BATHTUB CONSPIRACIES – AN INDIAN COMPETITION LAW PERSPECTIVE

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Having imposed a penalty of approximately USD $2 billion in the seven years since the enforcement of the Competition Act, 2002 ("Competition Act"), the Competition Commission of India ("CCI") has become one of India's most active regulators. The wide-ranging commercial implications of competition law enforcement on domestic and international business groups present in India have made it imperative for them to insulate their legitimate commercial practices from conduct which may be abusive or anti-competitive. One such area within which the mandate of CCI's intervention remains largely untested is the regulation of business groups' internal cooperation and arrangements, and their resultant obligation to ensure parity of treatment between a competitor and owned verticals.

Enforcement of competition law rules on conduct within an enterprise, or a group, is widely known as the intra-enterprise conspiracy doctrine or "bathtub conspiracies."[2] Across jurisdictions, intra-enterprise coordination is protected from competition law interference by operation of the single economic entity doctrine ("SEE Doctrine"), which presumes unity of

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[2] "The so-called "intra-enterprise conspiracy" doctrine provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership." *Copperweld Corp. Et al. v. Independence Tube*, 467 u.s. 752 (1984), available at: https://www.law.cornell.edu/supremecourt/text/467/752.

interest between a parent and its subsidiary. The SEE Doctrine allows legally separate entities pursuing the same commercial goals and under common ownership and control to be treated as integrated economic units. The SEE Doctrine shields intra-enterprise conduct, which may otherwise be held as anti-competitive, from competition law interference.

The Competition Act classifies its behavioral prohibition between anti-competitive agreements (regulated by Section 3) and abuse of dominant position (regulated by Section 4). Principally, Section 3 deals with coordinated or concerted offenses, which requires an "agreement" between two "enterprises" (or persons or association of persons). Section 4, on the other hand, prohibits certain categories of unilateral or single-firm conduct by dominant enterprises or groups.

The Competition Act does not expressly recognize the SEE Doctrine, and as such, does not convey an express protection to intra-enterprise conduct. However, in line with internationally recognized principles, the CCI and the Competition Appellate Tribunal ("COMPAT") have acknowledged the protection of the SEE Doctrine to Section 3 offenses (i.e. anti-competitive agreements) on multiple occasions. The CCI dealt with the SEE Doctrine for the first time in 2012, when it held that an exclusive arrangement between Automobili Lamborghini S.p.A. and its group company, Volkswagen Group Sales Pvt. Ltd. could not be considered as an agreement between two enterprises under Section 2(h) of the Competition Act, and consequently, could not be examined under Section 3 of the Competition Act.[3] On the question of what constitutes a single economic entity, the CCI noted that so long as two enterprises form part of the same group,[4] any internal agreement between them is not considered an agreement for the purpose of Section 3. The COMPAT upheld the CCI's finding, albeit by deviating slightly in the line of reasoning adopted by the CCI.[5] The latest CCI decision concerning the SEE Doctrine, i.e. *Association of Third Party Contractor v. General Insurers'*

[3] "To establish a contravention under Section 3, an agreement is required to be proven between two or more enterprises. Agreement between opposite party and its group company 'Volkswagen India' cannot be considered to be an agreement between two enterprises as envisaged under section 2(h) of the Act. Agreements between entities constituting one enterprise cannot be assessed under the Act. This is also in accord with the internationally accepted doctrine of 'single economic entity'." *Exclusive Motors Pvt. Limited v. Automobili Lamborghini S.P.A,* CCI's order dated November 6, 2012 in Case No. 52 of 2012.

[4] The "group" test gets satisfied with any of the three conditions under Explanation (b) to s.4 being met, i.e. being able to i) exercise 50 percent voting rights; or ii) appoint 50 percent members on the board, or iii) control the management or affairs of the enterprise.

[5] The COMPAT in *Exclusive Motors Pvt. Ltd. v. Automobili Lamborghini SPA,* deviating from CCI's reliance on the definition of "enterprise" to reach its findings, noted "There can be no dispute that the Volkswagen India is an enterprise like appellant Lamborghini. There can also be no dispute that this was an agreement between the two enterprises. However, the question is as to whether agreement between these two enterprises could be viewed as contravening of Section 3". Instead, the COMPAT relied on "control" and held "In both the cases, almost 99% of the shareholding is directly or indirectly controlled by the mother company and therefore, we have no hesitation in endorsing the finding of the CCI that these two companies amount to a single economic entity." COMPAT's order dated February 28, 2014 in Appeal No. 1 of 2013, available at: http://compat.nic.in/upload/PDFs/febordersApp2014/28_02_14.pdf.

Association re-affirmed the group-test.[6] In *Shamsher Kataria*, the CCI also held "inseparability of economic interest" to be a vital ingredient in the rebuttable presumption of the SEE Doctrine available to enterprises belonging to the same group.[7] Further, moving away from an enterprise-level control, the CCI in the *Insurance Cartel Case* narrowed its assessment to *de facto* and *de jure control* over specific business decisions which were the subject-matter of the allegations.[8] Clearly, due to the statutory requirement of showing an "agreement" between "enterprise[s]" under Section 3, these decisions of the CCI and the COMPAT only extend the SEE Doctrine to Section 3 offenses. Its application to Section 4 offenses remains elusive, and a matter of potential debate.

Section 4 of the Competition Act, which is the corresponding provision to Section 2 of the U.S. Sherman Antitrust Act of the 1890 and Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), deals with certain categories of unilateral conduct by a dominant enterprise or group. By its very nature, Section 4 is aimed at combatting single-firm conduct. What stands out, however, is the prohibition on enterprises on imposing discriminatory conditions or price in purchase or sale of goods or service, which forms part of the prohibition contemplated by Section 4(2)(a) of the Competition Act ("Anti-Discrimination Provision"). The Anti-Discriminatory Provisions have a unique requirement of showing a discriminatory price or condition to be in relation to a "purchase or sale." A "purchase or sale" cannot be purely unilateral in nature, and arguably, should be subject to the same SEE Doctrine principle as Section 3.

The Anti-Discrimination Provision of the Competition Act is based on the provisions of Article 102(c) of the TFEU, which prohibits dominant undertakings from "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" and the Robinson-Patman Act, which prohibit "discriminating in price between different purchasers of commodities of like grade and quality." Relying on these very provisions of the TFEU and the Robinson-Patman Act, the COMPAT in *Schott Glass*[9] recognized two vital ingredients for establishing an offense under the Anti-Discrimination Provision, i.e. first, dissimilar treatment to equivalent transactions; and second, harm or likely harm to competition.

An offense of abusive discrimination in India, therefore, must be established on the basis of juxtaposing multiple equally placed purchases or sales (transactions), and establishing an element of discrimination in either the price, or condition (dissimilar treatment) imposed by a dominant enterprise. This naturally raises an important question, that is, whether one of these transactions could be a transaction within a single economic unit. To answer this, it must

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[6] *Association of Third Party Contractor v. General Insurers' Association*, CCI's order dated January 4, 2016 in Case No. 107 of 2013, available at: http://www.cci.gov.in/sites/default/files/Order_107_of_2013.pdf.

[7] *Shamsher Kataria v. Honda Siel*, CCI's order dated August 25, 2016 in Case No. 3 of 2011, available at: http://www.cci.gov.in/sites/default/files/032011_0.pdf.

[8] *In Re: Cartelization by public sector insurance companies,* CCI's order dated July 10, 2015 in Suo Moto Case No. 02 of 2014, available at: http://www.cci.gov.in/sites/default/files/022014S.pdf.

[9] *Schott Glass India Pvt. Ltd v. Competition Commission of India*, COMPAT's order dated April 2, 2014 in Appeal No. 91 of 2012, available at: http://compat.nic.in/upload/PDFs/aprilordersApp2014/02_04_14.pdf.

be tested whether an intra-enterprise arrangement could amount to a purchase or sale (or as the COMPAT puts it, a "transaction") for Section 4(2)(a), and therefore, be used as a benchmark for requiring a dominant enterprise in affording the same treatment to similarly placed market players. In other words, does the Anti-Discrimination Provision prevent conglomerates from favoring their group entities?

The CCI has penalized enterprises under the Anti-Discrimination Provision on seven occasions. Out of these, the CCI has found preferential treatment to affiliated entities (or to the dominant entity itself) to be in violation of the Anti-Discrimination Provision on two occasions, i.e. in *Schott Glass*[10] and *ITPO*.[11] In *Schott Glass,* the CCI penalized an enterprise operating in an upstream market for providing favorable discounts to its own joint-venture ("JV") operating in the downstream market, as opposed to the JV's competitors, while in *ITPO*, the CCI found an organization in violation of Section 4(2)(a) for giving preferential treatment to its own fairs over competing fairs. Both these decisions of the CCI have not survived the appellate scrutiny of the COMPAT, albeit not on a reasoning which would permit intra-group preferential treatment.

Interestingly, while dealing with Anti-Discrimination Provision of the Competition Act, neither the CCI, nor the COMPAT, have dealt with the two-sale requirement for application of Section 4(2)(a), and therefore, have tacitly accepted transfers between affiliated enterprises as purchase or sale of goods or services. The dissenting order of Dr. Geeta Gauri (former Member, CCI) in *Schott Glass,* however, partially recognized the extension of the SEE Doctrine to hold internal sales as intra-group transfers, and observed: "Generally, a lower input cost charged by the dominant firm to its own joint venture partner vis-à-vis the other buyers in the market should be looked at as internal transfer of profits, unless an adverse effect on downstream competition due to the differential treatment can be clearly established."[12] Unfortunately, the COMPAT, while upholding the other findings of the dissenting order, did not deal with these observations. Relatedly, the COMPAT in *ITPO* has recognized that the Competition Act does not impose an obligation on dominant enterprises to part with their own assets for the benefit of others, which may be detrimental to the enterprise's own interest.[13] This is the underlying rationale of the SEE Doctrine. COMPAT's observations in *ITPO,* although not necessarily hitting the nail on the head, are extremely helpful in questioning the expectation

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[10] *Kapoor Glass Private Limited v. Schott Glass India Private Limited*, CCI's order dated March 29, 2012 in Case No. 22 of 2010, available at: http://www.cci.gov.in/sites/default/files/Case22of2010MainOrder_0.pdf

[11] *Indian Exhibition Industry Association v. Ministry of Commerce & Industry & Indian Trade Promotion Organization*, CCI's order dated April 3, 2014 in Case No. 74 of 2012, available at: http://www.cci.gov.in/sites/default/files/742012_0.pdf and COMPAT's order dated July 1, 2016 in Appeal No. 36 of 2014, available at: http://compat.nic.in/upload/PDFs/judgement-orders-2016/FINAL%20ORDER%20FOR%20UPLOADING%20%20-%20ITPO%20-%20for%201st%20July,%202016.pdf

[12] *Kapoor Glass Private Limited v. Schott Glass India Private Limited,* Dissenting Order of Dr. Geeta Gauri dated March 29, 2012, Former Member CCI in Case No. 22 of 2010 at Paragraph 8.3, available at: http://cci.gov.in/sites/default/files/Case22of2010OrderMemberGG.pdf.

[13] The COMPAT in *ITPO* observed: "It is beyond comprehension of any reasonable person as to how a person/entity can be compelled to part with, permanently or temporarily, his/its own assets for the benefit of others, which may, at times detrimental to his/its own interest."

of parity that the CCI appears to have imposed in one's dealings with its own enterprises versus the market participants.

The courts in the U.S. have repeatedly extended the SEE Doctrine to the Robinson-Patman Act, the principal anti-discrimination provision of the U.S. They have held that the Robinson-Patman Act is not concerned with transfers between single economic undertakings.[14] For instance, in *BMW*,[15] the U.S. Courts of Appeal observed: "we find nothing special in the Robinson-Patman Act context that militates against Copperweld's reasoning or result." The Court also recognized that "...M's sale of a good to a wholly owned subsidiary D is not a "sale" for Robinson-Patman Act purposes; rather, it is simply a transfer; and that is so whether D is, or D is not, somehow "independent" in reality." Similarly, the U.S. Courts of Appeal in *Security Tire*[16] affirmed the two-transaction test, and held "Courts have interpreted the Section 2(a) language to require that a plaintiff establish two separate and contemporaneous sales transactions made by the same seller to two distinct purchasers." It recognized that "For price discrimination to occur, [...] one purchaser must pay more than another purchaser; there must be two or more transactions at different prices." Similarly, in the context of Article 102(c) of the TFEU, Faull and Nikpay recognizes that to establish an offense of price discrimination, the buyer must be independent from the seller. The authors note: "Price discrimination does not occur where there are differences between the internal transfer price the seller agrees with its own group companies and the price agreed with third parties. However, such price differences may be investigated as a margin squeeze."[17]

Since an internal transfer between single economic undertakings does not amount to an "agreement" between two "enterprises" for Section 3 (as acknowledged by the CCI), it may be difficult to term it as a "purchase or sale" for Section 4. Such a construction may not only be inconsistent with foreign jurisprudence surrounding the Robinson-Patman Act in the U.S., and Article 102(c) of the TFEU in the European Union, but could also lead to a situation where an unincorporated division of an enterprise will not be exposed to the Anti-Discriminatory Provision, whereas distinct legal entities will be. Finally, with there being no order of the CCI penalizing abusive discrimination involving single economic units – which has been upheld by the COMPAT – it would be interesting to see whether the CCI imposes an obligation on dominant enterprises to treat internal arrangements among owned entities on par with dealings with their market participants, as if they qualified the "equivalent transactions" test.

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[14] *Mumford v. GNC Franchising LLC*, 437 F. Supp. 2d 344, 348 (W.D. Pa. 2006), available at: https://casetext.com/case/mumford-v-gnc-franchising-llc/case/alarmax-distribs-inc-v-honeywell-intl-inc#cited-link-1.

[15] *Caribe BMW v. Bayerische Motoren Werke*, order of the U.S. Courts of Appeal, First Circuit dated March 25, 1994, 19 F.3d 745, available at: http://openjurist.org/19/f3d/745/caribe-bmw-inc-v-bayerische-motoren-werke-aktiengesellschaft.

[16] *Security Tire & Rubber Co. v. Gates Rubber Co.*, order of the U.S. Courts of Appeal, Fifth Circuit dated July 12, 1979, 598 F.2d 962 (1979), available at: http://www.leagle.com/decision/19791560598F2d962_11424/SECURITY%20TIRE%20&%20RUBBER%20CO.%20v.%20GATES%20RUBBER%20CO.

[17] Paragraph 4.890, Faull & Nikpay: The EU Law of Competition (3rd Edition).