

WOUTERS EXCEPTION: THE INDIAN CONTEXT

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*The promulgation of the Competition Act of 2002 marks a huge step forward by our country into the liberalized world and its commitment to fostering competition amongst actors in various relevant markets. It endeavours to maintain a precarious balance between the prevailing forces in the market while constantly tackling contemporary challenges owing to its dynamic nature. The Competition Act of 2002 has been modelled along the lines of laws prevailing in the European Union, such as the Treaty on the Functioning of the European Union (TFEU). Doctrines developed through years of jurisprudence in the EU have found their applicability in the Indian anti-trust arena. This paper will talk about one such doctrine which is yet to be tested in Indian anti-trust regulations, the Wouters Exception. Tracing its origins back to 2002 in the case of *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, the exception counsels that the objectives of the bodies must be taken into consideration while examining their actions for restrictive effects on the competition, and determining whether they were inherent to the pursuit of achieving those objectives. This paper seeks to scrutinize the Indian anti-trust jurisprudence through the lens of this very exception.*

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I. INTRODUCTION

The landmark judgments delivered by the Court of Justice of the European Union (‘CJEU’) on 21 December 2023, notably the *European Super League Company (ESL) case (C-333/21)*,¹ *International Skating Union (ISU) v Commission (C-141/21 P)*,² and *SA Royal Antwerp Football Club (Royal Antwerp) (C-680/21)*,³ have reverberated across global legal landscapes. These rulings, while primarily addressing the intricacies of EU competition law within the realm of sports governance, have underscored broader questions concerning the delicate balance between competition regulations and legitimate objectives. Evidently, the term ‘legitimate objective’ carries the weight of subjective interpretation, varying in every case. It can be gathered from the EC’s decision in *International Skating Union*, that in issues pertaining to sporting rules, the legitimate objectives can be “organisation and proper conduct of competitive sport”.⁴ Furthermore, some decisions have seen legitimate objectives being defined as “in pursuance of public interest” or “protecting the public good”.⁵

Central to these discussions is the elucidation and delineation of the enigmatic *Wouters* exception, a doctrine that has emerged as a pivotal aspect in the evaluation of restrictive practices under EU competition law. The *Wouters* exception, as articulated by the CJEU, offers a framework wherein decisions of associations of undertakings containing restrictions of competition may find an exemption from the prohibition of Article 101(1) *Treaty on the Functioning of the European Union* (‘TFEU’) if such restrictions align with a legitimate objective.⁶

¹ Case C-333/21 *European Superleague Company SL v. Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* [2023] EU:C:2023:1011.

² Case C-141/21 *International Skating Union (ISU) v. Commission* [2023] EU:C:2023:1012.

³ Case C-680/21 *UL and SA Royal Antwerp Football Club v. Union royale belge des sociétés de football association ASBL (URBSFA)* [2024] EU:C:2023:1010.

⁴ *International Skating Union’s Eligibility Rules* (Case AT.40208) [2017].

⁵ Case C-184/13 *API – Anonima Petroli Italiana SpA and Others v. Ministero delle Infrastrutture e dei Trasporti and Others* [2014] EU:C:2014:2147.

⁶ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (Treaty on European Union).

This exception finds its origins in the case of *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, decided in the year 2002, which dealt with a specific regulation adopted by the Bar of the Netherlands, setting a precedent for considering legitimate objectives as grounds for exemption from antitrust rules. However, the interpretation and application of this doctrine remain subject to debate and scrutiny, particularly concerning the types of objectives that may be balanced against restrictions of competition within Article 101(1) TFEU and the circumstances under which such balancing occurs.⁷

In India, the Competition Act, 2002,⁸ in replacing the outdated Monopolies and Restrictive Trade Practices Act, 1969, aimed to foster fair competition, prevent anti-competitive practices, and safeguard consumer interests in the evolving market economy. Empowering the Competition Commission of India ('CCI'), the legislation addresses various aspects of competition law, including anti-competitive agreements, abuse of dominance, and regulation of mergers and acquisitions.⁹ Indian jurisprudence with respect to the powers of the CCI pertaining to adjudication on situations involving regulatory bodies is a part of an ever-changing landscape. The Delhi High Court in the case of *Institute of Chartered Accountants of India v CCI* has enumerated conditions delineating the situations when a body discharging regulatory functions falls under the CCI's purview.¹⁰ The High Court, through this order, expanded the scope of CCI's powers in order to accommodate the regulatory bodies involved in policymaking, which stand to significantly influence competitive forces in the market, be it on a fact-specific basis.

The *Wouters* exception, while primarily a product of EU competition law, offers valuable insights when considering its potential application within the Indian framework. As India's competition regime continues to evolve, marked by the growing interplay between regulatory bodies and competitive market forces, there arises an opportunity to explore how this exception could be integrated into Indian jurisprudence. The delicate balance between ensuring fair competition and pursuing legitimate objectives, such as public interest and regulatory oversight, echoes challenges faced within the EU context. By

⁷ Case C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] EU:C:2002:98.

⁸ The Competition Act 2002.

⁹ The Competition Act 2002.

¹⁰ *Institute of Chartered Accountants of India v. CCI*, Writ Petition (Civil) No. 2815/2014 of 2023 (Delhi High Court, 2 June 2023).

examining the principles underpinning the *Wouters* exception, Indian courts and regulatory authorities, particularly the CCI, could potentially adopt a similar approach in cases where certain restrictive practices by regulatory bodies or associations may warrant exemption from competition law on the grounds of legitimate objectives. This comparative analysis could pave the way for a more nuanced and flexible interpretation of competition law in India while safeguarding consumer interests and market fairness.

Through a meticulous examination of relevant case law, legislative frameworks, and scholarly discourse, this article endeavours to provide a comprehensive understanding of how the *Wouters* exception may be interpreted and applied within the Indian legal landscape by delving into the nuances of Indian competition law and its interface with legitimate objectives.

II. EVOLUTION OF THE EXCEPTION

In the case of *Wouters*, CJEU was tasked with assessing whether regulations set by the Bar, which prohibited multidisciplinary partnerships between lawyers and accountants, violated Article 101 of the TFEU. Under Dutch law, the College of Delegates of the Bar had the authority to establish regulations to ensure the proper practice of the legal profession,¹¹ with the prohibition of multidisciplinary partnerships aimed at maintaining the independence of the legal profession.¹²

Initially, the CJEU acknowledged that the prohibition of multidisciplinary partnerships could indeed restrict competition, falling within the ambit of Article 101(1)(b) TFEU. However, the CJEU introduced the notion that not every decision by an association of undertakings leading to a restriction of freedom necessarily violates Article 101(1) TFEU. It emphasized considering the overall context and objectives behind such decisions, particularly related to organizational rules, qualifications, ethics, supervision, and liability, aimed at ensuring integrity and experience in legal services and the administration of justice.¹³

In analysing the contextual framework of the decision, the CJEU concluded that despite inherent effects restrictive of competition, the Bar could reasonably consider the regulation necessary for the proper practice of the legal

¹¹ *Wouters* (n 7) para 9.

¹² *ibid* para 15.

¹³ *ibid* para 97.

profession in the Member State concerned, thus not infringing Article 101(1) of the TFEU. This highlighted the CJEU's balancing act between the objective of upholding the proper practice of the legal profession and the potential restrictions of competition stemming from such regulations.

Following the *Wouters* precedent, similar reasoning has been applied in subsequent CJEU cases. For instance, the OTOC judgment involved rules set by the Portuguese Order of Chartered Accountants regarding member training.¹⁴ Although these rules imposed certain restrictions on competition, they could potentially be justified by the legitimate objective of ensuring the quality of services provided by chartered accountants. However, in this instance, the CJEU found that the rules exceeded what was necessary to achieve this objective.

Similarly, the CNG judgment addressed professional rules for geologists concerning reference fees,¹⁵ which were also found to restrict competition. Yet, these restrictions could potentially be justified by the objective of ensuring consumers receive necessary guarantees regarding the services provided by the actors involved in the field regulated by the association of undertakings.¹⁶

In contrast, the API judgment dealt with Italian national legislation that prohibited setting prices for road haulage services lower than minimum operating costs.¹⁷ Although the objective was to protect road safety, the CJEU deemed this approach disproportionate. It ruled that setting minimum prices went beyond what was necessary, as there were more effective and less restrictive measures available to achieve road safety objectives.

These cases illustrate the CJEU's consistent approach of weighing legitimate objectives against potential competition restrictions when evaluating decisions by associations of undertakings. Such analysis aims to strike a balance between regulatory objectives and competition concerns in diverse sectors across Member States.

In its ruling on the ISU Eligibility Rules, the European Commission introduced a constraint by asserting that only non-economic objectives can be recognized as legitimate aims. It drew from the *Wouters* exception, which

¹⁴ Case C-1/12 *Ordem dos Técnicos Oficiais de Contas (OTOC) v. Autoridade da Concorrência* [2013] EU:C:2013:127.

¹⁵ Case C-136/12 *Consiglio Nazionale dei Geologi (CNG) v. Autorità Garante della Concorrenza e del Mercato* [2013] EU:C: 2013:489.

¹⁶ *ibid.*

¹⁷ *API* (n 5).

originates from free movement case law, where “economic” goals are excluded as acceptable justifications.¹⁸ Consequently, the Commission declined to view the safeguarding of financial interests as a legitimate objective, and it recognized the prevention of free-riding solely as an efficiency gain. On the other hand, the Court of Justice did not engage with this specific issue. Instead, it referred to “legitimate objectives in the public interest” and “principles or ethical objectives,” appearing open to accepting identified sporting interests, such as the promotion of youth training and recruitment, as justifiable grounds irrespective of the analytical framework applied. This approach is reasonable, given that the sports sector often blurs the line between economic and non-economic aims, making such distinctions less meaningful. For instance, maximizing commercial revenues can be framed as supporting the sports ecosystem, thereby contributing to grassroots development. Whether such an argument should be accepted as a valid justification would hinge on the presence of robust redistribution mechanisms.¹⁹ The subsequent chapters will deliberate upon the other instances of the criteria for qualification of an action to be in pursuit of legitimate objectives and examine their application to cases in Indian jurisprudence.

III. REQUIREMENT OF GOVERNMENT INVOLVEMENT IN EUROPEAN JURISPRUDENCE

It has been observed in some CJEU decisions that the scope of legitimate objectives was not solely limited to consumer interest. Rather, broader public-interest objectives also play a significant role. For instance, in the *Wouters* case, the CJEU took into account not only the guarantees to consumers but also the overarching objective of ensuring the sound administration of justice.²⁰ Similarly, in *API*, the regulation's objective was to safeguard road safety,²¹ extending beyond the direct interests of consumers. This broader scope of objectives suggests that the CJEU allows for the incorporation of public interests beyond mere consumer welfare in its analysis under Article 101 TFEU.

Such incorporation of public interests in justifying competition restrictions is unusual, as it typically falls under the government's purview to protect such interests rather than undertakings'.²² Moreover, justifications based

¹⁸ *ISU Eligibility Rules* (n 4) para 220.

¹⁹ *European Super League* (n 1).

²⁰ *Wouters* (n 7) para 97.

²¹ *API* (n 5) para 50.

²² Guidance on the Commission's Enforcement Priorities in applying Article 82 of the CJEU Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, para 29.

on public interests could potentially serve commercial purposes, underscoring the need for caution in accepting them at face value.

Another notable aspect of the case law is the involvement of the legislature. In cases like *Wouters*, *OTO*, *CNG*, and *API*, the regulatory functions of professional bodies were embedded in national laws. This involvement of the legislature, termed "regulatory ancillarity" by Whish,²³ appears to be a decisive factor in allowing for this specific type of justification. The government's role seems crucial, as evidenced by the CJEU's reliance on the legislative framework rather than other analytical frameworks like Article 101(3) or "objective justification."²⁴

The significance of legislative involvement was further highlighted in the case of *Ordre National des Pharmaciens* ('ONP').²⁵ Here, the order of pharmacists operated within the framework of the French Public Health Code, which delegated various functions to the association to ensure compliance with professional duties and promote public health. The General Court ('GC') emphasized that for the *Wouters* exception to apply,²⁶ the association must act within the limits of the legal framework. However, after a thorough examination, the GC concluded that the association's behaviour exceeded its legal mandate, precluding the application of the *Wouters* exception. It can be inferred that this case underscores the importance of government involvement through the legal framework in determining the applicability of the *Wouters* exception, as bodies representing private interests cannot unilaterally protect those interests beyond legal authorization.

It can be surmised from the rulings that the incorporation of public interests beyond consumer welfare and the involvement of the legislature through the legal framework are key elements in the application of the *Wouters* exception. The government's role appears pivotal in legitimizing competition restrictions justified by broader public-interest objectives, while also ensuring that private bodies adhere to their mandated responsibilities within the confines of the law.

Expanding on the role of public interests in competition law, it is essential to recognize that objectives such as the sound administration of justice or road

²³ Richard Whish and David Bailey, *Competition Law* (11th edn, OUP 2012), 132.

²⁴ Treaty on European Union.

²⁵ Case T-90/11 *Ordre national des pharmaciens (ONP) v. Commission* [2014] EU:C: 2014:2201.

²⁶ *ibid* para 44.

safety transcend the immediate concerns of consumers. These objectives reflect broader societal goals that may require the regulation of competition to achieve. The CJEU's willingness to consider such objectives in its assessments demonstrates a nuanced understanding of the complex interplay between competition law and public policy objectives.²⁷

IV. IN INDIAN JURISPRUDENCE

As we have discussed in the chapter above, in *Wouters* the operating powers of the Bar were derived from the Dutch legislation. This has emerged as a necessary albeit not all-encompassing pre-condition of the application of this exception, thus this section will be dedicated to the examination of the CCI's jurisdiction pertaining to bodies of a statutory nature. Ahead of attempting to apply *Wouters* exception in the Indian context, we must examine the prevailing opinion with regard to the powers of the Competition Commission of India and as to whether it has the authority to adjudicate upon competitive concerns brought to its attention against statutory bodies performing regulatory functions.

The CCI is empowered under Section 18 of the Competition Act 2002 to tackle anti-competitive practices and promote competition. However, confusion arises from Sections 60 and 62,²⁸ which assert the Act's supremacy while also requiring the CCI to collaborate with other statutes. This ambiguity has led to tension between the CCI and other regulators. Nonetheless, Section 18 aligns with international norms, such as those in the European Union, highlighting the need for clearer jurisdictional guidelines to prevent conflicts.

The Delhi High Court, in the case of *Institute of Chartered Accountants of India v. Competition Commission of India* ('ICAI') on 2 June 2023,²⁹ aimed to clarify the CCI's jurisdiction. The case examined the widening investigative powers of the Director-General ('DG') and jurisdictional overlaps between the CCI and other bodies. The High Court addressed whether the ICAI falls within the scope of the Act and if it abused its dominant position by monopolizing Continuing Professional Education (CPE) seminars. The Court affirmed that ICAI qualifies as an enterprise under Section 2(h) of the Act, even when

²⁷ *ibid* para 346-347.

²⁸ The Competition Act 2002.

²⁹ *Institute of Chartered Accountants of India v. Competition Commission of India* [2023] 3 HCC (Del) 467.

performing regulatory functions, as it adds “*value to the professionals in field of accountancy*.”³⁰ Therefore, ICAI cannot be exempted from the Act's purview.

Regarding the alleged abuse of its dominant position, the Court rejected CCI's argument that the CPE program, part of ICAI's regulatory duties under the Chartered Accountants Act 1949,³¹ was non-regulatory. The judgment addressed whether CCI, as a market regulator, could scrutinize decisions of statutory regulators unrelated to trade and commerce. As mentioned in the judgment “*The scope of examination must be confined to only those areas of economic activities, which have a bearing on the market that engages entities involved in trade and commerce.*”³² It determined ICAI to be a statutory body under Section 2(w) of the Act, granting it regulatory powers beyond CCI's scope.

Statutory bodies like ICAI have limited intervention from CCI in their regulatory decisions, as they act within their mandated regulatory powers. The Delhi High Court interpreted Section 62 to imply that CCI's powers supplement rather than override other statutes. Thus, the CPE program did not constitute an abuse of dominance, and CCI's assertion regarding CPE seminars' organization as a relevant market was dismissed.

Therefore, the case highlights the need for clarity in CCI's jurisdiction to avoid conflicts with other regulators. The ruling in *ICAI* underscores that statutory bodies exercising regulatory functions are subject to limited scrutiny by CCI, aligning with Section 62's supplementary nature of CCI's powers. This case sets a precedent for delineating the boundaries of CCI's authority vis-à-vis other statutory bodies, emphasizing the importance of maintaining harmony between competition law and sector-specific regulations. This decision has been followed by the CCI as can be gathered from its order in the case of *Shrikant Ishwar Mendke vs. Insurance Regulatory and Development Authority of India and Ors*,³³ wherein the Hon'ble Commission held that the actions of Insurance Regulatory and Development Authority of India ('IRDAI') in making it mandatory to be a member of the Indian Institute of Insurance Surveyors and Loss Assessors ('IISLA') for grant and renewal of licenses for Surveyors and Loss Assessors are

³⁰ *ibid* 48.

³¹ Chartered Accountants Act 1949.

³² *ICAI* (n 10) para 71.

³³ *Shrikant Ishwar Mendke v. Insurance Regulatory & Development Authority of India*, 2023 SCC OnLine CCI 19.

purely regulatory in nature and does not pertain to trade and commerce, making it not amenable to CCI's jurisdiction.

V. APPLICATION TO THE INDIAN SCENARIO

Having established the conditional powers of the CCI over statutory bodies, this paper shall now seek to apply the *Wouters* exception to a few orders already passed by the CCI and examine the ramifications of introducing it into the Indian jurisprudence.

A. MEDICOS LEGAL ACTION GROUP TRUST (REGD.) V. PUNJAB MEDICAL COUNCIL AND ORS³⁴

The Medicos Legal Action Group Trust ('MLAG') filed an Information under Section 19(1)(a) of the Competition Act, 2002 against the Punjab Medical Council ('PMC') and Omnicuris Healthcare Pvt. Ltd. ('OHPL'). MLAG, a non-profit trust based in Chandigarh, comprises doctors from across India advocating for various medical profession-related policies. PMC is responsible for registering medical practitioners in Punjab, maintaining a registry of doctors, and accrediting Continuing Medical Education ('CME') programs. Registered Medical Practitioners ('RMPs') are required to earn a specific number of credit hours through CME programs for registration renewal.

Before the COVID-19 pandemic, MLAG's offline CME conferences were accredited by PMC. However, due to the pandemic, CME programs shifted online. MLAG alleges that PMC only approved OHPL's Omnicuris platform for online CMEs, excluding other platforms. This exclusivity allegedly stems from an agreement between PMC and OHPL, limiting the technical development in medical practice and restricting competition.

Doctors attending CMEs on non-Omnicuris platforms were allegedly denied credit hours, affecting their ability to renew registration and practice. MLAG contends that PMC's conduct violates Sections 3 and 4 of the Competition Act, restricting market access and controlling the supply of online CMEs.

1. Analysis

The CCI held that it has the power to adjudicate upon the issue at hand owing to the fact that despite the PMC being a statutory body established to provide

³⁴ *Medicos Legal Action Group Trust v. Punjab Medical Council*, 2022 SCC OnLine CCI 56.

for the registration of medical practitioners and maintain an up-to-date register of all medical practitioners in the State of Punjab, its discharge of functions with respect to allotment of CMEs is a commercial activity and not purely a regulatory one.³⁵

Moving forward, if we were to bypass the restriction of statutory bodies falling outside the jurisdiction of the CCI and attempt to apply *Wouters* exception to the facts of the present case in order to understand its utility in the Indian context, we would be left with the answer as elaborated below.

Furthermore, with respect to the allegations that the PMC's decision to not allot the tender for the conduction of CMEs to the other well-accredited online CME platforms and going with their own choice needs to have a "legitimate objective" as seen in the *Wouters* case.³⁶ It can be gathered that the objective of PMC is to prescribe certain standards and guidelines for the purpose of maintaining quality in the market of medical awareness and education. It can be said to be a legitimate objective as enumerated by the CJEU in the *International Skating Union's Eligibility rules*,³⁷ as it can be said to be non-economic in nature.

However, in the current case, the exception cannot be applied owing to a complete restriction on competition directly resulting from PMC exclusive Memoranda of Understanding with the other CME providers, which effectively eliminates the competition on the delineated relevant market.³⁸

B. SURINDER SINGH BARMİ V. THE BOARD OF
CONTROL FOR CRICKET IN INDIA³⁹

The case involved the question of whether the Board of Control for Cricket in India ('BCCI') falls under the definition of an 'enterprise' as per Section 2(h) of the Competition Act, 2002, and thus, whether Section 4 of the Act applies to it. The court held that BCCI's activities, including organizing the Indian Premier League ('IPL') and associated events, constitute economic activities falling within the ambit of Section 2(h). Despite being a society registered under the Tamil Nadu Societies Registration Act, 1975, BCCI engages in economic activities through cricket, partnering with various entities to generate income.

³⁵ *Medicos* (n 34) para 24.

³⁶ *Wouters* (n 7) para 97.

³⁷ *ISU Eligibility Rules* (n 4) para 158.

³⁸ *European Superleague Company* (n 1) para 133.

³⁹ *Surinder Singh Barmi v. Board for Control of Cricket in India (BCCI)*, 2013 SCC OnLine CCI 9.

Regarding the delineation of the relevant market, the Commission noted that cricket enjoys unique popularity in India, with no other sport being interchangeable with it. IPL, being a distinct format of cricket, forms a separate market for professional domestic cricket leagues/events in India. The court rejected the argument that general entertainment programs could substitute cricket, emphasizing the distinctive characteristics and consumer preferences of cricket.

Next, the CCI addressed whether BCCI holds a dominant position in the relevant market. It highlighted BCCI's regulatory powers in Indian cricket governance, including the authority to sanction/approve cricket events. This regulatory role allows BCCI to create barriers to entry for other cricket leagues, indicating its dominance in the market.

Finally, the CCI examined whether BCCI abused its dominant position. It found that BCCI's imposition of restrictive clauses in the IPL Media Rights Agreement, aimed at protecting commercial interests rather than promoting cricket, constituted an abuse of dominance. The clauses created entry barriers for other cricket leagues, thereby foreclosing competition. As such, BCCI's conduct was deemed to contravene Section 4(2)(c) read with Section 4(1) of the Act. The Commission directed BCCI to cease and desist from such conduct.

1. *Analysis*

The BCCI was unable to cite any reasonable justifications for its self-imposed restriction of preventing other organizations from conducting T20 cricket competitions. It fails to explain how these restrictions further the interests of cricket as a whole in India.⁴⁰ As seen in *Wouters* and *European Superleague Company SL* wherein the concept of “legitimate objectives” such as confirming that the principles are adhered to, and promoting values of the game, was enumerated upon.⁴¹ Furthermore, the regulatory body does not go beyond doing what is necessary in pursuit of achieving such legitimate objectives. It was also held that “*case-law applies in particular in cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional*

⁴⁰ *Surinder Singh Barmi* (n 39) para 45.

⁴¹ *European Superleague Company* (n 1) para 183.

*activity if the association concerned demonstrates that the aforementioned conditions are satisfied.’*⁴²

Coming back to the present case, BCCI fails to provide any reasonable justification for the impugned clause in the IPL Media Rights Agreement, the only reason provided was the “protection of the commercial interests of the company.”⁴³ Although the media firm may benefit from the restriction by recouping its investments, BCCI has not been able to demonstrate how the contested restriction serves the “legitimate interests/objectives” of both the consumers in the relevant market and cricket in the nation. This justification from BCCI is insufficient because the restriction aids in the organisation of BCCI's monopoly in the relevant market for the creation of domestic professional cricket leagues. The clause makes it very evident that BCCI wants to prevent competition. Furthermore, restrictions cannot claim protection under Section 32 of the ICC Bye-laws if they have no connection to cricket or are disproportionate to its goal or purpose. Thus it can be said that the exception does not apply in this case.

C. INTERNATIONAL SPIRITS AND WINES ASSOCIATION OF INDIA (ISWAI) .V
UTTARAKHAND AGRICULTURAL PRODUCE MARKETING BOARD⁴⁴

The CCI, with the Coram of Chairperson Ashok Kumar Gupta and Members Sangeeta Verma and Bhagwant Singh Bishnoi, addressed a case concerning the State of Uttarakhand's Liquor Wholesale Order, which vested state officials with exclusive authority over the procurement and distribution of alcoholic beverages. The case was initiated by the International Spirits and Wines Association of India against the Uttarakhand Agricultural Produce Marketing Board (OP-1), Garhwal Mandal Vikas Nigam Ltd. (OP-2), and Kumaun Mandal Vikas Nigam Ltd. (OP-3), alleging violations of Section 4 of the Competition Act. The Informant represents several international spirits and wines companies. The Excise Policy issued by the State of Uttarakhand appointed OP-1 as the exclusive wholesale licensee for alcoholic beverages and OP-2 and OP-3 as exclusive sub-wholesalers, creating a monopoly that dominated the relevant market. However, a subsequent policy change in 2016 relieved OP-2 and OP-3 from their licenses and OP-1 from its procurement duties. The OPs exploited

⁴² *Wouters* (n 7) para 97.

⁴³ *Surinder Singh Barmi* (n 39) para 48.

⁴⁴ *International Spirits and Wines Association of India v. Uttarakhand Agricultural Produce Marketing Board*, 2021 SCC OnLine CCI 15.

their monopoly by arbitrarily and discriminatorily placing orders for alcoholic beverages, ignoring consumer demand, and favouring certain brands over others, which negatively impacted brands with high consumer demand. They failed to maintain minimum stock levels and did not supply Indian-made Foreign Liquor brands according to retailers' demands, violating Clauses 10 and 11 of the Liquor Wholesale Order.

The CCI's investigation revealed that OP-1 disregarded procurement mechanisms and directives, resulting in significant procurement declines from USL and Pernod. OP-1's actions were deemed to contravene Sections 4(2)(c) and 4(2)(b)(i) of the Act. Despite complaints from retailers about brand unavailability, OP-1 continued its arbitrary procurement practices. The CCI concluded that OP-1's failure to maintain minimum stock levels and arbitrary procurement adversely affected competition, denying market access to USL and Pernod products. Clauses in the Liquor Wholesale Order were found to be one-sided, unfair, and anti-competitive. The CCI emphasized that the nature of procurement and distribution activities, regardless of profit motive, qualified OP-1, OP-2, and OP-3 as enterprises under the Act.

It was noted that the State has options in regulating the liquor trade, but in this case, the licensees, though government entities, engaged in economic activities. The Liquor Wholesale Order granted OPs monopoly power, denying competitor entry and allowing OPs to operate exclusively. OP-1's failure to maintain brand stocks and arbitrary procurement decisions limited market access, violating Sections 4(1), 4(2)(b)(i), and 4(2)(c) of the Act. The CCI referenced *Surinder Singh Barmi* to highlight that the unfairness of contractual obligations imposed by a dominant entity is a concern regardless of anti-competitive effects. Consequently, OP-1 was directed to cease anti-competitive conduct, and a penalty of Rs one crore was imposed under Section 27(b) of the Act due to the arbitrary and discriminatory procurement practices that adversely impacted competition and market access.

1. *Analysis*

In the present case, the State of Uttarakhand's Liquor Wholesale Order granted exclusive rights to OP-1, OP-2, and OP-3 to procure and distribute alcoholic beverages within the state. The ostensible objective of this regulatory framework was to control the alcohol market, ostensibly for reasons of public health and order. However, the manner in which these entities exercised their exclusive

rights raises significant issues that challenge the applicability of the *Wouters* exception.

The investigation revealed that OP-1 engaged in arbitrary and discriminatory procurement practices, placing orders for alcoholic beverages without regard to actual consumer demand and failing to maintain minimum stock levels of high-demand brands. These actions led to significant market distortion, replacing popular brands of USL and Pernod with less sought-after alternatives, thus denying market access to certain manufacturers. Such behaviour not only contravenes the principles of fair competition but also exceeds what could be deemed necessary or proportionate for regulatory purposes. The Liquor Wholesale Order, in its implementation, resulted in an abuse of dominance, infringing upon Sections 4(2)(b)(i) and 4(2)(c) of the Competition Act, 2002.

The CCI's findings highlighted that the anti-competitive conduct of OP-1, under the guise of regulatory discretion, was not integral to the legitimate regulation of the alcohol market. Instead, it demonstrated a misuse of regulatory power that significantly hindered competition. The monopolistic practices facilitated by the Liquor Wholesale Order, granting 100% market share and unfettered control to the OPs, are not aligned with the objectives that the *Wouters* exception seeks to protect. The exclusionary practices and adverse market effects far outweigh any potential regulatory benefits purportedly sought by the state.

Therefore, the *Wouters* exception cannot be aptly applied to justify the conduct of OP-1, OP-2, and OP-3 under the Liquor Wholesale Order. The regulatory measures taken by the State of Uttarakhand, in this instance, do not satisfy the criteria of necessity and proportionality that are central to the *Wouters* exception. The anti-competitive consequences and the denial of market access underscore a misuse of dominance that cannot be reconciled with the objectives of ensuring proper professional practice or protecting public interest as envisaged under the *Wouters* doctrine. Thus, the monopolistic and exclusionary practices of the OPs, sanctioned under the Liquor Wholesale Order, fall outside the permissible bounds of the *Wouters* exception.

VI. THE NEED FOR ITS APPLICATION

Importing this exception into the Indian context is essential for several reasons. The CCI operates under the Competition Act, 2002, which empowers it to curb

anti-competitive practices and promote competition. However, the intersection of the CCI's authority with the regulatory functions of other statutory bodies has often led to jurisdictional ambiguities and conflicts, as observed in above discussed case involving the ICAI and the IRDAI.⁴⁵ These conflicts highlight the need for a more refined legal framework that can effectively balance the enforcement of competition law with the legitimate regulatory functions of statutory bodies.

Firstly, applying the *Wouters* exception in India would help clarify the boundaries of the CCI's jurisdiction vis-à-vis other regulators. The CCI's mandate under Section 18 of the Competition Act is broad and mirrors international norms, emphasizing the promotion of competition and the prevention of anti-competitive practices. However, Sections 60 and 62 introduce ambiguity by asserting the Act's supremacy while also necessitating collaboration with other statutes. This ambiguity has resulted in tension between the CCI and other regulatory bodies, as seen in *ICAI*, where the Delhi High Court had to determine whether ICAI's regulatory functions exempt it from CCI's purview. The Court affirmed that while ICAI qualifies as an enterprise under Section 2(h) of the Act, its regulatory functions in accrediting Continuing Professional Education (CPE) seminars could be considered beyond CCI's scope, emphasizing the need for clearer jurisdictional guidelines.

Secondly, the *Wouters* exception would provide a framework for assessing whether certain regulatory actions, which might appear anti-competitive, are justified by a legitimate objective. In *ICAI*, the High Court recognized ICAI's regulatory role in setting standards for accountancy as adding value to the profession, which aligns with the concept of a legitimate objective under the *Wouters* exception. Similarly, in *Shrikant Ishwar Mendke*, the CCI acknowledged that mandating membership in the Indian Institute of Insurance Surveyors and Loss Assessors (IIISLA) was a regulatory decision outside the ambit of trade and commerce. By applying the *Wouters* exception, Indian courts and the CCI could better evaluate whether such regulatory measures are necessary and proportionate to achieving legitimate public interest goals, thereby preventing unjustified interference with statutory regulators' mandates.

⁴⁵ *ICAI* (n 10).

Moreover, the application of the *Wouters* exception would foster a balanced approach to competition law enforcement in India. It would ensure that regulatory actions, while potentially restrictive, are not imperiously overridden by competition mandates unless they lack necessity and proportionality. This balance is crucial in sectors where regulatory objectives such as maintaining professional standards, ensuring public safety, or protecting consumer interests might necessitate certain restrictions. For instance, in the case of the PMC,⁴⁶ the CCI's assessment of whether PMC's exclusive approval of the Omnicuris platform for online CME seminars was justified would benefit from the *Wouters* exception's framework. The exception would allow for a thorough examination of whether the exclusivity was essential and proportionate to achieving quality standards in medical education.

Furthermore, adopting the *Wouters* exception would enhance legal certainty for statutory bodies and market participants. It would provide a clear criterion for evaluating when anti-competitive restrictions can be justified, thereby reducing litigation and fostering a more predictable regulatory environment. This predictability is particularly important in complex and dynamic sectors where regulatory bodies need to implement policies swiftly and effectively to address emerging challenges. It could also bring a shift to the normative position of the Commission with regard to its jurisdiction over bodies discharging statutory functions, effectively rendering them immune to the provisions of this act, as can be seen in the case of *Satyendra Singh v Ghaziabad Development Authority*, wherein it was deemed that the OP was discharging statutory function by constructing flats for EWS allottees and thus wouldn't fall under the description of enterprise under Section 2(h) of the act.⁴⁷

Therefore, the *Wouters* exception needs to be applied in India to harmonize the enforcement of competition law with the regulatory mandates of statutory bodies. It would clarify jurisdictional boundaries, provide a framework for assessing the necessity and proportionality of regulatory actions, foster a balanced approach to competition law enforcement, and enhance legal certainty. By ensuring that regulatory measures are appropriately justified, the *Wouters* exception would support the effective functioning of statutory regulators while safeguarding competitive markets.

⁴⁶ *Medicos* (n 34).

⁴⁷ *Satyendra Singh v. Ghaziabad Development Authority*, 2017 SCC OnLine CCI 8, para 11.

VII. CONCLUSION

In conclusion, the analysis of the *Medicos Legal Action Group Trust v Punjab Medical Council* and *Surinder Singh Barmi v The Board of Control for Cricket in India* cases sheds light on the application of the *Wouters* exception within the Indian legal framework concerning competition law and regulatory bodies.

In the first case, despite acknowledging the legitimate objective of the Punjab Medical Council in maintaining quality standards in medical education, the Competition Commission of India (CCI) found that the exclusive agreements with certain CME providers resulted in a complete restriction on competition, thus not falling within the scope of the exception.

Similarly, in *Surinder Singh Barmi*, the court recognized the need for legitimate objectives in imposing restrictions, such as safeguarding the integrity and values of cricket. However, the BCCI failed to justify its restrictive clauses in the IPL Media Rights Agreement as serving the legitimate interests of cricket or consumers. Instead, it appeared to protect commercial interests, indicating an abuse of dominance.

These cases underscore the importance of aligning competition law with sector-specific regulations while ensuring that regulatory bodies exercise their powers judiciously to promote both competition and public interest. While the *Wouters* exception provides leeway for regulatory bodies to pursue legitimate objectives, such objectives must be clearly defined, proportionate, and directly related to the regulation's purpose.

Moreover, these cases highlight the necessity for clarity in delineating the boundaries of the CCI's jurisdiction to prevent conflicts with other regulators. The Delhi High Court's ruling in *ICAI* sets a precedent by affirming that statutory bodies performing regulatory functions are subject to limited scrutiny by the CCI, emphasizing the importance of maintaining harmony between competition law and sector-specific regulations.

In essence, while the *Wouters* exception offers a nuanced approach to balancing competition law with regulatory objectives. By clarifying the boundaries of the Competition Commission of India's jurisdiction, it would mitigate jurisdictional ambiguities and conflicts, as evidenced in cases involving the Institute of Chartered Accountants of India and the Insurance Regulatory and Development Authority of India. The *Wouters* exception provides a robust

framework for evaluating whether regulatory actions, which may seem anti-competitive, are justified by legitimate objectives, ensuring these actions are necessary and proportionate. This balanced approach is crucial for sectors where regulatory objectives, such as maintaining professional standards and ensuring public safety, might necessitate certain restrictions. Moreover, adopting the *Wouters* exception would enhance legal certainty, providing clear criteria for justifying anti-competitive restrictions and reducing litigation. It would also shift the normative position of the CCI regarding its jurisdiction over statutory bodies performing regulatory functions, as seen in *Satyendra Singh*. Ultimately, the *Wouters* exception would support the effective functioning of statutory regulators while safeguarding competitive markets, fostering a more predictable and coherent regulatory environment in India.