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Abuse of Dominance under Indian Competition Law: A Review of the Schott Glass Case

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Introduction

The Supreme Court of India recently passed its judgment in the Schott Glass case[1]. The ruling comes after more than ten years when the Competition Commission of India first adjudged the matter and passed a contravention order against Schott Glass India Private Limited ('Schott Glass'). The SC has mostly confirmed the findings of Competition Appellate Tribunal (COMPAT) setting aside the contravention order and highlighted the commercial justification of the impugned business practices. The judgment has further shed light on policy where it has suggested that India should take advantage of the current geopolitical scenario and practice prudence when it comes to regulating import of foreign technology. The ruling gains importance as Indian competition law jurisprudence is currently in nascent phase and the Supreme Court's opinion would provide much required guidance to the Competition Commission of India both on law and policy as far as interpreting section 4 of the Competition Act, 2002 is concerned. This is more so when the National Competition Policy is still in the drafting phase. The ruling would further allow commercial enterprises to comply with competition law by balancing pro-competitive and anti-competitive effects of a business practice.

Factual and industrial background

The relevant product in question was 'Neutral USP-1 Borosilicate glass tubes'. There were five players in the Neutral USP-1 Borosilicate glass tube market out of which three exited due to various reasons. Resultantly, Schott Glass became a dominant entity with Nipro Glass Private Limited being a distant second. The said product is used in two variants of 'clear' and 'amber' to manufacture respective ampoules, cartridges and vials to be supplied to the pharmaceutical industry. The case was initiated by Kapoor Glass Private Limited ('Kapoor Glass'/ 'Informant') which was a 'converter' for the supply of ampoules and cartridges to various pharmaceutical companies.

Kapoor Glass primarily alleged that Schott Glass was abusing its dominance in the upstream market of Neutral USP-1 Borosilicate glass tubes to cement its position in the downstream market of ampoules and cartridges made of such borosilicate glass tubes, a violation of the Competition Act, 2002 ('Act'). This supply chain between Neutral USP-1 borosilicate glass tube manufacturers,

ampoule converters and pharmaceutical companies is important as any competition assessment ought to consider these linkages before reverting a finding. The importance is underlined for pharmaceutical companies who were never consulted during the investigation phase as the final consumers of ampoules and cartridges by the Director General but are now still bound by the court ruling.

Legal analysis

At the outset, the authors submit that there are three orders passed by the Commission (majority order, minority order, supplementary order)[2] and a judgment passed by the Competition Appellate Tribunal[3] and Supreme Court each in the case. A critical analysis of these combined orders would suggest that some of the key issues under consideration were the competitiveness of the Neutral USP-1 borosilicate glass tubes and subsequent ampoules and cartridges, contractual terms between the entities in the supply chain and the legal standard for the competition authority to intervene.

The prime text on Indian competition law remains the Competition Act, 2002[4]. The preamble of the law focuses on 'promoting competition' and 'consumer welfare' and the three substantive provisions are anti-competitive agreements (section 3), abuse of dominance (section 4) and merger control (section 5-6). Interestingly, while the phrase 'Appreciable Adverse Effect on Competition (AAEC)' appears in anti-competitive agreements and merger control provisions, its absence is conspicuous in abuse of dominance[5]. This aspect is at the core of assessing the 'cause vs. effect' debate[6] of an anti-competitive activity and whether it is even applicable in the context of abuse of dominance, notwithstanding the ambiguity around what are the core elements of an 'effects-test'.

Another key aspect is the nature of proceedings under Indian competition law. Section 19(1) of the Act makes it very clear that an 'information' (vs. complaint) is to be filed before the CCI to set the ball rolling[7]. This position has been settled by the Supreme Court first in the *CCI vs. SAIL case*[8] where the Court held that the Competition Commission of India has broad discretionary powers to grant a 'right to hearing' to the party before dismissing a case under section 26(2) of the Act. The Court re-emphasised the regulatory powers of the Commission in *Samir Agrawal case*[9] where it held that the proceedings under the Act are *in rem* in nature. The said regulatory powers gain importance as once a *prima facie* contravention order is being passed by the Competition Commission of India, there is virtually no bar on the Director General (DG) in terms of defining the methodology to conduct the investigation. As the facts would show, the Director General in this specific case ought to consult the pharmaceutical companies who were the final buyers of the ampoules, the leveraged segment for Schott Glass to conduct a holistic competition assessment.

Out of the total of six orders, two orders stand out. One is the majority order passed by the CCI finding a case for violation and the minority note which was relied upon by the Competition Appellate Tribunal and the Supreme Court while overturning the majority order. The evidence used by the Commission in the majority order was that the overall terms & conditions offered by Schott Glass for the supply of glass tubes to ampoule manufacturers were such to cement its dominance in the upstream market of glass tubes and enter the downstream market of ampoules and cartridges. It further held that the volume-based discounts given by Schott Glass to Schott Kaisha, though per se not anti-competitive, puts the latter in the position of strength through

increased profits thereby violating the provisions of the Act.

In this backdrop, some of the observations made in the minority order are of interest. In particular, the dissenting member while scrutinising the discount policy of Schott Glass, at one place, mentioned that it has failed to uniformly apply the discount rates. These comments are important as the gravamen of the dissent lies in commercial justification of the Schott Glass's (theoretical) discount policy and how the majority order has erred in overlooking the economic aspects of it. The fact that there was divergence between the written text and the implemented text, the judgment ought to hinge on evidence rather than economic theory. The dissenting member goes beyond and notes that the ampoule manufacturers were always at liberty to diversify their procurement options, should they be willing to forego the 8% discount offered by Schott Glass on the condition of exclusivity. It is submitted that such observations are unsustainable both from a legal and economic standpoint as it is a settled position under the law that any starting point for a legal inquiry under competition law is the conduct of a dominant enterprise and not the recipients of it. Similarly, any foregoing of such a discount would be catastrophic to the economic efficiency of ampoule manufacturers which would result in increased input costs.

'Special responsibility' under Indian competition law

One of the major jurisprudential values of this ruling is whether there is a 'special responsibility' cast upon a dominant entity to comply with the provisions of Indian competition law. The Supreme Court has yet again missed an opportunity to opine on this question which is key to interpreting any factual matrix alleging imposition of unfair and discriminatory conduct by a dominant enterprise. For instance, a monopolistic entity is bound to deal under fair and non-discriminatory terms with its upstream and downstream supply chain partners in the European Union (EU) where such a doctrine is applicable. On the contrary, a dominant entity has higher freedom under the US antitrust law when it comes to deal with its partners[10]. While the CCI majority order has taken a position on the same, the minority note, Competition Appellate Tribunal ruling and the Supreme Court judgment are silent on this.

In the *Fast way transmission case*[11], the Supreme Court looked into the factual matrix and held the respondent ('Fast way Transmission Private Limited') in violation of section 4 of the Competition Act. It, however, did not take a position on the special responsibility doctrine. Similarly, in the *Coal India Limited case*[12], the Court ruled that an enterprise already governed under the provisions of the Nationalisation Act could be scrutinised by the CCI under section 4 of the Act but kept the question of applicability of 'special responsibility' doctrine open. All of this has led to legal uncertainty resulting in the much abhorred ping-pong game between the CCI and – which is now replaced by the National Company Law Appellate Tribunal.

Conclusion

This is the third instance when the Supreme Court has substantially reviewed section 4 of the Indian Competition Act. The Court has practiced an unsought silence on whether a dominant enterprise has special responsibility to comply with the provisions of the Act. This is more so when

the CCI has consistently answered this question in affirmative resulting in ambiguity. The second question is whether AAEC is the correct measure when it comes to observing violation of section 4 of the Act, more so when its absence is conspicuous in the legislative text. It is high time that the Indian government takes appropriate legislative measures to address this gap so that concepts such as 'legal certainty' and 'ease of doing business' are felt for real, rather than remain merely an academic nicety.

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[1] https://api.sci.gov.in/supremecourt/2014/19707/19707_2014_5_1501_61745_Judgement_13-May-2025.pdf

[2] https://www.cci.gov.in/antitrust/orders/details/877/0

[3] Competition Appeal (AT) No. 91 and 92 of 2012

[4] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India)

[5] Supra

[6] Payal Malik et al., Legal treatment of abuse of dominance in Indian competition law: adopting an effects-based approach, 54(2) Review of Industrial Organisation 435, 436 (2019).

[7] Supra

[8] Competition Commission of India vs. Steel Authority of India Ltd. (2010) 10 S.C.C. 744

[9] Samir Agarwal vs. Competition Commission of India (2021) 3 S.C.C. 136

[10] Centre for Competition Law and Economics, Memorandum of the Panel Discussion on "Competition in Digital Markets: A Look at the US AdTech Trial" (Nov. 25, 2024),

https://www.icle.in/wp-content/uploads/2024/11/US-AdTech-trial-conference-memorandum.pdf.

[11] Competition Commission of India vs. Fast way Transmission Private Limited, (2018) 4 S.C.C. 316 (India)

[12] Coal India Limited vs. Competition Commission of India, (2023) 10 S.C.C. 345 (India).

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