COMPETITION APPELLATE TRIBUNAL
NEW DELHI

APPEAL No. 36 of 2014

[Under Section 53-B of the Competition Act 2002 against order dated 03.04.2014 passed by the Competition Commission of India in Case No.74/2012]

CORAM

Hon'ble Mr. Justice G.S. Singhvi
Chairman

In the matter of:

India Trade Promotion Organisation,
Pragati Bhawan, Pragati Maidan,
New Delhi 110 001. ... Appellant

Versus

1. Competition Commission of India,
Through its Secretary,
Hindustan House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110001.

2. Indian Exhibition Industry Association,
Through Chairman,
Pankaj Plaza, First Floor, 1,
Commercial Complex,
Pocket H & J, Sarita Vihar,
New Delhi 110076.

3. Ministry of Commerce and Industry,
Through its Secretary,
Udyog Bhavan,
New Delhi 110 017. ... Respondents

Appearances : Shri Krishnan Venugopal, Senior Advocate with Shri Sidhartha, Advocate for the Appellant.

Shri Mayank Bansal, Advocate for Respondent No. 1, Competition Commission of India.

Shri Muneesh Malhotra and Shri Vikram V. Minhas, Advocates for Respondent No. 2.

O R D E R

Whether an entity (appellant herein) created by the Government of India, which is incorporated under Section 25 of the Companies Act, 1956 (for short 'the 1956 Act'), is under an obligation to temporarily part with the assets placed at its disposal by the Central Government and whether the time-gap policy, which has also been described as 'time gap restriction' in the record of this appeal, framed/implemented by the appellant for holding exhibitions/fairs and other events at Pragati Maidan, New Delhi and the alleged discrimination practiced in the allotment of spaces to the private organisers are contrary to Sections 4(2)(a)(i), 4(2)(b)(i), 4(2(c) and 4(2)(e) read with Section 4(1) of the Competition Act, 2002 (for short 'the Act'), are the questions which arise for consideration in this appeal filed against order dated 03.04.2014 passed by the Competition Commission of India (for short, 'the Commission') in Case No. 74 of 2012 titled 'Indian Exhibition Industry Association and Ministry of Commerce and Industry and another'.

2. The appellant is a 100% Government-owned non-profit making company and functions under the administrative control of the Department of Commerce, Ministry of Commerce and Industry, Government of India. It was incorporated in 1976 under Section 25 of the Companies Act, 1956 (for short 'the 1956 Act') as 'Trade Fair Authority of India', which was merged in 1992 with Trade Development Authority of India and was re-named as 'India Trade Promotion Organisation'. The initial subscribers of the company were (1) the President of India; (2) the Prime Minister's Special Envoy, Ministry of External Affairs; (3) Joint Secretary, respondent Ministry; and (4) Chief Executive Director, Fair Organisation, respondent Ministry.

3. The main objects of the appellant, as set out in its Memorandum of Association are :

> "1. To promote, organize and participate in industrial trade and other fairs and exhibitions show-rooms and depots in India and abroad and to take all measures incidental thereto for boosting up country's trade.
>
> 2. To publicize in India and abroad international Trade Fairs and Exhibitions to be held in India and invite the foreign participants to participate in them.
>
> 3. To organize and undertake trade in commodities connected with or relating to such fairs, exhibitions show-rooms and depots in India and abroad and to undertake the purchase, sale, storing and transport of such commodities in India or anywhere else in the world.
>
> 4. To undertake promotion of exports and to explore new markets for traditional items of export and develop exports of new items with a view to maintaining, diversifying and expanding the export trade."

4. Before the incorporation of the Trade Fair Authority of India under Section 25 of the 1956 Act, India International Trade Fair Organisation (a wing of Ministry of Commerce) and Indian Council of Trade Fairs and Exhibitions (a registered Society operating under the control of Ministry of Commerce, Government of India) were engaged in the organisation of trade fairs and exhibitions at Pragati Maidan. The task of formulating the policy, direction and supervision of exhibitions and commercial publicity was performed by the Directorate of Exhibition and Commercial Publicity (another wing of Ministry of Commerce). These entities were

merged and a unified autonomous agency with the name ‘Trade Fair Authority of India’ was created and incorporated under the 1956 Act. The main task of Trade Fair Authority of India was to facilitate organisation of National / International trade fairs and exhibitions at Pragati Maidan, which was given to it on nominal rent.

5. The appellant, which was created with the merger of Trade Fair Authority of India with Trade Development Authority of India provides services to trade and industry and acts as a catalyst for the growth of India’s trade and policy and regulates holding of various exhibitions in India. It also approves holding of International Exhibition Fair Trade and India Trade Exhibitions abroad. The appellant also manages and rents out spaces at Pragati Maidan. It has regional offices in Bangalore, Chennai, Kolkata and Mumbai. The appellant has two subsidiary companies, namely, KTPO and TNTPO, which manage venues at Bangalore and Chennai, respectively.

6. Although, the appellant was created as an autonomous entity, the Ministry of Commerce issued guidelines/instructions generally for achieving the objects set out in its Memorandum of Association and in particular, the holding of fairs/exhibitions in India and abroad. The appellant acted in consonance with those guidelines/ instructions and also issued circulars from time to time to apprise the public about the guidelines/ instructions issued by the Government of India. In July, 2006, the appellant framed policy for licencing of exhibitions and space and facilities at Pragati Maidan. The particulars of the guidelines/instructions/circulars issued from time to time for holding trade fairs and exhibitions, to which reference has been made in the investigation report prepared by the Director General (DG) and which are relevant to the issue involved in this appeal are given below :

(i) Vide Memorandum No. 10(7)/95-TP(Vol-II) dated 21.09.1999, Government of India approved the guidelines for holding International Fairs/Exhibitions in India and Indian Trade Exhibitions abroad by the organizers other than the appellant. Paragraphs 1, 2, 3.2 to 3.4 of those guidelines read as under :

> "1. GENERAL
>
> 1.1 The instrumentally through which International Exhibitions in India and Indian Exhibitions abroad is currently regulated is through the provisions of Handbook of Procedures of the Export and Import Policy of the Government of India.
>
> 1.2 The approval or grant of permission for holding exhibition abroad does not amount to any endorsement or support of Government of India or ITPO for the event. The approval is only to facilitate trans/border movement of exhibits through the customs authorities for the approved events."
>
> 2. THE NEED FOR A FRAMEWORK
>
> 2.1 It has been observed that a large number of organizers are coming forward to organise events in India and abroad and at time frequent exhibition convey confusing signals to the participants and to business visitors from India and abroad when events also lead to poor business response causing loss of opportunity on the organizer and the nation.
>
> 2.2 Further, there exists the need to have transparency in granting approvals by the Designated Authority. Thus

the need was felt to review the existing framework and a Committee was constituted by the Ministry of Commerce (MOC) for the same.

3. INTERNATIONAL TRADE EXHIBITION/FAIRS IN INDIA

3.1 General

Any Indian entity wishing to organize any International Trade Fairs/Exhibitions in India or abroad, would be required to obtain a certificate from an officer of Government of India through the Ministry of Commerce not below the rank of Under Secretary or an officer of the India Trade Promotion Organisation duly authorized by its Chairman on this behalf to the effect that such exhibition, fairs or as the case may be similar show or display, has been approved or sponsored by the Government of India in the Ministry of Commerce or the India Trade Promotion Organisation and the same is being held in the public interest (Export. Import Policy 1997-2002, handbook of Procedure Chapter II para 11.71).

Import is allowed without a license, of exhibits including construction and decorative materials required for the temporary stands of the foreign exhibitors at the approved exhibitions for a period of six months on re-export basis (Export-Import Policy 1997-2002, Handbook of procedures, Chapter 5, para 5.41 sub paras (ix)]

3.2 APPLICATION FOR GRANT OF APPROVAL

(i) Application is to be submitted to the General Manager (Domestic Fair Divisions) India Trade Promotion Organization (An undertaking of Ministry of Commerce), Pragati Bhavan, Pragati Maidan, New Delhi.

(ii) The information to be provided in the application would include:-

(a) The details of the legal status and financial status of the applicant/firm/company.

(b) Past experience in organizing trade exhibition and whether such events were supported by Apex/State Chambers of Commerce and Industry, Export Promotion Council etc.

(c) Whether the proposed events have the support of Chambers of Commerce and Industry, Export Promotion Councils, Commodity Boards etc. (Proof of Support to be attached).

3.3 CONSIDERATION OF THE APPLICATION

While considering the application, it has to be ensured that the slots of well-established trade fairs/exhibitions that are being held regularly with certain product profile are not granted to new applicants without ascertaining the requirements of such established exhibition organizers. This is to prevent pre-empting of established events.

3.4 The time gap required between two exhibitions/fairs on the same theme and similar product profile within the same city would be three months and if held in another city, it would be one month."

(Emphasis supplied)

(ii) After two years, the Ministry of Commerce and Industry issued D.O. No. 11 (14)/99-TP dated 02.01.2001 and amended the guidelines relating to time gap required between two International Exhibitions/Fairs to be held in India on the same theme and similar product profile within the same city and directed that the time gap would be 45 days instead of 3 months. For similar exhibitions/fairs held in different cities in India, the time gap was prescribed as one month. However, an exception was made in the case of IT, Telecom and Broadcasting Sectors and it was provided that there will be no time gap between the fairs / exhibitions organised by the industries in these sectors.

(iii) In response to letter dated 19.12.2002 sent by the appellant, the Ministry of Commerce and Industry, Department of Commerce, Government of India decided to lift the time gap restriction for holding International Exhibitions in India and Indian Exhibitions abroad. This decision was conveyed to the appellant vide letter dated 27.02.2003, which reads as under :

"No. 11(14) Government of India
Ministry of Commerce & Industry
Department of Commerce
Udyog Bhawan, New Delhi – 110011.

Dated the 27th Feb. 03

To
CMD, ITPO, New Delhi

Sub. : Review of working of ITPO-proceedings regarding :-

Sir,

I am directed to refer to the correspondence resting with ITPO communication No. ITPO/OSD/1/2002 dated 19.12.02 on the above subject and to say that the existing guidelines for holding international exhibitions in India and India Trade exhibitions abroad, in so far as those relate to the requirement of maintaining time gap between two exhibitions/fairs, have been reviewed. On a careful consideration of the matter and keeping all relevant factors in view, it has been felt that the time gap restrictions prescribed in the said guidelines should be lifted to make the system transparent and afford greater freedom to the organizers to hold exhibitions/fairs in the manner which promotes their business interests but does not conflict with any Government policy. It has accordingly been decided that henceforth no time gap restriction need be imposed between two exhibitions/fairs irrespective of where the exhibitions/fairs are held. The existing guidelines stand amended to the said extent.

Yours faithfully,

(S.K. Tuli)
Deputy Secretary"

(iv) The appellant implemented the aforementioned decision of the Government by issuing letter No. 144-ITPO(Misc.) Mktg03 dated 28.03.2003, the relevant portions of which are extracted below :

"Please find enclosed a copy of letter No. 11(14)99-TP dated 27th February, 2003 from the Ministry wherein it is stated that the time gap restriction prescribed in the said guidelines should be lifted to make the system transparent and afford greater freedom to the organizers to hold exhibitions/fairs in the manner which promotes their business interests but does not conflict with any Government Policy. It has accordingly been decided that henceforth no time gap restriction need be imposed between two exhibitions fairs irrespective of where the exhibitions/fairs are held. The existing guidelines stand amended to the said extent."

(v) In July, 2006, the appellant issued guidelines for licensing of exhibition spaces and facilities at Pragati Maidan and reintroduced the time gap requirement for two similar events. This is evident from paragraph 6.2 of the new guidelines, which reads as under :

"6.2 Halls are allotted after checking the status of booking and keeping in view the following :-

a. Slots for all regular events are reserved.

b. Optimum utilisation of Halls.

c. In case of competing demands, applications are considered on first-come-first served basis subject to payment of advance licence fee as per the approved schedule.

d. Normally, a gap of 15 days would be ensured between two events having similar product profits/coverage. However, in case of ITPO fairs, this gap will be 90 days before start or 45 days after the close of ITPO show."

(vi) The issue of the time gap requirement was discussed in the meeting of the Business Development Review Committee of the appellant held on 29.10.2007 and it was decided that normally a time gap of 15 days would be ensured between two events having similar product profile/coverage and in case of ITPO show and third party show having similar product profile, the time gap should normally be 90 days before and 45 days after the event of the appellant. This decision was implemented by issuing circular of the same date, the relevant portions of which are extracted below :

"(d)….."Normally a gap of 15 days would be ensured between two events having similar product profiles/coverage.

19…… In case of ITPO show and 3rd party show having similar product profile a gap of 90 days before ITPO's show and 45 days from ITPO's is to be maintained."

(vii) The clause relating to the time gap was further amended vide circulars dated 11.05.2010 and 15.02.2011 issued on the basis of the decisions taken in the meetings of the Business Development Review Committee of the appellant. The relevant portions of these circulars are also extracted below :

Circular dated 11.05.2010 :

e. "In the guidelines for approval, events having similar product profile/coverage should have a gap of 15 days, it was decided that the guidelines would be amended to read as "as far as possible, a gap of 15 days would be maintained between such events, to safeguard ITPO's interests of maintaining required booking in Pragati Maidan".

Circular dated 15.12.2011

(e) … "The existing guidelines regarding gap between similar event of ITPO and third party event revised to 90 days prior and after the event".

(viii) The same issue was again raised in the meeting held on 08.11.2011, which was attended by 14 organisers of trade fairs/events in Pragati Maidan. During the course of deliberation, it was felt that the time gap of 90 days before and after an ITPO event of similar product profile was operating as a big deterrent for many organisers who are compelled to consider other venues. However, no final decision appears to have been taken for doing away with the time gap requirement.

(ix) In November, 2012, the appellant initiated the process for revision of the time gap policy and after taking into consideration the views of various stakeholders, the following circular was issued on 28.12.2012 :

No. 144 - ITPO(624)/MKTG/2012

India Trade Promotion Organisation
(BDD)

CIRCULAR

Dated : 28.12.2012

Subject : Policy regarding time gap restriction between two events of similar product profile in Pragati Maidan.

With the approval of the Competent Authority, the time gap policy between two events of similar product profile stands amended as below with immediate effect:

A. There will be no time gap restriction between two third party events of similar product profile in Pragati Maidan.

B. A gap of 30 days before and 15 days after an ITPO fair and a third party fair of similar product profile will be maintained."

(S. Bahadur)
Sr. Manager"

7. In 2009, the Ministry of Defence, Government of India, decided to organise Defexpo at Pragati Maidan and the Joint Secretary (Exports), Ministry of Defence sent letters dated 01.10.2009 and 09.10.2009 to the appellant with the suggestion that the dates of Civil Security Show proposed for 2010 may either be shifted or the same should have completely different entrance than Defexpo. The appellant accepted the suggestion and decided to shift Indian Civil Security Show to October, 2011.

8. In the meanwhile, UBM India submitted an application dated 09.09.2009 for hosting IFSEC, FIREX and Internal Security India 2011 and requested for

allocation of the dates between 10th and 16th October. The appellant declined the request vide letter dated 03.03.2010 and suggested the applicant to identify alternative slots. Thereafter, UBM India sent application dated 27.04.2010 for booking of Pragati Maidan for IFSEC, FIREX India, Homeland Security India 2011 and 2012. That application was partially accepted on 18.10.2010 and UBM India was allowed time-slot from December 6 to December 10, 2011 for IFSEC, FIREX India and Homeland Security India 2011.

9. Electronics Today made an application on 16.06.2010 for allocation of space at Pragati Maidan for its SmartCards Expo 2011 and its co-located events, namely, 'Security Expo 2011', 'RFID India Expo 2011' 'Biometrics India Expo 2011' and 'e-Payments India Expo 2011' between 28.09.2011 and 30.09.2011. That application was declined vide letter dated 28.10.2010 and the applicant was asked to look into the possibility of alternative dates.

10. After issue of circular dated 15.02.2011, letter dated 02.04.2012 was sent to UBM India that as per the revised guidelines, it can be allowed to organise the events of IFSEC, FIREX India and Home Securities India 2012 after January, 2013.

11. On October 30, 2011, Electronics Today sent an application for allotment of the slot from 10.09.2012 and 13.09.2012 for holding SmartCart Expo 2012. The request of Electronics Today was declined vide letter dated 10.01.2012. By another letter dated 21.02.2012, Electronics Today was informed that alternative dates could be allotted for organisation of its events.

12. While the issue relating to further revision of the time gap requirement was under consideration, which culminated in the issue of circular dated 28.12.2012, Respondent No. 2, Indian Exhibition Industry Association, which claims to be a representative body of the private parties engaged in the business of organisation of trade fairs and exhibitions, filed an information dated 10.12.2012 under Section 19(1)(a) of the Act, the sum and substance of which was that the appellant was in a dominant position in the market of organisation of exhibitions and fairs and it has been abusing that position in the matter of grant of permission for organisation of exhibitions and trade fairs at Pragati Maidan and that the time gap policy was arbitrary, discriminatory and contrary to Section 4 of the Act.

13. The information filed by Respondent No. 2 was considered by the Commission in its ordinary meeting held on 20.10.2012 and it was decided to hear both the sides. Accordingly, the representative of Respondent No. 2 was asked to appear on 30.01.2013 and that of the appellant on 06.02.2013. Subsequently, the date fixed for appearance of the appellant's representative was shifted from 06.02.2013 to 12.02.2013.

14. Shri V.S. Mehta, Deputy General Manager and Shri V.P. Malik, Manager, appeared before the Commission on 12.02.2013 and gave out that the appellant has drafted a competition friendly / uniform policy for licensing of exhibition space and facilities at Pragati Maidan for future exhibitions/ fairs and the anomaly in the existing policy has been rectified. They also assured that a copy of the new guidelines/ policy will be filed within fifteen days. The Commission took cognizance of their statement / assertion and passed order dated 12.03.2013, which reads as under :

"COMPETITION COMMISSION OF INDIA

(Secretariat)

Filed by: Indian Exhibition Industry Association, Pankaj Plaza, 2st Floor, 1, Commercial complex, Pocket H & J, Sarita Vihar, New Delhi – 110075

Against: (i) Ministry of Commerce and Industry. Through the Secretary, Department of Commerce, Udyog Bhawan, New Delhi

(ii) India Trade Promotion Organization. Through its Chairperson, Pragati Bhawan, Pragati Maidan, New Delhi-110001

Order

The Commission considered the matter in its ordinary meeting held on 12.02.2013. Shri V.S. Mehta, Dy. General Manager and Shri V.P. Malik, Manager, India Trade Promotion Organization (ITPO), Pragati Maidan, New Delhi appeared before the Commission on behalf of OP no. 2 and explained the case. They informed that they have drafted competition friendly/uniform policy for licensing of exhibition space and facilities in Pragati Maidan for future exhibitions/fairs and the anomaly in modified policy has now been rectified.

The representatives of ITPO assured the Commission that they will file a copy of the new guidelines/policy within 15 days before the Commission.

After submission of the modified guidelines, the Commission will take further view in the matter."

[Emphasis supplied]

15. Thereafter, an undertaking was filed before the Commission by Shri S. Bahadur, Senior Manager of the appellant in the following terms :

"India Trade Promotion Organization

Subject: Case No. 74/2012 – Filed by Indian Exhibition Industry Association, Pankaj Plaza, 1st Floor, 1, Commercial Complex, Pocket H & J, Sarita Vihar, New Delhi – 110076.

Against: (i) Ministry of Commerce and Industry – Through the Secretary, Department of Commerce, Udyog Bhawan, New Delhi

(ii) India Trade Promotion Organization – Through its Chairperson, Pragati Bhawan, Pragati Maidan, New Delhi-110001

UNDERTAKING BEFORE HON'BLE COMPETITION COMMISSION OF INDIA

I, S. Bahadur, Senior Manager, ITPO S/o late Shri Raghuvansh Bahadur hereby state on behalf of India Trade Promotion Organization that ITPO has made a friendly time gap policy for licensing of exhibition space and facilities in Pragati Maidan for future exhibitions/fairs.

I undertake that ITPO shall modify the current policy for licensing of space in Pragati Maidan with in next 3 months to ensure uniformity in organizing exhibitions/fairs at Pragati Maidan and provide a copy of the same to the Competition Commission of India for kind information.

(S.Bahadur)
Senior Manager,
India Trade Promotion Organization,
Pragati Bhawan, Pragati Maidan
New Delhi -110001"

16. In furtherance of the undertaking given before the Commission, the appellant issued circular dated 20.05.2013 and reduced the time gap between an ITPO fair and the third party event on product of similar profile to three days before and after. The same reads thus :

"144/ITPO(624)/MKTG/2012
INDIA TRADE PROMOTION ORGANISATION
(BDD)

CIRCULAR

Subject: Policy regarding time gap restriction between two events of similar product profile in Pragati Maidan.

With the approval of the Competent Authority, the time gap policy between two events of similar product stands amended as below with immediate effect:

"Time gap between an ITPO fair and a third party fair of similar product profile reduced to 3 days before and after. However, no fairs on similar product profile to be held concurrently in Pragati Maidan by third party organizers."

(V.S.Mehta)
Dy. General Manager"

17. Although, the appellant had informed the Commission on 12.02.2013 that it had drafted a competition-friendly policy for licencing of exhibition space and facilities in Pragati Maidan for future exhibitions/ fairs and the Senior Manager of the appellant had filed an undertaking that the extant policy for licencing of exhibition space and facilities will be modified within 3 months and within that period, circular dated 20.05.2013 was issued, the Commission did not wait for the

issuance of the modified policy and passed order dated 06.05.2013 under Section 26(1), paragraphs 24 and 25 of which read as under :

> "24. On the basis of the information and material on record it appears that ITPO was abusing its dominant position prima facie in the following manners :
>
> - By imposing discriminatory conditions of the time gap restrictions, it was abusing its dominant position in contravention of section 4(1) read with section 4(2)(a)(i) of the Act.
> - By the time gap restriction and preferential treatment given to itself for organizing trade fairs and exhibitions over other organizers, it was limiting the provisions of services of holding trade show/ exhibition at Pragati Maidan in contravention of section 4(1) read with section 4(2)(b)(i) and section 4(2)(e) of the Act.
> - By altering the guidelines coupled with phenomenal delay in confirmation of allotment dates to other organizers, it was denying access to use the venue in contravention of section 4(1) read with section 4(2)(c) of the Act.
> - By allotting the venue subject to acceptance of supplementary obligations such as conditions of compulsorily taking of foyer area, engaging of empanelled House Keeping agency, it was in contravention of section 4(1) read with section 4(2)(d) of the Act.

25. Resultantly, the Commission is of the opinion that prima facie there is sufficient material to refer the case to the Director General (DG) to cause an investigation to be made into the matter under Section 26(1) of the Act."

18. On receipt of the aforesaid order, the Director General (DG) issued notice dated 21.06.2013 under Section 41(2) read with Section 36(2) of the Act and called upon the appellant to respond to as many as 22 queries and furnish the related documents. In its reply dated 13.08.2013, the appellant explained the background and rationale of the time gap policy and amendments made therein. It also disclosed the reasons for some delay in processing the applications of UBM India and Electronics Today. Since the reply submitted by the appellant to the notice issued by the DG has considerable bearing on the decision of this appeal, the relevant portions thereof are reproduced below :

"2. Furnish ownership pattern, organizational structure, functions, area of operations/ activities of ITPO :

ITPO is a 100% Govt. owned company, ITPO functions under the administrative control of Department of Commerce in the Ministry of Commerce and Industries. ITPO was incorporated u/s 25 of Companies Act, 1956 on 30/12/1976 as Trade Fair Authority of India (TFAI). Subsequent to the merger of erstwhile Trade Development Authority of India (TDAI) with TFAI on 1/1/1992, the merged organisation was renamed as India Trade Promotion Organisation (ITPO).

The organisational structure of ITPO is attached herewith at Annexure V.

The main functions and objectives of ITPO are :

- To promote, organise and participate in industrial trade through fairs and exhibitions in India and abroad and to take all measures incidental thereto for boosting up countries' trade.
- To publicise in India and abroad international trade fairs and exhibitions to be held in India and mobilise the foreign participants to participate in them.
- To organise and undertake trade in commodities connected with or relating to such fairs, exhibitions in India an abroad.
- To promote exports and to explore new markets for traditional items of exports and develop export of new items with a view to maintaining, diversifying and expanding the export trade.
- To support and assist small and medium enterprise to access market both in India and abroad.
- To prepare and update trade related database for dissemination among trade and industry in India.
- Organising seminars, conferences and workshops on trade-related issues.

- To lease out its exhibition halls and facilities to other organisers for holding trade related events.

3. Explain in brief the role of ITPO in various capacities like organiser, participant, facilitator etc. for conducting the exhibitions, trade shows, fairs (hereinafter referred as 'Events') and other rules, if any.

- ITPO organizes several trade fairs in India at Pragati Maidan and other Centres in country. Some of these fairs are India International Trade Fair, India International Security Expo. Delhi Book Fair etc. Each fair is marketed among trade and industry and an extensive campaign is also launched for mobilising buyers and other trade visitors. The show décor is given due importance and ITPO has been holding a number of these fairs successfully over the years.
- ITPO organizes participation of Indian trade and industry in various overseas trade fairs & exhibitions. It also organizes exclusive India shows in overseas markets. The program of participation in various fairs abroad is based on Foreign Trade Policy of Govt. of India. Focus Areas and New Markets as identified by Department of Commerce. Bilateral and Multilateral trade agreements of India and other countries/ regions and views of Indian missions

abroad. Some of the overseas events are self-financing and others are provided budgetary support by the Department of Commerce.

- ITPO is also responsible for marketing of its various exhibitions halls and conference facilities in Pragati Maidan. A number of India's leading trade fairs are organised at Pragati Maidan by third party organisers. ITPO is regularly upgrading facilities in Pragati Maidan to ensure holding of world class exhibitions and conventions.
- ITPE, vide guidelines issued by Ministry of Commerce vide Letter No.10(7)95-TP (Vol II) dated 21.9.1999 approves holding of International trade Fairs/ exhibitions in India and abroad by issuing approval letter/ certificate . Ministry of Commerce vide guidelines issued with the above letter conveyed the need for such framework as "It has been observed that a large number of organisers are coming forward to organise events in India and abroad and at times frequent exhibitions convey confusing signals to the participants and to business visitors from India and abroad when events on similar themes overlap. Lack of appropriate spacing of events also lead to poor business response causing loss of opportunities for the organiser and the nation.

Further, there exists the need to have transparency in granting approvals by the Designated Authority. Thus the need was felt to review the existing framework and a Committee was constituted by the Ministry of Commerce for the same". It further mentions that "any Indian entity wishing to organise any International trade Fairs/ exhibitions in India or abroad would be required to obtain a certificate from an officer of Government of India in the Ministry of Commerce not below the rank of Under Secretary or an officer of India Trade Promotion Organisation duly authorised by its Chairman on this behalf to the effect that such exhibition, fairs or as the case may, similar show or display, has been approved or sponsored by the Government of India in the Ministry of Commerce or the India Trade Promotion Organisation and the same is being held in public interest (Export – Import Policy 1997-2002, Handbook of Procedures 11, para 11.71". (Annexure V-A).

It would not be out of place to mention that India Trade Promotion Organisation (ITPO), as part of its objective, has been engaged in various trade promotion activities such as exclusive India Trade Shows, participation in specialized and general

trade fairs, Buyers-Sellers Meet, etc. Identifying and organizing participation of Indian trade and industry in relevant overseas fairs and exhibitions.

The ITPO's overseas programme is formulated on the basis of the inputs received from Ministry of Commerce and External Affairs, Indian missions abroad, EPCs, Commodity Boards, Apex organisations etc. Besides, detailed studies on foreign markets are undertaken to target those countries where potential exists for Indian products and services. While selecting destinations and events, the following parameters are also kept in mind:

- Share of Indian exports to various countries
- Leading importing countries
- Emerging markets
- Neighbouring countries

ITPO as the nodal trade promotion agency of the country, has had a pioneering role in the national trade growth dynamics since its inception. Apart from its role in bringing the Indian businesses particularly those in SMEs sector close to global markets, it was first to use and popularize trade fairs as a tools of trade promotion within the country and abroad. In fact, ITPO (Ex-TFAI) has

introduced the fair participation culture since 1977 and organised India's participation in leading fairs abroad like:

- Milan International Fair, Milan
- Dar-es-Salam International Fair, Tanzania
- Baghdad International Fair, Baghdad
- Tripoli International Fair, Libya
- Cairo International Fair, Cairo
- Chicago Hardware Show, Chicago
- Australia International Engg Exhibition, Sydney
- Hiemtextile, Frankfurt
- International Hardware Show, Cologne
- Foodex, Japan
- Hannover International Fair, Hannover
- SIAL, Paris

The emphasis in ITPO's participation in foreign events was on projecting the industrial image of India highlighting the technological and managerial competence in different sectors of the industry and traditional items.

ITPO has also introduced the concept of brand India promotion through India Show and organized exclusive India shows abroad :

- India Trade Exhibition 1977, Kuala Lumpur
- Indian National Exhibition 1978, Moscow

- _____(not legible)
- Indian Trade Exhibition 1980, Dubai
- Indian Exhibition 1981, Nigeria
- India Exhibition 1981, Singapore
- India Exhibition 1981, Jeddah
- India Exhibition 1982, Bahrain
- India Exhibition 1982, Kenya
- India Exhibition 1982, London
- India Exhibition 1983, Kuwait
- India Exhibition 1983, Venezuela
- India Exhibition 1984, Vietnam
- India Exhibition 1984, Mauritius
- India Exhibition 1985, Nepal and so on.

A major Indian Exhibition was held at Moscow during August 1-30, 1978. The objective of this Exhibition was to present India's achievements in science and technology against the background of its rich culture and history. This display was divided into 5 sectors covering the theme followed by product displays of engineering items comprising heavy/light machinery, electronics and precision engineering, chemicals and pharmaceuticals, textiles and coir, plastics, sports goods, arts and crafts, processed foods, coffee, tea tobacco, spices, etc.

The concept of India show is now being adopted by other apex organizations. Being a Section 25 company, unlike private organizations, ITPO operates on no-profit basis. ITPO encourages participation of MSME sectors in its activities. Most of the trade promotion organizations like EPCH, HEPC, APEDA, NSIC, KVIC, DC (Handicrafts, DC (Handloom), Tea Board, Ministry of Tourism, MOFPI etc, participate under the banner of ITPO.

The project India's achievements and policy initiatives, ITPO has been the Official organizer of India's participation in World Expo series. ITPO had set up India Pavilion at Expos (Hannover 2000, Aichi 2005, Shanghai 2010).

ITPO since its inception has been instrumental in promoting domestic trade and industry. A major event which was entrusted to the Authority immediately on its formation was the organising of a National agricultural Exposition, 1977, known as AGRI-EXPO'77 which lasted for a month from November 13 to December 14, 1977. It was inaugurated by the then Prime Minister and the closing ceremony was performed by the then President of India. Sixteen State Governments, 5

Union Territories, 6 Central Ministries/ Department, 8 Public Sector Undertakings, 24 Private Sector Undertakings, 16-Export Promotion Councils and 8 Commodity Boards took part in this Exposition. In addition, there were 4 participants from abroad viz. Japan, Afghanistan, Hungary and USSR. The Exposition displayed in vivid detail the progress achieved in the field of agriculture and rural sectors in the country. Out of the estimated 18 lakhs persons who from various States and Union Territories. Students sponsored by local schools, colleges, universities and Agricultural Research institute were encouraged to visit the Fair.

To highlight the important role of the small, cottage and tiny sector industries in the economy of the country, a National Small Industries Fair was held in Pragati Maidan from November 17 to December 19, 1978. The fair was organised primarily to project the following :

a) the potential of small and cottage industries;
b) the role of small industries in the context of economic growth in India;
c) the role of State Governments in the development of small and cottage industries;

d) the export potential of small and cottage industries; and

e) the role of technical education in the promotion of small and cottage industries.

The scope of display was to represent the small and tiny sectors covering inter alia electronic, electrical, mechanical and metallurgical products, rubber, plastic and chemical products, hosiery, handicrafts including carpets, leather products, handloom products, khadi and village industries, ancillary industries, as also the service/ facilities extended to these sectors by banks, financial institutions and export promotion agencies. The theme pavilion in the Fair was set up by the Small Industries Development Organisation (SIDO) which depicted the role of small scale sector in the national pursuit of serving the people and the progress made by it over the past 3 years.

The Gandhi Mandap set up in collaboration with Gandhi Darshan Samiti projected India of Gandhiji's dreams, his concept of Gram Swarajya and his contribution to the cause of socio-economic freedom of the nation through rational use of machines, preservation of human creativeness and full employment through the aid of

small industries. The exhibition, which was inaugurated by the then Prime Minister of India on 17th November, 1978 was visited by over 12 lakh people.

ITPO in its earlier years as Trade Fair Authority of India, initiated a project of holding Our India Exhibitions in the North Eastern States, Madhya Pradesh and Ladakh (Jammu & Kashmir) with the objectives of

i) Creating awareness of the progress achieved by the Nation as a whole in different fields,

ii) Projecting specific possibilities in the areas of Agriculture, Rural Technology, Small Scale industries etc. depending on the needs and interest in each area and

iii) Promoting national integration.

The Exhibition series started with Kohima (Nagaland) during March 1987. During 1987-88, the second and third Exhibitions were held at Imphal (Mannipur) 14-26 Aril, 1987 and Leh (Ladakh-J&K) 18-30 August, 1987.

India International Trade Fair (IITF), the popular flagship event of ITPO, with over 6000 exhibitors from across the country and covering the widest

range of products from micro enterprises in rural areas to multi-national companies, presents a panorama of trade and industry, technology and economic cooperation of countries from all over the world. This fair commences with the birth date of Pandit Jawahar Lal Nehru.

IITF is the largest integrated trade fair with Business to Business and Business to Consumer components. It has emerged as the largest consumer goods fair in the Indian sub-continent and one of the largest trade fairs in the world both in terms of exhibitor and visitor participation. IITF has evolved as an iconic national event with a unique character. The unique feature of the fair is participation by almost all states and union territories of India apart from domestic and foreign companies. A number of government organisation use this platform to spread awareness about their programmes and policies among the public. ITPO's magnum opus, the IITF continued to be a major business attraction and boosts the economy activity of Delhi. Indian Engineering Fair of CII and Auto Expo of SIAM were organized much later than IITF.

National Centre for Trade Information was inaugurated by the Hon'ble Commerce Minister, Shri Pranab Mukherjee on October 8, 1994. National Centre for Trade Information (NCTI) is a joint venture of India Trade Promotion Organisation (ITPO) and National Information Centre (NIC) as a Company of the Ministry of Commerce under Section 25 of the Companies Act 1956. It has the responsibility to provide the latest trade, business and economic information, to help Indian as well as foreign enterprises in the promotion of trade from and to India. NCTI uses high speed NICNET National Info Highway for collection and dissemination of information.

4. xxx xxx

5. Following information may be submitted with respect to the booking of space/ venue for Events and related activities at Pragati Maidan, for the referred period from time to time.

a. A copy of the guidelines/ policies issued by Ministry of Commerce and Industry.

Ministry of Commerce and Industry has not issued any guidelines for booking of space/ venue for Events and related activities at Pragati Maidan. However, in exercise of powers, vide guidelines issued by Ministry of

Commerce vide Letter No.10(7)/95-TP (Vol II) dated 21.9.1999, ITPO approves holding of international exhibitions in India and abroad. In this context, Ministry of Commerce from time to time have issued certain directions which are annexed at Annexure VI, VII and VII.

b. Procedure and formalities stipulated.

The detailed procedure and guidelines for Licensing of Exhibition space and facilities in Pragati Maidan are enclosed (Annexure IX).

c. A copy of the related manuals/ guidelines/ circulars etc. of ITPO.

As above.

d. In brief salient terms and conditions for booking of Events and related activities at Pragati Maidan

The salient terms and conditions for booking of space in Pragati Maidan are :

(i) Organizers wishing to hold their events in Pragati Maidan are required to submit application in the prescribed form with application money to ITPO. The application money payable is as per the space requirements of the organizers :

Space Required	Application Money
0 – 5000 sq. mtrs	Rs.2,00,000/-
5001 sq. mtrs and above one	Rs.2 lakh Plus Rs. lakh per sqm or part thereof.

(ii) Allotment is considered by Business Development Review Committee chaired by CMD, ITPO with ED and HODs as members keeping in view the following criteria:

- Slots for all regular events are reserved.
- Optimum Utilization of Halls.
- In case of competing demands, applications are considered on first-come-first served basis subject to payment of advance licence fee as per the approved schedule.
- Guidelines issued by ITPO in July 2006 for licensing of Exhibition space & facilities in Pragati Maidan stated that 'Normally a gap of 15 days would be ensured between two events having similar ____ (illegible).
- Vide decision dated Oct. 29 2007, it was included in the guidelines that in case of ITPO fairs, this gap will be 90 days before start or 45 days after the close of ITPO show.
- Vide decision dated Feb. 15, 2011, the guidelines were amended to "The existing guidelines regarding gap between similar event of ITPO and third party event revised to 90 days prior and after the event."

- Vide decision dated Dec. 28, 2012, the time gap policy was further amended as “There will be no time gap restriction between two third party events of similar profile in Pragati Maidan. A gap of 30 days before and 15 days after an ITPO fair and a third party fair of similar product profile will be maintained.”
- Vide decision dated May 20, 2013, the time gap policy was again amended as “Time gap between and ITPO fair and a third party fair of similar product profile reduced to 3 days before and after. However, no fairs on similar products profile to beheld concurrently in Pragati Maidan by third party organisers.”

e. xxx xxx xxx

With a view to encourage different segments of third party organisers to organise events in Pragati Maidan, ITPO offers three slots of rentals of its facilities in a FY i.e. Lean period (May-July), Semi-peak period (April, Aug-Oct., March) and Peak period (Nov-Feb). This policy ensures that all small and big organisers avail the benefit of holding their event in one of the most established exhibition complex in the country.

f. Whether there are any differences in applicable terms, conditions and rates, charges, fees etc. for booking of Pragati Maidan venue by ITPO itself vis-a-vis that for other players? If yes, please highlight the same along with rationale.

As stated above, ITPO is a Govt. of India Enterprises entrusted with the responsibility of promoting external and domestic trade of India in a cost effective manner by organising and participating in international trade fairs in India and abroad. The main focus of ITPO is to support and assist small and medium _____ (not legible) both in India and abroad. ITPO's events cover a wide variety of sectors such as handlooms, handicrafts, textiles, manufacturing, processed food, publishing and printing industry, agriculture, leather goods etc. Thus, ITPO organises events in Pragati Maidan with an objective of trade promotion and as such the cost of participation in ITPO's events in Pragati Maidan is required to be kept at a reasonable level as compared to the events organised by third party organisers.

Pragati Maidan, as a venue for organising trade fairs, has been hosting trade fairs/ exhibitions for more than four decades now. Some of the major exhibitions organised in the past are ASIA 72, Agri Expo 77, National Small Industries 778 etc. Thus Pragati Maidan has been

hosting trade fairs and exhibitions on behalf of Govt. of India since the time when Private players/ organisers in this industry were almost non-existent. Thereafter, in the later years, private organisers entered in the business of organising trade fairs and exhibitions in Pragati Maidan with a limited objective of commercial benefit. Thus, a third party event in Pragati Maidan is primarily organised by companies/ organisations with profit-motive and accordingly the cost of participation is usually kept high by them.

ITPO generally targets small and medium enterprises to provide them a platform to exhibit their products at a reasonable cost. Further, in the events organised by ITPO, facilities in the form of discounted rentals, complimentary space publicity support are provided to the organisations like State Govt/ Union Territories, Central Leather Research Institute, NSIC CAPART, MSME, APEDA, training Institutes etc. which may not be possible by a private organiser.

Keeping the above in view, ITPO, being owner of Pragati Maidan, does not invoice itself for using its facilities for trade promotion activities. Thus, the terms and conditions to the extent of space rent of halls are not accounted for while working out the cost of organising an event by ITPO.

6. xxx xxx xxx

7. Explain the rationale for the time gap restrictions between events.

Guidelines on time gap restrictions between two events of similar product profile were introduced by Ministry of Commerce vide guidelines issued through Letter No.10(7)/95-TP (Vol II) dated 21.9.1999. It conveyed the need for such framework as “It has been observed that a large number of organisers are coming forward to organise events in India and abroad and at times frequent exhibitions convey confusing signals to the participants and to business visitors from India and abroad when events on similar themes overlap. Lack of appropriate spacing of events also _____ (line not legible) for the organiser and the nation. Further, there exists the need to have transparency in granting approvals by the Designated Authority. Thus, the need was felt to review the existing framework and a Committee was constituted by the Ministry of Commerce for the same”. It further mentions that “Any Indian entity wishing to organise any International trade Fairs/ exhibitions in India or abroad would be required to obtain a certificate from an officer of Government of India in the Ministry of Commerce not below the rank of Under Secretary or an office of India Trade Promotion

Organisation duly authorised by its Chairman on this behalf to the effect that such exhibition, fairs or as the case may, similar show or display, has been approved or sponsored by the Government of India in the Ministry of Commerce or the India Trade Promotion Organisation and the same is being held in public interest (Export – Import Policy 1997-2002, Handbook of Procedures 11, para 11.71)". (Annexure V-A). These guidelines have been issued/ amended by Ministry of Commerce from time to time in the following manner :

(i) Vide letter no.10(7)/95-TP (Vol II) dated September 21, 1999, Ministry of Commerce issued the guidelines for holding international fairs in India and India trade exhibitions abroad by organisers other than the ITPO. As per these guidelines, time gap required between two international trade exhibitions/ fairs in India on the same theme and similar product profile within the same city would be 3 months and if held in another city, it would be one month. Further, for Indian exhibitions abroad, a gap of 12 months would be maintained between exclusive Indian Exhibitions/ Made in India Exhibitions. (Annexure VI).

(ii) Vide letter no.D.O. No.11(14)/99-TP dated Jan. 2, 2011, Ministry of Commerce amended the

guidelines related to time gap required between two international exhibitions/ fairs in India on the same theme and similar product profile and directed that within the same city, time gap would be 45 days instead of 3 months as stipulated earlier. However, for IT, Telecom and Broadcasting sectors, there will be no need for maintaining any time gap, if held within the same city. Time gap of one month to be maintained between two international exhibitions/ fairs on the same theme and similar product profile in two different cities in India. (Annexure VII)

(iii) Vide letter no.11 (14)/99-TP dated Feb. 27, 2003 from Ministry of Commerce, it was conveyed that no time gap restriction between two exhibitions/fairs irrespective of where the exhibition/fairs are held. (Annexure VIII).

The above guidelines were being followed by ITPO also. However, the time gap policy between two events of similar product profile in Pragati Maidan was introduced during the year 2006 after receipt of certain representations by ITPO from trade and industry.

- ITPO had received requests for booking of space for two events of similar product profile i.e. (i) Fespa World Expo India, Dec. 1-4, 2005 and (ii) World Expo 2005 expressed their resentment as ITPO allowed to

hold concurrently another exhibition which according to them had similar produce profile. The matter was examined in detail and since both the events were booked, the other event's dates were slightly modified to avoid conflict between the two third party organisers. With a view to avoid similar conflict in future ITPO management examined the possibility to have time gap between events on similar products in future.

- Similarly, in another case, ITPO received requests for booking of space for Jewellery Exhibitions from two organisers i.e. (i) Montgomery and (ii) ITE India for holding their events concurrently in the last week of Sept. 2006. Montgomery within 24 hours of approval of allotment of space to ITE, India raised an objection with ITPO on the issue.

The reason for objection by one organiser to another similar event concurrently or without a buffer time is that holding similar events concurrently or without specified gap may lead to unhealthy competition and practices such as grabbing each other's exhibitors, visitors and also taking advantage of publicity efforts of one organiser. Such time gap policy is also followed by leading exhibition venue owner worldwide. Thus such buffer time ensures avoiding of unfair or damaging competition among trade events and their clients. A copy

of Booking Protocol of Hong Kong Convention and Exhibition Centre is enclosed (Annexure XI).

After examining the above cases in detail, time gap restriction of 15 days between two events of similar product profile in Pragati Maidan was introduced by ITPO for fairs in Pragati Maidan during July 2006.

However, after having detailed interactions/ discussions with industry and organisers and also with an objective to increase capacity utilisation of space in Pragati Maidan, the time gap requirement between two third party events have been done away on 21.12.2012 with subject to the condition that no concurrent events of similar product profile can be held. Time gap between an ITPO fair and a third party fair of similar product profile has been also reduced to 3 days before and after (for logistic reasons only).

It is also brought to the knowledge of Hon'ble Commission that after doing away with the time gap restriction between two events of similar product profile, one of the organisers whose event namely 'Jewellery Wonder' scheduled to be held in Pragati Maidan from Sept. 28-30, 2013, vide letter dated July 3, 2013 has objected to the allotment of space by ITPO to another Jewellery Event i.e. "Delhi Jewellery & Gem Fair by M/s UBM India scheduled from Sept.21-23, 2013 in Pragati

Maidan. A copy of this letter is placed as Annexure XI-A. The organiser of 'Jewellery Wonder' is accusing ITPO for its unethical policies damaging Exhibition Industry as another jewellery event has been approved by ITPO in Pragati Maidan just one week before their event. The organiser has stated that many of their exhibitors have cancelled their stalls because of another jewellery Show approved by ITPO just one week before which is ruining their event.

8. Highlight the differences in the provisions as applicable to events of ITPO and third party in case of similar product profile along with rationale thereof.

It is reiterated that ITPO is a Govt. of India Enterprises entrusted with the responsibility of promoting external and domestic trade of India in a cost effective manner by organising and participating in international trade fairs in India and abroad. The main focus of ITPO is to support and assist small and medium enterprises to access markets – both in India and abroad. ITPO's events cover a wide variety of sectors such as handlooms, handicrafts, textiles, manufacturing, processed food, publishing and printing industry, agriculture, leather goods. Thus, ITPO organises events in Pragati Maidan with an objective of trade promotion.

Pragati Maidan, as a venue for organising trade fairs, has been hosting trade fairs/ exhibitions for more than four decades now. Pragati Maidan has been hosting trade fairs and exhibitions on behalf of Govt. of India since the time when Private players/ organisers in this industry were almost non-existent. It is by virtue of immense success of fairs organised by ITPO (erstwhile TFAI) that the private sector got encouraged to enter into the business of organising trade fairs and exhibitions in India. ITPO has been instrumental in the evolution of trade fair industry been a sea change in the exhibition industry in India with the emerging of private players from within the country as also from overseas, the role assigned to ITPO by Govt. of India has not lost its significance.

Today private organisers organise about 60-70 events annually at Pragati Maidan as compared to very few events during 80s and 90s. Most of these events are organised with the objective of commercial benefit and not solely for the cause of trade and industry. On the other hand, India Trade Promotion Organisation has been mandated to promote trade through various mediums particularly trade fairs and exhibitions. ITPO has been (organising) third party event in Pragati Maidan primarily organised by companies/ organisations with profit-motive and accordingly the cost of participation is usually kept high by them.

ITPO generally targets small and medium enterprises to provide them a platform to exhibit their products at a reasonable cost. Further, in the events organised by ITPO, facilities in the form of discounted rentals, complimentary space, and publicity support are provided to the organisations like State Govt./ Union Territories, Central Leather Research Institute, NSIC CAPART, MSME, APEDA, training Institutes etc. which may not be possible by a private organiser.

ITPO organise events in Pragati Maidan with an objective of trade promotion and as such the cost of participation in ITPO's events in Pragati Maidan is quite low. ITPO generally targets small and medium enterprises to provide them platform at a reasonable cost for promoting their products. In the events organised by ITPO like IITF, ILFA, Aahar etc. the facilities in the form of discounted rentals, complimentary space, publicity support are provided to the organisations like State Govt./ Union Territories, Central Leather Research Institute, NSIC, CAPART, MSME, APEDA, FSSA, NIFT etc., which may not be possible by a private organiser.

Moreover, with an objective to increase capacity utilisation of Pragati Maidan, the time gap restriction between ITPO event and a third party event on similar

product profile has been gradually reduced to 3 days before and after an ITPO event.

9. What is ITPO's criteria and procedure for deciding allotment of space in the exhibition when apart from ITPO there are also other interested parties for common area slot? Copies of the circulars/ guidelines issued by ITPO or Government in this regard may also be supplied.

Allotment of space for fairs in Pragati Maidan is considered by a Business Development Review Committee (BDRC) chaired by CMD, ITPO with ED and HODs as members keeping in view the guidelines as applicable from time to time. ____ (line not legible) guidelines are as below :

- Slots for all regular events are reserved.
- Optimum Utilization of Halls.
- In case of competing demands, applications are considered on first-come-first served basis subject to payment of advance licence fee as per the approved schedule.
- No time gap between two third party fairs of similar product profile subject to the condition that no concurrent events on similar product profile can be held in Pragati Maidan.

- Further time gap between an ITPO fair and a third party fair of similar product profile has been reduced to 3 days before and after (that too for logistic reasons only).

Copies of Circulars/ Guidelines to this effect are already placed at Annexure IX and X.

10. Please furnish names and addresses of your competitors in the Industry along with their market share and in terms of options available to the organizers of shows/ fairs/ exhibitions with regard to the venue for organizing such events.

ITPO does not maintain any data regarding competitors in the industry along with their market share. However, as per the UFI Report researched and compiled by the Business Strategies Group – 'The Trade Fair Industry in Asia 2011', the details of other established exhibition venues in India are as below :

S.No.	Exhibition Centre	City	2012 Gross Indoor Size (Sq. mtrs)	Establishment year	No. of Halls
1	Pragati Maidan	New Delhi	62,997	1977	17
2	Bangalore International Exhibition Centre.	Bangalore	40,000	2006	3
3	Trade Centre Bangalore	Bangalore	20,000	2004	4
4	Chennai Trade Centre	Chennai	17,600	2001	4
5	Codissla Trade Centre Complex	Coimbatore	10,250		
6	Exhibition Cum Convention Centre (ECC)	Gurgaon		2014	

7	Hyderabad Intl. Trade Expositions Ltd. (HITEX)	Hyderabad	10,500	2001	3
8	Hyderabad Trade Fair Centre	Hyderabad		2012	
9	Bombay Exhibition Centre	Mumbai	40,683	1991	4
10	Godrej Works	Mumbai	20,000		2
11	Nehru Centre	Mumbai	2,351		5
12	World Trade Centre, Mumbai	Mumbai	2,346		
13	Dhirubhai Ambani Intl. Convention and Exhibition Centre	Mumbai			
14	India Expo Centre Expo XXI	NCR	28,000	2005	4
15	India Exposition Centre and Mart Ltd.	NCR	2,750		8
16	India Fair Complex	Tirupur	2,750		3
	Total Area		2,85,457		

It is also pertinent to mention that as per information available with ITPO, there are a number of venues providing space for exhibitions/ conventions purposes (including hotels) which are not referred in the above details.

11. Whether any major exhibition/ fair has been shifted outside Delhi (NCR)? Please furnish the details of such events which have been shifted since 2009 onwards along with reasons for such shift.

As per the information available with ITPO, most of the major fairs such as Autoexpo, Defexpo, Plastindia, World Book Fair, Acetech, Wills Fashion Week, Convergance, Printpack etc. continue to take place in National Capital Region.

12. What are the applicable terms and conditions with respect to the “Foyer areas” while booking exhibitions space?

Hall 8-11, 12-12A and 18 have foyers as integral/inseparable part within the halls and thus the area of these foyers is included in the gross area of these halls while booking of exhibition space of these halls. Thus, organisers taking these halls for their events are not invoiced separately for the foyer areas since these areas are integral part of the halls.

Hall 7 has four sub-halls i.e. Hall 7 ABC, 7D, 7E and 7 FGH, Multiple exhibitions can take place concurrently in these sub-halls. Hall 7 has two foyers of 500 sq mtrs each i.e. Foyer A and Foyer B which are located adjacent to sub-halls and serve as entrance/ lobby to sub-halls of Hall 7. These foyers are also given on rent on exclusive basis in case an organizer takes the complete hall 7 and there is a fixed rental of these sites on per sq mtrs per day basis. However, the area of these foyers is not included in the billing to organizers in case of multiple exhibitions take place in sub-halls since no organizer has exclusive right to the foyer area. Foyer A serves as entrance/ lobby to Hall 7ABC, 7D and 7E whereas Foyer B serves mainly as entrance/ lobby to Hall 7 FGH. Thus ITPO levies charges for this area i.e. for Foyer A for non-

exclusive usage at the rate of 50% of the site rentals where organizers are also allowed construction of stands on pro-rata basis in the specified areas in the Foyer A. The same principle is also applied when two separate events take place in Hall 12 & 12A which has a common foyer. The copy of the circular dated 31.08.2012 is annexed herewith as Annexure XII.

13. Please explain the rationale and justification of alleged compulsory condition to take “foyer areas” even though not desired by exhibitors.

Hall 8-11, 12-12A and 18 have foyers which are integral/ inseparable halls and thus the area of these foyers is included in the gross area of these halls while booking of exhibition space of these halls. Thus, organisers taking these halls for their events are not involved separately for the foyer areas since these areas are integral part of the halls and stand construction is also permitted in these foyers. As per our experience, objections have not been received on this account in respect of above mentioned halls. The purpose of foyer are multiple and include providing entry/exit, gathering/ disbursal, opening to staircases and services like toilets, transition space. Foyer also helps in quick crowd disbursal and management during the times of emergency such as fire, stampede etc.

It is reiterated that the objection/ complaint in the instant case pertains mainly to compulsorily charging for Foyer A of Hall 7. It may be stated that Hall 7 comprise of four sub-halls i.e. Hall 7ABC, 7D, 7E and 7 FGH. Besides, there are two foyer areas i.e. Foyer A and B. Charges for Foyer are levied in respect of exhibitions held in Hall 7ABC, 7D and 7E only. No compulsory charges are levied in respect of Foyer B adjacent to Hall 7 FGH. This is pertinent to mention that Foyer A serves as main entrance/ lobby to Hall 7 and specifically for Hall 7ABC, 7D and 7E whereas Foyer B serves mainly as entrance/ lobby to Hall 7FGH. Foyer A is used invariably by all the exhibition organisers in Hall 7 for setting up of Registration counters/ exhibition stands (subject to Architecture norms of ITPO). Hence ITPO though is prudent to levy charges for Foyer A without granting exclusive right to any of the organiser for use of this area. These charges are levied compulsorily irrespective of the fact whether they want to use this space. The central idea behind charging for this area (i) to recover maintenance for Hall 7 (ii) to prevent unauthorized/ unregulated (use) of this area by any of the organiser (iii) to avoid conflict between multiple organisers regarding use of this area and ensure controlled allocation of this area and (iv) to ensure smooth conduct of the event, movement of visitors. The rental for the foyer in case of

such non-exclusive usage are charged at the rate of 50% of the site rentals where organisers are also allowed constructions of stands on pro-rata basis in the specified areas in the Foyer A. The rentals are not very high and in case charging of rentals for the foyer area cannot amount to use of dominant position by ITPO for the aforesaid reasons. The same principle is also applied when two separate events take place in Hall 12 & 12A which has a common foyer. The copy of the circular dated 31.8.2012 is annexed herewith as Annexure XII.

14. Details and manner of computation of "foyer areas" charges and the revenue collected by ITPO under this head for the referred period. Breakup of aforesaid data in terms of charges collected from other exhibitors and that on account of Events organized by ITPO itself.

It is reiterated that the objection/ complaint in the instant case pertains mainly to compulsorily charging for Foyer A of Hall 7. It may be stated that Hall 7 comprise of four sub-halls i.e. Hall 7ABC, 7D, 7E and 7 FGH. Besides, there are two foyer areas i.e. Foyer A and B. Charges for Foyer are levied in respect of exhibitions held in Hall 7ABC, 7D and 7E only. This is pertinent to mention that Foyer A serves as main entrance/ lobby to Hall 7 and specifically for Hall 7ABC, 7D and 7E whereas Foyer B serves mainly as entrance/ lobby to Hall 7FGH. Foyer A

is used invariably by all the exhibition organisers in Hall 7 for setting up of Registration counters/ exhibition stands (subject to Architecture norms of ITPO). The rental for the foyer in case of such non-exclusive usage are charged at the rate of 50% of the site rentals where organizers are also allowed construction of stands on pro-rata basis in the specified area in the Foyer A. The same principle is also applied when two separate events take place in Hall 12 & 12A which has a common foyer.

During 2012-13, a revenue of Rs.45.70 lakh was generated from compulsory charging Foyer A of hall 7 and common foyer of hall 12-12A and details are at Annexure XIII-A.

As already mentioned above, Foyer B of hall 7 is optional for booking by organisers at the prevailing site rentals.

For other halls, foyers are integral/ inseparable part within the halls and thus the area of these foyers is included in the gross area of these halls while billing of these halls to organizers.

As stated above, ITPO does not invoice itself for usage of space (including Foyers) for holding its events in Pragati Maidan.

15. Are there any differences in terms and conditions with respect to “foyer areas” for ITPO itself vis-a-vis other players (organisers)?

In terms of technical/ construction guidelines, there is no difference in terms and conditions with respect to “foyer areas” for ITPO itself vis-a-vis other players. As explained with rationale in Question No.5 (f) above, ITPO, being the venue owner, does not invoice itself for usage of space/foyer areas for its events.

16. What are the applicable terms and conditions with respect to the engagement of housekeeping facilities while booking exhibition space?

The conservancy charges @ Rs.1.20 per sq. mtr per day are levied to third party organisers for general cleanliness, hygiene, disposal of waste, maintenance of halls. The copy of the circular dated 30.03.2012 is annexed herewith as Annexure XIII.

However, the organisers are free to bring in their own housekeeping agency during the tenancy of their event. It is not mandatory for organizers to engage housekeeping agency engaged/ empanelled by ITPO.

The conservancy charges are levied by ITPO for general cleanliness, hygiene, ___(line not legible) over the entire area. The objective is general maintenance. It needs no

emphasis that with a view to keep Pragati Maidan clean and hygienic, ITPO provides the entire gamut of conservancy services during the tenancy of an event. ITPO has accordingly engaged an outside agency exclusively at its cost for this job. ITPO incurs the conservancy cost for entire Pragati Maidan and only a part of this expenditure is recovered from the third party organizers by charging conservancy charges.

17. Provide the rationale for the alleged requirement of exhibitors to necessarily engage with ITPO's empanelled agency(ies) for housekeeping. Details of the revenue collected since 2009 onwards from exhibitors on account of providing housekeeping agency by ITPO. Breakup of aforesaid data in terms of charges collected from other exhibition on account of events organised by ITPO itself.

As stated above, it is not mandatory for third party Organisers to engage necessarily ITPO's empanelled agency for housekeeping during their events. However, it has been observed that in more than 80-90% of the third party events no outside housekeeping agency is brought in by the organisers and they avail the benefit of conservancy services of the agency empanelled by ITPO without incurring any additional charges for housekeeping.

Details of revenue collected towards conservancy charges for third party fairs during 2012-13 are annexed at Annexure XIV.

As stated above ITPO incurs the conservancy charges for entire Pragati Maidan and does not invoice itself on account of conservancy for individual events of ITPO.

xxx xxx xxx

21. Any other information relevant and related to this matter.

A stated above, one of the organisers whose event namely 'Jewellery Wonder' scheduled to be held in Pragati Maidan from Sept.28-30, 2013 has objected to the allotment of space by ITPO to another leading organiser i.e. M/s. UBM India Pvt. Ltd. for holding of Jewellery Event i.e. "Delhi Jewellery & Gem Fair scheduled from sept 21-23, 2013 in Pragati Maidan. The organiser of 'Jewellery Wonder' is accusing ITPO for its unethical policies damaging Exhibition Industry as another has been approved by ITPO in Pragati Maidan just one week before their Event. The organiser has stated that many of their exhibitors have cancelled their stalls because of the UBM's Jewellery Show approved by ITPO just one week before their event which is ruining their event."

[Emphasis supplied]

19. After two month, the DG issued second notice dated 03.10.2013 under Section 36(2) read with Section 41(2) of the Act and directed the appellant to furnish the information and documents on six points, which were already covered by the first notice. The appellant submitted detailed reply dated 14.10.2013, which was substantially similar to the reply submitted in response to notice dated 21.06.2013.

20. Apart from issuing notices to the appellant, the DG summoned the representatives of Electronics Today and UBM India and recorded their statements on 11.12.2013 and 12.12.2013. Only four answers given by Shri S. Swarn, Editor-in-Chief and CEO of Electronics Today, which may have some relevance are extracted below :

> "Q.7 Please substantiate your contention that the product profile of Smartcard Expo is not similar to that of India International Security Expo held by ITPO
>
> Ans. The Indian International Security Expo organized by ITPO is being held at Pragati Maidan since 1984. Its product profile is mainly of physical nature and used by army, police and other security forces, whereas the product profile of Smartcard Expo is the oriented technology information, which is covered by Information Technology. It is a niche technology which was not clashing with the product profile of the India International Security Expo. To prove this, we had compiled the list of participants in both the exhibitions and found that not

even a single company was common in the two exhibitions. This fact was highlighted by us to the ITPO authorities while applying for the venue for holding our Smartcard Expo 2012.

Q. 8 What was the response of ITPO to your above submissions

Ans. It informed that the competent authority of ITPO has not approved our requested for holding the show at Pragati Maidan. I shall provide the copy of their reply.

Q.9 What is the normal timeframe within which your applications for venue are decided and communicated to you.

Ans. There is no specific rule related to timeframe within which ITPO is bound to decide and communicate their decision to the applicants for venue allotment to hold their event. For e.g. we had applied for holding Smartcard Expo 2011 (September 28-30) on 17th June, 2010 and they replied on 28th October, 2010 to convey their decision that my request has been denied.

Q. 10. When were you informed that the venue at Pragati Maidan will not be available in 2010 on account of Common Wealth Game.

Ans. ITPO had issued circular for the information of all exhibitors who were organizing their events at Pragati Maidan that the venue will not be available during a certain timeframe of 2010 due to the Common Wealth Games. Therefore, we organized our event in Mumbai. Since we were aware of this fact in advance, we organized our exhibition and conference by emphasizing the product profile suitable to the Banks and other Financial Institutions since they are primarily based in Mumbai. However, our feedback from exhibitor was not in favour of changing the venue from New Delhi to Mumbai because the ultimate user i.e. Central Government was based in New Delhi. Therefore we decided not to continue our event in Mumbai despite it being cheaper and good response.

Q.11 Are you aware of the information dated 10.12.12 filed by Indian Exhibition Industry Association against ITPO and Ministry of Commerce and Industries and its contents.

Ans. I am not aware of the dates but for the Association, it was obligated to take action against the bitter experience of several exhibitors who were victim of the three months gap policy (as explained above) ITPO and some of them had complained to the Association about this fact. However, the Association chose to cite the examples of our experience."

Similarly, the replies given by Shri Sanjay Bose, Head Corporate Affairs of UBM India to questions Nos. 5 to 9, which may have some relevance to this case are reproduced below :

"Q.5. What is the similarity in product profiles of IISE organized by ITPO and IFSEC organized by UBM ?

Ans. Both the exhibitions are in the same segment of the industry i.e. fire, safety and security.

Q.6 What is the process followed for organizing an international exhibition like IFSEC India?

Ans. As the current market scenario is very competitive and there is huge increase of exhibitions, trade fair activities in India most of the organizers in India are blocking venues three years in advance particularly at Pragati Maidan owned by ITPO.

Q7 What are the parameters kept in mind while deciding the venue of an international event ?

Ans. We choose a venue keeping in mind the location of the venue, the exhibitor profile of the said exhibition, proximately *(proximity)* to the airport, hotels, Delhi flight connectivity to various locations in India and abroad for the advantage of the exhibitors, delegates and visitors. Another factor is the segment to which the exhibition

pertains to, we basically see that maximum numbers of exhibitors are within radius of 100 Km.

Q.8 What are the various options available to you in India to hold international exhibition like IFSEC ?

Ans. Very few exhibition venues in India namely, India Expo Centre, Greater Noida and Codissia Trade Fair Complex, Coimbatore which provide all amenities to organizers to host international exhibition. The others provide only few amenities.

Q.9 What is the normal timeframe within which your application for venue are decided and communicated to you ?

Ans. It is between 7 days to 45 days in case of Pragati Maidan and in case of other venue it is 24 hours."

21. After recording the statements of the representatives of the two entities, the DG sent yet another notice dated 13.12.2013, to which reply dated 20.12.2013 was submitted on behalf of the appellant.

22. The DG also issued notices to the National Small Industries Corporation Ltd., India Habitat Centre and International Trade Export Centre Ltd. (Noida). One of them, namely, National Small Industries Corporation Ltd. submitted reply dated 23.09.2013 but the remaining two did not respond.

23. After completing the investigation, the DG submitted report dated 14.12.2014, which was divided into 16 parts and was accompanied by copies of the guidelines issued from time to time for organisation of events at Pragati Maidan and circulars issued, e-mail dated 14.02.2014 sent by the Business Development Review Committee of the appellant and print-outs taken from the websites various venues providing facilities for fairs and exhibitions. In Part 9 of the report, the DG identified the following issues :

> "i. Whether there is any conflict of interest amongst various roles of being performed by ITPO resulting in competition issues ?
>
> ii. Whether ITPO is dominant in the defined relevant market?
>
> iii. Whether the time gap restrictions imposed by ITPO amount to imposition of unfair conditions ?
>
> iv. Whether the time gap restrictions apply uniformly to ITPO's own events vis-à-vis third party events or are discriminatory ?
>
> v. Whether the policy regarding determination of similar profile events is transparent, fair ?
>
> vi. Whether ITPO takes unreasonable time to confirm the bookings in respect of that space amounting to imposition of unfair and discriminatory conditions ?
>
> vii. Whether ITPO has been applying its guidelines regarding reserving slots for regular events in fair and non discriminatory manner ?

viii. Whether ITPO has been applying its guidelines regarding allocation of venues on first-cum-first basis in fair and non-discriminatory manner.

ix. Whether ITPO applied its policy to charge the exhibitors for 'foyer area' along with allocated area, other charges, in fair and non-discriminatory manner ?

x. Whether ITPO policies regarding engaging house keeping agency fair and non-discriminatory ?

xi. Whether the recently announced policies of ITPO are uniform and competition friendly and rectify the earlier anomalies, if any ?

24. The DG then undertook the exercise for determination of relevant market. He referred to Section 2(r), (s) and (t) read with Section 19 (6) and (7) of the Act, took into consideration the information relating to various venues available in the country and defined the relevant market as 'providing venue in International and National trade fairs / exhibitions in Delhi'. The DG next made assessments of dominance. He analysed the factors enumerated in Section 19(4), took into consideration the market share of the appellant, its size, location, importance vis-à-vis other exhibition spaces available in Delhi and other parts of the country, the factors which attract the enterprisers to Delhi, referred to order passed by the Commission in Case No. 48 of 2012 PDA Trade Fairs Vs. ITPO and held that the appellant is in a dominant position in the relevant market. He also considered whether the appellant was an 'enterprise' within the meaning of Section 2(j) of the Act and returned an affirmative finding by relying upon the definition of the term 'person'. After completing this exercise, the DG examined the following facets of the abuse of dominance :

i. Whether there is any conflict of interest amongst various roles of being performed by ITPO resulting in competition issues

ii. Whether the time gap restrictions between two events amount to imposition of unfair condition

iii. Whether the time gap restrictions have been stipulated, amended and applied in unfair and discriminatory manner

iv. Whether the time gap guidelines revised pursuant to directions of Commission are uniform and non discriminatory

v. Whether ITPO imposes unfair and discriminatory condition in processing the applications received for organizing events

vi. Allegation related to Foyer Area

vii. Allegation related to choice of engaging House Keeping Agency

viii. Allegations related to non charging of rental, foyer charges by ITPO for its own events

ix. One sided nature of Agreement / Terms and Conditions

26. While dealing with the first facet of the abuse of dominance, the DG took cognisance of the multiple functions performed by the appellant, which include organisation of its own events at Pragati Maidan and licencing of venue to 3rd parties and allocation of spaces for holding events at Pragati Maidan and observed:

> "Against this background it can be stated that there exist conflict of interest in the multiple roles of ITPO as the provider of venue to the event organizers, as well as it simultaneously being one of the event organisers who at times competes with third parties for organizing events at

Pragati Maidan. The fact that ITPO also processes the applications of the third party organisers and decides the time gap restriction, etc. further extenuate the conflict of interest.

It is also observed that pursuant to guidelines issued by Ministry of Commerce vide letter No. 10(7)95-TP (Vol. II) dated 21.9.1999, ITPO along with Ministry of Commerce have been authorized to approve holding of International Trade Fair/Exhibitions in India and abroad by issuing approval letters/certificates as per the provisions of Handbook of procedure of the Export and Imports policy of the Government of India. It is understood that the same is with the objective to avoid duplication of efforts while ensuring proper timing, ensure that the same are held in public interest and also to facilitate trans border movement of exhibits through the custom authorities. However, in the given scheme of things there is scope for ITPO to favour its own events vis-à-vis competing third party organized events at Pragati Maidan.

Hence it is found that there exist elements of conflict of interest in different functions being performed by ITPO under various capacities related to organization of events at Pragati Maidan particularly that of a venue provider, event organizer, policy maker, approver for International events etc., leading to competition concerns. As a result it is in a position to exercise its dominance in the relevant market of venue provider in Delhi

to its advantage at the expense of competitors in the other relevant market organization in India. This aspect would provide added strength to ITPO which has bearing on its alleged anti competitive conduct under the provisions of the Act which has been examined hereunder."

27. The DG next considered history and chronology of the time gap requirements for similar events, referred to the guidelines framed by the Ministry of Commerce and Industry, Government of India and amendment made therein from time to time, the guidelines issued by the appellant in July, 2006 for licencing of exhibition spaces and facilities in Pragati Maidan and amendments made therein by various circulars including those dated 28.12.2012 and 25.05.2013, the justification offered by the appellant for time gap policy and observed :

"In view of the analysis of the submissions and documents mentioned above, there appears to be an economic rationale for the time gap restriction between similar profile international events to avoid confusion, free riding concerns and to protect in a reasonable manner the interest of potentially competing events. The available information has revealed that internationally also time gap restrictions are followed.

Against this background, notwithstanding the fact that the Ministry had in the interest of transparency and fairness decided to remove the time gap restrictions as such the time gap introduced by ITPO on its own in 2006 for competing events at Pragati Maidan, does not by itself amount to imposition of unfair condition on the exhibitor. Rather as discussed above, the requirement in certain circumstances

may serve to promote healthy competition, depending on the terms and conditions.

However, in this context, it was further examined whether the manner in which these time gap restriction guidelines were stipulated, amended and applied by ITPO, from time to time, are indicative of any abusive conduct in exercise of its dominant position in the relevant market. These aspects have been dealt in the succeeding paras."

[Emphasis added]

28. The DG then considered the third facet of the abuse of dominance. He again referred to the guidelines and circulars issued by the appellant between July, 2006 and May, 2013 on the issue of time gap requirement, referred to the relevant parts of reply dated 13.08.2013 submitted by the appellant in response to the notice issued by the DG and held that adopting of different parameters in relation to the time gap restrictions for itself and third party exhibition organisers amounts to infringement of Sections 4(2)(a)(i), 4(2)(b)(i), 4(2(c) and 4(2)(e) of the Act. The discussion contained in the investigation report on this aspect is extracted below :

"From the details of applicable guidelines prevalent from time to time it has emerged that ITPO has been adopting different parameters in terms of time gap restrictions for itself as exhibition organizer vis-à-vis other third party exhibition organizers.

It is observed that the time gap restriction at Pragati Maidan was introduced in 2006. As per the guidelines, a substantially higher time gap, was maintained between an ITPO event and a third party event of similar product

profile as against that between two third party events of similar product profiles. Minor changes to these guidelines were made during 2006-2010. On 15.2.2011, the time gap available to ITPO events (after the event) was substantially enhanced from 45 to 90 days. This translated into a comparative advantageous terms for ITPO events as compared to third party organizers due to higher buffer period available to the former.

ITPO in their response have inter-alia justified the same by stating that ITPO primarily cater to small and medium industries and are not governed by commercial considerations.

In this regard it is noted that as per the Annual Report for the year 2011-12, the excess of income over expenditure amounted to Rs. 183.03 Crores which was carried forward to the Reserve and Surplus Account for the utilization of the same in furtherance of its objectives. As on 31.3.2012, the Reserves and Surplus of ITPO was Rs.960.37 Crores (Annexure 14). Hence it is observed that over the years ITPO has been earning high returns/profits from its operations.

Further, available information also reveals that very often there are common exhibitors, visitors, in the events of similar profile organized by ITPO and third parties. Infact vide letter dated 9.1.2014 (Annexure 15) ITPO has confirmed that there are a number of common exhibitors

in ITPO's fairs and third party fairs organised in Pragati Maidan and has furnished details of few instances.

Hence, admittedly on several occasions there is an overlap of participants between the exhibitors of ITPO organized events and third party events thereby indicating that ITPO does not necessarily organize only those events where private third party organizers would not be interested. In this context it is found that all two third party events are treated differently with respect to time gap restrictions as compared to an ITPO own events and third party event, irrespective of the sector, profile of the industry, participants, etc.

Thus the rationale offered by ITPO does not fully explain the issue of blanket difference in the time gap restrictions applicable depending on whether the event are being organized by ITPO or third parties.

In view of the lesser stringent time gap restrictions applicable for ITPO events, the exhibitors are likely to prefer to participate in an ITPO organized event rather than a third party event of similar profile. As a result of this difference in rules, the ITPO events stand to gain vis-à-vis third parties events.

It has been informed by ITPO that these changes were decided in the meetings of the Business Development Review Committee. Minutes of the meeting dated 15.2.2011, through which the time gap restrictions

between ITPO and third party events was enhanced to 90 days (after the event) is Annexed. However, these documents also do not reveal any background and reasons due to which the time gap restrictions applicable were revised in favour of ITPO's own events.

In this context it is pertinent to mention that in view of the multiple roles of ITPO and inherent conflict of interest and considering the dependence of organizers and exhibitors on Pragati Maidan as a venue particularly for International events, ITPO is placed in a position to stipulate terms which confer an unfair competitive advantage to it as an organizer.

On the basis of the aforesaid examination of facts it is found that by stipulating favourable time gap restrictions for its own events as compared to third party organized events ITPO imposed unfair and discriminatory conditions on the third party event organizers at Pragati Maidan. Further, increase in the time gap restrictions for holding third party events, before and after ITPO own events of similar profile, amounted to denial of market access to the third parties who compete with ITPO for organizing events at Pragati Maidan.

Thus it is also observed that ITPO used its dominant position in the relevant market of venue provider in Delhi for organizing events to protect and enhance its position in the relevant market of event organization. In the process, due to time gap restrictions the availability of venue for conducting events of

> similar profile is also limited particularly in case of large time gaps, thereby limiting provision of these services.
>
> Hence, it is found that the aforesaid conduct of ITPO amounted to infringement of section 4(2)(a)(i), 4(2)(b)(i), 4(2)(c) 4(2)(e) of the Act."
>
> [Emphasis supplied]

29. The DG then referred to the circulars issued on 28.12.2012 and 27.05.2013 and made the following observations :

> "From the perusal of the revised circulars and discussions above, it is observed that the discriminatory features that earlier existed due to non parity in time gap restrictions applicable to two third party events and that between an ITPO and third party events have been largely removed through the amendment dated 20.5.2013, barring a small element of comparative advantage that ITPO fairs continue to enjoy due to the 3 days of time gap restriction which is not available between two third party events."

30. On the issue of the alleged discrimination in the processing of applications of the private parties, the DG referred to the cases of UBM India and Electronics today, compared the IFSEC event of UBM India and SmartCards Expo of Electronics Today with India International Security Expo and recorded the following observations and conclusion :

"From the aforesaid analysis it is found that ITPO imposed discriminatory condition on UBM by giving preferential treatment in processing and scheduling of its own event IISE over the other institutionalized third party event IFSEC of UBM. UBM was constrained to shift its event from regular time slot to alternate period during 2011 which amounted to imposition of unfair condition. As result of the conduct and amendment of time gap restrictions made applicable for third parties vide circular dated 15.2.2011, UBM could not organize event at Pragati Maidan in 2012 even as per revised schedule resulting in denial of market access."

*** ***

From available information it is observed that Electronics today had in their letter cited the basis of their contentions that these events according to them were not similar and requested for reconsideration of decision. While, their request was not approved by the competent authority, the basis on which these two events were treated as similar was apparently not communicated to Electronics Today. From the information furnished by ITPO to this office, it appears that there were some similarities in terms of participants and areas covered. Hence, in view

of the same, it does not stand established that these events were not similar.

Notwithstanding that it is observed that on account of the enhanced time gap restriction made applicable between an ITPO and third party event through circular dated 15.2.2011 coupled with shifting of ITPO's own event to the slot regularly held by Smart Card Expo in the past as per the decision taken in BDRC meeting dated 9.2.2010, Smart Card Expo could not be held at Pragati Maidan and as demonstrated by the entity resulted in loss of business and status.

It also appears that ITPO has to a large extent discretion while deciding similarity of profiles of events since the parameter followed in this regard appears to be very broad and the specific facts are neither mentioned in the minutes nor communicated to the parties concerned.

ITPO being the entity processing the applications as well as one of the exhibitors is placed in a position to use the procedures for processing of applications to its advantage and to the detriment of other competing exhibitors. It is noted that there is no stipulated time frame within which the application of third parties for grant of space for exhibitions are to be decided. This provides leeway to ITPO to accord preferential treatment to its own events vis-à-vis third party events.

> In the absence of any other venues of the size and importance of Pragati Maidan in terms of its location, the big and the regular exhibitors of it is the first preference for such exhibitors. Accordingly, they are considered to abide by the procedures and policies which at times could be inconsistent and frequently amended. Any shift to an alternate venue particularly at a short notice is at the cost of loss of footfall and business as appears from the aforesaid instances.

Hence from the aforesaid examination it is observed that by taking long time in confirming the allotment dates, by not deciding applications on first come first basis and that of reserving slots for regular fairs, coupled with altering of time gap restriction guidelines to its advantage, giving preferential treatment to its own fair over competing fairs, ITPO has imposed unfair conditions, discriminatory conditions and was denying access to third parties to use the venue and limited the provision of services of holding events at Pragati Maidan. It also used its dominant position as venue provider for holding events in Delhi to protect its activities in related market of organizing events.

Against this background of an in view of preferential treatment accorded to its own exhibitions by ITPO, uncertainty attached with the application of the third party exhibitors, the potential customers would always prefer ITPO as the exhibitor vis-à-vis other exhibitors for the same product profiles. The conduct

> therefore further amounts to imposition of unfair and discriminatory condition on the exhibitors competing with its ITPO owned exhibitions.
>
> Thus from the analysis of the procedures, guidelines and facts related to specific instances discussed above the aforesaid conduct of ITPO is found to be in contravention of Section 4(1) read with Section 4(2)(a)(i), 4(2)(b)(i), 4(2)(c), 4(2)(e) of the Act."

31. As regards next two facets relating to Foyer Area and House Keeping Agency, the DG held that no violation of the provisions of the Act has been established. In the last, he considered whether the terms and conditions of the agreement were one-sided and held they were so and the appellant, in exercise of its dominant position, contravened Section 4(2)(a)(i) of the Act.

32. In Part 14 of the report, the DG reiterated the findings recorded on various facets. He finally considered the issue of contravention and liability under Section 48 of the Act, prepared a table showing the names of the persons who attended the meetings held between 29.10.2007 and 20.05.2013 but did not find any particular person responsible for anti-competitive conduct.

33. The Commission considered the investigation report and directed that copies thereof be supplied to the parties to enable them to file their reply/objections/suggestions. The appellant submitted reply dated 25.03.2014. Paragraphs 2 to 4 of the reply, on a portion of which reliance has been placed by the Commission for holding that the appellant has admitted its dominant position in the relevant market, read as under:

"2. Whether ITPO is dominant in the defined relevant market?

ITPO is a 100% Govt. owned company incorporated under Section 25 of Companies Act 1956 and functions under the administrative control of Department of Commerce in the Ministry of Commerce and Industries. It is mandated with the responsibility of promoting trade of India in a cost effective manner through the medium of trade fairs. As such, ITPO is the oldest and original player and only PSU in this industry, Pragati Maidan, as a venue for organising trade fairs, has been hosting trade fairs for more than four decades now. Pragati Maidan has been hosting trade fair and exhibitions on behalf of Govt. of India since the time when Private players/organisers in this industry were almost non-existent. It is by virtue of immense success of fairs organised by ITPO (erstwhile TFAI) that the private sector got encouraged to enter into the business of organising trade fairs and exhibitions in India. ITPO has been instrumental in the evolution of trade fair & exhibition industry in the country by popularising exhibition culture in the country.

We hereby respect the firings of the investigation on the point that ITPO is dominant player in the exhibition industry by virtue of owning one of the largest exhibition venue at a prime location in the capital of the country.

The venue is speared over an area of 123 acres and as a venue has significant area in India in terms of covered exhibition space, number of events and revenue generation.

However, ITPO has never attempted to take advantage of its dominant position in the India exhibition industry and has been providing its space/facilities to private organisers in a transparent manner. In fact, most of the leading third party fairs in India i.e. AutoExpo, Plastindia, World Book Fair, Acetech, Defexpo, Wills Fashion Week etc. have earned global recognition by successful holding of these events regularly in Pragati Maidan over the years. As stated above, a major part of ITPO's revenue comes from these third party fairs taking place in Pragati Maidan and ITPO would not think of denying space to its esteemed clients i.e. third party organisers.

In a one-off incidence in the year 2011, referred to in the instant case of Security Fairs, there was never an effort or motive of denying space to any organiser, rather the space could not be allotted under the extant policy of time gap where the ultimate objective was to provide opportunities to MSMEs to participate in ITPO's fairs at a reasonable cost.

3. Whether the time gap restriction imposed by ITPO amount to imposition of unfair conditions ?

Guidelines on time gap restrictions between two events of similar product profile were introduced by Ministry of Commerce vide guidelines issued through Letter No. 10(7)95-TP (Vol II) dated 21.9.1999. It conveyed the need for such framework as “It has been observed that a large number of organisers are coming forward to organise events in India and abroad and at times frequent exhibitions convey confusing signals to the participants and to business visitors from India and abroad when events on similar themes overlap. Lack of appropriate spacing of events also lead to poor business response causing loss of opportunities for the organiser and the nation. Further, there exists the need to have transparency in granting approvals by the Designated Authority. Thus the need was felt to review the existing framework and a Committee was constituted by the Ministry of Commerce for the same”. It further mentions that “Any Indian entity wishing to organise any International Trade Fairs/exhibitions in India or abroad would be required to obtain a certificate from an officer of Government of India in the Ministry of Commerce not below the rank of Under Secretary or an officer of India Trade Promotion Organisation duly authorised by its Chairman on this behalf to the effect that such exhibition, fairs or as the case may, similar show or display, has been approved or sponsored by the Government of India

in the Ministry of Commerce or the India Trade Promotion Organisation and the same is being held in public interest (Export–Import Policy 1997-2002, Handbook of Procedures 11, para 11.71. These guidelines have been issued/amended by Ministry of Commerce from time to time in the following manner :

DOC letter dated	Time Gap Policy
21.9.1999	Time gap required between two international trade exhibitions/fairs in India on the same theme and similar product profile within the same city would be 3 months and if held in another city, it would be one month. Further, for Indian exhibitions abroad, a gap of 12 months would be maintained between exclusive Indian Exhibitions/Made in India Exhibitions.
2.1.2001	Time gap required between two international exhibitions/fairs in India on the same theme and similar product profile and directed that within the same city, time gap would be 45 days instead of 3 months as stipulated earlier. However, for IT, Telecom and Broadcasting sectors, there will be no need for maintaining any time gap, if held within the same city. Time gap of one month to be

	maintained between two international exhibitions/fairs on the same theme and similar product profile in two different cities in India.
27.02.2003	No time gap restriction between two exhibitions/fairs irrespective of where the exhibitions/fairs are held.

It is pertinent to mention that time gap restriction w.r.t. two fairs on similar product profile (intercity and intra-city in India) were introduced in the year 1999 and subsequently removed in the year 2003 by Ministry of Commerce and Industry in the context of issuance of above approval letters by ITPO in a broader context only and not in the context of Pragati Maidan as a venue.

Between 2003 and 2006, there was no time gap restriction between two fairs of similar product profile at Pragati Maidan. Time gap restrictions between two events of similar product profile at Pragati Maidan were introduced in July 2006 by ITPO on the basis of representations received from third party organisers. Page 40 of the CCI Investigation Report may kindly be referred to in this regard. The reason for objection by one organiser to another similar event concurrently or without a buffer time is that holding similar events concurrently or without specified gap leads to unhealthy competition and

practices such as grabbing each other's exhibitors, visitors, enjoy free riding on others publicity efforts etc. There was never any commercial objective behind introduction of such a policy by ITPO, rather ITPO lost revenue through this policy by not leasing the available space to third party organisers who were willing to organise event of similar product profile in contradiction of the mandatory time gap requirement between two such events. As submitted by us earlier, this is an international practice followed by leading venue owners worldwide. Page 41 of the CCI Investigation Report may kindly be referred to in this regard. Thus it was done to avoid unhealthy competition and promote healthy competition amongst events of similar product profile.

Recently, UFI (The Global Association of the Exhibition Industry for trade show organisers, fairground owners, national and international associations of the exhibition industry and its partners) held its 'Open Seminar in Asia 2014' at Bangalore on March 6-7, 2014 which was attended by all leading exhibition venue owners, fair organisers and service providers from India including officials from ITPO, CMD, ITPO also attended the seminar. During one of the presentation on 'Exhibition Venue' it was highlighted that Theme Protection Element through time gap is one of the important criteria for an

organiser while selection/ finalisation of venue for holding the exhibition.

4. Whether the time gap restrictions apply uniformly to ITPO's own events viz a viz third party events OR are discriminatory?

Regarding time gap restriction between an ITPO fair and a third party fair of similar product profile, we humbly accept that these were not at par with the time gap restriction between two third party events of similar product profile. The time gap required (earlier) between an ITPO fair and a third party fair of similar product profile was higher than the time gap applicable to two third party fairs of similar product profile. However, we would again like to submit here that the earlier management in ITPO (2007-2011) was of the view that third party fair organisers, with the objective of making higher profits, sometimes exploit exhibitors by charging higher participation cost from them as their events have been established. Thus, participation by MSMEs become difficult in such established fairs. Since ITPO does not organise fairs with the solo objective of surplus generation and the cost of participation in ITPO's fair is kept low, the management at that time felt the need of promoting MSMEs and accordingly introduced a larger time gap between an ITPO fair and a third party fair of similar product profile. It is pertinent to mention that most

of the senior officers, who were part of this decision, have retired or no more in the services of ITPO.

It may be observed here that with this objective of promoting participation by small enterprises, ITPO has forgone its revenue in terms of the opportunity cost lost for available space for competing events. Such a policy was never brought with the objective of denying market access to any third party organiser.

After change in management during the year 2012, a number of reform measures were undertaken taking into account aspirations of ITPO's clients. Meetings/ deliberations were held regularly with stakeholders to take their feedback. Accordingly, in one of the meeting taken by ITPO with third party organisers on Nov. 8, 2012, the organisers put forward the issue of time gap restrictions between two events of similar product profile at Pragati Maidan. The request of the organisers were considered by ITPO and accordingly the policy was liberalised in Dec. 2012 by ITPO and notified, much before the receipt of the first communication from Hon'ble CCI on the subject. The time gap was significantly reduced from 90 days before and after ITPO fair of similar product profile to 30 days before and 15 days after. Time gap restriction of 15 days between two third party events of similar product profile was also removed.

After giving undertaking to Hon'ble CCI, the policy was further modified to bring uniformity in organising exhibitions at Pragati Maidan and the time gap between ITPO fair and a third party fair of similar product profile was reduced significantly to 3 days. The requirement of 3 days gap is just for logistics reasons in terms of removal of publicity/ advertising material from the premises.

Third party organisers remove all their exhibits, construction materials, brandings etc. immediately during the night hours after conclusion of their fair by hiring a number of vendors, service providers, labours, machineries etc. However, ITPO, being a Govt. Organisation is required to follow all labour legislations, specified working hours as per rules, safety & fire regulations etc. and accordingly 3 days gap has been kept to take care of these requirements."

34. After receipt of the replies/ submissions of the parties, the Commission framed the following issues :

"Issue 1: What is the relevant market in the present case?

Issue 2: Whether OP 2 is dominant in the relevant market?

Issue 3: If yes, whether OP 2 has abused its dominant position within the meaning of section 4 of the Act?"

35. On each of the above issues, the Commission merely referred to the findings/observations recorded by the DG and approved the same. As regards Issue No.1, the Commission referred to the investigation report and recorded its

agreement with the findings recorded by the DG by making the following observations :

> “15. The DG noted the relevant product market as ‘provision of venue for organizing national and international exhibitions and trade fairs’. It may be noted that the allegations in the present case relate to the policies and procedures stipulated by OP 1 and OP 2 with respect to licensing of venues to exhibitors for conducting fairs and exhibitions. In order to attract exhibitors and visitors, the venue for exhibition plays a key role. The venues which regularly hold exhibitions and trade fairs ideally have large space to accommodate multiple exhibitions, are centrally located and are well known on the world map and are, therefore, most preferred by the exhibitors particularly for organizing international and national exhibitions and trade fairs.
>
> 16. Hence, the venues regularly used for organizing national and international exhibitions and trade fairs can be distinguished from venues for other kind of events in terms of parameters such as physical characteristics, consumer preferences.
>
> 17. In view of the above, the Commission is of the opinion that the relevant product market delineated by the DG i.e. market for ‘provision of venue for organizing national and international exhibitions and trade fairs’ is correct.

19. The DG delineated the relevant geographic market in the present case as Delhi. As highlighted in the DG report, Delhi has been hosting exhibitions at Pragati Maidan since 1977 and it has a rich historical background as a venue for holding international and national exhibitions and trade fairs. Factors like better public transport system, connectivity to airports, railway stations and inter-state bus terminals, centralized location, nearby hotels, substantially large exhibition and open display space at its venue Pragati Maidan, location of Central and State Ministries etc. also distinguish and create preference for exhibitors as well as visitors for Delhi over other places in the country. Further, as brought out in the DG report, such fairs usually require liaisoning and approvals from governmental authorities which makes Delhi as an advantageous location as a venue. Lastly, it may also be highlighted that Delhi being the capital of the country also adds to its attractiveness as a preferred location.

20. The Commission is satisfied with DG's observations on this aspect. Further, in terms of the available infrastructure of other exhibitions centres in comparison to Pragati Maidan, the conditions of competition of supply and demand for venues for national and international exhibitions in Delhi are different from those prevailing outside. Further, the factors such as consumer preference, adequate facilities, transport cost etc. make Delhi a distinct destination for holding international and national exhibitions and trade fairs. Considering all the above stated

> factors, the Commission is of the view that 'Delhi' as a venue for holding international trade fairs and exhibitions cannot be substituted with other venues in NCR or other cities in the country. Therefore, the relevant market in the present case is 'provision of venue for organizing international and national trade fairs/exhibitions in Delhi'.

36. On the issue of dominance, the Commission agreed with the finding recorded by the DG and buttressed the same by the alleged acceptance thereof by the appellant.

37. While dealing with Issue No.3, the Commission did not advert to the detailed reason put forward by the appellant before the DG vide reply dated 13.08.2013 and also in reply dated 25.03.2014 filed after receiving the copy of the investigation report and mechanically endorsed the finding recorded by the DG. This is borne out from paragraphs 25 to 27 of the order under challenged, which are reproduced below :

> "25. The DG conducted a detailed investigation into the various issues and allegations arising out of the information. The main allegation of the informant pertained to arbitrary and discriminatory time gap restrictions imposed by OP 2 between two events. Though the DG did not find time gap restrictions *per se* as abusive, the conduct of OP 2 in stipulating, amending and applying the same was found to be abusive in terms of the provisions contained in sections 4(2)(a)(i), 4(2)(b)(i), 4(2)(c) and 4(2)(e) of the Act.

26. On perusal of the DG's observations and findings on the time gap restriction, it is evident that by stipulating favourable time gap restrictions for its own events as compared to third party organized events, OP 2 imposed unfair and discriminatory conditions on the third party event organizers at Pragati Maidan. The findings show that the time gap restriction between two 'third party events' was 15 days before and after the event whereas in case of OP 2's own organised events/exhibitions, the time gap restriction was 90 days before and 45 days after the event in case of OP 2 events (which was amended to 90 days before and after the event in 2011). This has been accepted by OP 2 in its own written submissions. Such a conduct is clearly in contravention of the provisions of section 4(2)(a)(i) of the Act. Besides, it also limited/ restricted the provision of services and market thereof in contravention of the provisions of section 4(2)(b)(i) of the Act. Further, increase in the time gap restrictions for holding third party events, before and after OP 2's own events of similar profile, amounted to denial of market access to the third parties who compete with OP 2 for organizing events at Pragati Maidan in contravention of the provisions of section 4(2)(c) of the Act. The Commission also believes that OP 2 has used its dominant position in the relevant market of venue provider in Delhi for organizing events to protect and enhance its position in the market of event organization and thereby contravened the provisions of section 4(2)(e) of the Act.

27. The informant also alleged that OP 2's guidelines for reserving slots for regular events and allocation on first-come-first basis was often disregarded for benefitting its own events. It was alleged that OP 2 would take unreasonable time to confirm the booking which allowed it to manipulate the bookings. The informant cited various instances in support of this allegations. From chronology of events in processing applications for events received from third party organizers viz. "UBM and Electronics Today", it is evident that OP 2 imposed unfair and discriminatory conditions upon the third party organizers by taking long time in confirming the allotment dates; by not deciding applications on first-come-first-basis; coupled with altering of time gap restriction guidelines to its advantage; giving preferential treatment to its own fairs over competing fairs in contravention of the provisions of section 4(2)(a)(i) of the Act. Further, such conduct amounted to denial of market access to the third parties who competed with OP 2 for organizing events at Pragati Maidan in contravention of the provisions of section 4(2)(c) of the Act.

38. On the remaining issues of compulsion to take the foyer area, designation of housekeeping agency, non-charging of rental of foyer area for the events organised by the appellant, the Commission agreed that the allegations made against the appellant have not been proved. In conclusion, the Commission recorded its concurrence with the DG that the appellant's conduct was contrary to Section 4(2)(a)(i), 4(2)(b)(i), 4(2)(c) and 4(2)(e) read with Section 4(1) of the Act,

directed it to cease and desist from indulging in anti-competitive practices and imposed penalty @ 2% of the average income/receipt/turnover for the last preceding three financial years amounting to Rs.6,75,03,540/-.

39. Shri Krishnan Venugopal, learned Senior Counsel for the appellant made many fold arguments to challenge the impugned order. He firstly questioned the very initiation of the investigation by the Commission under Section 26(1) of the Act by arguing that the appellant does not fall within the definition of the term 'enterprise' under Section 2(h) of the Act and no investigation can be ordered in respect of the allegation of violation of Section 4 unless the party proposed to be investigated is an 'enterprise'. Shri Venugopal pointed out that the appellant's predecessor, i.e., Trade Fair Authority of India was incorporated under Section 25 of the 1956 Act to take over the functions which were being performed by the Ministry of Commerce through three entities, namely, India International Trade Fair Organisation, Indian Council of Trade Fairs and Exhibitions and Directorate of Exhibition and Commercial Publicity and the same continues to be the task of the appellant. He pointed out that as per the licence granted by the Central Government under Section 25, the Trade Fair Authority had to invest its profits and other income solely for promoting its objects and there was total prohibition on the payment of any dividend to its members and even today, the appellant has been investing its income and profits for augmenting the infrastructure at Pragati Maidan. Shri Venugopal laid emphasis on the fact that the main objects of the appellant, as set out in its Memorandum of Association are to promote, organise trade and other fairs and exhibitions in India and abroad, to publicise in India and abroad international trade fairs and exhibitions and invite foreign participants to participate in India, to organise and undertake trade in commodities connected

with or relating to such fairs and exhibitions and promote exports. He submitted that in last 23 years, the appellant is primarily engaged in promotion, organisation of trades, fairs and exhibitions for Small and Medium Enterprises and Traditional Industries and also participate in fairs organised in different parts of the world to boost the Indian exports. He submitted that the impetus given by the appellant to Small and Medium Enterprises and Traditional Industries is meant to ensure that the ownership and control of the material resources of the community are distributed to sub-serve the common good and the operation of the economic system does not result in concentration of wealth and means of production in the private hands to the detriment of common person, which are the constitutional goals set out in Article 39(b) and (c) and, therefore, the appellant will be deemed to be discharging sovereign functions of the Government and is not amenable to the jurisdiction of the Commission. In support of his argument, Shri Venugopal relied upon the judgments of the Supreme Court in Bangalore Water Supply and Sewerage Board vs. A. Rajappa, Kasturi Lal Lakshmi Reddy vs. State of J&K (1980) 4 SCC 1, Bakhtawar Singh Bal Kishan vs. Union of India and others (1988) 2 SCC 293, Municipal Corporation of Delhi vs. Female Workers (Muster Rolls) (2000) 3 SCC 224, State of U.P. vs. Jai Bir Singh (2005) 5 SCC 1, N. Nagendra Rao & Co. vs. State of Andhra Pradesh (1994) 6 SCC 205, Assam Small Scale Industries Development Corpn. Ltd. vs. J.D. Pharmaceuticals (2005) 13 SCC 19 and State of Bihar and others vs. Project Uchcha Vidya, Sikshak Sangh and others (2006) 2 SCC 545.

40. The next argument of Shri Venugopal is that Pragati Maidan is an asset of the Government of India, which was created more than 40 years ago with the sole object of providing a venue for holding national and international exhibitions and

fairs with particular emphasis on promotion of Small and Medium Enterprises and Traditional Industries and three entities of the Ministry of Commerce, namely, India International Trade Fair Organisation, Indian Council of Trade Fairs and Exhibitions and Directorate of Exhibition and Commercial Publicity, of the Ministry of Commerce for organisation of fairs and exhibitions to encourage the Small Scale and Medium Enterprises in the country, which did not have independent resources to advertise their products. Later, these entities were merged and a new entity, namely, Trade Fair Authority of India was incorporated under Section 25 of the 1956 Act and Pragati Maidan was leased out to the new entity at a nominal rent. In 1992, Trade Fair Authority of India was merged with the Trade Development Authority of India resulting in creation of the appellant which continues to be a company registered under Section 25 of the 1956 Act and Pragati Maidan was placed at its disposal for carrying out the purposes which were hitherto carried on by the three wings of Ministry of Commerce and subsequently by the Trade Fair Authority of India. To buttress his statement that Pragati Maidan is an asset of the Government of India, Shri Venugopal placed before the Tribunal a xerox copy of the Perpetual Leave dated 07.03.2011 executed between the President of India acting through the Land and Development Officer, Nirman Bhawan, New Delhi and the appellant. He then argued that neither the Government of India nor its agencies and instrumentalities can be compelled to part with the possession or lease out its/their assets on the conditions favourable to the private parties and, in any case, the Commission could direct that the conditions for allocation of space to private parties should be the same as that of the exhibitions/fairs and other events organised by the appellant. Learned counsel emphasised that merely because the infrastructure and facilities at Pragati Maidan were subsequently made available to the private parties for organisation of fairs and exhibitions and

other events, the provisions of the Competition Act cannot be invoked to directly or indirectly denude the appellant of its power to regulate the allocation of spaces in Pragati Maidan and lay down the terms and conditions for organisation of fairs/exhibitions and other events, which are uniformly applied to all private enterprises. He submitted that the private players cannot claim equal treatment, priority or preference in the matter of allocation of spaces during the period Pragati Maidan is required for holding the exhibitions and fairs of the Government Departments or the appellant. He further submitted that the private players like Respondent No. 2, which is primarily representing the interest of UBM India and Electronics Today does not have the *locus standi* to question the time gap policy/time restriction on the ground of violation of Section 4 of the Act because the appellant has the absolute prerogative to prescribe time gap restriction in its own interest and the interest of public. He then argued that the appellant is not expected and in any case it cannot be compelled to provide access to private parties to its only asset, i.e., Pragati Maidan even when it would be detrimental to one of the main object, namely, promotion of export with special focus on Small and Medium Enterprises and Traditional Industries. In support of this argument, Shri Venugopal relied upon Verizon Communications v. Law Officers of Curtis Trinko, 540 US 398 (2004), STATE OF ILLINOIS, ex rel. Roland W. BURRIS, Attorney General of the State of Illinois, in its proprietary capacity, in its parens patriae capacity, and in its representative capacity v. PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware corporation 935 F.2d 1469 and Oscar bronnerGmBH v. MediaprintZeitungs, EU Case C-7/97 decided by the Courts in the United States and the European Commission, respectively.

41. Shri Venugopal further argued that the DG and the Commission acted in clear violation of the principles of natural justice. He referred to the provisions of

Sections 26(8), 27 and 36(1) of the Act as also the provisions contained in the Competition Commission of India (General) Regulations, 2009 (for short 'the Regulations') to drive home the point that in discharge of their functions to conduct investigation and inquiry, the DG and the Commission are to be guided by the principles of natural justice and emphasised that it is the solemn duty of the Commission and the DG to act in consonance with those principles. He referred to the judgments of the Supreme Court in Brahm Dutt Vs. Union of India (2005) 2 SCC 431 and Competition Commission Vs. Steel Authority of India (2010) 10 SCC 744 to show that the Commission performs adjudicatory as well as regulatory functions and argued that while carrying out its adjudicatory functions, the Commission is bound to comply with the principles of natural justice. Learned Senior Counsel referred to the provisions contained in Regulations 20 to 46 of the Regulations and argued that one of the facets of the principles of natural justice embodied in those regulations is to afford an opportunity to a party to cross-examine a witness/person whose statement is used against him/it, but this opportunity was blatantly denied to the appellant. He pointed out when the DG recorded the statements of Shri S. Swarn, Editor-in-Chief of Electronics Today and Shri Sanjay Bose, Head Corporate Affairs of UBM India, the representative of the appellant was not given opportunity to cross-examine them and to elicit information about the availability of other venues in NCR, Delhi and various other parts of the country including Mumbai, Bangalore, Hyderabad and Chennai where large number of exhibitions and fairs are held every year and domestic as well as international companies participate in those fairs and exhibitions. Shri Venugopal submitted that failure of the DG to call upon the appellant to cross-examine these two persons has caused serious prejudice to the appellant. In support of this argument, the learned Senior Counsel relied upon the judgments of the Supreme

Court in State of M.P. vs. Chintman Sadashiva Vaishampayan, AIR 1961 SC 1623, Union of India vs. T.R. Varma, AIR 1957 SC 882, State Bank of India vs. R.K. Jain and others (1972) 4 SCC 304, New India Assurance Co. Ltd. v. Nusli Neville Wadia (2008) 3 SCC 279, Girotra vs. United Commercial Bank and others 91995) Supp (3) SCC 212 and Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra (2013) 4 SCC 465.

42. Shri Venugopal then argued that the Commission committed grave error by relying upon the so-called admission in the reply submitted by the appellant on 25.03.2014 on the issue of dominant position to buttress the finding recorded by the DG but completely overlooked the grave deficiency in the investigation conducted by the DG who misdirected himself in analysing the factors enumerated in Section 19(4) to (6) of the Act. Learned Senior Counsel submitted that the question whether an enterprise is or is not in a dominant position is a mixed question of fact and law and the so-called admission made in the reply filed on behalf of the appellant cannot be treated as a substitute of the DG's and the Commission's duty to determine the issue of dominance in the context of the relevant market by taking into consideration various factors enumerated in Section 19. In support of his argument that admission of a person can only be relied on an issue of fact and not on a mixed question of fact and law, Shri Venugopal relied upon the judgment of the Supreme Court in Ram Bharose Sharma Vs. Mahant Ram (2001) 9 SCC 471. He then submitted that even if the admission contained in the reply filed on behalf of the appellant could be relied upon, then the same does nothing more than to accept that the appellant has one of the largest exhibition centre with an area of 123 acres at an important location in Delhi, but

that cannot be made basis for recording a finding that the appellant is a dominant player in the exhibition industry.

43. Shri Venugopal further argued that the findings recorded by the DG on the issues of 'relevant market', 'relevant geographic market' and 'dominant position' of the appellant and abuse thereof, which have been approved by the Commission are liable to be quashed not only on the ground that the procedure adopted by the DG in conducting investigation was flawed in more than one way, but also because the findings are perverse. Learned Senior Counsel emphasised that the DG had misdirected himself in considering the relevant market by keeping Delhi in focus with particular reference to Pragati Maidan. He submitted that while delineating the relevant market, the DG had failed to properly analyse the factors enumerated in Section 19(6) and (7). He emphasised that the DG had conducted the entire investigation by assuming that Pragati Maidan, which was centrally located in Delhi having a vast area of 123 acres and was easily accessible due to availability of means of transport, nearness of the Government and choice of the customers for organising international and national exhibitions was pivotal to the determination of the relevant market. Learned Senior Counsel pointed out that while doing so, the DG completely lost sight of the fact that there is no distinction between the venues which regularly hold exhibitions and trade fairs and other events like Ashoka Hotel, NSIC, India Habitat Centre located in Delhi, similar venues available in Noida and several venues available in different parts of the country i.e. Bangalore, Chennai, Mumbai and Hyderabad. Shri Venugopal submitted that the largeness of the area at Pragati Maidan is also not a factor which necessarily attracts the customers because seldom any fair or exhibition is organised in Pragati Maidan covering the entire area. Learned Counsel further submitted that the DG

went wholly wrong in observing that there is convenient availability of traffic for approaching Pragati Maidan. Learned counsel emphasised that as against the availability of convenient modes of transport, there is always enormous problem of traffic in reaching Pragati Maidan and the conditions of parking are chaotic whereas extremely convenient mode of transport are available at similar venues in Bangalore, Chennai, Mumbai and Hyderabad. He submitted that there are several factors which desist the customers from choosing Pragati Maidan for exhibiting their products as against the venues available in two other metros and two equally big cities where sufficient areas are available for holding fairs and exhibitions and larger facilities are available to the customers as well as visiting public and, in fact, a very large number of fairs, exhibitions etc. have been held by different types of trades and industries at those places. Learned counsel further argued that the DG and the Commission did not make any effort to gather any evidence to find out the consumer preference for one or more of the venues available in India for organisation of fairs and exhibitions and similar events. He pointed out that even though the DG had, on the basis of information contained in reply dated 13.08.2013 filed by the appellant, taken note of the availability of alternative venues at places like Bangalore, Chennai, Mumbai and Hyderabad, he did not make any effort to ascertain the extent of area, quantity and quality of the services, facilities and amenities available at those venues and preference of the consumers. Learned Senior Counsel invited the Tribunal's attention to paragraph 9.30 of the memo of appeal to show that out of 314 fairs and exhibitions organised in 2010-11 only 59 were organised in Delhi at Pragati Maidan, out of 345 fairs and exhibitions organised in 2011-12 only 77 were organised at Pragati Maidan and out of total 290 fairs and exhibitions organised in 2012-13 only 75 were organised at Pragati Maidan. He also pointed out that in 2010-11 and 2011-12 as many as

101 and 98 fairs and exhibitions were organised at Mumbai which were more than the fairs and exhibitions organised at Pragati Maidan. Shri Venugopal submitted that another grave error committed by the DG was not to examine at least some of the parties which had organised fair and exhibition in other towns to ascertain the reasons why they had chosen venues other than Pragati Maidan. He also pointed out that even UBM India and Electronics Today, whose grievance was primarily projected by Respondent No.2, had organised fairs at places other than Pragati Maidan during Commonwealth Games, Defexpo etc. and other occasion. Shri Venugopal criticised the approach adopted by the DG by pointing out that the concerned officer did not make any endeavour to consider whether the other venues available within Delhi, National Capital Region (NCR) and other States for organising fairs and exhibitions and like events were regarded by the consumers of the service as interchangeable or substitutable as contemplated in Section 2(t) of the Act. In support of this argument, Shri Venugopal relied upon Brown Shoe Company vs. United Stated 370 US 294, Little Rock Cardiology Clinic vs. Baptist Health 591 F. 3d. 591(US Court of Appeals) and A.I. Root Company vs. Computer/ Dynamics Inc. 806 F. 2d. 673. Shri Venugopal also relied upon European Commission Notice on the definition of relevant market for the purpose of Community Competition Law (paragraphs 38, 40 and 41). He submitted that if empirical data relating to consumer preferences is taken into consideration, then the Commission's approval to the finding recorded by the DG clearly become erroneous because there is absolutely no justification to treat Pragati Maidan as the relevant market for the national and international trade fairs and exhibitions. He pointed that several customers utilized the services from other similar service providers, who cater not only to national but also international trade fairs.

44. Learned counsel also criticized that the determination of Delhi as a relevant geographic market by pointing out that while deciding this aspect, the DG and the Commission completely ignored the factors enumerated in Section 19(6). Learned Counsel submitted that the DG had proceeded to decide the entire issue with a pre-determined mind that Pragati Maidan was the relevant market and the Delhi was the relevant geographic market for judging violation of various clauses of Section 4 and conducted the entire exercise for judging the substitutability with other venues in NCR and other cities in the country with a closed mind and this is the reason why he casually treated other venues as inadequate. Learned Senior Counsel pointed out that the DG was under obligation to collect information, statistics and datas from the owners of other venues and customers who availed services at those venues but he neither contacted the organisers of exhibitions, fairs and other events in places like Mumbai, Bangalore, Hyderabad and Chennai, nor he exercised powers vested in him under Section 41 of the Regulations to summon at least few of the organisers and customers participating in the exhibitions and fairs outside Delhi. Learned Counsel further pointed out that even in the statements made by the representatives of Electronics Today and UBM India there was a clear admission that India Expo Centre, Greater Noida and Codissia Trade Fair Complex Coimbatore provide amenities sufficient for holding international exhibitions, but both the DG and the Commission ignored the same and also overlooked the stark fact that during the Commonwealth Games, Defexpo and other similar events, the organisers who had booked Pragati Maidan had shifted their events to other places.

45. Shri Venugopal then argued that the findings recorded by the DG on the time gap policy or restriction are not only self-contradictory but are perverse. He extensively referred to detailed reply dated 13.08.2013 submitted by the appellant

in response to the notice issued by the DG under Section 41(2) read with Section 36(2) as also the reply dated 25.03.2014 filed after receipt of copy of the investigation report to show that the appellant had furnished rational explanation for the time gap policies framed by the Government of India and the appellant, but even after accepting that there was an economic rationale for the time gap policy, the DG did not give due weightage to reply dated 13.08.2013 and returned a finding that the appellant was guilty of abuse of dominance.

46. Shri Venugopal assailed the impugned order on an additional ground that the Commission failed to discharge the duty cast upon it under Section 19(4), (6) and (7) read with Section 26(8) and Section 27 and Regulations 20 to 46 of the Regulations. He argued that while passing the impugned order, the Commission completely forgot its duty to hold independent inquiry into the matter, merely referred to certain portions of the report of the DG and recorded its concurrence in few lines without even adverting to reply dated 25.03.2014 submitted by the appellant. Learned Senior Counsel emphasised that the DG's role of conducting investigation is altogether different than the duty of the Commission to inquire into the matter. He laid particular emphasis on the words 'where after inquiry' appearing in Section 27 and argued that it's a solemn duty of the Commission to independently examine each and every piece of evidence collected by the DG, analyse the same and then record a finding on the issue of violation of Section 4 of the Act.

47. In the end, Shri Venugopal argued that penalty imposed by the Commission is totally arbitrary and unjustified. He submitted that while imposing the penalty, the Commission completely lost sight of the fact that the appellant was a non-profit making Government Company engaged in performing an important commercial

functions on behalf of the Government and there was neither any allegation of malice qua its decision/ resolution nor any evidence was produced before the DG or the Commission to prove that the appellant had indulged in anti-competitive practices. He also pointed out that even before considering the information of Respondent No.2, the appellant had initiated the process for further amendment of the time gap and the Commission was also informed about framing of a competition friendly uniform policy for licencing of exhibition space and facilities at Pragati Maidan for future exhibitions and fairs and in fact the modified policy was circulated on 20.05.2013 and there was no complaint from any quarter and the appellant had acted in violation of its last policy, but the Commission ignored all these aspects and imposed huge penalty of Rs.6,75,03,540/-

48. Shri Mayank Bansal, learned Counsel for the Commission and Shri Muneesh Malhotra, learned counsel for Respondent No.2 supported the impugned order and argued that the findings and conclusions recorded by the Commission do not suffer from any legal infirmity requiring interference by the Tribunal. Both Shri Bansal and Shri Malhotra emphasised that the appellant clearly falls within the definition of term ‘enterprise’ under Section 2(h) because its activities are purely commercial in nature and have nothing to do with the sovereign functions of the Government or those carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. Learned Counsel also pointed out that Section 54 of the Act empowers the Government to issue notification and exempt an enterprise which performs a sovereign functions on behalf of the Central or the State Government, but no such notification has been issued. Learned counsel argued that methodology adopted by the DG for conducting investigation was in consonance with the scheme of the Act and the Regulations and he rightly found that the relevant market was the market for

providing venue in international and national trade fairs/ exhibitions in Delhi; that the appellant was in a dominant position in the relevant market and abused its position by imposing unequal time restriction on the holding of exhibitions and fairs of its own and those of the private parties. Shri Bansal pointed out that as per the appellant's own admission, appellant organise only 15% of the total exhibitions and fairs organised every year at Pragati Maidan and the remaining 85% are organised by third party organisers. He further argued that none of the venues available in Mumbai, Bangalore and Chennai can be compared with Pragati Maidan in the size, resources, availability of means of communication and accessibility and argued the alleged failure of the DG to make detailed investigation qua those venues cannot lead to a conclusion that the investigation was flawed.

49. Shri Malhotra referred to the allegations contained in the information, the time gap policy introduced by the Ministry of Commerce, the guidelines issued by the appellant in 2006 and argued that there is no rational of having different time gaps in the exhibitions and fairs organised by the appellant on the one hand and those organised by the third party and the Commission rightly held the appellant guilty of violation of Section 4(2)(a)(i), 4(2)(b)(i), 4(2)(c), 4(2)(e) read with Section 4(1). He also justified the imposition of penalty by pointing out that the appellant had adequate notice about the proposed penalty.

50. I shall first deal with the preliminary ground on which the appellant has questioned the Commission's jurisdiction to order an investigation into the allegations contained in the information filed by Respondent No.1. This objection is founded on the assertion that the appellant is not covered by the definition of the term 'enterprise' contained in Section 2(h) and that it has been performing sovereign functions of the Government.

51. For deciding the aforesaid question, it will be useful to notice the definitions of the terms ‘enterprise’, ‘person’ and ‘service’ contained in Section 2(h), (ℓ) and (u) of the Act. The same read as under :

> “2(h) “enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any 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, whether such units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, 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.
>
> Explanation.-For the purposes of this clause,—
>
> (a) “activity” includes profession or occupation;
>
> (b) “article” includes a new article and “service” includes a new service;

(c) “unit” or “division”, in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service

“(ℓ) “person” includes—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;

(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(vii) any body corporate incorporated by or under the laws of a country outside India;

(viii) a co-operative society registered under any law relating to co-operative societies;

(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding sub-clauses.

(u) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising."

52. A reading of the plain language of Section 2(h) shows that an enterprise means a person [this term has been given an inclusive definition in Section 2(***l***)] or department of the Government, who or which is or has been engaged in **any activity relating to** production, storage, supply, distribution, acquisition or control of articles or goods, or **the provision of services, of any kind**…… but does not include any activity of the Government relatable to its sovereign functions including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. By incorporating Explanation below Section 2(h), the legislature has given inclusive meanings to the words 'activity', 'article' and 'unit' or 'division'. The definition of the word 'person', which finds place in the opening part of Section 2(h) is contained in Section 2(l). It is inclusive and takes within its fold an individual, a Hindu Undivided Family, a company, a firm, an association of persons or a body of individuals, whether incorporated or not, any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the

Companies Act, 1956, or any body corporate incorporated by or under the laws of a country outside India, a registered co-operative society, a local authority and every artificial juridical person. The word 'service', which finds place in Section 2(h) has been defined in Section 2(u). It **means service of any description** which is made available to potential users and also includes the **provision of services in connection with** business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, **construction, repair**, conveying of news or information and advertising. This shows that every possible type of activities is encompassed in the inclusive part of the definition of the term 'service'.

53. If the term 'enterprise', as defined in Section 2(h) is read in conjunction with the definitions of the terms 'person' and 'service', it becomes clear that the legislature has designedly included government departments in relation to any activity relating to storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. The width of the definition of 'enterprise' becomes clear by the definition of the term 'service'. The first part of the definition of 'service' makes it clear that service of any description, which is made available to potential users, falls within the ambit of Section 2(h). The inclusive part of the definition of 'service' takes within its fold service relating to construction and repair. These two words are not confined to construction and repair of buildings only. The same would include all types of construction and repair activities including construction of roads, highways, subways, culverts and other projects etc. It is thus evident that if a department of the Government is engaged in any activity relating to construction or repair, then it will fall within the

definition of the term ‘enterprise’. I may add that there is nothing in Section 2(h) and (u) from which it can be inferred that the definitions of ‘enterprise’ and ‘service’ are confined to any particular economic or commercial activity. The only exception to the definition of the term ‘enterprise’ relates to those activities which are relatable to sovereign functions of the Government and activities carried by the four departments of the Central Government, i.e., atomic energy, defence, currency and space. It is also apposite to mention that Section 55 of the Act empowers the Government to issue notification to exempt from the application of this Act or any provision thereof any enterprise which perform a sovereign function on behalf of the Central Government or the State Government but, in its wisdom, the Central Government had not issued any notification granting exemption to the appellant. This implies that the Central Government had not considered the appellant to be an enterprise performing sovereign functions on behalf of the Central Government.

54. Although, the term ‘sovereign function’ has not been defined in the Constitution or the Act, but the same has acquired a definite meaning. It has been repeatedly held by the Courts that sovereign functions of the State/ Government are those which are inalienable. These include enactment of laws, the administration justice, the maintenance of law and order, signing of treaties, meeting punishment to those found guilty committing crime. None of these and similar functions of the State can be delegated or performed by a third party or a private agency. In contrast, any activity relating to trade, business, commerce or like is a non-sovereign function because the same can be performed by any private party/entity. To put it differently, the functions which are integral part of the Government and which are inalienable are ‘sovereign functions’ and commercial actions/trading activities and actions, which can either be delegated or performed by the third parties are alienable and are not treated as ‘sovereign functions’.

55. In Hemant Sharma and others Vs. Union of India and others, Writ Petition (Civil) No.5770/2011 decided on 05.11.2011 (MANU/DE/7438/2011), the Delhi High Court considered the question whether All India Chess Federation is an enterprise under Section 2(h) of the Act. After analysing the definition of the term 'enterprise', the Court observed :

> "…prima facie, it appears to me that respondent No. 2 is rendering services to the petitioners and to all others who are registered with it as chess players. The responsibilities of respondent No. 2 as an NSF are set out in the guidelines issued by respondent No. 1, some of which have already been referred to earlier. Admittedly, respondent No. 2 organises chess tournaments and provides technical support and expertise for conduct of such chess tournaments. That, in my prima facie view, would constitute service rendered by respondent No. 2 to the players who are registered with it. Such service is being rendered for a consideration received from the players, as is evident from the registration form, a copy whereof has been filed on record by respondent No. 2. It is also borne by respondent No. 1 for the benefit of all chess players who provides grants to respondent No. 2.
>
> 27. Respondent No. 2, prima facie, would also fall within the expression 'enterprise', as used in the Act which is very widely worded to even include a person or a department of the government rendering services "of any kind" and excludes only those activities of the government which are relatable to

sovereign functions of the government and all activities carried out by the departments of the Central Government dealing with atomic energy, currency, defence and space. Respondent No. 2 does not fall in any of the said exceptions.

31. The definition of the expression ‘enterprise' as used in the Competition Act read with the definition of "service" thereof, in my view clearly shows that the Respondent No. 2 is an enterprise which is covered by the said provisions. The allegation against Respondent No. 2 is that respondent No. 2, by virtue of its agreement with the petitioners, is seeking to control the provision of services which is causing adverse effect on competition within India, inasmuch as the chess players registered with Respondent No. 2 are not free to form another association or to organize tournaments and participate therein, without facing the consequence of losing their registration with respondent No. 2 which is the nationally recognized sports federation for the sports of chess. The allegation also is that respondent No. 2 is abusing its dominant position as the NSF.”

56. A somewhat similar view was expressed by the same High Court in Union of India vs. CCI, Writ Petition (Civil) 993/2012 decided on 23.02.2012, wherein the following observations were made :

“It is not petitioner’s contention that it is not a Department of Government. It is also not the petitioner’s contention that it is not engaged in an activity relating to provisions of services, …… Therefore, unless the petitioner’s aforesaid activity can

> be classified as "relatable to sovereign functions of the Government including all activities carried on by the departments of atomic energy, currency, defence and space", it cannot avoid being classified as an "enterprise" under section 2(h) of the Act. If it is an "enterprise" under section 2(h) of the Act, the Commission gets jurisdiction under Chapter IV of the Act."

57. The organisation/holding of trade fairs and exhibitions, national or international, at a venue owned by it are certainly commercial activities of the State in contrast to sovereign function. Such activities can easily be carried by private enterprises and, as a matter of fact, these activities are being carried by private players at several places within the National Capital Region and other parts of the country like Bangalore, Mumbai, Chennai and Hyderabad. Therefore, the objection raised by Shri Venugopal to the jurisdiction of the Commission to entertain the information filed by Respondent No. 2 and order an investigation under Section 26(1) cannot be sustained.

58. I may hasten to add that under Section 54 of the Act, the Central Government is vested with the power to issue notification to exempt from the application of the Act or any provision thereof for such period, as it may specify in the notification, any enterprise which performs a sovereign functions on behalf of the Central Government or a State Government, but no such notification has so far been issued in respect of the appellant.

59. I may now notice the judgements on which reliance has been placed by the learned Senior Counsel for the appellant. In Bangalore Water Supply and Sewerage Board vs. A Rajappa and others (supra), the majority judgment was

delivered by Krishna Iyer, J. with whom Bhagwati and Desai, JJ. agreed in entirety. He referred to several previous decisions including the judgments in D.N. Banerji vs. P.K. Mukherjee, AIR 1953 SC 58 and Corporation of City of Nagpur v. Its Employees, AIR 1960 SC 675 and observed :

> "The Court proceeded to carve out the negative factors which, notwithstanding the literal width of the language of the definition, must, for other compelling reasons, be kept out of the scope of industry. For instance, sovereign functions of the State cannot be included although what such functions are has been aptly termed "the primary and inalienable functions of a constitutional government".
>
> (Emphasis supplied)

The aforesaid decision does not contain any discussion on what are and what are not sovereign functions of the State. Therefore, one line observation cannot be relied upon for recording a finding that the appellant is performing a sovereign governmental function.

60. In Bakhtawar Singh Bal Kishan Vs. Union of India and others (supra), the Supreme Court affirmed the judgment of the Division Bench of the Delhi High Court, which held that it did not have jurisdiction to entertain a petition filed for challenging an award passed in relation to a contract entered into at Bareilly in U.P. and observed:

> "The Supreme Court has drawn a distinction between the commercial activities of the State on one hand and the discharge of the sovereign functions of the State on the other.

> The decision in that matter has been rendered in the context of business activity carried on by the Union of India namely running of the Railways and not in the context of a sovereign activity carried on by the Union of India."
>
> (Emphasis supplied)

61. In Assam Small Scale Industries Development Corp. Ltd. vs. J.D. Pharmaceuticals (supra) the Supreme Court while interpreting the provisions of the Assam Preferential Stores Purchase Act, 1989 observed – "it was primarily enacted so as to enable the State to effectively perform a sovereign function, namely, health care".

62. In State of U.P. Vs. Jai Bir Singh (supra), a Constitution Bench made a reference to the larger Bench to reconsider the judgment of the earlier Constitution Bench in Bangalore Water Supply and Sewerage Board vs. A Rajappa, but did not laid down any preposition of law.

63. In State of Bihar and others Vs. Project Uchcha Vidya, Sikshak Sangh and others (supra), the Court made one line observation that education is a sovereign function of the State but there is no discussion on the issue.

64. In the above noted judgements, there is no discussion about the nature of sovereign functions of the State. Although, in two of the judgements, the Supreme Court did treat 'education' and 'healthcare' as sovereign functions of the State, but neither of these judgments lay down that the commercial or trading activities carried on by the State or its agencies/ instrumentalities are sovereign functions of

the Government. The reason for this is very simple because such activities can always be undertaken and carried out by private parties. Activities like Railways, Air services would also fall in that category. I may also observe that till three decades ago healthcare and education were treated as exclusive functions of the State and the Courts had treated them as sovereign functions of the State, but the scenario has undergone a complete change in the last three decades and even though education and healthcare continues to be primary duty of the State, a large number of private players have come into both the fields. Thousands of schools, colleges and hospitals have been established and are being operated throughout the country by private entities and now it is not possible to say that these are inalienable functions of the State. In any case, the activities relating to organisation of exhibitions, trade fairs and like events at Pragati Maidan, which can also be done by third parties, cannot be regarded as sovereign functions of the State. The holding of fairs, exhibitions etc. are intrinsically connected with trade and commerce and have no nexus with the sovereign functions of the State.

65. The next issue which merits consideration is whether the DG and the Commission can be said to have acted in violation of the principles of natural justice because the appellant's representative was not given opportunity to cross-examine Shri S. Swarn, Editor-in-Chief of Electronics Today and Shri Sanjay Bose, Head Corporate Affairs of UBM India. The argument of the learned Senior Counsel is that if the appellant had been given opportunity to cross-examine these two persons, then it could have elicited information about the availability of other venues in NCR, Delhi and various other parts of the country like Mumbai, Bangalore etc. Though appears attractive, this argument lacks merit and deserves to be rejected because during the investigation conducted by the DG, the appellant

had, at no point of time, made any oral or written request that its representative should be given an opportunity to cross-examine the persons who may summon by the DG for recording their statements. Even if one is to assume that the appellant did not have any idea about the DG's decision to summon some persons for recording statements and they did not know that Shri S. Swarn and Shri Sanjay Bose have been summoned by the DG, a grievance to that effect could have surely been made in the reply filed after receipt of the investigation report. However, the fact of the matter is that the appellant neither made any grievance about the denial of opportunity to cross-examine Shri S. Swarn and Shri Sanjay Bose nor it claimed that denial of opportunity to cross-examine these two persons had caused prejudice to its case.

66. It is true that an adjudicatory authority i.e. the Commission is required to act in consonance with the principles of natural justice but it is also one of the well-recognised principle that a party which seeks compliance of the rules of natural justice also has the right to waive that rights. The right to seek cross-examination of a person whose statement is sought to be relied on against him is personal to the person concerned and he has the absolute discretion to waive that right. This is precisely what the appellant had done in the present case by not raising any objection in reply dated 25.03.2014 about denial of the opportunity to cross-examine by the DG. Not only this, the appellant did not make separate application before the Commission that two persons examined by the DG should be summoned for cross-examination. In its power to hold inquiry under the provisions of the Act and the Regulations, the Commission is definitely possessed with power and it could have accepted the request, if any, made by the appellant. However, the fact of the matter is that no such request was ever made. Therefore, the logical conclusion which can be drawn from this conduct of the appellant is that its

grievance about the denial of opportunity to cross-examine Shri S. Swarn and Shri Sanjay Bose is illusory. The preposition laid down by the Supreme Court in State of M.P. vs. Chintman Sadashiva Vaishampayan and other judgements on which reliance has been placed by Shri Venugopal are no help to the appellant's case, because as mentioned above, it did not make any grievance on the issue of denial of opportunity to cross-examine Shri S. Swarn and Shri Sanjay Bose. I may also add that the statements of Shri S. Swarn and Shri Sanjay Bose does not contain anything, which may implicate the appellant in the matter of violation of various clauses of Section 4 of the Act and neither the DG nor the Commission have relied upon the same for recording a finding against the appellant.

67. The next and more important question which requires consideration is whether the investigation/inquiry conducted by the DG and the Commission was consistent with the relevant statutory provisions and the DG rightly held the relevant market as 'providing venue in International and National trade fairs/ exhibitions in Delhi'.

68. Sections 4, 19, 26, 27, 36(1) of the Act and Regulations 18 to 21 of the Regulations read as under :

> "Sec. 4. Abuse of dominant position.—(1) No enterprise or group shall abuse its dominant position.
>
> (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group],---
>
> (a) directly or indirectly, imposes unfair or discriminatory-
>
> (i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts--

(i) production of goods or provision of services or market therefore; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

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

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.--For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to--

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5."

"Sec.19. Inquiry into certain agreements and dominant position of enterprise.--(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on--

(a) receipt of any information, in such manner and, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:--

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section4, have due regard to all or any of the following factors, namely:--

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:--

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:--

(a) physical characteristics or end-use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers;

(f) classification of industrial products.”

“Sec.26. Procedure for inquiry under section 19. – (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director-General to cause an investigation to be made in to the matter:

Provided that if the subject-matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director-General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in subsection (3) to the parties concerned:

Provided that in case the investigation is caused to be made based on a reference received from the Central Government or the State government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director-General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State government or the statutory authority or the parties concerned, as the case may be, on such report of the Director-General.

(6) If, after consideration of the objections or suggestions referred to in subsection (5), if any, the Commission agrees with the recommendation of the Director-General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in subsection (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director-General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director-General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of the Act."

"Sec. 27. Orders by Commission after inquiry into agreements or abuse of dominant position.- Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section or section 4, as the case may be, it may pass all or any of the following orders, namely:-

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times

of the amount of profits made out of such agreement by the cartel or ten per cent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher;

(c) award compensation to parties in accordance with the provisions contained in section 34;

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) recommend to the Central Government for the division of an enterprise enjoying dominant position;

(g) pass such other order as it may deem fit."

[Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.]"

"Sec.36. Power of Commission to regulate its own procedure.—(1) In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure."

Regulations 18, 19, 20 and 21:

"18. Issue of direction to cause investigation on prima facie case – (1) Where the Commission is of the opinion that a prima facie case exists, the Secretary shall convey the directions of the Commission 1[within seven days,] to the Director-General to investigate the matter.

(2) A direction of investigation to the Director-General shall be deemed to be the commencement of an inquiry under section 26 of the Act."

"19. Communication of order when no prima facie case found.– If the Commission is of the opinion that there exists no prima facie case, the Secretary shall send a copy of the order of the Commission regarding closure of the matter forthwith to the Central Government or the State Government or the Statutory Authority or the parties concerned, as the case may be, as provided in sub-section (2) of section 26 of the Act."

"20. Investigation by Director-General. – (1) The Secretary shall, while conveying the directions of the Commission under regulation

18, send a copy of the information or reference, as the case may be, with all other documents or materials or affidavits or statements which have been filed either along with the said information or reference or at the time of preliminary conference, to the Director-General.

(2) The Commission shall direct the Director-General to submit a report within such time as may be specified by the Commission which ordinarily shall not exceed sixty days from the date of receipt of the directions of the Commission.

(3) The Commission may, on an application made by the Director-General, giving sufficient reasons, extend the time for submission of the report by such period as it may consider reasonable.

(4) The report of the Director-General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation.

Provided that when considered necessary, the Director General may, for maintaining confidentiality, submit his report in two parts. One of the parts shall contain the documents to which access to the parties may be accorded and another part shall contain confidential and commercially sensitive information and documents to which access may be partially or totally restricted.

(5) Ten copies of the report of the Director-General, along with a soft copy in document format, shall be forwarded to the Secretary within the time specified by the Commission:

Provided that the Secretary may ask for more copies of the report as and when required.

(6) If the Commission, on consideration of the report, is of the opinion that further investigation is called for, it may direct the Director-General to make further investigation and submit a supplementary report on specific issues within such time as may be specified by the Commission but not later than forty-five days.

"21. Procedure for inquiry under section 26 of the Act. – (1) On receipt of the report of the Director –General, the Secretary shall place the said report before the Commission [within seven days,] for further orders and, in accordance with the direction of the Commission, forward [either a hard or a soft copy (in electronic form)] [of non confidential version] thereof to the Central Government or the State Government or the statutory authority, or the parties concerned, as the case may be.

(2) If the report of the Director-General finds no contravention of the provisions of the Act, the Secretary shall [within seven days,] convey the directions of the Commission for inviting objections or suggestions [to be filed within fifteen days] from the Central Government or the State Government or the statutory authority, or from the parties concerned, as the case may be on such report of the Director-General.

(3) If the Commission orders closure of the matter on consideration of the objections or suggestions, if any, referred to in sub-regulation (2), an agrees with the findings of the Director-General, the Secretary shall [within seven days,] convey the orders of the Commission to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(4) If the Commission, on consideration of the objections or suggestions, referred to in sub-regulation (2), directs further investigations in the matter by the Director-General or further inquiries in the matter to be made by an officer of the Commission so authorized by it, the Secretary shall [within seven days,] convey the directions of the Commission to the Central Government or the officer so authorized, as the case may be.

(5) On an application made by the officer authorized by the Commission justifying the production of specified books or other documents, as may be required to make further inquiries under sub-regulation (4), the Commission may direct any person to produce such specified books or other documents relating to any trade carried out by such person or enterprise, as per the provisions of sub – section (4) of section 36 of the Act.

Explanation. - For the purpose of this sub-regulation, the word “officer” shall include the experts and professionals mentioned under sub-section (3) of section 17 or sub-section (3) of section 17 or sub-section (3) of section 36 of the Act.

(6) On receipt of the report of the Director-General on further investigation or report of the authorized officer on further inquiries, as the case may be, the Secretary shall [with the approval of the Chairperson, fix the meeting of the Commission within seven days for consideration thereof].

(7) If the report of the Director-General mentioned under sub-regulation (1) finds contravention of any of the provisions of the Act, the Secretary shall obtain the orders of the Commission for inviting objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(8) On consideration of the objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, or the report of further investigation or further inquiries, as the case may be, if the Commission is of the opinion that further inquiry is called for, the Secretary shall fix the meeting of the Commission for consideration thereof, after issue of notice as per regulation 22, to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(9) The Secretary shall keep the Director-General informed of the dates of the meetings of the Commission for inquiry under sub-section (7) or sub-section (8) of section 26 of the Act for appearing in person or through any of his officers in accordance with the provisions of section 35 of the Act.”

69. Some of the above reproduced provisions were considered by a three judge Bench of the Supreme Court in Competition Commission of India Vs. Steel Authority of India Limited (2010) 10 SCC 744. In that case, the Commission had challenged the maintainability of an appeal filed by the respondent against an order passed under Section 26(1) of the Act. The Supreme Court analysed the relevant provisions of the Act and the Regulations and laid down several propositions including the following :

> "78. Cumulative reading of these provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion.
>
> 97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that

> the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned."

70. The appellant has criticised the approach adopted by the DG and the exercise undertaken by him for determination of the relevant market by relying upon the provisions of Section 2(r), (s) and (t) read with Section 19(6) and (7) of

the Act. He submitted that the concerned officer had proceeded with a pre-determined mind that Pragati Maidan was the only venue available in Delhi for organisation of international and national trade fairs/exhibitions. A careful reading of paragraph 10 of the DG's report shows that he treated Pragati Maidan which was earlier used by the three wings of Ministry of Commerce and then by the Trade Fair Authority of India and lastly by the appellant for organisation of international and national trade fairs and exhibitions as the target for deciding the issue of relevant market. He was also obsessed with the idea that the Delhi is the venue for holding international trade fairs and exhibitions and made no attempt to compare it with the other venues available not only in National Capita Region but places like Bangalore, Chennai, Mumbai and Hyderabad. He took into consideration the large size of Pragati Maidan, factors like better transport system, connectivity to airports, railway stations, Inter State Bus Terminus, centralised locations, hotels, location of Central and State Ministries and observed that such fairs/exhibitions would usually require liaison for an approval from the Government Authority and, therefore, as the location of a venue offers added advantage in these respects and being capital of the country and it attracts people from all over the world. Unfortunately, while undertaking this exercise, the DG did not bother to find out as to how much of the total area of Pragati Maidan is used for holding international/national trade fairs/exhibitions, how much is the area available for holding exhibitions in other parts of NCR and other places like Mumbai, Bangalore, Chennai, Hyderabad etc. He also did not made any attempt to find out the nature of transport facilities available for the 4 venues at Mumbai, 2 venues at Hyderabad, 2 venues at Bangalore, 3 venues at Chennai/ Coimbatore, Gurgaon and 2 venues in NCR. He did not issue notice under Section 41(2) read with Section 36(2) to any of the owners/persons controlling these venues, nor he tried to ascertain the

nature of the trade fairs/exhibitions organised on these venues between 1971 and 2013. On internal page 22 of his report, the DG has reproduced the table from reply dated 13.08.2013 filed by the appellant in response to the notice issued under Section 41(2) read with Section 36(2) of the Act. Columns 3, 6, 7, 8 and 9 of this table contains the word 'N.A.'. In the second column these letters have been used against four exhibition centres (1 at Gurgaon, 1 at Hyderabad and 2 at Bombay. In Column 4, the letters N.A. have been used against five centres (2 at Bombay, 1 at Tirupur, Coimbatore (T.N.) and 2 at Delhi. In Column 5 the letters N.A. have been used against two centres at Delhi. In Column 6, which relates to total areas in acreage, letters N.A. has been used against 7 centres (1 at Bangalore, 1 at Chennai, 1 at Hyderabad, 4 at Bombay, 1 in NCR and 1 at Tirupur, Coimbatore (T.N.)). In Column 7, which relates to gross indoor size (in sq. mtrs.), the letters N.A. has been used against four centres (1 at Gurgaon, 1 at Hyderabad and 2 at Delhi). In Column 8, which relates to open area (in sq. mtrs.), the letters N.A. has been used against 15 centres (1 at Bangalore, 1 at Chennai, 1 at Coimbatore, 1 at Gurgaon, 2 at Hyderabad, 4 at Bombay, 2 in NCR, 1 at Tirupur and 2 at Delhi). In the last column, which relates to number of halls, letters N.A. has been used against 7 centres at Coimbatore, Gurgaon, Hyderabad, World Trade Centre Mumbai, Dhirubhai Ambani International Convention and Exhibition Centre Mumbai and two at Delhi. The use of words 'NA' signifies 'Not Available'. It is quite possible that the appellant may not have been able to collect complete data regarding various exhibition centres operating in different parts of the country, it was the solemn duty of the DG to have conducted a comprehensive investigation to ascertain the actual position. Unfortunately, he did not even bother to find out what is the total area of various centres available in the country other than Delhi, what was the total gross indoor area, what the open area, what were the numbers

of halls. Rather, he proceeded on the assumption that being the largest complex in Delhi, which is capital of the country, Pragati Maidan is the only venue which can be treated as the relevant market. It is not as if no data or statistics could be made available about the total area of the Bangalore International Exhibition Centre, Chennai Trade Centre, Hyderabad Trade Fair Centre, Godrej Works (Mumbai), Nehru Centre (Mumbai) and India Fair Complex, Tirupur, Coimbatore (T.N.). It is also not possible to believe that the DG was not in a position to find out the gross indoor size of Exhibition Cum Convention Centre at Gurgaon, Hyderabad International Trade Expositions Ltd., Bombay Exhibition Centre, Goregaon and he could not find out the total open area of Trade Centre at Bangalore, Coddissia Trade Fair Complex, Coimbatore, Hyderabad International Trade Expositions Ltd. and Hyderabad Trade Fair Centre, Bombay Exhibition Centre, Goregaon, Nehru Centre, World Trade Centre at Mumbai, India Expo Centre Expo XXI (NCR), India Exposition Centre and Mart Ltd. (NCR), India Fair Complex [Tirupur, Coimbatore (T.N.)] and other places mentioned in the chart. Respondent No.1 has not offered any explanation as to why the DG had, despite the availability of enormous power under Regulations 41 and 42 of the Regulations make any effort to collect information on the vital factors mentioned in the chart. The reason for this appears to be the obsession of the DG with Pragati Maidan having a large area and the fact that several fairs and exhibitions, national and international, are held every year at that venue. I am sure that if the DG had taken little trouble to send his representative to collect complete information about the 4 venues available at Mumbai, 3 venues available at Chennai, 2 venues available at Bengalore and 2 venues available at Hyderabad, then he would have been in a position to objectively make a comparative analysis of the availability of amenities and facilities at those venues as compared to Pragati Maidan, convenience of the

customers, visiting public at those venues, the traffic problems, etc. Total failure on the part of the DG to even make an attempt to find out these details and particular coupled with its failure to examine any customer, who may have participated in the trade fairs/ exhibitions organised at the places mentioned in the table and his obsession with Pragati Maidan and Delhi lends credibility of the argument of the learned Senior Counsel of the appellant that the DG had not conducted proper investigation with reference to the relevant factors for the purpose of determination of the relevant market. It also leads to an irresistible inference that the exercise undertaken for determination of relevant market was laconic in several respects. In fact, it is a case of complete failure of the DG to perform the duty vested upon him. Unfortunately, the Commission too has decided the relevant market with a pre-conceived notion that Delhi, being the capital of the country and having largest physical area, Pragati Maidan can only be treated as the relevant market as a venue for international/national trade fairs/exhibitions in Delhi.

71. What is most surprising is that neither the DG nor the Commission made any attempt to ascertain the availability of various amenities and conveniences at places available in other important cities like Bangalore, Mumbai, Chennai and Hyderabad. They did not obtain the empirical data prepared by various Government Agencies on the traffic problems at the locations where trade fair/exhibition centres are being organised, at least, in the two metropolitan cities and equally big cities like Bangalore and Hyderabad. They did not examine even a single customer, who may have availed the opportunity to participate in the trade fairs and exhibitions organised at Bangalore, Chennai, Mumbai and Hyderabad. All this supports the argument of the learned Senior Counsel that while deciding the issue of relevant market, the DG and the Commission were obsessed with the

idea that Delhi and Delhi alone can be the relevant market and venue for international / national trade fairs/exhibitions and their finding is vitiated by paten error.

72. The determination of relevant geographic market by the DG is likewise flawed. At the cost of repetition, I would like to observe that the concerned officer had proceeded to determine the relevant geographic market with the obsession that Delhi being the capital of the country with easy accessibility to the parties proposing international / national trade fairs and exhibitions to Central and State Governments Agencies as the determining factor relevant for the determination of relevant geographic market. In my view, Shri Venugopal is right in his contention that if the DG had made a comparative study of various amenities and facilities available at Delhi and different places with reference to specific parameters, then alone Delhi could not have been described as relevant geographic market and taking note of the venues available in various parts of the country, India and India alone can be treated as relevant geographic market for organisation of fairs and exhibitions.

73. At this stage, it will be useful to notice the guidelines laid down by the European Commission for determining the ‘relevant market’, ‘relevant geographic market’, their concept and objective of Community Competition Policy and the manner in which the evidence should be gathered. Though not binding on the Commission and the courts in this country, these guidelines do help in understanding the approach required to be adopted for determination of the ‘relevant market’ and ‘relevant geographic market’. The relevant portions of the EU Note are extracted below :

“2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of 'relevant market` is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market` to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By

rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market` is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO

with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets` are defined as follows:

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use`.

8. 'Relevant geographic markets` are defined as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area`.

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 an 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

Concept of relevant market and objectives of Community competition policy

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need

to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

Basic principles for market definition

Competitive constraints

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant

market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

14. The competitive constraints arising from supply side substitutability other then those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

Demand substitution

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely

reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power,

where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of

sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general,

and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. it is often the case that the inclusion of product B would be enough to remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

Geographic dimension

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to

focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an

examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

The process of gathering evidence

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might

also request additional information to the undertakings involved.

34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.

40. Views of customers and competitors. The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it requires to reach a conclusion on the scope of the market. Reasoned answers of

customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account when they are sufficiently backed by factual evidence.

41. Consumer preferences. In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. Marketing studies that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission's delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out ad hoc by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17

will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. Barriers and costs associated with switching demand to potential substitutes. There are a number of barriers and costs that might prevent the Commission from considering two prima facie demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

46. Basic demand characteristics. The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local

presence have a strong potential to limit the geographic scope of competition.

47. Views of customers and competitors. Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. Current geographic pattern of purchases. An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide."

74. In Dan A. MORGENSTERN, MD., **Vs.** Charles S. WILSON, M.D. and others, the United States Court of Appeals, Eighth Circuit, considered the question whether professional corporation formed in Lincoln and Nebraska was bound to provide administrative, clinical and marketing services to its members and against group cardiology practice and cardio-surgical group practice which constituted the members of professional corporation. It was alleged that refusal of the corporation was contrary to the Sherman Antitrust Act. The United States District Court for the

District of Nebraska granted injuncting relief to cardiac surgeon. The Court of Appeals reversed the order of the District Court. The relevant paragraphs of the same read as under :

> "FN2. Our resolution of the issue of the relevant geographic market has made it unnecessary for us to reach all of the issues presented on appeal. Defendants raise several challenges to the theories of liability upon which the present case was submitted to the jury. Defendants first argue that, as a matter of law, a medical referral from one specialist to another is an act of medical judgment and cannot support antitrust liability. Defendants also argue that an actual monopolization claim must be predicated on the market domination of a single defendant or single economic entity and cannot be established by combining the market power of multiple defendants. There is a split in authority on this question. See generally Julian O. von Kalinowski, Antitrust Laws and Trade Regulation Secs. 17.01, 19.06 (1993); II E. Kinter, Federal Antitrust Law, Sec. 16.2, at 482 (1980) (indicating that several firms acting in concert can be guilty of actual monopolization). Defendants further contend that, if this Court recognizes such a joint monopolization claim, it should treat such a claim as a conspiracy to monopolize claim, and, thus, require an agreement among defendants to commit an anti-competitive act. The jury in the present case was not instructed regarding the finding of an agreement. We are cognizant that no circuit has squarely addressed these questions. Even were we to rule

in Morgenstern's favor on these issues, defendants would still be entitled to judgment in their favor. We consequently leave resolution of these issues for an appropriate case.

[5][6] To establish that defendants have the market power required for monopolization liability, Morgenstern had to establish that defendants have "a dominant market share in a well-defined relevant market." Flegel v. Christian Hosp., Northeast-Northwest, 4 F.3d 682, 689 (8th Cir. 1993) (quoting Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 318 (8th Cir. 1986)). The "relevant market" is defined in terms of both product market (here, adult cardiac surgery) and geographic market. An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market. Alexander v. National Farmers Organization, 687 F.2d 1173, 1181 (8th Cir. 1982) (citing Julian O. von Kalinowski, Antitrust Laws and Trade Regulation, Secs. 8.02c, 9.01 (1982) (collecting cases)), cert. denied, 461 U.S. 937, 103 S. Ct. 2108, 77 L. Ed. 2d 313 (1983).

[7][8] The geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition. Baxley-DeLamar Monuments, Inc., v. American Cemetery Ass'n, 938 F.2d 846, 850 (8th Cir. 1991). The burden of establishing that a specified area constitutes a relevant geographic market in a particular case rests with the plaintiff. United States v. Empire Gas Corp., 537

F.2d 296 (8th Cir. 1976), cert. denied, 429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977).

[9][10] In the present case, Morgenstern proposed a relevant market of patients of adult cardiac surgery to include Lincoln and twenty-six surrounding Nebraska counties extending in certain directions over 200 miles beyond Lincoln. However, Morgenstern's relevant geographic market excluded the heart programs in Omaha and all other regional and national heart programs. Defendants' relevant geographic market included, at a minimum, Omaha. The question before this Court is whether Morgenstern provided sufficient evidence from which the jury could reasonably have found that defendants possessed market power within the relevant geographic market.

FN3. Within the relevant geographic market found by the jury (Lincoln and twenty-six surrounding counties, but not including Omaha), defendants possessed close to eighty percent of the market share of the patients. An eighty percent market share is within the permissible range from which an inference of monopoly power can be drawn. If, as defendants contend, the relevant geographic market includes Omaha, then defendants have only a thirty percent market share. As a matter of law, absent other relevant factors, a thirty percent market share will not prove the existence of monopoly power. See, e.g., Fineman v. Armstrong World Indus., Inc., 980 F.2d 171,

201 (3d Cir.1992) (fifty-five percent market share is insufficient to constitute monopoly power), cert. denied, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed.2d 677 (1993); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489 (5th Cir.1984) (ninety percent is enough, sixty percent is not likely to suffice, and thirty-three is insufficient) (citations omitted); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir.1981) (thirty percent market share insufficient), cert. denied, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir.1976) (forty-seven to fifty percent share in liquid propane gas market held insufficient), cert. denied, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977).

[11] A close examination of the record reveals that Morgenstern's evidence regarding the relevant geographic market failed to address a critical legal question: where could consumers of the product (adult cardiac surgery) practicably turn for alternative sources of the product. See Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 331-32, 81 S. Ct. 623, 630, 5 L. Ed. 2d 580 (1961) (defining the relevant geographic area as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies"). The evidence provided by Morgenstern to support his geographic market definition consisted primarily of expert testimony

regarding the residences of the cardiac surgery patients in the Lincoln and Omaha heart surgery programs, and the Nebraska counties that supplied the largest number of patients to each program. Morgenstern's proposed geographic market was also based upon evidence that cardiologists in Lincoln seldom refer their patients to cardiac surgeons in Omaha. Joint Appendix Vol. IV at 1692, 1791. Morgenstern's expert focused upon where Lincoln and Omaha residents actually went, as opposed to where they could practicably go, for their cardiac surgery services, and specifically presented insufficient evidence regarding whether or not CVTS patients could practicably turn for alternative sources of the product to Omaha or other more distant heart programs. Morgenstern's expert concluded that Lincoln and Omaha must be in different geographic markets "[b]ecause patients overwhelmingly went to the closest hospital." Brief for Appellee at 20. Morgenstern further provided no evidence that patients viewed Lincoln as a market separate from Omaha, located only fifty-eight miles from Lincoln.

The evidence produced in the present case falls far short of establishing Lincoln and surrounding counties, to the exclusion of Omaha, as the relevant geographic market. By contrast, the record shows that Omaha should have been included in the relevant geographic market definition. The Supreme Court has recognized the importance of distance and its counterpart convenience in determining the relevant

geographic market. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 358, 83 S. Ct. 1715, 1738-39, 10 L. Ed. 2d 915 (1963). Defendants' evidence showed that Lincoln residents need travel only fifty-eight miles by main highway to receive cardiac surgical care in Omaha. Morgenstern himself traveled from Lincoln to Omaha on more than thirty occasions in a single year to assist in performing cardiac surgery. The defendants also provided testimony from health care providers in various professions throughout Nebraska who uniformly confirmed the existence of vigorous competition between Lincoln and Omaha. Lincoln cardiologists and cardiac surgeons testified to strong competition between them and the six Omaha heart programs. Joint Appendix Vol. II at 810-18, 904, 979-80; Vol. III at 1174-76, 1215-17, 1466-68. Omaha cardiac surgeons and hospital administrators testified to strong competition from CVTS and the cardiologists of CCPC. Moreover, the evidence showed that, throughout Nebraska, primary care physicians considered both Lincoln and Omaha as feasible sources of healthcare when making recommendations to their patients in need of cardiac surgery services. Joint Appendix Vol. II at 766-72, 775, 935; Vol. III at 1079-83, 1227-28. In Lincoln itself, physicians would refer patients to Omaha if, in their medical judgment, better treatment was available there. Joint Appendix Vol. II at 777-80. Defendants' expert provided further corroborative evidence consisting of three distinct economic studies designed to determine reasonable, practicable

> substitutes for Lincoln's residents in need of cardiac surgery services. Each analysis concluded that the relevant geographic market consisted of, at a minimum, Lincoln and Omaha.
>
> [Emphasis supplied]

75. Reverting to the issue of time gap policy, I would like to observe that the finding recorded by the DG which the Commission has recorded its agreement albeit without even going through the record including detailed reply dated 13.08.2013 filed by the appellant in response to the notice issued by the DG and reply dated 25.03.2014 filed by it after receipt of the investigation report is *ex-facie* erroneous. In the first place, it needs to be emphasised that there was absolutely no occasion much less justification for the DG to have devoted much of his time on the policy introduced by the Government of India in 1999 and by the appellant in 2006 because the appellant had made a statement before the Commission on 12.03.2013 that a competition-friendly/uniform policy for licensing exhibition space and facilities at Pragati Maidan for future exhibitions/fairs is being framed and anomaly in the existing policy has been rectified. Not only this, Senior Manager of the appellant, Shri S. Bahadur, filed an unequivocal undertaking in that regard and assured that the current policy will be modified within three months to ensure uniformity in organising exhibitions/fairs at Pragati Maidan and, in fact, the revised policy was issued vide circular dated 20.05.2013. Therefore, it cannot be said that the Commission was not aware of the fact that the appellant has taken in-principle decision to revise the time gap policy and yet it issued an order under Section 26(1). So far as the DG is concerned, he was very much aware of the modification made in the policy and knew that from 20.05.2013, the time gap between an ITPO Fair and 3rd party fair of similar profile had been reduced to 3 days before and after except that no fair of similar product profile could be held concurrently by the third

party organisers. Unfortunately, both the DG and the Commission completely overlooked the amendments made in the policy and returned a finding that the appellant had acted in violation of various sub-section of Section 4 and their sub-clauses.

76. In the investigation report, the DG agreed that there was economic rationale for time gap policy, but still held it to be arbitrary. The Commission did not even bother to direct its attention to the economic rationale of the time gap policy supplied by the appellant in its replies dated 13.08.2013 and 25.03.2014. It completely ignored the salient points in the two policies filed by the appellant, which are being extracted below at the cost of repetition :

(i) ITPO and its predecessors had been created/incorporated for organisation of fairs/exhibitions and Pragati Maidan, which is owned by the Central Government, was placed at their disposal, was given to them for achieving the main objections set-out in the Memorandum of Association i.e. promotion, organisation and participation in Industrial Trade Fairs and Exhibitions in India and abroad and to take all measures incidental thereto for boosting up the country's trade; to publicize in India and abroad International Trade Fairs and Exhibitions to be held in India and mobilize the foreign participation to promote exports and to explore new markets for traditional items of exports and develop exports of new items with a view to maintaining, diversifying and expanding the export trade and to support and assist Small and Medium Enterprises to access markets both in India and abroad and this was the reason why in the initial years, Pragati Maidan was exclusively used by the Trade Fair Authority of India and then by the appellant for organisation of trade fairs and exhibitions. No-one could

possibly take any exception to the utilisation of the Government asset i.e. Pragati Maidan, which was given to the Indian Trade Fair Authority of India on nominal rent. Of course, vide indenture dated 07.03.2011, perpetual lease was granted in the appellant's favour by the President of India acting through the Land and Development Officer, New Delhi, subject to payment of Rs. 2,40,00,000/- and a specified amount on annual basis. In paragraph (f) of reply dated 13.08.2013, the appellant had given detailed reasons for difference in the applicable terms and conditions and rates, charges fees etc. for booking of Pragati Maidan venue by the appellant viz-a-viz private players. Although, it may appears repetitive, I deem it necessary to extract that portion of the reply, which is as under :

> "f. Whether there are any differences in applicable terms, conditions and rates, charges, fees etc. for booking of Pragati Maidan venue by ITPO itself vis-a-vis that for other players? If yes, please highlight the same along with rationale.
>
> As stated above, ITPO is a Govt. of India Enterprises entrusted with the responsibility of promoting external and domestic trade of India in a cost effective manner by organising and participating in international trade fairs in India and abroad. The main focus of ITPO is to support and assist small and medium _____ (not legible) both in India and abroad. ITPO's events cover a wide variety of sectors such as handlooms, handicrafts, textiles, manufacturing, processed food,

publishing and printing industry, agriculture, leather goods. Thus, ITPO organises events in Pragati Maidan with an objective of trade promotion and as such the cost of participation in ITPO's events in Pragati Maidan is required to be kept at a reasonable level as compared to the events organised by third party organisers.

Pragati Maidan, as a venue for organising trade fairs, has been hosting trade fairs/ exhibitions for more than four decades now. Some of the major exhibitions organised in the past are ASIA 72, Agri Expo 77, National Small Industries 778 etc. Thus Pragati Maidan has been hosting trade fairs and exhibitions on behalf of Govt. of India since the time when Private players/ organisers in this industry were almost non-existent. Thereafter in the later years, private organisers entered in the business of organising trade fairs and exhibitions in Pragati Maidan with a limited objective of commercial benefit. Thus, a third party event in Pragati Maidan is primarily organised by companies/ organisations with profit-motive and accordingly the cost of participation is usually kept high by them.

ITPO generally targets small and medium enterprises to provide them a platform to exhibit their products at a reasonable cost. Further, in the events organised by ITPO, facilities in the form of discounted rentals, complimentary space publicity support are provided to the organisations like State Govt/ Union Territories, Central Leather Research Institute, NSIC CAPART, MSME, APEDA, training Institutes etc. which may not be possible by a private organiser.

Keeping the above in view, ITPO, being owner of Pragati Maidan, does not invoice itself for using its facilities for trade promotion activities. Thus, the terms and conditions to the extent of space rent of halls are not accounted for while working out the cost of organising an event by ITPO."

(ii) In paragraph 7 of that reply, the appellant explained the rationale of the time gap policy and in paragraph 8, it highlighted the difference in the provisions applicable to the appellant's events and those of the third parties in relation to the similar product profile. These paragraphs are also reproduced below:

"7. Explain the rationale for the time gap restrictions between events.

Guidelines on time gap restrictions between two events of similar product profile were introduced by Ministry of

Commerce vide guidelines issued through Letter No.10(7)/95-TP (Vol II) dated 21.9.1999. It conveyed the need for such framework as “It has been observed that a large number of organisers are coming forward to organise events in India and abroad and at times frequent exhibitions convey confusing signals to the participants and to business visitors from India and abroad confusing signals to the participants and to business visitors from India and abroad when events on similar themes overlap. Lack of appropriate spacing of events also _____ (line not legible) for the organiser and the nation. Further, there exists the need to have transparency in granting approvals by the Designated Authority. Thus the need was felt to review the existing framework and a Committee was constituted by the Ministry of Commerce for the same”. It further mentions that “Any Indian entity wishing to organise any International trade Fairs/ exhibitions in India or abroad would be required to obtain a certificate from an officer of Government of India in the Ministry of Commerce not below the rank of Under Secretary or an office of India Trade Promotion Organisation duly authorised by its Chairman on this behalf to the effect that such exhibition, fairs or as the case may, similar show or display, has been approved or sponsored by the Government of India in the Ministry of Commerce or the India Trade Promotion

Organisation and the same is being held in public interest (Export – Import Policy 1997-2002, Handbook of Procedures 11, para 11.71)". (Annexure V-A). These guidelines have been issued/ amended by Ministry of Commerce from time to time in the following manner :

(i) Vide letter no.10(7)/95-TP (Vol II) dated September 21, 1999, Ministry of Commerce issued the guidelines for holding international fairs in India and India trade exhibitions abroad by organisers other than the ITPO. As per these guidelines, time gap required between two international trade exhibitions/ fairs in India on the same theme and similar product profile within the same city would be 3 months and if held in another city, it would be one month. Further, for Indian exhibitions abroad, a gap of 12 months would be maintained between exclusive Indian Exhibitions/ Made in India Exhibitions. (Annexure VI).

(ii) Vide letter no.D.O. No.11(14)/99-TP dated Jan. 2, 2011, Ministry of Commerce amended the guidelines related to time gap required between two international exhibitions/ fairs in India on the same these and similar product profile and directed that within the same city, time gap would be 45 days instead of 3 months as stipulated earlier. However, for IT, Telecom and

Broadcasting sectors, there will be no need for maintaining any time gap, if held within the same city. Time gap of one month to be maintained between two international exhibitions/ fairs on the same these and similar product profile in two different cities in India. (Annexure VII)

(iii) Vide letter no.11 (14)/99-TP dated Feb. 27, 2003 from Ministry of Commerce, it was conveyed that no time gap restriction between two exhibitions/fairs irrespective of where the exhibition/fairs are held. (Annexure VIII).

The above guidelines were being followed by ITPO also. However, the time gap policy between two events of similar product profile in Pragati Maidan was introduced during the year 2006 after receipt of certain representations by ITPO from trade and industry.

- ITPO had received requests for booking of space for two events of similar product profile i.e. (i) Fespa World Expo India, Dec. 1-4, 2005 and (ii) World Expo 2005 expressed their resentment as ITPO allowed to hold concurrently another exhibition which according to them had similar produce profile. The matter was examined in detail and since both the events were booked, the other event's dates were slightly modified to avoid conflict between the two third party organisers. With a view to avoid similar conflict in

future ITPO management examined the possibility to have time gap between events on similar products in future.

- Similarly, in another case, ITPO received requests for booking of space for Jewellery Exhibitions from two organisers i.e. (i) Montgomery and (ii) ITE India for holding their events concurrently in the last week of Sept. 2006. Montgomery within 24 hours of approval of allotment of space to ITE, India raised an objection with ITPO on the issue.

The reason for objection by one organiser to another similar event concurrently or without a buffer time is that holding similar events concurrently or without specified gap may lead to unhealthy competition and practices such as grabbing each other's exhibitors, visitors and also taking advantage of publicity efforts of one organiser. Such time gap policy is also followed by leading exhibition venue owner worldwide. Thus such buffer time ensures avoiding of unfair or damaging competition among trade events and their clients. A copy of Booking Protocol of Hong Kong Convention and Exhibition Centre is enclosed (Annexure XI).

After examining the above cases in detail, time gap restriction of 15 days between two events of similar

product profile in Pragati Maidan was introduced by ITPO for fairs in Pragati Maidan during July 2006.

However, after having detailed interactions/ discussions with industry and organisers and also with an objective to increase capacity utilisation of space in Pragati Maidan, the time gap requirement between two third party events have been done away on 21.12.2012 with subject to the condition that no concurrent events of similar product profile can be held. Time gap between an ITPO fair and a third party fair of similar product profile has been also reduced to 3 days before and after (for logistic reasons only).

It is also brought to the knowledge of Hon'ble Commission that after doing away with the time gap restriction between two events of similar product profile, one of the organisers whose event namely 'Jewellery Wonder' scheduled to be held in Pragati Maidan from Sept. 28-30, 2013, vide letter dated July 3, 2013 has objected to the allotment of space by ITPO to another Jewellery Event i.e. "Delhi Jewellery & Gem Fair by M/s UBM India scheduled from Sept.21-23, 2013 in Pragati Maidan. A copy of this letter is place at Annexure XI-A. The organiser of 'Jewellery Wonder' is accusing ITPO for its unethical policies damaging Exhibition Industry as another jewellery event has been approved by ITPO in

Pragati Maidan just one week before their event. The organiser has stated that many of their exhibitors have cancelled their stalls because of another jewellery Show approved by ITPO just one week before which is ruining their event.

8. Highlight the differences in the provisions as applicable to events of ITPO and third party in case of similar product profile along with rationale thereof.

It is reiterated that ITPO is a Govt. of India Enterprises entrusted with the responsibility of promoting external and domestic trade of India in a cost effective manner by organising and participating in international trade fairs in India and abroad. The main focus of ITPO is to support and assist small and medium enterprises to access markets – both in India and abroad. ITPO's events cover a wide variety of sectors such as handlooms, handicrafts, textiles, manufacturing, processed food, publishing and printing industry, agriculture, leather goods. Thus, ITPO organises events in Pragati Maidan with an objective of trade promotion.

Pragati Maidan, as a venue for organising trade fairs, has been hosting trade fairs/ exhibitions for more than four decades now. Pragati Maidan has been hosting trade fairs and exhibitions on behalf of Govt. of India since the time when Private players/ organisers in this industry

were almost non-existent. It is by virtue of immense success of fairs organised by ITPO (erstwhile TFAI) that the private sector got encouraged to enter into the business of organising trade fairs and exhibitions in India ITPO has been instrumental in the evolution trade fair industry been a sea change in the exhibition industry in India with the emerging of private players from within the country as also from overseas, the role assigned to ITPO by Govt. of India has not lost its significance.

Today private organisers organise about 60-70 events annually at Pragati Maidan as compared to very few events during 80s and 90s. Most of these events are organised with the objective of commercial benefit and not solely for the cause of trade and industry. On the other hand, India Trade Promotion Organisation has been mandated to promote trade through various mediums particularly trade fairs and exhibitions. ITPO has been a third party event in Pragati Maidan is primarily organised by companies/ organisations with profit-motive and accordingly the cost of participation is usually kept high by them.

ITPO generally targets small and medium enterprises to provide them a platform to exhibit their products at a reasonable cost. Further, in the events organised by ITPO, facilities in the form of discounted rentals,

complimentary space, and publicity support are provided to the organisations like State Govt./ Union Territories, Central Leather Research Institute, NSIC CAPART, MSME, APEDA, training Institutes etc. which may not be possible by a private organiser.

ITPO organise events in Pragati Maidan with an objective of trade promotion and as such the cost of participation in ITPO's events in Pragati Maidan is quite low. ITPO generally targets small and medium enterprises to provide them platform at a reasonable cost for promoting their products. In the events organised by ITPO like IITF, ILFA, Aahar etc. the facilities in the form of discounted rentals, complimentary space, publicity support are provided to the organisations like State Govt./ Union Territories, Central Leather Research Institute, NSIC, CAPART, MSME, APEDA, FSSA, NIFT etc., which may not be possible by a private organiser.

Moreover, with an objective to increase capacity utilisation of Pragati Maidan, the time gap restriction between ITPO event and a third party event on similar product profile has been gradually reduced to 3 days before and after an ITPO event."

[Emphasis supplied]

77. In the reply filed by the appellant before the Commission, the appellant did casually admit that it was dominant in the field of organisation of trade and

exhibitions but explained the same by giving detailed reasons in paragraph 2, which is reproduced below :

> "2. Whether ITPO is dominant in the defined relevant market?
>
> ITPO is a 100% Govt. owned company incorporated under Section 25 of Companies Act 1956 and functions under the administrative control of Department of Commerce in the Ministry of Commerce and Industries. It is mandated with the responsibility of promoting trade of India in a cost effective manner through the medium of trade fairs. As such, ITPO is the oldest and original player and only PSU in this industry, Pragati Maidan, as a venue for organising trade fairs, has been hosting trade fairs for more than four decades now. Pragati Maidan has been hosting trade fair and exhibitions on behalf of Govt. of India since the time when Private players/organisers in this industry were almost non-existent. It is by virtue of immense success of fairs organised by ITPO (erstwhile TFAI) that the private sector got encouraged to enter into the business of organising trade fairs and exhibitions in India. ITPO has been instrumental in the evolution of trade fair & exhibition industry in the country by popularising exhibition culture in the country.
>
> We hereby respect the firings of the investigation on the point that ITPO is dominant player in the exhibition

industry by virtue of owning one of the largest exhibition venue at a prime location in the capital of the country. The venue is speared over an area of 123 acres and as a venue has significant area in India in terms of covered exhibition space, number of events and revenue generation.

However, ITPO has never attempted to take advantage of its dominant position in the India exhibition industry and has been providing its space/facilities to private organisers in a transparent manner. In fact, most of the leading third party fairs in India i.e. AutoExpo, Plastindia, World Book Fair, Acetech, Defexpo, Wills Fashion Week etc. have earned global recognition by successful holding of these events regularly in Pragati Maidan over the years. As stated above, a major part of ITPO's revenue comes from these third party fairs taking place in Pragati Maidan and ITPO would not think of denying space to its esteemed clients i.e. third party organisers.

In a one-off incidence in the year 2011, referred to in the instant case of Security Fairs, there was never an effort or motive of denying space to any organiser, rather the space could not be allotted under the extant policy of time gap where the ultimate objective was to provide opportunities to MSMEs to participate in ITPO's fairs at a reasonable cost."

[Emphasis added]

78. The time gap policy evolved by the Central Government, its amendment from time to time, the licensing policy framed by the appellant in July, 2006 and its amendment were also highlighted in reply dated 25.03.2014. While justifying adoption of different yardsticks of time gap, the appellant made the following statement in paragraph 4 of the reply :

> "..Regarding time gap restriction between an ITPO fair and a third party fair of similar product profile, we humbly accept that these were not at par with the time gap restriction between two third party events of similar product profile. The time gap required (earlier) between an ITPO fair and a third party fair of similar product profile was higher than the time gap applicable to two third party fairs of similar product profile. However, we would again like to submit here that the earlier management in ITPO (2007-2011) was of the view that third party fair organisers, with the objective of making higher profits, sometimes exploit exhibitors by charging higher participation cost from them as their events have been established. Thus, participation by MSMEs become difficult in such established fairs. Since ITPO does not organise fairs with the solo objective of surplus generation and the cost of participation in ITPO's fair is kept low, the management at that time felt the need of promoting MSMEs and accordingly introduced a larger time gap between an ITPO fair and a third party fair of similar product profile. It is pertinent to mention that most

of the senior officers, who were part of this decision, have retired or no more in the services of ITPO.

It may be observed here that with this objective of promoting participation by small enterprises, ITPO has forgone its revenue in terms of the opportunity cost lost for available space for competing events. Such a policy was never brought with the objective of denying market access to any third party organiser.

After change in management during the year 2012, a number of reform measures were undertaken taking into account aspirations of ITPO's clients. Meetings/ deliberations were held regularly with stakeholders to take their feedback. Accordingly, in one of the meeting taken by ITPO with third party organisers on Nov. 8, 2012, the organisers put forward the issue of time gap restrictions between two events of similar product profile at Pragati Maidan. The request of the organisers were considered by ITPO and accordingly the policy was liberalised in Dec. 2012 by ITPO and notified, much before the receipt of the first communication from Hon'ble CCI on the subject. The time gap was significantly reduced from 90 days before and after ITPO fair of similar product profile to 30 days before and 15 days after. Time gap restriction of 15 days between two third party events of similar product profile was also removed.

> After giving undertaking to Hon'ble CCI, the policy was further modified to bring uniformity in organising exhibitions at Pragati Maidan and the time gap between ITPO fair and a third party fair of similar product profile was reduced significantly to 3 days. The requirement of 3 days gap is just for logistics reasons in terms of removal of publicity/ advertising material from the premises.
>
> Third party organisers remove all their exhibits, construction materials, brandings etc. immediately during the night hours after conclusion of their fair by hiring a number of vendors, service providers, labours, machineries etc. However, ITPO, being a Govt. Organisation is required to follow all labour legislations, specified working hours as per rules, safety & fire regulations etc. and accordingly 3 days gap has been kept to take care of these requirements."
>
> [Emphasis supplied]

79. The DG and the Commission were legally bound to take into consideration the explanation furnished by the appellant about the justification of the time gap policy and the terms and conditions for allocation of space for exhibitions/ fairs organised by the appellant, but both proceeded to decide the issue as if the appellant was a private organiser and it had no choice in utilising its own asset to its advantage viz-a-viz third parties. At least, the Commission was expected to have given due consideration to the detailed explanation given twice over by the appellant to justify the time gap policy and restriction but it simply brushed aside the same without assigning any tangible and cogent reasons.

80. In my considered view, both the DG and the Commission committed grave illegality by refusing to appreciate the rationale of the time gap policy framed by the Government of India from 1999 and its amendments from time to time, the licensing policy framed by the appellant in July 2006, which also contain time gap clause, which was amended on multiple occasions and lastly on 20.05.2013. Both the DG and the Commission completely lost sight of the fact that on 20.05.2013, the appellant has drastically amended the time gap policy and reduced the time gap to 3 days between its own event and that of the private party of same product profile. The only restriction maintained was that such trade fairs/exhibitions with the same profile cannot be organised at the same time and there was ample justification for doing that.

81. The entire matter deserves to be examined from another angle. In the earlier part of this order, I have taken cognisance of the argument of Shri Krishnan Venugopal that Pragati Maidan is owned by the Central Government and the three wings of the Ministry of Commerce were engaged in organizing trade fairs and exhibitions with special emphasis on Small and Medium Enterprises and Traditional Industries. Subsequently, this task was assigned to the Trade Fair Authority of India and Pragati Maidan was leased out to it on nominal rent. The same continued to be the position with the appellant till the execution of a perpetual lease dated 07.03.2011 in the name of the President of India in favour of the appellant, the relevant portions of which are extracted below :

> "THIS INDENTURE made on this 7th day of March, 2011 between the President of India acting through Land & Development Officer, Nirman Bhawan, New Delhi (hereinafter

called the Lessor) of the one part, and Trade Fair Authority of India, now India Trade Promotion Organisation, Pragati Maidan Complex, Mathura Road, New Delhi (hereinafter called the Lessee) of the other part.

WHEREAS under the instructions of the Government of India relating to the disposal of building sites in the New Capital of Delhi, the Lessor has agreed to demise the plot of Nazul land hereinafter described to the Lessee in the manner hereinafter appearing.

NOW THIS INDENTURE WITNESSETH that in consideration of the premium of ₹ 2,40,00,000 (Rupees Two crore forty lakhs) paid before the execution of these presents (the receipt whereof he Lessor hereby acknowledges) and of the rent hereinafter reserved and of the covenants on the part of the Lessee hereinafter contained, the Lessor doth hereby demise unto the Lessee ALL THAT plot of land containing by admeasurements 123.51 acres (40 acres of land under permanent buildings and 83,51 acres under horticulture/open land) situated at Pragati Maidan Complex, Mathura Road, New Delhi in the site acquired for the erection of the New Capital of Delhi which said plot of land is more particularly described in the schedule hereunder written and with the boundaries thereof has for greater clearness been delineated on the plan annexed to these presents and thereon colored red TOGETHER with all rights, easements and appurtenances whatsoever to the said

plot of land belonging or appertaining TO HOLD the premises hereby demised unto the Lessee in perpetuity from the 30.12.1976 YIELDING AND PAYING therefore the yearly ground rent of the premium payable in advance of 2½% of said premium i.e. ₹ 6,00,000/- per annum (Rupees Six Lakhs only) for the land under permanent buildings and ₹ 1/- per annum for the area under horticulture/open land w.e.f. 1.1.1982 onwards of such other sum as may hereafter be assessed under the covenants and conditions hereinafter contained clear of all deductions by equal half-yearly payments on the fifteenth day of January and fifteenth day of July in each year at the Axis Bank, Nirman Bhawan, New Delhi or at such other place as may be notified by the Land & Development Officer for this purpose, from time to time, the first of such payments to be made on the fifteenth day of January and July.

2. The land under permanent buildings which at present measure about 40 acres have been allotted to the Trade Fair Authority of India now ITPO on a 99 years lease commencing from 30.12.1976 on payment of premium at the rate of ₹ 6 lakhs per acre and annual ground rent at the rate of 2½ % of the said premium. Any land which may be allowed by the Lessor for permanent construction in future will be allotted to the Trade Fair Authority of India now ITPO at a premium worked out on the basis of rates

in force on the date of allotment plus 2½% thereof as annual ground rent.

3. The area of approximately 83.51 acres under horticulture/open land in Pragati Maidan Complex shall be allotted to Trade Fair Authority of India now ITPO on payment of a nominal ground rent of ₹ 1/- per annum.

xxx xxx xxx

13. The Lessee will on the determination of this lease peaceably yield up the said demised premises and the said Pragati Maidan Complex appertaining unto the Lessor.

15(a). The Lessee shall neither sub-let, transfer, sale, mortgage or assign any manner whatsoever nor enter into any agreement for sale/transfer/assignment (by whatever name such intended transaction may be called) of the said premises hereby demised or any part thereof without the sanction of the Lessor in writing first and obtained and while according such sanction, the Lessor may impose such terms and conditions as she may in her absolute discretion think fit as conditions of such sanction for such sub-letting, transfer or assignment. Such conditions may provide that the Lessee or the transferee or assignee, as

the case may be, shall pay to the Lessor enhanced ground rent as may be specified in such sanction.

xxx xxx

(c) PROVIDED also the lessor shall have a pre-emptive right to purchase the demised premises after deducting the amount of the unearned increase as aforesaid.

(d) PROVIDED further that in case the transfer is proposed to be made in favour of a person or organisation which does not have similar objectives as the Lessee or which is not entitled to the same concessional allotment as the lessee, then the said demised premises and all structures standing on the said demised premises thereto shall revert to the Lessor without the requirement of any further action.

xxx xxx

(17) The land will be resumed by the Lessor in case any of the terms and conditions of allotment are violated by the lessee if the allotment is obtained fraudulently or by the misrepresentation of facts.

III. If there shall be at any time have been in the opinion of the Lessor or duly authorized officer whose decision shall be final, any breach by the Lessee or by any person claiming through or under her of any of the covenants or conditions contained in Clause II and if the said intended Lessee shall

neglect or fail to remedy any such breach to the satisfaction of the Lessor within thirty days from the receipt of a notice signed by the Lessor or duly authorized officer requiring him to remedy such breach it shall be lawful for the officers and workmen acting under the authority and direction of the Lessor to enter upon the premises hereby demised and (a) to remove or demolish any alterations in or additions to the buildings erected on the said premises (b) to remove or demolish any buildings erected on the said premises without the previous consent in writing of the Lessor or duly authorized officer as aforesaid (c) to fill any excavation or carry out any repairs that may be necessary and all such moneys and expenses as maybe laid out and incurred by the Lessor or by her order shall be paid by the said Lessee; and it is hereby expressly declared that the liberty hereinbefore given is not to prejudice in any way the power given to the Lessor by Clause-II- 4, 5 & 7 hereof."

82. The terms and conditions of the Perpetual Lease, which have been extracted hereinabove, show that the permanent buildings existing on Pragati Maidan were leased out to the appellant for a period of 99 years @ Rs.6 lakhs per acre and yearly ground rent @ 2½ % of the said premium and horticulture/open land was leased out @ Rs.1/- per annum. The ownership thereof continued with the Government of India and in its capacity as a Perpetual Leasee, the entire Pragati Maidan became an asset of the appellant.

83. From what I have mentioned above, it is more than evident that Pragati Maidan is an asset of the appellant to be utilised for achieving the objects set-out in its Memorandum of Association. It is beyond comprehension of any reasonable person as to how a person/entity can be compelled to part with, permanently or temporarily, his/its own assets for the benefit of others, which may, at times detrimental to his/its own interest.

84. A somewhat similar question was considered by the European Court (Sixth Chamber) in Oscar Bronner Gmbit & Co. KG **Vs.** Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG and others, European Court Reports 1998 page I-07791 (ruled on 25.11.1998). The facts of the case was that by order of 01.07.1996, received at the Court on 15.01.1997, the Oberlandesgericht Wien (Higher Regional Court, Vienna), in its capacity as the Kartellgericht (court of first instance in competition matters), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 86 of the Treaty. The questions were raised in connection with an action brought by Oscar Bronner GmbH & Co. KG ('Oscar Bronner') against Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG (hereinafter collective referred to as 'Mediaprint') under Paragraph 35 of the Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Federal Law on Cartels and other Restrictive Practices, 'the Kartellgesetz') of 19.10.1988 (BGBl. 1988, p. 600), as amended in 1993 (BGBl. 1993, p. 693) and 1995 (BGBl. 1995, p. 520). Paragraph 35(1) of the Kartellgesetz provides :

> “The Kartellgericht shall, upon application, order the undertakings concerned to bring the abuse of a dominant position to an end. Such abuse may consist, in particular, of:

1. directly or indirectly imposing unfair purchase or selling prices or other trading conditions

2. limiting production, markets or technical development to the detriment of consumers

3. placing other trading parties at a competitive disadvantage by applying dissimilar conditions to equivalent transactions

4. making the conclusion of contracts subject to the acceptance by other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.'

The objects of Oscar Bronner are the editing, publishing, manufacture and distribution of the daily newspaper Der Standard. In 1994, that newspaper's share of the Austrian daily newspaper market was 3.6% of circulation and 6% of advertising revenues. Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG publishes the daily newspapers Neue Kronen Zeitung and Kurier. It carries on the marketing and advertising business of those newspapers through two wholly owned subsidiaries, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.

In 1994, the combined market share of Neue Kronen Zeitung and Kurier was 46.8% of the Austrian daily newspaper market in terms of circulation and 42% in terms of advertising revenues. They reached 53.3% of the population from the age of 14 in private households and 71% of all newspaper readers. For the distribution of its newspapers, Mediaprint has established a nationwide home delivery scheme, put into effect through the intermediary of Mediaprint Zeitungsvertriebsgesellschaft

mbH & Co. KG. The scheme consists of delivering the newspapers directly to subscribers in the early hours of the morning.

In its action under Paragraph 35 of the Kartellgesetz, Oscar Bronner seeks an order requiring Mediaprint to cease abusing its alleged dominant position on the market by including Der Standard in its home delivery service against payment of reasonable remuneration. In support of its claim, Oscar Bronner argues that postal delivery, which generally does not take place until the late morning, does not represent an equivalent alternative to home-delivery, and that, in view of its small number of subscribers, it would be entirely unprofitable for it to organise its own home delivery service. Oscar Bronner further argues that Mediaprint has discriminated against it by including another daily newspaper, Wirtschaftsblatt, in its home delivery scheme, even though it is not published by Mediaprint.

In reply to those arguments, Mediaprint contends that the establishment of its home-delivery service required a great administrative and financial investment, and that making the system available to all Austrian newspaper publishers would exceed the natural capacity of its system. It also maintains that the fact that it holds a dominant position does not oblige it to subsidise competition by assisting competing companies. It adds that the position of Wirtschaftsblatt is not comparable to that of Der Standard, since the publisher of the former also entrusted the Mediaprint group with printing and the whole of distribution, including sale in kiosks, so that home-delivery constituted only part of a package of services.

After noticing the facts, Kartellgericht decided to stay the proceedings and referred to the following questions to the Court of Justice for preliminary ruling: market within the meaning of Paragraph 35 of the Kartellgesetz which is analogous in content, since under the principle of the primacy of Community law conduct which is incompatible with the latter cannot be tolerated under national law either,

the Kartellgericht decided that it first needed to resolve the question whether the conduct of Mediaprint infringed Article 86 of the Treaty. Referring subsequently to the fact that Article 86 of the Treaty applies only if trade between Member States is capable of being affected by the conduct of traders in breach, the Kartellgericht found that condition met in the main proceedings, since refusal of access to the homedelivery scheme could have the effect of completely excluding Oscar Bronner from the daily newspaper market and Oscar Bronner, as publisher of an Austrian daily newspaper also sold abroad, participated in international trade.

11 In those circumstances, the Kartellgericht decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

> “(1) Is Article 86 of the EC Treaty to be interpreted in such a way that there is an abuse of a dominant position, in the sense of an abusive barring of access to the market, where an undertaking which carries on the publication, production and marketing of daily newspapers, and with its products occupies a predominant position on the Austrian market for daily newspapers (46.8% of total circulation, 42% of advertising revenue and 71% range of influence, measured by the number of all daily newspapers), and operates the only nationwide home-delivery distribution service for subscribers, refuses to make a binding offer to another undertaking engaged in the publication, production and marketing of a daily newspaper in Austria to include that daily newspaper in its home-delivery scheme, in the light also of the circumstance that it is not possible, on account of the small circulation and the consequently small number of subscribers, for the undertaking

> seeking inclusion in the home-delivery scheme to build up its own home-delivery scheme for a reasonable cost outlay and operate it profitably, either alone or in cooperation with the other undertakings offering daily newspapers on the market?
>
> (2) Does it amount to an abuse within the meaning of Article 86 of the EC Treaty, where, under the circumstances described at (1) above, the operator of the home-delivery scheme for daily newspapers makes the entry into business relations with the publisher of a competing product dependent upon the latter entrusting him not only with home deliveries but also with other services (e.g. marketing through sales points, printing) within the context of an overall package?"

The Court of Justice noted the rival pleadings and formulated the following question :

> "Finally, it would need to be determined whether the refusal by the owner of the only nationwide home-delivery scheme in the territory of a Member State, which uses that scheme to distribute its own daily newspapers, to allow the publisher of a rival daily newspaper access to it constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty, on the ground that such refusal deprives that competitor of a means of distribution judged essential for the sale of its newspaper."

After discussing the issue, the Court of Justice ruled :

> "47. In the light of the foregoing considerations, the answer to the first question must be that the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty."

Although, the Court of Justice referred to the second question whether refusal by that undertaking, in the circumstances mentioned in the first question, to allow the publisher of a rival daily newspaper to have access to its home-delivery Scheme, where the latter does not at the same time entrust to it the carrying out of other services, such as sale of kiosks and printing, constitutes an abuse of dominant position within the meaning of Article 86 of the Treaty, but did not answer it by observing that in the light of the answer to the first question, it was not necessary to decide the second one.

83. In State of Illinois, ex. Rel. Roand W. BURRIS, Attorney General of the State of Illinois, in its proprietary capacity, in its parens patriae capacity and in its representative capacity **Vs.** Panhandle Eastern Pipe Line Company, a Delaware

corporation, United States Court of Appeals Seventh Circuit, 935 F. 2d 1469, the question considered was whether the respondent pipeline company was obliged to transport through its pipeline natural gas purchased by the local distribution companies with which it had exclusive dealing contracts. The State of Illinois brought this antitrust suit on its own behalf and on behalf of a class of residential and commercial consumers of natural gas in central Illinois. The State alleges that the Panhandle Eastern Pipe Line Company violated federal and state antitrust laws in early 1980s by refusing to transport natural gas purchased by its principal commercial customers (the local distribution companies that distribute gas to residential and most commercial and industrial end-users) through its pipelines. After trial, the District Court ruled that Panhandle's conduct was not anti-competitive. After taking cognisance of the relevant arguments, the United States Court of Appeals ruled that the action of Panhandle was not discriminatory. The relevant extracts of the judgement/ruling are reproduced below :

> "Despite the dire predictions of the state, this does not mean that there now exists a "contract immunity" defense to antitrust liability. The existence of a contract in this case does not immunize Panhandle from antitrust liability; it is merely a factor that is relevant to the question of Panhandle's intent to monopolize. The existence of a contract that was itself an unreasonable restraint of trade, violating Sec. 1 of the Sherman Act, would do little to dispel an inference of anticompetitive intent. In Otter Tail, for example, the utility attempted to invoke contractual provisions in its contracts with other suppliers that forbade the suppliers from providing electricity to any of the utility's retail customers, past or present. That provision, as the

Supreme Court observed, was simply a territorial allocation scheme designed to insulate the utility from competition in the sale of electricity and had no legitimate justification. 410 U.S. at 378-79, 93 S.Ct. at 1030. Panhandle's exclusive dealing contract with its G tariff customer, by contrast, was a legitimate means of ensuring that it would not be stuck holding expensive natural gas for customers who had decided to purchase unexpectedly plentiful and cheap gas from others, one that had been given regulatory sanction. Contrary to the state's suggestion, when Congress enacted the NGPA, Panhandle's tariffs did not become invalid or illegal. Recognizing the obligations Panhandle incurred in reliance on the tariffs does not elevate a private contract above national policy as the state suggests.

The state has its own theory about Panhandle's motives, but its conjecture does little to make us question the soundness of the district court's findings. According to the state, Panhandle refused to adopt an open access transportation policy because it wanted to exact monopoly profits from the gas it sold to its G tariff customers. It did so, according to the state, by tying the purchase of its monopolistically priced gas to the purchase of its regulated pipeline capacity and by unlawfully segmenting the central Illinois natural gas market and price discriminating between gas consumers who were able to switch to an alternate fuel and those who did not.

Panhandle, however, didn't profit on its sales of gas to the LDCs. Panhandle's gas was priced above the spot market, but that price merely reflected the price it was paying for gas as the result of the long-term contracts it agreed to in order to secure gas that was both high-priced and scarce during the early days of deregulation. Panhandle's rate of return was based on its transportation service, not its gas prices, a fact that suggests that absent a fear of take-or-pay liability it would have had little reason to object to transporting gas purchased from other sources. The state's brief acknowledges this point but, inexplicably, goes on to rail against “the profits of Panhandle and its subsidiaries on gas sales.” Brief of Appellant at 35. The inconsistency is explained later, when the state reveals that what it calls “profits” on the sale of gas are “more accurately” characterized not as profits but as losses avoided. Brief of Appellant at 39. Translated, the state’s theory is simply that Panhandle’s desire to avoid take-or-pay liability constituted an antitrust violation because Panhandle enforced the G tariff rather than reducing its rate of return by recouping less than 100% of its gas prices. Panhandle was entitled to pass through 100% of the cost of its gas to its customers, however; it had no duty to voluntarily reduce its rate of return below the “just and reasonable” level authorized by regulators. Cf. Town of Concord v. Boston Edison Co., 915 F.2d 17, 27 (1st Cir.1990). This is not to say, of course, that a utility can engage in anticompetitive conduct in order to increase its earnings to the

authorized level. Nor do we say that there can never be a case in which a utility's refusal to voluntarily take action that would reduce its profit margin is anticompetitive. The plaintiff in that case, however, will have to present a more plausible theory than Illinois has presented here.

The state points out that Panhandle was vertically integrated, which meant that it might have been able to force consumers to pay a supracompetitive price for gas by purchasing gas at above market rates from affiliated producers, but there is no evidence that this was the reason that its costs were high. The evidence suggested that its high costs were due principally to its Algerian and Canadian ventures, neither of which were with affiliated producers. True, Panhandle bought the liquified Algerian gas from an affiliated pipeline, Trunkline, but self-dealing is a danger when a regulated company and an unregulated company are vertically integrated, see Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 n. 4, 104 S.Ct. 1551, 1571 n. 4, 80 L.Ed.2d 2 (1984) (O'Connor, J., concurring), not when two regulated companies are affiliated horizontally. Trunkline, like Panhandle, merely passed on the above market rate it paid to unaffiliated gas producers.

But what of Panhandle's willingness to transport for its non-captive customers? By mollifying them, the state maintains, Panhandle engaged in "price discrimination" and "market segmentation," facilitating its ability to charge supracompetitive prices for the gas it sold to captive customers

and thereby perfecting its monopoly over those customers. This is exactly the argument raised by petitioners when they challenged FERC Orders 234 and 319 in MPC II, see 761 F.2d at 784, and it succeeded there, but there are several reasons why it fails here.

First, we should be clear about the state's complaint. The discrimination it objects to related not to the price of gas Panhandle sold to consumers who could switch between gas and other fuels (producers, not Panhandle, sold gas at the lower spot market rate), but to the discriminatory access Panhandle gave those consumers to cheaper sources of gas by agreeing to transport it. In this respect, the state's theory merely restates its claim, discussed above, that the G tariff did not preclude LDCs from purchasing gas directly from producers. See supra note 2. The state maintains that Panhandle selectively applied its interpretation of the G tariff--that the tariff applied to direct sales from producers to consumers--to captive customers, but fails to explain that the end-users who obtained transportation for non-system gas were not themselves G tariff customers, and were under no contractual obligation to Panhandle. Of course, neither were the captive residential and industrial consumers to whom the LDCs distributed gas, but those consumers didn't purchase gas directly from the wellhead. The district court found that the fuel-switchable end-users eligible for the MAT program did, and the state points to no contrary evidence. The captive residential and

commercial LDC customers could, in theory, have purchased gas from producers directly, but most LDCs, including CILCO, "had transportation tariffs which either expressly precluded transportation services for residential end-users or effectively precluded transportation for residential end-users by imposing a volumetric limitation.... In addition ... most producers and brokers were unwilling to enter into contracts for small volumes of gas." 730 F.Supp. at 890. We therefore agree with the district court's conclusion that Panhandle did not selectively enforce the G tariff; "the 'discrimination' apparent in Panhandle's transportation policy was a legitimate enforcement of that G tariff" against those who were bound by it. 730 F.Supp. at 921.

After FERC issued Order 436, discrimination on the basis of sole supplier clauses was no longer legitimate; the FERC order required pipelines offering transportation to make the option available to all customers, regardless of the existence of full requirements or sole supplier clauses in their gas purchase contracts. See 50 Fed.Reg. 42445. Rather than comply, Panhandle initially shut down its MAT program, and only resumed it after its G tariff customers agreed not to request unbundled transportation services. The G tariff customers agreed to this condition because they, too, had a stake in keeping fuel-switchable industrial consumers on line; keeping the industrials on line helped spread the fixed cost component of Panhandle's rates among a wider customer base, and helped support their own revenues by maintaining high through-put

volumes to these end-users (the LDCs, like Panhandle, were effectively selling transporting services to these customers). This agreement did not, as the state suggests, violate the terms of Order 436, for the Order also required "full requirements" customers to switch to a partial requirements tariff to obtain transportation, recognizing that "[t]here can be differences in the costs of providing full and partial requirements service." 50 Fed.Reg. at 42445; see also FERC Order 436-A, 50 Fed.Reg. 52217 (1985) (reiterating requirement that full requirements customers switch to partial requirements tariff to receive pipeline transportation services). Panhandle's G tariff customers thus had the option to obtain transportation by switching to a partial requirements tariff, but were unwilling to give up the security of the G tariff to do so; Panhandle therefore had no obligation to transport for them. These events effectively demonstrate that if the state (and the residential consumers it represents) have a quarrel with a utility, it should be with CILCO and other LDCs rather than with Panhandle. Faced with a choice of obtaining access to low-priced gas supplies or giving up stable gas supplies, CILCO and other LDCs opted for the latter.

(Underlining is mine)

The second reason the state's price discrimination theory fails is that, as noted above, there is no evidence suggesting that self-dealing was the cause of Panhandle's high gas prices. The real culprits were long-term supply contracts. When the

self-dealing charge is deflated, the state's price discrimination theory collapses as well because Panhandle had no monopoly profits to hide. Panhandle undoubtedly wanted to pass on the full amount of its gas costs, but that is a far cry from extracting monopoly profits. The state's theory ignores the fact that, under its PanMark program, Panhandle received take-or-pay credit from producers for volumes its fuel-switchable customers purchased from them directly. Panhandle did not always receive take-or-pay credit for the gas transported under the MAT program (although the MAT program did yield over $50 million in take-or-pay credits), but that program too was designed to help mitigate the problems created by the discrepancy between the spot market price of natural gas and the price Panhandle was contractually obligated to pay. PanMark enabled Panhandle to recover its gas costs by giving it take-or-pay credits for gas sold at low spot market prices, and MAT enabled Panhandle to obtain some take-or-pay relief by keeping large industrial end-users from switching, or converting, to other fuels. FERC may or may not have adequately justified its reasons for approving such programs, see MPC I, 761 F.2d at 774, but that fact is not relevant to the issue of whether Panhandle's actions under the FERC programs constituted an unlawful exercise of monopoly power. As unbundled transportation became the norm in the industry, the FERC programs were the principal means available to Panhandle for resolving its take-or-pay dilemma. Panhandle's

implementation of these programs reinforces the conclusion that it was the discrepancy between spot market and contract prices for gas, rather than exclusionary animus, that drove Panhandle's policies. Had Panhandle's goal been to exclude other sellers from central Illinois, it would not have transported gas under any program, whether or not it provided take-or-pay credit.

IV. Conclusion

This case is essentially a dispute about who should bear the cost of the transformation of the natural gas industry from a regulatory to a competitive regime. Panhandle refused to transport natural gas for its G tariff customers out of concern for its take-or-pay exposure. The state maintains that enforcing the G tariff was anticompetitive because it was at odds with the changes wrought by enactment of the NGPA and FERC's moves to give consumers access to a competitive gas market. FERC's reluctance to jump with both feet into an open access transportation policy, however, rebuts the state's claim that the FERC's initial sallies in that direction stripped the G tariff of its mantle of regulatory sanction. Panhandle had to respond to those changes mandated by law and by regulation, but was unwilling to go further than required because to do so would have been to expose itself to huge losses. Panhandle abided by the terms of FERC's transportation initiatives, and relied on them in good faith, a fact that, while not rising to the level of a regulatory justification defense (the FERC did not require

> pipelines to participate in the programs), leads us to agree with the district court that Panhandle's programs were the product of legitimate business concerns and not a naked desire to deny natural gas producers access to the central Illinois market. FERC itself was reluctant to move ahead too quickly; it didn't require pipelines offering unbundled transportation to do so on a nondiscriminatory basis until it adopted Order 436 in late 1985, and that Order was later vacated because it did not adequately address the dilemmas faced by pipelines like Panhandle. None of FERC's attempts to manage the deregulatory transition have completely satisfied the courts; it is hardly reasonable to expect that Panhandle should have jumped on the open access bandwagon after FERC's initial, tentative, moves to get that wagon rolling. The district court attributed Panhandle's reserve in the face of regulatory flux to caution and self-preservation rather than to monopolistic excess, a determination we find eminently reasonable. The decision of the district court is therefore AFFIRMED."
>
> [Emphasis supplied]

85. In Verizon Communications Inc. Vs. Law Offices of Curtis v. Trinko, LLP No. 02-682, 540 U.S. 398, the facts were that the customers who received local telephone service from competing local exchange carrier (LEC) brought action against incumbent LEC, alleging anti-trust and communications Act violations. The United States District Court for the Southern District of New York dismissed the action. Customers appealed. The Second Circuit Court partly affirmed the order of the District Court and partly reversed the same and remanded incumbent

LEC's petition. Thereupon, LEC applied for a writ of certiorari. Scalia, J., with whom three other Judges agreed while two others did not express any opinion, held as under :

> "(1) Telecommunications Act of 1996 had no effect upon application of traditional antitrust principles, in light of anti- trust-specific saving clause which barred finding of implied immunity;
>
> (2) complaint alleging breach of incumbent LEC's duty to share its network with competitors did not state monopolization claim under § 2 of Sherman Act;
>
> (3) traditional antitrust principles did not justify addition of case to few existing exceptions to proposition that there was no duty to aid competitors; and
>
> (4) disposition of case made it unnecessary to consider alternative contention of lack of antitrust standing."

In its appeal, the respondent alleged breach of duty under the 1996 Act by LEC to share its network with competitors. After noticing the relevant facts, the Court made the following observations :

> "[1] To decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional anti-trust principles. The Act imposes a large number of duties upon incumbent LECs—above and beyond those basic responsibilities it imposes upon all carriers, such as assuring number portability and providing access to rights-of-way, see 47 U.S.C. §§ 251(b)(2), (4). Under the sharing duties of § 251(c), incumbent LECs are required to offer three kinds of

access. Already noted, and perhaps most intrusive, is the duty to offer access to UNEs on ‘‘just, reasonable, and non discriminatory’’ terms, § 251(c)(3), a phrase that the FCC has interpreted to mean a price reflecting long-run incremental cost. See Verizon Communications Inc. v. FCC, 535 U.S., at 495–496, 122 S.Ct. 1646. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers. See §§ 251(c)(2), (4). The Act also imposes upon incumbents the duty to allow physical ‘‘collocation’’—that is, to permit a competitor to locate and install its equipment on the incumbent’s premises—which makes feasible interconnection and access to UNEs. See § 251(c)(6).

That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. See, e.g., United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975). In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the

real possibility of judgments conflicting with the agency's regulatory scheme ''that might be voiced by courts exercising jurisdiction under the antitrust laws.'' United States v. National Assn. of Securities Dealers, Inc., supra, at 734, 95 S.Ct. 2427.

Congress, however, precluded that interpretation. Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause providing that ''nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.'' 110 Stat. 143, 47 U.S.C. § 152, note. This bars a finding of implied immunity. As the FCC has put the point, the saving clause preserves those ''claims that satisfy established antitrust standards.'' Brief for United States and the Federal Communications Commission as Amici Curiae Supporting Neither Party in No.02–7057, Covad Communications Co. v. Bell Atlantic Corp. (CADC), p. 8.

But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act ''modify, impair, or supersede the applicability'' of the antitrust laws. We turn, then, to whether the activity of which respondent complains violates pre-existing antitrust standards.

III

[2] The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that

allegation states an antitrust claim at all, it does so under § 2 of the Sherman Act, 15 U.S.C. § 2, which declares that a firm shall not ‘‘monopolize’’ or ‘‘attempt to monopolize.’’ Ibid. It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, ‘‘the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’’ United States v. Grinnell Corp., 384 U.S. 563, 570–571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘‘business acumen’’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

[3] Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price,

quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act ''does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'' United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919).

[4] However, ''[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.'' Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

[5] The leading case for § 2 liability based on refusal to cooperate with a rival, and the case upon which respondent understandably places greatest reliance, is Apen Skiing, supra. The Aspen ski area consisted of four mountain areas. The

defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant cancelled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. Id., at 593–594, 105 S.Ct. 2847. The defendant refused even that. We upheld a jury verdict for the plaintiff, reasoning that ''[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition over the long run by harming its smaller competitor.'' Id., at 608, 105 S.Ct. 2847.

Aspen Skiing is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. See id., at 608, 610–611, 105 S.Ct. 2847. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Ibid. Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent.

The refusal to deal alleged in the present case does not fit within the limited exception recognized in Aspen Skiing. The

complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal-upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In Aspen Skiing, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.

The specific nature of what the 1996 Act compels makes this case different from Aspen Skiing in a more fundamental way. In Aspen Skiing, what the defendant refused to provide to its competitor was a product that it already sold at retail to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. Id., at 370–371, 377–378, 93 S.Ct. 1022. In the present case, by contrast, the services allegedly withheld are not otherwise

marketed or available to the public. The sharing obligation imposed by the 1996 Act created ‘‘something brand new’’—‘‘the wholesale market for leasing network elements.’’ Verizon Communications Inc. v. FCC, 535 U.S., at 528, 122 S.Ct. 1646. The unbundled elements offered pursuant to § 251(c)(3) exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible-indeed, it is the failure of one of those systems that prompted the present complaint.

[6] We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the ‘‘essential facilities’’ doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. See generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989). We have never recognized such a doctrine, see Aspen Skiing Co., supra, at 611, n. 44, 105 S.Ct. 2847; AT & T Corp. v. Iowa Utilities Bd., 525 U.S., at 428, 119 S.Ct. 721 (opinion of BREYER, J.), and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the

unavailability of access to the ‘‘essential facilities’’; where access exists, the doctrine serves no purpose. Thus, it is said that ‘‘essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.’’ P. Areeda & H. Hovenkamp, Antitrust Law, p. 150, ¶ 773e (2003 Supp.). Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act’s extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent’s ‘‘essential facilities’’ argument is distinct from its general § 2 argument, we reject it.

IV

[7] Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. As we have noted, ‘‘careful account must be taken of the pervasive federal and state regulation characteristic of the industry.’’ United States v. Citizens & Southern Nat. Bank, 422 U.S. 86, 91, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975); see also IA P. Areeda & H. Hovenkamp, Antitrust Law, p. 12, ¶ 240c3 (2d ed.2000). ‘‘[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic

and legal setting of the regulated industry to which it applies.'' Concord v. Boston Edison Co., 915 F.2d 17, 22 (C.A.1 1990) (Breyer, C.J.) (internal quotation marks omitted).

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, ''[t]here is nothing built into the regulatory scheme which performs the antitrust function,'' Silver v. New York Stock Exchange, 373 U.S. 341, 358, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, see, e.g., United States v. National Assn. of Securities Dealers, Inc., 422 U.S., at 730–735, 95 S.Ct. 2427, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.

The regulatory framework that exists in this case demonstrates how, in certain circumstances, ''regulation significantly diminishes the likelihood of major antitrust harm.'' Concord v. Boston Edison Co., supra, at 25. Consider, for example, the statutory restrictions upon Verizon's entry into the potentially lucrative market for long-distance service. To be allowed to enter the long-distance market in the first place, an

incumbent LEC must be on good behavior in its local market. Authorization by the FCC requires state-by-state satisfaction of § 271's competitive checklist, which as we have noted includes the nondiscriminatory provision of access to UNEs. Section 271 applications to provide long-distance service have now been approved for incumbent LECs in 47 States and the District of Columbia. See FCC Authorizes SBC to Provide Long Distance Service in Illinois, Indiana, Ohio and Wisconsin (Oct. 15, 2003).

The FCC's § 271 authorization order for Verizon to provide long-distance service in New York discussed at great length Verizon's commitments to provide access to UNEs, including the provision of OSS. In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In–Region, InterLATA Service in the State of New York, 15 FCC Rcd. 3953, 3989–4077, ¶¶ 82–228 (1999) (Memorandum Opinion and Order) (hereinafter In re Application). Those commitments are enforceable by the FCC through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. See 47 U.S.C. § 271(d)(6)(A). Verizon also subjected itself to oversight by the PSC under a so-called ''Performance Assurance Plan'' (PAP). See In re New York Telephone Co., 197 P.U.R. 4th 266, 280–281 (N.Y.P.S.C., 1999) (Order Adopting the Amended PAP).

The PAP, which by its terms became binding upon FCC approval, provides specific financial penalties in the event of Verizon's failure to achieve detailed performance requirements. The FCC described Verizon's having entered into a PAP as a significant factor in its § 271 authorization, because that provided ''a strong financial incentive for post-entry compliance with the section 271 checklist,'' and prevented '' 'backsliding.' '' In re Application 3958–3959, ¶¶ 8, 12.

The regulatory response to the OSS failure complained of in respondent's suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon's servicing of orders, the FCC and PSC responded. The FCC soon concluded that Verizon was in breach of its sharing duties under § 251(c), imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC found Verizon in violation of the PAP even earlier, and imposed additional financial penalties and measurements with daily reporting requirements. In short, the regime was an effective steward of the antitrust function.

Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 ''can be difficult'' because ''the means of illicit exclusion, like the means of legitimate competition, are myriad.'' United States v.

Microsoft Corp., 253 F.3d 34, 58 (C.A.D.C.2001) (en banc) (per curiam). Mistaken inferences and the resulting false condemnations ‘‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’’ Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The cost of false positives counsels against an undue expansion of § 2 liability. One false-positive risk is that an incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with ‘‘death by a thousand cuts,’’ Brief for New York et al. as Amici Curiae 10 (internal quotation marks omitted)-the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.

Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of § 251 may

be, as we have concluded with respect to above cost predatory pricing schemes, ‘‘beyond the practical ability of a judicial tribunal to control.’’ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993). Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: ‘‘No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.’’ Areeda, 58 Antitrust L. J., at 853. In this case, respondent has requested an equitable decree to ‘‘[p]reliminarily and permanently enjoi[n] [Verizon] from providing access to the local loop market ... to [rivals] on terms and conditions that are not as favorable’’ as those that Verizon enjoys. App. 49–50. An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.

* * *

[8] The 1996 Act is, in an important respect, much more ambitious than the antitrust laws. It attempts ‘‘to eliminate the monopolies enjoyed by the inheritors of AT & T’s local franchises.’’ Verizon Communications Inc. v. FCC, 535 U.S., at 476, 122 S.Ct. 1646 (emphasis added). Section 2 of the

> Sherman Act, by contrast, seeks merely to prevent unlawful monopolization. It would be a serious mistake to conflate the two goals. The Sherman Act is indeed the ‘‘Magna Carta of free enterprise,’’ United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. We conclude that respondent's complaint fails to state a claim under the Sherman Act.**"**
>
> [Emphasis supplied]

86. At this stage, we may also take cognisance of order dated 14.08.2012 passed by the Commission in Cases Nos. 64 of 2010, 02/2011 and 12/2011 Arshiya Rail Infrastructure Ltd. (ARIL) Vs. Ministry of Railways (MoR) through the Chairman, Railway Board and another. The facts of that case show that Kribhco Rail Infrastructure Limited (KRIL) was a 100% subsidiary of Krishak Bharti Co-operative Limited (KRIBHCO) in which Government of India had approximately 48.36% of the total equity. While KRIBHCO was engaged in the business of manufacturing, marketing and distribution of fertilizers and other agricultural products, the objectives of KRIL included operating container trains and undertaking infrastructure projects. KRIBHCO procured Category I licence in the year 2007 for running container trains which was later transferred to KRIL. Arshiya Rail Infrastructure Limited (ARIL) was incorporated in 2008 as a wholly-owned subsidiary of Arshiya International Ltd. and was an integrated supply chain and logistics infrastructure solutions provider. Container Corporation of India (CONCOR) is a public sector company set up with an intention of developing

multi-modal transport and logistic support for domestic and international containerized cargo. In February, 2005, the Union Minister for Railways announced that MoR and Government of India would permit private operators to run container trains on the IR network. It was, therefore, decided to open rail container freight segment to private parties through Public Private Partnership (PPP). Accordingly, MoR appointed RITES Limited (RITES), a multi- disciplinary consultancy organization to study 'Operation of Container Trains on Indian Railways'. The Report submitted by RITES highlighted the need for allowing private container train operators other than CONCOR, which would bring financial as well as operational benefits to the Railways. On 09.01.2006, MoR issued a policy document under which Private Container Train Operators (PCTOs) were assured of non- discriminatory access to move container trains on the rail network on the A Comm1 CL same line as CONCOR for both international as well as domestic traffic. On 26.09.2006, MoR notified the 'Indian Railways (Permission for operators to move container trains on Indian Railways) Rules, 2006' granting, inter alia, permission to carry all goods and access to rail network where Indian Railways (IR) has right to operate, on payment of uniform haulage and other charges. Pursuant to the PPP Policy and the CTO Rules, a Model Concession Agreement was drafted for execution between MoR and PCTOs, which guaranteed, among other things, (a) Non-discriminatory access to the rail network including rail terminals, (b) Non-discriminatory access to PCTOs trains on networks not owned by MoR (i.e. private sidings), (c) Uniform Haulage charges on non-discriminatory basis not to be revised more than twice a year and (d) Level playing field for all concessionaires.

On 11.10.2006, Ministry of Railways issued a letter by virtue of which, among other things, four commodities namely ores, minerals, coal and coke were

brought under the category of restricted commodities, resulting in foreclosure and denial of market access to PCTOs to the extent of 60-65% of the relevant market identified as market for rail freight transportation.

Arshiya filed an information under Section 19(1) of the Act alleging that Indian Railways had a monopoly and its exclusionary non-price conduct/discrimination was in violation of Section 4(2)(a(i), 4(2)(b)(i) and 4(2)(c) of the Act. It alleged that while MoR is competing with the PCTOs in the business of transportation of goods on rail, at the same time it also regulates the PCTOs to its own advantage. As such, there was a serious conflict of interest between the MoR's role as regulator and as a competitor. It also alleged that by forcing Private Container Train Operators to agree to the maintenance clause 5.8 of the Concession Agreement, the Ministry of Railways has resorted to Tie-in agreement and thereby resorted to Tie-in agreement in which the Ministry required the Private Containers Train Operators to agree to get the maintenance of their wagons done by Ministry of Railways in order to get permission for transportation of goods on the railway network.

In compliance of the directions given by the Commission under Section 26(1), the DG conducted detailed investigation with reference to eight issues and observed that there is an inherent conflict of interest in the roles of the Ministry of Railways and Containers Corporation of India on the one hand and Private Containers Train Operators. He observed that having permitted entry of the private players in the relevant market, any attempt to restrict, inhibit, foreclose competition and the same cannot be justified on the ground that the Railways was discharging a social obligation. The DG also described the Ministry of Railways and Containers Corporation of India is group entity. He then dealt with the issue of dominance of Railways, referred to its market share, size and resources/economic power of

enterprise, size and importance of competitors, vertical integration of enterprises, legal/statutory monopoly status of the Indian Railways, entry barriers, countervailing buyer power and held that the Indian Railways was in a dominant position. In conclusion, the DG held that the conduct of Ministry of Railways through Railway Board in the relevant market has been in violation of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b)(i), 4(2)(b)(ii), 4(2)(c), 4(2)(d) and 4(2)(e) of the Act and also found to be engaged in the practice contrary to Sections 3(1) and 3(4) of the Act.

After disposing of the preliminary issue relating to jurisdiction, the Commission considered the following three substantive issues :

> "i. Given the complexities of freight movement, what are the critical parameters for defining the relevant market? What, therefore, is the relevant market in the present case?
>
> ii. In the market so defined, is there any dominant enterprise that enjoys a position of strength to enable it to 'operate independently of competitive forces'.
>
> iii. Whether the dominant enterprise as established above has abused its position to the detriment of competition?"

While dealing with the first issue, the Commission referred to the history of the Railway being used as a mode of transport, the fact relating to the commissioning of RITES to undertake the study and lay down guidelines and other requirements for selection of prospective rail operators (other than CONCOR) for movement of containers in the Indian Rail network, referred to the guidelines framed by RITES and the relevant provisions of the policy. The Commission then referred to Section 19(5)(6) and (7) and observed :

“14.8 Relevant product market as defined in the Act mandates demand substitutability as revealed by consumer preferences. The informant and DG have defined the relevant product market as 'transportation of goods/freight either through containers or wagons over the railway network'. Their definition lays emphasis on the substitutability of wagons and containers for carrying freight of all types over the rail network. The DG observes that freight is carried in both containers and wagons and avers that on the basis of technical substitution a commodity is capable of being carried in either of them and therefore no distinction has been drawn between wagon freight and container freight. Therefore, the market is defined by DG to be the transportation of freight over the rail network thereby ruling out substitutability, in the present case, between road, rail, air and water as alternative medium of transportation for carrying container freight. The Deutsche Bahn/ PCC logistics judgement of the European Commission is referred to in the report to justify rail network as the appropriate market.

14.9 The DG's report draws attention to the possibility of two options for defining the market in this case. Substitution can be between container and wagon for carrying freight as argued in the report or between the different modes of transportation over which containers can be carried as this case refers specifically to container freight. Let us first look at substitution between wagons and containers for movement of goods over rail network. No doubt it is possible to load goods either in a wagon

or in a container and at a broad level this could be acceptable. However, logistics management point to a clear cut distinction between the two. In the parlance of logistics, container-freight refers specifically to high value non-bulk goods. Containers allow easy and flexible handling of non-bulk goods from point of production to point of consumption and, are therefore, preferred by transporters (also referred to as shippers) and consignors. Also, chances of damage and pilferage are considerably reduced when freight is transported in containers. Furthermore, where transhipment of freight is required, container is the only option. Wagons do not meet these conditions as they cannot be taken off rails. To classify wagon and container in the same category is, therefore, inappropriate.

14.10 A transporter (shipper) in the case of container has several options in the choice of transport medium. Often they combine different modes of transport to benefit from the right mix of cost effectiveness, speed and locational flexibility. Within the inter-modal transportation options for container freight, the choice of transport depends on a plethora of factors like distance to be moved, physical characteristic and value of the commodity to be moved, total time required for the consignment and total price of transportation. Transport logistics indicate that for short hauls, road transport is preferred while for longer hauls rail transport and where available, water transports are the preferred options. Since, the informants have not specified the nature of freight and the distance to be covered, it is only

appropriate that the relevant market covers both road and rail transportation. To restrict the relevant market to only the rail network tantamount to a constrained analysis, arising solely from the allegations of the informants, and overlooking the broader issue of availability of alternative choices to users in the transport of container freight.

14.11 The very fact that railway freight transport has been partially opened for running containers trains only and not the entire rail freight clearly implies that the regulator i.e. MOR distinguishes container and wagon freight as two separate segments within the overall ambit of rail transportation. In fact CONCOR was set up only to take care of container freight. As an aggregator of container freight CONCOR operates both on rail and road. As submitted, the purpose of the PPP would get defeated if a distinction is not made between the type and characteristic of goods that a container train would carry and those carried by general wagons. The intent of the PPP policy was to invite application from private parties to run only the container trains (and not all types of trains) on IR network. As submitted by IR, the objective behind the Policy was to increase the rail share in respect of container traffic. It was also envisaged that the PCTOs would do so by aggregating the piecemeal traffic, as hitherto being done by CONCOR.

14.12 To establish whether rails and roads are substitutable for movement of containers let us look at the available evidences:

- In their submission, IR have forwarded the views of Adviser (Transport), Planning Commission who has opined:

  "On the basis of cross price elasticity (i.e. percentage change in quantity of freight offered to the Railways when the price of the road freight is changed by 1%), substitutability between road and rail products is an accepted fact. The level and scope of substitution depends on factors such as commodity to be carried, distance over which it has to be carried and other factors such as relative freight rates etc."

- The Task Force on Dedicated Freight Corridor Planning Commission gives an indication of potential competition to railways from road with the operationalization of the Dedicated Freight Corridor. Specifically, some of the observations of Task Force on Freight Corridor, Planning Commission are as follows:

    - The competitive pressure on Indian Railways will increase with the further up-gradation of the National Highways on the Golden Quadrilateral.
    - In order to compete with the roadways it would be necessary not only to lower price but also to improve performance generally in

accordance with the requirement of the clientele.

- On the Mumbai-Delhi segment, trucks moving on the National Highways would offer enough competition to the dedicated freight corridor.

- Indian Institute of Management (Ahmedabad) in their case study on 'Introducing Competition in Container Movement by Rail' notes that CONCOR priced its services possibly keeping in mind competition from the road sector.

14.13 The Commission has also noted the fact that several CTOs operate not only container trains, but also own fleet of trucks of various capacities to offer road freight services, thus complementing the rail container services. In other words, there is an intermodal choice between road and rail with respect to container freight. Thus, the Commission opines that the two major modes of container transport in India i.e. road and rail offer competitive constraint to each other.

14.14 Two judgments quoted in the submissions are useful to understand the principle involved and differences in approach in defining the relevant market. The GHV case which has been quoted by the informant to justify rail network as the relevant market is a case regarding opening of the Hungarian railway network to other private players for freight. In this case the Competition Commission of Hungary observed:

Rail freight transport services are acquired mainly by shippers of bulk goods. Bulk goods are generally transported in bulk, in a regular manner, in huge quantity, without any packaging.

14.15 The market in the GHV case was the bulk freight market and the need to distinguish between container freight and wagon freight never arose.

14.16 The other case referred to by the respondent is the judgment of the Commission of European Communities on the Deutsche Balm/ PCC Logistics. "This was a merger case between DB Mobility Logistics, the transportation and logistics division of Deutsche Bahn (a state owned German Company) and PCC Logistics wherein the market definition remained undefined.

14.17 On the basis of the above discussion and view of independent agencies, the 'relevant market in the present case is the transportation of containers within the boundaries of the country' and consequently the Commission concludes that road and rail are substitutable for container freight operations.

Issue II:

In the market so defined, is there any dominant enterprise that enjoys a position of strength to enable it to 'operate independently of competitive forces'.

15. Having defined the relevant market as being market for transportation of containers within the country the next step is to assess the dominance of IR. As stated earlier, in this market the two relevant modes are road and rail. It is axiomatic to state that rail network is the monopoly of Indian Railways while in the case of major highways it is the state that owns the roads. On rail network the new policy of private container operators there are 16 eligible players who have obtained licence to run container trains. The road network has a large number of operators including some of the rail CTOs. Many of the operators on roads are small operators (77%) owning less than five trucks.

15.1 The RITES Report (2005) notes that in 2004-05, while the major ports handled a combined volume of over 4 million TEUs, less than 1 million of this volume was carried over the rail network. It also notes that the average annual growth rate of container traffic was between 12 and 24 per cent during 1995 to 2005. Despite substantial growth in container traffic rail share remain low. The RITES Report also mentions that for export market the dominance is of freight forwarders operating on roads.

15.2 The CAG Report no. 8 of 2010-11 (Railways) covering its performance for the period 2004-05 to 2008-09 mentions "over the years the railways share of the total transport sector has come down from 53% in 1972-1977 to 37% in 1997-2002 due

to inadequate investment in infrastructure and competitive weakness vis-à-vis other modes of transport".

15.3 The Commission notes that railways are not a competitor in the relevant market, after the incorporation of CONCOR. Further CONCOR is not a dominant player in this market as there has been no indication that it enjoys a position of strength to influence either the competitors or the customers in its favour.

15.4 The above data, clearly establishes that container freight is largely carried on roads and railways are not dominant in container freight."

The Commission lastly examined the issue relating to abuse of dominance, proceeded on the premise that neither the Indian Railways nor CONCOR have been found to be dominant in the relevant market and observed :

"16.1 It may be appropriate, nonetheless, to examine whether the market is constrained by any of the actions of IR as infrastructure provider. This issue is posed in the larger context of reducing logistics cost which according to an author is as high as 14% of total value of goods (GDP) compared to 6-8% of goods (GDP) in developing countries.

16.2 Among other things, the Concession Agreement gives the right to container train operators to require the railway administration to haul their container trains on the IR network for movement of EXIM traffic as well as domestic traffic, subject to various terms and conditions and on payment of haulage

charges. Further, the railway administration is under an obligation to provide non-discriminatory infrastructure access to container trains on first come basis, subject to technical and running requirements.

16.3 The informant has argued that CONCOR as a unit of IR has been specially favoured to their disadvantage. Essentially, the arguments on allegations pertain to the level playing field in the concession agreement and the changes in the rates.

16.4 In the backdrop of the critical nature of transport logistics and its impact on the overall economic activity, it is important to deliberate on each of the allegations:

i. Exclusionary non-price conduct in violation of sections 4(2)(a)(i), 4(2)(b)(i) and 4(2)(c) of the Act - Prohibition from movement of coal, coke, ores and minerals by CTOs.

16.5 By prohibiting transportation of commodities such as Coal, Coke, Ores and Minerals, the DG is in agreement with the informant that MoR / IR have foreclosed about 60% of the market to the CTOs. The prohibition also has the effect of depriving choice of rail network to the customers who wish to transport less than train load of any of these commodities. Further, because of the restrictions, MOR / IR have prohibited the technical and scientific development relating to containers.

16.6 The Commission observes that DG's conclusions arise from the lack of distinction between container freight and wagon freight. As stated, rail infrastructure has been opened only to container trains, it is imperative to understand what is a container train and what type of goods are usually carried in containers. Bulk freight is normally transported in wagons while non-bulk and high value goods are transported in containers. This distinction is maintained even in maritime logistics where ships that are dedicated to bulk items like coal, grains, liquid and gaseous items are separated from ships that are designed to carry containerized items in containers, which are trans-modal in nature. Furthermore, no discrimination has occurred between CONCOR and the CTOs after signing of the Concession Agreement.

ii. Exclusionary price discrimination / exploitative pricing and exclusionary pricing in violation of sections 4(2)(a)(ii) and 4(2)(c) of the Act - unfairly high prices and margin squeezing.

17. By increasing haulage charges, imposing increased haulage charges on nine notified commodities on the basis of a container class rate and increasing stabling charges, the CTOs have been put to major cost disadvantage vis-à-vis movement of notified commodities in wagons as also making their operations commercially unviable. This allegation is accepted by DG.

17.1 The comparison of rates between wagons and containers on rail is inappropriate. Wagons have also carried non-bulk freight prior to the introduction of containers but the major freight traffic on rails has always been in bulk category. Comparison of rates must be between haulage charges of containers on rail network vis-à-vis roads. Despite increase in haulage charges, transportation by road is at least 1.3 times costly between Delhi-Mumbai and people have preference for road as a transport-medium. The allegation of discrimination of rates between wagons and container is not valid and accordingly, the Commission is of the view that it is not substantiated. Moreover, setting access charges is a tariff matter and is outside the purview of CCI."

Referring to unfair trade conditions in violation of Sections 4(2)(a)(i) and 4(2)(c), the Commission made the following observations :

"18.2 An issue that has been raised by one of the informants is that of applicability of essential facility doctrine to certain infrastructural facilities owned by CONCOR. On this issue the DG has observed:

"Considering the facts of the present case, it is felt that the CONCOR's terminals particularly those built on MoR land fulfils the aforesaid conditions to be considered as infrastructure essential to compete. Based on the above principles, it would be in the fitness of things to grant access to such infrastructure to other players at a

reasonable fee. Investigation has revealed that since under the present prevailing circumstances, CTO's are not able to access most of the terminals of CONCOR, the doctrine of essential facility is found to be violated by CONCOR and MoR."

18.3 The Commission opines that the essential facility doctrine is invoked only in certain circumstances, such as existence of technical feasibility to provide access, possibility of replicating the facility in a reasonable period of time, distinct possibility of lack of effective competition if such access is denied and possibility of providing access on reasonable terms. In the present case, we are of the view that there are no technical, legal or even economic reasons as to why other CTOs should not be creating their own terminals or similar facilities. As set out in the Indian Railways (Permission for operators to move container trains on Indian Railways) Rules, the Model Concession Agreement (MCA) and Gazette Notification No 458 dated 26/09/2006, CTOs are obligated to build their own terminals at their cost.

iv. Leveraging dominance in one market to protect another market in violation of section 4(2) (e) of the Act

19. By leveraging their dominance in rail services including tracks, terminals etc., railway entities are able to leverage their

dominance to protect their rail freight services to the detriment of the CTOs, as evident from the following:

a. Prohibition on specific commodities from operation by CTOs.

b. Provision of land owned by MoR on favourable terms and conditions to CONCOR, giving them unfair advantage over other private CTOs in setting up terminals.

c. Denying access to terminals and sidings owned by CONCOR, resulting in denial of effective market access to CTOs.

d. Restricting competition in the derivative market of maintenance services.

19.1 The conclusion of DG on this issue is based on his definition of relevant market. Rail freight service is an altogether different market and the Commission opines that leveraging does not arise in the market of transportation services for container freight. The issue of leveraging can be examined if and when a competitor tries to protect a market that is being threatened, which is not a case here."

On the basis of the above discussion, the Commission recorded the following conclusions :

"22. The case under consideration is of immense national importance in the light of increasing containerized trade to meet the demands of EXIM and domestic trade. Logistics

management clearly demarcate container freight and wagon freight and having taken note of these differences the relevant market is defined to focus on the competitive constraints of alternative transportation mediums that prevail. Further, the Commission has also held that in the relevant market, neither IR nor CONCOR are dominant. It is also legally not valid to treat IR and CONCOR as group entity. The Commission notes that in this commercial activity, the allegation pertaining to Sec 4 do not hold. There is, therefore, no abuse of dominant position.

22.1 The allegation however raises some concerns on the larger issue of policy design for incentivizing private participation. Section 18 of the Act and the preamble mandates the Commission to 'promote and sustain competition in markets'. From this dimension, the Commission is of the opinion that if the allegations regarding changes in haulage charges frequently act as disincentives it may be appropriate for the MoR to look into the matter. Private players look for consistency and continuity in policy. If the informants in this case perceive changes in haulage rates as inconsistent, the MoR may examine this to be in line with the avowed intent of the policy to encourage private players. Further, the Commission notes that there is a conflict of interest in as much as Railway Board/ IR exercise multiple roles as a licencor and operator, apart from owning the railway network. In view of this, it is desirable that these functions be delegated to independent entities."

(Underlining is mine)

87. The above noted judgement unmistakably shows that even through the Railways was in a preferential position viz. a viz. private parties availing the services for movement of containers, keeping in view the 'relevant market', the requirement of movement of certain commodities on priority basis, the allegation of abuse of dominance was not sustained. It is unfortunate that, while deciding the present case, the Commission did not even bother to refer to an important decision of its own.

88. Reference may also be made to order dated 02.04.2014 passed by the Tribunal in Appeal No. 91 of 2012, Schott Glass India Pvt. Ltd. (Schott Glass India) Vs. Competition Commission of India and another. In that case, the Commission had held the appellant guilty of acting in contravention of Section 4 of the Act and imposed penalty of Rs. 5.66 Crores. While setting aside the finding recorded by the Commission that the appellant was in a dominant position in the relevant market, the Tribunal relied upon the minority opinion and approved the same. Paragraphs 47 to 51 of the Tribunal's order which contain discussion on issues involving violation of various clauses of Section 4 of the Act are extracted below :

> "47. In paragraph 9.45 the CCI had observed that the continuation of functional discount of Schott Glass India was contingent upon the Converters signing the Trade Mark Licence Agreement (TMLA) which according to the Appellant was to deal with the problem of 'mixing risk' or of its products with the inferior quality Chinese imports. This observation is only partly correct because this situation started only after April, 2010 and was not in prevalence before that date. It must be realized here that the concerned provisions of sections 3 and 4 of the

Competition Act came into anvil on 20.5.2009. The CCI, therefore, would have done better if it had considered the discount pattern which continued between 20.5.2009 to April 2010 i.e. for nearly a period of 11 months. We have no hesitation in confirming the finding of the minority judgment to the effect that at least until April 2010 there was no dis-similar or favourable treatment given to Schott Kaisha in comparison to the other converter companies in so far as target discount was concerned. We, therefore, endorse the observation in the minority order in Paragraph 7.4.1.19 to the effect that, offer of target discount continued upto 31.03.2010 and thereafter by April 2010 began the regime of TMLA. This functional discount was on the following conditions as per the Sale Purchase Agreement:-

i) That Converters will promote Schott tubing by purchasing the agreed quantity in the particular year of agreement.
ii) That the Converters will not use or convert inferior quality Chinese tubing and will provide all information and proof in this regard.
iii) That the Converters will maintain “Fair Pricing” of ampoules and vials for Schott tubing.

48. It is to be seen that from April 2010 the Converters companies were required to sign TMLA and MSA in order to be eligible for availing functional discount. The learned Member Smt. Geeta Gouri in the minority order has observed that this functional discount policy has been applied uniformly to all the Converters at the same flat rate since its inception and was

non-discriminatory. We endorse the finding. It is also relevant to take note of the fact that at the time of the hearing on 22nd August, 2012 of the interim application for stay, it was very fairly contended by the learned senior counsel for the Appellant that he will have no difficulty in complying with the condition of not making the discount on both Amber and Clear tubes contingent upon sale of each other. In this view of the matter, we find no merit in the allegation of functional discount policy upto April, 2010 being discriminatory. It was only the computation of discount that was based on the total quantum of sales of both Amber and Clear tubes and not the sale of one kind of tube contingent upon sale of the other.

49. The main attack on the TMLA appeared to be on the basis of its unfairness. We have carefully seen the discussion further in the Minority order. The learned Member in the paragraphs from para 7.4.1.21 upto para 7.4.1.29 has painstakingly analyzed the implications of TMLA. It is not as if the functional discount was not available prior to April, 2010. It was indeed there but was subject to the earlier three conditions mentioned above. It is only after April 2010 that the Converters were required to sign the TMLA. The situation prior to April 2010 included both target discount as well as functional discount. While the target discount depended upon the purchases made by the Converters from the Appellant, functional discount on the other hand depended on the three conditions mentioned above. That is the only difference. This functional discount was only

8% in comparison to the target discount which essentially depended upon the stocks purchased by the Converters from the manufacturer and the slabs were between 2% to 12% in various degrees which have earlier come in the judgment. That is the only difference between the target discount and the functional discount. The situation changed after the TMLA was assailed for its alleged unfairness to the Converter companies.

50. In our opinion, the clauses of TMLA should not have been confused and mixed with the functional discount and the target discount which error appears to have been committed in the impugned majority order.

51. The learned Member Smt. Geeta Gouri while analyzing the TMLA has correctly observed that it was assailed on the ground of its unilateral language and which spelt out unfair and restrictive clauses in that agreement. According to the Informant (or that at least appears to be in this case) the clauses spelling out the right of the Appellant to enter any part of the factory or the premises where the manufacture of the relevant products is carried on, unilateral determination of breach by the Appellant, and penalty amount of Rupees Seventy lakhs in case a sample was found to be sub-standard, were the example of such unfair and restrictive clauses. In fact the oral statements which remained untested by cross-examination and which came from essentially interested witnesses also spelt out these complaints. We have already deprecated that practice of accepting the statements of the interested witnesses without

any opportunity of cross-examination as the gospel truth. Be that as it may, the learned Member in the minority order has then painstakingly analyzed these clauses and has also considered the contentions raised by the Appellant that the TMLA was brought to mitigate the mixing risk of the products with inferior tubes such as Chinese tubes. The defence of the Appellant was that there was increasing pressure from the low price manufacturers from China and therefore it was felt that it was necessary to promote its brand and as such it introduced TMLA and also the MSA which was basically an agreement to co-promote its brand and products with the Converters to the pharmaceutical companies. The TMLA was also to authorise Converters to use the logo of the Appellant for its own benefit as admittedly the product of the Appellant was far too better as compared to the imported Chinese tubes. That aspect has already been covered in the earlier part of the judgment that there was a preference to the tubes manufactured by the Appellant and in fact the pharma companies were also complaining about the use of the Chinese tubes. We have in the earlier part of the judgment also referred to the fraud played by the Informant of getting fake logos printed in order to pass of its product under that logo to the pharma companies who insisted on the tubes manufactured by the Appellant company alone."

(Underlining is mine)

89. The last ground of challenge relates to the penalty imposed by the Commission. In paragraph 36 of the impugned order, the Commission took cognisance of the fact that vide Circular dated 20.05.2013, the time gap restriction was substantially reduced and 3 days' time gap does not appear to have any adverse effect in the market. Notwithstanding this, the Commission arbitrarily imposed penalty @ 2% of the average income receipt/turnover of the appellant for the last three preceding financial years.

90. In this context, it is apposite to note that the proviso to Section 27(b) (unamended) was couched in a language, which made it mandatory for the Commission to impose on each producer, seller, distributor, trader or service provider included in a cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or 10% of the average of the turnover of the cartel for the last preceding three financial years, whichever was higher. It is thus clear that if the proviso to Section 27(b) had not been amended, then the Commission had no option but to impose penalty on each producer, seller, distributor, trader or service provider in cases involving formation of cartel. However, in its wisdom, Parliament amended the proviso and substituted the word 'shall' with the word 'may'. This amendment was done to bring the proviso in tune with the main Section 27, which uses the expression "it may pass all or any of the following order" and clause (b), which confers discretion upon the Commission to impose penalty as it may deem fit, subject to the rider that it shall not be more than 10% of the average of the total turnover for the last three preceding financial years. Clauses (c) and (d) also uses the word 'may', which signifies that the Commission has the discretion to pass the particular order, which it may deem proper in the facts and circumstances of the case.

91. Since the legislature has not laid down any criteria for imposing penalty, the Commission is duty bound to consider all the relevant factors like – nature of industry, the age of industry, the nature of goods manufactured by it, the availability of competitors in the market and the financial health of the industry etc. and also take note of the law laid down by the Supreme Court, the High Courts and the Tribunal. In Dilip N. Shroff v. Joint CIT [2007] ITR 519, the Court considered the scope of Section 271(1)(c) of the Income Tax Act, 1960 and observed :

> "The legal history of section 271(1)(c) of the Act traced from the 1922 Act prima facie shows that the Explanations were applicable to both the parts. However, each case must be considered on its own facts. The role of the Explanation having regard to the principle of statutory interpretation must be borne in mind before interpreting the aforementioned provisions. Clause (c) of sub-section (1) of section 271 categorically states that the penalty would be leviable if the assessee conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing of inaccurate particulars alone, the assessee does not ipso facto become liable for penalty. Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings as has been noticed in some of the decisions of this court, inheres on the face of the statutory provisions. Penalty proceedings are not to be initiated, as has

been noticed by the Wanchoo Committee, only to harass the assesse. The approach of the Assessing Officer in this behalf must be fair and objective."

[Emphasis supplied]

92. In Hindustan Steel Ltd. vs. State of Orissa [1970] SC 253, the Supreme Court made the following important observations on the issue of imposing penalty:

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

[Emphasis supplied]

93. What needs to be emphasised that being an adjudicatory body, the Commission exercises quasi judicial function. The orders passed by it can have

great adverse impact on the rights of the parties. Therefore, it is bound to act in consonance with the provisions of the Statute and the rules of natural justice, which are required to be followed by every quasi judicial authority functioning under our Constitution. To put it differently, no quasi judicial body has the right to trample over the fundamentals of the rule of law, which constitute an integral part of democracy in our country. One of the facets of the rules of natural justice is that every quasi judicial authority must record reasons in support of its order and such reasons reflect and demonstrate the application of mind by the quasi judicial authority. An order which is bereft of reasons is just like inscrutable face of a sphinx.

94. An extremely lucid exposition of law on the requirement of recording of reasons has been made by the Full Bench of Gujrat High Court in Testeels Ltd. Vs. N.M. Desai and Another [AIR 1970 Guj. 1]. In the judgement authored by him on behalf of the Full Bench, P.N. Bhagwati, C.J. (as he then was) examined the issue whether the administrative officer discharging quasi judicial functions is bound to give reasons in support of his order he makes. That question arose in the backdrop of challenge of an order made by the Conciliation Officer under Section 33(2)(b) of the Industrial Disputes Act, 1947. After examining the various facets of the question, the Full Bench observed :

> "3. There are two strong and cogent reasons why we must insist that every quasi-judicial order must disclose reasons in support of it. The necessity of giving reasons flows as a necessary corollary from the rule of law which constitutes one of the basic principles of our constitutional set up. Our Constitution posts a welfare State in which every citizen must

have justice - social, economic and political and in order to achieve the ideal of welfare State, the State has to perform several functions involving acts of interferences with the free and unrestricted exercise of private rights. The State is called upon to regulate and control the social and economic life of the citizen in order to establish socio-economic justice and remove the existing imbalance in the socio-economic structure. The State has, therefore, necessarily to entrust diverse functions to administrative authorities which involve making of orders and decisions and performance of acts affecting the rights of individual members of the public. In exercise of some of these functions, the administrative authorities are required to act judicially. Now what is involved in a judicial process is well settled and as pointed out by Shah J., in Jaswant Sugar Mills's case, AIR 1963 SC 677 (supra), a quasi-judicial decision involves the following three elements:

(1) It is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rules:

(2) It declares rights or imposes upon parties obligations affecting their civil rights; and

(3) the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of material if a dispute be on question of facts, and if the dispute be on question of law, on

the presentation, of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact.

The administrative authorities having a duty to act judicially cannot therefore decide on considerations of policy or expediency. They must decide the matter "solely on the facts of the particular case solely on the material before them and apart from any extraneous considerations" by applying "pre-existing legal norms to factual situations". The duty to act judicially excludes arbitrary exercise of power and it is, therefore, essential to the rule of law that the duty to act judicially is strictly observed by the administrative authorities upon whom it is laid. If any departure from the observance of the duty to act judicially could pass unnoticed, it would open the door to arbitrariness and make a serious inroad on the rule of law. To quote the words of the Supreme Court in S. G. Jaisinghani v. Union of India, AIR 1967 SC 1427: ". . . . .. the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the

antithesis of a decision taken in accordance with the rule of law." Now the necessity of giving reasons is one of the most important safeguards to ensure observance of the duty to act judicially. If the administrative officers can make orders without giving reasons, such power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But if reasons are required to be given for an order, it will be an effective restraint on such abuse as the order, if it discloses extraneous or irrelevant considerations or is arbitrary, will be subject to judicial scrutiny and correction. As observed by Subba Rao J., as he then was, in Madhya Pradesh Industries Ltd., v. Union of India, AIR 1966 SC 671, "A speaking order will at its best be a reasonable and at its worst at least a plausible one". The condition to give reasons introduces clarity, checks the introduction of extraneous or, at any rate, minimises arbitrariness in the decision making process and it gives satisfaction to the party against whom the order is made and guarantees consideration of all relevant factors and discharge of his functions by the officer in accordance with the requirement of law. We may in this connection usefully quote the following passage from "American Administrative Law" by Bernard Schwartz at page 163:

> "The value of reasoned decisions as a check upon the arbitrary use of administrative power seems clear....

The right to know the reasons for a decision which adversely affects one's person or property is a basic right of every litigant

(and that whether the forum be judicial or administrative). But the requirement that reasons be given does more than merely vindicate the right of the individual to know why a decision injurious to him has been rendered. For the obligation to give a reasoned decision is a substantial check upon the misuse of power. The giving of reasons serves both to convince those subject to decisions that they are not arbitrary and to ensure that they are not, in fact, arbitrary. The need to publicly articulate the reasoning process upon which a decision is based, more than anything else, requires the Magistrate (judicial or administrative) to work out in his own mind all the factors which are present in a case. A decision supported by specific findings and reasons is much less likely to rest on caprice or careless consideration. As Judges Jerome Frank well put it in language as applicable to decision-making by administrators as by trial judges, the requirement of reasons has the primary purpose of evoking care on the part of the decider. . . . ." If the administrative officers having a duty to act judicially are required to set forth in writing the mental processes of reasoning which have led them to the decision, it would to a large extent help to ensure performance of the duty to act judicially and exclude arbitrariness and caprice in the discharge of their functions. The public should not be deprived of this only safeguard.

4. Another reason of equal cogency which weighs with us in spelling out the necessity for giving reasons is based on the

power of judicial review which is possessed by the High Court under Article 226 and the Supreme Court under Article 32. The High Court under Article 226 and the Supreme Court under Article 32 have the power to quash by certiorari a quasi-judicial order made by an administrative officer and this power of review exercisable by issue of certiorari can be effectively exercised only if the order is a speaking order and reasons are given in support of it. If no reasons are given, it would not be possible for the High court or the Supreme Court exercising its power of judicial review to examine whether the administrative officer has made any error of law in making the order. It would be the easiest thing for an administrative officer to avoid judicial scrutiny and correction by omitting to give reasons in support of his order. The High Court and the Supreme Court would be powerless to interfere so as to keep the administrative officer within the limits of the law. The result would be that the power of judicial review would be stultified and no redress being available to the citizen, there would be insidious encouragement to arbitrariness and caprice. The power of judicial review is a necessary concomitant of the rule of law and if judicial review is to be made an effective instrument for maintenance of the rule of law, it is necessary that administrative officers discharging quasi-judicial functions must be required to give reasons in support of their orders so that they can be subject to judicial scrutiny and correction.

5. This has always been regarded as a most important reasons in the United States for insisting that quasi-judicial decisions must show reasons on their face. To quote from Schwartz's "American Administrative Law" at page 166:

> "In the United States, perhaps the most prominent reasons advanced for the requirements of reasoned decisions is the role of such decisions in facilitating review by the courts. If the bases of administrative decisions are not articulated, it is most difficult for a reviewing court to determine whether the decision is a proper one. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong', reads an oft-cited statement of Gardozo J., ... for judicial control to be of practical value, the administrative tribunal or agency, 'in making its order, should not make it an unspeaking or unintelligible order, but should in some way, state upon the face of the order the element which had led to the decision'. The words quoted are from a noted judgment of Lord Cairns, L.C., in which he laid down the distinction between 'speaking' and 'unspeaking' orders, which has become of basic importance in present-day English Administrative law. When Lord Cairns speaks of an 'unspeaking or unintelligible order', he obviously means an order which gives no reasons. If the administrator does not give reasons, he, in effect, disarms the exercise of the High Court's supervisory jurisdiction. In such a case, the Court cannot examine further than the face of the challenged

decision, which, in Lord Sumner's famous phrase, 'speaks' only with 'inscrutable face of a sphinx'."

(Underlining is mine)

95. In Excel Corp Care Ltd. Vs. Competition Commission of India -Appeal No.79 of 2012 and the connected matters, the Tribunal upheld the finding recorded by the Commission on the issue of violation of Section 3(3)(b) and 3(3)(d) read with Section 3(1) of the Act but set aside the penalty. Paragraphs 60 and 61, which contain the reasoning on this aspect of the matter are extracted below :

> "60. The arguments put forward by Shri Ravinder Narain, Shri Ramji Srinivasan as also by Dr. V. K. Aggarwal are more or the less correct when they point out the total absence of reasons as to why the CCI decided to inflict the penalty @ 9% of the average turn over. Time and again we have been reiterating the necessity of the reasons while ordering the penalty. We hope that the CCI take serious note of that factor. This is particularly true as the CCI is an adjudicatory body as declared by two Supreme Court judgments. The role as an adjudicatory body would cover all the aspects of hearing and deciding.
>
> 61. There can be no dispute that where harsh financial penalties are inflicted the reasons become all the more necessary."

96. In Rangi International Limited vs. Nova Scotia Bank and others (2013) 7 SCC 160, a two-Judge Bench of the Supreme Court considered the question

whether the Commission and the Appellate Tribunal should record reasons in support of their orders and observed :

> "The Competition Commission as well as the Competition Appellate Tribunal are exercising very important quasi-judicial functions. The orders passed by the Commission and the Appellate Tribunal can have far-reaching consequences. Therefore, the minimum that is required of the Commission as well as the Appellate Tribunal is that the orders are supported by reasons, even briefly."

97. Since the penalty part of the impugned order is totally bereft of reasons, the same is liable to be quashed.

98. It is most unfortunate that while imposing the penalty, the Commission has ignored the law laid down by the Supreme Court, the High Courts and this Tribunal. In this case, penalty portion of the impugned order can appropriately be described as 'inscrutable face of a sphinx' and I do not have any option but to set aside the same which I hereby do.

99. In the result, the appeal is allowed and the impugned order is set aside. The amount deposited by the appellant in compliance of the interim order dated 10.07.2014 passed by the Tribunal shall be refunded to it within three months.

[G.S. Singhvi]
Chairman

1st July, 2016