



M/s. Schott Glass India Pvt. Ltd.* (Abuse of Dominance)

Forum:

Competition Commission of India¹ and
Competition Appellate Tribunal²

Legislative Provisions Referred:

Competition Act, 2002³-

1. Section 2(h): "enterprise"
2. Section 3(4): Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including – (d) Refusal to deal.
3. Section 4 (2)(a): Directly or indirectly, imposes unfair or discriminatory; condition/price
4. Section 4(2)(c): Indulges in practice or practices resulting in denial of market access
5. Section 4(2)(e): Uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Parties to the Case:

1. Schott Glass India Pvt. Ltd.
2. M/s. Kapoor Glass Private Limited
3. Competition Commission of India

Facts of the Case:

Schott Glass, a wholly owned subsidiary of the Schott group (German origin), is a manufacturer of Neutral USP-1 borosilicate glass tubes having unique properties (such as low thermal expansion co-efficient and highly resistant to chemical reaction), therefore are used to make glass ampoules, vials, cartridges, syringes, which

are used as packaging material for liquid injectables and drugs by the pharmaceutical industry. These glass tubes conform to the needs of the pharmaceutical companies.

Kapoor Glass was the informant before the CCI wherein it alleged Schott Glass of anti-competitive practices, such as – (a) practices affecting the state of competition in the market for Neutral USP Type I Borosilicate Glass Tubes in India and (b) practices affecting the state of competition in market for downstream product of glass ampoules and other containers. Schott Glass and Nipro Glass India were the only two companies producing 'neutral USP-I borosilicate glass tubes' in India. Here, Schott Glass was alleged of engaging in anti-competitive practices such as offering discounts in lieu of bank guarantee of Rs.70 lacs from ampoules manufacturers. Further, it was alleged of forcing upon some anti-competitive agreements to the Converters. Application was filed regarding infringement of section 4(2)(a),4(2)(e),3(4), and sought reliefs under section 27 & 33 of the Act. The CCI after finding a *prima facie* case directed the DG to investigate the matter.

The DG's report stated that the unique characteristics of the glass manufactured by Schott Glass made it non-substitutable. DG took the territory of India as the relevant geographical market and categorised relevant product market broadly into two, (a) Market for 'Neutral Clear USP-I borosilicate Glass Tubes' (NGC) and (b) Market for 'Neutral Amber USP-I Borosilicate Glass Tubes' (NGA).

The CCI found Schott Glass guilty of contravening section 4 of the Act and imposed a penalty of Rs. 5.66 crore (INR 56.6 mn) with a cease and desist order. The CCI ordered to cease and desist from indulging in anticompetitive practices like applying dissimilar conditions while giving discounts to Schott Kaisha vis-à-vis other Converters; non-discriminatory terms of transactions for supply of tubes and tied selling of Neutral Glass Clear (NGC) and Neutral Glass Amber (NGA). Aggrieved with the CCI's order, Schott Glass filed for an appeal. Kapoor Glass, too, filed an appeal

*M/s. Schott Glass India Pvt. Ltd. vs CCI & Ors., decided by COMPAT available at http://www.compat.nic.in/upload/PDFs/aprilordersApp2014/02_04_14.pdf and Kapoor Glass Pvt. Ltd. vs Schott Glass India Pvt. Ltd., decided by CCI available at <http://www.cci.gov.in/May2011/OrderOfCommission/Case22of2010MainOrder.pdf> last accessed on 28th July 2014

¹ Hereinafter referred to as 'CCI'.

² Hereinafter referred to as 'COMPAT'.

³ Hereinafter referred to as 'the Act'.



CASE STUDY 27

JULY 2014

seeking for the enhancement of penalty imposed on Schott Glass in the CCI's order.

The COMPAT did not contest the "market definition" as well as the test of "dominant position" adopted by the CCI. The main issues before the COMPAT viz: discriminatory pricing, functional discounts, exclusionary behaviour and refusal to deal, have been summarised in the following manner.

Main Issues:**Issue 1. Discriminatory conditions and pricing contravening section 4(2)(a)(i) & (ii) of the Act**

CCI (main): The increase in the quantity supplied may result in lower overall cost for a dominant supplier which can be passed on to the consumers in the form of a more favourable discount. Also Schott Glass was giving favourable conditions to its JV which establishes the fact that cost was not the key consideration for the Schott Glass as price was fixed as per the long term supply agreement of the JV. Further, target discounts coupled with loyalty rebates as a counterpart of a commitment from the purchaser to place all or most of its requirements to the seller may act as a potent horizontal exclusionary device aimed at fore-closing competition. CCI therefore found that Schott Glass violating section 4(2)(a)(i) and (ii).

CCI (minority): For a discount policy to be discriminatory, it must be different rates for equivalent transactions. To establish this, two conditions should be met: (i) dissimilar treatment to equivalent transactions; and (ii) harm to competition or is likely harm to competition. Regarding the effect on competition, it was found that the Converters manufacture and supply containers to pharmaceutical companies based on their requisitions. The pharmaceutical companies usually dealt with two-three Converters. Further, the prices of the containers were negotiated between the Converters and pharmaceutical companies on a one-to-one basis. Therefore, the cost differential in inputs caused by the discount scheme of Schott Glass did not affect the end price of the final products. Discounts scheme of Schott

Glass did not harm the competitive ability of the customers and competition in the downstream relevant markets.

COMPAT: The COMPAT relied on the observations of the CCI's minority order which alluded to the EU and American jurisprudence. Therefore, COMPAT ruled out the contravention of section 4(2)(a)(i) and (ii) of the Act and it set aside the main order of the CCI.

Issue 2. Exclusionary behaviour and denial of market access contravention of section 4(2)(b)(i) and 4(2)(c) of the Act

CCI (main): Regarding section 4(2)(b)(i), the CCI read all the agreements (Trade Mark License Agreement, Sale Purchase Agreement, Supply Agreement and Market Support Agreement) conjunctively along with the discount policies of Schott Glass and found it guilty. It was of the opinion that this was an attempt to bind the Converters to procure the glass tubes only from it. Further, the CCI relied on the statements of the Converters given before the DG, wherein, it was claimed restrictions were put on them to not purchase tubes from any other sources. For allegations under section 4(2)(c), the CCI took note of two things. The reprehensible behaviour on the part of the Informant in printing fake labels of Schott Glass and passing them as well as the fact that the incident had taken place before the charging sections became operational and therefore such refusal could not be taken into consideration. The CCI, therefore, exonerated Schott Glass from these charges.

CCI (minority): There were no express or partial or full exclusivity clauses present in the contracts, in the absence of which, it cannot be treated as imposition of unfair conditions – restricting choice, access to competing suppliers and freedom from trade. Regarding TMLA, Schott Glass had a valid reason to enforce it to protect its brand and reputation and prevent brand infringement through measures which are consistent with the provisions of the Act. On allegations of denial of market access, the pharma



CASE STUDY 27

JULY 2014

companies stated that switching or shifting to a new supplier is not a significant constraint. The ability of the Informant to survive in market therefore is not determined by the availability of Schott Tubes as its input. Therefore, conduct of Schott Glass has not contravened the above provisions of the Act.

COMPAT: The agreements do not suggest any clause of exclusive dealing with the Appellant nor does it spell out any loyalty clause. Schott glass pleaded the only purpose of TMLA requirement is to attach the logo of Schott to the package of container made out of Schott tubes which the converter delivers to the pharmaceutical companies. In this instance too, the COMPAT agreed with the minority order and found no infringement of the provisions of 4(2)(b)(i) and 4(2)(c) of the Act.

Issue 3. Tie- in arrangement contravening provisions of section 4(2)(d) in the sale of amber tubes

CCI (main): Both the products are tied and marketed together and a bundled discount was given to the customers on them. Additionally the fact that Schott Glass had a large market share of around 90% in NGA and NGC segments which is a virtual monopoly, with the power to leverage the sale of one contingent upon the sale of another. The policy of Schott Glass to market both the products jointly with common incentive appears to be designed with a view of protecting its dominance in the upstream market. The CCI further read the discount policy of Schott Glass with the TMLA and the overall discount policy of the Schott Glass to hold that the discount offered was a bundled discount. On this basis, the CCI found Schott Glass guilty of breach of section 4(2)(d).

CCI (minority): Allegation of tie- in was not backed by any documentary evidence wherein sale of amber borosilicate glass tubes was contingent upon the Converters purchasing clear borosilicate glass tubes. Further, glass tubes manufactured by Schott Glass were far more superior in quality and were much in demand in the market. The COMPAT was also of the

opinion that NGA and NGC were not entirely different material. Also the fact that the Schott Glass has 90% market in the amber tubes there was no need for Schott Glass of pushing the amber tubes along with the clear tubes. Held, in the absence of any documentary evidence there was no question of linking the discount scheme with the tying-in as the parties could opt to purchase the amber tubes or ignore to purchase it.

COMPAT: The COMPAT set aside the main CCI order and upheld the minority order thereby exonerating Schott Glass of section 4(2)(d) charges.

Issue 4. Leveraging its market power to enter downstream market in contravention of section 4(2)(e) of the Act

CCI (main): The CCI charged Schott Glass guilty of the breach of the above provisions. It referred to the profits earned by Schott Kaisha and linked it to favourable treatment on account of discounts. The Appellant being dominant in the upstream market and with its Long Term Tubing Supply Agreement with Schott Kaisha; its vertically integrated firm was earning profits in the downstream market too. To establish this instance, the CCI corroborated the statements of all interested parties. Held, Schott Glass guilty of contravening section 4(2)(e).

CCI (minority): In order to be guilty of section 4(2)(e), there have to be two markets, wherein the guilty party had presence. It did not agree with the CCI's observation that Schott Kaisha was at an advantageous position because of its JV with Schott Glass. Further it observed that the neither the DG nor the CCI pursued case against Schott Kaisha and it failed to join them as a party in the case before CCI. Schott Glass on its own had no presence in the downstream market, the provisions of section 4(2)(e) cannot be applied. In the absence of any evidence that Schott Kaisha was being favoured to leverage itself in the downstream market breach of section 4(2)(e) cannot be implied. Further, the factors relied by CCI are not applicable as those were prior to the enforcement of section 3 and 4.



CASE STUDY 27

JULY 2014

COMPAT: Therefore, both conditions being absent, it set aside the findings of the CCI main order. It upheld the minority observation and exonerated Schott Glass from charges of section 4(2)(e).

Decision: The COMPAT allowed the appeal by Schott Glass, thereby setting aside the order and penalty awarded by CCI. Further, it dismissed the appeal filed by Kapoor Glass with cost for lack of bona-fide and imposed a fine of Rs.1,00,000/- (rupees one lakh).

Analysis of the order:

The COMPAT in this case has stuck to the competition principle that "Being big is not bad. Being big and abusive is bad insofar as the competition culture is concerned." A detailed analysis of the case revealed the long standing strained relation between the two companies. Not to tout it as a regular corporate war alone, the COMPAT in this case has laid down precedent setting principles.

This case has unfolded many principles which can be taken as competition jurisprudence. First, the fact that the CCI while framing the charges and corroborating the statements of the Convertors, did not give an

opportunity to the other party to cross-examine, was found to be improper on the part of CCI to straight away accept the statements on oath by the Convertors who can be biased because of its ulterior business motives. This amounted to denial of natural justice to the other party. Second principle, "discounts *per-se*" is not anti-competitive. Transactions of different volumes cannot be equivalent transactions warranting equivalent treatments from the seller and therefore, discount schemes could not be deemed to be discriminatory for setting different price conditions to identical transactions with different buyers. There is a difference between "equivalent transactions" and "identical transactions".

Third principle deduced herein, is that the past conduct/behaviour of the parties will also affect the contentions of the case - the test of *bona fide* as well as malicious past intent. To stress on this, the COMPAT imposed a fine on the informant whilst dismissing the appeal.

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