COMPETITION LAW- PRACTICE AND PROCEDURE

Scheme of Legislation

- 9 Chapters- 66 Sections
- Chap 2- Sec.3-6- Prohibition of Certain Agreements, ADP, Regulation of combinations
- Chap 3- CCI; Chap 4- Duties, powers, functions of CCI; Chap 5- Duties of DG; Chap 6- Penalties
- Chap 7- Competition Advocacy; Chap 8-FAA; Chap 8A- AT; Chap 9- Miscellaneous
- Sec.19-39- Orders, Inquires, Procedures
- Sec.3- agreement being anti-competitive- AAEC; Sec.4- ADP- not allowed
- Samir Agarwal- Informant; Rajasthan LPG- CCI suo motto; Aviation Cartel- Reference received by Chairman of LS/ CG/SG; Google v. Umed Jawed; Bharti Airtel v. CCI
- CCI has extra-territorial jurisdiction
- sLienancy+ mechanism; Under Sec.5- Combinations- Asset turnover threshold- deal value threshold

Investigation Procedure

- Triggers: Indv, enterprises, Govt Departments- CG, SG, SA, *suo moto* cognisance
- Investigation- rigorous, structured approach, comprehensive scrutiny of potential anti-competitive practices
- Initiation of investigation: 1. Through formal complaints from affected parties, references, whistleblowers
- 2. Suo moto- on its own- market conditions, news reports, other credible sources
- Preliminary: Compliant/reference received, CCI preliminary investigation- ascertain validity of claims
- CCI finds PF evidence of anti-competitive practices- directs DG to conduct a detailed investigation
- Detailed investigation by DG: Crucial in CCI investigative process, thorough, unbiased investigations
- Provide comprehensive reports- DG operates independently of CCI- gather evidence, search, summon
- Collect, analyse data, doc, relevant materials, and various stakeholders- build a comprehensive case
- Interview indv- gather firsthand info, insights- on-site inspections, collect crucial physical evidence
- Coordination with CCI- essential- smooth functioning- regularly updates of progress and seek guidance
- After investigation, submit detailed report, outline findings, recommendations on collected evidence
- Beyond investigation, contribute CCI adjudicative process- DG may be called for addl info or clarification

<u>Ms. Prachi Agarwal, Mr Tushar Sharma v. M/s Swiggy, Bundl Technologies Pvt Ltd. ()</u>

- Informant before CCI against OP- Sec.19- Inquiry into certain agreements and DP of enterprise
- **<u>Sec.19</u>**- 6 subcl; Sec.19(1)- CCI may inquire into any alleged contravention of Sec.3(1), 4(1)
    - On own motion
    - (a) Receipt of any info- any person, consumer, association, trade association- fee, manner
    - (b) Reference made by CG, SG or SA
- Here, Sec.19 (1) (a)- Informant claiming Swiggy contravening Sec.4
- **Informant Statements:**
    - Swiggy- App-based food delivery market- Customer option to select restaurant, online payment, POD
    - *Not same* in phone dialed delivery system
    - Swiggy leading, among others- Zomato, Uber Eats, Foodpanda
    - Relevant market= App-based food delivery with restaurant search platform
    - Delivery app- smartphones- whole India- RGM- App-based food delivery with restaurant search platform across territory of India

Ms. Prachi Agarwal, Mr Tushar Sharma v. M/s Swiggy, Bundl Technologies Pvt Ltd. ()

- CCI- seek comments from S- made public and confidential submissions
- **Public Submissions of S**
  - S- Platform-Partners-Consumers model; Level-playing field for all partners- equal opportunity
  - Partners- saves cost- hiring delivery services is by Platform
  - S- merely acts as intermediary and prices fixed by Partners- no D/ID influence by S
- **Functioning- Informant Submission**
  - S- online platform- restaurant listed- own delivery fleet- doorstep delivery- app, webiste
  - Once ordered, partner gets details in their website, broadcast signal to drivers- choose, deliver
  - S- charges commission on total bill amt+ delivery fee+surge fee
  - Rates of S higher than rates of outlets- Consumers unaware of offline price- non-comparable
  - S- intentionally not declare- increased prices from original prices
  - Consumers- blinded; Inflated prices- unreasonable and contravention of Sec.4

Mr. Ramakant Kini v. Dr L H Hiranandini Hospital, Mumbai (2014)

- Order u/S.27 of CCI
- **Relevant Facts**
    - Stemcells- science- umbilical cord of child- preserve to cure future diseases
    - Mrs. Jain- agreement with Life Cell India Pvt Ltd- collect cord within 10 mins of child birth
    - Keep in a bank sub zero temperature- 21 years- collection- by hospital staff or collection unit
    - OP- refused request- not allow LC in premises- option to use Cryobanks International India- not prior informed
    - OP- excl. agreement with Cryobank- only permitted to collect stemcell
    - Lifecell not allowed to enter into agreements with clients of OP; Mrs. Jain shifted to another hospital
    - Informant approached CCI- violation of Sec.3 and 4
    - CCI- PFC- directed DG investigation
    - DG- OP DP in RM of provision of maternity services by super-speciality hospitals; GM- 0-12Kms from HNH
    - Dominant position to influence consumers- unfair conditions on expecting mothers
    - OP-Cryobank agreement unfair- AAEC

Mr. Ramakant Kini v. Dr L H Hiranandini Hospital, Mumbai (2014)

- **Legal Analysis**
  - Preamble: CCI- to prevent practices having AE on competition- protect interests of consumers- freedom of trade carried on by other participants in markets in India and matters connected therewith
  - Allows CCI to interfere to protect consumers interest- welfare mechanism
  - Sec.3(1)-Firms not enter into agreement- production ….. provision of services in AEC within India
  - 3(2)- Agreement entered into contravening 3(1)- void
  - 3(3)- Eg. where agreement violative of 3(1)- presumption of AAEC- burden of rebuttal on OP
  - 3(4)- Eg. where agreement considered by statute against 3(1)- AAEC
  - 3(3)- exhaustive- not allow CCI to add categories; 3(4)- illustrative- diff stages, level of production- AAEC
  - 3(3), 3(4)- expansion of 3(1) but not exhaustive of scope of 3(1)
  - Multiple agreements- fall in 3(1); 3(3)- carves out only one area; 3(1) wider in nature
  - 19(1), 33 deals with violations of 3(1) and not of 3(3), 3(4)- ie, 3(1) independent of 3(3), 3(4)
  - 3(3), 3(4) not limit scope of 3(1)+ while discussing 3, not look into scope of dominance as in 4

Mr. Ramakant Kini v. Dr L H Hiranandini Hospital, Mumbai (2014)

- **Situational Analysis**
  - Relevant Cl: Operational Issues: Gynaec be informed of Cryobank tie-up; offer exclusively
  - Not recommend other stem cell banks; provide suitable place for counselling; Enrollment fee-18K/pm
  - **OP arguments:** Sec.3 not cover normal commercial agreements- for 3(4)- agreement b/w 2 undertakings be in diff stages, level of production chain- PSDSSP or trade in goods, provision in services
  - OP-Cryobank agreement- not construed as maternity services- stemcell collection diff market
  - OP-CB not operating at diff levels, stages- not vertical or horizontal
  - No existence of relationship of any nature- allegation be examined only when there is V/H agreement
  - **CCI:** OP arguments misconceived- 3(1) wider as against 3(3), 3(4)
  - CCI consider if agreements falls within 4 fold of Sec.3 (1) and assess AAEC
  - Sec.3(1) check based on AAEC, keeping consumer welfare in mind
  - **OP Contentions:** Agreement for 1 year only- clear, transparent policy
  - Assessment of Anti-competitive effects- exclusive contract- factors based on 19(3)

Mr. Ramakant Kini v. Dr L H Hiranandini Hospital, Mumbai (2014)

- **Situational Analysis**
  - Sec.19(3)- CCI while determining AAEC under Sec.3 follow
  - a) creation of barriers of new entrants in market
  - b) driving existing competitors outside nation
  - c) foreclosure of competition- hindering market entry
  - d) accrual of benefits to consumers
  - e) improvements in production, distribution of goods, provision of services
  - f) promotion of technical, scientific, eco development by means of P, D of GoS
  - At moment, 13 players- 67% market share of CB, LC- excl. contract- disruption tendency
  - AEC- dependency of mothers in maternity services
  - Customers- may suffer in long run- inefficiency of services- cause failure in system
  - Peculiar case- long term association- 21 years- entry barrier creation for other players

Mr. Ramakant Kini v. Dr L H Hiranandini Hospital, Mumbai (2014)

- **Situational Analysis**
  - Affect prices, quality, quantity, limits consumer choices- no benefit but cost to consumers
  - OP- not prove- promotion, technical, production, distribution of goods, provision of services
  - Collection of umbilical cord- not technical, but mere physical process
  - Present case- Jain changed hospital to save money paid to LC
  - For Sec.3, important to identify RM- entry barrier created in RM
  - Found HNH and CB- violative of Sec.3
  - Sec.4- ADP- dominant as per reports- market share alone is not relevant
  - Hospitals- similarly competing- but not give charge same- no provision of comparable
  - No evidence backed by DG as commercial advantage
  - Violation only as per Sec.3 and not Sec.4

Fx International Solutions India Pvt Ltd v. Hyundai Motor India Ltd. (2014)

- Order u/S.27
- Informants: Fx International and St. Antonys Car- allegations of violation of Sec.3
- HMIL- HC- HMC, Korea, GDR- FIPB, 1996- 100% WOS
- HMIL-6.3L car/pa- ATO- 27K Cr, 14K D/ID Ee
- Fx International- Delhi- Hyundai dealership of sale, service of Hyundai cars- dealership from 2006
- Submitted notice of termination of dealership- 2014
- **Claims of I1:** OP enters into exclusive dealership agreements- dealers take prior consent with OP
- HMIL- dealers to procure spare parts, accessories, other equipments from OP or its vendors
- Imposes restriction on Discount Control mechanism- fixes price ceiling- against RPM- Sec.3(4)(e)
- Also contributes to hub and spoke arrangement- bilateral vertical and horizontal agreements- price collusion
- HMIL- control over sources of supply- ties purchase of desired cars to unwanted complimentary
- Result in TIA- violation of Sec. 3(4)(a)

Fx International Solutions India Pvt Ltd v. Hyundai Motor India Ltd. (2014)

- St Antony Car- distribution of passenger car- non-exclusive dealer in Kollam
- Dealership agreement- for 3 years from date of execution
- Cl. 5(iii)- prohibited dealer from investing in any business- dealership with competitors of OP
- Dealers of OP not take dealership with competitors of OP- RFD- Sec.3(4)(d)
- Directions to DG- PFC of Sec.3 made as under Sec.26(1)
- **Investigation by DG:** Passenger cars- interchangeable, substitutable in view of utility
- RM- Sale of passenger cars in India- subdivisions
- RTD- Inter-brand sale of passenger cars in India
- RPM- Intra-brand sale of Hyundai cars in Delhi and NCR
- TIA- Whether OP imposes TIA- CNG Kits, Lubricants, Insurance
- TIA- RM- After sales services of Hyundai Brand Cars in India
- DG- noted- 5(iii)- prior permission- from OP- ESA, RTD- 3(4) rw 3(1)

<u>Fx International Solutions India Pvt Ltd v. Hyundai Motor India Ltd. (2014)</u>

- DG- found- strict discount control mechanism
- Breached Sec.3- rewarding dealers+ TIA found
- CNG, Lubricants, Insurance- ADP- Sec.4- discriminatory higher price, denial of market services
- DG report to CCI- HMIL- violation of Sec.3, 4
- **Consideration of DG Report:** Report sent to parties- HMIL replied with objections
- 1. DG unilaterally expanded scope of investigation- DG no suo motto power to investigate
- Not embark on investigation beyond PFC made by CCI- Sec.3 and not 4- ultra vires and PNJ
- Emails relied by DG- mandatory certification not obtained-Sec.65B IEA
- Informants not approached CCI with clean hands- malafide intention
- Present cases- contractual perspective- ICA apply and not CCI
- ESA, RTD- consensual agreement- no compulsion on informants- no evidence on restrictions
- 100 dealers engaged in activities and no prior consent taken- no action taken against them

Fx International Solutions India Pvt Ltd v. Hyundai Motor India Ltd. (2014)

- Dealerships of competing manufacturers- unwirtten rule to not allow other dealers
- To keep financial health, check and balance diverting, investing in other business fin resources
- DPM- for healthy and roboust dealership network- not provide for predatory discounts
- Fin health of Delhi NCR affected due to unscrupulous activities of selective dealers
- Avoid mystery dealers through unannounced visits to dealers showroom
- Penalties imposed is distributed among all non-violating dealers in equal proportion
- CNG, lubricants and insurance- recommendations are provided- not imposed
- **Analysis**: DG- investigated OP- Sec.3 and not on Sec.4- since recommendations were on Sec.3
- DG's investigation- *dehors* directions given to DG- ultravires scope of investigation
- Evidences email without Sec.65 IEA
- Further, checks on upstream and downstream market
- To extent of Sec.4 investigation- void and Sec.3- accepted