

Setting Competition Jurisprudence: Deductions from COMPAT's order

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The COMPAT in the *M/s. Schott Glass India Pvt. Ltd. vs. CCI & Ors.*; case 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 *M/s. Kapoor Glass* (herein the Informant) and *M/s. Schott Glass India* (herein the Appellant). Not to tout it as a usual corporate war alone or a big entity trying to abuse the small, the COMPAT in this case has laid down precedent setting economic and procedural principles. While in the process, the Appellate Tribunal overturned the main order of the CCI and upheld the minority order.

The CCI received an information with regard to the contravention of provisions of section 4 and 3(4) of the Competition Act (herein the Act) by the Appellant. Appellant is a manufacturer of Neutral USP-1 borosilicate glass tubes which are made of borosilicate glass, a special type of glass having unique properties. The Appellant was alleged of engaging in unfair and discriminatory pricing, tying two unrelated products, granting loyalty rebates and discounts that could prevent the shift of ampoules manufacturers to imported goods. To avail loyalty discounts it also imposed conditions to purchase at least 80% of their total requirement from the Appellant also sought a bank guarantee of INR.70 lacs from the ampoules manufacturers. Further,

the Appellant was charged with discriminating on discount price by favouring its own JV- Scott Kaisha.

The Director General (herein DG) had to investigate: whether the OP (herein Appellant) was a dominant player in relevant market; whether it abused its dominant position and whether it abused its position in upstream market and used its JV to leverage the downstream market. The DG upon investigation found the unique characteristics of the Neutral Borosilicate USP-I Borosilicate Glass Tubes produced by the Appellant made it a non-substitutable product. The DG concluded that relevant product market for the downstream market was that of ampoules, vials, cartridges and other containers. The DG took the whole of India as the relevant geographic market and concluded that the Appellant was a dominant player having major market share of 61.49% in 2008-09 and 81.17% in 2009-10. Apart from other palpable

practices, the DG found that "price discrimination" and "discount policy" of the Appellant have led to denial of market access and found the Appellant guilty of contravention of most of the provisions of section 4.

In its March 29, 2012 order (*Kapoor Glass Pvt. Ltd. Vs. Scott Glass India Pvt. Ltd.*) the CCI had held the Appellant guilty of contravention of section 4 of the Act and had inflicted a penalty of INR5.66 crore. It had also passed a cease and desist order with regard to the alleged anti-competitive practices of the Appellant. It is pertinent to mention here that this was the majority view of the CCI. The minority held otherwise. Being aggrieved with the decision of CCI, Scott Glass filed for an appeal. Interestingly, the Informant too filed an appeal as it did not agree with some of the observations of the CCI order, it appeal to raise the penalty imposed on the Appellant.



The COMPAT in its April 2, 2014 order turned the majority order upside down and upheld the minority order. It also laid down some economic and procedural principles.

First principle delves around the principles of 'natural justice' i.e. the right to a fair hearing (*audi alteram partem*). The principle of *audi alteram partem* is the basic concept of principles of natural justice. The expression *audi alteram partem* implies that a person must be given an opportunity to defend himself. This principle is in *pari materia* with cross-examination. The COMPAT, though did not refer this principle in toto, frowned upon the fact that the CCI while framing the charges and corroborating the statements of the Converters, did not give an opportunity to the Appellant to cross-examine the same and it was found unjust on the part of CCI to straight away accept the statements on oath by the Converters who can be biased because of its ulterior business motives. It is a trite principle of the Evidence Act that any 'untested statement by the cross-examination cannot be blindly accepted' and it is bereft of natural justice principles.

Second principle deduced from the case is that "discounts per-se" is not anti-competitive. Transactions of different volumes cannot be treated as equivalent transactions warranting equivalent treatments from the seller and therefore discount schemes could not be deemed to be discriminatory inasmuch as selling at different prices for identical transactions with different buyers. This means there is a difference between "equivalent transactions" and "identical transactions". While framing charges against the appellant, the CCI ignored this basic principle that the prices could be 'discriminatory' only for equivalent transactions, so if a different price was charged for the same quantity of the same product only then it would be termed as discriminatory pricing. The COMPAT agreed with the minority view which alluded to the principles of matured jurisdictions. Under the Robinson- Patman Act of US, discrimination in prices between different

purchasers of the same products is condemned, where the effect of such discrimination may be to substantially lessen competition. Similar provisions prevalent in EU- Article 102 TFEU (previously Article 82 (c) of the EC Treaty), wherein if a dominant player applies dissimilar conditions to equivalent transactions with other trading parties, thereby creating competitive disadvantage, is considered to be an abuse of dominant position. The COMPAT therefore held discount, per-se, could not be deemed to be discriminatory inasmuch as it gives different price conditions to identical transactions with different buyers.

Third and last principle is that the past conduct/ behaviour of the parties to necessarily apply the test of bona fide as well as malicious past intent. It was submitted that the Informant had previously attempted to infringe Appellant's trademarks and fraudulently pass off borosilicate glass tubes manufactured by Appellant. Because of which the Appellant had black listed the Informant and had decided not to enter into any supply arrangement with it. No duty is cast upon the Appellant by the law to supply its products to the Informant. Additionally some facts were submitted by counsel of Appellant before the COMPAT that suggested a history of corporate war between Informant and the Appellant. The COMPAT considered it and to discourage such spurious litigations imposed a fine of INR 100,000 on the Informant for his lack of bona fide.

The author feels that judicial pronouncements in such lines will contribute in developing competition law jurisprudence in India, which is still at a nascent stage. The COMPAT's order has established many principles which can become competition jurisprudence. From time to time the CCI and COMPAT have alluded to the competition principles of matured jurisdictions just like in this case. Ultimately such judgments will build up the Indian competition law jurisprudence. 



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