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**Agenda Item 3a. Competition issues in the sale of audio-visual
rights for major sport events**

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Upcoming concerns and the case of Indian cricket league

Introduction

Restraints to competition that arise in the grant of audiovisual rights for major sports events are generally analysed from the perspective of maintaining competition between media houses so that there is no adverse impact on competition at the broadcaster level as well as on consumers in terms of viewership of existing live sports events. These generally arise from horizontal or vertical restrictions or a mixture of both and are seen as key issues for maintenance of competition in media markets.¹ This is because exclusive rights to broadcast major sports events hold considerable value in terms of profitability and competitiveness in the broader media market.² Viewers also significantly value access to live broadcasting of sports events and the demand for the same is widely considered to be non-substitutable with other forms of entertainment.³ The factor of non-substitutability also holds true if we compare one sport event to the other, meaning thereby that ‘a viewer who wants to see a given event is unlikely to be satisfied with coverage of another event’.⁴ As a result of these unique characteristics, the market is susceptible to anti-competitive conduct, be it in the form of horizontal restrictions⁵ or vertical restrictions⁶ or a mixture of both⁷.

Through this piece, we intend to add to the aforementioned understanding of competition concerns in broadcasting of audiovisual rights of sports events by highlighting an upcoming issue and also elucidating a recent competition case law by the Competition Commission of India.

Disruption by tech giants and revisiting approaches of traditional competition analysis

¹ See Alexander Schaub, ‘*Sports and Competition: Broadcasting Rights of Sports Events*’ (2002) <http://ec.europa.eu/competition/speeches/text/sp2002_008_en.pdf> accessed 2 July 2018

² Blázquez et al, *Audiovisual sports rights between exclusivity and right to information*, (2016) <<https://rm.coe.int/1680788a5d>> accessed 2 July 2018

³ Alexander Schaub, ‘*Sports and Competition: Broadcasting Rights of Sports Events*’ (n 1)

⁴ Ibid

⁵ Sport clubs assigning their rights to their associations that sell the rights on behalf of the clubs to broadcasters in the form of large exclusive packages. This prevents clubs to compete with each other for sale of their rights. See Alexander Schaub, ‘*Sports and Competition: Broadcasting Rights of Sports Events*’ (n 1)

⁶ Long duration of exclusivity and the preferential treatment of one set of rights at the expense of another. See Alexander Schaub, ‘*Sports and Competition: Broadcasting Rights of Sports Events*’ (n 1)

⁷ Combination of dominant positions in the upstream and downstream markets leading to very strong market foreclosure, particularly in the area of TV live rights. See Herbert Ungerer, *Commercialising Sport* (2003) <http://ec.europa.eu/competition/speeches/text/sp2003_024_en.pdf> accessed 2 July 2018

The chief tech giants of the 21st century such as Amazon and Facebook are eyeing to enter into the live sports broadcasting market.⁸ Experts predict that owing to their deep pockets and locked-in dedicated consumer audience, the tech giants would be able to disrupt the live sports broadcasting market in the near future. This puts the incumbents in a tight spot as deep-pocketed digital platforms start to enter their domain.

In such a scenario, the hotly debated competition policy issues of control over consumers' data and possible lock-in effect caused due to network effects will enter the live sports broadcasting market as well. Critics believe that the entry of tech giants into this market would adversely affect competition as it could lead to entrenched exclusivity in the long-run.⁹ Sports viewership being an ephemeral product (viewers interested in only viewing it live) and non-substitutable in nature, exclusive ownership of broadcasting rights by deep-pocketed tech companies (that have been criticized of following a price below-cost strategy of growth¹⁰) reinforces the challenge of reviewing the existing framework of competition analysis, specifically the manner in which the markets are defined and how the level of competition is measured.¹¹

The case of the Indian Premier League

Another worthwhile addition to present literature on the subject can be gathered from one of the recent orders passed by the Competition Commission of India (CCI). The case addressed possible abuse of dominance by the national cricket regulator in the organisation of India's leading private professional cricket league (the Indian Premier League or the IPL). This case looks at restraints emanating from broadcasting rights agreements which can also cause entry barriers from the

⁸ Arjun Kharpal, *Amazon will be a 'major disruptive force' to live sports rights in the next few years, analyst says*, (13 March 2018) <<https://www.cnb.com/2018/03/13/amazon-will-be-major-disruptive-force-to-live-sports-rights-analyst.html>> accessed 2 July 2018; Also see *Amazon Wins Exclusive U.K. Rights to Broadcast Some Premier League Matches* <<https://www.nytimes.com/2018/06/07/business/media/premier-league-amazon-soccer.html>> accessed 2 July 2018

⁹ *Measuring Competition*, (8 June 2018) <http://stumblingandmumbling.typepad.com/stumbling_and_mumbling/2018/06/measuring-competition.html> accessed 2 July 2018

¹⁰ LM Khan, *Amazon's Antitrust Paradox*, Yale Law Journal (2017) <<https://www.yalelawjournal.org/note/amazons-antitrust-paradox>> accessed 2 July 2018

¹¹ For possible new economic approaches, See Jan Boone et al, *How (not) to measure competition* (2007) <<http://competitionpolicy.ac.uk/documents/8158338/8207804/2007+-+NIE+Paper+5.pdf/1abdf931-7a6a-4bfb-9cfd-e8062a547065>>; Cristina Caffarra and Oliver Latham, *Market Definition in the Digital Age*, (2017) <http://www.konkurrensverket.se/globalassets/english/research/pros-and-cons2017_5-cristina-caffarra.pdf>

perspective of sports event organisers (which extends beyond looking at competition restraints from the broadcaster and viewer perspective).

Before discussing the order, a brief introduction to IPL is essential. In a time span of just 10 years, the IPL has grown by leaps and bounds and has drawn parallels to the famous football league in England (English Premier League). According to data provided by the Board of Control for Cricket in India (BCCI), in 2015, IPL contributed USD 182 million to India's Gross Domestic Product (GDP).¹² The data also revealed that the economic output associated with IPL in India stood at USD 418 million.

As is the case with any other major sporting event, broadcasting rights are one of the major sources of income for the organisers of the IPL. However, the manner in which these rights were granted to the media attracted scrutiny from India's competition regulator in 2013. The Competition Commission of India (CCI) held BCCI responsible for abusing its dominant position in the relevant market of "organization of professional domestic cricket leagues/events in India".¹³ The 2013 order of CCI went to appeal and was set aside by the Competition Appellate Tribunal (COMPAT) on the basis of non-adherence to the principles of natural justice. As per the directions of COMPAT, the CCI ordered the Director General (DG) to conduct a fresh investigation in the matter.

The manner of grant of media broadcasting rights was one of the major contentious issues in the case, which we explain below in detail.

Facts

The BCCI acts as the *de facto* regulator for cricket in India. This is primarily because of the pyramid structure of sports governance and the endorsement of the BCCI to act as the national governing body from the topmost governing body for cricket i.e. the International Cricket Council.¹⁴ BCCI's main responsibilities include controlling and promoting cricket in India,

¹² Manas Tewari, 'IPL economy: What the cash-rich league adds to India's GDP' *The Financial Express* (22 January 2018) <<https://www.financialexpress.com/sports/ipl/ipl-economy-what-the-cash-rich-league-adds-to-indias-gdp/1025063/>> accessed 2 July 2018

¹³ In the case of Sh. Surinder Singh Barmi (Informant) and the BCCI (opposite party) <https://www.cci.gov.in/sites/default/files/612010_0.pdf>

¹⁴ *Ibid.*, at p.23

framing laws governing it and also selecting the teams that represent India in the various types of cricket matches played domestically or abroad.¹⁵ In 2008, BCCI started the private professional league T-20 cricket tournament, namely the Indian Premier League (IPL). In 2013, an avid cricket fan filed a complaint with the CCI against the BCCI basically alleging three kinds of anti-competitive activities in relation to the organization of IPL. The concerns raised in the complaint included:

- a) Irregularities in the grant of franchise rights for team ownership.
- b) Irregularities in the grant of media rights for coverage of the league.
- a) Irregularities in the award of sponsorship rights and other local contracts related to organization of IPL¹⁶

In the following sections, we dissect the subsequent order (passed by CCI after re-investigation by the DG) specifically the parts related to delineation of the relevant market and the allegation of abuse of dominance vis-à-vis the grant of media rights.

Relevant Market¹⁷

The assessment of the relevant market in the present case gives a detailed insight into the uniqueness and importance of competition issues in the organisation of major sports events and their live broadcasting.

In the present case, the DG delineated the relevant market to be the market for ‘organization of professional domestic cricket leagues/events in India’, which was agreed to by the Commission.¹⁸ The following chief factors formed part of the rationale behind this assessment:

- a) Non-substitutability from consumer preference perspective between professional domestic cricket leagues like IPL and other forms of entertainment and sports**

¹⁵ Nishith Desai Associates, *Apex competition regulator declares BCCI not-out on appeal* <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/apex-competition-regulator-declares-bcci-not-out-on-appeal.html?no_cache=1&cHash=e745a7d5086fbcacf33055d699d5d64c> accessed 2 July 2018.

¹⁶ See Sh. Surinder Singh Barmi (Informant) and the BCCI (opposite party) <https://www.cci.gov.in/sites/default/files/612010_0.pdf>

¹⁷ See In Re: Sh. Surinder Singh Barmi (Informant) and the BCCI (opposite party) <<https://www.cci.gov.in/sites/default/files/61%20of%202010.pdf>>

¹⁸ Ibid. at p.29

The DG's conclusion after investigation was that 'professional domestic cricket leagues/ events are neither substitutable with general entertainment programmes nor with other sports nor even with other formats of cricket itself'.¹⁹ Agreeing with this narrow level of substitutability the Commission went on to observe, "While popularity of each sport depends upon the players, teams and the tournament involved, none is interchangeable with the other by virtue of characteristics. Thus, a cricket match cannot be perceived to be substitutable with any other sport based on characteristics of the game."²⁰ Hence, 'Cricket, as a product, is completely different and not comparable with general entertainment television programmes and other sports, although there may be common viewership.'²¹

b) Absence of price competition amongst different sports

Another distinctive factor about sports events and their live broadcasting is that there is no price-competition between different sports and their diverse forms. As the DG observed, "*There is nothing to conclude that on lowering of ticket price of football events, the viewers of cricket will switch over to football match or if the price of cricket match ticket or channel subscription fee is increased, the viewer will switch over to other sports or events. The loyalty of fans of any sport is so strong that there is negligible chance of any cross elasticity of demand*"²² A SSNIP test in such cases would thus fail to cover within its scope other forms of entertainment or sports.

This analysis strengthens the fact that organization of major sports events and their live broadcasting display unique characteristics and form a separate product market altogether.

Abuse of dominance: Lessons in store for sports regulators

However, the present order by the CCI is unique in the sense that it examines the important issue of anti-competitive exclusive restraints when it comes to competition between present organisers of sports events and possible competitors (in addition to maintaining competition between broadcasters and protecting choice of the viewer). This was achieved by CCI when it critically

¹⁹ Ibid. at p.20

²⁰ Ibid. at p.21

²¹ Ibid. at p.24

²² Ibid. at p.25

analysed the IPL media rights agreement between BCCI (de-facto regulator of cricket in India and hence, the dominant entity in the relevant market) and Sony (a media house).

The agreement was granted for a period of 10 years. Clause 9.1(c)(i) of the agreement reads as follows:

*“BCCI represents and warrants that it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league”.*²³

The Commission observed that via this clause is in effect an entry barrier for other competitors who wish to organize similar leagues in India. The CCI found, *“the representation and warranty given by BCCI that it shall not organize, sanction, recognize, or support any other league that is competitive to the professional domestic Indian T20 competition, during the rights period i.e. for a sustained period of ten years, forecloses the market for organization of professional domestic cricket leagues/events in India.”*²⁴ As a counter-argument, it was contended that such restrictions were important keeping in mind the nascency of the league and the limited time for recoupment. However, these criticized by the Commission as being restrictive and anti-competitive and *extra-vires* to the actual functions of the regulator. Another focal point of the decision was that the Commission found the exclusivity clause of ten years as ‘enduring’ and having the potential to impede the development/evolution of the game of cricket (in addition to competition).²⁵

In effect, the regulator had acted in commercial capacity and made a commercial commitment by adding the restrictive clause to the broadcasting rights agreement and could not provide evidence to the effect that it was pursued in the interest of the sport. Hence, the representation given by BCCI amounted to denial of market access for organization of professional domestic cricket leagues/events in India and was accordingly held liable for abusing its dominant position. A penalty of USD 7.56 million was accordingly levied.

²³ Ibid. at p.5

²⁴ Ibid. at p.37

²⁵ Ibid. at p.38