

# CCI on Whether Inefficiency or Delay in Service Amount to a Violation under the Competition Act

September 15, 2019

[*Anirban Chanda* is a 4th year B.A., LL.B. (Hons.) student and *Anujay Shrivastava* a 5th Year B.A., LL.B. (Hons.) student, both at the Jindal Global Law School]

In its recent decision in *National Consumers Co-operative Federation of India v. New Town Electric Supply Company Ltd. and West Bengal State Electricity Distribution Ltd. (NCCFI)*, the Competition Commission of India (CCI) has declared that inefficiency or delay in providing services are not similar in nature to anti-competitive agreements and abuse of dominant position. Hence, a legal remedy for such inadequate services cannot be sought in the Indian Competition Act, 2002.

A factual commonality observable in all the concerned judgments involves a commercial entity as a service provider. This service provider is often the sole entity available in the relevant market. By legal inference, this turns it into a dominant entity because of its exclusive existence in the market.

Informants are regularly seen to argue that when the dominant commercial entity deliberately refuses to resolve disputes regarding inefficiency or delay in providing services it should be seen as an 'abuse of its dominance'. The jurisprudential question that confronts the CCI is whether the issues such as inefficiency or improper service can be read into sections 3 and 4 of the Competition Act. What unfolds as follows is an attempt to chart the line of CCI decisions on this specific issue.

## *Existing Jurisprudence on this Issue*

In *Shri Jagat Singh v. State of UP Power Corporation*, the plaintiff Jagat Singh complained that the defendant UP Power Corporation had disconnected electricity supply to his house because of non-payment of electric bills. Singh had refused to pay the bill as he believed that the electricity meter was faulty and thereby showed high electric consumption which was incorrect. However, since UP Power Corporation was the only supplier of electricity in his locality, Singh had no other option but to pay the incorrect high cost bills.

In light of the above facts, Singh sought relief under sections 3 and 4 of the Act arguing that the conduct of UP Power Corporation was an abuse of its dominant position. The CCI, however, refused to entertain the complaint as it found that there was no actual competition that could be hampered as the informant claimed and, therefore, sections 3 and 4 could not be attracted. At most, the claims made were in the nature of inadequate services provided by the UP Power Corporation. The CCI reiterated its stance that an abuse of dominance or inadequate service could not be read as an abuse of dominance or anti-competitive agreement.

Similarly, in *Sun Electronics Pvt. Ltd. v. ElecTek Solutions Pvt. Ltd, Mumbai* the CCI dismissed the arguments of the plaintiff-informant Sun Electronics, which were based on alleged deficiencies in the defendant ElecTek's service and its non-completion of work. Sun Electronics argued that the inefficient service led to a breach of the sale agreement according to which ElecTek was supposed to provide RTI India Private Limited with residential automation appliances. Moreover, Sun Electronics vehemently argued that over time the demands made by ElecTek were becoming increasingly unreasonable and this specific conduct by ElecTek should be declared to amount to a creation of 'anticompetitive agreements' under section 3 of the Act. Additionally, Sun Electronics prayed that this specific conduct should be declared as an 'abuse of dominance' by an undertaking under section 4 of the Act.

In the *Sun Electronics* decision, the CCI clearly noted the *prima facie* absence of any agreement between the defendants (i.e. ElecTek, Miantic AV Distribution Pvt. Ltd., RTI India and Remote Technologies Incorporated), and dismissed the arguments for existence of a horizontal anti-competitive agreement. It also found that Sun Electronics was not a part of residential automation appliance suppliers and, thus, could not make a claim for vertical anti-competition agreements against the defendants. As for 'abuse of dominance' under section 4 of the Act, the CCI noted that, first, none of the defendants could be said to be 'dominant' entities in the relevant market

(supply and installation of smart home solutions in India’); second, the concept of ‘collective dominance’ was never envisaged in section 4 of the Act and, therefore, the claim for abuse of dominance would also not succeed.

### ***Background to the NCCFI Dispute***

In the *NCCFI* case (mentioned at the outset), the informant National Consumers Co-operative Federation of India (NCCFI) had filed a complaint under section 19(1) (a) of the Act against the New Town Electric Supply Company (NTESCL) and West Bengal Electricity Distribution Company (WBSEDCL). The informant argued a breach of section 4 of the Act.

The informant submitted that it had repeatedly communicated to the concerned defendant authorities the urgency of providing an unhindered supply of electricity for a residential housing project based in Kolkata. However, in spite of making several communications, the project was delayed and could not be completed due to inadequate power supply. This in turn, invited criminal complaints against the informant from the concerned stakeholders, i.e. the flat owners.

NCCFI argued that this delay was a direct consequence of the lackadaisical nature and lack of professionalism on part of the defendant authorities. It prayed that, according to an interim relief under section 33 of the Act, the defendants be directed to stop abusing their dominant position. Additionally, NCCFI prayed for an award to be granted in the form of compensation for the losses suffered due to the defendants’ abuse of their dominant positions as under section 4 of the Act.

### ***CCI’s Decision in the NCCFI Dispute***

In its findings in the *NCCFI* decision, the CCI observed that WBSEDCL indeed enjoyed a dominant position in the relevant market as it was the only distribution licensee of electric supply in the area where the residential housing project was located.

On the question of whether the commercial entity was ‘abusing’ its dominant position, the CCI cited the decision of *Mr. Hitesh Bhatt v. Vadodara Municipal Corporation and Gujarat Electricity Board*. In that case, the legal question before the CCI was whether inefficiency or inadequacy in providing civic amenities like electric and water supply could invite a legal remedy in the sphere of competition law under sections 3 and 4 of the Act which deal with ‘anti-competitive agreements’ and ‘abuse of dominance’ respectively. The CCI categorically dismissed the complaint and held that elements of anti-competitive agreement and abuse of dominant position definitely stood on a higher pedestal than deficiency in services. Hence, no remedy could be sought under sections 3 and 4 of the Act, in light of the inadequacy of services as put forth by the informant.

### ***Conclusion***

The Competition Act, despite all the amendments, is still silent on whether insufficiency or a delay in service amounts to an abuse of dominance or existence of anti-competitive agreements. The latest decision in *NCCFI* may be said to be another step in the crystallisation of the legal conclusion that the remedies available for section 3 (anti-competitive agreement) and section 4 (abuse of dominance) can only be attracted if the precise legal requisites as laid down by the CCI in its various decisions are satisfied. One can therefore observe that the CCI has once again clarified the legislative vagueness that existed by reiterating that inefficiency or delay in providing services cannot attract penalties under sections 3 and 4 of the Act, and in doing so one must commend the CCI for laying down and following a consistent jurisprudence on this specific issue.

– Anirban Chanda & Anujay Shrivastava