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SINGLE ECONOMIC ENTITY AND CORPORATE SEPARATEDNESS DOCTRINE: A JUXTAPOSITION

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1. Introduction

1.1 The law governing companies globally, and in India, recognises a company to be a personality, distinct from its shareholders. In the celebrated case of *Salomon v Salomon & Co. Ltd*[1]., Lord Halsbury LC, had stated:

> "*[A] company must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself … whatever may have been the ideas or schemes of those who brought it into existence.*"

1.2 As a rule, a subsidiary remains a separate legal entity, distinct from its holding / parent company. However, the doctrine of 'piercing the corporate veil' is an exception to the rule that a company is a legal entity, separate from its shareholders.

1.3 In the *Escorts*[2] case, the Indian Supreme Court had opined that "*the corporate veil may be lifted where the statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.*"

1.4 Thus, it may be safe to say that the Courts lift the "corporate veil" when the device of incorporation has been used for illegal or improper purpose such as to defraud creditors, to evade an existing obligation, to circumvent a statute etc.

1.5 The Single Economic Entity doctrine ('**SEE Doctrine**'), on the other hand, goes beyond the company law concept of a company having a 'separate legal personality' and recognizes that different juristic persons may, in certain cases, be acting and behaving as one.

1.6 This paper aims to provide a brief overview as to the interplay between the applicability of the SEE Doctrine vis-à-vis the corporate

[1] 1897 AC 22: (1895-99) All ER Rep 33 (HL)
[2] *LIC v Escorts Ltd.* (1986) 1 SCC 264

separatedness doctrine (piercing the corporate veil), which has not been discussed by any regulator / authority / court in India. In fact, not just in India, there is not much commentary on the juxtaposition in international jurisprudence either.

2. Relevant Legislative Provisions in India

2.1 Section 3 of the Competition Act, 2002 ('**Act**') provides for anti-competitive agreements and states:

> "*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India*".

2.2 Section 2(h) of the Act defines the term 'enterprise' as:

> "***A person*** *or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting, or dealing with shares, debentures or other securities of any other body corporate,* ***either directly or through one or more of its units or divisions or subsidiaries****, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.*" [emphasis added]

2.3 The Act is unique in as much as, it provides a definition of an 'enterprise'. From the definition prescribed under Section 2(h), it entails that the enterprise is one which acts either directly or indirectly through its divisions or subsidiaries, thereby going beyond the company law concept of a company having a 'separate legal personality' and recognising that different juristic persons may, in certain cases, act and behave as one single entity. Thus, for competition law analysis, a 'legal entity' is distinct from an 'economic entity'. We will delve into the distinction in more detail later in the opinion.

2.4 Having said that, The Act is also pretty clear that in order to establish a contravention under Section 3, an agreement is required to be proven between two or more enterprises. Which means that agreements between entities constituting one enterprise cannot be assessed under the Act. This is also in accord with the internationally accepted doctrine of 'single economic entity'[3].

3. The '*Single Economic Entity*' Doctrine (SEE)

3.1 The jurisprudence of the Indian competition watchdog – the Competition Commission of India ("**CCI**") in relation to the SEE doctrine is still at a nascent stage and the CCI may well accept the internationally accepted principles of SEE, should the facts of a matter merit so. In light of the same, we set out below, a brief overview of the position in respect of the SEE Doctrine in the jurisdictions where the SEE doctrine has been used for a long time by the competition authorities – U.S. and EU.

3.2 <u>Position in the U.S.</u>

3.2.1 Section 1 of the U.S. antitrust legislation – the Sherman Act, prohibits 'every contract, combination…or conspiracy in restraint of trade'[4]. This has been understood by American courts as requiring a concerted

[3] *Exclusive Motors Pvt Limited v Automobili Lamborghini S.P.A*, Case No. 52 of 2012 (CCI) Para 6
[4] 15 U.S.C., Section 1 (2012) [Sherman Act]

action between two or more independent firms in the market. It exempted unilateral action[5].

3.2.2 The U.S. single entity doctrine provides business units with a defence against the imposition of antitrust penalties. The notion of single entity was most explicitly evinced in the U.S. Supreme Court's decision in 1984 in the *Copperweld* case[6]. There the Supreme Court held that a parent corporation and its wholly owned subsidiary constituted a single entity.

3.2.3 Following divergent case law interpretations on the scope of single entity, the U.S. Supreme Court revisited and clarified its analysis in the important 2010 *American Needle* judgment[7].

3.2.4 *American Needle* did not explicitly overrule *Copperweld* but re-interpreted its meaning to propose a *rule of reason* test rather than a *per se* approach to affiliated corporations[8]. In words of one group of commentators, 'before *American Needle*, lower courts agreed that complete common ownership was a sufficient condition for single entity status but not, perhaps a necessary one. Following *American Needle*, complete common ownership now appears to be a necessary condition for single entity status, but not a sufficient one'[9].

3.2.5 The *American Needle* opinion does not explicitly proclaim a single 'single-entity' testing framework. The opinion rather presents the conditions for a judicially refined single entity analysis framework[10]. *American Needle* distinguishes three conditions: **control** (absence

[5] Chirayu Jain, '*Single Economic Entity Doctrine in India*', at page 11
[6] U.S. Supreme Court, *Copperweld Corp. v Independent Tube Corp.* (1984), 104 S. Ct. 2739)
[7] U.S. Supreme Court, *American Needle, Inc. v National Football League* (2010), 130 S. Ct. 2206
[8] Pieter Van Cleynenbreugel, '*Single Entity Tests in U.S. Antitrust and EU Competition Law*', at page 18
[9] J. Stone and J. Wright, '*Antitrust Formalism is Dead! Long Live Antitrust Formalism! Some implications of American Needle v NFL*', Cato Supreme Court Review (2010), 374.
[10] Pieter Van Cleynenbreugel, *supra* note 6, page 19

of independent decision-making centres); **interests** (absence of concurring entrepreneurial interests); and **competitive links** (lack of actual or potential competition)[11]. [emphasis added]

3.3 **Position in EU**

3.3.1 Single entity analysis in EU law is enshrined under a broader 'undertaking' concept[12]. The basic elements of the single entity component have been interpreted quite consistently over time by EU Courts. In the *Shell* case[13] the General Court stated that a single entity is an 'economic unit which consists of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision'[14].

3.3.2 While the notion of business links refers to a parent company effectively influencing commercial policy, personal links relate to the sharing of directors or executives among different legal persons[15] [entities].

3.3.3 When dealing with a group of undertakings, the constituent factor one should bear in mind is not whether those undertakings have a separate legal personality, but whether or not they act together on the market as a single unit[16].

[11] American Needle, *supra* note 5, 2212

[12] Cases 56/64 and 58/64, *Etalissements Consten S.a.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299, 340

[13] Case T-11/89, *Shell International Chemical Company Ltd v Commission of the European Communities* [1992] ECR II-757

[14] *Ibid*, at para 311

[15] A. Montesa and A. Givaja, '*When Parents Pay for their Children's Wrongs; Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios*', W. Comp. 29 (2006) at page 569

[16] CFI T-9/99, *HFB Holdings fur Fernwarmetechnik Beteiligungsgesellsschaft GmbH & Co KG and Others v Commission of the European Communities* [2002] ECR II-1487, para 66

3.3.4 Single unit market conduct implies that a subsidiary or affiliate has no real freedom to determine its course of action on the market[17].

3.3.5 Thus, it emerges that the assessment of single economic unit status in the EU depends crucially on control and conduct factors, including among others, parental control over the board of directors, instructions imposed on the subsidiary to be carried out, the amount of profit taken by the parent and other elements referring to real decisive influence by a parent over its subsidiary [18]. Reliance may also be placed on an erstwhile decision of the European Court of Justice, which, in the *Beguelin Import* case [19], held that one undertaking could comprise several corporations which can be organised in a simple parent company and subsidiary scheme or in even more complex schemes with several levels of subsidiaries.

4. Applicability of SEE Doctrine in India

4.1 As mentioned previously, the jurisprudence in relation to the SEE Doctrine in India is still evolving with the CCI setting a confusing precedent by confirming this principle in a merger case and denying it in a cartel case involving the same set of parties (more specifically set out in the following paragraphs).

4.2 In the *Lamborghini* case[20], the CCI accepted the concept of single economic entity and opined that "*[A]greements between entities constituting one enterprise cannot be assessed under the Act. This is with accord with the internationally accepted doctrine of 'single economic entity' … As long as the opposite party and Volkswagen*

[17] Case 48/69, *Imperial Chemical Industries Ltd v Commission of the European Communities* [1972] ECR 619, para 134

[18] Case 107/82, *Allegemeine Elektrizitats-Gesellschaft AEG-Telefunken AG v Commission of the European Communities* [1983] ECR 3151, para 50-52

[19] *Beguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949, para 8

[20] *Supra* note 1

India are part of the same group, they will be considered as a single economic entuty for the purpose of the Act.[21]"

4.3 In the appal before the Competition Appellate Tribunal ('**COMPAT**')[22], it was observed that an internal agreement between subsidiaries, which are part of the same group[23], cannot be considered as an agreement for the purpose of Section 3 of the Act, thereby endorsing the view of the CCI[24].

4.4 Similarly, in the *Honda* case[25], the CCI observed that "*an internal agreement / arrangement between an enterprise and its group / parent company is not within the purview of the mischief of section 3(4) of the Act…At the same time, the Commission would like to emphasize that the exemption of single economic entity stems from the inseparability of the economic interests of the parties to the agreement. Generally, entities belonging to the same group e.g. holding-subsidiaries are presumed to be part of a 'single economic entity' incapable of entering into an [anti-competitive] agreement, the presumption is not irrebuttable*.[26]"

4.5 The SEE doctrine was also analysed by the COMPAT in the *Public Insurers* case[27] where four public-sector insurance companies raised a preliminary plea that they were exempted from Section 3 of the Act as they formed a 'single economic entity' with 100% shareholding vested with the Government of India, which controlled the management and affairs of the said companies. The decision in this matter was that even though the overall supervision of the insurance companies was with the central government, each of the

[21] Supra note 1

[22] *Exclusive Motors Pvt Ltd v Automobili Lamborghini S.P.A.*, Competition Appellate Tribunal, Appeal No. 1/2013

[23] Explanation (b) to Section 5 lays down the definition of "group" to mean "*two or more enterprises which, directly or indirectly are in a position to-*

(i) exercise twenty-six percent or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty percent of the members of the board of directors in the other enterprise; or

(iii) *control the management or affairs of the other enterprise.*"

[24] *Supra*, note 20, at para 11, page 11

[25] *Shamsher Kataria v Honda siel & Ors*, Competition Commission of India, Case No. 03/2011

[26] *Ibid*, at para 20.6.5, page 177-179

[27] *National Insurance Companies Ltd & Ors v Competition Commission of India* (2017) Comp LR 1

companies placed a separate bid in response to the tenders floated by the government. Further, it was also observed that the Ministry of Finance did not exercise *de facto* control over the business decisions of the companies and as such, cannot be considered as a single economic entity. The decision in the *Public Insurers* case seems to suggest that a common shareholder, management or enterprise may not be sufficient for the SEE doctrine to apply.

4.6 The latest case(s) where the SEE doctrine has been opined upon have been the Grasim case(s). Through two cases having the same set of facts and between the same parties, by giving diverging opinions, the CCI has set a confusing precedent. We set out below, a brief summary of both cases:

4.6.1 ***Grasim Industries*: Merger Case[28]**

In 2015, the CCI approved the merger of Aditya Birla Chemicals and Grasim Industries. At that time, the companies had argued that they fall within the SEE doctrine with common leadership, executive management, marketing, procurement and HR team. The regulator had, at that time, accepted this argument.

4.6.2 ***Grasim Industries*: Cartel Case[29]**

In this case, the CCI found Grasim Industries and Aditya Birla Chemicals guilty of bid-rigging a Delhi Jal Board tender. The regulator in this case, rejected the argument of the companies that there could not be collusion amongst them since they were part of the same group and hence, constituted a single economic entity.

[28] Grasim Industries Limited and Aditya Birla Chemicals (India) Limited, Competition Commission of India, Combination Registration No. C-2015/03/256

[29] *Delhi Jal Board v Grasim Industries Ltd & Ors, Competition Commission of India*, Ref. Case No.s. 03 & 04 of 2013

In considering this matter, the regulator pointed out that though Grasim and Aditya Birla Chemicals had common shareholders, employees etc, they participated in the tender as separate entities.

4.7 In light of the above averments, it can be said that there is an element of uncertainty and inconsistency in the CCI's approach when dealing with the SEE doctrine and the CCI does not have a fixed template for analysing the applicability of the SEE doctrine, which may differ according to the facts of the case. However, from the limited cases that have been adjudicated upon by the CCI and COMPAT on the applicability of the SEE doctrine, there seems to be a degree of significance on the factors set out below:

(a) Whether the entities constitute a "group" within the meaning of Explanation (b) to Section 5;

(b) *Legal control* – for this, the regulator may consider:

(i) Parent / subsidiary relationships;
(ii) The shareholding pattern, i.e, the shares held, whether directly or indirectly;
(iii) Voting rights held (including negative voting rights) by parent entity;
(iv) Control in the appointment and removal of board members/ senior management employees;
(v) Compliance of directives by subsidiaries;
(vi) Parent's control over the business operations or affairs;
(vii) Whether the parent entity is in charge of preparing rules that govern the subsidiaries;
(viii) Siblings - A sibling relationship exists when two distinct legal entities have a common owner; etc

(c) *Inseparability of the economic interest of the parties* – for this, the regulator may consider:

(i) Whether the subsidiaries are economically dependent on the parent entity;

(ii) Identity of Interests – i.e. whether the parent and subsidiaries' interests are common or different;

(iii) Absence of actual or potential competition or '*complementarity*' among the products / services of the concerned entities, give the presumption of a single entity.

(d) The parent's ability to influence pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing etc.

5. Concluding Words

5.1 In light of the above, we would like to state that it is not uncommon for companies within a group to be closely associated. In some instances, there may be some form of operational unity, or an overlap in management. However, this in itself does not mean that they may be considered as one legal entity, instead, each company is treated in law as having its own separate legal personality.

5.2 The position in a jurisdiction, closer to home, provides a bit more clarity. Singapore, as a colonial jurisdiction, has evolved into one of the most modern and progressive jurisdiction(s). The rapid development of Singapore's regulatory and compliance roadmap, combined with an equally ardent enforcement environment, reflects Singapore's growth and progress as a nation.

5.3 In 2014, the High Court of Singapore in its decision in the *Manuchar Steel*[30] case, addressed the exact issue – being a question as to whether there is a legal principle that treats some companies as having the same corporate personality on the grounds of being a "single economic entity".

5.4 In the said case, the Singapore Court indulged in an analysis of international cases and analysed the single economic entity concept to a multidirectional version of the 'piercing the corporate veil' doctrine. However, even then for corporate veil cases, it determined

[30] *Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd*, [2014] SGHC 181

that "*the law eschews disregard of the separate corporate legal personality of a company… except in exceptional circumstances, and only where there has been some form of abuse. Respect for the separate corporate legal personality…is sacrosanct in nearly every other circumstance.*"

5.5 Thus, to conclude, it may be stated that the applicability of the SEE Doctrine vis-à-vis the corporate preparedness doctrine is still a grey area and it is advisable to seek legal assistance to determine whether one or both of the aforementioned doctrines may be applicable to a given set of facts.

DISCLAIMER

The information contained in this article is correct to the best of our knowledge and belief at the time of writing. The contents of the above article are intended to provide a general guide to the subject-matter and should not be treated as a substitute for specific professional advice for any particular course of action as the information above may not necessarily suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation.

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- **Asialaw Leading Lawyers 2018** lists Piyush as a leading individual and has ranked him as a 'Market-Leading Lawyer' in Competition & Antitrust in India for the third consecutive year.

- **Asia Pacific Legal 500 (2018, 2017 & 2016)** lists Piyush as a 'Top Individual Lawyer' for Aviation and 'Recommended Lawyer' for Antitrust / Competition laws in India.

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Piyush represents various Indian and multinational clients across sectors such as petroleum, pharmaceuticals, financial services, airlines, telecom, automobiles, glass, FMCG, etc. Piyush has represented prominent Indian clients in significant cases before the Competition Commission of India ('CCI'), the High Court of Delhi as well as before the Supreme Court of India.

Piyush has also assisted various multi-national and local companies in setting up competition law compliance and audit structures, as well as advising regularly on dawn raids and whistle-blowing programmes for companies in a wide range of industries.

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