1 2015 Comp LR 179 (CCI).

The requirements of 'agreement', as defined under section 2 (b) of the Act are proved as the governing body took a collective decision in the aforesaid meeting. In addition to ingredients of agreement given in section 2 (b), additional ingredients for horizontal agreements are also given in section 3 (3) which is also proved. On the basis of available material the CCI also found that members of OP also entered into an anti-competitive agreement to suspend IP from the membership of OP.

CCI also rejected the justifying arguments given by OP that it has a fundamental right to form associations and hence did not enter into any anti-competitive agreement. Though every citizen has a fundamental right to form an association but the objective of the association must not be illegal or illegitimate. The circular of 1.12.2011 limiting, controlling, production and supply *etc.*, of services violates the provisions of section 3 (3) (b). Suspension of IP also violated the provisions of section 3 (3) (b). Apart from cease and desist order, the CCI also imposed a penalty of Rs.75315/- (5% of the average turnover of the last three preceding years). As the new executive committee showed compliance and cooperation in as much as it restored the membership of IP, lesser penalty was imposed.

Cinemax India Limited v. Film *Distributors Association,* [2] is also a case on anti-competition agreement by an association. The IP, Cinemax India Ltd., now known as PVR Ltd., is in the business of exhibition of films. They have 39 properties and 138 screens in India. The OP is an association of film distributors in Kerala, and has 221 members, but about 20 distributors in Kerala are not its members.

IP alleged violation of sections 3 and 4 of the Act, in as much as the members of OP are behaving like a cartel and OP also abused its dominant position by imposing unfair terms on IP. Erstwhile formula for revenue sharing between the distributors and exhibitors was as follows. The distributors share in the first week 50%, in the second week 42.5%, in the third week 37.5%, and in subsequent weeks 30%. In a letter dated 01.6.2012 issued by OP the rates were revised to, first week 60%, second week 55% and third week onward 50%. The IP also alleged that in the letter of 14.7.2012 the OP complained that IP had not yet implemented the decision of OP. This anti-competitive behaviour of OP compelled the IP to move the CCI. Finding a *prima facie* case CCI referred the matter to DG.

As per the report of the DG, OP infringed the provisions of the Act. OP directed the revenue sharing pattern to the IP and made the pattern binding on the distributors and exhibitors in Kerala; OP also did not allow the IP to negotiate independently with the distributors and forced it to accept the collective call of the association. Revenue sharing amounted to price fixing violating section 3(3) (a), and thereby limiting and controlling the market amounting to violating section 3 (3) (b).

CCI, agreeing with the DG, concluded that Film Distributors Association, Kerala was directly involved in directing, imposing and implementing revenue sharing pattern in the market of Malayalam film exhibition. OP has violated section 3 (3) (a) and (b). If the agreement is proved to exist, it is presumed that there is

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2 2015 Comp LR 81(CCI).

appreciable adverse effect on competition unless disproved. A fine of Rs.75315/- was imposed on OP at the rate of 5 % of the average of three years turnover.

Indian Sugar Mills Association v. *Indian Jute Mills Association*[3] is a case of violation of section 3 and 4 by an association and also a case of abuse of dominance by reason of monopoly conferred by statutory provisions. Indian Sugar Mills Association (ISMA) IP1 is an association of sugar mills whose members produce 46% of total sugar produced in India. National Federation of Cooperative Sugar Factories (NFVSF), IP2 is an association of cooperative sugar mills. All India Flat Tape Manufacturer Association, (AIFTMA), IP3, is an association of plastic bags manufacturers association. Indian Jute Mills Association (IJMA), OP1, is an association of jute mills. Gunny Trade Association (GTA) OP2 is an association of jute bags manufacturers and Ministry of Textile Government of India is OP3.

It was alleged by IPs that there is an anti-competitive agreement between members of IJMA and between members of GTA for fixation of price of jute packaging material, compulsorily used by sugar under statutory provisions. OP3's orders made under statutory provisions facilitated OP1 and OP2 to raise prices arbitrarily. Under the provisions of the Jute Packaging Materials (Compulsory Use in Packaging Commodities) Act 1987 (JPM Act) use of jute packaging material was made compulsory for packaging of certain commodities. However in 1998 cement and fertilizers were exempted from the use of jute packaging material. Now sugar industry is dependent on jute packaging material for packaging sugar. This statutory requirement has conferred dominance on jute industry. OP1 and OP2 now enjoy dominant position in the relevant market of packaging bags. As a *prima facie* case was established, CCI referred the matter to the DG for investigation.

The DG in its report concluded that the provisions of section 3 (3) (a) and (b) were violated by OP1 and OP2. According to the DG daily price fixation under the daily price bulletin (DPB) issued by GTA, followed by the members of GTA and IJMA, were not decided by the market forces but arbitrarily decided by GTA and followed by IJMA. Both these bodies behaved like a cartel in fixation of prices, thus violating section 3 (3) (a) and (b).

CCI in deciding the case took into consideration the report of the DG, submissions made by the informants and opposite parties, documentary evidence and deposition of the witnesses. First it summarised the findings of the DG. DG on the basis of actual transactions of sale and purchase of jute packaging material, concluded that actual price of the material was close to rates of daily price bulletin (DPB) pricing. The members of GTA and IJMA followed price suggested by DPB rather than by market forces. Without DPB pricing, the rates would have been competitive and fair. DG also noted that because of the provisions of the JPM Act, it was obligatory on the part of the sugar mills to use A-twill jute bags made in India with jute produced in India. DG also found that DPB pricing was not governed by market forces but manually controlled by GTA and member mills of GTA and IJMA and followed DPB pricing in a concerted manner.

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3 2014 Comp LR 225 (CCI).

After considering the available evidence, CCI agreed with the DG regarding the existence of a tacit agreement between the members of GTA to follow DPB pricing. Members of IJMA were also party to this agreement as they also followed the DPB pricing. This amounted to price fixing in violation of the provisions of section 3(3) (a). CCI also noted that B-twill are used for packaging food grains, but material and process of manufacturing A-twill bags and B-twill bags is the same, yet the pricing of A-twill bags is considerably higher. The price of B-twill bags is fixed by a statutory authority, which fixes the price after taking into consideration cost of production and a reasonable amount of profit. The DG also analysed the supply and demand position. Though there was a high demand of A-twill bags, yet the production was reduced, notwithstanding higher installed capacity. This was done with a view to control production of the A twill bags, thus violating the provisions of section 3(3) (b).

CCI passed a cease and desist order and imposed a fine of 10% of the average turnover of the last preceding three years. In accordance with the provisions of section 48 of the Act certain officers of both the associations were found guilty of violation of the provisions of the Act. The CCI imposed fines on them at the rate of 5% of the average income of the last three preceding years.

Another case involving an association is in *Re The Chemist and Druggist Association of Goa*.[4] This case arose because of deliberate failure of the Chemist and Druggist Association of Goa (CDAG) to obey the earlier order of the Commission. Information in *M/s* V*arca Druggist & Chemist* v. *Chemist and Druggist Association of Goa*[5] was filed before the Monopolisties and Restrictive Trade Practice (MRTP) Commission but after the repeal of the MRTP Act, 1969 the case was transferred to the CCI, and the CCI passed a cease and desist order on 11.06.2012. Subsequently Mr. Mario Vaz, the proprietor of M/s Xcel Healthcare, herein after IP, informed the CCI that under the guidance of CDAG, OP1, and a number of pharmaceuticals and chemists and druggists are acting against the order of CCI. The IP alleged that under the guidance of OP1, M/s Glenn Pharmaceuticals Ltd. has stopped dealing with the IP, and under the guidance of OP1, all stockists of Wockhardt Limited, OP3 had stopped dealing in the medicines of OP3 so as to compel them not to deal with the IP. This according to the IP amounted to violation of section 3 of the Act.

CCI *suo moto* took the cognizance of the allegations raised by the IP, and finding that a *prima facie* case has been established, ordered investigation by the DG. The DG, on the basis of minutes of different meetings of the EC of CDAG held during 2012, email exchanged between OP and IP, found that CDAG provided a platform for anti-competitive conduct and for control of supply chain through which medicines are made available in the market. DG reported that CDAG coerced OP2 on the issue of institutional stockists, to route the supplies through stockists appointed by CDAG. CDAG also coerced OP3 not to supply medicines to the IP. DG also reported that CDAG has neither any intention of complying with the order of CCI dated 11.06.2012, nor did it actually complied with the order.

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4 2014 Comp LR 301 (CCI).

5 Case no. MRTP-C-127/2009/DGIR (4/28).

CCI, agreeing with the findings of the DG held that practices of CDAG amounted to continued contravention of section 3 (3) read with section 3(1). However the CCI did not find OP2 and OP3 guilty of violation of the provisions of section 3 (3) and section 3(4) of the Act. CCI imposed a fine of Rs.10,62,062/- on CDAG at the rate of 10% of the average receipt of the preceding 3 years.

IV RELEVANT MARKET

Shri Avtar Singh v. *M/s Ansal Township and Land Development Limited*[6] is case on the definition of relevant market (RM). This case relates to allegation of abuse of dominant position by the OP1 in the allotment of commercial space in a project Ansal Plaza in Jalandhar, being constructed by OP1. OP2 and OP3 are the managing employees of OP1.In the afore said project Ms. Neena Sharma and Ms Pooja Sharma booked two commercial spaces but later these commercial spaces were transferred to the IP for a consideration. The IP gave various instances of abuse of dominant position but they need not be elaborated as the CCI decided that the OP was not dominant in the relevant market.

However the most important allegation of the IP is that the whole project was shut down by the OP in March 2011and IP alleges that it is a case of abuse of dominant position. The CCI proceeded to define the relevant market. The relevant product market was defined as 'the services for the development and sale of commercial space in shopping malls'. The relevant geographical market was defined as Jalandhar. The CCI did not find the OP dominant in this relevant market as according to them there are a number of real estate developers of malls such as EMAAR MGF, DLF, and TDI *etc.* They are also developing malls in Jalandhar. The CCI concluded that there is no prima facie case of abuse of dominant position.

There is an important aspect of the case which has not been discussed by the Commission at all. That the IP gave the consideration for commercial space, his capital remained locked for a long time, and he willingly locked the capital for the purpose of getting a commercial space in the mall. In March he finds that the project was shut down. The important question which the CCI did not answer is that, why the capital of IP remained locked, what is about the waste of time and opportunity during the locking period, whether he will get a similar commercial space on the same terms and conditions? It is difficult to understand why the CCI did not decide that it is a case of captive consumer and locked market? In our opinion the CCI was wrong in defining relevant market as 'the services for the development and sale of commercial space in shopping malls', but should have been as 'project Ansal Plaza in Jalandhar' and in this relevant market the OP was dominant.

V ABUSE OF DOMINANT POSITION

Sai Wardha Power Company Ltd. v. *Western Coalfields Ltd*.[7] is a case on abuse of dominant position. IP has setup and operates a thermal power plant in the

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6 2014 Comp LR 154 (CCI).

7 2014 Comp L R 265 (CCI).

state of Maharashtra. The OP is engaged in production and supply of coal, a key material for power generation, across the country. The IP has got a letter of assurance (LoA) on cost plus basis from the OP, and has also entered into a Fuel Supply Agreement (FSA) for supply of coal from three different identified cost plus coal mines under a contract with OP. The IP alleged that the OP enjoys a virtual monopolistic position over production and supply of coal in India and dominance in the supply and production of coal in India. Because of the dominant position he was able to abuse the dominance. The IP alleged abuse on many grounds. Some of them are as follows. The OP delayed the execution of FSA to such an extent that the IP became so desperate that it has to sign on one sided agreement which was unfair and discriminatory. Initially the OP issued a LoA to the IP assuring IP that coal would be supplied on cost plus basis or notified price whichever is lower. But later the OP reneged and insisted that coal would be supplied at price of coal plus 12% of Internal Rate of Return (IRR) *i.e.*, price per metric ton of coal which yields IRR of 12% on the entire investment at 85% of capacity utilisation covering the entire life of mine or 20 years whichever is less. However in the FSA the OP jacked up the price beyond cost plus 12% IRR. This defeated the whole purpose of cost plus formula of coal supply. OP raised the cost of coal from Rs.1613/- per metric ton to Rs 2177/- per metric ton. OP refused to execute FSA for the supply of the remaining 6,35,000 metric tons of coal unless the IP furnish additional bank guarantee to the tune of Rs 233.53 crores. According to the IP there were many more similar unfair or discriminatory terms.

The CCI after considering entire material on record referred the matter to DG for investigation. The findings and conclusions of DG are as follows. The DG determined the relevant market as 'production and supply of non-coking coal to thermal power producers in India'. DG also found that the OP was in a dominant position in the relevant market under sections 4 and 19 (4). Ability of OP to act independent of market forces allowed OP to include unfair terms in LoA and FSA in violation of section 4 (2) (a) (i) of the Act. As OP not only delayed the signing of FSA but also increased the price to the detriment of IP, the conduct of OP is exploitative in violation of section 4 (2) (a) (i). Imposition of unfair price in the supply of coal to IP amounted to violation of section 4 (2) (a) (ii). DG also found that insistence on Financial Risk Bank Guarantee was also an unfair condition in violation of section 4 (2) (a) (i).

After taking into consideration all the material on record, the CCI decided as follows. First it defined the relevant market as 'production and supply of non-coking coal for thermal power producers in India.' In the instant case the product in question is non-coking coal which is used as raw material for generation of power by thermal power plants. This product has no demand side substitutability as imported non-coking coal is not a substitute on demand side because of the type of boilers, used by the IP, would not accept imported non-coking coal and because of the higher cost of imported coal. Thus the demand of the OP that geographic market is the world was rejected.

Regarding the question of dominance, OP denied that Coal India Limited (CIL) has dominance in the RM. If RGM is global, India's share is negligible (7.8%). OP further contended that if RGM is India, even then it is not dominant, as it has to fulfil certain social obligations, and further in accordance with New Coal Distribution Policy (NCDP), linkage for coal supply is decided by Standing Linkage Committee (Long Term) [SLC (LT)]. SLT (LT) consists of various stakeholders including Ministries of Coal, Railways and Surface Transport *etc*. CIL does not exert any influence in decision making.

However, CCI found that in view of the provisions of the Coal Mines Nationalization Act, 1973, production and distribution of coal in India has been nationalized and the CIL and its subsidiaries exercise monopolistic position because of the act.

CCI also found the conduct of OP exploitative. It was able to exploit the IP because of its statutory monopolistic power. Delay in executing Fuel Supply Agreement (FSA) was attributed to OP's monopolistic power resulting in increase of price during the period of delay. Also the one sided nature of LoA in Commitment Guarantee with no reciprocal obligation of the OP was clearly the result of OP's dominant position. CCI concluded that OPs were guilty of violation of the provisions of section 4 (a) (i) of the Act.

The OP's are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the Act. OPs are also required to modify the agreement in the light of the findings of the case within 60 days and are required to give undertaking to that effect. The OP's have preferred an appeal before the appellate tribunal and the appellate tribunal has ordered *status quo*. Therefore the order of the CCI is subject to the decision of the appellate tribunal.

Bijay Poddar v. *Coal India Limited* [8] is also a case on abuse of dominant position by Coal India Ltd. The IP alleged that Coal India Ltd. (CIL) had introduced a scheme called spot e- auction Scheme 2007. The conditions attached to the scheme were as follows. (a) All the bidders who bid under the scheme for coal had to deposit a non interest bearing Ernest Money Deposit (EMD) at the rate Rs. 200 per ton, which was later raised to Rs. 500 per ton (b) If the bidder does not lift the entire available quantity of coal within the stipulated time, the amount at the rate of Rs. 200/- or Rs. 500/- as the case may be, would become forfeit for the un-lifted quantity (c) However there would be no forfeit if the un-lifted quantity is less that a truck/rake load (d) On the other hand if CIL or its subsidiaries fail to supply whole of the stipulated quantity, they would neither pay any penalty nor any compensation for the un-supplied quantity, which the bidder has to purchase from other sources at a higher price (e) The opposite parties retain the money from the successful bidders for more than 112 days (break-up of the days is as follows:7 days approximately for deposit of coal value; 60 days for lifting of coal and 30 to 60 days for refund after the expiry of the deliver order) and the amount works out to be Rs. 225/- to 300/- per tonne; as a result of this buyer/bidder has to bear interest losses while opposite parties enjoy the credit without incurring any cost.

There being a *prima facie* case, the CCI referred the case to the DG for investigation. The DG defined RM as 'sale of non-cocking coal to the bidders under spot e-auction scheme in India.' CIL and its subsidiaries are dominant in

8 2014 Comp LR 208 (CCI).

this market. The OPs have violated the provisions of section 4 (a) (i) by imposing discriminatory provisions in the sale on non-cocking coal in the spot e auction scheme.

CCI after taking into account all the material before it determined the relevant market. Both the contentions of the OPs, that RPM is the sale of non-coking coal from e-auction scheme and from forward e-auction scheme, that RGM is not India but the whole world, were rejected by the CCI. OPs' contention was that imported non-coking coal is a substitute of no-coking coal from e-auction scheme, and as it is a substitute, RGM is global. The CCI concluded that imported coal is not a substitute of non-coking coal from e-auction scheme for several reasons. (a) Imported non-coking coal is not suitable because of size quality and quantity. Imported non coking coal is available in powder for on which is not suitable for the boilers used by IP; (b) IP is a small user and imported ship load of coal cannot be afforded by IP. Smaller quantities of imported coal are very costly. Therefore RGM is India. E-auction scheme was introduced to cater to the needs of users of smaller quantities.

The next issue before the CCI was whether in the RM, OPs were dominant? CCI concluded that in RM OPs are dominant. OPs contention was that in the global market, India's share is mere 7.8%. Even if the RM is restricted to India, OPs do not command economic power for several reasons. (a) It was because of the Coal Mines (Nationalisation) Act that CIL became major player; (b) Being controlled by Government of India, it has to perform certain social obligations; (c) Its distribution policy is controlled by New Coal Distribution Policy (NCDP) and linkage for coal is done by Standing Committee (Long Term) [SLC(LT)] which consists of several stakeholders. The OP does not have economic power to vitiate the competitive market. But the contention was rejected by the CCI on grounds that despite these factors CIL has operational independence to exercise dominance. Then, CCI found that actually OP has abused its dominant position, on the basis of its dealings with the IP. (i) One sided penalty (in the form of forfeiture of EMD) for non-performance by the successful bidder under clause 9.2 of the scheme. (ii) Enhancement in amount of EMD without reflecting the enhancement in the terms and conditions on main page of CIL website. (iii) Earning income/unduly enriching itself from the interest earned on the amounts collected under e-auction. (iv) The power to modify and consequent modification of some existing clauses and inclusion of new clauses in terms and conditions of the scheme. (v) Stipulated validity period for forfeiture of EMD (i.e. for making payment of coal value) within 7 working days i.e. clause No. 5.2 of the scheme.

CCI passed a cease and desist order, and ordered the OPs to suitably amend the terms and conditions in the spot e-auction scheme. As a penalty has already been imposed, no fresh penalty was imposed.

Another important case, decided by CCI on abuse of dominant position is *Faridabad Industrial Association* v. *Adani Gas Ltd*.[9] The IP is an association of industries registered under the Societies Registration Act 1860 situated in

9 2014 Comp LR 185 (CCI).

Faridabad. The OP Adani Gas Ltd (AGL) is a company registered and incorporated under the Companies Act, 1956 and is engaged in the supply of natural gas to industrial domestic and CNG customers. It informed that about 90 members of the association consume gas supplied by the OP. It is further alleged that that OP by grossly abusing its dominant position in the RM of supply and distribution of natural gas in Faridabad has put unconscionable terms and conditions in the Gas Sales Agreement (GSA) which are unilateral, lopsided and heavily tilted in favour of the OP. The terms of the GSA are drafted by the OP without consulting the IPs. As there was a *prima facie* case, the matter was referred to the DG for investigation.

The DG defined the RM as 'the market of supply and distribution of natural gas to industrial consumers in the district of Faridabad'. DG also concluded that OP is dominant in the RM in terms of the explanation (a) to section 4 of the Act. DG also concluded that OP did not abuse its dominant position in term of provisions of sub clause 9.4 of clause 9 (quality), sub clauses 10.2, 10.5, 10.6 of clause 10 (measurement and calibration). Many other provisions of GSA were found not to be abusive by the DG. They were the provisions of GSA relating to shutdown and stoppage of gas, contract price, billing and payment, payment security. In so far as the allegation of the IP, regarding irrational and arbitrary increase in gas price by the OP, is concerned, the conduct of the OP in the said matter cannot be construed to be abusive. The allegation of the IP regarding non-adherence to the Petroleum and Natural Gas Regulatory Authority Board (PNGRB) Regulations by the OP in the matter of fixation of Transportation/Network tariff, is not based on facts.

But some of the terms of GSA were found to be abusive by the DG. Sub clause 13.5 of clause 13 to the extent of stipulating 'at such rate as may be stipulated by the seller in future', sub clause 7 of clause 13 to the extent of absolving the OP from paying interest on disputed excess amount paid by the consumers, amounts to imposition of unfair condition by the OP in contravention of provisions of section 4 (2) (i) of the Act. The DG also found the following terms of the SGA abusive. (a) sub clause 3 of clause 16 to the extent that the OP has reserved the right at its sole discretion to accept or reject request of customers for force majeure, (b) sub clause 2.1 of clause 11to the extent the buyer is obliged to meet its minimum guaranteed off take payment obligation even in the event of emergency shutdown calling for complete or partial off take of gas. (c) Sub clause 4 of clause 17 empowering the OP to terminate the GSA in the event of buyer's failure to take 50% or more of the cumulative daily contracted quantity (DCQ) during a period of 45 consecutive days.

On the basis of the record the CCI formulated three issues relating to RM, dominance of OP in the RM and whether the OP has abused its dominant position? Having regard to any or all the characteristics *viz.*, physical characteristics or end use of goods, price of goods or services, consumer preferences, exclusion of in house production, existence of specialised producers and classification of industrial products, the CCI found RM to be 'supply and distribution of natural gas to industrial consumers'. The CCI rejected the contention of the OP that there are other substitutes of natural gas such as furnace oil, electricity, high speed diesel, coal, and naphtha. The CCI agreed with DG that natural gas is a unique product and being a gaseous substance, being supplied in pipes cannot be compared with other sources of energy. It may also be argued by the author of this survey that any change of energy would require change in the machinery of the consuming industry. As the Government of Haryana has authorised only one supplier in Faridabad this alone can be RGM.

As the OP has a 100% share of the market because it alone has been given a licence to operate in Faridabad, it is dominant. Regarding abuse of dominant position, the CCI found only some of the terms of GSA abusive but not all of them. Clause 13.4 was abusive; it provided that notwithstanding any dispute in relation to any amount invoiced, the buyer shall not withhold any amount of any payment in accordance with the provisions of this section. After making full payment, the buyer shall in writing make a claim with the seller, and if such claim is found correct, the seller shall adjust the same against the next invoice. Clause 13.5 provides that the buyer shall pay interest on all payments delayed beyond due date at the uniform rates equivalent to PLR of SBI+ 2.0% p.a. Clause 13.6 provides that 'If full payment of the invoice is not made by the buyer as stipulated in section13 by due date, the seller may discontinue the supply of gas to the buyer and shall be entitled to invoke security instrument for any unpaid amount which shall be replenished in accordance with this agreement'. Clause 13.7 provides that 'The buyer shall not have recourse to the arbitration mechanism for any dispute relating to payment and/or invoice unless the invoice amount is paid in full with interest and penalty. The CCI found these provisions unfair in contravention of section 4 (2) (a) (i) on grounds that 'an excess payment by the buyer due to erroneous billing on the part of the seller gives rise to no liability whatsoever on the part of the seller including interest, whereas a delayed payment by the buyer renders him liable to pay interest at such rate as may be decided by the seller in future. CCI found this provision to be unfair.

CCI, however did not find another provision of clause 13.7 which mandates the buyer to pay the invoiced amount along with interest and penalty before taking recourse to the arbitration mechanism for disputes relating to payment/invoices, abusive, because OP too in terms of its agreement with GAIL is bound by similar stipulation

Clause 17 provides if the seller fails, (other than as a consequence of buyer's default or failure due to force majeure or due to planned maintenance period) to tender delivery for 50% or more of the cumulative DCQ for a period of 180 consecutive days, the buyer may at its sole option, terminate the agreement upon not less than 30 days prior notice to seller. If the buyer fails (other than as a consequence of force majeure or planned maintenance) to take 50 % or more of the cumulative DCQ during a period of 45 consecutive days, then, the seller may, at its sole option, terminate this agreement upon not less than 30 days prior written notice to the buyer. This provision was found to be in contravention of section 4 (2) (a) (i), of the Act. The CCI found clause 17 abusive because while the OP enjoys longer period from GAIL for meeting the cumulative DCQ obligation, it provides only 45 days to do so for its industrial consumers. The wide disparity between the two periods is not warranted by the risk. This is an abuse as OP imposes a discriminatory condition on the IP, in violation of section 4 (2) (i).

The seller has in terms of clause16.3 reserves the right to accept or reject at its sole discretion the request of customers even with respect to force majeure events. Further, under clause 11.2.1, even in the event of unplanned interruption and emergency shutdown of facilities calling for complete off take of gas by the buyer, it has been stipulated by the OP that the provisions relating to payment of minimum guarantee take off by the buyer shall continue to be applicable. These provisions are in contravention of section 4 (2) (a) (i).

The CCI in its order held that the OP was asked to cease and desist from indulging in conduct in violation of the provisions of the Act. The gas supply agreement was ordered to be modified in terms of the observation of the CCI. A penalty at the rate of 4% of the average turnover of the last preceding three years was imposed.

VI ABUSE OF DOMONANT POSITION BY A GOVERNMENT COMPANY

Generally government departments and government companies at least in earlier years of functioning hardly ever were found to be guilty of abuse of dominant position. In *Pandrol Rahee* v. *Delhi Metro Rail Corporation*[10] and *Arshiya Rail Infrastructure* v. *Ministry of Railways*[11] CCI did not find the government department and a government company guilty of any competition concern though we were of the opinion that CCI decided wrongly.

However in *Indian Exhibition Industry Association* v. *Ministry of Commerce and Industry and Indian Trade Promotion Organisation*[12] and in two cases involving Coal India Limited, discussed earlier, the CCI decided otherwise. It found the Trade Promotion Organisation guilty of abuse of dominant position. The IP is an association of exhibition organisers, venue owners, service providers, registered under the Societies Registration Act 1860 with the objective of promoting development of Trade Fairs and Exhibition Industry. OP1 is responsible for development of trade, commerce and industry. OP2, a wholly owned company of central government, is a company registered under the Companies Act. The main object of creating Indian Trade Promotion Organisation (ITPO) was to promote, organise and participate in industrial trade fairs and exhibitions in India or abroad

The grievance of IP is (1) the time gap restriction of 15 days between two events, having similar product profile/coverage imposed by OP2 between two exhibitions/fairs in case the event is organised by a private organiser and in case of ITPO fairs 90 before the start or 45 days after the close of an ITPO show. In 2011, the OP 2 substituted, '45 after the close', with, '90 days after the close'. The IP alleges that the provision adversely affected the established exhibitions of other players in the market by scheduling its own unrecognised exhibitions and refusing the permission to other players on the pretext of arbitrary time gap restrictions. (2)

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10 Dixit, V.K., 'Competition Law' XLVII ASIL 160-161(2011).

11 *Ibid.*

12 2014 Comp LR 87 (CCI).

IP further alleged that OP2 would announce an exhibition and later cancelled it causing loss to the whole industry. (3) In addition to these, IP alleged that ITPO imposes a number of services on them which are not required by them.

CCI after taking into consideration all the material on record proceeded to decide three issues. (1)What is the RM? (2) Whether OP2 is dominant in the RM? (3) If OP2 is dominant in the RM has it abused its dominant position in the RM? According to the CCI the RPM was 'provision of venues for organising national and international exhibitions and trade fairs'. In order to attract exhibitors and visitors the venue plays a key role. The venue which regularly holds exhibitions and trade fairs, having large space sufficient to accommodate multiple exhibitors, centrally located and well known to the world, is most preferred by exhibitors. Delhi was defined the RGM. It is Delhi as it has better public transport system, connectivity to airports, railway stations and interstate bus stations, has a number of quality hotels and it is the capital of the country. CCI defined RM as 'provision of venue for organising national and international events in Delhi'.

Regarding dominance, the CCI found OP2 to be dominant in the RM. There is no competitor of OP2 in the RM; even outside Delhi OP2 as venue provider stands way ahead of other venue providers; it performs multiple roles as a regulator and organiser. It formulates policies and guidelines for holding such events; these plural roles give it a position of strength in the RM. Regarding abuse of dominance, the CCI found OP2 guilty of abuse of dominant position on many counts. (1) Though the time gap restrictions imposed by OP2 were not abusive per se but the conduct of OP2 in stipulating, amending and applying the same was found to be abusive in terms of ss. 4(2) (a) (i), 4 (2)(b) (i), 4 (2) (c) and 4 (2) (e). OP2 provided favourable time gap restrictions for its own events as compared to third party events. The provision of different gaps gave OP2 discriminatory advantage over others. Such a conduct violates section 4(2) (a) (i). It also limits and restricts provision of services and market in contravention of section 4 (2) (b) (i). Increase in time gap restriction for holding third party events, before and after OP2's own events of similar profile amounted to denial of market access to the third parties, in violation of section 4 (2) (c). OP2 has also used its dominant position in the RM of venue provider in Delhi, to protect and enhance its position in the market of event organisation, thus contriving the provisions of section 4 (2) (e). The allegation that guidelines for cancellation and rescheduling of events impose onerous conditions on third parties was found to be correct on the face of the terms of the guidelines and held to be abusive by the CCI.

It was also alleged that OP2's guidelines for reservations of slots for regular events and allocation on first come first served basis was often disregarded for benefit of its own events. OP2 would take unreasonable time to confirm the bookings, allowing it to manipulate the bookings. In support many instances were cited. This manipulation gives an unfair advantage to OP2 and results in violation of section 4 (2) (a) (i) and denial of market access in violation of section 4 (2) (c). However the requirement of compulsory taking of foyer area along with the allotted area and compulsory usage of designated housekeeping services was not found to be abusive as these requirements are uniform and for the clean and efficient functioning of the events.

However the Ministry of Commerce and Industry was not found to violate any provision of the Act on grounds that (1) there is no specific allegation against it and (2) it is not an enterprise within the meaning of section 2 (h) of the Act. It debatable if the second ground is correct, because an entity which controls the production or provision of services is also an enterprise provided it does not relates to sovereign functions. In our opinion the important question would have been if the ministry really controls the functioning of ITPO?

VII AFTER MARKET

Shamsher Kataria v. *Honda Siel Cars India Ltd*.[13] is a case on anti competition agreement and abuse of dominant position in the aftermarket of passenger cars.

The information has been provided by a Mr. Shamsher Singh against Honda Siel Cars (OP1) Volkswagen India (P) Ltd. (OP2) and Fiat India Automobiles Ltd. (OP3) against their alleged anti-competitive activities. It was alleged that genuine parts of the cars manufactured by OP1, OP2 and OP3 are not available in the open market and in the independent service and repair shops, but only at authorised service stations, where servicing and repair is more costly. These practices make the whole transport market uncompetitive, rendering road transport more costly. In contrast, IP alleges that he can get a Maruti car easily repaired as its spare parts are easily available in the open market. These practices have made the market monopolistic, amounts to denial of market access to independent service stations, transport costly and hamper economic growth. IP also maintain that in Europe and US there are competition regulations that ensure availability of spares in the open market. IP alleges violation of sections 3(3) (a) and (b), 3 (4) (d), 4(2) (a), (b) and (c) of the Act.

Finding that a *prima facie* case has been established the CCI referred the case to the DG for investigation. The DG gathered the information that these practices are not confined only to the three OPs but there are 14 more such enterprises and CCI permitted the DG to join them as OPs. The DG issued detailed questionnaire to them as well as their group companies engaged in the automobile after market in India.

The DG in his report divided the RM in two segments namely, primary market consisting of manufacture and sale of passenger vehicles, and after market for after sales repair and maintenance services that are required after the purchase of primary product. After the purchase of primary product the consumer is required to purchase the after sales repair and maintenance services. According to DG even in the aftermarket there are two distinct markets. (a) Supply of spare parts, including diagnostic tools, technical manuals, catalogue *etc.*, and (b) the provision of after sales service, including servicing of vehicles and maintenance and repair services.

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13 2014 Comp LR 001 (CCI).

The DG noted that once the primary product is purchased, the choice of the consumers in the aftermarket is also limited to the aftermarket products or services compatible with primary product specifications. The consumer, more or less is locked into certain after market supplies. In order to determine whether each brand of vehicle has a separate relevant market different from other markets, the question asked was whether it is possible for the consumers to switch to spare parts manufactured by another producer? Or whether it is possible for the consumers to switch over to another primary product to avoid increased cost of aftermarket of his/her primary product? The answers to both the questions were given in negative. Regarding the first question, the DG observed that interchange ability is not possible because most of the spare parts of a primary product are manufactured specifically for that specific model. Regarding the second question the DG concluded that the cost of after sales services over the life time usage of a vehicle constitute a significant amount. However the DG viewed that such cost in the secondary market could not be efficiently compared with the cost of purchasing a new product in the primary market. It was not possible to estimate the cost of aftermarket over the years during which a consumer intends to use the vehicle and such cost depend on many unknown and confidential factors, which the manufacturers do not share with the consumers. Each after market of every model is different and monopolistic. But the geographic market is whole of India. As no alternative source is available to procure the spares and diagnostic facilities and maintenance, every after market is a separate market and not substitutable by others. Therefore every (original equipment maker) OEM is dominant in his specific market.

Regarding abuse of dominant position, the DG analysed the practices and conduct of each OEM. OEMs are dominant largely because of holding of intellectual property rights (IPRs) on parts manufactured by OEMs and by (original equipment suppliers) OESs. Mere holding of IP rights does not amount to abuse unless the IPRs result in imposition of discriminatory and unfair conditions. However, the restrictions placed by the OPs on OESs, authorised dealers, spare parts and diagnostic tools *etc.* and denial of access to independent service stations, amounts to abuse of dominant position. Imposition of unfair conditions and denial of market access to independent service stations results in violation of the provisions of sections 4(2) (a) (i) and 4 (2) (c) of the Act. Because of the restrictions, the choice of the consumer, to choose between the authorised dealers and independent service providers, does not exist.

Because of the use of high technology and denial of sophisticated diagnostic tools, spare parts *etc.* to the independent service providers makes every OEM dominant and the denial an abuse.

For the purposes of violation of section 3 of the Act, DG concluded that the OESs are suppliers of auto components for (a) the assembly line purposes and (b) for the aftermarket requirement of the OEMs. The DG broadly categorised them in three categories. (a) Where the design, drawing, technical specification, technology, know-how, equipment, are very few, for example, batteries, tyres etc. Quality parameters etc. are provided to the OESs by OEMs, the OESs are required to make the parts and supply according to these parameters. (b) Where the patents, know-how, technology belong to the OESs however, the manufactured parts are based on the specification, drawings, designs supplied by the OEMs The tooling/tooling cost may also be borne by the OEMs in some of these cases. (c) Where the parts developed and sold by the OESs are made to their own specifications or designs which are commonly used in the automobile industry. Such parts are very few for example batteries and tyres. In case of spare parts of categories (b) and (c), OESs cannot supply spare parts to third parties without the consent of OEMs.

The agreement between OEMs and OESs, in relation to specialised diagnostic tools and specialised spare parts, has features of exclusive distribution agreement (only to authorised dealers) and refusal to deal (refusal to deal with independent service providers) is violative of section 3(4) (c) and (d) of the Act. The DG further notes that in a number of cases, specially in those cases where the OEMs have foreign affiliations, there is no written exclusive supply agreement yet no supply is made to the independent parties. The DG also noted that in most of the cases overseas suppliers are group companies of the OEMs, and there is a strong possibility of unwritten agreements. In this case the DG for all practical purposes is saying that there is no need of giving an independent proof of meeting of mind of the agreeing parties but proof of agreement may be inferred from the practices carried on by the agreeing parties. The author of this survey, while criticising earlier decisions of CCI in 2011, in which the CCI held that in order to constitute an anti competition agreement it is necessary that there must be an independent proof of meeting of mind**,** observed that there is no need of an independent proof of meeting of mind but meeting of mind may be inferred from the anti competitive practices carried on by the parties.[14]

OPs also invoked the protection of IP rights to defend exclusive distribution and exclusive dealing agreements. Section 3 (5) gives limited protection to IPRs holders from the strict requirements of the Act. Nothing contained under the Act shall restrict the holder of the IPRs, the right to restrain the infringement of IPR or to impose reasonable conditions. The important word in this section is 'reasonable'. The DG found that the restrictions imposed by the OEMs in the sale of spare parts are not reasonable to protect such IPRs. (a) OEMs claimed that they have a right to provide that OESs cannot sell to third parties without their consent in order to protect IPRs, but the DG noted that in no case such permission was demanded or given. That cannot be reasonable. DG noted that OPs could not also establish copy right on designs. Hence claim to protection under IPRs was rejected by the DG.

Regarding the vertical agreement between OEMs and authorised dealers under which after sales service is provided to the customers, DG observed that there are four types of agreement between them. (a) In certain cases the agreement between the OEMs and dealers prohibited the sale of parts over the counter in the nature of exclusive distribution agreement. (b) Where there is no such specific agreement, there was some sort of understanding between the OEMs and authorised

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14 Dixit,V.K., 'Competition Law' XLVII *ASIL* 154-155(2011).

dealers pursuant of which the dealers did not sell spare parts in the open market. This amounted to refusal to deal and exclusive dealing. (c) In some cases OEMs had an agreement with the authorised dealers that they will source the spare parts only from OEMs or authorised vendors in the nature of exclusive supply agreements. (d) The agreement between the dealers and OEMs also provide that the dealers would not sell the cars of other OEMs without OEMs consent in the nature of exclusive distribution agreement.

In case of vertical agreements it is also necessary to prove AAEC, the DG analysed AAEC with reference to parameters given in section 19 (3). The parameters are creation of entry barriers, driving existing competitors out of the market, foreclosure of competition, accrual of benefit to consumers, improvement in production or distribution of goods or services and promotion of technical and scientific and economic development. In view of these findings the CCI found OPs guilty of violation of section 3 and 4 of the Act.

VIII COMPETITION COMMISSION: CAPTIVE MARKET

Three D Integrated Solutions Ltd. v. *Veri Fone India Sales Pvt. Ltd.*[15] is a case on alleged violation of sections 3 and 4 of the Act. The informant, a company registered under the Companies Act, 1956 is engaged in the video audio broadcasting *etc*. The OP, a wholly owned subsidiary of Verifone System Inc. headquartered in USA, is engaged in the business of providing hardware and software solutions such as mobile Ticketing Machines (ETMs), Point of Sales (POS) terminals and related services and has expertise in electronic payment transactions at POS terminals. The Ministry of Urban Development (MOUD) launched a National Programme for Standardised Fare Collection System (AFCS) in 80 cities with a National Common Mobility Card (NCMC) for passengers. The MOUD awarded this project to UTI Infrastructure Technology Services (UTIITSL).UTIITSL floated a proposal for implementation of Integrated Transport Management System (ITMS) with a NCMC for Jaipur City Transport Services Ltd.(JCTSL) in Jaipur. This bid was awarded to M/S Efkon India Pvt. Ltd. (M/S Efkon) who in turn sub contracted it to the IP for supply, installation and maintenance of hand held payment device for mobile use with wireless connectivity, security certifications, etc. to be used in buses for the afore said project.

The IP placed a purchase order with the OP for the purchase of 275 fully functional mobile ETMs for ITMS project so that the IP may load independent application software and operate it from its infrastructure. The IP maintained that OP was fully aware of the requirement of IP and should have supplied fully functional ETMs but imposed a restrictive condition without giving prior information to IP. ETMs were supplied with restrictive use with super imposed condition of requirement of a Software Development Kit (SDK) to achieve full functionality of ETMs. For the restrictive SDK, in the garb of IPR protection, IP was forced to pay additional Rs.365615/-. OP informed the restrictive use of ETMs only after securing and accepting purchase order. Since the IP was running behind

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15 2015 Comp LR 464 (CCI).

schedule and it did not want to tarnish its image it had no option but to accept the restrictive condition and had to accept SDK along with the ETMs.

According to IP the OP imposed the restrictive condition with a malicious intention. OP, a major player in hardware, wanted to attain a similar position in the market of software. OP wanted to acquire monopolistic conditions. The supplied SDK was locked by a security key *i.e.,* File Signing Tool (FST). Without the key and certain critical components, IP was fully dependent on OP for the operation of SDK. OP even approached M/s Efkon, bypassing IP and made a commercial offer on the basis of knowledge gained from the software of IP. Though the IP gave two legal notices to the OP but got only evasive replies.

Finding that a prima facie case has been established, CCI referred the case to DG. The DG, on the basis of the investigation, found that OP has a position of strength in the relevant market and can act independent of the market forces. The DG defined the RPM (relevant product market) as 'the market of POS terminals in India'. The DG also revealed that POS terminals installed by the OP with Europay Mastercard and Visa (EMV) are of different category and cannot be substituted by ordinary ETM devices.

The DG found that OP by imposing restrictive clause through SDK licence agreement, has violated the provisions of section 4 (2) (a) (i), section 4 (2) (b) (ii) and section 4 (2) (e) of the Act.

(I) The OP did not allow the IP to use the application developed by Delhi Integrated multi-model Transport System Ltd. With the intention to leverage its dominant position in the POS terminals market to enter into and protect the down stream market of VAS, the OP acted in violation of the provisions of section 4 (2) (e).

(II) The OP also limited and restricted the scientific and technological development of the market to the detriment of the consumers, thus violating the provisions of section 4 (2) (b) (ii).

(III) Withholding the production key and FST for having control over the terminals is unfair and violative of section 4 (a) (i).

(IV) The DG also identified three officers of OP who were responsible for the said anti-competitive conduct of the OP.

OP objected to certain findings of the DG.

(i) According to OP the relevant market should have been 'The market for ETM' and not 'The market for POS terminals', as the contract with Efkon was for ETM.

(ii) OP also challenged the determination that OP enjoys dominant position. OP has a miniscule share in the ETM market. But even in the POS terminal market OP's nearest rival Ingenico has 57% of share.

(iii) The draft SDK agreement does not amount to abuse of dominant position as the draft agreement does not require disclosure of any confidential and commercially sensitive information.

The CCI made three issues to decide the case.

(i) Determination of relevant market, (ii) Whether OP is dominant in the relevant market? (iii) Whether the conduct of the OP amounts to abuse of dominant position? CCI disagreed with the OP, who invited CCI to find the relevant market as market for ETMs in India. Agreeing with the DG, the CCI defined the relevant market as 'market for POS terminals in India'. CCI observed that ETMs with EMV/PCI certification are basically POS terminals with specific features like EMV and PCI with certain basic features. There are other ETMs which do not have such features. All ETMs are not substitutable.

After defining the relevant market CCI determined the dominant position of the OP. In accordance with the provisions of the Act, the following factors were taken into account, market share, size and resources, size and importance of its competitors, economic power and commercial advantage over competitors, vertical integration, service network, high capital cost of entry, marketing and technical entry barriers, dependence of consumers on it, high cost of substitutable goods and service etc. CCI preferred to rely on DG report in order to determine dominance. Relying on RBI data rather than the submissions of OP, CCI found that OP has 80% of the POS terminal market as on 31.3.12. It is far ahead of its nearest rival Ingenico. OP is in a position to act independently of the market forces.

Regarding abuse of dominant position, there were several allegations against the OP, inter alia, not disclosing the conditions in SDK agreement, restricting the licensee from transferring any software it develops, not allowing the use of any applications developed by a third party, keeping controls of sold POS terminals, and leveraging its dominant position in the POS terminal market to enter into and protect the downstream VAS market.

CCI next considered if OP has abused its dominant position. The thrust of the argument of the IP is that OP by not disclosing the conditions of SDK agreement, not allowing the use of applications developed by third parties, keeping control of sold POS terminals, and leveraging its dominant position in the POS terminal market to enter and protect the downstream VAS market has violated the provisions of section 4.

From the report of the DG it is revealed that no other POS terminal vendor in India or outside India has been found to have imposed restriction on development of applications or putting restrictive clauses similar to those found in the SDK agreement of the OP. The intent of the OP seems to be to exploit the VAS players by either restricting them or sharing their revenue because VAS market is highly profitable.

The licence restriction clause "not to use licensed software to develop any payment software that directly or indirectly interacts with any acquiring bank" seems to be unfair and restrictive. The SDK agreement of the OP does not allow a third party to write a payment application in India which is contrary to practice followed by the OP elsewhere across the world as is evidenced from the statement made in its website.

In addition to restriction clauses there are also disclosure provisions in the SDK licence agreement (a) disclosure to licensor from time to time activities relating to licensed software, (b) What value added software it has created and (c) what the licensee intend to create using the licensed software. Based on the above observations CCI concluded that OP has violated the provisions of section 4(2) (a) (i), 4(2) (b) (i) (ii), and 4(2) (e).

As penalty has already been imposed on OP for similar violations, CCI did not impose any further penalty, but issued a cease and desist order. The DG also identified three officers of OP who were responsible for the abuses. After receiving response of these three officers CCI would take appropriate action.

It is significant to note the IP stated that "since the IP was already running behind the schedule and was under the threat of penalties and even cancellation of order, it had no choice but to sign the agreement with highly restrictive clauses." It simply means that IP agreed to the agreement because it was a captive consumer. Though the word captive market has not been used in the order, it is clearly a case of captive market.

Anchal Khetrapal v. *Jaiprakash Associate Ltd.*[16] is a preliminary decision by the CCI, in which they have decided to refer the case to the DG for investigation. We would not have discussed the case but for the fact that the case appears to be a case of captive market and the OP is dominant in it and the consumer is captive but CCI seems to treat the case as a case of ordinary dominance in a non captive market in which the OP also seems to be dominant.

The IP booked a plot for residential accommodation for an amount of Rs61,93,990/- out of which Rs. 11,57,598/- has already been paid. When there was delay in delivery of the plot, even after the allotment letter, IP wrote several letters to OP, which remained unanswered and OP cancelled allotment and after a lapse of time gave a refund of Rs.5,38,199/- which the IP refused to encash in protest. IP alleges abuse of dominant position by the OP as in a number of cases OP was found to be dominant in 'the market for the services development and sale of residential plots in Noida and Greater Noida.'

The CCI observed that there are a number of real estate players in this market but OP appears to be dominant in this market. Several terms of the agreement between the IP and the OP appear to be unfair and discriminatory. There being a prima facie case the matter was referred to the DG.

It appears that CCI referred the case to the DG because in 'the market for the services development and sale of residential plots in Noida and Greater Noida' OP is declared to be dominant in other cases. As we have pointed out in the surveys of 2011 and of 2012 that only Mr. R.Prasad applied the well known concept of Captive consumer and captive market, but unfortunately other members, without giving any reasons, whatsoever did not subscribe to this concept and refused to follow it.[17]

However in preceding case discussed above, CCI without mentioning the concept of captive market applied the concept to the facts of afore-mentioned

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16 [2014] CCI 106.

17 *Supra* note 14; Dixit, VK, "Competition Law", XLVIII *ASIL* 167-168 (2012)

case. Our question is what CCI would have done had the ‘unfair and discriminatory conduct’ was done by any of the minor builder in afore mentioned RM? Perhaps the CCI would have observed that the consumer has other choices as it said in Unitech case[18] analysed in the survey of 2011.[19] Here two important facts are; (a) The terms and conditions of all the builders are substantially the same whether they are minor or major. (b) Builders usually give the consumer the draft of the agreement when he has already made substantial payments. Because of these two factors the consumer becomes captive and at that stage exit becomes very costly. It is expected that CCI in deciding such cases would take these factors into consideration.

Deepak Kumar v. *TDI Infrastructure Ltd*.[20] is a case similar to the preceding case except that in this case the OP was not found to be dominant in a relevant market defined very widely by the CCI. The IPs booked four plots with the OP and paid 79.80% of the cost of the plot. IPs’ contention is that (a) though they paid for plots at prime location but the allotted plots were at ordinary location (b) instead of refunding the excess money charged for prime location plots the OP kept on adding additional charges, significantly inflating the outstanding balance, (c) OP threatened IPs that if outstanding dues are not paid by a stipulated date, a heavy penalty shall be imposed, (d) if the amount is not paid by the stipulated date, the amount deposited by the IPs shall be refunded without interest after deducting the earnest money and other charges.

All these alleged abuses were done by the OP after IPs paid 79.80% of the agreed price of plots. At this stage it was impossible for the IPs to switch over to other competitors of the IP in the relevant market because it would have been very costly as OP would refund the deposited amount without interest after deducting earnest money and other charges. The CCI in stead of discussing this costly exit conveniently declared that ‘in the market for services of development and sale of the residential plots in the Sonipat district of Haryana’ the OP is not dominant and therefore there is no abuse of dominant position.

IX NO COMPETITION CONCERN

Magnus Graphics v. *Nilpeter India Pvt. Ltd*.[21] is a case in which CCI did not find any violation of any provision of the Act. IP is a partnership firm engaged in label printing at Muzaffarnagar in U.P. OP1 is engaged in manufacturing, distribution, marketing, installation and after sales service including training of operators of Nilpeter brand of printing machines in India. OP1 is a subsidiary of Nilpeter of Denmark. OP2 and OP3 are managing director and sales manager of OP1. OP4, M/s Sai Com Codes Flexo Prit Pvt Ltd., is a competitor of IP.

It is alleged by the IP that on persuasion by OP2 and OP3 IP purchased a Nilpeter brand of machine for Rs.2, 41, 11,148/- for which an advance was paid

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18 2011 Comp LR 31 (CCI)

19 *Supra* note 14.

20 [2014] CCI 106.

21 2015 Comp LR 93 (CCI).

and the rest was paid later. The machine was installed on 15.5.2012. IP alleges that the machine started giving problem from the initial stages. IP alleged abuse of dominant position and taking advantage of its dominance OP imposed a number of unfair and discriminatory terms. IP will have to bear travel and lodging expenses of service engineers. In spite of an agreement OP did not provide a trained operator to the IP. On many occasions OP refused to provide service engineers and spare parts to IP on the ground that IP has started doing business with 'Patanjali', who is a customer of OP4, a competitor of IP. OP locked the machine of IP with a pass word not known to IP and would not unlock it till the balance payment is made, But the machine was unlocked on payment of the balance. OP has also not issued the invoice for the payment made to the IP. Though a cheque has been issued for annual maintenance, OP refused to make an agreement on ground that IP is doing business with Patanjali. Because of non cooperation of OP the IP has not been able to complete the orders of Patanjali, and suffered loss of business and revenue. IP also alleged the existence of an anti-competition agreement on grounds that OP1 to OP3 have entered into an agreement with OP4. In consequence OP refused to deal with IP and thereby OP1 to 4 are determining the price of printing with Nilpeter machines in northern India. CCI referred the matter to the DG.

The DG in order to determine alleged abuse of dominant position, defined relevant market as "the servicing of Nilpeter FB 3300 Servo Flexo Printing Machine in the territory of India". In this relevant market OP1 was dominant. DG also determined that denial of service to IP amounts to abuse of dominant position in violation of the provisions of section 4(2) (a) of the Act. The DG also found that there was vertical anti-competitive agreement between OP1 and OP4, as OP1 and OP4 operated at different levels of production chain. The vertical anti-competitive agreement also causes AAEC in India. The DG also found Alan Barretto, the Managing Director of OP1, Manish Kapoor, Sales Manager of OP1 and Harish Gupta, Director of OP4 responsible for anti-competitive conduct of OP1 and OP4.

However, CCI did not agree with the findings of DG on both the counts. Unfortunately the case only reports the findings of DG but not the detailed reasoning for arriving at these findings. If CCI differs from the decision of DG, it is better to give the findings of DG in detail. We find the findings of the DG far more plausible than the findings and decision of the CCI. The reasons for decision given by the CCI appear to be very weak. However they need to be discussed because they are binding on the parties.

The CCI did not agree with the definition of relevant market given by the DG. CCI observed that the relevant product market in the present case may not be confined to the servicing of Nilpeter FB 3300 Servo Flexo Printing Machine alone, because for some reasons CCI decided that the technology used by the competitors of Nilpeter is either similar or same. As according to CCI, label printing machines manufactured by Nilpeter and its competitors are substitutable by virtue of physical characteristics, price and intended use, therefore, servicing may also be substitutable. Though most of the customers of Nilpeter FB 3300Servo Flexo machine preferred getting their machines serviced by Nilpeter, yet CCI on the basis of evidence of some witnesses found that even the service is substitutable. It must be pointed out that CCI used a vague phrase 'same or similar'. A similar technology is not necessarily the same technology. In addition to this CCI ignored the importance of design. Same or similar technology may use different design resulting in different specifications of spare parts. Even if the service of printing machines in this case is substitutable there is difference between efficient substitutability and inefficient substitutability. On the basis of the deposition of some non-expert witnesses CCI came to the conclusion that in the market of servicing of Nilpeter FB 3300 Flexo printing machines, OP1 is not dominant as other service providers can provide equivalent service and spare parts are easily available in the market. Hence CCI decided that this case does not involve any competition concern. The main difference between the findings of DG and that of CCI is that the DG treated the IP as a locked consumer and the market as captive market whereas the CCI treated the market as competitive, which it actually was not.

It is not possible to agree with the CCI, we would prefer to agree with DG. If this case is made a precedent, would it not make, in most of the cases, the requirement of specialised after markets, redundant. It appears that even CCI was not sure of its arguments. That is why it used words 'same' and 'similar' inter changeably. Hence it was asserted that similar is not the same. Therefore the Commission was of the opinion that this case was not a case of captive market in which OP1 was dominant and its conduct was abusive.

X HOW NOT TO DECIDE A CASE

Nandan Kumar v. *Association of Health Care Providers (India)*[22] is an excellent example of how not to decide a case. The case appears to have been decided without seriously taking into account the relevant provisions and concepts of the law of competition. The IP in this case is a beneficiary of Central Government Health Service (CGHS) of the Central Government. The Association of Health Care Providers, OP1 is an association of health care providers in India that includes hospitals, nursing homes and clinics *etc*. Apollo Hospitals enterprise Ltd., OP2 and Yashoda Hospital, OP3 are the members of afore said association. IP alleged violation of the provisions of sections 3 and 4.

In accordance with the rules and agreement between CGHS and private health providers, the empanelled hospitals are under an obligation to provide cashless medical facility to the CGHS beneficiaries. According to IP, OP2 and OP3 stopped providing cashless medical facility to CGHS beneficiaries and OP1, which has about 10000 member hospitals in India, issued a circular advising its members to stop providing cashless service to CGHS beneficiaries on grounds that the Central Government has made default in making payments to the empanelled hospitals.

CCI decided that the case does not involve any competition concern as only 24 out of the 407 hospitals have discontinued cashless facility and that these 24 hospitals have decided to discontinue cashless facility unilaterally. Since the majority of the empanelled hospitals did not comply with the circular of the association and 95% of the hospitals continue to provide cashless facility, CCI

22 2015 Comp L R 192 (CCI).

noted that the hospitals chosen by the IP were out of those 24 hospitals and do not depict the correct picture. The IP could have gone to the hospitals that provide cashless medical facilities. CCI thus came to the conclusion that there was no anti competitive agreement since the majority of the hospitals did not comply with the circular of the association.

Though the majority of the hospitals did not comply with the circular of the association, the minority has. There should have been an investigation as to who acted on the circular of the association because in order to constitute horizontal anti competition agreement, even if a tiny minority of hospital act on the circular there would be an anti competition agreement. If there is an anti competition agreement there is also a presumption of appreciable adverse effect on competition (AAEC). The presumption of AAEC can be rebutted, but it must be rebutted by the OP and not by the CCI, for there is no presumption of the rebuttal. For rebuttal relevant market must be defined by the CCI, within which OP must prove that there is no AAEC. Without taking these necessary steps it is difficult to understand how CCI came to the conclusion that there is no competition concern. Further there is no substance in the averment, seems to have been relied by CCI, that central government is making default in payment to hospitals, that there is arbitration clause in the agreement between government and empanelled hospitals. Even if averment is correct, it would not deprive CCI of its jurisdiction.

In our opinion CCI in this case should have examined the existence of an anti competition agreement even if the number of hospitals constitute a minority. Then in order to facilitate rebuttal of AAEC, relevant market should have been defined. The hospital should be situated within the reach of an individual beneficiary. The geographic market for the IP or for any other beneficiary cannot be a state or even a metropolis (it seems that IP lived in Hyderabad, a metropolis). For an ordinary ailment such as seasonal fever, it is impractical to expect a patient to travel long distances. The geographic market in such cases should not be beyond 4-5 kilometres.

XI COMPETITION APPELLATE TRIBUNAL

As Singhavi J, apparently a conservative judge, has recently joined the tribunal, it will be appropriate to discuss his decisions in order to understand his legal ideology with specific reference to the competition law. One of the cases decided by the Judge is *D.H.M. Value Services Limited* v. *Janta Land Promoters Limited*.[23]

In pursuance to the Industrial Policy 2003 the government of Punjab allotted land to many private players for the establishment of industrial parks at many places in Punjab. The appellant applied for a plot in Mohali industrial park, managed by the respondent. A plot was allotted to the appellant for a consideration of Rs.15800000 (one crore fifty eight thousand) out of which Rs. 5800000 were paid and rest were to be paid in stipulated instalments. In case the instalments were not paid within the stipulated time, there was a provision of penal interest and even

23 2015 COMPAT 684.

cancellation of allotment. The appellant did not pay the instalments because the respondent did not clear the dues payable to different government departments and therefore the project was not sanctioned as a park. The respondent after giving due notice cancelled the allotment of the plot, but the respondent refunded the deposited amount (38 lakh) after deducting 10% from the amount.

Immediately thereafter the appellant filed a civil suit for declaration that the cancellation of the land was illegal. The civil court ordered that the cancellation was illegal but at the same time the appellant has to pay the remaining instalments. The court refused to pass a permanent injunction.

After one year the appellant informed the CCI of the violation of section 4 of the Act. CCI rejected the allegation as there was no violation of section 4.

On appeal the tribunal through Singhvi J agreed with the CCI that a case of abuse of dominant position has not been made out. As we have been writing in these surveys year after year, that Indian commission as well as the tribunal is reluctant to find the concept of captive consumer even in appropriate cases. It is regretted that even Singhvi J failed to appreciate the importance of captive market. In case of captive market there is practically no choice with the consumer to go to other competitor if the terms offered by a competitor are found to be onerous, discriminatory or unfair. In this case also, if the facts are carefully observed, the appellant did not have a choice to go to another industrial park, when the respondent failed to create the condition for which the plot was purchased by the appellant in his park. As a matter of fact it would have been onerous to move to another park in the State of Punjab.

Singhavi J agreeing with the Commission defined relevant market as the market of industrial parks in Punjab. As there are many industrial parks in Punjab the park in Mohali is not dominant, hence no abuse of dominant position. Singhvi J additionally gave two other reasons for refusal to give relief. He says that the appellant has not come to the tribunal with clean hands and there is inordinate delay in seeking relief from CCI.

The relief should have been given because, contrary to what Singhvi J, the appellant does not have a choice to go to another park in Punjab as to do so would have been costlier and onerous to the appellant for several reasons. (a) The park was not sanctioned as industrial park because of the fault of the respondent. They failed to pay dues to the government. The hands of the respondent are unclean. (b) Because of the non-sanctioning of the park, the appellant suffered monetary loss (loss of 10% of the deposit) but more importantly the loss of wasted time (in a competitive society wasted time gives advantage to the competitors of the entrepreneur) and diminished opportunities in other parks. Possibly it is also a case of lost opportunities in other parks and the market.

XII COMPAT: NATURAL JUSTICE

Pan India Infra Project Private Ltd. v. *CCI*[24] is a case on violation of rules of natural justice. The decision of CCI was turned down and the case was remanded

24 2015 COMPAT 671.

to CCI for revision of decision. The IP alleged that Board of Control of Cricket in India (BCCI) abused its dominant position in as much as the IP, out of other bidders, alone was black listed and prevented from bidding for broadcasting rights. A three member Arbitral Tribunal unanimously awarded that BCCI has abused its dominant position against the appellant.

On the information given by the appellant, CCI, making a reference to *Surinder Singh Barni* v. *BCCI*[25] decided that no fresh case was made out against BCCI and cease and desist order given in *Surinder Singh Barni's* case (at the time stayed by Compact) would apply to it as well and in case of violation of the order the appellant can move the Commission under section 42 of the Act.

In the present appeal the appellant alleges that the Commission failed to make a distinction between sanctioning the private professional cricket and organising private professional cricket. They are two different relevant markets. It was further stated that BCCI in its appeal against *Surinder Singh Barni's* case averred that the DG defined RM as underlying economic activities in organising private professional cricket but the CCI defined it as organising private professional cricket and no opportunity was given to BCCI to counter the definition of RM by CCI. This objection was accepted by Singhvi J. In view of these findings Compact remanded the case to CCI for fresh decision.

XIII COMPAT: ANTI-COMPETITIVE AGREEMENT

Coordination Committee of Artists and Technicians of West Bengal Film and Television Industry v. *Mr Sajjan Kumar Khaitan, Proprietor of M/s Hart Video, East India Motion Pictures Association, Kunal Ghosh and Mr. Sanjoy Das*[26] is an appeal against the order of CCI. The CCI delivered two judgements majority and minority. The *competition* appellate tribunal (COMPAT) affirmed minority opinion and set aside that of the majority. The majority held the OP guilty of violating section 3 (3) of the Act whereas the minority represented by Dhingra J held that there was no violation of section 3 (3).

Eastern India Motion Pictures Association (EIMPA) was OP1, General Secretary Coordination Committee of Artists and Technicians of West Bengal Film and Television Industry was OP2. The IP was in the business of making video cinematographic TV serials telecasting regional serials in eastern India. It was alleged that B.R. Chopra produced a serial 'Mahabharat' in Hindi and the IP purchased the rights to dub and telecast in regional language in Eastern India. Two channels of Kolkata were to telecast the serial. In March 2011 these two channels received letters from EIMPA not to telecast this serial, as there was a restriction on running the dubbed national programmes in eastern India. The majority of CCI found that there was a horizontal anti competitive agreement among the members of EIMPA and the coordination committee in contravention of section 3 (3) (b) of the Act. On the other hand according to the minority there was no anti-competitive agreement as the RM was 'the broadcast of TV serials in

25 2013 Comp L R 297 (CCI).

26 2014 Comp L R 329 (CompAT).

bangala' and no opposite party was active in the RM. The letters from EIMPA did not amount to an agreement among the enterprises but only a kind of trade union pressure. The broadcasters were at full liberty to ignore these coercive threats and continue to broadcast the serial. The COMPAT agreed with the opinion of the minority and set aside the findings of the majority.

The COMPAT decided the case too literally to be satisfactory. The real question was whether the pressure exerted by the two OPs was effective against the broadcasters? Whether the failure to abide by the advisory of the OPs entailed some evil consequences for the broadcasters?

XIV COMPAT: ABUSE OF DOMINANT POSITION

Imperia Structures Limited v. *Dakshin Haryana Bijli Vitaran Nigam*[27] is a case on abuse of dominant position, decided by Singhvi J. This is an appeal against the order of CCI, that the case does not involve competition concern, hence the DG was not ordered to investigate the case. The allegation of the IP that the respondent, (OP) has abused its dominant position was found not to contain any merit both by the CCI and the COMPAT.

On 16.07.2011, the Director Town and Country Planning, Haryana, issued a licence for construction of group housing in favour of M/s Phoenix Datatech Services Pvt. Ltd., M/s Prime Infoways Pvt. Ltd. and M/s Prime IT Solutions Pvt. Ltd. and for this purpose granted land measuring 17 acres. However, later, Phoenix Datatech(P) Ltd. and the appellant (IP) amalgamated under the Companies Act, 1956. After the amalgamation the appellant (IP) owned only 11 acres of land. The appellant applied for grant of electricity connection only for 11 acres of plot to the respondent but the application was rejected on the ground that, according to the rules, for one licence granted by the Director Town and Country Planning only one electricity licence can be granted. The prayer of the Appellant (IP), that the refusal to grant a separate licence for the plot of 11 acres was abuse of dominant position, was rejected by the COMPAT, approving the order of the CCI.

Another important case decided by the COMPAT is *National Stock Exchange Ltd*. v. *CCI*[28]. In this case the COMPAT agreed with the substantive outcome of the decision of the CCI, but partly agreed and partly disagreed with grounds of decision given by the majority as well as minority.

In this case the IP, MCX Stock Exchange, alleged before the CCI that the OP has abused its dominant position specially to enter into another market. The IP alleged that the OP aimed at eliminating competition from currency derivative (CD) segment, discouraging new entrants from entering into exchange services, achieving foreclosure of competition from exchange services. To achieve these ends the OP resorted to transaction fee waiver in CD segment, admission fee waiver in this segment but not in other segments, waiver of annual subscription in CD segment and waiver of data feed charge in CD segment. NSE was able to do this because of economy of scales and cross subsidisation of CD segment from other segments.

27 Appeal no. 58 of 2014 with IA no.87 of 2014, decided on 10.10.2014.

28 2014 Comp LR 304 (CompAT).

The DG defined RM as all exchange services except OTC in India. The OP was also dominant in the RM as their combined market share was 92.5%. The abuse consisted of the waiver of various fee as referred to above. On the other hand the response of NSE was that as they do not incur any cost in CD segment, zero cost is justified. The logic of fee waiver was that the CD segment was a nascent segment and fee waiver was to encourage this segment. But the DG negatived it on the ground that initially the OP charged fee in CD segment but it was waived only after the entry of the IP

The majority of CCI defined the RM as consisting of CD segment only and decided that NSE is dominant in this market as it has a position of strength because in F&O, WDM and CD segments its share was 92%, its deposits and profits are huge, it is present in whole of India and it is vertically integrated. The fee waiver in CD segment was an abuse, and it used its dominance in one market to enter into CD segment. The majority did not agree with the opinion of two dissenting members Anurag Goel and Geeta Gauri, who found that NSE did not have a position of strength in CD segment and did not consider zero pricing as predatory. They also held that in order to apply section 4 (2) (e) both the market must be associated. As CD market is not associated with other segments section 4 (2) (e) cannot apply.

Sirpurkar J first discussed the facts of the case in detail and then discussed the opinions of the DG, and the majority and minority of CCI. Sirpurkar J then defined the relevant market. He upheld the opinion of the majority that OTC (over the counter) cannot be part of the market of CD segment. CD market is future derivative market where underlying securities are currencies. On the other hand OTC market includes various products such as forwards, swaps and options for hedging the currency risks. Though functionally these products may appear to be similar but they are quite different in terms of characteristics. OTC segments are basically for importers and exporters. However Sirpurkar J did not agree with the majority that CD segment is a separate segment. According to the majority the CD segment was separate because it has a separate membership, its governing council is also different and that MCX-SX was given a licence to deal only in CD segment. Till 2008 India did not have CD segment. The minority on the other hand began by observing that the stock exchanges are only an infrastructure platform, but simply because these different products are traded from the same platform they do not lose their distinct characters. Therefore CD segment, because of its unique characteristics, is a separate market. Sirpurkar J not only rejected the minority definition of RM but also the majority view. Concentrating on majority view Sirpurkar J disagreed with all the three grounds that the majority gave in justification of treating CD segment as a distinct market. He said that CD segment was started in India in 2008, its members and governing council are different are irrelevant factors. If the exchange services are common for all the segments, then there is no need to restrict stock exchange services in respect of CD segment alone. The fundamental error that was committed by both majority and minority was that they assessed the RM focused on the product being traded on stock exchange as opposed to the services, which are offered by the exchanges. Stock exchanges do not offer sale or manufacture any product. It simply offers a trading platform. The market for assessment has to be services offered by the stock exchanges. A person purchasing CD need not restrict himself only to CD, he may have the choice to deal with securities or WDM or F&O. It is always a broker who deals and broker need not restrict himself only to the product of CDs.

It is not possible to totally agree with Sirpurkar J. He defines the market from supply side and therefore decides that the broker would not restrict himself only to CD segment, but from demand side various services may not be interchangeable. The customer who needs the service of CD may not switch over to the service of F&O.

On the question of whether NSE is dominant there was a difference between DG and majority on the one side and minority on the other. Sirpurkar J did not agree with the minority that NSE was not dominant in the RM. Because of a number of factors, such as dominance of NSE over WDM, F&O, and securities, its market share, national presence of NSE, a high degree of vertical integration, entry barriers, and high profitability makes NSE dominant.

Decision about abuse primarily depended on whether NSE was justified in making cost of CD segment zero? According to NSE, the parties that are pricing low (a consumer benefit) can do so in a way that an equally efficient competitor can also provide the same product at such low cost. As marginal cost, a cost for producing one additional unit is difficult to determine. As marginal cost depends on fixed cost such as rent, salaries and these costs are incurred irrespective of amount of production, it is better to refer to average variable cost (AVC). AVC in the present case would amount to resources required to facilitate one extra trade on CD segment. As AVC in NSE's CD segment was zero there is no abuse. Sirpurkar J. says that the argument on AVC did not convince him. It is not necessary for him to go to the concept of AVC or average avoidable cost. The NSE was well aware that MCX-SX did not have a license for any segment other than CD. MCX-SX was actually their competitors. It was therefore clear that if zero transaction fees were levied, MCX-SX would have no alternative but to follow the suit. MCX-SX had to continue with the policy of zero transaction fees. Consequently NSE registered a profit of Rs.515.54 crore whereas MCX_SX suffered a loss of 29.81 crore in the very first year. NSE totally ignored the existence of s.4 and remained complacent with their own policy of continuing with the zero transaction fees. This is the worst example of abuse. From DG it came to light that NSE did not have a historic philosophy of zero transaction fees. It began waiver only after MCX-SX entered the CD market. There is no justification for NSE to continue with the predatory pricing after 20th May, 2009 when the Act came into force.

As the RM market was defined as security exchange services there is no question of application of s.4 (2) (e). It is clear that there is a breach of sections 4 (2) (a) (i) and (ii). However, the tribunal did not make any change in the quantum of penalty. The amount of penalty would be 5% of the average turnover of the preceding three years.

Another important case decided by the COMPAT is *DLF Ltd.* v. *CCI* [29] an appeal by DLF against the decision of CCI on the information provided by the

29 2014 Comp LR 001 (CompAT)

owners of the housing complex Belaire, Magnolia and Park Place. In these appeals the tribunal substantially agreed with the findings of CCI. In all the three cases of the three housing complexes information and findings were almost similar.

Before the CCI it was alleged that the appellant was guilty of entering into anti-competition agreement and also of abusing its dominant position. The grievances were as follows; (a) the terms of apartment buyers agreement (ABA) were different from the promises made in the brochure. (b) There was considerable delay in giving possession of apartments. (c) Payment by members was time bound and not related to progress in construction. (d) For delay by members in payments the interest for the period of delay was 18%, with a super added condition that if the payment is not made up to a period of 90 days DLF has a right to terminate the membership with the forfeiture of substantial amount of payment. (e) For delay in giving possession of apartments the penalty paid by DLF was miniscule. (f) The DLF could change the plan and number of stories unilaterally. (g) The terms of ABA could be changed unilaterally by DLF. In all the three cases terms were similar and one sided. After taking into consideration all the material on record, CCI did not find any evidence of anti-competitive agreement but according to them there was abuse of dominant position. The CCI defined the RM as 'high end multi story apartments in Gurgaon'. The CCI defined the RPM as the high end facilities provided in these apartments are not provided in less expensive apartments. RGM was Gurgaon as most of the customers booked the apartments for residence and many for both, investment and residence. The purpose of residence cannot be separated from that of investment. After taking into consideration the factors given in sections 4 and 19 (4), the CCI found DLF to be dominant. Most of the terms of ABA were found to be one sided and unfair and hence abusive. The contention of DLF that they were willingly signed by the members and that they were part of usual commercial practice were rejected by the CCI. Though the majority agreed that the members did not sign ABA willingly yet they did not subscribed to R. Prasad's contention that the consumers were captive or locked. According to Prasad the RM was 'Belaire' (or the other relevant apartment), and the market was captive as the exit from the captive market was costly (exit involved forfeiture of substantial amount of payment).

As has been discussed in the Annual Survey of 2011[30] all builders of Gurgaon, whether dominant or not, used similar terms of agreement with customers. They followed the leader, DLF, in making ABA, yet the CCI refused to find Unitech,[31] another non dominant builder of Gurgaon guilty of anti-competitive agreement in accordance with the provision of section 3(3) which provides that anti competitive agreement can be constituted on grounds of 'practice carried on'.

The tribunal substantially agreed with the findings of the CCI. Relevant market was correctly determined by the CCI. For a high end or luxury residential apartment size alone is not decisive factor, but reputation of the location, characteristics of neighbourhood and socio economic reality of India are also relevant. The COMPAT also found that 'Gurgaon' is the relevant geographical

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30 *Supra* note 14.

market. In India houses are purchased primarily for having a roof on one's head. The fact, that most of the flats were purchased for sale or renting, does not mean that the customers primarily purchased the flats for investment. Resale takes place for a variety of reasons including transfer of owners. Proximity to Delhi and airport, world class malls, golf courses and brand image makes Gurgaon unique.

For dominance the tribunal agreed with the CCI. The Tribunal accepted all the factors given by DG in finding DLF dominant. High market share early entrance in real estate business, availability of huge land mass and vertical integration were some of the factors to make DLF dominant. It can act independent of market forces.

The conduct of DLF and many terms of ABA were found to be abusive by the COMPAT. Raising number of stories, addition of floors without sanction of the competent authorities, silence of the DLF in not informing the allottees about the addition of flats even after coming into force of section 4 of the Act, amounts to abuse. It is also abusive to decrease the common area and increase the super area by addition of floors without informing the customers. Discrimination in imposing charges for delay on the part of members in paying the dues to DLF, and in imposing penalty on account of delay in giving possession were also found to be abusive. The tribunal also made adverse comment on statutory authorities of the Government of Haryana, which ignored the illegalities, committed by the DLF. The tribunal also refused to bring down the amount of penalty imposed by the CCI.

XV SUPREME COURT OF INDIA

In *DLF Ltd*. v. *CCI* [32] the Supreme Court admitted the appeal of DLF against the order of the COMPAT, which affirmed the order of CCI. The court ordered that the appellant deposit 50 crore within a period of three weeks and the rest of the 650 crores within a period of three months subject to final outcome of the decision of this appeal. The COMPAT imposed an interest of 9% on the amount from the date of decision of CCI and the date of payment.

XVI CONCLUSION

As with the development of minimal and night watchman state and dismantling of welfare state, with the increasing dependence of the citizen on private entrepreneurs, citizens' resources cannot match with that of the corporates, there is an increasing need of a more vigilant Commission. On every technical ground the informant should not be asked to go to consumer forums or seek a civil remedy. The alternative of accessing the consumer forum is not very effective against the manipulating enterprises and civil remedies are notoriously time consuming. Hoping that in the coming years the Commission and the appellate tribunal would be more vigilant.

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31 *Jagmohan and Shalini Chabra* v. *Unitech Ltd*., 2011 Comp LR 31 (CCI).

32 *Supra* note 29.