

## FIRST NUALS ANTITRUST MOOT COURT COMPETITION

### CENTRE FOR COMPETITION LAW AND POLICY,

#### NUALS, KOCHI

#### MOOT PROPOSITION

1. Kryptonion is a country in South Asia with a population of approximately 196 million people. Kryptonion is a gradually developing economy with an annual GDP growth rate of approximately 4% over the last 3 years (2014-2016). In 2002, Kryptonion enacted the Kryptonion Competition Act ("**Act**") to regulate practices having an adverse effect on competition. However, the Act was brought into force in a phased manner with the provisions on anti-competitive agreements (Section 3) and abuse of dominance (Section 4) coming into force on 20 May 2009 and the provision on regulation of combinations (Sections 5 and 6) coming into force on 1 June 2011.
2. In 2009, Clarke RO Systems Limited ("**Clarke**"), a "pioneer" in water purifiers for domestic households brought in the revolutionary reverse osmosis ("**RO**") technology into Kryptonion. The new technology gained popularity rapidly and Clarke soon became one of the leading players in water purifiers in Kryptonion. Subsequently, Clarke diversified into other purification systems and started producing air purifiers and vegetable and fruit purifiers. In June 2014, Clarke introduced a rebate system for its distributors whereby distributors were given a rebate of 10% of the total value of their purchases if they purchased 80% or more of their annual requirements for RO technology water purifiers from Clarke. In March 2014, Wayne Inc. ("**Wayne**") a manufacturer of traditional non-RO water purifiers launched a competing RO technology water purifier. While Wayne was able to achieve limited success, it was never able to overtake Clarke in the sales of RO technology water purifiers.
3. In April 2016, Wayne filed an information with the Competition Commission of Kryptonion ("**CCK**") alleging that Clarke, being in a dominant position in the market for RO technology water purifiers in Kryptonion had abused its dominance by introducing its rebate system which had the effect of distributors obtaining almost all of their requirements from Clarke thereby foreclosing the market for Wayne. Wayne alleged that this had resulted in its inability to compete fairly on the market and had led to heavy losses so much so that Wayne was considering exiting the market.
4. Clarke, in its terms and conditions of sale specifies that its RO technology water purifiers require an annual maintenance check and replacement of the internal filter after 3 years. For this purpose, customers are required to enter into a separate annual maintenance contract ("**AMC**"). Clarke itself offers these AMC services to customers. However, several independent AMC providers also claim to be able to provide AMC services for Clarke branded RO technology water purifiers. Till 2012, Clarke used to offer the AMC services to its customers free of cost for 5 years from the date of purchase as an introductory offer. From 2012 onwards, Clarke started charging a nominal price of 500 Kryptonion Rupees for one water purifier per annum for its AMC services. In May 2016, Luthor Corp ("**Luthor**") an independent AMC provider filed an information with the CCK against Clarke alleging that Clarke had abused its dominance by charging below cost prices in the AMC market for RO technology water purifiers. Luthor also alleged that Clarke had indulged in a margin squeeze by charging an unreasonable price for the diagnostic tools and manuals it supplied to independent AMC providers such as Luthor. Without these diagnostic tools and manuals, it would be impossible for independent AMC providers to provide AMC services for Clarke RO technology water purifiers.

5. The CCK clubbed the two informations filed against Clarke and found that a *prima facie* case for investigation was made out in both cases. The matter was referred to the office of the Director General (“**DG**”) for investigation. It should be noted that Clarke was not granted an oral hearing before the CCK arrived at its *prima facie* conclusion. The DG completed its investigation and submitted a report finding Clarke in violation of the Act on all counts alleged by Wayne and Luthor. The CCK circulated the DG’s report to all parties and granted them an opportunity to file written objections and an opportunity of oral hearing. At the oral hearing, Clarke had raised an objection that the DG had relied on statements of its customers and competitors whose statements could be prejudiced without providing Clarke an opportunity of cross-examination. Subsequent to the oral hearing, the CCK passed its’ final order with the following findings:
- a) There was no necessity to provide Clarke an opportunity of cross-examination as Clarke had not specifically disputed any of the statements of the competitors/customers;
  - b) There are two relevant markets to be assessed in this matter:
    - i. The market for manufacture and sale of RO technology water purifiers in Kryptonian (“**Primary market**”);
    - ii. The market for repair and maintenance of RO technology water purifiers in Kryptonian (“**Aftermarket**”).
  - c) Clarke is dominant on both these markets. In the Primary market, Clarke was a monopoly till the entry of Wayne in 2014. Even after Wayne’s entry, Clarke has managed to consistently hold a market share of over 70%. Clarke possesses a first mover advantage which cannot be easily overcome by new entrants. In the Aftermarket, Clarke benefits from its strong position on the Primary market. For its own RO technology water purifiers, Clarke has held a market share of over 90% in the aftermarket even when there are independent AMC providers in the market.
  - d) Clarke has abused its dominant position on these markets by indulging in the following practices:
    - i. Granting rebates conditional on the distributors purchasing 80% or more of their requirements from Clarke resulting in the denial of market access to its competitor in violation of Section 4(2)(c) of the Act;
    - ii. The practice of offering AMC for free until 2012 and subsequently for a nominal price of 500 Kryptonian Rupees per annum amounts to a predatory price in violation of Section 4(2)(a)(ii) of the Act. The CCK found that the average avoidable cost (“**AAC**”) of offering AMC services for one water purifier per annum would be around 600 Kryptonian Rupees and Clarke had consistently offered its AMC services below AAC; and
    - iii. Clarke’s prices for its diagnostic tools and manuals amounted to a margin squeeze as it left Luthor with no margin to compete fairly on the Aftermarket. The CCK found that the diagnostic tools and manuals were offered for a price of 400 Kryptonian Rupees. Luthor’s further cost of operations amounted to another 400 Kryptonian Rupees. This meant that in order to match Clarke’s price of 600 Kryptonian Rupees, Luthor would have to offer its AMC services at a loss.
  - e) Clarke was ordered to cease and desist from indulging in the above mentioned conduct. A penalty amounting to 3% of the average turnover of Clarke for the last three years amounting to 150 crore Kryptonian Rupees was imposed on Clarke.

6. Clarke filed an appeal against the order of the CCK before the Competition Appellate Tribunal (“**COMPAT**”) of Kryptonion. In its appeal, Clarke challenged the CCK’s order on the following grounds:
- a) Denial of opportunity to cross-examine amounts to a violation of the principles of natural justice and has vitiated the entire investigation;
  - b) The relevant market has been incorrectly delineated by the DG and the CCK. The relevant market cannot be restricted to RO technology water purifiers as customers view non-RO technology water purifiers as substitutes to RO technology water purifiers. Further, there is no separate aftermarket for repair and maintenance of RO technology water purifiers. Customers are able to indulge in whole life costing when they purchase a water purifier. Therefore, the correct relevant market is a systems market for all water purifiers.
  - c) In this correct relevant market, Clarke is not dominant as its market share is less than 50% and there are other competitors who impose significant competitive constraints on Clarke.
  - d) Without prejudice to the above, the conduct of Clarke does not amount to abuse for the following reasons:
    - i. The rebate system was introduced by Clarke to meet the competition. Further, the CCK has failed to carry out a cost analysis to assess whether an equally efficient competitor would be able to compete with Clarke;
    - ii. The price charged by Clarke for AMC is not predatory. The free AMC services till 2012 was an introductory offer as Clarke was a new entrant in the market. Post 2012, the CCK has used the wrong measure of cost. The correct measure of cost should be average variable cost (“**AVC**”) and the price charged by Clarke was above its average variable cost which it estimates to be around 200 Kryptonion Rupees;
    - iii. There is no margin squeeze in the price charged by Clarke for its diagnostic tools and manuals. The reason for Luthor’s inability to compete is its own inefficiency. An equally efficient competitor would have much lesser cost of operations than Luthor.
  - e) Without prejudice, the CCK erred in imposing a penalty on the total turnover of Clarke and should have imposed a penalty only on the “relevant turnover” of Clarke i.e. only the turnover arising out of sales of water purifiers and related AMC services.
7. The **COMPAT** has listed the matter for final hearing and has framed the following issues for consideration:
- a) Does the denial of opportunity of cross-examination vitiate the investigation?
  - b) What is the relevant market in the instant case?
  - c) Is Clarke in a dominant position in the relevant market?
  - d) Does Clarke’s conduct amount to abuse of dominance?
  - e) Should the penalty have been imposed only on relevant turnover or on the total turnover of Clarke?

**NOTE:**

1. The laws of Kryptonion are in *pari materia* with the laws of the Republic of India. Decisions of the Competition Commission of India, Competition Appellate Tribunal of India and other courts in India have very high persuasive value in Kryptonion. The CCK and **COMPAT** in Kryptonion also

regard decisions and jurisprudence of the competition regulators in the European Union and the United States of America highly.

2. One team will represent Clarke and one team will represent the CCK. Lawyers representing both sides are required to address the arguments raised in the Proposition above. In addition, the lawyers are free to raise any further arguments in support of their case.

