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CHIEF PATRON'S MESSAGE

"Research Consists of seeing what everybody has been but thinking what nobody has ever thought"

-Plato

It is my privilege to present the Second issue of Volume One, which forms a part of the RGNUL Student Law Review (RSLR).

The present edition of the university's flagship student-run journal aims at promoting interest and encouraging academic research, deliberations and writing on the contemporary legal issues in the field of Competition Law. The purpose of RSLR is to serve as a platform where students and legal practitioners can contribute their original thought to the ongoing legal debates. I sincerely believe that it would help in providing momentum to the spread of quality legal research.

The theme of the current edition is "Current Issues in Competition Law". The contemporary nature of the present theme in addition to the theme of the previous edition go on to establish the contemporary and establish In times like these, with the globalization of the economy leading to the growing presence of Multinational Corporations, we see that the Indian market scenario has undergone tremendous change. It has grown and evolved into a behemoth of trade and regulations, which is why study of Competition Law is so important so that such corporations do not use their position of power to the disadvantage of the consumer. It is the root of instilling a fair, non-discriminatory, competitive environment truly in line with the rule of law professed in our society.

On behalf of the students and faculty of RGNUL Punjab, I wish to express my deep gratitude to all the distinguished members of the peer review board who have devoted their valuable time in reviewing the papers and providing their valuable insights. I would like to appreciate the efforts made by the Faculty Editor and the entire student-run Editorial Board. This issue of the RSLR, I hope, will be a trendsetter; both in terms of its importance to the field of study as well as the direction it provides for prospective endeavours.

Professor (Dr.) Paramjit S. Jaswal
Chief Patron
RGNUL Student Law Review

PATRON'S MESSAGE

The legal profession, by its very nature, largely involves researching the law, communicating the results, and determining the best course of action. This training should ideally commence in law school. The importance of developing these skills cannot be overstated. No matter the area of practice, every lawyer has to spend a large amount of his/her time researching and writing about the law. Keeping in mind the significance of legal research, RGNUL has always cultivated the culture of academic deliberation and writing in its students. It is an essential part of the curriculum and therefore the students, from the very beginning, are taught the intricacies of legal research through classroom teaching, seminars and project works. However the quality of legal academic literature has seen a dramatic decline in recent years, and thus the need for a forum was felt which would allow students to use their legal training and apply it by participating in the most contemporary legal debates of the times.

RGNUL Student Law Review set an unprecedented standard with its first issue. This is very heartening to witness. The hard work the students and the faculty have put into the journal is truly commendable.

I would like to express my gratitude to the esteemed members of the Peer Review Board for their valuable support and time. Further I would like to appreciate the efforts made by Dr. Anand Pawar, the Faculty Editor for providing guidance to the Student Editors. Students play an important role in the analysis of legal frameworks in the modern day and I am confident that the Journal's take on current academic debate will be appreciated by law professionals and academicians alike. I congratulate the Editorial Board of RSLR and all the young scholars who took out time from their academics for this extraordinary initiative and wish them success in all their future endeavours.

Prof. (Dr.) G.I.S Sandhu
Patron
RGNUL Student Law Review

FOREWORD

It gives me immense pleasure to write the foreword for the second edition of the RGNUL Student Law Review (RSLR). I would like to take the opportunity to appreciate the efforts made by the students of RGNUL in the form of an Editorial Board for the successful completion of this edition. Work like this is an example of how the University has grown and nurtured such bright and talented editors.

I sincerely appreciate te effort of our student members of the Editorial board for their hard work and dedication because of which, it became possible to release this issue on time. They interacted with the leading academicians of this country, practicing advocates and other legal luminaries. Their support has been invaluable to us and I humbly thank them for the time they took out to review the articles that were submitted for consideration. I would like to take this opportunity to thank our contributors for their excellent work. This journal would not have been possible without the support that the student community all over the country has provided.

The second edition begins with a guest article from Mr. Atul Dua and Dr. V.K Aggarwal, partners in Seth Dua Associates, New Delhi who have very succinctly presented their views on procedures of investigation by the Director-General under the Competition Act, 2002.

Furthermore, the contributors have provided articles on a wide spectrum of topics, establishing the nexus of competition law with sports law, medical care, economics of trade and issues related to pricing of products.

I sincerely hope that the review makes for an interesting read and we would love to hear your opinions on any improvements we can make in the journal. Please feel free to write to us for any feedback regarding the journal.

Dr. Anand Pawar
Faculty Editor

TABLE OF CONTENTS

[GUEST ARTICLES]

PROCEDURE OF INVESTIGATION BY DIRECTOR GENERAL UNDER THE COMPETITION ACT- BREACH OF PRINCIPLES OF NATURAL JUSTICE

- Atul Dua* and Dr. Vijay Kumar Aggarwal**

1. INTRODUCTION

The Competition Act, 2002 (hereinafter referred to as '**the Act**') was enacted to prevent practices having an adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of the consumers and to ensure the freedom of trade carried on by other participants in the markets in India. The Competition Commission of India (hereinafter referred to as '**CCI**') was established under the Act which empowers the CCI to investigate cases/complaints that come before it. Therefore, for the purpose of assisting the CCI in conducting enquiries into contraventions of any of the provisions of the Act, the Director General (hereinafter referred to as '**DG**')[1] was appointed by the Central Government.

The role of the DG assumes significance particularly after the notification of provisions relating to anti-competitive agreements[2] and abuse of dominance[3] under the Act, as the CCI is required to compulsorily refer the matter[4] to the DG to undertake an investigation, in case the CCI is of the opinion that there exists a *prima-facie* case of violation of the provisions of the Act. Thus, a direction of investigation

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** Partner, Seth Dua & Associates, New Delhi.

1 Section 16, The Competition Act, 2002 (includes Additional, Joint, Deputy or Assistant Director General).
2 Id, Section 3 (w.e.f. 20/05/2009).
3 Id, Section 4 (w.e.f. 20/05/2009).
4 Id, Section 26(1).

by the CCI to the DG is deemed to be the commencement of an enquiry under the Act.[5]

The DG commences the investigation as soon as it receives a *prima-facie* order[6] passed by the CCI along with a copy of the information or reference as the case may be along with all other documents, materials, affidavits or statements which have been filed either along with the said information or reference or at the time of hearing before the CCI.[7]

The point for consideration here, is whether there is any established procedure for the DG to conduct the investigation as directed by the CCI under the Act and the Competition Commission of India (General) Regulations, 2009 (the Regulations)?

In order to examine the above proposition, the relevant provisions of the Act and the Regulations framed thereunder are to be examined.

The Act devotes a specific Chapter[8] entitled 'Duties of Director General', which has only one Section[9] dealing with the powers of the DG to investigate contraventions under the Act as ordered by the CCI. Broadly for the purpose of investigation, the DG has been vested with (i) certain powers of the Civil Courts[10] under the Code of Civil Procedure, 1908 (CPC) and (ii) powers of Inspector relating to production of documents and evidences[11] and seizure of documents[12] under the Companies Act, 1956. The Regulations framed under the Act, more or less state the powers of the DG during investigation in taking evidence on record including issuance of commissions for examination of witnesses and documents.[13] However, the Act also provides that every procedure shall be guided by the principles of natural justice.[14]

Now, an attempt is made to ascertain whether the following procedure adopted by the DG in conducting the investigation as per the order of

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[5] Regulation 18(2), Competition Commission of India (General) Regulations, 2009.
[6] Id.
[7] Id, Regulation 20(1).
[8] Chapter V, Duties of Director General, The Competition Act, 2002.
[9] Supra 1, Section. 41.
[10] Id, Section 36(2).
[11] Id, Section. 240.
[12] Id, Section 240A.
[13] Supra 5, Regulations 41, 42 and 44.
[14] Supra 1, Section 36(1).

the CCI is guided by the principles of natural justice under the scheme of the Act.[15]

2. NON- SUPPLYING OF *PRIMA-FACIE* ORDER OF THE CCI AND OTHER DOCUMENTS

In general, experience reflects that the DG as soon as it receives the *prima-facie* order along with other relevant documents as mentioned above[16] from the CCI, issues a notice[17] to the opposite parties (including the Informant/ Third parties) without forwarding a copy of the *prima-facie* order passed by the CCI along with other relevant documents mentioned above.[18] Through the said notice, the DG asks for certain information through interrogatories or for discoveries or production of documents etc. and also intimates the consequences[19] of non-furnishing of requisite information and documents. The Act also provides hefty penalty for providing false/ incorrect information to the DG in response to the said notice of the DG.[20]

It is seen that when such notices issued by the DG are received by the opposite parties, they are unaware of the fact that some investigation is going on against them under the Act for violation of any of the provisions of the Act for which the CCI, for such violation can *inter-alia* impose a hefty penalty up to 10% of the average turnover for the last three preceding financial years.[21] Therefore, such opposite parties in good faith furnish the requisite information/ documents as sought by the DG, without taking the defence available to them at this stage under the scheme of the Act[22] and thus, become a law abiding corporate. However, in some cases where the opposite party (or parties) has (have) any suspicion when they receive the notice u/s 41 of the Act from the DG that there may be some investigation going on for violation of the provision of the Act, they request the DG to supply them a copy of the order passed by the CCI on the basis of which the DG has issued the

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[15] Ibid.
[16] Regulation 18(2), Competition Commission of India (General) Regulations, 2009.
[17] Id, Section 41(2) r.w.Section. 36(2).
[18] Supra 5.
[19] Supra 1, Section.43.
[20] Id, Section 45.
[21] Id, Section 27(b).
[22] Id, Section.19(3) & Section 19 (4).

notice to them. Even in such cases, the DG instead of supplying a copy of the *prima-facie* order of the CCI and other relevant documents,[23] informs the opposite party that they may approach the CCI in this regard.[24]

3. NON-SUPPLYING OF ADDITIONAL INFORMATION DURING INVESTIGATION

As stated above, the DG also issues notices[25] to the informant and/or the third Parties during investigation for collecting further documents/evidence etc. Pursuant thereto, the informant and/or the third parties furnish their reply to the said notices. However, it is seen that the DG almost on no occasion supplies the copies of additional information collected during investigation from the informant and/or third parties to the opposite parties against whom it is using the said additional information in its Investigation Report.

4. RECORDING OF EVIDENCE ON OATH OF INFORMANT/THIRD PARTY IN THE ABSENCE OF OPPOSITE PARTY

During investigation, the DG is competent to call parties to lead evidence by way of affidavit or oral evidence in the matter.[26] In accordance with the provisions of the Act, the oral evidence may be recorded on oath.[27] It is seen that during investigation, the DG almost on no occasion, informs the opposite parties against whom the investigation is being conducted, as regards his calls for the informant and/or third party to lead evidence either orally or by way of affidavit. Thus, the evidence given by the informant and/or third party is recorded by the DG in the absence and without the knowledge of the

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[23] Supra 5.

[24] There is one exception to the above stated position which is that in case the Informant while filing the Information Petition (Section 19(1)) before the CCI also moved an Application for interim orders (Section 33) then in such situations, the CCI before passing any interim order forwards the Information Petition along with the documents with a *prima-facie* order (Section 26(1)) passed by it to the opposite parties for their reply and comments.

[25] Supra 17.

[26] Supra 5, Regulation 41(4).

[27] Supra 1, Section. 36(2)(a).

opposite party. In fact, whenever the DG is calling the informant and/or third party for leading evidence, he is duty bound to inform the opposite party.

5. No Opportunity by the DG for Cross Examination of the Informant/Third Party to the Opposite Party Against Whom the Investigation is Being Carried Out

As noted above, the evidence given by the informant and/or third party is recorded by the DG in the absence and without the knowledge of the opposite party. Therefore, at least thereafter, the DG should give a copy of the evidence so recorded of the informant/third party during investigation to the opposite party for giving him an opportunity for cross examination of the said informant and/or third party, in terms of the regulations.[28] It is seen that in practice, no such opportunity for cross examination of the informant and/or third party is given.

6. Inevitably—No Evidence Led in Rebuttal by the Opposite Party During Investigation

As stated above, the evidence given by the informant and/or third party is recorded by the DG in the absence and without the knowledge of the opposite party and no opportunity for cross examination of informant and/or third party is given to the opposite party by the DG, therefore, the opposite party by the DG is handicapped in producing any evidence in rebuttal during investigation. Thereafter, the Investigation Report is prepared by the DG without any rebuttal of the opposite parties to the evidence.

From the aforesaid, it is abundantly clear that not only the procedure adopted by the DG in conducting the investigation as per the order of the CCI is in gross violation of the principles of natural justice at various stages of investigation, but also the procedure given in the Regulations framed under the Act is not being followed rigorously by the DG during investigation as per the order of the CCI which also leads to the gross violation of the principles of Natural Justice.

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[28] Supra 5, Regulation 41(5).

As a result, the Investigation Report submitted by the DG to the CCI pursuant to their *prima-facie* order is not reflective of the correct conclusions/findings as the procedure adopted by the DG gives rise to reasonable suspicion of business as it is one sided. In *stricto sensu*, the Investigation Report submitted by the DG is not a valid document in the eyes of law as it is in gross violation of the principles of natural justice and may not be relied upon by the CCI.

It is seen that in the regulations framed under the Act with respect to various topics such as "Power and Functions of the Secretary," "Procedure for Scrutiny of Information" etc., a set procedure has been laid down exhaustively. Therefore, it is suggested likewise, the CCI may incorporate the "set procedure for conducting investigation by the DG" by appropriately amending the regulations as the provisions of the Act and the Regulations framed thereunder are in vogue for more than five years (5 years).

[ARTICLES]

A BITTER PILL TO SWALLOW – ANALYZING ANTI-TRUST CONCERNS IN THE INDIAN PHARMACEUTICAL SECTOR

- Sanchit Srivastava and Shubhashish Chaudhri [*]

ABSTRACT

The regulation of innovation and the optimal design of legal institutions in an environment of uncertainty are two of the most important policy challenges of the twenty-first century. Innovation is critical to economic growth. Regulatory decisions and, in particular, competition and intellectual property regimes can have profound consequences for economic growth. However, remarkably little is settled about the relationship between innovation, competition and regulatory policy. The debate between which shall prevail – the legal monopoly of an inventor or creator who has invested his time, labour and capital in coming up with new technology and the competition policy of the State which aims to ensure that monopoly is not used to disrupt market dynamics – takes spotlight in context of the pharmaceutical sector. Public health is an essential cog in the social machinery and it is the duty of the State as parenspateria to ensure proper health care facilities for its citizens. However, the drugs manufactured by pharmaceutical companies are protected under the patent law which grants the companies a right to exclude others from exploiting their invention. So what if the companies themselves exploit their invention in order to maximize monetary gain? The State has countermeasures such as compulsory licensing under TRIPS and the anti-trust regime which prevents an enterprise from abusing its dominant position to the detriment of consumers.

This paper is an attempt to highlight the emerging issues in the ongoing battle between profit-oriented entities and the regulatory authorities in the field of drug manufacture, pricing and procurement. The authors shall try to suggest the reasons why, and methods by which the Competition Commission of India can regulate the

[*] 4th Year, B.A. LL.B (Hons.), Dr. Ram Manohar Lohia National Law University Lucknow. The authors are indebted to the guidance and contribution of Dr. Manish Singh, Associate Professor (Law) RMLNLU. However, the authors are solely responsible for any errors that might have crept in this draft – factual or otherwise.

pharmaceutical sector so as to ensure that the healthcare sector in our nation is not adversely influenced while at the same time there is enough incentive for private companies to invest in the development of new drugs for the patient population.

1. INTRODUCTION – A BIRD'S-EYE VIEW OF THE TUSSLE BETWEEN IPRS AND COMPETITION LAW

Intellectual Property Rights (hereinafter referred to as '**IPRs**') and Competition Law are like two quibbling siblings – while the former is all about exclusion, the latter is about liberation. IPRs are basically rights that allow the right-holder to exclude others from exploiting an intangible asset. The objective of granting IPRs is twofold – firstly, it is a sign that the law promotes other people to be innovative by offering them new technologies and creations which increase the knowledgebase of the public; and secondly, it also serves to protect the time, labour, skill and capital of the inventor/author from undue exploitation by any member of the public. IPRs also encourage the possibility of various kinds of investments, such as in research and development (R&D).

However, the rights conferred may take the unruly shape of a monopoly and lead to significant market power, especially if there are no or inferior substitutes on either the demand or supply side of the market. In other words, it becomes extremely tough for new players or players who make generic and/or affordable versions of the protected product, to enter the market. Perceived *ex post,* IPRs may operate as barriers to entry for third parties. There is a much controversial trade-off between the incentive to innovation and investment therein, and the liberty of others to use the protected product freely. In this debate, it is often competition in innovation which takes precedence over competition from someone providing the same product in the same way. In this regard, Joseph Schumpeter has argued that the "competition" in question should be the competition incurred from the entry of new products in the market, the new sources of supply, and the new organization – and this competition should work in order to provide for an advantageous change in quality but without adversely affecting the profits and outputs of the pre-existing firms.[1]

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[1] J.A. Schumpeter, *Capitalism, Socialism and Democracy* 84 (George, Allen and Unwin Ltd, London, 1943); cited by V. Korah, *Competition Law and Intellectual Property Rights*, 129,

There has been a significant change in the approach and objective of competition law over the years. At first there was considerable dispute over the actual function of competition law – whether it served as a benevolent gatekeeper of the market, allowing access to competitors; or whether it worked towards increasing efficiency and consumer welfare. In the last decade, the European Union policy in relation to competition law has undergone a paradigm shift from catering to the competitors, especially small and medium sized enterprises, to protecting consumer welfare.[2]The United States of America went through similar changes prior to this period and the regulators claim that they are pro-consumer.[3] However, the scenario in developing nations such as India is different from the aforementioned developed nations. On the one hand there is the need to promote the small and medium sized firms with better access to indigenous resources to move outside the shadow of multinational firms that are rich enough to invest considerably in R&D, while on the other hand there is a duty to ensure that the public is positively benefited from this competition. With regard to the pharmaceutical sector, there is the additional responsibility upon developing nations of promoting domestic industry since the product market is global and not restricted to national boundaries. In such situations, the domestic industry has to face stiff competition from the multinational firms in terms of market strategies, product qualities and revenue share.

In this regard, the pharmaceutical sector rests tentatively on the fault-lines between these policy objectives – competition, intellectual property, state regulation and social welfare. The pharmaceutical sector has been characterized by the Schumpeterian concept of "creative destruction" – the market revitalizes itself from within by scrapping old and failing businesses and reallocating resources to newer and thriving ones.[4]The role of competition law in pharmaceutical sector arose since product patents on drugs and pharmaceuticals were allowed under the Indian patent law[5] and its role is ailing with an insufferable complexity.

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131 in Vinod Dhall, *Competition Law Today* (Oxford University Press, New Delhi, 2007).

[2] *Commission notice, Guidelines on the Application of Article 81 (3) of the Treaty,* OJ 2004, C101/97, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri =OJ:C:2004: 101:0097:0118:EN:PDF last seen on 04/11/2014.

[3] Supra 1.

[4] Geoffrey A. Maine, Joshua D. Wright, *Competition Policy and Patent Law under Uncertainty: Regulating Innovation,* 3(Cambridge University Press, New York, 2011).

[5] The Patents (Amendment) Act, 2005.

The debate between incentivizing firms to develop new products by granting them patent protection which aids the inventors/developers in marketing said products(IP) and promoting price competition to reduce health expenditure and maximizing public benefit (anti-trust regulations) acquires limelight in the pharmaceutical industry.

This paper seeks to examine the above discussed conflict by examining the regulatory measures in India, and contrasting them with those in the UK, USA and the European Union, including the UK. The authors will seek to provide an alternative route to the much criticized mode of compulsory licensing by empowering the apex anti-trust authority of India – the Competition Commission of India – to deal with matters relating to pharmaceutical sector.

2. UNDERSTANDING THE DYNAMICS OF PATENT AND COMPETITION LAW IN RELATION TO THE EUROPEAN COMMISSION

2.1. Need for Patent Monopoly for Originators

There are two facets which add importance to this deliberation – one economic and the other legal. The 'originators' (innovative pharmaceutical companies that develop new medicines) bring about substantial public health benefits for the population. However, the issue of finance and research is not a sinecure one.

Originators are incentivized to develop new products (whether for a completely novel clinical therapy or as an enhancement to an existing method) by the promise of patent monopoly to exploit the monetary returns thereof. The average cost of developing a new drug and bringing it to the market is estimated, by the European Federation of Pharmaceutical Industries and Associations (EFPIA)[6], to be over USD 1.3 billion. Such an incredible amount is the resultant of the shift from

[6] *Submission to the European Commission in relation to the Pharmaceutical Sector Inquiry,* European Federation of Pharmaceutical Industries and Associations (EFPIA), http://www.efpia.org/content/default.asp?PageID=559&DocID=4892 last seen on 04/11/2014) para 50, citing JA DiMasi and HG Grabowski, *The Cost of Biopharmaceutical R&D: Is Biotech Different*, (2007) 28 Managerial and Decision Economics 469-79.

drugs based on traditional chemical compounds to biotechnologies.[7] R&D costs occupy a significant fraction of development costs for a new drug – the report for an inquiry conducted by the European Commission in 2008-09 (hereinafter 'Report')had found that for the period of 2000-07, originators spent on an average 17% of their global turnover upon R&D.[8] For biopharmaceutical industries, this percentage went up to 40%.[9] Therefore, these figures suggest that the superiority granted by patents to these companies is justified.

Furthermore, these products have a gestation period ranging typically between 10-12 years after initial discovery and patenting of a compound before they actually reach the market. There are two major consequences of this – firstly, because so much of the patent-protected time period expires prior to the commercial utilization of the product the scope of recoupment of R&D costs gets substantially reduced; and secondly, due to this delay patent protection may expire before the product acquires an attractive niche in the marketplace which allows generic firms to enter with a relatively low commercial risk (since the initial cost of entry has already been borne by the originators) by legitimately making copies of the patented product available at a cheaper price than it. The authors have provided herewith a table depicting this phenomenon in the Indian market.[10]

However, due to the whip of competition law it is often the case that these monopolies have to succumb to the public welfare. Pharmaceutical giant Novartis AG in its comments on this report stated that the Commission had failed to take into account the pricing and reimbursement policies of its member States, as these are the "single biggest obstacle to generic competition"[11]. It also contended herein that there is no relation between anti-competitive practices and pharmaceutical innovation and that there is no incentive to manufacture medicines which

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[7] Simon Priddis and Simon Constantine, *The Pharmaceutical Sector, Intellectual Property and Competition Law in Europe*, 241-275, 243 in *Intellectual Property and Competition Law: New Frontiers* (Steven Anderman and Ariel Ezrachi, New Delhi, Oxford University Press, 2009).

[8] *Pharmaceutical Sector Inquiry Final Report, European Commission*, available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.htm, last seen 04/11/2014.

[9] Ibid, para 56.

[10] See Appendix, table 1.

[11] *Consultation on the preliminary findings of the Pharmaceutical Sector Inquiry*, available at http://ec.europa.eu/competition/consulations/2009_pharma/novartis.pdf last seen 04/11/2014.

are a small but significant enhancement over existing therapies, and that the regulatory practices of member States in favour of the generic companies thwart the purpose of companies such as Novartis AG investing in R&D.[12] Similarly Bayer AG lambasted the contention of the report that the growth of the generics industry has been hampered as a result of anti-competitive practices of the research-based industry ('BigPharma'). It has criticized the nomenclature given by the Report to "legitimate, legal and appropriate activities ranging from filing and enforcement of patents to development and launch of improved products" as a "tool-box" used by originators to hinder the entry of generic players into the market.[13]

2.2. Dynamics of Competition in the Pharmaceutical Sector

The analysis of the interaction between competition law and intellectual property is somewhat inconvenienced by the multiple variants of competition that exists in the pharmaceutical sector. These can be categorized broadly into four different modes:

i. Originators competing *inter se* through innovation to bring a new product into the market; and for this purpose each originator seeks to develop a unique product i.e. which could not be substituted easily and would be the only drug available to treat a particular condition. [Inter-brand competition]
ii. Direct 'in market' competition amongst companies that supply the same patented product i.e. parallel trading. Thus, there is a stiff competition faced by distributors of products in developed economies (where the product is priced higher) from their counterparts in the developing/under-developed economies (where the price of the product is cheaper) [Intra-brand competition].
iii. Direct 'in market' competition between different brand names vis-à-vis the same patented product; in this the parameters are founded on efficacy i.e. therapeutic effect, absence of side-effects and patient convenience, along with price.
iv. Competition from manufacturers of generic equivalents as the market exclusivity of an originator's product diminishes.

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[12] Ibid.

[13] Ibid 9,'Bayer' available at http://ec.europa.eu/competition/consulations/2009_pharma/ bayer.pdf , last seen on 04/11/2014.

In short, affairs operate in a *virtuous circle* in the pharmaceutical sector. First a firm would develop a new product through research and innovation. Since the new product would bring about a positive change in the competition in the relevant marketplace, the firm would reap substantial profits which are protected by the patent monopoly. The product would also induce competitors of the firm to come up with innovative alternatives to the same product (ideally without encroaching upon the former's patent rights). Following expiry of statutory protection, the product would enter the public domain wherein it would face competition from its generic counterparts manufactured at a lower cost than it. Firms then would compete for a subsequent innovation (better than the previous one) in order to win over the business in the marketplace.

The EU has hit the right note in this debate, inasmuch that if upon enforcement of Article 102 Treaty on the Functioning of European Union (hereinafter referred to as '**TFEU**') an obligation to supply drugs were imposed upon the originators in lieu of remuneration, it would result in dissuading them from investment and innovation thereby harming consumers.[14] The European Courts have propounded that the exercise of IPRs would only be considered contrary in "exceptional circumstances"; thus making it a factual rather than legal question.[15] In India however, u/s 3 of the Competition Act, 2002 the standard specified for exercise of IPRs is "reasonable". The authors suggest that the distinction between the EU and Indian approach is that while the former operates on a belief that *per se* exercise of IPRs would not necessarily hinder free and fair competition, the latter is based on a *rebuttable presumption* that IPRs do not hinder competition because they are *statutory* rights.

[14] *Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,* European Commission, [2009] OJ C45/07 para 75, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri =OJ:C: 2009:045:0007:0020:EN:PDF, last seen 04/11/2014.

[15] Case T-201/04 *Microsoft v Commission,* [2007] ECR II-3601, para 331.

3. A LOOK AT THE PHARMACEUTICAL INDUSTRY IN INDIA

3.1. Structure

The pharmaceutical sector in India is the fourth largest pharmaceutical industry in terms of volume and thirteenth in value across the world. It contributes 8% to global production and comprises of 2% in terms of market share in pharmaceuticals. The Indian pharmaceutical industry at the end of 2007 was estimated at a staggering USD 18 billion, with the domestic industries contributing USD 10.76 billion. India is one of the top 20 countries that export pharmaceuticals, and also accounts for approximately 21% of patent challenges.[16] Therefore, indubitably the pharmaceutical sector in India is no stranger to development.

The industry in India is a mixed bag – some sub-sectors are dominated by foreign firms and multinational corporations (MNCs) such as Bayer, Novartis, Pfizer etc., whereas Indian firms such as Sun, Lupin, Cipla etc. have the upper hand. The authors have provided with a volume-based comparison depicting transitions in share of MNCs and Indian companies over the years. In Financial Year 2013-14 the domestic pharmaceutical industry accounted for over 70% of the pharmaceutical market.[17]

The domestic companies invest very little in basic R&D, since their profitability as compared with the pharmaceutical giants is low and may not increase substantially in the near future. A look at the top 10 Indian companies in terms of investment in R&D has been provided herewith.[18]

3.2. Legal Framework

In the 2001 Doha Declaration on TRIPS and Public Health[19], it was clarified that pharmaceutical patents could be granted by the Member countries. This enhancement was put into effect in 2003 and the

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[16] *Report of the Task Force on Strategy for Increasing Exports of Pharmaceutical Products*, availablehttp://commerce.nic.in/publications/Report%20Tas%20Force%Pharma%2012th%20Dec%2008.pdf?id=16, last seen on 04/11/2014.

[17] See Appendix, table 7.

[18] See Appendix, table 3.

[19] *Declaration on the TRIPS Agreement and Public Health,* WTO Ministerial Conference of 2001, Doha, November 9 – November 13, 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm, last seen on 04/11/2014.

Members decided to make it a permanent amendment to TRIPS in 2005 subject to ratification by two-thirds of the total members.[20]

The pressure of globalization put India under an obligation to amend its Patent Act in order to conform to the amended TRIPS. According to TRIPS, the developing countries (including India) had time until January 1, 2005, to enact domestic legislation to conform to the amended agreement. Since the Indian patent regime did not previously allow product patents for drugs, it became obligatory to provide for a 'mail box' facility for filing patent claims to protect these products with effect from January 1, 1995. Similarly those 'mail box' patent applications that satisfied certain conditions were entitled to receive exclusive marketing rights for five years. The amendment of the Patents Act came into force on January 1, 2005, incorporating the provisions for granting product patent in all fields of technology including chemicals, food, drugs and agrochemicals. In order to protect the interest of Indian industry, including the pharmaceutical industry, full transition period of ten years available under the TRIPS Agreement was utilized. In the amendment, a provision was made that in respect of applications for drugs and medicines filed before January 1, 2005 the rights of patentee shall accrue only from the date of grant of the patent and not with retrospective effect.

3.3. Scope of Anti-competitive Practices in the Indian Pharmaceutical Industry

There are basically two defined types of anti-competitive structures – horizontal agreements (e.g.: cartels, collusions) and vertical agreements (e.g.: tie-in, exclusive supply and distribution agreements, refusal to deal). A plain look at s 3 (3) of the Competition Act 2002 suggests that it is designed to deal with the horizontal agreements, whereas s 3 (4) primarily concerns itself with the latter type. The abuse by any enterprise of its dominant position in the relevant market is governed under s 4.Ss 5 and 6 give the Competition Commission of India power to examine any combination (mergers, acquisition or amalgamation) for anti-competitive effect.

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[20] WTO OMC, *Fact Sheet*, TRIPS and Pharmaceutical Patents (September 2006), available at http://www.wto.org/english/tratop_e/trips_e/tripsfactsheet_pharma_2006_e.pdf, last seen on 04/11/2014.

With regard to horizontal and vertical agreements, although there have been very few reported cases of collusion in the Indian pharmaceutical market[21], it may be suggested here that it is tough to presume the inexistence of tendencies to such an end amongst competing manufacturers. For instance, a very rampant (and unethical) practice that major pharmaceutical companies employ is that of influencing doctors and pharmacists towards prescribing their products by lucrative commissions, free samples and travel and other luxury packages. This expenditure is embedded in the cost of the drugs and is borne by the hapless consumers. [22] These activities of doctors along with the companies are essentially collusive behaviour and therefore illegal. The Medical Council of India Guidelines (hereinafter referred to as '**MCI Guidelines**') specifically dictates that doctors should prescribe drugs with generic names, thereby an effort to curb the practice of brand loyalist doctors and pharma companies. [23] The violation of these Guidelines by any medical practitioner, according to Section 20A of the Medical Council Act, 1956, constitutes "professional misconduct" and therefore is binding upon the industry. But the MCI Guidelines have no binding effect on pharmaceutical companies, so in order to bolster this objective even further by an amendment to the Guidelines dated December 10, 2009 a new clause 6.8 was added which specifically regulated the conduct of doctors and their professional association with pharmaceutical companies and allied health sector industry.[24]

Gratifications in the form of gifts, travel facilities, hospitality arrangements or cash benefits have now been strictly disallowed. However, it is recommended by the authors that since pharmaceutical industries are one of the key players in the healthcare milieu these MCI Guidelines should be made applicable *mutatis mutandis* to them as well, or separate guidelines intended to regulate their conduct should be framed.

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[21] See *In re: Bengal Chemists and Druggists Association and Dr. Chintamoni Ghosh,* [2014] 121 CLA 196 (CCI)

[22] Khomba Singh, *Free samples to doctors to be now considered part of taxable income,* The Economic Times (07/08/2012), available at http://articles.economictimes.indiatimes.com/2012-08-07/news/33083546_1_drug-makers-pharmaceutical-companies-free-samples, last seen on 04 October 2014.

[23] Regulations 1.6 and 1.7, Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002, available at http://www.medindia.net/education/mci-guidelines.asp, last seen on 04/11/2014.

[24] Id.

Secondly, in the context of anti competitive combinations, it is submitted by the authors that this situation was presumed as highly unlikely given the variegated structure of the Indian pharmaceutical industry which on the contrary ensures free and fair competition, until first major combination has only occurred recently between Sun Pharma and Ranbaxy. The authors shall discuss this in more detail in the following section. However, an analogy can be drawn from other sectors wherein foreign players entering our market with the sole intent of maximizing profit and the pressure of drug prices makes them resort to mergers and amalgamations with Indian companies so as to unite portfolios, achieve a decrease in the cost of development and an increase in market reach. These deals can pose a threat to the indigenous industries, and as a corollary to competition; which is the reason why the Competition Act provides for a stringent mechanism for regulation of combinations and there potential effects on the market.

The issue of abuse of dominant position is the focal point of discussion in this debate. Since the pharmaceutical industry is largely based on know-how and now the Patent Act allows product patents for pharmaceuticals, companies acquire a near-monopoly status as a result of patent grants, which is often abused to the detriment of consumers. This is because albeit the focus of competition law lies in substitutability/interchangeability of goods on demand side, there have been instances where life-saving drugs were priced as exorbitantly as over INR 3 lakhs for a month's dosage; and such drugs may not always have viable substitutes available in the market. Pharmaceutical manufacturers consistently demand a liberal anti-trust regime as according to them competition and not price regulation increases innovation which would lead to availability of better drugs. However abuse of the patent protection in favour of recoupment of their investments by companies impedes development which results in the end consumer bearing the brunt of the blast. Ensuring essential healthcare facilities is one of the primary requirements to be fulfilled by any government in the world, especially in a developing country such as India.

4. COMPULSORY LICENSING IN INDIA – THE NEXAVAR CONTROVERSY

"Between our trade and our health, we have chosen to look after our health."
- Luiz Inacio Lula da Silva (President of Brazil); on compulsory licensing of AIDS drugs

A compulsory license is basically an involuntary contract entered between a party willing to contract and a party which is not willing and it is imposed and enforced by the state. Compulsory licensing is a form of state intervention with the rights of the patentee, granted on grounds such as exorbitant prices of essential facilities or commodities; or patents being not allowed in the country; or when the person exercises his IPR right is such a way so as to be violating the public interest at large. In a nutshell the entire concept of compulsory licensing is that the rights-holder is compelled by court or competent authority to license his rights to other parties in public interest, and he or she gets royalty which is provided and sanctioned by said court or other competent authority.

Compulsory licensing has been mandated by several international conventions/ agreements like World Intellectual Property Organization (WIPO), Paris Convention for the Protection of Industrial Property[25] and WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[26] These international agreements have given several grounds to their contracting states to like promotion of public health and nutrition or to promote the public sectors of vital importance to their socio economic and technological importance.

In India the law on compulsory licensing is provided for under Ss 84-90 of the Indian Patents Act 1970. S 84 (1) is the substantive law on the issue, listing the criteria on which an application for compulsory license may be allowed by the Controller of Patents ("Controller"):

i. the reasonable requirements of the public insofar the patented invention are not satisfied with the *status quo*; or
ii. the patented invention is not available to the public at an affordable price; or
iii. the patented invention is not *worked* within the territory of India.

[25] Article 5(a) TRIPS.
[26] Id, Art. 8, 31 and 40.

A compulsory license is encumbered with certain qualifications which emphasize the fact that the law in order to elevate public interest does not completely subvert the interests of the inventor, and that these are modes to secure such interest. Firstly, the application for grant of a compulsory license may be filed only by *any person interested* i.e. holding either a technical or financial interest in the working of the patent (albeit a compulsory license is generally motivated by financial concerns); but the Controller has to keep in mind the attempts made by the applicant to obtain a voluntary license from the patentee[27], and the ability of the applicant to work the invention to the benefit of the masses[28]; and a compulsory license may be revoked on ground of non-working by the applicant.[29] Therefore, there is a risk involved once an applicant is granted the compulsory license for any patented invention. Secondly this license is non-exclusive, non-assignable and for a fixed term (usually the remainder of the term of the patent, but it can be for a shorter period if the public interest is sufficiently satisfied therein), and is deemed to operate as an agreement between the patentee and the applicant.[30] Furthermore a reasonable sum in the form of royalty has to be paid to the patentee by the applicant-licensee in pursuance of this order, which is fixed by the Controller.[31]

Compulsory licensing has been a contentious issue in India since our country recently joined the bandwagon after the Controller awarded a compulsory license for a cancer drug Nexavar patented by Bayer AG to generic drug maker NATCO Pharma[32] wherein it was observed and written by the Controller Mr. P.H. Kurien, while awarding that:

> "…*a right cannot be absolute. Whenever conferred upon a patentee, the right also carries accompanying obligations towards the public at large. These rights and obligations, if religiously enjoyed and discharged, will balance out each other. A slight imbalance may fetch highly undesirable results. It is this fine balance of rights and obligations that is in question in this case.*"[33]

Prior to licensing of this drug, it was observed by the Controller that the statistics of supply of this drug in India did not justify reasonable

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[27] Section 84 (6) (iv), The Patents Act 1970.
[28] Id, Section 84(6) (ii).
[29] Id, Section 85 (1).
[30] Id, Section 93.
[31] Id, Section 90 (1) (i).
[32] C.L.A. No. 1 of 2011, Order pronounced on March 9, 2012.
[33] Id, para 1.

requirements of the public and "depicted the neglectful conduct of the patentee as far as India is concerned". The patentee did not take any steps to start the working of the invention on a commercial scale to an adequate extent, which is denoted by the import figures of 2008-10[34] as below.

It would be interesting to note that Bayer tried to escape liability by citing infringing copies of Nexavar being sold by Cipla in India at INR 30,000 which reduced the profit margin of Bayer while at the same time made available the drug to the public at a lower price. However, this contention was rejected by the Controller holding that Cipla's sales are irrelevant due to the fact that it is an infringer facing injunction, and the demands for a life-saving drug cannot be left to the contingent outcome of the injunction suit. Bayer also contended that the applicant had only satisfied the first requirement under s 84 (1) and not the other two requirements namely (b) and (c) (i.e. invention not available at an affordable price and not worked in the territory of India), which was dismissed by the Controller as "an objection of a hyper-technical nature"[35]. Therefore, the Controller's order was primarily founded on the "reasonable requirement of the public" criterion under s 84 (1).

In appeal to the Intellectual Property Appellate Board (IPAB)[36], the IPAB while upholding the order of the Controller further added that the term "reasonably affordable price" should be construed from the point of view of different classes and sections of the public and not from the convenience of the innovator.[37] Therefore, the IPAB clearly emphasized upon the importance of social welfare rather than the profitability of the manufacturer/inventor. It also held that the conditions prescribed under s 84 (1) are mutually exclusive i.e. even if one of these conditions is satisfied the Controller can grant a compulsory license in favour of the applicant.[38] In this case the excessively expensive price of the drug was the tipping factor as it affected its affordability to the patients.

As for the issue of "working" of the patented invention in the territory of India, it was held by the IPAB that this was a question of fact and would be determined on a case-to-case basis. In some cases it could be only restricted to local manufacture, whereas in others it could extend to

[34] See Appendix, table 9.
[35] Id, para 8 (a).
[36] Bayer AG v. UOI, Controller of Patents and NATCO Pharma, MIPR 2013 (2) 97.
[37] Id, para 32.
[38] Id, para 38.

cover importation as well. In this case, the patentee failed to adduce evidence in order to establish that the patent would be worked effectively merely by importation and that it could not be manufactured locally to the same effect.[39]

The cancer drug Nexavar is now available at INR 8900 instead of the previous price of INR 2.8 lakh per month. At its original price it was available to only 2% of total patients of liver and kidney cancer. The license means that the same drug after compulsory licensing is available at just 3% of its earlier price to a larger section of patients. Bayer was sanctioned 6% of profits from sale of Nexavar by NATCO Pharma.[40]

However there is a caveat to compulsory licensing of patented pharmaceuticals inasmuch it should only be implemented in dire cases to rectify the unfair trade practice by a patentee. It should be treated as an option of the last resort by the State, lest apprehensions of compulsory licensing may cause companies to not to venture into Indian jurisdiction for want of profitability. Extraordinary cases involving IPRs over life-saving drugs and essential services may be licensed if all the prerequisites of compulsory licensing are proved against a patentee. Multinational companies use a lot of their money, resources and technology in devising efficient life-saving drugs for the public so compulsorily licensing would add as a benefit and fair and free competition will get a boost, but it may also bring about a feeling of mistrust amongst the companies.

5. A CASE STUDY OF THE LEGAL SETUP IN THE USA

It has been observed by statistical figures that the benefits to consumers in the USA has been phenomenal, which sets a perfect example for balance between intellectual property and competition law. A report from the Congressional Budget Office analyzing the impact of generic drugs on competition in the pharmaceutical market has estimated that since 1994 consumers save up to USD 8-10 billion annually on

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[39] Ibid, para 51.

[40] *India's First Ever Compulsory License Granted,* Pharma Times, available at http://www.pharmatimes.com/article/12-03-12/India_s_firstever_compulsory_ license_-_a_ game- changing_move.aspx, last seen on 04/10/ 2014.

prescription drugs due to the advent of generic drugs in the market.[41] Apart from the Federal Trade Commission's sustained efforts to restrict the surging cost of prescription drugs and healthcare in the States, one of the most beneficial statutes in this regard has been the Hatch – Waxman Act[42], enacted in 1984. The objective of this Act was to accomplish a balance of intellectual property and competition policies while at the same time ensuring there was enough incentive for originators to indulge in new drug development.[43]

5.1. The Hatch – Waxman Act – Mechanism and Impact

Hatch-Waxman Act also amended the Federal Food, Drug, and Cosmetic Act s 505(j) (21 U.S.C. 355(j)) which sets forth the process by which would-be marketers of generic drugs can file Abbreviated New Drug Applications (ANDAs) to seek Food and Drug Administration (FDA) approval of the generic version. When an ANDA is filed, the application must contain a certification with respect to the patents listed in the Orange Book.[44]

There are four certification options i.e. Paragraph I certifies that there are no patents listed, Paragraph II certifies that the patent had expired; Paragraph III certifies that the patent will expire and Paragraph IV certifies that the patent is invalid or will not be infringed by the generic drug. Section 505 (j) (5) (B) (iv), the so called Paragraph IV, allows 180-day exclusivity to companies that are the First-To-File (FTF) an ANDA against patents listed in the Orange Book.[45]

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[41] Congressional Budget Office, *How increased competition from generic drugs has affected prices and returns in the pharmaceutical industry* (July 1998), 31, available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/6xx/doc655/pharm.pdf, last seen 04/11/2014.

[42] The Drug Price Competition and Patent Term Restoration Act, 1984.

[43] *H R Rep No. 98-857(I), 14-15 (1984) reprinted in 1984 USCCAN 2647*, available at http://www.cadc.uscourts.gov/internet/opinions.nsf/83C7394DFFEB2AC485256F12006E8166/$file/97-5188a.txt, last seen on 04/11/2014.

[44] The "*Orange Book*" is an annual publication of the FDA, which contains a list of: (1) approved prescription drugs; (2) approved over the counter (OTC) drugs (3) biologics; and (4) products that were approved but were revoked, available at http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/UCM071436.pdf, last seen on 04/11/2014.

[45] Y. Srihari, S. Padmaja and G. Srinivasa Rao, *Implications of Drug Price Competition and Patent Term Restoration Act (DPCPTRA) on Indian Pharma Industry,* 14(6) Journal of Intellectual Property Rights 501.

The Hatch-Waxman Act provides for an exclusivity period of 180 days from filing for the first-filing generic drug companies which can be triggered by a court decision of invalidity or non-infringement or by one of the first-filing generics entering the market. The FDA does not grant a generic company the right to manufacture the drug for which it has filed a Paragraph IV certification after the first filer until either one of these events occur. The court's decision need not be in a dispute directly contested by any of the first-filing generics.

The impact of introduction of Hatch-Waxman has been immensely positive for the pharmaceutical industry in the USA. Besides a significant reduction in expenditure on prescription drugs, anti-competitive practices such as collusive agreements between originators and generic manufacturers whereby the latter kept the generic version of a drug patented by the former off the market for a massive sum of money were curbed by the Federal Trade Commission (FTC) on a number of occasions.[46]The measures taken by FTC against delay-to-file agreements have encouraged the entry of generic drugs in the market after expiry of patent term, showing as much as a 50% drop in drug prices.[47]A table has been provided by which exhibits the sales in USA of top drugs which lost their patent protection during 2004-08.[48]

However if the generic manufacturer files a Paragraph IV certification on grounds that the patented invention would not be infringed by its generic copy, the applicant is sued by the originator. The Act provided that in case any lawsuit is filed against an ANDA applicantthe FDA cannot grant approval before the expiry of 30 months from the date of filing or final court decision, whichever is earlier.[49]Herein if the parties settle out of court and the originator somehow convinces the generic manufacturer to keep its product off the market for the balance period of the patent in lieu of compensation paid by the originator, this settlement would defeat the purpose of the Act.

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[46] See *Abbott v Geneva,* C-3945 (26/05/2000), available at http://www.ftc.gov/os/2000/03, last seen on 04/11/2014; *FTC v Mylan Laboratories Inc.,* FTC File No. X990015 (29/11/2000), available at http://www.ftc.gov/opa/2000/11/mylanfin.htm, last seen on 04/11/2014; *Hoecsht Marion Roussel v Carderm Capital LP and Andrx Corp,* FTC File No. 9810368, available at http://www.ftc.gov/enforcement/cases-proceedings/9810368/hoecsht-marion-roussel-inc-carderm-capital-lp-andrx, last seen on 04/11/2014.

[47] Supra 45, 504.

[48] See Appendix, table 4

[49] Supra 45, 502.

Indian generic pharma companies have also derived advantage from this Act. Out of the first-time generic approvals for ANDAs by the FDA in 2004-08, 83 were filed by Indian companies. Ranbaxy led the table with 19 approvals followed by Dr. Reddy with 13 ANDA approvals, illustrated by a graph.[50]

The first Indian company to file ANDA and receive a 180-day exclusive marketing period for a generic drug was Dr Reddy's with the launch of Fluoxetine 40 mg capsules on August 3, 2001. Fluoxetine sales of USD 68.5 million contributed 21% of the total turnover in 2001-02.[51] Indian companies are the first to file ANDAs with Paragraph IV for 4 products out of 15 products by sales.[52][53]

Therefore even though Indian companies entered into the US generics market as late as 1997, since then the number of companies as well as the number of ANDAs by Indian companies have increased exponentially. Indian companies have been empowered to compete with companies from other nations as well as *inter se* to launch a product sooner than the other after the expiry of a product patent. Most of the top Indian companies now have a major contribution in their annual turnover from the US market.

6. UGANDA AND BRAZIL – PERSPECTIVES OF UNDER-DEVELOPED COUNTRIES

Uganda showed an example of balancing public necessity with patent protection and at the same time controlling the competition when it successfully combated the HIV/AIDS crisis during 2000-02. Generic competition, use of the public health exceptions in TRIPS and State funding for health service are some key steps that were taken by the Ugandan policymakers in order to provide free drugs to the patient populace.[54]

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[50] See Appendix, table 5.
[51] Supra 45, at 508.
[52] Ibid.
[53] Supra 54.
[54] C. Wendo, *Uganda Begins Distributing Free Antiretrovirals*, 363 THE LANCET 2062 (19/06/2004), available at http://download.thelancet.com/pdfs/journals/lancet/PIIS01406736041 64959.pdf?id=haaMfi0Nh268cLIzOEJu, last seen on 04/11/2014 (the article can be accessed after a free subscription to the website).

AIDS is an incurable disease and can only be mitigated by the used of anti-retroviral drugs (ARVs). As such, access to ARVs is pivotal to the survival and life quality of the infected population. Research showed that due to entry of generic ARVs in the Ugandan market, prices of branded drugs fell significantly. The largest decrease was in the prices of D4T,from USD 173 for a monthly dosage of 40 mg to USD 118 in December 2000, to USD 23 in February 2001 and then eventually at a paltry USD 6 in April 2002.[55] Such significant price reductions ensured that the public received the best standard of pharmaceuticals at a very affordable price.[56] Seven ARVs are patented in Uganda, and five of these have generic variants which are flown from India.[57]

In Brazil, a similar situation arose which was efficiently rectified by the Brazilian Government by adopting a decree which laid down rules for grant of compulsory licenses in case of "national emergency" and "public interest". The definition provided to these concepts is vast enough to cover almost all aspects of social welfare such as public health, nutrition, environmental protection – thus ensuring the fulfilment of most basic needs.[58]

These cases are nearer to the heart of the Indian economy. India can emulate the steps taken by Uganda or Brazil in order to combat deadly diseases such as AIDS, tuberculosis, malaria, dengue – except for AIDS all other diseases are curable but a large section of rural population is afflicted by these till date due to inaccessible prices of the branded drugs available in the market. In fact, some towns in India have already made the shift from branded to generic – most of these movements have been spearheaded by public spirited individuals. In 2012 Maharashtra was the first state to officially establish generic pharmacies – wherein only drugs

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[55] M.K. Smith, *Generic Competition, Price, and Access To Medicines: The Case of Antiretrovirals in Uganda*, Oxfam Briefing Paper Series, Briefing Paper No. 26, Oxfam GB, Oxford (2002), available at http://oxfamilibrary.openrepository.com/oxfam/bitstream /10546/114502/bp26-generic-competition-price-access-medicines-100702-en.pdf. txt, last seen on 04/11/2014.

[56] Anon, *Closing the Access Gap: The Equitable Access License*, available at http:// uaem.org/cms/assets/uploads/2013/03/EAL-primer.pdf, last seen on 04/11/2014.

[57] Ibid.

[58] International Centre for Trade and Sustainable Development, *WTO Disputes rise again: Bananas, patents & aircrafts*, ICTSD BRIDGES Weekly News Digest, 5 (20/02/2001), available at http://www.ictsd.org/html/weekly/story5.20-02-01.htm, last seen on 04/11/2014.

with generic names were made available at affordable prices to the consumers.[59]

7. EXAMINING THE CAPACITY OF THE COMPETITION COMMISSION OF INDIA ("CCI"/ "COMMISSION") IN REGULATION OF PHARMACEUTICAL SECTOR IN INDIA

Under the Monopolies and Restrictive Trade Practices Act 1969 ("MRTP Act") monopoly itself was considered to be bad. But the enactment of The Competition Act 2002 marked a change in policy of the Indian Government; inasmuch the Act does not prohibit monopoly *per se* but only its abuse to the detriment of competitors to the extent that the offending enterprise has a dominant position with respect to the relevant market. The object of the Act is clear from the Preamble which states that it is:

> *"An Act to provide, keeping in view of the economic development of the country, 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 or incidental thereto"*

Therefore, consumer welfare was considered as one of the objectives of this Act by the legislators. Nonetheless, the Raghavan Committee Report (which suggested that this Act be enacted to replace the erstwhile Act) did not want the CCI to excessively interfere with the market. However, the report did acknowledge the presence of anti-competitive tendencies extant in the pharmaceutical sector.[60] On the issue of standards and quality, the Committee observed that if there are certain firms in a particular sector which are in a better economic position than their competitors they may use their dominance to create arbitrary standards and norms to prevent competition from flourishing. Such practices which prevent market access should attract the relevant provisions dealing with abuse of dominant position.[61]

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[59] Anon, *SatyamevJayate: Maharashtra flags off Generic Medicine Stores across the State*, ZeeNews Bureau(16 June 2012), available at http://zeenews.india.com/entertainment/idiotbox/satyamev-jayate-maharashtra-flags-off-generic-medicine-stores-across-the-state_113515.html, last seen on 04/11/2014.

[60] The Raghavan Committee Report (1991), para 2.4-2.

[61] Ibid, para 4.3.

The Act does not expressly arm the CCI with the power to regulate pharmaceutical companies. However, the provisions regarding abuse of dominant position/predatory pricing[62] and regulation of combinations[63] would nevertheless apply to any potentially anti-competitive activities by these companies. Section 3 and 4 was brought in force vide notification in 2009, seven years after the enactment of the main Act. S 3(3)[64] can prove helpful in dealing with agreements which manipulate the supply chain. Mass boycott of products and doctors agreeing to prescribe or not to prescribe a particular brand are within the purview of s 3(3) prohibitions. Some agreements under Section 3(3) are presumed to be illegal if they are in the nature of quintessential cartels. The section can also be enforced to restrain collusive practices in drug procurement.

By virtue of Section 4 (1), the Commission can take note of unfair prices in case of pharmaceuticals as well if the actor in question has a dominant position. Nothing in the Act precludes the CCI from intervening in price regulation of drugs or granting compulsory licenses. As may be evinced from Section 84 (1) of the Patents Act, the compulsory licensing criteria provided therein is motivated by public interest concerns and therefore are not based on stricter competition analysis. Currently there is no settled position upon whether the CCI can grant orders partaking the nature of compulsory licenses, nevertheless an analysis of the provisions in Section 27 and Section 28 of the Act confer a great deal of power on the CCI to grant access which may include compulsory licenses. Section 27(g) of the Act provides for the orders by the Commission after inquiry into agreements or abuse of dominant position.

The Controller in Bayer v. Natco had granted a compulsory license to Natco for the drug Nexavar owing to the fact that it was not available to the public at a reasonably affordable price. In doing so, the term "reasonably affordable price" was construed in reference to the price to the public and not Bayer's R&D costs. Therefore, it is not entirely inconceivable that a similar order could be granted by the Commission under Section 27 (g) if a complaint were filed against a dominant pharmaceutical company, alleging that the price charged for a drug is unfair as it is unaffordable to the general public or that the same drug could be accessed by the public more easily if it were manufactured by some other

[62] Supra 23.
[63] Sections. 5 & 6, The Competition Act, 2002.
[64] Supra 22.

firm. Such a complaint could be tenable under Section 4 (2) (a) (ii) of the 2002 Act.

Similarly, a refusal to license IP held exclusively by an enterprise could be interpreted as limiting the "production of goods or provision of services or market", or restrict the "technical or scientific development relating to goods or services to the prejudice of consumers", or result in denial of market access; all three of which amount to abuse of dominant position under Ss 4 (2) (b) (i), 4 (2) (b) (ii) and 4 (2) (c) of the 2002 Act.[65]

Therefore, a purposive interpretation of this blanket provision can confer upon the CCI the power to grant a compulsory license of IPRs in case the exclusivity conferred by the rights is used by the right-holder to gain unfair advantage in the relevant market. The Commission may also pass an order for transfer of property rights (both tangible and intangible i.e. intellectual property) under s 28 (2) (a).[66] It is the opinion of the authors that the Competition Act exhibits strong inclination towards the interests of the "common man" than on competitors or competitive approach, thereby giving rise to an argument that even the CCI can grant compulsory license of pharmaceutical patents under consumer welfare and socialist considerations.

8. Instances of Action Taken by CCI vis-à-vis Pharmaceutical Industries in India

8.1. Curbing Abuse of Dominance by Pharmaceutical Associations

In the recent past, the CCI has played an active part in restraining abuse of dominance and cartelizing tendencies by the associations of chemists, druggists, stockists, whole-sellers and manufacturers which could have had a potential adverse impact over public health. In a press release dated 03 February 2014[67] the CCI identified and emphasized upon

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[65] N.S. Chopra, D. Muthappa, *The Curious Case of Compulsory Licensing in India,* Competition Law International 8(2) (August 2012), available at http://awa2013.concurrences.com/business-articles-awards/article/the-curious-case-of-compulsory, last seen on 08/01/2015.

[66] Supra 63, Section. 28 (2)

[67] Press Information Bureau, Release, *CCI Draws Attention of Associations of Chemists, Druggists, Stockists, Wholesellers and Manufacturers to the Anti-Competitive practices in the Pharmaceutical Industry* (03/02/2014), MANU/PIBU/0109/2014.

certain activities which are anti-competitive and have been held so by the CCI in the past:

1. Issuance of No Objection Certificate or letter of consent by such associations for opening chemist shop/being appointed stockists/ distributor/ whole-seller.
2. Compulsory payment of PIS charges by pharmaceutical firms/ manufacturers to associations for release of new drug/new formulation.
3. Fixation of trade margins at different levels of sale of drugs/ medicines.
4. Issuance of instructions to chemists/ druggists/ shops/ stockists/ whole-sellers/ manufacturers restricting discounts on sale of drugs in retail or wholesale.
5. Issuance of boycott calls by the associations to their members against any enterprise for not following the instructions of associations.

The CCI has been instrumental in controlling the abovementioned activities which were normally prevalent among associations comprised of key players in the pharmaceutical industry. The authors have herewith provided a brief summary of the cases in chronological order which served as precursors to each of the above directive. However the fourth point i.e. restriction on discounts to consumers was the central issue in *Re: Bengal Chemists and Druggists Association and Dr. Chintamoni Ghosh*[68], which was decided in March 2014.

Varca Druggist and Chemist and Ors v. *Chemists and Druggists Association Goa ("CDAG")*[69]

The Informant filed a complaint against the guidelines framed by the CDAG for regulation of its members, alleging them as abuse of dominance and unfair and restrictive trade practices. The guidelines were following:

i. All pharmaceutical companies setting up industry in Goa were to appoint their stockists and wholesalers only from those individuals and firms, who are members of the CDAG. Thus, no person or firm who was not a member of the CDAG is eligible

[68] (2014) CompLR 221(CCI).
[69] (2012) CompLR 838 (CCI).

for being appointed as the stockiest or wholesaler of such a company even if the said person or firm possessed all necessary qualifications.

ii. A No Objection Certificate (NOC) was required to be obtained from the CDAG prior to appointment of such stockists or wholesalers.

iii. A company had to seek prior Public Information System (PIS) approval for introducing any new pharmaceutical product in the territory of Goa. Further, under the system of PIS approvals, the CDAG took an amount of Rs. 500 per drug per category from drug manufacturing companies for introduction/marketing of drugs in Goa.

iv. For appointment of more than two stockists, the CDAG had imposed restrictions related to volume of sales achieved by previous stockists of the company. In any case, the total number of stockists appointed by a company could not exceed five. Furthermore, even if the company felt its need, it could not appoint another stockist until one year past the appointment of the previous one.

v. If a new entrant (stockist, distributor or retailer of any pharmaceutical product) wished to carry on business without obtaining the membership of CDAG, the CDAG issued directions to all its members debarring them from dealing with such entrant in any manner whatsoever.

vi. No credit was given to any retailer, which was contrary to industrial practice of allowing 20 days' credit to retailers.

The Commission held that the cumulative effect of above practices like compulsory membership of the Association for anyone entering into the drug market, obtaining NOC and giving fees for introduction of any new product by any pharmaceutical company and appointment of new stockist and further imposing penalties on violation of guidelines was evidentiary of the fact that the CDAG was engaged in the practice of eventually restricting the number of players in the market and in turn also limiting or controlling supply and availability of drugs. Doing away with the practice of NOC would result in free supply of drugs in the market and consequently more availability of the drugs to the consumers. The guidelines mandating issuance of NOC for appointment of a new or an additional stockist in a particular territory eventually restricted the number of players in the market and in turn also limits or controlled

supply of drugs.[70] The imposition of mandatory PIS approval followed by imposition of penalties on firms which did not follow this diktat established that the practices and conduct of CDAG were limiting and controlling the supply of drugs in the state of Goain violation of provisions of Section 3(3) (b) of the Act. It is to be noted here that the requirement of PIS approvals *per se* does not have any appreciable adverse effect on competition. Additionally, the regulation and fixation of price margins by CDAG had the inevitable consequence of determining the sale prices of the drugs and thus was held in contravention of Section 3 (3) (a) of the Act. In such circumstances, accessibility of potentially life-saving drugs to the common man at reasonable prices was restricted by the CDAG guidelines.[71]

M/s Peeveear Medical Agencies v. *All India Organization of Chemists and Druggists ("AIOCD") and Janssen Cilag Pharmaceuticals Ltd. (A division of M/s Johnson & Johnson Ltd.)*[72]

The Informant alleged that under the guise of protecting interests of its members, the AIOCD was engaging in abuse of its dominance and entering into anti-competitive agreements with other parties such as the Indian Drugs Manufacturers Association (IDMA) and The Pharmaceuticals & Allied Manufacturers & Distributors Association Ltd. (OPPI) which result in limiting and controlling the supply and markets, and directly influencing the sale and purchase price of the drugs and pharmaceutical products in India. The AIOCD had been controlling the trading policies of different manufacturing companies, regulating profit margins, inspecting the stockists/distributor agreement of manufacturing companies, recommending desired profit margins to all its members and stockists all over the country, and collecting Rs. 2,000/- per drug per category from every manufacturer in each state under the name of PIS approval before permitting them to launch their new medicines. If a manufacturer did not abide by the instructions of AIOCD, its products were boycotted everywhere in the country. The Informant also insinuated that Jansen Cilag Pharma were colluding with the AIOCD and supporting such activities with the ulterior motive of securing unseemly profits and favours of the AIOCD.

[70] Supra 73, para 26.27.
[71] Supra 73, para 26.44.
[72] (2014) CompLR 10 (CCI).

The Commission held that mandatory requirement of NOC/LOC from AIOCD (through respective State and District Associations) although evolved to prevent entry of spurious or inferior quality drugs purchased from unauthorized persons; its effect resulted into problems to consumers and limits or controls supply in market thus was deemed to be anti-competitive.

Further on PIS approvals the Commission in light of its previous decisions on this issue[73], was of view that payment for PIS approval as advertisement charges, at time of product launch or any change in product brand, dosage, form, strength etc. in respective PIS bulletins ensures certain compliances, which also bolsters advertisement and circulation of product information to all retailers at a very nominal cost and thereby cannot be presumed to be anti-competitive. Nonetheless if the launch of a product in market is made contingent upon PIS approval it would result in restraint of trade and denial of market access.[74] Moreover, it was observed that any attempt on part of members of AIOCD and or its affiliates to delay or withhold any PIS approval on whatever ground could not be justified. This ultimately deprived consumers of the benefits of such drugs.

On trade margins, after examination of evidence given by DG, the Commission observed that practice of fixed trade margins resulted from MOUs between AIOCD, OPPI and IDMA. Commission also noted that as result of this practice, trade margins were not being determined on competitive basis nor were allowed to fall below agreed percentages. Further the Commission noticed that while margin for retailer was fixed for scheduled (controlled) drugs, for non-scheduled drugs there was no obligation to pay any specified margins either to retailers or to wholesalers. Therefore, an agreement to give fixed trade margins to wholesalers and retailers directly or indirectly affected the purchase prices of the drugs in the open market[75].

In re: Bengal Chemist and Druggist Association ("BCDA") and Dr. Chintamoni Ghosh[76]

[73] Varca Druggist & Chemist v. CDAG; Santuka Associates Pvt. Ltd. v. AIOCD and Ors. (2013) CompLR 223.
[74] Id, para 30.
[75] Id, para 13.12.12.7.
[76] Supra 72.

This was a *suo moto* inquiry initiated by the CCI after receiving an email alleging anti-competitive practices on part of the BCDA. It was alleged by the Informant that the BCDA's executive committee directed its retailer member not to give discount on the Maximum Retail Price (MRP) in the sale of medicines to consumers. Further, the Informant alleged that in order to ensure strict compliance of its directives, BCDA carried out "vigilance drives" to identify the retailers defying the directions issued by it, and even forced the defiant members to shut their shops as a punishment measure.

The Commission in its well reasoned judgment noted that *the MRP is only a ceiling limit on the price of the product, i.e. it cannot be sold at a higher price. It does not preclude sale of the product(s) below MRP.*[77]It was evident from the facts of the case that there were a large number of retailers who were willing to offer discounts on MRP to customers. However, the concerted and collusive activities of BCDA members were impedimental to price competition between retailers. This resulted in the fixation of sale prices, since drug prices were not allowed to be influenced by independent market forces. Such conduct of BCDA contravened provisions of Section 3(3)(a) read with Section 3(1) of Act.[78] When sale of drugs was determined to take place only at MRP, on account of agreement entered into amongst members of the BCDA, then such a trade practice caused or was likely to cause an appreciable adverse effect on competition, especially when almost all retailers and wholesalers were members of BCDA.[79]It was also a matter of record that BCDA and its affiliated District/Zonal Committees had taken concerted action against retailers offering discounts, by launching organizational movements, threatening them with dire consequences, picketing their shops, collecting fines from them, forcing them to shut their shops, directing their wholesale members not to make supplies and not to cooperate with such retailers. Such a conduct had resulted or was likely to result in controlling and or limiting supply of medicines and market of provision of drugs, which contravened provisions of Section 3(3)(b) of Act. These activities had also adversely affected consumers in addition to retailers concerned. Furthermore it was observed by the Commission that this practice of not offering discounts on drugs was palpably anti-competitive as it would directly the profits made by most of the

[77] Id, para 61.
[78] Id.
[79] Id.

members of the BCDA if competitive forces were allowed to operate in the market.[80]

8.2 Regulating Combinations in the Pharmaceutical Industry in light of the Sun-Ranbaxy Deal

The most recent development in pharmaceutical combinations has been the merger of Sun Pharmaceuticals and Ranbaxy Laboratories, which received the official nod on 05 December 2014 by the CCI.[81] This merger has been touted as the most important transaction between two Indian pharmaceutical companies since the enactment of the Competition Act, and it was valued at approximately USD 4 billion by industry experts.[82] The merged entity would operate in 65 countries across the globe with 47 manufacturing facilities across 5 continents, along with a global portfolio of specialty and generic products. This was also the first case which the CCI subjected to public scrutiny process, since it had found the deal to be *prima facie* anti-competitive.

In its order under Section 31 (7) of the Act, the CCI approved this combination subject to certain conditions. CCI directed Sun Pharma to divest all products containing the compounds tamsulosin and tolterodine which were marketed and supplied under the "Tamlet" brand name. Similarly Ranbaxy was ordered by the regulatory authority to divest all products containing leuprorelin which were marketed and supplied under the "Eligard" brand name. Ranbaxy would also have to divest products such as Terlibax, Rosuvas EZ, Olanex F, Raciper L and Triolvance. The Commission was of the view that unless these brands were divested to third parties the combined entity would hold a monopoly status thereon in terms of market share which would negate the entry of new players. According to the Order:

> *"The modification to the proposed combination aims to maintain the existing level of competition in the relevant markets through:*
>
> *a. the creation of a viable, effective, independent and long term competitor in the relevant markets pertaining to the Divestment Product(s);*

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[80] Supra *72,* para 64.

[81] Combination Registration No. C-2014/05/170.

[82] *CCI clears $4-bn Sun Pharmaceutical, Ranbaxy Laboratories merger deal, but adds riders,* The Financial Express (08/12/2014), available athttp://www.financialexpress.com /article/industry/companies/cci-clears-4-bn-sun-pharmaceutical-ranbaxy-laborator ies-merger-deal-but-adds-riders/16972, last seen on 01/01/2015.

> *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."*[83]

The parties have six months to divest or procure the divestiture of the aforementioned products. This divestiture shall not be effective unless CCI ratifies the terms and conditions of final and binding sale and purchase agreements and the third-party purchasers that have been proposed by the parties.[84]The two firms are to give full information regarding divestment products to potential purchasers so as to enable them to undertake reasonable due diligence.CCI would appoint an agency to monitor the due diligence process, including the preparation of data room documentation, in accordance with the monitoring agency agreement.[85] As per the Order, the divestiture shall not concern any intellectual property rights held by the parties which do not contribute to the current operation.[86]

The divestment brands constitute less than one percent of the total revenue of the combined entity in India. This deal, however, would produce India's largest and the world's fifth largest drug manufacturing entity in terms of revenue.[87] However industry analysts predict that this deal would not result in a lot of revenue loss to the parties involved, as both companies combined hold rights over 300-400 brands thus divestiture of seven would seem insignificant.[88] This deal would have appreciable effect on consumers as the combined entity would rise in the global market of generic pharmaceuticals, thus ensuring better accessibility to generic variants instead of branded drugs.[89]

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[83] Supra 16*,* at para 39.

[84] Id, para 57.

[85] Id, para 52.

[86] Id, para 47.

[87] *CCI clears Sun-Ranbaxy merger deal with riders, asks two companies to divest some products,* The Economic Times (08/12/2014), available at http://articles.economictimes.indiatimes.com/2014-12-08/news/56839367_1_cci-chairman-ashok-chawla-fair-trade-watchdog-cci-ranbaxy, last seen on 01/01/2015.

[88] Digbijay Mishra and Deepak Patel, *CCI gives nod to Sun-Ranbaxy Merger, asks to divest 7 drug assets,* The Business Standard (09/12/2014), available at http://www.business-standard.com/article/companies/cci-gives-nod-to-sun-ranbaxy-merger-asks-to-divest-7-drug-assets-114120800727_1.html, last seen on 01/01/2015.

[89] See Appendix, table 8.

9. CONCLUSION – PAVING A SMOOTHER MIDDLE GROUND

There is a need for better advocacy in the pharmaceutical sector by the CCI. The Centre for Trade and Development (hereinafter referred to as "**CENTAD**") in its report on the impact of competition law in the pharmaceutical sector[90] states that since the Act itself is new and not many government authorities and functionaries are aware of the competition elements while framing policies for the pharmaceutical sector. The pharmaceutical sector is regulated and governed by a myriad of authorities, thereby bolstering the need to sensitize all such authorities about the prevalent competitive elements therein. The industry heavily relies on patents thus expanding the possibility of abuse. Legal rights are granted with intent to improve market conditions, but its abuse adds salt to injury. Incidences of pharmaceutical companies abusing patents and dominant position have been observed globally over the years. This is also confirmed by the recently concluded EU Pharmaceutical Sector Inquiry Report.[91] Therefore, it is the prerogative of the CCI to create awareness about competition in this sector.

Mergers, acquisitions and alliances in the industry need to be regulated vigilantly and examined for potential abuse. The CCI could frame specific guidelines for combinations in pharmaceutical sector which prohibit those combinations which would have a direct or indirect effect of stifling the production of generic drugs. The guidelines relating to intellectual property and competition in comparative jurisdictions should be codified by the CCI so as to render them binding upon all enterprises. Pricing practices of originators may be challenged under s 4 of the Act instead of directly seeking a compulsory license under the Patents Act, as the criteria for abuse of dominance are more objective in nature than those for the grant of a compulsory license. The Commission may also contemplate the application of the essential facilities doctrine in case of accessing patented knowledge. The Supreme Court has imposed certain obligations similar to this doctrine in *Binny Ltd and Anr.* v. *V Sadasivan*[92] and it is also provided for in certain statutes.[93]

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[90] CENTAD, *Competition Law and the Indian Pharmaceutical Industry* (23/06/2011), 179, available at http://www.cci.gov.in/images/media/completed /PharmInd230611.pdf, last seen on 04/11/2014.

[91] Supra 7.

[92] AIR 2005 SC 3202.

[93] See The Petroleum and Natural Gas Regulatory Board Act 2006, s 2 (m); The Electricity Act 2003, "open access regime".

In conclusion, it would be hoove to examine a radical opinion expressed by some critics of disallowing patentability of life-saving drugs altogether on the ground that there is no actual evidence that patent protection awarded to originators facilitates research as such; but results in millions of patients to "buy their lives" from these companies.[94] In this regard, the authors would like to submit that private players in the pharmaceutical sector have technology and the skilled labour force that the State does not have. India is a mixed economy; therefore the State should work hand-in-hand with these companies and allow them to flourish in order to ensure development. Intellectual property is a tool for incentivizing innovation and therefore maximum utilization in favour of these corporations would ensure new drug development. Nonetheless, States have the option to exercise the public health exceptions under the TRIPS in order to grant compulsory licenses for the benefit of the public or regulate the impact of such pharmaceutical corporations upon the relevant product and geographical market in order to ensure free and fair competition. Besides, the internal mechanisms of private entities do not suffer from the evil (some would call it a necessary evil) of bureaucratic power-play and red-tapism. Therefore a proposal to nationalise the entire pharmaceutical research and development sector would do more harm than good, inasmuch it would dissuade the multinational companies from employing their superior know-how for the betterment of the community thus bringing about a situation of stagnancy. The CENTAD report however suggests a cure for this problem – the patentability threshold of life-saving drugs could be increased in order to ensure that the anticompetitive nature of patents does not adversely affect the economy.[95]

Thus it can be concluded that even though the pharmaceutical industry is heavily regulated and the prices of drugs in our country are comparatively lower than their global counterparts, asymmetry in possession of information and exercise of passive market power may often lead to anticompetitive outcomes. It is expected that as per the current framework the CCI may actively play a role in ensuring healthy and competitive markets from a health care perspective which will go a long

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[94] Akansha Mehta, *Patenting of life-saving drugs has created a global health crisis where human life has become a commercial commodity* LSE Impact on Social Sciences Blog, available at http://blogs.lse.ac.uk/impactofsocialsciences/2014/08/06/the-morality-of-patenting -life-saving-drugs, last seen on 04/11/2014.

[95] Supra 68, at 201.

way in fulfilment of the objectives laid down in the Competition Act and thereby let the *virtuous circle*[96] operate smoothly and unhindered.

APPENDIX

Table 1:[97]

Drug Name	Year of Global Introduction	Year of Indian Marketing Approval or Introduction in India	Introduction Lag (Years)	Year of European Patent Expiry
Cefuroxime sodium	1978	1988	10	1994
Cefaclor	1979	1991	12	1994
Netimicin	1980	1988	8	1994
Aciclovir	1981	1988	7	1995
Ranitidine	1981	1985	4	1997
Captopril	1980	1985	5	1997
Norfloxacin	1984	1988	4	1998
Ketoconazole	1981	1988	7	1998
Famotidine	1984	1989	5	1999
Ceflazidime	1983	1988	5	2000
Ciprofloxacin	1986	1989	3	2001
Ofloxacin		1990		2001
Roxithromycin		1992		2001

Table 2:[98]

[96] Supra. 13.

[97] O. Lanjouw, '*The Introduction of Pharmaceutical Product Patents in India: Heartless Exploitation of the Poor and Suffering?*' NBER Working Paper Series, Working Paper No. 6366, National Bureau of Economic Research, Massachusetts (1998).

[98] S. Chaudhuri, '*R&D for Development of New Drugs for Neglected Diseases: How can India contribute? A study prepared for WHO Commission on IPR, Innovation and Public Health*' available at http://www.who.int/intellectualproperty/studies/S.%20Chaudhuri.pdf, last seen on 04/11/2014.

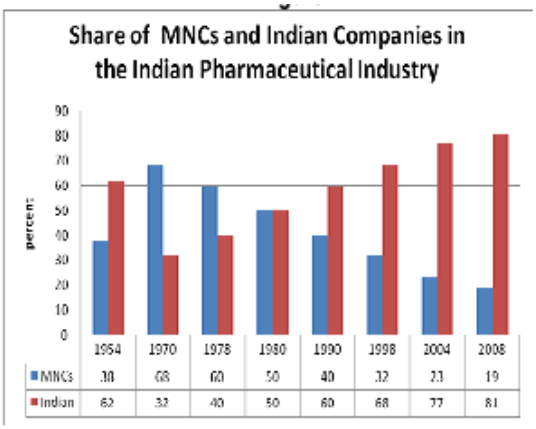

Table 3:[99]

Sl. No.	Company Name	Sales	Research & development expenses	Investment in R& D as % of Sales
1	Ranbaxy Laboratories Ltd.	3,656.2	460.5	12.6
2	Dr. Reddy's Laboratories Ltd.	4,146.2	292.8	7.1
3	Sun Pharmaceutical Inds. Ltd.	1,722.1	188.3	10.9
4	Cipla Ltd.	3,658.0	175.7	4.8
5	Cadila Healthcare Ltd.	1,758.5	161.8	9.2
6	Lupin Ltd.	2,051.7	142.1	6.9
7	Wockhardt Ltd.	1,189.0	126.7	10.7
8	Torrent Pharmaceuticals Ltd.	895.2	112.1	12.5
9	Panacea Biotec Ltd.	843.0	107.2	12.7
10	Aurobindo Pharma Ltd.	1,991.0	96.7	4.9

Table 4:[100]

[99] Ministry of Commerce and Industry, Government of India, *Report of the Task Force on Strategy for Increasing Exports of Pharmaceutical Products*, 20, available at http://commerce .nic.in /publications/Report%20Tas%20Force%Pharma%2012th%20Dec%2008.pdf ?id=16, last seen on 04/11/2014.

[100] Available at https://prod1.newportdata.com/hg/login.asp?ref=/hg/Default.asp?, last seen on 25/12/2014. Cited in Y. Srihari et al, note50, 504.

Generic drug name	Patent expiry	US retail sales before the patent expiryMAT ($ million)	US retail sales post patent expiry MAT March 2009 ($ million)
Pravastatin sodium	2006	1,567	159
Sertraline	2006	3,096	299
Simvastatin	2006	5,786	2,194
Amlodipine besylate	2007	2,790	2,283
Carvedilol	2007	1,606	120
Cetirizine	2007	1,425	104
Zolpidem tartrate	2007	2,491	171
Alendronate sodium	2008	2,183	606
Divalproex sodium	2008	1,751	1,406
Risperidone	2008	2,723	1,752
Venlafaxine	2008	2,941	2,987
Metoprolol succinate	2008	1,666	1,003

Table 5[101]:

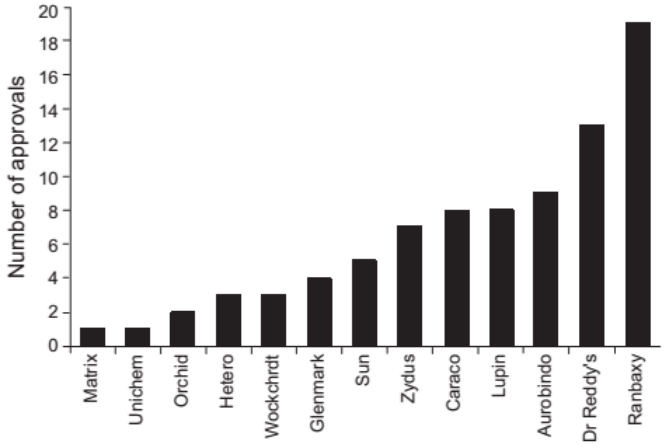

Table 6:[102]

[101] Available at http://www.accessdata.fda.gov/scripts/cder/ob/docs/queryai.cfm, last seen on 04/11/2014. Cited in Y. Srihari et al, note50, 507.

[102] Cited in Y Srihari et al, note 50, 508.

Table 6— Top 15 US pharmaceutical products by sales

Drug name	2008 sales in $ billion[41]	FTF generic company	180-day exclusivity possibility
Lipitor	7.8	Ranbaxy	Yes
Nexium	5.9	Ranbaxy	Yes
Plavix	4.9	Apotex	-
Advair diskus	4.4	No Para IV	-
Seroquel	3.9	Teva	No
Singulair	3.5	Teva	No
Enbrel	3.4	No Para IV	-
Neulasta	3.1	No Para IV	-
Actos	3.1	Ranbaxy, Mylan	Yes
Epogen	3.1	No Para IV	-
Prevacid	3.1	Teva	No
Abilify	3.1	Barr, Synthon, Sandoz, Sun	No
Remicade	3.1	No Para IV	-
Effexor XR	3.0	Teva	Yes
Lexapro	2.7	Teva	Yes

Table 7: A bar graph depicting top ten Indian pharmaceutical companies in terms of revenue of last twelve months.

Table 8: Top 10 global generic companies by estimated annual sales post the Sun-Ranbaxy Merger.

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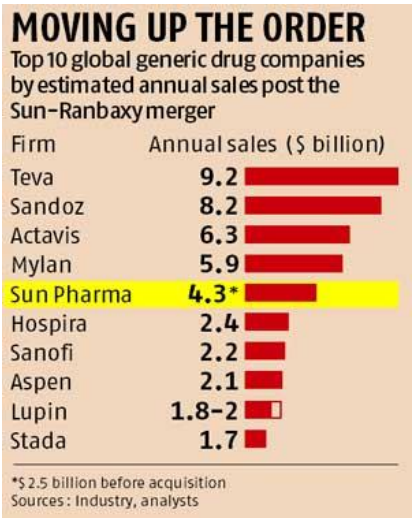

Table 9[103, 104]

	Total Patients	Demand for 80% of patients	Bottles per month (required)	Bottles Imported in 2008	Bottles Imported in 2009	Bottles Imported in 2010
Liver Cancer	~ 20,000	~ 16,000	~ 16,000	-Nil-	~ 200 bottles	Unknown
Kidney Cancer	~ 8,900	~ 7,120	~ 7,120			

[103] Supra 32, para 10 (a).
[104] Ibid, para 10 (c).

Sales figures of the drug:

	2006	2007	2008	2009	2010
Sales per year (Worldwide)	$165m	$371.7m	$677.8m	$843.5m	$934m
Sales in India	Nil	nil	Nil	16 crores	unknown

THE ESSENTIAL FACILITIES DOCTRINE - A POTENT TOOL FOR MITIGATING THE RIGOURS OF SOCIALLY PERNICIOUS BEHAVIOUR OF MONOPOLISTS

- Rahul Bajaj and Chiranjivi Sharma[*]

ABSTRACT

Since its inception in 2009, the Competition Commission of India, ("CCI"), has played a proactive role in promoting the vitality of market forces and has spearheaded a fast-growing competition law regime with remarkable clarity and foresight to protect the market from incipient challenges. The decisions of the CCI are symbolic of the regulator's desire to repair the damage emanating from years of protectionist laws and to bring the Indian competition law regime at par with its western counterparts. Even though the CCI's quality of analysis and clarity of decisions has been widely appreciated, the regulator has garnered intense criticism for its reticence in using more complex and sophisticated doctrines in order to fully appreciate the nuances that shape and influence the decisions and policies of competitors in a market. This inability has prevented the CCI from fully effectuating the idea of fostering a culture of competition and innovation that undergirds the competition law regime in India. This paper seeks to analyze one such doctrine which the CCI hasn't fully utilized for realizing the fundamental tenets of the Competition Act, 2002 – the essential facilities doctrine. In its most basic form, this doctrine seeks to provide a competitor access to an indispensable facility without which it cannot compete in the market. Succinctly put, it recognizes that monopolists can gain an unfair advantage in a sector by denying their competitors access to a resource which is necessary for effectively competing in that market.[1] *The doctrine, which is more than a century old, has been the subject of intense debate and discussion among competition lawyers, academicians and*

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[1] T.A. Piraino, Jr., *An Antitrust Remedy or Monopoly Leveraging by Electronic Networks*, 93 N W. U. L. REV. 1, 6-7 (1998).

researchers[2] *and is of immense contemporary relevance. This paper seeks to explore the efficacy of this doctrine in the Indian context. It is divided into 3 principal sections. In addition to mapping the evolution of the doctrine from a historical perspective, the first section seeks to lay bare the legal position pertaining to the doctrine in some key jurisdictions.The second section succinctly examines extant laws in India in which the doctrine finds expression and explores their efficacy and ramifications. In the third section, the authors argue that the doctrine can act as a potent tool for countervailing the pernicious effects of anti-competitive behaviour. Apart from expatiating upon the principal arguments in favour of and against its wider application, they succinctly describe the cases in which the CCI has dealt with the doctrine and discuss the modalities for its implementation in India.*

1. THE ESSENTIAL FACILITIES DOCTRINE: AN ANALYSIS OF ITS CONTOURS

It is a well-settled principle of competition law that mere possession of monopoly power is not *ipso facto* unlawful. On the contrary, it is a crucial element of the free-market system that many countries subscribe to. The opportunity to enjoy the advantages of monopoly power is what attracts business acumen and promotes risk taking that lies at the heart of innovation and economic progress.[3] That being said, when that dominant position is used to employ "methods different from those which condition normal competition", abuse of dominance takes place.[4] As a result, the actions of competition regulators are actuated by the primary objective of preventing monopolists from preserving their monopoly in a market by unlawful means or using that monopoly power to expand into another market by resorting to a constellation of satellite concepts such as refusal to deal/supply, price squeeze, monopoly leveraging, etc. Competition laws across the globe unequivocally recognize that an organization is free to act in any manner it deems fit within the confines of the law. This implies that the organizations are free to deal with whomsoever they want and, conversely, to refuse to deal for justifiable business reasons.[5] However, it would be fallacious to assert that the high importance attached to the right of refusal to deal implies

[2] R. Whish, *Competition Law*, 691 (6th Edn., 2009).

[3] Verizon Communications v. Law Offices of Curtis V. Trinko LLP 540 U.S. 398 (2004, Supreme Court of the United States).

[4] J. Faull and A. Nikpay, *The EC Law of Competition*, 350 (2nd Edn. 2007).

[5] United States v. Colgate & Co. 250 U.S. 300 (1919, Supreme Court of the US).

that the right has no exceptions.[6] Determining when a refusal to deal is tantamount to abuse of dominance and when it is lawful has been "one of the most unsettled and vexatious issues in the antitrust law."[7] An analysis of all the contexts in which a refusal to deal amounts to abuse of dominance is beyond the scope of this paper. This paper specifically analyzes circumstances in which the refusal to deal pertains to a facility sans which a certain kind of business cannot be conducted.[8]

The essential facilities doctrine obliges a firm controlling an essential facility whose duplication is not possible or feasible to deal with its competitors with the goal of providing them access to such a facility.[9] Cases involving the essential facilities doctrine are a subset of the refusal to deal cases.[10] Let us take an example from the aviation sector. In order to be able to function effectively, an airline requires access to landing lanes and underground pipes that are needed for refueling aircrafts. In such a case, the essential facilities doctrine is invoked to mandate the sharing of these facilities.[11] Notably, this doctrine can only be invoked if the competitor wanting to access the essential facility can show that the facility is not available elsewhere. Furthermore, the doctrine is not an independent cause of action; it has to be part of a monopolization claim.[12] A highly contentious issue is the determination of what constitutes an essential facility. Herbert Hovenkamp divided essential facilities into 3 principal categories:

i. Natural monopolies or joint venture arrangements that constitute significant economies of scale;
ii. Productive assets possessing considerable value such as plants or structures that came into existence as a part of a regulatory regime; and

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[6] Twin Labs v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).
[7] Byars v. Bluff City News Co. 609 F.2d 843, 846 (6th Cir. 1979).
[8] S V Siclen, Background Note, *OECD Roundtable on the Essential Facilities Concept* OCDE/GD (96)113, 1996 available at http://www.oecd.org/dataoecd/34/20/1920021.pdf, last seen on 14/09/2014.
[9] A. Massadeh, *The Essential Facilities Doctrine under Scrutiny: EU and US Perspective*, UEA Law School Working Paper Series, Working Paper Number UEA LAW WPS 2011-AM-1, UEA Law School (2011).
[10] J. S. Venit and J. J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy (1994).
[11] Supra 4, p. 358-59.
[12] Kramer v. Pollock-Krasner Found, 890 F. Supp. 250, 257 (S.D.N.Y. 1995).

iii. Facilities those are owned, maintained and subsidized by the government.[13]

When the doctrine was in its infancy, it was mostly applied in the context of infrastructure assets and networked goods.[14] However, in recent years, it has also been applied to mandate the sharing of intellectual property assets.[15] Debates about the essential facilities doctrine seek to address issues such as a situation in which sharing of the essential facility becomes necessary, the modalities for granting access to such facilities and the circumstances in which the justification of the dominant undertaking for denying access should be overlooked for the greater good.[16]

2. HISTORICAL PERSPECTIVE

The genesis of the doctrine can be traced back to the enactment of the Sherman Act in the United States. Even though the Act makes no direct reference to the essential facilities doctrine, it is believed that one of Congress's primary objectives at the time of enacting the Sherman Act in 1890 was to prohibit the Standard Oil Trust from denying other oil refiners access to pipelines and rail transportation facilities which were required for bringing their products to market.[17] In the year 1912, the doctrine came up for consideration for the first time before the US Supreme Court in the case of *US* v. *Terminal Railroad Association of St. Louis*[18]. In the instant case, a group of 14 railroad companies, known as the Terminal Railroad Association, exclusively controlled the railroad terminal as well as the bridge linked to it in St. Louis. In a bid to thwart the competition, the Railroad Association tried to prevent competing railroads from offering transportation through the terminal. The court noted that it was impossible for any train to enter into or to pass

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[13] H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, (3rd Edn. 2005); also see Herbert Hovenkamp, *Unilateral Refusals to Deal, Vertical Integration, and the Essential Facility Doctrine*, University of Iowa Studies Research Papers Series, Working Paper Number 08-31, University of Iowa (2008).

[14] B. Frischmann and S. W. Waller, *Revitalizing Essential Facilities*, 75 Antitrust Law Journal, 1, 8 (2008).

[15] C. Ritter, Refusal to deal and Essential facilities: *Does intellectual property require special deference compared to tangible property?,* 28(3),World Competition, 281, 282 (2005).

[16] A. Jones and B. Surfin, *EU Competition Law*, 489 (4th Edn. 2011).

[17] R. Chernow, Titan: *The Life of John D. Rockefeller*, Sr., 283-98 (1998).

[18] US v. Terminal Railroad Ass'n, 224 U.S. 383 (1912, Supreme Court of the US).

through St. Louis without accessing the facility that was controlled by the Terminal Railroad Association.[19] Moreover, no undertaking could become a member of the association without obtaining the consent of all existing members.[20] The Supreme Court unequivocally recognized the indispensable role that is played by terminal companies for effectuating the goal of public welfare[21]. Against this backdrop, the Supreme Court held that, in the prevailing circumstances, it was necessary for the Association to act in an impartial manner so as to preserve the freedom of trade and commerce among states.[22] As a result, the court asked the Association to provide all non-members access to the terminal facility on just and reasonable terms in order to allow them to compete on a footing of equality with the companies controlling the terminal[23]. Interestingly, the court did not specifically refer to the essential facilities doctrine by name. The second significant case which is often cited in modern literature pertaining to the doctrine was the *Associated Press case.*[24] The Associated Press (hereinafter "AP") had a discriminatory policy of sharing the news that it collected only with its members. Moreover, existing members were given complete authority to block the entry of new members[25]. The Supreme Court emphatically asserted that this policy of the AP was in restraint of trade as it was clearly designed to stifle competition in the market[26]. Justice Frankfurter, who delivered a concurring opinion in the case, hinted to the essential facilities doctrine by emphasizing the obligation of the AP to freely disseminate the news that it possessed for public welfare[27]. This was the first case in which a non-infrastructure asset i.e. membership of the AP was viewed as an essential facility for competing in a market. Similarly, the first case in which the principles of the doctrine were invoked in the European Union was the *Commercial Solvents case.*[28] The aforementioned case pertained to a fact situation in which Commercial Solvents, a chemical firm, refused to supply raw materials to the players in the downstream market for manufacturing in which Commercial Solvents was itself a

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[19] Ibid, 397.
[20] Id, 399-400.
[21] Id, 402.
[22] Id, 405.
[23] Id, 411.
[24] Associated Press v. US, 326 U.S. 1 (1945, Supreme Court of the US).
[25] Id, 10-11.
[26] Id, 19.
[27] Id, 29.
[28] Cases 6/73 and 7/73, ICI and Commercial Solvents v. Commission ECR 223, CMLR 309 (1974, European Court of Justice).

player through a subsidiary. Although the European Court of Justice did not directly invoke the essential facilities doctrine, its decision in holding that Commercial Solvents' refusal to deal was unlawful has been interpreted as recognition of the raw materials in question as an essential facility.

3. LEGAL POSITION OF THE ESSENTIAL FACILITIES DOCTRINE IN THE US

Even though cases like the Terminal Railroad case, and the Associated Press case grappling with the "refusal to deal" principle are believed to be within the auspices of the essential facilities doctrine. The first case in which the doctrine was clearly articulated by a US court was *MCI Communications Corp*. v. *ATT*.[29] In this case, MCI contended that ATT had refused to allow MCI to connect its telephone lines to ATT's nationwide telephone network which was an indispensable facility for MCI to be able to compete in the long-distance telephone business. The court laid down a 4-factor test for cases grappling with the essential facilities doctrine. The factors are:

1. Control of the essential facility by a monopolist;
2. A competitor's inability practically or reasonably to duplicate the essential facility;
3. The denial of the use of the facility to a competitor; and
4. The feasibility of providing the facility.

After applying these factors, the Court concluded that it was technically and economically feasible for ATT to provide MCI access to its facility and that ATT's actions amounted to unfair monopolization. American courts have generally adopted a narrow interpretation of the 4-factor test. They have held that a facility does not become essential merely if it is economical, so "a plaintiff must show more than inconvenience, or some economic loss; he must show that an alternative to the facility is not feasible"[30]. So, for example, access to a hospital's facilities is not considered essential if the plaintiff can treat a large portion of his patients in his own clinic.[31]An absolute denial to provide access to the

[29] MCI Communications Corp. v. ATT. 708 F.2d 1081, 1132 (7th Cir.), Cert. Denied, 464 U.S. 891 (1983, Supreme Court of the US).

[30] Supra 6.

[31] McKenzie v. Mercy Hosp. of Independence Kan., 854 F.2d 365 (10th Cir. 1988).

facility as well as a constructive denial i.e. providing access at an exorbitant rate or on unreasonable terms would satisfy the third factor laid down in the test.[32]

The determination of the fourth factor has to be made in accordance with the facts of every case; no consistent themes have appeared in competition law jurisprudence so far in this regard. Scholars in the United States have repeatedly sought to problematize the use of the doctrine and have vehemently argued in favour of clearly defining its scope and limits.[33]Furthermore, many experts have subscribed to the view that the refusal to deal principle should be suitably altered to provide adequate remedies against the abuse of dominance instead of formulating doctrines whose use may have many unintended consequences.[34] Similarly, courts have been averse to the idea of holding undertakings that refuse to share their patented or copyrighted inventions liable under the Sherman Act.[35] In a move that was widely hailed by critics of the doctrine, the US Supreme Court in the case of Verizon Communications Inc. [36] stated that it had never officially endorsed or accepted the doctrine, which, it claimed, was crafted entirely by lower courts.[37] In this case, the question that the court was required to address was if Verizon's refusal to share its telecom network which it was mandated to share in accordance with the Telecommunications Act of 1996 was violative of the Sherman Act or not. The court cited the uncertain virtues of forced sharing and the difficulties associated with curbing anticompetitive conduct by single firms as justifications for its circumspect approach in the context of the doctrine.[38]

Finally, the court stated that the application of the doctrine would not only reduce the incentive for businesses to invest in infrastructure assets, but would also require the court to closely supervise sharing arrangements and to act as central planners for the industry. Even though the Court did not completely repudiate the doctrine, it significantly undermined the potential of this doctrine being invoked

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[32] Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544-545 (4th Cir.),cert. denied, 502 U.S. 814 (1991, Supreme Court of the United States).

[33] P.Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 (3) Antitrust Law Journal, 841-853 (1989).

[34] Supra 13, 336.

[35] American Bar Association, *Antitrust Law Developments*, 266 (6th Edn. 2007).

[36] Supra 3.

[37] Ibid, 410-411.

[38] Id, 407-408.

against monopolists. The hostile approach of US courts to the doctrine can be attributed to several important factors. First, the US is believed to be a vehement supporter of the Chicago School of Antitrust Analysis, which is predicated on the notion that markets are self-correcting mechanisms, and, therefore, regulators should not interfere with their functioning unless it is absolutely necessary to do so.[39] Second, the United States has traditionally been one of the strongest advocates of stricter norms to protect the interests of large investors, so the idea of the essential facilities doctrine is inconsistent with the worldview that the US subscribes to. Finally, it is believed that sectoral regulators possess the expertise to provide industry-specific solutions and are, therefore, ideally positioned to deal with such issues.[40]

4. LEGAL POSITION OF THE DOCTRINE IN THE EUROPEAN UNION

On the other side of the Atlantic, courts have viewed the doctrine more favourably and have openly embraced its virtues in several contexts. Scholars believe that courts in the EU have consistently subscribed to the view put forth by the ECJ in the *Commercial Solvents* case mentioned earlier.[41] The first case in which the ECJ explicitly dealt with the doctrine was the *Sealink* case[42]. In the instant case, the defendant, Sealink, not only ran its own ferries, but also owned and controlled the Holyhead Port. In exercise of its powers as the controller of the port, Sealink decided to alter the sailing time of its ferries as a result of which BI, one of Sealink's competitors, had to endure considerable hardship. More specifically, the loading and unloading of BI's ferries was constantly interrupted by the arrival and departure of Sealink's ships. After carefully analyzing the facts, the ECJ held that any efforts made by the undertaking controlling a facility, without which its competitors cannot compete in a given market, to either deny to its competitors access to such a facility or to provide access on terms less favourable than those that govern the dominant undertaking's access to such a facility is unlawful. An interesting case in which the ECJ was required to rule on

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[39] R. A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 938-44 (1979).

[40] R. Pitofsky, *At the Glasser Legal Works Seminar on Competitive Policy in Communications Industries*, Washington, D.C., Competition Policy in Communications Industries: New Antitrust Approaches (10/03/1997).

[41] Supra 15.

[42] Sealink/BI Holyhead: Interim Measures (1992, European Court of Justice).

the applicability of this doctrine in the context of intellectual property was IMS Health[43]. In the instant case, IMS Health refused to share the 1860 Brick Structure that it had developed for collating and analyzing market data pertaining to the German pharmaceutical industry with its competitors. The court opined that the conduct of IMS Health was tantamount to denial of access to an essential facility and ordered the sharing of the Brick Structure. Another important case, which sheds some light on the standard of essentiality that the ECJ has adopted, is the *Magill* case.[44] Magill, an Irish publisher of TV guides, tried to obtain copyrighted program listings from the 3 stations that published their own program guides for preparing its weekly TV guide. The ECJ noted that the information contained in the program guides was indispensable for the publication of weekly TV guides and held that the refusal of the broadcasters to provide access to the information without any reasonable justifications amounted to abuse of dominance. Courts in the EU have generally adopted a 3-step test to deal with cases of this sort. The steps are:

i. The refusal is preventing the emergence of a new product for which there is a potential consumer demand;
ii. The refusal is not justified by an objective consideration; and
iii. The refusal will exclude/eliminate any or all competition in the secondary market.

The capacious scope of the doctrine in the EU is clearly evidenced by the decision of the court in the *Microsoft case.*[45] The court held that Microsoft's refusal to supply interoperability information which was necessary for software developers to allow their applications to work on the Windows operating system amounted to abuse of dominance and directed Microsoft to supply the information within the prescribed time period. The liberal interpretation of the doctrine by European courts can be attributed to three principal factors. First, the highest goal of the competition law regime in the European Union is to preserve competition and to remove any impediments that may impede market competition. This is in sharp contrast with the approach adopted by some other jurisdictions in which the competition law regime serves the

[43] IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG ECR I-5039 (2004, European Court of Justice).
[44] Case C-241/91 P & 242/91 PRTE & ITP v. Commission [1995] 4 CMLR 718 (1995, European Court of Justice).
[45] Case T-201/04, Microsoft v. Commission [2007] ECR II (2007, European Court of First Instance).

primary purpose of consumer welfare. Second, dominant undertakings in the EU have special responsibilities which prevent them from acting like non-dominant undertakings.[46] As a result, they have a peremptory obligation not to engage in any action which results in the distortion or foreclosure of competition.[47] Finally, the threshold that must be met for an undertaking to be considered a dominant undertaking is relatively lower in the EU in comparison to the US.[48] However, it would be incorrect to say that European courts have given themselves *carte blanche* to apply the doctrine without appreciating the facts of every case. This is best evidenced by the decision of the court in the *Oscar Bronner case*.[49] The court was faced with the challenge of deciding whether a national newspaper home delivery service was an essential facility. The court held that the doctrine cannot be invoked when the access is merely convenient or desirable; it must be indispensable to stay alive in the market. Since other modes of newspaper delivery were available, the court refused to invoke the doctrine. Recent guidelines issued by the Commission reaffirm the Commission's commitment to invoking the doctrine as an enforcement priority when consumers or competitors are likely to be harmed by lack of access to the essential facility.[50]

5. LAWS IN INDIA MANDATING SHARING OF FACILITIES

Even though the essential facilities doctrine has not yet been explicitly invoked in India in the context of competition law, the doctrine is, by no means, a *tabula rasa* in the Indian legal system. The clearest manifestation of the principles underpinning the doctrine can be found in the Indian Patents Act, 1970. Similarly, many sectoral laws also explicitly recognize the doctrine. The open access regimes that these laws entail have been designed in accordance with market structures, technological frameworks, ownership patterns and regulatory experiences of each sector.

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[46] E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law*, 71 (2010).

[47] Case C-322/81 NV Nederlandsche Banden-Industrie Michelin v. Commission [1983] ECR 3461, para. 57 (ECJ).

[48] See B. A. Facey and D. H. Assaf, *Monopolization and abuse of Dominance in Canada, The United States and The European Union: A survey*, 70 Antitrust Law Journal, 513 (2003).

[49] Case C-7/97 Oscar Bronner v. Mediaprint Zeitungs (1998) ECR I-7791 (1998, European Court of Justice).

[50] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 24th February, 2009, available at http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.C_.2009.045.01.0007.01.ENG, last seen on 30/09/2014.

5.1 Compulsory licensing regime under the Indian Patents Act

In its most rudimentary form, a compulsory license is an authorization by the state that enables a third party to access a patented invention without the patent holder's consent. In one sense, a compulsory license can be viewed as a broader concept than the essential facilities doctrine because it can not only mandate the sharing of assets enjoying intellectual property protection that are essential facilities, but can also be used to mandate the sharing of facilities that are of great public value such as life-saving medicines and inventions for the protection of the environment. On the other end of the spectrum, the essential facilities doctrine can also be viewed as a broader concept because it can be invoked to mandate the sharing of a large array of assets, not just intellectual property. Section 84 of the Indian Patents Act, 1970 delineates 3 conditions in which a compulsory license can be granted after three years of the grant of the patent: If the reasonable requirements of the public for the patented product are not satisfied, if the invention is not made available to the public at a reasonably affordable price and, finally, if the invention is not "worked" in the territory of India. The Act also makes it very clear that an application for a compulsory license should be filed only if all efforts to acquire a voluntary license fail. Compulsory licensing can be viewed as a remedy against the patent holder's refusal to deal inasmuch as it compels the patent holder to transact with the third party in question. The compulsory licensing provision has been wisely used by the Indian patent regulator to take corrective steps against the actions of patent holders that are inconsistent with the interest of the public at large. This is best evidenced by the recent *Natco Pharma Ltd.* v. *Bayer Corporation*[51] case in which Bayer refused to provide Natco Pharma, a generic drug manufacturer in India, access to its patented anti-cancer drug Nexavar which Bayer was selling in the market at an exorbitant price. Natco filed an application to the Controller General of Patents and Designs for the grant of a compulsory license. After reviewing the pertinent facts, the Controller General granted Natco a compulsory license to sell the drug in the market at a comparatively cheaper price.[52] The Intellectual Property Appellate Board reaffirmed the decision of the Controller General.[53]

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[51] Natco Pharma Ltd. v Bayer Corporation, Compulsory License Application No. 1/ 2011 (Indian Patent Office, 09/03/2012).

[52] A. Pandey, *Compulsory License Granted To NATCO*, Mondaq (15/05/2012), available at http://www.mondaq.com/india/x/177328/Patent/Compulsory+License+Granted+To+NATCO, last seen on 27/09/2014.

[53] Bayer Corporation v. NatcoPharma Ltd., Order No. 45/2013 (Intellectual Property Appellate Board, 04/03/2013).

5.2 The Telecom Sector

The idea of open access has greater importance in the telecom sector because of the peculiar features of the sector that necessitate collaborative efforts among different undertakings in order to ensure that the fruits of innovation and progress reach the last man in the line. More specifically, it is essential to create a regime that provides for the sharing of different forms of technology such as links, nodes, communication units, systems and networks.[54] Moreover, as a few monopolists have traditionally dominated the telecommunications sector, it is essential to provide other competitors access to their facilities in order to promote facility-based competition.[55] One of the primary reasons why the Telecom Regulatory Authority of India was set up was to facilitate interconnections and other collaborative efforts among stakeholders in the telecom sector.[56] As a result, Section 11(1) (b) (ii) along with Section 11(1) (b) (iii) of the Telecom Regulatory Authority of India Act, 1997 impose an obligation on the TRAI to ensure interconnection and technical compatibility between the services that are provided by various players in the telecom sector. The TRAI is also mandated to maintain a register encompassing details of interconnection agreements between service providers u/s 11 (1) (b) (vii).

In order to facilitate sharing of resources, TRAI enacted the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations in 2004. The regulations set out the provisions governing interconnection arrangements among service providers as well as the modalities for revenue sharing. Every broadcaster is mandated to provide cable operators, direct to home operators, multi system operators, and others access to its signals on a non-discriminatory basis. Similarly, in order to streamline the procedure for interconnections, TRAI enacted the Telecommunication Interconnection (Reference Interconnect Offer) Regulations, 2002. The Regulations exhaustively enumerate details for structuring interconnection arrangements between dominant undertakings and their competitors seeking interconnection. The regulations also contain a model reference interconnect offer which sets out the terms and conditions upon which an undertaking may share its network with others. Undertakings are free to either accept the model offer entirely or to

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[54] J. Singh, *Is there a Case for Essential Facilities Doctrine in India?* CIRC Working Paper Series, 11, Working Paper No. 04, Cuts Institute for Regulation and Competition, New Delhi (2013).

[55] Supra 11.

[56] Supra 54, at 11-12.

formulate an individualized interconnection offer that can meet their peculiar needs. There was considerable ambiguity about the pricing of such interconnection arrangements.

Initially, TRAI directly stipulated the price for interconnection arrangements instead of laying down cogent principles for determining an appropriate price. This led to several complications as it was difficult to know the basis upon which TRAI had stipulated the price.[57] In order to remedy this problem, TRAI came out with the Telecommunication Interconnection Usage Charges (IUC) Regulations, 2003. The regulations explicitly state that interconnection charges should be determined by adopting a cost-based approach which would be applied uniformly on a non-discriminatory basis. TRAI regularly consults all major stakeholders in the telecom industry to modify its interconnection regime in accordance with changing needs. The impact of this regime has been twofold. First, it has cultivated growth and innovation in the telecom sector and has played a pivotal role in making India's telecommunication network the second largest in the world.[58] Second, it has profoundly and fundamentally transformed the structure and composition of the telecom sector and has allowed new entrants to access facilities that were hitherto inaccessible to them.

5.3 Oil and natural gas sector

In the pre-liberalization era, the gas transmission grid in India did not extend beyond the western, northern, central and north eastern regions due to lack of participation of private players. In addition, the Gas Authority of India Limited owned 70% of the market share.[59]Therefore, it was necessary to develop a framework to provide new entrants access to essential facilities in order to solve what is commonly referred to as the 'access problem'.[60]

In pursuance of this goal, the Petroleum and Natural Gas Regulation Board Act ("PNGRB Act"), 2006 was enacted to clearly spell out provisions to mandate the sharing of essential resources. Section 2 (J) of

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[57] Supra 54, 11.

[58] S. Bafna, *Indian Telecom Network Becomes the 2nd Largest In The World, Telecom Talk* (15/09/2010), available at http://telecomtalk.info/indian-telecom-network-becomes-the-2nd-largest-in-the-world/40619/, last seen on 28/09/2014.

[59] Supra 54, 12.

[60] W. Tye, *Competitive Access: A Comparative Industry, Approach to the Essential Facility Doctrine*, 8 Energy Law Journal 337, 344 (1987).

the PNGRB Act empowers the Petroleum and Natural Gas Board to declare any pipeline for the transportation of petroleum, petroleum products or natural gas a "common carrier" which allows multiple entities to access such pipelines on a non-discriminatory basis. It is pertinent to note that pipelines that are constructed for supplying petroleum products or natural gas to a specific consumer or for the supply of crude oil cannot be declared a "common carrier". Similarly, Section 2 (M) empowers the Board to declare a pipeline for transporting petroleum, petroleum products or natural gas a contract carrier which would allow multiple entities to access the aforementioned facilities in accordance with a firm contract. As per the explanation to Section 2 (J), a contract carrier shall be treated as a common carrier if it has surplus capacity over and above the resources that are employed in accordance with firm contracts or after the firm contract expires. The actions of the Board in this regard must be actuated in pursuance of 5 cardinal objectives: Promoting competition, preventing infructuous investments, increasing supplies, ensuring equitable distribution of resources and finally, ensuring that petroleum, petroleum products and natural gas are available in an adequate quantity u/s 20(5) of the PNGRB Act. The Board is empowered to fix the terms and conditions upon which the resources would be accessed, but its orders must be in consonance with public interest, competitive transport rates and the right of first use u/s 20(2). It is believed that the spirit of cooperation and competition that this framework has engendered has considerably quickened the growth of this sector and has led to the development of liquefied natural gas terminals at places like Dabhol and Kochi.[61]

5.4 Electricity sector

The electricity sector, like most other sectors in India, is experiencing a transition from an antiquated regulatory paradigm to a pro-competitive environment. In this context, the Electricity Act, 2003 can be viewed as a transitory piece of legislation which aims to foster competition and cooperation and thereby to fundamentally alter the landscape of the electricity sector in India. The Act includes within its ambit the essential facilities doctrine for effectuating these goals. Section 2 (47) of the Act empowers the appropriate commission to issue regulations for the non-discriminatory use of transmission lines or distribution systems by licensees, consumers and all other entities involved in electricity generation. Section 38 (2) (d) and Section 39 (2) (d) of the Act impose a

[61] Supra 54, 12.

duty on the Central Transmission Utility and the State Transmission Utility respectively to provide non-discriminatory access to their transmission facilities to licensees or generating companies by imposing the necessary transmission charges and the prescribed surcharge in accordance with the provisions mandating open access. Similarly, Section 40 (c) of the Act imposes an obligation on transmission licensees to provide access to their transmission facilities on the payment of the required charges and surcharge. However, no surcharge should be levied for providing access to those who have established their own captive power plants for transmission of electricity to the destination of their use. Such open access is subject to the availability of adequate transmission facilities which is determined by the party controlling the facility. Any disputes in this regard are adjudicated upon by the Appropriate Commission. The concerned State Electricity Regulatory Commissions have been empowered to invoke the open access provisions in a phased manner upon the terms and conditions that they deem fit. They must also determine the extent to which open access should be granted in every phase and the charges for wheeling. The Commission must take cognizance of operational constraints, cross subsidy requirements and other relevant factors while invoking the doctrine.

6. AN ANALYSIS OF THE POSITION OF THE ESSENTIAL FACILITIES DOCTRINE IN INDIA

As the competition law regime in India is still in a nascent stage, the essential facilities doctrine has not been explicitly invoked by the CCI in any case so far. Several arguments have been made in favor of and against the application of the doctrine in India. Those who are against the invocation of the doctrine make 4 principal arguments to claim that the doctrine can have several deleterious effects and that it is under theorized and unarticulated.[62]

6.1 Dynamic efficiency

The doctrine greatly undermines dynamic efficiency in that it reduces the incentive to innovate because dominant undertakings can be

[62] M. Lao, *Networks, Access, and Essential Facilities: From Terminal Railroad to Microsoft*, 62 SMU. Law Review 557, 558 (2009).

compelled to share the fruits of their innovations with competitors who lack the technological prowess to make those innovations.[63]

6.2 Fear of collusion

Competition law, in general, is averse to the idea of cooperation between competitors. This doctrine, on the other hand, necessitates cooperation which, the argument goes, could lead to the creation of larger, and potentially more destructive, monopolistic structures that could undermine, as opposed to reinforcing, the vitality of competitive forces.

6.3 Lack of uniformity in implementation

There is considerable divergence in the implementation of the doctrine by courts across the globe in some cases it involves hundreds of parties whereas others just two. Some courts adopt a narrow interpretation of the doctrine whereas others impose a broad duty to deal on the dominant undertaking.[64] Therefore, it is believed that there is no workable model of the doctrine that can be imported into India.

6.4 Powers of sectoral regulators

Finally, it is argued that sectoral regulators have sufficient power to rectify problems of this nature; there is no need for the competition regulator to dabble into these issues.

However, we respectfully submit that these arguments are predicated on flawed assumptions and that suitable safeguards can be put in place to address these concerns. There are several reasons why the essential facilities doctrine can be an appropriate remedy to deal with contemporary challenges in the field of competition law.

6.5 In accordance with competition philosophy

An analysis of the literature pertaining to competition law clearly indicates that the primary goal of the competition law regime in India is

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[63] See E. Elhauge, *Defining Better Monopolization Standards*, 56 Stanford Law Review 253, 300-305 (2003).

[64] S. M. Maurer, & S. Scotchmer, *The Essential Facilities Doctrine: The Lost Message of Terminal Railroad*, TSE Working Papers Series, Working Paper Number 14-476, Toulouse School of Economics (2014).

to empower the CCI to enact policy instruments and to undertake strategic interventions to foster a culture of competition. Therefore, wider application of the doctrine would be perfectly in consonance with the philosophy of our competition policy.

6.6 Need for ex-post interventions

Even though some sectoral regulators can mandate the sharing of essential facilities, their interventions are *ex-ante* in nature i.e. they are meant to prevent stakeholders in a certain market from denying access to certain facilities. On the contrary, the interventions by the CCI are *ex-post* in nature, which implies that they can take corrective measures to repair the damage that is caused by lack of access to essential facilities.[65] This *ex-post* role is of particular significance, as not all cases of denial of access can be envisaged in advance, so it is necessary to arm the CCI with the doctrinal tool essential for unravelling the Gordian knot of complex sectoral regulations to undo the damage caused to competition.

6.7 Build Operate Transfer model

Most arrangements relating to the construction of infrastructure assets in India are based on the Build Operate Transfer (BOT) model which implies that private entities have to transfer their assets to the government after a certain time period. Therefore, since the scope of the right to control infrastructure assets is so limited, adoption of the essential facilities doctrine would not lead to the curtailment of that right. In addition, the right to property under the Indian constitution is no longer a fundamental right; it is merely a legal right. This implies that the state has greater power to take away that right in the interest of public welfare.

6.8 Ladder of investment approach

In order to strike a balance between the interests of monopolists and competitors, CCI can adopt the ladder of investment approach developed by Martin Cave.[66]Under this approach, new entrants would be initially provided a lift upon the investment ladder by providing them

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[65] F. Marie-Anne, *Regulation versus Competition, I-1.30* The Journal of Regulation, 550-560 (2011).

[66] M. Bourreau, P. Dogan and M. Manant, *A Critical Review of the 'Ladder of Investment' Approach*, Telecom ParisTech Working Paper Series, Working Paper Number ESS-09-06, Telecom ParisTech, (2009).

access to facilities controlled by dominant undertakings that are essential for competing in a particular market. Then, as they climb up the investment ladder and amass greater wealth, the price of accessing the facility would steadily increase which would compel the undertaking to build its own facility. This would foster facility-based competition while ensuring that new entrants do not take undue advantage of the facilities controlled by the dominant undertaking.

7. MODALITIES FOR IMPLEMENTING THE DOCTRINE IN INDIA

A close inspection of the Indian Competition Act, 2002 clearly shows that the legislation is broad enough to bring the essential facilities doctrine within its fold. More specifically, Section 4 (2) (c) unequivocally prohibits dominant firms from engaging in any activity that results in the denial of market access in any manner. This provision is capacious enough to cover the denial of access to facilities which are critical for competing in the given market within its ambit. In addition, Section 4 (2) (e) prevents an undertaking from using its dominance in one market (upstream/downstream) to establish a footing or to protect its position in another market. Another provision into which the essential facilities doctrine can be read is Section 3 (4) (d) of the Act which prohibits the refusal to deal by dominant undertakings when it can create an appreciable adverse effect on competition. Viewed through this lens, the doctrine can be construed as a part of the refusal to deal clause in the Act. Thus far, the doctrine has come up for consideration in 3 important cases. First, in the case of Arshiya Rail Infrastructure Limited (ARIL),[67] CCI faced the challenge of deciding whether the essential facilities doctrine could be invoked to compel CONCOR, a cargo carrier and terminal operator, to share its terminals with new container train operators (CTOs) in the market. The CTOs contended that it would be very costly as well as unnecessary for them to construct new terminals and requested the CCI to declare CONCOR's terminals as an essential facility for competing in the relevant market. Rejecting the CTO's argument, the CCI held that as a pioneer in the market, CONCOR was able to build the terminals at a comparatively lower cost. It further held that it would be unfair to provide access to CONCOR's terminals to the CTOs when there was no concrete reason why the CTOs couldn't build

[67] Arshiya Rail Infrastructure Limited (ARIL) v. Ministry of Railways (MoR), Case No. 64 of 2012 (CCI, 14/08/2012).

their own terminals. The second case was of Ms. Anila Gupta,[68] where CCI had to decide whether it was legally permissible for a customer of a government electricity provider i.e. BEST to switch over to a private electricity provider i.e. TPCL. Even though this case wasn't directly related to the essential facilities doctrine, one of the judges, R. Prasad, invoked the doctrine in his dissenting opinion. He opined that it would not be in the economic interest of the country or consumers for different electricity distributors to lay down their own supply networks. It was his view that TPCL should, therefore, be allowed to access BEST's supply network on payment of required charges so as to prevent wasteful expenditure involved in the construction of a separate supply network. Finally, in a recent case of *Shri Shamsher Kataria*,[69] CCI was required to decide whether the refusal of 14 car manufacturers to provide independent repairers access to their spare parts and diagnostic tools amounted to abuse of dominance and/or anticompetitive conduct. In his report, the Director General contended that the spare parts and diagnostic tools were essential facilities sans which the local repairers couldn't perform their functions efficaciously and advocated in favour of the invocation of the essential facilities doctrine. The CCI accepted that it was essential to provide independent repairers access to essential inputs such as spare parts and diagnostic tools to create a more competitive system and imposed a fine of INR 2544 crores on the 14 car manufacturers for their anticompetitive conduct as well as abuse of dominance. It did not, however, explicitly invoke the essential facilities doctrine.

As these cases clearly reflect, the CCI has always chosen to deal with cases involving the use of this doctrine on an *ad hoc* basis as opposed to formulating a coherent and consistent policy that is critical for ushering in a greater degree of uniformity and certainty in the decision making process. Therefore, we are of the considered opinion that the CCI should exercise the powers bestowed upon it under Section 64 (1) of the Competition Act and should release a broad policy statement which should clearly set out the intricacies of providing access to essential facilities.[70] As the Supreme Court noted in the case of *Kilpest Pvt. Ltd.* v.

[68] Ms. Anila Gupta v. Best undertaking, Case Number 06/2010 (CCI, 11/01/2012).

[69] Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors, Case No. 03/2011 (CCI, 25/08/2014).

[70] Piyush Joshi and Anuradha R.V., *Study on Competition Concerns in Concession Agreements in Infrastructure Sectors,*(June 2009).

Shekhar Mehra[71], it is always in the fitness of things to adapt and modify legal principles enunciated by courts in other countries in accordance with the idiosyncrasies of the Indian society. Therefore, the CCI should adopt a hybrid model of the US and EU approaches which should be based on a 4-pillar approach: encouraging the sharing of tangible as well as intangible assets; attaching greater emphasis on the sharing of assets in the infrastructure sector where there is scarcity of resources; ensuring that access is provided on reasonable terms and encouraging competitors to develop their own facilities, if possible, in the medium to long term in conformity with the ladder of Investment approach.[72]

8. CONCLUSION

At the heart of any thriving liberalized economy lies a robust and flexible competition law regime. If such a regime is not suitably modified to meet contemporary challenges, monopolistic structures would continue to go unchecked which would have a large array of corrosive effects on the health of the economy.[73] Therefore, it is our earnest belief that the essential facilities doctrine should be applied on a large scale in order to place fetters on activities that whittle competition and to lend greater robustness to our competition law regime. In the post-liberalization era, many sectors that were hitherto controlled by state-owned enterprises are gradually being exposed to the volatility of market forces in India. It would, therefore, be apposite to compel monopolists who control certain indispensable facilities in such sectors to share these facilities with others so as to eliminate production and supply bottlenecks, reduce costs and improve the quality and productivity of goods and services by harvesting the synergies of different undertakings. If properly implemented, this doctrine can emerge as a strong pillar to support and strengthen the edifice of Indian

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[71] Kilpest Pvt. Ltd. v. ShekharMehra (1996) 10 SCC 696.

[72] K. Vaishali, *Competition issues in the infrastructure sector- with special reference to Indian electricity sector,* Internship report for the Competition Commission of India, (July 2012), available at http://cci.gov.in/images/media/ResearchReports/Competition%20Issues%20in%20the%20Infrastructure%20Sector_With%20Special%20reference%20to%20the%20Indian%20Electricity%20Sector.pdf, last seen on 30/09/2014.

[73] M. Mehra, Competition Law and Inclusive Growth, the Economic Times, (04/11/2009), available at http://articles.economictimes.indiatimes.com/2009-11-04/news/2766 2326_1 _ competition-law-maintenance-of-monopoly-power-fdi/2, last seen on 30/09/2014.

competition law. While it is true that some developed countries have been averse to the idea of widening the scope of the doctrine, it is essential to remember that the problem of scarcity of resources poses a far greater threat to the growth of developing economies like India as opposed to developed economies that possess abundant resources. Not only does this doctrine have the potential of efficaciously dealing with this threat, but it is also firmly embedded in Article 39 (b) of the Constitution of India which imposes an obligation on the State to ensure that the ownership and control of all material resources is distributed in such a way as to subserve the common good.

[CASE COMMENTS]

HOCKEY INDIA JUDGEMENT, 2013 – INTERPLAY BETWEEN COMPETITION AND SPORTS LAWS

- Devrupa Rakshit[*]

"*Given the specificities of sport, the competition law must be applied with sufficient flexibility to take account of the unique features inherent in sports that distinguish it from other sectors.*"

– *Dhanraj Pillay* v. *Hockey India*[1]
31st May 2013

ABSTRACT

This review is a succinct analysis of the subtleties associated with the interplay between the persistently overlapping domains of competition and sports law, which every so often appear to be discordant with each other in spirit. Unlike the all-consuming prominence accorded to commerce in virtually every sector, the essence of sports often overshadows commerce diluting its fetters, to some extent, in the process. While the incidence and manifestation of such occurrences are open for deliberation, the scope of warranted intervention by competition law into the sphere of sports has spurred many debates since its inception; and considering the colossal amounts of money that accompany national and international meets and events, the extent of scrutiny sanctioned to competition regulators assumes paramount importance. Furthermore, the ensuing tussle bears testimony to the underpinnings of competition law that shroud the latter in its labyrinth. Even as the reflections upon the conceivable aftermath of the judgment have been restricted simply to a well-researched 'critical appraisal' of the salient features of the order, the controversial aspects of the Act that have consistently

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[1] Sh. Dhanraj Pillay & Ors v. Hockey India, Case No. 73 of 2011 (CCI, 31/05/2013) available at http://www.cci.gov.in/May2011/OrderOfCommission/732011.pdf last seen on 20/10/2014.

been highlighted across a plethora of cases besides finding their way into the case in point, have been scrutinised at greater depth. While expounding the impugned facets, the review passively highlights the extent of immunity that the legal corridors have allowed against the rapidly changing commercial scenario in the realm of sports.

1. INTRODUCTION

While there is a pronounced dissemblance between the manners in which the notion of competition operates in sports and in purely commercial sectors,[2] as an emerging profit-yielding industry, sports cannot break free from the yoke of the statutes governing competition.[3] The exploration of the nuances that trace the convergence of competition and sports law, and their subsequent clashes, constitutes the bedrock of *Dhanraj Pillay* v. *Hockey India* – a 2013 judgment by the Competition Commission of India (hereinafter referred to as "**CCI**") touted as the 'Hockey India Order'[4] by the media. Given the vast multitude of parallel developments spiralling into existence in the territories of sports and competition law, the elusiveness springs forth as it is but natural to lose sight of one in the enterprise to keep pace with the other.

The leading legislation concerning competition law in the country, at present, is The Competition Act, 2002 (hereinafter referred to as "**the Act**"), which was brought into force on 20 May 2009 – three years short of a decade since its enactment in 2002. Having been implemented only in part, the three functional elementary principles enumerated by the Act continue to include – the embargo on anti-competitive agreements, the proscription of abuse of dominance and the superintendence of combinations, branded universally as merger control.[5]

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[2] K.J.M. Mortelmans, *Towards a Convergence of the Application of the Rules on Free Movement and Competition?,* 38 Common Market Law Review, 613 (2007), available at http:// dspace .library.uu.nl/bitstream/handle/1874/7217/article_print32.html?sequence=1, last seen on 15/10/2014.

[3] A. Vermeersch, *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, 3 JCER 238, 238 (2007), available at http://www.jcer.net/index.php/ jcer/article/viewFile/48/70, last seen on 15/10/2014.

[4] T. Sundar Ramanathan, *Hockey India Order – Sports and Competition Law*, Competition Law and Policy, available at http://competitionlawyer.blogspot.in/2013/06/hockey-india-order-sports-and.html, last seen on 16/10/2014.

[5] C. Shroff & N.K. Uberoi, *India: Abuse of Dominance*, The Asia-Pacific Antitrust Review – Global Competition Review (2014), available at http://globalcompetitionreview.

In the case under review, the 46-year-old Indian field hockey player and former captain of the national hockey team – Dhanraj Pillay – often described as mercurial, levelled charges of abuse of dominant position and anti-competitive demeanour against Hockey India and the International Hockey Federation. Despite the organising bodies being exonerated of the claims of having indulged in practices contrary to the decorum required by the legal machinery of the state, antagonistic to the speculation in the media,[6] the CCI, in a bid to preserve the sanctity of the national sport of the country, reproached the defence for the conflicts of interest between their regulatory and administrative powers directing them to streamline the inconsistent spheres by means of an internal mechanism.

2. OCCASIONED BY VIOLATION OF COMPETITION RUBRICS? –THE MILIEU OF THE PETITION

Dhanraj Pillay, Gundeep Kumar, Gurbax Singh Grewal, Balbir Singh Grewal, Alloysius Edwards and V Baskaran – the line-up of personages, who brought the claim before the panel, included former Olympic champions, and the star-achievers of Indian hockey. Under the radar of heavy criticism, Hockey India, the accredited body for hockey in the republic, laboured for a couple of years to encounter the contentions of gross exploitation of the powers vested in it. Having incurred the wrath of the bigwigs as well as the sports-enthusiasts through the alleged act of threatening the players with sanctions upon participation in World Series Hockey League that was slated to be organised by the rival society Indian Hockey Federation (hereinafter, IHF), and to be played in India between December 17 and January 22,[7] Hockey India was subsequently absolved of the charges by a majority decision of five judges against the sole judge R. Prasad, who elected to opine to the contrary.

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com/reviews/60/sections/206/chapters/2342/india-abuse-dominance/, last seen on 19/10/2014.

[6] Sidhartha & Pankaj Doval, *Hockey India faces Competition Commission of India Heat*, The Times of India (01/06/2013), available at http://timesofindia.indiatimes.com/ sports /hockey/top-stories/Hockey-India-faces-Competition-Commission-of-India-heat/articleshow/20375200.cms?referral=PM, last seen on 15/10/2014.

[7] IndiaTimes, *150 Indian Players Sign Up for World Series Hockey*, India Times Beta (18/11/2011), available at: http://www.indiatimes.com/hockey/150-indian-players-sign-up-for-world-series-hockey-6599.html, last seen on 15/10/2014.

The trials and tribulations leading to the organization of the World Series Hockey League institute the core of the controversy. Envisioned as the first professional hockey league in India by the IHF in collaboration with Nimbus Sport, that is a subsidiary of the sports rights-management and marketing company Nimbus Communications Limited, it was expected to witness participation from eight city-based teams comprising national and international players competing 61 matches for a total prize of $2 million[8] – an idea structured roughly around the Twenty20 cricket tournament Indian Premier League that has emerged as a tremendously successful model in the sub-continent.[9]

Interestingly, IHF, which lingered in the spotlight for the entire spell of the proceedings, is not affiliated to the International Hockey Federation (hereinafter, FIH) as the association accords recognition exclusively to Hockey India as the national federation for hockey in the country. It is pertinent to note that parallel coercions from the international organisation followed soon thereafter, and was met with remonstration by the European players, who eventually appealed before the European Competition Commission, Competition Authorities of Spain, Belgium and the United Kingdom against the protocols published by the FIH seeking restraint from partaking in the sporting event regardless of the interest exhibited by the players.[10] The repercussions resounded in Pakistan as well, where the Pakistan Hockey Federation, under pressure from the FIH, prohibited the national players from taking part in the World Series Hockey League.[11]

The *Regulations on Sanctioned and Unsanctioned Events*, or the *FIH Regulations*, circulated by the global establishment to all allied national associations through a letter dated March 11, 2011, endowed Hockey India with the

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[8] Press Trust of India, *World Series Hockey Season 2 from December 15*, NDTV Sports Beta (06/09/2012), available at: India Times Beta (18/11/2011), available at http://www.indiatimes.com/hockey/150-indian-players-sign-up-for-world-series-hockey-6599.html, last seen on 15/10/2014.

[9] Shruti Choudhury, *Competition Commission of India to Referee Indian Hockey Slugfest*, The Economic Times (19/11/2011), available at: India Times Beta (18/11/2011), available at http://articles.economictimes.indiatimes.com/2011-11-19/news/30419506_1_hockey-india-competition-act-international-hockey-federation, last seen on 15/10/2014.

[10] Vaish Associates Advocates, *Media Updates: CCI to Investigate Indian Hockey & Chess Federation*, 3 Competition Law Bulletin 3, 4 (November-December 2011), available at: http://www.vaishlaw.com/new/fp_competition/_Nov%20-%20Dec%202011.pdf, last seen on 17/10/2014.

[11] Supra 9.

power to initiate disciplinary action in the event of participation in any events that had earned the status of being unsanctioned vide the notification, and the penalty for contravention entailed debarment from the selection procedure to the national team as per the amendment to its *Code of Conduct Agreement* (hereinafter, the *CoC Agreement*). The league in question had attained the standing of an unendorsed prospective private professional league. However, soon after the directive surfaced, Hockey India floated the proposal for laying the foundation of its own professional hockey series along the lines of the league envisaged by Nimbus Sport and the IHF.

At this juncture, the petitioners deemed it crucial to seek a probe into the assumed misconduct of Hockey India eliciting unwarranted constraints on the mobility of players, and additionally on prospective private professional leagues.

3. THE DYNAMICS OF THE SUCCESSIVE POLEMICS – PYRAMID STRUCTURE AS THE JUSTIFICATION FOR MONOPOLY?

3.1. Abuse of Monopoly Powers

The principal, and correspondingly mammoth, onus on the informants was to successfully demonstrate the jurisdiction of the CCI to consider a matter adjunct to the discipline of sports. Submitting, therefore, that by virtue of being registered under the Societies Registration Act of 1860, Hockey India was a society, and consequently a 'person' under the Act.[12] As the custom dictates a characterisation of the relevant marketplace to be put forth in course of the courtroom debates focussing on the abuse of dominant position under competition law, the informants chose to designate – *the market for conducting and governing international hockey activities for both men and women in India* – as the official definition. Proceeding with their arguments, the counsel articulated that on account of being handed over the charge of recruiting players for the national team, besides being the sole governing body for the national sport, Hockey India was in a position of monopoly that quintessentially brings about a dominant position. Evinced further by the presence of the FIH in the grand scheme of events, the monopoly powers wielded by Hockey India forms the crux of one side of the argument.

[12] Section 2(l) (v), The Competition Act, 2002.

Adducing further evidence to substantiate the dominant position of Hockey India, the formal incapacity of the players to call its regulations into question was cited. In a bid to present an irrefutable argument, quite remarkably, the petitioners to the claim alluded to the connexion of Hockey India with activities concerning the procurement of sponsorship for the team, which being downright commercial in nature, confers upon it the grade of an 'enterprise' under the Act.[13]

Nonetheless, as the existence of monopoly powers is not the bone of contention here, even as the manipulation of the same constitutes the backbone of the mêlée, it is absolutely indispensable to review the key assertions insinuating such abuse. In pursuance of that objective, a summary of the alleged aberrations follows –

i. Hockey India was taking undue advantage of its bureaucratic powers to stimulate mass appeal for its own hockey league nipping the World Series Hockey League at the bud, which boils down to denial of market access to rivals that is, unassailably, an abuse of dominant position under the Act.[14]
ii. Flouting the rule established by the Act,[15] Hockey India was misusing its supremacy to cross the threshold into the market of spear-heading a domestic event in the country.
iii. Hockey India was imposing unwarranted limitations upon the mobility of players by way of the *CoC Agreement* which is, for all intents and purposes, anti-competitive under the Act[16], on account of being an exclusive supply agreement.

3.2. Pyramid Structure of Governance

Adhering to the trend conventionally observed by respondents in countless petitions heard by quasi-judicial bodies in India, at the outset, Hockey India disputed the jurisdiction of the CCI.[17] Laying emphasis on its role as the custodian of the sport, Hockey India endeavoured to establish that economic pursuits, as portrayed by the informants, is not what it curates, as its liabilities predominantly encompass organisational, governmental and regulatory tasks, which pertain to the territory of

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[13] Id, Section. 2(h).
[14] Id, Section. 4(2) (c).
[15] Id, Section. 4(2) (e).
[16] Id, Section. 3(4).
[17] Novartis AG v. UOI, Order No. 100 of 2009 (IPAB, 26/06/2009) available at: http://www.ipab.tn.nic.in/Orders/100-2009.htm, last seen on 18/10/2014.

public good. Further, debunking the arguments of the informants, who had striven to draw an analogy between hockey players in this context and consumers in a market, Hockey India contended that the depiction is flawed as they do not cater any product or service that may be taken into consideration to classify the setting as a market in accordance with the Act;[18] ergo, they established that hockey players cannot be equated with consumers. They abbreviated this reasoning saying – *regulatory functions cannot be assessed against the yardstick of market forces*.

Presenting a tenacious rebuttal to the allegation of misuse of authority, and in a bit to defend its monopoly status in the state, Hockey India sought asylum under the pyramid structure for governing international sport which is an arrangement commanded by the International Olympic Committee, which itself stands at the peak of the pyramid as the single worldwide federation for competitive sports, and holds a monopoly at the highest level.[19] Hockey India argued that in perpetuation of the tenets enshrined in the Olympic Charter, the pyramid structure is indispensable for the regulation and administration of competitive sports, particularly if the integrity of the sport and the primacy of international competitions through adequate standardisation of the sporting calendar is sought to be safeguarded. Furthermore, by virtue of being in line with the traditional and time-honoured sport structure, the monopoly of Hockey India as the single national sport association for hockey in India is justified in its entirety.
On the matter of conceding to approve the World Series Hockey League, Hockey India, with the object of absolving itself from the accusation of vested interest, drew a reference to the respective continental federations, in addition to the FIH, whose seal of approval was an unconditional stipulation for the ratification of the event, given that it involved players from continents across the globe.

4. THE SUBTLETIES OF THE VERDICT

The finding of the CCI that has been chronicled under the head – *Analysis of the Commission* – is outstandingly commendable, and the

[18] Supra 13, Section. 2(r).
[19] G.F. Schuppart, *Law Without a State? A "New Interplay" Between State and Nonstate Actors in Governance by Rule Making*, 65, 72 in *Governance Without a State – Policies and Politics in Areas of Limited Statehood* (Thomas Risse., 1st Edn., 2011).

applause may be attributed to the exceptionally careful scrutiny of the factual matrix *in tandem* with the legal warren *vis-à-vis* the customs prevalent in the domain of sports. Assigning immense significance to the balancing of rights in this backdrop, the CCI dove into the intricacies of the dilemma analysing the broad sports sector through the prism of competition regulation. Embarking upon the journey with an understanding of the merits of the much-deliberated pyramid structure, and the competition concerns it gives rise to; the CCI delves into a meticulous breakdown of the particulars of sports that render it distinct from other commercial enterprises, in the form of a comprehensive study, before addressing the core issues of the matter.

4.1. Jurisdiction

Weighing the structures of sports governance against the scope of jurisdiction of the Act over sports federations, the CCI followed international jurisprudence coupled with appurtenant literature on sports to draw broad principles in the interest of determining its jurisdiction over the case that had been at the forefront of media attention since its commencement. With strikingly similar facts, it was not long before *Surinder Singh Barmi* v. *Board of Control for Cricket in India* (hereinafter referred to as "**BCCI**")[20] found a mention in the list of precedents to highlight that the institutional aspects of an entity are subordinate to its functional facets when evaluated under the purview of the Act. Thereupon, in view of the organisational activities, over and above the policy-making obligations that the National Sports Federations oversee on a regular basis, rob them of the umbrella of immunity from the application of the Act. This interpretation is an upshot of the economic nature of their undertaking comprising ventures like the sale of tickets and grant of broadcasting rights that rake in revenue for the establishment.

On the same wavelength as the inferences drawn by the Director General, who had been directed to investigate into the matter, the CCI engaged in the contemplation of its jurisdictional powers over the FIH, which is an international federation founded under Swiss law, and winded up by observing that in view of the definition of 'person' under

[20] Sh. Surinder Singh Barmi v. BCCI, Case No. 61 of 2010 (CCI, 08/02/2013) available at: http://www.cci.gov.in/May2011/OrderOfCommission/612010.pdf, last seen on 19/10/2014.

the Act[21], alongside the scope of its extra-territorial jurisdiction[22], it may preside over the FIH in this instance.

4.2. Abuse of Dominance– Exercise of Monopsony Power?

Abuse of dominance or unilateral conduct arises when an enterprise or a group of enterprises stands on a footing comparable to a cartel – wielding sufficient clout in a market that it can afford to operate without hinging upon market forces or the competitive constrictions triggered by the performance of market rivals – and abuses its position engendering ramifications casting a deleterious aftermath not only upon its adversaries, but also, and most importantly so, upon the consumer.[23] Having said that, the Act, by no means, forbids a position of dominance, or simply, a monopoly.

Considering the bearing that the abuse of dominance could have in the instant matter, the CCI dealt with the dispute with the utmost discretion going to great lengths to ensure that every material element had been duly pondered over.

i. Dissenting vehemently with the definition of relevant market chalked out by the informants apropos of the contention of preclusion of rival leagues, the CCI defined it as – *the market for organization of private professional hockey leagues in India*. Moving on to the precinct of its supervisory powers, the CCI pointed them out to be the root cause of dominance that have, nevertheless, been conferred upon Hockey India by the FIH. The authority to sanction private professional hockey tournaments in the country and as the corollary evokes, to forge impediments thwarting their access, accrues from these vested rights, and is brought into effect in the form of *No Objection Certificates* (hereinafter, the NOCs). Being an unqualified pre-requisite to enter a league, it thereby empowers Hockey India to impact the market straightaway.
ii. Germane to the indictment of curbing the mobility of players, the CCI defined the relevant market as – *the market for services of hockey players* – and attributed the dominance of Hockey India in the market to its position as a monopsony buyer, as opposed to a monopolistic retailer, by espousing the perspective that

[21] Supra 13, Section. 2(l).
[22] Id, Section. 32.
[23] Supra 5.

> perceives it as the sole buyer of the services of hockey players for the national team. Vindicating the stance of Hockey India, the CCI held that it is completely within its rights to cherry-pick these services from a massive pool of players. However, the CCI was quick to acknowledge that this station capacitates the body to restrict the freedom of movement of the players.

Looking at the *FIH Regulations on Sanctioned and Unsanctioned Events* and the *CoC Agreement* as the antecedents of the quandary, the CCI upheld the former based on the grounds of up-keeping the prevalence of international competitions, dissuading free-riding on the investments by national associations, insuring the integrity of the sport and retaining the calendar of events in a unified manner so as to not be cutting across the interests of participating members, which are integral to the methodical growth and progress of the sport that constitutes the underlying purpose of sports associations. The CCI made an interesting observation in noting that no sanction for the IHF-Nimbus Sport joint venture had been sought in accordance with the guidelines of the FIH, whose imposed conditions were not retrospective in nature, and by virtue of being merely prospective, it would not apply to the 150 estimated players, who had already registered themselves for the event. As a result, there had not been an abuse of dominant position to deny market access as per the Act[24], and the assertions claiming so were deemed uncorroborated.

Approaching the contention of capitalising upon its market dominance to gain a strong foothold in the domestic market, the CCI found no cogency in the argument. Further, having taken cognizance of the accusation charging Hockey India for the fundamentally anti-competitive nature of the *CoC Agreement*, the CCI factored in on the clause mandating an NOC, stating that it cannot be considered anti-competitive as it seeks to forbid players from participation solely in unsanctioned events, and does not propose a blanket ban on every event that is outside its aegis.

4.3. The Proportionality Test – Why CCI exercised 'Different Strokes for Different Folks'[25]?

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[24] Supra 13, Section 4 (2) (c).

[25] Abraham C. Mathews, *CCI: Different Strokes For Different Folks*, Business World (26/06/2013), available at http://www.businessworld.in/news/web-exclusives/cci-different-strokes-for-different-folks/960061/page-1.html, last seen on 15/10/2014.

As cited earlier in this exposition, the CCI, despite recognising the dominance of Hockey India in the relevant market, refrained from labelling it as abusive. The reasoning, which drew heavily from the *Mecca-Medina* ruling[26] of the European Court of Justice (hereinafter referred to as "**ECJ**"), was built upon the principle of "inherence proportionality", or the *Proportionality Test* that is regarded as the most seemly mechanism to weigh anti-competitive practices in the field of sports.

Reverting back to the *CoC Agreement* that was reproached on the ground of conscripting a bunch of restraints on the free movement of players, the CCI's observations that termed the conditions in the covenant as "inherent and proportionate to the achievement of the objectives" of Hockey India, were founded upon the *Proportionality Test* – that seeks to strike a balance between competition laws and the integrity of sports by striving to understand whether a practice has not only exceeded its limits, but also gone beyond the legitimate goals it was meant to pursue thereby leading to a scenario where, to put it in strict economic terms, the claimed benefits have exceeded the costs.[27] Basically, the abuse of dominance could be justified only under situations that qualify as inherent and proportionate to the objectives of the sport that the enterprise promotes. This rationale was echoed by a member of the CCI – R. Prasad, who vehemently argued in favour of the abuse of dominance on this footing.

Settling this issue, the CCI held the conditions to be perfectly legitimate, and accorded them a bubble of cogency that could not be burst on a *per se* basis, but solely upon instances of their application in a disproportionate manner, which was not considered to be the case in the present matter.[28]

However, the CCI's ruling in the much-written about *Surinder Singh Barmi* case[29] – that had called the conduct of the BCCI into question – proceeds on an entirely different trajectory as far as the *Proportionality Test* is concerned. But, before the course of the BCCI case is dealt with, it is imperative to cast a cursory glance at its facts and circumstances.

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[26] David Meca-Medina and Igor Majcen v. Commission of the European Communities, [2006] I ECR 6991 (ECJ).

[27] Wolf Sauter, *Proportionality Analysis and Models of Judicial Review*, European Law Blog, available at: http://europeanlawblog.eu/?p=1833, last seen on 10/12/2014.

[28] Supra 10.

[29] Supra 21.

While competitive values have always been deeply intertwined with the sports sector, the first professional sporting league that occasioned mediation by the CCI was the BCCI case. The matter was reviewed by the CCI, which looked into the demeanour of the *de facto* regulator for cricket in India in the co-ordination and organisation of the Indian Premier League (hereinafter, the IPL), particularly with respect to the endowment of media rights to cover the private professional cricket league. The CCI held that barring the institution of any other professional domestic Indian Twenty-20 tournament by means of a clause in the media rights contract for the IPL that prevented third parties from organising, sanctioning or supporting any event on similar lines amounted to an abuse of dominant position that the BCCI ought to be penalised for.[30]

In pursuance of to the *Proportionality Test* that the matter was ultimately subjected to, the CCI failed to see how the conduct of the BCCI could be classified as an inherent and proportionate instrument to the cause of preserving the integrity of the sport, and aspiring for its orderly development. It further went on to state that the measures implemented by the consortium under its pyramid structure were not unconditionally inherent and proportionate to the achievements of purely sporting objectives. In fact, the CCI read a strong commercial dimension into the conduct of the board. While some may argue that this case lacks the balancing of rights perspective that was employed in the Hockey India judgment, it would also, perhaps, not be altogether misguided to prefer the Hockey India judgment to have progressed on the lines of the BCCI case.

5. CONCLUSION

With a firm recommendation to revamp the core structure of its organisation such that clashes between its regulatory and organisational powers cease to be a regular feature, the CCI liberated Hockey India of the charges levelled against it. Directing the institution of a rationalised and transparent system to supervise the promulgation of NOCs, the CCI relied on an effects-based approach to appreciate the state of affairs and discern fact from conjecture.

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[30] Supra 5.

The ruling, which is in stark contrast with the recently concluded *BCCI Case*[31], saw the CCI legitimising the assertion of dominance by Hockey India as 'intrinsic and proportionate'. Where a fine as colossal as Rs. 52 crores (rupees fifty two crores only) was slapped on the national governing body for cricket in India, Hockey India was relieved of the charges for want of consequential evidence certifying the abuse of dominant position. While some may argue that the former matter was contended primarily on the subject of the grant of media rights, a substantial similarity between the facts of the two cases can hardly be overlooked.

One might, however, wonder whether the failure of the World Series Hockey League to apply for sanction before Hockey India is indeed a sufficient reason for the CCI to exempt the latter from the charges of abuse of dominance. The stance of the CCI does appear to be rather implausible, especially as it dismisses the arguments to the alternative citing the lack of evidence that effectively corroborates that Hockey India deliberately acted against the players who wished to participate in the league. Moreover, it is pertinent to note that within a year of the alleged anti-competitive policies being drawn up by Hockey India, its proposal for a rival league was released. Hence, to absolve the body for inclusion of commercial aspects in its practices might hardly be the way to proceed. In addition, while the *CoC Agreement* did not explicitly enjoin the freedom of players to participate in the World Series Hockey League, it certainly served as a sheer deterrent.

The basic concern, however, pertaining to the divergent functions of the governing bodies continues to persist despite the guidelines issued to one in the meadow of countless other organisations. The advent of the All India Chess Federation (AICF) under the scanner of the CCI validates the comment.[32] Being the supreme arbiters of innumerable sports, the organisations assume both bureaucratic as well as administrational functions by tradition. As long as the recommendation of the CCI is not followed in letter and in spirit, the interplay between competition and sports is likely to get murkier..

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[31] Supra 21.
[32] Supra 10.

IS ZERO PRICING PREDATORY UNFAIR: MCX STOCK EXCHANGE LTD. V. NATIONAL STOCK EXCHANGE

- Shrijita Bhattacharya and Gargi Bohra [*]

ABSTRACT

This article examines the law that has been laid down by the Competition Appellate Tribunal and the Competition Commission of India in relation to zero pricing as given by the recent order passed against the National Stock Exchange. The Competition Act, 2002 and the Regulations thereunder do not provide for any specific mechanism or cost criteria that may be exclusively applied to determine the predation of a market where average variable costs may be close or equal to zero. The Article analyses how in such an absence of guidelines the Competition Commission of India and Competition Appellate Tribunal have faltered in their approach and have deviated from the long accepted practices of cost based determination of predation. Further, a new criteria of 'unfairness' has been evolved which does not rest on a firm ground. In this context, the article seeks to compare the approach undertaken by both, the United States and the European Commission, and the application of various criteria by them- like intention to eliminate competition, ability of recoupment of losses, impact on consumers and a threat to disrupt the harmonious functioning of the market- which are a necessary pre-requisite for any determination of predation in cases of pricing above average variable cost or marginal cost. The article concludes by pointing out the lacunae in the Competition Commission of India order and a possible alternative approach.

1. INTRODUCTION

Recently, on August 5, 2014 the Competition Appellate Tribunal (hereinafter referred to as "**COMPAT**") upheld the order of the Competition Commission of India (hereinafter referred to as "**CCI**")

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passed against the National Stock Exchange (hereinafter referred to as "**NSE**") in *MCX Stock Exchange Ltd.* v. *National Stock Exchange & Ors.*[1], holding the fee waivers given by NSE in the currency derivatives segment to be unfair; NSE was held to be guilty of abusing its dominant position. Earlier in 2011, the CCI had come to conclusion that the 'zero pricing' adopted by NSE, although not predatory, was still unfair and the same amounted to an abuse of dominant position.

The relevant legal questions raised are: what should be the test to determine whether zero pricing amounts to predatory pricing? Should the cases of zero pricing in relation to network industries be treated differently? Whether the impact of such zero pricing on competitors (and not competition) should at all be taken into account? These are a few questions that have posed a challenge to competition regulators across jurisdictions. It was the first time that both the CCI and the COMPAT were faced with a situation of zero pricing and both have failed to seize this opportunity and lay down a clear law that may be applied to test the predation of zero pricing. However, the dissenting opinion came very close to a clear determination of the law.

The article examines the CCI order (both, the majority and minority order) in brief in Part I. The authors then examine various costs parameters that have been used across jurisdictions to determine the predation of the zero pricing mechanisms in question and compares them to the criteria applied by the CCI in Part II. Part III delves into the more pertinent debate of the necessity of an impact on consumers for an action to be held predatory or unfair. Further, in Part IV, we look into the requirement of an intention and a possibility of recoupment, which, wasn't considered in adequate detail by either the CCI or the COMPAT. The article concludes with a criticism of the CCI Order and the possible alternatives that both the CCI and the COMPAT could have adopted.

1.1. The CCI Order

NSE, in 2008, right at the time of its entry into the Currency Derivatives segment, announced a transaction fee waiver in respect of all currency future trades executed on its platform. At the time when Multi Commodity Exchange of India Ltd. (hereinafter referred to as "**MCX**")

[1] MCX Stock Exchange Ltd. v. National Stock Exchange & Ors. Case No. 13 of 2009 (COMPAT, 5/12/2014)

entered into the currency derivative segment, NSE was its only competitor.

MCX claimed that the waiver continued even after the Currency Derivatives (hereinafter referred to as "**CD**") segment became mature. Further, no admission fee was being charged in the CD segment, unlike the equity, F&O and debt segments. It was 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 (the only segment where MCX operates), from the date of its entry into the stock exchange business, which results into losses to the MCX. It was also alleged that NSE was charging no fee for providing the data feed and that this action of NSE is aimed at blocking the residual revenue stream of the MCX. The losses, it was contended by the informant MCX, were being cross-financed by NSE, using its profits from other segments describing the pricing as annihilating or destructive.

The CCI, though a majority order, has found violation of Ss. 4(2)(a)(ii), 4(2)(b)(i) & (ii), 4(2)(e) and (d) of the Competition Act, 2002 (hereinafter referred to as "**the Act**").

In its assessment of the relevant market for the determination of dominant position, the CCI - both by the majority and minority orders-had restricted the relevant market to the CD segment. The COMPAT modified the relevant market to include the entire stock exchange service market in India. After such extension, it was beyond doubt that NSE was the dominant player.

As per the relevant market determination by the CCI, the majority decided, post the consideration of factors enumerated in Section 19(4) that NSE held dominant position mainly because it was able to maintain its zero pricing in the CD segment by recovering its losses from other segments, and further because it was aware of this ability. It was also held that in absence of this strength, NSE would not want to continue with zero pricing, which indicated its special advantageous position. The minority disagreed, claiming that none of the players in the market enjoy a special power against the other, all players had the necessary size and resources to overcome the competitive disadvantage, and most importantly, although NSE began with a 100% market share, its share dropped with the entry of competitors, thus showing its inability to influence the market or the competitors in its favour.

The abuse of dominant position was examined on account of four factors, namely, transaction fee waiver, admission fee and deposit level waivers, data feed fee waiver and exclusionary denial of "integrated market watch" facility in the CD segment. NSE's defence to these waivers was that it was done to encourage larger participation since the CD segment was at a nascent stage. However, this was rejected by the CCI on the ground that nascence must be differentiated from infancy and while the market in question may be claimed to be at an infant and immature stage, it cannot be called nascent. The waivers were continued in the third year of the existence of the market, well after its nascent stage. No reason was provided, however, for the determination of what period qualifies as nascent stage for such a market. The finding that the same has not been done for other segments refuted the claim that NSE historically waives fees.

It is, however, imperative to note that the CCI could not get itself to hold that the fee waivers that led to zero pricing did amount to predation. It circumvented its way through it and went on to hold that the waivers amounted to unfair pricing by NSE. This was despite the fact that NSE was not incurring any variable cost in its operation in the CD segments. The minority disagreed with this conclusion citing peculiarities of the market, inappropriate use of a cost-price model by the majority and pointing to the lack of possibility of recoupment and therefore intention on the part of NSE. The Competition Appellant Tribunal upheld the majority order. It is this aspect of the Order that the Article seeks to examine. The authors have attempted to analyse the correctness of the ruling in relation to the unfair or predatory nature of the zero pricing adopted by NSE in the backdrop of the legal framework and existing precedence on the issue in other jurisdictions.

2. DETERMINING AN APPROPRIATE COST TEST FOR ZERO PRICING PREDATION

Predatory pricing can be defined as pricing below cost by a firm, which enjoys dominant position, so as to drive out competition and eventually, recoup the losses.[2] In order to show that there exists an abuse of dominant position due to predatory pricing the conduct of the market dominant enterprise should be looked at and the mere fact of the presence of

[2] Abir Roy & Jayant Kumar, *Competition Law in India,* (1st Edn., 2008).

dominant position is not enough. Every strategy aimed at raising barriers to entry to the market is an abusive behaviour.[3]

2.1. The Threshold for Determination: Marginal Cost/ Average Variable Cost as a Proxy

Although predatory pricing must definitely be below cost, it is a difficult task to differentiate between predatory pricing and pro-competitive pricing.[4] So as to identify predatory pricing, courts have attempted to lay down benchmarks in terms of cost, below which, a price can be presumed or suspected to be predatory. One such approach is using the Marginal Cost. An addition in cost that results from the production of one more unit is the marginal cost.[5] Marginal cost is theoretically considered to be the most appropriate measure for determining the existence of predatory pricing however; there exist a few practical problems due to which its application is infrequent.[6]

In *United States* v. *AMR Corp.*[7], the Court while evaluating the first criteria laid down by *Brooke Group*[8] i.e. 'pricing below an appropriate measure of cost' held that marginal cost was the ideal measure because "[a]s long as a firm's prices exceed its marginal cost, each additional sale decreases losses or increases profits."[9] The Court further stated that Average Variable Cost[10] (hereinafter referred to as "**AVC**") was only a commonly accepted proxy for marginal cost. Arguing in favour of marginal costs, the Second Circuit Court in the *North eastern Telephone Case*[11] stated that a rule involving marginal costs protects relatively inefficient firms along with the interest of consumers.

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[3] D. P. Mittal, *Competition Law and Practice*, ¶6.11 (2nd Edn., 2008).

[4] Raghavan High Level Committee, *Report on Competition Law and Policy,* 2000.

[5] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, 733 (2nd Edn. 2002).

[6] Ne. Tel. Co. v. AT&T, 651 F.2d 76, 88 (1981, US Court of Appeals, Second Circuit).

[7] United States v. AMR Corp., 335 F.3d 1109 (2003, US Court of Appeals, tenth circuit) (No. 01-3202), available at <http://www.usdoj.gov/atr/cases/f9800/9814.pdf.>.

[8] Brooke Group Limited v. Brown and Williamson Tobacco Corporation, 509 US 209 (1993, US Supreme Court).

[9] 335 F.3d at 1116 (alteration in original) (quoting *Advo, Inc.* v. *Phila. Newspapers, Inc.*, 51 F.3d 1191, 1198 (1995, US court of Appeals, third circuit).

[10] See Regulation 2 of Competition Commission of India (Determination of Cost of Production) Regulations, 2009.

[11] Ne. Tel. Co. v. AT&T, 651 F.2d 76, 90 (1981, US Court of Appeals, Second Circuit).

The U.S. Department of Justice recognizes that some courts have indicated that marginal cost is an appropriate benchmark of cost for determination of predation, though it has not been used in any case due to the difficulty associated with its estimation.[12]Realising that estimation of Marginal Cost can prove to be extremely difficult, the AVC Test[13] was propounded, whereby; predatory pricing is defined as pricing below the AVC.

At the earlier stages, the test did not include in its ambit intention of the dominant player or the possibility of recoupment. However, judicial precedence has included these parameters in this test, making below-cost pricing merely a rebuttable presumption of illegality.[14] A two-tier test has eventually evolved to minimize errors in calculation of an appropriate price for predation.[15] The first tier analyses the market structure to assess the likelihood of predation by judging how competitive the market, extent of restriction to entry etc. The second tier looks at the pricing in the context of production costs. The test follows the *AKZO* rule in the second tier whereby prices below AVC are presumed to be illegal and those between AVC and Average Total Cost (hereinafter referred to as "**ATC**") are judged on intention. The US Supreme Court, in the case of *Utah Pie* v. *Continental Baking Company*[16] considered price below full cost as predatory, because, although it was above the average variable cost and marginal cost, it was done with an intention to drive out competitors, who are as efficient as the dominant player, but have less financial resources.

2.2. CCI's Approach to the Cost Criteria

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[12] U.S. Federal Trade Commission and U.S. Department of Justice, available at <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20pp/us%20response%20predatory%20pricing.pdf>..

[13] Also known as the Areeda and Turner test. *See* Areeda and Turner*, Predatory Pricing & Related Practices under Section 2 of the Sherman Act,* 88 Harvard Law Review 697, (1975).

[14] American Bar Association Antitrust Section, Monograph No. 22, Predatory Pricing (1996), available at <http://books.google.co.in/books?id=SG3WVSq7K1AC&pg=PA65&lpg=PA65&dq=Sherman+Act+predatory+pricing+average+variable+cost&source=bl&ots=tEwQ6HIMfQ&sig=xxPH6hhrRNcRIqVBFcCGE92JrEw&hl=en&sa=X&ei=jXpCVJq1D4ytac6rgegB&ved=0CCQQ6AEwAQ#v=snippet&q=rebuttable&f=false>.

[15] Paul L. Joskow and Alvin K. Levorick, *A Framework for Analysing Predatory Pricing*, 89(2) Yale Law Journal 213, 245 (1979).

[16] Utah Pie v. Continental Baking Company, 386 US 685 (1967, Supreme Court of the United States).

According to explanation (b) of Section 4, it is for the CCI to issue regulations stipulating what cost must be considered to determine predatory pricing. As per Regulations 3(1) of cost regulations,[17] the term "cost" in the explanation to Section 4 shall generally, be taken as AVC as a proxy for marginal cost. The regulations also provide that in specific cases, depending on the nature of the industry, market and technology used, other relevant costs such as relevant cost concept such as avoidable cost, long run average incremental cost (hereinafter referred to as "**LRIC**"), market value etc. may be considered.

In the case at hand, the Director General (hereinafter referred to as '**DG**'), rejected NSE's argument that AVC is the appropriate cost benchmark in this case and concluded that there is a strong case for following ATC or at least LRIC. The DG had concluded that since NSE was not incurring any variable costs for running the CD segment and therefore, the zero pricing could not amount to predatory pricing within the meaning of Section 4 of the Act, but it incurred costs under various heads that could not specifically be allocated to any segment. It was further held that NSE could not have survived on zero pricing had it not had any other segment to support its income and further that although there was no variable cost, substantial fixed cost had been incurred for all the segments and thus, the DG chose to follow the ATC to decide the case. Further, the DG and the CCI concluded that the CD segment does include some variable costs, by analysing the data provided by MCX. The majority finally concluded that the pricing may not be predatory, but definitely does Section 4 contemplate "unfair" as. The definition of "unfair pricing" was held to be something that must be decided on a case-to-case basis.

An approach similar to the *AKZO* Rule was been taken by the DG and the majority order where the market was analyzed to conclude as one with a few players and high barriers to entry, in the context of which, the pricing was adjudged to be unfair. The rule laid down by the *AKZO* judgment,[18] which the DG has relied upon in this case, remains the most accepted rule for identifying predatory pricing across jurisdictions. The same has been followed by the CCI which, in the case of *H.L.S. Asia Limited* v. *Schlumberger Asia Services Ltd,*[19]which followed the benchmark of AVC.

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[17] Competition Commission of India (Determination of Cost of Production) Regulations, 2009.

[18] Case C-62/86, AKZO Chemie BV v. Commission, ECR I-3359, (1991, EC)

[19] Case No. 80 of 2012(CCI, 11/04/2013).

The question before the CCI was whether zero-pricing could be predatory where there are no variable costs. As the dissenting order explains, the stock exchange industry displays the characteristics of a network industry where fixed costs may be high but marginal costs are negligible or zero,[20] wherein it is a sound business strategy to charge low prices initially in order to attract more customers, increase liquidity and expand the market so as to succeed.[21] Its economic characteristics differ from other market because of its complementarities or dependency between various users who form buyers and sellers of a transaction. This makes it unreasonable to judge by traditional economic tools used for other markets.[22] The dissenting order further compares the stock market to an infrastructure industry where marginal cost is low or zero and prices must be initially kept low or zero so as to attract users, a rationale similar to promotional pricing.

It must be noted that our law does not make a special mention of zero pricing. Considering the peculiar nature of the market, the case can, however, be judged by cost parameters different from AVC according to regulation 3 of the Cost Regulations. For example, the DG in the NSE case had argued that some fixed costs were incurred which were not attributable to any particular product but needed to be taken into account. Accordingly, the ATC was considered to determine pricing. The minority judgment, on the other hand, puts forward another solution to the problem of zero pricing by introducing a concept of "value-based pricing", according to which, the pricing must be decided according to the value of the product. Since the value of the product grows with liquidity, initially, zero pricing must be allowed, which will gradually change when the products gain more value.

In the US, a similar question of joint costs arose in the *Northeastern Telephone Case* and it was claimed that the predator could utilise its monopoly in other markets or products by allocating all its fixed costs there, keeping the variable costs in one product very low. The Second Circuit court allowed cross subsidisation on the ground that it made no real difference to predation because the opportunity cost of lost profits would be the same for diversified firm and a single-product firm. The

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[20] Dissenting opinion, MCX Stock Exchange Ltd. v. National Stock Exchange & Ors., Case No. 13/2009 (COMPAT, 5/12/2014)

[21] Pradeep S Mehta, "Making the case for NSE", The Financial Express, July 14, 2011, available at < http://www.cuts-ccier.org/Article-Making_the_case_for_NSE.htm>.

[22] Supra 20.

court argued that allocation of joint costs is arbitrary and must be left to the enterprise. The majority judgment in the NSE case too agrees that cross subsidization is not *per se* against the law, and yet goes on to conclude that NSE enjoys a dominant position merely on the basis of its capability to cross subsidize. Further, based on joint costs, the Average Variable Cost test was rejected by the DG. The Commission, however, did not go by any cost measurement at all. It is submitted that since the DG as well as the majority seemingly agreed to the US position that cross subsidization was permissible, the fact of cross subsidization should not have been used to draw an inference of dominance against NSE. It is also self-contradictory on the part of the majority to hold NSE guilty of unfair pricing because it is in a position to recover its costs. By doing so, the CCI essentially penalised cross-subsidization.

The pricing methods used by network industries have caused a stir throughout jurisdictions. In the U.K., the test for predation has changed overtime in order to fix liability on network industries. Initially, the rule laid down in the *AKZO Case*[23] in the case of *Tetra Pak II*[24] was followed for all markets. Later, in order to deal with the problem of network industries which weren't accounted for in these two cases or the U.K. Competition Act, 1988 and also to take into account the common/joint costs that are specific to network industries, the European Commission had suggested that instead of taking recourse to an average variable cost parameter, a determination should be based on average incremental costs (costs that are attributable to a product when that product is added to a company's existing product line) over a period longer than one year.[25] Contrary to the approach adopted by the E.C. and the U.K., the U.S. allows zero pricing on the basis of cross subsidization which is evident from the *Northeastern Telephone Case*. The approach adopted by CCI does not follow any of these approaches. The CCI, as pointed out earlier, has adopted a self-contradictory approach wherein the reasoning adopted does not lead to the conclusion.

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[23] Supra 18.

[24] Case C-333/94P, Tetra Pak International SA v. Commission ECR I-5941 (1997, EC).

[25] *Notice on the application of competition rules to access agreements in the telecommunications sector*, 41 Official Journal of the European Communities, 98/C 265/02, (1998)

3. EVALUATING THE IMPACT ON CONSUMERS

The Raghavan Committee Report on competition law[26] formulated a few questions for the adjudication of abuse of dominance. One such question was whether consumers benefit from lower prices and/or greater product and service availability.

An approach that is adopted to determine the predation of price, in the context of its impact on consumers, is to test the actions of a dominant firm which is suspected of predatory pricing as against those of a hypothetical rival who must be 'as efficient' as the firm. In cases where at the same price the hypothetical rival who is equally efficient would be able to sustain itself in the market, the same would be taken as an indication or evidence of the price not being predatory.[27] The rationale behind such an approach is that even if such a price is allowed to prevail, it would only drive out competitors who are not as efficient but would not affect the competition in the market; thus the same cannot be said to be anti-competitive.[28] Also, if this approach is not adopted, it would be unfair to the efficient firms and at the same time eliminate any sort of price competition.

The as-efficient rule advocates that predatory behaviour is characterised by a firm attempting to exclude competition or restricting entry on the basis of something other than efficiency.[29]Further, the need to ensure that the predatory pricing test remains a below cost test comes from the fact that the law must not discourage efficient producers from indulging in price competition. [30] Prioritizing consumer interests, one school of thought argues that predatory pricing must not be stringently prohibited.[31]It has been argued that an action must be understood to be an abuse of dominance if it eliminates competition in a way that it adversely affects

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[26] Supra 4.

[27] "What is Competition on the Merits?" OECD Policy Brief, p. 4, available at <http://www.oecd.org/dataoecd/10/27/37082099.pdf>.

[28] ICN Unilateral Conduct Working Group, Report on Predatory Pricing, April 2008 (UCWG Predatory Pricing Report), p. 11 and 23.

[29] Supra 2, 112.

[30] Ritter, Cyril, *Does the Law of Predatory Pricing and Cross-Subsidization Need a Radical Rethink?,* Vol. 27, No. 4 World Competition: Law and Economics Review (2004), available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=572888>

[31] Professor Easterbrook had stated that there is no reason for competition law to take predation seriously. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV.263, 264 (1981).

consumers.[32] For example, the Supreme Court, in the case of *Haridas Exports* v. *All India Floating Glass Mfrs. Association and Ors*[33] held that availability of goods from abroad at prices lower than costs in India encourages and not reduces competition and therefore must not be restricted, as long as the pricing benefits the consumers.

In the case of NSE, competition was not seen to be reduced as a result of the waiver. Rather, due to the waiver, the competitors also waived their fees in an attempt to price-compete. The question arises as to whether such price competition can be and must be restricted and whether the impact on consumers must be contemplated in doing so? Further, when determining whether the pricing is responsible for reducing competition, is it not necessary to consider whether competition was eventually reduced as a result of the same. For example, in the case of of *Utah Pie* v. *Continental Baking Company,*[34] the petitioner, Utah Pie, had managed to secure a high market share owing to local production advantages and resulting low prices. The competitors (respondents) reacted by lowering the prices further. The price competition resulted in the market having lower prices than other similar markets .The US Supreme Court interpreted the Robinson Patman Act to decide against the respondents holding that they created a deteriorating price structure. The judgment has received severe scholarly criticism for having directly struck at competition and advocated restraint of trade.[35] One of the criticisms leveled against it is that it protects particular competitors at the cost of competition.[36]

It is submitted that the NSE decision may be criticized similarly. Although the statute restricts the reduction of competition and elimination of competitors, it must be argued that the underlying presumption is the economic hypotheses that the means of restricting competition are created through acts against particular competitors to eliminate them. Such acts must be restricted so that the market, in the long run, functions harmoniously and provides to the consumers more at lower costs.[37] From here, it follows that particular competitors must be protected, but only for

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[32] Supra, 30.

[33] AIR 2002 SC 2728

[34] 386 US 685 (1967, the Supreme Court of the United States)

[35] Bowman, Ward S. Jr., *Restraint of Trade by the Supreme Court: The Utah Pie Case (1967),* Faculty Scholarship Series, Paper 4243, available at <http://digitalcommons.law.yale.edu/fss_papers/4243>

[36] Id.

[37] Id.

the larger cause of protecting competition, since the law condemns price discrimination only to the extent that it threatens to injure competition.[38]

4. INTENTION OF THE PREDATOR AND POSSIBILITY OF RECOUPMENT

The principle that governs predatory pricing is the intention to drive out competitors or to lessen competition, that is, restrict their entry.[39] The requirement of intention becomes clear from the language of the explanation to Section 4 which states that the below cost pricing must be with a view to reduce competition or eliminate the competitors.

In the case of NSE, it is doubtful whether this intention was proved. When NSE has entered the CD segment, it had 100% market share. Its share reduced to below 40% after the entry of the competitors, MCX and United Stock Exchange in spite of zero pricing, proving that the pricing did not either reduce competition or eliminate competitors as the explanation to Section 4 contemplates predatory pricing to cause. The majority decision rejects the claim that the market was in a nascent stage without providing a benchmark as to what period qualifies as nascent for this market and from here, deduces an intention to eliminate competition without actually proving it. For this, it relies on the fact that similar fees were charged in other segments. Finding no other reason for the zero pricing, the majority assumes the same was done with anti-competitive intent. The minority order argues that there may be truth in the contention by NSE that the zero pricing was intended at the growth of the CD segment, which, in fact, had grown in the 2 years after the waivers. Further, one of the factors that led to the determination of NSE as a dominant player was that there were high barriers to entry into the market caused by the various regulatory laws that govern the stock exchanges in India. The entry of MCX and USE further show that the restriction to entry was, in fact, low.[40]Their entry into a market operating at zero price led the minority order of the judgment to argue that the competition in the market was non-price, since, in spite of all enterprises charging zero price, the market share got divided once 2 new entities entered.

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[38] Supra 8.

[39] Standard Oil Co. of New Jersey v. United States, 221 US 1 (1911, Supreme Court of the US*);* Newmann v. Reinforced Earth Co., 786 F 2d 424 (1986, the US Court of Appeals for the District of Columbia Circuit); Supra 18.

[40] Supra 21.

Possibility of recoupment is another parameter by which predatory pricing may be judged. The US courts, in particular, follow this test to establish whether the consumers eventually stand to lose from the pricing.[41] The European courts, however, as seen in the *Tetra Pak case,* do not find it necessary to prove recoupment. This view has been confirmed by the European Commission's Guidance paper of 2008 on abusive conduct by dominant undertakings. As the Raghavan Committee puts it, practically, the fact of predation is only established once the rival has left the market and the predator has acquired a monopoly position in the market,[42] which brings into the ambit of predation, a "dangerous probability"[43] of the predator recouping its losses and being able to benefit from monopoly power in the future. In essence, it must be established that the act of predatory pricing makes economic sense. It follows from here that the law intends to restrict any act that brings a threat of this creation of monopoly. The minority order in the NSE case delves into the test of recoupment, arguing for a sufficiently high standard of proof for predatory pricing so as to differentiate it from competitive behaviour.

In the case of NSE, even after the waiver, the market as well as the competition in it has expanded, thus dispelling such fears. It is submitted that this should have been considered by the majority bench to determine whether the pricing was predatory. With regard to the possibility of recoupment, as the US Supreme Court held in the case of *Matsushita Industrial Electric Co. Et Al.* v. *Zenith Radio Et Al.*,[44] predation depends on the ability of the predator to maintain monopoly power for long enough to recoup its suffered losses. In the case of NSE, MCX and USE entered the market when the prevailing price was zero. It can, thus, reasonably be assumed that even if the pricing scheme were to drive out competition, new competitors would enter the market when NSE would increase the price, which, in turn, would force it to reduce prices. The possibility of recoupment was, therefore, very low. This strikes at the intention of predation by NSE. In this situation, a scheme of predation does not make economic sense and hence, such pricing must not be held to be anti-competitive. Arguing that merely low prices, even if below cost, cannot suffice as predatory, the minority opinion considered recoupment as an

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[41] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp 509 US 209 (1993, the Supreme Court of the US)

[42] Supra 43.

[43] William Inglis et al. v. ITT Continental Banking Co. 668F.2d 1014, 1035 (1981, US Court of Appeals, Ninth Circuit).

[44] 475 US 574 (1986, the Supreme Court of the US)

important component of predation to strike a balance between preventing predation and preserving competition.

5. CONCLUSION

As has been argued in the minority order it is too simplistic an approach to adjudge a pricing policy to be predatory merely because the price is zero. The CCI's attempt to determine what is "unfair" in relation to a customer or a competitor does not address the direct impact of the measure on the competition in the market. Further, the CCI has not adjudged the unfairness on the basis of a specific cost-related parameter and has stated that the question that it attempts to answer is "whether, in this case, zero pricing by NSE can be perceived as unfair as far as MCX-SX is concerned."[45] It then goes on a detailed comparison between NSE and MCX to conclude that the situation at hand is adversely affecting MCX. The CCI states, "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."[46]The Commission here has gone further than the court in *Utah Pie*, by absolutely disregarding the competition in an aggressive attempt to save a presumably helpless competitor. It concludes that had MCX been as strong as NSE, the same pricing would not be termed as unfair. This line of argument is without any reasonable justification or legal backing, and, it is submitted, amounts to admitting that the act of zero pricing *per se* is not an abuse of NSE's dominant position, it is the helplessness of its competitor that makes the same an abuse. It directly follows from here that the act is not anti-competitive.

In the opinion of the authors, in order to resolve the competition-competitor conflict the CCI should have looked at the intention; that is, whether NSE was intending to eliminate competitors in a way that would hurt the consumers, a consideration that the majority attempts to take, but fails to address. The intention of the enterprise, as has been discussed earlier, should not have been gathered merely from a lack of any other reason for its actions. It was imperative for the Commission to enquire as to whether the scheme of pricing made economic sense as an act of predation. Hence, it has been further submitted that the possibility of

[45] Para 10.73

[46] Para 10.75

recoupment must have been decided in the backdrop of the fact that entry of competitors in the market has not proven to be highly restricted. In such a situation, recoupment is difficult and therefore, a successful predation is rare. As was observed in the *Northeastern Telephone Case*, in this case, a simple rule of determining predation must be used and fully distributed cost test tends to favour the interests of single market rivals over those of the consumers. This is exactly where the majority order went wrong. By restricting zero price in a situation where recoupment would have anyway not been possible, the CCI has run the risk of depriving consumers of the lowest possible prices in the CD segment and the CD segment of expanding and benefitting from greater liquidity.

As a concluding remark, there is a need to raise the standard of proof required for predatory pricing so as to preserve competition, because, as the *Brooke* judgement lucidly explains, "it would be ironic indeed if the standards of predatory pricing were so low that the anti-trust suits themselves become a tool for keeping prices high".

SHRI SHAMSHER KATARIA v. HONDA SIEL CAR INDIA LTD: A COMMENT

Kamal Sharma & Anand Swaroop Das [*]

ABSTRACT

The Competition Commission of India, in a path breaking pronouncement recently, held 14 automobile manufacturing companies guilty of anti-competitive practices and imposed upon them a penalty of INR 2544.65 crores. The Commission, while delivering its maiden judgment on vertical agreements, touched upon the issues of relevant market, abuse of dominance, anti-competitive agreements and the intellectual property rights' controversies. The order of the Commission comes as a much needed wake-up call for the Government and the companies in the automobile sector of the country. In the light of the aforementioned aspects, the present case commentary critically analyzes the order of the Commission on the car manufacturing companies. The commentary begins with the appreciation of the facts of the case, the issues involved therein and the order passed by the Commission. The authors then move on to a critical and multi-dimensional analysis of the order, taking into account the hits and misses of the Commission while delivering the same. In conclusion, the authors deal with the implications of the order on the Government, automobile sector and its market players and the market players of other sectors.

Keywords: automobile, anti-competitive practices, vertical agreement, abuse of dominance, intellectual property rights.

1. INTRODUCTION

The Competition Commission of India delivered a landmark decision on August 25, 2014 in the case of *Shri Shamsher Kataria* v. *Honda Siel Car*

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India Ltd. & Ors[1] wherein it found 14 automobile companies[2] guilty of anti-competitive practice, in violation of Section 3(4) and Section 4 of the Competition Act, 2002 and imposed upon them a staggering penalty of INR 2544.65 crores. The Competition Commission of India (hereinafter referred to as '**CCI**') for the first time scrutinized and passed an order on vertical agreements and imposed the largest penalty of the year. The CCI is authorized under the Competition Act to impose penalties on companies engaging in cartel formation, price manipulation or abuse of their dominance to the tune of 10% of their turnover or an amount thrice their annual profit. It is yet to be seen how this judgment is going to impact the auto manufacturing sector in the absence of any specific regulator or governing legislation to implement the CCI's order. Even the penalty imposed is bound to be challenged by the companies as precedents suggest that such high amounts have either been reduced in appeals or stay has been granted on them.[3] The present case comment critically analyses this judgment, taking into account all the major issues involved therein and also its implications on the existing model of interested parties.

2. FACTS OF THE CASE

Mr. Shamsher Kataria had filed the information against Volkswagen India, Honda India and Fiat India for violation of Section 3(4) and Section 4 of the Competition Act, 2002. It was alleged by the informant that the aforementioned Original Equipment Manufacturers (hereinafter referred to as '**OEMs**') entered into agreements with Original Equipment Suppliers (hereinafter referred to as '**OESs**') and authorized dealers, which imposed unfair prices on the sale of auto spare parts and restricted the free availability of genuine auto spare parts in the market. These vertical agreements hindered the OESs from selling the auto spare parts directly to the independent car users and repairers in the market. It was further alleged that the OEMs did not furnish the technological information, diagnostic tools and software programs that are required to maintain, service and repair the technologically advanced

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[1] Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors, Case No. 03 of 2011 (CCI, 25/10/2014).

[2] Ford India, Tata Motors, BMW India, Toyota, Maruti Suzuki, General Motors India, Volkswagen India, Hindustan Motors, Fiat India, Mahindra & Mahindra, Mercedes-Benz India, Nissan Motor India, Skoda Auto India, and Honda India. The decision against Hyundai India, Mahindra Reva and Premier is yet to be given by CCI.

[3] Cement Cartel or Coal India Cases. However, in DLF Case, the penalty of about INR 6.3 billion has been approved by the Supreme Court of India.

automobiles to the independent repairers in the open market.[4] This led to the OEMs carrying out restrictive trade practices with their authorized dealers and thus denying market access to independent repairers. The OEMs also charged high and arbitrary prices to the consumers for maintenance services and supply of spare parts.

The informant, Mr. Kataria, also stated in the information that the governing authorities on anti-competitive practices of various countries like USA and Europe have dealt with cases of the similar nature and implemented corrective measures in the automobile manufacturing sector.

Following this, the Director General (hereinafter referred to as "**DG**") investigated into the case. The DG sought detailed information from the various OESs, authorized dealers, independent repairers, SPX India Ltd and the automobile industry associations during the investigation. The DG observed that the 14 car manufacturing companies were involved in the violation of Section 3(4) and Section 4 of the Competition Act (hereinafter referred to as the "**Act**"). The DG held that the denial of market access stemmed from the denial to access diagnostic spare parts and tools.

3. ISSUES DECIDED

The present case involved four pertinent issues which were determined by the Commission:

i. Whether the automobile market as a whole is a single unified 'systems market' or there exists separate relevant markets at different stages?
ii. Is there any abuse of dominance by the OEMs in the spare parts market?
iii. Whether the OEMs are entitled to the benefits arising out of statutory exemption provided to agreements related to intellectual properties?
iv. Whether agreements entered into by the OEMs with OESs and authorized dealers are anti-competitive in nature?

[4] Supra, 1.

4. ORDER OF THE COMMISSION

The Competition Commission of India directed the OEMs to cease and desist[5] from anti-competitive practice, to allow the OESs to sell genuine spare auto parts in open market and to formulate an effective system to ensure availability of aftermarket spare parts, diagnostic tools and other relevant information in the public domain.[6] The Commission imposed a penalty upon the 14 car manufacturing companies of 2% of their total turnover in India and ordered them to submit a compliance report within 180 days. The primary motivations of the Commission while granting the order were:

i. to enable the consumers accessibility to spare parts and to exercise their freedom of choice while choosing between independent repairers and authorized dealers and
ii. to enable the independent repairers to participate in the aftermarket and provide services in a competitive manner.

It also held that necessary and reasonable provisions can be made by the OEMs in their agreements relating to the IPR protection. The Commission also directed the OEMs not to impose an absolute condition on the consumers in case of them availing the services of the independent repairers. However, from the point of view of liability and safety, required safeguards may be put in place.

5. A CRITICAL AND MULTIDIMENSIONAL ANALYSIS OF THE ORDER

The present commentary has critically analyzed the order of the Commission in four sub-headings. The first deals with the issue of 'relevant market'. The second heading covers the issue of 'abuse of dominance'. The third and fourth sub-headings deal with the issues concerning 'anti-competitive agreements', and 'intellectual property rights', respectively.

5.1. Relevant Market

Relying majorly on international case laws and findings of the DG, CCI determined the appropriate relevant market. CCI held that in the

[5] Section 27, The Competition Act, 2002.
[6] Supra 1, 22.3.

automobile sector, a primary product cannot be easily switched to another competing product, which makes it difficult to club the primary market and secondary market into a unified 'systems market'. Unified 'systems market' comprise a set of products or services, which cannot be distinguished into two different antitrust markets, since the consumers demand the primary and the secondary products as a 'system' and determining inter-changeability and substitutability of such products when distinguished into different markets are an inefficient determination of competitive market behaviour for such complex durable goods where the competition for the sale of the products exists at the "point of sale of primary goods" (even if consumers are uninformed, have high switching costs and become locked in ex post). Thus, it dismissed the contention of unified 'systems market' as was raised by the OEMs and held that the primary market of "manufacture and sale of cars" and aftermarkets- "sale of spare parts, diagnostic tools etc." and "service of repair and maintenance" are three separate relevant markets.[7] In the present case, there was no engagement of the customers in 'whole life costing' while buying automobiles in primary market and also the price of spare parts have been substantially hiked by the car manufacturers despite reputational factors. The aforementioned reasons signify that there is no existence of a 'systems market'. The theory of 'clusters market' which was raised by the OEMs was also rejected by CCI. Cluster markets are characterized by transaction complementarities between various components of a bundle of products or services.[8] The Commission observed that a 'clusters market' exists for each of the spare parts in every brand of cars, manufactured by the OEMs. Thus CCI held that this forms a part of a separate 'aftermarket' in the Indian automobile sector.

The stand taken by CCI appreciating the fact that a relevant market can be an 'aftermarket' for those primary products which cannot be changed by consumers unless substantial switching cost is incurred is interesting. The Commission took the position that determining whether a market is relevant market or not is a means to determine the strength of a company in that particular market. Thus, before determining the dominance of an enterprise, the Commission has to identify the market as relevant market. This was a circular approach taken by the

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[7] Supra 1, 20.5.54.

[8] For a detailed discussion on the same see *Policy Roundtables, Market Definition 2012*, OECD, available at http://www.oecd.org/daf/competition/Marketdefinition2012.pdf, last seen on 05/10/2014.

Commission for determining relevant market. However, the questions regarding CCI's stand on the aftermarkets in other sectors still remain unanswered.

5.2. Anti-Competitive Agreements

On the issue of internal arrangement between the OEMs and the overseas suppliers, the Commission dismissed the findings of the DG and held that such arrangement does not stand in violation of Section 3(4) of the Act. The Commission applied the doctrine of 'single economic entity[9] to arrive at this conclusion.

On the issue of arrangement between the OEMs and the OESs, CCI was of the view that the eventual choice has to remain at the hands of the consumers to choose either an independent repairer or an authorized dealer of the OEMs for the purchase of genuine auto spare parts. Thus, CCI held that the restrictions placed on the OESs under the agreement between OEMs and OESs are anti-competitive in nature and are violative of Section 3(4) of the Act.

On the issue of arrangement between the OEMs and the authorized dealers, CCI held that the provisions in the agreements, which require the authorized dealers to source the spare auto parts only from the OEMs, are anti-competitive in nature. It further held that the restriction of access of independent repairers to the spare parts and other diagnostic tools, are anti-competitive in nature and violative of Sections 3(4)(b), (c) & (d) of the Act.

The Commission has taken corrective measures by directing the OEMs to train the independent repairers so that the end consumers would be able to approach the independent repairers for spare parts. Without having taken such measures, the effect of the order would not be of much significance because lack of basic training will hinder the independent repairers from repairing the vehicles even if they have the requisite spare parts and diagnostic tools. Similar kinds of measures have been taken by the European Union and by different states of United States of America by passing the "Block Exemption Regulation"[10] and

[9] Agreements between entities constituting one enterprise (Parent & its subsidiary) cannot be assessed under the Competition Act, 2002.

[10] Block Exemption Regulations enable the European Commission to exempt specific categories of State Aid from the requirement of prior notification and Commission approval based on certain conditions (As per the European Commission Legislation, the European

"Motor Vehicle Owners Right to Repair Act"(popularly known as the Right to Repair Act),[11] respectively. The authors are of the opinion that the higher courts/Appellate body may find these measures as being excessive exercise of the Commission's power, because in other jurisdictions, specific legislations have been enacted for the same. The fact that in two major foreign jurisdictions, independent repairers derive the aforementioned authority from a statute, it would be interesting to note as to how CCI's directions will be implemented.

5.3. Abuse of Dominance

On the aspect of abuse of dominance by the OEMs, CCI decided on three major sub-issues namely market access deniability, unfair pricing and leveraging the dominant position.

CCI observed that the OESs were not supplying the spare parts to the Indian aftermarket directly. It was further revealed by the Commission that the agreement between OEMs and the local OESs imposed restrictions on the OESs to supply spare parts directly to the third parties without prior permission of the OEMs. In this aspect, CCI held:

> "*Each OEM severely limits the access of independent repairers and other multi brand service providers to genuine spare parts and diagnostic tools required to effectively compete with the authorized dealers of the OEMs in the aftermarket which amounts to denial of market access by the OEMs under Section 4(2) (c).*"[12]

CCI observed that the OEMs had hiked up the prices of its spare parts substantially (as high as 5000% in some cases), which was disproportionate to the actual economic value of the products being supplied. It was also noted that the margin from car business unreasonably exceeded that of the spare parts business. Thus, CCI held

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Council Regulation No. 994/98 of 7 May 1998 as amended by the Council Regulation No. 733/2013 of 22 July 2013) *Block Exemption Regulations*, European Commission, available at http://ec.europa.eu/competition/state_aid/legislation/block.html, last seen on 05/10/2014.

[11] Right to Repair is an act protecting motor vehicle owners and small businesses in repairing motor vehicles.*Bill H.4362*, The 188th General Court of The Commonwealth of Massachusetts, available at https://malegislature.gov /Bills/187/House/H4362, last seen on 05/10/2014.

[12] Supra 1, 20.5.83.

that this practice was exploitative in nature and all the 14 car manufacturing companies have violated Section 4(2)(a)(ii) of the Act.

The Commission also held that the OEMs abused their dominance in the relevant market of supply of spare parts to protect the other relevant market namely the after sales service and maintenance, thereby, violating Section 4(2)(e). Thus, CCI finally held that the OEMs have abused their dominant position by indulging in anti-competitive activities in violation of Sections 4(2)(a)(i), 4(2)(a)(ii), 4(2)(c) and 4(2)(e) of the Act.

The authors of the present commentary are of the opinion that while deciding the issue on 'dominant position'[13], the Commission has drifted away from the definition of '*dominance*' in this particular case. The Commission has said that an OEM's dominant position will be seen in respect of the products manufactured by it. Undoubtedly, it can be said that either the entire spare products/diagnostic tools is one relevant market and all the players are participating in that one market or it can be said that the manufacturer's specific products are the relevant market. In the first case, it is difficult that there can be 15-20 dominant players in one market and in second case, which has been accepted by the Commission, not only does the automobile sector but also the car/motor manufacturers will enjoy dominant position in respect of their manufactured products. If that would be the scenario, then CCI is duty bound to check each manufacturer for *abuse of dominant position*. Apart from this, the CCI should have voiced its opinion on the DG's findings in relation to the application of *'essential facility doctrine'* in the present case. The DG had held that there was a denial to access 'essential facility' in the present case as the OEMs restricted access to diagnostic tools and spare parts. However, the Commission chose to not comment on this particular aspect.

5.4. Intellectual Property Rights

This is another pertinent issue of the case wherein there existed a direct conflict between the scope of IPR and Competition Law. The period of LPG has given new dimensions to Adam Smith's definition of Economics which is *'Economics is a science of Wealth'*. The economic and cultural importance of the collection of rules of IPRs is increasing

[13] Supra 5, Section 4 Explanation (a).

rapidly.[14] At the same time, Governments need to ensure that the efficiency of manufacturers/sellers should increase, which will ultimately result in the welfare of the end consumers. It would not be an exaggerated statement to say that these two laws are almost two opposite sides of a coin. The jurisprudence of both the laws is at a nascent stage and it is natural to expect a conflict between them. Many scholars of different schools of thought are in agreement that both IPR and Competition Law are the basic need of the ongoing post-modern time period. As Michael Porter, in his highly influential treatise on anti-trust policy,[15] argues favoring competition laws that, strict enforcement of competition law encourages the continual improvement and innovation that drive industries of a nation to lead to economic growth.[16]

Section 3(5)(1) limits the scope of 'anti-competitive agreements' with the insertion of various statutes relating to IPR. It says that Section 3 shall not restrict any person from imposing '*reasonable condition*s', as may be necessary for protecting any of the person's rights in different fields of IPR. In this particular case, the major contention of OEMs was that they invested a significant amount of money into their R&D[17] facilities which helped in the creation of these products; and the restrictions of sales on OESs, of their proprietary parts to third parties without prior consent of OEMs would fall within the ambit of 'reasonable condition to prevent infringements of their IPRs'.[18]

In the investigation conducted by DG, not a single OEM submitted documentary evidence before the DG in order to establish that they have IPRs in India. The Commission is of the view that the phrase *'which have been or may be conferred upon him under'* cannot be neglected while

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[14] William W. Fisher III, *Theories of Intellectual Property*, Originally published in *New Essays in the Legal and Political Theory of Property* (Stephen Munzer, 2001), available at http://cyber.law.harvard.edu/people/tfisher/IP/Fisher_IP_Theories.pdf, last seen on 05/10/2014.

[15] Michael E. Porter, *The Competitive Advantage of Nations*, Harvard Business Review (1990), available at http://kkozak.wz.cz/Porter.pdf, last seen on 05/10/2014.

[16] Dando B. Cellini, *Economic Growth and Consumer Welfare: The Role of Competition Law*, 429, 434 in *Competition Law Today* (Vinod Dhall, 2007).

[17] R&D are the investigative activities that a business entity chooses to conduct with the intention of making a discovery that can either lead to the development of new products or procedures, or to improvement of existing products or procedures. *Research And Development - R&D*, Investopedia, available at www.investopedia.com/terms/r/randd.asp, last seen on 05/10/2014.

[18] Supra 1, 20.6.15.

deciding the case. To enable protection under Section 3(5)(1) it is necessary to either be protected under the specified IPR statutes mentioned under the same Section or to be under the process of being granted protection.

Further, while analyzing *'may be conferred',* the Commission said that the OEMs could not provide sufficient evidence to establish that they have initiated the process of getting their rights secured under relevant statute of IPRs. In both the categorization, *i.e. 'have been or may be',* the OEMs couldn't show that they have registered/applied for registration of specified spare parts to which these correspond. As we have already discussed in the beginning of this part of the commentary that the Commission classified 'aftermarket' or 'individual spare market(s) and diagnostic tool(s)' as 'relevant market', so it is required to be shown by the OEMs that they have IPRs in the 'relevant market'.[19]

While rejecting the 'technology transfer agreement (TTA)'[20] based argument given by some of the OEMs, the Commission said that unless an OEM has *right(s)* under any of the statutes mentioned under Section 3(5)(1), the exception of Section 3 are of no use to OEMs. The reasoning behind rejecting the argument was that some of the IPRs are territorial in nature and since the parent corporations of the OEMs have rights under different jurisdiction, the subsidiary OEMs cannot merely ask for protection of IPRs in India without fulfilling the conditions prevalent here. In relation to this issue, the Commission held that by entering into a TTA, the OEMs have a right to use and exploit a particular IPR but they do not become the owners of that right because the parent company merely authorizes the exploitation of the right and not assignment of the same.[21]

In respect of copyright protection, OEMs had argued that they had protection over the engineered drawings of the various spare parts and the technical manuals. The Commission upheld the findings of the DG that the rights under the Copyright Act are restricted by the same Act

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[19] Supra 5, Section 2(r).

[20] Technology Transfer is the process by which a technology, expertise, know-how or facilities developed by one individual, enterprise or organization is transferred to another individual, enterprise or organization.
Overview of Contractual Agreements For the Transfer of Technology, World Intellectual Property Organization (WIPO), available at http://www.wipo.int/export/sites/www/sme/en/documents/pdf/technology_transfer.pdf, last seen on 05/10/2014.

[21] Supra 1, 20.6.17.

itself, which *per se* mandates the designs to be registered under Design Act, 1911 or if the product has not been registered, then rights shall cease to exist once the concerned design has been applied more than fifty times in industrial process by the owner of the copyright or his licensee.[22]

The Commission didn't go into the merits of the argument given by OEMs in respect of the provisions of the International Copyright Order, 1999, Berne Convention read with Section 33 of the Indian Copyright Act, which extended the scope of copyright protection over the drawings of the OEMs to the territory of India. The Commission took a different stand by saying that even if they have right*(s),* the word '*necessary'* in Section 3(5)(1) has been wrongly used by OEMs to gain undue profit in the 'relevant market'. Citing different practical examples, the Commission conclusively said that these products are finished products and merely selling them in the open market does not necessarily compromise the IPRs belonging to relevant products. Therefore, the OEMs plea to get exemption under Section 3(5)(1) was rejected by the Commission.

In paragraph number 20.6.16[23], the Commission interpreted the phrase '*may be conferred upon him under*' given under Section 3(5)(1) such as that when a person initiates the process of getting protection in relevant statute, then the exemption can be asked for under Section 3(5)(1). However, the Commission could have interpreted the phrase '*may be conferred upon*' differently. Going with the order of the Commission, it would imply that a mere initiation of the process of getting protection under any of the statute(s) specified in Section 3(5)(1) would make a person entitled to claim for exemption under Section 3(5)(1).

In other words, Commission is implying that a person who has filed a form of registration for his product is equivalent to a person who has got protection under that relevant statute. Tomorrow it may so happen that people would misuse the order by asking exemption under Section 3(5)(1) irrespective of whether they get protection under the relevant statute or not, post the examination of the product, by the competent authority as per the conditions given under the relevant statute of IPRs. Further, in the cases of patent(s), if we go with the interpretation of the

[22] Ibid, 20.6.19.

[23] Belaire Owner's Association v. DLF Limited, Case No. 19 of 2010 (CCI, 12/08/2011).

Commission, it implies that the Commission is competent to go into the intricacies of the IPRs related to a product. This approach stands in direct encroachment into the domain of Controller/Patent Agents.

In the opinion of the authors, the intention behind insertion of '*may be'* by the legislators, was that under certain laws of IPR, for which registration of product is not necessary (e.g. Copyright), a person would be entitled to ask for exemption under Section 3(5)(1). In line with the interpretation of the authors in the present commentary, if a person asks for exemption under Section 3(5)(1) for a product having copyright value, it should not be denied just because his product is not registered under the Copyright Act. Needless to mention that if his product is registered under the Copyright Act then the phrase *'have been conferred upon'* would come into force.

6. IMPLICATIONS OF THE ORDER PASSED BY THE COMMISSION

The order by the CCI against the 14 car manufacturing companies holds significance as it is the first case where the Commission has imposed penal provisions on companies violating provisions dealing with anti-competitive agreements[24] and abuse of dominant market position in a vertical market[25]. Though the penalty imposed is the lowest by CCI until the present date, yet the OEMs might face potential claims for compensation by affected consumers. The Competition Appellate Tribunal (COMPAT) had previously in the Aluminium Phospide tablets cartelization case[26], imposed penalty on the 'relevant turnover' and not the 'total turnover'. But however, the CCI in the present case, imposed penalty on the 'total turnover' of the guilty enterprises. This is a departure from the ruling in the preceding case. Thus, this can be raised as a ground for appeal by the OEMs.

It is also to be seen as to how much penalty will the 14 car companies have to actually pay considering the fact that there have been many instances in the other industrial sectors in the past wherein the fines

[24] Supra 5, Section 3(4).
[25] Supra 5, Section 4.
[26] M/s. Excel Corp Care Ltd v. CCI, Appeal No. 79, 80 and 81 of 2012 (pending n before the Supreme Court of India).

imposed by the CCI have proved to be pending and non-threatening[27]. DLF Limited was held guilty of abusing its dominant market position in the real estate sector, for which CCI imposed 600 odd crores as penalty on DLF Limited but till date no action has been taken against it post-appeal. The High Court of Delhi stayed a penalty amount of Rs 471.14 crores, which was imposed on Maruti Suzuki Ltd, on the ground that the order cannot take effect until the pending litigation before the Madras High Court is disposed off.

The need for an independent regulator in the automobile sector has also been urged by the CCI. CCI had previously given its recommendations to the Government in the DLF Belaire Association case in the same regard. Though, corrective measures have been issued by the CCI to curb the anti-competitive practices by the car manufacturing companies, in the absence of any independent regulator, it would in fact, become a herculean task for CCI to check its compliance orders.

However, if the CCI implements the compliance orders successfully, the judgment will bring about a revolutionary change in the aftermarket of the automobile sector. The August 24 order of CCI is set to be challenged by the OEMs before the COMPAT. The COMPAT might decide on the issues of penalty computation, relevant market determination and IPR protection. It is also a possibility that some of the OEMs might skip appealing before the COMPAT and choose to pay the fine amount instead.

7. CONCLUSION

It can be concluded that this case being India's first landmark judgment on vertical agreements in the automobile sector in an era of competition, has definitely raised some questions and debatable issues. However, it remains to be seen that how the automobile R&D will be affected in the country by the decision and the floodgates of complaints open before the CCI regarding similar anti-competitive practices operating in the aftermarkets of other industries (for e.g. electronic industry, mobile industry etc.). But the present order is definitely going to change the existing scenario. The CCI is determined to bring the companies

[27] CCI, in 2012, issued an order against 12 cement companies for price control tactics but the case is still withheld.

engaged in anti-competitive agreements to task, which is a positive development for the competition law regime in the country.

Nevertheless, whatever the changed scenario would be, corrective measures or lacunae, the consumers are going to welcome the decision whole-heartedly.

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