

Competition Law Hotline

April 10, 2015

APEX COMPETITION REGULATOR DECLARES BCCI NOT-OUT ON APPEAL

- Competition Appellate Tribunal allows appeal filed by Board for Control of Cricket in India due to failure by the Competition Commission of India to follow procedures.
- Competition Appellate Tribunal reiterates significance of complying with principles of Natural Justice.

INTRODUCTION

The Competition Commission of India ("**Commission / CCI**") based on a complaint filed by a cricket enthusiast- Mr. Surinder Singh Barmi in February, 2013 had imposed a fine on the Board for Control of Cricket in India ("**BCCI**") of INR 52.24 Crores for abusing its dominant position in contravention of Section 4(2) (c) of the Competition Act, 2002 ("**Act**") ("**CCI Order**"). The Commission in addition to imposition of fine had also directed BCCI to cease and desist from any practice of denying market access to potential competitors through inclusion of one-sided clauses in any agreement in the future, deletion of certain clause in media agreements as well as usage of its regulatory powers in the process of deciding matters relating to its commercial functions. Consequently this decision was challenged by the BCCI before the Competition Appellate Tribunal ("**COMPAT**") which stayed the penalty as well as the directions issued by the Commission and thereafter allowed the appeal, setting aside the order of the Commission due to breach of principles of natural justice.

FACTUAL MATRIX

BCCI is a society registered under Tamil Nadu Societies Registration Act, 1975. It is engaged primarily in controlling and promoting cricket in India, framing laws governing it and is also responsible for the selection process of teams to represent India in Test Matches, ODIs and Twenty 20 matches played in India or abroad. The BCCI in the year 2008 had started a professional domestic T20 cricket league tournament known as Indian Premier League ("**IPL**"), which over the years has developed to become a global brand with an estimated brand value of more than USD 4.1 billion in 2010. However this valuation fell considerably to USD 2.9 billion in 2012 due to the various controversies shrouding the league.¹

Mr. Surinder Singh Barmi, (hereinafter referred to as "**Informant**") filed a complaint under Section 19(1) (a) of the Act, against BCCI alleging anti-competitive activities in relation to operation of IPL. He alleged irregularities in the grant of franchise rights for team ownership, irregularities in the grant of media rights for the coverage of the league as well as irregularities in the award of sponsorship rights and other local contracts related to the organisation of the IPL. Based on these allegations, the CCI ruled under Section 26(1) that a prima facie case existed and directed the Director General ("**DG**") to investigate it. On the basis of the report submitted by the DG, it was observed that the process for grant of franchisee agreements for infinitum tenure was unfair and discriminatory, as also the mechanism of awarding the media rights for a period of 10 years caused appreciable adverse effect on the market.

KEY ISSUES

Before the Commission:-

The key issues that were considered by the CCI in this matter were, firstly, what is the legal status of BCCI, secondly, whether BCCI could be considered an enterprise for the purposes of the Act, and finally whether BCCI had abused its dominant position in the relevant market in contravention of Section 4 of the Act. The last issue would involve defining the relevant market, assessment of dominance by the BCCI in the relevant market, as well as analysis of the conduct of the BCCI for contravention of Section 4 of the Act.

Before COMPAT:-

Whether the CCI Order ought to be set aside due to violation of the principles of natural justice?

Whether the Commission was correct in relying upon TRP ratings and other news reports available online in its findings, without affording an opportunity to controvert the same?

Whether the Commission was right in making observation in context of Clause 9.1 (c) (i) of the Media Rights Agreement when no references were made to it during the hearing?

COMMISSION'S ORDER

A. De facto status of BCCI

BCCI contended that it did not perform the role of a regulator. However, contrary to such assertions, BCCI continued to loosely refer itself as custodian/regulator or organiser of cricket in India, depending on their functions both in their oral and written submissions. The CCI on the basis of facts on record and the submissions of BCCI held that though no '**statutory status**' / **regulatory backing**, is accorded to BCCI but their actions in terms of laying down the rules of the game and team selection, affiliation to International Cricket Council ("**ICC**") fall within the ambit of a regulatory

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role.

Further, CCI examining the current structure of BCCI held that being an autonomous body; it performs regulatory functions despite no recognition from the Government. The Government has also sought to include BCCI within its ambit though no documentary evidence exists to categorise BCCI as a national association, but vide its submissions before the Apex Court has stated that they would fall under the umbrella of Ministry of Youth Affairs and Sports. The CCI also examined plethora of other factors like ICC regulations which mandates cricket matches played in a particular territory of its member requiring its approval thereby recognising the regulatory role. The CCI held that *'Donning two hats by BCCI without clarity on roles merits an examination on whether BCCI is a regulator and whether in its capacity as custodian of cricket it extends its role to organising of events'*. Based on the factors listed above, CCI concluded that BCCI is a *de facto* regulator of cricket in India.

B. Whether BCCI is an enterprise for the purpose of the Act?

BCCI contended that being a *"not-for-profit"* organisation, it is engaged in promoting and encouraging the game, thereby not within the purview of the provisions of the Act. The BCCI also submitted that its commitments are neither driven by nor conditional upon commercial considerations since the revenue obtained by BCCI is ploughed back into the game of cricket. BCCI in support of its contentions placed reliance on the Supreme Court judgment of *Secretary, Ministry of Information and Broadcasting (Mol&B), Govt. of India (GoI) and Ors Vs. Cricket Association of Bengal and Others*², wherein it was held that sporting organisations should not be placed at par with other business organisations as their objective of organising events is not for commercial benefit but educating and promoting sports.

The CCI considering the DG's Report and submissions made by BCCI held that the Act focuses on the functional aspects of an entity rather than institutional aspects. The nature of activity would decide whether the entity is an enterprise for the purposes of the Act or not, rather than the form of the entity and analysed the very rationale of insertion of Section 2(h)³ of the Act. The CCI placed further reliance on various international judgments⁴ as well as Indian judgments⁵ on the aspect of definition of enterprise and in light of a similar case involving the chess federation concluded that BCCI is an enterprise for the purpose of the Act, and therefore, well within the jurisdiction of the Commission.

In essence, the CCI held that the concept of *"enterprise"* as envisaged under the Act appears to be used in relation to the main activity carried out by the enterprise and not a one - off commercial activity. The activities of sports organisations also fall within the ambit of an *"enterprise"* and treated at par like any other business organisations to the extent of its entrepreneurial activities are concerned. The fact that BCCI is a *"not-for-profit"* organisation does not take it out of the ambit of definition of an *"enterprise"*, only exception is permissible in relation to sovereign functions of the Government.

C. Abuse of Dominant Position by BCCI in the relevant market

a) Determining the relevant market;

The CCI held that basic premise for determination of alleged abuse of dominance is establishing that one party is in a dominant position in the relevant market. The CCI doing so made an in-depth analysis of the components to a market, *viz. the producer on the supply side, the consumer on the demand side and the underlying product or service*. Further, CCI held that the Act considers relevant market to comprise of goods and services which could be interchangeably used by consumers and viewed from the demand perspective based on characteristics of the product, price and intended use.

The DG had considered the relevant market to be the *"underlying economic activities which are ancillary for organizing the IPL Twenty-20 cricket under the aegis of BCCI."* The CCI acknowledged that cricket match having its unique characteristics cannot be substituted for any other form of entertainment including other sports/entertainment as, every sports event is unique in itself and has its own characteristics that differentiate it from other sporting events or other entertainment events. During the course of investigation, reliance was also placed on **Target rating points (TRP Ratings)** used as a basis to compare different genres of entertainment against the viewership attracted by IPL. On the basis of above factors, CCI held that though entertainment is the ultimate goal, definition of relevant market in this case cannot be substituted.

Thereafter, CCI narrowing the definition examined the differences between the two broad categories of events viz. First Class/International events (only Indian players) and Private Professional League Cricket (includes foreign players) events to establish the definition of relevant market. Both having separate characteristics and objectives reflected that the relevant market is the organization of Private Professional Cricket Leagues/Events in India.

b) Assessment of Dominance of BCCI in market for Organization of Private Professional League Cricket events

Having established that BCCI is de facto regulator for cricket in India, assessment of dominance of BCCI in the market for Organisation of Private Professional Leagues stems from the same power. CCI relying on the bye-laws of ICC held that BCCI approval is critical to operation of prospective private professional leagues and access to the vital inputs (stadium, list players) thereby constituting an important source of dominance for BCCI.

For assessing BCCI's position in the relevant market, CCI considered important factors like availability and access to infrastructure, control over players which contribute to the success of a league all being made available only through BCCI.

The CCI also touched upon reasons for the possible failure of the independently promoted Indian Cricket League (*"ICL"*) and held that *while it cannot be conclusively said that ICL's failure was solely attributable to BCCI's dominance, it can be said that BCCI's dominance was definitely a factor in ICL's failure*. The CCI relied on the DG's report which laid down the reasons for the failure of the league as, lack of infrastructure facilities, BCCI/ICC's refusal to approve the league and provide infrastructural support, among other reasons that might be relevant. The CCI concluded that owing to regulatory role, monopoly status, control over infrastructure, players, ability to control entry of other leagues, historical evidences that BCCI is in a dominant position in the market for organizing private professional league cricket events in India.

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c) Analysis of conduct of BCCI for any contravention of Section 4 of the Act

CCI having established the relevant market and BCCI's dominant position therein proceeded to examine whether BCCI has abused its dominance in contravention of Section 4 of the Act. CCI acknowledged the uniqueness associated with organising Private Professional League Cricket but did not place reliance on the documentary evidence provided with respect to failure of ICL owing to BCCI dominance as the same pertained to a period when the provisions of Section 3 and 4 of the Act were not notified.

The CCI examined related issues, including the procedures followed and the agreements entered into, to determine whether there was any anti-competitive conduct on the part of BCCI. Interestingly, CCI in its main Order did not deal with the issues pertaining to the Franchise Agreement, but the same has been dealt extensively in the dissenting order. On examination of the IPL media rights agreement between BCCI and MSM for a period of 10 years, CCI noted Clause 9.1(c)(i), which reads as follows:

"BCCI represents and warrants that it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league".

Thus the Commission noted that the BCCI has clearly bound itself not to organize, sanction, recognize any other private professional domestic league/event which could compete with IPL. The above clause gains increasing significance in light of the sole right been given to the BCCI by the ICC, by virtue of ICC member regulations whereby, only members of ICC are authorised to permit/deny the entry of any league. The ICC regulations read as follows:-

'A cricket match will be deemed to be "Disapproved Cricket" if it has not been approved by the Member in whose territory it is played.'

The Commission held that Clause 9.1(c) (i) clearly and unambiguously amounts to a practice through a contractually binding agreement resulting in denial of market access to any potential competitor, and is decidedly a violation of Section 4(2)(c) of the Act.

The CCI held that *creation of monopoly by a regulatory power is an overreach to protect the market and the regulatory power to approve an event should not be used for this purpose*. BCCI being involved in discharging both regulatory and commercial functions, the roles often tend to overlap *leading to usage of its regulatory powers in entering commercial agreements*. The CCI held that by explicitly agreeing not to sanction any competitive league during the currency of media rights agreement BCCI has used its regulatory powers in arriving at a commercial agreement, which is at the root of a violation of Section 4(2) (c).

DISSENTING AND SUPPLEMENTARY ORDER

Shri M.R. Tayal while delivering the dissenting view, discussed at length on the aspect of franchise rights and whether such agreement amounted to any form of bid rigging between BCCI-IPL and the bidders as alleged by the Informant. The Hon'ble Member was of the view that circulating such standard agreements was essential as the same was required to be entered by multiple bidders, thereby following a fair and non-discriminatory process. Further, agreements entered between BCCI and the bidders was largely in the form of a vertical arrangement and not between competitors or persons engaged in "identical or similar trade of goods or provision of services" and thus held that no bid rigging arrangements could exist among such entities leading to violation of Section 3(3) of the Act. However, he concurred that BCCI is in a dominant position by virtue of being the sole authority responsible for regulating game of cricket in India, having membership of ICC, recognising one cricket board/authority and exercising monopoly powers in relation to commercial activities.

Hon'ble Member, Mr. Prasad in his supplementary Order looking into the issue of grant of media rights held that grant of such exclusive rights for a period of ten years would put the entity in an advantageous position, promoting market power and barriers for new entrants thereby leading to violations under Section 3(1) of the Act creating appreciable adverse effect on the market. Mr. Prasad directed that reasonable time-frame should be fixed for both media and franchise agreement and tendering process in a fair and transparent manner should be followed in relation to sponsorship agreements.

PENALTY

The CCI having established BCCI of contravening provisions of the Act directed them to:-

- Cease and desist from any practice denying market access to potential competitors, including inclusion of similar clauses in any agreement in the future;
- Cease and desist from using its regulatory powers in any way in the process of considering and deciding on any matters relating to its commercial activities;
- Deletion of Clause 9.1(c)(i) in the Media Rights Agreement; and
- Penalty of INR 52.24 Crores.

The CCI while determining the penalty held that the abuse by BCCI being grave, the quantum of penalty to be levied should be commensurate with the gravity of the violation. While levying the penalty, several factors including economic power of BCCI, nature of barriers created and whether such barriers can be surmounted by the competitors and the type of hindrances by the dominant enterprise against entry of competitors into the market were considered. The CCI held that BCCI being the *de facto* regulator misusing the position had gained tremendously from the IPL format of the cricket in financial terms, owing to there being no other competitor in the market or anyone being allowed to emerge due to BCCI's strategy of monopolizing the entire market imposed penalty of 6% of the average annual revenue of BCCI for past three years under Section 27(b) of the Act.

JUDGMENT- COMPAT

Aggrieved by the order of the CCI, the BCCI approached COMPAT under Section 53B of the Act due to violation of principles of natural justice. BCCI contended that the relevant market considered by both the Director-General and Commission differed substantially and no opportunity of hearing had been given to BCCI to rebut it. Further, the Commission had placed reliance on information available in the public domain including unreliable newspaper reports and information available on the internet that was not disclosed to BCCI, thereby depriving them of their right to rebut the same. The DG Report made no reference to Clause 9.1(c) (i) of the Media Rights Agreement, which was

heavily relied upon by the Commission, enlarging the scope of the enquiry despite no finding qua that clause by DG or any notice and opportunity being afforded to BCCI. The Commission submitted that all material was provided to the parties and the order did not suffer from any legal infirmity.

COMPAT initially found a prima face case in favour of BCCI and ordered that only 25% of the penalty imposed by CCI be paid within one month. The recovery of the rest of the amount was stayed until further orders. Considering the contentions of both the parties, COMPAT while relying on settled propositions of natural justice in a plethora of cases held that the impugned order was vitiated due to violation of the principles of natural justice.

COMPAT held that BCCI did not get any opportunity to contest the proposed determination of the 'relevant market' by the Commission. It clarified that if the Commission wanted to differ with the DG on the issue of 'relevant market' them notice stating its intention to do so and opportunity of hearing should have been given to BCCI. Additionally, COMPAT also held that reliance on TRP and TAM ratings available online in the public domain was wrong since the Commission had failed to disclose the information/material being used to arrive at findings to BCCI, thereby denying the opportunity of controverting the same and per se do not constitute legally acceptable evidence. Furthermore, any discussion on Clause 9.1(c) (i) of the Media Agreement vitiated the BCCI's right of being heard since the same was neither referred in the DG's Report nor in the Commission's order under section 26(1) of the Act or any arguments advanced at the time of hearing.

CONCLUSION

The Commission's order was considered to be a timely move to curtail the practices adopted by BCCI by virtue of it being the sole regulator in the cricketing arena. The Commission had imposed penalty of 6% of the average annual revenue for past three years. However, the Commission's order had failed to address the issues pertaining to significant violations under Section 3 of the Act and the nature of several agreements entered between BCCI and the bidders in relation to franchise, media and sponsorship rights which were alleged to have been an abuse of the dominant position in the relevant market. The main CCI Order having failed to analyse the anti-competitive effects created in the market by entering into such perpetual or long-term agreements on an exclusive basis had formed the basis for the challenge to the said CCI Order leading to appeal before COMPAT.

COMPAT looked into the procedural loopholes and the Commission's failure to comply with the principles of natural justice. COMPAT has laid stress on the significance of parties being heard as also the opportunity of controverting the evidence placed against it. The merits of the matter were not considered by COMPAT and remitted it back to the Commission for fresh disposal on grounds of vitiated proceedings. The importance of abiding by procedure and principles of natural justice have been given importance by COMPAT notwithstanding the force in arguments of the Commission on abuse of dominance by BCCI, ensuring that all future orders by the CCI would need to be in compliance with procedural laws to be tenable under law.

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You can direct your queries or comments to the authors

¹ <http://www.firstpost.com/business/brand-ipls-problem-too-much-entertainment-too-little-cricket-328592.html>

² 1995 2 SCC 161

³ *enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.*

⁴ Motosykletistiki Omospondia Ellados NPID v. Elliniko Dimosio Grand Chamber of ECJ

⁵ Hemant Sharma & Ors. V. Union of India & Ors. W.P. (C) 5770 of 2011

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