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## Substitutability In Relevant Market Definitions— A Two Way Street?

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PAGE

4 : Behavioural Orders

5 : Combination Orders

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## Substitutability In Relevant Market Definitions— A Two Way Street?

### Introduction

Market definition is arguably the most essential analytical tool which antitrust regulators across the globe use to analyze competition concerns. An inaccurate market definition would entail incorrect market share computations—the primary and most commonly relied on indicator of a firm's market power. Given the significance of market shares in a competitive analysis, particularly for merger control notifications and analysis, it becomes all the more critical to ensure an accurate market definition. For this purpose, antitrust regulators of various jurisdictions seek to construct a systematic conceptual framework that must be followed while determining the relevant market.

### Relevant Markets

The (Indian) Competition Act, 2002 ('Act') identifies a relevant product market to include all *products or services regarded as interchangeable or substitutable by the consumer by reason of characteristics, price and intended use*. Factors relevant for determining a relevant product market include both demand side factors (physical characteristics, end-use, price and consumer preferences) and supply side factors (classification of industrial products, specialized producers, exclusion of in-house production).

Accordingly, the empirical determination of a relevant market hinges, largely, upon the test of substitutability (or interchangeability)<sup>1</sup>. Typically, substitutability is tested on a two-sided basis i.e. if X is substitutable with Y, Y would, by and large, be substitutable with X. However, there may be instances where substitutability is asymmetric, i.e. where X may be viewed as being substitutable with Y, but Y is not viewed as substitutable with X. In this article, we examine how antitrust regulators approach relevant market definitions in the case of one-way substitution or 'asymmetric' substitutability.

### Asymmetric substitution

Markets may be asymmetric for several reasons. Markets which include products at different levels of the quality spectrum or markets where new and old technologies coexist, typically show some measure of asymmetric substitution. The high quality version of the product may exert a considerable competitive constraint on the pricing of a low quality version, whereas the converse may not hold true. If so, the regulator may define two separate product markets: one including the low and high quality versions, and another one including the high quality version only, depending on the subject of the inquiry or areas of overlaps.<sup>2</sup>

Asymmetric substitution is most frequently experienced in technology markets. If two products perform the same function, but one product has additional functionalities or is of a higher quality and price, it may well be argued that on account of varying characteristics, prices and number of end uses, they should form distinct markets. When considering products or services that exhibit asymmetric substitution, it is key to identify the focal product for the analysis (usually the subject of the inquiry) or areas of overlaps. For e.g. the European Commission ('EC'), when reviewing the merger between Crown Cork & Seal Company Inc. and Carnaud-Metalbox SA<sup>3</sup>, in which both entities were engaged in the business of packaging manufacturing, found asymmetric substitution between aluminum and tinplate cans, in that, while there was no evidence of substitution *from* tinplate to aluminum, consumers were able to and indeed did switch from aluminum to tinplate cans on account of lower cost of and the ability to recycle the latter. Further, there were no significant switching costs – since customers who used aluminum in their operations could move to tinplate with minor adjustments to their equipment. However, since both parties supplied only tinplate cans and not aluminum cans, the EC rejected the parties' contention that the relevant market should include both aluminum and tinplate cans. Instead, the EC defined the relevant market as the market for tinplate cans only. It is likely that in case the parties were present only in the market for provision of aluminum cans, the EC

<sup>1</sup> The SSNIP (Small but Significant and Non-transitory Increase in Price) test seeks to meaningfully test for substitutability between products and services. The application of the SSNIP test begins with defining the smallest possible markets both in the product and geographic dimension, in which a hypothetical monopolist could profitably and permanently raise the price of the products by 5 to 10 % above the competitive level. The relevant market would then include all those products which the consumer would regard as sufficiently interchangeable or substitutable to avoid the increase in price.

<sup>2</sup> For example, the CCI in the past has defined separate markets for luxury cars [Jeetender Gupta/ BMW India (Case No. 104 of 2013)]; luxury apartments [Belair's Owners Association/ DLF (Case No. 19 of 2010)]; luxury watches [M/s Counfreedise/ Timex Group (Case No. 55 of 2017)]; and luxury sports goods [Om Datt Sharma/ Adidas AG (Case No. 10 of 2014)].

<sup>3</sup> [1998] OJ L316/1.

would have defined the market as comprising of both aluminum and tinplate cans, given that the EC found competitive constraints posed by aluminum cans to tinplate cans.

Similarly, when examining Bayer/Aventis Crop Science<sup>4</sup>, the EC noted that both Bayer and Aventis were active in the market for crop protection agents including herbicides, insecticides, fungicides, etc. to control plant diseases. The EC defined the relevant market for insecticides by type of crop and subdivided into foliar and soil insecticides. One of the sub-markets assessed by the EC was of the products designed for protecting cereals against the fungus *Gaeumannomyces Graminis*, also known as 'take-all-disease'. There were only two products available for protection against this disease – Jockey (a Fluquinconazole-based product developed by Aventis) and Latitude (a comparable product manufactured by Monsanto). The EC noted that while both Jockey and Latitude could protect against the 'take-all-disease', Latitude only treated the 'take-all-disease' whereas Jockey has a broader spectrum. The EC noted this as a classic case of asymmetric substitution – wherein Latitude was always substitutable with Jockey, but Jockey was not always substitutable with Latitude (i.e. in cases where the consumer sought to protect cereals against diseases other than the 'take-all disease').

In an abuse of dominance investigation against Wanadoo Interactive ('Wanadoo'), a subsidiary of France Telecom (a leading internet service provider in France), the EC assessed the substitutability between high-speed internet access and low-speed internet access.<sup>5</sup> Wanadoo argued for a single market for internet access as subscribers used both high-speed access and low-speed access to use the same type of internet applications and functions. The EC disagreed as there was a range of activities that could be carried out on a high-speed internet connection (downloading videos or games), whereas, all activities possible on low-speed internet were possible on a high speed connection. Accordingly, the EC noted that subscribers migrated from low-speed internet facilities to high-speed facilities and *"its operation is extremely asymmetrical, given the value attached by users to the intrinsic features of high-speed Internet access."* The EC went on to observe that had the two services been perfectly substitutable, the rates at which customers of high speed internet migrated to low speed internet would be identical or at least comparable to the migration patterns from low speed to high speed. The EC, accordingly, held the relevant market to be specifically for high-speed internet access, excluding the low-speed market.

### Decisional Practice of CCI

The Competition Commission of India ('CCI') has examined the concept of asymmetric substitution in only a handful of cases till date. When considering the proposed merger between Dish TV and Videocon D2H<sup>6</sup>, where both parties were engaged in the provision of Direct to Home ('DTH') services, CCI distinguished DTH as a content distribution service from services provided by other distribution platform operators (DPOs) such as multi system operators ('MSOs'), internet protocol television, local cable operators (LCOs) and over-the-top ('OTT') services on the basis of packages offered, pricing, flexibility, technology, infrastructure requirements, etc. Notably, both parties were engaged in DTH services only and not other content distribution services mentioned above. CCI held the relevant market to be that for the provision of DTH services alone. Had the parties shown empirical evidence of significant migration from DTH to cable (both of which are, incidentally, priced in India), or from DTH to other forms of content distribution such as OTT, CCI may have arguably accepted a broader market for cable and DTH, or possibly one involving all distribution platforms. However, since both parties were present only in the market for provision of DTH services, the argument that DTH and other forms of distribution formed a single market was rejected. On the other hand, in RIL/Den/Hathway<sup>7</sup> in which both parties were MSOs and present in the market for cable TV services in India, CCI noted that DTH services provide competitive constraint to cable TV operations and, as such, the two services may be viewed at par in terms of end-use and quality of service. Customers frequently moved from cable TV to DTH platforms and on this basis, CCI defined the relevant market as *"the market for aggregation and distribution of broadcast TV channels to homes through cable TV and DTH services"*.

### Conclusion

In markets where technologies contrite to develop rapidly, and enterprises continue to develop and integrate service offerings, defining relevant market becomes an increasingly complex challenge for antitrust regulators such as CCI. While the guiding principle i.e. the assessment of interchangeability between two products/ services, shall remain constant across all such analysis, regulators such as CCI would need to continue to stay conscious of the risks of defining a market narrowly by not taking into account asymmetric substitution. With more and more cases deal-



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4 [2004] OJ L107/1.

5 COMP/38.233.

6 Combination Registration No.C-2016/12/463.

7 Combination Registration Nos. C-2018/10/609 and C-2018/10/610.



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ing with fast paced and increasingly technology driven markets – ranging from e-commerce to precision manufacturing, it would be interesting to see how the Indian antitrust watchdog tackles the issue of substitution and market definition going forward.

## Behavioural Cases

### **Delhi HC dismisses challenge to CCI's demand for interest on penalty accumulated during pendency of proceeding before the appellate tribunal<sup>8</sup>**

On September 11, 2019, the Delhi High Court passed a judgment stating that enterprises penalized by CCI which have the benefit of a stay order by the appellate court are also liable to pay interest on penalty for the period during which the stay was operational.

In July 2015, CCI had imposed a penalty of Rs. 1,570 million on United India Insurance Company Limited ('UIICL') for contravention of Section 3 of the Act ('CCI Order'). CCI then issued a demand notice to UIICL for deposition of penalty, failing which UIICL would have been liable to pay a simple interest of 1.5% per month on the penalty amount. Subsequently, UIICL filed an appeal against the CCI Order before the Competition Appellate Tribunal ('COMPAT'). During the pendency of UIICL's appeal, COMPAT stayed the penalty imposed by CCI, subject to a deposit of 10% of the penalty amount. In December 2016, COMPAT upheld CCI's substantive findings under Section 3(3) of the Act, but substantially reduced the penalty imposed on UIICL.

Post COMPAT's order, UIICL deposited the principal penalty amount with CCI. However, CCI directed UIICL to also pay interest on the reduced penalty for the 14 month period between the payment deadline per CCI's demand notice and the COMPAT's final order. UIICL challenged CCI's demand for interest before the Delhi High Court through the instant writ petition. Before the court, UIICL *inter alia* argued that there was no delay on its part in paying the penalty since COMPAT had issued a stay on the CCI Order, and the penalty was paid within the prescribed time post COMPAT's order.

In its judgment, the Delhi High Court agreed with CCI's demand for interest. It found the interest to be a statutory levy which has to be paid, especially since COMPAT had re-affirmed CCI's decision to levy penalty in the first place. It also found that COMPAT had issued a stay only on the operation of the CCI Order and had not obliterated it. While dismissing UIICL's writ petition, the court held that the demand notice as well as CCI's demand for interest became operative, albeit to a reduced extent, as soon as the stay was lifted by the COMPAT. The court accordingly dismissed the writ petition.

### **Delhi HC upholds the expansion of the DG's investigation beyond CCI's *prima facie* finding<sup>9</sup>**

On September 12, 2019, the Delhi High Court reversed its single judge bench's finding that the Director General ('DG') cannot expand the scope of its investigation beyond what is directed in CCI's *prima facie* order.

On May 30, 2011, information was filed with the CCI which alleged that all the manufacturers of man-made fibre ('MMF'), including Grasim Industries limited ('GIL'), had imposed anti-competitive restrictions upon the Indian textile industry. Thereafter, CCI passed an order under Section 26(1) of the Act ('26(1) Order'), wherein CCI directed the DG to investigate the conduct of MMF manufacturers (including GIL) under Section 3(3)(a), (b) and (c) of the Act, which deal with anti-competitive horizontal agreements. The DG's investigation report ('DG Report') did not find any violation under Section 3 of the Act by any of the MMF manufacturers. However, it was observed by the DG in his report that GIL (as the sole manufacturer of Viscose Staple Fibre, which is a type of MMF) had abused its dominant position under Section 4 of the Act. Thereafter, GIL requested the CCI to quash the DG Report on the ground that the investigation of the DG was limited to allegations under Section 3(3) of the Act and the DG could not *suo motu* enlarge the scope of the investigation to a violation of Section 4. CCI dismissed this request, noting that a *prima facie* order under Section 26(1) was only a direction to the DG and was not meant to limit the scope of investigation. GIL preferred a writ petition before a single judge bench of the Delhi High Court against this dismissal order of CCI.

Before the single judge, GIL contended that the DG Report had found GIL to have abused its dominant position, in contravention of Section 4 of the Act whereas the 26(1) Order only directed the DG to investigate GIL's conduct in relation to Section 3(3) of the Act. GIL also argued that it was not provided with any notice that it was also being investigated for alleged violation

<sup>8</sup> United India Insurance Company Limited v. Competition Commission of India, Writ Petition (Civil) 1100 of 2019.

<sup>9</sup> Competition Commission of India v. M/s Grasim Industries Limited, LPA 137 of 2017.

of Section 4, and therefore had no opportunity to make submissions to the DG on market definition, dominance and abuse of dominance. GIL claimed that this was a violation of principles of natural justice. The single judge upheld GIL's contentions, stating that the DG does not have the power to *suo moto* expand the scope of investigation beyond what it is directed to investigate in CCI's *prima facie* order. However, the single judge clarified that any information collected by the DG which alluded to the violation of any other provision of the Act would be treated as 'information' under Section 19 of the Act, on which CCI was required to pass a separate *prima facie* order directing the DG to investigate.

CCI challenged this order of the single judge before a division bench, which while coming to its decision, placed reliance on **Competition Commission of India v. Steel Authority of India Limited**, where the Supreme Court of India held that CCI's opinion as recorded in a *prima facie* order under Section 26(1) of the Act does **not** restrict the DG's investigation. The Supreme Court had clarified that under Section 26(1), CCI merely triggers an investigation. The division bench also relied on the Supreme Court's judgment in **Excel Crop. Care Limited v. Competition Commission of India** and the Delhi High Court's judgment in **Cadila Healthcare Limited v. Competition Commission of India**<sup>10</sup> to conclude that while the information filed with CCI did pertain to allegations of violation of Section 3(3), the direction given to investigate 'the matter' enabled the DG to examine any other violation that may have come to its notice during the course of the investigation.

In relation to GIL's contention on violation of principles of natural justice, the division bench relied on the Delhi High Court's previous decision in Cadila to reassert that the DG Report is inconclusive, and the final determination of the parties' rights happens before CCI. Accordingly, the DB held that GIL had an opportunity to present its case before CCI, and therefore there was no violation of principles of natural justice, and reversed the judgement of the single judge.



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## Combination Orders

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### **CCI approves Manulife Asset Management's acquisition of 49% shares in Mahindra Asset Management Company Private Limited and Mahindra Trustee Company Private Limited**<sup>11</sup>

On August 22, 2019, CCI approved the acquisition of 49% of the total equity share capital of Mahindra Asset Management Company Private Limited ('**Mahindra AMC**') and Mahindra Trustee Company Private Limited ('**Mahindra TCPL**') by Manulife Asset Management (Singapore) Pte. Ltd ('**MAMSG**').

MAMSG is a wholly-owned subsidiary of Manulife Financial Asia Limited (an entity based in Hong Kong) and an indirect wholly-owned subsidiary of Manulife Financial Corporation, and is engaged in fund management services. Mahindra AMC is the investment manager for the Mahindra Mutual Fund. Mahindra TCPL is the trustee of Mahindra Mutual Fund.

CCI noted that there are no horizontal overlaps between the MAMSG, Mahindra AMC and Mahindra TCPL, either directly or indirectly (through their affiliates), and are also not engaged in any vertically overlapping business. Based on this, CCI held that the transaction is not likely to have an appreciable adverse effect on competition in India, and granted its approval.

### **CCI approved Housing Development Finance Corporation Limited's acquisition of Apollo Munich Health Insurance**<sup>12</sup>

On August 20, 2019, CCI approved the acquisition of 51.20% of the total equity shareholding of Apollo Munich Health Insurance Company Limited ('**Apollo Munich**') by Housing Development Finance Corporation Limited ('**HDFC**'), and the subsequent merger of Apollo Munich into HDFC ERGO General Insurance Company Limited ('**HDFC ERGO**').

HDFC is a financial conglomerate based in Mumbai, India engaged in housing finance, home loans, loans against property, etc. HDFC ERGO is a joint venture between HDFC and ERGO International AG, a Germany-based company. Its activities include providing health insurance services. Apollo Munich is a joint venture between the Apollo Hospitals Group and Munich Health, and is also engaged in providing health insurance services.

In its assessment, CCI noted that health insurance in India includes personal accident and travel insurance, and both Apollo Munich and HDFC Group are active in this market in India. It stated that there are several public and private general insurance companies in these segments.

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<sup>10</sup> Letter Patent Appeal 160 of 2018.

<sup>11</sup> C-2019/07/673.

<sup>12</sup> C-2019/07/671.



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Further, it noted that there was only an incremental increase in the market share as a result of the transaction, which had no significant effect on the broader market segment of health insurance or the narrower segments of personal accident, travel and other insurances.

CCI also noted that an affiliate of HDFC, HDFC Bank, is *inter alia* engaged in the distribution of insurance products. Further, Gruh Finance Limited, another HDFC affiliate, is in the process of merger with Bandhan Bank, which is also engaged in the distribution of insurance products. CCI noted that these activities were vertically linked to Apollo Munich's insurance business. However, it observed that only 8% (in value) of the insurance services were distributed through banks. Additionally, Apollo Munich's presence in the distribution of personal accident and travel insurance products was not significant.

In light of the above, CCI held that the transaction was not likely to have an appreciable adverse effect on competition in India, and approved it. The approval order of CCI also notes that the scope the non-compete agreements entered into as a result of the transaction, is not ancillary to the combination—an increasingly common observation in cases where the scope of the non-compete does not fully comply with CCI's 'Guidance Note on Non Compete Restrictions'. While the implication of such an observation is yet to be seen, it appears that observations of this nature in CCI's approval order is to enable CCI to review such non-compete clauses under behavioural provisions of the Act.





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