

## Anti-competitive Agreement: The Magnified Burden of Proof

### Introduction

On March 7, 2017 the Supreme Court (“SC”) delivered an important judgment in *Competition Commission of India vs. Co-ordination Committee of Artists and Technicians of W. B. Film and Television and Ors.*<sup>1</sup> In this case, the SC confirmed the findings of Competition Commission of India (“CCI”) in an analysis of anti-competitive agreements enshrined in section 3, described below, of the Competition Act, 2002 (“Act”). It held that while conducting an analysis of anti-competitive agreements, the first and foremost aspect that needs to be determined is the *relevant market*.<sup>2</sup> This term as such does not appear in section 3; therefore, until this judgment was pronounced once an agreement fell under any of the four categories of section 3(3)<sup>3</sup> it was presumed to cause appreciable adverse effect on competition without requirement of any further proof. The judgment has magnified the burden of proof on the CCI to define the *relevant market*, which is not only difficult to determine, but also has an element of subjectivity in its determination.

This newsletter summarizes the rulings of CCI, Competition Appellate Tribunal (“COMPAT”) and SC and its impact.

### 1. The Facts

A T.V. serial, Mahabharat, originally produced in Hindi was dubbed in Bengali and was to be telecast in West Bengal through two channels, i.e., channel 10 and CTVN Plus. Certain producers in eastern India formed an association called Eastern India Motion Picture Association (“EIMPA”). Similarly, the artists and technicians of film and television industry in West Bengal formed Committee of Artists and Technicians of West Bengal Film and Television Investors (“Coordination Committee”). Both these bodies together opposed the telecast stating it would adversely affect the producers, artists and technicians working in West Bengal with the apprehension that the entry of dubbed serials may deter production of such Bengali serials. Thereafter, they wrote letters to the two channels asking them to stop the telecast of the dubbed serial. They also threatened them with consequences for failure to stop the telecast which included non-cooperation, agitation, demonstration and strike.

The informant was a distributor of video cinematographic TV serials and telecaster of regional serials in eastern India who was assigned the right to prepare the dubbed version of the serial and telecast it. He executed a revenue sharing agreement with the two channels for its telecast. EIMPA issued a letter to the informant asking him to stop the telecast, while the two channels notified him about the pressure put by the Coordination Committee. As a consequence, he complained to CCI about their concerted actions and requested action.

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1 AIR 2017 SC 1449

2 Section 2(r) defines it as market which may be determined with reference to the relevant product market or with relevant geographic market or both

3 These categories are where an agreement (a) directly or indirectly determines purchase or sale price, (b) limits or controls production, supply, market, technical development, investment or provision of services (c) shares the market or source of production by allocating geographical area of market, type of goods or services, (d) directly results in bid rigging or collusive bidding. The per se rule applied to such agreements

## 2. Relevant Legal Provisions

Before dwelling into the contentions of the parties and rulings, it is important to understand the relevant statutory framework concerning the case. An “agreement” is defined in 2(b) as any arrangement, understanding or action in concert. Under section 2(l) “person” includes, amongst others, individual, association of person whether incorporated or not, body corporate, artificial juridical person or enterprise etc. Section 3 places an embargo on a person, enterprise or their respective associations from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which cause or likely to cause appreciable adverse effect on competition within India. Specifically, section 3(1) prohibits anti-competitive agreements which are treated as void by virtue of 3(2). Section 3(3)(b) stipulates that any agreement which limits or controls production, supply, market, technical development, investment or provision of services is anti-competitive in nature. Section 19(1) empowers the CCI to enquire into such agreements based on factors mentioned in 19(3) which, amongst others, are agreements which create barriers to new market entrants or foreclose competition by hindering entry into the market. Section 19(6) lists the factors for determination of relevant geographic market while 19(7) lists the factors for determination of relevant product market.

## 3. Parties Contentions and Rulings

Upon receipt of the complaint, the CCI found that channel 10 stopped the telecast of the serial directly due to the pressures exerted by the two bodies and formed a *prima facie* opinion that their actions were anti-competitive. The CCI instructed the Director General (“**DG**”) to conduct a detailed investigation under section 26 of the Act.

**3.1 Contentions raised:** The two bodies contended that **(a)** the Coordination Committee was, in fact, a trade union of artists and technicians under the Trade Union Act and not an *enterprise*. They were neither *person* or *association of persons* engaged in the business of production, supply and distribution of goods and they also did not provide any services so as to attract section 3(1) deeming their conduct anti-competitive; **(b)** the artists and technicians in the Coordination Committee sold their labour against remuneration given by the producers. They had no control over distribution and supply of products nor could control production, programming, marketing and up-linking of any serial in the satellite channel; consequently, their action could not be anti-competitive in nature; **(c)** their agitations against the telecast of dubbed serial was to safeguard the interest of freedom of speech and expression of their members, a constitutional right under Article 19(1)(a) of the Constitution of India

**3.2 DG’s Views:** The DG was not convinced with the aforesaid arguments and took the following position: **(a)** the Coordination Committee comprised of various bodies<sup>4</sup> engaged in the business of visual films for exploitation of theaters or the TV channels; hence, the *relevant market* would be the *film and television industry* of West Bengal; **(b)** the two bodies consisted of *persons* or *association of persons* dealing with identical market of film-making and their joint actions must be examined under section 3(3); **(c)** the action of asking the two channels to stop telecast, threats of non-cooperation, demonstrations and agitations which effectively stopped the telecast amounted to restricting commercial exploitation and was hit by section 3(3)(b); **(d)** the agitation was uncalled for as there was a huge potential of local film artists and the industry was unlikely to suffer on

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<sup>4</sup> West Bengal Motion Picture Artists Forum, Federation of Cine Technicians and Workers of Eastern India, Welfare Association of Television Producers in West Bengal, Association of Television Affiliates and EIMPA

account of the dubbed serials shown on the two channels; (e) although the Coordination Committee was a trade union they, along with their associated organizations, tried to impose restrictions on the commercial exploitation of the dubbed serial and such conduct was anti-competitive in nature. The DG concluded that the actions of Coordination Committee resulted in foreclosure of competition by hindering entry of dubbed serials into the market by imposing restrictions on its commercial exploitation as well as of business opportunities for those engaged in the production, distribution, and telecast of such programs.

**3.3 CCI's Findings:** Once the DG's report was submitted, the two bodies raised the same arguments before the CCI based on which two issues were framed: (i) whether the two bodies imposed or attempted to impose restrictions on the telecast of dubbed serial, (ii) whether the act and conduct of imposing restrictions on the intended telecast was violative of section 3(3)(b). Considering DG's findings, CCI reviewed the letters sent to the two channels as well as the informant to stop the telecast along with oral and written submissions of the two bodies. After due consideration, it was divided in its findings - the majority held that the actions of the two bodies directly stopped telecast of the dubbed serial; hence, the first issue was decided in the affirmative. Further, the Coordination Committee comprised of five organizations (association of enterprises) which, in turn, consisted of artists, technicians and other professionals associated with the film and television industry whose actions fell within section 3(3) and, in fact, adversely effected competition. Although they were a trade union; yet their action was not exempt from section 3(3) of the Act.

In contrast, the minority took the view that the relevant market was "*broadcast of TV serial*" and not "*film and TV industry of West Bengal*" in as much as the former took place either by way of direct-to-home services or through cable. Therefore, broadcasting service was altogether a separate market different from production, exhibition and distribution of films. Since the two bodies were not active in the *relevant market* of broadcast of dubbed TV serials, their action did not violate section 3(3)(b). The minority observed that coercive action taken by a trade union did not amount to an agreement resulting in discontinuance of telecast of the dubbed serial, nor be termed as economic pressure and was outside the domain of the Act.

**3.4 COMPAT:** Aggrieved with the findings of CCI, the Coordination Committee alone preferred an appeal before COMPAT. On the other hand, EIMPA chose to do nothing and accepted the majority decision. The main ground of challenge was that the Act did not apply as the Coordination Committee was a trade union and not engaged in the business of production, supply and distribution. COMPAT set aside CCI's majority view and accepted the minority view. They held that section 3(3)(b) applied to competitors engaged in the same line of commercial activity and when their agreement restricted competition. Since the two bodies were not active in the relevant market of broadcast of dubbed serials, it took the view that the actions of the Coordination Committee did not violate section 3(3)(b). They further observed that mere protests voicing grievance for the benefit of its members by itself did not become a competition law issue, as they were neither trading in any groups or rendered services and there was no agreement, as envisaged in section 3.

#### 4. SC Ruling and Analysis

The CCI filed an appeal against COMPAT's order at the SC and questioned the manner in which the *relevant market* was assigned a limited sphere. SC framed two main issues: (i) the *relevant*

*market* for inquiry into the impugned activity of the Coordination Committee, and (ii) whether the action and conduct of the Coordination Committee was covered by section 3 of the Act.

**4.1 Relevant market:** The CCI contended that the DGs view, as upheld by its majority view, that the matter related to *film and TV industry* was correct. Further, the concerted action of the Coordination Committee affected competitiveness in the entire film and television industry was correct. On the other hand, the Coordination Committee relied upon the minority view that the relevant market was *broadcast of TV serial*. The SC held that the word *market* in section 3 refers to *relevant market* and COMPAT took a myopic view by ignoring the most important aspect i.e., the intended effect of the agitation was not confined to telecast of dubbed serial on TV in West Bengal, but on the entire film and TV industry. In support of this view, the SC held that even according to the Coordination Committee's letters telecast of the dubbed serial would adversely affect the TV and film industry of West Bengal and the alleged purport behind the threat was to save that.

**4.2 Applicability of section 3:** The CCI contended that the definition of agreement in section 2(b) had wide connotation and any anti-competitive agreement between persons or association of persons was hit by section 3(3)(b). The Coordination Committee persisted in stating that they were a trade union and their action would be outside 3(3). The SC gave a broad interpretation to the terms *agreement*, *person* and *enterprise* in section 3 and observed that *action in concert* amounted to an agreement and Coordination Committee would be covered by the definition of *person*. Further, the SC took the view that any entity, regardless of its form, constitutes an enterprise when it engages in economic activity. The SC referred to the notes of DG and CCI majority opinion viz., that although the two bodies did not undertake any economic activity themselves, but were, in fact, an association of enterprises whose members were engaged in production, distribution and exhibition of films. They acted in a concerted and a coordinated manner by taking decisions on behalf of the members who were engaged in similar or identical business. Since their decisions reflected collective intent of the members, the matter could not be brushed aside in the name of trade unionism. Thus, the SC upheld CCI's view that the impugned acts deprived the consumers from watching the dubbed serials and hindered competition in the market by barring them from getting telecast. This amounted to creating barriers to the entry of new content and, therefore, violated section 3(3)(b).

**4.3 Analysis:** Over the years, CCI has consistently held that a relevant market need not be defined for analysis under section 3. This view now stands changed in light of SC's observation to determine the relevant market in which competition is affected, even for examining the existence of an anti-competitive agreement. In *Builders Association of India* case<sup>5</sup> CCI had held that determination of relevant market is not a pre-requisite for an analysis of anti-competitive conduct and that distinction between *market* and *relevant market* was intentional. The latter has also been expanded by widening the defining factors to include *effected market*, which is not defined anywhere in the Act. The term *market* appears in sections 3 and 19(3) whereas *relevant market* appears in sections 4, 19(5), (6) and (7) where the determination arises only for analysis of abuse of dominant position. The judgment is, therefore, a departure from the principle of interpretation of statutes which mandates courts to construe words based on their plain meaning, unless the literal interpretation gave rise to absurdity or rendered the legislation ineffective.

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<sup>5</sup> MANU/CO/0052/2016

## Conclusion

It is possible that the effect of this ruling is likely to place a burden on the CCI to define relevant market for investigations under section 3, especially when the express language of the statute is silent. Moreover, since such determination will involve an element of subjectivity, any person, enterprise or their respective associations whose conduct or agreements are found to be anti-competitive would find opportunities to challenge a particular market definition or propose an alternate. This, in turn, may delay CCI's functioning as determination of a relevant market is a complex economic exercise.

## Author

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