

CPI's Asia Column Presents:

A TALE OF TWO MRI MACHINES

By Anisha Chand and Radhika Seth (Khaitan & Co., India)¹



Copyright ©2016

Competition Policy International, Inc. for more information visit CompetitionPolicyInternational.com

November 2018

The Competition Commission of India (“CCI”) has recently fined an Italian company, often touted as the world leader in dedicated Magnetic Resonance Imaging (MRI) machines, Esaote S.p.A (“Esaote”) and its Indian subsidiary, Esaote Asia Pacific Diagnostic (“Esaote Asia Pacific”) for abusing its dominant position in the market for the sale of “Dedicated Standing/ Tilting MRI machines”. The decision of the Commission is intriguing on various counts, particularly considering that the majority order and the minority dissent order diverge on fundamental grounds central to the decision. Before we delve into the minutiae of the decision, the brief facts leading to the investigation are summarily discussed below.

The informant, House of Diagnostics LLP (“Informant”) engaged in the business of provision of medical diagnostics and diagnostic imaging services to hospitals and certain charitable institutions had filed a case against Esaote for alleged abuse of dominance by the Esaote which was the only supplier of the dedicated/non-conventional MRI machines in India.² The Informant had averred that it entered into an agreement with Esaote for the purchase of dedicated standing/ tilting MRI machines (“DST Machine”) and lightweight Perforated See Through Cages (“PTC”). The Informant had further contended that Esaote had abused its dominant position in the market for DST Machines by *inter alia* selling old machines to it, unilaterally altering the terms of the purchase order, refusing to install DST Machines and restricting the after-market services by granting its subsidiary, Esaote Asia Pacific which held the exclusive right to provide after sales services of DST Machines at huge costs. It was also alleged that Esaote entered into revenue sharing contract with another competing diagnostic center to supply DST Machines free of cost and without any maintenance charge. The Informant alleged that such revenue sharing contracts were detrimental to its operations, specifically because the procurement costs of the DST Machines, and the maintenance costs were increasing the operational costs of the Informant compared to its competitor who was able to procure them without any charge from Esaote.

In its investigation, the Director General (“DG”) delineated the relevant product market as the market for ‘Dedicated Standing/Tilting MRI machines in India’. The DG’s finding was based on the premise that DST Machines are not substitutable with the traditional MRI machines given that they can scan human body in different weight bearing positions which cannot be done by traditional MRI machines. The DG also focussed on the fact that many consumers of MRI machines *i.e.* diagnostic centres do not consider DST Machines as interchangeable with conventional MRI machines. The majority members of the CCI agreed with the relevant market delineation by the DG. The CCI additionally relied upon the opinion of various diagnostic centers, doctors and hospitals to conclude that the DST Machines have specific functional capabilities (such as the ability to capture image changes when a patient is standing), they are less claustrophobic, and provide more effective and accurate diagnosis compared to conventional MRI machines for diagnosis of ailments of specific body parts. Given such advantages over conventional MRI machines, DST Machines were considered as distinct products not substitutable with ordinary or conventional MRI machines.

Interestingly, objecting to the relevant market definition, Esaote argued that DST Machines are only one of the many options of diagnostic imaging tools available in the market and are in fact substitutable with other MRI machines. Esaote also cited an instance where after receiving a favourable offer from Esaote, a consumer had still purchased a full body conventional MRI machines instead of DST Machine to demonstrate that DST Machines are substitutable with full body conventional MRI machines. Although the majority members did not seem to have bought Esaote’s argument, the Chairperson found merit in Esaote’s submissions. The Chairperson’s dissent order stated that consumers view different types of diagnostic equipment as inter-changeable particularly the different types of MRI machines available in the market as there is no single factor that determines the solution for which a consumer opts.

Among others, the dissent order also noted that the insignificant sales of the DST Machines in a period of 11 years indicated the negligible demand for the product and as a consequence, highlighted the lack of a distinct demand for DST Machines in India independent from ordinary MRI machines. Further, the

Chairperson noted that the alleged additional functionality of the DST Machines was capable of being added in the conventional MRI machines at an affordable cost. Based on these findings, the minority order observed that the relevant product market should be delineated as the market for MRI machines as a whole without separately defining a market for DST Machines.

However, the majority order maintained its position on the narrower relevant market delineation thereby finding that Esaote was the sole player operating in India and hence, held a dominant position by default. It is worthwhile to note that the Chairperson noted that there were other foreign players which could enter the market easily without any entry barriers and in that sense, the dominance of Esaote, if any, could be transitory.

The stark difference in the approach adopted by the members of the CCI in the majority and dissent orders have brought certain latent issues to the fore. *First*, does the presence of certain unique features in an otherwise similar product allow it to be seen as a distinct product in itself for the purposes of competition analysis? This question is crucial in quickly evolving markets such as smartphones which almost on a daily basis see an upgrade or addition of a novel feature - in such markets, would it be correct to consider products with additional advanced features to be treated as a separate market for the purposes of competition law assessment? The CCI has, in the past ruled on this aspect in a case involving iPhones stating that despite Apple iPhones having unique features, the target customers don't perceive it as the only available or inter-changeable product in the market.³ Although MRI machines cannot be equated with a smartphone market entire, the issue of a novel feature in a product (performing in essence the same function) and thus, forming a separate market is relevant in this case since the dissent specifically noted that the additional feature could be replicated by other competitors with ease and without adding significant cost and therefore, may comprise the same market.

Second, if and to what extent can limited demand of a product be a reason to prevent an intervention by an antitrust regulator in abuse of dominance cases? The extent of adverse impact on the market may not necessarily be linked to the market share of the product, however, it is arguable that while finding a contravention the degree of actual and/or possible impact ought to be considered to determine the need for an intervention in line with the principles of equity. It is debatable that products having limited impact on the market may not be suitable for a competition assessment as changes in the market such as entry of new players, maturity of nascent markets, technological changes could possibly cure the defects being alleged, and any antitrust interference in markets which could undergo self - correcting changes can adversely impact the growth in such markets. Previously, the CCI in its order relating to the cab-hailing markets has also noted the need for non-interference in developing industries to ensure that innovation is encouraged and not nipped.

Third, it is possible to infer that allegations pertaining to supply of old DST Machines, and non-provision of agreed merchandise, to the Informant were patently consumer disputes, and in isolation did not deserve a competition law scrutiny let alone a finding of abuse on this aspect. This brings us back to the inter-section between consumer and competition laws which have historically blended-in and coincided more often than they were seemingly intended to thereby continuing to blur the lines between the two legislations. While there is no dispute that the CCI ultimately looks out for the consumer, a conundrum often arises as to whether the protection of consumer interest is a primary role of the CCI, or a necessary implication of the chief mandate to protect the state of competition in the market. The distinction however fine is relevant given that it has a direct impact on the scope and extent of adjudicatory powers of the CCI.

The CCI has taken a keen interest in the pharmaceutical sector from the very beginning both on the merger control and behavioural realms of the competition laws. With the CCI's recent policy note on "Making Markets Work for Affordable Healthcare" which provides recommendations on issues like high drug prices, the issue of generic v. branded drugs, conditions on patients to use in-house pharmacy/ labs,

etc., it appears that the healthcare and pharmaceutical sector will continue to be on the CCI's radar and it may therefore be an opportune time for the industry players to put their houses in order.

¹ Anisha Chand is a principal associate at Khaitan & Co., India. Radhika Seth is an associate at Khaitan & Co., India.

² In House of Diagnostics LLP vs. Esaote SPA, Case No.9 of 2016, Decided on: 27.09.2018

³ Shri Sonam Sharma vs Apple Inc. USA, Apple India Pvt. Limited, Vodafone Essar Limited, Bharat Airtel Limited, Case No. 24/2011; Date of Decision:19.03.2013; Also refer Bharti Airtel Limited Vs. Reliance Industries Limited and Ors, Case No. 03 of 2017; Date of Decision: 09.06.2017 where the CCI did not view 4G internet services as a separate relevant market.