# THE COMPETITION LAW PRIMER

A GUIDE TO THE SEMINAL SUPREME COURT RULINGS ON KEY PRINCIPLES OF COMPETITION LAW

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# TABLE OF ABBREVATION

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| **Act** | Competition Act, 2002 |
| **AAEC** | Appreciable Adverse Effect on Competition |
| **CCI** | Competition Commission of India |
| **COMPAT** | Competition Appellate Tribunal |
| **Dyestuffs** | Imperial Chemical Industries Ltd. v. Commission of European Communities, 1972 ECR 619 (ECJ) |
| **ECJ** | European Court of Justice |
| **FCI** | Food Corporation of India |
| **IDO** | Incumbent Dominant Operator |
| **LPG** | Liquefied Petroleum Gas |
| **MRTP Act** | Monopolies and Restrictive Trade Practices Act, 1969 |
| **MSO** | Multi System Operator |
| **POI** | Point of Interconnection |
| **QOS** | Standard of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Regulations, 2009 |
| **SC** | Supreme Court |
| **TRAI** | Telecom Regulatory Authority of India |

# TABLE OF CASES

01. Competition Commission of India v. Bharti Airtel & Ors. (2019) 2 SCC 521
02. Competition Commission of India v. Coordination Committee of Artistes & Technicians of West Bengal & Ors. (2017) 5 SCC 17
03. Competition Commission of India v. Fastway Transmission Pvt. Ltd. & Ors. (2018) 4 SCC 316
04. Excel Crop Care Ltd. v. Competition Commission of India & Anr. (2017) 8 SCC 47
05. Competition Commission of India v. Steel Authority of India Ltd. & Anr. (2010) 10 SCC 744
06. Competition Commission of India v. Thomas Cook (India) Ltd. & Anr. (2018) 6 SCC 549
07. Uber (India) Systems Pvt. Ltd. v. Competition Commission of India & Ors. (2018) 8 SCC 697
08. SCM Soilfert Ltd. & Anr. v. Competition Commission of India (2018) 6 SCC 631
09. Rajasthan Cylinders & Containers Ltd. v. Union of India 2018 SCC Online SC 1718
10. Competition Commission of India v. JCB India Ltd. & Ors. Criminal Appeal No. 76-77 of 2019
11. Imperial Chemical Industries Ltd. v. Commission of European Communities 1972 ECR 619 (ECJ)
12. Southern Pipeline Contractors v. Competition Commission 2011 SCC On Line ZACAC 5

# INTRODUCTION

## INTRODUCTION

It has been a little more than a decade since the Competition Act, 2002 ("**Act**") was introduced in India which transformed the landscape of competition law in India. The Act replaced the erstwhile and rather ineffective regime under Monopolies and Restrictive Trade Practices Act, 1969 ("**MRTP Act**"). The regime under MRTP Act , was dubbed by many commentators as a toothless tiger. With the Act coming in, India now boasts of a robust competition law regime, both in terms of enforcement and merger control.

The last decade saw a resurgence in antitrust appeals before the Supreme Court of India ("**SC**") which has led to the SC laying down essential principles of competition law in India. Indian antitrust jurisprudence, especially EU, which had primarily been dependent on the precedents of other mature competition jurisdictions, has evolved in its own right through a series of cases decided by the Indian SC on substantive provisions of the Act as well as due process. It must be noted herein that the Act draws its inspiration from Article 38 and 39 of the Constitution of India, which seeks to ensure that there is no economic concentration in hands of a few, while the EU jurisprudence is based on the concept of free and fair markets. Thus, there is bound to some differences in the way the principles of law is interpreted in both the countries.

With more antitrust issues finding prominence in the context of big data, digital markets online markets & trade and extra territorial operations of the Act, it is likely that future pronouncements of the SC shall delve in more deeply into issues arising out of such unique, fast-paced and developing markets. The anti-competitive uses of data, the dominance of online platforms and the intricate interface between data protection and antitrust law are issues which may require scrutiny by the SC in the years to come.

In this handbook, we seek to explore the different legal issues and principles which the SC has already dealt with and their implications on competition jurisprudence in India.

# TABLE OF CONTENTS

# OBJECTIVES AND BASIC PRINCIPLES OF THE ACT

The case of *Competition Commission of India v. Steel Authority of India Ltd.*[1] *("**SAIL**")* was one of the earliest SC decisions which discussed the background, object and core principles of the Act. The SC reflected on the overall intention of competition law to limit market power and remedy situations where the activities of one or more firms lead to the breakdown of the free market system. The SC recognized the legislative intent behind the Act to deal with contraventions of the Act expeditiously and in a time-bound manner.

Subsequent decisions of the SC have also dealt with the general scheme and objectives of the Act. Notably, in the case of *Excel Crop Care Ltd. v. Competition Commission of India*[2] ("***Excel Crop Care***"), the SC was of the view that the pursuit of fair and effective competition is instrumental in improving economic efficiency, economic growth and development of consumer welfare. The SC also noted that competition fosters innovation and productivity, and effective antitrust enforcement is not only essential to sanction anti-competitive conduct but to also act as a deterrent and maintain competition. The SC reaffirmed these observations in the case of *Competition Commission of India v. Bharti Airtel Ltd. & Ors.* [3] ("***Airtel***") while elaborating on the jurisdiction of the CCI.

In the case of *Competition Commission of India v. Fastway Transmission Pvt. Ltd.* [4] ("***Fastway***"), the SC observed that it is the duty of the Competition Commission of India ("***CCI***") to promote and sustain competition to protect the freedom of trade in different markets in India, in addition to protecting consumers.

# INTERPLAY BETWEEN CCI AND SECTORAL REGULATOR

The CCI is bestowed with the exclusive jurisdiction to deal with all instances of anti-competitive activities. However, over the years, there have been several key questions regarding overlap of jurisdiction between the CCI and other sectoral regulators.

The decision of the SC in the *Airtel* case is of significant import as the apex court of the country, for the first time, decided upon an issue where the jurisdiction of the CCI and a sectoral regulator appeared to overlap. In the *Airtel* case, there appeared to a clash of jurisdictions of the CCI and the sectoral regulator of telecommunications, the Telecom Regulatory Authority of India ("**TRAI**"). In this case, RJIL , a new entrant into the telecommunications market, alleged before the CCI that certain Incumbent Dominant Operators ("**IDOs**") had entered into an anti-competitive agreement to deny points of interconnection ("**POIs**") to RJIL. RJIL alleged that this would effectively block RJIL from entering the market. However, at the same time, proceedings had been initiated against the IDOs before TRAI. RJIL had alleged before the TRAI that, by denying the POIs to RJIL, the IDOs had (i) violated the mandatory provisions under the Standard of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Regulations, 2009 ("**QOS**"), and (ii) the interconnection agreements and the Unified License, which required the IDOs to provide POIs to all eligible telecom service providers. The principal questions which were raised before the TRAI for consideration were – (i) whether the IDOs were obligated to provide POIs during the test period, (ii) whether RJIL's demand for POIs was reasonable or not, (iii) whether the IDOs had provided sufficient POIs to RJIL in compliance with the license conditions, and, (iv) whether Vodafone had delayed or denied the provision of POIs to RJIL etc.

While dealing with which set of proceedings would gain primacy over the other, the SC started to examine the jurisdictions of CCI and TRAI under their respective statutes and the factual circumstances of the case. In this case, the questions which were raised by RJIL before the TRAI required the specific expert scrutiny of TRAI in light of the regulations and license agreement, since only TRAI has the jurisdiction to examine the same. As a result, the SC deemed it fit to allow TRAI to look into this issue first, before allowing the CCI to proceed with examining the merits of the case in light of the Act. The SC held that the questions concerning the finer aspects of the agreement between the IDOs were very specific jurisdictional questions that only the TRAI was fit to rule on and if the CCI was allowed to look into the matter at this juncture, it would necessarily have to overstep into the jurisdiction of TRAI.

It is worth noting that in this case, the ultimate decision of the CCI was dependent on the decision of TRAI in the first instance. The SC, in order to avoid conflicting decisions, paved the way for

TRAI to decide first. However, the SC acknowledged the fact that the CCI had the overarching jurisdiction to deal with anti-competitive activities under the Act and even if the TRAI were to find any instance of anti-competitive conduct, the ultimate power to deal with the same vested with the CCI. Thus, the decision ensured that while the CCI jurisdiction was not completely ousted but the facts demanded a scrutiny from the sectoral regulator first.

It is pertinent to point out that though this case established TRAI's right to decide the matter before the CCI, the same is not at odds with the decision passed by the Delhi High Court in the case of *Telefonaktiebolaget LM Ericsson v. Competition Commission of India* [5]. The difference lies in the factual backgrounds of both cases. In the latter decision, the proceedings of the CCI were allowed to run distinctly and concurrently from that of the patents authorities, since the two were entirely on separate legal questions under two different laws, and the outcome of one was not dependent on the other.

However, in *Airtel*, since the CCI's determination was, in the first instance, dependent on TRAI's interpretation of the IDOs' contracts, the SC bestowed primacy upon TRAI for conducting the proceedings before the CCI.

### KEY TAKEAWAYS

- In cases where the decision of the CCI is dependent on the interpretation of certain jurisdictional facts or issues which fall within the domain of a sectoral regulator, CCI should not assume jurisdiction over such an issue until the sectoral regulator disposes of the matter.

- However, if the issues pending before the sectoral regulator are distinct from the antitrust issues, the CCI can simultaneously look into the matter.

# RELEVANT MARKET

### i. Relevant market and market power

Before making any analysis of anti-competitive activities under the Act, the CCI needs to determine the relevant market in which the alleged anti-competitive conduct has taken place. The determination of relevant market is based on determining the relevant product market (i.e. all relevant products which are either competing or substitutable with the product in question) and the relevant geographic market (i.e. the geographical boundaries of the market within which all conditions of competition of the products in question are homogeneous). Although Section 3 of the Act, which deals with anti-competitive agreements, does not explicitly mention the requirement for a relevant market analysis unlike Section 4 (which deals with abuse of dominance), the same is imperative as anti-competitive agreements are also analysed on the benchmark of market power.

Keeping the notion of market power in mind, in the case of *Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Film and Television & Ors.* [6] ("***Coordination Committee***"), the SC has succinctly captured the essence of this concept by holding that market definition is 'a tool to identify and define the boundaries of competition between firms' Accordingly, the relevant market must be defined even in a Section 3 case to delineate market power appropriately. Both in the *Coordination Committee* case and the *Airtel* case, the SC acknowledged that the degree of market power which an enterprise or group wields on the relevant market in question is essential while determining contraventions of the Act, both for anti-competitive agreements and abuse of dominance.

### ii. Methods of defining the relevant market

In order to provide a comprehensive test for defining the relevant market, and especially the relevant product market, the SC in *Coordination Committee* noted the need to define a relatively narrow product market which would at most include all substitutes of the product, which a customer could potentially turn to in the face of a price increase in the original product in question. According to the SC, the process of defining the relevant market should start by looking into a relatively narrow potential product market and then be expanded to include close substitutes of the same. This test has grown to be of utmost importance, since providing a broad relevant market definition is unlikely to assist the CCI with grasping a complete picture of the degree of market power which the offending enterprises wield in the respective segment.

The SC in *Coordination Committee* was also quick to point out that the relevant market for a specific product may be defined either from the perspective of the buyer or the supplier based on which level of the supply chain is affected by the anti-competitive conduct. For instance, if the anti-competitive conduct affects the wholesale segment and not the retail segment, the relevant market shall be defined from the perspective of wholesale buyers.

**KEY TAKEAWAYS**

- The relevant product market should be defined narrowly to allow the CCI to effectively define and analyse the boundaries within which the anti-competitive conduct has taken place.
- A relevant market analysis is equally critical while assessing anti-competitive agreements as it is while looking into cases involving abuse of dominant position.

# ANTI-COMPETITIVE AGREEMENTS

Section 3 of the Act prohibits anti-competitive agreements in India. Section 3 categorizes these agreements into two types, namely:

### a) Horizontal agreements under Section 3(3) of the Act:

Section 3(3) deals with agreements which are between parties who are on the same level of the supply chain and are direct competitors of each other in the same relevant market. There is a rebuttable presumption that the four kinds of horizontal agreements enumerated under this section (i.e. agreements fixing price, allocating markets by geographical area / type of goods, limiting production / supply / technical development etc. and big rigging / collusive bidding) cause an appreciable adverse effect on competition ("**AAEC**") in India.

### b) Vertical agreements under Section 3(4) of the Act:

These are agreements which are concluded between parties who are on different levels of the supply chain. Vertical agreements are not considered to be per se violative of the Act. They are considered to be in contravention of the Act only if they have an AAEC in the relevant market. The SC has elaborately dealt with various facets of Section 3, including the overall object and coverage, burden of proof, standard of proof and concepts such as bid rigging and collusive bidding, among others. The same are discussed below.

### i. Object and coverage of Section 3

In the *Excel Crop Care* case, the SC noted the object behind prohibiting anti-competitive agreements is to ensure that consumers have adequate and affordable choices in the relevant market and that there is a level playing field for all market players to compete effectively. The SC also recognized that the purpose of Section 3 is to thwart any such anti-competitive agreement and maintain healthy competition in the market.

The SC noted that the expansive coverage of Section 3 can be seen through the fact that it couched in negative terms which clearly mandates that no enterprise or person (or group of enterprises or associations of persons) may enter into an agreement which causes or is likely to cause an AAEC in India. In *Excel Crop Care*, the SC acknowledged the same and observed that the very fact that both enterprises and persons are prohibited from concluding such agreements is testament to the broad coverage of this section.

### ii. Burden of proof

Section 19(3) [7] of the Act enumerates a number of anti-competitive and pro-competitive factors which, when weighed against each other, help the CCI decide whether an agreement has caused or is likely to cause an AAEC. However, in the case of *Rajasthan Cylinders and Containers Ltd. v. Competition Commission* *of India* [8] ("***Rajasthan Cylinders***"), the SC pointed out that since agreements under Section 3(3) are presumed to be anti-competitive, there is no need for the CCI to make a specific analysis under Section 19(3). As such the SC clarified that this presumption of AAEC of horizontal agreements under Section 3(3) is rebuttable. The burden of proof in case of agreements under Section 3(3) would shift to the opposite parties (who have allegedly entered into such agreements) to show that their conduct was not anti-competitive. In *Excel Crop Care*, the SC had also recognized that the onus was on the appellants (i.e. the parties against whom the allegations were made) to discharge their burden under Section 3(3) by justifying their conduct and showing that their conduct does not cause any AAEC in the market.

Per contra, in case of agreements not falling within the ambit of Section 3(3) and for vertical agreements under Section 3(4), where the informant (i.e. the person making the allegations) and CCI bears the burden of showing that the vertical agreement in question is causing / likely to cause an AAEC in the market in light of the factors under Section 19(3).

### iii. Standard of proof

The standard of proof, especially in case of horizontal agreements which lead to price parallelism, has been debated upon extensively by the CCI and its appellate authorities over the years. Indian antitrust authorities have often adopted the formula of looking into 'plus factors' (i.e. direct or circumstantial evidence of anti-competitive conduct in addition to price parallelism) while determining whether parallel conduct is indicative of collusion. The SC has opined in this context in both the *Excel Crop Care* case and the *Rajasthan Cylinders* case in great detail.

#### (a) Findings concerning the standard of proof in the Excel Crop Care case

In *Excel Crop Care*, an appeal was filed against a decision of the erstwhile Competition Appellate Tribunal ("**COMPAT**") holding the appellants liable of engaging in collusive tendering practices concerning tenders floated by the Food Corporation of India ("**FCI**") for the supply of aluminium phosphide tablets. The appellants were held to have quoted identical prices and jointly boycotted the 2011 tender of the FCI and were unable to prove that the same was a result of an increase in the production cost or due to a similarity in their cost structures. In light of these findings of the CCI and the COMPAT, the SC examined the question of the standard of proof in cases of parallel conduct.

The SC, in this case, echoed its agreement with the observation of the European Court of Justice ("**ECJ**") in *Imperial Chemical Industries Ltd. v. Commission of*

*European Communities* [9] (otherwise known as the "**Dyestuffs**" case), wherein the ECJ had held that though parallel conduct may not point to a concerted practice in all circumstances, it would amount to strong evidence of collusion if it leads to conditions of competition which do not correspond to the ordinary conditions of the market. The SC observed that the prior conduct of all four suppliers for a period of ten years, including for the impugned tenders in question, showed an unmistakable trend of quoting identical prices which could not be attributed to a mere coincidence, especially since the cost structures and geographical locations of all the suppliers were entirely different. The SC further noted that the decision of all four suppliers, who were the only suppliers of such tablets in the entire market, to abstain from submitting their bids also made their anti-competitive intention rather clear. On this basis, the SC confirmed the allegations of collusive bidding by the appellants.

**(b) Findings concerning the standard of proof in the Rajasthan Cylinders case**

*Per contra*, in the *Rajasthan Cylinders* case, the SC looked into similar issues of cartelization and bid-rigging by suppliers of liquefied petroleum gas ("**LPG**") concerning some tenders issued by IOCL. However, unlike with the *Excel Crop Care* case, the structure of the market, in this case, was unique, prompting the SC to exonerate the bidders despite apparent price parallelism and differences in the cost structures of the respective suppliers.

The SC noted that in this case, the structure of the market was such that the parallelism in prices was a natural consequence and the suppliers of LPG had successfully discharged their burden of proof under Section 3(3) of the Act. In this case, the SC observed that LPG in a 14.2 Kg cylinder was an essential commodity whose prices were regulated in terms of the Essential Commodities Act, 1955. In such a case, it was natural that there was a high degree of transparency and similarity in the pricing of LPG. Regional differences or differences in the cost had little to no role to play in the determination of prices.

Further, the SC found that the market, in this case, was in the nature of an oligopsony where there were a number of suppliers and only three buyers. In this case, the buyers (specifically, IOCL) exercised control over the pricing of the products supplied in the market, and any seller would be eliminated from the market if it attempted to raise the prices. Referring to the findings in *Excel Crop Care*, the SC drew a sharp distinction with the facts of this case. The SC drew attention to the *Dyestuffs* case and pointed out that while parallel conduct is strong evidence of a concerted practice, such an inference can only be drawn if the conditions of competition differ from the normal market conditions with regard to the nature of the products, size and volume of the market. Where an oligopsony is in existence, such an inference cannot be made.

Thus, through its decisions in *Excel Crop Care* and *Rajasthan Cylinders*, the SC comprehensively laid down the standard of proof for collusion in cases where parallel conduct and parallel pricing appear to exist in the market.

### iv. Bid rigging and collusive bidding

In the *Excel Crop Care* case, the SC also extensively dealt with the terms 'bid rigging' and 'collusive bidding' under Section 3(3)(d) of the Act. Section 3(3)(d) mentions both 'bid-rigging' and 'collusive bidding' as constituting two kinds of horizontal agreements under the Act for which there is a presumption of AAEC.

However, in the explanation that follows this provision, only the different methods of bid-rigging have been mentioned. In this instance, the SC dealt with the issue of whether this would lead to the implication of exclusion of collusive bidding from the purview of this section.

The SC unequivocally stated that there was no intention to exclude 'collusive bidding' from the coverage of this section. Both bid rigging and collusive bidding were terms to be used interchangeably and, as terms with analogous meanings, each of these terms could take the colour of the other.

While deliberating on these concepts, the SC was also of the view that the process of bidding would cover every stage from the notice inviting tender to the very end of the process and include all intermediate steps such as pre-bid clarifications and bid notifications.

**KEY TAKEAWAYS**

- In the case of horizontal agreements under Section 3(3), there is a rebuttable presumption of AAEC.

- Parallel conduct may be taken as strong evidence of collusion. However, it is not sufficient in itself to establish collusion in all circumstances.

- The standard of proof for establishing collusion in cases involving parallel conduct depends to a great extent on the nature of the market. In certain markets such as an oligopsony, the buyers exercise control over pricing and other conditions of competition. In such cases, price parallelism cannot be taken as proof of collusion.

**KEY TAKEAWAYS**

- Price parallelism also cannot be taken as proof of collusion in highly regulated markets where a statute governs the prices.

- It is noteworthy that as a defence strategy, one can place on record economic and market data to show that their conduct does not constitute any AAEC in the market even if the existence of an agreement is proved. The parties can also efficiencies in the market by collaboration in terms of administrative efficiencies and / or consumer efficiencies. The SC noted that alleged participants of a cartel could argue that they were dealing with a dominant buyer and hence show that their conduct did not lead to an increase in prices or an AAEC in the relevant market in India.

# ABUSE OF DOMINANT POSITION

Section 4 of the Act deals with the concept of abuse of dominant position. This section explicitly prohibits dominant entities, who are in a position to exercise significant power over the relevant market and who are capable of operating independently of market forces and their competitors, from leveraging their position in the market to indulge in anti-competitive activities. It must be noted herein that the definition of dominance under the Act is very broad and it states that enterprise who are in position of strength to enable it to (a) operate independently of the competitive forces; or (b) affect competitors; or (c) affect consumers; or (d) affect relevant market in its favour. Thus, even if one leg of the definition is met, that enterprise can be said to be in a dominant position. This has been reaffirmed by the SC in the *Fastway Case*.

Section 4 enumerates instances by which such abusive conduct may take place, either in an exclusionary manner or an exploitative manner. Such instances are:

- Imposition of unfair or discriminatory conditions in the purchase of any goods or services
- Imposition of unfair or discriminatory pricing, including predatory pricing
- Limitation or restriction of production of goods or services in the market
- Limitation or restriction of the technical development in a way that is harmful to consumers
- Denial of market access in any manner
- Making the conclusion of contracts subject to the acceptance of supplementary conditions which are unrelated to the contracts
- Using a dominant position in one market to enter into or protect another relevant market

Till date, the SC has dealt with only two cases involving an abuse of dominant position – one involving a denial of market access and another involving *prima facie* allegations of predatory pricing.

### i. Denial of market access

Section 4(2)(c) of the Act prohibits explicitly dominant entities from indulging in activities which would lead to a denial of market access in any manner to another entity. The *Fastway* case is a landmark decision concerning this provision. In the *Fastway* case, the SC noted that a group of dominant multi-system operators ("**MSOs**") holding 85% of the market share had prematurely terminated a vertical agreement with a broadcaster, which effectively hindered the broadcaster's ability to access and compete in its relevant market.

The SC deliberated upon the issues of how the words 'in any manner' under the section are to be interpreted and whether a party, who is not a competitor of the dominant entity, can be denied market access to its respective relevant market by a dominant entity which operates in an entirely different relevant market. In this context, the SC emphasized on adhering to the natural meaning of the words 'in any manner' and stated that these words are of wide amplitude and coverage. The SC implied that the words 'in any manner' are to be construed to cover all scenarios where a party is unable to gain access to and operate in its market due to the actions of the dominant party, irrespective of whether they are direct competitors. The threshold for assessing the denial of market access is of a lower than that of assessing situations where the essential facilities doctrine should apply.

This was a landmark decision as it reaffirmed the fact that dominant entities can often impact and deny market access to parties in upstream or downstream markets through their exclusionary and unilateral conduct.

### ii. Predatory pricing

Although there is yet to be a final pronouncement on predatory pricing by the SC, the SC looked into the nuances of this concept in its decision in *Uber (India) Systems Pvt. Ltd. v. Competition Commission of India & Ors.*[10] ("***Uber***"). In this case, the question of whether there was any *prima facie* merit in the allegations of abuse of dominance against Uber, was considered.

The SC noted that in the information filed by Meru, Meru had claimed that Uber had been locking drivers and car owners onto its network by providing unreasonably high incentives and discounts. The SC also specifically observed that Uber appeared to be losing Rs. 204 per trip per day which *prima facie* appeared to be with the sole intention of eliminating Uber's competitors and influencing the market in Uber's favour. The SC adopted a circular argument and noted that the very fact that Uber can lose Rs. 204 per trip for a sustained period shows that they have the ability to affect competitors or at the very least, the relevant market in their favour. The conduct of pricing so low as to incur a loss of Rs. 204 per trip, in turn, shows that they are prima facie dominant and that incurring such losses per trip may prima facie show that they engage in unfair pricing. The SC acknowledged that there was enough merit in the allegations of unfair and predatory pricing against Uber and upheld the COMPAT's decision to direct the CCI to investigate into the same. The outcome of this investigation would be very interesting since it would address fundamental principles on pricing and dominance.

# GUN JUMPING

The Indian merger control regime is suspensory by nature. Parties to a combination (i.e. a notifiable merger / amalgamation / acquisition) are not allowed to consummate the transaction till they have obtained the approval from the CCI. Earlier the merger form had to be filed with the CCI within 30 days of approval of the merger or amalgamation, or execution of an agreement for acquisition. However, the requirement of 30 days has now been removed. Nonetheless, the requirement for notifying the combination to the CCI and obtaining the CCI approval prior to consummating the transaction remains mandatory. Failure to comply exposes the parties to penalty for gun jumping.

Gun-jumping, in this context, refers to a situation where the parties to the combination consummate the combination directly without obtaining prior approval from the CCI. The same is punishable with a fine in terms of Section 43A of the Act.

The SC has dealt with gun jumping and notification requirements in great detail and laid down the law in this regard.

### i. Legislative intent behind prohibition of gun jumping

In the case of *SCM Soilfert Ltd. & Anr. v. Competition Commission of India* [11] ("**Soilfert**"), the SC aptly outlined the legislative intent behind prohibiting gun jumping. The SC highlighted that the legislative mandate of Section 6 was that every combination would have to be notified prior to entering into the same to afford the CCI the opportunity to assess whether the same was likely to have an AAEC in the relevant market. The SC also noted that if approval were to be obtained after the combination was consummated, it would defeat the very purpose and intent of the relevant provisions of the Act. Consequently, the SC held that the fact that approval had been gained subsequently by the parties from the CCI did not mean that a penalty under Section 43A would not be imposed for gun jumping. This is because there are two separate issues at play here – (i) the approval of the transaction by the parties, and (ii) the requirement for adherence to the suspensory regime of the CCI.

Even if the parties to a combination have internally approved the combination, they cannot give effect to the transaction until and unless they notify the CCI and the CCI grants approval to the proposed combination after making its own analysis. No provision for ex post facto approval (i.e. CCI approval after consummation of the combination) is envisaged under the Act.

### ii. Importance of mens rea

In the *Soilfert* case, the SC dealt with another important legal question. A question arose as to whether the 'mens rea' of the notifying party (i.e. the intention of the notifying party) while consummating the transaction was relevant to the computation of penalty in gun jumping cases. The SC affirmed that whether the notifying party actually intended to evade notification under the Act or not was immaterial to the imposition of penalty under Section 43A of the Act for gun jumping. The SC stated that 'mens rea' was a key component in determining the penalty in criminal cases. However, the same was not an essential element in a civil Act, like the Act in the present case.

### iii. Notification of interconnected transactions

In *Competition Commission of India v. Thomas Cook (India) Ltd. & Anr.* [12], the SC held that where multiple interconnected transactions formed a part of a larger composite combination, all such interconnected and related transactions were required to be notified at the time of notifying the principal combination. In this case, the SC found that several market purchases were ultimately related to the main combination and should have been notified along with the main combination. However, by consummating these market purchases prior to notifying the Commission, the notifying party had contravened the provisions of the Act.

**KEY TAKEAWAYS**

- No combination can be consummated by the parties without first obtaining approval from the CCI. An ex-post-facto approval, even if obtained, will not protect parties from being penalized for gun jumping.
- The intention of the parties in gun-jumping cases is immaterial, even if they are bona fide.
- Every single transaction which builds up to a composite combination needs to be notified to the CCI.

DUE PROCESS

When person provides information to the CCI about anti-competitive activities or the CCI takes cognizance of any anti-competitive conduct of its own volition, the CCI commences *prima facie* proceedings in the given case to determine whether the information provided calls for further investigation. Section 26 envisages two such outcomes of *prima facie* proceedings:

**1.** An order is passed under Section 26(1) if there appears to some *prima facie* merit in the allegations in the Information. The CCI directs the Director General ("**DG**"), the investigative wing of the CCI, to start a formal investigation into the matter.

**2.** An order is passed under Section 26(2) to close the case if there appears to be no *prima facie* merit in the allegations made. This order is appealable before the first appellate authority, the National Company Law Appellate Tribunal ("**NCLAT**").

The SC has debated elaborately on the nature of proceedings at Section 26(1) stage, and the following are dealt with under the following sub-heads:

### i. Nature of an order under Section 26(1)

The *SAIL* case, for the first time, outlined the general nature and scope of orders which are passed at the *prima facie* stage under Section 26(1). The SC observed that in contrast to a decision under Section 26(2) which was final in nature, an order under Section 26(1) was nothing more than an administrative direction by the CCI to one of its own departments investigate into the case. The SC further stated that an order under Section 26(1) does not lead to any closure or final determination of the rights or obligations of the party or lead to any civil consequences for any person.

### ii. Appealability of an order under Section 26(1)

In the *SAIL* case, the question of whether an order under Section 26(1) is appealable was raised. The SC concluded that an order passed under Section 26(1) of the Act is not appealable as the same does not in any way conclude any of the rights and liabilities of the parties. The same is only a consequence of an administrative direction and does not lead to any final repercussions against any party.

### iii. Right to be heard at Section 26(1) stage

Section 36 of the Act mandates that the CCI should be guided by the principles of natural justice while discharging its functions under the Act. This provision has been statutorily enshrined to ensure that the CCI acts within the contours of natural justice principles and equity. However, there are exceptions. The application of this doctrine was discussed at length in the *SAIL* case, where, in particular, the principle of 'audi alteram partem' (i.e. the right of both parties to be heard before a decision is made) was dealt with. Swatanter Kumar J. held that the right to be issued notice and heard at the *prima facie* stage could not be claimed as an absolute right.

### iv. Meaning of 'inquiry' and 'investigation'

In *SAIL*, the SC dealt with an important distinction between the terms 'inquiry' and 'investigation' in the context of Section 26 of the Act. An 'inquiry', which is defined under Regulation 18(2) of the Competition Commission of India (General) Regulations, 2009, is deemed to have commenced once the CCI provides the DG with a direction to investigate into the matter. While both terms are often used interchangeably, the SC clarified that both are different, and an investigation is merely a part of the process of inquiry. The SC stated that an inquiry continues until the final order is passed by the CCI and includes the phase after the investigation where the CCI considers the investigation report of the DG and hears objections of the parties.

### v. Scope of the investigation by the DG

In the *Excel Crop Care*, the SC elaborately dealt with the limit to which an investigation of the DG could extend. The SC bestowed wide powers upon the DG to look into all necessary facts and evidence of anti-competitive practices adopted by the parties complained against, regardless of whether the same was covered in the Information (complaint) of the informant. The SC affirmed that the DG would be well within its powers to include in its report new facts, evidence and grounds of anti-competitive conduct that come to light during the course of the investigation.

### vi. Interim orders

Section 33 of the Act bestows the CCI with the power to pass interim orders in the form of ex-parte injunctions during an inquiry if it is satisfied that an act violating Section 3 or Section 4 is continuing. Under Section 33, the CCI may pass an ex-parte injunction restraining the offending party from continuing with such an act for the duration of the inquiry.

In *SAIL*, the SC discussed the scope of Section 33. The SC held that an ex-parte injunction may be passed by the CCI only if it is was satisfied as to a contravention of the Act by the party being so restrained. The standard of recording satisfaction under this section is higher than that of Section 26(1). In order to pass such interim order the CCI would have to record a definite expression of satisfaction as opposed to a *prima facie* one under Section 26(1). In *SAIL*, the SC, however, cautioned that such injunctions should be passed sparingly by the CCI and only under compelling and exceptional circumstances.

### KEY TAKEAWAYS

- Orders passed under Section 26(1) at the *prima facie* stage are mere administrative orders which are not appealable.

- The principles of natural justice do not apply at the *prima facie* stage.

- Interim orders may only be passed in rare cases.

# SEARCH AND SEIZURE

In the case of *Competition Commission of India v. JCB India Ltd. & Ors.* [13] ("***JCB***"), an interesting question was raised about the power of the DG to seize material obtained during a dawn raid pursuant to the provisions of search and seizure under Section 41(3) of the Act read with Section 240A of the Companies Act, 1956. In this case, the CCI had passed an order under Section 26(1) of the Act after finding *prima facie* merit in the allegations of abuse of dominant position against JCB and had directed the DG to initiate an investigation. During the investigation, the Additional Director General had obtained a search warrant from the Chief Metropolitan Magistrate to search the premises of JCB in terms of Section 41(3) of the Act read with Section 240A of the Companies Act, 1956. Pursuant to obtaining the search warrant, the office of the DG seized several key documents, hard drives and laptops from the premises of JCB.

In its order dated 15.01.2019, the SC in the *JCB* case held that Section 240A does not merely deal with provisions of search but also authorise seizure. The SC emphasized that unless the power to seize was granted, a power to merely search would not be sufficient for the purpose of the investigation.

Subsequent to this decision, the office of the DG has proactively conducted several dawn raids and seized materials in order to aid their investigations.

### KEY TAKEAWAYS

- The SC held that the DG has the power to seize material during dawn raids for the purpose of investigation.

- This decision has armed the CCI with greater powers to ensure that a thorough investigation is conducted and that offending parties do not have a chance to destroy relevant records and evidence which would implicate them before the CCI.

# QUANTUM OF PENALTY: TOTAL TURNOVER vs RELEVANT TURNOVER DEBATE SETTLED

## QUANTUM OF PENALTY:
## TOTAL TURNOVER vs. RELEVANT TURNOVER DEBATE SETTLED

For several years, the CCI had been imposing penalties on offending companies which violated Section 3 of 4 of the Act based on their entire turnover. However, this led to several questions as to whether the penalty should be imposed on the entire turnover of giant conglomerates engaged in businesses in diverse sectors, especially when only one of their business units was a participant in anti-competitive practices. The judgment of the SC in the *Excel Crop Care* case was a turning point in this regard.

In the *Excel Crop Care* case, the SC relying on the decision of the Competition Appeal Court of South Africa in *Southern Pipeline Contractors v. Competition Commission* [14], held that any penalty imposed under the Act should be imposed only on the 'relevant turnover', i.e. the turnover of the specific unit or business of a multi-product company, with respect to which the violation has taken place. The SC also relied on the doctrine of proportionality to arrive at this conclusion and believed that imposing a penalty on the total turnover of multi-product companies would be grossly disproportionate to the degree of contravention.

### KEY TAKEAWAYS

- In the case of multi-product companies, the penalty should be imposed only upon the turnover of the relevant business unit of such companies for contraventions of the Act.

- This decision of the SC ensured that penalties imposed would be proportionate to the violation committed.

# IMPLEADMENT OF THE CCI IN APPEALS

## IMPLEADMENT OF THE CCI IN APPEALS

In *SAIL*, the SC explored the issue of whether the CCI should be impleaded as a party in all appeals arising out of its orders. The SC noted that any party seeking impleadment should have a substantial interest in the outcome of the proceedings and that it should be in the interest of the public to allow such an application for impleadment. According to the SC, the CCI met both these tests. The SC further noted that in *suo moto* proceedings (i.e. proceedings which were initiated by CCI on its own), the CCI should be impleaded as a necessary party. In all other cases, the CCI may be impleaded as a proper party.

This decision was a visible departure from the standard practice of quasi-judicial bodies or tribunals not being impleaded as parties in cases where appeals had been filed against their decisions.

# CONCLUSION

## CONCLUSION

In conclusion, it is pertinent to point out that antitrust jurisprudence in India owes a great deal to the pronouncements of the SC. The introduction of the present Act has been instrumental in overhauling the landscape of competition law in India from the ineffective control of the MRTP regime which did not possess the wide powers of the CCI to deal with all kinds of anti-competitive activities. It is important to note that the Act not only envisages enforcement against the antitrust violations that have already taken place but also of potential violations of the Act. Section 3 (anti-competitive agreements) and Section 6 (merger control) of the Act both envisage scenarios where there is a likelihood of an AAEC in India.

Further, it may be noted that the combination review process and the penal gun jumping provisions ensure that CCI has the power to prohibit a combination from going through if it is of the opinion that it is likely to cause an AAEC in future. This power was not bestowed upon the earlier MRTP Commission. The decisions of the SC have only reaffirmed these aspects of antitrust enforcement in India.

With newer competition issues arising due to the rapid digitization of India and the growth of e-commerce and electronic app-based services, it would be interesting to see how the SC interprets the same and expands the boundaries of competition law in India. Across the globe, specific guidelines are being formulated to deal with emerging competition issues in digital markets. Even the CCI has recently published its market study on e-commerce in India which is likely to pave the way for further regulation in this arena. It is doubtless that these issues shall eventually find their way to the SC and usher in a new era in competition jurisprudence in India.

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[1] (2010) 10 SCC 744

[2] (2017) 8 SCC 47

[3] (2019) 2 SCC 521

[4] (2018) 4 SCC 316

[5] (2016) 232 DLT (CN) 1

[6] (2017) 5 SCC 17

[7] Section 19(3) of the Act states that:
"The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:— (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; or (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services."

[8] 2018 SCC OnLine SC 1718

[9] 1972 ECR 619 (ECJ)

[10] (2019) 8 SCC 697

[11] (2018) 6 SCC 631

[12] (2018) 6 SCC 549

[13] Criminal Appeal No. 76-77 of 2019

[14] 2011 SCC OnLine ZACAC 5

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