INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 3 AND ISSUE 2 OF 2023

INSTITUTE OF LEGAL EDUCATION

INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN - 2583-2344

(Free and Open Access Journal)

Journal's Home Page – https://ijlr.iledu.in/

Journal's Editorial Page - https://ijlr.iledu.in/editorial-board/

Volume 3 and Issue 2 of 2022 (Access Full Issue on - https://ijlr.iledu.in/volume-3-and-issue-2-of-2023/)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 - info@iledu.in / Chairman@iledu.in

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

EXAMINING THE CONTOURS OF SINGLE ECONOMIC ENTITY UNDER INDIAN COMPETITION LAW

AUTHOR - TANVI SHARMA & AYUSHI RAJ, LAWYER / YOUNG PROFESSIONAL WORKING WITH THE COMPETITION COMMISSION OF INDIA IN COMBINATION DIVISION.

Best Citation - TANVI SHARMA & AYUSHI RAJ, EXAMINING THE CONTOURS OF SINGLE ECONOMIC ENTITY UNDER INDIAN COMPETITION LAW, *Indian Journal of Legal Review (IJLR)*, 3 (2) of 2023, Pg. 234-246, APIS – 3920 – 0001 & ISSN - 2583-2344.

Abstract

The doctrine of single economic entity signifies that two or more entities may be so closely connected that they form part of a single economic unit albeit their separate legal form. The entities forming a single unit may either defend themselves or incur liability contingent on the circumstances which are dealt forthwith. The concept of single economic entity emanated from Europe and has been recognized in Indian jurisprudence through judicial precedents. This study assays the concept of single economic entity in the European Union, the United States and India. Further, this article delves into the concept of single economic entity in India through case studies to demonstrate how this doctrine has evolved in India. Lastly, this paper critically analyses both combination and antitrust cases to provide a complete overview of this concept as dealt by the Competition Commission of India.

Keywords: Single economic entity, group, control, material influence, common management, merger, antitrust.

I. Introduction

The main aim and objective of the competition laws throughout the world is to protect the consumers and to prevent such practices that harm the market practices between the independent parties who aim or who are competing for a larger slice in the market. The Single Economic Entity Doctrine (**SEE**), embodies that "*irrespective of the legal status of two or more enterprises, they can be said to form a single entity for the purposes of competition law*". In simpler terms, the concept of 'single economic entity' lays down that irrespective of the legal status of two or more enterprises, they can sometimes be so closely connected to each other that they form a single economic unit and it would be amiss to consider them separate economic players.[502]

The doctrine of the Single Economic Entity was first enumerated by the European Commission in 1960s and now it has also formed an integral part within the laws of the Indian jurisdiction as well. The prime reason or rationale behind the evolution of this doctrine is that a subsidiary may not take a decision independently, and when its parent company is involved in a particular business, it is reasonable that they would take decisions unitedly. In fact, when the parent company decides and the subsidiary then subsequently follows, they should not be treated differently but rather they can be

[502] Mahwesh Buland, *A Study of Single Economic Entity Doctrine in Context of India*, 2, IJLMH, 1, 1 (2018).

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

termed as a single economic entity. Thus, any agreement amongst them cannot be said to be anticompetitive. [503]

The concept of the single economic entity doctrine can be referred to a double-edged concept as it has both a defensive dimension and a prosecutorial dimension.[504] Under Defensive dimension, the entities tend to include their parent companies along with their subsidiaries and thus take the defence that whatever they have obtained a consensus upon, has been done by them under the umbrella of the single economic entity doctrine. Under the prosecutorial dimension, while giving the doctrine a broader perspective, the competition authorities are enabled to sanction larger entities comprising multiple affiliated corporations, as the competition authorities can now include the parent companies while computing the penalties on account of any act done by the subsidiaries.[505]

This paper covers an overall concept of SEE as instilled in the provisions of antitrust as well as combinations under the Indian Competition Law. Firstly, the paper introduces the concept of SEE in different jurisdictions such as European Union (**EU**), the United States (**US**) and India. The second part of the paper elaborates upon the Indian concept of single economic entity illustrated with the help of case laws relating to Aditya Birla Group and how the Competition Commission of India (**CCI/ Commission**) has dealt with these cases. Aditya Birla Group belongs to one of the most eminent families with over 150 years long history in the Indian market. They are a global powerhouse in a variety of sectors such as chemicals, textiles, pulp, metal, cement, fibre etc. Considering its frequent reorganisation, this group has often come under the scanner of the Commission making it an apt example for studying the concept of SEE in India.

II. Concept of SEE in the EU and USA

A Doctrine of Single Economic Entity in EU

The European Commission (**EC**) was the first to define the notion of single economic entity (**SEE**) under its guidelines on horizontal cooperation[506]. This concept in the European Union (**EU**) emanates from the term 'undertaking' which is also mentioned in Article 101 and 102 of The Treaty on the Functioning of the European Union (**TFEU**). Further, an entity which is engaged in an **economic activity,** irrespective of the legal status and by the way it's financed is referred to as an undertaking.[507] In simpler terms, an undertaking can be defined as an economic unit. An economic unit may comprise several legal or natural persons which are collectively referred to as a single economic entity.

The Article 101 applies only to the agreements between independent undertakings.[508] To further facilitate the regime in relation mergers and acquisition, the concept of '*undertaking concerned*' has also been explained *via* EC's Notice[509] which helps assay the entities in question. In case of mergers, the merging parties are to be considered as '*undertakings concerned*' and in case of acquisitions, the parties acquiring or being acquired, as a whole or in part, except the seller, are to be considered as 'undertakings concerned'.

It is also important to understand the reason for emphasizing categorically on the notion of economic entity and not legal entity. In simple words, one may consider economic entity as a sub set of legal entity i.e., legal entities may endorse numerous economic interactions with no implications on the Competition in a market.[510] Therefore, to reduce the scope of the

[503] Ibid.

[504] Pieter Van Cleynenbreugel, *Single entity tests in U.S. antitrust and EU competition law*, (April 22, 2023, 20:35), https://orbi.uliege.be/bitstream/2268/201655/1/SSRN-id1889232.pdf.

[505] Ibid.

[506] Communication from EU Commission- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011, OJ C11/1, para 1.

[507] See EU Commission Notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, 1998, OJ C 66/03, para 5.

[508] Mahwesh Buland, cited *supra* note 1, 2.

[509] See for details: Commission notice on the concept of undertakings concerned, cited *supra* note 6.

[510] Okeoghene Odudu and David Bailey, *The Single Economic Entity Doctrine In EU Competition Law*, 51 Common Market Law Review 1721, 1722 (2014), https://doi.org/10.54648/cola2014136.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

assessment only those economic entities which form part of the same undertaking are considered. Further, there are several cases that are frequently associated with the single economic entity doctrine, most notably the judgments in *Viho v. Commission*[511], which determined whether the relationship between separate legal entities is governed by "an agreement" within the meaning of Article 101.

According to Odudu and Bailey (2014), the after effects of being part of a Single economic entity, may include persons performing a concerted action that would be considered incapable of infringing Article 101[512] but at the same time all the entities forming part of such SEE may incur liability for infringement.[513] Further, in case of entities forming a SEE which are domiciled outside of the European Union, EU may claim subject-matter and enforcement jurisdiction as well.[514]

As stated earlier, the EU Courts have held that the concept of undertaking must be understood as an "*economic entity*". This is because not all economic interactions between separate legal entities can be considered capable of having a competitive significance. On the contrary, it is possible that economic interactions within a legal entity are capable of having competitive significance. Even though a legal entity be it a corporate or a natural person, has certain rights and duties, that are distinct from the other independent legal entities, it does not imply that such legal entity possesses the ability to exert a competitive force on the market.

B Nexus between SEE and parent-subsidiary relationship

Multiple consequences may arise from the concept of SEE, one of which would be a parent company may be held liable for the actions of its subsidiary or be exempted from notifying a merger or acquisition. A parent subsidiary relationship can be defined as a corporate legal person is wholly owned by another corporate legal person, the relationship between the two legal persons can be described as a parent/subsidiary relationship, where the parent is the owner of the subsidiary. These separate legal entities, as defined earlier, may enter into legally binding contracts *inter se*. However, these legal entities in the parent subsidiary relationship cannot actively compete *inter se*. The rationale is more fully articulated in detail the case of *Viho v. Commission*. It was held that that Article 101(1) TFEU was not applicable to agreements between a parent and its wholly-owned subsidiaries as there can be no competition between the parent company and its subsidiaries. It is inconceivable by the subsidiaries to adopt independent, economic competitive measures where the parent company determines and controls their conduct completely. Consequently, Article 101 was not applicable because there was no competition seen between the group companies which need protection. The question that emerged during this time was that why competition between the parent and the subsidiary is not feasible. Two possible factors behind this would be- first, parent and its subsidiary have an identity of interests, and second, the parent has legal power of control over the subsidiary.

Moreover, the identity of interests in a parent subsidiary relation arises because any profit ultimately accrues to the same individual which is the owner who is entitled to transfer all of the subsidiary's profits to itself. Therefore, the interests of the parent company and its wholly-owned subsidiary are entirely aligned with each other. Another objective reason why a parent and its subsidiary cannot compete is that the subsidiary does not enjoy real autonomy in determining their course of action in the market. The parent has legal rights by virtue of its ownership through which it is able to control strategic decisions made by the subsidiary.[515]

[511] [1996] EUECJ C-73/95P.

[512] Commission's Guidelines on Horizontal Cooperation Agreements, cited *supra* note 5, para 11; RICHARD WHILSH AND DAVID BAILEY, COMPETITION LAW, 94-96, (Oxford University Press 2018).

[513] Okeoghene Odudu* And David Bailey, cited *supra* note 9, 1722.

[514] Case 48/69, Imperial Chemical Industries (**ICI**) v. Commission, (1972) ECR 622, paras 131–140.

[515] Okeoghene Odudu and David Bailey, cited *supra* note 9, 1730.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

C Common Ownership

A sibling relationship (or Common Ownership) is created when two distinct legal entities have a common owner. The case of *Hydrotherm v. Compact*[516] demonstrated the impossibility of competition between the owner and the separate legal entities it owns.[517] The Court in the present case held that no possibility of competition between the owner and the corporate legal persons that he owned and thereby controlled. However, the case did not address the possibility of competition between corporate legal entities and their common owner. Currently, in both the US and the EU the separate legal entities with common owner(s) are not considered to be capable of competing.[518]

D Doctrine of Single Economic Entity in US

In the US, it is seen that a parent company is not held liable for the antitrust violations of a subsidiary or other related company. Corporate separateness and formalities cannot be ignored within the US jurisdiction. Notwithstanding the above difference, it is evident that a parent and its wholly owned subsidiary is deemed incapable of forging an anti- competitive agreement between themselves both in the US and EU. The concept of Single Economic Doctrine in USA can be explained through a series of case laws[519].

The prime concern that emerged in the ***Copperweld Corp. v. Independent Tube Corp.*** **(Copper weld)**[520] case was whether a parent company and its wholly owned subsidiary are legally capable of conspiring with each other. The Supreme Court held that "*the coordinated activity of the parent and its wholly owned subsidiary must be viewed as that of a single enterprise under Section 1 of the Sherman Act.*" Section 1 of the Sherman Act, 15 U.S.C. 1, sets forth the basic antitrust prohibition against contracts, combinations, and conspiracies "*in restraint of trade or commerce among the several States or with foreign nations.*" The court in the instant matter, found an absolute unity of interest amongst the parent and its wholly owned subsidiary.[521] They have common objectives and their general corporate actions are guided or determined not by two separate corporate bodies, but one. The subsidiary acts for the parent's benefit with or without any agreement. The parent and subsidiary always have a unity of purpose or a common design.[522]

The Copperweld case, extended the SEE doctrine of unitary control achieved by ownership to various other cases. This was elucidated or clarified in the *American Needle, Inc. v. National Football League*, (**American Needle**)[523] case. The US Supreme Court eschewed distinctions, such as whether the alleged conspirators are legally distinct entities, and adopted a functional consideration of how they actually operate, in order to determine whether there is concerted action under Section 1 of the Sherman Act. The court held that the "*relevant inquiry is one of substance, not form, which does not turn on whether the alleged parties to contract, combination, or conspiracy are part of a legally single entity or seem like one firm or multiple firms in any metaphysical sense.*" The inquiry primarily questions whether the agreement in dispute joins together "*separate economic actors pursuing separate economic interests*," such that it "*deprives the marketplace of independent centres of decision making*," and therefore of actual or potential competition.[524] If it is doing or capable of doing so, then it is a concerted action covered by Section 1, and the court must decide whether the restraint of trade can be held as unreasonable and therefore illegal.

In effect, the Court had identified three prime conditions in American Needle to assess single

[516] Case 170/83, Hydrotherm Gerätebau v. Compact, (1984) ECR 2999.
[517] Ibid.
[518] Okeoghene Odudu and David Bailey, cited *supra* note 9, 1732.
[519] Subodh Prasad Deo & Ajay Goel, *The Prosecutorial and Defensive Dimensions of 'Single Economic Entity' Concept and Its Application by the CCI*, 9 Lex Witness 14, 8 (2018), https://www.saikrishnaassociates.com/wp-content/uploads/2023/02/Comp_Buzz_March_2018.pdf.
[520] Copperweld Corp v. Independence Tube Corp, 467 U.S. 769 (1984).
[521] Copperweld Corp v. Independence Tube Corp, cited *supra* note 19, 4.
[522] Natasha G. Menell, *The Copperweld Question: Drawing the Line between Corporate Family and Cartel*, 101 Cornell L. Rev. 467, 478 (2016).
[523] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010).
[524] American Needle, Inc. v. National Football League, cited *supra* note 22.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

economic unit i.e. control (absence of independent decision making centres), interests (absence of concurring entrepreneurial interests) and competitive links (lack of actual or potential competition).[525]

Further, as identified under the Copperweld case, the American Needle case also makes it clear that antitrust evaluation of a joint venture (**JV**) must separate the analysis of the formation of joint venture from the analysis of its post-formation JV conduct. The antitrust analysis of a JV at the formation stage is more exacting than merger analysis. A JV between two relatively small horizontal competitors that would be allowed to merge would not necessarily pass muster under the antitrust laws. The Department of Justice/ Federal Trade Commission Guidelines (**DOJ/FTC**) Guidelines for Collaborations Among Competitors, requires that a proposed JV between horizontal competitors achieve efficiencies through sufficient integration of economic activity to warrant review under a rule of reason rather than per se condemnation. In contrast to a merger, members of a JV tend to remain independent at least with respect to activities outside the scope of a JV.[526] Therefore, anti-trust analysis of the potential anticompetitive effects from the formation of a JV must consider not only the coordination of the JV member activities within the JV, but also whether the JV affects competition between the JV members in areas outside the scope of the JV.

Thus, the American Needle case reduces, but does not eliminate, the applicability of single entity antitrust doctrine to joint ventures. The essential principle first observed in Copperweld and later reiterated in American Needle is that a JV's conduct is that of a single entity when the venture has integrated ownership of the assets necessary for the conduct. If this key principle applied on a function-by-function basis to JV conduct post-American Needle, the single entity doctrine will remain an important element of antitrust analysis of JV's.[527]

III. Implication of SEE in India

The doctrine of '*single economic entity*' lays down that two or enterprises may be so interrelated that they have to be considered as one despite having separate form. The Companies Act, 2013 iterates that a company has a separate legal entity and it is only when another company holds an entity i.e. it is subsidiary of company, working under the authority of the parent company that it forms a separate economic entity. However, in Competition law the concept of single economic entity is comparatively more diluted.

The doctrine of SEE has its root in the concept of 'enterprise'. The Competition Act, 2002 or the **Act** (as amended as amended on 11th April, 2023) provides for the definition of 'enterprise' under section 2(h) means "***a person or a department of the Government, including units, divisions, subsidiaries****, who or which is, or has been, engaged in* ***any economic activity****, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either* ***directly or through one or more of its units or divisions or subsidiaries,*** *but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space*." [528]

It is worth noting that the Competition Amendment Act, 2023 has inserted the term '*economic*' and modified the language of the section 2(h) to inculcate the comments of

[525] Ibid.

[526] Benjamin Klein, *Single Entity Analysis Of Joint Ventures After "American Needle": An Economic Perspective*, 78 Antitrust Law Journal 669, 674 (2013).

[527] Ibid.

[528] The Competition Act, 2002, § 2(h), No. 12, Acts of Parliament, 2003 (India).

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

Competition Law Review Committee (**CLRC**)[529]. Therefore, the definition is amended, in line with the decision of the Supreme Court in *Coordination Committee Case*[530], to indoctrinate engagement of an enterprise in an economic activity as a relevant factor instead of its legal form or the way of it being financed. It is however, not wrong to say that the new definition of enterprise within the Indian Competition Act now closely resembling the definition of enterprise in the EU. The definition also includes unit/division/subsidiary of the Government engaged in any economic activity (except the ones performing sovereign functions). Therefore, the 2023 Amendment to the Act has inserted the term 'economic' activity of a unit, thus, limiting the scope activities performed by an enterprise which come under scrutiny of the Commission.

The concept of SEE was applied for the first time by the CCI in the *Exclusive Motors case*[531] wherein the Commission stated: "*Agreements between entities constituting one enterprise cannot be assessed under the Act.*" This is also in conformity with the internationally accepted doctrine of SEE.

Subsequently, in the *Public Insurers case*[532], the Commission had rejected the defence of single economic entity, as invoked by the four public sector insurance companies in the bid rigging case of tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna (**RSBY**). They contended that they constituted a 'single economic entity', as the Government of India (**GoI**) held 100% shares of each and controlled their management and affairs. While the Commission agreed that although the public sector insurance companies are presently under the overall supervision of the Central Government, they had all placed their separate bids for the aforementioned scheme. Further, the parties themselves had submitted to the Director General (**DG**) that all decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally themselves at company level without any *ex ante* approvals from Ministry of Finance. Therefore, on this basis, the Commission decided that the Ministry of Finance did not exercise any *de facto* or *de jure* control in business decisions in submitting bids for impugned tenders. Thus, the Commission repudiated their claim of immunity from cartel conduct on grounds of constituting a single economic unit.

A Grasim Industries Limited (GIL) and Aditya Birla Chemicals (India) Limited (ABCIL)[533]

Brief Description- This case pertains to the merger of ABCIL into GIL with GIL as the resultant company. It was submitted by the parties that both ABCIL and GIL were listed companies which manufacture chemicals such as stable bleaching powder (**SBP**), chlorinated paraffin wax (**CPW**), poly aluminium chloride (**PAC**), caustic soda, liquid chlorine and aluminium chloride[534].

Observation- In relation to the combined market shares of the parties, the Commission noted that the parties had less than 20% market share in caustic soda, less than 20% market share in liquid chlorine, less than 10% market share in hydrochloric acid, less than 45% market share in aluminium chloride, less than 65% market share in SBP, less than 60% market share in PAC and less than 20% market share in CPW. Further, the parties offered modification to the combination so as to limit the ex-plant prices of SBP and PAC which was also rejected considering these products are sold in bidding

[529] Report Of Competition Law Review Committee ,https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf. (July 2019),

[530] CCI v. Coordination Committee of Artists and Technicians of W.B. Film and Television (2017) 5 SCC 17.

[531] Exclusive Motors Pvt. Limited vs Automobili Lamborghini S.P.A., Case No. 52 of 2012.

[532] In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna. vs National Insurance Co. Ltd. and Others, Suo Moto Case No. 02 of 2014.

[533] Grasim Industries Limited and Aditya Birla Chemicals (India) Limited, Combination Registration No. C-2015/03/256.

[534] It was stated that liquid chlorine and hydrochloric acid are produced as by-products of the manufacturing process of caustic soda which itself is used to produce alumina and VSF.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

markets. It was noted that GIL and HIL[535] had common shareholders, including individual shareholders and certain companies held directly or indirectly by them. Moreover, according to the parties, ABCIL and GIL form part of a single economic entity considering the promoters i.e. Mr. Kumar Mangalam Birla, his family and the enterprises controlled by them, have the ability to exercise decisive influence[536] over both the entities. Based on the aforementioned contentions along with the submission that ABCIL and GIL has '*common management level employees*' and 'common procurement and marketing teams' and 'common logistics management', the Commission approved the Combination.

Dissent note- However, the learned member Augustine Peter did not agree with the conclusion that the impugned combination would not create appreciable adverse effect in the market since, they form part of Aditya Birla Group. He opined that SBP and PAC had high combined market shares that were way ahead of their competitors. This may be an indicator of appreciable adverse effect, hence, the dissent note elaborates on other factors under section 20(4) of the Act. Prime facie, it was asserted that the anti-competitive effects of this merger outweigh its pro-competitive effects.

As against the argument of entities forming single economic entity, following observations were made. Firstly, Explanation to section 5 of the Act defines the terms 'control'[537] and 'group'[538] which clarifies what enterprises would be covered under the notifiability requirement of section 5 of the Act. Also, Item 2[539] and Item 9[540] of Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**) provides exemption where entities need not file a notice when acquiring in an enterprise where they already hold shares or voting rights. However, the common promoters from Aditya Birla Group effectively hold only 18.9% in ABCIL and 24.56% in GIL which falls short of the essentials provided under Indian Competition law to be part of the same entity. Also, the promoters do not hold majority shareholding in either HIL or GIL.

Secondly, the submission of the Parties that they form part of the same group *de facto* considering the common management executives, common procurement and marketing teams, common human resource and management and the same logo are consistent with the fact that they bid as competitors in the PAC market in 2013-14. Thirdly, there were 2 common customers out of the top 5 customers of these entities which should not be considered a conclusive evidence of being part of the same entity since, it may happen in case of collusive conduct[541] as well.

Further, other inconsistencies such as ambiguity regarding how the entities presented themselves (as single or separate entity) to other Regulators, lack of information on how profits were shared, and no mention of parent subsidiary relationship that could be corroborated from the annual reports still persisted. Further, even though the entities

[535] ABCIL is a subsidiary of Hindalco Industries Limited (**HIL**).

[536] This was corroborated by the fact that the promoters of both the companies have been voting as a single voting bloc in the shareholder' meetings of HIL and GIL.

[537] "*control*" includes "controlling the affairs or management by—
(i) one or more enterprises, either jointly or singly, over another enterprise or group;
(ii) one or more groups, either jointly or singly, over another group or enterprise;"

[538] "group" means "two or more enterprises which, directly or indirectly, are in a position to —
(i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or
(ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
(iii) control the management or affairs of the other enterprise;"

[539] "An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control."

[540] "A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group: Provided that the transaction does not result in transfer from joint control to sole control."

[541] It was highlighted in the dissent that the fact that there was an ongoing collusive bidding case under investigation should also be taken into consideration.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

argued common procurement, this common arrangement started only in November, 2011.

Learned Member went onto saying that only the cases where the shareholding is above 50% should be subjected to '*rule of reason*' test, as the Act provides complete definition of a single economic entity. Else it would be impossible to distinguish the unity of purpose in an entity from that of a cartel.

Hence, he was of the opinion that the combination should proceed to phase two investigation and views from the other stakeholders should be taken into account before deciding on the effects of the combination.

It can be established from the above that in the concurrent opinion, the CCI emphasized more on the operational control of one entity over the other to establish that they were part of the same economic entity. However, the dissent follows the structure and insists that the concept of single economic entity can only be inferred if the shareholding breaches the threshold of it being a group first. Even though the dissent is well-founded, the authors do not agree with the argument that in cases where shareholding is below 50%, the argument of SEE should not even be tested on '*rule of reason*'. All in all, we can see that in the instant case the Commission came to the conclusion that ABCIL and GIL are part of the same entity considering the control over the management and affairs of both the entities are exercised by the same set of promoters, voting unanimously as single bloc.

It is noteworthy that the argument of the Parties that they form part of a single economic entity acted as a double-edged sword and backfired in section 44 proceedings against Ultratech.[542] Ultratech[543] (which is part of the Aditya Birla Group) pleaded, in response to a show cause notice issued under section 43A, that Century Textile and Industries Limited (**CTIL**), is its competitor in the market for cement in India. Further, Ultratech omitted information in relation to their control over CTIL and KIL[544]. The CCI highlighted the significance of a non-controlling minority shareholding in creating anti-competitive effects and recorded reasons for holding Ultratech liable under section 44. The Commission penalised Ultratech on for omitting information as well as incorrectly indicating CTIL as their competitor for the following reasons that - (1) In GIL and ABCIL case, ABCIL and GIL were considered part of the group, hence, the fact that KMB family's shareholding in CTIL exceeds GIL and HIL, makes these entities relevant for analysis of the transaction in the impugned matter, (2) the said shareholding in CTIL may confer negative rights, and (3) the presence of Kumar Mangalam Birla on the Board of CTIL as well as Ultratech creates likelihood of material influence, thus, nullifies their argument of being competitors. Therefore, the CCI imposed a fine of INR 50 lakhs.[545] However, the question of control over CTIL and KIL was left open ended considering the observation of the Commission that KMB family has stake in said entities was highlighted only to demonstrate the criticality of the information omitted.

B Delhi Jal Board (DJB) v. Grasim Industries Limited (GIL), and others.[546] Aditya Birla Chemicals (India) Limited, Gujarat Alkalies and Chemicals Limited, and Kanoria Chemicals and Industries Limited[547]

Brief Description- This case relates to the two complaints filed in relation to Poly Aluminium Chloride (**PAC**) and Liquid Chlorine (**LC**) by Delhi Jal Board (**DJB**). DJB alleged bid rigging and a cartel, negotiating/ decreasing price of PAC and

[542] Combination Registration No. C-2015/02/246. Further, Kumar Mangalam Birla and his family members (**KMB Family**) hold shares in CTIL and KIL. Also, the CCI considered in this case that Kumar Mangalam Birla was a director in both Ultratech and CTIL, which qualified the structure of the group to be scrutinized.

[543] It is a subsidiary of GIL.

[544] Kesoram Industries Limited (**KIL**). Ultratech argued that CTIL and KIL do not form part of the Aditya Birla group considering the minority shareholding. Rather, they form part of Basant Kumar Birla Family.

[545] This order of the Commission is in appeal in NCLAT as yet.

[546] Ref. Case No. 03 of 2013 was filed against Aditya Birla Chemicals (India) Limited (**ABCIL**), Gujarat Alkalies and Chemicals Limited (**GACL**), and Kanoria Chemicals and Industries Limited (**KCIL**) and Ref. Case No. 04 of 2013 was filed against GIL, ABCIL, Punjab Alkalies and Chemicals Limited (**PACL**) and KCIL. These two cases were merged and Director General conducted a combined investigation.

[547] Ref. Case No. 03 of 2013 and Ref. Case No. 04 of 2013.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

LC. So, the DG conducted a combined investigation on allegations of bid rigging in procurement of PAC and LC, only to find substance in these allegations and establishing contravention against all the opposing parties except KCIL. In relation to the allegations, GIL and ABCIL contented that they form part of Aditya Birla Group of companies with common promoters, directors, shareholders, and customers which can be corroborated by the Commission's finding in Combination Case. No. C-2015/03/256[548]. It is pertinent to note that GIL also adduced a '*Letter of Offer*' as filed with the Securities and Exchange Board of India stating that GIL is controlled by Aditya Birla Group. Further, GACL contended mere price parallelism does not suffice allegations of collusive bidding. Both GACL and PACL averred that DG did not give sufficient evidence to support its conclusion of collusion amongst the Parties.

Observations- It was observed by the Commission that ABCIL did not participate in the tenders floated to procure PAC till 2010-11. However, even after acquisition of chloro chemical division in KCIL in 2011, ABCIL kept bidding separately for PAC. Therefore, GIL and ABCIL were to be treated as competitors for procuring PAC. Further, the contention of common management was also disproved as DJB could not be expected to know such innate details of the management of the entities. There were distinct correspondence address and different units of manufacturing with separate sales and marketing representatives who then took final confirmation on prices from a common head. Aforementioned facts corroborated the allegation of entities colluding on bid prices with an intention to circumvent law by taking SEE as a defence. Moreover, it was observed that the bid values of ABCIL, GIL and GACL were in small range. On analysing cost of production, it was found that despite the disparity in their costs of production, transportation, geographical location of their plants etc., the bid values were within a close margin. This was considered as circumstantial evidence to collusive behaviour. Thus, it was observed that ABCIL and GIL exchanged confidential price sensitive information continually during the tender process.

In relation to LC, it was observed that unlike PACL, LC is a by-product of caustic soda which is of toxic nature and cannot be stored. The cost of production analysis as effected by the DG was not admitted. Further, neither similar timing of the bid nor the same executive appearing in negotiating meeting was held to be of any consequence to the allegation of concerted practice.

Accordingly, the Commission found that GIL, ABCIL and GACL to be in contravention of Section 3(3)(d)[549] read with Section 3(1) of the Act and were ordered to cease and desist such conduct. Further, GIL, ABCIL and GACL was penalized with INR 2.30 crore, INR 2.09 crore and INR 1.88 crore, respectively.

Dissent- It is worth noting that Learned Member Sudhir Mittal noted a limited dissent in relation to alleged violations of GACL. He observed that absent analysis on costs of production for GACL by the DG which could justify the price quoted by GACL. Also, GACL in its averments had cited much higher freight charges due to transportation costs as opposed to GIL/ABCIL as the reason for offsetting its cheap cost of production. However, such explanation was not taken into account. Further, he disagrees with DG's assumption that narrow price range and locational difference indicates collusion. He opined that the conclusion of liability on the

[548] As stated earlier, the combination was approved noting that ABCIL and GIL were to be considered part of the same group.

[549] Section 3(3)- "Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding."

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

basis of prices being in small range as a result of meeting of minds falls short of the '*standard of proof*' as required to prove the liability of GACL. Accordingly, GACL should not have been held liable under Section 3(3)(d) of the Act.

This case established the fact that GIL and ABCIL are separate entities considering they have been presenting themselves as competitors in the relevant market. It clarified that the contention that a common person setting the bid prices ultimately is not a proof of GIL and ABCIL forming part of the same entity rather it is a smokescreen, being used by two separate entities to evade cartel prosecution. Here, the Commission rightly analysed the competition from a consumer's perspective, so, the fact that these entities portrayed themselves as competitors and that DJB had no means of knowing that they are part of the same entity was given emphasis by the CCI. This case was filed in 2013 and the judgement was published in 2018, however, interestingly, the combination assent was provided in 2015 and in 2016 ABCIL merged with GIL. Therefore, they are now structurally part of the same entity.

C Umang Commercial Company Private Limited and Aditya Marketing and Manufacturing Private Limited[550]

Brief Description- The most recent case to have demonstrated the concept of single economic entity is the *Umang- Aditya Marketing* case. Despite of the fact that there is no explicit mention of the term single economic entity, the instant case has painted a clearer picture regarding the structure of the Aditya Birla Group as compared to the cases discussed above. The order of the Commission in this instant case can be taken as the most recent take on the concept of single economic entity.

The combination involved the merger of the Aditya Marketing & Manufacturing Private Limited (**Target)**, into the Umang Commercial Company Private Limited, also known as (**Umang / Acquirer)**. Subsequent to the merger between the two, the shares held by the Target in 15 entities[551] will get vested in the Acquirer. The Acquirer Group subsequently will acquire control over a total of 5 entities (Century Textile and Industries Limited (**CTIL**), Padmavati, Pilani, Ganesh Tubes and Services Private Limited and Century Enka Limited), which as on date are under the control of BKB Family.

The Acquirer is an investment company which belongs to the Aditya Birla Group of companies. It holds shareholding in various entities on behalf of the Kumar Mangalam Birla and/or his family (**KMB Family**). In the instant matter, it had been submitted that Aditya Birla Group is not a legal entity and the group definition test prescribed under the Act is not applicable to it. Aditya Birla group is an expression created and used after the larger Birla Family re-organisation, to represent companies and other entities, including joint venture companies, in which KMB Family hold(s) directly or indirectly at least 20% of the voting rights; and includes entities which have been traditionally controlled and/or managed by KMB Family, and/or combination thereof. The Target is also an investment company and belongs to the B.K. Birla Group of companies. The Target holds shareholding in various entities on behalf of late Mr. Basant Kumar Birla and his family (**BKB Family**).

It is submitted that Grasim Industries Limited (**GIL**), an affiliate of KMB Family, manufactures and sells Viscose Staple Fibre (**VSF**) and Viscose Filament Yarn (**VFY**) and Kesoram Industries Limited (**KIL**), an affiliate of the Target, manufactures and sells VFY. The Parties had identified market for manufacture and sale of MMF and cotton in India at a broad level and

[550] Combination Case no. C-2022/07/952.

[551] The Target holds shares in the following: Pilani Investment and Industries Corporation Limited (**Pilani**), Padmavati Investment Private Limited (**Padmavati**), Century Textile, Ganesh Tubes, HGI Industries Limited (**HGI**), UltraTech Cement Limited (**UltraTech**), Kesoram Industries Limited (**KIL**), Birla Tyres Limited (**Birla Tyre**), Kesoram Textile Mills Limited (**KTML**), Vidula Chemicals and Manufacturing Limited (**Vidula**), Jayshree Tea & Industries Limited (**Jayshree**) , Bizari Veneer & Saw Mills Limited (**Bizari Veneer**) , Manav Investment and Trading Company Limited (**Manav**), Essel Mining & Industries Limited (**Essel Mining**) and Mangalam Cement Limited (**MCL**).

market for manufacture and sale of VFY in India at a narrower level.

Observation- It was noted by the Commission that the market shares of the Parties in the Narrow Relevant Market for VFY were high, ranging to about [50-55]% with an increment of [10-15]% in terms of volume. Further, there were no other domestic manufacturers except the parties and the competition in this market arose only from imports.

Furthermore, the activities of UltraTech Cement Limited (**Ultratech**), which is an affiliate of the KMB Family, and KIL and MCL, affiliates of the Target, had horizontal overlap in the manufacture and sale of different types of Grey Cement. The combined market share of the parties on the basis of installed capacity were in the range of [35-40]% in Karnataka Relevant Market and [30-35]% both in Western Uttar Pradesh Relevant Market and Rajasthan Relevant Market . Thus, the market for manufacture and sale of VFY in India and market for manufacture and sale of Grey Cement in Rajasthan Relevant Market, Western Uttar Pradesh Relevant Market and Karnataka Relevant Market were identified as areas of key concerns.

With respect to the possible competition concerns raised during the review of the Combination by the Commission, *inter alia*, in relation to the above identified markets, the Parties had submitted that post the Combination, GIL, UltraTech, KIL and MCL will continue to function as independent entities as the control of the respective companies will remain vested with distinct groups. Further, the Acquirer group will *de facto* not acquire any special rights or material influence over KIL or MCL. Both the entities will remain under the control of the BKB Family only, despite the shareholding of the Acquirer group being higher than the BKB Family in these entities, post the Combination.

An undertaking was submitted by Umang establishing the fact that they will not exercise any control in KIL. It will, *inter alia*, not engage in management and affairs of the board of directors, nominate any key managerial or observer on KIL's board, will not exercise any rights other than those exercised by ordinary shareholders. Also, no business agreement / commercial understanding (other than those on an arm's length basis in ordinary course of business), date sharing cooperation will arise between GIL/Ultra Tech and KIL post the Combination. Furthermore, Umang will also reduce its shareholding from 26.1% to 25%.

A similar undertaking was submitted by Umang in relation to its shareholding in MCL. It will, *inter alia*, not engage in management and affairs of the board of directors, nominate any key managerial or observer on KIL's board, will not exercise any rights other than those exercised by ordinary shareholders. No business agreement / commercial understanding (other than those on an arm's length basis in ordinary course of business), data sharing cooperation will arise between Ultra Tech and MCL post the Combination.

Therefore, this case further demystifies the Commissions' take on analysing the concept of single economic entity. To this extant, the Commission considered GIL and UltraTech as part of KMB Family, and KIL and MCL as part of BKB family and not a part of a single group. Despite the cross-shareholdings amongst the Acquirer group and target entities, the parties contented that KMB Family has no control over KIL and MCL and therefore, pursuant to a family understanding such entities were considered a part of two distinct groups. Further, the Commission looked at the operational control of the entities and provided behavioural remedy so that the structure of the enterprises would also reflect the separateness of entities.

Moreover, it is worth noting that in March 2018, Ultratech was penalised for considering CTIL as their competitor in a section 44 proceedings by the CCI and in August 2018, Ultratech purchased

INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

VOLUME 3 AND ISSUE 2 OF 2023

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

cement unit of CTIL[552]. Subsequently, pursuant to the Umang- Aditya Marketing merger, CTIL has been merged in Umang Commercial thus, it is now part of the KMB family. Thus, the Commission's probe in the above- mentioned cases are a testimonial of how the doctrine of single economic entity has been used in Indian context.

Additionally, the difference between the above-mentioned three cases[553] can be understood by separating them on the basis of combinations and antitrust. The two merger cases assessed the operational control of the enterprises and how it may create anti-competitive effect on the market. However, the antitrust (or cartel) case analysed the structure of the enterprise in public domain and how they were perceived in the market. Consequently, it can be said that the approaches differed owing to the facts in issue. Further, the time take in a merger assessment is limited[554] and the repercussions of the conduct of the parties are analysed ex-ante while in antitrust analysis the timelines is flexible and the Commission analyses the actual conduct of the parties, therefore the standard of proof may differ in both investigations. Accordingly, such differences were appreciated while examining observations of the Commission in the aforesaid cases.

IV. Conclusion

In light of the above discussion, it is evident that the Commission takes into account both control and market conduct parameters in determining whether economic actors constitute a single economic entity or not. It can be ascertained from the cases analysed above that the aspect of 'enterprise', 'control' and 'group' have been analysed in relation to the concept of single economic entity. As can be seen from the cases related to Aditya Birla Group that different stance has been taken by the CCI in different cases in accordance with the facts in issue. However, the dissent note of Learned Member Augustine Peter when read in consonance with bid rigging allegation against GIL and ABCIL clarifies how single economic entity has been dealt under Indian Competition Law. Further, the Umang- Aditya Marketing case clarifies that Aditya Birla Group is a notion[555] as it does not fulfil the essentials of 'group' as provided in the Act.

In order to determine that the parties belonging to a group constitute a single economic entity, the Commission tends to give primacy to conduct parameters – such as whether such entities have represented themselves as competitors in the market or in public tenders or not. Further, while parental liability has not been imputed by the Commission so far in contrast to that of EU and USA, it remains an open issue and only future case laws will determine whether the Commission would make a presumption of parental liability in cases where the wholly owned subsidiaries are found to be engaged in cartel conduct or not and whether there could be other facts and circumstances where the parent entity could be held vicariously liable for the conduct of its subsidiaries. Although the Indian invocation of the doctrine has been rare, the case study of the Aditya Birla Group, along with several decisions on the TEFU and Sherman Antitrust Act, provide the requirement of decisive influence and supporting indicators to invoke the single economic entity doctrine.

Therefore, the four take aways from this article would be that : (1) even if SEE is not expressly defined in the Act, it has been taken up in judicial precedents through section 2(h), explanation to section 5 of the Act read with Item 2 and 9 of Schedule I of the Combination Regulations, (2) GIL and ABCIL combination case admitted the argument of GIL/ABCIL as being part of the same entity and did not find any discrepancies nevertheless, it was an ex-

[552] UltraTech Cement Limited case, Combination Registration No. C-2018/05/575.

[553] GIL and ABCIL combination case, Delhi Jal Board case, and Umang-Aditya Marketing case.

[554] The two merger cases were analyzed with the statutory timeline of 30 working days while the antitrust inquiry took about four years.

[555] Aditya Birla Group is not a group as per Explanation to section 5 of the Act.

ante, time bound merger analysis. Further, as can be observed from the Delhi Jal board case, both the investigations happened almost at the same time wherein the anti-trust case looked at the allegations in more detail. Although, it also took almost 4 years to conduct such thorough inquiry whereas the GIL and ABCIL case limited the scope its investigation thus carrying out assessment in a much shorter period, (3) Despite holding GIL and ABCIL part of the same economic entity, the CCI, in GIL and ABCIL Case, assessed anti-competitive effect on the market. Similarly, in the cartel allegations as well the effect on the market was analysed, and (4) Lastly, through the Umang- Aditya Marketing case, the CCI endorses a harmonious reading of structural and operational control to help in clarifying the approach of the CCI towards the concept of Single economic entity.

Bibliography

Statutes

- EU Commission Notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, 1998, OJ C 66/03.
- European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.
- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011, OJ C11/1.
- The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
- The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 201.
- The Sherman Act 15 U.S.C. §§ 1-38.

References

Books

- RICHARD WHILSH AND DAVID BAILEY, COMPETITION LAW, (Oxford University Press 2018).

Report

- Report Of Competition Law Review Committee, https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf. (July 2019).

Articles

- Mahwesh Buland, *A Study of Single Economic Entity Doctrine in Context of India*, 2, IJLMH, 1 (2018).
- Pieter Van Cleynenbreugel, *Single entity tests in U.S. antitrust and EU competition law*, https://orbi.uliege.be/bitstream/2268/201655/1/SSRN-id1889232.pdf.
- Okeoghene Odudu and David Bailey, *The Single Economic Entity Doctrine In EU Competition Law*, 51 Common Market Law Review 1721, 1722 (2014), https://doi.org/10.54648/cola2014136.
- Subodh Prasad Deo & Ajay Goel, The Prosecutorial and Defensive Dimensions of 'Single Economic Entity' Concept and Its Application by the CCI, 9 Lex Witness 14, 8 (2018), https://www.saikrishnaassociates.com/wp-content/uploads/2023/02/Comp_Buzz_March_2018.pdf.
- Natasha G. Menell, *The Copperweld Question: Drawing the Line between Corporate Family and Cartel*, 101 Cornell L. Rev. 467 (2016).
- Benjamin Klein, *Single Entity Analysis Of Joint Ventures After "American Needle": An Economic Perspective*, 78 Antitrust Law Journal, 669 (2013).