Q) Has your government put into place a clear policy statement/strategy on promoting and protecting innovation? If yes, what has been the positive and negative of this?

A) **National IPR Policy, 2016**[1]

The Government of India in 2016 released the National Intellectual Property Rights Policy. "The policy reinforces the strengths of IPRs to acquire both economic and social benefits on a bigger and higher scale for India."

The vision statement of the policy is:

> *To stimulate a dynamic, vibrant and balanced intellectual property rights system in India to: • foster creativity and innovation and thereby, promote entrepreneurship and enhance socio-economic and cultural development, and • focus on enhancing access to healthcare, food security and environmental protection, among other sectors of vital social, economic and technological importance.*

In order to fulfil this mission, the policy lays down 7 main objectives:

1. IPR Awareness: Outreach and Promotion - To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society
2. Generation of IPRs - To stimulate the generation of IPRs
3. Legal and Legislative Framework - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest
4. Administration and Management - To modernize and strengthen service oriented IPR administration
5. Commercialization of IPR - Get value for IPRs through commercialization
6. Enforcement and Adjudication - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements
7. Human Capital Development - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs

The renewed focus on building capacities and encouraging SMEs, start-ups and educational institutions to venture into R&D is a definite positive of the policy. Moreover, the vision to create an IP culture is also commendable. This would be achieved by guiding and enabling all creators and inventors to realize their potential for generating, protecting and utilizing IPRs

[1] Available at http://dipp.nic.in/sites/default/files/National_IPR_Policy_English.pdf

which would contribute to wealth creation, employment opportunities and business development.

However, it is important to note that in order to promote innovation, a holistic and cohesive policy framework is required and protection and strengthening of IP is just one part of this framework. This is because the objective of innovation policy is to unlock the dynamic innovative capabilities of the nation and includes the removal of bottlenecks that prevent industries to reach their full potential.[2]

This is especially true for encouraging innovation in emerging high-tech industries. Hence, in addition to IPR protection, developing an innovation policy requires a certain degree of focus on additional policy mechanisms such as competition policy - that promotes dynamic efficiency; consumer protection - that protects the consumers' interests in a fast-changing environment; and investment policy - that promotes technology transfer and access to knowledge.

To promote innovation, competition policy adoption is particularly vital - and is often undermined by developing nations. This is the reason why **CUTS runs a global campaign namely the World Competition Day** that is celebrated on the 5th of December every year. The campaign is run to ensure that consumers from across the world realise the potential benefits from an effectively implemented competition regime, and also play their role in making competition regimes work worldwide, it is critical that focus on competition policy and law issues at an international level be strengthened. We believe this can be achieved through the adoption of a World Competition Day. The 5th of December 1980, saw the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set), which had been approved by the UN Conference on Restrictive Business Practices. In view of the disruptive business models based on continuous innovation in today's digital economy, **the theme selected for this year's World Competition Day campaign is 'Digital Economy, Innovation and Competition'**.

In addition to these policies, innovation also requires a renewed focus on removing critical infrastructural bottlenecks and other deterrents to investment. Take Pakistan for example - where it was recently observed by the World Economic Forum (WEF) that at the heart of

[2] https://link.springer.com/article/10.1007/s40309-013-0008-3

Pakistan's digital revolution lies - investments in power and connectivity infrastructure, technology and digital infrastructure.

Hence, India's innovation policy requires something more in addition to a renewed focus on strengthening the IPR regime. It needs to be synchronised and readjusted with its broader socio-economic requirements. At the heart of this argument is that innovation should not be seen as an end in itself but as a process that needs facilitation from all angles in order for it to work for the socio-economic betterment of the nation.

Considering the aforementioned need for cohesion to facilitate innovation, I would like to speak more about (a) the need for a nexus between competition policy and Intellectual Property and (b) the interaction between consumer protection and IP - **which also addresses the second and third questions.**

Q) Does your country's consumer protection legal framework, assuming there is one, protect consumers from infringements related to IP, e.g., branding issues, false packaging and labelling, etc.?

Yes, India's consumer protection framework i.e. The Consumer Protection Act, 1986 is an important social legislation that protects the consumers from exploitation from the business and trading community that engage in unfair trade practices, that includes protection from counterfeit goods. India's CPA protects the consumers from influences of the seller's (marketer / manufacturer) coercive power by way of unfair trade practices. **The following unfair trade practices related to IP infringements are prohibited**:

- False representation of the quality, composition, style or model of goods and services.
- Falsely alleging affiliation and misleading statements about the usefulness of goods and services.

The Consumer Protection Act, 1986 can be invoked to seek redressal against any defective products or deficient services including restrictive or unfair trade practices adopted by the manufacturer or trader. Further when the Act was amended in 2002, the spurious goods and services were brought within the ambit of the Act, besides enlarging the scope of unsafe goods and services that are hazardous to life and safety. With a view to serve the consumers better, the amended Act contains several provisions for facilitating quicker disposal of complaints by consumer forums, enhancing the capability of redressal agencies, strengthening them with more powers, streamlining procedures and widening the scope of the Act to make it more effective and purposeful.[3]

Moreover, there is also a pending Consumer Protection Bill-2018 which aims at strengthening the enforcement mechanisms and substantive provisions of the Act. With a view to fill the institutional void in the regulatory regime extant, the **Bill envisages** the creation of a **Central Consumer Protection Authority** to address the issues of false or misleading advertisements which are prejudicial to the interests of the public and unfair trade practices as defined in section 2(47) of the Bill, with an investigation wing to probe into instances thereof.

The Bill also makes an express provision for the imposition of the punishment of imprisonment and fine for manufacturing for sale or storing, selling or distributing or importing **products containing injurious adulterants, as well as spurious goods**.[4]

However, in the Indian context, the counterfeit market has grown 44.4 percent per annum and as of 2014, it had reached INR 1.05 lakh crore in size.[5] This is higher than the rate at which the overall consumer goods market in the country is growing. In order to tackle conterfeit goods, a multi-stakeholder collaborative effort is necessary. Keeping in mind broader policy goals of ‘Make in India’ which includes indigenous manufacturing, policy makers should work to strengthen IP laws which protect branding and make enforcement mechanisms more stringent and robust. However, the onus is not only on the government. As profits, goodwill and branding of industry players are all at stake, businesses have an inherent role to play. For example, through data collection and sharing of information re counterfeit markets across sectors, businesses can collectively tackle the increased production of illicit products. Moreover, through Corporate Social Responsibility projects, market players can spread awareness about the harms of counterfeiting. Industry corporations can also make smaller businesses and SMEs better understand IP protection and brand evaluation.

Q) Should there be a nexus between IP laws and competition laws in developing countries?

[3] http://www.consumereducation.in/monograms/Brand_Imitation.pdf

[4] https://www.livelaw.in/highlights-consumer-protection-bill-2018-read-bill/

[5] PTI, Counterfeit goods real challenge to 'Make in India': Report , 25 th Sept 2015, available at http://economictimes.indiatimes.com/news/economy/policy/counterfeit-goods-real-challenge-to-make-in-india-report/articleshow/48747471.cms

It has been widely acknowledged that Intellectual property laws and competition law are two of the most important legal mechanisms that promote innovation and contribute towards consumer welfare. Their importance is intensified in the context of developing nations as a unique balance and cohesion needs to be maintained to promote access to knowledge and information (through competition policy) and incentivize innovators (through the IPR laws). This balance is crucial for achieving sustainable development.

Although IPRs are generally considered as pro-competitive (as they incentivise innovation and encourage dynamic competition), in some contexts and circumstances, the mechanisms deployed by both laws to achieve these shared goals might lead to contradictions. For instance, the exercise of monopoly rights by an IPR owner in an exclusionary manner to the detriment of players that lie below it in a value chain might lead to an adverse impact on competition.

This is but one of the examples that displays the intersection. In order to appreciate the true nature of the Competition-IP interface, there are three broad perspectives that are important to consider. These are:

(1) **Looking IP laws/policies from Competition policy perspective**: e.g. inclusion of TRIPS flexibilities in domestic laws – highly contentious issues in pharmaceuticals and agriculture (seeds, agrochemical etc.) sectors; shaping IP positions in international negotiations. These are (competition) policy issues and are dealt at the highest levels, and are governed by the political economy of respective countries. It can be said that India's position and US' position forms the two extremes of IP positions.

(2) **Implementation of pro-competition provisions in IP laws**: e.g. compulsory license in patent laws, or having and invoking provisions (like Section 3(d) of Indian Patents Act) to deal with evergreening of patents. These are implemented by IP authorities. Patent Licencing Agreements are also predominantly dealt under Patents Act, however, such agreements can also be scrutinised under Competition laws (concurrent jurisdiction). In India, there are court cases regarding jurisdictional issues.

(3) **Dealing of IPRs under competition law**: generally IPRs are treated as exceptions under competition law/'anti-competitive agreements'. The competition law allows only 'reasonable restrictions' by the IP holders in exercising their IPRS. Mostly, IPRs related competition concerns arise due to 'abuse of dominance'. Cases related with Standard Essential Patents

(SEPs) and licensing on FRAND (Fair, Reasonable and Non-discriminatory) terms are more frequent under competition law.

Some case examples

1. Abuse of dominance through exclusion - Refusal to license

One of the ways in which an IP owner can distort market competition is through the act of refusing to license the IP. This is especially true in the case of markets where a competitors' ability to enter/compete is dependent on getting access to intellectual property owned by a dominant entity. By refusing to license IP, entities that hold a dominant position in a particular market can essentially exclude competitors and withhold competition

1.1. The European Union approach

The Microsoft case[6] is an important example of the how refusal to license of Intellectual Property is treated by the EU. Briefly, the case was initiated through a complaint filed with the EC by Sun Microsystems. Sun claimed that Microsoft refused to provide interoperability information regarding the Windows Operating System which was needed by Sun to facilitate communication of their Solaris Operating System.

Citing ongoing abuse by Microsoft, the EU reached a preliminary decision in the case in 2003 and ordered the company to (a) offer the information necessary for competing networking software to interact fully with Windows desktops and servers and (b) make a version of Windows without Windows Media Player. In March 2004, the EC concluded that Microsoft abused its dominant position and infringed Article 82 and hence is liable to pay €497 million as penalty, the largest fine ever handed out by the EU at the time, in addition to the previous penalties, which included 120 days to divulge the server information and 90 days to produce a version of Windows without Windows Media Player.

In response to the server information requirement, Microsoft released the source code, **but not the specifications**, to Windows Server 2003 Service Pack 1 (SP1) to members of its Work Group Server Protocol Program (WSPP) on the day of the original deadline. Microsoft also appealed the case, and the EU had a week-long hearing over it. Neelie Kroes, the then European Commissioner for Competition stated:

[6] Microsoft Corp v. Commission E.C.R. 11-3601 (2007).

> *"Microsoft has claimed that its obligations in the decision are not clear, or that the obligations have changed. I cannot accept this characterization--Microsoft's obligations are clearly outlined in the 2004 decision and have remained constant since then… I must say that I find it difficult to imagine that a company like Microsoft does not understand the principles of how to document protocols in order to achieve interoperability."*[7]

Therefore, on 12 July 2006, the EU fined Microsoft for an additional €280.5 million (US$448.58 million), €1.5 million (US$2.39 million) per day from 16 December 2005 to 20 June 2006. The EU also threatened to increase the fine to €3 million ($4.81 million) per day on 31 July 2006 if Microsoft did not comply by then.

On 17 September 2007, Microsoft lost their appeal against the European Commission's case. The €497 million fine was upheld, as were the requirements regarding server interoperability information and bundling of Media Player. In addition, Microsoft had to pay 80% of the legal costs of the Commission, while the Commission had to pay 20% of the legal costs by Microsoft.

Laying emphasis on previous cases, the EC laid down the law on anti-competitive action vis-à-vis refusal to license and stated that only in certain 'exceptional circumstances', a dominant firm's actions will lead to anti-competitive liability. The court stated,

> [T]he following circumstances, in particular, must be considered to be exceptional: in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand.[8]

If these conditions are met and the exceptional circumstances have been proved, the refusal by a dominant entity may be equated to abuse of dominance unless objectively justified.

[7] https://www.cnet.com/news/no-alternative-to-microsoft-fine/
[8] Ibid, at 6.

In an earlier case[9] the court had mentioned that ownership of an IPR cannot be equated to dominant position. Applying the essential facilities doctrine the court said that only in cases meeting the requirements of exceptional circumstances, a refusal to license can be an abuse of dominant position. These exceptional circumstances are; firstly it is required that there is refusal on part of the essential facility provider. Secondly, such refusal must lead to denial of market access to other providers of the product. Finally, such a refusal should not have a valid and objective justification.

This has broadly been called the exceptional circumstances approach.

1.2. The US approach

If we look at the approach taken by courts in the US, it is significantly different from the EU perspective. It can preliminarily be stated that the US courts *have rarely equated* a refusal to license to an anti-competitive liability. The US courts generally follow a higher threshold for invoking liability, as compared to the 'exceptional circumstances' approach followed by the CJEU.[10]

One approach of looking at refusal to license is through the lens of the essential facilities doctrine. The application of this doctrine does not depend upon the conduct of the facility holder but perceives it as a breach of duty by a monopolist to deal fairly with his competitors.[11] This special duty emanates from the fact that the monopolist has an exclusive right over the essential facility and its breach implies the automatic foreclosure of competitors in the market.[12]

An important case illustrating the application of this doctrine is MCI Comm. Corp. v. AT&T.[13] In this case, AT&T owned the Bell System which meant effective control over the local phone exchange lines. AT&T refused usage of the Bell System to MCI which required access in order to connect long distance calls. This refusal in the opinion of the court meant effective elimination of downstream competition. Also the court laid down certain conditions for the fulfilment of the doctrine;

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[9] Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities Joined cases C-241/91 P and C-242/91 P

[10] Herbert Hovenkamp et al., *Unilateral Refusals to License in the US*, Stanford Law School John M. Olin Program in Law and Economics Working Paper No. 303, 46 (2005)

[11] Ibid., at 20.

[12] *Supra* note 69, at 21.

[13] 708 F.2d 1081 (7th Cir. 1983).

(a) Essential facility should be controlled by the monopolist
(b) The competitor should be unable to feasibly duplicate the essential facility
(c) There should be denial of the facility to a competitor; and
(d) The practicability and feasibility of providing the facility

The court held that if a case fulfils all the above mentioned conditions, the owner of the essential facility will have to compulsorily provide access on fair and non-discriminatory terms.

The *second* approach is to view the conduct of the entity in question as anti-competitive under Sec.2 of the Sherman Act (monopolising or attempting to monopolise) on grounds of acquiring monopoly power through refusal.[14] However, it is important to note that the scope of this approach is narrower than the essential facilities doctrine and it is really hard to establish that the exercise of IPR through refusal to deal is an anti-competitive conduct. From the case law such as Intergraph v. Intel[15], Data General v. Grumman Systems Support[16] and Image Technical Services v. Eastman Kodak[17] it is clear that there has been a substantial shift from the *pre se* legality rule (vis-à-vis refusal to license) to a rule of reason approach, wherein evidence can be adduced to rebut the presumption of legality. However, it is still an arduous task to place antitrust liability in cases of refusal to license.

2. Abuse of dominance through exploitation – demanding unfair, unreasonable and discriminatory royalties etc.

Apart from possible exclusionary conduct emanating from refusal to license, the IP owner can also theoretically abuse its dominant position through exploitative means. This occurs when the royalty amount demanded by a dominant entity is excessive and unfair.

2.1. The case of standard essential patent licensing – Indian cases

The Patents Act bestows rights on a patent holder to prevent third parties from making, using, offering for sale, selling or importing the products using the said patent without its consent. The Patents Act also presents a framework for exercise of such rights and remedies in cases of abuse of the patent rights. Therefore, it is generally contended that such matters pertaining

[14] *Supra* note 69, at 27.
[15] 195 F.3d 1346 (Fed. Cir. 1999).
[16] 36 F.3d 1147 (1st Cir. 1994).
[17] 125 F.3d 1195 (9th Cir. 1997).

to patents and licensing need to be dealt under the Patents Act and not under the Competition Act.

However, this exception possibly engenders anti-competitive conduct in cases wherein patents are essential to the working of an industrial standard (known as Standard Essential Patents or SEPs) and are ideally to be licensed on a Fair Reasonable and Non-Discriminatory (FRAND) basis. It is often the case that the vague term FRAND is open to interpretation and leads to disputes between SEP holders and potential SEP licensees. The main disputed issue in such cases is the amount of royalties to be paid to the SEP holder.

India has also witnessed its fair share of disputes at the interface of SEPs and competition law. The disputes have predominantly arisen in the telecommunications sector. Ericsson being the owner of numerous SEPs for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices in India, has filed several infringement lawsuits against mobile handset manufacturers. Simultaneously, the handset manufacturers such as Intex, Micromax and iBall have filed antitrust complaints at the CCI against Ericsson alleging abuse of dominance.

Ericsson vs. Macromax (at CCI)

Indian mobile handset manufacturers in several complaints have raised anti-competitive concerns against Ericsson. The first instance where an SEP holder was accused of anti-competitive behaviour was in 2013 when Micromax filed information with the CCI against Ericsson, under Section 19(1)(a) of the Competition Act. In nutshell, the basic issue which the manufacturers (in addition to Micromax) have raised is Ericsson's demand for excessive royalties. Ericsson owns several SEPs with respect to the Global System for Mobile Communication (GSM) standard set by ETSI.

While licencing these SEPs to handset manufacturers like Micromax, Ericsson demanded royalties which were based on the Net Selling Price of the end product. According to Micromax and others, this demand was considered to be arbitrary and abusive and was allegedly in contravention of the FRAND commitment made by Ericsson to the ETSI. By demanding unfair, discriminatory and excessive royalties based on the Net Selling Price of the mobile handset, it was alleged that Ericsson abused its dominance in the relevant market of "*SEP(s) in GSM compliant mobile communication devices in India.*"

In 2013, in its *prima facie* order under Section 26(1) of the Competition Act, considering Ericsson's ownership over wide ranging SEPs and the lack of substitutability of the relevant product, CCI stated that Ericsson was dominant in the relevant market.73 Moreover, according to the Commission, the royalties charged were unrelated to the patented product and were thus against the FRAND commitment. In other words, the order indicates that conceptually, the Commission was against the methodology of determining royalties according to the final selling price of the product and was in favour of the fixing royalty based on SSPPU. Based on this reasoning, an order was passed by the Commission directing the Director General to investigate the matter and report back to the Commission with its findings. The matters is still pending.

Ericsson vs. CCI (Delhi High Court), 2016

Ericsson went to the High Court challenging CCI's jurisdiction.

The Delhi High Court considering precisely the same issue related with the jurisdiction of the CCI in the case *Telefonaktiebolaget LM Ericsson vs. Competition Commission of India & Another*[18] held that CCI has the jurisdiction to entertain cases related to 'abuse of dominance' and 'anti-competitive agreements' even when the product concerned is patented. The following paragraphs summarise the logic and reasoning given by the Court.

The Section 62 of the Competition Act states that "the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force". Also S.60 of the Act says, "the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force". Therefore, mere plain reading of these two provisions, it is evident that the intention of the Parliament in enacting the Competition Act was not to curtail or whittle down the full scope of any other law, as the Act would be "in addition to, and not in derogation of" any other Act.

The Court also observed that the remedies as provided under Section 27 of the Competition Act for abuse of dominant position are materially different from the remedy as available under Section 84 (Compulsory License) of the Patents Act. It is also apparent that the remedies under the two enactments are not mutually exclusive; in other words grant of one is not destructive of the other. Thus, it may be open for a prospective licensee to approach the

[18] W.P.(C) 464/2014; Judgement delivered by Delhi High Court on 30.03.2016

Controller of Patents for grant of compulsory licence in certain cases. The same is not inconsistent with the CCI passing an appropriate order under Section 27 of the Competition Act.

Furthermore, the provisions of Sections 21 and 21A of the Competition Act indicate that the intention of the Parliament was not to abrogate any other law but to ensure that even in cases where CCI or other statutory authorities contemplate passing orders, which may be inconsistent with other statutes, the opinion of the concerned authority is taken into account while passing the such orders. These provisions clearly indicates the Competition Act co-exist with other regulatory statues and be harmoniously worked in tandem with those statues and as far as possible, statutory orders be passed which are consistent with the concerned statutory enactments including the Competition Act.

The Court also observed that the operative width of the two enactments is different. Whereas the Patents Act provides specific remedy to the 'person' seeking relief, the orders passed by CCI are in 'rem' (i.e. against or about a 'thing'). While the doors are open for the parties to initiate proceedings related with a patented product under the Patents Act, the jurisdiction of the CCI cannot be curtailed and hence any proceeding initiated on such product under the Competition Act are maintainable.

Unless until, contrary view is given by the Supreme Court, this may be taken as settled. On similar lines, a Monsanto has challenged CCI's jurisdiction related with a licensing dispute regarding Bt Cotton.

Monsanto Bt Cotton (at CCI)

In November 2015, the Central Government made a reference[19] to CCI alleging certain anti-competitive practices on the part of Mahyco Monsanto Biotech (India) Limited (MMBL). In December 2015, three private seed companies (Informants), whose licenses were terminated by MMBL, also moved to CCI raising allegations of anti-competitive practices by MMBL. Later few more private seed companies joined as informants.

Box 1: Allegations against MMBL and its defence before CCI
The Central Government's allegations against MMBL are:

[19] Under Section 19(1) of the Competition Act

- Abuse of dominant position by charging unreasonably high trait fees for Bt cotton seeds
- Creating a monopoly through restrictive (licensing) agreements for unjust enrichment by charging high trait value from its licensees and ultimately from farmers
- Its sub-licensing agreements with the Indian seed manufacturing companies are anti-competitive

The private seed companies' allegations are:

- The sub-license agreements between MMBL and the seed companies are one-sided, arbitrary and onerous as well as it is restrictive if sub-licenses want to deal with new technology provider
- Linkage of the trait value to the MRP of seed packets is without any economic justification and as such is unfair
- MMBL has not entered into any sub-license with MAHYCO and MHPL, hence they are not subject to unfair conditions. This amounts to discriminatory conduct on part of MMBL.

MMBL, on the other hand, contended that these allegations are emerging from contractual dispute between the parties and has no competition issue involved. MMBL justified the trait value by stating that they are entitled to reward for innovation and claimed that the trait value charged from Indian seed companies is lowest in the world. On restrictiveness, MMBL submitted that the sub-licensees are only required to intimate it regarding proposed negotiations with any of the sub-licensor's competitor and the same is not abusive or unreasonable. To counter the allegation regarding discriminatory treatment and leveraging of its dominant position, MMBL contended that the market share of MAHYCO and MHPL in the cotton seed market has reduced from 13 percent to 7 percent since 2013.

Broadly, there were two issues before the CCI to decide for the purpose of initiating a thorough investigation:

- Whether the conducts of MMBL amounts to “abuse of dominance” [20] within the meaning of the Competition Act?
- Whether, sub-license agreements between the Licensees and MMBL are “anti-competitive agreements” [21] within the meaning of the Competition Act?

After detailed deliberations the CCI came to conclusion that the “provision of Bt cotton technology in India” is the relevant market for the purpose of analysis. It also figured out that there also exist entry barriers in the form of rigorous regulations and requirement of huge investment.

Does MMBL enjoy a dominant position? The CCI found that there were few other companies offering single gene Bt Cotton technology. However, for the two gene Bt cotton technology (BGII), MMBL is the only player. In addition, out of 1128 Bt Cotton hybrids approved by the GEAC (till May 2012), 986 were having Bt technology sub-licensed by MMBL. The CCI also found that the MMBL’s Bt cotton technology was used in more than 99 percent of area under Bt cotton cultivation. Therefore, for CCI the dominant position of MMBL in the relevant market is apparent.

Is such alleged dominance by MMBL being *abused*? The sub-license agreements contain certain terms and conditions that appeared to the CCI as being abusive, stringent and restrictive as well as unfair. For instance, the termination of a license would have the effect of denial of market access to the seed manufacturers, given their dependence on MMBL for Bt cotton technology. These conditions also amount to restriction of development of alternate Bt cotton technologies.

Box2: Restrictive conditions in the Licensing Agreement

The sub-licenses between MMBL and seed companies have been alleged to contain the following abusive and restrictive terms & conditions:

- License requires the sub-licensee to intimate MMBL within 30 days from date of undertaking development of hybrid cotton based on a trait obtained from a competitor of MMBL, failing which may trigger termination of the license with immediate effect
- The consequences of such termination require the sub-licensee to immediately

[20] Under Sections 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b), 4(2)(c) and 4(2)(e) of the Act
[21] Under Sections 3(1) and 3(4) of the Act

cease selling the GM cotton seed produced under the agreement and immediately destroy all such seeds

- The sub-licensee shall immediately destroy all parent lines or other cotton germplasm which has been modified to contain the Monsanto's technology
- MMBL is empowered to terminate the sub-license agreement with immediate effect, if at any time, any laws in the territory restrict the sub license fees (trait value) payable by the sub-licensee

According to the CCI, the termination of license, while the matter was still *sub-judice*, and invoking stringent termination conditions, *prima facie* points towards MMBL using its dominance in the upstream market to protect its presence in the downstream market through its group entities. MMBL also could not provide evidence to get rid of the allegations of discriminatory conduct favouring its groups companies. As any discrimination has the potential to distort the level playing field in the downstream Bt cotton seeds market, CCI felt the need for further examination.

As regards the allegations of "anti-competitive agreements," the CCI observed that the notification requirements coupled with the stringent termination conditions in the sub-license agreement entered into between MMBL and the aggrieved seed manufacturers were in the nature of refusal to deal and exclusive supply agreements within the meaning of S.3(4)(b) and 3(4)(d) of the Act.

To the CCI, the termination conditions were found to be excessively harsh and did not seem to be reasonable as may be necessary for protecting any of the IPR rights, as envisaged under S.3(5) of the Act. Such agreements discourage and serve as a major deterrent for the sub licensee from exploring dealing with competitors. The agreements thus, have the effect of foreclosing competition in the upstream Bt Technology market which is characterised by high entry barriers.

The CCI came to the conclusion that there exists a *prima facie* case of contravention of the provisions of S.3(4) and S.4 of the Act by the Monsanto Group and consequently directed the Director General to conduct an investigation into the whole matter. As of now, the DG is yet to complete the investigation.

One Member[22] of the CCI, however, did not agree with the conclusion reached by the majority. Even if MMBL holds a dominant position vis-à-vis BG-II, there is no *prima facie* case for abuse of such dominance. The dissenting note says, "…it is not a violation of any provision of the Act, though it may have competition concerns. The remedy lies elsewhere. The decision of the Central Government to fix trait fee and prescribe terms of licensing under the Essential Commodities Act, 1955 could be one."[23]

In the meantime, MMBL moved to the Delhi High Court[24] asking it to stop the CCI from investigating. MMBL's main contention is that the CCI has no jurisdiction in respect of any matter related to IPRs, including rights pertaining to licensing of patents, which falls within exclusive jurisdiction of the patent authority, civil courts as provided under the Patents Act, 1970. The Court[25] refused to stay the investigations but directed CCI not to pass any final order. The matter is still *sub judice*.

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[22] M.S. Sahoo
[23] CCI Order dated 10 February 2016, Case No. 02/2015
[24] Writ petition (civil) No. 1776/2016 and WP(C) No.1777/2016
[25] Vide its Order dated 29th February 2016