Antitrust Chronicle

SPRING 2015, VOLUME 1, NUMBER 1

Developing Competition Regimes Evolving Perspectives

CPI COMPETITION POLICY INTERNATIONAL

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

April 2015 (1)

Defining "Enterprises" Poses a Jurisdictional Issue

Abdullah Hussain
Luthra & Luthra Law Offices

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2015© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Defining "Enterprises" Poses a Jurisdictional Challenge

Abdullah Hussain[1]

I. INTRODUCTION

The High Court in Delhi is currently inundated with petitions questioning not only the jurisdiction of the Competition Commission of India ("CCI/Commission") to adjudicate on issues ranging from intellectual property rights enforcement, to overlapping jurisdiction with sectoral regulators, to the validity of the first dawn raid conducted by the Director General's office, but also to adjudicate on the constitutional validity of the Competition Act, 2002 (Act) itself. Add to that the recent uptick in M&A transactions involving multi-billion dollars deals leading to the first 'phase II' inquiries by the CCI resulting in divestments, and it would be safe to say that the last 12 months have been very busy for the Indian competition law space.

In all the hullabaloo, there have been a few small but significant decisions passed by the Commission regarding the scope and determination of what constitutes an "enterprise" so as to fall under the Commission's jurisdiction. These decisions have been especially relevant in cases concerning government entities. The government, be it union or state, remains India's largest litigator, and several cases involving the government, through various instrumentalities, have found their way to the Commission. Many of them have been dismissed on the ground that the entity complained against did not fall under the purview of the term "enterprise." However, little attention has been paid to these decisions.

II. DETERMINING WHAT CONSTITUTES AN "ENTERPRISE"

Section 2 (h) of the Act provides that an "enterprise" includes any entity (including a department of the Government) that is engaged in any activity relating to the production, storage, supply, distribution, acquisition, or control of articles or goods, or the provision of services. But this does not include any activity of the Government relatable to the sovereign functions of the Government, including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense, and space.

The first step in the determination of what constitutes an "enterprise" thus involves an examination of whether the entity is engaged in one of the listed activities, while the second step exempts such activities if they are relatable to the sovereign functions of the state. Both steps involve determinations to be made—first, what it means to be engaged in an activity and second, in cases involving government entities, what activities are relatable to sovereign functions of the state. At times, however, the two are muddled into one.

In an early decision relating to the Department of Telecommunications[2] (relating to discriminatory licenses), the Department took the plea that the licenses it granted to telecom

[1]Partner in the New Delhi office of Luthra & Luthra Law Offices.

[2] *Internet Service Providers Association vs. Department of Telecommunication*, Order dated 29.06.2010 in Case No. 10/2009.

operators and internet service providers were in discharge of its sovereign functions, and hence did not fall under the meaning of the term "enterprise." Although the complaint was dismissed, the Commission gave no definitive finding on this point. It appears from the order, however, that the Commission found that there was no discrimination on facts, suggesting that the Department indeed constituted an enterprise; however, it had not abused its position.

In *Jindal Steel and Power Ltd. vs. SAIL*,[3] the analysis was better articulated. In determining whether the Indian Railways would fall within the term's ambit (given that in India the national railways is a monopoly and undertaken solely by the Government), the CCI considered the fact that Indian Railways was a department of the Ministry of Railways, which was specifically engaged in the provision of railway services, and therefore was engaged in an economic activity. The procurement of steel rails was therefore not relatable to sovereign functions of the state.

Although the question relating to the department was thus settled, the Ministry of Railways found itself to be the subject of inquiry in a subsequent case pertaining to discriminatory rate structures for haulage and land leased to container train operators, resulting in favorable treatment to its own public sector company. The Ministry raised the plea of sovereignty. The CCI however held that the exemption was unavailable as the issuance of rate circulars was a commercial activity and not a sovereign function.[4] The matter found its way to the High Court, which held that the activity itself was of a commercial nature, and could be performed by entities other than the state.[5] Implicit in these decisions is a finding that the Ministry is in fact engaging in an economic activity, presumably through the public sector companies that operate under its purview.

Similarly, in *Surinder Singh Barmi* vs. *BCCI*,[6] the CCI again focused on the nature of the activity in question (organization of a cricket league and sale of various rights associated with it viz. franchise rights, media rights, and other sponsorship rights) rather than the nature of the body performing the activity. The Board for Cricket Control in India ("BCCI") was held to be an enterprise despite its institutional form or the fact that it was a "not for profit" organization. The CCI noted that the BCCI performs two types of roles—as a custodian and as an organizer. While its role as a custodian may not include economic activities, its role as an organizer was not demonstrably outside the scope of economic activity.[7]

III. BROADLY INTERPRETING ECONOMIC ACTIVITY BUT NARROWLY INTERPRETING SOVEREIGN EXEMPTION

These decisions show that the Commission has been interpreting the scope of what it means to be engaged in an economic activity broadly, while interpreting the scope of the sovereignty exemption narrowly. The Commission, however, appears to have become a tad over-

---

[3] Order dated 20.12.2011 in Case No. 11 of 2009.

[4] Arshiya Rail Infrastructure Ltd. vs Ministry of Railway & Ors., Order dated 14.08.2012 in 64/2010, 12/2011 & 02/2011.

[5] Union of India vs. CCI and Ors., AIR 2012 Del 66.

[6] Order dated 08.02.2013 in Case No. 61 of 2010.

[7] These activities included sale of tickets, grant of media rights, and other revenue generating activities. However, this rationale does pose dangers. Revenue generation may not by itself be an accurate indicator of the nature of the activity.

zealous in this regard. In a complaint against the Department of Industrial Policy and Promotion ("DIPP"), regarding the policy to allow 49 percent foreign investment in the aviation sector in India, the Commission perplexingly came to the conclusion that the DIPP also constituted an enterprise in exercise of issuing this policy, which was subsequently implemented via amendments to the regulations governing investments issued by the Reserve Bank of India.[8] In an expansive statement, the Commission held that "A department of the government can be classified as an enterprise if the functions discharged by it amounts to 'control of articles or goods, or the provision of services'."[9]

Taken at face value, this statement could include every single one of the government's functions as they would all inevitably in some way control the supply of goods or services. If obtaining a license to sell tickets amounts to an economic activity[10] so would the requirement of getting a license to set up a store, employment related licenses and compliances, as well as health and safety clearances. Clearly, however, a strong argument may be made that the requirement of obtaining environmental clearance for a stipulated fee should not lead to the conclusion that the Pollution Control Board is an "enterprise" in so far as that clearance requirement is concerned. The DIPP could not be said to be engaged in an economic activity, nor the sovereignty exemption unavailable, with respect to a decision relating to foreign investment caps in a sector.

The Commission appears to have realized the expansiveness of the "control of goods or services" approach. In subsequent orders relating to the Director General of Health Services,[11] the Insurance Regulatory and Development Authority,[12] and the Commercial Taxes Department,[13] the Commission concluded that the said bodies did not constitute "enterprises," as they related to the body's regulatory functions rather than to any economic activity. In doing so the Commission again reverted to the "nature of the activity" test.

IV. APPLYING THE "NATURE OF THE ACTIVITY" TEST

However, the "nature of the activity" test too cannot be applied in a blanket fashion. In *DGHS,*[14] for example, the Commission made some broad comments focusing on the institutional make-up and the purpose for which it was established, rather than the particular activity in

---

[8] Shubham Srivastava vs DIPP, Ministry of Commerce & Industry., Order dated 08.10.2013 in Case No. 39/2013.

[9] *Id.* ¶9. The Commission relied on its earlier order dated 30.11.2011 in *Debapriyo Bhattacharya v. The Principle Secretary & Anr.*, Case No. 54 of 2011, where it held that the Secretary of the Home Department was covered within the definition of "enterprise" since the activity of granting licenses for e-ticketing for cinemas amounted to a "control over the provision of services." The order in the DIPP matter was not passed without resistance. In a dissent, one member was of the opinion that the issuance of FDI policies by DIPP could not be interpreted as an economic or commercial activity, and was a sovereign function that could not be delegated to any private entity.

[10] *Debapriyo Bhattacharya, id.*

[11] *Biswanath Prasad Singh* vs. *Director General of Health Services, Ministry of Health and Family Welfare & Ors.*, Case 20/2014, Order under Section 26(2), Order dated 23.06.2014.

[12] *Shri Dilip Modwil* vs. *IRDA*, Case No. 39 of 2014, Order dated 12.09.2014.

[13] *Red Giant Movies v. Secretary, Government Commercial Taxes & Registration Department, G.O. Tamil Nadu & Ors.*, Case 54/2014, Order dated 29.10.2014.

[14] *Supra,* note 11.

question.[15] Similarly, in *Rajat Verma vs. PWD, Haryana*,[16] the Commission focused on the overall nature and purpose for which the Public Works Department ("PWD") was established rather than the particular activity in question.[17] Such observations may lead to all functions performed by such bodies being exempt from the application of the Act.

Focusing on the nature of the body and its purpose is not the appropriate test, save as to supplement the determination of the nature of the activity in question where ambiguity may arise. As the Commission itself held in the *BCCI* case, the same entity could perform different functions—some relatable to economic activities while others not. In *PWD*, the Commission may have mixed the determination of whether the activity is an economic one with the determination of whether the activity may relate to a sovereign function.

In a recent order of February 2015, the Commission had occasion to discuss the definition of an enterprise in a matter that concerned a non-government entity, namely a truckers co-operative society.[18] Associations are normally excluded from the purview of the definition as they do not engage in any economic activity of their own, but only act as the industry's voice and interface with the government. In this particular case, however, the Commission found that the association was conducting a service on behalf of its members and being paid a commission. On this basis, the association was also held to be engaged in an economic activity and thereby constituted an enterprise.

Had a similar approach been applied in *PWD*,[19] the outcome may have been different. In floating tenders to procure the service of construction of certain roads the PWD was engaging in an economic activity regardless of the fact that it may not have been charging customers for the use of the road. In a strong dissenting note in that matter, one member did in fact remind the Commission of the need to strictly limit the application of the sovereignty exemption. Activities such as the procurements of road construction services cannot be said to satisfy the sovereignty requirement.

---

[15] For example at ¶9 the Commission states that the National Accreditation Board for Hospitals and Healthcare Providers "is a constituent board of the Quality Council of India, set up to establish and operate accreditation programmes for healthcare organizations. It has been established with the objective of enhancing health system & promoting continuous quality improvement and patient safety. The activities performed by the above said entities cannot be covered under the definition of enterprises in terms of Section 2(h) of the Act as they are not engaged in any commercial or economic activities."

[16] Order dated 12.01.2015 in Case No. 70 of 2014.

[17] At ¶8, the Commission holds that "The activities being performed by the Opposite Party No. 1 cannot be covered in the definition of 'enterprise' because it is not directly engaged in any economic and commercial activities. The role of the Opposite Party No. 1 is limited to provide infrastructural facilities to the people without any commercial consideration."

[18] *Shivam Enterprises v. Kiratpur Sahib Truck Operators Co-operative Transport Society Limited*, Order dated 04.02.2015 in Case No. 43 of 2013

[19] *Supra*, note 17.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

April 2015 (1)

Competition Law Scrutiny of Vexatious Litigation in India: Recent Developments

Ravisekhar Nair & Shivanghi Sukumar
Economic Laws Practice

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2015© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Competition Law Scrutiny of Vexatious Litigation in India: Recent Developments

Ravisekhar Nair & Shivanghi Sukumar[1]

I. INTRODUCTION

In March 2014, the Competition Commission of India ("Commission"), for the first time, initiated an investigation into the conduct of a dominant enterprise based on an allegation of vexatious/bad faith litigation. This article provides a comparison to standards for a finding of vexatious litigation in other jurisdictions, outlines core features of the order passed by the Commission finding *prima facie* that the enterprise had abused its dominance, and discusses some key issues raised by the case.

II. VEXATIOUS LITIGATION AND COMPETITION LAW

The institution of legal proceedings can result in a competition law concern where a dominant enterprise misuses the adjudicatory process to strengthen its position in the market, thereby adversely affecting the market. Competition authorities and courts in different jurisdictions have developed tests to characterize the pursuit of legal proceedings as anticompetitive or abusive. Often, competition concerns in relation to litigation pertain not only to access to justice, but also to the enforcement of intellectual property rights ("IPRs").

A. The Experience of the European Union

The seminal *ITT Promedia/Belgacom*[2] case laid down a test for determining whether the institution of legal proceedings by a dominant undertaking is abusive. The General Court, referring to the criteria laid down by the European Commission, stated that legal proceedings would be abusive where such legal action:

> (i) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition."[3] These cumulative criteria were originally set out by the European Commission, and as the General Court did not assess the correctness of these, the implication is that they are correct.[4]

The judgment demonstrates that vexatious litigation can be abusive, but only where the cumulative criteria, which constitute an exception to the right of access to courts, are fulfilled.

---

[1] Associate Partner and Associate, respectively, in the Competition Law and Policy practice of Economic Laws Practice, New Delhi.

[2] *ITT Promedia NV* v. *Commission* Case T-111/96 [1998].

[3] *Id.* at ¶55.

[4] ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW 528 (4th ed., 2011).

Although *ITT Promedia* did not concern IPRs, the European Union has recognized that cases involving anticompetitive litigation can also involve IPRs. The European Commission conducted an in-depth inquiry into the pharmaceutical sector, to examine, *inter alia*, the conduct of companies in creating artificial barriers of entry by vexatious litigation.[5] In addition to the pharmaceutical sector, the conduct of IPR-owners in the telecommunications sector has been examined from a competition law perspective.[6]

B. The Experience of the United States

The contours of vexatious litigation have been drawn out in the United States in the *Noerr-Pennington* and the *Walker Process* doctrines. The extent to which communications to the government are amenable to assessment under antitrust laws is guided by the *Noerr-Pennington* doctrine, which extends immunity to private entities seeking to influence government action, even if the intent or effect of such efforts is anticompetitive.[7]

The landmark *PREI*[8] case provides for a two-part test to qualify litigation/petitioning as sham:

1. the litigation is objectively baseless,[9] and
2. the litigation conceals a subjective intent to directly interfere with the business of the competitor through the use of the government process.[10]

The *Walker Process* doctrine establishes that proof of the assertion that patent holders obtained such patents by "knowingly and willfully misrepresenting facts to the Patent Office" would not be exempt from the application of antitrust law.[11]

Sham litigation as an exception to the *Noerr-Pennington* and the *Walker Process* doctrines are two ways in which a party's conduct in obtaining an enforcing a patent is subject to antitrust scrutiny.[12] In addition to vexatious litigation concerning patents within the scheme of the *Walker*

---

[5] European Commission, Antitrust: Commission launches sector inquiry into pharmaceuticals with unannounced inspections, Press Release, IP/08/49, *available at* http://europa.eu/rapid/press-release_IP-08-49_en.htm?locale=en.

[6] Owing to the involvement of the authors of this article in a case involving the seeking of injunctive relief by an owner of Standard Essential Patents, no comments are offered on anticompetitive litigation in the context of Standard Essential Patents.

[7] *See generally:* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf; EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 1212 (2nd ed., 2011).

[8] 508 U.S. 49 (1993).

[9] *Id.* at 60.

[10] *Id.* at 61.

[11] *Walker Process Equipment Inc.* v. *Food Machinery Corp.*, 382 U.S. 172 (1965) at 177.

[12] *See generally* Simonetta Vezzoso, *Towards an EU Doctrine of Anticompetitive IP-Related Litigation*, 3(6) J. EUR. COMPETITION L. & PRACTICE 521-535 (2012).

Process doctrine, much like the European Union the use of litigation as an anticompetitive tool in relation to IPRs has arisen in the pharmaceutical and telecommunications sectors.[13]

It is pertinent to note that the consequence of satisfying the *ITT Promedia* test is that the conduct of the enterprise is deemed to be abusive, whereas the consequence of satisfying the *PREI* test is that the conduct of the enterprise is deemed to be subject to analysis under antitrust law; in the former case, the conduct is considered to be abuse, whereas in the latter case, abuse will have to be demonstrated.

In this manner, the scope of the tests laid down in both jurisdictions is markedly different.[14] The existence of additional differences between the standards for finding litigation vexatious in both jurisdictions has been debated, such as whether vexatious litigation in the United States would apply to a pattern of litigation.[15] The overarching theme, however, is that tests for determining when the pursuit of legal proceedings by an enterprise can lead to competition law concerns have been developed in other jurisdictions.

III. THE ORDER OF THE COMMISSION IN *BULL MACHINES V. JCB*[16]

Bull Machines Pvt. Ltd. ("Bull Machines") and JCB Pvt. Ltd. ("JCB") are competitors in the market for backhoe loaders, a particular type of light construction equipment. Bull Machines' backhoe loader is styled as "Bull Smart." Alleging that Bull Smart violated its designs and copyright, JCB sought, and consequently obtained, an interim injunction order from the High Court of Delhi ("High Court"), and served such order on Bull Machines during the formal launch of Bull Smart at an exhibition for earthmoving machinery. The consequences of the order included the removal of Bull Smart from the exhibition, the stalling of operations and production of Bull Smart, and the seizure and sealing of the documents, molds, and components for Bull Smart.[17]

Subsequently, Bull Machines filed an interim application in the High Court seeking vacation of the injunction order, and submitted evidence to demonstrate that JCB obtained such order on the basis of misrepresentations and by relying on fraudulent design registrations pre-existing in the public domain. They argued that there was no similarity in the designs of Bull Smart and those belonging to JCB. During the course of the High Court proceedings, a consent order was recorded by the High Court in December 2011, by virtue of which the interim order stood suspended, and included terms that JCB was to inspect Bull Smart in order to verify that its registered designs were not infringed. However, JCB voluntarily withdrew its application for *ex-parte* interim injunction within 10 months of filing its infringement suit, without submitting a reply or report based on its inspection of Bull Smart.[18]

---

[13] For example, sham litigation in pharmaceuticals was considered in *In Re DDAVP Direct Purchaser Antitrust Litigation*, 585 F.3d 677 (2d Cir. 2009).

[14] Vezzoso, *supra* note 12 at 533.

[15] *Id.* at 534.

[16] Case No. 105 of 2013.

[17] Order, ¶2.

[18] *Id.*

Based on the above facts, Bull Machines alleged that JCB had engaged in anticompetitive practices in contravention of the provisions of the Competition Act, 2002 ("Act"). [19]

A. The Analysis and Order of the Commission

The Commission employs a three-step process in its analysis of abuse of dominance. First, it defines the relevant market. Second, it assesses the dominance of the enterprise in the relevant market. And, third, it determines whether the conduct of the enterprise falls within one of the five types of conduct deemed to be abusive under the Act.

In defining the relevant market, it was noted that no two types of construction equipment perform the same function and are not substitutable. The Commission therefore defined the relevant product market as the market for backhoe loaders. Observing that the conditions of competition for supply of backhoe loaders are homogenous in India, the Commission defined the relevant geographic market as the whole of India.

In assessing dominance, the Commission considered several factors—including JCB's network throughout the country, sales in 2011, and sunk costs contributing to entry barriers—and concluded that JCB was dominant in the market for backhoe loaders for India. It further noted that JCB, in possessing 75 percent market share, was "super dominant."[20]

In determining abuse, the Commission took note of the claims of the Informant,[21] and stated that predation through abuse of judicial process is a threat to competition, and concluded *prima facie* that JCB abused its dominant position by denying market access and foreclosing the entry of Bull Smart.[22] The Commission proceeded to pass an order under Section 26(1) of the Act ("Order") directing the Office of the Director General ("DG") to carry out an investigation and submit a report thereon.

B. Writ Proceedings Before the High Court

JCB challenged the Order vide writ proceedings[23] before the High Court, contending, *inter alia*, that the investigation interfered with the jurisdiction of the High Court. In response, Bull Machines, relying on the landmark judgment of the Supreme Court of India in *Competition Commission of India* v. *SAIL,*[24] averred that an order under Section 26(1) of the Act directing investigation is an administrative nature and is not determinative of any rights or obligations of the party, and as such should not be interfered with in writ proceedings.

---

[19] Order, ¶3.

[20] Order, ¶¶6-13.

[21] Order, ¶14.

[22] Order, ¶¶15-16.

[23] Article 226 of the Constitution of India provides for the power of High Courts to issue writs. Under writ jurisdiction, High Courts can pass writs in the nature of *mandamus, quo warranto, habeas corpus,* and *certiorari* in order to protect the rights of parties, whether granted by the Constitution of India or otherwise. Parties in competition proceedings have invoked writ jurisdiction of High Courts: for example, writ petitions have been filed before the High Courts of Delhi, Madras, Gauhati, Karnataka, Kerala, and Mizoram against certain orders passed by the Commission.

[24] (2010) 10 SCC 744.

The Single Judge of the High Court held that a substantial question of jurisdiction of the Commission had arisen, and made reference to an order of the Division Bench of the High Court in another case involving the jurisdiction of the Commission.[25] The Single Judge stated that no final order/report should be passed either by the Commission or by the DG, and that the DG required the permission of the party to be investigated prior to summoning officers stationed abroad.[26]

It is pertinent to note that this case was the first in which the DG has conducted a dawn raid. The Single Judge of the High Court, noting that the DG took "drastic action" in conducting the raid, stayed the Commission proceedings, and directed that hardware seized during the raid be kept in safe custody.[27] Arguments of both parties on the aforementioned issues are presently being heard before the High Court.

C. Comments: Core Concerns Raised by the Case

The Commission, in *prima facie* condemning the conduct of JCB, does not specifically state the actions of JCB are deemed to be abusive. A *prima facie* finding of bad faith typically would consider: (i) that the timing of the injunction order coincided with the launch of the product in an exhibition, severely impacting its goodwill; (ii) the withdrawal of the injunction order; and (iii) the alleged misrepresentation of design rights and/or fraudulent obtaining of design rights. The Order does not make reference to which of these allegations led the Commission to arrive at the *prima facie* conclusion that JCB had abused its dominant position in the market by denying market access and foreclosing the entry of Bull Smart into the market for backhoe loaders.

Additionally, there is no indication as to the circumstances in which legal proceedings are likely to be abusive or anticompetitive. The yardstick that the Commission will use for determining whether litigation is vexatious remains to be seen.

Although the Commission is only required to provide a *prima facie* determination that conduct is abusive or anticompetitive in order to direct an investigation into the matter, neither the specific activity/activities of JCB leading to a finding of contravention, nor the criteria to be satisfied for the characterization of litigation as bad faith, have been expressly stated.

Bull Machines alleges, *inter alia*, that JCB fraudulently obtained such design rights. In this light, the lack of clarity relating both to the basis of the finding and the scope of investigation directed causes concern. The validity or otherwise of the design rights is an issue that, under the statutory framework for IPR in India, can only be decided by the High Court. The mandate of the Commission may extend to the conduct of an enterprise in exercising its IPRs, but does not envision scrutiny of the IPR itself.

Even where the DG does not determine the validity of the design rights, there are several important questions that arise. Assuming the existence of the IPR, the ability of a dominant

---

[25] *Telefonaktiebolaget LM Ericsson (Publ.)* v. *Competition Commission of India*, order *available at* http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=44339&yr=2014.

[26] *Available at* http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=73033&yr=2014.

[27] *Available at* http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=197360&yr=2014

entity to seek injunctive relief to protect its IPRs is one of the key issues that the Commission will have to contend with. If the design rights are indeed valid, what are the actions that JCB can take without being subject to competition scrutiny? Given that the primary right conferred by an IPR is the right to exclude, this question is to be examined against the larger issue of when it is permissible under competition law for a dominant enterprise possessing an IPR to seek injunctive relief, without such conduct being characterized as market foreclosure. Larger still is the issue of when competition intervention in the exercise of IPRs by a dominant entity is warranted.

IV. CONCLUSION

Section 4(2)(c) of the Act prohibits dominant enterprises from indulging "in practice or practices resulting in denial of market access in any manner." This case, in condemning the use of litigation in denying market access to Bull Smart, is an effort at highlighting one of the ways in which market access may be denied. However, the Order passed by the Commission does not prescribe a *prima facie* legal standard for the characterization of pursuit of legal action as abusive or anticompetitive.

The issues to be decided in the writ proceedings before the High Court, as well as the Commission's findings, will have a significant impact on the development of the relatively new Indian competition jurisprudence as the case brings to the fore important issues pertaining, *inter alia*, to the jurisdiction of the Commission, the relationship between IPR and competition, and bad faith litigation as a new theory of harm.

COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
April 2015 (1)

Expectations from the CCI after Five Years of Existence and a Change in Federal Government

KK Sharma
KK Sharma Law Offices

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2015© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Expectations from the CCI after Five Years of Existence and a Change in Federal Government

KK Sharma[1]

I. INTRODUCTION

After a long spell of ten years and passing through phases which, sometimes, were associated with a number of scams and policy paralysis—being a reference to the fear psychosis which gripped the bureaucracy at one point of time—this year there was a change in the Indian Government at the federal level. A long marginalized right wing party, the Bharatiya Janata Party ("BJP"), under the leadership of its new dynamic leader Mr. Narendra Modi, rose to the helm—for the second time—of the Indian government.

Its first stint of governance, under the leadership of Mr. Atal Bihari Vajpayee, the flowery orator, was from 1998-2004. Interestingly, despite an economy that was doing quite well at the time of the 2004 elections, and relying on the catchy slogan of "India Shining," the party was not reelected. Either call it the innate wisdom or the fickle mindedness of the Indian electorate, the party, which headed a coalition called National Democratic Alliance ("NDA"), unexpectedly lost the elections despite there being a good number of economic performance parameters on an upswing. Mr. Atal Bihari Vajpayee, who was conferred Bharat Ratna, the highest Indian Civilian Honor by the Government of India only a couple of weeks back, was the only non-Congress party Prime Minister to have completed a full five-year term in the history of the country after independence.

This loss paved the way for a two-term stay in power for the Congress Party and its Allies, going by the name of United Progressive Alliance ("UPA"). But the Indian electorate decided to give a clear majority to one party after a rather long era (two decades) of coalition politics, an era having its own unstable dynamics.

Looking at the run up to the elections before the present Government came to power, it can be safely said that the markets were quite buoyant in anticipation. As an indication of market sentiment, the sensex (an index configured to track stock exchange movement on Indian bourses) went up, reasonably proving that the markets and the general public alike had great hopes from the new Government led by Mr. Narendra Modi. It was aptly reflected in the slogan of the incoming leadership, "Achhe Din Aane Wale Hain" (Good days are going to come).

Coincidentally, the author was a part of the event in which this catch phrase took birth, in an event in December 2013 called "Pravaasi Bhartiya Diwas 2013"—an annual event for Indian

---

[1]Chairman, KK Sharma Law Offices & ex-Director General, Competition Commission of India. For further details, visit www.kkslawoffices.com; the author can be reached on kksharma@kkslawoffices.com or kksharmairs@gmail.com.

Diaspora—where the present Prime Minister, in his capacity as the Chief Minister of the state of Gujarat, was to address the gathering. He was to speak immediately after the then Prime Minister, Mr. Manmohan Singh. Being an economist, Mr. Singh spoke at length on economic cycles—cycles being the law of nature and economics. He exhorted people not to worry as economic cycles are a reality and good tides would follow bad tides.

Being an astute politician with a way with the words, the present Prime Minister (Mr. Modi), who was the then Chief Minister of Gujarat, seized an opportunity presented by the earthy economic wisdom just handed out in good faith by the Prime Minister, Mr. Man Mohan Singh, who did not realize the devastating effect it could be put to by the following speaker.

Mr. Modi, speaking immediately after Mr. Singh, started with saying in the vernacular that he completely agreed with the Honorable Prime Minister. After pausing for a couple of seconds for good effect, he said "I agree, ache din aane waale hain (I agree, good days are going to come) …. you only have to wait for a few months." Connecting this cool and cryptic remark with the impending general elections, the audience immediately caught the import of what he was hinting at and roared with laughter. A new slogan, which was put to good effect in the election that followed, was born.

II. THE NEW REGIME'S APPROACH TO THE ECONOMY

While early in its first term, the new regime has been perceived as "market friendly." And these perceptions of market friendliness have only gone up more notches despite all attempts by the opposition to portray the present regime as favoring crony capitalism and not caring for the common man. These accusations are based on Mr. Modi's track record when he served in his earlier capacity as the Chief Minister of Gujarat, where he unleashed market forces to be a potent force of state development. No wonder all types of industry flocked to his state and its unending concessions to encourage investment.

Perhaps he believes in the philosophy that, unless there is a growing pie, it cannot be shared, whether equitably or otherwise and, therefore, the growth of the pie is as important, if not more so, than as our keenness to divide it equitably. If this proposition is believed, the second proposition is that growing the pie will be an uphill task unless the establishment is tolerant enough of or, at least, benignly disposed towards the possibilities of the agents (read the entrepreneurs) of this growth being allowed to take a part of this pie, even though their share may appear to be disproportionate in the short run.

This economic proposition may appear to be simple enough but its simplicity may be misleading when we keep in mind the long-term historic socialist leanings of the Indian State and the traditional expectations by the general masses of looking to the State for all benefits, including employment, as well as their almost genetically ingrained susceptibility to be suspicious of any activity in which the private sector is involved. To that extent, the philosophy of Prof. Ajit Singh of University of Cambridge finds an echo in the present establishment. Readers may recall that Prof. Ajit Singh strongly advocates the possibility of entrepreneurs earning some above competitive profits to help a developing country leapfrog the distance by which they have been left behind in the race towards development.

It's informative to look back at the posturing of different political figures in the run up to the election, as this provides insight into the minds of these different contenders to the top job in

one of the most vibrant democracies in the world. When all others were competing with each other to offer all kind of freebies to the electorate—like power, water, internet (free Wi Fi), waiver of debts etc.—the winner, Mr. Narendra Modi, never offered such largesse to the public.

On the contrary, he emphasized the availability of various necessities which, when added up, improve the standard of living for a nation. If these are available in abundant supply, a nation is called a developed nation, but if not available, or available only in small quantities and intermittently, a nation is called less-developed or under-developed. He defined these necessities as availability of power, infrastructure, and ease of doing business. Thus even while electioneering, he was speaking the language of competition law.

And Mr. Modi has walked the talk after coming to power. Initiating the process for such infrastructural projects as bullet trains, some cities have started to achieve those amenities that will make them modern cities. He has started "Swachh Bharat Abhiyan" to spread the word of cleanliness. So when nearly all others were offering free power, here was a candidate offering, instead, an uninterrupted supply of power. He did not talk of supplying power either at half the price or free for that matter. And this approach applied to all other basic, or basic plus, amenities (like Wi Fi)—amenities/ favors being doled out by different parties and their candidates.

Interestingly, India has long been a victim of competitive populism. There are instances galore when some goodies or the other—such as free rice, saris (a traditional woman's garment in India), power, waiver of debts, laptops, cash gifts, etc. etc.—are offered to either some segments of populations or the other and usually just prior to elections. What is surprising is not that these goodies are being offered, but that these offers actually work in a democracy.

It is not clear if all the democracies have to suffer this fate before becoming mature but, perhaps, the Indian democracy is paying a heavy price for universal adult suffrage in absence of much less than full literacy. Maybe it is due to the lack of literacy and education that the vast segments of populations can be taken for a ride by such a large number of hollow slogans and offer of freebies that cannot be produced out of thin air. Thinking minds would immediately question and not be swayed by such promises.

This lack may be why many elections have been won on misleading representations like "vital power from water was taken out by the previous regime in the form of electricity through hydro power generation upstream, which is why any water you get for irrigation is useless." Similarly, many slogans for winning elections such as "Garibi Hatao" (eliminate poverty), "Corruption free governance," etc. have remained only slogans, even after the completion of the term which was won on such slogans. Indian democracy has had to struggle with such misleading slogans almost on a daily basis. Imagine a polio immunization drive failing because of some vested interests spreading the canard that the polio drops were intended to cause infertility. In such an environment, it was indeed refreshing that a potential leadership candidate was not making such hollow promises but was offering what was eminently possible by appropriately harnessing market forces.

While offering continuous power, water supply, or good roads for connectivity what was left unsaid was the fact that availability of good quality goods was more important and realistic than just talking of providing free things—which was not possible without straining an already excessively burdened state exchequer. There is an old saying, "money does not grow on trees." It

is really difficult to believe if any sane living being does not understand that basic truth. If someone pretends otherwise, he is either insane or attempting to drive the general population insane.

III. THE COMPETITION COMMISSION OF INDIA, FIVE YEARS IN

Given this background, and with a Government that believes in market forces, the spotlight has naturally shifted to the market regulator, i.e. the Competition Commission of India ("CCI"). If we look back, the last five years have been quite eventful for CCI. From the time the CCI officials had to entertain requests for help by young students preparing for different competitive examinations, to a time when there was hardly a day when the business papers were not carrying stories on the market regulators and how their orders touched different aspects of the economy, awareness of competition law has come a long way. It has also come to command a respect of the consumer class on account of many judgments appreciating their plight and, sometimes, holding big companies accountable for their deeds.

Having begun to exercise its enforcement powers back in May 2009, the CCI has been able to touch nearly all the sectors of the economy. The journey began with the first case of FICCI Multiplex Association against the collective decision of the United Producers and Distributors Forum ("UPDF") for not supplying film prints to multiplex theatres. Along the way, the CCI has imposed penalties of U.S.$9.25 million on the National Stock Exchange (NSE);U.S.$105 million on DLF, a reality major; U.S. $1.05 billion on cement companies; and U.S.$295.5 million on Coal India Limited, a state owned enterprise.

Merger reviews are soon going to celebrate their four-year anniversary; and they have gained considerable praise from a spectrum of stake-holders by way of prompt and transparent review track records. Recently, by actually taking two mergers—one relating to pharma and the other to cement—to full Stage II reviews and clearing the reviews with modifications (as the remedies in Indian competition law are called), the CCI has shown the maturity it has achieved.

With a Prime Minister who believes in market forces, there are huge expectations regarding the Market Regulator. The functioning of the CCI in the last five years, wherein it has enforced provisions relating to anticompetitive conduct and merger reviews to varying degrees, has been commendable despite the many constraints faced by a new agency.

The new Government has shown that it means business—as far as business is concerned. For example, there was considerable uncertainty over what was being called by many as "retrospective taxation" in the aftermath of Vodafone tax matter. The Government moved quickly to generate an atmosphere of confidence by taking the exceptional decision of not appealing against the order of the Bombay High Court, which quashed the penalty imposed.

Not only is the competition agency expected to curb with an iron hand any cartelization or bid-rigging activity, but it will also have to keep a constant vigil that this forum is not abused by vested interests to settle personal scores, which can be very tricky. Expectations to successfully discriminate the vital from trivial will also be certainly very high. While it is true that not pursuing leads on cartelization may encourage anticompetitive forces to be emboldened to carry on their nefarious activities, entertaining complaints filed with ulterior motives may adversely affect the "ease of doing business" which the present government is guarding very carefully.

Optimal harnessing of market forces means first that the deviant has to be controlled and, if need be, penalized to set an example. But, at the same time, it also implies that the compliant operator be suitably protected from the malicious abuse of the process of law and rewarded for compliant behavior if, inadvertently, it gets into the cross hairs of the implementation of competition law through no fault of its own.

In a developing economy in transition, where the awareness of this new law is still growing, and where many anticompetitive conducts have been treated as simply the way of doing business, such instances may not be uncommon. In particular, there are instances of the heads of state owned enterprises ("SOEs")acting on the directions of the designated functionaries in the Government, even those these may be board-controlled enterprises in terms of company law. These board members, being appointed by the shareholders, are fully controlled by the state or its nominees. The top executives, i.e. the Chairman and Managing Directors ("CMDs") may consider it absolutely necessary to follow the directions of the owner, i.e. the State in these cases. In fact, there have been written directions to these executives to follow the instructions or else face serious action. Some of these written directions may even go to the extent of requiring complete consultation before bidding for different projects, which—strictly speaking—falls beyond the bright line in competition law. Some two years back, leading financial dailies dealt in detail with one such written direction, which had the potential of being called cartelization.

IV. CONCLUSION

The CCI's task, which is already complex, becomes even more complex when it is highly expected to neither be sparing to those who violate the law, nor too overzealous in its approach lest it should disturb economic progress by any negative sentiments. Therefore, the best course for the regulator should be to ensure compliance of the law while evoking caution, but not fear, while dealing with the realities of the economy. And it will need to remember that the economy has been in the tight grip of the State, with many state-controlled giants still holding sway despite appearing to be legally independent enterprises. A tough job indeed!

CPI Antitrust Chronicle
April 2015 (1)

An Introduction to Iranian Competition Law and Policy

Mina Hosseini
Shahid Beheshti University

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2015© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

An Introduction to Iranian Competition Law and Policy

Mina Hosseini[1]

"

I. INTRODUCTION

Competition law is attracting considerable interest in developing countries because of their desire for economic development and competitive markets. Few studies have been published about Iranian Competition Law and several comparative law studies have found that Iran does not have a competition law, competition authority, or the merger control regime. This perception is due to two reasons. The first is that, even though historically in Iranian law there had been some provisions regarding competition law and unfair competition, until 2007 Iran didn't have a competition act. The second reason is, notwithstanding the fact that Iran approved a competition law in 2007, this act was part of another act regarding privatization and remained hidden.

So this perception is false. This article presents the competition law provisions of Iran, especially the Act of the execution of the General Policies of article 44 of the Constitution (2007) ("the Act"), and uses a comparative study method. The European Union has one of the most valuable and practical competition laws in the world. Many countries, including Iran, have been inspired by European competition law and policy, and many acts are modeled upon European competition provisions. This article examines the similarities and differences between TFEU and the Act.

This article is divided into three sections. The first section gives a brief history of competition law in the Iranian legal system. The second section examines the general rules of the Act, including objectives, personal application, unilateral anticompetitive conducts, collective anticompetitive conducts, and mergers and acquisitions. In the third section, we examine the competition council—its role in Iranian competition law, members of the council, duties and authorities of the council, sanctions that council can impose—and the Retrial Board, which has been established to review the competition council decisions.

II. THE HISTORY OF COMPETITION LAW IN THE IRANIAN LEGAL SYSTEM

Iran, like many other developing countries, until recently did not have a specific competition act. However, historically there were some provisions in different acts regarding competition law issues. Article 244(A) of the abrogated Penal Code of Iran[2] (1925), Articles 1[3]

---

[1] Shahid Beheshti University, Faculty of Law, Tehran, Iran. I would like to thank Dr. A. R. Ghadak for his support. Without his help, this work would never have been possible.

[2] "Unfair competition is forbidden and its perpetrator shall be punished by three to six months of imprisonment and payment of a fine of between 1000 rials and 5000 rials or one of these punishments."

[3] "Any person who, without legal authority, intentionally or as a result of carelessness inflicts an injury or loss to body, health, property, freedom, dignity, commercial reputation or any other right created for individuals by law,

and 2[4] of the Civil Responsibility Act (1960), Article 64[5] of the Electronic Commerce Act (2003), Article 133 of the bill of amendment of commerce code[6] (1969), and the Paris Convention for the Protection of Industrial Property (1833) of which Iran is a member, are some examples of Iran's competition law provisions before 2007. However, most of these articles concerned unfair competition.

After the 1979 revolution and the eight-year war, the state-owned sector expanded rapidly. In this situation, there was no need for competition law. Further, the constitution that was adopted contained many critical views towards the private sector. According to article 44:

> The economy of the Islamic Republic of Iran is to consist of three sectors: state, cooperative, and private, and is to be based on systematic and sound planning. The state sector is to include all large-scale and mother industries, foreign trade, major minerals, banking, insurance, power generation, dams and large scale irrigation networks, radio and television, post, telegraph and telephone services, aviation, shipping roads, railroads and the like; all these will be publicly owned and administered by the State. The Cooperative Sector is to include cooperative companies and enterprises concerned with production and distribution, in urban and rural areas, in accordance with Islamic criteria. The private sector consists of those activities concerned with agriculture, animal husbandry, industry, trade, and services that supplement the economic activities of the state and cooperative sectors. Ownership in each of these three sectors is protected by the laws of the Islamic Republic, as far as this ownership is in conformity with the other articles of this chapter, does not go beyond the bounds of Islamic law, contributes to the economic growth and progress of the country, and does not harm society. The [precise] scope of each of these sectors, as well as the regulations and conditions governing their operation, will be specified by law.

Article 43 of the Constitution also discusses competition law issues. This article presents impositions, including "The prohibition of infliction of harm and loss upon others, monopoly, hoarding, usury, and other illegitimate and evil practices…"

Article 81 of the Constitution is another example of a clear and strong tendency towards nationalization and the exclusion of foreign participation in the local economy.[7] It reads as follows: "The granting of concessions to foreigners for the formation of companies or institutions

---

which causes tangible or intangible loss to another persons, shall be responsible for the payment of compensation for the damage arising out of his act."

[4] "Where the act of the party inflicting the injury or loss has resulted in either tangible or intangible damage to the injured party, the court, after trial and establishing the facts, shall issue a judgment against him to pay compensation for the said damage."

[5] "In order to protect legitimate and fair competitions in electronic transactions, illegal acquisition of trade or economic secrets of agencies and institutions or the disclosure of such secrets to third parties in electronic environment is deemed an offence and the offender will be sentenced according to this Law."

[6] "The directors and the managing director shall not be allowed to conclude transactions identical to the transactions of the company and which are considered to compete with the company. If any director, acting in contradiction of the purport of this article, inflicts a loss to the company by his violation, he shall be held responsible to indemnify the company's losses. The losses mentioned in this article purport actual losses incurred or reductions in profit."

[7] MAHER M. DABBAH, COMPETITION LAW AND POLICY IN THE MIDDLE EAST (2007).

dealing with commerce, industry, agriculture, services or mineral extraction, is absolutely forbidden."

However, after many debates over the years among economists and lawyers about productivity and the efficiency of a state-dominated economy, Iran's economic structure has begun to change and a privatization process has been initiated. Although there were privatization goals in the First Five-Year Development plan (1989-1993), until the Third Five-Year Development plan (2000-2004) the privatization process hadn't been initiated. In this last plan, there were rules about state-owned enterprises, privatization (chapter 2), monopolies, and the promotion of competition in economic activities (chapter 4).

In 2004, The Expediency Council[8] offered a new interpretation of the Article 44 of the Constitution and the Supreme Leader approved it as a new policy.[9] This policy led to a law regarding privatization that also has some provisions about competition. The Act of "Execution of the General Policies of Article 44 of the Constitution" ("the Act") was adopted in 2007.

III. GENERAL RULES OF THE ACT

The Act was modeled upon EU competition law, although in some provisions there are major differences.

Understanding this Act is the key to understanding the current situation of the Iran's economy. The Act consists of ten chapters; chapter nine is devoted to competition law issues. Unlike other legal systems that keep competition acts as separate laws, competition rules in Iran are considered as part of the privatization act. These issues (privatization and competition) were combined in order to facilitate economic restructuring.[10]

It is remarkable, however, that the Iranian lawmakers did not consider the fact that, after completing the privatization process and assigning ownership of state-owned enterprises, the privatization act would be useless. Therefore, in the future, the Competition Council won't be able to administer an applicable law.[11]

A. Objectives

The title of the ninth chapter is "facilitating competition and prohibiting monopoly." The Act has two main objectives and other objectives (including consumer protection and efficiency) are generally considered to be secondary. But some researchers believe that efficiency is one of the main objectives of the competition policy of Iran.[12] In other provisions, Iranian lawmakers do regard efficiency as an objective.

---

[8] Expediency Council was created in 1988. It works as a mediatory body when there is a dispute between Parliament and the Council of Guardians.

[9] H. RASTEGAR & A.OMIDVAR, IRAN PRIVITIZATION PERFORMANCE REPORT (2011).

[10] MEHDI RASHVAND BOUKANI, COMPETITION LAW IN FEGH, IRANIAN LAW AND EUROPEAN UNION LAW (2010).

[11] BEHNAM GHAFARI FARSANI, COMPETITION LAW AND ITS CIVIL REMEDIES (2014).

[12] M.H. Sadeghi Moghadam & B. Ghafari Farsani, *The Soul of Competition Law, A Comparative Study on Objectives of Competition Law*, 75(73) JUDICIARY'S L.J. 113-146 (2011); Boukani, *supra* note 10; S.M. Ghamami & M. Esmailee, *A Comparative Study OF Competition Law in Iran and France*, ISLAMIC L. RESEARCH J. (2010).

For example, consider the general policies of Article 44 of the Constitution of the Islamic Republic of Iran, which was endorsed in 2006 by the Leader of the Islamic Republic of Iran. These policies are intended to achieve the following objectives:

- Accelerated growth of the national economy;
- Promotion of a broad-based public ownership to achieve greater social justice;
- Enhancing the efficiency of economic enterprises and productivity of human and material resources and technology;
- Enhancing the competitive capability of the national economy;
- Reducing the financial and administrative burdens imposed on the government because of its controlling role in economic activities; and
- Increasing the general level of employment.[13]

In comparison with European Competition Law,[14] it seems that the consumer protection is not one of the main objectives of Iranian Competition Law.

B. Personal Application

The first question when looking at the application of any competition law is: Who is bound by this law? Article 101 of the Treaty on the Functioning of the European Union ("TFEU")[15] states that:

> The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...

Although the TFEU does not define "undertaking," over the years the European Commission and European lawyers have defined this concept.[16] The European Commission has stated: "The functional concept of undertaking in Article 85 (1) covers any activity directed at trade in goods or services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to earn profits.[17]"

Returning to Iran, Article 43 of the Act states that: "All legal and real entities from the public, government, cooperative and private sectors will be subject to articles of this chapter." In Article 1 (4) of the Act, an entity is defined as an "economic unit involved in producing goods or providing services as that can be either a legal or natural person."

---

[13] *The general policies of the Article 44 of the Constitution of the Islamic Republic of Iran* (2006), *available at* http://www.en.ipo.ir/index.aspx?siteid=83&pageid=822 (last accessed Dec. 31, 2014).

[14] Jules Stuyck, *EC competition law after modernisation: More than ever in the interest of consumers*, 28(1) J. CONSUMER POL'Y, 1-30 (2005).

[15] *Official Journal,* 115, 09/05/2008 P. 0088 – 0089.

[16] DAVID VAUGHAN, EU COMPETITION LAW: GENERAL PRINCIPLES (2006).

[17] 89/536/EEC: Commission Decision of 15 September 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.734 - Film purchases by German television stations) OJ L 284, 36-44 (3.10.1989).

However, this article excludes distribution entities without any reason. This could potentially lead to some problems. The first draft of the Act proposed by the Ministry of Commerce included distribution entities in the definition, but it was deleted later.[18]

One main issue in competition law is how to treat governmental-owned entities or governmental-linked companies, especially when they are lead players of a market and their monopolistic situation harms competition. Fortunately, governmental entities are not excluded from the scope of the Act, unlike in competition acts of other Middle Eastern countries (including Saudi Arabia, UAE, Qatar, and Iraq) that exclude governmental entities. However, although state-owned entities are within the scope of this Act, after eight years there are still major monopolies in different markets.[19]

Similar to the EU Commission's notice about its de minimis rule,[20] Article 50 of the Act follows a similar view as individuals who supply retail goods or services are excluded from the scope of this chapter. The article reads: "Guild members subject to the Guild Organization Act who are engaged in Small-scale supply (retail sale) of goods or services will be an exception to the chapter."[21]

C. Unilateral Anticompetitive Conducts

The provisions governing unilateral anticompetitive conducts are found in Article 45 of the Act, which forbids "The following acts which hinder competition," including:

1. Hoarding and refusal to enter into transactions,
2. Discriminatory pricing,
3. Discrimination in trade conditions,
4. Aggressive price setting,
5. Misleading comments,
6. Forced sales or purchases,
7. Supplying substandard goods or services,
8. Intervening in the internal affairs or dealings with a rival company,

---

[18] Mahmoud Bagheri & Behnam Ghafari Farsani, *The Scope of Application of Competition Law: Persons Covered by Rules*, 6517 IRANIAN J. TRADE STUDIES, 87-113 (2013).

[19] For example, in the automotive industry, few governmental or semi-governmental companies are active in the market. There were some privatization plans for offering the shares of these companies through the stock exchange. In 2010 18 percent of the shares of IranKhodro, one of the largest companies of the market, was offered through the stock exchange. The buyer of these shares was the cooperative organization of IranKhodro employees. Many accused the winner of collusion and the Competition Council wanted to investigate the validity of the transaction but the contract was canceled. Rastegar & Omidvar, *supra* note 9.

[20] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014).

[21] The Act of amendment of Guild Organization Act (2013) requires retailers' commitments towards consumers. This act offers definitions for overcharging, dishonesty in dealing, hoarding, smuggled goods, not adopting pricing requirements, and not exercising hygienic and technical instructions. Specific bodies are established for the violation of the provisions of the act.

9. Abusing a dominant economic condition,
10. Restricting resale prices, and
11. Unauthorized professions, abusing information and positions of persons

Although Article 45 was modeled on Article 102 of the TFEU, there are major differences between them. The most important difference is the scope of the article. Article 102 states that: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States." The aim of Article 102 of TFEU is to prevent abusing a dominate position and protecting the market against firms with monopolistic market powers.[22]

Compared to Article 102 of TFEU, Article 45 of the Act contains limitations on special conduct of every entity in the market—not just entities which hold a dominate position. In this article, abuse of a dominate position is one example of a unilateral anticompetitive conduct.[23]

The first sentence of Article 45 defines: "The following acts which hinder competition." Article 1 (20) defines this situation as "sabotage in competition:"

> Sabotage in competition refers to the cases which lead to monopoly, hoarding, and economic corruption harming the public, centralization and the distribution of wealth by placing it at the disposal of certain people or specific groups, reducing skill and innovation in the community and/or permitting economic domination of foreigners over the country.

As we can see, Article 1(20) is not clear. Iranian lawyers and researchers have expressed many critical views towards Article 45. They believe that this article must be amended because it's against freedom of contracts, plus it changes the principles of civil law and contract law.[24] Article 45 also has some sections that are irrelevant to competition law e.g., section G, E and K—these sections relate to unfair competition.

D. Collective Anticompetitive Conducts

In Article 44, The Act imposes provisions regarding collective anti-competitive conducts. This article defines collusion as a wide concept, including agreements. Article 44 does not differ between horizontal and vertical agreements, and it seems that it is the duty of the Competition Council to define these kinds of agreements.

Article 44 of the act reads as follows:

> Any collusion among persons through (written, electronic, verbal or practical) contracts, agreements or accords resulting in one or multiple effects mentioned below that will obstruct competition is prohibited:"

---

[22] FRANCESCO RUSSO, MAARTEN PIETER SCHINKEL, ANDREA GÜNSTER, & MARTIN CARREE, EUROPEAN COMMISSION DECISIONS ON COMPETITION: ECONOMIC PERSPECTIVES ON LANDMARK ANTITRUST AND MERGER CASES (2010).

[23] Reza Maboudi Neishabouri, *Discriminatory Contracts that Lead to the Distortion of Competition: A Comparative Study of the Iranian, U.S. and E.U. Legal Systems*, 20(3) ENCYCLOPEDIA OF ECONOMIC RIGHTS, 135-165 (2013).

[24] BEHNAM GHAFARI FARSANI, COMPETITION LAW AND ITS CIVIL REMEDIES (2014).

- Specifying prices for the purchase or sale of goods or services and the process of determining these prices in the market either directly or indirectly.
- Restricting or controlling the amount of production, purchase, or sale of goods or services in the market.
- Imposing discriminatory conditions in identical transactions with different trading partners.
- Having the trading party conclude a contract with a third party or dictating contract terms to them.
- Conditioning the conclusion of the contract on an acceptance of supplementary commitments by other parties that, based on trade norms, have nothing to do with the contract.
- Dividing or giving shares in the market for goods or services between two or more persons.
- Restricting market access of those not signatory to the contract, agreement, or accord.

  Note—Contracts between workers' or employers' organizations to decide wages and benefits will be subject to the labor law.

Article 44 is modeled upon Article 101 of TFEU, although there are some differences between them. One of the differences is exemptions. In Article101, there are exemptions as follows:

> 101(3): The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> - any agreement or category of agreements between undertakings,
> - any decision or category of decisions by associations of undertakings,
> - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>   - impose on the undertakings concerned restrictions, which are not indispensable to the attainment of these objectives;
>   - afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Unlike Article 101, Article 44 of the Act doesn't mention any exceptions and some researchers believe that omitting these makes this article imperfect.[25]

Another difference between the two articles is the concept of "concerted practices." Article 44 does not talk about the concerted practices, unlike Article 101 of TFEU.

[25] Boukani, *supra* note 10; M. Shams. Norouzi, *Collusion Between Undertaking in Perspective of The EU and Iranian Competition Law*, 14(56) IRANIAN J. TRADE STUDIES, 87-117 (2010).

E. Mergers and Acquisitions

Historically, competition authorities seek to control or prevent mergers and acquisitions that have a negative effect on competition and harm market activities. Competition provisions of many countries contain mandatory pre-merger systems. Competition authorities handle merger control in each country, e.g., in the European Union the Competition Directorate General of the European Commission as well as competition authorities in Member States have the power and duty of controlling mergers. The first attempt by the European Commission to enforce merger control in Europe was in the *Continental Can* in 1972. In 1989 the first "Merger Control Regulation" was approved. Since then, the European Commission has made over 3500 decisions regarding mergers.[26]

Iranian lawmakers define "undertaking" in Article 1 (4) and "company" in Article 1 (5).[27] Article 1 (16) prefers to use the term "company" instead of "undertaking." This article reads as follows: "Merger is a process under which one or several companies do away with their legal personality to form a new entity or join other legal bodies."

Article 48 of the Act defines clear provisions regarding mergers. Mergers are allowable; but, in exceptional circumstances, mergers need to be controlled by the competition authority. Article 48 prohibits the merger of companies or firms in the following cases:

- When prices of goods or services increase unconventionally as a result of the merger.
- When the merger will lead to extreme centralization of the market.
- When the merger will lead to the establishment of a controlling firm or company in the market.

  Note 1– Mergers will be allowed when the merger is the only way to prevent firms and companies from ceasing activity or maintaining their access to technical know-how, even though the merger will result in paragraphs (3) and (4) of this article.

  Note 2- The scope of extreme centralization will be specified and announced by the Competition Council."

The Act does not define acquisition. According to Article 47, "No legal or real entity will be authorized to own capital or share of other companies or firms in a way that would hinder competition in one and/or more markets." However, there are some exceptions:

- Ownership of shares or capitals by a broker or the like that is engaged in the purchase and sale of notary bonds. This will be in effect as long as s/he has not used the voting rights of their shares to hamper competition.

- Enjoying or securing mortgage rights of shares and capital of companies and firms active in a market for a good or service on condition that possession will not lead to owning voting rights in companies or firms.

[26] Russo, et al., *supra* note 22.

[27] "Company" is a legal person set up on the basis of trade law or special applicable law.

- If share or capital is owned under emergency situations, on condition that the Competition Council is informed of the issue within one month from the ownership and that ownership will not be maintained longer than the time limit set by the Council."

Article 49 of the Act stipulates that:

> Firms and companies can ask the Competition Council whether their actions are subject to articles (47) and (48). The Competition Council will have the responsibility to investigate the cases within a maximum of one month from receipt of due request(s) and inform the applicant of the result in a written way or by sending a reliable message. If the inquiry related actions that are announced that are not subject to articles (47) and (48) and if no response is received from the Competition Council within the specified time, the actions will be deemed proper.

The Act, in Article 49, uses the verb "can" instead of "shall." This means that asking the Competition Council for clearance is not mandatory; therefore Iranian competition law has a voluntary regime of merger control. Some researchers believe that when notification is mandatory, it is more efficient.[28]

Finally, whereas in other legal systems mergers and acquisitions are under the same control regime, Iranian competition law has two different approaches towards mergers and acquisitions without any specific reason.

IV. COMPETITION COUNCIL

Under Article 53 of the Act (2007), a Competition Council was formed to achieve the objectives of chapter nine of the Act. The creation of this council is one of the major developments in the history of competition law in Iran, although some concerns still exist.

One of the major concerns about the Competition Council is the problem of independence. Many believe that "the most effective bodies for the enforcement of competition law are autonomous and the quasi-autonomous ones that are independent from the government."[29]

Although Iranian law stipulates that the Competition Council is to be independent, according to UNCTAD, "any assessment of the independence of the competition authorities must necessarily consider both de facto independence (what competition exists in reality) and de jure independence (what is reflected in the statutes)."[30] The Competition Council is not really an independent body as it is semi- governmental e.g., the budget of the Council is provided by the government and the president of the council is changed after the presidential election. According to the OECD rules, these are negative points regarding independence of a Competition Council.[31]

---

[28] Elena Carletti, Philipp Hartmann, & Steven Ongena, The economic impact of merger control: what is special about banking? (2007).

[29] UNCTAD, Independence and accountability of competition authorities (2008).

[30] *Id.* at 4.

[31] Tay-Cheng Ma, *Competition authority independence, antitrust effectiveness, and institutions*, 30(3) Int'l Rev. L. & Econ., 226-235 (2010); Davoud Hadifar, Legal Regulatory Agencies (2009).

A. Members

Article 53 of the Act imposes some provisions regarding the composition and the conditions of selecting members, as follows:

- Three members of parliament from the economic, programs and budgets, and calculations sections of the Industries and Mines Commissions; one person from each of these are selected as observers by the Islamic Parliament.
- Two judges from the Supreme Court, as selected by the Chief of Judiciary.
- Two prominent economic experts, as proposed by the Minister of Economic Affairs and Finance and by the President's decree.
- A prominent lawyer familiar with the economic rights, as proposed by the Minister of Justice and by the President's decree.
- Two experts in trade, as proposed by the Minister of Commerce and by the President's decree.
- One expert in industry, as proposed by the Minister of Industries and Mines and by the President's decree.
- One expert in infrastructure services, as proposed by the President of Management and Planning organization and the President's decree.
- A finance expert, as proposed by the Minister of Economic Affairs and Finance and by the President's decree.
- One person selected by the Iranian Chamber of Commerce, Industries and Mines.
- One person selected by the Islamic Republic of Iran Central Chamber of Cooperatives.

According to the Article 53:

> The president of the council is selected among the economic experts of the council. After proposing by the council members, he/she is appointed by President's decree. Members of the Competition Council must have Iranian citizenship and be at least 40 years old. Having a valid doctorate degree for the experts in law and economics and at least a bachelor degree for the experts in commerce, industry, financial and infrastructure services is required.

"Not having convictions mentioned in Article (62) of the Islamic Penal Code or definite convictions to the bankruptcy to the fault or fraud" is also another condition stated in Article 53. "Having at least ten years of useful and relevant work experience and not having definite police records" are other requirements for becoming a member in Competition Council.

B. Duties and Authorities

According to Article 58 of the Act, the Competition Council, in addition to the points mentioned above, has the following duties and authority:

- Identification of instances of anti-competition procedures and exemptions covered by this law and making decisions on exemptions as mentioned in the law;

- Assessment of conditions and specifying boundaries of goods and services markets in connection with articles 44 to 48;
- Providing consultation to the government to draw up necessary bills; and
- Ratification of guidelines on price adjustments, amounts, and conditions of access to monopolized markets of goods and services, in each case in line with related regulations.

Article 60 of the Act also stipulates some provisions regarding the authority of the Competition Council for inspection and research.

The Competition Council in Iran is a newly established authority. Because of the ambiguities of the Act and differences regarding the interpretation of these provisions, some problems in defining the power and duties of the Council still exist.

Beside the Competition Council, there are some sectoral regulators—such as The Communications Regulatory Authority—that have specific duties according to the relevant provisions. In recent years, these regulators and Competition Council have been involved in some legal disputes.

C. Sanctions

It is crucial to note that, in comparison with some countries where the competition authority does not have power to impose fines, Competition Council is empowered to autonomously impose fines and other remedies for infringements of competition law. According to the Article 61 of the Act, "If the Council proves after receipt of complaints or conclusion of necessary investigation that one or more than one case of anti-competition procedures per articles (44) and (48) of this law have been enforced by a firm, it can make one or more than one of the following decisions:

- Order cancellation of any contract, agreement, and understanding that incorporate anti-competition procedures per articles (44) to (48) of this law.
- Order the parties reaching accord or relevant accords to stop continuing intended anti-competition procedures.
- Order the stoppage of any anti-competition procedures and their repetition.
- Order general information dissemination in order to make market more transparent.
- Order the removal of directors that have been elected contrary to regulations of Article (46) of this law.
- Order ceding shares or capital of firms or companies secured contrary to Article (47) of this law.
- Mandating suspension or ordering annulment of any sort of merger deemed contrary to Article (48) of this law or mandating the disintegration of the merged companies.
- Order the return of extra income or confiscation of properties secured through anti-competition procedures per articles (44) to (48) of this law as determined by competent judicial experts.

- Order the firm or company not to be active in any specific field or region or special region.
- Order the amendment of corporate by-laws or notes of the general assemblies or board of directors of companies, or require the government to amend the articles of association of public sector companies and institutions.
- Mandate firms and companies to observe minimum supply levels or price ranges under monopolized conditions.
- Set a cash penalty of ten million rials (10,000,000) up to one billion rials (1,000,000,000) in cases of violation of prohibitions envisioned in Article (45) of this law."

Iranian law prefers to use "cancellation" instead of "voiding" without specific reason. "Cancellation" usually is used for contracts, while for agreements and understandings it seems that "voiding" is preferable. Furthermore, according to the Iranian Civil Code, a void contract is invalid from the outset; however, cancelling the contract doesn't have such the same effect.[32]

D. Retrial Board

According to the Article 63 of the Act "Based on Article (61), decisions of the Competition Council can be reviewed within 20 days from the notification to the beneficiary as per Article (64) of the law. The period will be two months for those living abroad. In cases where the decision is not reviewed in the period under study and in cases where the Council's decisions are not confirmed by the Retrial Board, the decisions will be final. In cases where the Council's decisions are deemed generally in the view of the Council, they shall be published in one of the mass circulated dailies with the losing party bearing the expense once they become final."

Article 64 also imposes some provisions regarding the location, the composition, the conditions of elections, and the type of decisions made by the board:

> The board is located in Tehran. The Retrial Board consists of three judges appointed by a decree by the Judiciary Chief. They are the State Supreme Court judges. Two economic experts proposed by the Minister of Economic Affairs and Finance, and two commercial, industrial and infrastructural affairs experts jointly proposed by ministers of Industries and Mines and Commerce, are the other members of The Retrial Board. Members of the Retrial Board should have at least 15 years of experience in a related field. Decisions of the Retrial Board will depend on majority members' approval but the Retrial Board's verdict on decisions relating to Article (61) of the Act will be effective with the consent of at least two of the judges of the Board.

According to the Article 63-3(C), "The Retrial Board can reject the Council's decisions or accept them as they are or make them lenient or amend them if required or make other decisions independently." As article 64-3(D) stipulates, "the Retrial Board decisions will be final and binding."

---

[32] Boukani, *supra* note 10.

As we mentioned above, only the Competition Council's decisions based on the article 61 are reviewable. It seems that the Retrial Board and Competition Council are quasi-judicial bodies and do not follow the mandatory procedural requirements of the courts.

One of the most important concerns about the Act is that the Iranian law does not anticipate a judicial control mechanism over Council decisions. In some countries, judicial review is a very strict control over the decisions of a competition authority. We believe that the structure of Retrial Board is ambiguous and the Act should be amended to enforce competition law efficiently.

V. CONCLUSION

The evidence from this study suggests that, although there are some problems regarding the enforcement of competition rules in Iran, having a competition law and policy is a big step for a developing country. Compared with the European Union, with its long history of competition law, there are some challenges in enforcing competition law in Iran. Some of these challenges are as follows:

- The Competition Act in Iran is a part of the privatization act, but after completing the privatization process, the privatization act will be useless. Having a separate competition act is preferable; therefore, the Iranian competition provisions need to be amended.
- The objectives of the ninth chapter of the Act are "facilitating competition and prohibiting monopoly." According to Iranian lawyers, efficiency should be an additional goal of competition law. Consumer protection is not one of the main objectives of Iranian competition law.
- Article 1(4) of the Act defines an entity as an "economic unit involved in producing goods or providing services, which can be either a legal or natural person." This article excludes distribution entities without any specific reason.
- In comparison with other Middle Eastern countries, the Iranian competition act seems more efficient because government entities are not excluded from the scope of the Act.
- Compared to the article 102 of TFEU, Article 45 of the Act contains limitations on special conduct of every entity who holds a dominate position. The approach offered by Article 102 of the TFEU is preferable.
- Article 44 of the Act is modeled upon Article 101 of TFEU; however, Article 44 does not mention the same exceptions, which makes this article imperfect.
- Because of using the verb "can" instead of "shall" in Article 49, we can say that Iranian competition law has a voluntary regime of merger control. This approach needs to be amended because a mandatory regime is more efficient.
- Because of some factors such as its budget and members, it seems that the Competition Council is a semi-governmental body; however, the Act stipulates that the Competition Council is independent.
- The Act does not anticipate a judicial control mechanism over the Council's decisions but there is a Retrial Board for reviewing some decisions of the Competition Council.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
April 2015 (1)

Israel—"Follow-On" Class Actions Against International Cartels

Tal Eyal-Boger & Ziv Schwartz
Fischer Behar Chen Well Orion & Co.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2015© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Israel—"Follow-On" Class Actions Against International Cartels

Tal Eyal-Boger & Ziv Schwartz[1]

I. INTRODUCTION

In recent years a growing trend has emerged in Israel: more and more motions to certify class actions based on alleged global cartels are being filed with the Israeli District Courts. The typical petitioners in these cases are Israeli private consumers or private consumer organizations while the respondents are global companies that allegedly were parties to (alleged) global cartels.

Often, the trigger for private enforcement based on antitrust claims is a criminal or an administrative enforcement action taken by the Israeli Antitrust Authority. However, the new trend expands the said trigger to be enforcement actions taken by foreign competition authorities worldwide.

II. BACKGROUND: THE ISRAELI "NEW TREND"

Under the Israeli Restrictive Trade Practices Law, 5748-1988 (the "Law"), an act or omission contrary to the Law constitutes a tort, which allows the injured party to file a civil lawsuit against the violator. Additionally, under the Israeli Class Actions Law, 5766-2006, (the "Class Action Law") a lawsuit may be filed on the grounds of a violation of the Law.

A. Enforcement Measures in Israel

Enforcement actions taken by the Israeli Antitrust Authority (the "IAA") incentivize private enforcement based on antitrust claims in Israel. In some cases, motions to certify a class action against the suspected companies were submitted only a few days after companies were dawn raided by the Investigation Department of the IAA. Moreover, a motion to certify a class action will generally be submitted before (i) the Investigation Department of the IAA completes its work; (ii) the IAA assesses whether there is reasonable possibility for a conviction and whether to issue an indictment; (iii) before any hearing proceedings take place; and, of course, (iv) considerably before any verdict is reached. At times, the mere publication of a summoning of a company for a hearing with regard to suspected violations of the Law leads to civil claims.

This phenomenon is not unique to Israel. In the United States, for example, it is very common for a follow-on civil antitrust litigation to pursue actions taken by the United States Department of Justice.

[1] Ms. Tal Eyal-Boger, Adv., Partner, Head of Competition and Antitrust Group, Mr. Ziv Schwartz, Adv., Associate, Competition and Antitrust Group of Fischer Behar Chen Well Orion & Co.

B. Enforcement Measures Worldwide

Recently, there has been a notable increase in class actions filed in Israel against parties to international cartels that allegedly affected the Israeli market. Enforcement measures taken by competition authorities worldwide against parties to global cartels, usually accompanied by civil litigation, act as an incentive for private petitioners in Israel, who gradually have become less hesitant to reach out to the courts for compensation.

C. Treble Damages

A new "tool" which may also enhance the power of private antitrust enforcement in Israel is the Treble Damages legislative proposal (Antitrust Bill (Amendment No. 14) which was published in Israel in October 2013 (the "Bill")). Treble Damages offer consumers and corporations harmed by violations of the Law, *inter alia*, by cartels and abuse of dominant position by a monopoly, an opportunity to seek triple damages, an injunction, and costs (including attorney fees) against the violator.

The mechanism of Treble Damages is an important deterrent, as it changes the cost-benefit calculus of the violator and is likely to provide incentives for civil enforcement. However, with respect to international cartels, serious doubt rises as to whether large foreign companies will take into account the cost-benefit balance of their exposure to Israeli civil claims.

It is interesting to note that Treble Damages will not be applicable in the case of a violator under the IAA's leniency program. Thus, the Bill might result in an increase of leniency applicants as well as private enforcement.

III. EXAMPLES OF FOLLOW-ON INTERNATIONAL CARTELS: CLASS ACTIONS SUBMITTED IN ISRAEL

Following is a brief overview of the outstanding international cartel class actions that have been submitted in Israel pursuant to proceedings worldwide:

A. The "GIS (Gas-Insulated Switchgear) Cartel"

An early bird of the current trend appeared in 2007. In January of that year, the European Commission ("Commission") issued a decision regarding the existence of an alleged international cartel of several companies (*inter alia*, Alstom, ABB, Siemens, Hitachi, and Toshiba) in the GIS market (sales of Gas Insulated Switchgear).

Even though the Commission's decision did not mention Israel, Israel was the first jurisdiction in which a motion to certify a class action was filed with respect to the alleged GIS Cartel (the said motion was removed at a preliminary stage).

Later on, two class actions were filed again in Israel pursuant to the Determination of the General Director of the IAA (the "General Director"), dated September 2013, regarding the alleged effect of the GIS Cartel on the Israeli market (the "Determination").

A few months after the publication of the Determination by the General Director, Israel Electric Corporation also filed a suit for damages against several of the members of the alleged GIS Cartel—a private claim in the amount of approximately U.S. $1 billion.

B. The "Air Cargo Cartel"

In 2006, competition authorities in Europe and in the United States exposed the existence of an international alleged cartel in the air cargo shipping market between multiple airlines. In the United States charges were filed against 22 airlines, and fines of more than U.S. $1.8 billion were imposed. Also, the European Commission published that it had fined 11 airlines in a cumulative amount of EUR 799 million. In addition, multiple class actions against alleged members of the cartel have been filed in the United States. Pursuant to the said proceedings, in February 2013, a motion to certify a class action was filed in Israel against El Al., British Airways, Lufthansa, and Swiss regarding the alleged cartel.

C. The "LCD Cartel"

In 2006, several competition authorities worldwide launched an investigation against members of an alleged global cartel in the market of LCD Panels for flat screens. Among the members of the alleged cartel were Chi Mei, Sharp, Samsung Electronics, AU Optronic, and LG Display. The investigation resulted in various proceedings in several jurisdictions—criminal, administrative, and civil. In Israel, a motion to certify a class action with respect to the LCD Cartel was filed against several members of the alleged cartel. The Motion is based on similar proceedings previously conducted worldwide with regard to the alleged global cartel.

D. The "CRT Cartel" –

On November 2014, a motion to certify a class action was submitted in Israel against LG Electronic, Philips, LG Philips Displays, Samsung Electronics, Samsung Display Device, Toshiba, Panasonic, Hitachi, and Chunghwa, all members of an alleged cartel in the CRT and CRT-based products industry. The arguments and factual information presented in the Motion are based, *inter alia*, on foreign worldwide proceedings against the said companies in the United States, Europe, Japan, and South Korea.

The damage to the Israeli consumers allegedly derives from the broad impact of the alleged global cartel on the CRT-based products market. Recently, the Central District court in Israel approved the applicant's motion for service outside of the jurisdiction, in accordance with Regulation 500 of the Rules of Civil Procedure, 5744-1984 ("Rules of Civil Procedure").

IV. ANTITRUST CLAIMS AND CLASS ACTIONS IN ISRAEL

When discussing class actions in Israel with regard to international cartels, it is important to analyze whether it is possible to apply the local antitrust and class action laws to a cartel that involves only, or is comprised mostly of, foreign corporations. Such circumstances raise several issues:

A. Jurisdiction and Service

1. The Effects Doctrine

The General Director determined[2] that in order to achieve the purpose of the Israeli antitrust law, which is mainly to protect competition in Israel, it is necessary to interpret it, and

[2] Determination Pursuant to Section 43(a)(1) of the Restrictive Trade Practices Law, 5748-1988, Regarding the Restrictive Arrangement with regard to the Selective Fragrances Market, 3002438, 1999.

other rules governing competition in Israel, in the spirit of the American "Effects Doctrine" (the "Doctrine").

According to the Doctrine, it is insufficient to rely on the assumption that an alleged international cartel, which was formulated outside of the Israeli territory, influenced the Israeli market. The plaintiff must also analyze and demonstrate in a consistent and in-depth manner that the evidence shows a concrete, direct, and clear influence of an alleged international cartel on the Israeli market.

The Doctrine is well accepted under Israeli law, thus, claims of a “world-wide” international cartel which affects the Israeli market cannot be maintained without a sufficient explanation of the manner in which the cartel allegedly influenced the Israeli market and unless supported by evidence of such influence. The Doctrine is particularly relevant to the Israeli market, which is likely to be smaller and of less significance than other global markets.

2. Service Out of the Jurisdiction

Under Israeli law, if a defendant or respondent is not present in person in Israel, the court may grant a motion for service outside of the jurisdiction if the claim falls under one of the categories listed in Regulation 500 of the Rules of Civil Procedure. Regulation 500 sets forth the basis for granting permission to serve abroad and is the functional equivalent of the American "long-arm" jurisdiction statute.

However, the Rules of Civil Procedure allow an Israeli petitioner/plaintiff to avoid the need to obtain leave for service out of the jurisdiction, if a corporation or an individual located in Israel is deemed to be an “agent” of the foreign respondent/defendant. This depends, however, on the degree of intensity of the relationship between the “agent” and the foreign respondent/defendant. The greater the cooperation between the local entity and the foreign respondent/defendant from a business perspective under the specific circumstances, the more inclined the court will be to conclude that the local entity is an “agent” of the foreign respondent/defendant.

An additional method of serving court documents upon a foreign respondent/defendant is through personal service when a representative of the corporation is present in Israel, and the petitioner/plaintiff serves it with the court documents.

Current rulings of Israeli District Courts examine the matter of service out of the jurisdiction in the case of a motion to certify a class action against foreign parties to an alleged cartel. A recent ruling[3] of the Central District Court reversed a prior ruling that did not approve service outside the jurisdiction, in a class action against the alleged foreign members of the "CRT Cartel." In the appeal, the judge concluded that once the court is convinced that the grounds for the claim and the grounds for the service out of the jurisdiction are both sufficiently based, the court should approve requests for service out of the jurisdiction, subject to compliance with the "Forum Non-Conveniens" doctrine.

[3] Appeal 15317-12-14, *Merom et el. Vs. LG ELECTRONIC INC et. el.* (2015).

B. Damages: Indirect Purchaser Doctrine

The indirect purchaser doctrine is a principle of antitrust law that provides that a consumer is not entitled to damages following a violation of antitrust laws.[4]

The indirect purchaser doctrine has yet to be substantially reviewed under Israeli law. Nowadays, all class actions filed in Israel following alleged international cartels are still pending. Thus, there is no conclusive answer whether the indirect purchaser doctrine applies in Israel.

On the one hand, the indirect purchaser doctrine accords with common legal principles under Israeli law, such as the Civil Wrongs Ordinance, consumer protection laws, and so forth. On the other hand, recently, the Israeli Attorney General decided to join a pending motion to certify a class action regarding the Air Cargo Cartel and filed a position in this case, according to which the indirect purchaser doctrine does not, and should not, apply in Israel with respect to price-fixing class actions, and especially with regard to class actions which relate to international cartels. The Attorney General points out that, in his view, the claims of indirect consumers should be accepted, regardless whether the damage caused to purchasers is direct or indirect.

C. The Class Action Proceedings

The Israeli Class Action Law sets out the matters regarding to which type of motions to certify class actions may be filed in Israel and establishes the principles and requirements governing class action claims in Israel.

The Class Action Law establishes a two-stage process for hearing a class action. First, the Motion to Certify stage—an initial stage in which the court is required to determine (principally), based on *prima facie* evidence, whether the motion raises a cause of action and whether a class action is the appropriate procedural instrument to address such cause of action.

Pursuant to the Israeli Class Action Law, at the first stage a potential class petitioner is required to satisfy an evidentiary test, in order for his motion to be certified as a class action. Accordingly, a court may certify a motion as a class action claim only if it finds that all of the following conditions are met:

1. The motion raises substantial questions of fact or law that are common to the class, and it is reasonably possible that such questions would be decided in favor of the class,
2. A class action is the most efficient and appropriate means of resolving the dispute under the circumstances of the case,
3. There is reasonable basis to assume that the interests of all members of the class will be properly represented and managed, and
4. There is reasonable basis to assume that the interests of all members of the class will be represented and managed in good faith.

These conditions are cumulative and in the absence of any one of them, the court is required to reject a motion to certify.

[4] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

It should be noted that the first stage involves pleadings, depositions, expert opinions, cross-examinations, and summaries. Disclosure of documents at the first stage of the proceeding would also be permitted under the Class Action Regulations, 5770-2010, in order to allow the court to make an informed determination regarding the motion, subject to three conditions:

1. Disclosure is limited to those sources necessary to make a determination on certification issues;
2. The court must ascertain that the petitioner has established an "initial evidentiary basis" for his claims, and that the petitioner has demonstrated that he possesses a personal cause of action in the claim; and
3. The order for discovery contains the restrictions necessary to ensure confidentiality of the respondent's information, particularly with respect to trade secrets.

If the motion is certified as a class action, according to the Civil Procedure Rules both sides are obliged, among other things, to disclose, subject to a request, all documents in their control that are relevant to the claims and allow the other party to review the documents. In addition, each party is obliged to provide answers to interrogatories of the other party.

Finally, if the court accepts the motion to proceed in the case as a class action, it will continue to the second stage and address the claims in the lawsuit itself.

V. SUMMARY

To conclude, a new emerging trend is flourishing in Israel, as demonstrated by the above-mentioned class actions filed in Israel against alleged international cartels. It appears that petitioners in Israel are interested in enforcement measures taken by both competition authorities and private plaintiffs worldwide with respect to international cartels. The said petitioners wish to walk (at least partially) in a "plowed pathway" even though it has been "plowed by a foreign plow."

This rising trend of class actions regarding international cartels raises many interesting legal questions—both procedural and substantial—which have not been determined yet under Israeli law. This trend will encourage Israeli courts to provide clearer answers with respect to these issues, and thus interesting rulings are expected to be delivered in Israel in the upcoming years.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

April 2015 (1)

Regulatory Capture: Private Interests Deriving Public Policy

The International Clearing House Case in Pakistan

Joseph Wilson
Competition Commission of Pakistan

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2015© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Regulatory Capture: Private Interests Deriving Public Policy
The International Clearing House Case in Pakistan

Joseph Wilson[1]

I. INTRODUCTION

Where private interests derive public policy, the role of a Competition Agency becomes even more challenging. One case in point, described below, is the establishment of International Clearing House ("ICH") by 14 international long distance telecom operators ("LDI Operators") in Pakistan.

II. EXEMPTION APPLICATION

In September 2011, the LDI Operators filed an application under Section 5 of the Competition Act 2010 ("the Act") for exemption, from Section 4 of the Act, of their agreement to establish ICH. Section 4 prohibits entering into agreements that have the object or effect of preventing, restricting, or reducing competition within the relevant market. Section 5 permits the Commission to grant exemption to certain agreements that lessen competition, but: (i) can improve production or distribution; (ii) promote technical or economical progress, while allowing consumers a fair share of the resulting benefit; or (iii) where the benefits of the agreement clearly outweigh the adverse effects of absence or lessening of competition.

The ICH Agreement, in essence, proposed: (i) giving a monopoly to one of the LDI operators, namely PTCL, to receive all incoming international traffic; (ii) a single rate for terminating incoming international traffic with the rates increasing from U.S. 2 cents to more than U.S. 8 cents; and (iii) dividing the profits from incoming international traffic based on the existing market share of the LDIs.

The Commission heard the parties in detail to analyze whether the proposed ICH Agreement could be granted an exemption. However, before a final order could be issued, LDI Operators requested to withdraw the exemption application. Conflicting rationales were given by the parties for the withdrawal of their application. For example, Dancom Pakistan Private Limited, in its letter dated February 8, 2012, stated "that industry has made joint representation before MoIT [Ministry of Information and Technology] for seeking provisions of ICH under policy framework. Until a firm reply from the Ministry, it is requested that matter may be kept in abeyance." Pakistan Telecommunication Company Limited, in its letter dated February 7, 2012,

[1] Commissioner (and former-Chairman), Competition Commission of Pakistan. The author is a founding member of the Commission and has served since November 2007. He is a member of the State Bar of New York, U.S.A., and also serves on the International Advisory Board of the Loyola University Chicago's Institute for Consumer Antitrust Studies. The views expressed here are the author's alone and are not necessarily the views of the Competition Commission of Pakistan or any of its members.

wrote "[t]he industry has not reached consensus on the modalities of ICH operations and therefore, we have decided to withdraw application filed by PTCL to seek exemption on ICH agreement."

Despite the withdrawal of exemption applications by the LDIs, the Commission issued its determination on February 8, 2012 wherein the Commission stipulated that:

> If in future the Applicants enter into such agreement/arrangement, notwithstanding, any authorization obtained from any other authority such agreement/arrangement prior to its execution would require clearance from the Commission, as, prima facie, it has serious competition concerns and would attract the provisions of the Act.[2]

III. MOIT POLICY DIRECTIVE

Recognizing that the Commission was not going to exempt the ICH agreement, the LDI Operators were able to get the ear of the MoIT. Some six months after the Commission's decision on the exemption application, the MoIT on August 13, 2013 issued a Policy Directive[3] that it had decided to establish one gateway (International Clearing House Exchange)—to be operated by the PTC—for termination of all incoming international traffic instead of the individual gateways of the LDI operators.

The Policy Directive was in complete violation of the provisions of the Act as well as the Telecom De-regulation Policy of 2003, which has as its objectives, among others, to: (i) increase service choices for customers of telecommunications services at competitive and affordable rates, (ii) liberalize the telecommunication sector by fair competition among service-providers, and (iii) maintain an effective and well-defined regulatory regime that is consistent with the international best practices.

IV. POLICY NOTE BY CCP

In response to the MoIT's Directive, the Commission issued a Policy Note on August 28, 2012, wherein it highlighted the competition concerns emanating from the prospective establishment of International Clearing House, and recommended that MoIT withdraw the Policy Directive.[4] The Commission also warned that any such proposed arrangement/agreement, if entered into, would not be tenable under the law in terms of Section 4 of the Competition Act.

V. PTA'S INDEPENDENCE COMPROMISED

We have heard of "regulatory capture"[5] where the regulatee influences the decisions of the regulator. However, in this case, we witnessed the capture by MoIT of the Pakistan Telecommunications Authority ("PTA")—an independent regulatory body.

---

[2] Policy Note available at http://www.cc.gov.pk/images/Downloads/policy_notes/policy_note_ich_exchange_arrangement.pdf.

[3] MoIT letter No. 9-1/2002 DT.

[4] http://www.cc.gov.pk/images/Downloads/policy_notes/policy_note_ich_exchange_arrangement.pdf.

[5] "Regulatory capture" is a form of political corruption that occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or special concerns of interest groups that dominate the industry or sector it is charged with regulating.

On July 23, 2012, the four-year term of the incumbent PTA Chairman, Dr. Muhammad Yasin, came to an end. On July 28, 2012, Prime Minister Raja Pervez Akhtar appointed Mr. Farooq Awan, a civil servant, who has been working as acting Secretary Information Technology, as member PTA and then as Chairman PTA on the same day, in violation of various provisions of the Pakistan Telecommunications Re-Organization Act 1996.

The appointment of Farooq Awan was challenged in the Lahore High Court. The single bench terminated the appointment in January 2013 as illegal and against the law.[6] While Mr. Awan challenged the order of the single bench through an intra-court appeal, the government appointed Mr. Awan as Member (Finance)/Chairman on an acting-charge basis—this time as a civil servant on deputation to a regulatory body.[7] A division-bench of the Lahore High Court restrained Mr. Awan from performing his duties as Member (finance)/Acting Chairman in March, 2013 and in June 2013 declared his appointment as illegal.

The government's insistence on placing a civil servant as head of the PTA, which ought to be an independent body, smacks of pushing ulterior motives.

VI. PTA'S CONDUCT IN PROMOTING ICH

On August 23, 2012, the PTA issued a letter wherein it directed all LDI Operators to conclude the International Clearing House Agreement in light of the Directive.

On September 25, 2012, the PTA issued another letter directing all Local Loop Operators and Cellular Mobile Operators to suspend their international inter-connect circuits to terminate international incoming traffic with all LDI Operators except PTCL.

The PTA, in furtherance of its letter dated August 23, 2012, issued a letter dated August 30, 2012 to fix, *inter alia*, the Approved Accounting Rate ("AAR"), Approved Settlement Rate ("ASR"), and the Access Promotion Contribution ("APC").

VII. LITIGATION ENSUED

Brain Telecommunication Limited, one of the circuit providers for international incoming traffic to LDIs—being aggrieved of the PTA's Directive to all Local Loop Operators and Cellular Mobile Operators to suspend their international inter-connect circuits with all the LDI Operators—filed a writ petition before the Lahore High Court[8] challenging the Policy Directive of the MoIT (and the directive of the PTA which flowed from the Policy Directive). The Lahore High Court issued an interim order on October 25, 2012, where the Court held:

> It is also noticed that the Competition Commission in its various policy notes and communications repeatedly informed the respondents that the proposed ICH Agreement constituted ant-competitive conduct and was likely to be hit inter alia by the provisions of Section 4 of the Competition Commission Act. . . It appears that the said advice was not heeded and statutory authority, which is charged with the responsibility of safeguarding interests of the consumer was intentionally and deliberately bypassed in a manner which shows undue haste in the matter regarding which serious questions were being raised at all relevant levels.

[6] Appointment of Farooq as PTA head illegal: LHC; 2013 WLNR 2243951; Loaded Date: 01/29/2013.
[7] http://tribune.com.pk/story/517416/lahore-high-court-suspends-new-pta-member-finance/
[8] Brain Telecommunication Limited Vs. MoIT etc. (WP No. 26636/2012).

Until the next hearing date, several items were suspended: (i) operation of the August 13, 2012 Directive issued by respondent no. 1 (MoIT); (ii) the PTA's August 30, 2012 Applicable Rates Letter; (iii) the September 25, 2012 Implementation Letter issued by Respondent no. 2 (PTA); and (iv) the August 20, 2012 ICH Agreement.

Aggrieved with the decision of the Lahore High Court, *ADG LDI Private Limited* filed a "civil petition for leave to appeal" before the Supreme Court of Pakistan.[9] The Supreme Court, while deciding the petition, directed the Competition Commission of Pakistan to treat the Writ Petition,[10] filed by the M/s Brain Telecommunication Limited ("BTL") before the Lahore High Court, as representation under the Competition Act.

VIII. CASE BEFORE THE COMMISSION

The Commission, pursuant to the order of the Supreme Court, treated the petition filed by Brain Telecommunication as a complaint before it, heard all the parties concerned in detail, and issued its order on April 30, 2013.[11] The Commission held the ICH Agreement to be null and void, in violation of the Competition Act, and imposed a penalty of 7.5 percent of the annual turnover of the preceding year (2012) on all the LDI Operators.

In its decision, the Commission looked at various competition concerns, including, among others: (i) price-fixing, (ii) quota-fixing, (iii) placing of entry barriers, (iv) impact on the international incoming calls, (v) impact on the economy, (vi) violation of international obligations under the WTO, and (vii) likely-hood of an increase in grey-trafficking. The scheme of ICH was encapsulated in the following excerpt from the decision:

> the respondents have agreed under the ICH Agreement not to compete on the settlement price with foreign carriers. In addition, they have also agreed to share revenue as per the allocated shares. We must draw a distinction between the sharing of revenue as in the instant case and dividing of the market. In the latter a member of cartel is still a market player, whereas in case of former the member of the cartel is a pure rent seeker seeking rent on the strength of its license despite suspending its services as is in the present case. This situation is more egregious than those who divide the market and still provide services.[12]

IX. DECISION CHALLENGED

LDI Operators challenged the decision of the Commission before the Sindh High Court and the Lahore High Court, which granted interim orders against the decision of the Commission.

In the meantime, after the May 2013 general election, a new government took charge in June 2013. By this time the adverse effects on the economy highlighted by the Commission in its Policy Note and decision had became evident, and with the new top brass at the MoIT, through a directive dated June 17, 2013, the MoIT rescinded its earlier Policy-Directive to establish the International Clearing House Exchange for International Incoming Calls. Despite the withdrawal

[9] *ADG LDI Private Limited v. Brain Telecommunication Limited, et al*; C.P.L.A. No. 102-1/2013.
[10] WP No. 26636/2012.
[11] http://www.cc.gov.pk/images/Downloads/ich_order_30_april_2013.pdf.
[12] Para 116, http://www.cc.gov.pk/images/Downloads/ich_order_30_april_2013.pdf.

of the Policy Directive to establish ICH, LDI Operators continued with the arrangements, citing "vested" interests. The federal government then filed a "civil petition for leave to appeal" before the Supreme Court of Pakistan.[13] Finally, the Supreme Court put a closure on litigation and gave finality to the decision of the MoIT through its order dated February 24, 2015, which suspended the operation of the interim reliefs granted by the Sindh High Court and Lahore High Court and, in essence, gave effect to the Policy Directive of MoIT cancelling establishing the ICH.

X. CONCLUDING REMARKS

This case shows how private interests find their way in forming public policy. And once that public policy is formed, those private interests become the legitimate vested interest of the private parties. The problem is the same as when the fox is set to guard the hen house. Had the MoIT not became a party with the LDI Operators, the ICH would never have established.

The challenges facing a competition agency (assuming there is no fox guarding the hen-house at the agency) in a developing country are much more than in developed countries where institutions function within their mandate. For a competition culture to be embedded in a developing country, competition agencies must remind themselves that it not the pressure of the river flow, but the persistence of that flow, that cuts its way through rocks and stones.

[13] Federation of Pakistan vs. Redtone Telecommunications (Pvt) Ltd. CPLA No. 146 of 2015.