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### Sports and Competition Law in India: The Need for a Third Umpire?

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### I. INTRODUCTION

In today's world of increased internationalization and commercialization of sports, the relationship between competition law and sports cannot be underplayed. Given the emergence and rapid growth of economic interests in sports, it certainly cannot escape the application of competition law principles. While competition law authorities in the European Union and the United States have recognized the concept of a "sporting exception" in the 20<sup>th</sup> century in order to appreciate the distinctive characteristics of sports, the ambit of such an exception is seen to be shrinking given the increasing commercialization of sports. However, there is sufficient rationale to support the sporting exception premised on the notion that sports should be treated differently from other "ordinary" industries/sectors given its special characteristics and its significant social, cultural, and recreational features.

### II. ORGANIZATION OF SPORTS VIS-À-VIS ECONOMIC DIMENSION OF SPORTS

The difficulty in distinguishing between sporting and economic facets of sports has resulted in some highly challenging questions before competition law authorities across the globe. In the Indian context, three noteworthy cases have demonstrated the troubled relationship between these two areas, marking the beginning of an intense debate in relation to the application of competition law principles to the area of sports and the unique issues that arise in this regard.

Given that sporting events or activities are typically globally or nationally organized under the supervision of a single administrative body, the use or abuse of a dominant position by such bodies is often subject to judicial scrutiny. Moreover, it has been recognized internationally that "it is not the power to regulate a given sporting activity as such, which might constitute an abuse but rather the way in which a given sporting organisation exercises such power."<sup>2</sup> The Competition Commission of India ("CCI"), the nodal enforcement authority established under the Competition Act, 2002 ("Act"), has, in its relatively nascent existence, investigated the conduct of two sports organizations: the Board of Control for Cricket in India ("BCCI") in the case of *Surinder Singh Barmi v. The Board of Control for Cricket in India*<sup>3</sup> ("BCCI case") and

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<sup>2</sup> *Commission debates applications of competition rules to sport*, European Commission press release dated 24 February 1999, IP/99/133.

<sup>3</sup> Case No. 61 of 2010. Decided on 9 February 2013. It is important to note that there was a separate dissenting order wherein the BCCI was not found guilty of abuse of dominant position. Majority order *available at*

Hockey India (“Hockey India”) in the case of *Dhanraj Pillay and Others v. M/s Hockey India*<sup>4</sup> (“*Hockey India* case”). The CCI’s order in the *BCCI* case is currently under appeal before the Competition Appellate Tribunal (“COMPAT”).<sup>5</sup>

Further, the CCI is currently investigating the All India Chess Federation (“AICF”) for allegations regarding abuse of dominance by AICF in relation to banning/threatening to ban players associating themselves with other chess associations.

### III. SPORTS BODIES AND CCI’S JURISDICTION

Sports bodies have contested that they do not fall within the purview of an “enterprise”<sup>6</sup> and are out of the CCI’s jurisdiction. In its case, the BCCI contended that it does not fall within the definition of an “enterprise” under the Act as it is a not-for-profit organization not engaged in any “economic activity.” The CCI, while addressing this issue, disagreed. It held that the act of “organizing events” (which involves grant of various commercial rights) is an economic activity since there is a revenue dimension involved in such activities, relying on the EU position.<sup>7</sup>

Previously, a decision of the Delhi High Court in *Hemant Sharma & Others v. Union of India*<sup>8</sup> had held that the CCI had jurisdiction over the AICF in response to a similar preliminary objection raised during the course of the CCI’s investigation into the AICF. The Delhi High Court’s ruling, however, was premised on the fact that the AICF levied a fee for membership and

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<http://www.cci.gov.in/May2011/OrderOfCommission/612010.pdf> and Dissenting order available at <http://www.cci.gov.in/May2011/OrderOfCommission/612010S.pdf>. By way of disclosure, the authors were involved in representing the BCCI.

<sup>4</sup> Case No. 73 of 2011. Decided on 31 May 2013. It is important to note that there was a separate dissenting order wherein Hockey India was found to be guilty of abuse of its dominant position. Majority order available at <http://www.cci.gov.in/May2011/OrderOfCommission/732011.pdf> and Dissenting order available at <http://www.cci.gov.in/May2011/OrderOfCommission/732011R.pdf>

<sup>5</sup> By way of disclosure, the authors are representing the BCCI.

<sup>6</sup> The Act defines “enterprise” as follows:

a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

<sup>7</sup> C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, 1 July 2008, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30db9364394bd21d4d03874f8a60f154d601e34KaxiLc3qMb40Rch0SaxuMbhv0?text=&docid=67060&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=807163>.

<sup>8</sup> WP(C) 5770/2011. In this case, the Delhi High Court, while dealing with a writ petition challenging CCI’s investigation in relation to an allegation regarding abuse of dominance by AICF by banning/threatening to ban chess players associating with other chess associations, held AICF to be an “enterprise” within the definition of the Act, given that AICF was charging an annual registration fee, including separate fees for participating in tournaments organized by it. Given that in the *BCCI* Case the CCI did not factually analyze this aspect, the ratio of the *Hemant Sharma* Case in relation to AICF being an enterprise should not have been blindly followed merely because both the AICF and the BCCI perform similar functions for the game of chess and cricket, respectively.

that this constituted the economic activity that brought it within the definition of “enterprise” under the Act, in contrast with the BCCI which does not levy any fee for membership.

Similarly, relying on international precedents<sup>9</sup> in the *Hockey India* case, the CCI claimed jurisdiction over Hockey India by holding that the “organization” of sporting events included economic activities such as the grant of media rights and sale of tickets which were undisputedly revenue-generating activities. The CCI noted that the “nature of the activity” would, in fact, be the yardstick to decide whether the entity was an enterprise for the purpose of the Act. On this basis, they felt that sports organizations, whether not-for-profit or otherwise, are not exempt from the application of the Act, so long as they carried on any activities that the CCI regarded as “economic” in nature.

#### IV. NATURE OF SPORTS BODIES: NATURAL MONOPOLIES

In both the *BCCI* and the *Hockey India* cases,<sup>10</sup> the CCI acknowledged the importance and necessity of a pyramidal structure of governance (i.e. where the governance of a particular sport is entrusted to a single authority or federation) for particular sports, whether on a global or a nation-wide basis, recognizing the efficiency-enhancing benefits of such a structure.

However, this pyramid structure, in essence, gives rise to a natural monopoly by the sports federation in the regulation of a particular sport as well as the organization of sporting events. Nevertheless, such a natural monopoly is essential, as having multiple bodies would: (i) lead to uncertainty in terms of rules governing a particular sport; (ii) lead to flagging interest from spectators in a particular sport, as spectators would be faced with multiple leagues, tournaments, and potentially different sets of players or teams between leagues to keep track of (as opposed to one centralized league); and (iii) result in a limited pool of players for each league, on account of clashing schedules and physical limitations.

Moreover, team loyalty is also a factor to be considered, especially in the case of non-private sporting leagues, i.e. where players are representing a particular country, state, or region as opposed to playing the sport for a private club. Further, given that sport by its very nature is competitive, commercial interests in private professional leagues are, in fact, enhanced by maintaining the pyramid structure.

#### V. RELEVANT MARKET DEFINITION

The CCI’s orders raised an abuse-of-dominance concern, questioning whether sports federations may use, or are using, this pyramidal structure to preclude third parties from setting up rival professional sports leagues.

In the *BCCI* case, the BCCI was alleged to be abusing its dominant position in relation to the grant of franchise rights, media rights, sponsorship rights, and commercial contracts (“Rights”) related to the organization of the Indian Premier League (“IPL”). Interestingly, this is one of the few instances where the relevant market definition proposed by each of the BCCI, the Director General (“DG”) (the investigative arm of the CCI), and the CCI was different.

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<sup>9</sup>*Supra* Note 7; *Minnesota Made Hockey, Inc. v. Minnesota Hockey, Inc.*, Civil No.10-3884(JRT/JJK), United States District Court, District of Minnesota and The EU White Paper on Sports (2007).

<sup>10</sup> Pertinently, majority and dissenting orders were passed in both these cases.

The scope of the CCI's investigation (as set out in its order) was the conduct of the BCCI in binding itself, under an agreement for the sale of IPL media rights, to not "organize, sanction, recognize any other private professional domestic league/event" which could compete with the IPL. The CCI questioned whether that practice resulted in denial of market access to any potential competitor of the BCCI looking to establish a competing private professional cricket league/event, thereby violating Section 4(2)(c) of the Act.<sup>11</sup>

The DG, on the other hand, examined the conduct of the BCCI in granting the various Rights to third parties and whether or not competition was foreclosed in this process. The DG took the stance that the relevant market ought to be the market for "underlying economic activities which are ancillary for organizing the IPL" given that each of the Rights was associated with economic activities in relation to the IPL.

The BCCI, by contrast, contended that the definition of the relevant market proposed by the DG was incorrect since each of the Rights was distinct. The BCCI argued that there were separate relevant markets, given that franchise rights are not substitutable with media or sponsorship rights.

Contrary to the DG's analysis, given that the CCI's scope of investigation was (inexplicably) merely media rights, the CCI's relevant market analysis was completely different and referred to the most commonly used tools such as demand/supply side substitutability, together with the small but significant non-transitory increase in prices ("SSNIP") test. It is notable that the decision did not present any empirical analysis to indicate how the SSNIP test was applied and what the conclusions of its analysis were. Instead, the CCI referred to both various industry and news reports which have shown a wide variance in the television rating points of cricketing events in comparison to other sporting events in India, as well as other entertainment programs, to show that cricket cannot be substituted with any other sport or entertainment programming.

Further, the CCI did not present or refer to any other substantial data in terms of survey of customers, media rights companies, etc. to confirm its definition of the relevant market, which is in stark contrast to the level of detail of relevant market analysis the CCI has undertaken in other cases relating to abuse of dominance, such as the early cases of *Belaire Owners' Association v. DLF Limited* ("DLF case")<sup>12</sup> and *MCX Stock Exchange v. National Stock Exchange of India Limited* ("NSE case")<sup>13</sup> as well as more recent cases such as *Prints India v. Springer India Private Limited*<sup>14</sup>. Therefore, the CCI seems to have deviated from its previous approach in defining the relevant market and applying the principles of relevant market.

As such, the CCI's order in the *BCCI* case lacked the required level of empirical analysis and adopted an overly simplistic approach to delineate the relevant market to be that for the "organization of private professional cricket leagues/events in India."

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<sup>11</sup> Section 4 (2)(c) of the Act states that there shall be an abuse of dominant position if an enterprise or a group indulges in practice or practices resulting in denial of market access in any manner.

<sup>12</sup> Case no. 19 of 2010.

<sup>13</sup> Case no. 13 of 2009.

<sup>14</sup> Case no. 16 of 2010.

Surprisingly, the CCI's analysis of the relevant market in the subsequent *Hockey India* case was different from the *BCCI* case. A key point of difference between the *Hockey India* and *BCCI* cases is that the CCI had not precisely identified the consumer in the *BCCI* case. In *Hockey India*, the CCI's analysis was more holistic and considered a plethora of factors in its assessment of dominance. For instance, the CCI observed that the sports sector constituted a "multitude of relationships" and that there are distinct consumers for different kinds of rights. The ultimate viewer is only one of the consumers to be considered.<sup>15</sup>

In contradistinction to the *BCCI* case, in the *Hockey India* case the CCI undertook a far more detailed analysis and considered it appropriate to define the relevant market on the basis of the specific allegations. These allegations were: (i) precluding hockey players from participating in the independent World Series Hockey League ("WSH") by imposing restrictive conditions for sanctioned and unsanctioned events in order to foreclose the market for rival leagues; and (ii) including unfair clauses in the Code of Conduct Agreement ("CoC") entered into between hockey players and Hockey India, which included disqualification from the national team for participation in unsanctioned events.

The CCI perhaps subjected its methodology in the *BCCI* case to closer scrutiny to arrive at a well-reasoned relevant market definition in the *Hockey India* case. Accordingly, based on the allegations, the relevant market was defined to be the "market for organization of private professional hockey leagues in India" and the "market for services of hockey players" in the *Hockey India* case.

It is worth considering that had the CCI adopted this approach in the *BCCI* case, (i.e. based on the precise allegations leveled against the BCCI), the framework of the CCI's analysis would have been the markets for each of the various Rights being granted in relation to the IPL. It can only be assumed that, in the *BCCI* case, the CCI's relevant market analysis in relation to sports organizations was too nascent, but that it evolved in *Hockey India*. Further, in concluding that cricket cannot be substituted for any other sport or entertainment event, the CCI may have been swayed by the fact that cricket is an extremely popular sport in India and, in its current form, attracts a substantial amount of commercial interest.

## VI. ASSESSMENT OF DOMINANCE: "BIG IS NOT BAD"?

While Hockey India and BCCI may be dominant, it should be noted that dominance *per se* is not a violation. Given that competition law in India has made significant progress to reflect the more reasoned approach of "big is not bad," the CCI's foregone conclusion of abuse of dominance in the *BCCI* case was ill-conceived. As stated above, a single sports regulator would be akin to a natural monopoly that could be both efficiency-enhancing and promote sport.

In its assessment of dominance in the two cases, in order to arrive at a ruling of commercial dominance the CCI observed that both Hockey India and BCCI were conferred with the two-fold role of regulation and organization. Further, membership of Hockey India and

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<sup>15</sup> This is also in keeping with the principles of relevant market definition under the Act, where demand-side substitutability is required to be considered.



BCCI in the International Hockey Federation (“FIH”)<sup>16</sup> and International Cricket Council (“ICC”), respectively, as well as the by-laws of the international apex sporting associations, were relied on to attribute dominance to Hockey India and BCCI, respectively.

Moreover, in the *Hockey India* case, the CCI adopted an application of the “effects” based test to determine the actual effect of the conduct of Hockey India. The focus in both the *BCCI* and *Hockey India* cases was the foreclosure of rival private professional cricketing and hockey leagues, respectively. Given that the relevant market analysis was detailed and well-reasoned (i.e. based on the specific allegations) in the case of *Hockey India*, Hockey India was held not to have abused its dominance.

However, the CCI’s incorrect application of the relevant market principles in the *BCCI* case unsurprisingly resulted in the misapplication of abuse of dominance principles, thereby holding BCCI to have abused its dominance in the relevant market for essentially the same conduct as Hockey India. The CCI’s order in the *BCCI* case does not throw light on whether the grant of various Rights (which was the actual scope of investigation conducted by the DG) by the BCCI resulted in abuse of dominant position.

In contradistinction to the *BCCI* case, the CCI in the *Hockey India* case was of the view that, since there was no substantive evidence to demonstrate prejudiced application of the clauses, a contravention of the Act could therefore not be proved, which is evidence of its “effects” based approach. Interestingly, the CCI noted that the restrictive conditions imposed on hockey players were, in fact, “intrinsic and proportionate” to the objectives of Hockey India, while at the same time they did not seem to have considered the possibility of any commercial justification in relation to media rights in the *BCCI* case. Despite not having found a violation of abuse of dominance, the CCI considered it appropriate for Hockey India to “put in place an effective internal control system to its own satisfaction, in good faith and after due diligence to ensure that its regulatory powers are not used in any way in the process of considering and deciding on any matters relating to its commercial activities.”

Nevertheless, the difference between the *Hockey India* and the *BCCI* cases clearly brings out the seminal role of the relevant market definition in undertaking an abuse of dominance analysis. Clarity in the relevant market, and the methodology used for defining the relevant market, would have in all probability have altered the outcome of the *BCCI* case.

## VII. THE CCI AND SPORTS LEAGUES: TIME FOR A TIME OUT?

The CCI has taken significant steps in its four years as India’s competition law regulator and has certainly proved to be a more proactive regulator than its predecessor.<sup>17</sup> However, the

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<sup>16</sup> FIH is the international governing body for the sport of hockey in India and is recognized by the International Olympic Committee.

<sup>17</sup> The Act superseded the Monopolies and Restrictive Trade Practices Act, 1969, under which the Monopolies and Restrictive Trade Practices Commission was established. Given that the MRTP Act did not allow for the imposition of penalties or grant sufficient powers of regulation, the MRTPC was never an effective regulator.

CCI is in a predicament of its own making due to its contradictory rulings. This casts aspersions on the growing body of competition law jurisprudence in India and the CCI's credibility.<sup>18</sup>

First, in evaluating the sports sector, it is vital for the CCI to adopt the concept of "specificity of sport,"<sup>19</sup> which was popularized in the European Union, in order to appreciate the distinctive characteristics of sports that distinguishes it from other industries and warrants unique treatment by competition law authorities, including the CCI.

Evidently, both the *BCCI* and the *Hockey India* cases addressed the same question in law, i.e. whether or not they had abused their dominance in their respective relevant market. In the *BCCI* case, the CCI, besides prohibiting BCCI from indulging in practices that led to foreclosure of potential competitors, imposed a penalty of INR 522.4 million for a contravention of the provisions of the Act. On the contrary, the CCI let Hockey India off with a slap on the wrist, by merely cautioning it in relation to the potential conflict between its regulatory and commercial functions. Moreover, given that the CCI held that Hockey India had not abused its dominance, there was no penalty imposed. Despite the lack of consistency, it seems clear that there is an increasing intent on part of the CCI to apply competition law principles to sports organizations and events in India.

It remains to be seen as to how the CCI will close the loop in its assessment of sports regulators. Perhaps in its assessment of dominance in relation to AICF, the CCI will adopt a well-reasoned and well-researched approach by ensuring that it does not view the sports sector in a vacuum in all contexts and identifies the consumer consistently to determine the relevant market. However, the real opportunity to resolve the confusion created by the CCI lies with the COMPAT, which is currently considering the BCCI's appeal and can provide some much-needed clarity and certainty in the application of competition law to the sports sector.

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<sup>18</sup> It is pertinent to note that this is not the first instance where the CCI has found itself in a tight spot. Earlier, the CCI was exposed to criticism in relation to conflicting verdicts on cartelization with regard to cement and tire manufacturers.

<sup>19</sup> The *EU White Paper on Sports* (2007) states that the specificity of sport has to be taken into consideration in the sense that restrictive effects on competition that are inherent in the organization and proper conduct of competitive sport are not in breach of EU competition rules, provided that these effects are proportionate to the legitimate genuine sporting interest pursued. The necessity of a proportionality test implies the need to take into account the individual features of each case.