Counter Point – VI: Minority Order Overcoming Its Minority Status
— *Kapoor Glass* v. *Schott Glass*

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There have been many instances of differences in approach, amongst different members, in the orders passed by the Competition Commission of India (CCI or Commission). In a pluralistic body, meeting as a collegium, it is natural and expected. As we know, the orders of the higher appellate forum take precedence over the orders passed by the lower judicial authorities. Appeals against the orders passed by the CCI lie before the Competition Appellate Tribunal (COMPAT), in terms of the provisions of section 53 B of the Competition Act, 2002 (Act). Therefore, the instances where there have been disagreements and, on appeal, the order of the majority of the members of the Commission has been set aside and the order of a single member has been upheld by COMPAT are indeed extremely important milestones in the journey of the evolution o the competition law in the country. Unless appealed against, before Hon'ble Supreme Court and reversed, such order of a single minority member attains finality at that point of time. It is for reason that such orders are landmark decisions.

The author, who drafted regulations for the functioning of the Commission and established the competition law investigation framework for the country as the very first Director General of the functional Competition Commission of India, looks back at the case in the light of the order of the majority, the dissenting order passed by one member of CCI and upheld by COMPAT and the order of COMPAT.

Continuing to look at the dissenting orders which, sometimes, may hold the key to the future jurisprudence on competition law, in this article, we look critically at a matter where the order of majority of members of the Competition Commission of India (CCI or Commission) was set aside by Competition Appellate Tribunal (COMPAT) by its order dated 2nd April, 2014, in Appeal no. 91/2012 and Appeal no. 92/2012, and dissenting order passed by a single member of the Commission was confirmed. Not only that this particular order of the single member of the Commission was confirmed by the COMPAT but the reasoning given in this order of COMPAT has also been frequently used by COMPAT in subsequent orders of COMPAT as a handle to strike down the penalties imposed by the Commission in other cases as well. The latest being the order dated July 1, 2016 of COMPAT in Appeal No 36 of 2014 through which substantial penalty, imposed on India Trade Promotion Organisation by CCI, was also set aside citing the earlier order of COMPAT, amongst others, in the case of Kapoor glass.

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The Appeal no. 91/2012, filed by M/s. Schott Glass India Pvt. Ltd (Schott Glass India) against the Commission and M/s. Kapoor Glass Pvt. Ltd. (Kapoor Glass) appealing against the imposition of penalty on Schott Glass India by the Commission on information filed by Kapoor Glass before the Commission. The second Appeal no. 92/2012 was against the Commission and Schott Glass India appealing against non-acceptance of some of the allegations contained in the information filed by Kapoor Glass against Schott Glass India for violation of the provisions of the Competition Act, 2002 ("Act").

To recount the whole sequence of events, the Commission had, after going through the information filed by Kapoor Glass, passed an order directing:

a) That Schott Glass India should desist from applying dissimilar conditions while giving discounts to Schott Kaisha *vis-à-vis* other Converters.

b) The terms of transactions for supply of tubes to Schott Kaisha, the JV should be similar and non-discriminatory vis-à-vis the other Converters.

c) The discount on both amber and clear tubes should not be contingent upon sale of each other.

Schott Glass India is a manufacturer of neutral USP – I borosilicate glass tubes which are made of borosilicate glass, a special type of glass having unique properties, such as the glass tubes have low thermal expansion and are highly resistant to chemical reaction and, therefore, are used to make glass, ampoules, vials, cartridge and syringes, being the primary packaging material for liquid injectables and drugs by pharmaceutical industry. Schott Glass India is a fully owned subsidiary of Schott Glaswerke Beteiligungs GmbH, Germany. Whereas Schott Gmbh is wholly owned subsidiary of Schott AG, Germany and thus Schott AG is the ultimate parent company of the Schott group. In May, 2008, Schott group through Schott Pharmaceutical Packaging GmbH (Schott Packaging), a subsidiary of Schott Germany, entered into a Joint Venture agreement with a downstream ampoule manufacturer Kaisha Manufacturers Pvt. Ltd. (Kaisha) to integrate operations of Schott in India vertically with downstream glass containers manufacturing business, now known as Schott Kaisha Private Limited (JV). Thus since the year 2008, Schott India, through the JV of its related group company, Schott Packaging, has been engaged in the business of producing both borosilicate glass tubes and glass ampoules in India.

As summarised by COMPAT, the allegations brought by Kapoor Glass against Schott Glass were pertaining to two types of practices. There were:

(a) practices affecting the state of competition in the market for 'Neutral USP Type I Borosilicate Glass Tubes in India and

(b) practices affecting the state of competition in market for downstream product of glass ampoules and other containers.

In terms of the information filed by Kapoor Glass before the Commission, Schott Glass India indulged in unfair and discriminatory pricing in as much as it sold its products at predatory pricing which were lesser than the cost of production as well as the prevailing pricing in the international market in order to drive out the existing competitors in the upstream market including Kapoor Glass and two other concerns. It was also alleged that Schott Glass India was charging unfair prices and was also granting loyalty rebates and discounts in order to prevent the shift of ampoules manufacturers to imports and to ensure that the ampoules manufacturers used glass tubes of Schott Glass India alone.

The interesting part of the order of COMPAT was that Appeal no. 92/2012

filed by Kapoor Glass against the order of the Commission, was not only dismissed for lack of bonafide but also a penalty of Rs. 1 Lakh was imposed on Kapoor Glass for the same, which had to be paid within three months of the passing of the order. That means COMPAT only allowed Appeal No. 91 of 2012 and overturned the judgment of the CCI and resultantly the penalty imposed therein. This is an interesting case where minority order of a single member was upheld by COMPAT against the order of majority passed by the Commission in which the majority concurred with the allegations of Kapoor Glass and imposed a penalty of Rs. 5.5 Crores on Schott Glass India.

The readers may recall an earlier write up in the December, 2015 issue of Competition Law Reports(CLRs) on the order of the Commission in the case of Jaypee Group titled as "Importance of being a Member of CCI: Order in Jaypee Case". To an extent, this particular order of the COMPAT in which the order passed by a single Member of CCI in dissent, being in minority, was upheld in contrast to the order of the majority proves that point further.

Seen in that perspective, this is a real landmark judgment where the order of a single member of the Commission has been upheld against a much bigger majority. The observations made by and the findings given by COMPAT are indicative of the fact that it is not always that the majority rules the roost. As discussed in the preceding paragraphs, the entire matter commenced on the basis of the Information filed by Kapoor Glass before the Commission against Schott Glass India. The allegations of Kapoor Glass against Schott Glass India, as detailed in the information before CCI, are broadly being summarised as under:

1. The Opposite Party (OP), or Schott Glass India, through its **predatory pricing strategy**, eliminated competition and ousted Kapoor Glass and other market players from the borosilicate glass tubes market in India;

2. The OP indulged into **predatory hiring** of the skilled workers and personnel of Kapoor Glass, having failed to acquire Kapoor Glass.

3. The OP **increased the prices** of 'neutral USP -I borosilicate glass tubes' sharply and consistently, subsequent to the exit of some of the players in this segment

4. The OP, through its discriminatory treatment to downstream ampoule manufacturers in the form **of target discounts and functional discounts**, adversely affected the conditions of competition in the ampoules market.

5. It was further alleged that in order to be eligible for discount, ampoule manufacturers were required to sell ampoules at prices suggested by Schott Glass India.

6. It was also alleged that the Schott Glass India required (in order to avail tubes at discounted rates) the ampoules manufacturers to agree to furnish bank guarantee of Rs. 70 lacs.

7. The OP further imposed unfair conditions on sale of its products such as **tie-in arrangement**, wherein OP made the supply of amber tubes to ampoule manufacturers contingent on the procurement of the clear tubes from no other source but the OP alone.

8. The OP also required the ampoule manufacturers not to purchase glass tubes from any other source, including imports.

8**. The OP stopped supply to the Informant**, which led the informant to undertake the work of making ampoules on temporary job work arrangement basis for M/S MAK Ampoules, in reaction to which Schott stopped supplies to MAK, which further led to complete exit of Kapoor from glass ampoule market.

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After discussing the matter, in its prima facie meeting, the Commission reached the conclusion that there existed a prima facie case and, accordingly, it directed the Director General (DG) to investigate into the matter and submit a report. It is to be noted here that the analysis of the orders of the Commission and COMPAT, which follows, has been done in an issue wise manner.

As regards the issue of relevant market and the position of dominance of the OP within the relevant market are considered, there is not much difference of opinion and on the basis of the available jurisprudence world wide as well as the fact of the case, the relevant market was determined by the Commission to be-

(a) "The market for neutral clear USP-I borosilicate glass tubes and market for neutral Amber USP-I borosilicate glass tubes in the upward upstream" and

(b) the market of containers i.e ampoules, vials, dental cartridges and syringes made out of neutral Amber USP-I borosilicate glass tubes as the downstream relevant product market.

Relevant geographical market was held to be India. After considering all the factors in the Section 19(4) of the Act, the Commission reached the conclusion that the superior size and resources of JV and OP in both upstream and downstream markets give them superlative economic power over their competitors. Further, consumer dependence and lack of countervailing buying power along with presence of entry barriers like high level of investments, high gestation periods make their position formidable in upstream and downstream relevant markets. Thus, their dominant position was on account of their financial strength and their deep pockets which gave them significant power in the relevant market.

The next issue was that whether OPs violated the Section 4(2) of the Act by indulging in predatory pricing. On this issue, the Commission noted that allegations of predatory pricing pertain to the period when the enforcement provisions of the Act were not notified. No allegation as to whether the anti competitive act had continued after the date of notification was there. Thus, the allegation with respect to the intention of recouping loses by increasing the prices of the tubes post 2008 could not be concluded.

The next issue for determination was whether the OP has imposed unfair and discriminatory conditions or price in the sale of neutral USP-I borosilicate glass tubes through its discount policies, Trade Mark, Licence Agreement, Marketing Support Agreement and Sale Purchase Agreement in contravention of the provisions of Section 4(2)(a)(i) and (ii), of the Act. After a careful perusal of the submissions of the parties and report of the DG, the majority of the Commission concluded that conduct of a dominant enterprise in upstream market may give rise to competition concern if through that conduct it enforces an unfair and discriminatory discount on the products sold to the players (converters) in the downstream market wherein the JV, which is a subsidiary of and is controlled by common group is also competing and is in fact a market leader. This is because an unfair and discriminatory discount policy giving preferential treatment to its related entity in downstream market will

mean higher purchase price for the other competing players as a result of which they cannot compete on even terms. Thus, through its discount policies, OP binds the converters with it in the beginning of the year by giving incentives and pays discount towards the end of the year based on quantity procured.

On this issue, there was a difference and the minority in the Commission held a different view. The view of minority on this issue of unfair and discriminatory pricing was as under:

> Unlawful discrimination in pricing entails establishment of (i) dissimilar treatment to equivalent transactions and (ii) harm to competition or likely harm to competition making buyers suffer competitive disadvantage against each other leading to competitive injury in the downstream market. An examination of the effect of differential treatment on competitive ability of 'disfavored buyers' and any injury on competitive conditions in the downstream market were examined.

Examination of facts and material brought on record revealed that the supplies to the pharmaceutical companies are, generally, based on their requisitions. Prices of containers are negotiated between the convertors on a one time basis. The invoices revealed that prices charged by different converters were similar and exactly same in some instances for a given pharmaceutical company. Therefore, the cost differential in inputs (tubes) caused by the volume based discount scheme of the OP does not get translated into price differential in final products (containers) for the pharmaceutical companies. Hence change in market structure or market share composition cannot be linked to discounts received by the converters. Further, the dissenting order held that clauses of Trade Mark License Agreement (TMLA) cannot be construed as exclusive dealing agreement since it pertains to right to enter the premises and unilateral determination of breach are only in furtherance to the underlying objectives of a standard TMLA.

The next issue for determination before the Commission was whether the aforesaid policies of OP are exclusionary and limit and restrict the market in violation of provisions of Section 4(2)(b)(i) and are also causing denial of market access in terms of Section 4(2)(c) of the Act?

On this issue, the Commission held that the discount policies coupled with the terms of TLMA which are considered to be one sided and heavily loaded in favour of OP when read with the sale purchase agreement, supply agreement and marketing support agreement, restrains converters from using any other tubes except Schott. The aforementioned acts ensure that converters do not switch over to other suppliers in upstream market including imports and thus limits the overall market of tube glass. However, at the same time the Commission did not find that these acts restrict market entry access is for other upstream manufacturers.

Minority of one Member of the Commission, did not agree with the views of the majority of the Commission on this issue. With respect to volume discounts, OP and Nipro are the competitors with respect to NGC/NGA glass tubes along with Chinese competitors and potential international entrants such as Neubor. On an examination of price, it was revealed that the prices of tubes of Nipro and those imported from china are less than that of Schott. Hence exclusionary strategy cannot be attributed to application of volume discounts. However, functional discount policy was considered to violate the Section 4(2)(b) and 4(2)(c) since it restricted entry of new players in the upstream market and could not be justified by any efficiency gains or pro-competitive motives.

A perusal of the order of COMPAT shows that COMPAT has decided to agree and go with the view of the minority for the detailed reasons given in the order dated

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2nd April, 2014. COMPAT held that the agreements do not suggest any clause of exclusive dealing with the Appellant nor does it spell out any loyalty clause. Schott Glass India pleaded that the only purpose of TMLA requirement is to attach the logo of Schott Glass India to the package of container made out of Schott tubes which the converter delivers to the pharmaceutical companies. The COMPAT agreeing with the order, of one Member minority agreed that there was lack of exclusivity conditions with respect to the Commission's approach of reading discount policies with other agreement and that the Schott Glass India had a legitimate claim in protecting its brand name. Thus none of the aforementioned conduct could be found to violate the provisions of 4(2)(b)(i) and 4(2)(c) of the Act by the Commission. It was this part of the order which was challenged before the COMPAT in Appeal No. 92/2012 discussed previously.

The next issue was whether it was a case of leveraging upstream dominance to protect the downstream market or was there any violations of Section 4(2) (e) of the Act. In this regard, the Commission noted that JV was getting favorable treatment on account of discounts from the OP in addition to the price of tubes being different and lower compared to other converters. The basis of increase of percentage price was different for JV and for other converters. Thus, the OP, having position of dominance in upstream market, with its Long Term Tubing Supply Agreement with Schott Kaisha, its vertically integrated firm, has ensured that the competitors of the JV do not have a level playing field. After examination of statements of converters and DG reports, it was held by the Commission that it is evident that conduct of the OP, who is in dominant position in the upstream relevant market of tubes, has contributed to the lessening of level of competition in the downstream market in favor of JV, Schott Kaisha.

The minority of one Member of the Commission, went into the financial details and, after a thorough financial analysis, did not consider earnings before interest, taxes, depreciation, and amortization (EBIDTA) comparison between convertors as a meaningful way of differing efficiencies between the converters as established by their operating ratios. With respect to the trend in absolute sales, all converters have grown post JV. It also revealed that Compound Annual Growth Rate (CAGR) sales of Schott-Kaisha decreased post JV and had turned negative post 2009-10. Further, records of supply furnished by OP revealed an average of 95% performance record on all deliveries on the for all converters. Further, it was opined by the minority member in her order that in view of the new capacity addition made by OP, supply availability no longer remains an issue of significance in this discussion. Thus, on analysis of the performance of the converters in the downstream relevant markets, the long term tubing supply agreement between Schott and Kaisha did not have an appreciable adverse

effect on the competition (AAEC) structure of the market.

COMPAT did not agree that Schott Glass India could have violated Section 4(2)(e) since it was not present in the downstream market of ampoules. Favoring of Schott – Kaisha for making its presence strong in the downstream market could not be considered as violating Section 4(2)(e) without establishing the same. Breach is possible only if the appellant was itself trying to enter the market or secure its presence in the downstream market. Therefore, both conditions being absent, it set aside the findings of the majority of the Commission's order. It upheld the minority observation and did not confirm the charges of violation of Section 4(2)(e) on Schott Glass India.

The next issue for determination was whether the OP had engaged in the practice of making the sale of amber tubes contingent upon converters buying clear tubes from it, in contravention of provisions of Section 4(2)(d) of the Act, and any other provisions of section 4 of the Act.

On this point, the majority of the Commission had held that both NGC/ NCA are tied and marketed together and bundled discount is given to the consumers on them. Further OP having a market share of around 90% in NGA and Fiolax Amber, enjoying virtual monopoly over these segments, it has the power to leverage sale of the amber tubes contingent upon sale of clear tubes. While the dark Amber tube is imported, light shade variety, preferred by pharmaceutical companies, is produced only by the OP since this shade cannot be imported as they do not match the requirements of these companies.

Many converters, during the course of proceedings, like Indian Scientific Glass Industries (ISGI) had replied that it is not commercially viable to import the entire requirement of Amber Tubes due to major difference in price. The statements of the converters that the OP leverages such power in the amber segment to enforce sale of clear tubes finds further force when seen along with the TMLA and overall discount policy of the OP. Thus it makes it clear that the OP as a dominant player. As a dominant player, the OP will seek to maximize its revenues by selling two products together by providing bundled discounts on them- one, on which it exercises near monopoly and the other product in which there are competitors in the market, since that would lead to more and additional units of both the products being sold in the market.

The COMPAT did not entertain the findings of the majority members of the Commission and concurred with the minority opinion on two main grounds. First, clear and amber tubes cannot be said to be un-connected to each other as the two products are not entirely different from each other. Second, Schott India had no reason to push the sales of amber tubes where it had a market share of 90%. The COMPAT set aside the order of the majority of the Commission and upheld the minority order thereby exonerating Schott Glass India from changes of violations of section 4(2)(d) of the Act.

Still the next issue was whether refusal to deal with the informant was leading to the denial of market access and, therefore, Infringement of Section 4(2) (c) and (e) of the Act.

On this issue, the majority of the Commission did not find any merit in the aforesaid allegations since, on an analysis of the facts, it was revealed that informant was involved in fraudulent usage of Schott labels and products. Thus, OP was within its rights to stop supplies of the informant in order to protect its trademark. The Commission further observed that a manufacturer or a supplier is not obliged and cannot be forced to supply its products to an entity which has used its name and labels without its prior permission in past.

The minority of the Commission pointed towards the fact that OP cannot be forced to deal with the informant in light of the unauthorized use of trademark of the OP by the informant. With respect to the issue of denial, OP was not being the only manufacturer of tubes in the upstream relevant market, informant could have approached other manufactures. Further, contention as to pharmaceutical industry's preference of Schott was rejected after a perusal of their statements which merely put forth their preference with respect to USP type- I standard tubes. With regard to the stability test, the period mentioned by the pharmaceutical industries was 6 months thus shifting to new suppliers was not constrained by the requirement of the stability test.

The COMPAT upheld the CCI's order reiterating that a supplier is not under any obligation to supply its product to any entity. Moreover, informant's conduct with respect to manufacturing fake labels of Schott had violated Schott India's trademark. It condemned such act of Kapoor Glass as the relevant products had a direct relation with human lives and serious consequences could ensue on account of usage of inferior quality of glass tubes and treated it as justification enough from OP for refusing to give supplies. The COMPAT concluded that it was in Schott India's power to restrict itself from dealing with an entity when there is a risk of violation of its trademark and threat to its brand value.

The last issue before the Commission was whether the OP had indulged in the practice of predatory hiring of employees of the informant and, if yes, can the practice be called inconsistent with the requirements under Section 4(2) (e) of the Act? Further, can this act be said to be violative of provisions of Section 4(2)(b)(i) since it is limiting and restricting the ability of the informant to produce goods as alleged by the informant?

The Commission, on an analysis of the submissions by the parties and DG's report, concluded that the movement of key personnel to Schott-Kaisha cannot be attributed as abusive conduct on the part of the OP in contravention of any of the provisions of Section 4 of the Act. The movement of labor from one industry to another was considered as normal conduct of employees and also that the Act did not restrict or consider such movement as anti-competitive. After considering the order of both majority as well as the minority COMPAT overruled the order of the CCI and absolved the penalty imposed against Schott Glass India.

This is one interesting case where the judgement of the majority of the Commission has been quashed and order of the single member minority has been upheld and become the final judgement. To that extent, it is an extremely significant and important judgement.

The Appellate Tribunal has set another important precedent on the point that being big is not essentially bad, as long as the might of dominance is not necessarily abused, to the disadvantage of other market players, in our Indian competition regime. It also implies that being in majority in the orders passed by the Commission is not just enough for an order to attain finality and, sometimes, even minority orders if reasoned well can be the final orders after the review by COMPAT.