

# Kluwer Competition Law Blog

## Lessons from COMPAT's judgment in Hiranandani

D. Daniel Sokol and Ruchit Patel (Ropes & Gray LLP) · Friday, February 5th, 2016

The COMPAT's recent judgment in *Hiranandani* contains several important lessons for the Indian antitrust community. The case reflects the CCI's desire for strong enforcement and effective deterrence of exclusive contracts in strategically important sectors (hospital services). And it reflects effective judicial control by the COMPAT of the CCI's process, institutional design, and analysis. COMPAT's lessons are important for the Indian business community, competition law practitioners, academics, and the CCI itself, as the competition community seeks to ensure that its decisions are proportionate, procedurally sound, and analytically robust.

### Facts

Hiranandani Hospital in Mumbai entered into an exclusive agreement with Cryobank to supply all stem cell banking services to the hospital's patients for a period of one year (the "*Exclusive Contract*"). Stem cell banking involves the collection of blood from umbilical cords shortly after birth. The blood, which is rich in stem cells, is frozen, and the cells it contains may be used to treat illnesses such as cancer and sickle-cell anaemia that may affect the baby later in life.

Manju Jain, a pregnant woman, entered into an agreement with Life Cell (Cryobanks' competitor) to use its services for banking of stem cells. Mrs. Jain was registered with Hiranandani Hospital for maternity services and for the delivery of her child. Mrs. Jain requested Hiranandani Hospital to allow Life Cell to collect the stem cells blood soon after her delivery. After a Hiranandani doctor told her that Life Cell could not provide its services due to the Exclusive Contract, Mrs. Jain chose to give birth in another hospital. At the time of admission, Mrs. Jain was not informed by Hiranandani Hospital that it had an arrangement with Cryobank and that it does not allow other stem cell banks to enter the hospital.

### CCI's Findings

The CCI held that the Exclusive Contract was anti-competitive in contravention of the provisions of Section 3(1) of the Competition Act 2002. The basis for this finding was that Cryobank had caused appreciable adverse effect on competition in the market for stem cell banking. The CCI reasoned that the Exclusive Contract foreclosed an important route to market for stem cell banking (Hiranandani Hospital). The CCI asserted that consumer harm might result in the future (e.g., if Cryobank left the market or if its service quality dropped), and the Exclusive Contract created entry barriers and reduced patient choice (e.g., by creating a first mover advantage for Cryobank). The CCI made these findings notwithstanding that the Exclusive Contract had a short duration (1 year) and was terminable on notice.

## COMPAT's Judgment and Lessons

The CCI's decision was heavily criticised by the COMPAT. The COMPAT held that the Exclusive Contract did not restrict the choice of the service provider in the relevant market (market for stem cell banking). By virtue of the Exclusive Contract, Hiranandani could provide stem cell banking services only through Cryobanks but patients remained free to secure those services from Cryobanks competitors by switching hospitals. The COMPAT highlighted that there were 13 other suppliers of stem cell banking services active at the time (excluding two subsequent new entrants) and patients were free to use those service providers according to their convenience and financial capacity. The COMPAT noted that the CCI confused its competitive effects analysis by presuming that the stem cell banking service was an integral part of the maternity services (it was not).

The COMPAT's judgment in *Hiranandani* provides the CCI, academics, and practitioners with valuable lessons for the future:

- **The CCI should be wary of self-interested informants.** The COMPAT judgment makes clear that the CCI should look critically at the identity of Informants and should regard their submissions with suspicion when motivated by an ulterior motive.
- **Findings need to be supported by evidence and cannot be mere conjecture or imagination.** The COMPAT was damning of the quality of the CCI's evidence, specifically the manifest absence of any evidence probative of the theory of harm. The CCI's analysis consisted, per the COMPAT, of mere conjecture and imagination. There was no analysis of actual effects and nothing to support the posited theory of harm.
- **Exclusive dealing is a fundamental part of business – it is not anticompetitive by nature.** The COMPAT cautioned that the CCI might hurt pro-competitive business activities, such as innovation, if it does not conduct a complete effects-based analysis of exclusivity arrangements.
- **Examinations in chief are important.** In the *Hiranandani* case, neither the DG nor the CCI deposed the actual complainant. And there was necessarily no cross-examination. This failure was described as “*fatal to the allegations ... that the appellant had indulged in anticompetitive activities.*” The DG's failure to conduct a complete assessment was sufficient to overturn the decision in and of itself.
- **The CCI should independently test the DG's conclusions.** The CCI committed a failure because it “*did not independently examine the various factors enumerated in Section 19(3), (5), (6) and (7) for deciding what constituted relevant market for the purpose of the present case.*” This suggests that the CCI cannot merely rubber-stamp the DG's analysis and must, in appropriate circumstances, conduct its own examination / independent testing of allegations.
- **Consumer protection is different to competition law.** The COMPAT made clear that consumer protection law is different to competition law. Both statutes have different objectives and function in different ways. Accordingly, the CCI should not be as concerned by typical consumer protection issues (e.g., deficiencies in service or asymmetries in negotiating position). It should focus on the competitive process and structure.
- **Precedent should be followed or distinguished.** The COMPAT encouraged the CCI and practitioners to research and apply CCI precedent. In this case, the majority of the CCI has not even referred to the view taken by it in *Shri Sonam Sharma's* case, which concerned similar tying issues.
- **The turnover for the fine should be “relevant” turnover.** The CCI should not set fines by reference to any revenues that are not directly related to an identified infringement.

The CCI's desire for strong enforcement in markets that are of intrinsic importance to India (such

as life sciences, biotech, and hospital services) is commendable. But, the CCI will need to ensure that its future judgments are in line with the COMPAT's guidance to avoid reversals and weakening the deterrence value of its antitrust decisions. Heeding COMPAT's advice would ensure that decisions are more robust. That would be a good thing.

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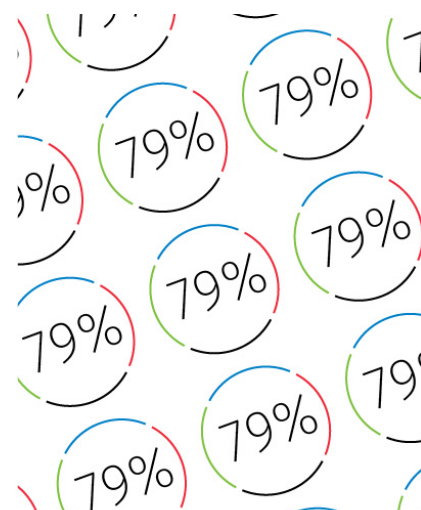
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