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Mapping the Journey of Competition Analysis in India: From Precedence to Evidence

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The National Company Law Tribunal (hereinafter 'NCLAT') on September 19, 2018, passed an order which set aside the penalty of 87 crores imposed on Hyundai Motor India Limited by the Competition Commission of India.[1] One of the primary reasons for the penalty being set aside was the Commission's failure to appreciate the evidence as the impugned order was solely based on the opinion of the Director General (hereinafter 'DG') in his report and not on any specific evidence. The order emphasised on the non-binding nature of the DG report under section 26(2) of the Indian Competition Act and rebuked the Commission for failing in its duty to make an autonomous analysis based on evidence brought on record.

The Commission had found HMIL guilty under Section 3(4)(e) read with Section 3(1) for arrangements (Discount Control Mechanisms) which resulted in Resale Price Maintenance, and under Section 3(4)(a) read with Section 3(1) of the Act for mandating its dealers to use recommended lubricants and oils through the tying-in arrangements. The NCLAT pointed out that the Commission had merely reiterated what the 'DG' had observed in his report: *"the Appellant has admitted to having engaged in various mystery shopping agencies for policing its dealers and monitoring the abovementioned arrangement, without citing any evidence for coming to such conclusion"*.

With respect to allegations pertaining to a tie-in arrangement, the NCLAT opined that there was no evidence on record to suggest that the penalised appellant had mandatorily enforced the use of recommended products through penalties against the non-abiding dealers. The Commission failed to take note that normally car dealers of all companies recommend use of a particular quality of lubricants and oils which are mere suggestion keeping in mind the types of vehicle.

The NCLAT reasoned that application of judicial mind in appreciation of relevant evidence is the *'sine qua non'* for the process of inquiry by the Commission under Section 19 and Section 26 of the Act. The report cannot assume a primary role in the investigation by the CCI and is limited to assist it for appreciation of evidence. Furthermore, the Commission also failed to analyse the agreement in light of the factors mentioned in Section 19(3). In light of such grave infirmities, the NCLAT had no option but to set aside the order for want of appreciation of evidence and thorough analysis by the Commission of the agreements in question.

The Division of Responsibilities: DG v CCI

Section 26(1) of the Act empowers the Commission to direct the DG to investigate in a case where it is of the opinion that a prima facie case exists. The DG is only an investigative arm of the Commission[2] and the decision, whether there is any contravention of the provisions of the Act is the sole prerogative of the CCI. The text of Section 19, Section 26, and Section 27 paints an extensive picture about the duties that the Act imposes upon the Commission: such that under section 19, the onus to determine the 'Relevant Market', 'Dominance', or 'Appreciable Adverse Effects on Competition' lies on the Commission and the DG report is merely assistive in nature.

The duty of the Commission is not only supervisory or adjudicatory but also requires enquiry and investigation of any alleged contraventions; after taking assistance from the DG's report, considering objections, and appreciating evidences raised by all parties. Therefore, the Commission's adjudicatory role is not constrained to a myopic view of the report of the DG but a profound analysis of the submissions and evidence submitted by the concerned parties, thereby making its role both an adjudicatory and investigative one.

The Hyundai order also restricts the power of the DG to add charges on his whims while investigating into the allegations. The DG report can only focus upon the allegations pertaining to which the Commission had formed a prima facie case under section 26(1) and directed investigation by the DG. Therefore, any anti-competitive practice of the accused, not covered under the Commission's prima-facie order cannot be subject to the DG's investigation.

The Existing Framework

The CCI's modus operandi thus far has been mostly restricted to a theoretical and precedence based approach rather than profound economic deliberations. The intermittency of cases delving into broader aspects of competition law creates information discontinuities. This raises the question of the relevance of precedence in light of more recent issues. The application of the rule of precedence also entails the risk of erroneous economic explanations and flawed reasoning overpowering the economic justifications.

Even while applying precedents, there has been a lack of consistency on the part of the Commission. In the *Hiranandani Hospital case*[3], the CCI had passed an order finding a violation of Section 3(1) without coupling it with either of Section 3(3) or Section 3(4) of the Act. This was in contrast to an earlier order where it was of the view that *"Section 3(1) of the Act should not be evoked independently."*[4] Again, in its order in the *Aditya Birla caes*[5], the CCI ruled against the precedent set by the COMPAT in the *Lamborghini case*[6] for the satisfaction of the group test under section 5 as the relevant parameter to qualify as a single economic entity for Section 3 offences. Owing to the rule of precedence, the CCI reproduced this erroneous and ignorant approach in *Aditya Birla case* and the *Rail Coach Factory*[7] case as well.

The inherent flaw with reliance on precedents in Competition law disputes is the economically exclusive nature of every offence. Every case merits an independent economic analysis with respect to the market structure, competitors, and consumers. As a result, laying down steadfast rules for specific situations would be imprudent exercise. Instead, the reduction of precedents to merely-support well-accepted economic theories as in the mature antitrust jurisdictions is the right

way forward.

March towards an Economics based Evidence Model

The Commission has acknowledged the importance of clear, unambiguous evidence and limiting their interventions based on such evidence.[8] To make their decisions economically sound the judges should endeavour to apply the established principle after careful consideration of the factual aspects. Moreover, the use of precedents should be limited to general propositions because a single case would usually involve a narrow range of issues in an exceedingly particularized context.

Setting aside a penalty because of incomplete economic analysis has the potential to instil the practise of conducting case specific economic analysis, rather than heavy reliance on precedents. The inclination of the appellate authority while overruling the decisions of the CCI has usually been procedural or administrative infirmities in the past.[9] Overruling cases based on incomplete economic analysis or incorrect use of precedents has been a rare practise due to the trepidation and disinclination towards the use of economic evidence in the enforcement of the competition law in India. The NCLAT has set off a much needed change in the competition landscape of the country by accentuating the importance of economics based evidences and insightful analysis of the factors enumerated in Section 19(3), which could ultimately result in incorporation of economic theories and principles into case analysis and the strengthening of judicial reliance on economic evidence in India.

References[+]

This entry was posted on Friday, October 5th, 2018 at 12:00 pm and is filed under Source: OECD“>Competition, Economics, India
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