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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5843 OF 2014

COMPETITION COMMISSION OF INDIA ...APPELLANT(S)

VERSUS

SCHOTT GLASS INDIA PVT. LTD. & ANR. ...RESPONDENT(S)

WITH

CIVIL APPEAL NO. 9998 OF 2014

KAPOOR GLASS INDIA PVT. LTD. ...APPELLANT(S)

VERSUS

SCHOTT GLASS INDIA PVT. LTD ...RESPONDENT(S)

J U D G E M E N T

VIKRAM NATH, J.

1. India's economic ascent rests on a delicate but decisive equilibrium. On the one hand, markets must remain contestable: no undertaking may extinguish rivalry by stratagems foreign to fair, merit-based competition. On the other hand, genuine achievement whether expressed in scale, efficiency or technological advance, must be rewarded and not punished, for it is the impetus for investment, innovation and

consumer welfare. The Competition Act, 2002[1], is the charter that secures both pledges. It equips the Competition Commission of India with wide-ranging powers of inquiry and remedy, yet it permits intervention only where hard evidence shows that the impugned conduct has caused, or is likely to cause, a demand rigorous fact-finding, adversarial testing of testimony and, above all, an effects-based appraisal that balances commercial justification against proven harm. Preserving this symmetry between discipline and encouragement is essential if the statute is to nurture robust rivalry while sustaining the confidence of domestic and global investors who increasingly view India as a premier destination for enterprise and innovation.

I. Background of the Case

2. These statutory appeals, preferred under Section 53T of the Act, challenge a common order dated 2 April 2014 passed by the Competition Appellate Tribunal[2] in Appeal Nos. 91 and 92 of 2012. Civil Appeal No. 5843 of 2014 has been filed by the Competition Commission of India[3]. Civil Appeal No. 9998 of 2014 has been filed by Kapoor Glass India Pvt. Ltd.[4]. In both the matters, Schott Glass India Pvt. Ltd.[5] is the contesting respondent.

[1] In short, the "Act"
[2] In short, "COMPAT"
[3] In short, "CCI"
[4] In short, "Kapoor Glass", the original informant
[5] In short, "Schott India"

3. The proceedings have their genesis in an information lodged on 25 May 2010 by Kapoor Glass under Section 19 of the Act. Kapoor Glass alleged that Schott India, then the principal domestic manufacturer of neutral USP-I borosilicate glass tubing, had abused its dominant position by offering exclusionary volume-based discounts, imposing discriminatory contractual terms, and, on occasions, refusing supply.

4. Forming a prima-facie opinion under Section 26(1) of the Act, CCI directed the Director General (Investigation)[6] to inquire into the matter. The DG's report dated 14 March 2011 concluded that Schott India had violated Section 4 of the Act. After hearing the parties, CCI by majority order dated 29 March 2012 levied a penalty equal at a rate of 4 per cent of Schott India's average of 3 years turnover equivalent to about Rs 5.66 crores and also issued a cease-and-desist order against Schott India from doing any discriminatory practices to any of the converters.

5. Schott India challenged that order before COMPAT by Appeal No. 91 of 2012. Kapoor Glass also preferred a separate appeal by Appeal No. 92 of 2012 seeking a broader relief and reiterating its refusal-to-supply grievance. By the impugned order COMPAT:

    a) allowed Schott India's appeal, annulled the penalty, and held that the evidentiary material did not establish any abuse of dominant position; and

    b) dismissed Kapoor Glass's appeal with costs of ₹ 1,00,000/-.

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[6] In short, "DG"

6. Vide these appeals, CCI seeks revival of its original order and Kapoor Glass supports CCI on the liability of Schott India but contends that COMPAT erred in refusing effective relief and in discounting the alleged "mixing risk". Schott India, the contesting respondent herein, on the other hand, defends the COMPAT decision in its entirety.

II. A Primer on the relevant Competition Law principles:

7. Before moving ahead, we believe it would be helpful to briefly explain the chief statutory provision and certain competition-law principles that recur throughout these appeals and are key to understand this case.

8. Section 4 of the Act is at the heart of the present dispute. It has been reproduced hereunder for ease of reference:

> *"Section 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;*
> *(b) limits or restricts —*
> *(i) production of goods or provision of services or market therefor; or*
> *(ii) technical or scientific development relating to goods or services, to the prejudice of consumers;*
> *(c) indulges in practice or practices resulting in denial of market access in any manner;*
> *(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;

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

Explanation.—For the purposes of this section,

(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 below cost, as may be determined by regulations, with a view to reduce competition or eliminate competitors;

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

9. A bare perusal shows that the provision has two moving parts. First, it forbids only abuse, not dominance as such. Secondly, it gives five illustrations of the abuse of dominant position which are (i) price or contract discrimination, (ii) limiting output, (iii) blocking entry, (iv) tying or bundling, and (v) leveraging power from one market into another. If a dominant firm engages in any one of these practices, and cannot justify it as a legitimate business response to competition, the conduct is prohibited.

10. Section 4, sub-Section (1) of the Act states that "no enterprise or group shall abuse its dominant position." Thereafter, sub-Section (2) then lists, in clauses (a) to (e), the aforementioned five ways in which abuse may occur. Put shortly, an enterprise may not

(i). impose unfair or discriminatory prices or conditions,

(ii). limit production or technical development, (iii). block others from the market,

(iv). force a buyer to accept an unrelated product or obligation, or

(v). use power in one market to muscle into, or protect, another.

11. Apart from Section 4 of the Act, in order to aid comprehension of the discussion that follows, we are outlining the relevant competition-law concepts that recur throughout the pleadings and the analysis that follows:

(i). **Relevant market:** Competition is measured within a field large enough that buyers can, at a reasonable cost, turn to alternative suppliers. In the present dispute, two layers of trade must be kept distinct yet viewed together:

- **Upstream market** – the manufacture and sale of neutral USP-I borosilicate glass tubing, whether clear or amber.
- **Downstream market** – the sale of pharmaceutical containers—ampoules, vials, cartridges and syringes—made by converters.

The first market supplies the raw material; the second transforms it into finished goods. Because the output of the upstream market is the indispensable input of the downstream market, the two are conventionally described as “upstream” and “downstream” respectively.

(ii). **Dominant Position:** A firm is dominant when its economic strength lets it act largely on its own terms. A town with a single water utility, or a manufacturer whose patented device has no practical substitute, offers the everyday picture. Dominance is lawful; the question is how the power is used.

(iii). **Volume or "Target" Discounts:** These are price reductions that grow purely with the quantity a buyer takes over an agreed period. For example, a supermarket chain that orders ten thousand sacks of rice may pay less per sack than a corner shop that orders ten. Such scale rebates are benign when offered to every purchaser on identical volume thresholds.

(iv). **Functional discounts:** Sometimes the buyer performs an extra function—say, warehousing, local advertising, or after-sales service. A seller may repay a buyer for performing that extra task like storing stock, advertising the brand, or providing repairs. Airlines, for example, pay travel agents a commission for marketing flights. If the rebate merely covers the cost of that task and is open to any buyer willing to do the same, competition law is usually satisfied.

(v). **Margin squeeze:** A vertically integrated supplier sells an essential input to rivals and also competes with them downstream. If it keeps the input price high *and* its own downstream price low, equally efficient rivals may be left with an unsustainable margin. Telecom operators that control not only broadband network but also sell retail internet access provide the classic example.

(vi). **Tying or bundling:** Where a supplier insists that customers accept product A as a pre-condition for buying product B, it is tying; where A and B are sold only as a package, it is bundling. The practice becomes abusive if the supplier wields dominance in product A to force unwanted sales of B, thereby foreclosing choice.

(vii). **Mixing risk:** In the instant case, there is an allegation that certain converters might blend premium Schott tubing with cheaper imports and still market the containers as wholly premium. If true, the practice could endanger patients and tarnish the reputation of high-quality suppliers. Whether that risk existed, and how Schott India responded, will be examined in due course.

(viii). **Procedural fairness:** Even in an inquisitorial setting, the parties must see and test the evidence against them. Cross-examination of a witness is a recognised, though not in every case, an indispensable safeguard. A serious denial of that opportunity can itself undermine the findings of the adjudicating body.

Having explained these basic concepts pertaining to the matter, we shall now proceed to detail the material facts of the case and the determinations made at each previous stage of the proceedings.

III. Factual Matrix

12. Schott India, the first respondent, is a wholly-owned subsidiary of Schott Glaswerke Beteiligungs-GmbH, which in turn is wholly owned by Schott AG of Mainz, Germany. Its Jambusar plant in Gujarat, acquired in 1998 from Bharat Glass Tubes, manufactures neutral borosilicate tubing in the following three

grades: Fiolax-clear (for export and domestic sale), Neutral Glass Clear[7] and Neutral Glass Amber[8].

13. Neutral borosilicate tubing constitutes the upstream market; converters re-heat and form that tubing into ampoules, vials, cartridges and syringes, which comprise the downstream market and are supplied to pharmaceutical undertakings. Of the five Indian tube-makers that existed prior to 1998, all except Schott India and Triveni Glass (now Nipro-Triveni) had exited by 2010 and the balance of demand was met by imports from Germany, Japan, Italy and, at the low-end, China.

14. In May 2008, a Schott group company entered into a joint-venture with Kaisha Manufacturers, creating Schott Kaisha Pvt. Ltd.[9], the country's largest converter. Schott Kaisha is neither a subsidiary nor a division of Schott India, but it purchases a substantial share of the latter's annual melt.

15. **Discount architecture and agreements**: To secure economies of scale and steady furnace utilisation, Schott India offered two rebate schemes:

a. **Target (volume) rebates**: slabbed discounts, credited quarterly, rising with aggregate annual purchases of NGC and NGA; and

b. **Functional rebates**: an eight-per-cent allowance extended to converters that (i) met annual purchase plans, (ii) refrained from using Chinese tubing, and (iii) adhered to "fair-pricing" commitments in their container sales.

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[7] In short, "NGC"
[8] In short, "NGA"
[9] In short, "Schott Kaisha"

16. **Long-Term Tubing Supply Agreement[10]:** In 2008 Schott India and Schott Kaisha executed a three-year agreement under which the converter agreed to source at least eighty per cent of its requirements, approximately thirty per cent of Schott India's capacity, in consideration of a price concession over the slab rate, a three-year price freeze and priority dispatch in periods of tight supply.

17. On 20 May 2009, the principal abuse-of-dominance provisions of the Act were brought into force. On 25 May 2010, Kapoor Glass, a Mumbai converter, lodged an information alleging, inter alia, that:

    (i). The target-rebate structure coerced loyalty and tied clear and amber tubes;

    (ii). The functional rebate and its successor Trade-Mark Licence Agreement[11] foreclosed the use of lower-priced Chinese tubes;

    (iii). The LTTSA conferred on Schott Kaisha an unmatchable cost advantage; and

    (iv). Schott India had rationed supplies to independent converters whilst fully meeting Schott Kaisha's demands.

18. Acting on a prima-facie opinion under Section 26 (1) of the Act, CCI directed the DG to investigate. In a report dated 14 March 2011, the DG gave the following findings:

    (i). Schott India enjoyed a market share exceeding sixty per cent and was dominant in the upstream market;

[10] In short, "LTTSA"
[11] In short, "TMLA"

(ii). The combined effect of the target rebates, functional rebates and the Long-Term Agreement was to foreclose rival suppliers, attracting clauses (a), (b) and (e) of Section 4(2) of the Act;

(iii). Aggregating NGC and NGA purchases for rebate purposes amounted to tying, offending clause (d); and

(iv). Selective supply curtailments denied market access to certain converters, invoking clause (c).

19. On 29 March 2012, the majority of the Commission substantially endorsed the DG's analysis. The Economic Member of the Commission dissented on the discount issues and gave various relevant findings which would be important for the discussions that follow. The majority, however, reasoned that:

(i). The volume-based "target" rebates, the trademark-linked "functional" rebates, and the LTTSA, taken together, "tilted the playing field" in favour of Schott Kaisha and foreclosed effective competition in the upstream market;

(ii). The aggregation of clear and amber tubing for the purpose of achieving higher rebate slabs operated, in effect, as a tying arrangement; and

(iii). The temporary curtailment of supplies to certain converters reinforced the exclusionary strategy.

Having concluded that the conduct attracted Clauses (a) through (e) of Section 4 (2) of the Act, the CCI:

(i). Directed Schott India to cease and desist from the impugned practices with immediate effect; and (ii). Levied a monetary penalty calculated at four per cent of the company's average turnover for the three preceding financial years, amounting to ₹ 5.66 crore.

20. Schott India and Kapoor Glass appealed the matter to COMPAT by way of Appeal Nos. 91 and 92 of 2012. The COMPAT gave the following finding in the impugned order:

(i). **Appeal of Schott India allowed:** The evidence against the company rested "for the most part on statements never subjected to cross-examination"; on that footing COMPAT found no proof of discriminatory rebates, margin squeeze or tying. It pointed out that, barring one exception, every converter had grown its output after 2009, a fact at odds with the charge of foreclosure.

(ii). **All sanctions annulled:** The penalty of one per cent of turnover and the attendant cease-and-desist directives were quashed in toto.

(iii). **Appeal of Kapoor Glass dismissed with costs:** Kapoor Glass's prayer for wider relief was rejected and costs of ₹ 1,00,000 were imposed.

(iv). **Serious procedural lapse recorded:** COMPAT remarked that the CCI's refusal to let Schott India cross-examine the converter-witnesses was a material infraction that gravely weakened the probative worth of their allegations.

21. In the present appeals against the COMPAT's order, the parties seek the following reliefs:

(i). CCI seeks reinstatement of its original order and penalty, contending that COMPAT misread the evidence and overstated the impact of the procedural lapse.

(ii). Kapoor Glass, aligning with CCI on liability, argues that COMPAT further erred in downplaying the alleged "mixing" of Schott and Chinese tubes.

(iii). Schott India, being the main respondent, supports the COMPAT's decision in full, submits that its rebates were open to all converters on equal quantitative terms, and renews its objection that denial of cross-examination fatally tainted the CCI's process.

IV. Arguments Advanced

22. Mr. Amit Sibal, learned Senior Counsel for the appellant-CCI, has advanced the following main arguments:

A. Schott India's unquestioned dominance: It is submitted that during the investigation period, Schott India supplied more than sixty per cent of neutral USP-I borosilicate tubing, controlled the only large-scale domestic melt tanks and possessed clear technological and capacity advantages. On any accepted test, it occupied a dominant position in the upstream market.

B. Loyalty-inducing "target" rebates: It is argued that the annual-slab rebate scheme penalised converters who failed to meet their forecast: a single below-target month dragged the entire year's purchases into a lower tier, clawing back earlier discounts. Converters therefore dared not split orders with alternative suppliers, while Schott Kaisha, by reason of volume, always secured the maximum twelve-per-cent rebate. Such discrimination, Counsel contends, is in violation of clause (a) of Section 4(2) of the Act.

C. **Exclusionary functional rebates and the LTTSA**: Schott Kaisha's LTTSA locked in eighty per cent of its requirements for three years, guaranteed price freezes and monthly "functional" bonuses and gave it delivery priority. It is submitted that this package, unavailable to others, further foreclosed rivals and breached clauses (a), (b) and (e).
D. **Tying of clear and amber tubes**: Discounts were calculated on the combined quantity of clear and amber tubing. Because Schott India held over ninety per cent of amber tubes, indispensable for light-sensitive formulations, converters had little choice but to buy clear tubes from it as well. The appellants characterise this as a tie-in contrary to clause (d).
E. **Margin squeeze on independent converters**: It is argued that the preferential input price to Schott Kaisha enabled it either to sell containers below the cost level sustainable by equally efficient converters or to harvest abnormal margins, squeezing rivals out of the downstream market in violation of clauses (a) and (e).
F. **Selective refusals to supply**: Instances were cited where converters who sourced even modest volumes elsewhere found their subsequent Schott allocations curtailed or delayed. It is argued that such conduct amounts to denial of market access under clause (c).
G. **"Mixing" rationale a façade**: It is submitted that the assertion that Chinese tubes might be secretly mixed with Schott tubes is speculative; no concrete incident was proven. The quality argument therefore serves only to cloak an exclusivity obligation.

H. **Procedural lapse not fatal**: Finally, it is contended that Regulation 41(5) vests discretion in the CCI to refuse cross-examination. The converters' statements, although not tested orally, were corroborated by documentary evidence, rebate circulars, purchase data and the LTTSA. The absence of cross-examination, it is argued, cannot outweigh this substantive proof of abuse.

I. The learned Senior Counsel has relied upon the following case laws in support of their arguments:

(i). Excel Crop Care Ltd. v. Competition Commission of India and another[12],

(ii). Competition Commission of India v. Steel Authority of India Ltd.[13],

(iii). Competition Commission of India v. Fastway Transmission Pvt. Ltd.[14],

(iv). K.L. Tripathi v. State Bank of India, (1984) 1 SCC 43

(v). Transmission Corporation v. Sri Rama Krishna Rice Mills[15],

(vi). United Brands Co. & United Brands Continental BV v. Commission[16],

(vii). Irish Sugar plc, Commission Decision IV/34.621

(viii). HOV SVZ/MCN, Commission Decision IV/33.941

23. Shri A.N. Haksar, learned Senior Counsel for Kapoor Glass, has rendered similar submissions to CCI but has also made the following additional points:

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[12] (2017) 8 SCC 47
[13] (2010) 10 SCC 744
[14] (2018) 4 SCC 316
[15] (2006) 3 SCC 74
[16] Case 27/76, EUCJ

A. **Two-decade exclusionary course of conduct.** Kapoor Glass's purchase orders for Schott tubes were first rebuffed in 2000. From that moment, nine years before Section 4 of the Act came into force, Schott India treated Kapoor Glass as a non-customer while continuing to serve other converters, thereby laying the ground for Schott Kaisha's later entry. The chronological record (1996-2010) filed in evidence is said to reveal a pre-meditated plan to freeze Kapoor Glass out of both upstream and downstream trade

B. **Espionage and intimidation tactics.** Kapoor Glass's internal paperwork surfaced in Schott India's possession; key employees were poached; and Schott Kaisha's managing director reportedly "gloated" that Kapoor Glass had been finished (letter of 23 Jan 2010). These incidents, Kapoor Glass submits, show that upstream dominance was reinforced by unlawful means and by threats to converters who awarded job-work to Kapoor Glass.

C. **Absolute refusal to supply means abuse under Section 4(2)(c) of the Act.** The boycott began in 2000, years before the 2002 label episode deployed by Schott India as an after-the-fact excuse. Any private trade-mark grievance expired with limitation; competition law requires proportionality, not a perpetual embargo by the sole large-scale amber-tube supplier.

D. **Persistent mix-up hazard**. Kapoor Glass maintains that a real and present danger existed of converters mis-labelling containers by "mixing" premium Schott tubes with lower-grade imports. The LTTSA and the functional rebate, it is submitted, were devised not to protect quality but to immunise Schott

Kaisha from price rivalry on the pretext of that hazard; COMPAT, in discounting the risk, ignored contemporaneous complaints from Ranbaxy, Cadila and other buyers.

E. **Quantum of penalty.** Finally, Kapoor Glass submits that the four-per-cent turnover penalty originally imposed by the CCI was conservative, given both the duration of the abuse (2008-2012) and the deterrence objective set out in Section 27(b). It prays for reinstatement of the penalty and for broader behavioural remedies.

F. The learned Senior Counsel has placed reliance on the following precedents apart from those relied on by the Counsel for CCI:

(i). Voltas Ltd. v. Union of India[17],

(ii). Coal India Ltd. v. Competition Commission of India[18],

(iii). Samir Agarwal v. Competition Commission of India[19],

24. Mr. Percival Billimoria, learned Senior Counsel, for the respondent-Schott India, has advanced the following main arguments:

A. **Reliance on un-tested statements vitiates the case:** It is submitted that the Director-General's report, and consequently the majority order of the CCI, rest almost entirely on questionnaires and witness statements procured from a handful of converters openly adverse to Schott India. None of those deponents was offered for cross-examination despite the respondent's repeated requests. That denial, by itself, renders the evidentiary foundation infirm and justified the COMPAT's rejection of the findings.

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[17] (1995) Supp (2) SCC 498
[18] (2023) 10 SCC 345
[19] (2021) 3 SCC 136

B. **Volume (or "target") rebates are legitimate and non-discriminatory:** The impugned discount ladder rewarded only the quantity actually lifted in a financial year; every converter, large or small, moved up the scale on identical tonnage slabs. Differential outcomes reflected differential volumes, not the identity of the purchaser. Such scale rebates, it is argued, are standard commercial practice and have been treated as lawful in the CCI's own earlier decisions.

C. **The LTTSA is objectively justified:** Neutral USP-I tubing is produced in continuous-fire tanks that run at about 1600 °C and requires extremely high investment. To finance capacity expansion Schott India sought a three-year, eighty-per-cent offtake commitment from its then largest customer, Schott Kaisha. The modest extra rebate and price-freeze granted in return are submitted to be a normal quid pro quo for assured purchase and not an exclusionary device.

D. **Functional rebate covered additional services, not loyalty:** Converters who wished to emboss the "Schott" mark on the finished container had to meet traceability and marketing obligations and bore the associated costs. The functional allowance merely reimbursed those outlays and was open to any converter prepared to undertake the same function. It neither required exclusivity nor penalised the use of rival tubing.

E. **No margin squeeze was possible or shown:** Schott India does not operate in the downstream market. Schott Kaisha sold ampoules and vials at prices comparable to, and in many cases higher than, rival converters. The latter's own sales volumes and EBITDA margins rose in the period under enquiry, facts extracted by the Economic Member and by COMPAT. With margins intact and output expanding, foreclosure is conceptually impossible.

F. **No tying or bundling of clear and amber tubes:** NGC and NGA tubing emerge from the same tank; converters order each variant in the proportion demanded by their pharmaceutical customers. The rebate scheme merely aggregated annual purchases of both variants to compute the slab. Nothing in the contracts obliged a converter to buy clear tubes as a pre-condition to obtaining amber (or vice-versa).

G. **"Mixing risk" furnished a bona-fide rationale for the no-Chinese clause later withdrawn:** Documentary evidence from Ranbaxy and other pharma demonstrated that some suppliers were passing off low-quality imports as premium containers. The temporary restriction on Chinese tubing, in force only until March 2010, protected patient safety and Schott's reputation; converters were always free to source from Nipro-Triveni or any approved foreign manufacturer.

H. **Absence of competitive harm:** No converter exited the business; imports held a double-digit share; Nipro-Triveni expanded capacity; and pharmaceutical buyers enjoyed stable or declining container prices. The respondent submits that Section 4 of the Act targets only conduct that harms the competitive process, not vigorous rivalry that benefits downstream customers.

I. The learned Senior Counsel for Schott India has placed the following case laws on record in their submissions:

(i). CCI v. Steel Authority of India Ltd. (supra), (ii). Voltas Ltd. (supra),

(iii). Coal India Ltd. (supra),

(iv). Excel Crop Care Ltd. v. CCI (supra),

(v). Rajasthan Cylinder & Containers Ltd. v. Union of India[20],

(vi). Cadila Healthcare Ltd. v. CCI[21],

V. ISSUES FOR CONSIDERATION

25. Having carefully examined the material on record, the submissions of the parties and the orders of the Court below, we are of the view that the appeals present the following issues for adjudication:

I. Whether the target-discount scheme of Schott India amounts to discriminatory or exclusionary pricing in contravention of Section 4(2)(a) and Section 4(2)(b) of the Act.

II. Whether the functional-discount / "no-Chinese" scheme (including the later TMLA arrangement) imposes unfair or discriminatory conditions under Section 4(2)(a) and Section 4(2)(b) of the Act.

III. Whether the LTTSA with Schott Kaisha produced a margin-squeeze proscribed by Section 4(2)(e) of the Act.

IV. Whether Schott India tied or bundled NGA and NGC tubes, thereby breaching Section 4(2)(d) of the Act.

V. Whether an effects-based (harm) analysis is an essential component of an inquiry under Section 4 of the Act., and, if so, whether it was omitted in the present case.

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[20] (2020) 16 SCC 615

[21] 2018 SCC OnLine Del 11229

VI. Whether the investigation and the Commission’s order are vitiated by denial of cross-examination and allied breaches of natural justice.

VI. ANALYSIS

26. At the outset, we must clarify that unless the context expressly indicates otherwise, every factual recital or numerical datum herein is drawn from, or corresponds verbatim with, the findings of fact recorded in the DG’s Investigation Report and thereafter relied on, adopted, or reiterated in substance by the CCI and/or by the COMPAT. Before dealing with each of the aforementioned issues, it is essential to ascertain the contours of the relevant market in the present dispute. The evidence placed by the DG and accepted, in substance, by the CCI, discloses that converters treat NGC tubes and NGA tubes as distinct and non-interchangeable inputs. The physicochemical attributes of NGA are required where the packed drug is photo-sensitive, whereas NGC is preferred when no such protection is demanded. No party has pointed us to any functional substitute capable of meeting the identical pharmaceutical standard. We accordingly identify two discrete upstream product markets: NGC and NGA. Each of them feeding the downstream market for containers (ampoules, vials, cartridges, syringes) fabricated from the respective tube.

27. As to geographic scope, the record shows that converters located across the country source tubes from the same limited set of manufacturers. The transport cost is marginal compared

with the value of the product, import barriers are uniform nationally, and pharmaceutical end-buyers impose identical quality specifications regardless of State. Those considerations, noted both by the DG and by the CCI, warrant treating India as a single geographic market for present purposes.

28. Having decided on the relevant market, we next examine Schott India's position in the same. Market-share data culled from statutory filings and sales declarations show that Schott India supplied approximately 61 per cent of NGC+NGA in 2008-09, rising to over 80 per cent in 2009-10. These findings have been endorsed by the DG, CCI and the COMPAT. The only domestic rival of any consequence, Nipro-Triveni, hovered in low double digits, while imports, mainly from China, were constrained both by price sensitivity at the high end and by quality reservations among major pharmaceutical companies.

29. Market share of the respondent is reinforced by economic strength. Schott India draws upon the financial and technological resources of the global Schott group, whose consolidated turnover exceeded €2.8 billion and workforce 17,500 during the period under review. That scale secures favourable raw-material procurement and sustained R&D, advantages that smaller rivals cannot replicate easily. The firm's vertical integration amplifies its clout. Through its 50 per cent participation in the downstream JV, Schott Kaisha, Schott India enjoys a guaranteed outlet for roughly one-third of its tube output, while simultaneously influencing a leading converter's sourcing decisions. The CCI recorded that the JV was at the material time the largest Indian ampoule producer.

30. Finally, as has been observed by the COMPAT, countervailing buyer power is conspicuously absent in the relevant market. Converters, barring the JV, are fragmented and purchase volumes that are individually modest; the evidence shows they are "heavily dependent" on Schott India because many pharma customers insist upon its branded tubing to meet USP-I neutrality requirements.

31. Therefore, weighed cumulatively under Section 19(4) of the Act, factors in the present case such as commanding and persistent market share, economic and technological superiority, vertical integration, high entry barriers and weak buyer power, lead us to the undeniable conclusion that Schott India holds a dominant position in each of the two identified upstream markets during the period relevant to these appeals. With market definition and dominance thus determined, we turn to the specific allegations of abuse, taking them seriatim under the issues framed earlier.

Issue I - Whether the target-discount scheme of Schott India amounts to discriminatory or exclusionary pricing in contravention of Section 4(2)(a) and Section 4(2)(b) of the Act.

32. A perusal of Section 4(2)(a) of the Act implies that an abuse arises only where a dominant enterprise "directly or indirectly imposes unfair or discriminatory…price in purchase or sale". As the words "unfair or discriminatory" import a comparative enquiry, it must first be established that transactions which are materially equivalent have been accorded materially different treatment. If the challenged differentiation rests on an objective

commercial justification, or if it is open on identical terms to every purchaser similarly placed, the price cannot be stigmatised as abusive. In ***British Airways plc v Commission (Court of Justice of the European Union in Case C-95/04 P, dated 15 March 2007)***, it was observed that dominant firm must not "favour or disfavour" trading partners. However, the court further held that applying different prices only becomes abusive when it lacks an objective commercial justification or when equivalent customers cannot obtain the same terms. In other words, if the differentiation "rests on an objective commercial justification, or if it is open on identical terms to every purchaser similarly placed," the conduct is not condemned under Article 102 (c) TFEU. The relevant paras where these observations have been made are as follows:

> *"68. It follows that in determining whether, on the part of an undertaking in a dominant position, a system of discounts or bonuses which constitute neither quantity discounts or bonuses nor fidelity discounts or bonuses within the meaning of the judgment in Hoffmann-La Roche constitutes an abuse, it first has to be determined whether those discounts or bonuses can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners.*
>
> *69. It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted. In accordance with the analysis carried out by the Court of First Instance in paragraphs 279 to 291 of the judgment under appeal, an*

undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified.

70. With regard to the first aspect, the case-law gives indications as to the cases in which discount or bonus schemes of an undertaking in a dominant position are not merely the expression of a particularly favourable offer on the market, but give rise to an exclusionary effect."

33. In the present case, the record shows that, for the relevant period, Schott India circulated a single rebate ladder applicable to all converters. Four slabs of 2%, 5%, 8% and 12% were triggered exclusively by the aggregate tonnage of Neutral Glass Clear and Neutral Glass Amber collected within the financial year. Every customer who reached a slab, whether by one purchase order or by several, obtained the corresponding allowance on the entire year's turnover. The rebate therefore rose mechanically with volume and with nothing else; identity of the buyer was irrelevant. All converters were informed of the thresholds in advance, and none has suggested that any hidden concessions existed outside the ladder.

34. Differential outcomes certainly occurred as Schott Kaisha, by reason of an offtake exceeding three thousand tonnes per annum, habitually captured the 12% step, whereas smaller converters realised lower steps. Yet such divergence mirrors the inequality of quantities, not unequal treatment of like quantities. The appellants have not demonstrated that any converter lifting an equivalent tonnage to Schott Kaisha was refused an identical 12 % abatement.

35. Moreover, the technical realities of borosilicate production reinforce the commercial logic of the scheme. Furnace tanks operate at temperatures around 1600 °C and cannot be cyclically shut down without inflicting catastrophic refractory damage. Stable, high-volume orders are therefore indispensable for efficient utilisation and for amortising the very substantial capital employed. A volume-contingent rebate transmits a share of those scale economies downstream, to the ultimate benefit of pharmaceutical customers. Such an objectively grounded incentive cannot be condemned as "unfair".

36. It must also be noted that there is no evidence that the slab mechanism foreclosed alternative suppliers or throttled output in order to attract Section 4(2)(b)(i) of the Act. On the contrary, uncontested data placed by the Economic Member of the Commission and reproduced by the COMPAT record that, between 2007-08 and 2011-12, every major converter other than the informant increased both the tonnage purchased from Schott India and the tonnage sourced from imports or Nipro-Triveni. Container prices to pharma companies remained broadly stable. These market facts are inconsistent with the argument of exclusion or limitation.

37. The appellants nevertheless submit that the quarterly crediting of rebates created a "retroactive claw-back" risk which deterred dual sourcing. This argument is not persuasive. Quarterly settlement was adopted to ease cash-flow: it neither penalised nor rewarded purchases from rival mills; it simply reconciled the running total with the pre-declared annual ladder. No

contractual term prohibited converters from buying elsewhere, and several did so without suffering discrimination.

38. Finally, reliance is placed on the untested declarations of five converters alleging that Schott Kaisha received "special" terms. Those statements, taken *ex parte* and never subjected to cross-examination, cannot displace the documentary rebate circulars that bind the company, nor alter the legal test that only unequal pricing for equal transactions contravenes Section 4(2)(a) of the Act.

39. For the foregoing reasons we hold that the slabbed target-rebate scheme:
    (i). employs a neutral, volume-based criterion applicable to all purchasers alike;
    (ii). is objectively justified by demonstrable efficiency considerations; and
    (iii). has not been shown to restrict rival output, limit imports or distort downstream prices.

The charge of abuse under clauses (a) or (b) of Section 4(2) of the Act fails and **Issue I is answered in the negative.**

Issue II - Whether the functional-discount / "no-Chinese" scheme (including the later TMLA arrangement) imposes unfair or discriminatory conditions under Sections 4(2)(a) and 4(2)(b) of the Act.

40. It is apparent from the records that Schott India, at the commencement of FY 2007-08 (vide the Sale–Purchase

Agreement), introduced a uniform "functional rebate" scheme. For each of the three financial years 2007-08, 2008-09 and 2009-10, a converter that (i) met its annual purchase plan, (ii) refrained from processing Chinese tubing, and (iii) complied with traceability-cum-"fair-pricing" obligations became entitled to a flat rebate of 8 per cent on the invoiced value of NGC, NGA and Fiolax tubes. With effect from 1 April 2010, the quantum of the allowance remained unchanged, but the qualifying conditions were restated in a Trade-mark Licence Agreement (TMLA) paired with a Marketing-Support Agreement. Execution of the TMLA conferred a royalty-free right to emboss the "SCHOTT" mark on finished containers and in exchange the converter accepted limited inspection rights and furnished a bank guarantee of ₹ 70 lakh to guard against misuse. Only one converter chose to execute the TMLA; all others continued on list price plus the ordinary target-rebate ladder.

41. As already observed in the previous section, to attract Section 4(2)(a) of the Act, it must be shown that transactions which are equivalent in every commercially relevant respect are nevertheless subject to dissimilar conditions. The purchase ledgers for FY 2008-09 to FY 2011-12, collated in the COMPAT's own table, disclose no instance in which two converters performing the same function received different net prices. The rate (8 per cent) was invariant; the only divergence lay in the timing of credit, monthly for the joint-venture converter and annual for the others. That scheduling preference is rationally tied to the joint-venture's rolling audit cycle and to its undisputed order volume, which averaged 30 per cent of the

Jambusar melt. It must be emphasized that differential timing, unaccompanied by differential rates, does not amount to price discrimination.

42. The appellants contend that the three qualifying conditions themselves are exclusionary. Therefore, it is necessary to address each in turn. First, the purchase-plan requirement secures furnace utilisation in a continuous-fire technology whose tanks cannot be cyclically idled without grave damage; the DG in fact accepted the objective necessity of load stability. Secondly, the temporary "no-Chinese" stipulation rested upon contemporaneous chemical-analysis certificates showing alkali-release values above the USP-I threshold in certain Chinese tubes and was withdrawn altogether on 31 March 2010. Thirdly, the inspection right extends solely to verifying tubing origin and is a standard incident of trade-mark licensing, as observed by the minority Member in CCI's order after surveying comparative jurisprudence. Each condition is therefore objectively connected with the legitimate aim, patient safety and brand integrity, and is proportionate to it.

43. The allegation of a market-restrictive effect under Section 4(2)(b)(i) of the Act fares no better. Nipro-Triveni's share of neutral tubing rose from 12 per cent in 2008 to 14 per cent in 2009. Imports of NGC increased from 620 tonnes to 1000 tonnes during the same interval. Two new container plants, Parenteral Glass and SVM Glass, commenced commercial production in 2011 sourcing mixed tubes. In the Downstream market, total output of ampoules and vials expanded by 38 per cent between FY 2008 and FY 2012, while the median EBITDA

margin of independent converters improved from 11.4 per cent to 13.7 per cent. Therefore, practices coincident with increasing volumes, new entry and rising profitability cannot plausibly be branded capacity-restrictive.

44. The specific objections of the appellants stand answered by the evidence on record. The Rs.70 lakh guarantee is payable only upon adjudicated trade-mark abuse and no converter asserts having suffered any deduction. Several converters imported Chinese tubes for un-branded lines during 2009-10 and merely waived the functional rebate, demonstrating the voluntariness of the arrangement. The right of inspection is pre-announced, confined to stock verification, and of brief duration.

45. Therefore, in conclusion, every converter prepared to assume the same traceability and quality-promotion obligations received exactly the same economic consideration; the ancillary conditions are objectively justified; and the evidence shows no foreclosure of rivals or suppression of output. The functional rebate and its successor agreements therefore do not offend either Section 4(2)(a) or Section 4(2)(b)(i) of the Act. **Issue II is answered in the negative.**

Issue III - Whether the LTTSA with Schott Kaisha produced a margin-squeeze proscribed by Section 4(2)(e) of the Act.

46. Having settled the relevant markets and Schott India's dominance upstream, we next examine the impugned LTTSA and the allegation that it enabled Schott India to foreclose independent converters by compressing the margin between

their input cost and the downstream selling price of Schott Kaisha.

47. The facts are not in dispute that under the LTTSA which Schott Kaisha undertook, for three financial years commencing 1 April 2008, it would source at least eighty per cent of its aggregate requirement of neutral tubing, clear, amber and Fiolax, from Schott India. In consideration, it received (i) a two-percentage-point rebate over the public slab, (ii) a freeze of base prices till 31 March 2011, and (iii) priority despatch in periods of constrained furnace capacity. It must be emphasized that no purchaser other than Schott Kaisha sought or was denied comparable terms.

48. Section 4(2)(e) of the Act proscribes the use of a dominant position in one relevant market "to enter into, or protect, another relevant market." The classical manifestation of this is the alleged margin-squeeze: a vertically integrated firm fixes the wholesale input price so high, and its own downstream price so low, that downstream rivals, though equally efficient, cannot earn a viable margin. Three cumulative conditions must therefore be shown:

(i). The respondent must itself operate downstream;

(ii). The wholesale-to-retail spread must be insufficient for an equally efficient competitor; and

(iii). The compression must threaten competitive harm.

These conditions have been laid down elaborately in the case of ***TeliaSonera Sverige AB v Konkurrensverket (Court of Justice of the European Union, Case C-52/09, judgment dated 17 February 2011)*** in the following paras:

"31. A margin squeeze, in view of the exclusionary effect which it may create for com petitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU (see, to that effect, Deutsche Telekom v Commission, paragraph 183).
32. In the present case, there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broad band connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a com petitor which is as efficient as that undertaking to compete for the supply of those services to end users.
33. In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at arti ficially reduced levels of profitability.
34. It must moreover be made clear that since the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be (Deutsche Telekom v Commis sion, paragraphs 167 and 183)."

49. **No downstream participation by Schott India-** Schott India manufactures tubing only; it neither converts nor sells containers. The downstream entity, Schott Kaisha, is a separate company in which the global Schott AG holds fifty per cent stakes, the balance being with the Kaisha promoters. The record discloses no board overlap, no common management, and

separate audited accounts. Section 4 of the Act may of course reach a group; but leverage still demands proof that the upstream entity used its dominance to enter or protect the downstream market. Mere supply to a related undertaking is insufficient.

50. **No demonstrable squeeze of rivals' margin-** The allegation rests on a price differential: for FY 2009-10 the net LTTSA price was approximately 5 per cent below the slab price paid by other converters. A gap is not a squeeze unless the downstream price of the integrated converter leaves an equally efficient rival in deficit. The only downstream data before the authorities are the audited financials of nine converters reproduced in COMPAT Annex III. Those figures show that, during the entire period of the LTTSA, every independent converter recorded positive EBITDA, and seven of the nine improved both tonnage and margin year-on-year. The price lists of Ranbaxy and Cadila, produced by Kapoor Glass, further show that Schott Kaisha's ampoules and vials were quoted *at or above* the prices of its rivals. On that evidence the COMPAT was right in holding that an equally efficient converter could, and did, operate profitably notwithstanding the LTTSA.

51. **Absence of foreclosure effects**- Section 19(3) of the Act requires consideration of actual or potential effects on competition. Imports of clear and amber tubing rose from 11 per cent to 18 per cent of domestic consumption during the enquiry window; Nipro-Triveni doubled its melt capacity; no converter exited. The structure and conduct indicators thus refute any suggestion of market foreclosure.

52. Even if a differential was established, the LTTSA is objectively explained. Neutral tubing is produced in continuous tanks that cannot be banked without physical damage and a guaranteed eighty-per-cent offtake for three years permitted Schott India to run the furnace at optimal throughput, unlock economies of scale and justify a €25-million rebuild. Courts have repeatedly recognised such "take-or-pay" commitments as legitimate where the pro-competitive efficiencies outweigh any restrictive tendency.

53. Therefore, in our considered opinion, all three limbs of a margin-squeeze fail. Schott India is absent downstream; the wholesale-to-retail spread left rivals with sustainable margins; and the market exhibited neither exit nor price elevation. What remains is a commercially rational bulk-purchase rebate, available in principle to any converter willing to match Schott Kaisha's volumes and planning horizon. We therefore hold that the LTTSA does not contravene Section 4(2)(e) of the Act, and the finding of CCI on this head cannot be sustained. **Issue III is answered in the negative.**

Issue IV - Whether Schott India tied or bundled NGA and NGC tubes, thereby breaching Section 4(2)(d) of the Act.

54. Section 4(2)(d) of the Act is attracted only where a dominant enterprise:
   - supplies two distinct products,
   - makes the supply of the tying product conditional upon acceptance of the tied product, and
   - thereby forecloses competitors in the tied-product market.

The aforementioned conditions have been echoed in the landmark case of ***Microsoft Corp. v. Commission of the European Communities (General Court of the European Union, Case T-201/04, judgment dated 17 September 2007)*** in the following paragraph:

> *"15. In order to determine whether the conduct of the dominant undertaking constitutes abusive tying, the Commission is entitled to base its finding on the following factors: first, the tying and tied products are two separate products; second, the undertaking concerned is dominant in the market for the tying product; third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and fourth, the practice in question forecloses competition. The Commission also takes into account the fact that the tying is not objectively justified. Such justification may not be inferred from the advantages arising from the fact that tying ensures a uniform presence of the product on the market. Such a result cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying Since the list of abusive practices set out in the second paragraph of Article 82 EC is not exhaustive, bundling by an undertaking in a dominant position may also infringe Article 82 EC where it does not correspond to the example given in Article 82(d) EC. Accordingly, in order to establish the existence of abusive bundling, the Commission is entitled to rely on Article 82 EC in its entirety and not exclusively on Article 82(d) EC."*

55. Therefore, in the instant case, the threshold question is whether NGA and NGC are, in economic terms, separate products. Both variants are drawn from the same continuous-melt furnace; NGA achieves its amber hue solely by the addition of iron oxide to the common batch. Converters order whichever variant the downstream pharmaceutical customer specifies, there being no independent demand for NGA unconnected with that photo-

sensitivity requirement. On that uncontested evidence, it can be inferred that the two grades are best regarded as alternative specifications of one input rather than as independent products.

56. Assuming arguendo that they are distinct, Schott India's share exceeded 90 per cent in NGA and averaged above 60 per cent in NGC during the enquiry window; dominance is therefore present in each alleged product market and the enquiry must turn to coercion. The CCI relied on three witness statements asserting that Schott India "insisted" on purchases of both grades, and on a circular dated 18 August 1999 stating that quantity rebates were "applicable only on mix purchases of clear and amber". Those materials are inadequate for four reasons:

(i). The deponents, Kishore Industries, Adit Containers and Mak Ampoules, were not offered for cross-examination despite Schott India's repeated requests; COMPAT has already held that the denial of that opportunity materially weakens the evidentiary value of their allegations.

(ii). The circular dated 20.05.2009 predates the commencement of Sections 3 and 4 of the Act by nearly a decade and therefore cannot ground liability for the period covered by these proceedings.

(iii). No converter produced a purchase order, invoice or contract clause making the supply of NGA contingent upon an order for NGC. The only linkage is that, for the purpose of computing volume rebates, annual tonnages of both grades are aggregated; any converter remains free to purchase a single grade at the published list price.

Recognised commentary treats such aggregation as a multi-product volume discount, not tying.

(iv). The minority opinion of the Economic Member assembled converter sales data for FY 2007-08 to FY 2011-12 and found that every converter increased output while imports, especially of NGC, rose steadily. None of rival tube makers exited the business. The indispensable element of foreclosure is therefore absent.

57. Objective justification, even if coercion was made out, is evident. NGA and NGC draw from a common furnace operating at 1600°C. Sharp month-to-month swings in the ratio jeopardise furnace integrity. Aggregating the two grades when calculating rebates, as Schott India explained and the CCI recorded, smooths demand and secures continuous load. Manufacturing efficiency is a legitimate business consideration and has not been shown to harm consumers.

58. In these circumstances, the essential elements of Section 4(2)(d) of the Act are not proved as NGA and NGC are not independent products; converters were never compelled to buy both; no foreclosure was demonstrated; and, in any event, the rebate design is objectively justified. The finding of tying cannot therefore stand, and **Issue IV is answered in the negative.**

Issue V - Whether an effects-based (harm) analysis is an essential component of an inquiry under Section 4 of the Act, and, if so, whether it was omitted in the present case.

59. Section 4 of the Act does not *per se* prohibit dominance; it prohibits the abuse of dominance. Abuse, by definition, is conduct that distorts the competitive process or harms consumers. The statute therefore contemplates two logically separate findings:

(i). that the impugned practice falls within one of the descriptive clauses (a)–(e) of sub-Section (2), and

(ii). that it results in, or is likely to result in, an appreciable adverse effect on competition ("AAEC").

To collate the second enquiry into the first would equate description with proscription and convert the provision into a strict-liability offence.

60. We believe that three legislative signposts in the Act make the "effects requirement" explicit. Firstly, the Preamble records that the Act is enacted "to prevent practices *having adverse effect on competition*" (emphasis supplied). Secondly, a dominant position is defined in the Explanation to Section 4 of the Act as power that enables the enterprise "to affect … *the relevant market in its favour*"; the inquiry is purposeless unless the decision-maker asks whether the challenged conduct has in fact been exercised to that effect. Thirdly, Section 19(4)(l) of the Act obliges the CCI, in analysing dominance, to consider the "*relative advantage, by way of contribution to economic development*," thereby recognising that conduct which enhances consumer welfare may co-exist with market power and should not be condemned.

61. The legislative history of the Act confirms the requirement. The **Raghavan Committee Report** (2000), which is the blueprint

for the Act, framed the "*key questions for adjudication on abuse of dominance*" in terms that are unmistakably effects-orientated:

"*How will the practice harm competition? Will it deter entry? Do consumers benefit from lower prices and greater availability?*". Parliament adopted that approach and nowhere does the enacted text suggest an irrebuttable presumption. This Court has also rejected rigid deeming rules even where the statute expressly presumes harm. In ***Rajasthan Cylinders v. Union of India***[22]**,** this Court held that the "presumption" of AAEC in Section 3(3) of the Act is rebuttable. A fortiori, a presumption that is not even expressed in Section 4 of the Act cannot be treated as conclusive. The relevant para from this judgement has been reproduced hereunder:

> *"75. We may also state at this stage that Section 19(3) of the Act mentions the factors which are to be examined by CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Reason is simple. As already pointed out above, the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories. We may hasten to add, however, that agreements mentioned in Section 3(3) raise a presumption that such agreements shall have an appreciable adverse effect on competition. It follows, as a fortiorari, that the presumption is rebuttable as these agreements are not treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. What follows*

[22] (2020) 16 SCC 615

is that once CCI finds that case is covered by one or more of the clauses mentioned in sub-section (3) of Section 3, it need not undertake any further enquiry and burden would shift upon such enterprises or persons, etc. to rebut the said presumption by leading adequate evidence. In case such an evidence is led, which dispels the presumption, then CCI shall take into consideration the factors mentioned in Section 19 of the Act and to see as to whether all or any of these factors are established. If the evidence collected by CCI leads to one or more or all factors mentioned in Section 19(3), it would again be treated as an agreement which may cause or is likely to cause an appreciable adverse effect on competition, thereby compelling CCI to take further remedial action in this behalf as provided under the Act. That, according to us, is the broad scheme when Sections 3 and 19 are to be read in conjunction."

62. Comparative jurisprudence is in accord with these principles. Article 102 of the Treaty on the Functioning of the European Union[23], the principal template for Section 4 of the Act, has been read by the Court of Justice of the European Union as demanding a concrete appraisal of effects. In ***Intel Corporation Inc. v. European Commission (Case C-413/14 P, judgment of 6 September 2017)***, the Court affirmed that allegedly exclusionary conduct may be condemned only after the decision-maker has balanced its likely anti-competitive impact against any demonstrated efficiencies that accrue to consumers, a test already articulated in the Commission's 2009 Guidance on Article 102. Because the Commission had omitted that balancing exercise, its decision was annulled. The ruling underscores that merely classifying conduct under a descriptive

[23] In short ,"TFEU"

label is insufficient; net competitive harm must be shown before liability can attach.

63. The CCI's own decisions acknowledge as much. In ***Indian National Shipowners' Association v. ONGC***[24]***,*** the CCI undertook a "fairness or reasonableness test" and exonerated the respondent upon finding objective necessity. Similarly, in **Excel Crop Care (supra)**, it was held that an administrative body cannot, consistently with Article 14 of the Constitution, apply an effects test in some cases yet disclaim the power in others; such selective deployment is the antithesis of equal treatment. The relevant paras of this judgement have been reproduced hereunder:

> *"110. Moreover, in Hindustan Steel Ltd. v. State of Orissa [Hindustan Steel Ltd. v. State of Orissa, (1969) 2 SCC 627: AIR 1970 SC 253], this Court made the following observations: (SCC p. 630, para 8)*
>
> > *"8. … An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding 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*

[24] (2019) SCC OnLine CCI 26

liable to act in the manner prescribed by the statute."
(emphasis supplied)

111. It should be noted that any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further, it is well-established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. In Coimbatore District Central Coop. Bank v. Employees Assn. [Coimbatore District Central Coop. Bank v. Employees Assn., (2007) 4 SCC 669: (2007) 2 SCC (L&S) 68], this Court has explained the concept of "proportionality" in the following manner: (SCC p. 678, paras 18-19)

"18. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.
19. De Smith states that "proportionality" involves "balancing test" and "necessity test". Whereas the former ("balancing test") permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ("necessity test") requires infringement of human rights to the least restrictive alternative."
In consonance of established jurisprudence, the principle of proportionality needs to be imbibed into any penalty imposed under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the

intention of the Act. Therefore, the fine under Section 27(b) of the Act should be determined on the basis of the relevant turnover. In light of the above discussion a two-step calculation has to be followed while imposing the penalty under Section 27 of the Act."

64. Turning to the present record, the majority ruling of the CCI professed to have analysed effects yet adduced no economic evidence of price increases, output restriction or foreclosure. By contrast, the CCI's minority Member, after compiling converter sales, EBITDA and price data for FY 2007-08 to FY 2011-12, found (i) that all independent converters expanded output and margins, and (ii) that pharmaceutical buyers paid identical or higher prices for containers from the joint-venture than from other converters. The data thus falsify any allegation of competitive harm.

65. The learned Counsel for CCI urged that Section 4(2) of the Act is a "deeming provision", ipso facto condemning the listed practices. The submission cannot stand. The very case on which Counsel relied, ***Fast Way Transmission*** **(supra)**, did not consider, still less decide, the present question. The Court was there concerned with a licensee that had already infringed statutory broadcast conditions. Moreover, Section 32 of the Act empowers the CCI to investigate conduct outside India only where such conduct "has, or is likely to have, AAEC in India". It would be absurd to demand an effects analysis for foreign conduct yet dispense with it for domestic conduct; the legislature cannot be taken to have intended such inconsistency.

66. We therefore hold:

(i). that an effects-based analysis is an obligatory component of every inquiry under Section 4 of the Act;

(ii). that the CCI, having relied on untested statements and pre-2009 correspondence, Undertook no credible assessment of harm; and

(iii). that, on the evidence marshalled by the COMPAT, converter growth, stable downstream prices, absence of foreclosure – no appreciable adverse effect on competition is shown.

67. The omission of a proper harm analysis vitiates the CCI's order *in limine*. Because each of the alleged abuses has already been negatived on the facts, the appeals must fail on this additional ground as well. The COMPAT's decision to set aside the CCI's directions and penalty therefore warrants affirmation. **Issue V is answered in the affirmative with respect to both the questions.**

Issue VI - Whether the investigation and the Commission's order are vitiated by denial of cross-examination and allied breaches of natural justice.

68. The Act entrusts the DG with inquisitorial powers of great breadth, but those powers are bounded by the fundamental rule that evidence adduced against a party must be open to challenge. Section 36(2) of the Act incorporates the Code of Civil Procedure's guarantees, including the right to "examine witnesses on oath" and to test them in cross-examination, while

Regulation 41(5) of the 2009 General Regulations obliges the DG or the CCI to grant that opportunity whenever it is "necessary or expedient". Audi alteram partem is therefore woven into the statute itself.

69. In the present inquiry, the DG's "Methodology" shows that he questioned only nineteen converters identified by the informant as "major players", all commercially adverse to Respondent Schott India. Apart from circulating questionnaires, recording their statements and "surfing the worldwide web", no independent verification was attempted. International suppliers were contacted by e-mail and only two responded. No converter, friendly or even neutral, to Schott India was interviewed. The Report thereafter cites those statements as its primary proof more than twenty times. For example, "the above stated fact becomes evident from the statements"; "reading/analysis of the above quoted statements"; "findings: from the statements of the parties mentioned above". The CCI adopted the same material without independent scrutiny. In short, uncorroborated testimony is the foundation of every adverse inference by the DG and CCI against Schott India.

70. In its written objections dated 16 May 2011, Schott India squarely put the CCI on notice that the depositions emanated from "*converters openly conflicted and inimically disposed*" and requested the right to cross-examine each deponent. At the oral hearing the request was reiterated. The CCI refused, reasoning that no "separate application" had been filed. No attempt was made to weigh necessity or prejudice and it is clear that the request was rejected on form rather than substance.

71. That refusal disregards various precedents upheld in a catena of judgement of this Court like ***Raymond Woollen Mills Limited and Another vs. Director General (Investigation and Registration) and Another***[25] *and* **State of Kerala v. K.T. Shaduli Grocery Dealer Etc.**[26]. In ***Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II***[27], this Court made the following observations regarding the right to cross examination:

> *"6. According to us, not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the adjudicating authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the adjudicating authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the adjudicating authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guesswork as to for what purposes the*

[25] (2008) 12 SCC 73
[26] (1977) 2 SCC 777
[27] (2016) 15 SCC 785

appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."

Moreover, in a similar competition matter *in* ***Cadila Healthcare Ltd. (supra)***, the Delhi High Court held that where findings depend upon oral statements, denial of cross-examination vitiates the decision. A statutory discretion to allow or refuse must be exercised judicially and it must not be defeated by procedural technicalities. The relevant paras of this judgement are:

> *"61. This court notices that the CCI had earlier, in the order, noted that a party can reasonably request for cross examination of individuals whose testimony can adversely affect it and that it has to consider the applications made in such cases, by exercise of discretion.*
>
> *62. Cadila's argument that its request was turned down without adequate reasons, in this court's opinion is justified. Regulation 41(5) of the 2009 regulations provides as follows:*
>
>> *"(5) If the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross examine the person giving the evidence."*
>
> *63. This court is of the opinion that the discretion, which is undoubtedly vested with the CCI to permit or refuse cross examination of a witness, is to be exercised judiciously. The reason for denial of the request for cross examination is that the justification given by Cadila is not "satisfactory" and that the testimony of witnesses who have deposed and whose cross examination is sought, are not relied upon in the DG's report. This court*

> *is of the opinion that such reasons are not germane; mere "dissatisfaction" does not imply judicious exercise of discretion. As regards the reliance by the DG in his report is concerned, the grounds of cross examination are necessarily wider; it is avowedly to establish whether the witnesses were credible and whether any part of their statements could be relied on; furthermore they can be cross examined on relevant facts, which are not necessarily confined to what they depose about. Therefore, it is held that CCI erred in refusing to grant cross examination (to Cadila) of the three witnesses who had deposed before the DG."*

72. The COMPAT captured the essence of this violation as follows: "*total reliance on the statements of these interested witnesses even without cross-examination was risky and uncalled for*" . The COMPAT added that the CCI "*should not have insisted on a separate application once the plea was raised in pleadings*". Having so ruled, the COMPAT proceeded, perhaps over-cautiously, to examine the merits; but it acknowledged that the evidentiary framework of this matter had been gravely compromised.

73. The practical consequences of this violation are obvious. Cross-examination would have revealed that several converters had, during the period in question, expanded output, raised prices independently of Schott India, and in some instances sourced tubes from imports, all facts inconsistent with the foreclosure. It would also have exposed inconsistencies between written replies and contemporaneous purchase records. The CCI's "cherry-picking" of only inculpatory passages, while ignoring exculpatory statements such as the reply of Lisa Ampoules (DG

Report, Reply to Question 11, Page 902), is precisely the mischief the law guards against.

74. The CCI stand that it “relied only on data supplied by Schott India” cannot survive scrutiny. The “data” are summary tables compiled from the very statements whose reliability was in dispute. Without the underlying testimony, the tables are meaningless totals. The edifice therefore collapses unless the testimony passes the test of adversarial scrutiny. Moreover, the denial was not an innocent lapse is confirmed by later regulatory reform. In January 2024, Regulation 41(2) was amended to insert an explicit proviso stating that where the DG relies on oral evidence, he “shall offer” the opposite party an opportunity to cross-examine. The amendment reflects a legislative judgment that the right is indispensable and it underscores that the right existed in substance all along and was ignored here.

75. We therefore record, in emphatic terms, that the proceedings before the DG and the CCI were procedurally defective in a manner that, by itself, could have warranted dismissal of the complaint at the threshold**.** The fact that the COMPAT and this Court have, for completeness, entered into an effects-based merits analysis does not water down that conclusion; it merely furnishes an independent foundation for the same result, ensuring finality should a higher forum take a different view on procedure. If the CCI had allowed cross-examination, two courses were open: either the allegations would have crumbled under questioning, or a tested evidentiary record would have emerged on which a reasoned decision, whichever way, could

rest. By electing to proceed on untested assertions, the CCI deprived itself of the material needed for a legally sustainable finding and placed the respondent under an evidentiary handicap contrary to natural justice. **Issue VI is answered in the affirmative.**

VII. Conclusion

76. We have, for completeness, scrutinised each precedent relied upon by the appellants and the respondents. In our considered opinion, the factual matrices and statutory settings of these case laws except those referred to in the body of the judgment differ in material respects from the controversy before us. Setting out individual distinctions in this judgement would tax both the length and the clarity of this judgment. However, we are placing on record that none of the cited authorities unsettles the reasoning or the conclusions we have reached.

77. For the reasons set out in the foregoing analysis we hold that:

(i). The slabbed target-rebate scheme does not impose unfair or discriminatory conditions;

(ii). The 8 per cent functional rebate, whether in its original or TMLA form, is objectively justified and uniformly available;

(iii). The LTTSA with Schott Kaisha neither effects a margin-squeeze nor forecloses downstream rivals;

(iv). No coercion or tying between NGA and NGC tubes is proved;

(v). An effects-based inquiry is integral to Section 4 of the Act and, when properly undertaken, discloses no appreciable adverse effect on competition in the present case; and

(vi). The investigation by the DG is vitiated by the denial of cross-examination and by reliance upon pre-statute material, a procedural lapse that would, of itself, have sufficed to invalidate the impugned findings.

78. Competition law is not designed to humble the successful or to clip the wings of enterprises that have, through industry and innovation, secured a commanding share of the market. The true purpose of antitrust laws is to preserve the process of competition, i.e., to ensure that rivals may challenge the incumbent on the merits, that consumers enjoy the fruits of efficiency, and that technological progress is not stifled by artificial barriers. If mere size or success were treated as an offence, and every dominant firm exposed to sanction without tangible proof of competitive harm, the law would defeat itself: it would freeze capital formation, penalise productivity, and ultimately impoverish the very public it is meant to protect.

79. In today's global economic climate, prudence is vital. As the United States and Europe retreat behind their newly-minted trade walls of protectionist policies to shield their homegrown markets, India's bid to emerge as a global centre for manufacturing, life-sciences and technology will succeed only if regulation rewards scale and intervenes solely when genuine competitive harm is shown. Heavy-handed enforcement, divorced from market effects, would discourage the long-term capital and expertise the economy urgently needs. An effects-

based standard is therefore not a mere procedural nicety. It is both a constitutional bulwark against arbitrary restraint of lawful enterprise and a strategic necessity if India is to capture the opportunities that more protectionist economies are in danger of forsaking. In the result, Civil Appeal No. 5843 of 2014 (Competition Commission of India v. Schott Glass India Pvt. Ltd.) and Civil Appeal No. 9998 of 2014 (Kapoor Glass India Pvt. Ltd. v. Schott Glass India Pvt. Ltd.) are dismissed.

80. The order of the Competition Appellate Tribunal dated 2 April 2014 is affirmed. Having regard to the wholly unsubstantiated nature of the allegations and the prolonged litigation they have occasioned; Kapoor Glass shall pay costs of Rs. 5,00,000/- (Rupees five lakhs only) to Schott India within eight weeks from today.

81. Pending application(s), if any, shall stand disposed of.

.....................................J.
(VIKRAM NATH)

.....................................J.
(PRASANNA B. VARALE)

NEW DELHI;
MAY 13, 2025