

REVISITING *PER SE* vs. RULE OF REASON IN LIGHT OF THE INTEL CONDITIONAL REBATE CASE

INTRODUCTION

Technology companies and competition law have always had a tumultuous relationship. Regulators and courts are struggling to find the optimal balance between encouraging innovation and ensuring that the primary drivers of this innovation do not use their position to the detriment of consumers and competitors alike. Nowhere has this struggle been more pronounced than in the European Union (EU), with regulators pulling up various technology and internet companies for antitrust violations. So much so, that the EU antitrust regulator has been accused of harbouring a bias against American companies, a charge the European Competition Commissioner Margrethe Vestager has vehemently rejected.¹

One such case in the ever-growing list of cases against American internet companies is the one against technology giant Intel². According to the regulator, Intel incentivized laptop manufacturers to source most of their Central Processing Unit (CPU) requirements from the former by offering rebates in exchange. Beginning in 2009, the case has dragged on for years—most recently, the Grand Chamber of the European Court of Justice (ECJ), in its September 6th judgement³, remanded for re-examination the decision of the General Court on the grounds that the latter had left unaddressed crucial aspects.

In another recent development, the European Commission (“EC” or the “**Commission**”) sent a Statement of Objections⁴ to Google and its parent company, Alphabet Inc., alleging that Google had *granted significant financial incentives to some of the largest smartphone and tablet manufacturers as well as mobile network operators on the condition that they exclusively pre-install Google Search on their devices.*⁵

The alleged antitrust violation in the two cases is similar—Intel and Google have both been accused of providing financial incentives to further their already dominant positions at the expense of competitors and consumers. The Intel case hinged, and was finally decided on the question of whether an anticompetitive effect had to be proven, or whether it was sufficient to

¹ David McCabe, ‘EU antitrust chief: We’re not biased against US companies’, TheHill (2nd October, 2015), available at <http://thehill.com/policy/technology/255775-eu-antitrust-chief-says-probes-of-us-companies-not-indicative-of-bias>.

² *Intel Corporation Inc. vs. European Commission*, Case T-286/09.

³ Case C-413/14 P.

⁴ A Statement of Objections indicates a *prima facie* finding by the European Commission on a matter.

⁵ ‘Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications’, 20th April 2016, available at http://europa.eu/rapid/press-release_MEMO-16-1484_en.htm#_ftnref1. This case must be differentiated from the Google search results case, where Google was found guilty of abusing its dominance to promote Google Shopping over other comparable services by displaying the former more prominently in its search results.

prove that the form and structure of the measure was anticompetitive. In other words, it was decided on whether a *per se* rule or a rule of reason ought to have been adopted.

This note seeks to re-examine the *per se* rule and the rule of reason in light of the Intel dispute. Part I provides a detailed analysis of the dispute, examining in particular the various courts' stances on exclusive conditional rebates and whether they were *per se* illegal or illegal only if their effects distorted competition. Part II looks at the two rules in the context of existing European and Indian antitrust statutory and case law. The author argues that while the law in the EU is vague and unpredictable, Indian law on this matter is more consistent, enabling more effective resolution of disputes. Finally Part III explores implications of the discussion to the mobile application and internet sectors.

I. INTEL CORP. VS. EUROPEAN COMMISSION- THE ANTI-COMPETITIVENESS OF CONDITIONAL REBATES

The position of law is settled, in that the mere granting of incentives (financial or otherwise) is not inherently anti- competitive; however, imposing exclusivity conditions in lieu of them runs the risk of falling afoul antitrust regulations.

i. Case before the European Commission

In this dispute, the EC investigated anticompetitive practices by Intel with respect to the market for 'x86 CPUs'. Intel was accused of, among other things, offering rebates to Original Equipment Manufacturers (OEMs) which were conditional on the latter purchasing almost all of their x86 CPU requirements from it ("conditional rebates"). This effectively ensured that all or almost all of the OEMs' supply needs were sourced from Intel, thus preventing its competitors from gaining access to the market.⁶

Intel was found guilty of abusing its dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU), and ordered to pay a fine of €1.06 billion. Having concluded that Intel was a dominant player in the x86 CPU market, the Commission pointed out that Intel structured its rebates in such a manner that:

a computer manufacturer which opted to buy (the competitor's) CPUs for that part of its needs that was open to competition would consequently lose the rebate (or a large part of it) that Intel provided for the much greater part of its needs for which the computer manufacturer had no choice but to buy from Intel. In other words, should a computer manufacturer fail to purchase virtually all its x86 CPU requirements from Intel, it would forego the

⁶ 'Antitrust: Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices', 13th May 2009, available at http://europa.eu/rapid/press-release_IP-09-745_en.htm.

*possibility of obtaining a significant rebate on any of its very high volumes of Intel purchases.*⁷

Intel argued that merely proving that the rebates were conditional was insufficient for a finding of abuse; the EC had to additionally demonstrate on fact that Intel's conduct was capable of causing or likely to foreclose competition. Disagreeing with Intel, the Commission dismissed its claim in this regard, holding that no such proof was necessary.⁸ However, in the interest of completeness, it proceeded to establish the anticompetitive effects of Intel's actions by using the "as-efficient competitor" (AEC) test.⁹ The AEC test is a method used to determine whether the dominant player in a market is able to squeeze out a competitor who is as efficient as it is. The underlying rationale of this test is that:

- a. in a normal market, it is acceptable for less-efficient players to be left behind, but
- b. the knocking out of an entity that is as efficient or more efficient than the dominant incumbent could point to some sort of anticompetitive practice by the latter.¹⁰

On the basis of the AEC standard, the EC found that Intel's competitors in the x86 CPU market would have had to offer their equally-efficient products at throwaway prices to match its rebate scheme, making it an unviable business proposition for them.¹¹ The EC thus concluded that Intel's conditional incentives were capable of or likely to have the effect of foreclosing competition.¹²

ii. Case before the General Court

Predictably, Intel appealed the EC's ruling before the General Court of the European Union. The General Court was of the opinion that the use of conditional rebates by an undertaking in an already dominant position led to a distortion in competition in the common market.¹³ It even went a step further, stating that such rebates were intended solely to restrict the purchaser's freedom of choice and could seldom be justified purely on the basis of economic efficiency.¹⁴

⁷ *Id.*

⁸ Commission Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, COMP/C-3 /37.990 - Intel, available at http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf, para. 922.

⁹ *Id.*, para 925.

¹⁰ Andrew Silver, 'Intel's €1bn EU antitrust appeal: What the heck is the AEC test?', The ARegister (7th September, 2017), available at https://www.theregister.co.uk/2017/09/07/intel_antitrust_case_analysis/.

¹¹ *supra* note 8, para 1574.

¹² *Id.*, para 1574.

¹³ *Intel Corp. vs. European Commission*, Case T-286/09, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153543&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=881926>, para 77.

¹⁴ *Id.*, para 77.

Intel made the same claim before the General Court as it had before the EC- that a finding of abuse of dominant position is incomplete without a determination on the actual or potential effect of the alleged misconduct.¹⁵ Relying on the dictum in an earlier case of *Hoffmann-La Roche & Co. AG vs. Commission of the European Communities*¹⁶ (“**Hoffmann**”)- which also dealt with the issue of conditional rebates- the General Court dismissed Intel’s claim, stating that exclusivity rebates, when granted by an undertaking in a dominant position, were inherently capable of restricting and foreclosing competition and did not require further factual proof to that effect.¹⁷

Strangely, while acknowledging that conditional rebates may, in fact, have beneficial effects on competition under normal circumstances, the Court dismissed this as irrelevant to the case. Instead, the Court stated that in cases where the rebates were provided by already dominant market players, competition was automatically restricted, thereby rendering the “effects test” inapplicable.¹⁸ It justified this leap in reasoning by¹⁹:

- a. placing a special responsibility on the dominant undertaking to not to allow its conduct to impair genuine undistorted competition in the common market; and
- b. concluding that exclusive supply conditions of a substantial proportion of purchases by a customer constitute an unacceptable obstacle to access to the market.

Moreover, from the point of view of the OEMs, there were very few substitutes to Intel’s products which met a substantial part of their demand; the OEMs, therefore, were effectively Intel’s ‘unavoidable trading partners’.²⁰ The General Court reasoned:

“The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor.”²¹

In light of the above considerations, the Court deemed it unnecessary to analyze both the actual effect of the rebates on foreclosing competition and the existence of a causal link between Intel’s conduct and such an effect.²² According to the General Court, the fact that Intel was a dominant

¹⁵ *Id.*, para 80.

¹⁶ Case 85/76.

¹⁷ *supra* note 13, para 85.

¹⁸ *Id.*, para 89.

¹⁹ *Id.*, para 90.

²⁰ *Id.*, para 91.

²¹ *Id.*, para 93.

²² *Id.*, paras 103-104.

market player who granted exclusive conditional rebates was sufficient to find it guilty of antitrust violations under Article 102 TFEU.

iii. Case before the Court of Justice of the European Union

On further appeal by Intel, the ECJ dealt a major blow to the regulatory authorities by quashing the General Court's decision and remanding it to the latter for retrial. The ECJ began by pointing out that Article 102 TFEU did not preclude an undertaking from acquiring a dominant position, nor did it encourage less- efficient competitors to remain in the market.²³ The ECJ acknowledged that, as per Hoffmann, an undertaking is deemed to abuse its dominant position within the meaning of Article 102 TFEU if it obligates purchasers to obtain most/all of their requirements exclusively from it.²⁴ However, in situations where the undertaking submits evidence disputing the actual/potential effect of its conduct in foreclosing/restricting competition, the Court ought to have studied more closely the effect of such conduct.²⁵ It could not be presumed, as the General Court did, that Intel's conduct was anticompetitive, without undertaking a factual and economic analysis as to whether it's practices did, in fact, produce the alleged foreclosure effects. The General Court, according to the ECJ, failed to examine whether the conditional incentives did actually foreclose competition and, if yes, whether they could be objectively justified by Intel.²⁶ In conclusion, the ECJ stated:

“balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.”²⁷

According to the ECJ, the Court was required to examine all arguments, including Intel's rebuttals, concerning the AEC test that was applied by the EC.²⁸ Having failed to do so, the matter had to be remanded to the General Court, who would be required to re-examine it more holistically.

II. PER SE VS. RULE OF REASON

With the EC and the General Court presuming abuse without undertaking an “effects-analysis”, and the ECJ setting aside the Court's decision on the ground that such an effects-analysis was not gone into, the EU has reignited the debate between the *per se* rule and the rule of reason. In other

²³ *Intel Corporation Inc. vs. European Commission*, Case C-413/14 P, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1124385>, para 133.

²⁴ *Id.*, para 137.

²⁵ *Id.*, para 138.

²⁶ *Id.*, para 140.

²⁷ *Id.*, para 140.

²⁸ *Id.*, para 147.

words, the ECJ in the Intel case effectively rejected the *per se* rule applied by the lower courts and adopted the rule of reason to the dispute.

The *per se* rule is a rule of competition law analysis that considers a particular type of trade-restraint to be so manifestly anticompetitive that it does not require an inquiry into the nature of the harm caused.²⁹ This is in contrast to the rule of reason, wherein the adjudicating authority examines the totality of market circumstances to determine whether the impugned conduct is, in fact, anticompetitive.³⁰

It is vital to note that the two rules are not rules of fact; rather, they determine the incidence of burden of proof.³¹ Under the *per se* rule, the anti-competitiveness of a practice is presumed by the court on the fulfilment of certain preconditions, and the burden of proof lies with the defendant to prove otherwise. The defendant is at liberty to demonstrate, with evidence, that despite the existence of the preconditions, there is either a negligible effect on competition or that there are overriding positive factors that negate the anti-competitiveness of the measure. The rule of reason, on the other hand, places the onus on the applicant to prove that the effect of the alleged anti-competitive conduct can potentially/has restricted competition.

The following section contains an analysis of these competing concepts with respect to the competition law regimes of both the EU and India.

i. Law of the European Union

Article 101(1) TFEU is said to embody the *per se* rule under EU law³²:

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market....”

However, this position has been disputed- Article 101(3) carves out exceptions to a finding of anti-competitiveness in cases where the disputed conduct improves production or distribution, benefits customers or promotes economic progress. The presence of exceptions defeats the very basis of the *per se* rule, viz., an automatic presumption of anticompetitive behavior.³³

²⁹ Antitrust: An Overview, Legal Information Institute, available at <https://www.law.cornell.edu/wex/antitrust>.

³⁰ *Id.*

³¹ *Sodhi Transport Co. vs. State Of U.P.*, 1986 AIR 1099.

³² Slaughter and May, ‘An overview of the EU competition rules’ (June 2016) available at <https://www.slaughterandmay.com/media/64569/an-overview-of-the-eu-competition-rules.pdf>, at 7.

³³ Caleb Vesey, *Per se Rules in U.S. and EU Antitrust/Competition Law*, available at <http://www.eucomplaw.com/comparing-eu-and-us-competition-law/per-se-rules/>.

Article 102 TFEU, which is the basis of the Intel case, deals with abuse of dominant position, and reads:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Curiously, even though the EC and the General Court interpreted Article 102 as allowing for a presumption of an abuse of dominant position in cases where a dominant firm applied exclusive conditional rebates, nothing in the text of the provision explicitly indicates as such. This presumption is a judicially constructed one, with European courts having earlier held that “...Article 102 is violated when a dominant firm applies a system of fidelity rebates, that is to say discounts conditional on the customer’s obtaining all or most of its requirements—whether the quantity of its purchases be large or small”³⁴, and that “for the purposes of applying Article 102, “establishing the anti-competitive object and the anticompetitive effect are one and the same thing”³⁵.

This position was severely criticized in 2005 by the Economic Advisory Group on Competition Policy (EAGCP).³⁶ Alleging that the test adopted by the courts did not follow the tenets of economics, the EAGCP advocated for a rule of reason- based approach as opposed to the *per se* one followed thus far.³⁷ It bolstered this argument by pointing out that rebates could also contribute to economic efficiencies, which a purely form- based analysis might not detect.³⁸

³⁴ *Hoffmann-La Roche & Co. AG vs. Commission of the European Communities*, Case 85/76, para 89.

³⁵ *Michelin vs. Commission of the European Communities*, Case T-203/01, para 241.

³⁶ Jordi Gual et. al., ‘Report by the EAGCP- “An economic approach to Article 82”’ (July 2005) available at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

³⁷ *Id.*, at 7.

³⁸ *Id.*, at 36.

The EAGCP's observations played a major role in the adoption of the European Commission's 2009 Guidance Document³⁹, which laid down guidelines to interpreting Article 102. In the context of conditional rebates, the Guidance notes that it is necessary to undertake an examination of quantitative evidence in order to conclude whether anticompetitive effects actually exist.⁴⁰ In fact, the Guidance goes so far as to outline the process by which the AEC test ought to be applied when conducting such quantitative analysis.⁴¹ As far as the Intel case was concerned, the General Court dismissed the applicability of the Guidance to the dispute. The Court believed that the Guidance, having been enacted subsequent to the initiation of the dispute, could not be applied retrospectively. Hence, the principles espoused therein were irrelevant to the present case.⁴²

In contrast to earlier case of law the EU which read the *per se* rule into Article 102, the subsequent cases of *Konkurrensverket vs. TeliaSonera Sverige AB*⁴³ and *Post Danmark A/S vs. Konkurrencerådet*⁴⁴ were of the firm opinion that a finding of anti-competitiveness under Article 102 was not possible without a study of the objective effect of the impugned measure.⁴⁵ The emphasis on the "effects-test" in these later cases, along with that in the Guidance Document, has prompted some authors to claim that, unlike the Sherman Act of the United States, no *per se* rule exists at all under EU competition law.⁴⁶

Therefore, in spite of clear indications exclusive conditional rebates under EU law were to be dealt with under rule of reason, it is surprising that both the European Commission and the General Court based their findings of abuse under Article 102 on the *per se* rule.

Even assuming that the *per se* rule can be said to exist under Article 102, the author believes it was understood and applied wrongly. As mentioned above, this rule does not establish something as fact; rather, it merely assists in identifying the party who bears the burden of proving the existence/non- existence of an anticompetitive effect. When the party is able to discharge such a burden, it is incumbent on the adjudicating authority to either dismiss or accept its claims with

³⁹ See, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02 (February 2009), available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN) (hereinafter, the 2009 Guidance Document). Article 102 TFEU was earlier Article 82 of the EC Treaty.

⁴⁰ Frances Dethmers and Heleen Engele, *Fines under article 102 of the Treaty on the Functioning of the European Union*, [2011] E.C.L.R., Issue 2, at 86.

⁴¹ 2009 Guidance Document, paras 41-45.

⁴² *supra* note 13, paras 155- 159.

⁴³ Case 52/09.

⁴⁴ Case 23/14.

⁴⁵ Damien Geradin, *Loyalty Rebates After Intel: Time For The European Court of Justice to Overrule Hoffman-La Roche*, [2015] Journal of Competition Law & Economics, Vol. 11 , at 11.

⁴⁶ Alexander Italianer, 'Competitor agreements under EU competition law' (September 2013), available at http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf, at 7.

evidence of its own. In the present circumstance, the General Court did none of the above- instead, it termed the claims as irrelevant to the dispute despite Intel discharging its burden. In treating the *per se* rule as a rule of fact, the author believes that the Court misemployed it. The ECJ concurred with this opinion in an indirect manner in stating that:

“...where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

In that case, the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.”⁴⁷

ii. Law in India

In the Indian competition law landscape, the *per se* rule and the rule of reason are more distinctly delineated. Section 3(3) of the Competition Act, 2002 (“**the Act**”) stipulates that horizontal agreements, which are between enterprises or persons engaged in similar trade of goods or provision of services, would be presumed to have an appreciable adverse effect on competition (AAEC). The phrase *would be presumed* is clearly indicative of the applicability of the *per se* rule- if the conduct in question were to fall within any of the acts stipulated in Sections 3(3)(a)-(d), it would automatically lead to a presumption of anticompetitive behavior.⁴⁸

On the other hand, vertical agreements, such as those involved in the Intel and Google disputes, are agreements between enterprises or people located at different stages of the production/value chain- for example, that between manufacturer and distributor.⁴⁹ Such agreements, as per Section 3(4) of the Act, are governed by the rule of reason. They can only be declared anti- competitive if it is conclusively proven on fact that they cause or are likely to cause an appreciable adverse effect on competition. In analyzing whether there is an AAEC, the adjudicating authority must take into account factors such as the creation of barriers to market entry, the squeezing out of existing competitors, the foreclosing of competition and the provision of benefits to end-

⁴⁷ *supra* note 23, paras. 138 and 139.

⁴⁸ Chaitra Yadwad, *Antitrust Cases- Rule of Reason and Per Se Illegal*, 1(2), International Journal of Legal Insight, available at <http://www.ijli.in/assets/docs/ChaitraYadwad.pdf>, at 204.

⁴⁹ Aman Srivastava, *Anti Competitive Agreements Under Competition Act 2002*, 2(5), LawMantra, available at <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/10.pdf>, at 10.

consumers, among others.⁵⁰ Thus, no presumptions can be made as to the anticompetitive nature of such agreements without a comprehensive factual and economic analysis.

This legal position has been further clarified by India's written submission to the Roundtable on Fidelity Rebates, held at the 125th session of the OECD Competition Committee. Recognizing the lack of case law to supplement existing legislative provisions⁵¹, the submission states that fidelity rebates or loyalty discounts are to be scrutinized under Section 3(4) of the Act, and more specifically under Explanation (b) to the provision.⁵² Explanation (b) states that an *exclusive supply agreement includes 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.*

Moreover, when undertaking such scrutiny, the submission points out that:⁵³

- a. vertical agreements such as these are subject to the rule of reason; and
- b. being a softer rule of analysis than the *per se* rule, the rule of reason assumes that vertical agreements may contain beneficial aspects, which are to be weighed against any potential/actual harm caused, in order to reach any finding of anti-competitiveness.

Finally, Section 4 of the Act, similar to Article 102 TFEU, deals with abuse of dominant position. Three sets of determinations are required to be made under this provision:

- a. Can the enterprise be said to possess a dominant position in the relevant product market?;
- b. Can the enterprise be said to possess a dominant position in the relevant geographic market?; and
- c. If the answers to a. and b. are in the affirmative, has the dominant enterprise abused such a position? The Act details the types of conduct that be deemed abuse, including engaging in predatory pricing, limiting supply to restrict market access and leveraging dominance in one market to protect another.⁵⁴

A stark difference between Section 4 of the Act and Article 102 TFEU is that the categories of abuse in the former is an exhaustive list⁵⁵, while those in the latter are illustrative and inclusive. If an act by a dominant firm were to fall within the Section 4's list of prohibited conduct, it would automatically be abuse and therefore anticompetitive. By making the list exhaustive and not inclusive, Indian competition law has specified the exact nature of conduct that would

⁵⁰ Section 19(3), Competition Act, 2002.

⁵¹ Note by India, 'Roundtable on Fidelity Rebates', DAF/COMP/WD(2016)10 (23rd May 2016), available at [https://one.oecd.org/document/DAF/COMP/WD\(2016\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2016)10/en/pdf), para 5.

⁵² *Id.*, para 8.

⁵³ *Id.*, para 6.

⁵⁴ Sections 4(2)(a)-(e).

⁵⁵ Competition Commission of India Advocacy Series, Provisions Relating to Abuse of Dominance, available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf, at 8-10.

amount to abuse, thereby limiting judicial subjectivity in this matter. This has helped India avoid an EU-like situation, where different courts, at different times, have put forth differing interpretations on the elements necessary to constitute an abuse of dominant position.

Uniformity in judicial interpretation

Because of this statutory clarity, there is also judicial uniformity and consistency in the interpretation of these concepts in India.

As mentioned above, Section 3(3) embodies the *per se* rule, which presumes anti-competitiveness. However, the Supreme Court of India has clarified that this is a rebuttable presumption and that the phrase “*shall be presumed*” under this provision merely indicates the party on whom the burden of proof lies.⁵⁶ Unlike in the EU, this clear judicial pronouncement ensures that no defendant is denied a chance to contest a presumption of anti-competitiveness on fact.

In the case of *Builders Association Of India vs. Cement Manufacturers*⁵⁷, the Competition Commission of India (CCI) held that an AAEC is presumed under Section 3(3).⁵⁸ However, in light of the fact that the Opposite Parties (OPs) had presented rebuttals to demonstrate that competition had not been impacted, the CCI analyzed this claim on fact.⁵⁹ Ultimately, it concluded that there was no beneficial impact caused by the impugned measures, holding them anticompetitive under Section 3(3).⁶⁰ Similarly, in the case of *Sunshine Pictures Private Limited vs. Central Circuit Cine Association*⁶¹, the CCI once again noted that while Section 3(3) presumed an AAEC, those against whom such presumptions were raised could rebut them with evidence.⁶² Once they manage to defend their actions, however, “*it becomes incumbent on the part of the Commission to establish whether the impugned rules and regulations, acts and conduct have indeed caused anti-competitive effects in the market. As per the provisions of the Act, in order to find out whether an agreement as per provisions of section 3(3)(b) read with section 3(1) has caused appreciable adverse effects on competition, factors listed in Section 19(3) of the Act are required to be considered.*”⁶³ Here too, the CCI found that there was strong evidence of foreclosure of competition and held accordingly.⁶⁴

⁵⁶ *Sodhi Transport Co. vs. State Of U.P.*, 1986 AIR 1099.

⁵⁷ Case No. 29/2010.

⁵⁸ Para. 6.10.7.

⁵⁹ Para 6.10.7.

⁶⁰ Para 6.10.8 and 6.10.9.

⁶¹ Case No. 52 of 2010.

⁶² Para 6.57.

⁶³ Para 6.58.

⁶⁴ Paras 6.67- 6.68.

However, in cases where the OP is unable to adduce evidence as to the existence of pro-competitive effects or the absence of anticompetitive effects, the presumption under Section 3(3) kicks in. This can be seen in the case of *FICCI – Multiplex Association of India vs. United Producers/ Distributors Forum*⁶⁵. The CCI noted that since the conduct fell within the purview of Section 3(3), it was incumbent on the OP to rebut it.⁶⁶ Since there were no facts presented to controvert it, the presumption stayed and the conduct was deemed *per se* anticompetitive.⁶⁷ This principle was reiterated in the matter of *Uniglobe Mod Travels Pvt. Ltd. vs. Travel Agents Association of India*.⁶⁸

On the other hand, cases under Section 3(4) of the Act result in a factual examination by the CCI to establish anti-competitiveness. In *Mohit Manglani vs. Flipkart India Private Limited*⁶⁹, the CCI did examine the factors under Section 19(3) of the Act to determine whether the impugned arrangement was anticompetitive. Concluding that the arrangement at hand did not have anti-competitive effects and, in fact, promoted competition and consumer welfare, the CCI held that Section 3(4) was not attracted.⁷⁰

From the above analysis, it can be concluded that adjudicatory authorities in India have been consistent in their interpretation of competition law provisions, unlike those in the EU. According to the author, this is possible in no small part due to the fact that the statutory basis of the law is far clearer in the Indian context, allowing the courts less room to manoeuvre.

III. POSSIBLE IMPLICATIONS

i. Intel and Google disputes

Thus, EU law does not seem to be any closer to a reconciliation between the *per se* rule and the rule of reason. The courts aren't doing the resolution any favours either by ruling in an inconsistent manner. This is further complicated by the fact that the 2009 Guidance Document, which was clearly in favour of the rule of reason analysis, is not binding either on the courts or on the EU.⁷¹ One hopes that the final decisions of the General Court re-hearing the Intel dispute, and the European Commission hearing the Google dispute are more consistent with the changing trends in EU law away from the *per se* rule of analysis and towards the rule of reason.

In India, however, a case analogous to the Intel/Google one would fall within Explanation (b) to Section 3(4) of the Competition Act, and would therefore be subject to the rule of reason

⁶⁵ Case No. 01/2009.

⁶⁶ Para 23.53.

⁶⁷ Para 24.

⁶⁸ CASE NO. 03/2009, Para 42.3.

⁶⁹ Case No. 80/2014.

⁷⁰ Paras 16-17.

⁷¹ *supra* note 46, at 6-7.

analysis. As per established case law, the adjudicating authority cannot make a determination as to the anticompetitive nature of conditional financial incentives without analyzing the actual/potential impact of the incentives on competition.

ii. Tez payments app

It is interesting to note that the new Tez payments service application introduced by Google will be pre- installed in smartphones produced by manufacturers such as Micromax, Lava and Xolo.⁷² While it is too early to judge and there is no evidence whatsoever at the moment to indicate any sort of anticompetitive behavior, Google could, in the future, engage in a system of financial incentives on the condition that the Tez app is exclusively pre-installed.

iii. Over-the-top (OTT) services

This debate is also relevant in the controversial tussle between Over-the-top (OTT) services and telecom service providers. An OTT service provider is defined as one who offers *ICT (Information Communication Technology) services, but neither operates a network nor leases network capacity from a network operator.*⁷³ OTT service providers use existing internet networks provided by telecommunications companies, thus going “over-the-top” of a telecom service provider’s (TSP’s) network.⁷⁴ They can provide communication services (such as WhatsApp or Skype), services relating to application eco-systems linked to social networks or e-commerce (such as Facebook, Amazon or Flipkart) and/or video/audio content (YouTube).⁷⁵

In the face of massive competition to telecom companies by OTT services, there is growing deliberation as to whether OTTs must be subject to regulation, prompting the Telecom Regulatory Authority of India (TRAI) to release a Consultation Paper on this matter.⁷⁶ The primary issue as regards regulation of the sector is whether to continue with the net neutrality (NN) model, wherein TSPs are barred from discriminating against content on the internet. The TRAI paper points out that doing away with NN could result in anticompetitive practices, including where TSPs bargain for exclusive arrangements with content providers in exchange for higher compensation.⁷⁷

⁷² ‘Google partners with budget smartphone makers for pre-installing Tez in devices’, BGR (September 18th, 2017), available at <http://www.bgr.in/news/google-partners-with-budget-smartphone-makers-for-pre-installing-tez-in-devices/>.

⁷³ Telecom Regulatory Authority of India, ‘Consultation Paper On Regulatory Framework for Over-the-top (OTT) services’ (27th march 2015), available at <http://www.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf>, para 2.1. Hereinafter, the Consultation Paper.

⁷⁴ The Consultation paper, para 2.1.

⁷⁵ The Consultation Paper, para 2.7.

⁷⁶ *Id.*

⁷⁷ The Consultation Paper, para 5.13.

This presents another potential area where financial incentives (including rebates) may be promised by dominant OTT service providers on the condition that exclusive access to telecommunication services is granted. While bigger content and application providers like Google or Facebook possess the financial resources to enter into such agreements with TSPs, smaller ones cannot afford to do so, effectively losing out on access to the public.⁷⁸ This creates potential anticompetitive issues that would need to be addressed. In line with the principles adopted thus far by the Indian regulatory authorities, the author believes that since OTT service providers and TSPs are on different levels of the production chain, the rule of reason would apply to such cases.

In the event of any of the above possibilities occurring, the author is of the opinion that statutory and judicial clarity and consistency will enable Indian antitrust regulators to handle them in a nuanced manner. Such lucidity could also be useful to European regulators and corporations when attempting to navigate the muddy waters of the “*per se* vs. the rule of reason” in the future.

⁷⁸ The Consultation Paper, para 5.14.