LL.B. IV Term

LB-4033 Competition Law

Cases Selected and Edited By

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LB - 4033 – COMPETITION LAW

Objective of the course

Competition plays a key role in ensuring productive, efficient, innovative and responsive markets. It is recognized that through Fair competition the consumers are ensured availability of 'goods' and 'services' in abundance of acceptable quality at affordable price. In this direction, competition law, also known as anti-trust law, aims at promoting or maintaining market competition by regulating anti-competitive conduct. In line with the international trend and to cope with changing realities, India has reviewed the Monopolies and Restrictive Trade Practices Act, 1969, and based on the recommendations of High Level Raghavan Committee the Competition Act, 2002, was enacted.

The course is designed to give students a thorough understanding of the Competition Law in India with related case studies to understand the basic concept of economics of law. It comprise of classroom lectures and arranged thematically with introduction to the development of Competition Act in India and the specific provisions of the Competition Act. It will provide an overview of the emerging law in corporate sector and consumer welfare. Contemporary issues related to interface between Intellectual Property Law and Competition Law as well as other sectoral regulators like TRAI is also covered.

The broad learning objectives of the course will be

- To provide an overview of the basic concepts of Competition Law with the help of the Indian decisions.
- To compare the Competition laws of India with the other jurisdictions especially US and EU.
- To appreciate and understand the economic underpinnings of the legal framework.
- To examine the applicability of Competition law to business agreements, the exercise of dominant position, the combinations between the firms and sellers
- To appreciate the Enforcement mechanisms and significance of Competition Advocacy and Leniency programme.
- To examine the pivotal role of Competition Commission of India (CCI) in ensuring competition in the Indian market across the sectors.
- To appreciate the emerging trends in Competition Law and its interface with Sectoral Regulator.
- To enable the students to take up professional practice in competition law and policy in India and abroad.

Topic 1: Introduction and Development of Competition Law

Basic Concepts –Constitutional aspect of Elimination of Concentration of Wealth and Distribution of Resources Article 39 (b) (c) Relation between Competition Policy and Competition Law –Objectives of Competition Law
History and Development of Competition Law/ Antitrust Law, Liberalization and Globalization, Raghavan Committee Report, Competition Act 2002; Difference between MRTP Act and Competition Act, Salient feature of Competition Act, Reference to EU and US laws.
Establishment and Constitution of Competition Commission of India, Powers and Functions-Jurisdiction of the CCI – adjudication and appeals, Director General of Investigation (DGI), Penalties and Enforcement

Topic 2: Important Definitions

Important Definitions under the Competition Act, 2002.
Agreement, Cartel, Consumer, Enterprise, Goods, Services, Practice, Market, Relevant Market, Relevant Turnover

Topic 3: Anti-Competitive Agreements

Anti- Competitive Agreements, Horizontal and Vertical agreement, Rule of Per se and Reason, Appreciable Adverse Effect on Competition (AAEC) in India, Exemption, Prohibition of Anti-competitive agreement/ Cartel/bid rigging, Buyers' cartel

Reference Cases

1. *All India Tyres Dealers Federation* v. *Tyres Manufacturers*, 2013 COMP LR 92 (CCI), Main Order dated October 30, 2012 and Minority Order by Mr. R Prasad (Member, CCI) dated October 30, 2012.
   available at *http://www.cci.gov.in/sites/default/files/202008_0.pdf*
2. *Hyundai Motor India Ltd* v. *CCI*, Competition Appeal (AT)No.6 of 2017 order dated 19.09.2018 decided by National Company Law Appellate Tribunal available at https://nclat.nic.in/Useradmin/upload/6594600435ba2337253f81.pdf
3. *Association of Malayalam Movie Artists* v. *Competition Commission of India* Competition Appeal (AT) No. 05 of 2017 available at https://nclat.nic.in/Useradmin/upload/17500597585e6c6948aa449.pdf
4. In *re Delhi Jal Board and Grasim Industries Ltd*, Ref. C. No. 03 & 04 of 2013 available at https://www.cci.gov.in/sites/default/files/Ref.C.%20Nos.%2003%20%26%2004%20of%202013%20%5BMajority%20Order%20%28p.1%20to%20p.90%29%2C%20Dissent%20Note%20by%20Member%20Sudhir%2

Topic 4: Regulation of Abuse of Dominant Position

Dominance in Relevant Market, Abuse of dominance, Predatory Pricing.

Reference Cases

1. *Jagmohan Chhabra And Shalini Chhabra* v. *Unitech*, 2011 Comp LR 31 (CCI); Main Order dated November 8, 2011 and Dissenting Order by Mr. R. Prasad (Member, CCI) dated 8.11.2011,Available at:

http://www.cci.gov.in/sites/default/files/Mr.%20J%20ChabraDissenting 8Nov2011_0.pdf

2. *Matrimony.Com Limited* v. *Google Lic & Others,* CCI, Case Nos.07 &30 of 2012 order dated 31.10.2018 available at https://www.cci.gov.in/sites/default/files/07%20%26%20%2030 %20of%202012.pdf
3. *All India Online Vendors Association* v. *Flipkart India Private Limited and Another* (Case No. 20 of 2018) decided on 6.11.2018 available at https://www.cci.gov.in/sites/default/files/20-of-2018.pdf
4. *Rico Auto Industries Limited and Others* v. *GAIL (India)* decided on 8.11.2018 available at https://www.cci.gov.in/sites/default/files/Final-Order-Gail.pdf

Topic 5: Regulation of Combinations

Combinations: Merger, Acquisition, Amalgamation and Takeover - Horizontal, Vertical and Conglomerate Mergers - Combinations Regulations, Penalties, Green Channel

Reference Cases

1. *PVR and DT Cinemas,* C-2015/07/288, CCI, Order dated 4.5. 2016 Available at *http://www.cci.gov.in/sites/default/files/event%20document/C-2015-07-288.pdf*

2. *Schneider Electric India Private Limited and MacRitchie Investments Pte. Limited*, C-2018/07/586, order dated 18.04.2019 available at https://www.cci.gov.in/sites/default/files/Notice_order_document/Public1.pdf

3. *Jio Futuristic Digital Holdings Pvt. Ltd; Jio Digital Distribution Holdings Pvt. Ltd.; Jio Television Distribution Holdings Pvt. Ltd and Den Networks Ltd*, C-2018/10/609, order dated 21.1.2019 available at https://www.cci.gov.in/sites/default/files/Notice_order_document/2019Order.pdf

4. *Jio Content Distribution Holdings Private Limited, Jio Internet Distribution Holdings Private Limited, Jio Cable and Broadband Holdings Private Limited and Hathway Cable and Datacom Limited*, C-2018/10/610,21.01.2019 available at https://www.cci.gov.in/sites/default/files/Notice_order_document/2019Order.pdf

5. *Mitsui & Co. and IHH Healthcare Berhad*, C-2018/09/601, dated 14.2.2020 available at https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2018-09-601O.pdf

6. Adani Transmission Limited (Penalty for Gun-Jumping by CCI), Combination Registration No. C-2018/01/547 available at https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20under%20Section%2043A_1.pdf

7. *Northern TK Venture Pte Limited and Fortis Healthcare Limited* ,Combination Registration No. C-2018/09/601, dated 29.10.2018 available at https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2018-09-601O.pdf

Topic 6: Leniency Programme and Competition Advocacy

Leniency, Competition Advocacy in India

Reference Cases

1. Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo Moto Case No. 03 of 2014, Available at:*http://www.cci.gov.in/sites/default/files/Order_Suo_Moto_03_of_2014%20%28Final%29_1.pdf*
2. Cartelization in respect of tender floated by Indian Railways for supply of brushless DC fans and other electric items, Suo motu case no. 3 of 2014 order dated 18.01.2017
3. Cartelization of broadcasting service providers by rigging the bids submitted in response to tender floated by sports broadcasters Suo motu case no. 02 of 2013, order dated 11. 07.2018
4. In re: Anticompetitive conduct in dry cell batteries market in India, Suo motu case no. 01 of 2017, order 30.08.2018
5. In re: Alleged Cartelization in flash light in market Suo motu case no. 01 of 2017, order dated 06.11.2018

Topic -7: Emerging Trends in Competition Law (Interface with Sectoral Regulator)

Intellectual Property Rights and Competition Law, Telecom Regulatory Authority of India and Competition Law

Reference cases

1. *Monsanto Holdings Private* v. *Competition Commission Of India*, W.P.(C) 1776/2016 and CM Nos. 7606/2016, 12396/2016 & 16685/2016, decided on 20.5.2020 (High Court of Delhi) available on https://indiankanoon.org/doc/158839264/

Suggested Readings:

Books

Chatterji Souvik, ***Competition law in India and Interface with Sectoral Regulators***, Thomson Reuters (2019).

Abir Roy & Jayant Kumar, ***Competition Law in India***, Eastern Law House (2018).

Sinha Manoj and Mallaya, Susmitha P ***Emerging Competition Law***, Wolters Kluwer, (2017).

Richard Whish and David Bailey, ***Competition Law***, 8th ed.,Oxford University Press, (2015).

T Ramappa, ***Competition Law in India: Policy, Issues and Developments***, 3rd ed., Oxford University Press, New Delhi, (2014).

Mark Furse, ***Competition Law of the EC and UK***, 6th ed., Oxford University Press, (2008).

Vinod Dhall (ed.), ***Competition Law Today***, Oxford University Press, (2007).

S.M. Dugar, **Commentary on MRTP Law, *Competition Law & Consumer Protection Law*,** 4th ed., Wadhwa Nagpur, (2006).

Journals

Indian Competition Law Review (ICLR)
The Competition Law Review (Comp L Rev)
Competition Law Insight
Competition Law International
OECD Journal of Competition Law and Policy
European Competition Journal (ECJ)
Antitrust Law Journal (ALJ)

Legislations:

The Sherman Anti-Trust Act, 1890
The Clayton Act, 1914
Federal Trade Commission Act, 1914
Competition Act, 1998 (UK)
Enterprise Act, 2002 (UK)
MRTP Act, 1969 (India)
The Competition Act, 2002 (India)
The Competition Amendment Bill, 2012(India)
Notifications issued by Competition Commission of India

Some Important Notifications issued by the Ministry of Corporate Affairs, Government of India

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IMPORTANT NOTE:

1. The topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.
2. The students are required to study the legislations as amended up-to-date and consult the latest editions of books.
3. Reference cases mentioned indicates the additional suggested cases which the students can refer to enhance their knowledge in the concerned area.

Rubric for Theory Exam Papers:

'All the theory papers, except for CLE subjects*, for LL.B. semester exams carry 100 marks each, for which the University of Delhi conducts an end semester descriptive exam of 3 hours duration. A typical theory question paper contains 8 questions printed both in English and Hindi languages. The student is required to answer 5 out of 8 questions. Each question carries equal marks, that is 20 marks each. Hence the maximum marks for each paper is 100. A student has to secure a minimum of 45 marks out of 100 to pass a paper.

Answers may be written either in English or in Hindi but the same medium should be used throughout the paper.'

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Brahm Dutt v. *Union of India*

AIR 2005 SC 730

G.P. MATHUR, C.J. & P.K. BALASUBRAMANYAN, J.:

The Competition Act, 2002 received the assent of the President of India on 13.1.2003 and was published in the Gazette of India dated 14.1.2003. It is an Act to provide for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith. The statement of objects and reasons indicates that the Monopolies and Restrictive Trade Practices Act, 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the country's focus from curbing the monopolies to promoting competition. Section 1(3) of the Act provides that the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and provided that different dates may be appointed for different provisions of the Act. Pursuant to this, some of the sections of the Act were brought into force on 31.3.2003 vide S.O. 340 (E) and published in the Gazette of India dated 31.3.2003 and majority of the other sections by notification S.O. 715 (E) dated 19.6.2003. In view of bringing into force Sections 7 and 8 of the Act, the Central Government had to make prescription for the appointment of a Chairman and the members as composing the Commission in terms of Section 9 of the Act.

2. In exercise of the Rule making power under Section 63(2)(a) read with Section 9 of the Act, the Central Government made "The Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003" and published the same in the Gazette of India on 4.4.2003. Section 9 of the Act provides for the selection of the Chairperson and the other members as may be prescribed. The Rules above referred to was that prescription. Under Rule 3, the Central Government was to constitute a Committee consisting of a person who has been retired Judge of the Supreme Court or a High Court or a retired Chairperson of a Tribunal established under an Act of Parliament or a distinguished jurist or a Senior Advocate for five years or more, a person who had special knowledge of and professional experience of 25 years or more in international trade, economics, business, commerce or industry, a person who had special knowledge of and professional experience of 25 years or more in accountancy, management, finance, public affairs or administration to be nominated by the Central Government. The Central Government was also to nominate one of the members of the Committee to act as the Chairperson of the Committee. The function of the Committee was to fill up the vacancies as and when vacancies of Chairperson or a member of the Commission exits or arises or is likely to arise and the reference in that behalf had been made to the

Committee by the Central Government. It is said that the Committee so constituted made a recommendation in terms of Rule 4(3) of 'the Rules' and a Chairman and a member were appointed. Though, the member claims to have taken charge immediately after beingappointed, the person appointed as Chairman, has taken the stand that he had not taken charge since he was content to await the orders of this Court in view of the filing of this Writ Petition.

3. The present Writ Petition was filed in this Court by a practicing Advocate essentially praying for the relief of striking down Rule 3 of the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 (hereinafter referred to as 'the Rules') and for other consequential reliefs including the issue of a writ of mandamus directing the Union of India to appoint a person who is or has been a Chief Justice of a High Court or a senior Judge of a High Court in India in terms of the directions contained in the decision in ***S.P. Sampath Kumar v. Union of India & Others***, (1987) 1 SCC 124. The essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the contention is that the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary. The arguments in that behalf are met by the Union of India essentially on the ground that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and such expertise cannot be supplied by members of the judiciary who can, of course, adjudicate upon matters in dispute. It is further contended that so long as the power of judicial review of the High Courts and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the Constitution. It was also contended that the Competition Commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial office Since the main functions of the expert body were regulatory in nature, there was no merit in the challenge raised in the Writ Petition.

4. During the pendency of the Writ Petition, two additional counter affidavits were filed on behalf of the Union of India, in which it was submitted that the Government was proposing to make certain amendments to the Act and also Rule 3 of 'the Rules' so as to enable the Chairman and the members to be selected by a Committee presided

over by the Chief Justice of India or his nominee. This position was reiterated at the time of arguments. Of course, it was also pointed out that the question of amendment had ultimately to rest with the Parliament and the Government was only in a position to propose the amendments as indicated in the additional affidavits. But it was reiterated that the Chairman of the Commission should be an expert in the field and need not necessarily be a Judge or a retired Judge of the High Court or the Supreme Court.

5. We find that the amendments which the Union of India proposes to introduce in Parliament would have a clear bearing on the question raised for decision in the Writ Petition essentially based on the separation of powers recognized by the Constitution. The challenge that there is usurpation of judicial power and conferment of the same on a non- judicial body is sought to be met by taking the stand that an Appellate Authority would be constituted and that body would essentially be a judicial body conforming to the concept of separation of judicial powers as recognized by this Court. In the Writ Petition the challenge is essentially general in nature and how far that general challenge would be met by the proposed amendments is a question that has to be considered later, if and when, the amendments are made to the enactment. In fact, what is contended by learned counsel for the petitioner is that the prospect of an amendment or the proposal for an amendment cannot be taken note of at this stage. Since, we feel that it will be appropriate to consider the validity of the relevant provisions of the Act with particular reference to Rule 3 of the Rules and Section 8(2) of the Act, after the enactment is amended as sought to be held out by the Union of India in its counter affidavits, we are satisfied that it will not be proper to pronounce on the question at this stage. On the whole, we feel that it will be appropriate to postpone a decision on the question after the amendments, if any, to the Act are carried out and without prejudice to the rights of the petitioner to approach this Court again with specific averments in support of the challenge with reference to the various sections of the Act on the basis of the arguments that were raised before us at the time of hearing. Therefore, we decline to answer at this stage, the challenge raised by the petitioner and leave open all questions to be decided in an appropriate Writ Petition, in the context of the submission in the counter affidavits filed on behalf of the Union of India that certain amendments to the enactment are proposed and a bill in that behalf would be introduced in Parliament.

6. We may observe that if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognized by the Constitution. Any way, it is for those who are concerned with the process of amendment to consider that aspect. It

cannot be gainsaid that the Commission as now contemplated, has a number of adjudicatory functions as well.

7. Thus, leaving open all questions regarding the validity of the enactment including the validity of Rule 3 of the Rules to be decided after the amendment of the Act as held out is made or attempted, we close this Writ Petition declining to pronounce on the matters argued before us in a theoretical context and based only on general pleadings on the effect of the various provisions to support the challenge based on the doctrine of separation of power.

8. The Writ Petition is thus disposed of leaving open all the relevant questions.

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Competition Commission of India v. Steel Authority of India Ltd.

(2010)10 SCC 744

Jindal Steel and Power Ltd, the informant, invoked the provisions of Section 19 read with Section 26 (1) of the Act by providing information to the Commission alleging that Steel Authority of India entered into an exclusive supply agreement with Indian Railways for supply of rails, thereby violating Section 3 and 4 of the Act. The Commission formed the opinion that prima facie a case existed against SAIL and directed the Director General to investigate the matter. SAIL filed an interim reply seeking a hearing before the Commission before any interim order is passed. On reiteration of its earlier orders by the Commission, SAIL challenged the correctness of the directions before the Competition Appellate Tribunal. The Tribunal in its order dated 15th February, 2010, inter alia, but significantly held as under:

a) The application of the Commission for impleadment was dismissed, as in the opinion of the Tribunal the Commission was neither a necessary nor a proper party in the appellate proceedings before the Tribunal. Resultantly, the application for vacation of stay also came to be dismissed.

b) It was held that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Thus, the Commission is directed to give reasons while passing any order, direction or taking any decision.

c) The appeal against the order dated 8th December, 2009 was held to be maintainable in terms of Section 53A of the Act. While setting aside the said order of the Commission and recording a finding that there was violation of principles of natural justice, the Tribunal granted further time to SAIL to file reply by 22nd February, 2010 in addition to the reply already filed by SAIL.

This order of the Tribunal dated 15th February, 2010 is impugned in the present appeal].

In order to examine the merit or otherwise of the contentions raised by the respective parties,itwill be appropriate for us to formulate the following points for determination:-
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1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a prima facie opinion would be appealable in terms of Section 53A(1) of the Act?

2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case?

3) Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

4) At what stage and in what manner the Commission can exercise powers vested in it under Section 33 of the Act to pass temporary restraint orders?

5) Whether it is obligatory for the Commission to record reasons for formation of a prima facie opinion in terms of Section 26(1) of the Act?

6) What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the procedural intricacies do not hamper in achieving the object of the Act, i.e., free market and competition.

Submissions made and findings in relation to Point No.1

If we examine the relevant provisions of the Act, the legislature, in its wisdom, has used different expressions in regard to exercise of jurisdiction by the Commission. The Commission may issue directions, pass orders or take decisions, as required, under the various provisions of the Act. The object of the Act is demonstrated by the prohibitions contained in Sections 3 and 4 of the Act. Where prohibition under Section 3 relates to anti- competition agreements there Section 4 relates to the abuse of dominant position. The regulations and control in relation to combinations is dealt with in Section 6 of the Act. The power of the Commission to make inquiry into such agreements and the dominant position of an entrepreneur, is set into motion by providing information to the Commission in accordance with the provisions of Section 19 of the Act and such inquiry is to be conducted by the Commission as per the procedure evolved by the legislature under Section 26 of the Act. In other words, the provisions of Sections 19 and 26 are of great relevance and the discussion on the controversies involved in the present case would revolve on the interpretation given by the Court to these provisions. (Refer to Sections 19 and 26 of the Act).

The Tribunal has been vested with the power to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission in exercise of its powers under the provisions mentioned in Section 53A of the Act. The appeals preferred before the Tribunal under Section 53A of the Act are to be heard and dealt with by the Tribunal as per the procedure spelt out under Section 53B of the Act. (Refer to Sections 53A and 53B of the Act).As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of theAct. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53A of the Act. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative

direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

The provisions of Sections 26 and 53A of the Act clearly depict legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Once the legislature has opted to specifically state the order, direction and decision, which would be appealable by using clear and unambiguous language, then the normal result would be that all other directions, orders etc. are not only intended to be excluded but, in fact, have been excluded from the operation of that provision.

The objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected of the Court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature. Right to appeal is a creation of statute and it does require application of rule of plain construction. Such provision should neither be construed too strictly nor too liberally, if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum.

In the case of Maria Cristina De Souza Sadder vs. Amria Zurana Pereira Pinto [(1979) 1 SCC 92], this Court held as under:

“5 ...It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof.”

The principle of ‘appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure’ is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being creation of a statute, legislature has to decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law.

Thus, it is evident that the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be

provided by the law in force. In absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party. A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is jus dicere, not jus dare. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

Recently, again Supreme Court in Grasim Industries Ltd. v. Collector of Customs, Bombay, (2002) 4 SCC 297 has followed the same principle and observed:

"Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for Court to take upon itself the task of amending or altering the statutory provisions."

Having enacted these provisions, the legislature in its wisdom, made only the order under Section 26(2) and 26(6) appealable under Section 53A of the Act. Thus, it specifically excludes the opinion/decision of the authority under Section 26(1) and even an order passed under Section 26(7) directing further inquiry, from being appealable before the Tribunal. Therefore, it would neither be permissible nor advisable to make these provisions appealable against the legislative mandate. The existence of such excluding provisions, in fact, exists in different statutes. Reference can even be made to the provisions of Section 100A of the Code of Civil Procedure, where an order, which even may be a judgment, under the provisions of the Letters Patent of different High Courts and are appealable within that law, are now excluded from the scope of the appealable orders. In other words, instead of enlarging the scope of appealable orders under that provision, the Courts have applied the rule of plain construction and held that no appeal would lie in conflict with the provisions of Section 100A of the Code of Civil Procedure.

Expressum facit cessare tacitum – Express mention of one thing implies the exclusion of other. (Expression precludes implication). This doctrine has been applied by this Court in various cases to enunciate the principle that expression precludes implication. [Union of India vs. Tulsiram Patel, AIR 1985 SC 1416]. It is always safer to apply plain and primary rule of construction. The first and primary rule of construction is that intention of the legislature is to be found in the words used by the legislature itself.

Applying these principles to the provisions of Section 53A(1)(a), we are of the considered view that the appropriate interpretation of this provision would be that no other direction, decision or order of the Commission is appealable except those expressly stated in Section 53A(1)(a). The maxim est boni judicis ampliare justiciam,

nonjurisdictionem finds application here. Right to appeal, being a statutory right, is controlled strictly by the provision and the procedure prescribing such a right. To read into the language of Section 53A that every direction, order or decision of the Commission would be appealable will amount to unreasonable expansion of the provision, when the language of Section 53A is clear and unambiguous. Section 53B(1) itself is an indicator of the restricted scope of appeals that shall be maintainable before the Tribunal; it provides that the aggrieved party has a right of appeal against 'any direction, decision or order referred to in Section 53A(1)(a).' If the legislature intended to enlarge the scope and make orders, other than those, specified in Section53A(1)(a), then the language of Section 53B(1) ought to have been quite distinct from the one used by the legislature. One of the parties before the Commission would, in any case, be aggrieved by an order where the Commission grants or declines to grant extension of time. Thus, every such order passed by the Commission would have to be treated as appealable as per the contention raised by the respondent before us as well as the view taken by the Tribunal. In our view, such orders cannot be held to be appealable within the meaning and language of Section 53A of the Act and also on the principle that they are not orders which determine the rights of the parties. No appeal can lie against such an order. Still the parties are not remediless as, when they prefer an appeal against the final order, they can always take up grounds to challenge the interim orders/directions passed by the Commission in the memorandum of appeal. Such an approach would be in consonance with the procedural law prescribed in Order XLIII Rule 1A and even other provisions of Code of Civil Procedure. The above approach will subserve the purpose of the Act in the following manner :

First, expeditious disposal of matters before the Commission and the Tribunal is an apparent legislative intent from the bare reading of the provisions of the Act and more particularly the Regulations framed thereunder. Second, if every direction or recording of an opinion are made appealable then certainly it would amount to abuse of the process of appeal. Besides this, burdening the Tribunal with appeals against non-appealable orders would defeat the object of the Act, as a prolonged litigation may harm the interest of free and fair market and economy. Finally, we see no ambiguity in the language of the provision, but even if, for the sake of argument, we assume that the provision is capable of two interpretations then we must accept the one which will fall in line with the legislative intent rather than the one which defeat the object of the Act.

For these reasons, we have no hesitation in holding that no appeal will lie from any decision, order or direction of the Commission which is not made specifically appealable under Section 53A(1)(a) of the Act. Thus, the appeal preferred by SAIL ought to have been dismissed by the Tribunal as not maintainable.

Submissions made and findings in relation to Point Nos.2 & 5

The issue of notice and hearing are squarely covered under the ambit of the principles of natural justice. Thus, it will not be inappropriate to discuss these issues commonly under the same head. The principle of audi alteram partem, as commonly understood, means 'hear the other side or hear both sides before a decision is arrived at'. It is founded on the rule that no one should be condemned or deprived of his right even in quasi judicial

proceedings unless he has been granted liberty of being heard. In cases of Cooper v. Wands Worth Board of Works [(1863), 14 C.B. (N.S.) 180] and Errington v. Minister of Health, [(1935) 1 KB 249], the Courts in the United Kingdom had enunciated this principle in the early times. This principle was adopted under various legal systems including India and was applied with some limitations even to the field of administrative law. However, with the development of law, this doctrine was expanded in its application and the Courts specifically included in its purview, the right to notice and requirement of reasoned orders, upon due application of mind in addition to the right of hearing. These principles have now been consistently followed in judicial dictum of Courts in India and are largely understood as integral part of principles of natural justice. Inother words, it is expected of a tribunal or any quasi judicial body to ensure compliance of these principles before any order adverse to the interest of the party can be passed. However, the exclusion of the principles of natural justice is also an equally known concept and the legislature has the competence to enact laws which specifically exclude the application of principles of natural justice in larger public interest and for valid reasons. Generally, we can classify compliance or otherwise, of these principles mainly under three categories. First, where application of principles of natural justice is excluded by specific legislation; second, where the law contemplates strict compliance to the provisions of principles of natural justice and default in compliance thereto can result in vitiating not only the orders but even the proceedings taken against the delinquent; and third, where the law requires compliance to these principles of natural justice, but an irresistible conclusion is drawn by the competent court or forum that no prejudice has been caused to the delinquent and the non-compliance is with regard to an action of directory nature. The cases may fall in any of these categories and therefore, the Court has to examine the facts of each case in light of the Act or the Rules and Regulations in force in relation to such a case. It is not only difficult but also not advisable to spell out any straight jacket formula which can be applied universally to all cases without variation.

In light of the above principles, let us examine whether in terms of Section 26(1) of the Act read with Regulations in force, it is obligatory upon the Commission to issue notice to the parties concerned (more particularly the affected parties) and then form an opinion as to the existence of a prima facie case, or otherwise, and to issue direction to the Director General to conduct investigation in the matter. At the very outset, we must make it clear that we are considering the application of these principles only in light of the provisions of Section 26(1) and the finding recorded by the Tribunal in this regard. The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into the motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a prima facie case for issuance of direction to the Director General to conduct an investigation. This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received by it. Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or

any other person is required to be issued at this stage. In contra-distinction to this, when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Section 26(7) or 26(8) of the Act, as the case may be. This obviously means that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and we see no compelling reason to read into the provisions of Section 26(1) the requirement of notice, when it is conspicuous by its very absence. Once the proceedings before the Commission are completed, the parties have a right to appeal under Section 53A(1)(a) in regard to the orders termed as appealable under that provision. Section 53B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or setting aside the direction, decision or order appealed against. Some of the Regulations also throw light as to when and how notice is required to be served upon the parties including the affected party.

Regulation 14(7) states the powers and functions, which are vested with the Secretary of the Commission to ensure timely and efficient disposal of the matter and for achieving the objectives of the Act. Under Regulation 14(7)(f) the Secretary of the Commission is required to serve notice of the date of ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a prima facie case and to convey the directions of the Commission for investigation, or to issue notice of an inquiry after receipt and consideration of the report of the Director General. In other words, this provision talks of issuing a notice for holding an ordinary meeting of the Commission. This notice is intended to be issued only to the members of the Commission who constitute 'preliminary conference' as they alone have to decide about the existence of a prima facie case. Then, it has to convey the direction of the Commission to the Director General. After the receipt of the report of the Director General, it has to issue notice to the parties concerned.

Regulation 17(2) empowers the Commission to invite the information provider and such other person, as is necessary, for the preliminary conference to aid in formation of a prima facie opinion, but this power to invite cannot be equated with requirement of statutory notice or hearing. Regulation 17(2), read in conjunction with other provisions of the Act and the Regulations, clearly demonstrates that this provision contemplates to invite the parties for collecting such information, as the Commission may feel necessary, for formation of an opinion by the preliminary conference. Thereafter, an inquiry commences in terms of Regulation 18(2) when the Commission directs the Director General to make the investigation, as desired. Regulation 21(8) also indicates that there is an obligation upon the Commission to consider the objections or suggestions from the Central Government or the State Government or the

Statutory Authority or the parties concerned and then Secretary is required to give a notice to fix the meeting of the Commission, if it is of the opinion that further inquiry is called for. In that provision notice is contemplated not only to the respective Governments but even to the parties concerned. The notices are to be served in terms of Regulation 22 which specifies the mode of service of summons upon the concerned persons and the manner in which such service should be effected. The expression 'such other person', obviously, would include all persons, such as experts, as stated in Regulation 52 of the Regulations. There is no scope for the Court to arrive at the conclusion that such other person would exclude anybody including the informant or the affected parties, summoning of which or notice to whom, is considered to be appropriate by the Commission. With some significance, we may also notice the provision of Regulation 33(4) of the Regulations, which requires that on being satisfied that the reference is complete, the Secretary shall place it during an ordinary meeting of the Commission and seek necessary instructions regarding the parties to whom the notice of the meeting has to be issued. This provision read with Sections 26(1) and 26(5) shows that the Commission is expected to apply its mind as to whom the notice should be sent before the Secretary of the Commission can send notice to the parties concerned. In other words, issuance of notice is not an automatic or obvious consequence, but it is only upon application of mind by the authorities concerned that notice is expected to be issued. Regulation 48, which deals with the procedure for imposition of penalty, requires under Sub-Regulation (2) that show cause notice is to be issued to any person or enterprise or a party to the proceedings, as the case may be, under Sub-Regulation (1), giving him not less than 15 days time to explain the conduct and even grant an oral hearing, then alone to pass an appropriate order imposing penalty or otherwise. Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than 25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

Cumulative reading of these provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events

the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that noncompliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law
and the requirement of compliance to the principles of natural justice in light of the above noticed principles. In the case of Tulsiram Patel (supra), this Court took the view that audi alteram partem rule can be excluded where a right to a prior notice and an opportunity of being heard, before an order is passed, would obstruct the taking of prompt action or where the nature of the action to be taken, its object and purpose as well as the scheme of the relevant statutory provisions warrant its exclusion. This was followed with approval and also greatly expanded in the case of Delhi Transport Corporation vs. Delhi Transport Corporation Mazdoor Congress [(1991) Supp1 SCC 600], wherein the Court held that rule of audi alteram partem can be excluded, where having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions, fairness in action does not demand its application and even warrants its exclusion.

The exclusion of principles of natural justice by specific legislative provision is not unknown to law. Such exclusion would either be specifically provided or would have to be imperatively inferred from the language of the provision. There may be cases where post decisional hearing is contemplated. Still there may be cases where 'due process' is specified by offering a full hearing before the final order is made. Of course, such legislation may be struck down as offending due process if no safeguard is provided against arbitrary action. It is an equally settled principle that in cases of urgency, a post-decisional hearing would satisfy the principles of natural justice. Reference can be made to the cases of Maneka Gandhi v. Union of India [(1978) 1 SCC 48] and State of Punjab v. Gurdayal [AIR 1980 SC 319]. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass ex parte ad interim injunction orders immediately in terms of Section 33 of the Act, while granting post decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice. It is true that in administrative action, which entails civil consequences for a person, the principles of natural justice should be adhered to.Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such

principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. Reference can be made to the judgment of this Court in the case of ***Canara Bank v. Debasis Das*** [(2003) 4 SCC 557]. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself. 'Natural justice' is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well defined principles enunciated by the Courts. Every quasi judicial order would require the concerned authority to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness.

Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami vs. Union of India [(1992) 4 SCC 605] explained the expression 'inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory power In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but sui generis.

The exceptions to the doctrine of audi alteram partem are not unknown either to civil or criminal jurisprudence in our country where under the Code of Civil Procedure ex-parte injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries.

The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there

is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. That is the precise reason that the legislature has used the word 'direction' to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in the case of Assistant Commissioner, C.T.D.W.C. v. M/s Shukla&Brothers [JT 2010 (4) SC 35].

12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orde Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment...

13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orde

The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act.

Submissions made and findings in relation to Point No.4

Under this issue we have to discuss the ambit and scope of the powers vested in the Commission under Section 33 of the Act. (Refer to Section 33 of the Act).

A bare reading of the above provision shows that the most significant expression used by the legislature in this provision is ‘during inquiry’. ‘During inquiry’, if the Commission is satisfied that an act in contravention of the stated provisions has been committed, continues to be committed or is about to be committed, it may temporarily restrain any party ‘without giving notice to such party’, where it deems necessary. The first and the foremost question that falls for consideration is, what is ‘inquiry’? The word ‘inquiry’ has not been defined in the Act, however, Regulation 18(2) explains what is ‘inquiry’. ‘Inquiry’ shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). In other words, the law shall presume that an ‘inquiry’ is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the Director General. Once the Regulations have explained ‘inquiry’ it will not be permissible to give meaning to this expression contrary to the statutory explanation. Inquiry and investigation are quite distinguishable, as is clear from various provisions of the Act as well as the scheme framed thereunder. The Director General is expected to conduct an investigation only in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation suo moto. Then the Commission has to consider such report as well as consider the objections and submissions made by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested under Section 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an ex parte order. Even at that stage, the Commission is required to record a satisfaction that there has been contravention of the provisions mentioned under Section 33 and that such contravention has been committed, continues to be committed or is about to be committed. This satisfaction has to be understood differently from what is required while expressing a prima facie view in terms of Section 26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commisssion upon due application of mind while the latter is a tentative view at that stage.s Prior to any direction, it could be a general examination or enquiry of the information/reference received by the Commission, but after passing the direction theinquiry is more definite in its scope and may be directed against a party. Once such satisfaction is recorded, the Commission is vested with the power and the informant is entitled to claim ex parte injunction. The legislature has intentionally used the words not only ‘ex parte’ but also ‘without notice to such party’. Again for that purpose, it has to apply its mind, whether or not it is necessary to give such a notice. The intent of the rule is to grant ex parte injunction, but it is more desirable that upon passing an order, as contemplated under Section 33, it must give a short notice to the other side to appear and to file objections to the continuation or otherwise of such an order. Regulation 31(2) of the Regulations clearly mandates such a procedure.

Wherever the Commission has passed interim order, it shall hear the parties 71against whom such an order has been made, thereafter, as soon as possible. The expression 'as soon as possible' appearing in Regulation 31(2) has some significance and it will be obligatory upon the fora dealing with the matters to ensure compliance to this legislative mandate. Restraint orders may be passed in exercise of its jurisdiction in terms of Section 33 but it must be kept in mind that the ex parte restraint orders can have far reaching consequences and, therefore, it will be desirable to pass such order in exceptional circumstances and deal with these matters most expeditiously. During an inquiry and where the Commission is satisfied that the act has been committed and continues to be committed or is about to be committed, in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders, without giving notice to such party where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, inter alia, should : (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market. The power under Section 33 of the Act, to pass a temporary restraint order, can only be exercised by the Commission when it has formed prima facie opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations. It will be useful to refer to the judgment of this Court in the case of Morgan Stanley Mutual Funds v. Kartick Das [(1994) 4 SCC 225], wherein this Court was concerned with Consumer Protection Act 1986, Companies Act 1956 and Securities and Exchange Board of India (Mutual Fund) Regulations, 1993. As it appears from the contents of the judgment, there is no provision for passing ex-parte interim orders under the Consumer Protection Act, 1986 but the Court nevertheless dealt with requirements for the grant of an ad interim injunction, keeping in mind the expanding nature of the corporate sector as well as the increase in vexatious litigation. The Court spelt out the following principles:

"36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are—

(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal or ex parte injunction would involve greater injustice than the grant ofit would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is

prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application;

(f) even if granted, the ex parte injunction would be for a limited period of time. (g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court."

In the case in hand, the provisions of Section 33 are specific and certain criteria have been specified therein, which need to be satisfied by the Commission, before it passes an ex parte ad interim order. These three ingredients we have already spelt out above and at the cost of repetition we may notice that there has to be application of mind of higher degree and definite reasons having nexus to the necessity for passing such an order need be stated. Further, it is required that the case of the informant-applicant should also be stronger than a mere prima facie case. Once these ingredients are satisfied and where the Commission deems it necessary, it can pass such an order without giving notice to the other party. The scope of this power is limited and is expected to be exercised in appropriate circumstances. These provisions can hardly be invoked in each and every case except in a reasoned manner. Wherever, the applicant is able to satisfy the Commission that from the information received and the documents in support thereof, or even from the report submitted by the Director General, a strong case is made out of contravention of the specified provisions relating to anti- competitive agreement or an abuse of dominant position and it is in the interest of free market and trade that injunctive orders are called for, the Commission, in its discretion, may pass such order ex parte or even after issuing notice to the other side. For these reasons, we may conclude that the Commission can pass ex parte ad interim restraint orders in terms of Section 33, only after having applied its mind as to the existence of a prima facie case and issue direction to the Director General for conducting an investigation in terms of Section 26(1) of the Act. It has the power to pass ad interim ex parte injunction orders, but only upon recording its due satisfaction as well as its view that the Commission deemed it necessary not to give a notice to the other side. In all cases where ad interim ex parte injunction is issued, the Commission must ensure that it makes the notice returnable within a very short duration so that there is no abuse of the process of law and the very purpose of the Act is not defeated.

Submissions made and findings in relation to Point No.6

In light of the above discussion, the next question that we are required to consider is, whether the Court should issue certain directions while keeping in mind the scheme of the Act, legislative intent and the object sought to be achieved by enforcement of these provisions. We have already noticed that the principal objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having

adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalize the Indian Economy to bring it at par with the best of the economies in this era of globalization would be jeopardised if time bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53B(5) and 53T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time bound disposal of such matter.

The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the Legislature upon the Commission under Sections 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification. These powers of the Commission, read with provisions mentioned earlier, certainly require issuance of certain directions in order to achieve the object of the Act and to ensure its proper implementation. The power to restructure the agreement can be brought into service and matters dealt with expeditiously, rather than passing of ad interim orders in relation to such agreements, which may continue for indefinite periods. To avoid this mischief, it is necessary that wherever the Commission exercises its jurisdiction to pass ad interim restraint orders, it must do so by issuing notices for a short date and deal with such applications expeditiously. Order XXXIX, Rules 3 and 3A of the Code of Civil Procedure also have similar provisions. Certain procedural directions will help in avoiding prejudicial consequences, against any of the parties to the proceedings and the possibility of abuse of jurisdiction by the parties can be eliminated by proper exercise of discretion and for valid reasons. Courts have been issuing directions in appropriate cases and wherever the situation has demanded so. Administration of justice does not depend on individuals, but it has to be a collective effort at all levels of the judicial hierarchy, i.e. the hierarchy of the Courts or the for a before whom the matters are sub-judice, so that the persons awaiting justice can receive the same in a most expeditious and effective manner. The approach of the Commission even in its procedural matters, therefore, should be macro level rather than micro level. It must deal with all such references or applications expeditiously in accordance with law and by giving appropriate reasons. Thus, we find it necessary to issue some directions which shall remain in force till appropriate regulations in that regard are framed by the competent authority.

Having discernibly stated our conclusions/ answers in the earlier part of the judgment, we are of the considered opinion that this is a fit case where this Court should also issue certain directions in the larger interest of justice administration. The scheme of the Act and the Regulations framed thereunder clearly demonstrate the legislative intent that the investigations and inquiries under the provisions of the Act should be concluded as expeditiously as possible.

The various provisions and the Regulations, particularly Regulations 15 and 16, direct conclusion of the investigation/inquiry or proceeding within a "reasonable time". The concept of "reasonable time" thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade. In this backdrop, we are of the considered view that the following directions need to be issued:

A) Regulation 16 prescribes limitation of 15 days for the Commission to hold its first ordinary meeting to consider whether prima facie case exists or not and in cases of alleged anti-competitive agreements and/or abuse of dominant position, the opinion on existence of prima facie case has to be formed within 60 days. Though the time period for such acts of the Commission has been specified, still it is expected of the Commission to hold its meetings and record its opinion about existence or otherwise of a prima facie case within a period much shorter than the stated period.

B) All proceedings, including investigation and inquiry should be completed by the Commission/Director General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.

C) Wherever during the course of inquiry the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days.

D) The Director General in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can proceed any further in absence of the report by the Director General in terms of Section 26(2) of the Act. The reports by the Director General should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of Section 26(1) of the Act.

E) The Commission as well as the Director General shall maintain complete 'confidentiality' as envisaged under Section 57 of the Act and Regulation 35 of the Regulations. Wherever the 'confidentiality' is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in terms of the provisions of the Act and the Regulations in force.

In our considered view the scheme and essence of the Act and the Regulations are clearly suggestive of speedy and expeditious disposal of the matte Thus, it will be desirable that the Competent Authority frames Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission. Till such Regulations are framed, the period specified by us supra shall remain in force and we expect all the concerned authorities to adhere to the period specified. Resultantly, this appeal is partially allowed. The order dated 15th February, 2010 passed by the Tribunal is modified to the above extent. The Commission shall proceed with the case in accordance with law and the principles enunciated *supra*.

In the circumstances there will be no order as to costs.

Mahindra Electric Mobility Limited v. *Competition Commission of India*
2019 OnLine Del 8032

1. In all these proceedings, under Article 226 of the Constitution of India, the petitioners challenge various provisions of the Competition Act, 2002 (hereafter "the Act"). The specific challenge is to provisions of Sections 22(3), 27(b), 53A, 53B, 53C, 53D, 53E, 53F and 61 ("the impugned provisions" hereafter) of the Act and the notification dated 31.03.2011 amending Regulation 48(1) of the Competition Commission of India (General) Regulations, 2009 (hereafter "the Regulations" and the "impugned amending regulation"); and in relation to the appellate remedies to the COMPAT. Now those functions have been taken over by the NCLAT due to provisions of the Finance Act, 2017. Though by amendments, the petitioners have impugned provisions of the Finance Act nevertheless, they do not press it, in view of the order of the Supreme Court in a pending proceeding before it, in respect of the general challenge to the Finance Act, 2017.
2. The genesis to these disputes arose on account of a complaint by one Mr. Shamsher Kataria who filed information under Section 19 (1)(a) of the Act against M/s. Honda Siel Cars India Ltd; Volkswagen India Pvt. Ltd. and Fiat India Automobiles Limited on 18.01.2011 alleging that these auto producers were indulging in abusive behavior in regard to the spare parts market. He later filed supplementary information against Toyota, Skoda, General Motors, Ford, Nissan Motors, Mercedes Benz, BMW, Audi etc., on 27.01.2011. On the basis of these materials, the CCI recorded its *prima facie* opinion that the complaints needed investigation by its order of 24.02.2011. Subsequently, on 19.04.2011, the DG in pursuance of the directions of the CCI conducted investigation into the allegations made by the Informant and submitted his investigation report. The DG by that report requested for permission to expand the scope of the investigation to include other car manufacturers. By its order of 26.04.2011, CCI expanded the scope of investigation being conducted by the DG to include the petitioner herein and certain other car manufacturers operating in India. The DG thereafter issued notice to the other car manufacturers, on 04.05.2011 seeking detailed information and documents from them with reference to an investigation being conducted into certain anti-competitive practice alleged to be prevalent in the sale, maintenance, service and repair market of the cars manufactured in India. Proceedings in this case were stayed by the Madras High Court in WP 31808/2012 filed by M/s. Hyundai Motors India Ltd., *inter alia*, challenging the order dated 26.04.2011 passed by the CCI. This led to some of the petitioners seeking stay of proceedings through orders of the CCI; in the meanwhile, this court in W.P.(C) 2734/2013 filed by M/s. Maruti Suzuki India Ltd, directed that CCI could continue with the proceedings before it, but not give effect to its final order for 10 days. One of the petitioners, i.e.

Mahindra & Mahindra (W.P.(C) 6610/2014) filed an application dated 10.07.2013 which requested CCI to ensure that the varying quorum of its Members who have heard the matter would not result in any injustice to or adversely impact the outcome of the judgment in Case No. 03/2011. Consequently, CCI by its order dated 24.07.2013 while dismissing that application held that only those (of its) members who had heard the matter and were present at the time of arguments, shall decide the case in question.

3. In the meanwhile, the writ petition before this court and the Madras High Court led to orders of stay in some cases, and notice (in the other case). Eventually, on 25.08.2014, the CCI made its final order in Case No. 03/2011. By this Final Order, the CCI held that all the car manufacturers including the petitioner have contravened the provisions of Sections 3(4)(b), 3(4)(c), 3(4)(d), 4(2)(a)(i) and(ii), 4(2)(c) and 4(2)(e) of the Act.

9. The common thread of arguments of all the writ petitioners is that the CCI is essentially an adjudicatory body, given its mandate to investigate into allegations that fall within its watch (abusive behaviour due to market dominance, cartelization etc.), adjudicate the rights of parties and entities, and where necessary, impose penalties. The petitioners submit that composition of the CCI (in terms of its membership), manner of their appointment, their qualifications, the procedure adopted by it, violate principles of separation of powers and independence of the judiciary, which are essential bulwarks upon which the Constitution rests and which are assured to the people of India, in regard to adjudication of disputes. The petitioners contest the position of the UOI that CCI is basically a regulatory body, invested with certain adjudicatory attributes and that the objective of setting it up was to regulate market behaviour to ensure a "level playing" field.

10. It is argued by Mr. Amit Sibal, learned senior counsel appearing in the lead matter [W.P.(C) 6610/2014- "the *Mahindra case*"], that the Constitution of India guarantees adjudication by an independent body with a judicially trained mind. The CCI carries out adjudicatory and essential judicial functions. Therefore, procedure under the Act must conform to the judicial approach. However, procedure under the Act is *ultra vires* Article 14 of the Constitution of India and anathema to judicial decision making. Elaborating, it is submitted that both CCI and COMPAT have all the trappings of a court and are hence tribunals. Therefore (i) the composition; (ii) manner of appointment; (iii) term of office and (iv) executive control over the CCI and COMPAT must be aligned to that of a judicial body and should be in consonance with the doctrine of separation of powers and principles of preserving the independence of the judiciary. It is submitted that the penalty under Section 27 of the Act is vague, discriminatory, arbitrary and violative of Article 14 of the Constitution of India. Further, Regulation 48 of the General Regulations which dispenses with the requirement of a separate hearing prior to imposition of penalty is also bad in law. Turning to the principal argument, it is stated that in Braham Dutt case, the Supreme Court observed that it would be appropriate for the Union of India to consider the creation of two separate

bodies: one advisory and regulatory, and the other adjudicatory; and an appellate body following up the adjudicatory body. The Competition Amendment Act, 2007 was passed on a complete misreading of Braham Dutt case. The adjudicatory function of the CCI remained unchanged, but several amendments with respect to its procedure were a mismatch to its adjudicatory functions and were more suited to a corporate body.

11. Mr. Sibal urges that CCI's functions are overwhelmingly adjudicatory (to substantiate this, reference is made to Sections 3, 4, 26, 27 and 28 of the Act). It is argued that the CCI perceives itself to be a judicial body and in this regard, he placed reliance on Regulations 24, 26, 27, 29, 31, 32, and 35 of the General Regulations. Learned senior counsel submitted that the CCI clearly passed the impugned order while exercising adjudicatory/judicial functions. It was also contended that Section 22(3) of the Act is ex facie unconstitutional. He said that the terms used, i.e. "meetings", "voting", "second" or "casting vote" and "quorum" are anathema to adjudicatory functions. According to the learned senior counsel, Section 22(3) particularly, which enables the Chairperson to rely on a casting vote is anathema to a judicial body. It is submitted that the Union of India ("UOI" hereafter) and the CCI failed to point out a single instance of judicial functions, in any other statute, where there is a provision for a casting vote or where a subset of those who hear and deliberate are permitted to pass the order.
12. It was submitted that the Security Exchange Board of India Act ("SEBI"), no doubt, contains provision for a casting vote. However, that power applies only when SEBI functions as a regulatory board, and does not apply to the power of the Adjudicating Officer. Unlike the CCI, there is a wall between the regulatory and adjudicatory functions of the SEBI. It is argued that the proviso to Section 22(3) of the Act, which allows a quorum of three to pass an order is plainly contrary to the main provision, which requires a decision to be made by majority [with the CCI having up to seven members, the majority being four members]. In every determination that affects the rights of a citizen or leads to any civil consequences, the said body is bound to adopt a judicial approach. Section 22(3) militates against a judicial approach and is, therefore, ultra vires the Constitution.
13. The impugned order is characterized as per se illegal as it was passed by 3 members of the CCI taking refuge of the unconstitutional proviso to Section 22(3), despite the fact that final arguments on behalf of the Petitioners were heard by seven members. It was argued that the four members who shaped the course of the final hearings, posed questions to parties, requesting additional information, and participated in deliberations, did not participate in the final decision. The instance of one member, Mr. Bunker, who heard the final arguments of the informant on 05.03.2013, and thereafter participated in substantive hearings and deliberations leading to the impugned order, and his not signing the impugned order is cited as incurably illegal and not merely procedurally improper.
14. The petitioners argue that the CCI's hearing procedure ingrains the concept of the "revolving door" whereby members of the body participate in any

proceeding at any given point of time, without any principle or pre-determined manner, essentially destroying the guarantee of fair hearing: this is enabled by Section 22(3) of the Act and violates the basic principle that one who hears must decide. It is submitted that the "revolving door" is a death knell to collegiality and collective decision making which is essential to all judicial decision making, as a collegium has a personality that exceeds its members. This is an unconstitutional aspect embedded in Section 22(3) in unambiguous and definite terms. Therefore, it cannot be read down nor be saved by the manner in which it is administered.

17. Next, the proviso to Section 22(3) of the Act, which invests the CCI's President with the power of a casting vote (in case of an even member tribunal, where the plurality of its opinions is equally differing) is challenged. It is submitted that no judicial tribunal with a multiplicity of members, that decides a lis or adjudicates a dispute over which it has jurisdiction, can, in India, permit greater weight to the decision of one or some of its members. The concept of a casting vote, say the petitioners, is an appropriate concept for corporate board rooms and not in a judicial tribunal that have plurality of members, who and exercise the same jurisdiction and powers. Mr. Sibal relied on *Shobhana Shankar Patil* v. *Mrs. Ramachandra Shirodkar* AIR 1996 Bom 217, where the court held that a rule that allowed the chief judge of an appellate bench to rely on a casting vote, was arbitrary.

18. It is submitted, next, that the Act violates the doctrine of separation of powers and the independence of the judiciary. Counsel submitted that the CCI is a tribunal and satisfies the test highlighted in the case of *Cooper* v. *Wilson* [1937] 2 K.B. 309 relied in the *Bharat Bank* v. *Employees of Bharat Bank Ltd.* AIR 1950 SC 188; *Harinagar Sugar Mills* v. *Shyam Sundar Jhunjhunwala* AIR 1961 SC 1669 and *Jaswant Sugar Mills Ltd.* v. *Lakshmi Chand* AIR 1963 SC 677. In Harinagar Sugar Mills (supra), it was observed that a tribunal "is a body which is required to act judicially and which exercises judicial power of the State does not cease to be one exercising judicial or quasi-judicial functions merely because it is not expressly required to be guided by any recognised substantive law in deciding the disputes which come before it." The other decision cited was *Indian National Congress* v. *Institute of Social Welfare* (2002)5 SCC 685, where the court held that the Election Commission did perform adjudicatory functions while exercising some of its powers. It was observed in that case that:

"What distinguishes an administrative act from a quasi-judicial act is that in the case of quasi-judicial functions under the relevant law be statutory authority is required to act judicially. In other words where law requires that an authority before arriving at a decision must make an enquiry such a requirement of law makes the authority a quasi-judicial authority. Another test which distinguishes administrative function from quasi-judicial function is that the authority which acts quasi-judicially is required to act according to the rules, whereas the authority which acts administratively is dictated by policy and expediency."

19. Mr. Sibal relied extensively on the observations in *Union of India* v. *R. Gandhi* (2010) 11 SCC 1 and submitted that separation of powers is part of the basic structure and provides that the legislature and executive shall not, in discharge of their functions, transgress constitutional limitations. This relates to the principle of the independence of the judiciary, which provides that judicial functions shall be independent of executive influence. Separation of powers equally applies to all legislations, but is violated in the Act. It is submitted that separation of powers prohibits one branch of the State taking over an essential function of another branch (in the present case, the Executive exercising both direct and indirect control and influencing over adjudication by the CCI).

20. …..The Ld. Senior Counsel argues that Section 18 of the Act shows that the regulatory and adjudicatory functions are discharged by adjudicatory function under Section 3 and 4 of the Act by eliminating practices having an "appreciable adverse effect on competition". Stressing that the CCI's functions are predominantly reactive, unlike sectoral regulators which are proactive. The CCI, cannot be equated with bodies like SEBI, TRAI (Telecom Regulatory Authority of India), RERA (Real Estate Regulatory Authority of India), IRDA (Telecom Regulatory Authority of India) or SERC/CERC whose primary function is proactive, i.e. setting tariffs, laying down substantive guidelines, etc. Further, the CCI's power to frame regulations is extremely narrow, as can be seen from Section 64 of the Act. CCI is closer to purely adjudicatory bodies: CAT, NIT, NCLT, etc. Therefore, on the spectrum of bodies that carry out both adjudicatory and regulatory functions, the CCI tilts heavily towards the adjudicatory side.

21. It was next argued that the absence of predominance of judicial members or those with experience in law, in the CCI is anathema to the judicial approach and renders the Act void. It was urged that since the CCI primarily performs adjudicatory functions, it must be predominantly staffed by persons of law. Though there may be a mix of judicial members and technical members, there should nevertheless be a predominance of judicial members. In this context, it is stated that Section 19 of the Act, does not derogate from the requirement of a predominance of judicial members. Minority of technical members, along with the power to call upon experts under Section 36(3) would satisfy the requirement of Section 19. Judges experienced in these fields can be appointed. On the other hand, that final argument in the present case were heard in part by seven members, but finally signed by three non-judicial members which illustrates the perils of proceeding without judicial/legal members.

22. The argument advanced by Mr. Gopal Subramanian, learned senior counsel was that CCI adjudicates a lis whereas the COMPAT, is primarily appellate and has limited original jurisdiction. This is in contrast to the TRAI-TDSAT model, where the TDSAT discharges adjudicatory functions with a very wide original jurisdiction, while the TRAI is a regulatory body. Reliance was placed upon *State of Gujarat* v. *Utility Users Welfare Association* (2018) 6 SCC 21 where the Supreme Court held that it is mandatory that a person of

law to be a member of a primarily regulatory body performing some judicial function and further that the presence of a judge in an appellate body cannot cure the defect of not having a judicial member in original adjudicatory proceedings.

24. It was submitted that justice through an independent tribunal, comprised entirely or mainly of legally trained professionals, is a manifest guarantee held out by the Constitution of India. Therefore, a body, such as CCI, with no guarantee of any judicial composition (of legally trained and experienced minds) but which clearly performs judicial tasks leading to re-defining of legal rights and creating binding disabilities in the course of carrying on trade and commerce, is unreasonable and arbitrary. Learned counsel relied on passages from the decision in *Madras Bar Association* v. *Competition Commission of India Union of India* (2014) 10 SCC 1 (hereafter "NTT Case") to say that separation of powers and independence of the judiciary are inalienable and nonderogable guarantees to the citizens of India. Observations to the effect that independent judicial tribunals for determination of the rights of citizens are necessary are relied on.
25. Counsel stressed that the right to equality envisions the right to have adjudication of disputes of citizens "adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication" and that "wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum such legislative Act is open to challenge if it violates the right to adjudication by an independent forum."
26. Reliance was also placed on the observations that the personnel who man such tribunal should be sufficiently qualified and should possess relevant experience in law or judicial office, so as to discharge the functions entrusted impartially; and furthermore, the predominance of any individuals attached to or associated with the government or the executive would undermine the rule of law and separation of powers. It was further argued that adjudicatory responsibilities do not involve technical expertise of any kind, or knowledge and that consequently, provisions enabling appointment of non-judicial members is unconstitutional.
27. It was urged that the predominantly judicial nature and function of the CCI is evident from the various provisions of the Act which show that its proceedings are akin to civil court proceedings; a tabular chart was presented to the court, which is extracted below:

RELEVANT SECTION OF THE ACT	*DETAILS*
Section 35	*States that the parties can present the case before CCI*
Regulation 29	*Provides the manner of making submissions or arguments by parties before the Tribunal.*

Section 36(2)	*While discharging its functions has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit.*
Section 19	*Determines/adjudicates the issue of contravention of the provisions of Section 3 or Section 4 of the Act.*
Section 26(2)	*The CCI can also dispose of the matter/close the matter in case it is of the opinion that there exists no prima facie case*
Section 27(b)	*The CCI can impose penalty with unfettered powers.*

28. Mr. Subramanian also emphasized that CCI's adjudicatory nature was underlined in *Competition Commission of India* v. *SAIL* (2010) 10 SCC 744.

29. It is argued that Section19 of the Act is a provision for the CCI's enquiry into any alleged contravention of the provision of Sections 3 or 4 of the Act; Section 35 of the Act read with Regulation 29(1) of the regulations provides for making of submission or arguments by parties before the CCI; Section 27 of the Act read with Regulation 32 of the regulations gives the power to the Commission to pass various orders after enquiry into agreements or abuse of dominant position; Section 26(2) further empowers the CCI to close the matter forthwith and pass such orders as it deems fit in case it is of the opinion that there exists no prima facie case; Section 35 of the Act enables a person or an enterprise to appear in person or through any other person authorized by it to present his or its case before the CCI. All these forms the core of that body's functioning, which is essentially judicial.

30. It is urged that assuming without conceding that the CCI is not predominantly performing adjudicatory functions, it has certain definite adjudicatory functions. These need to be dealt with in accordance with the NTT case. On the issue of whether there is adjudication, the material question ought to be one of substance not form. If one sees the impact of CCI's decisions, they are significant and no different from consequences that flow from adjudicative decisions. Here, the ld. Senior counsel relied on the observations of the Supreme Court in *A.K. Kraipak* v. *Union of India* (1969) 2 SCC 262 that:

> "113. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is

regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision."

31. It is submitted that the Supreme Court underpinned that it is impossible to delineate watertight categories of what are "administrative" and "quasi-judicial" functions. Therefore, in this event, slotting the CCI into one or other of these watertight categories is inappropriate in deciding the instant case. This is because firstly, irrespective of whether CCI is a judicial body, all statutory decision makers are delegates of state power. So, they must be independent of influence, and have duty to act justly and fairly to uphold the rule of law. Secondly, CCI has the power to alter freely formed agreements. Whenever freedom of contract is at issue, the substance and impact of the action is material, not the form in which it is performed. Furthermore, the counsel submitted, various forms of state action are changing and merging, so the standard adopted to distinguish different forms of state action must focus on purpose of the protection and not the mechanics of it. The State is increasingly delegating its functions to new forms of entities. The Supreme Court, through its decisions, has been ensuring that the force of the Constitution is maintained through both the form and means by which power is exercised. Two notable instances of this approach are the following- first, the Supreme Court's shift towards a function-based test for interpreting "other authorities" under Article 12 and secondly, its adoption of purposive interpretation of the Constitution, through the "living constitution" approach.
32. It is submitted that existing tribunals are incomplete and not appropriate examples for building a constitutionally compatible regulator. Counsel argued that the Securities and Exchange Board of India ('SEBI') and other "new generation tribunals" are not appropriate examples. Reliance was placed on a five Judge Bench decision of the Supreme Court in R. Gandhi (supra) which observed that many tribunals are not independent, and ought to be reformed. It was argued that preponderance of judicial members, transparent procedure, are the best possible version of a constitutional regulator. For these reasons, it is submitted that CCI does not even meet the minimum standard for constitutionality. Characterizing the CCI as a "bureaucratic board" and not an independent decision maker, counsel submitted that this conclusion emerges from (a) the manner of selection of members of the CCI; (b) composition of the CCI; (c) lack of fixed process-as admitted by CCI in relation to the limited scope of its transaction of business rules. In fact, the Supreme Court in R Gandhi (supra) stated that: (i) tribunals must resemble courts not bureaucratic boards; (ii) Civil servants, or those selected by a panel constituted heavily of

employees in the executive cannot select an independent entity.

33. It is further submitted that even the SEBI's structure includes certain safeguards that are not present in the CCI, such as the fact that SEBI separates the judicial and regulatory function by providing for a dedicated adjudicatory officer (Section 15 of the SEBI Act and other similar provisions); the concept of a casting vote (as in Section 22 of the Act) does not come into play during adjudication by the SEBI.
34. Counsel submits that though superficially, CCI and ECI perform adjudicatory functions with no judicial input in the latter body, a deeper analysis of the ECI's functions show that adjudication is confined to registration of parties and recommending findings on qualification or disqualification; it lacks any power of review or imposition of penalty. On the other hand, even with such limited adjudicatory functions, it has greater functional independence; the appointment of its Commissioners (and Chief Election Commissioner) is not by a government dominated body, but rather by an independent collegium; its members have an assured age of retirement and constitutionally protected tenure of office and protected conditions of service. Despite performing judicial functions, CCI's members lack both protections and are chosen by a selection body dominated by members of the government. It was argued that Sections 55 and 56 show that CCI inherently lacks independence. These provisions are so sweeping in scope that they cast the shadow of the central government over all activities of the CCI. This creates a high likelihood of bias, and fatally undermines CCI's independence from the executive. Therefore, it is not necessary that these sections be directly at issue in the lis in this case. It is therefore, submitted that Sections 55 and 56 are so fundamentally unconstitutional that they must be struck down even though these are not directly in issue in the present case.
35. It was submitted that an overemphasis on the technical expertise or qualification of members of the CCI, cannot obscure its role as an adjudicatory body or a judicial tribunal, deciding serious and important question, which directly and adversely implicate those subject to its jurisdiction. It was argued that the eventual provision of appeal to a body comprising of a retired judge (even of the Supreme Court) would not take away the fact that rule of law would be subverted at the forum of first instance, if judicially trained and experienced members are not mandated to judge the dispute. Counsel submitted that the jurisdiction to decide violation of Section 3 or indulge in deleterious practice which can result potentially in a bar to the manner of carrying on of one's trade, had grave civil consequences, which the Indian Constitution permits, only if it is adjudicated by a court or a tribunal comprised of personnel with proven judicial experience. Without that prerequisite, the guarantee of equality before law, and equal protection of law is violated. Counsel submitted that the bar to jurisdiction under Section 61 of the Act underscores the fact that the task performed by CCI is essentially judicial, ordinarily performed by civil courts: Section 9 of the Civil Procedure Code envisions jurisdiction over disputes of

the kind that the CCI exercises, but for the bar or jurisdiction under Section 61. Learned counsel submitted that the bar of jurisdiction, which resulted in deprivation of the regular course of established courts that had traditional experience in adjudication, resulted in deprivation of the rule of law and violated Article 14 of the Constitution of India. Counsel also impugned the appeal provided by the Act (Section 53T) to the Supreme Court, stating that a direct appeal to the Supreme Court, which tended to exclude scrutiny through judicial review under Article 226 of the Constitution of India, was anathema to the rule of law.

36. Appearing on behalf of Tata Motors, Dr. A.M. Singhvi and Mr. Arvind Nigam, learned senior counsel submitted that Section 27 (b) of the Act is void and arbitrary, because CCI has unfettered discretion on WHEN to impose penalty; Section 27(b) provides no guidance on when CCI should impose penalty, i.e. whether circumstances warrant the imposition of penalty. It also has unfettered discretion as to quantum of penalty; it has unfettered discretion to pick an arbitrary percentage figure from 0 -10% of turnover or 0 times to 3 times of profits of an enterprise for imposing penalty. The Act provides no guidelines.

38. It is argued that Section 27(b) is void as it does not provide for opportunity of hearing. The Act read with Regulation 48(1) specifically excludes an opportunity of hearing to parties at the time of imposing penalties for contravention under Sections 3 and 4 of the Act. Counsel disputed the CCI's position that a composite hearing for both presenting arguments against contravention and penalty is provided, and urge that it is not sufficient to uphold its vires under the Indian Constitution. An opportunity of hearing, must be given before imposing penalty and the person proceeded against must know that he is required to meet certain allegations, which might lead to a certain, action being taken against him-reliance is placed on S.L. Kapoor v. Jagmohan (1980) 4 SCC 379. It is stated, further, that the DG's report only contains findings of an investigation. The Act contemplates and the NCLAT has held in Hyundai Motor India Ltd. v. CCI [Competition Appeal (AT) No. 06 of 2017, decided on 19.09.2018] that the CCI must carry out an independent inquiry further to the DG's report. Therefore, the only time parties are provided with an opportunity of hearing, they do not know the CCl's charge against them.

39. As a sequitur, parties do not know what arguments to make on penalty. Had the petitioners known that the CCI was going to pass a blanket penalty on total turnover of the OEMs, they could have used the opportunity to distinguish the cases and highlight that penalty on turnover from outside India should be excluded. Unlike the Act, the Competition and Markets Authority, UK provides a draft penalty statement, which sets out key aspects for penalty calculation, post which parties are able to present arguments.

40. It was contended that there is discrimination in the manner for imposing penalty: Regulation 48(1) of the General Regulation-specifically denies enterprises an opportunity of hearing to present arguments on penalty if CCI

finds a case of contravention of Sections 3 and 4. By amendment to Regulation 48(1) of General Regulations in 2011, CCI amended its own regulations to take away the right of parties to benefit from (a) a show cause notice and (b) reasonable opportunity to represent his case before CCI. Counsel highlighted that in contrast, opportunity of hearing is provided before imposing penalties in cartel cases under Section 46 of the Act, read with lesser Penalty Regulations, but not under Section 3 of the Act. Hearing on penalty is extended to all other cases under Chapter VI of the Act including for non-cooperation and gun-jumping, but not for penalties in respect of contraventions under Sections 3 and 4. The contrasting and differential treatment is per se discriminatory and not based on any rationale.

41. Further, submitted counsel, the Act envisions multiplicity of wide-ranging and extensive orders under Section 27(b), which further demonstrates the requirement for a hearing in this case, a finding of contravention did not only lead to penalties, but also burdensome directions on the Petitioner's business. An opportunity of hearing would have allowed the Petitioner to present its case on why the directions of the CCI were not commercially sound and would have resulted in overhauling the automotive parts industry in India.

43. Mr. V. Lakshmikumaran, learned counsel appearing on behalf of M/s. Honda Cars India Limited dwelt in length on the role of regulatory bodies in India and that of the CCI in particular. He emphasized that a regulator is a governing or independent body setting standards or striving at a fair balance between the interests of consumer and that of the service provider - by relying on P. Ramanatha Aiyar's, The Major Law Lexicon, (Vol.5, 4thEdn. 2010 P.5804).

44. Mr. Lakshmikumaran, argued that regulators principally performed the functions which are regulatory, advisory or recommendatory, executive and in certain cases adjudicatory (the latter is incidental to regulatory framework in order to maintain the balance in the principal sector or industry concerned). In the process, the regulator is concerned mainly with issuing rules or regulations which forms the framework governing the sector and ensuring compliance by issuing directions; it advices in certain cases while also discharging adjudicatory functions.

45. Mr. Lakshmikumaran submitted that there is a basic difference between Courts and Tribunals on the one hand and regulatory bodies on the other. Former are essentially an authority which reacts to given situations which is brought to its notice whereas the regulatory is of proactive bodies empowered to frame statutory rules and regulations... it is clear that the Competition Commission of India is not a regulator and it is a principal authority which exercises a judicial functions conferred by the Statute. It has all the trapping of courts and is a Tribunal. It in fact determines the rights and liabilities of the parties before it.

46. It is urged by Mr. Lakshmikumaran who supplemented the submission of the previous counsel that a body which is a Tribunal and performs judicial functions as opposed to one which predominantly advices or regulates or

discharges its executive functions that independently adjudicatory functions, its composition has to be of judicial members… In this context, it was urged that the CCI in exercise of its powers under Section 3 and 4 is conferred with judicial power of the state and, therefore, discharges the judicial functions. This is demonstrable from its powers and functions, having regard to Sections 27, 28, 33, 36 and 61 and Regulations 10, 12(2), 15, 24-28, 31, 32, 39, 41- 43 and 45. These are essentially judicial functions which can be performed by a court. Its power is conclusive and also it is empowered to impose penalty. Highlighting Section 61 of the Act, it is submitted that the jurisdiction of the Civil Courts (which otherwise are possessed with the authority to adjudicate upon all disputes of civil nature) is expressly barred. The corollary is, therefore, that the role and functions of the Competition Commission of India are that of a court and not a regulatory body. It is, therefore, urged that the Act is unconstitutional as it does not mandate judicial membership under Sections 8(2), 22(2) and (3). These are also arbitrary because they trench upon the rights of an individual who is denied access to the courts and right to be heard by a judicial body, comprised of judicially competent and qualified personnel which is the standard required of by the Constitution of India. Learned counsel also submitted that Section 22(2) and (3) as far as it adopts the concepts of 'members present and voting', 'casting vote' and a 'quorum of 3 members' is opposed to recognized principles of justice, adjudication in India and in complete deviation of standards which constitutes the rule of law. It was submitted that it is the only judges or adjudicatory personnel who hear the case finally and throughout the final hearing, who are competent and empowered to decide the final order. The participation of others at intermittence stages and absence of one or many of them in the final decision vitiates it.

52. It is contended that an expert regulatory body such as CCI cannot be castled in the watertight compartments of separation of powers, which in the quasi federal framework of Indian Constitution are inherently overlapping. In the context of CCI, notwithstanding the multiple hats it wears, the legislature has taken care to provide for an appellate mechanism which is apart from the power of Judicial Review by the Constitutional Courts. Counsel urged that under the amended Act, post Braham Dutt (supra), CCI is structured and set up as an expert regulatory body performing the role of independent regulator/watchdog for the economy in the same mould as Securities and Exchange Board of India (hereinafter referred to as "SEBI") performs qua the Securities market. In the course of its functioning CCI undertakes "executive adjudication" in juxtaposition to judicial adjudication in respect of all aspects entrusted under the Competition Act. Therefore merely because CCI also performs adjudicatory functions it does not acquire the character of judicial tribunal or Court. According to Black's Law Dictionary, Seventh Edition, Administrative Adjudication is defined as "the process used by an administrative agency to issue regulations through an adversary proceeding. The same definition has been reiterated in Wharton's Law Lexicon, Fifteenth Edition."

61. Mr. Jain argued that it is clear that a body charged with performing multiple functions can adjudicate and it is not necessary that the person(s) manning the

body must have a legal background. The only aspect that emerges is that the body while adjudicating performs in a quasi-judicial manner, which mandates that the executive must adopt judicial procedures and not that the person performing a quasi-judicial function must have a judicial background. Furthermore, if a body decides between an individual and public interest at large there is no lis per se, which further ratifies the fact that the CCI does not perform a judicial function. CCI's adjudication is also used to regulate and monitor conduct of various companies.

66. It was next argued-in the context of Section 27 that there is no need to give a separate hearing for the purpose of determination of quantum of penalty, for the reason that (a) the "opposite parties" are at liberty to address them compositely while making submissions on merits and (b) the COMPAT is empowered to reduce or stay the penalty even without insisting on full or partial pre-deposit unlike several other appellate regimes. It was submitted that as to the concept of 'relevant turnover', merely because the CCI has in a particular order, taken the total turnover or a company rather than the product specific turnover, it does not given rise to challenge being mounted for constitutional validity of the provision. In fact the COMPAT itself has interpreted the expression turnover as the relevant turnover which in turn would consider the data confined to the product in question. The matter is presently pending adjudication in the Supreme Court and hence need not be addressed in these proceedings. Suffice to state, the terms turnover, enterprise etc have been clearly defined under the Act and there is neither any vagueness nor any unconstitutionality qua the same.

67. Turning next to the manner of appointment of members of CCI it was urged that the composition of the selection committee is in conformity with the established legislative norms and do not require any judicial review merely on the basis of speculative presumptions, particularly when the Chief Justice of India is the Chairperson of the Selection Committee and amongst other members two are "Expert Members". Such a high powered and well represented Selection Committee has inherent capacity to ensure fair selection in keeping with the qualifications set out in Section 8(1) of the Act. The composition of such selection committees cannot be questioned on the basis of cynicism. In a democratic body polity, trust must be reposed on a committee which comprises of the Chief Justice of India. Further, the challenge to constitutionality of the selection committee has been mounted-in these cases-on the presumption that the CCI is a judicial body, which the respondents submit to the contrary. It is contended that Sections 54-56 of the Act, in fact establish and clarify the character of the CCI as an executive body and the provisions are meant to ensure that CCI functions within the broad policy framework of the Central Government.

68. On the question of validity of Section 22 (3), it was argued that since CCI is contemplated as a regulatory body which carries out its functions in the meetings as distinct from court hearings, there is nothing irrational in providing for a minimum quorum of 3 members particularly in the light of

Section 22(3) of the Act. In a regulatory mechanism where decisions are taken in a meeting, the casting vote contemplated under Section 22(3) is an effective and logical working tool. This is the only viable option in a scenario, where in a particular meeting, there are only 4 or 6 members present and the meeting results in a deadlock. In such situations the provision of casting vote enables achievability of a majority decision.

69. Mr. Jain refuted that the enactment was void as it permitted "the revolving door" procedure. It was submitted that the allegation is unfounded and misconceived since it is a settled proposition of law that validity of a law cannot be determined on the assumption that the concerned authority is likely to act in an arbitrary or irregular manner. It was further submitted that "the revolving door" allegation is based on the premise that certain members who heard the final arguments of the case, chose not to sign the final order. This is disputed as incorrect since apart from the three members who signed the final order, all the other members who had heard the final arguments of the petitioners before the CCI had retired.

74. The present case concerns the constitutionality of Section 8, 9, 15, 17, 22, 26, 17, 36, 53C, 53D, 55, 56 and 61 of the Competition Act, 2002 and Regulations 37, 41, 44, 45 and 48 of the Competition Commission of India (General Regulations, 2009).

75. This court is of the view that the issues involved in these batch of petitions are the following:

(1) Is the CCI a tribunal exercising judicial functions, or is it performing administrative and investigative functions and also adjudicating issues before it;

(2) Is the CCI unconstitutional inasmuch as it violates the separation of powers principle, which underlies the Constitution - and is now recognized as a basic or essential feature of the Constitution of India.

(3) Is Section 22 (3) unconstitutional for the reasons urged by the petitioners;

(4) Does the "revolving door" practise vitiate any provision of the Act or the decisions rendered by the CCI;

(5) Was the power exercised by the CCI to expand the scope of inquiry and notice under Section 26 (1) in an illegal and in an overboard manner;

(6) Is Section 27 (b) of the Act and the provision for penalties unconstitutional or the orders impugned arbitrary, for the reason that no separate hearing is provided, and the statute provides no guideline for exercise of discretion.

Analysis and Conclusions

Re Point No. 1: Is the CCI a tribunal exercising judicial functions, or does it performs administrative and investigative functions as well as adjudicates issues before it.

76. On this aspect, there can be little scope for debate; the SAIL (supra) judgment of the Supreme Court, which considered the effect of orders made under

Section 26(1), analysed Sections 3, 4, 19, 26 and various regulations, and ruled on the effect of the enactment: *"Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act."* This enunciation of the law binds the courts; furthermore, there can be no other view, given that SAIL (supra) delineated the role of CCI, which decides whether to commence an inquiry or investigation, under Section 26(1). The court unambiguously ruled that at that stage, the function was administrative:

"*Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26 (1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami v. Union of India [(1992) 4 SCC 605] explained the expression 'inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High-Power Judicial Committee constituted, were neither civil nor criminal but sui generis."*

77. Characterizing the proceeding before CCI as one akin to the preliminary stages of a departmental proceeding, the court, in SAIL (supra), held that prima facie opinion formation was merely an administrative function and that inquiry into the information or complaint (received by CCI) commences after such opinion was formed, for which notice to the opposite party is not a pre-requisite, though it may seek information in that regard, in view of Regulation 17:

"The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26 (2) of the Act, which order itself is appealable before the Tribunal and only after this stage; there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26 (1), we are of the considered view that the right of notice

of hearing is not contemplated under the provisions of Section 26 (1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously. We may also usefully note that the functions performed by the Commission under Section 26 (1) of the Act are in the nature of preparatory measures in contrast to the decision-making process. That is the precise reason that the legislature has used the word 'direction' to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission."

78. It is therefore, clear that though information or complaint which may trigger an inquiry, (but not necessarily so, in all cases) is received by the CCI, the initial steps it takes are not always towards, or in aid of adjudication. They are to ascertain fuller details and inquire into the veracity (or perhaps) seriousness of the contents of the information, to discern whether such investigation and further steps towards adjudication are necessary. It is important to flag this function, because a court or tribunal, which has adjudicatory functions, is seized of the lis or the dispute, when the suitor or litigant approaches it. The issuance of notice or summons, by the court, in exercise of compulsive jurisdiction (like in a suit, or civil proceeding, or by a tribunal, in an appeal before it) or in discretionary jurisdiction (like in writ proceedings) are judicial acts, necessarily in furtherance of the adjudicatory function which the court or tribunal performs. At the stage when CCI entertains and directs an inquiry, it does not perform any adjudicatory function; the function is merely administrative. This position has been reiterated in *Competition Commission of India* v. *Bharat Sanchar Nigam Ltd.* (2019) 2 SCC 521.

79. At the next stage, after CCI directs investigation, the Director General (DG), after investigation, has to report to it [Section 26 (2)]. If the recommendation of the DG is that no case exists, the CCI is nevertheless obliged to forward a report to the informant/complainant, receive its or his comments and afford a hearing [Section 26 (5)]. After the hearing, it may dismiss the complaint [Section 26 (6)]; or direct further inquiry [Section 26 (7)]. If, on the other hand, the DG's report recommends that there exists some contravention of

provisions of the Act, the CCI has to proceed further, and inquire into that [Section 26 (3) read with Section 26 (8)]. The CCI has limited powers of the civil court [Section 36 (2)] in matters such as (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such record or document from any office. The CCI can also require the opinion of experts [Section 36 (3)]. Significantly, CCI has no power to review its orders: previously, Section 37 permitted review; however, the 2007 amendment repealed that provision; it has limited rectification power, under Section 38. In case of imposition of penalty, one mode of recovery is through reference to the concerned income tax authority [Section 39 (2)]; such officer or income tax authority can then recover the penalty as if the party concerned were an "assessee in default" under provisions of the Income tax Act [Section 39 (3)]. These investigative powers are also conferred concurrently upon the DG [Section 41 (2)].

80. The powers of the CCI and duties cast upon it include an advisory role, whereby the Central or any State Government can seek its opinion on any aspect of its competition policy and make any reference to its impact; the CCI has to give its opinion within 60 days of receipt of such a reference [Section 49 (1)]. The opinion, however, is not binding. CCI is also invested with the duty of competition advocacy (Section 49 (3)) in the discharge of which, it has to "take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues."

84. In view of these specific functions, this court is of opinion that there can be no manner of doubt that the CCI does not perform exclusive adjudicatory functions to be called a tribunal. However, the creation of CCI and investing it with a multifarious function, which extend to directing (and overseeing) investigation and fact gathering, advising the government on policy (as an expert body) and advocating competition, in addition to issuing directions or orders against specific entities or companies with the aim of eliminating a practice found pernicious or one which constitutes a barrier to competition and fair dealing in the marketplace.

85. However, the above finding that the CCI is not a tribunal exercising exclusive judicial power, does not lead to the conclusion that its orders are any less quasi- judicial- at the stage when they attain finality. They are, for the simple reason that the consequences are far reaching, to those entities and companies which are subjected to directions (cease and desist orders, directions to alter agreements, etc). The right to freedom of trade, to the extent that it impinges on the right of the entity to exercise free choice about contractual terms, or whom to associate with (in regard to association and merger) are undeniably implicated. These orders, however, are subject to appeal, to a tribunal (COMPAT). CCI is also amenable to judicial review under Article 226 of the

Constitution of India as regards the directions it makes procedurally. For instance, if it can be shown that investigation has been launched without a reasoned prima facie expression of its opinion, under Section 26 (2), the CCI's orders can be corrected in writ proceedings.

86. In view of the above discussion, it is held that CCI does not perform only or purely adjudicatory functions so as to be characterized as a tribunal solely discharging judicial powers of the state; it is rather, a body that is in parts administrative, expert (having regard to its advisory and advocacy roles) and quasi-judicial -when it proceeds to issue final orders, directions and (or) penalties.

Point No. 2 Is the CCI unconstitutional inasmuch as it violates the separation of powers principle, which underlies the Constitution - and is now recognized as a basic or essential feature of the Constitution of India

88. There can be no two opinions that CCI performs important regulatory tasks. No doubt, it has no *subordinate legislative power* over the aspect of market behaviour, which its task is to regulate, but that places no limitation in the manner of its regulating entities, markets, contractual relationships and associations once it determines, with respect to the undesirable effect upon competition in the "relevant market" of a particular product or service.

122. The question then is, whether conferment of power on the CCI, whose orders and decisions have a lasting impact on the economic ability and freedom of business, trade and commerce (in the course of which business relationships are ordered and contracts of long duration are entered) are the result of an *adjudicatory* process which does not meet the standards required of by the Constitution in respect of decision of disputes by courts.

125. In R. Gandhi (supra), the Supreme Court had to deal with provisions of the National Company Law Tribunal, which sought to replace the jurisdiction and powers of the Company Law Board and the appellate tribunal, which sought to supplant the jurisdiction of the High Court, which had existed for a long time. The court held that:

"87. The Constitution contemplates judicial power being exercised by both courts and Tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by Legislative enactments. High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create Tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore

it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to Tribunals.

88. The argument that there cannot be 'whole-sale transfer of powers' is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to Tribunals. The competence of the Parliament to make a law creating Tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word 'Tribunal' in place of 'High Court' necessarily there will be 'whole-sale transfer' of company law matters to the Tribunals. It is an inevitable consequence of creation of Tribunal, for such disputes, and will no way affect the validity of the law creating the Tribunal.

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106. We may summarize the position as follows:

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(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for 'Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect

the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.…"

135. If these observations are kept in mind, the fact that some powers under an enactment, which clothe the authorities with a broad range of powers (and jurisdiction) - such as administrative, quasi legislative and quasi-judicial per se would not make that body a judicial or purely administrative one. Previously, this Court noticed various decisions which held that the bodies created under the TRAI Act and the Electricity Act are acknowledged to be regulatory ones; in the case of TRAI, one of the rulings of the Supreme Court stated that regulation can take shape through subordinate legislation (i.e. rule making, regulation framing) or through "litigation" i.e. quasi-judicial determination in the course of decisions, directions and orders, after fact gathering i.e. granting opportunity to the parties concerned. In the case of the Electricity Commissions, it was held that they do perform quasi-judicial functions. As regards primary authorities under SEBI (i.e. the Board and the adjudicatory officers) there is no question that they do perform adjudicatory functions. The consequence of these functions (i.e. quasi-judicial determinations leading to orders and directions) is serious and parties concerned or service providers as a class are potentially impacted, sometimes gravely. In the case of SEBI, the Board's decisions can in fact lead to commercial shut down for specified periods, if the direction to stop trading is given. Undoubtedly, these result in serious civil consequences. In all these cases-as in the case of the Act, the remedy of appeal is available as a right; the appellate tribunals uniformly are chaired by a judicially trained person (former High Court Chief Justice or former Supreme Court judge) in a couple of tribunals, in addition, other members drawn from the legal field are necessary. However, as regards the primary regulator, i.e. the bodies such as TRAI, SEBI, Electricity Commissions, AAI, AERA, PNGRB the statutes do not mandate that the members concerned (including adjudicating officers under Section 15I of SEBI Act) should be legally qualified or possess judicial experience.

137. All the petitioners had urged that given the nature of tasks conferred upon the CCI, i.e. to probe into the allegations of anti-competitive agreements, which under Section 3(3) directly or indirectly (a) determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market which is the consequence of anti-competitive arrangement; directly or indirectly results in bid rigging or collusive bidding, and also investigate into the matters provided in Section 3(4), i.e. agreements

at different stages or levels of production generally in different markets, including by any arrangement, exclusive of supply arrangement, distribution arrangement, refusal to deal or resale price maintenance, the implications of exercise of jurisdiction by CCI have a far reaching effect. It was urged that by Section 27, the CCI can direct any association or enterprise etc. involved in the agreement or possession of dominant position, to discontinue or not to enter into such agreements which results in the direct restriction or even prohibition of the right to trade and enter into contracts. The CCI's jurisdiction to direct modification of agreements in the manner specified by it or to abide by other orders, such as payment of costs etc. are equally important implications. Furthermore, the power to issue penalty after adjudication under Section 27(b) only reinforces the essential judicial nature and content of the powers outlined in Sections 3 and 4.

139. This Court has already, for reasons elaborated in the preceding section of this judgement, held that the CCI does not perform purely adjudicatory functions like in the case of deciding a lis between two competing parties. It is tasked with investigating into complaints received and information provided to it by individual entities and those aggrieved by patterns of behaviour perceived to be barriers in the course of trade and business, which would have the undesirable effect of injecting anti-competitive elements. Now, this task is not a straight forward adjudicatory one. The Commission has to, through an administrative process, sift the complaint or information and arrive at an opinion which the Supreme Court has characterized in SAIL (supra) to be of "administrative nature". With that, the CCI directs investigation into the complaint or information, by the DG. In the course of this investigation and inquiry, again not an adjudicatory function, as no rights of any party are decided or determined, the representatives of the parties as well as the officials and employees of the concerned entities which are allegedly involved in the anticompetitive practices, are examined, and wherever necessary, depositions under oath are recorded. By virtue of decisions of the courts, in this fact-gathering exercise, wherever adverse evidence or deposition is collected, the opportunity of cross-examination is provided. The DG then analyses the material and evidence and prepares a report, stating whether the complaint is made out fully or in part. It is thereafter that the adjudicatory mode is launched, as it were. Even at this stage, the CCI may not proceed further and close the matter after hearing the parties. Conversely, if the DG in a given case reports that no further action or order is warranted after hearing the individual or the applicant as well as the parties who are alleged to be involved in the objectionable behaviour, the CCI can direct a further enquiry and thereafter proceed further in the matter with the hearing. It is only at this stage after the culmination of the investigation that the CCI enters into an adjudicatory phase. Undoubtedly, at this final stage, it decides the rights and liabilities of the parties. Given these overall realities, the question is, can it be said that the CCI's composition ought to be substantially or predominantly drawn from those possessing legal expertise or

judicial experience as is urged.

142. The Competition Act does not take away or supplant the jurisdiction of the preexisting jurisdiction of any court or tribunal….Given the multiple tasks that the Act requires CCI to discharge (advisory, advocacy, investigation and adjudication), it cannot be held that the CCI must necessarily comprise of lawyers or those possessing judicial experience or those entitled to hold office as judges, to conform with the provisions of the Constitution. CCI's task as the primary regulator of marketplace and watchdog in regard to anti-competitive practices was conceived by the Parliament to be as a composite regulator and expert body which is also undoubtedly required to adjudicate at a stage. That stage, however, cannot be given such primacy as to hold that the CCI is per se or purely a judicial tribunal. As an adjudicatory body, there can be, no doubt, of course, that its orders are quasi-judicial and must be preceded by adherence to a fair procedure. As to what is a fair procedure has been elaborately dealt with by Section 26 and various regulations that mandate the kind of opportunity that various interested parties are to be given. Equally, in the course of such proceedings, the CCI is required to make procedural orders-which, a line of decisions require-are to be based on reasons. The final adjudicatory order, of course, has to contain elaborate reasoning. In that sense, the CCI is, no doubt, a Tribunal. But it is emphasized again that it is not purely a judicial Tribunal but discharges multifarious functions, one of which is adjudicatory.

143. As regards the challenge to Sections 61 of the Act, this Court notices that such provisions are not alien to the body of law. Similar provisions exist in other statutes…. This Court notices that firstly, the Act creates new rights and casts new obligations. The decision which is to be taken by the CCI is preconditioned upon a detailed fact gathering and fact analysis carried out by a body specially designated with the task, i.e. the DG. That official's powers are circumscribed by the Act and regulations. Furthermore, the conduct of proceedings and the application of principles by the CCI after the report of the DG- with assistance of parties' counsel or their representatives, is not only factual and legal, but substantially depends upon analysis of a complex matrix of economic impact on competition of the particular entities' behaviour. As such, CCI does not decide a traditional lis which is premised on an adversarial proceeding, which the courts are wont to, in their regular course of work.

144. This court notices, in this context, the observations of the Supreme Court, in Union of India v. Delhi High Court Bar Association, (2002) 4 SCC 275, when it decided and upheld the bar to jurisdiction of civil courts enacted by Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

146. The next challenge addressed was with respect to Section 53T, which provides for an appeal to the Supreme Court. The submission here was that this tends to exclude scrutiny by the High Court altogether and places a heavy burden on parties adversely affected by the COMPAT's orders. This

court is of opinion that given the fact that no citizen can claim a vested right to an appeal…. The right once conferred, can be taken away only by law. However, no one can complain that the lack of a further appeal, or that provision of further appeal, is not to their convenience-as is being done, in this case. There may be of course some merit in the thought that if an appeal is provided to the High Court, jurisprudence can develop in the regulatory field, thus generating a body of regulatory law and standards that is available to the regulatory field. However, that can hardly be a ground for holding a law unconstitutional; the policy choice in that regard is to be made by Parliament, not the courts. Therefore, it is held that Section 53T is valid- similar provisions have been made in the TRAI Act, SEBI Act, Electricity Act, etc.

147. As far as the argument that the CCI's membership (i.e. the Chairman and members) qualification and experience are concerned, the Act visualizes that individuals with qualifications and expertise in diverse fields can be appointed; these include persons from the legal field. This statutory provision ipso facto, however, does not satisfy the test of constitutionality, in view of the decisions of the Supreme Court in Utility Users' Welfare Association (supra). In that decision, the Supreme Court dealt with a challenge to Section 113 on the ground that appointment of a judicial member was not mandated, which rendered the functioning of the State Commission (under the Electricity Act) questionable in law. The previous ruling in *Tamil Nadu Generation and Distribution Corporation Limited v. PPN Power Generating Co. Private Ltd.*, (2014) 11 SCC 53 was cited. In Tamil Nadu Generation (supra) the court had made observations indicating that the chairman of such commission had to be necessarily a person with judicial experience. In Utility Users' Welfare Association (supra), resolving the issue, the court clarified that the appointment of such judicial personnel was optional. However, the court further held that:

"106. In Madras Bar Association28 (MJ-II), the Constitution Bench, referring to the decision in Madras Bar Association29 (MJ-I) observed that members of tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. We are conscious of the fact that the case (MJ-I) dealt with a factual matrix where the powers vested in courts were sought to be transferred to the tribunal, but what is relevant is the aspect of judicial functions with all the 'trappings of the court' and exercise of judicial power, at least, in respect of same part of the functioning of the State Commission. Thus, if the Chairman of the Commission is not a man of law, there should, at least, be a member who is drawn from the legal field. The observations of the Constitution Bench in Madras Bar Association30 (MJ-II) constitutes a declaration on the concept of basic structure with reference to the concepts of "separation of powers", "rule of law" and "judicial review". The first question raised before the Constitution Bench as to whether judicial review was part of the basic structure of the Constitution was, thus, answered in the affirmative.

107. We are, thus, of the view that it is mandatory to have a person of law, as a member of the State Commission. When we say so, it does not imply that any person from the field of law can be picked up. It has to be a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

108. In Brahm Dutt v. Union of India, it has been observed that if there are advisory and regulatory functions as well as adjudicatory functions to be performed, it may be appropriate to create two separate bodies for the same. That is, however, an aspect, which is in the wisdom of the legislature and that course is certainly open for the future if the legislature deems it so. However, at present there is a single Commission, which inter alia performs adjudicatory functions and, thus, the presence of a man of law as a member is a necessity in order to sustain the provision, as otherwise, it would fall foul of the principles of separation of powers and judicial review, which have been read to be a part of the basic structure of the Constitution.

109. We are also not in a position to accept the plea advanced by the learned Attorney General that since there is a presence of a Judge in the Appellate Tribunal that would obviate the need of a man of law as a member of the State Commission. The original proceedings cannot be cured of its defect merely by providing a right of appeal.

110. We are, thus, of the unequivocal view that for all adjudicatory functions, the Bench must necessarily have at least one member, who is or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law and who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge."

148. **It follows, therefore, that in line with the above declaration of law, at all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary.**

149. The related aspect is the selection procedure. Objection was taken to Section 53D stating that whereas it envisages the Chairperson of a tribunal as a retired judge, there is no obligation that at least one of the other members ought to be a trained judicial personnel. The court is undoubtedly of the opinion that the Appellate Tribunal performs judicial functions; it hears and decides appeals from orders of CCI. However, the mandate that the Chairman should have been a Supreme Court judge or a Chief Justice of a High Court, in the opinion of this court, sufficiently guarantees the application of a judicial mind and, more importantly, application of judicial principles to the issues brought/agitated before that tribunal. This Court notices that the appellate tribunal provisions contained in regulatory enactments in various sectors (telecom, electricity, petroleum and natural gas, airports, securities etc.) follow an identical pattern.

150. With respect to the selection procedure contained in Section 8 (for members of CCI) the court perceives no infirmity in the impugned

provision, having regard to the view taken previously, mandatorily, the CCI should have a judicial member, in keeping with the dicta in Madras Bar Association (supra), as reiterated in R. Gandhi (supra) and the recent ruling in Utility Users Welfare Association (supra). This would consequently mean that the provision of Section 8 has to be resorted to for selection at all times. This, in the opinion of the court is sufficient safeguard to ensure that executive domination in the selection process (of the panel, shortlisting the names for appointment) does not prevail. The structure of the provision (Section 9 of the Act) is that five members-including the Chief Justice of India (or his nominee) as the chairman in it. At the same time, the composition also ensures the participation of two outside independent experts.

151. As far as the selection to the appellate tribunal (COMPAT) goes (Section 53E), the court notices that the recent decision in Swiss Ribbons Pvt. Ltd. v. Union of India 2019 SCC OnLine SC 73, has outlined the correct perspective, having regard to the decisions in R. Gandhi (supra) and Madras Bar Association (supra). The court had observed as follows:

"13. Shri Rohatgi has argued that contrary to the judgments in Madras Bar Association (I) (supra) and Madras Bar Association (III) (supra), Section 412(2) of the Companies Act, 2013 continued on the statute book, as a result of which, the two Judicial Members of the Selection Committee get outweighed by three bureaucrats.

14. On 03.01.2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended as follows:

412. Selection of Members of Tribunal and Appellate Tribunal.--

xxx xxxxxx

(2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of--

(a) Chief Justice of India or his nominee-- Chairperson;

(b) a senior Judge of the Supreme Court or Chief Justice of High Court-- Member;

(c) Secretary in the Ministry of Corporate Affairs--Member; and

(d) Secretary in the Ministry of Law and Justice--Member.

(2-A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote.

This was brought into force by a notification dated 09.02.2018. However, an additional affidavit has been filed during the course of these proceedings by the Union of India. This affidavit is filed by one Dr. Raj Singh, Regional Director (Northern Region) of the Ministry of Corporate Affairs. This affidavit makes it clear that, acting in compliance with the directions of the Supreme Court in the aforesaid judgments, a Selection Committee was constituted to make appointments of Members of the NCLT in the year 2015 itself. Thus, by an Order dated 27.07.2015,

(i) Justice Gogoi (as he then was), (ii) Justice Ramana, (iii) Secretary, Department of Legal Affairs, Ministry of Law and Justice, and (iv) Secretary, Corporate Affairs, were constituted as the Selection Committee. This Selection Committee was reconstituted on 22.02.2017 to make further appointments. In compliance of the directions of this Court, advertisements dated 10.08.2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of the NCLT and NCLAT have been appointed. This being the case, we need not detain ourselves any further with regard to the first submission of Shri Rohatgi."

152. In this context, it is significant that the Constitution Bench judgment in the second case of Madras Bar Association v. Union of India (2015) 8 SCC 583 [hereafter "the Madras Bar Association-II"] dealt with the issue concerning the composition of Selection Committees for the National Company Appellate Tribunal. There too, Section 412 of the Companies Act 2013, was in issue. Before the amendment noticed in Swiss Ribbons (supra), the Committee comprised of five members, including the Chief Justice of India or his nominee as Chairperson and a senior judge of the Supreme Court or the Chief Justice of the High Court and three other Secretary level members. In Madras Bar Association-II (supra) it was held as follows:

"25. This issue pertains to the constitution of Selection Committee for selecting the Members of NCLT and NCLAT. Provision in this respect is contained in Section 412 of the Act, 2013. Sub-section (2) thereof provides for the Selection Committee consisting of:

(a) Chief Justice of India or his nominee-Chairperson;

(b) a senior Judge of the Supreme Court or a Chief Justice of High Court--Member;

(c) Secretary in the Ministry of Corporate Affairs--Member;

(d) Secretary in the Ministry of Law and Justice--Member; and (e) Secretary in the Department of Financial Services in the Ministry of Finance--Member.

Provision in this behalf which was contained in Section 10FX, validity thereof was questioned in 2010 judgment, was to the following effect: 10FX. Selection Committee: (1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of:

(a) Chief Justice of India or his nominee Chairperson;

(b) Secretary in the Ministry of Finance and Member; Company Affairs

(c) Secretary in the Ministry of Labour Member;

(d) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department) Member;

(e) Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs) Member.

(2) The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee.

26. The aforesaid structure of the Selection Committee was found fault with by the Constitution Bench in 2010 judgment. The Court specifically remarked that instead of 5 members Selection Committee, it should be 4 members Selection Committee and even the composition of such a Selection Committee was mandated in Direction No. (viii) of para 120 and this sub-para we reproduce once again hereinbelow:

(viii) Instead of a five-member Selection Committee with Chief Justice "of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in Section 10FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee-Chairperson (with a casting vote);

(b) A senior Judge of the Supreme Court or Chief Justice of High Court-Member;

(c) Secretary in the Ministry of Finance and Company Affairs-Member; and

(d) Secretary in the Ministry of Law and Justice-Member.

27. Notwithstanding the above, there is a deviation in the composition of Selection Committee that is prescribed Under Section 412(2) of the Act, 2013. The deviations are as under:

(i) Though the Chief Justice of India or his nominee is to act as Chairperson, he is not given the power of a casting vote. It is because of the reason that instead of four member Committee, the composition of Committee in the impugned provision is that of five members.

(ii) This Court had suggested one Member who could be either Secretary in the Ministry of Finance or in Company Affairs (we may point out that the word "and" contained in Clause (c) of sub-para (viii) of para 120 seems to be typographical mistake and has to be read as "or", as otherwise it won't make any sense).

(iii) Now, from both the Ministries, namely from the Ministry of Corporate Affairs as well as Ministry of Finance, one Member each is included. Effect of this composition is to make it a five members Selection Committee which was not found to be valid in 2010 judgment. Reason is simple, out of these five Members, three are from the administrative branch/bureaucracy as against two from judiciary which will result in predominant say of the members belonging to the administrative branch, is situation that was specifically diverted from.

The composition of Selection Committee contained in Section 412(2) of the Act, 2013 is sought to be justified by the Respondents by arguing that the recommended composition in the 2010 judgment was in broad terms. It is argued that in view of subsuming of BIFR and AAIFR which are in the administrative jurisdiction of Department of Financial Services, Secretary DFS has been included. No casting vote has been provided for the Chairman as over the period of time the selection processes in such committees have crystallized in a manner that the recommendations have been unanimous and

there is no instance of voting in such committees in Ministry of Corporate Affairs. Moreover other similar statutory bodies/tribunals also do not provide for 'casting vote' to Chairperson of Selection Committee. Further, the Committee will be deciding its own modalities as provided in the Act. The following argument is also raised to justify this provision: (i) Robust and healthy practices have evolved in deliberations of Selection Committees. Till now there is no known case of any material disagreement in such committees. (ii) The intention is to man the Selection Committee with persons of relevant experience and knowledge.

28. We are of the opinion that this again does not constitute any valid or legal justification having regard to the fact that this very issue stands concluded by the 2010 judgment which is now a binding precedent and, thus, binds the Respondent equally. The prime consideration in the mind of the Bench was that it is the Chairperson, viz. Chief Justice of India, or his nominee who is to be given the final say in the matter of selection with right to have a casting vote. That is the ratio of the judgment and reasons for providing such a composition are not far to seek. In the face of the all pervading prescript available on this very issue in the form of a binding precedent, there is no scope for any relaxation as sought to be achieved through the impugned provision and we find it to be incompatible with the mandatory dicta of 2010 judgment. Therefore, we hold that provisions of Section 412(2) of the Act, 2013 are not valid and direction is issued to remove the defect by bringing this provision in accord with sub-para (viii) of para 120 of 2010 judgment."

153. Having regard to the above discussion, it is, therefore, held that necessarily, the composition of the Committee, which selects from amongst names to fill the position of Chairperson and members of the Company Appellate Tribunal has to conform to the dicta in Madras Bar Association-I (supra) and Madras Bar Association-II (supra). Swiss Ribbons (supra) too is an authority on this aspect; the amended provisions of the Companies Act which was faulted in Madras Bar Association-II (supra) was approved. Consequently, Section 53E, as it stood, before the amendment by the Finance Act, 2017, is exposed to the vice of unconstitutionality. The court notices that unlike a mere appellate tribunal, COMPAT also possesses special jurisdiction to award damages through adjudication of "claims" under Section 53N. This power, in addition to the appellate power makes it imperative that the personnel chosen for the task assigned to the COMPAT, (from whose orders, appeals lie to the Supreme Court directly under Section 53T) are with the approval of the Chief Justice, and at least a judge of the Supreme Court, following the pattern indicated in Madras Bar Association-II and reiterated in Swiss Ribbons (supra). Consequently, Section 53E as it stood prior to amendment, cannot be sustained.

154. The above observations are, however, not determinative or seem to be dispositive of the issue entirely-that the validity of Section 53E which was repealed by Sections 171(d) of the Finance Act, 2017 and instead replaced by the provisions in Section 184 of the Finance Act, 2017 are pending

consideration before the Supreme Court.

Re. Point No. 3 - Section 22(3) unconstitutional for the reasons urged by the petitioners

Re. Point No. 4 - Revolving door policy vitiating any law, policy or practice rendered by the CCI

157. Both these points are taken up together because common arguments were addressed by all counsels on this aspect. Section 22(1) provides that the CCI would meet at such times and places and observe such procedure as is provided by the regulations. Section 22(2) enacts that in the event of Chairperson's inability to attend a meeting of the Commission, the senior most person present would preside over it. Section 22(3) stipulates that all questions which come up for consideration in a meeting would be decided by majority of members present and voting and that in the event of equality of votes, the Chairperson or the Member presiding would have a second or casting vote. The proviso to Section 22 (3) stipulates a minimum quorum of at least three members for any meeting.

158. The petitioners' argument was that Section 22(3), to the extent it enables the Chairperson or the senior member presiding a board meeting to vote twice, i.e. have a casting vote is anathema to judicial functioning. It is submitted that the concept of casting vote is relatable to board meeting in private environs such as company board meetings etc. and cannot have any place where the duty to act judicially and give reasons for such decisions are mandated. It was urged consequently that having regard to the stipulation of a minimum quorum (3 members) wherever there is a difference of opinion, in the CCI where the quorum is of even members - 4 or 6 invariably, the Chairperson or the member presiding would have his say because, he would necessarily vote twice.

159. On behalf of the CCI, it was further urged that such provision for a casting vote is not anathema to all statutory bodies and finds place and mention in several statutes, such as SEBI, TRAI etc…. The concept of a casting vote, in the opinion of this Court, is better confined to the realm of meetings where decision to run a body or even select personnel or in regard to decisions with respect to day-today functioning of a body or entity, including the choice of selection of personnel etc. are decided. On the other hand, an adjudicatory function presupposes a fair procedure whereby the tribunal comprised of an impartial member or members hearing the parties render their decisions objectively on the given facts and apply a pre-existing norm. This in turn means that each member of the tribunal (where plurality of members exists) applies her (or his) mind independently and arrive at decisions which could be common. In this broad spectrum, various permutations are possible. For example, in a 3 member tribunal, it is likely that each member may express a different opinion but all may agree on a common conclusion. On the other hand, two may agree upon a common opinion and express in it in one opinion and the third may differ for stated reasons. Equally, it is possible that there is

complete unanimity on all aspects resulting in one common opinion or decision. Each potential decision is premised upon application of mind by every member who participated in the tribunal. Furthermore, a strong element of collegiality is necessary either in all stages of functioning and at least, at the stage of the decision making. This collegiality or collaborative process and requirement of application mind is entirely subverted if one member, Chairperson, senior member or any member characterized by any appellation is conferred a second or casting vote. The principle of each member's opinion and view carrying the same weight is destroyed in such instance.

160. In the considered opinion of this Court, there can be no two opinions that a casting vote, which potentially can lead to as adjudicatory result or consequence, is anathema to and destroys the Rule of Law in the context of Indian Constitution.

161. The court further is of the opinion that the principle of equal weight for the decisions of each participant of a quasi-judicial tribunal is undoubtedly destroyed by Section 22(3) and further that the provision is incapable of compartmentalization or "reading down". This can be shown by an illustration whereby the decision taken by a majority of four members might be to question a complaint and record that there is no prima facie opinion. The potential mischief which the casting vote provision can result in is that the Chairperson may well take recourse to the second or casting vote and tip the balance the other way and direct that a prima facie case exists in order to investigate into the matter further. There can be several such illustrations where the potential repercussions can be felt in the ultimate adjudicatory result. Consequently, the provision of Section 22(3) is incapable of a clear or neat segregation and has to be declared void in entirety. As a consequence, the only provision which would survive then is the proviso which mandates a minimum quorum of three members (including the Chairman). The proviso then would stand on its own and act as a norm since per se it is harmonious and caters to situations and contingencies where the entire Commission of seven members may be unable to sit and composition larger than 3 may not be able to function for several reasons.

162. As regards point No. 4, the most serious objection to Section 22(3) as a whole was that it places or permits "the revolving door policy" that enables members to participate in one or the other proceedings or desist from participation at their will.

163. There can be no two opinions about the impropriety of a decision which is contrary to the principle that a tribunal or adjudicatory body is bound to render its decision, after hearing the parties; if the body comprises of one or several members, it is a necessary corollary that only those who hear should decide.

164. The question here is, did anyone who did not hear the complaints decide it? The record and the tabular chart, listing the members who heard the matters on 05.02.2013 to 08.02.2013, shows that those who participated were Mr. HC Gupta, Anurag Goel, M L Tayal, Ashok Chawla, R Prasad, Justice

S.N. Dhingra (Retd) and Ms. Geeta Gouri. On 05.03.2013, when CCI requested for additional information from the informant and the other OEMs, the same members - except Mr. R. Prasad participated; he had retired, in the meanwhile. On 09.05.2013, the same combination (Mr. HC Gupta, Anurag Goel, M L Tayal, Ashok Chawla, Justice S.N. Dhingra (Retd) and Ms. Geeta Gouri) were present. Instead of R Prasad, Mr. Bunker, was present at this meeting. He was not present during the oral submissions and he joined the CCI on 25 March 2013. On 08.08.2013, five equipment manufacturers (OEMs) made submissions; on this date, Mr. Anurag Goel, M L Tayal, Ashok Chawla, Justice S.N. Dhingra (Retd) and Ms. Geeta Gouri (from the original combination who heard the matter consecutively on 5th-8th February, 2013) were present; two (R. Prasad, who had retired and H.C. Gupta) were not present; Mr. Bunker was present like in the previous hearing. The final order was made on 25.08.2014; it was by three members, i.e. Mr. Anurag Goel, Ashok Chawla and M.L. Tayal.

165. It is evident that Mr. Bunker, who was not present in the initial hearings on 05.02.2013 to 08.02.2013 and 05.03.2013, joined the hearings of 09.05.2013 and 08.08.2013. Those who had initially heard, but retired, in the meanwhile, before the final order was made, were Mr. R. Prasad, Justice S.N. Dhingra (Retd); Mr. H.C. Gupta and Ms. Geeta Gouri. The petitioners had urged that the hearings in which Mr. Bunker participated (i.e. on two dates) tainted the procedure and furthermore, that the retirement (or end of tenure) of four members resulted in violation of law and rules of natural justice. Their submission was, firstly that a tribunal acts as one body; the quoram rule (per proviso to Section 22 (3)) cannot be stretched to such levels as to render access to justice, an illusion, whereby a larger body comprising of several members hears the matter and the ultimate decision is rendered by a minority of such body or tribunal, for whatever reasons.

169. It is clear that on the question whether in a particular case, a suitor or litigant can justly complain of violation of principles of natural justice-on the aspect that a tribunal of varied composition rendered decision through only some members, when at earlier stages, all members had participated and heard, is not capable of any one answer. Much depends on the factual context. Here, the three members who did finally decide the complaints (Mr. Anurag Goel, Ashok Chawla and M.L. Tayal) were present throughout all the dates of final hearing. No doubt, as time passed, four original members (Mr. R. Prasad, H.C. Gupta, Justice S.N. Dhingra (Retd), and Ms. Geeta Gouri) retired or completed their tenure. That fact is not disputed; in these circumstances, in the opinion of the court, the mere fact that Mr. Bunker participated in two intervening hearings, but was not a party to the final decision, per se does not amount to violation of principles of natural justice.

170. That proviso to Section 22(3) permits the possibility of the "revolving door" in the opinion of the court, does not result in its invalidity.

173. In view of the above discussion, it is held that the mere circumstance that in a given case or group of cases, the practise of "revolving door" hearing is

resorted to, would not ipso facto, constitute a valid ground to declare Section 22 invalid or arbitrary. Whether in a particular case, the concerned party has been prejudiced would have to therefore, be examined, in the light of the facts and circumstances of that case.

177. Having so concluded, this Court is nevertheless of the opinion that a hearing by a larger body and decision by a smaller number (for compelling reasons or otherwise) does lead to undesirable and perhaps at times avoidable situations. To address this, the court hereby directs that when all evidence (i.e. report, its objections/affidavits etc.) are completed, the CCI should set down the case for final hearing. At the next stage, when hearing commences, the membership of the CCI should be constant (i.e. if 3 or 5 members commence hearing, they should continue to hear and participate in all proceedings on all hearing dates); the same number of members (of the CCI) should write the final order (or orders, as the case may be). This procedure should be assimilated in the form of regulations, and followed by the CCI and all its members in all the final hearings; it would impart a certain formality to the procedure. Furthermore, the court hereby directs that no member of the CCI should take a recess individually, during the course of hearing, or "take a break" to rejoin the proceeding later. Such "walk out and walk in" practise is deleterious to principles of natural justice, and gravely undermines public confidence in the CCI's functioning. Once the hearing commences, all members (who hear the case, be they in quorums of 3 or 5 or seven) should continue to be part of the proceeding, and all hearings, en banc. An analogy may also be drawn to the hearings in courts before benches of more than one member. Hearings may take place from time to time before benches of varying composition, but once the final hearing has commenced, the matter is heard and decided only by the same bench. There is no addition, deletion or substitution in the composition of the bench during the course of final hearing. If at all, it becomes impossible to continue the hearing before the same bench (for example, due to one of the judges having demitted office), the matter is heard afresh by the new bench even if the composition is partly common with the previous bench. A similar example may be given of hearings in the Supreme Court - if a matter is heard in part by a bench of two judges, further hearings are held only before that bench, and not before the bench of three judges even if both the original members of the bench are also part of the three judge bench. The invariable practice of the courts, which also ought to be followed by the CCI, is that the bench which hears the matter decides it, and that every member who participates in the hearing, is also party to the final decision.

178. Furthermore, the court is of the opinion that the CCI should be manned fully with all nine members. This will enable the Chairman to ensure that substantial numbers (of at least five) are present at every substantial hearing and final hearing. Furthermore, the Central Government should seriously consider recruiting legal practitioners who regularly practise in the field of company law, competition, securities and other related fields, with sufficient

experience (of over 7 years, as in the case of District Judges, under the Constitution) as technical members. This will eventually promote wider participation in CCI's decision making process and result in these lawyers' grooming for responsible positions in their later years: this can foster expertise which will be valuable to the legal and judicial system.

Re. Point No. 5 - Was the power exercised by the CCI to expand the scope of inquiry and notice under Section 26 (1) in an illegal and overbroad manner

179. The petitioners had impugned the expansion of scope of the initial inquiry. The facts here are that based on the complaint by the informant and supplementary materials, the CCI recorded its prima facie opinion that the complaints needed investigation by its order of 24.02.2011. On 19.04.2011, the DG conducted investigation into the allegations made by the informant and submitted his investigation report. That DG Report requested for permission to expand the scope of its investigation to include other car manufacturers. By its order of 26.04.2011, CCI expanded the scope of investigation being conducted by the DG to include the petitioners herein and certain other car manufacturers operating in India. The DG thereafter issued notice to the other car manufacturers, i.e. the petitioners on 04.05.2011 under Section 36 (2) read with Section 41 (2) of the Act, seeking detailed information and documents from them with reference to an investigation being conducted into certain anti-competitive practices alleged to be prevalent in the sale, maintenance, service and repair market of the cars manufactured in India in Case No. 03/2011.

181. The Commission in its order dated 26.04.2011 recorded as follows:

"The information was referred to DG on 08.03.2011 for investigation and submission of report within 60 days.

2. The DG vie not dated 19.04.2011 has requested for directions to initiate investigation against other car manufacturers, inter alia starting that the scope of investigation needs to widened in this case.

3. The Commission considered the DG's note in the ordinary meeting-held on 26.04.2011 and approved the request to initiate investigation against other car manufacturers also as mentioned in the note of DG dated 19.04.2011.

4. Commission further observed that whenever Commission orders of investigation in any case it need not be confined to the parties mentioned in the information. The investigation is ordered on certain issue and all the parties which are covered by that issue should be investigated. There is no need to obtain the orders of Commission on each individual case."

182. The final order of the CCI further records the following findings - while dealing with the issue of validity of the expansion of hearing by a separate order under Section 26 (1):

"The direction of the Commission was with respect to alleged anticompetitive conduct by the said industry in general and not specifically qua the car manufacturers named in the information. This is apparent from the order of

the Commission dated April 26, 2011 which was passed after considering the request of the DG when he found, at that stage that alleged anticompetitive conduct was not confined to the named entities in the information but was prevalent across the industry. Further, while directing the DG to investigate against those car manufacturers also who were not specifically named in the information, the Commission treated the almost similar conduct of all car manufacturers equally and gave mandate to the DG that he can investigate the matter against not only the named car manufacturers but against other car manufacturers as well.

20.3.7 In the present case the DG brought the matter to the Commission and thereafter exercising its power under the Act, the Commission allowed the request in order to achieve the objectives of the Act, as mentioned in the preamble an discharge of its functions under section 18 of the Act. The Commission, therefore, cannot be said to have committed any irregularity by allowing the request of DG for doing thorough and complete investigation as mandated under the Act for achieving its objectives. It is also noted that all OPs were given ample opportunity by the DG to present their case and without exception all of them have indeed taken that opportunity to make detailed submissions. Further, all OPs have not only submitted their detailed objections to the report of the DG but they have been heard at length by the Commission and they were further allowed to submit written arguments. All these facts demonstrate that principles of natural justice were followed by the Commission at every stage of inquiry and none of the OPs has claimed that DG has drawn findings against it without affording sufficient opportunity of hearing.

20.3.8 The Commission is of the opinion that the objections taken by the Ops regarding jurisdiction of the Commission are not only contrary to the scheme of that but also do not capture the factual position in the correct perspective. Based on above discussion the contention raised by the OPs has no force and is liable to be rejected."

183. This Court is of the opinion that the argument with respect to illegality of the CCI's procedure, in expanding the scope of inquiry under Section 26 (1) is insubstantial. At the stage the CCI decides to act on a complaint, and directs investigation, it does not always have all information or material in respect of the general pattern or method adopted by parties that vitiates the marketplace. It is only the information given to it. Premised on that information, the DG is tasked to look into the matter. During that inquiry, based on that solitary complaint or information, facts leading to pervasive practises that amount to abuse of dominant position on the part of one or more individuals or entities may be possibly unearthed. At that stage, the investigation is quasi-inquisitorial, to the extent that the report given is inconclusive of the rights of the parties; however, to the extent that evidence is gathered, the material can be final. Neither is the DG's power limited by a remand or restricted to the matters that fall within the complaint and nothing else. The Excel Crop Care (supra) case has explained the DG's powers in

broad terms: ("if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report….If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition"). The assumption of jurisdiction of the CCI, then is upon receipt of complaint or information, when the "Commission is of the opinion that there exists a prima facie case" [as per Section 26 (1)].

184. ….Likewise, the steps outlined in Section 26 are amplified in the procedure mandated by Regulation 20 and 21, which requires participation by "the parties", in the event a report after DG's inquiry, which is likely to result in an adverse order, under Sections 27-34 of the Act. Consequently, the argument that a specific order by CCI applying its mind into the role played by each of them was essential before the DG could have proceeded with the inquiry, is unmerited and, therefore, rejected.

Re Point No. 6 Is Section 27 (b) of the Act and the provision for penalties unconstitutional or the orders impugned arbitrary, for the reason that no separate hearing is provided, and the statute provides no guideline for exercise of discretion.

187. The common refrain of all petitioners on this aspect is that sans a mandated pre-penalty notice and hearing, an adverse action by way of monetary penalty cannot be imposed and that the provision which enables such penalty without hearing is void.

192. In the present case, what is important is that the petitioners' complaint is not that they were not given any opportunity; rather it is that they ought to have been given a separate opportunity of hearing. Ordinarily, the court would have concurred with such an argument. However, a deeper analysis of the nature of the proceeding before the CCI would reveal that the procedure it adopts-and is required to adopt gives sufficient safeguard to parties likely to be affected adversely, both as regards findings and the sanctions. The first step, of course, is to decide whether to issue notice. Excel Crop Care (supra) and the later decisions have now held conclusively that this step is administrative and does not contemplate any prior notice or hearing to the opposite parties. The next stage is investigation by the DG. At this stage, the parties - whenever needed - receive notice and opportunity; if it is denied, they can seek directions to the DG from the CCI. This stage incudes evidence gathering and wherever necessary, cross-examination on behalf of one or more individuals, before the DG-and later, before the CCI, if the complaint is that cross-examination is not granted. The next stage is the report of the DG, which is shared by the parties, who then make their comments, and are granted full opportunity of hearing. This step is very significant, because

when the parties do address the CCI and submit their contentions, they have foreknowledge of all the materials, including adverse materials and comments made in the DG's report. This stage is a "full blown" hearing, when the parties know and have a fair awareness of the range of options available with the CCI in terms of both findings and the sanctions (such as orders enjoining some activity, or requiring positive steps to be taken). This forewarning, as it were, and the statutory cap (of not more than 10 percent) is a broad guideline within which both CCI and the parties before it, operate.

195. If these considerations are kept in mind, the fact that certain types of penalties (which are pre-determined quantum for specific violations of the Act) elicit show cause notice as prelude to penalty on the one hand, and absence of any compulsion to issue a separate show cause notice preceding a penalty under Section 27 (b) (although a show cause notice and full hearing is provided with opportunity to submit against the report of DG) does not in the opinion of this Court, render that provision arbitrary.

196. The court is cognizant of the fact that there are several adjudications-quasi judicial and by judicial tribunals, which envision a "rolled up" hearing which visualizes only one show cause notice-that can culminate in both an adverse finding and a consequential penalty….

198. This Court is of the opinion that the Supreme Court felt compelled to say what it did, in each of those decisions, and the long line of successive authorities, because the action taken by the executive government or the public agency was not preceded by fair procedure, that encapsulated any opportunity of hearing. Here, however, the CCI followed all the steps indicated in the statute; the DG held an inquiry, during which the petitioners were permitted participation; the consequent report and documents were shared with them, or they were given access to the record. After these, each petitioner was given full hearing which included submissions on potential orders under Section 27. It is undeniable that the petitioners also furnished written submissions. The DG's report contains an elaborate analysis of the materials found and inquired into; the CCI's order analyses the report, in the light of the petitioners' submissions. The penalty order is reasoned. Having regard to these circumstances, it cannot be said that the CCI was compelled by the statute to adopt an unfair procedure (i.e. the absence of a second specific hearing before imposition of penalty) exposing Section 27 to the vice of arbitrariness and unconstitutionality.

199. Having concluded that Section 27 is not arbitrary or unreasonable, the court now proceeds to deal with the second submission of the learned counsel, which is that the provision lacks guidelines with respect to the scale of penalty that is to be imposed in any given case and that this very omission renders it vague and clothes CCI with uncanalized power.

203. Following the salutary principle of constitutional interpretation, this Court is of the opinion that the soundness of discretion and the method adopted by the CCI having regard to the objectives of the Act and regulations framed under it should be the paramount guiding factors, apart from the principle of

proportionality which Excel Crop Care (supra) talked about. Given that the Supreme Court has indicated the path and course that guides CCI, and the relevant considerations, this Court is of the opinion that the objection to the unconstitutionality of Section 27 (b) cannot survive.

206. Several subsequent authorities have reiterated the necessity of furnishing reasons in support of conclusions. Therefore, this Court concludes that to decide whether to, and to what extent impose penalty are in the domain of the CCI's discretion, which it is bound to exercise, keeping in mind the factors (deemed not exhaustive) in Excel Crop Care (supra) and also general objects and purposes of the Act. The challenge to Section 27(b) and Regulation 48, therefore, fails. It goes without saying that the exercise of such power can be interfered by COMPAT on appeal, on its merits. All these are inbuilt safeguards which if transgressed by the CCI in any given case, are capable of correction within the framework of the Act.

Conclusions and Directions

212. In view of the findings of this Court, in the previous parts of this judgment, the following conclusions are recorded and directions issued:

(i) Section 22(3) of the Competition Act (except the proviso thereto) is declared unconstitutional and void;

(ii) Section 53E (prior to the amendment in 2017) is declared unconstitutional and void: however, this is subject to the final decision of the Supreme Court in the writ petitions challenging the Finance Act, 2017;

(iii) All other provisions of the Competition Act are held to be valid subject to the following orders:

(a) The CCI shall frame guidelines with respect to the directions contained in para 179 of this judgment, i.e. to ensure that one who hears decides is embodied in letter and spirit in all cases where final hearings are undertaken and concluded. In other words, once final hearings in any complaint or batch of complaints begin, the membership should not vary-it should preferably be heard by a substantial number of 7 or at least, 5 members.

(b) The Central Government shall take expeditious steps to fill all existing vacancies in the CCI, within 6 months;

(c) The CCI shall ensure that at all times, during the final hearing, the judicial member (in line with the declaration of law in Utility Users Welfare Association, (supra) is present and participates in the hearing;

(d) The parties should in all cases, at the final hearing stage, address arguments, taking into consideration the factors indicated in Excel Crop Care (supra) and any other relevant factors; they may also indicate in their written submissions, or separate note, of submissions, to the CCI, why penalty should not be awarded, and if awarded, what should be the mitigating factors and the quantum-without prejudice to their other

submissions.

(iv) Since the petitioners had not availed the remedy of appeal (and had approached this Court) it is open to such of them who wish to do so, to approach the Appellate Tribunal, within 6 weeks; in such eventuality, the Appellate Tribunal shall entertain their appeals and decide them on their merits in accordance with law, unhindered by the question of limitation.

213. The writ petitions are partly allowed in the above terms. There shall be no order on costs.

Excel Crop Care Limited v. *Competition Commission of India and Another*
(2017) 8 SCC 47

A.K. SIKRI, J.

All these Civil Appeals arise out of the common judgment and order dated October 29, 2013 passed by the Competition Appellate Tribunal(forshort,'COMPAT').These proceedings have their origin in the letter dated February 04, 2011 written by the Food Corporation of India (for short, 'FCI') to the Competition Commission of India (for short, 'CCI') complaining of an anti-competitive agreement purportedly arrived at between M/s. Excel Crop Care Limited, M/s. United Phosphorous Limited (for short, 'UPL'), M/s. Sandhya Organics Chemicals (P) Ltd. respectively (the appellants in CA Nos. 2480, 2874 and 2922 of 2014 and hereinafter referred to as the 'appellants') and Agrosynth Chemicals Limited, in relation to tenders issued by the FCI for Aluminium Phosphide Tablets (for short, 'APT') of 3 gms. between the years 2007 and 2009. The CCI entrusted the matter to the Director General (DG) for investigation, who submitted his report on October 14, 2011 giving his *prima facie* findings affirming the allegations of the FCI that the appellants had entered into an anti-competitive agreement, which was violative of Section 3(3) of the Competition Act, 2002 (hereinafter referred to as the 'Act'). On receipt of this complaint, the CCI issued notices to the appellants who filed their objections. After hearing the parties, the CCI passed the order dated April 23, 2012 whereby it concluded that the appellants had entered into the anti-competitive agreement in a concerted manner thereby offending the provisions of Section 3 of the Act. As a consequence, it imposed penalty @ 9% on the average total turnover of these establishments for last three years. Appeals were filed by the appellants before the COMPAT undersection 53-B of the Act. In these appeals, the issue on merits has been decided against the appellants by COMPAT in its judgment dated October 29, 2013. These appeals question the validity of the order of the COMPAT on the aforesaid aspect.

Now the facts in detail :

An Inquiry in this case was initiated by the CCI on the basis of letter/ complaint dated February 04, 2011 written by the Chairman and Managing Director of the FCI to the CCI. It was alleged in this complaint that four manufactures of APT had formed a cartel by entering into an anti-competitive agreement amongst themselves and on that basis they had been submitting their bids for last eight years by quoting identical rates in the tenders invited by the FCI for the purchase of APT. It was alleged that the requirement for APT was almost got doubled during the period 2007-2009 and was likely to rise further in view of the requirement

of large quantity of these tablets by the FCI, Central Warehousing Corporation and other State agencies for preservation of food grains, which these agencies were storing in their godowns. The CCI assigned the complaint to the DG for investigation. The DG collected required information from the FCI and other Government agencies dealing in warehousing and storage of food grains and also from Central Insecticides Board and Registration Committee, Faridabad. Representatives of FCI were also examined. After collecting the aforesaid information, the DG submitted his report with the following findings:

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(a) There were only four manufacturers of APT, namely, M/s. Excel Crop Care Limited, M/s. UPL, M/s. Sandhya Organics Chemicals (P) Ltd. (which are the three appellants herein) and Agrosynth Chemicals Limited.

(b) It was noted that the FCI had adopted the process of tender, which is normally a global tender. The concerned tender had two-bid system, that is first techno commercial and then the financial bid. On the basis of the bids, the rate running contracts are executed with successful bidders. The DG found that there was also a Committee comprising of responsible officers for evaluation of technical and price bids. As per the practice, the lowest bidder is invited by the Committee for negotiations and after negotiations, the Committee submits the report giving its recommendations and the contracts are awarded and after that the payment for the purchased tablets is released by the concerned regional offices.

(c) It was found that right from the year 2002, up to the year 2009, all the four parties used to quote identical rates, excepting for the year 2007. In 2002, Rs. 245/- was the rate quoted by these four parties and in the year 2005 it was `310 (though the tender was scrapped in this year and the material was purchased from Central Warehousing Corporation @ `290). In November 2005, though the tenders were invited, all the parties had abstained from quoting. In 2007, M/s. UPL had quoted the price which was much below the price of other competitors. In 2008, all the parties abstained from quoting, while in 2009 only the three appellants, barring Agrosynth Chemicals Limited, participated and quoted uniform rate of `388, which was ultimately brought down to `386 after negotiations. It was also found that the tender documents were usually submitted in-person and the rates were normally filled with hand.

(d) In respect of the tender floated in the year 2009 for procurement of fixed quantity of 600 MT with a provision of ± 10%, the three appellants had quoted identical rates of `388. It was found that the tender documents were to be submitted by 2:00 p.m. on May 08, 2009 and bid was to be opened at 3:00 p.m. on the same day. For

submitting the bids, representatives of the three appellants made common entries in the Visitors' Register. In fact, one Shri S.K. Bose of M/s. Excel Crop Care Limited made these entries on behalf of the representatives of other competitors as well.

(e) By analysing the aforesaid bids carefully and taking into consideration the total number of 16 tenders, including tenders dated May 08, 2009, the DG recorded that:

(i) pricing pattern definitely showed the practice of quoting identical pricing by all the three appellants or at some other times by two appellants, including M/s. Agrosynth ChemicalsLimited;

(ii) the explanation given by the appellants was unconvincing. Though, the appellants had stated that rise in price was mostly attributed to increase in price by China during the Beijing Olympics, but it was noticed that even during the period when the Phosphorous prices had fallen, no reflection thereof was seen in the high prices quoted by the appellants;

(iii) examination of the cost structure of each company reflected that there was nothing common between the appellants as far as the said cost structure was concerned and, therefore, quoting of identical prices by all the appellants was unnatural; and

(iv) joint boycotting by the appellants, at times, showed their concerted action, which happened again in March 2011 when the FCI had issued *e*-tender, which was closed on July 25, 2011. According to the DG, explanation given by the appellants and M/s. Agrosynth Chemicals Limited for boycotting the said tender to the effect that tender conditions were very stringent, was an afterthought and did not inspire any confidence. As per the DG, even if the conditions were stringent, the appellants could discuss the same with the FCI as there was sufficient time between March 2011 and July 25, 2011, but it was not done.

On the basis of the aforesaid findings, the DG framed an opinion that the appellants had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act.

3) The CCI took up the report of the DG for consideration and passed the order that the appellants had entered into an agreement or understanding, and indulged in anti-competitive activities while submitting their bids in response to the tenders issued by theFCI.

4) For indulging in anti-competitive practices in violation of the provisions of Section 3 of the

Act, the CCI imposed penalties upon all the three appellants at 9% of average 3 years' turnover of these appellants under Section 27(b) of the Act. Quantifying the same, penalty to the tune of 63.90 crores was imposed upon M/s. Excel Crop Care Limited, `1.57 crores upon M/s. Sandhya Organics Chemicals (P) Ltd., and UPL was fastened with the penalty of `252.44 crores.

5) The appellants filed three separate appeals before the COMPAT. The legal and factual arguments remained the same before COMPAT as well. In addition, argument was raised on the quantum of penalty. The COMPAT has, vide common judgment dated October 29, 2013, rejected all the contentions, except *qua* penalty, of the appellants. Insofar as imposition of penalty is concerned, COMPAT has held that though penalty @ 9% of three years' average turnover was not unreasonable, the penalty cannot be on the *'total turnover'* of these establishments, and has to be restricted to 9% of the *'relevant turnover'*, i.e. the turnover in respect of the quantum of supplies made *qua* the product for which cartel was formed and supplies made. In other words, it had to relate to the goods in question, namely, APT and turnover of other products manufactured and sold by the establishments, which were without blemish, could not be included for calculating the penalty.

6) As noted above, before us, three appeals are filed by these manufacturers/suppliers against the findings of the COMPAT holding that there was violation of Sections 3(3)(a), 3(3)(b) and 3(3)(d) of the Act on the part of the appellants. On that basis, it is pleaded that those findings be declared as untenable and penalty imposed be set aside. On the other hand, the CCI has also preferred Civil Appeal Nos. 53-55of 2014 against that part of the impugned order whereby penalty imposed upon these suppliers is restricted to *'relevant turnover'* instead of *'total turnover'*. Since submissions before us remain substantially the same, we are not pointing out the reasons given by the COMPAT which weighed with it after taking the aforesaid course of action, inasmuch as, while discussing the submissions of the parties, we shall be referring to the reasons adopted by the COMPAT.

7) Having painted the canvas with seminal and essential facts, it becomes manifest that following issues arise for consideration in these appeals:

(i) Whether the dispute regarding violation of Section 3 of the Act by the appellants could not be gone into in respect of tender of March, 2009, as Section 3 was operationalised only by notification dated 20th May,2009?

(ii) Whether CCI was barred from investigating the matter pertaining to the tender floated by FCI in March, 2011 because of the reason that FCI in its complaint dated 4th February, 2011 given to the CCI had not complained about this tender?

(iii) Whether, on the facts of the case, conclusion of CCI that the appellants had entered into an agreement/arrangement and pursuant thereto indulged in collusive bidding by forming a cartel, resulting into contravention of Section 3(3)(a), 3(3)(b) and 3(3)(d) read with Section

3(1) of the Act, is justified?

(iv) Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on "relevant turnover", i.e., relating to the product in question?

8) First two issues are in the nature of preliminary objections that were raised by the appellants, which are jurisdictional issues as the attempt of the appellants is to show that CCI was not even empowered to look into the merits of the case because of those objections. Therefore, in the first instance, we deal with these issues.

9) **Issue No.1**

Re: Applicability of Section 3 of the Act in respect of Notice

Inviting Tender (NIT) dated 28th March, 2009

Section 3 is the first provision in Chapter II of the Act. Chapter II is titled as "Prohibition of certain agreements, abuse of dominant position and regulation of combinations". It starts by specifying those agreements which are prohibited under this Chapter and Section 3 enumerates such prohibitive agreements.

10) At this juncture, it is the applicability of this Section which is dealt with.

Though, the Competition Act is of the year 2002 and was passed by the Legislature on 13th January, 2003, as per the provisions of Section 1(3), the Act was to come into force from the date to be notified by the Central Government in the Official Gazette. Notification was issued by the Central Government wherein 31st March, 2003 was specified as the appointed date. However, vide this notification, some of the provisions of the Act, and not all the provisions, were enforced. Many other provisions came into force vide notification dated 19th June, 2003 and thereafter by notification dated 20th December, 2007 some more provisions were notified. Insofar as Section 3 of the Act is concerned, this provision along with many other provisions came into force on 20th May, 2009 vide S.O. 1241(E) dated 15th May, 2009 on which date the said notification was published in the Gazette of India as well. Remaining provisions were notified by subsequent notifications. It is, thus, a unique example where the entire Act was not enforced by one single notification but different provisions of the Act were enforced in bits and pieces by issuing various notifications over a span of time.

11) NIT in question was issued by FCI on 28th March, 2009. Last date for submission of bids was

8th May, 2009. Few days thereafter, i.e., on 20thMay, 2009, Section 3 of the Act was notified. It is on these facts, the argument constructed by the appellants is that as on 8th May, 2009 when the appellants had submitted their bids, Section 3 of the Act was not in operation and, therefore, tender of March, 2009 could not be the subject matter of inquiry by the CCI. According to the appellants, if this is allowed, it would amount to introducing the provisions of Section 3 of the Act retrospectively though the provision was introduced only prospectively that is from the date of the notification.

12) The COMPAT has also noted that the anti-competitive conduct of the appellants was not limited to the 2009 tender alone. It had considered tender dated November 03, 2009 floated by the U.P. State Warehousing Corporation, tender dated July 13, 2010 of the Central Warehousing Corporation, tender dated July 15, 2010 of the M.P. State Warehousing Corporation, and tender dated February 14, 2011 of the Punjab State Cooperative SS & Marketing Federation and found that even against these tenders the appellants had quoted identical prices. Keeping in view the said pattern of quotation, the COMPAT opined that notwithstanding any objection of the appellants premised on retrospective application of Section 3, the anti-competitive conduct of APT manufacturers, i.e. the appellants, continued right up to the year 2011, much after Section 3 of the Act had come into force. Therefore, even if 2009 tender was to be completely ignored, the provisions of the Act would nevertheless be attracted in the instant case.

13) The Competition Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure 'level playing field' for all market players that helps markets to be competitive. It sets 'rules of the game' that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare.

14) Once the aforesaid purpose sought to be achieved is kept in mind, and the same is applied to the facts of this case after finding that the anti-competitive conduct of the appellants continued after coming into force of provisions of Section 3 of the Act as well, the argument predicated on retrospectivity pales into insignificance.

One has to keep in mind the aforesaid objective which the legislation in question attempts to sub-serve and the mischief which it seeks to remedy. As pointed out above,

Section 18 of the Act casts an obligation on the CCI to *'eliminate'* anti-competitive practices and promote competition, interests of the consumers and free trade. It was rightly pointed out by Mr. Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in ***Competition Commission of India*** v. ***SteelAuthorityof IndiaLimited & Anr.***[1] in the following manner:

> "6. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

15) Having regard to the aforesaid objective, we are of the opinion that merely because the purported agreement between the appellants was entered into and bids submitted before May 20, 2009 are no yardstick to put an end to the matter. No doubt, after the agreement, first sting was inflicted on May 8, 2009 when the bids were submitted and there was no provision like S. 3 on that date. However, the effect of the arrangement continued even after May 20, 2009, with more stings, as a result of which the appellants bagged the contracts and fruits thereof reaped by the appellants when Section 3 had come into force which frowns upon such kinds of agreements.

16) In this behalf ,it is to be emphasised again that merely by submitting the tenders, role of the appellants as tenderers had not come to an end. As already pointed out, the DG in its report noted that FCI resorted to global tender which had two-bid systems: techno-commercial bid and financial bid. Those who qualified in techno-commercial process, their financial bids were to be opened. The appellants had submitted their bids on May 08, 2009, which was the last date for this purpose. Bids were to be submitted by 2.00 pm on that day and were to be opened at 3.00 pm on the same day. The committee of responsible officers for evaluating the technical price bids was constituted. As per the practice, the lowest bidder is invited by the committee for negotiations. And after negotiations, the committee submits the report giving its recommendations on the basis of which contract is awarded. If there was variation in the

prices quoted by the appellants in their bids, things would have been different. Then L-I could have been called for negotiations. However, all the three appellants quoted identical rates of Rs. 388/-. Because of this reason all the appellants were LI and had to be called for negotiations. Therefore, bidding process did not come to an end on May 08, 2009 as argued by the appellants. It continued even thereafter when the appellants appeared before the committee for negotiations, much beyond May 20, 2009 the date on which provisions of Section 3 of the Act were enforced.

17) The COMPAT has referred to the explanation to Section 3(3)(d) also while arriving at the conclusion that May 08, 2009 cannot be the determinative date on which the bid was submitted, as *'manipulating the process of bidding'* is also covered by virtue of the said explanation and this process of bidding continued even after May 20,2009.

18) Learned counsel for the appellants submitted that this explanation has no application as it referred only to *'bid rigging'* which is different from *'collusive bidding'*. In an attempt to distinguish the two expressions, it was argued that although the terms *'bid rigging'* or *'collusive bidding'* may, in certain contexts, overlap or even may be referred to as *'synonyms'*, in certain context they may cover activities which are not identical. *'Bid rigging'* may cover larger and more varied activities than *'collusive bidding'*. It was submitted that in view of the specific exclusion of *'collusive bidding'* from the *'Explanation',* an activity which squarely falls within the scope of *'collusive bidding'* would not be covered by the *'Explanation'* and would be excluded from it. Submission is that since the allegation in the present case relating to identical pricing or identical reduction in price squarely falls within the term *'collusive pricing'*, the *'Explanation'* has no relevance to the present case.

19) Mr. Neeraj Kishan Kaul, learned Additional Solicitor General, refuted the aforesaid submission with vehemence by urging that bid rigging and collusive bidding are not mutually exclusive and these are overlapping concepts. Illustratively, he referred to the findings of the CCI, as approved by the COMPAT, in the instant case itself to the effect that the appellants herein had *'manipulated the process of bidding'* on the ground that bids were submitted on May 08, 2009 collusively, which was only the beginning of the anti-competitive agreement between the parties and this continued through the opening of the price bids on June 01, 2009 and thereafter negotiations on June 17, 2009 when all the parties reduced their bids by same figure of `2 to bring their bid down to `386 per kg. from `388 per kg. From this example, he submitted that on May 08, 2009 there was a collusive bidding but with concerted negotiations on June 17, 2009, in the continued process, it was rigging of the bid that was practiced by the appellants.

We are inclined to agree with this pellucid submission of the learned Additional Solicitor General.

Even internationally, '*collusive bidding'* is not understood as being different from *'bid*

rigging'. These two expressions have been used interchangeably in the following international commentaries/ glossaries and websites of competition authorities:

As the Leigman of the law, it is our task, *nay* a duty, to give proper meaning and effect to the aforesaid 'Explanation': it can easily be discussed that the Legislature had in mind that the two expressions are inter-changeably used. It is also necessary to keep in mind the purport behind Section 3 and the objective it seeks to achieve. Sub-section (1) of Section 3 is couched in the negative terms which mandates that no enterprise or association of enterprises or person or association of persons shall enter into any agreement, when such agreement is in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services and it causes or is likely to cause an appreciable adverse effect on competition within India. It can be discerned that first part relates to the parties which are prohibited from entering into such an agreement and embraces within it persons as well as enterprises there by signifying its very wide coverage. This becomes manifest from the reading of the definition of *"enterprise"* in Section 2(h) and that of *'person'* in Section 2(l) of the Act. Second part relates to the subject matter of the agreement. Again it is very wide in its ambit and scope as it covers production, supply, distribution, storage, acquisition or control of goods or provision of services. Third part pertains to the effect of such an agreement, namely, 'appreciable adverse effect on competition', and if this is the effect, purpose behind this provision is not to allow that. Obvious purpose is to thwart any such agreements which are anti-competitive in nature and this salubrious provision aims at ensuring healthy competition. Sub-section (2) of Section 3 specifically makes such agreements as void. Sub-section (3) mentions certain kinds of agreements which would be treated as *ipso facto* causing appreciable adverse effect on competition. It is in this backdrop and context that 'Explanation' beneath sub-section (3), which uses the expression *'bid rigging'*, has to be understood and given an appropriate meaning. It could never be the intention of the Legislature to exclude *'collusive bidding'* by construing the expression *'bid rigging'* narrowly. No doubt, clause (d) of sub-section (3) of Section 3 uses both the expressions *'bid rigging' and 'collusive bidding',* but the Explanation thereto refers to *'bid rigging'* only. However, it cannot be said that the intention was to exclude *'collusive bidding'*. Even if the Explanation does contain the expression *'collusive bidding'* specifically, while interpreting clause (d),it can be inferred that *'collusive bidding'* relates to the process of bidding as well. Keeping in mind the principle of purposive interpretation, we are inclined to give this meaning to *'collusive bidding'*. It is more so when the expressions *'bid rigging'* and *'collusive bidding'* would be overlapping, under certain circumstances which was conceded by the learned counsel for the appellants as well.

We are, therefore, of the opinion that the two expressions are to be interpreted using the principle of *noscitur a sociis*, i.e. when two or more words which are susceptible to

analogous meanings are coupled together, the words can take colour from each other {See – ***Leelabai Gajanan Pansare & Ors.*** v. ***Oriental Insurance Company Limited & Ors.***[6], ***Thakorlal D. Vadgama*** v. ***State of Gujarat***[7], and ***M.K. Ranganathan*** v. ***Government of Madras & Ors.***[8]}.

We, thus, answer Issue No. 1 in the negative by holding that the CCI was well within its jurisdiction to hold an enquiry under Section 3 of the Act in respect of tender of March, 2009.

ISSUE NO.2

Re.: Jurisdiction of DG/CCI to investigate into the boycott of 2011 FCI's tender

20) The CCI had entrusted the task to DG after it received representation/complaint from the FCI vide its communicationdated February 04, 2011. Argument of the appellants is that since this communication did not mention about the 2011 tender of the FCI, which was in fact even floated after the aforesaid communication, there could not be any investigation in respect of this tender. It is more so when there was no specific direction in the CCI's order dated February 24, 2011 passed under Section 26(1) of the Act and, therefore, the 2011 tender could not be the subject matter of inquiry when it was not referred to in the communication of the FCI or order of the CCI. The COMPAT has rejected this contention holding that Section 26(1) is wide enough to cover the investigation by the DG, with the followingdiscussion:

"28. As per the sub-section (1) of Section 26, there can be no doubt that the DG has the power to investigate only on the basis of the order passed by the Commission under Section 26(1). Our attention was also invited to sub-section (3) of Section 26 under which the Director-General, on receipt of direction under sub-section (1) is to submit a report of its findings within such period as may be specified by the Commission. The argument of the parties is that if on the relevant date when the Commission passed the order, even the tender notice was not floated, then there was no question of Direction General going into the investigation of that tender. It must be noted at this juncture that under Section 18, the Commission has the duty to eliminate practices having adverse effect on competition and to promote and sustain competition. It is also required to protect the interests of the consumers. There can be no dispute about the proposition that the Director General on his own cannot act and unlike the Commission, the Director General has no suo-moto power to investigate. That is clear from the language of Section 41 also, 28 which suggests that when directed by the Commission, the Director General is to assist the Commission in investigating into any contravention of the provisions of the Act. Our attention was also invited to the Regulations and more particularly

to Regulation 20, which pertains to the investigation by the Director General. Sub-regulation (4) of Section 20 was pressed into service by all the learned counsel, which is in the following term:-

"The report of the Director-General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation:"

29. We have absolutely no quarrel with the proposition that the Director General must investigate according to the directions given by the CCI under Section 26(1). There is also no quarrel with the proposition that the Director General shall record his findings on each of the allegations made 29 in the information. However, it does not mean that if the information is made by the FCI on the basis of tender notice dated 08.05.2009, the investigation shall be limited only to that tender. Everything would depend upon the language of the order passed by the CCI on the basis of information and the directions issued therein. If the language of the order of Section 26(1) is considered, it is broad enough. At this juncture, we must refer to the letter written by Chairman and Managing Director of FCI, providing information to the CCI. The language of the letter is clear enough to show that the complaint was not in respect of a particular event or a particular tender. It was generally complained that appellants had engaged themselves in carteling. The learned counsel Shri Virmani as well as Shri Balaji Subramanian are undoubtedly correct in putting forth the argument that this information did not pertain to a particular tender, but it was generally complained that the appellants had engaged in the anticompetitive behaviour. When we consider the language of the order passed by the CCI under Section 26(1) dated 23.04.2012 the things becomes all the more clear to us. The language of that order is clearly broad enough to hold, that the Director General was empowered and duty bound to look into all the facts till the investigation was completed. If in the course of investigation, it came to the light that the parties had boycotted the tender in 2011 with pre-concerted agreement, there was no question of the DG not going into it. We must view this on the background that when the information was led, theCommission had material only to form a prima facie view. The said prima-facie view could not restrict the Director General, if he was duty bound to carry out a comprehensive investigation in keeping with the direction by CCI. In fact the DG has also taken into 30 account the tenders by some other corporations floated in 2010 and 2011 and we have already held that the DG did nothing wrong in that. In our opinion, therefore, the argument fails and must berejected."

We entirely agree with the aforesaid view taken by the COMPAT.

2l) If the contention of the appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary

facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited bySection 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms *prima facie* opinion on receipt of a complaint which is recorded in the order passed under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is tobe restricted in the manner projected by the appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the appellants as well touching upon the jurisdiction of the DG.

ISSUE NO.3:

22) It is not in dispute that in respect of 2009 tender of the FCI, all the three appellants had quoted the same price, i.e. `388 per kg. for the APT. The appellants have attempted to give their explanations and have contended that it cannot be presumed that it was the result of any prior agreement or arrangement between them. This aspect shall be taken note of and dealt with in detail later at the appropriate stage. Before that, it needs to be highlighted that it is not only 2009 FCI tender in respect of which DG found the violation. Pertinently, the investigation of DG revealed that the appellants had been quoting such identical rates much prior to and even after May 20, 2009. No doubt, in relation to tenders prior to 2009, it cannot be said that there was any violation of law by the appellants. However, prior practice definitely throws light on the formation of cartelisation by the appellants, thereby making it easier to understand the events of 2009 tender. Therefore, to take a holistic view of the matter, it would be essential to point out that the DG in his report had tabulated this tendency of quoting identicalrates by these parties in respect of various tenders issued by even other Government bodies before and after 2009. The statistics in this behalf, given in tabulated form by the DG, are reproduced below:

S.No.	Tendering Agency	Tender Opening Date	Rates quoted (Rs. Per kg.)			
			Excel	United	Sandhya	Agro

1.	U.P. State Warehousing Corp.	14/03/2007	225	225	-	-
2.	Punjab State Civil Supplies Corp.	28/04/2008	260	260	-	-
3.	Central Warehousing Corp.	06/08/2008	450	-	450	-
4.	U.P. State Warehousing Corp.	19/09/2008	449	449	-	-
5.	Punjab State Co-op SS & Mktg. Fed.	26/12/2008	419	419	-	-
6.	Central Warehousing Corp.	06/01/2009	414	414	-	-
7.	Punjab State Civil Supplies Corp.	27/02/2009	409	409	-	-
8.	Food Corporation of India	08/05/2009	388	388	388	-
9.	Punjab State Civil Supplies Corpn.	15/06/2009	399	-	-	399

10.	U.P. State Warehousing	03/11/2009	399	399	-	-
11.	Director, SS&Disposal, Haryana	01/12/2009	-	-	399	399
12.	Punjab State Civil Supplies Corp.	18/03/2010	419	-	-	410
13.	Central Warehousing Corp.	13/07/2010	421	421	421	-
14.	M.P. State Warehousing Corp.	15/07/2010	436	-	436	-
15.	Punjab State Co-op SS & Mktg. Fed.	14/02/2011	415	415	-	-
16.	Punjab State	15/03/2011	-	415	-	415
	Civil Supplies Corp.					

23) The aforesaid table shows identical pricing by these parties even in respect of tenders floated by the U.P. State Warehousing Corporation and Punjab State Civil Supplies Corporation. It was repeated in respect of 2008 tender floated by the Central Warehousing Corporation. Tenders up to S.No.7 above, no doubt, relate to the period which is earlier to coming into force of the provisions of Section 3. At S.No. 8 is the tender of the FCI of March, 2009, which is held to be covered on the principle of retroactivity, as already held above. However, insofar as tenders mentioned at S.Nos. 9 to 16 are concerned, they all pertain to the period after

Section 3 became operational. These are clear cut examples of identical pricing by the three appellants. No doubt, the appellants cannot be penalised in respect of tenders mentioned at S.Nos. 1 to 7 as there was no provision like Section 3 at that time. However, such illustrations become important in finding out the *mens rea* of the appellants, i.e. arriving at an agreement to enter into collusive bidding which continued with impunity right up to 2011. Further, this trend of quoting identical price in respect of so many tenders, not only of FCI but other Government bodies as well, is sufficient to negate all explanations given by the appellants taking the pretext of coincidence or economic forces.

24) It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderee's list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

25) Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties. One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a central secretariat, which will then cost the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

26) We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr. Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by U.K.Court of Justice in Dyestuffs[9]:

"By its very nature, then, the concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants. *Although parallel behaviour may not itself if identified with a concerted practice,* it may however amount to strong evidence of such a practice if it leads to conditions

of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers.

27) At this juncture, we would advert to tender of May, 2011. It is not in dispute that all the three appellants, as well as M/s. Agrosynth Chemicals Limited did not participate in the said tender. These are the four manufacturers in all.When this fact is not in dispute, the only question is as to whether it was a concerted action on the part of the appellants herein. According to all the appellants, their decision not to participate in the aforesaid bid was the onerous, unreasonable, arbitrary and unquestionable conditions that were put in the said tender. As these were not acceptable to them, they individually decided not to take part in the tender, which was a valid business decision and not result of pre-concerted agreement of the appellants.

28) The COMPAT, after discussing the matter, arrived at the conclusion that it was clearly an after-thought move, in as much as the tender was published on April 28, 2011 and the last date for submitting the price bids was May 27, 2011, but only a day before i.e. on May 26, 2011, such a letter was sent by M/s. Excel Crop Care Limited to the FCI. Insofar as M/s. UPL is concerned, it did not even bother to give any representation. Likewise, M/s. Sandhya Organics did not approach the FCI at all with the representation that the quantities to be supplied were huge and the tender conditions be suitably modified.

29) We feel that COMPAT has examined the matter in right perspective as after examining the record, one finds that important fundamental conditions were the same which used to be in the earlier tenders. and if the appellants were genuinely interested in participating in the said tender and were aggrieved by the aforesaid conditions, they could have taken up the matter with the FCI well in time. Reaction of not participating in the said tender by four suppliers could have been perceived otherwise, had there been a number of manufacturers in the market and four out of them abstaining. Abstention by hundred percent (who are only four) makes the things quite obvious. Events get quite apparent when examined along with pasthi story of quoting identical prices, an aspect already commented above.

30) Since collusion stands proved by the aforesaid conduct of the appellants in abstaining from the bidding in respect of May 2011 tender, requirement of Section 3(3)(d) of the Act read with 'explanation' thereto stands satisfied, viz., concerted action based on an agreement/arrangement between the appellants, resulted in restricting or manipulating competition or process of bidding, since the said act was collusive in nature.

31) We, therefore, agree with the conclusions of the COMPAT on this aspect as well.

32) **Issue No.4**

After giving its finding that there was a contravention of the provisions of Section 3 of the Act by the appellants, the CCI imposed the following penalties on the three entities/ appellants:

Name of the firms	Average of three years turnover (inCrore)	Penalty at 9% of average turnover (in Crore)
Excel Crop Care Ltd.	710.09	63.90
United Phosphorus Ltd.	2804.95	252.44
Sandhya Organics Chemicals (P)Ltd.	57.4 Crore	1.57 Crore

33) Under Section 27(b) of the Act, penalty of 10% of the turnover is prescribed as the maximum penalty with no provision forminimum penalty. CCI had chosen to impose 9% of the average turnover keeping in view the serious nature of the breach on the part of these appellants.

34) The COMPAT has maintained the rate of penalty i.e. 9% of the three years average turnover. However, it has not agreed with the CCI that 'turnover' mentioned in Section 27 would be 'total turnover' of the offending company. In its opinion it has to be 'relevant turnover' i.e. turnover of the product in question. Since, M/s. Excel Crop Care and UPL were multi-product companies, products other than APT could not have been included for the purpose of imposing the penalty. It, therefore, held that penalty of 9% would be limited to the product/service in question – in this case, the APT – which was the relevant product for the enquiry. The penalty, thus, stands substantially reduced in the cases of M/s. Excel Crop Care and UPL.

35) Insofar as M/s. Sandhya Organics Chemicals (P) Ltd. is concerned, the 'relevant turnover' and 'total turnover' is the same as this company produced only APT tablets. CCI had imposed penalty of `1.57 crores on the basis of their turnover of this product. However, in its case also, penalty is reduced on the ground that it is relatively a small enterprise. Moreover, in respect of May 2011 tender, it could not have taken part since its production capacity was only 25 MT a month. Though, the aforesaid plea was not accepted while discussing the merits of the case, the COMPAT deemed it proper to take this aspect into consideration when it came to imposition of penalty. On the aforesaid basis, COMPAT reduced the penalty to $1/10^{th}$ of penalty awarded by CCI i.e. `15.70 lakhs.

36) The CCI is not happy with the aforesaid outcome whereby penalty imposed by it is sharply

reduced by the COMPAT.Against this part of the impugned judgment, CCI is in appeal.

37) In the aforesaid backdrop, the moot question is as to whether penalty under Section 27(b) of the Act has to be on 'total/entire turnover' of the company covering all the products or it is relatable to 'relevant turnover', viz., relating to the product in question in respect whereof provisions of the Act are contravened. Section 27 of the Act stipulates nature of the orders which the CCI can pass after enquiry into agreements or abuse of dominant position. This Section empowers CCI to pass various kinds ofordersthenaturewhereofisspeltoutinclauses(a),(b),(d)and(g) (clauses (c) and (f) stand omitted). As per clause (b), CCI is empowered to inflict monetary penalties, the upper limit whereof is 10% "of the average of turnover for the last three preceding financial years".

38) Extensive as well as intensive argument of Mr. Kaul, learned Additional Solicitor General, was that in S. 27(b) of the Act, there is no reference to 'relevant turnover'. On the contrary, clause (b) of S. 27 in clear terms, stipulates penalty on the 'turnover' i.e. average of the turnover for the last three preceding financial years and it plainly suggests that this 'turnover' has to be of the enterprise which had contravened the provisions of Section 3 or Section 4. He submitted that clear intention of the Legislature was to take into consideration entire turnover of the enterprise. Reading the word 'relevant' thereto would be doing violence to the plain language of the statute, by adding the word which is not there.

39) According to him, the expression *'turnover'* is not limited or restricted in any manner and introduction of concept of *'relevant turnover'* amounts to adding words to the statute. He premised his submission on well-settled principle of statutory interpretation that where the language of a statute is plain and clear, the Court ought not to add words to limit or alter the meaning of the statute and cited the following judgments in support.

40) Mr. Kaul also placed heavy reliance on the following discussion in the case of ***Steel Authority of India Ltd.***[14] in the context of the Competition Act:

"52. A statute is stated to be the edict of legislature. It expresses the will of legislature and the function of the court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction...

56. Thus, the court can safely apply rule of plain construction and legislative intent in light of the object sought to be achieved by the enactment. While interpreting the provisions of the Act, it is not necessary for the court to implant, or to exclude the words, or overemphasise language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication."

41) According to him, a plain reading of Section 27 as a whole, which includes Section 27(a) as well, also makes it clear that the target of the penalty is the 'person' or 'enterprise' that has acted in violation of the Act, and not the 'product' or the 'service' alone which is made the subject of the violation. As such, the expression *'turnover'* must necessarily mean the turnover of the 'person' or the 'enterprise' which is party to the anti-competitive agreement or abuse of dominance.

42) Critiquing the approach of the COMPAT,he submitted that it has introduced the concept of *'relevant'* turnover in Section 27 despite the absence of the word *'relevant'*, failing to notice that wherever the Act wanted to introduce the concept of *'relevance'* the word *'relevant'* has, in fact, been used in the appropriate sections. In this regard, he referred to Sections 2(r), 2(s), 2(t), 4(2)(e), 6, 19(6), 19(7), etc. where the expression *'relevant'* is specifically used. He also referred to the definition of *'turnover'* as contained in Section 2(y) of the Act, which includes value of goods or services, and submitted that it is the aforesaid definition of *'turnover'* which has to be applied wherever this expression occurs in the Act and it cannot be read to have different criteria for determining penalty and the thresholds applicable for regulation of combinations. He also sought to highlight that where the expression is used in the same section, it should generally be given the same meaning, as held in ***Suresh Chand*** v. ***Gulam Chisti***[15]and ***Raghubans Narain Singh*** v. ***Uttar Pradesh Government through Collector of Bijnor***[16].

43) Mr. Kaul went to the extent of arguing that even if purposive interpretation is to be given to the provisions of Section 27(b) of the Act, main purpose which cannot be lost sight of and ignored is that it is a deterrent provision. The purpose behind such a provision is to give a message that the persons or enterprises should not indulge in such anti-competitive activities, as otherwise they will be inflicted with heavy penalties. According to him, the kind of cartalisation formed by the appellants in this case is a clear example of *'hardcore cartel'* behaviour which is deprecated by even the OECD as such hardcore cartels benefit only the cartel members and are extremely injurious to the interest of all others, with extraordinary adverse affect on the market and the consumers. He further submitted that formation of cartels reduces social welfare and the COMPAT has ignored these factors as well while giving restricted interpretation to *'turnover'* by making it product specific and not person/enterprise specific.

44) Advancing this very argument further, he even drew parallel with the laws in other jurisdictions by stating the comparative legal position in European Union, United Kingdom, Australia, etc. and submitted that it could be discerned from the law enacted in those jurisdictions that everywhere overall cap is of 10% of *'worldwide turnover'* and is not restricted to *'relevant turnover'*.

45) He further submitted that the aforesaid provision imposed a cap on the penalty by stipulating that it shall not be more than 10%. Thus, the CCI had the discretion to impose the penalty from 0% to 10% and this was sufficient safeguard to take care of the proportionality aspects

of the penalty wherever penalty on total turnover is found to bring unreasonable results. In other words, in respect ofmulti-product companies where the turnover covering non-offending products, is quite high, the CCI can always impose much lesser rate of penalty so that the penalty does not sound to be excessive and unconscionable and remains proportionate to the nature of contravention. However, it is not permissible to tinker the language of a statute.

46) Adverting to the specific case of M/s. Sandhya Organics Chemicals (P) Ltd., submission of Mr. Kaul was that the reason given by COMPAT in reducing the penalty was self-contradictory inasmuch as contention of this appellant that it did not bid in May 2011 tender of FCI was because of the reason that its production capacity was mere 25 MT per month was specifically rejected by the COMPAT, but this very rejected contention formed the basis of reducing the penalty. It was also submitted that in any case there was no justification in reducing the penalty to $1/10^{th}$ of the penalty imposed by the CCI, i.e. from 9% to 0.9%, when the COMPAT itself observed that the nature of breach committed by the appellants was very serious and going by this consideration, the COMPAT maintained the penalty @ 9% in the case of the other two appellants.

47) Learned counsel appearing for the three appellants attempted to put an astute and sagacious answer to the aforesaid arguments of the Learned Additional Solicitor General. Justifying the approach of the COMPATin this behalf, it was argued that even the plain language of Section 27(b) leads to the interpretation that is given by the COMPAT. They also stressed that this provision being a penal provision, has to be strictly construed. No wider meaning can be given to it. The learned counsel quoted the illustration in cases where identical infringement is alleged in respect of several enterprises, some of which may be *'single product companies'* and others may be *'multi-product companies'* (which was the position in the instant case itself), and submitted that there would be no justification for prescribing the maximum penalty based on the total turnover of the enterprise, as it would result in prescribing a higher maximum penalty for multi-product companies, as against the single product companies, thereby bringing very inequitable results. For identical infringement, there would be no justification for prescribing such differential maximum limits. Keeping this aspect into consideration, it is all the more reason for interpreting Section 27(b) on the basis of its plain language as the word 'total' was also not prefixed with 'relevant' by the Legislature. Since it was a provision relating to penalty, which was to be imposed on 'turnover', the said 'turnover' was necessarily relatable to the offending product only and Legislature never intended to punish any person or enterprise even in respect of unblemished product. It was also emphasized that penalty under Section 27(b) is to be levied for contravention of Section 3 in respect of any *'agreement'* resulting in appreciable adverse effect on competition. Therefore, it would not relate to all the products of the company included in the total turnover of the enterprise. As such, when penalty is being imposed in respect of any infringing product, the turnover of that product would be relevant. The learned counsel criticised the approach of the CCI in imposing penalties by taking the maximum penalty as the starting point of

determination and then purporting to reduce it suitably, as totally incorrect approach. It was argued that the quantum of appropriate amount of penalty has to be first determined after taking into consideration the relevant factors. The relevance of the maximum penalty is only for the limited purpose to ensure that the quantum so determined, does not exceed the maximum penalty.

48) Learned counsel for the appellants also advocated for applying the doctrine of proportionality which has universal application and lays down that *'the broad principles that the punishment must be proportioned to the offence is or ought to be of universal application'* as held in ***Arvind Mohan Sinha*** v. ***Amulya Kumar Biswas & Ors.***

49) In addition to the aforesaid arguments, learned counsel appearing for UPL submitted that since it was a multi-product company, its average of the total turnover of three years was `2804.95 crores. By imposing penalty of 9% on the total turnover, the CCI had levied penalty of `252.44 crores, which was highly disproportionate as even the total production and sale of APT tablets, for the three years, was much less than the aforesaid penalty. It was pointed out that the average total turnover of the APT tablets comes to `77.14 crores only, which is hardly 3% of the total turnover. On that basis it was argued that by taking total turnover for the purpose of penalty clearly amounted to disproportionate penalty as it was more than 300% of the total turnover of APT tablets. This, according to the learned counsel, itself provided full justification in the approach of the COMPAT by reading the concept of *'relevant turnover'* while interpreting Section 27(b) of the Act.

50) We have given our serious thought to this question of penalty with reference to *'turnover'* of the person or enterprise. At the outset, it may be mentioned that Section 2(y) which defines *'turnover'* does not provide any clarity to the aforesaid issue. It only mentions that turnover includes value of goods or services. There is, thus, absence of certainty as to what precise meaning should be ascribed to the expression *'turnover'*. Somewhat similar position appears in EU statute and in order to provide some clear directions, EU guidelines on the subject have been issued. These guidelines do refer to the concept of *'relevant turnover'*.

51) In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of *'relevant turnover'* for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. For arriving at this conclusion, we are influenced by the following reasons:

(a) Under Section 27(b) of the Act, penalty can be imposed under two contingencies, namely, where an agreement referred to in Section 3 is anti-competitive or where an enterprise which enjoys a dominant position misuses the said dominant position thereby contravening the provisions of Section 4. In case where the violation or contravention is of Section 3 of theAct it has to be pursuant to an *'agreement'*. Such an agreement may relate to a particular product between persons or enterprises even when such persons or enterprises are having production in more than one product. There may be a situation, which

is precisely in the instant case, that some of such enterprises may be multi-product companies and some may be single product in respect of which the agreement is arrived at. If the concept of total turnover is introduced it may bring out very inequitable results. This precisely happened in this case when CCI imposed the penalty of 9% on the total turnover which has already been demonstrated above.

(b) Interpretation which brings out such inequitable or absurd results has to be eschewed. This fundamental principle of interpretation has been repeatedly made use of to avoid inequitable outcomes.

When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the *'maximum penalty'* imposed in all cases be prescribed on the basis of 'all the products' and the '*total turnover'* of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of *'relevant turnover'*.

Even the doctrine of 'proportionality' would suggest that the Court should lean in favour of *'relevant turnover'*. No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out 'proportional result or proportionality *stricto sensu'*. It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act.

The doctrine of *'purposive interpretation'* may again lean in favour of *'relevant turnover'* as the appropriate yardstick for imposition of penalties. It is for this reason the judgment of Competition Appeal Court of South Africa in the ***Southern Pipeline Contractors Conrite Walls***, becomes relevant in Indian context as well inasmuch as this Court has also repeatedly used same principle of interpretation. It needs to be repeated that there is a legislative link between the damage caused and the profits which accrue from the cartel activity.

Therehastobearelationshipbetweenthenatureofoffenceandthe benefit derived therefrom and once this co-relation is kept in mind, while imposing the penalty, it is the affected turnover, i.e., 'relevant turnover' that becomes the yardstick for imposing such a penalty. In this hue, doctrine of 'purposive interpretation' as well as that of 'proportionality' overlaps.

In fact, some justifications have already appeared in this behalf while discussing the matter on the application of doctrine of proportionality. What needs to be repeated is only that the purpose and objective behind the Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others. Such a purpose can adequately be served by taking into consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. Therefore, it cannot be said that purpose of the Act is to 'finish' those industries altogether by imposing those kinds of penalties which are beyond their means. It is also the purpose of the Act not to punish the violator even in respect of which there are no anti-competitive practices and the provisions of the Act are not attracted.

Thus, we do not find any error in the approach of the order of the COMPAT interpreting Section 27(b).

52) The upshot of the aforesaid discussion would be to dismiss the appeals of the appellants as well as the appeals filed by the CCI. There shall, however, be no order as to costs.

N. V.RAMANA, J.

A plain reading of Section 27 elucidates that the commission is empowered to impose penalty and to the extent as it deems fit but not exceeding ten percent of the turnover. Section 27(b) emphasize that penalty is to be levied on 'person or enterprise' who have contravened Section 3 or Section 4 of the Act. It is to be noted that proviso to Section 27(b), before it was amended, was couched in following terms-

'provided that in case any agreement referred to in section 3 has been entered into by any cartel, the commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average of the turnover of the cartel for the last preceding three financial years.

After the amendment [*Central Act 39 of 2007*] the proviso as it stands today has been quoted above. The change which was brought about by the aforesaid amendment is that the mandatory nature of the *Proviso* was made discretionary by substitution of 'shall' with 'may'. This amendment was done to bring the provisoin tune with the rest of Section 27, which uses the expression

"it may pass all or any of the following order" and main part of clause (b), which confers discretion upon the Commission to impose penalty as it may deem fit, subject to the rider that it shall not be more than 10% of the average of the turnover for the last three preceding financial years. It is important to note that Clauses(c) and (d) of Section 27 alsouses the word 'may', which signifies that the Commission has the discretion to pass a particular order, which it may deem proper in the facts and circumstances of thecase.

Two interpretations were canvassed before us, wherein either the turnover, as occurring under Section 27(b), is equivalent to the 'relevant turnover' or is equivalent to the 'total turnover'.In order to strengthen their arguments, respective Counsel have drawn our attention to various interpretations of 'turnover' applied across the globe, such as the judgment of *Bundesgerichtsh of* (German Supreme Court) on 26th February 2013, *BCN Aduanas y Transportes, SA v Attorney General*, Judgment of the Supreme Court of Spain, No 112/2015, Case 2872/2013, OCL183(ES2015) dated 29th January 2015 and *Southern Pipeline Contractors Conrite Walls (Pty) Ltd. and the Competition Commission*, 105/CAC/Dec10 (South Africa). Further we have perused Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of regulation 1/2003(2006/C210/02) issued by the European Commission and Guidance as to the appropriate amount of penalty (September 2012) issued by the Office of fair Trading (OFT), United Kingdom. It is my considered opinion that the interpretation to Section 27(b) of the Actrequires fresh indigenous consideration rather than relying on foreignjurisprudence.

1. First a word on interpretation, before we indulge ourselves in the legal discussion. As the interpretative exercise, as thiscase, involves various equitable facets[26], literal interpretation might not be conclusive. It should be noted that an interpretation should sub-serve the intent and purpose of the statutory provision. Therefore we would have to look beyond the plain and simple meaning, to extract the intention of the Act and rationalize the fining policy under Section 27 (b) of the Act.
2. It is well settled that the Competition Act, 2002 is a regulatory legislation enacted

to maintain free market so that the Adam Smith's concept of invincible hands operate unhindered in the background.[27] Further it is clear from the Statement of objects and reason that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promoteeconomic democracy, and support good governance by restricting rent seeking practices. Therefore an interpretation should be provided which is in consonance with the aforesaid objectives.

3. At this point, I would like to emphasize on the usage of the phrase '*as it may deem fit*' as occurring under Section 27 ofthe Act. At the out set this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by rule of law and not by arbitrary, vague or fanciful considerations.
4. It should be noted that any penal law imposing punishment is made for general good of the society. Asapart of equitable consideration, we should strive to only punish those who deserve it and to the extent of the irguilt. Further it is well established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. In *Coimbatore Distict Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Assn.*,[30] this Court has explained the concept of 'proportionality' in the followingmanner-

"'proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of the decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise- the elaboration of a rule of permissible priorities. De Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or

infringement of rights or interestsand a manifest imbalance of relevant considerations, the latter ('necessity teat') requires infringement of human rights to the least restrictive alternative' Inconsonance of established jurisprudence, the principle of proportionality needs to be imbibed in to any penalty imposed under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Therefore the fine under Section 27(b) of the Act should be determined on the basis of the relevant turnover. In light of the above discussion a two step calculation has to be followed while imposing the penalty under Section 27 of the Act.

STEP 1: DETERMINATION OF RELEVANT TURNOVER.

5. At this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity' saudited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on available information. However the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter.

STEP 2:DETERMINATION OF APPROPRIATE PERCENTAGE OF PENALTYBASED ON AGGRAVATING AND MITIGATING CIRCUMSTANCES.

6. After such initial determination of relevant turnover, commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc. These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty. At the cost of repetition it should be noted that starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter the tribunal should calculate appropriate percentage of penalty based on facts and circumstances of the case taking into consideration various factors while determining the quantum. But such penalty should not be

more than the overall cap of 10% of the entity's relevant turnover. Such interpretation of Section 27 (b) of the Act, wherein the discretion of the commission is guided by principles established by law would sub-serve the intention of the enactment.

7. Lastly, I am of the opinion that the penalty imposed by COMPAT is appropriate in this case at hand and requires no further interference.
8. These appeals are, accordingly, disposed of in the above terms.

CCI v. *Co-Ordination Committee Of Artists And Technicians Of W.B. Film And Television*

The Supreme Court Of India
Civil Appeal No. 6691 Of 2014

A.K. SIKRI, J. This appeal raises an interesting and important question of law touching upon the width and scope of jurisdiction of the Competition Commission of India (for short, the 'CCI') under Section 3 of the Competition Act, 2002 (hereinafter referred to as the 'Act'). Before we mention the nuances of the issue that has arisen for consideration, it would be apposite to take stock of the background facts under which the issue needs determination, as the factual canvass would provide clarity of the situation that has led to the dispute between the parties. Respondent No. 2 herein, Mr. Sajjan Kumar Khaitan, is the proprietor of M/s. Hart Video having his establishment in Kolkata. He is in the business of distributing video cinematographic TV serials and telecasting regional serials in the States of Eastern India, which includes the State of West Bengal. M/s. BRTV, Mumbai, which is the producer of T.V. programmes, had produced T.V. Serial named 'Mahabharat', original version whereof was in Hindi. The said BRTV entrusted the sole and exclusive rights of 'Mahabharat' to M/s. Magnum T.V. Serials to dub the Hindi version of the said serial in Bangla with further rights to exploit its Satellite, Pay TV, DTH, IPTV, Video, Cable TV and internet rights till September, 2016. Magnum TV, in turn, appointed Hart Video as the sub-assigner to dub the said serial 'Mahabharat' in Bangla language, which it did. Thereafter, for the purposes of telecasting the said dubbed serial, an agreement was executed for the time slot, on revenue sharing basis, with M/s. Bengal Media Pvt. Ltd., Kolkata, which is the owner of 'Channel 10', as well as with M/s. Calcutta Television Network Private Ltd., Kolkata, which is the owner of CTVN+ Channel. These two channels were given hard disks of four episodes of the serial on 2nd February, 2011 and 12th February, 2011. An advertisement was placed in Daily Newspapers on 19th February, 2011 informing the public at large that serial 'Mahabharat' would be telecast in Bangla on Channel 10 at 10.00 a.m. in the morning and on CTVN+ at 10.00 p.m. every Sunday.

2) Certain producers in Eastern India have formed an association called Eastern India Motion Picture Association (for short, 'EIMPA'). Likewise, the artists and technicians of film and television industry in West Bengal have formed an association known as 'Committee of Artists and Technicians of West Bengal Film and Television Investors (hereinafter referred to as the 'Coordination Committee').

3) Telecasting of serial 'Mahabharat' in Bangla after dubbing it in the said language from the original produced Hindi language was not palatable to EIMPA or the Coordination Committee. In their perception, serials produced in other languages and shown on the T.V. Channels after dubbing them in Bangla would affect the producers of that origin and, in turn, would also adversely affect the artists and technicians working in West Bengal. The apprehension was that it may deter production of such serials in Bangla because of

the entry of serials produced in other languages and shown to the public by dubbing the same in their language. Because of this reason, on 18th February, 2011 CTVN+ received a letter from the Coordination Committee to stop the telecast of the dubbed serial 'Mahabharat'. Letter dated 1st March, 2011 to the similar effect was written by EIMPA to CTVN+. Identical demands were made to this Channel by the Coordination Committee as well. It was stated in this letter that such a step was necessary in the interest of healthy growth of film and television industry in West Bengal. It was also alleged that for the last thirteen years there was a convention and practice adopted in the said region not to dub any programme from other languages in Bangla and telecast them in West Bengal. Threat was also extended to CTVN+ as well as Channel 10 that in case the telecast is not stopped, their channels would face non-cooperation from these two bodies, i.e., EIMPA and the Coordination Committee.

4) When Mr. Sajjan Khaitan (Respondent No. 2), Proprietor of M/s. Hart Video, came to know of the aforesaid developments and the threat extended to CTVN+ and Channel 10 and found that these two television channels were going to succumb to those pressures, he informed the CCI of the aforesaid details and requested the CCI to take action in the matter, as according to him, the aforesaid act on the part of EIMPA as well as the Coordination Committee contravened the provisions of the Act. Even an interim relief was sought in the nature of direction from CCI to CTVN+ and Channel 10 not to yield to the threats of EIMPA and Coordination Committee and restart the telecast of the serial which was stopped since 17th April, 2011. Hereafter, Respondent No. 2 shall be described as the 'informant'.

5) The CCI, after receiving the aforesaid information from the informant formed a *prima facie* opinion that acts on the part of EIMPA and Coordination Committee were anti-competitive. Accordingly, matter was assigned to the Director General (DG) for detailed investigation as per the procedure prescribed in the Act. On investigation, the DG found that the details contained in the information supplied by the informant were factually correct. On that basis, he examined the matter in the context of provisions contained in the Act.

6) In order to understand with clarity the task undertaken and accomplished by the DG, we deem it proper to refer to some of the relevant provisions of the Act at this stage. Chapter II of the Act deals with 'prohibition of certain agreements, abuse of dominant position and regulation of combinations'. It comprises of Sections 3 to 6. Section 3 deals with anti-competitive agreements and Section 4 prohibits the abuse of dominant position. Section 5, on the other hand, takes care of those acquisitions and mergers which have the potential to become anti-competitive or attain dominant position, with threat to abuse the said position in order to control such acquisition and mergers. Section 6 empowers the CCI to regulate those combinations which are stipulated under Section 5. Thus, this Chapter deals with three kinds of practices which may be anti-competitive, viz., agreements which may turn out to be anti-competitive; abusive use of dominant position by those enterprises or groups which enjoy such

dominant position as defined in the Act; and regulations of combination of enterprises by means of mergers or amalgamations so that they do not become anti-competitive or abuse the dominant position which they can attain.
7) The scheme of this Chapter, therefore, is to ensure fair competition by prohibiting trade practices which cause appreciable adverse effects in competition in markets within India. This task of curbing negative aspects of competition is assigned to CCI. In the present case, since we are concerned with the issue as to whether EIMPA and/or Coordination Committee resorted to any anti-competitive agreement, it will be apposite to scan through Section 3 of the Act and other provisions which revolve there around.

8) As can be seen from the bare reading of the provision, sub-section (1) of Section 3 puts an embargo on an enterprise or association of enterprises or person or association of persons from entering into any agreement in respect of roduction, supply, distribution, storage, acquisition or control of goods or provisions of services which causes or is likely to cause an appreciable adverse effect on competition within India. Thus, agreements in respect of distribution or provisions of services, if they have adverse effect on competition, are prohibited and treated as void by virtue of sub-section (2). Sub-section (3), with which we are directly concerned, stipulates four kinds of agreements which are presumed to have appreciable adverse effect on competition. Therefore, if a particular agreement comes in any of the said categories, it is *per se* treated as adversely effecting the competition to an appreciable extent and comes within the mischief of sub-section (1). There is no further need to have actual proof as to whether it has caused appreciable effect on competition. Proviso thereto, however, exempts certain kinds of agreements, meaning thereby if a particular case falls under the proviso, then such a presumption would not be applicable.

9) We have already mentioned in brief the contents of letters which were written by EIMPA and the Coordination Committee to the Channel 10 and CTVN+. The DG was to investigate as to whether this 'agreement' falls within the four corners of Section 3(3)(b) of the Act, namely, whether it limits or controls production, supply, markets, technical development, investment or provisions of services.

10) Section 2(b) defines 'agreement' ,S.2 (l)"person" , S.2(m) "practice" , S.2(r) ; 2(s) "relevant geographic market" , 2(t) "relevant product market; S.2(u) "service", S.2(x) "trade" .
12) At this stage, we would like to refer to Section 19 of the Act which permits the CCI to conduct an enquiry into certain kinds of agreements and dominant position of enterprise. Sub-section (1) of Section 19 empowers the Commission to inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 (i.e. anti-competitive agreements) or sub-section (1) of Section 4 (i.e. abuse of dominant position). Sub-section (3) of Section !9 deals with the factors which have to be kept in mind by the CCI while undertaking an inquiry into anti-competitive agreements.

13) Since the appreciable adverse effect on competition has to be seen in the context of 'relevant market' as defined under Section 2(r) of the Act, sub-section (5) of Section 19 stipulates that in order to determine whether a market constitutes a 'relevant market' for the purposes of this Act, CCI shall have due regard to the 'relevant geographic market', and 'relevant product market'. The factors which are to be taken into account while determining relevant geographic market are mentioned in sub-section (6) of Section 19. Likewise, the factors which are to be taken into consideration while determining the relevant product market are stipulated in sub-section (7) of Section 19.

14) Having noticed the relevant provisions postulating the scheme qua prohibited anti-competitive agreements, on the basis of which investigation is to be made by the DG, the first aspect was to determine as to what would be the 'relevant market'. The DG, in his report submitted to the CCI, opined that in the instant case 'relevant market' would be the 'film and television industry of West Bengal'. He further recorded that the Coordination Committee consisted of persons or association of persons who were dealing with identical market of film making. In his opinion any agreement of joint action taken by the constituents, being in the nature of horizontal agreement, could be examined under the provisions of Section 3(3) of the Act. The impugned action of the Coordination Committee and EIMPA threatening non-cooperation in case telecast of the serials was not stopped and holding demonstrations as well as organising strike, which resulted in actually stopping the telecast of the serial by Channel 10 (though CTVN+ continued to telecast), amounted to restricting its commercial exploitation and was, therefore, unjustified. He found that following conduct of the Coordination Committee specifically contravened the provisions of the Act:

"a. Act of the Co-ordination Committee writing a letter on 18.02.2011 to CCTVN Plus Channel asking it to stop the telecasting of Mahabharata serial.

b. Further, act of the Co-ordination Committee writing a letter on 01.03.2011 to Channel 10 and letters on 11.03.2011, 12.03.2011 and 14.03.2011 to CTVN Plus Channel asking them to stop the telecast of Mahabharata serial.

c. Observance of one-day work stoppage on 07.04.2011 against telecast of the Mahabharata serial by the members of all the constituents of Co-ordination Committee and demonstration on the same day from 11.00AM to 02.00PM at Rani Rasoni Road in Kolkata.

d. The Co-ordination Committee approached Shri Mithun Chakraborty, the leading actor of Indian Film Industry and the Chief Adviser of Channel 10 and finally succeeded in getting the telecast of Mahabharata stopped by Channel 10."

15) The DG concluded that the action on the part of Coordination Committee had resulted in foreclosure of competition by hindering entry into the market. The DG also held that by not allowing the dubbed version of the serial, the Coordination Committee foreclosed the business opportunities for the businessmen engaged in the production, distribution, and exhibition, telecast of such programmes. The DG, therefore, concluded that the actions on the part of EIMPA and Coordination Committee were in violation of the

provisions of Section 3(3)(b) of the Act, since they restricted and controlled the market and supply of dubbed versions of serials on the Television Channels through collective intent of all the constituents/associations coming together on one platform.

16) Certain fundamental objections were taken by the Coordination Committee as well as EIMPA touching upon the jurisdiction of the DG to inquire into the matter as according to them the inquiry was beyond the scope of the Act. In nutshell, it was argued:

(a) The Coordination Committee comprised of artists and technicians of West Bengal Film and T.V. Industry and consisted of West Bengal Motion Picture Artists' Forum and Federation of Cine Technicians and Workers of Eastern India only. The other members like WATP, ATA and EIMPA were not in the Coordination Committee. It was, in fact, a trade union of the artisans and technicians under the Trade Union Act. Therefore, the Coordination Committee was not an 'enterprise'.

Likewise, it was not a 'person or 'association of persons' who were in the business of production, supply and distribution or providing services etc. Therefore, their act would not fall under Section 3(1) of the Act.

(b) It was argued that the Coordination Committee was not in a position to control production programming marketing and up linking of any serial in the satellite channel and, therefore, provisions of the Act would not apply to it.

(c) According to the Coordination Committee, the action which they had taken was in the form of an agitation against the telecast of Hindi serial after dubbing the same into Bangla in order to safeguard the interest of its members. It was their constitutional right to lodge such protests under Article 19(1)(a) of the Constitution of India.

17) The DG, however, did not get convinced with the aforesaid defence put by the Coordination Committee and found that the agitation of the Coordination Committee was uncalled for inasmuch as there was a huge potential of local film artists, and the industry was not likely to suffer on account of the dubbed serials shown on the said channels. He also found the industry of television channels in Bangla was growing by leaps and bounds and, therefore, argument of the Coordination Committee was not based on facts. Thus, their action was held to be unjustified, as it had resulted in foreclosure on competition by entering into the market as well as foreclosure of business opportunities for the businessmen engaged in the production, distribution and exhibition/telecast of such programmes. This, according to him, came within the mischief of Section 3(3)(b) of the Act.

18) Against the aforesaid report of the DG, being adverse to the Coordination Committee as well as EIMPA, both of them preferred their objections before the CCI. These objections were almost on the same lines which were taken before the DG and, therefore, it is not necessary to repeat the same at this stage inasmuch as we would be turning to the stand of the Coordination Committee at the appropriate stage, in any case.

19) The CCI, after scanning through those objections, formulated two questions which according to it fell for consideration. These are:

Issue 1 Whether EIMPA and Co-ordination Committee imposed/attempted to impose restrictions on the telecast of dubbed serial 'Mahabharat'?
Issue 2 Whether the act and conduct of imposing restrictions on telecast of the said serial is in violation of provisions of the Act?

20) The CCI gave a fractured verdict on the aforesaid issues. As per the majority, the complainant was able to give clinching evidence thereby proving both the issues. The majority held that Channel 10 stopped the telecast of serial as a direct consequence of the threats extended to it by EIMPA as well as Coordination Committee through their various letters coupled with the agitations and demonstration held by them. In this manner, pressures were exerted on both Channel 10 and CTVN+ not to telecast the dubbed serial, though as far as CTVN+ is concerned it did not succumb to such a pressure. But Channel 10 gave in by discontinuing the telecast of the serial. In this manner, first issue was decided in the affirmative.

Taking up the second issue, the majority members held that since the Coordination Committee was not an 'enterprise', question of breach of Section 4 did not arise. However, the activities of the Coordination Committee fell within the ambit of Section 3 of the Act and violated that provision since it had adverse effect on competition. It accepted that the Coordination Committee (and for that matter even EIMPA) were trade unions. Notwithstanding, they were not exempted from the purview of the Act. Q*ua* the Coordination Committee specifically, the CCI was influenced by the fact that even when bodies like WATP, ATA and EIMPA were not members of the Coordination Committee, still it was found that the Coordination Committee takes the measures in consultation with these associations and, therefore, the Coordination Committee must be deemed to be comprised of all the five members.
21) Judicial member in the CCI put discordant note as he differed from the majority opinion. According to him, first mistake committed by the DG was that he did not identify the 'relevant market' correctly. According to him, 'relevant market' was 'broadcast of TV serial' and not 'Film and TV Industry of West Bengal' as found by the DG. After identifying the relevant market as broadcast of TV serials, learned member opined that broadcast of TV serials took place either by way of Direct to Home Services (DTH) or through Cable and, therefore, broadcasting service is altogether a separate market, different from production, exhibition and distribution of films. Insofar as the two channels, namely, CTVN+ and Channel 10 are concerned, they were in the market for telecasting programmes for the viewers of the DTH category or Cable TV category and were not in production, distribution or exhibition of dubbed films. According to the minority view, since the offending parties, i,e., Coordination Committee and EIMPA, were not active in the relevant market of broadcast of dubbed TV serials, there was no question of any violation of any provisions of the Act. It was further held that Section 3 of the Act does not take into its fold coercive actions taken by workers' union affecting the various facets or products or service market, affecting production, distribution and supply of goods or services. It was accepted that, as a matter of fact, the Coordination Committee as well as EIMPA had put pressure on these

channels from broadcasting the dubbed TV serial in question through various means. However, it could not be treated as an economic pressure. It was an act of trade union putting such pressures which was outside the domain of the Act and not an 'agreement' amongst the enterprises, active in the same relevant market, which resulted in discontinuing the telecast of dubbed serials. Further, the TV channels were at liberty to ignore such coercive facts. The minority opinion went to the extent of expressing that right to hold dharnas, boycotts, strikes etc. was fundamental right of any trade union guaranteed under Article 19(1)(a) of the Constitution which could not be taken away by the Act, unless it is shown that the offending parties were involved in economic activities in the same 'relevant market' and they had entered into an 'agreement' which finds foul with the provisions of Section 3 of the Act.

22) Significantly, it is only the Coordination Committee which preferred the appeal before the Competition Appellate Tribunal (hereinafter referred to as the 'Tribunal'). EIMPA, by its conduct, accepted the majority decision of the CCI. It is for this reason the Tribunal did not go into the issue with reference to EIMPA. It discussed the stand of the Coordination Committee and deliberated itself confining to the activities of the Coordination Committee to find out whether majority view of CCI was correct in law. By the impugned judgment, it has held otherwise thereby setting aside the majority view and accepting the minority opinion of the CCI resulting into allowing the appeal of the Coordination Committee and holding that there is no contravention of Section 3 of the Act which could not even be invoked on the facts of this case. In the first place, the Tribunal has affirmed the opinion of the dissenting member of the CCI on the question of 'relevant market' by holding that it was not the ‘Film and Television Industry in the State of West Bengal’, but the relevant market was the ‘telecasting of the dubbed serial on television in West Bengal’. Thereafter, the Tribunal took note of the provisions of Section 3(3) of the Act and concluded that the Coordination Committee was not trading in any groups, or provisions of any services, much less by the persons engaged in identical or similar trade or provisions of services. Therefore, it could not be said that there was any 'agreement' as envisaged in Section 3 entered into. According to the Tribunal, Section 3(3)(b) of the Act applies to the competitors who would be in the same line of commercial activity and by their agreement tend to restrict the competition. No evidence to this effect was available in the instant case. It was merely a protest of the Coordination Committee voicing its grievance for the benefit of its members and even if such a move on the part of the Coordination Committee was wrong and even if its agitation was influenced by foul play in projecting that exhibiting dubbed TV serial would affect their prospects of getting further work, that by itself would not become a competition issue covered by the Act**.**

23) Challenging the aforesaid view of the Tribunal, Mr. Chandhiok, learned senior advocate appearing for the CCI, referred to the various provisions of the Act and also extensively read out from the exercise undertaken by the DG and the majority view of the CCI. His submission was that exercise undertaken by the DG and approved by the CCI in its majority decision was correct in law. He questioned the manner in which 'relevant market' has been assigned limited sphere as,

according to him, the matter related to film and television industry of the State of West Bengal and the concerted action of the Coordination Committee was to obviously effect the competitiveness in the entire film and television industry of the State of West Bengal. He also read out various definitions from the Act, which we have already reproduced above. His submission was that the definition of 'agreement' contained in Section 2(b) had a much wider connotation and any such agreement which was anti-competitive in nature between persons or association of persons was hit by Section 3.

24) Learned counsel appearing for the Coordination Committee, on the other hand, heavily relied upon the impugned judgment and submitted that the conclusion drawn therein was correct in law as the Coordination Committee, which was in the nature of a trade union, and not in the business of production, supply, distribution, storage, acquisition or control of goods or provision of services, could not be covered within the scope of Section 3 of the Act. He also submitted that the action on the part of the Coordination Committee had nothing to do with the competition and it was the fundamental right of the Coordination Committee, as a trade union, to lodge legitimate protest. He submitted that even if in this protest the Coordination Committee had exceeded the limits, that may be an action actionable under any other law but would not fall within the domain of Competition Law.

25) We have given our due consideration to the respective submissions and have minutely gone through the orders passed by various authorities, glimpse whereof is already reflected above.

26) Two fundamental aspects which need determination are:

(i) What is the 'relevant market' for the purposes of inquiry into the impugned activity of the Coordination Committee? and

(ii) Whether the action and conduct of the Coordination Committee is covered by the provisions of Section 3 of the Act?

27) Before we discuss the aforesaid questions, it would be necessary to clear the air on some of the fundamental aspects relating to the Act.

28) The Competition Act of 2002, as amended in 2007 and 2009, deals with anti-trust issues, viz. regulation of anti-competitive agreements, abuse of dominant position and a combination or acquisition falling within the provisions of the said Act. Since the majority view of the CCI also accepted that the impugned activities of the Coordination Committee did not amount to abuse of dominant position, and it treated the same as anti-competitive having appreciable adverse effect on competition, our discussion would be focused only on anti-competitive agreements. Section 3 of the Act is the relevant section in this behalf. It is intended to curb or prohibit certain agreements. Therefore, in the first instance, it is to be found out that there existed an ‘agreement’ which was entered into by enterprise or association of enterprises or person or association of persons. Thereafter, it needs to be determined as to whether such an agreement is anti-competitive agreement within the meaning of the Act. Once it is found to be so, other provisions relating to the treatment that needs to be given thereto get attracted.

29) While inquiring into any alleged contravention, whether by the Commission or by the DG, and determining whether any agreement has an appreciable adverse effect on competition under Section 3, factors which are to be taken into consideration are mentioned in sub-section (3) of Section 19.

30) The word 'market' used therein has reference to 'relevant market'. As per sub-section (5) of Section 19, such relevant market can be relevant geographic market or relevant product market. The factors which are to be kept in mind while determining the relevant geographic market are stipulated in sub-section (6) of Section 19 and the factors which need to be considered while determining the relevant product market are prescribed in sub-section (7) of Section 19. It is for this reason, the first and foremost aspect that needs determination is: 'What is the relevant market in which competition is effected?"

31) Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.

Therefore, the purpose of defining the 'relevant market' is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned.

32) While identifying the relevant market in a given case, the CCI is required to look at evidence that is available and relevant to the case at hand. The CCI has to define the boundaries of the relevant market as precisely as required by the circumstances of the case. Where appropriate, it may conduct its competition assessment on the basis of alternative market definitions. Where it is apparent that the investigated conduct is unlikely to have an adverse effect on competition or that the undertaking under investigation does not possess a substantial degree of market power on the basis of any reasonable market definition, the question of the most appropriate market definition can even be left open.

33) The relevant market within which to analyse market power or assess a given competition concern has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. The relevant product and geographic market for a particular product may vary depending on the nature of the buyers and suppliers concerned by the conduct under examination and their position in the supply chain. For example, if the questionable conduct is concerned at the wholesale level, the relevant market has to be defined from the perspective of the wholesale buyers. On the other hand, if the concern

is to examine the conduct at the retail level, the relevant market needs to be defined from the perspective of buyers of retail products.

34) It is to be borne in mind that the process of defining the relevant market starts by looking into a relatively narrow potential product market definition. The potential product market is then expanded to include those substituted products to which buyers would turn in the face of a price increase above the competitive price. Likewise, the relevant geographic market can be defined using the same general process as that used to define the relevant product market.

35) Bearing in mind the aforesaid considerations, we concur with the conclusion of the Tribunal. It is the notion of 'power over the market' which is the key to analysing many competitive issues. Therefore, it becomes necessary to understand what is meant by the relevant market. This concept is an economic one.

36) In the instant case, the geographic market is the State of West Bengal and to this extent there is no quarrel inasmuch as activities of the Coordination Committee were limited to the said State. The dispute is as to whether relevant market would cover 'broadcast of TV serial' or it would take within its sweep 'film and TV industry of the State of West Bengal'. TV serial in question was produced in Hindi. It was thereafter dubbed in Bangla. When the two channels, namely CTVN+ and Channel 10, decided to broadcast this TV serial in dubbed form, i.e. in Bangla language, this move was opposed by the Coordination Committee and EIMPA. The Tribunal has upheld the minority view of CCI in saying that nature of the information does not show anything which could even be distinctly connected with the whole 'film and television industry in the State of West Bengal'. The information is only against showing the dubbed serial on the television and it has no relation whatsoever with production, distribution, etc. of any film or any other material on the TV channels.

We feel that this is a myopic view taken by the Tribunal which ignores many other vital aspects of this case, most important being the width of the effect of the aforesaid cause on which the agitation was led by the Coordination Committee. The effect is not limited to the telecast or broadcast of the television serial. No doubt, the Coordination Committee was against the 'broadcast of the television serial 'Mahabharat' on the aforesaid two channels, in the dubbed form. However, even as per the agitators, the said broadcast was going to adversely affect the TV and Film Industry of West Bengal and the alleged purport behind the threats was to save the entire TV and Film Industry. The Coordination Committee itself mentioned so in its letter dated February 18, 2012 as under:

"We came to know that you are publicizing in your channel that Bengali dubbed version of "Mahabharat" will be telecasted in your channel, shortly this is for your kind information that **the whole TV and Film Industry had fought back ruthlessly against telecast of Bengali dubbed versions of Hindi serials in DD-1 slot** in 1997 and since that agitation DD National Network has stopped telecasting any Bengali dubbed version of Hindi programs. At the same time, it is to be noted that the film industry was also successful in debarring the release of Bengali dubbed version of Hindi Movie "Luv Kush" produced by Mr. Dilip Kankaria of Deluxe Films in the year 1997.

We have done this to stop withering away of the prestigious and internationally acclaimed Bengali Film and Television Industry, thereby creating job for artistes, workers and allied people associated with this industry. Hence we would request you to stop telecast of dubbed Bengali version of "Mahabharat" in your channel. (emphasis added)".

37) The relevant market was, therefore, not limited to the broadcasting of the channel but entire film and television industry of West Bengal. Whether it was the misgiving of the Coordination Committee that telecast of dubbed version of 'Mahabharat' is going to affect Bengali film and television industry or it was a genuine concern, is not the relevant factor while defining the 'relevant market'. It is the sweep of the aforesaid action which is

to be considered. Even in the perception of the Coordination Committee, telecast of Bengali dubbed version of 'Mahabharat' was going to affect the whole Television and Film Industry. In view thereof, it was hardly a matter of debate as to what would be the relevant market.

38) With this we advert to the central issue that bogs the parties, namely, whether the activities in which the Coordination Committee indulged in can be treated as 'agreement' for the purpose of Section 3 of the Act.

39) At the outset, it may be noticed that the entities which are roped in, whose agreements can be offending, are enterprise or association of enterprises or person or association of persons or where the agreement is between any person and an enterprise. The expression 'enterprise' may refer to any entity, regardless of its legal status or the way in which it was financed and, therefore, it may include natural as well as legal persons. This statement gets further strengthened as the agreement entered into by a 'person' or 'association of persons' are also included and when it is read with the definition of 'person' mentioned in Section 2(l) of

the Act. Likewise, definition of 'agreement' under Section 2(b) is also very widely worded. Not only it is inclusive, as the word 'includes' therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as 'agreement'. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by legal proceedings or not. Therefore, the Coordination Committee would be covered by the definition of 'person'. However, what is important is that such an 'agreement', referred to in Section 3 of the Act has to relate to an economic activity which is central to the concept of Competition Law. Economic activity, as is generally understood, refers to any activity consisting of offering products in a market regardless of whether the activities are intended to earn a profit. Some examples may be given which would not be covered by Section 3(3) of the Act. An individual acting as a final consumer is not an enterprise or a person envisaged, as he is not carrying on an economic activity. We may also mention that the European Union Competition Law recognises that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in Section 3. The

reason is obvious. The 'agreement' or 'concerted practice' is the means through which enterprise or association of enterprises or person or association of persons restrict competition. These concepts translate the objective of Competition Law to have economic operators determine their commercial policy independently. Competition Law is aimed at frowning upon the activities of those undertakings (whether natural persons or legal entities) who, while undertaking their economic activities, indulge in practices which effect the competition adversely or take advantage of their dominant position.

40) The notion of enterprise is a relative one. The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an enterprise when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering activities carried out by non-profit-making organisations or public bodies. These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits. Thus, any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making, that involves economic trade.

41) In the instant case, admittedly the Coordination Committee, which may be a ‘person’ as per the definition contained in Section 2(l) of the Act, is not undertaking any economic activity by itself. Therefore, if we were to look into the ‘agreement’ of such a ‘person’, i.e. Coordination Committee, it may not fall under Section 3(1) of the Act as it is not in respect of any production, supply, distribution, storage, acquisition or control of goods or provision of services. The Coordination Committee, which is a trade union acting by itself, and without conjunction with any other, would not be treated as an ‘enterprise’ or the kind of 'association of persons' described in Section 3. A trade union acts as on behalf of its members in collective bargaining and is not engaged in economic activity. In such circumstances, had the Coordination Committee acted only as trade unionists, things would have been different. Then, perhaps, the view taken by the Tribunal could be sustained. However, what is lost in translation by the Tribunal i.e. in applying the aforesaid principle of the activity of the trade union, is a very pertinent and significant fact, which was taken note of by the DG as well as the CCI in its majority opinion. It is this: The Coordination Committee (or for that matter even EIMPA) are, in fact, association of enterprises (constituent members) and these members are engaged in production, distribution and exhibition of films. EIMPA is an association of film producers, distributors and exhibitors, operating mainly in the State of West Bengal. Likewise, the Coordination Committee is the joint platform of Federation of Senior Technician and Workers of Eastern India and West Bengal Motion Pictures Artistes Forum. Both EIMPA as well as the Coordination Committee acted in a concerted and coordinated manner. They joined together in giving call of boycott of competing members i.e. the informant in the instant case and, therefore, matter cannot be viewed narrowly by treating Coordination Committee as a trade

union, ignoring the fact that it is backing the cause of those which are 'enterprises'. The constituent members of these bodies take decision relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business of production, distribution or exhibition of the films. Decision of these two bodies reflected collective intent of the members. When some of the members are found to be in the production, distribution or exhibition line, the matter could not have been brushed aside by merely giving it a cloak of trade unionism. For this reason, the argument predicated on the right of trade union under Article 19, as professed by the Coordination Committee, is also not available.

42) When the lenses of the reasoning process are duly adjusted with their focus on the picture, the picture gets sharpened and haziness disappears. One can clearly view that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus, the CCI rightly observed that the protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; *albeit* for a brief period. It also hindered competition in the market by barring dubbed TV serials from exhibition on TV channels in the State of West Bengal. It amounted to creating barriers to the entry of new content in the said dubbed TV serial. Such act and conduct also limited the supply of serial dubbed in Bangla, which amounts to violation of the provision of Section 3(3)(b) of the Act.

43) Resultantly, the instant appeal of CCI stands allowed. No costs.

Note:A miscellaneous application was filed by Competition Commission of India seeking certain clarifications with regard to the judgment dated 07.03.2017 in *Competition Commission of India* v. *Coordination Committee of Artist and Technicians of West Bengal Film and Television Industry.* The CCI contended that by the judgment an impression is given that the question of relevant market has to be determined in all types of cases under section 3 which may not be the correct position. The Supreme Court by its order dated 07.05.2018 in this application clarified that delineation of relevant market is not a mandatory pre-condition for making assessment of the violation under section 3 of the act

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Builders Association of India v. *Cement Manufacturers'*

Case No. 29/2010, CCI, Date of Order: 20.06.2012.

The CCI, through its order dated 20 June 2012, imposed a penalty of approximately six thousand crores (*approx*. USD 1.1 billion) on cement manufacturers in India after holding them guilty of cartelisation in the cement industry. The penalty has been imposed at the rate of 0.5 times the net profit of such manufactures for the past two yea Additionally, the Cement Manufacturer's Association (the CMA) has been fined 10% of its total receipts for the past two years for its role as the platform from which the cartel activity took place.

The decision of the CCI emanates from information filed by the Builders' Association of India on 26 July 2010 against the CMA and ACC, Gujarat Ambuja Cements Limited (now Ambuja Cements Limited), Ultratech Cements, Grasim Cements (now merged with Ultratech Cements), JK Cements, India Cements, Madras Cements, Century Textiles & Industries Limited, Binani Cements, Lafarge India and Jaiprakash Associates Limited.

On 15 September 2010, the CCI formed a *prima facie* opinion on the contravention of the Competition Act, 2002 (the Competition Act) and directed investigations in the matter. On 31 May 2011, the Director General (DG) submitted his report (the Report) detailing contravention of the Competition Act by the respondents.

The CCI called for comments and objections from the respondents, and after considering their submissions came to the conclusion that the respondents had contravened sections 3(3)
(a) and (b) of the Competition Act.

Before going to the principal findings of the CCI, it is important to note that the CCI restricted itself to the cement companies named in the information owing to the fact that such companies were the prominent participants in the market and were key players in the whole arrangement.

Similarly, as to the period of contravention, the CCI limited the period from 20 May 2009 to 31 March 2011. However, it made clear that this limitation was only relevant to the present case and would be independent of other cases.

Preliminary Issues

Jurisdiction: The respondents had raised concern over the DG's investigation andreliance on data prior to 20 May 2009 (the date on which the provisions of Section 3 of the Competition Act were brought into force). The CCI held that mere examination of data prior to 20 May 2009 cannot be construed to mean that the provisions of the Competition Act have been applied retrospectively. Moreover, relying on the Bombay High Court decision in *Kingfisher Airlines* v *CCI*, the CCI took the view that if the effects of acts taken place prior to 20 May 2009 were continuing, it had the jurisdiction to examine such conduct.

Failure to provide opportunity to cross examination: The respondents contented that theDG did not give them an opportunity to cross examine witnesses relied upon by him. The CCI rejected this submission and stated that by giving the respondents the chance to submit oral and written evidence before it, the proceedings were in accordance with the principles of natural justice.

Incorrect reliance on motivated information and press reports: The respondents statedthat the information filed by the Builders' Association was motivated. This, again, was rejected by the CCI. It held that under the scheme of the Competition Act, the final outcome was to be determined on the basis of an inquiry after going into the questions whether competition forces were being inhibited due to certain anti-competitive behaviour.

Substantive Issues

The substantive question before the CCI was whether the conduct of the cement companies violated sections 3 (anti-competitive agreements) (discussed below). The CCI also examined whether there was an abuse of dominant position, but found that the market was characterised by several players and no single firm or group was in a position to operate independent of competitive forces or affect its competitors or consumers in its favour (*cf.* explanation (a) to section 4 of the Competition Act).

In respect of violations of sections 3(1) (a) and (b), the CCI examined the following facts and submissions:

Market Structure of the Cement Industry: As previously stated, the CCI observed that noplayer can be said to be dominant in India as per the prevailing market structure. The industry is characterised by twelve cement companies having about 75% of the total capacity in India with about 21 companies controlling about 90% market share in terms of capacity. Given the oligopolistic nature of the market, each company takes into account the likely reactions of other companies while making decisions particularly as regards prices. In such a scenario, collusion between companies is possible and can be adduced from circumstantial evidence.

Circumstantial evidence is sufficient to prove violation: The chief objection taken by thecement companies was that the DG failed to support his findings with any direct evidence. The CCI, relying on international practice, noted that given the clandestine nature of cartels, circumstantial evidence is of no less value than direct evidence to prove cartelisation.

Section 3 does not require a delineation of relevant market: The CCI has held that for aninquiry under section 3 of the Competition Act, there is no requirement under the Competition Act to determine a 'relevant market'. The Commission states that there is a distinction between 'market' as used in section 3 and the 'relevant market' as defined in section 4 of the Competition Act.

CMA is engaged in collecting competition sensitive data: The respondents contended thatCMA collects retail and wholesale prices data from different parts of the country and transmits them to the Ministry of Commerce, as per the latter's request. The CCI held that the competitors were interacting using the platform of the CMA and

this gave them an opportunity to determine and fix prices. The fact that it was being under the instruction of DIPP did not absolve them of liability.

Further, the CCI noted that the CMA publishes statistics on production and dispatch of each company (factory wise) and circulates such information amongst its membe The sharing of price, production and dispatch data makes co-ordination easier amongst the cement companies.

High Power Committee Meetings: The CCI took note of the fact that cement pricesincreased immediately after the High Power Committee Meetings of the CMA which were attended by the cement companies in January and February 2011. It further noted that ACC and ACL, despite having ceased to be members of the CMA, attended these meetings. The CCI observed that whilst ACC and ACL admitted to having attended these meetings, both CMA and JAL refuted their presence. The inconsistencies in the statements of the different respondents established that they were keen on hiding material information.

Amendments to the CMA constitutional documents: Certain rules and regulations of CMAhad serious competition concerns. These were highlighted in a CMA meeting on 30 November 2009. However, the amendments to those rules and regulations were only carried out once the DG sent notice to the respondents in the instant case.

Price Parallelism: The DG had conducted an economic analysis of price data whichindicated that there was a very strong positive correlation in the prices of all companies. This, according to the DG, confirmed price parallelism. The respondents argued that the correlation benchmark of 0.5 taken by the DG was arbitrary. Moreover, the prices used by the DG were incomparable since the prices submitted by the companies differed from each other (some had submitted gross prices, while others had submitted depot prices, average retail prices etc.). The CCI did not accept these arguments and stated that given the nature of data exchanged between the parties, price parallelism could not be a reflection of non-collusive oligopolistic market conditions.

Limiting and controlling production: The Report submitted by the DG suggested thatwhilst capacity utilisation increased during the last four years, the production has not increased commensurately during this period. The various respondents contested these figures and led evidence to show that capacity utilisation was on the increase. It was also argued that the DG had incorrectly relied upon ‘name plate’ capacity whereas actual capacity was dependent on raw materials, plant stabilisation time, power supply etc. Therefore, if the aforesaid is taken into account, the capacity utilisation would be much higher. These submissions did not hold water with the CCI, which observed that on a year on year and plant wise basis, the capacity utilisation across the respondents had decreased.

Limiting and controlling supply: The CCI observed that the forces of demand and supplydictated that the dispatch figures should have been more than or equal to consumption of cement in the corresponding period of the previous year. However, in two months of November and December 2010, the dispatch was lower than the actual consumption for the corresponding months of 2009. It was not the case that the market

could not absorb the supplies, but, instead, the lower dispatches coupled with the lower utilisation establishes that the cement companies indulged in controlling and limiting the supply of cement in the market.

Production Parallelism: The production figures across cement companies (in a particulargeographical region) showed strong positive correlation. According to the CCI, in November – December 2010 the cement companies reduced production collectively, although during the same period in 2009, the production of the cement companies differed. This was a clear indication of co-ordinated behaviour.

Dispatch Parallelism: It was observed that the dispatches made by the cement companieshave been almost identical for the period from January 2009 to December 2010. The cement companies argued that the parallelism in both production and dispatch is on account of the commoditised nature of cement, the cyclical nature of the cement industry and the ability of competitors to intelligently respond to the actions of their competito The CCI noted that the drop in production and dispatch in the November 2010 was unusual especially when November 2009 witnessed a mixed trend. Interestingly, the CCI held that the parties to a cartel may not always co-ordinate their action; periodically their conduct may reflect a competitive market. Where co-ordination proves gainful, parties will substitute competition for collusion.

Increase in price: The deliberate act of shortage in production and supplies by the cementcompanies and almost inelastic nature of demand of cement in the market resulted into higher prices for cement. The CCI was of the view that there was no apparent constraint in demand which could justify the lower capacity utilisation. Further, there was no constraint in demand during November and December 2010, and, in fact, the construction industry saw a positive growth in the third quarter of 2010-11.

Price Leadership: The CCI noted that the given the small number of major cementmanufacturers, the price leaders gave price signals through advanced media reporting which made it easier for other manufactures to co-ordinate their strategies.

High Profit Margins: The profit margins of all the cement companies were examined bythe Commission, which arrived at the conclusion that some companies posted a high Return on Capital Employed and higher EBITDA in 2010-11 as compared with 2009-10. Additionally, the CCI observed that the respondents earned huge margins over the cost of sales.

Factors set out in Section 19(3) of the Competition Act: It is worth noting that the CCIhas stated that where contraventions of sections 3(3) (a) and (b) are proved, the adverse effect on competition is presumed. However, on account of the rebuttals raised by the respondents, it considered the factors mentioned in section 19(3) to determine whether an appreciable adverse effect on competition has been caused.

Although, the Commission did not go into the factors set out in section 19 (3) (a), (b) and (c), it held that the increase of price and reduced supply in the market was to the detriment of the consume Further, the efficiency defences in section 19 (e) and (f) were not available as the conduct of the respondents neither caused any

improvement in production or distribution of goods nor any promotion of technical, scientific and economic development.

In view of the evidence and the analysis of the factors mentioned in sections 19(d) to (f), the contraventions of sections 3(3) (a) and (b) stood established.

Directions of the CCI

In cartel cases, the CCI has the power to to fine parties up to three times of its profit for each year of the continuance of the cartel or 10% of its turnover for each year of the continuance of the cartel, whichever is higher. The turnover and profit for the cement companies were examined and accordingly the following penalties were levied on the cement companies.

Company	Penalty (INR in Crores)
ACC Ltd.	1147.59
Ambuja Cements Ltd.	1163.91
Binani Cements Ltd.	167.32
Century Textiles Ltd.	274.02
India Cements Ltd.	187.48
J K Cements Ltd.	128.54
Lafarge India Pvt. Ltd.	480.01
Madras Cements Ltd.	258.68
Ultratech Cement Ltd.	1175.49
Jaiprakash Associates Ltd.	1323.60

In addition, the CMA was fined 10% of its total receipts for the past two yea

The respondents have been directed to pay the above penalties within 90 days of the receipt of the CCI order.

The CCI also directed the companies to ‘cease and desist’ from indulging in agreement or understanding on prices, production and supply of cement in the market. Similarly, the CMA has been directed to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies and also from circulating the details on production and dispatches of cement companies to its members.

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Exclusive Motors Pvt. Limited v. Automobile Lamborghini S.P.A

CCI Case No. 52/2012, Order Date: 06.11.2012

The present information has been filed by Exclusive Motors Pvt. Limited ('the informant') under Section 19(1)(a) of the Competition Act, 2002 ('the Act') against Automobili Lamborghini S.P.A. ('the opposite party') alleging inter-alia contravention of Section 3 and Section 4 of the Act.

2. The informant claimed to be in the business of importing and selling of 'Super Sports Cars' in the territory of Delhi. The opposite party is well known manufacturer of Super Sports Cars. The opposite party is the subsidiary of Audi Ag which in turn is a part of Volkswagen group. Volkswagen group is stated to own majority of luxury car brands such as Audi, SEAT, Lamborghini, Volkswagen, Skoda, Bentley, Bugatti and Porsche.

3. Briefly stated, the informant alleged that it was appointed as the importer and dealer of Super Sports Cars manufactured by the opposite party in 2005 by way of a Dealership Agreement. Thereafter, the informant invested substantial time, efforts and money to develop Indian market for opposite party's cars which was negligible prior to this agreement. Sometime in 2011, the opposite party appointed its own group company, Volkswagen Group Sales Pvt. Ltd. (Volkswagen India) as exclusive importer of opposite party's cars and the informant was requested (through a letter dated 24.01.2012) to terminate the existing dealership agreement with the opposite party and to bring in place a fresh dealership agreement with Volkswagen India. The new agreement entailed a larger deposit amount and the notice period required for termination was sought to bereduced from 12 months to 3 months. The informant, therefore, did not agree to the new arrangement. In response to this, the opposite party withdrew the new arrangement and served a 12 month's notice to the informant for terminating the existing dealership agreement entered between them in 2005. It is alleged that during the notice period the opposite party had offered its products to the informant at a much higher price than its own company i.e. Volkswagen India thereby adopting discriminatory pricing policy.

4. The informant, therefore, alleged contravention of section 3 and 4 of the Act. The agreements of the opposite party with its group company (Volkswagen India) and its
Partner (Auto-Hanger) are alleged to be anti competitive and in contravention of section 3(3)(a) as they directly determine sale and purchase price of the car.

Also, the exclusive distribution agreement between opposite party and its group company Volkswagen India is alleged to be in violation of section 3(4)(c) of the Act since it excluded the informant and other prospective dealers to become the importers anddealers of opposite party products. With regard to section 4, the informant considered the relevant market as market for 'distributing super sports cars in India'. The informant stated that the opposite party held 52% share in this market individually while with other group cars of Volkswagen group (Martin and Porsche) its share amounted to 60%. Informant insisted that this showed dominant position of the opposite party which enabled it to impose unfair and discriminatory conditions on the informant. Therefore, the opposite party violated section 4(2)(a)(i) and (ii) by imposing unfair and discriminatory conditions and section 4(2)(c) by denying market access to the informant. On the aforesaid basis, the informant prayed the Commission to direct an inquiry under section 26(1) of the Act into the anti-competitive practices adopted by the opposite party and Volkswagen India.

5. The Commission has perused the information and heard the counsel for the informant at length.

6. To establish a contravention under Section 3, an agreement is required to be proven between two or more enterprises. Agreement between opposite party and its group company 'Volkswagen India' cannot be considered to be an agreement between two enterprises as envisaged under section 2(h) of the Act. Agreements between entities constituting one enterprise cannot be assessed under the Act. This is also in accord with the internationally accepted doctrine of 'single economic entity'. It was averred by the counsel for the informant that as per opposite parties letter dated April 2, 2011, Volkswagen India was 'not a subsidiary of the Automobili Lamborghini S.p.A but was a separate legal entity owned by Volkswagen Group'. This does not help the informant's case in any manner whatsoever. As long as the opposite party and Volkswagen India are part of the same group, they will be considered as single economic entity for the purposes of the Act. Any internal agreement between them is not considered as an agreement for the purposes of Section 3 of the Act.

6.1 Relevant Market: The relevant product market determined by the informant seems correct. Section 2(t) defines relevant product market as 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use'. Market for 'Super Sports Cars' constituted a separate market within the auto industry because of its

characteristics, price, intended use etc. The super sports cars are generally 2-door automobiles with high engine capacity and low weight. They differ from other cars in the auto industry because of their use only for sports purposes. Their engine capacity (3500cc or higher), horse power (450 HP or higher) and weight (2000 kg or lower) enable them an exceptionally high speed of at least 250 kmph. The price of these super sports cars is also Rs. 2 crores or above, making these carsexclusively catering to a distinct class of consumers. These features of the super sports cars make them different from other passenger and luxury cars owing to their physical design, price, intended use etc. A consumer desiring to buy a sports car will not buy a normal luxury passenger car and vice-versa. Manufacturers, apart from the opposite party, producing cars falling within this market of super sports cars in India are Aston Martin, Audi, Ferrari, Mercedes, Porsche etc. Therefore, considering their characteristics, price and end use, super sports cars constitute a distinct relevant market within the auto industry which cannot be substituted for other types of cars in the auto industry. Having regard to the foregoing, it may be concluded that market for 'super sports cars' constitute a distinct market, relevant for this case. The relevant geographic market in this case is proposed to be the 'whole of India' which appears to be correct. Therefore, the relevant market is market for 'super sports cars in India'.

6.2 In order to show dominance of Opposite Party, the informant has relied upon the market share of Opposite Party in the relevant market. It is alleged that Opposite Party held more than 50% of market share in the market of Super Sports Car in India and thus was dominant. Section 19(4) of the Competition Act provides that while considering whether an enterprise enjoyed a dominant position, the Commission would have due regard to market share or any of the following factors:-

(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprise.
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;
(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition.

7. The informant had not devolved upon the size of the Opposite Party nor compared the size with the other competitors. The information is silent upon the economic power of the Opposite Party nor had talked of any commercial advantage which the Opposite Party has over the competitors, rather the cause of the informant is that while prior to his becoming importer and dealer of Opposite Party, the competitor was selling more cars than the Opposite Party. He increased the sale of Opposite Party. The information also reveals that the informant was the only agent of the Opposite Party in India till last year and it is only recently that the Opposite Party opened another agency in Mumbai for importing its car. It is also a fact that these cars are made ready only on orders of consumers who place orders considering price, cost of the product of each manufacturers. There is no special liking of the consumers for the opposite party product. There are no entry barriers for other competitors nor cost-wise other products are costlier or cheaper. A consumer can place order according to his pocket. Size of the market in India of the Super Sports Car is minuscule. According to the informant, in the last five years, only 93 cars of all manufacturers had been sold i.e. on an average in one year not even 19 cars in this category have been sold. The other competitors having some presence in Indian market are Aston Martin, Mascrati, Bugatti and Gumpert Apolo. Brands like Aston Martin, Ferrari and Lamborghini form part of this market but the presence of these cars in India is at such a small level that none of them can be said to be a dominant as far as market share is concerned. Economic strength wise and resource wise, all the competitors stand at the same footing and none of them has commercial advantage over the other. Thus it cannot be said that the Opposite Party was a dominant enterprise in the market of Super Sports Car in India.

8. Even if the plea of informant that Opposite Party was dominant was considered as correct (though it is not), the informant has failed to show an

abuse of any kind on the part of the Opposite Party. The informant was having a dealership agreement dated 16.12.2005 with the Opposite Party. Under this dealership agreement, the informant was appointed as sole dealer for the area of Delhi. However, since there was no other dealer in India, the informant started catering to the needs of people outside Delhi also. The Opposite Party appointed one of its own group company as dealer in Mumbai and right to import its car was given only to its group company and the status of informant was restricted to that of a reseller of car and not that of importer. The right of an enterprise to appoint its own group company as an importer in a country cannot be assailed on the ground of dominance. A company has a right to open its office in any country and directly import cars through that office or can constitute a subsidiary company to import its car in other country. There is no abuse involved nor any competition issue is involved. Since the number of cars being sold in India is so less, it was not at all necessary for Opposite Party to have many importers and if the Opposite Party itself wanted to import cars in India through its group company that cannot be acause for initiating proceedings against the Opposite Party, even if the Opposite Party were a dominant player. The Opposite Party gave an offer to the informant of terminating the existing agreement and to execute a fresh agreement with its group company - Volkswagen India. The informant refused this offer and resisted termination of the agreement dated 16.12.2005 on the ground of contractual obligation as stated in the agreement itself. The informant claims that the new agreement which Opposite Party wanted it to execute was altogether different from earlier agreement, while in earlier agreement a notice of 12 months was required to be given for termination, in the new agreement, a notice of only three months was required to be given. Under the new agreement, right to import was not given to the informant, but the import was to be done by Volkswagen India. On refusal of informant to execute new agreement with Volkswagen, the Opposite Party, in terms of earlier agreement, gave 12 months notice to the informant for terminating the contract in terms of the agreement. The informant grievance now is that after Opposite Party had made its own group company a dealer in Mumbai, the informant was being offered product at higher price as compared to the new dealer. The orders placed by it were not being given priority whereas the orders placed by Mumbai dealer, were being delivered and given priority and the deliveries booked by informant were being delayed on false pretext. The informant was being discriminated also in respect of supply of spare parts.

9. On the basis of aforesaid, the Commission is of the view that since the Opposite Party is not dominant, there is no ground for directing DG to investigate the matter.

10. There is no prima facie case either under Section 3 or under section 4 of the Act. The case deserves to be closed under section 26 (2) of the Act and is accordingly hereby closed.

11. The Secretary is directed to communicate the decision of the Commission to all concerned accordingly.

* * *

Shamsher Kataria v. *Honda Siel Cars India Ltd.*

CCI Case No. 03/2011
Date of Order: 27.07.2015

ORDER UNDER SECTION 27 OF THE COMPETITION ACT, 2002

1. Factual Background:

1.1 The information in the present case was filed by Shri Shamsher Kataria ("Informant") under Section 19 (1)(a) of the Competition Act, 2002 (hereinafter, referred to as the "Act") on 18.01.2011 against Honda Siel Cars India Ltd., Volkswagen India Pvt. Ltd. and Fiat India Automobiles Ltd., alleging anti-competitive practices on the part of these three car manufacturers, whereby the genuine spare parts of automobiles manufactured by them were not made freely available in the open market. The Commission considered the matter and on perusal of the material on record, passed *prima facie* order dated 24.02.2011 under section 26(1) of the Act directing the DG to conduct an investigation into the matter and submit his investigation report. From the preliminary enquiries made during the investigations, the DG opined that other automobile manufactures or Original Equipment Manufacturers ("OEMs") (other than the three car manufacturers named by the Informant) might also be indulging in similar restrictive trade practices with respect to after sales service, procurement and sale of spare parts from the Original Equipment Suppliers ("OES"), setting up of dealerships etc. It appeared that the case involved a much larger issue relating to the prevalence of anti-competitive conduct by the automobile players in the Indian automobile sector and its implications on the consumers at large. Consequently, the DG proposed before the Commission that the investigation should not be restricted to the 3 car manufacturers alone and it should be expanded to examine the alleged anti-competitive trade practices of all car manufacturers in India, as per the list maintained by the Society of Indian Automobile Manufacturers ("SIAM"). The Commission considered the abovementioned request of the DG and, vide order dated 26.04.2011, approved the request to initiate investigation against 14 other OEMs operating in India, in addition to the three car manufacturers named in the information filed by Shri Shamsher Kataria. These 14 OEMs were: BMW India Pvt. Ltd. ("BMW"), Ford India Pvt. Ltd. ("Ford"), General Motors India Pvt. Ltd. ("GM"), Hindustan Motors Ltd. ("Hindustan Motors"), Hyundai Motor India Ltd. ("Hyundai" or "HMIL"), Mahindra & Mahindra Ltd. ("M&M"), Mahindra Reva Electric Car Company (P) Ltd. ("Reva"), Maruti Suzuki India Ltd. ("Maruti"), Mercedes-Benz India Pvt. Ltd. ("Mercedes"), Nissan Motor India Pvt. Ltd. ("Nissan"), Premier Ltd. ("Premier"), Skoda Auto India Pvt. Ltd. ("Skoda"), Tata Motors Ltd. ("Tata") and Toyota Kirloskar Motor Pvt. Ltd. ("Toyota")

1.5 After considering the investigation report submitted by the DG, the Commission decided to forward copies thereof to all the 17 Opposite Parties for filing their replies/objections thereto vide its order dated 04.09.2012. Pursuant to that, Reva and

Premier filed applications dated 01.02.2013 and 21.12.2012 respectively under Regulation 26 of the Competition Commission of India (General) Regulations, 2009 ("General Regulations") requesting for striking out of their names from the array of parties. The Commission decided to dispose of these applicationswith the final order. With regards to Hyundai, a Writ Petition No. 31808/2012 was filed by it before the Madras High Court challenging the jurisdiction of the Commission. Madras High Court granted an *ex-parte* stay in the matter vide its interim order dated 06.02.2013 and, therefore, the matter could not be proceeded *qua* Hyundai also. Therefore, the Commission vide its order dated 25.08.2014 under Section 27 of the Act ("Main Order") had *inter alia* imposed penalties only on fourteen out of the seventeen Opposite Parties (OPs). For the reasons recorded in the preceding paragraph, the order of the Commission has remained pending against Hyundai, Reva and Premier ("present Opposite Parties") as the Commission decided to pass separate order against the present Opposite Parties after affording them reasonable opportunity to make their submissions in respect of the findings in the DG report and queries raised by the Commission. The relevant excerpt from the Main Order in this context is reproduced below: 'The Commission makes it clear at this stage that the present order governs the alleged anti-competitive practices and conduct of OPs (1-14) only. The Commission shall pass separate order in respect of three car manufacturers, *viz*., Hyundai, Reva and Premier after affording them reasonable opportunity to make their submissions in respect of the findings of the DG report and queries raised by the Commission. Keeping this in mind, the findings of the DG report and contentions raised, if any, in respect of these three OPs have not been dealt with in this order.'

1.7 In accordance with that decision, subsequently, the Commission vide its order dated 05.11.2014 directed Hyundai, Reva and Premier to appear before the Commission for oral hearing and asked them to file their respective written submissions/objections in response to the DG report, if any. Accordingly, the present Opposite Parties appeared before the Commission and also filed their written submissions. Before dealing with the written submissions and oral arguments made by the present Opposite Parties, the Commission deems it appropriate to elucidate the findings of the DG with respect to these Opposite Parties.

2. Findings of the DG:

2.1 In the Main Order, the Commission has already recorded the overall findings of the DG as enshrined in the main report and specific findings with regard to 14 OEMs. Since the general findings of the DG, as contained in the main DG Report is representative of the specific findings of the DG, as contained in each of the sub-reports, the same should be read as part of this order. Similarly, the present order of the Commission should also be read as part of the Main Order. For the sake of brevity, the general findings of the DG, as recorded in that order, are not reproduced here in detail. The present order contains brief and succinct discussion of the main DG report and the respective sub-reports, dealing with each of the present Opposite Parties i.e. Hyundai, Reva and Premier. Findings of the Main DG report 2.2 The DG Report identified two

separate markets for the passenger vehicle sector in India—the primary market, consisting of the manufacture and sale of passenger vehicles and the secondary market (After-Sales Markets), comprising of the complementary products or secondary products which is complementary to and derived from the primary product (i.e., spare parts for passenger vehicles). The DG report has further identified the two sub segments of the aftermarket for passenger vehicles in India, as follows: (a) Supply of spare parts, including diagnostic tools, technical manuals, catalogues etc for the aftermarket usage; and (b) Provision of aftersaleservices, including servicing of vehicles, maintenance and repair services. The second question which the DG has dealt with was to analyze whether the aftermarket segments described above constitute distinct relevant product markets or whether the products in the primary market (i.e. cars) and the products in the aftermarket (i.e., repair services and spare parts) constitute a single market i.e. part of one indivisible „system" of products consisting of a durable primary product and a complementary secondary product. After conducting detailed analysis and providing cogent reasons, the DG concluded that the spare parts market for each brand of cars comprising of vehicle body parts (manufactured by each OEM, spare parts sourced from the local OESs or overseas suppliers), specialized tools, diagnostic tools, technical manuals for the aftermarket service together formed a distinct relevant product market. With regard to the question as to whether maintenance and repair services of the products in the primary market constitute a separate relevant market, the DG has concluded that after sale repair and maintenance services constitute a distinct relevant product market. The DG's investigation has further revealed that the spare parts for a particular brand of vehicle were available through the authorized dealers of the respective OEMs in any part of India and hence concluded that the relevant geographic market would be "India". The DG has further found that each OEM is a dominant player in the relevant market of supply of spare parts (including those manufactured inhouse, sourced from overseas or obtained from local OESs), diagnostic tools, technical manuals, software, etc. required to repair and maintain their respective brand of automobile. Since the diagnostic tools were not sold directly in the aftermarket by the manufacturer of these tools due to restrictions in the agreement or arrangements between the OEMs and such equipment manufacturers, the DG found each OEM to be the only viable source of supply of these specialized tools, technical manuals, fault codes, etc., for their respective brand of automobiles and hence dominant.

2.7 Finding the conduct of the OEMs abusive, the DG has further observed that in the absence of availability of genuine spare parts, diagnostic tools, technical manuals etc. in the open market, the ability of the independent repairers to offer repair and maintenance services to the vehicle owners and effectively compete with the authorized dealers of the OEMs for similar services was severely hampered. Such conduct was found to be in contravention of section 4(2)(a)(i) and 4(2)(c) of the Act, as it amounts to an imposition of unfair condition and denial of market access to independent repairers by OEMs. Further, as per the DG, each OEMs used their dominant position in the market for the supply of their spare parts to protect their dominance in the market for repair and maintenance services for their respective

brands of automobiles which amounted to a violation of section 4(2)(e) of the Act. The DG's investigation also revealed that each OEM had substantially escalated the price of spare parts, for their respective brands of automobiles which showed their ability of imposing unfair prices in the sale of spare parts in terms of section 4(2)(a)(ii) of the Act. The DG has further concluded that the essential facilities doctrine is applicable to the restrictive practices adopted by the OEMs, as the OEMs have put the independent repairers at a distinct disadvantageous position and have jeopardized their ability to undertake repairs of the automobiles manufactured by the OEMs by not making spare parts and diagnostic tools available to them. The DG has also examined the agreements/letters of intent entered into between the OEMs and the OESs and found that most of such agreements/letters of intent had clauses which restricted the ability of the OESs to supply spare parts directly to third parties or in the aftermarketwithout the prior written consent of the OEMs. The DG has found that none of the present Opposite Parties held valid Intellectual Property Rights (IPRs) for any of their spare parts in India to claim exemption under section 3(5)(i) of the Act. Agreements between OEMs and the local OESs were found to contain exclusive distribution agreements and refusal to deal clauses which are in contravention of the provisions of section 3(4)(c) and (d) of the Act, respectively. The DG during the course of the investigation also found that a large number of OEMs, particularly those having foreign affiliations, were sourcing large number of spare parts from overseas suppliers and such overseas suppliers were not supplying spare parts to any entities apart from the OEMs. The DG, therefore, concluded that in such situations there may be a possibility of the existence of an unwritten arrangement between the OEMs and the overseas suppliers for ensuring that the spare parts are supplied to the OEMs or its authorized vendors only, which would be in violation of section 3(4)(c) and 3(4)(d) of the Act. With regard to the agreements between the OEMs and their authorized dealers, the DG has found that certain clauses of the agreements specifically restricted the sale of spare parts over the counter to third parties, which were in the nature of exclusive distribution agreements and amounted to refusal to deal under section 3(4)(c) and 3(4)(d) of the Act. Further, the DG has observed that, though certain agreements entered between the OEMs and their authorized dealers did not contain specific terms restricting the sale of spare parts in the open market, he concluded that there was an unwritten understanding or arrangement between such dealers and the OEMs, contrary to section 3(4)(b) of the Act as the dealers were found to be not selling spare parts in the open market.

2.13 The dealer agreements entered by and between the OEMs and their authorized dealers also contained restrictions on dealing with competing brand of cars and the dealers had to obtain the consent of respective OEMs in writing prior to entering into agreements with competitor brands. The DG has analyzed the appreciable adverse effect on competition ("AAEC") owing to the practices adopted by the OEMs in each of the secondary markets of spare parts and repair and maintenance services. The DG has found that there was AAEC on competition in terms of section 19(3) of the Act in the market of spare parts for each OEM on account of the restrictions such as exclusive supply agreements, refusal to deal and exclusive distribution agreements.

Findings of the DG with respect to Hyundai/HMIL:

3.1 As per the DG‟s investigation report, Hyundai is a 100% subsidiary of M/s Hyundai Motor Company, South Korea (HMC) and was incorporated in the year 1996. Hyundai is involved in the manufacture and sale of motor vehicles, spare parts, after sales and related activities. The wholesale distribution and supply chain solutions for Hyundai are currently being provided by M/s MOBIS India Ltd. ("MIL"). As such, the after sales market for spare parts of Hyundai brand of cars is catered to by MIL. The DG has been informed that MIL is a subsidiary of Mobis Korea which is a part of the Hyundai group and is engaged in the distribution of spare parts in several countries for HMC. Mobis Korea, as part of its global spare part management strategy, handles supply of spare parts in all the countries where Hyundai cars are sold. The specific findings of the DG against the alleged anti-competitive practices of Hyundai are summarized below: Hyundai has entered into a technology and royalty agreement with HMCfor supply of spare parts for its operations in India. On perusal of the said agreement, though the DG could not discover the existence of any clause(s) which prohibits the ability of the overseas supplier from selling directly to the aftermarket in India, the DG has reported that, "the fact that the overseas supplier is the parent company of Hyundai and only supplies spare parts to MIL (a group company of Hyundai for dealing with aftermarket requirements in India), indicates the existence of an arrangement between Hyundai and the overseas supplier for not supplying spare parts directly into the Indian aftermarket." The DG, after reviewing Hyundai's basic purchase agreement (entered with the OESs for supply of spare parts) and other purchase orders executed by Hyundai for procuring of spare parts from various OESs in India, found that such agreements contained clauses which restricted the OESs from supplying spare parts directly to the aftermarket. Such restrictions appeared to be due to use of drawings and designs of Hyundai. Further, based upon the submissions made by independent repairers and multi-brand retailers, the DG found that, in most cases, the dealers refused to sell spare parts in the open market and spare parts of only certain car models were made available over the counter. It was also discovered during the course of DG‟s investigation that the authorized dealers are being permitted to source spare parts from Hyundai directly or from its authorized vendors but not from the OESs who themselves supplied spare parts to Hyundai. Further, the DG has found that during the warranty period, owners of Hyundai cars are totally dependent on its authorized network as the warranty extended is liable to be invalidated if a Hyundai car is repaired by an independent repairer. The ability of the Hyundai dealers to deal in competing brands was also restricted. Hyundai's dealers are not permitted to deal with competing brands without seeking the prior permission of the OEM. The DG could not come across a single instance wherein such permission has been granted.

3.9 Further, the price mark up for top 50 spare parts in terms of revenue generated is observed to be in the range of 28.26% - 502.76% and price mark-up of top 50 spare parts on the basis of consumption is observed to be in the range of 50.04% - 644.68%. Though Hyundai has justified its restrictions on the basis of IPR and safety issues, it has failed to establish before the DG that it possesses valid IPRs in India, with respect to its spare parts for which restrictions are being imposed upon OESs. Further, the DG

has opined that refusal to supply diagnostic tools and spare parts by Hyundai to independent repairers amounts to denial of access to an "essential facility". The DG has concluded that the restrictions imposed upon the OESs and the authorized dealers, coupled with the restrictions on the independent repairers (non-availability of spare parts and diagnostic tools used for repairing of Hyundai brand cars) amounts to not only imposition of unfair terms under section 4(2)(a)(i) but also denial of market access under section 4(2)(c) of the Act. The substantial price margin earned on spare parts amounts to unfair pricing within the meaning of section 4(2)(a)(ii) of the Act. The DG has also found that Hyundai has leveraged its dominance in one relevant market (i.e., supply of spare parts) to protect the other relevant market (i.e. market for repair services) in violation of section 4(2)(e) of the Act.

4. Findings of the DG with respect to Reva:

4.1 Reva is a subsidiary of M/s Mahindra and Mahindra which holds 55% stake in Reva. It has been gathered from the public domain that Reva, formerly known as the Reva Electric CarCompany ("RECC"), is an Indian company based in Bangalore, involved in designing and manufacturing of compact electric vehicles. The company's flagship vehicle is the Reva electric car, available in 24 countries with more than 4,000 vehicles sold worldwide. Reva was acquired by the Indian conglomerate M&M in May 2010. The company has its manufacturing facility at the Bommasandra Industrial Area, Bangalore. The company has submitted that it has engaged dealers of M&M to deal in Reva cars and has a dealership network of 25 dealers across the country. During the course of investigation, the DG has found that Reva has executed purchase orders with overseas suppliers for supplying of spare parts for its operations in India. On perusal of the purchase orders, it was found that such overseas suppliers are restricted from supplying spare parts (which have been manufactured based on the designs supplied by Reva) directly into the aftermarket in India. With regards to the agreements with the local OES, the DG has found that OESs are restricted from selling spare parts manufactured based on design, drawing etc. supplied by Reva to other entities and in the open market. With respect to agreements entered with authorized dealers, the DG has analyzed the Letter of Intent ("LOI") but did not find any clause pertaining to the rights of dealers to undertake over the counter sales of spare parts. In actual practice, it was found by the DG that there was only limited availability of spare parts in the open market and there appeared to be an understanding between Reva and its dealers prohibiting the sale of spare parts over the counter. Further, the DG also discovered that, contrary to the contentions of Reva, the dealers of Reva were not permitted to deal with competing brands of cars in any manner without seeking the prior permission of Reva and no such permission had been granted in any instance by Reva. Again, the

users of Reva brand cars would stand to lose their warranty if they avail the services of independent repairers.

4.7 The Price mark up for 38 out of top 50 spare parts in terms of revenue generated is observed to be in the range of (-) 66.74% to 797.33% and price mark up of 42 out of top 50 spare parts on basis of consumption is observed to be in the range of (-) 66.74% to 1180.42%. The DG found that the non-availability of diagnostic tools and spare parts necessary to repair the Reva cars hampered the ability of independent repairers to effectively compete with the authorized dealers of Reva. Refusal to supply such diagnostic tools and spare parts was found by the DG to amount to denial of access to an "essential facility". Further, as per the DG's investigation, given the restricted availability of spare parts in the open market, non-availability of diagnostic tools and technical manuals, the ability of independent repairers to undertake repairs and maintenance service of the vehicles of Reva and effectively compete with the authorized dealers of Reva is significantly reduced, thereby amounting to denial of market access in terms of section 4(2)(c) and imposition of unfair condition on independent repairers in terms of section 4(2)(a)(i) of the Act. The pricing of spare parts has also been found to be unfair in terms of section 4(2)(a)(ii) of the Act. Reva is also found to be using its dominant position in the relevant market for supply of spare parts to enter and protect the relevant market for after sales services in contravention of section 4(2)(e) of the Act. The DG has also found that the agreements/arrangements entered by Reva with the OESs, overseas suppliers and authorized dealers are in the nature of exclusive supply, exclusive distribution and refusal to deal as contained in section 3(4)(b), 3(4)(c) and 3(4)(d) of the Act.

5. Findings of the DG with respect to Premier:

5.1 Premier is promoted by M/s Doshi Holding Pvt. Ltd., holding 43.36% of the voting capital in Premier. The company is, *inter-alia*, engaged in the businesses of manufacturing CNC machines, heavy engineering and automotives. The company also sells CNC machines, components for wind mills, auto components etc. The company operates in the automotive business segment and manufactures sports utility vehicles (SUV) and light commercial vehicles (LCV). Premier's manufacturing facility is located at Chinchwad, Pune. The company has 53 automobile dealers which are located in 53 cities.

5.3 The DG has reviewed the LOI executed by Premier with the local OESs for supplying of spare parts for Premier"s assembly line and aftermarket requirements and has found that the LOI contains clauses that restrict the OESs from supplying spare parts directly into the aftermarket. The DG has observed that the clause of the LOI require that all the spare part requirements shall be met through Premier and its authorized agents. Although Premier had maintained that its spare parts were freely available over the counter, it was not able to substantiate the said claim in any manner. Further, Premier has claimed that its consumers were under the warranty period at that time and therefore the need for over the counter sales has not arisen yet. Further, the warranty conditions of Premier were found to be such that the owners of Premier cars stand to lose their warranty if they avail the services of

independent repairers. Premier has claimed that it is open to technologically support the independent repairers, but as the cars sold by it are all within the warranty period and are not being catered by independent repairers, such contention of Premier remained untested. The DG, during the course of the investigation, did not discover any restrictions being imposed upon the dealers of Premier from dealing with competing brands. The DG could not find out as to whether Premier has marked up the price of its spare parts since Premier was not able to provide the prices of its top 50 spare parts as it had just started the initial market seeding of its vehicles for trial and consumer feedback and related data was not available. Further, the DG has stated that the availability of the diagnostic tools and spare parts in the future (when the consumers of Premier would be in the post warranty period) would be necessary for the independent repairers to repair the Premier cars and also essential to effectively compete with the authorized dealers of Premier. Consequently, in the opinion of the DG, denial to access such diagnostic tools and spare parts amounts to denial to access an "essential facility" and amounts to abuse of dominant position by Premier. The DG has also found that there are implied restrictions on Premier's OESs from supplying spare parts in the aftermarket and the fact that Premier's dealers are allowed to sell spare parts and diagnostic tools in the open market is an untested claim. In the view of the DG, such restrictions enable Premier to be the sole supplier of genuine spare parts in the aftermarket in India and consequently a dominant entity in the aftermarket for Premier branded cars. Further, Premier was also found to be in a position to restrict the availability of spare parts and diagnostic tools in the open market which would amount to an imposition of unfair condition and denial of market access to independent repairers in terms of sections 4(2)(a)(i) and 4(2)(c) of the Act. The DG also opined that provisions of section 4(2)(e) of the Act would be invoked since Premier was using its dominant position in one relevant market i.e. market of supply of spare parts to enter and protect other relevant market of after sales services, repair and maintenance of cars. The DG apprehended that Premier would be able to charge unfair prices for its spare parts in the post warranty periodin the absence of competition in the market for spare parts. The DG has also found that agreements/arrangements entered by Premier and its OESs are in the nature of exclusive supply and exclusive distribution, thereby violating section 3(4)(b) and 3(4)(c) of the Act.

6. Replies of the Parties:

6.1 At the outset it may be mentioned that the Commission, after considering the investigation report submitted by the DG, decided to forward copies thereof to all the 17 Opposite Parties for filing their replies/objections thereto vide its order dated 04.09.2012. Pursuant to that, Reva and Premier had filed their objections to the DG report but did not participate in the matter thereafter as their applications dated 01.02.2013 and 21.12.2012, respectively, filed by them under Regulation 26 of the General Regulations were taken on record but were kept pending. Further, pursuant to Madras High Court's order dated 06.02.2013 granting *ex parte* interim stay in the WP No. 31808/2012 filed by Hyundai challenging the jurisdiction of the Commission, the matter could not be proceeded *qua* Hyundai. At that time, the Commission decided to

pass an order with respect to the present OPs separately after passing the order with respect to the remaining 14 OEMs (OP 1 to 14 in the Main Order). In pursuance thereof, the Commission in its ordinary meeting held on 05.11.2014 directed the present Opposite Parties to appear before the Commission for oral hearing. Subsequently, in the ordinary meeting held on 12.02.2015, the present Opposite Parties were directed to file their replies/objections by way of written submissions to the DG report, if any. 6.3 The replies of the present Opposite Parties have been summarized in the following paragraphs.

6.4 Reply of Hyundai:

6.4.1 In its reply, Hyundai has submitted that the DG has drawn incorrect conclusions and erred in the application of competition law and established competition law principles, *interalia*, in (a) assessing the relevant market; (b) assessing the dominance of Hyundai; (c)assessing the conduct of Hyundai to be abusive; and (d) assessing the agreements between Hyundai on the one hand and OESs and dealers on the other to be anti-competitive. It was submitted that Hyundai is not dominant in any of the relevant markets as defined by the DG and has not engaged in any conduct which would be an abuse of a dominant position under the Act. In addition, Hyundai has not imposed any condition or engaged in any conduct that would constitute an infringement of Section 3 of the Act. On the contrary, the actions of Hyundai were claimed to be pro-competitive. It was contended that Hyundai has a large and one of the most accessible service and sales network as compared to other car manufacturers in India with 412 dealers and more than 1,087 service points located across India. Hyundai has also argued that the unorganized sector in India is characterized by a lack of skills and proper training because the independent repairers are averse to investing in training themselves for repairing of high end and executive premium cars. Further the absence of any effective government regulation and the problem of counterfeits are the major challenges being faced by the OEMs like Hyundai in the Indian market. It was averred that the DG had incorrectly relied upon thedevelopments in USA and EU, with respect to after-market services without considering the differences and dynamics of Indian Automobile Industry. Apart from the preliminary objections, Hyundai has submitted that the DG has fundamentally misconstrued the nature of Hyundai's relationship with its OESs. It was claimed that Hyundai's agreements with its OESs are 'subcontracting arrangements' and as such exclusivity in such arrangements fall outside the purview of Section 3 of the Act because such exclusivity is required to protect Hyundai's significant investments in developing its OESs and contributions to the manufacture of spare parts. Hyundai has further stated that even if the sub-contracting agreements are found to fall within the scope of Section 3, the designs, specifications, drawings and technologies provided by Hyundai to its OESs are protected by unregistered copyright and trade secret. In addition to Hyundai/ HMC drawings and specifications which are entitled to copyright protection, Hyundai has claimed that its drawings/know-how/specifications would also be conferred with IPprotection by virtue of them being confidential information. To substantiate the claim, Hyundai cited the judgment of the

Delhi High Court in ***Cattle Remedies and Anr. v. LicensingAuthority/Director of Ayurvedic and Unani Services***, wherein it has been observed that apartfrom specific statutes relating to trade mark, copyright, design and patent, etc., trade secrets are also a form of IP. Further, it was argued that Hyundai‟s agreements with its local OESs do not cause an appreciable adverse effect on competition in India

6.4.7 With regard to the findings on the Hyundai's agreements with its overseas suppliers, it was argued that the DG has failed to establish the existence of an 'agreement' and has wrongly relied on the mere 'possibility' of an agreement to conclude the existence of an agreement. Further, Hyundai has sought exemption for such agreements citing the established principle of 'single economic entity' doctrine as such agreements were between the Hyundai Group companies. It was contended that Hyundai encourages over the counter sale of spare parts and diagnostic tools by authorized dealers, dealer's branch and Hyundai authorized service centres and does not prohibit its dealers from taking competing dealerships and that a number of its dealers have competing dealerships. Hyundai objected to the relevant market identified by the DG based on the concept of after markets, stating that the correct relevant market in this case is a 'systems market' consisting of the sale of cars in India. 6.4.10 Further, it was contended that Hyundai has not abused its dominant position in the market for spare parts for Hyundai vehicles. DG's finding on the applicability of essential facilities doctrine was also objected to by Hyundai on the ground that such doctrine has very strict requirements. It was urged that there is no denial of access to spare parts for Hyundai vehicles as independent repairers have access to Hyundai branded spare parts as well as to OESs branded and non-branded spare parts. It was also argued that the DG has failed to show that the prices of Hyundai spare parts were unfair or excessive within the meaning of Section 4(2)(a)(ii) of the Act.

6.5 Reply of Reva:

6.5.1 Reva has submitted that it is in the business of manufacturing and sale of electric cars and is one of the pioneer companies to have introduced electric cars in the Indian market. Reva has stated that it remains committed to the cause of manufacturing and selling of a “green car” focusing on the ongoing research and development work on the Reva NXR car that will be launched next year. Reva has submitted that the company has sold only 4500 cars over the last11 years (less than 500 vehicles per year) since Reva was conceptualized in 2001 and it has a very negligible market share. Therefore, as per Reva, the size and resources of the company, when compared to other car manufacturers would reveal that the company has a miniscule share in the market. It was claimed that it has made no profits since the time of its inception. Reva has further submitted that the dealers of the company have not done any significant business over the past 3 years. The electronic components utilized in the Reva car are complex and the mechanics who repair the Reva car must either be diploma holders or automobile engineers, as per the company's standards. Reva has further stated that the company especially trains engineers for this purpose. In order to repair an electric car, specialized skills are required and safety being a critical parameter, the company

mandates training before attending to the electric vehicles as opposed to mechanical cars that run on petrol or diesel. It was submitted that *vis-à-vis* Reva's relationship with the OESs from whom it sources spare parts and components for its cars, Reva is on a receiving end because the OESs require minimum quantities to be ordered before they accept an order and this increases the company's costs manifold. Considering the low volume of work opportunity that Reva cars offer, there are not sufficient OESs who would be interested in manufacturing spare parts for Reva. With regard to the findings of the DG regarding agreements between Reva and its authorized dealers, Reva has stated that it has been using the support of the dealership network of the company's promoter's (Mahindra & Mahindra Limited) dealer network. Reva has stated that the company currently has 37 authorized dealers and workshops including certain multibrand workshops (who have been authorized by the company) in some cities. The company continues to be challenged by the fact that the dealers are reluctant to maintain a stock of the spares that may be needed because they do not consider the business as viable. Reva has submitted that since the number of Reva cars on the road is directly proportional to the demand for the spare parts and since the demand and the sale of the Reva cars are low, the spare parts requirements would also be limited. Reva has submitted that it has sought to ensure the availability and appointment of a dealer at least in those cities where there were at least 20 Reva cars registered. Additionally, for those consumers who approach the company and want to buy Reva cars in cities where the company has no dealerships and workshops, Reva attempts to maintain a force of service engineers who visit the residence of such consumers to repair and/or service the car. Reva has further stated that the consumer is made aware of the nonavailability of after sales service and signs an agreement with the company for the availability of offbeat service of the cars. Reva has submitted that it has not revised the price of its spare parts in the last three (3) financial years. Government of NCT of Delhi had initiated a scheme for granting of subsidy to battery operated vehicles (BOVs) sold in Delhi with a view to promote the use of such vehicles so that in due course they emerge as competitors to petrol driven vehicles in maintaining a cleaner environment. This, as per Reva, indicates that the Government and its agencies appreciate that the company needs all possible assistance to emerge as a competitor much less to be in a position to cause AAEC in the market or abuse its dominance. Reva has submitted a list of top 100 parts by quantity of the 583 odd parts that are supplied by the company for the Reva brand of car. Reva has submitted that out of these top 100 parts, there are no IPRs registered or claimed in India on any of the parts except the EMS (energy management system) Assembly on which the company claims patent rights (U.S. Patent No. 5487002). Reva has submitted that it had not applied for a patent on EMS in Indiaand it has no registered patents or designs with respect to any of these top 100 parts of the company in India. Further, out of the top 100 spare parts referred above, 74 parts have substitutes available in the open market, because (i) the manufacturer uses generic parts for the same, (ii) the manufacturer claims no copyright or other IPR on the same; (iii) not only the company's OESs but also third party suppliers and vendors supply this product into the open market and the same may be

procured by any independent repairer for using on the cars manufactured and sold by the company. Reva has justified its high mark up in the prices by stating that due to the low demand for its cars it is not possible for it to achieve any economies of scale. Lastly, Reva has submitted that it is not in a dominant position and, therefore, incapacitated to abuse its dominant position.

6.6 Reply of Premier:

6.6.1 Premier has submitted that both the primary and the secondary activities of the automotive sector constitute one distinct systems market and, therefore, the aftermarket definition provided by the DG is misplaced. The DG has failed to apply any of the factors stated in section 19(7) of the Act and that the relevant market identified by the DG does not confirm to the definition stated in section 2(t) of the Act since: (a) physically the spare parts are but a part of the end product, i.e., the vehicle and therefore a part of the same system and that the DG has erroneously disregarded the physical characteristics or end use of the goods whilst arriving at a conclusion on the relevant market since the end use of the spare part is the functionality of the vehicle and the consumer derives utility not from the spare part itself but by applying the same to the vehicle; (b) the consumer utility is derived only through the use of the final product, i.e., the vehicle and considering the availability of non-genuine products, it is the consumer's choice to opt for a non-genuine product as long as the customer can continue to derive utility by using the primary product; and (c) the primary activities and the secondary activities are undertaken by the same specialized producer and hence it would be erroneous to segregate the products into two separate markets.
6.6.2 Premier has stated that the DG has identified the relevant product market in a counter intuitive manner and that the DG fails to appreciate that in respect of the spare parts that are manufactured in-house, subject to sharing of know-how and technical information, there is no contractual or statutory prohibition on OESs to manufacture or supply the same. Premier has further submitted that with respect to the in-house manufactured auto components there is no after market demand. Further, as per Premier, the products sourced from local OES, diagnostic tools, technical manuals, software etc., are vehicle specific. Premier has submitted that it has a miniscule market share in the passenger vehicle sector and that the same has been acknowledged by the DG in the Reports. Further, it has been contended that even assuming that the alleged vertical restraints exists in terms of section 3(4)(b), (c) and (d) of the Act, the same must be viewed in terms of the minuscule market share of Premier in the passenger vehicle market. There were no restrictions on its OESs to sell its spare parts directly in the aftermarket and that the DG has erroneously disregarded the fact that the alleged restrictive clause is a part of the standard letter of intent issued to a supplier and this stands superseded by the purchase order once the development cycle of the component is over. The DG has made no conclusive finding as to whether there is an operative restriction on sale/supply of spare partsin the aftermarket which contravenes section 3(4) of the Act. The DG did not cite a single OESs who has been restricted/prohibited from dealing in the aftermarket by virtue of the alleged supply/distribution agreements

and failed to appreciate the viability of supplying to the aftermarket for the OESs. Premier has submitted that with the miniscule sale figures, it would be unrealistic for an OES to develop transportation and distribution networks, supply chains, packaging, credit risk, promotions and business development for the purpose of aftermarket sales catering to an odd 2000 vehicles (number of vehicles sold since 2009). Further, it submitted that several other OESs may not engage in direct sales/distribution on account of commercial unavailability, operational hazards or on account of business prudence.

6.6.6 There are no restrictions upon the dealers to source the spare parts from Premier and no restrictions have been imposed on its authorized dealers from undertaking any over the counter sales and the DG has not found any clause in the dealer agreements regarding the restriction on the dealers to undertake over the counter sales of spare parts. Given the fact that most of the cars manufactured by Premier are under warranty, there is no competition in the sector of aftermarket sales, repair and maintenance and that the post warranty period remains untested. Therefore, Premier has submitted that there are no conclusive findings by the DG that the agreements entered into by Premier would cause an AAEC. Even assuming that there was a vertical restraint in the nature of exclusive distribution, the same would be reasonable given the extensive warranty obligations taken up by Premier. At the relevant time, it was manufacturing a single car model, i.e., an SUV by the name of Premier Rio which was running in loss and was in the process of re-entering the Indian automotive sector. Premier has submitted that even assuming that it has applied certain vertical restraints in its dealing with local OESs, the same would be crucial to cement its re-entry in the Indian automotive sector and the pro-competitive effects of the entry of a new market entrant in the automotive sector far outweighs the anti-competitive effects, if any, especially since Premier had a miniscule market share in the Indian automotive sector.

6.6.9 With respect to the observations of the DG regarding the supply of spare parts by the overseas suppliers of Premier, directly into the aftermarket, Premier has stated that the conclusion reached by the DG is erroneous. Firstly, a perusal of the importer agreements have not revealed the existence of any restriction on the ability of the overseas supplier from directly selling the spare parts into the aftermarket; secondly, Premier's overseas suppliers are not catering to the aftermarket; and thirdly, there is no evidence to confirm that overseas suppliers are catering to the aftermarket. Premier has submitted that in the absence of any direct evidence from the overseas supplier, the conclusions reached by the DG should be excluded. With respect to the availability of technical and diagnostic tools, manuals, software, etc., Premier has stated that it would be dangerous to open up the market to an organized sector dominated by two or three players or the unorganized sector dominated by unskilled individual repairers and counterfeit spare parts. Premier has stated that in India there is no requirement of matching quality of spare parts available from nonauthorized sources and, consequently, any liability that such spare parts do not confirm with the legal certification requirements would have to be borne by Premier if independent repairers fail to use genuine spare parts/tools etc. The conclusions reached by the DG regarding the applicability of the “Essential Facilities Doctrine” to Premier are based upon a

comparison of the Indian automotive market with that of other mature automobile markets which is erroneous considering the massivecounterfeit/non-genuine spare parts market in India.

6.6.12 Further, Premier has stated that the reliance by the DG on the regulations of the European Union (EU) are erroneous since the quality control mechanism and the market realities of the Indian automobile sector and the EU automobile sector are very different and the EU regulations cannot be applied *mutatis mutandis* to the Indian scenario. Premier has also submitted that, the DG has observed that Premier is the sole supplier of the spare parts for Premier brand automobiles and hence is in a position to influence the ability of independent repairers to attend to its automobiles. However, the DG also opined that this position is untested since most of the Premier brand automobiles are still under warranty and thus are not being attended to outside the dealer network. Premier has submitted that since the DG could not make any conclusive finding as to whether Premier is abusing its alleged dominant position and in the absence of such a finding, merely a position of dominance should not be construed as a contravention of section 4 of the Act. During the course of the oral submissions, on 13.12.2012, Premier requested for striking out its name followed by a written application under Regulation 26 of the General Regulations dated 21.12.2012 on the grounds that (a) Premier has a miniscule market share (below 0.29%) in the Indian automotive market and that approximately only 2000 vehicles of a single model (Premier Rio) of Premier have been sold till date; (b) that the DG has found no evidence of contravention of the Act by Premier. It was also urged that the DG has erroneously: (i) relied upon certain statements of dealers of Premier stating that they source spare parts for Premier cars from Premier itself without analyzing that in the absence of any demand for spare parts in the aftermarket (during the course of the DG's investigation all Premier brand cars were within the warranty period) why would suppliers wish to retail Premier spare parts and (ii) relied upon a particular clause of the Premier LOI which stated that the spare parts need to be sourced from Premier or its authorized dealers, without analyzing the responses of the Premier's OESs, who have stated that they do not wish to enter the aftermarket for Premier spare parts; and (c) that based upon the DG's investigation, Premier has not abused its dominance under section 4 of the Act and further, the only conduct that can be considered as abusive under section 4(2) of the Act, are conducts that has already taken place and since Premier has not yet performed any of the abusive conducts enumerated in section 4(2) of the Act, it is not liable for abusing its dominance under the provisions of the Act.

7. Decision of the Commission:

7.1 The Commission has carefully gone through the material placed on record and submissions made by the present Opposite Parties. In addition to the substantive issues involved in the matter, objection regarding the jurisdiction of the Commission to inquire into the conduct of the OEMs who were not named specifically in the initial information filed by the Informant has also been raised. At the outset, it may be noted

that all the issues, preliminary as well as substantive, which need to be determined through this order have already been dealt with by the Commission in the Main Order in great detail. Before, dealing with the substantive issues the Commission deems it proper to deal first with the objections raised by Hyundai regarding the jurisdiction of the Commission in the present matter.

7.4 Determination of Preliminary Issue regarding jurisdiction of the Commission:

7.4.1 Hyundai has raised preliminary objection on the Commission's jurisdiction to investigate and proceed against any other Opposite Party other than the three OPs, *viz*., Honda, Volkswagen and Fiat, named in the original information. It has been urged that the DG had no power to investigate the conduct and agreements of Hyundai as the Informant did not raise any allegations against it for any violation of the provisions of the Act. The issue of jurisdiction has been dealt with in length in the Main Order wherein the Commission rejected this plea taken by the other OPs. The Commission is a statutory body, established under the Act with the legislative mandate inter alia to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets, in India. To perform the above mentioned functions, under the scheme of the Act, the Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. As such, the purpose of filing information before the Commission is only to set the ball rolling as per the provisions of the Act. The Commission further mentioned that the scope of inquiry is much broader and the Commission during its inquiry is not restricted to consider the material placed by the parties only. The direction under section 26(1) is an administrative direction to the DG for investigation of the contravention of the provisions of the Act, without entering upon any adjudicatory or determinative process. During the investigation, the DG may come to know that not only the parties named in the direction of the Commission but also other players in the same industry are also involved in the alleged anti-competitive conduct. In such a case to hold that the Commission cannot direct the DG to investigate the conduct of other parties would not only render the inquiry inchoate but would further deprive the Commission from delivering complete justice in the matter and also lead to multiplicity of proceedings relating to the same type of conduct, which the law always seeks to avoid. On the basis of this reasoning, the Commission in its Main Order had held that there was no irregularity in allowing the request of the DG for investigating the conduct of all the OEMs suspected to be indulging in anti-competitive activities. Challenging the jurisdiction of the Commission, Hyundai had filed a Writ Petition which was admitted in the Madras High Court on 28.11.2012. The Madras High Court, vide interim order dated 06.02.2013 allowed *ex parte* interim stay of proceedings against Hyundai. The Writ Petition was finally disposed off by the final order dated 04.02.2015, wherein the Madras High Court confirmed the jurisdiction of the Commission. The Madras High Court, in its order dated 04.02.2015, has observed that though DG cannot initiate an investigation *suo motu*, the real question is whether in the case on hand, what was done

by the DG would tantamount to *suo motu* initiation of investigation or not. The Madras High Court answered the question in negative. While commenting on the scope of the DG‟s investigation, the Madras High Court opined that the DG placed additional information before the Commission. The Commission then passed an order on 26.04.2011. Thereafter, the DG issued a notice to the writ petitioner on 04.05.2011, only in compliance of the directions issued under Section 41(1) of the Act. Citing the foregoing reasons, Madras High Court's order unequivocally held that neither the DG nor the Commission have overstepped the jurisdiction vested in them by law. Even otherwise, since all the OPs were given ample opportunity to present their case and all the OPs have submitted their detailed objections to the DG report,presented their oral arguments and filed their written submissions before the Commission, the Commission is of the view that there has been no procedural irregularity as such in the present case.

7.4.6 In view of the aforesaid, the Commission is of the view that the contention raised by Hyundai challenging the jurisdiction of the Commission is devoid of any merit, especially in the light of the Madras High Court's order dated 04.02.2015.

7.4.7 Before moving to the substantive issues, the Commission feels it appropriate to deal with the applications filed by Reva (dated 01.02.2013) and Premier (21.12.2012) under Regulation 26 of the General Regulations. Reva and Premier have alleged before the Commission that the order dated 05.11.2014 wherein these parties were asked to present their objections to the DG's report was bad in law as the Commission had already exonerated them in the matter. Reva has submitted that during the course of the hearing, on 04.02.2013, the Commission had informed the representatives of Reva that it has taken note of its prayers and has accordingly exonerated Reva from the allegations of the DG's Report and that a substantive order in this regard would be passed in due course. It was further stated that the order of the Commission dated 05.03.2013, had explicitly mentioned that the Commission is considering the application filed on behalf of Mahindra Reva for exemption under Regulation 26 of the General Regulations. Similarly, Premier stated that in its order dated 08.02.2013, the Commission had mentioned that it is considering the application filed on behalf of Premier for striking off its name from the array of Parties. It was also submitted by the aforementioned parties that in the order of the Commission dated 28.05.2013, the Commission had sought additional information from the OPs other than Reva and Premier. Citing these reasons, Reva and Premier have requested, recall of Commission's order dated 05.11.2014 through which the Commission has re-initiated proceedings against them in the present matter.

7.4.8 The Commission has considered the submissions and applications filed by Reva and Premier and perused all the dated orders mentioned above. Based on a combined reading of all the material, it appears that both Reva and Premier have misconstrued the orders and directions of the Commission. During the pendency of the proceedings in Case No. 03/2011, the Commission had only taken on record the applications filed by Reva (dated 01.02.2013) and Premier (dated 21.12.2012) under Regulation 26 of the General Regulations. Since, the final determination on the issue of relevant market definition was pending at that moment; the Commission had put those applications on hold as the determination of the relevant market will have a great bearing on the

decision by the Commission on those applications. This is evident from the orders of the Commission dated 08.02.2013 and 05.03.2013 wherein the Commission had categorically stated that the order on such applications will be passed in due course. 7.4.9 Thereafter, the Commission, at the time of passing the Main Order with respect to 14 other Opposite parties, had made it clear that it shall pass a separate order in respect of the present OPs, *viz.* Hyundai, Reva and Premier after affording them a reasonable opportunity to make their submissions in respect of the findings in the DG report and queries raised by the Commission. The Commission, had only deferred its order with respect to these three Opposite Parties and had not at any point of time, exonerated any of them from the proceedings. The contention raised by Reva and Premier that they should be exempted owing to their miniscule market share in the car segment would also be dealt with later in this order. At this juncture, it would suffice to say that the Commission did not exonerate at any time any of these abovesaid parties from the proceedings.

8. Determination of Substantive Issues:

(1) Issue 1: Whether the present Opposite Parties have violated the provisions of section 4 of the Act?
(2) Issue 2: Whether the present Opposite Parties have violated the provisions of section 3 of the Act?

8.1 Issue 1: Whether the present Opposite Parties have violated the provisions ofsection 4 of the Act?

8.1.1 It has already been mentioned before that the present order is in continuation of the Main Order of the Commission. Consequently, this order should be read in continuation with and as an extension of that Main Order.

Determination of the Relevant Market:

8.1.2 The Commission has discussed in detail the principles governing the determination of the relevant market generally and more specifically for the case at hand in its Main Order and therefore, only the main observations and findings are reproduced hereunder. After considering the relevant provisions of the Act, findings of the DG report, conceptual framework relating to the issues with respect to the “aftermarkets” and “systems market” as concepts of competition law, submissions made by the OPs and other material placed on record, the Commission accepted the aftermarkets definition as opposed to the concept of 'unified systems market' definition advocated by the OPs to argue that the sale of cars and spare parts together constitute a single market. The Commission had held that there exist two separate relevant markets: one for manufacture and sale of cars, and another for sale of spare parts. The latter is further divided into two sub-segments, consisting: (a) supply of spare parts, including diagnostic tools, technical manuals, catalogues etc. for the aftermarket usage

and (b) provision of aftersale services, including servicing, maintenance and repair services for vehicles. Further the Commission held that a 'cluster market' exists for all the spare parts for each brand of cars, manufactured by the OEMs, in the Indian automobile market. The Commission rejected the OEMs systems market definition primarily on two grounds - firstly, the consumers/buyers in the primary market (manufacture and sale of cars) do not undertake (and are not capable of undertaking) whole life cost analysis when buying the automobile in the primary market and secondly, reputation effects do not deter the OEMs from setting supra competitive price for the secondary product. The Commission, relying on the hard reality as depicted by the facts, concluded that in-spite of reputational factors, as argued by the Opposite Parties, each OEM has in practice substantially hiked up the price of the spare parts (usually more than 100% and in certain cases approx 5000%); thereby rebutting the theory that reputational concerns in the primary market usually dissuade the OEM from charging exploitative prices in the aftermarket. 8.1.4 With regard to the relevant geographic market, the Commission held that the relevant geographic market consists of the entire territory of India as a car owner can get his car serviced or repaired from repair shops located across the territory of India. The Commission isof the view that the relevant market definition with respect to the present OPs would be the same as provided in the Main Order. Therefore the relevant market in the present case would be as follows:

(i) manufacture and sale of cars in India,

(ii) sale of spare parts in India.

a. supply of spare parts, including diagnostic tools, technical manuals, catalogues etc. for the aftermarket usage in India and;

b. provision of aftersale services, including servicing of vehicles, maintenance and repair services in India Assessment of Dominance of OEMs

8.1.6 In its Main Order, the Commission noted that the underlying principle in the definition of a dominant position is linked to the concept of market power which allows an enterprise to act independently of competitive constraints. Such independence enables an enterprise to manipulate the relevant market in its favour to the economic detriment of its competitors and consumers. It was further revealed during the investigation of the DG that each OEMs had entered into various agreements with their overseas suppliers or OESs to ensure that they become the sole supplier of their own brand of spare parts and diagnostic tools in the aftermarket. The OEMs pursuant to such agreements have effectively shielded themselves from any competition. The Commission also took into account the DG's finding that various multi brand repairer/maintenance service providers were unable to cater to the demand of the customers to service their automobile because of the nonavailability of the spare parts of the OEMs in the open market. Taking into consideration the aforesaid, the Commission held that each OEM is a 100% dominant entity in the aftermarket for its genuine spare parts and diagnostic tools and correspondingly in the aftermarket for the repair services of its brand of automobiles. The Commission discarded the argument raised by various OEMs that they hold a miniscule market share in the primary market of sale of cars and therefore, miniscule share in the aftermarket. It was observed by the

Commission, that each OEM has a clear competitive advantage in the aftermarket for sale of spare parts/diagnostic tools and repair services for their respective brand of automobiles, irrespective of the market share they hold in the primary market.

8.1.9 Similarly, with respect to Hyundai, Reva and Premier also, the Commission is of the view that considering the technical compatibility between the products in the primary market and the secondary market, they hold 100% market share and are dominant in the aftermarket of their respective genuine spare parts and diagnostic tools and correspondingly in the aftermarket of their respective repair services for their brand of automobiles. Considering the adoption and application of after markets theory in defining the relevant market in the present case, the argument put forward by Reva and Premier in their respective applications filed under Regulation 26 of the General regulations is liable to be rejected. Since each OEM is dominant in the aftermarket irrespective of the market share it has in the primary market, there is no reason why Reva and Premier should be excluded from the array of OPs. Those applications are, therefore, rejected.

8.1.10 As per the specific findings of the DG report, the present Opposite Parties have ensured through their agreements with the local OESs and overseas suppliers that the independent repairers are not able to effectively compete with the authorized dealers in the secondary market for repairs and maintenance services by denying them access to the required spare partsand diagnostic tools to complete such repair work. Finally, the warranty conditions which the present Opposite Parties impose on their consumers dissuade them from availing the services of independent repairers. In conclusion therefore, the Commission has no hesitation in holding that Hyundai, Reva and Premier hold a position of strength which enables them to affect their competitors in the secondary market, i.e., independent service providers in their favour, thereby limiting consumer choice and forcing the consumers to react in a manner which is beneficial to them, but detrimental to the interests of the consumers.

Abuse of Dominant Position:

8.1.11 A perusal of the agreements entered between OEMs (Hyundai, Reva and Premier) and local OESs and between OEMs and their respective overseas suppliers makes it abundantly clear that these OEMs have imposed restrictions on the supply of genuine spare parts to the independent repairers. In the case of Premier, the DG has found that the LOI executed between Premier and the local OESs for supplying of spare parts for Premier's assembly line and aftermarket requirements contained clauses that restrict the OESs from supplying spare parts directly into the aftermarket. The clauses require that all requirements for spare parts shall be met through Premier and its authorized agents. In case of Reva, the DG has found a restrictive covenant in the purchase order placed by Reva on its local OES. Further in the case of Hyundai, though the DG could not find a specific clause but the DG has found implied agreement on the basis of facts revealed during the investigation. The DG has examined the technology and royalty agreement entered between Hyundai and its overseas supplier, HMC, for supply of spare parts for its operations in India. Though

the DG, on perusal of such agreement, could not discover the existence of any clauses which restricts the ability of the overseas supplier from selling directly into the aftermarket in India, the DG has reported the fact that the overseas supplier is the parent company of Hyundai and only supplies spare parts to MIL (a group company of Hyundai for dealing with the aftermarket requirements in India), indicates the existence of an arrangement between Hyundai and its overseas supplier for not supplying spare parts directly into the Indian aftermarket. Further, the DG has found that the basic purchase agreement (entered with the OESs by Hyundai for the supply of spare parts) and other purchase orders executed by Hyundai for procuring spare parts from various OESs in India contained clauses that restrict the OESs from supplying spare parts directly into the aftermarket which are based upon the drawings and designs of Hyundai.

8.1.13 On the basis of the foregoing discussion, the Commission is of the view that the conduct of Hyundai, Reva and Premier amounts to a denial of market access to the independent repairers to procure genuine spare parts in the aftermarket. As discussed earlier, each OEM holds a dominant position in the aftermarket for its own brand of spare parts and diagnostic tools and is in effect the sole supplier of such spare parts and diagnostic tools in the aftermarket. Therefore, the practice of the OEMs in denying the availability of its genuine spare parts severely limits the independent repairers and other multi brand service providers in effectively competing with the authorized dealers of the OEMs in the aftermarket. Such practices amounts to denial of market access by the OEMs under section 4(2)(c) of the Act. Further, the investigation by the DG has revealed that Hyundai and Reva earn a considerable mark up margin and the margin earned significantly varies across the spare parts. The DG hasfound that a substantial mark up was being earned in most of the top 50 spare parts sold by each of the OEMs.

8.1.16 On the issue of leveraging, the Commission had held that since the car owners purchasing spare parts have to necessarily avail the services of the authorized dealers of the OEMs, OEMs have used their dominance in the relevant market of supply of spare parts to protect the relevant market for after sales service and maintenance thereby violating Section 4(2)(e) of the Act. Further, since the access to specialized diagnostic tools, fault codes, technical manuals, training etc. is critical for undertaking maintenance and repair services of such vehicles, the independent repairers are substantially handicapped from effectively attending to the aftermarket requirements of automobiles due to the lack of access to specialized diagnostic tools. Further, it may be noted that the facts pertaining to the present OPs are substantially similar to the other OEMs considered in the Main Order. Applying the same reasoning, therefore, the Commission is of the view that the conduct of the present OEMs is in contravention of section 4(2)(e) of the Act. 8.1.17 In view of the aforesaid, the Commission finds Hyundai, Reva and Premier to be indulging in abuse of their dominant position thereby contravening the provisions of section 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act.

9. Issue 2: Whether the present Opposite Parties have violated the provisions of section 3 ofthe Act?

9.1.1 A perusal of the DG report shows that the OEMs source spare parts for their assembly line and aftermarket requirements from the overseas suppliers and other local OESs, pursuant to the agreements with such overseas suppliers and the local OESs. The OEMs then distribute the spare parts in the aftermarket and also provide after-sale repairs and maintenance services to their various models of cars through their network of authorized dealers. Therefore, as noted in the Main Order, the OEMs enter into three types of agreements: (a) agreements with overseas suppliers; (b) agreements with local OESs and (c) agreements with authorized dealers. The analysis of these agreements in respect of the present Opposite Parties i.e. Hyundai, Reva and Premier is entailed in the following paragraphs. Analysis of agreements/arrangements entered between the OEMs and their overseas suppliers. During the investigation, the DG has analyzed the importer agreements entered by the OEMs (Hyundai and Reva) with their overseas suppliers. The DG, in case of Hyundai, examined the technology and royalty agreement entered between Hyundai and its overseas supplier, HMC, for supply of spare parts for its operations in India. Though the DG, on perusal of such agreement, could not discover the existence of any clauses which restricted the ability of the overseas supplier from selling directly into the aftermarket in India, the DG has reported that, the fact that the overseas supplier is the parent company of Hyundai and only supplies spare parts to MIL (a group company of Hyundai for dealing with aftermarket requirements in India), indicates existence of an arrangement between Hyundai and such overseas supplier for not supplying spare parts directly into the Indian aftermarket. Further, in case of Reva, the DG has found that it has executed purchase orders with the overseas suppliers for supplying of spare parts for its operations in India. As per Reva's statements before the DG, the purchase order contained terms and conditions that govern the relationship between Reva and its overseas suppliers. Onperusal of such purchase orders, it was found that such overseas suppliers were restricted from supplying spare parts (which have been made with the design of Reva) into the aftermarket in India. Since Premier was found to be procuring all its spare parts from local OESs, there was no finding of the DG against Premier under this sub-head.

9.1.4 On the basis of DG's findings, it is evident that Hyundai and Reva have restricted their respective overseas suppliers from directly supplying spare parts in the aftermarket in India. Hyundai has claimed exemption for such agreements by citing the doctrine of 'single economic entity'. The concept of single economic entity is generally applicable only if there exists inseparability in the economic interest of the parties to the agreement. Therefore, it is a mixed question of law and facts, to be decided based on the facts and circumstances of each case. Considering the facts in this case, the agreement between Hyundai and HML may not be held violative of section 3 of the Act. The purchase orders with respect to Reva are found to be between Reva and an independent overseas supplier. Therefore, the doctrine of single economic entity will not be applicable to Reva. Analysis of agreements/arrangements between the OEMs

and the OESs The second category of agreements that the OEMs enter into are with the local OESs for the procurement of spare parts for both assembly line and aftermarket requirements. As noted in the order dated 25.08.2014, the spare parts supplied by the OESs can be broadly categorized under the following heads:
(1) Where the design, drawing, technical specification, technology, knowhow, toolings (which are essentially large machines required for manufacture of the spare parts), quality parameters etc., are provided by the OEMs. The OESs are required to manufacture and supply such spare parts according to the specified parameters;
(2) Where the patents, know-how, technology belongs to the OES, however, the parts are manufactured based on the specifications, drawings, designs supplied by the OEM. The tooling/tooling cost may also be borne by the OEM in some of these cases; and
(3) Where the spare parts are developed by the OESs as per their own specifications or designs or designs and specifications which are commonly used in the automobile industry. Such parts are very few for example, batteries, tyres etc.
9.1.7 As per the DG's report, it has been observed that those OESs supplying spare parts pursuant to agreements/arrangements which fall within category (1) and (2) above; cannot supply spare parts directly into the aftermarket without seeking prior consent of the OEMs. Although the present OPs have alleged that they do not restrict sale of spare parts after prior consent in the aftermarket, the DG's investigation has not revealed any instance where written consent has been granted by OEMs to OESs to supply spare parts directly into the aftermarket. 9.1.8 On the basis of the findings of the DG report and the submission made by the parties, the Commission is of the view that none of the present three OEMs allow their OESs to supply genuine spare parts directly into the aftermarket. Also, all the three OEMs have justified their restrictions on the basis of IPR protection and sought an exemption under section 3(5)(i) of the Act. Accordingly, the Commission deems it appropriate to assess whether such an exemption is available to these OEMs or not before concluding that the agreements between the OEMs and the OESs are in the nature of "exclusive distribution agreements" and "refusal to deal" as contemplated under section 3(4)(c) and 3(4)(d) read with section 3(1) of the Act respectively.

9.1.9 IPR exemption: All the present Opposite Parties have claimed IPR exemptions statingthat on account of the provisions of section 3(5)(i) of the Act, the restrictions imposed upon the OESs from undertaking sales, of their proprietary parts to third parties without seeking prior consent would fall within the ambit of reasonable condition to prevent infringements of their IPRs. The Commission has already clarified in its Main Order that while determining whether an exemption under section 3(5)(i) of the Act is available or not, it is necessary to consider, inter alia, the following: a) whether the right which is put forward is correctly characterized as protecting an intellectual property; and b) whether the requirements of the law granting the IPRs are in fact being satisfied.
9.1.10 After analysis of the material placed on record with regard to the other 14 OEMs in the Main Order, the Commission had held that the exemption enshrined under section 3(5)(i) of the Act was not available to those OEMs for the following reasons: OEMs had failed to submit the relevant documentary evidence to successfully

establish the grant of the applicable IPRs in India, with respect to the various spare parts. OEMs had failed to show that their restriction amounted to imposition of← reasonable conditions, as may be necessary for protection any of their rights. In the light of these observations, therefore, the Commission will ascertain as to whether the exemption under section 3(5)(i) of the Act would be available to Hyundai, Reva and Premier. At the outset it may be noted that as per the observations of the DG and the submissions made by the present Opposite Parties, none of them own any registered IPR on any of their spare parts as such in India. It has been admitted by Hyundai and MIL that they do not possess any valid IPRs in India except for its trademark/logo. The DG has further reviewed the license agreement entered into between Hyundai and HMC and opined that such agreement does not specify the technologies, patents, knowhow, copyrights and other IPRs which are being granted to Hyundai. Similarly, Reva and Premier have also admitted that none of their spare parts are covered by IPRs in India. Further, it needs to be clarified here that though registration of an IPR is necessary, the same does not automatically entitle a company to seek exemption under section 3(5)(i) of the Act. The important criteria for determining whether the exemption under section 3(5)(i) is available or not is to assess whether the condition imposed by the IPR holder can be termed as "imposition of a reasonable conditions, as may be necessary for the protection of any of his rights". The Commission is of the view that the concept of protection of an IPR is qualified by the word "necessary". So the relevant question is whether in the absence of the restrictive condition, would the IPR holder be able to protect his IPR. The Commission has dealt with this question in detail in its Main Order. Suffice to conclude that mere selling of the spare parts, which are manufactured end products, does not necessarily compromise upon the IPRs held by the OEMs in such products. Therefore, the OEMs could contractually protect their IPRs as against the OESs and still allow such OESs to sell the finished products in the open market without imposing the restrictive conditions. Furthermore, the Commission is of the view that none of the present three OEMs are eligible to seek exemption under section 3(5)(i) of the Act for the agreements entered between OEMs and OESs. As such, the contravention under section 3(4)(c) and 3(4)(d) read with section 3(1) of the Act for exclusive distribution agreement and refusal to deal stands established. Before we part with this issue, it may be relevant to point out the contention made by Hyundai in this regard. In addition to Hyundai/ HMC drawings and specifications which are entitled to copyright protection, Hyundai claimed that its drawings/knowhow/specifications would also be conferred IP-protection by virtue of being confidential information. Tosubstantiate its claim, Hyundai cited the judgment of the Delhi High Court in ***Cattle Remediesand Anr. v. Licensing Authority/Director of Ayurvedic and Unani Services***, wherein it hasbeen observed that apart from specific statutes relating to trade mark, copyright, design and patent, etc., trade secrets are also a form of IP. The contention of Hyundai is without any merit and is liable to be rejected. With regard to the trade secrets and confidential knowledge, the Commission is of the view that they are not among the listed categories of IPR laws and thus, Hyundai cannot claim any exemption under section 3(5)(i) of the Act.

Analysis of agreements/arrangements between the OEMs and the authorized dealers:
9.1.16During the course of the investigation, the DG has examined the conduct of Hyundai, Reva and Premier with respect to their dealing with their authorized dealers and the terms and conditions of the agreements with them for the sale of automobiles in the primary market and the sale of spare parts and provision of maintenance services in the secondary market. From the perusal of the agreements, the DG has reported the following observations: Though Hyundai has alleged that there is no restriction on the Authorized dealers to make over the counter sale of the spare parts, diagnostic tools etc., it could not substantiate its claims. With regards to Reva, the DG has concluded that the LOI issued to the authorized dealers did not impose any restriction on the over the counter sale of such spare parts. The DG has also observed that the data furnished by Reva suggested that the sale of such spare parts was taking place over the counter. However, taking into account the submissions of independent repairers that such spare parts were available only to a limited extent and not freely, the DG has concluded that there is an implied understanding between Reva and its authorized dealers regarding non-supply of spare parts over the counter. Similarly in case of Premier, the DG has reported that Premier has stated that it allows over the counter sale to the independent repairers of its spare parts, such claim however remains unsubstantiated.
9.1.21 It should be noted that as per the provisions of section 3(4) of the Act, only agreements which cause or are likely to cause an AAEC on competition in India, shall be subject to the prohibition contained in section 3(1) of the Act. Therefore, in order to determine if the agreements entered between the OEMs and the authorized dealers are in the nature of an "exclusive distribution agreement" or "refusal to deal" under section 3(4)(c) and 3(4)(d) of the Act, the Commission needs to determine if such agreements cause an AAEC in the market based upon the factors listed in section 19(3) of the Act.
9.1.22 The Commission has taken note of the justifications offered by the Opposite Parties for imposing restrictions through agreements on the authorized dealers with respect to over the counter sales. The justifications provided by them were as follows: (i) the independent operators may not possess the skills required to replace the parts and undertake repairs thereby causing health hazards, (ii) widespread availability of counterfeit parts; (iii) parallel resale network if established would conflict with the distribution network etc. It may be noted that these justifications have already been rejected by the Commission in respect of the other 14 OPs in the Main Order. Therefore, there is no need to go into the detail of the propriety of such justification with regard to the present three OPs. Additionally, it was found that all these OEMs had stringent warranty conditions which required their customers to only get their automobile repaired through their authorized service network of dealers otherwise their warranty would be invalidated. Therefore, the Commission is of the view that the present OPs, either specifically through theiragreements or otherwise through understanding with their dealers, have restricted/prohibited the sale of spare parts over the counter, thereby resulting in prescribing exclusive distribution agreements and refusal to deal in terms of Section 3(4)(c) and 3(4) (d) of the Act. Further the present OPs, either specifically through their agreements or otherwise through their understanding with their dealers, require them to source spare parts only from them or

their approved vendors. These agreements are found to be in the nature of exclusive supply agreements in terms of Section 3(4)(b) of the Act.

ORDER

10. In view of the aforesaid discussions and for reasons recorded in this order as well as the general findings in its Main Order, the Commission is of the considered opinion that the three OPs *viz.* Hyundai, Reva and Premier have contravened the provisions of sections 3(4)(b), 3(4)(c), 3(4)(d), 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act, as applicable.

11. It may be noted that the Commission in the Main Order has provided the following directions to the OPs u/s 27 of the Act:-

i) The parties are hereby directed to immediately cease and desist from indulging in conduct which has been found to be in contravention of the provisions of the Act.

ii) OPs are directed to put in place an effective system to make the spare parts and diagnostic tools easily available through an efficient network.

iii) OPs are directed to allow OESs to sell spare parts in the open market without any restriction, including on prices. OESs will be allowed to sell the spare parts under their own brand name, if they so wish. Where the OPs hold intellectual property rights on some parts, they may charge royalty/fees through contracts carefully drafted to ensure that they are not in violation of the Competition Act, 2002.

iv) OPs will place no restrictions or impediments on the operation of independent repairers/garages.

v) The OPs may develop and operate appropriate systems for training of independent repairer/garages, and also facilitate easy availability of diagnostic tools. Appropriate arrangements may also be considered for providing technical support and training certificates on payment basis.

vi) The OPs may also work for standardization of an increasing number of parts in such a manner that they can be used across different brands, like tyres, batteries etc. at present, which would result in reduction of prices and also give more choice to consumers as well as repairers/service providers.

vii) OPs are directed not to impose a blanket condition that warranties would be cancelled if the consumer avails the services of any independent repairer. While necessary safeguards may be put in place from safety and liability point of view, OPs may cancel the warranty only to the extent that damage has been caused because of faulty repair work outside their authorized network and circumstances clearly justify such action.

viii) OPs are directed to make available in the public domain, and also host on their websites, information regarding the spare parts, their MRPs, arrangements for availability over the counter, and details of matching quality alternatives, maintenance costs, provisions regarding warranty including those mentioned above, and any such other information which may berelevant for full exercise of consumer choice and facilitate fair competition in the market.

12. The above stated directions apply to the present OPs with the same force and the Commission hereby directs them to abide by the same with immediate effect. As regards the imposition of the penalty under section 27 of the Act, the Commission has already taken into account the aggravating factors and mitigating factors that apply to the automobile sector generally and the present OPs specifically. Apart from the general factors taken into account in the Main Order, the Commission notes that there are other specific mitigating factors that are applicable to Premier and Reva.

13. The Commission is of the view that though Premier was found to be dominant in the aftermarket for its genuine spare parts and diagnostic tools and correspondingly in the aftermarket for the repair services of its brand of automobiles, its conduct remained untested during the DG investigation. It is to be noted that at the relevant time period of the investigation, all Premier cars were under warranty and as such the conduct of Premier with respect to abuse of dominance remained untested. Furthermore, Premier did not impose any restrictions on its authorized dealers to deal with vehicles of competing brands. In the case of Reva, the Commission has noted that with respect to the agreements entered with the authorized dealers, the DG during the investigation has found that its spare parts were, to some extent, available over the counter.

14. The mitigating factors stated above work in favor of Premier and Reva. The Commission finds it appropriate to not to impose any monetary penalty on Premier and Reva, though other directions reproduced in para 11 above would apply to them in the same manner as other OPs in the Main Order.

15. Hyundai has, *inter alia*, urged before the Commission that its case is entirely different from the other OEMs and, therefore, it deserves a reduced penalty. It has been contended that the excessive pricing by the other OEMs was extremely high as compared to Hyundai. It was further urged that it is the very first competition law infringement case against Hyundai and it has effectively cooperated with the DG and also with the Commission. Hyundai also submitted that it allowed over the counters sales partially. It was also contended that the automobile sector is being investigated for the first time and, therefore, no fine should be levied. It may be noted that most of the factors cited by Hyundai are general in nature which do not qualify for a reduced penalty. 16. In view of foregoing, the Commission is of the opinion that a penalty of 2% of the total turnover in India may be imposed on Hyundai. Resultantly, a penalty of 420.2605 crores (Rupees Four Hundred and Twenty Crores, Twenty Six Lakhs and Five Thousand only)— calculated at the rate of 2% of the average income of Hyundai for three financial years is hereby imposed on it.

18. The directions of the Commission contained in paragraph 11 and 12 of this Order will have to be complied with by the present OPs in letter and spirit. Each OP is directed to file an individual undertaking, within 60 days of the receipt of their order, about compliance to cease and desist from the present anti-competitive conduct, and initiation of action in compliance of the other directions. This will be followed by a detailed compliance report on all directions within 180 days of the receipt of the order. The amount of penalty will have to be paid by Hyundai within 60 days of the receipt of this order.

19. The Secretary is directed to inform the parties accordingly.

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Rajasthan Cylinders and Containers Limited v. Union of India and Another

CIVIL APPEAL NO. 3546 OF 2014
Decided on 1.10.2018

A.K. SIKRI, J.

1) All these appeals are filed against the orders dated 20th December, 2013 passed by the Competition Appellate Tribunal (hereinafter referred to as 'COMPAT'). The COMPAT by the said judgment has upheld the findings of the Competition Commission of India (for short, 'CCI') that the appellants/suppliers of Liquefied Petroleum Gas (LPG) Cylinders to the Indian Oil Corporation Ltd. (for short, 'IOCL') had indulged in cartelisation, thereby influencing and rigging the prices, thus, violating the provisions of Section 3(3)(d) of the Competition Act, 2002 (for short, the 'Act').

2) We may point out at the outset that all these appellants are manufacturing gas cylinders of a particular specification having capacity of 14.2 kg which are needed for use by the three oil companies in India, namely, IOCL, Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL) [all public sector companies]. It is also a matter of record that apart from the aforesaid three companies there are no other buyers for these cylinders manufactured by the appellants. Insofar as IOCL is concerned, it is a leading market player in LPG as its market share is 48%. Thus, in case a particular manufacturer is not able to supply its cylinders to the aforesaid three companies, there is no other market for these cylinders and it may force that company to exit from its operations.

4) The suo-motu proceedings were started by the CCI on the basis of the information received by it in Case No. 10 of 2010 titled M/s. Pankaj GasCylinders Ltd. Vs. Indian Oil Corporation Ltd. in that case a complaint wasmade by M/s. Pankaj Gas Cylinders before the CCI complaining about unfair conditions in the tender floated by IOCL for the supply of 105 lakh 14.2 Kg. capacity LPG Cylinders with SC valves in the year 2010-11, the tender No. being LPG-O/M/PT-03/09-10. While considering the Director General's investigation report in Case No. 10 of 2010, the CCI in pursuance of its duties under Section 18 felt that investigation was necessary in the case of all bidders who were the suppliers of 14.2 kg. LPG cylinders in that tender. In the investigation report in the said case, the Director General had noted that out of 63 bidders who participated in the tender, 50 bidders were qualified for opening of price bids, while 12 bidders were qualified as new vendors who were not required to submit price bids and one bidder was not qualified for the opening of the price bid. The technical bid of the subject tender was opened on 3.3.2010 and the price bids of 50 qualified bidders were opened on 23.3.2010. According to the Director General, there was a similar pattern in the bids by all the 50 bidders who submitted price bids for various States. The bids of a large number of parties were exactly identical or near to identical for different States. The Director General had observed that there were strong indications of some sort of agreement and understanding amongst the bidders to manipulate the process of bidding.

5) It was on this basis the CCI directed further investigation in the matter. The Director General after careful consideration submitted a detailed investigation report to the CCI. After the CCI considered the freshly ordered investigation report, it directed that a copy of the report be sent to the parties seeking their objections. In all, 44 opposite parties submitted their objections. After giving them the opportunity to be heard, the CCI passed the order in question.

6) As per the Director General's report, the process of bidding followed by the IOCL in the tender was as under:-
   i) The bidders would submit their quotations with the bid documents.
   ii) The existing bidders, who were existing suppliers, were required to submit the price bids and technical bids.
   iii) The bidders were to quote for supplies in different States of India in keeping with their installed capacity.
   iv) After price bids were opened the bidders were arranged according tothe rates in the categories of L-1, L-2 and L-3.
   v) The rates for the supplies in different States were approved after negotiations with L-1 bidder. In case the L-1 bidder could not supply a required number of cylinders in a particular State, the orders of supplies went to L-2 and also L-3 bidder or likewise depending upon the requirement in that State as per fixed formula provided in the bid documents.
   vi) Certain bidders were called new parties. They were required to submit only technical bids and to supply as per L-1 rates determined after the negotiations.
   vii) One bidder could quote for maximum eight States.

7) The Director General after analyzing the bids came to the conclusion that there was not only a similarity of pattern in the price bids submitted by the 50 bidders for making supply to the IOCL but the bids of large number of parties were exactly identical or near to identical in different States. It was also found that bidders, who belonged to same group, might have submitted identical rates. It was found that not only there was identical pricing in case of group concerns but the rates of other entities not belonging to the group were also found to be identical. The D.G. painstakingly noted the names of group companies as well as non-groupcompanies. He came to the conclusion that in all 37 entities could not be said to be belonging to any single group and were independently controlled. The Director General found it unusual that unrelated firms had quoted identical rates in different States. The D.G. had analyzed the bidding pattern for the various parties for all the 25 States.
8) The D.G. had found further that though the factors like market conditions and small number of companies were different, there was a largescale collusion amongst the bidding parties. He also arrived at a finding to the effect that the LPG Cylinder Manufacturers had formed an Association in the name of Indian LPG Cylinders Manufacturers Association and the members were interacting through this Association and were using the same as a platform. The date for submitting the bids in the case of the

concerned tender was 3.3.2010 and just two days prior to it, two meetings were held on 1st and 2nd March, 2010 in Hotel Sahara Star in Mumbai. As many as 19 parties took part and discussed the tender and, in all probability, prices were fixed there in collusion with each other. The D.G. reported that the bidders had agreed for allocation of territories, e.g., the bidders who quoted the bids for Western India had not generally quoted for Eastern India and that largely the bidders who quoted the lowest in the group in Northern India, had not quoted generally in Southern India. The D.G. also concluded that this behavior created entry barrier and that there was no accrual of benefits of consumers nor were there any plus factors like improved production or distribution of the goods or the provision of services.

9) Ultimately, the D.G. came to the conclusion that there was a cartel likebehaviour on the part of the bidders and that the factors necessary for the formation of cartel existed in the instant case. It was also found that there was certainly a ground to hold concerted action on the part of the bidders. The D.G. had also noted that the rates quoted for the year 2009-10 and in years previous to that were also identical in some cases. Thus, he came to the conclusion that the bids for the year 2010-11 had been manipulated by 50 participating bidders. It was thereafter that the CCI decided to supply the D.G.'s investigation report to the concerned parties and invite their objections.

10) A common reply came to be filed as also the individual replies. After considering the same, the CCI formulated the following issue for determination: -

> "Whether there was any collusive agreement between the participating bidders which directly or indirectly resulted in bid rigging of the tender floated by IOCL in March 2010 for procurement of 14.2 kg. LPG cylinders in contravention of Section 3(3)(d) read with Section 3(1) of the Act?"

11) After considering the oral as well as written submissions, the CCI answered the issue against the Cylinders Manufacturers and inflicted the penalties against the present appellants. In its impugned order, while determining the issue, the CCI, in the first instance, considered the common replies to the DG's report filed by as many as 44 opposite parties. It was more or less pleaded that every part of LPG Cylinder is regulated by the Rules through various Notifications and that the price of steel constitutes 50% of the total manufacturing cost, so also the price of the paint, it being an essential raw material. All these factors, including the taxes which vary from State to State, determine the overall bidding pattern of the bidders. In para-5.2.3 of the common objection, it was added that these 44 parties had nominated six agents for depositing their bids on their behalf and it was a common practice amongst the bidders to direct their agents to keep close watch on the rates offered by their competitors in respect of a particular State and this led to the possibility of copying and matching of the rates quoted in the price bids by many suppliers in a particular State, who may have appointed common agents. Due to this reason, cutting and over-writing in the price bids for the tender in question was noticed by the Director General.

12) It was further pointed out that there were only 62 qualified tenderers in the whole country, out of whom 12 bidders were classified as new parties, meaning thereby that they had not supplied Cylinders in last three years and were not required to bid in the tender. Out of the remaining 50 bidders, there were group companies controlled by single management.

13) The CCI in its detailed order began with considering the scope ofconstructed bid rigging agreement and cartel. In that the CCI also considered the 18 famous observations by Lord Denning in case of RRTA vs. W. H. Smith & Sons Limited regarding the quiet and secret nature of the agreement between the parties. The CCI then went on to record its inference holding that there was element of agreement and considered the following factors in coming to the conclusion. They being: -

1. Market conditions
2. Small number of suppliers
3. Few new entrants
4. Active trade association
5. Repetitive bidding
6. Identical products
7. Few or no substitutes
8. No significant technological changes
9. Meeting of bidders in Mumbai and its agenda.
10. Appointing common agents
11. Identical bids despite varying cost.

14) After consideration of these factors, the CCI came to the conclusion that it did suggest collusive bidding.

15) The COMPAT after discussing the findings of the CCI and also taking note of the arguments of the appellants which were advanced before the CCI, proceeded with its own discussion. It started with the admitted facts of the case, and took note of the following such facts:

(A) The tender offers were to be made at Mumbai on 03.03.2010. Admittedly there were meetings in Hotel Sahara Star, Mumbai on 1st and 2nd March, 2010 which were attended by some of the appellants. The D.G. has held that 19 appellants were represented by various persons in that meeting. The fact of the meeting having been held was not disputed.

Though some of the appellants stated that they did not attend the meeting and those who attended the meeting maintained that nothing was discussed about the tender, the same was not believed by the COMPAT and it held that these meetings did relate to the tender offers which were to be submitted on 03.03.2010. This finding is premised on the basis that nobody came with the explanation as to what transpired in the meeting or gave any proof that prices were discussed. Minutes of the meeting were also not produced.

(B) There is an association of the cylinder manufacturers. All the parties, except few competing with each other, stated that they were not the members of that association. A

feeble argument was also raised by some appellants that though they were the members but they were not the active members thereof. Some of the appellants also argued that they had abandoned the membership by not contributing the subscription in the later years. However, the appellants could not deny the position that there was an association called Indian LPG Cylinder Manufacturers' Association.

It was a registered association, its Memorandum of Association provided that one of the objectives was to protect common interest and welfare of LPG cylinder manufacturers. According to COMPAT, there was a definite platform available for all cylinder manufacturers and practically all the appellants appear to be the members of that Association.

(C) A common written reply was submitted by as many as 44 parties. Further, the appellants had nominated six agents for depositing bids on their behalf. These common agents were instructed to keep a close watch on the price quoted by the competitors in a particular State.

Though some of the appellants had contended that they had not appointed the common agents, the plea was not accepted by the COMPAT. The COMPAT, therefore, proceeded on the 'admitted grounds' that there was an association of cylinder manufactures; practically all the appellants were members of the said association; this association was an active association; it held meetings on the eve of entry tender obviously for discussing tenders, its conditions etc.; these meetings were attended by representatives of at least 19 appellants; and these appellants had six common agents at Mumbai who were instructed to watch the prices offered by the others. A dinner meeting as also a munch was held and one Mr. Chandi Prasad Bhartia of M/s. Haldia Precision Engineering Private Limited paid the bill for the same. Dinner and lunch held in Sahara hotel were attended by about 50 persons in all. From this the COMPAT inferred that there was no reason to disbelieve that the parties had an access to each other through their association which was an active association. The existence of such an association under the aegis of which meetings took place just before the submission of tender has been noted as a very relevant factor by the COMPAT in affirming the findings of CCI on cartelisation and it summed up the position in the following manner:

> "26. What is important is not whether a particular appellant was a member of the association or not. The existence of an association is by itself sufficient, as it gives opportunity to the competitors to interact with each other and discuss the trade problems. There will be no necessity to prove that any party actually discussed the prices by actively taking part in the meeting. If there is a direct evidence to that effect that is certainly a pointer towards the fact that such party had a tacit agreement with its competitors. However, the existence of an association and further holding of the meetings just one or two days prior to the last date of making offers and further admission that the parties had appointed common agents with the instructions to keep watch on the prices quoted by the competitors would go a long way in providing plus factors in favour of the agreement between the parties. All these factors would form a back drop, in the

light of which, the further evidence about agreement would have to be appreciated. We have seen the comments of Director General as also the findings of the CCI. We are convinced that CCI has not committed any error in considering all these factors as plus factors to come to the conclusion that there was a concerted agreement between the parties on the basis of which the identical or near identical prices came to be quoted in tenders for the supply of cylinders to the 25 States. In view of this, we need not dilate on the individual claims by some of the appellants that they were not the members of the association or that they were only the dormant members or that they had abdicated their membership. We also need not go on the claim that while the meeting was attended by the 19 parties as held by the D.G. and confirmed by the CCI, it was not attended by the rest of the appellants because that would be of no consequence. Once there was a meeting, there was every opportunity to discuss or to communicate to each other whatever transpired in the meeting.

27. We have seen the order of the CCI and while commenting about the meeting, the CCI has painstakingly noted the details of that meeting. The CCI has referred to the evidence of Mr. Dinesh Goyal, who was an active member of the Indian LPG Cylinder Manufacturers' Association and noted that he had attended the meeting. He has also referred to the statement of Mr. Sandeep Bhartia of Carbac Group though initially he denied to have organized the conference, he later on had confirmed about such a conference having been held along with Mr. Sandeep Bhartia of Carbac Group. The CCI also noted that he admitted that in such meetings there were discussions on pre-bid issues. He also admitted that though there are about 50 competitors, in fact about 25 persons control the whole affairs. From this evidence, the CCI correctly deduced that pre-bid issues were discussed in that meeting. The CCI has then referred to the evidence of Mr. Manvinder Singh of Bhiwadi Cylinders Limited, Mr. Chandi Prasad Bhartia of Haldia Precision Engineering P. Ltd., Mr. Vijay Kumar Agarwal of SM Sugar Pvt. Ltd., Mr. S. Kulandhaiswamy, MD of Lite Containers Pvt. Ltd. and Secretary of the Association, Mr. Ramesh Kumar Batra, Director of Surya Shakti Vessels Pvt. Ltd. and on that basis came to the correct conclusion that not only was the meetings held on 1st and 2nd March, but thorough discussions went on in those meeting on the pre-bid issue of the concerned tender. The CCI has also correctly noted about the agenda of the meeting and has also referred to an admission made by one of the witnesses that the matching of the quotation was a matter of co-incidence and telephonic discussions do take place amongst the parties regarding the trends. We are thus thoroughly convinced about holding of the meeting, the discussion held therein and also the discussion regarding the pre-bid issue having been taken place in that meeting."

16) Another significant argument which was canvassed before us also with great emphasis was that it was an oligopolistic market wherein there was a likelihood of each player being aware of actions of the other and in such a situation price parallelism would be a common phenomenon. Thus, merely because there was a price parallelism, it would not be construed as evidence of collusion. The COMPAT rejected this argument as well. In the process, it analysed the order of CCI, conclusion whereof was founded on the following factors:

(1) The prevailing market conditions were such that there was a constant demand for cylinders not only by IOCL but by other two oil manufacturing companies as well. Therefore, there was a constant need for the cylinders which facilitated factor for the collusion.

(2) There was small number of suppliers. Among the 50 participating companies, only 37 companies could be said to be independent bidding companies and there were seven groups consisting of 20 participating companies. This small number of suppliers should also be a facilitating factor.

(3) There were very few new entrants.

(4) The existence of an active trade association in which all the bidders, except seven companies, were members would be another facilitating factor.

(5) Few other factors like repetitive bidding, identical products, few or no substitutes and no significant technological changes were the additional factors which persuaded the CCI to arrive at such a conclusion.

(6) These manufacturing companies had their factories at different places in India, where the costs of the components would differ from State to State. Even the taxing structure, the labour conditions and other factors like cost of electricity etc. were bound to be different. Still the prices quoted were almost identical.

(7) On the above considerations, the defence of the appellants was rejected as unconvincing, thereby undergoing the factors considered by the CCI.

17) According to the COMPAT all these could not have been possible unless there were internal agreements between the appellants. The COMPAT has approved the finding of the CCI that owing to the collusion, the IOCL could not get lower or the competitive prices.

19) It negated the argument of the appellants that when the IOCL was placing orders on the basis of negotiated rates there could be no possibility of incentive to collude. According to it, even where the rates are fixed, the bid rigging can still take place to keep the big amounts to a pre-determined level. Such pre-determination can be by way of intentional manipulation by members of the bidding group and where the L-1 rates themselves get fixed like in the present case at higher level even if there are negotiations the negotiators would have to take into consideration the benchmark rates. There is also a possibility that such benchmark rates could go higher in the subsequent tenders; known as rippel effect in long term.

21)Having examined the relevant provisions whereupon these appeals centre around, we proceed to take note of the arguments that were advanced by various counsel appearing for the appellants and the manner in which respondents endeavoured to meet the same.

22)Ms. Madhavi Divan, learned counsel appearing in the appeal filed by Rajasthan Cylinders and Containers Ltd., attacked the very basis and foundation on which CCI came to conclusion that there was an agreement or cartelisation by the appellants aimed at bid rigging. She premised her case on the following three propositions:

(i) the inherent nature of the market of cylinder manufacturers itself precludes the possibility of competition;
(ii) alternatively, there is no collusive agreement or bid-rigging in the present case; and
(iii) further, in the alternative, even assuming that there is a collusive agreement or bid-rigging in the present case, there is no appreciable adverse effect on competition.

23) On the first proposition, argument developed by Ms. Divan was that the Act prohibits anti-competitive practices, which would imply that there has to be a competition in the market, in the first place. As a corollary, if there is no such competition, Section 3(1) of the Act does not get triggered. According to her, in the instant case, the fact would show that there was a tight control and regulation by the IOCL and, thus, it did not lead any scope of competition at the very threshold. She stressed that the conditions of monopsony/oligopsony prevailed. For the existence of monopsony/oligopsony, she referred to the Glossary of Industrial Organization Economics and Competition Law published by the Organisation for Economic Co-operation and Development (OECD), as per which a monopsony consists of a market with a single buyer. When there are only a few buyers, the market is described as an oligopsony. In general, when buyers have some influence over the price of their inputs, they are said to have monopsony power. The ability of a firm to raise prices, even when it is a monopolist, can be reduced or eliminated by monopsony or oligopsony buyers. To the extent that input prices can becontrolled in this way, consumers may be better off.

24) According to her, these conditions were adequately present in the instant case. In her attempt to make this proposition good, she highlighted the following features and conditions surrounding the contract:
(i) Extremely limited number of buyers and for this particular kind of market - a sole buyer, i.e., IOCL. IOCL controls 48% of the market share. There are no other purchasers of 14.2 Kg gas cylinders except for HPCL and BPCL, both of whom invite e-tenders, having a market share of 26% and 25% respectively.
(ii) The product is standardized and special to the extent that it is tightly controlled and regulated by the Government and also there are no other takers for it.
(iii) There are entry barriers in the market. As per the Tender conditions, only those manufacturers having valid approval from the Chief Controller of Explosives (CCOE)

and Bureau of Indian Standards (BIS) license for manufacture of 14.2 kg LPG cylinders as per IS-3196 (Part 1) could submit bids for the tender.

(iv) Even the machinery used to manufacture this product is special and will become obsolete and reduceable to scrap if IOCL and the aforesaid two players were to discontinue contracts for supply of 14.2 kg cylinders.

She pointed out that this was accepted in the Expert Report of Dr. Rughvir K.S. Khemani.

(v) The tender conditions state that it can be rejected without furnishing reasons. Therefore, the lowest price is not sacrosanct (clause 11 of the contract).

(vi) L2 and L3 have also been granted contracts irrespective of the price they have quoted.

(vii) Effective price has no sanctity since not only L2 and L3 also get contracts in addition to or in exclusion of L1 but further, the final negotiated price is determined on the basis of privately conducted negotiations with individual bidders for which the benchmark is not the price quoted by them but the internal estimates arrived on the basis of objective criteria.

(viii) In most States, the final negotiated price was concluded at a rate lower than the internal estimate. The internal estimate had absolutely no correlation with the quoted rates by L1 or any other party. In this behalf, she pointed out that the IOCL had carried out the exercise of ascertaining the estimated cost of the cylinder through its experts. In the report given by the expert, the estimated cost per cylinder was arrived at Rs. 1106.61 paisa per cylinder. As against this, the final negotiated price at which the appellants had supplied cylinders to the IOCL was much lesser. According to her, in the whole process the price determination was on the basis of internal estimates by IOCL which could not be influenced by the appellants at all. In fact, even after the tenderers submitted their bids, final price was the price negotiated by IOCL which fact was accepted by Mr. Y. Ramana Rao of IOCL in his deposition recorded by the Director General of CCI. This, according to the learned counsel, clearly proved that there was no adverse effect on competition, in any case.

(ix) The internal estimates were drawn up long after the price bids were made, i.e., on 5th May, 2010. Price bids were opened on 23rd March, 2010 and negotiations were held only after the submission of Mott MacDonald Report on 05.05.2010.

(x) The pattern shows that since L1, L2 and even L3 were awarded the contract and not merely L1, quoting the lowest price did not even determine the identity of the parties who were to get the contract, therefore, the manner in which the process was conducted or controlled by IOCL, completely leaves no scope for either determination of price or the identity of the parties who would get the contract.

25) She submitted that in such market conditions where on account of the vertical agreement there is virtually no scope of competitive forces between horizontal players, the question of anti-competitive conduct by virtue of horizontal agreements does not arise. There is no competition in the market even before a player enters the fray. Therefore, the first premise for the application of Section 3, i.e., the presence of an otherwise competitive market is absent. The burden of proof is on the respondent— CCI

to establish that there is competition in the market before it can justify invoking Section 3. There is no automatic presumption under Section 3 that there is competition in the market.

26) From the aforesaid factors, Ms. Divan tried to deduce that price control was entirely in the hands of IOCL and in a situation like this, question of entering into any agreement with the motive of bid rigging or collusive bidding did not arise.

27) She also referred to LPG (Regulation of Supply and Distribution) Order, 2000 published vide Notification dated 26th April, 2000 as per which only Government oil companies can supply LPG to domestic consumer of 14.2 kg LPG cylinders with dimensions as specified therein. Predicated thereupon, her submission was that the LPG supply in 14.2 kg gas cylinders is an essential commodity; the distribution of such cylinders takes place only through Government oil companies; the price to the consumer is controlled by the Government; and parallel marketeers, supplier and distributor of LPG cylinders may do so only for cylinders and specifications other than 14.2 kg cylinders. This control of the Government, insofar as supply of 14.2 kg gas cylinders is concerned, would also show tight control over the pricing. In such a statutorily tight control price fixing mechanism there could not be bid rigging, was the submission of Ms. Divan. She supported this submission by drawing the attention of the Court to the following observations in Ashoka SmokelessCoal India (P) Ltd. v. Union of India[1]:

> 127.While fixing a fair and reasonable price in terms of the provisions of the Essential Commodities Act (although the price is not dual), it is essential that price is actually fixed. Such price fixation is necessary in view of the fact that coal is an essential commodity. It is, therefore, vital that price is actually fixed and not kept variable. Fixation of price of coal is of utmost necessity as it is a mineral of grave national importance. Non-availability of coal and consequently, the other products may lead to hardship to a section of citizens. It may entail closure of factories and other industries which in turn would lead to loss to the State exchequer; as they would be deprived of its taxes. It will lead to loss of employment of a large number of employees and would be detrimental to the avowed object of the Central Government to encourage small-scale industries."

31)She, thus, argued that merely because there was price parallelism, it could not have been the reason to arrive at a conclusion that there was a collusive agreement or bid rigging. She submitted that in a monopsonistic market where there are few buyers, the price is set by the buyers, and the conditions are such that sellers can predict demand, there is a repetitive

[1] (2007) 2 SCC 640

bidding process and the products are identical and specialized, the likelihood of price parallelism is natural.

32)Further, price parallelism is inevitable where the buyer has a high degree of control and determines price, quantity, and even the identities of the awardees at its discretion. Referring to the following discussion inUnion of India v. Hindustan Development Corporation4[2],she arguedthat mere identical pricing cannot lead to the conclusion of cartelisation:

> "7. [….] (1) There is not enough of material to conclude that M/s H.D.C., Mukand and Bhartiya formed a cartel. Because of mere quoting identical tender offers by the said three manufacturers for which there is some basis, the conclusion that the said manufacturers had formed a cartel does not appear to be correct. However since the offers of the said three tenderers were identical and the price was somewhat lower, the Tender Committee entertained a suspicion that a cartel had been formed and the same got further strengthened by the post-tender attitude of the said manufacturers which further resulted in entertaining the same suspicion by the other authorities in the hierarchy of decision making body including the Minister of Railways. [….]

The learned counsel pointed out that CCI arrived at an interface of collusive agreement based, interalia, on presence of the circumstances which acted as 'facilitating factors' for collusion. These factors which describe the nature of the industry are:

(i) Predictability of demand
(ii) Small number of suppliers
(iii) Few new entrants
(iv) Active trade association
(v)
(vi) Repetitive bidding
(vii) Identical products
(viii) Few or no substitutes
(ix) No significant technological changes, i.e, a standardised product in repsect of which there has been no change or alteration in design.

36) Adverting to her 2nd proposition, namely, there was no collusive agreement or bid rigging in the present case, her submission was that CCI has relied on a dinner attended by some manufacturers on 1st March, 2010 and a lunch on 2nd March, 2010 as evidence of a price fixing agreement. Her response was that the factum of meetings of an association by itself in any case cannot lead to a conclusion of collusion. Likewise, the COMPAT also upheld that inference based on the factum of the meetings of the Association. The COMPAT went to the extent of holding that it is irrelevant whether a

[2](1993) 1 SCC 467

particular party was a member of the Association or not and the existence of Association is by itself sufficient. This approach was attacked as contrary to the fundamental right to form an association under Article 19(1)(c)(g) of the Constitution of India.

37) So far as the meetings over dinner and lunch are concerned, both were hosted by individual members. In the case of the dinner meeting on 1st March, 2010, it was hosted by Mr. C.P. Bhartiya, MD of North India Wires. The lunch on 2nd March, 2010 was hosted by Mr. Santosh Bhartiya of Haldia Precision. It is not as if that the Association paid or the expenses were shared by all members who attended.

38) She also submitted that insofar as appellant – Rajasthan Cylinders and Containers Limited is concerned, no representatives of appellant attended the said meeting. Further, many other members did not attend the meeting. Even as per the findings of the Director General, only 12 persons representing 19 parties are said to have attended the meeting. Her submission was that as per the allegations, 45 persons had entered into an agreement of cartelisation which should not be established only with the said meeting which was not attended by all and in fact very few members.

41) The test as laid down in the case of Ahlstrom Osakeyhtio v.Commission is: Is the concertation the only plausible explanation for the conduct ?

> "126. Following that analysis, it must be stated that, in this case, concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain period. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.
>
> This test is not met in the present case for reasons that are enumerated.

i) Her third proposition was that in any case there was no appreciable adverse effect on competition. She tried to make this submission good by contending that when industry is an oligopoly, the price parallel or a finding of identical quoting of price does not by itself lead to the conclusion of a concerted price. Moreover, in the instant case, number of entrants had increased as 12 new entrants submitted their bid for the year 2010-11. Therefore, the finding of the CCI, upheld by the COMPAT, that there has been a creation of barriers for new entrants is without any basis.

ii) Mr. Jaiveer Shergil, who argued for the appellant—Om Containers (C.A. No. 6369 of 2014) submitted that in order to attract the presumption contained in Section 3(3) about the appreciable adverse effect on competition, in the first instance, there has to be a finding that there has been an agreement of the kind set out in Section

3(3)(a) to (d). Since, the allegation against the appellants was that the agreement resulted in bid rigging and case is covered under Section 3(3)(d) of the Act, it was necessary that there is a positive finding to the aforesaid effect, namely, that there was agreement which had resulted in bid rigging. According to him, since the definition of bid rigging in Explanation to Section 3(3) uses the words 'means', the definition is a hard and fast definition and no other meaning can be assigned to the expression than is put down in the definition, as held in Punjab Land Development & Reclamation Corporation Ltd. vs. Presiding Officer, Labour Court[3]inthe following words:

> "72. The definition has used the word 'means'. When a statute saysthat a word or phrase shall "mean"— not merely that it shall "include" — certain things or acts, "the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition" (per Esher, M.R., Gough v. Gough [(1891) 2 QB 665 : 65 LT 110]).

44) Thus, according to him, for it to be a case of bid rigging, the agreement must be such which is defined in the Explanation to Section 3(3)(d) creating the effect of:

a. Eliminating or reducing competition for bids or
b. Adversely affecting the process for bidding or
c. Manipulating the process for bidding.

46) He submitted that there is no positive evidence of this nature at all and the CCI as well as COMPAT has proceeded on inferences as regardsbid rigging and, therefore, such orders cannot be sustained.

In the absence thereof, submitted the learned counsel, doctrine of reverse burden which was put on the appellants would not apply. He referred to the following judgmentsin support.

47) The counsel relied upon the following observations in CCI v. Artistes & Technicians of W.B. Film & Television:

> "31. The Competition Act, 2002, as amended in 2007 and 2009,deals with anti-trust issues viz. regulation of anti-competitive agreements, abuse of dominant position and a combination or acquisition falling within the provisions of the said Act. Since the majority view of CCI also accepted that the impugned activities of the Coordination Committee did not amount to abuse of dominant position, and it treated the same as anti -competitive having appreciable adverse effect on competition, our discussion would be focused only on anti - competitive agreements. Section 3 of the Act is the relevant section in

[3](1990) 3 SCC 682

> this behalf. It is intended to curb or prohibit certain agreements. Therefore, in the first instance, it is to be found out that there existed an "agreement" which was entered into by enterprise or association of enterprises or person or association of persons. Thereafter, it needs to be determined as to whether such an agreement is anti-competitive agreement within the meaning of the Act. Once it is found to be so, other provisions relating to the treatment that needs to be given thereto get attracted."

48) Taking aid of the aforesaid legal principle, it was submitted that in the present case it will be seen that the CCI, rather arriving at a finding with focus on the aforesaid factors, proceeded to analyse factors which attach to the general market conditions of the industry to 'infer' the 'possibility' of bid rigging and then concluded that the 'facilitating factors' which may be 'considered conducive for cartelisation' are present. The D.G. found that 'in all the probability, prices were fixed there at the meeting in Bombay in collusion with each other. Such an inference and assumption based on 'higher chances', 'probability', 'tendencies' or 'likelihood' by the CCI does not meet the requirement of the definition contained in Explanation to Section 3(3) and certainly does not constitute a finding of 'bid rigging' as defined therein. The Tribunal has also proceeded on the basis that it 'is to be deduced...that these meetings did relate to the tender offers'. There was, thus, not clear cut, precise and consistent evidence to support that the alleged bid rigging took place.

49) Next submission of Mr. Shergil was that apart from the complete absence of a finding of bid rigging, in the present IOCL tender, as a matter of fact there canot be any bid rigging as defined in Section 3(3). To take the first ingredient, i.e., eliminating or reducing competition for bids, the report of D.G. itself finds that out of the 60 bidding parties 37 entities were not belonging to any single group and are independently controlled. Hence, straight away there is no case of 'eliminating or reducing competition for bids' which is one of the possible ingredients of bid rigging as there were 37 entities who were free of mind to participate and bid of their own accord in the absence of any control by any cartel.

50) As regards the second and third requirement of bid rigging, i.e., adversely effecting or manipulating the bidding process, he argued that the submission of bids by the appellant (even if identical) can have no effect of 'adversely effecting or manipulating the bidding process' this being on account of the very nature of the present tender process. Although, bids are invited from bidders, IOCL has a fixed/base procurement price of Rs. 1106.61 per cylinder. IOCL then works out an estimated rate per State based on certain factors peculiar to that State such as octroi, freight etc. The bid offered by the L1 (lowest bidder) is then subject to further

downward negotiations by IOCL as per the tender clause and a further finalised rate is arrived at. Such finalised rate is eventually even lower10 than the L1 bid amount. Thus, factually, logically and in reality any bid submitted by any party can never be one which is said to adversely affect or manipulate the bidding process. All of this information is with IOCL as part of its bidding process preparations, estimates and financial workings and could easily have been taken into consideration. In support, Mr. Shergill also referred to the terms and conditions of the IOCL tender.

51) His further submission was that CCI, or for that matter COMPAT, were wrong in getting influenced by the submissions of identical bids by the appellants as it could not be, ipso facto, inference of bid rigging. Suchidentical prices could be for various reasons and he shared that the reasons given by Ms. Divan predicated her submissions on oligopsony/monopsony.

54)Various other counsel also argued on the same lines and in addition referred to facts or their specific cases and it is not necessary to state all those arguments to avoid repetition.

55)Per contra, Mr. Salman Khurshid, learned senior counsel appearingfor CCI highlighted the purpose for which the Act is enacted and, in particular, objective behind Section 3 of the Act, which is taken note of by this Court in Excel Crop Care Limited as well as West Bengal ArtistsAssociation. Insofar as instant case is concerned, his submission wasthat it is a stark and clear-cut case of bid rigging as a result of anti-competitive agreement amongst LPG manufacturers in respect of a tender (Tender No. LPG-O/M/PT-03/09-10) floated by IOCL for procurement of approximately 1,05,00,000 (105 lakhs) LPG Cylinders. This is a matter of serious public concern because these cylinders were to be used to supply Liquefied Petroleum Gas (LPG) for domestic consumption across 25 States. A rise in price resulting from anti-competitive activities would affect the cost of living for the common man, and has serious ramifications for the economy as a whole.

56) Mr. Khurshid referred to the findings of the CCI as approved by COMPAT and submitted that there was a strong economic evidence of collusion which is evident from the following aspects:

(a) Identical or near-identical bidding by all 50 empanelled LPG vendors resulting in bid rigging.

(b) Results of the tender revealed that these bids were made in such a way that all the bidders were awarded some portion of the tender and no bidder was left empty handed, i.e., Market Sharing Arrangement.

(c) Geographical/Territorial allocation of market, i.e., the bids were placed in such a way that entities located in the northern parts of the country were awarded the tender

in the northern States, entities located in the southern parts were awarded the tender in respect of southern States etc.

(d) No plausible economic rationale or explanation was forthcoming for the identical bids, despite obvious difference in cost of production, location, input cost etc.

(e) The overall effect of increase in price of procurement of LPG Cylinders over previous years.

57) He also submitted that pattern of identical and near identical bids, which was all pervasive throughout, could not be brushed aside lightly as that was the clear indicator of price bidding as a result of agreement between the parties. The analysis of the bids also shows that it had already been decided amongst the LPG Cylinder manufacturers as to who the L1 and L2 bidders were going to be prior to submission of bids. For instance, in the State of Punjab, the L1 bidder (Shri Ram Cylinders) bid Rs. 1080 whereas the four L2 bidders placed identical bids at Rs, 1080.50, i.e., a difference of only 50 paise from the L-1 bid. Similarly, in Rajasthan, the L-1 bidder (M/s. Rajasthan Cylinders) quoted Rs. 1130, whereas nine L2 bidders quoted identically by just 50 paise more, at Rs. 1130.50. This pattern is repeated across a number of States.

58) Not only this, in order to achieve the pre-decided outcome, some of the bidders hastily made corrections to their bid documents. One such case is that of M/s. Jesmajo Industrial Fabrications (appellant in C.A. No. 4868 of 2014). In the bid documents, the bid of Rs. 1103 was cut-corrected to make it Rs. 1103.60 even though the calculation of VAT was done only on the figure of |Rs. 1103.

59) Mr. Khurshid also refuted the submission of the appellants that there was no competition and, therefore, Section 3 was not applicable. According to him, if the matters are examined on such basis most of the culprits will get away. The purpose of the Act was not only to eliminate cartelisation but also to promote competition. His submission was thatonce the findings of the CCI and COMPAT are accepted that there was an agreement, such an agreement was obviously for the purpose of curbing the competition.

60) Answering the argument of ‘price parallelism’ which according to the appellants resulted in identical and near identical bids, Mr. Khurshid argued that legal submission in this respect was settled by this Court in Excel Crop Care case wherein such an argument was rejected in thefollowing words:

> “48…It was argued that since dominant position is enjoyed by thebuyer, it leads to parallel pricing and this conscious parallelism takes place leading to quoting the same price by the suppliers. The explanation, thus, given for quoting identical price was the aforesaid economic forces and

not because of any agreement or arrangement between the parties. It was submitted that merely because same price was quoted by the appellants in respect of the 2009 FCI tender, one could not jump to the conclusion that there was some "agreement" as well between these parties, in the absence of any other evidence corroborating the said factum of quoting identical price. In respect of this submission, Mr Venugopal had also referred to a few judgments.

49. The aforesaid argument is highly misconceived. A neat and pellucid reply of Mr. Kaul, which commands acceptance, is that argument of parallelism is not applicable in bid cases and it fits in the realm of market economy. It is for this reason that entire history of quoting identical price before coming into operation of Section 3 and which continued much after Section 3 of the Act was enforced, has been highlighted..."

63) Mr. Khurshid also highlighted that in spite of there being difference in location of appellant's units and their input cost, the bids submitted by various tenderers were identical and there cannot be any plausible economic rationale for such identical bidding. Therefore, the inference drawn by the CCI as well as COMPAT based on the aforesaid features and factors was justified and valid in law. He also referred to certain judgements of this Court as well as other jurisdictions, such as, European Commission and the Court of Justice of European Union to which reference would be made at the appropriate stage.

68) In Excel Crop Care Limited, scope of Section 3 of the Act which prohibits three kinds of practices as anti-competitive, was taken note of asfollows:

"20. Chapter II of the Act deals with three kinds of practices which are treated as anti-competitive and prohibited. These are:

(a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

(b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

(c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain."

70) The Court also mentioned, in particular, that competition leads to economic efficiency, economic growth and development as well as consumers welfare. The

Court also spelled out the manner in which competition contributed to increase economic growth and increased productivity.

71) It follows from the above that whereas on the one hand the economic policy of the nation has ushered in the era of liberalisation and globalisation thereby giving freeplay to the private sector in the manner of conducting business, at the same time, in public interest and in the interest of consumers, a regime of regulators has also been brought to ensure certain checks and balances. Since competition among the enterprises or businessmen is treated as service for a public purpose and, therefore, there is a need to curb anti-competitive practices, the CCI is given the task (as a regulator) to ensure that no such anti-competitive practices are undertaken. In fact, Section 18 of the Act casts a specific and positive obligation on CCI to 'eliminate' anti-competitive practices and promote competition, interest of the consumer and free trade.

72) As mentioned above, one of the anti-competitive practices is cartelisation, the essential postulate whereof is agreement between enterprises or association of enterprises or persons or associations of persons in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of service, which causes or is likely to cause an appreciable adverse effect on competition within India. Such an agreement is treated as void. The types of agreement which may fall foul of Section 3 are mentioned in sub-section (3) thereof. These include sharing the market by way of allocation of geographical areas of market [clause (c)] and the agreements which result in bid-rigging or collusive bidding whether directly or indirectly [clause (d)]. There is a presumption that four types of agreements mentioned in sub-section (3) will have anappreciable adverse effect on competition.

73) We may also state at this stage that Section 19(3) of the Act mentions the factors which are to be examined by the CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Reason is simple. As already pointed out above, the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by the CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories. We may hasten to add, however, that agreements mentioned in Section 3(3) raise a presumption that such agreements shall have an appreciable adverse effect on competition. It follows, as a fortiorari, that the presumption is rebuttable as these agreements are not treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. What follows is that once the CCI finds that case is covered by one or more of the clauses mentioned in sub-section (3) of Section 3, it need not undertake any further enquiry and burden would shift upon such enterprises or persons etc. to rebut the said presumption by leading adequate evidence. In casesuch an evidence is led, which dispels the presumption, then

the CCI shall take into consideration the factors mentioned in Section 19 of the Act and to see as to whether all or any of these factors are established. If the evidence collected by the CCI leads to one or more or all factors mentioned in Section 19(3), it would again be treated as an agreement which may cause or is likely to cause an appreciable adverse effect of competition, thereby compelling the CCI to take further remedial action in this behalf as provided under the Act. That, according to us, is the broad scheme when Sections 3 and 19 are to be read in conjunction.

74) In these appeals, the Court is concerned with the alleged agreement entered into between the appellants falling in clause (d) of sub-section (3) of Section 3, which talks of bid rigging or collusive bidding. Therefore, it would be necessary to understand the meaning of the expression 'bid rigging' and 'collusive bidding'.

75) The necessary ingredients of bid rigging, thus, are: (a) agreement between the parties; (b) these parties are engaged in identical or similar production or trading of goods or provisions of services; and (c) the agreement has the effect of eliminating or reducing competition of bids or adversely affect or manipulating the process for bidding.

76) Though the expression 'collusive bidding' is not defined in the Act, it appears that both 'bid rigging' and 'collusive bidding' are overlapping concepts. This position stands accepted in ***Excel Crop Care Limitedcase*** which should be found from the following discussion therefrom:

> "38. Mr Neeraj Kishan Kaul, learned Additional Solicitor General, refuted the aforesaid submission with vehemence by urging that bid rigging and collusive bidding are not mutually exclusive and these are overlapping concepts. Illustratively, he referred to the findings of CCI, as approved by COMPAT, in the instant case itself to the effect that the appellants herein had " *manipulated the process of bidding*" on the ground that bids were submitted on 8-5-2009 collusively, which was only the beginning of the anti-competitive agreement between the parties and this continued through the opening of the price bids on 1-6-2009 and thereafter negotiations on 17-6-2009 when all the parties reduced their bids by same figure of Rs 2 to bring their bid down to Rs 386 per kg from Rs 388 per kg. From this example, he submitted that on 8-5-2009 there was a collusive bidding but with concerted negotiations on 17-6-2009, in the continued process, it was rigging of the bid that was practiced by the appellants. We are inclined to agree with this pellucid submission of the learned Additional Solicitor General.
>
> 39. Richard Whish and David Bailey [*Competition Law*, 7th Edn., p. 536.] , in their book, have given illustrations of various forms of collusive bidding/bid rigging, which include:

(*a*) Level tendering/bidding (i.e. bidding at same price — as in the present case).

(*b*) Cover bidding/courtesy bidding.

(*c*) Bid rotation.

(*d*) Bid allocation.

40. Even internationally, "collusive bidding" is not understood as being different from "bid rigging". These two expressions have been used interchangeably in the following international commentaries/glossaries and websites of competition authorities:

(*a*) *UNCTAD Competition Glossary dated 22-6-2016*

"Bid rigging or collusive tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids. Essentially, it relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions."

(*b*) *OECD Glossary of Industrial Organisation Economics and Competition Law*

"Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts. There are two common forms of bid rigging. In the first, firms agree to submit common bids, thus eliminating price competition. In the second, firms agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts.

Since most (but not all) contracts open to bidding involve Governments, it is they who are most often the target of bid rigging.

Bid rigging is one of the most widely prosecuted forms of collusion."

Collusive bidding (tendering) — *See "bid rigging"*.

(This shows collusive bidding and bid rigging are treated as one and the same.)

(*c*) *OECD Guidelines for fighting bid rigging*

"Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process."

(*d*) *United States Office of the Inspector General, Investigations(Fraud Indicators Handbook)*

"Collusive bidding, price fixing or bid rigging, are commonly used interchangeable terms which describe many forms of an illegal anti-competitive activity. The common thread throughout all these activities is that they involve any agreements or informal arrangements among independent competitors, which limit competition. Agreements among competitors which violate the law include but are not limited to:

(*1*) Agreements to adhere to published price lists.

(*2*) Agreements to raise prices by a specified increment.

(*3*) Agreements to establish, adhere to, or eliminate discounts.

(*4*) Agreements not to advertise prices.

(*5*) Agreements to maintain specified price differentials based on quantity, type or size of product."

(*e*) *Australian Competition and Consumer Commission*

"Bid rigging, also referred to as collusive tendering, occurs when two or more competitors agree they will not compete genuinely with each other for tenders, allowing one of the cartel members to '*win*' the tender. Participants in a bid rigging cartel may take turns to be the '*winner*' by agreeing about the way they submit tenders, including some competitors agreeing not to tender."

41. As the Liegeman of the law, it is our task, *nay* a duty, to give proper meaning and effect to the aforesaid "Explanation". It can easily be discussed that the legislature had in mind that the two expressions are interchangeably used. It is also necessary to keep in mind the purport behind Section 3 and the objective it seeks to achieve:

41.1. Sub-section (1) of Section 3 is couched in the negative terms which mandates that no enterprise or association of enterprises or person or association of persons shall enter into any agreement, when such agreement is in respect of production, supply, distribution, storage, acquisition or control

of goods or provision of services and it causes or is likely to cause an appreciable adverse effect on competition within India. It can be discerned that first part relates to the parties which are prohibited from entering into such an agreement and embraces within it persons as well as enterprises thereby signifying its very wide coverage. This becomes manifest from the reading of the definition of "*enterprise*" in Section 2(*h*) and that of "*person*" in Section 2(*l*) of the Act. The second part relates to the subject-matter of the agreement. Again it is very wide in its ambit and scope as it covers production, supply, distribution, storage, acquisition or control of goods or provision of services. The third part pertains to the effect of such an agreement, namely, "appreciable adverse effect on competition", and if this is the effect, purpose behind this provision is not to allow that. Obvious purpose is to thwart any such agreements which are anti-competitive in nature and this salubrious provision aims at ensuring healthy competition. Sub-section (2) of Section 3 specifically makes such agreements as void.

41.2. Sub-section (3) mentions certain kinds of agreements which would be treated as ipso facto causing appreciable adverse effect on competition. It is in this backdrop and context that "Explanation" beneath sub-section (3), which uses the expression "bid rigging", has to be understood and given an appropriate meaning. It could never be the intention of the legislature to exclude "collusive bidding" by construing the expression "bid rigging" narrowly. No doubt, clause (*d*) of sub-section (3) of Section 3 uses both the expressions "bid rigging" and "collusive bidding", but the Explanation thereto refers to "bid rigging" only. However, it cannot be said that the intention was to exclude "collusive bidding". Even if the Explanation does contain the expression "collusive bidding" specifically, while interpreting clause (*d*), it can be inferred that "collusive bidding" relates to the process of bidding as well. Keeping in mind the principle of purposive interpretation, we are inclined to give this meaning to "collusive bidding". It is more so when the expressions "bid rigging" and "collusive bidding" would be overlapping, under certain circumstances which was conceded by the learned counsel for the appellants as well.

42. We are, therefore, of the opinion that the two expressions are to be interpreted using the principle of noscitur a sociis i.e. when two or more words which are susceptible to analogous meanings are coupled together, the words can take colour from each other. (See *Leelabai Gajanan Pansare* v. *Oriental Insurance Co. Ltd.* [*Leelabai Gajanan Pansare* v. *Oriental Insurance Co. Ltd.*, (2008) 9 SCC 720] , *Thakorlal D. Vadgama* v. *State of Gujarat* [*Thakorlal D.Vadgama* v. *State of Gujarat*, (1973) 2 SCC 413 : 1973 SCC (Cri) 835] and *M.K. Ranganathan* v. *State of Madras*[*M.K.Ranganathan* v. *State of Madras*, (1955) 2 SCR 374 : AIR 1955 SC604] .)"

77) The first proposition of Ms. Divan, viz. there is no competition, has two facets. First, the legal one which concerns the jurisdiction of the CCI to deal with such matters and the other is factual, which is to be examined on the basis of facts in these cases. Insofar as the first component is concerned, having regard to the aforesaid scheme of the Act, we are not convinced with the argument of Ms. Madhavi Divan that there is no possibility of a competition in these cases and, therefore, CCI had no jurisdiction to carry out any such investigation. The scope and ambit of the provisions of Section 3 have been considered in detail in ***Excel CropCare Limited*** case. This Section prohibits anti-competitive agreementsand brings about the prime objective of the Competition Act.

78) We would like to reemphasise that the purpose of the Act is not only to illuminate practices having adverse effect on the competition but also to promote and sustain competition in the market. Enforcement provides remedies to avoid situation that will lead to decrease competition in the market. Therefore, effective enforcement is important not only to sanction anti-competitive conduct but also to deter future competitive practices. In the present case itself, there are sixty suppliers of the product for which there are three buyers. After all, each supplier would like to be L-1 or L-2 so that it is able to get order for larger quantities than the other. In this sense, there would be a competition among them. Further, it would also be in the interest of the buyers like IOCL etc. that the elements of healthycompetition persists in the market. In any case, it is the duty of the CCI to ensure that the conditions which have tendency to kill the competition are to be curbed. It is also the function of the CCI to ensure that there is a competition so that benefits of such competition are reaped by the consumers. However, insofar as certain factual aspects highlighted by the appellants are concerned, they would be dealt with while examining the third proposition, as we deem it more appropriate to discuss these two aspects together.

79) Second proposition of Ms. Divan was that there was no collusive bidding in the present case. The CCI and COMPAT have rejected this argument in view of the fact that there is an active trade association of the suppliers; a meeting took place couple of days before the date of bidding; common changes were pointed out by these appellants who submitted bids on their behalf; and bids were of identical amounts despite varying cost, which were repetitive in nature. The respondents may be right in their submission that there may not be a direct evidence on the basis of which cartelisation or such agreement between the parties can be proved as these arguments are normally entered into in closed doors.

81) It is also significant to state that respondents had drawn attention of this Court to OECD Policy Roundtables Prosecuting Cartels without Direct Evidence 2006 which discussed the nature of evidence that is required for proving cartel agreement, relevant portion thereof contained in para 2 of the said Policy is reproduced below:

> “Available evidence for proving cartel agreements

2.1 Categories of evidence

Evidence used to prove a cartel agreement can be classified into two types: direct and circumstantial. Circumstantial evidence, in turn, consists of "communication" evidence and economic evidence, which include firm conduct, market structure, and evidence of facilitating practices.

Common types of direct evidence include:

- A document or documents (including email messages) essentially embodying the agreement, or parts of it, and identifying the parties to it.

- Oral or written statements by co-operative cartel participants describing the operation of the cartel and their participation in it.

There are different types of circumstantial evidence. One isevidence that cartel operators met or otherwise communicated but does not describe the substance of their communications. It might be called communication evidence for purposes of this discussion. It includes:

- Records of telephone conversations between competitors (but not their substance), or of travel to a common destination or of participation in a meeting, for example during a trade conference.

- other evidence that the parties communicated about the subject e.g., minutes or notes of a meeting showing that prices, demand or capacity utilisation were discussed; internal documents evidencing knowledge or understanding of a competitors pricing strategy, such as an awareness of a future price increase by a rival.

A broaer category of circumstantial evidence is often called economic evidence. Economic evidence identifies primarily firm conduct that suggests that an agreement was reached, but also conduct of the industry as a whole, elements of market structure which suggest that secret price fixing was feasible, and certain practices that can be used to sustain a cartel agreement.

Conduct evidence is the single most important type of economic evidence. As noted earlier, observation of certain, suspicious conduct frequently triggers an investigation of a possible cartel. And as the section in this paper on economics highlights 11 careful analysis of the conduct of parties is important to identify behaviours that can be characterised as contrary to the

parties' unilateral self-interest and which therefore supports the inference of an agreement. Conduct evidence includes, first and foremost:

- Parallel pricing – changes in prices by rivals that are identical, or nearly so, and simultaneous, or nearly so. It includes other forms of parallel conduct, such as capacity reductions, adoption of standardised terms of sale, and suspicious bidding patterns, e.g., apredictable rotation of winning bidders.

Industry performance could also be described as conduct evidence.

It includes:

- abnormally high profits;

- stable market shares

- A history of competition law violations.

Evidence related to market structure can be used primarily to make the finding of a cartel agreement more plausible, even though market structure factors do not prove the existence of such an agreement. Relevant economic evidence relating to market structure includes:

- high concentration;

- low concentration on the opposite side of the market;

- high barriers to entry;

- high degree of vertical integration;

- Standardised or homogeneous product.

The evidentiary value of structural evidence can be limited, however. There can be highly concentrated industries selling homogeneous products in which all parties compete. Conversely, the absence of such evidence cannot be used to show that a cartel did not exist. Cartels are known to have existed in industries with numerous competitors and differentiated products.

A specific kind of economic conduct evidence is *facilitating practices*

> – practices that can make it easier for competitors to reach or sustain an agreement. It is important to note that conduct described as facilitating practices is not necessarily unlawful. But where a competition authority has found other circumstantial evidence pointing to the existence of a cartel agreement, the existence of facilitating practices can be an important complement. They can explain what kind of arrangements the parties set up to facilitate the formation of a cartel agreement, monitoring, detection of defection, and/or punishment, thus supporting the 'collusion story' put together by the competition law enforcer. Facilitating practices include:
>
> - information exchanges;
> - price signalling;
> - freight equalisation;
> - price protection and most favoured nation policies;
> - Unnecessarily restrictive product standards."

82) Thus, even in the absence of proof of concluded formal agreement, when there are indicators that there was practical cooperation between the parties which knowingly substitute the risk of competition, that would amount to anti-competitive practices. Then, there areguidelines on the applicability of Article 101 of the Treaty on the functioning of the E.U. to horizontal cooperation agreements which records as under:

> "60. Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. The existence of an agreement, a concerted practice or decision by an association of undertakings does not prejudge whether the agreement, concerted practice or decision by an association of undertakings gives rise to a restriction of competition within the meaning of Article 101(1). In linewith the case- law of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.

83) According to us, the real question in the present case is as to whether there was a possibility of such an agreement having regard to market conditions even when we proceed on the basis that meeting did take place. Possibility of such an agreement has been inferred by the CCI on the grounds that identical bidding takes place thereafter and

various suppliers gave such a bid despite varying cost and also that they have appoined common changes etc. as pointed out above.

84) The first and foremost issue which needs to be considered is that whether there was a situation of monopsony or oligopsony.

85) From the aforesaid discussion, it is clear that as far as CCI is concerned, it has come to the conclusion that there was a cartelisation among the appellants herein and a concerted decision was taken to rig the bids which were submitted persuant to the tenders issued by IOCL. On the other hand, the appellants argue that there was no such agreement and even if the bids of many bidders were identical in nature, the bidswere driven by market conditions. Their plea is that there was a situation of oligopsony and the modus which was adopted by IOCL in floating the tenders and awarding the contracts would show that the determination of price was entirely within the control of the IOCL. As per them, the way price was determined for supply of these cylinders, it had become an open secret known to everybody. Therefore, there was no question of any competition and no possibility of adversely affecting that competition by entering into any contract.

86) The factors which have influenced the authorities below in coming to the conclusion that the appellants had colluded and formed a cartel which led to bid rigging have already been noted above. To recapitulate, the authorities below have been influenced by the following factors:

1. Market conditions
2. Small number of suppliers
3. Few new entrants
4. Active trade association
5. Repetitive bidding
6. Identical products
7. Few or no substitutes
8. No significant technological changes
9. Meeting of bidders in Mumbai and its agenda.
10. Appointing common agents
11. Identical bids despite varying cost.

After deliberating on the aforesaid aspects, the CCI has concluded that there is an active trade association in which many of the appellants are members. That product in question, namely, gas cylinder is of a particular specification which is needed by IOCL in large numbers every year and there are very few manufacturers and suppliers of this product to IOCL and two other buyers. For this identical product which is to be supplied by all the suppliers, there is no substitute and no significant technology change. Further, there is an active trade association in which most of the appellants are the members. Their interest is to ensure that no new entrants are able to join. Further, the trade association also

ensures that all the members are able to get some order. It is for this reason the bids submitted in various standards which are floated by IOCL at different places are almost identical despite varying cost. The authorities below attributed this identical bidding to the concerted action of the appellants. This has been inferred from the fact that 2-3 days before the submission of bids, meeting of the association took place which most of the appellants attended. Not only this, common agents, six in number, were appointed who submitted the bids on behalf of these appellants.

87) We may say at the outset that if these factors are taken into consideration by themselves, they may lead to the inference that there was bid rigging. We may, particularly, emphasise the fact that there is an active trade association of the appellants and a meeting of the bidderswas held in Mumbai just before the submission of the tenders. Another very important fact is that there were identical bids despite varying cost. Further, products are identical and there are small number of suppliers with few new entrants. These have become the supporting factors which persuaded the CCI to come to the conclusion that these are suggestive of collusive bidding.

88) However, that is only one side of the coin. The aforesaid factors are to be analysed keeping in mind the ground realities that were prevailing, which are pointed out by the appellants. These attendant circumstances are argued in detail by the counsel for the appellants which have already been taken note of. We may recapitulate the same in brief hereinbelow:

(i) In the present case there are only three buyers. Among them, IOCL is the biggest buyer with 48% market share. It is also a matter of record that all these appellants are manufacturers of 14.2 kg gas cylinders to the three buyers who are available in the market, namely, IOCL, HPCL and BPCL. If these three buyers do not purchase from any of the appellants, that particular appellant would not be in a position to sell those cylinders to any other entity as there are no other buyers.

(ii) There are only three buyers, it may not attract many to enter the field and manufacture these cylinders. It is because of limited number of buyers and for some reason if they do not purchase, the manufacturer would be nowhere. That may deter the persons to enter the field.

(iii) The manner in which the tenders are floated by IOCL and the rates at which these are awarded, are an indicator that it is the IOCL which calls the shots insofar as price control is concerned. It has come in evidence that the IOCL undertakes the exercise of having its internal estimates about the cost of these cylinders. Their own expert arrived at a figure of Rs. 1106.61 paisa per cylinder. All the tenders which have been accepted are for a price lesser than the aforesaid estimate of IOCL itself. That apart, the modus adopted by the IOCL is that that final price is negotiated by it and the contract is not awarded at the rate quoted by bidder who turns out to be L-1. Negotiations are held with such a bidder who is L-1 which generally leads to further reduction of price than the one quoted by L-1. Thereafter, the other bidders who may be L-2 or L-3 etc. are awarded

the contract at the rate at which it is awarded to L-1. Thus, ultimately, all the bidders supply the goods at the same rate which is fixed by the IOCL after negotiating with L-1 bidder. The only difference is that bidder who is L-1 would be able to receive the order for larger quantity than L-2 and L-2 may get an order of more quantity than L-3.

(iv) It has also come on record that there are very few suppliers. For the tender in question, there were 50 parties already in the fray and 12 new entrants were admitted. Number of 12, in such a scenario, cannot be treated as less. Therefore, the conclusion of CCI that the appellants ensured that there should not be entry of new entrant may not be correct.

(v) Since there are not many manufacturers and supplies are needed by the three buyers on regular basis, IOCL ensures that all those manufacturers whose bids are technically viable, are given some order for the supply of specific cylinder. For this purpose, it has framed its broad policy as well. This also shows that control remains with IOCL.

Thus, the appellants appear to be correct when they say that all the participants in the bidding process were awarded contracts in some State or the other which was aimed at ensuring a bigger pool of manufacturers so that the supply of this essential product is always maintained for the benefit of the general public. Had IOCL left some manufacturers empty handed, in all likelihood, they would have shut their shops. However, IOCL wanted all manufacturers to be in the fray in its own interest. Therefore, it was necessary to keep all parties afloat and this explains why all 50 parties obtained order along with 12 new entrants.

(vi) There is another very relevant factor pointed out by the appellants, viz., the governmental control which is regulated by law. As pointed out above, it is not only the three oil companies which can supply LPG to domestic consumers in 14.2 kg LPG cylinders as mandated in the LPG (Regulation and Distribution) Order, 2000 which is issued under the provisions of Essential Commodities Act, 1955, even the price at which the LPG cylinder is to be supplied to the consumer is controlled by the Government.

89) The manner in which tendering process takes place would show that in such a competitive scenario, the bid which the different bidder would be submitting becomes obvious. It has come on record that just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. In a scenario like this, that obviously becomes a guiding factor for the bidders to submit their bids.

90) When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, become valid explanations to the indicators pointed out by the CCI. We have already commented about the market conditions and small number of suppliers. We have also mentioned that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50. Identical products along with market conditions for which there would be only three buyers, in fact, would go in favour of the appellants. The factor of repetitive bidding, though appears to be a factor

against the appellants, was also possible in the aforesaid scneario. The prevailing conditions in fact rule out the possibility of much price variations and all themanufacturers are virtually forced to submit their bid with a price that is quite close to each other. Therefore, it became necessary to sustain themselves in the market. Hence, the factor that these suppliers are from different region having different cost of manufacture would lose its significance. It is a situation where prime condition is to quote the price at which a particular manufacturer can bag an order even when its manufacturing cost is more than the manufacturing cost of others. The main purpose for such a manufacuring would be to remain in the fray and not to lose out. Therefore, it would be ready to accept lesser margin. This would answer why there were near identical bids despite varying cost.

91) Insofar as meeting of bidders in Mumbai just before the date of submission of tender is concerned, some aspects pointed out by the appellants are not considered by the CCI or the COMPAT at all. No doubt, the meeting took place a couple of days before the date of tender. No doubt, the absence of agenda coming on record would not make much difference. However, only 19 appellants had attended that meeting. Many others were not even members or did not attend the meeting. In spite thereof, even they quoted almost same rates as the one who attended the meeting. This would lead us to the inference that reason for quoting similar price was not the meeting but something else. The question is whatwould be the other reason and whether the appellants have been able to satisfactorily explain that and rebut the presumption against them?

92) The explanation is market conditions leading to the situation of oligopsony that prevailed because of limited buyers and influence of buyers in the fixation of prices was all prevalent. This seems to be convincing in the given set of facts. The situation of oligopsony can be both ways. There may be a situation where the sellers are few and they may control the market and by their concerted action indulge into cartelization. It may also be, as in the present case, a situation where buyers are few and that results in the situation of oligopsony with the control of buyers.

93) To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, quoting almost the same rates in their bids.

94) Monopsony consists of a market with a single buyer. When there are only few buyers the market is described as an oligopsony. What is emphasised is that in such a situation a manufacturer with no buyers will have to exit from the trade. Therefore, first condition of oligopsony stands fulfilled. The other condition for the existence of oligopsony is whether the buyers have some influence over the price of their inputs. It is also to be seen as to whether the seller has any ability to raise prices or it stood reduced/eliminated by the aforesaid buyers.

95) On a holistic view of the matter, we find that the appellants have been able to discharge the onus by referring to various indicators which go on to show that parallel behaviour was not the result of any concerted practice.

96) In Dyestuffs, the European Court held that parallel behaviour does not, by itself, amount to a concerted practice, though it may provide a strong evidence of such a practice. Nevertheless, it is a strong evidence of such a practice. However, before such an inference is drawn it has to be seen that this parallel behaviour has led to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, size and volume of the undertaking of the said market. Thus, we examine the matter from the stand point of market economy where question of oligopsony assumes relevance. Whenever there is a situation of oligopsony, parallel pricing simplicitor would not lead to the conclusion that there was a concerted practice there has to be other credible and corroborative evidence to show that in an oligopoly a reduction in price would swiftly attract the customers of the other two or three rivals, the effect upon whom would be so devastating that they wouldhave to react by matching the cut.

101) After taking note of the test that needs to be applied in such cases, which was laid down in Dyestuffs and accepted in ***Excel Crop CareLimited***, we come to the conclusion that the inferences drawn by the CCIon the basis of evidence collected by it are duly rebutted by the appellants and the appellants have been able to discharge the onus that shifted upon them on the basis of factors pointed out by the CCI. However, at that stage, the CCI failed to carry the matter further by having required and necessary inquiry that was needed in the instant case.

102) We are emphasising here that in such a watertight tender policy of IOCL which gave IOCL full control over the tendering process, it was necessary to summon IOCL. This would have cleared many aspects which are shrouded in mystery and the dust has not been cleared.

103) We, thus, arrive at a conclusion that there is no sufficient evidence to hold that there was any agreement between the appellants for bid rigging. Accordingly, we allow these appeals and set aside the order of the Authorities below. As a consequence, since no penalty is payable, appeals of the CCI are rendered infructuous and dismissed as such. All the pending applications stand disposed of.

No orders as to costs.

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Samir Agrawal v. *CCI*

CIVIL APPEAL NO 3100 OF 2020 (Supreme Court)

R.F. Nariman, J. K.M .Joseph and J. Krishna Murari

1. The present appeal is at the instance of an Informant who describes himself as an independent practitioner of the law. The Appellant/Informant, by an Information filed on 13.08.2018 ["**the Information**"], sought that the Competition Commission of India ["**CCI**"] initiate an inquiry, under section 26(2) of the Competition Act, 2002 ["**the Act**"], into the alleged anti-competitive conduct of ANI Technologies Pvt. Ltd. ["**Ola**"], and Uber India Systems Pvt. Ltd., Uber B.V. and Uber Technologies Inc. [together referred to as "**Uber**"], alleging that they entered into price-fixing agreements in contravention of section 3(1) read with section 3(3)(a) of the Act, and engaged in resale price maintenance in contravention of section 3(1) read with section 3(4)(e) of the Act. According to the Informant, Uber and Ola provide radio taxi services and essentially operate as platforms through mobile applications ["**apps**"] which allow riders and drivers, that is, two sides of the platform, to interact. A trip's fare is calculated by an algorithm based on many factors. The apps that are downloaded facilitate payment of the fare by various modes.

2. The Informant alleged that due to algorithmic pricing, neither are riders able to negotiate fares with individual drivers for rides that are booked through the apps, nor are the drivers able to offer any discounts. Thus, the pricing algorithm takes away the freedom of riders and drivers to choose the best price on the basis of competition, as both have to accept the price set by the pricing algorithm. As per the terms and conditions agreed upon between Ola and Uber with their respective drivers, despite the fact that the drivers are independent entities who are not employees or agents of Ola or Uber, the driver is bound to accept the trip fare reflected in the app at the end of the trip, without having any discretion insofar as the same is concerned. The drivers receive their share of the fare only after the deduction of a commission by Ola and Uber for the services offered to the rider. Therefore, the Informant alleged that the pricing algorithm used by Ola and Uber artificially manipulates supply and demand, guaranteeing higher fares to drivers who would otherwise compete against one and another. Cooperation between drivers, through the Ola and Uber apps, results in concerted action under section 3(3)(a) read with section 3(1) of the Act. Thus, the Informant submitted that the Ola and Uber apps function akin to a trade association, facilitating the operation of a cartel. Further, since Ola and Uber have greater bargaining power than riders in the determination of price, they are able to implement price discrimination, whereby riders are charged on the basis of their willingness to pay and as a result, artificially inflated fares are paid. Various other averments *qua* resale price maintenance were also made, alleging a contravention of section 3(4)(e) of the Act.

3. The CCI by its Order dated 06.11.2018, under section 26(2) of the Act, discussed the Information provided by the Appellant/Informant and held:

"**13.** At the outset, it is highlighted that though the Commission has dealt with few cases in this sector, the allegations in the present case are different from those earlier cases. The present case alleges that Cab Aggregators have used their respective algorithms to facilitate price-fixing between drivers. The Informant has not alleged collusion between the Cab Aggregators i.e. Ola and Uber through their algorithms; rather collusion has been alleged on the part of drivers through the platform of these Cab Aggregators, who purportedly use algorithms to fix prices which the drivers are bound to accept.

15. In the conventional sense, hub and spoke arrangement refers to exchange of sensitive information between competitors through a third party that facilitates the cartelistic behavior of such competitors. The same does not seem to apply to the facts of the present case. In case of Cab Aggregators model, the estimation of fare through App is done by the algorithm on the basis of large data sets, popularly referred to as 'big data'. Such algorithm seemingly takes into account personalised information of riders along with other factors e.g. time of the day, traffic situation, special conditions/events, festival, weekday/weekend which all determine the demand-supply situation etc. Resultantly, the algorithmically determined pricing for each rider and each trip tends to be different owing to the interplay of large data sets. Such pricing does not appear to be similar to the 'hub and spoke' arrangement as understood in the traditional competition parlance. A hub and spoke arrangement generally requires the spokes to use third party platform (hub) for exchange of sensitive information, including information on prices which can facilitate price fixing. For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers. In the case of ride-sourcing and ride- sharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators. Thus, the Commission finds no substance in the first allegationraised by the Informant.

16…In case of app-based taxi services, the dynamic pricing can and does on many occasions drive the prices to levels much lower than the fares that would have been charged by independent taxi drivers. Thus, there does not seem to be any fixed floor price that is set and maintained by the aggregators for all drivers and the centralized pricing mechanism cannot be viewed as a vertical instrument employed to orchestrate price-fixing cartel amongst the drivers…

17.Based on the foregoing discussion, the allegations raised by the Informant with regard to price fixing under section 3(3)(a) read with section 3(1), resale price maintenance agreement under section 3(4)(e) read with section 3(1). Moreover, the

Commission observes that existence of an agreement, understanding or arrangement, demonstrating/indicating meeting of minds, is a sine qua non for establishing a contravention under Section 3 of the Act. In the present case neither there appears to be any such agreement or meeting of minds between the Cab Aggregators and their respective drivers nor between the drivers inter-se. In result thereof, no contravention of the provisions of Section 3 of the Act appears to be made out given the facts of the present case.

18. Further, the allegation as regards price discrimination also seems to be misplaced and unsupported by any evidence on record. Price discrimination can perhaps be scrutinised under Section 4 of the Act, which has not been alleged by the Informant. Imposition of discriminatory price is prohibited under Section 4(2)(a)(ii) of the Act only when indulged in by a dominant enterprise. It is not the Informant's case that any of the OPs is dominant in the app-based taxi services market. Given this, the Commission does not find it appropriate to delve into such analysis given that the market in question features two players, Ola as well as Uber, none of which is alleged to be dominant. Further, the provisions of the Act clearly stipulate dominant position by only one enterprise or one group and does not recognise collective dominance. This position was amply made clear in Case Nos. 6 & 74 of 2015 and later reiterated in Case Nos. 25, 26, 27 & 28 of 2017, both matters pertaining to the Cab Aggregators market. Thus, given these facts and legal position, the Commission rejects the allegation of the Informant with regard to price discrimination.

19…The situation of cement manufacturers colluding through a trade association is different from an App providing taxi/cab services. If drivers were colluding using an App as a platform, the said arrangement would have amounted to cartelisation; however, this cannot be equated with the facts of the present cases as demanded by the Informant. Ola and Uber are not an association of drivers, rather they act as separate entities from their respective drivers. In the present situation, a rider books his/her ride at any given time which is accepted by an anonymous driver available in the area, and there is no opportunity for such driver to coordinate its action with other drivers. This cannot be termed as a cartel activity/conduct through Ola/Uber's platform. Thus, the present case is different from the Cement case, not only with regard to adoption of digital App but also with regard to other relevant aspects as elucidated hereinbefore.

23. Based on the foregoing, the Commission is of the view that no case of contravention of the provisions of Section 3 has been made out and the matter is accordingly closed herewith under Section 26(2) of the Act."

19. The Appellant/Informant, being aggrieved by the Order of the CCI, filed an appeal before the National Company Law Appellate Tribunal ["**NCLAT**"] which resulted in the impugned judgment dated 29.05.2020. This judgment recorded that the point as to resale price maintenance was not pressed before it, after which it delved into the *locus standi* of

the Appellant to move the CCI. After setting out section 19 of the Act, the NCLAT held:

"**16. It is true that the concept of locus standi has been diluted to some extent by allowing public interest litigation, class action and actions initiated at the hands of consumer and trade associations. Even the whistle blowers have been clothed with the right to seek redressal of grievances affecting public interest by enacting a proper legal framework. However, the fact remains that when a statute like the Competition Act specifically provides for the mode of taking cognizance of allegations regarding contravention of provisions relating to certain anti-competitive agreement and abuse of dominant position by an enterprise in a particular manner and at the instance of a person apart from other modes viz. suo motu or upon a reference from the competitive government or authority, reference to receipt of any information from any person in section 19(1) (a) of the Act has necessarily to be construed as a reference to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices. Any other interpretation would make room for unscrupulous people to rake issues of anti-competitive agreements or abuse of dominant position targeting some enterprises with oblique motives. In the instant case, the Informant claims to be an Independent Law-Practitioner. There is nothing on the record to show that he has suffered a legal injury at the hands of Ola and Uber as a consumer or as a member of any consumer or trade association. Not even a solitary event of the Informant of being a victim of unfair price fixation mechanism at the hands of Ola and Uber or having suffered on account of abuse of dominant position of either of the two enterprises have been brought to the notice of this Appellate Tribunal. We are, therefore, constrained to hold that the Informant has no *locus standi* to maintain an action qua the alleged contravention of Act."**

20. Despite having held that the Informant had no *locus standi* to move the CCI, the NCLAT went into the merits of the case and held:

"**17.** Assuming though not accepting the proposition that the Informant has locus to lodge information qua alleged contravention of the Act and appeal at his instance is maintainable, on merits also we are of the considered opinion that business model of Ola and Uber does not support the allegation of Informant as regards price discrimination. According to Informant, the Cab Aggregators used their respective algorithms to facilitate price fixing between drivers. It is significant to notice that there is no allegation of collusion between the Cab Aggregators through their algorithms which necessarily implies an admission on the part of Informant that the two taxi service providers are operating independent of each other. It is also not disputed that besides Ola and Uber there are other players also in the field who offer their services to commuters/ riders in lieu of consideration. It emerges from the record that both Ola and Uber provide radio taxi services on demand. A consumer is required to download the app before he is able to avail the services of the Cab Aggregators. A cab is booked by a rider using the respective App of the Cab Aggregators which connects the rider with the driver and provides an estimate of

fare using an algorithm. The allegation of Informant that the drivers attached to Cab Aggregators are independent third party service provider and not in their employment, thereby price determination by Cab Aggregators amounts to price fixing on behalf of drivers, has to be outrightly rejected as no collusion inter se the Cab Aggregators has been forthcoming from the Informant. **The concept of hub and spoke cartel stated to be applicable to the business model of Ola and Uber as a hub with their platforms acting as a hub for collusion inter se the spokes i.e. drivers resting upon US Class Action Suit titled "Spencer Meyer v. Travis Kalanick" has no application as the business model of Ola and Uber (as it operates in India) does not manifest in restricting price competition among drivers to the detriment of its riders. The matter relates to foreign antitrust jurisdiction with different connotation and cannot be imported to operate within the ambit and scope of the mechanism dealing with redressal of competition concerns under the Act.** It is significant to note that the Informant in the instant case has alleged collusion on the part of drivers through the platform of the Cab Aggregators who are stated to be using their algorithms to fix prices which are imposed on the drivers. In view of allegation of collusion *inter se* the drivers through the platform of Ola and Uber, it is ridiculous on the part of Informant to harp on the tune of hub and spoke raised on the basis of law operating in a foreign jurisdiction which cannot be countenanced. The argument in this core is repelled.

Admittedly, under the business model of Ola, there is no exchange of information amongst the drivers and Ola. The taxi drivers connected with Ola platform have no *inter se* connectivity and lack the possibility of sharing information with regard to the commuters and the earnings they make out of the rides provided. This excludes the probability of collusion inter se the drivers through the platform of Ola. In so far as Uber is concerned, it provides a technology service to its driver partners and riders through the Uber App and assist them in finding a potential ride and also recommends a fare for the same. However, the driver partners as also the riders are free to accept such ride or choose the App of competing service, including choosing alternative modes of transport. Even with regard to fare though Uber App would recommend a fare, the driver partners have liberty to negotiate a lower fare. It is, therefore, evident that the Cab Aggregators do not function as an association of its driver partners. Thus, the allegation of their facilitating a cartel defies the logic and has to be repelled.

18. Now coming to the issue of abuse of dominant position, be it seen that the Commission, having been equipped with the necessary wherewithal and having dealt with allegations of similar nature in a number of cases as also based on information in public domain found that there are other players offering taxi service/ transportation service/ service providers in transport sector and the Cab Aggregators in the instant case distinctly do not hold dominant position in the relevant market. Admittedly, these two Cab Aggregators are not operating as a joint venture or a group, thus both enterprises taken together cannot be deemed to be holding a dominant position within the ambit of Section 4 of the Act. Even otherwise, none of

the two enterprises is independently alleged to be holding a dominant position in the relevant market of providing services. This proposition of fact being an admitted position in the case, question of abuse of dominant position has to be outrightly rejected."

Based on these findings, the appeal was accordingly dismissed.

21. The Appellant/Informant, who appeared in person before this Court, referred to a Services Agreement between Uber and its drivers, updated on 08.09.2015, and an Agreement between Ola and its transport service providers, dated 01.11.2016. He reiterated the submissions made before the CCI and the NCLAT. In particular, he attacked the finding of the NCLAT as to *locus standi* and referred us to various provisions of the Act, including, in particular, sections 19 and 35, arguing that the amendments made in the sections would show that any person can be an informant who can approach the CCI, as one does not have to be a "consumer" or a "complainant", which was the position before the Competition (Amendment) Act, 2007 ["**2007 Amendment**"]. He contrasted these provisions with sections 53B and 53T of the Act, where the expression used is "person aggrieved", but hastened to add that once an informant had moved the CCI, for the purposes of filing an appeal, such informant would certainly be a "person aggrieved", howsoever restricted the expression "person aggrieved" may be in law.

22. The Appellant then argued substantially what was submitted before the CCI and NCLAT on the merits, stating that the arrangements in the present case amounted to "hub and spoke" arrangements and referred us to a particular diagram depicting Ola and Uber as the "hub" and drivers as "spokes" (at page 263), which indicated that the provisions of section 3 of the Act had clearly been violated.

23. As against this, Dr. Abhishek Manu Singhvi, learned senior advocate appearing on behalf of Uber, took us through the concurrent findings of fact of the CCI and the NCLAT, and stated that they could not be said to be, in any sense, even remotely perverse and would therefore have to be upheld. He was at pains to stress that every driver of a taxi cab, who uses the Ola or Uber app, can have several such apps including both Ola, Uber and the apps of some of their competitors, and can take private rides *de hors* these apps as well. There is, therefore, complete discretion with the drivers to negotiate fares with riders, not only insofar as Ola and Uber are concerned, but also otherwise, there being nothing in either the agreements or practice, which prevents them from doing so. Furthermore, there would be no question of any anti-competitive practice in the form of cartelization, as there are thousands of drivers, none of whom have anything to do with each other, there being no common meeting of minds as far as they are concerned. On the contrary, the apps allow drivers to negotiate fares that are below what is quoted in the app, thereby increasing competition and giving riders greater flexibility to take rides with those drivers who offer the most competitive fares.

24. Shri Rajshekhar Rao, learned advocate appearing on behalf of Ola, also supported Dr. Singhvi's submissions on merits, but went on to add that even if the Appellant could be said to be an informant for the purposes of section 19 of the Act, he could not be said to be a "person, aggrieved" for the purposes of filing an appeal under section 53B under the Act, and referred to the judgment in **Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484**, ["**Adi Pherozshah Gandhi**"]. He also went

on to argue that information can be provided by persons like the Appellant at the behest of competitors, which will have a deleterious effect on persons like Ola and Uber, as the value of their shares in the share market would instantly drop the moment the factum of the filing of such information before the CCI would be advertised. In any event, he exhorted us to lay down that in such cases heavy costs should be imposed to deter such persons from approaching the CCI with frivolous and/or *mala fide* information, filed at the behest of competitors.

25. The learned ASG, Shri Balbir Singh, appearing on behalf of the CCI, took us through the provisions of the Act together with the regulations made under it, and stated that though he would support the CCI's Order closing the case, he would also support the right of the Appellant to approach the CCI with information.

26. Having heard the learned counsel appearing on behalf of the various parties, it is necessary to first set out the sections of the Act which have a bearing on the matter before us:
"**Definitions**

a. In this Act, unless the context otherwiserequires,— xxx xxx xxx
S.2(c) "cartel"
S 2(f) "consumer"
S.2 (I) "person
S. 3 "**Anti-competitive agreements**
S.18 Duties of Commission
"**Inquiry into certain agreements and dominant position of enterprise**
section 19 "**Procedure for inquiry under**

26. (1) On receipt of a reference from the Central Government or a State Government or a statutory authority
S 35 "**Appearance before Commission**
S 45"**Penalty for offences in relation to furnishing of information**
S. 53B. "**Appeal to Appellate Tribunal**
S. 53N. "**Awarding compensation**
S.53S "Right to legal representation.
S.53T. Appeal to Supreme Court

27. The relevant regulations that are contained in the Competition Commission of India (General) Regulations, 2009 ["**2009 Regulations**"] are set out as under:
"**2. Definitions.** –
(1) In these regulations, unless the context otherwise requires, –
(i)"Party" includes a consumer or an enterprise or a person defined in clauses (f), (h) and (l) of section 2 of the Act respectively, or an information provider, or a consumer association or a trade association or the Director General defined in clause (g) of section 2 of the Act, or the Central Government or any State Government or any statutory authority, as the case may be, and shall include an enterprise against whom any inquiry or proceeding is instituted and shall also include any person permitted to join the proceedings or an intervener;..."

"**10. Contents of information or the reference.** –

"**14. Powers and functions of the Secretary. –**

(1) The Commission may sue or be sued in the name of the Secretary and the Commission shall be represented in the name of the Secretary in all legal proceedings, including appeals before the Tribunal."

"**25. Power of Commission to permit a person or enterprise to take part in proceedings.**

"**35. Confidentiality**. –

"**51. Empanelment of special counsel by Commission.–**

28. A reading of the provisions of the Act and the 2009 Regulations would show that "any person" may provide information to the CCI, which may then act upon it in accordance with the provisions of the Act. In this regard, the definition of "person" in section 2(l) of the Act, set out hereinabove, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of "consumer" in section 2(f) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.

29. A look at section 19(1) of the Act would show that the Act originally provided for the "receipt of a complaint" from any person, consumer or their association, or trade association. This expression was then substituted with the expression "receipt of any information in such manner and" by the 2007 Amendment. This substitution is not without significance. Whereas, a *complaint* could be filed only from a person who was aggrieved by a particular action, *information* may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings *in rem* which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion, is also laid down in section 19(1) of the Act. Further, even while exercising *suo motu* powers, the CCI may receive information from any person and not merely from a person who is aggrieved by the conduct that is alleged to have occurred. This also follows from a reading of section 35 of the Act, in which the earlier expression "complainant or defendant" has been substituted by the expression, "person or an enterprise," setting out that the informant may appear either in person, or through one or more agents, before the CCI to present the information that he has gathered.

30. Section 45 of the Act is a deterrent against persons who provide information to the CCI, *mala fide* or recklessly, inasmuch as false statements and omissions of material facts are punishable with a penalty which may extend to the hefty amount of rupees one crore, with the CCI being empowered to pass other such orders as it deems fit. This, and the judicious use of heavy costs being imposed when the information supplied is either frivolous or *mala fide*, can keep in check what is described as the growing tendency of persons being "set up" by rivals in the trade.

31. The 2009 Regulations also point in the same direction inasmuch as regulation 10, which

has been set out hereinabove, does not require the informant to state how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Also, regulation 25 shows that public interest must be foremost in the consideration of the CCI when an application is made to it in writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings. What is also extremely important is regulation 35, by which the CCI must maintain confidentiality of the identity of an informant on a request made to it in writing, so that such informant be free from harassment by persons involved in contravening the Act.

32. This being the case, it is difficult to agree with the impugned judgment of the NCLAT in its narrow construction of section 19 of the Act, which therefore stands set aside.

33. With the question of the Informant's *locus standi* out of the way, one more important aspect needs to be decided, and that is the submission of Shri Rao, that in any case, a person like the Informant cannot be said to be a "person aggrieved" for the purpose of sections 53B and 53T of the Act. Shri Rao relies heavily upon **Adi Pherozshah Gandhi** (supra), in which section 37 of the Advocates Act, 1961 came up for consideration, which spoke of the right of appeal of "any person aggrieved" by an order of the disciplinary committee of a State Bar Council. It was held that since the Advocate General could not be said to be a person aggrieved by an order made by the disciplinary committee of the State Bar Council against a particular advocate, he would have no *locus standi* to appeal to the Bar Council of India. In so saying, the Court held:

> "**11.** From these cases it is apparent that any person who feels disappointed with the result of the case is not a "person aggrieved". He must be disappointed of a benefit which he would have received if the order had gone the other way. The order must cause him a legal grievance by wrongfully depriving him of something. It is no doubt a legal grievance and not a grievance about material matters but his legal grievance must be a tendency to injure him. That the order is wrong or that it acquits some one who he thinks ought to be convicted does not by itself give rise to a legal grievance…."
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> (page 491)

34. It must immediately be pointed out that this provision of the Advocates Act, 1961 is in the context of a particular advocate being penalized for professional or other misconduct, which concerned itself with an action *in personam*, unlike the present case, which is concerned with an action *in rem*. In this context, it is useful to refer to the judgment in **A. Subash Babu v. State of A.P., (2011) 7 SCC 616**, in which the expression "person aggrieved" in section 198(1)(c) of the Code of Criminal Procedure, 1973, when it came to an offence punishable under section 494 of the Indian Penal Code, 1860 (being the offence of bigamy), was under consideration. It was held that a "person aggrieved" need not only be the first wife, but can also include a second "wife" who may complain of the same. In so saying, the Court held:

> "**25.** Even otherwise, as explained earlier, the second wife suffers several legal wrongs and/or legal injuries when the second marriage is treated as a nullity by the

husband arbitrarily, without recourse to the court or where a declaration sought is granted by a competent court. The expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which the contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict the right of filing complaint to the first wife and there is no reason to read the said section in a restricted manner as is suggested by the learned counsel for the appellant. Section 494 does not say that the complaint for commission of offence under the said section can be filed only by the wife living and not by the woman with whom the subsequent marriage takes place during the lifetime of the wife living and which marriage is void by reason of its taking place during the life of such wife. The complaint can also be filed by the person with whom the second marriage takes place which is void by reason of its taking place during the life of the first wife."

(page 628)

35. Clearly, therefore, given the context of the Act in which the CCI and the NCLAT deal with practices which have an adverse effect on competition in derogation of the interest of consumers, it is clear that the Act vests powers in the CCI and enables it to act *in rem*, in public interest. This would make it clear that a "person aggrieved" must, in the context of the Act, be understood widely and not be constructed narrowly, as was done in **Adi Pherozshah Gandhi** (supra). Further, it is not without significance that the expressions used in sections 53B and 53T of the Act are "*any* person", thereby signifying that *all* persons who bring to the CCI information of practices that are contrary to the provisions of the Act, could be said to be aggrieved by an adverse order of the CCI in case it refuses to act upon the information supplied. By way of contrast, section 53N(3) speaks of making payment to an applicant as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II of the Act, having been committed by an enterprise. By this sub-section, clearly, therefore, "any person" who makes an application for compensation, under sub-section (1) of section 53N of the Act, would refer only to persons who have suffered loss or damage, thereby, qualifying the expression "any person" as being a person who has suffered loss or damage. Thus, the preliminary objections against the Informant/Appellant filing Information before the CCI and filing an appeal before the NCLAT are rejected.

36. An instructive judgment of this Court reported as **Competition Commission of India v. Steel Authority of India, (2010) 10 SCC 744** dealt with the provisions of the Act in some detail andheld:

"**37.** As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section

19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53-A of theAct.

38. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of theRegulations."(page 768)

"**101.** The right to prefer an appeal is available to the Central Government, the State Government or a local authority or enterprise or any person aggrieved by any direction, decision or order referred to in clause (*a*) of Section 53-A [ought to be printed as 53-A(1)(*a*)]. The appeal is to be filed within the period specified and Section 53-B(3) further requires that the Tribunal, after giving the parties to appeal an opportunity of being heard, to pass such orders, as it thinks fit, and send a copy of such order to the Commission and the parties to the appeal.

102. Section 53-S contemplates that before the Tribunal a person may either appear "in person" or authorise one or more chartered accountants or company secretaries, cost accountants or legal practitioners or any of its officers to present its case before the Tribunal. However, the Commission's right to legal representation in any appeal before the Tribunal has been specifically mentioned under Section 53-S(3). It provides that the Commission may authorise one or more of chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers before the Tribunal. Section 53-T grants a right in specific terms to the Commission to prefer an appeal before the Supreme Court within 60 days from the date of communication of the decision or order of the Tribunal to them.

103. The expression "any person" appearing in Section 53- B has to be construed liberally as the provision first mentions specific government

bodies then local authorities and enterprises, which term, in any case, is of generic nature and then lastly mentions "any person". Obviously, it is intended that expanded meaning be given to the term "persons" i.e. persons or bodies who are entitled to appeal. The right of hearing is also available to the parties to appeal.

104. The above stated provisions clearly indicate that the Commission, a body corporate, is expected to be party in the proceedings before the Tribunal as it has a legal right of representation. Absence of the Commission before the Tribunal will deprive it of presenting its views in the proceedings. Thus, it may not be able to effectively exercise its right to appeal in terms of Section 53 of the Act.

105. Furthermore, Regulations 14(4) and 51 support the view that the Commission can be a necessary or a proper party in the proceedings before the Tribunal. The Commission, in terms of Section 19 read with Section 26 of the Act, is entitled to commence proceedings suo motu and adopt its own procedure for completion of such proceedings. Thus, the principle of fairness would demand that such party should be heard by the Tribunal before any orders adverse to it are passed in such cases. The Tribunal has taken this view and we have no hesitation in accepting that in cases where proceedings initiated suo motu by the Commission, the Commission is a necessary party.

106. However, we are also of the view that in other cases the Commission would be a proper party. It would not only help in expeditious disposal, but the Commission, as an expert body, in any case, is entitled to participate in its proceedings in terms of Regulation 51. Thus, the assistance rendered by the Commission to the Tribunal could be useful in complete and effective adjudication of the issue before it." (page 788)

"**125.** We have already noticed that the principal objects of the Act, in terms of its Preamble and the Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalise the Indian economy to bring it on a par with the best of the economies in this era of globalisation would be jeopardised if time-bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53-B(5) and 53-T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time- bound disposal of such matters.

126. The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the legislature upon the Commission under Sections 27(*d*) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification." (page 794)

37. Obviously, when the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of theAct.

38. Coming now to the merits, we have already set out the concurrent findings of fact of the CCI and the NCLAT, wherein it has been found that Ola and Uber do not facilitate cartelization or anti-competitive practices between drivers, who are independent individuals, who act independently of each other, so as to attract the application of section 3 of the Act, as has been held by both the CCI and the NCLAT. We, therefore, see no reason to interfere with these findings.

Resultantly the appeal is disposed of in terms of this judgment.

Belaire Apartment Owner's Association v. *DLF Ltd & HUDA*

2011 Comp LR 0239(CCI)
Main Order dated August 12, 2011;
Supplementary Order by Mr. R Prasad (Member, CCI) dated August 12, 2011
and Supplementary Order dated January 3, 2013

DLF Ltd. v. CCI, 2014 Comp LR 01 (CompAT)

The case under consideration concerns competition issues and consumer interests in the residential real estate market in India. With more than 1.2 billion people, India is the second most populous country in the world after China. Since 1991, a series of economic measures have led India to a higher sustained level of growth which has stimulated development across all sectors including the real estate industry. Since the real estate industry has significant linkages with several other sectors of the economy, investment in real estate sector results in incremental additions to the GDP of the country. Along with the growth in real estate industry, accompanied by increased level of income, demand for residential units has also risen throughout India. Residential sector constitutes a major share of the real estate market; the balance comprising of commercial segment like offices, shopping malls, hotels etc. Apart from its importance as a segment of real estate sector, residential housing has a special place in India where investment in a home remains one of the biggest and most important investment in a person's life. Along with food and clothing, a home is one of the most basic necessities of existence according to economic thought.

1.1 The growth in the residential real estate market in India has been largely driven by rising disposable income, a rapidly growing middle class, fiscal incentives like tax concessions, conducive and markedly low interest rates for housing loans and growing number of nuclear families. The residential sector is expected to continue to demonstrate robust growth, assisted by rising and easy availability of housing finance. The higher income levels and rising disposable income are also expected to lead to demand for the high end residential units, a situation which was not witnessed in the earlier days.

1.2 Indian residential real estate sector offers plenty of opportunities. There is a huge shortage of housing units in semi-urban and urban areas and there is a scope of bridging the deficit. The growth in demand due to rising income and expenditure levels, increasing phenomenon of nuclear families and perception of investment in real estate as secure and rewarding has far outstripped the supply of residential housing. The growing rate of urbanization, coupled with rising income has led to demand for better housing with modern amenities. Also the pace of growth of demand is far higher than the pace of growth of supply due to limited supply of urban land, lack of infrastructure in non-urban area, concentration of facilities and amenities as well as income opportunities in urban areas. This is the reason that the sector is witnessing tremendous boom in recent days. Real estate industry in India was said to be worth

$12 billion in the year 2007 and is estimated to be growing at the rate of 30 per cent per annum.

1.3 Previously, government's support to housing had been centralized and directed through the State Housing Boards and development authorities. In 1970, the Government of India set upthe Housing and Urban Development Corporation (HUDCO) to finance housing and urban infrastructure activities and in 2002; the government permitted 100 per cent foreign direct investment (FDI) in housing through integrated township development. The residential real estate industry now is driven largely by private sector playe The mushrooming activities in the sector are reflected in the advertisements that come up in the newspapers and number of messages on the cell phones received every day indicating launches of new products. Along with the increased activity in the sector, often reports of problems being faced by the consumers do also surface.

1.4 The informant in this case has alleged unfair conditions meted out by a real estate player. It has been alleged that by abusing its dominant position, DLF Limited (OP-1) has imposed arbitrary, unfair and unreasonable conditions on the apartment - allottes of the Housing Complex 'the **Belaire**', being constructed by it.

1.5.1 The informant in this case is **Belaire** Owners' **Association**. The **association** has been formed by the apartment allottes of a Building Complex, '**Belaire**' situated in DLF City, Phase-V, Gurgaon, being constructed by OP-1. The President of the **association** is Sanjay Bhasin, who himself is one of the allotees in the complex.

1.5.2 DLF Limited (referred to hereafter as DLF or OP-1 and includes group companies), the main Respondent is a Public Limited Company. It commenced business with the incorporation of Raisina Cold Storage and Ice Company Private Limited on March 16, 1946 and Delhi Land and Finance Private Limited on September 18, 1946. Pursuant to the order of the Delhi High Court dated October 26, 1970, Delhi Land and Finance Private Limited and Raisina Cold Storage and Ice Company Private Limited along with another DLF Group company, DLF Housing and Construction Private Limited, merged with DLF United Private Limited with effect from September 30, 1970. Thereafter, DLF United Limited merged with another Company, then known as American Universal Electric (India) Limited (incorporated in the year 1963), with effect from October 1, 1978, under a scheme of amalgamation sanctioned by the Delhi High Court and the Punjab and Haryana High Court. The merged entity was renamed as 'DLF Universal Electric Limited' with effect from June 18, 1980. In 1981 DLF Universal Electric Limited changed its name to DLF Universal Limited and in 2006, DLF Universal Limited changed its name to DLF Limited.

1.5.3 DLF with its different group entities has developed some of the first residential colonies in Delhi such as Krishna Nagar in East Delhi that was completed as early as in 1949. Since then, the company has developed many well known urban colonies in Delhi, including South Extension, Greater Kailash, Kailash Colony and Hauz Khas. However, following the passage of the Delhi Development Act in 1957, the state

assumed control of real estate development activities in Delhi, which resulted in restrictions on private real estate colony development. As a result, DLF commenced acquiring land outside the areas controlled by the Delhi Development Authority (DDA), particularly in Gurgaon.

1.5.4 In the initial years of 1980s, DLF Universal Limited obtained its first licence from the State Government of Haryana and commenced development of the 'DLF City' in Gurgaon, Haryana. In the year 1985, DLF Group initiated plotted development, sold first plot in Gurgaon, Haryana and consolidated development of DLF City for township development. In1991, construction of the DLF Group's first office complex, 'DLF Centre', began at New Delhi and in 1993; completion of the DLF Group's condominium project, 'Silver Oaks', at DLF City, Gurgaon, Haryana was accomplished.

1.5.5 In 1996 'DLF Corporate Park', DLF Group's first office complex at DLF City, Gurgaon, Haryana was built and in 1999 DLF golf course was developed. The DLF Group ventured into retail development in Gurgaon, Haryana in 2002 and in the same year DLF ventured into the commencement of operation of 'DT Cinemas' at Gurgaon, Haryana. DLF undertook development of 'DLF Cyber city', an integrated IT park measuring approximately 90 acres at Gurgaon, Haryana in the year 2004. In the year 2005, DLF acquired 16.62 acres (approx) of mill land in Mumbai.

1.5.6 DLF in course of expansion of its business has entered into JV with Laying O'Rourke (one of Europe's largest construction company). DLF has also entered into various Mous, joint ventures and partnerships with other concerns like WSP Group Acquisition, Feedback Ventures, Nakheel LLC, a leading property developer in UAE, Prudential Insurance, MG Group, HSIIDC, Fraport AG Frankfurt Airport Services etc.

1.5.7 The company was listed on July 5, 2007 and is at present listed on NSE and BSE.

1.5.8 Haryana Urban Development Authority (**HUDA**) is a statutory body under Haryana Urban Development Authority Act, 1977. The precursor of **HUDA** was the Urban Estates Department (U.E.D.) which was established in the year 1962. It used to look after the work relating to planned development of urban areas and it functioned under the aegis of the Town

& Country Planning Department. Its functioning was regulated by the Punjab Urban Estates Development and Regulations Act, 1964 and the rules made there under and the various development activities used to be carried out by different departments of the State Government such as PWD (B&R), Public Health, Haryana State Electricity Board etc. In order to bring more coordination, to raise resources from various lending institutions and to effectively achieve goals of planned urban development it was felt that the Department of Urban Estates should be converted into such a body which could take up all the development activities itself and provide various facilities in the Urban Estates expeditiously. Consequently the Haryana Urban Development Authority came into existence on 13.01.1977 under the Haryana Urban Development Authority Act, 1977 to take over work, responsibilities hither to being handled by individual

Government departments. The functions of Haryana Urban Development Authority, interalia, are:

a. To promote and secure development of urban areas in a systematic and planned way with the power to acquire sell and dispose of property, both movable and immovable.

b. Use this so acquired land for residential, industrial, recreational and commercial purpose.

c. To make available developed land to Haryana Housing Board and other bodies for providing houses to economically weaker sections of the society, and

d. To undertake building works.

2.2.15 According to the informant, the unfair and deceptive attitude is reflected form the Brochure issued by OP-1 for marketing "the **Belaire**" when compared with the Part E of Annexure-4 to the agreement. While through the Brochure a declaration is made to the generalpublic that innumerable additional facilities, like, schools, shops and commercial spaces within the complex, club, dispensary, health centre, sports and recreational facilities, etc. would be provided to the allottes, however, Part "E" of the agreement stipulates that OP-1 shall have absolute discretion and right to decide on the usage, manner and method of disposal etc.

2.2.16 It has been submitted by the informant that there are various other terms and conditions of the Apartment Buyer's Agreement which are one sided and discriminatory. The Schedule of Payment unilaterally drawn up by OP-1 was not construction specific initially and it was only after OP-1 amassed huge funds unmindful of the delay caused in the process, it made the payment plan construction-linked arising out of the compulsion of increase in the number of floors from 19 to 29.

2.2.17 According to informant, OP-1 from the very beginning has concealed some basic and fundamental information and being ignorant of these basic facts, the allottes have entered into and executed the agreement reposing its total trust and faith on OP-1. Giving specific instances, the informant has submitted that on 04.09.2006 one of the allottee Mr. Sanjay Bhasin, has applied for allotment by depositing the booking amount of 20 lakh pursuant whereto on 13.09.2006 OP-1 issued Allotment Letter for apartment No. D-161, the **Belaire**, DLF City, Gurgaon. On 30.09.2006 a Schedule of Payment for the captioned property was sent. According to the said Schedule, the buyer was obligated upon to remit 95% of the dues within 27 months of booking, namely, by 04.12.2008. The remaining 5% was to be paid on receipt of Occupation Certificate. The Apartment Buyer's Agreement, however, was executed and signed on 16.01.2007. By that date, OP-1 had already extracted from the allottee an amount of 85 lakh (approx.) without the buyer being aware of the sweeping terms and conditions contained in the agreement and also without having the knowledge whether the necessary statutory approvals and clearance as also mandatory sanctions were obtained by OP-1 from concerned Government authorities.

2.2.18 It has been submitted that because of the initial defaults of OP-1 in not applying for and obtaining the sanction of the building plan/lay-out plan, crucial time was lost

and delay of several months had taken place. This delay was very much foreseeable but OP-1 deliberately concealed this fact from the apartment allottes. After keeping the buyers in dark for more than 13 months, OP-1 intimated the buyers on 22.10.2007 that there was delay in approvals and that even the construction could not take off in time. By that time, OP-1 had enriched itself by hundreds of crore of rupees by collecting its timely instalments from scores of buye Before a single brick was laid, the buyers had already paid instalments of November, 2006, January, 2007 March, 2007, June, 2007 and Sept. 2007, up to almost 33% of the total consideration.

2.2.19 According to the informant, only through the letter dated 22.10.2007, the allottes were further ex-post-facto conveyed by OP-1 in an oblique manner that the original project of 19 floors was scrapped and a new project with 29 floors with new terms has been envisaged in its place.

2.2.20 The informant has submitted that the decision to increase the number of floors was without consulting the allottes and while payment schedule was revised based upon the increase in the number of floors, there was no proportionate reduction in the price to be paid by the existing allottes whose rates were calculated purely on the basis of 19 floors and the landbeneath it although their rights/entitlements of the common areas and facilities substantially got compressed due to increase in number of floors and additional apartments, which is in violation of the provisions of the Haryana Apartment Ownership Act, 1983, more particularly, Sections 6(2) which says that the common areas and facilities expressed in the declaration shall have a permanent character and without the express consent of the apartment Owners, the common areas and facilities can never be altered and Section 13 which makes it mandatory that the floor plans of the building have to be registered under the Indian Registration Act, 1908.

2.2.21 The informant has cited the case of one of the members of **Belaire** Owners' **Association**, the RKG Hospitality Private **Ltd**. It was submitted that
concerned with delays, RKG Hospitality Private **Ltd**. in its communication dated 03.06.2009, informed OP-1 that the project had already been delayed by 8 months and also expressed resentment that the number of storeys had unilaterally gone up from 19 to 29. In its reply dated 07.07.2009, with respect to the arbitrary and unilateral increase in the number of floors, OP-1 took refuge in Clause 9.1 of the Apartment Buyer's Agreement. In its reply, without explaining the delay of 8 months, OP-1 tried to assure that it would deliver the possession within the time frame. OP-1 also stated that even if there was delay, compensation @ 5 per sq. ft. per month was already stipulated to meet the plight of the allottes. In an admission that lay-out plans/building plans were not shown to the allottes, OP-1 agreed that the same could be verified by any authorized representative of RKG. RKG, expressing its disapproval of the stand taken by the OP-1, sent a rejoinder on 27.07.2009, that Apartment Buyer's Agreement was unfair, unreasonable and unconscionable.

2.2.22 According to informant, on 25.08.2009, OP-1 responded stating that the buyer had signed the agreement after going through and understanding the contents thereof

and as such no objection could be raised that the agreement was one-sided. On 18.09.2009, when the representatives of the RKG visited the office of OP-1 for the purpose of verification/inspection of the building plans they were told by an officer of OP-1 that he didn't have the sanctioned building plans. However, the perusal of title deeds, licensees, etc. revealed that various companies/entities were involved in the transaction. On 21.09.2009, RKG conveyed all of their concerns to OP-1.

2.2.23 It has been submitted by the informant that while the discount given to the prospective buyers after the revised plan was as high as Rs 500 per sq. ft., OP-1 had offered only Rs 250 per sq. ft to the older buye The buyers of the apartments, who invested huge amount of money starting from October, 2006 in 'The **Belaire**' and November, 2006 in 'DLF Park Place' had been put to a disadvantageous position vis-à-vis prospective buyers in November, 2009 i.e., after a period of 3 year Against all these, on 21.12.2009, RKG raised grievance before the Ministry of Housing and Urban Poverty Alleviation showing the helplessness of the buyers who did not have any option even to opt out as the exit route was too heavily tilted in favour of OP-1 and on 28.01.2010 the **Association** in its detailed representation to OP-1 raised many pertinent issues pointing to the illegal acts of omission and commission of OP-1. The **Association** categorically registered its protest by stating that the agreement was arbitrary, lopsided and unfair, with apparent double standards with respect to the rights and obligationsof OP-1 vis-à-vis the investor In its reply dated 09.03.2010, OP-1 did not furnish any convincing response except for referring to the one-sided clauses of the agreement.

2.2.24 The informant has submitted that the manner in which OP-1 has exercised its arbitrary authority is evidenced by the letter dated 13.04.2010, which it has written to Mr. Pankaj Mohindroo cancelling the allotment of his apartment for alleged non-payment of dues and unilaterally went to the extent of forfeiting an amount of over 51 lac, notwithstanding the fact that Mr. Mohindroo has adhered and fulfilled his obligation of making regular payments of all the installments totaling over 1.29 crore, while OP-1 has defaulted in all its obligations including the targeted date of completion and physical handing over the possession.

2.2.25 The informant has submitted that at the time of seeking permission for public issue of its equity shares in May, 2007, OP-1 gave information to SEBI with regard to **Belaire** as under:

The **Belaire** is expected to be completed in fiscal 2010 and consisting of 368 residential units approximately 1.3 million square feet of saleable space in five blocks of 19 to 20 floors each.

This information given to SEBI almost after six months of the allotment of the apartment to the allottes clearly brings out the fact that either the information given to SEBI was incorrect and misleading or for reasons not known to the allottes, OP-1 scrapped the original project in October, 2007.

2.2.26 It has been submitted by the informant that the OP-2 has framed Haryana Urban Development Authority (Execution of Building) Regulation, 1979 which interalia

specifies various parameters for any building. The maximum FAR therein is 175% of the site area and population density is 100 to 300 persons per acre @ 5 persons per dwelling unit. So far as the maximum height of the building is concerned, the Regulation prescribes that in case of more than 60 mts. height, clearances from the recognized institutions like IT Ts, Punjab Engineering College (PEC), Regional Engineering College/National institute of technology etc. and for the fire, safety clearance from institute of Fire Engineers, Nagpur will be required. There is hardly any material to show that the buildings of 'The **Belaire**' have been constructed in adherence to the said Regulations and there has been violation on account of both FAR and density per acre.

2.2.27 As per the informant, engineering norms prescribe that the foundation of a building is laid out keeping in mind a margin of 25% as safety factor. This means if a building is to be constructed up to 19 floors, the foundation work would be such that the 25% more load can be sustained thereon. This 25% extra cushion is only a safety measure and is never utilized in making extra construction. OP-1, however, has increased the height up to 29 floors while the foundation laid out underneath the building is suited only to sustain the load of 19 floo

2.2.28 It has been submitted by the informant that the fact that the project could not be completed in the stipulated time was either within the contemplation of OP-1 or it was reasonably foreseeable by OP-1 from the very threshold stage as the statutory approvals and clearances were not obtained by OP-1. The Act of OP-1 in concealing this fact, therefore, amounts to "suppresio veri". From the very beginning it was in the knowledge of OP-1 that the project has been inordinately delayed. Yet it never informed the apartment allottes of the factor of delay till the time it extracted substantial payment from them. In the said circumstances, the action of collecting the money is absolutely fraudulent and unwarranted.

2.2.29 According to informant, acts and deeds of OP-1 are "culpa-grave" both in attracting the buyers by making promises in the colorful brochure/advertisement to enter into the contract only to be followed by gross and deliberate carelessness in performance of the contract. The informant has contended that in the present form, the agreement is heavily weighted in favour of OP-1. Taking shelter of the expression "Sole Discretion", OP-1 can act arbitrarily without assigning any reason for its inaction, delay in action, etc. and yet disowned its responsibility or liability arising there from. The informant has alleged that the various clauses of the agreement and the action of OP-1 pursuant thereto are ex-facie unfair and discriminatory attracting the provisions of Section 4(2)(a) of Competition Act, 2002 and per-se the acts and conduct of DLF are acts of abuse of dominant position by OP-1.

2.2.30 The informant finally has also alleged that it is not clear how the various Government Agencies, more particularly, OP-2 and OP-3 have approved and permitted OP-1 to act in this illegal unfair and irrational manner. Various Government and statutory authorities have allotted land and given licenses, permissions and clearances to OP-1 when it is ex-facie clear that OP-1 has violated the provisions of

various Statutes including Haryana Apartment Ownership Act, 1983, the Punjab Scheduled Roads and Controlled Areas (Restriction of Unregulated Development) Act, 1963 and Haryana Development and Regulation of Urban Areas Rules, 1976.

3. Reference to Director General

3.1 The Commission, after considering the available information formed an opinion that a prima-facie case exists and directed under Section 26(1) vide order dated 20.05.2010 that investigation be made in the matter by the office of Director General (hereinafter referred to as DG).

3.2 It would be pertinent to note that the order under Section 26(1) of the Commission was challenged before the Competition Appellate Tribunal, interalia raising the issues of jurisdiction. The Tribunal vide order dated 18.08.2010 observed that the Appellant (OP-1) can raise these issues before the Commission and disposed off the appeal accordingly.

5.22 On the issue of dominance it has been stated by OP-1 it does not enjoy "dominant position" within the meaning of explanation (a) of Section 4. In order to find out whether it has a "Dominant Position as defined in Explanation (a) to Section 4, it is to be established that it enjoys a position of strength, in the relevant market, in India, which enables it to act in a manner as provided in Clauses (i) & (ii) thereof. Even though in a general sense, in the context of describing the status of a leading company, it may be referred to as having a "Dominant Position", in various statements/Annual Reports etc., such description would have no relevance, unless there is sufficient material to establish that the enterprise enjoys a "Dominant Position" in terms of the exhaustive definition thereof as set out in Explanation (a).

5.23 According to OP-1, there are many large Real Estate Companies and Builders in India, particularly in Northern India as well as in NCR and Gurgaon who offer stiff competition and give competitive offers in the relevant market of residential apartments to give a wide choice to the consumer Even though OP-1 is a large builder, there are hundreds of other builders all over India as well as in Northern India including NCR, who offer residential apartments to prospective investor.

5.24 According to OP-1, the conditions of offer of each builder are considered by the intending investor and then he makes up his mind as to which offer suits him. The choice of residential property available in the market has never been limited and apart from the Residential properties offered by it there were a large number of residential properties available in the market for the investor to choose from.

5.25 OP-1 has submitted analysis reports from Jones La Salle Meghraj (JLLM), ICICI Direct Analyst, RBS (The Royal Bank of Scotland) Analyst, Knight Frank, Goldman Sachs, Prop Equity, Research to support their contention that they are not dominant in the relevant market. Further, a list of 83 members of CREDAI NCR obtained from their Website also indicates the number of Developers who are their members and operate in NCR, which is indicative of the fact that there are a large number of developers, who offer competition. Based upon these, it has been stated that the

residential space offered by OP-1 does not constitute any substantial part of the total residential properties offered by various developer

5.26 OP-1 has also contended that it is not a dominant player as the choice of residential property available in the market was never limited and apart from the Residential properties offered by OP-1, there were a large number of residential properties available in the market for the investor to choose from. This also included offers from Government and Public Sector Organizations like DDA, **HUDA**, NOIDA Development Authority, Ghaziabad Development Authority, etc.

5.27 OP-1 has also discussed in its reply factors other than the market share mentioned in Section 19(4) of the Act to state that it is not a dominant player in the relevant market. With reference to Clauses (b) & (c) of Section 19(4), it has been stated that its total size and turnover relates to commercial as well as retail business also, which is large. Moreover, it is not confined only to the aforesaid markets under consideration as relevant market. It has other businesses also. Moreover, there are several other large competitors in the relevant market. According to OP-1 so long as it has to face competition from other competitors having large size and resources, it cannot be said to enjoy a "Dominant Position" in terms of Explanation
(a). It is immaterial as to who is the largest. So long as there are large players in the market, no one enterprise can enjoy a "Dominant Position" in terms of Explanation (a). Such other competitors with large size and resources also offer competing products which creates intense competition in the market and the customers have ample choice to consider before making any purchase.

5.28 With reference to Clause (f) of Section 19(4), it has been brought out by OP-1 that it cannot be said that any customer is in any way dependent on it when he desires to purchase a residential property. In a case where alternative apartments are available from different sources to the consumer, to choose from, it cannot be said that the consumer is dependent on the enterprise.

5.29 With reference to the factor mentioned in Clause (h) of 19(4) during the period from 2007 onwards, it has been stated by OP-1 that a large number of new developers have entered the market to offer residential apartments including luxury apartments. Such new developers are also creating intense competition in the market and the old existing developers have to meet this intense competition. In such a situation, it cannot be said that because of the "DominantPosition" of any enterprise, there is an impediment for new entrants or that the "Dominant Position" of any enterprise results in "entry barriers for new entrants.

5.30 As regards factor in Clause (j) of Section 19(4), it has been stated by OP-1 that the size of market, even for Residential Properties is very large in Northern India, NCR and even in Gurgaon. The new master plan for Gurgaon also includes within it 'New Gurgaon - Manesar'. Apart from customers who buy apartments for their own residence, there are a large number of customers who buy residential apartments as an investment for value appreciation and renting in the meantime. Apartments in the residential sectors from the point of view of investment are compared on the basis of the likely value appreciation and not necessarily on account of factors which a

customer may look for in a luxury apartment for his own personal use. As such, an apartment in different locations and segment may compete with each other, keeping in view the likely appreciation in value and all such apartments would fall in the same segment keeping in view the competitive aspects relating to price appreciation.

5.31 DG has done exhaustive assessment of dominance with reference to explanation (a) to Section 4 of the Act. The DG in his report has assessed dominance of the OP-1 along the lines indicated in Section 19(4) of the Act. The assessment of DG is summarized as under;

5.31.1 Market share of the enterprise: DG has submitted that as per the annual reports of OP-1, it has a number of subsidiaries on which it exercises complete control out of which DLF Home Developers Limited and DLF New Gurgaon Home Developers Private Limited are prominent ones which are engaged in the business of residential real estate development. OP-1 is having 82.72% ownership in M/s DLF Home Developers Limited and 100% ownership in M/s DLF New Gurgaon Home Developers Private Limited as per annual report of OP-1 for the year ending 2009. Under the description -subsidiary companies/partnerships firms under control of OP-1, names of DLF Home Developers Limited and M/s DLF New Gurgaon Home Developer Private Limited are also mentioned. DG has analysed the market share of OP-1 in the relevant market by taking into account the operations of DLF Home Developers Pvt. **Ltd**. and DLF New Guragaon Home Developers Pvt. **Ltd**.

5.32 DG has further submitted that market share analysis is 'static 'and is not suited for application to dynamically competitive markets and that market shares by themselves may not be conclusive evidence of dominance and therefore not a proper substitute for a comprehensive examination of market conditions. Thus, along with market share, analysis of other factors mentioned in Section 19(4) has also been carried out by him to establish dominance. The findings of DG on other factors are summarized as under;

5.33.1 DG has also stated that OP-1 has huge resources at their disposal. As part of their business expansion strategy, they have also diversifed into other real estate related businesses such as the development of SE Zs, the development of super luxury, business and budget hotels as well as service apartments. DG has pointed out that OP-1 has more than 13, 000 acres of prime land. As per draft herring prospectus filed by OP-1 Limited in the year 2007, the group had the total land bank of 10,225 acres, out of which Gurgaon has 49%, which was a big concentration in one city.

5.33.2 OP-1 as per its own projections are developing projects throughout India, which will involve the development of plot, residential, commercial and retail developed area ofapproximately 46 million square feet, 377 million square feet, 88 million square feet and 56 million square feet, respectively, totaling over 574 million square feet. It has taken up two big real estate projects in Mumbai recently. It has also entered into a joint venture with Hilton, a leading US- headquartered global hospitality company, to set up a chain of hotels and serviced apartments in India. It is proposing to set up 20,000 business hotel rooms in the next 5 years in partnership with Hilton. OP-1 had also engaged itself in the buy-out of Aman Resorts business.

5.33.3 DG has also brought out that in one of the presentations, OP-1 has stated that it is India's largest real estate company in terms of revenues, earnings, market capitalisation and developable area with a 62-year track record of sustained growth, customer satisfaction and innovation.

5.34.2 Economic power of the enterprise including commercial advantages over competitors: DG has established that OP-1 has gigantic asset base as compared to its competiton Further, it also has enormous cash profits and Net profit as compared to its competiton The position of Cash profits and Net worth (figures taken from CMIE) shows that OP-1 is far ahead on these accounts also as compared to its competiton Based on a comparison of cash profits and net profit of 128 companies, it has been established by DG that OP-1 has 78% and 63% share respectively. Huge cash profits and net worth of OP-1 is giving them tremendous economic power over their rivals.

5.34.3 DG has stated that OP-1 is active in the market since 1946 and has also the distinction of developing 3000 acre integrated township in Gurgaon. In 2009 it bagged a 350-acre plot for 1,750 crore in Haryana for developing a recreation and leisure project. It has vast Land bank and familiarity with the area which gives it distinct advantage. The Annual Reports of OP-1 for the year 2009 also states that, it is a having a dominant position in Indian offices segment too, "due to the fact that it is founder and pioneer of Grade A office leasing market, it has locational advantages and deep customer relationships having occupancy levels of 98%, more than two-third of client base belonging to Fortune 500 list....

5.34.4 It has been pointed out by DG that going by size of OP-1 and its scale of operations, Unitech may be the only comparable player. However, not only Unitech lags behind sales, assets, market capitalisation, income, profit and overall market share but in other aspects also. Further, it has higher visibility in metro cities, than Unitech. The presence of OP-1 in prime locations in New Delhi and Mumbai (NTC mill land) also suggests the high quality of its land bank.

iv) Based upon analysis- reports of Motilal Oswal, it has been stated by DG that OP-1 has a presence in 32 cities in India. Further, OP-1 has the richest quality land bank, with almost 45% of land bank in Tier I cities and it has a clear market leadership position in commercial, retail, and lifestyle/premium apartments.

5.34.5 It has also been pointed out by DG that OP-1 has significant gross asset value as per reports of Molitlal Oswal in Gurgaon in 2007 and has advantage over other players as far as land cost outstanding as per cent of market capitalization, Land cost outstanding as per cent of net profit is concerned.

5.34.6 It has further been pointed out by DG that in terms of execution, OP-1 is better positioned, due to vast experience in the industry, larger area developed till date and jointventures with strategic partner The JV with Laying O'Rourke (one of Europe's largest construction company) provides access to one of the best technology, processes and engineering skills. OP-1 has also undertaken joint ventures and partnerships with WSP Group to provide engineering and design consultancy and project management

services for real estate plans of DLF, Acquisition of stake in Feedback Ventures to provide consulting, engineering, project management and development services for infrastructure projects in India, MoU with Nakheel to develop real estate projects in India through a 50:50 JV company, Joint venture with Prudential Insurance to undertake life insurance business in India, Joint venture with MG Group to enter into a 50:50 joint venture with MG group for real estate development, joint venture with HSIIDC for developing two SEZ projects, Memorandum of Co-operation with Fraport AG Frankfurt Airport Services to establish DLF Fraport SPV which would focus on development and management of certain airport projects in India.

5.34.7 DG has concluded that all these above establish that OP-1 has distinct economic advantage to it as compared to its competiton The analysis of financials of OP-1 over different parameters clearly bring out that it is enjoying a position of market leader.

5.35 Vertical integration of the enterprises or sale or service network of such enterprises: It has been stated by DG that OP-1 has developed 22 urban colonies, and its development projects span over 32 cities. It has about 300 subsidiaries engaged in real estate business. Thus, it has a vast network through which it can do business effectively. According to DG, since OP-1 has large land bank, it is capable of carry out construction without depending upon the requirement of acquiring land. Moreover, the land was also acquired long back, unlike its competitors; the land was acquired by it quite a low cost. Its wide sales network act as a relevant factor conferring upon commercial advantage over its rivals.

5.36 Dependence of consumers on the enterprise: DG has submitted that although there are other real estate developers also in Gurgaon, since OP-1 has acquired land quite early and has developed integrated township in Gurgaon, there is an advantage and if consumers want to have all the developed facilities within the DLF Township, they will have to opt for residential units developed and constructed in Gurgaon. Further, there is superlative brand power of OP-1 which affects consumers in its favour.

A coloniser intending to set up group housing colony has to enter into an agreement with the Director, Town and Country Planning, Haryana in Form LC IV(a) which mandates that adequate health, recreational and cultural amenities in accordance with norms and standards provided in respective development plan of the area are to be provided by the coloniser. The coloniser has to ensure that dwelling unit is sold or leased by him in accordance with the provisions of Haryana Apartment Ownership Act, 1983 with common areas and facilities. Common areas of the plot of land on which Group Housing Colony is developed, in fact, belong to and are meant for the common use of apartment owners and once the apartments are sold, all the common areas and facilities vest jointly in apartment owners and are to be maintained by apartment owners by forming an **association** in terms of the laws laid down by Haryana Govt.

(ix) The coloniser has to sign an agreement with the Haryana Govt. that he shall derive maximum net profit only of 15% of the total project cost of the development of colony aftermaking provisions of statutory taxes. In case the net profit exceeds 15% after completion of the project, the surplus amount either has to be deposited with the State Govt. treasury within two months of the completion or he has to spend this money on further amenities/facilities in the colony for the benefit of residents.

Further, the Act of 1983 was enacted to provide for ownership of individual apartments and make ownership rights as transferable for the promotion of group housing in the State of Haryana. As per Section 5 of the Act, owner of every apartment, as defined in the Act, is required to execute and get registered a conveyance deed. 'Apartment' in the Act of 1983 has been defined in section 2(a) as a part of a property intended for any type of independent use, as may be prescribed, with a direct exit to a public street, road or highway or to a common area leading to such street, road or highway. 'Apartment owner' has been defined as the person or persons owning an apartment and having undivided interest in the common areas and facilities in the percentage specified and established in the declaration.

31. Judgment of Supreme Court in 'Nihal Chand Lallu Chand Pvt. **Ltd**. vs. Pancholi Cooperative Housing (AIR 2010 SC 3607)' also has bearing. In the judgment, it was held that garage is not an independent unit by itself, but is an appurtenant or attachment to flat within the meaning of Section 2(a-1) of Maharashtra Ownership Flats (Regulations of Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA). Open to sky-parking area or stilted portion usable as parking space was not garage within the meaning of Section 2(a-1) of the Act and not sellable independently as flat or along with flat. However, promoter was entitled to charge price for common areas and facilities from each flat purchaser in proportion to carpet area of flat. Further, the Act mandated the promoter to describe common areas and facilities in advertisement as well as agreement with flat purchaser and indicate price of flat including proportionate price of common areas and facilities. Stilt parking space could not cease to be a part of common areas and facilities merely because promoter had not described the same as such in advertisement and agreement with flat purchaser. Promoter had no right to sell any portion of such building which was not 'flat' within the meaning of section2(a-1) of the Act. He had no right to sell stilt parking spaces as these were neither flat nor apartments or attachment to flat. Hon'ble Supreme Court also observed in this Judgment that the rights arising from the Agreement signed under the MOFA between the promoter and the flat purchasers cannot be diluted by any contract or undertaking to the contrary. The undertaking contrary to Development Controlled Regulations for Greater Bombay 1991(DCR) will not be binding either on the flat purchasers or the Society. It is to be noted that provisions of MOFA 1963 are similar to Haryana Act of 1983.

32. In the light of the above judgment of the Supreme Court, applicable Acts and Rules and development model of the Group Housing societies envisaged under law, the agreement executed between DLF **Ltd**. and members of the informant **Belaire**

Owners' **Association** is to be considered and looked upon by the Commission for the purpose of suggesting modifications so that there are no abusive clauses. Several clauses of the agreement are interwoven and have impact on other clauses. Modification of one would necessitate modification of other. The Commission therefore had to consider modifications wherever it found clause of the agreement was abusive.

33. The Commission thus considered all the clauses of the Buyer's Agreement. The reasons for proposed modification are given hereunder. The modifications suggested have been given in tabular form at the end opposite the existing clause.

35. The counsel for the company had vehemently argued that the rights of the allottee are limited to only flat/apartment and the proportionate right in the land at the footprint of the tower in which the apartment is situated. The allottee had no right of ownership over the land and every inch of the place outside the apartment belonged to the company and the right of the allottee was limited only to use of open areas as may be permitted by the company on payment of maintenance charges. This stand of the company is contrary to law and highly abusive. The apartment owners of a complex jointly become owner of the entire land of which FAR is utilised for construction of the complex. The land area and common facilities belong exclusively to the apartment owners as per the Law and Rules discussed above and no right of the company is left in the land area. It is also clear from explanation given to clause 1.1 and Clause 2 of the existing agreement wherein the company has made it categorically clear to the apartment owners that apart from the cost which the company was charging on per sq. feet of super area, the allottee was liable to pay additional price proportionate to the share in the taxes which are payable by the company or its contractor by way of value added tax, sales taxes (Central and State), works contract, service tax, education cess or any other taxes by whatever name called in connection with construction of the complex and the property of the complex. It is clear from this that all taxes including the tax in respect of the land area of which FAR is used and apartments are constructed are to be borne by the allottees jointly in proportion to the super area purchased by them. The company is not to bear burden of any State Tax or Central Tax in respect of the GH complex. The company cannot claim ownership of even an inch of the open area of the land of the complex. The entire land area of the complex falls under joint ownership of the allottees. The ownership is indivisible and the allottees have a right to manage the same by forming an **association** and can tell the company to move out of the area with lock stock and barrel. Thus, the company's argument that it retains ownership rights over the open area even after sale of apartments is not tenable and all such clauses in the agreement put by the company giving it a claim/right over the open areas/common areas, etc. amounted to abuse of dominance and this abuse can be removed by modifying the abusive clause and providing in the agreement about the obligation of the company to abide by the Laws, Rules and Regulations as applicable to a Group Housing Complex. It would be worthwhile to mention that for making a Group Housing Complex, the maximum FAR applicable in 2009 was 175%. The restriction on number of storeys/floors was, however, removed. The company on

removal of this restriction raised the height of the building from 19 floors to 29 floors using the same footprint and same **Belaire** area. However, since the FAR was only 175%, the land area/open area for the Complex would have to be commensurate with total super area of all the apartments in all 29 floor As per the calculations made by the informant, which have not been disputed by the company (and the company has not come up with its own calculations) the total land area on which the Bellaire Complex of 29 floors could be constructed as per FAR was 20.885 acres.

36. The allottees of **Belaire** Complex jointly would have, therefore, undivided ownership rights over land area in ratio of FAR inclusive of the footprint of the building and not alone onthe footprint of the building as is asserted by the company in the agreement. The abuse in different clauses of the agreement could only be removed by specifying the land area of GH complex **Belaire** as per FAR ratio. However, if the company has already deprived the allottees of land area, by abusing its dominance and curtailed the land area, the allottees' right to claim compensation as per law shall be there.

37. In the order, the Commission had observed that when an allottee does not get preferential location, he only gets the refund/adjustment of amount at the time of last instalment without any interest. The preferential location charges were imposed and charged by the company @ of
300 per sq. feet of the super area. The Commission considers that in case the allottee does not get apartment with preferential location, the amount taken by the company for preferential location should be returned to the allottee with a reasonable rate of interest from the date of the payment of the amount till the date amount is returned to the allottee. The rate of interest should be commensurate with rate of interest being charged by the company from allottee on delayed payments. If the amount is adjusted against the balance payment payable by the allottee, it should be adjusted alongwith interest. The suggested modification is given in clause
1.5.

38. In the order, the Commission observed that DLF enjoyed unilateral right to increase or decrease super area at sole discretion without consulting allottees who, nevertheless, were bound to pay additional amount or accept the reduction in area. When the construction of a multi storey building is envisaged, the plans are drawn on drawing board. Most of the group Housing Complexes are sold on the basis of the plans drawn on drawing board. Super area and the actual apartment area are two different concepts. The apartment area is the area which is exclusively enjoyed by the apartment owner. It includes carpet area plus area under the walls of the apartment, while super area is the sum of apartment area and common areas which the allottee enjoys along with other apartment owne This area is inclusive of lift area, staircase area and other entrance areas, etc. Most of the times, the actual building and the drawing board plans match with each other and the building is constructed in accordance with the construction plan as approved by authorities in advance. However, there may be instances where at the time of actual construction, certain minor changes

are required to be made in some of the drawing board plans and the building is constructed slightly different from the drawing board plan but it, more or less, conforms to the drawing board plan. In such a case, there may be either minor (say + 2%) increase or decrease in the super area as well as the carpet area of each apartment. However, the company if substantially changes the lay-out plan resulting, in more than 2% increase or decrease in super area, the allottees' consent should be obtained for such changes in the lay-out plans. Since the price paid by the allottee is per sq. ft. of super area, the price of the apartment would increase or decrease after the actual building is constructed. In order to lay a claim on the basis of increase in super area, the company is supposed to give information to the allottee about the difference in the initial building plan and the actually-constructed building plan on the basis of which the new super area is calculated. The actual plan should be the one submitted to the authorities for completion certificate and on the basis of which occupancy certificate is granted. The calculations of increased area should be sent to the allottee, so that the allottee knows and can verify on ground as to how his super area has increased. A mere letter from the company that the super area has increased is notsufficient to claim any amount from the allottee. Thus, whenever a claim on the basis of increase in super area is made, the company is bound to give the relevant information as to how the super area stands increased. The clauses in this respect therefore need to be modified. Accordingly modified clause 1.6 is given in the table. Clause 9.2 also gets covered by modified clause 1.6.

39. In the order, the Commission had found that the proportion of land on which apartment is situated and over which the allottee would have ownership right was to be decided unilaterally at the discretion of the company (DLF **Ltd**.). In clause 1.7 of the existing agreement, company has stated that it may, at its own discretion for the purpose of complying with the Haryana Apartments Ownership Act, 1983 or other applicable Laws, substitute the method of calculating the proportionate share in the ownership of the land beneath the building/common areas or facilities. The company in so many words stated that the allottee will only have proportionate ownership rights in the land underneath the building i.e. the land which is the footprint of the building in which the said apartment is situated. Similarly, company has unlawfully provided for itself right to further go up in air by increasing the number of floors and reserving to itself terrace rights. This is totally contrary to the law and imposition of this condition on the allottee by DLF is because of its dominance and amounts to gross abuse. All relevant clauses depriving allottee of his lawful rights need to be modified to bring them in conformity with Law, Rules and Regulations so as to remove the abuse vis-à-vis the allottee. Modified clauses are given in the table below.

40. In the order, the Commission observed that the covenant in clause 1.7(viii) of the agreement, giving right to DLF of having full and absolute rights in the community buildings/sites/recreational and sporting activities sites including maintenance of those, was abusive.

41. In the order, the Commission observed that DLF's sole discretion to link one project to another was abusive in nature. Interlinking of projects for the purpose of

mobility of residents and for ingress egress is one thing, but interlinking projects for any other purpose without giving equivalent rights to allottee is altogether different. When **Belaire** Complex apartments were agreed to be sold to allottees, the FAR was 175%. If, in future, FAR is increased, only owners of apartments will have collective right to use or not to use increased FAR and the company cannot club the project with its other projects for this purpose. Accordingly, different clauses of the agreement need to be modified and reference to phase V need to be deleted. It should be retained only where rights of allottees are not adversely affected. The modified clauses 1.9 & 1.10 are given in table below.

42. In the order, the Commission observed that clause 1.11 of the agreement was abusive. EDC is charged by Government for development of main lines of roads, drainage, sewage, water and electricity. EDC is proportional to the land area of the project and may be linked with number of dwelling units. EDC is invariably passed over by the builder to the allottees. Entire EDC charges for a complex are burdened on allottees in proportion to super area. There may be a case of State increasing EDC charges. Builder can pass on increased EDC charges to allottees only after informing the allottee about the order of the State Government enhancing EDC (with a copy of letter) and how his share of EDC has been calculated. Non-payment of EDC by an allottee can result only into a recovery action as per law. Neither the allotment can becancelled, nor possession of his apartment can be taken by force. Provision in this clause relating to resumption of the apartment in case of default in payment of EDC is contrary to the provisions of relevant laws. As per section 19 of the Act of 1983 all sums assessed by the **association** of apartment owners towards the share of the common expenses chargeable to any apartment and remaining unpaid has to constitute a charge on such apartment prior to all other charges, except charge, if any on the apartment, for payment of local taxes and all sums unpaid on a first mortgage of the apartment. Further, in case the allottee fails to pay these charges, the Director, Country Planning may recover these charges as arrears of land revenue as per the regulation 19 of Regulations of 1976. The relevant clause 1.11, therefore, should be modified as given in the table below.

43. In the order, the Commission observed that clause 1.14 of the agreement was abusive since it gave sole discretion to DLF regarding arrangement for power supply and rates levied for the sale of power to the allottees. By this clause, the company takes away the right of Allottees' **Association** to get competitive offers from other playe DLF has arbitrarily foisted compulsory payments for another service-provider on the allottee. Clause 1.13 and 1.14 of the agreement are interconnected. Clause 1.13 is about power backup whenever the supply of DHBVN (State Electricity Board) is not there. Clause 1.14 envisages a situation when DHBVN fails to supply electricity to the complex. So long as Resident Welfare **Association** of the Complex does not take charge of services of the complex, the company is bound to provide essential services to the complex in terms of maintenance agreement, but once RWA takes over the responsibilities of the complex, it will have freedom to continue with the service providers engaged by the company or to enter into fresh contracts with some service provider or engage new service provider. Also since the Company marketed and sold

Belaire Complex as govt. approved residential project and govt. charging heavy amount as EDC, providing of DHBVN connection by the state is mandatory and the company has to ensure DHBVN connection for each allottee. The relevant clauses 1.13 and 1.14 be modified as suggested in the table.

44. In the order, the Commission found clause 4 of the agreement abusive as it provided arbitrary forfeiture of earnest money by the company without even a notice to the allottee. The company provided for forfeiture of amounts of allottee for non-fulfillment of the conditions of agreement by the allottee, but there is no corresponding clause in respect of non-fulfillment of clauses of agreement on the part of company. Clause 5, 8, 10 and 12 of the agreement are highly one-sided and should be modified. Modified clauses are given in the table below.

45. The delivery of possession of the apartment by the company is governed by clause 10 and clause 11 of the Agreement. However, clauses 11.1, 11.2, 11.3 and clause 39 provide for those circumstances under which the company may not deliver the possession in time or may abandon the project altogether without its fault and the consequences. Clause 11.1 talks of non availability of construction, material, strike of the work force, terrorist act, enemy act, act of God, delay in grant of permissions, completion certificate etc. from the government or the property becoming subject matter of litigation in Courts or before Tribunals. Clause 11.2 provides for eventualities of delay in giving possession of apartments due to Govt. rules, orders, notifications, after the agreement and the companies' decision to challenge the same in Courts/Tribunals. Clause 11.1 provides that the company shall not be bound by the existingperiod of delivery in case of eventualities as stated therein and shall have the power to extend the period of delivery of possession and may also unilaterally alter the terms of agreement. It also provides that in case of abandonment of project by the company, it would be at liberty to cancel the agreement and to refund to the allottee "amount attributable to the agreement" without any interest. 'Amount attributable to the agreement' has not been defined clearly and the same is vague, which gives arbitrary powers to the company. In cases of cancellation/abandonment of the project by the company for none of the fault of the allottee, the company was not even liable to return the amount actually paid by the allottee to the company with interest but the company, out of the amount paid by the allottee was to deduct the interest paid by the allottee and the interest due towards allottee on delayed payment as well as to deduct amount of non refundable nature. The company had not specified as to what was the amount of non-refundable nature to be deducted. Similar provision is there in clause 11.2 towards refund of "amount attributable to the agreement" without interest in case of the project getting scrapped altogether. Clause 11.3 provides that if for the reasons other than clause 11.1, 11.2 and clause 39, the company fails to deliver the possession to the allottees within three years from the date of execution of agreement or within the extended period (the company having liberty to extend the period to any extent.) then the allottee shall be entitled to give notice to the company within 90 days from the expiry of the said period of three years or extended period of terminating the

agreement. Even in that event the company was not liable to refund the amount deposited by the allottee along with interests to him. In such an eventuality, the company on receipt of notice, was at liberty to sell/dispose of the apartment to any other party and without accounting for the sale proceeds of the apartment to the allottee within 90 days of the realisation of the price was to refund to the apartment allottee his amount without interest, after deduction of brokerage paid by the company to the broker/sale organiser (in case booking was done through broker/sale organiser) the allottee thereafter could make no claim against the company. If the allottee failed to exercise his/her right of termination within the period as provided in this clause by delivering a written notice to the company then he was not to be entitled to terminate the agreement and was to continue to be bound by the terms of the agreement. In similar way, clause 11.4 provided that in case of abandonment of the project/scheme by the company or if the company failed to give possession within three years of the execution of the agreement or within the extended period as extended by the company itself under various clauses of the agreement, the company shall be entitled to terminate the agreement and the company shall, on such termination refund only the amount paid by the apartment allottee with 9% simple interest for such period for which it was lying with the company. The company was not liable to pay any other compensation. Even in such an eventuality, the company, at its sole option and discretion, could decide not to terminate the agreement and to pay to the allottee and not to anyone else (his successor or subsequently transferee) compensation at 5/- per sq. feet of the super area of the said apartment per month for the period of such delay beyond three years or extended period, subject to condition that apartment allottee was not in default under any term of the agreement. This compensation was also to be adjusted only at the time of giving possession the said apartment to the Allottee. Clause 12 described defaults only on the part of the allottee as if company can commit no default.

These provisions also show that there was no exit option with the allottee and the clauses were abusive and heavily loaded in favour of the company. The company had foisted these clauses on the allottee giving no option to the allottee to bargain for the exit, while the company had liberty to extend the period of delivery of possession on self serving grounds like non availability of material, non availability of work force, any govt. notifications, orders or litigations in the Court, which may even have been invited by the company itself, without any penalty on the company for such extended period of delivery. The allottee in case of delay in payment of the instalment had to pay interest to the company @ 15% within 1st 90 days and 18% thereafter. Even where the company failed to deliver the possession within the extended period, a written notice is to be given by the allottee with duly acknowledge receipt of the company whereas the company unilaterally, without any prior notice could terminate the agreement even in case of default in payment of instalment by the allottee. The abuse of dominance is self evident from the provisions of these clauses. The Commission considers that the above clauses should be modified in the manner as given in the table to make this agreement non abusive.

46. Clause 13 is regarding execution of conveyance deed in favour of apartment allottee who has paid full consideration amount to company. The transfer of ownership has to be in accordance with the Act of 1983. However, clause is totally one sided putting no obligation on company to execute the conveyance deed once stamp duty papers are sent to the company after paying entire price as per the agreement. Clause 14 of the original agreement is concerning maintenance and it does not recognise the right of allottees to manage the common services of the complex through RWA, as provided in the Act of 1983. Clause 13 & 14 can be made non abusive by suggested modifications given in table below.

47. In para 12.90, the Commission observed that under the agreement DLF had sole authority to make addition and alteration in the building with all benefits flowing to DLF and the allottee having no say in this regard. The abusive provisions are contained in clauses 20, 22 and other clauses of the agreement, excerpts of which were re-produced in the main order of 12th August, **2011**. Clause 20 gives unfettered right to company to make any addition, alteration, improvements, repair whether structural or non structural, ordinary or extraordinary to unsold units within the building with no right to the allottees of other apartment to raise any objection. The allottee as well as the company both are bound by the building bye laws applicable to apartments. If the company has a right to make structural changes in the apartments belonging to it, the same rights have to be available to the allottee also and these rights are naturally to be exercised in accordance with the laws applicable to a GHS Complex. The relevant clauses should be modified as suggested in the annexure.

48. Clause 20 gives the company the right to make additions, alterations, improvements and other changes in unsold apartments. The rights of the company and the apartment owners in their respective apartments are equal. Company cannot have more rights.

49. Clause 22 gives rights to the company to make additional constructions, to put up additional structure in or upon the building or put additional apartments or structures anywhere in the said complex or in the said portion of land as may be approved by the competent authority and additional apartments/buildings have to be the sole property of the company which the company would be entitled to dispose of in any way without any interference on the part of the apartment allottee.

The laws applicable to Group Housing Complexes have been briefly narrated above. These laws make it abundantly clear that once the plan for Group Housing Complex is approved by the competent authority as per the applicable FAR and these apartments are sold on the basis of such approved plans, the company is left with no rights either in the sold apartments or in the common areas. Once the apartments of the complex are sold for considerations or agreed to be sold, the company cannot change the plans without approval of the allottees since the allottees are charged not only for the apartment but for all internal and external developments including common areas, open areas, external and internal infrastructure. The allottees while entering into the agreement had before them the complex as promised to be developed by the developer and they put their hard earned money keeping in mind the number of flats to come up,

the kind of facilities to be given, population density, the open green areas and other common facilities etc. The joint ownership rights of apartments allottees over common areas and land and the apartment ownership rights of the allottees go together. The company cannot take away these rights from the allottees. Once the company had utilized FAR available at the relevant time in respect of the land over which the complex is to be developed, any subsequent increase in FAR would belong to the allottees and not to the company and it is only the allottees **association** which will have right to put additional construction with consent of all the allottees. The company shall have no right to have additional construction if subsequently FAR is increased. As such, clause 20 & clause 22 and other such clauses are highly abusive, should be modified as suggested in the table.

50. In para 12.90, the Commission had observed that creation of 3rd party rights by the company without allottees consent was to the determinant of allottees interest and was abusive. A reference was made to clause-23 of the agreement. Clause 23 of the Agreement gives right to the company to raise finance, loan for its own purpose from any financial institution, bank by way of mortgage or creating charge over the building/apartment/portion of building or by any other mode subject to condition that when the conveyance deed is executed, the apartment shall be free from all encumbrances. It is further provided that the company/financial institution/bank shall always have first lien/charge on said apartment for their dues and other sums to be payable by the apartment allottee in respect of any loan granted to the company for purpose of construction of the building/complex. While first part of the clause gives right to the company to raise loan before execution of conveyance deed and provides that at the time of conveyance deed it shall be free from all encumbrances, the second part of the clause provides that the banks or financial institution shall have first lien for recovery of their dues on the apartment of the allottee. The first part is contradictory to the second. Moreover, this clause only talks of the apartment and not of the complex. There is no doubt that during the construction and before delivery of possession of apartment of the complex, the property belongs to the company. However, once the complex is complete and completion certificate is obtained and it is ready for transfer to the allottees, the company has to make entire complex free from all encumbrances, before transferring the apartments and other common areas under joint ownership rights. The apartment alone is not the property of the allottee. The allottee is also joint owner of all the open areas, common facilities etc. within the complex. Therefore,when the complex is ready and conveyance deeds are executed with the allottees, the whole complex has to be free from all encumbrances and of mortgage, charges or any kind of loan from financial institutions or banks over the complex. If the company has any unpaid loan of the banks/financial institution after the apartments are sold, the banks etc. can have lien only over unsold apartments for recovery of dues of the company. Clause 23, 24 & 25 should be modified as given in the table below to remove this abuse.

51. The Commission, in its order, observed that while heavy penalties were imposed in the agreement for default of allottee, there were insignificant penalties on DLF for

its own defaults. A reference was made to clause 35 of the agreement, which shows abuse of dominance. The company can refuse to condone delay and can cancel the apartment even if the allottee was prepared to pay interest on delayed payment. While in case of company, the company for itself has reserved so many excuses for non delivery of possession and for scrapping the contract altogether or for delaying the project. It has given itself the powers to extend the period of delivering possession but for the allottee, the sole discretion lies with the company to cancel the flat in case of delayed payment. In case of condoning delay, the Company could be charging interest to the tune of 15% for 1st 90 days and thereafter 18%. However, for the default of the company, the company was liable to pay only 9% interest to the allottee on only such amount which the company deemed refundable to the allottee. That makes the clause abusive, one sided and shows blatant abuse of dominance. In clause 12, the company has given events of defaults and consequences for the allottee. The company has nowhere given in the entire agreement the events of defaults for itself. The Commission considers that the defaults can be on the part of the company as well on the part of the allottees and the agreement should provide for defaults of both the parties and the agreement must be equitable in dealing with both the sides and levy of interest/penalty should of equal level on both sides. The Commission also considers that Force Majeure in clause 39 should be defined as understood in common parlance of law. The consequent modifications are suggested in the clauses 35 & 39.

52. In view of the modified clauses/sub clauses as suggested above in the agreement, certain clauses/sub clauses of the agreement have become superfluous. The Commission has suggested deletion of these clauses. Certain clauses of the agreement, in view of the suggested modified clauses, needed small changes so as to bring them in consonance with the modified clauses. These changes are minor in nature and have been suggested wherever needed. Some clauses are closely interlinked with the abusive clauses and had to be modified so that the abuse was not perpetuated. These interlinked clauses wherever existed have been accordingly modified. The clauses which needed fine tuning with the modified clauses have also been accordingly modified and the suggested clauses have been given in the table below.

53. The terms of the agreement to be entered into with the allottee were never shown to the allottee at the time of booking of the apartment. These terms and conditions of the agreement were prepared and framed by the company unilaterally without consulting the buyer. Once the company had already received considerable amount from the applicants/buyers, this agreement was forced upon the allottees and the allottee had no option but to sign the agreement, as otherwise the agreement provided for heavy penalties and deduction from the money already deposited by the allottees with the company, which itself was an abuse of dominance. Theappropriate procedure would have been that a copy of the agreement which DLF proposed to enter with the allottee should have been made available to the applicants at the time of inviting applications. The agreement should be signed within a reasonable time from the date of allotment and all additional amounts should be demanded from the allottee only when the agreement has been signed. Any allottee, who was not agreeable to the terms

of agreement, should have liberty to withdraw his application and should be given the entire application amount back.

54. Secretary is directed to provide a copy of this order to all concerned, besides forwarding the same to Hon'ble Competition Appellate Tribunal (COMPAT). It is ordered accordingly.

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Surinder Singh Barmi v. *Board for Control of Cricket in India (BCCI)*

[2013]113 CLA579 (CCI), 2013 Comp LR 297(CCI), [2013]118 SCL 226 (CCI)

In its order of 8 February, 2013, the Competition Commission of India (CCI) has found the Board of Control of Cricket in India (BCCI) to be abusing its dominant position in contravention of Section 4(2)(c) of the Competition Act, 2002 (Competition Act) and imposed a penalty of approximately 52 crores.

CASE NOTE: Inquiry - Section 19(1)(a) of The Competition Act, 2002 ("Act") - Complaint with the Competition Commission of India (CCI) alleging irregularities with the BCCI's grant of franchise rights, media rights, and sponsorship rights in the context of the Indian Premier League (the "IPL"), a private professional Twenty20 cricket league run annually in India - Investigation conducted by the CCI with reference to Competition Law principles - What is the de facto status of BCCI - Held, BCCI has no "statutory status" but their actions in terms of laying down the rules of the game and team selection fall within the ambit of a regulatory role. This status arises on account of the institutional form of BCCI and its inter-linkages with ICC. The approach of Government of India on this matter also needs to be considered. Moreover the background and historical evolution of BCCI will enable to discern the issue.

Despite the fact that BCCI is not recognized by Government of India (GOI) as the regulator of cricket in India, the examination of object clause of Memorandum of Association of BCCI reveals that in substance, BCCI considers it as the regulator of cricket in India. BCCI is a full member of ICC and as such BCCI follows the Rules/Bye Laws made by ICC. Specifically, attention is drawn to Section 32 of ICC Regulations which prescribes the definition of "disapproved cricket"; the Authority of the Members of ICC to "approve" cricket leagues; and the course of action to deal with "disapproved cricket". It is very clear from the reading of the clause that the Members of ICC are authorised to permit/deny the entry of competing leagues. Thus by virtue of Section 32 of ICC Rules, the "right of approval" is vested with BCCI. This "right of approval" is clearly a regulatory role. ICC also vests the rights of deciding on any factor related to cricket with its Members and declares the Members as "custodian" of sport. ICC very clearly declares that the Members of ICC are the custodian of sport of cricket. The word "custodian" clearly highlights the intent of ICC and its Members to regulate/control the sport of cricket in their respective jurisdictions. Another evidence of BCCI as being a de facto regulator and the team participating in International events being Indian team and not a representative of BCCI is found in the ICC Guidelines specifying full member criteria. It expressly states the performance of "national team" as one of the paramete

(a) The substance the "first mover" advantage and the implicit recognition by GOI as the national association for cricket, have contributed to the present status of BCCI.

(b)The Object Clauses of BCCI's Memorandum of Association contradicts the BCCI's stand that it is not a regulator and the team is representing the Board and not India.

(c) The linkages with ICC and the Mndate/Rules/Bye Laws of ICC make it very clear that BCCI is the regulator/custodian of sport of cricket in India. The ICC Bye Laws also makes it very clear that the team is Indian National team and that BCCI is the National Sports Federation.

(d) The submission of GOI to the Supreme Court and the recent attempts made by GOI to bring BCCI within the ambit of Right to Information makes the Government intent clear even if there is absence of any documentary evidence to suggest that BCCI is explicitly declared as a National Association for the sport of cricket in India.

Thus, the Commission from the above evidence concludes that BCCI is a de facto regulator of sport of cricket in India.

Enterprise - Scope and meaning of - Section 19(1)(a) of The Competition Act, 2002 (“Act”) - Complaint with the CCI alleging irregularities with the BCCI's grant of franchise rights, media rights and sponsorship rights in the context of the Indian Premier League (the “IPL”), a private professional Twenty20 cricket league run annually in India - Investigation conducted by the Commission with reference to Competition Law principles - Whether BCCI is an enterprise for the purpose of the Act –

Held, the BCCI's role as ICC governing body for cricket in India was “custodian” for the game and “organizer” of matches. Although the BCCI was a “not for profit” society, its activities were revenue generating (e.g., it sold media rights as well as tickets). Accordingly, the CCI held that insofar as their entrepreneurial (i.e., revenue generating) conduct is concerned, all sports associations are to be regarded as “enterprises” for the purposes of the Act and treated “at par with other business establishments.” In so holding, the Commission placed reliance on established European law decisions (e.g., MOTOE v. Elliniko and Meca-Medina) which held that the commercial exploitation of sport constitutes an economic activity which would be the subject of European competition rules. In India also in a recent decision in Hemant Sharma and O v. Union of India), Delhi High Court held All India Chess Federation (which performs similar functions as BCCI for the game of Chess) to be an enterprise for the purpose of the Act. Thus, in line with the provisions of the Act, international jurisprudence and Delhi High Court decision in case of Chess Federation, it was concluded that BCCI is an enterprise for the purpose of the Act and therefore within the jurisdiction of the Commission.

Determination of relevant market - Section 19(1)(a) of The Competition Act, 2002 (“Act”)

- Complaint with the CCI alleging irregularities with the BCCI's grant of franchise rights, media rights, and sponsorship rights in the context of the Indian Premier League (the “IPL”), a private professional Twenty20 cricket league run annually in

India - Investigation conducted by the Commission with reference to Competition Law principles - Abuse of dominant position by BCCI in relevant market

Held, the Act considers relevant market as the market of various goods or services that are regarded as interchangeable by consumer with reference to product characteristics, intended use and price. The objective of this definition is for precise understanding of the competitive constraints the market forces are subjected to. Moreover, the Act emphasises that definition ofrelevant market needs to be viewed from the demand perspective and based on characteristics of the product, price and intended use. Thus, the Commission considered the definition in accordance with the parameters laid down under the Act. The Commission differentiated (1) sports from other forms of television (including movies and general entertainment programs), (2) cricket from other forms of sport, and (3) first class/international cricket (e.g., Test Matches, One Day Internationals, or Ranji Trophy cricket) from cricket played in "private professional leagues" (such as the IPL). The differentiations were based on qualitative and subjective demand considerations (e.g., "every sports event is unique in itself") as well as some viewer data. Considering the basic test of non-transitory relative price rise of 5 per cent to 10 per cent also known as SNNIP test for a cricket event and considering the consumer behaviour, it seems quite unreasonable to believe that a consumer would substitute cricket event with any other form of entertainment viz. Films, TV shows etc. or any other sporting event. There is enough behavioural evidence to suggest the same is reflected in data regarding viewership above. After concluding that cricket is not substitutable with other sports or other entertainment events, the Commission considered it necessary to examine whether there are inherent differences between the two broad categories of events also viz. First Class/International events and Private Professional League Cricket events as noted in review of sports sector above which merit examination for determination of relevant market. This distinction arose from the fact that entry of private professional leagues saw the merger of media and entertainment to raise the level of cricket to a different height altogether, contributing to the commercialization of the game. A new genre of cricket emerged with a market distinct from existing cricket events. The Commission, therefore, opined that the relevant market is the Organization of Private Professional Cricket Leagues/Events in India.

Dominant player in relevant market - Section 19(1)(a) of The Competition Act, 2002 ("Act") - Complaint with the CCI alleging irregularities with the BCCI's grant of franchise rights, media rights, and sponsorship rights in the context of the Indian Premier League (the "IPL"), a private professional Twenty20 cricket league run annually in India - Investigation conducted by the Commission with reference to Competition Law principles - Abuse of dominant position - Assessment of Dominance of BCCI in market for Organization of Private Professional League Cricket events –

Held, undoubtedly the most significant source of dominance is the regulatory powers of BCCI. In the given case, BCCI was already the monopoly organizer of First Class Cricket leagues and matches in India. With the advent of the "private professional league", BCCI extended its monopoly to the new genre of cricket in the

establishment of Indian Premier League, IPL. In their justification of venturing to IPL, BCCI refers to re-ploughing of funds generated in the development of game as a primary objective in addition to other objectives of IPL such as: i) to identify and nurture Indian talent and provide a platform for them to perform;
ii) to promote the game of cricket with a sense of competition at the domestic level, and provide opportunity and international exposure to players playing at domestic level; and iii) to bring in newer audiences to the sport especially women and children. It is already noted that BCCI is a de facto regulator within the pyramid and in this capacity is vested with certain rights by ICC. BCCI has assumed the right to sanction/approve cricket events in India. This right vests BCCI from the conditions laid down in Section 32 under the heading "Disapproved Cricket" with the onerous task of ensuring a free and transparent sanctioning of competing private professional leagues. Thus, considering the ICC Bye Laws, the Commission noted that BCCI approval was required by any prospective private professional leagues and binding for access to the vital inputs (stadium, list players) required to ensure successful conduct of the league. Thus, the approval of BCCI is critical to the organization and success of any competing league and is a very important source of dominance for BCCI. Internationally too there has been concern that role overlap may lead to competition concern. In the present case, it is strengthened by the powers vested with BCCI to give consent to application for authorisation to organise cricket events. The concern deepens if this power is not subjected to restrictions, obligations and review, sports associations such as BCCI in the present case to thwart competition by favouring events which it organises or those in whose organisation it participates. The other significant factor is the infrastructure owned and controlled by BCCI. Over a period of time, BCCI or its member sports federations were allotted land by GOI at subsidized rates for construction of stadiums to help the cause of development of the sport and was also granted tax exemptions. With the changed paradigm in cricket this emerged as a tool of significant commercial advantage for BCCI.

It cites, supported by European law, the BCCI's role as gatekeeper, i.e., its ability to "approve leagues" and considers that to be "critical to the organization and success of any competing league."

Dominance also stems from the role of BCCI as an organizer of First Class/International Cricket events. With this role, BCCI controls a pool of cricketers under contract with BCCI for First Class/International events. The sentiments of Indian fans are reflected in the slogan seen at many matches which reads, "Cricket is my religion and Sachin is my God". Thus to an Indian cricket fan, these players are icons and their participation can make any league a success. BCCI's ability to control an input which is indispensable to the success of cricket events is also a source of dominance for it.

Further, if historical evidences are considered, this Court have the case of ICL which is now temporarily suspended. The reasons for the failure of the league were lack of infrastructure facilities, BCCI/ICC's refusal to approve the league and provide

infrastructural support, among other reasons that might be relevant . Thus, while it cannot be conclusively said that ICL's failure was solely attributable to BCCI's dominance, it can be said that BCCI's dominance was definitely a factor in ICL's failure.

Thus, owing to regulatory role, monopoly status, control over infrastructure, control over players, ability to control entry of other leagues, historical evidences, BCCI is concluded to be in a dominant position in the market for organizing private professional league cricket events in India.

Abuse of dominant position - Section 19(1)(a) of The Competition Act, 2002 ("Act") - Complaint with the CCI alleging irregularities with the BCCI's grant of franchise rights, media rights and sponsorship rights in the context of the Indian Premier League (the "IPL"), a private professional Twenty20 cricket league run annually in India - Investigation conducted bytheCommission with reference to Competition Law principles - Contravention of Section 4 of the Act - Whether BCCI has abused its dominance in contravention of Section 4 of the Act?

Held, the Commission examined all the related issues including the procedures followed and the agreements entered into to determine whether there was any anti-competitive conduct on the part of BCCI. On examination of the IPL media rights agreement, the Commission noted Clause 9.1(c)(i), which reads as follows "BCCI represents and warrants that it shall not organize, sanction, recognize or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league."This Agreement had been entered between BCCI and MSM for a period of 10 yea Thus, BCCI had clearly bound itself not to organize, sanction, recognize any other private professional domestic league/event which could compete with IPL. Clause 9.1(c)(i) clearly and unambiguously amounts to a practice through a contractually binding agreement resulting in denial of market access to any potential competitor and is decidedly a violation of Section 4(2)(c) of the Act.

The Commission examined the above clause further considering the provisions in ICC Bye Laws Section 32 regarding "Disapproved Cricket". The insistence on rival leagues to get approval from National Sports Federation defended on the grounds of the same being inherent and proportionate remedy to preserve the integrity of the sport, orderly development and consistency in application of technical rules of the sport may have certain merit. But the creation of monopoly by a regulatory power is an overreach to protect the market and the regulatory power to approve an event should not be used for this purpose.

Examination of Section 32 reveals that the intent behind this Regulation introduced by the international regulator at the top of pyramid ICC is not so much in preserving the specificities of sport rather of assuring revenue for Cricket Sports Federations under the guise of pyramid structure.

Thus, an analysis of the position clearly brings out that there is an overlap between the way BCCI is discharging its regulatory and commercial roles respectively, and the modus operandi/decision making process does not clearly separate the two roles. The conduct of BCCI in incorporating the clause (Clause 9.1(c)(i)) mentioned above in its Agreement conclusively indicates that BCCI has also used its regulatory power in the process of arriving at a Commercial Agreement. The Commission notes that by explicitly agreeing not to sanction any competitive league during the currency of media rights agreement BCCI has used its regulatory powers in arriving at a Commercial Agreement, which is at the root of a violation of Section 4(2)(c).

The Commission has noted that BCCI by virtue of its role as the custodian of cricket vested with the rights to sanction a cricket event thereby facilitating the success of the event took unto itself the right of restricting economic competition in sporting event. The Commission however, strongly holds the view that competition is essentially for benefits to be widespread. The game of cricket and the monetary benefits of playing professional league matches must be spread out and not concentrated in a few hands, in a few franchisees. In a country of large young population more private professional leagues opens up more venues foryoungsters to play cricket, to earn a livelihood and to find champions where least expected. BCCI in its dual role of custodian of cricket and/organizer of events has on account of role overlap restricted competition and the benefits of competition. The objective of BCCI to promote and develop the game of cricket has been compromised.

The Commission, therefore, concludes that BCCI has abused its dominant position in contravention of Section 4(2)(c) of the Act.

1. This case was initiated on the basis of information filed by Sh. Surinder Singh Barmi, a cricket fan from New Delhi against Board for Control of Cricket in India (hereinafter "BCCI") to the Competition Commission of India (hereinafter "Commission") under Section 19(1)(a) of The Competition Act, 2002 (hereinafter "Act") on November 02, 2010. The Commission, upon examination of the facts of the information, passed an order under Section 26(1), on December 09, 2010 recording its opinion that there exists a prima facie case, and directed the Director General (hereinafter "DG") to investigate into the matter.

1.1 The DG submitted the investigation report on February 21, 2012. The investigation report was sent to the parties seeking their response on the same and further process of inquiry was undertaken in accordance with the provisions of the Act and relevant regulations thereunder. Full opportunity was given to both BCCI and the informant for perusal of all relevant records and making their submissions, both in writing and orally before the Commission.

Factual Background

1.2 The Opposite Party(OP), BCCI, is a society registered under Tamil Nadu Societies Registration Act, 1975 with the primary objectives as stated in the Memorandum of Association (MoA) of controlling the game of cricket in India,

promoting the game in India, framing the laws of cricket in India, selecting teams to represent India in Test Matches, ODIs and Twenty 20 matches played in India or abroad. It is a 'full member' of International Cricket Council ("ICC")

1.3 A party related to the OP is ICC. ICC is the global governing body for international cricket. It is responsible for administration of men's and women's cricket including the management of playing conditions and officials for Test Match and One Day International (ODI) Cricket and the staging of international cricket events for men, women and junio It has three categories of Members viz. Full Members, Associate Members and Affiliate Membe

1.4 Full Members are the governing bodies for cricket of a country recognised by the ICC, or nations associated for cricket purposes, or a geographical area, from which representative teams are qualified to play official Test matches (10 Members).

The alleged irregularities pertained to:

1. Grant of franchise rights for team ownership;
2. Grant of media rights for coverage of the league;
3. Award of sponsorship rights and other local contracts related to organization

of IPL.

Key Issues

The issues framed by the CCI were as follows:

- Whether BCCI is an enterprise for the purpose of the Competition Act?
- What is the *de facto* status of BCCI i.e. whether it is a regulator/custodian of cricket in India or an organizer of cricket events or both?
- Whether actions of BCCI associated with organization of IPL contravene any of the provisions of the Competition Act, in particular Section 4 of the Competition Act?

Decision

The CCI traced the historical evolution of BCCI and its linkages with the International Cricket Council (ICC) to hold that the BCCI is a *de facto* regulator of the sport of cricket in India. At the same time, BCCI organized cricket events and was thus a commercial beneficiary of the sport. Given BCCI's revenue-generating capacity by virtue of being an organizer, the CCI heId that BCCI was an 'enterprise' under the Competition Act.

In determining the relevant market, the CCI observed that from a demand perspective, cricket was not comparable to the general entertainment programs in

terms of advertisement revenue and further, TRP ratings suggested that other sports were not in the same market as a cricket league event. The CCI observed that IPL - a new genre of cricket wherein revenue generation was a primary consideration – formed a distinct market from existing cricket events. Thus the CCI held the relevant market in the present case to be organization of private professional cricket leagues/events in India.

The CCI further held that BCCI was in a dominant position in the relevant market for the following reasons: (a) BCCI was a *de facto* regulator of cricket in India; (b) BCCI was empowered by ICC by-laws with the right to sanction/approve cricket events in India and consequently, its approval is required by any prospective private professional league; (c) BCCI was at a significant commercial advantage by owning infrastructure; (d) BCCI controlled a pool of cricket players under contract.

The CCI then examined whether BCCI had abused its dominant position in contravention of Section 4 of the Competition Act. The CCI declined to go into the issue of BCCI's conduct vis-à-vis Indian Cricket League (ICL) as it related to the period prior to the notification of Sections 3 and 4 of the Competition Act. The CCI, however, examined whether BCCI had been anti-competitive in matters related to IPL. The CCI observed that there was an overlap in BCCI's regulatory and commercial roles, with no clear demarcation between the two. The BCCI had used its regulatory power in the process of entering into commercial agreements. In this respect, the CCI examined Clause 9.1(c)(i) of the IPL media rights agreement whereby BCCI had agreed to not organize, sanction, recognize or support any other professional domestic T- 20 tournament which is competitive to the IPL. The CCI held that the above restriction was anti-competitive inasmuch as it resulted in denial of market access to any potential competitor. It was held that this was in violation of Section 4(2)(c) of theCompetition Act. The CCI observed that BCCI had overreached its powers under ICC bye laws to sanction/approve cricket events to protect its market.

For the above contravention, the CCI imposed a penalty of 52.24 crores, being 6% of the average annual revenue of BCCI for the past three yea

The dissenting opinion written by a single member of the CCI states that the relevant market in the case was promotion and regulation of the sport of cricket in India. While observing that BCCI was in a dominant position in the above relevant market, the dissenting member held that Clause 9.1(c)(i) of the IPL media rights agreement was not anti-competitive as it was necessary to incorporate such a clause to attract investment since the success of the IPL format could not be predicted with precision at the initial stages. Further, the member observed that such a clause was in consonance with international practice because the ICC rules envisaged commercial partners to take steps to protect their investments.

Analysis

The CCI order is an important ruling inasmuch as it confirms that sports regulatory bodies exercising a commercial role are within the purview of competition laws. The

order emphasizes the need for subjecting such regulatory power to restrictions, obligations and review.

However, the methodology and tests adopted by the CCI to determine relevant market, dominant position and abuse thereof are likely to be tested at the appellate level.

At the crux of the debate is the idea that the concept of 'denial of market access' under Section 4(2)(c) is linked to the essential facilities doctrine. The doctrine deals with situations where a dominant player is in control of certain essential facilities/infrastructure and refuses to share the same with competitor. This is because the cost of replication of the infrastructure would be prohibitive for the competitor.

The concept of denial of market access is unlikely to be maintainable in the context of any corporate entity generally entering into commercial arrangements through, for instance, media rights arrangement. However, where an entity exercises monopoly control over goods/services, it will be under an obligation to ensure that its commercial arrangements do not constitute abuse of dominant position through denial of market access.

In the present case, it appears that the fact that BCCI was the *de facto* monopolist regulator of cricket in India and it undertook a commercial venture in the form of IPL to the exclusion of other leagues constituted sufficient proof in the mind of CCI to hold that competition had been affected.

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MCX Stock Exchange Ltd. & Ors v. *National Stock Exchange of India*

CCI, CASE NO. 13/2009

Dated: 23 June, 2011

1.1 The instant case relates to competition concerns arising in the stock markets services in India, which is an important part of the financial market in the country. Therefore, it is essential to outline a brief history and nature of this sector at the start for putting the market dynamics in a perspective.

1.2 Financial market can broadly be divided into money market and capital market. Securities market is an important, organized capital market where transaction of capital is facilitated by means of direct financing using securities as a commodity. Securities market can further be divided into a primary market and secondary market.

1.3 Primary market is that part of the capital markets that deals with the issuance of new securities. It is where the initially listed shares are traded first time.

1.4 The secondary market is an on-going market, which is equipped and organized with its own infrastructure and other resources required for trading securities subsequent to their initial offering. It refers to a specific place where securities transaction among several and unspecified persons is carried out through the medium of the securities firms such as licensed brokers or specialized trading organizations in accordance with the rules and regulations established by the exchanges and the extant laws and regulations laid down by the regulators. Such an institution is called a stock exchange. To be able to trade a security on a certain stock exchange, it must be listed there.

1.9 An important event in the history of the stock market in India was the formation of the Native Share and Stock Brokers Association at Bombay in 1875, the precursor of the present day Bombay Stock Exchange. During that time trading in stock market was just a nascent concept and was limited to merely 12-15 brokers. The “stock market” was situated under a banyan tree in front of the Town hall in Bombay (now Mumbai). After 5 decades of existence, the Bombay Stock Exchange was recognized 6 in May 1927 under the Bombay Security Contracts Control Act, 1925.

1.10 Recognizing the growing importance of stock exchanges and the consequent need to regulate their affairs, the Government of India passed the Securities Contract Act In 1956. With the start of the era of economic reforms and liberalization in the ‘90s, the Government revoked the outdated Capital Issue Act of 1947 and established The Securities and Exchange

Board of India (SEBI) on April 12, 1992 in accordance with the provisions of the newly framed Securities and Exchange Board of India Act, 1992. The Preamble of the Securities and Exchange Board of India describes the basic functions of the Securities and Exchange Board of India as "…..to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto"

1.11 With time, new technologies and new systems were introduced in the Indian stock exchange. The decade of '90s saw considerable evolution of the stock exchanges and capital market products traded in India. Simultaneously, there was growth in the financial markets as well. Over the Counter (OTC) market was established in 1992 and National Stock Exchange (NSE) was 7 established in 1994. In February 2000, internet trading was permitted. In August 2008, the market for stock exchange traded currency derivative was opened on recommendation of RBI and SEBI. All these events changed picture of stock markets in India.

(Informant) MCX Stock Exchange Ltd. (MCX-SX) is a public limited company incorporated on August 14, 2008. As per the information, MCX-SX is a Stock Exchange recognized by the Securities and Exchange Board of India ('SEBI') under section 4 of the Securities Contract (Regulation) Act, 1956 ('SCRA'). The initial recognition has been extended from time to time by SEBI vide gazette notifications.

The promoters of the informant are Financial Technologies of India Ltd. ("FTIL") and Multi Commodity Exchange of India Ltd. ("MCX"). FTIL is engaged in the business of developing and supplying software for financial and securities market. FTIL is also the principal provider of software solutions for brokers and other market intermediaries for use in their front office, middle office and back office for the purpose of dealing in securities through exchanges.

National Stock Exchange (NSE) – Opposite Party NSE was incorporated in November, 1992 and was recognized as a stock exchange in April, 1993 under SCR Act, 1956.

2.2 The informant submitted that the informant and NSE are providing currency futures exchange services. The NSE through its circular dated 26.08.2008 announced a transaction fee waiver in respect of all currency future trades executed on its platform. NSE has continued to extend its waiver programme from time to time despite the fact that the Currency Derivatives (CD) segment is now mature and trading, the CD segment has become high volume and potentially profitable.

2.3 It is alleged that due to transaction fee waiver by the NSE, the MCX was forced to also waive the transaction fee for the transactions on its platform for CD segment from the date of its entry into the stock exchange business which results into losses to the MCX.

2.4 It is also alleged that NSE is charging no admission fee for membership in its CD segment as compared to charging of membership fee in the equity, F&O and debt segments. NSE also does not collect the annual subscription charges and an advance minimum transaction charges in respect of CD segment. The cash deposits to be maintained by a member in the CD segments are also kept at a very low level compared to its other segments.

2.5 It is also alleged that NSE is not charging any fee for providing the data feed in respect of its CD segment ever since the commencement of the segment. On account of this waiver by NSE, MCX has also not been in a position to charge the information vendors for the data feed pertaining to its CD segment, which is presently its only operational segment. It is alleged that this action of NSE is aimed at blocking the residual revenue stream of the MCX.

2.6 That Omnesys is a software provider for financial and security market. The NSE has taken 26% stake in Omnesys through DotEx, 16 which is a 100% subsidiary of NSE. The DotEx / Omnesys has introduced a new software known as “NOW” to substitute a software called “ODIN” develop by Financial Technologies India Ltd. (FTIL), which is the promoter of the MCX and the market leader in the brokerage solution sector. 2.7 After taking the stake in Omnesys, DotEx intentionally wrote individually to the NSE members offering them “NOW” free of cost for the next year. Simultaneously, NSE has refused to share its CD segment Application Programme Interface Code (APIC) with FTIL, thus disabling the ODIN users from connecting to the NSE CD segment trading platform through their preferred mode. The product thus thrust upon the consumers desirous of the NSE CD segment was the product “NOW” developed by DotEx / Omnesys, in place of ODIN. NSE is using “NOW” on a separate computer terminal for accessing its CD segment.

2.8 The main advantage of ODIN software was that a trader could view multiple markets using the same terminal and take appropriate calls. Shifting between different terminals (NOW and ODIN) severely hampers the traders ability to do so. Thus the expected response from a common trader will be to confine to one terminal which connects to the dominant player only i.e. to use the 17 “NOW” terminal (free of cost) and confine himself to the NSE CD segment, which has both a first mover advantage in CD segment as well as dominant player advantage in stock exchange business.

2.9 It is further alleged that the losses suffered by informant in the CD Segment is much higher than the loss suffered by the NSE because the NSE enjoys the economies of scale and has the ability to cross-finance the losses from the profits made in other segments and has the financial strength to fund its predatory practices based on massive reserves built through accumulation of monopoly profits over the years. In contrast, Informant is dependent solely on the revenues from the CD Segment and its losses are mounting in view of its transaction fee waiver, the continuation of which is compelled by the NSE's decision to continue with the fee waiver.

2.10 It is also alleged that the continuation of NSE's fee waiver would not only eliminate the business of the informant in CD segment but also eliminate potential and efficient competitors from the entire stock exchange services. Informant has alleged that the fee waiver and other concessions in CD segment have been adopted by the NSE as an exclusionary device to kill competition and competitors, and to eliminate the Informant from the market as a supplier of stock exchange services. NSE has therefore, used its 18 dominant position in the relevant market to eliminate competition and competitors. Informant has also alleged that the NSE along with DotEx and Omnesys violated provisions of section 4 of the Act by denying the integrated market watch facility to the consumers by denying access of Application Programme Interface Code (APIC) to the promoter of Informant.

3. Reference to the Office of the Director General (DG): 20 3.1 The Commission in its meeting held on 30.03.2010 considered the information and opined that prima facie, a case exists for referring the matter to the Office of Director General for conducting an investigation into the matter under section 26(1) of the Act.

10.1 The Commission has given due consideration to facts given in the information, the investigation report of the DG, the detailed written and oral submissions made by the concerned parties along with opinions and analysis of experts relied upon by the Informant and the OPs. The relevant material available on record and the facts and circumstances of the case throw up the following issues for determination in this case:
(Issue 1) What is the relevant market, in the context of section 4 read with section 2 (r) and section 19 (5) of the Competition Act, 2002?
(Issue 2) Is any of the OPs dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?
(Issue 3) If so, is there any abuse of its dominant position in the relevant market by the above party?

Findings

Issue no. 1

While examining facts of a particular case, the Commission must give due regard to any or all factors mention in section 19 (6) with respect to "relevant geographic market" and section 19(7) with respect to "relevant product market".

10.4 The Commission first considers the RBI-SEBI Standing Technical Committee Exchange Trade Currency Futures report (RBI – SEBI report) of 2008. This report in its para 5.2 of Chapter 5 advocated a clear separation of CD segment from other segments in any recognized stock exchange where other securities are also been traded.

10.7 The second indicator to be kept in mind is the fact that the Informant, MCX-SX was incorporated on 14.8.2008 and was initially authorised by SEBI to operate an exchange platform in trades in CD segment for currency futures in USD – INR of different tenures upto 12 months. NSE was an existing exchange and got permission to commence trading in CD segment on 29.8.2008. The latest entrant into the segment, USE got approval of SEBI in January, 2009. 10.8 The Information in this case has been filed by MCX-SX which is only permitted to operate in the CD segment. The competition concerns which may arise for any enterprise would be in respect of the market in which it is operating and not in context of a market that does not concern its operation.

Here it would not be out of place to discuss a few concepts:

i. Equity market: The equity market in the context of the information is the secondary market which allows trading in the equities of various companies at the stock exchanges. The underlying asset in this market is equity. Largely, investment in the stock of companies performing well is a major consideration for picking up equity in that company.

ii. F&O (Futures and Options) market: Futures are contracts to buy or sell an asset on or before a future date at a price specified today. Options are contracts that give the owner the right but not the obligation to buy (in the case of call option) or sell (in the case of a put option) an asset. The considerations for trading in this market are largely the same as those in the equity market and consequently, the participants are basically the same.

iii. WDM market: RBI has permitted banks, primary dealers and financial institutions in India to undertake transactions in debt instruments among themselves or with non-bank clients through the members and stock exchanges. Accordingly, stock exchanges commenced trading in Government Securities and other fixed income instruments.

iv. The CD market is a futures derivative market where underlying securities are currencies.

10.16 This Commission found it rather unnecessary to dive into technical tests such as SSNIP, particularly in the absence of historic data of prices. The SSNIP test is a tool of econometric analysis to evaluate competitive constraints between two products. It is used for assessing competitive interaction between different or differentiated products. Ideally, time - series price data or trend should be examined to see whether a small but significant non-transitional increase in price has led to switching of consumers from one product to another. However, international jurisdictions have not reposed excessive faith in this test. The US Horizontal Merger Guidelines, 2010 considers SNIPP test as solely a methodological tool for performing hypothetical monopolist test for the analysis of mergers. Similarly, in its notice published in the Official Journal C 372, 09/12/1997 P, 005 – 0013, the European Commission advises action 100 on the applicability of SSNIP test for determining market definition in terms of Article 82 of the European Union Treaty. In the instant case, firstly, the CD segment did not exist prior to August, 2008 and secondly, right since inception, transaction fees, data feed fees etc., which may be said to constitute price, have not been charged by any market player. In such a scenario, an attempt to determine even hypothetical competitive prices would be nothing more than pure indulgence of intellect and unwarranted misuse of an econometric tool, which in itself, is not error- proof. Such an attempt is bound to attract the criticism drawn in the United States v/s El du Pont de Nemour & Company (Case No. 351 US 377 – 1956), notorious in the competition lexicon as the “Cellophane Fallacy” case where the SNIPP test exaggerated the breadth of the market by the inclusion of the false substitutes.

10.18 Similarly, there is little point in going into any extended debate to distinguish the words “interchangeable” from “substitutable”, given the facts of the case and different aspects of capital market in India. It is undisputed fact that as underlying assets, equities and currencies are entirely different. Consequently, related derivatives are also different. From any practical point of view, a product over CD segment exchange cannot be said to be either interchangeable or substitutable by a product in segments like equity and F&O for the purchaser.

As an analogy, the capability of a grain mandi (wholesale market) to also start a wholesale spice mandi does not mean that grain and spices are interchangeable and substitutable nor does it mean that the platforms of the two mandis are interchangeable or substitutable.

In this case, the stock exchange services in respect of the CD segment in India is clearly an independent and distinct relevant market.

Issue No. 2

10.26 Having delineated the relevant market in consideration for the instant case, it is now possible to examine facts to determine whether NSE has “dominant position” in the relevant market.

10.28 Unlike in some international jurisdictions, the evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise but on the basis of a host of stipulated factors such as size and importance of competitors, economic 105 power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry. 10.29 The investigation by the DG followed by the inquiry by the Commission during the course of the proceedings before it has thrown up several facts which, when viewed holistically, project a clear image. Some of the most important facts are mentioned below: a. In the equity segment of stock exchange services in India, NSE has continuously held high market share for the past 8 years going beyond 71% in 2008-09. b. In the F&O segment, NSE has almost 100% market share. c. In WDM segment, NSE has maintained more than 90% market share for the past 6 – 7 years. d. Putting together equity, F&O, WDM and CD segments, NSE have garnered 92% market share as of 2008-09. e. In CD segment itself, NSE has a market share of 48% according to the DG report. 106 f. NSE has been in existence since 1994 as against incorporation of MCX-SX IN August, 2008. g. As at 31.3.2009, reserves and surplus of NSE stood at Rs.18.64 million, deposits at Rs. 9.17 billion and profit before tax at Rs. 6.89 billion. h. In comparison, BSE had a net profit of Rs.2.6 billion only and MCX-SX carried forward net loss of Rs.298.7 million for the period ending 31.3.2009. i. NSE has presence in 1486 cities and towns across India. BSE has presence mainly in Maharashtra and Gujarat and is now reduced to mostly operating in equity segment. MCX-SX has only about 450 centres and operates only in CD segment. j. NSE has high degree of vertical integration ranging from trading platform, front-end information technology, data information products, index services etc. k. Stock exchange services in India are highly regulated and require approvals of SEBI to start a new exchange.

10.30 The above facts are not disputed on any substantive ground. Triangulation of the above facts creates a hologram picture of the players in the capital market in general and in the relevant market of exchange traded currency derivatives forwards in particular.

10.32 The explosive rate of growth of the Indian economy in the new millennium and the dramatic improvements in the variety of products and technology encouraged some new players to start stock exchanges in limited segments. Despite the presence of an undisputed

giant like NSE in the exchange services sector, optimism about the Indian economy and overall size of the growing pie led to MCX-SX and later USE venturing into the arena.

10.34 An important point in consideration of this issue is the current market structure. As of now, the relevant market has only three players, viz. NSE, MCX-SX and USE. According to some recent figures published in the public domain, this market is currently divided almost equally with about 34% share with MCXSX, 30% with NSE and 36% with the latest entrant USE, as of October, 2010. Incidentally, this is a very dynamic market and market shares could vary with time. But the important thing is that in a market with just three players, each would have at least some ability to affect its competitors or the relevant market in its favour even if it is not capable of operating completely independent of competitive forces or affecting consumers in the relevant market.

10.35 However, this is a very limited ability which comes from the relevant market being a triopoly. This is not the "strength" which would come not just from market share (which is fairly evenly distributed at the moment) but from several other factors mentioned in section 19 (4) referred to above.
What has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc. to be able to do things which would affect its competitors who, in turn, would be unable to do or would find it extremely difficult to do so on a sustained basis. The reason is that such an enterprise can force its competitors into taking a certain position in the market which would make the market and consumers respond or react in a certain manner which is beneficial to the dominant enterprise but detrimental to the competitors.

10.38 In the context of the Competition Act, what has to be ascertained is whether an enterprise has "strength" and whether it has the ability to use that strength in its favour. Explanation (a) to Section 4 raises many possible ways in which such strength could be used. These possibilities can be examined individually or in a combined manner, depending upon the facts of a case. In the instant case, we can first ascertain whether NSE has a position of strength which enables it to affect MCX-SX as a competitor in its favour. The question is not whether NSE is doing so but whether all the indicative facts point out that it has the ability to do so. This assessment can be done by posing a few questions.

10.39 Firstly, can NSE sustain zero pricing policy in the relevant market long enough to outlive effective competition?
10.40 To answer this, it must be kept in mind that the rationale for doing any business is to earn some profit out of it. Although there could be slightly diverse strategies such as output

optimisation, turnover maximisation, profit maximisation, positioning etc., the fact remains that earning of zero profit or accumulating losses for indeterminate period would never be the goal of any commercial enterprise. Looking at the financial statements of NSE, its reserves and surplus or its profits after tax, it cannot be argued that the capacity of NSE to defer profits or to bear long-term risk of possible market failure is lesser than that of MCXSX in the relevant market. This clearly is a position of strength.

10.41 Secondly, is there any indication that the conduct of NSE shows that it is aware of its capability?

This Commission has not found any acceptable justification for why a professionally managed enterprise like NSE would not want to keep any track of the commercial viability of its operations or does not have any concerns about the desire of its shareholders to earn higher dividends. It is unthinkable that a professionally managed modern enterprise can afford such financial complacency in the face of competition unless it is part of a bigger strategy of waiting for the competition to die out. This complacence can only point to awareness of its own strength and the realisation that sooner or later, it would be possible to start generating profits from the business, once the competition is sufficiently reduced.

The Commission has also given due consideration to some important cases from international jurisdictions such as AKZO, United Brands, Du Pont amongst others as also guidance papers of some other jurisdictions. A perusal of these indicates that authorities have taken a very wide and varied range of market shares as indicators of dominance, going down to 40% in some jurisdiction. In context of the Indian law, this indicator does not have to be pegged at any point but has to be considered in conjunction with numerous factors given in section 19(4) of the Act.

10.49 In view of the discussion above, the Commission is of the firm opinion that NSE has a position of strength and, therefore, enjoys dominant position in the relevant market in context of Section 4 read with section 19(4) of the Act.

Issue No.3

As regards waiver of data feed fee on the basis of customer requests, this Commission notes that the same magnanimity is not evidenced in respect of other segments where data feed has not been waived. Generation of data, creation of backend and front-end software and live data feed involves considerable technical and commercial investment and costs, not to speak of investment of billable man hours. No profit making enterprises delivering such costly services would deliver it free of cost for years merely on customer requests. Even with regard to customer requests not sufficient evidence was produced by the OPs to show that there was overwhelming demand for free services. Even this magnanimity would not have been felt had the only source of earning for the data feed services been the CD segment. For these reasons,

this Commission finds no merit in the justification given by the OPs regarding data feed fee waiver.

10.63 Regarding denial of access interface code (APIC) for ODIN supposedly done due to programme vulnerabilities and client complaints, this Commission notes that the denial has only been with respect to data feed for CD segment trading on NSE. No denial of APIC has been done in respect of data feed for any other segment. It is also noted that ODIN is a software developed by FTIL, which is one of the promoters of MCX-SX. Vulnerability or defects, if any, in ODIN would be a matter of concern for other segments also. Normally, APIC should have been denied for all segments but this was not the case.

10.64 All these facts put together take the wind out of the sails of the justification given by the OPs for denial of APIC for CD segment operations or for putting FTIL on its watch list. This conduct of NSE/DotEx smacks of dubious anti competitive intent when all the facts are viewed together.

10.72 It has been amply demonstrated in the DG report that there are manpower, hardware, infrastructure and other resources dedicated to CD segment operations by NSE. Several of these heads of expenditure are variable in nature. The operation of CD segment cannot be run without employing those resources and none of those resources including manpower and electricity etc. come for free. Even though it may not be easy to make cost allocations as claimed by NSE, it is certainly desirable and not impossible. Had NSE been operating in no other segment, it would certainly have ascertained its own cost of operations. As mentioned elsewhere while discussing dominance, this cavalier attitude of not allocating cost of operation for a clearly segregated operation can come only from a position of strength and the intent to wait for competition to die out.

10.74 As discussed above, NSE has a position of strength which has enabled it to resort to zero pricing since August, 2008. MCXSX does not have such strength or deep pockets. There is practically no justifiable reason for NSE to continue offering its services free of charge for such a long duration when it is paying for manpower and other resources for running the business.

10.75 MCS-SX, which operates only in the CD segment, has no other source of income. This is a major constraint. In these circumstances, the zero price policy of NSE cannot be termed as anything but unfair. If this Commission were to treat it as fair, it would go against the grain of the Competition Act and betray the economic philosophy behind it. If even zero pricing by dominant player cannot be interpreted as unfair, while its competitor is slowly bleeding to

death, then this Commission would never be able to prevent any form of unfair pricing including predatory pricing in future.

10.76 Had NSE and MCX-SX been on equal footing in terms of resources directly available, spectrum and scale of operation, nationwide presence, length of existence etc. perhaps perception of unfairness would not have been so blatant and impossible to ignore, but in this case, the sense of the two being equal or even almost equal does not exist. Therefore, this Commission concludes that the zero price policy of NSE in the relevant market is unfair.

10.80 The Indian Competition Act recognizes leveraging as an act by an enterprise or group that "uses by its dominant position in one relevant market to enter into, or protect, other relevant market." Nowhere does the Act indicate that there has to be a high degree of associational link between the two markets being considered for this sub section. This is so because competition concerns are much higher in India than in more mature jurisdictions because of the historical lack of competition laws. In India, if an enterprise dominant in the market of audio-visual (AV) equipment enters into the market of say, computers, it is possible for it to use its strength 131 in terms of finances, technological expertise, sales network etc. in the AV market to muscle its way into and protect its position in the computer market, even though the two markets are not at all connected. That is why the Act does not indicate any requirement of associational link.

10.81 At this stage, the Commission would like to clarify the intent as well as the import of section 4(2)(e) of the Competition Act, 2002. It is incorrect to argue that the whole of section 4 pivots around determination of only one "relevant market" or that determination of a second "relevant market" is not possible or that having treated a particular market as the "relevant market" for the purpose of explanation (a) to section 4, that market cannot be treated as the "other market" for the purpose of section 4(2)(e) as per the wordings of the provision.

10.82 Explanation (a) is for defining what dominant position means for any market being examined under section 4 while section 4(2)(e) deals with a situation where an enterprise in dominant position in (any) delineable relevant market uses its strength therein to enter or protect any other (delineable) relevant market.

10.83 Section 4(2)(e) uses the terms, "one relevant market" and "other relevant market". The section recognizes the fact that an enterprise may be multi-product and may be operating in two (or more) markets. It may be possible for such enterprise to use its position of strength derived in one market to leverage its position and gain unfair advantage in the other market. While its conduct in the second market has to be separately examined for abuse if and after it

acquires a dominant position there, the fact that it has used the strengths from the first market to wrongfully enter into or to protect the second market is independently considered harmful to competition under the Act. The "relevant market" of the explanation (a) applies equally in intent for sections 4(1) and (2) but the relevant market in respect of clauses (a) to (d) of section 4(2) can be different than the relevant market for the purpose of clause (e).

10.84 In the instant case, the relevant market in respect of clauses (a) to (d) of section 4 (2) has been taken as stock exchange services for currency derivatives in India. It must be emphasized that this Commission has considered NSE as being in dominant position in this market based on factors given in section 19(4). But it must be kept in mind that NSE is also operating in other markets, such as equity, F&O and WDM. It is not the place to go into a discussion whether each of these is independent relevant market or some are interchangeable / substitutable for the consumer and therefore constitute a single market. What is important is that this Commission has clearly differentiated the CD segment as an independent relevant market. For the sake of convenience, we shall refer to the rest of the market (or markets) as the "market of stock exchange services for the non CD segment". In this discussion, we shall call the relevant market as the "X market" and the market of stock exchange services for the non CD segment as the "Y market". The complexity in this case arises from the fact that NSE has been considered as dominant in the X market due to its strengths in the Y market (amongst other things). A question can then be posed as to how, once determined as dominant in the X market, can the charge of leveraging the position in the X market to enter or protect the same X market itself be made? But this question is assuming that once X has been taken as the "relevant market" then wherever the word "relevant market" occurs in clauses (a) to (e), it should automatically refer to X market.

10.85 This is distortion of the provisions. As explained earlier, the "relevant market" for clause (e) can be different from the "relevant market" for clause (a) to (d) but the aspects of dominance given in explanation (a) would apply equally to both. In fact, the scheme of the section, particularly when read with section 19(4), is such that it is possible to take one market as the "relevant market" for sub sections (a) to (d) of section 4(2) and the same market as the "other market" for section 4(2)(e).

10.86 In the Indian Competition Act, under section 19(4), the ability to leverage, in itself, is taken as one of the factors of dominance. This revalidates our observation above that both "position of strength" as well as the concept of leveraging has slightly different nuances in the Indian Act. Phrases like "size and importance of competitors", "vertical integration", "relative advantage" etc. are concepts that indicate the strength to leverage based on strengths in other markets. It is this strength that would render an enterprise dominant in the relevant market itself and would expose its conduct therein to evaluation of any other abuse of dominance

separately. At the same time, the wrongful exercise of that strength by itself is also held as abusive conduct in its own right, under section 4(2)(e).

10.87 To further clarify, if an enterprise merely uses its dominant position in any "relevant market" to enter or protect some other "relevant market" wrongfully, it can only be held guilty of contravening section 4(2)(e). But if the enterprise, after entering the other relevant market through such leveraging and acquiring 135 dominant position there, commits further acts of abuse (such as unfair pricing) in that relevant market, then there would be a separate violation of section 4(2)(a).
10.88 The conduct of NSE has been examined within the relevant market delineated for this case (X market). The cumulative impact of those conducts also translates into the act of protecting its position in the X market by the dint of its strengths in the Y market where also NSE is dominant. Whereas X market is the "relevant market" for sub sections (a) to (d), the Y market is the "relevant market" for sub section (e).

10.89 It is worthwhile to observe here that the language of section 4(2)(e) does not exclude the possibility that the enterprise is dominant in both, the "relevant market" as well as the "other relevant market". An enterprise can be dominant in one market and can enter another market, acquire position of strength there and then commit acts to protect its position. This is the situation in this case. The acts of abuse in the market of stock exchange services in CD segment have to be examined in terms of sub sections (a) to (d) of section 4(2), whereas, the anti-competitive use of might arising from the market of stock exchange services in non CD segment is to be examined under section 4(2)(e).
10.90 Having clarified the existence of two market necessary for examining section 4(2)(e) and without prejudice to our view on the requirement of associational links under the Indian law, we now examine if the two markets have associational link. This can be done by considering the following questions: (a) Whether NSE holds a position of strength on the CD segment market comparable to its position in the CD and non CD segment markets as a whole? (b) Whether the NSE enjoys advantages in the CD segment market by virtue of its dominance in the non CD segment market? (c) Whether the NSE customers in one market are potential customers in the other? (d) Whether the NSE and its competitors can become competitors in both markets? 10.91 As evident from our discussion in the section on dominance, the NSE possesses almost the same strengths in the CD segment as it does in the combined stock exchange market. This fact gives it definitive advantages in the CD segment. There is high commonality of brokers and traders in other segments and CD segment. As indicated in the introductory section of this order, MCX-SX has already applied for permission to operate in the equity/cash ("Equity") and equity derivatives - Futures and Options ("F&O") segments and has also communicated its willingness to SEBI to commence

the SME (small and medium enterprises) segment. At this point in time, the necessary regulatory approvals have not been given and the matter is sub judice. However, potentially, NSE and MCX-SX can be competitors in those segments. Indeed, MCX-SX is desirous to compete with NSE in other segments. Therefore, all the above four questions can be answered in the positive. Consequently, it can be said that the two relevant markets have associational links. Therefore, it is concluded that NSE has used its position of strength in the non CD segment to protect its position in the CD segment.

10.92 In the instant case, the acts of NSE such as fee waivers, denial of APIC for ODIN and distribution of NOW for free are clear acts of protecting its position in the CD segment and are possible due to its position of strength in the non CD segment.

Conclusion

11.1 In the previous section, the Commission framed three issues for determination and has discussed them in great detail. The findings of the Commission, based on the above discussions are summarized as below.

11.2 The stock exchange services in respect of CD segment in India is clearly an independent and distinct relevant market. In this delineated relevant market, NSE has a position of strength and, therefore, enjoys dominant position in the relevant market in context of Section 4 of the Act.

11.3 In the facts and circumstances of the case, the defence of nascent market development and historical philosophy of fee waivers by NSE and DotEx is not tenable.

11.4 This Commission finds no merit in the justifications given by the OPs regarding waivers of transaction fees, admission fees or data feed fee waiver. Therefore, the zero price policy of NSE in the relevant market is unfair. It can, in fact, be termed as annihilating or destructive pricing. This is contravention of section 4(2)(a)(ii).

11.5 The conduct of NSE / DotEx in denying APIC to ODIN and putting FTIL on watch list is an exclusionary conduct both, in the aftermarket for software for trading on NSE as well as in the relevant market delineated in this case. This is contravention of sections 4(2)(b)(i) and (ii); 4(2)(c) and 4(2)(d).

11.6 Lastly, NSE has used its position of strength in the non CD segment to protect its position in the CD segment. This is contravention of section 4(2)(e).

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Indian Exhibition Industry Association v. *Ministry of Commerce and Industry and Indian Trade Promotion Organisation*

2014 Comp LR 87 (CCI);

Indian Trade Promotion Organisation v. *CCI & Ors*

CompAT Decision.

Order under Section 27 of the Competition Act, 2002

1. The present information under section 19(1)(a) of the Competition Act, 2002 („the Act") was filed by Indian Exhibition Industry Association („the informant") against Ministry of Commerce & Industry („OP 1") and Indian Trade Promotion Organization („OP 2"/ ITPO) alleging *inter alia* contravention of the provisions of section 4 of the Act. The Commission after considering the entire material available on record *vide* its order dated 06.05.2013 passed under section 26(1) of the Act, directing the DG to cause an investigation to be made into the matter and to submit a report.

Brief facts of the Case

2. The informant is an association of exhibition organisers/ venue owners/ service providers, registered under the Societies Registration Act, 1860 with the objectives of *interalia* promoting development of Trade Fairs & Exhibition Industry and to support itsorderly growth.

3. OP 1 is responsible for development of trade, commerce and industries in the country. OP 2 is a company registered under section 25 of the Companies Act, 1956 and is stated to be wholly owned by the Government of India which has administrative control over it. It is further stated that the main object for creating ITPO was to promote, organize and participate in industrial trade fairs and exhibitions in India or abroad and to take all the measures incidental thereto and to organize, undertake and publicize tradeshows and fair exhibitions depots in India as well as abroad and to undertake promotion of export to explore new market for traditional items of export etc.

4. Briefly, the informant is aggrieved by the alleged time gap restriction imposed by OP 2 between two exhibitions/ fai As per the informant, OP 1 issued a letter dated 27.02.2003 to OP 2 stating therein that the time gap restrictions prescribed in the guidelines issued by OP 2 for Licensing of Exhibition Space & Facilities in Pragati Maidan ("the Guidelines") should be lifted to make the system transparent and afford greater freedom to the organizers to hold exhibitions/ fairs in a manner which promotes the business interests. Accordingly, OP 2 intimated OP 1 vide its letter dated 28.03.2003 that the Guidelines have been amended to drop the „time

gap restriction‟ between two exhibitions/ fairs irrespective of where the exhibitions/ fairs are held.

5. However, in 2006, OP 2 re-formulated the said Guidelines and added clause 6.2 therein which imposed a "time gap restriction" of 15 days between two events having similar product profiles/ coverage and in case of ITPO fairs, *90 days before start or 45 days afterthe close of an ITPO show*. The Guidelines were re-considered in October, 2007 wherein agap of 15 days between two events having similar product profiles/ coverage was maintained whereas in case of ITPO and third party fairs having similar product profiles, a gap of 90 days before ITPO‟s show and 45 days after ITPO‟s show was imposed.

6. In 2011, OP 2 further amended the said "time gap restriction" and revised the same to

90 days before and after the fair in case of ITPO fairs and third party fairs having similarproduct profiles.

7. Highlighting the above amendments as arbitrary and discriminatory, the informant alleged that OP 2 adversely affected the established exhibitions of other players in the market by scheduling its own unrecognized exhibitions and refusing the permission to other players on the pretext of arbitrary time gap restrictions. It was further alleged that OP
2 would announce its exhibitions and later cancel them causing loss to OP 2 as well as the industry as a whole. Lastly, it was alleged that in addition to these abuses, exhibitors were also forced by the ITPO to avail certain services which were not required by them but were imposed by OP2 by way of unreasonable and arbitrary conditions in the agreement.

8. Based on the above averments and allegations, the informant alleged abuse of dominant position by OP 2 by virtue of playing a dual role as a regulator as well as the organiser of exhibitions which, as per the informant, led to the contravention of section 4 of the Act.

9. The Director General ("the DG"), after receiving the directions from the Commission, investigated the matter and submitted the investigation report on 14.02.2014. On investigation, the DG found OP 2 to be a dominant entity in the relevant market of "provision of venue for international and national trade fairs and exhibitions in Delhi". It was observed that various competition concerns emerge due to the conflict of interest on account of OP 2 being an event organizer at Pragati Maidan as well as the entity which decides the applications and makes rules for leasing space at Pragati Maidan to third parties, who compete with OP 2 as event organize The DG found that from time to time, OP 2 had amended the

time gap restrictions between two similar profile events at Pragati Maidan which were much more stringent for third party events as compared to OP 2‟s own events.

10. Noting that there may be an economic rationale for time gap restrictions like confusion between events, free riding concerns *etc*., the DG opined that the same was not *per se* unfair. However, since the restrictions were discriminatory and more stringent for third party events as compared to OP 2's own events, the DG concluded contravention of theprovisions of section 4(1) read with section (4)(2)(a)(i) of the Act. Further, it was noted that in the year 2011, OP 2 shifted its own event (IISE) into the period traditionally reserved for other competing events (Smart Expo, IIFEC). As such, the DG was satisfied that OP 2 discriminated against third party organizers by altering the time gap restriction guidelines, rescheduling its own events and delaying the confirmation of allotment dates to third parties which resulted in denial of market access to third parties to use the venue Pragati Maidan for their events at their usual slots. Such acts of the OP 2 were found to have the effect of limiting the provision of services of holding trade fairs and exhibitions at Pragati Maidan and also denial of market access to such third party exhibitors and was accordingly found by the DG to be in contravention of section 4(1) read with section 4(2)(b)(i) and section 4(2)(c) of the Act. The DG further noted that OP 2 leveraged its dominant position in the relevant market of „provision of venue for holding international and national exhibitions in Delhi‟ to protect its activities in the other market of organization of events at Pragati Maidan‟ thereby contravening section 4(2)(e) of the Act.

11. The DG, however, did not come across any evidence of role/responsibility of OP 1 in the aforesaid conduct. Rather, it was found that through directions issued on 27.02.2003, OP 1 had specifically directed OP 2 for removal of time gap restrictions between similar profile events to make the system more transparent.

12. Further, the allegations regarding allotment of venue subject to acceptance of supplementary obligations such as conditions of compulsorily taking of foyer area, engaging of empanelled housekeeping agency, non-invoicing of such charges by OP 2 for its own events were found to be causing no contravention of the provisions of the Act.

13. The Commission considered the DG report, the submissions of the parties and the information available in public domain. The main issues before the Commission in this case are as follows:

Issue 1: What is the relevant market in the present case? Issue 2: Whether OP 2 is dominant in the relevant market? Issue 3: If yes, whether OP 2 has abused its dominant position within the meaning of section 4 of the Act?

Issue 1: Relevant Market

14. "Relevant product market" has been defined in section 2(t) of the Act meaning as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Furthermore, to determine the "relevant product market", the Commission is required to have due regard to all or any of the following factors viz. physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.

15. The DG noted the relevant product market as "provision of venue for organizing national and international exhibitions and trade fairs". It may be noted that the allegations in the present case relate to the policies and procedures stipulated by OP 1 and OP 2 with respect to licensing of venues to exhibitors for conducting fairs and exhibitions. In order to attract exhibitors and visitors, the venue for exhibition plays a key role. The venues which regularly hold exhibitions and trade fairs ideally have large space to accommodate multiple exhibitions, are centrally located and are well known on the world map and are, therefore, most preferred by the exhibitors particularly for organizing international and national exhibitions and trade fai

16. Hence, the venues regularly used for organizing national and international exhibitions and trade fairs can be distinguished from venues for other kind of events in terms of parameters such as physical characteristics, consumer preferences.

17. In view of the above, the Commission is of the opinion that the relevant product market delineated by the DG i.e. market for "provision of venue for organizing national and international exhibitions and trade fairs" is correct.

18. Further, "relevant geographic market" has been defined in section 2(s) of the Act meaning as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the „relevant geographic market", the Commission is required to have due regard to all or any of the following factors viz., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs,

language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

19. The DG delineated the relevant geographic market in the present case as Delhi. As highlighted in the DG report, Delhi has been hosting exhibitions at Pragati Maidan since 1977 and it has a rich historical background as a venue for holding international and national exhibitions and trade fai Factors like better public transport system, connectivity to airports, railway stations and inter-state bus terminals, centralized location nearby hotels, substantially large exhibition and open display space at its venue Pragati Maidan, location of Central and State Ministries etc. also distinguish and create preference for exhibitors as well as visitors for Delhi over other places in the country. Further, as brought out in the DG report, such fairs usually require liasioning and approvals from governmental authorities which makes Delhi as an advantageous location as a venue. Lastly, it may also be highlighted that Delhi being the capital of the country also adds to its attractiveness as a preferred location.

20. The Commission is satisfied with DG's observations on this aspect. Further, in terms of the available infrastructure of other exhibitions centres in comparison to Pragati Maidan, the conditions of competition of supply and demand for venues for national and international exhibitions in Delhi are different from those prevailing outside. Further, the factors such as consumer preference, adequate facilities, transport cost etc. make Delhi a distinct destination for holding international and national exhibitions and trade fai Considering all the above stated factors, the Commission is of the view that Delhi‟ as a venue for holding international trade fairs and exhibitions cannot be substituted with other venues in NCR or other cities in the country. Therefore, the relevant market in the present case is "provision of venue for organizing international and national trade fairs/exhibitions in Delhi".

Issue 2: ***Dominance of OP 2 in the Relevant Market***

21. On the issue of dominance, the DG on the basis of the available facts and assessment in terms of parameters contained in section 19(4) of the Act, found OP 2 to be dominant in the relevant market of "provision of venue for organizing international and national exhibitions, trade fairs (events) in Delhi" within the meaning of section 4 of the Act.

22. DG noted that there were no competitors of OP 2 in the relevant market which could match it in terms of size and importance. It was also observed that even outside Delhi, OP
2 as a venue provider stood way above other venue providers in terms of various parameters such as area of operation, space, location, resources, infrastructure etc. Furthermore, multiple roles were performed by OP 2 at different levels involved in

the holding of events i.e. as a regulator it issues necessary permissions and no objection certificate, as an organizer of international events in India and abroad, it formulates policies and guidelines for holding such events, grants approvals for third party exhibitions held at Pragati Maidan and other international events at other venues. Additionally, it also organizes trade fairs and exhibitions at Pragati Maidan. These plural functions and powers conferred on OP 2 only strengthen its position of dominance in the relevant market. Due to the unique features and characteristics of Pragati Maidan, it becomes the first preference and almost irreplaceable for holding important national and international events. Further, since Government has envisaged ITPO to play a significant role in various facets of organizing national and international events, the consumers are heavily dependent upon ITPO for holding events at Pragati Maidan. There are entry barriers in terms of availability of adequate space, appropriate location, state of art infrastructure, visibility on global map, approvals for being in the relevant market of providing venue for holding international and national events in Delhi. In the absence of alternate venues, most of the third party organizers are dependent on ITPO for venue for conducting international and national events in Delhi. The DG also observed the absence of any countervailing buying power which could be exerted upon ITPO.

23. The Commission is in agreement with the DG's finding on the issue of dominance ofOP 2 in the relevant market. It may be additionally pertinent to note that OP 2 has acceded to DG's findings by accepting that it is a dominant player in the exhibition industry by virtue of owning one of the largest exhibition venues at a prime location in the capital of the country. OP 2 submitted that the venue is spread over an area of 123 acres of land hosting large number of events/exhibitions and generating substantial revenue.

24. In view of the facts before the Commission and OP 2's own submissions, the Commission has no hesitation in holding that OP 2 is dominant in the relevant market for "provision of venue for organizing international and national exhibitions, trade fairs (events) in Delhi". Pragati Maidan is the only established venue for holding international and national trade fairs/exhibitions (events) in Delhi and OP 2 as venue provider for holding events in Delhi has absolute control and dominance.

Issue 3: ***Abuse of dominant position by OP 2***

25. The DG conducted a detailed investigation into the various issues and allegations arising out of the information. The main allegation of the informant pertained to arbitrary and discriminatory time gap restrictions imposed by OP 2 between two events. Though the DG did not find time gap restrictions *per se* as abusive, the conduct of OP 2 in stipulating, amending and applying the same was

found to be abusive in terms of the provisions contained in sections 4(2)(a)(i), 4(2)(b)(i), 4(2)(c) and 4(2)(e) of the Act.

26. On perusal of the DG's observations and findings on the time gap restriction, it is evident that by stipulating favourable time gap restrictions for its own events as compared to third party organized events, OP 2 imposed unfair and discriminatory conditions on the third party event organizers at Pragati Maidan. The findings show that the time gap restriction between two "third party events" was 15 days before and after the event whereas in case of OP 2's own organised events/exhibitions, the time gap restriction was
90 days before and 45 days after the event in case of OP 2 events (which was amended to
90 days before and after the event in 2011). This has been accepted by OP 2 in its own written submissions. Such a conduct is clearly in contravention of the provisions of section 4(2)(a)(i) of the Act. Besides, it also limited/ restricted the provision of services and market thereof in contravention of the provisions of section 4(2)(b)(i) of the Act. Further, increase in the time gap restrictions for holding third party events, before and after OP 2's own events of similar profile, amounted to denial of market access to the third parties who compete with OP 2 for organizing events at Pragati Maidan in contravention of the provisions of section 4(2)(c) of the Act. The Commission also believes that OP 2 has used its dominant position in the relevant market of venue provider in Delhi for organizing events to protect and enhance its position in the market of event organization and thereby contravened the provisions of section 4(2)(e) of the Act.

27. The informant also alleged that OP 2's guidelines for reserving slots for regular events and allocation on first-come-first basis was often disregarded for benefiting its ownevents. It was alleged that OP 2 would take unreasonable time to confirm the booking which allowed it to manipulate the bookings. The informant cited various instances in support of this allegations. From chronology of events in processing applications for events received from third party organizers viz. "UBM and Electronics Today", it is evident that OP 2 imposed unfair and discriminatory conditions upon the third party organizers by taking long time in confirming the allotment dates; by not deciding applications on first-come-first-basis; coupled with altering of time gap restriction guidelines to its advantage; giving preferential treatment to its own fairs over competing fairs in contravention of the provisions of section 4(2)(a)(i) of the Act. Further, such conduct amounted to denial of market access to the third parties who competed with OP 2 for organizing events at Pragati Maidan in contravention of the provisions of section 4(2)(c) of the Act.

28. The other allegations of the informant with regard to compulsion for taking the "foyer area" along with the allocated area, compulsory usage of OP 2's designated housekeeping agency etc. do not appear to raise any competition concern. OP 2 submitted that the charges imposed on the third party organizers for common foyer area were to: (i) to prevent unauthorized/unregulated use of this area by any of the organizers (ii) to avoid conflict between multiple organizers regarding use of this area and to ensure controlled allocation of this area and (iii) to ensure smooth conduct of the event, movement of visito The Commission is satisfied with the explanation furnished by OP 2 and, therefore, no contravention is found on this ground.

29. Similarly, the issue of designating housekeeping agency on their panel and not giving any option to the exhibitors to engage any other housekeeping agency does not raise any competition concern to warrant Commission'ss intervention. From the submissions made by OP 2 before DG, it appears that third party organizers were free to engage housekeeping agencies of their choice though that would be in addition to the conservancy charges to be paid by them. The DG opined that OP 2 being the owner of the Pragati Maidan was vested with the responsibility of ensuring cleanliness, maintenance, proper sanitary conditions as per international standards. This necessitated OP 2 to provide housekeeping services for the entire venue. We agree with the finding of the DG and hence, the appointment of housekeeping agencies for the aforesaid purpose and levying of conservancy charges on the third party organizers appear to be justified subject to the quantum being levied in a fair, transparent and non-discriminatory manner. No contravention is found on this ground.

30. On the issue of non-charging of rental, foyer charges by OP 2 for its own events, the Commission is satisfied with the explanation provided by OP 2. The informant alleged that since every organizer has to include in their costing the hall rental, foyer charges, housekeeping charges etc. charged by OP 2, the cost charged by the other organizers was very high in comparison to the cost charged by OP 2. This was alleged to be an abusiveconduct of the dominant undertaking. OP 2 submitted that it is entrusted with the responsibility of promoting external and domestic trade of India in a cost effective manner by organizing and participating in international trade fairs in India and abroad. The main focus of OP 2 is to support and assist small and medium enterprises to access markets both in India and abroad. OP 2"s events cover a wide variety of sectors such as handlooms, handicrafts, textiles, manufacturing, processed food, publishing and printing industry, agriculture, leather goods. Thus, OP 2 organizes events in Pragati Maidan with an objective of trade promotion and as such the cost of participation in ITPO's events in Pragati Maidan is required to be kept at a reasonable level as compared to the events organised by third party organise Commission cannot completely

ignore the fact that while a third party event in Pragati Maidan is primarily organized by companies/organizations with profit-motive keeping the cost of participation high, OP 2 generally targets small and medium enterprises to provide them a platform to exhibit their products at a reasonable cost. Therefore, the Commission is satisfied with the explanation furnished by OP 2 in this regard and no contravention is found on this ground as well.

31. The last allegation made by informant was with regard to onerous terms and conditions imposed in the Agreement entered into between OP 2 and third party organizers in case of cancellation or re-scheduling of events. The Commission has perused the clauses in the Agreement pertaining to cancellation and rescheduling and apparently the different regime for liability of OP 2 and third party organizer is *ex facie* discriminatory which can be noticed from a bare perusal of the impugned clauses noted below:

7.21 Rescheduling The exhibition organizers may be permitted to reschedule their events subject to the following conditions:
(a) Re-scheduling will be permitted only once and the rescheduled dates should be within 6 *months of the original booking. Any rescheduling beyond* 6 *months will be treated ascancellation of original booking and applicable penalty has to be paid by the organize*
(b) Minimum of 5 *months notice from the date of the original tenancy of the booking. (c) Atleast 50% of the committed License Fees should have been paid. (d) The proposed re-scheduling should be for the same quantum of area booked in terms of per sqm./day. In the event of shortfall, the applicable penalty will have to be paid before such re-scheduling. 5.20 Liability of ITPO limited to refund of deposit in the event of halls being unavailable ITPO is in the process of undertaking a modernization program or facilities in Pragati Maidan. ITPO will inform the organizers in advance of any dislocation in the halls blocked by the organizers in the event of implementation of modernization program. In such an eventuality, ITPO's liability is limited to refunding the advance license fee received from the organizer.*
32. In view of the above, Commission is of considered opinion that the above stipulations amount to imposition of unfair conditions on third party organizers by OP 2 in exercise of its dominant position in contravention of the provisions of section 4(2)(a)(i) of the Act. Resultantly, Commission is of view that OP 2 has contravened the provisions of section4(2)(a)(i), 4(2)(b)(i), 4(2)(c) and 4(2)(e) read with section 4(1) of the Act, as detailed above.

33. Before parting with this order, it may be pointed out that the informant has also impleaded OP 1 (Ministry of Commerce & Industry) as opposite party in the present case. Though no specific allegations are levelled against the Ministry, yet

the same was presumably arrayed as a party due to its role in policy formulation with regard to development of trade, commerce and industry in the country as well as implementation projects. The Commission is of the considered opinion that the aforesaid functions of the Ministry do not qualify it to render an „enterprise" within the meaning of section 2(h) of the Act.

34. In view of the above, the Commission passes the following order.

ORDER

35. The Commission directs OP 2 to cease and desist from indulging in such anti-competitive practices which have been found to be abusive in terms of the provisions of section 4 of the Act in the preceding paras of this order.

36. Before levying the penalty on OP 2 for contravention of the provisions of section 4 of the Act, it may be pointed out that subsequent to filing of information, the discriminatory features that earlier existed due to non-parity in time gap restrictions applicable to two „third party events" and that between an ITPO and third party events have been largely removed through the amendment dated 20.05.013, barring a small element of comparative advantage that OP 2 fairs continue to enjoy due to the 3 days of time gap restriction which is not available between two third party events. The time gap, as it stands presently, is very small and was sought to be justified by OP 2 on logistical grounds and the same does not appear to have any adverse effect in the market.

37. With this mitigating factor in mind along with OP 2"s self submission and admissions, the Commission considers it appropriate to impose penalty @ 2% of the average of the Income/Receipt/Turnover for the last three preceding financial years as calculated below.

C. No. 74 of 2012 Page **17** of **17**	**Income/Receipt/Turnover (in rupees)**
Year	
2010-11	3,05,11,88,066.00
2011-12	3,73,79,52,630.00
2012-13	3,33,63,90,378.00
Total	**10,12,55,31,074.00**
Average	**3,37,51,77,025.00**
Penalty @ 2%	**6,75,03,540.00**

Etihad Airways PJSC and Jet Airways (India) Limited Combination
Combination Registration No. C-2013/05/122
Date of Order: 12.11.2013

Order under Section 31(1) of the Competition Act, 2002:

A. INTRODUCTION

1. On 1st May 2013, the Competition Commission of India received a notice under sub-section
(2) of Section 6 of the Competition Act, 2002 given by Etihad Airways PJSC and Jet Airways (India) Limited. The notice was given to the Commission pursuant to an Investment Agreement ("IA"), a Shareholder's Agreement ("SHA") and a Commercial Co-operation Agreement ("CCA"), all executed on 24th April 2013……

3. In terms of Regulation 16 (1) of the Combination Regulations, the Parties, vide their letter dated 3rd June 2013, informed the Commission that, on 27th May 2013, they have made certain amendments to the SHA, CCA and the Corporate Governance Code ("CGC"), a code agreed to be adopted pursuant to the SHA. The Parties submitted that the changes to the SHA, CCA and the CGC were clarificatory in nature and the core nature of the transaction remains unchanged. The Commission considered the changes and noted the same on 6th June 2013….

8. In terms of sub-regulation (3) of Regulation 19 of the Combination Regulations, Air India was required to furnish its views/comments on the proposed combination by 29th October 2013. After seeking extension of time twice, Air India furnished its response on 8th November 2013, broadly raising two main concerns viz. impact of the alliance on the competitive landscape of the India-Abu Dhabi route and impact of the alliance on Indian aviation and Air India. These concerns have been considered and addressed in the assessment of the combination….

B. COMBINATION

10. It has been stated in the notice that the proposed combination relates to acquisition of 24% equity stake and certain other rights in Jet by Etihad….

C. PARTIES TO THE COMBINATION

11. Etihad, a company incorporated in the United Arab Emirates (UAE), is stated to be the national airline of UAE and is based in the emirate of Abu Dhabi. Etihad is wholly-owned by the Government of Abu Dhabi and is primarily engaged in the business of international air passenger transportation services. Etihad also operates Etihad Holidays (a division of Etihad Airways offering holiday packages to the airline's passenger destinations, including its home base, Abu Dhabi), Etihad Cargo (a division of Etihad Airways offering cargo services linked to its international route network and aircraft fleet) and a global contact centre organization as part of its commercial group. The Abu Dhabi International Airport located at Abu Dhabi, the capital of the UAE,

operates as Etihad's hub airport. Etihad is also stated to hold 29.21 percent equity stake in Air Berlin; 40 percent equity stake in Air Seychelles; 10 percent equity stake in Virgin Australia and 2.9 percent equity stake in Aer Lingus.

12. Jet, a listed company incorporated in 1992 under the provisions of the Companies Act, 1956, is primarily engaged in the business of providing low cost and full service scheduled air passenger transport services to/from India. Jet also provides air transportation services for cargo, maintenance, repair & overhaul services and ground handling services. Jet Airways Cargo is the cargo division of Jet which operates through the passenger flights with belly space cargo capacity and does not operate any dedicated cargo flight. Jet Lite (India) Limited is a wholly-owned subsidiary of Jet and operates low cost air transportation service under the brand name 'JetKonnect'.

D. JURISDICTION

13. As per the details provided in the notice, the combined value of assets and turnover of the Parties meet the threshold requirements for the purpose of Section 5 of the Act.

14. In the instant case, both the Parties are engaged in the business of providing international air transportation services. The background of the IA pursuant to which 24 percent equity interest in Jet is proposed to be acquired categorically states that the Parties wish to enhance their airline business through a number of joint initiatives. In such a case, Etihad's acquisition of twenty-four percent equity stake and the right to nominate two directors, out of the six shareholder directors, including the Vice Chairman, in the Board of Directors of Jet, is considered as significant in terms of Etihad's ability to participate in the managerial affairs of Jet.

15. With a view to achieve the purported objective of enhancing their airline business through joint initiatives, the Parties have also entered into the CCA. Under the CCA, the Parties have *inter alia* agreed that: (A) they would frame co-operative procedure in relation to (i) joint routeand schedule coordination; (ii) joint pricing; (iii) joint marketing, distribution, sales representation and cooperation; (iv) joint/reciprocal airport representation and handling; (v) joint/reciprocal technical handling and belly-hold cargo and dedicated freight capacity on services (into and out of Abu Dhabi and India and beyond); (B) the Parties intend to establish centres of excellence either in India or Abu Dhabi; (C) Etihad would recommend candidates for the senior management of Jet; (D) Jet would use Abu Dhabi as its exclusive hub for scheduled services to and from Africa, North and South America and UAE; and (E) Jet would refrain from entering into any code sharing agreement with any other airline that has the effect of: (i) bypassing Abu Dhabi as the hub for traffic to and from the above said locations, or (ii) is detrimental to the co-operation contemplated by the CCA.

16. It is observed that the Parties have entered into a composite combination comprising *interalia* the IA, SHA and the CCA, with the common/ultimate objective of enhancing their airlinebusiness through joint initiatives. The effect of these agreements including the governance structure envisaged in the CCA establishes Etihad's joint control over Jet, more particularly over the assets and operations of Jet.

E. ASSESSMENT OF THE PROPOSED COMBINATION

Indian aviation sector

17. According to a recent report of the Ministry of Civil Aviation, Government of India, over the past decade, the domestic passenger segment of the Indian civil aviation sector grew by aCompound Annual Growth Rate (CAGR) of 14.2% and the air cargo segment grew by 7.8%. An IATA report further points out that the market already has some 150 million travellers passing through its airports, and by 2020 traffic at Indian airports is expected to reach 450 million, making it the third largest aviation market in the world. In 2012, the number of international passengers was approximately 41 million. Of those, 28.5 million travelled to the west of India, mainly to Europe and North America. Based on the latest IATA growth forecast this market is expected to grow to approximately 42.6 million passengers by 2018.

18. However, the sector has multiple challenges and issues to address in order to realize an effective passenger growth in future. To address the concerns surrounding the operational viability of Indian carriers, the Government of India has initiated a series of measures including allowing Foreign Direct Investment by foreign airlines (up to 49% stake) in Indian carrie

19. The CCA between Jet airways (India) limited and Etihad Airways PSJC, as a part of the acquisition of 24% equity stake, is so drafted such that the parties through their proposed strategic alliance[1]can extract the potential of a wider airline network. It is in this background that the competition assessment of this deal has been undertaken.

International Aviation Regulatory Framework

20. The regulatory framework for the international aviation industry has developed on the basis of principles laid in the 1944 Convention on International Civil Aviation. The Convention recognises exclusive sovereignty of countries over their airspace and different freedoms that could be granted by a country to a foreign nation/airline.

21. Air transport services between two nations primarily depend on the bilateral air service agreement (BASA) between them, which establishes the framework for scheduled air services between them. The BASAs generally specify the entitlements of the designated airline(s) of both countries in terms of frequency of operations, number of seats, points of call etc. BASAs envisaging minimal or no restriction on the ability of designated airlines of the party nations are referred to as open-skies agreement. For instance, the BASA between India and United States provides for an open skies arrangement, allowing the designated carriers to operate scheduled air services without

[1]Alliancesare cooperation agreements entered into by airlines with the objective of integration of services. The alliance partners operate as a single entity. However, their individual corporate identity is still maintained. Airline passengers demand seamless service on international markets ‘from anywhere to anywhere’. However, no airline isable to efficiently provide such a service on its own metal as traffic density on many city pairs does not make it viable for a single airline to provide non-stop services on all conceivable routes. In order to meet such diverse travel demands at an efficient cost, airlines have had to seek commercial partners to help them provide the network and service coverage required

limitation on the number of flights that could be operated and the number of passengers who could be carried.

Relevant Market

22. In order to assess the impact of the proposed transaction on competition, the first step is to define the relevant market. Relevant Market for passenger air transport services is normally defined on the basis of point of origin or point of destination ("O&D") pair approach on a non-
directional basis. According to this approach, every combination of a point of origin and a point of destination is considered to be a separate market from the consumers' viewpoint. Furthermore, two or more adjacent airports may be categorized in the same relevant O&D market. Consumers may consider multiple airports, within a reasonable distance or time for a given O&D pair, substitutable. If airports are considered substitutable, then these too can be included as origin and destination.

23. The O&D approach to market definition is an appropriate starting point for the competition analysis in air transport cases. The O&D approach is essentially a demand-based approach to market definition. It has the advantage of being capable of taking into account several relevant competition aspects in the airline sector, if not all. The O&D approach is applied by the European Commission as well as by many other competition authorities. This approach of defining the relevant market is also in consonance with the definition of the relevant market as given in Section 2(t) of the Act, where a group of products or services lie in the same relevant market if they are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices or intended use.

24. Further, consumers may consider direct flights (i.e. non-stop services) and indirect flights (i.e. one-stop services) as substitutable. The main factors that determine whether indirect flights provide a competitive constraint to direct flights are the type of passengers (whether they are time-sensitive or non time-sensitive), the duration of the flight and the connecting time, flight schedules and prices. Either one or all of the factors can be of consideration, by a consumer based on her trade-offs and preferences, in determining substitutability. Furthermore, for the purpose of concluding substitutability, indirect flights offered by independent competitors of the parties can be considered as a competitive alternative for passenge

25. Thus, when taking a demand-based approach to market definition it is essential to make a distinction between different groups of passengers, given that different services may be substitutable for different kinds of custome It is particularly worth considering a distinction between time-sensitive and non time-sensitive passengers as well as between point-to-point passengers and connecting passenge

26. For a time sensitive passenger, price considerations may not be that important and she may not find indirect flights substitutable for direct flights. For a very price sensitive passenger, price consideration may dominate all decisions and she may thus find substituting indirect flights with direct flights even if it means sacrificing on time.

27. This distinction can be of great importance in competition assessment. Generally, time-sensitive travelers expect faster connections and timeliness in the flight

schedules. Non time-sensitive travelers are interested in obtaining the lowest fares, and are willing to accept longer travel time and less flexibility as long as their price considerations are met.

28. The assessment of the proposed combination primarily focuses on the effect of the proposed combination on those services that are offered by both the Parties.

29. The Acquirer (*i.e.* Etihad) is the national airline of Abu Dhabi, primarily offering international airline services to and from Abu Dhabi, and between other international destinations using Abu Dhabi airport as the transit hub. Whereas, Jet is a listed Indian company offering both domestic and international air transportation services. Jet is stated to offer services between different call points in India to 20 destinations abroad.

30. At the outset, it is observed that Etihad is not operating in Indian domestic air transportation services i.e. air transportation between two airports located within India. Therefore, the proposed combination is not likely to raise any competition concern in the said sector.

31. Considering that India has adopted an open skies policy in respect of international air cargo transportation and relatively more number of players including dedicated freight carriers are present in the said sector, the proposed combination is considered not likely to give rise to any competition concern in the business of international air cargo transportation services to and from India.

32. In the light of the foregoing discussion, the Commission is of the view that the relevant market for the purpose of this transaction is the market for international air passengers:

(a) on the O&D pairs originating from or ending in 9 cities in India (Kochi (COK), Bombay (BOM), Hyderabad (HYD), Thiruvananthapuram (TRV), Bangalore (BLR), Kozhikhode (CCJ), Ahmedabad (AMD), Delhi (DEL) and Chennai (MAA)) to/from United Arab Emirates (UAE) from;

(b) on the O&D pairs originating from or ending in India to/from international destinations on the overlapping7 routes of the parties to the combination.

33. In arriving at the relevant market definition the Commission made a distinction between different groups of passengers and observed that Indian passengers on the 9 direct overlapping O&D pairs are generally more price sensitive and less time sensitive. Moreover, passengers living in the catchment areas of two or more airports may consider those airports as possible substitutes when choosing which airport they fly from and which airport they fly to. For instance, it must be stressed that in the case of passengers travelling to Abu Dhabi, there are 3 international airports in UAE that passengers might consider as substitutable with each other i.e. Abu Dhabi (AUH), Dubai (DXB) and Sharjah (SHJ). Depending on the O&D pair, either DXB or SHJ airport can be considered in the same O&D pair. Abu Dhabi, Dubai and Sharjah airports are within 2 hours distance from each other. Several carriers serve Delhi and Mumbai with direct flights to/from DXB. Etihad and Emirates offer free shuttle bases between Abu Dhabi and Dubai, and there are other modes of public transport between them as well. The direct horizontal overlap between Jet and Etihad occurs between the UAE and India as origin and destinations points.

34. India-UAE passenger traffic consists of approximately 3.5 million origin and destination passengers per year. Out of this, Jet has only 20 percent share and Etihad carries only 5 percent of the market. Jet and Etihad provide overlapping services in 9 nonstop markets between India and UAE. On all these nine routes Jet and Etihad services can be considered as substitutable. When the two airlines cooperate on such routes, they no longer compete against each other and there is an apprehension that competition may be reduced. However, the market share of Jet and Etihad combined in all nine nonstop O&D city pairs is below 36% and face intense competition from other airlines serving the same routes. The elasticity of demand is expected to be sufficiently high on all O& D pairs, as the Commission observed that Indian passengers flying to these destinations are fare sensitive and in many cases time insensitive. So, any tendency to raise fares on such routes will not be profitable for the airlines.

35. Having accepted the fare sensitivity of the Indian passengers, the Commission also undertook a competition assessment of the O&D city pairs between India and Abu Dhabialone, since Jet and Etihad both fly to AUH and currently provide competition constraint to each other. Moreover, Etihad has its hub in AUH. Air India in its response of November 8, 2013 had expressed concern about the competitive landscape of the India-AbuDhabi route. The competition assessment of the Commission for these 9 O&D pairs between India and Abu Dhabi is as follows: (a). AUH-BLR: Etihad (EY) Airways is already dominant and the deal does not alter the picture. For the given small market size on this route there are still many indirect flights such as Qatar, Air India, Oman and Sri Lankan that can restraint market power, if exercised. (b). AUH-HYD: For the given small market size on this route there are still many indirect flights such as Emirates, Air India and Oman that can restraint market power, if exercised. The airport substitutability with DXB (with Emirates as the carrier to DXB), in any case increases the catchment area for this O&D city pair and hence there are no competition concerns. (c). AUH-BOM: The combined market share of Jet and Etihad increases to 55% but competition concerns are addressed by the presence of AI as a credible competitor with a market share of 32%. The airport substitutability with DXB in any case increases the catchment area for this O&D city pair that will substantially reduce the possibility of exercise of market power. Moreover, indirect flights can also restraint market power, if exercised. (d). AUH-DEL: The combined market share of Jet and Etihad increases to 50% but competition concerns are addressed by the presence of AI as a credible competitor with a market share of 24%. The airport substitutability with DXB (with Emirates as the carrier to DXB), in any case increases the catchment area for this O&D city pair that will substantially reduce the possibility of exercise of market power. Moreover, indirect flights can also restraint market power, if exercised. (e). AUH-MAA: Similar arguments of airport substitutability (DXB and AUH in the same catchment area) and other cheaper indirect flights apply. (f). AMD-AUH: A very small market size (10 passengers a day) that cannot support multiple direct flights, many one stop flight options available (g). AUH-TRV: AI Express cheaper and has a direct flight, airport substitutability with DXB and other indirect flight options provide sufficient competition constraints. (h). AUH-COK: Similar arguments as for AUH-

TRV, hence sufficient competition constraints exist. (i). AUH-CCJ: Similar arguments as for AUH-TRV, hence sufficient competition constraints exist.

36. While it may be relevant to understand whether the other airports in UAE are substitutable to Abu Dhabi, considering the fact that the Parties and Air India are likely to increase their services, in a phased manner, on Mumbai-Abu Dhabi and Delhi-Abu Dhabi routes, the potential apprehension regarding reduced competition, if any, is mitigated. It is also likely that other airline show interest in these routes as and when the Government proposes to allocate the remaining seats under the MoU.

37. There are 38 routes to/from India to other destinations where Etihad and Jet fly and there is at least one competitor on the route. Of these, on only 7 routes Jet Etihad have a combined market share of greater than 50 percent. Of these 7 routes, on 3 routes either Jet or Etihad has a market share of less than 5 per cent. For instance, on the Bombay (BOM)-Brussels (BRU) route, Jet has a market share of 72.90% and Etihad has a market share of 3.30%. On the AMD-BRU route Jet has a market share of 83.10% while Etihad has a market share of 2.61%. Thus, post transaction change in market share is marginal for the combined entity and the deal does not alter the competition dynamics.

38. The six of the seven above mentioned routes, where Jet and Etihad have an indirect overlap and the market share is greater than 50 percent consist of Brussels (BRU) and six Indian cities (BRU-AMD, BLR-BRU, BOM-BRU, BRU-COK, BRU-HYD and BRU-TRV) as O&D pai As discussed for the UAE market, the Commission did consider airport substitutability in the same catchment area of these O&D pairs and the possibility of their being in the same relevant market. When these airports are considered as substitutable, the combined market share of Jet and Etihad decrease significantly (it comes down to around 30%). For the one remaining route Chennai-Toronto (i.e MAA-YYZ), where market share is greater than 50%, Jet and Etihad are not the closest competitor and there is at least one credible competitor in the market from which the customers can choose from an alternative (Emirates, Lufthansa, and British Airways). In summary, on all routes, passengers have a major carrier to choose from other than Jet and Etihad which can constraint the pricing behavior of Jet and Etihad and ensure that the passengers can select between more than one airline even after the combination.

39. The Commission has gone beyond the O&D approach for competition assessment and has also given due consideration to the potential of network effects of the proposed combination. Some aspects of network competition can be dealt within the framework of the O&D approach (e.g. the role of connecting traffic, the substitutability of indirect services) but many aspects can get overlooked in a pure O&D approach of competition assessment. The network effects can be described as the macro competition issues, which have been discussed in addition to individual O&D markets, such as competition between airline hubs and between alliances. A more comprehensive competition assessment is not just restricted to the market share analysis of the hub airline (EY in this instance) - i.e. not just restricted to the market shares between cities in India to the hub (AUH in this instance) but the competition in the onward bound traffic and competition between systems.

40. The parties have submitted data on 21st June 2013 and 30th August 2013 in respect of market share on various O&D route pairs from India to points in United States viz. New York, Chicago, Washington, San Francisco and Los Angeles. According to the data, the MIDT combined market size from points in India to the above stated destinations in US is 10.49 lakh passengers and the combined market share of Jet and Etihad work out to 1.09 lakh passengers i.e. 10.42 %. The low current combined market share and the open skies policy between India and US does not raise any potential competition concern.

41. When considering network effects, the competition assessment is carried out beyond gateway traffic and is not just restricted to O&D pai In evaluating the proposed combination the Commission accordingly considered competition between airline systems. Airline systems are either formed through alliances (that are multilateral) or strategic equity partnership between two airlines of the kind in this proposed combination. Linked hub-and-spoke airline network form integrated system of complementary markets, and this is what is proposed in this combination. The complementarity of routes of Jet and Etihad makes the network effects stronger. Hubs, increased access to gates, slots, and other infrastructure interfaces that link markets-competition is increasingly among systems and not merely on point to point (PTP) O&D City pai In this context, merely high market shares of the hub airline on point to point, O&D pairs do not imply lack of competition. In fact there are many instances where the hub airline may have high market shares in PTP O&D pai Oman Air has a 56 percent market share in the Kozhikode (CCJ)-Muscat (MCT) route and Sri Lankan Airlines has a 59 percentmarket share in the Colombo (CMB)-Delhi (DEL) PTP O&D. Many such instances can be cited. So, Jet-Etihad combined market share on AUH-DEL and AUH-BOM route would not mean that competition is absent on west bound traffic from India and in fact, competition would be present from alternative networks and alliances/systems for the west bound traffic.

Abu Dhabi as the exclusive hub

42. One of the clauses of the CCA requires Jet to use Abu Dhabi as its exclusive hub for scheduled services to and from Africa, North and South America and the UAE (the Exclusive Territories), and there will be certain O&D pairs where Jet cannot code share with other airlines. For eg : Mumbai-Chicago, Delhi-Chicago, New Delhi- New York, Mumbai – New York Mumbai-Johannesburg etc. are O&D city pairs on which Jet has to cancel its code share with other airlines and flow its traffic through Abu Dhabi.

43. It is conceivable that cancellation of code share agreements can lead to market foreclosure and abuse of dominance on such routes in the absence of other strong competito However, all such routes face competition from other credible players such as American Airlines, Air India, Emirates, South African Airways, Qatar Airways etc. which would constrain the market power of Etihad-Jet combined. On the majority of such O&D pairs, the combined market share of Jet and Etihad is less than 30% and there are other strong players present on such routes. Further, Etihad already has strong presence on routes to Chicago and Johannesburg from few cities in India. However,

Jet's share is negligible on such routes and post transaction change in market share is negligible. Thus, on all these O&D pairs, the competitive concern from concentration of market shares does not arise.

44. At the moment, as part of the deal the parties have decided to extend their relationship to

23 cities. Thus, Jet flights from multiple points in India would operate to Abu Dhabi and then continue onwards to points in Middle East and North America. This allows a Jet customer to *'cross-connect'* at Abu Dhabi further on to any number of Jet and Etihad flights beyond AbuDhabi, creating a whole host of city pai For instance, Jet could leverage Etihad's strong presence in Europe by bringing Indian passengers through Abu Dhabi. Etihad directly flies to

17 destinations and, through its elaborate code sharing agreements with 13 airlines, offers seamless connectivity to more than 80 cities.

45. The code share relationship also allows customers in multiple Indian cities, the ability to seamlessly connect to other destinations including smaller markets abroad using the Etihad network. Abu Dhabi's proximity to India enables the option of deployment of smaller, narrow body aircraft from these secondary markets in which larger wide body aircraft would have been unviable. In addition, by utilizing the hub in Abu Dhabi and the transfer flows that it creates, Jet will be able to sustain larger aircraft on the routes from Delhi and Mumbai to North America which will increase the capacity and therefore choice available to the Indian consumer.

Potential efficiencies

46. Airline alliances create substantial opportunities for generating economic benefits, many of which are dependent at least in part on the closer integration achievable. These benefits can be viewed as demand-side – relating to the creation of new or improved services through expanded networks or seamless service, or supply-side – essentially the ability to produce thesame services at lower cost taking advantage of traffic densities, improved utilization of capacity and lower transaction costs.

47. In the aviation industry two carriers and passengers might benefit by integrating complementary networks. One of the benefits of the proposed transaction would be lower fares for passengers travelling to smaller cities in India through one of 9 major destinations served by Etihad. Jet and Etihad already have a code share agreement on such one stop routes. Post transaction, Jet and Etihad will cooperate on pricing decision on such routes through the proposed CCA. The possibilities to coordinate pricing, fares and inventory/yield management will eliminate inherent inefficiencies to pricing and enable the members to offer more attractive fares to custome Passengers from smaller cities can seamlessly travel to international destinations without interlining to Delhi or Mumbai and thus saving on interline fares. 48. Perhaps one of the most fundamental potential benefits from closer cooperation and integration arises from economies of traffic density. This type of economy of scale is a key feature of airline network models. Airline alliances extend the Hub and Spoke (H&S) network with a large presence at both ends of the market. Feeder routes and services delivering connecting traffic can increase the traffic density on a city-pair, allowing airlines to

operate larger, more efficient aircraft and to spread end point fixed costs over a larger number of passenge

49. On the issue of likely impact on fares on routes from India to destinations in exclusive territories, the proposed transaction will generate significant synergies for both airlines in terms of network efficiencies and cost savings. Additionally, the parties to the transaction plan to introduce substantial capacity into the Indian market. Both of these factors could and generally do create downwards pressure on fares.

50. Airline alliance has an increased incentive to harmonize and improve customer service standards. They have an incentive to integrate their operations to provide a true 'online' quality experience throughout the processes of ticketing, seat selection, airport lounges, gate location for connecting services, on board amenities and service quality, baggage policies and problem resolution, frequent flyer plans and refunds and exchanges. As these aspects are integrated and jointly managed, the customer receives a correspondingly simplified and consistent service. This aspect of cooperation is likely to provide consumer benefit without anti-competitive results, due to the intense, global competition between alliances for customer loyalty.

51. In addition to the potential efficiencies of the proposed combination on account of the synergies expected to be generated, the Commission also considered the importance of the proposed equity infusion and its implication for the Indian aviation sector. Jet, which has been beleaguered with debt, in addition to infusion of cash, hopes to access a large global network. Jet's debt of INR 89,994 million on March 31, 2013 is nearly 50% of its 2013 revenues and the business reported substantial negative equity at the end of March 2013 of minus INR 18,272 million. This equity infusion will be beneficial to Jet as it will strengthen its operational viability. The Commission is of the view that this partnership will allow Jet to continue to compete effectively in the relevant markets in India and internationally.

Contestability

52. On the issue of contestability, one of the major impediments to domestic airlines launching international services is the 5 year/20 aircraft rule. This regulation requires that Indian carriersmust complete five years of domestic operations before being permitted to launch international services, a restriction which does not apply to foreign airlines. Once this rule is relaxed, the contestability of the Indian aviation sector is likely to increase and make the Indian aviation sectormorecompetitive.

Impact of BASA

53. As per the Bilateral Air Services Agreement (BASA) entered into between India and the UAE in 2008 (as amended), Abu Dhabi was entitled to operate 13,330 seats per week in each direction through points specified viz. Mumbai, Delhi, Thiruvananthpuram, Kochi, Chennai, Kozikhode, Jaipur and Kolkata. Three additional points were further granted (Hyderabad, Bangalore and Ahmedabad) in 2009. Now, with the latest bilateral agreement signed, the seat entitlement is agreed to be increased to 24,330 seats per week with immediate effect, 37,130 seats from IATA winter 2014 and 50,000 seats from IATA 2015 schedule. The bilateral agreement and consequent

increase in seats is of relevance to the competition assessment of this deal, given the fact that Abu Dhabi is to be used as an exclusive hub by Jet.

54. With very realistic assumptions regarding the distribution of increased seats to Jet in addition to the increased seats to Etihad (totalling 50,000 total seats per week/each way up from current 13,300, to Etihad), the market shares forecasted as a consequence of the revised bilateral of the combined entity increases from 17.06 to 22 percent.12 This does not portend any possibility of market power that is likely to be exploited.

55. Moreover, the Commission also recognizes that ASAs for other airlines are not likely to be static and some of the other airlines13 including European airlines have the flexibility of increasing fleet capacity as they are governed by almost open skies or similar ASAs. Secondly, the increase in BASA for Jet and Etihad has to be implemented in phases.

56. Last but not the least, the Commission is of the view that the dynamic responses of other airlines as a consequence of this proposed deal which, cannot be completely evaluated *ex-ante*, will change the competitive landscape that is most likely to benefit the Indian aviation passenger.

F. CONCLUSION:

57. Considering the facts on record and the details provided in the notice given under sub-section (2) of Section 6 of the Act and the relevant factors mentioned in sub-section (4) of Section 20 of the Act, the Commission is of the opinion that the proposed combination is not likely to have appreciable adverse effect on competition in India and therefore, the Commission hereby approves the same undersub-section (1) of Section 31 of the Act. This approval however, shall have no bearing on proceedings under section 43A of the Act.

58. It is however to be noted, that the Commission is granting the present approval, under section 31(1) of the Act, and that such approval is being granted, pursuant to the underlying competition assessment, based upon the information/details provided by the Parties, in the notice given under subsection (2) of Section 6 of the Act, as modified and supplemented from time to time. This approval should not be construed as immunity in any manner from subsequent proceedings before the Commission for violations of other provisions of the Act. It is incumbent upon the Parties to ensure that this *exante* approval does not lead to *ex-post* violation of the provisions of the Act……

Note: One of the members, Mr. Anurag Goel, passed a minority order stating that the proposed combination is likely to cause an appreciable adverse effect on competition within the market of international air passenger transportation from and to India.

In addition on 19.12.2013, the Commission, in exercise of its power under Section 43A of the Act imposed a penalty of Rupees One Crore on Etihad for consummating parts of the deal without getting its approval.

The appeal filed was dismissed by CompAT on account of no locus standi in the Appellant. (Appeal No. 44 of 2013).

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Sun Pharmaceutical Industries Limited and Ranbaxy Laboratories Limited Combination

Combination Registration No. C-2014/05/170
Date of Order: 05.12.2014

Order under Section 31 (7) of the Competition Act, 2002

INTRODUCTION

1. On 06.05.2014, the Competition Commission of India received a notice under sub-section

(2) of Section 6 of the Competition Act, 2002 given by Sun Pharmaceutical Industries Limited and

Ranbaxy Laboratories Limited

2. The Notice was filed with the Commission pursuant to (a) a scheme of arrangement approved on 06.04.2014 by the respective board of directors of Sun Pharma and Ranbaxy under Sections 391 -394 and other applicable provisions of the Companies Act, 1956 and the Companies Act, 2013 (b) Transaction agreement executed between the Parties on 06.04.2014 and (c) Investor agreement executed on 06.04.2014 between Sun Pharma and Daiichi Sankyo Company Limited, which holds approximately 63.40 per cent of the outstanding shares of Ranbaxy……..

PARTIES TO THE COMBINATION

5. Sun Pharma is an integrated specialty pharmaceutical company. It manufactures and markets a large basket of pharmaceutical formulations as branded generics in India, USA and several other markets across the world. The key therapy areas of Sun Pharma are central nervous system, dermatology, cardiology, orthopaedics, ophthalmology, gastroenterology, nephrology, etc. It is also *inter alia* engaged in manufacture and sale of active pharmaceutical ingredients (APIs).

6. Ranbaxy is a vertically integrated company that *inter alia* develops manufactures and markets generic, branded generic, over-the-counter (OTC) products, APIs and intermediates. It has a presence in many therapy areas including anti-infectives, cardiovascular, pain management, central nervous system, gastrointestinal, respiratory, dermatology, orthopaedics, nutritionals and urology. Ranbaxy holds 46.79 per cent equity in Zenotech Laboratories Limited ("Zenotech") which is stated to be a pharmaceutical company engaged in development, manufacture and supply of injectible products having portfolio of niche therapies like chemical oncology and biotechnology products from bacterial and mamilian cell-culture.

PROPOSED COMBINATION

7. The proposed combination relates to the merger of Ranbaxy into Sun Pharma pursuant to the scheme of arrangement approved by their respective board of directors under Sections 391 -

394 and other applicable provisions of the Companies Act, 1956 (as amended) and the Companies Act, 2013. Post combination, the existing shareholders of Ranbaxy will

hold approx. 14 per cent of the equity share capital of the Merged Entity on a pro forma basis. As stated by the Parties, pursuant to the proposed combination, the promoter group of Sun Pharma is expected to own approx. 54.7 per cent equity share capital of the Merged Entity. Further, asRanbaxy holds 46.79 per cent equity share capital of Zenotech, the proposed combination would result in acquisition of this 46.79 per cent equity share capital of Zenotech by Sun Pharma from Ranbaxy. Zenotech is a listed company and as per the details given in the Notice,
in terms of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, Sun Pharma has announced an open offer for 28.1 0 per cent equity share capital of Zenotech through the public announcement dated 11.04.2014 to be commenced after the merger of Ranbaxy into Sun Pharma.

INVESTIGATION UNDER SECTION 29 OF THE ACT

8. The Commission in its meeting held on 07.07.2014 considered the facts on record, details provided in the Notice and the responses filed by the Parties and formed a *prima facie* opinion that the proposed combination is likely to cause an appreciable adverse effect on competition in the relevant markets in India. Therefore, the Commission decided to issue a show-cause notice to the Parties in terms of subsection (1) of Section 29 of the Act. Accordingly, a show cause notice was issued to the Parties under sub-section (1) of Section 29 of the Act ("SCN") on 16.07.2014, as per which the Parties were directed to respond, in writing, within thirty days of the receipt of SCN, as to why investigation in respect of the proposed combination should not be conducted.

9. The response of the Parties to the SCN was received on 19.08.2014. The Commission considered and assessed the Response to the SCN in its meetings held on 25.08.2014 and
27.08.2014 and formed a *prima facie* opinion that the proposed combination is likely to have
an appreciable adverse effect on competition. Accordingly, under sub-section (2) of Section 29 of the Act read with Regulation 22 of the Combination Regulations, the Commission directed the Parties to publish details of the proposed combination within ten working days from the date of the direction, for bringing the proposed combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. The said direction was communicated to the Parties vide letter dated 27.08.2014.

10. In accordance with the directions of the Commission, the said details of the proposed combination were published by the Parties on 04.09.2014 in Form IV contained in Schedule II to the Combination Regulations and other applicable provisions. Vide the said publication, the Commission invited comments/objections/ suggestions in writing, in terms of the provisions of sub-section (3) of Section 29 of the Act, from any person(s) adversely affected or likely to be affected by the proposed combination, within fifteen working days from the date of publication, i.e., by 25.09.2014.

11. Pursuant to such publication, the Commission received comments from different stakeholders which were duly noted by the Commission in its meeting held on 13.10.2014. In terms of sub-section (4) of Section 29 of the Act, the Commission further decided to seek para-wise clarification(s) from the Parties on the comments submitted by stakeholders and certain
other information. Accordingly, a letter was issued to the Parties seeking such details on

17.10.2014,the response to which was submitted by the Parties on 03.11.2014.

12. The Commission considered the proposed combination in its meeting held on 03.11.2014. The Commission also considered the response of the Parties submitted on 03.11.2014 and theproposed combination in its meeting held on 20.11.2014 and decided to propose Divestiture to the Parties in respect of certain relevant markets. In the said meeting, the Commission was also of the view that response of the Parties was not comprehensive enough to arrive at the proposal for modification under sub-section (3) of Section 31 of the Act. Accordingly, the Commission decided to seek detailed information from the Parties in relation to structuring of the divestiture package, transitional supply and other arrangements, etc., under the provisions of sub-section (4) of Section 29 of the Act and sub regulation 4 of Regulation 5 of the Combination Regulations. Accordingly, on 21.11.2014, a letter was issued to the Parties seeking aforesaid information, the response to which was received by the Commission on 24.11.2014. The Commission in its meeting held on 26.11.2014 considered the said response of the Parties and decided to proceed with the case in accordance with the provisions contained in Section 31.

COMPETITION ASSESSMENT

Relevant Market

13. It is observed that both the Parties are engaged in the manufacture, sale and marketing of various pharmaceutical products including formulations/medicines and APIs. Both the Parties are primarily generics manufacturers (i.e., producers of generic copies of originator drugs) with a small number of licensed molecules. Sun Pharma and Ranbaxy are also in the process of research and development on various pharmaceutical products. For the purpose of the competition analysis, the Parties categorized their products on the basis of classification of pharmaceutical products given by the AIOCD(All India Organization for Chemists and Druggists) in terms of the hierarchy oftherapeutic area, super group, group and molecule.

14. The various generic brands of a given molecule are chemical equivalents and are considered to be substitutable. Therefore, the molecule level would be most appropriate for defining relevant markets on the basis of substitutability. Alternatively, pharmaceutical drugs falling within a therapeutic group may also be considered as constituting a potential relevant market. However, in this regard it is noted that the pharmaceutical drugs within a group may not be substitutable because of differences in the intended use, mechanism of action of the underlying molecule, mode of

administration, contra indications, side effects etc. Moreover, in generics markets, competition primarily takes place between different brands based on the same molecule.

15. Accordingly, it is appropriate to define the relevant product market at the molecule level, i.e., medicines/formulations based on the same API may be considered to constitute a separate relevant product market. Further, as per the submissions in the Notice, the products of the Parties are available across India and therefore, the relevant geographic market is considered to
BetheterritoryofIndia.

16. It is observed that there are horizontal overlaps between the products of the Parties in various molecules. The relevant market of formulations based on each of these molecules was examined for the purpose of competition analysis of the proposed combination.

17. In addition to identification of horizontal overlaps between the products of the Parties in certain molecules, the Commission also considered the pipeline products of the Parties with a view to assess the potential competition concerns, if any.

18. In relation to APIs, it is noted that APIs are the primary inputs in the manufacture of formulations and thus constitute a separate relevant market, distinct from formulations. In this regard, as per the information given in the notice, the Commission observed that both the
PartiessellAPIstothirdparties.

I. Market for Formulations

19. ***Horizontal Overlap:*** On the basis of combined market share of the Parties, incrementalmarket share as a result of the proposed combination, market share of the competitors, number of significant players in the relevant market etc., the Commission focussed its investigation on forty nine relevant markets where the proposed combination was likely to have appreciable adverse effect on competition in the relevant market in India.

20. In addition to these forty nine relevant markets, the Commission also identified two relevant markets for formulations wherein Sun Pharma is already marketing and selling its products whereas Ranbaxy has pipeline products to be launched in the near future.

Markets with appreciable adverse effect on competition

21. Based on its assessment of the following relevant markets, the Commission is of the view that the proposed combination is likely to result in appreciable adverse effect on competition in the following markets:

S.No.	Market	Share of Ranbaxy (%)	Share of Sun Pharma (%)	Other Competitors (Name and %)	Conclusion Drawn
1.	TAMSULOSIN + TOLTERODINE G4C13	60-65	30-35	Intas (5-10)	The combined market share of the Parties is [90-95] per cent resulting in near monopoly in the market. The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.
2.	ROSUVASTATIN + EZETIMIBE C10G6	55-60	30-35	Lupin (5-10)	The combined market share of the Parties is [90-95] per cent resulting in near monopoly in the market.The proposed combination will eliminate a significant
					competitor and is likely to have an appreciable adverse effect on competition in this relevant market.
3.	LEUPRORELIN, H1C6	45-50	35-40	Bharat Serums (5-10)	The combined market share of the Parties is [85-90] per cent.The other players in the relevant market have negligible market share and thus may not be in a position to exert significant competitive constraint on the Merged Entity. Moreover, the market share of other players has been decreasing over the period of last four yea The proposed combination will eliminate a significant competitor and is likely to have an appreciable

					adverse effect on competition in this relevant market.
4.	TERLIPRESSIN, H4D7	5-10	55-60	Alembic (20-25)	The combined market share of the Parties is [65-70] per cent. It is noted that effectively there are only three players in this market and as a result of the proposed combination, the number of significant players will be reduced from three to two. Ranbaxy has recently entered this market and therefore, the proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.
5.	OLANZAPINE + FLUOXETINE, N5A6	20-25	40-45	Intas (30-35)	The combined market share of the Parties is [65-70] per cent. The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.
6.	LEVOSULPIRIDE +ESOMEPRAZOLE, A3F49	5-10	50-55	Torrent (35-40)	The combined market share of the Parties is [60-65] per cent. The proposed combination will eliminate a significant competitor and is likely to have an appreciable adverse effect on competition in this relevant market.
7.	OLMESARTAN+	5-10	30-35	Macleods	Pursuant to the proposed

	AMLODIPINE+ HYDROCLORTHIAZIDE, C9E22			(15-20), Micro Labs (10-15)	combination, the Merged Entity is likely to be the market leader with a market share of [40-45] per cent.The market share of Merged Entity would be almost double the market share of next competitor. Moreover, market share of Micro Labs has been continuously decreasing over the last four yea The proposed combination will eliminate a significant competitor from the market and number of significant competitors would reduce from four to three. Therefore, the proposed combination is likely to have an appreciable adverse effect on competition in this relevant market.

Markets without appreciable adverse effect on competition

22. In relation to five relevant markets of formulations containing, i.e., Ibandronate | M5A5, Olopatadine | R6A47, Lactitol | V6E4, Lubiprostone | A6F5 and Cyclobenzaprine | M3B7, the Parties have submitted that Ranbaxy has discontinued its product and accordingly, at present there is no horizontal overlap between the products of the Parties. Further, in relation to relevant market of Somatostatin | H1D3, it has been submitted by the Parties in the Response to SCN that the products of Sun Pharma and Ranbaxy are entirely different and it is only due to an error that they had been classified in a single category in the AIOCD database. Sun Pharma's product is based on Somatostatin which is used in the treatment of severe and acute intestinal bleeding whereas Ranbaxy's product is based on Somatropin which is used for the
treatment of growth hormone deficiency. Accordingly, it is noted that at present there being no

overlap, the proposed combination is not likely to have an appreciable adverse effect on competition in the said markets.

23. It is noted that some of the molecules identified above for further investigation are covered in the National List of Essential Medicines (NLEM). In respect of these molecules, the Parties have submitted that these are subject to price control by the National Pharmaceutical Pricing Authority (NPPA). Further, exit from these markets is cumbersome and requires approval of the NPPA. Out of the above said forty nine relevant markets, formulations based on four molecules are covered under NLEM. The detailed assessment of these four relevant markets is as follows:

S.No.	Market	Share of Ranbaxy (%)	Share of Sun Pharma (%)	Other Competitors (Name and %)	Conclusion Drawn
1.	OLANZAPINE, N5A5	0-5	35-40	Intas, 30-35; Alkem 5-10; Micro Labs 5-10	The combined market share of the Parties is [35-40] per cent. However, the incremental market share is only [0-5] per cent and the market position of the Merged Entity will only be marginally strengthened by the proposed combination. Also, the market share of Ranbaxy has been declining over the past few yea The
					competitors are likely to be in a position to exert significant competitive constraint on the Merged Entity. The proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.
2.	CLOPIDOGREL , B1C5	0-5	25-30	Lupin, 15-20; Torrent, 10-15;Intas, 10-15; Cipla, 5-10; Sanofi, 5-10;	The combined market share of the Parties is [30-35] per cent. However, the incremental market share is only [0-5] per cent and the market position of the Merged Entity will only be marginally strengthened by the

					proposed combination.Thus, the proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.
3.	ATORVASTATIN, C10A1	10-15	10-15	Zydus (10-15), Lupin (10-15), Intas (5-10), Abbott (5-10), Dr. Reddy's (5-10), Micro Labs (5-10)	The combined market share of the Parties is [20-25] per cent. These competitors are likely to be in a position to exert significant competitive constraint on the Merged Entity.Thus, the proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.
4.	LOSARTAN, C9D3	5-10	15-20	Unichem (30-35), Zydus (5-10)	The combined market share of the Parties is [20-25] per cent.These competitors are likely to be in a position to exert significant competitive constraint on the Merged Entity. The proposed combination is not likely to have an appreciable adverse effect on competition in this relevant market.

24. (In 32 relevant markets, the CCI concluded that the combination is not likely to have an appreciable adverse effect on competition on grounds like existence of significant competitors in the relevant market, incremental market share being marginal, decline in the market shares of the parties over the past years and presence of market leader in the relevant market other than the parties etc,).

25. ***Pipeline Products***: In addition to the above said markets, the Commission also identifiedtwo pipeline products of Ranbaxy, i.e., formulations containing Sitagliptin, which fall under therapeutic category Oral Anti-diabetics and are expected to be launched in the near future. In this regard, it is noted that Sun Pharma already markets formulations containing these
molecules under the brand name "Istavel" and "Istamet", respectively, under a licence from the patent owner, viz., MSD. There is one more player, i.e., Glenmark which also markets its products in both of these markets. It is likely that on consummation of the proposed combination, the development of these formulations by Ranbaxy could be stalled and the product(s) would not be launched in the market.

26. As per the information given by the Parties, it is noted that the validity of the said patent is under dispute and the decision of the relevant judicial authority is awaited. If the said patent is upheld by the judicial authorities, then generic versions of these formulations cannot be launched. However, if the said patent is rejected, then considering the attractiveness of the market, many companies are likely to be in a position to launch their generic versions of these molecules. It has also been submitted by the Parties, that MSD has secured injunctions against few companies from launching their products in India, thus indicating that there is a likelihood of new entries in these markets, if the patent is rejected by the courts. Thus, the proposed combination is not likely to have an appreciable adverse effect on competition in these pipeline products.

II. Market for APIs

27. ***Horizontal Overlap*:**As already noted above, both the Parties sell APIs to Third Parties.However, it is observed that the horizontal overlap in APIs is insignificant to raise any competition concern.

28. ***Vertical integration post-merger:*** The primary competition concern due to verticalintegration post-merger is whether the proposed combination leads to input foreclosure (i.e., the Merged Entity raises downstream rivals' costs by restricting their access to an important input) or to customer foreclosure (i.e., the Merged Entity forecloses upstream rivals' access to their downstream customers). It is observed that both the Parties are engaged in the business of APIs as well as formulations. Post combination, there is a possibility of vertical integration between the Parties as the APIs manufactured and sold by one Party can be used as raw material for the formulations produced by the other.

29. In this regard, it is noted that manufacturing and sale of APIs is not the primary business of either of the Parties. Sun Pharma’s revenue from the sale of APIs constitutes only five per cent of its total revenues. Similarly for Ranbaxy, the sale of APIs constitutes only six per cent of itstotal revenues. It is further observed from the information provided by the Parties that in relation to the APIs sold by the Parties to the Third Parties, there are a number of suppliers, both within and outside India, which supply APIs to the formulation manufacture Moreover, as per the information available in the public domain and the information provided by the Parties, these APIs are also imported into India. Accordingly, the proposed combination is not likely to result in vertical foreclosure.

30……The Commission is of the opinion that the proposed combination is likely to have an

appreciable adverse effect on competition in India in the following relevant markets for the formulations containing:

i. Tamsulosin + Tolterodine

ii. Rosuvastatin + Ezetimibe

iii. Leuprorelin
iv. Terlipressin
v. Olanzapine + Fluoxetine
vi. Levosulpiride + Esomeprazole
vii. Olmesartan + Amlodipine + Hydroclorthiazide.

32……The Commission is of the opinion that the adverse effect of the proposed combination
on competition can be eliminated by suitable modification.

33. Accordingly, the Commission proposed modification to the combination in terms of sub-section (3) of Section 31 of the Act …… The Commission proposed that:

a. Sun Pharma shall Divest:

i. All products containing Tamsulosin + Tolterodine which are currently marketed and supplied under the Tamlet brand name.
ii. All products containing Leuprorelin which are currently marketed and supplied under the Lupride brand name.

b. Ranbaxy shall Divest:

i. All products containing Terlipresslin which are currently marketed and supplied under the Terlibax brand name.
ii. All products containing Rosuvastatin + Ezetimibe which are currently marketed and supplied under the Rosuvas EZ brand name.

iii. All products containing Olanzapine + Fluoxetine which are currently marketed and supplied under the Olanex F brand name.
iv. All products containing Levosulpiride + Esomeprazole which are currently marketed and supplied under the Raciper L brand name.
v. All products containing Olmesartan + Amlodipine + Hydroclorthiazide which are currently marketed and supplied under the Triolvance brand name.

c. The Parties shall Divest, or procure the Divestiture of the Divestment Product(s) within the First Divestiture Period, absolutely and in good faith, to Approved Purchaser(s), pursuant to and in accordance with Approved Sale and Purchase Agreement(s).

d. The Divestiture shall not be given effect to unless and until the Commission has approved (i) the terms of final and binding sale and purchase agreement(s) and (ii) the purchaser(s)
proposed by the Parties. e. The proposed combination shall not be effected by the Parties until Approved Sale and Purchase Agreement(s) have been entered into in accordance with the Order. Pursuant toexecution of the Approved Sale and Purchase Agreement(s), the Parties shall ensure that the Closing takes place within First Divestiture Period.

34. The Parties submitted below mentioned amendment to the modification proposed by the Commission under the provisions of sub-section (6) of Section 31 of the Act. The Parties have further submitted that in case an amendment is not acceptable to the Commission, it may be ignored.

a. The Commission may reconsider/modify the requirement provided in subparagraph
(e) of paragraph 33 above.
b. With respect to the relevant market of products containing Leuprorelin, the Commission may consider Divestiture of products containing Leuprorelin currently marketed and supplied by Ranbaxy under the brand name Eligard instead of divestiture of products containing Leuprorelin currently marketed and supplied under Sun Pharma‟s brand name Lupride.

35. The Commission in its meeting held on 05.12.2014 considered the above said amendments and decided as follows:

a. Not to accept the amendment submitted by the Parties under sub-paragraph (a) of paragraph 34 above.
b. To accept the amendment submitted by the Parties in relation to the relevant market of products containing Leuprorelin, i.e., Ranbaxy shall Divest its products containing Leuprorelin currently marketed and supplied under the brand name Eligard. As an additional safeguard, as proposed by the Parties, in the event the Divestiture of distribution rights of Eligard is not achieved within the First Divestiture Period, Sun Pharma shall Divest its products containing Leuprorelin currently marketed and supplied under Sun Pharma‟s brand name Lupride.

36. Pursuant to the above, the Commission hereby approves the proposed combination under sub-section (7) of Section 31 of the Act, subject to the Parties carrying out the modification to the proposed combination as provided below:

MODIFICATION TO THE PROPOSED COMBINATION

37. Sun Pharma shall Divest all products containing Tamsulosin + Tolterodine which are currently marketed and supplied under the Tamlet brand name.

38. Ranbaxy shall Divest:

i. All products containing Leuprorelin which are currently marketed and supplied under the Eligard brand name. In the event the Divestiture of distribution rights of Eligard is not achieved within the First Divestiture Period, Sun Pharma shall Divest its products containing Leuprorelin currently marketed and supplied under Sun Pharma‟s brand name Lupride,.
ii. All products containing Terlipresslin which are currently marketed and supplied under the Terlibax brand name.
iii. All products containing Rosuvastatin + Ezetimibe which are currently marketed and supplied under the Rosuvas EZ brand name.
iv. All products containing Olanzapine + Fluoxetine which are currently marketed and supplied under the Olanex F brand name.
v. All products containing Levosulpiride + Esomeprazole which are currently marketed and supplied under the Raciper L brand name.
vi. All products containing Olmesartan + Amlodipine + Hydroclorthiazide which are currently marketed and supplied under the Triolvance brand name.

(The brands Tamlet, Eligard, Terlibax, Rosuvas EZ, Olanex F, Raciper L and Triolvance shall be collectively referred to as "**Divestment Brands**"). The Divestment Brands shall include all strengths, indications, dosages and packaging (in all forms).

39. The modification to the proposed combination aims to maintain the existing level of competition in the relevant markets in India through:

a. the creation of a viable, effective, independent and long term competitor in the relevant markets pertaining to the Divestment Product(s);

b. ensuring that the Approved Purchaser of Divestment Product(s) has the necessary components, including transitional support arrangements to compete effectively with the Merged Entity in the relevant markets in India.

40. The modification to the proposed combination shall be given effect to in accordance with the terms and conditions provided below.

Structure of the Divestment Product(s)

46. As stated by the Parties in their response dated 24.11.2014 none of the Divestment Product(s) are currently operated as a standalone business held by distinct legal entities within the respective Parties‟ group of companies, or by dedicated management, sales and marketing personnel. On the basis of the said submission of the Parties, the Commission is of the opinion that the Divestment Product(s) shall include, *inter alia,* the Assets detailed in sub-paragraph (a) to (d) below and the transitional arrangements provided in (e) below, as agreed between the Parties and the Approved Purchaser subject to the approval of the Commission.

a. All tangible assets including but not limited to all raw materials, stocks, work in progress, and semi-finished and finished goods relating to the Divestment Product(s).

b. Intangible assets (including intellectual property rights) which contribute to the current operation or are necessary to ensure the economic viability, marketability and competitiveness of the Divestment Product(s); in case of shared know how (retained by the Parties for use in their other business), the Parties shall grant a non-exclusive, irrevocable, royalty free and perpetual licence.

c. All licences, permits and authorisations (including marketing authorisations) issued by any governmental organisation, relating to the Divestment Product(s) and all contracts, leases, commitments and customer orders, relating to the Divestment Product(s).

d. All customer records, credit records and other records, relating to the Divestment Product(s).

e. At the option of the Approved Purchaser(s), the Parties shall extend such transitional support as may be required by the Approved Purchaser in order to ensure the continued supply of the Divestment Product(s) in the relevant markets.

47. The Divestment Product(s) shall not include:

a. Any manufacturing facilities of the Parties.

b. Intellectual property rights which do not contribute to the current operations and/or is not necessary to ensure the economic viability, marketability and competitiveness of the respective Divestment Product(s).

c. Any rights to the domain name of the Parties.

d. Books and records required to be retained pursuant to any statute, rule, regulation or ordinance, provided that an Approved Purchaser shall be entitled to obtain a copy of the same and shall be permitted access to the original of such books and records during normal business hou

e. General books of account and books of original entry that comprise the Parties permanent accounting or tax records.

f. Monies owed to the Parties by customers for the purchase of Divestment Product(s) and monies owed by the Parties to suppliers for materials used in the production of the Divestment Product(s), or to suppliers for the production of the Divestment Product(s). g. The Parties names or logos in any form (except the logos and names pertaining to Divestment Product(s)).

Purchaser Requirements

55. The purchaser proposed by the Parties, in order to be approved by the Commission, must, *inter alia*:

a. be independent of and with no connection whatsoever with the Parties; b. have the financial resources, proven expertise, manufacturing capability or ability to outsource manufacturing and incentive to maintain and develop the Divestment Product(s) as a viable and active competitor to the Parties in the relevant markets;

c. be a company active in the sales and marketing of pharmaceutical products in the

India; and d. neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Order will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Product(s).

Alternative Divestment Product(s)

60. If, the Parties do not reach agreement with the purchaser(s) regarding the Divestiture of all Divestment Product(s) within the First Divestiture Period, the Commission may direct the Parties to Divest the Alternative Divestment Product(s) and may under Regulation 27 of the Combination Regulations, appoint an independent agency as Divestiture Agency to effect the Divestiture.

61. In order to maintain the structural effect of the modification, the Parties shall, for a period of five years after the Closing Date, not acquire direct or indirect influence over

the Alternative Divestment Product(s) pursuant to sale of Alternative Divestment Product(s) to Approved Purchaser(s)……

74. In carrying out the aforesaid modification, the Parties shall comply with the provisions of the Act, the Combination Regulations and the Competition Commission of India (General Regulations), 2009.

75. The Order shall stand revoked, if any time, the information provided by the Parties is found to be incorrect.

Note: The Commission further made an order on March 17, 2015 whereby the Commissionapproved (a) Emcure as the Approved Purchaser of the Divestment Products and (b) the APA (Asset Purchase Agreement) and the SA (Supply Agreement), as agreed between the Parties and Emcure in relation to the Divestment Products.

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Wal-Mart and Flipkart Combination

Combination Registration No. C-2018/05/571
Date of Order: 08.08.2018

Order under Section 31(1) of the Competition Act, 2002

A. Combination

1. On 18th May, 2018, the Competition Commission of India (Commission) received a notice under sub-section (2) of Section 6 of the Competition Act,2002 (Act) given by Wal-Mart International Holdings, Inc. (Walmart), asubsidiary of Walmart Inc. for acquisition between 51% and 77% of the
outstanding shares of Flipkart Private Limited (Flipkart) and matters incidental thereto (Proposed Combination). The notice was given pursuant to the execution of a Share Purchase Agreement on 9th May, 2018 by and among Walmart and certain shareholders of Flipkart (SPA); and a Share Issuance and Acquisition Agreement on the same day by and among Walmart and Flipkart(SIAA).

2.In terms of Regulation 14 of The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations,2011 (Combination Regulations), vide letter dated 24th May, 2018, Walmart was required to provide certain information/document(s) by 29th May, 2018.After seeking due extension of time, Walmart filed its response on 7th June,2018.

3. Further, in terms of Regulations 5 and 19 of the Combination Regulations, vide letters dated 13th June, 2018 and 4th July, 2018. Walmart was asked to furnish additional information in relation to the Proposed Combination. Walmart filed its response on 26th June, 2018 and 23rd July, 2018, respectively.

4. As per the information provided in the notice, the various steps involved in the Proposed Combination are as under:

4.1. Pursuant to the SIAA, Walmart will subscribe to the ordinary shares issued by Flipkart for an aggregate purchase price of USD 2 billion in cash. WIH may assign its rights under the SIAA in whole or in part, to any other entity.

4.2. Pursuant to the SPA, contemporaneously with the closing of the Share Issuance, Walmart will purchase from the sellers preference shares and ordinary shares of Flipkart for an aggregate purchase price of approximately USD 14 billion in cash. Walmart may assign its rights under the SPA in whole or in part, to any other entity.

4.3. Immediately after the closing of the above acquisitions, all Flipkart preference shares will convert into ordinary shares. As a result, Walmart will hold approximately 51% - 77% of the outstanding shares of Flipkart.

4.4. At closing of the Share Transactions, Walmart or another affiliate of Walmart Group, Flipkart, and certain other shareholders of Flipkart will enter into a Shareholders Agreement, which will set forth the agreement of the Parties relating to the activities and governance of Flipkart and ownership and disposition of its shares.

B. Parties to the proposed combination

5. Walmart is a subsidiary of Walmart Inc. and belongs to the Walmart group. Walmart Inc. is an American multinational retail corporation that operates a chain of hypermarkets, discount department stores, and grocery stores. Walmart Group is present in India through its indirect wholly owned subsidiary -Walmart India Private Limited, which is engaged in wholesale cash and carryof goods (B2B Sales). On account of restrictions under the Foreign Direct Investment (FDI) Policy, Walmart India cannot engage in direct sales to consumers (B2C Sales). B2B Sales of Walmart India are carried on through the following two channels:

5.1. Best Price Stores: Walmart India owns and operates 20 Best Price Stores in 9 States across India. The first store opened in Amritsar in May 2009.A typical Best Price Store spans over 50,000 square feet and sells around5,000 products, including a wide range of fresh, frozen and chilled foods,fruits and vegetables, dry groceries, personal and home care, hotel andrestaurant supplies, clothing, office supplies and other generalmerchandise items, at competitive wholesale prices. Best Price Storesoperate on a member only model and to enter and purchase from BestPrice Stores, it is mandatory to become a member. In compliance withthe Foreign Direct Investment norms, members are not retail consumersand usually belong to different business categories, such as: resellers, offices and institutions and hotels, restaurants and caterers. WalmartIndia also has an operational fulfilment centre in Mumbai that focuseson storing and delivering fast moving consumer goods to registeredbusiness members of Walmart India.

5.2. B2B e-commerce for members only: On 1st July 2014, Walmart India launched B2B e commerce platform to make the products provided at the Best Price Stores available to members through the e-commerceplatform also (https://www.bestprice.in/). This platform acts as anexclusive virtual store available only to registered Best Price members.Walmart India does not provide e-commerce B2B services in the marketand the presence of Walmart India in the e-commerce segment is limitedto its members.

6. As per the notice, Flipkart is principally an investment holding company incorporated in Singapore. In India, besides being engaged in B2B sales, Flipkart is also providing online

marketplaces to facilitate trade between customers and sellers. The business activities of Flipkart in India are as under:

6.1. Wholesale cash and carry of goods (B2B Sales): Flipkart group is engaged in B2B sales across several product categories. Flipkart does not operate in the online B2B space. Goods are bought from various manufacturers, suppliers, distributors and the same are sold on an offlineB2B basis to various third party retailers and re-sellers.

6.2. Marketplace based e-commerce platforms: Flipkart offers online marketplaces for e-commerce. These online platforms offered are Flipkart.com, Myntra.com, Jabong.com, etc. Under the FDI Policy, a marketplace based e-commerce platform cannot hold inventory and it could only act as an interface to facilitate sales between buyers and sellers. The marketplace based e-commerce platform, thus, just acts as an intermediary between various retailers and the final consumers. As per extant policy the company that operates the marketplace cannot itself be a retailer offering goods to the final consumer. Thus, Flipkart cannot maintain inventory and sell goods on the

marketplace as a retailer, its role is limited to a platform connecting retailers with the final consumers.

6.3. Provision of other ancillary services: Incidental to its main business activities, Flipkart also provides the following ancillary services:

(a) payment gateway, unified payment interface and prepaid
payment instrument services;
(b) advertising services;
(c) information technology product related issues;
(d) logistics, courier and other allied services;
(e) installation, repair and other allied services; and
(f) technology based services.

6.4. Additionally, Flipkart is engaged in private labelling of productsmanufactured through third parties under certain brand names.

C. Assessment of the proposed combination

7. Before this Order delves into the competition assessment of the proposed acquisition, the Commission considers it pertinent to elaborate its legal mandatewhile assessing a combination as opposed to a conduct related to anticompetitiveagreements and abuse of dominance. Unlike anti-competitiveagreements and abuse of dominance conduct, that are prohibited, combinations (i.e. mergers, amalgamations and acquisitions) are only regulated under the Act.

8. A market structure with the presence of a large number of players, presence ofa formidable competitor of sufficient scale and size and ease of entry are someof the fundamental factors

indicative of a competitive market that will not allowany competition harm of a combination to play out in the market postcombination. If combinations do not alter the competition both in the horizontaland vertical markets based on the above parameters as spelt out in section 20(4)of the Act, then the combination does not pose any competition harm. Thepurpose of this assessment is to assess the extent of competition that would belost solely as a result of the proposed combination. In general, a combinationwould pose competition concerns if the parties are close competitors in similarlines of business (horizontal overlaps, in combination parlance). Similarly, acombination between a manufacturer and distributor who are at different stagesor levels of production chain in different markets (vertical overlaps, incombination parlance) may pose competition concerns if it is likely to foreclosethe market for other distributors. The perception of competition harm would bean assessment of the competition landscape of the relevant markets based onseveral factors including market share, barriers to entry, extent of verticalintegration, extent of competition likely to remain after the combination, etc.

9. In the instant case, pursuant to the Proposed Combination, Walmart groupwould hold substantial shares and control over Flipkart, which, inter alia, isengaged in B2B Sales, and provision of online marketplace platforms tofacilitate trade between retailers and consumers (B2C). The Commission wouldexamine the proposed combination from the perspective of horizontal overlapand vertical overlap.

9.1. Horizontal overlap

9.1.1. The Commission observes that both the parties are engaged in B2Bsales and thus, there exists horizontal overlap between theirbusinesses in the said segment. Walmart has proposed the relevantmarket as 'pan-India market for B2B sales', which is beingcharacterized by intense competition among a very large numbercompetitors – both online and offline; and both channels givethe customers a plethora of choice.

9.1.2. It is observed that the both the parties to the Proposed Combinationare entities with foreign investments and are thus governed by thestipulations under FDI Policy, which explains B2B Sales as "Cash& Carry Wholesale trading/Wholesale trading, would mean saleof goods/merchandise to retailers, industrial, commercial,institutional or other professional business users or to otherwholesalers and related subordinated service providers.Wholesale trading would, accordingly, imply sales for the purposeof trade, business and profession, as opposed to sales for thepurpose of personal consumption. The yardstick to determinewhether the sale is wholesale or not would be the type of customersto whom the sale is made and not the size and volume of sales.Wholesale trading would include resale, processing and thereaftersale, bulk imports with ex-port/ex-bonded warehouse businesssales and B2B e-Commerce." This lays the boundaries of B2Bsales within which the parties to the combination have to operate.

9.1.3. The Commission notes that B2B supply chain entails flow ofgoods from manufacturer to the wholesaler, retailer or institutionalbuyers. Such goods are typically bought in bulk and the recipientbuys such goods for the purpose of using as inputs/raw

materialsfor production of goods for sale or for re-sale of the products. Apartfrom the sellers and buyers in this segment, there are otherincidental service providers who may facilitate the B2B Sale.Walmart has submitted that between every level of supply chain,there are enablers like logistics, financial intermediaries, serviceproviders, etc.

9.1.4. The competition assessment of this transaction reveals that theparties are neither close competitors in the B2B sales nor have acombined market share that raises competition concern. Walmarthas submitted that as per Indian Brand Equity Foundation, theretail market size of India for 2017 was estimated at USD 672billion and 93% of retail trade is unorganized (traditional) trade.Walmart estimates that 30-40% of this to be the size of B2B salesacross India and the combined market share of the parties in thatwould be less than five percent. It has been submitted that giventhe limited size of the B2B Sales of the parties to the Combination,the Proposed Combination is not likely to cause any adverseimpact on competition. As per the notice, the market share ofWalmart in B2B sales in India is less than half a percent and thus,the incremental changes on account of the proposed combinationis insignificant.

9.1.5. In order to understand the extent of overlap, Walmart was asked toprovide further information regarding B2B business of both theparties at the granular level of verticals. Upon examination of therelevant details, it was found that the operations of Flipkart wererelatively strong in mobile and electronics products, whichconstituted substantial majority of its business. However,operations of Walmart in the same products was insignificant. Onthe other hand, operations of Walmart were focussed on groceriesbut Flipkart was not present in this segment. Both the parties dohave some horizontal overlap in lifestyle products, which includesskincare, haircare, oral care, baby & feminine hygiene, personalwash, apparel and shoes & accessories. But again, the combinedvalue of sales of the parties in this segment is low and relativelyinsignificant to the size of the markets for the said products. At themargin this combination, therefore, does not alter the currentmarket structure.

9.1.6. The parties have not made a distinction between organised andunorganised B2B sales. They have considered both these as part ofone relevant market. However, even if both the segments aredefined as separate markets and the parties are considered to be present in organised B2B sales, such market still looks competitivedue to the presence of larger plyers such as Reliance Retail, MetroCash and Carry, Amazon wholesale etc. Apart from these players, unorganised sector also pose a significant constraint on organised wholesalers.

9.1.7. Based on the foregoing, the Commission is of the view that theProposed Combination is not likely to have any adverseimplication on competition irrespective of the whether the marketis taken as all B2B sales or narrower B2B markets on the basis ofparticular category of product sold by the parties to thecombination. Accordingly, the relevant market for B2B segment isleft open.

9.2. Vertical overlap

9.2.1. With respect to B2C sales, Walmart has submitted that the FDIPolicy restricts the parties from engaging in business to consumersales and thus, they are not engaged in the said segment. However,there is no restraint on the parties to offer an online marketplaceplatform to facilitate sales between retailers and consumers. Flipkart operates such platforms in the name of Flipkart.com, Myntra.com, Jabong.com, etc. Presently, Walmart is not engagedin any online marketplace business for B2C sales. Based on these,it has been further submitted that there is no vertical overlapbetween the businesses of the parties.

9.2.2. As the parties have regulatory restriction to engage in B2C salesand are admittedly not engaged in the same, the Commission doesnot find any vertical overlap between B2B business of Walmartand the online marketplaces of Flipkart.

10. Furthermore, the Commission notes that the proposed combination is notresulting in elimination of any major player in the relevant market. The Flipkartmarketplace platform will remain under the operation of Walmart, thus not onlypreserving a successful ecommerce platform but also enhancing the financialstrength of the platform. This would enable the combined entity to competeeffectively with competitors in a dynamic e-commerce market characterisedwith network effects. It is also relevant to note that 100% FDI under automaticroute is permitted in marketplace model of e-commerce and B2B segment,which is an encouraging factor for entry of new players.

D. Third party representations

11. During the inquiry into the matter, the Commission received representationsagainst the Proposed Combination from trade associations, traders/retailers,etc., which besides expressing concerns on compliance of FDI norms byFlipkart; 'predatory' practices and preferential treatment to specified sellers inFlipkart's online marketplaces; also expressed concerns on the impact of the Proposed Combination on employment, entrepreneurship, small and mediumscale enterprises, retailing, etc. Some of these also placed reliance upon thedecision dated 25th April, 2018 of Income Tax Appellate Tribunal in FlipkartIndia Private Limited v. Assistant Commissioner of Income-Tax [ITA No.693/Bang/2018 (Asst. Year - 2015-16)] to suggest 'predatory' pricing by Flipkartand its nexus with certain specified etailers in the online marketplaces.

12. The Commission notes that majority of the concerns expressed in therepresentations referred above have no nexus to the competition dimension ofthe Proposed Combination. Issues falling beyond the scope of the Act cannot bea subject matter of examination by the Commission, though they may meritpolicy intervention.

As per FDI Policy an e-commerce platform cannotinfluence market prices directly or indirectly. However, this is a matter ofconsideration for the appropriate regulatory/ enforcement authority. The issuesconcerning FDI policy would need to be addressed in that

policy space to ensurethat online market platforms remain a true marketplace providing access to allretailers.

13. The limited concerns in the representations that may merit examination fromcompetition perspective were deep discounting and preferential treatment toselect etailers in online marketplaces of Flipkart. In this context, Walmart wasasked to furnish detailed information on the said aspects to gauge whether theProposed Combination would have nexus to any of the said concerns. Uponexamination of the relevant facts, it was found that a small number of sellers inFlipkart's online marketplaces contributed to substantial sales. Almost all ofthese were customers of Flipkart in B2B segment, and hence were commoncustomers, availing significant discounts from Flipkart in both B2B segment aswell as in the online marketplaces. Further, the revenue earned from these common customers in the online marketplaces was relatively less vis-à-vis thenon-common sellers whose sales on the platform was considerably low. It was also seen that the top common customers in the Flipkart online marketplaceswere incorporated on or after 2016.

14. While the above factors may merit examination from the perspective of anticompetitive vertical restraints under the Act, the same to be a subject matter ofregulation under Section 6 of the Act has to be a consequence of the ProposedCombination. Competition assessment of a combination involves analysis oftwo counterfactual market scenarios i.e. with and without the combination. TheCommission considers the relevant factors mentioned under Section 20(4) ofthe Act, which, inter alia, includes market share of the parties to thecombination, entry barriers, extent of vertical integration and the economicstrength of the parties, and determines the effect of the Proposed Combinationon competition in the relevant markets. In doing so, the endeavour is to addresspotential adverse implications resulting from the combination but not to addresspre-existing conditions that are not attributable to the proposed combination or problems in the markets, in general. Based on the facts on record, the Commission observes that the discounting practice of Flipkart and its preference, if any, to select etailers in its online marketplaces are not specific to the Proposed Combination, as they are already prevalent in the market even without the proposed acquisition by Walmart. In other words, the issues about common customers of Flipkart are not directly or indirectly related to the Proposed Combination and thus, the same is not likely to alter the competition dynamics as it exists today.

15. Section 6(1) of the Act regulates combinations that are likely to cause appreciable adverse effect on competition. Section 6(2) requires partiesproposing combination to give prior notice to the Commission. In terms ofSection 6(2A) of the Act, such combination reported to the Commission shallnot come into effect for a period of 210 days from the date of notification orearlier approval by the Commission. These envisage ex ante regulation ofcombinations, the purpose of which is to provide an opportunity to theCommission to evaluate and address potential competition concerns, if any,emanating as a result of the Proposed Combination. The Commissiondeliberated extensively on the concerns raised in the representations butconcluded that the instrument of Regulation of Combinations cannot addressthese and different policy and legal instruments maybe taken recourse to. Thus,this review process

cannot be a window to resolve concerns that are notincidental or arise from the Proposed Combination. Nevertheless, there is no baron the Commission at any point of time to examine such issues under therelevant provisions of sections 3(4) and 4 the Act and regulations madethereunder.

E. Decision of the Commission

16. Considering the facts on record and the foregoing assessment, the Commission is of the opinion that the Proposed Combination is not likely to have anappreciable adverse effect on competition in India and therefore, the same ishereby approved in terms of Section 31(1) of the Act.

17. The information provided by Walmart is confidential at this stage, in terms ofand subject to the provisions of Section 57 of the Act.

18. This order shall stand revoked if, at any time, the information provided by Walmart is found to be incorrect or misleading.

19. The Secretary is directed to communicate to Walmart accordingly.

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Concept of Green Channel

In line with the Government's policy of Ease of Doing Business in India the Competition Commission of India (CCI) has amended certain key aspects of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations), by its notification dated 13 August 2019 (Amendment). In one of the most significant amendments to the merger control regime in India, the CCI has finally introduced the concept of a 'Green Channel' approval route (Green Channel), which will allow parties to receive an on-spot approval from the CCI, instead of waiting for the 30 working day period. It is pertinent to note that the Green Channel is one of the recommendations of the Competition Law Review Committee, which was set up to review the competition law framework in India. The Green Channel is of course, subject to certain stringent conditions. The Form I (i.e., the simple form) has also been revised to present a more comprehensive picture of possible effects of the proposed combination and to simplify the filing for Green Channel notifications.[1]

Combinations qualifying for the Green Channel are deemed to be approved on the date of receipt of the acknowledgment of filing of the Notice in **Form 1** in CCI . The parties desirous of taking this deemed approval route are required to *self access* the transactions to check if they will qualify for the Green Channel route or not. This eliminates the statutory 210 days time limit prescribed under the Act for *ex-ante* examination of combinations by CCI to see if they may cause *appreciable adverse effect on competition* in the relevant market or not before grant of CCI approval, and enables the parties to implement the transactions immediately without waiting for CCI approval.[2]

PRESS RELEASE No. 8/2019-20
Competition Commission of India (CCI) introduces Green Channel clearance for Merger & Acquisitions (Dated: 19.08.2019)[3]

Competition Commission of India (CCI) is an expert body to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants. Regulation of mergers and acquisitions (M&A) above certain financial threshold (Combinations) is an important regulatory function of CCI. Since its inception, the CCI has cleared 666 combinations. As part of its ongoing and regular efforts to make M&A

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[1] http://www.cyrilshroff.com/wp-content/uploads/2019/08/Client-Alert-CCI-Green-Channel.pdf.

[2] https://www.competitionlawyer.in/green-channel-automatic-approval-route-for-certain-combinations-a-primer/#:~:text=The%20%E2%80%9CGreen%20Channel%E2%80%9D%20route%20provides,in%20Form%201%20in%20CCI%20.

[3] https://www.cci.gov.in/sites/default/files/press_release/PR82019-20.pdf

filings approval faster, the CCI has introduced an automatic system of approval for combinations under Green Channel. Under this process, the combination is deemed to have been approved upon filing the notice in the prescribed format. This system would significantly reduce time and cost of transactions. Simultaneously, CCI has also revised its pre-filing consultation guidance note to extend its scope to include consultation to assist the parties to determine whether their combination is eligible for Green Channel. The parties filing combination notice can also meet the case team between 10 am. and 12 pm. from Monday to Friday for this purpose. The Green Channel is aimed to sustain and promote a speedy, transparent and accountable review of combination cases, strike a balance between facilitation and enforcement functions, create a culture of compliance and support economic growth.

Press Information Bureau, Government of India, Ministry of Corporate Affairs
28 MAR 2020 1:06PM by PIB Delhi[4]
CCI revises Guidance Notes to Form-I under the Green Channel

The Competition Commission of India (CCI) has revised guidance notes to Form I with a view to incorporate the changes made in Green Channel. The revised Form I, under the Green Channel, will be used to file the notice under Section 6(2) of the Competition Act, 2002 (Act) and Regulation 5(2) of the Combination Regulation. The guidance notes provide the scope of information and documents to be submitted along with the form. It also provides clarification regarding eligibility criterion for Green Channel. The CCI issues guidance notes for parties to facilitate them to make a filing before it. As part of its ongoing and regular efforts to streamline M&A filings process and make it simpler and faster, in August 2019, the CCI introduced an automatic system of approval for combinations under Green Channel and revised Form I to file the notice under Section 6(2) of the Competition Act, 2002 (Act) and Regulation 5(2) of the Combination Regulation. In case of any other guidance on the information requirement in the Form I, the parties may request Pre-Filing Consultation (PFC) with the officers of the CCI. The parties are encouraged to seek PFC as per the guidelines available on the CCI's website.

General Guidance[5]
Notes to Form I-In terms of Regulation 5(3A) of the Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (Combination Regulation), the parties are required to give notice in Form I in accordance with the notes thereto. Notes to the Form I are as under:
1. Information submitted in soft form i.e. electronic form should be free of computer viruses or malware, be accessible, searchable, readable and printable, and be devoid of passwords or encryption.

[4] https://pib.gov.in/Pressreleaseshare.aspx?PRID=1608766.
[5] https://www.cci.gov.in/sites/default/files/page_document/Form1.pdf.

2. Hard copy or paper records produced in electronic form should be produced as single page images with a resolution of 300 dpi (dots per inch) and OCR text (searchable text). Where colour is required to interpret the record, such as hard copy photos, and certain charts, that image should be submitted in colour.
3. All information be provided on portable storage media appropriate to the volume of data (e.g., USB/flash drive, CD, DVD, hard drive) and be identified with a label setting out the matter name, the contents and the date of production.
4. The Parties shall provide an index that shall include an entry for each paragraph and sub-paragraph(hyperlinked) and a corresponding reference to all records that are related to such paragraph or sub-paragraph.

In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India
Suo Motu Case No. 02 of 2016

Against

1. Eveready Industries India Ltd.
2. Indo National Ltd.
3. Panasonic Energy India Co. Ltd.
4. Association of Indian Dry Cell Manufacturers

Order under Section 27 of the Competition Act, 2002

1. **Introduction**

1.1 The instant case was taken up by the Competition Commission of India (hereinafter, 'Commission') *suo motu,* pursuant to an application dated 25 May, 2016 filed by Panasonic Energy India Co. Ltd. (OP-3), a subsidiary of Panasonic Corporation Japan under Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter, 'Lesser Penalty Regulations') read with Section 46 of the Competition Act, 2002 (hereinafter, the 'Act').

1.2 OP-3 in its Lesser Penalty Application submitted that there existed a cartel amongst OP-1, OP-2, and OP-3, which were all engaged in the business of, *inter alia*, manufacture and supply of zinc-carbon dry cell batteries, to control the distribution and price of zinc-carbon dry cell batteries in India, in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act. (hereinafter, OP-1, OP-2 and OP-3 are collectively referred to as 'Manufacturers').

1.3 It was also disclosed that the Manufacturers were members of a trade association, *namely,* Association of Indian Dry Cell Manufacturers (hereinafter, 'AIDCM'/ 'OP-4') which facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers. (hereinafter, Manufacturers and OP-4 are collectively referred to as 'OPs').

1.4 As per the Lesser Penalty Application, the Manufacturers were under stress in 2013 due to rise in input costs and the depreciating rupee and resistance to previous attempts of the Manufacturers to raise prices of zinc-carbon dry cell batteries to off-set the rising

input costs. Therefore, the senior management of the Manufacturers, which had known each other for several years, decided to raise the
maximum retail price (hereinafter, 'MRP') of their respective zinc-carbon dry cell batteries to improve their sale realisations.

1.5 Revealing the *modus operandi* of the Manufacturers, it was stated in the application that employees of OPs actively involved in the cartelisation, *inter alia*, used to meet and agree on the price increase, which was to be led by one manufacturer of zinc-carbon dry cell batteries and followed by others under the pretext of following the market leader. It was also stated that the Manufacturers agreed not to push sales through their channel/ distribution partners aggressively to avoid price war amongst themselves.

2. **Direction of the Commission to the Director General (hereinafter the 'DG') to conduct an investigation**

2.1 Based on the disclosure under Lesser Penalty Application of OP-3, the Commission noted that the alleged conduct of cartelisation essentially took place through, (a) coordinated price increase by the Manufacturers; (b) active measures by the Manufacturers to implement price control and reduce possibilities of price competition amongst them; and (c) reduction of price competition at the stockist/ retailer/ wholesaler level by controlling and agreeing on the level of incentives to be provided.

2.2 After examining the material on record, the Commission was of the *prima facie* view that the case involved contravention of the provisions of Section 3 of the Act. Accordingly, the Commission, *vide* its order dated 22 June 2016 passed under Section 26(1) of the Act, directed the Director General (hereinafter, the 'DG') to conduct an investigation into the matter and submit an investigation report. The DG was also directed to investigate the role of persons / officers of OPs who were in-charge of and responsible for the conduct of the businesses of such parties at the time of the alleged contravention. Further, the DG was directed to conduct a detailed investigation into the contraventions disclosed in the information up-to-
date without restricting or confining itself to the duration mentioned in the information.

2.3 During the course of investigation, the DG, pursuant to the issue of search warrant from the Chief Metropolitan Magistrate, Delhi, carried out search and seizure operations at the premises of OP-1, OP-2 and OP-3 simultaneously on 23 August, 2016, in terms of powers vested with the DG under Section 41(3) of the Act, and incriminating material and documents were seized therefrom.

3. **Lesser Penalty Application of OP-1 and OP-2**

3.1 Subsequently, on 26 August 2016, OP-1 filed an application under Regulation 5 of the

Lesser Penalty Regulations read with Section 46 of the Act.

3.2 On 13 September 2016, OP-2 also filed an application under Regulation 5 of the Lesser Penalty Regulations read with Section 46 of the Act.

4. **Industry Overview**

4.1 The Commission first of all notes that though dry cell batteries are broadly of three types: (a) zinc-carbon; (b) alkaline; and (c) rechargeable, infringement in the instant case pertains to cartelisation in the zinc-carbon dry cell battery only, in India. In this regard, it is useful to have a glance at the product involved *i.e.* dry cell battery, in general, and zinc-carbon dry cell battery, in particular.

4.2 Battery is a device that converts chemical energy into electrical energy. It consists of one or more electrochemical cells with external connections to power electrical devices such as flashlights, remote controls of various electronic gadgets, smart phones *etc*.

4.3 Primary (single-use or "disposable") batteries are used once and discarded. Secondary (rechargeable) batteries can be recharged multiple times using mains power from wall socket.

4.4 A dry cell is a disposable battery, which uses a paste electrolyte, with only enough moisture to allow current to flow. A common dry cell is the zinc-carbon battery, sometimes called the dry Leclanche cell, with a nominal voltage of 1.5 volts, the same as the alkaline battery (since both use the same zinc-manganese dioxide combination). A standard dry cell comprises of a zinc anode, usually in the form of a cylindrical pot, with a carbon cathode in the form of a central rod. The electrolyte is ammonium chloride in the form of a paste next to the zinc anode.

4.5 *Dry Cell Battery market in India*

a) Highlights of the Indian market for dry cell batteries, as per one of the publicly available research report on dry cell market (by Emkay Global Financial Services Ltd., dated 5 September 2014[1]) are, as follows:
i. Dry cell batteries are generally of different sizes, namely, D size, C size, AA size and AAA size. Zinc-carbon dry cell battery segment contributes about 97% of the total dry cell market, while high priced alkaline batteries are just 3% of the market.

ii. Alkaline batteries though popular in western countries, have not yet emerged as a serious alternative to zinc-carbon batteries in the Indian market due to price sensitive nature of the Indian consumers.

iii. Consumers have shifted from the more expensive 'D' size batteries to AA' sized ones. The shares of the principal battery categories (in percent) for a three year period are as tabulated below:

Table 1: The market share of various sizes of principal dry cell batteries

Product Line (size of dry cell batteries)	FY 2013-14	FY 2012-13	FY 2011-12
D	**14.5**	**15.4**	**17.5**
C	**0.3**	**0.3**	**0.4**
AA	**74.3**	**74.8**	**73.1**
AAA	**10.9**	**9.5**	**9.0**
Total	**100**	**100**	**100**

iv. A growing need for portable power and the advent of a number of battery operated gadgets like remote controls, toys, clocks and flashlights has catalysed the consumption of dry cell batteries. Since these gadgets are used regularly, the battery demand is not cyclical in nature.

v. The latest trend indicates that the market will continue to grow @ 4-4.5% per annum. 'AA' size should grow lower than market growth; whereas D' size should decline. However, due to increase in digitisation, the 'AAA' size category will continue to show high double digit growth.

4.6 In this context, OP-1 has submitted the estimated annual market shares of itself (including Power cell), OP-2 and OP-3 based on the reported sales figures circulated by OP-4 from 1 April 2009 to 30 September 2016:

Table 2: Market share in percent for the period 1 April, 2009 to 30 September, 2016

	Year-wise Share (in percent)

Brand	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
OP-1	47.7	45.6	46.4	47.0	48.0	49.9	49.2
OP-2	31.0	31.0	29.5	29.2	29.1	27.5	28.0
OP-3	18.2	18.9	19.5	20.2	19.9	20.2	20.9

5. **Profile of the parties**

5.1 *Eveready Industries India Ltd. (OP -1)*

a) The brand Eveready entered the Indian market in 1905. The company was incorporated in 1934 under the earstwhile Companies Act 1913. Previously the company was a subsidiary of Union Carbide Corporation, USA. Shri B. M. Khaitan and the Williamson Magor Group of Companies acquired OP-1 in 1993. OP-1 is headquartered in Kolkata and is currently involved in the marketing of various product categories such as batteries (including dry-cell batteries), flashlights, general electric products, packet tea and appliances.

b) As per its annual report for the year 2015 – 2016, OP-1 was selling over 1.3 billion units of dry cell batteries annually. The sales of OP-1 from dry cell batteries was about Rs. 760.19 crores, which constituted 56.36% of its total turnover.

5.2 *Indo National Ltd. (OP-2)*
a) OP-2, incorporated in 1972, has its registered office at Chennai. Upon grant of license by the Government of India for manufacture of zinc-carbon dry cell batteries on 28 August, 1972, it entered into a technical collaboration agreement with Matsushita Electrical Industrial Company Limited of Japan for manufacturing of dry cell batteries which are sold under brand name Nippo (Matsushita renamed subsequently as 'Panasonic Corporation'). b) As per its annual report for the year 2015-16, out of OP-2's total turnover for the year *i.e.* Rs. 353 crores, sales from dry cell batteries constituted 88.57% of the total turnover for the year. 5.3 *Panasonic Energy India Company Limited* (*OP-3)*
a) The company, established in 1972 as Lakhanpal National Limited, is a subsidiary of Panasonic Corporation, Japan. It is a public listed company, headquartered in Vadodara (Gujarat) and is primarily engaged in the manufacture and supply of dry cell batteries. Majority of OP-3's business comprises of zinc-carbon batteries. In addition to dry cell batteries, OP-3 also trades in torches but the same constitutes only a minimal portion of its business b) As per its annual report for the year 2015-16, out of OP-3's total turnover for the year *i.e.* Rs. 278 crores, sales from dry cell batteries constituted 93% of the total turnover for the year.
5.4 The Association of Indian Dry Cell Manufacturers (OP-4)
a) AIDCM is an unregistered association of dry cell manufacturers primarily comprising

of three members *i.e.* Eveready, Nippo and Panasonic. The DG has gathered that till 1987, there were 12 to 13 members of AIDCM who were all manufacturers. However, most of them have since closed down.

b) AIDCM has described its main activities as, *inter alia*, to encourage good relations amongst the manufacturers and marketers of dry cells in general and members of the association in particular; to promote dry cell / battery industry in India, including manufacturers of raw materials and components used in batteries; and to be a central point of contact for queries on dry cells and torches for different ministries and departments of the government.

6. **DG's Investigation**

6.1 With respect to the alleged contravention of Section 3 of the Act by OPs, investigation by the DG has brought to the fore the details/ conducts of OPs, mentioned in the succeeding paragraphs.

6.2 During investigation, the DG examined the emails, fax and other incriminating material and documents obtained from the search and seizure operations at the premises of the Manufacturers as well as the evidence furnished by them with their respective Lesser Penalty Applications and responses to the notices of the DG. Further, the DG also recorded the statements on oath of certain individuals of the Manufacturers.

6.3 From the evidence gathered in the case, the DG found that the Manufacturers had an arrangement whereby they exchanged commercially sensitive information amongst themselves for the purpose of price-coordination. Such arrangement was found to be in place since 2008 *i.e.* much prior to 20 May 2009, the date on which Section 3 of the Act became enforceable, and continued uptil 23 August 2016 *i.e.* the date of search and seizure operations by the DG.

6.4 Examination of evidence collected by the DG revealed that top management of the Manufacturers maintained regular contacts by way of personal visits, meetings of association, exchange of fax messages, emails, *etc*., and shared pricing and other vital, confidential commercial information. They used all this to mutually agree on the price increases (MRP). They also decided implementation modalities of price increase which included deciding the schedule of start of production, commencement of billing with new MRP and availability of products (with revised rates) in the market.

6.5 In order to give effect to the decided price increase in the market, the market leader *i.e.* OP-1 used to make announcement of increase in MRP through press releases. Such price increase by OP-1 was immediately followed by OP-2 and OP-3. In this manner, MRP was increased by OPs at least on six occasions by Rs 0.50 (fifty paisa) each,

resulting in about sixty percent increase in price of the concerned product since January, 2010.

6.6 Illustratively, one of the e-mails referred to by the DG to establish the coordination amongst the Manufacturers for the purposes of price increase in 2010, is an email dated 19 January 2010 sent by Shri R. P. Khaitan (of OP-2) to Shri Suvamoy Saha (of OP-1). In this e-mail, the two OPs have shared their price and MRP with suggestions. The remarks column in the shared document contains comments like "*as agreed MRP to change Rs 15 and trade price w.e.f. April, 2010 in 2 phases*". When this e-mail was shown to Shri Suvamoy Saha (of OP-1), he explained that the email contained the price and MRP structure details of OP-2 and OP-1 and that through this email, Shri R. P. Khaitan (of OP-2) had circulated a previously discussed price and MRP structure with his comments to OP-1. This was confirmed by OP-2, who also provided copy of the said email. Similarly, the DG found other evidence of contacts and communications amongst OPs through e-mails, fax and even meetings, which showed coordination amongst the Manufacturers to increase prices in not only in 2010 but in 2013, 2014 and 2015 as well.

6.7 Further, the investigation showed that coordination amongst OP-1, OP-2 and OP-3 not only pertained to the MRP of their products but also exchange of information about the components of pricing structure of their products including trade discount, wholesale price, dealers/ stockist landing cost, open market rates, retailers margin, sales promotion schemes *etc.* to monitor effective implementation of price increase and determine price for distributors/whole sellers/retailers and end consumers, for allocation of market amongst themselves on the basis of types/sizes of batteries and/or geographical areas, and to control output to establish higher prices and control supply (especially to the Institutional buyers like Geep, Godrej *etc.* and modern retail channels like Walmart, Metro C & C *etc.*).

6.8 With respect to AIDCM (OP-4), the DG found that it facilitated cartel activities amongst its members by providing a convenient platform for sharing /discussing prices and other commercially sensitive issues on the pretext of discussing the market conditions. Further, by collating and providing regular information on production/sales data of the member companies, it provided information that assisted the Manufacturers in monitoring the cartel implementation.

6.9 Based on foregoing analysis, the DG concluded that OPs had indulged in anti-competitive agreement/ conduct and concerted practices, in the domestic dry cell battery market of zinc carbon batteries, during the period 20 May 2009 to 23 August, 2016 and thereby contravened the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act.

6.10 After finding contravention as above, the DG identified certain persons in terms of

Section 48 of the Act who played active role in the contravention of the provisions of Section 3 of the Act and also those who were incharge of and responsible to the respective companies for the conduct of their businesses. In this regard, the DG found active involvement of the top management of OPs including their Managing Director, Joint Managing Director and Whole-time Director, Head of Marketing & Sales *etc*. as well as other officers/ office bearers.

6.11 The following individuals were identified by the DG to be liable under Section 48 of the Act:
OP-1:
a) The DG found five officers of OP-1 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, *namely*, Shri Suvamoy Saha, Whole-time Director; Shri Partha Biswas, Vice President; Shri Anil Bajaj, Vice President – Flashlights and Batteries; Shri Kunal Gupta, Vice President – Powercell; and Shri Indranil Roy Chowdhury, Vice President – Finance.

b) The DG also found two persons of OP-1 to be liable in terms of Section 48 (1) of the Act as persons incharge of running the affairs of the company during the cartel period, *namely,* Shri Deepak Khaitan, Former Managing Director and Shri Amritanshu Khaitan, Managing Director.

OP-2:
a) The DG found seven officers of OP-2 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, *namely*, Shri R. P. Khaitan, Joint Managing Director; Shri M. Sankara Reddy, Chief Financial Officer; Shri B. L. N. Prasad, Head Marketing and Institutional Sales; Shri Latesh Madan, General Manager Sales; Shri Manas Mitra, Manager- Sales; Shri Santosh Tanmay, General Manager – Sales; and Shri Hemant Gupta, AGM Sales.

b) The DG also found one person of OP-2 to be liable in terms of Section 48 (1) of the Act as person incharge of running the affairs of the company during the cartel period, *namely,* Shri P. Dwarakanth Reddy, Managing Director and CEO.

OP-3:
a) The DG found five officers of OP-3 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, namely, Shri Hideya Maekawa, Former Vice President – Sales and Marketing; Shri A. K. Dhanda, General Manager – Sales; Shri R. R. Desai, Deputy General Manager – Sales; Shri Parimal Vazir, General Manager – Institutional Sales and Shri Ketan Valand, Officer Marketing.

b) The DG also found one person of OP-3 to be liable in terms of Section 48 (1) of the Act as person incharge of running the affairs of the company during the cartel period,

namely, Shri S. K. Khurana, former Chairman and Managing Director.

OP-4

c) The DG found two office-bearers of OP-4 to be liable in terms of Section 48 (2) of the Act for their specific role in cartelisation, *namely*, Shri Subramania Kumaraswami, Secretary of AIDCM from 1 April, 2009 to 31 October, 2014 and Shri Ravindra Grover, Secretary of AIDCM from 1 November, 2014 onwards.

d) The DG also found three persons of OP-4 to be liable in terms of Section 48 (1) of the Act as persons incharge of running the affairs of the association during the cartel period, *namely,* Shri Deepak Khaitan, President; Shri S. K. Khurana, Chairman and Shri R. P. Khaitan, President.

6.12 The DG, with the above findings, submitted its investigation report to the Commission on 20 February 2017.

7. **Consideration of the investigation report of the DG**

The Commission considered the investigation report of the DG and decided to forward an electronic copy of the same to OPs and the persons identified by the DG to be liable under Section 48 of the Act, for filing their suggestions/objections thereto. OPs were heard on 28 November 2017.

8. **Submissions of OPs to the DG's Investigation Report**

Submissions of OP-1 and its individuals

8.1 OP-1 submitted that it has made 'significant value addition' in the case by providing a full, true and vital disclosure about the said cartelisation in the zinc-carbon dry cell battery. In this regard, it has also disclosed that Geep Batteries (India) Private Limited (hereinafter, 'Geep') was a member of AIDCM along with other Manufacturers and was involved in the said cartel till 2012.

Furthermore, it has named AIDCM (OP-4) as one of the participants of the said cartel, which strengthened the investigation conducted by the DG, though both OP-2 and OP-3 had denied the role of AIDCM in fixing the price. Furthermore, OP-1 submitted that it disclosed the name of an individual of OP-3, Shri Osamu Oyamada, who was involved in the said cartel.

8.2 OP-1 also submitted that it has provided evidence demonstrating that the cartel was in existence for several years including periods before 20 May 2009 and at least until 23 August 2016.

8.3 OP-1 further submitted that OP-1 and its individuals have fully cooperated in the investigation and accordingly, the Commission should grant them immunity from penalty.

8.4 OP-1 also requested the Commission to consider various mitigating factors while imposing penalty, if any, such as the fact that per capita consumption of batteries in India is one of the lowest in the world and hence, the market potential of demand in batteries is limited; and rise in the cost of raw materials for zinc-carbon dry cell batteries resulting in loss of battery business for OP-1 from the financial year 2011-12. Further, OP-1 submitted that the price increase affected by OP-1 was largely in the range of the price movement of the overall basket of consumer goods in the country.

Submissions of OP-2 and its individuals

8.5 OP-2 submitted that it does not have any objection to the findings in the DG report and it has made 'significant value addition' by providing a full, true and vital disclosure in relation to the said cartelisation of zinc-carbon dry cell batteries. Furthermore, OP-2 and its individuals have extended genuine, full, continuous and expeditious cooperation to the DG and the Commission throughout the investigation.

8.6 OP-2 also requested the Commission to consider various mitigating factors while imposition of penalty, if any, such as stagnant demand of zinc-carbon dry cell batteries and increase in the cost of raw materials for zinc-carbon dry cell batteries; and that there has not been any profiteering by OP-2 because of the said cartelisation as zinc-carbon dry cell batteries are a low value product.

8.7 Further, OP-2 submitted that it understands the seriousness of the violation and therefore, is in a process of putting in place an effective Competition Law Compliance Program, which will assist in ensuring that it adopts policies and practices that are in conformity with the requirements of the Act.

8.8 OP-2 has requested the Commission to provide the maximum penalty waiver available to OP-2 and its individuals indicted in the said cartelisation.

Submissions of OP-3 and its individuals

8.9 OP-3 submitted that because of the Competition Compliance Program in its organisation, it became aware of the existing cartel of Manufacturers and accordingly approached the Commission under the Lesser Penalty Regulations.

8.10 OP-3 further submitted that it was the first to disclose the details of the cartel and provided full and complete disclosure, including all relevant information/ documents/ submissions, which helped establish the existence and methodology of the cartel in

operation. Further, it cooperated throughout the proceedings with the Commission and the DG.

8.11 OP-3 also submitted that its Lesser Penalty Application not only enabled the Commission to order investigation, but also was sufficient to establish contravention of the Act. Accordingly, OP-3 and its individuals ought to be granted hundred percent reduction in the penalty.

Submissions of OP-4 (AIDCM) and its individuals

8.12 AIDCM submitted that it had no role to play in the pricing decisions of the dry cell batteries of the Manufacturers, which stands substantiated by OP-2 and OP-3, respectively. As regards its individuals, OP-4 has stated that Secretary of the association is the only an employee of OP-4 who functions only in an administrative capacity and cannot be considered liable under Section 48 of the Act.

8.13 In this regard, present Secretary of AIDCM, Shri Ravindra Grover in his submissions has raised the contention that proceedings against an officer of the 'company' under Section 48 of the Act can only be initiated once finding of contravention against the 'company' is established under Section 27 of the Act.

8.14 Further, it has been contended that Section 48 of the Act relates to contravention by companies. So, it does not apply to an unregistered association of companies. As Shri Ravindra Grover is not Secretary of any company, no proceedings against him can be initiated under Section 48(2) of the Act. Furthermore, it has been argued that the Commission has not informed Shri Ravindra Grover whether Section 48(1) or Section 48(2) of the Act is being invoked against him in the instant case thereby preventing him from discerning the exact nature of the case being made out against him and accordingly filing a proper response.

9. **Analysis of the Commission**

9.1 The Commission has considered the Lesser Penalty Applications filed by the Manufacturers, the investigation report of the DG and the submissions of OPs and their individuals. It is noted that all the Manufacturers have admitted the fact that they were involved in the cartelisation of zinc-carbon dry cell batteries.

9.2 From the information and evidence furnished by OPs and the investigation by the DG, it is observed that the Manufacturers indulged in anticompetitive conduct of price coordination, limiting production/ supply as well as market allocation. The price coordination amongst the Manufacturers encompassed not only increase in the MRP of the zinc carbon dry call batteries but also exclusion of 'price competition' at all levels in

the distribution chain of zinc-carbon dry cell batteries to ensure implementation of the agreement to increase price. In addition, the Manufacturers also agreed to control supply in the market to establish higher prices and indulged in market allocation by requesting each other to withdraw their products from the market. For these purposes, the Manufacturers exchanged amongst themselves confidential and commercially sensitive information about pricing as well as other information such as production and sales data.

9.3 In order to increase price of the zinc carbon dry call batteries, the Manufacturers mutually agreed on the implementation modalities of MRP. They not only decided the schedule of start of production of units with new MRP but also the start of billing as well as availability of products, with revised rates in the market.

9.4 The evidence gathered during investigation and submission of OPs shows that the individuals of the Manufacturers regularly discussed and agreed when to give effect to the price increase during the personal /AIDCM meetings. OP-1 being the market leader would take lead by issuing press release to announce increase in price of its zinc-carbon dry cell batteries. Thereafter, OP-2 and OP-3 would respond to it immediately with corresponding increase in price of their batteries on the pretext of following the market leader.

9.5 For example, in 2013, senior employees of the Manufacturers held a meeting on 10 April 2013, and, *inter alia,* agreed to increase the MRP of 'Economy' category of batteries. On 12 April 2013, OP-1 issued a press release announcing the increase in MRP of its 'Economy' range of dry cell batteries effective from May, 2013. OP-2 and OP-3 simultaneously increased MRP of their 'Economy' segment batteries from May, 2013.

9.6 The next press release by OP-1 was on 20 September 2013 announcing price increase of its 'Economy' dry cell batteries from October 2013. This was after the AIDCM meeting on 12 September 2013. OP-2 and OP-3 also increased MRP of their products from October 2013.

9.7 Subsequent meeting of AIDCM was held on 25 February 2014. OP-1 made a press release dated 20 March 2014 announcing price increase in all types of dry cell batteries from April 2014. This was followed by OP-2 and OP-3 increasing MRP of their 'Economy' and 'Premium' category of batteries from April 2014. The same *modus operandi* was followed in 2015 as well.

9.8 The evidence on record shows that price increases made by OP-2 and OP-3 immediately following announcement of price increase by OP-1 were with prior information of imminent price increase by OP-1. Due to this, OP-2 and OP-3 were able to

increase prices of their respective products on most of the occasions with little or no time lag though ordinarily such actions of changing the price label of the product, packaging with new price tag *etc.* would take considerable time.

9.9 Further, evidence collected during investigation shows that price coordination agreement amongst the Manufacturers was not limited to deciding and implementing increase in MRP of zinc-carbon dry cell batteries alone but extended to include monitoring and controlling of prices at all levels so as to exclude 'price competition' in the entire distribution chain of zinc-carbon dry cell batteries.

9.10 Notably, in the distribution chain, the Manufacturers sold the batteries to the distributors/ wholesalers and through them to the retailers on 'principal to principal' basis. Once the batteries were sold to wholesalers/ retailers they pushed sales of the batteries by offering attractive margins/ incentives. At the same time, sales staff of the companies tried to promote sales performance of their products by resorting to promotional schemes - like scratch coupons, gifts, combo offers, festival offerings *etc*. All this resulted in 'price competition' at various levels. For instance, if wholesalers / retailers of OP-1 tried to boost sale of OP-1's products, by offering incentives to the consumers, it would result in lower sales for OP-2 and OP-3.

9.11 Since the 'price competition' in the distribution chain, as stated above, could have rendered the agreement/ understanding reached among the Manufacturers ineffective, they entered into agreement/ understanding/ coordination amongst themselves to cover all other elements of the price structure besides MRP, comprising trade discount, wholesale price, dealer/ stockist landing cost, open market rates, retailers' margin, sales promotion schemes *etc*.

9.12 The evidence on record shows that despite the above agreement/ understanding/ coordination, the Manufacturers faced problem in actual implementation of increased MRP in the market. Since deviation from the agreed stand by any of the Manufacturers could result in drop of sales volume of others, they would bring to one another's notice concerns about slow implementation of the mutually agreed decisions and would seek corrective action if deviations from the agreement were observed in the market. Besides, they would regularly share amongst them information regarding operating margin rates, wholesale offer price *etc.* prevailing in various states/ cities/ towns collected by the sales staff and would even control supply in the market to establish higher prices of batteries.

9.13 The e-mails exchanged amongst the Manufacturers show that there was also an understanding amongst them to allocate market based on geographical area and types of batteries. They would often request each other to withdraw their products from a particular geographical area such as a state or town or city.

9.14 Apart from all this, Manufacturers in their meetings held under the aegis of AIDCM, would share common concerns about low rates of batteries offered by other maverick players, mostly importers/ traders, as this occasionally caused constraints in raising/ maintaining the higher market price of their battery products. The evidence gathered by the DG shows that on one occasion in AIDCM meeting on 10 February 2012, the Manufacturers deliberated the impact of alkaline and rechargeable batteries on the market of the zinc–carbon dry cell batteries and contemplated reduction in MRP of AA and AAA size batteries by reducing trade margins. Also, the Manufacturers discussed the low rates at which their batteries were being sold by the modern retail channels like 'Walmart' and 'Metro Cash & Carry' *etc*. and agreed on the strategy to counter such issues. The Commission observes that while it may be legitimate for enterprises engaged in the same line of business to share common concerns, the Manufacturers in the instant case used the platform of AIDCM to coordinate their actions, *inter alia*, on pricing.

9.15 The top management of the Manufacturers played an active role in this collusion. It is observed that the coordination amongst the Manufacturers took place at the highest level in these companies. The top managerial personnel discussed various aspects of coordination in the meetings of AIDCM (reflected in the minutes of such meetings), on the sidelines of meetings of AIDCM (reflected in the hand-written notes and agenda points prepared by the individual members for the meeting) and in private meetings. Moreover, there were frequent direct email/ fax communications amongst the individuals of OPs, which show their close personal and friendly relations and the underlying deep commitment to adhere to '*gentlemen's agreement*'.

9.16 This conduct of the Manufacturers is summarised very well in the submission of Shri S. K. Khurana during his deposition before the DG wherein he stated as follows:

"*....PECIN had an understanding with other competitors namely Eveready and NIPPO not to enter into price war, i.e. not to resort to severe undercutting and such understanding existed for a long time even way before 2009.*"

9.17 Thus, based on the evidence furnished by OPs as well as that collected by the DG during investigation, Commission is of the opinion that the Manufacturers indulged in anti-competitive conduct in the domestic dry cell battery market of zinc carbon batteries.

9.18 In respect of OP-4, which has stated that it had no role to play in pricing decisions of the dry cell batteries of the Manufacturers, the Commission observes that the DG has given a finding that platform of AIDCM had been used for the purpose of cartelisation. Investigation by the DG has revealed that the data on volume of production and sales of member companies in respect of, *inter alia*, dry cell batteries (both zinc-carbon and alkaline) and flashlight / torches was formally shared on a monthly basis by AIDCM in a prescribed format. This has been admitted by OPs in their written replies as well as in the statements of their individuals. Besides, data on total import of zinc-carbon battery was

also shared.

9.19 An illustration of such information sharing is contained in the email dated 15 January 2016 which was sent by Shri Ravindra Grover, Secretary of AIDCM, to each of the Manufacturers. This e-mail reveals that micro details of production and sales data of the Manufacturers were available to the Manufacturers by the first fortnight of the ensuing month. The information on production and sales of zinc-carbon batteries of the Manufacturers, being compiled by AIDCM comprised company-wise detailed information for different battery sizes with further breakup on the basis of premium / popular types as well as the aggregate data of the industry.

9.20 When Shri Ravindra Grover was confronted with the aforesaid e-mail during his deposition before the DG on 5 January 2017, he stated that

"*This practice has been going on since prior to my joining the association. One of the reasons for collection of this data was to calculate the membership subscription payable by the companies. This was also done to basically understand the market conditions. Sometimes, we also used to get request from the Government seeking such data….*"

9.21 Contrary to this, when similar question was posed to Shri S. Kumaraswami, former Secretary of AIDCM during his deposition before the DG on 10 January 2017, he responded as under:

"The main objective of the association is collection and collation of production and sales figures of its member companies on monthly basis. It is done to calculate their market shares. This information was shared with the members themselves."

9.22 From the above statements, it is evident that reasoning given by Shri Ravindra Grover that data collated by AIDCM was being used for calculation of membership fee is not plausible. For the purpose of such a calculation, other publicly available information like aggregate turnover of the members given in their annual financial statements, could have been used. While the explanation by OPs that the Government agencies often require industry information is understandable, this cannot be a cogent reason to circulate such a granular and detailed information relating to production and sales among the competitors on a regular basis. In fact, the segregated data was seldom shared with any other agency/ organisation except the Manufacturers.

9.23 There is further evidence to show that by collating and disseminating crucial business data of the competitors, AIDCM facilitated better coordination amongst the Manufacturers. The monthly data on production and sales of the Manufacturers collected by AIDCM was used to compare/ assess the impact of the overall arrangement on pricing and other business strategies, on their market shares over a period. For instance, in one of the fax messages dated 13 February 2015 from Shri Suvamoy Saha of OP-1 to Shri R. P. Khaitan of OP-2, Shri Saha is stating that he has compared the sales data of OP-2 with

that of OP-1 and OP-3 for the years 2013-14 and 2014 -15 (till January 2015) and he tries to explain that negative growth of OP-2 could not be attributed to pricing *i.e.* price increase. Shri Suvamoy Saha has also proposed in that message to Shri R. P. Khaitan to have an open discussion in the forthcoming meeting in Delhi.

9.24 The Commission finds that practice by AIDCM of compiling and disseminating commercially sensitive data was greatly helpful to the Manufacturers to monitor the outcome of overall 'agreement/ understanding' reached at amongst them with regard to pricing, output, sale/ supply, allocation of market, *etc.* In fact, comparison of the market shares of OPs for the past six years *i.e.* from 2010-11 to 2015-16 based on their sales of zinc carbon dry cell batteries shows that market share of each of the OPs remained stable over these years. This is a clear indicator of the effectiveness of the cartel arrangement.

9.25 The evidence on record also shows that OP-4 through Shri S. Kumaraswami, former Secretary AIDCM, had been privy to the intended price increase by the members of AIDCM. Some of email communications of Shri S. Kumaraswami in 2012 indicate that when the Manufacturers were contemplating measures to increase prices, they roped in AIDCM for giving the press release. The emails exchanged show that, in 2012, Shri Suvamoy Saha after consulting Shri R. P. Khaitan of OP-2 had forwarded a draft on price increase measures of the members *i.e.* the Manufacturers *vide* email dated 23 March 2012 to Shri Kumaraswami and requested him to seek concurrence of Shri S. K. Khurana of OP-3 for the same. Shri Kumaraswami in turn contacted Shri S. K. Khurana and wrote back to Shri Suvamoy Saha conveying that Shri Khurana required details of the modalities of newspaper advertising *etc.* Subsequently, Shri Kumaraswami after an informal discussion with Shri Gupta of TPM consultants, wrote an e-mail dated 24 March 2012 to Shri Suvamoy Saha of OP-1 raising an apprehension that such press release by the association, *i.e.* AIDCM may attract attention of the Competition Commission of India. This e-mail is reproduced below:

"Dear Suvamoy,
This is further to my mail giving my suggestions on the draft. I had a meeting with Mr. Gupta this afternoon to discuss various issues post initiation of investigation – now expected by 28th or 29th. I was casually talking to him that the industry will be passing on duty increases with immediate effect and that the Association may be issuing a press release in this connection. According to him such a release by the association may, repeat may, attract the attention of Competition Commission – very active these days – and should be avoided. He has not- neither have I- come across any press release by any association on such matters. I have seen news items planted by individual companies mostly carmakers. Pl discuss internally and with other members and advice.
Regards

Kumar"

9.26 In view of the apprehension raised by Shri Kumaraswami in his e-mail, Shri Suvamoy Saha asked OP-4 not to issue any press release. When Shri Kumaraswami during his deposition on 10 January 2017 was asked to offer his comments on the above e-mail. He stated as follows:

"Mr. Suvamoy Saha of Eveready had suggested the issue of press release regarding price hike to be released by the Association, but I refused to let the Association be drawn into such thing."

9.27 The Commission is of the view that contention of Shri Kumaraswami that he refused to be drawn into such things *i.e.* price announcement, cannot be accepted considering that he played an active role in seeking concurrence of Shri Khurana, provided feedback to Shri Saha and later, after an informal discussion with Shri Gupta rendered considered advice to Shri Saha. There is also evidence on record to show that subsequently Shri Kumaraswami, *vide* email dated 20 March 2014, passed on the information of press release on price increase by OP-1 to the other two members, namely, OP-2 and OP-3. This shows that the individuals of OPs including OP-4 were fully aware that their conduct was in contravention of the Act.

9.28 In view of the foregoing, the Commission finds that OP-4 through its practices, decisions and conduct of the office bearers *i.e.* individuals of OP-4, facilitated anti-competitive agreement/ understanding and concerted action amongst its members in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

9.29 Further, the Commission finds that contention of Shri Ravindra Grover, Secretary of OP-4, that Section 48 of the Act does not apply to an unregistered association of companies and no proceedings against him can be initiated under Section 48(2) of the Act as he was not the Secretary of a 'company' but an association, is misconceived. In this regard, it is pointed out that Explanation (a) to Section 48 of the Act clearly provides that the term 'company' means a body corporate and includes a firm or other association of individuals. Thus, AIDCM being an association of individuals/ companies is squarely covered under Section 48 of the Act and individuals of OP-4 can be held liable under Section 48 of the Act once it is established that contravention has been made by the association.

9.30 In view of the foregoing, the Commission is of the opinion that OP-1, OP-2 and OP-3 have been involved in cartelisation of zinc-carbon dry cell batteries in India which has been facilitated by OP-4, in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act. Further, the individuals of OPs have also been actively involved in the said cartelisation in the domestic market.

10. **Evaluation of Applications for Lesser Penalty**

10.1 As mentioned earlier, the Commission received Lesser Penalty Applications from OP-1, OP-2 and OP-3 in the present matter. Keeping in view the sequence in which they approached the Commission under Regulation 5 of Lesser Penalty Regulations read with Section 46 of the Act, it granted First Priority Status to OP-3, Second Priority Status to OP-1 and Third Priority Status to OP-2.

10.2 The Commission observes that the information and evidence provided by OP-3, first applicant to file Lesser Penalty Application, was crucial in assessing the domestic market structure of the zinc-carbon dry cell batteries, nature and extent of information exchanges amongst OPs with regard to the cartel and identifying the names, locations and email accounts of key persons of OPs actively involved in the cartel activities. The information and cooperation received from OP-3 enabled the DG to conduct search and seizure operations at the premises of the Manufacturers and seize quality evidence in the form of emails, handwritten notes and various other documents. Thus, full and true disclosure of information and evidence and continuous cooperation provided by OP-3, not only enabled the Commission to order investigation into the matter, but it also helped in establishing the contravention of Section 3 of the Act by.

10.3 With respect to the Lesser Penalty Applications of OP-1 and OP-2, the Commission notes that incriminating documents (both hard and soft copies) recovered and seized from the premises of the Manufacturers during the search and seizure operations on 23 August 2016 were independently sufficient to establish the contravention of Section 3 of the Act by OPs. Therefore, information/ evidence on cartel including the period of cartel, submitted by OP-1 and OP-2 did not result in 'significant value addition' as is claimed by them in their submissions. But, the Commission also notes that both OP-1 and OP-2 have provided genuine, full, continuous and expeditious cooperation during the course of investigation in the present case.

10.4 On the basis of the foregoing, the Commission decides, as follows:

(a) The Commission grants reduction of 100 (hundred) percent of the penalty leviable under the Act, to OP-3.

(b) The Commission observes that OP-1, who is second in making a disclosure in this case, approached the Commission not at the beginning but at a later stage of the investigation, *i.e.* three days after the search and seizure operations had been carried out by the DG. OP-1 has claimed that the disclosures made in its Lesser Penalty Application regarding product involved, commencement/ duration of cartel, membership of Geep in AIDCM, *modus operandi* of cartel, evidence of role of AIDCM and involvement of certain individuals such as Shri Osamu Oyamada *etc.* demonstrated that it had met the

requirements of 'significant value addition'. On careful examination of the material submitted by OP-1, the Commission finds that almost all disclosures made by OP-1 were available with the Commission/ DG either as disclosures by OP-3 or material obtained by DG during search and seizure operation. However, OP-1 through several oral statements supported by contemporaneous documents, corroborated information already in possession of the DG and helped connect the evidence gathered during the search and seizure operations. Taking into account these factors, priority status as well as continuous and expeditious co-operation extended by OP-1 including admission of cartelisation, the Commission decides to grant 30 (Thirty) percent reduction in the penalty to OP-1 than what would otherwise have been imposed on it had it not cooperated with the Commission and admitted to the cartelisation.

(c) The Commission notes that OP-2, who is third in making a disclosure in this case, has also through several oral statements supported by contemporaneous documents, corroborated certain information already in possession of the DG and explained the evidence gathered during the search and seizure operations. However, the Applicant approached the Commission not at the beginning but after nearly three weeks of the search and seizure operations of the DG. Taking into account these factors, the priority status granted and continuous and expeditious co-operation extended by OP-2 including admission of cartelisation, the Commission decides to grant 20 (Twenty) percent reduction in the penalty to OP-2 than what would otherwise have been imposed on it had it not cooperated with the Commission and admitted to the cartelisation.

ORDER

11. In view of the above findings of contravention against OP-1, OP-2, OP-3 and OP-4 and their aforementioned individuals, the Commission directs them to cease and desist from indulging in such anti-competitive conduct in future.

12. As regards the penalty to be imposed under Section 27 of the Act, the Commission observes that the Manufacturers have accepted that they had an understanding / arrangement with each other to cartelise in the zinc-carbon dry cell battery in the domestic market. Moreover, conduct of OP-4 as a facilitator, stands conclusively established by the DG.

13. Further, it is noted that in the instant case the cartel continued for a period of more than six years. The Manufacturers had a clear agreement/ understanding to increase price of zinc-carbon dry cell battery in the market. To this end, they exchanged information on prices, monitored each other's prices and took steps to curb price competition amongst them. They also allocated market amongst them based on geographical area and types of batteries. The Manufacturers admitted to these anti-competitive activities unequivocally in their Lesser Penalty Applications; however, they also pointed out certain mitigating factors peculiar to the zinc-carbon dry cell battery industry such as less per capita

demand, rising input costs, low value of the product, little margin/ profit in sale of the product, competition from cheap imports *etc.* in their response to the investigation report of the DG.

14. Considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on OP-1, OP-2 and OP-3 in terms of the proviso to Section 27 (b) of the Act which provides as follows:

"*Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of upto three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher*."

15. On careful consideration of the aggravating and mitigating factors in the case and keeping in view the above provision of the Act, the Commission decides to levy penalty at the rate of 1.25 times of the profits of the Manufacturers for each year for the duration of the cartel. In case of AIDCM (OP-4), the Commission notes that the receipts of OP-4 are not significant and for achieving deterrent effect it would be appropriate to levy the penalty at the rate of 10 (ten) percent of the average of its gross receipts for the last preceding three financial years. Accordingly, the leviable penalty is tabulated below:

EVEREADY INDUSTRIES INDIA LTD. (OP-1)

Years	Profit After Tax	Penalty at 1.25 times of relevant profit (Rupees in crores)
2009-10	31.57	34.06*
2010-11	24.03	30.04
2011-12	-11.66#	0
2012-13	5.12	6.40
2013-14	7.94	9.93
2014-15	43.95	54.94
2015-16	53.91	67.39
2016-17	85.23	42.32*
	Total Penalty	**245.07**

INDO NATIONAL LTD. (OP-2)

Years	Profit After Tax	Penalty at 1.25 times of relevant profit (Rupees in crores)
2009-10	8.19	8.83*
2010-11	6.50	8.12
2011-12	-1.67*	0
2012-13	-11.62*	0
2013-14	3.03	3.79
2014-15	12.62	15.77
2015-16	7.38	9.22
2016-17	14.28	709*
	Total Penalty	**52.82**

PANASONIC ENERGY INDIA CO. LTD. (OP-3)

Years	Profit After Tax	Penalty at 1.25 times of relevant profit (Rupees in crores)
2009-10	8.39	9.05*
2010-11	5.79	7.23
2011-12	0.30	0.37
2012-13	-0.08*	0
2013-14	7.77	9.72
2014-15	19.95	24.93
2015-16	18.29	22.87
2016-17	1.01	0.50*
	Total Penalty	**74.68**

* *On a pro-rata basis for the duration of the cartel for the said financial year. For FY 2009-10, relevant profit considered from 20.05.2009 to 31.03.2010 i.e. 315 days out of 365 days. For FY 2016-17 relevant profit considered from 01.04.2016 to 23.08.2016 i.e. 145 days out of 365 days*

Negative profit for the concerned financial years (excluded).

ASSOCIATION OF INDIAN DRY CELL MANUFACTURERS (OP-4

Financial Years	Amount in INR(Total Receipts)
2014-15	6,36,980

2015-16	15,27,719
2016-17	33,98,810
Average turnover for preceding 3 years	18,54,503
Total Penalty (10 percent of average turnover for preceding 3 years) 1,85,450	

16. Considering that the Commission has decided to grant 30 (Thirty) percent reduction in penalty to OP-1 under Section 46 of the Act, as recorded hereinabove, total amount of penalty to be paid by OP-1 is INR 171.55 crores (Rupees One Hundred Seventy-One crores and Fifty-Five lakhs).

17. Considering further that the Commission has decided to grant 20 (Twenty) percent reduction in penalty to OP-2 under Section 46 of the Act, as recorded hereinabove, total amount of penalty to be paid by OP-2 is INR 42.26 crores (Rupees Forty-Two crores and Twenty Six lakhs).

18. Lastly, considering that the Commission has decided to grant 100 (One Hundred) percent reduction in penalty to OP-3 under Section 46 of the Act, as recorded hereinabove, total amount of penalty to be paid by OP-3 is NIL.
19. Total amount of penalty to be paid by OP-4 is INR 1,85,450 (Rupees One Lakh Eighty Five Thousand Four Hundred and Fifty).

20. The Commission directs OPs to deposit the penalty amount within 60 days of receipt of this order.

21. So far as the liability of the individuals of OPs in terms of the provisions of Section 48 of the Act is concerned, the DG after finding OPs *i.e.,* OP-1, OP-2, OP-3 and OP-4 to be in contravention of the provisions of the Act, has investigated and highlighted the individual roles of their personnel for the purposes of Section 48 as below:
Individuals of OPs found to be guilty of contravention of the Act and liable for penalty under Section 48 of the Act:
22. The Commission has already held that the impugned acts / conduct of OP-1, OP-2, OP-3 and OP-4 are in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act. The liability of the individuals of OP-1, OP-2, OP-3 and OP-4 under the provisions of Section 48 of the Act flows vicariously. In the instant case, the Commission observes that individuals of the respective OPs, as mentioned in Para 6.11, have been identified to be liable under Section 48 of the Act by the DG

23. No individual of OPs has shown that contravention of the Act was committed without his knowledge or that he had exercised due diligence to prevent the commission of contravention. But for two individuals of OP-2, namely, Shri P. Dwaraknath Reddy and Shri Hemant Gupta, who have questioned the finding of the DG, none of the other individuals of the Manufacturers mentioned by the DG, have disputed the finding in respect of those held liable under Section 48 of the Act. Therefore, each one of them is deemed to be guilty of the contravention of the Act and is liable for penalty under Section 48 of the Act.

24. In respect of Shri Reddy and Shri Gupta, who have disputed the finding of their involvement in the cartelisation of zinc-carbon dry cell battery, the Commission observes as under:

a) In respect of involvement of Shri P. Dwaraknath Reddy, the Commission has considered the submission that no incriminating evidence has been found against him by the DG and accordingly, he may be exonerated. The Commission observes that Shri P. Dwaraknath Reddy has been the Managing Director and CEO of OP-2 since October 2009. The collusion for such a long period of time could not have been possible without his knowledge and implicit approval. Moreover, in the Lesser Penalty Application of OP-2, Shri P. Dwaraknath Reddy has been named as a person associated with the cartel. During investigation also, it was identified that Shri P. Dwaraknath Reddy is overall in-charge of running the affairs of OP-2. More importantly, Shri P. Dwaraknath Reddy has neither been able to demonstrate that contravention of the Act was committed without his knowledge nor anything to show that he had exercised due diligence to prevent the commission of contravention. Therefore, Shri P. Dwaraknath Reddy is deemed to be guilty of the contravention and is liable for penalty under Section 48(1) of the Act.

b) In respect of Shri Hemant Gupta's involvement in the cartel, the Commission has considered the submission that he was only executive assistant of the Joint Managing Director of OP-2 and accordingly, he has not been involved in the cartel. The Commission, however, observes that in the Lesser Penalty Application of OP-2, Shri Hemant Gupta has been named as a person associated with the cartel. Further, the investigation has revealed that, Shri Hemant Gupta, AGM-Executive Assistant to Joint Managing Director of OP-2, had assisted Shri R. P. Khaitan, Joint Managing Director of OP-2, in the cartel arrangement by providing regular feedback points/ agenda for discussion with the individuals of OP-1 and OP-3. Not only that, Shri Hemant Gupta directly exchanged commercially sensitive information with senior personnel and his
counterparts in OP-1 and OP-3. Thus, there is enough evidence to show that Shri Hemant Gupta was actively involved alongwith his superiors and he executed the anti-competitive directions of his seniors on his own volition. Therefore, the Commission holds Shri Hemant Gupta liable under Section 48(2) of the Act.

25. *Role of the individuals of OP-4:* The Commission holds two individuals of AIDCM, namely, Shri Ravindra Grover and Shri S. Kumaraswami, who were functioning as Secretary of AIDCM liable for violation of Section 48 of the Act as they played an active role in aiding cartelisation in the domestic dry cell battery market. The Commission also holds Shri S. K. Khurana, who was the Chairman of OP-4 from February 2012 to September 2015, and Shri R. P. Khaitan, who was President of OP-4 from September 2015 to August 2016, liable in their capacity as the office-bearers of OP-4. Although Shri Deepak Khaitan of OP-1, the former President of AIDCM was also found liable by the DG, the Commission has allowed the request for deletion of his name as he passed away on 9 March 2015.

26. Thus, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty in terms of Section 27(b) of the Act calculated at the rate of 10 percent of the average of their income for the last three preceding financial years on the following individuals of OP-1, OP-2, OP-3 and OP-4:

INDIVIDUALS OF OP-1

S. No.	Name	Income in FY 2014-15	Income in FY 2015-16	Income in FY 2016-17	Average Income for three years	Penalty Imposed
(i)	Shri Suvamoy Saha	2,20,06,658	2,39,27,708	2,66,39,966	2,41,91,444	24,19,144
(ii)	Shri Partha Biswas	83,88,108	93,17,406	1,00,25,057	92,43,524	9,24,352
(iii)	Shri Anil Bajaj	55,93,721	53,31,617	55,83,200	55,02,846	5,50,285
(iv)	Shri Kunal Gupta	48,64,011	50,47,482	60,71,233	53,27,575	5,32,758
(v)	Shri Indranil Roy Chowdhury	40,72,723	51,13,169	62,38,902	51,41,598	5,14,160
(vi)	Shri Amritanshu Khaitan	1,99,41,302	2,87,64,271	3,19,93,973	2,68,99,849	26,89,985

INDIVIDUALS OF OP-2

S.	Name	Income in	Income in	Income in	Average	Penalty

No.		FY 2014-15	FY 2015-16	FY 2016-17	Income for three years	Imposed
(i)	Shri R.P. Khaitan	1,11,12,525	1,35,21,434	1,27,54,779	1,24,62,913	12,46,291
(ii)	Shri M. Sankara Reddy	55,15,144	61,62,402	67,85,157	61,54,234	6,15,423
(iii)	Shri B. L. N. Prasad	22,54,841	25,24,510	29,05,877	25,61,743	2,56,174
(iv)	Shri Hemant Gupta	18,62,140	19,84,315	20,76,347	19,74,267	1,97,427
(v)	Shri P. Dwaraknath Reddy	80,99,043	94,65,632	93,20,005	89,61,560	8,96,156
(vi)	Shri Santosh Tanmay@		16,57,863	24,53,281	20,55,572	2,05,557
S. No.	**Name**	**Income in FY 2013-14**	**Income in FY 2014-15**	**Income in FY 2015-16**	**Average Income for three years**	**Penalty Imposed**
(i)	Shri Manas Mitra@@	8,38,963	8,70,849	8,69,252	8,59,688	85,969
S. No.	**Name**	**Income in FY 2011-12**	**Income in FY 2012-13**	**Income in FY 2013-14**	**Average Income for three years**	**Penalty Imposed**
(i)	Shri Latesh Madan@@@	15,06,025	22,70,205	22,21,136	19,99,122	1,99,912

@ Shri Santosh Tanmay / Santosh Kumar was employee of OP-2 from 1 April 2015 to 31 May 2017. Income details have been considered, accordingly

@@ Shri Manas Mitra was employee of OP-2 from 1 December, 1983 to 31 December, 2015. Income details have been considered, accordingly

@@@ Shri Latesh Madan was employee of OP-2 from 5 September, 2011 to 1 June, 2013. Income details have been considered, accordingly

INDIVIDUALS OF OP-3

S. No.	Name	Income in FY 2014-15	Income in FY 2015-16	Income in FY 2016-17	Average Income for three years	Penalty Imposed
(i)	Shri A.K. Dhanda	10,86,882	14,71,239	14,37,327	13,31,816	1,33,182
(ii)	Shri R. R. Desai	10,71,187	10,83,395	10,76,126	10,76,903	1,07,690
(iii)	Shri Parimal Vazir	14,11,753	16,63,516	14,96,228	15,23,832	1,52,383
(iv)	Shri Ketan Valand	3,63,891	4,11,434	4,00,441	3,91,922	39,192
(v)	Shri S.K. Khurana	90,36,610	1,25,85,124	1,62,61,701	1,26,27,812	12,62,781
S. No.	**Name**	**Income in FY 2013-14**	**Income in FY 2014-15**	**Income in FY 2015-16**	**Average Income for three years**	**Penalty Imposed**
(vi)	Shri Hideya Maekawa@	37,35,396	55,14,609	27,61,857	40,03,954	4,00,395
@ Shri Hideya Maekawa was employee of OP-3 from January 2012 to November 2015						

INDIVIDUALS OF OP-4

S. No.	Name	Income in FY 2011-12	Income in FY 2012-13	Income in FY 2013-14	Average Income for three years	Penalty Imposed
(i)	Shri Subramania Kumaraswami, Secretary	6,39,615	6,55,289	8,38,166	7,29,023	71,102
S. No.	**Name**	**Income in FY 2014-15**	**Income in FY 2015-16**	**Income in FY 2016-17**	**Average Income for three years**	**Penalty Imposed**
(ii)	Shri Ravindra Grover, Secretary	22,50,108	26,98,559	32,99,870	27,49,512.33	2,74,951

S. No.	**Name**	**Income in FY 2014-15**	**Income in FY 2015-16**	**Income in FY 2016-17**	**Average Income for three years**	**Penalty Imposed**
(iii)	Shri S. K. Khurana	90,36,610	1,25,85,124	1,40,34,071	1,26,27,812	12,62,781
S. No.	**Name**	**Income in FY 2014-15**	**Income in FY 2015-16**	**Income in FY 2016-17**	**Average Income for three years**	**Penalty Imposed**
(iv)	Shri R.P. Khaitan	-	-	-	-	-

27. The Commission has decided to levy penalty on individuals of OP-4 as shown in Para 26 above. With respect to Shri R. P. Khaitan, it is pointed out that he has already been penalised as individual of OP-2. Accordingly, no penalty is levied on him separately for his role in the cartelisation as office bearer of OP-4.

28. Considering that the Commission has decided to grant 30 (Thirty) percent reduction in penalty to OP-1 under Section 46 of the Act as recorded hereinabove, the Commission allows the reduction in penalty by the same quantum to Shri Amritanshu Khaitan, Shri Suvamoy Saha, Shri Partha Biswas, Shri Anil Bajaj, Shri Indranil Roy Chowdhury and Shri Kunal Gupta of OP-1 under Section 46 of the Act. Thus, the total amount of penalty to be paid by each of above individuals of OP-1 is as follows:

S.No.	**Name**	**Penalty Payable after Reduction**
(i)	Shri Suvamoy Saha	16,93,401
(ii)	Shri Partha Biswas	6,47,047
(iii)	Shri Anil Bajaj	3,85,199
(iv)	Shri Kunal Gupta	3,72,930
(v)	Shri Indranil Roy Chowdhury	3,59,912
(vi)	Shri Amritanshu Khaitan	18,82,989

29. Similarly, considering that the Commission has decided to grant 20 (Twenty) percent reduction in penalty to OP-2 under Section 46 of the Act, the Commission allows the same quantum of reduction in penalty to Shri R. P. Khaitan, Shri M. Shankara Reddy, Shri B. L. N. Prasad, Shri Hemant Gupta and Shri P. Dwarkanath Reddy under Section 46 of the Act. Thus, the amount of penalty to be paid by each of the above individuals of OP-2 is as follows:

S. No.	Name	Penalty Payable after Reduction
(i)	Shri R.P. Khaitan	9,97,033
(ii)	Shri M. Sankara Reddy	4,92,339
(iii)	Shri B. L. N. Prasad	2,04,940
(iv)	Shri Hemant Gupta	1,57,941
(v)	Shri P. Dwarkanath Reddy	7,16,925
(vi)	Shri Santosh Tanmay	1,64,446
(vii)	Shri Manas Mitra	63,814
(viii)	Shri Latesh Madan	1,59,930

30. So also, considering that the Commission has decided to grant cent percent (Hundred percent) reduction in penalty to OP-3 under Section 46 of the Act as recorded hereinabove, the Commission allows the same reduction in penalty to Shri Hideya Maekawa, Shri A. K. Dhanda, Shri R. R. Desai, Shri Parimal Vazir, Shri Ketan Valand and Shri S. K. Khurana of OP-3 under Section 46 of the Act. Thus, no penalty is levied on any of these individuals of OP-3.

31. The Commission directs the parties to deposit the respective penalty amount within 60 days of receipt of this order.

32. The Secretary is directed to inform the parties accordingly.

Nagrik Chetna* v. *Fortified Security Solutions

Case No. 50 of 2015, order dated 01.05.2018

1. The present case was initiated on the basis of an information filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the 'Act') by Nagrik Chetna Manch against Fortified Security Solutions (hereinafter, 'OP-1'), Ecoman Enviro Solutions Pvt. Ltd. (hereinafter, 'OP-2') and Pune Municipal Corporation (hereinafter, 'OP-3/ PMC'). At a later stage, on request by the DG, four entities *i.e.* Lahs Green India Pvt. Ltd. (hereinafter, 'OP-4'), Sanjay Agencies (hereinafter, 'OP-5' Mahalaxmi Steels (hereinafter, 'OP-6') and Raghunath Industry Pvt. Ltd. (hereinafter, 'OP-7') were included as Opposite Parties in the matter.

2. The Informant obtained information from the website of PMC regarding certain tenders floated by it during the period of December 2014 to March 2015 for "Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)" *viz.* Tender nos. 34, 35, 44, 62 and 63 of 2014. On examination of the bid information and the tender documents submitted by the bidders for these tenders, the Informant found that bidding for these tenders appeared to involve anti-competitive practices in contravention of the provisions of Section 3 of the Act. Thus, the Informant approached the Commission with the present information.

3. After perusing the information, the Commission was of *prima facie* view that the case involved bid rigging and/ or collusive bidding in violation of Section 3(3) read with Section 3(1) of the Act. Therefore, the Commission *vide* its order passed under Section 26(1) of the Act on 29.09.2015 directed the Director General (hereinafter, the 'DG') to investigate the case.

DG's Investigation:

4. With respect to the five tenders under consideration, the DG noted that:

a. In Tender no. 34 of 2014 (for a project duration of six (06) months), three entities *i.e.* OP-1, OP-2 and OP-4 participated and OP-2 emerged L1 bidder with the lowest bid of Rs. 74,95,500/-.

b. In Tender no. 35 of 2014 (for a project duration of six (06) months), three entities *i.e.* OP-1, OP-2 and OP-4 participated and OP-2 emerged L1 bidder with the lowest bid of Rs. 54,96,500/-.

c. In Tender no. 44 of 2014 (for a project duration of three (03) months), OP- 1, OP-2, OP-4 and Aruna Green Venture Pvt. Ltd. participated. However, Aruna Green Venture Pvt. Ltd. was declared ineligible for the bid, as it did not fulfill the qualifying criteria of having at least one year of experience in operation and maintenance of similar plant with any Government / Semi Government / Private installation. OP-2 emerged L1 bidder in this tender with the lowest bid of Rs. 17,50,000/-

d. In Tender no. 62 of 2014 (for a project duration of sixty-six (66) months), OP-2, OP-5, OP-6 and Greenlite Power India Pvt. Ltd. participated in bid. However, Greenlite Power India Pvt. Ltd. was declared ineligible for the bid, as it did not

provide any distributor proof, certificate of experience or proof of sales tax. OP-2 emerged L1 bidder with the lowest bid of Rs. 9,08,84,235/

e. In Tender no. 63 of 2014 (for a project duration of sixty-six (66) months), five entities *i.e.* OP-2, OP-5, OP-6, Bioenable Technologies Pvt. Ltd. and Greenlite Power India Pvt. Ltd. participated in the bid. However, two of these entities *i.e.* Bioenable Technologies Pvt. Ltd. and Greenlite Power India Pvt. Ltd. were declared ineligible because they failed to sign the tender documents and did not provide any proof documents, company profile *etc.* OP-2 emerged L1 bidder with the lowest bid of Rs. 6,19,53,345/-.

Thus, from the above the DG noted that in the five tenders that were subject matter of investigation, OP-2 participated in all the five tenders and emerged as L-1 bidder in all of them. With respect to participation of other OPs, it was noted that OP-1 and OP-4 had participated only in Tender no. 34, 35 and 44 of 2014 and OP-5 and OP-6 had participated only in Tender no. 62 and 63 of 2014.

Tender no. 34, 35 and 44 of 2014

Address and Contact Details

5.OP-1 and OP-2 had a common place of business *i.e.* A-10 Shreyas Apartments, Opposite E-Square, Shivaji Nagar, Pune-411016 and they were managed by a common person *i.e.* Shri Bipin Vijay Salunke even though they were separate legal entities and had bid as competitors.

6. Further, the DG examined the 'contact details of a person for the bid' for Tender no. 34, 35 and 44 of 2014 and it was found that the phone number given by OP-1 in the contact details belonged to Shri. Parimal Salunke who was neither a proprietor nor the official designated to file online tender for OP-1. He was in fact an Executive Director in OP-2, which was the competitor of OP-1 in the said tender.

Demand Drafts for Earnest Money Deposit (EMD)

7. It was noted that the Demand Drafts (hereinafter, 'DD') submitted by OP-1 and OP-4 for EMD for Tender no. 34 of 2014 were prepared from the same bank *i.e.* Bank of Maharashtra, Pune main branch on the same date *i.e.* 20.12.2014. Also, the DD nos. were very close to each other *i.e.*, 816612 and 816621, suggesting that they were prepared almost around the same time. The DG did not consider this to be a mere coincidence, as OP-4 had its office in Thane, different town far away from Pune. Moreover, the account from which EMD amount of OP-4 was debited belonged to Shri Bipin Vijay Salunke, the proprietor of OP-1 and a director in OP-2, which were the other bidders for the tender. Thus, there appeared to be a common design and an understanding whereby the DDs for EMD were prepared by debiting the accounts of a common person who was the director in the company (OP-2) making L1 bid.

8. In case of Tender no. 35 of 2014 also the DDs of OP-1 and OP-4 for EMD amount of Rs. 50,000/- were prepared from the same bank *i.e.* Bank of Maharashtra, Pune main branch but on different dates. As in case of Tender no. 34 of 2014, in this tender also the bank accounts held by Shri Bipin Vijay Salunke, were used for preparing DDs for EMD amount for tender by all the three bidders.

9. In case of Tender no. 44 of 2014 also it was found that the DDs for OP-2 and OP-4 were prepared from the same Bank *i.e.* Bank of India, JM Road Branch, Pune, even though OP-4 was based in Thane, a city away from Pune. The DD of OP-1 was prepared from Bank of Maharashtra, Pune Branch. The DG observed that all the three drafts were prepared on the same date *i.e.* 31.12.2014. Moreover, the DDs of OP-2 and OP-4 had consecutive numbers *i.e.* 023959 and 023960. In addition, it was noted that the DD application of OP-4 mentioned the name "Bipin V. Salunke" under the head "Applicant's name and other details or Account Number".

Internet Protocol Address used for Uploading Tender Documents:

10. Further, on examination of the Internet Protocol address (hereinafter, the 'IP address') used by the three bidders to upload the tender documents, the DG noted that, OP-1 and OP-4 had uploaded the documents for the tender no. 34, 35 and 44 of 2014 from the same IP address. In addition, the IP address of OP-1 and OP-4 were found to be registered with the same mobile number in the name of Shri Bipin Vijay Salunke, Director of OP-2, indicating that the documents for the tender were uploaded from the same place by the same person.

Tender no. 62 and 63 of 2014

Demand Drafts for Earnest Money Deposit:

11. In Tender no. 62 of 2014, the DD of OP-2 and OP-6 were prepared from the same bank *i.e.* Bank of Maharashtra, Pune Branch and on the same date *i.e.* 10.03.2015. Moreover, the DD numbers of OP-2 and OP-6 though not consecutively numbered, were very close to each other *i.e.* 125818 and 125821, and thus appeared to have been made around the same time.

12. Similarly, in case of Tender no. 63 of 2014 also, it was found that the DDs of OP-2 and OP-6 were prepared from the same bank *i.e.* Bank of Maharashtra, Pune Branch and on the same date *i.e.* 10.03.2015. Although, the DDs of OP-2 and OP-6 did not bear consecutive numbers, however, the DD nos. *i.e.* 025819 and 025822 indicated that they were made around the same time.

13. In addition, from the submissions of the Bank of Maharashtra, the DG found that Shri Vijay Raghunath Salunke of OP-7 was the applicant for EMD draft for OP- 6 in Tender no. 62 and 63 of 2014 who was neither the proprietor nor authorized official to file the tender online. Also, the draft of OP-6 was prepared by debiting the account jointly held by Shri Vijay Raghunath Salunke and Smt. Sulabha Vijay Salunke, who were neither director nor employee of OP-6, but were in fact parents of Shri Bipin Vijay Salunke.

Contact Details

14. Further, it was found that though Abdul Ruf Shaikh was the person designated to file the tender online for OP-6, the phone number given by OP-6 in the tender documents belonged to Shri Parimal Salunke who was neither a proprietor nor the official designated to file online tender for OP-6. Infact, he was an Executive director in OP-2, a competitor of OP-6 in the said tender.

Internet Protocol Address used for Uploading Tender Documents:

15. Furthermore, in case of Tender no. 62 of 2014, out of the four qualified bidders, two of them *i.e.* OP-5 and OP-6 were found to have the same IP Address. Whereas OP-2 and the ineligible bidder had different IP Address. The log-in and the log-out time of OP-5 and OP-6 showed that the bid documents were uploaded within a gap of just 15-20 minutes. Also, the IP Address of the OP-5 and OP-6 were found registered with the same mobile number which was in the name of Shri Bipin Vijay Salunke, director of OP-2..

16. Based on foregoing analysis, the DG was of the view that all the evidences indicated that the OPs were hand- in-glove with each other and had engaged in bid rigging/ cartelisation in Tender nos. 34, 35, 44, 62 and 63 of 2014.

Apart from above, the DG also confronted the above evidences and recorded statements of key officials of the OPs while conducting the investigation. The observations of the DG from the statements of various OPs are summarised below:-

17. Shri Manoj Kumar Gupta, proprietor of OP-6 admitted that OP-6 was a part of cartel.He also disclosed the *modus operandi* of the cartel and admitted that OP-6 was a proxy bidder, with aim to ensure that there were at least three (03) eligible bidders in the first round of bidding. He also stated that the relevant documents were provided by him for filing the tender and uploading of documents *etc.* and other work was done by Shri Bipin Vijay Salunke. He also stated that he did not receive any consideration or benefit for participation in the tender and it was done solely for the purpose of benefiting Shri Bipin Vijay Salunke.

18. Shri Sanjay Harakchand Gugle, partner of OP-5 admitted that OP-5 was a part of the cartel. OP-5 submitted bid as a proxy bidder, so that it was ensured that there were at least three eligible bidders in the first round of bidding itself and tender would ultimately be awarded to OP-2. He also admitted that he only provided the relevant documents for filing the tender and the uploading of the documents *etc.* and other work was done by Shri Bipin Vijay Salunke. He also stated that he did not receive any consideration or benefit for participation in the tender and it was done solely for the purpose of benefiting Shri Bipin Vijay Salunke.

19. Shri Saiprasad S. Prabhukhanolkar, Director of OP-4 stated that OP-4 was a part of the cartel. He also disclosed the *modus operandi* of the cartel and disclosed that OP-4 was a proxy bidder, so that it was ensured that there were at least three eligible bidders in the first round of bidding itself. He claimed that Shri Bipin Vijay Salunke requested him to provide documents required for the bid in the tenders and the DDs for the EMD were prepared by OP-2 directly without the knowledge of OP-4. He stated that he did not receive any consideration or benefit for participation in the tender and it was done solely for the purpose of benefiting Shri Bipin Vijay Salunke.

20. Shri Vijay Raghunath Salunke, Director of OP-7_denied being aware of details of the cartel and also denied being offered any consideration for the same. He claimed that this was done at the behest of Shri Bipin Vijay Salunke. Further OP-7 had given authorization to OP-1 as at that time OP-1 was not engaged in manufacture of

composting machines. This help was rendered by OP-7 at the behest of Shri Bipin Vijay Salunke to ensure that at least three eligible bids were placed for the tenders.

21. Shri Bipin Vijay Salunke Proprietor of OP-1 & Director of OP-2 admitted to the existence of cartel and rigging of tender nos. 34, 35, 44, 62 and 63 of 2014. Further, he admitted that he had a lead role in bid rigging and other entities *i.e.* OP-1, OP-4, OP-5 & OP-6 were propped up as proxy bidders to enable OP-2 to win the tenders. In addition to the above, the DG found from the statement of Shri Bipin Vijay Salunke that his relative Shri Parimal Salunke was also coordinating with other bidders in the cartel. On instructions of Shri Bipin Vijay Salunke, he had procured the digital keys from the office of PMC and also prepared the DDs for EMD on their behalf for the said tenders

22. Thus, from the evidences gathered during the investigation and the statements of person(s)/ officer(s) of OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7, the DG concluded that there was bid rigging/ collusive bidding in the Tender nos. 34, 35, 44, 62 and 63 of 2014 for 'Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)' in contravention of Section 3(3)(d) read with Section 3(1) of the Act. Further, the DG concluded that there was also meeting of minds and co-ordination between various individuals which included the proprietor/ partner/ director of OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7. Accordingly, the DG identified such person(s)/ officer(s) to be liable under Section 48(2) of the Act.

23. The Commission considered the investigation report of the DG on 30.08.2017 and decided to forward the same to the Informant, the OPs and also to their person(s)/ officer(s) found to be liable under Section 48 of the Act by the DG *i.e.* (i) Shri Bipin Vijay Salunke (for OP 2); (ii) Shri Parimal Salunke (for OP 2); (iii) Shri Saiprasad Sharadchandra Prabhukhanolkar (for OP-4); (iv) Shri Sanjay Harakchand Gugle (for OP-5) and (v) Shri Vijay Raghunath Salunke (for OP 7), for filing their objections/ suggestions, if any.

Analysis:

Before proceeding to decide the case on merits, the Commission deems it appropriate to address certain legal and procedural issues raised by some of the OPs.

Legal Issue:

Whether Section 3(3) of the Act is applicable in the instant case when not all OPs are engaged in 'identical or similar trade of goods or provision of services'.

24. In this regard, it is observed that a plain reading of Section 3(3) of the Act shows that any agreement, practice, or decision, including cartels, by enterprises, persons or association thereof is amenable to the jurisdiction of the Commission if the parties that are engaged in identical or similar trade of goods of provision of service are directly or indirectly engaged in bid rigging/ collusive bidding, which means that they are competitors in the market. Some OPs herein, however, contend that they are not competitors as they are engaged in different trades and are, therefore, not

covered by the provision of Section 3(3) of the Act.

25. The issue that arises before the Commission is that when bid rigging is alleged in the tender process after the same has taken place, should it be open for any of the bidders to contend that they would not be covered by the provisions of the Act as they had not started that business activity at all at the time of bidding whereas the other bidders were well established players. In other words, whether in the context of Section 3(3)(d) of the Act the phrase 'engaged in' ought to be accorded the literal meaning or a meaning that advances the objectives of the Act. In this regard, the Commission notes that it is a well settled principle of law that when two interpretations are feasible, that which advances the remedy and suppresses the evil has to be preferred as envisioned by the legislature.

26. The Commission is of the view that it is the business activity of the parties that they are actually bidding for and the one regarding which the violation of law has been alleged which is relevant for the purpose of the applicability of Section 3(3)(d) Act rather than any other business activity(s) parties 'were' or 'are' engaged in. If the parties were allowed to escape the grasp of the Act by considering them as not competitors on the pretext that they are actually engaged in varied businesses, it may defeat the very purpose of the provisions of Section 3(3) (d) of the Act. Any construction other than this would mean that new entrants are totally exempt from the provisions of bid rigging for the reason that they are or were not involved in that business at the time of bidding. This would not only render the provision of Section 3(3)(d) nugatory but would make it totally redundant.

Procedural Issues

A. Breach of confidentiality by the DG/ Commission

27. It is noted that one objection that almost all OPs have taken is the issue of breach of confidentiality by the DG/ Commission. The OPs have claimed that DG,by disclosing the contents of their statements made before it in the investigation report as non-confidential information, has in effect disclosed the contents of their respective Lesser Penalty Application in breach of confidentiality accorded in terms of the Lesser Penalty Regulations. Further, the Commission by forwarding such report to the OPs has aided the breach of confidentiality.

28. The Commission observes that it is well recognized fact that the investigation report is not a public document and is not to be shared with public. This aspect is enshrined in Regulation 47 of the Competition Commission of India (General) Regulations, 2009 (hereinafter, 'General Regulations'), which clearly provides that the proceedings before the Commission are not open to public, except where the Commission so directs. In the instant case, there being no direction to make proceedings open to public, there was no question of sharing the investigation report of the DG with public.

29. However, despite this regulatory provision, the Informant shared the investigation report with the media for which, Shri S.C.N. Jatar, the President of the Informant, was directed to file an undertaking that the contents of the investigation

report as well as other information, documents and evidence obtained during proceedings would not be disclosed to any person who is not a party to the proceedings or used for a purpose other than the proceedings under the Act, which was subsequently filed.

30. In view of the foregoing, contention of the OPs that reputational harm has been caused due to action/ omission of the DG/ Commission appears to be misplaced. Such harm, if any, has been caused either due to disclosure of the contents of the investigation report of the DG by the Informant or due to OPs own acts of collusion in contravention of the provisions of the Act. The allegation against the DG/ Commission is nothing more than a ruse to get reduction or discharge from imposition of penalty under the Act.

B. The Investigation report of the DG does not reveal the fact that Lesser Penalty Applications had been filed by various OPs in the matter or the value addition provided by such Applications:

31. Some OPs have contended that the investigation report did not adequately deal with and distinguish between the evidences/ information that had been gathered by the DG on its own *vis-à-vis* those that had been furnished by the Lesser Penalty Applicant. Further, it is averred that by excluding the fact that OPs had filed a Lesser Penalty Application as well as the value addition that was provided by their information, investigation report has remained incomplete. The Commission with regard to this issue stated that the decision on significant value addition by the Lesser Penalty Applicant and consequent reduction in penalty to the Applicant is something which the Commission would decide and not the DG. Such a decision would be made looking into the contents of the Lesser Penalty Application, documents/ evidence obtained during investigation by the DG, investigation report of the DG and submissions of the OPs thereon. The observation in this regard would form part of the order of the Commission and not the investigation report of the DG.

Establishment of Violation:

32. The investigation revealed that lead role in the cartel was played by Shri Bipin Vijay Salunke, who is the director in OP-2 and L1 bidder in all the five tenders. He is also the sole proprietor of OP-1. The motive of cartelisation and bid rigging was to ensure that OP-2 emerged as L1 and won the tenders issued by PMC. To achieve this, Shri Bipin Vijay Salunke ensured that there were minimum three eligible bidders for each of the five tenders as the tender process guidelines laid down minimum of three technically qualified bidders for each bid. For this, Shri Bipin Vijay Salunke approached the directors/ partners/ proprietors of other OPs *i.e.* Lahs Green India Pvt. Ltd. (OP-4), Sanjay Agencies (OP-5) and Mahalaxmi Steels (OP-6) to bid as proxy bidders and file documents in Tender nos. 34, 35, 44, 62 and 63 of 2014. He also propped up OP-1 as proxy bidder in Tender nos. 34, 35 and 44 of 2014.

33. Two of the proxy bidders *i.e.* OP-1 and OP-6, did not have any experience or background in solid waste management and were thus, not eligible. However, Shri Bipin Vijay Salunke arranged for false authorization certificates for them

from OP-7 in which his father Shri Vijay Raghunath Salunke was a Director, thus, projecting them to be the authorized distributors of composting machine when in reality none of them was. Further, Shri Bipin Vijay Salunke prepared DDs for EMD for some of the proxy bidders.

34. For participation in Tender nos. 34, 35, 44, 62 and 63 of 2014, he obtained the relevant documents from proxy bidders *i.e.* OP-4, OP-5 and OP-6 and uploaded them on their behalf for the online tender. He decided and quoted the bid rates in the tenders filed on their behalf. All this was orchestrated by Shri Bipin Vijay Salunke though duly assisted by OP-4, OP-5 and OP-6 in the process. Thus, there is no doubt whatsoever on the meeting of minds and collusion amongst OP-1, OP-2, OP-4, OP-5 and OP-6 to rig the bid in Tender nos. 34,35, 44, 62 and 63 of 2014 floated by PMC.

35. As regards the role of OP-7, it is observed that OP-7 certified OP-1 and OP-6 as authorized distributor of composting machines to enable them to participate in the two tenders. Shri Vijay Raghunath Salunke, director of OP-7 accepted that he was aware that Shri Bipin Vijay Salunke would be taking help of other bidders for submission of tenders. Not only that, Shri Vijay Raghunath Salunke prepared two DDs on behalf of OP-6 from his bank account. These evidences show that OP-7 not only aided OP-1 and OP-6 to bid for tender but also played a pivotal role in the operation of the cartel.. Thus, the Commission finds that contravention of provisions of Section 3(3)(d) of the Act is made out in instant case not only against OP-1, OP-2, OP-4, OP-5 and OP-6 but also against OP-7

36. Additionally, the Commission notes that some of the OPs have averred that no appreciable adverse effect on competition in India has been caused by way of any alleged meeting of minds in this case, as the tenders that are under investigation were e-auction tenders open for all bidders. Therefore, the entry was not restricted in any manner due to the alleged agreement/ cartel and no actual loss was caused to PMC. Moreover, no consideration was derived from OP-2 by other bidders for submitting their bids, therefore, the latter did not even benefit from bid rigging. In this regard, the Commission observes that under the provisions of Section 3(3)(d) of the Act, bid rigging shall be presumed to have adverse effect on competition independent of duration or purpose and, also, whether benefit was actually derived or not from the cartel.Thus, in case of agreements listed under Section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the OPs.

37. In the present case, OPs have neither been able to rebut the said presumption nor been able to show how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. with respect to the averment of OPs that as bid rigging has not restricted entry there is no appreciable adverse effect on competition and, hence, no contravention of the provisions of Section 3(3) of the Act, the Commission observes that mere possibility that other bidders could have bid for the tender cannot absolve the colluding OPs from their conduct of bid rigging. Explanation to Section 3(3) of the Act makes it clear that bid rigging even includes an agreement that has the effect of reducing competition for bids or adversely affecting or manipulating the process of bidding. Therefore, even if a subset of

bidders collude amongst themselves to rig or manipulate bidding process, it would be a violation of Section 3(3)(d) of the Act.

38. In view of the forgoing, the Commission finds that OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7 have indulged in bid rigging/ collusive bidding in the aforesaid tenders of OP-3 in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.

39. With respect to the role of OP-3, it is noted that the DG has found evidence, which shows that OP-3 failed to detect cartelisation in its own tenders. It is clear from investigation that that OP-3 did not exercise due diligence while scrutinizing the bid documents. Even though there were several apparent indications of collusion like same IP addresses, common proprietor/ director, same office address, consecutive serial number for DDs *etc*., these were not taken into consideration by OP-3 while determining the eligibility of the bidders. Further, in Tender no. 62 and 63, OP-5 was considered an eligible bidder despite the fact that it neither had requisite experience in solid waste management, as required under tender conditions, nor had been authorized to supply composting machines by any manufacturer. Thus, there are glaring acts of omission and commission on part of OP-3, which intentionally or otherwise aided the bidders in cartelisation. However, this conduct cannot be said to be in contravention of the provision of Section 3(3)(d) of the Act and, thus, OP-3 cannot be held liable under the provisions of Section 3 of the Act.

40. So far as the individual liability of person(s)/ officer(s) under Section 48 of the Act is concerned, the Commission notes that the DG has identified Shri Bipin Vijay Salunke (OP-1 and OP-2), Shri Parimal Salunke (OP-2), Shri Saiprasad S. Prabhukhanolkar (OP-4), Shri Sanjay Harakchand Gugle (OP-5), Shri Manoj Kumar Gupta (OP-6) and Shri Vijay Raghunath Salunke (OP-7) as the person(s)/ officer(s) involved in the cartel under Section 48(2) of the Act. The Commission notes that under Section 48 separate liability arises against the officer(s)/ person(s) of the contravening company including partnership firms but not proprietorship firms. Thus, the Commission is of the view that provisions of this section would not apply to proprietorship firms. Accordingly, since OP-1 and OP-6 are proprietorship firms in the present case, the Commission decides not to hold their person(s)/ officer(s) separately liable under Section 48 of the Act. However, person(s)/ officer(s) who are the director/ executive director/ partners of OP-2, OP-4, OP-5 and OP-7, would be liable. In view of above, the Commission finds that each of the aforementioned persons played a key role in manipulation of the bid in Tender nos. 34, 35, 44, 62 and 63 and are, therefore, held to be liable under Section 48(2) of the Act.

ORDER

Computation of Penalty

As regards the penalty to be imposed under Section 27 of the Act, the Commission finds that OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7 entered into an arrangement to rig the bids and are, hence, responsible for infringement of the provisions of Section 3(3)(d) read with Section 3(1) of the Act and are liable for penalty. However, the Commission notes that in the instant case some OPs, namely, OP-5 and OP-6 have contended that they are not

engaged in any manufacture, trade or service pertaining to solid waste management, which were subject matter of the said tenders. Therefore, keeping in view the decision of Hon'ble Supreme Court in *Excel Crop Care (supra)* where "turnover" appearing in Section 27 of the Act has been interpreted to mean "relevant turnover", no penalty should be imposed on them as they do not have any "relevant turnover" or "relevant profit".

41. In this regard, the Commission observes that facts before the Hon'ble Supreme Court in that case were altogether different from the facts of this case. The Hon'ble Supreme Court invoked the principle of 'proportionality' and doctrine of 'purposive interpretation' in Excel Corp Care case to interpret the term 'turnover' in Section 27 of the Act as 'relevant turnover' to ensure that infringer does not suffer punishment which may be disproportionate to the seriousness of the infringement. This cannot be interpreted to mean that the infringer should not be punished at all. The Commission is of the view that in the peculiar facts of this case where OPs have admittedly submitted cover bids but are not engaged in the solid waste management *i.e.* the activity relating to which bid-rigging has taken place, interpretation of 'turnover' in Excel Crop Care case would not be applicable.

Evaluation of Lesser Penalty Applications:

OP-6

42. The Commission notes that the OP-6 was the first to accept the existence of a cartel/ bid rigging in Tender no. 62 and 63 of 2014 of PMC and submit information in support thereof. At the time OP-6 approached the Commission, DG had already gathered some evidence which indicated bid rigging/ collusion amongst OPs. However, OP-6 made a critical disclosure regarding *modus operandi* of the cartel. OP-6 disclosed not only the role of persons involved in the cartel but also made available copies of email exchange whereby documents were requested by and furnished to Shri Bipin Vijay Salunke. OP-6 also provided the bank statements showing transfer of amount from the account of Shri Manoj Kumar Gupta to the account of Shri Vijay Raghunath Salunke and *vice versa* after cancellation of tender. The Commission finds that except for the information regarding preparation of DDs, rest of the information provided by OP-6 made good value addition to the ongoing investigation as it provided a better and clear picture of the operation of cartel. The evidence provided in the Lesser Penalty Application and statement of Shri Manoj Kumar Gupta on 26.09.2016 before the DG accepting the existence of cartel substantiated the evidence in the possession of the DG/ Commission and completed the chain of events. Further, OP-6 supported the investigation and co-operated fully and expeditiously on a continuous basis throughout the investigation/ inquiry into the matter with the DG as well as the Commission. The Commission is satisfied with the cooperation offered by OP-6 and acknowledges that the evidence and cooperation provided by it helped the Commission's investigation in establishing the existence of a cartel in Tender no. 62 and 63 of 2014. No doubt, OP-6 was first to file an application under Section 46 of the Act but he came and filed the details not at the very beginning but at a later stage in the investigation, when some evidence was already in possession of the DG. Thus,

considering the above, the Commission decides to grant a reduction in penalty of *50% (fifty percent)* to the OP-6 than would otherwise have been leviable on it.

OP-5

43. The investigation report of the DG shows that at the time OP-5 approached the Commission, the DG had already gathered some evidence indicating collusion amongst OPs in Tender no. 62 and 63 of 2014. However, the Commission finds that the disclosures by OP-5 regarding *modus operandi*, role of persons involved in the cartel and copies of email exchange made a good value addition and aided the investigation by revealing the modalities of operation of cartel. Considering the co-operation extended by OP-5, in conjunction with the priority status accorded, the stage at which it approached the Commission and value addition provided by it in establishing the existence of cartel, the Commission decides to grant a reduction in penalty of *40% (forty percent)* to OP-5 than would otherwise have been imposed on it.

OP-4

44. The Commission is satisfied with the cooperation extended by OP-4 and observes that it furnished evidence *viz*. copy of email exchange whereby its documents were transferred to Shri Bipin Vijay Salunke and disclosed the role of other persons such as Shri Ashwin Jagtap and Ms. Nishida Shahjahan. However, evidence of IP addresses and preparation of DDs for EMD for Tender no. 34, 35 and 44 of 2014 were not disclosed by OP-4. These may not have been available with OP-4 as his role was limited to providing the documents.The Commission finds that information and evidence provided by OP-4 substantiated the evidence in the possession of the Commission, disclosed the *modus operandi* and made good value addition to the overall evidence gathered. OP-4 co-operated with the investigation/ inquiry of the DG/ Commission. OP-4 was marked as 3rd in priority status in the case, it was the first to approach the Commission under Section 46 of the Act read with Regulation 5 of the Lesser Penalty Regulations in relation to cartel in Tender no. 34, 35 and 44 of 2015. It was not found involved in cartelisation in Tender no. 62 and 63 of 2014. Given these facts, the Commission decides to grant first priority status to OP-4 with respect to Tender no. 34, 35 and 44 of 2015. However, it also notes that OP-4 approached the Commission at a later stage in the investigation, when some evidence of collusion amongst OPs was already in possession of the DG. Considering the co-operation extended by OP-4, the stage at which it approached the Commission and the value addition made by it in establishing the existence of cartel, the Commission decides to grant a *50% (fifty percent)* reduction in penalty to OP-4 than would otherwise have been imposed on it.

OP-2

45. The Commission observes that when OP-2 approached the Commission, several evidence indicative of collusion amongst OPs had already been gathered by the DG. Further, OP-4, OP- 5 and OP-6 had already approached the Commission under Section 46 of the Act read with Regulation 5 of the Lesser Penalty Regulations prior to OP-2. Therefore, almost all the information provided by OP-2, including the details of *modus operandi* of the cartel were already available with the Commission at the date and time of its approaching the Commission. Only value addition

which was made by disclosure of OP-2, was with respect to purchase/ procurement of digital keys by Shri Parimal Salunke for uploading the documents on website of PMC on behalf of other bidders from the computer of OP-2. Moreover, it is important to note that Director of OP-2, Shri Bipin Vijay Salunke, orchestrated the entire cartel. As a result of which OP-2 emerged as L1 bidder in all the five tenders. However, the Commission is also cognizant of the fact that OP-2 co-operated on a continuous basis throughout the investigation/ inquiry and accepted information indicating the *modus operandi* of the cartel and provided all evidence in its possession or available to it. Therefore, the Commission decides to grant a 25% (twenty-five percent) reduction in penalty to OP-2 than would otherwise have been imposed on it.

OP-7

46. The Commission notes that prior to the Lesser Penalty Application of OP-7, there were other applicants who had made disclosure about the cartel in the tenders floated by PMC. Thus, the documents furnished by OP-7 did not provide significant value addition to the evidence already in possession of the DG. In view of the facts and evidences gathered in the present matter, the Commission is of the view that OP-7 did not provide any value addition in establishing the existence of cartel. Accordingly, the Commission decides not to grant any reduction in penalty to OP-7.

OP-1

47. It is observed that at the time OP-1 furnished evidence and documents under Section 46 of the Act, the Commission was already in possession of evidence gathered by the DG and the evidence provided by OP-4 with respect to tender no. 33, 34 and 44 of 2014. Therefore, Lesser Penalty Application of OP-1 did not make any significant value addition to the evidence gathered during the investigation. In view of the foregoing, the Commission decides not to grant any reduction in penalty to OP-1.

Remedies including imposition of fines

48. In view of the finding of contravention against OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7, the Commission directs them to cease and desist from indulging in such anti-competitive conduct in future.

49. Considering that the Commission has decided to grant reduction in penalty to OP-4, OP-5 and OP-6 under section 46 of the Act, as recorded hereinabove, the total amount of penalty to be paid by respective OPSs is as follows:

	Opposite Parties	Penalties bove	Reducti	Penalty yable
	Fortifies Security)	13,07,24	NIL	13,07,240
	Ecoman Enviro Solutions	45,20,66	25%	33,90,500
	Lahs Green India Pvt.	42,	50%	21,00,258
	Sanjay Agencies (OP-5)	1,51,06,4	40%	90,63,874

	Mahalaxmi Steels (OP-6)	3,36,20,3	50%	1,68,10,16
	Raghunath Industry Pvt.	30,54,94	NIL	30,54,943

50. The Commission directs these OPs to deposit the penalty amount within 60 days of receipt of this order.

51. Considering that the Commission has decided to grant 50% reduction in penalty to OP-4, 40% reduction in penalty to OP-5, 25% reduction in penalty to OP-2 and NIL reduction to OP7 under section 46 of the Act, as recorded hereinabove, the Commission also decides to allow the same reduction in penalty to their person(s)/officer(s) under section 46 of the Act. Thus, the total amount of penalty to be paid by them is as follows:

	Individuals	Pe ra 99	Redu	Penalt ayable
	Shri Bipin Vijay Salunke, Managing	96	25%	72,50
	Shri Parimal Salunke, Executive	46	25%	34,60
	Shri Saiprasad Sharadchandra r, Director of OP-4	36	50%	18,21
	Shri Sanjay Harakchand Gugle, Partner	2,	40%	1,38,5
	Shri Vijay Raghunath Salunke, Director	97	NIL	97,48

52. The Commission directs the parties to deposit the respective penalty amount within 60 days of receipt of this order.

Concept note on Advocacy Activities of CCI

Source: CCI Website available at:
http://www.competitioncommission.gov.in/advocacy/Concept_note_on_Advocacy_Activities_of_CCI.pdf

The Competition Law has come into being in India with the passage of the Competition Act, 2002 (hereinafter referred to as the Act) in January 2003. The Competition Commission of India (hereinafter referred to as the CCI or Commission) has been established under section 7 of the Act by a Government
Notification dated 14th October, 2003.

2. The Commission, is mandated under the Act to prevent practices having adverse effect on competition, ***to promote and sustain competition inmarkets,***to protect the interests of consumers and to ensure freedom of tradecarried on by other participants in markets, in India. For achieving the aforesaid mandate, the Commission has jurisdiction to:

iii) Enquire into Anti-Competitive Agreements (eg. Cartel, bid-rigging, etc.);
iv) Enquire into abuse of dominant position (eg. Predatory Pricing, etc.);
v) Regulate combinations (Mergers / Amalgamation, Acquisition of shares or controls etc.); and
vi) Undertake Competition Advocacy (including advice to the Central Government on competition policy issues), Create Public Awareness and Impart Training on competition issues.

Thus, the jurisdiction of the Commission includes seeking compliance of its mandate by taking both enforcement and non-enforcement measures. Whereas, the enforcement measures extend to enquiries and regulations, as aforesaid and as the case may be, the non-enforcement measures imply undertaking Competition Advocacy, Creating Public Awareness and Imparting Training on competition issues.

3. Regarding the measures to be included under the broad category of Competition Advocacy, it would be apt to quote from the Report of the "High Level Committee on Competition Policy and Law", constituted by the Government of India. In para 6.4.7 and 6.4.8 of its Report, the Committee has conceptualized the competition advocacy in the following words:-

"6.4.7 Competition Advocacy

The mandate of the Competition Commission of India ('CCI') needs to extend beyond merely enforcing the Competition Law. It needs to participate more

broadly in the formulation of the country's economic policies, which may adversely affect competitive market structure, business conduct and economic performance. The CCI, therefore, needs to assume the role of competition advocate, acting proactively to bring about Government policies, that lower barriers to entry, promote de-regulation and trade liberalization and promote competition in the market place. There is a direct relationship between competition advocacy and enforcement of Competition Law. The aim of competition advocacy is to foster conditions that will lead to a more competitive market structure and business behaviour without the direct intervention of the Competition Law Authority, namely the CCI.

6.4.8 A successful competition advocacy can be viewed in terms of thefollowing:

1. *CCI must develop relationship with the Ministries and Departments of the Government, regulatory agencies and other bodies that formulate and administer policies affecting demand and supply positions in various markets. Such relationships will facilitate communication and a search for alternatives that are less harmful to competition and consumer welfare;*
2. *CCI should encourage debate on competition and promote a better and more informed economic decision making;*
3. *Competition advocacy must be open and transparent to safeguard the integrity and capability of the CCI. When confidentiality is required, CCI should publish news releases explaining why; and*
4. *Competition advocacy can be enhanced by the CCI establishing good media relations and explaining the role and importance of Competition Policy / Law as an integral part of the Government's economic framework."*

4. The concept of competition advocacy elucidated in the Report of the High Level Committee finds its echo in Chapter-VII, Section 49 of the Competition Act, 2002. However, the scope of advocacy activities to be undertaken have been widened in the Act by including the measures required for creation of awareness and imparting training about competition issues in addition to advising the Central Government on policies impacting competition and measures for promotion of competition advocacy per se. Under the Act, the Commission is required to proactively interact with the Government Departments / Ministries, media and all other stakeholders, such as, the business community and organizations, academia, consumer organizations and professional bodies, as an advocate of competition, and, foster conditions to create a more competitive policy regime, market structure and business behavior. To elucidate this assertion further, Chapter VII, Section 49 is reproduced below:-

"**Competition Advocacy**

49. (1) In formulating a policy on competition (including review of laws related to competition), the Central Government may make a reference to the Commission for its opinion on possible effect of such policy on competition and on receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, which may thereafter formulate the policy as it deems fit.

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government in formulating such policy.

(3) The Commission shall take su itable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about competition issues."

5. Thus, the Commission has to transcend beyond being merely an authority to enforce competition law, an d don the mantle of an advocate of competition and take suitable non-enforcement measures under section 49, together with theenforcement measures as prescribed under the Act. Competition law enforcement is both the foundation and the tool for fostering sustainable competitive markets that result in healthy inter-firm rivalry, opportunities for new entry, entrepreneurship, increased economic efficiency and consumer welfare. Competition advocacy can augment these and other benefits of competition. The measures to be taken under section 49, therefore, should aim to foster a competition culture where voluntary compliance of competition law becomes a reality and competition is internalized as a key driver for economic growth and consumer welfare by all the stakeholders. Competition Advocacy, thus quintessentially means non-enforcement mechanism for compliance of competition law and creation of competition culture.

6. In the context of the aforesaid, the Commission envisages the following advocacy activities to be undertaken as an competition advocate:-

6.1 Promotion of Competition Advocacy and creation of awareness about competition issues:

i) The Commission shall endeavour and undertake programmes, activities etc. for the promotion of competition advocacy and creation of awareness about competition issues in India and abroad as considered appropriate by the Commission;

ii) The Commission may constitute Advocacy Advisory Committee(s) with a view to have expert and stakeholder participation and consultation, on continuous basis, to carry forward the agenda of competition advocacy and creation of awareness about competition issues;

iii) The Commission may develop and disseminate advocacy literature, including audio-visual and other material with a view to promote competition advocacy and create awareness about competition issues. For doing so, the Commission may outsource the professional services as deemed appropriate;

iv) The Commission may make extensive use of the media, both print and electronic, for promotion of com petition advocacy and creation of awareness on competition issues, and, for this purpose may, inter-alia convene media meets, issue press notes, arrange publication and dissemination of articles/news, release advertisements and undertake other publicity related activities on competition issues as deemed appropriate;

v) The Commission shall proactively interact with the organizations of stakeholders, academic community, sectoral regulators, Central and State Governments, Civil society and other organisations concerned with competition matters and encourage debate on competition and promote a better and more informed economic decision making;

vi) The Commission may undertake studies and market research for the purpose of competition advocacy and creation of awareness about competition issues;

vii) The Commission may assume the role of a competition advocate and proactively interact with the Central and State Governments and other bodies in legislative policy and other areas, such as, but not limited to, trade liberalization, economic regulation, state aids, disinvestments; to bring about policies that lower barriers to entry, promote de-regulation and trade liberalization and promote competition in the market place. For this end in view, the Commission may, inter-alia, undertake studies and research on the Central and State Government policies, and, arrange for the dissemination of the reports thereof as deemed appropriate;

viii) The Commission may encourage the academic and professional institutions to include competition law and policy in the curricula administered by them; and

ix) The Commission may encourage and interact with the organizations of stakeholders, academic community, sectoral regulators, Central and State Governments, Civil society and other organizations concerned with competition matters to undertake activities, programmes, studies, research

work etc. relating to competition issues and may support such endeavours financially as considered appropriate.

6.2.Imparting Training about competition issues -

(i) The Commission shall arrange appropriate training in India and abroad for the Chairperson, Members, Officers and other employees assisting the Commission including the Director General about competition issues and participation in international events as considered necessary by the Commission;

(ii) The Commission may also arrange appropriate training in India or abroad for the stakeholders as considered necessary;

iii) The Commission may have arrangements with any national or international institution, as the case may be, for such training and may undertake to set up a center on competition law and policy as deemed appropriate; and

iv) The Commission may provide internship facilities to the students and professionals sponsored by universities, academic and professional institutions for undertaking studies, research etc. on competition issues and may extend financial assistance therefore as considered appropriate.

7. Many of the above activities are currently being undertaken. The activities will get scaled up eventually once the Commission gains in experience and certain administrative and financial impediments are resolved.

Note: The students are also advised to read competition advocacy of other countries.

Telefonaktiebolaget LM Ericsson (PUBL)* v. *Competition Commission of India
2016 OnLine Del 1951, (2016) 232 DLT (CN)

1. These petitions have been filed by Ericsson impugning orders dated 12th November, 2013 and 16th January, 2014 (the 'impugned orders') passed by the CCI under Section 26(1) of the Competition Act, 2002. The impugned order dated 12th November, 2013 was passed pursuant to an information filed by Micromax under Section 19(1)(a) of the Competition Act and the impugned order dated 16th January, 2014 was passed pursuant to an information filed by Intex.
3. Both Micromax and Intex have alleged that Ericsson, which has a large portfolio of Standard Essential Patents (SEPs) in respect of technologies that are used in mobile handsets and network stations, has abused its position of dominance. The information filed by them before the CCI under Section 19 of the Competition Act has persuaded the CCI to pass the impugned orders directing the Director General (DG) CCI to investigate the matter regarding violation of the provisions of the Competition Act. The substratal dispute between Ericsson and Micromax/Intex relate to Ericsson's demand for royalty in respect of SEPs held by Ericsson and which it claims has been infringed by Micromax and Intex.
4. According to Ericsson, the impugned orders passed by the CCI are without jurisdiction as it lacks the jurisdiction to commence any proceeding in relation to a claim of royalty by a proprietor of a patent (patentee). Ericsson contends that any issue regarding a claim for royalty would fall within the scope of Patents Act, 1970 and cannot be a subject matter of examination under the Competition Act.
8. Ericsson holds several patents in India in respect of technologies relating to infrastructure equipment, including 2G, 3G and 4G networks as well as mobile phones, tablets, data cards and dongles etc. Some of the patents held by Ericsson are SEPs. Essentially, these are the technologies which have been accepted as standards to be uniformly accepted and implemented across various countries in order to ensure uniformity and compatibility for a seamless transmission of data and calls across the world.
9. The use of a standard technology ensures that there is a uniformity and compatibility in communications network across various countries. Thus, any technology accepted as a standard would have to be mandatorily followed by all enterprises involved in the particular industry. In order to accept and lay down standards, various Standard Setting Organizations' (SSOs) have been established. European Telecommunication Standard Institute (ETSI) is one such body, which has been set up to lay down the standards for the telecommunication industry and particularly 2G (GSM, GPRS, EDGE), 3G (UMTS, WCDMA, HSPA) and 4G (LTE) standards. In cases where the technology adopted as a part of an essential standard is patented, the technology/patent is referred to as a Standard Essential Patent (hereafter 'SEP'). The implication of accepting a patented technology as a standard is that all devices/equipments compliant with the established standard would require to use the patented technology and its manufacture would necessarily require a licence from the patentee holding the SEP.
10. In order to ensure that a patentee cannot prevent access to SEP, clause 6.1 of the ―ETSI Intellectual Property Rights Policy expressly provides that:

    "When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall

immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory ("FRAND") terms and conditions under such IPR to at least the following extent:

● MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
● sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
● repair, use, or operate EQUIPMENT; and
● use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate."

Admittedly, Ericsson is bound by the aforesaid policy and in terms thereof, has undertaken to offer its SEPs on Fair, Reasonable And Non Discriminatory (FRAND) Terms. The disputes between the parties relate to the patents concerning the technologies pertaining to 2G and 3G devices that are claimed by Ericsson to be SEP's for which Ericsson is bound to offer licences on FRAND terms.

11. Ericsson alleges that the products manufactured and dealt with by Micromax and Intex violate its patents. Ericsson further claims that it made best efforts to negotiate a Patent Licencing Agreement (PLA) with Micormax and Intex on FRAND terms but its efforts were unsuccessful. Consequently, Ericsson was constrained to initiate proceedings for infringement of its patents.

14. On 24th June, 2013 Micromax filed a complaint/information under Section 19(1)(a) of the Competition Act before the CCI, inter alia, alleging that Ericsson had contravened the provisions of the Competition Act.

15. Micromax alleged that Ericsson had abused its dominant position by demanding an unfair royalty structure from Micromax in respect of its SEPs relating to the GSM Technology. It asserted that the royalty demanded by Ericsson was excessive and had no basis in the Indian commercial realities. Micromax contended that profit margin of Indian mobile companies was in the range of six to eight percent and if Micromax was called upon to pay royalties at the rate demanded by Ericsson, it's business would be rendered unviable.

17. Micromax also accused Ericsson of attempting to limit the development of technology relating to mobile phones in India to the prejudice of the Indian consumers by seeking excessive royalties for its technology. Micromax asserted that as a consequence of Ericsson's demand for excessive royalties, the Indian handset manufacturers were denied market access in respect of the GSM market.

19. Intex also filed information under Section 19(1)(a) of the Competition Act, alleging that Ericsson and its subsidiary in India, Ericsson India Pvt. Ltd., had abused its dominant position. The specific allegations made by Intex are summarized as under:-

19.2. That Ericsson had abused its position of dominance by insisting on Intex obtaining licences without disclosing the patents that were alleged to have been infringed by Intex.

19.3. That Ericsson had insisted on execution of a NDA as a necessary pre-condition for informing Intex of the specifics of the alleged infringement.

19.4. That Ericsson exerted pressure on Intex to conclude a Patent Licensing Agreement (PLA) without providing complete details of the patents and on terms which were alleged to be "grossly onerous, oppressive, unfair, unreasonable and discriminatory".

19.5. That the royalty rates demanded by Ericsson were exorbitant and excessive.

19.6. That the royalty rates were based at the end value of the mobile device rather than the components of the device using the patented technology. It was alleged that in this manner, Ericsson had sought to unfairly appropriate the value created by others in respect of the end product.

19.7. That Ericsson was not only charging separate rates from SEP holding companies and non-SEP holding companies but was also offering different royalty rates and commercial terms to potential licensees from the same category. And, it was doing so with a view to make unreasonable gains. It was alleged that this had the effect of altering the conditions of competition.

19.8. That Ericsson had failed to offer any objective basis for its royalty demands.

19.9. That Ericsson had offered its entire pool of patents as a bouquet and had refused to offer specific royalty rates in respect of each of the SEPs allegedly infringed by Intex. Thus, Ericsson was endeavoring to compel Intex to acquire licence for all its patents relating to 2G and 3G technologies without giving any choice to Intex to acquire the rights in respect of only some of the specific patents. This, according to Intex would amount to a practice of bundling and tying, which is proscribed under the Competition Act.

19.10. That the conduct of Ericsson was opaque and non-transparent and, in effect, sought to impose unfair and discriminatory terms/prices and restrict the provisions of goods and services.

20. The CCI passed the impugned order dated 12th November, 2013 under Section 26(1) of the Competition Act pursuant to an information filed by Micromax. The CCI took note of the fact that Ericsson was a member of ETSI and held several SEPs which were recognized as standard by ETSI. The CCI also noted that as per clause 6 of ETSI IPR policy, the IPR holder/owner is required to give an irrevocable written undertaking that it would grant irrevocable licence on FRAND Terms to be applied fairly and uniformly to similarly placed parties. The CCI noted that Ericsson had declared that it had standard patents in respect of 2G, 3G and EDGE technologies, which were also accepted by the Department of Telecommunications, Ministry of Communications and Information Technology, Government of India. The 'Unified Access Service License' granted by the Government of India also required all GSM/CDMA network and equipments imported into India to meet the international standards of international telecommunication technology. In view of the fact that in case of SEPs, there is no possibility of using a non-infringing technology, CCI formed a prima facie view that Ericsson enjoyed complete dominance over its present and prospective licensees in the relevant product market.

21. CCI further concluded that the information provided by Micromax indicated that the practices adopted by Ericsson were discriminatory and contrary to FRAND terms. In particular, CCI noted that the royalty rates charged by Ericsson had no link to the patented product and that was contrary to what was expected of a patentee holding SEPs; CCI was of the prima facie view that royalties linked with the cost of the end product were contrary to the FRAND obligations.

22. Insofar as the Ericsson‘s suit against Micromax was concerned, CCI held that the same was in respect of infringement of Ericsson‘s IPR rights and the pendency of the civil suit did not prevent the CCI from proceeding under the Competition Act and consequently, directed the DG to investigate any violation of the provisions of the Competition Act.
23. The impugned order dated 16th January, 2014 passed pursuant to the information filed by Intex is more or less similar to the impugned order dated 12th November, 2013 in Case No.50/2013. CCI specifically noted that it had already formed a prima facie opinion under Section 26(1) of the Competition Act on the information submitted by Micromax and had directed the DG to conduct an investigation. CCI was of the view that Intex's Case be clubbed for causing an investigation under proviso to Section 26(1) of the Competition Act. Accordingly, the DG was also directed to investigate the matter by looking into the allegations made by Intex within the specified period.
24. to 28. **Submissions on behalf of Ericsson:** Mr C.S. Vaidyanathan, learned Senior Advocate appearing for Ericsson contended in Intex Petition:
    - the Patents Act is a special act and contains comprehensive provisions for addressing all the matters including protecting the interest of consumers and general public, the Competition Act has been enacted as a general law to promote and sustain competition in the market and to prevent practices having an adverse effect on competition.
    - Reference was made to various provisions of the Patents Act - in particular Sections 83-90, 92 & 92A - to emphasize that the Patents Act contains provisions to adequately redress the grievances of any person in respect of non-availability of rights to use a patent on reasonable terms.
    - the Controller of Patents and/or a Civil Court were vested with the function and the power to remedy any grievance relating to a patentee‘s demand for excessive or unreasonable royalty by grant of compulsory licence and the CCI, on the other hand, had no jurisdiction to grant such relief.
    - Section 4 of the Act was not applicable in respect of licensing of patents- (a) That a patentee insofar as grant of patent license is concerned, is not an ‘enterprise’ within the meaning of Section 2(h) of the Act. (b) That the patentee insofar as licensing of patent is concerned, is not engaged in purchase or sale of goods or services. (c) Patents are not a goods or services and a licence for a patent is also not goods or services. Thus, licensing of patent would also not fall within the scope of sale of goods or sale of services.
    - Various provisions to address the anti-competitive practices were incorporated in the antitrust laws applicable in United Kingdom. However, in India, similar provisions were introduced in the Patents Act and not in the Competition Act. Thus the intention of the Parliament was that the issues regarding abuse of dominance by a patentee in respect of patent licensing be addressed under the Patents Act and not under the Competition Act.
    - CCI was not competent to effectively redress the grievance voiced by Intex as CCI would have no power to direct grant of licence for a patent but could only pass a cease and desist order or levy penalty; neither of which were effective remedies.

- Reference was made to Section 60 & 61 of the Competition Act which indicated that no Civil Court would have the jurisdiction to entertain any suit or proceedings in respect of which CCI was empowered to determine under the Competition Act. Therefore, the jurisdiction of the Civil Court was not ousted in respect of various matters relating to patent and in particular, grant of injunction; determination of fair terms for licensing of a patent and determination of damages.

29. -33. Mr T.R. Andhyarujina, Learned Senior Advocate, appearing on behalf of Ericsson in Micromax Petition :

- the Patents Act was a special statute which allowed monopoly by granting a patent and at the same time also contained provisions for controlling the abuse of such monopoly.
- the High Court has the jurisdiction to decide all issues pertaining to patents, which included, the issue of grant or non-grant of injunctions to prevent infringement of a patent; the terms on which such injunctions could be granted, if any; enforcement of other remedies such as customs inspections etc.; and issues regarding validity and fixing of reasonable fees and damages.
- the Competition Act did not provide any remedy to prevent anti-competitive practices in relation to patent rights and, therefore, the only recourse for redressal of grievances regarding demand of excessive licence fee would be under the Patents Act and not under the Competition Act.
- Reference was made to Section 60 of the Competition Act which provided that the Act would apply notwithstanding anything inconsistent contained in any other law. Since the Competition Act did not provide for grant of a compulsory licence or for determination of a royalty, there was no inconsistency between the Competition Act and the Patents Act.
- Since CCI had no jurisdiction to determine the reasonableness of the royalties in respect of the patented technologies, it would not have the jurisdiction to entertain any complaint in that regard particularly when a suit in regard to the same subject matter was pending before this Court.
- the impugned order dated 12th November, 2013 passed by CCI was also invalid inasmuch as it made observations which were adjudicatory and determinative in nature even prior to the conduct of investigation by the DG.

34. -35. Ms. Singh, learned Senior Advocate appearing for Ericsson supplemented the submissions made by Mr C.S. Vaidyanathan and Mr T.R. Andhyarujina. She submitted that:

- the abuse of dominance and anti-competitive behavior as alleged by Micromax and Intex related solely to the royalty sought by Ericsson for use of its patented technology. And this issue was outside the jurisdiction of CCI as the Patents Act provided an adequate mechanism to address all issues/reliefs.
- the order passed by CCI was without application of mind. CCI had failed to consider any of the contentions regarding the challenge to its jurisdiction while passing the impugned orders.

- the relevant market described by CCI in the impugned order dated 12th November, 2013 as initially uploaded on the website indicated the relevant market to be "market of GSM and CDMA technology in India", which was palpably erroneous and also clearly indicated that the CCI had not understood the subject of the SEPs for which royalty was claimed by Ericsson.

36. -40. **Submissions on behalf CCI :** Mr Haksar, learned Senior Advocate, appearing for CCI submitted that:
    - the impugned orders were not amenable to judicial review under Article 226 of the Constitution of India as the said orders did not amount to a final expression of opinion on merit.
    - CCI was not required to give any notice or hear the parties before passing an order under Section 26(1) of the Competition Act as an order under Section 26(1) only required formation of a prima facie opinion and the Competition Act provided sufficient safeguards by affording the parties an opportunity to be heard at a subsequent stage.
    - the provisions of the Competition Act were in addition to and not in derogation of any other law. Reference was made to Section 60 of the Competition Act which expressly provided the provisions of the Competition Act to have effect notwithstanding anything inconsistent contained in any other law. Thus, the CCI was not concerned with any other aspect regarding grant or exercise of any right pertaining to a patent except to ensure the compliance with Section 3 and 4 of the Competition Act.
    - there was no conflict between the Competition Act and the Patents Act as both the said legislations were independent in their respective spheres.
    - The definition of the term ‘enterprise’ was wide enough to include any person engaged in any activity relating to production and supply of articles or goods. Stressing upon the expression ‘relating to’, it was submitted that Ericsson‘s SEPs had a co-relation with production, distribution and control of articles or goods. It was not necessary that an enterprise be directly engaged in production of goods and an enterprise engaged in controlling the technology for production of goods would also fall within the scope of Section 2(h) of the Competition Act.

41. **Submissions on behalf of Intex:** Mr Arun Kathpalia, learned Advocate appearing for Intex, at the outset, challenged the maintainability of the present petition on the strength of the decision of the Supreme Court in Steel Authority of India. He submitted that:
    - a High Court would exercise its supervisory jurisdiction in respect of orders passed by the Tribunals only where an order suffered from a serious error of law manifest on the face of the record.
    - a Tribunal would also have the jurisdiction to determine questions regarding its own jurisdiction. If such questions involved contentious issues and if the complaint was not self evident and required long drawn arguments, it could not be said to be an error apparent on the face of the record and a writ of certiorari would not ordinarily be issued.

He contended that, none of the conditions for issuing a writ of certiorari existed as there was no lack of inherent jurisdiction with the CCI to issue the impugned orders.

42. The complaint further disclosed that (a) Ericsson had abused its position of dominance as Ericsson had attempted to bundle SEPs held by Ericsson which were not required by Intex; (b) royalty demanded was unfair, unreasonable and discriminatory; (c) necessary information was sought to be obfuscated; and (d) that royalty was demanded on the price of the end product and not on the basis of the value of the component that used or housed the relevant SEP. It is contended that the aforesaid allegations prima facie disclosed violation of Section 4 of the Competition Act and, therefore, fell within the exclusive jurisdiction of CCI.
43. He submitted that: (a) Section 60 of the Competition Act expressly stated that the Act would have effect notwithstanding anything inconsistent therewith in other laws; (b) there was nothing in the Patents Act which would either impliedly or expressly oust the jurisdiction of CCI; (c) the Competition Act was a later enactment; and (d) the scope and substance of the Competition Act and the Patents Act was different.
45. Insofar as the contention that CCI lacked the technical competence to examine issues relating to patents, Mr Kathpalia referred to Section 21A of the Competition Act and on the strength of the provisions, argued that in cases where CCI required any inputs from the Controller of Patents, it could always make a reference to the Controller of Patents and seek its opinion.
46. Mr Kathpalia next submitted that the reliance placed by Ericsson on the provisions of Section 3(5) of the Competition Act was misplaced as the complaint made by Intex did not relate to anti-competitive agreements under Section 3 of the Competition Act but alleged abuse of dominance which fell within the scope of Section 4 of the Competition Act. He also contended that the plain language of Section 3(5) of the Competition Act could also not be read to mean that jurisdiction of CCI was ousted.
48. **Submissions on behalf of Micromax:** Mr Salman Khurshid, learned Senior Advocate appearing on behalf of Micromax also contested the submissions made on behalf of Ericsson on by advancing arguments similar to those advanced by Mr. Haksar and Mr. Kathpalia.
49. **Mr Aditya Narain, Amicus Curiae,** submitted that the subject matter of disputes related to negotiation of licences for SEPs. Thus, CCI, at the threshold, had to consider whether Ericsson could be considered as an 'enterprise' within the meaning of Section 2(h) of the Competition Act; but, CCI had failed to consider the aforesaid issue while passing the order under Section 26(1) of the Competition Act. According to him, the expression 'any activity' as used in Section 2(h) of the Competition Act would not include negotiation of patent licences and, therefore, Ericsson could not be considered as an enterprise for the purposes of Section 4 of the Competition Act. He further submitted that the impugned orders also did not indicate whether Micromax and/or Intex could be considered as consumers within the meaning of Section 2(f) of the Competition Act and; apparently, CCI had also failed to consider the same.

Whether the petition is maintainable – Scope of judicial review

60. I have reservations as to merits of the contention that a direction under Section 26(1) of the Competition Act to conduct an investigation does not prejudice the party being investigated in any manner, as it does not amount to a final determination of the allegations made.

Indisputably, a direction to conduct an investigation may not involve an adjudicatory process and does not foreclose or in any manner affect the defence that is available to the party being investigated. But, nonetheless, it does have the effect of subjecting a party to an inquisitorial process at the hands of DG. The DG is obliged to carry out the directions of CCI and conduct an investigation into any contravention regarding provisions of the Competition Act. By virtue of Section 42(2) of Competition the Act, the DG has the same powers as conferred upon the CCI under Section 36(2) of the Act. Section 36(2) of the Competition Act expressly enacts that CCI will have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908.

61. Section 43 of the Competition Act also provides for imposition of penalty upon any person who fails to comply with the directions issued by the DG under Section 41(2) of the Competition Act. Any person subjected to an investigation would also have to endure the attendant inconvenience and, depending on the extent of investigation, would probably have to commit significant resources for complying with the demands for supply of information as well as for production of evidence including examination of persons employed or associated with the enterprise being investigated.
62. By virtue of Section 41(3) of the Competition Act, the provisions of Sections 240 and 240A of the Companies Act, 1956 would also apply to an investigation made by the DG, or any person investigating under his authority, as they apply to an Inspector appointed under the Companies Act, 1956.
63. The DG or any person acting under his authority would have an unmitigated access to any document available with the enterprise being investigated. Obviously, such documents may also include confidential and sensitive information and even though the DG may keep the same as confidential, it can hardly be disputed that an enterprise furnishing sensitive information to DG would run the risk of the information being leaked or disclosed. It also cannot be overlooked that the fact that an enterprise is being investigated in respect of allegations of its anti-competitive conduct may also result in loss of reputation and goodwill.
65. The submission made on behalf of Ericsson that impugned orders were being used in litigations by various parties not only in India but also in other jurisdictions was not controverted.
66. In the aforesaid circumstances, it could hardly be disputed that the commencement of investigation against Ericsson would certainly prejudice Ericsson. In the given facts, I am unable to accept that Ericsson's challenge to the impugned orders should be rejected at this stage solely on the ground that it does not affect Ericsson's right and, therefore, Ericsson cannot agitate any grievance in that regard.
68. In the aforesaid view, it is next to be examined as to whether the impugned orders passed under Section 26(1) of the Competition Act can be subjected to judicial review under Article 226 of the Constitution of India. Indisputably, scope of Article 226 of the Constitution of India is very wide.
70. It is well settled that although, the High Court does not sit as an Appellate Court to correct every error but in cases where an authority has acted outside the scope of its jurisdiction, the High Court would interfere under exercise of its jurisdiction under Article 226 of the Constitution of India. It is well recognised that the High Court would interfere in orders passed by any authority or subordinate court where "(1) there is an error manifest and

apparent on the fact of the proceedings such as when it is based on clear misreading or utter disregard of the provisions of law and (2) a grave injustice or gross failure of justice has occasioned thereby."

74. Having stated the above, it is also necessary to state that the scope of judicial review of the directions issued under Section 26(1) of the Competition Act is limited and does not extend to examining the merits of the allegations.

77. The question, whether in the given facts the CCI has the jurisdiction to pass directions under Section 26(1) of the Competition Act for causing an investigation and whether such directions are in terms of the statute would clearly fall within the scope of judicial review under Article 226 of the Constitution of India.

78. In terms of Section 26(1) of the Competition Act, a direction to cause an investigation can be made by CCI only if it is of the opinion that there exists a prima facie case. Formation of such opinion is sine qua non for exercise of any jurisdiction under Section 26(1) of the Competition Act. Thus, in cases where the commission has not formed such an opinion or the opinion so formed is ex- facie perverse in the sense that no reasonable person could possibly form such an opinion on the basis of the allegations made, any directions issued under Section 26(1) of the Competition Act would be without jurisdiction and would be liable to be set aside.

79. Any direction under Section 26(1) of the Competition Act could also be challenged on the ground - as is sought to be contended in the present case - that the subject matter is outside the pail of the Competition Act. However, it must be added that a challenge to the jurisdiction of the CCI to pass such directions under Section 26(1) of the Competition Act must be examined on a demurrer; that is, the information received under Section 19 must be considered as correct; any dispute as to the correctness or the merits of the allegations - unless the falsity of the allegations is writ large and ex facie apparent from the record - cannot be entertained in proceedings under Article 226 of the Constitution of India. Equally, in cases where the direction passed is found to be malafide or capricious, interference by this Court under Article 226 of the Constitution of India would be warranted.

80. In the present case, Ericsson has contested the jurisdiction of CCI to entertain any complaint regarding the rates of royalty in respect of SEPs as according to Ericsson, the same is outside the scope of the Competition Act. Since this issue relates to the jurisdiction of CCI, it would clearly fall within the limited scope of judicial review as available in respect of directions passed by the CCI under Section 26(1) of the Competition Act. In addition, Ericsson has also contested the impugned directions as being perverse and without application of mind. It is trite law that no authority has the jurisdiction to pass perverse orders and, therefore, this challenge would also fall within the limited scope of judicial review.

81. It is, thus, amply clear that Ericsson does have an alternative remedy of preferring an appeal but that remedy would be available only on a final determination. However, the fact that an alternate remedy by way of appeal is available to a party would not denude the jurisdiction of this Court under Article 226 of the Constitution of India.

83. In view of the above, the contention that the present petition is not maintainable, is without merit. However, the validity of the impugned orders can be examined only from the perspective of: (a) whether allegations made by Intex and Micromax could form the subject

matter of proceedings under the Competition Act; and (b) whether the impugned orders are perverse?

Jurisdiction of CCI to entertain the complaints of Micromax and Intex under the Competition Act, 2002

84. The central challenge in these petitions is to the jurisdiction of the CCI to entertain complaints filed by Micromax and Intex in relation to what is described as Ericsson‘s exercise of rights granted under the Patents Act. It is Ericsson‘s case that by virtue of being granted the subject patents under Section 48 of the Patent Act, it has the exclusive right to prevent third parties from making, using, offering for sale, selling or importing the products using Ericsson‘s patents without its consent. Ericsson asserts that the patents in question are SEPs and in accordance with its obligations to the SSO‘s it has offered licences for its SEPs to Intex and Micromax on FRAND terms. It is urged that having so complied with its commitments to SSO, Ericsson was well within its rights to seek injunctions restraining Ericsson and Intex from infringing its SEPs.

85. It is further claimed that the allegations made could not possibly constitute abuse or misuse of dominance and, therefore, the impugned orders passed by the CCI are wholly without jurisdiction.

87. Ericsson's challenge to the jurisdiction can - as is apparent from the submissions made by the counsel - be considered under the following broad heads:

(i) Ericsson is not an enterprise within the meaning of Section 2(h) of the Competition Act and, therefore, Section 4 of the Competition Act is wholly inapplicable in any matter relating to its exercise of its rights as a proprietor of its SEPs.

(ii) The Patents Act is a special Act vis-à-vis the Competition Act and therefore it shall prevail over the provisions of the Competition Act; consequently, insofar as exercise of patent rights are concerned, proceedings under the Competition Act would not be competent and outside the scope of that Act.

(iii) The allegations made by Micromax and Intex in their complaints cannot by any stretch constitute abuse of dominance under the Competition Act and, therefore, impugned orders passed by CCI are without jurisdiction.

(iv) The disputes between parties – alleged demand for excessive royalty, breach of FRAND assurances, imposition of unreasonable terms for licencing etc. – are subject matter of proceedings in the suits filed by Ericsson and, therefore, outside the scope of the Competition Act.

(v) The complaints made by Micromax and Intex are not maintainable as they have denied Ericsson‘s claim for infringement and Intex has also initiated proceedings for revocation of Ericsson‘s SEPs and, therefore cannot allege abuse of dominance by Ericsson as the same is premised on Ericsson being the proprietor of the subject SEPs. Micromax and Intex are unwilling licensees and therefore, their complaints with regard to licensing terms could not be entertained.

(vi) In the given facts and circumstances of the case, CCI‘s view that a prima facie case is made out is perverse and thus the impugned order is wholly without jurisdiction.

(i) Ericsson is not an 'enterprise' within the meaning of Section 2(h) of the Competition Act:

88. The next issue to be examined is whether Section 4(1) of the Competition Act - which is alleged to have been violated by Ericsson - could have any application inasmuch as it is contended that Ericsson is not an 'enterprise' within the meaning of Section 2(h) of the Competition Act.

93. The question whether Ericsson is an enterprise within the meaning of Section 2(h) of the Competition Act would, thus, have to be answered by ascertaining whether it is engaged in any activity relating to production, supply, distribution, acquisition or control of articles or goods. Admittedly, Ericsson has a large portfolio of patents and is, inter alia, engaged in developing technologies and acquiring patents. Thus, if patents are held to be goods, Ericsson would indisputably fall within the definition of 'enterprise' within the meaning of Section 2(h) of the Competition Act, since it is admittedly engaged in activities which entail acquisition and control of patents.

94. This brings us to the question whether patents are 'goods'.

95. As is apparent, the definition of goods is extremely wide and takes within its fold every kind of movable property. The word 'property' is defined by virtue of Section 2(11) of the Sale of Goods Act to mean "the general property in goods, and not merely a special property;".

96. The expression 'movable property' has not been defined under the Sale of Goods Act, 1930. Thus, in absence of such definition, one would have to turn to the General Clauses Act, 1897 which defines 'movable property' to mean "property of every description, except immovable property". Section 3(26) of the General Clauses Act, 1897 defines 'immovable property' to "include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth". Thus, plainly, the word 'goods' would encompass all kinds of property other than land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

97. Next, it is necessary to examine the nature of patent rights. Grant of a patent, essentially, provides the grantee, the right to exclude others from using the patented invention for the specified period; it does not provide the grantee (patentee) the right to use the patent but merely a right to restrain others from doing so.

100. Insofar as tangible property is concerned, the ownership carries with it, the right to use that property and to that extent, patent rights are different inasmuch as they only grant a right to exclude without further right to use. In the case of real or personal property, the right to exclude others essentially follows from the proprietor's right to fully enjoy that property, but in case of a patent, the right to exclude is the only substantive right that is granted to the patentee. However, this distinction between real property and patents does not detract from the fact that patents are property.

103. As noted above, the nature of patent rights - right to exclude without the right to use - does not in any manner exclude patent rights from the scope of 'goods' as defined under the Sale of Goods Act, 1930. All kinds of property (other than actionable claims, money and immovable property) would fall within the definition of 'goods' and this would also include intangible and incorporeal property such as patents.

104. Consequently, Ericsson would fall within the definition of 'enterprise' under Section 2(h) of the Competition Act.

105. The question whether licences for patents are goods is a contentious one. Since grant of licence does not extinguish the rights of a patent holder in the subject matter, it may not amount to sale of goods. There may be some merit in the contention that a case for abuse of dominant position under clause (a) of Section 4(2) of the Competition Act has not been made out. However, I do not propose to examine that question in these proceedings. The disputes as to whether Ericsson has fallen foul of any of the clauses of Section 4(2) of the Competition Act are as yet open and have not been finally adjudicated. Suffice it to say that the proceedings initiated by the CCI for violation of Section 4(1) of the Act cannot, at the threshold, be held to be without jurisdiction on account of Ericsson not being an enterprise within the meaning of Section 2(h) of the Competition Act.

(ii) Whether the Patents Act as a special Act would prevail over the Competition Act.

107. The key question is whether provisions of the Patents Act exhausts all remedies that are available in respect of abusive conduct by a patentee or whether an abuse of dominant position by a patentee could also be subject matter of proceedings and orders under the Competition Act. The aforesaid issue has to be addressed bearing in mind the objective, express provisions and the operative legislative fields of the two enactments.

110. Whereas patent laws are concerned with grants of rights enabling the patent holder to exclude others from exploiting the invention, and in that sense promoting rights akin to a monopoly; the competition law is essentially aimed to promote competition and, thus, fundamentally opposed to monopolization as well as unfair and anticompetitive practices that are associated with monopolies.

143. Chapter XVI of the Patents Act provides for grant of compulsory licences as well as revocation of patents in certain cases including in cases where the reasonable requirements of the public asspecified under Section 84(7) of the Patents Act have not been satisfied. Section 84(7) of the Patents Act, is couched in wide terms and takes within its sweep instances where a refusal by a patentee to grant licence on reasonable terms results in prejudicing the existing trade or industry or any person or class of persons trading or manufacturing in India. Plainly, Section 84(7) would also include instances of abuse that are proscribed under Section 4 of the Competition Act. Section 140 of the Patents Act also postulates certain restrictive conditions to be void.

144. As discussed above, the Patents Act not only provides for a statutory grant of Patent rights but also contains provisions relating to the exercise of and enforcement of those rights. Further, the Patents Act also includes provisions for redressal in the event of abuse of Patents rights. On the other hand, the Competition Act proscribes certain anti-competitive agreements and abuse of dominance in addition to regulating combinations to avoid concentration of market power in general. Undoubtedly, the Competition Act and Patents Act are special acts operating in their respective fields, however, viewed in the aforesaid perspective the Patents Act would be a Special Act, vis-à-vis, the Competition Act in so far as patents are concerned. The Patents Act is a self contained code.

146. It is also relevant to notice Section 62 of the Competition Act which reads as under:-

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

147. It is evident from the above provision that the intention of the Parliament in enacting the Competition Act was not to curtail or whittle down the full scope of any other law and, therefore, it is expressly stated that the Competition Act would be in addition to, and not in derogation of any other Act.

148. Thus, in my view Section 60 of the Competition Act, which provides for the provisions of the said Act to have an effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, must be read harmoniously with Section 62 of the Competition Act and in the context of the subject matter of the Competition Act. As discussed earlier, the Competition Act is directed to prohibit certain anti-competitive agreements, abuse of dominant position and formation of combinations which cause or are likely to cause appreciable adverse effect on competition. Plainly, agreements which may otherwise be lawful and enforceable under the general law - such as the Indian Contract Act, 1872 - may still be anti-competitive and fall foul of Section 3 of the Competition Act. Similarly, a practice or conduct which may be considered as an abuse under Section 4 of the Competition Act may otherwise but for the said provision be legitimate under the general law. Equally, mergers and amalgamations that are permissible under the general law may result in aggregation of market power that may not be permitted under the Competition Act. Section 60 of the Competition Act must be read in the aforesaid context.

151. Thus, if there are irreconcilable differences between the Patents Act and the Competition Act in so far as anti-abuse provisions are concerned, the Patents Act being a special act shall prevail notwithstanding the provision of Section 60 of the Competition Act.

152. This brings up the next issue, that is, whether there is any irreconcilable conflict between the Competition Act and the Patents Act and whether both the Acts could be construed harmoniously in the context of the Patents Act.

156. The provisions of the Patents Act which can be construed as dealing with a subject matter which is common with the Competition Act are essentially provisions of Chapter XVI and Section 140 of the Patents Act. Section 84 of the Patents Act provides for grant of compulsory licences in certain cases where reasonable requirement of public with respect to the patented inventions have not been satisfied or where the patented invention is not available to the public at a reasonably affordable price or where the patented invention is not worked in the territory of India.

157. Sub-section (7) of Section 84 lists out different instances where the requirements of public shall be deemed not to have been satisfied. Section 85 of the Patents Act provides for Revocation of patents where even after expiry to two years from the date of grant of compulsory licence the patented invention has not been worked in the territory of India or where reasonable requirements of public with respect to the patented invention have not been satisfied. In addition, Section 92 of the Patents Act also provides grant of compulsory licences.

158. Undisputedly, several of the instances listed out in Section 84 (7) could be construed, in certain circumstances, as an abuse of dominance if grant of patent rights places the right holder in a position of dominance. Remedy in cases as specified under Section 84(7) of the Patents Act is grant of compulsory licences and a possible revocation of licence.

159. It is relevant to note that in terms of Section 84 (4) of the Patents Act, the Controller is empowered to settle the terms on which the compulsory licence is to be granted. Section 90 of the Patents Act provides guidelines to the Controller for settling the terms of a compulsory licence. It is apparent that the only remedy that is available under the Patents Act, to a willing prospective licensee who has been denied a licence on reasonable terms is a compulsory licence under Section 84 of the Act on such terms as may be settled by the Controller.

162. The remedies as provided under Section 27 of the Competition Act for abuse of dominant position are materially different from the remedy as available under Section 84 of the Patents Act.It is also apparent that the remedies under the two enactments are not mutually exclusive; in other words grant of one is not destructive of the other. Thus, it may be open for a prospective licensee to approach the Controller of Patents for grant of compulsory licence in certain cases. The same is not inconsistent with the CCI passing an appropriate order under Section 27 of the Competition Act.

163. It is also relevant to refer to Section 21A of the Competition Act. The said Section enables CCI to make a reference to any statutory authority, which is charged with implementation of any Act, if it proposes to make any decision contrary to the provisions of the Act and an issue in this regard is raised by any party.

164. It is apparent from the above that the Competition Act also contemplates a situation where an order by CCI may be contrary to another statute being administered by another authority. Similarly, Section 21 of the Competition Act provides for a statutory authority to make a reference to the CCI if it proposes to take a decision which may be contrary to the provisions of the Competition Act.

165. The above provisions also indicate that the intention of the Parliament is not that the Competition Act impliedly repeal other statutes or stand repealed by other statues that present any inconsistency; but that it be worked and implemented in addition to and in not in derogation of other statues. Therefore, the Competition Act expressly contemplates that statutory orders passed - either by CCI under the Competition Act or by any other statutory authority under any other statute, - be made after the concerned authority has taken into account the opinion of the other statutory authority.

166. In the aforesaid context, clause (ix) of Sub-section (1) of Section 90 of the Patents Act may also be noticed. The said clause provides that the Controller General of Patents may also permit export of the patented product under a compulsory licence in cases where the licence is issued to remedy a practice that has been determined to be anti-competitive after a judicial or an administrative process. This clause also indicates the legislative intention that the Competition Act and the Patents Act be worked harmoniously. Thus, it is mandated that the Controller take into account any finding of anticompetitive practice, that is returned after a judicial or administrative process including by the CCI under the Competition Act, while settling the terms of a compulsory licence issued to remedy such practice.

171. At this stage, one may also refer to Section 3 of the Competition Act which prohibits a person, enterprise or association of persons/enterprises from entering into certain anti-competitive agreements which cause or are likely to cause appreciable adverse effect on competition within India. There does not appear to be any provision(s) of such wide import under the Patents Act. Sub-section (5) of Section 3 of the Competition Act expressly provides

that Section 3 would not restrict the right of any person to impose reasonable conditions for protecting its right, inter alia, under the Patents Act.

172. It follows from the above that whilst an agreement which imposes reasonable condition for protecting Patent Rights is permissible, an anti competitive agreement which imposes unreasonable conditions would not be afforded the safe harbor of Section 3(5) of the Competition Act and would fall foul of Section 3 of the Competition Act. The question as to whether a condition imposed under the agreement is reasonable or not would be a matter which could only be decided by the CCI under the provisions of the Competition Act. Neither the Controller of Patents discharging his functions in terms of the Patents Act, nor a Civil Court would have any jurisdiction to adjudicate whether an agreement falls foul of Section 3 of the Competition Act. This is so because the Controller of Patents cannot exercise any powers which are not specifically conferred by the Patents Act and by virtue of Section 61 of the Competition Act, the jurisdiction of Civil Courts to entertain any suit or proceedings in respect of any matter which the CCI or the COMPAT is empowered to determine, stands expressly excluded. Thus, in so far as the scope of Section 3 of the Competition Act is concerned, there does not appear to be any overlap or inconsistency with the Patents Act.

173. Facially, it may appear that the gravamen of the two enactments are intrinsically conflicting; however, when one views the same in the perspective that patent laws define the contours of certain rights, and the anti-trust laws are essentially to prevent abuse of rights, the prospect of an irreconcilable conflict seems to reduce considerably.

174. In my view, there is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. And, in absence of any irreconcilable conflict between the two legislations, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of Patent rights cannot be ousted.

177. It is apparent from section 84(6) of the Patents Act that a prospective licensee who applies for a compulsory licence is expected to have made, prior to his application, efforts to obtain a licence on reasonable terms. However, it further specifies that this consideration would not be relevant where the conduct of a patentee is found to be anti-competitive. In my view, the aforesaid proviso to Section 84(6)(iv) cannot be read to mean that a patentee's anti-competitive conduct would have to be first established in proceedings under the Competition Act before the Controller could take that into account. Sub-section (6) of Section 84 only indicates certain factors that would be required to be taken into account by the Controller and the question whether a patentee had adopted anti-competitive practices could also be considered by the Controller. However, if CCI has finally found a patentee's conduct to be anti-competitive and its finding has attained finality, the Controller would also proceed on the said basis and - on the principle akin to issue estoppel - the patentee would be estopped from contending to the contrary.

178. In view of the aforesaid discussion, the contention that the jurisdiction of CCI under the Competition Act is ousted in matters relating to patents cannot be accepted.

(iii) Whether the allegations made could be construed as an abuse of dominance

187. Given the nature of the right that a patentee enjoys, it is not easy to reconcile a patent holder's refusal to grant a licence to use his patent as a violation of antitrust laws. The

interface between IPR rights and antitrust laws have been a subject matter of debate in various jurisdictions and more particularly in cases where a patentee holds an SEP.

199. In view of the aforesaid, there is good ground to hold that seeking injunctive reliefs by an SEP holder in certain circumstances may amount to abuse of its dominant position. The rationale for this is that the risk of suffering injunctions would in certain circumstances, clearly exert undue pressure on an implementer and thus, place him in a disadvantageous bargaining position vis-a-vis an SEP holder. A patent holder has a statutory right to file a suit for infringement; but as stated earlier, the Competition
Act is not concerned with rights of a person or an enterprise but the exercise of such rights. The position of a proprietor of an SEP cannot be equated with a proprietor of a patent which is not essential to an industry standard. While in the former case, a non-infringing patent is not available to a dealer/manufacturer; in the latter case, the dealer/manufacturer may have other non-infringing options. It is, thus, essential that bargaining power of a dealer/manufacturer implementing the standard be protected and preserved.

200. In the present case, apart from instituting suits for infringement against Micromax and Intex, Ericsson has also threatened Micromax with complaints to SEBI, apparently, while Micromax was contemplating and/or in the process of floating a public offer of its shares. Such threats were, undoubtedly, made with the object of influencing Micromax to conclude a licensing agreement. It is not necessary for this Court to examine whether in the facts of this case, such threats also constitute an abuse of Ericsson's dominant position. Suffice it to state that in certain cases, such threats by a proprietor of a SEP, who is found to be in a dominant position, could be held to be an abuse of dominance. Clearly, in certain cases, such conduct, if it is found, was directed in pressuring an implementer to accept non FRAND terms, would amount to an abuse of dominance.

(iv)The disputes, being subject matter of suits, could not be entertained by CCI.

201. The proceedings under the Competition Act before the CCI are not in the nature of a private lis. The object of the proceedings is to prevent and curb the practices which have an adverse effect on the competition in India. The proceedings in the suits filed by Ericsson and the proceedings before CCI are not mutually exclusive. It is also necessary to bear in mind that it is not necessary that an adverse finding against Ericsson by CCI would necessarily results in the grant of relief as prayed for by Intex or Micromax. The scope of enquiry before CCI would obviously be limited to whether Ericsson has abused its dominant position and, if so found, CCI may issue orders as contemplated under Section 27 of the Act. Additionally, it must be noted that Ericsson had filed a suit after Intex had made a complaint before the CCI.

202. The question whether there is any abuse of dominance is solely within the scope of the Competition Act and a civil court cannot decide whether an enterprise has abused its dominant position and pass orders as are contemplated under Section 27 of the Competition Act. Merely because a set of facts pleaded in a suit may also be relevant for determination whether Section 4 of the Competition Act has been violated, does not mean that a civil court would be adjudicating that issue. Further, merely because certain reliefs sought by Micromax and Intex before CCI are also available in proceedings under the

Patents Act also does not exclude the subject matter of the complaints from the scope of the Competition Act. An abuse of dominant position under Section 4 of the Competition Act is not a cause that can be made a subject matter of a suit or proceedings before a civil court.

(v) Whether Micromax/Intex could maintain a complaint for abuse of dominance since they had contested Ericsson's claim for infringement

203. It is Ericsson's case that it is the proprietor of subject SEPs and, therefore, it is not open to Ericsson to contend that its conduct in respect of those SEPs cannot be made subject matter of enquiry by CCI on the ground that SEPs have been denied by Micromax and Intex. As mentioned above, the proceedings under the Competition Act are not in the nature of private lis and the scope of enquiry would be only limited to whether there is any abuse of dominance which is proscribed under Section 4 of the Competition Act. Of course, the conduct of Micromax and Intex would have to be taken into account in determining whether Ericsson had violated its FRAND obligations.

204. The issue whether a licensee/prospective licensee could enter into negotiations for a licence on FRAND terms while reserving its right to challenge the rights of a patentee is also a contentious issue.

205. In my view, a potential licensee cannot be precluded from challenging the validity of the patents in question. The expression ―willing licensee‖ only means a potential licensee who is willing to accept licence of valid patents on FRAND terms. This does not mean that he is willing to accept a licence for invalid patents and he has to waive his rights to challenge the patents in question. Any person, notwithstanding that he has entered into a licence agreement for a patent, would have a right to challenge the validity of the patents. This is also clear from clause (d) of Section 140(1) of the Patents Act, that it would not be lawful to insert in any contract in relation to sale or lease of a patented article or in a licence to manufacture or use of patented article or in a licence to work any process protected by a patent, a condition the effect of which may be to prevent challenges to validity of a patent. Thus, a licensee could always reserve its right to challenge the validity of a patent and cannot be precluded from doing so.

206. It follows from the above, that a potential licensee, could without prejudice to his rights to challenge the validity of patents could take such steps or proceedings which are premised on the patents being valid.

207. In view of the above, it would not be necessary for Micromax or Intex to waive their rights to challenge a patent for instituting a complaint which is based on the premise that Ericsson's patents are valid. The CCI, cannot be faulted for proceeding on the basis that Ericsson holds the SEP's that it asserts it holds; at any rate, Ericsson cannot be heard to complain against CCI proceeding on such basis.

(vi) Whether impugned orders are without jurisdiction as being perverse

208. In the given facts and circumstances, it is difficult to form an opinion that the conduct of Ericsson indicates any abuse of dominance considering the fact that it does appear that

Ericsson had made efforts to arrive at a negotiated settlement with Micromax and Intex, who on the other hand, appear to have been manufacturing/dealing with products using the patented technologies without either obtaining a licence from Ericsson or approaching the Controller of Patents for a compulsory licence. However, it is not open for this court, in proceedings under Article 226 of the Constitution of India, to supplant its views over that of the concerned authority; in this case the CCI. This is not a case where it can be held that no reasonable person could have formed a view that the complaints filed by Intex and Micromax, prima facie, disclosed abuse of dominance by Ericsson. This is also not a case where the impugned orders can be stated to have been passed on no material at all. Therefore, I am unable to accept that the impugned orders passed by CCI are perverse and, therefore, without jurisdiction.

209. Mr Narain had pointed out that the CCI having permitted Ericsson to file its submission ought to have considered the various issues raised by Ericsson but the impugned orders do not disclose that the CCI had considered the contentious issues. In my view, there is considerable merit in the said submission. Although at the stage of passing an order under Section 26(2) of the Act, the CCI is not required to enter into an adjudicatory process, nonetheless, it has to form a prima facie view and this would include a view as to its jurisdiction to entertain the information/complaint. It was thus apposite for the CCI to at least notice the contours of the controversy raised by Ericsson and take a prima facie view. This would also be necessary to outline the area in which investigations were required to be undertaken by the DG. Having stated the above, I do not consider it necessary to remand the matter to CCI for reconsidering its prima facie view, particularly as the issues pertaining to the CCI‘s jurisdiction as canvassed by Ericsson have been examined in these proceedings.

212. In view of the aforesaid, the writ petitions are dismissed.

Competition Commission Of India vs Bharti Airtel Ltd

CIVIL APPEAL NO(S). 11843 OF 2018

Reliance Jio Infocomm Limited (hereinafter referred to as 'RJIL') has filed information under Section 19(1) of the Competition Act, 2002 (hereinafter referred to as the 'Competition Act') before the Competition Commission of India (for short, 'CCI') alleging anti- competitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone 1 India Limited and Idea Cellular Limited (Incumbent Dominant Operators) (hereinafter referred to as the IDOs). Similar Informations under Section 19 of the Competition Act were also filed by one Mr. Ranjan Sardana, Chartered Accountant, and Mr. Justice Kantilal Ambalal Puj (Retd.). These were registered by the CCI as Case Nos. 80-81, 83 and 95 respectively. As per Section 26 of the Competition Act, on receipt of such an information, the CCI has to form an opinion as to whether there exists a prima facie case or not. If it is of the opinion that there exists a prima facie case, the CCI directs the Director General to cause an investigation to be made into the matter. Apart from the IDOs, certain allegations were also made against the Cellular Operators Association of India (for short, 'COAI'). The CCI issued notice to these parties and after hearing the RJIL, the aforesaid cellular companies and COAI, it passed a common order dated April 21, 2017 in all these cases (by clubbing them together) holding a view that prima facie case exists and an investigation is warranted into the matter. It, accordingly, directed the Director General to cause investigation in the case. Introduction: 3) Four writ petitions came to be filed by the Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and COAI respectively. The prayed for quashing of the aforesaid order and consequential action/proceedings on the ground that the CCI did not have any jurisdiction to deal with such a matter. Show-cause notices were issued pursuant to which the CCI as well as RJIL filed their counter affidavits. The mater was heard and vide judgment dated September 21, 2017 the High Court has allowed these writ petitions and quashed/set aside the order dated April 21, 2017 passed by the CCI and consequently notices issued by the Director General of the CCI have also been quashed. We may reproduce the conclusions and operative portion of the order passed by the Bombay High Court here itself, which are as under: "130. Conclusions: a) All the Writ Petitions are maintainable and entertainable. This Court has territorial jurisdiction to deal and decide the challenges so raised against impugned order (majority decision) dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act arising out of it. b) The telecommunication Sector/Industry/Market is governed, regulated, controlled and developed by the Authorities under the Telegraph Act, the Telecom Regulatory Authority of India Act (TRAI Act) and related Regulations, Rules, Circulars, including all government policies. All the parties, persons, stakeholders, service providers, consumers and enterprise are bound by the statutory agreements/contracts, apart from related policy, usage, custom, practice so announced by the Government/Authority, from time to time. c) The question of interpretation of clarification of any contract clauses, unified license, interconnection agreements, quality of service regulations, rights and

obligations of TSP between and related to the above provisions, are to be settled by the Authorities/TDSAT and not by the Authorities under the Competition Act.
d) The concepts of subscriber, test period, reasonable demand, test phase and commercial phase rights and obligations, reciprocal obligations of service providers or breaches of any contract and/or practice, arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. e) The Competition Act and the TRAI Act are independent statutes. The statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the object, for which they are established. There is no conflict of the jurisdiction to be exercised by them. But the Competition Act itself is not sufficient to decide and deal with the issues, arising out of the provisions of the TRAI Act and the contract conditions, under the Regulations. f) The Competition Act governs the anti-competitive agreements and its effect the issues about abuse of dominant position and combinations. It cannot be used and utilized to interpret the contract conditions/policies of telecom Sector/Industry/Market, arising out of the Telegraph Act and the TRAI Act. g) The Authority under the Competition Act has no jurisdiction to decide and deal with the various statutory agreements, contracts, including the rival rights/obligations, of its own. Every aspects of development of telecommunication market are to be regulated and controlled by the concerned Department/ Government, based upon the policy so declared from time to time, keeping in mind the need and the technology, under the TRAI Act. h) Impugned order dated 21 April 2017 passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act proceeded on wrong presumption of law and usurpation of jurisdiction, unless the contract agreements, terms and clauses and/or the related issues are settled by the Authority under the TRAI Act, there is no question to initiating any proceedings under the Competition Act as contracts/agreements go to the root of the alleged controversy, even under the Competition Act. i) The Authority, like the Commission and/or Director General, has no power to deal and decide the stated breaches including of delay, denial, and congestion of POIs unless settled finally by the Authorities/TDSAT under the TRAI Act. Therefore, there is no question to initiate any inquiry and investigations under Section 26(1) of the Competition Act. It is without jurisdiction. Even at the time of passing of final order, the Commission and the Authority, will not be in a position to deal with the contractual terms and conditions and/or any breaches, if any. The uncleared and vague information are not sufficient to initiate inquiry and/or investigation under the Competition Act, unless the governing law and the policy of the concerned market has clearly defined the respective rights and obligations of the concerned parties/persons. j) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act, therefore, in the present facts and circumstances, are not mere administrative directions. k) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act are, therefore, illegal, perverse and also in view of the fact that it takes into consideration irrelevant material and ignores the relevant material and the law. l) Every majority decision cannot be termed as cartelisation. Even ex-facie service providers and its Association COAI have not committed any breaches of any provisions of the Competition Act. 131. Hence the following ORDER a) Impugned order dated 21 April 2017, passed by the

Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act, are liable to be quashed and set aside, in exercise of power under Article 226 of the Constitution of India. Order accordingly. b) All the Writ Petitions are allowed. c) There shall be no order as to costs. d) In view of the above, nothing survives in Civil Application (Stamp) No. 17736 of 2017 in Writ Petition No. 7164 of 2017 and the same is also disposed of. No costs. 4) Gist of the aforesaid order, as per the High Court, is that insofar as the telecom sector/industry/market is concerned, same is governed, regulated, controlled and developed by the authorities under the India Telegraph Act, 1885 (hereinafter referred to as the Telegraph Act), the Telecom Regulatory Authority of India Act, 1997 (for short, TRAI Act), and as well as the related Regulations, Rules, Circulars, etc. Therefore, the question of interpretation or clarification of any contract clauses, unified license, interconnection agreements, quality of service regulations, rights and obligations of TSP between and related to the above provisions, are to be settled by the Authorities/Telecom Disputes Settlement and Appellate Tribunal (TDSAT) and not by the Authorities under the Act. It has also held that the Competition Act and the TRAI Act are independent statutes and the statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the objectives for which they are established. The Competition Act is itself not sufficient to decide and deal with the issues arising out of the provisions of the TRAI Act etc. Thus, the CCI has no jurisdiction to decide and deal with the various statutory agreements, contracts, including rival rights/obligations, of its own. The issues arising out of contract agreements, terms and clauses and/or the related issues are to be settled by the authority under the TRAI Act in the first instance and unless these issues are decided, there is no question of initiating any proceedings under the Act. In a nutshell, it is held that insofar as contracts, etc. which are regulated by the TRAI Act are concerned, in the first instance, it is the authority under the TRAI Act which has to decide these questions. Once there is a determination of the respective rights and obligations under these licenses by the authority under the TRAI Act, which provided an information to the effect that the particular act appears to be anti- competitive, only thereafter the CCI gets jurisdiction to go into the question of such anti-competitive practice. Primarily the message behind the decision of the High Court is that jurisdictional facts are to be decided by the authorities under the TRAI Act which has the exclusive jurisdiction to determine those issues as the TRAI is the statutory authority established for this very purpose, and unless there is a determination of these facts, the machinery under the Competition Act cannot be invoked. To put it otherwise, the judgment proceeds to decide that it was premature for the CCI to entertain the Information for want of determination of such issues that fall within the domain of the TRAI Act. 5) It is obvious that the RJIL is not happy with the aforesaid outcome. Even the CCI feels aggrieved. CCI has impugned this decision by filing four special leave petitions, while the other one has been filed by the RJIL. 6) The material facts which are absolutely essential to determine the controversy, eschewing the unnecessary details, may now be recapitulated:

7) In the instant appeals, width and scope of the powers of the CCI under the Competition Act, 2002 pertaining to telecom sector i.e. in respect of the companies in telecom industry providing telecom services is to be defined vis-a-vis the scope of the powers of TRAI under

the TRAI Act, 1997. It has arisen in these appeals, in the following background: As mentioned above, TRAI is the regulatory which regulates the functioning of the telecom service provider i.e. the telecom sector. Section 11 of the TRAI Act enumerates various functions which TRAI is supposed to perform under the Act. Section 13, likewise, empowers the TRAI to issue directions, from time to time, to the service provider. In exercise of powers under Section 13 read with Section 11 of the TRAI Act, the TRAI issued directions dated June 07, 2005 to all the telecom service providers to provide interconnection within ninety days of the applicable payments made by the interconnection seeker. The purpose behind providing interconnection by one service provider to the other service provider is to ensure smooth communication by a subscriber of one service provider to the cell number which is provided by another service provider. In that sense, this direction facilitates smooth functioning of the cell phone network even when it is managed by different companies as it ensures interconnectivity i.e. connectivity from one service provider to other service provider. 8) On October 21, 2013, RJIL was granted Unified License and Unified Access Service License under Section 4 of the Telegraph Act by the Department of Telecom (DoT) for providing telecommunication services in all 22 circles/licensed service areas in India. Soon thereafter, RJIL executed interconnection agreements (ICA) with existing telecom operators inter alia including, Bharti Airtel Limited and Bharti Hexagon Limited (hereinafter collectively referred to as the Airtel), Idea Cellular Limited (hereinafter referred to as the Idea); Vodafone India Limited/Vodafone Mobile Services Limited (hereinafter collectively referred to as the Vodafone). RJIL commenced test trial of its services after intimation and approval of the DoT and TRAI. 9) By its firm demand letter of June 21, 2016, RJIL vide separate letters requested IDOs to augment Point of Interconnection (POIs) for access, National Long Distance (NLD) and International Long Distance (ILD) services, as according to it, the capacity already provided to it was causing huge POI congestion, resulting in call failures on its network. According to RJIL, these companies intentionally ignored the aforesaid request. Accordingly, RJIL sent a letter dated July 14, 2016 to TRAI stating that the POIs provided by IDOs are substantially inadequate and leading to congestion/call failures on its network in all circles. Hence, TRAI was requested to intervene and direct these telecom operators to augment the POI capacities as per the demands made by RJIL. TRAI vide separate letters dated July 19, 2014 requested inter alia the aforementioned telecom operators to augment POIs as per the RJILs request. Further, responses of the respective companies were also sought on the issues raised by RJIL, within seven days. Idea responded by sending letter dated July 26, 2016 to RJIL denying that there had been any delay in augmentation of POIs and further stated that it is willing to fully support RJIL and that it had instructed its circle teams to augment the POIs on the basis of traffic congestion as per the ICA. Likewise, Airtel also sent reply dated August 03, 2016 to TRAI, inter alia stating that augmentation of POIs shall be undertaken as per the terms and conditions of the ICA and on the basis of traffic trends post their commercial launch. RJIL was not satisfied with such responses. It sent another letter dated August 04, 2016 to TRAI reiterating its earlier request for augmentation of POIs by the subject telecom operators. In the meantime, even Cellular Operators Association of India (COAI) intervened by addressing communication dated August 08, 2016 to TRAI wherein it took a stand by stating that the RJIL was providing free service to millions of users under the guise of testing which led to choking of POIs. It was further suggested that

due to the free service provided by RJIL, a substantial imbalance in voice traffic had occurred for which the existing operators were not adequately compensated under the Interconnection Usage Charges regulations (IUC) in place. 10) There was further exchange of correspondence between the parties and even by the parties to the TRAI which shows that the parties stuck to their respective positions and it may not be necessary to refer to those communications in detail. Suffice it is to mention that RJIL fixed September 05, 2016 as the launch date, which fact was informed to other service providers as well who were also told that the subscriber base was expected to substantially and swiftly increase resulting in even more POI congestion. On that basis, request was made for urgent POI augmentation vide letter dated September 02, 2016. The TRAI even facilitated a meeting between the representatives of RJIL and other service providers (respondents herein) to sort out and resolve the differences in the interest of the consumers. At the same time, in the said meeting, the three telecom operators (respondents herein) also raised a grievance that free calls being provided by RJIL has resulted in an unprecedented traffic congestion on their respective networks and the current IUC regime is inadequate to cover the cost of efficiently maintaining such high traffic. Thereafter, vide letter dated September 14, 2016, addressed by Airtel to RJIL, it stated that the POIs (also known as E1s) would be converted into 50:50 ratio to outgoing and incoming E1s. In other words, the E1s provided would be converted to only outgoing or only incoming i.e. one-way E1s. RJIL replied by stating that it was acceptable to them. 11) Soon thereafter, i.e. in September 2016 itself, Mr. Rajan Sardana, a Chartered Accountant, filed information under Section 19 of the Competition Act (registered as Case No. 81 of 2016) and similar application was filed by Justice K.A. Puj (retired) (registered as Case No. 83 of 2016). Then, it was followed by information under Section 19 of the Competition Act by RJIL in November, 2016

Proceedings before TRAI: 12) As the matter was with the TRAI as well, it issued show cause notices dated September 27, 2016 to IDOs and RJIL for violation of Standard of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009 (hereinafter referred to as the QoS) and for provision of the License Agreements. Similar show cause notices were also sent to other telecom operators. On October 21, 2016, TRAI issued recommendations to DoT after finding that IDOs have violated conditions under the QoS, interconnection agreements and Unified License. The TRAI inter alia stated in its recommendation as under: "21. (vii) It is evident from the above clauses that the licensees are mandated to provide interconnection to all eligible telecom service provider. However, as mentioned in para 6 above, Airtel along with other service providers have jointly through their association (COAI), declined Point of Interconnection to RJIL which is willful violation of the above mentioned license conditions. ...(x) COAIs letter dated 2nd September, 2016 which was confirmed by Airtel in the meeting held on 9 th September, 2016 clearly indicates attempt by three service providers namely, Airtel, Vodafone India Limited and Idea Cellular Limited to stifle competition in the market and willfully violate the license conditions; 23. While the Authority has been taking necessary steps to ensure effective interconnection between Airtel and RJIL, it is evident from Para 21 that Airtel is in non- compliance of the terms and conditions of license and denial of interconnection to RJIL appears to be with ulterior motive to stifle competition and is anti-consumer. 13) TRAI recommended that Rs. 50 crore per local service area (LSA) be imposed

on all the above three telecom operators for failure to adhere to TRAI norms and regulations. Similar recommendations were also issued to DoT against other telecom operators. Against the recommendations dated October 21, 2016 of TRAI, Vodafone filed a Writ Petition being Writ Petition (C) No. 11740 of 2016 before the High Court at Delhi. Meanwhile, on January 17, 2017, TRAI also recommended imposition of penalty of Rs. 1,90,000/- on Idea for its rejection of mobile number portability (MNP) requests to RJILs network. Against the aforesaid recommendation, Idea has preferred a Writ Petition being Writ Petition (C) No. 685 of 2017 before the High Court at Delhi. The DoT after examining the matter referred it back to TRAI for fresh consideration vide DoTs reference dated April 05, 2017 whereby its recommendations imposing penalty upon IDOs were sent back for reconsideration. The TRAI sent its response dated May 24, 2017 to the DoT, wherein it took a categorical stand that telecom operators have intentionally denied and delayed the augmentation of POIs to RJIL. Proceedings before CCI:

14) The CCI took the cognizance of the three informations given to it under Section 19 of the Competition Act which were registered as Case Nos. 81, 83 and 95 of 2016. It gave hearing to the respondents service providers as well as COAI and passed order dated April 21, 2017 under Section 26(1) of the Competition Act as per which it came to a prima facie conclusion that case for investigation was made out and directed the Director General to cause investigation in the case. This order was passed by majority of 3:2 as two members of CCI dissented from the said order. Operative portion of the majority order holds as under: "23. The Commission notes that allegations of anticompetitive agreement as well as abuse of dominant position have been made for the same conduct of refusal to facilitate call termination services and denial of mobile number portability. As discussed earlier, the Commission is satisfied that there exist a prima facie contravention of Section 3(3)(b) of Act, as the ITOs appear to have entered into an agreement amongst themselves through the platform of COAI, to deny POIs to RJIL. Having been prima facie convinced that the impugned conduct is an outcome of the anti-competitive agreement amongst ITOs, Commission does not find it appropriate to consider the same impugned conduct as unilateral action by each of the ITOs. The Commission therefore at this stage does not find it necessary to deal with the allegations and submissions regarding abuse of dominance in contravention of the provisions of Section 4 of Act Proceedings before the High Court:

21) The Bombay High Court in the impugned judgment has, thus, inter alia, held as under: "(i) the Competition Commission of India (CCI) had no jurisdiction in view of the Telecom Regulatory Authority of India Act, 1997 and the authorities and regulations made thereunder; (ii) the CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality; (iii) the order dated 21.04.2017 passed under section 26(1) of the Competition Act was not an administrative direction, but rather a quasi judicial one that finally decided the rights of parties and caused serious adverse consequences, because a detailed hearing had been given and many materials had been tendered in the courts of the hearings; (iv) on the merits of the matter, there was no cartelisation as alleged and COAI was exonerated; and (v) the order of the CCI was perverse and liable to be interfered with under writ jurisdiction. Arguments.

47) Insofar as the argument of the respondents that the TRAI Act is a complete code and the jurisdiction of CCI is totally ousted, the argument proceeded on the following basis: The real

issue which arises is comparison of two regimes one regulated by TRAI under the Indian Telegraph Act, 1885, Wireless Telegraphy Act, 1933 and the TRAI Act, 1997 which together forms a comprehensive and complete code; and the other being CCI under the Competition Act. The various provisions under these legislations seen with the terms of the License Agreement show that the issues arising out of interconnection between different operators shall be determined within the overall framework of the interconnection regulations/directions/orders issued by TRAI from time to time. The Object and Reasons of the TRAI Act itself lays down that it is mandated to make arrangements for protection and promotion of consumer interest and ensuring fair competition and to ensure orderly and healthy growth of telecommunication infrastructure. Moreover, the competition in the telecom sector is of a different kind as it has to function under the constant monitoring and regulation of TRAI. TRAI effectively plays the role of a watchdog of the sector as otherwise the entire sector would collapse if there is no interdependence between the telecom operators. Moreover, under Section 11(1)(a)(iv) of the TRAI Act, the authority is required to take measures to facilitate competition in the market. CCI can ensure competition only in an unregulated sector and not in the likes of the telecom sector wherein even the tariffs are capped/determined by TRAI.

74) In order to ensure that there is smooth interconnectivity and a consumer who is the subscriber of mobile phone of one service provider, say for e.g. Vodafone, and wants to make call to a mobile phone of his friend which is provided by another service provider, say Idea Cellular, the unified Competition licenses put an obligation on all these licensees to interconnect with each other on the POI. This is so mentioned in Clause 27.4 of Part I of the Schedule to the unified licence. Such interconnectivity of POI is subject to compliance of regulation/directions issued by TRAI. The interconnection agreement, inter alia, provides for the following clauses: (a) to meet all reasonable demand for the transmission and reception of messages between the interconnect systems; (b) to establish and maintain such one or more POIs as are reasonably required and are of sufficient capacity and in sufficient numbers to enable transmission and reception of the messages by means of applicable systems; and (c) to connect and keep connected to the applicable systems. Some of the other clauses of the interconnection agreement are as follows: A minimum four weeks written notice has to be given by either party for augmentation of interconnect links. Augmentation shall be completed within 90 days of receipt of requisite charges specified in the Schedule. Either party shall provide a forecast in writing, in advance for its requirements of port capacity for Telephony Traffic for the next six months to enable the other party to dimension the required capacity in its network. The interconnection tests for reach and every interface will be carried out by mutual arrangement between signatories of the agreement. By virtue of the licence, the licensee is obligated to ensure quality of service as prescribed by the licensor or TRAI and failure on their part to adhere to the quality of service stipulated by TRAI would make the licensor liable to be treated for breach of the terms and conditions of the licence. In order to render effective services, it is mandatory for the licensee to interconnect/provide POIs to all eligible telecom service providers to ensure that calls are completed to all destinations and interconnection agreement is entered into between the different service providers which mandates each of the party to the agreement to provide to the other interconnection traffic carriage and all the technical and operational quality service and time lines, i.e. the equivalent

to that which the party provides to itself. The interconnection agreement separately entered into different service providers is based on the format prescribed in the Telecommunication Interconnection (Reference Interconnect Offer) Regulations, 2002. 75) POI is defined in the agreement, in the following words: "POI are those points between two network operators which allow voice call originating from the work of one operator to terminate on the network by other operator

77) From the aforesaid analysis of the scheme contained in the TRAI Act, it becomes clear that the functioning of the telecom companies which are granted licence under Section 4 of the Telegraph Act is regulated by the provisions contained in the TRAI Act. TRAI is a regulator which regulates the telecom industry, which is a statutory body created under the TRAI Act. The necessity of such regulators has been emphasised by a Constitution Bench of this Court in Modern Dental College and Research Centre and Others v. State of Madhya Pradesh and Others17 in the following words: "Need for regulatory mechanism 87. Regulatory mechanism, or what is called regulatory economics, is the order of the day. In the last 60-70 years, economic policy of this country has travelled from laissez faire to mixed economy to the present era of liberal economy with regulatory regime. With the advent of mixed economy, there was mushrooming of the public sector and some of the key industries like aviation, insurance, railways, electricity/power, telecommunication, etc. were monopolised by the State. Licence/permit raj prevailed during this period with strict control of the Government even in respect of those industries where private sectors were allowed to operate. However, Indian economy experienced major policy changes in early 90s on LPG Model i.e. liberalisation, privatisation and globalisation. With the onset of reforms to liberalise the Indian economy, in July 1991, a new chapter has dawned for India. This period of economic transition has had a tremendous impact on the overall economic development of almost all major sectors of the economy. 88. When we have a liberal economy which is regulated by the market forces (that is why it is also termed as market economy), prices of goods and services in such an economy are determined in a free price system set up by supply and demand. This is often contrasted with a planned economy in which a Central Government determines the price of goods and services using a fixed price system. Market economies are also contrasted with mixed economy where the price system is not entirely free, but under some government control or heavily regulated, which is sometimes combined with State led economic planning that is not extensive enough to constitute a planned economy.

78) Thus, with the advent of globalisation/liberalisation leading to free market economy, regulators in respect of each sector have assumed great significance and importance. It becomes their bounden duty to ensure that such a regulator fulfils the objectives enshrined in the Act under which a particular regulator is created. Insofar as the telecom sector is concerned, the TRAI Act itself mentions the objective which it seeks to achieve. It not only exercises control/supervision over the telecom service providers/ licensees, TRAI is also supposed to provide guidance to the telecom/mobile market. Introduction to the TRAI Act itself mentions that due to tremendous growth in the services it was considered essential to regulate the telecommunication services by a regulatory body which should be fully empowered to control the services, in the best interest of the country as well as the service providers. Likewise, the Statement of Objects and Reasons of this Act, inter alia, stipulates as under: "1. In the context of the National Telecom Policy, 1994, which amongst other things,

stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private operator will be competing with Government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. xx xx xx 4. The powers and functions of the Authority, inter alia, are. (i) ensuring technical compatibility and effective inter-relationship between different service providers; (ii) regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication services; (iii) ensuring compliance of licence conditions by all service providers; (iv) protection of the interest of the consumers of telecommunication service; (v) settlement of disputes between service providers; (vi) fixation of rates for providing telecommunication service within India and outside India; (vii) ensuring effective compliance of universal service obligations. 79) TRAI is, thus, constituted for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. It is assigned the duty to achieve the universal service which should be of world standard quality on the one hand and also to ensure that it is provided to the customers at a reasonable price, on the other hand. In the process, purpose is to make arrangements for protection and promotion of consumer interest and ensure fair competition. It is because of this reason that the powers and functions which are assigned to TRAI are highlighted in the Statement of Objects and Reasons. Specific functions which are assigned to TRAI, amongst other, including ensuring technical compatibility and effective inter- relationship between different service providers; ensuring compliance of licence conditions by all service providers; and settlement of disputes between service providers. 80) In the instant case, dispute raised by RJIL specifically touches upon these aspects as the grievance raised is that the IDOs have not given POIs as per the licence conditions resulting into non- compliance and have failed to ensure inter se technical compatibility thereby. Not only RJIL has raised this dispute, it has even specifically approached TRAI for settlement of this dispute which has arisen between various service providers, namely, RJIL on the one hand and the IDOs on the other, wherein COAI is also roped in. TRAI is seized of this particular dispute. 81) It is a matter of record that before the TRAI, IDOs have refuted the aforesaid claim of RJIL. Their submission is that not only required POIs were provided to RJIL, it is the RJIL which is in breach as it was making unreasonable and excessive demand for POIs. It is specifically pleaded by the IDOs that: (i) RJIL raised its demand for POIs for the first time on June 21, 2016.

(ii) In the letter dated June 21, 2016, it was admitted that RJIL was in test phase.

(iii) There was no express mention of any commercial launch date.

(iv) As per the letter, immediately on commercial launch RJIL would have a 22mn subscriber base for which number series was already allotted.

(v) As per the DoT Circular dated August 29, 2005 test customers are not considered as subscribers and test customers can only be in the form of business partners. It was highlighted that problem, if any, of congestion has been suffered on account of provisioning of full-fledged services during test phase.
(vi) RJIL in its complaint before the TRAI was not considering the period of 90 days as was prescribed in the Interconnection Agreement. It was instead proceeding on the basis that the demand for POIs should be met on an immediate basis.
(vii) There was several errors in the forecast made by RJIL.
(viii) The tables given by the RJIL are wrong as they take into account its total demand at the end of nine months against what was actually provided.
83) We are of the opinion that as the TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by the TRAI in the first instance. These are jurisdictional aspects. Unless the TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that the CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated September 06, 2016 that the matter related to inter-connectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated September 27, 2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated October 21, 2016 on the issue of inter-connection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJILs grievance is that inter- connectivity is not provided by the IDOs in terms of the licenses granted to them. TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIS. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned. 84) We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by the TRAI which would bring on record findings on the aforesaid aspects, the CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of subscriber, test period, reasonable demand, test phase and commercial phase rights and obligations, reciprocal obligations of service providers or breaches of any contract and/or practice, arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 56 and 82 above are determined by the TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage the CCI can go into the question as to whether violation of the provisions of TRAI Act amounts to abuse of dominance or anti-competitive

agreements. That also follows from the reading of Sections 21 and 21A of the Competition Act, as argued by the respondents. 85) The issue can be examined from another angle as well. If the CCI is allowed to intervene at this juncture, it will have to necessarily undertake an exercise of returning the findings on the aforesaid issues/aspects which are mentioned in paragraph 82 above. Not only TRAI is better equipped as a sectoral regulator to deal with these jurisdictional aspects, there may be a possibility that the two authorities, namely, TRAI on the one hand and the CCI on the other, arrive at a conflicting views. Such a situation needs to be avoided. This analysis also leads to the same conclusion, namely, in the first instance it is the TRAI which should decide these jurisdictional issues, which come within the domain of the TRAI Act as they not only arise out of the telecom licenses granted to the service providers, the service providers are governed by the TRAI Act and are supposed to follow various regulations and directions issued by the TRAI itself. 86) This takes us to the next level of the issue, viz. whether TRAI has the exclusive jurisdiction to deal with matters involving anti- competitive practices to the exclusion of CCI altogether because of the reason that the matter pertains to telecom sector? 87) The IDOs have argued that not only TRAI is an expert body which can deal with these issues and has been assigned this function specifically under the TRAI Act, even the anti-competitive aspects of telecom sector are specifically assigned to the TRAI in the TRAI Act itself. On that premise the submission is that the TRAI Act is a special legislation which prevails over the provisions of the Competition Act as the Competition Act is general in nature. It is also argued that even if the Competition Act is treated as a special statute, between the two special statutes the TRAI Act would prevail as it is a complete code in itself which regulates the telecom sector in its entirety, including the aspects of competition. 88) Such a submission, on a cursory glance, may appear to be attractive. However, the matter cannot be examined by looking into the provisions of the TRAI Act alone. Comparison of the regimes and purpose behind the two Acts becomes essential to find an answer to this issue. We have discussed the scope and ambit of the TRAI Act in the given context as well as the functions of the TRAI. No doubt, we have accepted that insofar as the telecom sector is concerned, the issues which arise and are to be examined in the context of the TRAI Act and related regime need to be examined by the TRAI. At the same time, it is also imperative that specific purpose behind the Competition Act is kept in mind. This has been taken note of and discussed in the earlier part of the judgment. As pointed out above, the Competition Act frowns the anti-competitive agreements. It deals with three kinds of practices which are treated as anti-competitive and are prohibited. To recapitulate, these are: (a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition; (b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and (c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain. 89) The CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti-competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the

TRAI Act. Learned counsel for the appellants are right in their submission that the CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b) of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. The CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI. In Haridas Exports, this Court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act. Section 27 empowers the CCI to pass certain kinds of orders, stipulated in the said provision, after inquiry into the agreements for abuse of dominant position.

90) Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of the CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the comity between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained. 91) The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well. 92) We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by the CCI to investigate an alleged cartel does not impinge upon TRAIs jurisdiction to

regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to regulatory capture and, therefore, the CCI is competent to exercise its jurisdiction from the stand point of the Competition Act. However, having taken note of the skillful exercise which the TRAI is supposed to carry out, such a comment vis-a-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February, 2007, a sectoral regulator, may not have an overall view of the economy as a whole, which the CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out. B. Whether the writ petitions filed before the High Court of Bombay were maintainable? 93) Here comes the scope of judicial interference under Article 226 of the Constitution. As per the RJIL as well as CCI, the High Court could not have entertained the writ petition against an order passed under Section 26(1) of the Competition Act which was a pure administrative order and was only a prima facie view expressed therein, and did not result in serious adverse consequences. It was submitted that the finding of the High Court that such an order was quasi-judicial order is not only erroneous but it is contrary to the law laid down in the case of Steel Authority of India Limited. The respondents, on the other hand, have submitted that the judgment in the above case had no application in the instant case as it did not deal with the sector that is regulated by a statutory authority. Moreover, such an order was quasi-judicial in nature and cannot be treated as an administrative order since it was passed by the CCI after collecting the detailed information from the parties and by holding the conferences, calling material details, documents, affidavits and by recording the opinion. It was submitted that judicial review against such an order is permissible and it was open to the respondents to point out that the complete material, as submitted by the respondents, was not taken into consideration which resulted in an erroneous order, which had adverse civil consequences inasmuch as the respondents were subjected to further investigation by the Director General. 94) We may mention at the outset that in the case of Steel Authority of India Limited, nature of the order passed by the CCI under Section 26(1) of the Competition Act (here also we are concerned with an order which is passed under Section 26(1) of the Competition Act) was gone into. The Court, in no uncertain terms, held that such an order would be an administrative order and not a quasi-judicial order. It can be discerned from paragraphs 94, 97 and 98 of the said judgment, which are as under: "94. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasijudicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in CCT v. Shukla & Bros. [(2010) 4 SCC 785: (2010) 2 SCC (Cri) 1201 : (2010) 2 SCC (L&S) 133], wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies. xx xx xx 97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these

determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned. 98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act. 95) There is no reason to take a contrary view. Therefore, we are not inclined to refer the matter to a larger Bench for reconsideration. 96) It was, however, argued that since the case of Steel Authority of India Limited was not dealing with the telecom sector, which is regulated by the statutory regulator, namely, TRAI under the TRAI Act, that judgment would not be applicable. Merely because the present case deals with the telecom sector would not change the nature of the order that is passed by the CCI under Section 26(1) of the Competition Act. However, it raises another dimension. Even if the order is administrative in nature, the question raised before the High Court in the writ petitions filed by the respondents touched upon the very jurisdiction of the CCI. As is evident, the case set up by the respondents was that the CCI did not have the jurisdiction to entertain any such request or Information which was furnished by RJIL and two others. The question, thus, pertained to the jurisdiction of the CCI to deal with such a matter and in the process the High Court was called upon to decide as to whether the jurisdiction of the CCI is entirely excluded or to what extent the CCI can exercise its jurisdiction in these cases when the matter could be dealt with by another regulator, namely, the TRAI. When such jurisdictional issues arise, the writ petition would clearly be maintainable as held in Barium Chemicals Ltd. and Another v. Company Law Board and Others18 and Carona Limited. In Carona Limited, this Court held as under: "26. The learned counsel for the appellant company submitted that the fact as to paid-up share capital of rupees one crore or more of a company is a jurisdictional fact and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to paid-up share capital of

a company can be said to be a preliminary or jurisdictional fact and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the jurisdictional fact did not exist and the Rent Act was, therefore, applicable. 18 AIR 1967 SC 295 27. Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a jurisdictional fact. If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not posses. 28. In Halsbury's Laws of England (4th Edn.), Vol. 1, Para 55, p. 61; Reissue, Vol. 1(1), Para 68, pp. 114-15, it has been stated: Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive. The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal.

36. It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue. 97) Thus, even when we do not agree with the approach of the High Court in labelling the impugned order as quasi-judicial order and assuming jurisdiction to entertain the writ petitions on that basis, for our own and different reasons, we find that the High Court was competent to deal with and decide the issues raised in exercise of its power under Article 226 of the Constitution. The writ petitions were, therefore, maintainable. C. Whether the High Court could give its findings on merits? 98) Once we hold that the order under Section 26(1) of the Competition Act is administrative in nature and further that it was merely a prima facie opinion directing the Director General to carry the investigation, the High Court would not be competent to adjudge the validity of such an order on merits. The observations of the High Court giving findings on merits, therefore, may not be appropriate. 99) At the same time, since we are upholding the order of the High Court on the aspect that the CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality, i.e. only after the TRAI returns its findings on the jurisdictional aspects which are mentioned above by us, the ultimate direction given by the High Court quashing the order passed by the CCI is not liable to be interfered with as such an exercise carried out by the CCI was premature. The result of the discussion would be to dismiss these appeals, subject to our observations on certain aspects. Ordered accordingly.

IMPORTANT NOTIFICATIONS

MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 30th August,2017

S.O. 2828(E).—In exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002 (12 of 2003), the Central Government in the public interest hereby exempts, all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years from the date of publication of this notification in the Official Gazette.

[F. No. Comp-07/4/2017-Comp-MCA]
K. V. R. MURTY, Jt. Secy

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 10th August, 2017

S.O. 2561(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976 (21 of 1976), from the application of provisions of sections 5 and 6 of the Competition Act, 2002 for a period of five years from the date of publication of this notification in the Official Gazette.

[F. No. 5/31/2015-CS]
K. V. R. MURTY, Jt. Secy

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 29th June, 2017

S.O. 2039(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts every person or enterprise who is a party to a combination as referred to in section 5 of the said Act from giving notice within thirty days mentioned in sub-section (2) of section 6 of the said Act, subject to the provisions of sub-section (2A) of section 6 and section 43A of the said Act, for a period of five years from the date of publication of this notification in the Official Gazette.

[F. No. 5/9/2017-CS]
K. V. R. MURTY, Jt. Secy

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 27th March, 2017

S.O. 988(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the enterprises being parties to —

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

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

(c) any merger or amalgamation, referred to in clauseof section 5 of the Competition Act,

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

2. Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as

per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layoutdesign or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

[F. No. 5/33/2007-CS]
K. V. R. MURTY, Jt. Secy.

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 4th March, 2016

S.O. 673(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the 'Group' exercising less than fifty per cent. of voting rights in other enterprise from the provisions of section 5 of the said Act for a period of five years with effect from the date of publication of this notification in the official gazette.

[F. No. 5/33/2007-CS (Part)]
MANOJ KUMAR, Jt. Secy.

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 4th March, 2016

S.O. 674(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India from the provisions of section 5 of the said Act for a period of five years from the date of publication of the notification in the official gazette.

[F. No. 5/33/2007-CS (Part)]
MANOJ KUMAR, Jt. Secy.

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MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 4th March, 2016

S.O. 675(E).—In exercise of the powers conferred by sub-section (3) of Section 20 of the Competition Act, 2002 (12 of 2003), the Central Government in consultation with the Competition Commission of India, hereby enhances, on the basis of the wholesale price index, the value of assets and the value of turnover, by hundred per cent for the purposes of section 5 of the said Act, from the date of publication of this notification in the Official Gazette.

[F. No. 5/7/2013-CS]
MANOJ KUMAR, Jt. Secy.

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REVISED THRESHOLDS

On March 4, 2016, the Central Government issued notifications pertaining to the statutory thresholds for the purposes of "combinations" under Section 5 of the Competition Act, 2002 ("**Act**").

1. ***Increase in thresholds***: Pursuant to Notification No. S.O. 675(E) dated March 4, 2016, the value of assets and the value of turnover has been enhanced by 100% for the purposes of Section 5 of the Act. Accordingly, the revised thresholds for notification to the Competition Commission of India ("**Commission**") are:

THRESHOLDS FOR FILING NOTICE				
		Assets		**Turnover**
Enterprise Level	**India**	> 2000 INR crore	**OR**	>6000 INR crore
	Worldwide with India leg	>USD 1 bn with at least >1000 INR crore in India		>USD 3 bn with at least >3000 INR crore in India
OR				
Group Level	**India**	>8000 INR crore	**OR**	>24000 INR crore
	Worldwide with India leg	> USD 4 bn with at least >1000 INR crore in India		> USD 12 bn with at least >3000 INR crore in India

2. ***Increase in thresholds of De Minimis Exemption***: Pursuant to Notification No. S.O. 674(E) dated March 4, 2016, acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets of not more than Rs. 350 crore in India or turnover of not more than Rs. 1000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. Accordingly, the revised thresholds for availing of the *De Minimis* exemption for acquisitions are:

THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION FOR ACQUISITIONS				
		Assets		**Turnover**
Target Enterprise	**In India**	≤350 INR crore	**OR**	≤1000 INR crore

3. ***Definition of Group***: As per Notification No. S.O. 673(E) dated March 4, 2016, the exemption to the "group" exercising less than fifty per cent. of voting rights in other enterprise from the provisions of Section 5 of the Act under Notification No. S.O. 481(E) dated March 4, 2011, has been continued for a further period of 5 years.

Press Release

Competition Commission of India (CCI) amends the Combination Regulations *vide* notification dated 9th October 2018

The provisions of the Competition Act, 2002 ("Act") relating to the regulation of combinationsas well as the Combination Regulations have been in force with effect from 1st June 2011.

The Competition Commission of India (CCI), in continuation of its efforts towards simplifyingand providing greater clarity on the application of the combination provisions of the Act andthe Combination Regulations, has further amended the Combination Regulations on 09thOctober 2018. This amendment inter alia provide certainty & transparency and expedites fasterdisposal of combination cases before CCI.
A key change brought about by the present amendments is that the parties to combinations cannow submit remedies voluntarily in response to the notice issued under Section 29(1) of theAct. If such remedies are considered sufficient to address the perceived competition harm, thecombination can be approved. This amendment is expected to expedite disposal of suchcombination cases.

In another significant amendment, where the notice is found to exhibit significant information gaps, parties to combinations are allowed to withdraw the notice and refile the same. With this amendment, the parties could address the deficiencies without facing an invalidation by CCI. Further, fee already paid in respect of such notice shall be adjusted against the fee payable inrespect of new notice, if the refiling is done within a period of 3 months.

Apart from these, certain consequential and other clarificatory changes have also been made

in
the Combination Regulations.

A copy of the amendment is available on the website of the Commission: www.cci.gov.in

THE END