

No anti-competitive practices by banks in home loan sector

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Ruling in *Neeraj Malhotra v Deutsche Post Bank Home Finance Limited*, the Competition Commission of India (CCI) recently gave its first final decision under the Competition Act, 2002. In it the CCI held that “the prepayment charges levied by banks on home loans do not fall foul of competition law”.

The question considered by the CCI was whether the decision taken by Indian Banks Association (IBA) on prepayment charges on home loans amounted to agreement (as defined under section 2(b) of the act) having an appreciable adverse effect on competition under section 3 of the act. In addition the CCI considered if the respondents had abused their dominant positions, which would violate section 4 of the act.

Background

The case was concerned with the levying of pre-payment charges by various banks on the home loans taken by consumers. The informant, Neeraj Malhotra, alleged that by levying prepayment charges the banks were violating section 3 of the act. The informant also alleged that in doing so the respondents violated section 4 of the act on grounds of consumer interest and abuse of dominance. The informant asked the CCI to enquire into the above violations, to ensure the banks discontinue these charges and to levy a fine on all the respondent banks up to 10% of their average turnover for the last three preceding financial years.

Investigation and adjudication

The CCI, after forming an opinion under section 26 (1) of the act, found that there existed a prima facie case. Subsequently through an order dated 10 September

2009 the CCI referred the matter to the Director General (DG) for investigation. The DG, who is appointed by the government to assist the commission, investigated the matter and concluded that there was violation of sections 3(3)(a), (b) section 19(3)(a), (c) and (d).

After examining the DG’s report and the submissions made by the respondents, the CCI considered section 3(3) and accepted that the IBA was an “association” for the purpose of the act. However, it did not find that the IBA had taken any decision on prepayment, as the mere existence of a circular that it had sent to its member banks cannot in itself be said to be the basis for evidence of an agreement between banks.

A much considered decision

In relation to section 3(3) the CCI finally held: “It is equally clear that there is no agreement amongst the various service providers i.e. the banks/HFCs [housing finance companies], nor is there any uniform practice being followed by them.”

Further, in determining whether there was an abuse of dominant position by the respondents, the CCI held: “This is a multi-dimensional case involving macro-economic as well as consumer issues. We have, therefore, identified and determined the issues in this case very carefully within the four walls and boundaries laid down by the act. It is evident from our analysis and determination of these issues earlier in the order that there is a vibrant market in provision of home loans, with the number of service providers and the variety in products growing consistently and continuously over a period of years. There is no bank/HFC in the market which can be deemed to be dominant by any of the parameters used for determining dominance. The question of abuse of

dominance, therefore, does not arise.”

Therefore, the CCI has established that all the respondents were operating as competitors in a vibrant competitive market. Neither the information provided by the informant nor the investigation done by DG could establish the respondents had violated section 3 or 4 of the act. There was also no evidence of an appreciable adverse effect on competition in the home loan market in India.

Evaluating the decision

The order passed by CCI does not apply the test of economic analysis with the rigor that is expected in law. The majority decision (with two members dissenting), lacks a comprehensive analysis of the concept of asset liability management (ALM), which was critically accentuated by the respondents and accepted by the CCI.

In addition, unlike the minority order the majority order fails to consider the position of consumers who cannot extricate themselves from the home loan of a particular bank because of this penalty that increases the transaction cost. Significantly, the dissenting order demonstrates divergent approaches towards the provisions of the act.

We can only hope that though the present round has gone in favour of the banks there might be future occasions when the situation is tilted in favour of the consumers. Until then consumers of home loans must live with the quirky outcome of split decisions in which the majority view holds the field. For now the decision prevails.

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