



THE EIGHTH NLU ANTI-TRUST LAW MOOT COURT COMPETITION, 2017

National Law University, Jodhpur

In association with

Shardul Amarchand Mangaldas & Co.

And

The Competition Commission of India

KNOWLEDGE & RESEARCH PARTNERS



PROPOSITION

1. Bohemia is a republic in South Asia with its capital at Riverdale. The laws of Bohemia are in *pari materia* with the laws of India, with the limited exceptions created in this Proposition. Bohemia enacted its competition law, the Bohemian Competition Act (the **Competition Act**), in 2002. However, due to resistance from business and industrial houses in Bohemia, the Competition Act was only brought into force in a phased manner, with the last provisions coming into force in June, 2011.
2. The Competition Commission of Bohemia (**CCB**) treats decisions of the Competition Commission of India as well as other authorities as having high persuasive value. The CCB also regards the competition regulators of the European Union and the United States highly, and relies on precedent from these jurisdictions as well.
3. **Anmol** is one of the largest brands of milk and dairy products in Bohemia operated by the Davenport Cooperative Society (**Davenport Cooperative**), located at Norton, a small town in the state of Davenport. Formed in 1970, Anmol has been synonymous with revolutionizing milk and dairy processing and has made Bohemia one of the largest producers of milk. Today, its product range comprises of milk, milk powder, health beverages, ghee, butter, cheese, ice-cream, chocolates and traditional sweets. It has a strong network of dealers and retailers in Bohemia with 70 sales offices spread across 30 states in Bohemia. Being one of the most trusted brands, Anmol's milk is one of the most popular products out of the several milk products it offers.
4. Dairy Fresh Ltd. (**Dairy Fresh**) and **Farm Everyday** are other milk and dairy products brands in Bohemia. The milk brand of Dairy Fresh is advertised by Takshi Vohra, a star wrestler of Bohemia who recently won a gold at the Titans, the most prestigious sporting event in the world due to which it is very popular amongst the sporting community and Bohemian citizens in the age group of 15-25 years. Farm Everyday is known to use only cow's milk in its products and is very popular amongst Bohemian citizens in the age group of 50-70 years.
5. Dylon Nutricia (**Dylon**), a leading world nutrition chain, has recently set up business in Bohemia with factories located across four Bohemian states. Dylon has heavily advertised on focusing its products towards the nutrition of mothers and infants, with Dylon's Baby food being one of the most popular products. Dylon owns its own dairy farms and is known to use robotic milkers, individual cow sensors and automated calf feeders to make dairy farming more cost efficient. Globally, Dylon's milk products sell at extremely competitive, and generally low prices. Dylon has a specialized R&D team comprising of scientists and nutritionists for devising new and innovative methods in health and nutrition products. Dylon is a patent holder of a unique tetra packaging for milk treated under high temperature conditions and stringent manufacturing standards which allows the milk to be stored for six months without refrigeration and to last for seven extra days after the packaging has been opened.
6. Publicly available data suggests that Bohemia was the largest producer of milk in FY 2015-2016. It also mentions that Anmol, Dairy Fresh, Farm Everyday and Dylon collectively hold 75% share in the market of milk supply. The remaining market is characterized by the unorganized sector with independent milk suppliers and cooperatives in several states of Bohemia. While Anmol continues to dominate the market with its entire range of products, Dylon's market share has rapidly increased in 2015-2016 with demand for its packaged milk having surpassed the demand of milk of other manufacturers. The collective

market share of the other three companies has fallen to 36% for FY 2015-2016. All the four dairy and milk manufacturers supply milk in plastic pouches and tetra packs.

7. In August 2012, due to an unfortunate incident, poisoned cattle feed was fed to the cows and buffaloes in several dairy farms, which led to the death of over 50,000 cows and buffaloes. Due to widespread protests from the farming community and environmental groups, the Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture of the Government of Bohemia implemented the Cattle Feed (Manufacture and Sale) Regulations, 2012 to regulate the manufacture and sale of cattle feed (**Cattle Feed Regulations**).
8. The Cattle Feed Regulations imposed the following rules:
 - a. Cattle feed will be manufactured by the companies which receive certification and authorization from the Government of Bohemia;
 - b. Cattle feed was to consist of only specified ingredients;
 - c. Cattle feed to be subject to physical, biological and chemical tests which were to be conducted under strict laboratory conditions to be maintained by all the certified and authorized companies;
 - d. The certified and authorized companies were to share their monthly price lists at the end of the month to be published in the journal released by the Department of Animal Husbandry.
9. Acme Group Plc (**Acme**), a global giant in the animal husbandry and farm produce businesses, decided to begin operations in Bohemia, to capitalize the potential for growth, beginning with the cattle feed business. Whilst Acme has had immense success internationally with its cutting edge innovations in the animal husbandry business, environment groups globally have criticized it for its questionable business practices and “irresponsible” innovations, which are commercialized allegedly “without due regard for the ecological consequences”.
10. Acme entered into joint venture agreements with several Bohemian entities and formed Adiva Regina Cattle Feed Limited (**Adiva**), Brick Cattle Feed Limited (**Brick**), Cautious Cattle Feed Limited (**Cautious**) and Detro Cattle Feed Limited (**Detro**) between October and November 2012. In each of these entities, Acme held over 50% shares. Adiva, Brick, Cautious and Detro then entered into a formal Common Research and Development Agreement in January 2013 that would enable each of them to meet the standards required under the Cattle Feed Regulations, in an efficient manner using modern technology (**R&D Agreement**). In accordance with the research done pursuant to the R&D Agreement, the four companies agreed to use a certain ingredient in the manufacture of cattle feed, which was available only from local, unorganized supply chains. Adiva, Brick, Cautious, and Detro are all active throughout Bohemia, but each of them has noticeably higher market shares in the northern, eastern, western and southern states of Bohemia, respectively. Adiva, Brick, Cautious, and Detro received their certification from the Government of Bohemia in June 2013, and began the manufacture and sale of cattle feed to dairy farmers across Bohemia. Their prices for cattle feed across Bohemia were largely similar, but did not always move in tandem. Prices in different regions varied, and each of the four appeared to charge slightly lower prices in the region where it had higher market shares.
11. Due to global recession, the Bohemian economy suffered a slowdown which affected the unorganized sector in all markets and industries. As a result, the sales of nearly all fast moving consumer goods

(**FMCG**) reduced for a few months. There was a reduction in Adiva's supply of cattle feed in the northern belt of Bohemia, beginning mid-December 2014. Soon after, by January 2015, there was a reduction in the supply of cattle feed from Brick, Cautious, and Detro as well.

12. In May 2016, Mother Care and Child Care (**MCC**) a non-governmental organization in Bohemia, along with the Retailer's Association for Milk (**RAM**) filed an Information under Section 19(1)(a) of the Competition Act before the CCB alleging abuse of dominance by Dylon by charging unfair prices for its packaged milk over other dairy and milk product manufacturers in Bohemia. The CCB found that there was a *prima facie* case of violation of Section 4 of the Competition Act, and directed the office of the Director General (**DG**) to investigate the matter. RAM, a large association of dairy retailers, made a public announcement that it intended to seek compensation from Dylon on behalf of all the dairy retailers and consumers who paid an unfairly high price.
13. The DG sought information and explanation from Dylon and its competitors on the prices being charged. During the course of the investigation it was revealed that there was an increase in the price of milk by all the milk suppliers by unusual percentages; however, there was an extraordinary increase of 105% in the price charged by Dylon for packaged milk. While there was a reduction in prices of milk by other milk suppliers, Dylon continued to charge the increased price. One of the queries from the DG required Dylon to provide a break-up of its costs. Whilst Dylon resisted providing exact costing information citing their significant R&D expenses in relation to baby nutrition, milking technology and other milk products and packaging, it revealed that there was an increase in the price of cattle feed in the months of April to July 2015. Dylon also submitted a study by the National Commission on Mother and Child Nutrition indicating that, while all the milk suppliers offered packaged milk, Dylon's milk is the freshest and of the best nutritional quality due to the unique packaging which was not used by any other milk and dairy product manufacturer in Bohemia. Another study considered by the DG revealed that Dylon's marketing of the value its unique packaging offered swayed many consumers in its favour, resulting in a significant boost in sales. However, the study did not consider or comment on whether the unique packaging indeed had any connection to or benefit in relation to or the aftermath of the incident of poisoned cattle feed.
14. During the pendency of the investigation against Dylon, Dylon filed an Information against Adiva, Brick, Cautious, Detro under Section 19(1)(a) for cartelization in the manufacture of cattle feed through limiting and controlling production and supply of cattle feed and fixing prices. The CCB considered this information and as it believed that Adiva, Brick, Cautious and Detro have cartelized directed the matter for investigation by the DG under Section 26(1) of the Competition Act. Through the same order, the CCB clubbed the investigation against Dylon and the cattle feed manufacturers, and directed the DG to file a common investigation report.
15. During the DG investigation, the DG sought information from Adiva, Brick, Cautious and Detro on prices, capacity and production, sale and profits generated in FY 2015-2016. It was also revealed that on 20 December 2014, the cattle feed manufacturers attended a seminar conducted by the Department of Animal Husbandry, Dairying and Fisheries on safe environmental practices followed by an informal dinner. The representatives of Adiva had not attended the dinner since their names were not mentioned on the attendance sheet outside the dinner venue. The DG also considered the telephone records of the

CEOs of Adiva, Brick, Cautious and Detro for the months of December 2014 to March 2015, and found that there were several calls and SMSs exchanged between them during this period.

16. In their third party submissions to the DG, Mr. Andy Kurian, the CEO of Davenport Cooperative informed the DG that, in order to protect against the sudden increase in price, Davenport Cooperative had made written representations to all the cattle feed manufacturers to reduce the prices. However, the four companies refused their request and stated that their prices would follow the market trend. All four letters used almost identical language, and were dated the same day (almost three weeks after Davenport Cooperative's letter).
17. The DG's office submitted its report (**DG Report**) against Dylon and the cattle feed manufacturers. The DG rejected the market definition proposed by Dylon which had contended that the relevant market was '*processing and sale of milk*', instead the DG found Dylon to be dominant in the relevant market of '*processing and sale of packaged milk*'. The DG found Dylon to be in violation of Section 4 of the Competition Act for charging an unfair price and rejected its argument that the pricing was due to the increase in input cost of cattle feed.
18. Additionally, the DG noted that all the four cattle feed manufacturers colluded to curtail production and supply in the months of January to March 2015, which led to an increase in the price of cattle feed in the months of April to July 2015. The DG did not accept the justification offered by the cattle feed manufactures that the reduction in production and supply was due to the economic slowdown of Bohemian economy. The DG relied upon 'circumstantial' evidence to conclude that the cattle feed manufacturers entered into a collusive agreement in violation of Section 3(3) of the Competition Act.
19. The CCB heard all the Parties and perused the objections to the DG Report and written submissions filed by them. Dylon argued that since the cattle feed manufactures were overcharging for the supply of cattle feed, Dylon had to adjust the inflated price of cattle feed and was unable to overcome this price without having to pass it on to the consumers. The cattle feed manufacturers argued that since they were part of Acme, they were controlled by the same parent and were part of a '*single economic entity*' and hence there could not be any collusion between them under Section 3(3) of the Competition Act.
20. After considering the submissions, and the DG Report, the CCB passed a common order in relation to both cases (**CCB Order**). In this order, the CCB agreed with the recommendations of the DG, and held that the conduct of Dylon was abusive in nature and in contravention of Section 4(2)(a)(ii) of the Competition Act. It held that Dylon had benefitted from the significant increase in price, even if there was an increase in the cattle feed prices. However, the CCB disagreed with the DG's recommendation in relation to the alleged cartel, and held that there was no contravention of Section 3(3) of the Competition Act in the form of an anti-competitive collusive agreement between Adiva, Brick, Cautious and Detro since by virtue of being part of a single economic entity they could not have cartelized. After recording these findings, the CCB issued the following directions in the order, against Dylon:
 - Dylon is directed to cease and desist from charging unfair prices in the sale of packaged milk, and
 - Dylon is directed to pay a penalty of 10% of its average annual turnover for the last three years.

21. Aggrieved by the decision of the CCB, finding it to be in contravention of Section 4, and finding no contravention under Section 3 of the Competition Act by the four cattle feed manufacturers, Dylon filed an appeal to the Competition Appellate Tribunal (**COMPAT**). In this appeal, the respondents are the CCB, MCC, RAM, and the four cattle feed manufacturers. RAM also filed an application for compensation under Section 53N of the Competition Act. In addition to challenging the merits and substance of the CCB Order, Dylon contends that both the imposition and quantum of penalty are not sustainable, and that RAM is not entitled to compensation under the Competition Act.

22. The COMPAT has decided to hear the appeal and the application together, and will now hear all arguments, including the issues and contentions raised before the DG and the CCB, and the recommendations and findings of the DG and CCB respectively.

NOTE:

Lawyers representing both sides are required to address the arguments that are specifically mentioned in the Proposition. They are, however, free to make any other arguments that they deem fit. Lawyers for both sides are encouraged to explore additional arguments related to jurisdiction as well as merits.