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ICSI STUDENT MONTH – JULY, 2017

In view to provide a platform for the students to register their all-rounded development and to enhance their professionals interfaces inter as well as intra commune, the Institute announces the July, 2017 as the “Student Month”.

Various activities for the students have been planned during the month of July 2017 on pan India basis through various Regional Offices and Chapters of the Institute. Along with organizing the events based on the core activities pertaining to the profession, the Institute is also taking up relevant social issues to inculcate collective values in the prospering professionals, which include Plantation of Trees, Blood Donation Camp on Doctor's day, Swachh Bharat Abhiyan, Declamation Competition on World Nature Conservation Day, Essay Writing Competition on Kargil Victory Day. It is an opportunity for the students to participate in these programmes and competitions as the same shall groom them in developing their overall personality.

To further strengthen the objective and vibrant awareness for the Student Month, a dedicated webpage is also been exclusively developed for the Student Month containing the exhaustive details of related activities, which would be updated on day to day basis.

Students can visit the webpage at

http://www.icsi.in/student/Portals/0/StudentMonth_July2017/index.html

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My Dear Students


At the outset, I on behalf of whole ICSI fraternity welcome the launch of Goods and Services Tax in India. GST has superseded the multi-layered Indirect tax structure of India existing since a moon years ago which consisted of 17 taxes and 23 cesses levied by the Centre and the States. This was paramount to streamline the country's \$2-trillion economy and 1.3 billion people into a common market to give a push to ease of doing business in India. I would like to reiterate that the ICSI has always supported Government of India in all its growth initiatives. On this historical occasion, the entire fraternity of Company Secretaries are prepared to extend their contribution to ensure the successful transition and implementation of GST. I am pleased to share that to support the Government in this neoteric reform, ICSI has launched its GST app for general public to provide them with a comprehensive insight of GST and an online certificate course on GST for its members. I will reiterate my rumination that you all should also explore all kernals of GST to become proficient to explore upcoming opportunities in CS profession in the sphere of GST.

I will also advise to keep your focus on learning and acquiring knowledge day by day. It is said about leadership that:

“Outstanding leaders go out of their way to boost the self-esteem of their personnel. If people believe in themselves, it's amazing what they can accomplish.” -Sam Walton.

In this pursuit, ICSI is launching Corporate Leadership Development Program (CLDP). Based on the feedback received from the stakeholders, Industries, Corporate, Ministry, Regulators and Senior Members, the Institute is introducing **45 Days Residential Corporate Leadership cum Management Skill Orientation Programme** for Professional Pass Students for capacity building, enhancing quality and making them ready to be future KMPs. The proposed training Programme shall be designed to develop requisite skills among the prospective members with Practical knowledge and professional skills to exacting business solution in an effective and efficient manner. Initially, such residential training program shall be provided to the eligible students on subsidised basis from the ICSI. The training program will be quite comprehensive and rigorous and will prepare the upcoming members to take up roles of KMPs and CEOs. You may register for the same before the seats are blocked.

Happy reading.


सी एस (डॉ.) श्याम अग्रवाल
अध्यक्ष, भारतीय कंपनी सचिव संस्थान
Date: 6th July, 2017



COMPETITION COMMISSION OF INDIA

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In this article, the author provides an insight into the Competition Commission of India.

"Competition is the keen cutting edge of business, always shaving away at costs".-Henry Ford

Introduction

Competition is a situation where someone is trying to win from someone else. Competition exist in almost every field. It is in fact good for the business. It creates healthy environment and leads to innovation. It gives better customer service and shakes off complacency. Competition is vital to the operation of markets, productivity and growth, all of which generate wealth and reduce poverty.

As we know competition makes available the goods and services at the most competitive prices to the consumer. But competition isn't all good. Market do not always work good. In order to create and sustain fair competition in the economy, the Competition Act, 2002 was enacted on the recommendation of the Raghavan Committee.

The Competition Act, 2002 was passed by the Parliament in the year 2002, and received the assent of the President on the 13th January, 2003 and subsequently amended by the Competition (Amendment) Act, 2007 in September, 2007.

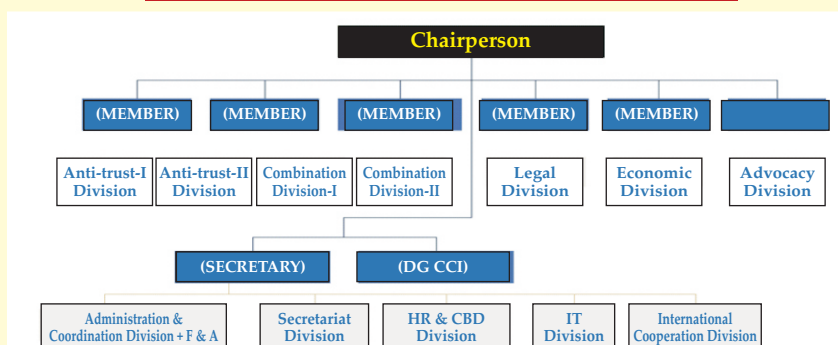
The Competition Commission of India(CCI) is a statutory authority established by the Central Government under section 7 of the Competition Act, 2002 with effect from 14th October, 2003 to undertake competition advocacy for creating awareness on competition issues, in addition to its primary job of ensuring fair competition in the country by enforcing competition law. The objective of the CCI is to create and sustain fair competition in the economy which will provide a 'level playing field' to the producers, while making the markets work for the welfare of the consumers. Earlier there were MRTPC (Monopolies and Restrictive Trade Practices Commission).

Composition

The CCI comprises of a Chairperson and six Members, who are appointed by the Government of India.

- Chairperson-DevenderKumarSikri
- Member –S. L. Bunker
- Member –Sudhir Mital
- Member –Augustine Peter
- Member –U. C. Nahta
- Member – Justice Shri G P Mittal

Structure



Competition Commission Of India

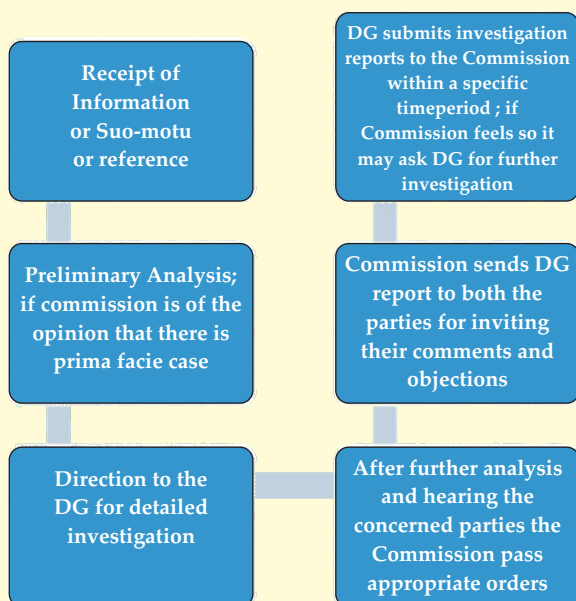
Term of Office

The term of office of all the members of CCI is 5 years or till the attainment of age of 65 years (whichever is earlier). The members are eligible for re-appointment.

Objectives of CCI

- 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

Inquiry Process



Initiatives of the CCI

The CCI has been engaged in various advocacies, some of them are discussed here-

The Commission has given its opinion on the draft of the following Bills:-

- Petroleum and Natural Gas Regulatory Bill, 2005.

- Warehousing (Development and Regulation) Bill, 2006
- Indian Post Office (Amendment) Bill, 2007, and
- Shipping Trade Practices Bill, 2007

Studies Conducted by CCI

- Intellectual Property Laws and Competition Law Policy – July 2015
- Competition Law and Indian Pharmaceutical Industry- July 2015
- Competitive Assessment of Onion Markets in India - July 2015
- Competition Concerns in Concession Agreements in Infrastructure Sectors- July 2009

The CCI has been engaged in various advocacies, and has given its opinion on the draft of the various Bills.

- Public Enterprises, Government Policy and Impact on Competition: Indian Steel Industry– July 2009
- Public Enterprises, Government Policy and Impact on Competition: Indian Petroleum Industry- July 2009
- Antidumping and Competition Law- December 2008
- Competition Issues in the Air Transport

Competition Commission Of India

Sector in India- November 2008

- Study of Cartel Case Laws in Select Jurisdictions– Learnings for the Competition Commission of India- April 2008
- Competition Policy in Telecommunications in India- December 2007

Recent Order/Decision of the Commission

| CASE NO | DESCRIPTION | TYPE | DATE OF ORDER |
|---------|--|---------------------------------|---------------------|
| 98/2016 | C. Shanmugam v. Reliance Jio Infocomm Ltd. | Antitrust, [Section 19 (1) (a)] | 15th June, 2017 |
| 10/2017 | Karnataka Power Corporation Ltd. v Singareni Collieries Co. Ltd. | Antitrust, [Section 19 (1) (a)] | 12th June, 2017 |
| 03/2017 | Bharti Airtel Ltd.Vs. Reliance Industries Ltd. | Antitrust, [Section 19 (1) (a)] | 9th June, 2017 |
| 15/2017 | Bablu & Co.v.. Fatehchand & Company | Antitrust, [Section 19 (1) (a)] | 9th June, 2017 |
| 18/2017 | Bijay Poddarv. Coal India Ltd. | Antitrust, [Section 19 (1) (a)] | 2nd June, 2017 |
| 99/2016 | Vinod Kumar Guptav. Whats App Inc. | Antitrust, [Section 19 (1) (a)] | 1st June, 2017 |
| 08/2017 | Applesoft v.The Chief Secretary to the Government of Karnataka. | Antitrust, [Section 19 (1) (a)] | 5th May, 2017 |
| 12/2014 | Vidharbha Industries Associationv.MSEB Holding Company Ltd. | Antitrust, [Section 19 (1) (a)] | 21stApril, 2017 |
| 68/2016 | Biocon Ltd.v. F. Hoffmann-La Roche AG | Antitrust, [Section 19 (1) (a)] | 21st April, 2017 |
| 88/2016 | Rama Agri Genetics (India) (P) Limited v. Mahyco Monsanto Biotech India Ltd. | Antitrust, [Section 19 (1) (a)] | 14th March, 2017 |
| 70/2014 | Rajat VermavPublic Works (B&R) Department | - | 27th February, 2017 |
| 86/2016 | Satyendra Singhv.Ghaziabad Development Authority | Antitrust, [Section 19 (1) (a)] | 2nd February, 2017 |
| 78/2016 | Sudarshan Kumar Kapur v. Delhi Development Authority | Antitrust, [Section 19 (1) (a)] | 12th January, 2017 |

DOMINANCE AND PREDATORY PRICING

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In this article, the author delves into provisions of section 4 of the Competition Act, 2002 which deals with the Abuse of Dominance and Predatory Pricing

Dominance and Predatory Pricing-Section 4

An enterprise or group is guilty for Abuse of dominance under the Competition Act, 2002 ('the Act'), if it follows certain practices listed under clauses (a) to (e) of sub - section (2) section 4 of the Act. One practice prohibited under this list is predatory pricing. The relevant part of section 4 read as under:

"4. (1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group-

(a) directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or service; or price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition: or

(b) *****; or

(c) *****; or

(d) *****; or

(e) *****.

Explanation.— For the purposes of this section, the expression

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" mean the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5. (emphasis added)

When Enterprise can be Questioned for Abusing its Dominant Position through Predatory Pricing

It is important to note that only such an enterprise or group is prohibited from predation who holds the dominant position in the relevant market. Hence it should first be established by the Competition Commission of India ('Commission') as to what is the relevant market. Thereafter it should be examined if the

Dominance And Predatory Pricing

enterprise or group concerned holds the dominant position in the relevant market. Only then can an enterprise or group can be questioned for abusing its dominant position through predatory pricing.

In its Order in the Appeal No. 81 of 2014, the Competition Appellate Tribunal (In *Coal India Ltd. v CCI*) offered a good narrative on the process to be followed in case of abuse of dominance:

'20.2 Therefore, unless an enterprise enjoys a dominant position in the relevant market, its conduct cannot be subjected to any inquiry to ascertain abuse. The exercise by the Commission while inquiring into allegation of contravention of Section 4 is sequential, as described below:

- (i) Firstly, determine as to whether the entity whose conduct is alleged to be abusive is an enterprise or group as defined respectively in section 2(h) and Explanation (b) to section 5 of the Act.
- (ii) Secondly, determine the 'relevant market' as defined under section 2(r) of the Act with due regard to the factors listed in sections 19(6) and (7) of the Act.
- (iii) Thirdly, determine whether the enterprise/group enjoys a dominant position in the relevant market based on consideration of the factors listed in section 19(4) of the Act.
- (iv) Fourthly, only if an enterprise or group is

dominant, analyze its conduct to ascertain whether it has abused its dominant position through behavior described in Section 4(2) of the Act.'

In Case No. 3 of 2017, *Bharti Airtel Ltd.* had filed an information under clause (a) of sub-section (1) of section 19 of the Act, stating that the free services being offered by *Reliance Jio Infocomm Ltd. (Reliance)* amounted to predatory pricing. After going through the submissions offered by the parties, the

Commission concluded that Reliance did not hold the dominant position in the relevant market. And in the absence of dominant position enjoyed by Reliance, the question of examining the alleged abuse of dominance through predatory pricing did not arise.

Relevant Market

In any information relating to the abuse of dominance, the Commission has to first determine the relevant market. Relevant market, as defined in the clause (r) of section 2, is the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. "Relevant product market" or the "relevant geographic market" are defined in clauses (s) and (t) of section 2 of the Act. The concept of relevant market was elaborated by the Supreme Court in *CCI v. Co-ordination*

In any information relating to the abuse of dominance, the Commission has to first determine the relevant market.

Relevant market was elaborated by the Supreme Court in CCI v. Co-ordination Committee of Artists & Technicians of W B Film & Television

Dominance And Predatory Pricing

Committee of Artists & Technicians of W B Film & Television [2017] 137 CLA 84 (SC)

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

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

Dominant Position

After deciding the relevant market, the Commission proceeds to determine if the enterprise or group concerned is holding a dominant position in the relevant market in

terms of clause (a) of Explanation to section 4. Sub section (4) of section 19 requires the Commission to consider all or any of the following factors to ascertain if an enterprise enjoys the dominant position:

- (a) market share of the enterprise
- (b) size and resources of the enterprise
- (c) size and importance of the competitors
- (d) economic power of the enterprise including commercial advantages over competitors
- (e) vertical integration of the enterprises or sale or service network of such enterprises
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether

After deciding the relevant market, the Commission proceeds to determine if the enterprise or group concerned is holding a dominant position in the relevant market in terms of clause (a) of Explanation to section 4. Sub section (4) of section 19 requires the Commission to consider all or any of the any of the factors

acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise

- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or

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service for consumers;

- (i) countervailing buying power
- (j) market structure and size of market
- (k) social obligations and social costs
- (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition
- (m) any other factor which the Commission may consider relevant for the inquiry.

Predatory Pricing

Predatory pricing is prohibited under the Act in certain circumstance. An enterprise or group holding the dominant position would be deemed to be abusing its dominant position if it directly or indirectly, imposes predatory price, in purchase or sale of goods or service. Under the Act, the 'predatory price' is defined to mean the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors. Hence it is essential to, establish that the objective of predatory pricing has been "to reduce competition or eliminate the competitors". In *Transparent Energy Systems Pvt. Ltd. & TECPRO Systems Ltd.* [2013] 115 CLA 575 (CCI), the Commission

observed as under:

"In order to find out whether the opposite party resorted to the predatory pricing, the Commission has to give a finding that the prices of the goods or services of the Opposite Party were at a very low level with the object of driving out competitors from the market, who due to low pricing would be unable to compete at that price. In predatory pricing, there is

always a significant planning to recover the losses if any after the market rises again and the competitors have already been forced out. It is considered that only a dominant company in such a market may have inclination and resources to finance such a strategy".

Determination of the cost of production in case of predatory pricing is an important exercise. The

Competition Commission of India (Determination of Cost of Production) Regulations, 2009 have been framed by the Commission to address this issue. In another case, *H.L.S. Asia Ltd. v. Schlumberger Asia Services Ltd.* [2013] 115 CLA 401 (CCI), the Commission observed as under:

"A party bidding for the provision of a service takes into account cost of his equipment, the life of equipment, the maintenance requirements of equipment, the operational cost and some reasonable returns on the capital

In predatory pricing, there is always a significant planning to recover the losses if any after the market rises again and the competitors have already been forced out. It is considered that only a dominant company in such a market may have inclination and resources to finance such a strategy.

Dominance And Predatory Pricing

invested. A party will bid at a price which is equal to the minimum of its' average variable cost to exploit scale economies. It will not be prudent for abiding firm to keep its capacity idle and bid at a price higher than its minimum average variable cost. Hence, the aspect of predatory pricing has to be looked from an *appropriate cost benchmark*." (emphasis added)

Predatory Pricing to Meet the Competition

Explanation to clause (a) of sub section (2) of section 4 provides for an exception when predation is permitted. Accordingly, imposition of predatory price in purchase or sale of goods or service shall not include such discriminatory condition or price which may be adopted to meet the competition. In *Dhruv Suri v Mundra Port & Special Economic Zone Ltd.*, the Commission observed as under "..... That there are two container terminals at Mundra Port, one is operated by the opposite party and the other by MICT. There is intense inter-port competition between the opposite party and MICT and others for attracting liner traffic on India's west coast. Commission finds force in the contention of the MPSEZ that the discounts were being offered by the OP essentially to meet the stiff competition from MICT, which was the incumbent terminal in Mundra Port and SEZ Ltd., as also from other more established ports on western coast such as Mumbai, JNPT etc. As such as per *Explanation* to section 4(2)(a) of the Act, any discriminatory condition or price which may be adopted to meet the competition shall not constitute abuse."

Conclusion

In the current scenario, Telecom Sector is witnessing predation in one or other manner. Consultation Paper on Regulatory Principles of Tariff Assessment issued by the Telecom Regulatory Authority of India covers various dimensions of predatory pricing in the telecom sector. According to the explanatory memorandum to the Telecommunication Tariff Order (Twenty-third Amendment) "Authority will continue to monitor the tariffs both with respect to predatory tariffs as well as unduly high tariffs because operators with dominant market and operations in more than one service sector will always have the capacity to do so". Of course, the final ruling on predatory pricing under the Competition Act would be written by the Supreme Court in the soon-to-be decided appeal wherein National Stock Exchange has been held guilty for following predatory pricing policy in the form of zero transaction fee.

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PREDATORY PRICING - AN ANALYSIS WITH CASE LAWS

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The author aims to analyze the concept of Predatory Pricing in detail along with related landmark Case Laws.

Predatory Pricing

In practical realm the supply of a product is more often than not, limited to the hands of a single market player, who, using his dominance grows very powerful because of the low production cost he has, for the simple reason that his economies of scale are huge and research and development facilities better than most, and, hence, in a commanding position to determine the price without considering the fixed price, thereby misallocating efficiency. There are also situations where such dominant players in the market, using their dominant position, create barriers for the new entrants or try to drive them out. One such method of driving out other players is called predatory pricing.

Predatory pricing (also known as

Abuse of dominance and predatory pricing, are two principles which are bound together by the intricate web of legal rules and the economics of single player control over a market.

Abuse of dominant position is the genus, whereas predatory pricing is the species.

'undercutting' in common parlance) is a pricing strategy where a product or service is sold/provided at a very a low price with the objective of either eliminating the

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competitor(s) or to create barriers to entry for potential new competitors, thereby attempting to eliminate competition from the market. It, **therefore, follows that the predatory pricing is pricing below one's cost with a view to eliminating a rival. After chasing competitors out of the market, the incumbent would have fewer competitors (and may in fact be a monopoly), and can then in theory raise prices above what the market would otherwise bear.**

Abuse Of Dominant Position And Predatory Pricing

Abuse of dominance and predatory pricing, are two principles which are bound together by the intricate web of legal rules and the economics of single player control over a market and are so obscurely overlapped that they can only be severed from one another by the genus-species disengagement. Abuse of dominant position is the genus, whereas predatory pricing is the species.

Case Law

MCX Stock Exchange Ltd. v. National Stock Exchange of India, DotEx International Ltd., Omnesys Technologies Pvt. Ltd (Case No- 13 /2009) {MANU/CO/0032/2011}

It was alleged that the National Stock Exchange, (NSE) has abused its dominant position by the following:

- ▶ Eliminating competition from the CD segment
- ▶ Discouraging potential entrants from entering the relevant market for stock exchange services;
- ▶ Achieving foreclosure of all competition in the market for stock exchange services.

Predatory Pricing - An Analysis With Case Laws

- ▶ No admission fee for membership in its CD segment as compared to others
- ▶ a Transaction fee waiver in respect of all currency
- ▶ future trades executed on its platform NSE
- ▶ Not charging any fee for providing the data feed in respect of its CD segment;
- ▶ Action of NSE aimed at blocking the residual revenue stream of MCX

DG has concluded that the acts of NSE have harmed competition in the Indian capital market, particularly in the CD segment. The behaviour of NSE is clearly exclusionary and the facts gathered during investigation indicate that they have been done with the intent to impede future market access for potential competitors and to foreclose existing competition. The harm of this anti-competitive conduct is enhanced because the relevant market of stock exchange services is a network effect of market. Any advantage gained by NSE would have manifold adverse impact on its competitors due to the network effect and held that NSE has abused its dominant position by its action in relation to waiver of transaction charges, data feed charges and admission fees and reduction of deposit levels by NSE in the CD segment are actions which violate sub-clause (ii) of clause (a) of sub-section (2) of section 4 of the Competition Act, 2002. In light of the above stated information and considering all the relevant factors involved in the case, the CCI levied a penalty on NSE which is equivalent to 5 percent of their average turnover amounting to a total of INR 55.5 crores (Rs. 55, 50, 00,000/USD 12.23 Mn). This is the first case, where a major penalty has been imposed by CCI for contravention of provisions of Competition Act, 2002.

International Cylinder (P) Ltd. v. CCI {Appeal No. 21 of 2012}

The CCI had slapped 44 LPG companies liable for engaging in the process of bid-rigging. The **Appellate Tribunal (COMPAT)** noted that existence of an association is itself sufficient, as it gives opportunity to the competitors to interact and discuss the trade problems and that it nullifies the need to prove that the party actually discussed the prices and took part in the meeting and agreed with the analysis and findings of the CCI. With respect to penalty, the CCI had imposed a penalty of 7 percent and has failed to give a reason as to why such rates were resorted to, and the COMPAT held that an unreasoned discretion was exercised. In view of the same, the COMPAT remanded back the matter on the question penalties to the CCI. By an order dated 6th, August, 2014 in Case No. 3/2011, the CCI has, after re-consideration, re-imposed the earlier fines.

Mega Cabs Pvt. Ltd. v. ANI Technologies Pvt. Ltd. ("Ola") and Meru Travel Solutions (P) Ltd. v. Uber India Systems (P) Ltd. ("Uber") {Case No-81 of 2015 }

The Commission rejected allegations of unfair business ways against taxi hailing apps Ola and Uber after finding no evidence of anti-competitive practices by them in the national capital. Separate complaints were filed by rivals Mega Cabs and Meru alleging that Ola and Uber indulged in unfair practices such as predatory pricing, which is hurting their businesses. Taxi hailing apps and radio taxi service providers are engaged in stiff competition in different markets across the country. It was alleged that Ola and Uber raised huge amount of funding in several rounds which helped them unleash the anti-competitive practices. For both cases, the market for "radio taxi services in Delhi-NCR" was taken as the relevant one by the regulator. Dismissing the complaint the Competition Commission held that the allegations made are

Predatory Pricing - An Analysis With Case Laws

"opposed to the basic tenets of competition law". *Inability of the existing players or new entrants to match the innovative technology or app developed by any player or the model created for operating in a particular industry cannot be said to be creating entry barriers in itself*

The Commission held that the route of venture funding, with which the Ola is bearing the costs of giving incentives to its drivers and discounts to the consumers are not exclusively available to it. With regard to allegations of unfair business practices against Uber, CCI said the fluctuating market share figures of the various players show that the competitive landscape in the relevant market is quite vibrant and dynamic.

The Commission is of the view that the radio taxi services market in Delhi is competitive in nature and Uber does not appear to be holding a dominant position in the relevant market. Since Uber group does not seem to be dominant in the relevant market, there is no need to go into the examination of its conduct in such relevant market".

The Concepts of 'Intention' and 'Recoupment'- Evolution of the Indian case Law from the American and E.U Precedents

What emerges is that for a complaint of predatory pricing to succeed the complainant/claimant must meet a two-prong test:

- (i) Firstly an effective demonstration that the scheme could actually drive the competitor out of the market. It is necessary to look for

an element of malafide, i.e., of eliminating competition by creating transitory phase of low pricing which a competition may not be able to withstand;

- (ii) Secondly, there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market.

When Price Reduction is not Predatory

Price Reduction, which may have to be resorted to survive in the competition market, or to meet the predatory pricing policy pursued by other competitors, would not be a restrictive trade practice liable to be struck down. In *Standard Oil Co. v. Trade Comm'n*, The US Supreme Court held that: "Section 2(b) of the Clayton Act permitted a seller to retain a customer by realistically meeting in good faith the price offered to that

customer, without necessarily changing the seller's price to its other customers."

The principle provided in 2(b) of the Clayton Act of US is contained in the explanation to section 4(2) (a) of the Indian Competition Act. Moreover, the *Explanation* of Section 4(2) (a) of the Competition Act, 2002 **clearly states that a price which may be adopted to meet the competition is not included in section 4 of the Competition Act, 2002 and cannot be termed as abuse of dominance.**

The Argument Against Law On Predatory Pricing

Some economists claim that true predatory pricing is rare because it is an irrational

Price reduction, which may have to be resorted to survive in the competition market, or to meet the predatory pricing policy pursued by other competitors, would not be a restrictive trade practice liable to be struck down.

Predatory Pricing - An Analysis With Case Laws

practice and that laws designed to prevent it only inhibit competition. One prominent leading economist explains that predatory pricing would pay off only if the surviving predator can then raise prices enough to recover the previous losses, making enough extra profit thereafter to justify the risks. These risks are not small. However, even the demise of a competitor does not leave the survivor home free. Bankruptcy does not by itself destroy the fallen competitor's physical plant or the people whose skills made it a viable business. Both may be available-perhaps at distress prices to others who can spring up to take the defunct firm's place. Critics of laws against predatory pricing may support their case empirically by arguing that there has been no instance where such a practice has actually led to a monopoly. Conversely, they argue that there is much evidence that predatory pricing has failed miserably.

An eminent jurist has rightly commented that It is the **civil equivalent of "preventive detention" in criminal cases**—punishment without proof.

Conclusion

The law relating to predatory pricing was introduced in India by the Competition Act, 2002, because most dominant MNCs before the enactment of the Act, chose predatory pricing as a tool to drive out Indian competitors from the market. In addition, after driving the competitors out, the companies went for recoupment, which meant that the prices of the

monopolistic or duopolistic market were sky high and it was the consumers who actually suffered from it, as they neither had the freedom to choose between products, nor were they paying the right amount for the essential or lifestyle products. From an analysis of the various case laws (Indian as well as foreign) it emerges that the current definition of predatory pricing is neither exhaustive nor crystal clear **on what exactly is predatory pricing and what is not**. The ambiguity on average variable cost and average total cost still continues. However, in legal parlance any ambiguity in law either leads to misinterpretation or misapplication and this finally leads to considerable wastage of

resources, money and time, without ultimately achieving the objective. Statistics support the fact that many new entrants and small competitors are still being challenged, as the dominant enterprises are selling products below their total cost of manufacturing i.e., without causing any profit. Although it may seem consumer friendly, independent researchers suggest that these

are anti-competitive behaviour too and the only reasons the enterprises adhere to these are to drive out competitors. Therefore, the Legislature should take a clear standpoint and make the law relating to predatory pricing a little more exhaustive. This will act as a stimulus to the new entrants and small competitors and will help in fostering competition and maximum welfare.

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KNOWLEDGE UPDATE

GST LAW

GST Rates Structure

No tax :

Goods - fresh meat, fish, chicken, eggs, milk, butter milk, curd, natural honey, fresh fruits and vegetables, flour, besan, bread, prasad, salt, bindi. Sindoor, stamps, judicial papers, printed books, newspapers, bangles, handloom, etc.

Services - Hotels and lodges with tariff below Rs 1,000, Grandfathering service has been exempted under GST.

5% :

Goods - Items such as fish fillet, cream, skimmed milk powder, branded paneer, frozen vegetables, coffee, tea, spices, pizza bread, rusk, sabudana, kerosene, coal, medicines, stent, lifeboats will attract tax of 5%.

Services - Transport services (Railways, air transport), small restaurants will be under the 5% category because their main input is petroleum, which is outside GST ambit. Further on fertilizer 5 percent GST will be levied.

12% :

Goods - Frozen meat products, butter, cheese, ghee, dry fruits in packaged form, animal fat, sausage, fruit juices, Bhujia, namkeen, Ayurvedic medicines, tooth powder, agarbatti, colouring books, picture books, umbrella, sewing machine, cellphones will be under 12 % tax slab.

Services - AC hotels, business class air ticket, Work Contracts will fall under 12 percent

18% :

Goods - Sugar, pasta, cornflakes, pastries and cakes, preserved vegetables, jams, sauces, soups, ice cream, instant food mixes, mineral water, tissues, envelopes, tampons, note books, steel products, printed circuits, camera, speakers and monitors.

Services - AC hotels that serve liquor, telecom services, IT services, branded garment

28% :

Goods - Chewing gum, molasses, chocolate not containing cocoa, waffles and wafers coated with chocolate, pan masala, aerated water, paint, deodorants, shaving creams, after shave, hair shampoo, dye, sunscreen, wallpaper, ceramic tiles, water heater, dishwasher, weighing machine, washing machine, ATM, vending machines, vacuum cleaner, shavers, hair clippers, automobiles, motorcycles, aircraft for personal use, will attract 28 % tax - the highest under .

In addition to the above, a few other items were mentioned in the council's announcement of rates. These items and the applicable rates on them are as follows:-

- The Council has set the rate for capital goods and industrial intermediate items at 18 per cent. This will positively impact domestic manufacturers as seamless input credit will be available for all capital goods. Indeed, it is time for "Make In India".
- Coal to be taxed at 5 percent against current 11.69 per cent. This will prove beneficial for the power sector and heavy industries which rely on coal supply. This will also help curb inflation.
- 28percent limit in hotels will start from Rs 7,500; between Rs 2,500- Rs 7,500 the rate will be 18percent
- GST on restaurants in these hotels will be at par with other air-conditioned restaurants (18 percent)
- State run lotteries will be taxed at 12percent of the face value and State authorised lotteries at 28percent
- IGST rate of 5percent on Ship with full ITC will be applicable
- Only three products – ice cream, paan masala and tobacco – have been added in the negative list of the Composition scheme. This implies that only the composition scheme will not be available for ice creams, paan masala and tobacco.

Knowledge Update

RELAXATION IN RETURN FILING PROCEDURE FOR FIRST TWO MONTHS OF GST IMPLEMENTATION

With the objective of ensuring smooth rollout of GST and taking into account the concerns expressed by the trade and industry regarding filing of the returns in GST regime, it has been decided that, for the first two months of GST implementation, the tax would be payable based on a simple return (Form GSTR-3B) containing summary of outward and inward supplies which will be submitted before 20th of the succeeding month. However, the invoice-wise details in regular GSTR-1 would have to be filed for the month of July and August, 2017 as per the timelines given below

| MONTH | GSTR-3B | GSTR-1 | GSTR - 2 (auto populated from GSTR - 1) |
|--------|----------------------------|-----------------------|---|
| JULY | 20 TH August | 1st –5th September* | 6th – 10th September |
| AUGUST | 20 th September | 16th – 20th September | 21st – 25th September |

* Facility for uploading of outward supplies for July, 2017 will be available from 15th July, 2017.

No late fees and penalty would be levied for the interim period. This is intended to provide a sense of comfort to the taxpayers and give them an elbow room to attune themselves with the requirements of the changed system. This not only underlines the government's commitment towards ensuring that all the stakeholders are on Board but also provides an opportunity to the taxpayers to be ready for this historic reform.

COMPANY LAW

EXEMPTION/AMENDMENT TO PRIVATE COMPANY

GSR. 583(E) dated-13th June, 2017

- Private company, if such private company is a start - up company is not required to prepare cash flow statement [proviso of section 2(40)].
- Earlier private companies can accept deposit from the members of the company after following the procedure set out in section 73(2). However, pursuant to new notification, such provision will not apply to private company which-
 - accepts from its members monies not exceeding 100 percent aggregate of the paid - up capital, free reserves and security premium
 - is a start- up for five years from the date of incorporation
 - fulfills all following conditions, i.e.
 - ▶ it should not be an associate/ subsidiary of any other company
 - ▶ if the borrowing of such a company from the banks/financial institutions/

body corporate is less than the twice of paid up capital or fifty crore rupees whichever is lower.

- ▶ It should not be defaulted in repayment of such borrowing [section 73(2)].

- “Small company” is required to file annual return regarding the aggregate amount of remuneration drawn by directors [section 92(1)(g)]
- Start-up company's annual return is required to be signed by company secretary or where there is no company secretary, by the director of the company [proviso to section 92(1)(g)]
- The auditor report which states whether the company has adequate internal control finance system in place and operating effectiveness of such control shall not be applicable to private company which is:- OPC or small company and has a turnover less than 50 crore as per latest audited financial system OR which has a aggregate borrowing from bank/financial institution/ any body corporate at any time during the financial year less than Rs. 25 crore [section

Knowledge Update

143(3)].

- Private company(if such private company is start- up company) shall be deemed to have complied with the provision of section 173(5), if at least one Board meeting during each half of calendar year has been convened and the gap between the two meetings is not less than 90 days [section 173(5)]
- In the Interested director of a private company may also be counted towards quorum in meeting after disclosure of his interest pursuant to section 184 [section 174(3)]

EXEMPTION / AMENDMENT TO GOVERNMENT COMPANIES

GSR-582 (E) dated-13th June, 2017

- Annual general meeting of company shall be held at registered office of the company or such other place within the city, town or village in which the registered office of the company is situate or such other place as the Central Government may approve in this behalf. [section 96(2)].
- The criteria for retirement of director shall not apply to the following:-
 - ▶ Government company, which is not a listed company, in which not less than fifty-one per cent of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
 - ▶ Subsidiary of a Government company, referred to in (a) above [section 152 (6),(7)]

EXEMPTION/AMENDMENT TO SECTION 8 COMPANY

GSR 584(E) dated-13th June, 2017

- The criteria for maximum number of directors shall not be applicable to section 8 companies [First proviso to section 149(1)(b)]
- No loan shall be given at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year

Government security closest to the tenor of the loan. The bar shall not apply to a company in which twenty-six per cent or more of the paid-up share capital is held by the Central Government or one or more State Governments or both, in respect of loans provided by such company for funding industrial research and development projects in furtherance of its objects as stated in its memorandum of association [section 186(7)].

RELAXATION ON AUDITOR'S TERM FOR PRIVATE COMPANIES HAVING PAID UP SHARE CAPITAL UPTO Rs.50 CRORE

GSR 621(E) dated- 22nd June, 2017

Pursuant to section 139(2) of the Companies Act, 2013, all listed companies and certain class of companies are required to rotate of their auditors. Rules 5 of the Auditors Rules specify certain category of the class of companies which are required to comply with this provision. One of the category of class of companies is all private companies having paid- up share capital of Rs. 20 crore or more. For this category now this limit has been increased to 50 crore. Now all private company whose paid up Share capital does not touch rupees fifty crore or above are not required to comply with the provisions of section 139(2).

TRANSMISION OF SECURITIES BY OPERATION OF LAW

General Circular No.-07/2017 dated 5th June, 2017

The Ministry of Corporate Affairs ('MCA') has clarified that since the transfer of shares to IEPF under section 124(6) of the Companies Act, 2013 is on account of operation of law the procedure followed during transmission of shares may be followed in such cases and duplicate shares need not to be issued in such case. MCA has further clarified that the procedure for transmission of shares may be followed for the transfer of shares to IEPF Authority under section 124(6) of the Companies Act, 2013.

INSOLVENCY AND BANKRUPTCY CODE, 2016

FAST TRACK INSOLVENCY

RNI Regd. No.DELENG/2017/71754
 Posted on : 13-14 July 2017
 Published on 9, 10 & 11 July 2017

DELHI POSTAL REGD. NO. DL-SW-10/4199/17-19
 Place of posting : NIEHO, Naraina

Knowledge Update

RESOLUTION PROCESS FOR CORPORATE PERSONS REGULATIONS

SO-1910 (E) dated -14th June, 2017

The Insolvency and Bankruptcy Board of India (IBBI), has notified the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017. These regulations provide process for initiation of insolvency resolution of eligible corporate debtors till its conclusion with approval of the resolution plan by the Adjudicating Authority. The process in these cases shall be completed within a period of 90 days, as against 180 days in other cases. However, the Adjudicating Authority may, if satisfied, extend the period of 90 days by a further period up to 45 days for completion of the process.

SO-1911(E) dated -14th June, 2017

The Ministry of Corporate Affairs has notified the relevant sections 55 to 58 of the Insolvency and Bankruptcy code, 2016 pertaining to the fast track process which shall be applied to the following categories of corporate debtor:

- A small company, as defined under clause (85) of section 2 of the Companies Act, 2013;
- A Start-up (other than the partnership firm), as defined in the notification dated 23rd May, 2017 of the Ministry of Commerce and Industry
- An unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs.1 crore.

INCOME TAX LAW

SUPREME COURT ON AADHAR - PAN LINKAGE

Section 139AA(1) of the Income-Tax Act, 1961 as introduced by the Finance Act, 2017 provides for mandatory quoting of Aadhaar/Enrolment ID of Aadhaar application form, for filing of return of income and for making an application for allotment of PAN with effect from 1st July, 2017. From 1st July, 2017 onwards, every person eligible to obtain

Aadhaar must quote their Aadhaar number or their Aadhaar Enrolment ID number for filing of Income tax Returns as well as for applications for PAN. Everyone who has been allotted permanent account number as on the 1st day of July, 2017, and who has Aadhaar number or is eligible to obtain Aadhaar number, shall intimate his Aadhaar number to income - tax authorities for the purpose of linking PAN with Aadhaar. However, the Court has been given a partial relief to those who do not have Aadhaar and who do not wish to obtain Aadhaar for the time being, that their PAN will not be cancelled.

The Supreme Court has upheld section 139AA as constitutionally valid -

It being neither discriminatory nor violative of article 14 of the Constitution. Section 139AA is also not violative of article 19(1)(g) of the Constitution insofar as it mandates giving of Aadhaar number for applying PAN and in the income tax returns and linking PAN with Aadhaar number. It held that the "Parliament was fully competent to enact Section 139AA of the Act and its authority to make this law was not diluted by the orders of this Court."

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