

Competition Law Hotline

June 01, 2009

MULTIPLEX OWNERS VS. PRODUCERS: COLD WAR REACHES COMPETITION COMMISSION OF INDIA

Subsequent to the notification dated May 15, 2009, notifying some of the substantive provisions of the Competition Act, 2002 ("**Competition Act**") relating to prohibition of anti competitive agreements and abuse of dominance, the Competition Commission of India ("**CCI**") has received its first formal complaint from the Multiplex Association of India against the film producers alleging cartelization. This complaint has been made in the backdrop of the ongoing deadlock on revenue sharing on Bollywood movies between the multiplex owners and film producers (such as UTV, Yash Raj Films, Dharma Productions, etc). This hotline provides a brief background on the provisions relating to anti competitive agreements under the Competition Act along with certain illustrations in accordance with the behavioral patterns that might be adopted by the multiplex owners and the film producers.

Provisions relating to anti competitive agreements and dominant position under the Competition Act.

Section 3(1) of the Competition Act provides that no enterprise or a person shall enter into an agreement, which causes or is likely to cause an appreciable adverse effect on competition ("**AAE**") within India. Section 2(b) of the Competition Act defines an agreement to include any arrangement, understanding or concerted action entered into between parties. Thus, such agreements need not be in writing or formal or intended, to be enforceable in law. Further, if an agreement does not have any AAE then it will remain out of the purview of this provision.

Cartel has been defined under the Competition Act to "include an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services." Under general legal parlance, cartels are arrangements which may be formed in secrecy, which may or may not be in writing, between firms in direct competition with one another in the relevant market, which result in profits due to unreasonable increase of prices by the cartel at the cost of exploitation of the customers of the wholesalers as well as retailers.

While the formation of a cartel amounts to an anti-competitive trade practice, which is in disputably against the public interest, the existence of a cartel is seldom proved by direct evidence. Determination of the existence of a cartel by cogent evidence is a herculean job for the competition authorities because not only the element of "meeting of minds" is necessary but also, as laid down by the Supreme Court in *Haridas Exports v All India Float Glass Manufacturers Association*¹, the mere formation of cartel by itself might not give rise to an action unless the detrimental effect of the same has been shown to the authorities.

Also, as per Section 4 of the Competition Act, no enterprise shall abuse its dominant position so as to (i) directly or indirectly impose unfair or discriminatory prices or conditions in the purchase / sale of goods or services; (ii) limit or restrict the production of good.

"**Dominant Position**" under the Competition Act means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

Potential Anti-Competitive Arrangements

While the CCI is still in the fact finding process with respect to the present complaint from the multiplex owners, an analysis can be made of certain hypothetical arrangements between the multiplex owners and the film producers which might be reviewed by the CCI:

Illustration 1

Any arrangement between the film producers and multiplex owners whereby ticket prices for end viewers are determined.

ANALYSIS

Section 3(3) of the Competition Act provides that any agreement between enterprises which directly or indirectly determines purchase or sale prices shall be deemed anti competitive. However, there is a carve out wherein such agreements shall not be considered illegal per se if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

CCI may analyze whether there exists any agreement or concerted practice, like the pre-fixing of the ticket price and whether such agreements can be characterized as anti competitive. On the contrary, if it can be proved that such agreements would increase efficiencies in the market, then the same would not be considered as anti competitive.

Illustration 2

An arrangement whereby multiplex owners agree not to acquire content from any particular film producer(s) or agree on boycotting / refraining the screening of films of any film producer(s). Similarly, inter-se arrangements between film producers so as to restrict / refrain from divulging content to any particular multiplex owners.

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ANALYSIS

Section 3(3) of the Competition Act provides that any agreement between enterprises which limits production and/or supply of goods or provision of services shall be deemed to be anti competitive. However, the carve out for efficiency, as mentioned above, is also applicable in this scenario.

CCI may analyze the arrangements between the multiplex owners or the film producer(s), as the case may be, and if the CCI determines that such arrangements are detrimental to competition as they limit the choices for end consumers, then the same shall be considered anti competitive as per section 3(3) of the Competition Act and hence illegal.

Such arrangements may also violate Section 4 of the Competition Act, if it is proved that either the multiplex owners or the film producer(s), as the case be, have individually achieved a position of dominance and such dominant position is being abused by directly or indirectly imposing unfair or discriminatory prices or conditions in the purchase / sale of goods or limiting or restricting the production of goods. As per the provisions of the Competition Act, a dominant position is held illegal only when it is abused.

Also, arrangements or concerted practice inter se the film producers and the multiplex owners, whereby the parties agree to screening of movies only of a particular film producer, then the same as per Section 3(4) of the Competition Act may be characterized as (i) exclusive supply arrangement which is defined to include any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person or (ii) exclusive distribution arrangement which is defined to include any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods. However, in the event it is characterized as an exclusive supply arrangement or exclusive distribution arrangement, it has to be proved that such arrangements have AAE in India for it to be declared anti competitive. Mere entering into such agreements shall not render them void.

CONCLUSION

Since there is no thumb rule for CCI to determine whether the conduct followed by enterprise(s) is anti competitive or not, CCI faces a challenging task in determining the extent of anti competitiveness between the arrangements entered into by film producers and multiplex owners. It would be interesting to see how CCI approaches its first formal complaint which in turn would lay down the precedence for forthcoming complaints / disputes.

The above illustrations and assumptions have only been provided for the benefit of readers and should not be construed as advice / recommendations for drawing any conclusions.

- Abir Roy, Huzefa Tavawalla & Nishchal Joshipura

1. AIR 2002 SC 2728

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