Hospital Exclusivity Contracts:

The Impact of *Kini v Hiranandani Hospital*

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In *Ramakant Kini v LH Hiranandani Hospital*, the Competition Commission of India ('Commission') considered the exclusive arrangement between a hospital and a provider of stem cell banking services. The majority order of the Commission, passed in February 2014, which found the arrangement to be anticompetitive, has considerably broadened the scope of agreements that are subject to assessment under the Competition Act, 2002 ('Act'), placed significant limitations on the ability of hospitals to enter into contracts with service providers, and marks the first time that the Commission has examined hospital exclusivity agreements.

I. The facts and findings in *Ramakant Kini v L H Hiranandani Hospital*

1. Facts leading to the Order

The exclusive agreement between L H Hiranandani Hospital ('the hospital') and Cryobanks International India ('Cryobanks'), a provider of stem cell banking services, in terms of which the collection of blood for the purposes of stem cell preservation would be carried out exclusively by Cryobanks, was at the core of the complaint. One Mrs. Jain had entered into an agreement with the hospital for availing of maternity-related services, and with Life Cell India Pvt. Ltd. ('Life Cell'), a competitor of Cryobanks, for availing of stem cell banking services. Mrs. Jain requested the hospital to allow Life Cell to collect blood immediately after the delivery of her child, which request was rejected by the hospital, on account of the exclusive agreement with Cryobanks. At the time of admission to the hospital, Mrs. Jain was not informed of the exclusive agreement.[1]

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[1] Para 2 of the order.

On the basis of the above, Mr. Ramakant Kini filed a complaint with the Commission on behalf of Mrs. Jain, alleging that the hospital had engaged in anticompetitive and abusive behaviour. Pursuant to finding the existence of a *prima facie* case, and the receipt of the Report of the Director-General ('DG')[2], three orders were passed by the Commission; the order analysed in this case comment is the majority order of the Commission ('order').[3]

2. The competition analysis of the agreements

Section 3(1) of the Act[4] prohibits agreements which cause, or are likely to cause, an appreciable adverse effect on competition ('AAEC') in the market, whereas Section 3(3) pertains to horizontal agreements and Section 3(4) to vertical agreements. The Commission referred to its duty to protect consumer interests and ensure freedom of trade, and noted that the scope of Section 3(1) is not the aggregate of the scope of Section 3(3) and of Section 3(4), but addresses agreements which adversely affect the interests of consumers, or hinder freedom of trade, or are likely to cause AAEC in the market, even if such agreements do not fall within the ambit of Section 3(3) or 3(4).[5]

The test for determining whether or not an agreement causes or is likely to cause an AAEC in the market is based on factors set out in Section 19(3) that the Commission is required to take into account, and calls for balancing negative and positive factors. In relation to negative factors, the Commission noted that there were very few players in the market for provision of stem cell banking services, and held that the exclusive contract could distort the market and lead to inefficiency, adversely impacting consumer interests. It observed that such agreements could create entry barriers and foreclose competition in the stem cell banking services market. In relation to positive factors, the Commission observed that the agreement did not result in the accrual of benefits to consumers, and that the hospital had not been able to provide pro-competitive justifications for the agreement.[6] The Commission rejected the contention of the hospital that the

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[2] Para 5 of the order.

[3] The majority order is available at http://cci.gov.in/May2011/OrderOfCommission/27/392012.pdf, and the minority orders are available at http://cci.gov.in/May2011/OrderOfCommission/27/392012GG.pdf and http://cci.gov.in/May2011/OrderOfCommission/27/392012DT.pdf, respectively. Interestingly, even at the stage of sending the matter for investigation, there was a difference in opinion amongst the members of the Commission; the minority order finding that there existed no case for directing investigation is available at http://cci.gov.in/May2011/OrderOfCommission/27/392012T.pdf.

[4] Hereinafter, references made to provisions are to be taken as referring to provisions of the Act.

[5] Paras 11, 14, and 15 of the order.

[6] Paras 19 -24 of the order.

arrangement with Cryobanks was the result of an objective assessment of proposals submitted by different providers, and, making reference to the fee of INR 20,000/- per patient to be paid to the hospital, held that the commission paid by Cryobanks was the sole reason for selecting Cryobanks.[7]

In relation to the market in which such AAEC is required to be demonstrated, it was noted that any market could be considered, including the market of the service of any party to the agreement. The Commission therefore held that the agreement resulted in an AAEC in the market for the provision of stem cell banking services, and that it contravened Section 3(1). [8]

3. The analysis of the abuse of dominance allegation

Section 4 pertains to the abuse of dominant position, and proscribes five types of conduct by a dominant enterprise or group. The Commission employs a three-step process in analysing abuse of dominance: the determination of the relevant market, the assessment of dominance, and the assessment of abuse. While agreeing with the DG Report on the definition of the relevant market as *'the provision of maternity services by super specialty hospitals within a distance of 1-12 km'* from the hospital, the Commission differed in the assessment of dominance. Noting that the market share of an enterprise is not the only factor in determining dominance, and the existence of comparable price structures in hospitals in the relevant market, the Commission opined that the hospital was not dominant, and accordingly held that the hospital did not abuse its dominant position.[9]

4. Effect of the Order and penalty levied

Having found the existence of an anticompetitive agreement, the Commission directed the hospital not to enter into a similar agreement with a provider of stem cell banking services in the future, and declared the existing exclusive agreement null and void. A penalty of INR 3, 81, 58,303/- was levied on the hospital.[10]

II. Some thoughts on *Ramakant Kini v L H Hiranandani Hospital*

1. The consequences of the expansive interpretation of Section 3

The Commission has expansively interpreted agreements that merit consideration under the Act by taking the view that horizontal agreements are covered by Section 3(3), vertical agreements by Section 3(4), and residual agreements by Section 3(1). This has the effect of rendering Section 3(1) a 'catch-all' provision for agreements

[7] Para 17 of the order.
[8] Paras 25-26 of the order.
[9] Paras 27-29 of the order.
[10] Paras 31 and 35 of the order.

with adverse effects on the market, thereby standing in contradiction to previous orders of the Commission.[11] On at least one occasion, it was on the basis that the agreements complained of did not fall within the ambit of either Section 3(3) or 3(4) that investigations were not initiated. For example, the January 2014 order of the Commission in *NK Natural Foods v Akshaya Private Ltd*[12] records the observation that the parties were neither horizontally nor vertically related, and that agreements under Section 3 are anticompetitive 'only if they create market distortions by causing an AAEC either 'through concerted action of horizontally placed enterprises or through agreement between or among vertically placed enterprises'.[13]

In addition, another consequence of the expansive interpretation is the lack of clarity in relation to the burden of proof where agreements are not addressed by either Section 3(3) or 3(4). In the case of horizontal agreements, there exists a presumption of AAEC, whereas in the case of vertical agreements, AAEC must be demonstrated. In the instant case, the Commission opined that the agreement fell under neither category, but did not specify the implications of the categorization under Section 3(1) for the burden of proof. In *Dhanraj Pillay v Hockey India*,[14] the Commission opined that the relationship between the national hockey organisation in India and professional hockey players is *'tantamount to a vertical relationship'*.[15] In light of the Commission's willingness to deviate from the conventional interpretation of vertical relationships, and in light of the fact that the agreements mentioned in Section 3(4) is only illustrative, it is arguable that the characterisation of the relationship between the parties in the instant case as vertical would have lent clarity to the burden of proof.[16]

The range of available justifications is also impacted by the expansive interpretation of Section 3. In cases where the agreement falls under Section 3(1), any justifications offered must be related to the positive factors listed under Section 19(3), whereas in cases where the agreement falls under Section 3(4), justifications need not be restricted to the positive factors listed under Section 19(3). This, in effect, means that the rule of reason analysis in the case of an agreement falling within the ambit of Section 3(1) allows for fewer justifications than its counterpart under Section 3(4).

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[11] The view that Section 3(1) should not be independently applicable is held by the minority order passed by Member M.L. Tayal, whose order is available at http://cci.gov.in/May2011/OrderOfCommission/27/392012DT.pdf.
[12] Case No. 74 of 2013.
[13] Ibid. at para 6.
[14] Case No. 73 of 2011.
[15] Ibid. at para 10.13.2.
[16] The minority order of Member Geeta Gouri, which opines that the agreement is vertical, is available at http://cci.gov.in/May2011/OrderOfCommission/27/392012GG.pdf.

2. Some inconsistencies in the Commission's approach in the context of the abuse of dominance analysis

By considering comparable price structures of hospitals in the relevant market, and by recognising that market share alone is not indicative of dominance, the Commission concluded that the hospital was not dominant in the relevant market. However, in its analysis of the agreement under Section 3, the Commission noted that it would be expensive and inconvenient for patients to switch hospitals after having developed a *'trust in the treatment'* of the hospital[17]. The Commission alludes to switching costs in its analysis under Section 3, but ostensibly does not consider the same in its analysis under Section 4. It must be noted that switching costs are a factor that impacts the assessment of dominance under Section 19(4).

3. The implications of the case for hospital exclusivity contracts

On a previous occasion, the Commission opined that exclusivity *per se* does not contravene competition law.[18] The order suggests that hospital exclusivity contracts may be assessed under Section 3(1), and not as a vertical agreement under Section 3(4). As abovementioned, the characterisation of agreements as falling under Section 3(4) or 3(1) has an impact on the range of the available justifications. In the instant case, the characterisation of the hospital exclusivity agreement under Section 3(1) of the Act has resulted in the Commission's balancing of the demonstration of negative factors under Section 19(3) by the aggrieved person, and that of positive factors under Section 19(3) by the hospital. This has the effect of limiting justifications for hospital exclusivity contracts to the positive factors listed in Section 19(3); had the exclusivity agreement been characterised as a vertical agreement, a wider range of justifications would have been available to the hospital.

The Commission notes that enterprises are generally free to choose their business models, but that the hospital could not do so, as the arrangement limited the growth of the market for stem cell banking services.[19] It is pertinent to note that this observation was recorded despite finding that the hospital was not dominant in the relevant market.[20] This limitation on the freedom of contract is being imposed on the hospital despite the lack of a finding of dominance.

The impact of competition *for* the market may also be relevant in the analysis of whether the agreement is anticompetitive. In the instant case, the Commission was

[17] Para 24 of the order.
[18] *Consumers Guidance Society v Hindustan Coca Cola Beverages Pvt.Ltd.,* Case No. UTPE 99/2009.
[19] Para 20 of the order.
[20] Para 29 of the order.

of the opinion that the selection of Cryobanks was motivated by commercial considerations.[21] However, had Cryobanks been selected on the basis of objective criteria, such as the technology used and efficiency, the manner in which such selection would be balanced against the reduction of choice for consumers is unclear.

Additionally, the time of disclosure of the exclusive arrangement seems to play a role in the analysis. In the instant case, Mrs. Jain was informed of the exclusive arrangement in the advanced stages of her pregnancy. However, in light of the fact that the Commission notes the lack of market power, it is entirely possible that a patient who was made aware of the exclusive arrangement would have been able to approach a hospital that would allow the pairing of maternity services with stem cell banking services that the consumer desired.[22] In this light, the extent to which the non-disclosure of the arrangement affected the analysis of the agreement is also debatable.

Lastly, the Commission has considered the effect of the behaviour on the market for provision of stem cell banking services, as also on the market for availing of stem cell banking services. Whereas in the instant case the Commission is of the opinion that the interests of the consumers and the competitors coincide, the manner in which such agreements would be assessed where such interests conflict, is unexplored.

IV. Conclusion

The Order of the Commission is significant in respect of its contribution to the treatment of hospital exclusivity contracts in specific, and to its treatment of anticompetitive agreements in general.

The order seems to suggest that hospital exclusivity contracts will be assessed under a provision that pertains neither to horizontal agreements, nor to vertical agreements, and there is no clarity as to the burden of proof. Further, the positive factors under Section 19(3) need to be demonstrated by a hospital entering into an exclusive arrangement with a service provider, and the hospital needs to be aware of the stage of development of the market. However, the impact of merit-based selection on the competition analysis is unclear, as is the market in which the anticompetitive behaviour is assessed. The net effect is a stricter standard to which

[21] Supra n. 8.

[22] In fact, the lack of evidence in relation to the inability of consumers to seek the service provider of their choice is a factor that led the Supreme Court of the United States in *Jefferson Parish Hospital District No 2 v Edwin G Hyde*, 466 US 2(1984) to conclude that no adverse effect had been demonstrated.

hospitals are held where hospital exclusivity agreements are held to fall under Section 3(1) and a greater limitation placed on the freedom of contract of hospitals.

The larger issue is the creation of a new category of anticompetitive agreements over which the Commission has jurisdiction. The order, in advocating the analysis of non-horizontal, non-vertical agreements under Section 3(1), is in direct contradiction to its earlier orders, and the impact of this interpretation is to vastly increase the scope of agreements which fall for scrutiny. The order has been appealed to the COMPAT, where arguments are presently being heard, and the outcome of the appeal has repercussions not only for the healthcare industry but also for the types of agreements that the Commission will have the power to assess.